Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 September 2017 *

[Text rectified by orders of 19 September and 24 October 2017]

(Appeal — Article 102 TFEU — Abuse of a dominant position — Loyalty rebates — Commission's jurisdiction — Regulation (EC) No 1/2003 — Article 19)

In Case C-413/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 August 2014,

Intel Corporation Inc., established in Wilmington (United States), represented by D.M. Beard QC, and by A. Parr and R. Mackenzie, Solicitors,

appellant,

the other parties to the proceedings being:

European Commission, represented by T. Christoforou, V. Di Bucci, M. Kellerbauer and N. Khan, acting as Agents,

defendant at first instance,

Association for Competitive Technology Inc., established in Washington (United States), represented by J.-F. Bellis, avocat,

Union fédérale des consommateurs — Que choisir (UFC — Que choisir),

interveners at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič, J.L. da Cruz Vilaça (Rapporteur), E. Juhász, M. Berger, M. Vilaras and E. Regan, Presidents of Chambers, A. Rosas, J. Malenovský, E. Levits, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: N. Wahl,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 June 2016,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 20 October 2016,

gives the following

Judgment

1 By its appeal, Intel Corporation Inc. ('Intel') asks the Court to set aside the judgment of the General Court of the European Union of 12 June 2014, *Intel* v *Commission* (T-286/09, 'the judgment under appeal', EU:T:2014:547) by which the General Court dismissed its action for annulment of Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel) ('the decision at issue').

Legal context

2 Recital 25 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] (OJ 2003 L 1, p. 1) states:

'The detection of infringements of the competition rules is growing ever more difficult, and, in order to protect competition effectively, the Commission's powers of investigation need to be supplemented. The Commission should in particular be empowered to interview any persons who may be in possession of useful information and to record the statements made. ... Officials authorised by the Commission should also be empowered to ask for any information relevant to the subject matter and purpose of the inspection.'

3 According to recital 32 of that regulation:

'The undertakings concerned should be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision should be given the opportunity of submitting their observations beforehand, and the decisions taken should be widely publicised. While ensuring the rights of defence of the undertakings concerned, in particular, the right of access to the file, it is essential that business secrets be protected. The confidentiality of information exchanged in the network should likewise be safeguarded.'

4 Article 19 of Regulation No 1/2003, entitled 'Power to take statements', provides:

'1. In order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation.

2. Where an interview pursuant to paragraph 1 is conducted in the premises of an undertaking, the Commission shall inform the competition authority of the Member State in whose territory the interview takes place. If so requested by the competition authority of that Member State, its officials may assist the officials and other accompanying persons authorised by the Commission to conduct the interview.'

5 Article 3 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 [EC] (OJ 2004 L 123, p. 18), entitled 'Power to take statements', provides:

'1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.

2. The interview may be conducted by any means including by telephone or electronic means.

3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.'

Background to the dispute and the decision at issue

6 Intel is a US-based company that designs, develops, manufactures, and markets central processing units ('CPUs'), chipsets, and other semiconductor components, as well as platform solutions for data processing and communications devices.

7 The present case concerns the market for processors, in particular x86 CPUs. The x86 architecture is a standard designed by Intel for its CPUs and can run both the Windows and Linux operating systems.

8 Following a formal complaint submitted on 18 October 2000 by Advanced Micro Devices Inc. ('AMD'), supplemented on 26 November 2003, the Commission launched a round of investigations in May 2004 and, in July 2005, carried out inspections at several Intel premises, inter alia in Germany, Spain, Italy and the United Kingdom, as well as at the premises of several Intel customers, in Germany, Spain, France, Italy and the United Kingdom.

9 On 26 July 2007, the Commission sent Intel a statement of objections concerning its conduct vis-à-vis five major original equipment manufacturers ('OEMs'), namely Dell Inc., Hewlett-Packard Company (HP), Acer Inc., NEC Corp. and International Business Machines Corp. (IBM). Intel replied to that statement of objections on 7 January 2008, and an oral hearing was held on 11 and 12 March 2008.

10 On 17 July 2008, the Commission sent Intel a supplementary statement of objections concerning its conduct in respect of Media-Saturn-Holding GmbH ('MSH'), a retailer of electronic devices and the largest desktop computer distributor in Europe, and Lenovo Group Ltd. ('Lenovo'), another OEM. That supplementary statement included new evidence on Intel's conduct vis-à-vis some of the OEMs covered by the Statement of Objections of 26 July 2007. Intel did not reply within the prescribed period.

11 The Commission, in the decision at issue, described two types of conduct by Intel vis-à-vis its trading partners, namely conditional rebates and so-called 'naked restrictions', intended to exclude a competitor, AMD, from the market for x86 CPUs. The first type of conduct consisted in the grant of rebates to four OEMs, namely Dell, Lenovo, HP and NEC, which were conditioned on these OEMs purchasing all or almost all of their x86 CPUs from Intel. The second type of conduct consisted in making payments to OEMs so that they would delay, cancel or restrict the marketing of certain products equipped with AMD CPUs.

12 In the light of those considerations, the Commission found that Intel had committed a single and continuous infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), from October 2002 until December 2007, and therefore imposed on it a fine of EUR 1.06 billion.

The procedure before the General Court and the judgment under appeal

13 By application lodged at the Registry of the General Court on 22 July 2009, Intel brought an action for the annulment of the decision at issue, relying on nine pleas in law.

14 By document lodged at the Registry of the General Court on 2 November 2009, Association for Competitive Technology Inc. ('ACT') sought leave to intervene in the proceedings in support of Intel. It was granted leave to intervene by decision of 7 June 2010.

