

# A « COLLUSIVE » REVIEW OF RECENT EU COMPETITION CASE-LAW

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# OUTLINE

1. Setting the scene – Topography of CJEU and GC cases in EU competition law (MVdW)
2. Objet and effect in Article 101 TFEU cases (NP)
3. Abuse of dominance (NP)
4. Fact finding in competition investigations (MVdW)
5. Parental liability (NP)
6. Judicial review (MVdW)

# SETTING THE SCENE — TOPOGRAPHY OF CASES (MVDW)

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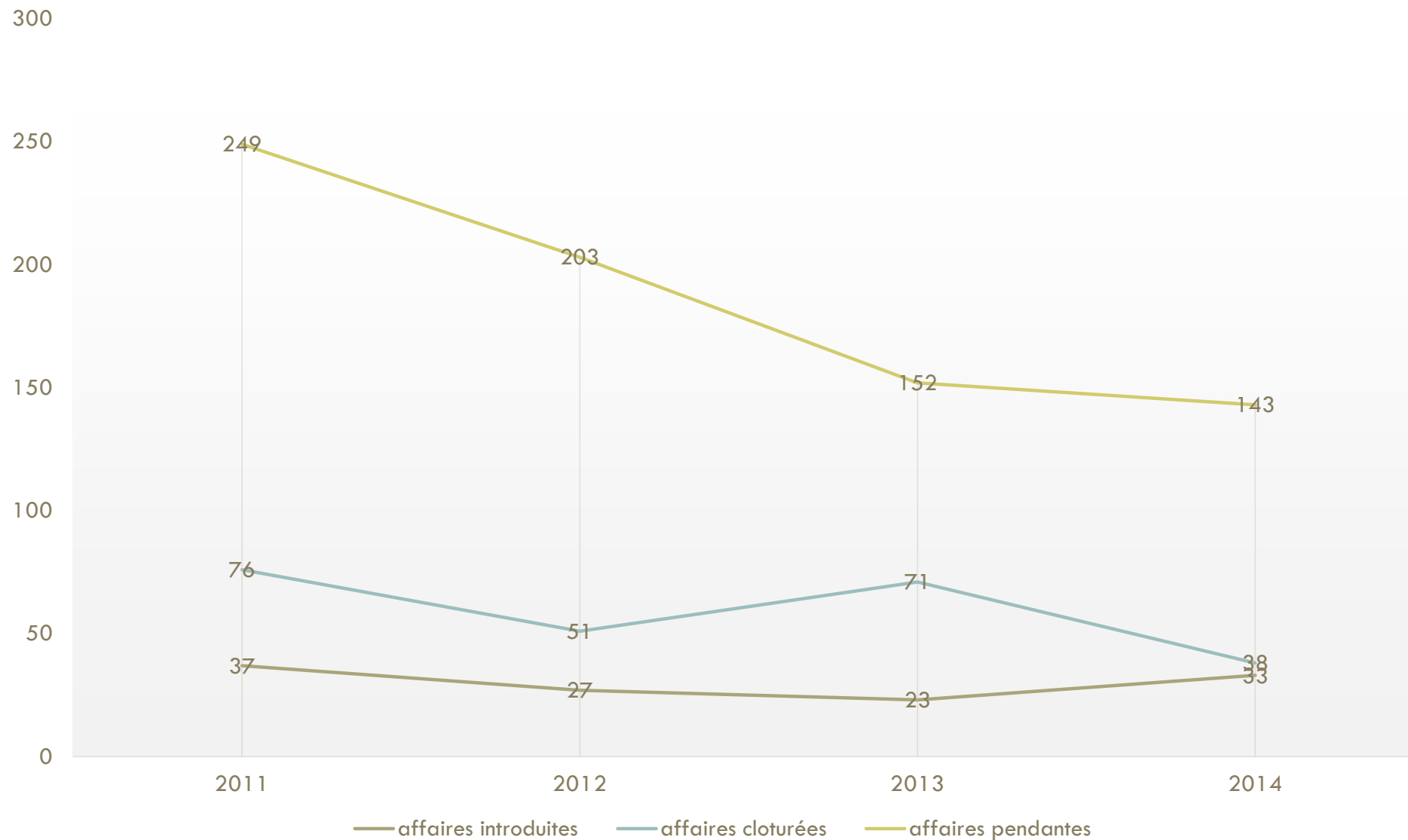
# DECLINING IMPORTANCE OF INCOMING COMPETITION CASES IN GC WORK

