



POLICY ROUNDTABLES

Fidelity and Bundled Rebates and Discounts 2008

Introduction

The OECD Competition Committee debated fidelity and bundled rebates and discounts in June 2008. This document includes an executive summary and the documents from the meeting: an issues paper by Mr. Antonio Capobianco for the OECD, written submissions from Belgium, the Czech Republic, Denmark, the European Commission, France, Germany, Hungary, Indonesia, Japan, Korea, the Netherlands, New Zealand, Norway, Russia, South Africa, Chinese Taipei, Turkey, the United Kingdom, the United States and BIAC as well as an aide-memoire of the discussion.

Overview

Bundled and loyalty discounts are common, even among firms with no market power, and they usually reflect efficiencies or the kind of competitive behaviour that competition policy seeks to promote. In certain circumstances, however, discounting practices can be anti-competitive, particularly when they restrict or prevent equally efficient rivals from competing or drive them out of the market.

Distinguishing between pro-competitive price cuttings and anti-competitive rebates is challenging. Even where an exclusionary effect is possible, most countries are reluctant to prosecute discounting that falls within the range of “normal commercial behaviour”. One way to distinguish normal commercial behaviour is with a “price cost” test – that is, a comparison of the effective price for the contestable products with some measure of their cost.

The need for clear legal rules in the area of rebates is in tension with the need for careful weighing of a range of economic factors. No clear “bright line” tests for liability have yet emerged, although there seems to be a consensus that “safe harbours” are a useful tool.

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- Guidance to Businesses on Monopolisation and Abuse of Dominance (2007)
- Evidentiary Issues in Proving Dominance (2006)
- Remedies and Sanctions in Abuse of Dominance Cases (2006)
- Competition on the Merits (2005)
- Barriers to Entry (2005)
- Loyalty and Fidelity Discounts and Rebates (2003)

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BUNDLED AND LOYALTY DISCOUNTS AND REBATES

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English, French

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Bundled and Loyalty Discounts and Rebates held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in June 2008.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les Remises Groupées et les Remises de Fidélité qui s'est tenue en juin 2008 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

From the issues paper, the country submissions, and the discussion at the roundtable on 10 June 2008, the following points emerge:

- (1) *In a “bundled” discount, a combination of products is offered at a lower price than the sum of the prices of the components of the bundle. A “loyalty” discount is a lower price offered to customers who buy more than a threshold volume.*

This roundtable focused on the potential anti-competitive impact of certain discounting practices. One is “bundled discounts”, whereby a customer receives a lower price when purchasing a combination of products compared to the price for purchasing the items individually. Another is single product “loyalty discounts”, whereby a customer receives a lower price when purchasing more than a certain volume of a product. This lower price may apply either to purchases above the threshold, or it may apply to all the previous purchases too. Where the lower price applies to all sales, the discount is sometimes referred to as a “retroactive”, “rollback”, or “first dollar” discount. All of these discounting practices are also referred to collectively as “conditional discounting”.

A distinction is sometimes made between “pure” bundling, where the customer does not have the option of purchasing the components of the bundle separately, and “mixed” bundling, where the customer retains the option of purchasing the components separately. Bundling is also often related to the concept of “tying”. The usual distinction is that with bundling the separate services are combined in a given, fixed proportion, whereas with tying the customer remains free to choose the volume of the different products in the bundle.

- (2) *Bundled and loyalty discounts are common, even among firms with no market power, and they usually reflect efficiencies or the kind of competitive behaviour that competition policy seeks to promote.*

Many speakers and many submissions emphasised that bundled discounts and single-product loyalty discounts are common commercial practices that, in most cases, have no anti-competitive purpose or effect. In fact, discounting is a key element of effective competition and therefore it is one of the practices that competition law and policy seek to promote.

These discounting practices have many commercial and efficiency benefits. Discounting is often carried out by small firms with no market power and no ability to prevent entry or to force their competitors out of the market. Bundled and loyalty discounts may simply reflect a passing on of some of the benefits of economies of scale and scope. Discounting practices might reduce the risk of fluctuation in demand over time, reducing the need to carry inventories. Discounting practices may also protect and promote customer-specific sunk investments. Some forms of discounting are designed to create incentives on downstream firms to supply a complementary input, such as sales effort or advertising.

Several commentators have pointed out that discounting practices may reflect a form of price discrimination, allowing the firm to increase sales by lowering the effective price to marginal consumers. This could, in turn, allow the firm to better exploit economies of scale, thereby lowering its average cost and possibly its marginal cost. Similarly, bundling or discounting may allow the firm to raise the effective price to consumers who value the product more highly, to more effectively recover its fixed costs and increase the reward to investment and innovation.

- (3) *In certain circumstances, discounting practices can be anti-competitive, particularly when they restrict or prevent equally efficient rivals from competing or drive them out of the market.*

Although it is generally accepted that discounting practices are often pro-competitive, efficiency enhancing, or at worst benign, in some circumstances they can prevent entry of equally efficient competitors or force them from the market. These effects depend on three factors that must be present: (a) the discounting firm must have a dominant position in at least one market, (b) there must be economies of scale in the competitive markets, and (c) the discounting practice must affect a sufficient volume of sales so as to deprive rivals of economies of scale. In these instances discounting practices may be harmful to consumers. The difficulty is distinguishing pro-competitive discounting from anti-competitive exclusionary behaviour.

In the case of loyalty discounts, the greatest competition concern arises where the dominant firm's customers must carry a certain percentage of its products and the discount is conditional on the customer purchasing *all* of (or a substantial part of) its requirements from it. Even where the discount is not explicitly linked with an agreement for exclusivity, some discounts may have a similar effect. In particular, "retroactive" or "first dollar" discounts may have the effect of locking in a proportion of the customer's purchases to a single supplier where a significant percentage of the customer's purchases are essentially uncontestable. In such schemes the "effective price" for additional purchases beyond the uncontestable portion near the threshold may be negative. The EU suggested that, in addition, greater concern would be raised when thresholds were tailored or targeted to each downstream firm, compared to the case when the same discount threshold applied to all customers.

For discounts to have an anti-competitive effect, the discounting firm must have a dominant (or monopoly) position in the market for certain products. In the case of bundled discounts, the firm must have a dominant position in the market for at least a subset of the products, sometimes referred to as the "essential", "must stock" or "must have" products. Similarly, in the case of single-product loyalty discounts, the discounting firm must have a dominant position for at least a proportion of the total sales. This has been described as the "non-contestable" or "assured base" of sales. Even if some sales are uncontestable, separating the "assured base" from the "contestable" sales is often difficult and depends on factors such as the relevant time horizon.

Where the discounting firm has a dominant position in some markets (for some components of the bundle or for the "assured base" of sales), rivals may be at a significant disadvantage from not being able to exploit economies of scale, and the dominant firm may have the ability either to prevent entry or to force existing firms in the market to exit. Whether this effect exists will depend on factors such as the market share of the incumbent, efficient scale in the industry, the volume of sales diverted from the rivals, and the duration of the discounting practices.

- (4) *The need for clear legal rules is in tension with the need for careful weighing of a range of economic factors. No clear “bright line” tests for liability have yet emerged, although there seems to be a consensus that “safe harbours” are a useful tool.*

Several submissions noted the presence of a fundamental tension in this area. Unclear or ambiguous rules have a chilling effect on business behaviour and expose businesses to unnecessary risk. The business and legal community seeks clear rules for guidance as to the limits of legal behaviour. In addition, clear rules simplify the task of enforcement authorities and allow improved prioritisation of enforcement resources.

But economic theory applied to discounting practices does not suggest clear “bright line” rules. Instead, it suggests that individual cases must be considered on the merits, with a weighing of the potential efficiency benefits of discounting against the potential anti-competitive harm. Both the business and legal communities are reluctant to leave the determination of anti-competitive harm to an uncertain economic balancing process. There was general agreement that it is not possible to define certain discounting practices (even pricing below certain measures of cost) as “per se” violations of competition law.

On the other hand, there remains scope for the definition of “safe harbours” for practices that are highly unlikely to be anti-competitive. These safe harbours may include both (a) structural criteria such as a firm’s degree of dominance in a market; and (b) behavioural criteria such as a price-cost test. Under this approach, pricing above the relevant measure of cost would be presumed to not be anti-competitive.

- (5) *Even where an exclusionary effect is possible, most countries are reluctant to prosecute discounting that falls within the range of “normal commercial behaviour”. One way to distinguish normal commercial behaviour is with a “price cost” test – that is, a comparison of the effective price for the contestable products with some measure of their cost.*

Even where discounting practices have a potential exclusionary effect, most competition authorities are reluctant to prevent an incumbent firm from pricing in a manner which exploits its cost advantages over other firms – particularly when the exclusionary effect is incidental to the normal commercial operation of the firm. This raises the questions of (a) whether there is a normal commercial justification for the discounting practices and (b) whether it is possible to define a pricing test that can assist either to identify pricing practices which would normally be anti-competitive, or to identify pricing practices which would normally be benign or pro-competitive.

Many countries examine whether a discounting practice has a normal commercial justification. The existence of a normal commercial justification shifts the presumption in favour of allowing the discounting, except where the anticompetitive harm outweighs the commercial benefit. The United States writes that “a proven explanation for a bundled discount that does not depend on exclusion of rivals should defeat a ... challenge to the bundled discount unless the anticompetitive harms are significantly disproportionate to the benefits flowing from the proven explanation”.

Several submissions discussed the use of a “price-cost” test as a tool for defining the boundaries of normal commercial practices. In the case of bundling, there was a consensus that the price-cost test should compare the “effective price” of the competitive services in the bundle (after “allocating” or “attributing” the discount on the bundle to these competitive services) to some measure of the costs, such as the incremental cost of the competitive services in the bundle. The

United States submission suggests that this price-cost test be used where bundle-to-bundle competition is not reasonably possible, but only as a safe harbour, and that failure to come within the safe harbour should not create a presumption of anticompetitive effects.

The EU submission sets out one possible price-cost test, which involves two cost measures. Under this approach an effective price above long-run average incremental cost (“LRAIC”) would not normally be considered anti-competitive. On the other hand, an effective price below average avoidable cost (“AAC”) would normally be viewed as capable of excluding an equally efficient competitor and therefore would be potentially anti-competitive. An effective price between AAC and LRAIC would require examination of other factors to assess the impact on equally-efficient rivals. Other cost measures have been discussed, such as average total cost. One problem with a measure of this kind is that, unlike a measure of incremental cost, it requires some (usually arbitrary) allocation of the joint and common costs of the firm. The appropriate cost benchmark remains unsettled.

In theory, pricing above incremental cost could still be anti-competitive in some circumstances. But it is undesirable to attempt to capture every economic nuance in the law. The circumstances for above-cost exclusionary pricing are so unlikely that a test permitting prices above incremental cost runs relatively little risk of under-deterrence.

In the case of single product loyalty discounts it is more difficult to establish the appropriate size of the “contestable” level of services for the purposes of applying a price-cost test. If the contestable bundle is taken to be only the services at the margin, in the case of a “retroactive” or “first-dollar” discount, the effective price at the margin is likely to be negative (which might incorrectly trigger liability), while if the contestable level is taken to be all services, the effective price may be above the average cost overall (suggesting an absence of anti-competitive behaviour). The EU proposed examining the volume of sales that can be realistically switched to a rival, taking into account the ability of rivals to expand capacity, or to enter the market. One key unresolved question is the length of time to consider when defining the relevant contestable part of the market, especially when the “reference period” to achieve the loyalty discount may be overlapping for different customers.

Where a discounting practice violates a price-cost test or safe harbour and rivals are excluded from some sales, further analysis is still required, in particular, a demonstration of harm to consumers. In other words, authorities should examine whether some consumers will face higher prices or a reduction in variety or service quality as a result of the practice.

A closely related question is the extent to which other firms are able to offer a competitive substitute bundle, or, alternatively, are able to compete for all of the requirements of a customer. This competitive bundle could be formed either by co-operation with other firms, by customers themselves combining the products from different firms or by the rivals acquiring the non-competitive products directly from the dominant firm. If other firms are able to offer a competing bundle – or they are able to compete to meet all of the requirements of a customer – the competitive analysis should proceed at the level of the entire bundle, or the entire service. In this case, the competitive analysis of discounting practices resembles a standard case of predation.

- (6) *Many cases of bundled or loyalty discounts have been investigated, and some have been successfully prosecuted. There is some evidence of convergence in approach to these cases, both across countries and across related practices (including tying, bundling, loyalty discounts and predation).*

Most countries reported that their competition law did not have provisions directly aimed at preventing anti-competitive discounting. In most, cases, anti-competitive discounting can be and usually has been prosecuted under laws preventing abuse of a dominant position. The jurisprudence associated with controls on abuse of a dominant position therefore typically plays a key role in the prosecution of bundling practices. In several countries, the competition law lists the kinds of conduct that may constitute an abuse of a dominant position, which may include practices related to discounting. Some countries (such as South Africa) have prohibitions on pricing below marginal or average variable cost, or rules prohibiting “unjustified price discrimination”.

Many cases about rebates have been investigated and some have been prosecuted by competition authorities. These cases included a wide range of dominant firms, including incumbent airlines, software companies, telecommunications companies, and computer chip manufacturers, amongst others. In some cases the bundling or discounting was linked to contractual arrangements designed to ensure exclusivity.

There is some movement, especially in Europe, from a “form-based” approach to enforcing this area of law, which focuses on whether specified criteria are met, to an “effects based” approach that focuses on the magnitude of the potential harm. The EU noted that there has been a shift in practice which more clearly takes into account efficiency justifications, when those efficiencies outweigh possible anti-competitive harm. Some submissions emphasised the importance of a consistent approach to analysis of a range of related practices, including exclusive dealing, discount practices, tying, predation and margin or price squeezes.

On the other hand, a consensus has not yet emerged around the precise definition of the correct test for a safe harbour or the other dimensions of the judgments a competition authority must make, such as the required extent of dominance, the volume of trade affected by the discount practice, the extent to which harm to competition must be objectively shown, and the nature of the allowed defences. Scepticism was expressed about the value of documents indicating that the intent of the firm was to harm competition. Although some delegates were prepared to accept such evidence as corroborative of an otherwise strong economic “story”, other delegates argued that such evidence could be found even in firms with no market power and should be given relatively little weight.

Development of case law, publication of guidelines and discussion papers and convergence in practices in different jurisdictions will clarify and reduce differences in the law and economics of bundled and loyalty discounts over time.

SYNTHÈSE

Par le Secrétariat

Les documents d'analyse, contributions des pays et discussions de la Table ronde qui s'est tenue le 10 juin 2008, font ressortir les points suivants :

- (1) *Dans une remise « groupée », un ensemble de produits est proposé à un prix inférieur à la somme des prix des composants du lot. Une remise de « fidélité » est un prix inférieur offert aux clients qui achètent plus qu'un volume donné de marchandises.*

Cette Table ronde s'est concentrée sur l'impact anticoncurrentiel éventuel de certaines pratiques en matière de remises. L'une d'entre elles est constituée par les « remises groupées », par lesquelles un client bénéficie d'un prix inférieur lorsqu'il achète un ensemble de produits par rapport au prix d'achat de ces produits individuellement. Une autre correspond aux « remises de fidélité » sur un seul produit, par laquelle le client bénéficie d'un prix inférieur lorsqu'il achète plus qu'un certain volume d'un produit. Ce prix inférieur peut s'appliquer à des achats au-dessus d'un certain seuil ou peut s'appliquer aussi à tous les achats antérieurs. Lorsqu'il s'applique à toutes les ventes, la remise est parfois appelée « rétroactive », « rollback », ou remise au « premier euro ». Toutes ces pratiques de remises sont également désignées collectivement sous l'appellation de « remises conditionnelles ».

On distingue parfois entre les remises groupées « pures », dans lesquelles le client n'a pas le choix d'acheter les composants du lot séparément, et les remises groupées « mixtes », dans lesquelles le client a le choix d'acheter les éléments séparément. Les remises groupées sont souvent associées au concept de « vente liée ». La distinction habituelle est que, dans les remises groupées, des services séparés sont combinés dans une proportion donnée fixe, tandis que dans la vente liée, le client demeure libre de choisir le volume des différents produits dans le lot.

- (2) *La pratique des remises groupées et remises de fidélité est répandue, même dans les entreprises sans pouvoir de marché, et elles reflètent généralement des efficacités ou le genre de comportement concurrentiel que la politique de la concurrence cherche à promouvoir.*

De nombreux intervenants et de nombreuses contributions ont mis l'accent sur le fait que les remises groupées et les remises de fidélité sur un seul produit constituent des pratiques commerciales courantes qui, dans la plupart des cas, n'ont aucun but ni effet anticoncurrentiel. De fait, les remises constituent un élément essentiel d'une concurrence efficace et par conséquent, elles constituent l'une des pratiques que le droit et la politique de la concurrence cherchent à promouvoir.

Ces pratiques de remises ont de nombreux avantages en termes commerciaux et d'efficacité. Les remises sont souvent réalisées par de petites entreprises sans pouvoir de marché et qui ne sont pas en mesure d'empêcher leurs concurrents d'entrer sur le marché ni de les contraindre à en sortir. Les remises groupées et les remises de fidélité peuvent simplement traduire la répercussion d'une partie d'économies d'échelle et d'envergure. La pratique des remises peut limiter le risque de fluctuation de la demande dans le temps, en réduisant la nécessité de conserver des stocks. Ces pratiques peuvent également protéger et promouvoir les investissements irrécupérables propres à

un client. Certaines formes de remises sont conçues pour créer sur les entreprises en aval des incitations à fournir un apport supplémentaire, comme un effort de vente ou de publicité.

Plusieurs commentateurs ont souligné que la pratique de remises pouvait refléter une forme de discrimination par les prix, en permettant à l'entreprise d'augmenter ses ventes en baissant le prix effectif pour les consommateurs marginaux. Cela peut permettre dès lors à l'entreprise de mieux exploiter les économies d'échelle, donc de baisser son coût moyen et donc éventuellement son coût marginal. De la même manière, les remises groupées ou les rabais peuvent permettre à l'entreprise d'augmenter le prix effectif facturé aux consommateurs qui valorisent plus fortement le produit, de façon à récupérer plus efficacement ses coûts fixes et augmenter la rémunération de l'investissement et de l'innovation.

- (3) *Dans certaines circonstances, la pratique des remises peut être anticoncurrentielle, en particulier lorsqu'elle restreint ou empêche également les concurrents efficaces de concurrencer ou lorsqu'elle les écarte du marché.*

Bien qu'il soit généralement accepté que la pratique des remises favorise souvent la concurrence, en renforçant l'efficacité, ou qu'elle soit au pire inoffensive, elles peuvent néanmoins dans certaines circonstances empêcher l'entrée de concurrents tout aussi efficaces ou les contraindre à quitter le marché. Ces effets dépendent de la présence de trois facteurs : (a) l'entreprise qui effectue la remise doit être en position dominante sur au moins un marché, (b) il doit y avoir des économies d'échelle sur les marchés concurrentiels, et (c) la pratique des remises doit toucher un volume de vente suffisant pour priver les concurrents des économies d'échelle. Dans ces cas, la pratique des remises peut être préjudiciable aux consommateurs. La difficulté est de distinguer entre les remises favorables à la concurrence et les comportements d'exclusion anticoncurrentiels.

Dans le cas des remises de fidélité, le facteur le plus préoccupant pour la concurrence réside dans la situation où les clients de l'entreprise en position dominante doivent atteindre un certain pourcentage de ses produits et que la remise est conditionnée par l'achat auprès d'elle par le consommateur de *tous* les produits (ou d'une partie substantielle des produits) dont il a besoin. Même lorsqu'elles ne sont pas explicitement liées à un accord d'exclusivité, certaines remises peuvent avoir un effet similaire. En particulier, les remises « rétroactives » ou au « premier euro » peuvent avoir pour effet d'attacher une partie des achats du client à un seul fournisseur lorsqu'un pourcentage significatif des achats du client est essentiellement incontestable. Dans de tels cas, le « prix effectif » des achats supplémentaires au-delà de la partie incontestable proche du seuil peut être négatif. En outre, de l'avis de l'Union européenne, les choses risquent d'être plus préoccupantes lorsque les seuils ont été établis sur mesure ou ciblés en fonction de chaque entreprise en aval, par rapport aux cas où le même seuil de remise s'applique à tous les clients.

Pour que les remises aient un effet anticoncurrentiel, l'entreprise qui les pratique doit avoir une position dominante (ou être en situation de monopole) sur le marché de certains produits. Dans le cas des remises groupées, la société doit avoir une position dominante sur le marché concernant au moins un sous-ensemble des produits, parfois considérés comme des produits « essentiels », « indispensables en stock » ou « qu'il faut avoir ». De la même manière, pour les remises de fidélité sur un seul produit, l'entreprise qui les offre doit avoir une position dominante pour au moins une sous-partie des ventes totales. C'est ce qu'on a décrit comme la part « non contestable » ou la « base assurée » des ventes. Même si certaines ventes sont incontestables, séparer la « base assurée » des ventes « contestables » est souvent difficile et dépend de facteurs comme l'horizon temporel applicable.

Lorsque l'entreprise qui offre des remises occupe une position dominante sur certains marchés (pour certains composants du lot ou pour la « base assurée » des ventes), les concurrents peuvent pâtir d'un désavantage significatif, faute de pouvoir exploiter les économies d'échelle, et l'entreprise en position dominante peut avoir la capacité soit d'empêcher l'entrée soit de contraindre les sociétés à quitter le marché. L'existence de cet effet dépend de facteurs comme la part de marché du titulaire, la masse critique dans le secteur, le volume des ventes détourné des concurrents, et la durée de la pratique des remises.

- (4) *La nécessité de règles juridiques claires découle de celle d'évaluer soigneusement une série de facteurs économiques. En matière de responsabilité, aucun critère de démarcation clairement établi n'est encore ressorti, même s'il semble se dégager un consensus autour de l'utilité d'un « régime d'exemption ».*

Plusieurs contributions ont noté l'existence d'une tension fondamentale dans ce domaine. Des règles peu claires ou ambiguës ont pour effet de refroidir les comportements commerciaux et exposent les entreprises à des risques inutiles. Les milieux d'affaires et les juristes cherchent des règles qui précisent les limites de la légalité d'un comportement. De plus, des règles claires simplifient la tâche des autorités d'exécution et permettent de mieux hiérarchiser les priorités d'affectation des ressources pour l'application du droit.

Mais la théorie économique appliquée à la pratique des remises ne laisse pas entrevoir de règles de « démarcation ». Au contraire, elle donne à penser que les différentes affaires doivent être examinées sur le fond, sans considération des efficiences éventuelles des remises par rapport aux éventuelles atteintes à la concurrence. Les milieux d'affaires et les juristes sont réticents à laisser la détermination de l'atteinte à la concurrence à une procédure de mise en balance économique incertaine. Un accord général s'est dégagé sur le fait qu'on ne peut pas définir certaines pratiques de remises (même la fixation de prix en dessous d'un certain indicateur de coût) comme des violations *per se* du droit de la concurrence.

D'autre part, il reste de l'espace pour définir des « régimes d'exemption » pour les pratiques qui ont très peu de chances d'être contraires à la concurrence. Ces régimes peuvent prévoir à la fois (a) des critères structurels comme le degré de domination d'une entreprise sur un marché; et (b) des critères comportementaux tel que le test prix-coût. Dans le cadre de cette approche, la fixation de prix au-dessus du niveau de coût approprié serait présumée ne pas être anticoncurrentielle.

- (5) *Même lorsqu'un effet d'exclusion est possible, la plupart des pays sont réticents à poursuivre dans le cas de remises qui relèvent des « attitudes commerciales normales ». Une manière de distinguer une attitude commerciale normale est de procéder à un test « prix coût » – c'est-à-dire de faire une comparaison entre le prix effectif pour les produits contestables et un certain indicateur de leur coût.*

Même lorsque la pratique de remises peut avoir un effet d'exclusion, la plupart des autorités de la concurrence sont réticentes à empêcher une entreprise en place de fixer les prix en tirant parti de ses avantages en termes de coûts sur les autres entreprises – en particulier lorsque l'effet d'exclusion est incident à l'exploitation commerciale normale de l'entreprise. Cela soulève les questions de savoir (a) s'il y a une justification commerciale normale à la pratique des remises et (b) si l'on peut définir un critère de fixation de prix qui puisse aider soit à identifier les pratiques de fixation de prix qui seraient normalement anticoncurrentielles, soit à identifier les pratiques de fixation de prix qui seraient normalement inoffensives ou favorables à la concurrence.

De nombreux pays vérifient si une pratique de remise a une justification commerciale normale. L'existence d'une justification commerciale normale déplace la présomption au profit de l'autorisation de la remise, sauf lorsque l'atteinte à la concurrence dépasse l'avantage commercial. Les États-Unis écrivent que la « justification d'une remise groupée par des raisons indépendantes de l'exclusion des concurrents devrait aller à l'encontre d'une ... contestation de ladite remise groupée à moins que les atteintes à la concurrence ne soient nettement disproportionnées par rapport aux avantages qui découlent de cette justification ».

Plusieurs contributions ont donné lieu à discussion sur l'utilisation du test « prix-coût » pour définir les limites des pratiques commerciales normales. Dans le cas des remises groupées, un consensus s'est dégagé sur le fait que le test prix-coût devrait comparer le « prix effectif » des prestations en concurrence dans le lot (après « allocation » ou « attribution » de la remise sur le lot à ces prestations) à une certaine mesure des coûts, tel que le coût marginal des prestations en concurrence dans le lot. La contribution des États-Unis propose d'utiliser ce test prix-coût lorsque la concurrence entre remises groupées n'est pas possible de façon raisonnable, mais seulement à titre de régime d'exemption, sachant que le fait de ne pas relever de la règle d'exception ne devrait pas constituer une présomption d'effet anticoncurrentiel.

La contribution de l'Union européenne présente l'un des tests prix-coût possible, qui implique deux mesures de coût. Avec cette approche, un prix effectif supérieur au coût moyen marginal à long terme (« LRAIC ») ne devrait normalement pas être considéré anticoncurrentiel. D'autre part, un prix effectif inférieur au coût moyen évitable (« AAC ») devrait normalement être considéré comme susceptible d'exclure un concurrent aussi efficient et par conséquent d'être anticoncurrentiel. Un prix effectif compris entre l'AAC et le LRAIC nécessiterait d'examiner d'autres facteurs pour évaluer l'impact sur des concurrents aussi efficients. D'autres mesures de coût ont été examinées, comme le coût total moyen. Le problème que pose une mesure comme celle-là est que, contrairement au coût marginal, elle requiert une certaine répartition (généralement arbitraire) de coûts conjoints et communs de l'entreprise. La question de la référence convenable en matière de coût approprié reste sans réponse.

En théorie, la fixation de prix au-dessus du coût marginal pourrait tout de même être anticoncurrentielle dans certaines circonstances. Mais il n'est pas souhaitable de tenter de rendre compte de chaque nuance économique dans la loi. Les circonstances dans lesquelles fixer des prix au-dessus des coûts peut avoir valeur d'exclusion sont si improbables qu'un test permettant des prix au-dessus du coût ne risque guère d'être trop peu dissuasif.

Dans le cas des remises de fidélité pour un seul produit, il est plus difficile d'établir la masse appropriée de services « contestables » pour appliquer le test prix-coût. Si le lot contestable s'avère concerner seulement les prestations à la marge, dans le cas des remises « rétroactives » ou au « premier euro », le prix effectif à la marge risque d'être négatif (ce qui peut engager la responsabilité de manière inopportune), tandis que si le niveau contestable concerne toutes les prestations, le prix effectif peut être supérieur au coût global moyen (suggérant une absence d'attitude anticoncurrentielle). L'Union européenne a proposé d'examiner le volume des ventes qui peut se reporter de manière réaliste sur un concurrent en prenant en compte la capacité des concurrents à accroître leurs capacités, ou à entrer sur le marché. Une question essentielle, qui reste sans réponse, est le moment à prendre en considération lorsque l'on définit la part contestable appropriée du marché, en particulier quand la « période de référence » pour obtenir la remise de fidélité peut se superposer pour différents clients.

Lorsque la pratique des remises contrevient à un test prix-coût ou à un régime d'exemption et que des concurrents sont exclus d'une partie des ventes, il faut toujours procéder à des analyses plus

poussées et démontrer en particulier le préjudice subi par les consommateurs. En d'autres termes, les autorités devraient examiner si certains consommateurs sont confrontés à des prix plus élevés ou à une réduction de la diversité ou de la qualité du service du fait de la pratique concernée.

Une question très étroitement liée consiste à savoir dans quelle mesure les autres entreprises sont à même de proposer un lot concurrent de rechange ou, alternativement, de concurrencer l'entreprise concernée pour satisfaire tous les besoins d'un client. Cette remise groupée concurrente pourrait être réalisée soit par voie de coopération avec les autres entreprises, par les clients eux-mêmes en combinant les produits de différentes entreprises ou par des concurrents qui acquièrent les produits non concurrents directement auprès de la société dominante. Si les autres entreprises peuvent proposer des remises groupées concurrentes – ou concurrencer l'entreprise concernée pour satisfaire tous les besoins d'un client – l'analyse de la concurrence doit se faire au niveau du lot entier, ou de l'ensemble des prestations. Dans ce cas, l'analyse des pratiques de remises sous l'angle de la concurrence ressemble à un cas classique de prédation.

- (6) *De nombreuses affaires de remises groupées ou de remises de fidélité ont donné lieu à des enquêtes et dans certains cas à des poursuites couronnées de succès. On observe des signes de convergence dans l'approche de ces affaires, à la fois dans les différents pays et dans les pratiques visées (y compris les ventes liées, les remises groupées, remises de fidélité et la prédation).*

La plupart des pays ont indiqué que leur droit de la concurrence ne contenait pas de dispositions visant directement à empêcher les remises anticoncurrentielles. Dans la plupart des cas, les remises anticoncurrentielles peuvent être et sont généralement poursuivies au titre des lois qui visent les abus de position dominante. La jurisprudence associée aux contrôles d'abus de position dominante joue donc traditionnellement un rôle clé dans la poursuite des pratiques de remises groupées. Dans plusieurs pays, le droit de la concurrence dresse une liste des comportements qui peuvent constituer un abus de position dominante, liste qui peut inclure des pratiques qui se rapportent aux remises. Certains pays (comme l'Afrique du Sud) interdisent de fixer les prix en dessous d'un coût variable marginal ou moyen, ou appliquent des règles qui interdisent toute « discrimination par les prix injustifiée ».

De nombreuses affaires concernant les rabais ont donné lieu à des enquêtes et certaines ont été poursuivies par les autorités de la concurrence. Ces affaires concernaient des entreprises dominantes des plus diverses, y compris des compagnies aériennes établies, des sociétés de logiciels informatiques, des sociétés de télécommunications et des fabricants de puces électroniques, entre autres. Dans certaines affaires, la remise groupée ou le rabais était lié à des arrangements contractuels conçus pour assurer l'exclusivité.

On observe une certaine évolution, en particulier en Europe, d'une approche « basée sur la forme » pour faire appliquer la loi dans ce domaine, qui se concentre sur le fait de savoir si les critères spécifiés sont remplis, vers une approche « basée sur les effets » qui se concentre sur l'étendue du préjudice éventuel. L'Union européenne a remarqué qu'il y avait un changement des pratiques qui prend plus clairement en compte les justifications d'efficacité, lorsque ces efficacités sont supérieures au préjudice anticoncurrentiel éventuel. Certaines contributions mettent l'accent sur l'importance d'une approche cohérente pour l'analyse d'un ensemble de pratiques liées, comprenant les accords d'exclusivité, les remises, ventes liées, pratiques de prédation et d'écrasement des marges ou des prix.

D'autre part, aucun consensus ne s'est encore dégagé autour de la définition précise du critère correct d'application d'un régime d'exemption ou autour d'autres dimensions des jugements

qu'une autorité de la concurrence doit rendre, par exemple l'ampleur requise de la domination, le volume d'affaires affecté par la pratique des remises, l'étendue requise de l'atteinte à la concurrence qui doit être objectivement prouvée, et la nature des moyens de défense permis. Un certain scepticisme s'est fait jour sur la valeur des documents indiquant que l'intention de l'entreprise était de porter atteinte à la concurrence. Bien que certains délégués aient été prêts à accepter une telle preuve comme corroborant par ailleurs une « histoire » économique forte, d'autres délégués ont fait valoir qu'on pouvait trouver de telles preuves même dans les entreprises sans pouvoir de marché et qu'il ne fallait pas leur accorder beaucoup d'importance.

Avec le temps, le développement de la jurisprudence, la publication de lignes directrices et de documents de réflexion ainsi que la convergence des pratiques dans les différentes juridictions clarifieront et réduiront les différences entre la loi et l'économie des remises groupées et des remises de fidélité.

ISSUES PAPER

By the Secretariat

1. Introduction

In February 2008, the Working Party n. 3 (WP3) agreed to hold a roundtable discussion on bundled and loyalty discounts and rebates. The Chair asked the Secretariat to identify in a short Issues Paper the main questions related to single and multi-product rebates that could be addressed in the country contributions and in the WP3 roundtable discussion on June 10. In his letter of 18 March 2008, the Chair invited the OECD member and observer countries to submit written contributions to the Secretariat on this topic by no later than 16 May 2008.

Pricing and discounting practices of dominant firms are among the most complex and contentious areas of antitrust enforcement involving single-firm conduct. In June 2002, a roundtable discussion on “Loyalty or Fidelity Discounts and Rebates” (DAFFE/COMP(2002)21) revealed important differences in the views among OECD countries which inhibited greater international convergence in enforcement involving certain discount practices. The roundtable emphasized that at the time the differences observed were more deeply rooted than simply different case enforcement experiences and involved different views on what should be the objectives of competition law with respect to monopolisation / abuse of dominance. Some countries regarded preserving fair play or a level playing field as part of protecting “competition”. Other countries focussed more on the increased economic efficiency and consumer welfare that competition usually promotes. To this day, despite recent important antitrust decisions and court judgements in important jurisdictions (such as the US and the EC) the topic is still widely debated and far from settled.

2. Definitions and description

Discounting practices can take many forms. The purpose of this roundtable is not to identify all possible ways in which firms can offer price cuts to customers but to identify issues that antitrust agencies should address in their enforcement practice. A broad distinction that will be used often in this paper separates discounts that apply to the sale of one product (single-product discounts) and discounts that apply to the joint sale of two or more products (multi-product discounts).

In the area of single-product discounts, it is common for manufacturers to offer a price reduction to buyers whose purchases meet or exceed certain quantity or share thresholds. An incremental-unit discount applies only to the incremental unit purchased. An all-units (or rollback) discount applies to all of the units purchased by the buyer, once the target threshold is reached. Other types of discount schemes include lump sum discounts (as opposed to a lower price per unit) and hybrid discount schemes which combine different types of discounts.

For the purposes of this roundtable, *single-product loyalty discount* refers to the practice of offering discounts or rebates on all units purchased of a single-product conditioned upon the level (or share) of purchases -- the discounts or rebates apply to all units of the buyer's purchases of the product rather than just the units beyond the level (or share) of purchases needed to obtain them. These discounts are also referred to as loyalty discounts or rebates. In this paper, we use the terms ‘fidelity’ and ‘loyalty’ interchangeably and the terms ‘rebate’ and ‘discount’ interchangeably.

In the area of multi-product discounts, firms often offer discounts to buyers who decide to purchase two or more products jointly. In case of a bundle, the products in the package can be purchased separately, each at a specified price, but the bundled price will be lower than the sum of the prices of each component of the bundle. Bundling differs from tying, which is considered by most countries to be unlawful in some circumstances, because the components of the bundle can be purchased separately. Bundling becomes relevant under antitrust law when the seller has significant market power with respect to one or more of the products, and faces competition in a product or product line where it lacks significant market power. In this case, the dominant firm bases the discount not solely on the product(s) facing competition, but on the dominant product as well.

For purposes of this roundtable, *bundled discount* refers to the practice of a dominant firm offering discounts or rebates contingent upon a buyer's purchase of two or more different products.

Box 1. Questions and Issues for Discussion

1. *Does your jurisdiction have statutory provisions expressly defining single-product loyalty discounts and/or bundled discounts?*
2. *Does your enforcement agency have any guidelines or other policy statements regarding such discount practices?*
3. *In your country, are there any judicial decisions that provide a legal precedent for how these practices should be evaluated?*

3. Policy framework for the analysis of rebates and discounts

Although there are some important differences in statutory language regarding unilateral conduct, there is broad agreement among competition agencies from OECD countries that the purpose of competition policy is to protect competition, not competitors. However, there is still some divergence on what should be the standard under which the conduct of dominant firms should be properly assessed. In other words, many agree that dominant firms should be allowed to “compete on the merits”, but not all agree on what this means in practice and what test should be applied to assess whether the specific conduct at issue is harming competition or is simply vigorous competition (DAF/COMP(2005)27).

Over the years, antitrust agencies and courts have devised a number of possible standards of review for discount practices but both the perimeter of what is legitimate conduct and the underlying principles that ought to define it remain unclear. The literature and enforcement practice of agencies and courts show that there are several possible tests that could be applied to determine if a certain pricing conduct is unlawfully exclusionary. For example, the “profit sacrifice” test, the “no economic sense” test and the “equally efficient firm” test have been advocated at one point or another. Others would only condemn conduct that unreasonably raises rivals’ costs. Finally, some argue that no single test captures the entire range of practices that we might wish to condemn as unlawfully exclusionary.

To distinguish pro-competitive discounts from anti-competitive ones, however, competition agencies must first address the question of what is the purpose of the antitrust laws in general and of unilateral conduct laws in particular. These questions have been the subject of considerable academic debate with the answers influencing enforcement practices towards rebates by dominant companies. In this debate, some argue that the main objective of the antitrust laws is to improve economic efficiency and consumer welfare. Others have argued that non-economic concerns such as justice, fairness or the protection of small businesses are the primary goals of the antitrust laws.

Those countries whose antitrust laws pursue objectives other than economic efficiency and consumer welfare tend to intervene more when enforcing their unilateral conduct laws. An interventionist approach is based on the view that dominant firms' conduct should be constrained in order to assist entrants or competitors even if the conduct in question makes good business sense in its own right (i.e.: would be pursued even absent a harmful impact on competition). These theories tend to balance the short-term benefits from the conduct with the long-term costs of monopoly and condemn the conduct if the latter exceed the former. This approach embodies the view that in the long-run some price competition, even if from less efficient firms, is better than no competition at all. Countries which take a more interventionist approach tend to rely on *per se* or on "form-based" rules on unilateral conduct which focus primarily on how conduct can be categorised rather than on its effects on the market. Form-based approaches have the advantage of providing businesses with greater legal certainty and with faster case resolution. However, when it comes to conduct, such as rebates, that may have opposite effects on consumers depending on the circumstances, a form-based approach may potentially expose antitrust enforcement to both false positives and false negatives.

Recognising the many pro-competitive effects of single-product loyalty discounts and bundled discounts (even if offered by dominant firms) and the difficulty of achieving profitable exclusion, other countries are less prone to rely on *per se* rules but rather take a case-by-case approach focusing on the economic impact that pricing practices have on consumers and on competition. These countries rely on an "effects-based" approach and balance in each case the pro and anti-competitive effects of a specific pricing practice. Contrary to the form-based approach, an effects-based approach reduces the risk that an aggressive enforcement action against one firm will chill pro-competitive pricing by others. As a result, an effects-based regime is less likely to dull the incentives for firms to strive to become the market leader.

Box 2. Questions and Issues for Discussion

15. *In your jurisdiction do you enforce per se rules against rebates offered by firms or do you take a case-by-case, effects-based approach?*
16. *What advantages and disadvantages do you see in a form-based approach and in an effects-based approach in terms of clarity and legal certainty for businesses and in terms of the efficacy of an enforcement action?*
17. *Are you concerned that your jurisdiction's antitrust approach to discount practices is either (a) too lenient, allowing anti-competitive effects to occur; or (b) too strict or not clear enough, chilling price-cutting that would benefit consumers?*

4. Effects of single-product loyalty discounts and bundled discounts on competition and on consumers

Rebates are a very common commercial practice in many markets. Often rebates are offered by the supplier to increase sales of its products but in many cases discounts are required by the buyer as a price of doing business. They are generally viewed as a sign of healthy price competition and the economic literature is unwilling to assume that these pricing practices are necessarily harmful or anti-competitive, even when offered by dominant companies. Many studies have shown that depending on the circumstances discounts can generate efficiencies which are beneficial to consumers and are therefore welfare-enhancing. However, the economic literature has also emphasised that in some cases rebate schemes could harm competition and that in these cases an antitrust intervention is required.

4.1 *Potential pro-competitive effects of single-product loyalty discounts and bundled discounts*

The efficiencies that stem from single-product loyalty discounts can include *savings in production costs and in other costs*: single-product loyalty rebates can generate production efficiencies from which society as a whole can benefit. The manufacturer can increase its future sales (and profits) if, for example, the loyalty discount increases sales stability and helps the manufacturer to reduce sales fluctuations and consequently inventory costs. Rebates may also generate efficiency gains in the form of economies of scale for the supplier or economies of transaction for the buyer (i.e. when the buyer concentrates its purchase on a single seller).

A manufacturer can use single-product loyalty discounts to identify the most price sensitive retailers and to offer this more elastic segment of demand lower prices for increased sales. This is because those retailers who think that they can pass on these discounts to generate greater sales and profits in the downstream market will be the ones who are most likely to take up the discount. This strategy is a rational behaviour (with or without market power) and, all else been equal, would benefit more elastic customers without harming others, with an overall positive impact on consumers.

Single-product loyalty discounts are also a powerful tool for manufacturers to support retailers' sale efforts. Rebates can be used by the supplier to incentivise efficient behaviour by retailers and to favour the retailer's efforts in promoting its good. For example, a supplier might decide to reward a retailer which has exceeded last year's sales by means of a rebate on this year's sales. This rationale, which is well developed in the literature on vertical relations, may enhance either inter-brand competition, intra-brand competition, or both.

As for bundled rebates, selling packages of goods or services via a bundled price is also a very common strategy in many markets and a strategy which can be beneficial to consumers and businesses alike. From the buyer's perspective, bundling directly benefits consumers through lower prices and it reduces consumers' search and information costs. Bundled rebates can also facilitate entry into new markets and more effective competition with established firms. Bundling also allows firms to achieve economies of scale or scope in production and distribution, to reduce production and inventory costs, and to package and market integrated and compatible products to the benefit of consumers. Moreover, bundling can serve as a tool for the manufacturer to expand its sales by providing incentives to the retailer for investing in better promotional and point-of-sale services required to achieve such objectives. In this case, bundled rebates compensate retailers for their efforts on behalf of the manufacturer, and thus can serve to mitigate retailer free-riding and hold-up problems.

4.2 *Potential anti-competitive effects of single-product loyalty discounts and bundled discounts*

Despite the many pro-competitive aspects of single-product loyalty discounts and bundled discounts, many recognize that there are differences between these types of pricing mechanisms and straight price cutting. Some focus on the long-term implications of discounts as new competitors contemplate entry and/or incumbent competitors consider exit, viewing discounts as a form of predation. Others focus on the short-term competitive effects of discounts, arguing that predation may not be the only effect of discounts and that rebates may also have anti-competitive effects which do not necessarily require a short-term profit sacrifice (i.e. below cost pricing) or a period of recoupment.

Most jurisdictions agree that if a discount is structured such that sales are made below an appropriate measure of cost (such as marginal costs or average variable costs) this can be considered abusive in some circumstances. In this case, the strategy of the dominant supplier may be exclusionary, since it decides to incur short-term losses to discourage a rival from entering the market or to induce a rival to exit from the market. The predatory strategy of the dominant firm is derived in some jurisdictions from the fact that that

short-term losses are recouped in the form of higher profits in the long-run once the competition is eliminated. This strategy applies equally to single-product loyalty rebates and to bundled rebates.

Another concern with rebates is that they can be used to raise entry barriers. Anti-competitive foreclosure is more likely to occur if the loyalty discount raises the costs of entry for rivals (who have to compensate buyers for their switching costs) or if it prevents rivals from achieving the minimum viable scale required to compete effectively. Single-product loyalty rebates are more likely to have foreclosing effects when the buyer is close to meeting its purchase target with the dominant firm. If the increment needed to obtain the rebate is small, however, one has to consider if the foreclosure of such small increment may not foreclose a significant amount of sales and therefore one should assess whether this is likely to have anti-competitive effects. In some cases, single-product loyalty discounts approach exclusive dealing arrangements, particularly if the buyer is required to purchase all or a high percentage of his requirements from the dominant supplier to obtain the rebate.

Box 3. Questions and Issues for Discussion

7. *What efficiency benefits and what anti-competitive effects could be associated with single-product loyalty discounts and with bundled rebates? How does your jurisdiction/agency assess the probability that they are actually occurring?*
8. *Please explain how characteristics of the discount¹ or the market² tend to increase the probability and significance of any pro and/or anti-competitive effects associated with the discount?*
9. *What conditions must prevail before one can confidently predict that a rebate scheme will harm consumers? Or is harm to competitors a sufficient factor for pursuing an antitrust case against a particular rebate scheme?*
10. *How does your enforcement agency treat price discrimination achieved through single-product loyalty discounts and bundled discounts?*
11. *How, if at all, might discounts lead to less price transparency in markets and under what circumstances would that tend to affect competition?*

Price cuts, in the form of single-product loyalty rebates may also have a discriminatory effect as they can lead to a situation in which the dominant supplier applies dissimilar conditions to customers, thereby placing some retailers at a competitive disadvantage. In some jurisdictions, such as the European Union, courts have found this to be sufficient ground for finding an abuse. Loyalty discounts could also make it considerably more difficult for consumers to compare prices and thus tend to discourage price competition. The Background Note of the Secretariat on Loyalty and Fidelity Discounts and Rebates (DAFFE/COMP(2002)11) concludes that probability that a single-product loyalty discount will have anti-competitive effects essentially depends on whether, and to what degree, the discount reduces price

¹ Examples of possibly pertinent characteristics could be: length of time over which the discount is calculated; units of purchases covered by the discount (such a discount may or may not be restricted to the incremental purchases required to qualify for the discount); degree to which it is explicitly tied to a buyer's requirements; and degree to which it rises with the quantity or percentage of requirements purchased.

² Examples of market characteristics that might be relevant include the presence or absence of a dominant firm, the degree to which loyalty discounts are widespread in the market, and the existence and importance of economies of scale, network effects, and buyer switching costs.

transparency and/or excludes or restricts actual or potential competitors, thereby facilitating anti-competitive co-ordination or strengthening a dominant position.

5. The standard of review for single-product fidelity discounts and bundled discounts

While businesses need a workable antitrust test to ensure that their rebate schemes are in compliance, significant uncertainty remains as to what should be the appropriate standard for review of both for single-product fidelity discounts and bundled discounts. While there seems to be some agreement on the unlawfully exclusionary effects of below-cost rebates, antitrust agencies and courts have not yet offered clarity on how to address potential anti-competitive effects of rebates which are above costs and on what (if any) safe harbours exist for dominant firms.

5.1 *Single-product loyalty discounts*

To assess whether single-product fidelity discounts are anti-competitive, some jurisdictions rely on cost-based tests under which the lawfulness of the discount depends on the discounted price being above or below an appropriate measure of cost (usually marginal cost, or long-run average variable costs). Pricing below the appropriate measure of cost is presumed to be unlawful, while pricing above this benchmark is presumed to be lawful. Under a predatory strategy, once the low prices associated with a discount have induced enough competitors to leave the market, the discounter raises prices above pre-discount levels in order to recoup the losses made during the low price stage of the strategy (DAF/COMP(2005)14). In such a situation, what consumers initially gain through lower prices, could be more than lost in the long-run. This will not happen of course, unless re-entry or new entry is somehow blocked once prices are raised in the recoupment phase. Supporters of predatory pricing tests for single-product rebates stress that as long as prices are above the relevant measure of cost, the discount cannot exclude an equally efficient rival.

Part of the literature also looks at single-product fidelity discounts under theories of harm other than pricing below cost. Some have looked at single-product loyalty discounts as a form of “light” exclusive dealing. Others have condemned loyalty discounts because they could raise rivals’ costs by depriving competitors of the minimum critical mass in terms of economies of scale required to effectively compete with the dominant firm. While there is generally some agreement on condemning below-cost loyalty discounts, the more complex question is whether above-cost loyalty discounts could also be deemed anti-competitive. While it is possible to identify specific situations in which above-cost prices can have exclusionary effects, this is an area where many scholars emphasise how the lack of a coherent and workable theory runs the risk of chilling behaviour which is entirely pro-competitive. A result, they point out, that could be more socially costly than the exclusionary effects they are trying to prevent.

Many argue that the antitrust laws should not be used to attack above-cost pricing because (a) this would generate excessive and inefficient litigation as rivals would likely challenge any pricing policy of the dominant firm as an exclusionary tactic; and (b) antitrust is not the most suitable instrument for dealing with pricing claims. Critics of theories condemning above-cost prices have also argued that to force a dominant firm to hold a price umbrella over its rivals, selling at above-cost prices in order to protect the rivals’ inefficiently small production, would be a blatant example of protecting competitors at the expense of consumers. In addition, it has been argued that the problems with the theory that discounts deprive rivals of economies of scale is that the theory does not really require a discount at all. The seller who simply sold all of its product at the fully discounted price, without requiring any purchase commitment, would also be depriving rivals of economies of scale.

Box 3. Questions and Issues for Discussion

12. *In your jurisdiction, have single-product loyalty discounts ever been challenged? If so, can you provide examples?*
13. *If your enforcement agency has challenged single-product loyalty discounts, (a) have you done so in instances in which the defendant did not already have monopoly power/dominance, and (b) have you done so in instances in which all significant competitors were not driven out of the market?*
14. *In your jurisdiction, is a “price-cost” test used to review single-product loyalty discounts? If so, please describe the test(s) and what additional analysis (if any) is applied to conduct that either passes or fails the test. If single-product loyalty discounts can be condemned as anti-competitive in your jurisdiction without application of some kind of price-cost test, what is the test that is applied, and what is the theory of anti-competitive harm?*

5.2 **Bundled discounts**

From an antitrust perspective, aggregated or bundled multi-product discounts pose different issues than single-product loyalty discounts. The situation of multi-product bundled discounts is somewhat more complex because an equally or even more efficient firm making only one product or a subset of products in a bundle may not be able to match an aggregated discount. Many competition authorities have argued that multi-product rebate programs may be a form of potential tying, which may allow the monopolist to leverage market power into competitive markets.

For bundled discounts, several tests have been suggested to assess whether a discount scheme could be anti-competitive. By bundling together different products, a firm with market power may be able to offer the bundle at a price which is still profitable for the dominant supplier, but could make it impossible for rivals to match or better these offers. As a result, a rational, profit-maximizing buyer is “forced” to take the bundle, since good competitive options are not available. Some have advocated the use of cost-based tests, whereby if the rebate lowers the price below an appropriate measure of cost (such as marginal cost, or long-run average variable costs), then it should be declared unlawful. If the discounted price for the bundle is below the cost of supplying the bundle, no equally efficient firm can match the discounted price. Generally, proof of below-cost sales and recoupment are required to condemn such discounting practices as anti-competitive.

However, these cost-based tests raise issues as to how to properly apply them in a multi-product context. One approach would be to compare the price of the bundle to the relevant cost of producing the bundle. Pricing conduct that results in bundle prices that exceed the relevant cost of producing the bundle would be presumptively lawful. Some have criticized such a standard as too permissive, and suggested that the bundled discount should be allocated between the component goods, and then examining whether the price of each component good, net of this allocated discount, is greater than the appropriate measure of cost. The problem with such an approach is there is no consensus, in theory or in practice, on how to make such an allocation, which would inevitably be arbitrary, particularly in the presence of significant common costs.

Next to the theories based on a predatory strategy through profit sacrifice, part of the literature has analysed bundled discounts as a form of *de facto* or *contractual* tying. According to these authors, while buyers can purchase each product in the bundle separately, the prices of the separate components are higher relative to the bundled price. This price increase makes purchase of the bundle relatively attractive, even when the prices in the bundle are set at the monopoly level. The bundle appears to offer consumers a

discount, but in fact does not, because the price for each separate good has been correspondingly increased, including raising the stand-alone price of the monopoly good above the monopoly price of the good in the absence of bundling. Under these theories, a bundle offers no benefit to consumers and simply disguises an increase in the price of the component goods.

An unresolved question is whether bundled discounts could be also condemned if above cost and, if so, under what circumstances. A bundled discount can in some cases exclude an equally or more efficient competitor, if the competitor competes with respect to only one part of the bundle and cannot profitably match the discount aggregated over the bundled products, even if the post-discount prices for both the bundle as a whole and each of its components are above cost. There is a growing theoretical literature which demonstrates how in these circumstances bundling can be used by monopolists as an exclusionary or entry deterring device. However, it has been argued that exclusionary effects of bundled discounts largely depend on the ability of the market to respond to dominant firm strategy. This is the case if there is at least one other firm in the market that offers the same package that the dominant firm is discounting or if the dominant firm faces competition on the non-dominant product, in which case consumers have the option to purchase the competing bundle or to compile their own bundle by purchasing each component individually. This would give the dominant firm less scope to exclude rivals profitably, because if one or more rivals can replicate the dominant firm's bundle (including through alliances with other firms), competition could potentially be ensured.

Box 5. Questions and Issues for Discussion

15. *In your jurisdiction, have bundled discounts ever been challenged? If so, can you provide examples?*
16. *If your enforcement agency has challenged bundled discounts, (a) have you done so in instances in which the defendant did not already have monopoly power/dominance, and (b) have you done so in instances in which all significant competitors were not driven out of the market?*
17. *In your jurisdiction, is a "price-cost" test used to review bundled discounts? If so, please describe the test(s) and what additional analysis (if any) is applied to conduct that either passes or fails the test. If bundled discounts can be condemned as anti-competitive in your jurisdiction without application of some kind of price-cost test, what is the test that is applied, and what is the theory of anti-competitive harm?*

5.3 Safe harbours for rebate practices

As repeatedly noted, many types of potentially exclusionary practices, including rebates, can have efficiency enhancing effects which may balance the restrictive effects of these practices. However, in some cases the efficiency enhancing effects of these practices may be hard to measure, exposing the enforcement agency to type II errors (or false positives). In order to limit this risk, some agencies have adopted broad safe harbours for permitted discount activities that are generally considered not likely to have anti-competitive effects. The advantage of this approach is that it enhances legal certainty in regard to discount practices, reducing any chilling effect on price cutting by dominant firms.

Some commentators have proposed that single firm rules should be applied differently depending on the degree of market power possessed by the dominant firm. Where a firm has real monopoly power (particularly where the firm in question is a present or former State-owned monopoly) the firm would be subject to more stringent obligations. Because predation and foreclosure are difficult strategies to be implemented successfully even for firms with large market shares, rebate rules could be suitable candidates for a "super-dominance" assessment. Some scholars have suggested that unless a firm has a market share of at least 65%, it is unlikely that a rebate scheme would have serious anti-competitive effects. With a market share of 65% or higher, there is a real risk of significant foreclosure effects. Although it is difficult

to say how large the market share of a company should be for a rebate scheme to be more likely to have exclusionary effects, some scholars have suggested that competition agencies should engage in this exercise to increase predictability and legal certainty by providing businesses with a clear and workable market share safe harbour.

Some countries apply to discount practices the same conduct safe harbours that apply to predatory pricing: the above-cost and recoupment tests. If the discounted price is above an appropriate measure of costs (usually marginal cost, or long-run average variable cost) the discount scheme is generally allowed. In addition to price-cost tests, some countries also apply the 'recoupment' test. Under the recoupment test, even if the rebates scheme is below cost, antitrust intervention is justified only if there is a compelling explanation for why prices will increase in the long-term as a result of the behaviour of the dominant firm. If recoupment is not possible, then the condition of long-term harm to competition and consumers is not satisfied and the case for intervention is not met. This recoupment test may appear severe if one looks only at the short-run exclusionary effects because competing firms are forced to exit (or are prevented from entering) the market, as a result of the dominant firm's practices. However, it appears justified in a long-term analysis of the competitive effects of rebates as it keeps the antitrust intervention focused on behaviour that likely results in genuine long-term harm to competition and consumers.

As noted above, the application of price-cost safe harbours to bundled rebates is more complex because of the difficulty of properly allocating costs to the products in the bundle. However, many argue that the safe harbour approach described above remains valid. In addition to these tests, some have proposed that if the total price of the bundle exceeds the sum of the separate costs of the constituent elements, then the dominant firm has not engaged in exclusionary conduct. Criticising this test as too lenient, others have proposed that the entire bundles discount should be allocated to the price of the product for which exclusion is claimed and if the implied price still exceeds the relevant measure of cost, then the discount scheme should be presumed not to have anti-competitive effects. Under this variant of the safe harbour, bundled discounts are lawful as long as they would not exclude or drive out of the market a hypothetical equally efficient competitor. Finally, others have proposed a test based on the analysis of incremental revenue and incremental costs: a multi-product pricing structure would fall in the safe harbour if the incremental revenue exceeds the incremental cost for all relevant subsets of products.

Box 4. Questions and Issues for Discussion

18. *In your jurisdiction, how do the laws or enforcement policies regarding rebates differ depending on whether or not they are offered by firms having significant market power, or are widespread in the market?*
19. *To what extent is there clarity in your jurisdiction as to how single-product loyalty discounts and/or bundled discounts will be evaluated? What degree of certainty do businesses have in being able to assess the legality of single-product loyalty discounts or bundled rebates that they may be considering?*
20. *In your jurisdiction, are there any structural or conduct safe harbours for rebate practices that businesses can rely on? Should there be different safe harbours for single-product rebates and bundled rebates?*
21. *When assessing discount practices, do you balance long-term entry/exit considerations with short-term effects of rebates on consumers and rivals? To what extent should antitrust intervention against dominant firms' discount practices satisfy a 'recoupment' test?*

6. Possible defences - Efficiencies, meeting competition and burden of proof

Many scholars and many antitrust enforcement agencies agree that pro-competitive effects of discounts should be duly taken into account when assessing the legality of a rebate scheme. The great

majority of discounting practices are pro-competitive and the economic models that show that certain discount practices can be anti-competitive have been criticised as being highly complex and based on unrealistic assumptions. Some jurisdictions, however, have taken a narrow view of the possible arguments that a dominant firm can introduce to show that the restrictive effects of the rebates scheme are outweighed by the efficiencies generated by the same pricing mechanism. In the European Union, for example, it appears that the case law of the European courts on fidelity rebates leaves very little scope for an efficiency defence which makes loyalty discounts by dominant firms essentially *per se* illegal. European courts have taken the view that discounts offered by a dominant firm that are not equally available to all buyers can be permitted only under strict cost justifications. The courts, however, have interpreted these justifications so narrowly that only cost savings appear likely to qualify. Yet these are in most cases difficult to establish and quantify.

One justification that is often put forward by dominant firms is that the rebate scheme was adopted in order to meet the competition's lower prices (the "meeting competition defence"). The extent to which this defence is accepted however varies across jurisdictions. Some agencies have accepted that defence provided that the price cut is not selective but is generally available to all buyers. Usually the concern is that lower prices have been targeted at a group of customers to induce them not to switch to a potential new entrant, whilst the customers who are less likely to switch continue to pay the undiscounted prices. Others have argued that the scope of the meeting competition defence should be broader and that agencies should consider it if the competitor has alternative routes to market on a scale sufficient to become a viable competitor.

If dominant firms are allowed to argue efficiencies to explain and justify discount practices, the question of the burden of proof becomes very important. Some argue that the burden of proof for such an objective justification or efficiency defence should be on the dominant company. Others argue that since economic theory does not indicate that discounts and price cuts normally result in anti-competitive outcomes, it is not justified to place the burden upon the dominant firm to bring forward efficiency arguments to support its price cuts or discounts. It has been argued that a presumption that rebates are to be condemned unless the dominant firm can conclusively show efficacy gains could cast the net too widely, catching many benign practices and generating an administratively costly process. As a result, such an approach could risk chilling effective competition by discouraging firms from engaging in a range of pro-competitive pricing practices.

Box 5. Questions and Issues for Discussion

22. *How, if at all, does your law and/or enforcement policies treat the pro-competitive or efficiency benefits of single-product loyalty discounts and bundled discounts? More particularly, what defences/exceptions are afforded to a dominant company which offers discounts?*
23. *What special difficulties, if any, have you encountered in dealing with the defences/exceptions pertinent in your jurisdiction? If conduct appears to adversely affect competition but there are legitimate business justifications for the conduct, how do you reach a decision?*
24. *In your jurisdiction, if a dominant manufacturer offers a fidelity rebate to one company, would it be obliged to offer the same rebate to competing purchasers? Or can it offer rebates selectively to respond to commercial initiatives of its competitors? If that is the case, under what conditions can it do that?*
25. *If in your jurisdiction dominant firms are allowed to argue efficiencies, how is the burden of proof allocated between the plaintiff and the defendant?*

26. *Does your jurisdiction/agency view anti-competitive intent as a relevant factor to consider in loyalty discounts and/or bundled discounts cases? If so, what types of intent evidence would work against a dominant firm?*

7. Remedies

The efficacy of enforcement actions against unilateral conduct depends on the utility of remedies that competition agencies can impose on businesses. Remedies for anti-competitive exclusionary conduct can be hard to fashion, particularly in the area of rebates and other pricing practices. The difficulty in devising satisfactory remedies in this area is due to the fact that structural remedies are not always available to the enforcement agency and non-structural (or behavioural) remedies too often amount to little more than price regulation, which rarely satisfies the goals of antitrust. This seems to point at monetary sanctions and at private actions for damages as the most appropriate remedies for anti-competitive rebates and discounts. However, it has been argued that monetary fines should not be imposed in especially complicated cases where the practices are not obviously anticompetitive, as is the case for discounts and rebates (DAF/COMP(2006)19).

Box 6. Questions and Issues for Discussion

27. *In cases where anti-competitive effects of a discount practice outweigh the pro-competitive effects, what remedies, if any, did your enforcement agency authority adopt in addition to fines and/or blanket prohibition orders? How effective did they prove to be?*

8. Conclusion

Rebates and discounts by dominant firms raise complex policy issues and competition enforcers and courts strive to identify workable standards for distinguishing between pro and anti-competitive pricing schemes. On the one hand, price-cutting is the essence of competition and is what consumers desire; on the other hand price cutting under certain circumstances may have exclusionary effects and therefore threaten competition. The real challenge for antitrust agencies is to gauge the tangible short-term benefits of lower prices for consumers against possible long-term harm to competition. Failing to provide the market with clear principles and standards to govern business conduct can lead to inconsistent approaches to the enforcement of competition rules on unilateral conduct. The uncertainty in the applicable standards may effectively discourage firms with large market shares from price cutting, abandoning pricing practices which are pro-competitive.

The challenge for competition authorities is to draw a clear dividing line between pro and anti-competitive rebate schemes and to provide businesses with a workable standard of review. If the line is drawn too aggressively, agencies risk chilling price competition and lower prices to the benefit of consumers; if the line is drawn too passively, agencies may leave room for anti-competitive behaviour on the part of the dominant firms. The proliferation of standards may lead to unpredictable results (both within and between jurisdictions) and makes dominant companies apprehensive about the likelihood of receiving different treatment from competition authorities across countries. For these reasons, the approach to unilateral conduct and particularly to discount and rebate practices of dominant firms would benefit from greater international convergence.

