I. Overview of 2016

The Commission’s most high-profile Article 102 investigations of 2015—Gazprom, Google, and Qualcomm—remained open at the end of 2016. Each of these companies received Statements of Objections (‘SO’) shortly after Commissioner Vestager took office.1 The Gazprom and Qualcomm investigations appear close to resolution.2 Conversely, the Commission’s Google investigations seem no closer to a final outcome. In 2016, the Commission issued two SOs addressed to Google: one relating to Google’s advertising and intermediation service, AdSense, and the other relating to the Android operating system. The Commission also issued a Supplementary SO in relation to the Google ‘Shopping’ service.3 A number of other investigations that were opened in 2015 or in which an SO was issued are ongoing, with no major developments announced in 2016.4

Despite this relatively full case docket, the Commission opened two new Article 102 investigations, issued an SO addressed to the International Skating Union, and conducted unannounced inspections in the Romanian gas market.5

The Commission adopted a settlement decision in its investigation into whether the Austrian waste management company, ARA, had unlawfully obstructed rivals’ access to the country’s household packaging waste management market between 2008 and 2012.6 It is the first time since the introduction of

Key Points

- DG COMP continued its Article 102 enforcement at a similar pace in 2016, opening two new investigations, conducting an unannounced inspection, and issuing provisional adverse findings (Statements of Objections) in four cases, three of which involved Google.

- DG COMP terminated Article 9 commitments in three cases and introduced a novel way to reward cooperation in ARA where it combined an infringement decision with a structural remedy and a 30 per cent fine decrease. The General Court also reviewed a commitment decision in Morningstar.

- Advocate General Wahl issued an opinion in Intel, rejecting the ‘per se’ treatment of exclusivity rebates, and proposing to set aside the judgement and refer the case back to the General Court.

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1 Case AT.39740—Google Search, Commission MEMO/15/4781; and Case AT.39816—Upstream Gas Supplies in Central and Eastern Europe, Commission MEMO/15/4829.
2 Reports suggest that the Gazprom investigation is likely to be resolved through commitments. See Mlex, ‘Vestager says still “work ahead” to conclude Gazprom probe’, 26 October 2016; and Mlex, ‘Gazprom aims to submit EU antitrust settlement plan by mid-December’, 28 November 2016. An oral hearing was held in one of the two Qualcomm investigations in November 2016 (AT.39711—Qualcomm (predation)); reports suggest that Qualcomm has chosen not to request an oral hearing in the second investigation (AT.40220—Qualcomm (exclusivity payments)). ‘Qualcomm to fight EU antitrust charge at November 10 hearing: sources’, Reuters, 30 September 2016, available at www.reuters.com/article/us-eu-qualcomm-antitrust-idUSKCN12025T.
3 Case AT.40999—Google Android, Commission MEMO/16/1484; Case AT.40411—Google Search (AdSense), Commission press release IP/16/2552; and Case AT.39740—Google Search, Commission press release IP/16/2532.
4 Case AT.40170—Exhaust Systems (unannounced inspections in March 2014); Case AT.39767—Baltic Rail Transport (SO issued in January 2015); Case AT.39849—BEH Gas Market (SO issued in March 2015); Case AT.40153—E-book MFNs and Related Matters (proceedings opened in June 2015, two additional Amazon entities were involved in the proceeding in December 2016); Rail Passenger transport sector in Austria (unannounced inspections in December 2015); Case AT.39711—Qualcomm (Predation) (SO issued in December 2016); and Case AT.40222—Qualcomm (Exclusivity Payments) (SO issued in December 2016).
5 Case AT.40208—International Skating Union’s Eligibility Rules, Commission press release IP/16/3201; Case AT.40134—Limes, Commission press release IP/16/2561 (investigation focuses on AB InBev’s restrictions of parallel trade by hindering imports of its beer from neighbouring countries); Ceske Drahy, Commission press release IP/16/3656 (investigation focuses on the Czech railway incumbents practice of predatory pricing); Case AT.40.335—International Skating Union, Commission press release IP/16/3656 (investigation focuses on the Czech railway incumbents practice of predatory pricing).
6 Case AT.39759—ARA Foreclosure, Commission decision of 20 September 2016.
Regulation 1/2003 that the Commission has used the settlement mechanism in an Article 102 case. The Commission also allowed for early termination of commitments imposed in Deutsche Bahn I, Deutsche Bahn II, and E.On Gas.7

