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COMPETITION COMMITTEE

ROUNDTABLE ON FIDELITY REBATES

--Note by Greece--

15 – 17 June 2016

This document reproduces a written contribution from Greece 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

Please contact Mr. Chris Pike if you have any questions regarding this document
[Email: Chris.Pike@oecd.org]

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1. Introduction

1. In implementing the rules on abuse of dominant position, namely article 2 of the Greek Competition Act (l. 3959/2011)[1] and article 102 TFEU[2], the Hellenic Competition Commission (HCC) follows the legal principles and interpretation articulated in the jurisprudence of the EU Courts, taking also into account the decisions of the European Commission. In general, with regard to rebates, the HCC follows the distinction established in General Court's *Intel* and *Post Danmark II* rulings.

2. In order to identify anti-competitive rebates, the HCC takes into consideration that rebates which prevent customers from being able to select freely the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage, limit the customers' choice of supplier and also make access to the market more difficult for competitors. Moreover, a foreclosure effect occurs not only where access to the market is made impossible for competitors, but also where access to the market is made more difficult – and not necessarily impossible[3].

3. According to settled case-law, exclusivity rebates occur when a dominant undertaking ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate[4].

4. Loyalty rebates have the meaning of discounts granted by a dominant undertaking, either under the terms of agreements concluded with purchasers or unilaterally, which, without necessarily tying the purchasers by a formal obligation, are conditional on the customer's obtaining — whether the quantity of its purchases is large or small — all or most of its requirements from the undertaking in a dominant position[5].

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1 Ex art. 2 l. 703/1977.

2 In the present submission reference is made to rebates by an undertaking in a dominant position.

3 See, to that effect, Case 322/81 NV Nederlandsche Banden Industrie Michelin v Commission [1983] ECR 3461 (Michelin I), paragraph 85; Case C-52/09 TeliaSonera Sverige [2011] ECR I-527 ('TeliaSonera'), paragraph 63, and Case T-203/01 Michelin v Commission [2003] ECR II-4071 ('Michelin II'), paragraph 244. Also Case T-286/09, Intel v Commission, Judgment of the General Court of 12.06.2014 ('Intel' or 'Intel v Commission'), paragraphs 88 and 149. So, since the structure of competition on the market has already been weakened by the presence of the dominant undertaking, any further weakening of the structure of competition may constitute an abuse of a dominant position and an anti-competitive practice which is liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates, is caught by the prohibition [cf. Case C-23/14, Post Danmark A/S v Konkurrencerådet, Judgment of the Court of 6.10.2015 (request for a preliminary ruling from the Sø- og Handelsretten — Denmark, regarding the market for the distribution of bulk mail and a retroactive rebate scheme for direct advertising mail), paragraph 73 – no need to establish elimination of competition, no de minimis threshold].

4 Hoffmann-La Roche, paragraph 71, 89, Case T 155/06, Tomra Systems and Others v Commission [2010] ECR II 4361 ('Case T 155/06 Tomra'), paragraph 208, Case T-286/09, Intel v Commission, paragraph 72.

5 Hoffmann-La Roche, paragraph 89, and Case C-549/10 P Tomra Systems and Others v Commission [2012] ECR ('Case C-549/10 P Tomra'), paragraph 70, Case T-286/09, Intel v Commission, paragraph 73.

5. As regards whether the grant of a rebate by an undertaking in a dominant position is abusive, a basic distinction is drawn between three categories of rebates[6].

- **First,** quantity rebate systems ('quantity rebates') linked solely to the volume of purchases made from an undertaking occupying a dominant position are generally considered not to have the foreclosure effect prohibited by Article 102 TFEU[7] (safe haven).
- **Second,** rebates the grant of which is conditional on the customer's obtaining all or most of its requirements from the dominant undertaking ('exclusivity rebates' or 'fidelity rebates within the meaning of *Hoffmann-La Roche*'[8]), are assumed to distort competition because they are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market and are not based — save in exceptional circumstances — on an economic transaction which justifies this burden or benefit[9]. As stated in *Intel*, "*it follows from Hoffmann-La Roche […], that an undertaking in a dominant position abuses that position if it applies an exclusivity rebate system even 'without tying the purchasers by a formal obligation'. In that regard, the Commission correctly states that the anti-competitive incentive of exclusivity rebates results not from the imposition of a formal obligation to buy exclusively or almost exclusively from the dominant company but from the financial advantages obtained or the financial disadvantages avoided by making such purchases. Thus, it is sufficient that the undertaking in a dominant position indicates in a credible manner to its customer that the grant of a financial advantage depends on exclusive or quasi-exclusive supply*".

6. Although exclusivity conditions may, in principle, have beneficial effects for competition, so that in a normal situation on a competitive market, it is necessary to assess their effects on the market in their specific context, those considerations are not valid in the case of a market where, precisely because of the dominant position of one of the economic operators, competition is already restricted. That approach is justified by the special responsibility that a dominant undertaking has, not to allow its conduct to impair genuine undistorted competition in the common market and by the fact that, where an economic operator holds a strong position in the market, exclusive supply conditions in respect of a substantial proportion of purchases by a customer constitute an unacceptable obstacle to access to the market[10].

