Call for common-sense approach to Article 102

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Competition & Antitrust, European Union

Summary

In contrast to the position taken by Advocate General Kokott in *Post Danmark II*, in *Intel* Advocate General Wahl called for a common-sense approach to Article 102 of the Treaty on the Functioning of the European Union and its recentring within mainstream economic thought.

No *per se* rules	Rebates can be pro or anti-competitive. As they result in a reduction in price, generally to the consumer's benefit, there is no sense in having *per se* rules to condemn rebate schemes.
Examine effects, not form	In *Intel* the EU General Court was wrong to find a category of *per se* illegal quasi-exclusivity rebate schemes – penalising form rather than effect. Rebates linked to exclusivity or high market share obligations should be judged in the round, just like any target-linked rebate.
A buse requires evidence of likelihood of harm	It is not enough that abuse is a mere possibility or that it appears to be likely.
A customer wanting a rebate is not evidence of illegal foreclosure	All customers want a price reduction, so the test must be whether competition is illegally foreclosed, and this requires further analysis.
Market coverage and duration are factors, but not necessarily decisive ones	Long-term schemes and 14% market coverage do not necessarily indicate foreclosure. The question is whether customers can easily switch and competitors can viably match the rebate scheme.

A price cost test, though also not decisive, is an important factor, especially if other criteria produce ambiguous results	The 'as-efficient-competitor' price-cost test is useful (asking whether an as-efficient-competitor rival can viably match the rebate's value over a smaller base of contestable sales if it had the dominant company's cost base). If the European Commission conducts an as-efficient-competitor test and other criteria produce an ambiguous result, the General Court must review the test results. It cannot simply ignore the as-efficient-competitor test, as the General Court did in *Intel*.

Super-category rebate

In *Intel* Wahl took issue with the General Court's three categories:

- *per se* illegal quasi-exclusivity;
- presumptively lawful volume-linked rebates; and
- all-circumstance third-category rebates (Sections 80 to 82).

He held that this was a misreading of *Hoffmann-La Roche* (Sections 83 to 84).

There are two categories:

- where cost benefits are volume linked, they are presumptively lawful; and
- loyalty rebates must be proven to be exclusionary based on a consideration of all circumstances.

There is no *per se* quasi-exclusivity category, as the General Court found in *Intel* (and as the European Court of Justice (ECJ) found in *Post Danmark II*), but rather only one super-category (Section 84) comprising both quasi-exclusivity and all-circumstance third-category rebates (as in *Intel*).

This super-category must be assessed based on all circumstances as to whether it is exclusionary. There is no legal shortcut to a *per se* presumption. A super-category is appropriate because:

- effects must be part of the assessment or objective justification would be impossible (Sections 86 to 88);
- rebates can be pro-competitive, so *per se* condemnation would be inappropriate ("experience and economic analysis do not unequivocally suggest that loyalty rebates are, as a rule, harmful or anticompetitive", Sections 89 to 93);
- the harmfulness of rebates is context dependent, so an in-the-round assessment is essential ("contemporary economic literature commonly emphasises that the effects of exclusivity are context-dependent", Sections 94 to 100); and
- it would otherwise result in a different standard being applied to price-based abuses, as between predation, margin squeeze and rebates (eg, *Post Danmark I)* (Sections 101 to 105).

Post Danmark II

The Grand Chamber decision in *Post Danmark I* (applying an as-efficient-competitor test to determine whether selective price cutting was exclusive) exemplifies a coherent economic approach. By contrast, Wahl encouraged the ECJ to depart from *Post Danmark II*'s *per se* condemnation of exclusivity rebates. He held that it was necessary "to ensure a coherent jurisprudential approach to the assessment of conduct falling under the purview of Article 102 TFEU" (Section 105).

Effects-based assessment

Frontal assault on mealy-mouthed standards of harm

Wahl attacked the least satisfactory strand of Article 102 jurisprudence head on, citing the failure of the European courts to provide a suitable yardstick to measure likelihood of harm. The rebate cases have never demanded proof of actual effects, but rather only that conduct 'tended to' or 'had the capability' of excluding. Once a rebate of a particular form has been identified, it is almost always branded capable of exclusionary effects, with no actual proof required.

Wahl said that the formulations were an unacceptable judicial shorthand that penalised form over substance:

> "*The special responsibility of dominant undertakings... cannot be taken to mean that the threshold for the application of the prohibition of abuse laid down in Article 102 TFEU can be lowered to such an extent as to become virtually non-existent. That would be the case if the degree of likelihood required for ascertaining that the impugned conduct amounts to an abuse of a dominant position was nothing more than the mere theoretical possibility of an exclusionary effect, as seems to be suggested by the Commission. If such a low level of likelihood were accepted, one would have to accept that EU competition law sanctions form, not anticompetitive effects.*" (Section 118.)