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NOTE POUR DISCUSSION

Par le Secrétariat

1. Introduction

En février 2008, le Groupe de travail n° 3 a décidé de tenir une table ronde sur les remises de fidélité et les remises groupées. Le Président a demandé au Secrétariat de recenser dans une courte note de réflexion les principales questions qui se posent en ce qui concerne les remises portant sur un ou plusieurs produits et qui pourraient être traitées dans les contributions des pays et à l'occasion de la table ronde du Groupe de travail le 10 juin 2008. Dans sa lettre du 18 mars 2008, le Président a invité les pays membres de l'OCDE et les pays ayant le statut d'observateur à soumettre des articles sur ce sujet au Secrétariat pour le 16 mai 2008.

Les pratiques de prix et de rabais des entreprises dominantes comptent parmi les domaines les plus complexes et les plus controversés de l'application du droit de la concurrence eu égard au comportement d'entreprises isolées. En juin 2002, une table ronde sur les remises de fidélité (DAFFE/COMP(2002)21) a révélé qu'il existait entre les pays de l'OCDE d'importantes divergences de vues qui faisaient obstacle à une meilleure harmonisation internationale dans la lutte contre certaines pratiques de rabais. Cette table ronde a mis en évidence le fait que les différences observées étaient plus profondément ancrées que ne le laissait supposer l'examen de quelques expériences d'application du droit et étaient liées à des divergences quant aux objectifs qui doivent être impartis au droit de la concurrence s'agissant de la monopolisation et de l'abus de position dominante. Certains pays considèrent la préservation et l'harmonisation des règles du jeu comme faisant partie de la protection de la « concurrence ». D'autres insistent davantage sur l'amélioration de l'efficacité économique et du bien-être des consommateurs habituellement favorisée par la concurrence. À ce jour, même si des décisions marquantes ont été prises par des autorités de concurrence et des tribunaux de pays importants (États-Unis et pays de la Commission européenne), cette question fait encore l'objet de nombreuses discussions et est loin d'être réglée.

2. Définitions et description

Les pratiques de rabais peuvent prendre diverses formes. Cette table ronde n'a pas pour but d'inventorier tous les moyens par lesquels les entreprises peuvent offrir des réductions de prix aux clients mais de mettre en évidence les problèmes que les autorités de concurrence devraient traiter dans leur activité d'application du droit. Une distinction sommaire est souvent faite dans le présent document entre les rabais applicables à un seul produit (remises portant sur un produit) et la vente simultanée de deux produits ou plus (remises groupées).

Dans le cas des remises qui portent sur un produit, il est courant que les fabricants offrent une réduction aux acheteurs dont les achats atteignent ou dépassent un certain seuil représenté par une quantité ou part. La remise peut porter seulement sur l'unité additionnelle achetée. Elle peut aussi être globale ou rétroactive et s'appliquer à toutes les unités achetées par l'acheteur une fois que le seuil cible a été atteint. On trouve également des programmes de remises globales (plutôt qu'à l'unité) et des programmes mixtes combinant différents types de remises).

Pour les fins de la présente table ronde, l'octroi d'une *remise de fidélité portant sur un produit* fait référence à la pratique consistant à offrir une remise sur toutes les unités achetées d'un seul produit, en

fonction du niveau (ou de la part) d'achats – la remise s'applique à toutes les unités achetées et non seulement à celles qui dépassent le seuil d'achat fixé (niveau ou part). Cette pratique est aussi appelée indifféremment remise ou rabais de fidélité.

Les remises concernant plusieurs produits sont souvent offertes par les entreprises aux acheteurs qui décident d'acheter simultanément deux produits ou plus. Dans le cadre d'une remise groupée, les composants peuvent être achetés séparément à un prix spécifié mais le prix groupé est inférieur à la somme des prix de chacun. Du fait que les composants peuvent être achetés séparément, les remises groupées ne constituent pas des ventes liées, que la plupart des pays considèrent comme illégales dans certaines circonstances. Ces remises sont soumises au droit de la concurrence lorsque le vendeur dispose d'un pouvoir de marché significatif pour un ou plusieurs des produits concernés et est confronté à la concurrence, sans détenir un pouvoir de marché important, pour un produit ou une gamme de produits. Dans ce cas, l'entreprise dominante pratique la remise sur le ou les produits sur le marché desquels elle est confrontée à la concurrence, mais aussi sur les produits sur le marché desquels elle détient une position dominante.

Pour les fins de la présente table ronde, la *remise groupée* s'entend de la pratique consistant, pour une entreprise dominante, à offrir des remises ou des rabais subordonnés à l'achat de deux produits différents ou plus.

Encadré 1. Questions et problèmes à examiner

1. *Votre pays est-il doté de dispositions législatives qui définissent expressément les remises de fidélité portant sur un seul produit et/ou les remises groupées ?*
2. *L'autorité de concurrence a-t-elle établi des principes directeurs ou d'autres déclarations d'orientation concernant ces pratiques de rabais ?*
3. *Dans votre pays, des décisions judiciaires ont-elles fait jurisprudence pour ce qui est des modalités d'évaluation de ces pratiques ?*

3. Politique générale pour l'analyse des remises

Bien que les textes réglementaires comportent des différences marquées dans le traitement du comportement unilatéral, il existe parmi les pays de l'OCDE une large convergence de vues sur le fait que la politique de la concurrence vise à protéger la concurrence et non les concurrents. Il subsiste toutefois certaines divergences en ce qui concerne le critère à l'aune duquel le comportement des entreprises dominantes devrait être correctement apprécié. En d'autres termes, beaucoup de pays s'accordent à penser que les entreprises dominantes devraient être autorisées à mener une concurrence par les mérites mais ne s'entendent pas sur ce que cela signifie dans la pratique et sur le critère qui devrait être appliqué pour déterminer si un comportement donné est préjudiciable à la concurrence ou relève simplement de la concurrence vigoureuse (DAF/COMP(2005)27).

Au fil du temps, les autorités de concurrence et les tribunaux ont élaboré de nombreux critères possibles d'appréciation des pratiques de rabais mais la délimitation d'un comportement licite et des principes correspondants qui doivent le définir sont encore flous. Si l'on se reporte aux textes publiés et à l'activité d'application du droit, on constate que plusieurs critères pourraient permettre de déterminer si un comportement donné en matière de prix a un effet d'exclusion illicite. Certains ont par exemple préconisé à un moment ou l'autre l'application de critères comme le « renoncement aux bénéfices », l'« absence de justification économique » et l'« efficacité équivalente des entreprises ». D'aucuns condamneraient

seulement le comportement ayant pour effet d'augmenter de façon excessive les coûts des concurrents. D'autres soutiennent enfin qu'aucun critère ne couvre toute la gamme de pratiques qu'il serait souhaitable de condamner pour leur effet d'exclusion illicite.

Pour établir une distinction entre les remises bénéfiques pour la concurrence et celles qui ne le sont pas, les autorités de concurrence doivent toutefois préciser en premier lieu l'objet du droit de la concurrence en général et du droit des comportements unilatéraux en particulier. Ces questions ont suscité de nombreux débats entre spécialistes et les réponses qui y ont été apportées ont influencé les activités d'application du droit à l'égard des remises octroyées par des entreprises dominantes. Certains estiment que le principal objectif poursuivi par le droit de la concurrence est l'amélioration de l'efficacité économique et du bien-être des consommateurs. D'autres soutiennent que le droit de la concurrence vise principalement des objectifs non économiques, comme la justice, l'équité ou la protection des petites entreprises.

Les pays dont le droit de la concurrence poursuit des objectifs autres que l'efficacité économique et le bien-être des consommateurs sont plus interventionnistes dans l'application du droit relatif aux comportements unilatéraux. L'attitude interventionniste est fondée sur l'idée que le comportement des entreprises dominantes doit être restreint afin d'aider les nouveaux entrants ou les concurrents même lorsque le comportement en cause procède en tant que tel d'un bon sens des affaires (en d'autres termes, cette attitude serait adoptée même en l'absence d'effet néfaste sur la concurrence). Cette théorie tend à mettre en équilibre les avantages à court terme du comportement et les coûts à long terme du monopole et à condamner le comportement si les coûts à long terme du monopole l'emportent sur les avantages. Cette manière de voir englobe le point de vue selon lequel à long terme, la concurrence par les prix, même si elle est le fait d'entreprises moins efficaces, est préférable à l'absence de concurrence. Les pays qui privilégient une attitude plus interventionniste ont tendance à s'en remettre, en matière de comportement unilatéral, à des règles *per se* ou formelles, c'est-à-dire à des règles qui s'attachent essentiellement au mode de catégorisation du comportement plutôt qu'aux effets de ce dernier sur le marché. L'approche formelle présente l'avantage de procurer aux entreprises une plus grande certitude juridique et un règlement plus rapide des affaires. Pour ce qui est des comportements comme l'octroi de remises, qui sont susceptibles d'avoir des effets opposés sur les consommateurs selon les circonstances, l'approche formelle risque toutefois d'exposer les autorités de concurrence à des résultats faussement positifs et à des résultats faussement négatifs.

D'autres pays, reconnaissant les nombreux avantages concurrentiels des remises de fidélité portant sur un produit et des remises groupées (même celles qui sont offertes par des entreprises dominantes) et le fait qu'il est difficile de réaliser une exclusion de manière rentable, sont moins portés à s'en remettre à des règles *per se* et procèdent plutôt au cas par cas en se concentrant sur l'impact économique des pratiques de prix sur les consommateurs et la concurrence. Ces pays abordent la question sous l'angle des effets et pèsent dans chaque cas les avantages et les inconvénients d'une pratique de prix précise pour la concurrence. Contrairement à l'approche formelle, l'approche axée sur les effets réduit les risques qu'une mesure coercitive sévère à l'encontre d'une entreprise dissuade d'autres entreprises de pratiquer des prix concurrentiels. Il en résulte qu'un système fondé sur les effets risque moins de diminuer les incitations des entreprises à conquérir la première place sur le marché.

Encadré 2. Questions et problèmes à examiner

4. *Dans votre pays, appliquez-vous des règles per se aux remises offertes par les entreprises ou procédez-vous plutôt au cas par cas en abordant la question sous l'angle des effets ?*
5. *Quels sont selon vous les avantages et les inconvénients respectifs de l'approche formelle et de l'approche fondée sur les effets en ce qui concerne la clarté et la certitude juridique pour les entreprises de même que l'efficacité des mesures coercitives ?*
6. *Estimez-vous que l'attitude des autorités de concurrence de votre pays à l'égard des pratiques de rabais est (a) trop indulgente et donc propice aux effets anticoncurrentiels ; ou (b) trop stricte ou insuffisamment claire, ce qui dissuade les entreprises d'offrir des réductions de prix dont pourraient bénéficier les consommateurs ?*

4. Effets des remises de fidélité portant sur un produit et des remises groupées sur la concurrence et les consommateurs

L'octroi de remises est une pratique commerciale très répandue sur de nombreux marchés. Les remises sont souvent offertes par un fournisseur qui souhaite augmenter les ventes de ses produits mais il n'est pas rare qu'elles soient consenties à la demande de l'acheteur en contrepartie de l'achat. Elles sont généralement considérées comme une manifestation de saine concurrence par les prix et les études économiques ne veulent pas croire que ces pratiques de prix sont nécessairement dommageables ou anticoncurrentielles, même lorsqu'elles sont le fait d'entreprises dominantes. De nombreuses études ont montré que selon les cas, les remises peuvent entraîner des gains d'efficacité bénéfiques pour les consommateurs et contribuent en conséquence à l'amélioration du bien-être. Les textes économiques soulignent toutefois que dans certains cas, les programmes de remises peuvent affecter la concurrence et que l'intervention des autorités de concurrence s'impose alors.

4.1 Effets bénéfiques possibles pour la concurrence des remises de fidélité portant sur un produit et des remises groupées

L'efficacité qui résulte des remises de fidélité portant sur un produit peut découler des *économies de coûts de production et d'autres coûts* : les remises accordées sur un produit entraînent un gain d'efficacité au niveau de la production dont l'ensemble de la société peut profiter. Le fabricant peut augmenter ses ventes (et ses bénéfices) futurs lorsque, par exemple, la remise de fidélité renforce la stabilité des ventes et l'aide à réduire les variations des ventes et, partant, ses frais de stockage. Les remises peuvent également favoriser des gains d'efficacité sous forme d'économies d'échelle pour le fournisseur ou d'économies de transaction pour l'acheteur (c'est-à-dire lorsque l'acheteur concentre ses achats auprès d'un seul vendeur.)

Un fabricant peut avoir recours à des remises portant sur un produit dans le but de déterminer quels sont les détaillants qui ont la plus forte sensibilité-prix et d'offrir à ce segment de la demande des prix plus bas pour augmenter les ventes. Cela s'explique par le fait que les détaillants qui estiment qu'ils peuvent répercuter ces remises pour générer plus de ventes et de bénéfices sur le marché en aval sont ceux les plus susceptibles de profiter de la remise. Cette stratégie procède d'un comportement rationnel (en présence ou non d'un pouvoir de marché) et, toutes choses étant égales, profiterait aux clients les plus sensibles aux prix sans nuire aux autres clients et aurait globalement un impact favorable sur les consommateurs.

Les remises de fidélité qui portent sur un produit sont également un moyen puissant dont disposent les fabricants pour soutenir les efforts de vente des détaillants. Elles peuvent être utilisées pour inciter les détaillants à adopter un comportement efficace et susciter leurs efforts en faveur d'un produit. Par

exemple, un fournisseur peut décider de récompenser un détaillant qui a augmenté ses ventes par rapport à l'année précédente en lui consentant une remise sur les ventes de l'année en cours. Ce principe bien décrit dans les travaux sur les relations verticales peut améliorer la concurrence intermarques, la concurrence intramarque ou les deux à la fois.

En ce qui concerne les remises groupées, la vente d'ensembles de biens et de services à un prix groupé est aussi une stratégie très répandue sur de nombreux marchés et qui peut être profitable aux consommateurs et aux entreprises. Du point de vue de l'acheteur, la remise groupée profite directement aux consommateurs, qui paient moins cher, et réduit leurs coûts de recherche et d'information. Les remises groupées peuvent également faciliter l'entrée sur de nouveaux marchés et l'instauration d'une concurrence plus efficace avec les entreprises en place. Elles permettent aussi aux entreprises de réaliser des économies d'échelle ou de gamme dans la production et la distribution, de réduire les coûts de production et les frais de stockage et de concevoir et de commercialiser des produits intégrés et compatibles, ce qui bénéficie aux consommateurs. De plus, un fabricant peut avoir recours à des remises groupées pour augmenter ses ventes en donnant au détaillant des incitations à investir pour améliorer les services de promotion et de point de vente nécessaires pour atteindre ces objectifs. Dans ce cas, les remises groupées dédommagent les détaillants des efforts qu'ils déploient pour le compte du fabricant et peuvent en conséquence atténuer les problèmes de comportement opportuniste et de « hold-up ».

4.2 *Effets anticoncurrentiels possibles des remises de fidélité portant sur un produit et des remises groupées*

Malgré les nombreux avantages concurrentiels des remises de fidélité portant sur un produit et des remises groupées, beaucoup reconnaissent qu'il existe des différences entre ces dispositifs de fixation des prix et une simple réduction de prix. Certains se préoccupent des incidences à long terme des remises, qui pourraient se manifester lorsque de nouveaux concurrents envisageront la possibilité d'entrer sur le marché et/ou les concurrents en place, d'en sortir, et les assimilent à une forme d'éviction. D'autres font ressortir leurs effets à court terme sur la concurrence et soutiennent que l'éviction n'est peut-être qu'un effet parmi d'autres et qu'il n'est pas nécessaire que les remises s'accompagnent d'un renoncement à court terme aux bénéfices (prix inférieurs aux coûts) ou d'une période de récupération pour que leurs effets anticoncurrentiels se fassent sentir.

La plupart des pays s'accordent à penser qu'une remise structurée de manière que le prix de vente soit inférieur à une mesure appropriée du coût (coût marginal ou coût variable moyen) peut parfois être considérée comme abusive. Il se peut alors que le fournisseur qui occupe une position dominante poursuive une stratégie d'exclusion puisqu'il décide de subir des pertes à court terme dans le but de dissuader un concurrent d'entrer sur le marché ou d'inciter un rival à en sortir. Dans certains pays, l'entreprise est réputée avoir mis en œuvre une stratégie d'éviction lorsque ses pertes à court terme sont compensées par des bénéfices supérieurs à long terme, une fois que ses concurrents sont évincés. Cette stratégie peut également être poursuivie au moyen de remises de fidélité portant sur un produit et de remises groupées.

L'autre préoccupation soulevée par les remises est qu'elles peuvent servir à élever des barrières à l'entrée. Une fermeture du marché contraire à la concurrence risque davantage de se produire si la remise de fidélité fait augmenter les coûts d'entrée des concurrents (qui doivent dédommager les acheteurs de leurs coûts de changement de fournisseur) ou si elle empêche les concurrents d'atteindre l'échelle minimum viable pour concurrencer efficacement leurs rivaux. Les remises portant sur un produit sont plus susceptibles de conduire à la fermeture du marché lorsque l'acheteur atteint à peu près son objectif d'achat auprès de l'entreprise dominante. Lorsque le surplus nécessaire pour obtenir la remise est faible, il convient d'évaluer si la fermeture du marché occasionnée par ce faible surplus risque d'affecter une quantité significative de ventes et, en conséquence, d'avoir des effets anticoncurrentiels. Dans certains cas, les remises de fidélité qui portent sur un produit confinent à des accords de distribution exclusive, en

particulier si l'acheteur doit, pour en bénéficier, effectuer la totalité ou un pourcentage élevé de ses achats nécessaires auprès du fournisseur dominant.

Les réductions de prix qui prennent la forme de remises sur un produit peuvent aussi avoir un effet discriminatoire étant donné qu'elles peuvent conduire à une situation dans laquelle le fournisseur dominant applique des conditions différentes à ses clients, au détriment de certains détaillants. Dans certains pays, par exemple ceux de l'Union européenne, les tribunaux ont estimé que cela constituait un motif suffisant pour conclure à un comportement abusif. Les remises de fidélité pourraient également faire en sorte que les consommateurs aient beaucoup plus de difficulté à comparer les prix et de ce fait, décourager la concurrence par les prix. La note du Secrétariat concernant la Table ronde sur les remises et primes de fidélité (DAFFE/COMP(2002)11) conclut que la probabilité qu'une remise de fidélité portant sur un produit ait des effets anticoncurrentiels repose essentiellement sur le fait que la remise réduit la transparence des prix et/ou qu'elle exclut les concurrents présents ou éventuels ou leur impose des restrictions, et facilite de ce fait la coordination anticoncurrentielle ou le renforcement d'une position dominante, et sur l'importance de ces effets.

Encadré 3. Questions et problèmes à examiner

7. *Quels gains d'efficacité et quels effets anticoncurrentiels peut-on associer aux remises de fidélité portant sur un produit et aux remises groupées ? Comment votre pays/l'autorité de concurrence de votre pays apprécient-ils la probabilité qu'ils se concrétisent ?*
8. *Veillez expliquer comment les caractéristiques de la remise¹ ou du marché² ont tendance à accroître la probabilité que la remise entraîne des effets favorables ou défavorables à la concurrence ainsi que l'importance de ces effets.*
9. *Dans quelles conditions peut-on prédire avec certitude qu'un programme de remises portera préjudice aux consommateurs ? Le fait que les consommateurs subissent un préjudice est-il un facteur suffisant pour justifier l'intervention de l'autorité de concurrence à l'encontre d'un programme de remises particulier ?*
10. *Comment l'autorité de concurrence de votre pays traite-t-elle la discrimination par les prix résultant des remises de fidélité portant sur un produit et des remises groupées ?*
11. *Comment, le cas échéant, des remises peuvent-elles conduire à une diminution de la transparence des prix sur les marchés et dans quels cas cela porterait-il atteinte à la concurrence ?*

¹ Voici des exemples de caractéristiques qui pourraient être pertinentes : la période sur laquelle la remise est calculée ; les unités achetées couvertes par la remise (ce type de remise n'est pas nécessairement restreint aux achats additionnels nécessaires pour obtenir la remise) ; le degré de rattachement manifeste aux besoins de l'acheteur ; enfin, le degré d'augmentation de la quantité ou du pourcentage des achats nécessaires effectués.

² Parmi les exemples des caractéristiques d'un marché qui pourraient être pertinentes, mentionnons la présence ou l'absence d'une entreprise dominante ; l'importance des remises de fidélité pratiquées sur le marché ; et l'existence d'économies d'échelle, d'effets de réseau et de coûts de changement de fournisseur de même que l'importance de ceux-ci.

5. Le critère qui préside à l'examen des remises de fidélité portant sur un produit et des remises groupées

Bien que les entreprises aient besoin d'un critère fonctionnel émanant du droit de la concurrence pour s'assurer de la conformité de leurs programmes de remises, il subsiste une grande part d'incertitude en ce qui concerne le critère qui serait approprié pour présider à l'examen des remises de fidélité portant sur un produit et des remises groupées. Bien qu'il semble y avoir une certaine communauté de vues en ce qui concerne les effets d'exclusion illicite provoqués par les remises si le prix est au-dessous du coût, les autorités de concurrence et les tribunaux n'ont pas encore déterminé clairement la manière de traiter les effets anticoncurrentiels éventuels des remises dans les cas où le prix se situe au-dessus du coût, non plus que les dispositions protectrices qui existent (le cas échéant) pour les entreprises dominantes.

5.1 *Remises de fidélité portant sur un produit*

Pour apprécier le caractère anticoncurrentiel des remises portant sur un produit, certains pays utilisent des critères fondés sur le coût en vertu desquels la licéité de la remise est fonction du fait que le prix se situe au-dessus ou au-dessous d'une mesure appropriée (en règle générale le coût marginal ou le coût variable moyen à long terme). Les prix situés au-dessous de la mesure appropriée du coût sont présumés illicites et ceux qui se situent au-dessus sont présumés licites. S'il y a une stratégie d'éviction, une fois que les bas prix associés à une remise ont incité suffisamment de concurrents à quitter le marché, l'entreprise qui offre la remise relève les prix au-dessus des niveaux préalables à la remise pour compenser les pertes subies à l'étape de la stratégie où les prix étaient bas (DAF/COMP(2005)14). Les consommateurs pourraient donc, à long terme, essayer une perte supérieure aux bénéfices qu'ils ont initialement retirés des bas prix. Cela ne se produira pas, bien sûr, à moins qu'un retour ou une nouvelle entrée soit d'une façon ou d'une autre bloquée une fois que les prix sont relevés, à l'étape de la stratégie où l'entreprise compense ses pertes. Les tenants d'une appréciation des remises portant sur un produit qui serait fondée sur des critères de prix d'éviction soulignent que tant que les prix se situent au-dessus de la mesure pertinente du coût, on ne peut considérer que la remise entraîne l'exclusion d'un concurrent d'égale efficacité.

D'autres auteurs examinent les remises de fidélité portant sur un produit sous un autre angle que celui des prix inférieurs au coût. Certains assimilent ces remises à une forme bénigne de distribution exclusive. D'autres les condamnent au motif qu'elles pourraient faire augmenter les coûts des concurrents en les privant de la masse critique minimum en termes d'économies d'échelle nécessaires pour concurrencer efficacement l'entreprise dominante. Même si les auteurs s'accordent généralement à condamner les remises de fidélité lorsque le prix est au-dessous du coût, il est plus difficile de déterminer si les remises de fidélité associées à un prix au-dessus du coût doivent également être considérées comme anticoncurrentielles. Bien qu'il soit possible de définir des situations particulières dans lesquelles des prix au-dessus du coût peuvent entraîner des effets d'exclusion, il s'agit d'un aspect au sujet duquel beaucoup de spécialistes soulignent que l'absence de théorie cohérente et fonctionnelle risque de dissuader des comportements entièrement favorables à la concurrence. Le résultat pourrait selon eux être socialement plus onéreux que les effets d'exclusion qu'ils tentent d'empêcher.

Beaucoup soutiennent que le droit de la concurrence ne devrait pas être utilisé pour lutter contre les prix situés au-dessus du coût parce que (a) cela provoquerait des litiges excessifs et inefficaces étant donné que les concurrents s'élèveraient vraisemblablement contre toutes les politiques de prix de l'entreprise dominante en les qualifiant de tactiques d'exclusion ; et (b) le droit de la concurrence n'est pas l'instrument le mieux adapté pour traiter les plaintes concernant les prix. Les adversaires des théories qui condamnent les prix supérieurs au coût affirment en outre que forcer une entreprise dominante à protéger des concurrents dont la production est faible et inefficace en pratiquant des prix supérieurs au coût serait un exemple flagrant d'initiative contraire aux intérêts des consommateurs. Certains estiment également que la théorie qui veut que les remises privent les concurrents d'économies d'échelle pose problème dans la

mesure où elle ne requiert pas vraiment l'octroi d'une remise : selon cette théorie, le détaillant qui vendrait simplement tous ses produits au rabais sans exiger d'engagement d'achat priverait lui aussi ses concurrents d'économies d'échelle.

Encadré 4. Questions et problèmes à examiner

12. *Dans votre pays, des remises de fidélité portant sur un produit ont-elles déjà été incriminées ? Dans l'affirmative, pourriez-vous fournir des exemples ?*
13. *Si l'autorité de concurrence de votre pays a déjà incriminé des remises de fidélité portant sur un produit, (a) l'incrimination a-t-elle déjà visé un prévenu qui n'exerçait pas déjà un monopole/une domination, et (b) l'incrimination a-t-elle déjà concerné une pratique qui n'avait pas entraîné l'éviction de tous les concurrents importants ?*
14. *Dans votre pays, un critère « prix-coût » est-il utilisé pour apprécier les remises de fidélité portant sur un produit ? Dans l'affirmative, veuillez décrire le(s) critère(s) appliqué(s) et, le cas échéant, l'analyse complémentaire des comportements qui satisfont ou non ce critère. Si, dans votre pays, les remises de fidélité portant sur un produit peuvent être condamnées pour atteinte à la concurrence sans que s'applique un quelconque critère prix-coût, quel est le critère appliqué et quelle est la théorie de la concurrence en vigueur ?*

5.2 Remises groupées

Du point de droit de la concurrence, les remises globales ou groupées ne posent pas les mêmes problèmes que les remises de fidélité portant sur un produit. Le cas des remises groupées est en quelque sorte plus complexe puisqu'une entreprise ayant une efficacité égale voire supérieure et qui fabrique un seul produit ou un sous-ensemble de produits présentés en lots pourrait ne pas être en mesure de concurrencer une remise globale. Un grand nombre d'autorités de concurrence soutiennent que les programmes de remises applicables à des produits multiples peuvent constituer une forme de vente liée au moyen de laquelle le monopoleur pourrait augmenter son pouvoir de marché sur des marchés concurrentiels.

Plusieurs critères ont été proposés pour apprécier si un programme de remises groupées risque de porter atteinte à la concurrence. En groupant différents produits, une entreprise qui détient un pouvoir de marché peut proposer un prix qui demeure rentable pour le fournisseur dominant mais que ses concurrents ne pourraient pas égaler ou améliorer. L'acheteur rationnel qui souhaite maximiser ses bénéfices est donc « forcé » d'acheter le lot étant donné qu'il n'y a pas d'autres offres concurrentielles. Certains ont préconisé l'utilisation de critères fondés sur le coût en vertu desquels serait réputée illicite la remise qui abaisse le prix au-dessous d'une mesure appropriée du coût (coût marginal, coût variable moyen à long terme). Si le prix réduit est inférieur au coût de fourniture, aucune entreprise d'égale efficacité ne peut s'aligner sur ce prix. En général, il est nécessaire de prouver la vente au-dessous du coût et la compensation pour condamner ces pratiques au motif qu'elles sont anticoncurrentielles.

Les critères fondés sur le coût soulèvent toutefois des problèmes tenant aux modalités d'application qui leur sont appropriées en cas de remises portant sur plusieurs produits. Une méthode possible consisterait à comparer le prix du lot à son coût de production. Un comportement en matière de prix serait présumé licite lorsque le prix des lots dépasse leur coût de production. Certains ont critiqué ce critère, l'estimant trop souple, et ont proposé de répartir la remise groupée entre les composants du lot puis d'examiner si le prix de chaque composant, moins le montant de la remise, dépasse la mesure appropriée du coût. Le problème de cette méthode tient au fait qu'il n'y a pas de consensus, en théorie comme en

pratique, sur la manière d'effectuer cette répartition, qui serait inévitablement arbitraire, en particulier en présence de coûts communs significatifs.

Après avoir étudié les théories fondées sur une stratégie d'éviction mise en œuvre par le biais d'un renoncement aux bénéfices, certains auteurs se sont penchés sur les remises groupées en tant que forme de vente liée, de fait ou contractuelle. Ces auteurs affirment que même lorsque les acheteurs peuvent acquérir séparément les produits d'un lot, ces produits sont plus chers séparément qu'en lot. L'achat par lot est donc plus attrayant même lorsque les prix du lot sont fixés à un niveau de monopole. L'offre de lot semble correspondre à une remise consentie aux consommateurs mais en réalité ce n'en est pas une parce que le prix de chaque bien a été élevé en proportion, et que le prix unitaire du bien monopolisé a aussi été augmenté et est supérieur au prix de monopole pratiqué en l'absence de remise. Selon ces théories, un lot n'offre pas d'avantage aux consommateurs et masque simplement une augmentation du prix des composants.

Reste à élucider la question de savoir si les remises groupées pourraient aussi être condamnées lorsque le prix est supérieur au coût et, dans l'affirmative, dans quels cas elles le seraient. Une remise groupée peut parfois exclure un concurrent d'efficacité égale ou supérieure qui rivalise pour une partie du lot seulement et ne trouverait pas rentable de s'aligner sur la remise groupée même si le prix du lot comme de chacun de ses composants, déduction faite de la remise, est supérieur au coût. De plus en plus d'études montrent comment des monopoleurs peuvent se servir d'une remise groupée comme moyen d'exclusion ou de dissuasion à l'entrée. Certains affirment toutefois que les effets d'exclusion de ces remises sont en grande partie fonction de la capacité de réaction du marché face à la stratégie de l'entreprise dominante. Tel est le cas si au moins une autre entreprise sur le marché offre le même programme de remises que l'entreprise dominante ou si l'entreprise dominante est concurrencée pour le produit sur le marché duquel elle ne détient pas de position dominante, auquel cas les consommateurs peuvent acheter le lot concurrentiel ou composer eux-mêmes leur lot en achetant chaque élément séparément. L'entreprise dominante aurait alors moins de latitude pour exclure ses rivales de manière rentable parce que si une ou plusieurs rivales peuvent offrir la même remise groupée que l'entreprise dominante, y compris en nouant des alliances avec d'autres entreprises, la concurrence pourrait bien être assurée.

Encadré 5. Questions et problèmes à examiner

15. *Dans votre pays, des remises groupées ont-elles déjà été incriminées ? Dans l'affirmative, pouvez-vous fournir des exemples ?*
16. *Si l'autorité de concurrence de votre pays a déjà incriminé des remises groupées, (a) l'incrimination a-t-elle déjà visé un prévenu qui n'exerçait pas déjà un monopole/une domination ? et (b) l'incrimination a-t-elle déjà concerné une pratique qui n'avait pas entraîné l'éviction de tous les concurrents importants ?*
17. *Dans votre pays, un critère « prix-coût » est-il utilisé pour apprécier les remises groupées ? Dans l'affirmative, veuillez décrire le(s) critère(s) appliqué(s) et, le cas échéant, l'analyse complémentaire des comportements qui satisfont ou non ce critère. Si, dans votre pays, les remises groupées peuvent être condamnées pour atteinte à la concurrence sans que s'applique un quelconque critère prix-coût, quel est le critère appliqué et quelle est la théorie de concurrence en vigueur ?*

5.3 Dispositions protectrices pour les pratiques de remises

On a vu que de nombreux types de pratiques susceptibles de provoquer l'exclusion, notamment les remises, entraînent parfois des gains d'efficacité qui peuvent contrebalancer leurs effets restrictifs. Les gains d'efficacité qui découlent de ces pratiques peuvent toutefois être difficiles à mesurer, ce qui expose

l'autorité de concurrence à commettre des erreurs de type II (faux positifs). Pour limiter ce risque, certaines autorités de concurrence ont adopté des dispositions protectrices globales pour les activités de remises autorisées qui sont généralement considérées comme peu susceptibles d'entraîner des effets anticoncurrentiels. Cela comporte l'avantage de renforcer la certitude juridique en matière de pratiques de rabais et d'atténuer d'éventuels effets dissuasifs sur les réductions de prix décidées par les entreprises dominantes.

Certains observateurs ont proposé d'appliquer des règles en fonction de la situation de chaque entreprise, en tenant compte du degré de pouvoir de marché de l'entreprise dominante. L'entreprise qui détiendrait un véritable pouvoir de monopole (en particulier si elle est un monopole d'État ou l'a déjà été) serait soumise à des obligations plus strictes. Du fait que les stratégies d'éviction et de fermeture du marché sont difficiles à mettre en œuvre avec succès, même par des entreprises qui détiennent d'importantes parts de marché, la réglementation relative aux rabais pourrait s'appliquer de manière appropriée à une évaluation de la « superdomination ». Certains spécialistes ont émis l'idée qu'à moins de détenir une part de marché d'au moins 65 %, il serait peu vraisemblable qu'une entreprise mette en œuvre un programme de remises portant sérieusement atteinte à la concurrence. Lorsqu'une entreprise possède une part de marché de 65 % ou plus, il existe bien un risque d'effets de fermeture du marché sensibles. Bien qu'il soit difficile de définir l'importance de la part de marché qu'une entreprise doit détenir pour que l'on puisse considérer que son programme de remises est plus susceptible que d'autres d'avoir des effets d'exclusion, certains spécialistes ont proposé que les autorités de concurrence procèdent à cette évaluation afin d'améliorer la prévisibilité et la certitude juridique en fournissant aux entreprises, en matière de part de marché, une disposition protectrice claire et fonctionnelle.

Certains pays prévoient, pour les pratiques de rabais, les mêmes dispositions protectrices liées au comportement qui s'appliquent aux prix d'éviction : ils recourent aux critères fondés sur le rapport prix-coût et la compensation. Si le prix réduit dépasse une mesure appropriée du coût (habituellement le coût marginal ou le coût variable moyen à long terme), le programme de remises est généralement autorisé. Outre les critères prix-coût, certains pays appliquent un critère fondé sur la « compensation ». Selon ce critère, même si le prix prévu par le programme de remises est au-dessous du coût, l'autorité de concurrence n'est justifiée à intervenir que s'il y a une raison indiscutable expliquant une augmentation à long terme qui interviendrait à la suite du comportement de l'entreprise dominante. Si aucune compensation n'est possible, il est conclu à l'absence d'atteinte à long terme à la concurrence et aux consommateurs et l'intervention n'est pas justifiée. Le critère de la compensation peut paraître sévère si l'on prend uniquement en compte les effets d'exclusion à court terme qui se produisent lorsque les entreprises concurrentes sont forcées de sortir du marché (ou sont empêchées d'y entrer) à la suite des pratiques de l'entreprise. Cette sévérité paraît toutefois justifiée dans le cadre d'une analyse à long terme des effets des remises sur la concurrence, étant donné que l'intervention de l'autorité de concurrence porte essentiellement sur un comportement qui, à long terme, affectera sans doute sensiblement la concurrence et les consommateurs.

On a vu que le fait d'appliquer aux remises groupées des dispositions protectrices fondées sur l'évaluation du rapport prix-coût revêt une plus grande complexité en raison de la difficulté qu'il y a à répartir correctement les coûts entre les produits qui composent un lot. De nombreux auteurs affirment toutefois que la méthode axée sur la disposition protectrice décrite ci-dessus demeure valable. Certains pensent en outre que lorsque le prix global d'un lot est supérieur à la somme des coûts de chacun de ses composants, l'entreprise dominante n'a pas eu un comportement d'exclusion. D'autres, pour qui ce critère est trop souple, proposent que la totalité du montant de la remise groupée soit affectée au prix du produit censé causer l'exclusion et que si le prix ainsi obtenu demeure supérieur à la mesure appropriée du coût, le programme de remises soit présumé exempt d'effets anticoncurrentiels. Dans cette variante de la disposition protectrice, les remises groupées sont licites dans la mesure où elles n'excluent pas un concurrent hypothétique d'égale efficacité ou ne l'incitent pas à sortir du marché. Enfin, d'autres auteurs

ont proposé d'appliquer un critère fondé sur l'analyse des recettes et des coûts supplémentaires : une structure de prix pour des produits multiples bénéficierait de la disposition protectrice si les recettes supplémentaires dépassent le coût supplémentaire de tous les sous-ensembles de produits considérés.

Encadré 6. Questions et problèmes à examiner

18. *Dans votre pays, en quoi la législation et les mesures d'application, en matière de remises, diffèrent-elles selon que les remises sont ou non offertes par des entreprises détenant un pouvoir de marché significatif ou pratiquées par tous les acteurs du marché ?*
19. *Dans votre pays, quel est le degré de clarté des modalités d'évaluation des remises de fidélité portant sur un produit et/ou des remises groupées ? Quel degré de certitude ont les entreprises pour apprécier la licéité des remises de fidélité portant sur un produit ou les remises groupées qu'elles envisagent de proposer ?*
20. *Dans votre pays, les entreprises peuvent-elles s'en remettre, en matière de pratiques de remises, à des dispositions protectrices fondées sur la structure ou le comportement ? Les dispositions protectrices devraient-elles différer selon qu'elles concernent des remises portant sur un produit ou des remises groupées ?*
21. *Lorsque vous appréciez les pratiques de remises, faites-vous un arbitrage entre les considérations liées aux entrées/sorties à long terme et les effets à court terme des remises sur les consommateurs et les concurrents ? Dans quelle mesure l'intervention de l'autorité de concurrence à l'encontre des pratiques de rabais des entreprises dominantes devrait-elle être soumise à un critère de « compensation » ?*

6. Moyens de défense possibles – Efficience, affrontement de la concurrence et charge de la preuve

De nombreux spécialistes et de nombreuses autorités de concurrence s'accordent à dire que l'appréciation de la licéité d'un programme de remises doit se faire en tenant compte des effets favorables à la concurrence entraînés par les remises. La grande majorité des pratiques de rabais sont bénéfiques pour la concurrence et les modèles économiques qui montrent qu'elles peuvent parfois porter atteinte à la concurrence sont critiqués pour leur grande complexité et le manque de réalisme de leurs hypothèses. Certains pays ont toutefois porté une appréciation stricte sur les arguments éventuels que les entreprises dominantes peuvent invoquer pour montrer que l'amélioration de l'efficience engendrée par les remises l'emporte sur leurs effets restrictifs. Dans l'Union européenne, par exemple, il semble que la jurisprudence des tribunaux en ce qui concerne les remises de fidélité laisse une très faible marge à l'invocation de l'efficience comme moyen de défense, et les remises de fidélité consenties par des entreprises dominantes sont par conséquent frappées d'illégalité *per se*. Les tribunaux européens ont adopté le point de vue selon lequel les remises offertes par une entreprise dominante qui ne sont pas accessibles de manière égale à tous les acheteurs ne peuvent être autorisées que sur présentation de justifications très rigoureuses fondées sur les coûts. Les tribunaux ont toutefois donné à ces justifications une interprétation si étroite que seules les économies de coûts semblent susceptibles de remplir les conditions nécessaires, bien qu'elles soient dans la plupart des cas difficiles à établir et à quantifier.

Les entreprises dominantes justifient souvent l'adoption d'un programme de remises par la volonté de s'aligner sur les prix plus bas de la concurrence (moyen de défense fondé sur « l'alignement sur les concurrents »). Ce moyen de défense est toutefois accepté diversement par les pays. Certaines autorités de concurrence l'admettent à condition que la réduction de prix ne soit pas sélective et qu'elle soit accessible à tous les acheteurs. Les pays craignent généralement que les bas prix aient pour cible un groupe de clients qu'il faut éviter de perdre au profit d'un nouvel entrant, les clients les moins susceptibles de changer de

fournisseur continuant de payer le prix habituel. D'autres ont affirmé que la défense axée sur la volonté de s'aligner sur la concurrence devrait avoir une plus grande portée et que les autorités de concurrence devraient en tenir compte lorsque le concurrent a d'autres moyens de commercialiser son produit à une échelle suffisante pour devenir viable.

Lorsque les entreprises dominantes sont autorisées à invoquer les gains d'efficacité pour expliquer et justifier leurs pratiques de rabais, la question de savoir à qui revient la charge de la preuve revêt une grande importance. Certains affirment que la charge de la preuve, s'agissant d'une justification objective ou d'une défense fondée sur l'efficacité, devrait incomber à l'entreprise dominante. D'autres estiment en revanche que la théorie économique ne mentionne pas que les remises et les réductions portent normalement atteinte à la concurrence et qu'il n'est donc pas normal qu'incombe à l'entreprise dominante la charge d'apporter la preuve des gains d'efficacité issus de ses réductions ou remises. Pour certains, le fait de prétendre que les remises doivent être condamnées sauf si l'entreprise dominante peut démontrer de façon convaincante l'existence de gains d'efficacité serait trop ambitieux et pénaliserait de nombreuses pratiques anodines tout en générant un processus administratif onéreux. En conséquence, cette attitude pourrait freiner la concurrence efficace en dissuadant les entreprises de mettre en œuvre des pratiques de prix bénéfiques pour la concurrence.

Encadré 7. Questions et problèmes à examiner

22. *Quel traitement vos mesures juridiques et/ou d'application réservent-elles, le cas échéant, aux effets bénéfiques pour la concurrence et aux gains d'efficacité issus des remises de fidélité portant sur un produit ou des remises groupées ? En particulier, quels sont les moyens de défense/les exceptions applicables aux entreprises dominantes qui offrent des remises ?*
23. *Quelles difficultés particulières avez-vous dû surmonter, le cas échéant, pour traiter les moyens de défense/les exceptions que prévoit votre législation ? Si un comportement semble porter atteinte à la concurrence mais qu'il est légitimement justifié par des considérations commerciales, sur quelles bases rendez-vous votre décision ?*
24. *Dans votre pays, un fabricant détenant une position dominante qui consent une remise de fidélité à une entreprise est-il tenu d'offrir aussi cette même remise à des acheteurs qui sont ses concurrents ? Peut-il offrir des remises sélectives pour réagir aux initiatives commerciales de ses concurrents ? Dans l'affirmative, quelles conditions doit-il remplir pour ce faire ?*
25. *Si, dans votre pays, les entreprises qui détiennent une position dominante sont autorisées à faire valoir l'amélioration de l'efficacité, comment la charge de la preuve est-elle répartie entre le plaignant et le prévenu ?*
26. *Votre pays ou votre autorité de concurrence estiment-ils que l'intention anticoncurrentielle est un facteur pertinent qu'il faut prendre en compte dans les affaires concernant des remises de fidélité et/ou des remises groupées ? Dans l'affirmative, quels types de preuve de cette intention seraient recevables à l'encontre d'une entreprise dominante ?*

7. Mesures correctrices

L'efficacité des mesures d'application prises à l'encontre du comportement unilatéral est fonction de l'utilité des mesures correctrices que les autorités de concurrence peuvent imposer aux entreprises. Les mesures correctrices, en cas de comportement d'exclusion, peuvent se révéler difficiles à élaborer, en particulier dans le domaine des remises et autres pratiques de prix. La difficulté qu'il y a à concevoir des mesures correctrices satisfaisantes dans ce domaine tient au fait que les mesures correctrices structurelles

ne sont pas toujours à la portée de l'autorité de concurrence et que trop souvent, les mesures non structurelles (ou liées au comportement) se bornent tout au plus à une réglementation des prix, ce qui correspond rarement aux objectifs du droit de la concurrence. On peut en conclure que les sanctions pécuniaires et les actions privées en dommages-intérêts sont les moyens les mieux adaptés pour contrer les remises préjudiciables à la concurrence. Certains estiment toutefois qu'il ne faudrait pas imposer d'amendes pécuniaires, en particulier dans les affaires complexes où les pratiques, par exemple les remises et rabais, ne portent pas atteinte à la concurrence de façon manifeste (DAF/COMP(2006)19).

Encadré 8. Questions et problèmes à examiner

27. *Lorsque les effets anticoncurrentiels d'une pratique de rabais l'emportent sur ses effets favorables à la concurrence, quelles mesures correctrices, le cas échéant, votre autorité de concurrence a-t-elle adoptées en plus des amendes et/ou des ordonnances d'interdiction générale ? Dans quelle mesure ces décisions se sont-elle révélées efficaces ?*

8. Conclusion

Les remises offertes par des entreprises dominantes soulèvent des problèmes complexes du point de vue de l'action des pouvoirs publics et des autorités de concurrence et les tribunaux s'efforcent de définir des critères fonctionnels pour établir une distinction entre les systèmes de prix qui sont favorables à la concurrence et ceux qui lui portent atteinte. La réduction des prix est d'une part au cœur de la concurrence et répond aux souhaits des consommateurs ; elle peut d'autre part entraîner dans certains cas des effets d'exclusion et constituer de ce point de vue une menace pour la concurrence. La véritable difficulté à laquelle sont confrontées les autorités de concurrence est d'évaluer les avantages concrets à court terme que représentent des prix plus bas pour les consommateurs, au regard d'un éventuel préjudice à long terme pour la concurrence. Le fait de ne pas indiquer aux acteurs du marché les principes et critères précis qui régissent le comportement des entreprises peut mener à des incohérences dans l'application des règles de concurrence relatives au comportement unilatéral. L'incertitude qui pèse sur les critères qui s'appliquent peut effectivement dissuader les entreprises qui ont d'importantes parts de marché de réduire les prix et d'adopter de pratiques de prix propices à la concurrence.

La difficulté que doivent surmonter les autorités de concurrence consiste à tracer une ligne de démarcation claire entre les programmes de remises qui sont favorables à la concurrence et ceux qui ne le sont pas afin de donner aux entreprises un critère fonctionnel d'appréciation. Si la ligne de démarcation est fixée trop sévèrement, les autorités de concurrence risquent de dissuader la concurrence par les prix et les réductions de prix bénéfiques pour les consommateurs ; si la démarcation est trop souple, les autorités rendent possible l'adoption de comportements anticoncurrentiels par les entreprises dominantes. La multiplication des critères peut conduire à des résultats imprévisibles (aux niveaux national et international) et faire naître parmi les entreprises dominantes la crainte de faire l'objet d'un traitement différent de la part des autorités de concurrence d'un pays à l'autre. Pour toutes ces raisons, la ligne de conduite en matière de comportements unilatéraux, et en particulier de pratiques de rabais mises en œuvre par des entreprises dominantes, aurait à gagner d'une plus grande convergence internationale.

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BELGIUM

Does your jurisdiction have statutory provisions expressly dealing with bundled discounts and/or single product loyalty discounts? Does your enforcement agency have any guidelines or other policy statements regarding these practices? Are there any judicial decisions that provide a legal precedent for how these practices should be evaluated?

We have no statutory provisions expressly dealing with bundled discounts and/or single product loyalty discounts. We do have, however, in the Unfair Trade Practices Act a provision prohibiting joint selling. This prohibition is not part of competition law, and is not enforced by the Belgian Competition Authority. It is enforced by the Courts and has led to a large number of cases. We also apply article 82 EC and the equivalent article 3 of the Belgian Competition Act in accordance with EU case law when discounts can qualify as an abuse of a dominant position.

To the extent your enforcement agency has investigated bundled discounts and/or single product loyalty discounts, what caused you to initiate the investigations (e.g., competitor complaints, customer complaints, etc.)? What sorts of factors or evidence do you consider before you decide to open an investigation regarding these practices?

When receiving (mostly informal) complaints, we refer in the absence of dominance the contact person (sometimes customer, also competitor) to the relevant legal provisions and procedures. The Competition Authority received one complaint from a competitor with a request for interim relief in respect of a tariff scheme that allegedly constituted an abuse of dominance and that could perhaps be interpreted as a discount scheme. The President of the Competition Council decided that there was no justification for the granting of interim relief.

Has your enforcement agency challenged bundled discounts and/or single product loyalty discounts? If so, can you provide examples? If your agency has encountered bundled discounts and/or single product loyalty discounts that you believe were anticompetitive, please describe the anticompetitive effects. If you have found anticompetitive effects, (1) have you found them in instances in which the defendant did not already have monopoly power/dominance, and (2) have you found them in instances in which all significant competitors were not driven out of the market?

N/A

To what extent is there clarity in your jurisdiction as to how bundled discounts and/or single product loyalty discounts will be evaluated? What degree of certainty do businesses have in being able to assess the legality of bundled or single product loyalty discounts that they may be considering? Are there any safe harbours that businesses can rely on? Are you concerned that your jurisdiction's antitrust approach to these discounts is either (1) too lenient, allowing anticompetitive effects to occur; or (2) too strict or not clear enough, chilling price-cutting that would benefit consumers?

It is difficult to say that there is clarity in the absence of case law! We hope that EU competition law offers business sufficient clarity in respect of the prohibition bundled loyalty discounts offered by dominant undertakings as discussed in the Commission DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses.

In your jurisdiction, is a price-cost test used to assess the legality of these discounts? If so, please describe the test(s) and what additional analysis (if any) is applied to conduct that either passes or fails the test. Can bundled discounts and/or single product loyalty discounts be condemned without application of some kind of price cost test? If so, what is the test that is applied?

Loyalty discounts will primarily be assessed in the light of their foreclosure effect. Bundled discounts will moreover be assessed in the light of the extent to which the granting dominant undertaking abuses its dominance on the market for one of the bundled products or services in order to obtain a stronger position on the market for the other products or services. We will use a price-cost test in case we suspect a predatory pricing as well as tying/bundling and loyalty abuse.

Does your agency/jurisdiction view intent as relevant in evaluating bundled discounts and/or single product loyalty discounts? If so, what types of intent evidence would work against a defendant? What types of business justifications would work in its favour? If conduct appears to adversely affect competition but there are legitimate business justifications for the conduct, how do you reach a decision?

In line with EU case law we consider that an abuse of dominance is an objective concept. Evidence that an undertaking intended to exclude a competitor will nevertheless be taken into account as evidence that helps to qualify market behaviour as abusive.

CZECH REPUBLIC

1. Introduction

To bundle the conclusion of a contract with the requirement that the other contracting party shall purchase other goods which are not related to the object of the contract, neither pertinently, nor according to commercial usage, represents abuse of dominant position named in demonstrative enumeration in the Act on the Protection of Competition (hereinafter referred to as “the Act”). Also the provision of so-called loyalty rebates by the undertaking in dominant position is generally deemed prohibited, if no objectively justifiable reasons of such conduct are proved.

According to the principles of competition law practice within the European Community the Czech Office for the Protection of Competition (hereinafter referred to as “the Office”) does not consider as anticompetitive so-called quantity rebates, i.e. discounts provided in relation to quantity of purchased goods (services), in particular in case that the conditions for providing the discounts are known in advance and are identical for all potential clients. On the other hand there are discounts which, if provided by the undertaking in dominant position, would lead to distortion of competition in the market in question. Those are typically so-called “loyalty rebates”, i.e. discounts or other advantages provided by supplier to the clients who commit themselves for example to purchase whole range of goods, to purchase services or goods exclusively from the supplier, to purchase some minimum quantity of goods or services etc.

Such practices generally result in strengthening the market position of the dominant undertaking that provides loyalty rebates, via obliging clients to purchase only the dominant undertaking’s goods or services for a longer period of time. Discounts offered or advantages related to bundled goods or to providing of loyalty rebates are always so attractive that clients are not interested in switching to competitors and thereby lose these advantages or eventually pay additional sanctions. Conditions of the advantages are usually included in contracts that are concluded with clients before initiation of supplies. This leads, in consequence, to price discrimination of those clients who do not accept the conditions of “loyalty rebates”, or eventually who were not offered advantageous conditions.

The Office doesn’t consider as decisive factor whether the dominant undertaking forces its clients to conclude contracts containing loyalty rebates or whether the clients require these contracts, because the contractual liberty of undertaking in dominant position is reduced for the benefit of a functioning economic system, whereby it stands that if competition is distorted, the whole economic framework won’t work.

Thus as a result of providing of loyalty rebates and bundled discounts the opportunity of the other competitors, who operate in the market with the undertaking in dominant position, to get clients of the dominant undertaking on their side is very reduced. Since this leads to the distortion of competition in the market, the competition legislation qualifies these cases as an abuse of dominant position.

Such conduct may, in consequence, result in “bonding of a client” by undertaking in dominant position; the competition may be gradually driven out of the market by this conduct, to the situation when the competitor’s market share as well as its influence on effective competition would be negligible. After weakening of competition and reinforcing of its own position in the market the undertaking in dominant position may reevaluate its business policy and abandon the rebates so that the final consumer would suffer most.

As the approach of the Office to the application of Article 82 of the EC Treaty is the same as to Article 11 of the Act, the Office, while assessing such behavior, proceeds pursuant to the practice of the European Commission and European Court of Justice.

The Office's investigation is usually initiated on the basis of a complaint made by the competitors of the incumbent, who feel to be threatened by its conduct. Firstly a preliminary analysis is always conducted to verify the presumption that the undertaking in question is in dominant position in the relevant market and whether the complaint is based on true information. Further, the Office assesses potential justifying reasons for such conduct including the possible regulatory measures. The Office usually demands all contracts (or at least sufficiently representative sample, eventually contracts with greater customers), business conditions, system of discount setting, reasons for which the products cannot be offered separately, eventually cost calculation and other supporting documents necessary for a preliminary assessment.

If there is a suspicion that the conduct is related to the dominant undertaking in the market and that there are no justifiable reasons for tying of services or loyalty rebates the Office initiates the administrative proceedings in order to prove all the facts detected in the preliminary investigation and complete the evidence so that there is no doubt that the Act has been infringed. The purpose of the proceedings is to prohibit the dominant undertaking's conduct and to order termination of the anticompetitive behavior in the market. While assessing the tying of services the Office examines whether the dominant operator offers the products from the package of services also separately, on nondiscriminatory and not less-favorable conditions.

While assessing the loyalty rebates and prohibited tying of services the Office takes account only of the behavior in the markets where the undertaking is in dominant position, respectively assesses if there is prohibited product tying of products from dominant and non-dominant market among each other. In case the undertaking is not dominant in any of the assessed markets such behavior is out of the scope of the Act and it is allowed. The Office also deems as anticompetitive conduct when the competition environment is only distorted by the product tying or by the loyalty rebates and the rest of the competitors of the dominant undertaking was not forced out of the market, because the meaning of the Office's intervention is not the protection of an individual undertaking but the protection of competition as such.

Furthermore, undertakings in dominant position are supposed to have cognizance of their duties stipulated by law and the Office is open to consultations in case of any doubts about accuracy of their conduct.

2. Examples from the Office's decision-making practice

2.1 *Český Telecom – Loyalty rebates*

The Office has dealt with both the loyalty rebates and the tying of services issues several times in its practice. The most important cases have been two administrative proceedings conducted with the company ČESKÝ TELECOM, a.s. – first of the proceedings concerned loyalty rebates.

In autumn 2002 the Office received several complaints in relation to a possible breach of the Act by the company ČESKÝ TELECOM, a.s. (hereinafter referred to as "ČTc") connected with offers of preferential tariff plans.

Within the framework of the administrative proceeding, it was established that the above mentioned company concludes contracts with the customers on the provision of tariff plans in the wording of the General Conditions for Provision of Tariff Plans in which it commits the customers to making a monthly fixed minimum amount of telephone calls - a so-called contractual telephone charge. This commitment was

defined in such a way that in case the amount of actual outgoing telephone calls is lower than the contractual telephone charge fixed by the relevant contract on the provision of a tariff plan, the customer is charged not only the price of the actual telephone calls but also the difference between the amount of the contractual telephone charge and the price of the actual calls.

Such behavior is just what was deemed as loyalty rebates for the customer was contractually bound to pay the previously set amount including “prepaid” telephone charge no matter if he had utilized the whole amount of the telephone charge during the past month or not. As a result the customer was motivated to utilize the whole amount because he would have to pay it anyway. Hence the customer had not even a reason to shift part of his calls to an alternative operator while such change would have been financially unfavorable.

The anticompetitive impacts of it were intensified through the fact that some contracts concluded by ČTc with its customers, in the wording of the above mentioned business conditions, contained a commitment that the given contract on provision of a tariff plan would not be cancelled by any of the contractual parties before a fixed date or that customers would use exclusively the services of the company ČTc for voice telephone traffic from all their fixed lines.

Apart from the abovementioned facts, it was also established that ČTc applied, when concluding the relevant contracts, individual conditions different from the conditions contained in the abovementioned business conditions or that it created plans applied with the aim to gain or maintain a customer to the detriment of competitors, on the basis of which it adjusts the conditions for concluding contracts to a particular customer’s individual needs.

Due to the described practices, the company ČTc created a barrier to the development of competition on the market of provision of public telephone services to businesses via fixed telecommunications networks. It thus abused its dominant position on the market, for which it was sanctioned by the Office that imposed a fine amounting to 81.7 million CZK and it was ordered to leave out the provisions committing customers to using the full amount of the contractual telephone charge, provisions limiting the possibility to cancel the contract on provision of a tariff plan before a fixed date and provisions committing the customer to using only the services of ČTc for all fixed lines from the relevant contracts.

Apart from this, ČTc was also ordered to cease preferential tariff plans and define conditions for the provision of preferential tariff plans so that it is not possible to provide these tariff plans pursuant to individual conditions. This decision has already come into force.

2.2 *Český Telecom – tying of services*

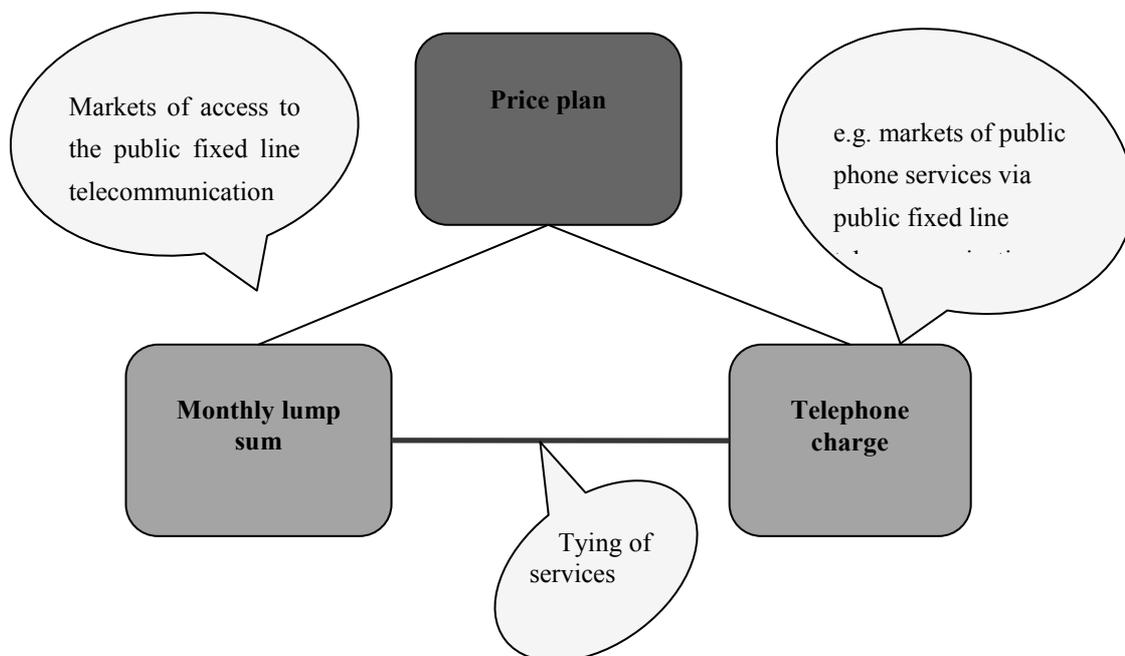
The second administrative proceeding conducted with the company ČTc concerned tying of services. In November 2005, the Chairman of the Office imposed a penalty of CZK 205 million on ČTc for the breach of Article 82 of the EC Treaty. This provision prohibits the abuse of dominant position provided it may affect the trade between member states.

Since 2002, ČTc had offered price plans intended for households and small entrepreneurs, which contained call credits or free minutes as a part of a monthly lump. By tying services together, ČTc prevented the development of competition, progress of existing alternative operators and as a consequence it limited the possibilities of consumers to obtain better services on competitive prices. The breach of competition rules concerned a larger number of price plans.

The abuse of dominant position of the ČTc consisted in tying services together, i.e. the monthly lump offered on markets where it has a substantially dominant position and services offered on markets where competitive environment continually develops. ČTc thus ensured a fixed minimal part of income from call

charges and access to the internet for itself in advance, regardless of the fact whether the customers with the price plans in question really used the services.

Figure 1. Tying of Services



An important fact is that customers by purchasing a price plan containing a call credit or free minutes obtained certain calls “for free”, whereas these price plans were more advantageous for them. In case a customer telephoned less than the call credit or free minutes were, he or she had to pay the full monthly flat rate nonetheless, and the amount of payment did not reflect the fact that the call credit (free minutes) had not been fully used. The structure of the price plans in question did not enable customers to divide the payment into call charge and lease of the telephone line. Customers were for this reason less willing to call through other operators, because they did not want to lose something they obtained “for free” as part of the monthly flat rate. By this conduct, competition in telecommunication services was restricted. The competition in this market would have been more developed if it had not been for the anticompetitive tying of services.

Both of these abovementioned examples shall be considered to be a model illustration of a prohibited services tying and loyalty rebates offering. It is important that the Office, by its intervention, has significantly contributed to the elimination of the barriers to the competition development in the telecommunication sector and promoted the competition development in respective relevant markets.

DENMARK

1. Introduction

The focus of this report is single product loyalty discounts. The topic will mostly be treated on the basis of two recent Danish cases relating to discrete discount schemes plus experiences relating to a continuous discount scheme.

In August 2007 the Danish Competition Authority (hereinafter: the Authority) submitted two cases concerning single product loyalty discounts to the Danish Competition Council (hereinafter: the Council). The cases concerned (1) the practices of the partially state-owned, incumbent universal postal carrier, Post Danmark A/S, on the liberalized market for distribution of magazines and other publications in subscription (hereinafter: the Post Danmark case), and (2) the practices of the largest Danish wholesaler of convenience goods to supermarkets and other retailers, SuperGros A/S (hereinafter: the SuperGros case). In both cases the discount schemes were changed after the ruling by the Council.

2. Jurisdiction/Guidelines

2.1 *Does your jurisdiction have statutory provisions expressly dealing with bundled discounts and/or single product loyalty discounts?*

The Danish Competition Act does not have a section expressly dealing with single product loyalty discounts. Section 11(1) of the Danish Competition Act contains a general prohibition against abuse of dominant position that mirrors the prohibition in Article 82 of the EC Treaty.

2.2 *Does your enforcement agency have any guidelines or other policy statements regarding these practices?*

The Authority has not issued guidelines or other policy statements regarding single product loyalty discounts.

2.3 *Are there any judicial decisions that provide a legal precedent for how these practices should be evaluated?*

There are a number of recent decisions that provide a legal precedent on retroactive discount schemes. Two of these decisions, the Post Danmark case and the SuperGros case, will be outlined in this paper.

3. Investigation

3.1 *To the extent your enforcement agency has investigated bundled discounts and/or single product loyalty discounts, what caused you to initiate the investigations (e.g., competitor complaints, customer complaints, etc.)?*

Most commonly, an investigation by the Authority is initiated by a complaint. However, given an initial complaint the Authority may choose to expand or reduce the scope of an investigation if support for

this can be found in the circumstances of the case. Furthermore, the Authority is free to open an investigation without an initial complaint if other indications of anti-competitive practices exist.

