GCLC 020222 - *Intel* judgement discussion speaking notes - Philip Lowe

1. Our panellists have given us the benefit of their own keen assessment of last week's General Court Judgement. So we are already in the middle of a lively debate! And we should not spend too much time raking over the ashes of the events since the Commission's 2009 Decision. We have to think about how the original Commission and the successive Intel judgements of the European Courts can contribute to a more effective application of competition law and policy in the future, in the interests of consumers of competitors and of society as a whole.
2. The starting point for this debate must surely be what society wants to achieve through the application of the law and to that extent how the law should be interpreted. This may of course change over time and at times the law may be interpreted differently by the courts, and ultimately the law itself may need to be changed.
3. In this respect Article 102 of the TFEU refers to abusive conduct by dominant firms which inter alia consists in 'applying dissimilar conditions to equivalent transactions…' and 'making the conclusion of contracts subject to acceptance by other parties of supplementary obligations…which by their nature…have no connection with the subject of such contracts'. It has been principally through case law that certain practices have come to be regarded as anti-competitive *per se*.
4. This obviously raises the question as to by whom and how the law is interpreted in the general interest: the competition authorities, the courts or both? Normally, one would hope, it is through a constructive interaction between the two. Competition authorities know more about markets and facts. Courts have the final say on the law, if not also on the interpretation of the facts.

   In a prosecutorial system as in the US, this interaction between them is more or less direct. The court takes account of the substantive analysis of a case as presented by the competition authority, which carries out a thorough investigation of the facts and proposes a theory of harm. Then the court decides. The competition authority subsequently digests the guidance provided by the court and may call it into question in subsequent pleadings.

   In the German and UK systems, the competition authorities have a more decisive role but their decisions are subject to a substantial degree of judicial control on factual evidence, on procedure and respect of rights,

and on the substantive analysis of the prevailing competitive situation on the market. So the Bundeskartellamt and the UK CMA can propose new and imaginative interpretations of the law but the courts which oversee them keep them in check. And when it is clear that the law needs to be changed, this can be done relatively quickly.

As far as European competition law is concerned, judicial control of the Commission- the European competition authority- has so far been restricted to points of law, to verification of facts, and to respect by the Commission of its own guidelines or guidance. (I leave aside for the moment control of the parameters of the AEC test!). The timelines for appeals are long, and the time needed for legislative changes is often even longer. As the Intel case shows, active young men and women can grow old before successive court judgements on the case come to an end! This means that in the interim, the responsibility placed on the shoulders of the Commission is that much heavier. It must continue to prosecute cases despite the legal uncertainties surrounding them. Yet as an administrative authority with not insubstantial resources at its disposal, its investigations have to reflect changing market realities and their impact of consumers and society. There will be new theories of harm to competition and consumers which need to be addressed.

5. I raise these issues of interaction between competition authorities and courts to put the Intel case into the context of the efforts to arrive at effective enforcement of EU competition law as well of its development in the interests of society as a whole, including protection of the rights of those impacted by the law..
6. To achieve effective enforcement of competition law, you need to pursue cases against alleged offenders but you also need to deter companies from entering into conducts or structures which are, at least in most circumstance, can be shown to be anticompetitive. Clearly abuses which are designated in law as anticompetitive per se, or which establish a negative presumption, provide that degree of deterrence, whether or not, in specific cases, they are genuinely abusive.
7. However there are conducts and structures which could be said to be in a ‘grey’ area (they could or could be regarded as anticompetitive) or in a ‘green’ category in the sense that they are unproblematic. In contrast to application of article 101 and of merger control law, where there are guidelines and a multitude of block exemptions, enforcement under article 102 before 2007 was never the subject of any effort to provide guidance to dominant firms as to whether they were acting lawfully,

questionably or unlawfully. This was despite the fact that the impact of a 102 decision on a company such as Microsoft in 2004 was substantial, not just in terms of the fine imposed on it, but also because of reputational damage- and arguably much more detrimental to it than an anticompetitive merger or agreement.

8. It was in that context that we made the effort between 2005 and 2009 to provide some guidance to firms as to what conduct could be described as anti-competitive under article 102. The investigation of Intel's conduct, and the preparation of the 2009 Commission decision against the company, was conducted in parallel to the policy discussion on guidelines or guidance on the application of article 102.
9. There was considerable opposition to the idea of guidelines. They would restrict the discretionary power of the Commission. They infringed on the ultimate power of the courts to decide on how the law should be interpreted (despite the reality that under 101 and merger control, guidelines and block exemptions were totally accepted and despite the fact that Commission Guidelines were only binding on the Commission and on no one else). Finally, there were those who said that whatever texts were drafted, they would be too approximate to provide any clear guidance to companies.
10. As a result of the debate around these issues, the draft Guidelines were turned into guidance and then into guidance only on the Commission's enforcement priorities. As a result too, the 2009 Intel Decision was based on two pillars: on the one hand a traditional 'by object' approach which was actively defended in court by the Commission, but on the other hand as a supplementary justification, -a toutes fins utiles- an analysis of the anticompetitive effects of Intel's conduct.
11. The emphasis on effects in the 2009 Decision was undoubtedly a major step forward in acknowledging that the analysis of effects of an abuse was crucial where there was no longstanding empirical evidence that a conduct such as fidelity rebates was clearly anticompetitive in the sense that it was part of a strategy to foreclose the market to competitors. However it goes without saying that the analysis of effects of abuse normally weighs heavily on the resources of a competition authority. It certainly enhances rights of defence but restricts the capacity of the authority to pursue other cases. Consequently on the back of the ECJ and the latest General Court judgement, the Commission has an interest now and in the future in defining more explicitly what kind of restrictions are by definition anti-competitive on the basis of substantial empirical evidence. And it will have to take into account of the fact that

in other cases, an effects-based analysis will inevitably attract a more in-depth judicial review, if only because the defendant firms will want to contest the basis of the effects analysis.

12. Finally I can't resist saying something about principles and tests. Generally lawyers are more impressed by respect of principles whereas economists like to take a principle and turn it into a test, which when applied, will decide the case. I am not sure that the precise parameters of an 'efficient competitor' test, in terms of scope and duration, should really constitute the decisive factor for a court in determining whether a conduct is abusive or not. What is required in my view is, in the wise language of many court judgements, a thorough examination of all the circumstances in which the rebates were offered and their impact on competition, including the use of tests where possible.

13. In conclusion, this judgement may look like another setback for the Commission insofar as its 2009 Decision was overturned. On the other hand, it has had the effect of moving on competition law and practice, certainly to a higher and more rigorous threshold of analysis but surely to a more solid basis for assessment of the conduct of dominant firms, with due respect for their rights. It should not rule out assessment of cases by object, but the precedents for this should not depend entirely on one or two past cases. We need more empirical evidence than that.

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