

# THE ADVOCATE GENERAL'S OPINION IN *INTEL V COMMISSION*: EIGHT POINTS OF COMMON SENSE FOR CONSIDERATION BY THE CJEU

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## Introduction

The Opinion recently delivered by Advocate General Wahl in *Intel v Commission* (“the Opinion”) invites the Court of Justice of the EU (“CJEU”) to “refine its case-law relating to the abuse of a dominant position” under Article 102 of the Treaty on the Functioning of the EU (“TFEU”).<sup>1</sup> In particular, AG Wahl suggests that the CJEU should: (i) adopt an interpretation of the case-law that considers most of the distinctions drawn between categories of rebates in the CJEU “line of authority devolving from *Hoffman-La Roche*” to be irrelevant;<sup>2</sup> (ii) consider all rebates offered by dominant firms other than quantity rebates (“volume-based rebates”) to be presumptively unlawful;<sup>3</sup> and (iii) determine, in light of “all the circumstances”,<sup>4</sup> whether such rebates are capable of having anticompetitive effects, and therefore should be deemed unlawful under Article 102 TFEU.

The Opinion is not unambitious. It proposes that the Court align the analytical treatment of rebates granted by dominant firms with the “object” and “effect” framework found in the wording of Article 101 TFEU, despite the absence of any express reference to those concepts in the wording of Article 102 TFEU.<sup>5</sup> Moreover, the Opinion addresses the delicate issue of the aims of EU competition law. It argues that, given its “economic character,” EU competition law must be viewed as a set of rules that aim “to enhance efficiency”.<sup>6</sup>

In doing so, the Opinion essentially invites the Court to return to first principles and inject common sense into the law of Article 102 TFEU, in the wake of the evolution started by *Post Danmark I* and *Post Danmark II*.<sup>7</sup> This can be understood through eight key points, the common thread of which is a concern to ensure legal coherence and economic reason in

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<sup>1</sup> Opinion of Advocate General Wahl delivered on 20 October 2016, Case C-413/14 P *Intel Corporation Inc. v Commission*, EU:C:2016:788, §3 (*Intel*).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Id.*, §81.

<sup>4</sup> *Id.*, §78.

<sup>5</sup> *Id.*, §§80 (talking of a “near-equivalent”) and 82.

<sup>6</sup> *Id.*, §41.

<sup>7</sup> Judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172 (*Post Danmark I*); Judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651 (*Post Danmark II*).

the application of Article 102 TFEU. This brief commentary highlights those eight points, and suggests that some should be taken even further than AG Wahl proposes.

### 1. An Effects Analysis underpins *Hoffman-La Roche*

Proponents of the *status quo* in the area of Article 102 TFEU rely on the 1979 judgment of the Court in *Hoffman-La Roche* to dismiss any possibility of analysing “fidelity rebates” under an effects-based approach.<sup>8</sup>

In *Hoffman-La Roche*, the Court ruled at paragraph 89 of its judgment that, in the absence of an objective justification, fidelity rebates are to be deemed presumptively unlawful, without any need to examine their effects:

“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 the said undertaking abuses its dominant position within the meaning of Article 86 of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate”.<sup>9</sup>

This statement was repeated verbatim by the General Court (“GC”) in *Intel v Commission*,<sup>10</sup> and has given rise to the extant appeal before the CJEU.

One of the Opinion’s most important contributions is its refutation of the very idea that *Hoffman-La Roche* precludes an assessment of the effects of fidelity rebates. Acknowledging that in *Hoffman-La Roche* the Court did not explicitly mention at paragraph 89 “the need to consider all the circumstances” to establish whether there is an abuse, the Opinion asks the reader to consider the subsequent paragraphs of the ruling. There, one finds a “thorough analysis of, inter alia, the conditions surrounding the grant of the rebates and the market coverage thereof”.<sup>11</sup> Further, the Opinion invites the reader to carry on, and examine the subsequent case-law on the application of Article 102 to rebates. AG Wahl finds that although all these subsequent judgments repeat paragraph 89 of *Hoffman-La Roche*, they follow the same approach and go on to consider “all the circumstances” surrounding the grant of the rebates.<sup>12</sup>

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<sup>8</sup> Judgment of 13 February 1979, *Hoffmann-La Roche v Commission*, 85/76, EU:C:1979:36 (‘*Hoffmann-La Roche*’).

<sup>9</sup> *Id.* §89.

<sup>10</sup> Judgment of 12 June 2014, *Intel v Commission*, T-286/09, EU:T:2014:547, §72 and Opinion, *supra* footnote 1, §70.