In the Post Danmark case the investigation was prompted by a complaint from a competitor. In the SuperGros case the investigation was prompted by a complaint from a customer.

3.2 *What sorts of factors or evidence do you consider before you decide to open an investigation regarding these practices?*

To open an investigation into a case of single product loyalty discounts with suspected anti-competitive effects the Authority requires a preliminary understanding of (1) whether or not the undertaking employing the discount scheme is dominant, and (2) whether or not the characteristics of the discount scheme are such that anti-competitive effects cannot be ruled out.

The Authority considers it unlikely that a discount scheme by a non-dominant undertaking can result in significant anti-competitive effects. Therefore, the Authority finds it essential to establish, before committing to an investigation, whether or not a working hypothesis of dominance is appropriate. This, of course, also entails consideration about delineation of the relevant market.

Anti-competitive effects cannot be ruled out if the discount system in question is characterized by (1) a sizeable span between the highest realized discount and the lowest realized discount (typically no discount), (2) a retroactive structure, i.e. that the discount applies not only to units beyond a given threshold, but to all units purchased, or (3) a long reference period upon which the discount is calculated. If none of these characteristics are present, the Authority is unlikely to open an investigation.

In previous cases concerning single product loyalty discounts the Authority has applied not only the prohibition against abuse of dominant position but also the prohibition against anti-competitive agreements. However, nowadays the Authority will as a main rule consider single product loyalty discounts as unilateral conduct and, accordingly, determine these practices solely on the basis of Section 11(1) of the Danish Competition Act and Article 82 of the EC Treaty.

4. Cases

4.1 *Has your enforcement agency challenged bundled discounts and/or single product loyalty discounts? If so, can you provide examples?*

On August 30, 2007 the Authority submitted two cases concerning discount schemes to the Council: The Post Danmark case and the SuperGros case.

With respect to the Post Danmark case the Council decided that Post Danmark in 2004 and 2005 had abused its dominant position by offering retroactive discounts on the market for distribution of magazines and other publications in subscription, thus infringing Section 11(1) of the Danish Competition Act and Article 82 of the EC Treaty. The Council ordered Post Danmark to arrange for its discount scheme to comply with section 11(1) of the Danish Competition Act and Article 82 of the Treaty from January 1, 2008 at the latest.

Post Danmark's overall discount scheme was made up of (1) a general price list, (2) an individual price list, and (3) individual quantity discounts granted on the basis of either the general price list or the individual price list.

The price lists were based on the principle that the higher the volume, the lower the prices, and a price reduction would occur whenever the purchased volume exceeded certain thresholds.

For instance, if a customer paid Post Danmark to deliver 45,000 magazines 12 times per year, the price according to the general price list would be 2.80 DKK per unit plus 14.00 DKK per kilogram. If the same customer increased the circulation to, say, 55,000 magazines delivered 12 times per year, the price would be 2.60 DKK per unit plus 12.75 DKK per kilogram. Likewise, if the customer paid Post Danmark to deliver 45,000 magazines 20 times per year, the price would be 2.70 DKK per unit plus 14.00 DKK per kilogram.

The discounts were retroactive, i.e. the discounts would apply to all units purchased and not only the units beyond the thresholds.

The reference period of Post Danmark's discount scheme was generally one year, and the scheme had significant spans between the highest and lowest prices, i.e. more than 20 per cent depending on the volume purchased. Based on these circumstances, and the fact that Post Danmark due to its market share above 90 per cent on the relevant market and its unique nation-wide distribution network was an unavoidable trading partner, it was the conclusion of the Council that the discount scheme infringed section 11(1) of the Danish Competition Act and Article 82 of the Treaty.

In the SuperGros case the undertaking in question (the largest Danish wholesaler of convenience goods to supermarkets and other retailers) employed a pricing scheme by which customers were divided into eight categories. For each category there was a unique price list covering all of the approximately 12,000 different items in SuperGros' product range. For every item customers in the first category paid at least as much as customers in the second category, customers in the second category paid at least as much as customers in the third category, and so on.

Customers were placed into categories according to their total purchase measured in list prices (first category prices) in each reference period. The reference period was three months for small customers and twelve months for large customers. The principle was that the higher the total purchase, the higher the category, and the lower the prices.

There was no common rule to determine the pricing pattern across the eight categories. Moving from one category to the next, the price of one item might change by one per cent, the price of another item by two per cent, and the price of a third item might not change at all. However, through sampling the Authority was able to derive the underlying retroactive, discount scheme. The overall discount span (between the first and the eighth category) was estimated at 14-17 per cent.

SuperGros offered to change their discount scheme by abandoning the system with pricing categories. As a replacement SuperGros would introduce identical list prices for all customers and an incremental discount scheme with a far smaller discount span than previously used and a shorter reference period for large customers. The Council decided that the commitments offered by SuperGros alleviated the concerns of the Council regarding SuperGros' discount scheme. The Council further decided to make the commitments offered by SuperGros binding until December 31, 2009.

In another case the Authority has encountered retroactive discount scheme with a span not unlike those of the Post Danmark and SuperGros cases, but in this case the retroactive discount scheme was continuous (hereinafter: the Continuous case), whereas the discount schemes in the Post Danmark and SuperGros cases were discrete. In the Continuous case there are no thresholds in the discount scheme. Instead there is a discount function, typically smooth and monotonically increasing, defined on a domain of total purchase amounts and a range of non-negative retroactive discounts.

Consequently, given a continuous discount scheme any extra purchase leads to a higher retroactive discount, though sometimes of a very small magnitude. In the Post Danmark and SuperGros cases where

the discount schemes were discrete and based on thresholds only extra purchases extending past such a threshold would lead to a higher retroactive discount. This has implications for the possible effects on competition, see section 4.2.

As a final example, on December 20, 2000 the Council concluded that the discrete discount scheme offered by Lauritz Knudsen (hereinafter: the Lauritz Knudsen case), a dominant undertaking whose business is in the production and sale of products and systems in the electricity distribution, e.g. plug and socket outlets and switches, had loyalty inducing effects and could not be justified due to cost savings. Among other things, discounts were awarded when customers ordered their purchases for the following year in advance and upon later delivery of the pre-ordered purchases. Hereby, customers had a strong incentive to place all of their purchases with Lauritz Knudsen and this inhibited smaller competitors and created entry barriers. Lauritz Knudsen referred the Council's decision for the national courts and on January 7, 2008 the Danish Supreme Court affirmed the findings of the Council.

4.2 *If your agency has encountered bundled discounts and/or single product loyalty discounts that you believe were anticompetitive, please describe the anticompetitive effects.*

In the Post Danmark case, the Council investigated the marginal discounts inherent in the discount scheme. Because the discount scheme was retroactive in nature, the scheme carried with it considerable switching costs which could lead to market foreclosure. Accordingly, Post Danmark's customers would have an incentive to continue buying from Post Danmark, and the customers of one of Post Danmark's competitors would likewise have an incentive to place most or all of their purchases with Post Danmark.

In the SuperGros case the Council calculated incremental discounts for hypothetical customers whose total purchase placed them just within a pricing category or, in the terminology of discount schemes, just beyond a discount threshold. The incremental discounts were calculated for five and ten per cent shares of each hypothetical customer's total purchase. Shares of this magnitude were seen as commercially viable for the smaller competitors of SuperGros. The Council found that the incremental discounts were substantially higher than the retroactive discounts.

Consider for example a hypothetical customer whose purchase measured in list prices exactly qualifies that customer for a retroactive discount of, say, 10 per cent. Consider further that the customer wants to shift a 5 per cent share of the initial purchase to a different supplier and that such a shift would mean that the customer would have to make due with a lower retroactive discount of, say, 8 per cent, on the remaining 95 per cent share of the initial purchase. The incremental discount on the 5 per cent share is thus 48 per cent (10 per cent retroactive discount on the 5 per cent share itself and an additional 2 per cent retroactive discount on the remaining 95 per cent share).

The Council concluded that the discount span of 14-17 per cent and the fact the discount scheme was retroactive, which led to substantially higher incremental discounts and switching costs, would serve to enhance customer loyalty towards SuperGros and thereby inhibit smaller competitors and create entry barriers.

Furthermore, the Council was concerned that the lack of transparency in the implicit nature of the discount scheme employed by SuperGros would exacerbate the anti-competitive effects.

In the Continuous case the concerns of the Authority with regard to anti-competitive effects have been quite similar to the concerns in the Post Danmark, SuperGros and Lauritz Knudsen cases, i.e. that the discount scheme will enhance customer loyalty towards the undertaking in question, inhibit smaller competitors, and create entry barriers. However, when faced with a continuous discount scheme the analysis of the effects on competition differs from the Post Danmark and SuperGros cases.

With discrete, retroactive discount schemes the existence of discount thresholds means that the incremental discount on a small extra purchase can be very high if the extra purchase extends past a discount threshold. Taking into account the extra discount on the existing purchase, the price of the extra purchase may even be negative. However, if the extra purchase does not extend past a discount threshold, the incremental discount equals the already acquired retroactive discount.

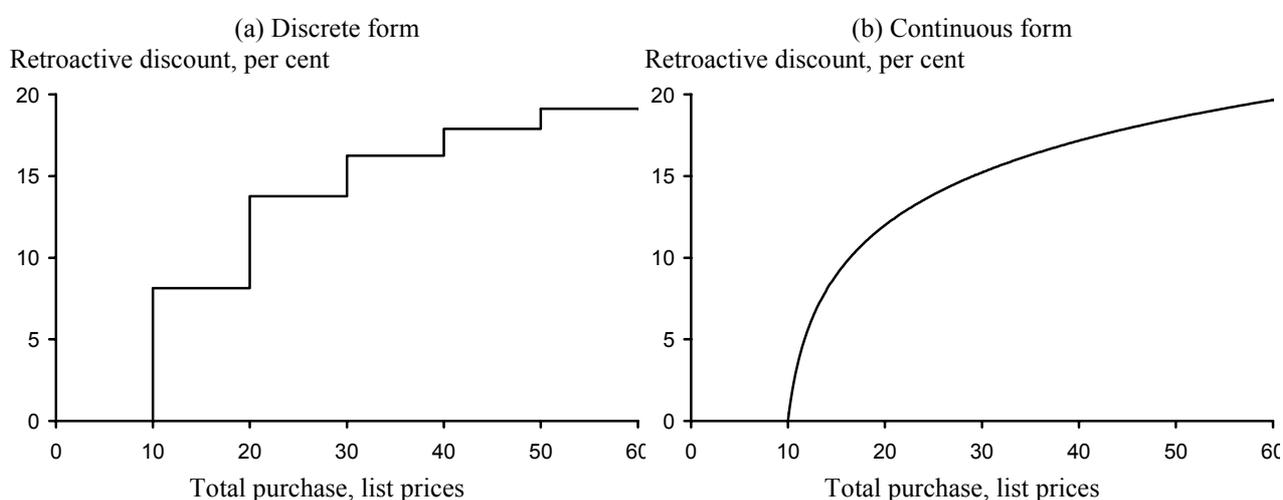
In the Continuous case there are no thresholds, but an extra purchase will always lead to an extra discount, albeit sometimes very small, on the existing purchase. Therefore, the incremental discount on an extra purchase is always higher than the acquired retroactive discount.

Assume for example that a hypothetical retroactive discount scheme exists in a discrete form as well as in a continuous form, i.e. the discrete form is an approximation of the continuous form, see Figure 1.

Given the discount schemes illustrated in Figure 1 consider a customer with a total purchase of 12 measured in list prices and a retroactive discount of 8.1 per cent in the discrete form and 5.5 per cent in the continuous form. An extra purchase of 4 leaves the retroactive discount unchanged in the discrete form and raises it to 9.7 per cent in the continuous form. The incremental discount of the extra purchase is 8.1 per cent in the discrete form and 22.3 per cent (9.7 per cent of the extra purchase and an extra 4.2 per cent on the existing purchase) in the continuous form.

Now consider a customer with a total purchase of 18 and a retroactive discount of 8.1 per cent in the discrete form and 11.0 per cent in the continuous form. An extra purchase of 4 raises the retroactive discount to 13.8 per cent in the discrete form and 12.8 per cent in the continuous form. The incremental discount of the extra purchase is 39.5 per cent in the discrete form and 20.9 per cent in the continuous form.

Figure 1. Retroactive Discount Schemes



The example shows that given the right circumstances, i.e. an extra purchase extending past a discount threshold, the discrete form will produce the highest incremental discount, but absent the right circumstances the incremental discount of the discrete form equals the already achieved retroactive discount. On the other hand, and no matter the circumstances, the continuous form consistently produces an incremental discount above the retroactive discount. How far above the retroactive discount depends on the curvature of the retroactive discount function.

The typical approach when evaluating a discrete form, e.g. Figure 1(a), is to construct an example with an extra purchase extending past a discount threshold, but if this approach is applied to a corresponding continuous form, e.g. Figure 1(b), the possible anti-competitive effects of the continuous form are likely to be underestimated. This is due to the fact that the incremental discount may be seen as small in comparison with that of the discrete form, but it must not be neglected that the opposite is the case whenever the right circumstances, i.e. an extra purchase extending past a discount threshold, are not present.

4.3 *If you have found anticompetitive effects, (1) have you found them in instances in which the defendant did not already have a monopoly power/dominance, and (2) have you found them in instances in which all significant competitors were not driven out of the market?*

In the Post Danmark and Lauritz Knudsen cases the undertaking in question was found to be dominant. In the SuperGros case the undertaking in question was presumed to be dominant, but no final conclusion on the matter of dominance was reached, because the Council terminated its investigation after accepting the commitments from SuperGros.

Given Post Danmark's market share in excess of 90 per cent, Post Danmark faced only a few minor competitors. SuperGros faced a series of competitors, but only one of these, Edeka, supplied a full product range like SuperGros. The remaining competitors supplied only a limited product range. Consequently, a customer of SuperGros wanting to substitute demand away from SuperGros could choose to (1) shift all of its demand to Edeka, (2) shift some of its demand to one or more of the smaller competitors offering only a limited product range, or (3) some combination of the two. Also Lauritz Knudsen faced only a few minor competitors.

5. Clarity/Certainty

5.1 *To what extent is there clarity in your jurisdiction as to how bundled discounts and/or single product loyalty discounts will be evaluated?*

It follows from its preparatory works (*travaux préparatoire*) that the Danish Competition Act should be interpreted in accordance with EC competition law. Consequently, single product loyalty discounts should be evaluated not only on the basis of national law and national decisions but also on the basis of Article 82 of the EC Treaty and Community case law. In the light of national and Community case law, dominant undertakings can assume that retroactive discounts as a starting point will be looked upon as loyalty inducing and, accordingly, abusive. However, it is also established practice that the Authority needs to analyse if there are economic justifiable reasons for the discounts, i.e. cost savings directly flowing from the volume purchased.

5.2 *What degree of certainty do businesses have in being able to assess the legality of bundled or single product loyalty discounts that they may be considering?*

The *per se* approach mentioned in paragraph 41 provides undertakings some legal certainty. Furthermore, Community case law and national decisions draw up orientations on issues such as the length of the reference period, the magnitude of the rebate span, how close customers are to the next discount threshold and - related hereto - the question of transparency for the customers regarding the thresholds inherent in the scheme, i.e. uncertainty as to when the discounts kicks in. Each scheme, however, should be evaluated on its own merits.

5.3 *Are there safe harbors that businesses can rely on?*

There are no safe harbours *per se*, but it is unlikely even in the absence of a cost justification that the Council will investigate discount schemes with (1) a discount span of, say, no more than approximately 5 per cent, (2) a short reference period, say, no longer than three months, and (3) an incremental rather than a retroactive structure. Concerning discount spans with a greater magnitude than approximately 5 per cent, it is not likely that the Authority will establish abuse if the practices are justifiable due to economic reasons, i.e. cost savings directly flowing from the volume purchased.

5.4 *Are you concerned that your jurisdictions antitrust approach to these discounts is either (1) too lenient, allowing anticompetitive effects to occur; or (2) too strict or not clear enough, chilling price-cutting that would benefit consumers?*

The approach of the Authority with respect to single product loyalty discounts is in accordance with the guidelines which can be derived from Community and national case law. The Authority makes its assessments in the light of the likely and actual market distorting foreclosure effects and addresses methods deviating from those which condition normal competition on the merits. The Authority is aware that discounts in the short run can entail lower prices and support competition, but by acting against market distorting discount schemes the Authority pursues a long-term objective against entry barriers and market concentration.

6. Price-Cost Test

6.1 *In your jurisdiction is a price-cost test used to assess the legality of these discounts? If so, please describe the test(s) and what additional analysis (if any) is applied to conduct that either passes or fails the test.*

In the Post Danmark case the Council looked into Post Danmark's cost structure, and it became clear that Post Danmark's prices near the thresholds were below its average total costs. Accordingly, to customers with purchases near the thresholds a competitor would have to offer prices below Post Danmark's average total costs to win market shares.

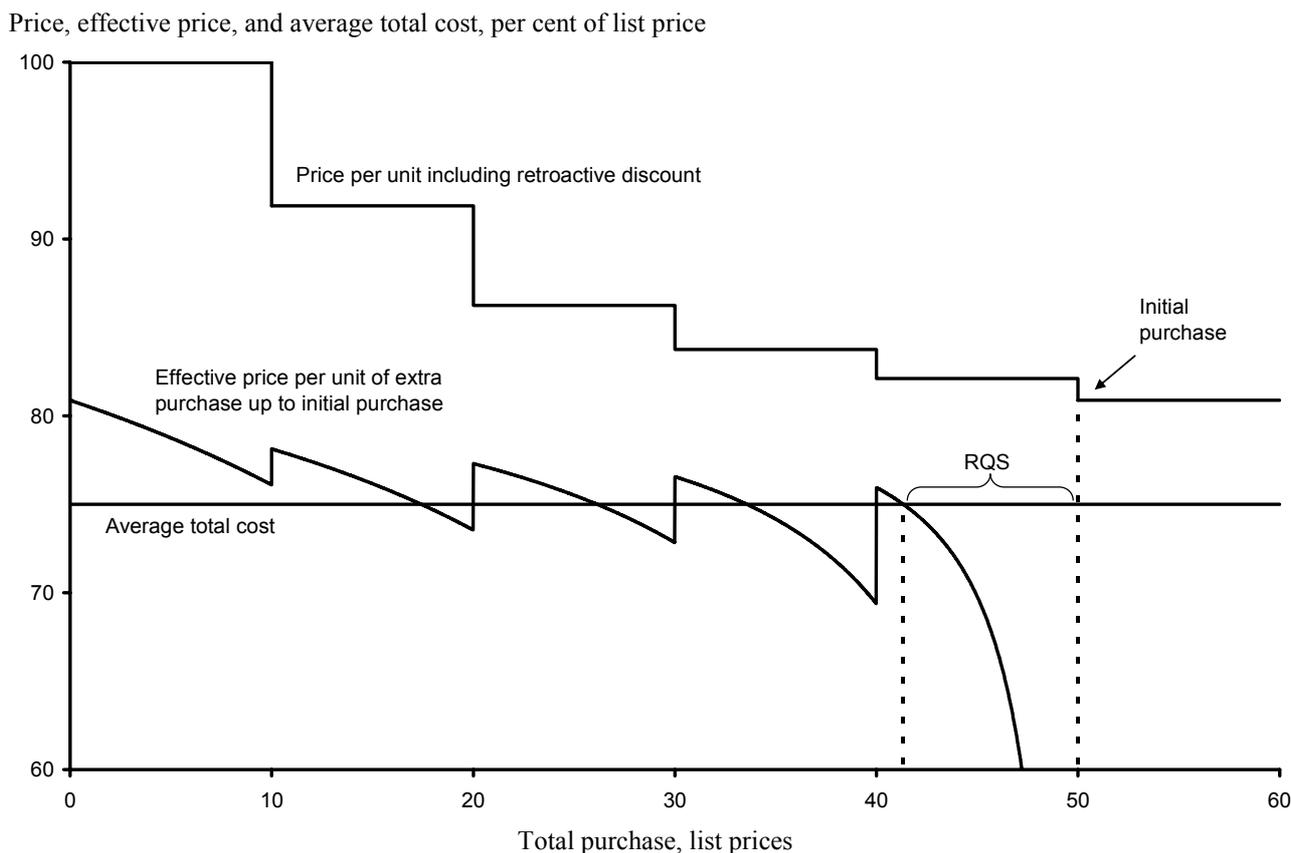
This indicated that in order for a competitor as efficient as Post Danmark to compete for customers with purchases near the thresholds, the competitor would have to accept less than full cost coverage. This would not only constitute an effective entry barrier, but in the long run it could potentially also drive existing competitors out of the market.

In addition, the Council calculated the required share of a customer's purchase that would be sufficient for a competitor as efficient as Post Danmark and offering the same marginal prices as Post Danmark before that competitor would experience full coverage of average total costs. In this respect the Council pursued the so-called RQS-test contained in the European Commission's Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses. The Council found that an as-efficient competitor would require a share of customer's purchases, which was above the commercially viable share for any competitor. This was due, in part, to the relative distribution of market shares among Post Danmark and the competitors with the former exceeding 90 per cent.

The Council noted that the calculations of ATC and RQS were based on estimation and that they were not necessarily accurate figures. Nevertheless, the Council observed that the analysis supported its conclusion of foreclosure. The Council also noted that the analysis of Post Danmark's cost structure and the performance of the RQS-test were additional investigations and not necessarily imperative to conclude that Post Danmark had abused its dominant position given that it is not mandatory after Section 11(1) or Article 82 to present evidence of concrete effects to establish abuse.

Figure 2 illustrates the approach of the Authority when calculating RQS for a given retroactive discount scheme, e.g. the scheme in the Post Danmark case. The scenario depicted in Figure 2 is the following: A customer initially makes a purchase at the expenditure of 50 measured in list prices from a dominant supplier offering a retroactive discount scheme. The customer qualifies for the sixth discount level (with no discount offered at the first level), but the customer is considering shifting part of the initial purchase to another supplier.

Figure 2. The Required Share (RQS)



The other supplier is as efficient as the dominant supplier and offers a fixed unit price equal to average total cost (75 per cent of list price in Figure 2). For every purchase at an expenditure between 0 and 50 measured in list prices the effective price curve in Figure 2 shows the unit price offered by the dominant supplier should the customer choose to remain entirely with the dominant supplier, i.e. continue to purchase at the expenditure of 50 measured in list prices, instead of shifting part of the initial purchase to the other supplier. The effective price includes possible extra discounts on units which the customer does not contemplate purchasing from another supplier.

If the customer chooses, for example, to reduce the purchase with the dominant supplier to an expenditure of 37 measured in list prices the effective price curve shows that the dominant supplier will sell the remaining share of the initial purchase, a further purchase at an expenditure of 13 measured in list prices, at an effective price per unit of approximately 72.7 per cent of the list price.

The customer will choose to shift a share of the initial demand from the dominant supplier to an as efficient alternative supplier if and only if the fixed price per unit offered by the other supplier is below the effective price per unit offered by the dominant supplier. In the setting of Figure 2 the customer may

choose to shift a share of initial demand only if the expenditure of that share measured in list prices is at least 8.7, which is approximately 17 per cent of initial demand, i.e. RQS for customers qualifying exactly for the sixth discount level is 17 per cent.

However, as illustrated by the example above and as is shown in Figure 2, the customer will not necessarily want to shift any share that is greater than 17 per cent to another supplier but only shares with an effective price from the dominant supplier above ATC. In the setting of Figure 2 the customer will want to shift shares of 17-20 per cent, 33-40 per cent, 52-60 per cent, and 65-100 per cent. Therefore, it may be argued that the estimated RQS of 17 per cent does not fully capture the exclusionary effect of the discount scheme, because the initial contestable share is quite narrow, 17-20 per cent, and the following contestable shares are separated by large gaps. This point is exacerbated if the customer cannot predict total purchase throughout the reference period or if the discount system is not properly transparent.

The required share can be found in the following way: Define list price, P_L , quantity, Q , the smallest quantity sufficient to obtain discount level i , Q_i , the retroactive discount, D_R , as a function of list price and quantity, $D_R = D_R(P_L, Q)$, and average total cost, ATC. The required share for discount level i , RQS_i , satisfies equation 1.¹

$$P_L(1 - D_R(P_L, Q_i)) = P_L(1 - RQS_i)(1 - D_R(P_L, Q_i(1 - RQS_i))) + ATC \cdot RQS_i \quad (1)$$

The left hand side of equation 1 is the unit price after discount when the entire purchase, Q_i , is placed with the dominant supplier. The right hand side is the unit price after discount when the required share, RQS_i , of the entire purchase is placed with the other supplier and the remaining share, $1 - RQS_i$, is placed with the dominant supplier. Solving for RQS_i yields equation 2.

$$RQS_i = \frac{P_L(D_R(P_L, Q_i) - D_R(P_L, Q_i(1 - RQS_i)))}{P_L(1 - D_R(P_L, Q_i(1 - RQS_i))) - ATC} \quad (2)$$

Equation 2 provides only an implicit solution as RQS_i is an argument in the discount function and thus present on the left and right hand side alike. Multiple values of RQS_i may satisfy equation 2, see Figure 2 for an illustration with four solutions. In such cases the smallest value in the interval from 0 to 1 is the relevant one.

The overall experience of the Authority is that the RQS-test can be a useful tool when attempting to quantify and clarify the foreclosing effects of a discount scheme by a dominant undertaking. However, the RQS-test is complicated to perform and often fraught with uncertainties, e.g. it may be necessary to establish the production costs of a single product from a multiple product undertaking.

With retroactive continuous discount schemes, see Figure 1(b), effective prices being substantially below ATC does not typically arise. In fact, the retroactive smooth discount scheme may be represented by a marginal and smooth scheme, though, with a larger discount span. Therefore, a smooth retroactive discount scheme is typically not as foreclosing with respect to the discount span as a discrete scheme containing (multiple) discount levels. In these cases, the Danish authority will test whether the scheme can be justified based on cost savings.

With retroactive continuous discount schemes the Authority will examine whether the discount schemes can be justified based on cost savings. Specifically, the Authority will examine whether or not the

¹ Equations 1 and 2 are a generalization for the case with multiple discount levels of the equations in the DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses.

marginal price of an extra unit sold is proportional to the marginal costs of producing an extra unit for the undertaking in question. If marginal price and marginal costs are proportional, the discount scheme can be said to be justified by cost savings.

In practice the test is performed by having the undertaking in question provide documentation for the discount given to each customer and the magnitude of the cost savings specific to each customer. If some customers receive no discount, they can serve as a benchmark against which the cost savings specific to the remaining customers are assessed in relative terms.

The marginal price takes into account that the purchase of every additional unit leads to an extra discount on units already purchased on top of the retroactive discount which applies to all units. Defining the retroactive discount, $D_R = D_R(P_L, Q)$, as an increasing and differentiable function of list price, P_L , and quantity, Q , the expenditure on the total purchase is $P_L Q(1 - D_R(P_L, Q))$. The marginal price, $P_M = P_L(1 - D_R(P_L, Q) - Q \partial D_R(P_L, Q) / \partial Q)$, is the partial derivative with respect to Q of the total expenditure. Defining $D_M(P_L, Q) = D_R(P_L, Q) + Q \partial D_R(P_L, Q) / \partial Q$ the expression for marginal price can be rewritten as $P_M = P_L(1 - D_M(P_L, Q))$, which shows that an equivalent marginal and well behaved discount scheme exists. Therefore, a continuous or smooth discount scheme is typically less loyalty enhancing than a corresponding discrete discount scheme. The price-cost test is whether P_M is proportional to the marginal costs of production for all relevant levels of Q .²

6.2 *Can bundled discounts and/or single product loyalty discounts be condemned without application of some kind of price-cost test?*

In the SuperGros case the Council did not carry out an analysis to assess the legality of SuperGros' discount scheme, as SuperGros had already offered commitments to alleviate the Council's concerns.

In the Post Danmark case the Council noted that the analysis of Post Danmark's cost structure and the performance of the RQS-test were additional investigations and not necessarily imperative to conclude that Post Danmark had abused its dominant position given that it is not mandatory after Section 11(1) or Article 82 to present evidence of concrete effects to establish abuse.

It is, however, always necessary to determine whether or not a discount scheme can be justified based on cost savings.

6.3 *If so, what is the test that is applied?*

See section 6.1.

7. Intent/Justification

7.1 *Does your agency/jurisdiction view intent as relevant in evaluating bundled discounts and/or single product loyalty discounts? If so, what types of intent evidence would work against a defendant? What types of business justifications would work in its favour?*

The Authority does not view intent as relevant in cases of single product loyalty discounts. Thus, the Authority is not required to show that the undertaking employing the discount scheme intends to foreclose competition.

² The equations in this paragraph were brought to the attention of the Authority by Claes Bengtsson, DG COMP.

7.2 *If conduct appears to adversely affect competition but there are legitimate business justifications for the conduct, how do you reach a decision?*

The Authority recognizes cost savings specific to the volume purchased by the individual customer as a possible justification for a discount scheme with anti-competitive effects, see section 6. No other possible business justifications, e.g. overall efficiency gains, have so far entered into the evaluation by the Authority.

In the Post Danmark case the Council evaluated whether the pricing and discount scheme could be vindicated due to economic justifications. However, Post Danmark had not been able to justify its discount scheme sufficiently on the basis of its costs. Specifically, Post Danmark had neither been able to justify in relation to its costs the cumulative nature of the discount scheme nor the thresholds and prices applying to some individual customers.

In the SuperGros case the Council received considerable amounts of cost data from SuperGros, which, according to SuperGros, showed that SuperGros' discount scheme could be justified by cost savings. However, the Council did not find the justification presented by SuperGros to be sufficient.

In the case concerning Lauritz Knudsen the Council likewise evaluated whether the discount scheme could be justified due to cost savings. The Council concluded that Lauritz Knudsen had not presented sufficient evidence in this respect.

FRANCE

1. Introduction

L'attribution de rabais, remises et ristournes sur le prix de vente est une pratique commerciale courante, qui peut être pro-concurrentielle et bénéficier aux consommateurs puisqu'elle peut engendrer une baisse des prix et/ou une amélioration des conditions d'offre (qualité, variété de choix etc.).

Cependant, la mise en place d'un système de remises incitant les acheteurs à s'approvisionner pour la totalité ou une partie importante de leurs besoins chez le fournisseur concerné peut avoir des effets anticoncurrentiels.

Le Conseil de la concurrence a été saisi à maintes reprises de ce type de pratiques et sa pratique décisionnelle les concernant est bien établie. Elle s'appuie sur la législation française et communautaire relative à la prohibition des pratiques anticoncurrentielles, ces pratiques pouvant être appréhendées sous l'angle de l'entente ou de l'abus de position dominante. L'article L 420-1 du code de commerce et l'article 81 CE permettent de sanctionner les systèmes de remises anticoncurrentiels mis en place par des fournisseurs à l'intention de distributeurs qui les ont approuvés. L'article L 420-2 du code de commerce et l'article 82 CE s'appliquent dans le cas où l'octroi anticoncurrentiel de remise est effectué par une entreprise en position dominante.

L'octroi de remises par une entreprise en position dominante est considéré comme anticoncurrentiel si le système en cause entraîne, de façon effective ou potentielle, la restriction de l'accès au marché à de nouveaux entrants ou vise à l'éviction de concurrents actuels, au détriment des consommateurs. Mais l'octroi de remise sera également prohibé s'il porte atteinte à la libre fixation des prix par le jeu de la concurrence, dans le cadre d'une entente.

Les rabais et remises de couplage et de fidélité anticoncurrentiels conduisent à l'éviction de concurrents déjà présents sur le marché ou à restreindre l'accès au marché de nouveaux entrants. Ainsi, lorsqu'un opérateur économique, en position dominante sur un marché de produits dit « liant », lie de façon obligatoire la vente de ce produit à la vente d'un autre produit, dit « lié », cette pratique de couplage est, sous certaines circonstances, constitutive d'un abus de position dominante, prohibé par l'article L 420-2 du code de commerce et, lorsqu'elle affecte le commerce entre Etats membres, par l'article 82 CE. De même, une pratique tendant à aboutir, par la voie de l'octroi d'avantages financiers, à la fidélisation des partenaires commerciaux pourra constituer un abus de position dominante.

Le Conseil de la concurrence ne condamne pas ces pratiques en raison de leur nature, analysée de façon abstraite et indifférenciée (approche dite *per se*), mais lorsqu'il est avéré qu'elles ont une incidence négative sur le bien-être des consommateurs (approche dite par les effets). Cette approche le conduit à analyser les effets actuels et potentiels, y compris sur le long terme, de ces pratiques, en prenant en considération les éventuels gains d'efficacité qui y sont attachés (1). Tout en étant donc nécessairement adaptée au cas par cas, l'approche économique du Conseil est fondée sur des tests et méthodes qui la rendent praticable et claire, afin de garantir une certaine sécurité juridique (2).

2. L'approche par les effets des remises de fidélité et de couplage

Les remises de fidélité et de couplage peuvent avoir à la fois des effets positifs et négatifs sur le bien-être des consommateurs (standard du Conseil de la concurrence). Il convient donc de mettre en évidence, et le cas échéant, de contrebalancer les effets négatifs de ces pratiques (1.1) avec les gains d'efficacité qu'elles engendrent (2.2), en évaluant leur impact global.

2.1 La prise en compte des effets anticoncurrentiels

Le Conseil prend en considération les effets anticoncurrentiels des remises de couplage et de fidélité. En ce sens, il recherche si le système en cause laisse aux firmes rivales une solution alternative pour concurrencer les offres proposées par la firme en position dominante.

Ainsi, dans la décision *Port autonome du Havre*¹, le Conseil a condamné un système de rabais de couplage en relevant le caractère peu attractif des offres concurrentes et l'absence de solution alternative pour concurrencer les offres couplées :

« Les entreprises de manutention concurrentes ne disposent pas de solution alternative pour pouvoir concurrencer en prix les offres de la CIPHA, puisque ce sont les tarifs publics pour l'utilisation de l'outillage public géré par le port et la location de l'outillage concédé qui leur sont appliqués ».

De même, le Conseil a condamné le caractère potentiellement anticoncurrentiel des remises commerciales sur le chiffre d'affaire accordées par la Poste² :

« le fait que LA POSTE puisse offrir à sa clientèle une gamme de produits très large accroît l'effet potentiellement anticoncurrentiel des remises de quantités combinées, les opérateurs concurrents, en général spécialisés dans un segment de marché, ne pouvant proposer des avantages commerciaux conjoints concernant une gamme de produits ».

C'est l'impact négatif pour le consommateur final de cet effet d'éviction (en termes de prix et/ou de choix) qui justifie l'interdiction du système de remise.

Ainsi, dans la décision *Roquefort*³, le Conseil précise qu'un tel système pourra avoir pour effet de restreindre la possibilité de choix des acheteurs.

« Il résulte du caractère incontournable des produits de la SOCIETE DES CAVES sur le marché du roquefort (...) que cette société est effectivement la seule à pouvoir offrir certaines références et certains volumes demandés par les grands distributeurs. Ce constat ne fait que rendre plus évident le pouvoir de l'entreprise en position dominante de restreindre la possibilité de choix des acheteurs »

« A ces considérations s'ajoute le fait que les linéaires des GMS constituent une ressource rare dont l'accès fait l'objet d'une forte compétition entre producteurs. Toute pratique qui restreint de manière illicite la concurrence sur ces linéaires prive le consommateur final de la possibilité d'accéder aux produits qui n'y ont pas trouvé leur place »

¹ Décision 07-D-28 du 13 septembre 2007, Port autonome du Havre.

² Décision 04- D-65 du 30 novembre 2004, La Poste.

³ Décision 04-D-13 du 8 avril 2004, Roquefort.

Conformément au code de commerce et au traité CE, les effets actuels et potentiels sont pris en compte dans l'analyse. Ainsi, le Conseil a rappelé dans la décision NMPP⁴, sans la condamner, qu'une pratique n'ayant pas d'effets actuels pourra être considérée comme anticoncurrentielle et, par conséquent, néanmoins condamnée si ses effets potentiellement anticoncurrentiels sont établis. La jurisprudence confirme la nécessité de prendre en compte l'effet potentiel des remises. Ainsi, dans son arrêt du 12 juillet 2005⁵, la Cour de cassation approuve le fait d'avoir considéré comme anticoncurrentiel un système de bonification exceptionnelle progressive proposé aux éditeurs par les NMPP en contrepartie d'engagements de fidélité, « *ce système pouvant dissuader les éditeurs de changer de messagerie de presse et avoir pour effet de figer les parts de marché.* »

En l'absence d'un tel effet, la pratique n'est pas susceptible d'être interdite. Ainsi, dans sa décision Canal Plus⁶, le Conseil a estimé, après avoir examiné l'évolution du nombre de clients de TPS et noté une augmentation des prix de TPS, que les pratiques incriminées n'avaient pas eu pour effet d'évincer TPS mais s'inscrivaient dans une stratégie de concurrence par les mérites.

« Il résulte de ces éléments qu'il n'est pas établi que la pratique de couplage des offres Canal Plus et CanalSatellite ait eu pour effet d'évincer la société TPS du marché de la télévision payante, voire même ait nui à son développement. »

De ce fait, le consommateur final n'a pas vu son choix restreint et aucun effet négatif sur son bien-être n'a pu être identifié. En outre, le Conseil a considéré que le système de couplage a suscité des gains d'efficacité dont ont bénéficié les consommateurs (cf. paragraphe suivant).

Un système de remises anticoncurrentiel ayant des effets négatifs sur le bien-être des consommateurs peut néanmoins être autorisé s'il génère par ailleurs des effets positifs supérieurs aux premiers. La prise en compte des gains d'efficacité est ainsi une pratique courante du Conseil en matière de remises couplées et de fidélité, comme pour les autres pratiques appréhendées par la pratique décisionnelle.

2.2 La prise en compte des gains d'efficacité

L'approche par les effets impose de prendre en compte les gains d'efficacité générés par les systèmes de remises et rabais, dans la mesure où ils sont démontrés à suffisance de droit par les entreprises en cause.

Les gains d'efficacité générés par une remise de couplage ou de fidélité sont soit pris en compte directement par le Conseil dans son analyse, soit examinés en tant que moyen de défense de la partie mise en cause. Dans les deux cas, ils seront le plus souvent pris en compte dans le cadre d'une analyse globale. Il ne s'agit donc pas d'exempter une pratique d'abord déclarée illégale, mais de conclure d'emblée à la justification de cette pratique au vu de son impact net positif sur le bien-être des consommateurs.

Les remises de fidélité permettent d'offrir des formules de prix/quantités adaptées à différents types de consommateurs et peuvent contribuer à faire baisser les prix. Les remises de couplage peuvent permettre d'amortir les coûts fixes, d'éliminer certains coûts de transactions et de résoudre les problèmes de compatibilité entre produits complémentaires. Ainsi, les gains d'efficacité bénéficiant aux consommateurs peuvent prendre la forme d'une baisse des prix, d'une amélioration de la qualité des produits, d'un élargissement de l'offre (plus grande variété), d'un gain en termes de praticabilité du fait de la réunion de deux produits en un seul et/ou d'un gain de temps *via* par exemple un paiement facilité, etc.

⁴ Décision 06-D-16 du 20 juin 2006, NMPP.

⁵ Arrêt NMPP de la cour de cassation du 12 juillet 2005.

⁶ Décision 05-D-13 du 18 mars 2005, Canal Plus.

Ainsi, dans la décision *Canal Plus* (précitée), en matière de remises de couplage, après avoir analysé les remises résultant de la promotion liant Canal+ et CanalSatellite, le Conseil a observé que ces pratiques pouvaient bénéficier directement aux consommateurs. Il a été démontré qu'elles présentaient, d'une part, un avantage financier, et, d'autre part, un avantage pratique, puisqu'elles permettaient l'utilisation d'un seul décodeur au lieu de deux, et que les consommateurs ne recevaient plus qu'une seule facture à la place de deux.

Dans les décisions *Renault et Peugeot*⁷, au moyen d'une analyse économique de chaque pratique en cause, le Conseil a mis en avant leurs effets pro-concurrentiels consistant en une baisse des prix et un maintien de la qualité du service offert, au profit du consommateur :

« En effet, des éléments tels que les baisses de prix ou le maintien de la qualité du service offert par les concessionnaires et par l'ensemble du réseau dont la densité a ainsi été préservée et dont les consommateurs ont bénéficié, contribuent à l'animation de la concurrence. »

A l'inverse, dans la décision *La Poste* (précitée), le Conseil a jugé que les remises accordées sur l'ensemble du chiffre d'affaire portant sur l'achat de deux produits en concurrence n'étaient pas justifiées par des gains d'efficacité :

« Cette globalisation n'est pas justifiée par des gains d'efficacité dans la mesure où les produits sont indépendants, de sorte que le développement de l'un ne procure pas d'économies d'échelle pour le développement de l'autre »

L'approche par les effets permet d'éviter de prohiber des remises bénéfiques au consommateur. Elle suppose une analyse précise et au cas par cas. Cependant, cette approche doit, pour être praticable, reposer sur une méthodologie simple et rigoureuse permettant de guider les comportements des acteurs sur les marchés.

3. Une méthodologie praticable et des directives claires

3.1 Une méthodologie praticable

L'analyse des effets peut être plus ou moins approfondie selon les cas. Elle sera plus limitée quand la pratique s'inscrit dans une stratégie claire (2.1.1). Dans la plupart des autres cas, les effets seront évalués au moyen d'outils économiques plus fins (2.2.2).

3.1.1 Une analyse moins approfondie dans certains cas

Lorsque la pratique en cause a un impact négatif manifeste sur le bien-être du consommateur, l'examen du Conseil peut être plus ramassé. L'approche par les effets repose ainsi sur des scénarios économiques supposant une répartition claire de la charge de la preuve entre l'autorité de la concurrence et les entreprises.

Dans certains cas, le caractère anticoncurrentiel du système de remises est tellement évident que le Conseil n'approfondit pas l'examen des effets réels. C'est le cas dans l'affaire *Ciment corse*⁸, dans laquelle le Conseil de la concurrence a condamné des producteurs de ciments ayant accordé des remises dont la seule raison d'être était de lutter contre les importations :

⁷ Décisions 03-D-66, Renault et 03-D-67, Peugeot du 23 décembre 2003.

⁸ Décision 07-D-08 du 12 mars 2007, Ciment Corse.

« Les remises mises en place (...) ne sont pas de simples baisses de prix commandées par la concurrence et visant un alignement sur les prix plus bas des ciments importés, mais des remises ciblées, attribuées ex post sous forme d'à valoir après vérification que la condition mise à leur attribution a été remplie : n'avoir pas importé de ciment étranger au cours du mois faisant l'objet de la remise »

Le Conseil caractérise alors les remises fidélisantes, conformément à l'analyse communautaire⁹, en recherchant l'existence d'une contrepartie économiquement justifiée à l'avantage financier consenti. Le Conseil, dans la décision *Roquefort*¹⁰, rappelle la jurisprudence communautaire sur ce point :

« Un système de rabais sera considéré comme abusif si les critères et les modalités de son attribution font apparaître que le système ne repose pas sur une contrepartie économiquement justifiée »

En l'absence de contrepartie justifiée, la stratégie anticoncurrentielle permet d'expliquer l'existence des rabais. Si l'entreprise en position dominante consent à octroyer des remises non justifiées, c'est qu'elle rémunère l'absence de mise en concurrence (réelle ou attendue) de la part des bénéficiaires.

Pour autant, les entreprises peuvent encore apporter la preuve que la remise en question est pro-concurrentielle, mais, la charge de la preuve repose alors sur elles.

Il convient donc d'apprécier les critères et les modalités de l'octroi des remises, et d'examiner si elles tendent, par un avantage qui ne repose sur aucune prestation économique qui les justifie, à enlever ou à restreindre la possibilité de choix de l'acheteur en ce qui concerne ses sources d'approvisionnement, à barrer l'accès du marché aux concurrents, à appliquer à des partenaires commerciaux des conditions inégales à des prestations équivalentes, ou à renforcer la position dominante par une concurrence faussée.

La méthode retenue par le Conseil implique cependant de recourir à des outils économiques reconnus, tels que les tests de coûts, afin d'évaluer les effets des pratiques de remises et rabais.

3.1.2 L'utilisation d'outils économiques

Dans tous les autres cas, une approche rigoureuse est suivie par le Conseil pour évaluer les effets sur la concurrence de la mise en place de remises de fidélité ou de couplage. Le Conseil calcule l'ampleur effective des remises offertes et leur impact, dès lors qu'elles ne s'inscrivent pas dans le cadre d'une stratégie claire d'éviction des concurrents. Le Conseil utilise un test de coûts afin de déterminer si l'effet d'éviction consécutif à la mise en œuvre de la remise s'inscrit dans une stratégie de prédation. Ces tests permettent d'étayer l'analyse du Conseil.

Dans la décision *Tuxedo*¹¹, le caractère anticoncurrentiel de la remise a été mis en évidence par le Conseil, notamment par l'estimation des tranches effectivement utilisées :

« Les deux critères retenus pour pouvoir bénéficier d'une majoration de rémunération, à savoir le nombre de points de vente et le chiffre d'affaires, sont calculés, par tranche, sur l'ensemble des points de vente détenus, pour la France entière, par l'entreprise considérée, et l'ensemble du

⁹ CJCE, Hoffmann-La Roche, 13 février 1979, CJCE Portugal/Commission, 29 mars 2001, TPICE Irish Sugar, 7 octobre 1999, Michelin, 23 septembre 2003.

¹⁰ Décision 04-D-13, Société des caves et des producteurs réunis de roquefort.

¹¹ Décision n° 03-D-09 du 14 février 2003.

chiffre d'affaires qu'elle réalise. Or, les seuils de ces tranches sont très élevés : il est nécessaire de dépasser le nombre de 50 points de vente pour atteindre la deuxième tranche de remise liée au nombre et de dépasser 100 millions de F. de chiffre d'affaires pour atteindre la seconde tranche de la remise complémentaire. Comme il y a 38 points de vente sur les plate-formes aéroportuaires parisiennes,, objet du litige, et que Tuxedo réalisait 38,7 millions de F. de chiffre d'affaires en 1994, même cette société qui est la principale concurrente de Relais H, ne peut bénéficier que de la remise la plus basse. A l'opposé, il faut dépasser 700 points de vente et 1,5 milliard de francs de chiffre d'affaires pour atteindre la tranche la plus haute : seul Relais H peut y prétendre (...) Sur les 112 cas de rémunération possibles prévus au barème, seules les deux extrêmes sont représentés ».

De la même manière, dans la décision *Canal Plus* (précitée), le Conseil a calculé la remise effective accordée et l'a comparée à l'économie de coûts potentielle :

« La remise de couplage peut être évaluée en comparant la somme des prix des deux offres séparées, soit 175 + 98 = 273 F, et celui de l'offre couplée, soit 225 F. La remise accordée est donc de 48 F. On pourrait concevoir qu'une entreprise réalisant ce montant d'économie de coût, lié au fait qu'elle traite un seul abonné au lieu de deux, veuille répercuter cette économie à ses clients».

En outre, le Conseil a utilisé un test de coûts pour vérifier que la remise n'était pas prédatrice :

« Il résulte de ces éléments que la perte sur coût variable par abonné et par mois s'élèverait à plus de 20 %. Ceci n'exclut pas que le prix de l'offre couplée Canal Plus / CanalSatellite soit inférieur aux coûts variables moyens, en raison du cumul de cette offre avec d'autres propositions, comme la parabole gratuite, qui a été offerte à partir de juin, et l'accès à Kiosque. »

Néanmoins, TPS n'ayant pas été exclu du marché, la prédation n'a pas été retenue.

Afin de garantir une certaine sécurité juridique, le Conseil de la concurrence s'attache enfin à diffuser cette méthodologie par une abondante « *guidance* » dans ses décisions.

3.2 De la guidance pour les opérateurs économiques

Le recours accru à l'analyse économique dans l'examen des remises de fidélité et de couplage par le Conseil s'accompagne d'une « *guidance* » précise à l'intention des opérateurs économiques. Les positions de principe tirées de la pratique décisionnelle antérieure et de la jurisprudence offrent aux opérateurs économiques concernés, l'opportunité de s'y référer pour évaluer des cas *a priori* similaires.

Dans la décision *Ciment Corse* (précitée), le Conseil a par exemple présenté de manière détaillée sa pratique décisionnelle en matière de remises de fidélité. Ainsi, l'on peut se référer à une présentation de principe sur les remises : « *Les remises de fidélité de l'espèce et la jurisprudence les concernant* ». Le Conseil a ainsi dans un premier temps présenté les systèmes de remise comme étant bénéfiques à l'acheteur final, pour préciser dans un second temps que certains systèmes de remises, lorsqu'elles sont ciblées sur certaines catégories d'acheteurs, peuvent nécessiter « *un examen plus circonstancié* ».

Cette « *guidance* » s'exprime aussi dans les décisions de non lieu rendues par le Conseil, décisions qui constituent une originalité du système français. Cet outil permet plus particulièrement de souligner dans quels cas une pratique de remise peut apparaître justifiée. Ainsi, dans la décision *Canal Plus*

(précitée), le Conseil rappelle sa pratique antérieure sur les remises de couplage (décision *Sandoz*¹² et décision *Lilly*¹³) et reprend ses critères d'évaluation des systèmes de remises couplées.

Enfin, les avis du Conseil contribuent à diffuser cette « *guidance* ». Ainsi, dans son avis n° 2000-A-26 du 15 février 2001, le Conseil précise que « *même si le couplage est établi entre des produits ou des services offerts sur deux marchés ou segments de marché tous deux offerts à la concurrence, il peut se faire que la pratique soit anticoncurrentielle. Ce peut être le cas, par exemple, lorsqu'un opérateur est présent sur deux marchés, tous deux concurrentiels, alors que ses concurrents ne sont, chacun en ce qui le concerne, présents que sur un seul d'entre eux* ». Dans son avis n° 07-A-17 du 20 décembre 2007, relatif à une demande d'avis de l'Autorité de régulation des communications électroniques et des postes (ARCEP) sur le dispositif de remises commerciales de La Poste, le Conseil détaille là encore sa pratique décisionnelle relative au rabais et remises.

Par le biais de cette « *guidance* », le Conseil contribue à orienter les comportements et émettre des recommandations auxquelles les opérateurs économiques peuvent se référer.

4. Conclusion

L'approche du Conseil de la concurrence en matière de remise de fidélité et de couplage est fondée sur un recours systématique à l'examen des effets. Ces pratiques peuvent se justifier comme étant source d'efficacité, mais elles peuvent aussi avoir un effet anticoncurrentiel, au détriment des consommateurs.

Le rôle de l'autorité de la concurrence est d'établir un partage entre les pratiques dont les effets globaux sont positifs et celles qui sont néfastes pour la concurrence et le bien-être des consommateurs.

Le Conseil ne retient pas une approche différente selon qu'il traite d'une remise de couplage ou de fidélité : il recherche dans les deux cas à évaluer de façon globale les effets du système en cause.

Cette analyse au cas par cas doit être menée de façon cohérente et lisible afin de permettre aux entreprises de cerner ce qui est illégal et ce qui ne l'est pas. A cette fin, le Conseil de la concurrence a développé une abondante « *guidance* » en matière de remises, rabais et ristournes.

Compte tenu du degré d'interaction croissant entre les économies, cette « *guidance* » se doit d'être cohérente au niveau international. La publication de lignes directrices de la Commission européenne relative à l'application de l'article 82 CE ne pourra qu'être bénéfique, ainsi que les travaux à venir de l'ICN sur ce thème.

¹² Décision 03-D-35 du 24 juillet 2003.

¹³ Décision 96-D-12 du 5 mars 1996.

GERMANY

1. General Remarks

In Germany, all firms – including dominant ones – are encouraged to compete on the merits. That means that dominant firms, too, are free in principle to determine their sales strategy and are not limited *per se* in their competitive behaviour, including pricing and granting of discounts.

On the other hand, dominant firms are under an increased responsibility under competition law because of their high degree of market power. The existence of market power means that competition in the respective market is already weakened. Through conduct that could not be pursued if the market was competitive, the degree of competition still existing in the market may be weakened further or the growth of that competition may be hindered.

Consequently, the conduct of a dominant firm that has or is likely to have negative effects on the market may be in violation of competition law. It should be underlined, however, that even a bonus or discount system producing anti-competitive effects may be compatible with German or EC competition law if the dominant firm demonstrates that such conduct is economically justified.

2. Statutory basis and elements of the analysis

2.1 *Abuse of dominance*

In Germany, anti-competitive discounts and rebates are prohibited by Article 82 EC as well as §§ 19 and 20 of the Act against Restraints of Competition (ARC)¹.

§ 19 (1) ARC constitutes a general prohibition of abuse of market power by dominant companies as a blanket clause and is similar to Article 82 sentence 1 EC. Like Article 82 sentence 2 EC, § 19 (4) ARC sets out four non-exhaustive examples of forbidden abusive behaviour. These examples include impairing the ability to compete and demanding unfavourable or discriminating business. § 20 (1) ARC adds that unfair hindrance and discrimination by dominant firms are prohibited. These provisions cover both, anti-competitive single as well as bundled discounts employed by dominant firms².

The elements that have to be established in order to find discounts and rebates to be anti-competitive include dominance, foreclosure/hindrance or discrimination and absence of an objective justification.

¹ An English version of the ARC is available at:
http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7_Novelle_e.pdf.

² Note that § 20 ARC also applies to anti-competitive discounts and rebates by non-dominant firms under certain circumstances. According to Article 3 (2) sentence 2 of Regulation 1/2003/EC, the member states are not precluded from adopting or applying on their territory stricter national laws which prohibit or punish unilateral conduct by companies. § 20 (2) ARC provides that an undertaking with a position of “superior market power” in relation to other undertakings must not unfairly abuse its position or hinder another undertaking without an objective justification. “Superior market power” may be present in a horizontal or vertical context.

2.1.1 Dominance

For §§ 19 (4) and 20 (1) ARC or Article 82 EC to be applicable it is required that the firm allegedly abusing its market power already holds a dominant position.

2.1.2 Market foreclosure/hindrance and discrimination

The *Bundeskartellamt* sees market foreclosure as a situation where actual or potential competitors of the dominant firm are completely or partially denied profitable access to a market and where the maintenance of the degree of competition still existing or the growth of competition in the market is thereby hindered³.

Neither German nor European competition law requires the competition agency or, in civil litigation, the plaintiff, to show that competitors were actually forced to exit the market as a consequence of the conduct at issue. Rather, it suffices to show that the conduct is capable of producing an exclusionary effect⁴, *i.e.* that the discount scheme provides for a strong economic incentive to concentrate purchases - in the dominated or another market⁵ - on the dominant firm so that the entry of potential competitors is made difficult or the market exit of actual competitors is probable or likely in the way that it can reasonably be expected.

Both under German and European Competition law a discount scheme is likely to produce foreclosure effects if it has a strong fidelity-building effect, *i.e.* produces strong economic incentives to concentrate purchases with the dominant firm (suction effect)⁶.

Hindrance according to German competition law rules is a market behaviour which has objectively negative effects on the hindered firm in the sense that the behaviour at issue is not objectively justified⁷. Discriminating between undertakings may also be held to be anti-competitive if it is not objectively justified (as to objective justifications, see below under 2.1.3).

Assessment of economic incentives and suction effect

The *Bundeskartellamt* analyses in detail the economic incentives of discount schemes. In this context, the *Bundeskartellamt* examines the quantitative effects of the discount, that means in particular the discount percentage, the discount scale (a progressive discount scale may induce customers to purchase products merely not to lose the discount that would be granted when the next discount step is attained), turnover on the basis of which the discount percentage is calculated (total turnover or incremental turnover, based on single product or more products), length of reference period, importance of the dominant firm as

³ Cf. the case law of the European Courts, e.g. European Court of Justice (ECJ), Case C-95/04 P, *British Airways v Commission* [2007] I-2331, paragraph 66.

⁴ Cf. European Court of Justice (ECJ), Case C-95/04 P, *British Airways v Commission* [2007] I-2331, paragraph 68.

⁵ Note that anti-competitive discounts of a dominant firm can also be addressed under § 19 ARC when they relate to products or services in the market not dominated by the firm under investigation (see Higher Regional Court Berlin, WuW/E OLG 3124, 2129 – *Milchaustauschmittel*). On the other hand, § 20 (1) ARC only applies to discriminatory practices in the dominated market (see Federal Court of Justice, WuW/E BGH 2483, 2490 – *Sonderungsverfahren*).

⁶ Cf. European Court of First Instance (CFI), Case T-219/99, *British Airways v Commission* [2003] II-5917, paragraph 271 *et seq.*, CFI, Case T-203/01, *Michelin v Commission* [2003] II-4071, paragraph 75 *et seq.*

⁷ Federal Court of Justice, Case KVR 8/80, WuW/E BGH 1829 *et seq.* - *Original VW-Ersatzteile II*.

a trading partner and importance of its products, (e.g. as “must-stock items”), as well as potential losses that switching to other suppliers would bring about⁸.

Role of Intent

Under EC competition law, if it is shown that the objective of the conduct of an undertaking in a dominant position is to limit competition, it is assumed that the conduct will have such an effect⁹.

The intent of a dominant firm to foreclose markets and to weaken competition has not yet been relevant in German discount and rebate cases. If there was, however, evidence that the granting of discounts and rebates was part of a plan to force competitors out of the market or foreclose markets for potential market entry, this fact would be considered in the process of weighing interests under German law.

If, as in most cases, no exclusionary intent can be shown, the *Bundeskartellamt* analyses the effects that the granting of discounts is likely to have.

2.1.3 Absence of objective justification

In their competitive analysis under Article 82 EC, the Community Courts examine whether a type of conduct is abusive by taking into consideration all the relevant circumstances of the case. The European Court of Justice (ECJ) examines whether there is an objective economic justification for the rebates, discounts and bonuses granted which counterbalances or outweighs the exclusionary effects¹⁰.

The *Bundeskartellamt*, when applying the provisions of German law (§§ 19, 20 ARC), balances the interests of the undertakings involved, *i.e.* in particular the economic and competitive interests of the dominant firm and its competitors. In this respect, the aim of the ARC to ensure competition and open markets is given due weight which means that the anti-competitive effects of the discount scheme are of relevance as well. Accordingly, the *Bundeskartellamt* also takes into consideration the factors referenced above in the context of the assessment of economic incentives, the firm’s market position as well as barriers to and history of entry.

Another aspect that is analysed in the jurisprudence is whether the discount was introduced as a reactive measure taken by the dominant company in the given market circumstances in order to avoid losing customers.

The *Bundeskartellamt* analyses whether rebates and discounts relate to cost savings as argued by the dominant firm. Other economic justifications may also be demonstrated by the dominant firm but have not

⁸ For example, share deals case, the *Bundeskartellamt* analysed that a media agency that had already placed 13 million Euro advertising budget and was planning to place advertising worth another million would qualify for a rebate of 11% instead of 10.5%, *i.e.* 1,54 million Euros instead of 1,365 million Euros. If the additional budget was placed with a competitor, it would thus lose 0,175 million Euros. On the other hand, the newly placed advertising budget of 1 million Euros would – if the bonus system of the firm under investigation was applied – account for a bonus of 5,000 Euros. In other words, by switching the media agency would lose 0,17 million Euros.

⁹ Cf. CFI, T-203/01 Michelin II, [2003] II-4071, paragraph 241.

¹⁰ ECJ, Case C-95/04 P, *British Airways v Commission* [2007] I-2331, paragraph 86; ECJ, Case 322/81 *Michelin I* [1983] ECR 3461, paragraphs 73 *et seq.*; ECJ, Case 85/76, *Hoffmann-La Roche* [1979] ECR 461, paragraph 90; ECJ, Case 40-48, 50, 54-56, 111, 113, 114/73, *Suiker Unie* [1975] ECR 1663, paragraph 518.

yet been invoked by firms under investigation. In the cases decided by the *Bundeskartellamt*, firms mainly argued that discounts were introduced in order to induce customers to place orders and purchases in a cost-saving manner (and to pass on part of these savings to these customers). However, in the cases decided so far, the absence of any relation to cost savings was rather obvious (see below under 4.).

2.2 Anti-competitive agreements

In November 2007, the *Bundeskartellamt* for the first time imposed administrative fines on the grounds of anti-competitive discount agreements based on Article 81 EC (see below, under 4).

3. Enforcement

In Germany, anti-competitive loyalty discounts may be pursued by the competition authorities or in private litigation. All German decisions referenced in this contribution are based on proceedings conducted by the *Bundeskartellamt*.

The *Bundeskartellamt* can initiate proceedings *ex officio*, *i.e.* on its own initiative, and following complaints by competitors or customers. In most loyalty discount proceedings the *Bundeskartellamt* initiated proceedings after having received complaints from competitors or customers.

The *Bundeskartellamt* focuses on discounts and rebate schemes that, *prima facie*, do not relate to any cost savings for the dominant firm and which may, *prima facie*, have the effect to enhance customer loyalty and foreclose competitors.

4. Case examples

4.1 Abuse of dominance - TUI-Partnership bonus (1985)

In this case the Higher Regional Court Berlin annulled a decision of the *Bundeskartellamt* that had prohibited TUI from granting a bonus to certain travel agencies. Firstly, the court left open the question whether TUI in fact held a dominant position. Secondly, the court held that the bonus granted was economically reasonable and proportionate to avert harm to TUI's business. The travel agencies had pressured TUI with the aim of becoming shareholders in the company, in order to profit directly from TUI's business. To avert this and at the same time to counter the pressure, TUI had offered to grant a partnership bonus to undertakings that met certain conditions (business relations with TUI for at least 10 years, 1 million Deutschmark revenue with TUI *per annum*, revenue *per annum* at least 85% compared to the previous year). The court concluded that the program was essentially intended to prevent the agencies from switching to competitors. At the same time, the bonus was held to be very modest, so that the court did not find it justified to interfere with the freedom of the allegedly dominant firm to do business. Furthermore, the court did not determine a market-distorting effect and did not expect such an effect to materialize.

4.2 Happy Digits (2001)

"Happy Digits" is a customer loyalty programme offered by Deutsche Telekom AG. Customers participating in this programme are supposed to be able to collect "digits", for example by purchasing terminal equipment from Deutsche Telekom or its subsidiaries, or by using its telephone, internet or other services.

As Deutsche Telekom is still dominant in some telecommunications markets, it is subject to regulation by the German regulator, the Federal Network Agency, in respect to certain services.

Deutsche Telekom applied to the Federal Network Agency for approval of its plans to grant customers a three percent discount, or, alternatively, at least a one percent discount, under its programme "Happy Digits". In its statement on the issue the *Bundeskartellamt* agreed with the Federal Network Agency's decision not to grant the main application, but merely to approve the alternative application to grant a one percent discount. The reason for approval was that the discount systems of dominant companies should only be prohibited if an anti-competitive suction effect was to be expected, which was not the case with a discount of merely one percent.

