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ROUNDTABLE ON FIDELITY REBATES

--Note by France--

15 - 17 June 2016

This document reproduces a written contribution from France submitted for item 6 of the 125th OECD Competition committee on 15-17 June 2016.

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

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Introduction

1. The *Conseil*, then the *Autorité de la concurrence*, which succeeded it in 2009, have assessed the practice of fidelity rebates on various occasions. Considered together, these decisions illustrate the analytical grid used by the *Autorité de la concurrence*¹ when dealing with such conduct, it being understood that only practices concerning loyalty rebates, i.e. those practices that have the effect of reducing competition between the supplier granting the rebates and its rivals, will be examined in this document². Furthermore, as in the Secretariat's background note³, bundling practices will not be considered in this paper.

2. In these decisions, the *Conseil* and the *Autorité de la concurrence* have recalled that quantity rebates are not, in themselves, anticompetitive. The diversity, and sometimes the complexity of discount mechanisms may require a detailed analysis in order to distinguish between quantity rebates, presumed lawful, and loyalty rebates. However, it can generally be considered that rebates for which the grant and level is exclusively related to the quantities purchased (and not, for example, the proportion of purchases made with the company granting the rebates or the duration of the commitment to purchase from the latter) and apply only to amounts or totals in excess of the rebate threshold⁴ cannot lead to anticompetitive effects insofar as the net price of these additional volumes is superior to the cost of production⁵.

3. Conversely, loyalty rebates granted because of the share of purchases made from the supplier⁶, or the duration of the customer's commitment to the supplier, or 'retroactive', i.e. based on the volume or the total amount of orders placed within a defined period⁷ (rather than on the incremental volume or total of orders) can introduce anticompetitive effects (1). The evaluation of these potential anticompetitive effects is then subject to a joint examination of the structure and operation of the market in which they are used and of the different characteristics of the rebate system under consideration (2). How far these parameters alter the anticompetitive effects varies according to the type of discount that is considered. Thus, in the current state of case law, it is presumed that exclusivity rebates set up by a business holding a dominant position may restrict competition, independently of their other characteristics. Retroactive rebates, although not necessarily inducing exclusivity, require a further examination of their characteristics and of the sector's functioning. Finally, potential efficiency gains associated with these different rebates are also taken into account. To date, however, the evidence of alleged pro-competitive effects adduced to justify the use of loyalty rebates has been very limited (3).

¹ See the thematic study of the 2004 annual report of the *Conseil de la concurrence* on discounts, rebates and commissions, pg. 94

² Rebates can also be understood as discriminatory pricing practices, which distort competition between purchasers. See the opinion 07-A-17 ('La Poste'), §88, the decision 03-D-09 and the decision 10-D-39 ('Road signs'). See also, judgement of the ECJ of the 29 March 2001 C-163/99 (Portuguese Republic vs. Commission).

³ "Loyalty rebates", background note by the Secretariat, §17.

⁴ 'Incremental rebates' to use the terminology in the Secretariat's note (§7).

⁵ See the opinion 07-A-17 ("La Poste" opinion), §109.

⁶ 'Share of need rebates' to use the terminology in the Secretariat's note (§7).

⁷ 'Retroactive rebates' to use the terminology in the Secretariat's note (§7).

1. The different types of loyalty rebate

4. Different types of loyalty rebate have been sanctioned by the *Conseil* and then the *Autorité de la concurrence*.

1.1 Exclusivity or quasi-exclusivity rebates

5. Several rebate systems sanctioned by the *Conseil* or *Autorité de la concurrence* were conditioned on exclusive or quasi-exclusive purchasing obligations weighing on the buyer⁸.

6. The anticompetitive nature of such exclusivity rebates, if they are put in place by an operator in a dominant position, was confirmed in the Court of Justice judgement '*Hoffmann La Roche*' (points 89-90): '*Considering that a company in a dominant position in the market, which binds purchasers - albeit at their request - by an obligation or a promise, to meet their needs in totality or in a considerable part, exclusively from the aforementioned company constitutes an abusive exploitation of its dominant position [...] whether the obligation in question is stipulated no further, whether it is offset by the granting of discounts; that it is the same when the aforementioned company, without binding the purchasers by a formal obligation, applies, either under agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, i.e., discounts related to the condition that the customer - regardless of the amount, whether large or small, of its purchases - is supplied exclusively for all or a significant part of its requirements from the dominant company; in fact, exclusive purchasing obligations of this nature, with or without consideration of discounts or loyalty rebates granted in order to encourage the buyer to purchase exclusively from the company in the dominant position, are incompatible with the objective of undistorted competition in the common market because they are not based [...] on an economic benefit justifying this charge or benefit, but tends to remove from the buyer, or to limit, the possibility of choice concerning their supply sources and to bar market access to other producers [...]*'.

