A Long Way from Formalism: Has Price Abuse Law in The European Union Come of Age?

BY ALEX POTTER AND NATHAN WILKINS

In December 2017, Advocate General Wahl wrote an Opinion to the EU Court of Justice (CJ) in the MEO case, in which he concluded:

[T]he rule has progressively developed that, where the conduct of an undertaking is examined by reference to Article 102 TFEU, the existence of a restriction of competition cannot be presumed. In order to conclude that there is such a restriction, it is necessary in every case to examine the actual or potential effects of the measure complained of, having regard to all of the circumstances of the case.1

AG Wahl was heralding the entrenchment of effects-based analysis in EU abuse of dominance law. As intuitive as his opinion appears, such a claim would have been hard to make even four months earlier. In reaching his view, Wahl relied particularly on the CJ’s September 2017 judgment in Intel—another case in which he had served as Advocate General—which reinterpret the approach to loyalty rebates that had prevailed in the European Union since 1979.2

Prior to these developments, EU law on abuse of dominance had a well-earned reputation for basing assumptions about the effect of pricing conduct on broad, form-based categorizations. Similarly, selective price cutting could readily be construed as abusive price discrimination. The abiding impression from several decades of the Court’s judgments was that many types of price competition were hazardous when practiced by firms in a dominant position.

The Intel judgment is ground-breaking in several respects. It can be seen, however, as the latest point on a course the CJ has been charting—not always in a straight line—since at least 2010. Concepts developed in judgments about predatory pricing and margin squeeze have been adopted in judgments about price discrimination and, finally, against some resistance, flowed into judgments about loyalty rebates. Steered by two interventions of the CJ’s Grand Chamber, the expanded panel of judges that convenes to deliver important developments in the law, there would appear to have been a clear determination by the Court to modernize the EU competition law rules that apply to the pricing conduct of dominant firms.

The outcome is arguably an overarching theory of harm relating to exclusionary pricing abuse that is more coherent and firmly grounded in meaningful effects analysis. Four key conclusions can be proposed.

First, there are no more hard presumptions that certain types of above cost pricing conduct are abusive—an analysis of actual or potential effects will in practice always need to be undertaken.

Second, while there is no requirement to prove that a particular effect has actually arisen in the market, the analysis must review in a meaningful way whether pricing conduct has the capacity to exclude—or foreclose—competitors. Foreclosure must be judged to be likely or probable. This requires a deeper analysis than observing that a detrimental effect may tend to arise from a particular pricing mechanic simply due to its form.

Third, for the most part only foreclosure of competitors who are as efficient as the dominant firm counts towards a finding of abuse—less efficient competitors receive no protection unless warranted by an extreme market structure.

Fourth, dominant firms are allowed to negotiate prices just like everyone else—there is no overriding requirement on them to offer a uniform price to all trading partners in an equivalent position. Absent an attempt to discourage cross-border trade within the European Union, price discrimination is not an abuse unless it involves pricing below cost or leads to the clear possibility of a competitive disadvantage for a dominant firm’s customers or suppliers. Again, this competitive disadvantage cannot be presumed.

There remain important issues to be explored. While an effects-based framework has been established, thus far there is little clarity on how it will be applied. Most notably, use of the “as efficient competitor” (AEC) test—whereby an examination is made of a dominant company’s costs to determine whether its pricing conduct would drive an equally efficient competitor from the market—appears not to be mandatory for the assessment of rebates. However, the CJ has acknowledged it to be a useful tool and confirmed that if a dominant company deploys such evidence in its defense then it must be taken seriously.

What types of market structure could cause the courts, or initially the EU enforcement authorities, to conclude that less

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efficient competitors should be shielded from above cost price competition by a dominant firm? How much, or how little, of any given market need be foreclosed for an anti-competitive effect to be established? The approach to be taken in the Intel case by the EU General Court, to which the case has now been returned for re-hearing following the CJ’s ruling, may do much to set the tone for how confident dominant firms will feel in exploring their new-found flexibility in this area.

