

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

DAF/COMP/WD(2016)62
Unclassified

FIDELITY REBATES

-- Note by Alison Jones --

15-17 June 2016

This paper by Alison Jones was submitted as background material for Item 6 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

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

JT03398851

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

TABLE OF CONTENTS

ROUNDTABLE ON FIDELITY REBATES.....3

1. INTRODUCTION AND TERMINOLOGY3

2. LEGAL FRAMEWORK: RELEVANT PRESUMPTIONS (PER SE VERSUS RULE OF REASON)5

3. DIFFERENT APPROACHES TO FIDELITY REBATES8

 3.1 Presumption of Legality unless Below Cost Predatory Pricing.....8

 3.2 An As Efficient Competitor or Discount Attribution Price-Cost Test.....10

 3.3 An Effects-Balancing test.....11

 3.4 A Presumption of Illegality: Abuse by Object in the EU13

4. CONCLUSIONS16

ROUNDTABLE ON FIDELITY REBATES*

Note by Alison Jones

1. Introduction and Terminology

1. This paper sets out a short note on issues to be discussed in the OCED roundtable on fidelity rebates (16 June 2016), focussing on terminology and legal framework.

2. There is concern that, especially where a firm is dominant, low or discriminatory pricing practices may harm the competitive process and consumer welfare in certain circumstances. These practices include:

- Predatory pricing – where a firm with market power (or hopes of acquiring it), lowers its prices with the purpose of eliminating or disciplining its competitors¹ and, following the predatory siege, charges supra-competitive prices. Although there may be some sceptics² there is now generally ‘a broad consensus that, in certain circumstances, temporarily charging prices below a firm’s costs can harm competition and consumers’;³
- Selective price cuts – where above-cost price cuts are selectively targeted at specific categories of customers;
- Margin (or Price) Squeeze – where a vertically integrated firm supplies an upstream input to rivals at a price which when compared to the price the dominant firm charges on the downstream market does not allow an equally (or reasonably) efficient competitor sufficient margin to trade profitably;
- Rebates – see further below;

3. The practices described above may involve price discrimination alleged to foreclose competitors and to harm competition and consumers (primary line injury). Some antitrust systems, however, are also concerned about price discrimination which distorts competition between buyers who compete downstream (secondary line injury), see for example, in the US the Robinson Patman Act and Article 102(c) of the

* Professor of Law, King’s College London. See also e.g., A Jones and B Sufrin, ‘The European Way – reflections on the Intel judgment’ [2015] 1(1) *Competition Law & Policy Debate* 32 and A. Jones, ‘Distinguishing legitimate price competition from unlawful exclusionary behaviour: reconciling and rationalising the case-law’ in S Oliverira Pais (ed), *Competition Law Challenges in the Next Decade Euroclio Vol 94 (PIE Peter Lang, 2016), 123*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614413.

¹ The lower prices may be applied across the board or targeted at certain customers (those that would be most likely to switch their custom to a competitor) or in certain areas, see also selective price cuts.

² See eg RH Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978, reprinted with a new Introduction and Epilogue, 1993), 144-155 and J McGee, ‘Predatory Pricing Cutting: The Standard Oil (NJ) Case’ (1958) *Journal of Law and Economics* 137.

³ Department of Justice, *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act* (2008) (now withdrawn), 49, relying on eg P Areeda and DF Turner, ‘Predatory Pricing and Related Practices Under Section 2 of the Sherman Act’ (1975) 88 *Harv L Rev* 697, 697.

Treaty on the Functioning of the European Union (TFEU). The buyer which pays a higher price is at a competitive disadvantage vis-a-vis a buyer which pays a lower price.

4. Predatory pricing involves pricing below cost (the challenge is to the unconditioned price which is so low rivals cannot effectively compete). The other practices, however, may be problematic even where the dominant firm prices above overall cost. In the EU, three separate strands of case-law indicate that above cost pricing by a dominant undertaking can be abusive where: (1) in exceptional circumstances, price cuts are targeted at specific categories of customers; (2) the pricing practices can exclude equally (or reasonably) efficient competitors and produce anticompetitive effects (in particular, margin squeeze cases); and (3) certain rebates are used.

5. This paper focuses on rebates and, specifically fidelity (or loyalty) rebates. Rebates may be conditional on/ linked to achieving specified thresholds:

- **Exclusivity / fidelity/ loyalty rebates** – are conditional on purchasing exclusively (or nearly exclusively) from the seller (incentivise but do not contractually require exclusive purchasing/ dealing) or on purchasing a set percentage from the seller (sometimes referred to as *share of need, market share, share-based* rebates or rebates referencing rivals);
- **Quantity/volume rebates** – in contrast, are linked to the volume of purchases made (without reference to total purchases). Such discounts reward large buyers, and can be cost related. Quantity discounts may however operate like fidelity rebates, and have a loyalty-inducing or suction effect, particularly where they are linked to growth, are individualised and/or where they are retroactive (rather than incremental) (see further below); and
- **Growth rebates** – are dependent on the buyer growing its purchases.

6. Discounts may be standardised (when targets, available to all customers, are met) or individualised (where they are set for individual customers). Further, units of discount may be:

- **Retroactive/rolled-back/all unit/ first dollar rebates** – applied to all units purchased when the specified threshold is met; or
- **Incremental** – applied only to additional units once the threshold is met.

7. This paper focuses on single product fidelity discounts. It does not consider bundled discounts, granted on aggregated purchases of products belonging to different product markets, which may, like tying, foreclose single-product rivals.

8. In the EU, the General Court (the ‘GC’) in *Intel*⁴ distinguished between three different types of single product rebate which it stated are analysed in different ways under Article 102 TFEU:

- Quantity rebates;
- Loyalty or fidelity rebates which it referred to as exclusivity rebates⁵, such as those at issue in *Intel* itself⁶;

⁴ Case T-286/09, *Intel v Commission* EU:T:2014:547, para 75 (appeal pending, Case C-413/14 P) and Case 85/76, *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, para 90.

