Session 3: The more economic approach in EU competition law: success or failure?

Part I: Rebates as a case study: a positive law perspective on the effects-based approach in Article 102 TFEU and national equivalent provisions

Dr. Victoria Mertikopoulou
Commissioner Rapporteur
Hellenic Competition Commission
vmertikopoulou@epant.gr
www.epant.gr

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Back on track: Post Danmark II (C-23/14) and Intel Corp. v European Commission (Case T-286/09)

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Par. 26: Notion of an abuse

«Article [102] refers to conduct which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (see, to that effect, judgments in Nederlandsche Banden-Industrie-Michelin v Commission, 322/81, EU:C:1983:313, paragraph 70, and British Airways v Commission, C-95/04 P, EU:C:2007:166, paragraph 66)».

Par. 27: Quantity v Loyalty rebates

“It is also settled case-law that, in contrast to a quantity discount linked solely to the volume of purchases from the manufacturer concerned, which is not, in principle, liable to infringe Article 82 EC, a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining all or most of their requirements from competing manufacturers, amounts to an abuse within the meaning of that provision (see judgments in Nederlandsche Banden-Industrie-Michelin v Commission, 322/81, EU:C:1983:313, paragraph 71, and Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221, paragraph 70)".
The rebate scheme in question was:

1. Standardized (all customers were entitled to receive the same rebate on the basis of their aggregate purchases over an annual reference period). [NO SAFE HAVEN FOR STANDARDIZED REBATES]

2. 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.

3. 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 / applying only to mailings exceeding the threshold initially estimated).

The Court observed (par. 28 et seq.) that this scheme cannot be regarded as a simple quantity rebate linked solely to the volume of purchases, since the rebates at issue are not granted in respect of each individual order, thus corresponding to the cost savings made by the supplier, but on the basis of the aggregate orders placed over a given period. [IN PRINCIPLE LAWFUL]

Moreover, it was not coupled with an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark, a point which served to distinguish it from loyalty rebates within the meaning of the case-law referred to in paragraph 27. [UNLAWFUL]
**Quantity Rebates** - linked solely to the volume of purchases
[in principle lawful]

**Fidelity rebates within the meaning of Hoffmann-La Roche’ or ‘exclusivity rebates’**: Conditional on exclusive supply or on the customer’s obtaining most of its requirements from the dominant undertaking
[Per se unlawful]

**Rebates falling within the 3rd category.** Gray area / Necessary to consider all the circumstances - does that rebate tend: 1. to remove / restrict the buyer’s freedom to choose his sources of supply, 2. to bar competitors from access to the market, 3. to apply dissimilar conditions to equivalent transactions or 4. to strengthen the dominant position by distorting competition
‘ALL THE CIRCUMSTANCES’ of the cases do not necessarily include effects-based criteria such as the AEC test but amount to general freedom of supply, removing access barriers, and also deterring discrimination, i.e. general competition on the merits and avoiding distortion of competition in the market place criteria

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“29 In those circumstances, in order to determine whether the undertaking in a dominant position has abused that position by applying a rebate scheme such as that at issue in the main proceedings, the Court has repeatedly held that it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the 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 (judgments in British Airways v Commission, C-95/04 P, EU:C:2007:166, par. 67, and Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221, par. 71).

30 Having regard to the particularities of the present case, it is also necessary to take into account, in examining all the relevant circumstances, the extent of Post Danmark’s dominant position and the particular conditions of competition prevailing on the relevant market.

31 In that regard, it first has to be determined whether those rebates can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for the co-contractors of that undertaking to choose between various sources of supply or commercial partners. It then has to be examined whether there is an objective economic justification for the discounts granted (judgment in British Airways v Commission, C-95/04 P, EU:C:2007:166, paragraphs 68 and 69).”
The Court assessed whether those rebates can produce an exclusionary effect, that is to say, make market entry very difficult or impossible for competitors and for the co-contractors of the dominant undertaking to choose between various commercial partners, and whether there was an objective economic justification for the discounts granted. To that effect the Court took into account:

**a. the retroactive nature of the rebates** exerting pressure on the counterparts of the dominant undertaking to purchase more (= if the threshold initially set at the beginning of the year in respect of the quantities of mail was exceeded, the rebate rate applied at the end of the year applied to all mailings presented over the reference period and not only to mailings exceeding the threshold initially estimated, whereas a customer whose volume of mailings proved to be lower than the quantity estimated had to reimburse Post Danmark).