It also appears to remain the case that evidence of a strategy or plan on the part of the dominant firm to drive a competitor out of the market will lead to a finding of illegality, at least where that competitor is equally efficient. This notion sits uneasily with the CJ’s oft-repeated declaration that abuse is an objective concept. Moreover, distinguishing between a (legal) intention to win business from a competitor and an (abusive) intention to drive a competitor out of the market may in some cases rest on fine judgements and, one suspects, be disproportionately influenced by unwitting turns of phrase in business documents.

Clarity in this area would be enhanced if front line competition law enforcers in the European Union were prepared to publish more about pricing practices that they consider not to be abusive. For the time being, the European Commission remains suspicious of rebates that are awarded for exclusivity or are conditional on other loyalty-inducing requirements. Dominant companies should still expect close scrutiny when they choose to offer them.

Nevertheless, EU law seems to have moved decisively away from formalism and towards a more unified theory of pricing abuse underpinned by effects analysis. The Commission can therefore expect to be held by the Court to a more rigorous standard and a more searching review of its analysis. To get to this stage has been a journey worth making.

Formalism Takes Root

Article 102 of the Treaty on the Functioning of the European Union (TFEU) sets out EU law’s prohibition on abuse of a dominant position. The second paragraph describes certain types of conduct that can fall foul of the prohibition. Those most relevant to pricing conduct are: sub-paragraph (a), which refers to “directly or indirectly imposing unfair purchase or selling prices” and sub-paragraph (c), which lists “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.”

The CJ has been clear, however, that these are only examples. A wide range of pricing conduct has in practice been found to amount to an abuse of dominance.

Loyalty Defined. Decisions on exclusionary pricing practices under Article 102 TFEU inevitably cite the CJ’s 1979 judgment in Hoffmann-La Roche as a key authority. This case established the principle that a dominant company could not tie customers to obtain “all or most” of their requirements exclusively from itself, even if it did so at their request.

The same applied to granting fidelity—or loyalty—rebates that were conditional on a customer obtaining all or most of its requirements from the dominant firm. Anticompetitive foreclosure effects could be assumed from such a rebate, and no further analysis was required.

In its 1983 ruling in Michelin I, the Court addressed discounts that were conditional on a customer meeting a progressive scale of target volumes. These were not loyalty rebates as there was no requirement for exclusivity or obtaining a specific proportion of supplies from the dominant company. Nor were they “mere” volume rebates that could be presumed to be non-problematic. The CJ therefore held that it was necessary to consider “all the circumstances, particularly the criteria and rules for the grant of the discount,” to determine whether the discount “tends to” have anticompetitive effects. The Court ruled that a discount based on volumes sold over a “relatively long reference period” (in this case, one year) had the “inherent effect” of putting pressure on the buyer to achieve the targets.

Volume-based discounts—and Michelin—were again in the firing line in 2003 when the EU Court of First Instance (CFI, subsequently renamed the General Court) delivered its Michelin II judgment. The CFI held that a rebate scheme structured to be quantity-based would not avoid illegality if it otherwise had loyalty-inducing effects. The Court therefore applied the approach in Michelin I of considering “all the circumstances” with a particular focus on the rebate rules.

The CFI acknowledged that a quantity rebate would not be problematic if the discounts were granted on individual invoices according to the size of the order. Schemes where the discount applied only to quantities above a threshold (sometimes known as “top slice” rebates) would be less loyalty-enhancing than retrospective (or “roll-back”) rebates, which were conditional on a customer purchasing all or most of its requirements from the dominant supplier in a given period. The main rebate scheme here was a roll-back rebate with a reference period of a year. This failed the test.

Such a rebate could nevertheless be acceptable if based on an economically justified countervailing benefit. Accordingly, a dominant company would be allowed to pass on cost savings caused by increased order levels. The burden of proof to show these benefits, however, rested on the dominant company. Michelin’s attempts in this regard were branded “too general,” and dismissed.

In 2007, the CJ took essentially the same approach in British Airways to a scheme of target rebates based on the percentage growth in sales of British Airways tickets achieved by travel agents. The Court determined that its review of all the circumstances required identification of whether the discount was “capable” of making market entry “very difficult or impossible for competitors” or making it “more difficult or impossible” for counterparties to choose different sources of supplies or purchases. However, the Court pointed only to the significantly higher levels of British Airways ticket sales compared to those of its rivals as sufficient to endorse the
conclusion that competitors were unable to match these discount levels. British Airways’ argument that rival airlines were financially capable of offering a competitive response was deemed inadmissible.