- Other conditional rebates, such as target rebates which are not directly linked to a condition of exclusivity or quasi-exclusivity but which may nonetheless have a ‘fidelity-building effect’.

2. Legal Framework: Relevant Presumptions (per se versus rule of reason)

9. A conundrum which every competition law system has to deal with is how to construct a test, or tests, to identify anti-competitive single firm pricing conduct and to distinguish it from hard-nosed price competition – competition on the merits. Most systems do not utilise a single test but adopt conduct-specific tests applicable, for example, to predatory pricing, margin squeeze and rebates respectively⁷. It is important, however, that such tests should be consistent with each other and with the objective underpinning the rules.

10. A first important issue is therefore to identify the core objective of the law⁸: a system which pursues a purely consumer welfare objective may devise different rules to one which pursues a broader set of objectives (for example, designed to prevent unfair methods of competition or to protect small businesses).

11. Although it has become accepted by the US courts that the Sherman Act is designed as a ‘consumer welfare prescription’⁹, the position is not so clear in all systems. In the EU, for example, the competition provisions were designed to put in place a system to ensure that competition in the internal market is not distorted¹⁰. This commitment to undistorted competition could, arguably, enshrine multi-faceted goals which permit non-competition, or public policy, factors to play an influential role in the law’s development¹¹. Indeed, even though for a number of years, the European Commission (the Commission) has articulated its clear view that the overarching goal of the competition laws is not to protect the process of competition as such (a process objective) but ‘to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources’¹² (an outcome

⁵ The Commission in its decision refers to these as ‘fidelity discounts within the meaning of the *Hoffmann-La Roche* case law’, see Case COMP/C-3/37.990 *Intel* [2009] OJ C 227/13, paras 922-923.

⁶ Case T-286/09, *Intel*, n 4, paras 125-137.

⁷ A number of tests have been proffered in the search for a coherent predictable and workable mechanisms for identifying all abusive conduct (such as the profit sacrifice test, the equally efficient competitor test and the consumer welfare effects test), but the truth seems to be that none of these are ideal. Although a perfect test in theory would be one that consistently and accurately condemns all, but only, conduct which leads to a net decrease in consumer welfare it seems that ‘[n]o such test exists in the real world’, H Pate, Testimony before the Antitrust Modernization Commission, 29 September 2005.

⁸ The identification of Article 102’s goal(s) is crucial to prevent Article 102 from ‘becoming a series of ad hoc and unpredictable rules ...’ see J Vickers, ‘Abuse of market power’ Speech to the 31st annual conference of the European Association of Research in Industrial Economics, Berlin, 3 September 2004.

⁹ *Reiter v Sonotone Corp* 442 US 330, 343 (1979). See also *NCAA v Board of Regents of University of Oklahoma* 468 US 85, 107–08 (1984).

¹⁰ See now, TEU, Art 3(3) and Protocol No 27 on the internal market and competition, annexed to the Treaty of Lisbon.

¹¹ Indeed, Art 120 TFEU specifically states that ‘the Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an *efficient allocation of resources*’ but no specific reference is made to an efficient allocation of resources in the EU competition rules.

¹² Commission Guidelines on the application of Art 81(3) [now Art 101(3) TFEU] of the Treaty (the ‘Art 101(3) Guidelines’) [2004] OJ C 101/97, para 13. The objective is to preclude conduct which will reduce competition in such a way that consumer welfare will be harmed – conduct liable to permit the relevant

objective),¹³ the case law of the EU Courts does not unambiguously endorse this approach. Rather, their judgments have placed emphasis on the need to protect not only the interests of consumers but the interests of competitors and the structure of the market and competition as such¹⁴; the function of the Treaty competition rules being ‘to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union¹⁵.’ This could suggest that importance is attached to competition as a mechanism, not simply for achieving consumer welfare and efficiency, but for ensuring the freedom to conduct a business and equal and undistorted access to the market which will result in variety and safeguard consumer choice¹⁶. Others, however, adhere to the view that changes to the structure of the market are important only in so far as they are likely to harm competition. ‘This focus on consumer harm gives orientation and consistency to competition law enforcement, something that cannot be expected from the goal of preserving a certain (not defined) structure of the market or the goal of protecting the competitive process itself¹⁷.’

12. A second question is how can the objective(s) be achieved; how can competition law identify and prohibit conduct that will thwart its goals? Because of the difficulty of measuring in any individual case how conduct affects competition, all competition law systems have to devise legal rules or standards aimed at distinguishing anticompetitive from pro-competitive conduct¹⁸. In the US, Federal Trade Commissioner Ohlhausen has set out an important reminder that

‘In shaping competition rules, we should aspire to promote predictability, fairness, and transparency in the law. The best way to accomplish these aims is to develop rules that are empirically grounded in economic efficiency while at the same time administrable by agencies and the courts.’¹⁹

13. In balancing these principles (predictability, fairness, transparency, accuracy and administrability) a trade-off generally needs to be made between, on the one hand, the application of more complex standards, requiring detailed factual and economic analysis, which are more difficult and costly to apply, both by undertakings and decision-takers, and less predictable and transparent and, on the other hand, application of clearer bright-line rules, requiring less sophisticated analysis and less emphasis on

entity(ies) to exercise market power, ‘the ability to maintain prices above competitive levels for a significant period of time or to maintain output in terms of product quantities, product quality and variety or innovation below competitive levels for a significant period of time’, *ibid*, para 25.

¹³ See L Peeperkorn, ‘Conditional pricing: Why the General Court is wrong in Intel and what the Court of Justice can do to rebalance the assessment of rebates’ (2015) 1 *Concurrences Journal* 43.

