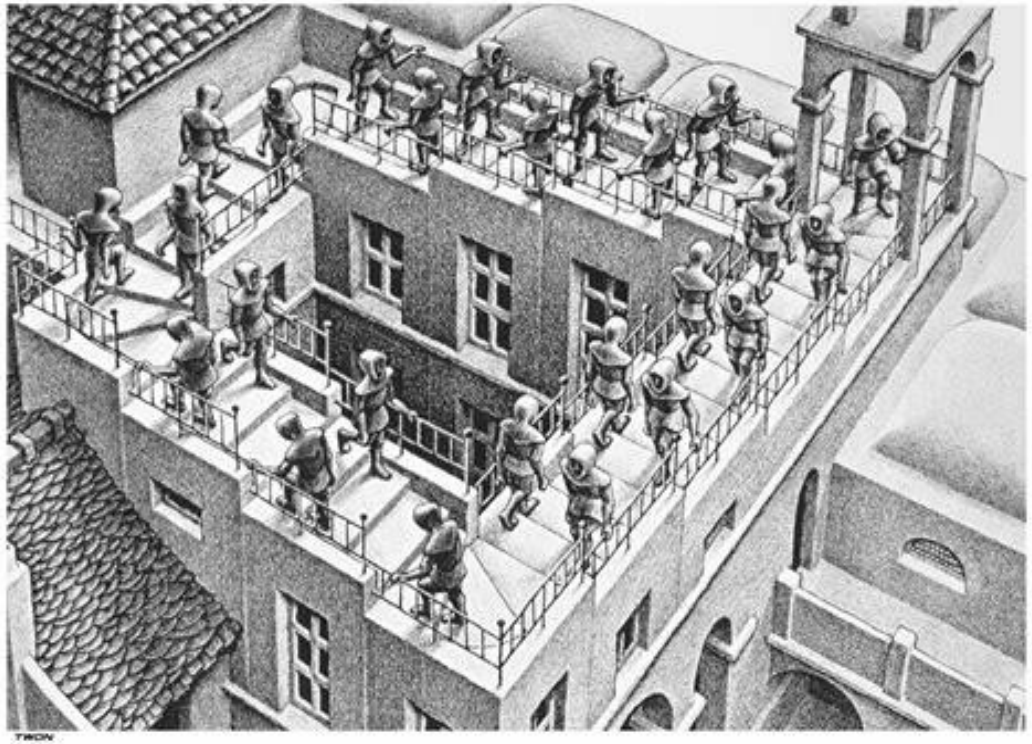

The evolution of case law under Article 102 TFEU – can antitrust enforcement be effective in digital markets?

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* All views expressed are personal and are not necessarily those of the European Commission

…the Court should not allow itself to be influenced so much by current thinking ('Zeitgeist') or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law.

- Advocate General Kokott, Case C-23/14 Post Danmark II

Article 102 TFEU

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Chronology of principal judgments relevant to exclusionary abuses

Date	Case
February 1979	Case 85/76 *Hoffmann La Roche v Commission*
September 2003	Case T-203/01 *Michelin II v Commission*
September 2010	Case T-155/06 *Tomra v Commission*
October 2010	Case C-280/08 P *Deutsche Telekom v Commission,*
February 2011	Case C-52/09 *Konkurrensverket v TeliaSonera*
March 2012	Case C-209/10 *Post Danmark I*
April 2012	Case C-549/10 P *Tomra v Commission*
June 2014	Case T-286/09 *Intel v Commission*
October 2015	Case C-23/14 *Post Danmark II*
September 2017	Case C-413/14 P *Intel v Commission*
January 2022	Case T-286/09 Renv *Intel v Commission*
May 2022	C-377/20 *Servizio Elettrico Nazionale SpA & ENEL v Autorità Garante della Concorrenza e del Mercato*
June 2022	Case T-235/18 *Qualcomm v Commission*
September 2022	Case T-604/18 *Google Android v Commission*
Pending	C-680/20 *Unilever Italia v Autorità Garante della Concorrenza e del Mercato* Case T-334/19 *Google AdSense v Commission*

