INTERNATIONAL COMPETITION NETWORK

Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws

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The Unilateral Conduct Working Group

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Executive Summary

This paper was prepared by the ICN Unilateral Conduct Working Group (UCWG) for the 8th Annual Conference of the ICN in June 2009. This year, the Working Group continued its work on the analysis of unilateral conduct by examining tying and bundled discounting, and single-product loyalty discounts and rebates. For each practice, the group gathered information through a questionnaire.[1] This paper on loyalty discounts and rebates is based on the responses of competition agencies and non-governmental advisors (NGAs) covering thirty-four jurisdictions.[2]

Most responding agencies stated that their competition laws do not specifically define loyalty discounts and rebates. The agencies define loyalty discounts and rebates much like the questionnaire did – discounts or rebates on units purchased of a single product, conditioned on the level or share of purchases. Some agencies highlighted that loyalty discounts and rebates condition discounts on loyal purchasing behavior; in other words, customers receive the discount only if their purchases exceed a certain threshold. A few agencies define the term to cover only discounts or rebates that apply to *all* units of the customer's purchases of the product.

Many agencies indicated that single-product loyalty discounts and rebates are considered a legitimate form of price competition and are generally procompetitive. While loyalty discounts and rebates can create efficiencies and can benefit consumers through lower prices, there is also general agreement that when exercised by dominant firms or firms with substantial market power, they have the potential to cause anticompetitive harm in certain circumstances. Given the potential benefits to consumers from loyalty discounts and rebates, several responses expressed a cautious approach to enforcement.

Many responses acknowledged a lack of experience in evaluating single-product loyalty discounts and rebates. During the past ten years, responding agencies brought approximately 45 cases in which a violation was established. Thus, while the responses and discussion of some agencies that contributed to this report are based on the experience and rulings in cases, a number of agencies' responses were based largely on their policy views and how they likely would assess such conduct. A summary of the key findings drawn from the responses is set out below.

The Role of Price-Cost Tests

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[1]The questionnaire and responses are available at http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/questionnaire.

[2] Responses were received from agencies in thirty-four jurisdictions: Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Croatia, Czech Republic, Denmark, European Union, France, Germany, Hungary, Ireland, Israel, Italy, Jamaica, Japan, Jersey, Korea, Lithuania, Mexico, Netherlands, Poland, Romania, Russia, Serbia, Singapore, South Africa, Switzerland, Taiwan, Turkey, United Kingdom, and United States (The references to US DOJ throughout this report are based on its November 2008 questionnaire response and do not necessarily reflect DOJ's current views.). Eight responses were received from NGAs. Barbosa, Müssnich & Aragão Advogados (Brazil), Damien Geradin (EC), Gianni, Origoni, Grippo & Partners (Italy), Paul Lugard and Martin Jongmans (Netherlands), Stoica & Associates (Romania), Hoffet, Meinhardt, Venturi (Switzerland), ABA Section of Antitrust Law's Unilateral Conduct Committee (United States).

Many agencies indicated that they would use price-cost tests to evaluate the legality of loyalty discounts and rebates. Among the agencies that use price-cost tests, some use a predatory pricing analysis to assess loyalty discounts and rebates, while others use price-cost test to assess whether the loyalty discount arrangement forecloses competitors by limiting their opportunities to compete for sales. Several of these latter jurisdictions stated that price-cost comparisons are one factor, among others, in their assessment of whether loyalty discounts and rebates have an anticompetitive effect.

The Role of Foreclosure Analysis

Agencies stated that loyalty discounts and rebates can be anticompetitive in certain circumstances. Several agencies stated that the discounts can be anticompetitive if they effectively foreclose a large share of the relevant market such that they exclude rivals or act as a substantial impediment to entry and/or expansion.

Presumptions and Safe Harbors

Given the importance of price cutting to vigorous competition, almost all agencies stated that there are no circumstances under which a firm's use of loyalty discounts and rebates is presumed illegal. Rather, agencies analyze the impact of the conduct on competition. No agency reported having a safe harbor from a finding of liability. However, a few agencies explained that they would be less likely to take enforcement action if the price is above their relevant cost benchmark.

Intent

The majority of responses indicated that anticompetitive intent is not required, but is often considered a relevant factor, particularly in assessing competitive effects. Agencies in a few jurisdictions may consider intent when establishing fines.

Justifications and Defenses

Many jurisdictions accept as a justification that single-product loyalty discounts and rebates may lead to efficiencies. Some agencies take the position that the actual efficiencies may depend on the type of single-product rebate (e.g., rebate schemes with individualized volume targets may be less likely to achieve the same efficiencies as those achieved with standardized volume targets). Some agencies accept a meeting competition defense under certain strict conditions.

Some agencies stressed that justifications and defenses must have an objective basis. Benefits that are purely speculative or that would arise only in the distant future are disregarded. Most agencies agree that, while it is up to the agency to show anticompetitive effects, the firm has the burden of proving efficiencies.

I. Introduction

A. Definition of Loyalty Discounts and Rebates

Most responding agencies stated that their competition law does not specifically define loyalty discounts and rebates. In practice, agencies define them as discounts or rebates on units purchased of a single product, conditioned upon the level or share of purchases.[3]

According to the European Commission, what characterizes single product loyalty discounts and rebates is their conditionality — they are conditional on the customers' engaging in loyal purchasing behavior. Customers are given a discount or rebate if their purchases over a defined reference period exceed a certain threshold. Discounts or rebates may be granted on all purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates).

Agencies in seven jurisdictions provided further details of the definition of loyalty discounts and rebates used in their jurisdictions.[4] For example, the U.S. antitrust agencies use a narrower definition, referring only to offering discounts or rebates on *all* units of the customer's purchases (e.g., purchasing 100 or more units results in a 10 percent rebate on all units purchased) rather than also including in the definition those discounts or rebates that apply *only* to units beyond the threshold (e.g., purchasing 100 units results in a 10 percent discount on all additional units). Israel's definition includes a discount conditioned on the customer's purchasing all or a defined portion of its requirements from the monopolist and a target discount whereby the customer agrees to purchase a certain quantity during the following year.

A few agencies did not provide a definition of loyalty discounts and rebates.[5] For example, the Brazilian agency explained that the concept of loyalty discounts and rebates is not defined in their legislation, nor has the agency dealt with any such cases.

B. Policy Considerations

Many responding agencies indicated that single-product loyalty discounts and rebates are common in their jurisdictions.[6] For example, the response from the Taiwan Fair Trade Commission states: "Loyalty discounting is a common strategy that a number of

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[3] Those of Belgium, Bulgaria, Canada, Chile, Colombia, Croatia, Czech Republic, Denmark, European Union, France, Germany, Hungary, Ireland, Italy, Jamaica, Jersey, Lithuania, Netherlands, Poland, Romania, Russia, Serbia, South Africa, and United Kingdom.

[4] Those of Israel, Mexico (the statutory definition in Mexico refers to granting discounts offered as incentive for suppliers or distributors to engage in exclusive contracts under the condition of not using, acquiring, selling, commercializing or supplying the products or services produced, distributed or commercialized by a third party), Singapore (guidelines include reference to fidelity discounts defined as schemes where discounts are conditioned on buyers making all or a large portion of their purchases from the dominant firm), Switzerland, Taiwan (defined with respect to the telecommunications industry as discounts offered to customers that are accompanied by provisions prohibiting the customers from switching trading counterparts, or the offer of large discounts to customers who are more likely to switch trading counterparts to prevent such switches), Turkey (offering discounts on the condition that the customer obtains all purchases or at least an important part of its purchases from the dominant seller and it does not buy from the seller's rivals), and United States.

[5] Those of Brazil, Japan, and Korea (no statutory definition).

[6] Those of Colombia, Chile, Croatia, Germany, Hungary, Italy, Poland, Singapore, Taiwan, and United States. But see agency responses from Bulgaria and Belgium.

enterprises employ to compete with their rivals." The Hungarian authority states: "Loyalty discounts and rebates are common business practices in Hungary."

Likewise, many responses noted that loyalty discounts and rebates are considered a legitimate form of price competition and generally procompetitive.[7] The Canadian Competition Bureau's response states that, "in general, practices that lower prices to consumers are pro-competitive. Firms are encouraged to compete on price, in addition to quality, choice, etc. . . . Low prices are generally a hallmark of competition and a benefit to consumers." According to the U.S. ABA Antitrust Section's Unilateral Conduct Committee, loyalty discounts and rebates are very common in the United States and can benefit consumers by reducing prices and increasing output, leading to more efficient resource allocation even when offered by a dominant firm. The response from the competition agency in Colombia suggests that loyalty discounts and rebates are generally procompetitive commercial strategies used by economic agents – with or without a dominant position – as incentives to increase their volume of sales of a specific product, promoting efficiency and benefiting consumers.[8] The French Competition Authority states that the assessment of loyalty discounts and rebates must recognize that practices contributing to vigorous price competition are very positive for consumers.

While loyalty discounts and rebates can create efficiencies and benefit consumers, there is also general agreement that when exercised by dominant firms or firms with substantial market power, they can cause anticompetitive harm in certain circumstances. The Canadian Competition Bureau's response explains that loyalty discounts and rebates "should not be discouraged, but for when they lower prices to predatory levels or have an exclusionary or disciplinary effect, the firm offering the rebates was dominant (where dominance might result from the anticompetitive act) and competition was substantially lessened or prevented as a result of the offering of the loyalty rebate scheme." In the Russian Federal Antimonopoly Service response, loyalty discounts are generally considered to be procompetitive; however, they may have anticompetitive effects if used "for predatory pricing (restrictive practice) or price discrimination (exploitative practice) purposes."

The German Bundeskartellamt stated that single-product loyalty discounts and rebates should be analyzed by focusing on whether they are capable of producing a loyalty enhancing "suction effect," which may lead to negative effects on competition (e.g., foreclosure, by maintaining or raising barriers to entry).[9] The Bundeskartellamt adds that, consequently, the analysis should not be limited to examining whether the discount amounts to predatory pricing because that approach may risk missing loyalty discounts that lead to prices that are not predatory but may nevertheless harm competition. The Chilean competition agency had concerns that loyalty discounts and rebates could be an

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[7] See agency responses from Canada, Chile, Colombia, France, Hungary, Italy, Mexico, Poland, Russia, Romania, Singapore, United Kingdom, and United States. However, some jurisdictions contend that such discounts by a dominant firm are generally anticompetitive and may result in distortion of competition and exclusion of competitors. See agency responses from Belgium and Bulgaria.

[8] See also agency response from Brazil (volume discounts that increase depending on the quantity purchased have an economic rationale).

[9] I.e., the discount arrangement provides a strong economic incentive to concentrate purchases on the dominant firm so that entry of potential competitors is made difficult, or market exit of actual competitors is probable or likely in a way that it can be reasonably expected (cf. European Court of First Instance (CFI), Case T-219/99, *British Airways v. Commission* [2003] ECR II-5917, paragraph 271 *et seq.*; CFI, Case T-203/01, *Michelin v. Commission* [2003] ECR II-4071, paragraph 75 *et seq*).

effective way to preclude potential competitors from entering the market. A few responding agencies have not yet developed criteria for evaluating the legality of loyalty discounts and rebates. [10]

There can be a large degree of similarity between the policy that a competition authority applies in relation to single-product loyalty discounts and rebates, and tying and bundled discounting.[11] For example, the U.K. response "advocates a unified approach to tying, bundling and loyalty discounts, viewing them all as forms of conditional discounting."

As detailed in Section II.C., many responses acknowledged a lack of experience in evaluating single-product loyalty discounts and rebates.[12] Thus, while the responses and discussion of some agencies that contributed to this report are based on their experience and rulings in cases, other agencies' responses were based largely on their policy views and how they likely would assess such conduct. Several responses also expressed openness to further development in this area. For example, the French Competition Authority noted: "To date, the French Competition Authority has had a relatively limited number of occasions to enforce this general policy in cases dealing with loyalty rebates granted by dominant firms. Thus, it is foreseeable that the decisional practice, which has already clarified a number of issues, will further develop in the coming years." Similarly, the Turkish Competition Authority stated: "The Competition Board tries to analyse the discount issue on a case by case basis, there is still room for improvement to have an economic approach regarding discounts, loyalty discounts and single product loyalty discounts."

In view of the potential for single-product loyalty discounts and rebates to benefit consumers and the relative lack of significant enforcement experience, several responses expressed a cautious approach to enforcement. The Canadian Competition Bureau response explains that "the Bureau has taken a careful stance in its enforcement of loyalty rebates in an attempt to avoid chilling legitimate price competition. Low prices are generally a hallmark of competition and a benefit to consumers." The U.S. Department of Justice commented: "U.S. law has tended to tread very cautiously in the areas of bundled discounting and single-product loyalty discounts. The concern is that the cost of uncertainty in these areas may harm consumers by deterring firms from engaging in beneficial price cutting, which is antithetical to what the antitrust laws aim to do." The Irish Competition Authority explained that it "employs an effects-based approach to the analysis of . . . single-product loyalty discounts and rebates. This decision is influenced considerably by recognition of the danger that a form based/presumptions approach could discourage pro-competitive and pro-consumer conduct by firms. The Authority believes that a competition analysis focused on preventing consumer harm can minimise the risks and the costs of misdiagnosis." The European Commission expressed a similar concern, noting that, while discounts and rebates are often instruments of healthy and legitimate price competition, the difficulty for the competition authority is, "as with so many alleged

[10] See, e.g., agency responses from Belgium (in the absence of case law, it is difficult to predict what exactly will make loyalty discounts and rebates abusive), Brazil (would apply a rule of reason approach), Jersey (likely would apply approach consistent with EC precedent), Ireland, and Lithuania.

