THE INTEL SAGA:

LESSONS FOR THE ANALYSIS OF EXCLUSIONARY CONDUCT

Roundtable of the Competition Law Working Group

European University Institute (EUI)

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Transcript

Nicolas Petit:

Good morning, ladies and gentlemen. My name is Nicolas Petit, and I'm the chair of this event. I'm talking on behalf of our Competition Law Working Group at the EUI, a group of more than 20 researchers interested in competition law and economics. We are delighted to hold this important event on the last judgment of the ECJ ['European Court of Justice' or 'the Court'] in the *Intel* antitrust case. I want to take two minutes to contextualize why this event is taking place, introduce our speakers – some of them in person, others online – and explain a little bit about the agreed-upon division of labour for our session.

Okay, so first, why this event? On 26 January 2022, the GC ['General Court'] handed down a judgment finding in favour of *Intel* in a protracted case of abuse of dominance. The judgment of the GC comes on the heels of what deserves to be called a long judicial antitrust saga. In 2009, the EC ['European Commission' or the 'Commission'] found that Intel had unlawfully granted rebates to computer manufacturers such as Dell, HP, Lenovo, and other companies, on the condition that they would purchase exclusively from Intel. The Commission found that these fidelity rebates were exclusionary and abusive, and imposed on Intel a huge fine at the time of more than 1 billion euros.

The legal analysis of the Commission in the case considered as fidelity rebates a set of financial incentives conditional on the purchasing performance of the dominant company and moved on to apply the first legality test established in the 1979 Hoffmann-La Roche case. Additionally, the Commission conducted a 151 pages-long economic analysis of the anti-competitive effects of Intel's rebates. Early commentators, including officials from the Commission, interpreted this analysis as a test case for what would be later called 'the

more economic approach to Article 102 of the Treaty on the Functioning of the European Union', enshrined in a parallel document called the guidance paper.

I want to stress here that the exercise according to the Commission in its decision was purely performative, not dispositive, of the findings in the case. The decision was appealed in 2014. The GC confirmed the Commission's decision, and the Court found that Intel's rebates fell squarely within the *per se* legality rule established in Hoffmann-La Roche. The case was appealed again before the Court of Justice. And the Court acknowledged that the case law had to be clarified. And it entirely annulled the General Court's judgment. So the Court, interestingly, established and held that the Commission can only reach a finding of abuse of dominance when in the effects-based or rule of reason territory, after a balancing of the favourable and unfavourable effects on competition of the practice in question. This is not the case in the territory of the *per se* rule of Hoffmann-La Roche. In a very deductive way, the Court established the factors of analysis that had to be carried out for the assessment of that type of practice. Now, more importantly, the Court also faulted the General Court, because the GC had not found it necessary to review the EC application of the AEC ['As Efficient Competitor'] test within the 151 pages of economic analysis that the EC had conducted, but declared not indispensable, and just for the sake of completeness.

Right. So, the case was sent back to the GC for application to the facts of the case. And this is the judgment that we'll be discussing today. I will let the speakers tell us what the judgment means in the particular case, but also for the broader context of enforcement in Article 102 cases and, maybe even for public policy in general. Now, I want to maybe point out four elements which can help contextualize a little what we're going to be discussing here. It is interesting to note, first, that the GC acknowledged a previous error, and found that in applying the AEC test, the EC made factual and analytical mistakes that did not support a finding of abuse. The second point is that the GC judgment of January has been appealed again to the ECJ. The third point is that since 2012, the Court of Justice has embarked on a sort of long journey where, case after case, Article 102 seems to require a more effects-based analysis. You know, the cases are well known, *Post Denmark I*, *Slovak Telekom*, *Intel* and the *Enel* case from last week. For the fourth, I want to mention that we are seeing a sort of directional tendency in the case law of the Court of Justice towards the more effects-based approach. We're seeing the reverse approach in the

enforcement's track and especially in moves taken by the Commission. Think of the DMA and all the discussion about the fact that enforcement is too slow, too soft and too weak in antitrust cases.

All right, so now over to the panellists. We have with us five amazing colleagues; I am deeply sorry that national strikes prevent some of them from attending this event in person today. We have with us Jean-François Bellis, partner and founder of the law firm Van Bael & Bellis, and one of the key actors, I would say, in the long-run development of the case law in the field of Article 102. Jean-François will tell us more about his history of litigation before the Court and the meaning of this case over the long arc of history. Our other speakers are Aleksandra Boutin, who's an economist and founder of the economic consultancy Positive Competition. We also have with us Avantika Chowdhury, who's an economist at Oxera in London, and a well-known friend of the EUI. Avantika has come several times this year to talk with us on a variety of issues. We also have with us Miguel Rato, a partner at the law firm Quinn Emmanuel, in Brussels, and last but not least, Giuseppe Conte, a member of the Legal Service at the Commission in Brussels. Today, we hope to provide a platform for a balanced discussion of the *Intel* judgment. And we've decided that we will start with three presentations: Jean-François will go first to talk about the antecedents of the case and the history of the judgments. Giuseppe will then come in to present the results of the appeal and his critique of the judgments of the GC. And then Aleksandra will give us her economic insights on the aspects of the case on which our friends from the economic profession like to think and discuss. I'll be monitoring the chat, and collecting questions and comments. We're also covering the event on Twitter. So please tune in to our various Twitter accounts. The event will be recorded, so if you don't agree with being recorded, please turn off your camera. All right, so we're ready to start with you Jean-François. You have the floor. Thanks for being with us.

Jean-François Bellis:

Thank you, Nicolas, for your overall presentation of the case. And I will just focus on some aspects of it. Also, I have to mention that I am personally involved in the case. I represent ACT, an association of IT companies which supported Intel throughout the proceeding. I've been involved in this case since 2010. I was not involved in the administrative procedure. And indeed, I can confirm that this is a never-ending saga since the Commission decided to file an appeal to the GC, on which I'm also working, the response to that appeal.

Maybe a description of the kind of practices which are at issue here. It's a combination of exclusivity, rebates, and naked restraints. Let's not forget about that other category which was defined for the first time as naked restraints in this case, and I will just give you a few examples of the type of practices which were at issue.

Let's start with Dell, then one of the main customers of Intel. The abuse in Dell is an exclusivity rebate. But it's important to bear in mind, the rebate as such was not, of course, an issue before the Court, because it's factual, it's a rebate, which was found to be conditional on exclusivity based on an analysis of internal communications within Dell. Essentially, for a period of three years, from 2002 to 2005, people inside Dell, which had been buying exclusively from Intel for, well, forever, were wondering, like in the song, so 'should we stay' with Intel? Or 'should we go' at least partially to AMD? They agonized about this decision for three years, and that's the infringement period. When they finally decided to switch to AMD in 2006, that's when the infringement stops. And considering conditionality, there was no conditionality in the agreements. These were agreements made by an exchange of emails, but the Commission found implied exclusivity. So that's one.

Another interesting one, because it combines exclusivity rebates and naked restraints, is HP. HP had been buying from Intel and AMD. But for its corporate desktop business segment, which was about 1/3 of its business, it had always bought from Intel, because Intel had a better reputation with corporate clients. But one day HP approached Intel and said: well, we have bad news and possibly good news for you. The bad news is we've decided to switch 5% of our corporate desktop business to AMD. That's a decision which was made and is irreversible. Now, maybe there is further bad news for you because we might shift 10% more to AMD. But if you give us really good prices, better than the ones you used to give us, we might just stick to 5%. And if you do that, then we will distribute the PCs incorporating AMD chips through secondary channels. So not the direct, normal distribution but to secondary channels. What about that?

And of course, Intel offered HP good prices, and this gave rise to two infringements: the first, exclusivity rebates conditional on HP buying 95% of its PC desktop requirements from Intel, and the second, second class status is given to the products incorporating AMD chips. That was a naked restraint. Now, the fact that these were HP's ideas –Intel would have much preferred the previous situation where they were supplying 100% of chips for corporate desktops to HP – was no defence because, as we know from Hoffmann-La

Roche, the fact that rebates are proposed, or requested, or even sometimes required by the customers, is no defence.

Then, the third type of practice to which strangely enough the Commission applied the AEC analysis was payments made by Intel to Mediamarkt –this big German distributor – conditional on Mediamarkt not distributing computers with AMD chips. This was an exclusivity payment but it was made to a retailer of PCs and laptops, not a buyer of chips. The Commission nevertheless found it useful to conduct an AEC analysis on that kind of payment, which reached a level of surrealism, such that in the appeal, the Commission is not challenging the General Court's finding concerning that customer. This shows the range of practices covered by this decision.

Now, the point I would like to emphasize is the procedural side of all of this, because it's very important to understand what went on in this case, especially at the last stage of the Commission's procedure. This is a case where – in fact, I've never seen something like that – an extraordinary level of exchange and interaction between Intel's economists, Professor Shapiro in particular, and the Commission's economists, took place. This was the first team of economists working on a large scale with the Commission. The chief economist had been appointed just a few years earlier. So there was an enormous amount of interaction and exchange during the administrative procedure, and the economic analysis was part of the statement of objections. But, when the Commission adopted the decision, something very interesting happened. The economic assessment was relegated to the status of something that was done to determine whether the case was consistent with the Commission's priorities. A strange approach, because why spend 150 pages of analysis to determine whether this is a case you want to take? And then you apply to that case the Hoffmann-La Roche *per se* rule? So this was a way of trying to make sure that that part of the analysis would not be subjected to judicial review, because the Commission decision stated very clearly that these 150 pages were not part of the legal reasoning supporting the findings of infringements.

For those of the older generation who are familiar with DVDs, economic analysis was like a bonus in the decision. Something which was not addressed to Intel. It was more like an exercise conducted by the Commission's economists to show their colleagues that, if they accept economic analysis, they will reach the same result as when you apply the Hoffmann-La Roche *per se* rule. And of course, this must be seen in the context of the debate within the Commission between the traditionalist camp, led by the legal service,

which finds it much easier to defend a decision based on the *per se* rule; and the more enlightened camp, if you want to see it that way, which is supporting effects-based analysis. The *Intel* decision is a mirror image of the guidance paper, which is also presented as something which doesn't change the law. It's something which the Commission will do to see whether the case is a case the Commission wants to take.

But then in the 2014 GC judgment, there is a recognition that the whole decision is based on Hoffmann-La Roche's *per se* rule. I don't think that Hoffmann-La Roche is that clear, but that's the way the GC described it. But then here you need to enter into some procedural niceties of the EU judicial system, based on the French administrative law system, with the concept of *à titre surabondant*, which is translated into English as "for the sake of completeness". This is a deceptive way of translating it because in the French administrative law system, *à titre surabondant* means that it's a reasoning that you find in a judgment, which is not necessary to support the conclusion of the judgment. And so, if there are errors in that part of the reasoning, they cannot lead to the annulment of the judgment because the judgment does not rest on them.

So the GC rightly sees the economic analysis as something which is *à titre surabondant* in the decision, but still decides to conduct some kind of judicial review on it, but in a very summary fashion. And it covers all aspects of the economic assessment, except one, the application of the AEC test. I heard through the grapevine that there was a section on the AEC test in their draft judgment, but they found it so bad that they preferred not to address that issue at all. And so in the discussion of the judgment, following the *à titre surabondant* model of analysis of the economic analysis in the decision, which is itself *à titre surabondant*, you have the GC stopping at the edge of the AEC abyss and deciding not to jump into it.

