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Post Danmark II and the Intel opinion: much more in common than first meets the eye

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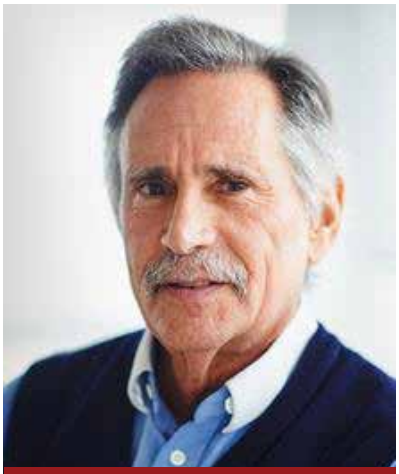
The ECJ (Credit: G. Fessy/CJUE)

If followed by the Grand Chamber of the European Court of Justice, Advocate General Nils Wahl's opinion in the Intel case will bring much-welcomed clarity to the approach of EU law to dominant firms' use of exclusive and loyalty-inducing rebates, says Skadden Arps Slate Meagher & Flom partner **James S Venit.**



Skadden Brussels partner James S. Venit.

There is a great deal to commend in the advocate general's opinion, including his recognition that discounting can stimulate competition; his insistence on abandoning the artificial form-based distinction between exclusive and loyalty-inducing rebates; and his reminder that *Hoffmann-LaRoche* took into account the relevant circumstances surrounding the rebates in question, notwithstanding the court's omission to note that it had done so.

While commentators have quickly seized on the positive aspects of Wahl's opinion, there has been less focus on the consistency of his approach with existing article 102 jurisprudence. In particular, one area that should be explored is the consistency of the advocate general's proposed approach with the ECJ's October 2015 judgment in *Post Danmark II*. The Intel opinion cites *Post Danmark II* on several occasions and notes, in particular, that the case "could be read as supporting the view that, insofar as exclusivity rebates are concerned, there might be no need to consider all the circumstances."

The opinion goes on to reject this reading on the basis that when dealing with rebates conditioned on exclusivity, *Hoffmann-LaRoche* did, in fact, carry out an analysis of all the relevant circumstances – and says any attempt to distinguish between exclusivity and loyalty-inducing rebates involves "a distinction without a difference (given that the difference lies in form rather than effects)."

The advocate general's opinion and its rejection of form-based distinctions is highly commendable.

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The discussion that follows focuses on the consistency between the advocate general's approach and the ECJ's judgment in *Post Danmark II*. This is of some importance as *Post Danmark II* might be viewed as an obstacle to an effects-based approach to price-based competition by dominant firms.

The analysis below focuses on two critical areas where the advocate general's approach appears to be supported by, and wholly consistent with, *Post Danmark II*. First, the need to consider all relevant circumstances when assessing the capability of all loyalty-inducing rebates to foreclose, irrespective of their form; and second, the relevance of the degree of market coverage when making that assessment.

I do not consider the as-efficient-competitor test because, as Advocate General Wahl noted in his opinion, any remaining uncertainty concerning the possible utility and relevance of the test "has disappeared with *Post Danmark II*". This is because that case "demonstrates that the case-law pertaining to other types of price-based exclusion cannot simply be disregarded in the context of rebate cases. As the court confirmed, by reference inter alia to that case-law, the AEC test may prove to be useful in the context of assessing a rebate scheme too."

The need to consider all relevant circumstances where the rebate is exclusive

Consistent with the advocate general's approach, paragraph 27 of *Post Danmark I*I distinguishes between only two classes of rebates: quantity rebates and loyalty rebates. This departure from the tripartite distinction relied on by the General Court in Intel would appear to be intentional. Paragraph 28 appears to complicate matters, in that the ECJ noted that Post Danmark's rebates were not accompanied by an obligation or promise to obtain all or a given proportion of the customer's requirements from the company. According to the court, this "served to distinguish… [them] from loyalty rebates within the meaning of the case-law referred to in paragraph 27".

While this language suggests that there may be a third category of rebates, it can be reconciled with the bi-partite classification in paragraph 27, since a rebate which on its face is neither a pure quantity nor a loyalty rebate may turn out to be a loyalty rebate if examination of the relevant circumstances establishes that it has a loyalty-inducing effect. Under this reading, paragraphs 27 and 28 complement each other, and support the division of rebates into two classes as proposed by Advocate General Wahl in *Intel*.

