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FIDELITY REBATES

-- Summaries of contributions --

15-17 June 2016

This document reproduces summaries of contributions submitted for Item 6 of the 125th meeting of the 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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FIDELITY REBATES

-- Summaries of Contributions --

This document contains summaries of the various written contributions received for the discussion on Fidelity Rebates (125th Competition Committee meeting, 15-17 June 2016). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

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SUMMARIES OF CONTRIBUTIONS ON FIDELITY REBATES

BIAC*

An assessment of how competition agencies approach regulation and enforcement in respect of fidelity rebates needs to be put in the economic context of the impact that these rebates have: the vast majority of fidelity rebates are used by firms who do not hold substantial market power, and are implemented with the effect of reducing prices for consumers. Although fidelity rebates can be used for anticompetitive purposes in some circumstances, they normally result in benefits to consumers, and agencies should apply a strong presumption to this effect. Finding the correct approach to formulating and then enforcing rules on fidelity rebates requires competition agencies to balance the need to prevent the anticompetitive use of rebates with the need to avoid over-enforcement or ambiguities which have the ultimate effect of deterring pro-competitive price reductions. Absent a clear set of economic principles on which to base intervention in this area, enforcers should avoid acting to challenge or chill discounting practices.

Alongside a recognition that fidelity rebates can have an anticompetitive effect should be an acceptance that the circumstances in which they can have such an effect are limited. Under the various theories of anticompetitive harm related to the effects of fidelity rebates, the seller of a product applying the rebate needs to hold substantial market power. It should be recognized that, in the absence of such a degree of market power, the use of fidelity rebates lead to beneficial outcomes for consumers. It should also be noted that generally speaking, a consequence of this practice is that competition operates on a customer basis rather than on a "unit sale" basis, which means they will not be potentially anticompetitive unless customers representing a predominant proportion of demand are covered. A central issue, then, is how competition agencies can formulate and enforce rules which catch clearly anticompetitive rebate schemes by firms with very substantial market power, without regulatory over-reach or over-enforcement which would stifle dynamic competition, at the expense of consumers. Inextricably linked to the question of how clear, unambiguous rules can be formulated and administered is the need for convergence at the agency level. The current regulatory environment is complicated by the fact that different agencies have divergent views on dominance tests and policies on rebates, meaning that – in practice – a business attempting to put in place a global or cross-border supply agreement that incorporates price reductions must navigate a formidable number of hurdles in order to hope to be in compliance.

BRAZIL*

In Brazil, it is widely recognized that fidelity rebates schemes are common and, in most cases, have positive effects. However, in some cases they can be considered anti-competitive. These schemes may therefore come under antitrust scrutiny as vertical restraints. CADE does not have any specific procedures for the analysis of fidelity rebates. However, in the case of vertical restraints, it stresses the relevance of an effects-based approach.

The use of an effects-based approach rather than a per se rule of illegality is also well established in CADE's case law on vertical restraints. Thus, it is crucial to demonstrate the existence of market power (usually, but not only, measured in terms of market share) and the practice's ability to generate a substantial impact in the market, representing a relevant risk to competition. The agency should also consider the possible economic efficiencies resulting from the practice, in order to verify its net impact on competition and consumers.

One of the most important CADE's decisions concerning fidelity rebates is the Ambev case. Ambev had 70% of market share. According to the loyalty program`s rules, Ambev would reward point of sales (POS) for selling the company`s products: for a certain quantity of beers sold, the POS accumulated points that could be exchanged for attractive prizes, equivalent to discounts. The formal rules of the program were transparent; there were no exclusivity provisions, no restriction on the selling of other brands, and no minimum quantities required to participate.

However, the investigation discovered several inconsistencies between formal rules and the implementation of the program in practice. Even though the formal rules of the program did not mention any exclusivity requirements, those requirements had occurred in practice at least for a group of selected POS. Advantages other than the prizes, such as price discounts and discounts in one specific brewery brand (Antarctica), were also used as tools to negotiate the participation of POS in the program, imposing in return limitations on the selling of products from Ambev`s rivals. The discounts were also not uniform: the program focused on strategically chosen POS and internal documents demonstrated that Ambev intended to limit competition through the creation of artificial barriers to the entry.

CADE`s decision also focused on the economics effects of the conduct. The authority concluded that the program had the effect of changing the pattern of competition in the market: instead of competing for sales to consumers, rivals begin to compete for the POS. However, even equally or more efficient rivals would not be able to compete in this way since Ambev`s market power was such that it was not possible for a POS to stop selling Ambev`s brands. In this context, the program works as an incentive for POS to concentrate all their demand in Ambev`s products. This increases rivals' costs. Ambev was not able to demonstrate that the practice had economic efficiencies capable to compensate all those potential anti-competitive effects. Ambev was fined 2% of its revenues in Brazil, totalizing R$ 352,7 million – the highest fine imposed by CADE to a single company at that time.