	2010	2011	2012	2013	2014 (Q3)
COMP	79	39	34	23	33
TOTAL	636	722	617	790	754
%	12%	5%	5%	3%	4%

# MORE STABLE FLOW OF COMPETITION WORK COJ

	2010	2011	2012	2013
COMP	20	60	30	40
TOTAL	631	688	632	699
%	3%	9%	5%	5%

## EVOLUTION OF COMPETITION CASES – GENERAL COURT LEVEL (2011 -2014)



# COMMENTS

Declining importance of competition work in Court activity

- Decentralization
- Commitments and Settlements

Relative importance of preliminary reference cases (e.g. *T-Mobile*, *Tele2Polska*, *Post Danmark*, *Expedia* and *Kone*)

# LENGTH OF PROCEEDINGS

2010	2011	2012	2013	2014 (Q3)
45,7	50,5	48,4	46,4	39,7

*Kendrion, Gascogne and Aalberts claims: totaling 23 million*



**OBJECT (AND EFFECT) IN ARTICLE  
101 (NICOLAS PETIT)**

**2**

# 9/11

## CJEU, *Groupement des cartes bancaires*, C-67/13P

Measures taken by platform to induce banks to balance their issuing and acquiring activities

Fees on issuing banks that free-ride on acquiring banks

Commission and GC find a restriction by object in issuing market

CJEU: Both GC and Commission should have taken big picture into account (legal and economic context). If acquiring side had been considered, no longer possible to find the fees were “*by their very nature*” injurious of competition

Effects analysis: if there is a two-sided market, their might be an efficiency on another market, which prevents the application of forms-based reasoning, and requires an effects reasoning

## CJEU, *MasterCard*, C-382/12P

Economics shows that to promote roll-out payment cards systems, it is efficient that merchant banks pay fees (MIFs) to issuing banks for the transactions

But MIFs form part of the fees charged by acquiring banks to merchants (the Merchant Service Charges or MSCs), which merchants in turn pass on to consumers.

CJEU: inflates fees charged to merchant (used as fee-floor/lower limit) => restrictive effect

But merchants subsidise users. Standard 2S finding.

CJEU: no need to consider the output effect on the other side of the market (issuing)? Too complex a trade-off?

A little inconsistent with *Groupement des cartes bancaires*: An out of market efficiency can be taken into account to discard an allegation of RO, but will not be looked at in a RE case???

Commission: at any rate, customers of merchants are both cardholders and non cardholders. Both harmed, through merchants increase in operational costs (w or w/o surcharge)

# *CARTES BANCAIRES* ON FINDING OF RO

## Restricted?

§57: « *the essential legal criterion [...] is that such coordination reveals in itself a sufficient degree of harm to competition* »

§58: « *the General Court erred in finding [...] that the concept of a restriction of competition by object must not be interpreted restrictively* »

## Wide open?

§78: « *In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary, in accordance with the case-law referred to in paragraph 53 above, to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place* »

# UNPACKING *CARTES BANCAIRES*

Intent: Joliet, Deringer, Waelbroeck and Frignani et al.

« Box » of obviously restrictive clauses: Whish, Mundt and Lemaire

Object or effect  
French law, 1949  
EEC Treaty, 1957  
« ertoe strekken »

« Economic context » relevant for object, C-56/65, STM, but « Economic and legal context » relevant for effect C-234/89, *Delimitis*; T-49/02, *Brasserie Nationale*

C-209/07, *Irish Beef*; C-8/08, *T-Mobile Netherlands*; C-32/11, *Allianz Hungária*; T-491/07, *Cartes bancaires*

« Restrictions by object are serious - but not necessarily obvious »: Italianer, DG COMP's WP (2013)

# UNPACKING *CARTES BANCAIRES*

AG Wahl: context should not matter

§45: « *recourse to the economic and legal context in identifying a restriction by object cannot lead to a classification to the detriment of the undertakings concerned in the case of an agreement whose terms do not appear to be harmful to competition* »

CJEU: context matters

§78: « *In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary, in accordance with the case-law referred to in paragraph 53 above, to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market* »

# A quote in a quote in a quote...

*Cartes Bancaires*, §53: “In order to determine whether an agreement [...] may be considered a restriction of competition ‘by object’ within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgment in *Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 36 and the case-law cited)”.

