

Intel ruling shows greater role for economic analysis, former EU judge says

Jurisdiction : EU / Europe

7 Sep 17 | 16:51 GMT

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IN BRIEF

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The EU Court of Justice yesterday set aside a 2014 lower-tier tribunal decision to uphold a 1.06-billion euro (\$1.27 billion) antitrust fine against the US chipmaker. The EU's highest court sent the case back to the General Court to re-examine whether Intel's rebates "are capable of restricting competition" (see [here](#)).

Maria Eugénia Martins de Nazaré Ribeiro, a former judge at the Luxembourg-based General Court, said that the Court of Justice endorsed a more economics-based approach in assessing rebates, moving away from a more legalistic, or form-based, assessment of rebates.

"The court emphasizes the importance of the effects and disregards the form of the rebates," Martins de Nazaré Ribeiro told a conference* in Brussels.

The EU's top judges said that the European Commission must assess the context of these rebates – the market features, the rebates' duration and the dominant company's alleged strategy to remove an "as efficient" competitor – if a company argues that the rebates are anticompetitive.

"The court is giving more importance on likely exclusionary effects," she said.

In the commission's 2009 decision, the regulator found that Intel had abused its market dominance by granting "exclusivity" rebates to four computer makers on the condition that they obtain all, or nearly all, of their x86 central processor units from Intel.

The regulator said that these rebates were capable "by their very nature" of restricting competition. As such, there was no need to look at effects on the market.

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Intel appealed the decision at the General Court. In 2014, the General Court endorsed the commission's decision, agreeing that EU case law dating from 1979 showed that exclusivity rebates violate EU antitrust rules by their very nature.

Martins de Nazaré Ribeiro said that the Court of Justice's decision shows that "the principle of the precedent is to be used carefully."

"We all know that previous judgments aren't fixed and immutable rulings, and that a fresh and updated view, connected with reality, and informed by experience, is a guarantee of the quality, reliability and authority of judicial review and the decisions taken by the court," she said.

She noted that it's significant that the Court of Justice's decision reflects the evolution of case law in two cases involving rebates by Post Danmark.

"I think it's also and more importantly to be read as the expression of the need to reflect and be consistent with the evolution of the jurisprudence concerning price-based exclusion," she said.

Still, Martins de Nazaré Ribeiro said that the court's decision shows that it's in line with previous cases, including an antitrust case involving Cartes Bancaires, a French bank-card association that was charged with fixing fees on issuing cards.

"Context is essential, and the importance of the context has already been endorsed by the Court of Justice" in the Cartes Bancaires case. "It seems that the Court of Justice is following the same approach," she said.

The former judge said that the Court of Justice's decision is in line with the commission's 2009 "guidance" paper on its enforcement priorities in cases involving dominant companies and exclusionary conduct.

For rebates, the guidance paper said that the commission would apply the "as-efficient-competitor test." This test focuses on whether a company's behavior is likely to prevent competitors that are "as efficient" as the dominant company from expanding or entering a market.

** Global antitrust hot topics: EU, US & global perspectives, Concurrences and Baker Botts, Brussels, Sept. 7, 2017*

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