POLICY ROUNDTABLES

Loyalty and Fidelity Discounts and Rebates

2002

Introduction

The OECD Competition Committee debated loyalty and fidelity discounts and rebates in June 2002. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Gary Hewitt for the OECD, written submissions from Australia, Brazil, Finland, the European Commission, France, Germany, Italy, Japan, Korea, Mexico, Norway, Sweden, Chinese Taipei, the United Kingdom, the United States, as well as an aide-memoire of the discussion.

Overview

As with other policies offering lower prices to at least some buyers, loyalty and fidelity discounts are generally pro-competitive and beneficial to consumers even though they may harm certain competitors. Potential problems exist, however, when such discounts are employed in ways that reduce price transparency, exclude or restrict a significant number of actual or potential competitors, or raise the probability of anticompetitive co-ordination.

The sometimes complex pro- and anti-competitive effects of loyalty and fidelity discounts are explored in the documentation on the topic. While these documents reveal some interesting policy differences among various members of the Competition Committee, they also point to general agreement that loyalty and fidelity discounts are more likely to raise competition concerns when practised by firms enjoying substantial market power.

Related Topics

Portfolio Effects in Conglomerate Mergers (2002)
Price Transparency (2001)
Airline Mergers and Alliances (2000)

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LOYALTY AND FIDELITY DISCOUNTS AND REBATES

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Loyalty and Fidelity Discounts and Rebates which was held by the Competition Committee in June 2002.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les remises et rabais de fidélité, qui s'est tenue en juin 2002 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

OTHER TITLES

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EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable, the delegate submissions and the background paper, a number of key points emerge:

(1) *Fidelity discounts can be defined as pricing structures offering lower prices in return for a buyer's agreed or* de facto *commitment to source a large and/or increasing share of his requirements with the discounter.*

Fidelity discounts come in a great many forms. Most, however, share the characteristic that the percentage discount increases, usually in discrete jumps, in response to current reference period purchase volumes exceeding purchases in a previous reference period. The reference period is usually considerably longer than would normally elapse between successive purchases in a pertinent market.

(2) *In addition to the possible benefits of a lower price, shared with other types of discounts, fidelity discounts can have several unique procompetitive advantages, including being a good means of incentivising distributors.*

Lower prices associated with fidelity discounts are only a "possible" benefit because fidelity discounting will almost certainly result in price discrimination. That means some buyers will pay higher prices and others lower prices than would prevail if there were uniform pricing. An overall net efficiency benefit could arise, however, to the extent the price discrimination represents a more efficient way to recover fixed costs, i.e. to the degree the fidelity discounters charge prices inversely related to different buyers' elasticities of demand. A necessary but not sufficient condition for such a benefit is that the price discrimination leads to an increase in output. Whether in such a situation not only total welfare, but also consumer surplus will increase will remain uncertain. In addition, an overall net efficiency gain is less certain if the fidelity discounts cause a reduction in competition. Once such a reduction has occurred, there is reason to believe that all buyers could end up paying higher prices than they would have without fidelity discounting.

An example of a unique procompetitive benefit of fidelity discounts can be found in Finland's Kenkä-Kesko case where they were used to encourage a group of different sized distributors to increase their purchases of a private brand of footwear. Without the resulting overall increase in sales, it would not have been possible to introduce Kenkä-Kesko's new private brand; i.e. the foreign supplier's price would have been too high. A single schedule quantity discount offered to all Kenkä-Kesko distributors might have given smaller distributors an insufficient incentive to help meet the minimum overall sales threshold of private label footwear. This problem was overcome through the use of fidelity discounts and the result was an improvement in inter-brand competition.

It is sometimes claimed that fidelity discounts could reduce a supplier's sales variability thus allowing it to realise economies in smoothing its production and reducing its inventories. This is not automatically the case, however, since reliance on a smaller number of buyers could increase rather than reduce variability even though each of the buyers is less likely to change its supplier than was the case before the fidelity discount was introduced. The exact outcome would presumably depend on which buyers a fidelity discounter happened to end up with and how sales variability is distributed across customers.

Fidelity discounts are sometimes instigated by buyers rather than sellers. In those cases, the discounts may result from the purchaser trying to exercise buyer power. Provided the seller enjoys a significant degree of market power, such fidelity discounts could increase economic efficiency, as long as they do not reduce competition at either the seller or buyer level.

(3) The probability that a fidelity discount will have anticompetitive effects essentially depends on whether, and to what degree, the discount reduces price transparency, excludes or restricts actual or potential competitors, and/or raises the probability of anticompetitive co-ordination.

Fidelity discounts could make it considerably more difficult for consumers to compare prices and thus tend to discourage price competition. Airline frequent flyer programs (FFPs) offer a good example of the difficulties fidelity discounts can pose for meaningful price comparisons. Few travellers are able to predict their future travel needs sufficiently well that they can compare the post-discount price of an airline ticket offered by two companies, one or both of which offers FFPs.

When customers compare suppliers with an eye to giving all or most of their custom to a single firm, some competitors are all but excluded from consideration. It could happen for example that a certain quantity of a particular supplier's product is viewed as a "must have" by a significant number of buyers. While an advantage usually rests on sustained hard work and investment, fidelity discounts might considerably increase the advantage's significance. The use of fidelity discounts to magnify competitive advantages can again be illustrated from the airline industry.

Airlines with extensive networks may enjoy several advantages over competitors with little or no network coverage. The significance of these advantages can be increased through the use of FFPs and corporate discounts having a loyalty inducing structure. Such pricing strategies could be used to convert competition for some, perhaps most, customers flying from City A to City B, to competition in flights between A and B where an important distinguishing attribute is the network coverage of each competitor. Because of the loyalty enhancing strength of FFPs and non-linear corporate discounts, some travellers potentially stand to lose a great deal in the way of free flights or other privileges if they opt to give part of their custom to a carrier with a less extensive network. This could be true even if carriers with smaller networks adopt discount programs similar, except for the number of destinations covered, to those offered by the larger network carriers. Airline fidelity discounts can therefore be seen as raising switching costs for the affected travellers and tending to restrict the market share of small network operators or to block the entry of new carriers who are able to enter the market only on an initially small scale. Non-linear travel agent commissions, although they operate at a different level of the distribution channel, could have the same effect as long as travel agents have some market power.

Disadvantaging or even excluding competitors through the use of fidelity discounts need not harm consumers. Harm will result in this fashion only if either of the following conditions are met: (*1*) there is a significant reduction in the variety of product offerings (i.e. product differentiation is reduced and consumers do not share in any resulting cost efficiencies); or

(*2*) the reduction in the number or strength of suppliers increases one or more discounters' unilateral power to profitably raise price above competitive levels, or facilitates anticompetitive co-ordination among suppliers.

(4) The potential anticompetitive exclusionary effects of a fidelity discount cannot be properly assessed without close examination of its specific characteristics and the market in which the discount is being applied.

The potential anticompetitive exclusionary impact of a fidelity discount depends critically on its degree of non-linearity (i.e. how rapidly and smoothly does the discount increase as a buyer sources more of his requirements with the discounter). This will determine the degree to which a fidelity discount actually will create or raise switching costs, i.e. increase loyalty among buyers. It is also important to note the length of the reference period. Generally speaking, the shorter such periods are, the less significant the fidelity discount induced increase in switching costs. The degree of synchronisation in reference periods across buyers could also be important - achieving minimum efficient scale by a new entrant could be delayed if the beginning and ending of reference periods were unsynchronised across buyers, leaving only a small portion of the market "up for grabs" at any point in time.

Other crucial factors influencing the anticompetitive effect of a fidelity discount are the degree of market power of the discounter and the discounter's relative position *vis-à-vis* competitors, the existence of other entry barriers, the cumulative use of similar practices by a majority of suppliers in an oligopolistic market and other factors facilitating collusion.

(5) It is difficult to determine what effect, if any, fidelity discounts will have on the probability of anticompetitive co-ordination in a market.

Fidelity discounts can have a number of offsetting effects on the probability of anticompetitive co-ordination. To begin with, fidelity discounts could change purchasing patterns. Instead of purchasing frequently from multiple sellers, fidelity discounts could cause customers in effect to bunch their purchases in time and to source from a single supplier rather than a group of suppliers. Such bunching and concentration in purchases could undermine the stability of collusion by increasing the potential payoff from each instance of secret price cutting and by postponing, at least as regards the customer receiving the shaved price, any retaliatory response by other suppliers. Working against this effect, however, the bunching and concentrating of purchases might make it easier to detect cheating because it could lead to larger, more sudden shifts in sales volume than price shaving would otherwise cause. Large sudden sales drops as contrasted with a slower more continuous decline in sales are more likely to be detected and attributed to cheating, hence to invite the kind of retaliation that makes cheating unprofitable.

To the extent fidelity discounts raise switching costs, they tend to make it necessary for a cheater either to offer larger discounts, or to offer them over a longer period of time (assuming that reference periods are unsynchronised across buyers) thus making the discounts easier to detect. Both effects discourage cheating, hence make collusion more likely.

A lower degree of price transparency induced by fidelity discounts will probably work in favour of collusion. This is because it may be harder for buyers to assess and compare discounts than it is for suppliers to do so. Buyers therefore may fail to respond as strongly and quickly as cheaters would hope, but retaliation could remain severe and swift in markets where fidelity discounts have reduced price transparency.

Finally, and perhaps most importantly, fidelity discounts could reduce the number of actual competitors to the point where collusion is easier to sustain. They could also reduce the number of potential competitors by raising barriers to entry. That in turn would make it possible for colluding firms to raise prices further above supra-competitive levels without fearing this will be undone by increased output coming from new firms.

(6) Any short term favourable effects from fidelity discounts for consumers as a group might be more than offset if the fidelity discounts are used as a predatory pricing or predatory foreclosure strategy.

There are basically two ways that consumers as a group could be better off in the short run because of fidelity discounts but lose in the long run. The first amounts to straightforward predatory pricing. Under this strategy, once the low prices associated with a discount have induced enough existing competitors to leave the market, the discounter raises prices above pre-discount levels in order to recoup the losses made during the low price stage of the strategy. In such a situation, what consumers initially gain through lower prices, could be more than lost over the long haul. This will not happen of course, unless re-entry or new entry is somehow blocked once prices are raised in the recoupment phase.

A second predatory strategy is more particular to fidelity discounting and is appropriately labelled "predatory foreclosure". In order to preserve existing supra-competitive price levels, fidelity discounts could be employed in both the short and long run to keep potential entrants out of the market. The result would be that although prices in the short run are below what they would be without the discounts, prices in the future will be higher than they otherwise would be. This is not simply another form of limit pricing since the average price is significantly above rather than marginally below what the excluded firms would charge were they able to enter the market.

(7) Cases of predatory foreclosure through fidelity discounting pose special problems for the application of cost-based safe harbours and recoupment tests typically applied to other forms of predation.

The standard approach to predatory pricing analysis in many OECD countries is to determine first whether prices fall below some critical cost standard. If they do, then a second screen is applied in some countries in the form of assessing the probability that the losses will be recouped at a later stage through supra-competitive prices following exit of the supposed victim(s).

Applying the two screen approach to predatory foreclosure through fidelity discounting may result in few instances of the practice being prohibited. Consider for example a fidelity discount involving "rollback" (or back to first unit) pricing. The effect of a rollback can be illustrated with a simple example. Suppose a buyer can get a ten percent discount on all units purchased provided s/he increases future purchase volumes by at least ten percent compared to some past reference period. The result could be that the extra amount spent to qualify for the fidelity discount could be close to zero or even negative. Nevertheless, since the average price paid for all units purchased could remain above some critical cost standard, such a fidelity discount would not be captured by the first screen. If the first screen functions as a safe harbour, such a fidelity discount could escape prohibition even if it has the effect of keeping prices above levels that would prevail were the discount prohibited.

As for the recoupment screen, this too could function to protect predatory foreclosure through fidelity discounting from attack under competition laws. Such predatory foreclosure is

presumably practised in order to block entry that would have the effect of causing prices to fall below what they are with the discount scheme in place. The discounts will never be eliminated as long as doing so would result in new firms entering the market and pushing average prices below what they are with the current level of fidelity discounts. There will be no recoupment phase with such a strategy.

There is no consensus about what if anything should be done about the problems connected with applying the two screen approach to predatory foreclosure through fidelity discounts. This would seem to be an appropriate area to investigate further in a subsequent roundtable discussion. That could involve comparisons between fidelity discounts and various non-compete or exclusive dealing arrangements.

(8) *In some jurisdictions, dominant firms are found to abuse their market power when practising fidelity discounting. Such discounts may, however, be accepted where they are cost justified, or were adopted in order to meet competition.*

This enforcement approach may have the advantage of enhancing legal certainty in regard to fidelity discounts and it takes account of the fact that fidelity discounts by dominant firms are more likely to be anticompetitive than fidelity discounting by other firms, especially because of the high risk of foreclosure with price increasing effects. It has the downside, however, of prohibiting dominant firms from using fidelity discounts to practise efficiency enhancing price discrimination, and may also inhibit them from engaging in exclusive dealing even when that has procompetitive effects. Moreover, depending on the reach of the meeting competition defence, strictly prohibiting their use of fidelity discounts could have a chilling effect on dominant firms causing them to cede market share to less efficient firms which are free to employ fidelity discounts.

