

# ARTICLE 102 TFEU: THE EFFECTS-BASED APPROACH AND THE *INTEL* JUDGMENT

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# ARTICLE 102, EFFECTS AND INTEL

## INTRODUCTION

- WHAT IS THE CORRECT BALANCE IN COMPETITION LAW BETWEEN LEGAL FORMALISM AND EFFECTS ANALYSIS?
  - BOTH CAN LEAD TO FALSE POSITIVES AND FALSE NEGATIVES
  - LEGAL FORMALISM IS PARTICULARLY LIKELY TO LEAD TO FALSE POSITIVES
  - THERE HAS BEEN A GENERAL MOVEMENT IN EU COMPETITION LAW AWAY FROM LEGAL FORMALISM
  - THIS HAS BEEN THE CASE FROM THE 1990S ONWARDS
  - EFFECTS ANALYSIS IS PARTICULARLY COMPLEX IN ABUSE CASES

# ARTICLE 102, EFFECTS AND INTEL

## INTRODUCTION

- I SPOKE IN REYKJAVIK ON ABUSE AND THE COMMISSION'S *ARTICLE 102 GUIDANCE PAPER* IN MAY 2011; MY LAST TWO SLIDES SAID:
  - 'THE TREND OF COMPETITION LAW ENFORCEMENT IS TOWARDS AN EFFECTS-BASED SYSTEM'
  - 'UNILATERAL CONDUCT IS TOO FORMALISTIC TO BE DEALT WITH BY PER SE OR FORMAL RULES'
  - 'A FORMALISTIC APPROACH LEADS TO FALSE POSITIVES'
  - 'LET'S REVIEW THE POSITION IN 2021!'

# ARTICLE 102, EFFECTS AND INTEL

## INTRODUCTION

- THERE HAS BEEN A MARKED INCREASE IN ARTICLE 102 CASES IN RECENT YEARS
- THE EU COURTS ARE VERY MUCH ‘IN THE SPOTLIGHT’
  - *GOOGLE SHOPPING, GOOGLE ANDROID, GOOGLE ADSENSE*
  - *QUALCOMM PREDATORY PRICING, QUALCOMM REBATES*
  - *BALTIC RAIL*
  - *BULGARIAN ENERGY*
- IT IS TO BE HOPED THAT A CLEARER PICTURE WILL EMERGE OF EFFECTS ANALYSIS FROM THESE CASES

# ARTICLE 102, EFFECTS AND INTEL

## *INTEL*

- WHAT DOES THE *INTEL* CASE TELL US ABOUT EFFECTS ANALYSIS?
- TIMELINE:
  - **COMMISSION DECISION 2009**: REBATES UNLAWFUL BY OBJECT AND EFFECT; NAKED RESTRICTIONS UNLAWFUL BY OBJECT
  - **GENERAL COURT JUDGMENT 2014**: REBATES UNLAWFUL BY OBJECT: EFFECTS ANALYSIS UNNECESSARY
  - **COURT OF JUSTICE JUDGMENT 2017**: EFFECTS ANALYSIS WAS NECESSARY
  - **GENERAL COURT JUDGMENT 2022**: COMMISSION FAILED TO PROVE EFFECTS

# ARTICLE 102, EFFECTS AND INTEL

## *INTEL*

- AS BETWEEN THE GENERAL COURT AND THE COURT OF JUSTICE, THE ERROR OF THE GC WAS TO REJECT INTEL'S ARGUMENT ON EFFECTS BECAUSE IT WAS IRRELEVANT
- AS BETWEEN THE GENERAL COURT AND THE COMMISSION THE ERROR WAS THAT THE GC SAID, WHEN IT LOOKED INTO IT, THAT THE COMMISSION HAD FAILED TO PROVE EFFECTS
- REMEMBER: THE COMMISSION HAD CONDUCTED AN EFFECTS ANALYSIS, AS IT HAD DONE BEFORE AND HAS DONE IN ITS SUBSEQUENT CASES

# ARTICLE 102, EFFECTS AND INTEL

## *INTEL*

- ◉ THE IMPORTANT CHANGE IN THE LAW IN *INTEL* IS IN THE COURT OF JUSTICE JUDGMENT, NOT THE GENERAL COURT'S 2022 JUDGMENT
- ◉ THE COURT OF JUSTICE'S REQUIREMENT FOR EFFECTS ANALYSIS IS CLEARLY DEMONSTRATED AGAIN IN THE *MEO* JUDGMENT OF 2018 ON PRICE DISCRIMINATION UNDER ARTICLE 102(2)(C)
- ◉ THE COMMISSION ANALYSED THE EFFECTS OF REBATES IN *QUALCOMM*, 2018 AND *GOOGLE ANDROID*, 2018; THEY ARE BOTH IN THE GENERAL COURT NOW

# ARTICLE 102, EFFECTS AND INTEL

## SOME THOUGHTS ON EFFECTS ANALYSIS

- ARTICLE 102 CANNOT BE APPLIED PURELY ON THE BASIS OF FORM
- SOME CONDUCT MAY BE ABUSIVE ‘BY OBJECT’, BUT THIS IS A REBUTTABLE PRESUMPTION
  - EG THE MISLEADING OF PATENT OFFICES IN *ASTRAZENECA*, THE ‘NAKED RESTRICTIONS’ IN *INTEL*
- EFFECTS ANALYSIS DOES NOT EXCLUDE THE USE OF PRESUMPTIONS
  - EG SELLING BELOW COST/PREDATION; EXCLUSIVITY REBATES/*HOFFMANN-LA ROCHE*
  - PRESUMPTIONS ARE ABOUT THE EVIDENTIAL BURDEN OF PROOF, NOT THE OVERALL BURDEN OF PROOF



# ARTICLE 102, EFFECTS AND INTEL

## SOME THOUGHTS ON EFFECTS ANALYSIS

- ◉ POTENTIAL EFFECTS ARE RELEVANT AS WELL AS ACTUAL ONES
- ◉ WHAT IS REQUIRED OF THE AUTHORITY WILL VARY FROM CASE TO CASE
  - THE EFFECTS ‘STORY’ IS MUCH EASIER TO TELL IN *ASTRAZENECA* THAN IN *INTEL*
- ◉ ONE WAY OF TELLING THE EFFECTS STORY IS THROUGH THE ‘AS EFFICIENT COMPETITOR’ TEST, BUT THIS IS NOT OBLIGATORY (CF *ROYAL MAIL V OFCOM* IN THE UK)
- ◉ THE GENERAL COURT’S JUDICIAL REVIEW IS MORE INTRUSIVE THAN IT WAS HISTORICALLY

# ARTICLE 102, EFFECTS AND INTEL

THANK YOU FOR YOUR ATTENTION!