¹⁴ Case C-501/06 P, *Commission v GlaxoSmithKline Services Unlimited* [2009] ECR I-9291, para 63.

¹⁵ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011] ECR I-527, para 22.

¹⁶ W Wils, ‘The Judgment of the EU General Court in Intel and the So-Called ‘More Economic Approach’ to Abuse of Dominance (2014) 37(4) *World Competition: Law and Economics Review*, 16-17. See also Behrens, P., ‘The Ordoliberal Concept of ‘Abuse’ of a Dominant Position and its Impact on Article 102 TFEU’ in Nihoul, P., and Takahashi, I., *Abuse Regulation in Competition Law*, Proceedings of the 10th ASCOLA Conference (2015).

¹⁷ Peeperkorn, ‘Conditional pricing’, n 13, 48.

¹⁸ See eg, L Kaplow, ‘Rules Versus Standards: An Economic Analysis’ (1992-1993) 42 *Duke LJ* 556 (a rule entails an advanced determination of what conduct is permitted leaving only factual issues to be determined by the adjudicator whilst a standard leaves specification of both what conduct is permissible and factual determinations to the adjudicator 559-560).

¹⁹ Comments of M. Ohlhausen, FTC-DOJ Conditional Pricing Practices Workshop June 23, 2014.

expert economic evidence and which are therefore easier to administer and for firms to self-assess, but which may be less accurate in some cases²⁰.

14. Although therefore competition law frequently demands that decision-takers engage in intricate analysis to determine the effects of the conduct of a firm(s) in the legal and economic context in which it occurs (often referred to as a ‘rule of reason’ style analysis or an effects based or a consumer-welfare balancing approach), because of the complexity and time-consuming nature of such assessments, it may also allow for shortcuts to be taken which sidestep such a full analysis, in particular, in cases where anticompetitive effects are either very likely or very unlikely. For example presumptions of legality may be utilised as a safe-harbour for conduct unlikely to be problematic and presumptions of illegality used as a mechanism for clearly prohibiting, deterring, and facilitating prosecution of manifestly anticompetitive conduct²¹. Setting out a clear rule against obviously pernicious conduct may be considered acceptable as it eradicates the need for a claimant to prove, at cost, its adverse consequences.

15. In devising an appropriate test it is important to consider whether it might be either over-inclusive—so sometimes condemning legitimate business practices (creating a risk of false positives or ‘Type 1’ errors), and so potentially chilling procompetitive conduct which benefits consumers, or under-inclusive—allowing anticompetitive practices which harm consumers to escape antitrust prohibitions (creating a risk of false negatives or ‘Type 2’ errors).

16. Finally, context may be of importance. For example, the enforcement structure might have an impact on the choice of test adopted – it may influence the view of the rule’s administrability and the risk it is likely to create of false positives or negatives (whether the rules are enforced principally publicly or privately, whether public enforcement follows a judicial or administrative model, whether or not there is a jury trial and/or what the consequences of a violation might be – an injunction, a fine and/or damages (single or multiple)). In the US, the Supreme Court has, partly because of high levels of private litigation, become more fearful of wrongly condemning legitimate competition and so chilling aggressive competition, the very conduct the antitrust laws are designed to protect²². It has thus avoided ‘constructions of § 2 that might chill competition, rather than foster it²³’, stressed that ‘the cost of false positives counsels against an undue expansion of section 2 liability²⁴’ and has been keen to ensure that ‘unmeritorious’ private litigation is not encouraged. In so doing it has set the bar high in monopolization cases, even for public enforcers. Indeed, there is some speculation that the bar has now been set too high, shutting out injured parties and undermining the credibility of the law.

17. In the EU, in contrast, partly perhaps because of the special responsibility imposed on a dominant firm not to allow its conduct to impair genuine undistorted competition on the common market²⁵, there is concern that some of the tests developed to identify abusive practices are excessively broad²⁶ and/or unclear and that this may be chilling aggressive (low-cost) pricing. These types of anxiety triggered the

²⁰ See eg OECD Policy Roundtables: Resale Price Maintenance (2008), available at <http://www.oecd.org/daf/competition/43835526.pdf>

²¹ See Case C-67/13P, *Groupement des cartes bancaires v Commission* (CB) EU:C:2014:1958, Opinion of Advocate General Wahl.

²² *Matsushita Elec Industrial Co v. Zenith Radio*, 475 US 574, 594 (1986).

²³ *Spectrum Sports, Inc. v McQuillan*, 506 U.S. 447, 458-459 (1993).

²⁴ *Verizon Communications v. Law Offices of Curtis v. Trinko LLP* 540 US 398, 414 (2004).

²⁵ Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v Commission* [1983] ECR 3461, para 57.

²⁶ In particular, there is excessive reliance on presumptions of illegality, see further *infra* 3.D.

debate in the EU, actively engaged in by the Commission²⁷, on the goals of Article 102 and the nature of an exclusionary abuse of a dominant position which culminated in the Commission's publication in 2009 of 'Guidance on its Enforcement Priorities in Applying Article 82 [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings' (the 'Guidance Paper')²⁸. The Guidance Paper explains that the Commission will focus its resources only on cases where the exclusionary conduct of the dominant firm impairs effective competition by 'foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare'²⁹ and proposes tests for identifying such conduct. Although it is explicitly not intended to constitute a statement of the law – rather, in some areas, it proposes a different approach from that set out in the case law of the EU courts – some have hoped that it will trigger a gradual evolution in, and recalibration of, the jurisprudence of the EU courts³⁰.