The General Court (‘GC’) issued judgements in two Article 102-related cases: Orange Polska8 (the existence of a variety of exclusionary conduct was not contested) and Morningstar (appeal against the imposed commitments in Reuters Instrument Codes).9 The Court of Justice (‘ECJ’) handed down a judgement concerning the interplay between Articles 102 and 106 in Slovenská Pošta.10 In 2016, Advocate General (‘AG’) Wahl also issued a noteworthy opinion in Intel, rejecting the ‘per se’ treatment of exclusivity rebates, and proposing to set aside the judgement and refer the case back to the GC. We discuss the AG’s opinion in further detail below.

II. Summary of selected decisions and judgements from 2016

In line with previous surveys, this section provides a thematic overview of last year’s Commission decisions and European Court judgements with Article 102 elements.11 In this survey, we focus on three themes: Article 9 commitment decisions and their operation (Deutsche Bahn I and II, E.On Gas, and the General Court’s judgement in Morningstar); settlement in Article 102 cases (ARA); and the examination of loyalty rebates under Article 102 (the AG’s Opinion in Intel).12

A. Commitments under Article 9

Under Article 9 of Regulation 1/2003,13 the Commission may bring to an end, with the agreement of the undertaking(s) concerned, behaviour that it believes may infringe Article 102. A commitment decision concludes that there is no longer ground for action by the Commission,14 'without concluding whether or not there has been or still is an infringement',15 although a preliminary assessment will explain in abbreviated fashion the Commission’s theory of harm and the principal evidence of misconduct it has found. Commitment decisions do not impose a fine and are 'not appropriate in cases where the Commission intends to impose a fine'.16

The advantages and disadvantages of commitment decisions as an enforcement policy tool have been widely discussed. On the one hand, Article 9 allows the Commission to close investigations expeditiously, without a prohibition decision, reducing appeal risk. Companies may welcome this accelerated outcome. On the other hand, since there is no infringement decision and rarely an appeal, Article 9 may impoverish the decisional practice of the Commission and the case law of the courts. The preliminary legal assessment in Article 9 decisions lacks the evidential depth and rigour of prohibition decisions. Fines for breaching of Article 102 are potentially significant and access to the courts is slow and potentially ineffective. In such circumstances, some suggest that Article 9 enables the Commission to extract concessions where the theory of harm is weak or speculative.17 Commissioner Vestager has recognised the dangers of over-using Article 9: ‘it’s very important not to make a

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7 Cases AT.39731/39731—Deutsche Bahn I/II, Commission decisions of 8 April 2016; and Case AT.39317—E.On Gas, Commission press release IP/16/2464. The Commission also rejected two Article 102-related complaints: Case AT.40291—Acquarient, Commission decision of 21 January 2016; and Case AT.40169—MACO, Commission decision of 11 March 2016. The Commission did not report on progress in three other investigations: Case AT.39986—Motorola: ITU, ISO/IEC and IEEE Standard Essential Patents (proceedings were opened in April 2012); Case AT.39492—EDF French Electricity Wholesale Market (unannounced inspections in March 2009); and Case AT.39493—CPU/PC Retailers (unannounced inspections in February 2008). The status of these investigations, in particular those that have been running for several years, is unclear.


11 We have not summarised the GC’s judgement in Orange Polska as the appellant did not dispute the existence of the Article 102 infringement but instead alleged that the Commission had erred in assessing the proportionality of the fine and did not take into account various mitigating circumstances. The judgement is under appeal (C-123/16 P).

12 Similar to last year, this survey focuses on the application of Article 102 on a standalone basis. We have therefore not summarised the ECJ’s judgement in Slovenská Pošta. The ECJ dismissed the appeal against the GC’s judgement, which set out the requirements for establishing a breach of Article 106 in conjunction with Article 102.


