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The latest intel from Luxembourg: an Advocate General prefers effects analysis in abuse cases

Over the last 15 years, the pendulum of abuse of dominance cases in EU competition law has been swinging between form-based and effects-based approaches. At a time when the former seemed to have gained prominence, the Opinion of Advocate General Wahl in the *Intel* case, delivered on 20 October 2016, expressed a strong preference for the latter. Where is the debate on abuse of dominance heading?

Few areas of competition law have seen such heated debates in recent times as abuse of dominance, and few have seen such marked shifts in position by the EU courts. Article 102 of the Treaty on the Functioning of the European Union (TFEU) and its national equivalents prohibit the abuse of a dominant position. In the past, EU case law tended to follow a form-based approach: first determine dominance; then assess the form of the conduct. Once a company was found to be dominant, its 'special responsibility'[1] not to impair competition meant that it could not engage in certain forms of behaviour, such as pricing below variable cost, tying products, or offering loyalty rebates. Little consideration was given to the likely effects of these practices on competition and consumer welfare in a given case.

In a 2008 guidance document, the European Commission sought to introduce a more effects-based approach.[2] This focused on the effects of the behaviour on competition and consumers. If a particular business practice is unlikely to foreclose competition in a significant part of the market, or if it generates efficiencies that benefit consumers, an effects-based approach suggests that intervention may not be required, even if individual competitors are harmed by the practice.

What followed was a series of Commission cases and EU court judgments that ranged from accepting an effects-based approach (e.g. the Court of Justice's *Post Danmark I* judgment, 2012[3])—to completely rejecting effects analysis (e.g. the General Court in *Intel*, 2014[4])—to leaving it somewhat ambiguous (e.g. the Court of Justice in *Post Danmark II*, 2015[5]).

In particular, the 2014 *Intel* judgment seemed hostile to the Commission's reform efforts. Intel had long been the dominant computer processor chip-maker, with more than 70% of the global market. In its 2009 decision, the Commission had carried out a detailed assessment of the effects of Intel's rebates to major computer manufacturers. In line with its 2008 guidance, the Commission assessed whether an as-efficient competitor (AEC) would be able to match these rebates, and concluded that it would not (hence finding an abuse on an effects basis). However, the General Court held that the Commission's analysis of effects was unnecessary, stating that exclusivity rebates granted by a dominant undertaking are by their very nature capable of restricting competition, so a form-based approach was sufficient to establish an abuse.

Chipping in

The *Intel* case has now taken a dramatically different turn. The Court of Justice is yet to rule on the case, but the Opinion of Advocate General (AG) Nils Wahl provides a damning verdict on the General Court's 2014 judgment.[6] In essence, it calls for an effects-based approach to rebate cases under Article 102.

From the outset, AG Wahl states that EU competition law is about protecting competition, not competitors. Reminiscent of the famous US antitrust mantra that 'the successful competitor, having been urged to compete, should not be turned upon when he wins',[7] such views were first expressed by the Commission when it launched its Article 102 reform process a decade ago. Now they are also shared by at least some people at the EU courts in Luxembourg:

> From the outset, EU competition rules have aimed to put in place a system of undistorted competition, as part of the internal market established by the EU. In that regard, it cannot be overemphasised that protection under EU competition rules is afforded to the competitive process

> as such, and not, for example, to competitors. In the same vein, competitors that are forced to exit the market due to fierce competition, rather than anticompetitive behaviour, are not protected. Therefore, not every exit from the market is necessarily a sign of abusive conduct, but rather a sign of aggressive, yet healthy and permissible, competition. This is because, given its economic character, competition law aims, in the final analysis, to enhance efficiency. The importance placed on efficiency is also in my view clearly reflected in the case-law of the EU Courts.[8]

AG Wahl revisited the classic *Hoffmann-La Roche* rebates judgment by the Court of Justice of 1979, which the General Court had relied on in *Intel*.[9] He states that, while in that case the Court of Justice considered the rebates in question to be anticompetitive, it had first 'examined in commendable detail the particularities of the pharmaceutical market in question, the market coverage of the rebates, as well as the terms and conditions of the contracts between the dominant undertaking and its customers'.[10]

The Court of Justice had also considered the duration of the rebates in that case.

