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ROUNDTABLE ON FIDELITY REBATES

-- Note by Romania --

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

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ROMANIA

1. The paper is structured in three parts. In part one, the context on fidelity rebates investigations is presented. In the second part, the focus is on the assessment of fidelity rebates and on the presentation of an abuse of dominant position case successfully conducted by RCC consisting in discriminatory practices on two markets of postal services by means of targeted fidelity rebates to major customers. The third part and final part of the submission concludes with some remarks on RCC's general policy on investigating fidelity rebates cases.

1. Context on fidelity rebate investigations

2. Usually, loyalty discounts (or premiums in the case of input purchases) and rebates are defined as discounts or rebates on units purchased of a single product, conditioned upon the level or share of purchases granted in return for an undertaking by the customer to obtain his stock exclusively or almost exclusively from an undertaking in a dominant position, independently of whether the quantities purchased were large or small.

3. It must be operated a distinction between *single-product* and *multi-product* (bundled) rebates, also between *conditional* and *unconditional* rebates. *Conditional* rebates are defined as rebates granted to customers to reward a specific purchasing behaviour over a particular period of time. As far as conditional rebates are concerned, it could be made a further distinction between *all-unit* rebates (whereby the conditional rebate is available to all purchases below and above the threshold once it is exceeded) and *incremental* rebates (whereby the conditional rebate is available only to incremental purchases above the threshold once it is exceeded). On the other hand, *unconditional* rebates are defined as rebates granted to customers independently of their purchasing behaviour.

4. Fidelity rebates or loyalty discounts allow sellers to offer buyers a better price conditional on the buyer demonstrating loyalty in the purchases they make. In this respect, fidelity rebates is a form of price discrimination of a firm among its retailers and distributors. They differ from exclusivity agreements since the buyer does not need to commit to purchasing everything they require from the seller, although they may incentivise the buyer to do so. Fidelity rebates are often introduced as discounts on an existing price and can therefore stimulate demand for a seller's product while also achieving another goal. In some circumstances they can prevent rivals to a firm with market power from competing effectively. For example, they may increase the rivals' costs, increase the effective price that buyers pay for rival products, or reduce the firms prices to a level at which equally efficient rivals cannot remain within market (not to mention the less efficient competitors).

2. The assessment of fidelity rebates

5. RCC did not issue a policy document regarding its standard with regard to exclusionary abuses, including rebates. Following the EU approach, RCC considers there are two cumulative conditions which must be fulfilled for a loyalty rebate to infringe national competition law: (i) there must be evidence of exclusionary effects (the effects-based approach) – in fact RCC will assess whether the rebate produces likely or actual exclusionary effects in that they make entry very difficult or impossible for competitors and make it more difficult or impossible for the customer to choose

other sources of supply, and (ii) the rebate cannot be justified by pro-competitive efficiencies and/or objective economic considerations (the rule of reason approach)¹.

6. The Community Courts have constantly taken into account the level of foreclosure: only rebate regimes which foreclosed a substantial portion of customers on the market have been found illegal. In this respect, if a “loyalty rebate” is available only to a small number of customers, then the rebate cannot restrict competition since there is a viable access to the market for competitors of the dominant firm. So, according to the case law, a “loyalty rebate” infringes Article 102 TFEU only if (a) it “threatens” to exclude competitors because notably it applies to a substantial share of the customers on the market and (b) it is not justified by economic considerations (such as, for instance, the realization of economies of scale).

7. Regarding the first condition, we should keep in mind the fact that fidelity rebates were closely linked with the issue of exclusivity in the EU competition law. In this respect, a loyalty price discount might be triggered by exclusivity or near-exclusivity. Also, in RCC’s view it should be taken into consideration, the market demand, in particular the size of the customers rather than their number. In this respect, there are circumstances when fidelity rebates are granted exclusively to a small number of customers who cover a significant share of market demand in order to prevent them to switch the supplier.

8. Loyalty discounts could be treated as predatory pricing allegations on the grounds that they involve lower prices. The predatory pricing model would treat all conditional discounts and payments as standard price competition not taking into consideration the fact that the discounts or payments are conditional rather than unconditional. That model would focus solely on whether or not the pricing is “predatory,” by applying an incremental price-cost test.

