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Summary of Discussion of the Roundtable on Fidelity Rebates

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This document prepared by the OECD Secretariat is a detailed summary of the discussion on Fidelity Rebates held during the 125th meeting of the Competition Committee on 15-17 June 2016.

More documentation related to this discussion can be found at www.oecd.org/daf/competition/fidelity-rebates.htm

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Summary of Discussion on the Roundtable on Fidelity Rebates

By the Secretariat

The **Chair** introduced the topic of the roundtable: fidelity rebate schemes. These are schemes in which buyers are offered better prices in return for demonstrating their loyalty to the seller's products. Fidelity schemes are common, especially among firms with no market power, and they may reflect efficiencies or the kind of competitive behaviour that competition policy seeks to promote. But they may also have anticompetitive effects, particularly when they restrict or prevent rivals from competing effectively, or even force their exit.

Before starting the roundtable discussion the Chair introduced the three panellists: Professor Joe Farrell, from University of California, Berkeley; Professor Alison Jones from Kings College London; and James Venit, partner at Skadden, Arps, Slate, Meagher & Flom in Brussels.

The Chair explained that the discussion would be organised around five topics: (1) What is a Fidelity Rebate scheme; (2) What is the legal framework for assessing Fidelity Rebate schemes; (3) How does one analyse the potential for anticompetitive effects of Fidelity Rebate schemes; (4) What are the potential efficiencies of such schemes; and (5) Whether competition authorities should prioritise unilateral conduct in their enforcement activity.

He then gave the floor to the Secretariat to present the background paper prepared for this session. The presentation focused on the so-called partial exclusivity rebates. It emphasised that these types of rebates can sometimes benefit consumers, like exclusive dealing, even when the firm granting them is dominant. They might, for example, align incentives and promote investment. Therefore, taking a strict per se approach poses a risk of harming consumers. The background paper sets out an analytical framework for assessing the exclusionary effects of fidelity rebates. The framework aims at identifying when it makes sense to look at different types of price-cost test and when, instead, it is better to use a raising rival's costs framework. The Secretariat concluded that analysing these rebate schemes is complex and depends on the specifics of the case. There is no place for simple presumptions, whether they be hard-line per se prohibitions against use by a dominant firm, or lenient safe harbours for schemes where price exceeds costs.

The Chair thanked the Secretariat for these opening remarks and turned to **Prof Alison Jones** to make a presentation on what is a fidelity rebate scheme and what is not. Prof Jones explained that most competition law systems accept that certain low or discriminatory pricing practices can or may harm the competitive process and consumer welfare in certain circumstances. These are, for example, predatory pricing, selective price cuts, margin squeeze, price discrimination and rebates. As for rebates, which are the main focus of the session, Prof Jones distinguished between: (i) *fidelity/loyalty/exclusivity rebates*, which are conditional on purchasing exclusively (or nearly exclusively) from the seller or on a set share of purchases made from seller, and (ii) *quantity/volume rebates*, which are linked to the volume of purchases without reference to total purchases and reward large buyers. She underlined that, nonetheless, quantity rebates can also have loyalty-inducing effects. This is particularly likely to happen if they are linked to targets for increasing purchases by the buyer, if they are individualised rather than standardised, and if they are retro-active (they are applied to all units when you hit that particular target).

Prof Jones then clarified the terminology used in recent EU case law, and particularly in the General Court's judgement on Intel. The Court distinguished between:

- *Quantity discount systems*: simple standardised quantitative rebates based purely on (non-discriminatory) volume of purchases.

- *Loyalty/exclusivity rebates*: conditional on purchasing all (or most) of the requirements from the dominant firm. These are the category of rebates in EU law that are presumptively illegal, they're abusive by object and prohibited unless the dominant firm can provide an objective justification for their conduct.

- *Other (target) rebates*: all the other types of rebates which do not include an exclusivity condition but may have a loyalty-inducing or suction effect, especially if individualised/retroactive.