The next stop is the Court of Justice. And the Court of Justice does something which is extraordinary. The Court accepts the existence of Hoffmann-La Roche and implicitly understands it as imposing some kind of *per se* rule. But then, reflecting exactly on what happened in *Intel*, this interaction between economists on both sides, it says well, when the company presents evidence about the effects of the practice on competition, and invokes the concept of the AEC, then the Commission is required to engage in the debate, and this is what happened in *Intel*. The key paragraph of the judgment is paragraph 139, where the Court of Justice spells out the five – I read five criteria, some people read six – that the Commission is required to apply.

At that point, you could say the Commission decision is legally dead. Because the economic analysis is not part of its legal reasoning, it was done *à titre surabondant*. And you could say that the Court of Justice should have annulled the Commission decision, but it did not do that. And if you read the judgment carefully, you'll see that the Court recognizes that this part of the GC judgment addressing economic analysis is *à titre surabondant*, for the sake of completeness. The Court notes that, in its judgment, the GC failed to address the application of the AEC test. And it is on that basis that the Court of Justice annuls the GC judgment, thus implicitly or explicitly telling the General Court:

> "We send you back this case. Please conduct an examination of Intel's objections about the application of the AEC test, despite it being *à titre surabondant*. And, on this point look in the Court of Justice judgment, at what it says about our argument on jurisdiction relating to the implementation test which is dismissed because it's *à titre surabondant* in the GC judgment."

Then the case went back to the General Court. And I invite you to look very carefully at paragraphs 144 to 149 of the judgment, where the Court is essentially saying, yes, this decision is illegal. It's based on an illegal foundation because the economic analysis is not part of the decision. So the decision does not apply the 5 criteria in paragraph 139. It's not in the decision itself. And it concludes that it's vitiated by a legal error. And you could say, well, that's it, the decision is dead. But then, starting in paragraph 149, and in the rest of the judgment, it analyzes the application of the AEC test, the economic analysis. You could see all of this as something which is entirely *à titre surabondant*, because the finding in paragraph 149, that the legal basis for the decision is wrong, is enough to annul that decision. You could say that, practically, this decision has been legally dead since 2017, when the Court of Justice found that Hoffmann-La Roche had to be clarified in a situation like this one, where there had been an economic debate between the company and the Commission. This makes the appeal that the Commission has just filed against this GC judgment very interesting in more than one respect.

I will just make a final remark. Nicolas mentioned my long experience with abuses of dominance cases. Indeed, my first case as a very, very young lawyer, was United Brands. Then we have been involved in a number of those cases. But what happened in this January judgment of the General Court is something which I've been waiting for 40 years, because the last time there was an annulment of a Commission decision in an abuse of dominance case was a very small case that everybody has forgotten, Hugin, in which I

was assisting Walter van Gerven. And that's the last case in which there was an annulment for a question of the effects on trade between member states. I also have some interesting stories about that one, but I will spare you. That was 1979. And since then, for 40 years, there has been no annulment of a Commission decision of the scale that occurred in *Intel*. So, well, I was not sure that in my lifetime I would experience something like this. I was very glad that it finally happened.

Then, the Commission, again, is trying to overturn this ruling by filing this, I think unwise, appeal. And so the title of this presentation, this seminar, is very appropriate. It's a saga. Well, it looks like an unending saga. Let's see how the next step will play out.

I will be happy to, of course, engage in a discussion of other specific aspects of the case, but these are the aspects that I wanted to highlight at the outset.

Nicolas Petit:

Thanks, Jean-François, that was great to kick us off. And it's certainly a saga, in which we learned that the EC 2009 decision is a zombie that keeps walking by ways of appeals and judicial proceedings, but at the same time that the annulment is like a phoenix reborn from the ashes after 40 years. But I'm sure that our friend, Giuseppe, from the Commission, has a different reading of the saga. And without further ado, just to say, thanks for being with us, you have the floor for the next 15 minutes.

Giuseppe Conte:

Thank you very much, Nicolas, thank you also Jean-François for the introduction. Thank you to the European University Institute for inviting me and organizing this nice event. I will speak about this case in my personal capacity. Even if I work for the Commission, I'd like to underline that I'm not here representing the position of the Commission, but of course, I bring a certain insight and knowledge. Jean-François indicated that he has been working on this case for many, many years; I have to make the opposite disclaimer. I was never working on this case. At the time of the decision, I was working for Ms. Kroes' cabinet, but I was dealing with state aid issues. So, I did not deal, if not marginally, with certain aspects concerning the Ombudsman, and I am not following the case in front of the Courts. I will try to focus my presentation on a couple of points, which in our view, are kind of systemic of this latest judgment of the General Court.

[technical issues]

I disagree with some of the remarks made by Jean-François, but I am not going back to re-discuss the whole case. I will focus on the latest judgment of the General Court, which implements the 2017 judgment of the Court of Justice. I would just like to note, just for the records, that, contrary to what Jean-François stated, the ECJ did not kill the Commission decision. If they felt that they had the elements to annul the Commission decision, they would have done that. It would have been much more efficient. And in fact, this would have ended much earlier this saga, but the Court of Justice in its wisdom decided to send the case back to the General Court. So the idea to consider this decision a zombie is not justified. The ECJ annulled the GC's judgement and developed some general criteria, which should be used by the GC to properly assess the legality of the decision.

While Jean-François is very happy with this latest judgment of the GC (and I didn't expect anything else), you would imagine that the Commission is not happy with that judgment and indeed it has brought an appeal raising several legal issues. This is just not to discuss some of the economics or the factual elements of the case. But there are some legal issues which in our view are kind of systemic and need to be addressed by a new judgment of the Court of Justice.

Nicolas said in his introduction that the legal service is traditionalist. Somehow, I would say that the legal service being a legal service kind of reads judgments and tries to comply and stick to the judgments. And in our view, the latest judgment of the GC did not correctly implement the judgment of the ECJ. And this is why we have brought this appeal. In the appeal there are six pleas. We contest a number of elements, some of a more procedural nature and some concerning the distortion of evidence. Some others are a bit more general, and maybe more interesting from a legal point of view. I will mainly focus on them, which might be more interesting for this discussion.

The first point I would like to mention is the kind of standard of judicial review which has been applied by the General Court. Here as discussed, a large part of the debate is whether the Commission performed properly its AEC test, which is an economic test. The debates which have gone on between the Commission economists and the other economists show that this is kind of a complex economic issue. It is not a question of establishing some punctual factual issues, but of examining all the economic evidence and drawing conclusions from it using economic science. The GC applies to the review a kind of assessment, a test, which is more typical of criminal law cases, the 'beyond any

reasonable doubt' test. Essentially, the General Court – for instance, I can refer to point 165 of the judgment – takes a case law which has been established in the framework of cartels. The GC says that where the Commission finds and establishes that there has been an infringement of the competition rules based on the supposition that the facts cannot be explained other than by the existence of anti-competitive behaviour, the EU Courts will find it necessary to annul the decision in question if the undertakings concerned put forward arguments which cast doubt / put the facts established by the Commission in a different light, which allows another plausible explanation of the facts to the one adopted by the Commission in concluding that any infringement occurred.

This kind of test was applied, for instance, on an element which was quite crucial for the AEC test as examined by the Commission. It was the contestable share of the purchases of the computer manufacturers of the chips of Intel's competitors. So, since they had to match the discounts of Intel, one element of the assessment was to estimate which part of those manufacturers' needs these competitors could hope to address with their sales and whether it would be feasible to give a discount large enough to match the one of Intel. The assessment was whether this percentage was 7%, 8%, 9%, or 10%. Applying the test I referred to before, the GC thinks that there would have been another plausible conclusion rather than the one reached by the Commission. And for instance, it says in point 254 of the judgment, "it is apparent from the contested decision that it was possible to determine the contestable share for Dell of between 8.2% and 10.1% on the basis of evidence other than a 2004 spreadsheet". The very existence of those estimates demonstrates that the assumption that 7.1 % contestable share in the case of Dell was not the only conceivable assumption. So the GC considers that if the assumption of the Commission in its economic analysis is not the only conceivable one, it should strike and annul the Commission's decision.

The Commission disagrees with this approach and thinks that this approach might be warranted when it comes to establishing certain facts. In a cartel case, you have to establish whether Mr. Rossi from a given company was present or not, say, during a cartel decision in a given airport - often cartel meetings take place in airports. And then one can see whether he was present or not. Sometimes this factual question "Was he present? yes or no", can be complex to show. Sometimes you can see that he got a flight ticket somewhere else and therefore he could not have been in that room, or whether he was driving his car or not is in doubt. But in a situation like that, when you establish whether

or not Mr. Rossi was in that room, it's a factual question. And in fact, the case law referred to by the GC considers the establishment of facts. Mr. Rossi either was in the room or was not. That may be difficult to establish. And if there is a doubt, one should give it in favour of Mr. Rossi or the defendant company. If it's not established beyond any reasonable doubt that Mr. Rossi was in the room, one cannot assume that he actually was. The same, according to the Commission cannot apply to the economic assessment, which is not black-and-white, but is a question of complex evaluations. The economists in this panel will confirm and ensure that if you asked 10 different economies or 10 different employees of a given company, which is the contestable share for a certain chip manufacturer, the answers will be different. There is no mathematics, there is not one exact number, there are economic evaluations.

According to the Commission, when it comes to these economic evaluations, the proper test, the judicial test, is the one established by the Court of Justice in the *Tetra Laval* judgment concerning a merger decision, which subsequently was applied in many other antitrust cases, in state aid, in other fields, which is a quite demanding test and at the time, it was considered to be a quite strict test. According to that test, the Court must not only establish whether the evidence relied on by the Commission is factually correct, accurate and complete, and that it contains all the information which is relevant to make this complex economic assessment; the Court must also establish whether the evidence is sufficient to substantiate the conclusions drawn by the Commission. If this is not the case, the Commission decision, like in the *Tetra Laval* case, must be struck. But this does not take into account the complexity of the economic assessment, which is not a factual one. So, this is a very important point according to the Commission, because if one started to apply this kind of quasi-criminal, "beyond any reasonable doubt" test to complex economic assessments, there will always be a possible doubt. It is difficult to see an economic paper where no economist would say that there might have been a doubt, where different interferences could have been drawn from it. So, the Commission considered that this is the wrong test.

The second point which I would like to make is that often economists, and those who plead for a more economic approach, say that the Commission is simplistic, and doesn't consider all elements. In fact, this is the lesson one can draw, in my view, from the judgment of the Court of Justice of 2017, that the Commissioner has to take into account all relevant factors. Now, it seems that those who plead for a more economic and overall

assessment are kind of reading this judgment of the Court of Justice in a very narrow way. They think that these five or six criteria established in point 139 of the judgment are an exclusive list and you cannot consider other elements; these are the holly Bible of the assessment. According to the Commission, this is not correct; you have to consider all sorts of elements. These are important and relevant elements, which should be considered in their context, none of them is in themselves determining. An overall assessment needs to be done. According to the Commission, the GC in its latest judgment *Intel* (Renvoi), did not make this overall assessment.

And then the last point I would like to make concerns the role of the AEC test in general in these kinds of cases. Now, we draw lessons from the judgment of 2017 of the Court of Justice. And one of the most important points of this judgment, point 134, which says that "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". So, there are several parameters of competition on the basis of which to establish whether a competitor is equally efficient or less efficient than the dominant company. And this relates to price, choice, quality, and innovation. The idea that the price-cost test, which only takes into account the price element, would be the overall encompassing test, having a determinant role, would be, in the Commission's view, and my view, wrong. And in fact, this does not comply with what the Court of Justice has indicated.