CANADA

The Competition Bureau of Canada (the "Bureau") is an independent law enforcement agency responsible for the administration and enforcement of the Competition Act (the "Act"). The basic operating assumption of the Bureau is that competition is good for both businesses and consumers.

The Bureau does not have presumptions specific to fidelity rebates given the ambiguous competitive effects relating to such rebate programs. Where fidelity rebates create, preserve or enhance a firm's market power by creating or strengthening barriers to expansion or entry, the Bureau may investigate such rebates under certain civil provisions of the Act aimed at restrictive trade practices, including the exclusive dealing and abuse of dominance provisions. The means through which the Bureau tests the necessary conditions under the relevant legislative provisions will be dependent on the factual circumstances specific to each case.

There is limited jurisprudence in Canada with respect to fidelity rebates; however, where there is sufficient evidence to demonstrate that a fidelity rebate may constitute a violation of the Act, the Bureau has taken, and will continue to take, appropriate action to address such concerns.

CHILE*

In 2008 the chemical matches industry in Chile was dominated by one company, the "Compañía Chilena de Fósforos" (Chilean Matches Company, or "CCF" onwards). The firm was the sole producer in Chile and had an 80% market share. Other brands were imported from abroad. The chemical matches market in Chile had been shrinking since the beginning of the '90s.

CCF started granting discounts to retailers that sold exclusively CCF's products. These discounts were around 6% of the total bought each month. These discounts effectively closed the market for new entrants. The Chilean tribunal prohibited the conduct. CCF then started offering fidelity rebates to retailers achieving certain sales goals, often corresponding to the sales of a previous month in which there was an exclusivity deal active. The Tribunal again deemed the discounts anticompetitive and aimed only at excluding rivals, based on three considerations: (i) CCF had a dominant position in the market; (ii) there was little fringe competition because of the high costs of importing and the impossibility of producing internally (at least in the medium term); and (iii) the total demand of matches was shrinking.

This case was assessed, not as a case of predatory pricing, but as a case of anticompetitive rebates that themselves were artificial barriers to enter this market. The tribunal concluded that these discounts and rebates strategies were illegal only when they closed the market to new competitors, and that was sufficient to find against them, without further analysis about the prices charged or the cost efficiency of possible new entrants. CCF argued that an equally efficient competitor could have entered the market if it offered the same discounts that they did. However, this does not consider that a share of the market is captive.

EGYPT*

Article 8 of the Egyptian Competition Law (ECL) prohibits exclusionary practices, including fidelity rebates, enacted by undertakings in dominant position on a relevant market. These provisions effectively put on dominant undertakings a special responsibility not to allow their conduct to impair undistorted competition in the Egyptian market.

In the Egyptian Competition Authority's (ECA) view, for establishing an infringement of article 8 it is sufficient to show that the rebate scheme offered by the dominant undertaking tends to restrict competition, or is capable of having exclusivity effects. When conducting an assessment for a rebate case, the ECA will generally consider the following (non-exhaustive) factors: (1) all the circumstances of the case, in particular the criteria and the rules applicable for granting the discount; (2) whether in the provision of the discount is based on normal quantities discounts as opposed to target discounts; (3) whether the discounts is loyalty-enhancing, in particular whether the discount tends to remove or restrict the buyer's freedom to choose his sources of supply; (4) whether the rebate scheme involves applying dissimilar conditions to equivalent; (5) whether the rebate scheme has the object or is capable of, or likely to, strengthen the dominant position by limiting the ability of other competitors to compete on equal terms.

Economic analysis can be helpful to ECA's analysis when proving whether the scheme in question would likely have a restrictive effect on competition (especially if the rebate scheme is examined under predation theory) but it is not a condition for the finding of abuse. The application of the "As Efficient Competitor" test presumes the presence of an efficient dominant firm and the likelihood of the presence/entry of efficient competitors. This presumption hardly fits the economic conditions in Egypt where market structure, in addition to other factors, does not lead to sufficient levels of innovation and other types of economic efficiency

In the El Ezz Steel Case, the dominant undertaking was retroactively rewarding those purchasers that were able to meet their targets thereby making it less attractive for them to switch their demand to alternative suppliers. El Ezz Group held a dominant position among the producers of steel rebar. El Ezz group implemented a selective distribution system: it obliged its customers (distributors) to purchase at least 90% of an agreed volume from El Ezz. Distributors who did not honour such obligation would be deprived from purchasing the previously agreed quantities till the end of the contract in force. However, those who would be able to exceed their allotted quantities will be rewarded in their upcoming contracts retroactively.