15 In support of its first plea in law, in relation to horizontal issues concerning the legal assessments carried out by the Commission, Intel disputed the allocation of the burden of proof and the standard of proof required, the legal characterisation of the rebates and payments granted in consideration of exclusive supply as well as the legal characterisation of the payments, which the Commission referred to as 'naked restrictions', made to OEMs so that they would delay, cancel or restrict the marketing of products equipped with AMD CPUs.

16 The General Court held, in essence, in paragraph 79 of the judgment under appeal, that the rebates granted to Dell, HP, NEC and Lenovo were exclusivity rebates, since they were conditional upon customers' purchasing either all their x86 CPU requirements or most of their requirements from Intel. In addition, the General Court explained, in paragraphs 80 to 89 of the judgment under appeal, that the question whether such a rebate can be categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing the capability of that rebate to restrict competition.

17 For the sake of completeness, the General Court considered, in paragraphs 172 to 197 of the judgment under appeal, that the Commission established, to the requisite legal standard and on the basis of an analysis of the circumstances of the case, that the exclusivity rebates and payments that Intel granted to Dell, HP, NEC, Lenovo and MSH were capable of restricting competition.

18 As regards the second plea in law, alleging that the Commission did not establish its territorial jurisdiction to apply Articles 101 and 102 TFEU to the practices implemented in relation to Acer and Lenovo, the General Court first of all considered, in paragraph 244 of the judgment under appeal, that in order to justify the Commission's jurisdiction under public international law, it was sufficient to establish either the qualified effects of the practice in the European Union or that it was implemented in the European Union. It then held, in paragraph 296 of the judgment under appeal, that the substantial, immediate and foreseeable effect that Intel's conduct was capable of having within the European Economic Area (EEA) justified the Commission's jurisdiction. Lastly, for the sake of completeness, the General Court held, in paragraph 314 of the judgment under appeal, that that jurisdiction was also justified on account of the implementation of the conduct in question in the territory of the European Union and the EEA.

19 In support of its third plea in law, alleging that the Commission committed procedural irregularities, Intel submitted, inter alia, that its rights of defence had been breached because of the absence of a record transcribing the meeting with Mr D 1, arguing that some of the evidence provided in that meeting could have been used as exculpatory evidence. Intel also maintained that the Commission wrongly refused to hold a second hearing and to send Intel certain AMD documents which could have been relevant for its defence.

20 First, the General Court considered, in paragraph 618 of the judgment under appeal, that the meeting in question did not constitute formal questioning for the purposes of Article 19 of Regulation No 1/2003 and that the Commission was not required to carry out such questioning. It therefore concluded, in that paragraph, that Article 3 of Regulation No 773/2004 was not applicable, with the result that the argument alleging an infringement of the formal requirements laid down in that provision was ineffective.

21 Secondly, the General Court held, in paragraphs 621 and 622 of the judgment under appeal, that, even though the Commission had infringed the principle of good administration by failing to draw up a document containing a brief summary of the subjects addressed at that meeting, as well as the names of the participants, it nevertheless remedied that initial omission by making the non-confidential version of an internal note relating to that meeting available to Intel.

22 As regards the fourth plea in law, alleging errors of assessment concerning the practices relating to the various OEMs and MSH, the General Court rejected all of the complaints raised by Intel in relation to Dell, HP, NEC, Lenovo, Acer and MSH in paragraphs 665, 894, 1032, 1221, 1371 and 1463 of the judgment under appeal.

23 As regards the fifth plea in law, by which Intel disputed the existence of an overall strategy aimed at foreclosing AMD's access to the most important sales channels, the General Court held, in paragraphs 1551 and 1552 of the judgment under appeal, that the Commission had, in essence, demonstrated to the requisite legal standard that Intel had attempted to conceal the anticompetitive nature of its practices and had implemented a long-term comprehensive strategy to foreclose AMD from those sales channels.

24 As regards the sixth plea in law, alleging that the Commission incorrectly applied the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2), the General Court considered, inter alia, in paragraph 1598 of the judgment under appeal, that neither the principle of legal certainty nor the principle that offences and punishments are to be strictly defined by law precludes the Commission from deciding to adopt and apply new guidelines on the method of setting fines, even after the infringement has been committed. In addition, the General Court considered, in that paragraph, that the interest in effective enforcement of the competition rules justifies that an undertaking must take account of the possibility of a modification to the general competition policy of the Commission as regards fines with respect both to the method of calculation and the level of fines.

25 As regards the seventh plea in law, alleging the absence of an intentional or negligent infringement of Article 102 TFEU, the General Court held, in essence, in paragraphs 1602 and 1603 of the judgment under appeal, that Intel could not have been unaware of the anticompetitive nature of its conduct and that the evidence relied on in the decision at issue demonstrated to the requisite legal standard that Intel had implemented a long-term comprehensive strategy to foreclose AMD from the strategically most important sales channels and that it had attempted to conceal the anticompetitive nature of its conduct.

26 As regards the eighth plea in law, concerning the allegedly disproportionate nature of the fine, the General Court held, in paragraphs 1614 to 1616 of the judgment under appeal, that the Commission's practice in previous decisions could not serve as a legal framework for the fines imposed in competition matters and that, in any event, the decisions relied on in that respect by Intel were not relevant as regards observance of the principle of equal treatment. Furthermore, contrary to Intel's assertions, the General Court pointed out, in paragraphs 1627 and 1628 of the judgment under appeal, that the Commission did not take into consideration the actual impact of the infringement on the market in order to determine its gravity.

27 As regards, lastly, the ninth plea in law, which sought a reduction of the fine by the General Court in the exercise of its unlimited jurisdiction, the General Court held, inter alia, in paragraph 1647 of the judgment under appeal, that there was nothing in the complaints, arguments or matters of law and of fact put forward by Intel from which it might be concluded that the fine imposed was disproportionate. The General Court considered, in that paragraph, that the fine was appropriate to the circumstances of the case and emphasised that it was well below the 10% ceiling set in Article 23(2) of Regulation No 1/2003.