**Discriminatory Tendencies.** In *Hoffmann-La Roche*, the CJ had also reached the conclusion that the loyalty rebates involved price discrimination, or “applying dissimilar conditions to equivalent transactions,” because customers received differential discounts for the same level of sales. There was, however, no mention of the additional requirement of Article 102(c) TFEU that trading parties be placed at a competitive disadvantage as a result.14

In *British Airways*, the CJ introduced some discipline to the analysis by underlining that a finding of abuse under Article 102(c) TFEU requires both that the behavior is discriminatory and that it places a counterparty at a competitive disadvantage. It was found to be sufficient, however, that the conduct “tends to” distort the competitive position of the dominant company’s suppliers or customers. There was no requirement for proof of an actual, quantifiable deterioration in an individual trading partner’s competitive position, and the Court assumed an effect without any analysis of the impact on travel agents’ costs or profits.

**Pricing Below Cost.** In 1991, the CJ defined the abuse of predatory pricing in its *AKZO* judgment. The Court held that setting prices below average variable costs (which vary depending on quantities produced) inevitably involved an abuse, as each sale generated a loss. Prices below average total costs (the sum of fixed and variable costs) would also be regarded as abusive if they were part of a “plan for eliminating a competitor.” Such prices, noted the Court, could drive competitors “which are perhaps as efficient as the dominant undertaking” from the market—foreshadowing a theme that would not return to the CJ’s attention for many years.15

**Pricing Above Cost.** Over this period, the EU courts also took several decisions which condemned selective price cutting above cost that targeted a competitor’s customers.16 While the conduct amounted to a form of price discrimination, the courts’ analysis did not include application of Article 102(c) TFEU—the harm identified was exclusion of the dominant company’s competitors rather than its business partners. Despite potential aggravating circumstances in these cases, there was also no clear limitation on the Court’s willingness to censure above-cost price cutting.

In the resulting uncertainty, dominant companies were at risk if they sought to retaliate against a competitor with selective price cutting, even where this did not involve predatory pricing or loyalty rebates.

**A Change of Tack**

In consequence, in past decades EU price abuse law gained the reputation of censuring rebates due to broad, form-based categorizations.17 Exclusivity and loyalty rebates were abusive. Pure quantity discounts were not. Other types of rebates were said to require a review of “all the circumstances.” This review, however, looked at the theoretical effects suggested by the form of the rebate and paid limited attention to whether such effects were likely in practice, or indeed to whether it was a proper aim of competition law to protect less efficient competitors from above cost price competition by a dominant supplier. In practice, dominant companies were on notice that any type of conditional, roll-back rebate was subject to a near presumption of illegality. Other types of price reduction were also laden with risk unless applied uniformly to all customers. Overall, price competition by a dominant firm in the European Union seemed inherently dangerous.

**Efficient Priorities.** In 2005, the European Commission responded to the debate by introducing a discussion paper on the application of Article 102 TFEU to exclusionary abuses. Then Competition Commissioner Neelie Kroes stated that dominant companies should be allowed to compete effectively, and described the task of setting this policy objective in a consistent legal and economic framework to be an ambitious project.18

This initiative eventually led to the issue in December 2008 of the Commission’s prioritization guidance for Article 102 TFEU (Guidance Paper).19 The Guidance Paper established a more effects-based approach to determining which exclusionary abuse cases the Commission would pursue. The Commission explained that the AEC test could be used for identifying when certain conduct—including exclusivity and loyalty rebates—would lead to anticompetitive foreclosure. However, the Guidance Paper expressly did not purport to reflect the law—it was guidance on case prioritization.

**Margin Squeeze Leads the Way.** Notwithstanding this, the CJ quickly showed signs of embracing the new approach. In its 2010 *Deutsche Telekom* judgment, a case involving the abuse of margin squeeze in the telecommunications industry, the Court ruled that Article 102 TFEU prohibited a dominant company from adopting pricing practices which had an exclusionary effect on its “equally efficient actual or potential competitors.”20 It then endorsed use of the AEC test as a first step in determining whether an abusive margin squeeze had occurred, referring to the *AKZO* judgment for support. This would amount to an abuse if it was “capable” of causing foreclosure.