[11] This is, for instance, the case in Canada with respect to bundled and single-product loyalty discounts and rebates.

[12] See, e.g., agency responses from Chile, Jamaica, Jersey, Lithuania, Serbia, Slovak Republic, Switzerland, and Taiwan.

abuses of market power, to distinguish genuinely pro-competitive behaviour from anti-competitive or exploitative conduct."

II. Legal Basis and Enforcement Experience

A. General v. Specific Provisions

All the responding agencies, with one exception, address single-product loyalty discounts and rebates under unilateral conduct provisions that do not explicitly refer to discounts and rebates.[13] Consequently, single-product loyalty discounts and rebates are covered under their general unilateral conduct provision.[14]

Most antitrust provisions that cover single-product loyalty discounts and rebates apply only to dominant firms. However, competition agencies from Japan, Germany, and Taiwan have provisions addressing unilateral conduct by non-dominant firms.[15]

B. Civil v. Criminal Laws

The questionnaire asked members whether single-product loyalty discounts and rebates are a civil or criminal violation in their jurisdiction. Twenty-seven responding authorities indicated that single-product loyalty discounts and rebates are subject only to civil law.[16] In seven jurisdictions, single-product loyalty discounts and rebates can be both civil and criminal offenses.[17] However, no responding agency reported bringing any criminal cases.

C. Agency Enforcement

The responses indicate that agencies have investigated few single-product loyalty discounts and rebates cases beyond a preliminary stage during the last ten years. Eleven agencies did not conduct any in-depth investigation regarding loyalty discounts and rebates.[18] Seventeen agencies answered that they had conducted in-depth investigations, but either have never brought any cases or found a violation in only one or two instances

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[13] In Mexico's law, the statute mentions the "granting of discounts or incentives" as a possible anticompetitive conduct.

[14] Note that, in addition to their own laws, which are generally similar to the EC's Article 82, competition agencies from EU member states apply Article 82 when the practices at issue may affect trade among them. Some other jurisdictions have modeled their unilateral conduct law after Article 82, *e.g.* Israel and Jersey.

[15] For example, Sections 20 (2) and (3) of the German Act against Restraints of Competition address single firm conduct by undertakings that do not have a dominant position but have relative market power. The Japan Fair Trade Commission also may prohibit single-product loyalty discounts and rebates under its unfair trade practice regulation, which does not apply only to dominant firms or firms having significant market power.

[16] Those of Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Croatia, Czech Republic, European Union, Germany, Hungary, Italy, Jamaica, Jersey, Lithuania, Mexico, Netherlands, Poland, Romania, Russia, Serbia, Singapore, South Africa, Switzerland, Taiwan, Turkey, United Kingdom, and United States.

[17] See agency responses from Denmark, France (in practice, no criminal conviction on abuse of dominant position has ever been rendered in 20 years), Ireland (criminal prosecutions are not envisaged in practice), Israel (subject to proof of specific intent; no criminal case has been brought); Japan (no criminal prosecution has been brought), and Korea (subject to fines).

[18] Those of Belgium, Colombia, Czech Republic, Ireland, Jamaica, Jersey, Mexico, Romania, Serbia, Singapore, and Slovak Republic. Not all agencies provided the number of investigations.

during the past ten years.[19] Only six agencies reported finding violations in four or more cases.[20]

Most investigations of loyalty discounts and rebates were prompted by competitor complaints. The agencies in Denmark, France, Hungary, Taiwan, and the United States as well as the European Commission (according to the response by NGA Damien Geradin) self-initiated some of their investigations. Israel conducted one in-depth investigation, which was conducted in the framework of a sector inquiry. In France, some cases were prompted by competitor complaints and others were either self-initiated or forwarded by the French Ministry for Economy or by the Authority for the Regulation of Electronic and Postal Communications.

D. Private Enforcement

According to the responses, with one exception, all agencies and NGAs answered that private parties in their jurisdictions can challenge single-product loyalty discounts and rebates in court.[21] However, in Mexico and Singapore a private challenge may be brought only after the agency has acted and an appeal has been addressed by the court.[22] In a few jurisdictions, either private parties must petition the agency first or the court may seek the agency's opinion. For example, in Switzerland, private parties are allowed to challenge loyalty discounts and rebates in court, but the case is referred to the Competition Commission for an opinion.[23] In South Africa, complainants must lodge a complaint with Competition Commission prior to referring a case to the Competition Tribunal.[24] In Colombia, the parties may challenge loyalty discounts and rebates before

[19] Those of Brazil, Bulgaria (1 violation), Canada, Croatia (1 violation), Germany (2 violations), Hungary (1 violation), Israel (1 violation), Italy (2 violations), Japan (1 violation), Korea (1 violation), Netherlands (1 violation), Switzerland (2 violations), South Africa (1 violation), Taiwan (1 violation), Turkey, United Kingdom, and United States. Data from Chile was not available.

[20] Those of Denmark, the European Union, France, Lithuania, Poland, and Russia.During the previous ten years, responding agencies brought approximately 45 cases in which a violation was established. Lithuania challenged loyalty discounts and rebates in four cases. The Danish Competition Authority and the Polish Office of Competition and Consumer Protection (from 2004 to 2008) each challenged five cases. The French Competition Authority (since 2004) and the European Commission each brought eight cases. The Russian FAS is not included in this count; it estimates that conducts between 20 and 30 in-depth investigations per year, most of which are resolved with a formal decision, with about ten percent resolved informally.

[21] There is no private right of action available to challenge loyalty discounts and rebates in Canada. Private rights of action are available in: Belgium, Brazil, Bulgaria, Chile, Colombia, Croatia (damages claims), Czech Republic (no known cases), Denmark, European Union, France, (no cases), Germany, Hungary (no known cases), Ireland, Israel (no known cases), Italy (the Gianni, Origoni, Grippo & Partners, NGA response suggests that the number of private antitrust actions in Italy has been increasing significantly in the last few years), Jamaica (no known cases), Japan, Jersey (no known cases), Korea (no known cases), Lithuania, Mexico, Netherlands, Poland (no cases), Romania (no known cases), Russia (no cases), Serbia, Singapore, South Africa, Switzerland (no known cases), Taiwan (no cases), Turkey, United Kingdom (no known cases), and United States.

[22] See also agency responses from Poland (due to practical difficulties, no private lawsuits have been filed; if private challenges are brought in the future, the agency contends they will almost certainly be follow-on lawsuits).

[23] See response from the Swiss agency and response by the Swiss NGAs (Hoffet, Meinhardt, Venturi) indicating no known private cases.

[24] Further, according to the agency response from South Africa, complainants can refer a case directly to the Competition Tribunal as an interim relief application (prior to the Competition Commission completing its investigation) or as a contested referral (after the Competition Commission has completed its investigation, but found that the conduct does not raise competition concerns).

the agency or through a "popular legal action" similar to a class action, but without the possibility of a claim for private damages.

In most jurisdictions private challenges are rare — in some, no cases have been brought. Agencies in only six jurisdictions reported any private actions.[25] In general, the responses describe instances of private parties who claim harm as a result of alleged anticompetitive discounts, seeking an end to such discounts and damages in court.[26] The Bundeskartellamt reports that, following its November 2007 decision in the *Share deals* case,[27] plaintiffs lodged a private case with the Düsseldorf Regional Court in late 2008. The plaintiffs sought information about the profits earned by the firms operating the rebate schemes that the Bundeskartellamt found to violate EC antitrust rules, and then claimed damages in the range of hundreds of millions of Euros.

III. Analysis of an Abuse of Dominance/Monopolization Based on Single Product Loyalty Discounts and Rebates

A. Presumptions and Safe Harbors

Almost all agencies stated that there are no circumstances under which a firm's use of loyalty discounts and rebates is presumed illegal. Rather, agencies look to the impact of the conduct on competition. The UK Office of Fair Trading stressed that it uses "due caution before intervening against loyalty discounts and rebates and eschews any per se approach in this respect," given the many policy considerations that suggest that loyalty rebates and discounts can be procompetitive.

Only agencies in the Czech Republic and Israel reported a presumption of illegality, which applies only in exceptional cases. The presumption is rebuttable in the Czech Republic if there are objectively justifiable reasons for the conduct. In Israel, however, the presumption cannot be rebutted.

None of the responding agencies reported having a safe harbor from a finding of liability. However, a few responding agencies explained that they would be less likely to take enforcement action if the price is above the relevant cost benchmark.[28] Some responses mentioned that loyalty discounts or rebates are not illegal when engaged in by a firm

[25] Those of Chile, European Union, Ireland, Japan, South Africa, and United States.
[26] According to the European Commission response, in practice, victims of antitrust infringements may face difficulties seeking reparation of the harm suffered. Consequently, in 2008, the Commission recommended a number of minimum rules that would guarantee an effective system of antitrust damages actions for breach of EC antitrust rules across the European Union.
[27] See English press release at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2007/2007_11_30.php. Note that the case was not investigated under abuse of dominance provisions.
[28] See responses from the European Commission (there is a "soft" safe harbor if the effective price is above the relevant cost benchmark), Hungary (pricing below relevant cost benchmark test is a pre-requisite to prove illegality), United Kingdom, and U.S. DOJ. The responses from the U.S. DOJ and FTC note that the lack of a Supreme Court decision makes it difficult to state whether there is a safe harbor based on the conduct, such as for above-cost pricing.

lacking dominance or substantial market power, or the prospect thereof.[29]

A few agencies stated that they have not yet addressed the issue of presumptions or safe harbors in this context.[30]

B. The Role of Price-Cost Tests

Many responding agencies indicated that they use price-cost tests to evaluate the legality of loyalty discounts and rebates.[31] Only a few agencies responded that price-cost tests do not play a role in the analysis.[32] Several others responded that their use has not yet been addressed in this context.[33]

Of the agencies that use price-cost tests, several indicated that they consider loyalty discounts and rebates equivalent to offering a price discount on a single product and assess them using a price-cost test drawn from predatory pricing analysis.[34] For example, according to the Canadian Competition Bureau, loyalty discounts and rebates can be anticompetitive when they bring the total price on all units sold to a customer below the supplier's average avoidable cost ("AAC") for the product and recoupment is likely or has occurred, such that competition has been or will be substantially lessened or prevented. Other agencies may use different cost measures.[35]

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[29] See agency responses from Canada (in its Guidelines, the Bureau states that a market share below 35 per cent will generally not give rise to concerns of market power or dominance under section 79, and this can be considered a safe harbor in this context), Japan (not yet addressed safe harbors for discounts under its private monopolization provision; however, in its unfair trade practices guidelines, discounts offered by a firm ranked at most fourth in the market and with less than a 10% share are not illegal), and United States. See also Section II.A, above.

[30] See agency responses from Belgium (in the absence of case law and an explicit legal provision, it is difficult to state that loyalty discounts and rebates can be presumed illegal), Jersey (presumptions and safe harbors not yet addressed; however, the agency likely would interpret Jersey's competition law consistent, so far as possible, with EC competition law).

[31] See notes 34 and 36, below.

[32] They do not play a role in the agency's analysis in Czech Republic, Chile, and Poland.

[33] The use of price-cost comparisons have not yet been addressed in this context by the agencies in Ireland (no formalized policy), Japan, Jersey (the agency noted it likely would follow EC practice), Korea (pending court decision on the use of price-cost tests in this context); Lithuania, and Turkey (no price-cost analysis undertaken although costs are evaluated in general terms). Price-cost tests were not referenced in the agency responses from Brazil, Bulgaria, Israel, Jamaica, Mexico (the discounted price does not need to reach a predatory level to make the strategy real or potentially harmful), Serbia, South Africa, and Switzerland (the Swiss NGA response (Hoffet, Meinhardt, & Venturi) suggested that "the authorities may need to examine whether the practice is replicable by competitors and, as a result, whether matching the pricing strategy of the dominant firm would lead competitors to price below some measure of costs").

[34] See, e.g., Canada, Colombia (applies a predatory pricing test using average variable cost), Romania (loyalty discounts are considered to be a legal practice unless they can be reduced to predatory pricing or price discrimination by a dominant firm), Russia (same), and United States (most judicial decisions involving loyalty discounts and rebates have applied some type of price-cost test). See also agency responses from Belgium (foreclosure is likely to be an important factor; loyalty discounts may imply that the pricing is also predatory; in that case, the price-cost comparison will be an important element), France (the French authority used a price cost test in *La Poste* to determine whether a rebate scheme might create a risk of predation), Hungary (market foreclosure must be likely; probably some sort of predation test could also be used), and Taiwan (costs and the extent to which costs can be recouped are considered in the telecommunication industry.).