Forms of order sought by the parties before the Court of Justice

28 Intel claims that the Court should:

– set aside the judgment under appeal in whole or in part;

– annul the decision at issue in whole or in part;

– cancel or substantially reduce the fine imposed;

– in the alternative, refer the case back to the General Court for determination in accordance with the judgment of the Court of Justice; and

– order the Commission to pay the costs of these proceedings and of the proceedings before the General Court.

29 The Commission contends that the Court should:

– dismiss the appeal; and

– order Intel to pay the costs.

30 ACT claims that the Court should:

– allow Intel's appeal in its entirety; and

– order the Commission to pay the costs incurred by ACT in the context of the appeal and in that of the action for annulment.

The appeal

31 Intel puts forward six grounds in support of its appeal. By the first ground of appeal, Intel submits that the General Court erred in law by failing to examine the rebates at issue in the light of all the relevant circumstances. By the second ground of appeal, Intel submits that the General Court erred in law in assessing the finding of an infringement in 2006 and 2007, inter alia as regards the assessment of the market coverage of the rebates at issue in those two years. By the third ground of appeal, Intel argues that the General Court erred in law as regards the legal characterisation of the exclusivity rebates which Intel concluded with HP and Lenovo. By the fourth ground of appeal, Intel submits that the General Court wrongly concluded that there was no material procedural irregularity affecting Intel's rights of defence in the Commission's treatment of the interview with Mr D 1. By the fifth ground of appeal, Intel argues that the General Court misapplied the tests in relation to the Commission's jurisdiction over the agreements concluded between Intel and Lenovo in 2006 and 2007. Lastly, by the sixth ground of appeal, Intel asks the Court to annul or to reduce substantially the fine imposed,

having regard to the principle of proportionality and the principle that the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 should not be applied retroactively.

The fifth ground of appeal, alleging that the General Court misapplied the tests relating to the Commission's jurisdiction over the agreements concluded between Intel and Lenovo in 2006 and 2007

Arguments of the parties

32 By its fifth ground of appeal, which it is appropriate to examine in the first place since it concerns the Commission's jurisdiction, Intel submits, first of all, that the General Court wrongly held that the Commission had jurisdiction to apply Article 102 TFEU as regards the agreements concluded between Intel and Lenovo, a Chinese company, in 2006 and 2007. Neither the test based on the place in which anticompetitive practices are implemented ('the implementation test') nor the test based on the qualified effects of those practices in the European Union ('the qualified effects test') could establish a basis for the Commission's jurisdiction in the present case.

33 Thus, according to Intel, the General Court wrongly held, in paragraph 311 of the judgment under appeal, that the implementation of those agreements could be established on the basis of practices affecting the plans of customers to sell downstream products anywhere in the world, including in the EEA. That circumstance could not justify a finding that the Commission had jurisdiction on the basis of the implementation test, since the conduct at issue was not implemented in the EEA and Intel did not sell products to Lenovo in the EEA.

34 In addition, the General Court erred in law by accepting the qualified effects test in order to determine the Commission's jurisdiction. According to Intel, the implementation test is the only test allowed by the case-law.

35 Intel then submits that, even if the qualified effects test were indeed applicable, it could not justify the Commission's jurisdiction in the present case. It refers, in that respect, to paragraph 87 of the judgment of 27 February 2014, *InnoLux* v *Commission* (T-91/11, EU:T:2014:92), in which the General Court considered that, in circumstances in which components are first sold outside of the EEA to unrelated purchasers, the link between the internal market and the infringement would be too weak. Intel infers from this that it was not foreseeable that the agreements with Lenovo regarding CPUs for delivery in China would have an immediate and substantial effect within the EEA. Furthermore, even if indirect effects could be sufficient to establish jurisdiction, the 2006 and 2007 agreements with Lenovo could not have had a substantial effect within the EEA.

36 In addition, according to Intel, the General Court unlawfully reversed the burden of proof, in paragraph 289 of the judgment under appeal, by requiring Intel to prove that all the planned sales concerned parts of the Europe, Middle-East and Africa region outside the EEA.

37 Lastly, Intel argues that the Commission's approach would give rise to jurisdictional conflict with other competition authorities and create a real risk of double jeopardy.

38 ACT agrees, in essence, with Intel's arguments. It submits, inter alia, that, according to the wording of Article 102 TFEU and the case-law arising from the judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others* v *Commission* (89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447), it is necessary to demonstrate that the conduct in question restricts competition within the common market.

39 The Commission contends that the fifth ground of appeal must be rejected.

Findings of the Court

40 The General Court, in paragraph 244 of the judgment under appeal, held that the Commission's jurisdiction under public international law to find and punish conduct adopted outside the European Union may be established on the basis of either the implementation test or the qualified effects test, before assessing the Commission's jurisdiction in the present case in the light of the qualified effects test and then, in the alternative, in the light of the implementation test.

41 In that context, it is appropriate to examine, in the first place, the argument put forward by Intel and ACT that the General Court wrongly accepted that the qualified effects test may serve as a basis for the Commission's jurisdiction.

42 In that respect, it must be borne in mind that, as the Advocate General noted in point 288 of his Opinion, the EU competition rules set out in Articles 101 and 102 TFEU are intended to prevent collective or unilateral conduct of undertakings limiting competition within the internal market. While Article 101 TFEU prohibits agreements and practices which have as their object or effect the prevention, restriction or distortion of competition 'within the internal market', Article 102 TFEU prohibits the abuse of a dominant position 'within the internal market or in a substantial part of it'.

43 Thus, the Court has held, as regards the application of Article 101 TFEU, that the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of that provision if that agreement is operative on the territory of the internal market (judgment of 25 November 1971, *Béguelin Import*, 22/71, EU:C:1971:113, paragraph 11).