The CJ followed the same approach in 2011 in *TeliaSonera*, also involving margin squeeze, with two important additions.21 First, it commented on some potential limits to the usefulness of the AEC test. The Court confirmed the principle that the test contributed to legal certainty because it allowed a dominant company to gauge the legality of its pricing conduct by reference to its own costs, rather than by reference to a competitor’s costs which often would not be known. However, the Court added that a competitor’s costs might be relevant in some circumstances—particularly where the dominant company’s cost structure was not ascertainable, where the relevant costs of the dominant company related to use of infrastructure whose cost had already been written off, or where the level of costs was “specifically attributable
to the competitively advantageous situation in which its
dominant position places it.”

Second, the Court explored the likelihood that a margin
squeeze would result in an anticompetitive effect. Where an
AEC was compelled to sell at a loss to compete with the domi-
nant company, a potentially exclusionary effect was probable.
However, it was also possible for an anticompetitive effect to
arise if an AEC avoided making a loss but had to sell at an arti-
ficially reduced level of profitability. This would be the case if
it was likely, due to, for example, reduced profitability, that “it
would be at least more difficult for the operators concerned to
trade on the market concerned.” The bar seemed to be set
relatively low.

Use of the AEC had therefore been established in this
area of price abuse law, but with a warning that it would not
always provide a clear defense. In some situations—certain of
which appeared more relevant to where dominance was
linked to being an operator of legacy infrastructure—appli-
cation of the AEC would need to be qualified.

The Grand Chamber Steps In: Post Danmark I
In March 2012, the CJ convened its Grand Chamber to
deliver a ruling in the first Post Danmark case that seemed
intended to impose a more coherent analytical structure on
the assessment of exclusionary pricing abuses. As signaled
by its expanded composition, the Court was in the mood to
establish a new course.

“Primary Line” Price Discrimination Clarified. In
addressing the main question under review, the CJ drew a line
under previous cases that censured dominant companies for
profitably but selectively cutting their prices to compete with
rivals. Dubbed “primary line” discrimination in Advocate
General Mengozzi’s Opinion to the Court, this (non-rebate)
pricing conduct affected the dominant company’s competi-
tors (as opposed to “secondary line” discrimination under
Article 102(c) TFEU, where the theory of harm was to place
customers or suppliers at a competitive disadvantage in their
markets).

In Post Danmark I, the CJ imported the cost benchmarks
for predatory pricing that it had first deployed in the AKZO
judgment to a case about primary line price discrimination.
The conduct in question involved targeted price cuts to cer-
tain customers which either fell between the average total cost
and the average incremental cost thresholds for predatory
pricing or were above Post Danmark’s average total cost
altogether.

The Court started by setting out a broad principle that
price discrimination was not in itself anticompetitive:

The fact that the practice of a dominant undertaking may
. . . be described as “price discrimination,” that is to say,
charging different customers or different classes of customers
different prices for goods or services whose costs are the same
or, conversely, charging a single price to customers for whom
supply costs differ, cannot of itself suggest that there exists an
exclusionary abuse.

The Court then dismissed the selective price cuts that
remained above average total cost, finding “[i]n those cir-
cumstances, it cannot be considered that such prices have
anticompetitive effects.” For the rest, the CJ stated—having
previously noted that there was no evidence of a plan by Post
Danmark to eliminate a competitor—that charging prices at
a level between average total cost and average incremental
cost could not on its own amount to an exclusionary abuse.
It was necessary to consider whether the conduct produced
“an actual or likely exclusionary effect, to the detriment of
competition.” In other words, theoretical “tendencies”
would not suffice.

The CJ seemed to be seeking to harmonize different strands
of price abuse law in a manner that would enable dominant
firms to predict with greater certainty whether selective price
retaliation would be viewed as illegal.