(9) *The roundtable discussion revealed some important differences in views among Member countries which could inhibit greater international convergence in enforcement against certain fidelity discounts, most notably as regards frequent flyer programs and other discounts offered by airlines.*

The differences observed may be more deeply rooted than simply different case enforcement experiences. Instead, some countries may regard preserving fair play or a level playing field as part of protecting "competition". Other countries seem to focus not so much on what competition consists of as on the increased economic efficiency that competition usually promotes. Further work on fidelity or other discounts offered by dominant firms should take cognisance of this possibly significant difference in basic approaches to competition policy.

SYNTHÈSE

Par le Secrétariat

Il ressort des discussions qui ont eu lieu en table ronde, des contributions des délégués et du document de référence un certain nombre de points essentiels :

(1) *Les remises de fidélité peuvent être définies comme des structures tarifaires offrant des prix plus bas en contrepartie du consentement ou de l'engagement de fait d'un acheteur à s'approvisionner en grande partie auprès de l'entreprise qui lui accorde la remise.*

Les remises de fidélité peuvent revêtir un grand nombre de formes. La plupart, toutefois, partagent la caractéristique suivante : le pourcentage de remise augmente, habituellement par tranches, en fonction du volume d'achats effectués dans la période de référence actuelle, qui dépasse celui des achats effectués dans une période de référence antérieure. La période de référence est généralement beaucoup plus longue que le temps qui s'écoulerait normalement entre des achats successifs sur un marché donné.

(2) *En plus des avantages éventuels de prix inférieur, qu'elles partagent avec d'autres types de remises, les remises de fidélité présentent plusieurs avantages proconcurrentiels particuliers ; c'est notamment un bon moyen de motiver les distributeurs.*

Les prix plus bas associés aux remises de fidélité sont seulement un avantage "possible", car ce type de remise se traduit presque à coup sûr par une discrimination par les prix. Cela signifie que certains acheteurs paient des prix plus élevés et d'autres des prix plus bas que si la tarification était uniforme. Il peut y avoir un gain net d'efficience, toutefois, dans la mesure où la discrimination par les prix représente un moyen plus efficace de récupérer des coûts fixes, c'est-à-dire dans la mesure où les entreprises qui offrent des remises de fidélité pratiquent des prix inversement proportionnels aux différentes élasticités de la demande des acheteurs. Une condition *nécessaire*, mais non suffisante d'un tel avantage est que la discrimination par les prix entraîne une augmentation de la production. Il n'est pas certain, dans une telle situation, que non seulement le bien-être total, mais aussi l'excédent de consommation augmente. En outre, un gain net d'efficacité est moins certain globalement si les primes de fidélité provoquent une réduction de la concurrence. Une fois que cette réduction s'est produite, on a des raisons de penser que tous les acheteurs risquent de finir par payer des prix plus élevés qu'en l'absence de remises de fidélité.

On trouve un exemple d'avantage particulier proconcurrentiel résultant des remises de fidélité dans l'affaire Kenkä-Kesko, en Finlande, où ces remises ont été utilisées pour encourager un groupe de distributeurs de différentes tailles à accroître leurs achats d'une marque privée de chaussures. Sans l'augmentation globale des ventes qui en est résulté, il n'aurait pas été possible d'introduire la nouvelle marque, car le prix du fournisseur étranger aurait été trop élevé. Si l'on avait seulement offert une remise de quantité à tous les distributeurs Kenkä-Kesko, les petits distributeurs n'auraient pas été suffisamment incités à participer à la réalisation du seuil

minimum de ventes de chaussures de cette marque. Ce problème a été résolu en recourant aux remises de fidélité, et il en est résulté une amélioration de la concurrence entre marques.

Certains prétendent parfois que les remises de fidélité peuvent réduire la variabilité des ventes d'un fournisseur, lui permettant ainsi de réaliser des économies en lissant sa production et en réduisant ses stocks. Ce n'est pas automatique, cependant, car le fait de dépendre d'un plus petit nombre d'acheteurs peut accroître la variabilité au lieu de la réduire, même si chacun des acheteurs risque moins de changer de fournisseur qu'avant l'introduction de la remise de fidélité. Le résultat exact dépendra probablement des acheteurs auxquels sera finalement accordée une remise de fidélité et de la répartition de la variabilité des ventes dans la clientèle.

Les remises de fidélité sont parfois suscitées par les acheteurs plutôt qu'à l'initiative des vendeurs. Dans ces cas là, les remises peuvent venir du fait qu'un acheteur essaie d'exercer son pouvoir d'acheteur. A condition qu'il jouisse d'un pouvoir de marché important, ces remises de fidélité peuvent accroître l'efficience économique aussi longtemps qu'elles ne réduisent pas la concurrence, ni au niveau du vendeur, ni au niveau de l'acheteur.

(3) La probabilité qu'une remise de fidélité ait des effets anticoncurrentiels dépend essentiellement de savoir si et dans quelle mesure la remise réduit la transparence des prix, exclut ou freine des concurrents effectifs ou potentiels et/ou augmente la probabilité d'une coordination anticoncurrentielle.

Les remises de fidélité peuvent augmenter la difficulté qu'ont les consommateurs de comparer les prix et tendre ainsi à décourager la concurrence par les prix. Les programmes de fidélisation des grands voyageurs proposés par les compagnies aériennes offrent un bon exemple des difficultés que peuvent poser les remises de fidélité lorsqu'il s'agit de comparer les prix. Peu de voyageurs sont en mesure de prédire leurs futurs besoins avec suffisamment de précision pour pouvoir comparer le prix - après remise - d'un billet d'avion proposé par deux compagnies lorsque l'une ou les deux compagnies proposent de tels programmes.

Lorsque des clients comparent des fournisseurs en vue d'accorder la totalité ou la majeure partie de leur clientèle à une seule entreprise, certains concurrents sont pratiquement exclus de l'opération. Il peut arriver, par exemple qu'une certaine quantité d'un produit particulier offert par un fournisseur soit considéré comme un objet «indispensable à avoir » par un nombre important d'acheteurs. Alors qu'un avantage récompense habituellement un travail et un investissement soutenus, les remises de fidélité risquent d'accroître considérablement l'importance de cet avantage. L'industrie du transport aérien, encore une fois, illustre bien ce recours aux remises de fidélité pour accroître des avantages concurrentiels.

Les compagnies aériennes qui disposent de réseaux étendus peuvent jouir de plusieurs avantages par rapport à leurs concurrents ayant peu ou pas de couverture réseau. L'importance de ces avantages peut être amplifiée par l'utilisation des programmes de fidélisation grands voyageurs et par des remises accordées à des sociétés, dont la structure tend à fidéliser cette clientèle. De telles stratégies de prix peuvent être utilisées pour transformer la concurrence qui s'exerce autour de certains clients, voire de la plupart des clients qui voyagent en avion de la ville A à la ville B, en concurrence sur les vols entre A et B, avec comme importante caractéristique distinctive la couverture réseau de chaque concurrent. En raison du pouvoir de renforcement de la fidélité que comportent les programmes grands voyageurs et les remises non linéaires accordées aux sociétés, certains voyageurs sont potentiellement exposés à perdre beaucoup en vols gratuits ou autres privilèges s'ils choisissent d'accorder leur clientèle à un transporteur au réseau moins étendu. Cela pourrait même être vrai si des transporteurs disposant de petits réseaux adoptaient des

programmes de remise similaires - sauf en ce qui concerne le nombre de destinations couvertes – aux programmes offerts par les transporteurs disposant d'un réseau étendu. Les remises de fidélité des compagnies de transport aérien peuvent donc être considérées comme un facteur de hausse des coûts de changement pour les voyageurs concernés, tendant à restreindre la part de marché des opérateurs de petits réseaux ou à bloquer l'arrivée de nouveaux transporteurs qui ne peuvent entrer sur le marché qu'à petite échelle au début. Les commissions non linéaires des agents de voyage, bien qu'elles agissent à un niveau différent du circuit de distribution, peuvent avoir le même effet, pour autant que ces agents ont un certain pouvoir de marché.

Désavantager ou même exclure des concurrents en recourant aux remises de fidélité ne nuit pas nécessairement aux consommateurs. Ces derniers n'en pâtiront que si l'une des conditions suivantes est remplie : (*1*) la variété des produits offerts se trouve nettement réduite (c'est-à-dire diminution de la différentiation de produits sans que les consommateurs ne partagent les réductions de coûts qui en résultent) ; ou (*2*) la diminution du nombre ou de la puissance des fournisseurs augmente le pouvoir unilatéral d'un (ou plusieurs) fournisseur(s) accordant des remises, qui peu(ven)t ainsi augmenter avec profit ses (leurs) prix au-delà des niveaux concurrentiels, ou facilite la coordination anticoncurrentielle entre fournisseurs.

(4) *Les effets potentiels anticoncurrentiels et d'exclusion d'une remise de fidélité ne peuvent être correctement évalués sans examiner de près les caractéristiques spécifiques de cette remise et le marché sur lequel elle est appliquée.*

L'effet potentiel d'exclusion, anticoncurrentiel, d'une remise de fidélité dépend essentiellement de son degré de non linéarité (c'est-à-dire de la vitesse et de la régularité avec laquelle la remise augmente à mesure que l'acheteur satisfait une plus grande part de ses besoins auprès du fournisseur qui lui consent la remise). Cela détermine à quel point une remise de fidélité crée ou augmente effectivement les frais de changement de fournisseur, c'est-à-dire augmente la fidélité parmi les acheteurs. La longueur de la période de référence a aussi son importance. En général, plus la période est courte, moins l'augmentation des frais de changement de fournisseur induite par la remise de fidélité est importante. Le degré de synchronisation des périodes de référence entre les acheteurs peut aussi avoir son importance – la réalisation d'une économie d'échelle minimum par un nouvel arrivant peut être retardée si le début et la fin des périodes de référence ne sont pas synchronisées entre les acheteurs, laissant seulement une petite portion de marché « à prendre » à tout moment.

D'autres facteurs essentiels jouent sur l'effet anticoncurrentiel d'une remise de fidélité : le degré de pouvoir de marché de l'entreprise qui consent la remise et sa position relative vis-à-vis de ses concurrents ; l'existence d'autres barrières à l'entrée ; le recours cumulé à des pratiques similaires par une majorité de fournisseurs sur un marché oligopolistique ; et d'autres facteurs facilitant la collusion.

(5) *Il est difficile de déterminer quel effet les remises de fidélité auront sur la probabilité d'une coordination anticoncurrentielle sur un marché.*

Les remises de fidélité peuvent avoir de nombreux effets compensatoires sur la probabilité d'une coordination anticoncurrentielle. Pour commencer, les remises de fidélité peuvent changer les modes d'achat. Au lieu d'effectuer des achats fréquents auprès de multiples vendeurs, les clients peuvent être incités par les remises de fidélité à grouper leurs achats dans le temps et à s'approvisionner auprès d'un seul fournisseur au lieu d'un groupe de fournisseurs. Ce groupage et cette concentration des achats peuvent déstabiliser les ententes en augmentant le gain potentiel attendu de chaque réduction secrète de prix et en retardant, du moins à l'égard du consommateur

bénéficiant du prix réduit, toute riposte des autres fournisseurs. En contrant cet effet, toutefois, la concentration des achats peut faciliter le repérage des tricheurs, car elle peut entraîner des changements de volume des ventes plus importants et plus soudains que des prix abusivement bas ne l'auraient fait. D'importantes et soudaines chutes des ventes, contrairement à une diminution plus lente et continue, ont davantage de chances d'être détectées et attribuées à une tricherie, donc d'appeler le type de riposte qui rend la tricherie non rentable.

Dans la mesure où les remises de fidélité augmentent les coûts de changement de fournisseur, elles tendent à pousser le tricheur soit à offrir des remises plus importantes, soit à les offrir sur une plus longue période (en supposant que les périodes de référence ne sont pas synchronisées entre les acheteurs), rendant ainsi les remises plus faciles à détecter. Les deux effets découragent les tricheurs, et rendent donc plus probable la collusion.

Une moindre transparence des prix induite par les remises de fidélité favorisera probablement la collusion, parce que les acheteurs auront peut-être plus de mal que les fournisseurs à évaluer et à comparer les remises. Les acheteurs risquent donc de ne pas réagir aussi fortement et aussi rapidement que les tricheurs l'espéreraient, mais les représailles peuvent être sévères et promptes sur des marchés où les remises de fidélité ont réduit la transparence des prix.

Enfin, et c'est peut-être le plus important, les remises de fidélité peuvent réduire le nombre de concurrents effectifs au point de faciliter une collusion durable. Elles peuvent aussi réduire le nombre de concurrents potentiels en augmentant les barrières à l'entrée. Ce qui permettrait en échange aux entreprises de connivence d'augmenter leurs prix au-delà des niveaux concurrentiels sans crainte que cela soit réduit à néant du fait de l'augmentation de l'offre provenant de nouvelles entreprises.