4.3 *Article 81 EC and § 1 ARC/Abuse of Dominance: Resale of DSL- Connections (2006)*

Approximately until the end of 2005, Deutsche Telekom AG offered DSL-connections for resale on the basis of a model called "Resale DSL". According to this model resellers were granted a standardized deduction of 11.5% on the end customer price charged by Deutsche Telekom. After the end of 2005, Deutsche Telekom alternatively offered resellers a model called "DSL Net Rental" and, as a start, concluded respective contracts with United Internet AG and AOL Deutschland GmbH & Co. KG. This new model which was characterised by Deutsche Telekom as the "supply of virtual net capacities" differed from "Resale DSL" with regard to the pricing. Within the new model the pricing was based on the connection areas of Deutsche Telekom's network. There are several thousand of such connection areas. For each connection area a minimum net capacity of 192 ports was billed irrespective of the actual use. This minimum capacity and additional 64-ports-packages were supplied for a minimum term of 24 months. Ports within the minimum capacity or the additional 64-ports-packages were not physically reserved for the resellers, but were allocated dynamically according to demand. The prices were calculated by Deutsche Telekom on a diminishing scale based on the number of ports billed for each connection area. As the number of ports increased, the price charged for the supply of each port decreased, at a certain point significantly below the price level under the "Resale DSL" model.

Following complaints by several market participants the *Bundeskartellamt* initiated proceedings against Deutsche Telekom, United Internet and AOL Deutschland. At the same time the Federal Network Agency instituted proceedings for retroactive price regulation pursuant to § 38 of the German Telecommunications Act (TKG). After further investigations the *Bundeskartellamt* came to the preliminary conclusion that the "DSL Net Rental" model violated both Article 81 EC/§ 1 ARC and Article 82 EC/§ 19 ARC.

With regard to Article 81 EC/§ 1 ARC there were strong indications that Deutsche Telekom's agreements with United Internet and AOL Deutschland restricted infrastructure competition because Deutsche Telekom de facto purchased from these companies the option to build up their own infrastructures for DSL access or to obtain such infrastructures from third parties. According to the *Bundeskartellamt's* preliminary findings large resellers like United Internet were the ones to benefit most from the "DSL Net Rental" offer. Incidentally, these are the companies that would be best placed to establish their own infrastructure or to obtain such infrastructure from third parties, given the number of their end customers under contract.

Moreover, based on the results of the investigations, a violation of Article 82 EC/§ 19 ARC could also be assumed. The "DSL Net Rental" offer by Deutsche Telekom, which has a dominant position in the market for upstream services for broadband internet connections, hindered companies demanding such upstream services in the end customer markets in which they were active. As a result, a very select group of large resellers were granted much better purchase prices for the upstream services than the rest of the suppliers. Due to this benefit, these large resellers had a significant competitive advantage over other resellers. It was even to be feared that most of the other resellers would be pushed out of the market and an oligopoly established. An objective justification was not given. In economic terms, the "DSL Net Rental" offer could also be qualified as a volume rebate for the same services offered on the basis of "Resale

DSL”. Relevant differences – in terms of technology or risk – between both offers could not be determined. Therefore, it was relevant whether, along general lines, the quantity scale was consistent with the cost function of Deutsche Telekom. However, there were no facts supporting this assumption. Rationalisation advantages over “Resale DSL” on Deutsche Telekom’s side could not be ascertained in the investigations.

In May 2006 the Federal Network Agency issued a decision in which it declared the prices for “DSL Net Rental” to be ineffective, since they were abusive and not in accordance with the rules laid down in § 28 TKG, and prohibited Deutsche Telekom from continuing to request them. On account of this decision the *Bundeskartellamt* refrained from issuing a decision in its own administrative proceedings. The *Bundeskartellamt* dismissed its proceedings when Deutsche Telekom had withdrawn the appeal it had filed against the Federal Network Agency’s decision and this decision had become final.

4.4 Article 81 EC and § 1 ARC: Share deals (2007)

In November 2007 the *Bundeskartellamt* issued a decision imposing fines totalling 216 million euros against the advertising time marketing companies of the two private broadcasting groups RTL and Pro7Sat.1.

The marketing companies IP Deutschland GmbH, active for RTL, and SevenOne Media GmbH, active for Pro7Sat.1, had concluded anti-competitive agreements with media agencies or the advertising industry in the form of contracts for the broadcasting of television advertising spots.

The discounts concerned were so-called proportional or share discounts. Under the agreements the media agencies were granted substantial discounts and other refunds if they placed certain large proportions of their advertising budget with the respective broadcasting group. Due to these discounts the media agencies had a strong economic incentive to place the respective proportion of their advertising budget with the two large marketing companies and not with other broadcasters because the discounts were granted retroactively for the entire budget, i.e. not only for incremental placements above the discount thresholds. This incentive effect foreclosed the TV advertising market to other broadcasters and generally made access to the market more difficult. Furthermore, the anti-competitive discounts were in the form of retroactive quantity discounts which have their own negative effect on competition.

The discount system practised by RTL and Pro7Sat.1 was not only contrary to German but also to EC competition law because the agreements had an effect on trade between the Member States.

There were no indications and the firms did not claim that the requirements for exemption under Article 81 (3) EC were satisfied, *i.e.* that the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit.

RTL and Pro7Sat.1 had already announced their acceptance of the fines before the decision was issued. Since then both broadcasters have introduced new discount schemes.

HUNGARY

Section 21 of the Competition Act of Hungary prohibits abuse of dominant position with a wording similar to 82 EC. It contains a non-exhaustive enumeration of prohibited behaviours and though some of them could be related to discounting and loyalty inducing pricing strategies, none of them refers explicitly to such situations. During the last five years the GVH examined two cases (Vj-167/2001, Vj-124/2003) having discounts in their focus, and each case was examined under different headings of Section 21. Infringement was established in only one instance and therefore no general guidance seemed to be necessary to ensure legal certainty concerning such behaviours.

Both procedures were initiated upon complaint from undertakings competing with the dominant firm. Complaints alleged horizontal foreclosure by a legal monopolist on a connected market (postal sector) and vertical foreclosure by a network owner (telecom operator). The complexity of the cases, the likeliness of the existence of dominance and the suspicion of foreclosure led the GVH to devote capacities for an in depth investigation of the cases.

Infringement was established in the case of the horizontal foreclosure. In this case Magyar Posta (MP), the former monopolist postal service provider that still enjoyed legal exclusivity for certain services, applied a progressively increasing discount system. The proceedings originated from a public tender announced by an electricity supplier (ÉMÁSZ) for the creation, preparation and delivery of its consumer invoices. Two markets were investigated, the market of creating postal items and the market of their delivery. At that time, MP was the exclusively authorised provider of basic postal services, like the clearance, sorting, transporting and delivery of items of correspondence.

One of the participants of the tender turned to the procurement supervisory authority, complaining that the electricity company should not have included an activity covered by legal monopoly into the requested service, as it excludes competition even in relation to that part of the requested service, which was not covered by legal monopoly. At first instance the complaint was rejected as unsubstantiated as the procurement authority considered that as MP can be involved as subcontractor into any of the tenders, competition was not restricted in its entirety. However, MP has also submitted a tender in which it provided a special discount for the electricity company on deliveries (the monopolised segment) should MP be chosen for the creation and preparation of the invoices (the competitive segment). This special discount on delivery was not available for other participants of the tender to whom the general progressive discounting framework applied. However as the cost of delivery represented around 60-70% of total costs even a slight deviation resulted in significant alterations in the offers. It was established that often, but not always, MP deterred from its general discounting framework and provided higher discounts where it was also chosen for the creation and preparation of invoices or direct mails. MP has not invoked a detailed efficiency defence for its practice only noted that the level of the discount depends not only on the number of deliveries but also on the level of the preparedness of the items to be delivered. MP claimed that should any of its competitors submit the postal items in the same level of preparedness as MP itself does, it would certainly receive the same special discount promised by MP in certain tenders.

The GVH found that this justification could not be accepted. First, the required level of preparedness is determined by regulation and therefore there is no room to make distinctions on that ground. Second, in fact MP refused the application of the same discount in certain cases without regard to the preparedness of the postal items. Third, MP has not consistently applied the special discount in all cases where it provided

all the services. All these circumstances suggested that in reality the discount on delivery had no connection with preliminary services, it was arbitrary and non transparent.

The reason for the application of the special discount was that MP used its monopoly on the delivery market to restrict and distort competition on the separate, competitive market of the creation of postal items. The special discount system used by MP provided customers with higher discounts if they contracted MP for the creation of postal items as well, thereby leveraging its market power to a competitive market.

In this case no proper cost-price test was applied mainly due to the fact that first, MP itself has not raised an effective efficiency defence, but only put forward efficiency based arguments that proved to be unsubstantiated even before any cost analysis became necessary, and second, because not the effects of a consistently applied discount system in general was at stake but the infringement was rather constituted by ad hoc discrimination aiming the leverage of market power on a connected market.

In the other case the GVH did consider cost tests for the discounts applied by the vertically integrated, upstream monopolist telecom operator. Matáv, the incumbent fix telecom provider, kept his position as the owner of the local loop in the majority of the designated territories of Hungary. In certain areas, other competitors, like Invitel took over the network. The owners of the local loop gave access to the infrastructure for ADSL Internet service providers. Through its subsidiary Axelero, Matáv also participated on the downstream market nationwide.

In order to encourage the development of broadband Internet facilities, Matáv, as a wholesaler, introduced a system of progressive discounts for its customers, the downstream Internet service providers. According to the number of subscriptions undertaken to be acquired in a given year, Internet service providers were entitled for a discount. Though the discount was not calculated upon the subscriptions de facto acquired during the given period, a penalty system was also envisaged (but leniently applied) for the failure to meet the quota undertaken. Out of 14, only two of the Internet service providers were able to make an undertaking meriting the highest discount level, Axelero the affiliated company of Matáv and an other, independent service provider. The discounts provided to the seven largest Internet providers were between 51.65%, and 49.04%.

Axelero has continuously increased its share on the domestic Internet retail market from 52.57% at the beginning of 2002 to 62.03% by the end of 2003. At the same time the shares of the second and third largest suppliers have decreased from 13.25% to 8.07% and from 12.78% to 10.55%, respectively. On the other hand if Internet provided through cable was also taken into account than the share of Axelero was well below 50%. Axelero was also weak on those markets where Invitel was the upstream supplier.

Axelero set the same retail prices irrespective of whether the wholesale service was provided at the given territory by Matáv, or by Invitel. This however meant that in areas where Axelero did not receive a discount comparable to that provided by Matáv, it was actually pricing below cost.

The investigation focused on three issues. First, whether the wholesale prices set by Matáv and the retail prices set by Axelero constitute a price squeeze. Second, whether the pricing of Axelero qualified as predatory on those areas where the wholesaler was not Matáv. And third, whether the progressive discount system of Matáv was discriminatory.

The GVH established that on Matáv's areas Axelero was pricing above costs and therefore no price squeeze was perceivable. Second, it was established that on the areas of Invitel Axelero was not dominant and therefore it had no opportunity to adopt a successful foreclosure, while it had objective reasons for such pricing first, as its entry was delayed by the pricing strategy of the incumbent and therefore had to

compete more aggressively, and second because as a nationwide service provider it intended to have the same offer in all areas for marketing reasons. Finally the GVH also gave up the idea that the progressive discount system of Matáv would be discriminative. Matáv admitted that there are no direct efficiencies deriving from the increase of the number of subscriptions from one discount level to the next one. However there are such efficiencies deriving from the overall increase in the number of subscriptions and Matáv passes on these efficiencies on the Internet providers according to their relative size. The GVH accepted this argument as an efficiency defence and distinguished the case from similar cases of the EC (the airport cases) on this ground. It was also acknowledged that not only Axelero, but an other independent provider also benefited from the highest level of the discount system.

In sum the application of discounts have not raised serious competition concerns in Hungary. In the few cases investigated the GVH carefully considered the experience of the EC to be able to construct a solid theoretical background. In its approach the GVH proved to be rather lenient and willing to accept claims of even indirect efficiencies as justification for the discount system. It does require however reference to efficiency gains and a plausible story. It also considers the possibility of discrimination.

JAPAN

1. Introduction

This paper describes single product loyalty discounts and rebates, not bundled discounts and rebates.

In Japan, the provision of rebates by manufacturers to distributors has been conventional, especially in the distribution of various consumption goods.

The nature of rebates provided by manufacturers to distributors is diverse, including those that adjust billing prices, and those that promote sales. Thus, rebates are paid for a variety of purposes, and rebates as one element of price also have the aspect of promoting price formation in keeping with the actual conditions in a market. Accordingly, the provision of rebates in itself does not necessarily present a problem under the Antimonopoly Act (“AMA”). However, business operators might be involved in anti-competitive conduct with the provision of rebates, and this conduct might be considered a problem as an “unfair trade practice” or “private monopolization” prohibited by the AMA.

In the following sections, we would like to introduce the viewpoint of the AMA on the provision of rebates by manufacturers to distributors, which is related to the theme of this roundtable, based on the Guidelines published by the JFTC in 1991. We would also like to introduce a recent JFTC case (against Intel Japan), which is closely relevant to it.

2. Viewpoint on the provision of rebates in the Distribution Systems and Business Practices Guidelines¹

The Guidelines, mainly keeping in mind transactions in the distribution process in which consumer goods reach their consumers, shows the viewpoint of the AMA on the provision of rebates by manufacturers to distributors, in light of the regulation of unfair trade practices. The viewpoint is as follows.

2.1 Viewpoint

The nature of rebates provided by manufacturers to distributors is diverse, including those that adjust billing prices, and those that promote sales. Thus, rebates are paid for a variety of purposes, and rebates as one element of price also have the aspect of promoting price formation in keeping with the actual conditions in a market. Accordingly, the provision of rebates in itself does not necessarily present a problem under the AMA.

There are cases, however, where depending on the ways that rebates are provided, they may restrict the business activities of distributors and present a problem under the AMA.²

¹ JFTC “Guidelines Concerning Distribution Systems and Business Practices” (1991).

2.2 *Cases where there is a problem under the AMA*

2.2.1 *Rebates provided as a means of restricting a distributor's business activities*

Rebates might be provided as a means of restricting a distributor's sales price, handling of competing products, sales territory, customers, etc. For example, rebates might be reduced if the distributor does not sell products at the price indicated by the manufacturer. It is to be judged whether such restrictions fall under unfair trade practices, including Dealing on Exclusive Terms (unjustly trading with another party on condition that the said party shall not trade with a competitor, thereby tending to reduce trading opportunities for the said competitor) and Resale Price Restriction.

Furthermore, the conduct of discriminating against the provision of rebates depending on the price, handling of competing products, or the like, is illegal as an unfair trade practice (Discriminatory Treatment on Transaction Terms, etc.) if it has the same or similar function as the imposition of illegal restrictions on distributors.

Also, the same shall apply to cases where a "repayment system" (under which a manufacturer collects all or a part of the margin from the distributors and pays it back after a certain period) is used as a way of illegal restriction, or has the same and similar functions as the imposition of illegal restriction on the distributors.

2.2.2 *Share rebates*

A manufacturer sometimes provides rebates to its distributors according to the percentage of sales of the manufacturer's products in the total business of each distributor during a specific period, or according to the share that the manufacturer's products have in the display of all goods at the distributor's store.

The provision of such rebates by an influential manufacturer³, if it has the function of restricting a distributor's handling of competing products and may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, is illegal as an unfair trade practice (Trading on Exclusive Terms, etc.).

2.2.3 *Remarkably progressive rebates*

At times a manufacturer in providing volume rebates may set a rebate rate progressively, according to a ranking of distributors based on criteria such as quantity of products supplied to each distributor during a certain period. While progressive rebates have the aspect of promoting price formation in keeping with actual conditions in a market, if the rate is remarkably progressive, they have the function of encouraging the preferential handling of that manufacturer's products over those of others.

² The Guidelines state that "In cases where a manufacturer discretionally provides rebates without a clear basis, and particularly if such opaque rebates account for a large percentage of a distributor's margin, they can give rise to the effect of making it easy for the manufacturer to conform the distributor to its sales policy, and are most likely to restrict the business activities of the distributor. For this reason, it is desirable for manufacturers to make clear the basis for the provision of rebates, and inform their distributors of it."

³ The Guidelines stipulate that "Whether a firm is 'influential in a market' is judged by the market share of the firm, that is, whether it has no less than 10% or its position is within the top three in the market (meaning a product market that consists of a group of products with the same or similar function and utility as the product covered by the conduct, and competing with each other judging from geographical conditions, transactional relations and other factors) . Nevertheless, even if a firm falls under this criterion, the firm's conduct is not always illegal."

The provision of such rebates by an influential manufacturer, if it has the function of restricting a distributor's handling of competing products and may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, is illegal as an unfair trade practice (Trading on Exclusive Terms, etc.).

3. Private Monopolization

The Guidelines stated above aim to clarify cases where anticompetitive conduct with the provision of rebates by manufactures falls under unfair trade practices. Such anticompetitive conduct might pose a problem as private monopolization prohibited by the AMA, as well.

The AMA prohibits as private monopolization “such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.”

“Exclusion” in this definition is interpreted as making it difficult for other companies to continue their business activities or to enter the market. “Control” is construed as depriving other companies of their freedom to make decisions concerning their business activities and forcing them to obey the controller's intent.

Acts that correspond to unfair trade practices are more specifically designated by the JFTC as activities stipulated by each Item of Paragraph 9 of Article 2 of the AMA. On the other hand, any act, if it causes “substantial restraint of competition” by “exclusion” or “control”, is prohibited as private monopolization.

As to “substantial restraint of competition in any particular field of trade”, the case laws⁴ state that “restraining competition in any particular field of trade substantially means causing or at least being about to cause a situation in which competition itself has significantly lessened in a market and thereby a specific company or companies can control the market by determining freely, to some extent, prices, qualities, volumes, and various other terms on its or their own volition”. Thus, “substantial restraint of competition in any particular field of trade” can be interpreted as the formation, maintenance and enhancement of a market dominance situation in the context of those case laws.

Anti-competitive conduct with the provision of rebates can be regulated as private monopolization prohibited by the AMA if it causes a substantial restraint of competition by excluding the business activities of other companies.

4. Recent relevant case: Case against Intel Kabushiki Kaisha (recommendation decision on 13 April 2005)

In this case, Intel Kabushiki Kaisha (IJKK) made domestic PC manufacturers refrain from making transactions with IJKK's competitors by offering special discount prices to the manufacturers in the market of central processing units (CPUs) sold to PC manufacturers in Japan on condition that the manufacturers would increase their market segment shares (MSSs) of Intel's CPUs to 100%, and other conditions. In this case, the JFTC found that a series of IJKK's acts under its policy to raise MSSs and other policies constituted a single act of violation. In other words, the JFTC didn't consider the provision of special discount prices in itself as a problem, but it focused on and applied the AMA to IJKK's exclusion of its

⁴ See decisions by Tokyo High Court on September 19, 1951 and December 7, 1953.

competitors' business activities from the market by linking its targeted MSS figures and other goals to the rebates offered to domestic PC manufacturers.

This is a private monopolization case. IJKK held an 80-90% share of the market of CPUs sold to PC manufacturers in Japan. In addition, IJKK was capable of setting conditions for transactions with domestic PC manufacturers, based on the strong financial resources, brand power, technology, production capacity, etc. of Intel Corporation in the United States. Accordingly, IJKK was regarded as a company with a market dominant power. And, as a result of the fact that the business activities of IJKK's competitors were excluded by its conduct, its market dominant power was further strengthened. Thus, it was found that IJKK substantially restrained competition in the market. Consequently, it was judged that IJKK's conduct fell under private monopolization.

In this case, it was not found that IJKK set predatory prices or sold CPUs to domestic PC manufactures at unjustly discriminatory prices.

4.1 Outline of the Violations

IJKK was the Japanese subsidiary of Intel Corporation in the United States, and was engaged in imports and sales of CPUs manufactured by Intel Corporation.

In addition to IJKK, the Japanese subsidiary of AMD in the United States (AMD Japan) and Transmeta from the United States were also selling CPUs to PC manufacturers in Japan.

Around 2000, AMD Japan started to sell its CPUs in competition with Intel's CPUs at lower prices. This and other surroundings led domestic PC manufacturers to incorporate AMD's CPUs into their PCs. Consequently, a percentage of AMD's CPU sales volume to the total domestic CPU sales volume increased from approximately 17% in 2000 to approximately 22% in 2002.

Based on such facts, IJKK felt apprehensive about a continuing increase in the sales volumes of AMD's CPUs. Since May 2002, in order to maximize the share of Intel's CPU volume incorporated into PCs manufactured by domestic PC manufacturers, IJKK had made five major domestic PC manufacturers refrain from adopting competitors' CPUs for all or most of the PCs manufactured and sold by them or all of the PCs that belonged to specific categories, by making commitments to provide the five PC manufactures with rebates and/or sales promotion funds on condition that

4. They have the share of Intel's CPU at 100% and refrain from adopting competitors' CPUs;
5. They have the share of Intel's CPU at 90% and the share of other CPU's at 10%; or
6. They refrain from adopting competitors' CPUs to be incorporated into all PCs that belonged to specific categories with relatively large production volume.

Such conduct by IJKK decreased the percentage of AMD's and Transmeta's CPU sales volume in the total domestic CPU sales volume from approximately 24% in 2002 to approximately 11% in 2003. In contrast, the percentage of Intel's sales volume was approximately 89% in 2003.

On March 8, 2005, the JFTC found that IJKK substantially restrained competition in the market for CPUs sold to domestic PC manufacturers by excluding its competitors' business activities concerning the sales of CPUs to the five domestic PC manufacturers, contrary to the public interest. The JFTC issued a recommendation to IJKK to implement the necessary measures to eliminate the violation. In response, the IJKK accepted this recommendation. On April 13, 2005, the JFTC made a decision with the same contents as the recommendation.

KOREA

1. Introduction

In general, pricing is the most important means of competition. That is because companies compete to attract customers by offering their products at a price as low as possible.

However, pricing sometimes can have an anticompetitive effect. The most classic example is predatory pricing, which refers to the practice of offering products priced far below the cost for a considerable time period on the purpose of driving out competitors in the market. In fact, other than this purpose, it is hard to explain why a company would offer products priced below the cost at the expense of its profit. Thus, it is general perception that this practice is hardly seen as a normal price competition.

One of the issues regarding pricing that are recently emerging as a relevant issue in competition law is *bundled discounts and single product loyalty discounts*, the theme for a roundtable discussion. In the following, we'll focus on single product loyalty discounts (hereinafter "loyalty discounts"). Loyalty discounting is different from ordinary price competition in that provision of discounts or rebates is conditional upon buyer's loyalty. Due to the condition, loyalty discounting can restrain competition in the relevant market and limit the range of product choices for end users.

In Korea, as loyalty discounting has not been a prominent issue, it is difficult to present a clear set of criteria regarding loyalty discounts. Rather, relevant regulations that concern loyalty discounting pursuant to the current statutes and such regulation-based approach will be explained in the following.

2. Relevant statutes

In Korea, provisions under the Monopoly Regulation and Fair Trade Act (MRFTA) that are relevant to loyalty discounts are the one concerning exclusion of competitors as one type of abuse of market dominance. What matters in loyalty discounting is not discounts or rebates themselves, but attached conditions. Loyalty discounting refers to the practice of offering discounts or rebates conditioned upon a buyer's partial or exclusive purchase. This is equivalent to an enterprise's offering discounts or rebates on the condition that a buyer will purchase all or beyond a certain level from it, which can constitute a violation of the exclusive dealing provision under the MRFTA and its Enforcement Decree. The relevant provision is as follows;

- Article 3-2 of the MRFTA (Prohibition of Abuse of Market Dominance)
 - ① No market-dominant enterprise shall commit acts falling under any of the following paragraphs.
 - ...
 - 5. An Act unfairly excluding competitive enterprises or which might considerably harm the interests of consumers
- Article 5 of the Enforcement Decree (Types of and Criteria for Abusive Activities)

⑤ “Unreasonable transaction to exclude competitors” pursuant to Article 3-2 (1) 5 of the MRFTA means any of the following:

...

2. Unreasonable transaction with a buyer on the condition that the buyer does not transact with a competing enterprise.

3. Factors to consider regarding loyalty discounts

As there is no legal precedent or cases handled by the KFTC regarding loyalty discounts, what to consider in loyalty discount cases has yet to be established. In the following are some factors taken into account when the KFTC handled cases concerning exclusive dealing.

For loyalty discounting to constitute “unreasonable transaction with a buyer on the condition that the buyer does not transact with a competing enterprise” as one type of acts of excluding competitors by a market-dominant enterprise, the following requirements should be met: (1) the enterprise in question should be a market-dominant enterprise, (2) the enterprise in question has transacted with a buyer on the condition that the buyer does not transact with a competing enterprise, (3) such a transaction should have anticompetitive effects such as unreasonably excluding competing enterprise. Based on these illegality requirements, factors to consider regarding loyalty discounts are set out in the following.

First of all, an enterprise should be a market-dominant enterprise in the relevant market for its loyalty discounting to constitute a violation of the MRFTA. In general, the bigger the market share of a discount-offering enterprise is, the more likely the enterprise’s loyalty discounting might restrain competition in the relevant market.

For instance, suppose that there are market-dominant enterprise A, non market-dominant enterprise B and their buyer C. C is currently meeting 70% of its total needs from A and 30% from B. And suppose that A and B each suggested C a same purchase deal in order to increase their sales. What would happen?

The deal condition: offering discounts or rebates on all units of the purchased goods contingent upon C’s purchase of additional 10% from A or B.

In this case, it is better for C to buy additional 10% from A rather than from B. That’s because that way, C could receive discounts or rebates not only on the 10% additional purchase but also on the current supply of 70% from A which C would have bought anyway regardless of rebates or discounts (due to A’s market-dominant power). In contrast, if C chooses B for additional 10% of supply, it would receive discounts only on 40% of its total purchase. Thus, C would finally purchase 80% of its demand from A, and 20% from B. As seen in this scenario, stronger market dominance equals bigger customer inducing power.

Next, the concerned enterprise’s act of offering rebates contingent upon a buyer’s not dealing (or dealing below a certain level) with its competitors should be proved. True, there are usually written contracts stating the fact that rebates will be offered on the condition of a certain amount (or proportion) of purchase. But there are also cases in which loyalty discounting is tacitly agreed although contracts have no apparent loyalty discount clause. In such cases, securing related internal documents (e.g. email exchanges between employees in charge or work plans) and statements of related employees can be used to prove the provision of conditional discounts or rebates.

Lastly, the competition effects the concerned loyalty discounts would have on the relevant market should be analyzed. Such analysis requires comprehensive consideration on factors including the nature and the purpose of offered discounts or rebates, the method of provision and the market position of the offering enterprise. If the analysis shows that the concerned loyalty discounts were effective in inducing

loyalty from the buyer and thus likely to unreasonably exclude competitors in the relevant market, such loyalty discounting is considered to constitute abuse of market dominance.

In Korea, there are no guidelines on analyzing loyalty discounts yet. In addition, there is neither safe harbour regarding loyalty discounts nor a price-cost test to assess the legality of these discounts. It seems that it will take more relevant cases handled to present a general method to analyze anticompetitive effect of these discounts. While safe harbour or price-cost test technique is dealt by some papers or internal reports of some competition authorities, there seems no clear consensus on criteria for them. Given this situation, regarding loyalty discounts, case-by-case approach would be desirable in consideration of market conditions or industry practices.

Furthermore, proving anticompetitive effect of loyalty discounts does not necessarily require complete expulsion of competing enterprises. If competition authority should wait until all competitors are driven out in the market, its intervention effort would be too little too late. For this reason, it is the role of competition authority to intervene in advance to prevent competing enterprises from being driven out in the relevant market. The MRFTA also states that an act which is likely to unreasonably exclude competing enterprises is illegal. In this case, illegality requirement is sufficient only with “probability” of such exclusion, and such probability can be determined based on several factors such as changes in the market share of competing enterprises by the excluding act, the purpose and the nature of offered rebates.

In addition, proving illegality of loyalty discounting does not require “intent” evidence under the MRFTA. However, in case it is evidently found that the purpose or the intent of loyalty discounts is to exclude competing enterprises, it becomes much easier to prove illegality.

4. Korea’s enforcement experience of loyalty discount case

As mentioned earlier, Korea has not handled loyalty discounting cases. But it has handled similar cases concerning air carriers’ mileage service and credit card companies’ bonus point service. Technically, they do not fall under the concept of loyalty discounts, but have similar aspects with these discounts in that they also induce customers’ loyalty. These services are now used as a common marketing means and their anticompetitive effect in their relevant market is negligible, so there have been no sanctions against them.

5. Conclusion

It seems that loyalty discounts are getting growing attention both academically and practically. In fact, this issue is on top of the agendas in many seminars and workshops on competition law, with many papers devoted to the theme. This trend is thought to be attributable to the fact that loyalty discounting has become an important marketing tactic and causing several competition issues in the process.

Yet, even jurisdictions such as the US or the EU which have accumulated a considerable amount of enforcement experience regarding loyalty discounting often do not have a clear analysis method regarding this practice. Apart from the fact that countries are using different analysis methods and have different illegality requirements, even within a country, debate is going on analysis method concerning loyalty discounts. Moreover, as loyalty discounting by large multinational IT corporations with huge financing power to drive out their competitors is recently stirring up debates, discussion on this practice is gaining traction around the world. In fact, the theme is frequently discussed topic at seminars on abuse of market dominance. Hopefully, these discussions will make a meaningful progress to come up with an effective analysis method regarding loyalty discounting.

NETHERLANDS

Does your jurisdiction have statutory provisions expressly dealing with bundled discounts and/or single product loyalty discounts?

Such discounts will be assessed under article 24 of the Dutch Competition Act, possibly in combination with art. 82 of the EC Treaty.¹ Article 24 forbids abuses of dominant positions by undertakings in analogy with 82 of the EC Treaty. Accordingly, the jurisprudence under art. 82 of the EC treaty with respect to bundled and loyalty discounts and rebates (hereafter: rebates) determines to a high degree the evaluation of these practices and, more specifically, what will be considered as an abuse of a dominant position under the Dutch Competition Act.

Does your enforcement agency have any guidelines or other policy statements regarding these practices?

No, the NMa has not published specific guidelines on rebates.

Are there any judicial decisions that provide a legal precedent for how these practices should be evaluated?

Yes. In addition to EC jurisprudence, the issue of (anticompetitive) rebates has been addressed in a limited number of national court cases, which are further addressed hereafter.

To the extent your enforcement agency has investigated bundled discounts and/or single product loyalty discounts, what caused you to initiate the investigations (e.g., competitor complaints, customer complaints, etc.)?

Competitor complaints were the triggering event in the most important cases that the NMa investigated.

What sorts of factors or evidence do you consider before you decide to open an investigation regarding these practices?

In general we consider factors like the economic impact of alleged abuse, harm to consumers, strategic considerations and the chance that we will be able to prove an infringement.

Has your enforcement agency challenged bundled discounts and/or single product loyalty discounts? If so, can you provide examples?

The NMa has challenged discounts in two cases: the Carglass case (repair services of car windows) and the CRV case (bull-sperm for artificial insemination). In both cases an amalgam of different discounts was at hand.

¹ Possibly, rebates may form an integral element of a (vertical) restrictive agreement, in which case an assessment under article 6 of the Dutch Competition Act and article 81 of the EC Treaty could be possible. However, in the rebates cases as dealt with by the NMa so far, the focus has been on the assessment of (possible) abuse of dominance. Therefore, the present contribution only discusses these cases.

In the Carglass case the (alleged) infringement concerned discounts that were granted to insurance companies. They were a combination of volume discounts, group-bonuses (related to the total demand of several insurance companies belonging to the same group), communication bonuses (for mentioning Carglass on the insurance policy) and a standard discount per item.

In the CRV case the (alleged) infringement concerned a combination of loyalty rebates, loyalty enhancing rebates (discounts with a so-called 'rollback' effect) and bundled rebates.

If your agency has encountered bundled discounts and/or single product loyalty discounts that you believe were anticompetitive, please describe the anticompetitive effects.

The central hypothesis in these cases was, whether the practices *will* have loyalty enhancing effects that *may* lead to the exclusion of competitors. Following EC jurisprudence, notably British Airways², relatively much weight is given to the analysis of the *potential* effects of the practices, while relatively less weight is given to the analysis of the actual effects that can be observed in the market.

In *Carglass*, after the NMa initiated the investigation, the company involved changed its behaviour in the sense that the group-bonuses were withdrawn. The NMa concluded that the other discounts were not anticompetitive: the volume discounts reflected cost-efficiencies, the communication bonuses reflected costs made by the insurers, and the standard discount per item was not a volume-related discount.

In *CRV*, our conclusion was that all three types of discounts viewed apart as well as taken together, had to be considered anticompetitive for the abovementioned reason. This conclusion was upheld by the Rotterdam court with respect to the loyalty rebates and the bundled rebates but not with respect to the – alleged - loyalty enhancing ('rollback') rebates.

If you have found anticompetitive effects, (1) have you found them in instances in which the defendant did not already have monopoly power/dominance, and (2) have you found them in instances in which all significant competitors were not driven out of the market?

Ad 1) No, we do not open proceedings if we cannot establish dominance.

Ad 2) Yes, In both cases competitors were (and are) still in the market.

To what extent is there clarity in your jurisdiction as to how bundled discounts and/or single product loyalty discounts will be evaluated?

Clarity is, given the general nature of the basic legal provision (art. 24), primarily dependent on the availability of EC-jurisprudence. With respect to bundled discounts/loyalty rebates there is relatively a well-established case-law.

What degree of certainty do businesses have in being able to assess the legality of bundled or single product loyalty discounts that they may be considering?

Certainty depends to a large degree on the availability and a strict application of EC-jurisprudence by the NMa and the (supervisory) courts. The ruling on the CRV case by the court of Rotterdam of 4 July 2007 and the ruling by the appeal court (at the 'College van Beroep voor het bedrijfsleven', appeal is pending) will enhance the certainty for businesses.

² European Court of Justice, case C-95/04, 15-03-2007, p.68.

Are there any safe harbors that businesses can rely on?

The most important safe harbour is probably that unilateral behaviour is not restricted for firms that are not dominant.

Are you concerned that your jurisdiction's antitrust approach to these discounts is either (1) too lenient, allowing anticompetitive effects to occur; or (2) too strict or not clear enough, chilling price-cutting that would benefit consumers?

Of these concerns the last-mentioned is probably the most real. A gradual transition, in the application of competition law, from a form-based approach to a more effects-based approach, is desirable to diminish this risk.

In your jurisdiction, is a price-cost test used to assess the legality of these discounts? If so, please describe the test(s) and what additional analysis (if any) is applied to conduct that either passes or fails the test.

No price-cost test was used in the above-mentioned cases. A price-cost test will however be used if the abuse is primarily related to (alleged) predatory behaviour.

Can bundled discounts and/or single product loyalty discounts be condemned without application of some kind of price-cost test?

Yes.

If so, what is the test that is applied?

The test can be summarised as follows:

- *To what extent can the rebate-system of the dominant firm, looking at the characteristics of the rebate-system itself, expected to be loyalty enhancing and, as a consequence thereof, anti-competitive?*

Depending on the degree in which these characteristics themselves (e.g. the existence and intensity of a 'rollback'-effect) give rise to the conclusion that the rebate-system is anti-competitive, we also should look at certain market-circumstances, so the second prong of the test can be described as:

- *Do the relevant market-circumstances make a loyalty enhancing effect plausible? (assess e.g. the degree in which the dominant firm has a non-contestable position and the possibilities of competitors to match the discounts)*

So far the analysis would to a high degree be of an a priori character. In addition to this, and depending on the firmness of the conclusions that can be drawn from it, it may be necessary to look also at the actual developments in the relevant market, in order to check whether the effects that the rebate system are expected to have, can be seen in reality. Therefore, the third prong of the test would be:

- *Do the reactions of market participants confirm that a (risk of) exclusion of competitors is at hand?*

This test may involve e.g. an assessment of the degree in which customers are enticed to concentrate their purchases to the dominant supplier in reality.

- *The fourth prong of the test is to assess whether the rebates are objectively justified.*

Does your agency/jurisdiction view intent as relevant in evaluating bundled discounts and/or single product loyalty discounts? If so, what types of intent evidence would work against a defendant?

Intent can be relevant in the following sense. A rebate system that rewards (a certain degree of) exclusive purchasing can *by its nature* be considered to aim at restricting competition. Thus, the Rotterdam court considered the loyalty rebates of CRV by its nature competition-restrictive. CRV granted a 1% discount to customers that purchased at least 90% of their total demand from CRV and 2% to customers that purchased 100% of their demand from CRV. In such a case, the court will be convinced more easily that an infringement is at hand.

What types of business justifications would work in its favor? If conduct appears to adversely affect competition but there are legitimate business justifications for the conduct, how do you reach a decision?

According to EU case-law discounts that reflect solely cost-economies of the supplier are in general not considered an infringement. This is a position we follow. Other economies such as avoidance of double marginalisation or promotion of relation specific investments have not yet been tested in concrete cases. Whether such factors would be taken into account is still an open question.

NEW ZEALAND

1. Introduction

The purpose of this submission is to present an overview of New Zealand's experience in the evaluation of the competitive effect of bundled discounts and single loyalty discounts. Four of New Zealand's most recent cases related to discounting offerings are covered. Three of the cases concern bundled discounting, and the other, which is still ongoing, concerns single product loyalty discounts.

As Lambert notes, a bundled discount is created when a seller offers a lower price for a group of different goods than the aggregate price for the same collection of goods purchased separately.¹ Bundled discounting is therefore a discount conditioned upon the purchasing of multiple products from a single firm.

Bundled discounts can allow a firm with substantial market power in one market to extend its monopoly power into related markets. For example, suppose an integrated firm faces competition in products A and B, but enjoys monopoly over a third product, C. This means that competitors cannot bundle the three products, and may find it difficult to compete with the integrated firm when it provides a discount conditional on all three products being purchased. Greenlee *et. al* considered that bundled discounts can be anticompetitive by impeding rivals' ability to make competitive offers to potential customers, if the rivals do not provide an equally diverse group of products.²

Despite their potential for being implemented in an anti-competitive manner, bundled discounts also have the potential to be pro-competitive. For example, they may serve to lower transaction costs and prices to consumers, achieve better price discrimination, take advantage of economies for scope and enhance consumer welfare.³

Single product loyalty discounts (loyalty discounts) are pricing structures conditional on a buyer sourcing a large or increasing share of its purchases with the discounter.⁴ These discounts are applicable where a customer exceeds a specific target for sales in a defined period. The target can be related to purchase growth, or to buying only (or a certain percentage) from a supplier, or to buying over a given threshold set on the basis of the customer's requirements. In other words, a loyalty discount is a discount, on a single product, given by a supplier to a consumer as a reward for remaining loyal to that supplier.

¹ T. Lambert, "Antitrust Analysis of Bundled Discounts", 2006, *Research Paper No 2006-39*.

² P. Greenlee, D. Reitman, and D.Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts 22-24* (DOJ 04-13 Econ Analysis Group Discussion Paper Oct 2004), online at http://papers.ssrn.com/abstract_id=600799

³ See, for example, B. Nalebuff, "Bundling, Tying, and Portfolio effects", *DTI Economic Paper No 1*, February 2003.

⁴ Organisation for Economic Co-operation and Development, Directorate for Financial, Fiscal and Enterprise Affairs, *Loyalty and Fidelity Discounts and Rebates*, JT00138668, 4 February 2003, pp 19.

Loyalty discounts may likewise have pro-competitive and anti-competitive effects. For example, they may result in a lock-in effect for customers, in that they generate switching costs for these customers, and may result in exclusionary effects. On the other hand, loyalty discounts may also result in decreasing prices and transaction costs, facilitate the gaining of economies of scale, protect consumer-specific investment and increase demand.

There is controversy concerning the anti-competitive effects of discounts. For some, the provision of the discounts may reflect nothing more than the natural process of competition, with competitors competing to provide the bundled offering or loyalty discount. For this reason it is important to consider appropriate tests to detect whether these practices cause competitive harm.

The rest of the submission will discuss the approach followed by the New Zealand Commerce Commission (NZCC) for determining whether a firm's bundled discounting or loyalty discount strategy is anti-competitive or not.

2. New Zealand Law

The practices of bundled and single loyalty discounts fall largely within the purview of sections 27 and 36 of the Commerce Act 1986 (the Act).

In particular, section 27 prohibits any person from entering into, or giving effect to, a contract, agreement or understanding that contains a provision that has the purpose or effect of substantially lessening competition. A substantial lessening of competition is a lessening of competition that creates, enhances or maintains market power, and refers to the ability to raise prices or otherwise act independently of competition.⁵ The focus under section 27 is therefore on whether or not a bundled or single product loyalty discount has the effect of substantially lessening competition.

To determine whether a substantial lessening of competition is likely, the NZCC undertakes a comparative analysis between two scenarios, one with the discounting offer, (the factual) and one without the discounting offer (the counterfactual). The difference in competition between these two scenarios reflects the impact of the discounting offer.

In terms of section 36 of the Act, any person that has a substantial degree of market power is prohibited from taking advantage of that market power for the purpose of preventing or deterring a person from engaging in competitive conduct in that or any other market. Nonetheless, parties that have a substantial degree of market power are allowed to compete.⁶ What is not permissible is the taking advantage of that power for a prescribed anti-competitive purpose. The phrase "taking advantage of" describes the causal connection between market power and prohibited practice.

To determine whether a conduct would contravene section 36, the NZCC will consider the following:

- whether the firm has a *substantial degree of market power* within a relevant market;
- whether it has *taken advantage of* that market power; and
- whether the *purpose* of the behaviour is to:
 - restrict entry of a person into that or other relevant market;

⁵ *Weddel Crown Corp* (1987) 1 NZBC (Com) 104, 200.

⁶ *Queensland Wire Industries Pty Ltd v Broken Hill Propriety Co Ltd* (1989) 167 CLR.

- prevent or deter a person from engaging in competitive conduct in that or any other market; or
- eliminate a person from that or any other market.

To determine whether a person has taken advantage of its market power, the NZCC is required by the Courts to apply a counterfactual test. The counterfactual test considers how the firm in question would behave absent its market power, but otherwise in the same circumstances. If the behaviour would have occurred in the absence of market power, then the market power cannot be said to have caused the anti-competitive behaviour.

The balance of the submission outlines the approach adopted by the NZCC in its analysis of the competitive effect of discounting offerings in four recent cases.

3. Investigation in the Telecommunications Industry

The largest case of bundled discounting was the recent investigation concerning Telecom Corporation of New Zealand Limited (Telecom), the country's incumbent telecommunications services provider.

In 2004, Telecom introduced a bundled discount price for customers purchasing all of their Homeline (local calling), toll calls and broadband Internet services from Telecom. Customers received a \$10 monthly discount on broadband services when purchasing all three services from Telecom. This bundle can be characterised as a “mixed bundle”, in that the products could be purchased individually or as a bundle.⁷ The bundle was sold at a discount compared to the sum of the prices of the individual products.

It was alleged by a number of Internet Services Providers (ISPs) that the introduction of this bundled discount had resulted in a price squeeze in the retail broadband market, which had had the effect of foreclosing that market.

The NZCC recognised that such bundled discounts are widely used and can be pro-competitive, yet can also be a mechanism to leverage market power from a monopoly (in this case, local calling - Homeline) to a competitive market (here, retail broadband services market). A concern was that given market dynamics and customer switching cost (especially in the context of some markets that are relative immature and fast growing, as broadband services were at the time), bundled discounts could provide the incumbent with a first mover advantage that could harm competition over the longer term.

The NZCC considered how the alleged conduct might best be characterised, with the following as possibilities:

- Price squeeze: whether the wholesale or retail broadband services were priced in such a way that the margin between those prices did not allow Telecom or a competitor to earn sufficient profits.
- Bundling: whether competitors were able to offer the same discount on the products they provided as that offered in the Telecom bundle.
- Predatory price squeeze: whether Telecom's retail broadband bundling involved it making a loss on an end-to-end basis, and hence pricing below an appropriate measure of cost, thereby causing rivals to exit the market.

⁷ M. Motta, *Competition Policy: Theory and Practice*, New York: Cambridge University Press, 2004.

The NZCC found that the conduct was best viewed as a potential price squeeze in the context of bundling local calling, toll and broadband services.

For the purposes of this case, the NZCC defined the following relevant markets: the retail residential local access services markets (local calling); the retail broadband access services market including ISP services, or alternatively a narrow market excluding ISP services; the wholesale broadband access market; the wholesale toll calls market; and the retail market for toll calls.

The service delivered by Telecom within the wholesale broadband market (upstream market) is a necessary input to the residential broadband access services (downstream market). The NZCC included both unbundled and bundled services within the upstream market. The NZCC also recognised that the downstream market was wider than solely the provision of broadband Internet access services, and included the provision of ISP services, due to the demand complementarities and characteristics of supply between the two. In this regard, the NZCC adopted a dual approach on the downstream market to evaluate the competitive effect. The implication of this approach was that in the broader market definition, Telecom's bundled offering included ISP services, and in the narrow market definition, the bundle only included the provision of Internet access services to residential customers.

The NZCC found that Telecom faced limited competition in the local calling and wholesale broadband access markets. For the other markets, the NZCC assumed that Telecom had a substantial degree of market power, and considered whether Telecom had taken advantage of that market power. This was done on the basis of that if Telecom had not have taken advantage of the assumed market power, it would be unnecessary to determine whether Telecom in fact had market power in those relevant markets.

In assessing the competitive effect of the bundled discount, the NZCC considered two aspects: whether Telecom's bundled discount had resulted in a margin squeeze, and whether competition had been substantially reduced, as a result of the discount offering.

The NZCC used economic analysis, in the form of an imputation test, to assess whether Telecom was engaged in a margin squeeze. This test involves determining whether, in broad terms, the margin between an upstream input price and a downstream retail price is sufficient to cover the downstream costs of the firm offering the bundled offering.⁸ In other words, it attempted to quantify whether the downstream retail margin would allow an equally efficient competitor to make a reasonable profit over a reasonable period of time.

The following provides a summary of the test applied:

- To perform the margin squeeze test, information was required mainly on retail prices, wholesale prices and retail costs. Because of data shortcomings, the NZCC imputed the retail prices and retail cost. The main elements were, *inter alia*, the use of representative price data for Telecom's main retail broadband plans (there were several, and these changed over the course of the investigation), Telecom's own estimates of downstream cost, average profitability across retail broadband plans offered by Telecom, the average a customer spent on toll calling per month, and Telecom's calling margin per residential customer per month to estimate the margins over the competitive bundled products. The NZCC based the level of retail costs on information provided by Telecom.

⁸ See, for example, S. King and R. Maddock, "Imputation rules and a vertical price squeeze", *Australian Business Law Review*, vol 30, no 1, 2002, pp 43-60.

- A key question in this analysis was how to allocate the \$10 discount between the bundled products. The Commission considered, for example, whether the discount—which ostensibly (in Telecom’s promotions) was related to the broadband and toll calling services—should be applied only to one of the services within the bundle, or to two or more of the services. After considering various alternatives, the NZCC chose not to allocate any of the discounts to Homeline services, on the grounds that price was set at cost on Homeline services due to regulation and Telecom had the ability to cross-subsidise the discount with its provision of Homeline services. The impact of this unmatched advantage was removed by splitting the discount between toll calls and broadband services only, thereby ensuring a level playing field between Telecom and its competitors. In short, the \$10 discount was allocated between those services where Telecom faced direct competition.
- The discount was allocated between broadband and toll calling services based on the relative proportion of the amount spent on both these services when purchased individually. Thus, for the wider retail broadband market, the starting point was to allocate part of the discount to both Internet access services and ISP services. For the narrower market, part of the discount was allocated only to Internet access services.
- It was assumed that if the margins on local access services were positive and the margins on toll calling and broadband services were negative, then Telecom’s rivals could not replicate the bundled offer or compete in offering the bundle.
- The approach developed to analyse the margins had limitations stemming from the assumptions made to derive the imputed retail prices and costs of broadband, and also the delineation of the retail broadband access market (whether to base the analysis on the narrower or wider market definitions).

With the imputed retail prices (including the discount) and imputed retail costs, the NZCC was able to determine that Telecom’s margins for broadband and toll calling services were estimated to have been positive over the entire period analysed. This implied that efficient competitors could earn positive margins over the combined calling and broadband offering when they sold similar bundles at similar prices to Telecom. Moreover, some ISPs had started to provide toll services, indicating that they were able to provide the same competing bundle. Further, Telecom’s market share in the retail broadband market actually decreased over the relevant period. Accordingly, the NZCC established that Telecom’s bundled discount offering had not resulted in a margin squeeze over those two products, and was, therefore, unlikely to constitute taking advantage of its market power.

In terms of section 27 of the Act, the analysis of the effect of Telecom’s conduct did not reveal any exclusionary effect to substantially lessen competition in any of the defined relevant markets. It was also found that an efficient competitor in the provision of residential broadband access and toll call services was able to match its bundled offering and pricing. The NZCC, therefore, concluded that the conduct was unlikely to lead to a substantial lessening of competition.

4. Investigation in the Tourism industry

This investigation involved conduct that can be characterised as “pure bundling”, where two products were sold together and were not available for individual purchase. The bundled offering was offered at a discounted price compared to the previous individual prices of the products.

The bundled strategy was employed by a South Island tourism operator, Aoraki Mount Cook Alpine Village Limited, through its operation called The Hermitage. The Hermitage is the sole provider of mid to

high standard chalet, motel and hotel accommodation in the Aoraki/Mount Cook Village (the Village). The Hermitage was also the only provider of food and beverages in its up-market restaurants, namely, the Alpine and Panorama restaurants. The Village is located in a remote area in a national park at the foot of Mount Cook, New Zealand's highest mountain. As it has only a small permanent population, and no passing trade, it exists entirely to service tourism. The Hermitage has iconic status as a tourism destination, both nationally and internationally (half of all Japanese tourists visiting New Zealand stay at the hotel).

In January 2003 the first competing supplier of restaurant services at the Village—The Old Mountaineer's Café Bar & Restaurant (The Café)—opened in the Village, the culmination of 10 years of effort. In part the delay resulted from the regulatory requirements imposed by the National Parks Act and the Conservation Act, and the lack of suitable sites within the Village. The Commission had also investigated The Hermitage over claims that it had obstructed the entry process.

In October 2003, The Hermitage replaced the separate provision of its hotel accommodation, breakfast and dinners at the Hermitage with a bundled or all-inclusive Dinner Bed and Breakfast rate (DBB rate). This bundled discount represented a \$10 discount on the three products purchased separately. It was alleged that The Hermitage had acted in this way to blunt the competition from The Café and other potential entrants. The focus of the investigation was to determine whether this was, indeed, the case.

Relevant markets in accommodation and in food and beverages were considered. In terms of the former, the NZCC assessed whether the market was a narrow market, encompassing accommodation in the Village only, or a wider one that extend to accommodation providers further away. It was found that those visitors wishing to stay overnight would require accommodation within a reasonable driving distance from their chosen visitor attraction, which was the Village and its surrounds. The only alternatives within the wider Mount Cook region were the Youth Hostel Association (YHA), the Alpine Lodge and the White Horse Hills camping grounds. Other alternatives were at least 45 minutes drive from the Village. It was considered that the accommodation services provided by The Hermitage were differentiated from these alternatives by virtue of its superior location and by distance, and so was unlikely to be significantly constrained by them.

Within the Village, the accommodation services were also found to be vertically differentiated, in terms of the range of accommodation standards available, and the substantial differences in the rates for the various options. From a demand perspective, it was found that there were no substitutes for the mid to upper level accommodation services provided by the Hermitage. It was also found that the competitive constraint exerted by potential supply substitution was minimal, due to the significant sunk cost associated with entry, and the limited lease arrangements available from the Department of Conservation in the National Park. The NZCC therefore restricted the accommodation market to mid to upper level accommodation in the Village.

Food and beverage services provided by The Hermitage were similarly found to be horizontally and vertically differentiated, in terms of its location and varying degrees of quality. Food and beverage services available outside the Village were too distant to be viewed as substitutes. Given the difficulties of entering this market, as exemplified by the Café's experience, it seemed likely that there were significant barriers to entry into food and beverages market within the Village. Also, it was considered that a meal at one time of the day is not a good substitute for a meal at another time. Accordingly, this market was delineated into markets for breakfast and evening meals. The NZCC also looked at the customer dimension of this market, and concluded that less than 1% of day-trippers were likely to consume breakfast or evening meals within the Village. Accordingly, the market included only those visitors that stayed overnight within the Village. The investigation focused on the dinner market, as this was the area in which the Hermitage's bundle was likely to impact on the Café.

It was established that The Hermitage had substantial market power within both of the relevant markets for accommodation and for food and beverages. The NZCC was concerned that The Hermitage could leverage its monopoly power from one market (the provision of hotel accommodation at the Village) to another market (the provision of dinners at the Village), thereby foreclosing competition in the latter.

The NZCC considered whether the offering of a bundled product was likely to have raised The Hermitage's profits, compared to the prior situation without bundling. This was done by developing a model of the operations of The Hermitage, based on deriving demand, marginal revenue and cost of supply functions to determine the profit-maximising prices and the resulting profits, and then calibrating it to approximate the facts of The Hermitage in the peak months.

The results suggested that the profit earned under the bundling pricing strategy was likely to be less than the unbundled offering by about \$45,000 per month during the peak season. After conducting a range of sensitivity tests on the key variables, the overall conclusion reached was that within the likely range of values, the bundled discount deterred a significant number of customers, and so resulted in a substantial profit loss for a monopoly supplier of beds and dinners.

The intuition behind this result can be explained as follows. Basically, the hotel is assumed to have two different classes of potential customers: those who stay in the hotel and eat in the hotel's restaurant, and those who stay and would rather eat somewhere else or not at all. If the differences in these individuals' valuations of staying in the hotel do not differ systematically across the groups, then there would be different demand curves for each group, with one being 'higher' than the other. This leads, in essence, to a classic price discrimination scenario, in which it pays the hotel to charge the keener customers (the 'diners') more than the less keen (the 'non-diners'), if they can be identified and kept apart. In this particular case, the customers identified themselves by showing up, or not, at the restaurant in the evening to have dinner. The setting of a single price for both groups (at the single price, profit-maximising level) to cover accommodation and meals would result in lower profits than could be earned by setting different profit-maximising prices for each group. This is because by lowering the total (bundled) price to persuade the non-diners to purchase, it would reduce the revenue it would get from the diners who would have purchased both components of the package anyway, but who are now paying less for the combined package.

The predictions of the model were tested econometrically by modelling room sales, using monthly data on the number of nightly rooms sold in the Hermitage hotel from July 2000 to March 2005.⁹ This period straddled the point when the bundle was introduced. The aim was to establish the counterfactual – that is, the sales the Hermitage would have achieved over the 2003/04 and 2004/05 seasons if the bundle had not been in place.

An ordinary least square (OLS) model was used, with the number of rooms sold as the dependent variable. The explanatory variables included: the number of tourist arrivals in New Zealand (with a limited 'lag' effect built in); dummy variables to capture the months during which the bundle was offered, and the winter season of low demand; and the average rate per room, with an adjustment for lower off-peak rates.

The estimated equation provided a good fit to the data. It suggested that sales of Hermitage hotel rooms and tourist arrival numbers moved very closely together, with the whole relationship shifting down markedly in the winter months. The dummy variable for the bundle period was moderately significant, and implied that demand for rooms was around 16% lower over this period than would have been expected,

⁹ The data covered 57 months in all, minus four months from June to September 2001 when the facility was closed for refurbishment (followed by the opening of the new Aoraki wing).

given tourist arrival numbers. This was substantially more than the model's prediction of about a 7% deterrence effect of the bundle on hotel guest numbers.

Although there were limitations with the data available for the econometric work, the results were strongly consistent with the theoretical and modelling predictions of an economically significant negative effect on demand (and profits) resulting from forcing all Hermitage guests to pay for dinner (and breakfast) in the hotel's restaurants, whether they would have wished to consume these meals or not. This result was not overturned when an approximate allowance was made for labour cost savings claimed by the Hermitage as a result of the bundled offering, nor when the diversion of profit from the Café to The Hermitage in the counterfactual without the bundle was allowed for.

Given the evidence that the bundled offering could not be justified on normal commercial grounds, because it resulted in a fall of The Hermitage's profits, other possible motives for imposing the bundle were reviewed. The most plausible was that as bundling has the effect of discouraging those potential guests who are 'non-diners', since they must pay a relatively 'high' price for a joint product acceptable to the 'diners', it has the ability to discourage the relatively 'low' paying 'non-diners', and thereby to provide a 'sorting' rationale for the bundle in a situation where the hotel faces excess demand for its accommodation in the short-run.

When the demand for the hotel's accommodation exceeds the supply, the room price will exceed the long-run marginal cost of supply. All the rooms will be booked (at least, in the peak season months). In these circumstances, further profit could be extracted by introducing a bundle to encourage those who do book to be 'diners'. The bundle automatically discriminates against 'non-diners', whereas the hotel otherwise could not distinguish between the two categories in advance. The capacity constraints are likely to be less binding in the hotel's restaurant capacity, so that the additional diners can be accommodated. However, this would be only a short-term solution. The fact that price exceeds long-run marginal cost is an indication that supply is deficient, and that profit would be enhanced by an expansion in accommodation capacity. In any case, there did not seem to have been systematic under-capacity in the period since the Aoraki Wing was added in November 2001.

Absent any other explanation, the NZCC concluded that the reason for the profit sacrifice by The Hermitage was to create an artificial barrier to entry to foreclose both actual (The Café) and potential competition. It was also established that it was highly unusual for a hotel to bundle accommodation and food in the manner that The Hermitage had done, without continuing to offer the two separately. The NZCC found that the purpose of the bundle was likely to be anti-competitive since The Hermitage would not have offered this bundle in a competitive market. Hence, a likely breach of section 36 was found.

In terms of section 27 of the Act, the NZCC looked at whether the agreements to bundle the purchase of hotel accommodation and dinners, unilaterally entered into by The Hermitage with inbound tour operators and independent travellers, had the effect or likely effect of substantially lessening competition in the market. The evidence indicated that:

- the purpose of the agreements was to restrict or hinder the Café from engaging in competitive conduct;
- the bundled offering foreclosed more than 90% of the dinner market; and
- econometric analysis showed that the Café's revenue decreased by an estimated 20%, compared to the counterfactual with no bundled discount.

However, the analysis itself did not provide conclusive evidence that the bundle had had the effect of substantially lessening competition in the dinner market, and the Café had continued to operate for the period of the bundle.

The NZCC concluded that, while the bundle may not have had the effect of substantially lessening competition in the dinner market, there was information to show that the conduct had had the likely effect and the purpose of substantially lessening competition in that market. Accordingly, there was likely to have been a breach of section 27.

The NZCC raised strong concerns with The Hermitage about its pricing policy. This led The Hermitage to enter into a settlement agreement with the NZCC, under which it introduced a separate Bed and Breakfast rate to operate alongside the DBB rate.

5. Bundling within the Skiing Industry

In 2006, the Edge to Edge, one of the 35 ski equipment rental-only companies based in the North Island, lodged a complaint against Ruapehu Alpine Lifts Limited (RAL), the only public ski field operator in the North Island. RAL has a capacity of 11,000 skiers per day, split between 25% beginners, 50% intermediate and 25% advanced. It was alleged that RAL had engaged in predatory pricing by bundling lift passes, lessons and ski equipment hire at its Mount Ruapehu ski fields in breach of section 36 of the Act.

As a general discounting policy, RAL offered lift tickets at a 10% discount to retailers. In addition to this discount, RAL offered a number of bundled discounts to beginners on combinations of lessons and equipment that varied according to the nature of the equipment. The discount varied from \$6 to \$15.

In previous decisions the NZCC had concluded that the relevant market was the North Island market for the provision of downhill skiing and snowboarding services to both retail and wholesale customers. For the purposes of this investigation, the NZCC also defined a related market for the North Island ski equipment rental market. It was found that RAL was likely to have a substantial degree of market power in the ski market as a result of it being the sole supplier of public ski services in the North Island market, and the lack of other suitable ski field sites in that market.

The NZCC approached this case by considering whether RAL had taken advantage of its market power in the North Island ski market for the anti-competitive purpose of restricting or deterring competition in the North Island ski equipment rental market. The concern was that RAL could use the discounted bundle to leverage its market power into the rental market, and foreclose competitors from that market.

The NZCC compared the prices of RAL's bundled offering and of competing rental companies. It found that competing rental companies were not able to compete on price with RAL. Some major customers switched to RAL, and the retailers were forced to supply the equipment at a substantially lower price.

The NZCC looked at the South Island ski market to provide the basis for a counterfactual test, given the competitive nature of that market, where there were 13 commercial ski fields. It found that the bundled products offered by RAL were also offered by the five major ski companies located in the South Island, with discounts varying from \$1 to \$21. This posed the same difficulty for the specialist South Island rental companies in competing on price. The fact that the discount bundles were offered in a competitive market suggested that a key feature of competition was for the bundled discount offers. This led the NZCC to conclude that RAL had not taken advantage of its market.

The NZCC also concluded that the bundles had the potential to foreclose only the beginner's portion of the market. Given that beginners comprised only 25% of the market, and not all of beginners would be interested in the bundled offering, it was unlikely that a significant portion of the market had been foreclosed.

In the light of these considerations, the NZCC concluded that RAL's bundled discount offering was not a breach of section 36 of the Act since it was unlikely that RAL had taken advantage of its market power in the North Island ski market for an anti-competitive purpose by offering bundling discounts.

6. Single product loyalty discounts in the tobacco industry

The NZCC is currently investigating its first major complaint relating to single product loyalty discounts. This section provides a brief outline of the matter.

In 2007, British American Tobacco (BAT), the major supplier of tobacco products in New Zealand, informed the NZCC that it would be implementing a new discount system. BAT's loyalty discount programme applies to individual retailers, and has two parts, namely, volume discounts, and compliance trading terms:

- The volume discounts are applied retrospectively to the total volume of cigarettes sold, and increase with the retailer's pre-determined volume grade category (e.g., for relatively low sales in volume grade 7 the rebate is \$3 per 1,000 cigarettes; for relatively high sales in volume grade 2 it is \$5.50 per 1,000 cigarettes).
- The compliance discount is based on the retailer's adherence to Smokefree legislation, stocking a certain percentage of BAT's range, and the proportion of the retail display area allocated to BAT's product packaging. A retailer who meets these requirements receives a discount determined by the last criteria.

The NZCC received complaints that this loyalty discount programme will substantially lessen competition, because retailers are likely to reduce the range of competitors' stock, resulting in a significant foreclosure of the market.

In previous investigations, the NZCC had established that BAT had substantial market power due to its large market share, customers' brand loyalty, the statutory prohibitions on advertising, the limited amount of facings and the declining market for tobacco products.

The concern now is that this loyalty discount programme could raise a further barrier to entry into the market, and foreclose rivals access to the retail market. This could happen when an existing rival or an entrant attempts to acquire some of the business of a customer of BAT. In this situation, the customer may, by making a smaller purchase from the incumbent, find itself in a lower volume discount range. To make the sale, the competitor may have to compensate the customer for its loss of discount, but on a smaller volume of sales. This could involve that firm having to offer a lower price per unit than the incumbent's price less discount. In short, the effect on competitors might be that they would have to incur a bigger discount per unit of product than would the incumbent in order to be able to compete on price.

The investigation of this case is continuing.

7. Conclusion

This submission details the approach followed by the NZCC in its analysis of bundled and single product loyalty discounts. Generally speaking, the NZCC follows a case by case approach to assess the

anticompetitive allegations of these forms of behaviour, taking into account the extent of market power held by the firm making the offers, the nature and size of the discounts being offered, the nature of the market, the potential for foreclosure, and the likelihood that such behaviour would feature in a competitive market.