The Chair thanked Prof Jones for her presentation and turned to **Korea** to ask whether they have the same kind of distinction between different types of rebates that had just been presented. The Korean delegation illustrated two cases where the KFTC deliberated on factors that distinguished fidelity rebates from volume rebates: the 2008 Intel case and 2009 Qualcomm case. In both cases, the KFTC determined that the rebate schemes offered by the dominant firms were fidelity rebates and not volume rebates based on the following considerations: 1) the level of rebate was not based on the purchase amount but on the purchase ratio from the firm and/or from competitors; 2) the rebate structure was designed differently from trade partner to partner; 3) when the purchase requirements were met, rebates on all units purchased were provided retroactively.

The Chair then asked to **Chile** to describe a case in the chemical or safety matches sector where an “exclusivity discount” was then replaced by a “fidelity rebate”. The Chilean delegation explained that in 2008 the matches industry in Chile was dominated by CCF. CCF started granting discounts to retailers that sold exclusively CCF’s products. After the start of the prosecutor’s investigation, CCF dropped most exclusivity discounts and started offering fidelity rebates to retailers achieving certain sales goals, often corresponding to the sales of a previous month in which there was an exclusivity deal in force. The Chilean Competition Tribunal concluded that fidelity rebates are not inherently anticompetitive, however in this case it deemed the exclusivity clauses as well as the loyalty-inducing discounts anticompetitive as they had the effect of foreclosing the market for new entrants. This was based on three main considerations: (i) CCF enjoyed a dominant position in the market; (ii) there was little fringe competition because of the high costs of importing and the impossibility of producing domestically (at least in the medium term); and (iii) the total demand of matches was shrinking so it amplified the negative effects of exclusivity and fidelity rebates. Hence, the Tribunal sanctioned CCF with a fine of US$ 1 million approximately. The delegation added that, if it were assumed that rivals were unable to compete for any of CCF’s current market share (92%), a competitor trying to enter the market and compete for the remaining 8% share would have needed to offer a discount of 75% to overcome the exclusivity or loyalty discount offered by CCF. The delegation clarified that these figures were based on the assumption that non-contestable sales was equal to the market share of CCF in previous years.

Next, the Chair turned to Prof Alison Jones for a presentation on the legal framework for examining these rebates schemes and the different approaches that competition authorities might take. **Prof Jones** pointed out that, when analysing low pricing practises, it may be difficult to distinguish aggressive price competition from unlawful predatory or anticompetitive conduct. So, most systems devise conduct specific tests to identify unlawful abusive conducts. These tests should be consistent with the objectives of competition laws, and should be based on predictable, clear and transparent rules in order to be administrable by decision takers and to provide clarity for firms trying to comply with the rules. The choice of the model to follow depends on the jurisdiction-specific context.

Prof Jones described the 4 main approaches to rebates that have been discussed in the EU and the US. The first, more extreme view is that rebates should be considered presumptively legal unless the firm is pricing below cost. Prof Jones explained that there was little support for this view since it was too permissive and disregarded theories of harm different to the predatory one. In the EU, the only types of rebates which are presumed to be legal are simple standardised quantitative rebates. The second approach entails the application of price-cost rule, which involves the attribution of the discount to the contestable part of market, to determine whether the rebates are capable of excluding efficiency competitors. The test, however, may be difficult to administer (for example how to identify what is non-contestable demand) and may again be under-inclusive (for example consumers may benefit if less efficient competitors are not strategically forced out of the market). In the US this approach has never been applied in a single product loyalty discount case. In the EU, the Commission states that it will use this approach in prioritising cases, but the case law of the Court is absolutely clear that there is no need for them to use this test. The third view favours a more detailed fact specific rule of reason analysis to this type of case where we look at the facts in detail to try to get a picture of why the dominant firm was using these rebates, and whether they are effectively operating as de facto exclusive dealing. In the EU, the problem in equating fidelity rebates to exclusive dealing is that it implies applying a fundamentally different approach to exclusive dealing in antitrust analysis depending on whether the supplier is dominant: a permissive approach in cases under Art.101 and a presumption of illegality in cases under Art.102 (e.g. *Hoffman-La Roche).* The fourth approach is the presumption of illegality, unless the firm can provide an objective efficiency justification. Prof Jones identified a high risk of errors in this approach (which she noted was adopted by the General Court in *Intel*). Prof Jones concluded with a summary of the EU case law: there is a presumption of legality for a very narrow category of standardised quantitative rebates, a presumption of illegality of what the courts described as ‘Exclusivity’ Rebates (e.g. *Intel*) and the need to conduct a fuller analysis for other types of rebates.