<sup>11</sup> Opinion, *supra* footnote 1, §66.

<sup>12</sup> *Id.*, §68.

The careful analysis conducted in the Opinion casts doubt on the misconceived notion that “*in the absence of an objective justification, the use of exclusivity rebates by dominant undertakings is prohibited under Article 102 TFEU*”.<sup>13</sup> It shows that, on the contrary, the necessary analysis of effects is inherent in the *Hoffman-La Roche* judgment and the case-law devolving from it. We will add that the reading of the French version of the judgment, which was the working language of the Court in 1979, confirms AG Wahl’s analysis. Paragraph 90 of the French text of *Hoffman-La Roche* states that fidelity rebates “*tendent à enlever à l’acheteur, ou à restreindre dans son chef, la possibilité de choix en ce qui concerne ses sources d’approvisionnement*”. This should be translated as fidelity rebates “*tend to deprive the purchaser of or restrict possible sources of supply,*” which is very different from the erroneous official English version of paragraph 90 of *Hoffmann-La Roche*, which says that such practices “*are designed to deprive the purchaser of or restrict his possible choices of sources*”.<sup>14</sup>

## 2. Category and “Super-Category” Mistakes

In *Intel v Commission*, the GC created a strict and novel typology of rebates under Article 102 TFEU, and associated a specific legal standard to each of the category of rebates it identified. The GC proposed that a distinction be drawn between: (i) “*quantity rebates,*” deemed presumptively lawful;<sup>15</sup> (ii) “*exclusivity rebates*” – rebates conditional on the customer obtaining all or most of its requirements from the dominant firm –, deemed presumptively unlawful;<sup>16</sup> and (iii) rebates not “*directly linked to a condition of exclusive or quasi-exclusive supply*”, which should be examined in light of “*all the circumstances*”.<sup>17</sup> In support of the GC’s distinction, a Commission official noted that “*all human thinking involves categorization*”.<sup>18</sup>

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<sup>13</sup> See, for instance, W. P.J. WILS, “The Judgment of the EU General Court in Intel and the So- Called ‘More Economic Approach’ to Abuse of Dominance” *World Competition: Law and Economics Review*, Vol. 37, No. 4, 2014, 424 and 425; Moreover, with this, the Opinion refutes any attempt to rationalize the presumptive illegality of “*fidelity rebates*” on grounds of anticompetitive intent. This thesis had been advanced by P. IBÁÑEZ and finds comfort in the English version of paragraph 90 of *Hoffmann-La Roche* where it is written that such rebates “*are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market*”. See P. IBÁÑEZ COLOMO, “Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy”, LSE Law, Society and Economy Working Papers 29/2014.

<sup>14</sup> Paragraph 90 of *Hoffmann-La Roche* clearly looks at a probabilistic effects standard, and not at an intent one. It notes that fidelity rebates “*are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market*”.

<sup>15</sup> *Intel*, *supra* footnote 10, §75.

<sup>16</sup> *Id.*, §76.

<sup>17</sup> *Id.*, §78.

<sup>18</sup> See W. P.J. WILS, *supra* footnote 13, 421.

The Opinion is also a sober reminder that all human thinking is subject to error. Building on its interpretation of *Hoffman-La Roche* as a ruling which, in spirit if not in substance, requires an analysis of effects, the Opinion reaches the logical conclusion that “*there is no separate category of exclusivity rebates*” subject to a strict rule of *per se* illegality.<sup>19</sup> According to AG Wahl, there are only two categories of rebates under Article 102 TFEU: “*volume based rebates*”, which are presumptively lawful,<sup>20</sup> and “*loyalty rebates, including but not limited to those termed by the General Court ‘exclusivity rebates’*”, which require an assessment of “*all the circumstances*”.

What is even worse, notes the Opinion, is that the GC compounded its erroneous analysis by going “*one step further*”, adding to this first error another one, namely a categorisation error.<sup>21</sup> As we wrote elsewhere in 2014, the *Intel* court augmented the second category of rebates (“*exclusivity rebates*”) by including in it not only “*exclusivity obligations*” – where A commits contractually to buying all or most of its product requirements from dominant firm B in return for a benefit – but also “*exclusivity options*” – where, if A buys all or most of its product requirements from B, A will receive a benefit (financial or non-financial).

The nuance between an exclusivity obligation and an exclusivity option is critical. On its face, an exclusivity obligation can be presumed to generate exclusivity – because the contract that provide for it can be enforced by the dominant company. An exclusivity option, by contrast, cannot be presumed to result in exclusivity because the customer can walk away from the rebate, i.e. divert its purchases to another supplier. An analysis of its effects is always necessary to establish the existence of any exclusivity.