I can make some examples. There might be in the pharmaceutical sector, a company which brings a new medication which is innovative for certain kinds of patients. Certain characteristics of it might be preferable to those of the dominant company, it brings innovation to the market and doesn't leave the dominant company as the only one able to provide certain lifesaving medication. Now, let's assume that this newcomer, who brings quality, innovation, and choice to the market had a cost structure which is worse than the one of the dominant company and so, from the price point of view, would not be as efficient as the dominant company. Would a strict application of the AEC test mean that the exit or the marginalization from the market of this competitor, which is as efficient or more efficient from the point of view of innovation, choice and quality, does not matter because from the point of view of cost and price it would not be as efficient as the dominant company? According to the Commission, this is not correct, and these other

parameters must be taken into account. This also shows that the AEC test is only one of the tools, as for instance, the Court of Justice reminded us in last week's judgment *Enel*. It is just one of the tools which can be used but is not the holy grail of the assessment and therefore one should not neglect other elements and principles. So, I think I stop here my presentation of the main points of interest, from my point of view. I'm sure there will be lots of questions and the opportunity to debate. Thank you.

[technical issues]

Nicolas Petit:

All right. So, I was thanking Giuseppe for giving us some commentary on the current thinking of the Commission concerning these judgments, for being very open and clear in his remarks and also for sticking to time. So without further ado, I'll move directly to Aleksandra, who has prepared slides and I'll just show them here.

[technical issues]

Aleksandra Boutin:

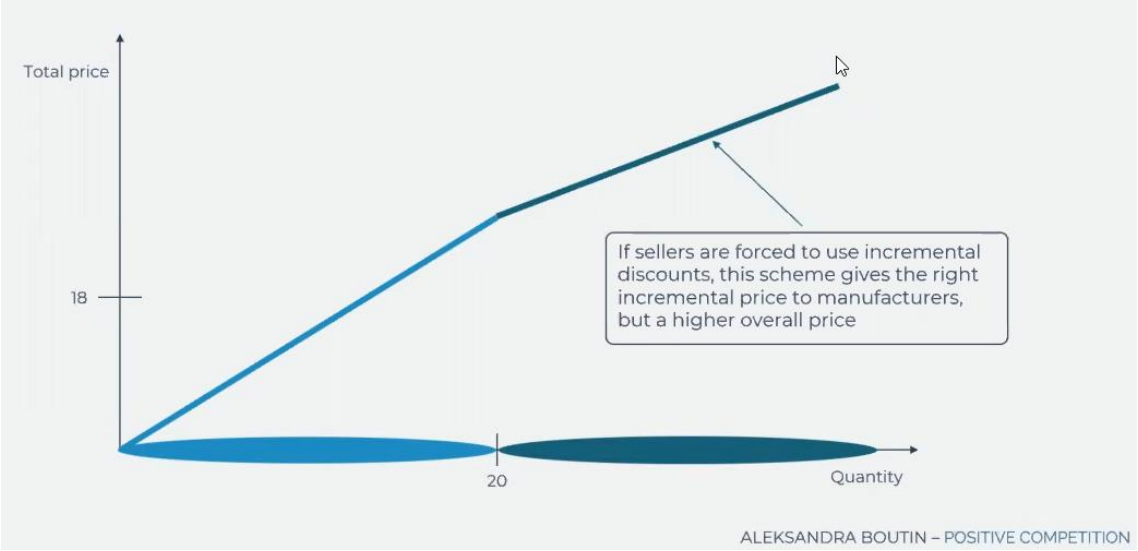
So, Nicolas asked me to throw a little bit of economics into the discussion to shed some light on the judgment. I will start with some economics of rebates. We economists don't like to talk about categories of rebates, as we have heard about different categories of rebates in the *Intel* saga, and in the previous case law. We economists speak about nonlinear prices, this is what we are talking about. These are prices where you don't have a fixed price per unit, but you have all sorts of discontinuities, jumps, and kinks, that create different incentives in different circumstances. So basically, loyalty discounts or rebates are nonlinear prices. And it's clear that the EU case law, in particular before Intel, has distinguished very clearly between all unit discounts and incremental discounts. All unit discounts are the sort of retroactive rebates where you will get a discount on all the units bought after you meet the thresholds. Meaning that you get a discount on all the units you buy from unit one. In incremental discounts you get the discount only on the unit you buy after you meet the threshold, let's say quantity thresholds. And there was a clear distinction in the case law: basically, if you had these discontinuities, your scheme was by its very nature illegal. Economics is clear that this was not correct. Fortunately, Intel ended this nonsense.

Economics also shows that firms use nonlinear prices for legitimate business reasons. The optimal price structure will always depend on the type of issues it's intending to solve and the type of information that can be put in the contract. Nonlinear prices or rebates generally try to solve two different issues. First, they can simply be price discrimination. So naturally, you would give different prices to buyers who have different outside options, where you have different competitive conditions. This is a legitimate course of business, and we know this can be procompetitive, right? Secondly, you can use nonlinear prices to align incentives: you might do that because you want your reseller to invest in a particular service, to recover your relation-specific investments, etc. There are different types of motives. It's clear in economics that linear prices are not always sufficient to solve these problems.

Incremental discounts are also not always sufficient to solve these issues. There might be situations where the optimal price is very nonlinear, and you might have discontinuities in the short-term. So consider a little example of price discrimination: if you face two types of buyers, if you face industrial manufacturers, which buy large quantities, and they have more outside options, because they can source from different places, and you have more captive customers, which are small repair shops, and you know that they normally buy small quantities, you would want to set up your tariffs like this:

You would want to set a higher per unit price for your captive customers, the small repair shops, the light blue line above, and you would give a lower per unit price to your customers who have more outside options. So, you would naturally have a retroactive rebate, you would naturally have a discontinuity. And here clearly, I'm not trying to

foreclose anyone, right? I'm just pricing efficiently my product to two different types of customers. I'm pricing a lower per unit price to large customers, which buy large quantities, here above 20. In the past, I would hear typically from the legal service of the Commission that you could achieve the same marginal incentive by having an incremental discount. But no, if we had that incremental discount, if we didn't allow for this discontinuity, we would end up with a higher price. This would not be pro-competitive:



Maybe one word on this alignment of incentives. As I mentioned, in practice, very often, in many types of markets, the sellers' and the buyers' incentives are not aligned. And often, the resellers don't internalize the overall benefits certain investments might make. So, you might need to induce them to do certain things. For example, sales efforts are very difficult to observe in practice and to be put into a contract. Nonlinear prices can fix this problem, for example, you give a lower price for larger quantities sold. This can remedy the incentives alignment problem.

As I mentioned, you might also have situations where the buyer or the seller makes relationship-specific investments. And in this case, again, the parties might not provide the right level of investments. There could be ex-post renegotiation and a holdup problem. And here again, you could try to connect your price to the quantity sold. But if there is demand uncertainty, that might not be sufficient. Then you might need, for example, to introduce market share thresholds. In certain cases, in practice, we have shown that where renegotiation is unavoidable, and you have this sort of relationship-specific investments, optimal contracts are very nonlinear. This is just the natural way of pricing in these markets. And actually, we have also shown in a particular case in front of the

Commission, that nonlinear prices in this context can actually foster dual sourcing. It can be pro-competitive in that sense. So now *in* Intel, we haven't seen any of these arguments. And that's very striking to me.

This mechanism might be present in markets, but not in all sorts of circumstances. It is not relevant in every industry. And clearly, if you bring these arguments to the Commission, they cannot be just general semi-cooked arguments, they need to be really backed up by data, by proper economic modelling, by serious grounding in reality. In *Intel*, we didn't see that. Now, what was the theory of harm in *Intel*? This was a very simple theory of harm, where you have the dominant firm, which bribes one or a small number of strategic customers, to anti-competitively foreclose competitors. And here you have several conditions that are required to establish harm. First, you need a large firm upstream, you need that firm to have market power, right? You need a dominant player. You also need strategic customers downstream that are offered the rebates. Well, will you have this in every case? No, I don't think so. This is not the theory of harm that will apply to every case, but this is the theory of harm we have seen in *Intel*. That's the theory of harm we have seen in several recent cases. So, once you have a hammer everything looks like a nail. What happens here is that the rebate prevents an equally efficient rival from competing effectively for these strategic customers; typically, because only part of their demand is contestable. And here the foreclosure weakens the rival, making it exit or never enter. The theory of harm here is anti-competitive foreclosure. The AEC test is a test designed to assess this particular theory of harm. What you are doing with the AEC is assessing the size of the rebate. You have this test, which is made of two legs:

As I mentioned, you first have the lock-in analysis. You evaluate whether a rebate scheme can actually foreclose an AEC from access to these particular customers, which are covered by the rebate. And then you have the impact analysis. That's the second step, where you assess the impact of such foreclosure on the market. Does it matter whether some customers are foreclosed? We know that in *Intel*, the Commission claimed that these were very strategic customers, they were the customers that were legitimizing AMD's chips in the market. If Dell was not selling AMD chips, other OEMs, which would be selling these chips would feel that they are at a competitive disadvantage. We have this type of quote in the decision, etc.

And now, we also have other theories of harm. I agree with you Giuseppe, this is only one theory of harm, we have other theories of harm, where maybe it's not the most

relevant that you have large rebates, but then you need to show how this theory of harm is backed by facts. You can have issues related to miscoordination of buyers, you can have downstream competition playing a role, etc, we can discuss if this is relevant.

So the role of the AEC test in cases like *Intel* is to assess whether the rebate is large or small. Basically, the size of the rebate is related to the likelihood of lock-in. And if the rebate is small, the lock-in is less likely. Here, economic evidence, in particular margin comparisons, can be very helpful. If the AEC is unable to recover even its marginal costs, then the rebate may be described as large. And it's quite likely that there is a lock-in. This is what the Commission showed in its analysis. Then if you show that the AEC can recover its total costs – costs also including some measures of R&D – then the rebate may be described as small. And then it's quite unlikely that there is a lock-in. So there should be no issue with the rebate.

The data we need here is normally available in the ordinary course of business. I can discuss that later if that's interesting for you, because we have implemented this test many times in different market circumstances. Very often it requires a different approach, depending on the case, the type of clients, the types of rebates, etc. But this is doable. It requires a bit of work, but it's not extremely complex or difficult. You basically need prices, you need rebates and the rebate structure, you need measures of per-unit margins. Okay, you might need to think a little bit about how you allocate your cost to a particular unit, you need to make assumptions, and you need to test whether changing the assumptions, your results remain robust. I mean, that's the bread and butter of economics, you have assumptions with parameters, and you test how changing these parameters changes the results. That's the bottom line of the discussions. Then you need measures of cost. Ideally, if you are a defendant – obviously, if you want to show that there is no problem with your rebate – you need a measure of long-run average incremental costs, reflecting the cost of R&D. Maybe later I will have a chance to say a few words on how all these economics links to the *Intel* judgment. But if you want, I can do that in the second round.

Nicolas Petit:

That's perfect, thanks a lot. And of course, we will hear what you want to say about how this links to the *Intel* judgment, what looks like sophisticated analysis, the bread and butter of what economists do. I think there's disagreement amongst lawyers about how

burdensome this is and how fragile it is to specification and simplification. And, if the decision is not already dead, we have to look into the AEC test, whether the analysis of the Commission was sound or not. So I want to maybe give an opportunity to Miguel and Avantika to comment on what we discussed until now. Avantika do you want to share some thoughts?

Avantika Chowdhury:

Yes, sure. Thank you, Nicolas. It was very interesting to hear all the perspectives, especially given that we don't yet know much about the Commission's appeal. So that was quite useful.

