**What’s new in the Intel case?**

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**On 6 September 2017, the European Court of Justice rendered its landmark judgment in the Intel case. The outcome of this judgment was eagerly awaited, as it had the potential to revolutionize how EU competition law assesses the business practices of undertakings with a dominant position.**

**Could you please comment on how this decision will affect in the future a number of high-profile European Commission investigations of alleged abuses of dominant positions;**

**[[1]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn2" \o ")Dr. Victoria Mertikopoulou:**In its Intel Decision (of 13.5.2009)[[2]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case#_ftn2), the European Commission examined a system of exclusivity rebates, and found that Intel had abused its dominant position, relying on case-law and qualitative criteria, but also, for the sake of completeness, applied the as-efficient competitor test (AECT) put forth by the Commission’s Enforcement Priorities Communication**[[3]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn3" \o ")**. The General Court (Case T-286/09) upheld the decision and did not assess the application by the Commission of the AECT. Intel alleged that the application of that test was flawed and that, had it been correctly applied, it would have led to the conclusion that the rebates at issue were not capable of restricting competition. In its ruling (Case C-413/14 P), the CJEU stressed that in the decision at issue, the AECT played an important role in the Commission’s assessment. The Commission had carried out an in-depth examination of the circumstances of the case in its decision, which led it to conclude that an as efficient competitor would have had to offer prices which would not have been viable, and had in fact deemed the AECT relevant. The Court held that *in those circumstances*, the General Court was required to examine all of Intel’s arguments concerning that test (and the errors allegedly committed by the Commission as regards that test) since the General Court had failed to take into consideration Intel’s line of argument on the alleged errors committed by the Commission in the AECT. The Court therefore set aside the judgment of the General Court and referred the case back to the General Court so that it may examine, in the light of the arguments put forward by Intel, whether the rebates at issue are capable of restricting competition[[4]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn4" \o ").

The CJEU judgment reiterates settled case-law, according to which the dominant undertaking bears a special responsibility not to allow its conduct to impair genuine, undistorted competition on the internal market. Then, it specifically refers to pricing practices, stating that 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[[5]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn5" \o ") and strengthening its dominant position by using methods other than those that are part of competition on the merits and that accordingly, not all competition by means of price may be regarded as legitimate.

Then, in para 137, the Court re-affirms the Hoffmann-La Roche presumption (settled case-law), stating that an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer’s obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position[[6]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn6" \o ").

The Court then [paras 138-139] makes a “further clarification” in that case, where the Commission had applied the AECT and where the undertaking concerned had submitted, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and of producing the alleged foreclosure effects (thus contesting the AECT as applied by the Commission). According to the Court, ***if,***in a decision finding a rebate scheme abusive, the Commission carries out such an analysis[[7]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn7" \o "), the General Court must examine all of the applicant’s arguments seeking to call into question the validity of the Commission’s findings concerning the foreclosure capability of the rebate concerned [para 141]. In that case, according to the CJEU Intel judgment, the Commission was required to analyze, first, the extent of the undertaking’s dominant position on the relevant market[[8]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn8" \o ") and, secondly, the share of the market covered by the challenged practice[[9]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn9" \o "), as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it was 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.

In *those* circumstances, the Court seems to be mitigating the by nature abusive character of exclusivity rebates to a presumption regarding the anticompetitive character (capability of restricting competition) of this *form*of behaviour, which can be rebutted by the dominant undertaking who bears the burden of bringing forth solid factual and economic evidence to the effect that the specific rebates scheme is not capable of generating foreclosure effects.

As to the structure of analysis it sets forth, it is noted that in rebates cases, it is standard practice to examine the market shares of the dominant undertaking and its competitors and other factors establishing the extent of its dominant position on the relevant market as well as the conditions and arrangements for granting the rebates, their duration and their amount; also, the existence of a strategy aiming to exclude competitors makes the rebuttal on the part of the dominant undertaking implausible.

At any rate, the requirement, when an AECT has been effected by the Commission in a rebates case[[10]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn10" \o "), for the General Court to assess its implementation in the light of the errors alleged by the dominant undertaking, is note-worthy. On the other hand, as stated also in Post Danmark II[[11]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn11" \o "), it is not possible to infer from Article 82 EC or the case-law of the Court that there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the AECT. On principle, recourse to the AECT is not excluded in cases involving a rebate scheme for the purposes of examining its compatibility with Article 82 EC. The application of the AECT does not, however, constitute a necessary condition for a finding to the effect that a rebate scheme is abusive under Article 102 TFEU[[12]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn12" \o "). In a situation such as that in the main proceedings in Post Danmark II, applying the AECT is, moreover, *of no relevance* (in a situation characterized by the holding by the dominant undertaking of a very large market share and by structural advantages[[13]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn13" \o ")), inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.

It is therefore noted that, in the case of loyalty rebates at issue in Post Danmark II, the CJEU did not consider it suitable that their abusive nature be substantiated on the basis of the AECT, whereas in Intel, a case different in several aspects –where the Commission had itself found the AECT relevant-, the CJEU stated that such an analysis was required, with regard to exclusivity rebates.

It ensues that AECT is not a necessary step in every rebates case[[14]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn14" \o "), but rather “one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position”[[15]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn15" \o ") and that it depends on the circumstances of the specific case whether it is suitable[[16]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn16" \o "). The analysis may also be qualitative instead of quantitative, based on all relevant circumstances of the case.

