INTEL V COMMISSION

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25 October 2017

INTEL V COMMISSION

STRUCTURE OF PRESENTATION

- *INTEL V COMMISSION*, 6 SEPTEMBER 2017
  - BACKGROUND TO THE COURT OF JUSTICE'S JUDGMENT
  - ARTICLE 102: REBATES AND THE AS EFFICIENT COMPETITOR ('AEC') TEST
  - THE JURISDICTIONAL ISSUE
  - THE PROCEDURAL ISSUE

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BACKGROUND TO THE
COURT OF JUSTICE'S JUDGMENT

- COMMISSION DECISION OF 13 MAY 2009 FINED INTEL €1.06 BILLION FOR TWO ABUSES
  - THE GRANT OF REBATES TO FOUR OEMS, DELL, LENOVO, HP AND NEC, CONDITIONAL ON THEM PURCHASING ALL OR MOST OF THEIR CENTRAL PROCESSING UNITS FROM INTEL
  - 'NAKED RESTRICTIONS' IN THE FORM OF PAYMENTS TO OEMS FOR PREVENTING THE MARKETING OF PRODUCTS EQUIPPED WITH AMD'S CPUS

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BACKGROUND TO THE
COURT OF JUSTICE'S JUDGMENT

- INTEL APPEALED TO THE GENERAL COURT ON A NUMBER OF GROUNDS
- THE GENERAL COURT REJECTED INTEL'S APPEAL IN ITS ENTIRETY ON 12 JUNE 2014
- THE JUDGMENT ADOPTED A STRICT APPROACH TO THE CONDITIONAL REBATES, AND ATTRACTED A GREAT DEAL OF CRITICISM – FORMALISTIC, 'PER SE', INCONSISTENT WITH THE COMMISSION'S *GUIDANCE PAPER* ETC.

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BACKGROUND TO THE COURT OF JUSTICE'S JUDGMENT

- THE JUDGMENT WAS ALSO CONTROVERSIAL ON THE ISSUE OF JURISDICTION

- HOW DID THE COMMISSION HAVE JURISDICTION OVER AGREEMENTS BETWEEN INTEL OF THE US AND LENOVO OF CHINA TO APPLY ARTICLE 102 TO INTEL'S CONDUCT?

- HAD THE COMMISSION ACTED IN A PROCEDURALLY FAIR MANNER BY INTERVIEWING 'MR D' OF DELL BUT NOT RECORDING THE INTERVIEW AND MAKING A FULL RECORD OF IT AVAILABLE TO INTEL?

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BACKGROUND TO THE
COURT OF JUSTICE'S JUDGMENT

- ADVOCATE GENERAL NILS WAHL GAVE HIS OPINION ON 20 OCTOBER 2016
- HE WAS VERY CRITICAL OF MOST ASPECTS OF THE GENERAL COURT'S JUDGMENT
- IN PARTICULAR HE REJECTED THE COURT'S CHARACTERISATION OF THE CONDITIONAL REBATES AS PRESUMPTIVELY UNLAWFUL ADVOCATED STRONGLY FOR AN 'EFFECTS-BASED' APPROACH TO REBATES

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THE COURT OF JUSTICE'S JUDGMENT

- THE COURT REJECTED INTEL'S APPEAL ON JURISDICTION: PARAGRAPHS 40-65
- IT REJECTED INTEL'S APPEAL ON PROCEDURE: PARAGRAPHS 79-107
- BUT IT HELD THAT THE GENERAL COURT HAD FAILED TO EXAMINE INTEL'S ARGUMENTS THAT THE COMMISSION HAD MISAPPLIED THE 'AEC' TEST AND THEREFORE SET ITS JUDGMENT ASIDE AND REFERRED THE MATTER BACK TO THE GENERAL COURT

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ARTICLE 102: REBATES AND THE AEC TEST

- THE COURT'S DISCUSSION OF ABUSE BEGINS WITH REFERENCES TO THE AS EFFICIENT COMPETITOR: SEE PARAGRAPHS 133 AND 134, AND THE REFERENCES TO *POST DANMARK I*