44 Moreover, it must be noted that, in order to justify the application of the implementation test, the Court has emphasised that if the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions (see, by analogy, judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others* v *Commission*, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 16).

45 The qualified effects test pursues the same objective, namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market.

46 The argument put forward by Intel, supported by ACT, that the qualified effects test cannot serve as a basis for the Commission's jurisdiction is therefore incorrect.

47 Accordingly, that argument must be rejected as unfounded.

48 In the second place, it is necessary to examine the argument put forward in the alternative by Intel, according to which, even if the qualified effects test were applicable in the present case, the General Court wrongly considered that the agreements concluded with Lenovo in 2006 and 2007 would have foreseeable, immediate and substantial effects in the EEA. Intel emphasises, in that respect, the allegedly limited number of products affected.

49 It must be noted, first of all, that, as the General Court held, in paragraphs 233 and 258 of the judgment under appeal, the qualified effects test allows the application of EU competition law to be justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union.

50 It must be pointed out, as the General Court did in paragraphs 268 and 280 of the judgment under appeal, that it is necessary to examine the conduct of the undertaking or undertakings in question, viewed as a whole, in order to determine whether the Commission has the necessary jurisdiction to apply, in each case, EU competition law.

51 Next, in so far as Intel criticises the General Court for considering that it was foreseeable that the agreements concluded with Lenovo concerning CPUs for delivery in China would have an immediate effect in the EEA, it must be pointed out, first, that the General Court rightly held, in paragraphs 251, 252 and 257 of the judgment under appeal, that it is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied.

52 Secondly, since in paragraph 255 of the judgment under appeal, the General Court found, in essence, that Intel's conduct vis-à-vis Lenovo formed part of an overall strategy intended to ensure that no Lenovo notebook equipped with an AMD CPU would be available on the market, including in the EEA, the General Court did not err in considering, in paragraph 277 of the judgment under appeal, that Intel's conduct was capable of producing an immediate effect in the EEA.

53 That argument must therefore be rejected as unfounded.

54 Lastly, Intel submits that the General Court wrongly considered that the agreements concluded with Lenovo concerning CPUs for delivery in China could have a substantial effect on the EEA market even though the effects of those agreements were negligible.

55 It suffices, in that respect, to note that the General Court held that Intel's conduct vis-à-vis Lenovo formed part of an overall strategy aimed at foreclosing AMD's access to the most important sales channels, which, moreover, Intel does not dispute in its appeal.

56 Accordingly, in view of the considerations set out in paragraph 50 above, the General Court did not err in law in holding that, faced with a strategy such as that adopted by Intel, it was appropriate to take into consideration the conduct of the undertaking viewed as a whole in order to assess the substantial nature of its effects on the market of the EU and of the EEA.

57 As the Commission emphasises, to do otherwise would lead to an artificial fragmentation of comprehensive anticompetitive conduct, capable of affecting the market structure within the EEA, into a collection of separate forms of conduct which might escape the European Union's jurisdiction.

58 Consequently, the argument mentioned in paragraph 54 of the present judgment must be rejected as unfounded.

59 In the third place, as regards Intel's argument that the General Court, in paragraph 289 of the judgment under appeal, unlawfully reversed the burden of proof, it suffices to note that this argument is based on a misinterpretation of the judgment under appeal. As can be seen from paragraphs 286 to 289 of that judgment, the General Court noted, as regards the postponement of the worldwide launch of certain computer models, that it was apparent from the evidence before it that sales of those computers were planned in the Europe, Middle East and Africa region, of which the EEA is a very important part, which was sufficient for a finding that there were at least potential effects in the EEA.

60 In that context, the General Court indeed referred to the absence of specific indicia which might suggest that all the planned sales concerned parts of that region other than the EEA. However, that statement must be read in the light of paragraphs 287 and 288 of the judgment under appeal, from which it is clear that the General Court considered that the suggestion, made at the hearing, that all of those computers were intended for areas other than the EEA was mere speculation on Intel's part, in support of which it had not put forward any argument.

61 Accordingly, that argument is unfounded.

62 In the fourth place, and lastly, as regards Intel's arguments relating to the General Court's application of the implementation test, it suffices to note that the General Court specified, in paragraph 297 of the judgment under appeal, that it examined that test for the sake of completeness.

63 Complaints directed against grounds of the judgment under appeal included purely for the sake of completeness cannot lead to the judgment's being set aside (see, to that effect, judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 79 and the case-law cited).

64 Those arguments must therefore be rejected as ineffective.

65 It follows that the fifth ground of appeal must be rejected in its entirety.

The fourth ground of appeal, alleging a material procedural irregularity affecting Intel's rights of defence

Arguments of the parties

66 The fourth ground of appeal, which it is appropriate to examine in the second place since it concerns the administrative procedure before the Commission, relates to the procedural treatment of the Commission's interview with Mr D 1. It is divided into three parts.

67 In the first place, Intel submits that the General Court erred in law by considering, in paragraph 612 of the judgment under appeal, that the Commission had not infringed Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004.

68 First, the General Court thus made, in paragraph 614 of the judgment under appeal, an artificial distinction between 'formal' interviews and 'informal' interviews. Relying on the decision of the European Ombudsman of 14 July 2009, Intel submits that any meeting with a third party to collect information relating to the subject matter of an investigation is an interview within the meaning of Article 19 of Regulation No 1/2003 and must therefore be recorded.

69 Secondly, and in the alternative, in the event that Regulation No 1/2003 were to be interpreted as meaning that there is a category of 'informal' interviews which do not need to be recorded, Intel submits that the interview with Mr D 1 did not fall within that category, with the result that the Commission was required to record the content of that five-hour interview since it concerned very important matters bearing an objective link to the subject matter of the investigation.