Case T-203/01 *Michelin v Commission*

§56 "….it is apparent from a consistent line of decisions that a loyalty rebate, which is granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, is contrary to Article 82 EC. Such a rebate is **designed through the grant of financial advantage, to prevent customers from obtaining their supplies from competing producers**…"

[discussion of different types of rebate scheme]

§60 "In determining whether a quantity rebate system is abusive, it will therefore be necessary to consider **all the circumstances**, particularly the criteria and rules governing the grant of the rebate, and **to investigate** whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply…"

Case C-280/08 P *Deutsche Telekom v Commission*

§177 "It follows from this that Article 82 EC prohibits a dominant undertaking from, *inter alia*, adopting pricing practices which have **an exclusionary effect on its equally efficient actual or potential competitors**, that is to say practices which are capable of making market entry **very difficult or impossible** for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view, therefore, not all competition by means of price can be regarded as legitimate (see, to that effect, *Nederlandsche Banden-Industrie-Michelin v Commission*, paragraph 73; AKZO v Commission, paragraph 70; and *British Airways v Commission*, paragraph 68).

Case C-52/09 *Konkurrensverket v TeliaSonera*

§28 “In order to determine whether the dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer’s freedom to choose his sources of supply…” [referring to cases citing *Michelin*]

§31 “A margin squeeze, in view of **the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking**, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU.”

§33 “although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss or at artificially reduced levels of profitability.”

§74 [even a positive margin could be abusive subject to shift in burden of proof] “it must then be demonstrated that the application of that pricing practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned.”

Case C 209/10 *Post Danmark v Konkurrencerådet*

§22 “Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.”

§23 “According to equally settled case-law, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market.”

§25 “Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits”

§38 “…to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term.”

But the judgment does not preclude a finding of abuse.

Case T-155/06 *Tomra v Commission*

§215 "….as the applicants indeed maintain, that in order to determine whether exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes are compatible with Article 82 EC, it is necessary to ascertain whether, following **an assessment of all the circumstances** and, thus, also of the context in which those agreements operate, those practices are **intended to restrict or foreclose competition on the relevant market or are capable of doing so**.

§260 "…the contested decision finds that the incentive to obtain supplies exclusively or almost exclusively from the applicants was particularly strong when thresholds, such as those applied by the applicants, were combined with a system whereby the achievement of the bonus threshold or, as the case may be, a more advantageous threshold benefited all the purchases made by the customer during the reference period and not exclusively the purchasing volume exceeding the threshold concerned."

Case C-549/10 *Tomra v Commission* (1)

§42 "First, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and **competitors should be able to compete on the merits for the entire market and not just for a part of it**. Second, it is **not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete** for the remaining contestable portion of demand."

§§44 -45 "The General Court accordingly determined, following that analysis of the circumstances of this case, in paragraph 243 of the judgment under appeal, that a considerable proportion (two fifths) of total demand during the period and in the countries under consideration was foreclosed to competition.

That conclusion of the General Court cannot be regarded as containing any error of law."

§46 "the General Court was correct to hold that the **determination of a precise threshold of foreclosure of the market beyond which the practices at issue had to be regarded as abusive was not required for the purposes of applying Article 102 TFEU**".

Case C-549/10 P *Tomra v Commission* (2)

§51 "Tomra state that the Commission did not examine the relevant costs in order to establish the level below which the prices charged by Tomra entailed exclusionary effects. A comparison of prices and costs was essential in order to assess the capacity of retroactive rebates to restrict competition"

Held irrelevant as:

§68 "for the purposes of proving an abuse of a dominant position within the meaning of Article 102 TFEU, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect."

§70 "…the Court has ruled that that undertaking abuses that position where, without tying the purchasers by a formal obligation, it applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates [citing *Hoffman-La Roche §89*]."

§71 "**In that regard**, it is **necessary to consider all the circumstances**, particularly the criteria and rules governing the grant of the rebate, and **to investigate whether**, in providing an advantage not based on any economic service justifying it, **the rebates tend to remove or restrict the buyer's freedom to choose his sources of supply**, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition (see *Nederlandsche Banden- Industrie-Michelin v Commission*, paragraph 73)".