14 Ibid., Article 9, second sentence.

15 Ibid., Recital 13, second sentence.

16 Ibid., Recital 13, fourth sentence.

habit out of settlements [...] they are much more quick and much more smooth and everyone can move on, but still you need occasion to develop [case law] and only our judges and going to court can do that. 18 The large number of Article 9 decisions adopted in Article 102 cases—22 to date—does little to alleviate concerns of over-use. 19

The Commission did not adopt a commitment decision in 2016. This is uncommon in itself; indeed, it is the first year in more than a decade in which the Commission has not adopted an Article 9 commitment decision in an Article 102 case.

I. Early termination of Article 9 commitments

However, while no new commitment decisions were adopted in 2016, commitment decisions nevertheless remained a feature of Article 102 enforcement. In 2016, the Commission terminated commitments adopted in Deutsche Bahn I and II and E.On Gas. In Deutsche Bahn I and II, the Commission terminated the commitments using the early termination mechanism included in the commitments. In E.On Gas, the Commission terminated the commitments on the basis of Article 9(2), which allows for the re-opening of an investigation where there has been a material change in the facts on which the original decision was based.

In Deutsche Bahn I and II, the Commission investigated the pricing policy of Deutsche Bahn (DB) in relation to traction current (i.e., the electricity used to power locomotives). The Commission had concerns that DB’s pricing policy resulted in an unlawful margin squeeze, with exclusionary effect on the downstream markets in Germany for rail freight and long-distance passenger transport. Under the 2013 commitment decision, DB committed to introduce a new pricing system for traction current that would enable electricity providers outside the DB group to directly supply traction current to all railway companies. 20 The commitments were made binding for 5 years. However, the commitments included a mechanism allowing for their early termination where, in a single calendar year, at least 25 per cent of the combined demand for traction current of all railway companies in Germany not affiliated with DB was purchased from third-party suppliers. At the end of 2015, the parties notified the monitoring trustee that the market share of alternative suppliers for external customers had exceeded 50 per cent in 2015. The monitoring trustee agreed and recommended to the Commission that DB be released from the undertakings. The Commission terminated the commitments in April 2016. 21

In E.On Gas, the Commission investigated E.ON’s practice of reserving for itself, on a long-term basis, the majority of spare capacity at entry points to its transmission networks. 22 The Commission reached a preliminary view that the practice unfairly excluded E.ON’s competitors from its gas networks, restricting competition in the downstream gas supply markets. The commitment decision envisaged that E.ON would release up to 15 per cent of pipeline capacity, and would reduce its reserved share of firm, freely allocable entry capacity (up to 50 per cent in the H-gas market area and 64 per cent in the L-gas network). Capacity reservations typically run up to 10–15 years into the future; the commitments were scheduled to last until April 2021. 23 The Commission terminated the commitments almost 5 years ahead of schedule due to several important changes in the structure of the German gas market. 24 First, E.ON had booked significantly less capacity than anticipated in the commitments, enabling competitors to enter the market and attain significant market shares. Second, transport capacity had become available to competitors in large volumes. Third, market participants had over time tended to take shorter term bookings in order to afford themselves greater flexibility. The Commission concluded that in the aggregate these developments represented a material change in circumstances, as a result of which the commitments were

18 ‘Europe Antitrust Chief Not Afraid of Starting a Fight’, Financial Times, 8 March 2015, available at www.ft.com/content/a6f2b5b4-c3ff-11e4-a02e-00144fe67d3e.
22 Case AT.39317—E.ON Gas, Commission decision of 4 May 2010.
23 Case AT.39317—E.ON Gas, Commission MEMO/10/164.
24 Case AT.39317—E.ON Gas, Commission press release IP/16/2646.
no longer necessary to ensure sufficient transport capacity for E.ON’s competitors. The Commission therefore terminated the commitments.