The Chair then asked **Brazil** to describe the effects-based approach that it used in the Ambev case to identify the impact on consumers of a fidelity rebate scheme. The Brazilian delegation explained that Ambev, the leading Brazilian brewery company, had 70% market share. According to the loyalty program`s rules, Ambev would reward points of sale (bars) for selling the company`s products: for a certain quantity of beers sold, the bar accumulated points that could be exchanged for attractive prizes, equivalent to discounts. CADE fined Ambev 2% of its revenue in Brazil, the highest fine imposed by CADE to a single company until that year. This was based on five considerations. First, the market power held by Ambev. Second, that even though the formal rules of the program did not include exclusivity requirements, those requirements had occurred in practice at least for a group of selected retailers. Third, that the increasing discounts imposed an additional burden for Ambev’s rivals. Fourth, that the company was not able to demonstrate compensating efficiencies. Fifth, internal documents showed an anticompetitive intent and also strategies to hide the company practices from the competition authorities.

Next, the Chair asked **Japan** to discuss what determines whether a fidelity rebate scheme is examined as an exclusionary practice or an unfair trading practice in their country. The delegation explained that, in Japan, there is no specific provision that describes the definition and the nature of fidelity rebates as well as their impacts on competition in the Antimonopoly Act, relevant legislations and the guidelines. Offering rebates in itself is not always problematic, but there are mainly two possible scenarios for fidelity rebates to violate the AMA: private monopolization and unfair trade practices. First of all, unilateral conduct that has the effects where an enterprise makes its trading partners refrain from dealing with its competitors through rebate-offering, for example, can be prohibited as private monopolization if such a kind of conduct by a dominant firm excludes its competitors from a particular field of trade, and causes substantial restraint of competition in the field. On the other hand, even if the conduct does not rise to such a restraint of competition, in cases, for example, where rebate-offering is imposed by an influential manufacturer in a market, and makes it difficult for new entrants or competitors to easily secure alternative distribution channels, such conduct may be prohibited as unfair trade practices. The **Chair** asked whether this meant that fidelity rebates were always prohibited since if the firm has market power it can be exclusionary while if it does not it can be an unfair trading practice? Japan explained that firms without market power could be considered to engage in an unfair trading practice if such conduct has a kind of possibility to exclude competitors, or it makes it difficult for trading partners to trade freely with others.

The Chair then turned to **Russia** and asked to describe the economic reasonableness test that FAS Russia uses to assess fidelity rebate schemes. The Russian delegation explained that the FAS can recognise fidelity rebates of a dominant economic entity as anticompetitive only if the provision of such rebates is not technologically or economically or in any other way justified. This criterion was applied, for example, in the Zelenokumskiy Elevator case. Zelenokumskiy Elevator, which held a dominant position in the Stavropol territory, set different prices for their services for different customers. After analysing the conditions of individual discounts scheme, FAS' regional office concluded that such conditions did not comply with the criteria of economic and technological reasonableness due to the lack of clear methodology of their application. This allowed the sales officers to arbitrarily take decisions on granting individual discounts without any reasons, using prices at his or her discretion.

The Chair thanked the Russian delegation and gave the floor to **Jim Venit** for a presentation on the current state of play on fidelity rebates cases under the EU law. Mr Venit started by underlining the current significant split in the EU between the position of the Courts and that of the Commission. The Commission in its Guidance Paper committed itself to an effects base approach. Part of which involves the As-Efficient Competitor (AEC) test, which sought to determine whether an equally efficient competitor could match the discount by a dominant firm. This approach has been rejected by the General Court in the *Intel* case and by the European Court of Justice in the *Post Danmark II* case in favour of a *per se* approach to exclusivity rebates.