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6 To that effect, *Michelin I*, paragraphs 71 to 73, Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331 ('Case C-95/04 P *British Airways*'), paragraphs 62, 63, 65, 67 and 68, Case T-286/09, *Intel v Commission*, paragraph 74.

7 If increasing the quantity supplied results in lower costs for the supplier, the latter is entitled to pass on that reduction to the customer in the form of a more favourable tariff. Quantity rebates are therefore deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position (see Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071 ('*Michelin II*'), paragraph 58 and the case-law cited, Case T-286/09, *Intel v Commission*, paragraph 75).

8 Hence, exclusivity rebates can be considered as a partial subtotal, contained under the heading of fidelity rebates and the terms may be used alternatively. The expression will also be used for rebates which are not conditional on exclusive supply but on the customer's obtaining most of its requirements from the undertaking in a dominant position.

In *Intel*, the Court, compares exclusivity rebates with loyalty rebates in which clients are not tied to the dominant firm by a formal obligation, but instead the dominant firm indicates in a credible manner to its customer that the grant of a financial advantage or the avoidance of a financial disadvantage depends on exclusive or quasi-exclusive supply (par. 106, passim).

9 See, to that effect, *Hoffmann-La Roche*, paragraph 71 above, paragraph 90, Case T-155/06 *Tomra*, paragraph 72, paragraph 209, and *Intel v Commission*, paragraph 77.

10 Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 11, and the Opinion of Advocate General Léger in that case, points 42 to 45, *Intel v Commission*, paragraphs 89 – 90 and 170.

7. Notably, the inherent foreclosure element of such rebates consists in their design to exclude, i.e. to prevent, through the grant of a financial advantage, customers from obtaining their supplies from competing producers. Per se prohibition of this category of rebates thus relates to their inherent propensity to foreclose (in and of themselves), and the ensuing harmful effects for the competitive process and, hence, the consumers. This is why, it is not relevant to establish the foreclosure capability of this type of exclusivity rebate[11].

- **Third**, there are other rebate systems where the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply from the dominant undertaking, but where the mechanism for granting the rebate may also have a fidelity-building effect ('rebates falling within the third category'). That category of rebates includes, inter alia rebate, systems depending on the attainment of individual sales objectives which do not constitute exclusivity rebates, since those systems do not contain any obligation to obtain all or a given proportion of supplies from the dominant undertaking.

8. For this third category rebate system, in order to examine whether its application constitutes an abuse of dominant position, it is necessary to consider all the circumstances, in the sense, particularly, of the criteria and rules governing the grant of the rebate. Here, the standard in order to assess whether the conduct is of an anticompetitive nature consists in whether, in providing an advantage not based on any economic service justifying it, that rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition[12]

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11 Intel, op.cit., paragraph 80 et seq. and 143 ("a finding that an exclusivity rebate is illegal does not necessitate an examination of the circumstances of the case (…). The Commission is not therefore required to demonstrate the foreclosure capability of exclusivity rebates on a case-by-case basis"). Post Danmark II refers to a rebate scheme which was:

Standardized (all customers were entitled to receive the same rebate on the basis of their aggregate purchases over an annual reference period).

Rebates were 'conditional', in the sense that Post Danmark and its customers concluded agreements, at the beginning of the year, in which estimated quantities of mailings for that year were set out. At the end of the year, Post Danmark made an adjustment where the quantities presented were not the same as those that had been estimated initially.

The rebates were 'retroactive', in the sense that, where the threshold of mailings initially set was exceeded, the rebate rate applied at the end of the year covered all mailings presented during the period concerned (not incremental, i.e. applying only to mailings exceeding the threshold initially estimated).

12 To that effect, Michelin I, paragraph 73; British Airways, paragraphs 65 and 67; Case C-549/10 P Tomra, paragraph 71; Case T-286/09, Intel v Commission, paragraph 78; Post Danmark II, paragraph 29. To that effect the Court in Post Danmark II took into account as circumstances, in which such a rebate scheme produces an anti-competitive exclusionary effect without tying customers by a formal obligation:

a. the retroactive nature of the rebates exerting pressure on the counterparts of the dominant undertaking to purchase more.
b. the long reference period (=one year) which also has the inherent effect, at the end of that period, of increasing the pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period. Consequently, such a rebate scheme is capable of making it easier for the dominant undertaking to tie its own customers to itself and attract the customers of its competitors, and the ensuing suction effect was further enhanced by the fact that the rebates applied also to the non-contestable part of demand.

