A Theory of Everything? Intel, Loyalty Rebates, and the Restriction of Competition by Object

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Hurtling 175 meters below the Franco-Swiss border at near light speed are compact beams of particles, guided by superconducting electromagnets cooled to a temperature colder than outer space itself. At the world's largest and most powerful particle accelerator, the Large Hadron Collider, physicists are searching for an elusive but all-embracing theory to unite quantum mechanics and general relativity – a theory of everything. And they are doing so by studying the collisions which tear at the most fundamental building blocks in their discipline.

Five hundred kilometers to the north, at the Court of Justice of the EU (**CJEU**) in Luxembourg, Advocate General (**AG**) Wahl too may have proffered a theory to unite not only the law on anticompetitive rebates (and, indeed, other unilateral pricing abuses), but also the law on restrictions of competition by object. "Irrespective of whether we are dealing with an enforcement shortcut such as that offered by the concept of a 'restriction by object' in the context of Article 101 TFEU, or with single firm conduct falling within the scope of Article 102 TFEU," he advised in his recent opinion in *Intel* (C-413/14 P), "EU competition rules seek to capture behaviour that has anticompetitive effects."

AG Wahl delivered his opinion – which advises the CJEU to uphold Intel's appeal and to quash the judgment of the General Court of the EU (**GCEU**) – 10 years after the European Commission (**Commission**) first began its investigation. In 2009 the Commission ordered a fine of €1.06 billion against Intel, which the Commission alleged to have abused a dominant position when Intel granted rebates to four major computer manufacturers on the condition that they obtain all, or nearly all, of their x86 central processor units from Intel. Central to the opinion is a critique of the taxonomy of rebates: "[I]t is of the utmost importance that legal tests applied to one category of conduct are coherent with those applied to comparable practices."

According to the Commission's guidance, a dominant undertaking's rebates can harm competition in certain circumstances by foreclosing a market to competitors. For example, suppose that a dominant undertaking offers a rebate to each customer whose purchases in a given reference period exceed a threshold set by the dominant undertaking, and that such rebate will apply not only to the customer's future purchases, but retroactively to all its purchases in the reference period. In this situation, meeting the purchasing threshold lowers the costs of the customer on all units purchased from the dominant undertaking and substantially reduces its incentives to purchase elsewhere, even if it might

otherwise prefer to do so. The rebate scheme thereby reduces the sales opportunities for competitors of the dominant undertaking and may raise their costs or, at the extreme, force them to leave the market.

For its part, the GCEU had distinguished between three categories of rebates: volume-based rebates, which are "generally considered not to have the foreclosure effect" (category 1); exclusivity rebates conditioned on the customer obtaining all, or nearly all, of its requirements from the dominant undertaking, which "are incompatible with the objective of undistorted competition within the common market" and whose abusive nature does "not depend on an analysis of the circumstances of the case" (category 2); and other types of rebates where the grant of a financial incentive is not directly linked to exclusive or quasi-exclusive supply, for which "it is necessary to consider all the circumstances" (category 3).

AG Wahl rejected the distinction between exclusivity rebates (category 2) and other rebates with a fidelity-inducing effect (category 3) ("difference… of degree rather than kind"), and described all such loyalty rebates under Article 102 TFEU as a "near equivalent" to restrictions of competition by object under Article 101 TFEU because both are "presumptively unlawful." AG Wahl then stated that the requirement for the Commission and the General Court to examine the legal and economic context of the impugned conduct, which according to the CJEU's case-law applies to the analysis of "by object" restrictions under Article 101 TFEU, also applies to the analysis of loyalty rebates under Article 102 TFEU. "To date," he writes, "the form of a particular practice has not been deemed important." Faintly hums the collider, primed for the collision to come.

If not the form (*e.g.*, exclusivity rebate), just what must the Commission establish, then, in relation to conduct which is presumptively unlawful? In AG Wahl's view, the Commission must establish that the conduct is capable of more than a restriction which is merely hypothetical or theoretically possible, and its effects must be more than ambivalent (or, indeed, ancillary for the performance of something pro-competitive): the "assessment of capability as concerns presumptively unlawful behaviour must be understood as seeking to ascertain… that its presumed restrictive effects are in fact confirmed." AG Wahl then offered a framework for determining such capability, including the probability of anticompetitive effects, the market coverage of the contested practice, and its duration.

By "presumptively unlawful," AG Wahl appears to suggest that the finding of anticompetitive effects is antecedent to – and separate from – any defense through objective justification of such effects. In other words, before the need for the undertaking to justify conduct arises, the Commission must positively establish its case that such conduct is indeed anticompetitive. Such a conclusion seems to reflect the judgment in *Post Danmark II* (Case C-23/14), in which the CJEU considered fidelity rebates of a kind which would fall within the GCEU's category 3: "should the referring court find that there are anticompetitive effects attributable to Post Danmark, it should be recalled that it is nevertheless open to a dominant undertaking to provide justification for behaviour liable to be caught by the prohibition set out in [Article 102 TFEU]."

It is effects, not form, that matter, and such effects – even when it is unnecessary, as with restrictions of competition by object, to establish them with direct evidence – must be confirmed by the Commission, according to the opinion. This is a welcome development which is consistent with the CJEU's re-emphasis earlier in 2016 on the requirement that the Commission must articulate the reasoning for a decision, as in *HeidelbergCement* (Case C-247/14 P), in order to safeguard the rights of defense of persons concerned by such decision and to enable competent review of its lawfulness by the EU courts.

But is this the elusive Higgs boson which explains the relationship between Article 101 TFEU and Article 102 TFEU? Perhaps herein lies a bit of background noise. On the one hand, the emphasis on a

review of the legal and economic context reflects AG Wahl's earlier opinion on Article 101 TFEU in the landmark *Cartes Bancaires* case (Case C-67/13 P), as well as the judgment of the CJEU in *Post Danmark II* on Article 102 TFEU. On the other hand, it could appear inconsistent with the GCEU's own recent judgments.

For example, in *Telefónica* (Case T-216/13) the GCEU upheld the finding that because the parties had not established that the duration of their non-compete clause was insufficient to restrict competition, there was no need for a detailed analysis. AG Wahl's opinion in *Intel* suggests that it was instead for the Commission to establish that the duration of the clause in *Telefónica* was sufficient to restrict competition.

And in *Lundbeck* (Case T-472/13), the GCEU upheld the finding that, even if the restrictions contained in the agreements at issue potentially fell within the scope of Lundbeck's patents, any such remedies through patent litigation were merely a possibility at the time the agreements were concluded and it was "irrelevant whether the undertakings would have undoubtedly entered the market." Certainly on one reading of AG Wahl's opinion in *Intel*, whether such competitors would have entered the market in *Lundbeck* is precisely the relevant question in law – "the fact that an exclusionary effect appears more likely than not is simply not enough."

Whether conduct can be characterized as anticompetitive under Article 101 TFEU, as AG Wahl advises also in respect of loyalty rebates under Article 102 TFEU, requires an examination of the legal and economic context by the Commission, as "[t]o date, the form of a particular practice has not been deemed important." Developing a theory to unite Article 101 TFEU and Article 102 TFEU may likewise require the CJEU, through its forthcoming judgment, to re-examine certain fundamental building blocks of EU competition law.

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