3. Different Approaches to Fidelity Rebates

3.1 *Presumption of Legality unless Below Cost Predatory Pricing*

18. Most competition law systems accept that predatory pricing by a firm may infringe antitrust law and many adopt a price-cost test to identify unlawful predatory conduct and to distinguish it from competition on the merits. In the EU, for example, the Court of Justice (CJ) in *AKZO Chemie BV v Commission*³¹ appeared to draw on the debate sparked by Areeda and Turner's seminal article on predatory pricing to craft relatively clear and well-defined rules governing predation³². The court, clarifying that not all competition by means of price can be considered to be legitimate, held that:

- prices below average variable cost (AVC) are presumed to be predatory³³;
- prices above AVC but below average total cost (ATC)³⁴ are abusive where they form part of a plan for eliminating a competitor³⁵.

²⁷ See in particular, DG Comp Staff Discussion Paper on the Application of Article 82 [102 TFEU] of the Treaty to Exclusionary Abuses' DG Competition Staff Discussion Paper, December 2005, available at <http://ec.europa.eu/competition/antitrust/art82/index.html>.

²⁸ Guidance on the Commission's Enforcement Priorities in Applying Article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings (the 'Guidance Paper') C(2009) 864 final, [2009] OJ C 45/7.

²⁹ *ibid*, para. 19. Anticompetitive foreclosure is defined as 'a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers'.

³⁰ See eg, N Kroes, 'Preliminary Thoughts on Policy Review of Article 82' Speech at the Fordham Corporate Law Institute New York, 23 September 2005 ('As far as I am concerned, I think that competition policy evolves as our understanding of economic evolves. In days gone by, "fairness" played a prominent role in section 2 enforcement in a way that is no longer the case. I don't see why a similar development could not take place in Europe').

³¹ Case C-62/86, [1991] ECR I-3359.

³² Areeda and Turner, n 3.

³³ It thus sets out a presumption of illegality for predatory situations where the dominant firm is pricing below its AVC. This presumption is, arguably, justifiable as if the dominant firm is not covering its variable costs it makes no sense for it to be selling extra units at all the conduct has 'no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking', Case C-333/94 P, *Tetra Pak II* [1996] ECR I-5951, para 41.

19. In *Post Danmark*³⁶ the CJ reaffirmed this test³⁷ and stressed that Article 102 does not generally ‘seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market ... Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation³⁸.’

20. One view is that extreme caution must be exercised before above cost pricing, which does not infringe the predatory pricing test, is condemned. An overly-draconian rule against low pricing might deter beneficial low cost pricing and provide the wrong incentives for competitors to complain about the conduct of their more successful rivals; ‘[g]iven the enormous stake that antitrust has in low prices, and our extraordinary difficulties assessing predation claims’, under-deterrent rules in this area are preferable, even if it means that some anticompetitive conduct goes unchecked³⁹.³⁹ In *Barry Wright v Grinnel*⁴⁰,⁴⁰ for example, Judge Breyer in the First Circuit, warned that:

*a legal precedent or rule of law that prevents a firm from unilaterally cutting its prices risks interference with one of the Sherman Act's most basic objectives: the low price levels that one would find in well-functioning competitive market ... the antitrust courts' major task is to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging desirable price-cutting activity*⁴¹

21. Although recognising that above cost pricing might sometimes be anti-competitive his view was that law cannot always precisely replicate economists’ (sometimes conflicting) views and that prices exceeding incremental and average costs should not generally be unlawful⁴²:

For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rules that seek to embody every economic complexity and

³⁴ There has been considerable debate as to whether, if a price-cost based test is appropriate, AVC and ATC are the correct cost-benchmarks. AVC was adopted by Areeda & Turner, n 3. Although they preferred a test based on marginal cost (the increase in total cost of increasing output by one unit), they accepted that marginal costs are hard to determine in practice and that such a test would not be workable; AVC (variable costs being much easier to distil from accounting records) was thus adopted as a proxy.

³⁵ Case C-62/86, *AKZO v Commission* [1991] ECR I-3359, paras 71-74. Although the Court requires some further analysis of the strategy of the dominant firm where its prices are between AVC and ATC, it has not demanded proof that recoupment of losses is feasible after the predatory siege. On the contrary, it has held that ‘demonstrating that it is possible to recoup losses is not a necessary precondition for a finding of predatory pricing’, Case C-202/07P, *France Télécom SA v Commission* [2009] ECR I-2369, para 113.

³⁶ Case C-209/10, *Post Danmark v Konkurrencerådet*, EU:C:2012:172.

³⁷ ‘Indeed, to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term’, *ibid*, para 38.

³⁸ *ibid*, paras 21-22.

³⁹ See eg, H Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (Harvard, 2005), 161 and 172.

⁴⁰ 724 F.2d 227 (1st Cir 1983).

⁴¹ *Ibid*.

⁴² *ibid*, 236.

qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. Thus, despite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing, are economically justified, the courts have held them unlawful per se, concluding that the administrative virtues of simplicity outweigh the occasional "economic" loss⁴³.

22. There seems to be a weight of opinion, however, that refusing to accept that loyalty rebates which are above cost on all units sold might be illegal, will lead to under-inclusive rules in this area and an unacceptable level of false negatives especially where rivals cannot compete for the all sales⁴⁴. One suggestion is that, as in margin squeeze and/ or bundled discount cases in some jurisdictions, a modified price-cost or an as efficient competitor (AEC) test (differing from the predatory pricing rule which compares average price (after discounts) to the cost of all units sold to customer) could be applied to identify loyalty rebates capable of excluding as efficient competitors and/or to provide a safe harbour for those that are not.

3.2 *An As Efficient Competitor or Discount Attribution Price-Cost Test*

23. In the EU the Commission states in its Guidance Paper that, given that vigorous price competition is generally beneficial to consumers⁴⁵ and that conditional rebates may stimulate demand and benefit consumers⁴⁶, it will focus enforcement only where loyalty rebates are most likely to have anticompetitive foreclosure effects, both where: (i) rival suppliers cannot compete with the dominant firm to supply the entire demand of the customer (for example, where the customer must carry a certain percentage of the dominant firm's products because it is a 'must stock item' or where competitors are capacity constrained); and (ii) the discounts are designed to induce customers to purchase the rest (or most) of their other requirements from the dominant firm – in particular where it enables the dominant firm 'to use the "non contestable" portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the "contestable" portion of demand (that is to say the amount for which the customer may prefer and be able to find substitutes)⁴⁷.

