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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ROUNDTABLE ON FIDELITY REBATES

Note by Ireland

15 – 17 June

*This document reproduces a written contribution from Ireland submitted for item 6 of the 125th OECD Competition committee on 15-17 June 2016.
More documents related to this discussion can be found at www.oecd.org/daf/competition/fidelity-rebates.htm*

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English - Or. English

1. Rebate Terminology

1.1 What terminology do you use when analysing fidelity rebates? How does this relate to the terminology set out in the background paper?

1. The CCPC generally uses the rebate terminology found in DG COMP decisions and the jurisprudence of the EU Courts.

1.2 What standard do you use in order to distinguish between anti-competitive and pro-competitive fidelity rebates? Why do you use that standard? What scope is there in this standard for errors of over or under-inclusion? How do you seek to mitigate this risk?

2. We take the view that target rebates with loyalty-inducing effects, when applied by a dominant undertaking, are likely to involve an abuse of dominance and therefore risk breaching Irish and/or EU competition law.

2. Assessing the effects of fidelity rebates

2.1 Which fidelity rebate schemes have you assessed in the last 10 years? Please describe the analytical framework used in these assessments (with examples).

3. On 7 October 2011, the Competition Authority (the “Authority”) entered into an Agreement and Undertakings in which Raidió Teilifís Éireann (“RTÉ”) entered into behavioural commitments in a form that allowed the Authority to close an investigation into alleged abuse of dominance by RTE. The investigation related to the terms of a scheme operated by RTÉ for the sale of television advertising airtime under which discounts granted to individual advertisers depended, among other factors, on the percentage (or share) of each advertiser’s total television advertising budget committed to RTÉ. The scheme is hereinafter referred to as the “Share Deal”.

4. RTÉ is a state-owned television and radio broadcaster in the State. RTÉ currently owns and operates two free-to-air national television channels (RTÉ One and RTÉ Two). RTÉ is financed from a combination of commercial and non-commercial revenues. Commercial revenues accrue from advertising, sponsorship, transmission fees and merchandising fees. Non-commercial revenue comes from mandatory TV licence fees.

5. As set out above, the Authority formed the preliminary view that RTÉ was likely to occupy a dominant position on the market for television advertising airtime in the State, with one of the potential contributing factors being RTÉ’s dual-funded status. The Broadcasting Act, 2009 provides for RTÉ to be funded via a TV licence fee, as well as from commercial sources such as advertising. It was alleged accordingly that RTÉ’s dual-funded status gave it an advantage over its competitors who relied almost exclusively on commercial revenues.

6. In a 2005 state aid decision in respect of licence fee funding of RTÉ and TG4, the Commission stated that RTÉ’s “*financing from license fee money reduces the operating costs that RTÉ would normally have to bear and provides RTÉ with an economic advantage compared to other broadcasters which finance their activities based on commercial revenues only*”¹.

¹ State Aid E 4/2005 (ex NN 99/1999) –State Financing of RTÉ and TG4, Brussels 27.02.2008 C(2008)723 final, at paragraph 56.

7. The Authority acknowledged that the separation of the accounting systems may help to prevent cross-subsidies between public service and non-public service activities, but in its preliminary view this does not necessarily mean that licence fee revenues do not afford RTÉ a competitive advantage. It may be argued that the public funding gives RTÉ the unique status it enjoys today, such as its image as the State broadcaster, its ability to deliver mass audiences and consumers' affinity with RTÉ. This, in turn, would make RTÉ more appealing to advertisers.

8. The Authority's investigation raised concerns that the Share Deal could amount to a breach of section 5 of the Competition Act, 2002 (the "Act") and/or Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). Ultimately, the Authority was satisfied that the undertakings offered by RTÉ addressed its concerns under section 5 of the Act.² Therefore, the Authority decided to close its investigation.

9. Section 5 of the Act and Article 102 TFEU prohibit an abuse by one or more undertakings of a dominant position. Conditional rebates with loyalty-inducing effect granted by a dominant undertaking may amount to an abuse of a dominant position. The Authority's investigation was initiated with the aim of reaching a view on the following issues:

- the relevant market,
- whether RTÉ held a dominant position in the relevant market, and
- whether the Share Deal amounted to an abuse of its dominant position.