Mr Venit then analysed the rationale for the Courts' and the Commission's approaches. The Courts' *per se* approach has two main components: an analytical component and an ideological component. The analytical component stems from the fact that in the EU dominance is an absolute concept as opposed to a relative concept: once dominance exists no further restrictions of competition can be accepted and firms have special obligations, irrespective of how dominant they might be. The ideological component is the consistency with fundamental goals of EU Treaty: under this view the *per se* approach can be seen as effects-based because it considers the effect of exclusionary rebates on the goal of preserving undistorted competition (as opposed to enhancing consumer welfare). The AEC test, in contrast, is inconsistent with the objectives of the EU Treaties because it would tolerate exclusion of competitors that are less efficient, but which would harm the competitive process. In terms of policy implications, the Courts' approach is defended on the basis that it provides a very clear predictable result, whereas the AEC test is resource-intensive and difficult to apply. The rationale for the Commission's approach is to avoid the chilling effect of prosecuting discounts in a *per se* way and rather take a look at the impact in the market place. The two approaches raise two legal questions: (i) Does the EU Treaty preclude an effects-based approach? and (ii) What does 'preserving undistorted competition' mean? Mr Venit suggested the Treaty does not preclude the use of an effects based approach.

Prof Farrell responded that price-cost tests are proposed because policymakers want to be able to reject complaints from inefficient competitors who are out-competed. However, he argued that the right way to address this concern is to say that we are concerned with competitors being excluded *even* when the dominant firm is charging high prices. That allows us to reject cases where inefficient firms complain in order to avoid competing, and instead to focus on cases where exclusion may support continued high prices (regardless of how efficient the complainant is).

The Chair then turned to **Greece** and asked the delegation to describe their approach to fidelity rebates. The delegation explained that in Greece exclusivity rebates applied by dominant firms are per se prohibited due to their inherent propensity to foreclose. The delegate suggested that by design, exclusivity rebates prevent customers from obtaining their supplies from competing producers, thus an AEC test is not necessary in order to establish their foreclosure capability. Below cost pricing is not a prerequisite of a finding that a retroactive rebate scheme is abusive. Regarding efficiencies, there may be less restrictive means to pursue a non-exclusionary objective and achieve the same result, other than exclusivity rebates. If there is no sufficient competitive pressure to the dominant firm, it is not likely that efficiency gains would be passed on to its customers and the consumers. The Hellenic Competition Commission has examined several cases of fidelity rebates, particularly in the food and beverages sector: for example in the Tasty Food decision, the Heineken decision, the Procter & Gamble decision, the Nestlé decision and the Coca-Cola decision. The delegation claimed that a per se test is a clearly recognizable approach that helps administrability and is founded on a strong economic basis. The **Chair** suggested this was a strong statement and asked whether this created an incentive for the dominant firm to refrain from competing (for example by refraining from reducing its price or investing in R&D to reduce purchases from rivals). The Greek delegation responded that offering better prices or quality was normal competition on the merits and quite distinct from offering to a customer a rebate conditional upon the latter not purchasing competitive products. The delegate said that if a dominant firm offers discounts that may have a fidelity-building effect but are not linked to a condition of exclusive supply, it would consider all the circumstances and the criteria for the grant of the rebate to determine whether the conduct had an exclusionary effect. In contrast looking at effects was unnecessary when the discount was conditional on the customer’s obtaining all or most of its requirements from the dominant undertaking.

Next, the Chair invited **Germany** to describe the Deutsche Post case. According to the German delegation, the Authority does not have many cases in the field of fidelity rebates. However, last year they concluded a case against Deutsche Post - the former state-owned monopolist - which had used a combination of margin squeeze and loyalty rebates to hinder competitors. Retroactive rebates were offered on yearly basis to some large customers who used Deutsche Post for almost their entire mailing services. These loyalty rebates had significant suction effects and the foreclosure effect was evident, so the Authority did not see the need to carry out an AEC test.