7. As indicated by this judgement and several subsequent cases, the exclusive nature of the rebate stems from the '*significant*' proportion of purchases that need to be made with the supplier to trigger the application of the discount. Thus, the '*Intel*' judgement indicated that meeting 80% or even 75% of the customer's needs could qualify as an exclusive rebate (point 135). The threshold of 80% is also used by the Vertical Block Exemption Regulation ('VBER') to define the notion of 'non-compete obligation' (Article, paragraph 1d), OJEU L102, 23rd April 2010, p 1). In fact, in numerous decisions prohibiting this type of rebate, the threshold for the activation of a rebate is greater than 80%⁹ and, in some cases, corresponds to the total purchases made by the client¹⁰.

8. In certain cases, however, the *Conseil* applied the Hoffman-Laroche case while the threshold for rebates was below 80%. Thus, in the decision 00-D-67 ('TF1') relative to practices observed in the sale of TV advertising space, the dominant operator offered rebates based on the share of TV advertising budgets entrusted to it, the rebates threshold being between 50% and 55%. The *Conseil de la concurrence* applied the Hoffman-Laroche case law considering that '*the implementation of rebates based on market share induces advertisers to allocate to the channel the minimum advertising budget eligible to the rebate; (...) Such a rebate, which is akin to a fidelity rebate, impedes the flow of advertising investments among different terrestrial channels; (...) implemented by a dominant company, it constitutes an abuse prohibited by Article L. 420-2 of the French Commercial Code*'.

⁸ See decisions 96-D-67 ('Coca-Cola'), 00-D-67 ('TF1'), 04-D-67 ('SFR'), 15-D-20 ('Orange').

⁹ See decisions 96-D-67 ('Coca-Cola').

¹⁰ See rebates concerning virtual private networks (VPN) sanctioned, among other practices, by the decision 15-D-20 ('Orange').

9. Furthermore, the situation in which rebates do not make reference to a share of the clients' needs does not necessarily signify that they are not exclusive rebates. In fact, in the case of individualised rebates and adequate information held by the supplier regarding the needs of the customers, rebates based on volume or amounts purchased can produce the same effect as "share of need" rebates. The threshold for obtaining the discount will be fixed as an absolute value but may correspond in fact to a large proportion, if not all, of the buyer's needs for these types of goods or services and its effects shall be equivalent to one of the non-compete obligations described above¹¹.

10. Finally, exclusivity rebates implemented by an operator who is not in a dominant position can be assessed in terms of vertical restraints. They require a further examination of their characteristics and structure and of the workings of the market concerned (see below and decision 04-D-67 'SFR').

1.2 *Duration rebate*

11. Some loyalty rebates reward the client for the amount of time they have used the supplier, as opposed to the amount of purchases. By way of example, the 'privilege' rebate prohibited, together with other loyalty rebates, by the *Autorité's* decision 15-D-20 of 17th December 2015¹² ('Orange') relating to practices implemented in the electronic communications sector, allowed business clients of the dominant operator to benefit from a rebate of 10 or 15 % on their monthly fees, in compensation for an extension of 24 - 36 months on their contract. Similarly, the rebates involved in the decision 09-D-04¹³ of 27th January 2009 ('NMPP') in the press distribution sector included an '*exceptional rebate*' at the end of each whole year of collaboration: terminating the contract during the year led to a loss of the said rebate. In addition, as the rebates built up over three years, terminating the contract before this three year period also led to a loss of rebate.

12. In fact, if the required period to obtain the rebate is lengthy, particularly compared with the frequency with which the suppliers are normally put in competition, the loss of rebate following from the termination of contract or when the objective is not reached may dissuade the client from switching to a competitor. The clients are therefore tied to their reference supplier for a given period, without the supplier's competitors being able to offer the client an attractive alternative during the period of agreement. Such rebates can have the effect of artificially raising the entry barriers to competitors during the period for which the client is tied to their supplier. In the decision 15-D-20, above, various characteristics of the 'privilege' rebate contributed to its anticompetitive effects. Firstly, the privilege discount and the length of contract related thereto were tacitly renewed for 12 months renewable. Then, the cost of the anticipated cancellation was raised. Finally, business clients which had multiple line subscriptions were presented with a multitude of different end dates: because of the privilege rebate, a client was hard pressed to find a date to change operator which did not lead to penalty payments.