10. Based on the information gathered during its investigation, the Authority was concerned that the Share Deal could amount to a conditional rebate likely to have loyalty-inducing effects and hence could be anti-competitive. The Authority communicated its preliminary concerns to RTÉ and, in response, RTÉ offered satisfactory undertakings to the Authority. In particular, RTÉ undertook to commence the process for implementing a new trading scheme which would exclude the "share of budget" element no later than 1 July 2012. RTÉ also informed the Authority that it had, in any event, intended to review how it sold television advertising airtime and the possibility of introducing a new scheme to, inter alia, improve efficiencies. As the undertakings offered by RTÉ addressed the Authority's concerns, the Authority did not need to continue its investigation and thus did not reach a final view on the application of section 5 and/or Article 102 to the Share Deal.

² The Authority's preliminary concerns in this investigation also arose under Article 102 TFEU. However, the Authority is unable to accept undertakings under Articles 101 and 102 as this is a function reserved to the Courts in Ireland (see Statutory Instrument 195 of 2004). In this case, however, the commitments provided in respect of section 5 of the Act effectively remedy any competition concerns that may arise under Article 102 TFEU.

3. As efficient test & Pro-Competitive Rebates

As-efficient competitor test

3.1 *How would the standard that you use treat claims that a firm has used its market power to reduce the competition with a less efficient rival and increase its profits (for example by raising the costs of a less efficient rival)? How would you assess whether a rival firm is less efficient? Would you assess whether a rival firm has the potential to be equally efficient? If so, how do you conduct this assessment?*

3.2 *If you use a price cost test, how do you conduct it? What definitions of cost do you use? Which firm's costs do you use? How do you identify and measure non-contestable sales?*

11. The Guidance Paper³ outlines an additional factor or test which may indicate that a conditional rebate is capable of foreclosing competition. In relation to the assessment of price-based exclusionary conduct such as conditional rebate schemes, the Guidance Paper, outlines an “as-efficient competitor test”.⁴

12. With price based-exclusionary conduct, an “as-efficient competitor test” attempts to establish whether a hypothetical competitor, as efficient as the dominant firm, could effectively compete, given the pricing conduct of the dominant firm. This is done by comparing the price charged by the dominant firm with an appropriate measure of cost. The lower the price, the more likely it is that the conduct has a foreclosing effect.

13. With conditional rebates, the price which is compared against the appropriate cost benchmark is referred to as the “effective price”.

“The effective price that the rival will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate it loses by switching, calculated over the relevant range of sales and in the relevant period of time.”⁵

14. The notion of the effective price is therefore based on the principle that a competitor would have to offer a price low enough to compensate a buyer for their loss of rebate if the latter switches part of its demand away from the dominant undertaking. If the effective price is below a certain cost benchmark, then the conduct is capable of foreclosing an as efficient competitor.

15. The Guidance Paper notes that the “as efficient competitor test” is carried out using economic data on costs and sales where such data is available and reliable. In this regard, two points are of note in respect of the Authority’s investigation into RTÉ.

16. **First**, broadcasting is a two-sided market. On one side of the market, broadcasters attract viewers with programming. On the other side of the market, broadcasters attract advertisers based on their viewership. The two-sided nature of the market complicates the exercise of comparing the effective price with the appropriate cost benchmark.

³ EU Commission Guidance OJ 2009/C45/02. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings

⁴ EU Commission Guidance OJ 2009/C45/02, paragraphs 41 to 45.

⁵ EU Commission Guidance OJ 2009/C45/02, paragraph 40.

17. **Second**, and as suggested in the Guidance Paper, where a comparison of the effective price with an appropriate benchmark is, for whatever reason, not possible, the effective price may by itself provide an indication of loyalty-inducing effects of the rebate scheme.

