Overview
On October 20, 2016, AG Wahl delivered a non-binding opinion in the Intel Corp v Commission case (C-413/14P). The opinion is remarkable insofar as (1) it proposes a novel approach in the treatment of exclusivity rebates under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and (2) it attempts to clarify the circumstances under which a rebate should be deemed abusive.

NB: The opinion addresses other interesting jurisdictional issues, which we will address in a separate and upcoming briefing.

Background
On May 13, 2009, the European Commission (Commission) imposed a record fine of €1.06 billion on Intel Corporation (Intel) for engaging in abusive practices on the market for central processing units of the x86 architecture ('x86 CPUs', i.e. a key computer component) from 2002 to 2007. The Commission found that Intel engaged in two specific forms of illegal practices, namely: (1) exclusivity rebates, i.e. rebates granted to manufacturers on the condition that they would buy all or almost all of the x86 CPUs from Intel; and (2) so-called 'naked restrictions,' i.e. direct payment to a retailer on condition that it stocks only computers with Intel x86 CPUs (hereafter, together, 'the Intel rebates').

The Commission took the view that the Intel rebates were, in and of themselves, sufficient to find an infringement. Owing to their very form, the Commission could assume that they were capable of restricting competition. Therefore, it was not necessary to show that the Intel rebates had anticompetitive effects (for the sake of completeness, it must be noted that, out of caution, the Commission did nevertheless examine whether such anticompetitive effects could arise).

Intel requested the EU General Court (GC) to annul the decision. In particular, Intel argued that the Commission was under the obligation to look at all the surrounding circumstances to ascertain whether the rebates at hand were in fact capable of restricting competition, and had failed to do so correctly.

In a judgment dated June 12, 2014 (T-286/09), the GC dismissed entirely Intel’s action. With regards to the rebate issue, the GC noted that:

- The Commission was not required to assess Intel’s rebates in light of the surrounding context. In support for this affirmation, the GC distinguished three categories of rebates:
- Category 1: volume-based rebates, which are presumed lawful;
- Category 2: exclusivity rebates, such as Intel’s, which are presumed unlawful. As a result, according to the GC, the Commission was not required to examine whether Intel’s practices were, in fact, capable of restricting competition;
- Category 3: rebates based on a mechanism that may have a fidelity-inducing effect, for which an analysis of all the circumstances is necessary in order to determine whether such rebates are capable of restricting competition.

Second, the GC found that, in any event, the analysis of the rebates in question in their surrounding context did show that Intel’s rebates were capable of restricting competition.

On August 26, 2014, Intel appealed the GC’s judgment before the EU Court of Justice (CoJ). In its opinion dated October 20, 2016, AG Wahl proposes to set aside the GC judgment, on the basis, inter alia, of the following considerations.

First Consideration: All Rebates – Whether Exclusive of Not – Should Be Assessed in Light of the Surrounding Circumstances

As a starting point, AG Wahl takes a look at the seminal case Hoffmann-La Roche (Case 85/76), where the CoJ found that exclusivity rebates, such as the ones at stake in Intel, were constitutive of an abuse in the meaning of Article 102 TFEU. Hoffmann-La Roche does not mention that the finding of such an abuse requires an examination of all the circumstances: for this reason, both the EC and the GC relied on this precedent to establish that Intel’s rebates did not require an examination of the surrounding circumstances.

According to AG Wahl, however, Hoffmann-La Roche does not suggest that exclusivity rebates do not require the examination of all the circumstances. On the contrary: exclusivity rebates must always be assessed in light of the surrounding circumstances. This is because:

- The case-law on rebates (including Hoffmann-La Roche) has almost invariably looked at the circumstances surrounding a rebate, irrespective of the existence of a formal statement in this sense. AG Wahl notes that, in doing so, the case-law – particularly following Cartes Bancaires – has adopted an approach similar to a ‘by object’ analysis under Article 101 TFEU, which also requires an examination of the legal and economic context of the conduct under examination.
- As a result of the above, the AG disagrees with the GC’s view that exclusivity rebates form a third category of rebates, for which abusiveness can be presumed in the abstract. For the AG, there are only two categories of rebates:
  - Volume-based rebates (category 1), which are presumed lawful; and
  - Loyalty rebates, either directly conditional upon exclusivity (category 2) or not (category 3), must be assessed in light of all surrounding circumstances before they may be held presumptively unlawful. These rebates form one single category because, according to AG Wahl, the difference between category 2 and category 3 rebates ‘is one of degree rather than kind.’
- AG Wahl further notes that the GC’s approach would raise further methodological issues:
  - This new category of rebates, for which consideration of all the circumstances would not be required, would be unlawful based on its form, not on its effects. As a result, it would be strictly impossible for an undertaking to rebut the presumption of unlawfulness. For the AG, this is a problem: an undertaking should always be able to justify the use of a rebate scheme by proving that its efficiencies outweigh its exclusionary effect;
  - There is no objective reason why category 2 rebates should receive a stricter treatment than those falling under category 3: experience shows that both categories of rebate can have equally restrictive effects on competition;
  - Contemporary economic literature shows that the effects of exclusivity rebates are context-dependent (as acknowledged by the CoJ in Tomra, C-549/10 P);
  - Related practices, such as margin squeeze, do require the consideration of all the circumstances.