The findings revealed that the exclusive purchasing obligation coupled with the rebate scheme made it nearly impossible for distributors to divert the contestable part of their demand to the competitors of the dominant firm. The economic analysis was useful supporting tool in explaining the harm to competition that flowed from the said strategy although that article 8 –c does not require any proof for to competition in order to establish an infringement. In 2009, based on the foregoing findings, the ECA case handlers concluded that the dominant firm's strategy infringed article 8(c) of the ECL. Accordingly, in cases of dominance if fidelity rebates lead to exclusive dealing this will violate article 8(c) of the ECL. Hence, it will be prohibited as a per se illegal offence.

FRANCE

The *Conseil*, then the *Autorité de la concurrence*, which succeeded it in 2009, have assessed the practice of fidelity rebates on various occasions, those practices that have the effect of reducing competition between the supplier offering the discount and its rivals. Reviewing these decisions enables the *Autorité* to identify an evaluation grid of these behaviours.

In these decisions, it was recalled that quantity rebates are not, in themselves, anticompetitive. Conversely, loyalty rebates granted because of the share of purchases made from the supplier, 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 period (rather than on the incremental volume or total of orders) can lead to anticompetitive effects.

Demonstrating the potentially anticompetitive effects is based on the analysis of two series of characteristics: those of the market and those of rebates. Regarding the structure and the workings of the market, one needs to look into the market power of the supplier, the share of the demand concerned, the degree of maturity of the market, and the costs implied by switching supplier. The overall effect of fidelity rebates depends on several features: the rebate base, its rate, the individualization of thresholds, the reference period taken into account, the scope of the rebate system, the transparency of rebates and the strategy pursued by the undertakings in setting up a rebate scheme... How far these parameters alter the anticompetitive effects varies according to the type of rebate that is considered.

Finally, potential efficiency gains associated with these different discounts are also taken into account – even though, to date, the value of the evidence adduced with regard to possible pro-competitive effects of loyalty rebates has been very limited.

GREECE*

When identifying whether a rebate by a dominant firm is abusive, a basic distinction is drawn between three categories of rebates. The first is quantity rebates which are subject to a presumptive safe-haven. The second is exclusivity rebates which are per se prohibited due to their inherent propensity to foreclose. The third is other rebates (including target rebates) 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. This final category of rebates requires an assessment of all the circumstances in order to understand whether it 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.

Below cost prices is 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. Overall, the AEC test only constitutes 'one tool amongst others' for assessing whether there is an abusive rebate scheme. In this regard, it is also noted that the AEC test can lead to under-inclusion / under-enforcement. A safe-haven based on cost benchmarks / price-cost tests is not applicable to rebates.

With regard to efficiency justifications, 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. Five fidelity rebate cases taken by the Helenic Competition Commission are described (Tasty Foods, Heineken, Proctor & Gamble, Nestle, and Coca-Cola).

INDIA

India's market since its economic liberalization in 1991 has only been burgeoning and it is now one of the world's fastest growing economies. The growth has helped changed India's image in the global market. There are numerous domestic firms which have done phenomenally well over the past decades and several other emerging start-ups are slowly and steadily making their impact across the country. They are building up their brands and fuelling the market growth even more.

Loyalty discounts result in exclusivity but the same is not prohibited per se under the Competition Law. However, the enterprise offering such schemes might come under anti-trust scrutiny. The Act prohibits five categories of vertical agreements if these cause or are likely to cause an appreciable adverse effect on competition in India. The five vertical agreements particularly listed in section 3(4) of the Act are: (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; and (e) resale price maintenance. Vertical agreements are subject to the rule of reason. This approach highlights the fact that vertical agreements may have beneficial aspects that need to be weighed against the harmful effects to see if the agreement is, on balance, anti-competitive.

Not much case law exists in respect of such business practices as of today under the Indian Competition Law due to the infancy of the regulatory regime, yet the statutory architecture makes sufficient provisions for governing and regulating such practices.

INDONESIA*

The categories of rebate are; first, quantity rebates based on quantity of purchase. Second, fidelity rebates that offers discounts to buyers who have committed themselves to buying a percentage of their needs from the seller so that the rebate is given both in volumes large or small. Fidelity rebate is generally considered as a strategy aims at preventing competitors thrive. Third, target rebates that are given to a business counterpart as a sales target based on the previous period.

Indonesia's Commission for the Supervision of Business Competition (KPPU) has never investigated a fidelity rebate case. If it were to deal with this type of case, the KPPU would expect to consider it using a case-by-case approach under the following articles of Indonesian Competition Law: price discrimination (Art. 6), abuse of dominant position (Art. 25), exclusive dealing (Art. 15.3b) and predatory pricing (Art. 20). The KPPU would take the following steps: (i) find evidence of market dominance; (ii) find evidence that the rebate agreement led to market foreclosure; (iii) identify whether the behaviour is causing exclusionary effects in the manufacturer's market; and (iv) find evidence of adverse effects for the consumer, i.e. whether the rebates create restrictions on consumer choice or not.