*Allianz Hungária Biztosító and Others* (EU:C:2013:160), paragraph 36: “When determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see *Expedia*, paragraph 21 and the case-law cited)”.

*Expedia*, paragraph 21 (about de minimis effects): “It is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (see, to that effect, *Asnef-Equifax and Administración del Estado*, paragraph 49)”

*Asnef-Equifax and Administración del Estado*, paragraph 49: “the appraisal of **the effects** of agreements or practices in the light of Article 81 EC entails the need to take into consideration the actual context to which they belong, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question”

# SEPARATING WHEAT FROM CHAFF

- §§53 and 78 of *Cartes Bancaires* have limited importance
- Contextual assessments have no place to find restriction by object
- C-226/11, *Expedia Inc.*: stricter regime for ROs
- C-1/12, *OTOC*: context matters for finding of REs
- Open question: context matters to discard RO?

Large scope,  
**contextual**

C-226/11, *Expedia Inc.*

C-1/12, *Ordem dos  
Técnicos Oficiais de  
Contas*

C-67/13P, *Cartes  
bancaires*

Small scope, **non contextual**  
**(exc. to dismiss RO?)**

**ABUSE OF DOMINANCE  
(NICOLAS PETIT)**

**3**



# T-286/09, *INTEL V COMMISSION*

## Traditional case-law

Hoffmann-La Roche, §90: *“fidelity rebates intended to give the purchaser an incentive to obtain its supplies exclusively from the undertaking in a dominant position are incompatible ... unlike quantity rebates”*

Pros (legal certainty and enforcement costs) and cons (type I errors)

## Guidance Paper

### “More economic” approach

- Focus on exclusionary abuses
- Focus on consumer welfare
- Focus on **outcomes**: “anticompetitive foreclosure”
- Commission to devise a theory of harm, and test it
- Price-costs tests + As Efficient Competitor (“AEC”) model
- Efficiency defence
- “But for” analysis

### Exclusive dealing

- Exclusivity obligations (quantity forcing, etc.)
- Conditional rebates
  - Retroactive or incremental
  - 2 components: “loyalty enhancing” effect and “anticompetitive foreclosure”