In *Post Danmark II*, a perceptive CJEU captured this important insight. It noted at paragraph 28 that loyalty rebates cover “*an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies*” from a dominant firm.<sup>22</sup> In other words, the term loyalty rebates is reserved to exclusivity obligations. In contrast, financial incentives, rebates schedules and discount scales are exclusivity options that require an assessment that takes into account “*all the circumstances*”.

Against this backdrop, AG Wahl’s Opinion and the Court’s ruling in *Post Danmark II* offer two distinct approaches for the assessment of loyalty rebates under Article 102 TFEU.

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<sup>19</sup> Opinion, *supra* footnote 1, §198.

<sup>20</sup> Opinion, *supra* footnote 1, §81.

<sup>21</sup> *Id.*, §84 and in particular, footnote 55. The AG talks of a “*super category*” of “*loyalty rebates*” (or “*fidelity rebates*”) found in *Intel*.

<sup>22</sup> *Post Danmark II*, *supra* footnote 7, §28.

The Opinion argues that there are only two categories of rebates: volume-based rebates, which are presumptively lawful on the one hand, and all other loyalty rebates, which are presumptively unlawful and require an assessment of “*all the circumstances*” on the other hand. The *Post Danmark II* court suggests that a distinction be drawn between three categories of rebates: (i) exclusivity *obligations*, which are presumptively unlawful; (ii) exclusivity *options* and other financial incentives, which must be considered in light of “*all the circumstances*”; and (iii) quantity rebates, which are presumptively lawful.

Which of those two categorisation systems is the most sound is far from clear. Let us outline some trade-offs. The Opinion suggests an effects-based assessment for all cases, and will thus delight the exponents of the so-called “*more economic*” approach. At the same time, the Opinion repeatedly declares that all loyalty rebates are “*presumptively unlawful*”. With this, the Opinion suggests the existence of a form-based *prima facie* abuse and seems to shift the burden of proof to the dominant firm. The many parallels found in the Opinion with the “*near equivalent*” concept of “*object*” under Article 101 TFEU is telling.<sup>23</sup> If this logic is right, then the Opinion implies that the assessment of “*all the circumstances*” is essentially a means of defence for the dominant firm, not an evidentiary burden to be discharged by competition agencies and/or complainants.

*Post Danmark II*, in contrast, is stricter in its treatment of exclusivity obligations contained in agreements concluded by dominant firms, but more lenient on exclusivity options negotiated by such firms (rebates schedules, financial incentives, discount scales, etc.), which are not treated as *prima facie* abuses. To some extent, *Post Danmark II* thus seems more aligned with the effects-based analysis that the Opinion calls for.<sup>24</sup>

### **3. The *Non Sequitur* of Exclusivity = Exclusion**

The Opinion shines light on several *non sequiturs* that vitiate not only the GC judgment but also much of the antiquated, traditional Article 102 TFEU case-law. There are two aspects to consider here. The first, which is discussed in this section, is the false consequential relation between exclusivity and exclusion. The Opinion rightly observes that the “*assumption that exclusivity rebates ... result always, and without exception, in anticompetitive foreclosure permeates the entire judgment under appeal*”.<sup>25</sup> It also notes from

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<sup>23</sup> Opinion, *supra* footnote 1, §§80 and 82.

<sup>24</sup> *Id.*, §43: “*the anticompetitive effects of a particular practice assume crucial importance*” and “*EU competition rules seek to capture behaviour that has anticompetitive effects*”.

<sup>25</sup> *Id.*, §47.

the outset that the “*fate*” of the appeal depends to a large extent on whether the CJEU finds this assumption to be correct.<sup>26</sup>

The origins of this assumption can be traced back to *Hoffman-La Roche* and its progeny. Those judgments repeat that it is abusive to “*remove or restrict the purchaser’s freedom to choose his sources of supply, and to deny other producers access to the market*”.<sup>27</sup> Paul Nihoul, one proponent of this view, gives a fuller version: “*the effect of exclusivity-based rebates is to compel clients not to deal with competitors; to impede competitors from dealing with clients; and to prevent clients from choosing the products or services best corresponding to their needs*”.<sup>28</sup> For the purposes of this discussion, we will call this the “HLR” statement.