9. On the other hand, due to the fact that loyalty discounts resemble exclusive dealing and tying contracts (loyalty discounts inducing increased sales with the promise of payments that are conditional on the customer’s willingness to sacrifice some or all purchases from competitors) it fits into the raising rivals’ cost paradigm of input and customer foreclosure. In contrast to predatory pricing model, the raising rivals’ cost foreclosure model would attack the condition, not the price level. It would focus on the fact that the discounts or payments have exclusionary conditions attached, and that these conditions can lead to anticompetitive foreclosure that raises effective costs of rivals, limits their output and erects barriers to entry and expansion.

10. Briefly, while the predatory pricing paradigm would attack the low prices, the raising rivals’ cost foreclosure paradigm attacks the condition. In this respect, there are some opinions that conditional pricing practices (including loyalty discounts) should be analyzed under the raising rivals’ cost foreclosure paradigm, not the predatory pricing paradigm. This analysis should apply the rule of reason, and not use the incremental price-cost test as a threshold test to screen out unmeritorious or weak claims².

¹ In is worth mentioning that, according to the European Court of Justice, a firm granting such rebates “is at liberty to demonstrate that its bonus system producing an exclusionary effect is economically justified.” (Case C-95/04 P, *British Airways plc v Commission*, [2007] ECR I-2331, §69 and §86). See also Conclusions of Advocate General Juliane Kokott in *British Airways*, C-95/04P, 23 February 2006, pt. 56 to 59 “Not all rebates and bonuses which a dominant undertaking grants to its contractual partners and produce a foreclosure effect are necessarily abusive and therefore prohibited under Article 82 EC. According to consistent case-law, such rebates and bonuses are to be regarded as abusive only if they are not based on an economic transaction which justifies them. If there is a discernible objective economic justification for the rebates or bonuses, they are not to be regarded as abusive, despite their foreclosure effect.” (emphasis added)

² The Raising Rivals’ Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test, Steven C. Salop, <http://scholarship.law.georgetown.edu/facpub/1620>

11. However, fidelity rebates is a form of price discrimination of a firm among its retailers and distributors. In this respect, especially in cases of input purchases, the test must be focussed on conditions attached to rebates scheme in order to assess the possibility of the dominant vertical integrated firm to foreclose the upstream or downstream market. In these cases, the analysis for price discrimination is similar to the raising rivals' cost foreclosure model.

12. In this respect, it is worth mentioning that in 2010, RCC found that the Romanian incumbent on postal services markets - Compania Națională Poșta Română S.A. (hereinafter Posta Romana) had abused its dominant position on two markets of postal services: the market of direct mail services and the market of commercial correspondence services (bulk mail services). Even though the investigation was focused on discrimination (Posta Romana was fined for discriminatory treatment and it was subject to corrective measures imposed by RCC in order to prevent such behaviour in the future), RCC stressed that the purpose of these deeds were:

- To prevent the major customers to shift to alternative suppliers on the markets open to competition (i.e. the market of direct mail services);
- To exclude the rivals on the upstream markets (i.e. the market of mail preparation services).

13. The mean used by Posta Romana in order to achieve these goals was granting targeted fidelity rebates to major customers. This had the effect of tying major customers and rising rival's costs 'foreclosing' the upstream market of mail preparation services and downstream market of direct mail services.

14. As in raising rivals' cost foreclosure paradigm, RCC attacked the condition, not the price level. This approach had an administrative advantage, making the burden of proof easier, without carrying out a complex price-cost test. Also, it allowed RCC to simply prohibit the condition, not regulating the price.

15. It is worth mentioning that this approach eases the burden on the firms. A firm can comply simply by setting unconditional prices. The cases will be briefly presented in Annex.

16. RCC is aware that up to date, the prevalent approach of loyalty discounts cases is based on predatory pricing model. In fact, the European Commission has introduced a "price-cost" test to analyse whether rebates granted by dominant firm can have foreclosure effects. In this respect, the European Commission uses an *as efficient competitor test*. This means that a rebate scheme will not be considered anti-competitive if it would only foreclose competitors that are less efficient than the dominant firm.

17. When applying the as efficient competitor test, the European Commission uses the dominant firm's costs. It is worth to mention that, under current EU competition law, recoupment does not yet play a central role in the assessment of the legality of a rebate.

18. Application of the predatory pricing model uses a threshold price-cost test. One test would simply compare the firm's total revenue for all units sold to its total variable costs, which amounts to a comparison of the firm's average price to its average variable cost. But this would be a very permissive test because it would involve a mixture of high price and low price units.

