



O'MELVENY & MYERS LLP

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in the Enforcement of Art. 102, April 9, 2010*



Rebates in the enforcement of Art. 102 Lessons from the Intel Decision

Settled EC Case-Law – *Per Se* Prohibition?

- The CFI's decision in ***Michelin v. Commission*** stated:
 - *“a loyalty rebate, which is granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, is contrary to Article 82 EC...”*
 - *“discounts granted by an undertaking in a dominant position must be based on a countervailing advantage which may be economically justified.”*

Settled EC Case-Law – *Per Se* Prohibition?

- A well established line of precedents on anti-competitive rebates exist, illustrating a *quasi per se* prohibition:
 - *Hoffman-La Roche*
 - *Michelin II*
 - *British Airways*
- Since 2005 however, there has been a marked shift from a *quasi per se* approach to a more economics-based approach at the Commission

The 2005 Discussion Paper

- Discomfort with the Commission's restrictive decisions and lack of economic framework was becoming increasingly evident within DG Competition
- Commission's steps towards a more effect-based approach in Article 102 included:
 - the establishment of DG Competition's first Chief Economist
 - publishing the Staff Discussion Paper on the application of Article 102 to Exclusionary Abuses in December 2005, which outlined an effects-based approach
 - the *Tomra* decision in March 2006

The 2009 Guidance Paper

- In January 2009, the Commission published Guidance on Enforcement Priorities for Article 102, confirming the Commission's intent to *"focus on those types of conduct that are most harmful to consumers"*
- The resulting GP does not impose a different interpretation of the existing Article 102 case law - only a court is capable of altering established precedent
- Intel case – first case to apply the effect based approach set out in the GP

The Intel Decision – May 2009

- The Commission found infringement through:
 - Four exclusive or near exclusive deals with computer makers, involving conditional rebates
 - One exclusive deal with Europe's largest retailer, involving conditional rebates
 - Payments to delay product introductions for AMD-based computers
- Cease and desist order covering illegal practices
- Imposes fine of EUR 1.06 billion

Application of Traditional Case-Law, and the “As Efficient Competitor” Test

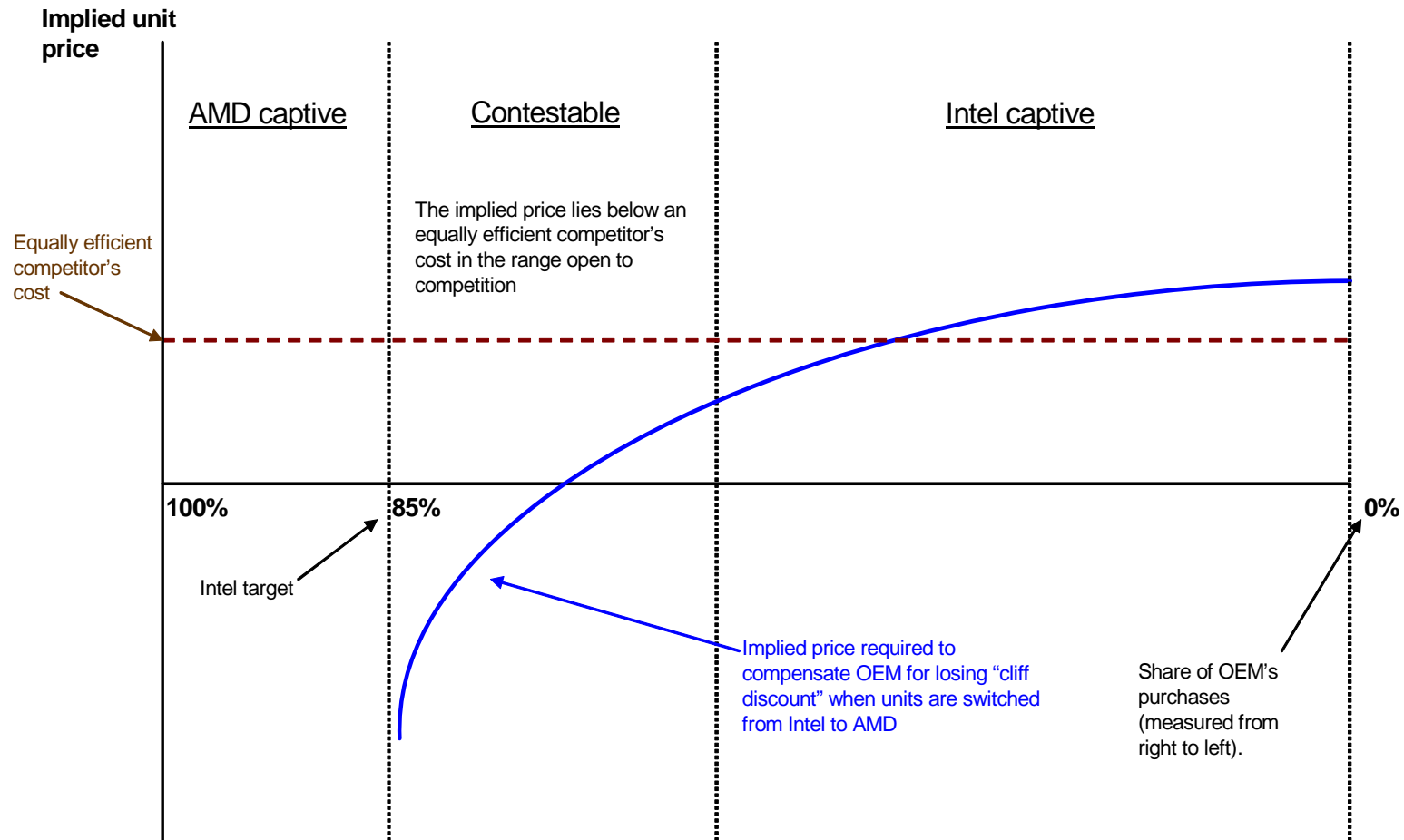
- The Intel decision is the first clear example of the Commission applying the “**As Efficient Competitor**” test:
 - The decision first examines the rebates under traditional case-law
 - The decision then examines the rebates under the as efficient competitor test, finding them capable of having or likely to have anticompetitive foreclosure effects
- The Commission was not obliged to apply the test by law, but states that the test was one way to demonstrate the exclusionary effects of Intel’s conditional rebates