[35] For further information regarding agencies' practices with respect to predatory pricing, including the use and definition of cost measures, see the ICN Predatory Pricing Report presented at the 7th Annual Conference of the ICN in Kyoto, Japan (April 2008), available at:

Other agencies that employ price-cost tests use them to evaluate whether loyalty discounts and rebates are capable of having a foreclosure effect.[36] Several of these agencies stated that price-cost comparisons are just one factor, among others, in the assessment of whether loyalty discounts and rebates have an anticompetitive effect, as explained in the next subsection.[37]

C. Role of Foreclosure Analysis

Many agencies stated that loyalty discounts and rebates can be anticompetitive if they foreclose a large share of the relevant market such that they exclude rivals or act as a substantial impediment to entry and/or expansion.[38] Several of these agencies use price-cost tests in their analysis of foreclosure.[39]

1. Assessing Foreclosure

The European Commission response explains that it analyzes whether a loyalty discount or rebate is likely to lead to anticompetitive foreclosure, i.e., whether it is likely to produce an adverse impact on consumer welfare, explaining that the identification of consumer harm will rely on qualitative as well as, where possible and appropriate, quantitative evidence.[40] If the effective price in a rebate scheme for the relevant range of a customer's demand is below AAC, as a general rule the arrangement is deemed capable

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http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/FINALPredatoryPricingPDF.pdf.

[36] Those of Croatia, Denmark (applied a cost-based test as part of the assessment in two cases; however it was not conclusive), European Union, France (price-cost comparisons may play a role, among other elements, in the assessment of whether single-product loyalty discounts and rebates may have a foreclosure effect), Germany (in general, the Bundeskartellamt analyzes whether a discount scheme is likely to lead to foreclosure effects. Price-cost comparisons have not played a role in the analysis, but if price-cost data were readily available, it might be used in an investigation), Italy, Netherlands (likely will use a price-cost test in future cases), Singapore (price-cost tests are relevant in so far as they have a causal effect of foreclosure on competition arising from the fidelity discounts), and United Kingdom.

[37] See, e.g., agency responses from European Commission (the price cost test is integrated in the general assessment of anticompetitive foreclosure) and France (price-cost comparison may play a role, among other elements).

[38] See, e.g., agency responses from Bulgaria (competitive concerns are distortion of competition and exclusion of competitors), Canada (if the loyalty rebate has the effect of exclusive dealing in that it, for example, forecloses a competitor from an important conduit to the market such as distributors, the loyalty rebate may be examined as an exclusionary practice), Chile (looks to whether the conduct produces artificial barriers to entry or market foreclosure effects), Croatia, Denmark (looks to whether access to market is hampered or blocked), France, Germany, Hungary, Japan, Jamaica, Jersey (according to relevant agency guidelines, looks to whether conduct removes or limits competition from existing or new competitors), Mexico (concerns arise when the dominant firm succeeds in preventing entry of other low cost producers), Netherlands (threatened exclusion of rivals must be shown), Poland (must have an exclusionary effect), Singapore, South Africa, Switzerland, Taiwan, and Turkey. In the Czech Republic, harm to competition or consumers may be found when loyalty discounts and rebates hinder the operations of other undertakings in the relevant market.

[39] See note 36 above.

[40] The European Commission considers that the assessment of conditional rebates differs from that of predation in that, according to the Commission, it can have foreclosure effects without necessarily entailing a sacrifice for the dominant undertaking.

of foreclosing equally efficient competitors from that part of the demand.[41] Because effective prices above long run average incremental cost ("LRAIC") would normally allow an equally efficient competitor to compete profitably, notwithstanding the rebate, the European Commission would normally not intervene if that were shown by the price-cost test. When the effective price is between AAC and LRAIC, the Commission will investigate whether other factors indicate that entry or expansion by equally efficient competitors is likely to be affected.

The French Competition Authority assesses whether or not the behavior of the dominant firm, considered in its context, is likely to reduce consumer welfare, by having the actual or potential object or effect of excluding equally efficient competitors from the marketplace.

The German Bundeskartellamt defines market foreclosure as a "situation where actual or potential competitors of the dominant firm are completely or partially denied profitable access to a market and where the maintenance of the degree of competition still existing or the growth of competition in the market is thereby hindered." In the assessment of foreclosure, the Bundeskartellamt analyses whether the discount provides a "strong economic incentive to concentrate purchases . . . on a dominant firm," which will likely either hinder entry or make actual competitors exit the market. The economic incentives are considered in light of such attributes as the percentage discount and the sales (turnover) on which the discount is based.

The response of the UK Office of Fair Trading indicated that the test for foreclosure should be whether the loyalty discounts risk foreclosing an equally efficient competitor.[42] In describing its foreclosure analysis, the OFT noted that "the impact should be sustained or durable and not merely transitory . . . in order to mitigate the risk that competition law intervention is deployed in order to protect less efficient rivals or where there will be new entrants within a relatively short period. Furthermore, this is important in relation to considering whether there is a likely substantial impact on effective competition."

In the assessment of foreclosure, a few responses mentioned looking at the time period for the offered discount or rebate and whether it was retroactive.[43] For example, the Danish Competition Authority is unlikely to investigate discount schemes with a discount of no more than approximately five percent, a short reference period, e.g., no longer than three months, and an incremental rather than retroactive structure.[44] France considers the time period as well, and explained that a reference period of a year or less is less likely to raise competitive concerns than a longer reference period. Germany also considers the period over which the discount is calculated.

The European Commission considers the likelihood of anticompetitive foreclosure to be higher when competitors are not able to compete on equal terms for the entire demand of each customer. Its response explains in general terms, that "retroactive rebates may

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[41] See also agency responses from Italy and United Kingdom.

[42] Though consumer harm may not be a necessary condition of a finding of actual infringement in the United Kingdom, the OFT will bear in mind potential consumer benefits and efficiencies that can be attributed to loyalty discounts and rebates when considering whether to investigate.

[43] Those of the European Union, Denmark, France, Germany, Korea, Turkey (limited time periods are among the justifications), and United Kingdom.

[44] The Danish Competition Authority notes that it will follow the EC Guidance paper on Article 82.

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 loss of the retroactive rebates. 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."

Similarly, the Italian authority adds that above cost sales may cause foreclosure when customers are unable or unwilling to switch their entire demand away from the dominant supplier (e.g., because its products are a "must-stock item") and other undertakings can compete only for smaller chunks of the total market demand. The Bundeskartellamt mentioned that the importance of the dominant firm as a trading partner and the importance of its products (e.g., as "must-stock items"), as well as potential losses that switching to other suppliers would bring about are relevant to the assessment.

Several responses noted that they consider whether the discounts are "personalized" or "individualized."[45] The European Commission stated that an individualized threshold may allow the dominant firm to set the threshold at a level where switching suppliers may be very expensive for the customer. By comparison, a general discount available to all is less likely to have a "loyalty enhancing effect."

2. Degree of Proof

Jurisdictions have different standards of proof with regard to anticompetitive effects: some require proof of actual anticompetitive effects (e.g., South Africa), while others require varying degrees of lesser proof, from a showing of potential anticompetitive effects[46] to a showing of likely[47] or probable[48] anticompetitive effects. According to the German Bundeskartellamt, neither the competition agency nor, in civil litigation, the plaintiff is required to show that competitors were actually forced to exit the market as a consequence of the loyalty discount or rebate. Rather, it suffices to show that the conduct is capable of producing an exclusionary effect, i.e., that the discount scheme provides for a strong economic incentive to concentrate purchases with the dominant firm so that the entry of potential competitors is made difficult or the market exit of actual competitors is probable or likely in a way that can reasonably be expected.

IV. Intent

The questionnaire asked whether a firm's intent is relevant in examining single-product loyalty discounts and rebate cases. The majority of responses indicated that intent is not required, but in 17 jurisdictions it is often considered a relevant factor, particularly in

[45] See response of European Union, France, and Germany.
[46] See, e.g., agency responses from Bulgaria, France, Lithuania, and Turkey.
[47] See, e.g., agency responses from European Union, Hungary, Italy, Jersey, Mexico, Netherlands, and Singapore.
[48] See agency responses from United States.

assessing the effects of the practice.[49] Ten agencies said intent was not relevant to their assessment.[50] Three agencies replied that intent is required.[51]

Although it is a necessary element under the Competition Act in Croatia, intent does not have to be proven separately from other relevant factors of the offense. This approach contrasts with that in Canada, where an intended negative effect on a competitor is required for a loyalty discount or rebate scheme to be considered anticompetitive, but this alone is insufficient to conclude that an abuse has occurred.[52]

Similar to the responses received pertaining to tying and bundled discounts, several responses indicated that although intent was not a requirement in establishing an offense, it is one factor considered during an investigation.[53] Some jurisdictions said that intent may be relevant in assessing competitive effects.[54] Authorities may look to both direct and indirect evidence in the form of the business strategies and other internal documents to find "evidence of the willingness to exclude competitors from the market through the implementation of the rebate scheme."[55] The South African response stated that while intent is not required, it is necessary that the dominant firm be enhancing its market power. The Competition Commission suggested that this is linked to intent in the sense that the dominant firm must have an exclusionary strategy in mind with respect to its rivals.

In a few jurisdictions, intent may be considered when establishing fines.[56] In Chile, the fine may be lessened if lack of intent is proved. The Belgium Competition Authority response indicates that, while intent is not required, it may be an "aggravating circumstance."

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[49] See notes 52 – 54, below. This issue has not been addressed by the agencies in Ireland (no formal policy) and Jersey (indicated that the issue had not yet been addressed, however it would be expected that any future discussion of intent would be consistent with the view taken in by the European Commission). Serbia and Switzerland did not respond to this question.

[50] Brazil, Bulgaria, Czech Republic, Denmark, Hungary, Jamaica, Lithuania, Netherlands, Russia, and Singapore.

[51] Canada, Croatia, and Mexico.

[52] In Canada, intent may be inferred. In the words of the Federal Court of Appeal in *Canada Pipe:* "Proof of the intended nature of the negative effect on a competitor can thus be established directly through evidence of subjective intent, or indirectly by reference to the reasonably foreseeable consequences of the acts themselves and the circumstances surrounding their commission, or both."

[53] Intent *may* be considered a relevant factor in Belgium, Colombia, France, Israel, Korea, Romania, Singapore, South Africa, Taiwan, and Turkey. In Poland, proof of intent is used as supplemental evidence. See also notes 52 and 54, below.

[54] See agency responses from European Union, Japan (important factor for judging the probability of exclusion), Germany, Romania, United Kingdom (intent is not generally a factor, however, in exceptional cases where effects are difficult to prove, it may be taken into account), and United States (noting that intent to increase sales by taking competitors' customers, for example, is not relevant, but evidence of the business purpose behind the conduct is relevant in assessing competitive effects), and NGA response from Lugard indicating that evidence of intent may play a role in the assessment of the likely effects in the Netherlands.

[55] See the French Competition Authority response. Similar statements are made in the responses of the European Union, Italy, and Romania.

[56] Intent may also be relevant in establishing fines in Chile, Germany, Italy and Poland. See also NGA response from Hoffet, Meinhardt & Venturi indicating that in Switzerland, intent may be an aggravating factor in the assessment of a fine.

V. Justifications and Defenses

A. The Use of Justifications and Defenses

It follows from the responses to the questionnaire that competition authorities are generally open to justifications and defenses for the use of single-product loyalty discounts and rebates.[57] Differences exist, however, in the type of justifications and defenses that they consider acceptable, as well as the conditions that need to be fulfilled.

It appears from the responses that most jurisdictions do not have specific legal provisions establishing concrete justifications and defenses for single-product loyalty discounts and rebates, as is the case, in some jurisdictions, with respect to tying. Acceptable justifications and defenses are based primarily on policy documents and case law.

Certain competition agencies provide some guidance by stating that it should concern "valid business justifications" (Canada), "relevant business justifications" (Hungary), or "efficiency justifications" (U.S. FTC).

One generally accepted justification is that single-product loyalty discounts and rebates may lead to benefits for suppliers and consumers.[58] The U.S. antitrust agencies noted that loyalty discounts and rebates are often procompetitive and result in lower prices to consumers. A manufacturer may use them, for example, to compete for the most desirable customers or to induce services from distributors or retailers.

Some competition agencies take the position that the actual cost efficiencies may depend on the type of discount or rebate. The European Commission argues that rebate schemes with individualized volume targets are generally less likely to achieve the same efficiencies as those achieved with standardized volume targets. It recognizes, however, that "conditional rebates, by allowing the dominant undertaking to secure that the customer purchases at least a certain minimum amount over a sufficiently long period, may provide incentives for the dominant undertaking to make certain relationship-specific investments in order to be able to supply a particular customer." The South African Competition Commission refers to court rulings in which it was held that volume-driven rebate schemes are more likely to be efficient than loyalty-driven ones.

The Singapore Competition Commission identified several specific pro-competitive effects of loyalty discounts and rebates. For instance, "loyalty discounts and rebates may reflect efficiency savings from supplying particular buyers, or provide an appropriate reward for the efforts of downstream undertakings to promote the dominant undertaking's products."