2. The As-Efficient-Competitor test

9. Settled case-law, including the recent *Post Danmark II* of the CJEU and the *Intel* judgment of the General Court, have examined the possibility to apply the As-Efficient-Competitor ('AEC') test with regard to a. exclusivity and b. 3rd category rebates[13]. It has now been clarified that regarding the per se unlawful exclusivity / *Hofmann-La Roche* type loyalty rebates, an AEC test is not necessary[14]; the AEC test and the scope of the relevant case-law is limited to pricing practices and does not affect the legal characterisation of exclusivity rebates[15]. Regarding 3rd category rebates, various competition on the merits criteria and not necessarily an as efficient competitor test are used in order to assess the potential of the rebate scheme to foreclose.

10. Below cost prices is also not a prerequisite of a finding that a retroactive rebate scheme is abusive. In general, there is no legal obligation requiring the AEC test in order to find that a rebate scheme is abusive[16]. On principle, recourse to the as-efficient-competitor test with regard to 3rd category rebates is not excluded, unless the structure of the market[17] makes the emergence of an as-efficient competitor practically impossible (as was the case in Post Danmark II, where applying the as-efficient-competitor test was found to be of no relevance)[18].

11. In a market with high barriers, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking.

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c. the high market share in levels that the dominant undertaking must constitute an unavoidable business partner in the market.

13 *Post Danmark II* judgment of the Court of Justice regarded a *standardized* retroactive rebate scheme.

14 See, to that effect, *Intel*, paragraph 140 *et seq*.: "150 […] *an AEC test only makes it possible to verify the hypothesis that access to the market has been made impossible and not to rule out the possibility that it has been made more difficult.* […], *a positive result means only that an as-efficient competitor is able to cover its costs* […]. *That does not however mean that there is no foreclosure effect. The mechanism of the exclusivity rebates,* […], *is still capable of making access to the market more difficult for competitors of the undertaking in a dominant position, even if that access is not economically impossible* […].

151 *It follows from the foregoing that it is not necessary to consider whether the Commission carried out the AEC test in accordance with the applicable rules and that it is also not necessary to examine the question whether the alternative calculations proposed by the applicant were carried out correctly. Even a positive AEC test result would not be capable of ruling out the potential foreclosure effect which is inherent in the mechanism described in paragraph 93 above*".

15 *Intel*, paragraph 99.

16 See *Post Danmark II*, paragraphs 56 et seq.: In the context of applying Article 102 TFEU to a rebate scheme, the invoicing of below cost prices to customers is not a prerequisite of a finding that a retroactive rebate scheme is abusive. It is not possible to infer from Article 102 TFEU or the case-law of the Court that there is a legal obligation requiring a finding to the effect that a rebate scheme is abusive to be based always on the as-efficient-competitor test. The as-efficient-competitor test must, thus, be regarded as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme.

17 E.g. where the dominant undertaking holds very large market shares and structural advantages like a statutory monopoly.

18 *Post Danmark II*, paragraph 58 *et seq*.

12. Overall, the AEC test only constitutes 'one tool amongst others' for assessing whether there is an abusive rebate scheme[19].In this regard, it is also noted that:

- The AEC test can lead to under-inclusion / under-enforcement, taking into account that less efficient competitors are also prone to exert a competitive pressure to the dominant undertaking20, not only in terms of price competition but also in terms of choice, quality and innovation (upsetting the monopolist's 'quiet life').
- Furthermore, to allow elimination of less efficient competitors would discourage new entry (especially since new entrant can be less efficient in the beginning – and then grow to become equally or more efficient) by signaling the dominant firm's ability to foreclose and thus lead to established monopolies or oligopolies. Thus, foreclosure harms the competitive process and the consumers, even if the competitor excluded is not equally efficient with the dominant undertaking.

13. Rebates schemes designed to exclude are not pro-competitive, even if the said schemes do not entail a profit sacrifice of the dominant firm. Thus, a safe-haven based on cost benchmarks / price-cost tests is not applicable to rebates.

3. On efficiency justifications

14. With regard to the notion of economic justification, according to case-law, neither the wish to sell more, nor the wish to spread production more evenly, could justify such a restriction of the customer's freedom of choice and independence. On the contrary, it is examined whether the position of dependence from the dominant suppliers, in which customers found themselves, created by the discount system, is based on any countervailing advantage which could be economically justified[21].

15. An efficiency justification is thus possible with regard to rebates[22]. However, it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct counteract any likely negative effects on competition and consumer welfare, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition, in the sense of removing all or most existing sources of actual or potential competition.

16. At any rate, in practice, it will be difficult to justify on efficiency grounds any conduct eliminating competition, since, in non-competitive markets with an undertaking in dominant position (i.e. where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened), it would be difficult to show that possible efficiency gains outweigh the deterioration of the competitive process. It is important to note that markets with a dominant firm are not competitive markets, thus there is no pressure to the dominant firm to pass on any efficiency gains to their customers and / or the consumers. This is a more general problem also with regard to the consumer welfare standard and the AEC test. Furthermore, as a general rule, there are other ways (other pricing modules such as even simple price cuts), less restrictive, to achieve the same result, instead of an exclusionary rebates policy. So, it is unlikely that the only proportionate way for the dominant company to achieve the efficiencies is an exclusionary pricing practice[23]. This is probably the reason

19 *Post Danmark II*, paragraph 61.