(6) Tous les effets favorables à court terme de remises de fidélité accordées à des consommateurs en tant que groupe risquent d'être plus que compensés si les remises de fidélité sont utilisées comme stratégie de prix de prédation ou comme stratégie d'exclusion par des pratiques prédatrices.

Il y a fondamentalement deux moyens par lesquels les consommateurs en tant que groupe peuvent être gagnants à court terme grâce aux remises de fidélité, mais perdants à long terme. Le premier correspond purement et simplement à la pratique des prix d'éviction. Dans ce cadre, une fois que les prix bas associés à une remise ont poussé suffisamment de concurrents à quitter le marché, l'entreprise ayant accordé cette remise augmente ses prix au dessus des niveaux d'avant, afin de récupérer les pertes enregistrées pendant la période de prix bas. Dans une telle situation, ce que les consommateurs gagnent initialement du fait des prix bas risque d'être plus que perdu à longue échéance. Cela ne se produit évidemment que si tout retour ou nouvelle entrée sur le marché est impossible une fois que les prix sont relevés dans la phase de récupération.

Une deuxième stratégie est plus spécifique aux remises de fidélité ; elle est qualifiée à juste titre « d'éviction prédatrice». Afin de préserver des niveaux de prix supérieurs à la concurrence, les remises de fidélité peuvent être employées à court et à long terme pour maintenir les entrants potentiels hors du marché. En conséquence, bien que les prix à court terme soient inférieurs à ce qu'ils seraient en l'absence de remises, à l'avenir ils seront plus élevés qu'ils ne l'auraient été autrement. Ce n'est pas simplement une autre forme de fixation de prix limite, puisque le prix moyen est sensiblement supérieur au lieu de légèrement inférieur à celui que pratiqueraient les firmes exclues si elles pouvaient entrer sur le marché.

(7) *Certains cas d'éviction prédatrice par la pratique des remises de fidélité posent des problèmes particuliers pour l'application de marges de tolérance fondées sur les coûts et de critères de récupération des pertes généralement appliqués à d'autres formes de prédation.*

Dans de nombreux pays de l'OCDE, l'approche habituelle de l'analyse des prix de prédation consiste à déterminer tout d'abord si les prix sont en dessous d'un certain seuil critique. Si c'est le cas, dans certains pays, on passe alors à une deuxième étape : on évalue la probabilité que les pertes soient récupérées à une date ultérieure grâce à des prix supérieurs à ceux de la concurrence, après la sortie de la (des) victime(s) supposée(s).

Le fait de procéder en deux étapes en cas d'éviction prédatrice par le biais des remises de fidélité peut aboutir dans quelques cas à l'interdiction de la pratique. Prenons l'exemple d'une remise de fidélité impliquant une tarification rétroactive (ou retour sur la première unité). On peut illustrer l'effet d'un tel « rétro-rabais » à l'aide d'un exemple simple. Supposons qu'un acheteur puisse obtenir une remise de dix pour cent sur toutes les unités achetées, à condition qu'il augmente ses futurs volumes d'achat d'au moins dix pour cent par rapport à une période de référence antérieure. Le résultat pourra être que le montant supplémentaire dépensé pour avoir droit à la remise de fidélité sera proche de zéro ou même négatif. Néanmoins, étant donné que le prix moyen payé pour toutes les unités achetées peut rester supérieur à un certain seuil critique, une telle remise de fidélité peut passer inaperçue au premier examen. Si la première étape fonctionne comme un « safe harbour », une telle remise de fidélité peut échapper à l'interdiction, même si elle a pour effet de maintenir les prix au dessus des niveaux qui prévaudraient si la remise était interdite.

Quant à la phase e récupération des coûts, elle peut aussi servir à empêcher, par le biais des remises de fidélité, que l'éviction prédatrice soit attaquée en vertu de la législation sur la concurrence. Une telle pratique peut probablement être utilisée pour bloquer une entrée qui aurait pour effet de faire baisser les prix plus bas qu'ils ne le sont avec le système de remises en place. Les remises ne seront jamais supprimées tant que leur suppression risquera de se traduire par l'entrée de nouvelles firmes sur le marché et par des prix moyens ramenés en-dessous de ce qu'ils sont avec le niveau actuel des remises de fidélité. Il n'y aura pas de phase de récupération avec une telle stratégie.

Il n'y a pas de consensus sur ce qu'on pourrait faire, à supposer qu'il y ait quelque chose à faire, pour résoudre les problèmes liés à la façon d'aborder en deux temps l'éviction prédatrice par la pratique des remises de fidélité. Voilà qui pourrait faire l'objet d'un examen plus approfondi lors d'une prochaine discussion en table ronde. On pourrait aussi comparer les remises de fidélité et divers arrangements de non concurrence ou d'exclusivité.

(8) *Dans certains pays, on estime que des firmes dominantes abusent de leur pouvoir de marché lorsqu'elles pratiquent les remises de fidélité. De telles remises peuvent toutefois être acceptées lorsqu'elles sont justifiées du point de vue coût ou lorsque leur adoption a été décidée pour soutenir la concurrence.*

Cette solution présente peut-être l'avantage de renforcer la certitude des juristes à l'égard des remises de fidélité, et elle tient compte du fait que les remises de fidélité pratiquées par des entreprises dominantes risquent davantage d'être anticoncurrentielles que les systèmes de fidélisation employés par d'autres firmes, en raison notamment du risque élevé d'éviction et de hausse des prix. Mais le revers de la médaille est que l'on interdit aux entreprises dominantes de recourir aux remises de fidélité pour pratiquer une discrimination par les prix renforçant l'efficience, et qu'on risque aussi de les empêcher de s'engager dans des contrats d'exclusivité,

même lorsque ceux-ci ont des effets favorables à la concurrence. De plus, selon la portée de l'exception d'alignement sur la concurrence, le fait de leur interdire purement et simplement d'utiliser les remises de fidélité risque de paralyser les firmes dominantes au point de les amener à céder une part du marché à des entreprises moins efficientes qui, elles, sont libres d'utiliser les remises de fidélité.

(9) *La discussion en table ronde a révélé quelques divergences de vues entre pays Membres qui pourraient faire obstacle à une convergence internationale plus grande dans la lutte contre certaines remises de fidélité, notamment en ce qui concerne les programmes grands voyageurs et autres remises accordées par des compagnies aériennes.*

Les différences observées peuvent être plus profondément enracinées que ne le laissent à penser ces quelques expériences d'application de la loi. Certains pays considèrent le maintien de la loyauté et de règles du jeu équitables comme faisant partie de la protection de la « concurrence ». D'autres pays semblent moins insister sur ce en quoi consiste la concurrence que sur l'efficience économique accrue qui va généralement de pair avec la concurrence. La poursuite des travaux sur les remises de fidélité ou autres remises offertes par des entreprises dominantes devrait prendre en compte cette différence d'approche de base de la politique de la concurrence, car elle peut avoir beaucoup d'importance.

BACKGROUND NOTE

By the Secretariat

1. Introduction

Can price competition ever be too vigorous? Most competition authorities would probably answer "no", except perhaps for rare cases of predatory pricing or markets in which consumers have a great deal of difficulty assessing the quality of goods on offer. This paper deals with another, perhaps less well-known qualification, relating to fidelity discounts and loyalty rebates ("fidelity discounts"). Such discounts have attracted some of the largest fines to date for non-cartel related, anticompetitive conduct.

In this paper, fidelity discounts are defined to be pricing structures offering lower prices in return for a buyer's agreed or *de facto* commitment to source a large share of his requirements with the discounter. Fidelity discounts could have both pro- and anticompetitive effects, some of which may not be immediately obvious. This paper will explore those effects and analyse policies that have been developed regarding fidelity discounts.

This paper begins by defining fidelity discounts and considering their anti- and procompetitive effects. That is followed with an in-depth illustrative example (i.e. fidelity discounts in the recent Virgin/British Airways case), and a discussion of some pertinent policy issues. The paper ends with a number of summary observations.

1.1 Main Points of the Paper

- fidelity discounts encourage each buyer to patronise fewer suppliers (focusing effect) and to make less frequent price comparisons;

- the strength of the focusing effect depends on the exact structure of a fidelity discount (i.e. the degree of non-linearity introduced into the pricing structure);

- as a consequence of focusing each buyer's purchases, fidelity discounts could change the predominant mode of competition in a market, i.e. from rivalry at the margin to competition for a buyer's total or near total requirements;

- fidelity discounts might have important anticompetitive effects namely: reduced incentives for suppliers to compete on price due to reduced price transparency in the market; increased probability of co-ordinated interaction; and such a high degree of harm to existing or new competitors that competition itself is adversely affected;

- harm to competitors is much more likely to be associated with harm to competition if: *a*) fidelity discounts are widespread in the market or practised by dominant firms; and *b*) too

few firms are able to compete on roughly equal terms if competition takes the form of rivalry to supply a buyer's total or near total requirements;

- the chances that fidelity discounts will result in too few firms being able to compete in the market are greatly increased if fidelity discounters enjoy some significant extra competitive advantage provided competition centres on supplying each buyer's total or near total requirements;

- fidelity discounts have the obvious procompetitive effect of lowering prices and may also have other procompetitive effects especially those sometimes associated with exclusive dealing; and

- because fidelity discounts have potentially significant pro- and anticompetitive effects, and both are highly dependent on specific features of the discounts and the markets they are found in, a case by case approach to fidelity discounts seems warranted.

2. Definition and description

While some fidelity discounts explicitly require full or partial exclusive purchasing, others do so implicitly. For example, if Buyer 1 normally purchases 50 units of some product (defined to be a group of close substitutes) per month, a producer might secure all Buyer 1's custom over the next year if it offers a 50 percent discount conditional on Buyer 1 purchasing at least 600 units over the course of the year. The fidelity discount characteristic would be still more apparent if the same producer is offering an identical discount to a smaller customer, but the critical quantity threshold is set at 360 units/year.

It is sometimes difficult to distinguish a fidelity discount from a straightforward quantity discount. For example, a 50 percent discount conditional on some minimum purchase quantity over a certain period of time, offered on exactly the same terms to all buyers, may or may not be a fidelity discount. The determining factor would be whether the minimum purchase quantity corresponds to a significant number of buyers' probable total or near total requirements in the period referred to.[1]

The notion of requirements is bound up with another important fidelity discount concept. Most fidelity discounts make use of what we will refer to as a "reference period" in calculating the percentage discount awarded.[2] The reference period will typically be considerably longer than the time normally elapsing between buyers' purchases. For example, a taxi operator working an average of 24 days per month and purchasing 40 litres of gasoline a day, might receive a ten percent fidelity discount if it purchases more than 900 litres a month from a particular petroleum distributor. The reference period would be one month and the taxi company's requirements would be stated as 960 litres per month.[3] More formally, a buyer's requirements are his estimated total purchases of some properly defined product (i.e. including appropriate substitutes) over the reference period used to determine eligibility for a particular fidelity discount.

Fidelity discounts can take a wider range of forms than simply a lower price or a percentage reduction. Sometimes they are offered in the form of "complimentary" goods. In return for a purchase of 20 or more litres of petrol, a service station might, for example, give away a statuette belonging to a set of twenty well-known football players. The desire to obtain a complete set could make this function like a fidelity discount, especially if the offer will be terminated in say six months. The same applies to many toys offered by breakfast cereal producers.

3. Anticompetitive Effects of Fidelity Discounts

The principal unifying theme in this section is that fidelity discounts can have anticompetitive effects if they reduce price transparency, facilitate anticompetitive co-ordination, or lead to exclusion or restriction of competitors. A supporting theme is that anticompetitive effects are more likely to occur if there is a special type of asymmetry favouring one or more fidelity discounters. While such an asymmetry increases the chances of anticompetitive effects, it does not guarantee them. It is axiomatic in competition policy that harm to competitors does not automatically translate into harm to competition and therefore into a reduction in economic welfare.

3.1 Effects of fidelity discounts on barriers to entry and expansion by new and existing competitors

As already noted, fidelity discounts encourage buyers to focus their purchases on the discounting supplier. Typically they accomplish this by non-linear pricing having the effect of reducing marginal and average prices as the total quantity purchased in some reference period rises.

In order to sell to a buyer who has been offered a fidelity discount by another supplier, a competitor has two basic alternatives. One is to compete at the margin, i.e. solely for small portions of the buyer's requirements. The other is to compete for the buyer's total requirements.

Competition at the margin could be highly unprofitable because a fidelity discount may drastically lower the marginal price. That price could even be negative if the rate of discount increases in discrete jumps and applies back to all units purchased during the relevant reference period. Buyers who cross the pertinent thresholds in effect receive a rebate on previous purchases that could exceed what they are charged on the extra units purchased. Because of this phenomenon, fidelity discounts may have the power to transform competition in a market from something occurring continually at the margin, to periodic rivalry for each buyer's total requirements.