The “As Efficient Competitor” Test

- The “**As Efficient Competitor**” test uses a hypothetical competitor, which is deemed to be “as efficient” as the dominant undertaking
- Many flavours of this test exist but it is similar to US approach in many respects
- Test asks question: Can an equally efficient competitor cover AVC (AAC) over the contestable share of demand and still compensate for the loss of rebate?

The “As Efficient Competitor” Test

- Hypothetical exercise
 - Test does not ask if the competitor in practice is as efficient or more efficient than dominant player;
 - test looks at the capability of the rebates to foreclose an equally efficient competitor
- Four elements to the test:
 - size of conditional rebate
 - contestable share
 - time horizon
 - measure of viable cost



Appendix

Firmwide Overview

- **Offices:**

- Beijing
- Brussels
- Century City
- Hong Kong
- London
- Los Angeles
- New York
- Newport Beach
- San Francisco
- Shanghai
- Silicon Valley
- Singapore
- Tokyo
- Washington, D.C.

- With approximately 1,000 lawyers in 14 offices worldwide, O'Melveny helps industry leaders across a broad array of sectors manage the complex challenges of succeeding in the global economy.
- **Litigation:** More than half of O'Melveny's lawyers are dedicated to resolving litigation matters crucial to their clients' key business objectives. The firm's litigators are recognized for reducing clients' exposure and risk, disposing of cases early, and developing innovative litigation and trial strategies.
- **Transactions:** O'Melveny routinely assists its clients with a diverse portfolio of transactions that supports the firm's position of prominence in representing virtually every industry. O'Melveny lawyers are experienced in mergers and acquisitions, private equity deals, spin-offs, public and private financings, and debt restructurings, as well as general corporate, securities, and compliance matters.

European Antitrust and Competition Practice

- **Range of Services:**

- Merger Control
- Cartel Investigations (EC/national)
- Abuse of Dominance cases
- Competition litigation
- State aid, public procurement and general EU law

- **Key facts:**

- **Global reach** – Offices and antitrust lawyers in Europe, China, Japan and the US
- **Renowned leadership** – our lawyers have leading reputations
- **Resources** – more than 70 antitrust lawyers worldwide
- **Range of skills** – we offer effective representation whatever the challenge

- A dedicated and focused EU antitrust team with a strong track-record:
 - Securing EUR 1.06 billion fine against Intel on behalf of complainant AMD
 - Phase I merger clearance for the US\$30 billion merger between Statoil and Norsk-Hydro
 - Clearing LVP from cartel charges (Chiquita, Dole and Del-Monte/Weichert fined aggregate EUR 60 million in same case)

Practice Recognitions

International Financial Law Review 1000 (2010) recommends our European Antitrust and Competition Practice, quoting one client who makes reference to the "very bright people" at O'Melveny and commenting, "Their service is excellent and they are very knowledgeable. Nothing but praise for their competition practice." Partner Riccardo Celli is recognized by *IFLR* as a "leading lawyer" and partner Christian Riis-Madsen is commended by peers as "a rising star in the antitrust community."