“The lower the estimated effective price over the relevant range is compared to the average price of the dominant supplier, the stronger the loyalty-enhancing effect.”⁶

18. The Authority did not carry out an “as-efficient competitor test” in the RTE case. However, as suggested in the Guidance Paper, the Authority did make a comparison between the effective price and the average price. The estimation of the effective price conducted by the Authority was based on what a competitor would have to offer to attract 1% of an advertiser’s budget away from RTE. As a working assumption therefore, the ‘relevant range’ (or “contestable share”)⁷ referred to in the Guidance Paper corresponded to a 1% share of budget. Based on this exercise, the Authority found evidence that the effective price was low relative to the average price. In the Authority’s preliminary view, the Share Deal, therefore, could amount to a conditional rebate scheme with a loyalty-inducing effect.

19. These preliminary results had not been shared with RTE by the time RTE had made a proposal which satisfactorily addressed the Authority’s concerns. Had the investigation proceeded, the Authority would have gone further in its analysis of the effective price and how it compared to the average price. In particular, the Authority would have refined its view of the ‘relevant range’, based on market enquiries, and, if necessary, recalculated the effective price(s) correspondingly.

Pro-Competitive Rebates

3.3 *Similarly, do you assume that certain types of rebate will have pro-competitive effects? If so, please describe when this safe-harbour would apply.*

20. The CCPC does not make a priori assumptions that certain types of rebates (where implemented by dominant firms) will necessarily have, or not have, anti-competitive effect. Accordingly, the CCPC has not established ‘safe harbour’ conduct for rebates. Each case is assessed on its own merits.

Per Se Abuse

3.4 *Do you assume that certain types of rebate will have harmful effects? If so, please describe when these presumptions apply. What is the rationale for this assumption and on what evidence is it based? (e.g. court’s decision, or based on agency experience).*

21. The CCPC does not assume that certain rebates are presumptively harmful. However, we take the view that the presence of certain factors (e.g. individualisation, retroactivity) and the characteristics of these factors may result in a higher risk of foreclosure. Each investigation is assessed on its own merits.

⁶ OJ 2009/C45/02, paragraph 42

⁷ The contestable share of the demand is the amount for which the customer may prefer and be able to find substitutes.

4. Theory of Harm

4.1 *Which theories of harm did you examine (e.g. predation; raising rivals' costs, taxing rivals' prices; softening competitive incentives)? Which did you not? If you decided not to examine a theory of harm, how did you reach that decision? What factors would affect your decision on which theory of harm to investigate in future?*

22. The reason why rebates with loyalty-inducing effects have been found to infringe Article 102 TFEU is because they seek to tie customers to the dominant undertaking and are therefore capable of foreclosing competitors. The EU courts have found that it is necessary to consider, in all the circumstances, whether a loyalty-inducing rebate is capable of producing an exclusionary effect. This involves determining whether the rebate (i) makes market entry impossible or more difficult for the dominant undertaking's competitors, and (ii) makes it more difficult or impossible for a customer to use other sources of supply. For the purpose of establishing an infringement of Article 102 TFEU, it is not necessary to demonstrate that the rebate has any actual foreclosure effects on the market but it must be capable of producing such effects. However, the anti-competitive effect must be probable – it must not be purely hypothetical.

23. In *Post Danmark II* (C-23/14 *Post Danmark v Konkurrenceceradet*, 2015), the Court of Justice endorsed the General Court's approach in *Intel* of distinguishing between different categories of rebates, namely (i) pure quantity based rebates, (ii) rebates linked to exclusivity or near exclusivity of supply (which the General Court in *Intel* found are “*by their very nature capable of restricting competition*”), and (iii) rebates which are not linked to exclusivity or near exclusivity of supply but which may have loyalty-inducing effects. In relation to the latter category, the Court found that:

*“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” (paragraph 31, emphasis added).*

The Court went on to say that:

*“the assessment of whether a rebate scheme is **capable of restricting competition** must be carried out in the light of all relevant circumstances, including the rules and criteria governing the grant of the rebates, the number of customers concerned and the characteristics of the market on which the dominant undertaking operates. Such an assessment seeks to determine whether the conduct of the dominant undertaking produces an actual **or likely exclusionary effect**, to the detriment of competition and, thereby, of consumers' interests” (paragraphs 68-69, emphasis added).*

24. The reason why rebates with loyalty-inducing effects have been found to infringe Article 102 TFEU is because they seek to tie customers to the dominant undertaking and are therefore capable of foreclosing competitors. EU case law has based the finding of abuse on whether loyalty rebates are capable of inducing incremental purchases by customers of the dominant undertaking thereby foreclosing competitors.⁸ It is not necessary to analyse any actual foreclosure effects of a loyalty rebate in the market for Article 102 to apply. In the *Tomra* case,⁹ the General Court confirmed existing case law and rejected

⁸ See, for example, Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331 (paragraph 68).