70 In the second place, Intel argues that the General Court wrongly considered that the procedural defect resulting from the breach of Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004, could be cured by sending Intel the non-confidential version of a note listing the agenda items for the key parts of the interview in question, but lacking a summary of the content of Mr D 1's testimony. Intel submits, in that respect, that that note does not contain a brief summary of the subjects addressed, as the General Court indicated in paragraph 622 of the judgment under appeal; rather, it merely lists the topics addressed during the interview.

71 In addition, Intel submits that the Commission's argument, put forward in its response, that the belated disclosure of the *aide-memoire* note cured the breach of Intel's rights of defence cannot be reconciled with the glaring omission in the note in question of the content of Mr D 1's testimony or with the Commission's admission that that note was not designed to accurately or fully reflect the content of the meeting concerned.

72 In the third place, Intel argues that the General Court erred in law by failing to apply the test established by the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686). By asserting, in paragraph 630 of the judgment under appeal, that the content of the interview in question could be reconstituted to the requisite legal standard even though Intel had not attended that interview, the General Court placed the burden upon Intel to prove the content of matters which were never disclosed to it.

73 ACT agrees with Intel's arguments in support of the fourth ground of appeal and emphasises, inter alia, that it cannot be ruled out that the views expressed by Mr D 1 would have been useful to Intel's defence given that that individual had provided exculpatory evidence in proceedings before the United States Federal Trade Commission in 2003.

74 Besides its contention that the fourth ground of appeal is ineffective, the Commission submits, in the first place, that the European Ombudsman's decision, on which Intel relies, cannot be invoked in order to demonstrate an error of law, since Intel does not challenge paragraph 617 of the judgment under appeal, according to which the meeting at issue was not aimed at collecting evidence in the form of countersigned minutes or statements under Article 19 of Regulation No 1/2003. The Commission adds that the General Court, in paragraphs 614 to 616 of the judgment under appeal, equated the nature of information that might be obtained pursuant to Article 19 of Regulation No 1/2003 with that which might be obtained under Article 18 of that regulation before concluding that that meeting was not an interview within the meaning of Article 19.

75 The Commission submits, in the second place, that the disclosure of the internal note sufficiently cured the alleged procedural irregularity. It adds that the fact that Intel was not present during the interview in question does not demonstrate any error in the finding, in paragraph 631 of the judgment under appeal, that that evidence could be reconstituted. Intel effectively repudiates its own arguments at first instance, whereby it submitted that Mr D 1's statements could be reconstituted, at least to the extent of finding that those statements were necessarily exculpatory.

76 The Commission argues, in the third place, that the circumstances of the present case are far removed from those of the case that gave rise to the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686), where the infringement of the rights of defence was raised in relation to the finding that Solvay SA held a dominant position on the relevant market, which was based on a rebuttable presumption.

77 The Commission also maintains that the General Court did not err in law by applying the case-law established in the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686) to the circumstances of the present case in order to conclude that there had been no breach of the rights of defence.

78 Since all of Dell's statements denying the existence of exclusivity rebates were considered, in paragraph 582 of the judgment under appeal, not credible in the face of the other evidence adduced, the Commission submits that a verbatim record of even the most emphatic denial by Mr D 1 would not have been of any use to Intel.

Findings of the Court

79 As a preliminary point, the Commission submits that the fourth ground of appeal is ineffective since the conclusion in the judgment under appeal that Intel granted exclusivity rebates to Dell is not disputed.

80 That argument must be rejected however since, by this ground of appeal, the appellant specifically seeks, first, a reduction in the amount of the fine imposed and, secondly, the annulment of the decision at issue in so far as it relates to Dell, arguing that the Commission, by failing to record the interview with Mr D 1, deprived the appellant of evidence and thus adversely affected its rights of defence.

81 Accordingly, it is appropriate to examine the substance of this ground of appeal.

82 By this ground of appeal, Intel submits, inter alia, that the General Court erred in law by considering, in paragraph 612 of the judgment under appeal, that the Commission had not infringed Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004.

83 In that respect, it should be noted, first of all, that, as the General Court pointed out in paragraph 621 of the judgment under appeal, it is apparent inter alia from the Commission's internal note on the interview with Mr D 1 that the subjects addressed at that meeting, which lasted for more than five hours, concerned questions bearing an objective link with the substance of the investigation. In addition, Mr D 1 was one of the most senior executives of Intel's largest customer and, as Intel emphasised without being contradicted in that respect, he was, more specifically, responsible for overseeing his company's relationship with Intel. It follows that the Commission's interview with Mr D 1 was aimed at the collection of information relating to the subject matter of its investigation concerning Intel, within the meaning of Article 19(1) of Regulation No 1/2003, which, moreover, the Commission has not disputed.

84 In the first place, as regards the criticised distinction made by the General Court between formal and informal interviews, in paragraph 614 of the judgment under appeal, it is apparent from the wording of Article 19(1) of Regulation No 1/2003 that that provision is intended to apply to any interview conducted for the purpose of collecting information relating to the subject matter of an investigation.

85 Recital 25 of Regulation No 1/2003 states, in that respect, that that regulation is intended to supplement the Commission's powers of investigation by, inter alia, empowering the latter to interview any persons who may be in possession of useful information and to record the statements made.

86 Article 19(1) of Regulation No 1/2003 therefore constitutes a legal basis empowering the Commission to interview a person in the context of an investigation, which is confirmed by the *travaux préparatoires* for that regulation (see the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (COM(2000) 582 final, OJ 2000 C 365E, p. 284)).

87 There is nothing in the wording of that provision or in the objective that it pursues to suggest that the legislature intended to establish a distinction between two categories of interview relating to the subject matter of an investigation or to exclude certain of those interviews from the scope of that provision.