**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 (approximately two-thirds of mail sent in the form of direct advertising mail not covered by the monopoly could not be transferred from Post Danmark to Bring Citymail without an adverse impact on the scale of the rebates). Emphasis on the customers’ incentives to obtain their supplies from Post Danmark, reducing significantly customers’ freedom of choice as to their sources of supply.
[on whether those rebates can produce an exclusionary effect, the Court took into account (cont’d from previous slide):]

As regards the standardisation of the rebate scale (=all customers were entitled to receive the same rebate on the basis of their aggregate purchases over the reference period), the mere fact that a rebate scheme is not discriminatory does not preclude its being regarded as capable of producing an exclusionary effect on the market (par. 38).

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

‘42 In those circumstances, it must be held that a rebate scheme operated by an undertaking, such as the scheme at issue in the main proceedings, which, without tying customers to that undertaking by a formal obligation, nevertheless tends to make it more difficult for those customers to obtain supplies from competing undertakings, produces an anti-competitive exclusionary effect (see, to that effect, judgment in Tomra Systems and Others v Commission, C-549/10 P, EU:C:2012:221, paragraph 72).’
Post Danmark II - circumstances, criteria and rules governing the grant of the rebate

Relevance of the factor of the portion of customers on the market to which the scheme applies - Coverage of the majority of the market leads to presumption of exclusionary effect (instead of saying that low coverage leads to exoneration / de minimis)

'46 [...] the fact that a rebate scheme, such as that at issue in the main proceedings, covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect' [w. reference to the Suiker Unie principle (par. 45): for the assessment of loyalty rebates, there is no need to ascertain the number of contracts which contained the clause at issue (Suiker Unie and Others v Commission, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, par. 511)].

Efficiency defence: in principle, possible (par. 48 et seq. - referencing British Airways v Commission, C-95/04 P, par. 86, TeliaSonera Sverige, C-52/09, par. 76 and Post Danmark, C-209/10, par. 42):
It is for the dominant undertaking to show:

- that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets,
- 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, by removing all or most existing sources of actual or potential competition.

Preliminary Conclusion

'50 In the light of the foregoing considerations, [...] in order to determine whether a rebate scheme, such as that at issue in the main proceedings, implemented by a dominant undertaking is capable of having an exclusionary effect on the market contrary to Article 82 EC, it is necessary to examine all the circumstances of the case, in particular, the criteria and rules governing the grant of the rebates, the extent of the dominant position of the undertaking concerned and the particular conditions of competition prevailing on the relevant market. The fact that the rebate scheme covers the majority of customers on the market may constitute a useful indication as to the extent of that practice and its impact on the market, which may bear out the likelihood of an anti-competitive exclusionary effect.'
CJEU (C-23/14, par. 52): ‘Given that the referring court has mentioned, in the fourth subparagraph of Question 1, the communication from the Commission entitled “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, it must be observed, as a preliminary point, that that document merely sets out the Commission’s approach as to the choice of cases that it intends to pursue as a matter of priority; accordingly, the administrative practice followed by the Commission is not binding on national competition authorities and courts.’

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Cf. AG’s Opinion, par. 60: "Such an administrative practice by the Commission is not, of course, binding on the national competition authorities and courts, however. This follows, on the one hand, from the wording of the Enforcement Priorities Communication itself, which does not constitute ‘a statement of the law’, and, on the other hand, from the settled case-law concerning such Commission statements. Although the national authorities themselves are not precluded from following the Commission’s example and using the AEC test, they are none the less, from a legal point of view, bound only by the requirements arising from Article 82 EC. It is for the Court to define what those requirements are".
Par. 60 et seq.: “Although the national authorities themselves are not precluded from following the Commission’s example and using the AEC test, they are none the less, from a legal point of view, bound only by the requirements arising from Article 82 EC. It is for the Court to define what those requirements are.”

Par. 74 - 75: “It follows that Article 82 EC prohibits an AEC test from being carried out on a market where, on account of the structure of the market, it is impossible for another undertaking to be as efficient as the dominant undertaking. [...] Article 82 EC does not require the abusive nature of the rebate scheme operated by a dominant undertaking to be demonstrated by means of a price/cost analysis such as the as-efficient-competitor test, where its abusive nature is immediately shown by an overall assessment of the other circumstances of the individual case. However, the authorities and courts dealing with competition cases are at liberty to avail themselves of a price/cost analysis in their overall assessment of all the circumstances of the individual case, unless, on account of the structure of the market, it would be impossible for another undertaking to be as efficient as the dominant undertaking”.