  - NOTE THAT THE COURT OF JUSTICE HAD REFERRED TO AS EFFICIENT COMPETITORS AS LONG AGO AS *AKZO V COMMISSION*, 1991

  - BUT NOTE ALSO THAT REFERENCES TO THE AS EFFICIENT COMPETITOR HAVE BEEN REGULAR SINCE THE COMMISSION'S *GUIDANCE PAPER ON ARTICLE 102 ENFORCEMENT PRIORITIES*

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ARTICLE 102: REBATES AND THE AEC TEST

- AT PARAGRAPH 137 THE COURT THEN CITES PARAGRAPH 89 OF *HOFFMANN-LA ROCHE* ON EXCLUSIVITY REBATES WHICH WAS THE BASIS FOR THE GENERAL COURT'S JUDGMENT IN *INTEL* THAT THEY ARE PRESUMPTIVELY UNLAWFUL
- TO THAT EXTENT THE COURT OF JUSTICE IN *INTEL* MAINTAINS THE PRESUMPTION AGAINST REBATES
- THEN COMES THE IMPORTANT PARAGRAPH!

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ARTICLE 102: REBATES AND THE AEC TEST

- PARAGRAPH 138 OF *INTEL* SAYS
  - ‘HOWEVER, THAT CASE-LAW MUST BE FURTHER CLARIFIED IN THE CASE WHERE THE UNDERTAKING CONCERNED SUBMITS, DURING THE ADMINISTRATIVE PROCEDURE, ON THE BASIS OF SUPPORTING EVIDENCE, THAT ITS CONDUCT WAS NOT CAPABLE OF RESTRICTING COMPETITION AND, IN PARTICULAR, OF PRODUCING THE ALLEGED FORECLOSURE EFFECTS’ (BLUE ADDED!)

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ARTICLE 102: REBATES AND THE AEC TEST

- PARAGRAPH 139 OF *INTEL* CONTINUES
  - ‘IN THAT CASE, THE COMMISSION IS NOT ONLY REQUIRED TO ANALYSE, FIRST, THE EXTENT OF THE UNDERTAKING’S DOMINANT POSITION ON THE RELEVANT MARKET AND, SECONDLY, THE SHARE OF THE MARKET COVERED BY THE CHALLENGED PRACTICE, AS WELL AS THE CONDITIONS AND ARRANGEMENTS FOR GRANTING THE REBATES IN QUESTION, THEIR DURATION AND THEIR AMOUNT; IT IS ALSO REQUIRED TO ASSESS THE POSSIBLE EXISTENCE OF A STRATEGY AIMING TO EXCLUDE COMPETITORS THAT ARE AT LEAST AS EFFICIENT AS THE DOMINANT UNDERTAKING FROM THE MARKET’

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ARTICLE 102: REBATES AND THE AEC TEST

- PARAGRAPH 140 OF *INTEL* ADDS THAT THE DOMINANT FIRM CAN SEEK TO ARGUE THAT THE REBATES ARE OBJECTIVELY JUSTIFIED, FOR EXAMPLE BY EFFICIENCIES; BUT THAT THIS REQUIRES THE COMMISSION FIRST TO HAVE DEMONSTRATED THAT THE REBATES HAVE AN INSTRINSIC CAPACITY TO FORECLOSE AS EFFICIENT COMPETITORS

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ARTICLE 102: REBATES AND THE AEC TEST

- PARAGRAPHS 141-147 THEN DEAL WITH THE CRITICISM THAT THE GENERAL COURT DID NOT ADDRESS INTEL'S ARGUMENTS THAT THE COMMISSION'S AEC ANALYSIS WAS FLAWED
- THE COURT OF JUSTICE HELD THAT THE GENERAL COURT SHOULD HAVE ADDRESSED THOSE ARGUMENTS AND THEREFORE REFERRED THE MATTER BACK TO IT FOR RECONSIDERATION
- NOTE: THE COMMISSION MAY YET WIN THIS CASE!

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ARTICLE 102: REBATES AND THE AEC TEST

- SO WHAT DOES *INTEL* MEAN IN PRACTICE?
  - PARAGRAPH 89 OF *HOFFMANN-LA ROCHE* IS NOT 'OVERRULED'
  - INSTEAD IT IS 'CLARIFIED'
  - HOWEVER ALL DOMCOS WILL ARGUE THAT THEIR CONDUCT IS NOT CAPABLE OF PRODUCING FORECLOSURE EFFECTS, AND THE COMMISSION MUST ADDRESS THOSE ARGUMENTS (PARAGRAPH 139)
  - IT FOLLOWS THAT REBATES CASES IN FUTURE WILL REQUIRE 'EFFECTS ANALYSIS'

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ARTICLE 102: REBATES AND THE AEC TEST

- BUT WHAT WILL THIS 'EFFECTS ANALYSIS' CONSIST OF?