AG Wahl therefore considered that the General Court was wrong to judge exclusivity rebates as anticompetitive by nature, and to reject any consideration of the circumstances of the case:

> Even in the case of seemingly evident exclusionary behaviour, such as pricing below cost, context cannot be overlooked. Otherwise, conduct which, on occasion, is simply not capable of restricting competition would be caught by a blanket prohibition. Such a blanket prohibition would also risk catching and penalising pro-competitive conduct.[11]

An Intel-ligent approach

As noted above, the form-based approach presumes that exclusivity rebates are by their very nature capable of restricting competition. AG Wahl questions both the reliance on the nature of the rebates and the reference to the concept of 'capable of restricting competition'. As regards the nature of the rebates, he states that:

> Experience and economic analysis do not unequivocally suggest that loyalty rebates are, as a rule, harmful or anticompetitive, even when offered by dominant undertakings. That is because rebates enhance rivalry, the very essence of competition.[12]

He further observes that exclusivity rebates should not be regarded as a separate and unique category of rebates that does not require a consideration of all the circumstances. As regards capability, AG Wahl accepts that evidence of actual effects does not need to be presented, but considers that the concept of capability cannot merely be hypothetical or theoretically possible. He prefers the term 'likelihood of anticompetitive effects', which must be considerably more than a mere possibility that certain behaviour may restrict competition. This opens the door to an effects-based approach:

> the assessment of all the circumstances under Article 102 TFEU involves examining the context of the impugned conduct to ascertain whether it can be confirmed to have an anticompetitive effect. If any of the circumstances thus examined casts doubt on the anticompetitive nature of the behaviour, a more thorough effects analysis becomes necessary.[13]

As part of the effects analysis one should consider the market coverage of the rebates in question. Intel's rebates covered on average around 14% of total sales in the market throughout the relevant period. AG Wahl notes the general principle that the likelihood of negative effects on competition increases in line with the size of the tied market share. He accepts that this part of the effects analysis is 'by no means an arithmetic exercise', and that there are no precise thresholds.[14] However, he considers that a 14% coverage cannot rule out that the rebates in question do not have anticompetitive effects.

Another important factor in the effects analysis is the duration of the arrangements between Intel and its customers. AG Wahl notes that a long overall duration of the arrangement can certainly point to a loyalty-inducing effect. However, he also states that, if a customer's choice is to stay with the dominant undertaking, it cannot simply be assumed that this choice results from abusive behaviour:

> where the customer has the option of switching suppliers on a regular basis, even where that option has not been exercised, loyalty rebates will also enhance rivalry. Thus they can also have a pro-competitive effect.[15]

An 'as efficient' approach?

AG Wahl also expresses strong support for the AEC test, as proposed by the Commission in its 2008 guidance and applied in its 2009 *Intel* decision. This stands in stark contrast to the *Intel* ruling by the General Court, which resolutely dismissed the AEC test. Many commentators wondered at the time whether that meant the end of the AEC test in competition law altogether (although, somewhat inconsistently, the AEC test had been accepted by the EU courts in pricing abuse cases involving margin squeeze).