24. Like margin squeeze and bundled rebates, the concern is thus about leverage; in this case not from one market to another but from one portion of the market to another. The Commission states in its Guidance Paper that it 'will normally only intervene where the conduct is capable of anti-competitive foreclosure of as efficient competitors⁴⁸' and advocates a test for identifying such conduct which involves calculation of the effective price for the contestable portion taking the rebate into account⁴⁹. The EU courts

⁴³ *ibid*, 234.

⁴⁴ See e.g., RH Lande, 'Should Predatory Pricing Rules Immunize Exclusionary Discounts' 2006 *Utah Law Review* 863.

⁴⁵ Guidance Paper, n 28, para 23.

⁴⁶ *ibid*, para 37.

⁴⁷ *ibid*, para 39.

⁴⁸ *ibid*, para 23.

⁴⁹ *ibid*, paras 40-47 (to determine whether loyalty rebates are using the non-contestable portion of the dominant firm's supply as leverage to decrease the price in the contestable portion). Although the Commission proposes use of the AEC test, it accepts that even if 'the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti-competitive foreclosure ...' which includes, the position of the dominant undertaking and its competitors, the conditions of the relevant market, the position of

have not endorsed this approach, however. Rather, in *Intel* the GC rejected the argument that an AEC test should be applied to determine whether loyalty rebates are abusive, holding that such a test was neither necessary nor dispositive (if passed) in an exclusive rebates case. On the contrary, it considered that anticompetitive foreclosure may occur even if the price/cost test is satisfied (on the basis that the AEC test shows impossibility to match, not absence of foreclosure effect); ‘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 difficult⁵⁰.’ Further, although in the US the Antitrust Modernization Commission proposed⁵¹, and the Ninth Circuit in *Cascade Health Solutions v PeaceHealth*⁵² adopted, a discount attribution test in the context of bundled rebates (considering whether after allocating the full amount of the discounts given by the defendant to the competitive product(s), the resulting price of the competitive product(s) is below the defendant’s incremental cost to produce them (the Ninth Circuit used AVC as an appropriate measure of the defendant’s incremental costs)), no US court has done so in the context of single-product loyalty rebates⁵³.

3.3 *An Effects-Balancing test*

25. Not all agree therefore that adopting a price-cost test provides an ideal mechanism for distinguishing anti from procompetitive use of rebates or that it would provide an easily administrable rule. In many cases such a test may prove fiendishly difficult and impracticable to apply (especially given the need to ascertain the non-contestable and contestable shares of the market)⁵⁴; indeed, application of the test appeared to present acute problems for the Commission in *Intel*, even when applying it *ex post*⁵⁵. In

customers or input suppliers, the extent of the allegedly abusive conduct, possible evidence of actual foreclosure and direct evidence of any exclusionary strategy, *ibid*, para 27

⁵⁰ Case T-286/09, *Intel*, n 4, para 150 (‘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. ... However, a positive result means only that an as-efficient competitor is able to cover its costs That does not however mean that there is no foreclosure effect. The mechanism of the exclusivity rebates, ..., is still capable of making access to the market more difficult for competitors of the undertaking in a dominant position, even if that access is not economically impossible ...). See also Case C-549/10 P, *Tomra* EU:C:2012:221, para. 81 and Case C-23/14 P, *Post Danmark II* EU:C:2015:651, para. 52.

⁵¹ Proposing a three-part test to identify anticompetitive bundled rebates. The plaintiff to show: (1) after allocating all discounts or rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product; (2) the defendant is likely to recoup its short-term losses; and (3) the bundled discount or rebate program had had or is likely to have an adverse effect on competition, Antitrust Modernization Commission, Report and Recommendation (Washington, 2007) 99, available at, http://www.amc.gov/report_recommendation/introduction.pdf. The AMC considered that such a test would ensure that bundled rebates would be prohibited only if they excluded *equally efficient* competitors, would provide clarity for business and bring the law into line with *Brooke Group*.

⁵² 515 F.3d 883 (9th Cir. 2008) (rejecting the defendant’s argument that an aggregate discount rule should be applied (that the rebates should be condemned only if the discounted price of the entire bundle did not exceed the bundling firm’s incremental cost of producing the entire bundle). Notably, unlike the AMC, the court did not require the plaintiff to go further and also prove that the defendant would recoup its short-term losses.

⁵³ Note by the United States, Roundtable on Fidelity Rebates 15-17 June 2016 DAF/COMP/WD(2016)20, para. 17; see *Eisai Inc v Sanofi-Aventis US LLC* (3d Cir, 2016) (declining to dismiss the action under the price-cost test applied in predatory pricing) and *Masimo Corp v Tyco Health Care Group* (9th Cir, 2009)

⁵⁴ But see Peeperkorn, ‘Conditional pricing’, n 13.

⁵⁵ J Jacobson, ‘A Note on Loyalty Rebates’ *theantitrust source* June 2010 1.

addition, some have argued that such an approach does not fully reflect the different nature of the exclusionary conduct in loyalty rebates cases; in such cases price is not used as the sole mechanism of excluding competitors (through lowering prices below cost as in predation cases) but as a means for encouraging (or mandating) exclusive dealing with the dominant firm and raising their equally efficient (or reasonably (or potentially equally) efficient) rivals' costs of entry, by preventing them from entering the market at an efficient scale and leading them to reduce output and raise prices (so permitting the dominant firm to raise or maintain its price and harm consumers)⁵⁶. A price-cost test is arguably not appropriate where the rebates amount to de facto exclusive dealing with the potential for substantial foreclosure effect and may not accurately predict consumer impact as below-incremental cost pricing is not necessarily required for the strategy to be successful⁵⁷. Rather, harm may occur because rivals 'are never given an opportunity to compete, despite their ability to offer products with significant customer demand', *ZF Meritor LLC v Eaton Corp*, 696 F3d 254 (3d Cir. 2012), 45.