If the behaviour is associated with pricing below cost, such as for predatory pricing, it is necessary to have a long observation period, starting at the point at which the firm implemented the strategy. The analysis requires observations on all prices, accurate data on marginal costs, a recoupment test and the evidence of profit sacrifice.

IRELAND

A dominant undertaking may use rebates to incentivise customers to concentrate their purchases of a particular product with that undertaking. Rebates are, therefore, capable of foreclosing competitors and this may amount to a breach of Irish and EU competition law. The following factors are of particular importance in determining whether a given system of target rebates is likely to have loyalty-inducing effects: whether or not the target rebate is an "all-units" rebate; the progressive nature of the rebate and the magnitude of the discounts; the individualised nature of the purchasing target; the duration of the reference period; the market shares of the competitors of the dominant undertaking; and, the economic analysis of the potential foreclosure effect. It is important to note that it is not necessary that all of these factors are present for a target rebate scheme to have loyalty-inducing effects. The likelihood of loyalty-inducing effects is higher where multiple factors are present.

On 7 October 2011, the Competition Authority (the "Authority") closed an investigation into an alleged abuse of dominance by Raidió Teilifís Éireann ("RTÉ") following an agreement by RTE to enter into commitments in a form acceptable to the Authority regarding its future market behaviour. RTÉ is a state-owned television and radio broadcaster in the State. RTÉ is financed from a combination of commercial and non-commercial revenues. The Authority considered that the relevant market was likely to be the market for television advertising airtime in the State. It ultimately proved unnecessary to make a definitive finding on market definition in light of the Agreement and Undertakings entered into by RTÉ and the Authority.

The Authority was of the preliminary view that RTÉ was likely to hold a dominant position in the market for television advertising airtime in the State. However, as the matter was settled when the Authority and RTÉ entered into the Agreement and Undertakings, the Authority did not have to reach a definitive view on this issue.

The Authority considered that RTÉ was capable, to an appreciable extent, of acting independently of its competitors in the market for television advertising airtime in the State. In support of this, the Authority had regard to the following factors:

- RTÉ's substantial share of the relevant market - RTÉ's market share by revenue has been substantial and relatively stable between 2002 and 2007, at [55-65%], albeit declining at a moderate rate since 2008.

- Barriers to expansion, mainly resulting from RTÉ's "unavoidable trading partner" status - Many advertisers felt that they had to advertise on RTÉ because of its status as an important part of Irish culture, its popular programmes and its ability to deliver mass audiences quickly.

- Insufficient countervailing buying power - RTÉ's potential unavoidable trading partner status implied that even the largest advertising agencies were not likely to be able to switch or credibly threaten to switch quickly to competing broadcasters.

- RTÉ's dual funded status, by means of a TV licence fee, and advertising.

The Authority's investigation related to the terms of a charging scheme operated by RTÉ for the sale of television advertising airtime. The investigation focused on an aspect of the scheme under which discounts granted to individual advertisers depended, inter alia, on the percentage (or share) of each advertiser's total television advertising budget that the advertiser committed to RTÉ.

ISRAEL

In this written contribution we will focus on describing a case which was recently (December 2015) decided by the Israel Antitrust Authority (hereinafter: "the IAA") in which *Ashdod Port* was found to be abusing its monopoly position by setting conditional discounts. This is the first case in which the IAA decided to impose financial sanctions on what was considered by it an abuse of dominance. It is also the first case in which the IAA decided to impose sanctions not only on the violating firm but also on its executives.

The case of Ashdod Port illustrates two points that are important to take into account when assessing whether a pricing strategy is an exclusionary conditional discounting. First, the question whether the discount granted is individually "tailor made" for each customer or is uniform for all customers (or customers of the same type). Second, the question whether the discount is given retroactively for the quantity already purchased, or only for additional units after reaching the target that was set.

JAPAN

While offering rebates in itself is not always problematic under the Antimonopoly Act (hereinafter referred to as 'AMA') in general, there are some possibilities for such a conduct to violate the AMA as "private monopolization" or "unfair trade practice", depending on the ways or the effects of the rebates.

The Japan Fair Trade Commission (hereinafter referred to as 'JFTC') published several guidelines focusing on specific types of conduct or specific business fields, which clarify the viewpoints regarding the application of the AMA. The JFTC considers whether rebate-offering is problematic under the AMA or not, based on the guidelines corresponding to the types of conduct, etc.

There is no specific provision in the AMA, relevant legislations, and guidelines which describes the definition and the nature of "fidelity" rebate as well as its impact on competition. The illegality of each case will be judged according to the relevant guidelines which describe the viewpoint on rebate-offering.

