

of business before undertaking any work. But this should have been dealt with under s. 18 of the Act, which provides the court with a discretion to find either that Devani is unable to enforce the contract, or that the amount recoverable should be reduced. The judge had held that the amount recoverable by Devani should be reduced by one-third, and this was supported by the Court of Appeal. Yet that would only be relevant if there were a binding contract in the first place, which is precisely what the majority's reasoning denied. The significance of whether or not a contract was formed extends well beyond the context of estate agents. The approach of the majority in *Wells v Devani* inappropriately narrows the scope of contract law.

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#### LOYALTY REBATES AND ABUSE OF DOMINANCE

THE recent judgment of the Court of Justice in *Intel v Commission* (Case C-413/14 P, EU:C:2017:632) deserves a cautious welcome for signalling a move to a more economics-based approach to the assessment of loyalty rebates under Article 102 TFEU, and for modulating the rigid legal presumptions that have characterised nearly four decades of case law. Yet it also represents a missed opportunity to provide a comprehensive analytical framework for one of the more unsatisfactory areas of EU competition law.

Not all rebates or discounts offered by a dominant undertaking will be regarded as an abuse of dominance under Article 102 TFEU; discounting is a fact of normal commercial life and some discounts are rivalry-enhancing, but it has not always been clear where the line should be drawn. On the one hand, *Michelin II* (Case T-203/01, EU:T:2003:250) confirmed explicitly (at [58]) what *Hoffmann-La Roche* (Case 85/76, EU:C:1979:36) had left implicit (at [90]): that quantity rebates or discounts, linked solely to volumes purchased from the dominant undertaking, are generally considered not to give rise to foreclosure effects and are presumptively lawful. They are deemed to reflect efficiency gains and economies of scale: if the dominant firm is able to reduce its costs by supplying larger quantities it should be entitled to pass on those cost savings to customers without falling foul of competition law. On the other hand, loyalty-inducing rebates (also known as “fidelity” rebates) are more problematic and have consistently been condemned ever since *Hoffmann-La Roche*. There, the Court held (at [89]) that a dominant undertaking will be guilty of an abuse if it offers, whether pursuant to an agreement with a customer or unilaterally, “discounts conditional on the customer's obtaining all or most of its requirements” from the dominant firm, irrespective of the quantity of the

purchases involved, and even if the discount is offered at the request of the customer. Loyalty rebates were considered an unjustifiable restriction on the customer's choice of supplier, foreclosing other suppliers from access to the market, and resulting in discrimination in so far as some customers would obtain a better price than others, in return for exclusivity (at [90], echoing similar comments in *Suiker Unie* (Joined Cases 40/73 etc., EU: C:1975:174) at [518], [523]). This approach has since been followed in several cases, including notably *Tomra* (Case T-155/06, EU:T:2010:370, at [208]–[209], and on appeal in Case C-549/10 P, EU:C:2012:221, at [70]).

Effectively, *Hoffmann-La Roche* treated loyalty rebates as akin to a restriction of competition by object, in which anti-competitive effects are presumed without any need to prove potential harm to competition. While it remained open to a dominant undertaking to prove that its conduct was objectively justified or counterbalanced by efficiencies that benefitted consumers (*Post Danmark I*, Case C-209/10, EU:C:2012:172, at [40]–[42] and the cases there cited), this defence (similar to the test for exemption under Article 101(3) TFEU) had yet to succeed in a loyalty rebates case. The central debate in *Intel* was whether the European Commission was right to condemn the loyalty rebates offered by Intel as akin to a restriction of competition by object, that is, without needing to carry out a market analysis to establish the likelihood of foreclosure effects.

The case concerned the supply of x86 central processing units (CPUs) (chips used in the production of computers). Intel had granted rebates to four original equipment manufacturer (OEM) customers, on the condition that they purchase from Intel between 80 and 100% of their requirements of x86 CPUs. Intel also made payments to a large European retailer of PCs, conditional on its exclusively selling PCs containing Intel x86 CPUs. Added to this, Intel made payments to certain OEMs in return for their delaying the launch of products containing x86 CPUs produced by the only other significant manufacturer of x86 CPUs, AMD. Following a complaint to the European Commission by AMD, the Commission adopted an infringement decision on 13 May 2009 (COMP/C-3/37.990, *Intel O.J.* [2009] C 227/13), imposing a fine of €1.06 billion on Intel for abuse of dominance. The Commission found that Intel was dominant in the market for x86 CPUs, with a market share over the relevant period of at least 70%. Relying on *Hoffmann-La Roche* the Commission concluded that the conditional rebates to the OEMs (including the payment to the retailer) amounted to an abuse of dominance, without any need to conduct a market analysis to establish likely foreclosure effects. However, the Commission did also assess the capability of Intel's rebates to foreclose a hypothetical competitor that was as efficient as Intel, albeit maintaining that the finding of abuse did not depend on this assessment. The so-called "as efficient competitor" (AEC) test derives from the Commission's February 2009 Guidance Paper (*Guidance on the Commission's Enforcement*