A change in the prevailing mode of competition may not in itself be anticompetitive. It could happen, for instance, that a large number of competitors are able to compete on roughly equal terms for each buyer's total requirements. It could also happen, however, that one or more fidelity discounters enjoy some advantage that becomes much more significant if fidelity discounts succeed in changing the mode of competition. We will refer to such an advantage as a "significant asymmetry". In the presence of such an asymmetry, fidelity discounts could lead to there being too few roughly equally placed competitors in the market.

Reputation is a possible example of a significant asymmetry. Forced to choose, for example, between giving their entire purchase volume over the next year to a well known firm or, alternatively, to a basically unknown new entrant, many buyers might prefer the former even if the price is somewhat higher than what a new entrant is offering. Another such asymmetry could take the form of a fidelity discounter having a significantly more desirable variant of a differentiated product. Encouraged to forego product variety because of the focusing effect of fidelity discounts, buyers might strongly favour the supplier offering the most popular variant. In some cases the superior product variant takes the form of a "must stock" good for a distributor, a non-substitutable input for a producer or, in rarer cases, a product for which many consumers have a minimum, non-substitutable demand.

Some hypothetical examples illustrating the effects we have been referring to can be found in the Annex to this paper.

The effects of significant asymmetries, in concert with fidelity discounts, are considerably magnified in the case of "tippy" markets. These are markets prone to evolving quite quickly to monopoly or dominance. The tippiness could be due to substantial economies of scale in production. It may also be rooted in demand side conditions such as network effects working together with high switching costs.[4] In such markets, there is often vigorous competition "for" the market, but much less once the market has matured, i.e. very little competition "in" the market. The market for computer operating systems provides a good example of a tippy market.[5]

In a tippy market, a slight initial lead over competitors could be parlayed into a lasting advantage through the early strategic use of a fidelity discount. The more the firm with an edge succeeds in using fidelity discounts to obtain *de facto* commitments to buy exclusively from it, the more existing competitors will tend to resign without a fight.

Fidelity discounting in tippy markets could be pro- instead of anticompetitive in nature. Much depends on the answer to two questions. First, does the firm that initially pulls ahead of the pack enjoy something more than a merely temporary advantage? If not, the fidelity discount could help a firm win the competition for a market even though some other more efficient firm might have prevailed if fidelity discounts had not been used. Second, and considerably more important since the first factor basically boils down to the occurrence of some kind of "accident", did the fidelity discount have the effect of reducing future prices below what they would otherwise have been?

Even if fidelity discounts in combination with significant asymmetries significantly restrict competitors, such harm will not translate into harm to competition and consumers if there remain a sufficient number of unrestricted actual or potential competitors in the market. Alternatively, the result of restricting competitors could be that a dominant position is created or strengthened with the result that prices are either raised or are kept from falling for longer than would have been the case without the fidelity discounts. It is also possible that higher barriers to entry or expansion might create the pre-conditions for anticompetitive co-ordination. That would be the case for example in markets where the threat of new entry is all that is stopping a small number of competitors from raising prices through some kind of anticompetitive co-ordination. Fidelity discounts could help remove that constraint.

Fidelity discounts have two more potential impacts on the probability of anticompetitive co-ordination. First, provided there are a small enough number of buyers, the focusing of purchases induced by fidelity discounting could facilitate the detection of cheating.[6] If a buyer is wooed away from his current supplier through the offer of a secret extra discount, there will be a larger shift of volume away from the cheated seller than if the switching buyer had previously been purchasing from all the co-ordinating sellers. Compared with what would happen without the fidelity discounts, the single aggrieved seller would be more likely to attribute the loss to cheating than to normal variation in the marketplace. Second, cheaters would like to offer a secret price cut, quickly achieve a significant increase in profits until detected, and then revert to higher co-ordinated pricing to avoid punishment or to reduce its severity. The switching costs associated with fidelity discounting undermine such a strategy. Secret discounting would either have to be so large as to risk being unprofitable, or offered instead only at the end of various, likely unsynchronised reference periods. This latter point actually cuts both ways. While fidelity discounting lowers the profitability of cheating (or requires it to be continued for a dangerously long period of time), it simultaneously raises the cost of punishing cheating (or lengthens the time over which punishment must continue).

The analysis of fidelity discounts becomes more complex when the commitment is to a percentage discount rather than to a specific set of prices. Once that type of fidelity discount has been running for any length of time, the discounting firm is faced with a strategic choice. On the one hand it will want to raise the "base" price (i.e. price before discount) in order to take advantage of already

"captive" customers. On the other hand, there will be offsetting pressure to maintain or even lower the base price to obtain a larger clientele to exploit in the future.[7]

The offsetting pressure to lower prices could prove quite insufficient to protect captive buyers. This is especially true if a fidelity discounter is able to price discriminate between new and old customers, or if there are very few new customers to attract with lower prices.

Airline frequent flyer programs ("FFPs") are a well-known example of fidelity discounts. Ignoring the fact that the person accumulating the loyalty points ("miles") could be different than the person paying for the ticket, the essence of the "discount" is that there are critical miles thresholds built into the rewards. In most cases the miles cannot be sold, just exchanged for free trips when a sufficient number of miles are accumulated. As a traveller approaches one of the miles thresholds, he is less and less willing to consider travelling with another airline even if a lower fare is offered. To opt for a competitor's lower fare might mean indefinitely postponing receiving a free flight, especially if the accumulated miles are lost if not redeemed within a set period of time. The incorporated switching cost could be enhanced by a convexity in the rewards, e.g. 10 000 miles can be exchanged for a flight initially priced at $400, 15 000 miles for one priced at $800, and 20 000 miles for one at $1 600, etc.

As with other fidelity discounts, asymmetries play an important role in determining the probable effects of FFPs. Consider the example of airlines competing to provide service between cities A and B. Suppose further that some of the competitors have extensive networks. If those airlines begin to offer FFPs, the airlines with much smaller networks may not be able to compete even if they enjoy an efficiency advantage. A free flight for every four paid flights between A and B may be worth considerably less to a traveller if the free flight is another A to B flight rather than one between A and any one of ten other destinations for which flights are roughly equally costly for airlines to provide.[8]

Whether or not the network to network competition fostered by an FFP spells less competition depends basically on the health of network to network competition and that could vary a lot from city to city. Some cities have airports that function as a hub for just one airline network. In relation to passengers living near a hub city, the airline operating that hub and offering an FFP may have a significant advantage not just over airlines having very limited or non-existent networks, but also over airlines with similarly extensive networks using other cities as hubs. This is because air travellers have a preference for direct flights as compared with longer, more inconvenient connecting flights.[9]

The possibility that FFP induced network to network competition will end up producing anticompetitive effects could be considerably reduced if airports could serve as hubs for several different networks. The problem is that few airports may have both the traffic volume and available "slots" required to serve as a hub for two or more roughly co-extensive airline networks.[10] These constraints are the source of one possible significant asymmetry explaining why FFPs may reduce competition in airline markets.

Before leaving FFPs, it should be noted that their welfare effects and those of fidelity discounts more generally, depend on more than simply the degree of competition among firms offering somewhat similar discounts. The welfare effects are also strongly influenced by whether the "free" or significantly lower priced bonus goods are: valued at more than what they cost to produce; and/or create an opportunity for pro- or anticompetitive price discrimination.[11]

3.2 Fidelity discounts and price discrimination

There is a type of price discrimination that is bound up with the very nature of some fidelity discounting, i.e. the discrimination occurring when the same buyer is charged a different price for different

units having the same unit costs (including marketing costs). For example, a buyer could be charged $10/unit for the first 100 units purchased, $9/unit for the next 100, and $8 for each additional unit. Price discrimination in the more typical sense of different prices for the same good sold to different buyers could also be associated with fidelity discounts. This happens if different buyers, offered the same fidelity discount, choose to source different percentages of their requirements with a supplier. It also arises if various buyers are offered different fidelity discount menus.

The welfare effects of price discrimination are complex and somewhat beyond the scope of this paper.[12] About the only generally applicable principle is that price discrimination will increase welfare only if it increases the total quantity sold.[13] It is possible that the customised non-linear pricing associated with fidelity discounts could increase quantity sold to each buyer. It is somewhat less likely, however, that fidelity discounting would lead to an efficient pattern of price discrimination across buyers. For that to occur, the different prices would have to reflect variation in price elasticities of demand (i.e. lower prices to buyers having higher elasticities of demand).[14]

It is often assumed that market power and the seller's ability to prevent or limit resale among customers are necessary conditions for price discrimination.[15] It turns out, however, that market power may not be a necessary condition for price discrimination, if there are important economies of scale.[16] It would be wrong then to jump to the conclusion that fidelity discounts having price discriminatory aspects, constitute sufficient proof of discounter market power.

As for the requirement that price discriminators be in a position to prevent resale, that could be misleading. There are products, personal services for example, where resale is impossible. There are also markets where high transactions costs (including search costs) ensure that buyer reselling is no threat to profitable price discrimination. Fidelity discounts could well play a role in that phenomenon. Adopting complex or secretive fidelity discount schemes could be a good way to reduce price transparency, hence increase transactions costs and facilitate price discrimination.

3.3 Fidelity discounts and price transparency

While a very high degree of price transparency may be harmful for competition, it is also true that anticompetitive effects could be associated with very low levels of price transparency having the effect of making it difficult for buyers to compare products.[17] Some fidelity discounts, particularly those that do not involve firm price commitments, could contribute to reducing price transparency and with it the incentives for suppliers to engage in price competition.[18]

Aside from fidelity discounts requiring 100 percent exclusivity, price transparency and comparability could be a real issue. How is a buyer to know for sure whether his purchases from Supplier A will account for X percent of his purchases during the year? Even worse, how could a buyer know for certain that he will reach a target quantity or year on year increase in purchases from the discounter? That would be especially problematic for buyers of services or non-storable goods such as airline tickets.

Special transparency issues arise in the case of discounts resembling frequent flyer programs. It would be exceedingly difficult for a traveller enrolled in an FFP to determine the true price of a ticket. About all he might be able to estimate is the mean value of the price. There could be quite a dispersion around that mean value based on various scenarios involving the probability of qualifying for a free flight, which destination is ultimately chosen, and the selling price of that flight at the time the reward is used. Complications also arise because the airline is free to change the price of the flights required to qualify for the discount. Matters could be considerably worse for price comparisons if the traveller is enrolled in several different frequent flyer plans with airlines offering imperfectly overlapping networks.[19]

3.4 Potential problems related to exclusive dealing between manufacturers and distributors

Some form of discount may be required to institute *de facto* or *de jure* exclusive dealing arrangements. This is because distributors may find it more difficult to attract sufficient sales volumes if they carry just one supplier's goods. Distributors may also expose themselves to greater commercial risks by practising exclusive dealing.

Although exclusive dealing induced by fidelity discounts may generate important procompetitive effects, we will return to that in the next section, it might also have significant anticompetitive effects. For negative effects to materialise, the exclusive dealing would first have to harm actual or potential competitors by restricting access to distribution channels. That is unlikely to happen unless the exclusive dealing affects a considerable percentage of the pertinent market, i.e. it is either practised by a dominant firm, or is widespread in the market. Harm is also unlikely unless either: restricted competitors are unable to break even at a lower level of output; there are barriers to entry into the distribution business; or it is simply too expensive or risky to enter simultaneously into two businesses instead of concentrating on just one at a time.

It is important to stress that even if exclusive dealing harms competitors this does not necessarily mean it harms competition, hence reduces economic efficiency. This is especially so in situations where harm to competitors stems from the widespread nature of exclusive dealing rather than it being associated with exclusive dealing by a dominant firm. Given a sufficient number of suppliers that are not restricted because of rivals' exclusive dealing, consumers could be adequately protected against anticompetitive pricing.[20]

3.5 Summing up anticompetitive effects

The probability that a fidelity discount will have anticompetitive tendencies essentially depends on whether, and to what degree, the discounts:

1. reduce price transparency; and/or

2. exclude actual or potential competitors, thereby facilitating anticompetitive co-ordination or creating/strengthening a dominant position.

These factors cannot be assessed without considering the exact details of the discount and the characteristics of markets they arise in.

In terms of the discounts themselves, special attention should be paid to: the degree of non-linearity (i.e. how rapidly and smoothly do the discounts increase as a buyer sources more of his requirements with the discounter); the fixed price versus fixed percentage nature of the discount; the length of reference period; and the degree to which reference periods are synchronised or staggered across buyers.

A buyer receiving fidelity discounts is less likely to switch to a competitor the further along in a reference period he happens to be. Longer reference periods could therefore aggravate any anticompetitive effects associated with a fidelity discount.[21] A related effect is the degree to which reference periods are non-synchronised across buyers.

In the presence of significant economies of scale in an industry, non-synchronised reference periods would augment any anticompetitive effects associated with a fidelity discount. Achieving minimum efficient scale could be considerably delayed if new entrants, to take an extreme example, could

only compete for one out of every 365 buyers on any given day of the year. They would tend to be in a better position if all reference periods began and ended on the same day for all buyers in the market.