▪THE JUDGMENT DOES NOT REQUIRE THE COMMISSION TO CONDUCT A FULL-BLOWN AEC TEST: INDEED THE *HOFFMANN-LA ROCHE* PRESUMPTION IS MAINTAINED

▪IT IS FOR DOMCO TO PRODUCE 'SUPPORTING EVIDENCE' THAT ITS CONDUCT WAS NOT CAPABLE OF RESTRICTING COMPETITION AND, IN PARTICULAR, OF PRODUCING THE ALLEGED FORECLOSURE EFFECTS

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ARTICLE 102: REBATES AND THE AEC TEST

- BUT WHAT WILL THIS EFFECTS ANALYSIS CONSIST OF?

- IF DOMCO PRODUCES ANY EVIDENCE (WHETHER PRICE-COST OR OF ANY OTHER KIND) THAT THERE WOULD NOT BE AN ELIMINATION OF AN AEC, THE COMMISSION WOULD HAVE TO ADDRESS THIS
- THAT WAS PRECISELY THE CRITICISM OF THE GENERAL COURT IN *INTEL*, BECAUSE THE COMMISSION HAD CONDUCTED AN AEC TEST BUT THE COURT DID NOT ADDRESS INTEL'S CRITICISM OF IT

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ARTICLE 102: REBATES AND THE AEC TEST

- BUT WHAT WILL THIS EFFECTS ANALYSIS CONSIST OF?
  - *INTEL* DOES NOT SAY THAT THERE HAS TO BE PROOF THAT PRICES WERE NEGATIVE
  - THE COURT OF JUSTICE HELD IN *TOMRA* AND IN *POST DANMARK II* THAT SUCH EVIDENCE IS NOT A PREREQUISITE FOR A FINDING THAT A REBATE SCHEME VIOLATES ARTICLE 102
  - BUT *POST DANMARK II* SAID THAT SUCH A TEST SHOULD NOT BE RULED OUT IN PRINCIPLE (PARAGRAPH 58)

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ARTICLE 102: REBATES AND THE AEC TEST

- BUT WHAT WILL THIS EFFECTS ANALYSIS CONSIST OF?

- BUT THAT SUCH A TEST IS ‘ONE TOOL AMONGST OTHERS’ FOR THE PURPOSES OF ASSESSING WHEHTER THERE IS AN ABUSE OF A DOMINANT POSITION IN THE CONTEXT OF A REBATE SCHEME (*POST DANMARK II*, PARAGRAPH 61)
- IN *POST DANMARK II* THE COURT HELD THAT, IN THE SPECIAL CIRCUMSTANCES OF THAT CASE, THE AEC TEST WAS OF NO RELEVANCE AS THERE WAS NO POSSIBILITY OF THE EMERGENCE OF SUCH A COMPETITOR (PARAGRAPH 59)

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ARTICLE 102: REBATES AND THE AEC TEST

- BUT WHAT WILL THIS EFFECTS ANALYSIS CONSIST OF?

- SO IT WOULD SEEM THAT, IN THE END, THE ANALYSIS OF REBATES WILL DEPEND ON ‘ALL THE CIRCUMSTANCES OF THE CASE’
- THERE IS NO SINGLE TEST FOR DETERMINING UNLAWFULNESS
- SALES BELOW LRAIC ARE HIGHLY LIKELY TO BE UNLAWFUL
- BUT IT WOULD SEEM THAT THERE COULD STILL BE UNLAWFUL REBATES ABOVE LRAIC

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ARTICLE 102: REBATES AND THE AEC TEST

- WHERE DOES *INTEL* LEAVE THE COMMISSION'S *GUIDANCE PAPER*?
  - THE *INTEL* JUDGMENT WOULD APPEAR TO BE CONSISTENT WITH THE *GUIDANCE PAPER*
  - THE COURT CLEARLY ACCEPTS THE AS EFFICIENT COMPETITOR TEST IN PRINCIPLE
  - THE COURT CLEARLY APPROVES THE MOVE TOWARDS A MORE EFFECTS-BASED SYSTEM
  - AND PARAGRAPH 139 OF THE JUDGMENT FITS NICELY WITH PARAGRAPH 20 OF THE *GUIDANCE PAPER*