13. In some cases, the contract duration already completed is not only used to extend an existing relationship but also to extend the duration of future commitment. Thus, the decision 09-D-36 of 9th December 2009¹⁴ ('*Orange Caraïbe*') relating to different electronic communication service markets overseas and decision 15-D-20, above, prohibited the use of a 'mobile change' programme by a company in a dominant position. This programme enabled the client to automatically accumulate points, every month, depending on how long they had been with the operator, their monthly statement and the number of lines subscribed, and then to exchange these points for a preferential price on their new mobile telephone,

¹¹ See the Secretariat background note for a similar analysis, §8

¹² http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=606&id_article=2681

¹³ <http://www.autoritedelaconurrence.fr/pdf/avis/09d04.pdf>

¹⁴ http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=305&id_article=1301

as long as they took out a new 12 or 24 month contract. The judgement of the Appeal Court, in confirming the penalties in decision 09-D-36, above, states that *‘in accumulating loyalty points on every bill based on its total amount [and being solely able] to use their loyalty points for the purchase of a handset under the condition of re-commitment, the scheme is not only a loyalty offer rewarding the past but also a loyalty offer offering the customer a benefit in return for a commitment in the future, thus depriving the customer of their capacity to arbitrate between offers for a subsequent period.’*

1.3 Other categories of rebates

14. Finally, several discount schemes can bring loyalty effects without, however, corresponding to exclusivity rebates or rebates due to length of custom or contract.

15. Decision 15-D-20 (‘Orange’) thus also prohibited ‘installed base rebates’, given to business clients depending on the number of registered lines and applied in a retroactive manner to all these lines. These rebates, below a certain number of lines, were defined in the reference price list, then individualized without it being possible to determine whether they were conditional, on account of their own eligibility criteria, upon exclusivity or quasi-exclusivity.

16. Decision 04-D-65¹⁵ of the 30th November 2004 (‘La Poste’), prohibited, as well as bundle rebates, rebates based on turnover in comparison with the previous year. The decision sets forth that *‘the “development rebate” is not awarded due to quantities, but depends on a progression in the turnover made with La Poste, independent of the volumes involved. Thus, a client who generates a sales figure for La Poste will not benefit from any development rebate if their turnover in Year N is less than or equal to the turnover in Year N-1. On the other hand, another client who brings less business activity to La Poste, if their turnover progresses from year to year, may benefit from a development rebate, even though their overall contribution to La Poste’s cost savings is much less than the first client, thereby excluding all economic justification for such rebates’* (§54).

2. Demonstration of the anticompetitive nature of loyalty rebates

17. The demonstration of the anticompetitive nature of loyalty rebates relies on the characteristics of the market (1) and that of the rebates studied (2). This demonstration can vary according to the nature of the loyalty mechanism on which the rebates rely. Thus, as already indicated, exclusivity rebates implemented by a company in a dominant position distort competition by stifling freedom of choice for clients with regards to supply sources and barring access to competition. Analysis of the market structure and the characteristics of the rebates therefore play a less important role than in the absence of exclusivity or quasi-exclusivity.

18. It should also be recalled that according to well-established case law, ‘for the purpose of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in this regard to show that the abusive conduct of the company in a dominant position tends to restrict competition or, in other terms, that the conduct is of that nature or may have that effect.’¹⁶ On the other hand, French law requires the Autorité de la concurrence to take into account in the level of fines imposed in relation to anti-competitive practices, the damage to the economy: therefore, the extent of the actual effects may be taken into account when assessing the damage to the economy. In general, factors that mitigate the effect of rebates, but are insufficient to deprive them of any appreciable effect on competition, may be taken into account during the assessment of the damage to the economy and therefore in the fine imposed against the concerned company¹⁷.

¹⁵ http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=133&id_article=357

¹⁶ Judgement of 17th December 2003, British Airways/Commission (T-219/99, Rec. p. II-5917, point 293).

¹⁷ See, among others, the economic harm analysis in the decision 15-D-20 (‘Orange’).

2.1 *Characteristics of the concerned markets*

2.1.1 *The supplier's market power*

19. To date, the loyalty rebates were mainly assessed in terms of their potential foreclosure effects. In this respect, the greater the market power of the operator in question, the stronger its rebates are likely to carry significant anticompetitive effects. The market power of the operator implementing them is, in effect, going to play a double role in the anticompetitive effects of rebates.

20. Firstly, the market power of the supplier makes it more difficult for competitors to replicate these rebates and reinforces their potential exclusionary effect. Therefore, when the rebates cover products or a share of volume which the client must procure from an operator, due to its dominant position, competitors, in order to replicate the rebate mechanism, must charge much lower prices than those of the dominant operator (as their rebates will apply to a smaller turnover)¹⁸. The disadvantage for the competitors will be most noticeable in the case of a strong dominant position¹⁹, reputation effects or capacity constraints with which competitors are confronted²⁰, or long term commitments taken out with the dominant operator²¹.