NORWAY

1. Introduction

Bundled discounts and single product loyalty discounts may alone or jointly have detrimental effects on competition. As an introduction, these possible anti-competitive effects are briefly explained below. Thereafter, in section 2, we describe the way the Norwegian Competition Act deals with bundling. Finally, in section 3, we provide a description of a recent case investigated by the Norwegian Competition Authority (NCA), which includes aspects of both bundled discounts and single product loyalty discounts.

Bundling¹ refers to the practice of selling two or more products as a package. If only the bundle is available to the buyer, and not the individual components, this is referred to as *pure* bundling. Cases where both the bundle and each of the components are available on the market are referred to as *mixed* bundling if the bundle is sold at a discount to the sum of the prices of the components bought separately. Bundled discounting corresponds to mixed bundling as it refers to the practice of offering discounts or rebates contingent upon a buyer's purchase of two or more different products. The concept of bundling is also closely related to tying.²

Bundling is a common practice that often has no anti-competitive effects. Both companies with and without market power engage in bundling in order to provide their customers with better products or offerings in cost effective ways. For companies bundling may lead to significant savings in production, distribution, transaction cost, and it may also lead to quality improvements.

However, bundling can lead to anti-competitive effects such as foreclosure, price discrimination and higher prices. In this paper we focus on the *foreclosure effects* of bundling and single product loyalty discounting. Single product loyalty discounts refer to the practice of offering discounts on all units purchased of a single product conditioned upon the quantity purchased. These discounts will typically be retroactive in the sense that they apply to all units of the customer's purchase of the product rather than just the units beyond the level of purchases triggering the discount. Single product loyalty discounts may have similar foreclosure effects as bundling.

An anti-competitive foreclosure effect may arise e.g. if a dominant company in one product market through bundling makes it impossible for competitors to operate in a second product market. In particular, such a situation may arise if the dominant company's product is a "must have" for the customer and this product is bundled into a package with other components. Such bundling may reduce the number of potential customers that is available for its competitors in the component markets.

Bundled discounts may foreclose competitors if the discount is so large that efficient competitors offering only some of the components cannot compete against the discounted bundle. An extreme example would be if the price of the bundle as compared to the price of the products bought separately implies that

¹ See e.g. M. Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, 2004.

² Tying occurs when a supplier makes the sale of one product (the tying) product conditional upon the purchase of another distinct product (the tied product) from the supplier. Only the tied product can be bought separately. Tying and bundling may have similar effects on competition.

one of the components is offered at a negative price. Imagine a bundle consisting of the products A and B. The price of the bundle charged by the dominant company is 20. Bought separately the price of A and B is 25 and 5, respectively. Calculating the incremental price of B, i.e. the price of the bundle less the price of A bought separately, gives a negative price of -5 ($20 - 25 = -5$). The incremental price tells us what price a competitor may charge for product B in order to be competitive. Obviously, a negative incremental price would mean that no competitor (no matter how efficient) will be able to operate producing only product B in such a situation.

These foreclosing effects may cause existing competitors to be marginalized or exit from the component markets. In this way, a dominant company may use bundling to expand its dominance from one market into related markets. The practice of bundling may be particularly detrimental to competition in combination with other contractual offerings or restrictions. An example of such offerings is single product loyalty discounts.

2. Assessment of bundling under the Norwegian Competition Act

The legal regime for competition policy in Norway was subject to revision in 2004.³ The Act on competition between undertakings and control of concentrations (Competition Act)⁴ replaced the Act relating to competition in commercial activity.⁵

With the revision in 2004, the Norwegian competition law regime was harmonized with the conduct rules in the European Union Treaty and the EEA Agreement. The prohibition against abuse of a dominant position in the EU Treaty Article 82 and EEA Agreement Article 54 were incorporated in section 11 of the Competition Act 2004.

Section 11 paragraph 1 of the Competition Act 2004 states as follows:

“Any abuse by one or more undertakings of a dominant position is prohibited.”

Section 11 paragraph 2 lists a number of conducts that, in particular, may constitute an abuse of a dominant position. It follows from this list that different kinds of bundling may constitute an abuse. Specifically, section 11 paragraph 2 letter d states that such abuse may consist in:

“(d) 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.”

The wording of paragraph 2 letter d corresponds to the equivalent paragraphs and letters in Article 54 of the EEA Agreement and Article 82 of the EC Treaty.

In the NCA's assessment, it is decisive that the conduct of the dominant undertaking may eliminate or reduce competition. It will therefore be necessary to investigate whether the bundling or loyalty discounts actually or potentially may have an exclusionary effect on the relevant markets.

³ A description (text in Norwegian) of the new Norwegian Competition Act and some of its peculiarities as compared to the EU competition law is given in Nese G., and R. Solberg (2006): *“Den norske konkurranseloven – noen særegenheter”* in The Finnish Competition Authority's Competition Law Yearbook 2006 (“2006 Kilpailuoikeudellinen Vuosikirja”).

⁴ Act on competition between undertakings and control of concentrations of 5th March 2004 No. 12.

⁵ Act relating to competition in commercial activity of 11th June 1993 No. 65.

The NCA has limited experience from assessment of bundling and loyalty discounts under the new Competition Act. However, a case involving both these concepts has recently been handled by the NCA. This case is described below.

3. Loyalty discounts and bundling in software licensing

In 2006 and 2007, the Norwegian Competition Authority (NCA) investigated a complaint against Microsoft. The case includes aspects of both bundled discounts and single product loyalty discounts.

3.1 Description of the case

The NCA's investigation was initiated by a complaint made by the IT-company Linpro, dated March 2nd 2006.⁶ Linpro complained against Microsoft's use of discount schedules targeting Norwegian schools. According to the plaintiff, Microsoft's so called County Agreement (CA), which builds on Microsoft's School Agreement (SA), includes conditions implying an exclusionary effect against Microsoft's competitors.

Microsoft's SA is a license model offering Microsoft products on terms available exclusively to primary and secondary schools. Schools taking SA do not own the licenses for the products, but instead rent the licenses on an annual basis for an annual fee. Such rental licenses differ from individual licenses purchased under other Microsoft license models such as Academic Select (Select), where the school owns the license to use the product in perpetuity, having paid an up-front one-off fee.

CA is a cooperation agreement between Microsoft and a number of Norwegian counties. This agreement builds on SA, but offers additional discounts on top of the discounts provided by SA, given that the schools accept some additional conditions.

Two conditions were of particular concern to the plaintiff. First, in order to achieve the discounts, schools licensing software under CA are obligated to license a bundle of programmes. The bundle is called the Desktop bundle (Desktop), consisting of the products Windows Upgrade, Office and Core CAL.⁷ The condition to purchase the whole Desktop is specific to CA. SA offers discount also for schools purchasing only one or two of the products included in the Desktop.

Second, the discounts are conditioned upon an Eligible PC Requirement (EPCR).⁸ EPCR implies that all eligible PCs in a school need to be licensed for the Microsoft products included in the Desktop, irrespective of whether the software is installed on the computers or not. For example, if a school taking CA requires the Desktop for only 80 percent of all its eligible PCs, the EPCR will still mean that 100 per cent of its eligible PCs are covered by CA. In contrast, under an alternative Microsoft licensing programme like Academic Select, a school can purchase the number of individual licenses for eligible PCs that it actually intends to load and use. As a result of EPCR, replacing Microsoft's software by alternative

⁶ Linpro offers products and solutions based on open source software.

⁷ Windows Upgrade is an upgraded version of the Operating System Windows XP (this is only an upgrade license and customers must already have a fully paid up license for Windows on the eligible PCs). Office refers to the Microsoft's well-known set of applications, consisting of Word, Excel, PowerPoint etc. A CAL is a client access license that allows the customers to access different server operation systems. Core CAL (Client Access License) consists of four different CALs (Windows Server, Exchange Server, SharePoint Portal Server and System Management Server).

⁸ An "eligible PC" refers to PCs with a certain minimum technical specification. In practice, the specifications for an "eligible PC" mean that the vast majority of all PCs in a school would qualify as "eligible" under SA and CA.

programmes does not reduce the price paid to Microsoft. The EPCR is not specific to CA, but is also a part of SA.

Thus, this case includes aspects of both *bundled discounts* and *single product loyalty discounts*. The discounts associated by the Desktop bundle is an example of bundled discounting which refers to offering discounts contingent upon a buyer's purchase of two or more different products. The EPCR implies that a school has to purchase Microsoft's Desktop license for 100 per cent its PCs to achieve the discount. Thus, EPCR is a kind of a single product loyalty discount. As such rebates and conditions may have anti-competitive effects, the NCA decided to launch an investigation.

3.2 *The investigation*

The NCA focused its investigation on CA, as this provided larger discounts and additional conditions (e.g. the obligation to buy the Desktop bundle), as compared to SA. During the investigation, the NCA was in extensive contact, through letters, e-mail and meetings, with both Linpro and Microsoft. The NCA also, during the early stages of its investigation, collected information from questionnaires sent to a number of Norwegian schools, municipalities, counties and distributors of Microsoft software.

The investigation convinced the NCA that both the condition regarding EPCR and the obligation to license the full Desktop package could harm competition.

More specifically, these concerns referred to the fact that the EPCR is a kind of a loyalty rebate which may have an effect similar to an exclusive purchase agreement. Even if the EPCR put an obligation on the schools to buy Microsoft products for every eligible PC, schools taking CA were not prevented from using any kind of non-Microsoft software. However, as a result of EPCR, the schools would be unable to run a mixed environment (i.e. some PCs installed with Microsoft products and others with non-Microsoft products) without having to pay twice for the PCs installed with non-Microsoft products. EPCR made exclusion of eligible PCs from CA impossible and the schools would therefore have to pay for Microsoft licenses also on PCs using only non-Microsoft products.

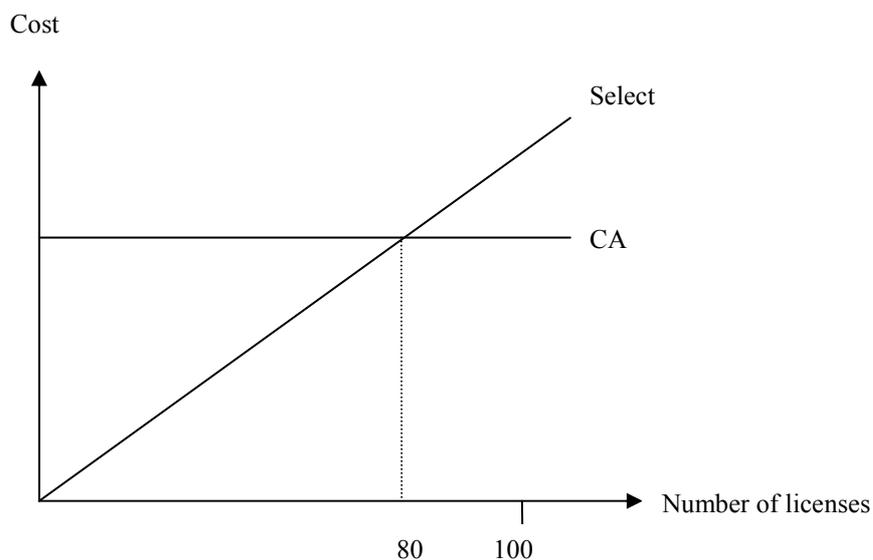
In order to evaluate the effects of the loyalty discounts and bundling in CA, the NCA focused – among other things – on the pricing of licenses offered under CA, as compared to the alternative licensing programme Select, which did not include EPCR. The NCA wanted to calculate the price differences between these two licensing programmes.

One of the key questions was to find out under what circumstances a school that only wants to purchase Microsoft products for *some* of its PCs would find it cheaper to license those products under SA rather than under Select. The idea was that if licensing identical products for only a part of the school's PCs under Select was more expensive than under CA, the schools would have incentives to take CA and then be subject to EPCR.

Figure 1 below illustrates the cost structure under Select and CA for a school with a given number - say 100 - of eligible PCs. Purchasing licenses under Select implies an increasing linear price. Thus, the total cost increases with the number of licenses purchased. Because of EPCR, the cost under CA is constant for each school. If a school has 100 eligible PCs, the total cost of CA is simply 100 times the price per Desktop license, regardless of how many of the licenses are installed. The only thing affecting the cost is the number of eligible PCs at the particular school. Looking at Figure 1, the total costs of licensing are identical under Select and CA at the point of intersection between the two lines. To the left of the intersection, i.e. for fewer eligible PCs, Select is the cheapest alternative, while to the right CA is cheaper. For example, if a school owns 100 eligible PCs and the intersection point is at 80 PCs, a rational school would choose CA as long as it wants Microsoft licenses on more than 80 of its 100 PCs. However, due to

EPCR, choosing CA will provide the school with licenses for 100 per cent of its eligible PCs.⁹ EPCR would then significantly decrease the incentives for this school to choose alternative vendors for any of its last 20 PCs. Moving the intersection point to the left would increase the potential exclusionary effect of EPCR.

Figure 1. Illustration of cost structures under Select and CA



In its comparison of prices between CA and Select, the NCA also considered the potential *suction effect* that could arise close to the intersection point.¹⁰ If, like in the example, the intersection point is at 80 per cent of a school's PCs, the school would experience a suction effect as it approaches this 80 percent level from below. The suction effect refers to the fact that approaching the intersection point, reduces the effective price of the next licenses. Imagine a school considering licensing 75 of its 100 PCs under Select, while choosing non-Microsoft licenses for the remaining 25 PCs. It would then have to take into account that the cost of increasing its purchase of Microsoft licenses from 75 to 80 licenses would in practice provide the school with the licenses for 100 per cent of its PCs as it could then take CA instead of Select for the same price. Due to the EPCR, the school will then in practice be able to purchase 25 licenses for the price of 5.

Concerning the bundling of products in the Desktop, the NCA did some calculations of incremental prices. However, the investigation focused on the *total* effect of CA's bundling, discounts and EPCR, and not on bundling as such. The EPCR could have an exclusionary effect even without the bundling condition. EPCR in combination with bundling would, however, increase the exclusionary effect as more products would be covered. Vendors of non-Microsoft alternatives to *all* the products included in the Desktop bundle will then be affected by the exclusionary effect of EPCR.

⁹ Please note that the real license prices are classified as business secrets and the numerical examples are made for illustration purposes only.

¹⁰ See e.g. the "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses" for a closer discussion of the suction effect. The paper is available from: <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

The investigation brought the NCA to a preliminary conclusion that CA could have an exclusionary effect against vendors of alternative non-Microsoft products to primary and secondary schools.

3.3 *Conclusion of the case*

In a meeting with Microsoft in January 2007, the NCA expressed its serious concerns regarding the conditions placed upon schools licensing software under CA.

In May 2007, the NCA received a letter from Microsoft, informing the authority about two changes made in CA.

The first change made by Microsoft implied that the obligation on schools to license the whole Desktop is removed. The result of the change is that discounts offered through CA are achieved also by schools choosing to license only one or two of the products contained in the Desktop bundle.

The second change implied a removal of the EPCR from CA. As a result of this change, schools are able to exclude any number of its eligible PCs from CA in order to use alternative software on these PCs. Thus, a school wanting to run e.g. Linux instead of Windows operation system or Open Office instead of Microsoft Office on a part of its eligible PCs is allowed to exclude these PCs from CA. Exclusion of PCs does not reduce the discounts offered through CA. Furthermore, exclusion of PCs from the agreement implies a linear reduction of the license fee paid to Microsoft. Hence, schools are only paying for the number of Microsoft licenses that are actually installed on their PCs.

These changes imply that CA has been altered significantly on the two main areas causing the NCA's concerns. Both the bundling condition and EPCR are removed.

As a result of Microsoft's response, the NCA decided to close its investigation of the aspects concerning bundled discounts and single product loyalty discounts in CA. Even if the NCA has closed its investigation, it is of course free to reopen it if the agreed changes of CA are not complied to.

TURKEY

Generally, sellers offer discounts in order to increase their sales volume against their competitors and to encourage buyers (retailers) to promote their products. In this vein, such practices are expected to increase consumer welfare by lowering prices and increasing production and consumer choices. Nevertheless, such practices also generate anti-competitive effects such as market foreclosure or exclusionary effects. It is also truism to argue that the discounts arise in various different forms which would make it quite harder for the competition agencies to examine them in a consistent way. Last but not least it is also important to underline the fact that anti-competitive effects of discounts depend on the market power of the undertaking offering those discounts.

This contribution will try to focus on discount systems in general. Then it will try to elaborate on loyalty discounts that refer to the practice of offering discounts upon the condition that the customer obtains all purchases or at least an important part of its purchases from the seller and it does not buy from the seller's rivals. To that purpose, various decisions will be summarized to provide the approach of the Competition Board after mentioning the statutory provisions.

1. Statutory Provisions

The Act no 4054 on the Protection of Competition (Competition Act) has no statutory provisions expressly dealing with discounts, target discounts or loyalty discounts. However, articles 4 and 6 in the Competition Act are the general provisions that would lead the Competition Board to deal with the anti-competitive effects of the discounts, target discounts or loyalty discounts while giving its decisions.

Articles 4 and 6 of the Competition Act deal with the anti-competitive effects and the abuse of dominant position respectively. The Competition Act prohibits anti-competitive agreements, decisions and concerted practices in article 4, while it prohibits abuse of dominant position in article 6. Both of the articles, 4 and 6, list non-exhaustive types of restrictive agreements and abusive cases respectively. On one hand, discounts can be analysed under article 4 as those practices generally emerge in the form of vertical agreements. On the other hand, discount systems can be dealt with under article 6 as well. In fact, the discount practices especially loyalty discounts are evaluated in case the undertaking is dominant in at least one market. Those practices may constitute abuse if the dominant undertaking either abuses its position via its practices in the market where it is dominant or tries to extend its dominant position to another market where it is not dominant (leveraging).

2. Competition Board decisions

Although the Competition Act does not have specific provisions for discounts, target discounts or loyalty discounts they are examined in Competition Board decisions in a detailed way especially when they have anti-competitive effects on the market such as foreclosure or exclusion. Those practices are evaluated especially in case the undertaking is dominant in at least one market. All the decisions below, except *Ülker*, were initiated on the basis of a complaint, only *Ülker* case was initiated on the basis of an informing and all of them were examined under article 6 of the Competition Act that regulates abuse of dominant position.

*Frito Lay*¹ decision is among the most important cases concerning discounts. The Competition Board examined whether the discounts provided in return for exclusive agreements are violating the Competition Act. In fact, this is a dominant position case initiated as a result of the competitor's complaints and discusses whether a dominant undertaking's exclusive agreements with retail outlets for sale of only its products complicate the rival's activity and constitute abuse. The Competition Board analyzed the discount systems in addition to other conducts of the dominant undertaking. Concerning discounts, the Competition Board stated that it is necessary to examine the effects of the discount offerings of Frito Lay on the market in return for exclusive agreements with retail outlets rather than accepting them as a *per se* violation. However, the conduct of Frito Lay, the dominant undertaking in salty snack market, in the form of discounts, products for free and cash in return for exclusivity was proved to be realized in limited time periods and limited areas and therefore such a conduct was deemed to produce limited effect with no power to drive the competitor out of the market. Therefore, no abuse was found by the Competition Board. Although the discount system which was examined in the Frito Lay case was a relatively simple one rather than a complex discount system, this decision is quite important due to the fact that the Competition Board adopted an "effects-based" approach instead of a form-based approach.

In another case initiated upon a complaint against *Microsoft Turkey*², the Competition Board initially mentioned that the discounts and supports granted by the dominant firm may be regarded as abuse if their object or effect is to provide incentives for the intermediaries to sell only the products of the dominant undertaking. Respectively, the Competition Board has not found existence of abuse as participation in and conditions of the quantity discount system provided by Microsoft were "open and objective" and no finding indicating that the effects of the this discount system distort competition has been detected. In line with the *Frito Lay*, this decision also considers the effect of the discount systems. Moreover, it also takes into consideration the object of the system. In brief, this assessment provides an insight to dominant undertakings as to how the discount systems should be designed in order to avoid antitrust investigations.

*Turkuaz*³ decision is a good example to show how the Competition Board defines and discusses loyalty discounts. Turkuaz is the new brand of Coca-Cola Selling and Distribution Company (CCSD) in the water market in Turkey. CCSD is the company which is in charge of marketing, selling & distribution activities of Coca-Cola Bottlers of Turkey (CCBT). CCBT carries out its production & bottling activities via another company again based in Turkey. The complaints include unlawful marketing strategies of Turkuaz water brand at the final sales points in a way to exclude rivals and the sale of Coca-Cola products to those resellers at lower prices which also sell Turkuaz water. The decision discusses whether CCSD is excluding its competitors from the market via applying loyalty discounts on its resellers. Two relevant markets are determined in the decision. The first one is the "water market" where there exists the possibility of the infringement of competition and the second one is the "cola soft drinks market" that could be used as a tool to infringe competition in the water market.

The Competition Board states that loyalty discounts are a type of price discrimination. Price discrimination represents the selling of a product at different prices in separate markets. There are some conditions for the success of price discrimination. In this regard, the Competition Board decision says that the undertaking shall have market power, separation of the market on the basis of customer groups which have different demand elasticity for the same product shall be possible and the resale between various groups shall be prevented.

¹ *Frito Lay* (6.4.2006, 06-24/304-7).

² *Microsoft Turkey* (1.9.2005; 05-53/809-219).

³ *Turkuaz* (23.1.2003 ; 03-06/59-21).

According to this decision, loyalty discount refers to the practice of offering discounts upon the condition that the customer obtains all purchases or at least an important part of its purchases from the seller (dominant) and it does not buy from the seller's rivals. Loyalty discounts are considered abusive as they prevent customer's obtaining its needs from other undertakings and decrease the rivals' chances of competing on the market. Loyalty discounts have two open effects. Firstly, loyalty discounts act as a barrier to entry with respect to newcomers and they can drive competitors out of the market. The aforementioned effects of loyalty discounts can be considered acceptable in highly competitive markets. However, in markets where dominant undertakings exist, such conducts might distort competition. The basic difference of loyalty discounts from other types of discounts is the fact that the seller grants discounts on the condition that the customer shall not buy from its rivals. Loyalty discounts are also different from promotional discounts that could be practiced for short time periods at the beginning of the launching of a new product into the market without any condition on not to buy from the rivals. The buyer's consent or demand is irrelevant in abuse analysis. In addition to that, discounts with an increasing rate can be considered as loyalty discounts especially when their effects are taken into consideration. Indeed the exclusionary effects of loyalty discounts are greater than their discriminatory effects.

Concerning the evaluation on loyalty discounts, the Competition Board analyses depend on whether the CCSD has a significant market power or not in the relevant markets. Moreover, during the preliminary investigation, the Competition Board evaluated whether there is discrimination among resellers due to this conduct and whether the conduct could drive rivals out of the market. The invoice examinations of the final sales points on the market showed that the prices that are paid by final sales points that sell Coca-Cola products and Turkuaz water together and the prices paid by final sales points that sell either Coca-Cola products or Turkuaz separately do not differ. In other words, invoice examinations showed that discount rates for Coca-Cola products are determined independently from those for the sale of Turkuaz water. Furthermore, communications with the dealers showed that to have all the products distributed by CCSD is not a determinative factor on the discounts that would be provided by the CCSD. Dealers prefer to sell Turkuaz brand water due to cost advantages when compared to other rival water brands. Another observation puts forward that if there is not enough demand for Turkuaz water, dealers could stop buying this product and as a result the discounts or due date conditions they would get for the purchases of Coca-Cola products are not affected at all. These findings pointed out that there is no discrimination since the launching of the Turkuaz water brand with respect to vertical relations. As loyalty discounts are provided on the condition that rival's products should not be purchased, their expected *de facto* effect would be to complicate the activities of the rivals in the market. But only 4 % of the total final sales points sell exclusively Turkuaz brand. Again, evidence showed that rival water brands had significant market power in some regions. Against this backlog, the Competition Board decision found that there is no loyalty discount enforcement based on refusal to purchase rival products.

Competition Board's *Ülker*⁴ decision, like the *Turkuaz* decision above, provides certain explanations and principles as to how discounts would be evaluated under the provisions concerning abuse of dominant position in the Competition Act. The case concerns distribution system of the dominant supplier, namely Ülker, operating in many fast-moving consumer goods markets and being dominant in markets for biscuits, chocolates and products coated with chocolates. Ülker has a system of contracts with certain retailers that it calls customers with special status (CSS) and the contracts include, among others, clauses regarding various discount programs. This decision briefly discusses Ülker's retail distribution system, having a discount system with an increasing rate. On one hand, separate discount systems are applied for each product group marketed by different marketing firms belonging to the same group rather than a single discount system for sale of all products marketed by these firms. Then, it states that exclusionary effect of the conduct is weakened due to difficulty in transferring market power from one market into another one, i.e. so called leveraging effect. On the other hand, the Competition Board decision says that Ülker is

⁴ *Ülker* (2.6.2005; 05-38/487-116).

offering standard discounts to all product groups including those over which Ülker has market power and moreover buyers do not feel obliged to sell Ülker products. As a result, the Competition Board states that such activities can not be regarded as abuse of dominant position.

Firstly, the decision defines, within the context of the case in question, target discounts as discounts granted whenever sales target determined for a certain period is reached. Target discounts contain separate rates for each level determined according to the quantity purchased instead of a single rate. Regarding target discounts with increasing rates, the purchaser is entitled to receive higher discounts if he purchases at quantities corresponding to a higher level. Such discounts may indirectly be equivalent of non-compete clauses if the contract between the CSS and the dominant undertaking lacks an overt non-compete clause.

Ülker decision admits that discounts based on efficiency gains are acceptable from competition law perspective. However, loyalty discounts as incentives to increase loyalty of the buyer may be considered abuse.

According to the decision, loyalty discounts are designed by the dominant undertakings independent of products purchased and in a way to make the buyer buy as many his requirements as possible from them and to prevent the buyer from purchasing from rival undertakings. In this sense, whether there is a single fixed discount in return for buyer's purchase of all of his requirements from the supplier or there are increasing rates depending on the size of the requirements satisfied from the supplier is irrelevant in deciding the existence of loyalty discounts.

In this context, the decision mentions that if the discount with increasing rates depending on the percentage of requirements of the buyer independent of the quantity purchased results in purchase by the buyer of all or a significant amount of his requirements from the dominant supplier in order to get more discounts, then it will be regarded as loyalty discount in terms of its effect. Secondly, if the discount is not based on a certain percentage of the requirements of the buyer, but based on quantity purchased and implemented in increasing rates, then it is possible that the dominant undertaking can predict buyer's requirements beforehand and adjust the upper limit of the discount according to buyer's requirements. In this context, although the discount would seem to be dependent on the quantity purchased, it will be regarded as loyalty discount as it is designed to capture all of buyer's requirements.

In *Ülker* case, discount is granted at fixed rates for all the CSS in question rather than separate discount systems structured corresponding to requirements of each CSS concerned. Therefore, at first sight it is decided that the discount system is not designed to make the buyer purchase a significant part of its requirements from Ülker, the dominant undertaking, and as a result there is no abuse.

One other aspect of Ülker's distribution system is the fact that Ülker has five marketing firms, each distributing different fast-moving consumer products. However, as CSS are granted separate discounts by separate marketing firms in contrast to a single discount based on sales of all Ülker products, it is regarded that exclusionary effect caused by Ülker's wide product portfolio is weakened. For instance, one of Ülker's marketing firms, namely Atlas, distributes products such as biscuits and chocolates for which Ülker holds dominant position in the market. Regarding other products distributed by Ülker's remaining four marketing firms; Ülker does not have a powerful position. As a result, there is no leverage effect meaning transfer of market power into another market because there are separate discount systems. In order that market power of Atlas had been transferred to other product groups distributed by the remaining four marketing firms, it is required that Ülker would have adopted a single discount system.

Although actual effects of the discount system applied by the dominant undertaking have not been to prevent new entry or complicate activities of the existing competitors, the Competition Board also takes into account the potential impacts of the distribution system including its discount scheme. It is observed

that the share of contracts concluded with CSS in retail distribution system and therefore affected part of the market is minimal. On the other hand, significant part of the remaining market is composed of shops that are the traditional channels of distribution. The Competition Board considers that in case Ülker extended the system of such contracts to cover these traditional channels of distribution or establishes a similar system for them, then potential effects of these contracts could arise in a significant part of the market. By taking into account the existence of such potential effects restricting competition, the Competition Board has decided that the relevant technical department should monitor the market. This assessment shows that the follow-up procedure aims to prevent the transfer of potential effects into actual effects that could infringe competition in the market.

In a recent Competition Board decision namely *Amadeus*⁵, Amadeus is the distributor of the ‘computerized reservation systems services’ in the travel services market. This market is an oligopoly market and there is high dependency to Amadeus services in the market since Amadeus is the first player that entered into the market. Amadeus concludes agreements with its agents including exclusivity clauses entailing provisions on not to provide discounts to agents in case agents would use rival systems. However, those agreements form only a small portion of the market (signed with only 5 agents out of more than 500 agents) and the agents accept those conditions willingly. Furthermore, the decision states that Amadeus is not complicating or intending to complicate the activities of its competitors in the market. In addition, there is no discrimination with respect to other existing agents of Amadeus. As a result, the Competition Board decision states that there is no need to initiate an investigation against the discount system provided by Amadeus, the dominant firm, to its five agents in return for exclusive agreements as they only form a small portion of the market based on the agents’ consent. Nevertheless, the Competition Board decision further states that in terms of potential competition limited harm may occur in the competitive structure of the market and thus the agreements shall be terminated.

3. Conclusion

The Competition Act does not have specific provisions for discounts, target discounts or loyalty discounts. Yet they are examined in Competition Board decisions in a detailed way especially when they have anti-competitive effects on the market such as foreclosure or exclusion. Those practices are evaluated especially in case the undertaking is dominant in at least one market. The Competition Board takes into consideration effects based approach in dealing with discounts (*Frito Lay, Microsoft Turkey and Turkuaz* decisions). Moreover, the Competition Board tries to avoid turning of potential effects into actual ones (*Ülker* decision) while carrying out its analysis with respect to practices including various discount systems. Similarly, in its *Amadeus* decision, the Competition Board stresses the potential effects of the discount systems rather than only focusing on their current actual effects. Although the Competition Board tries to analyse the discount issue on a case by case basis, there is still room for improvement to have an economic approach regarding discounts, loyalty discounts and single product loyalty discounts.

⁵ *Amadeus* (3.1.2008; 08-01/6-5).

UNITED KINGDOM

1. Introduction

The OFT enforces no statutory provisions explicitly dealing with tying, bundling, or loyalty rebates ("conditional discounts"), does not have any current guidelines on the matter, and has not made any competition law infringement findings.

Therefore, this paper discusses the OFT's approach to tying, bundling, and loyalty rebates in the context of a non-infringement decision¹, cases closed on grounds of administrative priority², published discussion papers³, and prioritisation criteria⁴.

2. Similarities between tying, bundling, and loyalty discounts

In economic terms, bundled discounts and single product loyalty discounts work in similar ways. Consumers who already wish to buy from a given supplier are offered a reduced price for an additional purchase – whether this is of a different product as in a mixed bundled discount, or more of the same product as in a single product loyalty discount.⁵ In some cases this reduced price is 'rolled-back' to cover past purchases, in effect making the price of the additional purchase negative.

Since the OFT, along with DGCOMP and other competition authorities, advocates increased use of economic analysis when determining whether discounts are anticompetitive, we welcome the opportunity to discuss loyalty rebates, and tying and bundling, in the same forum. We consider that there are strong arguments for adopting a unified approach to their assessment if possible. For the remainder of this note, we use the term 'conditional discounts' to collectively describe tying, bundling, and loyalty rebates.

¹ *BSkyB*. Case no CA98/20/2002.
http://www.of.gov.uk/advice_and_resources/resource_base/ca98/decisions/bskyb2.

² *British Airways corporate deals*.
http://www.of.gov.uk/advice_and_resources/resource_base/ca98/closure/British-Airways2.

³ *Selective price cuts and fidelity rebates: Economic discussion paper July 2005*. OFT804.
http://www.of.gov.uk/shared_of/reports/comp_policy/oft804.pdf.

⁴ *2006 Prioritisation Criteria for competition enforcement*. <http://www.of.gov.uk/news/press/2006/146-06>.
2007 Draft Prioritisation Principles for all market interventions.
http://www.of.gov.uk/shared_of/consultations/oft953con.pdf.

⁵ However the literature also discussed a further possibility whereby a “ firm with market power in M can engage in foreclosure. . . : The monopolist offers to lower the price of the monopoly good from m to m – e, provided that the customer agrees to buy all of its demand for the C good from the firm at a slightly inflated price of c + d. The original price of m remains available. . . . Provided that the price increase on C is relatively small, most consumers will accept this offer as they save more on M than they lose on C. . . . [Nalebuff “Tied and True Exclusion: Comment on Jean Tirole’s “The Analysis of Tying Cases: A Primer”, *Competition Policy International* Spring 2005, Vol. 1, No. 1, page 46.

3. Against a *per se* approach

Conditional discounts can have strong pro-competitive effects by allowing suppliers to price-discriminate and increase output, benefiting consumers. Evidence for this includes the prevalence of conditional discounts amongst smaller firms with limited market power and no ability to foreclose, such as loyalty cards at coffee shops or free bread served with meals at a restaurant.

A “rebates based” form of price discrimination can be particularly helpful in the presence of asymmetric information: sellers offer a menu of pricing options to consumers who then select the most appropriate one for themselves.

Price reductions implemented through discounts may break collusive equilibria and benefit consumers since firms may find it easier to implement than a linear reduction of prices, because such reduction would be more transparent and might be readily replicated by rivals.

In markets with very high fixed costs, loyalty discounts contribute to reducing per unit costs by increasing total sales, and contribute to covering the fixed costs, thus increasing the incentives of firms to invest and innovate. Where there are high fixed costs per customer, loyalty rebates can more closely align cost and price structures, increasing allocative efficiency by reducing double marginalization.

When rebates are implemented by an upstream producer to a downstream retailer they can help eliminate negative externalities among individual retailers. These are present when the services, for example advertising, provided by one retailer are not fully appropriable. This allows free riding by other retailers and will lead to underprovisioning of these quality enhancing services, which in turn will lead to lower demand and to lower manufacturer’s profits. Since rebates create nonlinear prices this can be designed as to induce a price floor that eliminates undercutting by the free riding retailers, restoring appropriability of the quality efforts.

Tying can also bring efficiency gains in production, such as replacing expensive forms of metering. For example the case in which a firm would like to charge a customer a 'pay per use' fee for every photocopy, but instead charges an inflated price for a tied product – such as ink – which is correlated to usage and thus saves on direct metering costs.

Tying and bundling can also be used for efficient price discrimination to reduce consumers’ heterogeneity. A typical example is provided by the pricing of bundled softwares at less than the sum of the individual prices. This allows capture of demand for “generalist” consumers that are willing to pay the price for the bundle but not the higher price for the separate components. Moreover it is known that in industries with complementary products, joint production reduces double marginalization problems since it allows the internalisation of positive externalities due to complementarity.

In highly dynamic industries producing integrated goods, rebates in the form of tying and bundling can be efficient since the cost of developing products that integrate with each other often grows with the number of “unbundled” versions available. As a result, innovation may be artificially stifled and the competitive process unjustifiably thwarted by too heavy handed an approach to conditional rebates.⁶

⁶ We note here a play-off between the benefits of innovation by competitors from requiring greater openness and integration between products, and the increase in fixed costs of providing that interoperability. We suggest detailed case specific analysis is required to judge the impact on effective competition of tying products, with the key element likely being the contestability of the products in the bundle.

Against these, foreclosure - the use of discounts to prevent other firms competing in the market – is the main anticompetitive object of conditional discounts, and a number of conditions need to be met in order for a foreclosing strategy to be either profitable or possible.

As such, the OFT strongly opposes any per se rule against either bundled discounts or single product loyalty discounts.

4. Four steps of an economic approach

The OFT takes the view that in bringing an abuse of dominance case against conditional discounts, the key thing is to set out a rounded, compelling and well-evidence story, which describes how:

- the dominant firm has the ability to foreclose
- the dominant firm has the incentive to foreclose
- the discounts have a likely substantial impact on effective competition, and
- there are no countervailing efficiency benefits that outweigh the anti-competitive effect.

5. The ability and incentive to foreclose

Where firms are able to compete across all of the sales made by a rival firm to each customer, then there can be no problems with either firm engaging in conditional discounts. Each firm can simply price on a similar basis to the other firm and win sales. Conditional discounts only have a foreclosing effect where customers have a very strong preference for one firm's products for some, but not all, of their purchases. These purchases, which are essentially pledged to one firm, are commonly described as the “assured base” of sales.

By offering conditional discounts on purchases greater than the assured base, the firm can reduce the “effective price” that customers pay for the non-assured segment of their demand. Absent the discount the consumer may have simply not purchased beyond the assured amount, or they may have purchased from an alternative supplier. If the effective price in the latter “contestable” segment of their purchases is too low, it can make it impossible for competitors to win these contestable sales profitably, and thus competition is foreclosed.⁷

In effect, conditional discounts may allow firms to predate in the contestable segment of demand without sacrificing profits in their assured base. Further, and perhaps more importantly, by foreclosing competition in the contestable segment of demand, conditional discounts can help maintain market power over the assured segment since rivals often need to obtain a foothold in the contestable segment in order to have a chance of competing across the whole market. This is particularly likely in the presence of economies of scale, or when firms need to learn by doing.

This suggests two tests such that if either of them is met conditional discounts should not be treated differently from any other prices:

⁷ We note that list prices may be lower in the absence of conditional discounts, though actual paid prices may be higher. We also note that if conditional discounts are used to drive out current competitors, they may lead to higher paid prices in the medium term.

- Where competitors are able to compete across all of the sales made by a firm to a customer, then there can be no difficulty from that firm offering conditional discounts. Competitors can simply price on a similar basis to the rebating firm, and win sales.⁸
- If competitors can not compete across all of the sales made by a firm to a customer, then so long as competitors have a similar quantity of assured sales to the firm offering conditional discounts, the competition between the firms is symmetric, and in the case of loyalty rebates we should not be concerned that any firm has the ability to foreclose another since all firms appear to be able to achieve a minimum efficient scale.

If neither of the above conditions are met, it is necessary to determine if the conditional discount has a foreclosing effect. Due to the many pro-competitive possibilities of conditional discounts we believe an analysis of incentive is also required, and therefore at least a theoretical analysis of possible recoupment.

6. A likely substantial impact on effective competition

When assessing the likely anti-competitive effect of conditional discounts the OFT strongly supports the use, where possible, of an empirical assessment involving an examination of the “effective price charged for contestable sales”, and comparing it to an appropriate cost benchmark.

We do not advocate a mechanistic approach, but suggest that where the effective price for contestable sales is less than the cost benchmark, a presumption of effect could be found. Where it is not, we suggest a presumption of no effect.

Any such test represents an important step forward. In a number of past cases, by contrast, great emphasis was placed on the marginal price paid for a particular single unit of a product, ignoring the fact that in markets with conditional discounts it is likely that firms will be competing for more than just single units of demand. A presumption of anticompetitive harm shouldn't be maintained even when the marginal price of some units is negative, which is common when a discount is granted on all purchases once a particular target is reached.

The CFI's judgement in *Michelin II* provides an interesting case of a “form based” approach to these issues⁹. It considered a “sliding scale rollback” rebates policy as a per se abuse if implemented by a dominant firm, which Michelin was deemed to be. The policy worked by paying a rebate on all previously acquired units, thus decreasing total expenditure whenever a target is reached. When expenditure drops, and this happens at every target reached on the sliding scale, there is an implied negative marginal price on some of the units preceding the drop. Since pricing below average variable cost is presumed unlawful, under a simple mechanistic per se rule the rebates would be illegal and little further analysis would be necessary. However, a negative marginal price does not necessarily imply a profit loss since the new average discounted unit price can be lower than the previous one but still higher than the marginal costs. In effect, the aim of the target may be to induce the buyer to purchase a certain quantity of the good, with the very low effective marginal prices being a byproduct.

The main question then becomes whether it is anticompetitive to induce the buyer to reach the target granting the rebate.

⁸ We note that there could still be standard predation where average prices overall are less than an appropriate cost benchmark.

⁹ COMP/E-2/36.041/PO-Michelin OJ [2002] L 143/1, CFI Case T-203/01.

We welcome the approach set out in the DGComp staff discussion paper as one version of an "effective price for contestable sales" test. We also welcome the suggestion that an abuse will only be found if the "incidence" rate of a conditional rebate is large enough to create a distortionary effect.

Whilst the DGComp paper may express the approach in a somewhat over-complicated way, it is important to recognise that applying such a test is very difficult, and may not always be possible.

There are essentially two types of difficulties: conceptual and practical.

6.1 Conceptual difficulties

The key conceptual question is what the right cost measure should be. In particular, whether it should be Average Avoidable cost (AAC) or Average Total Cost (ATC). The pros and cons of using either measure in predation cases are relatively well rehearsed, and we do not discuss them here.

The Commission suggests a similar test for abusive prices in Tying and Bundling cases as used in *AKZO* in predation: pricing less than AAC *or* pricing less than ATC with evidence of intent. The Commission suggests a more onerous test to determine whether Loyalty Rebates are abusive by dropping the requirement of evidence of intent from the ATC test.

Arguably this implies a presumption - that we find hard to accept - that loyalty rebates imply intent by their nature. We would suggest a consistent and symmetric cost measure when testing for abuse across predation, tying and bundling, and loyalty rebates. Any difference in their likely harm should be reflected in the number of successful cases taken, not the evidentiary standard required to take them.

Other important unresolved conceptual difficulties that we do not discuss further include:

- How long a time-period to use when defining contestable and assured segments of the market;
- How to analyse multiple contracts covering overlapping bundles of goods and time periods, which can both make it harder for competitors to enter, but also substantially increase the complexity of estimating costs and prices;
- Whether the possibility of competitor firms entering into cross-selling agreements should be taken into account in any analysis of what segments of the market are potentially contestable, and any associated complications with Article 81.¹⁰

6.2 Practical difficulties 1: Incremental price doesn't equal incremental revenue and BSkYB

In 2003 the OFT published a non-infringement decision containing a full analysis of the bundling discounts of premium movie and sports channels by *BSkyB*.¹¹ In particular, the OFT examined whether the

¹⁰ By working together firms may be able to compete across the whole range of sales offered by a firm with an otherwise assured base, thus satisfying the first test outlined in the previous section. It is a good general principle that competition law should not intervene where competitors can overcome any problem themselves, by simply altering their behaviour – in this case by working together. On the other hand, there may be other obstacles to such joint working that should also be taken into account in assessing whether a given behaviour on the part of a dominant firm is in practice likely to harm competition.

¹¹ Note that this decision was taken prior to the 2003 Modernisation Regulation, and applied UK competition law at the time, rather than EC law.

bundling of BSkyB's premium sports and film channels was preventing competition into either the premium sports channel or premium film channel market.

The OFT first examined the incremental prices of each additional channel under BSkyB's bundling scheme, and compared these to the marginal costs of providing an additional channel to the customer. In most cases, the incremental price lay above the incremental marginal cost.

BSkyB argued that below marginal cost pricing on incremental channels, where it exists, could be profit maximising by encouraging customers to enter the market who would not have bought any channels at their stand-alone price, but would buy a combination at the discounted combined price. In effect, BSkyB argued that the correct test is whether the incremental revenue to a firm from a conditional rebate is greater than incremental cost, rather than just incremental price, since focussing on incremental price ignores the market growing effect of conditional rebates.

In its decision the OFT agrees with the principle that conditional rebates can grow the market, but argued that it "would need to be demonstrated, not just hypothesised, to rebut a presumption of abuse." That is, in the absence of being able to determine whether the effective price is less than cost on contestable sales, a presumption of abuse can be formed if incremental price is less than cost, and no evidence of market-growing can be provided.

The OFT based its final conclusion of non-infringement on evidence that new firms had been able to enter the relevant market in the relevant time period, and appeared to be growing and stable.

6.3 Practical difficulties 2: Defining the "assured" and "contestable" segments

While sound in theory, perhaps the most difficult aspect of applying the "effective price charged for contestable sales" test is assessing what proportion of a customer's purchases are in practice "assured", as opposed to "contestable".

This can vary across customers, time, and on which competitors, or groups of competitors, one considers. It may be appropriate to carry out sensitivity analysis, which looks at whether the finding of anti-competitive effect would hold true under a variety of realistic assumptions.

The OFT faced such complexities when examining the loyalty rebates offered by *British Airways* to its corporate deals customers, though due to the nature of the industry it was probably easier to identify than it would have been in many other markets.

Each customer had a different contract, and within each contract the deals were complicated and covered multiple routes. To have carried out a complete analysis would have involved a substantial amount of data and resource, and even then would have involved strong assumptions caused principally by the artificially binary nature of the distinction - in reality, there is a continuum of contestability amongst customers and goods.

In practice the OFT took the view that there was a lack of evidence indicating that BA's corporate deals were likely to have had a substantial foreclosing effect and, in terms of our prioritisation criteria, there was therefore a lack of consumer benefit in relation to the resources required in taking this case

forward.¹² As regards any other criteria, the OFT did not identify anything to suggest this investigation should receive administrative priority.

The OFT closed an investigation into the growth rebates of *Walkers Snacks Limited's* on similar grounds.¹³

It is interesting to note that the OFT has closed down a number of conditional discounts cases over the last 18 months on similar grounds. It is possible that the OFT could have pursued infringement decisions in these cases, but the OFT did not consider them an appropriate use of resources given the limited evidence of consumer detriment, and thus dropped them on grounds of administrative priority.

7. Efficiency benefits

The OFT suggests that a standard approach to efficiency benefits should be adopted, with the parties involved in the alleged abuse responsible for demonstrating that:

- The scale of efficiency benefits to consumers;
- The alleged abusive conduct is indispensable to achieving these efficiencies;
- The alleged abuse does not eliminate competition.

The third requirement is particularly important in the case of conditional rebates due to their potential predatory purpose.

8. Conclusion

The OFT believes that there are many pro-competitive uses of conditional discounts, and strongly opposes any *per se* rule of illegality. The OFT supports the use of an "effective price charged for contestable sales" test as part of an economic approach to tying, bundling, and loyalty rebates. The OFT suggests that a consistent cost test should be applied across predation, tying, bundling, and loyalty rebates and that setting different evidentiary standards for essentially similar abuses is inadvisable.

The OFT recognises the substantial practical difficulties in applying such a test, and has used its ability to prioritise cases to close down a number of investigations into conditional discounts on the basis that the resources they require are not matched by the likelihood of consumer harm. The OFT considers that the greatest harm comes when entry is completely foreclosed, or competitors are driven out of the market. Where the OFT has made a decision in an investigation it has found no infringement on the bases that firms had successfully entered the market during the period of alleged abuse.

The OFT remains open to taking action against tying, bundling, and loyalty rebates where a strong case can be made that competition and consumers have been harmed.

¹² *British Airways* was closed under the OFT's 2006 Competition Act prioritisation criteria which contains 6 steps including "estimate of consumer detriment" at step 1 and "resources required" at step 5. The other steps cover deterrence, recidivism and other aggravating or mitigating factors, strategic considerations such as precedent, and the chance of success. The OFT has just finished consulting on updated prioritisation principles that will apply across all of our market interventions.

¹³ http://www.offt.gov.uk/advice_and_resources/resource_base/ca98/closure/Walkers.

UNITED STATES

1. Introduction

This paper considers two forms of discounting that are ubiquitous throughout most developed economies - bundled discounting and single-product loyalty discounts¹. Generally they are efficient means of competing that do not raise antitrust concerns even if they may harm individual competitors at times. To the contrary, discounting of any type usually reflects the type of robust competition that the antitrust laws aim to foster. On the other hand, under certain assumptions, such discounting practices, when engaged in by a monopolist, may harm competition².

This paper considers the competitive implications of these practices in the context of United States case law and commentary. Because bundled pricing and single-product loyalty discounts involve related but somewhat different issues, they will be treated separately in the discussion that follows.

2. General legal framework regarding unilateral conduct

The United States does not have statutory provisions expressly dealing with bundled discounting and single-product loyalty discounting, as those terms have been defined for this Roundtable. The main statutory provision that addresses unilateral conduct, section 2 of the Sherman Act, does so generally, prohibiting monopolization and attempts to monopolize³.

Section 2 does not condemn monopoly itself; nor does it prohibit a firm from charging monopoly prices⁴. Indeed, the desire to reap the benefits of a lawfully obtained, dominant position induces firms to invest, innovate, and vigorously compete. That dynamic process is good for consumer welfare. Section 2 does bar anticompetitive *conduct* that improperly facilitates the acquisition or maintenance of monopoly power, or the dangerous probability of achieving monopoly power.

A basic problem, however, is this: it is often difficult to differentiate between “good” conduct, which constitutes aggressive competition and is to be encouraged, and “bad” conduct, which improperly facilitates the acquisition or maintenance of monopoly power and is to be condemned. As one leading antitrust authority has observed,

Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is

¹ Bundled discounting refers to the practice of offering discounts or rebates contingent upon a buyer’s purchase of two or more different products. Single-product loyalty discounting refers to the practice of offering discounts or rebates on all units purchased of a single product conditioned on the level (or share) of purchases, i.e., the discounts or rebates apply to all units of the customer’s purchases of the product rather than just the units beyond the level (or share) of purchases needed to obtain them.

² See, e.g., Barry Nalebuff, *Exclusionary Bundling*, 50 Antitrust Bull. 321 (2005).

³ 15 U.S.C. § 2 (2000).

⁴ See, e.g., *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

*deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike*⁵.

As the recently-completed Antitrust Modernization Commission (AMC)⁶ recommended, “[S]tandards for applying Section 2 of the Sherman Act’s broad proscription against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize overdeterrence and underdeterrence, both of which impair consumer welfare.”⁷

3. Bundled and single-product loyalty discounts and rebates

As a leading antitrust treatise has stated, “Discounting is presumptively precompetitive and should be condemned only in the presence of significant market power and proven anticompetitive effects.”⁸ As with section 2 in general, the challenge in this area is thus to determine when bundled and single-product loyalty discounts and rebates are anticompetitive rather than beneficial to competition.

3.1 Bundled Discounting

The practice of sellers offering discounts contingent upon a buyer’s purchase of two or more different products is very common and generally benefits consumers. For example, restaurants often offer diners a choice between a la carte items and complete meals priced at a discount compared to a la carte. Or a telecom company may offer a package of multiple services at a reduced price. Generally, such package discounting is viewed as an efficient means of competing that raises no antitrust concerns. Bundled discounting can allow businesses to achieve economies of scope, save packaging costs, reduce transaction costs, induce existing customers to try new product or service offerings, and give retailers incentives to promote particular products and services. The benefits of bundled discounting, and the frequency of its use by firms with no market power, lead some commentators to conclude that similar consumer benefits are likely to result from bundled discounting when employed by firms with significant market power.

Commentators also point to strategic but non-exclusionary purposes that may underlie bundled discounting. In particular, firms may use bundled discounting to price discriminate among consumers who value goods differently, a practice that can increase output and benefit consumer welfare:

*In brief, bundling may take advantage of the fact that different customers have different demand elasticities for individual goods. By bundling them and selling them at a single bundled price the seller can capture larger amounts of consumers’ surplus from customers. In the process, output can go up as well, and production and distribution costs can decline*⁹.

⁵ Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 *Colum. Bus. L. Rev.* 345, 345.

⁶ The AMC was established by Congress “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues” and to prepare and submit to Congress and the President a report containing “a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate.” Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11053, 11058, 116 Stat. 1856, *amended* by Antitrust Modernization Commission Extension Act of 2007, Pub. L. No. 110-6, 121 Stat. 61.

⁷ Antitrust Modernization Comm’n, *Report and Recommendations* 88 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

⁸ 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 749b, at 245 (Supp. 2007) (referencing *id.* §§ 739-40 (2d ed. 2002)).

⁹ *Id.* § 749b2, at 263-64.

Where a seller has market power in at least one of the products offered, however, bundled discounts (or bundled rebates) may, under certain circumstances, generate anticompetitive effects. Distinguishing anticompetitive from procompetitive bundled discounts, however, has proven difficult. Indeed, there is limited agreement on the theory of potential harm. Is the harm essentially that of predatory pricing? If so, then as long as the post-discount price of the bundle exceeds its cost, there would be no harm. But others have suggested that consumer welfare may be harmed even when the bundled price is not predatory. As the Agencies recently observed,

*A bundled rebate or discount can—under certain theoretical assumptions—exclude an equally efficient competitor, if the competitor competes with respect to but one component of the bundle and cannot profitably match the discount aggregated over the other products, even if the post-discount prices for both the bundle as a whole and each of its components are above cost.*¹⁰

Consequently, some have suggested that the effects of bundled discounting, and thus the exclusionary theory, may more closely resemble tying, and should be analyzed accordingly.

Although there is general agreement that bundled discounting by a monopolist *can* be anticompetitive, there is less consensus on *how likely* that is. The Supreme Court has not yet rendered a bundled-discounting decision, and challenges to this conduct have all been private treble damage cases. Courts and commentators have been grappling with the question of how a court—and even more importantly, a business deciding whether to offer bundled discounting—should go about determining whether a particular bundled discount is anticompetitive¹¹. There are only a few federal court decisions analyzing bundled discounts under section 2, and the standards they have used are not entirely consistent.

Any such standards need to address the core elements of any section 2 violation: whether the conduct actually harmed competition or is likely to harm competition and not merely competitors; and whether the conduct is justified as competition on the merits, or by some other valid business rationale that is not outweighed disproportionately by harm to competition. In addition, standards need to be not only judicially administrable but also readily applicable by businesses based on information available to them at the time they are making pricing decisions.

3.1.1 *Cost-based Standards*

Most, but not all, of the federal court decisions, as well as the recent Antitrust Modernization Commission, have suggested that some type of objective cost-based standard be applied in evaluating bundled discounts. An issue arises in applying a cost-based test as to which prices and costs need to be compared.

¹⁰ Brief for the United States at Amicus Curiae at 13, *3M v. LePage's Inc.*, 542 U.S. 953 (2004) (No. 02-1865), *denying cert. to* 324 F.3d 141 (3d Cir. 2003).

¹¹ See, e.g., Areeda & Hovenkamp, *supra* note 8, § 749b2; Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 Emory L.J. 423 (2006); Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 Minn. L. Rev 1688 (2005); Patrick Greenlee et al., *An Antitrust Analysis of Bundled Loyalty Discounts* (Econ. Analysis Group Discussion Paper No. 04-13, 2006); Timothy J. Muris, *Antitrust Law & Economics: Exclusionary Behavior and Bundled Discounts* (Nov. 29, 2006); Barry Nalebuff, *Bundling As a Way to Leverage Monopoly* 24 (Yale Sch. of Mgmt., Working Paper No. ES-36, 2004).

Total Bundle Predation-Based Test

Some have argued that the normal rule for predatory pricing should be applied with reference to the defendant's price and cost for the entire bundle¹². In the United States, the Supreme Court set forth the rule for predatory pricing of a single product in its *Brooke Group* decision¹³. Under this standard, the defendant could not violate section 2 if the price of the bundle of products exceeds the appropriate measure of the defendant's cost for the entire bundle. This is the least restrictive of the approaches commonly discussed - the one that would allow firms the greatest latitude in pricing bundles. The main virtues of this test are its simplicity and predictability, and the unlikelihood that it will lead to deterring precompetitive behavior; proponents of this test see these virtues as outweighing the risk of possibly missing some anticompetitive behavior.

Some have suggested applying such a total bundle predation-based test only in instances in which it is likely that other significant rivals would offer a comparable bundle¹⁴. Where such bundle-to-bundle competition is possible - whether because an individual competitor itself can provide all the products in the bundle, multiple competitors can team together to provide their own bundle, or sophisticated customers could assemble their own bundles - equally efficient competitors (alone or together) would be able to match an above-cost bundled price.

“Equally Efficient Competitor” and “Discount Allocation” Concepts

A number of courts and commentators have sought to develop legal standards that reflect the possibility that a monopolist's bundled discounting could pass a predation-based test applied to the entire bundle and still exclude an equally efficient producer of one or more products in the bundle.

For example, in one of the earliest cases involving bundled discounts, *SmithKline Corp. v. Eli Lilly & Co.*¹⁵, the court appeared to focus on whether Lilly's use of bundled rebates could exclude an equally efficient competitor. Prior to SmithKline's entry into the market, Lilly had used a volume rebate plan to sell four patented antibiotics known as cephalosporins to nonprofit hospitals. When SmithKline licensed Ancef, a fifth cephalosporin, from a foreign firm and sold it in competition with Lilly's market-dominating Keflin, Lilly responded by licensing the same drug and selling it as Kefzol. Lilly then modified its rebate plan by simultaneously reducing the rebate offered by roughly three percent and adding a “bonus dividend” of three percent provided that the hospital bought specified minimum quantities of *three* cephalosporins. Lilly expected that hospitals would meet the target on its *two* most dominant cephalosporins, and that hospitals would have to purchase the minimum quantities specified for Kefzol in order to qualify for the bonus dividend. SmithKline would have to offer a rebate of more than twenty percent on its one product in order to match the “inducement” offered by Lilly's bundled rebate. Even if SmithKline were able to lower its costs to Lilly's level, SmithKline's drug would never be sufficiently profitable to justify remaining in the market. Thus, the court concluded that Lilly violated section 2 when it used its monopoly power in two products to exclude the “slightly less efficient” SmithKline from the market for the competitive product because the bundled rebates would have excluded SmithKline even if it were an equally efficient producer. Neither the district court nor the appellate court appeared to consider whether Lilly sold each of its products at a price above its average cost.

¹² See, e.g., Muris, *supra* note 11.

¹³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

¹⁴ See Areeda & Hovenkamp, *supra* note 8, § 749b, at 245-46, 258-59.

¹⁵ 427 F. Supp. 1089 (E.D. Pa. 1976), *aff'd*, 575 F.2d 1056 (3d Cir. 1978).

About twenty years after *SmithKline*, a different federal court analyzed a somewhat similar bundled-pricing plan by also applying the equally efficient competitor concept, but found that it did not violate section 2. In *Ortho Diagnostic Systems*¹⁶, blood donor centers (BDCs) required five “assays” used to test blood for various viruses, and only defendant Abbott made and sold all five. It had seventy to ninety percent of sales of four of them. The Council of Community Blood Bank Centers solicited bids on a contract to supply assays to member BDCs, asking for different pricing schedules depending on whether the BDC bought all the assays from the chosen seller. Abbott won the contract with pricing schedules that gave significant discounts on each of the assays for buying all of them from Abbott. Particularly because, as a practical matter, BDCs had to buy at least two of the assays from Abbott, the discount plan created a very significant incentive to buy all five from Abbott and none from Ortho.

The court, drawing on *SmithKline*, noted that the key question “is whether a firm that enjoys a monopoly on one or more of a group of complementary products, but which faces competition on others, can price all of its products above average variable cost and yet still drive an equally efficient competitor out of the market.”¹⁷ The court held that “pricing that could drive a more efficient competitor from the marketplace” is the standard “which separates legitimate from illegitimate competition.”¹⁸ Thus, said the court, a plaintiff “must allege and prove either that (a) the monopolist has priced below its average variable cost or (b) the plaintiff is at least as efficient a producer of the competitive product as the defendant, but that the defendant’s pricing makes it unprofitable for the plaintiff to continue to produce” the product¹⁹. Because Ortho did not claim that it could not sell its products at a profit as a result of Abbott’s bundled discounting, the district court found no section 2 violation.

Accordingly, some, including a leading antitrust treatise²⁰ and the most recent circuit court decision on bundled discounting²¹, have suggested a “discount allocation” or “discount attribution” approach, in which all of the discounts offered by the defendant for the bundle should be attributed to the competitive product(s) (i.e., the product(s) for which the defendant does not have market power). The resulting imputed price for the competitive product(s) would then be compared against the defendant’s costs for the product(s)²².

The AMC Test’s Use of a Discount Allocation Safe Harbor

The Antitrust Modernization Commission proposed a three-part test for bundled discounts, requiring a plaintiff in a section 2 case to show:

¹⁶ *Ortho Diagnostic Sys., Inc. v. Abbott Labs.*, 920 F. Supp. 455 (S.D.N.Y. 1996).

¹⁷ *Id.* at 467.

¹⁸ *Id.* at 468 n.16.

¹⁹ *Id.* at 469. While the Ortho decision focuses on whether plaintiff was actually an equally efficient competitor, most other decisions and commentary properly suggest that the focus should instead be on whether a hypothetical equally efficient competitor could meet the defendant’s discount.

²⁰ Areeda & Hovenkamp, *supra* note 8, § 749b2, at 246 (supporting a discount allocation safe harbour in instances in which no significant rivals offer the same package); *cf. id.* at 258-59 (explaining that the package might be offered through implicit or explicit coordination of two or more firms).

²¹ *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

²² *See, e.g., Virgin Atl. Airways Ltd. v. British Airways PLC*, 69 F. Supp. 2d 571 (S.D.N.Y. 1999), *aff’d*, 257 F.3d 256 (2d Cir. 2001) (citing *Ortho* as holding “that there would be an antitrust violation if the competitive product in the bundle were sold for a price below average variable cost after the discounts on the monopoly items in the bundle were subtracted from the price of that competitive product”).

*(1) after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup these short-term losses; and (3) the bundled discount or rebate program has had or is likely to have an adverse effect on competition*²³.

The AMC thus suggests employing a “discount attribution” or “discount allocation” approach, but only as a safe harbor in analyzing bundled discounting by a monopolist and not as the standard for liability.

The principal U.S. court decision addressing this issue since the issuance of the AMC proposal is the Ninth Circuit’s decision in *PeaceHealth*²⁴. The court relied in part on the AMC approach in adopting a discount allocation standard for evaluating bundled discounts. Under that standard,

*the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products. If the resulting price of the competitive product or products is below the defendant’s incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2*²⁵.

The court explained that “this standard makes the defendant’s bundled discounts legal unless the discounts have the potential to exclude a *hypothetical* equally efficient producer of the competitive product.”²⁶

PeaceHealth and McKenzie (the predecessor to Cascade Health Solutions) were competing providers of primary and secondary acute-care hospital services. PeaceHealth also provided tertiary care services in which it had a very high market share (upwards of ninety percent in certain sub-specialities). McKenzie did not provide tertiary care services. McKenzie, which asserted that it could provide primary and secondary care services at a price lower than PeaceHealth’s prices for those services, brought monopolization and attempted monopolization claims against PeaceHealth based on evidence that PeaceHealth offered bundled service packages to some customers (insurance companies), which provided discounts on all services if the customers made PeaceHealth their sole preferred provider for primary, secondary, and tertiary care.

In analyzing PeaceHealth’s bundled offerings, the Ninth Circuit rejected the non-cost-based approach of *LePage’s*²⁷, discussed below, explaining that “a fundamental problem . . . is that it concludes that all bundled discounts offered by a monopolist are anticompetitive with respect to its competitors who do not manufacture an equally diverse product line” and that it fails to consider whether such discounts may be procompetitive²⁸. The Ninth Circuit also noted that the Supreme Court, which in *Brooke Group*²⁹ and

²³ Antitrust Modernization Comm’n, *supra* note 7, at 99.

²⁴ *PeaceHealth*, 515 F.3d 883.

²⁵ *Id.* at 906.

²⁶ *Id.* The Ninth Circuit criticized *Ortho*’s requirement that plaintiff demonstrate *it* is an equally efficient producer of the competitive product and that defendant’s discount would require it to charge a price below its costs to compete. The Ninth Circuit explained that this element of the test would require firms that are considering offering a bundled discount to know their competitors’ costs, information firms likely will not have, and thus the test did not offer adequate guidance to sellers who wish to offer precompetitive bundled discounts.