For example, Guidelines for Exclusionary Private Monopolization clarify the viewpoint whether or not the rebate-offering which have the effects of restraining the trade partners' dealings of competitors' products (exclusive rebate–offering conduct) falls under the exclusive conduct in terms of the regulation against the exclusionary private monopolization, while Guidelines Concerning Distribution Systems and Business Practices clarify the viewpoint on rebate-offering which may be problematic under the AMA in terms of the regulation against the unfair trade practices (rebates provided as a means of restricting a distributor's business activities, share rebates and remarkably progressive rebates).

Although the intentions and purposes of the two guidelines are different, we can find some commonality in them about which aspects of rebates we should focus on to judge illegality, such as progressiveness of rebates and level of offering rebates (mainly based on market share).

There are few cases where rebate-offering was used as tools for anti-competitive conducts in Japan. However, "Case against Intel Kabushiki Kaisha", on which a decision was rendered in 2005, is considered to be one such case.

KOREA

In Korea, loyalty discounts are considered as an exclusive dealing behavior among abuses of market dominance under Korea's competition law, the Monopoly Regulation and Fair Trade Act (hereinafter referred to as "MRFTA"). Loyalty discounts are also counted as an unfair inducement of customers as a type of unfair trade practice, in addition to exclusive dealing, regardless of whether the enterpriser concerned is dominant or not, if the act concerned has the potential to undermine fair trade by unfairly attracting customers of competitors.

First of all, when it comes to loyalty discounts caught as an exclusive dealing by a market-dominating enterpriser, the Korea Fair Trade Commission (hereinafter "KFTC") noted in its recent decisions that what distinguishes loyalty discounts from volume discounts are as follows: 1) the rebate structure is designed differently from trade partner to partner; 2) when the purchase requirements are met, rebates on all units purchased are provided retroactively; and 3) when purchase ratio gets higher, rebates payout rate progressively increases. In this sense, the KFTC's recent measures against Intel and Qualcomm's exclusive dealings are meaningful in that they will serve as a good example by presenting criteria for judging the illegality of loyalty rebates taken by dominant enterprisers.

For example, the KFTC deemed that the rebate structure of Qualcomm satisfies the requirements to be counted as a loyalty discount: rebate structure differentiated by customers, retroactive provision of rebates and progressive rebate ratio based on purchase amounts. This kind of structure not only induces customers, handset makers in this case, to purchase at lease more than the minimum purchase requirement, but also to increase their purchase amount even after they meet the rebate threshold, thereby creating maximum loyalty enhancing effect and making it difficult for customers to switch their suppliers.

Also, in its Intel decision, the KFTC stated that loyalty discounts are not necessarily limited to direct impositions of the exclusivity condition. Even when the enterpriser concerned does not directly foreclose competitors, a simple restraining or reducing customer's incentive to have a transaction with competitor can sufficiently have the effect of blocking market entry or market expansion.

Meanwhile, loyalty discounts is also regulated as an unfair inducement of customers, which is categorized as a type of unfair trade practices under the MRFTA. The KFTC can select which legal provision to enforce depending on the effect of the conduct concerned. That is, like the Intel and Qualcomm cases, when rebates provided by a dominant firm exclude competitors or raise market entry barrier, such a conduct is regulated under the exclusive dealing provision. On the other hand, just as the KT&G case, when a provision of rebates is deemed unfair or excessive from the perspective of fair trade and considering common business practices, and when the provision hinders the trade partner from making reasonable choices, such a conduct can be regulated as an unfair inducement of customer.

LATVIA*

Loyalty rebates are conditional on the customer demonstrating loyalty in their purchases of the dominant product. Loyalty rebates can be individualized to reflect customers' full or close to full purchase capacity of the relevant product. The incentives created by such a scheme may alter the competitive structure of the market and prevent rivals from penetrating the market. This is because rivals may not be able to compensate customers for the risk of losing the rebate from a dominant firm.

The Agency will look closely at rebate schemes applied by a dominant company, where the scheme is individualised to attract full or near full capacity of the customers. The Agency has to refrain from commenting its enforcement practice, because there is an ongoing investigation into the rebate scheme of a dominant company.