21. The market power available to the supplier implementing the disputed rebates is also essential for assessing the anticompetitive effects of duration rebates Decision 09-D-36 '*Orange Caraïbe*' thus showed that when the market is characterized by strong asymmetries in the market shares, particularly by the

¹⁸ See, in this respect, the 'Intel' and 'Tomra' judgements on the link between the existence of a non-contestable share and the exclusionary effect of a loyalty rebate: *'In order to submit an attractive offer, it is not therefore sufficient for the competitor of an undertaking in a dominant position to offer attractive conditions for the units that that competitor can itself supply to the customer; it must also offer that customer compensation for the loss of the exclusivity rebate. In order to submit an attractive offer, the competitor must therefore apportion the rebate that the undertaking in a dominant position grants in respect of all or almost all of the customer's requirements, including the non-contestable share, to the contestable share alone. Thus, the grant of an exclusivity rebate by an unavoidable trading partner makes it structurally more difficult for a competitor to submit an offer at an attractive price and thus gain access to the market. The grant of exclusivity rebates enables the undertaking in a dominant position to use its economic power on the non-contestable share of the demand of the customer as leverage to secure also the contestable share, thus making access to the market more difficult for a competitor.'* ('Intel' judgement, point 93). *'The General Court was therefore justified in ruling, in essence, in paragraphs 269 to 271 of the judgment under appeal, that the loyalty mechanism was inherent in the supplier's ability to drive out its competitors by means of the suction to itself of the contestable part of demand.'* ('Tomra' judgement, paragraph 79).

¹⁹ *'it is inherent in a strong dominant position, such as that occupied by the applicant, that, for a substantial part of the demand, there are no proper substitutes for the product supplied by the dominant undertaking. The supplier in a dominant position is thus, to a large extent, an unavoidable trading partner (see, to that effect, Hoffmann-La Roche, paragraph 71 above, paragraph 41; Case C-95/04 P British Airways, paragraph 74 above, paragraph 75; and Case T-155/06 Tomra, paragraph 72 above, paragraph 269). (...)'* ('Intel' judgement, point 91).

²⁰ Thus, in the context of the decision 09-D-04 ('NMPP') above, the evidence in the file showed that publishers could be reluctant to entrust their high circulation press titles to the dominant operator's competitor because of costs associated with errors of distribution and that the existence of capacity constraints limited the share of demand likely to be distributed by the competitor.

²¹ In the context of 'installed base' rebates, prohibited under decision 15-D-20, a share of the phone lines of each client was tied to the dominant operator due to the long term commitments involved in the 'privilege' rebate.

presence of small scale operators who have not reached critical scale, the fidelity practices may impede the development of these operators by restricting the number of clients that these competitors can address²².

22. Then, when implemented by an operator in a dominant position, these loyalty rebates risk crystallizing a situation of limited competition. Thus, in the judgement relating to the decision 09-D-36 ‘*Orange Caraïbe*’, the Appeal court considered that the loyalty programmes ‘*were of a nature which dissuaded the consumer from turning to competitors at a time when it was possible and, in doing so, crystallized the market share of the dominant operator.*’

23. The existence of a dominant position is therefore an important element in demonstrating the anticompetitive effects of a fidelity rebate. However, insofar as they are based on an agreement between a supplier and a vendor, anticompetitive rebates can also be understood in terms of vertical restraints, particularly in the case of exclusivity rebates (see above). As noted, the 2010 VBER defines non-compete obligations as those requiring a buyer to obtain over 80% of its needs from one supplier. When the market share held by the supplier in the market in which it sells the contractual products to the buyer and that held by the buyer in the market in which it purchases the contractual goods are each less than or equal to 30%, and subject to meeting the conditions set out in Article 4 (no hard-core restriction contained in the vertical agreement) and Article 5 of the VBER (fixed term of commitment, not exceeding five years), the non-compete obligations are exempted (Article 2).

24. Otherwise, a case-by-case analysis of the pro and anticompetitive effects of the agreement is carried out, in which, again, the larger the market share of the undertaking implementing the rebate scheme, including compared to its competitors, the more significant the anticompetitive effects are likely to be.

2.1.2 *The severability of demand*

25. The rebates which aim to encourage purchasers to obtain all or part of their supplies from the same supplier contribute to the raising of the entry barriers by moving from a competition on each unit sold to a competition on each buyer. Thus, if each buyer is initially disposed to share its purchases between various suppliers, the fidelity rebates risk making “fringe” competition impossible or difficult, which is sometimes a pre-requisite to more direct competition. Therefore, in decision 09-D-04, the *Conseil de la concurrence* judged that in a context in which demand was concentrated amongst a few publishers, loyalty rebates orientated the market towards competition publisher by publisher rather than title by title. Similarly, in its decision 15-D-20, the *Autorité* noted that in general, companies attribute their virtual private network (VPN) to a single operator, even though there were several situations where companies could call on numerous operators²³. However, the fact that, in general, the companies preferred not to share their network between several operators has reduced the harm caused by such practice (§365).