# #1: “*LOYALTY ENHANCING*” EFFECT, §§37-45

Firm A is dominant

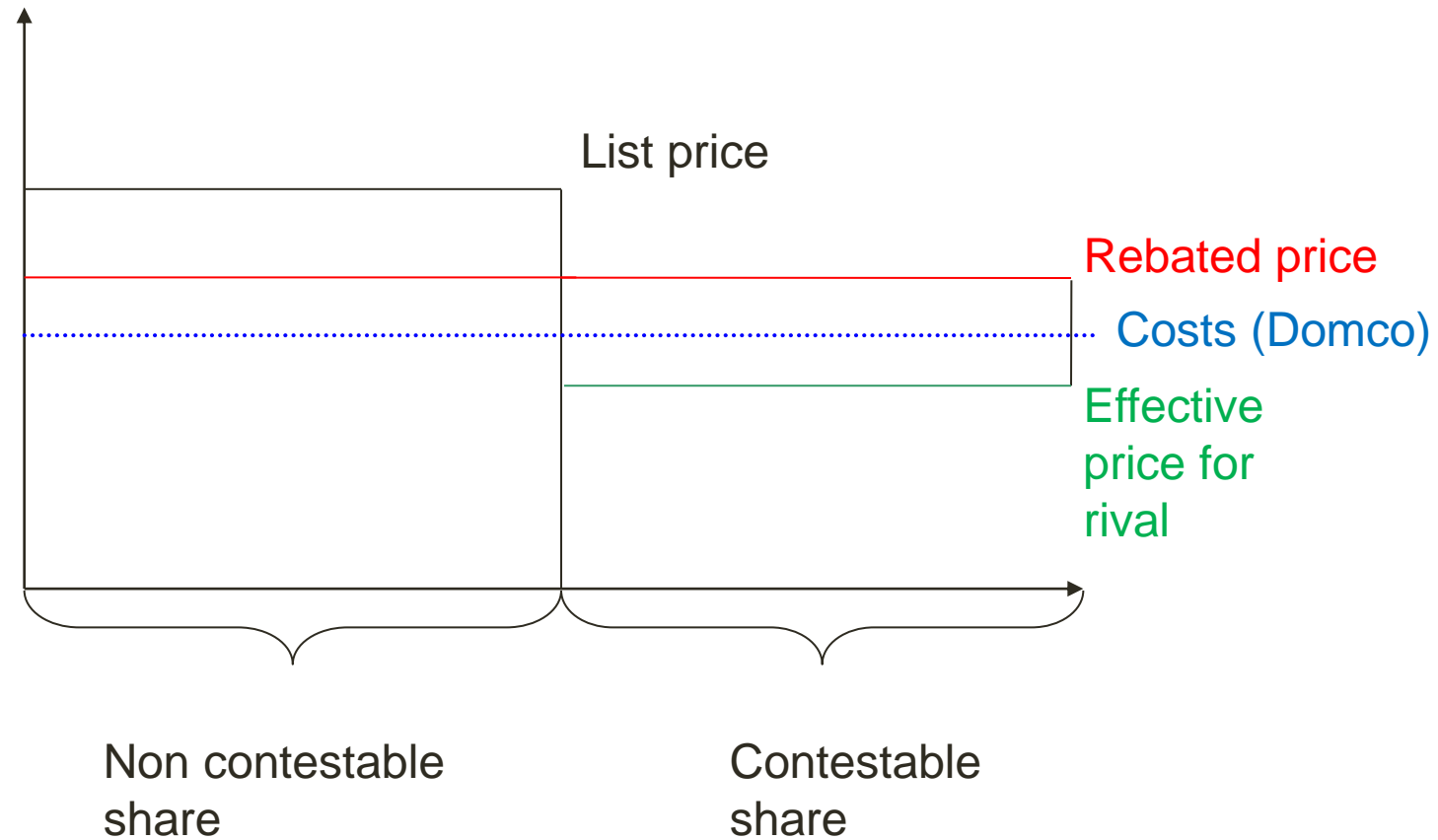
- Non contestable share of 70%
- Cost per unit=5€
- P=10€ below 70; P=5€ above 70
- If customer X takes all with A, he pays 500; if he takes 70 with A and switches 30 elsewhere, he pays 700+150€
- For X, multi-sourcing is more costly than single sourcing

If firm B (which is equally efficient) wants to compete for the 30% of X, it must not only offer 30 at 5€, but also compensate loss of 5€ on 70, ie 350€

B must thus give 200€ to customer X to keep supplying it (negative price)

The rebate creates loyalty from X towards A

# ANALYTICAL FRAMEWORK, §41



## #2: “*ANTICOMPETITIVE FORECLOSURE*”, §20

- Position of the dominant undertaking
- Conditions on the relevant market
- Position of the dominant undertaking’s competitors
- Position of customers or input suppliers
- Extent of the allegedly abusive conduct
- Possible evidence of actual foreclosure
- Direct evidence of any exclusionary strategy

# COMMISSION DECISION

Worldwide market for x86 CPUs (desktops, notebooks and servers)

Two suppliers since 2000, Intel and AMD

4 important purchasers, Dell, HP, NEC and Lenovo (OEMs) + MSH (a retailer)

Intel MS close to 70%, high barriers to entry

2 abuses between 2002 and 2007

- Conditional rebates that constitute « *fidelity rebates* » (incl. conditional payments to MSH). No formal exclusivity, « *level* » of rebates was « *de facto* » conditional (decision, §924);
- And « *naked restrictions* » (pay for delay with Acer and Lenovo; and pay for business desktops exclusivity with HP)

Decision applies more economic test and finds Intel rebate “*capable of having or likely to have anticompetitive foreclosure effects, since even an as efficient competitor would have been prevented from supplying*” (§§1281, 1406, 1507, 1573, 1575) + significant tied market share (§§1577 and following)