⁹ Case T-155/06, *Tomra v Commission*, OJ C 288, 23.10.2010.

the need to analyse any actual foreclosure effects where the conduct in question intends to or is capable of foreclosing competition. The Court stated that:

“It may be concluded from that line of cases, as the applicants indeed maintain, that in order to determine whether exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes are compatible with Article 82 EC, it is *necessary to ascertain whether, following an assessment of all the circumstances [...], those practices are intended to restrict or foreclose competition on the relevant market or are capable of doing so*”. (Paragraph 215)

“It must also be stated that, for the purposes of establishing an infringement of Article 82 EC, it is *not necessary to show that the abuse under consideration had an actual impact on the relevant markets*. It is sufficient in that respect to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (*Michelin II*, paragraph 239, and *British Airways v Commission*, paragraph 293)” (Paragraph 289) (*Emphasis added*).

25. Paragraph 38 of the Guidance Paper also suggests this approach, stating that:

“[...] the following factors are of particular importance to the Commission in determining whether a given system of conditional rebates *is liable to result in anti-competitive foreclosure and, consequently, be part of the Commission’s enforcement priorities*” (*Emphasis added*).

5. Necessary conditions tested

5.1 *What necessary conditions were tested? What types of evidence did you use to test them? For example, how important was ex-post industry data? What limits or challenges were there in using this data? What other challenges did your analysis encounter?*

26. Target rebates with loyalty-inducing effects when applied by a dominant undertaking are likely to amount to a breach of Article 102 TFEU. EU case law has deemed the following factors to be of particular importance in determining whether a given system of target rebates likely has loyalty-inducing effects:

- whether or not the target rebate is an “all-units” rebate - all-units rebates (also known as “retroactive” or “rollback” rebates) are those that apply to all the purchases made during the reference period and not only to those purchases made in excess of the purchasing target(s);
- the progressive nature of the rebate and the magnitude of the level of 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.

27. 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.

5.2 *Relevant Evidence*

5.2.1 *The loyalty-inducing effects of the Share Deal*

28. The Authority's preliminary view was that the Share Deal was likely to be a target rebate scheme with loyalty-inducing effects and therefore capable of foreclosing RTÉ's competitors. The Share Deal could be classified as a target rebate because discounts were conditional on advertisers committing a specific share of their total television advertising budget with RTÉ (the "purchasing target") during a reference period, which was normally of one year. The Authority was of the view that the Share Deal may have had loyalty-inducing effects and, therefore, may have been capable of foreclosing RTÉ's competitors.

29. The Authority's view was supported by the factors relied upon by the European Courts and DG COMP to establish potential loyalty-inducing effects. As it proved unnecessary to pursue the investigation further, the Authority did not draw any final conclusions on whether the Share Deal was, in fact, loyalty-inducing and detrimental to competition.

30. During the investigation, RTÉ argued that the Authority's application of the factors below to the Share Deal did not demonstrate a loyalty-inducing effect to the legal standard required by the case law.

– (a) *All-units rebate*

31. All-units rebates (also known as "retroactive" or "rollback" rebates) are those that apply to all the purchases made during the reference period and not only to those purchases made in excess of the purchasing target(s) (incremental rebates). The loyalty-inducing effect of all-units rebates is very significant since they represent a strong incentive to reach the purchasing target(s) in order to benefit from discounts on the total purchases made over the reference period.¹⁰ In other words, all-units rebates make it less attractive for customers to switch to an alternative supplier, even for a small number of units.