The “As Efficient Competitor” Goes Mainstream.
Arguably the more important aspect of the Grand Chamber’s
judgment was that it could also be viewed as taking the AEC
concept applied by the Court in the margin squeeze cases and
establishing it as a central concept for the application of
abuse of dominance law more generally. For the first time, the
Court declared what to economists had long appeared self-
evident: dominant companies should not be condemned for
price competition that forecloses inefficient competitors:

Nor does [Article 102 TFEU] seek to ensure that competi-
tors less efficient than the undertaking with the dominant
position should remain on the market. . . . Thus, not 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 competi-
tors that are less efficient and so less attractive to con-
sumers from the point of view of, among other things, price,
choice, quality or innovation. . . . Thus, Article [102 TFEU]
prohibits a dominant undertaking from, among other things,
adopting pricing practices that have an exclusionary effect on
competitors considered to be as efficient as it is itself and
strengthening its dominant position by using methods other
than those that are part of competition on the merits.

Following Post Danmark I, this notion could no longer be
viewed as a limited concept. It seemed to have been proposed
as a defining principle for exclusionary abuse under Article
102 TFEU.

Familiar Headwinds: Tomra and Post Danmark II
It was perhaps ironic, then, that the CJ’s next two pro-
nouncements on rebates—the first issued less than a month
after Post Danmark I—expressly rejected any requirement to
make use of the AEC test.

In April 2012, the CJ delivered its ruling in Tomra—
which denied that it was necessary to show pricing below
cost, or “negative prices”—to find that a retroactive rebate
scheme was abusive. Instead, the Court confirmed that a
focus on various aspects of the rebate mechanism itself, simi-
lar to those discussed in British Airways, was sufficient.
Price abuse law as it applied to rebates was apparently unaf-
ected by the notions of efficiency that had been described just 23 days earlier.

A second judgment relating to Post Danmark in October 2015 sent more mixed messages. It is tempting to think of the CJ’s second chamber which ruled in this case as feeling torn between the Grand Chamber’s outing in Post Danmark I and the Court’s established body of case law on rebates. In the event, the Court seemed to land somewhere in between. While it chose largely to follow the orthodoxy of the previous rebates cases, the Court also made enough comments about the AEC test to suggest that this was a judgment necessitated by a relatively specific set of circumstances.

**Almost All the Circumstances.** The pricing conduct before the CJ in Post Danmark II was once again a volume-based rebate. Due to its retroactive nature over a series of orders, the rebate could not benefit from the presumption of legality for quantity rebates, and nor was it a loyalty rebate presumed to be illegal, but instead a rebate that once again required an assessment of all the circumstances.

The Court ruled that it was necessary to assess the structure and terms of the rebate, the extent of the dominant position, and the conditions of competition on the market. Nothing explicit here about the efficiency of competitors or any broader principle set out in Post Danmark I. Instead, the Court’s observations about these circumstances stressed Post Danmark’s high market share, the fact that it enjoyed a statutory monopoly for a large proportion of the market, and the likely foreclosing effect arising from a retroactive rebate offered by a firm with such a high share. The closer a customer was to a threshold for the next discount level, the less likely it was to purchase from competitors of the dominant supplier. This was all very reminiscent of British Airways and Tomma, which were cited with approval in this part of the judgment. The review of all the circumstances was in practice based largely on market share and the form of the rebate.

**Not Always, But Sometimes.** As regards the AEC test, the CJ noted that the concept had previously been applied by the Court in cases about predatory pricing, margin squeeze, and selective price cuts. Rebates were, however, different: it was “not possible to infer” that Article 102 TFEU required use of the AEC to find a rebate scheme abusive. Nevertheless, immediately after reaching this conclusion the Court stressed that there was no reason either to exclude use of the AEC. The CJ then declared that the AEC test “must thus be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme.”

Interspersed with these conclusions was commentary about the market structure which may explain the CJ’s reluctance to embrace the AEC test in all cases. On the facts before the Court, Post Danmark enjoyed a market share of 95 percent and a statutory monopoly which covered 70 percent of the relevant market. In these circumstances, said the Court, the AEC test could be of no relevance because the emergence of an AEC was “practically impossible.” Moreover, in a market such as this—with the added protection of high barriers to entry—even competition from a less efficient firm would be beneficial.