€1,06 billion fine

# MCP REBATES TO DELL

Commission Decision, §201:

*“Dell negotiated with Intel that a small portion of the MCP discount could vary based on Dell’s success in meeting specific criteria negotiated on a quarterly basis. This portion of the MCP discount was known as [...]MCP (‘[...]’), and related to [...] of Dell’s total spend (...) It could potentially fall to [...] or rise to [...] depending on Dell’s performance against the negotiated criteria”.*

# THE APPEAL

## Commission

“*De facto conditional*” rebates

Similar to those of *Hoffmann-La Roche* case law (see §90, C-85/76) => “*fidelity rebates*”

No need to establish “*actual or potential effects on a case-by-case basis*” (§71) => **≠ Commission does not plead the Guidance Paper test (#1 and 2)**

Absent an objective justification, such conduct constitutes abuse

## Applicant

Commission should have assessed “*all the circumstances*” (*Michelin I*, §73) to see whether the rebates and payments “*were capable of restricting competition*”;

Where conduct is historic, Commission to prove that there was “*actually*” foreclosure

# THE JUDGMENT'S PROPOSED TYPOLOGY, §74

Type of rebate	Guidance paper test	<i>Intel</i> test
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality (refers to <i>Michelin II</i> )
Fidelity “ <b>Exclusivity</b> ” rebates (§76)	Rule of reason (implied predation + objective justification)	<i>Per se</i> illegality (refers to <i>Hoffmann La Roche</i> )
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (implied predation + objective justification)	Rule of reason (“ <i>consider all the circumstances</i> ” refers to <i>Michelin I</i> )



# PER SE APPROACH?

## #1: Exclusivity effect

Rebates conditional on buyer obtaining “*most or all*” of its requirement with Domco constitute “*exclusivity rebates*” GP §76

According to GC, rebates granted to Dell, HP, NEC and Lenovo belong to this (2<sup>nd</sup>) category

Loyalty presumed: “*the capability of tying customers to the (Domco) is inherent in exclusivity rebates*” (§86)

Precedent in *Hoffmann-La Roche*

Does not say what “*most or all*” is: you know it when you see it

## #2: Exclusionary effect

§80: the question whether it is abusive “*does not depend on an analysis of the circumstances of the case aimed at establishing potential foreclosure effects*”

Exclusivity rebates are “*by their very nature capable of restricting competition*” (§85)

Competitors’ “*access is made more difficult*”, §88

Not “*necessary to assess their effects on the market in their specific context*” when there is dominance, §89 (see also, §143)

# OR CONFINED *PER SE* APPROACH? (1)

Meanwhile, the GC imports some Guidance Paper reasoning

§§92-93: strict prohibition rule on exclusivity rebates because the dominant firm can use the “*non contestable share*” of demand as leverage to capture “*contestable share*”. Rivals must offer “*compensation for the loss of exclusivity rebate*”, which makes their life “*more difficult*” (see also, §§103, 178)

Non-leveraging rebates excluded from the *per se* prohibition rule

*Per se* prohibition rule only applies to conditional “*retroactive rebates*”

“*Incremental rebates*” in the GP sense fall within the 3<sup>rd</sup> category

# THE JUDGMENT, REFINED READING (2)

Type of rebate	Test in Guidance paper	Test in <i>Intel</i>
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality ( <i>Michelin II</i> )
Conditional <b>retroactive</b> rebates (§76)	Rule of reason (quantitative price test + objective justification)	<i>Per se</i> illegality ( <i>Hoffmann La Roche</i> )
Conditional <b>incremental</b> rebates	Rule of reason (quantitative price test + objective justification)	<b>Rule of reason</b>
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (quantitative price test + objective justification)	Rule of reason (“ <i>consider all the circumstances</i> ” <i>Michelin I</i> )

# LEVERAGING (OR EXCLUSIVITY) REBATES

## Harm

### Presumed

#### Absolute presumption, irrelevance of:

- tied market share
- customer coverage
- rebate size
- Lack of actual effects

## Efficiencies?

§94: potential foreclosure effect that it brings about may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers"