88 The General Court therefore erred in considering, in paragraphs 614 to 618 of the judgment under appeal, that a distinction had to be made, among the interviews conducted by the Commission in the context of an investigation, between formal interviews subject to Article 19(1) of Regulation No 1/2003 in conjunction with Article 3 of Regulation No 773/2004, and informal interviews falling outside the scope of those provisions.

89 In the second place, as regards Intel's submission that the Commission is required to record any interview conducted on the basis of Article 19(1) of Regulation No 1/2003, it must be noted, first of all, that Article 3(1) of Regulation No 773/2004, which provides that the Commission 'shall also

inform the person interviewed of its intention to make a record of the interview', must be understood as meaning, not that the recording of the interview is optional, but that the Commission is required to warn the person concerned of its intention to record it.

90 Next, Article 3(3) of Regulation No 773/2003, which states that '[t]he Commission may record the statements made by the persons interviewed in any form', implies, as the General Court correctly held in paragraph 617 of the judgment under appeal, that, if the Commission decides, with the consent of the person interviewed, to carry out such an interview on the basis of Article 19(1) of Regulation No 1/2003, it must record the interview in full, without prejudice to the fact that the Commission is free to decide on the type of recording.

91 It follows that the Commission is required to record, in a form of its choosing, any interview which it conducts, under Article 19 of Regulation No 1/2003, for the purpose of collecting information relating to the subject matter of an investigation.

92 As to whether the General Court was entitled to hold, in paragraph 622 of the judgment under appeal, that by making available to Intel, during the administrative procedure, the non-confidential version of an internal note drawn up by the Commission concerning its meeting with Mr D 1, the Commission had remedied the omission resulting from the lack of a record of the interview conducted during that meeting, it must be pointed out that, although, as the General Court noted in paragraphs 635 and 636 of the judgment under appeal, that internal note contains a brief summary of the subjects addressed during the interview in question, it does not, however, contain any indication of the content of the discussions that took place during that interview, in particular as regards the nature of the information that Mr D 1 provided during that interview on the subjects raised. In those circumstances, the General Court erred in concluding that the disclosure of that internal note to Intel during the administrative procedure had remedied the initial omission in that procedure resulting from the lack of a record of the interview in question.

93 It follows from the foregoing considerations that the General Court erred in law, first, by making a distinction, among interviews relating to the subject matter of a Commission investigation, between formal interviews, subject to Article 19(1) of Regulation No 1/2003 in conjunction with Article 3 of Regulation No 773/2004, and informal interviews, falling outside the scope of those provisions, secondly, by considering that the meeting between the Commission's services and Mr D 1, concerning a Commission investigation, did not fall within the scope of those provisions, on the ground that it did not constitute a formal interview and, thirdly, by considering, in the alternative, that the disclosure, during the administrative procedure, of a non-confidential version of the internal note drawn up by the Commission in relation to that meeting had remedied the lack of a record of that meeting.

94 However, if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such an infringement is not capable of bringing about the annulment of that judgment, and a substitution of grounds must be made (judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 118 and the case-law cited).

95 In the present case, it must be noted that the General Court emphasised, in paragraph 611 of the judgment under appeal, that it is undisputed between the parties that the Commission, in the decision at issue, did not make use of the information obtained during the interview with Mr D 1 to inculpate Intel.

96 That being said, in so far as Intel argued that Mr D 1 had provided exculpatory evidence to the Commission which the latter should have properly recorded and disclosed to Intel, it must be borne in mind that, as regards failure to disclose an exculpatory document, it is for the undertaking

concerned to establish that the non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision (see, to that effect, judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 23 and the case-law cited).

97 The undertaking must thus show that it would have been able to use that exculpatory document for its defence, in the sense that, had it been able to rely on it during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in its decision (see, to that effect, judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 23 and the case-law cited).

98 It follows that the undertaking concerned must establish, first, that it did not have access to certain exculpatory evidence and, secondly, that it could have used that evidence for its defence (see, to that effect, judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 24).

99 In the present case, it is apparent from the detailed analysis carried out by the General Court in paragraphs 629 to 659 of the judgment under appeal that, during the administrative procedure, Intel was provided with not only the non-confidential version of the internal note drawn up by the Commission in relation to the interview with Mr D 1, but also a 'follow-up document' containing Dell's written responses to the oral questions put to Mr D 1 during that interview.

100 In addition, as indicated in paragraphs 44 to 49 and 628 of the judgment under appeal, although Intel was able to submit, during the proceedings before the General Court, its observations in the light of the confidential version of that internal note, which contained indications as to the content of the discussions, it has not however adduced any evidence to suggest that the Commission failed to record, during that interview, exculpatory evidence which could have been useful for its defence in that it would have been such as to cast a different light on the direct documentary evidence relied on in the decision at issue in order to establish the conditionality of the practices at issue.

101 In particular, as the Commission submits, Intel did not make use of the possibility open to it under Articles 68 to 76 of the Rules of Procedure of the General Court, in the version applicable when the judgment under appeal was delivered, to request that Mr D 1 be summoned before the General Court. It did not even demonstrate before the General Court that it had attempted to contact Mr D 1 so that he could confirm that he had provided, during his interview, exculpatory evidence which might have been useful to Intel's defence.

102 In those circumstances, the errors of law, identified in paragraph 93 of the present judgment, which vitiate the judgment under appeal are not such as to invalidate the conclusion, in paragraph 625 of the judgment under appeal, that the administrative procedure was not vitiated by an irregularity, in breach of Intel's rights of defence, capable of leading to the annulment of the decision at issue (see, to that effect, judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, paragraph 164).

103 The first and second parts of the fourth ground of appeal must, consequently, be rejected as ineffective (see, to that effect, judgment of 12 February 2015, *Commission* v *IPK International*, C-336/13 P, EU:C:2015:83, paragraph 66).