²⁷ *See id.* at 903.

²⁸ *Id.* at 899.

²⁹ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

*Weyerhaeuser*³⁰ applied a cost-based test to predatory-pricing and predatory-bidding claims, respectively, “forcefully suggested that we should not condemn prices that are above some measure of incremental cost.”³¹

In crafting its cost-based discount allocation standard for evaluating bundled discounts, the Ninth Circuit rejected PeaceHealth’s proposed “aggregate discount” rule, which would have allowed for liability only in those cases in which the discounted price of the *entire bundle* is below defendant’s incremental cost to produce the *entire bundle*. The court reasoned that this test fails to recognize that bundled discounts can serve to exclude an equally efficient competitor that produces fewer products than defendant (even where defendant’s prices are above cost for the entire bundle), because the competitor may not be able to match in one product category the aggregate discount defendant offers across all its product lines.

3.1.2 Non-cost-based standards

The 2003 *LePage’s* decision³² represents the principal departure from using objective, cost-based standards as part of the assessment of the legality of bundled discounts under section 2. In *LePage’s*, a manufacturer of “private label” transparent tape charged that 3M maintained a monopoly in the market for transparent tape through, among other means, a bundled rebate program for large retail chains. That rebate program conditioned certain discounts on retail customers meeting multiple target growth rates for their purchases of 3M products in diverse product lines such as home care products, home improvement products, and stationery products. The rebate program allegedly shifted purchases away from LePage’s private label tape and towards 3M’s branded and private label tape, because, if a customer failed to meet its target for purchases of 3M’s tape, the customer would lose the rebate on multiple products. To defeat this shift, LePage’s alleged, it would have to compensate the purchaser for the loss of rebates across product lines, not just for the loss of tape-specific rebates. The jury found liability for monopoly maintenance after hearing LePage’s evidence that bundled rebates and other conduct forestalled competition to 3M’s high-priced Scotch brand tape from LePage’s private label tape and thereby helped to maintain 3M’s transparent tape monopoly.

The Third Circuit ultimately affirmed the trial court’s judgment in favor of the plaintiff in an en banc decision. Notably, the court did not require LePage’s to prove that either it or a hypothetical equally efficient (as 3M) competitor could not meet the discount without pricing below cost. And once LePage’s showed that 3M’s bundled discount made it difficult for LePage’s to compete, the burden seemingly shifted to 3M to show cost savings approaching the total amount of the discounts.

The Supreme Court denied certiorari. The brief for the United States³³ had urged that certiorari be denied because of deficiencies in the record and to allow further case law development and academic analysis of bundled rebates. It did, however, criticize the Third Circuit’s decision for providing little guidance on how section 2 should be applied to bundled rebates, failing to explain why 3M’s conduct was

³⁰ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

³¹ *PeaceHealth*, 515 F. 3d at 901.

³² *LePage’s Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).

³³ United States, *supra* note 10, at 13.

unlawful, and perhaps encouraging challenges to (and therefore chilling the adoption of) procompetitive bundled rebate programs. Similar criticisms of *LePage's* have been voiced by many others³⁴.

3.1.3 Safe Harbors

As discussed above, the AMC and others have proposed using the discount allocation test not as a standard of liability but rather as a safe harbor. It is important to recognize that use of a safe harbor in antitrust analysis can be counterproductive if businesses or courts improperly assume that failing to come within the safe harbor creates a presumption of anticompetitive conduct. In particular, a monopolist defendant's failing to come within the discount allocation safe harbor should indicate only that an equally efficient single-line competitor would be unable to compete for sales *to customers who buy both the monopoly product and the competitive product* (who are getting the benefit of the discount) - it does not by itself indicate harm to consumers in either market.

3.1.4 Conclusions

The Need for Clear, Administrable Standards

While a monopolist offering bundled discounts or rebates *may*, in certain circumstances, produce anticompetitive effects, pricing that benefits consumers may be inhibited by legal uncertainty. Clear and administrable standards are needed to enable firms to know in advance if bundled discounting that they are considering may subject them to antitrust liability. The development of clear, administrable standards for analyzing bundled discounts would be furthered by use of an appropriate price-cost safe harbor.

Use of Price-Cost Safe Harbors

The particular price-cost safe harbor that should be used depends at least in part on whether bundle-to-bundle competition is reasonably possible. If so, potential competitive harm mirrors predatory pricing, and a price-cost safe harbor could look to whether the discounted price of the bundle exceeds an appropriate measure of cost of the products constituting the bundle.

Where bundle-to-bundle competition is not reasonably possible, potential competitive harm more closely resembles the harm that can arise from tying. Such harm *may* exist in instances in which the bundled pricing would cause customers to take the monopolist's bundle instead of taking the competitive product from an equally efficient competitor. The "discount allocation" safe harbor suggested by the AMC and Professor Hovenkamp is a screen for whether such consequences are possible. The discount allocation safe harbor compares an appropriate measure of the defendant's cost for the competitive product (or products) in a bundle to the imputed price of that product (or products), which is the price after allocating all discounts and rebates attributable to the entire bundle to the competitive product (or products).

³⁴ See, e.g., Antitrust Modernization Comm'n, *supra* note 7, at 97 (criticizing the *LePage's* decision as "too vague and therefore... likely to chill welfare-enhancing bundled discounts or rebates"); Daniel L. Rubinfeld, *3M's Bundled Rebates: An Economic Perspective*, 72 U. Chi. L. Rev. 243, 250-51 (2005) (noting a "striking" lack of clarity in the *LePage's* opinion and that in the absence of clear guidance "legitimate marketing practices may be discouraged"); see also *PeaceHealth*, 515 F.3d 883, 899-903 (rejecting *LePage's* because it seemingly would find all bundled discounts by a monopolist to be anticompetitive with respect to rivals who do not manufacture an equally diverse array of products and it fails to recognize that such discounts may be precompetitive, and further concluding that *LePage's* is inconsistent with the Supreme Court's *Brooke Group* and *Weyerhaeuser* decisions, which applied a cost-based test to predatory-pricing and predatory-bidding claims, respectively).

If the conduct falls outside a safe harbor, further analysis is required. Failure to come within the safe harbor should not create a presumption of anticompetitive effects. No bundled discounting should be condemned without an adequate showing of actual or probable harm to competition. In this regard, significant considerations include whether the plaintiff can show that rivals have exited or are exiting the market as a result of the challenged discounts. Further, a proven explanation for a bundled discount that does not depend on exclusion of rivals should defeat a section 2 challenge to the bundled discount unless the anticompetitive harms are significantly disproportionate to the benefits flowing from the proven explanation.

3.2 *Single-product loyalty discounts*

Compared to the voluminous legal and economic commentary analyzing bundled discounting (and other unilateral conduct, such as predatory pricing and tying), there has been relatively little commentary regarding single-product loyalty discounting - the practice of offering discounts or rebates on all units purchased of a single product conditioned upon the level (or share) of purchases.

Those who have addressed this subject generally agree that such discounts are most often procompetitive: for example, a manufacturer may use these discounts to induce retailers to provide increased brand support, or such discounts may be a way to compete for the most desirable customers. There is also consensus that, as with standard predatory pricing, these discounts can be anticompetitive where they bring the total price on all units sold to a customer below an appropriate measure of cost and there is the likelihood of recoupment. Some commentators have further posited that single-product loyalty discounts that are above cost when measured against all units sold to a customer can in theory be anticompetitive where a monopolist's customers must carry a certain percentage of the leading firm's products and the discount is structured so as to induce purchasers to buy all or nearly all needs beyond that "uncontestable" percentage from the monopolist³⁵.

Although there is general agreement that a monopolist's above-cost (on all units sold to a customer) single-product loyalty discounts *can*, under certain circumstances, be anticompetitive, there again is no consensus on *how likely* that is. Further, there are questions as to how a court should go about determining whether a particular single-product loyalty discount is anticompetitive and, even more importantly, how a business deciding whether to offer such a discount can know ahead of time whether it will be deemed illegal.

3.2.1 *Court Decisions*

As with bundled discounting, no single-product loyalty discount antitrust case has yet reached the Supreme Court, and the challenges to this conduct have all been private treble damage cases. The three cases that have thus far resulted in appellate decisions illustrate both the importance of factual evidence of an anticompetitive effect (rather than simply of an effect on a competitor) and the substantial judicial concern about deterring beneficial price cuts. These cases seem to accept that such discounting should be judged under some type of price-cost test, even if they do not conclusively establish precisely what that test should be.

³⁵ See, e.g., Willard K. Tom et al., *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 *Antitrust L.J.* 615, 627 (2000) (arguing that discounts can be used to achieve total or partial exclusivity where a "dominant firm is so well established among ultimate consumers that its consumers... have a base, inelastic demand for the firm's products").

The earliest case, *Barry Wright Corp. v. ITT Grinnell Corp.*³⁶, involved the market for “snubbers” used in nuclear power plants. Pacific Scientific had most of the market for snubbers (about 83%) because it was the only acceptable producer of mechanical snubbers for U.S. nuclear plants. Grinnell, which accounted for about half of snubber purchases had been trying to help the plaintiff Barry Wright become an alternative source. Pacific then offered Grinnell a large discount if it would agree to purchase large quantities of snubbers—the specified amounts constituted most, but not all, of Grinnell’s anticipated purchases over a two-year period. Grinnell agreed, and Barry Wright subsequently abandoned its attempt to enter the market and sued, alleging that the discount was unlawful under section 2.

Both the district court and the court of appeals rejected the claim. In the First Circuit opinion, then judge (now U.S. Supreme Court Justice) Breyer explained that under conventional price-cost tests for predatory pricing, Pacific’s discount was not predatory in that the resulting price was above any relevant measure of Pacific’s cost, and that the theoretical possibility that such prices could harm competition did not justify the risk of deterring procompetitive price cutting by entertaining that possibility in litigation. As the court cautioned:

“[U]nlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. . . . [W]e must be concerned lest a rule . . . that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition³⁷.”

In the second of the cases, *Concord Boat Corp. v. Brunswick Corp.*³⁸, several boat builders challenged Brunswick’s discount program on stern drive engines. Brunswick manufactured and sold the engines for recreational boats and had a large market share (about 75%). Beginning in the early 1980s, Brunswick (like its competitors) offered market-share discounts. Boat builders who agreed to buy a certain percentage of their engine requirements from Brunswick for a certain period received a discount off the list price for *all* engines purchased. Because the boat builders’ customers preferred Brunswick engines, the boat builders arguably had to purchase a significant percentage of their engine needs from Brunswick; nevertheless the discounts might well have led them to purchase higher quantities from Brunswick than they otherwise would have. There was, however, evidence that at least two customers who had purchased more than 80% of their engines from Brunswick switched to a competitor for more than 70% of their purchases.

The court of appeals reversed a jury verdict in favor of the plaintiff. While the court did not quite state that the plaintiff’s failure to show that Brunswick’s prices were below cost was determinative, it relied on a strong presumption that prices above cost are lawful. It found nothing to overcome that presumption, particularly since the agreements were not exclusive-dealing agreements (buyers could purchase 40% of requirements from other sellers while still receiving loyalty discounts from Brunswick) and other engine sellers could compete with Brunswick by offering better discounts. While Brunswick offered testimony that the discounts served procompetitive purposes (beyond simply lowering prices) by increasing predictability of demand and thus lowering manufacturing costs, the court of appeals did not rely on this

³⁶ 724 F.2d 227 (1st Cir. 1983).

³⁷ *Id.* at 234.

³⁸ 207 F.3d 1039 (8th Cir. 2000).

evidence, instead stating that “Brunswick’s business justification . . . is that it was trying to sell its product by cutting prices³⁹.”

*Virgin Atlantic Airways Ltd. v. British Airways PLC*⁴⁰ also involved an unsuccessful challenge to a first-dollar discount program. British Airways provided incentive programs that provided travel agencies with commissions, and corporate customers with discounts, for meeting specified thresholds for sales of BA tickets which applied to all sales, not just those beyond the target threshold. Virgin claimed that the result was below-cost pricing on certain transatlantic routes where it and BA competed.

Both the district court and the court of appeals concluded that Virgin failed to show below-cost pricing. Virgin’s expert had assumed that the incentive agreements had generated additional flights to carry increased passenger load, and compared the incremental costs of those flights with the revenues they generated. The courts, however, were not sufficiently persuaded that the assumption reflected reality, and concluded that “the issue of whether British Airways is selling below-cost tickets to the marginal passengers on the five routes at issue in this case is a fact-rooted question as to which Virgin has not submitted direct evidence⁴¹.”

The disposition of the *Virgin Atlantic* case by the U.S. courts stands in marked contrast to that in the EU, where BA’s travel agent discounts were found abusive under Article 82⁴².

An ongoing high-profile challenge to first-dollar rebates is also a major part of the section 2 challenge brought by Advanced Micro Devices (AMD) against Intel in the U.S. as well as a number of other jurisdictions throughout the world.

In its private suit pending in U.S. district court in Delaware, AMD alleges, *inter alia*, that Intel has “imposed on OEMs a system of first-dollar rebates that have the practical and intended effect of creating exclusive or near-exclusive dealing arrangements and artificially foreclosing AMD from competing for a meaningful share of the market.”⁴³ However, the challenge appears not to rest solely on below-cost pricing, since the Complaint goes on to allege that “[e]ven where Intel’s prices are above cost on the incremental volumes and overall despite its retroactive rebate schemes, these rebates enable Intel to lower prices selectively in the contested market segment” and “exacerbate normal impediments to entry and expansion.”⁴⁴

In September 2006, the court dismissed AMD’s claims with respect to foreign customers, finding that those claims failed to satisfy the jurisdictional requirements of the Foreign Trade Antitrust Improvements Act of 1982,⁴⁵ however, AMD’s U.S. claims remain active. The case is reportedly scheduled to go to trial in April 2009.

³⁹ *Id.* at 1062.

⁴⁰ 69 F. Supp. 2d 571 (S.D.N.Y. 1999), *aff’d*, 257 F.3d 256 (2d Cir. 2001).

⁴¹ *Id.* at 580.

⁴² *See* Case Comp/34.780, *Virgin/British Airways*, 2000 O.J. (L30) 1 (14 July 1999); Case T-219/99, *British Airways v. Comm’n*, 2003 E.C.R. II-5917, *appeal denied*, Case C-95/04, 2007 E.C.R. I-2331 (ECJ, 15 Mar. 2007).

⁴³ Complaint para. 59, *Advanced Micro Devices, Inc. v. Intel Corp.*, No. 05-441 (D. Del. June 27, 2005).

⁴⁴ *Id.* paras. 70-71.

⁴⁵ *See In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555 (D. Del. 2006).

3.2.2 *Commentary*

Commentators' analyses of above-cost (on all units sold to a customer) single-product loyalty discounts depend on their view of the likelihood of such discounts having anticompetitive impact and the feasibility of addressing any such impact with an administrable test that does not chill desirable, procompetitive discounting. For example, based on concerns regarding administrability and chilling procompetitive conduct, Professor Hovenkamp would apply "antitrust's ordinary predatory pricing rule" to all single-product loyalty discounts, finding the discount "lawful if the price [on all units sold] after all discounts are taken into account exceeds the defendant's marginal cost or average variable cost."⁴⁶ While acknowledging that such discounting can be viewed as purchasing exclusionary rights, he argues that there are important differences in that traditional exclusive dealing typically involves long-term contracts or offerings in situations in which the buyer can purchase the good from another supplier only by giving up something else, such as its franchise or dealership. In such situations, he suggests, an equally efficient producer of the excluded product cannot win sales simply by offering a lower price. By contrast, the loyalty discount puts the buyer in a different position: when it purchases from a rival, it loses only the discount, and in this situation, "an equally efficient rival should be able to steal the sale as long as the fully discounted price is above cost."⁴⁷

A predatory-pricing approach, though, could be criticized as failing to detect certain instances in which single-product loyalty discounts might result in anticompetitive foreclosure. For example, it has been argued that "market share discounts structured to produce total or partial exclusivity should be judged according to the same economic principles that govern exclusive dealing" and should be condemned under existing case law "if they produce anticompetitive effects without counterbalancing procompetitive effects."⁴⁸ In this view, when customers have a strong initial preference to buy a substantial "uncontested" percentage of a product from a certain firm, an overall above-cost loyalty discount schedule may be established that convinces consumers to buy all their products from that firm, in effect inducing exclusive dealing, with potentially anticompetitive consequences. These analysts conclude that a rule of reason assessment might condemn discounts that effectively lock up such a large portion of available business that competitors cannot achieve substantial scale economies that significantly reduce their marginal costs or have sales volumes sufficient to make investments in quality improvements profitable⁴⁹.

Another commentator acknowledged that non-linear pricing could achieve the same results as exclusive dealing, but recommended that antitrust intervention "be used rarely and apply only to extreme pricing conditions . . . where marginal pricing below marginal cost is unambiguous. . . ."⁵⁰ In his view, "Such nonlinear pricing can reflect real economic savings that are difficult to measure . . . or simply may be ways that firms choose to compete for the most desirable customers."⁵¹

Anticompetitive effects that have been theorized from above-cost (on all units) single-product discounts appear possible only where some significant portion of the market is uncontestable due to factors external to the parties. An approach requiring courts to determine whether a portion of a market is uncontestable and to quantify that portion, as well as to analyze whether a discount deprived plaintiff of

⁴⁶ Areeda & Hovenkamp, *supra* note 8, § 749b, at 245 (referencing *id.* §§ 739-40 (2d ed. 2002)).

⁴⁷ Herbert Hovenkamp, *The Law of Exclusionary Pricing*, Competition Pol'y Int'l, Spring 2006, at 21, 28.

⁴⁸ See Tom et al., *supra* note 35.

⁴⁹ See *id.* at 622-23.

⁵⁰ Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak Are Misguided*, 68 Antitrust L.J. 659, 664 (2001).

⁵¹ *Id.*

efficient scale, would be difficult to administer. More importantly, such an approach would not provide clarity to firms deciding whether to offer such discounts and could chill desirable price competition.

3.2.3 *Conclusions*

A predatory-pricing approach to single-product loyalty discounting has certain advantages, including, in particular, its administrability, and may be the best test to apply in most situations. However, in light of ongoing discussion among commentators and the relatively limited case law on these types of discounts, further assessment of the real-world impact of such discounts is necessary before concluding that standard predatory-pricing analysis is appropriate in all cases.

In any situation in which a foreclosure-based approach is used, plaintiff should be required to demonstrate that the discount forecloses a significant amount of the market and harms competition. Further, as with bundled discounting, plaintiff's (and any other rival's) ability to remain in the market should be a significant factor in assessing competitive effects. In situations where harm to competition is implausible, courts should uphold the discount. Also, as with bundled discounting, when plaintiff demonstrates actual or probable harm to competition, a single-product loyalty discount should be illegal only when the discount produces harms significantly disproportionate to any procompetitive benefits.

4. **Conclusion**

United States law has tended to tread very cautiously in the areas of bundled discounting and single-product loyalty discounts. The concern is that the cost of uncertainty in these areas may harm consumers by deterring firms from engaging in beneficial price cutting, which is antithetical to what the antitrust laws aim to do. Within the past several years, there has been increased attention to both of these areas. There appears to be emerging consensus that price-cost safe harbors can be used to provide greater clarity to market participants, and that administrable standards are needed.

EUROPEAN COMMISSION

1. Statutory provisions, case law, decisional practice and/or guidelines

There are no statutory provisions dealing expressly with single product loyalty discounts or bundled discounts under EC competition law. Although not mentioned expressly in Article 82 of the EC Treaty that prohibits as incompatible with the common market in so far as it may affect trade between Member States any abuse by one or more undertakings of a dominant position, these practices can be caught by this Article, as shown by the decisional practice of the Commission and the extensive case law by the European Court of Justice and Court of First Instance (hereinafter “the European Courts”).

Discounts and rebates¹ are often used as instruments of healthy and legitimate price competition. For example, discounts based on the quantity, value, or volume purchased per single transaction are normally not exclusionary. Since dominant firms are not subject to effective competitive constraints, they should in principle be allowed and encouraged to share their profits by offering discounts and rebates, provided that this does not ultimately lead to depriving customers of the benefits of residual competition. Also the bundling of products in the case of multi-product rebates may allow the dominant undertaking to provide customers with better products and offerings in more cost effective ways.

The difficulty for the competition authority or other enforcer of the competition rules is, as with so many alleged abuses of market power, to distinguish such genuinely pro-competitive behaviour from anti-competitive or exploitative conduct. At one end of the spectrum, where the discount/rebate is a direct reflection of the dominant company’s efficiency, it will be unobjectionable. At the other end, where the only commercially rational explanation for the discount/rebate is in terms of an attempt to exclude competitors or exploit customers, it will infringe Article 82.

In *Hoffmann-La Roche*², the Court gave its most comprehensive indication that rebates can infringe Article 82. It said that a dominant firm may not only infringe Article 82 when it ties purchasers *de jure* through exclusivity obligations, but that “*the same applies if the said undertaking [the dominant firm], without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer’s obtaining all or most of its requirements, whether the quantity of its purchases be large or small, from the undertaking in a dominant position*”.

The decisional practice of the Commission and the case law of the European Courts have covered various types of rebates and discounts, from discounts conditional upon the acceptance by customers of meeting the totality of their requirements from the dominant undertaking (e.g. *Suiker Unie*³) to schemes that do not explicitly depend on any customer's obligation to achieve all or most of his requirements from

¹ Discounts are generally offered on individual transactions, whereas rebates are normally deductions or cash payments made to a customer in accordance with the latter’s purchases over a period of time. Although the terms “discounts” and “rebates” are used interchangeably in this document, the emphasis of the document is on rebates.

² ECJ 13 February 1979, Case C-85/76, *Hoffmann-La Roche v. Commission*.

³ ECJ 16 December 1975, Case C-40/73, *Suiker Unie v. Commission*.

the dominant undertaking, but have the same loyalty inducing and exclusionary effects. The latter include selective target rebates (whereby the rebate is granted on the basis of the customer having reached a specified sales target fixed individually between the dominant undertaking and its customer (e.g. *Michelin I*⁴, *Coca Cola*, *Irish Sugar*⁵, *British Airways*⁶, ...) and generally applicable volume rebates (*Michelin II*⁷).

Central to the Commission's and the Court's assessment have been the criteria and rules governing the grant of the discount, such as the length of the reference period upon which the rebate is calculated, and linked to that the amount of the rebate that the customer would lose in case it switches (part of) its demand to a rival of the dominant firm, and the degree to which the criteria for granting the rebate are objectively related to specific efficiencies and thus non-discriminatory.

For example in the first *Coca-Cola* case, which was resolved without the need for a formal decision, the Commission objected to Coca-Cola's target rebate scheme for its customers in Italy, which used a reference period of one year for the calculation of the rebate. As in *Michelin I*, the Commission felt that such a scheme had a tying effect on purchasers, thereby substantially foreclosing the market to Coca-Cola's competitors. When the company volunteered to reduce the reference period to three months, the Commission accepted that the scheme no longer substantially impeded the company's customers from switching suppliers

The selective target rebates in the *Irish Sugar* decision, which was upheld by the Court of First Instance, provides an example of a scheme that the Court considered as not being governed by objective efficiency related award criteria and having the effect of discouraging competition.

The Commission has also pronounced on so-called top-slice rebates which is a specific form of incremental rebates. Purchasers sometimes obtain the bulk of their requirements from a single supplier and the rest from elsewhere and the dominant undertaking seeks to induce the purchaser to purchase in addition that remnant (the so-called "top-slice") from it by offering a special discount on the top slice tonnage (*ICI*⁸, *Solvay*⁹). Furthermore, the Commission has issued decisions, up-held by the European Courts, on bundled discounts, i.e. a situation where a bundle of different products being is sold at a discount to the sum of the prices of the components (e.g. *Hoffman-La Roche*).

The Commission has been analysing the potential anti-competitive effects of discounts and rebates granted by dominant undertakings as part of its on-going reflection on the policy underlying the implementation of Article 82 and the way in which it should enforce that policy, which is guided by an effects-based approach to the assessment of the practices of dominant undertakings.

2. Analytical framework for assessing single product rebates

Rebates are generally granted to customers to reward them for a particular form of purchasing behaviour, i.e. they are "conditional". The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted

⁴ ECJ 9 November 1981, Case C-322/81, *NV Nederlandsche Banden Industrie Michelin v. Commission*.

⁵ CFI 7 October 1999, Case T-228/97, *Irish Sugar plc v Commission*.

⁶ CFI 17 December 2003, Case T-219/99, *British Airways plc v. Commission*.

⁷ CFI 30 September 2003, Case T-203/01, *Manufacture française des pneumatiques Michelin v. Commission*.

⁸ Commission Decision of 19 December 1990 n°91/299/CE (OJ L 152/21 of 15.6.1991).

⁹ Commission Decision of 19 December 1990 n°91/300/CE (OJ L 152/40 of 15.6.1991).

either on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates).

The Commission considers that single product rebates, in that they may lock-in customers and foreclose a dominant company's competitors by hindering them from selling to customers, are a form of exclusive dealing.

The likelihood of anticompetitive foreclosure is higher where there are no viable substitutes for the dominant supplier's product and / or where competitors are not able to compete on equal terms for the entire demand of each individual customer. If the dominant supplier is an unavoidable trading partner, a conditional rebate may enable the dominant supplier to use the 'non contestable' portion of the demand of each customer (i.e. the amount that would anyhow be purchased by the customer from the dominant firm) as leverage to decrease the price to be paid for the 'contestable' portion of demand (i.e. the amount for which the customer may prefer and be able to find substitutes).

In general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to loss of the retroactive rebates. The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure.

It is normally important to consider whether the rebate system is applied with an individualised or a standardised threshold. An individualised threshold – one based on a percentage of the total requirements of the customer or an individualised volume target - allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect. By contrast, a standardised volume threshold – where the threshold is the same for all or a group of customers – may be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect. If, however, it can be established that a standardised volume threshold is tailored to the requirements of a significant proportion of customers, the Commission considers that such a standardised system of rebates may produce anticompetitive foreclosure effects.

If sufficiently reliable data are available or can be obtained the Commission will investigate whether the rebate system is capable of hindering the expansion or entry of 'as efficient' competitors by making it more difficult for them to supply part of the requirements of individual customers. In applying the 'as efficient' competitor benchmark the Commission will estimate what price a rival would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch a part of his demand ('the relevant range'). The effective price that the customer faces in deciding from whom to purchase, and which the rival will thus have to match, is not the average price of the dominant firm, but the normal (list) price less the rebate it loses by switching, calculated over the relevant range of sales.

The relevant range over which to calculate the effective price in a particular case depends on whether the rebate is incremental or retroactive. For incremental rebates, the Commission considers that the relevant range is the incremental purchases that are being considered. For retroactive rebates, it will generally be relevant to assess in the specific market context how much of a customer's purchase requirements can realistically be switched to a rival. If customers are likely to be willing and able to switch large amounts of demand to a (potential) rival relatively quickly, the relevant range is likely to be relatively large. If on the other hand customers are likely only to want or be able to switch small amounts incrementally, then the relevant range will be relatively small. For existing competitors their capacity to expand sales to customers and the fluctuations in these sales over time may also provide an indication of the relevant range. For potential competitors it is important to assess at what scale a new entrant would

realistically be able to enter. It may be possible to take the historical growth pattern of new entrants in the same or in similar markets as an indication of a realistic market share of a new entrant.

The lower the estimated effective price is compared to the average price of the dominant supplier, the stronger the loyalty-enhancing effect. However, as long as the effective price remains above the long run average incremental cost (LRAIC)¹⁰ of the dominant undertaking, this would normally allow an equally efficient competitor to compete profitably notwithstanding the rebate. In those circumstances the rebate is normally not capable of foreclosing anti-competitively.¹¹ Where the effective price is below average avoidable cost (AAC)¹², as a general rule the rebate scheme is capable of foreclosing as efficient competitors. Where the effective price is between AAC and LRAIC, it is important to investigate whether other factors point to the conclusion that entry or expansion by as efficient competitors is likely to be affected. In this context, the Commission will investigate whether and the extent to which rivals have counterstrategies at their disposal, for instance whether and to what extent competitors are also able to use a ‘non contestable’ portion of the buyer’s demand as leverage to decrease the price for the relevant range. Where competitors do not have sufficient possibilities to match the effective price, the Commission will consider that the rebate scheme is capable of foreclosing equally efficient competitors.

3. Analytical framework for assessing multi-product rebates

The previous section related to rebate systems applied by a dominant undertaking for a particular product and which have their possible negative effect in the market where the undertaking is dominant. Mixed bundling, or multi-product rebates, refers to situations where a bundle of different products is sold at a discount compared to the sum of the prices of the products when purchased separately. Such multi-product rebates can have exclusionary effects in a number of markets simultaneously.

Multi-product rebates are part of the category of abuse commonly referred to as ‘tying and bundling’. “Tying” usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). “Bundling” usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In case of mixed bundling, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price (i.e. the dominant undertaking offers a multi-product rebate).

In the case of bundling, the undertaking may be in a dominant position for more than one of the products of the bundle. The anticompetitive foreclosure is likely to be stronger the greater the number of such products in the bundle. This is particularly true if the bundle is difficult for a competitor to replicate, either on its own or in combination with others.

¹⁰ Long-run average incremental cost (LRAIC) is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. Average total cost (ATC) and LRAIC are good proxies for each other, and are the same in the case of single product undertakings. If multi-product undertakings have economies of scope, LRAIC would be below ATC for each individual product, as true common costs are not taken into account in LRAIC. In the case of multiple products, any costs that could have been avoided by not producing a particular product or range are not considered to be common costs.

¹¹ In situations where common costs are significant, they may have to be taken into account when assessing the ability to foreclose as efficient competitors.

¹² Average avoidable cost (AAC) is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output, in this case the amount allegedly the subject of abusive conduct. In most cases, the average variable cost (AVC) and AAC will be the same, as it is often only variable costs that can be avoided.

A multi-product rebate may be anticompetitive on the tied or the tying market if it is so large that efficient competitors offering only some of the products cannot compete against the discounted bundle.

In its enforcement practice the Commission, to apply the as efficient competitor test, will assess the incremental price and compare it to the relevant cost benchmark. If the incremental price that customers pay for each of the dominant undertaking's products in the bundle remains above the LRAIC to the dominant firm of including this product in the bundle, the Commission will normally not intervene since an equally efficient competitor with only one product should in principle be able to compete profitably against the bundle. Enforcement action may however be warranted if the incremental price is below the LRAIC, because in such case an equally efficient competitor may be prevented from expanding or entering.

If the evidence suggests that competitors to the dominant undertaking are also selling bundles, the Commission will generally regard this as bundle competing against bundle, in which case the relevant question is not whether the incremental revenue covers the incremental costs for each product in the bundle, but rather whether the price of the bundle as a whole is predatory.

4. Efficiencies of single and multi-product rebates

The Commission will consider evidence demonstrating that rebate systems achieve cost advantages which are passed on to customers. Rebate schemes with individualised volume targets are generally less likely to achieve such advantages than those with standardised volume targets.

Conditional rebates, by allowing the dominant undertaking to secure that the customer purchases at least a certain minimum amount over a sufficiently long period, can provide incentives for the dominant undertaking to make certain relationship-specific investments in order to be able to supply a particular customer.

The bundling present in multi-product rebates may lead to savings in production, distribution or transaction costs. Combining two independent products into a new, single product may be an innovative way to market a product. It may also save transaction costs for customers and it may allow suppliers to save on packaging and distribution costs. It may also allow the supplier to pass on efficiencies arising from its production or purchase of large quantities of the tied product.

Some commentators argue that both the Commission and the European Courts have failed to consider (sufficiently) possible efficiencies on the demand side. Although the debate is far from closed, it seems that the Commission and the Courts did concentrate on the exclusionary effects for efficient rivals of the dominant firm rather than on the possible direct benefits that a rebate system may provide to the dominant firm's customers. Lately there has been a shift in the Commission's and European Courts' practice which, more clearly than in the past, ensures that efficiencies are taken into account by allowing the dominant firm to show that the efficiencies are likely to outweigh the anti-competitive effects to the benefit of consumers.¹³

¹³ ECJ, 15 March 2007, C-95/04P, *British Airways plc v. Commission*, §86 ("Assessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the case (...). It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse."). See also CFI, 17 September 2007, Case T-201/04 *Microsoft Corp. v. Commission*, §688, §709, §710, §1144.

5. Intent

Under EC competition law, the concept of abuse is an objective one: there cannot be any finding of abuse based on intent only. However, the Commission may look at internal documents or business plans of the dominant undertaking that suggest that there is a strategy whereby the discounts or rebates are used to foreclose competitors. This may be relevant for the assessment of the likely effects of the discount or rebate scheme.

INDONESIA

1. Introduction

Competition between business actors felt increasingly tight recently. Opening of some previous business sectors that closed has caused a tight competition in those sectors. The result is really amazing for political economy, decreasing in price, increasing quality of product, creation of alternative product and some other positives. Competition itself has rounded into a good model in management various industrial sectors in this country, even for business sector that is at first believed as natural monopoly like telecommunications, electric, and trains.

Industrial sector characteristic which open to visitors (in and out) then to push the presents of firm competition has caused business actor to work hard in defining various strategies to make their existence and wins competition. Development of strategy to competes developed by business actors tend to grows from time to time. Optimization of time usage, resource (man, fund, equipments) implemented in multifarious strategy that more focused and sharper in the effort of netting their consumer as much as possible.

One of strategy which many developed recently is bundling. Bundling which simply defined as effort to oversell out of one products in a sale packet with certain price. Generally the price of bundling is cheaper if compared to if consumer buy them separately. Expansion of bundling as one of strategy competes applied by business actors frequently generates controversy. Because bundling frequently accused as one of way of competing that impede fair competition. The suspicion gains strength because bundling generally applied as strategy to win competition by dominant players with certain market power. On this basis, hence becoming a real interesting thing to see exhaustively on the existence of bundling strategy within the perspective of business competition.

2. Investigation on Bundling according to the Law No. 5/1999

As competition regulation in other nations, the Law No. 5/1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition is not peculiarly state articles that prohibiting bundling that impedes principle of fair competition. However, this behavior can be banned throughout available articles, especially related to predatory pricing and tying sales.

2.1 *Predatory Pricing*

In Law No. 5/1999, principles of predatory pricing treated as prohibited activities under Article 20 which says "Business actors shall be prohibited from supplying goods and or services by selling while making a loss or by setting extremely low price with the aim of eliminating or running the business of their competitors in the relevant market which may result in monopolistic practices and or unfair business competition". In accordance with bundling practices which recently identified, this article is hardly match the leverage theory that been used in pushing market dominance in secondary market through usage of market power in primary market. In the end, bundling according to this theory is completely applied to remove competitor through a real low price strategy from its competitor.

It has been a general practice that business actors applies bundling strategy through market power in certain product in one sides by pricing a real cheap price in other product market which correlated with main product. Pays attention to above trend, hence it have been clear for KPPU that research focus on bundling with tendency to predatory pricing strategy is more pointed out to a product with lowest price, and not on a product of dominant firms. The simply focus of investigation by KPPU is first on the indication of the appearance of cheaply product passed as a packet (bundling). Second indication is the appearance of dominant firms that selling other product with a low price.

To prove impeachment of Article 20 of the Law No. 5/1999 is not an easy task for KPPU if concentrated to the intention in finding a loss sale. Because through this intention, the substantial steps which has to be done by KPPU that being proved difficult to obtain for the whole time is the cost structure of a product. As due to bad data structure in Indonesia, an accurate data on certain product is hard to find. Therefore in order to prove Article 20 of the Law No. 5/1999, it will need a depth research to precisely find a certain product cost structure so that KPPU can assure that a product has been selling in term of loss sale.

But if this approach is done with consistent to a very low price fixing with intention to removes or kills its competitor in market, hence verification becoming not difficult to be done. Verification also can be done by using historical data on a product in market for certain duration of time. Observation done will not be momentary, but rather haves the character of time series. Predatory pricing strategy would easily to prove if time series data of a product twitter out the low price trend when rigid competition takes place, for then the price is becoming higher together with the decreasing number of competitors in the market.

2.2 Tying in

Tying Sale is considered as prohibited activities within the Law No. 5/1999 which regulated by Article 15 point 2 and 3. This article stated that:

7. Business actors shall be prohibited from entering into agreements with other parties stipulating that the party receiving certain goods and or services must be prepared to buy other goods or services of the supplying business actor;
8. Business actors shall be prohibited from entering into agreements concerning prices or certain price discounts for goods and or services, stipulating that the business actor receiving goods and or services from the supplying business actor:
 - a. Must be prepared to buy other goods and or services from the supplying business actor; or
 - b. Shall not buy the same or similar goods and or services from other business actors, competitors of the supplying business actor.

Both articles are strictly prohibiting tying sale's principle. Meanwhile if we correlate this article with the bundling theory, then it will be seen that this is more appropriate for a pure bundling behavior which doesn't provide any alternatives to consumer (buyer) except to buy other product that hooked with other product (in term of packet). In this case, business actor must force to receive other product other than product that they needed from the supplier. This pure bundling activity strictly treated as tying sale in term of business competition law.

Unfortunately in the application of this section then is being burdened with a situation where transaction must be involving two business actors. While bundling case is tend to have a character of producers that harms their consumers. Even Article 15 point (2) didn't give strict definition on "other parties" in the article. Would it be only business actor or even can involve the consumer? Should this

article define “other parties” as business actors, then definitely this article won’t reach bundling strategy that harms consumer.

Until today, we haven’t publish any guideline for these articles (predatory pricing and tying sale), by which they still being edited for further references. Moreover, there still no decision issued or examination carried out related to bundling issues.

3. Investigation in Bundling Issues

Although we haven’t carried out an examination on bundling case, we still have several monitoring on this behavior due to its impact on competition. Two of them are bundling in international direct connection and cellular services; and bundling in cellular service and its handset, which will be explain briefly below.

3.1 *Bundling in international direct line and cellular services*

During several years, Indonesian consumer might have experience a rare event in Indonesian telecommunication industry, which was a price cut by Indosat Corp. and Telekomunikasi Indonesia Corp. for international direct connection’s tariff. One of their programs was limited only for cellular services (001 and 008 connection). Unfortunately this discount only comes for cellular communication within their group. For example, discount for 001 Connection only available for Telkomsel Corp (one of subsidiary of Telekomunikasi Indonesia Corp.). In flash, this seems to be a discounted product. However in the other site, this was a mixed bundling strategy by a dominant business actor in international direct connection to control their consumer to use their cellular services. Obviously consumer will be benefit by this situation due to lower tariff for their connection although their choice was being limited into subscription from two telecommunication companies. Under this circumstance, other cellular operators (such as Excelcomindo Corp, Mandara Seluler Corp, and Lippo Telecom Corp) almost have no competitive advantage to brawl for this type of niece market. This occurs because their tariff will not be attractive, as no other variable cost drawn in this international connection considering they all use the same telecommunication network.

With regard to certain condition that there are only two licenses from the Government for international direct connection, hence this bundling strategy tends to have potency in breaching the Law No. 5/1999. Additionally, to prove whether this strategy is part of prohibited activities banned by the Law No. 5/1999, an examination needs to be embraced.

3.2 *Bundling in cellular service and its handset*

On September 2007, “Fren”, a product of Mobile 8 Corp (a cellular telecommunication company) offered a packet (called Friendship) which consists of a Samsung headset and a Fren’s number. This packet sold with amount of Rp 338,000, considering the market price of headset itself was Rp 1,100,000 and the value of Fren’s voucher was Rp 38,000. Truly expressed by its packaging, hence clearly that this bundling was one of Mobile 8 Corp’s strategy in promoting their new product with an intention to stole market share (which extreme still low) from their competitor. So, it has been concluded that this packet was a mixed bundling that benefit the consumer as well as harmed the market.

This conclusion was due to an inelastic demand between CDMA technology and GSM technology that currently available in Indonesia. It’s deemed relatively hard in drawing consumer to switch between both technologies accordingly. Therefore the prime target of this promotion was new costumers that have not yet become a cellular subscriber. We noted that today, there are still small number of CDMA’s user due to their low sound and network quality. Hence we view that “Frenship” will become a breakthrough for consumer with financial constraint to have an affordable handset with a current technology.

4. Conclusion

Generally, there were two motives in bundling. First is to increase sales by exploiting consumer surplus. Second is to exterminate the competitor. Indonesian competition law only involves with bundling that tend to exterminate the competitor. This behavior can be made by a dominant business actor using two ways, which is by fixing a predatory price and a tying sale. The Law No. 5/1999 do not regulated bundling explicitly. Nonetheless, bundling that violated fair business competition can be treated as prohibited activities banned by Article 20 on Predatory Pricing and Article 15 point (2) and (3) on Tying Sales.

RUSSIAN FEDERATION

The bundled discounts provided by the economic entities to its clients are not considered as a breach of the antitrust legislation, if these discounts are set by the economic entity itself, and influence only profit received by the economic entity. But if these discounts are set by the group of economic entities acting under certain agreements, then competition authority would check these agreements in order to evaluate its influence on restriction of the competition.

Regulations that envisage prohibition of agreements restricting competition and concerted practices of economic entities are established in the Article 11 of the Federal Law №135-FZ of 26/07/2006 “On Protection of Competition”.

Article 11. Prohibition of Agreements Restricting Competition or Concerted Practices of Economic Entities

1. Agreements between economic entities or concerted practices of economic entities in the commodity market are forbidden if such agreements or concerted practices lead or can lead to:

- 1) establishment or maintaining of prices (tariffs), discounts, markups (extra charges), margins;*
- 3) division of the commodity market according to the territorial principle, the volume of sales or purchases of commodities, the range of sold products or composition of sellers or purchasers (customers);*
- 6) economically, technologically or in any other way unjustified establishment of different prices (tariffs) for one and the same commodity;*

While controlling agreements restricting competition and concerted practices of the economic entities FAS Russia also checks the substance of agreements, that are concluded by the economic entities, in case there are any aspects that restrict competition. If in the text of agreement there are some provisions that according to FAS Russia restrict or can lead to restriction of competition, then companies that concluded that agreement will receive an inquiry in order to clarify the mechanism of realization of this agreement on practice.

Moreover agreements that restrict competition can be educed after receiving complaints and notifications from competitors and customers, and also during scheduled checks of the economic entities activities.

On receiving complaint on competitor’s activities FAS Russia holds several checks and issues a decision whether there was a breach of competition law or not.

FAS Russia considered the case against 11 insurance companies in 2006 against different insurance companies (JSC “General Insurance Company”, CJSC “Maks”, LLC “NSK “Rekon”, JSC “Moscow Insurance Company”, CJSC “SKPO Uralsib”, LLC “SO Zenit”, JSC “Ingosstrah”, JSC “Reso-garant”, CJSC “Standart-rezerv”, LLC “Rosgosstrah – Capital”, CJSC “SG Spasskie vorota”) with regard to violating Article 15 of the Federal Law №117-FZ of 23.06.1999 “On the Protection of Competition on the Financial Services Market”. The breach was described as follows: companies gave presents to the buyers of Compulsory Civil Liability Motor-Vehicle Insurance (OSAGO) policies, and placed advertisements containing inaccurate information on discounts offered for the buyers of the OSAGO policies. FAS Russia Commission classified such actions undertaken by these insurance companies as unfair competition, that

is,- actions oriented towards obtaining advantages in insurance business, violating the legislation of the Russian Federation and inflicting damages upon other financial organizations - their competitors on the financial services market.

Cases against JSC “Ingosstrah”, CJSC “SKPO Uralsib” and LLC “SO Zenit” were closed by FAS Russia due to the fact that the breach of Article 15 of the Federal Law wasn’t determined.

Cases against JSC “General Insurance Company”, LLC “NSK “Rekon”, JSC “Reso-garant”, CJSC “Standart-rezerv” was closed due to the voluntary elimination of violations.

Against JSC “Moscow Insurance Company”, “Rosgosstrah – Capital” and CJSC “Maks” there were issued decisions on admitting their actions on selling compulsory civil liability motor-vehicle insurance as a violation of Article 15 of the Federal Law and companies received a resolution to transfer to the federal budget the income in the amount of 78 456 Rubles, 4 472 539 Rubles and 208 248 Rubles correspondingly obtained by violating the antimonopoly legislation.

While this case consideration one of the concerned parties was Russian Association of Motor Insurance (RAMI). The presidium of RAMI has introduced some changes to the Rules on Compulsory Civil Liability Motor-Vehicle Insurance (OSAGO) promotion and Rules on application of sanctions and other measures against participants of the RAMI, its staff and employees concerning prohibition on the insurance companies’ actions on placing ads on OSAGO and other offers to the owners of the vehicles at the moment of acquiring OSAGO containing gifts and additional services.

Besides in 2007 according to the information received from prosecutor’s office of Omsk, Omsk Regional Office of FAS Russia started a case № 04/21-07 against JSC “Alfa-bank” and LLC “Eldorado-Omsk” accusing them in violation of Article 11 of the Federal Law № 135-FZ of 26.06.2006 “On protection of competition” by concluding an agreement between JSC “Alfa-bank” and LLC “Eldorado-Omsk”, that can lead to restriction of competition on commodity market.

JSC “Alfa-bank” and LLC “Eldorado-Omsk” concluded a Partnership Agreement, according to which Bank is liable to provide individuals that are going to buy goods at a certain selling point by credit, this credit on a basis of standard credit program, and credit programs, conditions of which are determined in the additional agreement to the Partnership Agreement.

According to the part 2 of the Article 492 of Civil Code of the Russian Federation the Retail Sales Agreement is a public agreement. According to the part 2 of the Article 426 of the Civil Code of the Russian Federation price on goods and services, and other parts of the public agreement should be equal for all customers, apart from times when law specifies certain types of customers that can receive benefits.

According to the Article 4 of the Federal Law “On Protection of Competition” № 135-FZ of 26/07/2006 indicators of restriction of competition - are reduction in the number of economic entities, which are not included in one group of persons, in the commodity market, increase or decrease in commodity price which is not connected with the relevant changes of other general conditions of commodity circulation in the commodity market, refusal of economic entities, which are not included in one group of persons, from independent actions in the commodity market, defining of general conditions of commodity circulation in the commodity market by agreement between economic entities or in accordance with instructions of another person which are obligatory for fulfillment by them, or in the result of coordination of actions in the commodity market by the economic entities not included in one group of persons as well as other circumstances creating opportunity for an economic entity or several economic entities to impact unilaterally on the general conditions of circulation of commodity in the commodity market.

Concerted practices of JSC “Alfa-bank” and LLC “Eldorado-Omsk” within the frameworks of the agreement lead to fixing of different prices for the same goods for customers depending, whether it’s paid by cash or by credit.

Thus actions of these companies on concluding an agreement consisting credit conditions on a certain types of credit programs, that provide a discount to the customers in case they take a credit from JSC “Alfa-bank” are actions that violate Article 11 of the Federal Law “On Protection of Competition”.

JSC “Alfa-bank” and LLC “Eldorado-Omsk” received an order to change their agreement so that it would comply with the antimonopoly legislation in the part of provision a discount to the customers that buy goods from the shops of LLC “Eldorado-Omsk” by using credits of JSC “Alfa-bank” and to prevent other violations of the antitrust law.

SOUTH AFRICA

1. Introduction

This paper comments on the South African competition authorities' experience with bundled discounts and single product loyalty discounts. We provide here the relevant statutory provisions, guidelines and policy statements with respect to these discounts, an explanation of the circumstances in which investigations into these forms of conduct have been undertaken, and an assessment of the rules established for these forms of conduct, including:

- whether the rules are too lenient or whether they are over-enforced;
- whether price-cost tests are applied;
- whether intent is needed in order to show a contravention; and
- how business reasons are taken into account in the assessment.

The key case in South Africa which discussed loyalty rebates was the Competition Commission v South African Airways (Pty) Ltd¹ matter (“the SAA case”), in which loyalty rebates by a dominant firm were found to be a contravention of the Competition Act 89 of 1998, as amended (“the Act”).²

The Competition Tribunal (“Tribunal”) briefly mentioned product bundling in Sappi Fine Papers (Pty) Ltd v the Competition Commission³ (“the Sappi case”) and in the large merger between Naspers Ltd and Electronic Media Network Ltd, Supersport International Holdings Ltd⁴ (“the Naspers merger”) and in the large merger between Telkom SA Ltd and Business Connexion Group Ltd⁵. However, the Tribunal’s comments in the latter cases provided no further guidance than what is stated in the Act. Therefore, the discussion on jurisprudence which follows concerns only the finding in the SAA matter.

2. Statutory provisions and judicial precedent

2.1 Statutory provisions

There are no statutory provisions expressly dealing with bundled or loyalty discounts. However, the Act contains provisions against which bundled discounts and single product loyalty discounts can be assessed including, 8(c), 8(d)(i) and/or 8(d)(iii) of the Act. Bundled discounts can most directly be assessed in terms of section 8(d)(iii) of the Act which states that:

¹ Case No: 18/CR/Mar01.

² All the judgments are available on the Competition Tribunal’s website: <http://www.comptrib.co.za>.

³ Case No: 62/CR/Nov01. Product tying was alleged in this matter.

⁴ Case No: 23/LM/Feb07.

⁵ 51/LM/Jun06.

It is prohibited for a dominant firm to ... [sell] goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or [to force] a buyer to accept a condition unrelated to the object of a contract unless the firm concerned can show technological, efficiency, or other pro-competitive gains which outweigh the anti-competitive effect of its act.

Allegations of bundled discounts and/or loyalty discounts could conceivably also be assessed in terms of the following rule-of-reason provisions:

- section 5(1) of the Act, which prohibits restrictive vertical agreements;
- section 8(c) of the Act, which prohibits exclusionary acts by a dominant firm⁶;
- section 8(d)(i), which prohibits a dominant⁷ firm from requiring or inducing a customer or supplier not to deal with a competitor;
- section 8(d)(iv), which prohibits a dominant firm from selling goods or services below their marginal or average variable cost (also referred to as predatory pricing); or
- section 9 of the Act, which prohibits unjustified price discrimination between purchasers.⁸

In the *SAA* case, discussed further below, the Tribunal noted that an “exclusionary act” not expressly provided for under section 8(d) would be considered to fall under section 8(c). However, conduct would be described as falling under 8(c) only if it met the definition of an exclusionary act.

An exclusionary act is defined as “*an act that impedes or prevents a firm from entering into, or expanding within, a market*”. This is in contrast to the forms of conduct prohibited under section 8(d) which does not require that the complainant prove that the conduct in question is exclusionary. As the Tribunal remarked in the *SAA* case “*it is not necessary for the Commission to go on to prove that the conduct ‘impedes or prevents a firm from entering into, or expanding within, a market’*”.⁹ Similarly, in the *Patensie* case¹⁰, the Tribunal held that section 8(d) does not require the showing of an exclusionary effect.

In respect of all abuses of dominance and price discrimination, a firm must be dominant in order for a contravention to be shown. This is not the case for vertical restrictive practices, prohibited in section 5(1) of the Act. In respect of the latter prohibition, no fine is possible for a first offence.

⁶ Section 8(c) of the Act is generally referred to as the “catch all” provision for all abuses by a dominant firm, whereas, section 8(d) prohibits defined exclusionary acts such as inducement, refusal to supply scarce goods, product bundling, predatory pricing and buying-up a scarce supply of intermediate goods.

⁷ A dominant firm is one that has at least 45% of a market, between 35% and 45%, unless it can show that it does not have market power or less than 35% if it has market power.

⁸ Section 9(1) of the Act prohibits a dominant seller from discriminating in terms of the price charged, discount, allowance, rebate or credit given, payment for or the provision of services if such discrimination relates to a sale in equivalent transactions between different purchasers. Section 9(2) provides a range of justifications available to a firm for the aforementioned differential treatment, namely: that the differentiation only allowed for reasonable differences in cost, that the differentiation was an act in good faith to meet a benefit offered by a competitor or that the differentiation was in response to changing conditions affecting the market.

⁹ *SAA* case on paragraph 105.

¹⁰ The Competition Commission and *Patensie* *Sitrus Beherend Beperk* – 37/CR/Jun01, at paragraph 95.

Furthermore, in order to show a contravention under all of these sections of the Act, an anti-competitive effect must be proven. In respect of all of those abuses, with the exception of price discrimination which is only permitted under specific circumstances¹¹, a pro-competitive effects defence is permitted. In respect of price discrimination, no fine is possible for a first offence. The Act, therefore, largely follows an effects-based approach, in that the assessment of pro-competitive and anti-competitive effects of a course of conduct must be undertaken on a case by case basis in order to show a contravention under most of the provisions of the Act relevant here; where dominance is not required, and where a pro-competitive effects defence is not available, a fine for a first offence is not permitted.

2.2 *Judicial precedent*

2.2.1 *Competition Commission v South African Airways (Pty) Ltd (“SAA”)*

The case concerned the legality of two incentive schemes, which SAA had with travel agents: the first incentivised travel agent companies to sell SAA tickets, and the second incentivised travel agent employees directly. The Commission brought this complaint referral following a complaint lodged by the Nationwide Airlines Group (“Nationwide”), a domestic rival of SAA. The Commission alleged that the incentives constituted an abuse of dominance designed to exclude or impede SAA’s competitors in the domestic airline market. It found SAA’s practices of paying travel agents override incentives and so-called “trust payments” to be anti-competitive. The Tribunal found that SAA had contravened section 8(d)(i) (the inducement provision) of the Act and ordered it to pay an administrative penalty of R45 million.

The Tribunal held, in the SAA matter, that travel agents had the ability and the incentive to move customers away from rivals to SAA. The Tribunal accepted as evidence the Commission’s economic expert’s evidence, which showed that, due to SAA’s overwhelming market share, the additional commission generated from alternative airlines was lower. It was shown that, in order for a travel agent to shift 5% market share away from SAA, a Commission of 14.4% would be necessary, which raised rivals’ costs so significantly that it became unviable. This was because the incentive scheme rewarded travel agents, not just on lower prices for additional tickets beyond a certain target, but lower prices for all of the tickets, back to the first ticket sold. The Tribunal also took into account the nature of the incentive scheme, per the views of the Commission’s economist, namely:

- the discount was passed on to retailers, not consumers, and was therefore less likely to have pro-competitive effects;
- there was a great degree of ‘non-linearity’ in the scheme, or the marginal benefits of selling additional tickets (per the example above) were large;
- the duration of the contracts was approximately one year, which was of sufficient duration for an anti-competitive effect to arise;
- the scheme involved a lack of transparency. This uncertainty meant that travel agents would be especially conservative in trying to reach their targets.

The Tribunal also held that, in a market such as that for airline tickets, travel agents had the ability to move consumers from other airlines to SAA, and did not incur substantial reputational risk in doing this, because ‘information on ticket prices was asymmetrical as a result of their volatility and complexity.

¹¹ See footnote 8 supra.

Furthermore, the Tribunal examined the following in order to assess the extent of anti-competitive effects:

- The extent of the market foreclosed to rivals – in this case 75% of sales of domestic airline tickets were sold through travel agents, the target of the loyalty rebate scheme;
- Effects on competitors: the Tribunal found that rivals such as Nationwide experienced lower growth, and in some instances negative growth, over the period during which the incentive scheme was implemented.

The Tribunal found against the Respondent, despite the fact that SAA's competitors, Nationwide and Comair, both had similar incentive schemes, and despite the fact that SAA had had a loyalty incentive scheme since Nationwide started its operations, and Nationwide had grown substantially in spite of the scheme. The Tribunal held nonetheless that the *nature* of SAA's scheme changed in 1999, and essentially became aggressive. Direct evidence of harm to consumers (discussed below) was not required, nor was it shown, in this case.

In respect of evidence, the Tribunal accepted the evidence of the Commission's economic expert in respect of demonstrating the anti-competitive effects of the scheme, evidence of SAA's competitors experiencing decline when the scheme became more aggressive, and evidence of SAA's competitors, including board minutes, prepared prior to the commencement of litigation.

3. Initiation of investigations, and circumstances in which a contravention was found

The Commission has never prosecuted a complaint in the Tribunal, where bundled discounts were concerned. Nonetheless, the Act makes provision for private litigants to refer a complaint to the Tribunal where the Commission has decided not to prosecute the complaint. Furthermore, private litigants can approach the Tribunal to obtain interim relief while the Commission is investigating their complaint. The only example of the Tribunal interpreting the prohibition of tying was in respect of the Sappi case referred to above in which the Tribunal merely stated that the sale under consideration would need to be in respect of two separate products rather than a single product.

In the one instance in which a firm was found to be abusing its dominance in respect of loyalty rebates, in the SAA case, SAA was overwhelmingly dominant in the market (its market share was approximately 66%). However, actual evidence of firms exiting the market was not necessary; SAA's competitors (Nationwide, Comair) had seen some decline in their business over the period of the abuse, and this, along with other evidence, was sufficient to show harm to the structure of competition in the market, the test for anti-competitive effect established by the Tribunal.

4. Price – cost tests

Bundled discounts have never specifically been tested in South African competition law. Nonetheless, it is unlikely that a price-cost test would be a *sine qua non* to show a contravention. As is discussed below, harm to the structure of competition is necessary to show a contravention, which admits of a variety of pieces of evidence, other than prices and costs. A bundling discount strategy that meant that one or other product was being charged for at below average variable cost or marginal cost would be assessed under predatory pricing. However, there have not been any cases successfully brought nor interpreted by the Tribunal in respect of predatory pricing.

5. Clarity on the evaluation of bundled discounts and/or single product loyalty discounts; are the rules for firms in this area too lenient or are they over-enforced?

The statutory provisions and jurisprudence that set out the tests where loyalty rebates would be allowed and where they would not be allowed are largely established from the Act and from the SAA decision by the Competition Tribunal. In respect of bundled discounts, the statutory provisions provide the only guidance as to where a firm would contravene the Act. There have been very few cases decided on by the Tribunal in these areas, particularly in view of the fact that the Act came into force in 1999. This suggests either that these sections of the Act are under-enforced, or that the tests to show a contravention in respect of these cases are too stringent and are likely to be met in rare circumstances or where an overly burdensome amount of evidence is required.

6. Anti-competitive effects

The Tribunal said in SAA that a complainant must prove that an anti-competitive effect has occurred. An anti-competitive effect could be proven in one of two ways, namely:

- evidence of actual harm to consumer welfare; or
- if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.

In the SAA case, the Commission found that SAA's incentive scheme for travel agents meant that consumers were flying on more expensive tickets. The Commission also stated that SAA would have been able to reinforce its dominant position, restrict new entry into the market, and inhibit competitors from expanding in the market. The Tribunal confirmed this finding and held that "*the exclusionary act [was] substantial or significant in terms of its effect in foreclosing the market to rivals.*"¹²

In the Naspers merger, the Tribunal, in analysing the prospect of bundling as a theory of competitive harm, noted the test to be applied in assessing whether bundling has anti-competitive effects outweighing possible pro-competitive effects and remarked that "*the bundling strategy must be sufficiently powerful to weaken competitive constraints to a degree that enables the offeror of the mixed bundle to exercise market power that it would not have been able to exercise in the absence of the bundling strategy*". Thus, for the Tribunal it was neither necessary to decide on whether the tests of anti-competitive bundling required that the bundle or a component of it had to be offered at a price below cost, nor was it necessary to decide whether the costs of the strategy should be capable of recoupment (predatory cost test). Instead, the Tribunal found that it was necessary to decide whether *the bundle would ultimately exclude competition and thus ultimately permit the exercise of market power* by the giver of the bundle.¹³

7. Intent and efficiency defences

The Tribunal does not generally require 'intent' on the part of the firm perpetrating the abuse in abuse of dominance cases. However, it does require that the dominant firm in question be enhancing its market power. This is to some extent linked to intent, in the sense that the dominant firm in question must have an exclusionary strategy in mind with respect to its rivals; excluding firms from markets as a consequence of its conduct, which does not enhance its market power, is not considered anti-competitive. Nonetheless, actual evidence, in the form of strategy documents or otherwise, that the perpetrator intended to exclude its rival, is not necessary.

¹² SAA case on paragraph 241.

¹³ See paragraph 61 of the Naspers' merger.

Efficiency defences have not been interpreted in tying or bundling cases in general; there have not been any ‘bundling discount’ cases at all.

In respect of loyalty rebates, in SAA, the Tribunal examined the business reasons for SAA’s conduct in some detail but found them wanting. The efficiency defences employed by SAA were that the incentive scheme was ‘trade creating’ rather than ‘trade diverting’, in that it incentivised travel agent staff to improve their knowledge of SAA’s products. A further efficiency cited was that travel agents’ interests were more aligned with those of SAA, and therefore travel agents would report poor service levels to the airline. The Tribunal held that there was an important tension between SAA’s efficiency defence in ‘growing the market’ by attracting consumers into airline travel, and its claim that travel agents did not have the ability to influence consumers; if they were able to influence consumers to buy airline tickets, travel agents did have an impact on consumer choice. The Tribunal found that there was no evidence linking travel agent training with the incentive scheme.

Furthermore, the Tribunal accepted the approach taken in certain EU cases which explained that rebate schemes that were volume driven were more likely to be efficient than schemes that were loyalty driven. Specifically, the Tribunal quoted the EC in the BA/Virgin case:¹⁴

“ A travel agent that sells an inefficiently small number of tickets can earn the maximum commission provided its small sales represent a 25% increase over its sales in the previous year. Equally, a high volume travel agent will not get extra commission in return for the economies of scale it realises for BA unless its sales increase over the previous year. .. Travel agents are encouraged to remain loyal to BA rather than to sell their services to competitors of BA by being given incentives to maintain or increase their sales of BA tickets which do not depend on the absolute size of those sales.”

The Tribunal went on to quote the SAS case where the Swedish authority pointed out that one of the objectionable features of the scheme it was considering was that the bonus scales were subjective:

“The bonus scale is thus not constructed on objective grounds but is wholly and completely adapted to the individual customer’s previous purchases.”

This relates not only to the assessment of the efficiencies of the conduct in question but the anti-competitive effects thereof too; to the extent that single product rebate schemes are targeted to specific customers rather than constructed objectively, they are more likely to be loyalty enhancing and anti-competitive, than they are likely to drive greater volumes of sales, and be pro-competitive.

8. Conclusion

Therefore, while there have been very few cases decided on in respect of bundling discounts and single product loyalty rebate schemes, the statutory provisions and tests established in jurisprudence set out for these forms of conduct are relatively clear, particularly in respect of single product loyalty rebate schemes. Dominance is required to prove a contravention in respect of most parts of the Act relevant here, except in respect of vertically restrictive practices and, in respect of the latter, no fine is permitted for a first offence.

Anti-competitive effects must be proven. Efficiency defences are permitted, except in respect of price discrimination. Nonetheless, no fine is permitted for a first offence in price discrimination cases.

¹⁴ SAA case on paragraph 254. The Tribunal quoted from Virgin/British Airways OJ [2000] L30/1, [2000] CMLR 999, SAS case, Swedish Competition Authority- DNR: 902/1998 Alitalia case Measure No. 9693 (A291) ASSOVIAGGI/ALITALIA.

Therefore, the Act largely follows an effects based approach to these issues, in that effects on competition of a course of conduct must be weighed up in most provisions of the Act relevant here; where an efficiency defence is not available or dominance is not required, no fine is permitted for a first offence.

Intent on the part of the dominant firm in question is not explicitly required, although 'enhancement of monopoly power' is. Price-cost tests have not been used to examine these cases, although there is scope within the Act for this. In view of the small number of cases in these areas, it seems as though the relevant sections of the Act that prohibit bundling discounts and single product loyalty discounts are either under-enforced or the tests to show a contravention are too stringent.