*Priorities in Applying Article 82 [EC] to Abusive Exclusionary Conduct by Dominant Undertakings* O.J. [2009] C 45/7), albeit it was alleged by Intel that the Commission's AEC assessment in this case did not adhere to the approach in the Guidance Paper. The logic of the AEC test is that, if an equally efficient competitor to the dominant undertaking would have to offer prices below a viable measure of cost in order to induce the customers of the dominant undertaking to switch and compensate them for the loss of the rebates, the rebate scheme is likely to have foreclosure effects. In this case, the Commission found that the prices would have had to be below Intel's average avoidable costs, demonstrating capability to foreclose.

Intel's appeal against the Commission decision to the General Court was dismissed in its entirety (Case T-286/09, EU:T:2009:547). This judgment proved controversial because the Court adopted a novel threefold categorisation of rebates that appeared to have no clear foundation in earlier case law. The first category (quantity rebates) was seen as presumptively lawful (at [75], applying *Michelin II*). A new second category of exclusivity rebates was seen as presumptively unlawful (at [77], applying *Hoffmann-La Roche*), without any need to analyse the circumstances of the case to establish potential foreclosure effects (at [80]), subject only to the (quite theoretical) possibility of an objective justification defence (at [81], [94]). A third category of "other" loyalty rebates required consideration of all the circumstances to determine potential foreclosure effects (at [78]). As Intel's rebates fell within the second category, there was, according to the General Court, no need to examine Intel's arguments relating to the market analysis carried out by the Commission (including the alleged deficiencies in its AEC test) (at [151]). Further, as the Commission had opened proceedings against Intel before the Guidance Paper was published, there was no need to consider whether the Commission's AEC assessment was in line with the Guidance Paper (at [155]).

However, as Advocate General (AG) Wahl observed in his Opinion in the subsequent appeal to the Court of Justice (at [81]), there are in fact only two recognised categories of rebate according to the case law: volume-based (quantity) rebates, which are presumptively lawful, and loyalty rebates (whether or not conditional on exclusivity), which are presumptively unlawful. In relation to the latter, he observed that "the legal and economic context must first be examined so as to exclude any other plausible explanation for that conduct" (at [82]). Seeking to rationalise *Hoffmann-La Roche*, AG Wahl added (at [75] and [83]) that the Court in that case did actually examine the circumstances surrounding the rebates in some detail. Here, AG Wahl's Opinion appears less convincing, because the Court's examination seems to have been largely directed towards establishing that the rebates were fidelity, rather than quantity, rebates.

Without expressly confirming AG Wahl's rejection of the General Court's threefold categorisation of rebates, or his somewhat generous

interpretation of *Hoffmann-La Roche*, the Court of Justice found that the General Court had been wrong not to consider Intel's arguments on the AEC test, and therefore set the judgment aside. The problem for the Court was whether to overrule *Hoffmann-La Roche* or seek to distinguish it on the facts. Instead, in a remarkable sleight of hand the Court ducked the issue, noting (at [138]) that *Hoffmann-La Roche* needed to be "further clarified" where the dominant firm submitted during the Commission's investigation (with "supporting evidence") that "its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects". In those circumstances, the Commission was required to analyse the extent of the firm's dominance, the market coverage of the rebates, the conditions attached to them, their duration and amount, and the possible existence of a strategy aimed at excluding equally efficient competitors (at [139]). Assessment of capacity to foreclose was also relevant when considering whether the conduct was objectively justified, and whether any exclusionary effects were counterbalanced by efficiencies benefitting consumers, which could only be done after applying the AEC test (at [140]). If the Commission carried out such an analysis, the General Court was required to consider all the arguments put forward by the dominant undertaking calling the analysis into question (at [141]). As the Commission had carried out a detailed AEC assessment in this case, the General Court should have examined Intel's arguments relating to it (at [142]–[144]).

Where does this leave *Hoffmann-La Roche*? It has not been explicitly overruled, but its practical significance appears to have been considerably diminished. It is scarcely conceivable that a dominant undertaking under investigation by the Commission would not seek to contest the Commission's characterisation of allegedly abusive rebates, by seeking to disprove the likelihood of foreclosure effects. In those circumstances, provided it submits the necessary "supporting evidence", the Commission will be required to carry out a market analysis, including applying the AEC test. The battleground in future rebates cases is likely to centre on whether the dominant undertaking has done enough to shift the burden of proof onto the Commission to demonstrate capability to foreclose. The Court has created a role for economic analysis, but has done so by the back door.

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