20 See, to that effect, *Post Danmark II*, paragraph 60.

21 Michelin I, paragraph 80 et seq.

22 *Post Danmark II*, paragraph 48 et seq.

23 See Case T-203/01 Michelin v Commission, paragraph 59, with reference to Hoffmann-La Roche, paragraph 90; Michelin I, paragraph 85; Case T-228/97 Irish Sugar v Commission [1999] ECR II-2969,

why no such instances of efficiency justified exclusionary rebates are to be found in the jurisprudence of the European Courts or of the HCC, as yet, but also why dominant undertakings do not often put forward such claims.

17. This approach is also consistent with the competition on the merits *versus* anticompetitive foreclosure dichotomy, valuing the preservation of competition in the market against the dominant firm's foreclosing interest. In the *ex post* examination of an abusive conduct that has already taken place (in contrast to the *ex ante* examination in mergers), such efficiencies would have had to be materialised, and the claims would have to be concrete and quantifiable.

4. Analytical framework for fidelity rebates compared with other exclusionary conduct

18. In anti-competitive rebates, the loyalty inducing incentives (in exclusivity rebates, the fact that the grant of the rebates is conditional on exclusive or quasi-exclusive supply[24]) are crucial, whereas regarding below cost pricing, the costs and prices charged by the dominant undertaking are relevant.

19. First of all, it is clear that a different treatment is warranted for exclusivity rebates than for other pricing practices, given that unlike an exclusive supply incentive, the level of a price cannot be regarded as unlawful in itself[25]. In other words, in low-pricing practices the abusive nature arises solely by the predatory level of costs and prices (hence the need to establish a predatory plan or pricing below AVC[26]), while in rebates the key exclusionary element is, in itself, the incentive provided to the customer not to deal with competitors of the dominant firm.

20. In general, different motives, scope, intensity and (thus) standards can be identified between rebates and pricing practices (even if rebates can amount also, concurrently, to predation). Fidelity rebates also entail, as a rule, undue discrimination in the sense of disadvantageous terms for customers who choose to have other suppliers (also).

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paragraph 114; and Portugal v Commission, paragraph 52. See also Commission Decision of 29 March 2006, Case COMP/E.1/38-113, Prokent/Tomra, paragraph 282.

24 See *Intel*, paragraph 152: "…*in the case of an exclusivity rebate, it is the condition of exclusive or quasi-exclusive supply to which its grant is subject rather than the amount of the rebate which makes it abusive*".

25 Case T-286/09, op. cit., paragraph 99 ("… *the scope of that case-law is limited to pricing practices and does not affect the legal characterisation of exclusivity rebates. Case C-280/08 P Deutsche Telekom, paragraph 98 above, and TeliaSonera, paragraph 88 above, concerned margin squeeze practices and Post Danmark, paragraph 94 above, concerned low price practices, so that those three cases concerned pricing practices. However, the present case does not relate to a pricing practice. As regards the rebates granted to the various OEMs, the complaint made against the applicant in the contested decision is not based on the exact amount of the rebates and thus on the prices charged by the applicant, but on the fact that the grant of those rebates was conditional on exclusive or quasi-exclusive supply. Different treatment of exclusivity rebates and pricing practices is justified by the fact that, unlike an exclusive supply incentive, the level of a price cannot be regarded as unlawful in itself*").

26 See, for example, Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951 and Case C-202/07 P, F*rance Télécom SA v Commission of the European Communities*, ECLI:EU:C:2009:214, ruling that prices below average variable costs give grounds for assuming that a pricing practice is eliminatory and that prices below average total costs but above average variable costs, are regarded as abusive if they are determined as part of a plan for eliminating a competitor.

5. Prioritisation

21. The enforcement action of HCC is based on public interest considerations. Priority is assessed in light of the estimated impact of the practice on effective competition and on consumers. Evidently, the selection of cases[27] depends on the nature and quantity of cases pending at any given point, as well as the strategic targeting of certain sectors at some given period.

22. In particular, priority is given to[28]: hardcore restrictions, products and services which are essential to the Greek consumer, and anticompetitive practices with cumulative effect. The prioritisation takes into account, inter alia, the need for clarification of novel legal issues and coherence in the interpretation of national rules with European law, as well as the estimated result of the Commission's intervention and the completeness of the information submitted with the complaint[29].

23. Due, among others, to resources constraints, CAs focus on prioritised cases – normal prioritisation filters out cases in which an adequately serious infringement is not likely to be proven and thus averts the risk of false positives.

24. It is further noted that in many instances, dominant firms have been found to use concurrently multiple abusive / exclusionary practices, e.g. the imposition of exclusivity obligations, fidelity rebates, predation.