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ARTICLE 102: REBATES AND THE AEC TEST

- WHAT DOES *INTEL* SAY ABOUT THE (LACK OF) A *DE MINIMIS* TEST IN ARTICLE 102?
  - *HOFFMANN-LA ROCHE* SAID THAT THERE IS NO *DE MINIMIS* DOCTRINE UNDER ARTICLE 102
  - AND THIS WAS CONFIRMED IN *POST DANMARK II*
  - THE COURT IS SILENT ON THIS POINT IN *INTEL*
  - SO DOES THIS MEAN THAT DOMCO CAN ARGUE THAT THERE IS NO FORECLOSURE EFFECT, BUT NOT THAT ANY FORECLOSURE EFFECT IS *DE MINIMIS*?

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THE JURISDICTIONAL ISSUE

- HOW COULD THE COMMISSION HAVE JURISDICTION OVER AGREEMENTS MADE BETWEEN INTEL OF THE US AND LENOVO OF CHINA?

- THE NORMAL BASIS OF JURISDICTION IS THE ‘IMPLEMENTATION’ DOCTRINE
- THIS WORKS FOR MANY CARTELS, WHERE THE CARTELISED PRICE IS CHARGED TO CUSTOMERS WITHIN THE EU
- BUT *INTEL* IS CONCERNED WITH UNILATERAL CONDUCT UNDER ARTICLE 102

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THE JURISDICTIONAL ISSUE

- HISTORICALLY THE COURT OF JUSTICE HAS AVOIDED DECIDING ON WHETHER THERE IS AN ‘EFFECTS’ DOCTRINE UNDER ARTICLES 101 AND 102
  - OFTEN IMPLEMENTATION HAS BEEN SUFFICIENT (EG *WOOD PULP*)
  - OR THERE HAS BEEN AN EU SUBSIDIARY OF A NON-EU PARENT (EG *DYESTUFFS*)
  - THE UK IN PARTICULAR WAS ALWAYS AN OPPONENT OF AN EFFECTS DOCTRINE

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THE JURISDICTIONAL ISSUE

- IN *INTEL* THE COURT OF JUSTICE ENDORSES THE EFFECTS DOCTRINE
  - PARAGRAPH 46: INTEL WRONG TO ARGUE THAT THE COMMISSION CANNOT BASE JURISDICTION ON QUALIFIED EFFECTS
  - PARAGRAPH 49: IT IS NECESSARY TO SEE IF THE EFFECTS ARE FORESEEABLE, IMMEDIATE AND SUBSTANTIAL
  - PARAGRAPH 50: THE CONDUCT SHOULD BE LOOKED AT AS A WHOLE
  - PARAGRAPH 51: PROBABLE EFFECTS SUFFICIENT

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THE PROCEDURAL ISSUE

- THE COMMISSION HAD INTERVIEWED ‘MR D’ BUT NOT RECORDED THE INTERVIEW AND HAD NOT MADE A TRANSCRIPT AVAILABLE TO INTEL
- THE COMMISSION SAID THAT THIS WAS AN INFORMAL INTERVIEW SO THAT ARTICLE 19(1) OF REGULATION 1/2003 WAS NOT APPLICABLE
- THE COURT SAID THAT THERE IS NO DIFFERENCE BETWEEN A FORMAL AND AN INFORMAL INTERVIEW
- SO ARTICLE 19(1) DID APPLY

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THE PROCEDURAL ISSUE

- AND THE COMMISSION SHOULD HAVE RECORDED IT IN FULL: PARAGRAPHS 90 AND 91
- THE IRREGULARITY WAS NOT CURED BY SHOWING INTEL AN INTERNAL NOTE OF THE MEETING: PARAGRAPH 92
- HOWEVER THE COMMISSION HAD NOT ACUTALLY USED THAT EVIDENCE SO THERE WAS NO EFFECT ON THE OUTCOME OF THE CASE

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THANK YOU FOR YOUR ATTENTION!