- Reference to CJEU *Post Danmark*
- Applies to three categories of rebates
- Already in *Hoffmann-La Roche* at §90 through reference to Article 101(3) TFEU

Practicality? How to balance with pro-competitive effects if anticompetitive effects have not been quantified in the first place? All the more so, since Domco's costs are no longer a relevant benchmark

Asymmetric rule of reason: Domco to argue efficiencies in the dark

# THE JUDGMENT, REFINED READING (3)

Type of rebate	Test in Guidance paper	Test in <i>Intel</i>
Quantity rebate systems (§75)	<i>Per se</i> legality	<i>Per se</i> legality ( <i>Michelin II</i> )
Conditional <b>retroactive</b> rebates (§76)	Rule of reason (quantitative price test + objective justification)	<b>Modified <i>per se</i> illegality (no harm verification + objective justification)</b>
Conditional <b>incremental</b> rebates	Rule of reason (quantitative price test + objective justification)	<b>Rule of reason</b>
Rebates not linked to a condition of exclusive or quasi exclusive supply (§78) => individual sales targets	Rule of reason (quantitative price tests + objective justification)	<b>Rule of reason</b>

# BOTTOM-LINE

## Take away

In *Intel* the General Court has accepted an economic theory of harm for *de facto* **exclusivity (#1)**, but has dispensed the Commission to prove it under an economic test

In *Intel*, the General Court has rejected the need to prove anticompetitive **exclusion (#2)**, because

- Exclusion can be presumed when the firm is dominant
- Conduct that makes rivals life “**more difficult**” is already problematic (but more difficult than what? After all, monopoly pricing is what makes rivals life the least difficult: should this be the lawful pricing point reference for the dominant firm?)

The reason behind it hinges on the belief that Article 102 TFEU should protect the “*freedom to choose*” and the “*freedom of access*” to the market. This is in contrast with the “*outcome*” philosophy of DG COMP

## Discussion

Competition policy choice: not questionable?

But this should not dispense the Commission from economic analysis under #1, when it comes to leveraging rebates (as long as A rebated price is above 8,50€, B can compete for X, and there is no exclusivity)

Edlin and Farrell, “*Freedom to trade and the competitive process*”, 2011 NBER WP Series

- Article 102 TFEU as prohibition on firms attempts to restrain improving trade between their rival and customers, rather than on outcomes >< focus on process, instead of GP focus on outcomes; but still a need to establish an improving coalition
- If X represents 1% of demand, B can compete if A rebated price is above 6,98€

# SHOULD DG COMP WITHDRAW ITS GUIDANCE PAPER?

## Yes

- Precedents in the US, withdrawal of contentious DoJ Report on Section II of the Sherman Act
- Impact on related sections in Guidance Paper (leveraging abuses)

## No

- But judgment says Guidance Paper may remain relevant outside the specifics of the “*present case*”, §158
- No contempt of court, for the Guidance Paper “*is not intended to constitute a statement of the law*” and “*without prejudice to the interpretation [of the EU courts]*”, §3
- Helpful self-assessment proxy for domcos in areas other than rebates + nice “*why*” paper (explains the theory behind the liability)
- Some of it was imported by GC (efficiencies)
- Case-specific setting (annulment proceedings), outcome of preliminary ruling could be different (see *Post Danmark I and II*) (see Ibanez, 2013)

# SHOULD DOMCOS WORRY?

No, formalistic rules of prohibition are easy to bypass

Can bypass the quasi *per se* illegality box by redesigning contractual schemes to fall within 3rd category

Rather than requesting « *exclusivity* » in the contract or *de facto*, Domcos to second guess the amount of sales achieved by customers in a period, and set a sales target

*Intel* judgment slightly increases the cost of *de facto* exclusive dealing, but falls far from making it impossible