Turning to market characteristics, the most important thing to determine is whether there is a significant asymmetry differentiating the fidelity discounter(s) from actual or potential competitors. The kind of asymmetry we have in mind is any advantage enjoyed by the fidelity discounter(s) which will grow considerably more important if competition switches from rivalry conducted continually at the margin, towards buyer by buyer contests to supply something approaching the buyer's total requirements. Where there is such an asymmetry, fidelity discounts are likely to restrict actual or potential competitors beyond what they are already because of the advantage possessed by fidelity discounter. Whether such harm will translate into harm to competition depends on things like: the initial market power of the firm or firms introducing fidelity discounts; the degree to which fidelity discounts are widespread in the market; and the existence and importance of economies of scale, network effects, and buyer switching costs. It also requires considering any procompetitive effects of fidelity discounts.

4. Procompetitive Effects of Fidelity Discounts and Summary of Pro- and Anticompetitive Effects

4.1 General effect

The most obvious potential procompetitive effect of a fidelity discount is shared with every form of discounting. Especially if they tend to spread throughout the market, discounts typically bring prices more in line with marginal costs and focus purchases on more efficient firms. The results are greater allocative efficiency (i.e. reduced "dead-weight losses") and enhanced technical efficiencies (i.e. resource savings in either production or distribution). There could also be increases in dynamic efficiency since discounts may be useful in convincing buyers to try new products.

Before attributing the above virtues to fidelity discounts, however, one should ask whether a fidelity discount in fact means prices are lower than they would be without the structured pricing. Considering only the immediate impact, i.e. before taking account of long run pro- and anticompetitive effects, abolishing fidelity discounts might result in no price change at all. A fidelity discount may, for example, be so well customised to the different requirements of a firm's various buyers that all of them consistently qualify for the same, back to the first unit, "low" price of $X/unit. There is no necessary reason in this situation to expect that the price would be any higher than $X/unit were the fidelity discounts abandoned.

4.2 Fidelity discounts and exclusive dealing between manufacturers and distributors

We have already noted that that fidelity discounts could considerably facilitate exclusive dealing arrangements which can sometimes have anticompetitive effects. Now we must address the possibility that exclusive dealing, hence fidelity discounts supporting it, could also have procompetitive effects.

Although exclusive dealing tends to reduce inter-brand competition within a particular distributor, it could improve inter-brand competition overall. This is because some product promotion may be better provided by suppliers compared with distributors. However, without exclusive dealing it may be difficult to prevent other supplier's free riding on such promotion efforts. For example, a major advertising campaign by a personal computer manufacturer might succeed in convincing consumers to visit

their local dealer, but if the dealer obtains a better profit margin from non-advertising manufacturers, he might steer the new enquirers to other makes.[22]

There is a type of exclusive dealing that is not always treated as such. It involves a retailer's commitment to set aside a certain amount of shelf space, or a particular location in a store, for the products of a certain supplier. In return for that commitment, or simply for agreeing to carry a supplier's product, the retailer may charge a periodic "slotting allowance". Paying such an allowance amounts to the supplier charging a non-linear price for its goods. It could be regarded as a fidelity discount having the unusual character that the percentage discount decreases rather than increases with the amount purchased. In any event, slotting allowances are sometimes defended as a means of transferring some of the risk of new product launches from retailers to suppliers who are presumably better able to estimate and to bear the risk. As with more traditional forms of exclusive dealing, slotting allowances may enhance inter-brand competition if they facilitate the launch of new products on the market.[23]

There could be markets where a type of fidelity discount, perhaps better characterised as buyer instigated exclusive dealing, could enhance economic efficiency without promoting inter-brand competition. Consider, for example, a theme park selling ice cream products in refreshment stands located throughout the park. Suppose that none of the ice cream suppliers are earning supra-competitive profits. In those circumstances the theme park would be unable to obtain a discount from a supplier no matter how much negotiating power it could muster by promising to carry just one supplier's product line for a certain period of time. That being so, the theme park would usually make more profit, depending on transactions and inventory costs, by purchasing from a number of different suppliers.

The ice cream example changes considerably if the suppliers have significant market power and are engaged in some form of oligopolistic rivalry. In that case, by agreeing for some period of time (analogous to a reference period) to sell only one suppliers' product range, the theme park may be able to negotiate a lower price. That lower price would amount to a fidelity discount. To the extent the theme park lacks market power on the selling side, any fidelity discounts it receives would presumably be passed on in the form of lower priced ice cream sold in the park. Whether or not that would produce a net improvement in consumer welfare depends, among other things, on the "cost" of reduced product differentiation in the pertinent market.[24] It could also be influenced by the strength of the various potential anticompetitive effects of fidelity discounts surveyed above, augmented by some others pertaining particularly to the exercise of buyer power.[25]

5. Summing up the Pro- and Anticompetitive Effects of Fidelity Discounts

Since genuine discounts initially benefit buyers, they can only have a net harmful effect if they eventually cause quality-adjusted prices to be higher than they would have been without the discounts.[26] The likelihood of such long term harm depends on whether and to what extent fidelity discounts would:

- reduce price transparency; and/or
- exclude actual or potential competitors, thereby facilitating anticompetitive co-ordination or creating/strengthening a dominant position.

In cases where competition concerns centre on creating or strengthening a dominant position, long term harm is likely only if all the following conditions are satisfied:

- neither existing rivals nor new entrants can match the fidelity discounter's ability to compete for the total or near total requirements of a significant number of buyers;

- actual competitors, if they exist, will be forced to reduce their sales;

- once subject to less constraint by existing and potential competitors, the fidelity discounter will find it profitable to raise its prices (this presumes the discounter's costs will not have declined by enough to make a price rise unprofitable);

- buyers cannot use countervailing power to hold prices at or below the level prevailing before the fidelity discounts were introduced;

- firms will not likely enter, re-enter or expand their market shares in response to price increases above pre-discount levels; and

- what buyers initially gain through discounts is less than what they later lose through paying higher than pre-discount prices.

Given the uncertainty surrounding the probability and magnitude of net anticompetitive effects, a case by case approach seems warranted as regards competition policy applied to fidelity discounts. Such an approach is needed to take full account of important differences in the structure of fidelity discounts and in pertinent market characteristics.

6. Case Illustration – Virgin/British Airways

6.1 Parties

Virgin Atlantic Airways Limited (Virgin) is a privately owned company operating scheduled passenger services on a number of international routes between London and the USA, Hong Kong, Athens and Tokyo. In 1997 Virgin ranked twenty-first in the world in terms of international scheduled passenger-kilometres flown, and thirty-first for combined international and domestic scheduled passenger-kilometres flown.

British Airways PLC (BA) was privatised in 1987 and is the largest airline in the United Kingdom. It operates a wide range of domestic and international scheduled and charter services. Its scheduled route network covers 15 destinations within the United Kingdom and 155 international destinations in 72 countries worldwide. In 1997 BA ranked first in the world in terms of international scheduled passenger-kilometers flown, and ninth for combined international and domestic passenger-kilometres flown.

6.2 Alleged Anticompetitive Discounting

In 1993, Virgin lodged a complaint with the European Commission (EC) against BA under what is now Article 82 EC. In 1994, it also brought suit against BA in the United States under sections 1 and 2 of the Sherman Act, 15 U.S.C ss. 1 & 2. The US antitrust authorities did not appear as intervenors in this case.

In the US courts, this case turned on the nature and effects of BA's incentive schemes offered to corporate customers and travel agents (i.e. travel agent commission over-rides - TACOs). These incentive schemes fell within what we have labelled fidelity discounts, although it must be noted that under

European Union jurisprudence they are more accurately referred to as target discounts.[27] The EC decision does not deal with BA's discounts to corporate customers.[28]

The essence of BA's incentive schemes was captured as follows:

> Part of the way in which British Airways competes in the airline industry is through the use of incentive agreements entered into with travel agencies and corporate customers. Such practice is allegedly common, with at least three different United States-based carriers purportedly using similar incentives. As British Airways describes its own agreements, commissions or discounts are awarded when specified thresholds of sales are reached, but the agreements contain no set mandatory minimum. As a general rule, the incentive agreements are based exclusively on measures such as sectors flown or revenue earned. In some agreements, travel anywhere on British Airways will count towards the thresholds, while in other agreements certain routes are specified. "Back-to-dollar-one" provisions allow the discount or rebate to apply retroactively to all sales under the agreement once a performance target is met.[29]

Although the incentive plans are "allegedly common", we found no mention of Virgin using them.

Focusing on BA's three TACO arrangements, referred to as "Marketing Agreements" (MAs), "Global Agreements" (GAs), and the "Performance Reward Scheme" (PRS), the European Commission (1999, para. 29) described an important common feature of the discounts and provided an illustrative hypothetical example:

> In each case meeting the targets for sales growth leads to an increase in the commission paid on all tickets sold by the agent, not just on the tickets sold after the target is reached. In the MA schemes the cash bonus per ticket paid to the travel agent increases for all tickets sold. In the PRS scheme the percentage commission paid increases for all ticket sales by the travel agent. This means that when a travel agent is close to one of the thresholds for an increase in commission rate selling relatively few extra BA tickets can have a large effect on his commission income. Conversely a competitor of BA who wishes to give a travel agent an incentive to divert some sales from BA to the competing airline will have to pay a much higher rate of commission than BA on all of the tickets sold by it to overcome this effect.

The illustrative example showed how BA's TACOs could make competition at the margin quite difficult for BA's competitors.[30]

In an extensive affidavit, Virgin's economic expert, Dr. B. Douglas Bernheim, characterised BA's discounts as predatory:

> Specifically, BA uses predatory incentive agreements (i.e., incentives that result in BA selling certain incremental output below its incremental costs) to create a powerful inducement for certain corporate customers and travel agents to treat BA's individual routes as a single, bundled product instead of being willing to purchase service on each BA route separately. Barriers to entry at Heathrow prevent BA's competitors from replicating, or even approximating, BA's network. Because BA's incentives are predatory, Virgin frequently cannot profitably induce travel agents or corporate customers to unbundle the individual routes where Virgin competes with BA from the rest of BA's network. To do so, Virgin would have to match or exceed BA's network-based incentives, and this would require Virgin to sell its services below BA's costs. Thus, even if Virgin is as efficient or more efficient than BA on a particular route, it is foreclosed from and commercially unable to compete for much of BA's incentivised business.

> Because its predatory incentive agreements anticompetitively induce many customers to treat BA's route network much like a bundle instead of purchasing service on individual routes, BA has been able to divert substantial revenue from its competitors, including Virgin, who can only compete on a limited set of routes. This diverted revenue has reduced the potential profits available to Virgin, thereby causing Virgin to delay or defer its entry or expansion on numerous US-UK routes. Since Virgin is a low-priced, high-quality carrier, and since Virgin's entry causes BA's fares to fall and quality to improve, consumers have been harmed. Specifically, consumers have been forced to pay supracompetitive fares and have received lower quality service as a result of BA's conduct. Had BA not foreclosed Virgin's entry, consumers would have paid lower prices and enjoyed higher quality service. Simply put, BA's predatory conduct has leveraged its monopoly power and foreclosed competition to the detriment of consumers.[31]

Bernheim concluded that BA's "predatory foreclosure" probably delayed Virgin in expanding or offering service from London (Heathrow) to several US cities, i.e. New York, Washington, Chicago, Los Angeles, and San Francisco, and that this had had negative effects on consumers.[32]

Bernheim dealt at some length with an important asymmetry. This had to do with BA having an extensive network using Heathrow as a hub. Due to a lack of slots, Virgin was unable to replicate that network. If competition had been conducted on a point to point basis, this asymmetry would presumably not have posed a critical barrier to expansion for competitors like Virgin. Fidelity discounts may have had the effect, however, of replacing point to point with network to network competition, thus greatly magnifying the competitive significance of the noted asymmetry to the detriment of Virgin and, allegedly, to consumers as well.[33]

There was some evidence that BA's discount schemes may not have had a very powerful effect. For example, the US Court of Appeals noted:

> Graphs prepared by British Airways show that in 1995-1996 corporate deals accounted for 1.96 percent of United Kingdom bookings on routes between the United Kingdom and the United States. No figures are provided for corporate deals involving United States sales. Travel agencies that booked 80 percent or more of their bookings between the United States and the United Kingdom on British Airways accounted for 3.01 percent of tickets sold in the United States and .33 percent of tickets sold in the United Kingdom.
>
> With respect to the individual routes for which Virgin claims it was delayed entry, British Airways' corporate deals accounted for the following percentages of United Kingdom bookings in 1995-1996: 2.42 between Heathrow and New York; .71 between London and Los Angeles; 3.22 between London and Chicago; 1.7 between London and San Francisco; and 3.79 between London and Washington, DC. For United Kingdom sales through travel agencies in the same time frame, those agencies that booked 80 percent or more on a particular route through British Airways accounted for the following percentages: 25 between Heathrow and New York; 34 between London and Los Angeles; 1.05 between London and Chicago; 1.3 between London and San Francisco; and 3.11 between London and Washington, DC.
>
> For United States sales, travel agencies that booked 80 percent or more of their bookings through British Airways accounted for the following percentages of bookings from London: 1.12 to New York; 1.82 to Los Angeles; 2.65 to Chicago; 1.85 to San Francisco; and 2.53 to Washington, DC[34]