5.1 HCC recent cases on fidelity rebates

25. The above-mentioned principles have been followed in HCC rebates decisions (implementing art. 2 l. 3959/2011 and 102 TFEU on the basis of settled EU case-law). To name some:

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27 In Greece, investigations in antitrust cases may be initiated: a) ex officio by the HCC, including by virtue of a leniency application, or b) by virtue of a complaint filed with the HCC. Natural or legal persons are entitled to launch a complaint, without further legal requirements (complainants are not required to demonstrate a legitimate interest for launching a complaint). A complaint can only be made about an alleged infringement of Articles 101 or 102 of the Treaty and their Greek facsimile provisions with a view to the Authority finding and prohibiting the infringement – the complainant cannot require the HCC to adopt interim measures. A complaint must comprise information equivalent to that of Form C annexed to Regulation EC 773/2004.

28 L. 3959/2011, art. 14.2.(n), art. 36.

29 Implementing the above criteria, on the basis of the HCC Point System the following are taken into account in order to quantify the impact of each case (HCC Decision 539/VII/2012):

- Whether the practice in question regards a cartel or an abuse of dominance (2 pts), or vertical restraints with cumulative effect (1+1 pts);
- Whether the product or service refers to a basic / household necessity according to the established statistical weighting and indicators (1 pt);
- Whether the practice is nationwide or refers to a large part of the country (2 pts);
- Whether a leniency application has been submitted (2 pts);
- Evidentiary value and probability of establishing an infringement (1 pt);
- Whether it concerns a continuous / repeated infringement (1 pt);
- Whether it concerns a novel or significant legal matter or an issue on European legislation and ECN cooperation (1 pt).

- Tasty Foods decision [520/VI/2011] (salty snacks) dealt extensively with exclusivity agreements at wholesale level, cabinet exclusivity, rebates conditional upon the commitment of all, or most available shelf and store space for its products, target rebates etc (fines totaling € 16.177.514 million).

- Heineken decision [590/2014] (beer market) dealt with significant payments conditional upon exclusivity and/or the foreclosure of competitive brands and, at the wholesale level, significant economic motives conditional upon exclusivity / not trading competing products (fines totaling € 31.451.211 and required to introduce written contracts with amended terms, etc).

- Procter & Gamble [581/VII/2013] (baby-diapers) dealt with target rebates and across the board rebates conditional upon the commitment of excessive shelf space for its baby diapers products (fines totaling € 5.3 million).

- Lastly, Nestle decision [434/V/2009] (instant coffee market) dealt with inter alia, target and fidelity rebates, prohibition of parallel imports and of marketing activities of competitive products (retail segment); exclusive supply and bundling contract arrangements, fidelity rebates (HORECA segment); hidden non compete obligation (fines: approx. € 30 million).

In particular:

5.1.1 HCC Decision No. 520/IV/2011 – Tasty Foods (Salty Snacks Market)

26. In its Decision 520/IV/2011, the HCC found that Tasty Foods (Tasty), a subsidiary of Pepsico, mainly active in the production and distribution of salty snacks, had infringed Articles 1 and 2 of the Greek Law 703/1977 as well as Articles 101 and 102 TFEU from 2000 to at least 2008. On this basis, it imposed a total fine of € 16 177 514[30] on Tasty.

27. The case was initiated following two complaints filed by a competitor "Tsakiris Food & Snacks Company", alleging that Tasty had implemented a targeted policy on a systematic basis, seeking to exclude its competitors from the market by means of exclusivity and discrimination. In the course of the ensuing investigation, the HCC gathered an extensive set of data from the dawn-raid which took place at Tasty's premises and from several information requests addressed to competitors and customers, with a view to establishing whether Tasty held a dominant position on the market and whether it had engaged in anti-competitive practices. Extensive economic analysis was also conducted for the purpose of defining the relevant product market, after the submission of economic reports and testimony by both Tasty and the complainant.

28. Following the oral hearing and the exchange of written observations, the HCC concluded that Tasty held a dominant position in the market for the production and distribution of salty snacks (mainly comprising potato chips, corn chips and extruded snacks), with markets shares ranging from 70% to 85% (consistently over the last decade). The HCC also found that Tasty had adopted and implemented a single, consistent and targeted policy in the market of salty snacks that sought to exclude its competitors from the distribution channel of smaller retailer outlets (notably kiosks, grocery stores and traditional food stores & mini markets) and to limit their growth possibilities. To achieve this objective, Tasty employed various abusive practices, some of which exhibited extraordinary intensity, including:

[30] € 11 739 387 for infringements of Articles 2 of Greek Law 703/1977 and 102 TFEU (abuse of dominance).

(1) exclusivity agreements at the wholesale level,

(2) agreements for the provision of cabinets on the basis of exclusivity, aimed at capturing the available space in smaller retailer shops (e.g kiosks) and raising entry/expansion barriers with the view to exclude competitors,

(3) rebates conditional upon the attribution of all, or the most substantial part of available shelf/store space to its products,

(4) target rebates at both wholesale and retail level, and

(5) coordinated and targeted acts of replacing and removing, by unorthodox means, the products and cabinets of competitors from those outlets.