Nicolas, I know that you have a number of provocative questions for debate. So, I don't want to preempt those. But I just wanted to say that, for me, the judgment is clearly, as you said, a move towards a more effects-based approach. The judgment followed what the ECJ had told it to do and then went beyond that. I don't know how many of us expected such a detailed analysis of the nitty gritty of the AEC test. That puts economics front and centre and as an economist, I obviously welcome that. But as Giuseppe said, there are quite tricky issues. I would react to a couple of comments you made.

I agree with you that economic evaluations are not black-and-white. It's not the same as facts. There's clearly a judgment involved, judgment around the reliability of the data, but also what all the data is ultimately telling you. It's not just about one test. Now, if we think of the contestable share, we all know that this is quite a tricky parameter in the AEC test. No doubt that one can have different views about exactly what it is, is it 7% or 12% or 15%? So I would agree with you, it's not black-and-white and one needs to look carefully. But there are other bits of the judgment which are more interesting. For example, when the judgment talks about the time period: whether the Commission's AEC test covers the entire time period, and whether some data is missing. My reading of what the judgment is saying is that you cannot be complacent, you really have to do a thorough and comprehensive job not just for one period, you need to do it for the whole period. It's not that onerous on the Commission. So, to me, the Court is saying the Commission could have done more (as Aleksandra said, all the data that is needed is often available to the Commission so there's no point to make about data not being available at all). The other part of it is about the explanation, i.e. justifying what analysis has been done and explaining it fully. Overall, there are parts of the judgment which are about a tricky

parameter (like the contestable share), while there are other parts which are really about comprehensive explanation and making a complete effort to really go as far as the Commission can.

I don't want to preempt the other questions, but I would later comment on the point Giuseppe made about the scale, the entrant example, and the AEC test. I think it's not just about the test, it's really about the AEC principle. Whether that's the Holy Grail, but I don't want to comment on that now, because I'm sure we'll come on to that later.

Nicolas Petit:

Thanks, Avantika. And yes, we will have an opportunity to discuss this in more depth in a few minutes. Some other thoughts, from Miguel now.

Miguel Rato:

Thanks, Nicolas. Well, I guess I'll just add a few observations on this issue of the contestants. More specifically, on Giuseppe's description of the reasons why the Commission has taken exception to the Court's findings, and the reason why it's decided to appeal. Again, with my limited knowledge, which is essentially based on what Giuseppe just described. If I heard him correctly, Giuseppe said that the Commission viewed the General Court's findings on the remanded judgment regarding the contestable share as establishing a quasi-criminal standard of proof. To me, the issue seems to be twofold. The first thing I would say is that there's this well-established principle, that doubt regarding elements of fact should operate to the benefit of the respondent, of the company under investigation. And this will include, necessarily, inferences to be drawn from the evidence. For instance, the case regarding the evidence necessary to establish the existence of a plan to eliminate competition in the predatory pricing case law. This is not something new. When there are doubts regarding the evidence necessary to establish a contestable share, it should operate to the benefit of the respondent. That means that the most generous interpretation should be the one adopted by the Commission. And that includes, let's say, the figures, the computation based on that evidence, of that contestable share; in particular, because we all know that the contestable share is crucial in these cases. It's such an important element that it requires this degree of certainty.

Then secondly, the other key issue is this old notion of the complex economic assessment and the degree of latitude that has to be afforded to the Commission in its assessment.

Here, my view simply is that it's incompatible with the standard of review that is required by penal law. And these are quasi-criminal proceedings. It's incompatible with Menarini. It's a vestige of the past. The standard of review should be a full jurisdictional analysis of all of the elements. We are essentially discussing something which is rooted in the evolution of case law and decisional practice, but which in this day and age, no longer seems to make any sense to me. We find similar structural issues with a topic on which I'm sure that we will all speak later, which is the treatment of evidence and the law of evidence. This structural issue is rooted, again, in the fact that the investigation system which the Commission follows was devised in the 1960s. And it's premised on what is a now rejected fallacy: that the Commission is an impartial tribunal in non-criminal proceedings. If you start from there, then you are led to the inevitable conclusion that the standard of review the Court has should be much higher.

Nicolas Petit:

Thanks Miguel, I guess that these are your last words on this particular point.

Miguel Rato:

Yeah, yeah. No, I mean, again. I don't want to preempt anything. You know, this was just on the issue of the content, and I welcome the Court's treatment of the notion of the contestable share. I welcome the fact that the Court did look under the hood and determined that the Commission could not be satisfied that the contestable share was as low as it was for the purposes of the AEC analysis. That said, the very notion of the contestable share, what it is, is left untreated in the General Court's judgment. In the Renvoi there is no reference, to the best of my knowledge, and no proper definition of the contestable share. For instance, the Court doesn't refer to the Commission's definition of the contestable share in the guidance paper, which is the share that can be shifted or switched to a rival of the dominant company, by virtue of the characteristics of the product. To the best of my knowledge the only two proper examples in the whole of the decisional practice, and the soft law, and the case law, are: must stock items and quantities that cannot be switched as a result of capacity constraints of rivals. And so, that is a glaring omission. It is, in my view, quite indefensible to not have proper case law and treatment of the notion. It's key, it shows up in every case. So, apart from the issues of evidence, then we have the definitional issue. This is a general, first principle. I looked again, now whilst we were speaking and I was looking for the term contestable share in

the General Court's judgment. I'm sure someone can correct me if I'm wrong, but I didn't see it there.

Jean-François Bellis:

No, the contestable share is really everywhere in the discussion of Dell. But on this point, I would like to draw everybody's attention to how the GC addressed this question, the fact that there was this doubt about the 7.1% figure used in the decision, because the GC relies only on figures coming from the Commission. The Commission also did an alternative calculation of contestable share. It found that it could range between 5.6% and 10.2%. And the Commission said, well, this confirms that 7.1% is okay. It's in the range. But then the Court observed that, in the decision, there is a table showing the point at which a contestable share shows the existence of an infringement, indicating when the company cannot pass the AEC test. And if you look at that table, you'll see that with 7.1%, the figure that the Commission used, the first four quarters of the three-year infringement period Intel passed the AEC test for Dell. If you use 10.2%, which was the figure that the Commission presented as the realistic one possible, then it's the entire period except for the last four quarters, in which Intel passes the AEC test. And if you have a contestable share, which is 12.5%, then it's the entire period in which Intel passes the AEC test. So, in this case, a difference of 1% or 2% in the contestable share can make an enormous difference: whether you pass the AEC test or not.

Then, how do you determine the contestable share? It's the share of the customer's demand that the customer will switch to, in this case, AMD. So, this is a number which is essentially a number that the dominant company doesn't know and could not know. How could it know precisely when the customer is going to shift to AMD? Now, Intel had some ideas about that. But the GC in its judgment said, we can't rely on those figures, because then it would be too easy; a dominant company could escape liability just by making a self-serving statement. So then, the contestable share must be based on an assessment of exactly how much a customer is going to shift. And different numbers were circulating within Dell. There was evidence cited by the GC showing that for many Dell executives at the highest level, the share of demand that could have been shifted to AMD, if Dell decided to shift to AMD, was much higher than the 7%, which was the number used as the basis for the calculation of the contestable share by the Commission. It could have been much higher than 7%; so, hence, these unavoidable doubts about the number.

My final point on this contestable share issue. When you read the very interesting Opinion of Advocate General Rantos in the *Enel* case, he says that the AEC concept, in fact, is a concept, which simply means that you use the costs of the dominant company to make your calculation. For example, in a predatory pricing situation, or a market squeeze situation, AEC simply means you use the dominant company's cost because the dominant company must be able to determine itself, whether its prices are consistent with EU competition law or not. But the weakness of the AEC test applied to rebates is that the contestable share, if it has to be based on the perceptions of the customer, nobody, even maybe not the customer itself, knows precisely how much it is going to shift.

So, then the AEC analysis applied in a case such as *Intel*, is an analysis that the dominant company cannot safely conduct itself, because it is unable to know what the number will be. In the *Intel* case, in fact, there was a very interesting episode with I think HP, where a third-party lawyer was used to aggregate confidential information from Intel on cost and confidential information from the customer on the contestable share, so as to calculate precisely what the contestable share was. And in the decision, the Commission dismissed this, almost presenting it as a trick, as a circumvention of the concept. Of course, if you try to know directly from the customer how much it is going to shift, the customer, knowing that the smaller the contestable share, the more likely the finding of infringement will be, will have an interest in providing high numbers because that will allow the customer to receive bigger discounts. So you see, this is a conundrum. And so I ask all the economists in this session to really think very hard about how to make the determination of the contestable share more predictable for the dominant company. Because I think this case is illustrating the problems with basically probing the corporate mind of Dell and the other companies involved in this case to find out what is the right number. It's an almost impossible task.

Nicolas Petit:

Thanks, Jean-François. I think there are two discussions here that are taking place. So, one is about the contestable share concept, which is a concept that has the appeal of conceptual clarity. It allows one's mind to make sense of what we're trying to establish, but it creates a lot of applicational ambiguity and disagreement. The dominant firm will come up with a number as we heard, and then the plaintiff will come up with another number. And so, the question that I have maybe for Aleksandra and Avantika is, can we

move on and progress towards a more predictable, but at the same time, less ambiguous, contestable share test? That would be my question for the economists.

The second question, which is in a way related, is, in the case law, the principle is that when such ambiguities exist over numbers – say economic numbers in the application of the contestable share, as Miguel was rightly recalling – doubt has to benefit the defendant. This is a cross-cutting principle that applies to the entire realm of quasi-criminal cases. And so, I was struck by Giuseppe's remark on the case law cited in paragraph 165. Because the *Ahlström (Woodpulp)* case that is mentioned in this paragraph is really not about the sort of standard cartel, it's about pricing parallelism. This case dealt with the theory of tacit collusion and actually said that confounding economic factors were sufficient to rule out a finding of concerted practice. So, what I mean to say is we're in the same universe of cases here, cases giving rise to fines. The facts that are confounding are pure economic factors. It's in the judgments. I was struck when you said that we have to apply the standards from, you know, merger law, in which you have no fine. I was wondering whether this was a way to find a path out of this by mobilizing case law, which actually should not apply, not quasi-criminal case law, and discarding case law which actually should apply, quasi-criminal case law, in the *Woodpulp* case.

So, two sets of questions, one for the economists – i.e. what steps a better contestable share concept - and one for the lawyers - on how to distinguish the controlling cases within past jurisprudence. Aleksandra you go ahead.

Aleksandra Boutin:

Would you mind putting back my slides? Because I think I can reply to a lot of these questions and to what Jean-François was saying in the slides. Just as a starter, we have done this test, including the analysis of the non-contestable share, many times. Normally, in our experience, you have market intelligence, knowing whether a particular client would switch at quantity x. Would he be switching a small quantity in the beginning or would he directly start with a larger quantity? Would switching a larger quantity directly put him at operational risk? Would he have sufficient demand to switch such a quantity? Would the competitor actually have the capacity to sell such a quantity? Normally, you make this assessment based on market information. If you're an enforcer, of course, you have also internal documents, you can make this assessment based on that. But this is all about coming up with ranges of parameters that are reasonable for assessment. But

actually, in the case of *Intel*, this whole discussion about the contestable share is completely irrelevant. And I will explain to you why. First, what was the role of the test in this judgment? Well, in my view, the relevant question here is whether this was the capability test in the context of a presumption of unlawfulness, restriction by its very nature, aka restriction by object. Or was it a test applied in the context of the 'effects analysis'?