§75 Endorses first instance §260. Incentive to customer matters in judging foreclosure, not viability of as efficient competitor.

Case T-286/09 *Intel v Commission* (1)

Dismisses relevance of margin squeeze cases:

§152 [the necessity for economic analysis in those other cases is] "attributable to the fact that it is impossible to assess whether a price is abusive without comparing it with other prices and costs. A price cannot be unlawful in itself. However, in the case of an exclusivity rebate, it is the condition of exclusive or quasi-exclusive supply to which its grant is subject rather than the amount of the rebate which makes it abusive."

Pure exclusivity rebates were unlawful *per se*:

§77 "Such exclusivity rebates, when applied by an undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, because they are not based - save in exceptional circumstances - on an economic transaction which justifies this burden or benefit but are designed to remove or restrict the purchaser's freedom to choose his sources of supply…Such rebates are designed, through the grant of a financial advantage, to prevent customers from obtaining their supplies from competing producers (*Hoffmann-La Roche*, paragraph 90…."

Case T-286/09 *Intel v Commission* (2)

§85 “That approach can be justified by the fact that exclusivity rebates granted by an undertaking in a dominant position are by their very nature capable of restricting competition.”

§86 “The capability of tying customers to the undertaking in a dominant position is inherent in exclusivity rebates…It is therefore not necessary to examine the circumstances of the case in order to determine whether that rebate is designed to prevent customers - from obtaining their supplies from competitors.”

§93 “…the grant of an exclusivity rebate by an unavoidable trading partner makes it structurally more difficult for a competitor to submit an offer at an attractive price and thus gain access to the market. The grant of exclusivity rebates enables the undertaking in a dominant position to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor.”

Case C-23/14 *Post Danmark v Konkurrencerådet* (1)

§29 "…the Court has repeatedly held that it is **necessary to consider all the circumstances**, particularly the criteria and rules governing the grant of the rebate, and to **investigate** whether, in providing an advantage not based on any economic service justifying it, the rebate tends to remove or restrict the buyer's freedom to choose his sources of supply.."

[Court noted PD's structural dominance and status as unavoidable trading partner, with limited competition on market]

§42 "In those circumstances, it must be held that a rebate scheme operated by an undertaking, such as the scheme at issue in the main proceedings, which, without tying customers to that undertaking by a formal obligation, nevertheless tends to make it more difficult for those customers to obtain supplies from competing undertakings, produces an anti-competitive exclusionary effect".

Case C-23/14 *Post Danmark v Konkurrencerådet* (2)

§§56-58 [AEC test not essential in law, but may be useful]

§59 [However, in the circumstances] "applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible."

§60 "Furthermore, in a market such as that at issue in the main proceedings, access to which is protected by high barriers, the presence of a **less efficient competitor might contribute to intensifying the competitive pressure** on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking."

§61 "The as-efficient-competitor test must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme."

§73 [weakened structure of competition meant that] "fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified"

Case C-413/14 P *Intel v Commission* (1)

Advocate General Wahl

§66 "…in *Hoffmann-La Roche* the conclusion concerning the unlawfulness of the rebates in question was, nevertheless, based on a thorough analysis of, *inter alia*, the conditions surrounding the grant of the rebates and the market coverage thereof.* It was on the basis of that assessment that the Court held that the loyalty rebates in question were, in that case, intended, by granting a financial advantage, to prevent customers from obtaining their supplies from competing producers…"

* - referring to §92 *et seq*. on the nature of the rebates in issue

§70 "Reiterating a statement of principle concerning a presumptive abusiveness is, as shown in the Court's case-law, however, not the same thing as failing **to consider the circumstances** in a concrete case. In fact, the judgment under appeal constitutes one of the very few cases where the Court's statement in *Hoffmann-La Roche* has been applied verbatim, without examining the circumstances of the case, before concluding that an undertaking has abused its dominant position."

Case C-413/14 P *Intel v Commission* (2)

Depends whether the circumstances in question are those relevant to determining if it is an exclusivity obligation, or those relevant to an enquiry into the capability to foreclose.