# ODDS OF *INTEL* APPEAL BEFORE CJEU?

Favorable, because the judgment

- Makes its interpretation of a number of CJEU precedents (eg, *Post Danmark*). Does the upper court agree?
- Is based at several times on Opinions from AGs, which do not constitute strong precedents and which have not been clearly endorsed by CJEU (§§116 on *de minimis* and 150 on AEC)
- Puzzling statement of §134: « *the rebates must be regarded as exclusivity rebates, even though the quasi-exclusivity condition concerned only a segment of HP's requirements* »
- Pushes the « *distinguishing method* » far (Coutron, 2009)?
  - To distinguish from DT and *Post Danmark*, GC affirms "The present case does not relate to a pricing practice", §99
  - To distinguish from *Ice Cream* case-law, GC affirms that the *VdBF* judgment « did not concern a practice by which a financial incentive was directly conditional », §121
  - On proof and evidence of agreed-upon, *de facto* exclusivity, no reference to Article 101 TFEU case law on meeting of the minds
  - At times, the GC refuses to distinguish, see *Irish Sugar* on naked restrictions

But unfavorable, because the Commission almost always wins in 102 (><101) 😊?

**FACT FINDING IN COMPETITION  
INVESTIGATIONS (MVDW)**

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# REQUESTS FOR INFORMATION

*Cement cases*, 14 March 2014

Balance between efficiency and rights of defence

- No access to file in preliminary investigation phase, but *ex post* judicial review

Commission decides on necessity, but *ex post* control

- In light of proportionality principle (including necessity, workload and time limits)
- No obligation to confess

# INSPECTION DECISIONS AND ECHR

## *Delta Pekarny*

- Fine € 11.500 by Czech CA for not having granted access to all electronic files and withholding two documents
- Article 8 not infringed according to Czech Courts (*Heino*, balance a priori and ex post control)
- ECHR other view
  - No reference to facts and underlying documents in reasoning
  - No control on how inspection was actually carried out
  - No control on facts which led to inspection: impact on possibility to control expediency, duration and scope of investigation

# INSPECTION DECISIONS AND EU

## *DB*

- *Heino*, no need for prior judicial control
- List of five safeguards [reasoning (*Nexans*), the Commission notice, possibility to refuse, national procedures and ex post legality review]
- Review of actual course of events in context of one out of three inspections

## *EPH*

- €2.5 million fine for accidental and deliberate obstruction
- Absence of final infringement decision does prevent fines

# INSPECTION DECISIONS

## *Orange*

- *Ne bis in idem* issue : EC after commitment decision of French CA concerning internet services
- NCA not competent for negative clearances: commitment decision does not block EC
- Art. 11 Reg. 1/2003, absence of 11§6 after having received draft decision does not mean approval
- Art. 12 Reg. 1/2003 could have been possible, but no alternative because French CA did not receive the info in the context of an inspection
- To verify arbitrary nature inspection no need to check initial documents in EC file

**JOINT AND SEVERAL LIABILITY  
(NICOLAS PETIT)**

**5**

# C-231/11 P TO C-233/11P, *SIEMENS AG ÖSTERREICH AND OTHERS V COMMISSION*

Mother (Siemens) and subsidiaries (SEHV and Magrini) found jointly and severally liable

GC quashes Commission decision => should have determined « *respective shares of the various companies* », task that « *cannot be left to national courts* », §157

CJEU, the EU law « *concept of joint and several liability* » concerns only the undertaking itself, and « *not the companies of which it is made up* », §57

Accordingly, while the Commission can determine « *joint and several liability from an external perspective* », it does not have « *the power to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship* », §58

This is « *for the national courts* », §62

Non substantive issue, subject to procedural autonomy

>< with from CJEU, X BV, where fining issue folded under effectiveness principle?



# C 247/11 P AND C 253/11 P, *ALSTOM AND OTHERS V COMMISSION*

Alstom Group has Transmission and Distribution subsidiaries (T&D)

Acquired by Areva, which also has a T&D subsidiary

Alstom and Areva are the two successive companies of the subsidiary participating to the infringement