CHINESE TAIPEI

1. Introduction

The Fair Trade Act does not have specific provisions on bundled discounts and/or single product loyalty discounts, although Article 19 of the Act does prohibit any enterprise from causing the trading counterpart of its competitors to do business with itself by coercion, inducement with interest, or other improper means where such actions are likely to lessen competition or to impede fair competition.

The Fair Trade Commission (the FTC) interprets the meaning of “inducement with interest” as enterprise taking advantage of the customers’ propensity toward luck and instant profits, so that the enterprise could entice customers rather than using quality, price, and service to vie for customers.

In 2000, as the telecommunications industry was being liberalized, the FTC issued its Policy Statements on the Telecommunications Industry under the Fair Trade Act. After taking into consideration of the content of the Act and the characteristics of that industry, the FTC defined “loyalty discounts” in that statement as “discounts offered to customers that are accompanied by provisions prohibiting the customers from switching trading counterparts, or large discounts offered to customers who are more likely to switch trading counterparts to prevent such switches. Since specific enterprises use such discounts to “lock in” to customers, the trading opportunities for competitors could thus be forfeited.”

Bundled sales of products may be a source of economies of scale or efficiency for the manufacturer, part of which may be reflected in a lower composite price for buyers than if all the different products were supplied or bought separately. In the short-run, bundled discounts result in lower prices and therefore provide immediate benefits to consumers. However, the above-cost (non-predatory) bundled discounts may harm the consumers in the long-run by foreclosing competitors that are as efficient as the discounter but do not sell as broad a line of products. Therefore, we adopt a rule-of-reason standard to analyze the related cases.

2. Bundled Discounts Issues: The Cable TV Sector as an Example

In Chinese Taipei, the cable television and its related industries, including those of upstream cable television channel providers and downstream cable television broadcasting system operators, are regulated by the Cable Broadcast Television Act. Still, the Fair Trade Act is applicable when conducts in those industries tends to restrain unjustly or unfairly market competition. In 1996, the FTC issued its Policy Statements on Cable Television and Related Industries to serve as a reference for handling relevant practices, including bundled sales of programs by cable TV channel providers.

Since each program is protected by the Copyright Law, cable TV system operators may not legally broadcast program unless they have been duly licensed by the cable TV channel providers. If a cable TV channel provider uses its superior market position to request that cable TV system operators to negotiate the prices for program licensing on bundled cases, such requests might generate the following competitive concerns: (1) the market power of cable TV channel providers will be improperly extended or expanded through bundling; (2) cable TV system operators will be denied the opportunity to make sensible choices of individual programs; and (3) a cable TV system operator will have a reduced program capacity, and

could also result in the crowding-out of the other cable TV channel providers in their trading with the cable TV system operator.

If the cable TV channel provider compels a cable TV system operator to purchase program contents in bundles, such action will be considered as improperly limiting the trading counterpart's business activities, which falls within the scope of Article 19, Subparagraph 6 of the Fair Trade Act. Nevertheless, a cable TV channel provider may provide quotations for individual program without excluding the possibility of selling individual program to cable TV system operators. In addition, it may offer a lower price to cable TV system operators who purchase a group of programs (i.e. "a discount price offered for a group of programs"). Whether such lower prices would constitute forced bundling shall be determined by the discounts given.

The FTC will apply "rule of reason" to determine whether the offering of a "discount price" constitutes a bundling case and a violation of Article 19, Subparagraph 6 of the Fair Trade Act. Nevertheless, cable TV channel providers may, while trading programs with cable TV system operators, give appropriate discounts to cable TV system operators based on the actual trading amount, the method of payment, credit risk, cost difference, subordinate trading terms and conditions (such as broadcasting the complete program contents or on a specific channel) and other justifiable reasons.

3. Loyalty Discounts Issues

3.1 *Reasons for Initiating Investigations into Loyalty Discounts*

In practice, the FTC has investigated the cases involving anti-competitive loyalty discounts based on customer complaints or competitor complaints. In light of Chinese Taipei's experience in handling such cases, enterprises with substantial market power that offer loyalty discounts can not be exempted from the governance of the Fair Trade Act. Enterprises offering loyalty discounts might need to present a concrete defence demonstrating that the discounts are cost-justified or showing that the discounts have been adopted to meet competition.

In determining whether the loyalty discounts conducted by telecommunications enterprises are unlawful, the totality of factors such as the trading purpose, intent, market position, market structure, characteristics of the goods, and the impact of such restrictions on market competition should all be considered. The FTC applied the "rule of reason" to such cases.

To ensure the competitive benefits of loyalty discounts and minimize their adverse effects on competition, the FTC carries out investigations and engaged in legal analysis by focusing on the buyers' cost from switching trading counterparts and on whether competition is restricted from the discounts and whether the given loyalty discounts are below cost.

3.2 *Anti-competitive Effects of Loyalty Discounts*

Loyalty discounts that are anti-competitive rather than pro-competitive are more likely to be observed in an oligopoly market. Enterprises enjoying dominant positions often use such discounts to eliminate competition. If the loyalty discounts deployed by dominant enterprises are accompanied by penalty provisions for violation of contracts, and if such penalty (exit payment) is obviously higher than the differences between promotional price paid and the original price, the customer could be "locked-in" to the enterprise. Such loyalty discounts are obviously anti-competitive and should be prohibited.

An enterprise can create *de facto* exclusive dealing arrangements through loyalty discounts. For instance, special discounts or money reward may be given for transactions reaching certain amounts or maintaining over a certain period, or special discounts may be given to restrict the distributors' sales

territory. Such arrangements easily limit trading counterparts' transaction freedom, impeding the right of other trading counterparts to do business, and thus leading to the lessening of market competition.

3.3 *Evaluating the Legality of Loyalty Discounts Proposed by Telecommunications Enterprises*

As the FTC judges the reasonableness of the loyalty discounts project conducted by the telecommunications enterprises, which is clearly described in the Policy Statements on the Telecommunications Industry under the Fair Trade Act, it will consider the following factors:

- the customers are given enough time to choose service providers before concluding the subscription contract;
- the period of the subscription contract;
- costs incurred by telecommunications enterprises from services provision;
- the extent to which the above-mentioned costs can be recouped during the period of the subscription contract;
- whether the amount of the exit payment exceeds the amount of the preferential discounts received by customers if they breach or terminate the contract prematurely;
- the effect of market foreclosure.

In order to prohibit other competitors from competing, the telecommunications enterprises with monopoly power may unduly conclude long-term service contracts with their customers, implement penalty provisions for violation of contract and prohibit the customers from switching trading counterparts. Such actions or provisions are likely to violate the Fair Trade Act due to the customers becoming "locked in" to the enterprises and the trading opportunities of other telecommunications enterprises being directly restricted.

3.4 *Case: The Telecommunications Market*

After Chinese Taipei liberalized its fixed line services market in 2001, operators were able to provide local telephone services in addition to long-distance and international telephone services. Prior to market liberalization, the incumbent Chunghwa Telecom was the sole fixed line operator in Chinese Taipei.

In vying for customers, the company offered different preferential plans to subscribers who entered into one-year, two-year, and three-year subscription contracts for its international telephone service and who agreed to maintain specific amounts of usage. However, subscribers who fail to maintain a specific amount of calls or terminate the contract prematurely had to compensate Chunghwa Telecom with an amount equivalent to a specific percentage of the discounts received.

In determining whether the loyalty discount in this case was unlawful, the FTC examined whether the penalty for breaching or terminating the contract was higher than the cost of switching service providers, or whether subscribers were protected by law to ensure their freedom to switch service providers.

If the subscribers had no obvious difficulty in changing service providers, Chunghwa Telecom's long-term contract and the cost of switching service providers would not have actual restrictive effects after market liberalization. Since the new fixed line service providers could still win over subscribers through quality and pricing, such preferential discount had limited anti-competitive effects.

In the case relating to the telecommunications market, the FTC reminded Chunghwa Telecom and requested it to abide by the Telecommunications Law after other fixed line service providers had entered into the market. Chunghwa Telecom was likewise reminded not to impose penalties for breach of contract on customers who wish to switch service providers, so that the consumers could freely change their trading counterpart to ensure fair competition in the telecommunications market.

3.5 Case: Cargo Clearance Information Transmission Network Market

In 1990, the Ministry of Finance established the Cargo Clearance Automation Division to set the Electronic Data Interchange (EDI) standard to facilitate cargo clearance procedures. In 1996, the Division was then reformed as Tradevan Information Services Co. (“Tradevan”), and it monopolized the cargo clearance information transmission network market.

Later in 2002, a new entrant Universal EC Inc. (“Universal”) attempted to enter the market and requested access to Tradevan’s network. Numerous complaints were soon filed with the FTC, including Tradevan’s refusal to provide Universal with the EDI standard, its refusal to interconnect with most of Universal’s services, its setting of access fees high enough to prevent Universal from entering the market, its unreasonably disconnecting the interconnection from time to time and its deployment of an unlawful loyalty discount scheme.

The FTC found that Tradevan’s trading counterparts included nearly 3,000 major cargo transportation enterprises. On the other hand, the trading counterparts of Universal were mostly customs brokers with small economies of scale. The services of the cargo clearance information transmission network have to be simultaneously accessed by customs officials, customs brokers, cargo transportation enterprises, and financial institutions so as to achieve the network effects. Thus, the users of the cargo clearance information transmission network tend to participate in the network of larger scale and with broader customers base. The incumbent Tradevan in a market with obvious network effect had the first mover advantage compared with the new entrant Universal and was able to eliminate the competition. Thus, Tradevan was deemed a monopolistic enterprise, as set forth in Article 5 of the Act.

After the competitor Universal entered the relevant market in July 2002, Tradevan offered different preferential plans to compete for customers from January to December 2003 and employed a lower price strategy to lure original users in the following way. Its program A offered a 20% discount off the original fee to the users access to Tradevan’s network during the promotional period, and its program B offered a 40% loyalty discount off the original fee to the users only promised access to Tradevan’s network during the same period. However, Tradevan had the right to terminate its program B and collected the differences between the promotional price paid and the original fees as a penalty if the users failed to keep their promises.

Furthermore, Tradevan imposed penalties on those users who wished to switch access to the Universal network within one year after participating in its program B. The FTC considered that this loyalty discount scheme resulted in a cost increase when switching transaction partners and the incentive to gain access to the Universal network therefore decreased. In addition, over 80% of Tradevan’s users were prohibited from switching trading counterparts. Since Tradevan used such discounts to “lock in” customers, the trading opportunities of competitors were restricted. This loyalty discount was obviously anti-competitive and needed to be prohibited.

After the FTC reviewed the market structure, the network effect, interconnection conditions, and the pricing schemes of both sides, the FTC reached the conclusion in 2005 that the incumbent Tradevan had been misusing its market position by deploying a loyalty discount scheme to prevent market entry.

Therefore, the FTC imposed an administrative fine of NT\$1.5 million on Tradevan in accordance with Article 41 of the Act.

The FTC is the sole competent authority of the Act. The Act is the general competition law and can be applied to all sectors in Chinese Taipei. However, since the “Regulations Governing the Operating Approval of the Cargo Clearance Information Transmission Network” was regulated by the Ministry of Finance, the FTC further recommended that the Ministry of Finance amend the aforesaid regulations by adding relevant obligations such as network connections, access fee regulation and opening up the EDI standard in order to improve fair competition in the cargo clearance information transmission network market.

4. Conclusion

If the competition authority wants to decide whether certain bundled discounts and loyalty discounts could give rise to pro-competitive effects or lead to anti-competitive effects, it has to carefully analyze the structure of the relevant market.

If the competition authority can elucidate on the market structure concerned, clearly state the types of bundled discounts and loyalty discounts that might be unlawful, and not excessively restrict firms’ promotional efforts that might foster competition, then the market could possibly enjoy the benefits of bundled discounts and loyalty discounts through a well-functioning market mechanism.

BIAC

1. Introduction

A discussion of bundled discounts and loyalty rebates should start with the recognition that the immediate effect of these sales devices is to reduce prices. Although these types of discounts can be used anticompetitively in some circumstances, they normally result in immediate benefits to customers in the form of lower prices. The challenge for competition policy is to develop rules that prevent the anticompetitive use of discounting but avoid overbroad or ambiguous restrictions that deter procompetitive price reductions.

The circumstances in which these devices can be used anticompetitively are limited. As a threshold, it should be recognized that theories of anticompetitive harm relating to bundled discounts and loyalty rebates require the presence of a dominant position or substantial market power by the seller of a product. Absent substantial market power, agencies should not be concerned about a competitive abuse involving these common sales tactics.

It is also a well recognized principle that in order to maximize consumer welfare, competition rules should protect competition, not competitors. Government enforcement action should not have the effect of creating a pricing umbrella under which inefficient competitors are allowed to remain shielded from a dynamic competitive process, at the expense of consumers.

Single-firm loyalty discounts and bundled discounts are pervasive throughout the modern economy. They are frequently used by firms that have no market power. For example, coffee shops and other retailers often offer free goods to customers who attain specified purchase threshold levels, hotel chains offer free stays to customers who accumulate points by lodging at their properties, and airlines offer free travel to customers who accumulate points by flying. The common feature of these discounts is that upon making an incremental purchase at the threshold level that triggers the loyalty reward, the customer earns a benefit that is disproportionate to, or even larger than, the incremental purchase.

Discounts for buying packages of products such as shampoo and conditioner or toothpaste and toothbrush are quite common, as are discounts for bundles of many other goods. In some cases, these discounts can be quite large or even disproportionate, such as the bundle that is sold for one cent above the normal price of a component product.

The pervasive use of these types of discounts by sellers that do not possess market power implies that single-firm loyalty discounts and bundled discounts are normally procompetitive and, without more, represent normal competition. This reflects the existence of efficiencies that are normally promoted by these practices.

The use of loyalty discounts can generate efficiencies. These include, among others: savings in manufacturing costs, attained by enabling firms to realize scale economies; marketing efficiencies, attained by incentivizing distributors to align their sales and marketing efforts to generate greater sales of a supplier's products; transaction cost efficiencies, attained by reducing the volume of transactions and individual negotiations; and risk-sharing efficiencies (in the case of share-based discounts), attained by allowing distributors to continue to receive cost savings when their business suffers a downturn.

In some circumstances loyalty discounts may generate efficiencies that would not be attained with uniform volume discounts. For example, they may incentivize a larger range of customers to increase their purchases because the availability of the discounts is not limited to the larger customers. In addition, the realisation of additional discounts upon the attainment of target sales levels incentivizes distributors to redouble sales efforts to obtain the additional savings.

Bundled discounts can likewise generate efficiencies. Among other things, they may enable the attainment of economies of scale or scope, reduce search costs (especially in the case of complementary products), reduce transaction costs, and promote marketing efficiencies similar to those generated by single-firm loyalty discounts. As is the case with single-firm loyalty discounts, bundled discounts make lower prices available to smaller, as well as large, customers.

It is also widely recognized that single-firm loyalty discounts and bundled discounts can be used as tools of anticompetitive exclusion. A consensus exists, for example, that when these forms of discounting are used by a party with substantial market power to price below cost, where the losses incurred in offering the lower prices are likely to be recouped, the practices should be condemned by the competition laws. There may be other scenarios where competitive harm may also be generated through the use of these discounting practices, and some economic models have identified such scenarios. A challenge arises in attempting to craft more restrictive rules concerning the use of such discounting practices, however, because there is a risk that these rules would prevent firms from competing on the basis of superior efficiency and that they would deter procompetitive discounting and thereby harm consumers.

A broad consensus exists that competition laws should not be used to shield less efficient competitors from the competitive process to the detriment of consumers. To that end, BIAAC believes that legal rules in the pricing and discounting area must be well-defined, predictable and administrable, while also effectively addressing clear competitive abuses.

2. Regulating anticompetitive discounting within an administrative system

BIAAC recognizes that it is difficult to apply theoretical economic tests to market realities in a way that will assure a procompetitive outcome. We therefore encourage the development of regulatory policies that, on balance, will allow businesses to conduct a reasonable ex ante self-assessment of compliance. This “reasonable opportunity to self-assess” is consistent with a legal framework – present in a number of jurisdictions – in which intent is a required element of an offence of monopolisation or abuse of dominance. Indeed, distinguishing between companies which flaunt the competition laws and those which compete vigorously on the merits is a key function of a competition regulatory framework.

Because of the obvious short-term benefits of discounting, discouragement or prohibition of discounting behaviour should be based on well-established economic theories that are administrable within the framework of legal institutions. This is particularly true when dealing with prices that are above-cost.

Economic theories that above-cost pricing can harm competition do exist, but while they are capable of predicting that anticompetitive outcomes can happen, they are poor at showing when they are likely to result. To base legal standards on such theories would make it difficult for businesses to predict when a discounting practice is subject to challenge, especially when such tests are imposed ex post. Basing enforcement on these tests may also make it difficult for agencies to effectively administer the law.

Significant chilling effects can result from overly-inclusive rules regarding discounting. U.S. Supreme Court Justice Stephen Breyer explained the problem as follows: “[T]he consequence of a mistake here is not simply to force a firm to forego legitimate business activity it wishes to pursue; rather, it is to

penalize a pro-competitive price cut, perhaps the most desirable activity (from an antitrust perspective) that can take place in a concentrated industry where prices typically exceed costs.”¹

The state of economic learning in the area of bundled discounts and loyalty rebates is still maturing. BIAC believes that only well-tested economic theories, demonstrating that the subject conduct will have adverse effects on consumers, should be used as the basis for enforcement. Otherwise, the risk of “false positives” and related chilling effect is unacceptably high. The potential for Type II error is enhanced where enforcement is based on economic models that cannot be translated into clear and predictable rules of law. As a leading antitrust treatise notes, “The economic modelling showing that certain discounts can be anticompetitive tend to be highly complex, often making unrealistic assumptions. The result can be proposed legal standards that make impossible informational demands on courts.”² Moreover, some of the economic models that conclude that above-cost discounts can lead to exclusion do not conclude that consumer harm necessarily will follow. For example, Professor Nalebuff’s model of bundled pricing shows that consumer surplus and total welfare increase, even when an efficient competitor is excluded.³

In crafting rules regarding discounting, it is thus important to take into account the limitations of legal institutions in translating complex economic theories into rules of law. This is especially important when evaluating the consequences of both Type I and Type II error. Any approach to regulation of discounting that isn’t perfectly calibrated (which is of course not possible), results in either under-enforcement or over-enforcement. In regard to discounting practices, the consequence of principled under-enforcement may be limited to those markets in which (presumably few) dominant firms are using anticompetitive discounting practices to entrench or even enhance their dominant position with detrimental effects on competition. The consequence of unprincipled over-enforcement, however, is to put at risk the procompetitive discounts offered by the many firms that are not using their discounting practices anticompetitively. Only enforcement efforts that are based on reliable economic tests, translated into reasonably clear rules and administered in a consistent and predictable manner will avoid this chilling effect and maximise consumer welfare.

3. The use of a price-cost test

One test that is demonstrated to be predictable, administrable, and reasonably effective in deterring anticompetitive behaviour is a price-cost test. Predictability rests on the fact that each firm can assess the relation of its prices to its costs.⁴ Administrability rests on the proven ability of legal institutions, within the context of predatory pricing actions, to deal with the economic assessment of price-cost standards. And effectiveness rests on the ability of the rules to address the one form of pricing conduct that is widely understood, based on accepted economic theory, to create harm.

It should be understood that a price-cost test entails a trade-off. Even proponents of the test recognize that it may allow certain conduct that can harm competition to go without remedy. However, because alternative economic models that show that above-cost discounting can be anticompetitive are not easy to administer, today there is no better substitute. Moreover, it avoids the lost consumer welfare associated with over-enforcement, which may well out-weigh the costs of under-enforcement for the marginal number

¹ *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983).

² Philip E. Areeda & Herbert Hovenkamp, *ANTITRUST LAW* ¶ 749b at 244 (Supp. 2007).

³ Barry J. Nalebuff, *Bundling as a Way to Leverage Monopoly* (Yale Sch. of Mgmt., Working Paper No. ES-36, 2004).

⁴ To be sure, the calculation of cost can be a complex matter. But such a calculation is within the capability of the selling party and places a reasonable burden on the selling party to determine its costs in relation to prices.

of cases that will go without remedy under this approach. In the absence of direct evidence of harm to consumers from discounting practices, BIAC believes that a price-cost test should be applied.

An important feature of an above-cost price test is that competitors who demonstrate superior efficiency are protected. Exclusion through superior efficiency is, of course, a normal form of competition; it is the way through which firms with a lower cost structure or superior products succeed in the marketplace. A price-cost test thus effectively filters out of the antitrust enforcement mechanism most instances in which the exclusion reflects the superior capabilities of the allegedly excluding firm.⁵

The utility of a test for pricing conduct that focuses on the exclusion of an equally efficient competitor has been recognized both in the United States⁶ and the European Union.⁷ In both jurisdictions, the result of focusing on exclusion of an equally efficient competitor has been a price-cost test. As one U.S. court noted with respect to an above-cost loyalty discount program, “a firm’s ability to offer above cost discounts is attributable to ‘the lower cost structure of the alleged predator, and so represents competition on the merits’”⁸ The European Commission has similarly concluded in its Article 82 Discussion Paper that “in general only conduct which would exclude a hypothetical ‘as efficient’ competitor is abusive.... Foreclosure of an as efficient competitor can in general only result if the dominant company prices below its own costs.”⁹ The Commission has applied this standard to both loyalty and bundling discounts.

An important consideration in adopting a price-cost test is establishing an appropriate measure of cost. In the United States, a broad consensus has emerged that the proper cost measure should reflect a proxy for incremental cost, with average variable cost being the most commonly endorsed proxy for this measure.¹⁰

⁵ There are models that show exclusion of equally efficient competitors without below-cost pricing. However, these models do not show that consumers are harmed. For example, under the Nalebuff model, consumer welfare increases. And under the Greenlee, Reitman, and Sibley model, the bundled price that causes the exclusion “can either raise or lower consumer welfare.” Patrick Greenlee, David Reitman, and David S. Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts* at 5 (U.S. Department of Justice, Antitrust Division, Economic Analysis Group Discussion Paper EAG 04-13, 2004). The model does not show which of these outcomes prevails in any instance. These models also rely on the assumption that the bundling firm raises the standalone price of the monopoly product included in the bundle above the monopoly price.

⁶ See, e.g., *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 906-09 (9th Cir. 2008); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232; Antitrust Modernization Commission, REPORT AND RECOMMENDATIONS 100 (2007)10; Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 749a at 241, ¶ 1807 at 419 (Supp. 2007).

⁷ European Commission, *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (2005) (cited as Article 82 Discussion Paper).

⁸ *Concord Boat*, 207 F.3d at 1061.

⁹ Article 82 Discussion Paper at ¶ 63.

¹⁰ See, e.g., *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 910 & n.20 (9th Cir. 2008); *United States v. AMR Corp.*, 335 F.3d 1109, 1116 (10th Cir. 2003); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1198 (3d Cir. 1995); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235-36 (1st Cir. 1983); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 87-88 (2d Cir. 1981).

The logic of using an incremental cost test is that selling above incremental costs increases profits immediately and is economically rational irrespective of its impact on rivals.¹¹

The European Commission's view with respect to the appropriate measure of cost is not yet settled. In its Article 82 Discussion Paper, the European Commission adopted an average total cost test for loyalty discounts (within the framework of its required share test), and long run incremental cost for bundling. However, since the issuance of the Discussion Paper, the Commission's Chief Economist, Damien Neven, has advocated the use of average avoidable cost as the cost measure for loyalty discounts.¹²

A test focusing on incremental or avoidable costs generally has at least two advantages. First, from a policy perspective, it avoids labelling as anticompetitive price cutting that increases short run profits and does not depend on exclusion to be profitable. Prices above incremental cost benefit consumers by allowing them to buy at lower prices. Second, from an implementation standpoint, an incremental cost measure does not require a judgmental allocation of joint costs that are incurred in the development or manufacture of multiple products. This leads to greater predictability, which in turn reduces the potential for antitrust rules to inhibit legitimate price cutting.

The use of an incremental cost measure is necessary for another reason. Because sales under a discount or rebate scheme often are not temporal, the methodology for assessing the revenues and costs also cannot be temporal. In evaluating any conduct, one should consider both the revenues and costs that are associated with (i.e., incremental to) that conduct. This is necessary to determine whether the conduct can exclude an equally efficient competitor or whether it is profitable without depending on the exclusion of rivals. Thus, the same sales increment, in terms of volume and time, should be used to measure both the revenues and costs. If the increment is a relatively small one covering a very short span of time, such as a single sale or small group of sales, there are unlikely to be significant investment decisions associated with it and the appropriate measure of incremental cost is likely to be average variable cost. In contrast, if the sales increment is significant enough in terms of volume or duration to capture major investment decisions, such as a multi-year sales contract that is significant in proportion to the firms' total sales, a longer-run increment of cost – such as long run average incremental cost – may be required. Using a different measure would not properly evaluate the incremental cost because investments in manufacturing or distribution may be incremental to those sales. Thus, a true comparison of price and cost requires that the same increment be used to measure both revenues and costs.

BIAC believes that clear rules that do not overreach are required if agencies are to safeguard against anticompetitive discounting practices while at the same time avoid the substantial chilling effect of false positives. To date, few tools have been developed which satisfy these competing objectives. Absent legitimate evidence of anticompetitive effect on consumers, enforcement should not be based on theoretical models where the cost of error is a direct reduction in consumer welfare.

¹¹ U.S. Supreme Court Justice Breyer explained the basis for an incremental cost test as follows: "When prices exceed incremental costs, one cannot argue that they must rise for the firm to stay in business. Nor will such prices have a tendency to exclude or eliminate equally efficient competitors." *Barry Wright*, 724 F.2d at 232.

¹² See, e.g., Damien Neven, *The Role of Economics in European Competition Enforcement and Policy* at 18, presentation at FIW Symposium (2008), available at <http://ec.europa.eu/dgs/competition/economist/innsbruck.pdf>; Damien Neven, *A reformed approach to exclusionary conduct* at 10, presentation at 12th EUI competition law and policy workshop (2007), available at http://ec.europa.eu/dgs/competition/economist/exclusionary_conduct.pdf.

SUMMARY OF DISCUSSION

The discussion was structured into two parts, with a discussion first of loyalty rebates (discounts applying to a single product), followed by a discussion of bundled rebates (discounts applying to the purchase of two or more products).

Prof. Dennis Carlton (one of three experts on the panel) emphasised that antitrust enforcement should not seek to ban all forms of price discrimination. Attempts to ban all price discrimination will do more harm than good. Instead, antitrust enforcement should focus on cases where the competitive process is harmed and, as a result of harm to rivals, some consumers end up paying higher prices. There needs to be a connection between the harm to the competitive process and consumers paying higher prices.

There is a need for simple and clear rules. In particular, there is a need for clear “safe harbour” provisions which allow firms some confidence that their behaviour will not trigger antitrust violations. Price-cost tests are not perfect. It would be a serious mistake to condemn as a *per se* violation pricing that falls outside of a price-cost safe harbour.

Instead, the analysis should proceed to ask: Is the effect of the discounting to deprive a rival of significant scale economies? If the answer is no, the analysis can end. But if the answer is yes, we need to ask further: is the rival deprived of such scale that he can’t succeed? If the rival can achieve the necessary scale selling to other customers or in other markets, the enquiry should end. If the rival is in fact harmed, will the rival withdraw entirely from the market?

Finally, if the rival is harmed, is there a customer who previously wasn’t dealing with the alleged dominant firm who now faces a higher price and is forced to deal with the dominant firm?

An example will make this clearer: Suppose we have an island with a single resort. A large number of tourists stay at the resort. Tourists eat both at the resort and in one of a number of local restaurants. The people who live on the island also eat in the local restaurants. Suppose that the resort imposes the condition that if you stay in the resort you must eat at the resort. Suppose that this reduces the volume of business to the local restaurants to the point where they close, forcing the locals to eat in the restaurant at the resort. If the price paid by the locals goes up, there is probably an anti-competitive harm. Otherwise the situation is probably not anti-competitive.

Quantity discounts and bundling are ubiquitous in a market economy even without significant market power. We should be careful to avoid stifling discounting, loyalty rebates and bundling since in most cases they are not an attempt to exploit or enhance market power, but are efficiency-enhancing. We should take care not to stifle competition by protecting rivals from the forces of competition.

Jorge Padilla (the second panel expert) reiterated the point that bundling and loyalty rebates are common practices in a market economy. These practices sometimes arise because they reflect underlying efficiencies, such as production efficiencies, joint selling efficiencies, or pricing efficiencies. The fact that bundling and loyalty rebates are sometimes undertaken by small companies, without any market power, indicates that there are often legitimate efficiency or competitive motivations behind these practices. These practices may also arise because a company wants to steal business from its competitors. There is nothing

wrong with that, providing that competitors can also respond and replicate that strategy. Bundling and loyalty rebates cannot be treated as *per se* illegal.

Most papers on bundling involve an element of “leverage”. In the mixed-bundling case the leveraging is from a market in which a firm has significant market power to another competitive market, in order to steal business from a standalone producer who can’t replicate the bundled offering. Single-product rebates can also be interpreted as leveraging devices. This might arise when a share of the sales is non-contestable or locked in to a specific supplier, perhaps due to switching costs. In this case the leveraging is from the non-contestable sales to the contestable or competitive part of the market.

The competitive consequences of bundling and loyalty rebates will vary from case to case. This places the antitrust authority in the difficult position of having to weigh up and balance the various effects. This is difficult to do, even if we have all the facts. In addition, it introduces legal uncertainty to the affected firms since, not only is the balancing exercise difficult to undertake *ex post* by the competition authority, it is impossible to undertake *ex ante* by the company that has significant market power. In addition, there is the problem of “administrability” – that is the level of resources that might be required by the competition authority to get the right answer (if that is possible at all).

There is a tension between the need for simple rules to ensure legal certainty and administrability, on the one hand, against case-by-case balancing on the other. This tension has led a large number of authors to focus attention on these problems, yielding many different proposals for simple tests that could yield reasonable good outcomes, while being simple, administrable and improving legal certainty.

These proposals have usually advocated some form of a structural rule of reason, with the following characteristics:

- (1) An analysis of the characteristics of the market or markets involved which might facilitate this form of market abuse:
 1. to what extent are there economies of scale, network effects, and economies of scope (and therefore to what extent it is possible to engage in foreclosure);
 2. in the context of single product rebates, to what extent are there switching costs, or to what extent the characteristics of the products and the relationship between customers and manufacturers are such that we observe “lock-in”;
 3. in the case of mixed bundling, what is the scope for bundle to bundle competition, or can the bundle can only be offered by one or few competitors? For example, are there entry barriers? Is there buyer power?
- (2) An analysis of the theory of harm.
 4. What is the incentive of the company with market power to leverage its non-contestable sales or its monopolized product onto the non-contestable part of the market, or onto other products?
 5. What is the ability of the company with market power to benefit from that leverage? Are there barriers to exit, or re-entry? To what extent can the strategy of the dominant company be replicated by rivals?
 6. What are the likely effects of the bundling or discounting strategy? Is the discounting below some measure of cost? What percentage of the market is covered by the rebates?

(3) An analysis of the possible efficiencies from the bundling/discounting.

Even if the case passes the first two stages, so that there is some real risk of anti-competitive harm, there may still remain the possibility of genuine efficiency benefits which must be balanced against the anticompetitive harm. This is both difficult and complex.

Because of these complexities, many people look to safe harbours, which set out the boundaries for behaviour that would normally be considered perfectly legal. A safe harbour test typically has two components: (a) a behavioural component, such as a price-cost test and (b) a structural component. The structural component should include a test for “replicability” – that is, whether or not the strategy of the dominant company can be replicated by the rival - either because they can offer their own bundle or because they have the possibility of competing for the whole business of the dominant company. Price-cost tests are unreliable since there are many efficiencies associated with price discrimination

Even with safe harbours, a competition authority is likely to find that many cases of this type are complex, the analysis is time consuming, and will require lots of resources. There is a question whether competition authorities should give priority to enforcement of competition policy against loyalty rebates and mixed bundling.

Paolo Palmigiano (the third panel expert) reiterated that discounting and bundling are very normal commercial practices. Whenever a competitor offers a new discounted product other companies usually respond. In telecommunications, many companies offer “triple play” or “quadruple play” bundles.

In Europe there is still a perception that discounts are bad. But there can be efficiencies from the practice. For example, in the British Airways (BA) case in Europe, some economic commentary argues that BA’s practices were an efficient way of discriminating between small and large agencies; if a small agency puts a lot of effort then it needs to be rewarded more than the bigger one which had to put less effort.

At present in Europe it is difficult to distinguish what is legal and what is illegal. Europe has so far taken a very legalistic approach. The major European cases - Michelin and BA - have almost created a *per se* rule: certain types of rebates are illegal. The key elements are the structure of the discount, the duration, and the “cost justification”. The problem is that “cost justification” has itself been interpreted in a very narrow manner. In practice many non- illegal discounts have no cost justification.

Mr Palmigiano noted that when the Michelin case came out in 2003, he and his colleagues examined the structure, duration, and cost justification of the discounting practices of BT. At the outset, they took a very narrow interpretation of these rules – any discounting had to be backed by a 100 per cent cost justification. One day they faced a situation where the regulatory staff could only justify 80 per cent of the discount as cost savings. The director asked: “What if I fired 20 people? Would that give me the right cost justification because my cost will go down?” That clearly shows that there is something wrong when you start applying the rules in a very formalistic manner. The OFT and the EC have started to apply a more economics-focused approach.

Companies need clear and applicable rules. Unless the rules are clear and applicable there is a danger of over- or under-enforcement. Companies need to know well in advance whether what they are doing is legal or not. There is a recent EC discussion paper on this issue, but one of the rules it proposes is unworkable. It is impossible for companies to evaluate which conduct would least disadvantage the competitor. The purpose of competition is to gain market share and to win shares from other companies. While such a rule might be useful *ex post* it is certainly not useful *ex ante*.

I. Single-product loyalty discounts

The Chairman (Tom Barnett) noted that for the purposes of this roundtable, the term “single-product loyalty discount” refers to the practice of offering discounts or rebates on *all* units purchased of a single-product conditioned upon the level (or share) of purchases of a product rather than just the units beyond the level (or share) of purchases needed to obtain the discount.

The Chairman asked the following questions to help focus the discussion:

- What are the positive or pro-competitive benefits of single product loyalty discounts and what is the role of dominance or monopoly power in assessing that?
- What are the anti competitive or harmful effects?
- Can single product discounts have any anti competitive effects when prices are above cost?
- Do we have administrable tests to detect potentially harmful conduct in this area?

Jorge Padilla asked: Are there pro-competitive effects of single product loyalty discounts? The answer is yes. There can be several benefits, some real efficiencies associated with economies of scale. These types of rebates (like many other rebates) will incentivize additional volume and, as a result, they may help the company to cover its fixed costs. They may be an efficient tool to provide incentives by introducing some form of non linear pricing that remunerates those downstream players (such as retailers) that exert additional efforts and therefore contribute to increase output. There is a question whether or not retroactive rebates are needed to achieve those efficiencies, but in principle there can be a number of benefits associated with these rebates.

These discounts can also produce anti competitive effects; obviously when you give a rebate you're giving your customer a much more attractive proposition, so you'll take some business away from competitors. Competitors may be or may not be able to replicate. If they can't replicate or can't match the offer perfectly they'll lose volume to the extent that they can no longer exploit economies of scale and they'll have to downsize their operations. This may exclude them from the market resulting in some form of foreclosure. This may be the ultimate motivation of the dominant firm. For example, to prevent entry in the contestable part of the market to prevent a rival building a loyal customer base which would allow it in future to contest the whole trade of the incumbent.

Can there be anti-competitive effects when prices are above costs? Yes, if by prices above costs you refer to the average price for the whole volume compared to the average total cost (or the average variable cost for all the business that a company has with a customer). What is important is what happens at the margin (the part of the market that is contestable). Even when the average price is above average cost, at the margin the average incremental price for the contestable sales can be below the average incremental cost and therefore you have a foreclosure effect.

Are there valid price-cost tests for anti-competitive harm? Any test is going to be very difficult to implement. The likelihood of false positives and false negatives is going to remain, with the risk that the policy will chill legitimate competition. Instead of seeking the perfect test, it is preferable to find workable safe harbours that try to minimize the chilling of competitive effects, combined with ex post rule-of-reason to get as close as possible to the right answer.

Paolo Palmigiano agreed that there are pro-competitive benefits of loyalty discounts and bundles. For example, a firm may want to reward a distributor downstream for putting in more effort, and selling more

units. For example, imagine you enter a new market or you have developed something new, and your costs initially are very high. If you have an assured outlet, increasing sales will allow your costs to drop over time. In this case, offering a discount based on your forecast volume to induce higher sales helps reduce costs overall.

Are there any anti-competitive effects? Certainly there are. The concern is that the supplier with substantial market power will require a buyer to buy all of its requirements from that specific company, excluding every other competitor. But, again, it's very difficult to distinguish at what point such behaviour is illegal.

Regarding the possibility for anti-competitive effects when prices are above cost, economic theories do find harm even when pricing above cost as has been said. But prohibiting pricing above cost has a real risk of heavily discouraging innovation.

Prof. Carlton agreed with the previous speakers that there can be pro-competitive benefits from discounting, both from achieving efficient scale and from improving incentives for downstream distributors. For example, it is often the case that if you buy a newspaper or magazine by subscription it is cheaper than if you buy it at the news stand. The reason is that it allows the business to plan for a more certain demand. There are clear efficiencies from loyalty discounting. Discounts can also be used as a method of price discrimination – even without any intention for competitive harm.

Can there be competitive harm if you practice these policies and you're a dominant firm? The answer, again, is yes. Prof Carlton noted that in the absence of strategic behaviour (to achieve an anti-competitive effect) as long as certain technical conditions are met, in general it would be unusual to see average incremental price to be below average incremental costs. Therefore if you want to have a test, that is probably not a bad test to start out with.

On the other hand, if there is pricing above cost (however you measure it) can you be sure there aren't any anti-competitive effects? Economic theory suggests there can be harm even when pricing above some measure of cost but Prof Carlton noted he would be reluctant to recommend the pursuit of such cases. Guidelines or safe harbours should be able to assure a business that if they are pricing above some measure of cost they will not be subject to further antitrust investigation.

Germany noted that all firms, including dominant firms, are free in principle to determine their competitive behaviour including pricing and the granting of discounts. But dominant firms are under an increased responsibility under competition law because of their high degree of market power. However, even a loyalty or discount system of a dominant firm that is producing anti-competitive effects may be compatible with the law if the firm demonstrates that its conduct is justified.

In Germany, anti-competitive discounts and rebates are prohibited by European law Article 82 of the Treaty, as well as by the German Competition Act, sections 19 & 20. Section 19, paragraph 1 of the German Act constitutes a general prohibition of abuse of market power by dominant companies as a blanket clause and, in that sense, is similar to Article 82, sentence 1 of the European Treaty. Like sentence 2 of Article 82 of the European Treaty, section 19 of the German law also sets out a non-exhaustive list of examples of forbidden abusive behaviour. These examples include impairing the ability of a rival to compete and/or demanding unfavourable or discriminatory terms and conditions.

The elements that have to be established in order to come to a finding that discounts and rebates are anti-competitive include (a) a dominant position of the company concerned, (b) foreclosure, hindrance or discrimination and (c) the absence of objective justification.

The Bundeskartellamt when applying these provisions of the German Competition Act balances the interests of the undertakings involved - i.e., the economic and competitive interests of the dominant firms and its competitors. Due weight is given to the aim of the Competition Act which is to ensure competition in markets. The Bundeskartellamt in this process analyses whether the discounts and rebates relate to cost savings as usually argued by the dominant firm. Other economic justifications may also be demonstrated by the dominant firm, but so far, in practice, they have not been invoked by firms under investigation. In the cases decided by the Bundeskartellamt firms mainly argue that discounts were introduced to induce customers to place orders and purchases in a cost saving manner and to pass on part of these savings back to the customers.

To illustrate the policy of the Bundeskartellamt, Germany described in detail a case involving resale of DSL connections. In 2005, Deutsche Telekom entered into a new pricing arrangements for DSL connections whereby the prices declined with the number of "ports" the purchaser made use of in each exchange. This pricing policy favoured two large companies - United Internet and AOL Deutschland. According to the Bundeskartellamt's preliminary findings these large resellers benefited the most from the pricing policy and were also the companies that would be best placed to establish their own infrastructure or to obtain it from third parties. With this policy a very select group of large resellers were granted much better resale prices for the upstream services than the rest of suppliers. Due to these benefits, the large resellers had competitive advantage over other resellers and it was feared that most other resellers would be pushed out of the market and an oligopoly would be established.

South Africa noted that in the South African competition law there is no express prohibition on loyalty rebates but depending on the effects, such a scheme may constitute a prohibition of certain sections of the relevant act.

South African Airways (SAA) is the national carrier of South Africa and dominates the South African market with about 2/3 of the market. This case concerned an incentive scheme for travel agents. SAA compensated travel agents with a flat basic commission up to a certain target figure. The target was set at a different level for each agency based on the volume tickets the agent sold the previous financial year. Once the agent reached his target he became eligible for additional commissions – the "overwrite" commission, which applied to all sales (not just the incremental sales, and the "incremental" commission, which applied to all additional sales above the target. In addition, individual employees of a travel agent who reached their own target would be rewarded with free international return tickets from SAA.

In 1999, SAA decided to adopt a more aggressive approach to the incentive scheme, by removing inflation adjustments and lowering the base commission rate. This meant that, in order to retain their previous level of profitability travel agents would not only have to exceed their targets but to exceed them by a big margin in order to qualify for the overwrite and incremental commissions. Predictably, as soon as the scheme came into effect, competitors of SAA started seeing a drop in their sales, especially sales through travel agents. In order to survive, travel agents found they had to sell more SAA tickets.

One of SAA competitors complained to the Competition Commission in 2000. The view of the Commission was that the schemes gave travel agents a compelling financial incentive to prefer SAA to all of its rivals and this had the effect of excluding the competitors of SAA from the market. The Explorer Program which incentivized the employees of the travel agencies directly also enhanced this exclusionary effect. The net result of all these schemes was a less competitive market in which there were higher fees, less choice for consumers and less innovation.

The Competition Tribunal in 2005 agreed with the submission of the Commission that the nature of the incentive scheme employed by SAA was anti competitive. The Tribunal considered the linearity of the incentive schemes and held that the greater the degree of non-linearity in a scheme, the greater the

anticipated anti-competitive effects of the scheme. In this case the Tribunal was satisfied that the way the scheme operated was non-linear: there was a sudden jump in the reward once the set target was reached. The Tribunal also considered the transparency of the rebate system. At any given time the agents didn't know whether they were meeting their targets or not. This meant there was an incentive on the agents to keep pumping business to SAA at all times.

Finally the Tribunal considered whether there were any efficiencies that could justify the incentive schemes. SAA had claimed 2 primary efficiencies: the schemes incentivized the travel agents to improve their knowledge of SAA product so that there was a better match between the airline and the customer, and that the scheme resulted in agents having a direct interest in improving SAA service by regularly informing it of complaints by customers and potential areas of improvement. The Tribunal found no connection between these claimed efficiencies by SAA and the way the incentive schemes were constructed. The Tribunal accepted the Commission's submission that the nature of the schemes was not to promote efficiencies but rather to promote loyalty to SAA. Most importantly the Tribunal found that the claimed benefits could easily be achieved without resulting to the schemes that SAA had set up. After all this consideration the Tribunal agreed with the Commission that these discount schemes contravened section 81 of the Act and imposed a fine of 45 million Rand on SAA.

Denmark discussed a case involving discounting by Post Denmark. The case involved the distribution of magazines. Post Denmark is the dominant carrier, with a market share of over 90%. The postal market, as in many other countries, is being increasingly liberalized. There are a few competitors, but Post Denmark remains the only nationwide distributor. Post Denmark offered a system of discounts based on the frequency and number of items in each delivery. The discount applies across all the items (i.e., is retroactive), similar to the Michelin case.

As part of the analysis the Danish competition authority conducted a "required share" (or RQS) test which asks the following question: What share of a customer's purchases does a rival to a dominant firm need to achieve in order to recover its costs when offering an attractive price?

Computing the RQS can be difficult, especially in a case like this where there are multiple discount thresholds and different dimensions to the discount systems. The competition authority chose to be as cautious and as conservative as possible. The resulting RQS was estimated to be 15-25 per cent - meaning that a competitor of Post Denmark would have to achieve a very large share of a customer's total purchase to be able to grow in that market.

In this case, the customer side of the market was quite concentrated, with a few large customers. For a rival to achieve 15 per cent of one customer's purchases would, for many of the rivals, involve a doubling or tripling of their total output. This was found to be a very convincing point when the case was presented to the Competition Council in Denmark. In this case the RQS wasn't used as a threshold or safe-harbour test. Rather it served as a way to understand the case better.

In Brazil, bundling and single product loyalty discounts are not specifically prohibited, but could be a violation of the competition law if they produce the anticompetitive effects required by law. The law requires the existence of market power, the case must be investigated under the rule of reason and efficiencies are required to be balanced against the anti competitive effects that might be observed.

Brazil reported a case involving a joint venture between the Bunc and DuPont groups. These companies entered into a joint-venture ("JV") to sell, buy, export and import agriculture commodities, especially soy beans. The agreement contained a clause that the farmers that had soy supply agreements with the JV would have the right to buy certain products from the parties under more favourable conditions than were offered in the market. It was considered there was a risk that this was anti-competitive. Although

the clause didn't prohibit JV buyers from acquiring products from other producers, the favourable conditions on complementary products produced the same economic effect as a "tying" sale or a price discrimination practice. However, the Council determined that there were no anti-competitive effects from this practice and cleared the merger without conditions.

The delegate from the European Commission raised an objection to the point made by Prof Carlton that we shouldn't be concerned about price discrimination. He noted that if you have consumer welfare in mind then allowing a firm to price discriminate to capture more consumers' surplus is objectionable.

The delegate also questioned the notion that rebates are ubiquitous in a market economy and therefore should be presumed to be acceptable by both dominant and non-dominant firms. He emphasized that discounts and rebates by a non-dominant firm (such as the local baker) are harmless. The question is what happens when a dominant firm applies rebates – what are the pro- and anti-competitive effects?

The delegate distinguished between conditional rebates and unconditional rebates (just having a lower price without any conditions). He also distinguished rebates from predation cases. In predation cases the questions asked include whether there is a sacrifice by the dominant firm, whether there is a reason to predate, and whether there can be recoupment, etc... However in cases of conditional rebates there can be foreclosure without sacrifice. They should be dealt with like exclusive-dealing cases.

How do we do this? The underlying question is: if the customer switches its purchases to the discounter, will it lead to a foreclosure that will harm those same customers? In other words, this is a general "effects-based" approach. We have to look at many factors: the level of dominance, the type of rivals, how good the products are, how attractive they are to customers, the coverage of the market, the conduct of the dominant firm, the possibility of buying power, incentives of rivals, and counter-strategies.

Is it possible to develop a first screen or safe harbour which can distinguish cases where there is not likely to be any anti-competitive effect or foreclosure that will lead to harm consumers? The delegate expressed the view that there can't be an absolute safe harbour. Depending on the circumstances of the case, it may be difficult to determine the "relevant range" of contestable sales. In the case of incremental rebates, the extra sales (above the threshold) are the relevant range. In the case of mixed bundling, the relevant range is the sales of the dominant firms on the contestable products. In the case of loyalty rebates determining the relevant range is more difficult.

What is the relevant cost benchmark for defining the safe harbour? The normal and most immediate cost benchmark is to ask whether or not the effective price over a relevant range is above or below some long run average incremental cost benchmark of producing that particular product. If the rivals have some non-contestable sales of their own, we could go down to a lower cost benchmark, but the starting point is whether or not the effective price is below some long run average incremental cost benchmark.

In the end the key question is: will it hurt consumers if these rivals leave the market? If those rivals have very good products and there is very little competition left in the market then there may be a reason to intervene and to protect those rivals from anti-competitive conduct.

In addition, as part of a general effects-based approach, it is necessary to look at possible efficiency justifications. There may be cost efficiencies, although these are most likely to be important for smaller firms. There may also be a need for a dominant firm to make specific investments to deliver or to supply particular customers. A rebate scheme or some other exclusive dealing arrangement may be necessary to lock-in a customer's demand to ensure a return on the specific investment made for a particular customer. The burden of proof should be on the dominant firm to show that there are efficiencies.

Prof. Carlton replied that it is very important to keep separate the concept of price discrimination from any anti-competitive harm that comes about from foreclosure. For example, a monopolist can engage in price discrimination with no effect on rivals (because there are no rivals). Such price discrimination is different to an anti-competitive effect. Price discrimination can be good or bad. Price discrimination should be treated separately and, in general, we shouldn't attack price discrimination – instead we should focus on pricing behaviour that has an anti-competitive effect.

Prof Carlton urged caution when using the word foreclosure, since every competitive action that is successful forecloses a rival from making sales. The word foreclosure is a loaded word. Instead it is preferable to say that we are opposed to pricing mechanisms (such as bundling or loyalty discounts) that have the effect of depriving rivals of scale when that scale matters. There must be economies of scale for the rival; if there are no large economies of scale for the rival then by depriving him of scale I maybe depriving him of business but I'm not depriving him of an ability to compete. Is the rival deprived of so much scale that he can't survive or operate efficiently? Can the rival achieve scale in other ways? Is the deprivation of scale so impairing the rival's ability to compete that prices are driven up for consumers who weren't forced to deal with the monopolist, or are the rivals driven out of business in a way that allows the monopolist to raise price?

Safe harbours are important to provide guidance to tell businesses what they can do. Otherwise the businessman is going to say: 'I'm subject to the whim of any antitrust authority'. For the antitrust authority to say: 'don't worry, we have smart lawyers and economists who are going to evaluate why you're pricing as you do', would create fear among most businessmen. The experience in the US was that this approach, when it was applied to the Robinson-Patman Act, was a disaster.

In Chinese Taipei loyalty discounts are reviewed on the basis of the rule of reason, rather than a *per se* rule. There are no safe harbour arrangements – rather each case is treated on a case-by-case basis.

On the other hand, there is a policy statement setting out how the authority will review loyalty discounts in the telecom industry. The reason is that since the liberalization of the industry in 2001, several potential entrants have tried to enter the market. The incumbent has responded by offering a variety of promotional programs to consumers. There have been a number of complaints from the rivals concerning loyalty discount programs.

The statement on loyalty discounts in telecoms, sets out the factors considered in the evaluation of the effect of the loyalty discounting, including the cost to the incumbent in providing the preferential rates and whether such costs can be recouped during the duration of the contract. Important among the considerations are the duration of the contract and the size of the penalty the consumer must pay for early termination. Finally the authority will take into account the size of the market foreclosure effect from such programs.

A recent case involved loyalty discounts for international calling. Consumers committed to a specific amount of usage were offered discounts ranging from 52% to 73%. In that case the authority found that the company had not violated the antitrust laws, in part due to the presence of high fixed and sunk costs in providing the service.

II. Bundling discounts

The Chairman turned to the topic of bundling discounts and asked, when we have a particular set of facts in front of us, how do we decide whether to take enforcement action or whether to investigate further?

Some commentators recommend a "total bundle" predation standard where the price of the entire bundle and is compared to the firm's costs of providing the entire bundle. Others have suggested a

“discount allocation” or “discount attribution” standard where the discounts for the entire bundle are allocated or attributed to the particular competitive product or products in the bundle. The effective price on that competitive product is then compared with the cost using some cost standard. The US Antitrust Modernization Commission recommended using discount allocation approach as a safe harbour in analysing bundle discounts.

The Chairman asked the following questions:

- (1) Should bundle discounts ever be condemned without the application of some kind of price-cost standard? If some kind of price-cost standard should be applied, which one?
- (2) Should the standard applied depend on whether there can be bundle to bundle competition as some people have suggested?
- (3) Should price cost standard be used as a test for illegality or simply as a matter for safe harbour?
- (4) If bundle pricing fails a price cost standard what else (if anything) should be shown regarding competitive effects before the pricing should be condemned? In particular should it matter whether rivals have exited or may soon exit the market as a result of the pricing?
- (5) Should evidence regarding commercial justification be relevant in evaluating these discounts?
- (6) Should evidence regarding intent to harm rivals be relevant in evaluating bundle discounts?

Paolo Palmigiano replied that, if we want some legal certainty, the price-cost standard does assist us to define what might be an abuse. But what standard? Each has its pros and cons. The test should probably be different when there is bundle-to-bundle competition, compared to when there is not such competition. Should the price cost standard be used as a test for illegality or as a safe harbour? Finding a test for illegality should be our first and main objective.

What happens if bundle pricing fails the price-cost standard? What else if anything should be shown? Certainly failing a test should not be enough to establish liability. There are many legitimate reasons for pricing below a certain level of cost (such as a developing market or markets where there are network externalities). In addition, an authority should look at the extent of barriers to entry, the extent of dominance, etc.

The mere exit of rivals cannot, in itself, be evidence of anti-competitive harm. There are many markets where, for example, there are 300 players initially but through consolidation this is reduced to 5 or 10. Was this the result of illegal conduct or was it just the market working properly? We have to be careful when we say that if rivals exit it must be an abuse.

On justifications, we saw earlier that in Europe there is no abuse if there is a cost justification. But there are many reasons why certain discounts or certain bundled product offerings are launched in the market. We need to be more careful about the rationale behind the discounting rather than simply applying a mechanical cost justification test.

In regard to evidence regarding intent to harm rivals, it is important to look closely at the intent of the company when they undertook this pricing conduct. On occasion you find some very clear e-mails that say ‘the only reason why we did it was because we wanted to kill competition’. That is certainly a very useful element in your analysis.

In response to the first question, Jorge Padilla replied that, most bundle discount cases should involve a price-cost standard – both to determine illegality and to determine the boundaries of the safe harbour. A price cost standard is useful in that it helps in understanding the likely effects.

But there is a special case which looks like a case involving bundling discounts, but in fact is a case of refusal-to-deal. This arises when, instead of lowering the price of the bundle, the dominant firm increases the price of the non-contestable components to the point where you foreclose competitors that require access to those components to compete with the system.

If a price-cost test should be applied, which one? The “total bundle” approach is relevant in the case of bundle-to-bundle competition and not outside those cases. In other cases the “discount allocation” approach constitutes a good starting point. But this approach runs the risk of over-deterrence. A price-cost test should not be used to determine illegality on its own. Further analysis is necessary before you can conclude that certain behaviour is likely to produce anti competitive foreclosure: for example, you need to look at the percentage of the market that is covered, whether there would be demand for the stand-alone product, the extent of economy of scale in the production of the stand-alone product, potential business justifications, and the extent of efficiencies that are realized through bundling, such as efficiencies in distribution, marketing and also price discrimination.

On intent, Jorge Padilla expressed scepticism about placing weight on emails that say “I want to kill competitors” as that is something many business people might say, whether or not they are engaging in anticompetitive activity.

According to Prof. Carlton the price cost standard should be used initially as part of a safe harbour test before carrying out further investigation of a bundle discount. Businesses like safe harbours - it gives them some certainty and thereby promotes healthy competition. But which price-cost test to apply? It's always hard to figure out the right price cost test. In the case of single products there is some guidance; in the case of bundled products it's even harder. None of these price-cost tests is perfect. All tests are going to allow some behaviour that has the possibility of harming competition and also condemn some behaviour that is perfectly innocuous and doesn't have any anti-competitive effect. The bundle-to-bundle approach is the most reasonable approach when there is competition between firms for the entire bundle. In other cases, the bundle standard is likely to be inappropriate as it allows behaviour to slip through that could result in competitive harm.

Prof Carlton criticized the allocation test proposed by the Antitrust Modernization Commission (“AMC”) on the grounds that a firm may fail the first prong of the test (is a “discount attribution” test) in a number of simple cases of price discrimination that have nothing to do with an anticompetitive harm. The violation of a price-cost test should be only the beginning of the next stage of the analysis.

Once it has been determined that the firm has violated a price-cost test, you should proceed to look at the extent of scale economies. If there are scale economies, is the shift in demand due to the discounting sufficiently large that the competitive impact of the rival is eliminated or greatly reduced? If A is the monopolized product and B is the competitive product the question is the following: is it the case that the price of B to stand-alone B customers is going to rise. If it does there is likely to be an anticompetitive effect.

The authority should also take into account possible efficiency justifications for the pricing strategy of the dominant firm. These should be balanced (although this may be difficult) against the anticompetitive harm.

Prof Carlton expressed the view that evidence of the intent of the firm would not normally be considered sufficient evidence to find a violation. Many competitive companies would like to eliminate or dominate their rivals. An economist usually focuses on the actual behaviour that has resulted and the consequences of that behaviour. Having said, evidence that identified behaviour was specifically intended by the firm can confirm the economic analysis.

New Zealand discussed at length a case of bundling in the tourism industry. The case involved the operation of a hotel, called the Hermitage, located in Mt Cook Village, in Mt Cook National Park. The Hermitage is the sole provider of mid- to high-standard accommodation, food and beverages and has the only up-market restaurant within the village. The village is located in a remote area in a national park at the base of New Zealand's highest mountain. It has a very small permanent population and very little passing trade. The village exists primarily to service tourism. The Hermitage itself has an iconic status as a tourism destination, both nationally and internationally.

In October 2003, the Hermitage replaced the separate provision of its hotel accommodation, breakfast, and dinners with a bundled all-inclusive "dinner, bed, and breakfast" rate. This bundled discount represented a \$10 discount on the three products purchased separately. It was alleged that the Hermitage acted in this way to blunt the competition from a new entrant and to prevent further entry. The new entrant in this case was the first competing supplier of services at the village since 2003. It took this entrant ten years to obtain a license to operate in the village. In part the delay resulted from regulatory requirements imposed by the National Parks Act and the Conservation Act as well as the lack of suitable sites within the village.

In this case the Dept of Conservation had entered into an arrangement with a corporation whose directors were a perfect match with the directors of the Hermitage. That company had been given the right to manage access to sites within the village and also to set some of the license conditions including hours of operation.

According to section 36 of the New Zealand competition law (the Commerce Act) any person who has substantial degree of market power is prohibited from taking advantage of that market power for the purpose of preventing or deterring a person from engaging in competitive conduct in any other market. To determine whether this conduct would contravene section 36 the Commission established that the Hermitage did have substantial market power within both relevant markets for the provision of accommodation but also for meals within the village. Further, the Commission found that the Hermitage had taken advantage of its market power. This was determined by considering whether the offering of a bundled product was likely to have raised the Hermitage's profits compared to the prior situation without bundling.

In particular, the Commission undertook modelling of the operations of the Hermitage. The results suggested that the profit earned under the bundled pricing strategy was likely to be substantially less than the unbundled offering during the peak season. This can be explained by a price discrimination story. Prior to the bundling strategy, the hotel could effectively offer two different sets of prices to two different types of customers – higher prices to those customers preferring to dine in the restaurant in the hotel, and lower prices to customers who want to stay at the hotel, but are prepared to eat elsewhere. The setting of a single price for both groups to cover accommodation and meals resulted in lower profits than could be earned by setting different profit-maximizing prices for each group.

In addition, the results of the model were compared with monthly data on the number of night-rooms sold in the Hermitage Hotel from July 2000 to March 2005. That period straddled the point when the bundle was introduced. The results showed that the demand for rooms was about 16% lower over this

period than it would have been expected given tourists arrival numbers. This was substantially more than the model prediction of about a 7% deterrence effect on the bundled hotel guest numbers.

The Commission looked at other efficiency explanations for the bundling strategy. One possibility was reduced transactions costs. The Hermitage argued that the tie allowed savings in transaction costs, for instance, through the reduction in the number of cashiers needed. The Commission found that this saving could not possibly justify the extent of the projected profit sacrifice. The Commission also looked at a possible sorting rationale, whereby the tying was a tool to discourage relatively low-paying customers, in a situation where the hotel faces excess demand for its accommodation in the short run. However, the Commission did not find systematic under-capacity in recent years. In any case, the company didn't argue this point. The Managing Director of the hotel also argued that they were trying to provide a "luxury lodge" sort of experience. Ties of this sort are the norm in many luxury lodges in remote locations in New Zealand. However, while the Hermitage satisfied the isolation criteria, it didn't appear to display the other characteristics of a typical luxury lodge. It was much larger, it lacked the same exclusivity and personal service, and guests stayed on average only one night (which is much shorter than the average lodge stay). Other similar hotels did not have tying of this kind.

In the end, when the Commission presented the company with their concerns the company offered a settlement. The Dept for Conservation was formally warned for their part in this case. There were similar issues in three other national parks around the country. In the end a settlement was agreed under which the Hermitage admitted liability and agreed to introduce a separate B&B rate alongside the dinner/breakfast/accommodation rate. Subsequently the Dept of Conservation has changed the way it interfaces with the dominant player in each of the national parks.

The European Commission expressed concern over "absolute" safe harbours for several reasons. The first is that firms that fall within a safe harbour may not co-operate with the enforcement authority in the provision of price and cost data. The second is that, although safe harbours are important in giving an indication to industry, and helping case handlers to prioritize their work, they cannot always guarantee that an action is not anti-competitive. The real test is to what extent there will be harm to consumers. A "bright line" test for that may not be possible.

Which price cost test should be used? The delegate noted the consensus that the relevant price is the effective price when you impute all of the rebates to the tied (competitive) product. But what is the relevant cost benchmark? The delegate expressed the view that the relevant cost benchmark is the long-run incremental cost of the incumbent in providing the competitive product.

Further analysis is then needed to determine why the discounting harms the ability of rivals to compete, including an investigation of the cost structure of rivals, possibilities for buyer power, and analysis of the importance of the customers that have been targeted by the discounting - why are these customers necessary for rivals to enter or be active on the market?

On efficiencies, the delegate noted that the most likely efficiencies are certain economies of scope in producing or in distributing the bundle compared to having individual products being sold. On the need for a showing of intent, the delegate agreed with the previous speakers in that evidence of intent may strengthen the story of the enforcement authority but can never be in itself sufficient to find an abuse.

The delegate also asked Prof Carlton to explain why the second prong of the safe harbour proposed by the AMC involves a test for whether or not the defendant is likely to recoup any short term losses. This seems to mix a predation test with a non-predation standard.

A delegate from BIAC commented on the question of evidence of intent. There is a difference between looking at intent subjectively versus objectively. One approach is to try to determine the expected economic impact of a pricing or bundling strategy, and then use that to infer intent. That yields an objective measure of intent. Another approach is to obtain documents expressing the company's own view of its intent (such as the intent to kill off competition), which could be said to be "subjective" intent. Subjective evidence of intent may sometimes give you some additional confidence in the objective evidence that you've assessed, but standing alone, subjective evidence is often quite meaningless. Such statements are rife in the files of every company, regardless of their market share or market position – including those companies that complain they've been excluded from the bundled activity.

Jorge Padilla (leading off the closing remarks) commented on the relevant cost benchmark. On the debate about long run average incremental cost versus average avoidable cost, the issue turns on whether the bundling involves a product that is already in the market or is a new product. In the case of bundling two existing products, the relevant benchmark is average avoidable cost. On the other hand, if the discounting is bringing a new product into the market (as part of a bundle) the relevant benchmark is long run average incremental cost.

Competition policy has two things in common with hell: (a) The devil and (b) The road to hell is paved with good intentions. The devil is in the details. Many competition decisions hinge on the factual details and uncovering those details is fundamental. Competition authorities have good intentions, but in this area the risk of type I and type II errors is high. The cost of those errors is non-negligible. The risk of these errors should feature prominently in decisions about the correct safe harbours or illegality tests, and also into decisions about enforcement priorities vis-à-vis cartels and other things.