This possible qualification to AEC analysis had originally been noted by the European Commission in its Guidance Paper, where it stated that “in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price-based conduct leads to anti-competitive foreclosure.” A plausible characterization of Post Danmark II, therefore, is of the Court being unwilling to apply the AEC to the facts at hand, but going out of its way to indicate that the AEC would have a role to play outside of such extreme circumstances.

**Not Purely Hypothetical.** Finally, the CJ addressed how likely and how serious an anticompetitive effect should be to amount to an abuse. As regards likelihood, the CJEU referred to the several different formulations of the standard required—“must not be purely hypothetical;” “may potentially exclude competitors;” “is capable of restricting competition;” “likely” to have an anticompetitive effect; “produces an actual or likely exclusionary effect” (this last example from Post Danmark I)—and implied that these all meant the same thing. In conclusion, the Court ruled that an anticompetitive effect must be “probable.” There was, however, no need to show that an anticompetitive effect was of a serious or appreciable nature.

**Loyalty Revisited: Intel in the Court of Justice**

Against this backdrop, the progress of the case against Intel came to be watched with increasing interest. Facing a European Commission fine of €1.06 billion for conduct that included rebates which were said to be conditional on exclusivity, Intel took its fight to the EU courts. The Commission had decided, relying on Hoffmann-La Roche, that there was no legal requirement to conduct an effects analysis for exclusivity rebates, as these were illegal simply due to their form. Nevertheless, the Commission had also conducted a lengthy effects analysis, and found that the rebates failed the AEC test—equally efficient competitors would, it said, have been forced to offer their products below a viable measure of Intel’s costs to match the rebates Intel had offered.

In June 2014, the General Court dismissed Intel’s appeal. In doing so, it refused to review Intel’s objections to the Commission’s AEC analysis, holding that it was not necessary to consider effects and, even if it were, there was no obligation to apply the AEC test. The court also expressly declined to apply the ruling in Post Danmark I to exclusivity rebates.

In response to Intel’s further appeal, the CJ once again assembled its Grand Chamber to make its point.

**Different Streams Converge.** The first signs that the General Court had misjudged the tides came from AG Wahl. In a 75-page Opinion to the CJ, Wahl took issue with most aspects of the General Court’s ruling. In his view, there were
only two types of rebates: those based solely on volume, which were presumed to be lawful, and the rest, which required a review of all the circumstances before they could be condemned as abusive. Criticizing the view that exclusivity rebates were a category apart from other pricing abuses, to which the principles in Post Danmark I and the margin squeeze cases did not apply, Wahl said:

To my mind, dismissing the relevance of that case-law is problematic: it results in an unwarranted distinction between different types of pricing practices. Indeed, loyalty rebates, margin squeeze practices as well as predatory pricing possess the common feature constituting “price based exclusion.”

It goes without saying that it is of the utmost importance that legal tests applied to one category of conduct are coherent with those applied to comparable practices. Sound and coherent legal categorisation benefits not only undertakings in terms of increased legal certainty, but also assists competition authorities in the enforcement of competition law. Arbitrary categorisation does not.

The Grand Chamber adopted a more statesmanlike tone, but nonetheless agreed.

The CJ chose to address the issue simply by citing the key finding of Post Danmark I verbatim. Thus, Article 102 TFEU did not seek to ensure that less efficient businesses stayed on the market. Legitimate competition on the merits may by definition lead to the exit of less efficient competitors. Article 102 TFEU therefore prohibited a dominant firm from, amongst other things, adopting pricing practices that had an exclusionary effect on competitors who were as efficient as itself. Post Danmark II was not mentioned at all.

There was now no further room for ambiguity. The theory of harm underpinning different types of pricing abuse had been unified.

**A Presumption Recharacterized.** This left the delicate question of what to make of the CJ’s seminal judgment on exclusivity and loyalty rebates in Hoffmann-La Roche. Here, the CJ deployed some careful footwork. It acknowledged that a presumption of abuse did indeed exist for exclusivity requirements, whether they were absolute or in return for a rebate. The same applied to loyalty rebates that were conditional on a customer obtaining all or most of its requirements from the dominant firm. However,

that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that this conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

In that case, the Commission is not only required to analyse, first, the extent of the undertaking’s dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is 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 . . . .