This is a very relevant question, because whether the Commission relied on good evidence cannot be looked at in isolation from how this analysis was interpreted within the legal test. And this is how it is reflected in this decision and how this analysis was reflected in the Commission's defence strategy later. In my view, this is what actually decides the fate of this case, unfortunately. The problem is that we do not really know what question the test is meant to address here because the Commission – and I'm not saying DG competition here – made it super confusing. The Commission never really embraced the economic analysis it made. This links to what Jean-François said in the beginning, we see a lot of schizophrenia here; "we did the test, but we didn't really do it, we have the guidance paper, but we don't really have one." And this is all a big mess.

In my view, you cannot just say that you have a license to kill in the form of a formalistic case law, but you will use it with purpose and parsimony. This whole idea of the guidance paper being the prioritization paper was flowed from the beginning. Prioritization guidelines are not the rule of law. Now we know Intel has shown that the guidance paper is the guidelines, and the elements described there are relevant. I think that's the real victory of this case. So I would like to take a step back to make sense of it. To me, the European Court of Justice suggests that this is the case where there is a presumption of unlawfulness. And we can discuss this for ages. But I don't think, again, that this is worthwhile. This is a conduct that's likely to be a restriction by its very nature, equivalent to by object. That's the question. As practitioners, again, we will disagree because we have seen many cases in practice where rebates were pro-competitive. I have been referring before to one in front of the Commission where we showed very strong procompetitive rationales and where we showed through the AEC test that there is no capability to foreclose, etc. So, because of these cases, we have revised our priors and we don't think this is a restriction by its very nature.

Also, given the economics I explained in the beginning, we would hope that if the Commission – and I'm not saying DG Comp here – thinks that this is a restriction by its

very nature, and they need a very low threshold to bring a case like this, that they will revise their priors with time, when parties come with rebuttals, when parties come forward with an AEC test showing no capability to foreclose, when parties come forward with procompetitive rationales, etc. So, at the end of the day, if there are still people in the Commission that treat rebates as by object restrictions, to me, this is not a very big deal. Because one should be able to rebut this presumption by bringing forward an AEC analysis showing no capability to foreclose, and by bringing forward procompetitive rationales, which just need to be plausible in light of the recent case law, like *UK Generics*, *Budapest Bank*, etc. If you have a plausible procompetitive rationale, this is not a restriction by object, right? So again, after several rebuttals, I think the Commission will also get there. But if we follow the ECJ, it's apparent that the objective of the EC in *Intel* was to assess the capability to foreclose. And the GC seems to agree here.

Again, as a reminder, taking a step back, we are in a case where there is evidence pointing to the fact that the rebates are targeting strategic customers – I think that the evidence is strong – at a time when the competitor is just starting to gain traction. It's investing in product quality, and it's starting to make its way to the market. Again, there is no claim of any pro-competitive rationales as I have described in the beginning. And there are a lot of colourful facts that raise at least an eyebrow. In this context, the conclusion of the Court says that most likely an AEC would not be able to recover its variable costs, but that there is a doubt because based on alternative assumptions it possibly could. I think this is wrong. And I agree here with Giuseppe, and with the previous speaker. This is a wrong threshold. But my question is, how is this useful in the first place? Right? If the AEC is about assessing capability here, then Intel has performed a test that completely misses the target. To prove the lack of capability, only the AEC test based on long-run average incremental cost would have been appropriate. And that replies to Jean-François' discussion earlier.

The point is that the fact that Intel performed the test that misses the target doesn't come out clearly in the decision. I think there's only one footnote about that. So I think there is an issue with the presentation. The Commission is not putting enough emphasis on the right places. This is probably because the AEC test in the decision was for a different purpose. It was not to assess capability. It was an enforcer perspective – as I explained – showing that the rebate is so large, that the AEC would not even be able to recover its variable costs. That's what the Commission did.

The AEC test that the Court is assessing in Intel was not intended to assess capability in the context of a presumption. We have a big misunderstanding here. Even if the Commission failed the test based on the average avoidable cost, this doesn't mean that there is no evidence in the case file that would allow us to conclude what the result of the test based on a long-run average incremental cost, would be. However, the Court again, could only reach this conclusion if the Commission explained this issue clearly to the Court. So I think clearly, there was some issue with how this analysis was explained to the Court.

And again, the Court here looks at the AEC analysis with the eyes of someone whose decision was just squashed. If the Commission embraced its economic analysis, in the first instance, we could have had a different outcome of the case. And I'm saying this because I think the Court is quite harsh and formalistic here. For example, on coverage. You know, it squashes the Commission because the Commission didn't give a figure, and I can discuss why this is a very relevant and formalistic point. Because the Commission actually discusses what was relevant here, it discusses that the rebates targeted strategic customers, that you actually needed Dell to sell AMD to legitimize entry of the chips in the market. So this discussion about the contestable share attracted a lot of attention. This is because the ECJ talks about doubt, which is a peculiar standard, and I think this could be reverted. I agree with Giuseppe.

Even though this is strange wording, in my view, I think that what the GC is doing here is simply asking the question of whether the results are robust to changes in assumptions. And this is the bottom line of the discussion. This is a good question. Because this is just a statistical test. The AEC test is a statistical test, all the parameters are measured with noise. So the conclusions of the test should not change if you change some parameters for the ranges that are reasonable. What does it mean to be robust here? It shouldn't be that you just change one parameter. It doesn't mean that the parties have to show that if you just change one set of parameters, the results go their way, and vice versa. What you need to assess is the consistency with which you failed the test or by what margin, how often, and for what reason. So basically, to go to the bottom of the issue you would need some proper cross-examination and hubs of economic experts. I don't think the current procedures in the Court really fully allow for that. And I think this is the real issue.

In a symmetric test, like the AEC test, the most important questions to ask are the following; when does the effective price exceed the average avoidable costs? Does it

happen often, in time and in parameters? And by what margin? The second question is, does the effective price ever exceed the long-run average incremental costs? If the effective price is consistently lower, or in the vicinity of the average avoidable costs, this is evidence that the rebates were large and likely to foreclose. Contrary to that, if the effective price consistently is larger than the long-run average incremental cost or in its vicinity, then this indicates a lack of capability to foreclose. This is what the GC doesn't discuss at all. And I think this is the core issue with the case. Can we blame the GC here? I don't know. Probably this was not made clear in the case in the beginning, and now this figure of 7% and 10%, that Jean-François mentioned. I don't know the exact figures I don't know the file. Only the case team knows.

But in my view, in this type of industry, where fixed costs are important, if you have a 7% contestable share, and you are below average avoidable costs, with a 10% contestable share, you are far below long-run average incremental cost and you are most likely in the vicinity of the average avoidable costs still. So, the rebates are still capable to foreclose an AEC. Maybe the evidence that the economic analysis the Commission has put forward is robust. Maybe the question is just with the presentation. Maybe indeed the Commission should have presented ranges and showed, you know, within the reasonable ranges, the assumptions hold and then the analysis is still robust. Thus, in my view, the Commission lost basically on the articulation of the economic analysis within the legal test.

This is in the end quite a formalistic judgment. And this is my last slide. Where does this bring us? In a way, it's great news to me that the Court is more and more inclined to look at the economic analysis, and that the Commission's margin of discretion on complex economic matters is narrowing. This doesn't come from the GC here. This is a clear message from the ECJ in other recent cases. In the first instance, in *Intel*, the GC didn't look at the evidence at all, in my view. The second time, it found a way not to really take full jurisdiction, again, through a very formalistic reading of the Court of Justice, as I explained. I would be surprised, but I would hope that they will be forced to get it right the third time. They will really need to look at the evidence for this case, to go the right way. And you know, jurisdictional control is a good thing. It's necessary, and maybe current hearing rules are not enough. As I said, experts need to be heard more. In my view, the fact that the Commission's margin of manoeuvre for complex economic matters is narrowing is a great thing for parties. And maybe parties should take this into account when agreeing to settle on cases where they think they have strong economic arguments,

like in RPM cases, because my guess is that these arguments will be more heard today than most people think.

Nicolas Petit:

Thanks, Aleksandra. Thanks. So that is interesting because when we are discussing competition policy on a daily basis here at the EUI, we hear a lot about the swing in the mood music of enforcement. Like, it has to be faster, go harder, less economically driven. But at the same time, the Court of Justice keeps adopting these judgments which seem to go towards consumer welfare benefits, and AEC tests, more and more. In February, we had a workshop here and a member of the GC came – it was just after the judgment in *Intel* was handed down –, and said, I don't understand. The GC member was perplexed. The message was this: I've been hearing for 10 years that we don't control the decisions of the Commission, and we don't engage with the economics; this is what we did, we heard the message, we did it, why this discussion about Intel? And, in a way, I would sort of throw here that the mood music, but also the spirits in DG Comp, might have changed over time, and further impediments to enforcement, raising the cost of enforcement, is no longer seen as something desirable. And this has to be fought regarding every possible opportunity that comes up, maybe explaining that further appeal. Avantika has a word, and then Giuseppe, because of course, I want to give you enough time to address all these points that have been made.

Jean-François Bellis:

I hope I also have a word on this.

Nicolas Petit:

Yes, I promise.

Avantika Chowdhury:

Thanks, Nicolas, I'll be brief, because Aleksandra has covered a lot. I just wanted to go back to your question Nicolas, which is: how can we be more certain about the contestable share? I wanted to take a step back and say, look, at the end of the day, not just on this AEC test, but what much of economic analysis does, is to try to get to the truth. And we estimate things. Take cartel damages cases, and take any merger assessment, we are estimating it. I don't think it's about how we can get to be certain about the contestable share, we just have to accept that we are estimating and there will be a margin of error.

So, I think then the key words here are robustness and sensitivity analysis. This is not specific to contestable shares or AEC tests or rebates. It's a general economic principle that is absolutely key in any economic analysis. You need to do your robustness checks; you need to do the sensitivity analysis. And yes, if one small change in the parameter is changing the result drastically, it does raise doubts. This would happen even if I didn't know anything about the legal standards. Just as an economist, that will give me pause for thought. In damages cases, there are Courts in the UK, for example, which have dismissed the claimant's case because the estimate was not robust enough. So, to me, the General Court's judgment, therefore, is quite aligned with sensible economic analysis.

To your point about different incentives of parties: Intel bringing a number, the Commission bringing a number,…. Intel, obviously, will have less information than the Commission. Any party, any applicant will come in, and the defendant will come in, each with their own numbers. The Commission does have an advantage here, and you would expect their information set to be larger. You would expect the Commission to have more certainty about inherently uncertain things such as the contestable share. That is quite important in this context when we evaluate the Commission's analysis. In sum, it's not about being certain, it's about being reasonably certain and accepting that there will be uncertainty. The Commission has an advantage, which makes it all the more important that they do that check well and scrutinize any views from competitors or customers thoroughly (because there are incentive issues, as Jean-François said).

We are talking a lot about the Commission and Intel in this case. I do wonder about a private enforcement case where a claimant is presenting this number. In this case, the information asymmetry is not as much because both the claimant and the defendant will not have much information. There, the importance of robustness checks obviously increases. The Court where this plays out matters. If it's the UK, I'll be relaxed, because there will be disclosure, but in some jurisdictions, the claimant would have a really difficult case meeting the burden of proof because of informational issues.

The overarching point I wanted to make is that yes, there are debates when you do an AEC test. Does it mean, you don't do this at all? Just because you have debates and these uncertainties, it doesn't mean that you should just avoid the AEC test. A world where you don't do the test and you only do something different is not better. You should look at the criteria where you are actually combining different factors, and look at what the effect is. It's the combination of factors that matters, not just one factor alone, as we have discussed

before. Overall, I think that it is progress that the Court has engaged with the economic analysis. Whether at the end of the day you rely on the AEC test or not, is a different matter. Some sceptics would ask 'why are we getting into this debate?'. But, in my view, it is very useful to operationalize the principle and see what the combination of factors (contestable share, the value of rebates, etc.) means for effects. Overall, the overarching direction of Courts engaging with it is a great thing.