29. In para 319, the said decision clarifies that according also settled case-law, the HCC has no obligation whatsoever to effect an "as–efficient-competitor" analysis in order to establish the abusive nature of the fidelity rebates examined. This is notwithstanding the fact that the decision uses, inter alia, relevant economic analysis in order to rebut the arguments advanced by the dominant undertaking.

5.1.2 HCC Decision No. 590/2014 - Heineken (Greek beer market)

30. Following an investigation (ex officio and upon a complaint by Mythos Brewery S.A.), the HCC found that Athenian Brewery S.A., a subsidiary of Heineken N.V. active in the production and distribution of beer in Greece, abused its dominant position, thereby infringing Articles 2 of the Greek Competition Act and 102 EU Treaty.

31. According to the Decision, the dominant company Athenian Brewery S.A. implemented a single targeted policy that sought to exclude its competitors from the on-trade consumption market (e.g. HORECA chains and other retail outlets) and to limit their growth possibilities. To achieve this objective, Athenian Brewery S.A. employed various commercial practices aimed at exclusivity[31], including exclusivity obligations, exclusivity rebates and other loyalty-inducing payments conditional upon exclusivity or foreclosure of one or more competitive brands. In particular, fidelity rebates comprised, inter alia, of individualized retroactive rebates consisting in a percentage of the value of the HORECA chain's purchases covering all its needs, with payment in advance corresponding to a percentage of the client's projected purchases at the end of the year -in case the amount would be exceeded, the corresponding extra payment would be due to the client, whereas in case the actual purchases were below the said amount, the difference would have to be returned by the client to the dominant supplier-, and various payments to retail outlets often characterized as advertisement or promotion expenses[32].

31 According to paragraph 689 of the Decision, an abusive fidelity rebate mechanism does not presuppose the application of an AEC test.

Further, according to paragraph 690 of the Decision (citing *Tomra*), even with regard to 3rd category rebates, it is not necessary to effect an as-efficient-competitor analysis which would show that a rebates system would require an as efficient competitor to charge negative prices. A fortiori this thinking applies to exclusivity rebates and practices.

32 In particular, the practices adopted by the dominant undertaking consisted in the imposition of exclusivity clauses (e.g. written exclusivity agreements between Athenian Brewery S.A. and several key accounts – HORECA chains– with the granting of rebates and other significant benefits in exchange), fidelity rebates (advance payments of rebates for the predicted value of the client's total purchases with a claw-back provision), and the granting of a variety of payments, benefits, gifts and rebates to retail outlets aiming at impeding their supply from competitors and often synchronous to the initiation of the exclusivity regarding the retail outlet.

32. Furthermore, Athenian Brewery S.A. was found to have engaged in restrictive practices at the wholesale level, by providing wholesalers with significant economic motives that promote exclusivity and by exercising pressure on them not to trade or introduce competing products (notably, economic motives in exchange for exclusivity, threat of retaliatory measures in case wholesalers traded or introduced competitors' products - replacement of competitors' products, granting of longer credit before peak and revaluation periods with a view to fill up storage space, reduction of benefits / of the days of credit and the credit limit as a means of pressure in order to exclude competitors, provision of various benefits such as assignment of the servicing of retail outlets to the wholesaler and provision of long-term credit as a kind of loan for the construction or extension of facilities such as warehouses, in exchange for exclusivity, etc). These practices amounted to both exclusionary conduct and discrimination by means of worse commercial terms - withdrawal of benefits to clients who dealt with competitors.

33. Moreover, with respect to super-markets, Athenian Brewery was found by majority to have abused its dominant position by granting, for a period of one year, fidelity rebates (consisting in a percentage on the total amount of purchases in the dominant firm's brands) conditional upon the commitment of 'satisfactory' shelf space (according to the dominant undertaking's assessment).

34. In the context of the investigation, dawn-raids in the premises of Athenian Brewery S.A. as well as in the premises of its clients (wholesalers and retailers) were conducted resulting in the collection of direct evidence, whereas further evidence from numerous testimonies and information requests (also from other competitors) was collected, along with the agreements and financial and other data provided by the respondent. The dominant firm closely followed the exclusivity status of retail outlets / chains. Athenian Brewery S.A. had also established a commercial strategy to penetrate retail outlets, in the context of which a presentation of relevant cases took place and the achievement of "exclusivity" was highlighted as a result of the successful implementation of the strategy. Another competitor, Macedonian Thrace Brewery S.A. also submitted written statements to HCC alleging the abuse by Athenian Brewery S.A. of its dominant position. According to the HCC unanimous Decision, the abovementioned infringement had a single and continuous nature and extended over a period of sixteen years, i.e. from September 1998 to September 2014.