NORWAY

Frequent Flyer Programmes (FFPs) are very common in the airline industry. From an antitrust perspective, FFPs have two potential anticompetitive effects. First, FFPs may dampening price competition by causing airlines to have customers that are more loyal. Most FFPs have a system with annual threshold levels for earned points that rewards loyal customers by providing them certain benefits. This accumulated progressive discount system might lead to a so-called suction effect. Costumers close to a threshold have an incentive to pass the threshold level by either travelling more with the same airline or purchasing tickets that are more expensive. Studies of SAS' FFP in Denmark are indicative of such a suction effect. Second, FFPs may lead to disclosure. Despite these concerns, there are very few examples of any interventions against FFPs by antitrust authorities. One of the exceptions are Norway. From 2002 until 2013, there was a ban on FFPs on domestic flights in Norway. In a recent study by the Norwegian Competition Authority (NCA) the reintroduction of FFPs in 2013 is used as a "natural experiment" to estimate the economic effects of FFPs. The NCA's preliminary conclusion is that FFPs seems to have had little impact on the competition in the short run. However, there might be important long run effects of FFPs that are not captured within this framework.

ROMANIA*

As a general policy, the Romanian Competition Council recognizes that dominant firms do not generally grant loyalty rebates to exclude competitors. The firms, irrespective their position in the market (dominant firms, non-dominant firms), resort to various types of rebates to increase their sales with resulting efficiencies, such as the realization of economies of scale, the faster recovery of fixed costs, etc. In fact, loyalty rebates realize valuable efficiencies and allow firms to grant beneficial discounts. Moreover, rebates primarily ensure price competition, which is the very behaviour antitrust laws should seek to encourage and protect. In this respect, there is no reason for competition authorities, in particular RCC, to take a policy of *per se* prohibition towards loyalty rebates by presuming that a given form of loyalty rebates always produces anti-competitive effects. The issue of whether or not loyalty rebates are anti-competitive should not depend on the *form* of such rebates. What should matter is whether the rebates in question produce foreclosure effects.

RCC is aware that to date, the prevalent approach of loyalty discounts cases is based on a predatory pricing model. Application of the predatory pricing model uses a threshold price-cost test. But the price-cost test is complex due to the fact that it must compare the incremental prices and incremental cost on the additional purchases or sales driven by the condition. This complexity makes the test difficult to implement with sufficient accuracy. This leads to a significant likelihood of errors. Even though the price-cost test takes into consideration the dominant costs, another problem could arise from the fact that the concept of "equal efficiency" is generally characterized as equal costs. It is very difficult for an undertaking, especially new entrant, to have equal cost with incumbent. On the other hand, entry by a less efficient competitor into a monopoly market that causes lower prices will benefit consumers. The price-cost test implies an erroneous idea that only equally efficient competitors are worth protecting by the antitrust laws. But it would not make economic sense for antitrust law to allow the monopolist to deter the entry by raising the entrant's costs rather than by reducing its own price.

An important step in a foreclosure analysis is to determine whether the rebate has *substantial* foreclosure effects. This is based on a review of additional factors, such as the proportion of the market demand affected by the rebate. Thus, where competitors can have access to a sufficient share of the demand for the products/services in question to allow them to profitably enter or remain on the market, the dominant firm remains constrain by its competitors and its rebates cannot be anticompetitive.

RCC has not developed a price-cost test and a clear safe-harbour with regard to loyalty discounts and rebates. In RCC view, the proper focus should be placed on the magnitude of the foreclosure and possible consumer harm, rather than whether or not the firm is pricing below some measure of costs. This also implies that the magnitude of foreclosure should not be measured mainly by the fraction of customers or suppliers affected. Instead, it should be determined by the impact on the competitors, including their costs, output, and ability to enter or expand. It also implies that the main focus of analysis should be placed on the impact of consumers in the output market.

RUSSIA

In exercising control over compliance by economic entities with the antimonopoly legislation the FAS Russia has developed a specific approach to the influence of different systems of incentives on competition. It concerns the provision of discounts, bonuses, various rebates, granting by companies to their contractors, distributors, or buyers. As practice of the FAS Russia shows, schemes of application of discounts are widely used by companies with significant market power.

In exercising control over the compliance with antimonopoly legislation the FAS Russia pays attention to the fact that the economic entities occupying a dominant position on the market, haven't created conditions for its customers or counterparties, with which they would put in an unequal position to each other, that is not carried out actions aimed at creation of discriminatory conditions for the provision of discounts, including the fact that they didn't established for each customer individually different discount on the same product. Thus, the FAS Russia can recognize fidelity rebates of a dominant economic entity as anticompetitive only in the case if the provision of such rebates is not technologically or economically justified.

According to the FAS Russia's practice, in order to reduce antitrust risks the process of working with contractors, as well as commercial terms, on scope of supply, product range, price, payment terms, discounts, bonuses and premiums may be stated in the relevant document (trade policy, price policy, etc.) of an economic entity occupying a dominant position. Development and publication by a company of transparent pricing policy, that is unified for all buyers and includes specific economic, technological or other objective and direct criteria influencing on the price, will reduce the risk of holding liability in case of claims by the FAS Russia.