2.1.3 *The maturity of the market*

26. The more mature the market, the more the loyalty practices can restrain competition. This mechanism is particularly valid in the examination of duration rebates. Indeed, in a market that is going through a phase of growth, the clients ‘*to attract*’ are the consumers that are newly present in the market. Consequently, even if most of the consumers are not part of this ‘addressable demand’ because they are already committed with another operator, a new entrant can, in principle, manage to enter the market. On the other hand, in a mature market, the largest share of the potential demand is already present in the market. Therefore, if these

²² §316.

²³ §209-210.

consumers are already engaged with the incumbents in long term contracts, market penetration by a new entrant will be very difficult.²⁴

2.1.4 *Switching costs*

27. Loyalty rebates make it more difficult for operators with less market power to attract customers. The effect of these rebates can be even greater because there are already obstacles to changing supplier. Thus, the decision 15-D-20 ‘Orange’ highlights, when reviewing the disputed rebates, the fact that these loyalty rebates were implemented in a market where the technical costs of migrating from one supplier to another already existed.

2.2. *The characteristics of the rebates*

28. The overall loyalty-enhancing effect of rebates depends on several features.

2.2.1 *The rebate base*

29. The rebate base plays a key role in the assessment of the anticompetitive nature of the rebate. The more significant the rebate base, the more a low level rebate can have attractive features with regards to the client. In particular, ‘retroactive’ rebates, i.e. those that are applied to all the customer's purchases and not just those that exceed the threshold, are more likely to yield anticompetitive effects.

30. The analysis of the rebate base also involves considering how this base covers products or volumes that competitors of the dominant firm would not be able to offer customers. In fact, in applying these rebates to non-contestable turnover, the dominant company increases the leverage of its rebates, making its competitors significantly reduce prices on contestable products. If the reduction to which the competitors are constrained is too strong, the dominant company is thus able to exploit its dominant position in a market or product segment by extending it to another segment or market.

2.2.2 *The discount rate*

31. The effect of rebates on the client’s incentives to purchase also depends on how much of a reduction the client can benefit from if it crosses the rebate threshold and, in particular, on the discount rate. The escalation of the rate of discount is also relevant in assessing the effects of rebates. In fact, discount rates which show significant escalation results in a client who only entrusts a limited fraction, to be heavily penalized. Thus, in its decision 04-D-65 the *Conseil de la concurrence* was able to identify an ‘*appreciable effect*’ of rebates based on the ‘*high level of discount rates used*’ and the ‘*strong elasticity of these rebates in relation to the increase in turnover*’ (§56). Conversely, rebates with a low value and/or low take up rate may not have a marked effect on competition²⁵. The level of progression in discount rates can also be taken into account when evaluating the harm caused to the economy. In its decision 15-D-20 “Orange”, the *Autorité* thus underlined, when assessing the harm caused to the economy by these practices, that it was necessary to distinguish between rebates with little progression that were provided for in the catalogue prices and highly progressive rebates applied to certain customized offers.

²⁴ See decision 09-D-36 (‘*Orange Caraïbe*’), §317

²⁵ See decision 04-D-22 relating to the submission before the Court of the French Association of Private Telecommunication Operators (*l'Association française des opérateurs privés en télécommunications - AFOPT*) and the Association of Telecommunication Service Operators (*l'Association des opérateurs de services de télécommunications - AOST*) concerning *France Télécom's* commercialization of the promotional tariff ‘*Primaliste long distance*.’

32. Lastly, the evaluation of the loyalty-enhancing effect must, in some cases take into account their cumulative effect. In the context of decision 15-D-20 ‘Orange’, objections made against Orange were targeted at duration rebates (‘privilege’ rebate) and retroactive rebates (‘installed base’ rebate), the decision explaining that *"on the one hand, with the ‘privilege’ rebate, the system aims to commit the client for long periods and to create artificial barriers to exit, in particular through a re-commitment mechanism by tacit agreement. On the other hand, with the set of additional and complementary rebates tied to the number of lines, usage or turnover (‘installed base’ rebate, target rebates, in particular), the system dissuades Orange clients from entrusting all or some of their lines and usage to a third party”* (§314).