Nicolas Petit:

Thanks, Avantika. Actually, on your last point, I want to remind something to the audience. This AEC test and all these concepts that came in the guidance paper were developed in a very consensual way in Brussels and elsewhere in Europe amongst economists and lawyers. So, 15 years ago, the entire profession rolled up its sleeves, to help develop a more economically literate and administratively practical approach to the enforcement of Article 102. It feels today that we've not only lost the idea that, when we discuss enforcement, there need to be some limiting principles and administrative action; but also, I think we've lost the broad agreement that there was at the time. Maybe, you know, Twitter doesn't help. But at the time, frankly, there was broad agreement in the entire profession and the Commission, about bringing up these concepts, which are imperfect as we are discussing today. Their application creates problems at the edges. But there was broad agreement that this was the way to go. I wonder what brought us to this very weird state of play where now everyone disagrees about this.

Giuseppe, the floor is for you.

Giuseppe Conte:

Thank you very much. I think the discussion has been extremely interesting and useful. And I feel quite relieved that in fact, I fully agree with the economists in the room. Sometimes the legal service is accused of being a bit formalistic. While I fully agree with the point of view of the economists, in fact, also some of the points made by Jean-François, I disagree with some of the points made by Miguel. I try to explain what I mean.

I think both Avantika and Aleksandra explained that indeed, the prognosis about the contestable share is a delicate and not a black-and-white exercise. Everybody can have doubts, there will never be two economists who will give exactly the same figure. As Jean-François noted, nobody could really know, it is difficult, it's vague. Nicolas also said

that. Hence, this all confirms the point I was making. I think that to evaluate such an economic concept, which is not black-and-white, but complex, you cannot apply the beyond any reasonable doubt standard. This is simply wrong and untenable. There will always be some possible doubt. It is impossible to reach a conclusion that gives a percentage number beyond any reasonable doubt. If you apply this test, you're killing the economic assessment. So, for those who care about the economic assessment, the test – and I refer to Aleksandra and Avantika – must be soundness, robustness, should be credibleness. These are the kinds of elements. Have you looked at everything relevant? Did you consider all aspects? Did you make an overarching assessment? It's very reassuring that Aleksandra as an economist thinks this latest judgment of the GC is formalistic. And I fully agree this is a formalistic judgment. I agree that there is a trend in the Courts to go towards a more sound economic assessment. For once we, in our appeal, are advocating for that. We're saying this judgment applies these economic concepts in a formalistic way, and this is wrong. We are advocating for an overall assessment of all circumstances. I have to be clear, because it's easy to accuse the Commission and say, the Commission wants a wide margin, a blank check, doesn't want to be scrutinized, and wants to do whatever they want. It is not, absolutely not, what the Commission today is advocating. It's advocating the contrary, to make an overall assessment taking into account all elements.

Now, when I was referring to the standard of proof, and therefore, the standard of review of the European Courts that was operating in the *Tetra Laval* judgement. It's a standard which started in *Tetra Laval*, but as we know and certainly, Nicolas knows, the EU Courts have applied it in 102 cases, Microsoft, and state aid cases. It is a standard which is rigorous. Exactly a standard which allows scrutinizing – as the economists in the room were arguing – the soundness of the approach, the robustness of the approach, exactly what we're saying.

And maybe since one can speak a bit abstractly, it's better to stick to the law, because that's also a bit the point of the lawyers, which is the test of *Tetra Laval*. The Court says that within an overall context, taking into account the complex assessment, the Court should verify whether the evidence relied on by the Commission is factually accurate, reliable, and consistent, but also whether the evidence contains all the information which must be taken into account and all the relevant information needed to assess a complex situation, and whether it is capable of substantiating the conclusion the Commission is

pursuing. So, is this information relevant? Did you consider everything? or should you have made a better inquiry, and looked at more things? And well, I avoid the polemics with some tech companies that are complaining that we ask for too much information and too much data and challenge our RFIs. But okay, I will avoid that. But it says whether you assess everything which is needed, and you do it in a sound, complete way, which substantiates and supports the conclusion you draw. This is exactly the soundness and robustness approach that the economists are advocating for, and this is exactly what the Commission in its appeal is advocating.

Then some other points, which are very, very useful, are taken from what Aleksandra said. Okay, you have to take into account also other aspects: if these are crucial customers, the timing of the discounts, if you are doing them at a certain specific point in time when the market was tipping, … and therefore, you have to consider several other elements, which may go beyond the points mentioned as a nonexclusive list in point 139 of the Court of Justice judgment of 2017. And therefore, the Commission thinks that an overall assessment is needed. I think this goes exactly towards the direction of the more sound economic approach.

As to the last point made by Nicolas, which is a valid one. Say, okay, there is this priority paper – which I remind you, is a paper on enforcement priorities, as recognized by the Court of Justice, and this is always to be kept in mind – referring to certain concepts. Quite some time has passed, we all started this debate when we were younger and without grey hair. Now we are discussing this after some years, and some lessons might have been learned. For some lessons – I think Aleksandra explained this very, very well – there are other elements, which might be relevant. You have to take into account a number of other points which might not have been considered in this judgment of the General Court: the intent, the timing, and the crucial character of these customers. This is what the Commission considers. Everything should be taken into account, making an overall assessment. The last point about the kinds of remarks made was very interesting, very well made by Aleksandra, about the fact that even if a competitor can recover his variable costs, if he cannot recover these long-run costs, this is an issue. Recovering just the short-run and variable costs, but not the long-run ones, is an issue. And therefore, even if one were to infer that a competitor could recover variable costs, the conclusions to draw from it are a bit to be taken with a certain pinch of salt. One cannot conclude, as Aleksandra said, that if you can recover your variable costs, but not your long-run cost, you can

recover all the parts of the investment which are needed. These are very investment-driven industries. And if you cannot recover these investments, then it is not economically sound to say that everything is fine.

So again, this is more complex than what may appear from that judgment. In my view, in the Commission's view, an overall assessment takes into account also other elements and some lessons learned. I hear that there was a reference to the conclusion of Advocate General Rantos in the *Enel* case which is very interesting. In conclusion, I would rather refer to the judgment delivered last week. I think the Court of Justice took an approach which is a very balanced and very useful one, but I think these might be the subject of a different seminar. And maybe I'm trying to take the opportunity to get invited again in this beautiful setting and in Florence to discuss this judgment, which is very interesting.

Nicolas Petit:

There will surely be other events on abuse of dominance case law. We could think about doing something on the *Enel* judgment, which is very interesting indeed. Absolutely. I listened to you, and I keep having this question that comes to my mind, which is: how should we allocate the burden of error in the face of uncertainty?

And the law suggests that in quasi-criminal proceedings, the burden of error in the case of uncertainty should be allocated in ways in which the defendants will, you know, get away unscathed by administrative action. But also, we had this sort of economic paradigm, which said, the burden of uncertainty, the burden of error in cases of uncertainty should benefit the defendant because markets go faster at remedying errors than enforcement. This is the famous Frank Easterbrook framework on type one and type two errors. I keep having this question in my mind, which is, how do we allocate the burden of error in the face of uncertainty? I know there are remarks from Jean-François and Miguel in the room. Jean-François, do you want to come in?

Jean-François Bellis:

Well, yes, a few points. *Tetra Laval* was a merger control case. But the standard of review in *Tetra Laval* is fine. That's what the GC did apply in this case, because in *Tetra Laval*, instead of just focusing on the words of the judgment, and reading them in a way which is consistent with your preconceived framework, it's more interesting to look at what the Court did. It's a case where the Commission found that Tetra, by buying Sidel, would

within five years, so just after five years – they didn't know the day nor the hour, but they knew that after five years,– *Tetra Laval*, thanks to this acquisition and various tying practices, – which anyway, were prohibited by a previous decision,– would have a dominant position in the market for plastic packaging machinery. The GC or rather the Court of First Instance, found that these series of assumptions that the Commission was making were not sound, and were not sustainable, and it annulled the Commission decision. So *Tetra Laval* is a case where the Commission lost because precisely, the Court found that this economic analysis was too questionable in a situation involving prospective analysis. So *Tetra Laval* is perfectly fine. And there is no difference with what the GC did in this case.

I was very interested listening to Aleksandra. And the more I was listening to her, the more I thought how right the GC was to annul this decision because it looks like a huge mess. Aleksandra, you are suggesting, the first time, the GC didn't look at the economic evidence, that was wrong. The second time, it looked at the economic evidence, but again, you find that it did not do it in the right way. And so, the third time you expect, then, this to be perfect. But one thing that you should bear in mind is that it's not the General Court's business to make findings of infringement. The appeal, for example, is suggesting that regardless of all the findings that are made by the General Court, the GC should, in fact, rewrite the Commission decision using even a concept of AEC which is not based on price factors, but on quality factors, something that the decision does not do. In the system of judicial review of the EU, the GC reviews the legality of the decision adopted by the Commission and as written by the Commission. It is not allowed to substitute its own reasoning for that of the Commission. And if there is something wrong in the decision, it's for the Commission to fix it, not the General Court. So the idea that there could be a debate before the GC about what kind of AEC standard should be applied is inconsistent with the very system of judicial review which is applied in EU proceedings.

One point about where Avantika indeed mentioned this problem of information. Now, an interesting feature of the Intel case is that there were in fact lots of witness statements, and a lot of information, which as Avantika pointed out, would normally not be accessible to the defendant in a normal case where the Commission would have investigative power. But here there were parallel US proceedings. There was a litigation in Delaware in which there was discovery, and depositions, so a lot of information became available to the parties, including Intel, through that channel. Asking the Commission to hear a witness

or to receive a witness, it's something that it would never accept to do. So, there was here a lot of information that could be used by both parties.

Some final words about *Enel*. What I find very interesting in the *Enel* judgment is the paragraph, I forgot the number, where the Court refers to recital 20 of the Commission's guidelines. And I remember, after the 2017 judgment of the Court of Justice, speaking with Damien Neven, who was the chief economist at the time. He said: paragraph 139 of the Court of Justice judgment in *Intel* is our recital 20 of the guidelines. And indeed, when you look at the list of factors in both documents they look very much the same. Article 139 is indeed importing recital 20, without referring to the guidelines, and *Enel* does not do so very explicitly.

Now, about the debate which Nicolas referred to, all these disagreements. I personally see the Intel case as DG Comp's *Affaire Dreyfus*, which split families at the dinner table. That was the subject to be avoided because people would finally end up going at each other's throats. Same thing with *Intel*. Wouter Wils after the General Court's judgment, saying, 'oh, it's so great, economic analysis is so bad'. And at the same time, Lucas Peeperkorn, writing, – then on a sabbatical in the US but still a Commission official at the time, now retired– the GC judgment should be appealed, and the Court of Justice should annul it. Still recently, Lucas Peeperkorn, in a seminar, said the guidance should be rebranded guidelines, because it was called guidance for a reason, because it was regarded as not really counting, as not being binding, it should be called guidelines. But the *Enel* judgment by itself, I think, raised the status of this document, and made it clear that it is a source of law, because in *Enel* it is the Court of Justice telling the Italian court, you must look, and rely on or refer to recital 20 of the guidelines to make your assessment of capability to foreclose. So indeed, from that viewpoint, it's a great advancement.