2. Appeal against Article 9 commitments
In 2016, the GC issued a judgement relating to the Commission’s decision to accept commitments from Thomson Reuters. The Commission’s Article 9 decision identified provisional concerns that Thomson Reuters, the leading supplier worldwide of consolidated real-time data feeds, had abused its dominant position by preventing customers from using Reuters Instrument Codes (‘RICs’) to source data from competitors. Thomson Reuters therefore committed to licence the use of RICs to its customers and third-party developers, allowing them to retrieve data feeds from other providers and set up mapping tables to enhance interoperability with rival data providers. Rival data feed providers were not included in the scope of the compulsory licence, however.

Morningstar appealed the commitment decision on the ground that Thomson Reuters’ commitments failed to adequately address the Commission’s concerns.

The GC first confirmed Morningstar’s standing to appeal, as the Commission’s decision did not explicitly mention Morningstar. However, the GC found that the decision directly and individually concerned Morningstar because it had participated in the administrative procedure at the Commission’s invitation and because it was one of Thomson Reuters’ few competitors.

Morningstar had argued that the compulsory licence was not proportionate to the infringement alleged. The GC recalled that the Commission enjoyed a wide discretion to accept or reject commitments, short of committing a manifest error of assessment. The GC found, further, that the principle of proportionality was attenuated in the context of Article 9 decisions. In the Article 7 context, a penalty must be proportionate to the infringement committed. Conversely, an Article 9 decision is proportionate if it addresses the Commission’s concerns. It is not legally relevant whether other or additional commitments would have been less restrictive to competition. The GC noted that the Commission’s concerns focused on the restrictions imposed by Thomson Reuters on customers. Although the creation of mapping tables for interoperability purposes involved certain costs, the GC considered that these were reasonable and would not be an excessive obstacle to switching providers. The GC also concluded that the scope of the licence was sufficiently broad to allow customers to benefit from equivalent services offered by competing providers. An extension of the compulsory licence was therefore not strictly necessary to address the Commission’s concerns.

B. Settlements in Article 102 cases
The traditional Article 7 settlement mechanism, for which the company concerned is offered a 10 per cent fine reduction, has been limited to cartels. Cooperation by companies with the Commission in the context of Article 102 has therefore tended to focus on the Article 9 commitment mechanism. However, the Commission may not consider Article 9 appropriate in all circumstances. For example, as noted above, Article 9 is not considered suitable where the Commission wishes to impose a fine, or where it considers that a formal finding of infringement is required. In such circumstances, the Commission has tended to choose between pursuing early resolution of an Article 102 investigation through the Article 9 commitment mechanism or proceeding with a lengthier investigation and infringement decision through Article 7. Yet, Article 102 cases often present forensic difficulties. Early cooperation by a dominant company accused of an infringement could materially shorten or alleviate Commission resource constraints. The Commission appeared to lack a structural framework enabling it to reward cooperation and facilitate early resolution of Article 102 investigations in such circumstances.

In this context, the Commission’s ARA decision is significant. ARA represents the first abuse of dominance case in which the Commission has combined an Article 7-type settlement with a fine reduction for cooperation. The final decision confirmed the existence of an infringement and imposed a fine. However, it also rewarded ARA with a 30 per cent fine discount for cooperation and

25 Case T-76/14, Morningstar v Commission, judgement of 15 September
26 Case AT.39654—Reuters Instrument Codes, Commission decision of
20 December 2012. RICs are alphanumeric codes that identify securities and their trading locations and allow customers to retrieve data from Thomson Reuters’ feeds.
27 The Commission appears to have limited the settlement procedure to
cartel cases as these are more frequent and entail a heavier procedure, inferring that settlement will represent a larger procedural saving for the Commission. Also, litigation in cartel cases typically focusses on fine reduction instead of the existence of the cartel or the parties’ involvement.

29 See also, P Thyr, ‘The ARA “consent decree”—a new enforcement tool for abuse cases ante portas?’, Chilling Competition, available at: https://
chillingcompetition.com/2016/10/18/the-ara-consent-decreed-new-
enforcement-tool-for-abuse-cases-ante-portas/.
makes binding certain structural commitments offered by ARA. The decision, therefore, combines elements of traditional Article 7 and Article 9 decisions.