Given that the Commission had carried out an analysis of whether the rebate scheme was capable of foreclosure, said the CJ, the General Court was required to review Intel’s challenge to that analysis. Moreover, because the AEC test played a key role in the Commission’s conclusion that the rebate scheme was capable of foreclosing equally efficient competitors, the General Court should have considered Intel’s objections to the Commission’s application of the test. The case was therefore sent back to the General Court for reassessment.

**Where to Now for Rebates?** How best to sum up the state of the law following these judicial maneuvers? First, the CJ has not overruled the presumption that exclusivity or loyalty rebates are abusive. However, this presumption now appears to be easily nullified—assuming the dominant company brings evidence during the investigation that its rebates are not capable of leading to foreclosure, the Commission must then look closely at effects. Underpinning this is the Court’s starting point that Article 102 TFEU permits pricing conduct by a dominant firm that can drive less efficient competitors from the market. The presumption should, therefore, have become one in name only.

The strategy pursued by the dominant company remains one of the relevant factors, although its relevance has been limited to strategy to exclude “at least as efficient” competitors. This seems to be a conscious restricting of the relevance of intention.

As for the AEC test, the Court avoids any commentary on whether or when it must be deployed. Rather, the CJ confines itself to finding that because the AEC test was an important part of the Commission’s assessment of foreclosure, the General Court must consider Intel’s criticism of this aspect of the Commission’s analysis. It therefore appears to remain the formal position that use of the AEC test is not mandatory for rebates. However, given the Court’s opening comments on the purpose of Article 102 TFEU, there also seems to be little scope left to ignore the AEC test when it is raised, with accompanying evidence, by a dominant company. We can evidently conclude that the market structure at issue in Intel—where the dominant company was held to have a market share of 70 percent or more—was not one where the AEC test was rendered irrelevant as in Post Danmark II, given that the Commission considered the test at length.

Finally, on the issue of likelihood, the CJ reverted back to the language of “capability.” AG Wahl had been characteristically forthright about what this meant, stating that the assessment of capability was to determine whether “in all likelihood” there would be an anticompetitive foreclosure effect. He continued:

[L]ikelihood must be considerably more than a mere possibility that certain behaviour may restrict competition. . . . Contrariwise, the fact that an exclusionary effect appears more likely than not is simply not enough.

…To assume the existence of an abuse on the basis that, on balance, anticompetitive foreclosure seems more likely than
not risks capturing not only isolated instances of practices, but a non-negligible number of practices that may, in reality, be pro-competitive. The cost of error of such an approach would be unacceptably high due to over-inclusion.41

The CJ chose not to comment on Wahl’s views or to elaborate any further itself. However, following both Post Danmark judgments, the standard appears to be that a foreclosure effect must be likely or probable (or to have actually been shown to have occurred in the market). Wahl’s Opinion will provide fertile ground for future debate about whether that standard is met in individual cases.42

Price Discrimination Repositioned: MEO

In the case of MEO, the CJ directed its attention afresh to the appropriate treatment of differential pricing or “secondary line” price discrimination under Article 102(c) TFEU (as opposed to the “primary line” discrimination that was at issue in Post Danmark I).

The litigation arose following a decision by the Portuguese Competition Authority to reject a complaint made by MEO, a pay-TV operator, against GDA, a collecting society that managed the rights of artists and performers and collected royalties on their behalf. GDA had applied a different royalty tariff to MEO than it had applied to MEO’s competitor. MEO alleged an abuse of dominance by GDA, based partly on discrimination, and subsequently challenged the Portuguese Authority’s rejection of this complaint.

In his Opinion to the Court, AG Wahl noted: “Contrary to what a superficial analysis might suggest, point (c) of the second paragraph of Article 102 TFEU does not compel monopoly holders or dominant undertakings to apply uniform tariffs to their trading partners.”43

The CJ’s ruling in April 2018 followed this philosophy. It started with the approach set out in British Airways—there must be discrimination and that discrimination must “tend to” hinder the competitive position of some of the dominant company’s business partners, without it being necessary to show an actual, quantifiable deterioration for individual partners. The Court added, however, that it was necessary to examine all the relevant circumstances to determine whether the price discrimination had produced or was “capable of” producing a competitive disadvantage.44