§75 "…in my view, the General Court's interpretation of *Hoffmann-La Roche* misses an important point. Contrary to what was held in the judgment under appeal, in *Hoffmann-La Roche* the Court considered several circumstances relating to the legal and economic context of the rebates in finding that the undertaking in question had abused its dominant position. True, that judgment does not explicitly state that an analysis of all the circumstances is crucial for determining whether the impugned conduct amounts to an abuse of a dominant position. Nevertheless, as noted above (point 66), a closer look at the judgment shows that the Court examined in commendable detail the particularities of the pharmaceutical market in question, the market coverage of the rebates, as well as the terms and conditions of the contracts between the dominant undertaking and its customers. On the basis of that detailed analysis of the legal and economic context of the rebates, namely the conditions for the grant of the rebates, the market coverage thereof, as well as the duration of the rebate arrangements, the Court reached the conclusion that loyalty rebates are unlawful, save in exceptional circumstances [citing §90 of *Hoffmann-La Roche]*"

Case C-413/14 P *Intel v Commission* (3)

§134 "…Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation."

§135 "However, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market.."

§136 "That is why Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself…"

§137 [endorsement of *Hoffmann-La Roche*]

Case C-413/14 P *Intel v Commission* (4)

§138 "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."

§139 "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 acquired 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 (see, by analogy, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 29)."

§140 [Any objective justification has to be examined]

Case C-413/14 P *Intel v Commission* (5)

§143 "…in the decision at issue, the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors."

§144 "In those circumstances, the General Court was required to examine all of Intel's arguments concerning that test."

Left unresolved a number of questions:

- If *HlaR* survives as a presumption, does this affect the burden of proof?
- Notion of an as efficient competitor – appears to be wider than price/cost analysis of AEC test
- No elaboration on possible utility for competition of less efficient competitor noted in *Post Danmark II*
- §136 – "*among other things*": can this mean this is only one manifestation of possible abuse? [*Royal Mail v Ofcom* [2019] CAT 27, §§474-485]
- How are the factors in §136 to be weighted, and is the outcome of the AEC test decisive?

Case T-286/09 Renv *Intel v Commission* (1)

Implication of *HlaR* as a presumption: §124 "…what is involved is, in that regard, a **mere presumption** and not a *per se* infringement of Article 102 TFEU"

Is the Commission therefore required to look beyond the rebuttal offered? It appears so: §125, "the Commission is, as a minimum, required to examine those five criteria for the purposes of assessing the foreclosure capability of a system of rebates"

Notion of an efficient competitor: §436 "…the hypothetical competitor whose ability to enter the market is assessed notwithstanding Intel's pricing practices is an as-efficient competitor, namely an operator capable of supplying x86 CPUs under the same conditions as Intel."

This appears to equate efficiency to purely cost/price terms, leaving the significance of the wider concept of the efficient competitor unclear.

Case T-286/09 Renv *Intel v Commission* (2)

Review of the AEC test very strict: no reference to any margin of assessment in economic analysis.

§239 "there remains **a doubt as to the definitive percentage** of the contestable share for Dell and, more particularly as to that contestable share having to be set at 7.1%."

§244 "…the very existence of those [other] estimates is sufficient to demonstrate that the assumption of a 7.1% contestable share was **not the only conceivable assumption** and casts doubt on the substance of the assessment made by the Commission in the contested decision.

§256 "…it must be concluded that the evidence put forward by Intel is capable of giving rise to doubt in the mind of the Court as to whether the contestable share for Dell had to be set at 7.1%. Consequently, the Commission has **not demonstrated to the requisite legal standard that the assessment of that contestable share is well founded**."

Case T-286/09 Renv *Intel v Commission* (3)

As to the weighting of the *Intel* ECJ §139 factors and relationship with AEC test: §525 "Even if it were necessary to infer that the AEC test could be regarded as conclusive [against Intel] for part of the period from November 2002 to May 2005, that could not demonstrate to the requisite legal standard the foreclosure effect of the rebates granted to HP, since the Commission did not consider properly the criterion relating to the share of the market covered by the contested practice and did not analyse correctly the duration of the rebates."