2.2.3 The individualization of thresholds

33. As was noted in the thematic study on discounts, rebates and commissions, published in the annual report of the Conseil for 2004²⁶, the establishment of individualized thresholds can help to determine the level of exclusivity desired by the manufacturer and adapt the system of rebates to the needs of each buyer. The European Commission also noted that *‘an individualized threshold, based on a percentage of the total needs of the client or an individual target volume, allows the dominant supplier to fix the threshold at a level at which the clients will find it difficult to change supplier, which will create a maximum loyalty effect. Conversely, a standardized threshold, i.e., the same level for all clients or for a category of clients, can be too high for certain small scale clients and/or too weak for large scale clients to have a loyalty effect. If however it is possible that a standardized volume threshold approximates the requirements of a high proportion of customers, the Commission is likely to consider that such a standardized system of rebates may produce anticompetitive foreclosure effects’*²⁷.

2.2.4 The reference period

34. The reference period is also a criterion in assessing the effect of rebates. Rebates which reward on a short term basis do not have the same loyalty-enhancing effects as long term rebates²⁸. Equally, rebates that were applied over a relatively short time are less likely to be able to foreclose the market to the detriment of competitors. The more that the rebates tie the purchasers to a long period, the greater the potential anticompetitive effects of the rebate. Thus, the decision 15-D-20 ‘Orange’, above, considered, in the context of the damage assessment the duration of commitments of two or three years, but also elements that were likely to extend the duration of these commitments, like their tacit renewal or overlap.

2.2.5 The coverage of rebate schemes

35. The rebates are even more likely to have a loyalty inducing effect if they cover a significant share of the market. The Tomra judgment of the European Court of Justice noted that the determination of a specific threshold of foreclosure is not essential and that the General Court’s conclusion, according to which, by foreclosing two fifths of demand, a considerable proportion of said demand evaded competition, was devoid of legal error (§44 to 48). In its judgment Post Danmark II, the Court confirms this approach, recalling, first of all, that it is not necessary to verify the share of clients concerned by the rebate system, while noting that the fact that a rebate system covers most clients in a market might be ‘a useful indication’ of the significance of this practice and its impact on the market (§44 to 46).

²⁶ <http://www.autoritedelaconurrence.fr/doc/etudethema.pdf>

²⁷ Communication from the Commission - Guidance on the priorities set by the Commission in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, §45.

²⁸ See 07-A-17 (‘La Poste’), §22.

36. In the context of an analysis carried out under Article 101 of the effects of the rebate offered by SFR to its ‘wholesale partners’ in consideration for a non-compete obligation (decision 04-D-67), the *Conseil* took into account the fact that only six wholesalers - who in 1998 accounted for 20.4% of the distribution of SFR sales, which itself held, at that time, a 36.5% market share of the mobile phone market - had signed this rebate agreement. Conversely, in its decision 09-D-36, ‘Orange Caraïbe’, the *Autorité de la concurrence* stated that whilst the ‘Change your mobile’ programme was only relevant to a part of Orange Caraïbe’s clients, the customers who benefited from the programme were those subscribing to a monthly plan (as opposed to a ‘pay as you go’ scheme), who had most usage and generated most income per user. Therefore, if only 20% of the customers were likely to benefit from this program, in value, the share was much larger and constantly increasing (§ 324).

2.2.6 *Transparency of rebates*

37. As explained in the aforementioned thematic study of the *Conseil de la concurrence*, the lack of transparency of a rebate system may also be an indication of its anticompetitive effect. In its decision 09-D-04 (“NMPP”), the *Conseil* thus explained ‘*while certain purchasers benefit from a discount even though it is not anticipated in the general conditions of sale, it needs to be checked that the rebates are not used to distort competition.*’ (§157).

2.2.7 *The strategy being pursued*

38. The loyalty-inducing nature of a commercial offer can also be shown by internal documents. Thus, in the context of decision 15-D-20, several internal documents showed that through the ‘change your mobile’ programme, the dominant operator pursued a policy of gaining the loyalty of business clients and limiting the level of subscription cancellations (the ‘*anti-churn*’ fight), by re-committing customers when they were renewing their handset.

2.3 *The as efficient competitor test*

39. The replicability test for an as efficient competitor, as described by the European Commission²⁹, also called ‘as efficient competitor (AEC) test’ allows, in theory, to integrate, in a single formal setting, various parameters which are the non-contestable share of demand, the significance, the progression and the individualisation of the rebates and the dominant operator’s costs. The ‘effective’ price, calculated in this manner enables to assess the scale of the rebates that the operator’s competitor has to concede in order to be as competitive. Combined with a measure of production costs, the test can be used to assess to what extent an ‘as efficient’ competitor can replicate the rebate mechanism without operating at a loss.