The Chair then asked the **United States** to describe the framework they use to analyse fidelity rebates. The US delegation explained that they view loyalty discounts as a way to incentivise customers to increase their purchases, but a way in which a supplier can do so without lowering their average price. Contrary to predatory pricing, the exclusionary effects of a loyalty discount do not depend on that initial loss or the later recoupment. From the US perspective, they work more like exclusive dealing, and therefore they can be either pro-competitive or anticompetitive. In the US, the courts have applied a price cost test in the context of bundled discounts where the entire discount is allocated to the foreclosed product(s). It has been suggested by some commentators that this is the same type of test that could be adapted in the single product loyalty discount context. However, in the agencies’ view, there are reasons not to do that: you have to determine the contestable sales volume and apply the full discount to that, and it risks both false positives and false negatives. From a US agency perspective the most important thing in trying to assess a loyalty discount is a very in-depth knowledge of the facts of any given case so that enforcers can effectively assess what the actual competitive effects (or likely potential competitive effects) are.

Next, the Chair asked **Spain** to illustrate the main features of the Telefonica case. The Spanish delegate explained that Spanish Commission on Markets and Competition (CNMC) recently found a loyalty scheme operated by Telefonica (the main mobile operator in Spain) to be anti-competitive. The scheme involved offering small and medium enterprise (SME) customers discounts conditional on them signing exclusive contracts for 12, 18 or 24 months. The contracts were automatically extended if customers did not give notice of termination. In addition, if customers did not complete the contract, they were billed for the sum of discounts that they had received. Since Telefonica was not dominant in the market for mobile communication services, the case was analysed as a vertical restraint under Art. 101.

The CNMC found that the penalty for exiting the contract before termination was a *per se* restriction of competition since it aimed at preventing customers from switching, raised rivals' costs and therefore led to the foreclosure of Telefonica's rivals.

Since **France** had a case similar to the Spanish one, again in the telecommunication market, the Chair gave the floor to the French delegation to describe its case. The French delegation explained that the *Autorité* sanctioned more than once rebate schemes conditional on the customer engaging in a contract for a longer period of time than the usual one in the market. In most cases, the contract was also automatically renewed. Since the conduct was enacted by a dominant firm, this was a way for the enterprise to keep its market share stable over time. Moreover, the longer the customers' commitments, the lower the number of customers available to switch to rival providers. This type of rebate scheme is different from fidelity or exclusivity rebates because it does not depend on the non-contestable part of the market. However, it still had a foreclosure effect.

The Chair then noted that the Turkish Competition Authority (TCA) examines the objective, the potential effect and the actual effect of the rebate scheme. He asked **Turkey** whether evidence is required on all three of these in order to find a fidelity rebate scheme anti-competitive. The Turkish delegation said that they did not require evidence on all three grounds. The delegation described the most important decision of the board relative to the provision of advertisement spaces in printed media sector (2011). First, the TCA found out that there was an intention of exclusion. Second, the TCA concluded that there was a likely effect of exclusion based on many indicators (e.g. the existence of dominance or an avoidable trading partner, market coverage of rebates, the extent and reference period of the scheme). Third, the TCA also conducted some empirical analysis in relation to actual effects.

The Chair gave the floor to Joe Farrell who had written a paper proposing a new analytical framework for thinking about an additional potential anti-competitive effect of fidelity rebates. **Prof Farrell** opened its remarks pointing out that a discount conditional on limiting purchases from others (so-called 'share of need' or 'partial exclusivity' rebates) can act as a tax on such purchases, while a pure quantity discount cannot. In a situation where competing manufacturers sell to distributors who compete downstream, there are joint gains from agreeing deals with distributors that create such a tax and therefore soften competition with other manufacturers. This can create competitive problems that do not rely on economies of scale or pricing below cost.