On the questions: Is it legally necessary to carry out a price/cost analysis (the AEC test) for rebate schemes? Must the exclusionary effect of the rebate scheme exceed some form of appreciability (de minimis) threshold? – AG opined that: “4. These questions are particularly important at a time when there are mounting calls for European competition law to adopt a more economic approach. It is my view that, in its replies, the signal effect of which is likely to extend well beyond the present case, the Court should not allow itself to be influenced so much by current thinking (‘Zeitgeist’) or ephemeral trends, but should have regard rather to the legal foundations on which the prohibition of abuse of a dominant position rests in EU law”

→ The Court followed AG’s proposal.
56 [...] prices **below cost prices, to customers is not a prerequisite** of a finding that a retroactive rebate scheme operated by a dominant undertaking is abusive ([judgment in *Tomra Systems and Others v Commission*, C-549/10 P, EU:C:2012:221, paragraph 73). In that same case, the Court specified that the **absence of a comparison of prices charged with costs did not constitute an error of law** ([judgment in *Tomra Systems and Others v Commission*, C-549/10 P, EU:C:2012:221, paragraph 80). […]

59 On the other hand, in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking’s statutory monopoly, which applied to 70% of mail on the relevant market, **applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.**

60 Furthermore, in a market such as that at issue in the main proceedings, access to which is protected by 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.

61 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.

62 Consequently, the answer to the third and fourth subparagraphs of Question 1 is that the application of the as-efficient-competitor test does not constitute a necessary condition for a finding to the effect that a rebate scheme is abusive under Article 82 EC. In a situation such as that in the main proceedings, applying the as-efficient-competitor test is of no relevance.
On the need for probability and appreciability of the anti-competitive effects of rebates

72 [...] 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 (judgment in Hoffmann-La Roche v Commission, 85/76, EU:C:1979:36, paragraph 123).

73 It follows that fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anti-competitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates. [Mirroring C-549/10 P, Tomra Systems ASA]

74 [...] Article 82 EC must be interpreted as meaning that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme operated by a dominant undertaking must be probable, there being no need to show that it is of a serious or appreciable nature.’

Cf. Tomra (judgment of the Court of 19.04.2012 in case C-549/10, par. 42): “In fact, and as stated by the General Court in paragraph 241 of the judgment under appeal, the foreclosure by a dominant undertaking of a substantial part of the market cannot be justified by showing that the contestable part of the market is still sufficient to accommodate a limited number of competitors. First, the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it. Second, it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand.”
'Article 1 - Intel ... has committed a single and continuous infringement of Article 82 [EC] and Article 54 of the EEA Agreement from October 2002 until December 2007 by implementing a strategy aimed at foreclosing competitors from the market of x86 CPUs which consisted of the following elements:
(a) Granting rebates to Dell between December 2002 and December 2005 at a level that was conditional on Dell obtaining all of its x86 CPU supplies from Intel;
(b) Granting rebates to HP between November 2002 and May 2005 at a level that was conditional on HP obtaining at least 95% of its corporate desktop x86 CPU supplies from Intel;
(c) Granting rebates to NEC between October 2002 and November 2005 at a level that was conditional on NEC obtaining at least 80% of its client PC x86 CPU supplies from Intel;
(d) Granting rebates to Lenovo between January 2007 and December 2007 at a level that was conditional on Lenovo obtaining all of its notebook x86 CPU supplies from Intel;
(e) Granting payments to [MSH] between October 2002 and December 2007 at a level that was conditional on [MSH] selling only computers incorporating Intel x86 CPUs;
(f) Granting payments to HP between November 2002 and May 2005 conditional on: (i) HP directing HP’s AMD-based x86 CPU business desktops to Small and Medium Business and Government, and Educational and Medical customers rather than to enterprise business customers; (ii) precluding HP’s channel partners from stocking HP’s AMD-based x86 CPU business desktops such that such desktops would only be available to customers by ordering them from HP (either directly or via HP channel partners acting as sales agent); and (iii) HP delaying the launch of its AMD-based x86 CPU business desktop in the [Europe, Middle East and Africa] region by six months;
(g) Granting payments to Acer between September 2003 and January 2004 conditional on Acer delaying an AMD-based x86 CPU notebook;
(h) Granting payments to Lenovo between June 2006 and December 2006 conditional on Lenovo delaying and finally cancelling its AMD-based x86 CPU notebooks.

Article 2 - For the infringement referred to in Article 1, a fine of EUR 1 060 000 000 is imposed on Intel ...

Article 3 - Intel ... shall immediately bring to an end the infringement referred to in Article 1 in so far as it has not already done so. Intel ... shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect....'
‘Naked restrictions ’ = payments to OEMs which were conditioned on these OEMs postponing and/or cancelling the launch of the competitor’s [AMD] CPU-based products and/or putting restrictions on the distribution of those products (directing the competitor’s products to categories of clients other than enterprise business customers and precluding channel partners from stocking competitive-based products).