32. The Guidance Paper deals with all-units rebates in paragraphs 37 and 40 as follows:

"[...] The usual nature of a conditional rebate is that the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold, the rebate being granted on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates) [...]" (Paragraph 37)

"In general terms, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to a loss of the retroactive rebates¹¹. The potential foreclosing effect of the retroactive rebates is in principle strongest on the last purchased unit of the product before the threshold is exceeded. However, what is in the Commission's view relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit, but the foreclosing effect of the rebate system on actual or potential competitors of the dominant supplier. The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors." (Paragraph 40)

¹⁰ Case 322/81 *Nederlandsche Banden Industrie Michelin v Commission (Michelin I)* [1983] ECR3461, paragraphs 70 to 73; Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331, paragraphs 73 and 74.

¹¹ Case 322/81 *Nederlandsche Banden Industrie Michelin v Commission (Michelin I)* [1983] ECR3461, paragraphs 70 to 73.

33. In the Tomra case, the General Court acknowledged that all-units rebate schemes “ensure that, from the point of view of the customer, the effective price for the last units [before the target] is very low because of the ‘suction effect’”¹² and that “a competitor’s average price will remain structurally unattractive” in the presence of an all-units rebate.¹³

34. The Authority was of the preliminary view that the Share Deal was an all-units rebate scheme. At the point of the annual negotiation, an advertiser committed a given percentage share of its total television advertising budget with RTÉ for the relevant year. This was done on the understanding that the particular level of discount corresponding to that share of budget commitment would apply to all the purchases of television advertising airtime made by that advertiser from RTÉ during that year. A different (lower or higher) share of budget commitment would attract a different (lower or higher) level of discount applying to all the purchases of television advertising airtime made by that advertiser from RTÉ during that year. In the Authority’s preliminary view, the Share Deal was likely to make it less attractive for advertisers to switch even small amounts of demand for television advertising airtime to RTÉ’s competitors at the negotiation stage in order to benefit from the discounts on all the purchases of television advertising airtime made from RTÉ. In addition, it was likely that television broadcasters, in order to compete effectively with RTÉ, would have had to compensate advertisers for the loss of the discount over all the purchases made from RTÉ.

– (b) *The progressive nature and the magnitude of the level of discounts*

35. Another important factor that may cause a discount scheme to have loyalty-inducing effects is its progressive nature. A scheme is said to be progressive if the discount rate increases according to the purchases made from the dominant undertaking.¹⁴ This loyalty-inducing effect will be reinforced if, in the case of multiple purchasing targets, the discount rates corresponding to the higher purchasing targets are substantial.¹⁵

36. This factor has also been taken into account in the Guidance Paper. According to paragraph 40:

“The higher the rebate as a percentage of the total price and the higher the threshold, the greater the inducement below the threshold and, therefore, the stronger the likely foreclosure of actual or potential competitors.”

37. While the Authority acknowledged that the level of the final discount given to an advertiser under the Share Deal did not exclusively depend on the level of share of budget committed to RTÉ, the investigation showed that it was a very important factor in establishing the final discount granted to an advertiser. In general terms, the larger the share of budget committed to RTÉ, the larger the level of discount RTÉ would offer.

38. Under the Share Deal, the discounts corresponding to high budget commitments were substantial. The Authority’s investigation showed that the Share Deal was designed to work most effectively for shares of budget commitments ranging between 50% and 70%, which, according to RTÉ, is a realistic negotiated share range. RTÉ tried to negotiate the largest share of budget possible and used a “supporting share” of [60-70]% as a benchmark for negotiations with advertisers. In 2008 and 2009, advertisers on average met the “supporting share” commitment and received a [20-30]% discount.

39. During the course of the Authority’s investigation, advertising customers of RTÉ suggested to the Authority that committing a substantial share of budget with RTÉ was, in some instances, necessary to make

¹² Paragraph 267.

¹³ Paragraph 270.

¹⁴ Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 272.

¹⁵ Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 95.

placing an advertisement with RTÉ economically viable. A reduction of the share of budget committed to RTÉ could lead to a substantial reduction of the level of discount to the extent that, in some instances, low levels of budget commitment made placing the advertisement prohibitively expensive. Advertisers were thus encouraged to commit a substantial share of budget with RTÉ in order to benefit from a “decent”¹⁶ level of discount.