Prof. Carlton, replying to the question about the AMC test, noted that the test has its own drawbacks. It is easy to construct cases which fail the first part of the test even if the firm is just carrying out simple types of price discrimination. The flaw in this part of the AMC test is that in assigning the discount to the monopolized product there is an assumption that the stand-alone price of the monopolized product would be the same whether or not you bundle. That turns out to be false. In the absence of the bundle, the price of the stand-alone product is going to be different. But all price-cost tests have their limitations.

In regard to the second prong of the AMC test, it is correct that bundling may be anti-competitive without making a "loss", so a recoupment test is probably not necessary.

These discounts are ubiquitous. We have a strong reason to believe that there are efficiency reasons for these practices. For that reason we should be worried about chilling the normal forces of competition. It is important to be clear about the nature of the harm from a case before proceeding with prosecution.

Paolo Palmigiano concluded by reiterating that companies want clear and applicable rules, as do competition authorities. We have seen that discounts and bundling are typically pro-competitive and a normal way of doing business. The fact that we struggle distinguishing pro- and anti-competitive discounting should tell us to be very careful when we intervene.

Bad decisions have an impact on companies. Mr Palmigiano reported being at a conference where an in-house lawyer for Michelin was speaking, hired after Michelin had been fined twice. She said: 'My role isn't to help my company. My role is just to make sure that we follow to the letter what the decision says. I'm basically stopping my company doing discounts; that is all I do'. Is that a good outcome or the intention of the decision? That is probably not what either the Commission nor ECFI wanted, but sadly that was the result. The possibility of chilling competition is something to be taken seriously into account.

Mr Palmigiano expressed that, in his view, a price-cost test is useful, especially as a screen. Business people understand price-cost tests. But failing a price-cost test shouldn't be enough to establish liability. Certainly, the opposite (which we currently have in Europe) which is *per se* rule isn't an option going forward. At least there is a willingness on all fronts to move forward to develop better rules.

The Chairman concluded by highlighting that there seems to be consensus on the following points:

- (1) Neither *per se* illegality nor *per se* legality is appropriate in this area;
- (2) The perfect answer has not been found yet, and the issue remains one which we are wrestling with;
- (3) The problem is limited to dominant firms or monopolistic companies;
- (4) Safe harbours are a useful tool;

In terms of determining what should be the standard of liability, the Chairman distinguished two lines of thought: the first based on a theory of predation and the other based on a theory of exclusionary behaviour. He also noted the desire to develop administrable tests and the recognition that all the existing tests are subject to criticism of one sort or another. This is a topic that will continue to be debated within the antitrust and competition community.

COMPTE RENDU DE LA DISCUSSION

La discussion s'est déroulée en deux temps, se consacrant tout d'abord aux remises de fidélité (remises s'appliquant à un seul produit), avant de s'attacher aux remises groupées (remises s'appliquant à l'achat de deux produits ou plus).

Le Professeur Dennis Carlton (l'un des trois experts du panel) attire l'attention sur le fait que l'application du droit de la concurrence ne devrait pas rechercher à interdire toutes formes de discrimination par le prix. Les tentatives visant à interdire toute discrimination par les prix font plus de mal que de bien. L'application du droit de la concurrence devrait plutôt se concentrer sur les cas dans lesquels le jeu de la concurrence est affecté et où, du fait du préjudice porté aux concurrents, certains consommateurs finissent par payer des prix plus élevés. Il faut qu'il y ait un lien entre l'atteinte au jeu de la concurrence et la hausse de prix pour les consommateurs.

Des règles simples et claires sont nécessaires. En particulier, il faut des « régimes d'exemption » clairs qui permettent aux entreprises d'avoir la certitude que leur comportement n'entraîne pas une violation des lois sur la concurrence. Les tests prix-coût ne sont pas parfaits. Condamner les fixations des prix qui ne bénéficient pas d'un régime d'exemption prix-coût en tant que violation *per se* serait une grave erreur.

L'analyse doit au contraire poser la question : la remise a-t-elle pour effet de priver un concurrent d'économies d'échelle importantes ? Si la réponse est négative, l'analyse peut s'arrêter. Mais si la réponse est positive, alors il faut également se demander : si le fait pour le concurrent d'être privé de cette économie le condamne à l'échec ? Si le concurrent peut atteindre l'échelle de vente nécessaire avec les autres clients ou sur d'autres marchés, l'enquête s'arrête là. Si le concurrent est bel et bien affecté, se retirera-t-il complètement du marché ?

Pour finir, si le concurrent est affecté, y a-t-il un consommateur qui, n'ayant auparavant, pas à faire avec l'entreprise dominante présumée, est désormais confronté à des prix plus élevés et se trouve contraint de traiter avec cette entreprise dominante ?

Un exemple illustre le propos : supposons une île équipée d'un seul hôtel. Un grand nombre de touristes y séjourne. Les touristes mangent à la fois à l'hôtel et dans l'un des nombreux restaurants locaux. Les gens qui vivent sur l'île mangent également dans ces restaurants. Supposons que l'hôtel impose aux clients pour condition de résidence à l'hôtel, d'y prendre également leurs repas. Supposons que cette décision réduise le volume de l'activité des restaurants locaux au point qu'ils doivent fermer, forçant les autochtones à manger au restaurant de l'hôtel. Si le prix qu'ils paient augmente, il y a probablement une atteinte à la concurrence. Sinon, la situation n'est probablement pas anticoncurrentielle.

Les remises sur les quantités et les ventes groupées sont inévitables dans une économie de marché même en l'absence de pouvoir de marché important. Il faut faire attention à ne pas étouffer les rabais, les remises de fidélité et les ventes groupées car dans la plupart des cas, ils ne constituent pas une tentative d'exploitation ni d'augmentation du pouvoir de marché, mais un facteur d'efficacité. Il faut faire attention de ne pas étouffer la concurrence en protégeant les concurrents des facteurs de concurrence.

Jorge Padilla (le deuxième expert du panel) rappelle que les ventes groupées et les remises de fidélité constituent des pratiques courantes dans une économie de marché. Ces pratiques reflètent parfois des capacités sous-jacentes, telles que les capacités de production, les capacités de vente conjointe, ou les capacités de fixation de prix. Le fait que les ventes groupées et les remises de fidélité soient parfois effectuées par des petites entreprises, ne disposant pas de pouvoir de marché, indique qu'il existe souvent des capacités légitimes ou des motivations concurrentielles derrière ces pratiques. Ces pratiques peuvent également survenir parce qu'une entreprise veut voler l'activité à ses concurrents. Il n'y a rien de mal à cela, à condition que les concurrents puissent également répondre et répliquer à cette stratégie. Les ventes groupées et les remises de fidélité ne sauraient être considérées comme illégales *per se*.

La plupart des travaux évoquent la notion « d'effet de levier ». Dans les cas de ventes groupées mixtes, l'effet de levier provient d'un marché où une entreprise dispose, sur un autre marché compétitif, un pouvoir de marché suffisant pour voler une activité d'un producteur autonome qui ne peut pas répliquer à l'offre groupée. Des remises sur un seul produit peuvent également être interprétées comme des outils de levier. On peut observer ce phénomène quand une partie des ventes n'est pas contestable ou est verrouillée par un fournisseur particulier, peut-être en raison des coûts de changement de fournisseur. Dans ce cas, le levier s'exerce à partir des ventes non contestables sur la part contestable ou compétitive du marché.

Les conséquences des remises de fidélité et des remises groupées sur la concurrence seront variables d'un cas à l'autre. L'autorité de la concurrence se trouve ainsi dans la situation délicate d'avoir à évaluer et à mettre en balance les différents effets. C'est difficile à faire, même en disposant de tous les éléments. De plus, cela introduit une incertitude juridique pour les entreprises affectées car, si l'exercice de la mise en balance est difficile à mener *ex post* par l'autorité de la concurrence, il est impossible à réaliser *ex ante* par l'entreprise qui dispose d'un pouvoir de marché important. De plus, il y a le problème de « l'administrabilité » – à savoir le niveau de ressources dont pourrait être avoir besoin l'autorité de la concurrence pour obtenir la bonne réponse (si cela est possible).

Il y a une tension entre la nécessité de règles simples pour assurer la certitude juridique et l'administrabilité, d'une part, et l'évaluation au cas par cas d'autre part. Cette tension a conduit un grand nombre d'auteurs à concentrer leur attention sur ces problèmes, en formulant de nombreuses propositions de tests simples susceptibles de donner des résultats raisonnablement bons, tout en étant simples, administrables et favorables à la certitude juridique.

Généralement, ces propositions préconisent une certaine forme de règle de raison structurelle, dont les caractéristiques sont les suivantes :

- (2) Une analyse des caractéristiques du ou des marché(s) impliqué(s) qui pourraient faciliter cette forme d'abus du marché :
 7. Dans quelle mesure y-a-t'il des économies d'échelle, des effets de réseau, et des économies d'envergure (et par conséquent dans quelle mesure peut-on parvenir à un verrouillage) ;
 8. Dans le cadre de remises sur un seul produit, dans quelle mesure y-a-t'il des modifications de la répartition des coûts de changement de fournisseur, ou dans quelle mesure les caractéristiques des produits et la relation entre les clients et les fabricants sont telles que nous observons des « verrouillages ».
 9. Dans le cas des ventes groupées mixtes, quelle est l'étendue de la concurrence entre lots vendus de façon groupée, ou l'offre groupée peut-elle n'être proposée que par un seul ou quelques concurrents ? Par exemple, y-a-t'il des barrières à l'entrée ? Existe-t-il un pouvoir des acheteurs ?

(3) Une analyse sous l'angle de la théorie du préjudice.

10. 4. quel est l'élément incitant l'entreprise qui dispose d'un pouvoir de marché à tirer avantage de ses ventes non contestables ou de son produit en situation de monopole pour influencer sur la part non contestable du marché, ou sur d'autres produits ?

11. 5. quelle capacité a l'entreprise qui dispose d'un pouvoir de marché à bénéficier de cet effet de levier ? Existe-t-il des barrières à la sortie, à une nouvelle entrée ? Dans quelle mesure la stratégie de l'entreprise dominante peut être reproduite par ses concurrents ?

12. 6. quels sont les effets possibles de la stratégie de vente groupée ou de rabais ? La remise est-elle inférieure à une certaine mesure des coûts ? Quel pourcentage du marché est-il couvert par les remises ?

(4) Une analyse des efficiences éventuelles tirées de la vente groupée ou des rabais.

Même si l'examen du dossier franchit les deux premières étapes, de sorte qu'il y a réellement un risque de préjudice anticoncurrentiel, on ne saurait exclure la possibilité de véritables avantages en termes d'efficience qui doivent être mis en balance avec le préjudice porté à la concurrence. C'est un problème est à la fois difficile et complexe.

En raison de ces complexités, de nombreux spécialistes examinent les régimes d'exemption, qui précisent les limites du comportement qui serait normalement considéré comme parfaitement légal. Un test d'application du régime d'exemption se compose généralement de deux éléments: (a) une composante liée au comportement, comme le test prix-coût et (b) une composante structurelle. La composante structurelle doit normalement comprendre un test de « reproductivité » – à savoir, la possibilité de reproduction de la stratégie de l'entreprise dominante par les concurrents – soit parce qu'ils peuvent proposer leur propre offre groupée soit parce qu'ils ont la possibilité de concurrencer l'ensemble de l'activité de l'entreprise dominante. Les tests prix-coût ne sont pas sûrs car il y a de nombreuses efficiences associées à la discrimination par les prix

Même avec les régimes d'exemption, une autorité de la concurrence risque de constater que de nombreuses affaires de ce type sont complexes, que l'analyse prendra du temps et nécessitera beaucoup de ressources. On peut dès lors se demander si les autorités de la concurrence devraient privilégier l'application de la politique de la concurrence aux remises de fidélité et ventes groupées mixtes.

Paolo Palmigiano (le troisième expert du panel) confirme que les rabais et les ventes groupées constituent des pratiques commerciales normales. À chaque fois qu'un concurrent offre des remises sur un nouveau produit, les autres entreprises réagissent généralement à cette initiative. Dans les télécommunications, de nombreuses entreprises proposent des offres groupées triples ou quadruples.

En Europe, les remises ont toujours mauvaise réputation. Mais en pratique, elles peuvent être sources d'efficience. Par exemple, dans l'affaire British Airways (BA) en Europe, certains commentaires économiques soutiennent que les pratiques de BA constituaient une manière efficiente de faire une discrimination entre les petites et les grandes agences ; en effet, si une petite agence déploie de gros efforts, elle doit alors être récompensée davantage que les plus grandes agences qui ont déployé moins d'efforts.

Actuellement en Europe il est difficile de distinguer entre ce qui est légal et ce qui ne l'est pas. L'Europe a jusqu'à présent opté pour une approche très legaliste. La plupart des affaires européennes - Michelin et BA – ont presque créé une règle *per se* : certains types de remises sont illégaux. Les éléments déterminants sont la structure de la remise, la durée et la « justification du coût ». Le problème est que

cette « justification du coût » a elle-même été interprétée d'une manière très restrictive. En pratique, de nombreuses remises non illégales ne sont pas justifiées par le coût.

M. Palmigiano note que, lorsque l'affaire Michelin a éclaté en 2003, il a examiné avec ses collègues la structure, la durée et la justification par le coût des pratiques de remises de BT. D'emblée, ils sont partis d'une interprétation très étroite de ces règles – toute remise devait être justifiée à 100 % par le coût. Un jour, ils ont été confrontés à une situation où le personnel de l'autorité de tutelle ne pouvait justifier que 80 % de la remise par des économies de coûts. Son directeur a demandé : « Et si je licenciais 20 personnes ? Cela me permettrait-il de justifier cette mesure par le coût puisque mes coûts diminueraient ? » On voit bien là que quelque chose ne va pas lorsqu'on commence à appliquer les règles de manière très formelle. L'OFT et la Commission européenne ont commencé à appliquer une approche davantage centrée sur une réflexion économique.

Les entreprises ont besoin de règles claires et applicables. À défaut de telles règles, il y a un danger de sur- ou de sous-application de ces règles. Les entreprises veulent savoir à l'avance si ce qu'elles font est ou non légal. Il existe un récent document de réflexion de la Commission européenne sur ce sujet, mais l'une des règles qu'il propose est inapplicable. Les entreprises sont dans l'impossibilité d'évaluer les conduites qui seront le moins désavantageuses pour le concurrent. Le but de la concurrence est d'obtenir des parts de marché et de prendre des parts aux autres entreprises. Si une telle règle peut être utile *ex post*, elle ne l'est certainement pas *ex ante*.

I. Remise de fidélité sur des produits uniques

Le président (Tom Barnett) a indiqué qu'aux fins de cette Table ronde, le terme « remise de fidélité sur un seul produit » fait référence à la pratique qui consiste à offrir des remises ou des rabais sur *toutes* les unités achetées d'un produit donné sur la base du volume (ou de la part) des achats d'un produit et non pas simplement sur les unités au-delà de ce volume (ou de cette part) d'achats nécessaire pour obtenir la remise.

Le président pose les questions suivantes pour cadrer la discussion :

- Quels sont les avantages positifs ou favorables à la concurrence des remises de fidélité sur un produit donné et quel est le rôle du pouvoir de domination ou de monopole dans l'évaluation ?
- Quels sont les effets anticoncurrentiels ou préjudiciables ?
- Les remises sur un seul produit peuvent-elles avoir des effets anticoncurrentiels lorsque les prix sont supérieurs aux coûts ?
- Dispose-t-on d'un test administrable pour relever les comportements potentiellement préjudiciables dans ce domaine ?

Jorge Padilla s'interroge : les remises de fidélité sur des produits donnés ont-elles des effets favorables à la concurrence ? Oui. Il peut y avoir des avantages, quelques efficacités réelles associées à des économies d'échelle. Ces types de remises (comme nombre d'autres remises) susciteront une augmentation des volumes et, donc, aideront l'entreprise à couvrir ses frais fixes. Ces remises peuvent constituer un outil efficace d'incitation en introduisant une certaine forme de fixation de prix non linéaire qui rémunère les acteurs en aval (comme les détaillants) qui déploient des efforts supplémentaires et par conséquent, contribuent à l'accroissement de la production. La question est de savoir si des remises rétroactives sont ou non nécessaires pour obtenir ces gains d'efficacité, mais en principe ces remises peuvent présenter un certain nombre d'avantages.

Ces remises peuvent également produire des effets anticoncurrentiels ; de toute évidence lorsque vous accordez une remise, vous faites une offre beaucoup plus intéressante pour le client et vous pouvez ainsi détourner l'activité des concurrents. Les concurrents sont ou non en mesure de réagir. S'ils ne le peuvent pas ou ne peuvent s'aligner parfaitement sur l'offre, ils perdront du volume au point qu'ils ne pourront plus mettre à profit les économies d'échelle et qu'ils devront réduire leur exploitation. Ils peuvent ainsi être exclus du marché, ce qui aboutit à une certaine forme de verrouillage. Cela peut constituer la motivation ultime de l'entreprise dominante. Par exemple, cette dernière peut vouloir prévenir l'entrée sur la partie contestable du marché pour empêcher un concurrent de constituer une clientèle fidèle qui lui permettrait à l'avenir de contester l'ensemble de l'activité de l'entreprise en place.

Peut-il y avoir des effets anticoncurrentiels lorsque les prix sont supérieurs aux coûts ? Oui, si par « supérieurs aux coûts », on fait référence au prix moyen pour l'ensemble du volume par rapport au coût total moyen (ou le coût variable moyen pour toute l'activité d'une société avec un client). L'important, c'est ce qui se passe à la marge (la partie du marché qui est contestable). Même lorsque le prix moyen est supérieur au coût moyen, à la marge, le prix marginal moyen pour les ventes contestables peut être inférieur au coût marginal moyen de sorte qu'on se trouve face à un effet de verrouillage.

Existe-t-il des tests prix-coût valables pour le préjudice porté à la concurrence ? Tout test sera très difficile à mettre en œuvre. La probabilité de faux positifs et de faux négatifs va demeurer, avec le risque que l'action des pouvoirs publics ne fasse refroidir la concurrence légitime. Au lieu de rechercher le test parfait, il est préférable de trouver des régimes d'exemption viables qui essaient de minimiser le coup de froid sur les effets concurrentiels, régimes conjugués à la règle de raison *ex post* pour s'approcher aussi près que possible de la bonne réponse au problème.

Paolo Palmigiano convient que les remises de fidélité et les ventes groupées présentent des avantages pour la concurrence. Par exemple, une entreprise peut vouloir récompenser un distributeur en aval pour avoir déployé davantage d'efforts, et vendu plus d'unités. Par exemple, imaginons une entreprise entrant sur un nouveau marché ou apportant quelque chose de nouveau, et que ses coûts initiaux soient très élevés. Si cette entreprise a un débouché assuré, augmenter ses ventes va lui permettre de faire baisser ses coûts avec le temps. Dans ce cas, offrir une remise sur la base du volume prévu pour induire des ventes plus importantes contribue à réduire les coûts globalement.

Y a-t-il des effets anticoncurrentiels ? Il y en a certainement. On peut craindre en effet que le fournisseur qui dispose d'un pouvoir de marché important exige de l'acheteur qu'il acquière tout ce dont il a besoin auprès de cette entreprise particulière, à l'exclusion de tout autre concurrent. Mais une fois encore il est très difficile de savoir à quel point ce comportement est illégal.

En ce qui concerne les éventuels effets anticoncurrentiels lorsque les prix sont supérieurs aux coûts, les théories économiques considèrent qu'il y a atteinte à la concurrence même lorsque les prix sont supérieurs aux coûts, comme on l'a vu précédemment. Mais interdire la fixation de prix supérieurs aux coûts risque réellement de décourager fortement l'innovation.

Le Professeur Carlton convient avec les intervenants précédents que les remises peuvent présenter des avantages pour la concurrence, à la fois en permettant d'atteindre une échelle efficiente et en améliorant les incitations pour les distributeurs. Par exemple, il est fréquent que lorsque vous achetez un journal ou un magazine par abonnement cela soit moins cher que si vous l'achetez au kiosque. Cela permet en effet à l'entreprise de prévoir une demande plus certaine. Les remises de fidélité présentent des efficacités manifestes. Les remises peuvent également être utilisées comme méthode de discrimination par les prix – même sans intention de porter atteinte à la concurrence.

Peut-il y avoir préjudice pour la concurrence si ces pratiques sont le fait d'une entreprise dominante ? Une fois encore, oui. Le Professeur Carlton note qu'en l'absence de comportement stratégique (pour atteindre un effet anticoncurrentiel) et tant que certaines conditions techniques sont réunies, on trouvera rarement des prix marginaux moyens qui soient inférieurs aux coûts marginaux moyens. Par conséquent, si l'on veut faire un test, celui-ci n'est sans doute pas un mauvais point de départ.

D'autre part, si les prix sont supérieurs au coût (quelle que soit la façon de le mesurer) peut-on être sûr qu'il n'y a pas d'effets anticoncurrentiels ? La théorie économique suggère qu'il peut y avoir préjudice même lorsque les prix sont supérieurs à une certaine mesure de coût mais le Professeur Carlton fait remarquer qu'il hésiterait à recommander d'engager des poursuites dans de telles affaires. Des lignes directrices ou des régimes d'exemption devraient permettre d'assurer à une entreprise que si ses prix sont supérieurs à un certain niveau de coût, elle ne fera pas l'objet d'une enquête plus poussée en termes de concurrence.

L'Allemagne note que toutes les entreprises, y compris les entreprises en position dominante, sont en principe libres de déterminer leur comportement en termes de concurrence, y compris pour la fixation des prix et l'application de remises. Mais les entreprises en position dominante ont une responsabilité accrue au regard du droit de la concurrence en raison de leur grand pouvoir de marché. Cependant, même les remises de fidélité ou les systèmes de remise d'une entreprise en position dominante qui produisent des effets anticoncurrentiels peuvent être compatibles avec la loi si l'entreprise démontre que sa conduite est justifiée.

En Allemagne, les remises et rabais anticoncurrentiels sont interdits par l'article 82 du Traité de Rome, ainsi que par les articles 19 et 20 de la loi allemande sur la concurrence. L'article 19, paragraphe 1 de cette loi constitue une interdiction générale de l'abus de pouvoir de marché par les entreprises en position dominante à titre de disposition générale et, en ce sens, il est similaire à l'article 82, première phrase du Traité de Rome. Comme la phrase 2 de l'article 82 du Traité de Rome, l'article 19 de la loi allemande dresse également une liste non exhaustive d'exemples de pratiques abusives prohibées. Ces exemples comprennent le fait de compromettre la capacité d'une autre entreprise à participer à la concurrence ou celui d'imposer des conditions défavorables ou discriminatoires.

Parmi les éléments qui doivent être établis pour conclure que les remises et rabais sont anticoncurrentiels, on retiendra (a) la position dominante de l'entreprise concernée, (b) le verrouillage, l'entrave ou la discrimination et (c) l'absence de justification objective.

Lorsqu'il applique ces dispositions de la loi allemande sur la concurrence, le Bundeskartellamt met en balance les intérêts des entreprises impliquées – à savoir, les intérêts économiques et concurrentiels des entreprises en position dominante et de leurs concurrents. L'objectif de la loi sur la concurrence qui est d'assurer que la concurrence sur les marchés a la place qui lui revient. Dans cette procédure, le Bundeskartellamt analyse si les remises et rabais se rapportent à des économies de coût comme cela est souvent avancé par l'entreprise en position dominante. Les autres justifications économiques peuvent également être démontrées par cette dernière, mais jusqu'à présent, en pratique, elles n'ont pas été démontrées par les entreprises contrôlées. Dans les cas tranchés par le Bundeskartellamt, les entreprises affirment généralement que les remises ont été introduites pour inciter les clients à passer commande et à acheter à moindre prix et pour répercuter une partie de ces économies sur les clients.

Pour illustrer la politique du Bundeskartellamt, l'Allemagne décrit précisément une affaire impliquant la revente de connections DSL. En 2005, Deutsche Telekom a conclu un nouvel accord tarifaire sur les connections DSL en vertu duquel les prix baissaient avec le nombre de « ports » que l'acheteur utilisait dans chaque échange. Cette politique de prix a favorisé deux grandes entreprises – United Internet et AOL Deutschland. Selon les premières conclusions du Bundeskartellamt, ce sont ces grands revendeurs qui ont

le plus bénéficié de la politique de prix de même que les entreprises qui étaient les mieux placées pour établir leur propre infrastructure ou pour les obtenir auprès de tiers. Avec cette politique, un groupe très restreint de gros revendeurs a obtenu un bien meilleur prix de revente pour les services en amont que le reste des fournisseurs. Les gros revendeurs avaient ainsi un avantage concurrentiel sur les autres revendeurs et on pouvait craindre que la plupart des autres revendeurs soient écartés du marché et que ne s'établisse un oligopole.

L'Afrique du Sud fait remarquer que la loi sud-africaine sur la concurrence ne prévoit pas d'interdiction expresse des remises de fidélité, mais qu'en fonction des effets, de tels systèmes pouvaient être interdits aux termes de certains articles de la loi concernée.

South African Airways (SAA) est la compagnie aérienne nationale en Afrique du Sud et occupe une position dominante, avec une part correspondant aux deux tiers du marché sud africain. Cette affaire concernait un programme d'incitation des agents de voyage. SAA rémunérait les agents de voyage sur la base d'une commission fixe jusqu'à un certain chiffre fixé comme objectif. L'objectif était différent pour chaque agence en fonction du volume de billets que l'agent avait vendu au cours de l'exercice précédent. Une fois que l'agent avait atteint cet objectif, il avait droit à des commissions supplémentaires, qui s'appliquaient sur toutes les ventes (pas seulement les ventes marginales, et la commission « marginale » qui s'appliquait à toutes les ventes supplémentaires au-dessus de l'objectif. De plus, les différents salariés de l'agence de voyage qui atteignaient leur propre objectif étaient récompensés par des billets gratuits allers-retours sur des vols internationaux avec SAA.

En 1999, SAA a décidé d'adopter une approche plus agressive du programme d'incitation, en supprimant les ajustements de l'inflation et en abaissant le taux des commissions de base. En d'autres termes, pour conserver leur niveau de rentabilité antérieur, les agents de voyage non seulement devaient dépasser leurs objectifs et en plus dans des proportions importantes pour avoir droit aux commissions supplémentaires et marginales. De manière prévisible, dès que cette politique est entrée en vigueur, les concurrents de SAA ont commencé à subir une chute de leurs ventes, en particulier les ventes par l'intermédiaire des agents de voyage. Pour survivre, ces derniers ont découvert qu'ils devaient vendre davantage de billets de SAA.

L'un des concurrents de SAA a porté plainte devant la Commission de la concurrence en 2000. De l'avis de la Commission, les programmes accordaient aux agents de voyage une incitation financière les contraignant à préférer SAA à tous ses concurrents ce qui avait eu pour effet d'exclure lesdits concurrents du marché. Le Programme Explorer d'incitation aux salariés des agences a également directement amplifié cet effet d'exclusion. En fin de compte, tous ces programmes ont abouti à un marché moins concurrentiel avec des prix plus élevés, moins de choix pour les consommateurs et moins d'innovation.

En 2005, le Tribunal de la concurrence a approuvé les conclusions remises par la Commission selon lesquelles la nature du programme d'incitation utilisé par SAA était anticoncurrentielle. Le Tribunal a étudié la linéarité des programmes d'incitation et considéré que plus le degré de non-linéarité était élevé dans un programme, plus grands étaient les effets anticoncurrentiels attendus du programme. Dans cette affaire, le Tribunal a été convaincu que la manière dont le programme fonctionnait était non linéaire : les récompenses augmentaient soudainement une fois que l'objectif fixé était atteint. Le Tribunal a également étudié la transparence du système de remise. À aucun moment les agents ne savaient s'ils avaient atteint ou non leurs objectifs. En d'autres termes, SAA incitait les agents à continuer de détourner en permanence les activités vers SAA.

En fin de compte, le Tribunal a vérifié s'il y avait des efficacités qui pourraient justifier les programmes d'incitation. SAA a avancé deux sources d'efficacité principales : les programmes incitaient les agents de voyage à améliorer leur connaissance des produits SAA pour une meilleure coordination

entre la compagnie aérienne et le client, et le programme aboutissait à ce que les agents aient un intérêt direct à améliorer le service SAA en informant régulièrement la compagnie des plaintes des clients et des domaines d'amélioration possibles. Le Tribunal n'a trouvé aucun rapport entre ces efficacités revendiquées par SAA et la conception des programmes d'incitation. Le Tribunal a accepté les conclusions de la Commission selon lesquelles la nature des programmes n'était pas de promouvoir les efficacités mais plutôt de promouvoir la fidélité à SAA. Mais surtout, le Tribunal a considéré que les avantages revendiqués pouvaient être facilement atteints sans en passer par les programmes mis en place par SAA. Après toutes ces considérations, le Tribunal a reconnu avec la Commission que ces programmes de remises contrevenaient à l'article 81 de la loi et a condamné SAA à une amende de 45 millions ZAR.

Le Danemark évoque une affaire impliquant des remises de Post Denmark. L'affaire concernait la distribution de magazines. Post Denmark est le transporteur dominant, avec une part de marché de plus de 90 %. Le marché des services postaux, comme dans de nombreux autres pays est de plus en plus libéralisé. Il y a quelques concurrents mais Post Denmark demeure le seul distributeur national. Post Denmark proposait un système de remises sur la base de la fréquence et du nombre d'objets à chaque livraison. La remise s'appliquait à tous les objets (c'est-à-dire rétroactivement), comme dans l'affaire Michelin.

Dans le cadre de son analyse, l'autorité danoise de la concurrence a procédé au test de la « part requise » (ou RQS) qui pose la question suivante : à quelle part des achats d'un client doit parvenir le concurrent d'une entreprise en position dominante pour recouvrer ses coûts lorsqu'il offre un prix intéressant ?

Le calcul de la « part requise » peut être difficile, en particulier dans une affaire comme celle-ci où il y a de multiples seuils de remises et où les systèmes de remises présentent différentes dimensions. L'autorité de la concurrence a choisi d'être aussi prudente que possible. La part requise qui en est ressortie a été estimée à 15-25 % – ce qui signifie qu'un concurrent de Post Denmark devrait atteindre une très grande part du total des achats d'un client pour être en mesure de s'affirmer sur ce marché.

Dans cette affaire, les clients sur le marché étaient très concentrés, avec quelques gros clients. Pour atteindre 15 % des achats d'un client, il fallait pour beaucoup de concurrents doubler ou tripler leur production totale. Cet argument a paru très convaincant lorsque l'affaire a été présentée devant le Conseil de la concurrence du Danemark. Dans cette affaire, la part requise n'a pas été utilisée comme test de seuil ou comme test d'application d'un régime d'exemption. Au contraire, elle a servi à mieux comprendre le dossier.

Au Brésil, les ventes groupées et les remises de fidélité sur un seul produit ne sont pas spécifiquement interdites, mais sont susceptibles de contrevenir à la loi sur la concurrence si elles produisent des effets anticoncurrentiels prévus par la loi. La violation est conditionnée par la loi à l'existence d'un pouvoir de marché ; l'affaire doit alors faire l'objet d'une enquête soumise à la règle de raison et il faut justifier d'efficacités pour pouvoir les mettre en balance avec les effets anticoncurrentiels qui peuvent être observés.

Le Brésil rapporte une affaire impliquant une coentreprise entre les groupes Bunc et DuPont. Ces sociétés ont constitué une coentreprise pour vendre, acheter, exporter et importer des produits agricoles, en particulier des germes de soja. L'accord comprenait une disposition selon laquelle les agriculteurs qui avaient des contrats d'approvisionnement en soja avec la coentreprise auraient le droit d'acheter certains produits auprès des parties à des conditions plus avantageuses que sur le marché. Les autorités ont considéré qu'il y avait là un risque de pratique anticoncurrentielle. Bien que la clause n'interdise pas aux acheteurs de la coentreprise d'acheter les produits auprès d'autres producteurs, les conditions favorables sur les produits complémentaires ont abouti au même effet économique que les ventes « liées » ou une

pratique de discrimination par les prix. Toutefois, le Conseil a décidé que cette pratique n'avait pas d'effets anticoncurrentiels et a donné son feu vert à la coentreprise sans conditions.

Le délégué de la Commission européenne soulève une objection sur l'idée évoquée par le Professeur Carlton selon laquelle il ne faut pas s'inquiéter de la discrimination par les prix. Il note qu'en termes de bien-être du consommateur, il est choquant de permettre à une entreprise de faire une discrimination par les prix pour conquérir davantage de consommateurs.

Le délégué remet également en cause la notion selon laquelle les remises sont courantes dans une économie de marché et qu'elles devraient donc être présumées acceptables aussi bien de la part des entreprises en position tant dominante que non dominante. Il souligne que les remises et rabais d'une entreprise non dominante (comme celles d'un boulanger local) sont inoffensives. La question est de savoir ce qu'il se passe lorsqu'une entreprise dominante applique des remises – quels sont les effets pro- et anticoncurrentiels ?

Le délégué distingue entre remises conditionnelles et sans conditions (obtenir juste un prix inférieur sans aucune condition). Il fait également la distinction avec les remises dans des affaires de prédation. Dans ces affaires, il faut notamment savoir s'il y a un sacrifice de la part de l'entreprise en position dominante, s'il y a une raison d'adopter une démarche de prédation, et s'il peut y avoir récupération des coûts, etc. En revanche, dans les cas de remises conditionnelles, il peut y avoir verrouillage sans sacrifice. Elles devraient être traitées comme les affaires similaires de distribution exclusive.

Comment faire ? La question sous-jacente est : si le client change de fournisseur au profit de l'entreprise qui accorde les remises, cela conduira-t-il à un verrouillage qui portera préjudice à ces mêmes clients ? En d'autres termes, il s'agit d'une approche générale « basée sur les effets ». Il faut tenir compte de nombreux facteurs : le niveau de domination, le type de concurrents, si les produits sont vraiment bons, s'ils sont vraiment intéressants pour les clients, la couverture du marché, la conduite de l'entreprise dominante, un éventuel pouvoir des acheteurs, les incitations des concurrents, et les contre-stratégies.

Peut-on mettre au point un premier filtre ou un régime d'exemption qui puisse faire la différence entre les affaires qui ne sont pas susceptibles d'avoir des effets anticoncurrentiels ou de créer un verrouillage de nature à porter préjudice aux consommateurs ? Le délégué estime qu'il ne peut y avoir de régime d'exemption absolu. Selon les circonstances de l'espèce, il peut être difficile de déterminer la « tranche pertinente » des ventes contestables. Dans le cas de remises marginales, les ventes supplémentaires (au-delà du seuil) correspondent à la tranche pertinente. Dans le cas de remises groupées mixtes, la tranche pertinente correspond aux ventes de produits contestables par des entreprises en position dominante. Pour ce qui est des remises de fidélité, il est plus difficile de déterminer la tranche pertinente des ventes.

Quel est le coût de référence pertinent pour définir les régimes d'exemption ? Pour trouver la référence normale et la plus immédiate des coûts, il faut se demander si le prix effectif appliqué à la tranche pertinente est supérieur ou inférieur à une référence quelconque en matière de coût marginal moyen à long terme de la production de ce produit particulier. Si les concurrents ont des ventes non contestables de leur côté, on peut descendre à un coût de référence inférieur, mais le point de départ est de savoir si le prix effectif est ou non inférieur au coût marginal moyen qui sert de référence.

En dernière analyse, la question clé est de savoir si les consommateurs subiront un préjudice si ces concurrents quittent le marché ? Si ces concurrents ont de très bons produits et qu'il reste peu de concurrence sur le marché, alors il peut y avoir une raison d'intervenir et de protéger ces concurrents contre ce comportement anticoncurrentiel.

De plus, dans le cadre d'une approche générale fondée sur les effets, il est nécessaire de tenir compte des éventuelles justifications par des gains d'efficacité. Il peut y avoir des efficacités en termes de coût, même si elles sont plus susceptibles d'être importantes pour les entreprises les plus petites. Il peut également être nécessaire qu'une entreprise en position dominante procède à des investissements spécifiques pour fournir ou approvisionner des clients particuliers. Un programme de remise ou un autre accord de distribution exclusive peut être nécessaire afin de verrouiller la demande d'un client pour s'assurer un retour sur un investissement particulier réalisé au profit d'un client donné. La charge de la preuve de l'existence des efficacités devrait incomber à l'entreprise en position dominante.

Le Professeur Carlton répond qu'il était très important de séparer le concept de discrimination par les prix vis-à-vis de toute atteinte à la concurrence provenant d'un verrouillage. Par exemple, une entreprise en situation de monopole peut se livrer à une discrimination par les prix sans effet sur la concurrence (faute de concurrents). Une telle discrimination par les prix diffère d'un effet anticoncurrentiel. La discrimination par les prix peut être bonne ou mauvaise. Elle devrait faire l'objet d'un traitement distinct et, en général, il ne faut pas attaquer la discrimination par les prix – mais au contraire, se concentrer sur les comportements en matière de prix qui ont un effet anticoncurrentiel.

Le Professeur Carlton prône la prudence lorsqu'on emploie le mot « verrouillage », puisque toute action concurrentielle réussie empêche un concurrent de réaliser des ventes. Ce terme est chargé de sens. Il serait préférable de marquer une opposition aux mécanismes de fixation de prix (comme les ventes groupées ou les remises de fidélité) qui ont pour effet de priver les concurrents d'économies d'échelle lorsque l'échelle a une importance. Il doit y avoir des économies d'échelle pour le concurrent ; s'il n'y a pas d'économies d'échelle importantes pour le concurrent, le fait de l'en priver peut alors revenir à le priver d'activité mais pas à le priver de sa capacité à participer à la concurrence. Le concurrent est-il privé d'une telle échelle qu'il ne peut survivre ou fonctionner de façon efficace ? Le concurrent peut-il atteindre une échelle autrement ? La privation d'échelle diminue-t-elle tellement la capacité du concurrent à participer à la concurrence que les prix augmentent pour des consommateurs qui n'étaient pas contraints de traiter avec l'entreprise monopolistique, ou les concurrents sont-ils mis hors d'activité d'une manière qui permet à l'entreprise monopolistique d'augmenter les prix ?

Les régimes d'exemption sont importants parce qu'ils donnent des indications aux entreprises sur ce qu'elles peuvent faire. Autrement, l'entrepreneur va se dire: « Je suis soumis au caprice de l'autorité de la concurrence ». Et la réponse de l'autorité de la concurrence : « ne vous en faites pas, nous avons de bons avocats et de bons économistes qui vont vérifier pourquoi vous fixez vos prix comme vous le faites », est de nature à inquiéter la plupart des dirigeants d'entreprises. Aux États-Unis, le recours à cette approche, lorsqu'elle a été appliquée à la Loi Robinson-Patman, a été un désastre.

Au Taipei chinois, les remises de fidélité sont évaluées sur la base de la règle de raison et non par une règle *per se*. Il n'y a pas de régime d'exemption : au contraire chaque affaire est traitée au cas par cas.

Cela étant, il y a un principe qui précise la manière dont l'autorité va évaluer les remises de fidélité dans le secteur des télécommunications. En effet, depuis la libéralisation de ce secteur en 2001, plusieurs entreprises ont tenté d'entrer sur le marché. L'opérateur historique a réagi en proposant diverses promotions aux consommateurs. Il y a eu un certain nombre de plaintes des concurrents concernant des remises de fidélité.

La déclaration sur les remises de fidélité dans les télécommunications précise les facteurs à prendre en considération pour évaluer l'effet de ces remises, y compris le coût pour l'opérateur historique des tarifs préférentiels et si de tels coûts peuvent être récupérés sur la durée du contrat. Au nombre des éléments importants parmi les facteurs à prendre en considération, on compte la durée du contrat et la pénalité que le

consommateur doit verser en cas de résiliation anticipée. En dernière analyse, l'autorité prendra en compte l'ampleur de l'effet de verrouillage sur le marché qu'induisent ces programmes.

Une affaire récente a concerné des remises de fidélité pour des appels internationaux. Les consommateurs s'engageant sur pour un certain volume d'utilisation obtenaient des remises de 52 % à 73 %. Dans cette affaire, l'autorité a considéré que la société n'avait pas contrevenu au droit de la concurrence, en partie en raison du niveau élevé des coûts fixes et irrécupérables de prestation de ce service.

II. Remises groupées

Le Président en vient ensuite aux remises groupées et demande, comment, face à des faits particuliers, décider s'il faut prendre des mesures d'application du droit ou approfondir l'enquête ?

Certains commentateurs recommandent une norme de détermination d'une éventuelle prédation sur la base du « lot total » où les prix de l'ensemble du lot sont comparés aux coûts pour l'entreprise de la fourniture du lot tout entier. D'autres ont suggéré une norme fondée sur « l'allocation des remises » ou « l'attribution des remises » dans laquelle les remises pour le lot entier sont accordées ou attribuées au(x) produit(s) particulier(s) soumis à la concurrence et figurant dans le lot. Le prix effectif sur ce produit soumis à la concurrence est alors comparé au coût en utilisant une norme de coût. La Commission américaine de modernisation du droit antitrust (« AMC ») a recommandé d'utiliser l'approche de l'allocation de remise à titre de régime d'exemption dans l'analyse des remises groupées.

Le président pose les questions suivantes :

- (7) Les remises groupées devraient-elles jamais être condamnées sans l'application d'une quelconque norme prix-coût ? Si une certaine norme prix-coût doit être appliquée, laquelle ?
- (8) La norme appliquée dépend de la question de savoir s'il peut y avoir une concurrence entre lots comme certains l'ont suggéré ?
- (9) La norme prix-coût devrait-elle être utilisée comme test de l'illégalité de la conduite ou simplement comme un aspect du régime d'exemption ?
- (10) Si la fixation du prix du lot ne répond pas à une norme prix-coût, que faut-il démontrer d'autre (le cas échéant) en ce qui concerne les effets concurrentiels avant de condamner la fixation de prix ? En particulier, est-il important que les concurrents aient quitté ou risquent de quitter bientôt le marché en raison de la fixation des prix ?
- (11) Les éléments concernant la justification commerciale sont-ils pertinents pour évaluer ces remises ?
- (12) Les éléments concernant l'intention de nuire aux concurrents sont-ils pertinents pour l'évaluation des remises groupées ?

Paolo Palmigiano répond que si l'on veut avoir une certaine certitude juridique, la norme prix-coût aide à définir ce qui peut constituer un abus. Mais quelle norme ? Chaque norme a ses défenseurs et ses détracteurs. Le test devrait probablement être différent lorsqu'il y a une concurrence entre lots, par rapport à la situation où ce type de concurrence n'existe pas. Est-ce que la norme prix coût devrait être utilisée comme test d'illégalité ou comme régime d'exemption ? L'objectif premier devrait être de trouver un test d'illégalité.

Que se passe-t-il si la fixation du prix du lot ne répond pas à la norme prix-coût ? Que faut-il démontrer d'autre le cas échéant ? Le fait d'échouer à un test ne devrait certainement pas suffire à établir une responsabilité. Il y a de nombreuses raisons légitimes de fixer les prix en dessous d'un certain niveau de coût (comme pour développer un ou plusieurs marchés lorsqu'il y a des externalités de réseau). De plus, une autorité devrait tenir compte de l'ampleur des barrières à l'entrée, de l'étendue de la domination, etc.

La simple sortie des concurrents ne peut, à elle seule, prouver une atteinte à la concurrence. Il y a de nombreux marchés où, par exemple, il y a initialement 300 acteurs mais où ce nombre a été ramené à 5 ou 10 à la suite de mouvements de concentration. Es-ce le fruit d'un comportement illégal ou juste le signe d'un bon fonctionnement du marché ? Il faut être prudent avant de dire que si des concurrents sortent du marché, c'est qu'il doit y avoir un abus.

À propos des justifications, on a vu qu'en Europe il n'y a pas d'abus s'il y a une justification par le coût. Mais il y a de nombreuses raisons pour lesquelles certaines remises ou certaines offres de produits groupées sont lancées sur le marché. Il convient donc d'être plus prudent sur la raison qui préside à la remise au lieu d'appliquer simplement un test mécanique de justification par le coût.

Pour ce qui est d'établir l'intention de nuire aux concurrents, il est important de regarder de près l'intention de l'entreprise lorsqu'elle adopte ce comportement de fixation de prix. Parfois, on trouve des courriels très clairs qui disent « notre seul motif était d'écraser la concurrence ». C'est sans doute un élément très utile dans l'analyse réalisée par les autorités de la concurrence.

En réponse à la première question, Jorge Padilla estime que la plupart des affaires de remises groupées devraient être appréciées à l'aune d'une norme prix-coût – à la fois pour établir l'illégalité de la pratique et pour déterminer les frontières du régime d'exemption. Une norme prix coût est utile dans le sens où elle aide à comprendre les effets éventuels d'un comportement.

Mais il y a des cas spéciaux qui ressemblent à des affaires impliquant des remises groupées, alors que ce sont en réalité des refus de vente. Ainsi, au lieu de baisser le prix du lot, une entreprise dominante va augmenter le prix des composants non contestables au point de verrouiller le marché pour les rivaux qui ont besoin d'avoir accès à ces composants pour concurrencer le dispositif.

Si un test prix-coût devait être appliqué, lequel ? L'approche par le « lot total » est uniquement pertinente dans le cas de concurrence entre lots. Dans les autres cas, l'approche par « l'allocation des remises » constitue un bon point de départ. Mais cette approche fait courir le risque d'une « surdissuasion ». On ne devrait pas utiliser un test prix-coût seul pour établir l'illégalité d'une pratique. D'autres analyses sont nécessaires avant de conclure que certains comportements sont susceptibles de produire un verrouillage anticoncurrentiel : par exemple, il faut étudier le pourcentage du marché qui est couvert, voir s'il y aurait une demande pour le produit vendu séparément, l'étendue de l'économie d'échelle dans la production du produit individuel, vérifier les éventuelles justifications commerciales, et mesurer les efficacités qui sont réalisées par le biais de la vente groupée, telles que les efficacités dans la distribution, la commercialisation et également la discrimination par les prix.

En ce qui concerne l'intention, Jorge Padilla exprime son scepticisme quant à l'importance donnée aux courriels qui disent « Je veux écraser les concurrents » car ce sont des propos que de nombreux entrepreneurs sont susceptibles de tenir sans nécessairement se livrer à des activités anticoncurrentielles.

Selon le Professeur Carlton, la norme prix-coût devrait être employée initialement à titre de test pour le régime d'exemption avant de procéder à de plus amples recherches sur les remises groupées. Les entreprises aiment les régimes d'exemption – ils leur donnent une certaine certitude et favorisent donc une saine concurrence. Mais quel test prix-coût appliquer ? Il est toujours difficile de trouver le bon test prix-

coût. Dans le cas de produits individuels, il y a quelques lignes directrices ; dans le cas des produits groupés, c'est encore plus difficile. Aucun de ces tests prix-coût n'est parfait. Tous les tests vont permettre des comportements susceptibles de porter atteinte à la concurrence tout en condamnant des comportements qui sont parfaitement inoffensifs et sans aucun effet anticoncurrentiel. L'approche des lots concurrents est l'approche la plus raisonnable lorsqu'il y a une concurrence entre les entreprises sur le lot entier. Dans les autres cas, cette norme risque de ne pas être adaptée car elle permet à certains comportements d'échapper aux mailles du filet, ce qui peut aboutir à des atteintes à la concurrence.

Le Professeur Carlton critique le test de l'allocation proposé par la Commission de modernisation du droit antitrust (« AMC ») car une entreprise peut fort bien échouer à la première branche du test (test de l'attribution des remises) dans un certain nombre d'affaires simples de discrimination par les prix qui n'ont rien à voir avec une atteinte à la concurrence. Le fait d'échouer à un test prix-coût devrait seulement marquer le début de l'étape suivante de l'analyse.

Une fois qu'il a été établi que l'entreprise a échoué à un test prix-coût, il faut passer à l'examen de l'ampleur des économies d'échelle. S'il y a des économies d'échelle, la modification de la demande due aux remises est-elle suffisamment importante pour que l'impact produit par le rival sur la concurrence soit éliminé ou fortement réduit ? Si A est le produit en situation de monopole et B est le produit concurrent, la question est la suivante : est-on dans le cas où le prix de B pour les clients individuels de B va augmenter. Si c'est le cas, il y a éventuellement un effet anticoncurrentiel.

L'autorité devrait également prendre en compte les justifications éventuelles de la stratégie de fixation de prix de l'entreprise dominante par des considérations d'efficacité. Ces dernières devraient être mises en balance (même si cela peut être difficile) avec le préjudice pour la concurrence.

Le Professeur Carlton fait valoir que la preuve de l'intention de l'entreprise ne devrait pas normalement suffire à établir l'existence d'une violation. De nombreuses entreprises concurrentes aimeraient éliminer ou dominer leurs concurrents. Un économiste se concentre généralement sur le comportement effectif qui en résulte et les conséquences de cette attitude. Cela étant, le fait de prouver que le comportement était délibéré de la part de l'entreprise peut confirmer l'analyse économique.

La Nouvelle-Zélande évoque longuement une affaire de vente groupée dans le secteur du tourisme. L'affaire concernait l'exploitation d'un hôtel, appelé l'Hermitage, situé à Mt Cook Village, dans le Parc national du Mt Cook. L'Hermitage était le seul hôtel de catégorie moyenne-haute, le seul fournisseur de nourriture et de boissons et disposait du seul restaurant haut de gamme dans le village. Le village est situé dans une partie éloignée du parc national au pied de la plus haute montagne de Nouvelle Zélande. La population locale permanente est très réduite et il y a très peu de passage. Le village vit essentiellement du tourisme. L'Hermitage lui-même a un statut emblématique ; c'est une destination touristique nationale et internationale.

En octobre 2003, l'Hermitage a remplacé la fourniture séparée de ses services hôteliers, de petit déjeuner et de dîners par un forfait incluant « dîner, chambre, et petit déjeuner ». Le forfait représentait une réduction de 10 NZD par rapport aux trois services achetés séparément. L'Hermitage a été accusé de vouloir écarter la concurrence d'un nouvel entrant et d'empêcher d'autres entrées. Le nouvel entrant dans cette affaire était le premier prestataire de services concurrents au village depuis 2003. Il lui avait fallu dix ans pour obtenir une licence d'exploitation dans le village. Ce délai était dû en partie à des dispositions réglementaires imposées par la Loi sur les parcs nationaux et la Loi sur la protection de l'environnement ainsi qu'au manque de sites appropriés dans le village.

Dans cette affaire, le ministère de la Protection de l'environnement a conclu un accord avec une société dont les administrateurs étaient totalement de mèche avec ceux de l'Hermitage. Cette société avait

obtenu le droit de gérer l'accès aux sites dans le village et également de fixer certaines des conditions d'exploitation y compris les heures d'ouverture.

Selon l'article 36 de la loi néo-zélandaise sur la concurrence (la Loi sur le commerce) quiconque dispose d'un pouvoir de marché important ne doit pas en profiter pour empêcher ou dissuader une personne de s'engager dans une démarche concurrentielle sur un quelconque autre marché. Pour déterminer si cette attitude contrevenait ou non à l'article 36, la Commission de la concurrence a établi que l'Hermitage avait bien un pouvoir de marché important sur les deux marchés pertinents de l'hôtellerie et de la restauration dans le village. De plus, la Commission a considéré que l'Hermitage avait profité de son pouvoir de marché. C'est la conclusion qu'a tirée la Commission après avoir examiné si l'offre de produit groupée était susceptible d'avoir augmenté les bénéfices de l'Hermitage par rapport à la situation antérieure sans remise groupée.

Plus précisément, la Commission a entrepris une modélisation du fonctionnement de l'Hermitage. D'après les résultats de cet exercice, les bénéfices dégagés avec la stratégie de fixation de prix groupés étaient vraisemblablement sensiblement inférieurs à ceux que générait l'offre non groupée en haute saison. La discrimination par les prix peut expliquer cette différence. Avant la stratégie de vente groupée, l'hôtel pouvait effectivement proposer deux types de prix à deux types de clients – des prix plus élevés aux clients qui préféraient dîner au restaurant de l'hôtel, et des prix plus bas aux clients qui ne faisaient que séjourner à l'hôtel, mais allaient prendre leurs repas ailleurs. La fixation d'un prix unique pour les deux groupes couvrant l'hébergement et les repas s'est traduite par une baisse de bénéfices qui pouvaient être dégagés en fixant des prix différents maximisant les produits pour chaque groupe.

De plus, les résultats du modèle ont été comparés avec des données mensuelles sur le nombre de nuitées vendues à l'hôtel de l'Hermitage de juillet 2000 à mars 2005. Cette période était à cheval sur la période au cours de laquelle l'offre groupée a été mise en place. Les résultats ont montré que la demande de chambre était d'environ 16 % inférieure aux attentes sur cette période compte tenu du nombre des arrivées de touristes. C'est un résultat substantiellement supérieur aux prédictions du modèle mettant en évidence un effet dissuasif de 7 % sur le nombre des résidents de l'hôtel choisissant les forfaits.

La Commission s'est penchée sur les autres explications de la stratégie de vente groupée par des considérations d'efficacité. Une explication possible résidait dans la réduction des coûts de transaction. L'Hermitage a fait valoir que la vente liée permettait des économies sur les coûts de transaction, par exemple, en réduisant le nombre de caissiers nécessaire. La Commission a estimé que cette économie ne pouvait pas justifier l'ampleur du sacrifice de bénéfice projeté. La Commission a également examiné l'hypothèse d'une logique de tri, dans laquelle la vente liée visait à décourager les clients dépensant relativement peu d'argent, dans une situation où l'hôtel faisait face à une demande excédentaire d'hébergement à court terme. Cependant, la Commission n'a pas relevé de sous-capacité systématique pour les années précédentes. Quoi qu'il en soit, l'entreprise n'a pas mis en avant cet aspect. Le directeur général de l'hôtel a également fait valoir qu'il essayait de proposer une sorte d'expérience en « résidence de luxe ». Les ventes liées de ce type constituent la norme dans de nombreux établissements de luxe dans des sites reculés de Nouvelle-Zélande. Toutefois, si l'Hermitage répond au critère de l'isolement, il ne semble pas présenter les autres caractéristiques de la résidence de luxe typique. L'hôtel est beaucoup plus grand, il ne dispose pas du même service exclusif et personnel, et les hôtes ne restent en moyenne qu'une seule nuit (ce qui est beaucoup plus court que le séjour moyen dans ces résidences). Les autres hôtels similaires ne pratiquent pas de vente liée de ce genre.

Finalement, lorsque la Commission a fait part de ses préoccupations à l'entreprise, cette dernière a proposé un compromis. Pour ce qui le concerne, le ministère de la Protection de l'environnement a été officiellement averti de cette affaire. Il y avait des affaires similaires dans trois autres parcs nationaux du pays. En fin de compte, un règlement amiable a été conclu en vertu duquel l'Hermitage a reconnu sa

responsabilité et convenu de proposer un tarif distinct pour une formule nuit + petit déjeuner en plus du tarif comprenant le dîner, le petit-déjeuner et l'hébergement. Le ministère de la Protection de l'environnement a par la suite modifié ses relations de travail avec l'entreprise dominante de chaque parc national.

La Commission européenne a exprimé ses préoccupations quant aux régimes d'exemption « absolue », et ce, pour plusieurs raisons. La première est que les entreprises qui relèvent d'un tel régime d'exemption peuvent ne pas coopérer avec les autorités compétentes pour fournir de données sur les prix et les coûts. La seconde est que même si les régimes d'exemption sont importants parce qu'ils donnent des orientations au secteur, et permettent aux agents qui traitent les dossiers de hiérarchiser les priorités de leur travail, ils ne peuvent pas toujours garantir qu'une action n'est pas anticoncurrentielle. Le véritable test consiste à évaluer l'ampleur du préjudice subi par les consommateurs. Or, en l'occurrence, il peut être impossible de définir un critère de démarcation net.

Quel test prix-coût faudrait-il utiliser ? Le délégué de la Commission note qu'il y a un consensus sur le fait que le prix pertinent est le prix effectivement payé une fois imputés tous les rabais sur le produit (donnant lieu à concurrence) vendu dans le cadre de l'offre groupée. Mais quel est le coût de référence pertinent ? Pour le délégué, le coût de référence pertinent est le coût marginal à long terme de l'entreprise en place pour la fourniture du produit donnant lieu à concurrence.

Des analyses plus poussées sont alors nécessaires pour déterminer en quoi la remise porte atteinte à la capacité des entreprises rivales à participer à la concurrence : cela suppose notamment d'étudier la structure de coût des concurrents, les pouvoirs éventuels des acheteurs, et l'analyse de l'importance des clients qui sont visés par la remise – pourquoi ces clients sont-ils nécessaires aux concurrents pour entrer ou être actifs sur le marché ?

En ce qui concerne les efficiences, le délégué fait remarquer que les efficiences les plus probables sont certaines économies d'envergure dans la production ou dans la distribution des produits vendus de façon groupée par rapport à la vente des produits individuels. Sur la nécessité de démontrer l'intention, le délégué convient avec les précédents intervenants que la preuve de l'intention peut conforter l'analyse de l'autorité compétente mais ne peut jamais suffire en soi pour caractériser un abus.

Le délégué demande également au Professeur Carlton d'expliquer pourquoi la seconde branche du régime d'exemption proposé par l'AMC implique un test visant à savoir si le défendeur est ou non susceptible de récupérer ses éventuelles pertes à court terme. Cela apparaît comme un mélange entre un test visant à déterminer l'existence d'une prédation et une norme indépendante de la question de la prédation.

Un délégué du BIAC intervient sur la question de la preuve de l'intention. Il y a une différence entre considérer l'intention subjectivement et objectivement. Une approche consiste à essayer de déterminer l'impact économique attendu de la fixation d'un prix ou d'une stratégie de vente groupée, et ensuite de l'utiliser pour en déduire l'intention. Cela aboutit à une mesure objective de l'intention. Une autre approche consiste à obtenir des documents exprimant la vision par l'entreprise elle-même de son intention (telle que l'intention d'écraser la concurrence), qui pourrait être qualifiée d'intention « subjective ». La preuve subjective de l'intention peut parfois apporter une confirmation supplémentaire de la preuve objective ressortant de l'évaluation effectuée par l'autorité, mais à elle seule, la preuve subjective n'a souvent aucune valeur. De telles déclarations d'intention sont répandues dans les dossiers de toutes les entreprises, quelle que soit leur part de marché ou leur position sur le marché, y compris des entreprises qui se plaignent d'avoir été exclues du segment sur lequel intervient la vente groupée.

Jorge Padilla (qui ouvre la série de remarques finales) revient sur la référence pertinente en matière de coût. Dans le débat sur le coût marginal moyen à long terme par rapport au coût évitable moyen, la question est de savoir si la vente groupée concerne un produit qui est déjà sur le marché ou un nouveau produit. Dans le cas de vente groupée de deux produits existants, la référence pertinente est le coût moyen évitable. En revanche, si la vente groupée apporte un nouveau produit sur le marché (dans le cadre du lot) la référence pertinente est le coût marginal moyen à long terme.

La politique de la concurrence a deux choses en commun avec l'enfer : (a) le diable et (b) le fait d'être pavé de bonne intention. Le diable se trouve dans les détails. De nombreuses décisions en matière de concurrence tournent autour de détails factuels et il est fondamental de mettre au jour ces détails. Les autorités de la concurrence ont de bonnes intentions, mais dans ce domaine le risque d'erreurs de type I et de type II est élevé. Le coût de ces erreurs n'est pas négligeable. Le risque de telles erreurs devrait avoir toute sa place dans les décisions concernant le régime d'exemption correct ou les tests sur l'illégalité, et également dans les décisions sur les priorités de l'application du droit par rapport aux ententes et autres pratiques.

Le Professeur Carlton, répondant à la question sur le test préconisé par l'AMC, note que ce test a ses propres inconvénients. Il est facile de concevoir des cas qui échouent à la première partie du test alors même que l'entreprise se contente d'appliquer des types simples de discrimination par les prix. Cette partie du test de l'AMC pêche par le fait qu'en appliquant la remise au produit en situation de monopole, on présume que le prix de ce produit vendu séparément serait le même que s'il était vendu dans un lot. Or, c'est faux. En l'absence de vente groupée, le prix du produit individuel serait différent. Mais tous les tests prix-coût ont leurs limites

En ce qui concerne la seconde branche du test de l'AMC, il est correct de dire que l'on peut pratiquer des ventes groupées contraires à la concurrence sans subir de « perte », de sorte qu'un test de recouvrement des coûts n'est sans doute pas nécessaire.

Ces remises sont pratiquées partout. Il y a de fortes raisons de penser que ces pratiques obéissent à des motifs d'efficacité. En conséquence, il faudrait se préoccuper du coup de froid sur le fonctionnement normal de la concurrence. Il convient de bien s'entendre sur la nature du préjudice résultant d'une affaire avant d'engager des poursuites.

Paolo Palmigiano conclut en réaffirmant que les entreprises veulent des règles claires et applicables, tout comme les autorités de la concurrence. On a vu que les remises et les rabais sont normalement favorables à la concurrence et relèvent des pratiques commerciales normales. Le fait que l'on ait bien du mal à distinguer entre remises pro- et anticoncurrentielles devrait inciter les autorités à être très prudentes dans leurs interventions.

De mauvaises décisions ont un impact sur les entreprises. M. Palmigiano raconte qu'il a assisté à une conférence où intervenait une avocate « maison » que Michelin avait recrutée après avoir été condamné par deux fois à des amendes. Elle avait alors déclaré : « Mon rôle n'est pas d'aider mon employeur. Il consiste à vérifier que nous suivons la décision à la lettre. En fait, je l'empêche de faire des remises ; c'est tout ce que je fais ». Est-ce une conséquence heureuse ou est-ce l'intention de la décision ? Ni l'un ni l'autre, ce n'est probablement pas ce que voulaient la Commission ni le Tribunal de première instance de la Cour de justice des Communautés européennes, mais c'est le triste résultat auquel on abouti. Le risque d'un coup de froid sur la concurrence est à prendre au sérieux.

Pour M. Palmigiano, un test prix-coût est utile, en particulier pour servir de filtre. Les chefs d'entreprise comprennent les tests prix-coût. Mais échouer à un test prix-coût ne devrait pas suffire à établir une responsabilité. Certes, le contraire (ce que nous connaissons actuellement en Europe) qui est

une règle *per se* n'est pas une solution d'avenir. Au moins, il y a une volonté sur tous les fronts d'aller de l'avant pour améliorer les règles.

Le Président conclut en soulignant qu'il semble y avoir un consensus sur les points suivants :

- (5) Ni la solution de l'illégalité *per se* ni celle de la légalité *per se* ne semble appropriée dans ce domaine ;
- (6) On n'a pas encore trouvé la réponse parfaite, et le débat reste ouvert ;
- (7) Le problème est limité aux entreprises en position dominante ou en situation de monopole ;
- (8) Les régimes d'exemption constituent un instrument utile ;

Pour ce qui est de déterminer quelle devrait être la norme de responsabilité, le Président distingue entre deux lignes de pensée : la première est fondée sur une théorie de la prédation et l'autre sur la théorie du comportement d'exclusion. Il relève également le désir de mettre au point des tests administrables et la conscience que tous les tests existants font l'objet de critiques diverses. C'est un thème qui continuera à être débattu entre spécialistes du droit antitrust et du droit de la concurrence.