35. A fine totaling € 31.451.211 was imposed on Athenian Brewery S.A. for the said infringement. The company was also required to cease the infringement, to introduce written contracts with amended terms, to stipulate in all its agreements and invoices that its customers are free to buy, sell and -in any way- distribute competitive products in kind and quantity of their choice, to define in a clear and precise manner the payment given by the dominant firm as well as the precise service provided by the co-contractor for which the said payment is granted.

5.1.3 HCC Decision No. 581/VII/2013 – Procter & Gamble (retail market for baby diapers and related baby care products)

36. The HCC concluded, by majority vote, that Procter & Gamble Hellas LTD (P&G), subsidiary of P & G International Operations S.A., infringed Articles 1 and 2 of the Greek Competition Act and Articles 101 and 102 TFEU, by engaging in anticompetitive commercial practices in the retail market for baby diapers in Greece. The case was opened following an ex officio investigation.

37. According to the decision, the evidence gathered throughout the investigation (including contracts between P&G and the supermarkets concerned; interviews of the undertakings concerned; supermarkets' scorecards; shelf planograms, instructions to merchandisers and other internal documents and emails) substantiates that, during the investigated period 2003 – 2011, P&G adopted and implemented anticompetitive practices aimed at maintaining and/or strengthening its dominant position in the market for baby diapers, thereby excluding competitors and limiting their growth possibilities.

38. The alleged abusive conduct included, in particular, individualised target rebates and rebates conditional upon the commitment of excessive shelf space for P&G baby diapers products, as agreed between the latter and major retail chains between 2003 and 2011.

39. The characteristics of the aforementioned rebates, as well as the way they were implemented, were analysed according to the criteria set out by case-law for exclusivity requirements. The rebates which were conditional upon the commitment of excessive shelf space were also found to constitute non-compete clauses infringing Article 1 of the Greek Competition Act and 101 TFEU.

40. In the statement of objections, it was alleged that P&G used "mixed bundling rebates", which enabled the company to leverage its power on the diaper market into related products of the baby-care sector. However, this allegation was dropped in the final decision.

41. Based on the gravity and duration of the infringement, and after taking into account the particularities and economic circumstances of the case, the HCC imposed on P&G a fine amounting to € 5.3 million.

5.1.4 HCC Decision No 434/V/2009 – Nestlé (instant coffee market)

42. Following an ex officio investigation, the HCC found that "NESTLE HELLAS S.A." had infringed articles 2 of law 703/1977 and 82 of the EC Treaty by abusing its dominant position in the instant coffee market. In particular:

- in the retail instant coffee market regarding its trading relations with super market chains, by granting target and fidelity rebates, prohibiting / impeding parallel imports, as well as by prohibiting any simultaneous marketing activities of its products and competitive products;

- in the HO.RE.CA. instant coffee market, by imposing exclusive supply and bundling contract arrangements, as well as by granting fidelity rebates aiming at inducing customer loyalty; and

- regarding its trading relations with its distributors, by imposing a "hidden" non-compete obligation (equivalent to an "English clause")[33].

43. A fine of approximately €30 million was imposed mainly with respect to the infringements in the retail instant coffee market for the years 2002 to 2006.

5.1.5 HCC Decision 207 / III / 2002 - The Coca-Cola case (carbonated soft-drinks)

44. Finally, specific mention is warranted for an older HCC case (Decision 207/III/2002 – Coca Cola), which shares many of the features of the above-mentioned more recent cases and was revisited by virtue of an HCC non-compliance decision in 2006. The case was initiated following complaints by "AGNI SA" and the "HELLENIC ASSOCIATION OF SOFT DRINKS PRODUCERS" against COCA-COLA HELLENIC BOTTLING COMPANY SA ("COCA-COLA HBC SA") with regard to alleged infringements of art. 2 of l. 703/1977.

[33] Moreover, "NESTLE HELLAS S.A." was found to have infringed articles 1 of law 703/1977 and 81 of the EC Treaty, by prohibiting/ impeding parallel imports by specific super market chains. "NESTLE HELLAS S.A." has infringed article 1 of law 703/77 also by prohibiting passive sales by its distributors.

45. The HCC found that Coca Cola HBC SA (known as 3E company) abused its dominant position by: (1) offering target rebates, (2) discriminating against retail resellers that did not distribute its products on an exclusive basis, (3) offering additional free benefits to those retail resellers who did not sell competitive products, and iv) leasing freezers to resellers upon the condition that they be used exclusively for Coca-Cola products. The main abusive practices found were: target discounts, fidelity rebates and freezer exclusivity.

Target Rebates applied to certain wholesalers / dealers

46. According to the HCC, rebates applied by dominant undertakings which depend on the attainment by the dealer of a certain sales target, individually determined for a certain time period (usually the target is increased with regard to the previous -corresponding- reference period), aim at binding the clients to the company and at barring actual or potential competitors.

