



The 'More Economic Approach' and Internal Coherence in the Case Law on Article 102 TFEU: Where are we after *Intel*?

Professor Pinar Akman

Centre for Business Law and Practice

School of Law, University of Leeds

p.akman@leeds.ac.uk

 @drpinarakman

The case law on rebates raises several questions relating to coherence of the law under Article 102 TFEU.



UNIVERSITY OF LEEDS

- Goal of Article 102 TFEU: protecting **competition as a process** (ie the process of rivalry) **vs** protecting **competition as an outcome** (lower prices, increased efficiency, etc)?
- Characterisation of rebates: pricing abuse **vs** non-pricing abuse?
- The test to be applied to rebates: predatory pricing standard **vs** exclusive dealing standard?
- Relevance of the as-efficient-competitor-test.
- Meaning of ‘presumptively unlawful’ practices under Article 102, and its relation to the effects-based approach.

Some of these questions go back to the Commission's Guidance and its handling of rebates.



UNIVERSITY OF LEEDS

- Conditional rebates discussed under ‘**exclusive dealing**’, suggesting that they are not pricing abuses.
- They may have anticompetitive effects **without ‘entailing a sacrifice for the dominant undertaking’**; [37] *cf* **predation, which always requires sacrifice**; fn 26.
- But, reference made to the use of **methodology for price-based conduct**; [41]. **Suggesting that they are pricing abuses...**
- The EC will investigate whether conditional rebates are ‘capable of hindering **expansion or entry even by competitors that are equally efficient** by making it more difficult for them to supply part of the requirements of individual customers’; [41].
- ‘**As long as the effective price remains consistently above the LRAIC** of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably ... the rebate is normally **not capable of foreclosing** in an anti-competitive way’; [43]. **Same as the predation test.**

Commission's decision in *Intel* did not quite follow the Guidance (and technically, did not need to).



UNIVERSITY OF LEEDS

- '[T]here is **no requirement in the case-law to demonstrate actual foreclosure** in order prove an infringement of Article [102]...'; [919] (wrt *Michelin II*; *British Airways*)
- '... the **Courts do not look into the actual impact** of the alleged anticompetitive conduct on the market in the analysis undertaken in cases like *Microsoft* or *British Airways* either'; [922].
- In addition to *Hoffmann-La Roche* case law not requiring evidence of actual foreclosure, 'a violation of Article [102] may also result from the **anticompetitive object of the practices** pursued by a dominant undertaking'; [923].
- A finding of exclusivity (ie level of rebates conditional upon exclusivity) which restricts the **customers' 'freedom to choose'**, in the absence of objective justification, is **in itself sufficient** to find an infringement; [924].
- The rebates in question were part of a **strategy to foreclose competitors**; [924].
- The Commission demonstrates '**on top of fulfilling the conditions of the case law**' that the rebates were '**capable of causing or likely to cause anticompetitive foreclosure** (which is likely to result in consumer harm)'; [925]. One way of showing this is using the AEC test.

Commission's decision in *Intel* did not quite follow the Guidance (and technically, did not need to).



UNIVERSITY OF LEEDS

- Thus, according to the EC, the case law did **not** require the showing of **even** capability or likelihood of causing anticompetitive foreclosure.
 - ***If the relevant benchmark is not capability or likelihood of anticompetitive foreclosure, can it be anything other than protection of freedom to choose of customers? Question on goals.***
- ‘Intel was able to use the tool of conditional rebates that were capable of **inducing loyalty and thereby limiting consumer choice and foreclosing the access of competitors** to the market’; [1598].
- ‘As a result of Intel’s [conduct], end-customers were artificially prevented from choosing other products on the merits (price and quality of the respective x86 CPUs), since Intel’s conduct prevented the competitors’ product from being offered ...’; [1603].
- ‘As such, Intel’s exclusionary practices had a direct and immediate negative impact on those customers who would have had a wider price and quality choice ...’; [1603].
- ***So, the goal is to preserve freedom to choose of customers and access of competitors to customers? Are these ‘as efficient’ competitors or any competitors? No reference to AECs.***

GC upheld the EC decision mostly on the basis of a process-orientated approach.



UNIVERSITY OF LEEDS

- The EC disputed the relevance of AEC test before the GC; [140].
- The GC held that there are **three categories** of rebates: quantity rebates; conditional/loyalty/exclusivity rebates; third-category rebates (eg target rebates); [74] et seq.
- Exclusivity rebates are incompatible with the objective of undistorted competition **because** they are not based on an economic transaction that justifies this burden or benefit, but ‘are designed to remove or restrict the purchaser’s **freedom to choose** his sources of supply and to **deny other producers access to the market**’; [77] (wrt *Hoffmann-La Roche* and *Tomra*)
- Finding exclusivity rebates abusive ‘**does not depend on an analysis of the circumstances** of the case aimed at establishing a potential foreclosure effect’; [80]
- Exclusivity rebates are abusive if they have no objective justification; **there is no requirement to prove capacity to restrict competition**; [81].
- Exclusivity rebates are **by their nature capable of restricting competition**; [85].