The Opinion carefully avoids challenging the merits of the HLR statement.<sup>29</sup> Instead, it provides from the outset a teleological argument based on the goals of EU competition law, noting that “*EU competition rules seek to capture behaviour that has anticompetitive effects*”.<sup>30</sup>

We hope that the following reasons will convince the CJEU to look deeper into the logic of the HLR statement and its offspring. *First*, the HLR statement contains a *fallacy of petitio principia*. When it says that loyalty rebates “*remove or restrict the purchaser’s freedom to choose*”, it focuses on the *post hoc* situation of a purchaser who *has* taken a rebate. It therefore ignores the simple fact that it may be the purchaser’s exercise of its freedom to choose that led him *pre hoc* to buy the dominant firm’s products, and take an “*exclusivity-based*” rebate.<sup>31</sup>

*Second*, the HLR statement is vitiated by a fallacy of composition. This logical problem arises when one infers that what is true of the part of the whole must be true of the whole. The HLR statement says that loyalty rebates “*remove or restrict the purchaser’s freedom to choose*”, and in turn suggests that such rebates “*deny other producers access to the market*”. Let us accept – subject to the abovementioned fallacy – that one purchaser’s freedom to buy from other producers is restricted by a loyalty rebate offered by a dominant

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<sup>26</sup> *Id.*, §48: “*the fate of the first, second and third grounds of appeal depends, ultimately, on whether the Court considers that assumption to be correct*”.

<sup>27</sup> Opinion, *supra* footnote 1, §46.

<sup>28</sup> See P. NIHOUL, “The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law?” (2014) 5(8) *Journal of European Competition Law & Practice*, Vol. 5, No. 8, 2014, 528.

<sup>29</sup> Possibly understanding that endogenous constraints have caused its ossification in the case-law.

<sup>30</sup> Opinion, *supra* footnote 1, §43.

<sup>31</sup> Schopenhauer said that this stratagem “*beg[s] the question*” over the implicit initial assumption. See A. SCHOPENHAUER, *The Art of Controversy*, translated by T. Bailey Saunders, The University of Adelaide, available at [ebooks.adelaide.edu.au/s/schopenhauer/arthur/controversy/chapter3.html](http://ebooks.adelaide.edu.au/s/schopenhauer/arthur/controversy/chapter3.html).

firm. It does not follow that those other producers' access to the whole *market* is restricted. For example, consider a dominant firm with a 75% market share. Assume that it applies an exclusivity rebate to a customer that covers 1% of the relevant market. 99% of the market would remain available to other producers, and this is regardless of the 75% market share of the dominant firm.

*Third*, the HLR statement is vitiated by a bias of causal determinism. This logical mistake arises when one infers a conclusion as to the cause of a determined situation just by looking at it, and fails to consider other causes that may produce the same result. Here, this fallacy arises because it is said that the purchaser's freedom of choice and rivals' market access are restricted by exclusivity rebates, when it is equally true that any purchase from a dominant firm restricts one's freedom of choice and rivals' market access, even in the absence of any rebate.

We hope that the Court will agree to look into the merits of the HLR statement, and refrain, in future rulings, from any reference to its flawed logic. We do not believe that this requires a revolution. In fact, the Court's seminal ruling in *Société La Technique Minière* demonstrated already in 1966 that exclusivity does not necessarily result in exclusion. In an undeservedly forgotten *dictum*, the Court stated that:

*“in order to decide whether an agreement containing a clause granting an exclusive right of sale ' is to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation” .*

Of course, the reference to *Société La Technique Minière* could be criticised on the grounds that the case concerned the analysis of agreements under Article 101 TFEU. However, the weakness of this argument can be exposed with a simple example. Consider a case in which a dominant undertaking offers to a customer a contract that provides for exclusivity rebates. The contract is litigated before a national court under both Article 101 and 102 TFEU.<sup>32</sup> The national court finds that the exclusivity covers 1% of the market, and states in its judgment that there is no infringement of Article 101 TFEU because the agreement *does not appreciably restrict competition*. The national court, however, proceeds

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<sup>32</sup> Like in the facts that gave rise to the *Van den Bergh Foods* case. See judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281.

to affirm liability under Article 102 TFEU on the ground that the contract *restricts competition* within the meaning of the HLR statement. How can the same contract restrict and not restrict competition at the same time, depending on the provision of the TFEU under which it is examined?

#### 4. The *Non Sequitur* that Any Exclusionary Effect is Anticompetitive

The second *non sequitur* besetting the GC's judgment in *Intel v Commission* is the idea that a dominant undertaking has a special responsibility not to exclude competitors, because exclusion by a dominant undertaking is anticompetitive.