Commission finds them jointly and severally liable for the fine

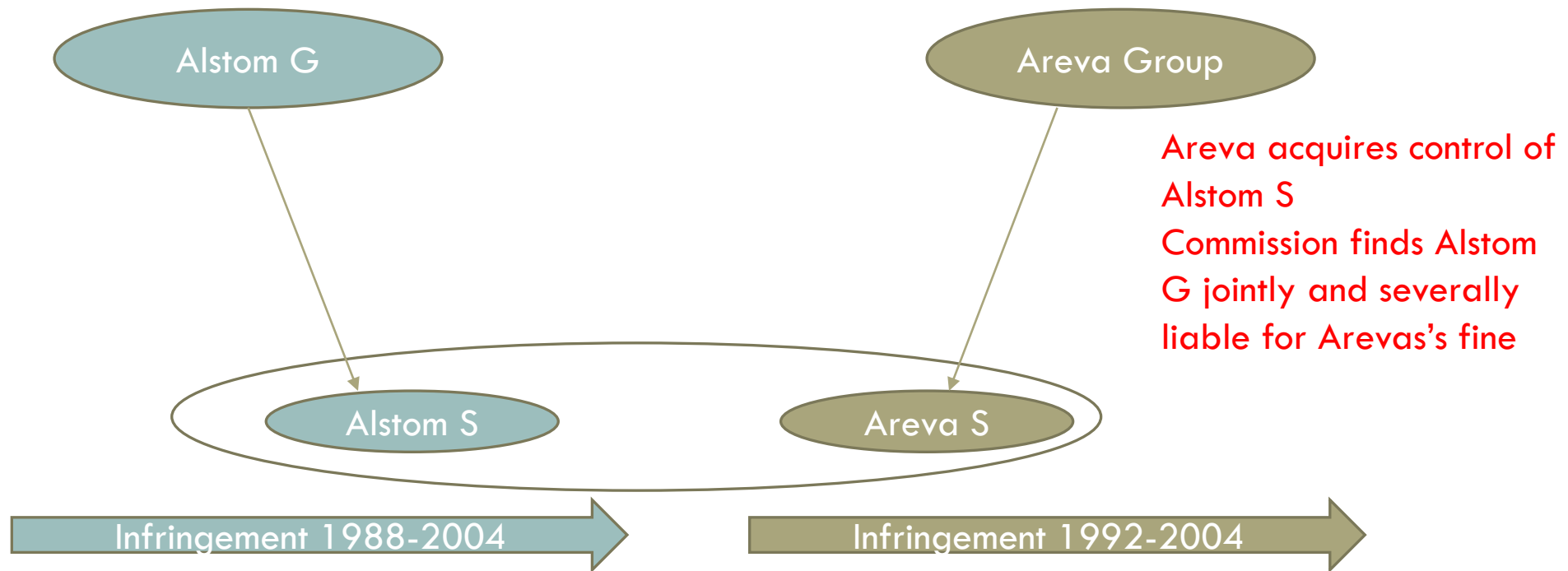
CJEU recalls the *Siemens AG Österreich and others v Commission* case law

It explains that even as regards the determination of joint and several liability from an external perspective, « *the Commission is subject to certain restrictions* », §126

In that context, penalties « *must be specific to the offender and the offence* » « *the Commission must also respect the principle of legal certainty* », §§127-128

In cases of « *succession* », the institution must « *fix separately, for each of the undertakings involved, the amount of the fine for which the companies forming part of the undertakings involved are jointly and severally liable* », §133

# ALSTOM, GETTING GRAPHIC



# JUDICIAL REVIEW (MVDW)

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# THE STANDARD CONTROL FORMULA

*“As regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the Commission’s interpretation of information of an economic nature. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it” CoJ, Commission v Tetra Laval, §84*

# IMPORTANCE OF ISSUE

## Reminders

- Legality of administrative system of competition law enforcement: *Menarini*
- Power to review fine even in the absence of illegality (*CEPSA*)
- Possibility to substitute reasons (*Marine Hose*)
- Not doing case all over again and not *ex officio* (*KME*)
- Possibility to put forward no evidence during Court proceedings (*Galp*)

# RECENT DEVELOPMENTS

*MasterCard and Telefonica*

Question of content, not of label

Applicant should specify where judicial control was deficient

The question as to whether the infringement is established is a matter for legality review

Obligation to state reasons and administrative practice

GC decides on unlimited jurisdiction, not CoJ

# CONCEPTUAL AND PRACTICAL DIFFICULTIES

Competition Policy ↔ Competition Law

Which criteria?

The guidelines and the non-discrimination principle

Help of applicants (*LG Display*)

# DISCLAIMER!

We never colluded!

The opinions expressed by each speaker are his only, and shall not be attributed to the other