Appears to conclude that even if the dominant undertaking fails the AEC test, that is insufficient to demonstrate foreclosure, although failing the AEC test implies that for the competitor, capturing some of the dominant undertaking's business requires selling below incremental cost of production of the goods sold to that customer. Under *Akzo*, that would be a *per se* abuse.

Appears to hold that, even accepting that Intel fails the AEC test with respect to HP for some of the relevant period, the finding that the Decision omitted to consider properly two of the §139 criteria (the market coverage of Intel's practices and the duration of the rebates) is nevertheless fatal. See also AG Rantos in *Unilever Italia*, §83

C-377/20 *Servizio Elettrico Nazionale SpA & ENEL v Autorità Garante della Concorrenza e del Mercato* (1)

ENEL, former incumbent operator, used customer data it had thereby acquired, to protect its position on liberalised market.

Referring Court asked some far-reaching questions about the nature of Article 102.

On the function of Article 102:

§44 Article 102 "seeks to sanction not only practices likely to cause direct harm to consumers but also those which cause them harm indirectly by undermining an effective structure of competition"

§45 Recalls *Intel* ECJ that "competition on the merits, [may lead to] departure from the market or marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation."

C-377/20 *Servizio Elettrico Nazionale SpA & ENEL v Autorità Garante della Concorrenza e del Mercato* (2)

Broad concept of efficiency can also work to the dominant undertaking's advantage in the range of matters that can be relied on:

§46 Undertaking can show "that the effects that could result from the practice at issue are counterbalanced or even outweighed by advantages in terms of efficiency which also benefit the consumer in terms of, specifically, price, choice, quality or innovation."

The range of consumers concerned is not further identified – do the principles of Article 101(3) apply by analogy? This is particularly pertinent in relation to exclusionary conduct that operates by conferring advantages on market gatekeepers.

As to the undertaking's evidence vitiating capability to foreclose:

§58 "..in order to rule out that the conduct of an undertaking in a dominant position is abusive, the fact that evidence adduced by the undertaking in question shows that that conduct has not produced **actual restrictive effects** is not of itself sufficient. That **evidence may indicate** that the conduct in question is **unable to produce anti-competitive effects**, although **it must be supplemented by further items of evidence** intended to demonstrate that inability."

C-377/20 *Servizio Elettrico Nazionale SpA & ENEL v Autorità Garante della Concorrenza e del Mercato* (3)

As what constitutes an abuse:

§71 "…it is sufficient that that practice was, during the period in which it was implemented, **capable** of producing an exclusionary effect in respect of **competitors that were at least as efficient** as the undertaking in a dominant position [citing *Post Danmark II*]".

§75 "…although undertakings in a dominant position can defend themselves against their competitors, they must do so by using means which come within the scope of 'normal' competition, that is to say, competition on the merits."

§78 "a practice that a hypothetical competitor – which, although it is as efficient, does not occupy a dominant position on the market in question – is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position" is not competition on the merits.

C-377/20 *Servizio Elettrico Nazionale SpA & ENEL v Autorità Garante della Concorrenza e del Mercato* (4)

Court appears to give primacy to AEC test for all pricing practices:

§80 "…it is clear from the case-law that those practices **must be assessed, as a general rule, using the 'as-efficient competitor' test**, which seeks specifically to assess whether such a competitor, considered *in abstracto*, is capable of reproducing the conduct of the undertaking in a dominant position."

§81 "**Admittedly**, …competition authorities do not have an obligation to rely always on that test in order to make a finding that a price-related practice is abusive [citing *Post Danmark II*].

But for the practice of using on the liberalised market an advantage obtained as a statutory monopoly, the Court was very strict towards ENEL: §99 – burden on ENEL to show it did not obtain any undue advantage.

Case T-235/18 *Qualcomm v Commission* (1)

Exclusivity agreement for supply of LTE chipsets to Apple, in return for payments from Qualcomm.

Some concession to review of complex economic assessments

§358 "in areas giving rise to complex assessments [*Tetra Laval* formula]". But, §359 "…it is for the Commission to prove the infringement found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. **Where the Court still has a doubt**, the benefit of that doubt must be given to the undertaking accused of the infringement."