In light of these elements, AG Wahl concludes that the GC erred in law in considering that exclusivity rebates, such as Intel’s rebates, do not require an analysis of the capacity of the rebates to restrict competition.

Second Consideration: The GC Failed to Establish the Abuse on the Basis of the Surrounding Circumstances

Having reached the above conclusion, AG Wahl then turns to the GC’s alternative assessment of Intel’s practices in light of the surrounding circumstances.

Requisite standard of proof: a two-step approach

AG Wahl takes a look at the requisite standard of proof to establish that a rebate is abusive. In this regard, the AG’s opinion proposes a two-pronged approach:
First step: a behavior should be deemed sufficiently likely to harm competition where it does not just have ambivalent effects on the market or only produce ancillary restrictive effects necessary for the performance of something which is pro-competitive, but that its presumed restrictive effects are in fact confirmed. Arguably, this is a rather high threshold. (NB: in her opinion in Post Danmark II, AG Kokott had advocated for a much lower threshold. A behavior would be deemed abusive where ‘the presence of the exclusionary effect appears more likely than its absence’).

Second step: if the behavior fails to pass this test, a fully-fledged analysis has to be performed. The AG does not give further indications as to the nature of the fully-fledged analysis.

Circumstances to be factored – or not – in the first step of the analysis

According to the AG, the GC failed to establish to the requisite standard that Intel’s rebates were likely to result in competitive harm. In particular, the GC wrongly assessed the following criteria:

- The limited size of the tied market share: Intel’s practices affected only 14% of the market. By contrast, in previous cases, this share was around 40%. According to the AG, the GC was wrong to dismiss this parameter as irrelevant to the analysis: ‘the size of the tied part of the market is equally relevant, irrespective of the form of the scheme.’
- The short duration of the challenged rebates: Intel applied the challenged rebates by means of a succession of short-term agreements over several years. For the GC, this meant that the rebates had lasted for the overall period covered by the short-term agreements, and therefore were capable of restricting competition. AG Wahl does not agree with this approach: since customers had the option to switch supplier at the end of each individual agreement, the duration of the rebates had to be assessed by reference to that of each individual agreement.
- Market performance of the competitor and declining prices: AG Wahl considers that this parameter is irrelevant to the analysis.
- AEC (‘as efficient competitor’) test: AG Wahl concedes that the Commission is not always under an obligation to apply the AEC test (as highlighted in previous cases - see in particular our briefing on Post Danmark II). However, he takes the view that, in the present case, the Commission was subject to this obligation. This is because, first, the Commission did in fact carry out an AEC test – and then disregarded it on the basis that it did not help to establish an abuse. Second, the other circumstances assessed by the GC did not unequivocally support a finding of an effect on competition.

In view of these elements, AG Wahl concludes that that assessment does not confirm an effect of the Intel’s rebates on competition.

Why the CoJ Should Follow AG Wahl’s Opinion

Assessing the legality of rebates under Article 102 TFEU is a headache for companies in search of practical solutions that provide a high level of legal certainty. Over the years, the administrative practice and the jurisprudence have considered different approaches to that end. Under one approach, a rebate must be regarded as abusive if it is ‘loyalty-enhancing,’ regardless of its concrete effects on the market. This rather formalistic approach stems from established case-law, which includes Hoffmann-La Roche. A second, more economic approach consists of assessing the practical effects of the rebate. Arguably, such an economic effect-based approach can provide greater flexibility to dominant undertakings that are willing to grant rebates to their customers.

If endorsed by the CoJ, AG Wahl’s suggestion that all rebates should be examined in their context would do away with a formalistic and somewhat ‘old school’ approach of rebates under Article 102 TFEU. In doing so, it would also bring clarity into a line of case-law that has been quite bewildering for several generations of competition law practitioners. Finally, such endorsement by the CoJ would ensure greater flexibility to dominant businesses willing to offer rebates to their customers.

As a side note, it is regrettable that the AG does not provide a more complete template for the assessment of rebates. In particular, the opinion focuses only on the first step of the two-steps approach for which AG Wahl advocated. No guidance is provided with regards to the fully-fledged economic assessment required as a second step of the analysis. This is an issue of importance for businesses, and yet a recurrent grey zone in the assessment of rebates under Article 102 TFEU (see for instance our briefing on Post Danmark II).