26. Arguably therefore there may be good reasons for the EU and US courts not having adopted a price-cost test in this area.

*'The suggested test compares the defendant's marginal cost to an implicit price calculated by allocation all of the discount a customer receives to just the "contestable volume"—what the defendant risks losing absent the loyalty discount. The discount-attribution test may prove difficult to apply in single-product cases due to complications in determining the contestable volume of sales and is unlikely to shed much light on the ultimate question of competitive effect.'*⁵⁸

27. An alternative might be to conduct an effects-based assessment similar to that proposed by the CJ in *Delimitis v Henninger Bräu*⁵⁹ in the context of Article 101. In this case, the CJ stressed that, given the procompetitive explanations for exclusive dealing arrangements and the potential advantages that they produced for suppliers and resellers, they could not be held to have as their object the restriction of competition (within the meaning of Article 101(1)); a careful market analysis had therefore to be adopted to determine whether the effect of the exclusive arrangements is to restrict competition by foreclosing access to the market. This requires an assessment of whether there is a concrete possibility for new competitors to enter the market, or for existing competitors to expand, taking account of the number and size of the producers on the market, the existence of networks of agreements, the saturation of the market, and brand loyalty, etc.

28. In the US, some courts have taken the view that above-cost price cuts are not per se legal where it is not the price that operates as the exclusionary tool but where the loyalty discounts operate like de facto exclusive dealing, sufficient to allow a jury to determine whether or not it produces a substantial foreclosure effect⁶⁰. In *Sanofi*⁶¹, for example, the Third Circuit considered whether Sanofi's conduct, as a

⁵⁶ See eg, TG Krattenmaker & SC Salop, 'Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price' (1986) 96 *Yale LJ* 209 and SC Salop, 'Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard' (2006) 73 *Antitrust LJ* 311.

⁵⁷ See e.g., Salop *ibid*, Jacobson, and JD Wright, 'Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts' 3 June 2013.

⁵⁸ Note by the United States, Roundtable on Fidelity Rebates 15-17 June 2016 DAF/COMP/WD(2016)20, paras. 17-18.

⁵⁹ Case C-234/89, [1991] ECR I-935.

⁶⁰ See eg, *ZF Meritor LLC v Eaton Corp*, 696 F3d 254 (3d Cir. 2012) and *Eisai v Sanofi Aventis US LLC* (3d Cir, 2016)

⁶¹ *ibid*

whole operated as a de facto exclusive dealing arrangement resulting in substantial foreclosure of the relevant market and in likely or actual anticompetitive effects, including reduced output, quality or increased price. In particular, did the dominant firm's conduct leverage its position as a dominant supplier to force customers into long term arrangements, rendering customer choice meaningless?

29. Exclusive dealing in the EU is, however, unlike the position in the US, where courts tend to apply similar rule of reason style analysis to exclusive dealing arrangements under section 1 and section 2 of the Sherman Act and section 3 of the Clayton Act⁶², treated in fundamentally different ways depending upon whether it is adopted by a dominant or non-dominant firm (see Annex 1)⁶³. Where a firm is not dominant a permissive approach is adopted, reflecting such agreements' scope to generate efficiencies and inability to restrict competition in many instances. If the supplier's and buyer's market shares do not exceed 30% of the relevant market, a presumption of legality applies so long as the non-competition provision⁶⁴ does not last longer than five years⁶⁵. Even where these market share thresholds are exceeded, *Delimitis*⁶⁶ requires a careful market analysis to be conducted. In contrast, where a firm is dominant, the CJ held in *Hoffmann-La Roche* that the anticompetitive effects of the conduct are assumed.

3.4 *A Presumption of Illegality: Abuse by Object in the EU*

30. Although unlike Article 101, Article 102 does not explicitly permit presumptions of illegality to be applied to conduct (it simply prohibits any 'abuse' of a dominant position not abuses by object or effect), the approach adopted under Article 102 mirrors that taken under Article 101; so presumptions are utilised in practice. In its Guidance Paper, the Commission recognises that, in the context of Article 102, there is no need for a demonstration of anticompetitive effects in the case of conduct 'that can only raise obstacles to competition and ... creates no efficiencies'⁶⁷; such practices are, by their very nature, abusive.

31. Although few would quibble with the fact that cartel activity is assumed to be anticompetitive/ to restrict competition (in *Groupement des cartes bancaires*, the CJ recognised that since horizontal price fixing by cartels, 'may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1)], to prove that they have actual effects on the market ...'⁶⁸), the question of whether, and if so when single firm conduct, which may conceivably be designed to achieve efficiencies, should be assumed to be anticompetitive is much more controversial. In the US, the rule of per se illegality is applied

⁶² *ibid*

⁶³ See P Ibáñez Colomo, 'Intel and Article 102 TFEU Case Law: Making Sense of a Perpetual Controversy' LSE, Law, Society and Economy Working Papers 29/2014.

⁶⁴ Which includes an obligation on the buyer to purchase from the supplier more than 80 % of the buyer's total purchases of the contract goods or services, see Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, art 1(d).

⁶⁵ See Reg 330/2010 *ibid*. Where the parties market shares do not exceed 15% it is unlikely that an exclusive dealing commitment, however, long it lasts will be found to restrict competition appreciably, see the Commission's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C291/01.

⁶⁶ Case C-234/89 *Delimitis*, n 59.

⁶⁷ Guidance Paper, n 28, para 22.