§383 Notes that Decision took account of all *Intel* ECJ, §139 factors, including notably that share of market covered by agreements with Apple was very substantial.

However, the Court found that the Decision did not take into account (§405) that "it is common ground between the parties that Apple had no technical alternative to the applicant's LTE chipsets as regards its requirements for iPhones to be launched between 2011 and 2015."

§410 This was "a relevant factual circumstance which must be taken into account when analysing the capability of the payments concerned to have foreclosure effects, since the Commission found that capability in the light of Apple's **total** requirements for LTE chipsets"

Case T-235/18 *Qualcomm v Commission* (2)

Rejected Commission's explanation that even if were not technically possible for the applicant's competitors to provide supply for iPhones, the agreements concerned made it possible for the applicant to 'leverage' that non-contestable share of Apple's demand relating to iPhones in order to foreclose competitors on the contestable share of that demand relating to iPads and, accordingly, to prevent competitors from expanding and growing on the market.

§420 "…the infringement which the applicant is alleged to have committed was defined by reference to Apple's total demand for iPhones and iPads and, second, the very concept of the applicant using 'leverage' in relation to the various Apple devices does not appear in the reasoning put forward by the Commission in Section 11.4 of the contested decision."

Judgment does not appear to appreciate that leverage over the contestable share is inherent to exclusivity payments.

Case T-235/18 *Qualcomm v Commission* (3)

AEC analysis:

Procedural issue over reduction in product scope of case, in which UMTS chipsets removed. Qualcomm claimed breach of rights of defence as its AEC analysis in response to the SO was based on supply of both UMTS and LTE chipsets:

§ 306 Notes Commission's argument this was irrelevant - a competing supplier of LTE chipsets could not have spread the costs of compensating for Qualcomm's exclusivity payments over the 150 million UMTS chipsets during the period covered by Qualcomm's economic analysis, namely 2012, 2013, 2014 and 2015 because, as the Decision explained, "the last of such devices [was] launched in 2011, whereas the first reference year for the critical margin analysis was 2012". §346 does not address that point.

Substantive assessment does not say an AEC test was essential, but notes it was absent:

§426 Moreover, it should be noted that, as is apparent from the contested decision and as the Commission expressly stated before the Court, in that same decision it did not rely on an economic model, such as an as-efficient competitor test, in order to conclude that the payments concerned were capable of having anticompetitive effects.

Case T-604/18 *Google (Android) v Commission* (1)

Four abuses:

AFA: recital (1016) - abuse of Google's dominant positions in the worldwide market (excluding China) for Android app stores and the national markets for general search services, the AFA being a precondition to entering into a MADA (itself an abuse) which enabled an OEM to install the Play Store and Google Search.

MADA: Search/Play recital (752) - Google tied the Google Search app with the Play Store, abusing Google's dominant position in the worldwide market (excluding China) for Android app stores.

Chrome/Play+Search recital (752) - Google tied Google Chrome with the Play Store and the Google Search app, abusing Google's dominant positions in the worldwide market (excluding China) for Android app stores and the national markets for general search services.

RSAs: recital (1192) - Google abused its dominant position in the national markets for general search services by granting revenue share payments to OEMs and MNOs on condition that they pre-install no competing general search service on any device within an agreed portfolio of devices.

Case T-604/18 *Google (Android) v Commission* (2)

RSAs

§644 "Nevertheless where, as in this instance, the AEC test is applied, it must be conducted rigorously".

Applies also to procedure:

§§995-996: the LoFs substantially altered the content of the objections in the SO on the RSAs, such as to require a further SO.

Coverage

§693 "…the share of the relevant markets covered by the contested practice cannot be characterised as significant." However, §696 suggests a qualitative approach to "significant" would have been acceptable, but no indication why coverage is particularly important as a factor [§800].

Case T-604/18 *Google (Android) v Commission* (3)

Costs of the AEC

§749 "…it is apparent from recital 1266 of the contested decision that the Commission recognises the relevance of incremental costs for the application of the AEC test in this case, in that it notes that, in so far as the 'operational costs' deducted by Google are a percentage of the revenues associated with search queries, they are essentially a proxy for those costs.

