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Discussion of the presentation of Professor Akman: Where are we after Intel?

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Alexis Walckiers
Belgian Competition Authority – Ecares (Université libre de Bruxelles)

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Summary of Professor Akman's presentation

We very much agree on the fundamentals

- *"The form-based categorisation of rebates does not make sense – even pure quantity rebates can have loyalty-inducing effects"*
- *"The predation test is not the same as the AEC standard – the standard is, in fact, 'equally or more efficient competitor', and pricing below cost is only an example (Posner, 2001)"*
- *"Case law should distinguish between the standard and the test"*
- *"It would make a lot of sense for coherence if the standard applied to pricing and non-pricing conduct were the same"*

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Summary of Professor Akman's presentation

Focus on the dark side of Intel? (Long) list of negatives?

What the Court of Justice did not do is at least important as what it did do.

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- It did not overrule *Hoffmann-La Roche*.
- It did not decide on whether the GC misinterpreted *Hoffmann-La Roche* in its categorisation of rebates – note that GC used CoJ's own holding in *Michelin I* in this categorisation.
- It did not engage with the argument that *Tomra* (CoJ) already held that it is necessary to consider 'all the circumstances' in exclusivity rebates. (GC interpreted *Tomra* not to concern exclusivity rebates ([97]), but in *Tomra* the CoJ said: the contested decision found individualised rebates where quantity is (almost) entire demand to have the same effects as fidelity rebates and exclusivity agreements; [14]).
- It did not decide on whether loyalty rebates are *per se* abusive (save for objective justification).
- It did not explicitly rule on whether rebates are a pricing practice (cf GC). But implicitly suggested so; [136].
- It did not refer to restriction of customers' freedom to choose.
- *It did not express whether predatory pricing or exclusive dealing (as the GC's judgment suggests) is the correct framework for loyalty rebates.*
- It did not find that AEC test is necessary or sufficient.
- It did not require proof of effects – actual *or potential* – to establish abuse; it is only where the Commission alleges foreclosure effects and the undertaking brings forth evidence that disputes that, the EC has to analyse 'all the circumstances' and assess the possible existence of strategy to exclude AECs.

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Summary of Professor Akman's presentation

Focus on the dark side of Intel? (Long) list of negatives?

- *"After Intel, it is still unclear whether rebates have to be analysed using the framework for exclusive dealing rather than predatory pricing. (More likely, the former?)"*
- *"How much can one read into the CoJ's expression of the objective as protecting AECs?"*

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Can we see the bottle half full?

Some useful messages from Intel

- Awkward for an economist to defend a Judgment, when a Professor of Law argues it is not very insightful
  - in general, I am supportive of guidelines
    - adoption after a wide consultation
    - avoids the need to infer a general rule, before applying the general rule to a specific case
    - can be revised regularly
- Intel very usefully reminds us of the importance of competition on the merits
  - competition on the merits can lead to exclusion, eg through innovation (Schumpeterian creative destruction), or intense price competition
- What is the role of a less efficient competitor?
  - a less efficient competitor can constrain a more efficient competitor, to the benefit of consumers
  - total welfare Vs consumer welfare

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Can we see the bottle half full?

Some useful messages from Intel

- As competition experts know: it's all about the counterfactual
  - Professor Akman reminds us that "the Commission's decision in Intel did not quite follow the Guidance"
    - *"[T]here is no requirement in the case-law to demonstrate actual foreclosure in order prove an infringement of Article [102]…" [919]*
    - *The Commission demonstrates "on top of fulfilling the conditions of the case law" that the rebates were "capable of causing or likely to cause anticompetitive foreclosure (which is likely to result in consumer harm)" [925]*
  - the General Court moved further away from the Guidance paper, making it more difficult for stakeholders to rely on it
    - *Finding exclusivity rebates abusive "does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect" [80]*
    - *Exclusivity rebates are abusive if they have no objective justification; there is no requirement to prove capacity to restrict competition [81]*
    - *Exclusivity rebates are by their nature capable of restricting competition [85]*

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Some useful messages from Intel

- Intel brings back the 2009 Guidance paper
  - §20 of the guidelines sets out seven criteria
    - the position of the dominant undertaking
    - the conditions on the relevant market (eg entry)
    - the position of the dominant undertaking's competitors
    - the position of the customers or input suppliers
    - the extent of the allegedly abusive conduct
    - possible evidence of actual foreclosure
    - direct evidence of any exclusionary strategy
  - § 139 of Intel refers to three sets of criteria
    - the extent of the undertaking’s dominant position
    - the share of the market covered by the challenged practice, as well as the conditions for granting the rebates, their duration and their amount
    - the existence of a strategy to exclude competitors that are as efficient as the dominant undertaking

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Can we see the bottle half full?

Some useful messages from Intel

- Intel further clarifies Hoffman-La Roche, in that there is a rebuttable presumption of harm [138]
  - 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
  - in practice, companies submit evidence during the administrative procedure… and they will now have an additional incentive to do so!
  - when it is hard to guide on the substance, giving a procedural answer might not be a bad idea [see below]

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Can we see the bottle half full?

Some useful messages from Intel

- Not saying too much is not always bad, provided that the guiding principles are clear [see §139]
- Does the AEC test help identify anticompetitive behaviour?
  - AEC test has many advantages: it is easy to understand, and companies can assess their rebate schemes themselves, by comparing their prices with their costs
  - the AEC test can both lead to over and under enforcement
  - useful in predation cases, where immediate losses are recovered after exclusion
  - there are instances where companies can successfully implement an eviction strategy even if their prices are higher than their costs
    - especially in the presence of economies of scale or when some customers are particularly important
    - but also through buyer mis-coordination or sequential contracts
  - lower prices are often indicative of competition, or potential competition
  - … coming back to the question of the counter factual, even if pricing above costs can lead to exclusion, a number of theories of harm will not be credible when you do so