Some competition agencies accept a meeting competition defense.[59] However, strict conditions have to be met. The Danish Competition Authority considers that "a loyalty rebate which is not cost based can under circumstances be justified if the dominant company uses the rebate system to meet competition from rivals. The meeting

[57] The Colombian agency indicated that there is no need for justifications or defenses under its competition regime, as single-product rebates are not considered anticompetitive as such.
[58] This justification is mentioned in the responses from agencies in Croatia, Denmark, European Union, Italy, Poland, and United States.
[59] The agencies of Denmark, Czech Republic, Germany, Ireland, and Israel.

competition defense can only be accepted if the dominant company is using the rebate system to maintain its own customers — whereas it would not be accepted if the dominant company uses the system to take over rivals' customers." Similarly, the Israel Antitrust Authority asserts that "this defense is meant to allow monopolists to take competitive measures that meet its rival's competitive actions. . . . This defense is however, not meant to legitimize the tactic of 'beating competition.'"[60] The Mexican Competition Commission adds that "if discounts are applied only to those segments of the market where there is a high probability of entry of new competitors, the purpose of the dominant firm would be to prevent the entrance of new competitors, and thus the discounts would be anti-competitive."

Some competition agencies accept the defense that a loyalty discount or rebate cannot be prohibited if its effect on competition is non-substantial.[61] The Turkish Competition Authority provided examples of cases in which this defense was accepted where the rebates were applied for a limited period of time and in a small geographic area.

A number of agencies stressed that justifications and defenses must have an objective basis.[62] Benefits that are purely speculative, or would arise only at some time in the distant future are disregarded. Other agencies indicate that it has to be demonstrated that there is a causal link between the alleged efficiency and the loyalty discount or rebate.[63] The United Kingdom takes the position that, in addition, it would have to be demonstrated that the same beneficial effect would not have occurred without the loyalty discount or rebates.[64] Some agencies indicated that a justification and defense can be accepted only if there is no less anti-competitive alternative for the conduct at issue.[65]

Several responses indicate that the agencies' assessment of justifications and defenses includes the evaluation of the pro- and anti-competitive effects.[66] The U.S. FTC looks to whether the anticompetitive harm "outweighs" the procompetitive effects. Similarly, the Italian Competition Authority must establish whether any foreclosure effects are outweighed by any advantages that may be passed on to the final consumer.

Another important condition, according to some competition agencies, is the requirement that efficiencies and cost savings that result from the discount must benefit consumers.[67] The Mexican Competition Commission adds that such efficiency benefits must be transferred to consumers "on a permanent and significant basis."

Finally, several competition agencies consider a justification or defense only if it does not eliminate competition, by removing all or most of existing resources of actual or potential

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[60] The Israel Antitrust Authority refers to the Court ruling in the Yedioth Ahronoth case.
[61] This point is put forward by the agencies of Turkey and United Kingdom.
[62] This requirement is mentioned by the agencies from Denmark, Switzerland, Jersey, and South Africa.
[63] This condition is, for instance, referred to by the European Commission.
[64] This condition is also applied by the Russian agency.
[65] Those of the European Union, Russia, and Singapore (dominant firm must show conduct is proportionate to the benefits produced).
[66] In these jurisdictions, a justification or defense can be accepted only if its benefits "outweigh" the anticompetitive effects. See in particular the agency responses from Belgium, European Union, Germany, Korea, Mexico, and United Kingdom.
[67] This is the case for the European Union, Germany, Ireland, and Russia. See also agency response from Jamaica (Act specifies that consumers must receive a fair share of the resulting benefit).

competition.[68] The European Commission asserts that where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweigh possible procompetitive efficiency gains.

B. Burden of Proof

Most competition agencies agree that, whereas it is up to the agency to show the anticompetitive effects, the firm has the burden of proving efficiencies.[69]

[68] See agency responses from the European Union, Ireland, and Russia.
[69] This is, for instance, the case for Croatia, Czech Republic, Denmark, European Union, France, Germany, Korea, Netherlands, Singapore, Turkey, and United States. But see agency response from Italy (where the Authority could not disregard any available evidence of pro-competitive efficiencies, even if they are not directly relied upon by the undertakings concerned).

Case Annex

Bulgaria

Gips, Decision No. 28/14.03.2000.

The CPC imposed sanction of 5 000 BGN (about 2 500 EUR) on "Gips" EAD (gypsum producer) for infringing Art. 18 LPC. The case was initiated on the basis of complaint. It was found that "Gips" EAD applied loyalty discounts, imposed unfair trading conditions, applied different conditions to identical type of contracts with regard to certain partners and unduly terminated established long-term trade relations.

With regard to the loyalty discounts in the course of investigation it was found that from 1997 "Gips" EAD started to offer to the largest customers discounts, which are based on the purchased quantity within one month. Such a system in itself leads to price discrimination between customers and constitute an abuse of dominant market.

The CPC reckons that the giving of discounts that depend on the quantity of the purchased product for a specified period of time is in favour of the larger distributors at the expense of the smaller. Such behavior is particularly harmful to the development of the market and the competition in the long term, since the implementation of this mechanism would leave only a few major distributors in the market.

Croatia

VIPnet d.o.o vs. HT d.d. v. T-Mobile d.o.o.

On 12 July 2007 the CCA adopted a final decision on abuse of a dominant position of the undertakings HT d.d. Zagreb and its connected company T-Mobile Hrvatska d.o.o. starting from 13 November 2003. The abuse was established on the relevant market covering the provision of telecom services through the conclusion of the Frame Contracts on the provision of telecom services including the appendices and annexes, with twenty three (23) different key accounts with their place of establishment in the Republic of Croatia.

The assessment procedure in question has been carried out upon the complaint submitted by the undertaking VIPnet d.o.o. whereas the provisions raising anti-competitive concerns included the conclusion of contracts subject to acceptance by key accounts of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts, and thus are considered as hardcore restrictions of competition within the meaning of competition rules.

The CCA established that a number of restrictions are still in force in fourteen (14) contracts concerned which is undoubtful evidence that HT and T-Mobile still abuse a dominant position in the relevant market. The content of the restrictive provisions, the duration of their implementation (approximately three years) and the sanctions that have been unilaterally envisaged in case of breach of the obligations limiting the use of services, undoubtedly indicate the abuse of dominance which has been established in the market concerned.

Consequently, the Agency ordered HT and T-Mobile to remove or dully modify the restrictive contract provisions which are still in force under 14 contracts in question. Furthermore, the CCA prohibited any future business practices which would result in abuse of dominance of the undertakings concerned or any direct or indirect financial incentives or sanctions imposed on the users of their services having as their object or effect restrictions on the use of telecommunications services offered by competing undertakings.

On 5 October 2007, HT (T-Com) and T-Mobile filed and administrative dispute before the Administrative Court of the Republic of Croatia. The decision of the Court is still pending.
In November 2007 undertakings HT (T-Com) and T-Mobile submitted to the CCA evidence in the form of annexes of the disputable Frame Contracts showing the compliance with all orders imposed by the CCA and that the restrictive provisions have been removed in their entirety.

Czech Republic

Česky Telecom

In autumn 2002 the Office received several complaints in relation to a possible breach of the Act by the company ČESKÝ TELECOM, a.s. (hereinafter referred to as "ČTc") connected with offers of preferential tariff plans. Within the framework of the administrative proceeding, it was established that the company concludes contracts with the customers on the provision of tariff plans in the wording of the General Conditions for Provision of Tariff Plans in which it commits the customers to making a monthly fixed minimum amount of telephone calls - a so-called contractual telephone charge. This commitment was defined in such a way that in case the amount of actual outgoing telephone calls is lower than the contractual telephone charge fixed by the relevant contract on the provision of a tariff plan, the customer is charged not only the price of the actual telephone calls but also the difference between the amount of the contractual telephone charge and the price of the actual calls. Such behavior is just what was deemed as loyalty rebates for the customer was contractually bound to pay the previously set amount including "prepaid" telephone charge no matter if he had utilized the whole amount of the telephone charge during the past month or not. As a result the customer was motivated to utilize the whole amount because he would have to pay it anyway. Hence the customer had not even a reason to shift part of his calls to an alternative operator while such change would have been financially unfavorable.

The anticompetitive impacts of it were intensified through the fact that some contracts concluded by ČTc with its customers, in the wording of the above mentioned business conditions, contained a commitment that the given contract on provision of a tariff plan would not be cancelled by any of the contractual parties before a fixed date or that customers would use exclusively the services of the company ČTc for voice telephone traffic from all their fixed lines.

Apart from the abovementioned facts, it was also established that ČTc applied, when concluding the relevant contracts, individual conditions different from the conditions contained in the abovementioned business conditions or that it created plans applied with the aim to gain or maintain a customer to the detriment of competitors, on the basis of which it adjusts the conditions for concluding contracts to a particular customer's individual needs.

Due to the described practices, the company ČTc created a barrier to the development of competition on the market of provision of public telephone services to businesses via fixed telecommunications networks. It thus abused its dominant position on the market, for which it was sanctioned by the Office that imposed a fine amounting to

81.7 million CZK and it was ordered to leave out the provisions committing customers to using the full amount of the contractual telephone charge, provisions limiting the possibility to cancel the contract on provision of a tariff plan before a fixed date and provisions committing the customer to using only the services of ČTc for all fixed lines from the relevant contracts.

Linde Gas a.s.

Second case is concerning abuse of dominant position of company Linde Gas a.s. (hereinafter referred to as "Linde"). In 2008 chairman of the Office imposed a fine amounting to 12 million CZK to the company for abusing its position on the market of technical gas cylinder delivery. The Office was dealing with the behaviour of Linde already in 2002 and fine was imposed in October 2004. The decision was canceled by the Regional Court in Brno in July 2007 because of procedural reasons; this was corrected in new proceeding.

The Office came into similar the conclusion as in 2004. Linde applied different price terms to the comparable categories of customers. Agreed price terms with customers, who had similar gas offtake, were differing in price up to the amount threefold. Behaviour of the Linde caused damage to the customers who paid the price higher then customers with similar gas offtake. And the damage was also indirectly caused to other competitors on the market.

Within administrative proceeding the Office came into conclusion, that the Linde broke the law on purpose. Offering low prices to the customers was intended by maintaining the customers in case they will gain preferable offer from other undertakings. The low prices were offered at the expense of the high prices, which were paid by other customers of Linde.

Denmark

Danish Competition Council Decision 30th August 2007 – SuperGros

English summary:

http://www.ks.dk/en/competition/decisions/decisions-2007-and-earlier/national-decisions-2007/konkurrenceraadets-moede-den-30-august-2007/improved-competitive-conditions-in-the-market-for-wholesale-of-groceries-to-independent-retailers/

SuperGros is one of the largest groups of undertakings in the Danish groceries industry and operates within the area of wholesale of groceries in Denmark.

In SuperGros' standard terms, regulating relations between SuperGros and independent retailers, SuperGros had a price system which in practice worked in the same way as a progressive, retro-active rebate system with a "rebate span" of 14-17 percentage points. Consequently, the price system could possibly create loyalty effects preventing niche suppliers and new entrants from competing at equal terms, thereby harming competition.

Even though SuperGros did not agree with the assessments made by the DCA, a solution was reached through negotiations between the DCA and SuperGros, and SuperGros made binding commitments in order to meet the concerns of the DCA.

Danish Competition Council decision 30th August 2007 – Post Danmark magazine mail

English summary:

http://www.ks.dk/en/competition/decisions/decisions-2007-and-earlier/national-decisions-2007/konkurrenceraadets-moede-den-30-august-2007/post-denmark-has-abused-its-dominant-position-in-the-market-for-magazine-mail/

The Danish universal postal carrier Post Danmark A/S is dominant in the national market for magazine mail. Post Danmark had in 2004 and 2005 a pricing and rebating scheme for magazine mail which consisted of i) a general price list, ii) individual price lists, and iii) individual quantity rebates granted on the basis of either the general price list or the individual price lists.

The rebating scheme resulted on the one hand in significant surcharges for customer that moved quantity from Post Danmark to a competing distributor and on the other hand significant discounts for customers that moved quantity to Post Danmark from a competing distributor. The rebates had significant spans between highest and lowest prices.

The DCA found that the rebate scheme infringed section 11 of the Danish Competition Act, and ordered Post Danmark to arrange for its pricing and rebate scheme for magazine mail to comply with the Danish Competition Act and Article 82 of the Treaty.

Danish Competition Council decision 28th April 2004 – Song Networks A/S

English summary:

http://www.ks.dk/en/competition/decisions/decisions-2007-and-earlier/national-decisions-2004/7/song-networks-as/

On March 8, 2002, Song Networks A/S - provider of fixed line telephony for business customers - filed a complaint against TDC and SONOFON to the Danish Competition Authority. TDC and SONOFON are the leading providers of mobile telephony as well as fixed line telephony to business users in Denmark. Song Networks complained inter alia that TDC had an illegal bonus system in the company's service provision agreements for mobile services.

The Competition Authority found that TDC used a bonus system which was both discriminatory and loyalty creating. The system progression could not be explained by differences in costs or other objective factors and consequently, because TDC had a dominant position on the wholesale market for service provision of mobile services, its bonus systems constituted an abuse of dominance covered by the section 11 of the Danish Competition Act.

The decision was, with regards to the bonus system, upheld by the Danish Competition Appeal Tribunal in decision of 2nd October 2006.

Danish Competition Council decision 31st August 2005 - Pradan Auto Import A/S

English summary:

http://www.ks.dk/en/competition/decisions/decisions-2007-and-earlier/national-decisions-2005/konkurrenceraadets-moede-den-31-august-2005/loyalty-rebates-was-an-abuse-of-a-dominant-position-by-skoda-importer/

An independent importer of original Skoda spare parts had complained that Skandinavisk Motor Co. (SMC), formerly Pradan Auto Import, operated an illegal discount-system, which prevented competing suppliers of original Skoda spare part from selling to authorised Skoda-repairers.