In this respect, the Opinion is right to recall that “*not every exit from the market is necessarily a sign of abusive conduct, but rather a sign of aggressive, yet healthy and permissible, competition*”.<sup>33</sup> The Court has already recognised the important nuance between anticompetitive and procompetitive exclusion in *Post Danmark I*, holding that: “[n]ot 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”.<sup>34</sup>

This viewpoint is shared throughout the field of economics, and not only by mainstream “(post-)Chicago (consumer) welfarist” economists.<sup>35</sup> Even heterodox economists like Friedrich Hayek, joint recipient of the 1974 Nobel Prize in Economics, recognise that dominant undertakings should be entitled to exclude rivals: “A *monopoly based on superior efficiency, on the other hand, does comparatively little harm so long as it is assured that it will disappear as soon as anyone else becomes more efficient in providing satisfaction to the consumers*”.<sup>36</sup>

In addition to the above, we wish to make one further argument based on coherence. An interpretation of Article 102 TFEU that would hold that all conduct that produces an exclusionary effect on a rival is abusive would prohibit precisely what the antitrust laws seek to persuade dominant undertakings to do, *i.e.* to leave the “*luxurious bed*” provided by their

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<sup>33</sup> Opinion, *supra* footnote 1, §41.

<sup>34</sup> *Post Danmark I*, *supra* footnote 7, §§21 and 22.

<sup>35</sup> See W. P.J. WILS, *supra* footnote 13, footnote 120.

<sup>36</sup> See F. A. HAYEK, “The Meaning of Competition”, in *Individualism and Economic Order*, Chicago, Chicago University Press, 1948; English translation available at [mises.org/library/meaning-competition](https://mises.org/library/meaning-competition).

entrenched position and jump into the “*frying pan*” of market competition.<sup>37</sup> To put things differently: if a dominant undertaking is indiscriminately deprived of the right to marginalise rivals through both anti *and* pro-competitive means, then it is subject to a wholesale prohibition against competing with them. If all competitive conduct by a dominant undertaking is forbidden, then this is equivalent to regarding the mere holding of a dominant position as being unlawful.

## 5. Capability, Likelihood and Probability Standards

The Opinion discusses the concept of the “*capability*” of a practice carried out by a dominant undertaking to restrict competition. This issue arises because the Commission and the GC considered that exclusivity rebates have, by their very nature, anticompetitive effects.<sup>38</sup> Yet, both proceeded, “*in the alternative*”, to assess whether Intel’s impugned practices were *capable* of foreclosing competitors.

To date, the CJEU has provided little guidance on the appropriate legal test to assess that capability under Article 102 TFEU. The case-law is rife with formulaic statements, such as that the conduct of a dominant undertaking does not need to have “*a concrete effect on the markets concerned*”<sup>39</sup> or an “*actual effect*”,<sup>40</sup> but that it is “*sufficient*” to establish an abuse that the impugned conduct “*tends to restrict competition*”,<sup>41</sup> or is “*capable of having that effect*”.<sup>42</sup> The case-law also talks of conduct “*liable to have foreclosure effect*”,<sup>43</sup> “*liable to restrict competition*”,<sup>44</sup> and “*liable to produce anti-competitive effects*”.<sup>45</sup> And in *Post Danmark II*, the Court framed the test in terms of the “*likelihood*” of the conduct to produce anticompetitive effects.<sup>46</sup>

The Opinion recommends that the CJEU not stray from the path followed by *Post Danmark II*, and consider the notion of a conduct’s “*capability*” to produce such effects as

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<sup>37</sup> To paraphrase the famous expression of G.J. STIGLER, *The Citizen and the State: Essays on Regulation*, Chicago, Chicago University Press, 1975, 113: “*We may tell the society to jump out of the market frying pan, but we have no basis for predicting whether it will land in the fire or a luxurious bed*”

<sup>38</sup> The GC noted at §85 that “*exclusivity rebates...are by their very nature capable of restricting competition*”. And at §§585 and 586, it repeated: “*It should be noted that, in order to find that the exclusivity rebates were unlawful, the Commission is not required to analyse the capability of those practices to restrict competition according to the circumstances of the case at hand*”.

<sup>39</sup> Judgment of 15 March 2007, *British Airways v Commission*, C-95/04P, EU:C:2007:166, §30 (‘*British Airways*’).

<sup>40</sup> Judgment of 30 September 2003, *Michelin v Commission*, T-203/01, EU:T:2003:250, §239 (‘*Michelin*’).

<sup>41</sup> *British Airways*, §30.

<sup>42</sup> *Michelin*, §239.