The foregoing analysis is further supported by the fact that in *Post Danmark II*, the court assessed all the relevant circumstances in the context of two distinct analyses: in paragraphs 31-36, whether the rebates in question were loyalty-inducing, and once their loyalty-inducing effect had been established; and in paragraphs 39-42, whether the rebates had the ability to foreclose.

The court's analysis of the relevant circumstances for these two different purposes strongly supports the advocate general's conclusion that any distinction between exclusive and loyalty-inducing rebates is one without a difference.

A principled argument could be made that an analysis of all the relevant circumstances might be required in order to determine whether retroactive rebates that do not include an exclusivity obligation nevertheless induce customer loyalty, but that such an analysis is not required where there is a contractual obligation requiring the customer to purchase all or most of its requirements from the dominant firm. That is because in the latter case – but not the former – the tying effect of the rebate can be established by reference to its contractual terms (although as Advocate General Wahl notes, the court in *Hoffman-LaRoche* did not so limit its assessment). However, if it is also necessary to assess all the relevant circumstances to determine whether a retroactive rebate that has been found to induce customer loyalty also has the capability to foreclose, then there is no principled basis for omitting this second analysis in the case of an exclusive rebate. As the advocate general notes, an exclusive rebate and a loyalty-inducing rebate are identical in their potential effects, even if they differ in form. As a result, if, as in *Post Danmark II*, it is necessary to carry out an assessment of the ability of a loyalty-inducing rebate to foreclose, there is no basis for not undertaking the same analysis in the case of an exclusive rebate.

The relevance of market coverage for assessing the capability to foreclose

Post Danmark II indicated that the existing, albeit ancient, jurisprudence dating back to 1975 does not require the EU courts to take into account the number of affected customers when assessing the legality of a loyalty rebate. How-

ever, the judgment also went on to state that market coverage – at least where a majority of customers are affected – may support the likelihood of exclusionary effects.

If, as *Post Danmark II* indicates, the extent of market coverage is relevant for assessing the presence of likely exclusionary effects then it must also be relevant for assessing the absence of such effects.

Post Danmark II contains a long and somewhat disturbing discussion of why it is unnecessary to consider the appreciability of actual foreclosure effects once a rebate's loyalty-inducing nature and its potential to foreclose have been established. Here, the court's analysis relies on an absolutist concept of dominance, and the special responsibility of dominant firms not to impose any further restriction of competition to reject the relevance of actual real world effects or the need for any *de minimis* threshold. While the court's mechanical approach to dominance, special responsibilities and actual effects merits criticism, its assertions on these points do not negate its earlier affirmation and Advocate General Wahl's conclusion that it is necessary to assess all circumstances, including market coverage, to determine whether a loyalty-inducing rebate is capable of tying customers and making market access more difficult for competitors.

For both Advocate General Wahl and the ECJ in *Post Danmark II*, capability to foreclose and actual foreclosure effects are not the same thing. Both agree that all relevant circumstances must be analysed to determine whether a loyalty rebate has the capability to foreclose. The point on which they may differ – the advocate general would look at actual effects when the analysis of the ability to foreclose is inconclusive, whereas *Post Danmark II* appeared to reject the relevance of actual effects for purposes of determining whether there has been an infringement – does not detract from, or affect, the point on which they agree. It may also not be a real point of disagreement, since in *Post Danmark II* the ability to foreclose had already been established.

Conclusions

The foregoing discussion indicates that the key parts of Advocate General Wahl's analysis are wholly consistent with, and are supported by, the approach taken by the ECJ in *Post Danmark II*. Both recognise the need to take account of all relevant circumstances when assessing the ability of loyalty rebates to foreclose, and the relevance of the extent of market coverage to that assessment. Furthermore, *Post Danmark II*'s acknowledgement that relevant circumstances must be considered to assess the likelihood of foreclosure once a retroactive rebate has been found to have a loyalty-inducing effect strongly supports Wahl's conclusion that there is no basis for not conducting the same exercise in respect of rebates whose loyalty-inducing effects are based on contractual obligations or promises. These points of convergence suggest that Advocate General Wahl's recommendations are well-anchored within the existing case law.

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