ARA is a waste management company, which is paid by producers of packaged goods to exempt them from the legal obligation to collect and recycle packaging waste stemming from their products. The Commission concluded that ARA had abused its dominant position in the Austrian exemption market for household packaging waste by refusing to give potential competitors access to its household waste collection infrastructure.

The case involved a possible refusal to supply. The Commission therefore applied the conditions first developed in Oscar Bronner. Under Bronner, a refusal to grant access to infrastructure will be considered abusive where the refusal: (i) relates to a product or service, access to which is indispensable to a rival to compete effectively in a market; (ii) the refusal is likely to eliminate competition in the affected market; and (iii) the refusal cannot be objectively justified and is not indispensable to achieve countervailing efficiency gains.

The Commission found that for legal, practical, and economic reasons, it was not possible for rivals to duplicate ARA’s household collection infrastructure (or it would at least be unreasonably difficult for them to do so). Access to ARA’s infrastructure was, therefore, indispensable for rivals to compete. Although ARA permitted rivals to apply for access to its infrastructure, the conditions of access were challenging. Rivals wishing to obtain governmental approval to collect waste had to demonstrate the ability to offer nationwide coverage. Under ARA’s scheme, however, rivals could only apply for access region-by-region, not for nationwide access. Moreover, to obtain access, rivals had to demonstrate that they could not duplicate ARA’s infrastructure in that particular region. ARA’s restrictive conditions of admission to their essential infrastructure therefore effectively prevented rivals from entering the market.

The Commission decision explains the procedure that ARA followed in order to obtain a fine reduction. Following an oral hearing on 26 November 2013, ARA received two further letter of facts. Instead of responding to the second letter, ARA chose to submit a formal offer to cooperate with the Commission on 21 July 2016. The offer included an acknowledgement of its infringement. ARA offered a structural remedy to divest a part of the Austrian household collection infrastructure that it owned. It indicated the maximum fine it anticipated being imposed and which it would accept in the framework of cooperation. Lastly, ARA confirmed that it had been given sufficient opportunity to make its views known and accepted to receive the final decision in English. While the infringement had already ended at the time of the decision, the Commission found that the structural remedy was necessary to ensure that it would not be repeated in the future. Due to ARA’s past behaviour, the Commission found that there was a substantial risk of a repeated infringement. A mere declaration by ARA not to refuse access in the future was therefore not as effective as a divestiture. Taking the different aspects of ARA’s cooperation submission into account, the Commission rewarded its cooperation by reducing the fine to be imposed by 30 per cent. The Commission based this reduction on the framework of the Commission’s 2006 Fining Guidelines. Paragraph 37 of the Guidelines allows the Commission to depart from the set methodology for calculating fines where ‘the particularities of a given case or the need to achieve deterrence in a particular case’ justify it. Unlike in cartel cases, where a fine reduction in settlement procedures is capped at 10 per cent, paragraph 37 therefore allows the Commission to decide on ad hoc reductions. The Commission has previously used paragraph 37 to reward cooperation in a number of cases before the entry into force of Regulation 1/2003.

The extent to which ARA represents the first in a number of Article 102 ‘settlement’ cases will depend on dominant companies’ willingness to trade-off a quick resolution of their investigation and accompanying fine reduction against the consequences of admitting...
liability. In the abstract, the mechanism seems likely to be more attractive to single-product or niche operators such as ARA. It is unclear whether large, multi-product dominant undertakings would be prepared to concede liability in return for quick resolution of a complex, arguable case, in circumstances where they may be a target for follow-on damages claims by private litigants or investigations (and possibly fines) in neighbouring markets. A senior Commission official has recently indicated that, as ARA cooperated relatively late in the procedure, its ability to provide evidence was limited. Where undertakings cooperate more fully, the official suggested that a fine reduction may exceed the 30 per cent awarded in ARA, making it a potentially more interesting resolution mechanism.