In addition, the European Commission's decision contains data showing that BA probably lost market share to Virgin as well as other competitors over the 1992 to 1998 period.[35]

6.3 The European Commission Decision and Guidelines

As earlier noted, this decision focused on competitive effects in the United Kingdom's air travel agency services market, a market in which the EC determined that BA had a dominant position as a purchaser. The EC also stated that BA was an obligatory business partner for UK travel agents.[36] Based on its analysis of the law and facts in this case, the EC concluded that BA's TACOs amounted to "…loyalty discounts as condemned in the Michelin and Hoffmann-La Roche cases and abusive discrimination between travel agents."[37] According to the EC the two cited cases: "…taken together establish that a dominant company can only give rebates in return for efficiencies realised and not in return for loyalty…."[38] The EC decided that BA's TACOs were clearly related to loyalty rather than efficiencies.[39]

The EC rejected the view that BA's competitors had viable alternatives to purchasing air travel agency services from travel agents, noting that in the United Kingdom, such agents accounted for some 85 percent of air travel sales.[40] This led the EC to conclude that BA's TACOs had serious effects on competitor airlines. The EC noted as well that:

> The exclusionary effect of the commission schemes affects all of BA's competitors and any potential new entrants. They therefore harm competition in general and so consumers, rather than only harming certain competitors who cannot compete with BA on merit.
>
> Despite the exclusionary commission schemes, competitors of BA have been able to gain market share from BA since the liberalisation of the United Kingdom air transport markets. This cannot indicate that these schemes have had no effect. It can only be assumed that competitors would have had more success in the absence of these abusive commission schemes.[41]

The European Commission also found that BA's TACOs (MAs and the PRS in particular) were discriminatory:

> Two travel agents handling the same number of BA tickets and providing exactly the same level of service to BA will receive a different commission rate, that is a different price for their air travel agency services if their sales of BA tickets were different in the previous year. Conversely two travel agents selling different volumes of BA tickets and providing a different level of service to BA could earn the same commission rate, that is be paid the same price by BA for their air travel agency services, if their sales of BA tickets have increased by the same percentage over the previous year.[42]

Based on its finding that BA had abused its dominant position, thus violating the Article 82 prohibition, the EC levied a fine of 6.8 million Euros and prohibited BA from continuing its infringing behaviour. BA has appealed this decision.

On the same day it published the Virgin/BA decision, the EC also published a set of principles to guide TACOs. The EC believed that application of these principles, worked out with BA's assistance, would assure that airline TACOs would be legal under European competition law.[43] The principles required that differences in commissions paid be cost justified. In addition, reference periods for extra commission were restricted to less than six months, and the extra payments could not relate to meeting sales targets based on an increase above sales in a previous period. Moreover, extra payments had to increase in a linear fashion above any adopted base line (presumably of sales), any increased discounts could not be applied to all tickets sold by an agent, and travel agents had to be free to sell the tickets of all airlines.

The suggested principles were apparently ignored by at least one airline. About two years after the BA decision, the Italian Competition Authority determined that Alitalia-Linee Aeree Italiane S.p.A ("Alitalia") was a dominant firm that had violated Article 82 in much the same way as BA had done. The Competition Authority found that the TACOs were designed to exclude rivals from the transport market by hampering access to the travel agency ticket-selling channel. The press release describing this decision stated:

> An Alitalia competitor that wishes to remunerate an agency for selling its tickets rather than Alitalia tickets would have had to offer that same agency commissions equivalent to about 30 percent of the value of its air tickets.[44]

The press release also stated that the loyalty bonuses had discriminatory effects as regards travel agents and noted that:

> …because of this abusive conduct, the fare-setting system used by airlines, which was already quite opaque, was made even less transparent, to the detriment of consumers.

Alitalia was ordered to desist from the prohibited conduct and assessed a fine of 1.3 percent of its 2 000 turnover on air transport services to and from Italy.

6.4 The United States Court of Appeal (2nd Circuit) Decision

The US Court of Appeals dismissed Virgin's appeal from a summary judgement in favour of BA. It found that Virgin's had submitted insufficient evidence to establish that BA had engaged in predation. In addition, the Court determined that Virgin "…failed to show how British Airways' competition harmed consumers."[45] The case concentrated on effects on five routes on which Virgin claimed injury, i.e. flights between London (Heathrow) and New York, Washington, Chicago, Los Angeles and San Francisco.

The Court also dismissed Virgin's claim that BA had engaged in concerted action having the effect of unreasonably restraining trade, i.e. violated s.1 of the Sherman Act. The Court rejected this on two grounds. First, it was noted that Virgin conceded on appeal that the case turned on BA's unilateral behaviour. Second, the Court stated that Virgin had not presented evidence that competition, as opposed to competitors, had been adversely affected.

Applying a s.1 analysis to BA's corporate discounts and TACOs (i.e. treating them, for the sake of argument, as if they had resulted from an agreement) the Court stated:

> These kinds of agreements allow firms to reward their most loyal customers. Rewarding customer loyalty promotes competition on the merits. Since the incentive agreements serve a procompetitive purpose, Virgin must show the same purpose could be achieved without restricting competition.

The Court did not explain why it concluded that: "Rewarding customer loyalty promotes competition on the merits." As regards a means to achieve the same benefits without restricting competition, the Court concluded that: "…Virgin's failure to address this point leaves intact the evidence that British Airways' incentive agreements are good for competition."[46] BA's evidence seems to have amounted to the presumption that discounts are *ipso facto* procompetitive. In any event, the Court concluded its s.1 analysis with:

> While Virgin believes it was disadvantaged by such agreements, injury to a competitor cannot be said to be the *sine qua non* of a s.1 violation. The Sherman Act and other antitrust laws are designed to protect competition, not individual competitors.

To succeed on the attempted monopolisation claim under s.2 of the Sherman Act, the Court noted that: "…Virgin must establish "(*1*) that [BA] has engaged in predatory or anticompetitive conduct with (*2*) a specific intent to monopolise and (*3*) a dangerous probability of achieving monopoly power."[47] It then proceeded to outline the essential elements of Bernheim's predatory foreclosure theory. Noting that this was derived from the theory of predatory pricing, the Court held that to succeed on this claim: "…a plaintiff must prove two elements: (*1*) "that the prices complained of are below an appropriate measure of its rival's costs,"…, and (*2*) that the predatory rival has a "dangerous probability" of recouping its investment through a below cost pricing scheme…."[48]

The Court found insufficient evidence to establish that BA had engaged in below cost pricing. This was primarily due to a lack of actual evidence, as opposed to mere deduction, showing that BA had added extra flights solely because of extra passengers flying in response to its various incentive programs.[49] Having made that crucial finding, the Court was able to reject Virgin's calculations that the presumed extra flights were non-compensatory at the margin, hence constituted evidence of below cost pricing.

Despite not being strictly necessary to the decision, the Court went on to consider the recoupment issue. It summarised Virgin's argument on this score as follows:

> Virgin's theory of predatory foreclosure has a second prong for purposes of showing attempted monopolisation, namely that British Airways immediately recouped losses on a below cost ticket by overpricing a "bundled" ticket sold at the same time on a monopoly route. Dr. Berhheim defines "bundling" as "the business practice of selling two or more distinct goods only as a 'bundle,' or a package, with a single price charged for the entire bundle." British Airways allegedly bundled the sale of tickets on its flights by offering discounted fares to corporate customers and increased commissions to travel agencies who entered into the incentive agreements. Dr. Bernheim opines that to induce these entities to "unbundle" individual routes and consider purchasing tickets on another airline for one route of a multi-route trip, Virgin would have to match the monetary value of British Airways' incentive agreements, which in turn would cause Virgin to sell its services below cost. Since this option is not commercially viable, and Virgin cannot replicate the network British Airways offers, Virgin claims it could not compete fairly for passengers who wished to fly the transatlantic leg of their journey on an airline other than British Airways.

The Court in effect widened Bernheim's definition of (pure) bundling to include mixed bundling, i.e. discounts for purchasing a bundle of products coupled with a willingness to sell the items separately, and referred to the latter as simply "bundling". It went on to reject Virgin's claim because of insufficient evidence supporting the notion that bundling had coerced a sufficient number of passengers not to buy tickets on Virgin on the five routes the complaint related to, or at least made it economically irrational for them to do so.

At points in its discussion of recoupment, the Court considered whether BA's bundling involved a subsidisation of lower prices on some routes, where BA faced competition, from extra profits raised by increasing prices on routes where it encountered much less or zero competition.[50] The Court found insufficient evidence to support that possibility. It also noted that prior to its bundling, BA was presumably pricing as high as it could in the markets where it enjoyed market power so that it would

presumably be unable to raise prices further on some routes as part of a strategy to subsidise lower prices elsewhere.

Summing up its recoupment discussion, the Court said:

> Absent proof of recoupment, a factfinder could conclude only that British Airways reduced fares under its incentive agreements, but not that the antitrust laws were violated…. Without proof of recoupment, predatory pricing produces lower aggregate prices benefiting consumers.

In the final section of its judgement, the Court turned to monopoly leveraging which it initially described as, "…the use of monopoly power in one market to strengthen a monopoly share in another market."[51] The Court questioned whether monopoly leveraging might extend to using "…monopoly power in one market to gain a competitive advantage in another, even without an attempt to monopolise the second market." In the end the Court did not have to decide that point because it held that competitive injury, e.g. higher prices or reduced quantity or quality of output, is an essential element of monopoly leveraging under US law. The Court found that Virgin failed to provide such evidence.

6.5 Comment on the decisions

The Virgin/BA case appears to fit the notion of a firm with market power using fidelity discounts to change the mode of competition (i.e. towards network to network competition) in a way benefiting the discounter. BA's conduct may also have had the effect of introducing some price discrimination. It is not completely clear whether the conduct actually harmed competition and thereby consumers of air travel services as well.

The EC decision was based on the premise that EC competition law prohibits dominant firms from offering discounts in exchange for loyalty instead of efficiencies. Although the decision referred to harm to competitors resulting in harm to competition, this theme was not extensively developed. If actual proof of harm to competition is not required, then one could say that EC competition law has adopted a somewhat truncated approach to fidelity discounts by dominant firms that parallels in some respects the EC approach to predatory pricing.

The US Appeal Court decision establishes that at least regards ss.1 & 2 of the Sherman Act, fidelity discounts are illegal under US law only if there is harm to competition, which could include a delay in the introduction of more competitive conditions. In essence that requires showing that the fidelity discounts harmed buyers not just competitors. The decision did not consider the possible application of the Robinson-Patman Act (concerning price discrimination) to BA's conduct.

One of the intriguing features of the US decision is that in balancing the pro- and anticompetitive effects of fidelity discounts, the simple fact of being a discount will qualify as a procompetitive effect. In the Virgin/BA case, at least some of the discounts resulted in some buyers receiving lower prices than others. Whether a procompetitive effect would also be presumed in the absence of this feature is perhaps still an open question under US law.[52]

Another puzzle related to the US decision is its treatment of the recoupment issue. The discussion on that point does not fully come to grips with the possibility that BA's discounts constituted a sacrifice of part of ongoing supra-competitive profits in the hope not of recouping them later but simply in order to prolong the period of time over which the remaining part of supra-competitive profits could be earned.

7. Policy Observations

7.1 Applying a truncated approach to dealing with fidelity discounts by dominant firms

The Virgin/BA example raises the question of whether or not some kind of truncated approach, i.e. one that avoids a full blown comparison of pro- and anticompetitive effects, should be taken to fidelity discounting. In discussing the advisability of a truncated approach to US monopolisation cases (i.e. under s. 2 of the Sherman Act), Timothy Muris noted that:

> …the most efficient rules minimise the sum of the cost of making mistakes and the litigation costs of the parties and the courts. Litigation costs include all counselling, investigation, and court expenses. The costs of mistakes are twofold: either false positives (cases in which the law wrongly condemns an efficient business practice) or false negatives (cases in which conduct that harms consumers is exonerated). Truncated analysis, such as the *per se* rule against naked price fixing, makes the most sense when the cost of proving actual consumer harm is high in individual cases and harm is strongly correlated with readily observable behaviour. Given the high correlation, conditioning liability on the behaviour minimises enforcement costs, including those of compliance, without causing large efficiency losses from false positives.[53]

The wisdom of applying some kind of truncated approach to fidelity discounts could vary across countries since it partly turns on country specific "litigation costs". There will probably be few, if any, jurisdictions, however, where the balance is strongly in favour of a truncated approach in all circumstances. This is because there are pro- as well as anticompetitive effects that could be associated with fidelity discounts. That raises the possibility of a truncated approach producing "false positives". In addition, the existence and magnitude of net harm may not be well enough correlated with readily observable behaviour, i.e. the mere existence of a fidelity discount. This is another way of saying that the potential for net harm could vary considerably from case to case depending on the particular characteristics of the discount concerned and the relevant market conditions.