The discount-system implied that each repairer had to achieve an individual purchase target every quarter, in order to have different categories of discounts paid out. The purchase target was fixed on the basis of the individual repairer's purchase in the previous year and Pradans overall aggregated spare part sales. The discount system was fit to secure Pradans dominant market share and keep possible new competitors out of the market. Consequently the Danish Competition Counsel found, that the discount system infringed section 11 of The Danish Competition Act.

The decision was upheld by the Danish Competition Appeal Tribunal in decision of 13th March 2006.

Danish Competition Council decision 21st December 2005 – TV2

English summary:

http://www.ks.dk/en/competition/decisions/decisions-2007-and-earlier/national-decisions-2005/konkurrenceraadets-moede-21-december-2005/abstract-prices-and-conditions-for-the-selling-of-tv-commercials-by-tv2/

A competitor on the market for TV-advertising in Denmark had complained that almost all advertisers that advertised on TV2 entered into annual agreements with TV2, in which the advertisers' expected annual TV-advertising budget placed with TV2 was laid down. In connection to the annual agreement TV2 offered advertisers an annual rebate, the size of which depended on the individual advertiser's annual budget. TV2's annual rebate was a progressive retroactive rebate with several volume thresholds. The percentage ranged from 4.7% to 19.7%. The effect of the rebate was that TV2 could charge a high price on the first part of an advertiser's annual budget and a low price on the marginal part of an advertiser's budget.

The Danish Competition Council found that TV2 had a dominant position on the market, and because competition mainly took place with regards to the allocation of the marginal part of advertisers TV-advertisement campaign budgets, TV2's annual rebate was capable of having an exclusionary effect on the market. The Council therefore issued an order requiring TV2 to cease its infringements of Article 82 in the Treaty and section 11 of the Danish Competition Act by refraining from applying the annual rebate to the agreements with advertisers.

Danish Supreme Court ruling of 7th January 2008 – Lauritz Knudsen A/S

The case began in December 2000 when the Danish Competition Council found that the company Lauritz Knudsen A/S (LK) had abused its dominant position by using a rebate system which was designed to encourage LK's customers (merchants) to pre-order their total purchases of sockets with LK. The Danish Competition Council found that the discount system locked the structure of the market for sockets by binding costumers to trade at LK. The Danish Competition Appeal Tribunal upheld in decision of 17th May 2002 the Competition Council decision.

LK brought the matter before the Danish High Court alleging that the Competition Council's decision should be repealed. The Danish High Court gave by order of 6th December 2005 judgment in favour of the Danish Competition Council and the Danish Supreme Court affirmed by order of 7th January 2008 the Danish High Court decision.

For judicial systems (i.e., the agency challenges the legality of the conduct in court and the court issues a decision), state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief. Also state the number of cases that resulted in a final court decision that the conduct did not violate the competition law.

European Commission

Michelin I

Court judgment:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61981J0322:EN:HTML

1999: Virgin/British Airways (14/07/1999),

Press release describing the main facts in the Commission Decision:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/99/504&format=HTML&aged=1&language=EN&guiLanguage=en

The relevant CFI judgment (17/12/2003):

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61999A0219:EN:HTML

and the relevant ECJ judgment (15/03/2007):

http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&jurcdj=jurcdj&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&typeord=ALLTYP&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=British+Airways&domaine=CONC&mots=&resmax=100&Submit=Submit

2000: Soda Ash (ICI and Solvay) (13/12/2000),

Press release describing the main facts in these two Commission decisions:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/00/1449&format=HTML&aged=1&language=EN&guiLanguage=en

2001: United Parcel Service/Deutsche Post AG (20/03/2001),

Press release describing the main facts in this decision:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/419&format=HTML&aged=1&language=EN&guiLanguage=en

2001: Michelin II (20/06/2001),

Press release describing the main facts in this decision:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/873&format=HTML&aged=1&language=EN&guiLanguage=en

and the relevant CFI judgment (30/09/2003):

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0203:EN:HTML

2004: Interbrew (30.4.2004), see

Press release describing the main facts of the settlement:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/574&format=HTML&aged=1&language=EN&guiLanguage=en

2005: Coca Cola,

Press release describing the main facts of the settlement:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/775&format=HTML&aged=0&language=EN&guiLanguage=en

2006: **Tomra Procent** **(29/03/2006),**

Press release describing the main facts in the Decision:

http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/398&format=HTML&aged=1&language=EN&guiLanguage=en

France

09-D-04, 27 January 2009, NMPP

The group NMPP, in position of dominance on the market for press distribution, granted various loyalty rebates to the press editors among which 3 were found anticompetitive since their actual or potential effect was to exclude the sole competitor on the market, MLP.

According to the French Competition Council, the first two rebates, provided incentive to the editors to remain customers to the NMPP group all year long and at least 3 years if they wanted to fully benefit from the loyalty scheme although they had the possibility to change their press distributor at any time subject to earlier notice. The third practice took the form of a termination clause in case of revenue advance which obliged the editor beneficiary of the cash advance to extend its business relationship to one additional year.

The French Competition Council held that the NMPP group did not bring any credible element to justify such rebate scheme. It stated that the NMPP group's conduct was all the more serious that by excluding MLP, it would re-establish a monopolistic market .

Taking into account NMPP's reiteration of the conducts at issue (which lead to increase the fine to 30%) and also its difficult financial situation, the French Competition Council imposed a fine to NMPP and to its subsidiary TP which amounted to a total of € 3 050 000 millions.

07-A-17, 20 December 2007, *La Poste* (opinion):

The Authority for the Regulation of Electronic and Postal Communications - *ARCEP* asked the French Competition Authority for its opinion about the rebate scheme planned by La Poste (in position of monopoly on the market for mail services) for 2008: i) the intended rebates would be based on the turnover and various discount rates, each of these applying to the part of turnover above the threshold to which it corresponds, and not to the whole turnover; ii) the same thresholds and discount rates would apply to the reserved (i.e. under monopoly) and unreserved sectors; iii) the turnover thresholds would be different depending on the market concerned; iv) the turnover thresholds would be adjusted so that the number of clients concerned by each section decreases progressively with the volume of mail.

In its competitive assessment, the French Competition Authority examined the number of thresholds, the reference period for calculating the rebates (one year), the level of the discount rates and the progressiveness of the rebates and concludes that they do not appear to be anticompetitive. The French Competition Authority concluded that these rebates were justified by the volume and by the economies of scale they generate.

The French Competition Authority also assessed the possible foreclosure effect of the rebates by analysing the market for sorting and mailing. Using a price-cost comparison, the French Competition Authority established that there was no risk of eviction for the distributors, notably since marginal price at the highest range of the rebate scheme (i.e. when the highest discount rate is granted) was superior to "*average attributable costs*" (i.e. there is no risk of predation) and was also superior to the marginal price of the highest range of the rebate scheme of La Poste's competitors.

The concerned rebates were granted to mailers only; consolidators were not eligible. The Competition Authority, however, did not find any anticompetitive discrimination. It argued that the purpose of the rebates was to stimulate the demand from the mailers. If consolidators were to be eligible, they would engage in arbitrage, thereby neutralizing the demand-enhancing effect of the rebates. The Authority found that the proposed rebates did not jeopardize efficient worksharing in the postal industry.

Finally, the French Competition Authority assessed the efficiency gains generated by the rebate scheme and concluded that it generated new volumes of mail and then, in a context of high fixed costs, reduced the average costs.

07-D-08, 12 March 2007, *cement of Corsica*

(This case mainly dealt with vertical restraints but the rebates granted were considered as an abuse of a dominant position)

Press release in English:

http://www.conseil-concurrence.fr/user/standard.php?id_rub=211&id_article=693

Lafarge and Vicat, in a collective dominant position on the market for cement in Corsica, offered monthly loyalty rebates to Corsican dealers, on the condition that they had not imported cement during the relevant month.

In this case, the fact that the discounts had no objective economic justification and were only conditional upon stopping imports into Corsica *"confirmed that they did not consist in a decrease in price aimed at making Vicat and Lafarge's cement more interesting, but rather in a reward for having stopped or significantly reduced imports"*. These discounts had as their object and effect the artificial restriction of imports of competing cement from Greece and Italy. Lafarge and Vicat were fined for abusing their collective dominant position.

Fines (including fines for vertical restraints): Lafarge (€ 17 000 000) and Vicat (€ 8 000 000).

06-MC-01, 23 February 2006, *NMPP*:

Press release in English:

http://www.conseil-concurrence.fr/user/standard.php?id_rub=185&id_article=537

The group NMPP, in position of dominance on the market for press distribution, granted various rebates to the press distributors. The rebate system combined a turnover threshold, a sales threshold and the increase in sales compared to an average amount of sales.

In the particular context due to the specific newspaper regulation, a large number of publications were vying for space in press depots and on news agency shelves. The extra prominence given to these publications in exchange of the rebates could only come at the expense of publications distributed by the competitor.

The rebate scheme did not appear to benefit the final consumer or the quality of distribution and therefore to be objectively justified on economic grounds. The thresholds represented a *"very significant"* part of an average distributor's sales, which gave rise to loyalty effects. The rebates being a function of the point of sales' performance compared to the average performance of the other points of sales, they were thus a collective incentive to be part of the loyalty system.

The implementation of loyalty rebates by the NMPP appeared to lead to the eviction of their only competitor, the MLP, since the financial effort the MLP would have had to give to remain in the market would have consisted in rebates of "*at least 12%*".

Therefore the French Competition Authority found that the NMPP might have abused its dominant position, and ordered them, as an interim measure, to stop their loyalty rebate policy.

05-D-32, 22 June 2005, *Royal Canin*

(This case dealt mainly with vertical restraints (resale price maintenance) but the rebates granted were considered to be an abuse of a dominant position):

Press release in English:

http://www.conseil-concurrence.fr/user/standard.php?id_rub=160&id_article=603

Royal Canin, in a dominant position on the market for dry dog food sold in specialised retail shops, offered various discounts to purchase pools and integrated channels on the one hand, and to wholesalers on the other hand.

Royal Canin granted its distributors discounts on invoices, which were based either on an estimate annual tonnage, or of the tonnage realised the year before. There were also various other discounts based on quantity or turnover, or on the progression of quantity or turnover.

The French Competition Authority recalled that discounts systems, *"which are legitimate and represent a normal business practice when applied by a non-dominant firm, could become abusive when applied by a firm in dominant position."*

The discounts at stake provided a strong incentive to purchasers (high level of discount rates, great number of thresholds, large basis of calculation, etc.) and could only be fought by competitors by means of disproportionate efforts. Since Royal Canin already granted its purchasers other rebates based only on quantity, the contemplated rebates had no economic justification.

"*Such discounts would force a competitor trying to increase its market share to decrease considerably its prices, and thus tend to constitute a barrier to entry"*. Consequently, the discounts were held to be abusive and Royal Canin was fined for implementing them.

Fine (also sanctioning anticompetitive vertical agreements with some distributors): € 2 500 000.

This decision was overturned on this point by the Paris Court of Appeal (judgement of the Paris Court of Appeal, 4 April 2006, *Royal Canin*) on the grounds that the foreclosure effect had not been established in concrete terms. For the Court, the French Competition Authority should have reviewed whether: i) similar rebates were granted by other competitors and whether ii) the rebates contributed to divert customers away from Royal Canin's competitors, which was not likely to occur since the market was growing. An appeal-in-law is pending before the *Cour de cassation.*

04-D-65, 30 November 2004, *La Poste*:

Press release in English:

http://www.conseil-concurrence.fr/user/standard.php?id_rub=134&id_article=358

La Poste, the incumbent national mail service provider, was in a dominant position on several markets related to mail services. It offered a discount to some of its clients the turnover of which was superior or equal to € 150,000. This discount was linked to the turnover achieved during the year but its discount rates depended on thresholds of growth of the turnover compared to the turnover achieved during the previous year.

This rebate had a loyalty effect since it was not based on mere quantities, but rather on a progressive scale of turnover achieved with La Poste, regardless of the volumes of mail treated.

Therefore, La Poste offered a discount *"without compensation for the efficiency gains resulting from the increase in volumes treated, and thus offered loyalty discounts"*.

These practices of La Poste (also including tying rebates) were considered as an abuse of a dominant position. La Poste was fined after a settlement reducing the amount by 90 %, in consideration of the undertaking not to grant any loyalty rebate based on the growth of the turnover achieved by the purchaser.

Fine: € 600 000.

<u>04-MC-02, 9 December 2004, *Orange Caraïbe*</u>:

Press release in English:

http://www.conseil-concurrence.fr/user/standard.php?id_rub=134&id_article=364

Orange Caraïbe, in a dominant position on the market for mobile phones in the French West-Indies and Guyana, implemented several loyalty programmes for the benefit of its (non professional) final customers. The main discount consisted in “points” offered to the consumer on each invoice, which amount depended on the quantity purchased, and which could only be used as a price reduction on the purchase of a new mobile phone. By using the points, the customers committed themselves with Orange for two more years.