⁶⁸ Case C-67/13P, CB EU:C:2014:2204, para 51. See also (in the US) *Northern Pac R Co v United States*, 356 US 1, 5 (1958).

sparingly and ‘rule of reason’ is the presumptive and prevailing standard. Similarly, in *Groupement des Cartes Bancaires* the CJ stressed that, in the context of Article 101, the category of agreements restrictive of competition by object must be interpreted restrictively and applied only to situations where an agreement inherently reveals a ‘sufficient degree of harm to competition’⁶⁹; the category should be confined to conduct which by its very nature can be seen to be harmful to the proper functioning of normal competition. As the Advocate General recognised, best practice suggests that any such rule or presumption should be drawn on the basis of the objectives underpinning it if it is to yield minimal error costs (especially from over-inclusive presumptions of illegality which may lead to false positives).

32. In 1979 in *Hoffmann-La Roche* the CJ laid down a rule that both exclusive dealing obligations and loyalty (or fidelity) rebates are abusive (unless objectively justified).

*An undertaking which is in a dominant position on the 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 the said undertaking abuses its dominant position within the meaning of Article [102], whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the said 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 fidelity rebates, that is to say discounts conditional on the customer’s obtaining all or most of its requirements—whether the quantity of its purchases be large or small—from the undertaking in a dominant position*⁷⁰.

33. Over the years this approach has caused much controversy⁷¹. Critics argue that the presumption is not justified as, (i) it is based only on the potential for such loyalty-inducing rebates to foreclose the dominant undertaking’s competitors and to restrict customers’ freedom to choose their source of supply; (ii) it does not require an examination of whether competition will be distorted through any foreclosure of competitors’ access to the market; (iii) it ignores the efficiency rationales that a voluminous literature records might underpin them (and which are recognised in the Article 101 jurisprudence); and, consequently, (iv) because it is not empirically grounded in economics⁷² or on a calculated study of whether such rebates are manifestly anticompetitive, its application creates a significant risk of false positives and an ‘intolerable risk’ of chilling legitimate procompetitive price competition⁷³.

34. In the lead up to the GC’s judgment in *Intel* there was considerable speculation as to whether the GC might consider ‘modernising’ and developing the law governing loyalty rebates as the Commission has

⁶⁹ Case C-67/13P, CB n 68, para 58. See also Peeperkorn, n 13.

⁷⁰ Case 85/76, *Hoffmann-La Roche* n 4, para 89. See also e.g., Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389 and Case T-57/01 *Solvay SA v Commission* [2009] ECR II-4621, aff’d Case C-109/10 P [2011] ECR I-10329

⁷¹ See eg Peeperkorn, n 13 and J Venit, ‘Case T-286/09, *Intel v Commission* – the Judgment of the General Court: All Steps Backward and No Steps Forward’ (2014) 10 *European Competition Journal* 203. Contrast, R Whish, Editorial ‘*Intel v Commission*: Keep Calm and Carry on!’ [2014] *Journal of European Competition Law & Practice* and Wils, n 16.

⁷² See Case C-67/13P CB, n 21, Opinion of Advocate General Wahl.

⁷³ The presumption can be rebutted only by demonstrating that the conduct is objectively necessary or that it is counterbalanced by economic efficiency justifications, and cannot be satisfied through arguing that no anticompetitive effects in fact occurred (as *Intel* sought to do by adducing evidence that its competitor had flourished despite the allegedly abusive rebates). The GC’s riposte was that it may have done even better in the absence of the rebates, Case T-286/09, *Intel*, n 4, para 186. This argument is impossible to rebut.

done in its Guidance Paper⁷⁴. Indeed, in assessing the loyalty rebates in its decision in Intel, the Commission as well as applying the principles derived from the existing case law, also applied an AEC test, reflecting the methodology set out in its Guidance Paper and carefully considered the factual context within which the rebates were granted. The Commission's conclusion was that, on either basis, Intel should be sanctioned for abuse of a dominant position and imposed a fine of €1.06 billion, the largest ever imposed on a single undertaking.

35. The GC in Intel did not however retreat from the orthodox approach to loyalty rebates. Rather, it upheld the Commission's decision, making it clear that it did so on the basis of established case law. It held that exclusivity (or loyalty) rebates, because of their innate capability of tying customers, do not have to be examined in context before concluding that, in the absence of objective justification, they infringe Article 102⁷⁵. Because it concluded that such rebates are 'inherently capable' of making access to the market more difficult for competitors⁷⁶, it held that the amount of the rebate⁷⁷, the short duration of the supply contracts⁷⁸, the (small) portion of the market concerned in the relevant conduct⁷⁹, and the fact that the rebates were granted in response to customer's requests and buying power⁸⁰, were all irrelevant. It also rejected the arguments that in respect of one customer (HP) the rebates did not qualify as 'exclusive' as they covered only 28 per cent of HP's total requirements for x86CPUs, on the grounds that the rebates did cover 95 per cent of its requirements in a certain market segment⁸¹ and that an AEC test should be applied⁸².

36. The GC rather equated loyalty rebates with de facto exclusive dealing and rejected the argument that it should harmonise its treatment of exclusivity under Article 102 and Article 101. It distinguished the situation of a dominant undertaking offering exclusivity conditions from that of a supplier operating on a 'normal competitive market'⁸³ holding that the supplier in a dominant position is to a large extent an 'unavoidable trading partner'; consequently its grant of an exclusivity rebate makes it structurally more difficult for a competitor to submit an offer at an attractive price and gain access to the market. Although therefore the GC did, using language adopted in the Guidance Paper, recognise the risk that the grant of exclusivity rebates would enable the undertaking in a dominant position to use its economic power on the non-contestable share of the demand of the customer as leverage to secure the contestable share, it assumed that such a result would ensue so depriving customers of their right to choose and making access to the market more difficult for a competitor⁸⁴. In so ruling, the GC⁸⁵ placed emphasis on the notion of the

⁷⁴ Case T-286/09, Intel, n 4, para 76.