19. The more relevant test compares the firm's incremental revenue on the "contestable" volume achieved as a result of the discount on the additional units sold to the incremental costs of providing that extra volume. This latter test could be used as a safe harbor.

20. 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.

21. 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.

22. Assuming that the application of a price-cost test shows that the rebate in question can foreclose as efficient competitors from supplying a given customer, the next step in the analysis is to determine whether the rebate has *substantial* foreclosure effects. This second step in the analysis is based on a review of additional factors, such as:

- The proportion of the market demand affected by the rebate, i.e., whether the rebate affects a substantial part of the market demand. While the price-cost test helps determining whether the rebates granted can have the effect of foreclosing competitors because the dominant firm’s customers cannot turn to alternative suppliers without incurring substantial switching costs, it should also be demonstrated that these customers represent a substantial share of the market to which equally efficient rivals can turn, depriving them of the possibility to profitably enter and/or expand. 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 constrained by its competitors and its rebates cannot be anticompetitive;
- The duration of the rebates. When a rebate scheme has been in place for some time the analysis of actual effects plays a decisive role. In general the longer the conduct has already been going on, the more weight will be given to actual effects.

23. When the rebate in question has substantial foreclosure effect, the next steps in the analysis are to determine:

- Whether the rebate can be objectively justified, and/or
- The rebate generates pro-competitive efficiencies.

24. The company has the burden of proof of these objective justifications and efficiency considerations. For this defence, the dominant undertaking must demonstrate that the following conditions are fulfilled:

- That efficiencies are realised or likely to be realised as a result of the conduct concerned;
- That the conduct concerned is indispensable to realise these efficiencies (i.e. the rebate is indispensable to obtain cost advantages or to make certain relationship-specific investments in order to be able to supply a particular customer);
- That the efficiencies benefit consumers (i.e. a reasonable share of the cost advantages are passed on to the customers); and
- That competition in respect of a substantial part of the products concerned is not eliminated.

25. In order to prevent over-inclusion, unlawful predation can only be established on the basis of additional evidence of a plan³ or a strategy to predate such as: direct evidence of intent; evidence that the pricing only makes commercial sense as part of a predatory strategy; the actual or likely exclusion of the prey; whether certain customers are selectively targeted etc.

26. In RCC's experience, particular in input purchases cases, there are a number of additional factors that should be taken into consideration when assessing a fidelity rebates (at list in cases that involved discriminatory treatment) such as:

- Whether the dominant firm is an unavoidable trading partner;
- Whether the dominant firm is a competitor on upstream or downstream market;
- The structure of the rebates scheme;
- Whether the input provided by the dominant represents a large proportion in the total cost of the product/the service provided by its customers.

3. Policy on investigating fidelity rebates

27. As a general policy, RCC recognize 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.

28. 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.

29. The legality of loyalty rebates should be exclusively assessed on the basis of an effects-based approached supported by objective economic criteria.

30. RCC has not developed a price-cost test and a clear safe-harbour with regard to loyalty discounts and rebates. RCC is aware that a price-cost test which relies on the "equally efficient competitor" standard could play a key role as a screening device to determine whether the rebate has the ability to foreclose a dominant firm's rivals to supply one or several customers. In the same time, the price-cost test should be part of a broader economic assessment to determine whether the loyalty

³ In line with the case law, it is necessary to consider all the circumstances, mostly the criteria and rules governing the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount is likely 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 (*Hoffman-La Roche*, paragraph 90; *Michelin*, paragraph 73). The distortion of competition arises from the fact that the financial advantage granted by the undertaking in a dominant position is not based on any economic consideration justifying it, but is likely to prevent the customers of that dominant undertaking from obtaining their supplies from competitors (*Michelin*, paragraph 71). One of the circumstances may therefore consist in the fact that the practice in question takes place in the context of a plan by the dominant undertaking aimed at eliminating a competitor (*AKZO*, paragraph 72; *Compagnie Maritime Belge Transports*, paragraphs 147 and 148).

rebates substantially foreclose the market and, in such cases, whether the foreclosure effect can be objectively justified and/or compensated by efficiencies.

31. But at least in the case of input purchases, the test must be focussed primary on conditions attached to rebates scheme in order to the asses the possibility of the dominant vertical integrated firm to foreclose the upstream or downstream market.

32. 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.