Legal 500 Europe (2009) comments on the "technically complex matters" that we handle; praises Riccardo Celli as impressive, calling his work "excellent;" and cites Christian Riis-Madsen – promoted to partner in February 2009 – as "excellent- partner quality."



ACQ Finance Magazine awarded the Brussels team the title of "Competition Law Firm of the Year" in 2008 and 2009.



At the European *Legal Business Awards 2008*, we received "Competition Team of the Year" honors for our representation of TUI AG in its acquisition of First Choice Holidays PLC, forming the leading travel group worldwide.

Global Competition Review (GCR) lists O'Melveny among Brussels' "recommended" antitrust firms in its annual, "Brussels Competition Bar Survey" (August/September 2009). In *GCR's* 2009 edition of "Global 100"–its guide to the world's leading competition practices – O'Melveny was listed in the "Global Elite" section – *GCR's* list of the top 20 antitrust firms worldwide.



Chambers Global (2009) recommends our global Antitrust and Competition practice, stating that O'Melveny "is the global quarterback – it is prominent around the world, from Beijing to Brussels." Our work with international cartels is also highlighted.

Chambers Europe (2009) states that our Brussels office "has the strength and resources to advise clients on big-ticket international mergers and other multi-jurisdictional competition proceedings." Sources are cited as saying, "The service is brilliant – it's rigorous but practical."



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- Head, Brussels office; Chair, European Antitrust/Competition Practice
- Advises in the fields of mergers and acquisitions, anti-competitive agreements and concerted practices, cartel investigations, abuse of monopoly positions, and state aids
- Experience across a wide range of industries including energy, IT/media, transport, banking, automotive, pharmaceuticals, aerospace, chemical, and manufacturing
- Represents clients in proceedings before the European Commission and the European Union courts, as well as the UK and Italian competition and regulatory authorities
- Recognized as one of the world's leading lawyers in the field of competition law in *Chambers Europe*, *Chambers Global*, *Euromoney's Guide to the World's Leading Competition and Antitrust Lawyers*, *European Legal Experts*, *Global Competition Review*, *PLC Which Lawyer?* and *International Who's Who of Competition Lawyers*

Noteworthy Transactions:

Merger Control

- **Advanced Micro Devices** in its deal with Advanced Technology Investment Co. and Mubadala Development Co. to create Global Foundries
- **Government of Singapore Investment Corp. Pte Ltd.'s** consortium bid of US\$18.5 billion for BAA plc
- **Honeywell International Inc.** in its US\$2.4 billion acquisition of Novar plc and in various other acquisitions
- **Norsk Hydro ASA** in the US\$30 billion merger of its oil and gas activities with Statoil ASA, and in its US\$1 billion sale of Kerling AS to UK-based INEOS, involving one of the very few "gun-jumping" investigations ever carried out by the EC
- **SanDisk** in relation to its US\$1.5 billion acquisition of msystems

Public Procurement

- Representing **Advanced Micro Devices** in its complaint to the EU Commission against illegal tenders for the supply of computers and servers issued by contracting authorities in 16 countries in the EEA.

Noteworthy Transactions:

Cartels

- Obtaining the acquittal of **Firma Léon van Parys** of all charges in the EC banana cartel investigation following dawn raids in 2005 and extensive follow-up inquiries prior to the laying of formal charges in mid 2007
- Successfully representing a defendant in the **GFU** cartel investigation
- Successfully representing a defendant in the **industrial gases** price fixing and market sharing case
- Successfully representing a defendant in the **PVC II** price fixing case
- Successfully representing a defendant in the **UK freight surcharges (ferries)** price fixing matter

Abuse of Dominance

- Represented **Advanced Micro Devices** in the Article 102 case against Intel, leading to a cease and desist order and a EUR 1.06 billion fine imposed on Intel. In November 2009, all of AMD's antitrust claims were settled, securing AMD US\$1.25 billion and wide-ranging injunctive relief.