- They have an ‘anti-competitive object’ (209).
- Inherent capability to make access to the market more difficult for competitors (178).
- Grant of payments to customers in consideration of restrictions on the marketing of competitive products ‘clearly falls outside the scope of competition on the merits’ (205).
- “The only interest that an undertaking in a dominant position may have in preventing in a targeted manner the marketing of products equipped with a product of a specific competitor is to harm that competitor. Consequently, by applying naked restrictions vis-à-vis HP, Lenovo and Acer, the applicant pursued an anti-competitive object” (204)
According to settled case-law, an undertaking which is in a dominant position on a market and 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 abuses its dominant position within the meaning of Article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate (Hoffmann-La Roche, paragraph 71 above, paragraph 89, and Case T-155/06 Tomra Systems and Others v Commission [2010] ECR II-4361 (‘Case T-155/06 Tomra’), paragraph 208).

The same applies where that undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts 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 (Hoffmann-La Roche, paragraph 71 above, paragraph 89, and Case C-549/10 P Tomra Systems and Others v Commission[2012] ECR (‘Case C-549/10 P Tomra’), paragraph 70).
A. ‘Quantity rebates’ linked solely to the volume of purchases are generally considered not to have the foreclosure effect. 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 (deemed to reflect gains in efficiency and economies of scale).

B. ‘Fidelity rebates within the meaning of Hoffmann-La Roche’ or ‘exclusivity rebates’: Conditional on exclusive supply or on the customer’s obtaining most of its requirements from the undertaking in a dominant position) → Not based — save in exceptional circumstances — on an economic transaction which justifies this burden or benefit but 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. Such rebates are designed, through the grant of a financial advantage, to prevent customers from obtaining their supplies from competing producers (citing Hoffmann-La Roche and T-155/06 Tomra).

[The question whether an exclusivity rebate can be categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect → PER SE]

C. Other (3rd category) rebate systems where the mechanism for granting the rebate may also have a fidelity-building effect but the grant of a financial incentive is not directly linked to a condition of exclusive or quasi-exclusive supply (‘rebates falling within the third category’).

3rd category of rebates includes systems depending on the attainment of individual sales objectives [but also, in Post Danmark II, standardized retroactive rebates]. Necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it that rebate tends:

a. to remove or restrict the buyer’s freedom to choose his sources of supply,
b. to bar competitors from access to the market, or
c. to strengthen the dominant position by distorting competition (citing Michelin I, C-95/04 P BA, and C-549/10 P Tomra).
143 First of all, it should be recalled that a finding that an exclusivity rebate is illegal does not necessitate an examination of the circumstances of the case (see paragraphs 80 to 93 above). The Commission is not therefore required to demonstrate the foreclosure capability of exclusivity rebates on a case-by-case basis.

144 Next, it follows from the case-law that, even in the case of rebates falling within the third category, for which an examination of the circumstances of the case is necessary, it is not essential to carry out an AEC test. Thus, in Michelin I, paragraph 74 above (paragraphs 81 to 86), the Court of Justice relied on the loyalty mechanism of the rebates at issue, without requiring proof, by means of a quantitative test, that competitors had been forced to sell at a loss in order to be able to compensate the rebates falling within the third category granted by the undertaking in a dominant position.

145 Moreover, it follows from Case C-549/10 P Tomra, paragraph 73 above (paragraphs 73 and 74), that, in order to find anti-competitive effects, it is not necessary that a rebate system force an as-efficient competitor to charge ‘negative’ prices, that is to say prices lower than the cost price. In order to establish a potential anti-competitive effect, it is sufficient to demonstrate the existence of a loyalty mechanism (see, to that effect, Case C-549/10 P Tomra, paragraph 73 above, paragraph 79).

146 It follows that, even if an assessment of the circumstances of the case were necessary to demonstrate the potential anti-competitive effects of the exclusivity rebates, it would still not be necessary to demonstrate those effects by means of an AEC test.
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. It is true that a negative result means that it is economically impossible for an as-efficient competitor to secure the contestable share of a customer’s demand. In order to offer a customer compensation for the loss of the exclusivity rebate, that competitor would be forced to sell its products at a price which would not allow it even to cover its costs. However, a positive result means only that an as-efficient competitor is able to cover its costs (in the case of the AEC test as carried out in the contested decision and proposed by the applicant, only the average avoidable costs). That does not however mean that there is no foreclosure effect. The mechanism of the exclusivity rebates, as described in paragraph 93 above, 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 (see, as regards that distinction, point 54 of the Opinion of Advocate General Mazák in Case C-549/10 P Tomra, paragraph 73 above).