Nicolas Petit:

Thanks Jean-François, I think the reference to the *Dreyfus case* will stay with us for a while thinking about the saga. I don't know if, in 100 years, there will be a movie on Intel's side. But you know, who knows?

Okay, Miguel, do you want to share some thoughts with us?

Miguel Rato:

I will start with some thoughts on this very apt analogy. The question is, who will be the Emile Zola of our days? So, in my *réquisitoire* against the Commission, and more specifically, against Giuseppe Conte – a fine lawyer and friend, by the way, in case anyone is under any apprehension – I was going to say that, again, just turning back to this question of the standard of proof, I don't think there's a question of having a beyond a reasonable doubt standard. I mean, yes, it's true, in *Tetra Laval* the standard is clear and convincing evidence. That's just one step removed, one step lower, as regards to the burden of persuasion of the beyond any reasonable doubt test. But there are many other standards or burdens, much, much lower, including the preponderance of evidence, of all sorts. This is the second highest, clear and most convincing evidence. It must mean, it's not beyond the reasonable doubt, but it's a very, very high burden to be discharged. What it seems to me that the Court has done. You know, the GC in *Intel II*, simply says, if I apply to the contestable share this clear and convincing evidence burden, what I conclude is that the Commission couldn't discharge it as regards to the share used to quantify the contestable share, because there's evidence that points to other possible assumptions. Essentially, that's it. We apply this high standard, and the Commission couldn't persuade us, could not have persuaded the trier, that that standard is met because there are other conceivable assumptions.

In my mind, this is not very complicated. We use lots of euphemisms for robustness, these or the other. You know, the contestable share is key. Once you have established the, let's call it, highest bound of the contestable share, it will be essential. It will be determinative, and key to the finding of antitrust liability. That's why it's so important. But it's not that complex to determine it. I have to disagree with the analysis of the Court. We need to determine it.

What we have in the discussion paper is the contestable share, which remains once you have determined the non-contestable share. The non-contestable share is the portion of demand that must be satisfied by the dominant company. And then there are three examples given. The key one is rival suppliers who are capacity constrained. There are must-stock items which must be bought from the dominant company. Then there's another example given in the sector of distribution. The guidance paper omits the third. And in the case law, and other notices, the reference is to the same. Right? It's not what results from the preferences of customers or from beneficial commercial conditions that have been granted. It must be possible to determine objectively what the contestable share is.

Once you do that, you take it as the litmus test, and this has been the Commission's view for at least 30 years. Now we have seen in decisions a different notion of what the contestable share should be, oh, it's a subjective assessment of what the customer would be able to switch to at any given point. Well, I'm sorry, that is not in my view sufficient and it's not in keeping with what we had before. So those are my thoughts on both, the question of the burden of proof and also on the all-important determination of the contestable share.

Avantika Chowdhury:

Thanks Miguel. Nicolas, can I make a very quick comment? To pick up on what Miguel said and also what Giuseppe said when talking about robustness. When we talk about robustness, it is about being reasonably reliable. The example François gave, referring to when you change the number from 10.2% to 12.5% or 7% to 10%. That doesn't sound very robust. To be clear that when I say robustness, it doesn't mean the estimate needs to be a number / one point, it can be a range. But the range cannot be large. This would be my view if I was coming at it coldly and doing sensitivity tests. I wouldn't call that very robust, especially in the context we are talking about. I don't agree with Miguel completely that it is objective, and there is a single contestable share. I mean, maybe that's not what you were saying.

Miguel Rato:

That’s not my point, yeah.

Avantika Chowdhury:

But there's inherent uncertainty, we just have to accept that in that number. I don't think that that's very robust.

Miguel Rato:

You have to use the upper bound, that's my point. My point is that you use the upper bound. Yes, there is uncertainty, but you use the upper bound of the contestable share, the one that will be the most beneficial and for which there is evidence, and that is a clear legal principle, which is applied by the Commission across the board.

Avantika Chowdhury:

Yeah.

Miguel Rato:

You can discuss what the evidence is, right? And what the standard is. I would say clear and convincing evidence of the upper bound, the one that was the most beneficial, I wouldn't say that it's completely conceivable that, you know, 100% of the market could be contestable. No, I'm saying there is the evidence, you can have a range, you can find a bound, there is evidence for the bound, and you use the one that is the most beneficial because these are quasi-criminal proceedings. So, I actually think that we agree Avantika.

Avantika Chowdhury:

Yes, I think we do.

Nicolas Petit:

I like agreements. Let's see what Aleksandra says.

Aleksandra Boutin:

I fully agree with this view, you need to take a conservative measure. If you are the Commission, in your assessment, you need to take a conservative measure and show that the rebate is very large. You do your assessment on variable costs, and you show, look, this AEC cannot even recover its variable costs. That's your conservative assessment. Then, as a defendant, you also want to be conservative, and you want to take into account long-term costs. And my point is that we need a proper and fair discussion. It's not going to help otherwise. Parties might think, okay, it's great news, because then we can just show that changing one parameter in Commission assessments blows the whole thing up.

No, you need to show how changing this parameter is actually relevant. What I have been saying in my presentation is that changing the parameter from 7 % to 10%, is irrelevant in the context of this case, because the AEC would not be able to recover any measure of its long-run costs. So you need a symmetric dialogue. If you are able to just change one parameter and believe that we're blowing up the Commission's assessment, the Commission can do the same. Then the parties are going to be submitting the analysis on their AEC tests and the Commission will say, hey, you took the number 10%, but I see in this internal document that it could be 11%.

What you need to show as a Commission, as a party, is how changing this parameter – and given the evidence that comes to you in like internal documents, etc, – is actually

relevant for the case; how it changes the assessment. What I have been saying is that you need a proper place for this dialogue. For me, it's a problem that the GC is not getting its hands dirty. That's why we have this *Intel* Saga. And we are going to have decisions taking two years until the GC allows for discussions of experts on economic evidence. I don't think there is anything in the Treaty that would prohibit this type of discussion. I think this is a classical view. And I think some friends who I have discussed this with, many lawyers and legal scholars, agree. I think there is a debate about whether this type of discussion should be allowed in the General Court. And if anything, you know that the ECJ could give a mandate. I think this is necessary, because we are going to end up with the Intel sagas until we have a proper discussion at the GC and that discussion should start at the Commission hearings.

Also at the Commission hearings, the economic experts of the parties, and not the Commission only, should be invited one way or another, to cross-examine. They should be allowed to fight it out in front of everybody, in front of the hearing officer. So that we get the best proxies for the contestable share, for the relevant cost benchmark, for the coverage thresholds, so that we have a well-informed discussion and we can take balanced decisions. Because, I don't think Nicolas, that there is only the risk of over-enforcement. I think there are also costs for under-enforcement. I mean, in some markets, you have persistent dominance. And we need a balanced threshold, we need a balanced standard that allows for a full hearing of all parties.

Avantika Chowdhury:

I know we have to get to the questions. But just to say, Aleksandra, I think we agree that we're not talking about the robustness of a single number, but the robustness of the analysis.

Jean-François Bellis:

Maybe one point. Of course, the GC was obliged to look at the decision as it was written, and to look at the AEC test which was developed in the decision. Now, it looks as if Aleksandra, you're dreaming of a system where in fact, the decision would be made by the GC itself, not by the Commission. And then if indeed the GC had jurisdiction to make those kinds of decisions, you could have the kinds of debates that you envisage, but for the time being, what the GC conducts is simply a review of the legality of a decision, as it finds it, and to which it cannot change one comma.

Nicolas Petit:

Yes, the institutional setup and the legal culture and design of the institution are very important in this discussion, as we hear you say, Giuseppe, one word, and then…

Giuseppe Conte:

Yeah, just to say that to me it seems that the agreement is broader than we thought, which is always good, which means our discussion maybe has brought us a bit closer together. And in fact, I kind I agree even with my friend Miguel now. Clear and convincing evidence is the standard. I agree with Jean-François. I was not advocating for a light standard, I was advocating for the *Tetra Laval* case, which we lost badly. I was not by the way at the Commission at the time, I was at the Court of Justice working for the Advocate General drafting the opinion in the *Tetra Laval*, but that's a different story.

But, you know, I'm not advocating for something light for the Commission. It's a rigorous test. It seems that there is a certain agreement that beyond any reasonable doubt is not the correct one. Clear and convincing seems to be better. I think that indeed you have to see if these other conceivable alternatives are sound or not. A sound and convincing test is required. And I respectfully submit that this is not what the GC did in this case. But now I think the Court of Justice will tell us.

Aleksandra Boutin:

I think everything would have looked different if the Commission had just drawn the figure of the long-run average incremental cost and the average avoidable costs, and had shown how close in this case these were to the average avoidable costs, and how far we are from the long-term puzzle. Everything would have been different. It's a simple graph that should have been presented to the judge, which would make him understand the confusion.

Jean-François Bellis:

Yes, but if the Commission would have done that, it would have added something which was not in the decision. So, you see, you must understand the limits on the General Court's jurisdiction in this type of cases, it must really look at the decision as it is.

Aleksandra Boutin:

The Commission here didn't embrace the AEC test, even though they had an opportunity to embrace it. Instead of bringing forward the more economic approach they were shying away from it, they preferred to rely on the formalistic case law, with which they felt more comfortable. That was a political mistake. If they had embraced it earlier, we wouldn't be in the situation we are in today.

Nicolas Petit:

One thing, though, the case law on the AEC test is a sort of implied predation case. And the case law on predation says that prices below long-term costs are not exclusionary by presumption, except when there's additional evidence of intent. So, I think, drawing the line you're saying would have required the Commission to show more than just the AEC test, but also evidence of intention, in line with established case law. So I wonder whether it's just a matter of them saying, the number is not allowing the dominant firm to recoup its long-term costs. That's not enough. Under the case law, there's clear evidence that firms do not try to recover these costs in the short term. Therefore, prices which are below long-term costs do not presumably or presumptively represent exclusionary abuse. There's established case law on that. We don't need the AEC discussion to confuse the discussion.

One point, which I think is coming out of this discussion, which I find interesting. I remember we discussed that five years ago when the Court adopted the judgments. It was, why isn't there before the Court of Justice, the more extensive practice of tapping into neutral economic expertise and a better way, as you were saying, to present and discuss the economic arguments? I mean, Jean-François knows that, but in the *Woodpulp* case, which you mentioned earlier, one key feature of the judgments was that the Courts appointed experts to look into the economic evidence. This constituted the basis on which the Court ruled in the case. We don't have Rene Joliet anymore in the Courts, but this would probably allow us to gain more common ground in discussing the evidence. I prepared four or five questions for the speakers. If there is no question in the Zoom Room, I would go to them. This will allow you to make final remarks on the discussion. I can't see any questions in the Zoom Room.

Okay, so I had prepared five questions, and I tried to formulate them in a way that would allow some spicy remarks just before lunchtime. So, the question to Jean-François is, in

consideration of your litigation experience, what is the relevance of the Intel Saga? We heard about the *Dreyfus case*. Can you elaborate on that? Or tell us something about this?