SPAIN*

Spain's Commission on Markets and Competition (CNMC) recently found a loyalty scheme operated by Telefonica (the main mobile operator in Spain) to be anti-competitive. The scheme involved offering small and medium enterprise (SME) customers discounts conditional on them signing exclusive contracts for 12, 18 or 24 months. The contracts were automatically extended if customers did not give notice of termination, and if customers did not complete the contract, they were billed for the sum of discounts that they had received. While these were not strictly fidelity rebates, they were nevertheless discounts that were conditional on the loyalty of the SME.

The CNMC found that Telefonica was not dominant in the market for mobile communication services in Spain. However, the CNMC deemed that since the customers were businesses the contracts amounted to vertical restraints and since Telefonica had a market share of more than 30% it did not qualify for the EU block exemption. Notably Telefonica's two main rivals operated the same schemes but had market shares of less than 30% and so were not investigated. The CNMC considered that these discounts were aimed at making it harder for competitors to attract Telefonica's customers, while they did not bring a significant benefit to the SME customers that received the discount. The CNMC found that the penalty for exiting the contract before termination was a per se restriction of competition since it aimed at preventing customers from switching and therefore led to the foreclosure of Telefonica's rivals. The CNMC considered that the clauses raised rivals costs by obliging them to compensate customers for the penalty that customers incurred when they left Telefonica. It was found that Telefonica had market power, and that it made it difficult for customers to switch (customers needed to call to find out the price discount they received or the penalty they would have to pay if they switched). Data from Telefonica was used to identify that the clauses were associated with lower customer switching rates. The CNMC considered that this helped to explain why mobile virtual network providers had failed to win SME customers. Telefonica argued that the clauses allowed them to reduce prices but the CNMC disagreed that the conditions attached to the commitment period were essential for granting price discounts. For example achieving a minimum level of network usage could be achieved through less restrictive means.

SWEDEN

Fidelity rebates are a type of incentive scheme that is granted to customers to reward them for a particular form of purchasing behaviour. Such rebates are frequently used by both small and large firms to increase sales and thus, are part of normal business practice. They can also be used as a means of foreclosing competitors and harming competition. This submission describes the pro- and anti-competitive aspects of fidelity rebates and under what circumstances these are prioritised for enforcement by the Swedish Competition Authority (hereafter "SCA").

The main non-exclusionary motives for fidelity rebates are to enable cost savings or investments and to price discriminate between customers, whereas the main competitive harm that could result from fidelity rebates is the foreclosure of competitors that are able to exercise effective competitive pressure. These two aspects of fidelity rebates must be carefully examined and balanced when deciding whether an intervention in a market is to the benefit of competition or not.

The SCA's Prioritisation Policy for Enforcement describes the issues that are prioritised for enforcement. The main objective of the SCA is to promote effective competition for the benefit of consumers. As regards unilateral conduct, the SCA prioritises investigating conduct that is capable of excluding or foreclosing firms, who are able to exercise effective competitive pressure on some level of the market. In assessing price-based conduct, such as rebates, the SCA also gives consideration to whether the pricing is capable of foreclosing a competitor which is, hypothetically, as efficient as the dominant firm.

The SCA has applied the "As-Efficient Competitor" test to evaluate fidelity rebates in a number of investigations and this note details the SCA's experience in using the test in this context. In the experience of the SCA the "As-Efficient Competitor" test is an administrable enforcement tool that provides predictability for how dominant firms can use fidelity rebates to achieve pro-competitive ends, while preventing the foreclosure of efficient competitors. In combination with an investigation into the effects of a rebate scheme, the test contributes to an enforcement policy that enables effective competition and innovation. In terms of the EU legal framework, recent case law gives support for the SCA's approach of employing the AEC-test in cases involving a rebate scheme as one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in that context.

CHINESE TAIPEI*

The Fair Trade Act (FTA) of Chinese Taipei does not have specific provision relating to "fidelity rebates" or "loyalty discounts". When handling "loyalty discount" cases, the FTA first considers whether the discount hinders competition by offering prices below cost. If the loyalty discount does not result in predatory pricing but may restrict competition by foreclosing the market, other conditions are considered. For example, the overall effects of intent, purposes, and market position of the parties, the structure of the market to which they belong, the characteristics of the goods or services, and the impact that such restrictions would have on competition. Most loyalty discounts cases in Chinese Taipei are in the telecommunications and cable TV industries. When assessing loyalty discounts, the FTC will evaluate several conditions, among which: (i) whether subscribers have been given enough options before signing the contract; (ii) the duration of the contract period; (iii) the costs to telecommunications enterprises of providing the services; (iv) the intention, purpose, market status of the subject of conduct, the structure of the relevant market, the characteristics of the product and the impact of the discount offers on market competition.