The case for a truncated approach to fidelity discounts grows considerably stronger if it is applied only to dominant firms, since dominance tends to increase the risk of anticompetitive effects without tending to increase the potential for procompetitive impact. This is especially so if the dominance is linked to the kind of asymmetry between fidelity discounter and rivals that we have emphasised in this paper.

Besides adopting a truncated approach to analysing fidelity discounts, the law on fidelity discounts could be made both clearer and easier to apply by including a formal efficiency defence. One way to do this would be to assign the competition authority the initial burden of proving that a fidelity discount had or will have significant anticompetitive effects.[54] If the initial burden is met, the fidelity discounter could avoid sanction only if it established that: *a*) its discounts had more than offsetting procompetitive effects, and *b*) there was no less anticompetitive way to achieve those benefits.

7.2 Relation between fidelity discounts and both predatory pricing and bundling

In our earlier summary of the pro- and anticompetitive effects of fidelity discounts, we noted that when competition concerns centre on anticompetitive exclusion (i.e. creating or strengthening a dominant position), long term harm is likely only under conditions analogous to those associated with anticompetitive bundling or predatory pricing. With reference to the Virgin/BA case, Bernheim (1997) dealt with such concerns under the label of "predatory foreclosure". He noted that although BA's

discounts involved below cost pricing (at least at the margin), the conduct differed in several important ways from classic predation:

> First, the objective of predatory foreclosure is to deter and/or delay the entry or expansion of a competitor, rather than to drive existing competitors from the market. Second, when a firm practices predatory foreclosure, it immediately recoups its losses on the sales that are priced below cost by setting prices substantially in excess of costs on other sales. Third, the economic conditions that enable a firm to engage in predatory foreclosure profitably differ fundamentally from the conditions that enable a firm to practice predatory pricing.

What Bernheim referred to as predatory foreclosure is, in some respects, better described as anticompetitive mixed bundling. This is especially pertinent to a situation in which a fidelity discount is offered in relation to purchases of a selection of products (e.g. a selection of city destinations) rather than a single one. It applies as well, however, for a single product except that in that case the focus would be on mixed as opposed to pure bundling.[55]

Applying some notion of predation tends to cast the analysis in terms of below cost pricing and recoupment. Bundling on the other hand could be anticompetitive even though prices are above cost.[56]

Consider, for example, a firm using bundling as a strategy of foregoing some supra-competitive profits so as to prolong the time over which a lower level of supra-competitive profits can be earned. This was the essence of the hypothetical example initially described in section II of this paper. Although fidelity discounts tend to lower prices, at least for the buyers offered them, the entry or expansion discouraged by such discounts would presumably have lowered prices even further.[57] Such a result could presumably have occurred in the earlier surveyed Virgin/BA case, although sufficient evidence was not provided to demonstrate it.

7.3 Need to ensure that dominant firms are not displaced by less efficient firms

Designing the optimal policy towards fidelity discounts, especially those offered by dominant firms, must take account of the inefficiency that could result if dominant firms and their competitors are subject to different rules regarding price competition. The inefficiency would materialise if differential treatment results in a transfer of market share to less efficient firms and the consequent losses in productive efficiency are not more than compensated by benefits associated with lower prices. In the worst case, prices might in fact be greater than they would have been if the dominant firm had been freer to compete.

Some countries recognise the problem we are alluding to by providing a meeting competition defence. This shows up for example in s.2(b) of the US Robinson-Patman Act. According to Bruckmann (2000, 293):

> The "meeting competition" defense permits a seller to offer selective discounts or promotional benefits to particular customers provided the discount or benefits are offered in good faith to meet (but not beat) an equally low price or promotion of a competitor.

Spinks (2000, 669-670) suggests that EC law may also provide a meeting competition defence as regards the prohibition of non-cost justified discounting by dominant firms, but added that this has not yet been clearly defined.

One might anticipate problems applying the defence to discounts as complex as some fidelity discounts, especially as regards the proviso that the discount does not beat what a competitor is offering.

8. Summary Remarks

Whatever other properties they may have fidelity discounts constitute a form of price competition. As such they will tend, at least initially, to make a positive contribution to economic welfare.

In addition to the obvious benefit of lower prices, this paper has discussed a number of other ways in which fidelity discounts might improve economic efficiency. These ranged from the gains sometimes derived from exclusive dealing, to the more esoteric benefits of: sales expanding price discrimination; gains achieved through the exercise of buyer power; and benefits that might be achieved in some markets if fidelity discounts help reduce an over supply of product differentiation.

Notwithstanding the various potential benefits of fidelity discounts, they could sometimes have a net anticompetitive, efficiency reducing effect in some markets. There are three basic ways in which that might occur. First, the complexity inherent in some fidelity discounts, perhaps coupled with a degree of secrecy, could significantly reduce price transparency. Under some circumstances, such a reduction could mean a less competitive market. Second, fidelity discounts could increase the expected profitability of co-ordinated interaction, partly by raising barriers to entry (or expansion) and partly by making it easier to detect cheating. Third, fidelity discounts could produce such severe harm to a significant number of competitors that competition itself is reduced. Assessing the probability of this happening calls for an analysis analogous to that applied to suspected predatory pricing or anticompetitive bundling.

Fidelity discounts are more likely to harm competitors in markets where there is a special kind of asymmetry, namely one bound up with changes in the predominant mode of competition. Fidelity discounts encourage buyers to focus their purchases on a single or much smaller group of suppliers than would occur without the discounts. Because of this tendency, fidelity discounts move competition away from something conducted at the margin, i.e. involving small shifts in patronage, to rivalry instead for each customer's entire requirements. Some fidelity discounters enjoy a significant extra advantage when competition takes that form, but their consequent gain in market share may not necessarily reflect any economic superiority.

Properly assessing the net competitive effects of fidelity discounts requires examining their known effects, if any, plus estimating their potential to reduce competition or to delay an increase in competition. The exact structure of a fidelity discount and the characteristics of the market it occurs in are critical to estimating their anticompetitive potential. One should pay special attention to: how quickly the marginal price drops as a buyer approaches sourcing his entire requirements with the discounter; the length of the reference periods; and whether or not reference periods are synchronised across buyers. Turning to market characteristics, attention should be devoted to: the initial market power of the firm or firms introducing fidelity discounts; the degree to which fidelity discounts are widespread in the market; and the existence and importance of economies of scale, network effects, and buyer switching costs.

The clear and important procompetitive effects of lower prices combined with a considerable degree of variation in the potential anticompetitive effects of fidelity discounts argue against using a truncated approach when applying competition laws to such discounts. A case by case balancing of pro- and anticompetitive effects seems more appropriate. If a truncated approach is nevertheless adopted in order to save enforcement resources or to enhance legal certainty, it should probably be confined to dominant firms. Even then, an efficiency defence should probably be permitted.

ANNEX

HYPOTHETICAL EXAMPLES OF FIDELITY DISCOUNTS

Suppose a monopoly supplier ("Supplier A") having average costs (including a risk adjusted normal return on investment) equal to $40/unit, is initially charging $55/unit for its product. Believing that new entrants are poised to enter the market, suppose Supplier A decides to offer the following fidelity discount:

- $55 - if annual purchases are below 1001 units;
- $50 - if annual purchases are 1001 or greater.

Faced with these prices, let us suppose that a representative purchaser, Buyer one, opts to purchase 90 units per month at a price of $50/unit. Sometime later, observing that supra-competitive profits are being earned by Supplier A, Supplier B considers entering this market. Suppose that Supplier B could break even (including making an appropriate return on his investment) if it received a price slightly below $50 a unit. Assume further that because of a desire to diversify suppliers, Buyer one would be willing to purchase nine units/month from Supplier B as long as this can be done without raising the amount he spends on this good. If Supplier A were simply quoting a price of $50/unit, Supplier B would be able to win sales of 108 units/year and Supplier A's annual sales to Buyer one would fall to 972. That possibility is blocked, however, by Supplier A's fidelity discount. Buyer one would refuse to purchase nine units/month from Supplier B because doing that would raise the price of his 1 080 units/year from $54 000 to $58 860. In fact, to make a purchase of nine units/month attractive, the price would have to be something below $5/unit.[58]

This example can be used to illustrate another important feature of fidelity discounts. Suppose that instead of 1 080 units, Buyer one responds to the fidelity discount by purchasing 1 001 units/year. What price has he paid for the last unit purchased? 1 000 units would sell for $55 000, while 1 001 units could be purchased for just $50 050. The last unit purchased would have a negative marginal price, and the same would be true for a certain range of outputs around any of the threshold quantities. For a still wider range of outputs, the marginal price would no longer be negative but nevertheless could be very low indeed. If the discount schedule were continuous instead of featuring discrete jumps, or if a different price were charged for each range of quantities purchased,[59] this would only guarantee that the marginal price is always positive.

Our numerical example implicitly assumes some kind of asymmetry between Suppliers A and B because it begs the question of why Supplier B does not take 100 percent of A's sales when it offers a price somewhat below $50/unit. The asymmetry could arise for a number of different reasons. One of the easiest to model is a reputation advantage, i.e. Supplier A has an established reputation in the market and Supplier B does not. Such an asymmetry is a normal feature of many markets and does not necessarily harm economic welfare.[60] The fidelity discount could change that, however, by considerably augmenting the power of Supplier A's reputation advantage. Forced to choose between giving all of next year's business to either Supplier A, with which he is familiar, or trying Supplier B and saving a small amount of money, Buyer one may prefer to stay with the known supplier, especially if it appears to have a better chance of staying in business over the whole of the reference period.[61]

To overcome the problem posed by Supplier A's reputational advantage magnified by the effects of its fidelity discount, Supplier B would have to enter with a price considerably below and at a scale

significantly above what would have been necessary absent Supplier A's fidelity discount. That translates into lower expected profit (perhaps even initial losses) and greater risk for Supplier B, and could well result in its choosing to stay out of the market.

The hypothetical example we have been working with illustrates that by adopting a fidelity discount and at the same time surrendering some of its supra-competitive profits, a monopoly supplier could prolong its monopoly even though there are potential entrants that could break even selling at a lower price. The monopoly will be retained until a firm appears that enjoys such low costs that entry is profitable despite higher barriers to entry occasioned by a fidelity discount augmenting some initial advantage the monopolist may enjoy. In the meantime, the monopolist will enjoy supra-competitive profits and economic welfare will be reduced because of the dead-weight loss associated with buyers purchasing less than they would have at lower prices.

Now let us consider a situation where there are multiple, unequal size suppliers offering differentiated products. Let us further assume that all firms are just breaking even but could achieve lower costs (because of significant fixed costs) at higher outputs, and that initially buyers are purchasing from all suppliers in order to enjoy the benefits of product variety. In the assumed situation, the supplier with the largest volume, presumably the one with the most popular product variant, might gain both market share and profits if it raised its price but simultaneously offered a fidelity discount.[62] The buyers desiring to give up product variety in exchange for a lower price would presumably be more willing to focus their purchases on the more popular product variant. Once again, we see that fidelity discounts could magnify the significance of an initial market asymmetry (in this case a superior product variant). The result could be a loss of economic welfare as market share is initially re-apportioned not because of some change in tastes or costs, but simply because of the introduction of the fidelity discounts. That point must be qualified, however, by noting that the fidelity discounts might have facilitated a move to a new market equilibrium featuring lower costs and lower prices on the part of the fidelity discounter, coupled with less product variety in terms of individual consumption patterns.

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NOTES

1. In one of its recent Deutsche Post decisions, the European Commission wrestled with the distinction between quantity discounts and what the European Court had described as a "fidelity discount" in its Hoffman-LaRoche decision. According to the Commission, the Court made the following distinctions:

   - the quantity rebate is linked exclusively to the volume of purchases from the producer;

     concerned. It is calculated on the basis of quantities fixed objectively and applicable to all;

     possible purchasers;

   - the fidelity rebate is linked, not to a specific quantity, but to the customer's requirements or a

     large proportion thereof. The reduction is granted 'in return' for the exclusivity in satisfying the demand;

   - even where the fidelity rebate is linked to a specific quantity, it is given on the basis; not of that quantity, but of the assumption that the quantity represents an estimate of each customer's presumed capacity of absorption, the rebate being linked, not to the largest possible quantity, but to the largest possible percentage of the requirements. [European Commission (2001, para. 33)]

2. Exceptions can probably be found as regards goods which can be cheaply stored, hence purchased for some time in advance. Consider, for example, small bottles of contact lens cleaning fluid normally purchased once a month. The producer of this good may obtain the equivalent fidelity effect by either offering six bottles, packaged together, for the price of five, or offering a sixth bottle free if the buyer purchases five bottles within the next five months.

3. In services markets, the reference period could be defined in an analogous fashion, or it could take the form of a length of time purchasers must sign up for in order to receive the discount. For example, an Internet service provider offering flat rate monthly contracts might offer lower prices in return for the customer signing up for a six month contract.