Jean-François Bellis:

Yes, the Dreyfus aspect is really how this case has split officials within the Commission. There are really two warring camps, those supporting the effects-based analysis and those who do not. I have the impression that recently within the institution, the formalistic camp is making progress. Fortunately, the Court is providing more and more support for the effects-based analysis. Now, *Intel* is a unique case. And I think we are in agreement with Aleksandra about the schizophrenia in the decision, which explains everything. Also, the ECJ judgment is based on the fact that in the Intel case there was an economic debate. So, in a sense, the Court of Justice judgment is very fact-specific. Concerning economic analysis, I was in the *Woodpulp case*, and I personally regard it as a form of success that we succeeded in convincing the Court, with the Commission's agreement, to have a team of, well, academic economists and economists specialized in the sector, who produced this great report explaining that the market was at the same time oligopolistic and not oligopolistic. And so then undermining the Commission's conclusion, that the only possible explanation for parallel pricing, in that case, was collusion. But, it was a special situation where in fact, the Commission relied on economic analysis to support the finding of infringement, and the Court hired economists to check whether that economic analysis was done well.

Nicolas Petit:

Thanks Jean-François for this perspective on the *Woodpulp* case. So I'm turning to Miguel now, and I'm going to quote Jean-François. I heard Jean-François many times say to me, and I quote here, there is no such thing as an EU law of evidence. And I wanted to ask you, do you agree with that statement? And also, if the Intel case is a good illustration of Jean-François' statement.

Miguel Rato:

Yes, very, very briefly. Yes, it is. But we've gone over this. We've touched upon it. There are many reasons for this. There's the structural issue that I mentioned. Everything is based on a system devised in a distant time, the 60s; the premise of the Commission as the impartial tribunal, proceedings that were noncriminal, the evolution since then,…

Well, Aleksandra also mentioned, and you've mentioned, the fact that the EU Courts are not well equipped to deal with the fact-finding and the assessment of evidence. That, I'm sure, contributed to the hearing of witnesses, theoretically possible, occurring in practice very seldom. Individuals are not compelled to testify at all on these things, or even the fact that the GC doesn't receive, as a matter of fact, the Commission's file from the Commission.

I will also say that there isn't a sensible hierarchy of the evidence. For instance, from the *Intel I* judgment of the General Court, we learn that all of the RFI responses are, you know, gospel truth. The Court says that, well, they require at most a weak degree of corroboration, but that's only the case if the Court agrees with the RFI responses. Otherwise, it can just say it's not credible, as it does concerning Lenovo's RFI response. In that case, again, we see the same now being confirmed in the General Court, *Intel II* judgment. Then we find things again, that reveal a very incipient treatment, an analysis of the potential hierarchy of evidence. For instance, in *Intel I*, the dismissal of statements given under oath in US litigation, which carries significant potential penalties, including jail, as you know, having less weight than an RFI response. Why? Well, because the RFI response given on behalf of a company carries with it some penalties of an administrative nature. But in reality, we know that there aren't any cases in which a third party would have been fined for having provided false information to the Commission in the context of Article 102 proceedings. The *Intel* Court of Justice's judgment says that answers given on behalf of a company carry more weight than the answers given by an employee or by one of its directors, whatever that person's experience or opinion may be. So, we have a very unsatisfactory law of evidence. A proper hierarchy is not clear. And then on the other hand, once you start to dig into what we have, it's inconsistent. And the explanations, the underpinnings, don't make much sense. Those are just a few examples. So, I'll keep it at that.

Nicolas Petit:

Yeah. Well, they're actually perplexing examples. And I think that it's true that in fairness, people like us, also in academia, might not spend enough time dealing with the dirty technicalities of the law of evidence, but it's so important that they establish the factual basis on which conduct is examined. I think we should really spend more time on this. Okay. Aleksandra. The question was, why are so many people today dunking on the AEC test? Why are so many people turning their back on the AEC test on Twitter?

Aleksandra Boutin:

Interesting. So which people? Who are we talking about? Are they lawyers? Are the economists? Because I think the problem is that the test means different things for lawyers and economists. That's the first thing. The natural reaction, the gut feeling of lawyers, or legal scholars for that matter, when they hear a test, is that the test should provide a very clear answer. Yes or no. You pass the test, or you don't pass the test. And that's also I think, where your comment on my point on the graph came from. It's not just about passing the test or not, it's part of the overall evidence for us. Normally, the result of the assessment of the test, it's not black-and-white. It's different shades of grey, that you need to evaluate in a given context, in the context of internal documents and other comprehensive evidence in the case. In this case, the evidence that the Commission has put forward is that the rebates were targeting particularly profitable segments of the market, particularly strategic customers, which needed Dell to sell AMD chipsets to legitimize them in the market. There is evidence where competitors say "if we sell AMD chips, and Dell doesn't, we are looking as if we're selling a product of a lower quality". You need to evaluate all this evidence, together with the assessment of the results of your price test, which is, as Giuseppe was saying, the overarching assessment you need to conduct.

So, I think the sort of bad feelings about the AEC you describe comes from the interpretation of what the test can deliver. Now, it's a part of the assessment. And we should always remember when the test came. It came at a time when the Commission's enforcement of rebates cases made no economic sense whatsoever. This was at the time of *Michelin I*, *Virgin / BA*; these cases made no sense. We have brought forward a thought experiment, which has brought us, I think, a long way forward. And I, in my practice, see this as a very helpful thought experiment, or a very helpful tool that large companies or dominant companies can use for compliance. And I have seen big companies getting off the hook of enforcement agencies or even the Commission because they're doing compliance-based AEC tests of their pricing going forward in the context of open investigations, where they have put forward a very solid comprehensive analysis of their capability to foreclose through the AEC test, based on their internal data and on the evidence they collect from the market.

This is what we have. It's not perfect, it has to be evaluated in the larger context of the evidence we have, it will not give us a black-and-white answer. We need to, as we say,

assess its robustness. We need to change the parameters and see what they change for the assessment. Whether we can bring this forward as an overall robust proof of the fact that we are not guilty or as evidence that can support our theory of harm as an enforcer in a rebates case, the Commission as well.

Nicolas Petit:

Okay, thanks for that. Without transition, turning to Avantika. The question is related in a way, because this is essentially the message that we heard through the grapevine. Is the burden of proof under the AEC test insurmountable? Will it lead to under-enforcement? Which is a concern, I agree.

Avantika Chowdhury:

Well, we have touched on this topic already, but just to summarize my view. Clearly, it's a high evidentiary burden. And rightly so in my view. Is it insurmountable? My answer is no. And we have discussed why to some extent. I see two types of challenges to the Commission. One is about some numbers like contestable share, and as we have discussed, I don't see them as insurmountable. You can make it more robust; you can scrutinize and test views from the market, and the evidence submitted by the defendant. The other group of challenges is really about the explanation and trying a bit harder. For example, when the Court is talking about, well, Commission, you say that HP's incentives to stay with Intel would be stronger because they fear that the rebates will be transferred to a competitor, explain a bit more, show me, don't just state. That's sensible. You can't just make an argument, you have to explain the argument. You have to convince the audience of the argument, ideally with data, but it doesn't always have to be with hard numbers. In this case, they could have done more, it's not that hard to explain and if possible, put some numbers to it. So, overall, I don't think it's insurmountable.

Nicolas Petit:

I want to express gratitude for the very clear answer you gave. I was about to ask you a yes or no answer. And you said no, and it's not insurmountable. We have to explain better. That's the point that was made earlier by Aleksandra as well. So, I think there's also agreement here among the economists. My last question was for Giuseppe Conte. I read the question again, and I thought to myself, I should rephrase this. So, I'm going to tell you the question I had prepared. The question was, why can't the Commission accept its

loss and move on? And, you know, this is a typical journalist question. But when I read it, I don't like it, because I don't like this framing of winning or losing. And anyway, I don't think it's very productive to have good discussions. So, my new question would be a variation around that question, which is, in an economist's way of thinking, what would be the optimal outcome of this latest appeal to the Court of Justice? What is the ideal situation, or judgment, that you want to see the Court formulate?

Giuseppe Conte:

Yes. Thank you very much. I found the "journalist" question a bit provocative. I would have been happy to answer, and I think I kind of answered it in my presentation. The reason is the systemic importance of these kinds of judgments. And the discussions we had, I think, somehow show that this is not an easy topic. And there might be different views. And the Court of Justice must give clarity. Intel lost in first instance. It appealed. That led to a useful judgment of the Court of Justice, which we think needs to be applied fully, and we think it's not being correctly applied. Maybe somebody could say that there are also some points in that judgment, which might benefit from some clarification, and the debate we're having about the previous point 139, or other elements in the judgment. Maybe the Commission's views have not been correctly assessed, they might need to be clarified. And that's what I hope for, a clear judgment, clarifying the principles. There are many other pleas that we didn't discuss because they are more linked to specific facts. And this is not the kind of setting where to discuss these nitty-gritty points. But I hope for a nice, clear judgment, which sets the principles. We had in the meantime, some other judgments. As we said, the *Enel* judgment is also very interesting and very important. We hope that the new ECJ *Intel* judgement will shed some clarity also about the role of the AEC test. And again, I agree with Aleksandra on the kind of conclusions one should draw from the result of the test. Should it be determinant? Or should the test be examined together with other elements? Is it so important to expect a yes or no answer from that test? Or should it be read together with the other elements?

I would also hope that this would give a bit of clarity about this enforcement priority paper, whose role has been debated. It is quite interesting that it has been quoted by the Court of Justice after so many years. Well, lots of the practice has moved on, leaving aside that, it has been quoted "a contrario". That sounds a bit interesting and ironic. But maybe it would be time, and this I say from a very personal view, to start reconsidering this enforcement priority paper and revisit it in the light of the experience we had. Because

some time has passed, some experience has been gained. The debate, both economic and legal, has moved on. And I would hope that the judgment of the Court of Justice would help bring clarity, for that purpose and within that debate.

Nicolas Petit:

Thanks a lot, Giuseppe, and you're fortunate you're not actually in a Brussels conference in a room full of journalists because the first thing they would do would be to tweet: EC official in a personal capacity calls for a revision of the guidance paper, which would be a conclusion that is not backed by the depths of the discussion that we had. You're prospectively thinking about potential avenues for future reform, which could be an output, but it's purely a personal thought that you shared with us here.

Okay, I think we are about to close. And I would not want to abuse the time of the people in the Zoom room and our guests. I want to say just a few things to close. This is an ongoing discussion. We have this working group in Florence. We're interested in reaching out more to the community of antitrust practitioners, lawyers and economists in Brussels and elsewhere. So, if you want to call on our capabilities, the infrastructure we have, the technology that we are developing, and do things here, we have an open door. Of course, subject to strikes. But you know, if you don't do it in May or June, there's a not insignificant chance that we can hold the event.

The other thing I want to say is to pay a token of gratitude to the coordinators of the competition law working group. Isaure D'Estaintot and Linus Hoffmann. And especially, Linus. They divide the labour under, a sort of market-sharing agreement. On this particular event, Linus has been absolutely instrumental in making sure this event would take place under the right conditions, dealing with all the variability of my demands until the last minute. So Linus deserves a huge round of applause, thanks to him.

The other thing I want to say is, I understand there will be an appeal before the Court of Justice in Luxembourg. And we might want to go see Jean-François plead the case and Giuseppe, you're not in the appeal. Okay. One of your colleagues. So, this is an idea for us. Maybe we could organize a field trip to see how these discussions take place in Luxembourg.

Jean-François Bellis:

If it reaches that stage, yes.

Giuseppe Conte:

A Court of Justice Grand Chamber hearing could be streamed.

Nicolas Petit:

Yes, that's true. So we might watch it from Florence. The last thing I want to say is a big, big thank you to the speakers, Jean-François, Avantika, Miguel, Giuseppe and Aleksandra, for having this very rich and cordial conversation today. This is exactly the kind of event I cherish. You're always invited here. This place is the University of the European Union. This is your university; you can come in and talk with us. I hope to see you all very soon. And a round of applause to the speakers.

[General thank you and farewell]