ANNEX

Posta Romana joint cases [2005 - 2010]

33. In 2010, Romanian's Competition Council (hereinafter RCC) found that the Romanian incumbent on postal services markets - Compania Națională Poșta Română S.A. (hereinafter Posta Romana) had abused its dominant position on two markets of postal services: the market of direct mail services and the market of commercial correspondence services (bulk mail services).

34. First of all, between 2005 – 2009 Posta Romana was investigated for a number of alleged anticompetitive practices on postal services markets including an excessive pricing policy for the provision of direct mail services (allegedly started in 2005) and two types of discriminatory treatment: *secondary line discrimination* (July 2005 – August 2009) on the market of direct mail services and *primary line discrimination* (March 2008 – August 2009) on the market of commercial correspondence services (bulk mail services).

35. Even though the investigation was focused on discrimination (Posta Romana was fined for discriminatory treatment and was subject to corrective measures imposed by RCC in order to prevent such behavior in the future) nevertheless RCC stressed that the purpose of these deeds were:

- To prevent the major customers to shift to alternative suppliers on the markets open to competition (i.e. the market of direct mail services);
- To exclude the rivals on the upstream markets (i.e. the market of mail preparation services).

36. The mean used by Posta Romana in order to achieve these goals was granting targeted fidelity rebates to major customers. This had the effect of tying major customers and rising rival's costs 'foreclosing' the upstream market of mail preparation services and downstream market of direct mail services.

37. As regards *primary line discrimination*, Posta Romana applied the following discriminatory discount policy for its clients (i.e. undertakings):

- for the supply of direct mail services, there were two situations:
 - if the customer was also the sender⁴ of the postal items, discounts were granted for the consolidated volume (i.e. originated only from the respective customer);
 - if the customer was an intermediary, it received separate discounts for the volumes of each client.

As a result, the intermediaries could not benefit from discounts for the consolidated volume generated by some of their clients (small or medium senders).

- for the supply of bulk mail services, discounts were granted only if the customer was also the sender of the postal item. As a result, in this market the situation were worse, intermediaries being excluded from getting discounts for the volume generated by all their clients (i.e. small or medium senders which can't receive the discounts themselves).

⁴ The sender is the natural or legal person which originates or generates the postal item. The postal items belong to the senders and the intermediaries provide services of mail preparation to the senders.

38. This policy applied by the Romanian Post with regard to the granting of tariff rebates indirectly creates a discrimination between the companies that generate large volumes of commercial correspondence and those that generate lower volumes of commercial correspondence and that could not access directly the tariff rebates due to the fact that the intermediaries/integrators were unable to obtain for the senders tariffs rebates by consolidating the volumes from many such senders.

39. Documents received by RCC during the investigation revealed that Posta Romana intended to exclude its competitors from the upstream market of mail preparation services. The pricing policy described above was clearly oriented only towards senders (especially the large customers), on the ground that they originated the postal items and therefore they should receive the discounts. The incumbent did not intend to grant discounts to intermediaries even though integrators/intermediaries, and not senders, were contracting parties in the agreements concluded with Posta Romana regarding the respective postal services (direct mail and bulk mail postal services). Also relevant was the fact that the incumbent granted additional targeted rebates for postal services to major clients: (i) so called *fidelity discount* which increased gradually according to the duration of commercial relations with its customers for the provision of the postal services on the relevant markets (during investigation, Posta Romana informed RCC that it renounce to implement this type of discounts), and (ii) supplementary discounts for the postal services that were bundled with its mail preparation services; the level of rebates could exceed 20% in addition to the public rebates scheme (it is worth to mention that at least at the time of investigation, the bundle of services do not constitute a distinct product/service market from its component services).

40. The Posta Romana is a vertically integrated company that carries out activities also on the market of mail preparation service (situated upstream to the market of postal services). The key feature of these upstream markets is the possibility of intermediaries to secure a reduction of postal services costs for their clients, especially for those clients which generate small amounts of volumes (i.e below the threshold of the Posta Romana rebates scheme). Thus, the non-granting of tariff rebates in consideration of aggregated volumes generated by several senders, but by considering only the volumes generated by each sender artificially increase the costs for postal service. Also, the cost structure of the intermediaries' mail preparation services was distorted by comparison to the Posta Romana cost structure for the same mail preparation services. This anti-competitive practices of Posta Romana was combined with the favourable treatment (in fact, fidelity rebates) granted to a particular client, Infopress, described below.