In particular, the Court confirmed that “the mere presence of an immediate disadvantage affecting operators who were charged more, compared with the tariffs applied to their competitors for an equivalent service, does not, however, mean that competition is distorted or is capable of being distorted.”45

The CJ then set out guidance for the types of circumstances that may be relevant.46 It considered three points in particular to be of importance in the case before it. First, it noted the negotiating power of the dominant company’s customers and apparent lack of control the dominant company had over the royalties charged to MEO, which were set by arbitration. Second, the Court held that where the effect of the differential prices on the costs or profits of a trading partner was “not significant,” this may in some cases allow the deduction that the price differentiation was not capable of having an effect on its competitive position. Finally, the Court was influenced by the apparent lack of any motive on the dominant company’s part to exclude one of its trading partners from a downstream market, noting that the dominant company itself had no presence on that market.

In conclusion, the CJ stated that to find an abuse, the analysis of all relevant circumstances must lead to the conclusion that the price discrimination “has an effect” on the costs, profits, or other relevant interests of one or more trading partners of the dominant firm.

It is likely to remain the case that discrimination by a dominant firm which penalizes cross-border trade will be illegal.47 Beyond that, however, the combination of MEO and Post Danmark I should banish the notion that price discrimination by a dominant company is inherently anticompetitive.

There will be a strong interest in understanding the proportion of costs at which competition law enforcers will start to consider that a dominant company’s input could have a relevant impact on its trading partners. At first sight, the CJ’s cautious comments about costs not being significant do not allow for a lot of freedom. The Court, however, was reacting to the facts before it. In certain industries, at least where individual suppliers represent a small proportion of a customer’s costs, dominant firms should be freed from the uneasy feeling that they operate in a pricing straightjacket in Europe.

If adopted in practice, this would be a welcome outcome.1

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3 A welcome example of this is the UK Competition and Markets Authority’s “no grounds for action” decision issued on August 10, 2017, relating to rebates offered by Unilever: Single-Wrapped Impulse Ice Cream: Suspected Anti-Competitive Conduct, www.gov.uk/cma-cases/consumable-goods-suspected-anti-competitive-conduct.
5 This provision was previously contained in Article 86 of the Treaty of Rome and then Article 82 of the EC Treaty. For simplicity, we refer to Article 102 TFEU throughout.
6 Article 102(d) TFEU also lists “making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the
subject of such contracts." This has been the basis of cases relating to bundling discounts, which we do not address here.


9 Id. at 89–90. The Court noted the possibility that exclusivity or fidelity rebates may be justified in exceptional circumstances where the anticompetitive effects were outweighed by efficiencies, a theme to which later judgments would return.


11 Id. at 81.


14 In its earlier Suiker Unie judgment, the first to address exclusivity rebates, the CJ had simply noted that customers competed with other buyers from the dominant firm: Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, Coöperatieve Vereniging Suiker Unie ‘UA and Others v. Comm’n, 1975 E.C.R. 1663, ECLI:EU:C:1975:174, at 525.


22 Id. at 44–45.

23 Id. at 74.


26 The average variable cost benchmark from Akzo was reformulated as the similar concept of average incremental costs.


28 Id. at 36, 44.

29 Id. at 21–25.


32 Id. at 55–58, 61.

33 Id. at 59, 60.

34 EC Guidance, supra note 19, at 24.


39 Id. at 133–36.

40 Id. at 138–39.


42 Support has been expressed for Wahl’s view by a fellow AG in Case C-123/16 P. Orange Polska S.A. v Comm’n, Opinion of Advocate General Wathelet (Feb. 21, 2018), ECLI:EU:C:2018:87, at 98.


45 Id. at 26.

46 Id. at 31. The Court listed as relevant factors the dominant position, the dominant company’s negotiating power as regards the relevant tariffs, the conditions and arrangements for charging the tariffs, their duration, and amount. The Court also listed, referring to Intel, the possible existence of a strategy to exclude a dominant company’s business partner which is at least as efficient as its competitors from the downstream market. This apparent application of the AEC test to a business partner active on a different market than the dominant firm raises some questions of practicality (the dominant firm may well not be able to assess the relative efficiency of its customers) and is not the most obvious scenario for application of this principle.