As stated in Post Danmark II, Article 82 EC [102 TFEU] must be interpreted as meaning that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme operated by a dominant undertaking, such as that at issue in the main proceedings, must be probable, and this is not a high threshold[[17]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn17" \o ")[[18]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn18" \o ").

In any event, it is sensible to wait for the European Commission to state its formal position and administrative practice on the issue as well as for the Courts, and indeed the General Court that will adjudicate on Intel, to fine-tune, elaborate and give guidance on the matter, and to reconcile the above-mentioned judgments of the CJEU.

One final remark: according to the CJEU, Article 102 TFEU does not prevent an undertaking from acquiring, *on its own merits*, dominant position on a market[[19]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftn19" \o "). This statement entails that competitive behaviour by dominant undertakings is desirable, as long as it is the result of competition on the merits, i.e. based on better prices or quality, choice and innovation, in favour of consumers. On the contrary, where a plan to exclude competitors is established, then the behaviour is not on the merits.

[[1]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref1" \o ") The content of this publication does not reflect the official opinion of the HCC. Responsibility for the information and views expressed therein lies entirely with the author.

[[2]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref2" \o ") The Commission imposed a fine of €1.06 billion on Intel, the US-based microchip manufacturer, for having abused its dominant position on the market for x86 2 central processing units (CPUs).

**[[3]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref3" \o ")** Communication from the Commission: “Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, OJ C 45, 24.2.2009, p. 7. It is noted that according to the Court in Post Danmark II [Case C-23/14, Post Danmark A/S v Konkurrencerådet, Judgment of the CJEU of 6.10.2015 (preliminary ruling), regarding a retroactive rebate scheme for direct advertising mail], par. 52: “that document merely sets out the Commission’s approach as to the choice of cases that it intends to pursue as a matter of priority; accordingly, the administrative practice followed by the Commission is not binding on national competition authorities and courts”.

*Cf*. Regulation (EC) 1/2003, Rec. 8 and art. 3 par. 2.

**[[4]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref4" \o ")** The Court rejected Intel’s arguments on the lack of territorial jurisdiction and alleged procedural irregularities that affected its rights of defence.

[[5]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref5" \o ") By definition, a price/cost test such as the AECT, is not applicable to non –pricing abuses.

[[6]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref6" \o ") See judgment of 13 February 1979, Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 89.

[[7]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref7" \o ") This is further exemplified in paragraph 142, stipulating that “*In this case, while the Commission emphasised, in the decision at issue, that the rebates at issue were by their very nature capable of restricting competition …,****it nevertheless carried out an in-depth examination****of those circumstances, setting out, in paragraphs 1002 to 1576 of that decision, a very detailed analysis of the AEC test, which led it to conclude, in paragraphs 1574 and 1575 of that decision, that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor.**[143]****It follows that, 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***”. Finally, the Court ruled in this case that the review of whether the rebates at issue are capable of restricting competition involves the examination of factual and economic evidence which it is for that General Court to carry out and referred the case back to the General Court.

[[8]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref8" \o ") *Cf*. Post Danmark II, par. 40 and 50: An undertaking which has a very large market share is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which secures for it freedom of action. In those circumstances, it is particularly difficult for competitors of that undertaking to outbid it in the face of discounts based on overall sales volume. By reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market.

[[9]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref9" \o ") *Cf*. Post Danmark II, par. 46:  The fact that a rebate scheme, such as that at issue in the main proceedings, covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect.

[[10]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref10" \o ") *Cf*. also paragraphs 141, 142.

[[11]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref11" \o ") Post Danmark II, paragraph 57-59.

[[12]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref12" \o ") Post Danmark II, paragraph 62. *Cf*. also Opinion of AG Kokott in that case, paragraph 75.

[[13]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref13" \o ") Conferred, inter alia, by that undertaking’s statutory monopoly, which applied to 70% on the relevant market - in Post Danmark II), applying the as-efficient-competitor test is of no relevance.

[[14]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref14" \o ") In Post Danmark II, par. 29 *et seq.*, “all the circumstances” were examined in order to determine whether the dominant undertaking has abused that position by applying a rebate scheme such as that at issue; in particular, the circumstances examined, i.e. the criteria and rules governing the grant of the rebate, aimed 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, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition. Having regard to the specifics of the case, the Court also took into account, in examining all the relevant circumstances, the extent of Post Danmark’s dominant position and the particular conditions of competition prevailing on the relevant market.

[[15]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref15" \o ") Post Danmark II, par. 61.

[[16]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref16" \o ") If the circumstances of the case indicate that the structure of the market makes it impossible for another undertaking to be as efficient as the dominant undertaking, again the AECT might not be suitable or might be of no relevance.

See also *Tomra Systems* v *Commission*, C‑549/10 P, EU:C:2012:221, paragraphs 73 and 80.

[[17]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref17" \o ") Paragraphs 63 et seq and 74.

**[[18]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref18" \o ")** Furthermore, according to the Intel judgment [paragraph 140], the analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates, may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.

[[19]](http://www.greeklawdigest.gr/news/169-on-6-september-2017-the-european-court-of-justice-rendered-its-landmark-judgment-in-the-intel-case" \l "_ftnref19" \o ") *Cf*. paragraphs 133, 134.