§750 However, it must be pointed out that the Commission is relying in that regard on mere conjecture, without referring to more precise data from Google."

Extent of rival's possible installation under an RSA

§780 Decision did not show "…that a hypothetically at least as efficient competitor wishing to share Google's revenues would not be able to have its app pre-installed on the entire portfolio of mobile devices of the OEMs and MNOs concerned", §781 holding that logic of Decision as to OEMs' interest in installing an alternative search service implied an interest in installation on all devices.

Case T-604/18 *Google (Android) v Commission* (4)

Contestable share

Decision took share obtained by all rival search services on PCs (worldwide), as proxy for AEC's contestable share on mobile,

§770 Finds it is not possible "to state with sufficient certainty that a hypothetically at least as efficient competitor could have contested only the same share on mobile devices". This gives no weight to: (i) the Decision having *cumulated* the shares of all competitors for searches on PCs or (ii) the fact that the Decision is concerned with the transition from search on PCs to search on mobile, thus the use of PC searches was the only reference point available unaffected by the impugned practices.

Case T-604/18 *Google (Android) v Commission* (5)

Propensity of older devices to generate ad revenue

§§791-792 accept that "as the number of mobile devices in circulation covered by the portfolio-based RSAs increased, the more difficult, in practice, it proved to be for a competitor, even one hypothetically at least as efficient, to be able to match them" because, once a device covered by a portfolio-based RSA is sold, a rival search service can no longer compete to provide a revenue share from that device to the OEM, whilst the OEM nevertheless continues to receive revenue from its RSA with Google, the loss of which would have to be compensated for if the OEM were to abandon its portfolio-based RSA with Google.

§793 Holds however that this is not quantified by recital (1249): "The Commission does not quantify in this case the actual effect of devices already sold on the ability of a competitor which hypothetically is at least as efficient as Google to offset the portfolio-based RSAs" and that the Commission could not rely on Google's failure to substantiate its claim that older devices generated less revenue, the Decision "taking for granted, without further analysis, the capacity of new and old mobile devices to generate the same general search revenues."

Enforcement challenges (1)

Evolution of the cases marks a shift, made decisively in *Intel* ECJ, from requiring simply an analysis of the nature of the conduct (from which certain legal consequences then flowed) to requiring a further analysis of all the relevant circumstances to determine the effects of the conduct in terms of its capability to foreclose competition.

Query if this applies to pure exclusivity obligations? See, *GoogleAdSense*.

Capability to foreclose is to be assessed in relation to an efficient competitor, but that concept extends beyond pure price/cost factors, although in pricing conduct cases (that concept being defined widely, to include exclusivity payments) there appears to be an obligation or at least expectation that an AEC test will be used.

How can efficiency in terms of qualitative elements be invoked to establish capability to foreclose? Digital markets are characterised by innovation; how can this be taken into account?

More fundamentally, can the as efficient competitor concept simply be waived in cases of overwhelming dominance where scale equates to efficiency, as arises in digital markets?

Post Danmark II suggests it can, but to date, that has been contemplated in context of dominance arising out of statutory monopoly, as in *Post Danmark II*. Arguments that the efficient competitor standard was simply a means of entrenching dominance did not succeed in *Google Android*.

Enforcement challenges (2)

Assuming the foreclosure of the as efficient competitor is the applicable standard, *Intel*, §139 is starting point as to what must be proved in pricing cases, but how those factors are to be weighted and assessed in connection with an AEC test remains unclear.

The complexities of the effects based approach lead to longer investigations (where use of investigative powers may be rendered less effective due to dominant undertakings being based outside the EU) and longer decisions, which in turn leads to longer proceedings for judicial review, perpetuating legal uncertainty.

The intensity of judicial review, even on the most technical aspects of an AEC test, is considerable.

Although this is liable to make the Commission cautious about using AEC tests, it might not have a choice, depending on how *Intel* ECJ is interpreted (See, AG Rantos in *Unilver Italia*).

In fast moving digital markets, *ex post* intervention may come too late to prevent permanent changes in the structure of competition.