C. Exclusivity and loyalty rebates

While rebates are a common feature of commercial relations and may be pro-competitive, dominant undertakings have a special responsibility to ensure that their rebate schemes constitute competition on the merits and do not impair competition. Rebate schemes have received significant attention from the Commission and the European Courts in recent years, including in Intel, Tomra, and Post Danmark II. These cases fit within a broader discussion—in both US and EU competition law—around whether a form-based or effects-based approach to rebate schemes, or some combination of the two, is preferable.

The Commission’s decisional practice reflects the tension between form-based and effects-based approaches. Prior to 2009, cases largely followed the form-based approach. However, the Commission’s guidance paper proposed a prospective shift to an effects-based analysis. The introduction of this approach created potential for conflict between the approach of the courts—reflecting the traditional form-based approach—and the new analytical framework proposed by the Commission (although the Guidance Paper clarified that its principles were ‘without prejudice to the interpretation of Article [102] by the Court of Justice or the Court of First Instance of the European Communities’).

The Intel case, to some extent, sits on the fault line of the competing approaches. The Commission’s investigation coincided with the transition from form-based to effects-based approach: the Commission prohibition decision was taken after the adoption of the Guidance Paper, but the SO, supplementary SO, and a further Letter of Facts were all issued before the Guidance Paper was adopted. The Commission decision is, as a result, a hybrid of the conventional and more economics-based approaches, considering the capability of Intel’s practices to exclude competition according to both the ‘as-efficient competitor test’ (part, but not determinative, of the effects-based analysis) and the more established form-based test. The GC’s 2014 judgment confirmed that the as-efficient competitor test was superfluous when assessing exclusivity rebates as these were per se unlawful. Subsequent rebate cases confirmed this orthodox view of exclusivity rebates.

Intel brought six grounds of appeal against the GC’s judgement, of which three concerned the legal qualification and treatment of exclusivity rebates. Advising the Court, AG Wahl’s October 2016 opinion recommended that the ECJ uphold all three grounds (and two further grounds), set the judgement aside, and refer the case back to the GC. We summarise below the AG’s conclusion on the first three grounds.

1. Assessment ‘in all the circumstances’
The AG, in essence, rejected the proposition that there are per se rules under Article 102. He argued that the GC ruling starts from an incorrect premise, namely that exclusivity rebates offered by a dominant company always, without exception, result in anticompetitive foreclosure. AG Wahl noted the statement of law in

37 See Mlex, ‘Companies may win fine cuts of more than 30 percent fine in antitrust cases, EU official says’, 27 January 2017.
38 Communication from the Commission—Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 457, 24 February 2009 (the ‘Guidance Paper’).
39 Guidance Paper, para. 3.
40 COM/37.990—Intel, Commission decision of 13 May 2009, para. 916 (‘the Commission considers that the guidance paper does not apply to this case. The Commission nevertheless takes the view that this Decision is in line with the orientations set out in the guidance paper’); para. 919 (‘the guidance paper does not apply to this decision’); para. 1002, 1155 (‘One possible way of examining whether exclusivity rebates are capable or likely to cause anticompetitive foreclosure is to conduct an as efficient competitor analysis […] the as efficient competitor analysis is one way of examining the capability to harm competition in the present context. However, it should not be regarded as a necessary or absolute test’).
42 Case C-23/14, Post Danmark A/S v Konkurrenceradet, judgement of 6 October 2015, ECLI:EU:C:2015:651 (‘Post Danmark II’).
43 Case C-413/14 P, Intel Corp. v Commission, Opinion of AG Wahl of 20 October 2016, ECLI:EU:C:2016:788 (the ‘Opinion’).
44 Opinion, para. 47. Case 857/66, Hoffmann-La Roche v Commission, judgement of 13 February 1979, ECLI:EU:C:1979:936. The GC repeated the statement of paragraph 89 of the judgement: ‘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.’
Hoffman-la Roche, cited with approval by the GC in Intel, that a dominant company abuses its position where it ‘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 dominant undertaking. The AG considered that the GC in Intel misapplied the case law. The AG considered that the case law does not provide for a ‘super category’ of rebates that are per se illegal. This would be inconsistent with economic evidence demonstrating the potential efficiency-enhancing effects of rebates. Rather, in Hoffman-la Roche, the ECJ assessed the lawfulness of the exclusivity scheme by reference to ‘the conditions surrounding the grants of the rebates and the market coverage thereof’. Subsequent rebate cases also took account of ‘all the circumstances’ surrounding the rebate scheme in question. Accordingly, rather than simply characterising Intel’s rebate scheme as exclusive and therefore unlawful, the GC should have considered the context of Intel’s rebate scheme. The AG noted that dispensing with the per se analysis of exclusivity rebates would align the treatment of rebates under Article 102 with that of other pricing abuses, including margin squeeze: ‘it is of utmost importance that legal tests applied to one category of conduct are coherent with those applied to comparable practices. Sound and coherent legal categorization benefits [...] arbitrary categorization does not’. The AG concluded that while exclusivity rebates had previously been distinguished from quantity rebates and loyalty rebates, there were in practice only two categories of rebates: quantity rebates and loyalty-inducing rebates. Quantity rebates were presumptively lawful; loyalty rebates required an assessment, based on ‘all the circumstances’, of whether the scheme was capable of foreclosing competition.