⁷⁵ *ibid*, paras 76-77, 86.

⁷⁶ *ibid*, para 179.

⁷⁷ *ibid*, paras 108-109.

⁷⁸ *ibid*, para 111.

⁷⁹ *ibid*, paras 116-124.

⁸⁰ *ibid*, paras 138-139.

⁸¹ *ibid*, paras 125-137. In contrast it held that quantity rebates are deemed to reflect gains in efficiency and economies of scale and are presumptively legal (para 75 and Case 85/76 *Hoffmann-La Roche*, n 4, para 90) and that other conditional rebates, such as the target rebates are unlawful only if it is shown by a consideration of all the circumstances that they are capable of restricting competition – proof of actual effects is not necessary, *ibid*, paras 78 and 103.

⁸² See n 50 and text.

⁸³ Case T-286/09, *Intel*, n 4, para 89.

⁸⁴ *ibid*, para 93.

‘special responsibility’ of dominant undertakings, the cornerstone of the jurisprudence on Article 102 since *Michelin I*⁸⁶. Dominant undertakings have a responsibility not to allow their conduct to impair genuine undistorted competition and are therefore under a positive duty towards the competitive process which puts them in a different position, not only to non-dominant undertakings, but also to firms subject to section 2 of the Sherman Act.

37. The GC also did not consider that it was acting inconsistently with other judgments dealing with above cost pricing under Article 102. Rather it distinguished case law applying the AEC test in the context of both selective low pricing (*Post Danmark*), and margin squeeze (*Deutsche Telekom and TeliaSonera*) on the basis that exclusivity rebates are about rebates which are conditional on exclusive, or quasi-exclusive supply, not pricing. ‘Different treatment of exclusivity rebates and pricing practices is justified by the fact that, unlike an exclusive supply incentive, the level of a price cannot be regarded as unlawful in itself⁸⁷’.

38. As Intel has appealed to the CJ, many of these issues will have to be considered by that Court, including the question of whether the GC applied the correct legal standard by concluding that the question was inherently capable of restricting competition without any need to consider all of the relevant facts and circumstances surrounding it and likely or actual effects.

4. Conclusions

39. The literature indicates that although loyalty rebates may form part of the normal competitive process and benefit consumers even when imposed by dominant firms (by reducing prices and costs of production or increasing output), they can have anticompetitive effects even where they are above cost, particularly if customers must carry some of their needs from the dominant firm and the rebates are structured to encourage customers to purchase all or nearly of the rest of their requirements from it.

40. The question to be addressed therefore is how problematic rebates can be identified, prohibited and deterred without chilling beneficial price-cutting, the essence of competition.

41. In the EU, a presumption of illegality is applied to exclusivity rebates which are, consequently, prohibited unless objectively justified by the defendant; it is assumed that the dominant undertaking is an unavoidable trading partner and that the rebates will enable it to leverage its power in the incontestable portion of the market to deprive consumers of choice. The GC’s decision in *Intel* not to modernise the law governing loyalty rebates has been a disappointment to many. The judgment and the rule it supports has been criticised for a number of reasons. In particular it has been argued that it is not grounded in economic efficiency and it is unreasonable to exclude all analysis of anticompetitive effect; it operates in practice as a rule of per se illegality, given the lack of clarity as to how the presumption can be rebutted; it is inconsistent with other lines of jurisprudence; it is against the trend of greater effects analysis (persistently championed by the Commission in its speeches and guidelines); and entails a high risk of false positives especially for firms who do not have a significant degree of market power. The case is currently on appeal to the CJ.

42. If an application of a presumption of illegality is not applied in rebates cases, it must be determined how an administrable test may be put in place to identify anticompetitive rebate arrangements. A price-cost test may be intuitively attractive as in theory at least they are reasonably easy to apply. Further in some jurisdictions such an approach might bring consistency between other lines of case-law dealing

⁸⁵ *ibid*, para 90

⁸⁶ Case 322/81 *Michelin*, n 25, para 57.

⁸⁷ Case T-286/09, *Intel*, n 4, para 99.

with predation, margin squeeze and/or bundled rebates. The reality, however, is that price-cost tests are complex to apply even in more straight forward predation, margin squeeze or bundled rebates cases, and are extremely difficult to apply in rebates cases given the need to assess the contestable portion of demand. As well as creating a risk of error, they may not therefore be the ‘panaceas of administrability’ once thought⁸⁸.

43. A body of opinion now seems to support the view that a more fact-specific rule of reason analysis is required, in particular to determine whether loyalty rebates constitute de facto exclusive dealing foreclosing rivals, preventing rivals from achieving minimum efficient scale and/or raising rivals’ costs. Some US courts have favoured this approach. This would seem to require an analysis of whether the exclusivity rebates operate as de facto exclusive dealing and whether the (de facto) exclusive dealing will foreclose rivals or raise their costs.

⁸⁸ Comments of M. Ohlhausen, FTC-DOJ Conditional Pricing Practices Workshop June 23, 2014.

Annex 1				
	Presumption of legality		Analysis of anti- and procompetitive effects required*	Presumption of illegality**
<i>Supplier's Market Shares</i>	<i>0-15%</i>	<i>16-30%</i>	<i>31-39%</i>	<i>40-100%</i>
Assessment of exclusive dealing contract under EU Competition Law	Unlikely to restrict competition appreciably if buyer's market share also does not exceed 15%	Even if the agreement infringes Article 101(1), presumed to satisfy Art 101(3) if buyer's market share does not exceed 30% and duration of agreement does not exceed 5 years	Market analysis must be undertaken to determine if agreement has as its effect the restriction of competition	Where firm is dominant, it abuses its dominant position (unless the conduct is objectively justified)

* A finding of dominance is unlikely but not impossible at market shares of less than 40%

** If the supplier is found to hold a dominant position