Prof Farrell went on to illustrate his new analytical framework to describe this mechanism. The framework involves a situation in which a dominant firm sells to distributors, who compete against each other to sell to consumers. There are some rivals who can also sell to the distributors. The product sold by the dominant firm is a 'must-have' for distributors. At the beginning, before the introduction of the questionable schemes, prices are below the joint monopoly level.

The basic intuition in the framework is that the dominant firm could raise its wholesale price to the distributors, and that would move the industry towards higher final prices to maximise total gains for the industry as a whole. The dominant firm could induce distributors to sign deals that help to raise industry profits, but as it did so each distributor would have an incentive to trade more with the dominant firm's rivals (a classic prisoners dilemma). Therefore, the scheme might not always work (or it would cost the dominant firm too much). However, as in collusive agreements, under certain conditions the manufacturer and the distributors would be able to find ways to make it work. For example, in horizontal collusion this could mean building a mechanism to punish rivals that trade with the dominant firm's buyers, such as a price war. In this setting, however, it would mean punishing buyers that trade with its rivals (that is punish for disloyalty). This would have the same effect as collusion and so would enable the dominant firm to raise its prices without too much business being diverted to the rivals. This is therefore a behaviour that competition enforcers should try to stop since consumers downstream are the fundamental victims.

Prof Farrell also stressed that the fundamental concern with anticompetitive conduct is not low prices, even if they may sometimes be part of an anticompetitive scheme. The concern is when a high price is insulated from attacks by competition. He therefore suggested that we should be most worried when we see a high price dominant firm doing things that discourage buyers from topping up or purchasing from rivals (this suggests that a price-cost test is not useful). The Chair asked what enforcers should look for. Prof Farrell responded that they should look at whether buyers face a significant tax on buying from rivals (by talking to buyers and rivals and through quantitative methods) and how high prices are. In addition, we should look at how distributors react. If when some turn away from the rebate others get more reluctant to continue with it that might indicate it is only profitable when everyone takes part in the scheme.

The **Chair** thanked Prof Farrell for the very interesting presentation introducing a new perspective to look at in fidelity rebates cases. He then gave the floor to **Australia**. The Australian delegation explained that the ACCC had two recent cases on fidelity rebates, involving two multinational companies in the health sector. In both cases, there were predatory elements to those cases but it was the foreclosure of competition that convinced the ACCC that the conduct was anticompetitive. The delegate then illustrated the main changes to the competition law proposed following the 2015 Competition Policy Review (known as 'Harper review'). The changes refocus the misuse of market power provision to protect competition. Firstly by removing the take-advantage test that looks at whether or not a firm without market power could also engage in the conduct (in fidelity rebate cases a firm without market power could engage in the conduct but rebate might still be harmful). Secondly by focusing the test for misuse of market power on whether conduct has an effect on competition rather than on whether it harms competitors.

Next, the Chair opened the discussion on the potential efficiencies of fidelity rebates. He asked **Jim Venit** whether he sees the possibility of bringing forward efficiency claims in a fidelity rebate case as realistic. Jim Venit answered that making arguments about efficiencies that come out of better capacity utilisation, better planning etc. is not attractive for a firm in an adversarial proceeding, because that argument is only relevant if the firm is accepting that the discount is anticompetitive, while the focus of the firm's defence is usually that the discount is not anticompetitive. He added that, in the bargaining between the dominant firm and its customers, the ability to grant discounts can enhance the efficiency or strengthen negotiating position of the customers and achieve a better price outcome for each individual customer through the threat of switching in order to extract the discount.