GC upheld the EC decision mostly on the basis of a process-orientated approach.



UNIVERSITY OF LEEDS

- Capability of ‘tying customers’ to the dominant undertaking is **inherent** in exclusivity rebates. *Therefore*, it is not necessary to ‘examine the circumstances of the case in order to determine whether that rebate is **designed to prevent customers from obtaining their supplies from competitors**’; [86].
- ***Thus, according to the GC, even the examination of the circumstances of the case is only carried out to establish whether customers are prevented from obtaining supplies from competitors.***
Goals.
- Exclusivity rebates are **by their nature capable of foreclosing** competitors because they provide customers an **incentive not to obtain supplies from competitors**; [87].
- **Rebates are not a pricing practice**; [99]. Cf Guidance [41].
- It is the **exclusivity** that matters – whether the competitor could have compensated the customer for the loss of the rebate is not relevant; [108]. Cf Guidance [41].
- ***Thus, restricting competition --- freedom of customers to choose leads to foreclosing competitors.***
- Showing anticompetitive object and effect may, in some cases, be one and the same thing; as in the present case; [203]-[204].

AG Wahl gave a strongly argued opinion embracing the effects-based approach.



UNIVERSITY OF LEEDS

- ‘... given its economic character, **competition law aims, in the final analysis, to enhance efficiency**’; AG Wahl Opinion [41].
- A corollary to the objective of enhanced efficiency is that the **anticompetitive effects of a practice assume crucial importance**; [43].
- It follows from the case law that rebates that are conditional on the customer purchasing all or most of its requirements from the dominant undertaking are ‘**presumptively unlawful**’; [61].
- **But an abuse of dominance is never established in the abstract**; even in the case of presumptively unlawful practices, the Court has consistently examined the legal and economic context (ie ‘**all the circumstances**’) of the impugned conduct; [73]. Conduct must – at the very least – **be able to foreclose** competitors from the market; *ibid*.
- There are **only two categories** (quantity rebates, presumptively lawful, and, loyalty rebates, presumptively unlawful); [81]-[82]. The latter requires an assessment of the legal and economic context (ie all the circumstances); [82]-[83].

Court of Justice gave a procedural answer to a substantive question (and did not answer most of the questions).



UNIVERSITY OF LEEDS

- The Court held:
 - Article 102 does not seek to ensure that **competitors less efficient** than the dominant undertaking should remain on the market (wrt *Post Danmark I*, [21]); [133]. **Goals.**
 - **Not every exclusionary effect is detrimental to competition**; competition on the merits may lead to the departure from the market or the marginalisation of competitors that are less efficient and less attractive to consumers (wrt to *Post Danmark I*, [22]); [134].
 - But **not all competition by means of price may be regarded as legitimate**; [136]. And, noted that Article 102 prohibits adoption of **pricing practices** which have an exclusionary effect on AECs; [136].

Court of Justice gave a procedural answer to a substantive question (and did not answer most of the questions).



UNIVERSITY OF LEEDS

- *Hoffmann-La Roche* 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**.’; [138].
- ***What if no foreclosure effects are alleged and a purely form-based approach is adopted?***
- ‘**In that case**, the Commission is not only required to analyse [the extent of dominance, market share covered by rebates, duration, amount, etc], but 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’ (wrt *Post Danmark I*, [29]); [139].
- ***But how can the legal test of whether the conduct is abusive be made dependent on what the dominant undertaking argued during the administrative procedure? Procedural answer to substantive question.***

Court of Justice gave a procedural answer to a substantive question (and did not answer most of the questions).



UNIVERSITY OF LEEDS

- ‘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 ..., 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** [wrt *British Airways*]. 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.’; [140]
- ***But objective justification was not a point of the appeal before the Court...***
- ***And ‘intrinsic capacity’ to foreclose as efficient competitors implies that there are inherently harmful practices.***
- ***Intrinsic capacity ≠ capability/likelihood of having foreclosure effects considering ‘all the circumstances’.***

Court of Justice gave a procedural answer to a substantive question (and did not answer most of the questions).



UNIVERSITY OF LEEDS

- **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.'; [141].
- ***Thus, if the Commission does not carry out such an analysis, then there is no need for such examination.***
- ***Namely, the GC decision was vitiated by a procedural error – not substantive error of assessment.***

What the Court of Justice did *not* do is at least important as what it did do.