According to the French Competition Authority, the number of points granted being proportionate to the amount of the invoice, they could be considered as a discount on volume. However, they appeared to qualify as a loyalty discount since they could only be used on the acquisition of a new phone, and on condition that the customer stays with the operator for two more years. In fact, this last condition meant the programme that a deterrent effect on customers to change mobile operator at the only time when it would have been possible to do so (end of engagement period), by making it seem cheaper to stay with Orange.

Therefore, Orange Caraïbe’s behaviour appeared to have a foreclosure effect and to constitute an abuse of dominant position. Orange Caraïbe was ordered, as an interim measure, to allow its customers to use their points on any purchase or service, and not only on the purchase of a new mobile phone.

<u>04-D-13, 8 April 2004, *Roquefort*:</u>

Press release in English:

http://www.conseil-concurrence.fr/user/standard.php?id_rub=134&id_article=288

The group Société des Caves, in a dominant position on the market for Roquefort cheese, offered various discounts to its distributors.

These discounts consisted in particular of a “selectivity rebate” which gave compensation for an exclusive purchase, a discount for a global commercial agreement, a remuneration for linear placement warranty, a remuneration for a contract of “selective presence” imposing the presence of Roquefort references and a discount on turnover for purchasing these cheese references.

The French Competition Authority found some of the discount on turnover to be anticompetitive because it did not result from an objective price list linked to the volume of sales, but was conditional on exclusive purchasing.

The contemplated rebate had no economically justifiable compensation and could not be fought by competitors, who would have been obliged to grant rebates with economically unbearable discount rates in order to remain competitive.

It was part of a commercial strategy of eviction of competitors, who could not offer competitive discounts, and of reinforcement of the group’s position on the market. Therefore, this discount had a loyalty nature, and Société was fined for abuse of dominant position.

Fine: € 5 000 000

03-MC-04, 12 December 2003, *NMPP*:

Press release in English:

http://www.conseil-concurrence.fr/user/standard.php?id_rub=127&id_article=249

The group NMPP, which was dominant on the market for press distribution, granted loyalty rebates, especially to editors as remuneration for the exclusivity of distribution of their newspaper(discount rate from 0,5 % to 1 % of the turnover achieved in France).

The French Competition Authority did not make a detailed assessment of the nature of the practice, since the decision was only aimed at discussing the opportunity of interim measures. However, it held that the group NMPP could reasonably have abused of its dominance, so that they were ordered to stop their loyalty rebate policies.

Germany

DSL-Connections (2006)

Approximately until the end of 2005, Deutsche Telekom AG offered DSL-connections for resale on the basis of a model called "Resale DSL". According to this model resellers were granted a standardized deduction of 11.5% on the end customer price charged by DTAG. After the end of 2005, Deutsche Telekom alternatively offered resellers a model called "DSL Net Rental" and concluded respective contracts with United Internet AG and AOL Deutschland GmbH & Co. KG. This new model which was characterised by Deutsche Telekom as the "supply of virtual net capacities" differed from "Resale DSL" essentially only with regard to the pricing. Within the new model the pricing was based on the connection areas of Deutsche Telekom’s network. There are several thousand of such connection areas. For each connection area a minimum net capacity of 192 ports was billed irrespective of the actual use. This minimum capacity and additional 64 port packages were supplied for a minimum term of 24 months. Ports within the minimum capacity or the additional 64port packages were not physically reserved for the resellers, but were allocated dynamically according to demand. The prices were calculated by Deutsche Telekom on a diminishing scale based on the number of ports billed for each connection area. As the number of ports increased, the price charged for the supply of each port decreased, at a certain point significantly below the price level under the "Resale DSL" model. The Bundeskartellamt came to the preliminary conclusion that the "DSL Net Rental" model violated both Article 81 EC/§ 1 ARC and Article 82 EC/§ 19 ARC. With regard to the latter provisions, Deutsche Telekom had a dominant position in the market for upstream services for broadband internet connections. The new tariff can be qualified as a volume rebate for the same services offered on the basis of “Resale DSL”. There was the danger that these benefits granted to large resellers could drive competitors out of the market and lead to the establishment of an oligopoly. Relevant differences in terms of technology or risk between both offers could not be determined. Therefore, it was relevant whether, along general lines, the quantity scale was consistent with the cost function of Deutsche Telekom. However, there were no facts supporting this assumption. Rationalisation advantages over “Resale DSL” on Deutsche Telekom’s side could not be ascertained in the investigations.

Share deals (2007)

In November 2007, the Bundeskartellamt issued a decision imposing fines totalling 216 million euros against the advertising time marketing companies of the two private broadcasting groups RTL and Pro7Sat.1. The marketing companies IP Deutschland GmbH, active for RTL, and SevenOne Media GmbH, active for Pro7Sat.1, had concluded agreements with media agencies and the advertising industry in the form of contracts for the broadcasting of television advertising spots. These vertical agreements violated Article 81 EC as well as the corresponding

§ 1 ARC: Under the agreements, the media agencies were granted significant discounts and other refunds if they placed certain substantial proportions of their advertising budget with the respective broadcasting group. These discounts provided the media agencies with a strong economic incentive to place the respective proportion of their advertising budget with the two large marketing companies rather than with other broadcasters, thus foreclosing markets for (potential) competitors. The reason for this was that the discounts were granted retroactively for the entire budget, i.e. not only for incremental placements exceeding the discount thresholds. The Bundeskartellamt analysed the potential loss that media agencies would incur by switching to other suppliers and found that it was substantial and led to the foreclosure of the TV advertising market. There were no indications, and the companies themselves did not claim that the requirements for exemption under Article 81 (3) EC were satisfied, i.e. that the agreement contributed to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit.

Hungary

Magyar Posta

In a case Magyar Posta (MP – the 'Hungarian Post'), the former monopolist postal service provider that still enjoyed legal exclusivity for certain services applied a progressively increasing discount system. The proceedings originated from a public tender announced by an electricity supplier (ÉMÁSZ) for the creation, preparation and delivery of its consumer invoices. Two markets have been investigated, the market of creating the postal items and the market for their delivery. At that time MP was the exclusive authorised provider of basic postal services, like the clearance, sorting, transporting and delivery of items of correspondence.

One of the participants of the tender turned to the procurement supervisory authority complaining that the electricity company should not have included into the requested service an activity covered by legal monopoly as it excludes competition concerning the part of the requested service that was not covered by legal monopoly. The complaint was rejected as unsubstantiated on first instance as the authority considered that as MP can be involved as subcontractor into any of the tenders, competition was not restricted. However MP has also submitted a tender in which it provided a special discount for the electricity company on deliveries should MP be chosen for the creation and preparation of the invoices. This special discount on delivery was not available for other participants of the tender to whom the general progressive discounting framework applied. However as the cost of delivery represented around 60-70% of total costs even a slight deviation resulted in significant alterations in the offers. It was established that often, but not always, MP deterred from its general discounting framework and provided higher discounts where it was also chosen for the creation and preparation of invoices or direct mails. MP has not invoked a detailed efficiency defence for its practice only noted that the level of the discount depends not only on the number of deliveries but also on the level of the preparedness of the items to be delivered. MP claimed that should any of its competitors submit the postal items in the same level of preparedness as MP itself does, it would certainly receive the same special discount promised by MP in certain tenders.

The GVH found that this justification can not be accepted. First, the required level of preparedness is determined by regulation and therefore there is no room to make distinctions. Second, MP in fact refused the application of the same discount in certain cases without regard to the preparedness of the postal items. Third, MP has not consistently applied the special discount in all cases where it provided all the services. All these suggested that in fact the discount on delivery had no connection with preliminary services, it was arbitrary and non transparent.

The reason for the application of the special discount was that MP used its monopoly on the delivery market to restrict and distort competition on the separate, competitive market of the creation of postal items. The special discount system used by MP provided customers with higher discounts if they contracted MP for the creation of postal items as well thereby leveraging its market power to a competitive market.

In this case no proper cost-price test was applied mainly due to the fact that first, MP itself has not raised an effective efficiency defence, but only put forward efficiency based arguments that proved to be unsubstantiated even before any cost analysis was necessary, and second, because not the merits of the discount system was at stake but the infringement was rather an ad hoc discrimination aiming the leverage of market power on a connected market.

In another case also against the MP the Competition Council established that the MP's 'Loyalty Discount' cannot be regarded as a quantity discount since the amount of the discount did not depend only on the purchased quantity but on the purchase of the previous period. At the same time it could not be regarded as a loyalty discount since for getting these discounts the purchaser did not have to undertake exclusive buying. (For the separation of quantity discount from loyalty discount the Competition Council used the concept from the Hoffmann-La Roche case of the ECJ.) The Competition Council took into account that lack of exclusivity clause. It laid down that – beside other factors - the degree of the discount is decisive when assessing other companies possibilities to market entry. In this case, the degree of the discount was too low to establish an infringement. However the Competition Council noted that further monitoring of the 'Loyalty Discount' is advised. It must be noted that this case ended with termination and no infringement was established.

Israel

***Yedioth Ahronoth* judgment (2/96 Gen. Dir. v. Yediot Aharonot Ltd. ATTRIB (supplementary judgment), 32(7) Dinim Mehozi 297, 2000 Antitrust 3008136, at 26-28)**

The *Yedioth Ahronoth* and *Ma'ariv* newspapers were sold to the public mainly through retailers. Each day, a retailer received the number of copies that it ordered, received a rebate (commission) of 14.5 percent for each copy that it sold, and returned the unsold copies. The retailer paid only for the copies sold and not for those returned.

Yedioth, a declared monopoly in the market of daily newspapers, started a promotion with two cumulative conditions. The first pertained to the quantity of newspapers bought. *Yedioth* required retailers to buy from it the same quantity that they ordered in the past; they were not allowed to order a smaller quantity. The second condition pertained to the price of the newspaper to the retailer. *Yedioth* sold copies of its newspaper to the retailer at 50 percent of its price to the consumer. Thus, the retailer's rebate climbed from 14.5 percent to 50 percent. These two conditions were interlocking because the retailer could not earn the higher rebate unless it bought the specified amount of newspapers and waived the right to return unsold copies.

The Tribunal stated that the rebate in question was not a quantity rebate since the quantity at issue was not objective and fixed; instead, it varied from one retailer to the next commensurate with the retailer's ordinary levels of sold and returned copies and is derived from each retailer's ability to absorb the extra quantity of copies required. The rebate was also not a "classic" loyalty (fidelity) rebate because it was not conditioned on the retailer's buying all newspapers that it sells, or a certain amount of them, only from *Yedioth*.

The type of rebate that the Tribunal found to be the most similar to the one at issue was a target rebate. However, it was different from an ordinary target rebate, which is usually typified by a specified quantity target, e.g., selling a certain quantity of flight tickets or insurance policies.

The Tribunal pointed out that even if the rebate at hand was not a classic example of any of the aforementioned types, it had features that are typical of rebates that are considered problematic from the antitrust point of view.

First, it was not determined on the basis of economic considerations derived from the extent of the retailer's purchases, the total level of purchases, the number of extra newspapers that were bought [by the retailer] and not sold, or some other objective economic standard. It was also not alleged that the rebate was derived from costs savings.

Second, the target needed for the rebate to take effect was an individual one, not common to all participating retailers; it was determined for each participant separately, commensurate with the number of copies that it returned.

Third, the rebate came with a large economic incentive that was intrinsic to it from the retailer's standpoint, and the more effective it was in increasing sales of *Yedioth*, the more it came at the expense of sales of *Ma'ariv,* i.e., on the purchase of newspapers that would be ordinarily bought from the competitor.

The Normative Framework:

Section 29A(a) of the Law forbids a monopolist to abuse "its position in the market in a manner which might reduce business competition or injure the public".

Here, according to the Tribunal, unlike in tying, that was discussed in the partial ruling, the practice in question is not one that the legislator presumed to be an abuse of position that may mitigate business competition or harm the public as set forth in Section 29A(b) of the Law. Absent such a presumption, this practice may be prohibited only if it is proved to have the ability to mitigate business competition or cause (other) harm to the public.

The Abuse:

The Tribunal found *Yedioth's* promotion and marketing method to be an unfair business practice that amounts to an abuse of *Yedioth's* monopoly position.

The advantage that *Yedioth* gained by using this method was reflected not in the direct business or economic benefits that it derived from using it, but solely in the damage that it inflicted on the rival – *Ma'ariv*. Such a method of competition, in which the monopolist cannot gain direct economic benefits but can only mitigate the rival's ability to compete, is a "classic" method of exclusionary behaviour toward competitors, one of the principal types of behaviour that are forbidden to a monopolist. Harming competitors is not forbidden *per se.* It is forbidden only when the competition is not conducted on the merits and when the harm is excessive.

The Tribunal added, that given its special position a monopolist must abide by stringent rules that do not apply to other competitors in the market and that enjoin it against competing unfairly even if the practice at issue is common among other competitors in the market.

As for the duration of the marketing method used, the Tribunal pointed out first, that the fact that *Yedioth* used it in a short-term and territorially limited way did not mitigate its long-term implications. *Yedioth's* use of the method as such was a long-term strategy that aimed to exclude its main competitor. Second, short-term loyalty rebates are generally not prosecuted, mainly due to the rationale that "acquiring" customers' loyalty and tying them to the monopolist can not be achieved when loyalty rebates are applied for short periods only. This rationale, however, cannot justify the use of the method even for short periods when its goal is deterrence, which can be attained effectively when the method is applied even for short periods.