41. The situation was worse in the case of commercial correspondence services (bulk mail postal services), when the intermediaries provided their services (for which they normally would receive tariff rebates) for free to the Posta Romana. This creates prerequisites for the Romanian Post to extend the dominant position it held on the markets of the postal services to the markets of mail preparation services (the upstream markets for direct mail services and bulk mail services). Even though this pricing policy was also exploitative (by reducing the possibility of the small and medium clients - the senders - to reduce their expenses with postal services), in fact Posta Romana's conduct had an exclusionary effect by raising the rivals' costs on the upstream markets. The exclusionary effect of the intermediaries was enhanced due to the additional discount granted for major clients described above (for bundling the bulk mail postal services with its mail preparation services).

42. It is worth to mention that data provided to RCC (by the incumbent and intermediaries) indicates a significant restriction of competition on the upstream market as a result of an anticompetitive practice of the Romanian Post described above.

43. The *secondary line discrimination* regarded the discriminatory treatment by the Romanian Post between its beneficiaries (Infopress and Mailers). At the time of investigation, both companies were providing mail preparation services.

44. In June 2006, one of Mailers' customers, the publishing house Reader's Digest SRL (herein after "ERD") renounced the services provided by Mailers and replaces it with those provided by Infopress, invoking the following reasons:

- The tariffs conditions offered by Infopress were better than those offered by Mailers;
- The payment terms offered by Infopress were more advantageous than those offered by Mailers.

45. The RCC's assessment of the contractual conditions revealed the fact that Infopress' offer for the services required by ERD is much better than Mailers' offer for the same services on the grounds indicated above.

46. In order to identify the existence of a discriminatory treatment applied by the Romanian Post, the investigation team evaluated:

- The commercial relations between the Romanian Post and Mailers, on one hand, and between the Romanian Post and Infopress, on the other hand, taking into consideration the services involved versus the contractual conditions related to tariffs (i.e. discount scheme) and payment terms;
- The impact of the Romanian Post's tariffs policy on the competitiveness of Mailers and Infopress on the market of mail preparation services – the extent to which the contractual conditions offered by the Romanian Post to Infopress and respectively to Mailers would have allowed Mailers to present ERD a competitive offer, comparable with that of Infopress.

47. The contractual conditions for the provision of the services Infadres and commercial correspondence applied by the Romanian Post in its relations with Mailers were those publicly-known, applicable to any company benefiting from the Romanian Post's services on the relevant markets of the postal services.

48. The contractual conditions applied by Posta Romana to Infopress (according to Addendum no.1 to the Framework Agreement of Collaboration (the main contract) concluded on the 30th of June 2005), provided for:

- Granting better tariffs rebates than those in the public offer (i.e. additional 5%);
- The deferral by 10 days (from the date when the invoice was issued) of payments for the services provided to Infopress (and the removal of the bank warrantee obligation);

in exchange of several obligations undertaken by Infopress as follow:

- to allow the access of "Casa de Expediții" (a subsidiary of the Romanian Post) to its own facilities (working space and logistics suitable for postal activities);
- to transport the postal mail items on its own expense to regional access points of Posta Romana's network.

49. Very shortly after that, on the 14th of July 2005 Posta Romana and Infopress signed the Addendum no.2 to the Framework Agreement of Collaboration which provides:

- Romanian Post granted the maximum level of the publicly available tariff rebates to Infopress (32.5% or 37.5% depending to the sorting degree of the postal items) in a uniform manner, regardless of the monthly volumes;

- the traffic (volume) between the 15th of August 2005 and 15th of October 2006 should reach a minimum target (i.e. at least 36 million direct mail items)⁵;

in exchange of **no supplementary** obligations to those already assumed by Infopress according to Addendum no.1.

50. Under these circumstances, the equivalence between the counter-obligations assumed by Mailers and by Infopress in their relations with Posta Romana needed also to be reviewed.

51. The analysis revealed that according to Addendum no.1 the supplementary transport service performed by Infopress was valued to 5% supplementary rebate applied to the discounted value that would have been granted based on the publicly available offer⁶.