104 In so far as the third part of the fourth ground of appeal concerns the application of the judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686), to the present case, it should be noted that the General Court ruled on that issue in the context of its examination, for the sake of completeness, of the consequences of a hypothetical irregularity in the administrative procedure.

105 Complaints directed against grounds of a judgment of the General Court included purely for the sake of completeness cannot lead to the judgment's being set aside and are therefore ineffective (see, to that effect, judgment of 21 December 2011, *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, EU:C:2011:853, paragraph 79 and the case-law cited).

106 It follows that the third part of the fourth ground of appeal must be rejected as ineffective.

107 It follows that the fourth ground of appeal must be rejected in its entirety.

The first ground of appeal, alleging that the General Court erred in law by failing to examine the rebates at issue in the light of all the relevant circumstances

Arguments of the parties

108 The first ground of appeal, which it is appropriate to examine in the third place, since it relates to the finding of an abuse of a dominant position, within the meaning of Article 102 TFEU, is subdivided into three parts.

109 By the first part of the first ground of appeal, Intel submits that loyalty rebates may be found abusive only after an examination of all the relevant circumstances in order to assess whether the rebates are capable of restricting competition. Intel relies, inter alia, on paragraphs 70 and 71 of the judgment of 19 April 2012, *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221), inferring from them that an analysis of all of the circumstances applies equally to exclusivity rebates and to other rebates that have a fidelity-building effect.

110 Intel adds that neither the wording nor the structure of Article 102 TFEU suggests that some types of conduct, when undertaken by an undertaking in a dominant position, must be treated as inherently anticompetitive.

111 Intel submits that the settled case-law of the Court requires, in order to find an abuse of a dominant position within the meaning of Article 102 TFEU, an examination of all the circumstances, including the level of the rebates in question, their duration, the market shares concerned, the needs of customers and the capability of the rebates to foreclose an as efficient competitor (as efficient competitor test, 'the AEC test'), in order to establish that those rebates are capable of restricting competition and, accordingly, constitute an abuse of a dominant position within the meaning of Article 102 TFEU.

112 Moreover, the General Court's assertion, in paragraph 94 of the judgment under appeal, that it is open to the dominant undertaking to show that its conduct is objectively justified, is an empty possibility, since, in paragraph 89 of that judgment, the General Court stated that the beneficial effects of such conduct cannot be accepted. Likewise, the Commission's position effectively reverses the burden of proof, since Intel must justify its conduct before the Commission has even established that the conduct is likely to restrict competition.

113 By the second part of the first ground of appeal, Intel submits that the General Court failed to assess the likelihood of a restriction of competition. Thus, the fact that the rebates at issue were classified or assessed in the judgment under appeal as exclusivity rebates should not exclude an examination of their capability to restrict competition.

114 By the third part of the first ground of appeal, Intel submits that the General Court's analysis, in paragraphs 172 to 197 of the judgment under appeal, concerning the capability of the rebates to restrict competition and intended to show that the conduct in question vis-à-vis the recipients of the discounts was capable of restricting competition, is insufficient and does not cure the errors of law identified above.

115 According to Intel, the General Court wrongly failed to consider highly relevant circumstances such as the insufficient market coverage of the rebates at issue, the short duration of the practices at issue, the lack of foreclosure and a rapid decline in prices as well as the prior 'as efficient competitor' analysis.

116 As regards the market coverage of the rebates at issue, the General Court incorrectly considered that the share of the market covered by the conduct at issue was significant. The coverage in question, of 14% on average, is not comparable to the foreclosure of 39% of the market concerned in the case that gave rise to the judgment of 19 April 2012, *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221), and of 40% in the case that gave rise to the judgment of 23 October 2003, *Van den Bergh Foods* v *Commission* (T-65/98, EU:T:2003:281). Intel contests, in that respect, the Commission's argument that the market coverage of the practices at issue is irrelevant, because it relates only to actual effects. Intel contends that substantial market coverage is a necessary element in order to find an abuse.

117 As regards the duration of the practices at issue, Intel submits that arrangements of short duration have no actual or potential adverse effects. Intel adds that the General Court's assertion, in paragraph 113 of the judgment under appeal, that the duration of the agreements was not short, was based not on the duration of individual agreements, but on the cumulation of multiple agreements, with the result that it was not able to take into consideration the fact that Intel's customers could frequently walk away from their agreements. Intel disputes, in that respect, the Commission's assertion that its OEM customers could not walk away from their agreements with Intel despite their short-term nature. The uncontroverted fact that Dell switched supplier to AMD at a time when its rebates from Intel were at an all-time high demonstrates that the ability to switch was real.

118 As regards its argument that the rebates at issue did not have a foreclosure effect, Intel submits that the General Court did not taken account of the capacity constraints with which AMD was faced and which prevented it from satisfying demand for its CPUs, with the result that Dell and Lenovo sourced solely from Intel during the periods concerned.

119 As regards the relevance of the AEC test, the General Court erred in law by failing to regard the analysis carried out by the Commission in the decision at issue as relevant and as forming part of the review that the General Court must perform in order to comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. According to Intel, whether the Commission was required to carry out that test is not the issue. Rather, since the Commission carried out that test, the properly assessed results should have been taken into account among all the circumstances relevant to demonstrating the likelihood of restricting competition.

120 ACT agrees, in essence, with Intel's position.

121 The Commission contends that the first ground of appeal is based on an unsubstantiated premiss that the exclusivity rebates were merely a type of pricing practice. The Court therefore need not examine this ground of appeal.

122 In the alternative, the Commission submits that the exclusivity rebates have anticompetitive features such that it is generally unnecessary to demonstrate that they are capable of restricting competition. Thus, those rebates have a dissuasive effect on customers caused by the prospect of losing the rebates over the non-contestable share of the market. It follows that they generally restrict the customer's freedom to choose the supplier with the most attractive offer.