The Chair next turned to **Canada**, who had a case in which a firm claimed that there were efficiencies associated with the loyalty discount but this argument did not convince the Competition Tribunal. Canada explained that Canada Pipe was the only case dealing with fidelity rebates in the last decade heard by the Canadian Competition Tribunal. The rebate programme gave distributors rebates in return for exclusively stocking the full line of cast iron products by Canada Pipe. It was considered both under abuse of dominance and exclusive dealing provisions. Canada Pipe put forward two business justifications: firstly, that the structure of the rebate programme encouraged competition in the downstream market by creating a level playing field between small and large distributors (since the discounts were based on loyalty, rather than volume); and secondly, that the rebate programme allowed the high volume sales necessary for the company to maintain a full line of products. The Competition Tribunal refused the first argument as it said this was unrelated to the analysis, but accepted the second justification. However the federal court subsequently disagreed and said that consumer welfare is on its own insufficient to establish a valid business justification. The case was eventually settled by way of negotiated outcome.

The Chair then gave the floor to **BIAC**. BIAC stated that, although fidelity rebates can be used for anticompetitive purposes in some circumstances, they normally result in benefits to consumers, and agencies should apply a strong presumption to this effect. Absent a clear set of economic principles on which to base intervention in this area, enforcers should avoid acting to challenge or chill discounting practices. BIAC also pointed out that according to the case law, there is a possibility to rebut the assumption that the discount regime is illegal and produces negative effects. However, putting forward a convincing efficiency defence is in practice impossible. The reason is that under each of the 4 conditions under European law (purpose and indispensability of the discount, benefit for consumers, and lack of elimination of residual competition) there are very difficult evidentiary problems. The **Chair** asked Prof Farrell whether there are efficiency arguments that relate to fidelity rebates and not to quantity rebates. **Prof Farrell** said that it could be easier to target the discount threshold using a share of need discount (instead of a straight discount). He also suggested that exclusive dealing arrangement could lead to: a) more non-relationship specific investments, or b) buyers choosing to have less product differentiation in order to sharpen price competition. Since in some cases buyers might have these motivations whilst preferring not to have a fully exclusive dealing arrangement, it could be the case that a partial exclusivity rebate might be the best way to generate that benefit. Hence there are potential benefits from exclusivity rebates which a *per se* prohibition would ignore.

Next, the Chair turned to **Sweden** for a presentation about the way they prioritise fidelity rebate cases. The Swedish delegation started by explaining that in Sweden there is no presumption that fidelity rebates have harmful effects. The Swedish Competition Authority (SCA) prioritises investigations of conduct that is able to harm competition and consumers. As regards unilateral conduct, priority goes to conduct that is capable of foreclosing effective competitive pressure at some level of the market. Furthermore, the SCA gives consideration to the outcome of the AEC test. Based on its experience, the SCA believes that the AEC test has a number of advantages: it can be applied at limited administrative cost, it does not require much advanced analysis, is transparent and predictable, it provides clear standards for dominant firms and provides incentives for competition on the merits. It also limits the potential chilling effects of over-enforcement, since the risk of over-enforcement is limited by the subsequent more detailed analysis of the effects which also considers potential pro-competitive effects. The SCA believes that properly calculating the effective price to be matched will identify potential foreclosure and limits instances of under-enforcement.

The **Chair** concluded the roundtable by summarising some of the main points emerging from the discussion. First, in fidelity rebate cases enforcers should be focused on high prices, and, as Prof Farrell's framework shows, sometimes the issue may not be unilateral foreclosure but a practice that would lead to coordinated behaviour. One tell-tale sign of this might be profit margins. Second, it may be useful to keep in mind the relationship between exclusivity rebates and simple quantity rebates, and to think about what we would say about each of these (or what analysis we would pursue) when we look at the effects of an exclusivity rebate case. Third, on the As-Efficient-Competitor test, some of it goes beyond the scope of this discussion but there is the question of whether it makes economic sense as a test? Prof Farrell said it did not, that it was under-inclusive, and that does appear to be an issue. However, Sweden said it might be a place to start, and so maybe there is some value in running the test. However, the test is evidently not sufficient and so it should not stop us from looking at other things like high prices (which might be missed if the test is the only screen that is used). Finally it has helped point those jurisdiction in which it is not a *per se* violation in various complementary direction, and has highlighted some arguments that explain why it should not be a *per se* violation.