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.
1. Rhetoric on form or effects: in substance both deal with effects (i.e. foreclosure) – notions such as “formalistic” or “effects-based”: rather misleading – recognizing that the risk of harm / foreclosure is sufficiently high to warrant an outright prohibition in certain conduct is methodologically, economically and legally sound; a form of standardization.

2. Dilemma on false positives v false negatives: Due, among others, to resources constraints, CAs focus on prioritized cases – normal prioritization filters out cases in which an adequately serious infringement is not likely to be proven.

3. Dilemma on legal certainty v pro-competitive standards: exclusionary features are well-known and should be avoided (pro-competitive motivations are irrelevant if conduct prone to foreclose – AG Kokott in Post Danmark II and Michelin I: “neither the dominant undertaking’s wish to increase its turnover nor its desire to plan its business better can be regarded as constituting an economic justification for granting rebates where these are capable of producing an exclusionary effect”).

European Courts’ substantive guidance on article 82 has successfully served EU law principles. Recent judgments are based on the Treaty and well established case-law. The competition law objective (protection of the competitive process / a system of undistorted competition – cf. GlaxoSmithKline Services C-501/06 P) is enshrined in the Treaty and underpins the implementation of Article 102 [prohibition of strengthening the dominant position by distorting competition] in the interest of the competitors – access to the market and opportunity to compete on the merits, the buyers and the consumers – who reap the benefits and the choice of a non-monopolized environment (in terms of prices, choice, quality) and non-discrimination.
[Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings - OJ C 45, 24.2.2009, p. 7–20]

1. Enforcement priorities (para. 2 / passim)

2. Not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the Court of Justice or the Court of First Instance of the European Communities (para. 3)

3. Only applies to exclusionary / not to exploitative conduct (para. 7)

4. Case-specific: The Commission may therefore adapt the approach set out in this Communication to the extent that this would appear to be reasonable and appropriate in a given case (para. 8)

5. Requires substantive analysis that cannot be effected at a prioritization stage without proper analysis & data

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Concerning rebates, divergent to what the Enforcement Priorities Communication provides:

1.a) Exclusivity and fidelity rebates = per se abuse (whereas in the Communication it was stated that: ‘it may be in the individual interest of a customer to enter into an exclusive purchasing obligation with the dominant undertaking’ and ‘Undertakings may offer conditional rebates in order to attract more demand, and as such they may stimulate demand and benefit consumers’)

1.b) As Efficient Competitor test is not a valid test for exclusivity / fidelity rebates and, as regards other rebates, it is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible: Whither section C of the Enf. Priorities Paper, on Price-based exclusionary conduct (on the need to show that the conduct is hampering as efficient competitors and in particular on whether the dominant undertaking is engaging in below-cost pricing), in conjunction with the specific abuse section IV.B (esp. par. 43 on exoneration of the practice as long as the effective price remains above the LRAIC of the dominant undertaking, thus no anticompetitive foreclosure / below cost test for rebates)?

2. ‘Direct evidence of anti-competitive foreclosure’ is not required

3. Countervailing buying power is not an exonerating factor
1. **Tasty Foods decision [520/VI/2011] (salty snacks):** Exclusivity agreements at wholesale level, cabinet exclusivity, aimed at capturing the available space at smaller retail shops (e.g. kiosks) and raising entry/expansion barriers, to the exclusion of competitors, rebates conditional upon the commitment of all, or the most substantial part of available shelf/store space for its products, target rebates, removing competitive products and cabinets (fines totaling €16,177,514 million)

2. **Heineken decision [590/2014] (beer market):** Athenian Brewery S.A. implemented a single and targeted policy that sought to exclude its competitors from the on-trade consumption market (e.g. HORECA chains and other retail outlets) – consisting, inter alia, on significant payments conditional upon exclusivity and/or the foreclosure of competitive brands and, at the wholesale level, by providing wholesalers with significant economic motives conditional upon exclusivity / not trading competing products (fines totaling €31,451,211 - required to introduce written contracts with amended terms, etc). {Stating inter alia that AEC is not required with regard to exclusivity & quasi – exclusivity rebates; 590/2014 states that NCA not required to apply the Commission’s Enforcement Priorities Communication which, by nature, has no binding force, as opposed to art. 102 TFEU and its interpretation by the European courts par. 689 et seq.}

3. **Procter & Gamble [581/VII/2013] (baby-diapers):** on 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)

4. **Nestle decision [434/V/2009] (instant coffee market):** 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)
Sources

Thank you for your attention!