As noted above, although both the Commission and the GC considered Intel’s practices per se anticompetitive, both the Commission decision and the GC judgement also carried out an alternative effects-based analysis of whether the conduct was capable of foreclosing competition. AG Wahl explained that capability cannot ‘merely be hypothetical or theoretically possible’, nor was it sufficient for the evidence to suggest that exclusionary effect was ‘more likely than not’. Instead, a full analysis of all the relevant circumstances was necessary. The AG considered that while the Commission and GC had assessed a number of relevant factors, they had overlooked several others, including market coverage, duration, market performance of the ‘foreclosed’ competitor, pricing data, and the as-efficient competitor test:

- The AG acknowledged that exclusionary effects were more likely the greater the proportion of a market covered by a rebate scheme, but rejected a purely arithmetic analysis. A finding that Intel’s scheme covered 14 per cent of the market was therefore inconclusive of foreclosure.
- The AG suggested that the duration of a rebate scheme may not be particularly important evidence since ‘the short duration of an arrangement does not exclude that the arrangement is capable of having anticompetitive effects’.
- The AG observed that a lack of switching did not necessarily imply foreclosure. A customer might choose to source from the dominant company for legitimate reasons. It was necessary to assess whether, in practice, low switching rates were a result of the rebate scheme.
- The AG considered that rivals’ market performance and evidence of falling prices were relevant to the assessment of whether a rebate scheme was capable of restricting competition, as part of a broader analysis.
- On appeal, the GC had largely disregarded the as-efficient competitor test. The AG, however, considered that it could be ‘particularly useful’ where other evidence was inconclusive of foreclosure. In the AG’s view, therefore, the GC erred in law by failing to consider the as-efficient competitor test as part of a broader analysis of capability to foreclose.

The AG concluded on this basis that the GC had not demonstrated capability of foreclosure to the requisite standard.

46 Ibid., para. 66.
47 Ibid., paras 68–69.
48 Ibid., para. 70.
49 Ibid., para. 103.
50 Ibid., para. 114.
51 Ibid., para. 117. AG Wahl therefore appears to impose a higher threshold than that articulated in Post Danmark II, Opinion of AG Kokott of 21 May 2015, ECLI:EU:C:2015:343, paras 82–84.
52 These included that (i) Intel was an unavoidable trading partner; (ii) OEMs’ low operating margins made rebates attractive; (iii) customers took Intel’s rebates into account in deciding whether to obtain all or most products from the company; (iv) Intel’s two practices complemented and reinforced each other; (v) Intel targeted undertakings which were of particular strategic importance to market access; and (vi) the rebates were part of a long-term strategy to exclude AMD. Opinion, para. 122.
53 See also Post Danmark II, paras 43–46.
54 Ibid., para. 140.
55 Ibid., para. 130.
56 Ibid., para. 155.
57 Ibid., para. 160.
58 Ibid., para. 165.
2. Single and continuous infringement
The AG subsequently considered the concept of a 'single continuous infringement' and its implication for assessing its capability to restrict competition. The GC had held that the conduct constituted a single and continuous infringement. On this basis, a global assessment of the average share of the tied market was appropriate. The resulting figure—14 per cent over the entire period of the infringement—was sufficient to conclude that the scheme was capable of restricting competition.\(^59\)