47. Such a system has the unavoidable result that the pressure increases on the buyer, towards the end of the period, to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period. In parallel, the buyer's freedom to choose his sources of supply (to be able to choose, at any given time, in view of the market conditions, the most favourable offer from those made by several competitors and to switch supplier without material adverse financial consequences), is restricted. At the same time, the access of new competitors to the supplier level is restricted, due to the fact that their cooperation with the distributors of their products (their access to the distribution networks) is rendered more difficult.

48. The effects of the said practice are further accentuated by the wide divergence between the dominant undertaking's market share and those of its competitors.

49. It is thus accepted that in view of the above, target rebates imposed by a dominant supplier result in the application of dissimilar conditions to equivalent transactions with other trading parties and in the restriction of production and consumption. The lack of transparency of the dominant undertaking's entire discount system, although not a condition to the qualification of a practice as abusive, intensified the discriminatory treatment of the buyers. On the contrary, quantity -or scale- discounts, which apply objectively and uniformly for all the clients and are based on economic advantages (cost reduction due to saving in storage or transportation expenses) justifying their provision, are lawful, in principle.

Individual anticompetitive practices:

50. COCA-COLA HBC SA's employees unilaterally set to wholesalers/dealers (customized) sales targets incorporating an increase (5%-15%) with relation to the previous year's sales. The said targets initially concerned a 2 to 4 months' period, and, if not attained, could, in some cases, be readjusted to 6 months' periods or to annual. Other rebates were annual. Some concerned the entire product range, some others were per product. The granting of the rebate was subject to the attainment of the sales targets and was effected through the provision (of different amounts) of free cartons, credit notes or a monetary rebate (apart from the normal profit margin). If the dealer failed to attain the target, he was obliged to purchase additional cartons or did not receive any rebate. COCA-COLA HBC SA's documents -showing the rebates were neither signed by the wholesaler nor given to the latter, or the whole arrangement was oral.

51. According to the HCC, the said rebates could not be considered as quantitative "scale" rebates (this was COCA-COLA HBC SA's defense line) since they were determined/calculated at the beginning of each year on the basis of sales exceeding those of the corresponding period of the previous year, individually for each dealer, and could be readjusted.

52. On the basis of evidence (wholesalers' testimonies) to the effect that COCA-COLA HBC SA set targets varying from 5% to 15% in relation to the previous year's sales, and given that the normal increase of the market due to a raise of the corresponding demand does not exceed 2,5% per year, the HCC concluded that the application of the rebates system in question unavoidably resulted in the exercise of pressure to the dealers for the distribution of the products of COCA-COLA HBC SA to the exclusion of competitive products. The non-attainment of the target would have as a consequence the loss of rebates with regard to all the dealer's sales (this should also be seen in the context of the latter's weak bargaining position). The said target rebates system, which was also a non-transparent one, created a dependence of the wholesalers from COCA-COLA HBC SA, whereas the latter's ability to choose between more favorable offers by COCA-COLA HBC SA's competitors was obstructed, thus limiting the wholesalers' capacity to choose their supply sources.

53. Furthermore, the entry of competitors to the market was subsequently hindered. The abovementioned constraints restricted competition. Moreover, the said system resulted in discrimination towards wholesalers since the targets depended from each wholesaler's sales in the previous year, thus the financial advantage was different for each wholesaler.

Operative Part of the Decision

54. The HCC: 1) unanimously ruled that COCA-COLA HBC SA abused its dominant position in breach of art. 2 of l. 703/1977, 2) imposed on COCA-COLA HBC SA a fine of €2.934.702,86 (0,59% of the company's gross revenues for the year 1999), 3) ordered the company to lift the exclusivity clause concerning the use of the freezer cabinets from its free-on loan contracts in particular as regards final retail outlets which do not have capacity for the installation of an additional competitive soft-drinks' freezer and 4) to cease the abovementioned infringements and to omit these in the future, and 5) threatened to impose a periodic penalty payment of 5.869 euros for each day of delay to comply with the decision, calculated from the date of issuance of the decision.

5.1.6 HCC Decision 309/V/2006 on the non-compliance of Coca Cola HBC SA with HCC Decision 207/III/2002

55. The HCC found with its Decision 309/V/2006 that Coca-Cola HBC SA had not complied with HCC Decision 207/III/2002 (upheld on appeal by the Athens Administrative Court of Appeal judgment 2116/2004).

The HCC ruled that Coca-Cola HBC SA did not comply with its obligations to: a) withdraw the exclusivity clauses concerning the use of the freezer cabinets from its free-on-loan contracts in particular as regards final retail outlets which do not have capacity for their installation of an additional competitive soft-drinks' freezer, b) end any discrimination in favour of exclusive wholesale dealers and c) end any discrimination in favour of retail outlets except for the non-exclusive ones.

56. Thus, the HCC ruled that the periodic penalty payment of 5.869 euros threatened for each day of delay in case of non-compliance with Decision 207/III/2002 was payable by Coca-Cola HBC SA, and imposed on Coca-Cola HBC SA the amount of 8.662.644 euros for 1476 days (1.2.2002 till 16.2.2006).