52. Even though it would be assumed that the Addendum no.1 provided an equitable mechanism for reimbursing Infopress for the supplementary transport services rendered to Posta Romana, by the application of Addendum no.2 the reimbursement of Infopress by Posta Romana for this supplementary service becomes disproportionate compared to the value set by Posta Romana in Addendum no.1. Thus, without adding any other supplementary services in the burden of Infopress or amending the existing ones, by Addendum no.2 Posta Romana granted solely to Infopress, in advance and over a long of period of time (more than a year) the maximum tariff rebates, regardless of the monthly volumes achieved (of course under the minimum threshold condition). Even though Mailers would have assumed obligations similar to those of Infopress and by this way would have benefited from contractual conditions as those stipulated in the Addendum no.1, Infopress would have continued to benefit from the better conditions stipulated by the Addendum no.2 and had a competitive advantage over Mailers. From the information in the case file, it results that Infopress is the only company benefiting from the contractual conditions offered by Posta Romana through the Addendum no.1 and Addendum no.2 described above⁷. Thus, Infopress was the only company benefiting from tariff rebates and payment conditions which are preferential as compared to those applied to its competitors. This has resulted into a significant competitive advantage for Infopress as compared to its competitors (including Mailers) as it allowed Infopress to set a long term strategy with regard to the provision of its services that in respect competed with those of Mailers.

53. Thus, the contractual conditions offered by Infopress to Reader's Digest, as compared to Mailers, were a direct consequence of the advantages obtained by Infopress from the Romanian Post in respect of the provision of the standard postal service of domestic direct mail.

54. Following the analysis of the circumstances in which the preferential treatment was granted to Infopress, the following resulted:

- Posta Romana was an inevitable trade partner;

⁵ In case when the set volume threshold of postal item was not met, the Romanian Post reserved itself the right to grant tariff rebates corresponding to the registered volume, in accordance to the rebate scale provided in Addendum no.1. Infopress has committed itself to pay the difference between the tariff payed and the tariff recalculated by the Romanian Post plus a penalty of 20%, without VAT.

⁶ Subsequently, in its publicly available offer Posta Romana valued the supplementary transport service performed by its customers (similar to Infopress) to 1% supplementary rebate applied to the discounted value that would have been granted according to the mail volume and sorting degree.

⁷ From the offers sent by Posta Romana to other intermediaries (competitors of Infopress), it results that the incumbent did not present either to Mailers or to other competitors, a real and non-equivocal offer, containing the same contractual conditions in exchange of the same obligations, as those offered to Infopress at list by Addendum no.1.

- from the assessment of invoices it results that the discrimination was significant, the favoured part, namely Infopress, paid significantly less than the other clients of Posta Romana's services;
- the product/the service provided by Posta Romana represented a large proportion in the total cost of the services of direct marketing by post provided by Infopress and by their competitors (including Mailers). In these circumstances, obtaining a tariff rebate played an important role in the activity of the direct marketing companies;
- the discriminatory treatment was persistent and had a duration long enough (14 July 2005 – August 2009) to have a direct and significant impact on the activities of the disadvantaged beneficiaries/clients, started from the moment when Posta Romana and Infopress entered into commercial relations concerning the direct mail services (in fact, after the Addendum no.2 was concluded).

55. Consequently, the preferential treatment granted by Posta Romana to Infopress made impossible for Infopress' competitors to efficiently replicate the service of direct mail preparation offered by Infopress. Thus Infopress offer was not the result of a real competition between this undertaking and Mailers but a result of a favourable treatment to Infopress in comparison with its competitors. Consequently, it was noticed that between 14.07.2005 and August 2008, Infopress held a significant competitive advantage as compared to its competitors.

56. The analysis conducted by RCC, but also the statement of Posta Romana, revealed that this favourable treatment of Infopress was implemented due to the fact that this firm was the biggest client of the incumbent on the relevant market of direct mail services. The investigation concluded that the rebates granted by Posta Romana to Infopress according to Addendum no.1 are fidelity rebates due to the fact that these were subject to the condition of achievement of minimum volume target, aiming to keep this firm as client of the incumbent.

57. Consequently, on the one hand, this anticompetitive behaviour has a foreclosure effect on the relevant market (maintaining the dominant position on the relevant market), and on the other hand, it distorts the competition on the upstream market of direct mail preparation services.

58. Moreover, as was showed in the case presented above, between March 2008 and August 2009, Posta Romana engaged itself in a new major discriminatory practice with regard to the granting of tariff rebates for the direct mail services and bulk mail services. The continuation of the preferential treatment to Infopress following its new approach by Posta Romana of tariff rebates, was likely to enhance the anticompetitive effects of the preferential treatment granted by Posta Romana to Infopress, by significantly reducing the possibility of other direct marketing companies to provide their services in competition with those of Infopress by matching the offer of this company.