Intel argued that the GC's approach was incorrect. Averaging the tied market share over the period of the infringement did not take proper consideration of changes in market size and therefore the foreclosure effect over time. The AG agreed with Intel. The AG observed that the concept of a single and continuous infringement was a procedural rule intended to alleviate the evidentiary burden on the authority. However, in the present case, the GC's reliance on the principle had the effect of sidestepping the requirement to show that the rebate scheme covered a sufficient proportion of the market to result in anticompetitive foreclosure. The AG concluded that 'where market coverage is considered inconclusive for the purposes of establishing an effect on competition during a certain period of time, that problem cannot be remedied by applying the concept of a single and continuous infringement'.\(^60\)

3. When are rebates 'exclusive'?
Intel's third ground of challenge concerning the legal qualification and treatment of exclusivity rebates queried the GC's classification of certain rebates as 'exclusivity' rebates. Intel's rebates applied to 80–95 per cent of HP and Lenovo's demand for CPUs for corporate desktops and notebooks, but only a minority of their total CPU purchases. CPUs for corporate desktops and notebooks were therefore a segment of a market, rather than the antitrust market itself.

As noted above, the AG considered that there should not be a separate category of 'exclusivity' rebates considered \textit{per se} unlawful. Loyalty-inducing rebates of any kind should be assessed 'in all the circumstances'. However, the AG stated that even if the ECJ ultimately came to a different view, the assessment of whether behaviour was anticompetitive could not depend on a seemingly arbitrary threshold or segmentation of the market. The key question was whether customers could still purchase 'significant quantities' from the dominant company's rivals.\(^61\) The AG therefore concluded that the GC erred in law in classifying Intel's rebates as exclusivity rebates.

The principal argument in favour of a form-based approach to loyalty rebates is that it would encourage predictability and consistency of treatment by the competition authorities and therefore improve legal certainty for businesses. Proponents of this view are unlikely to be encouraged by the AG's opinion. Although a scholarly endeavour to unify the analysis of loyalty rebates and other pricing practices—by identifying a common thread running through the case law on exclusivity rebates—the AG's opinion ultimately amounts to stating that each rebate scheme must be assessed on its own merits, in the specific market context. This approach trades certainty for flexibility and—if one assumes that a close analysis of the scheme is likely to lead to fewer Type 1 errors—fairness. However, if the approach advocated by AG Wahl is followed by the ECJ, whether it \textit{inject[s] common sense into the law of Article 102},\(^62\) as has been suggested, will ultimately depend on the diligence of the Commission, Courts and national competition authorities in scrutinising the particular facts and circumstances before them, and the skills with which companies and their advocates present their case.

III. Expectations for 2017
Article 102 cases are complex and fact intensive; it is therefore difficult to predict which of the Commission's open investigations will be concluded over the coming 12 months. Successive annual surveys have predicted the imminent resolution of the Google cases. We refrain from making any such prediction on this occasion. The case is hugely complex and the Commission has invested significant resources, as have Google and the interested parties that would challenge or support the Commission's theories of harm. Apart from \textit{Gazprom} and Google, the Commission now has five investigations at the SO stage: \textit{Baltic Rail transport, BEH gas market}, two Qualcomm investigations, and the \textit{International Skating Union}. At the Court level, the most eagerly anticipated ruling is the ECJ's judgement in \textit{Intel}, all the more so in light of AG Wahl's opinion.\(^63\)

\(^{59}\) Ibid., para. 178.

\(^{60}\) Ibid., para. 189.


\(^{63}\) Another Article 102-related case pending is C-123/16 P \textit{Orange Polska SA v Commission} (appeal brought on 27 February 2016 against the judgement T-486/16 of 17 December 2015).