



# The 2022 Intel judgment: some remarks on a chronicle of a failure foretold

Luc Peeperkorn

GCLC Lunch Talk Series

2 February 2022

The views expressed are those of the speaker and do not necessarily reflect those of the College of Europe, Brussels School of Competition, DG Competition, the Commission or any other organisation

# Limping between two opinions



- Commission decided not to adopt its Art 102 Guidance as real Commission Guidelines
- Commission argued in court against approach and importance of its own Art 102 Guidance
- Commission did limp on two thoughts: building its case on a by object analysis while doing part of the effects analysis prescribed in the Art 102 Guidance, resulting in a number of mistakes in the latter:
  - argued the effects analysis not to be necessary resulting in an error of law;
  - did an incomplete analysis of market coverage & duration;
  - used AAC instead of LRAIC as the cost benchmark

# GC not yet fully to grips with effects-based approach



- GC gives biased summary of Court of Justice *Intel* judgment (§116-120), leading to overly narrow “principles arising from the appeal judgment” (§123-126)
- Court of Justice in *Post Danmark I* and *Intel* :
  - pricing conduct normally only abusive if it can foreclose as efficient competitors;
  - this as-efficient-competitor principle together with other factors (extent of dominance, market coverage, strategy/intent etc.) to form a full effects analysis
  - as-efficient-competitor test useful but not necessary (see also *Google Shopping* §538-539)

# GC's biased summary of CoJ *Intel* judgment



- GC does not mention relevant parts of §136 and 140 of the *Intel* appeal judgment, which make it crystal clear that CoJ requires application of the AEC principle
- Instead, the GC concludes that the assessment must be based on 5 factors in §139 Intel appeal judgment and should focus on 'capability to foreclose' (instead of capability to foreclose as efficient competitors)
- GC seems to argue that only if authority conducts an AEC test, is it necessary to assess whether AEC principle is correctly applied

# Some positive points



- GC seems to accept that 'naked restrictions' are 'by object' conduct, for which the rebuttable presumption and need to show effects does not apply unless the domco substantiates efficiencies (§93-94):
  - Coherent with by object category under Art 101;
  - Types of conduct and agreements that cannot be expected to create efficiencies justify reversing the order of first having to show the negative effects;
  - GC draws here a better conclusion than it does in *Google Shopping* §435-437, where it seems to deny the 'by object – by effect' distinction for Art. 102

# Some positive points



- Since CoJ *Post Danmark I* and *Intel* judgments, the effects-based approach is confirmed as the standard
- There is little that should prevent the Commission to turn the Art 102 Guidance into Art 102 Guidelines:
  - Section on market power and dominance was already in line with case law;
  - Section on anti-competitive foreclosure test now also in line with case law;
  - Section on AEC principle for price-based conduct now also in line with case law;
  - Same for section on objective necessity and efficiency test;
  - Same for sections on exclusive purchasing and rebates, tying and bundling and predation;
  - Only a need to differentiate the test for refusal to supply and margin squeeze

# Thank you for your attention



- Contact: luc.peeperkorn@gmail.com
- On the distinction between AEC principle and AEC test and the usefulness of the latter to assess conditional rebates: *Conditional pricing and the AEC test: A happy marriage or an awkward couple?* - Concurrences No. 2-2019
- On the distinction by object – by effect: *Defining "by object" restrictions*, Concurrences No. 3-2015
- On the need for coherence between Articles 101 and 102: *Coherence in the Application of Articles 101 and 102: A Realistic Prospect or an Elusive Goal?* World Competition, September 2016, Vol. 39/3
- On why the GC was wrong in its original *Intel* judgment: *Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates*, Concurrences No. 1-2015