123 In addition, Intel misinterpreted paragraphs 70 and 71 of the judgment of 19 April 2012, *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221), by stating that those paragraphs relate to exclusivity rebates.

124 The Commission submits that the line of argument put forward by Intel in the second place is inadmissible since it does not refer to any error of law.

125 In any event, that line of argument is ineffective since, in paragraphs 172 to 197 of the judgment under appeal, the General Court considered that Intel's conduct was capable of restricting competition.

126 The Commission adds, in the alternative, that the legal test set out in the case-law on predatory pricing practices is not applicable to exclusivity rebates. It explains, in that respect, that the Court could have transposed the legal test for assessing the abusive nature of pricing practices to rebate schemes in the judgment of 19 April 2012, *Tomra Systems and Others* v *Commission* (C-549/10 P, EU:C:2012:221), but, in that judgment, it expressly reiterated that an undertaking in a dominant position abuses that position when it makes use of such a rebate scheme.

127 The Commission submits, lastly, that it is unnecessary for the Court to examine the arguments raised by Intel concerning paragraphs 172 to 197 of the judgment under appeal, since it was for the sake of completeness that the General Court examined whether the Commission had established in the decision at issue that Intel's conduct was capable of restricting competition.

128 In the alternative, the Commission submits that the judgment under appeal demonstrates the existence of an overall strategy to the requisite legal standard and that Intel's arguments in that respect are inadmissible since they seek a reassessment of the findings of fact. It also responds to Intel's arguments concerning the relevance of the market coverage and the duration of the practices.

Findings of the Court

129 In the first place, by the first two parts of its first ground of appeal, Intel, supported by ACT, argues, in essence, that the General Court accepted that the practices at issue could be considered an abuse of a dominant position within the meaning of Article 102 TFEU without first examining all of the circumstances of the present case and without assessing the likelihood of that conduct restricting competition.

130 In the second place, by the third part of its first ground of appeal, Intel criticises the General Court's analysis, carried out for the sake of completeness, inter alia in paragraphs 172 to 197 of the judgment under appeal, concerning the capacity of the rebates and payments granted to Dell, HP, NEC, Lenovo and MSH to restrict competition in the circumstances of the case.

131 In that context, Intel challenges, inter alia, the General Court's assessment of the relevance of the AEC test applied by the Commission in the present case.

132 It submits, in particular, that, since the Commission applied that test, the General Court should have examined Intel's line of argument alleging that the application of that test was badly flawed and that, had it been correctly applied, it would have led to the conclusion contrary to that which the Commission reached, namely that the rebates at issue were not capable of restricting competition.

133 In that respect, it must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market (see, inter alia, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 21 and the case-law cited).

134 Thus, not every exclusionary effect is necessarily detrimental to competition. 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 (see, inter alia, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 22 and the case-law cited).

135 However, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (see, inter alia, judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 57, and of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 23 and the case-law cited).

136 That is why Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, not all competition by means of price may be regarded as legitimate (see, to that effect, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 25).

137 In that regard, the Court has already held that an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position (see judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 89).

138 However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

139 [As rectified by order of 19 September 2017] In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market (see, by analogy, judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 29).

140 [As rectified by order of 24 October 2017] The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. In addition, the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer (judgment of 15 March 2007,

British Airways v *Commission*, C-95/04 P, EU:C:2007:166, paragraph 86). That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking.

141 If, in a decision finding a rebate scheme abusive, the Commission carries out such an analysis, the General Court must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings concerning the foreclosure capability of the rebate concerned.

142 In this case, while the Commission emphasised, in the decision at issue, that the rebates at issue were by their very nature capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an AEC test were not necessary in order to find an abuse of a dominant position (see, inter alia, paragraphs 925 and 1760 of that decision), it nevertheless carried out an in-depth examination of those circumstances, setting out, in paragraphs 1002 to 1576 of that decision, a very detailed analysis of the AEC test, which led it to conclude, in paragraphs 1574 and 1575 of that decision, that an as efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor.

143 It follows that, in the decision at issue, the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.

144 In those circumstances, the General Court was required to examine all of Intel's arguments concerning that test.

145 It held, however, in paragraphs 151 and 166 of the judgment under appeal, that it was not necessary to consider whether the Commission had carried out the AEC test in accordance with the applicable rules and without making any errors, and that it was also not necessary to examine the question whether the alternative calculations proposed by Intel had been carried out correctly.

146 In its examination of the circumstances of the case, carried out for the sake of completeness, the General Court therefore attached no importance, in paragraphs 172 to 175 of the judgment under appeal, to the AEC test carried out by the Commission and, accordingly, did not address Intel's criticisms of that test.

147 Consequently, without it being necessary to rule on the second, third and sixth ground of appeal, the judgment of the General Court must be set aside, since, in its analysis of whether the rebates at issue were capable of restricting competition, the General Court wrongly failed to take into consideration Intel's line of argument seeking to expose alleged errors committed by the Commission in the AEC test.

Referral of the case back to the General Court

148 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits. However, that is not the case here.

149 The review by the General Court, in the light of the arguments put forward by Intel, of whether the rebates at issue are capable of restricting competition involves the examination of factual and economic evidence which it is for that Court to carry out.

150 Accordingly, the case must be referred back to the General Court.

Costs

151 Since the case has been referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 12 June 2014, *Intel* v *Commission* (T-286/09, EU:T:2014:547);**

2. **Refers the case back to the General Court of the European Union;**

3. **Orders that the costs be reserved.**

Lenaerts	Tizzano	Silva de Lapuerta
Ilešič	Da Cruz Vilaça	Juhász
Berger	Vilaras	Regan
Rosas	Malenovský	Levits
Biltgen	Jürimäe	Lycourgos

Delivered in open court in Luxembourg on 6 September 2017.

A. Calot Escobar	K. Lenaerts
Registrar	President