<sup>43</sup> Judgment of 9 September 2010, *Tomra Systems v Commission*, T-155/06, EU:T:2010:370, §13.

<sup>44</sup> Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, §380.

<sup>45</sup> Judgment of 6 December 2012, *AstraZeneca v Commission*, C-457/10 P, EU:C:2012:770, §140.

<sup>46</sup> *Post Danmark II*, *supra* footnote 7, §§64 and 68-69.

equivalent to “*likelihood*” that the conduct will produce such effects. In turn, the Opinion discusses the degree of likelihood of anticompetitive effects necessary to establish an abuse.<sup>47</sup> AG Wahl suggests that a high probability threshold should be set: the dominant firm’s conduct must “*in all likelihood*” produce anticompetitive effects. In other words, the required degree of likelihood must be “*considerably more than a mere possibility*”.<sup>48</sup> The Opinion essentially argues that the standard of likelihood should be high on logical grounds:

“*Although it is certainly true that in its case-law the Court has consistently emphasised the special responsibility of dominant undertakings, that responsibility 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 [...]*”.<sup>49</sup>

Let us add here that the idea that the concept of “*capability*” necessitates a threshold inquiry into effects is far from new in EU competition case-law. It is present in the case-law that discusses *effects* in relation to trade. As is well-known, the application of Articles 101 and 102 TFEU requires proof that the conduct “*may affect trade between Member States*”. And the Court has consistently ruled that the assessment of the “*effect on trade*”<sup>50</sup> consists in understanding whether trade is “*capable of being affected*”.<sup>51</sup>

In turn, the Court’s case-law explains the type of threshold assessment required to establish an effect on trade. *Remia v Commission* is the leading case.<sup>52</sup> It holds that the condition is satisfied if it is “*possible to foresee*” effects “*with a sufficient degree of probability on the basis of a set of objective factors of law or fact*”.<sup>53</sup> Since then, the Court has repeatedly endorsed a probabilistic understanding of effects.

In our opinion, the case-law on *effects* on trade provides insights that could assist the Court in the development of its case-law on *effects* on competition.

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<sup>47</sup> Opinion, *supra* footnote 1, §115.

<sup>48</sup> *Id.*, *supra* footnote 1, §117.

<sup>49</sup> *Id.*, *supra* footnote 1, §118.

<sup>50</sup> For use of this expression, see Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, *OJ C* 101, 27 April 2004, 81-96.

<sup>51</sup> Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, §174.

<sup>52</sup> Judgment of 11 July 1985, *Remia v Commission*, 42/84, EU:C:1985:327, §22.

<sup>53</sup> *Ibidem*. See also, for other examples, judgment of 29 April 2004, *British Sugar plc v Commission*, C-359/01 P, EU:C:2004:255, §27; judgment of 15 December 1994, *Gøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovareselskab AmbA*, C-250/92, EU:C:1994:413, §54.

## 6. The AEC test is a legality test, not a priority test

One clear takeaway from the Opinion is that the as-efficient competitor (“AEC”) test is a legal standard forming part of the assessment of “*all the circumstances*” under Article 102 TFEU, and not merely a “*prioritization test*”. In the literature, some scholars have interpreted the AEC test narrowly as a case-selection tool, noting that an early (though not the earliest) formulation of the AEC test had appeared in a Commission soft law instrument titled “*Guidance Communication on the Commission’s enforcement priorities*”. Judiciously avoiding referring to it by the name the Commission itself employed – Guidance Paper<sup>54</sup> – Wouter Wils, for instance, contended:

“*The Priorities Paper clearly states that it is not meant to provide a test for assessing whether or not exclusionary conduct violates Article 102 TFEU (legality test), but only a test to be used by the Commission to determine, in the context of its priority setting, whether or not a case would be a priority case (prioritisation test)*”.<sup>55</sup>

The deficiency of that argument is that it fails to understand that in the Court’s case-law, the denomination of an act is not decisive, or even useful, to a determination of its legal effects.<sup>56</sup>

In *Post Danmark II*, the Court perfectly understood this, noting that the AEC test is a tool “*for the purposes of assessing whether there is an abuse*”.<sup>57</sup> The Opinion espouses a similar view, noting that the AEC test “*cannot be ignored*”, and is “*particularly useful*” for “*capturing conduct that has an anticompetitive foreclosure effect*”.<sup>58</sup>

Against this background, the CJEU should feel sufficiently comfortable to dissipate, once and for all, any remaining ambiguity over the nature of the AEC test as a legality standard. In doing so, the Court would ensure the coherence of its case-law across the board. Indeed, in both exclusionary and exploitative abuse cases, the Court invariably holds that as

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<sup>54</sup> See “Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings”, available at [http://europa.eu/rapid/press-release\\_IP-08-1877\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-08-1877_en.htm?locale=en)

<sup>55</sup> W. P.J. WILS, *supra* footnote 13, 409.