– (c) *The individualised nature of the target*

40. The Court of Justice of the European Union and DG COMP have also given consideration to whether the purchasing target set by the dominant firm is of an individualised nature (i.e., where the target is set for a specific customer) or standardised (i.e., where the target is the same for all or a group of customers). In general, the case law suggests that individualised targets are more likely to have a loyalty-inducing effect since they allow the dominant supplier to set a target which is close to all or most of the expected requirements of an individual customer, having regard to its historical purchases.

41. Paragraph 45 of the Guidance Paper also deals with the distinction between individualised targets and standardised targets as follows:

“It is normally important to consider whether the rebate system is applied with an individualised or standardised threshold. An individualised threshold – one based on a percentage of the total requirements of the customer or an individualised volume target – allows the dominant supplier to set the threshold at such a level as to make it difficult for customers to switch suppliers, thereby creating a maximum loyalty enhancing effect. By contrast, a standardised volume threshold – where the threshold is the same for all or a group of customers – may be too high for some smaller customers and/or too low for larger customers to have a loyalty enhancing effect. If, however, it can be established that a standardised volume threshold approximates the requirements of an appreciable proportion of customers, the Commission is likely to consider that such a standardised system of rebates may produce anti-competitive foreclosure effects.”

42. The Authority was of the preliminary view that the Share Deal was an individualised rebate scheme. As indicated above, RTÉ’s contracts with advertisers are on a line-by-line basis. In other words, RTÉ negotiates with advertising agencies (or directly with advertisers) specific terms of the contracts for each individual advertiser. Despite being an important factor, the share commitment was not the only factor to determine the total discount given to the advertisers. Other factors such as volume, deal history, target audience and optimisation potential also had a significant impact on the level of discount. All of these factors would be assessed by RTÉ during the course of the individual negotiations with the advertisers. Under the Share Deal, the final discount depended on the individual negotiations between RTÉ and each advertiser. This suggested that the Share Deal may have amounted to an individualised rebate system liable to have foreclosure effect on the market.

– (d) *The duration of the reference period*

43. According to the case law, the loyalty-inducing nature of a system increases in proportion to the length of the reference period on which the rebate applies (i.e., the longer the reference period, the more loyalty-inducing the target rebate scheme). In the *Michelin* case,¹⁷ a reference period of one year was sufficient for the rebate scheme to have loyalty-inducing effects. According to the Court:

¹⁶ This is the term used by some of the advertisers contacted by the Authority.

¹⁷ Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 95.

“[...] a quantity rebate system in which there is a significant variation in the discount rates between the lower and higher steps, which has a reference period of one year and in which the discount is fixed on the basis of total turnover achieved during the reference period, has the characteristics of a loyalty-inducing discount system.”

44. Therefore, the Authority was of the preliminary view that the length of the reference period under which the Share Deal operated (i.e., one year) was substantial and thus likely to have a loyalty-inducing effect.

45. RTÉ disputed the Authority’s assumption that the length of the contract was driven by loyalty-inducing intent, pointing to contextual factors such as (a) programme planning and commissioning is a long term process (6-9 months) and (b) TV advertisers plan their spending over their fiscal year.

– (e) *The market shares of competitors*

46. The case law¹⁸ suggests that the loyalty-inducing effects of a rebate scheme increase where the dominant undertaking holds a much larger market share than its competitors. A dominant undertaking with a market share significantly higher than its competitors generally constitutes an unavoidable trading partner in the market. This implies that customers will use alternative suppliers only for a limited portion of their purchases and such alternative suppliers would have to offer significantly higher rates of discounts in order to attract the dominant undertaking’s customers. In the *British Airways* case, the Court took the view that that:

“[...] the pressure exerted on resellers by an undertaking in a dominant position which granted bonuses with those characteristics is further strengthened where that undertaking holds a very much larger market share than its competitors (see, to that effect, Michelin, paragraph 82). It held that, in those circumstances, it is particularly difficult for competitors of that undertaking to outbid it in the face of discounts or bonuses based on overall sales volume. By reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market. Most often, discounts or bonuses granted by such an undertaking on the basis of overall turnover largely take precedence in absolute terms, even over more generous offers of its competitors. In order to attract the co-contractors of the undertaking in a dominant position, or to receive a sufficient volume of orders from them, those competitors would have to offer them significantly higher rates of discount or bonus”.
(Paragraph 75) (Emphasis added).