The Position of the General Director of the Antitrust Authority Regarding Commercial Practices between Dominant Suppliers in the Food Industry and Large Retail Chains

For many years, dominant suppliers have controlled the food staples markets in Israel. The objective of the Position was to remove competition barriers on the supply and sales tiers of the food staples sold to the Israeli general public. This Position, which later on formed the basis for a Consent Decree, approved by the Antitrust Tribunal, was signed on May 29th 2003.[70]

Early on, it was realized that dominant Israeli suppliers have a tendency to "enlist" the help of large sales platforms for the sake of excluding competitors, and, at a later stage, for the sake of creating and increasing barriers to direct competition against them. The array of benefits given to retailers by suppliers has become a central part of their relationships. The purpose of these benefits, or at least their likely result, was the possible foreclosure of access to the retail chains from competing suppliers, or, at a minimum, a significant narrowing of such access.

One of the most important financial benefits received by retail chains from suppliers was for meeting sales goals. In most cases these were financial goals, linking remuneration with the annual volume of sales of the supplier's goods at the retail chain. Generally, the benefit was paid to the retail chains as a lump sum, usually at the end of the calendar year. Failing to meet the goals set by the supplier resulted in a very significant loss to the retailer.

The General Director pointed out that this marketing technique may be legitimate, as it signifies the existence of competition that obligates such marketing efforts. However, when a powerful supplier practices this technique, there is reason to believe it attests not to the existence of competition, but rather to an attempt to decrease or abolish said competition.

The practice of granting rebates by dominant suppliers for meeting individual sales targets preserved and even intensified the power of dominant suppliers. In fact, this system constituted a type of target (or loyalty) discount given as a global sum, stipulated upon the retail chain's meeting a sales goal that increases the market share of the dominant supplier at the expense of his competitors (and not as a discount from the price at which the retail chains purchase the product from the supplier). This discount, as opposed to legitimate discounts, was not based on uniform objective parameters for all retailers, but was rather tailored to the dimensions of each client and directed towards a certain portion of the individual sales volume of each retailer. Therefore, competing suppliers could not approach the retailer with counter-offers of similar value, since their sales volumes were far smaller than those of the dominant supplier. This rebates system fully exploited the existed asymmetry between dominant suppliers and others, and placed the competitors in a position of inferiority, with no regard to their relative efficiency.

The directives issued in this matter by the Director General:

A large retail chain and a dominant supplier shall not be party to an agreement whose object or effect is the giving of benefits to the retail chain in return for meeting sales goals, unless the benefit is given as a discount off the purchasing price of units sold in above and beyond the sales goals, and restricted to these units alone.

In the aforementioned benefits, the prices of units surpassing the sales goals shall not be lower than the production costs of these units.

In other type of agreements between a large retail chain and a dominant supplier, the supplier was guaranteed that its market share of sales in various product categories would remain above a certain percentage.

The agreement guaranteed financial retribution to the retail chain in return for meeting the goals (market shares) set. These agreements could be used as a direct tool for preserving the power of a dominant supplier and as a shield before competition: whatever the nature and measure of attractiveness of competing products before the consumer, the chain must sell the products of the dominant supplier.

This and similar agreements, in General Director's opinion, constituted types of prohibited loyalty discounts, through which the dominant supplier assured himself a significant portion (and in the dominant category an overwhelming portion) of the total sales of the chain in the relevant categories.

The directive issued in this matter by the Director General:

A large retail chain and a supplier will not be party to an agreement whose object or effect is the determination of the supplier's market share (or those of competing suppliers) in the sales of the retail chain; without detracting from the aforesaid, the retail chain will not be party to an agreement whose object or effect is one of the following:

The retail chain guarantees that the supplier's share in the chain's sales of similar products (or of a certain category) will not be lower than a certain percentage.

To bring about that a competing supplier's share in the retail chain's sales of similar products (or in a certain category) will not be above a certain percentage.

Italy

A/224 Pepsico Food and Beverages International – IBG Sud / Coca Cola Italia, decision of 7 December 1999 n. 7804.

In this case – started upon a competitor's complaint - the dominant firm in the national market for colas set up a complex exclusionary strategy, aimed at foreclosing its main competitors. Such strategy included – but was not limited to – a loyalty discount scheme, whereby customers would be granted target discounts, applying to the totality of their purchases if they met the relevant threshold. The threshold was set individually and reviewed on a regular basis in order to enhance the loyalty inducing effect of the scheme.

The administrative courts upheld the Authority's decision.

A/291 *Assoviaggi /Alitalia*, decision of 17 June 2001 n. 9693.

Alitalia, the dominant undertaking in the markets of air transport of passengers to/from Italy, applied a scheme of differentiated incentives for agents, whereby additional sums (so called over-commissions), calculated on the basis of total sales, were paid to those agencies exceeding individually set threshold. As a result, competitors were foreclosed, since they could not match Alitalia's incentives without facing losses.

Notably, no competitors complained about the practice: the association of agents rather lamented the allegedly discriminatory effect of the differentiated thresholds triggering the incentives. The decision was appealed before the TAR Lazio, the administrative court of first instance. The court upheld the Authority's decision, but annulled the fine which had been imposed upon the undertaking concerned.

Japan

***Intel*, March 8, 2005**

English Press release:

http://www.jftc.go.jp/e-page/pressreleases/2005/March/050308intel.pdf

The Commission found that X, which is a leading manufacturer/distributor of CPUs installed on PCs, promised its customers who manufacture/ distribute PCs that X would provide them with a rebate or a refund on X's CPUs installed on such customers' PCs on condition that the customers maintain the MSS (the ratio of X's CPUs to all CPUs installed on their PCs) at 100%, not adopting therefore any CPUs other than X's, or that they maintain the MSS at 90%, reducing the ratio of competitors' CPUs to 10%. Thus, X prevented its customers from adopting the CPUs of its competitors.

Korea

Intel

English summary:

http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=18

The only case dealt by the KFTC regarding loyalty discounts is Intel's abuse of market dominance. In the case, Intel was found to have offered various rebates to Korean PC makers conditioned upon suspending transaction with its competitor AMD and purchasing its CPUs only . The conditional rebates were found to actually have caused Korean PC makers to suspend buying AMD-based CPUs by either their total CPU demand or by CPUs for specific sales routes and just to purchase only Intel-based CPUs for a considerable time period. As a result, AMD's market share of the Korean market greatly dropped and competition was severely constrained in the relevant market.

For administrative systems (i.e., the agency issues its own decisions on the legality of the conduct, which may be appealable in court), state the number of agency decisions finding a violation or settlements that were challenged in court and, of those, the number upheld and overturned.

The administrative measure was imposed on Intel by the KFTC, which has been the only case of its kind, with the Intel case pending at the court.

Lithuania

Abuse of a dominant position by *AB Mazeikiu nafta* in 1999

This case provides an example when a dominant firm offered quantity discounts to its clients conditional on exclusive dealing.

On 17 December 1999, the Competition Council started investigation concerning actions of AB Mazeikiu nafta, the only refinery of oil products in Lithuania. The investigation was prompted by a complainant who requested the Competition Council to determine whether AB Mazeikiu nafta acted in accordance with the Law on Competition, when in March 1999 it provided exclusive conditions of distribution of its products to a limited number of companies, fixing exclusive discounts of 60 LTL per tonne of gasoline and diesel fuel to them. The discounts were not announced in official price-lists and discount protocols of AB Mazeikiu nafta as required.

The investigation concluded that AB Mazeikiu nafta held a dominant position in the A-80 and A/92/95/98 brand gasoline and diesel fuel markets. The company took advantage of its unilateral decisive influence in the markets and, concluding similar agreements with different companies, fixed dissimilar conditions for the purchase of oil products. The agreements contained a no compete clause, since the buyer explicitly agreed neither to import nor purchase imported oil products except in cases where AB Mazeikių nafta had no possibility to supply such products. In return the buyer was rewarded with the quantity discount (rebate).

These actions of the company constituted an infringement of item 3 of par 1 of Article 9 of the Law on Competition, which prohibits abuse of the dominant position through application of dissimilar (discriminating) conditions to equivalent transactions with certain undertakings, thereby placing them at a competitive disadvantage. A range of agreements of similar character resulted in dissimilar competition conditions in the oil product markets which obstructed free competition therein.

The Competition Council imposed the highest fine that was allowed by the national law at that time. After prolonged litigation in the Court the decision was upheld.

Possible abuse of a dominant position by the brewery *UAB Svyturys-Utenos alus* in 2003

This case provides an example of termination of the investigation concerning loyalty discounts by accepting commitments.

In 2003, the Competition Council opened the investigation concerning possible abuse of a dominant position by the UAB Svyturys-Utenos alus, which is the leading brewery in Lithuania, after having received complaints from the local rival breweries. The alleged abuser had 74% share in the segment of premium beer sold in hotels, restaurants and cafes and slightly less than 40% share in the overall beer sales in Lithuania.

Rival breweries claimed that UAB Svyturys-Utenos alus offered supply contracts with loyalty discounts for the restaurants, hotels and cafes that resulted in exclusionary effects. They alleged that because of such contracts the leading brewery was able to strengthen its dominant position, inflict harm on competitors and reduce consumers’ choice.

During the investigation the Competition Council found that UAB Svyturys-Utenos alus indeed offered payments for sales promotion and advertising services. However, they depended directly only on the quantity supplied and therefore were equivalent to loyalty discounts. The investigation established that the actions of UAB Svyturys-Utenos alus did not incur material damage to the interests protected by law. Furthermore, UAB Svyturys-Utenos alus voluntarily ceased such activity, i.e. waived its requirements imposed upon the contracting public catering enterprises. It also assumed an obligation to amend the provisions of the contracts and refrain in the future from imposing such obligations.

Giving regard to all facts, the investigation was terminated.

Abuse of a dominant position by *AB Mazeikiu nafta* in 2005

This case involves a range of actions including loyalty discounts recognised as evidence of abuse of a dominant position.

The investigation was initiated in July 2004 with a view to establishing whether actions of AB Mažeikių nafta in the period between 2002 and 2004 could have caused the gasoline and diesel fuel prices in Lithuania to be higher than those in other Baltic States, also whether the differences in fuel prices in Lithuania, Latvia and Estonia could have resulted from the possibly restrictive actions of the company.

The investigation established that the Lithuanian fuel prices higher than those in Latvia and Estonia were caused by objective reasons stemming from different conditions in different territories of the Baltic States market (excise conversion differences, the fuel reserve accumulation requirement effective in Lithuania, etc.), as well as the abuse of the dominant position by AB Mažeikių nafta in the market. Being a monopoly producer and the main supplier of oil products in the Lithuanian, Latvian and Estonian market in 2002-2004 AB Mažeikių nafta was dominating in the Baltic states gasoline and diesel fuel markets and was able to exert a unilateral decisive influence therein while concluding contracts and selling oil products. The company has not made operational any clear-cut and transparent pricing system or a uniform discount system applicable for identical fuel purchases in Lithuania, Latvia and Estonia. This affected the fuel purchasers in the three Baltic States who were placed at different competitive conditions. The trade between the Member States was affected because AB Mažeikių nafta was marketing the major part of its production in the Baltic States, besides, the Lithuanian purchasers would acquire fuels at higher prices than Latvian and Estonian buyers. Since the fuels were marketed in Lithuania at higher prices, damage was also incurred to Lithuanian oil product consumers.

The Competition Council concluded that AB Mažeikių nafta was abusing the dominant position by discriminating, while concluding similar contracts, the Lithuanian, Estonian and Latvian purchasers on territorial basis. AB Mažeikių nafta could affect the trade between Member States also by forcing the undertakings operating in the Lithuanian, Latvian and Estonian markets to conclude contracts concerning the purchase of the amount of oil products meeting the major demand of undertakings in oil products.

A range of actions restricting trade performed by AB Mažeikių nafta was also recognised as evidence of abuse of dominance. Those included restricted possibilities of the buyers to freely choose amounts of purchases and discounts, and efforts to protect the gasoline and diesel fuel markets from import and potential importers, by granting some inadequate rebates to UAB Lukoil Baltija, UAB Lietuva Statoil and UAB Neste Lietuva thus eventually discriminating other minor purchasers-wholesalers. AB Mažeikių nafta was operating some economically ungrounded rebate system under which minor wholesalers found it unsound to purchase oil products from AB Mažeikių nafta, since they could acquire the same products at lower costs from Lukoil, Statoil and Neste.

Having examined and assessed the above and other facts and circumstances established during the investigation the Competition Council concluded the infringement of both Article 9 of the Law on Competition of the Republic of Lithuania and Article 82 of the Treaty establishing the European Community and resolved to impose a fine in the amount of LTL 32 million for the committed infringements. The company was also obligated to discontinue the actions restricting competition.