40. In practice, however, the test presents several difficulties regarding the measure of the relevant parameters, particularly concerning the non-contestable share of the market. Nevertheless, the sensitivity of the test results to this particular parameter can easily be evaluated. More problematic is the finding of the Court that ‘*a foreclosure effect does not occur only when market access is made impossible for competitors. Indeed, it is sufficient that such access is made more difficult (see point 88 above)*’³⁰. Once completed, an AEC test only enables a check on the hypothesis of impossible market access; it does not allow to dismiss the possibility of more difficult access to said market. Furthermore, as emphasized in the Secretariat’s paper, entry by a less effective competitor may be desired, either to exert some additional

²⁹ Guidance on the priorities set by the Commission in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, point 41.

³⁰ Intel Judgement, §149-153.

competitive pressure on the existing operator, or so that the economies of scale and experience due to their entry improve its effectiveness.³¹

41. Probably for these various reasons, the General Court considered in the aforementioned Intel case that “a finding that an exclusivity rebate is illegal does not necessitate an examination of the circumstances of the case (see paragraphs 80 to 93 above). The Commission is not therefore required to demonstrate the foreclosure capability of exclusivity rebates on a case-by-case basis.”³² For loyalty-inducing rebates which are not exclusivity rebates, for which a review of the circumstances of the case should be conducted, such a test is not, as well, required.³³ In its judgment Post Danmark II, regarding the application of Article 102 TFEU to a system of rebates, the ECJ described the AEC test as an “[...] instrument among others in order to assess the existence of an abuse of a dominant position through a rebate system” (paragraph 61).

42. In particular, such a test can indicate the size of rebates necessary so that a rival can remain competitive faced with the rebates that the operator has put in place. In its decision 15-D-20 ‘Orange’, the *Autorité* found, on the basis of an as efficient competitor test produced by Orange regarding the non-individualized ‘installed base’ rebate, ‘*the price disadvantage suffered by competitors of Orange was only on a small-scale*’ while, in contrast, ‘*regarding clients at the top of the market, benefiting from offers off catalogue, the retroactive rebates are individualized and demonstrate a strong rate progression. A client entrusting a limited fraction of its lines to a competitor can therefore be penalized by a considerable drop in rebates from Orange on the lines which, because of the long term commitments, continue to be handled by Orange.*’ (§388-389).

3. Efficiency gains

43. In its aforementioned thematic study of 2004, the Conseil de la concurrence recognized that ‘efficiency gains derived by a company from the incentives that it gives through rebates on the catalogue price may (...) imply restrictions in free competition’ (p.107). Article 101§3 of the Treaty states that an agreement which restricts competition under Article 101§1 may be exempted if it contributes to the improvement in production or distribution of goods or promotes technical or economic progress, while granting users a fair share of the profits which result therefrom, and without imposing restrictions on interested companies which are not necessary to reach these objectives nor give these companies the possibility, for a substantial share of the products in question, to eliminate competition.

44. To date, however, the evidential significance of arguments developed by companies as likely to justify an exemption has remained very limited. By way of an example, in the case of long term rebates prohibited by the decision 09-D-04 (“NMPP”), the defendants argued that their ‘modernization plan’, on the one hand generated a reduction in costs, and on the other hand, required a certain stability in turnover to build on provisional plans. However, neither the reduction in costs, nor the objective of turnover stability, justified a loyalty mechanism based on an increase in transfer costs for clients moving from one supplier to another, instead of passing the savings made onto them (§186). Similarly, in the same case, loyalty bonuses granted when the client press group entrusted all its titles to the dominant operator, were justified by a reduction in turnover, without advancing specific costs which would have been assumed should it not have been entrusted all the press group’s titles.

³¹ Secretariat’s note, §45.

³² Point 143.

³³ Points 144 to 146.

45. Likewise, in the 'Discount Coupons' case (decision 02-D-33 of 10th June 2002)³⁴, the group in question particularly justified the exclusive dealing by the reduction in the costs of processing the discount coupons: '*splitting coupons from the same supplier between two coupon banks brings about an additional cost in administration because of the necessity of double invoicing; that the processing of coupons by several management centres would leave the consolidation of information incomplete; that the sales points would be obliged to sort the vouchers in order to send them to different administrators and that, finally, the Sogec code is not a simple key but a real label and a secure financial guarantee for distributors*'. However, the *Conseil de la concurrence* found that the competitors were operating without exclusivity clauses and that the clients themselves wanted to have other service providers in spite of the technical difficulties put forward by the operator in question, in other respects easily overcome, as shown during the investigation of the case and the example of other European markets.

46. Finally, and similarly in its decision 04-D-65 of the 30th November 2004³⁵ ('La Poste'), the *Conseil* found that development rebates, which were dependent on the progression in turnover and not on the quantities or total amount of purchases, could not be justified by the contribution of additional volumes, gained due to these rebates, in the reduction of costs. Indeed, with these rebates, a client bringing a minimal but progressive turnover to the dominant operator, could benefit from a development rebate superior to that which has been awarded to a client with a higher, but stable, turnover.