To demonstrate abuse, evidence of likelihood of harm must be provided, not just that abuse is a mere possibility or appears likely (Section 117).

Rigorous analysis of likely exclusionary effect

Wahl demanded more rigorous evidence-lead proof of exclusion.

First, he dispensed with false flags. Evidence that customers found rebates attractive is not decisive (Sections 124 to 126). Offering customers lower prices is the essence of competition; it cannot of itself demonstrate exclusion of rivals. Evidence that a rival has enjoyed commercial success does not preclude abusive conduct being present (Sections 158 to 160). It is also inappropriate to conjoin separately alleged abuses as a single, continuous and complex infringement, unless the abusive nature of each conduct is proven. Two unproven abuses do not make one proven abuse (Sections 187 to 193).

Second, Wahl considered relevant criteria:

- Market coverage is an important criterion. If market coverage is low, other evidence may be required to show exclusionary effect. In *Intel*, 14% market coverage did not show exclusionary effect in itself. It would need to be determined whether, for example, this represented flagship customers:

  > "*Where loyalty rebates target customers that are of particular importance for competitors to enter or expand their share of the market, even modest market coverage can certainly result in anticompetitive foreclosure. Seen in that light, a market coverage of 14% may or may not have an anticompetitive foreclosure effect. What is certain, however, is that such market coverage cannot rule out that the rebates in question do not have an anticompetitive foreclosure effect. This is so even assuming that the rebates and payments in question target key customers. Quite simply, 14% is inconclusive.*" (Sections 142 to 143.)

- Duration should also be considered, but it may not be decisive as evidence of foreclosure. There can be many reasons for a long-term agreement and the key is whether the customer can switch to other suppliers without penalty. If the rival cannot sell its products and match the rebate except by making a loss, it indicates a tie (Section 53). The length of the relationship does not of itself aswer that question (Sections 154 to 157).
- The as-efficient-competitor test cannot be ignored (Sections 164 to 172). Wahl resuscitated the test laid down in Article 102 of the enforcement priorities paper after its marginalisation in *Tomra* and

Post Danmark II. He concluded that it is an important consideration where other factors in the commission's assessment are not determinative of whether there was anti-competitive foreclosure. Where "the other circumstances assessed by the General Court do not unequivocally support a finding of an effect on competition... the [as-efficient-competitor] test cannot simply be ignored as an irrelevant circumstance" (Section 169).

Wahl also set out a two-step approach to assessing illegal foreclosure:

- Market coverage, duration and other factors indicative of foreclosure should be considered. If the as-efficient-competitor test has been conducted by the commission, it should be verified.
- If the scheme fails to meet any of the criteria (low market coverage, short duration, positive as-efficient-competitor test) then a more thorough economic assessment is required (Section 172).

Wahl concluded that the General Court failed to apply this framework for analysis and the case should be remitted for review.

Other issues

Wahl found fault with the commission for taking long-arm jurisdiction in relation to Intel's rebate scheme with Lenova, finding that there was too remote a nexus with China (where the scheme was implemented). He found that considerations of international comity should lead to restraint in extraterritorial overreach (Sections 308 to 327).

He further faulted the commission for not keeping records of potentially exculpatory evidence – in this case, a meeting with a key customer, Dell. He concluded that this was such an essential defect of procedure that the case should be remitted to the General Court for further consideration as to whether the entire decision or just the findings in relation to Dell (Sections 251 to 277) should be annulled.

Comment

Wahl's opinion offers a welcome reappraisal of the spirit and intent of Article 102's analysis of rebate schemes. The three categories in *Intel* and *Post Danmark II* are rightly criticised as overly formalistic and likely to deter pro-competitive price cutting via rebate schemes. The cursory factual examination of a scheme's form is no substitute for a solid economic analysis of its likely foreclosure effects, in particular due to its market coverage and the viability of competitors matching the rebate (generally over a smaller volume of sales). The as-efficient-competitor test is meant to assess the latter and is an important advance in the legal analytical framework. Wahl rightly recognised this. The question therefore is whether the ECJ accepts this recommendation to revise and revisit old case law (and the new formulations in *Post Danmark II*) to engage in a more meaningful economic assessment, or whether the form-based categories of *Intel* will prevail.

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