Russia

Cases against *Lukoil, Gazpromneft, TNC-BP Holding, NK Rosneft* and *Surgutneftegaz*

June 21, 2008 FAS lodged a case against “Lukoil,” “Gazpromneft’,” “TNC-BP Holding,” “NK Rosneft,” and “Surgutneftegaz” alleging then in violation of Sections 1.1, 1.6 and 1.8 of Article 10 of the Law “On Protection of Competition.” FAS found that discounts established by these companies for aviation kerosene, black oil and diesel fuel to certain wholesalers were conditioned upon the share of purchases and led to discrimination of other wholesalers that had to acquire these type of fuel at monopoly high price. FAS found “Gazpromneft” and “TNC-BP” guilty in violation of the Article mentioned. Decision on “Lukoil” and “Rosneft” is pending till December 2008. “Gazpromneft” and “TNC-BP” were established liable to serve an administrative penalty – a turnover based fine of 1-2% of the company turnover for previous financial year in the relevant market (the exact amount of fine is to be established).

South Africa

***South African Airways*, Case number 18/CR/Mar01**

Link to the judgment: http://www.comptrib.co.za/list_judgement.asp?jid=110

The Competition Commission of South Africa and Competition Tribunal of South Africa have had one in depth investigation which was then referred to the Tribunal for adjudication. The Commission brought this complaint referral against South African Airways (Pty) Limited ("SAA") following a complaint lodged by the Nationwide Airlines Group ("Nationwide"), a domestic rival of SAA. The Commission alleged that the incentives paid by SAA to travel agents constituted an abuse of dominance designed to exclude or impede SAA's competitors in the domestic airline market.

South Africa has found the conduct of SAA to be unlawful, as described above. The case concerned the legality of two incentive schemes, which SAA had with travel agents: the first incentivised travel agent companies to sell SAA tickets, and the second incentivised travel agent employees directly. The Commission brought this complaint referral following a complaint lodged by the Nationwide Airlines Group ("Nationwide"), a domestic rival of SAA. The Commission alleged that the incentives constituted an abuse of dominance designed to exclude or impede SAA's competitors in the domestic airline market. It found SAA's practices of paying travel agents override incentives and so-called "trust payments" to be anti-competitive. The Tribunal found that SAA had contravened section 8(d)(i) (the inducement provision) of the Act and ordered it to pay an administrative penalty of R45 million.

Regarding the anti-competitive effect: the Tribunal held, in the SAA matter, that travel agents had the ability and the incentive to move customers away from rivals to SAA. The Tribunal accepted as evidence the Commission's economic expert's evidence, which showed that, due to SAA's overwhelming market share, the additional commission generated from alternative airlines was lower. It was shown that, in order for a travel agent to shift 5% market share away from SAA, a Commission of 14.4% would be necessary, which raised rivals' costs so significantly that it became unviable. This was because the incentive scheme rewarded travel agents, not just on lower prices for additional tickets beyond a certain target, but lower prices for all of the tickets, back to the first ticket sold. The Tribunal also took into account the nature of the incentive scheme, per the views of the Commission's economist, namely:

- the discount was passed on to retailers, not consumers, and was therefore less likely to have pro-competitive effects;
- there was a great degree of 'non-linearity' in the scheme, or the marginal benefits of selling additional tickets (per the example above) were large;
- the duration of the contracts was approximately one year, which was of sufficient duration for an anti-competitive effect to arise;
- the scheme involved a lack of transparency. This uncertainty meant that travel agents would be especially conservative in trying to reach their targets.

The Tribunal also held that, in a market such as that for airline tickets, travel agents had the ability to move consumers from other airlines to SAA, and did not incur substantial reputational risk in doing this, because 'information on ticket prices was asymmetrical as a result of their volatility and complexity.

- Furthermore, the Tribunal examined the following in order to assess the extent of anti-competitive effects:
- The extent of the market foreclosed to rivals – in this case 75% of sales of domestic airline tickets were sold through travel agents, the target of the loyalty rebate scheme;
- Effects on competitors: the Tribunal found that rivals such as Nationwide experienced lower growth, and in some instances negative growth, over the period during which the incentive scheme was implemented.

The Tribunal found against the Respondent, despite the fact that SAA's competitors, Nationwide and Comair, both had similar incentive schemes, and despite the fact that SAA had had a loyalty incentive scheme since Nationwide started its operations, and Nationwide had grown substantially in spite of the scheme. The Tribunal held nonetheless that the *nature* of SAA's scheme changed in 1999, and essentially became aggressive. Direct evidence of harm to consumers was not required, nor was it shown, in this case.

In respect of evidence, the Tribunal accepted the evidence of the Commission's economic expert in respect of demonstrating the anti-competitive effects of the scheme, evidence of SAA's competitors experiencing decline when the scheme became more aggressive, and evidence of SAA's competitors, including board minutes, prepared prior to the commencement of litigation.

For administrative systems (i.e., the agency issues its own decisions on the legality of the conduct, which may be appealable in court), state the number of agency decisions finding a violation or settlements that were challenged in court and, of those, the number upheld and overturned.

For judicial systems (i.e., the agency challenges the legality of the conduct in court and the court issues a decision), state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief. Also state the number of cases that resulted in a final court decision that the conduct did not violate the competition law.

Switzerland

***Telecom PTT*, (RPW/DPC 1997/4)**

The text is only available in German:

http://www.weko.admin.ch/publikationen/00212/RPW/DPC1997_4.pdf?lang=de

The Telecom PTT (since October 1st 1997: Swisscom) classified dealer in three categories of rebates depending on the turnover realized with the dominant enterprise. The Competition Authority established the abuse of a dominant position. The decision was then annulled on appeal.

***Swisscom ADSL*, (RPW/DPC 2004/2)**

The text is only available in German:

http://www.weko.admin.ch/publikationen/00212/RPW/DPC2004-2.pdf?lang=de

The anticompetitive effect in the case "Swisscom ADSL" was, that the dominant telecommunication firm Swisscom discriminated some ISP (Internet Service Provider) by giving them lower rebates than to the own ISP-subcompany Bleuwin. (RPW/DPC 2004/2, p. 415/416). Swisscom (the first telecommunication enterprise in Switzerland) appealed against the Swisscom ADSL decision and the case was referred to the Swiss Competition Authority. Then Swisscom changed his behavior (abandoned the rebate system) and the case was closed.

Taiwan

Tradevan Information Services Co

In 1990, the Ministry of Finance established the Cargo Clearance Automation Division to establish the Electronic Data Interchange (EDI) standard to facilitate cargo clearance procedures. In 1996, the Division was then reformed as Tradevan Information Services Co. ("Tradevan"), and it monopolized the cargo clearance information transmission network market.

Later in 2002, a new entrant Universal EC Inc. ("Universal") attempted to enter the market and requested access to Tradevan's network. Numerous complaints were soon filed with the TFTC, including Tradevan's:

- refusal to provide Universal with the EDI standard;
- refusal to interconnect with most of Universal's services;
- setting of access fees high enough to prevent Universal from entering the market;
- unreasonably disconnecting the interconnection from time to time; and
- deployment of an unlawful loyalty discount scheme.

The TFTC found that Tradevan's trading counterparts included nearly 3,000 major cargo transportation enterprises. The trading counterparts of Universal were mostly customs brokers with small economies of scale. The services of the cargo clearance information transmission network have to be simultaneously accessed by customs officials, customs brokers, cargo transportation enterprises and financial institutions for the network to operate effectively. Thus, the users of the cargo clearance information transmission network tend to participate in the larger scale network that has a broader customer base.

The incumbent Tradevan, in a market with obvious network effect, had the first mover advantage compared with the new entrant Universal and was able to eliminate the competition. Thus, Tradevan was deemed a monopolistic enterprise, as set forth in Article 5 of the Act.

After the competitor Universal entered the relevant market in July 2002, Tradevan offered different preferential plans to compete for customers from January to December 2003 and employed a lower price strategy to lure original users in the following way. Its first program offered a 20% discount off the original fee for existing user access to Tradevan's network during the promotional period. Its second program offered a 40% loyalty discount off the original fee to new users that promised to utilise Tradevan's network during the same period. However, Tradevan had the right to terminate its second program and collected the differences between the promotional price paid and the original fees as a penalty if the users failed to keep their promises.

Furthermore, Tradevan imposed penalties on those users who wished to switch access to the Universal network within one year after participating in its second program. The TFTC considered that this loyalty discount scheme resulted in a cost increase when switching transaction partners and the incentive to gain access to the Universal network therefore decreased. In addition, over 80% of Tradevan's users were prohibited from switching trading counterparts. Since Tradevan used such discounts to "lock in" customers, the trading opportunities of competitors were vastly restricted. Consequently, the loyalty discount was held to be anti-competitive and ultimately prohibited.

After the TFTC reviewed the market structure, the network effect, interconnection conditions and the pricing schemes of both parties, the TFTC reached the conclusion in 2005 that the incumbent, Tradevan, had been misusing its market position by deploying a loyalty discount scheme to prevent market entry. Therefore, the FTC imposed an administrative fine of NT$1.5 million on Tradevan in accordance with Article 41 of the Act.

Further, since the "Regulations Governing the Operating Approval of the Cargo Clearance Information Transmission Network" was regulated by the Ministry of Finance, the TFTC also recommended that the Ministry of Finance amend the regulations by adding relevant obligations such as network connections, access fee regulation and opening up the EDI standard in order to improve fair competition in the cargo clearance information transmission network market.

United States: FTC and DOJ

***Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (lst Cir. 1983) (Breyer, J.)**

Pacific Scientific had over eighty percent of the market for snubbers, which are safety devices used in nuclear power plants. *Id.* at 229. Grinnell, which accounted for about half of snubber purchases, had been trying to help plaintiff Barry Wright become an alternative source of supply. *Id.* Pacific Scientific then offered Grinnell a large discount if it would agree to purchase large quantities of snubbers, and Grinnell agreed. The specified amounts constituted most, but not all, of Grinnell's anticipated purchases over a two-year period. *Id.* Barry Wright subsequently abandoned its attempt to enter the market and sued, alleging that the discount violated section 2. *Id.* at 229–30.

Both the district court and the court of appeals rejected the claim. In the First Circuit opinion, then-Judge Breyer explained that, under conventional price-cost tests for predatory pricing, Pacific's discount was not predatory because the resulting price was above any relevant measure of Pacific's cost. *Id.* at 233. The theoretical possibility that such prices could harm competition did not justify the risk of deterring procompetitive price cutting by entertaining that possibility in litigation. As the court cautioned:

[U]nlike 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 qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. . . . [W]e must be concerned lest a rule . . . that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.

Id. at 234. The court thus concluded "that the Sherman Act does not make unlawful prices that exceed both incremental and average costs." *Id.* at 236.

***Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000)**

Several boat builders challenged Brunswick's discount program on stern-drive engines. Brunswick manufactured and sold the engines for recreational boats and had a large market share (about seventy-five percent). *Id.* at 1044. Brunswick (like its competitors) offered market-share discounts. Boat builders who agreed to buy a certain percentage of their engine requirements from Brunswick for a certain period received a discount off the list price for *all* engines purchased. *Id.* Because some of the boat builders' customers apparently preferred Brunswick engines, the boat builders arguably had to purchase a significant percentage of their engine needs from Brunswick; nevertheless, the discounts might well have led them to purchase higher quantities from Brunswick than they otherwise would have. There was, however, evidence that at least two customers who previously had purchased more than eighty percent of their engines from Brunswick switched to a competitor for more than seventy percent of their purchases. *Id.* at 1059.

In concluding that plaintiffs had not offered sufficient evidence for a jury to determine that Brunswick's market-share discounts were anticompetitive, the Eighth Circuit emphasized that Brunswick's discounted prices were above cost. *See id.* (Brunswick's above-cost prices left ample room for new competitors to enter the market and lure customers away with superior discounts); *id.* at 1062 (questioning the district court's rejection of Brunswick's contention that above-cost discounts are per se lawful). The court also found that Brunswick's discounts were not exclusive-dealing agreements (buyers could purchase forty percent of requirements from other sellers while still receiving loyalty discounts from Brunswick) and other engine sellers could—and did—compete with Brunswick by offering better discounts. *Id. at 1062-63.* While Brunswick offered testimony that the discounts served procompetitive purposes beyond simply lowering prices (for example, by increasing the predictability of demand and thus lowering manufacturing costs), *Id. at 1047,* the court of appeals relied simply on "Brunswick's business justification . . . that it was trying to sell its product." *Id. at 1062.*

***Virgin Atlantic Airways Ltd. v. British Airways PLC*, 69 F. Supp. 2d 571 (S.D.N.Y. 1999), *aff'd*, 257 F.3d 256 (2d Cir. 2001):**

British Airways (BA) offered incentive programs that provided travel agencies with commissions, and corporate customers with discounts, for meeting specified thresholds for sales of BA tickets. The discounts applied to all sales, not just those beyond the target threshold. *Id. at 574.* Virgin Atlantic (Virgin) claimed that the result was below-cost pricing on certain transatlantic routes where it and BA competed. *Id. at 576.*

Both the district court and the court of appeals concluded that Virgin failed to show below-cost pricing. 257 F.3d at 269; 69 F. Supp. 2d at 580. Virgin's expert had assumed that the incentive agreements had generated additional flights to carry increased passenger load and compared the incremental costs of those flights with the revenues they generated. 69 F. Supp. 2d at 575–77. The courts, however, were not sufficiently persuaded that the assumption reflected reality and concluded that "the issue of whether British Airways is selling below-cost tickets to the marginal passengers on the five routes at issue in this case is a fact-rooted question as to which Virgin has not submitted direct evidence." *Id. at 580.*