<sup>56</sup> See N. PETIT, “Intel, Leveraging Rebates and the Goals of Article 102 TFEU”, *European Competition Journal* 11.1 (2015): 26-68.

<sup>57</sup> *Post Danmark II*, *supra* footnote 7, §61. The Court explained that the AEC test is not a compulsory method to make a finding of Article 102 TFEU liability. See also paragraph 57: “*it is not possible to infer from Article 82 EC or the case-law of the Court that there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the as-efficient-competitor test*”. And paragraph 58: “*that conclusion ought not to have the effect of excluding, on principle, recourse to the as-efficient-competitor test in cases involving a rebate scheme for the purposes of examining its compatibility with Article 82 EC*”.

<sup>58</sup> Opinion, *supra* footnote 1, §165.

“a general rule”,<sup>59</sup> the “costs and the strategy of the dominant undertaking” are a “criterion of legality of conduct”.<sup>60</sup>

To clarify, we do not advocate in favour of recognising the AEC test as a mandatory test in all abuse cases. The AEC test should remain “one tool amongst others”<sup>61</sup> for the Commission and national competition authorities (unless, of course, they deliberately declare that they will use the AEC test in policy statements that generate legitimate expectations, as the Commission as done in the Guidance Paper).<sup>62</sup> Instead, we believe that the Court should follow its conventional approach in relation to tests of legality based on dominant undertakings’ costs, namely recognising that an abuse can be established “*inter alia*”, by an AEC test, and recalling that “other ways may be devised [...]” of “selecting the rules for determining whether the price of a product is unfair” and in turn abusive.<sup>63</sup>

## **7. A More Economic Approach to the Enforcement of Article 102 TFEU improves Legal Certainty, the Rule of Law and the Uniform Application of EU law**

The idea that a more economic approach to the enforcement of Article 102 TFEU would degrade legal certainty and increase enforcement costs is a red herring.<sup>64</sup>

Economics provides findings that can help fine-tune the application of the law in areas governed by abstract, broad and open-ended legal *standards*.<sup>65</sup> The specification of legal *rules* informed by economics does not only promote legal certainty. It also gradually ameliorates the protection of the “rule of law” by limiting arbitrariness. And the design of such legal rules ensures the “uniform application of Union law” in the “interlocking system of jurisdiction between the Union courts and national courts”.<sup>66</sup> Overall, this benefits defendants and complainants, agencies, courts and dominant firms, consumers and suppliers.

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<sup>59</sup> Judgment of 17 February 2011, *Konkurrensverket v TeliaSonera Sverige AB*, Case C-52/09, EU:C:2011:83, §41: “reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy”.

<sup>60</sup> Judgment of 3 July 1991, *AKZO Chemie v Commission*, C-62/86, EU:C:1991:286, §63 and following. See judgment of 14 February 1978, *United Brands Company and United Brands Continentaal v Commission*, 27/76, EU:C:1978:22, §§250-253 (*United Brands*).

<sup>61</sup> *Post Danmark II*, *supra* footnote 7, §61.

<sup>62</sup> See N. PETIT, “Rebates and article 102 TFEU: The European Commission’s duty to apply the guidance paper”, *Competition Law & Policy Debate*, Vol. 2 Issue 1, March 2016, 4.

<sup>63</sup> *United Brands*, §253, in relation to unfair pricing abuses.

<sup>64</sup> See, for such a proposition, W. P.J. WILS, *supra* footnote 13, 427.

<sup>65</sup> See for a discussion of the concept of “standards” and “rules”, D. KENNEDY, “Form and Substance in Private Law Adjudication”, *Harvard Law Review*, Vol. 89, 1976, 1687-1713 (talking of a “formal mode [that] favors the use of clearly defined, highly administrable, general rules”); See also, D.A. CRANE, “Rules Versus Standards in Antitrust Adjudication.” *Washington & Lee Law Review*, 64(1), 2007, 55.

<sup>66</sup> See K. LENAERTS, “The Rule of Law and the Coherence of the Judicial System of the European Union” *Common Market Law Review*, 44: 1625–1659, 2007.