UNIVERSITY OF LEEDS

- It did not overrule *Hoffmann-La Roche*.
- It did not decide on whether the GC misinterpreted *Hoffmann-La Roche* in its **categorisation** of rebates.
- It did not engage with the argument that *Tomra* (CoJ) already held that it is necessary to consider ‘all the circumstances’ in exclusivity rebates.
- It did not decide on whether loyalty rebates are **per se** abusive (save for objective justification).
- It did not explicitly rule on whether rebates are a **pricing practice** (cf GC). But implicitly suggested so; [136].
- It did not express whether **predatory pricing** or **exclusive dealing** (as the GC’s judgment suggests) is the correct framework for loyalty rebates.
- It did not refer to restriction of **customers’ freedom to choose**.
- It did not find that **AEC test** is necessary or sufficient.
- It did not require **proof of effects** – actual *or potential* – to establish abuse.

It is difficult to place *Intel* within the rest of the case law (partly because the Court of Justice said so little).



UNIVERSITY OF LEEDS

- *TeliaSonera* – suggests that what is necessary is more than reducing the profits of AECs (through squeezing their margins); an **anticompetitive effect** is necessary; [61].
- *Post Danmark I* – necessary to consider whether the pricing policy, without objective justification, produces **an actual or likely exclusionary effect**, to the detriment of competition and, thereby, of consumers' interests; [44].
- *Tomra* – CoJ already held that (by reference to *Hoffmann-La Roche and Michelin I*) that **it is necessary to consider all the circumstances**, particularly the criteria and rules applying to the grant of the rebate and whether, in providing an advantage not based on any economic service justifying it, the rebates **tend to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition**; [70]-[71].
- Parts in bold repeated almost verbatim from *Post Danmark I* which is not a rebate case, but is a pricing practice; [26].

It is difficult to place *Intel* within the rest of the case law (partly because the Court of Justice said so little).



UNIVERSITY OF LEEDS

- The CoJ also held that the GC was justified in finding that ‘the loyalty mechanism’ was **inherent** in the ability to drive out competitors due to the suction effect – it was **unnecessary to undertake an analysis of ‘actual effects** of the rebates on competition given that, for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to demonstrate that the conduct at issue is **capable of having an effect on competition**’; *Tomra* [79].
- ***It did not say that effects are irrelevant; capability to have an effect is still relevant.***
- ***Did Intel simply clarify that that effect is the effect on AECs?***

It is difficult to place *Intel* within the rest of the case law (partly because the Court of Justice said so little).



UNIVERSITY OF LEEDS

- *Post Danmark II* – the CoJ did distinguish between quantity rebates, loyalty rebates and another category of rebates like the scheme in *Post Danmark II* (where rebates were based on aggregate orders placed over a given period).
- And, the CoJ did suggest that it is for this **third type of rebate where the assessment of all circumstances is relevant**; [29].
- Prices do not need to be below cost for rebate to be abusive; [56] (also *Tomra*) ***Predation is not the test?***
- AEC test can be used, but is one tool among many; *Post Danmark II* [61].
- But, anticompetitive effect must **not be purely hypothetical**, and conduct must be **likely to have an anticompetitive effect** on the market; [65]-[67].
- It is sufficient to demonstrate that there is an anticompetitive effect which may **potentially exclude competitors at least as efficient** as the dominant undertaking; [66] (wrt *TeliaSonera*).
- ***So, did the CoJ really clarify anything new in Intel?***

It is – probably – significant that the Court of Justice did not refer to the customers' freedom to choose.



UNIVERSITY OF LEEDS

- In *Intel*, were the customers' freedom to choose actually restrained by Intel's rebates? 'Due to Intel's strong brand and long track record, many final customers would not consider switching away from Intel-based computers, even if an AMD-based alternative were offered'; [1010].
- ***Thus, customers may actually be exercising their freedom to choose in preferring Intel-based computers.***
- Arguably, the focus should not be (and is not?) on (i) customers' freedom to choose, but (ii) the competitors' ability to serve those customers.
- ***If the focus was on the as-efficient competitors' ability to access the market (and reach efficient scale?), this would make the case law more coherent.***
- The factors mentioned by CoJ in *Intel* [139] are in line with protecting (ii), but not directly relevant to protecting customers' freedom to choose – the share of the market covered by the practice; conditions and arrangements for granting the rebate; duration and the amount of the rebate; existence of a strategy to exclude AEC.



It is likely that we do not yet know the end of the *Intel* story.

- The form-based categorisation of rebates does not make sense – even pure quantity rebates can have loyalty-inducing effects.
- After *Intel*, it is still **unclear** whether rebates have to be analysed using the framework for **exclusive dealing** rather than **predatory pricing**.
- The predation test is not the same as the AEC standard – the standard is, in fact, ‘equally or more efficient competitor’, and pricing below cost is only an example (Posner, 2001).
- Case law should distinguish between the **standard** and the **test**.
- It would make a lot of sense for coherence if the standard applied to pricing and non-pricing conduct were the same.
- *How much can one read into the CoJ’s expression of the objective as protecting AECs?*