In *Post Danmark II*, the Court of Justice confirmed that the AEC test was not necessary, but did not disregard it altogether. Rather, it considered it as 'one tool among others for the purposes of assessing whether there is an abuse of a dominant position in the context of the rebate scheme'.[16]

AG Wahl takes his support for the AEC test a step further:

> However, given that an exclusionary effect is required, the AEC test cannot be ignored. As the General Court noted, the test serves to identify conduct which makes it economically impossible for an as-efficient competitor to secure the contestable share of a customer's demand. In other words, it can help identify conduct that has, in all likelihood, an anticompetitive effect. By contrast, where the test shows that an as-efficient competitor is able to cover its costs, the likelihood of an anticompetitive effect significantly decreases. That is why, from the perspective of capturing conduct that has an anticompetitive foreclosure effect, the AEC test is particularly useful.[17]

In line with the principles of the effects-based approach (and as noted above), AG Wahl considers that the assessment of all the circumstances in a case must at the very least take into account the market coverage and duration of the conduct in question. In addition, it may be necessary to consider other circumstances that may differ from case to case. This is where the AEC test comes in. AG Wahl is critical of the General Court for having ignored the AEC test carried out by the Commission:

> the AEC test, precisely because that test was carried out by the Commission in the decision at issue, cannot be ignored in ascertaining whether the impugned conduct is capable of having an anticompetitive foreclosure effect[18]

Concluding remarks

So will the pendulum swing back to a full effects-based approach? After all, as also noted by AG Wahl,[19] a similar emphasis on effects analysis has been seen in Article 101 TFEU on restrictive agreements. The Court of Justice's *Cartes Bancaires* ruling of 2014 placed a limit on the type of agreements that could be prohibited 'by object' (per se), instead focusing more on requiring an assessment of the context and effects of the agreement.[20]

It is probably too soon to tell. An AG Opinion is not the same as a Court of Justice judgment, so we will have to wait for the latter in the *Intel* case. Yet the reasoning and tone of AG Wahl's Opinion in *Intel* has already given Article 102 a strong push towards effects-based analysis, and shows that the heated debate about abuse of dominance approaches is likely to continue for years to come.

[1] Case 322/81, *Nederlandsche Banden-Industrie Michelin NV v Commission* [1983] ECR 3461 (*Michelin I*).

[2] European Commission (2008), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings', December.

[3] Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, judgment of 27 March 2012 (*Post Danmark I*).

[4] Case T-286/09 *Intel Corp v Commission*, judgment of 12 June 2014. See also Oxera (2015), 'Reform of Article 82: where the link between dominance and effects breaks down (reprint)', *Agenda*, April, http://www.oxera.com/Latest-Thinking/Agenda/2015/Reform-of-Article-82-where-the-link-between-domina.aspx.

[5] Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, judgment of 6 October 2015 (*Post Danmark II*). See also Oxera (2015), 'The Post Danmark II judgment: effects analysis in abuse of dominance cases', *Agenda*, October, http://www.oxera.com/Latest-Thinking/Agenda/2015/The-Post-Danmark-II-judgment-effects-analysis-in-a.aspx.

[6] Case C-413/14 P, *Intel Corporation Inc. v European Commission*, Opinion of AG Wahl, 20 October 2016.

[7] *US v Aluminum Co of America* 148 F 2d 416, 430 (2nd Cir. 1945).

[8] Opinion of AG Wahl, para. 41.

[9] Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461.

[10] Opinion of AG Wahl, para. 75.

[11] Opinion of AG Wahl, para. 78.

[12] Opinion of AG Wahl, para. 90.

[13] Opinion of AG Wahl, para. 135.

[14] Opinion of AG Wahl, para. 141.

[15] Opinion of AG Wahl, para. 156.

[16] Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, judgment of 6 October 2015 (*Post Danmark II*), para. 60.

[17] Opinion of AG Wahl, para. 165.

[18] Opinion of AG Wahl, para. 172.

[19] Opinion of AG Wahl, paras 82 and 135.

[20] Case C-67/13 P, *Groupement des cartes bancaires (CB) v Commission*, Judgment of 11 September 2014. AG Wahl had also delivered an Opinion in this case. See also Oxera (2014), 'From sports bras to cigarettes: economic analysis of anticompetitive agreements', *Agenda*, September, http://www.oxera.com/Latest-Thinking/Agenda/2014/From-sports-bras-to-cigarettes-economic-analysis-o.aspx.