In one case company A ran two schemes, Plan X and Plan Y. "Plan X" offers a 20% discount to those that use Company A's cargo clearance automation network service during the promotion period; "Plan Y" offers a 40% discount to customers that commit themselves 100% to using Company A's network during the promotion period. If trading counterparts (the users of the service) do not respect their commitment, Company A has the right to terminate the promotion and recover the discount already granted to the customer. Company A offered the "Cargo Clearance Automation Network Service Promotion" when Company B (the only other market player) entered the market and began attracting customers from Company A through lower prices. These services are characterised by network effects: users are inclined to join the network with the most users. According to Company A, the ratio of users that chose "Plan Y" exceeded 80% of its total number of users. Given that users wishing to switch to Company B within 1 year after joining a plan offered by Company A must pay the difference between the original price and the discounted price as a penalty, the scheme offered by Company A increases switching costs for users and reduces the incentives to choose Company B. Hence, "Plan Y" aims to restrict or exclude other competitors, creating an artificial barrier to entry. The conduct was found to: "directly or indirectly prevent any other enterprises from competing by unfair means."

TURKEY*

The Turkish Competition Board (Board) has examined three main points in fidelity rebates cases in the context of abuse of dominant positions. These are exclusionary objective, exclusionary potential of the rebate scheme and actual exclusionary effect. The Board has examined particularly internal documents as well as credible testimonials with respect to exclusionary objectives; conducted detailed structured rule of reason analyses with respect to exclusionary potential/likely effects and; made empirical analyses and conducted post-market data examination with respect to actual effects.

How the fidelity rebate schemes are used by the dominant undertaking, for example whether they constitute the main tool of the pricing mechanism or (quasi) exclusive dealing agreements are most likely to determine the choice of theory of harm. However, as fidelity rebate cases often include allegations of predation and exclusive dealing, the Board has tried to conduct all possible analysis as long as the claims were credible. However, in *Kale Kilit* and *Türk Hava Yolları A.O.* the claims of the plaintiff were focused on predation and so this was a very important factor in determining the theory of harm that was investigated. Nevertheless, the case handlers and the Board also investigated all relevant theories of harm.

The Board generally takes into account a number of indicators in order to distinguish between anti-competitive and pro-competitive fidelity rebates and therefore to decide whether to open or close an investigation. The indicators are as follows: whether the rebate scheme is composed of standard quantity rebates or individualized target rebates; whether the scheme is retroactive; whether there are contractual or de facto exclusivity arrangements; the maturity of the market; the level of trade in which the rebates under scrutiny take place; the existence of other ways to access distribution channels; and the coverage of the rebate scheme.

UKRAINE

It was discovered by the Antimonopoly Committee of Ukraine (hereinafter – the AMCU that majority of foreign pharmaceutical companies supply medicines in Ukraine through their exclusive importers which are usually in relationships of control (importers).

Thus, foreign pharmaceutical companies use in Ukraine following restrictions in relationships with Ukrainian distributors: a ban on the export of goods from Ukraine; obligation to prevent third parties in exporting goods outside Ukraine; and, an obligation to report and the establishing of payment conditions that provides a comprehensive control over the flow of goods in the market of medicines.

Distributors voluntarily comply to such restrictions and help pharmaceutical companies to control commodity markets. In turn they gain the assistance to evade the government regulation of prices and additional income as the result of actual allocation of markets or sources on the territorial principle, range of products, buyers or consumers.

The case papers show that the discounts received by distributors do not lead to a price decreasing for consumers and final users. On the contrary, suppliers provide additional discounts to Ukrainian distributors for medicines sold in the process of public procurement.

The AMCU discovered that the existence of the opaque terms of payment in conjunction with restrictions on re-export and excessive reporting restraints parallel import of medicines in Ukraine and causes the hidden increase of profitability of certain distribution market participants, which gives them additional unjustified competitive advantages. Also this business tradition leads to price manipulation in terms of government regulation that provides unreasonable competitive advantages. The AMCU assesses these actions as anticompetitive concerted actions.

UNITED STATES

Loyalty discount practices can, in some instances, have anticompetitive effects, and these practices can exclude competition in a different way from predatory pricing. Unlike predatory pricing, loyalty discounts can injure competition without below-cost pricing and without a profit sacrifice that makes sense only with a prospect of future recoupment. Loyalty discount practices are much like exclusive dealing with respect to both their potential to be exclusionary and their potential to promote competition. Experience with loyalty discount practices in the United States has indicated that the U.S. antitrust laws can deal with such practices adequately by focusing on harm to competition. U.S. experience has also demonstrated that antitrust analysis of any loyalty discount practice requires a thorough understanding of the particular facts. Therefore, in determining whether to challenge a loyalty discount practice, the U.S. agencies perform a detailed evaluation of the practice's actual or likely competitive effects.