47. The information obtained during the Authority’s investigation suggested that RTÉ held a much larger market share than its competitors. The Authority was of the preliminary view that the position of RTÉ in the market enhanced the likely loyalty-inducing effects of the Share Deal. RTÉ disputed the Authority’s preliminary views on the relevant market and its position in that market.¹⁹

¹⁸ Case T-155/06, *Tomra v Commission*, OJ C 288, 23.10.2010, paragraph 269; Case C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331, paragraph 75.

¹⁹ In particular, RTÉ noted that the available market share data did not reflect the recent increase in advertising minutage for RTÉ’s competitors (an increase from 10 to 12 minutes per hour).

6. Efficiency Justifications

6.1 *Which efficiency justifications did firms put forward in these cases? If firms did not put forward a justification, why was this?*

48. During the investigation, RTÉ submitted that the Share Deal was objectively justified mainly for the following reasons:

- The Share Deal is required to sell advertising airtime in an efficient manner
- Discounts based on volume would not be appropriate
- The annual reference period under the Share Deal ensures efficient negotiations from the perspective of both RTÉ and advertisers

49. The Authority took the preliminary view that RTÉ did not present full and precise evidence of any objective justification or substantial efficiencies that would outweigh any anticompetitive effects with the precision required by the Guidance Paper. However, as stated earlier, at the point when the investigation was closed, the Authority had not come to a final view as to whether the Share Deal amounted to an abuse of a dominant position. Therefore, the Authority did not require RTÉ to substantiate any objective justification or efficiencies that would outweigh any anticompetitive effects.

7. Policy on investigating fidelity rebates

7.1 *How do you prioritise between different fidelity rebate cases? Are fidelity rebate cases more or less of a priority than predatory pricing or exclusive dealing cases? Why is this?*

50. Irrespective of the type of alleged conduct, due to the level of resources deployed in investigations the CCPC must determine its own priorities in relation to the exercise of its functions to make the most of these resources and get the best value for consumers, business and the economy. We therefore adopt prioritisation criteria, which reflect the CCPC's role as a public enforcement agency whose duty is to investigate possible competition law infringements in the public interest. The key considerations which we apply in selecting the cases that warrant full investigation are as follows:

- Level of economic and/or physical harm.
- Likely impact of the CCPC's action
- Strategic significance
- Risks, resources and costs

51. We balance the above criteria against the risks and resources involved in pursuing a case further.

52. All allegations are assessed on their individual merits. As such, when selecting which cases to investigate, the CCPC does not accord more or less priority to Fidelity Rebates than to other unilateral conduct cases.

7.2 *What role does the potential for price chilling effects play in case selection? How do you assess this risk?*

53. As shown above, the case selection policies of the CCPC do not specifically assess the potential for price chilling. However, the CCPC would carefully assess the potential that an intervention could result in price rises for customers.

8. *Complaint Initiation & Ex Post Assessment*

8.1 *Do you initiate your own inquiries into fidelity rebates or require a complaint? How do you guard against risks of gaming from rivals that prefer not to compete with a fidelity rebate scheme?*

54. The CCPC can initiate its own inquiries into an alleged breach of competition law or may do so following receipt of a complaint. The CCPC treats complainants as potential witnesses to competition law infringements. As a necessary investigative measure, we routinely take steps to establish the evidential quality of information provided by witnesses. This process typically takes place before any contact is made with the subject(s) of the allegation.

9. *Ex post Assessment*

9.1 *Have you conducted any ex-post assessment of the impact of fidelity rebate cases?*

55. We normally do not conduct an ex-post assessment. In the example given, should the terms of the Undertaking be breached by RTE, we would in the first instance rely on market participants to bring this to our attention.