Conclusion

47. Identification of anticompetitive rebates relies primarily on the characteristics of the examined rebates. Incremental rebates and those exclusively linked to quantities purchased are unlikely to generate loyalty-enhancing effects. Regarding those rebates likely to bring about such effects, one must first distinguish exclusivity rebates, presumed anti-competitive pursuant to case law insofar as they are implemented by a company in a dominant position and of which a share of sales is not contestable by competitors, either because of the strong, dominant position of the company, or because of objective elements (significance of reputation, constraints on capacity, etc.). Regarding rebates linked to the duration of purchasing commitments and other categories of loyalty rebates, the analysis of their effects relies on a multiplicity of relevant parameters, either relating to the market characteristics (importance of the considered company's market power, maturity and fluidity of the market, severability of demand), or the characteristics of the chosen rebate (base, level, coverage, individualization and transparency of the rebates, objective pursued by the company involved). If the assumptions and data on which it is based are reliable, the as efficient competitor test, although not prescribed by case-law, can be a useful analytical tool, particularly for loyalty rebates that are not exclusivity rebates and to assess the scale of the pricing efforts to be made by the dominant operator's competitor. Finally, although they have little use of this possibility to date, the companies can seek to establish the efficiency gains that could justify their use of fidelity rebates.

48. This multi-criteria analysis ensures that pro-competitive rebates will not be sanctioned, especially at the instigation of plaintiffs faced with an aggressive, but pro-competitive, pricing policy by a more powerful competitor. Moreover, this evaluation grid also allows for sanctioning rebate practices which would displace less effective competitors but whose presence would be likely to, immediately or in the future, increase competition.

³⁴ <http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=02-D-33>

³⁵ http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=133&id_article=357

Decisions, judgments and other documents (in chronological order)

ECJ judgement C-85/76, Hoffmann-La Roche/Commission, of 13th February 1979.

Decision 96-D-67 of 29th October 1996 relating to practices implemented by the Coca-Cola Beverages company.

Decision 00-D-67 of 13th February 2001 on practices observed in the sector of the sale of television advertising slots.

ECJ judgement of 29th March 2001 C-163/99 (Portuguese Republic vs. Commission).

Decision 02-D-33 of 10th June 2002 on practices observed in the coupons processing industry.

Decision 03-D-09 of 14th February 2003 on the submission of the Tuxedo company on practices observed in the press dissemination market in the public airport domain.

Judgment of 17th December 2003, British Airways/Commission (T-219/99, Rec. p. II-5917, point 293).

Decision 04-D-13 of 8th April 2004 relating to practices implemented by the Society of Roquefort Caves and Cheese Producers (*la société des Caves et des Producteurs réunis de Roquefort*) in the blue cheese sector.

Decision 04-D-22 of 21st June 2004 relating to the submission to the Court of the French Association of Private Telecommunication Operators (*l'Association française des opérateurs privés en télécommunications - AFOPT*) and the Association of Telecommunication Service Operators (*l'Association des opérateurs de services de télécommunications - AOST*) concerning *France Télécom*'s commercialization of the promotional tariff 'Primaliste long distance.'

Decision 04-D-65 of 30th November 2004 relating to practices implemented by La Poste as part of its commercial contract.

Decision 04-D-67 of 1st December 2004 relating to practices implemented in the sector of the distribution of mobile phones and mobile subscriptions

'Discounts, rebates and commissions' (*'Rabais, remises et ristournes'*) Thematic Review of the 2004 Annual Report of the *Conseil de la concurrence*.

Opinion 07-A-17 of 20th December 2007 relating to an application for an opinion by the Regulatory Authority for Electronic Communications and Posts (*ARCEP*) on the mechanisms of La Poste's trade discounts.

Decision 09-D-04 of 27th January 2009 relating to the submission of the Messageries Lyonnaises de Presse against practices implemented by the Nouvelles Messageries de la Presse Parisienne in the press distribution sector

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Decision 09-D-36 of 9th December 2009 relating to practices implemented by Orange Caraibe and France Telecom in different markets of electronic communications services in the departments of Martinique, Guadeloupe and Guyana.

Decision 10-D-39 of 22nd December 2010 on practices observed in the vertical road signage sector.

Court of Justice judgment of 19th April 2012, Tomra Systems, case C-549/10P.

Tribunal judgment of 12th June 2014, Intel, case T-286/09.

Court of Justice judgment of 6th October 2015, Post Danmark, case C-23/14.

Decision 15-D-20 of 17th December 2015 on practices setup in the electronic communications sector.