Let us focus here on legal certainty only. No one can deny that the CJEU made the law less arbitrary when it injected economics into the interpretation of the notions of “concerted practice” in *Woodpulp*,<sup>67</sup> “collective dominant position” in *Bertelsmann AG v. Impala*,<sup>68</sup> and restrictions “by object” in *Groupement des Cartes Bancaires*.<sup>69</sup>

The Opinion is important because it invites the Court to move the law of Article 102 TFEU exactly in the same direction, noting 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”.<sup>70</sup>

The *Intel v Commission* appeal before the CJEU thus presents a potential *Woodpulp/ Bertelsmann AG v. Impala/ Groupement des Cartes Bancaires* moment. The Court should seize it.

## 8. Why a More Economic Approach does not entail more Mathematics

The claim that a more economic approach transforms competition enforcement into an exercise in quantitative mathematics is an intellectual fiction.<sup>71</sup> In recent years, the competition economics profession has itself been careful to avoid having its discipline being caricatured as a “sophisticated” branch of “hard science”.<sup>72</sup> Foreseeing a risk that courts and agencies could be prompted to marginalise the influence of economics in day to day competition policy, Simon Bishop, a seasoned EU competition economist, wrote an article in 2013 with the unequivocal title “Snake-oil with mathematics is still snake-oil”. The paper called upon the author’s peers to focus on “good practical economics”, and aim for “clarity in the application of sound, well-established economic principles, firmly rooted in and tested against observed market evidence”.<sup>73</sup> Such core, well-established principles include the propositions that cartels are wholly inefficient, that scale (or size) is not necessarily adverse to

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<sup>67</sup> Judgment of 31 March 1993, *A Åhlström Osakeyhtiö a. o. v. Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, §71.

<sup>68</sup> Judgment of 10 July 2008, *Bertelsmann AG v. Impala*, C-413/06 P, EU:C:2008:392.

<sup>69</sup> Judgment of 11 September 2014, *Groupement des cartes bancaires (CB) v Commission*, C-67/13P, EU:C:2014:2204.

<sup>70</sup> Opinion, *supra* footnote 1, §90.

<sup>71</sup> See, for expression of this idea, WILS, *supra* footnote 13.

<sup>72</sup> See S. BISHOP, Snake-Oil with Mathematics is still Snake-oil: Why Recent Trends in the Application of So-Called Sophisticated Economics is Hindering Good Competition Policy Enforcement”, *European Competition Journal*, Vol.1, 2013, 68 (writing: “Let me make an obvious but often forgotten observation: economics is a social science; it is not a hard science. In contrast to physics, say, economics is unable to conduct proper replicable controlled experiments.”).

<sup>73</sup> *Id.*, 77.

welfare, that prices below marginal costs are generally irrational, that firms respond to incentives, that profits trigger market entry, etc.<sup>74</sup>

Aiming for clarity in the application of sound, well established economic principles is precisely the direction that the Opinion proposes to follow. This involves beginning with the default principle that “*rebates enhance rivalry, the very essence of competition*”,<sup>75</sup> and applying a context-dependent framework of analysis in line with what the “*contemporary economic literature commonly emphasizes*”.<sup>76</sup> There is nothing mathematic, quantitative or sophisticated about this.

### **Conclusion**

The *Intel v Commission* appeal gives the CJEU an opportunity to ensure the much-needed coherence of its case-law. The Court can fix the last remnants of Article 102 TFEU law that are divorced from the teachings of basic competition economics and defy logic. Within the rich Opinion produced by AG Wahl, we submit that the eight key points discussed above deserve particular attention.

The Court has already advanced on this journey in *Post Danmark I* and *II*. Assuming (but who knows?) that there will be no *Post Danmark III* reference, *Intel v Commission* is the ideal case to bring about the reconciliation of Article 102 TFEU law with logic and common sense.

It is immaterial that *Intel v Commission* occurs in the context of an appeal of a GC judgment, and not in a preliminary ruling setting. In the past, the CJEU has often developed the law of competition in a judicial review context. *Woodpulp*, *Bertelsmann AG v. Impala* and *Groupement des Cartes Bancaires* are cases in point. May the “*supreme court*” of the EU have those insightful judgments in mind as it is asked to give “*the last word*” on Article 102 TFEU law in the forthcoming *Intel v Commission* judgment.<sup>77</sup>

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<sup>74</sup> Those principles may well suffer from derogations. But legal principles also have exceptions. So this objection cannot be a reason to discard the use of economics in the design of legal rules.

<sup>75</sup> Opinion, *supra* footnote 1, §90.

<sup>76</sup> Opinion, *supra* footnote 1, §§94 and 95.

<sup>77</sup> See K. LENAERTS, *supra* note 64 pp.1651 and 1652.