4. The competitive significance of network effects cannot be assessed without reference to switching costs. If an inexpensive means can be found, for example, to permit buyers using operating system "A" to use software developed for operating system "B", part of pertinent network effects would disappear. Of course, fidelity discounts could themselves amount to a switching cost.

   For a discussion of switching costs and an analysis of their effects on profits and economic welfare, see Klemperer (1984) and Klemperer (1995). The latter notes that switching costs result "…from a consumer's desire for compatibility between his current purchase and a previous investment." (517)

5. The cost structure for computer operating systems features very high fixed costs, but negligible marginal costs (essentially the cost of making a digital copy). In addition, the value to buyers of a particular operating system grows with the number of buyers opting for it and this for two reasons. First, a common operating system might make it easier to share data and programs, and to network computers. Second, the larger the number of people using a particular operating system, the greater the potential profit involved in writing software designed to work with that operating system. And the better and cheaper the compatible software, the more an operating system is valued by users.

6. See Klemperer (1984, 2). For a more recent general discussion of the possible anticompetitive effects of switching costs, including those created by certain fidelity discounts, see Klemperer (1995).

7. For further discussion of the trade-off involved, see Klemperer (1995).

8. For antitrust purposes, airline markets are normally considered to be city pairs - see the background paper contained in OECD (2000, 28). That paper also contains, at pp. 35-38, a discussion of the various ways airlines use to raise switching costs so as to increase the market power of their networks. In addition to FFPs, airlines with extensive networks also employ corporate discounts, and loyalty enhancing commissions to travel agents. Both of these are considered later in this paper in the context of discussing the Virgin/BA example.

9. For further discussion of airline competition, see ibid., 32-45.

10. With relation to airports, a "slot" is a time period allotted to an airline at a particular airport for taking off or landing. An airline requires both a departure and an arrival slot to operate a single flight.

11. See Borenstein (1996) for an economic analysis of repeat buyer programs in general and frequent flyer programs in particular. Morrison and Whinston (1995) also discuss the effects of frequent flyer programs. Interestingly, they note that the anticompetitive effects of such programs may be somewhat offset by the greater loyalty that smaller airlines generally benefit from.

See n. 59 (below) for the point that many fidelity discounts effectively involve offering free product to qualifying purchasers.

12. For a detailed analysis of the welfare effects of price discrimination, see Varian (1989). A general overview of price discrimination can be found in Carlton and Perloff (1989). For more detail about non-linear pricing (sometimes referred to as "2nd degree price discrimination", see Wilson (1993). Armstrong and Vickers (2001) analyse the welfare effects of price discrimination in oligopoly conditions.

13. Hausman and MacKie-Mason (1988, 255) note:

> With fairly general assumptions one can show that, aside from any incentive externalities, a necessary (not sufficient) condition for price discrimination to increase static Marshallian welfare (the sum of consumers' and producers' surpluses) is that total output of the product increase. The intuition is straightforward. If different customers are paying different prices for a product, their marginal valuations are driven apart. Thus, price discrimination necessarily leads to allocative inefficiencies. For welfare to increase, total output must increase sufficiently for the resulting surplus gains to exceed the allocative losses.
>
> By "allocative losses", the authors are not referring to deadweight losses. Rather they intend the inefficiency that results when buyers assign different relative values to pairs of goods, i.e. what is also often referred to as "distributive inefficiency".

14. One could think of fidelity discounts as non-linear pricing customised for each buyer. In seeking to maximise profits, fidelity discounters may well customise so as to roughly reflect what is known about differences in buyers' price elasticities of demand. This could be done, for example, by adopting sufficient non-linearity in relation to what is known about each buyers' requirements that virtually all of them decide to source exclusively from the discounter. The prices offered for such fidelity could then be adjusted to account for different price elasticities of demand on the part of different buyers.

15. See Carlton and Perloff (1989, 437), Varian (1989, 599), and Scherer and Ross (1990, 489). Reflecting that conventional wisdom, the exposition of price discrimination is frequently developed assuming the seller is a monopolist. An exception can be found in Armstrong and Vickers (2001) where the focus is instead on price discriminating oligopolists.

16. For discussions concerning price discrimination without market power, see Frank (1983) and Levine (2000). In analysing price discrimination in the form of advance purchase discounts on airlines, Dana (1998) also notes that price discrimination can occur in the absence of market power. Borenstein (1998) seems to accept that market power would be necessary for price discrimination in homogeneous goods, but not where they are heterogeneous:

> Competition among heterogeneous brands and the absence of entry barriers will almost never prevent price discrimination, even when they cause long-run profits to be driven to zero. In fact, when a usable sorting mechanism exists, a firm could be forced to discriminate to avoid losses when competing with other discriminating firms. (381)

Heterogeneity of brands can provide a good sorting mechanism and facilitate price discrimination.

17. For the pro- and anticompetitive effects of price transparency, see the background paper in OECD (2001).

18. In *Michelin v. Commission*, for example, the European Court of Justice remarked (at paragraph 14) on how the lack of transparency in Michelin's discounts aggravated their anticompetitive effects.

19. See Calkins (1990) for the negative effects of FFP induced reductions in price transparency.

20. For more on the competitive effects of exclusive dealing and closely related practices such as tying, bundling and full line forcing, see Whinston (1990) and Carlton (2001). These topics are also treated in the Background Paper found in OECD (2002).

21. Suppose the discounts are structured in such a way that customers are highly unlikely to switch during the last 2/3 of a reference period. If the reference period is six months, Supplier B could have to wait as long as four months to obtain Buyer 1's custom. That doubles to eight months if the reference period is one year.

22. See Marvel (1982).

23. They could do this by transferring to the presumably better informed producer a larger share of the risk entailed in launching a new product. For a detailed discussion of the competition effects of slotting allowances, see Tom (1999).

24. For a deeper look at the issues involved, see United Kingdom Competition Commission (2000), i.e. an inquiry into the UK impulse ice cream market. Ridyard (2002) criticised that inquiry's negative findings regarding the fidelity discounts:

> Although the main focus of that inquiry was the various vertical restraints practised in the industry, an interesting side issue was the practice of theme parks and other large leisure site customers securing long term exclusive supply contracts with a single ice cream supplier via a competitive tender process. Although Unilever held a high brand share in the market and was presumed to be dominant, it is evident from the customers' willingness to conduct tenders on this basis that they were prepared to contemplate a solus agreement with Nestlé, Mars, or one of the minor suppliers.
>
> In the event, the UK Commission concluded that such deals should be prohibited, with respect both to Unilever and also the other major suppliers. It is hard to see how this solution will make life any easier for those rivals, and harder still to see how the removal of a key bargaining weapon from customers could help their interests. (15, references omitted)

25. For a discussion of the effects of buyer power, see the background paper contained in OECD (1999). Related to this, see O'Brien (1994) who notes that by prohibiting price discrimination harming competing retailers, the United States Robinson-Patman Act could render: "…retailer bargaining power useless in mitigating manufacturer market power. As a result, all retailers end up paying higher input prices, and all retail prices rise." (296)

    For a general consideration of how the Robinson-Patman Act could impact on fidelity discounts, see Bruckmann (2000).

26. "Quality adjusted" should be broadly interpreted to include reduced product differentiation.

27. In EC jurisprudence, the term "fidelity discount" is reserved for discounts offered in return for a customer agreeing to give most or all of its business to the discounter. Target discounts, in contrast, offer a discount in return for the customer meeting certain quantity or increase in quantity targets.

28. European Commission (1999a, at paragraph 5)

29. *Virgin v. BA* (2001, page 4 of downloaded version of the decision)

30. The example was as follows:

> Assume a travel agent's sales of international air tickets to be GBP 100 000 a month in the benchmark year. If the travel agent sells GBP 100 000 worth of BA international air tickets a month it will earn the basic commission of seven percent and a 'performance reward' of 0.5 percent ((100 minus 95) x 0.1 percent) giving a total commission income on international air ticket sales of GBP 7 500 (100 000 x (7 percent + 0.5 percent)). If the travel agent diverted one percent of its international ticket sales to a competitor of BA, its 'performance reward' would decrease to 0.4 percent ((99 minus 95) x 0.1 percent) and this reduced rate would be applied to all of the agent's sales of BA tickets. The agent's commission income from the sale of international BA tickets would drop to GBP 7 326 (99 000

> x (7 percent + 0.45)). A reduction of GBP 1 000 in sales of international BA tickets leads to a drop of GBP 174 in commission income. The 'marginal' commission rate can be said to be 17.4 percent. In practical terms, this means that a competitor to BA that could offer flights that would replace GBP 1 000 of the travel agent's sales of BA tickets would have to offer a commission of 17.4 percent on these tickets to compensate the travel agent for its loss of BA commission revenue. Although BA also has to offer this high marginal rate of commission to increase its sales of tickets, it is at an advantage over the new entrant who must offer this high rate of commission on all of its sales….
>
> This effect increases if the number of tickets in question is a smaller percentage of the travel agent's benchmark sales of BA tickets. This effect is also increased if the travel agent in question is not only earning extra commissions under the PRS but can also earn bonuses under an MA. (at paragraph 30, omitting reference)

31. Bernheim (1997, paragraphs 6 & 7)

32. Ibid., para. 129.

33. The degree of magnification is greater the higher the percentage of travellers interested in multiple as opposed to single destinations. For passengers solely interested in a single destination, a network discount is the same as a route specific discount and, as such, could presumably be exactly matched by a carrier offering only the single destination. This is assuming there are no significant supply side economies of scale enjoyed by a network operator.

34. *Virgin v. BA* (2001, page 4 of downloaded version of the decision)

35. See European Commission (1999a, paragraphs 33 to 43).

36. See ibid., paras. 90 and 92.

37. See ibid., paragraph 96, case citations omitted. See also n.27 *supra* for the EC's definition of "fidelity discount", hence its use of the term "loyalty discount" to describe BA's TACOs.

38. Ibid., paragraph 101

39. See ibid., paragraph 101 and 102. Earlier in the decision, at para. 58, the EC had noted:

> BA has also provided evidence that there may be some cost savings for BA in selling its tickets using an agency that generates a large volume of business. BA argue that certain costs of dealing with an agency are either fixed regardless of the size of the agency or do not increase directly in proportion to the volume of business done by an agency, so realising cost savings for BA in dealing with larger agencies. They give the example of marketing and communication costs such as brochure production and product education, operational costs of processing enquiries from agencies, checking and inputting orders received from an agency and communicating fare information to agencies and commercial cost of entering into and managing a contractual relationship with an agency. The majority of these savings arise from dealing with a chain of travel agencies rather than a single-location travel agent.

40. See ibid., paragraph 103.

41. Ibid., paragrahs 106-107.

42. Ibid., paragraph 109

43. European Commission (1999b)

44. Italian Competition Authority (2001).

45. *Virgin v. BA* (2001) at page 2

46. Ibid., page 8.

47. Loc. cit., citation omitted.

48. Loc. cit., citation omitted.

49. See Bernheim (1997, paragraphs 96-111).

50. Ibid., pages 12-15

51. Ibid., page 13

52. There is always the possibility that all buyers qualify for the same fidelity discount in which case there would be no difference in price across buyers.

53. Muris (2000a, 701-702, references omitted).

54. Some jurisdictions might opt simply to presume such negative effects whenever the discounter is a dominant firm.

55. Consider a case of a buyer being offered 80 percent of his estimated requirements at a price of $10/unit, with the price dropping to $8/unit (for all units bought) if purchases exceed the estimated 80 percent threshold. The first 80 percent of requirements could be considered as one of the bundled products, and additional units purchased as the other. The additional units offered at a negative price for the first units purchased, cannot be purchased independently of the first 80 percent, so the concept of mixed bundling cannot apply.

56. See Tom et al. (2000, 637-638), Nalebuff (1999), and Nalebuff (2000). For a further discussion of the potential anticompetitive effects of pure and mixed bundling, see the Background Paper in OECD (2002).

57. If not, the fidelity discounter apparently made a mistake or was deliberately choosing not to maximise profits. The analysis becomes considerably more complex, however, if the discounts were adopted before entry would have occurred absent the discounts. When fidelity discounting occurs well in advance of entry, the scales are tilted in favour of the discounts increasing rather than reducing economic efficiency.

58. To ensure the buyer does not lose by transferring 108 units/year of his purchases to Supplier B, the total amount paid for 1080 units/year cannot exceed $54 000. Buying 972 units/year from Supplier A would cost $53 460 leaving just $540 to spend on units from Supplier B. Therefore Supplier B must charge something less than $540/108 = $5/unit to interest Buyer one in giving him nine units/month of business.

    Another way to look at Supplier A's fidelity discount is to say that, provided they purchase more than 1 000 units/year, buyers are being offered 910 units at a price of $55 each, 91 units free, and an option to purchase further units at $50/unit.

59. For example, $55 each for the first 1 000 units/year and $50 for each additional unit purchased in the same year.

60. For a discussion of the role of reputation in the competitive process, see Shapiro (1983) and Klein and Leffler (1981).

61. Something like this may explain the effect of the fidelity discounts featured in the Hale and Waterous cases brought by the US Federal Trade Commission. See Tom et al. (2000, 619).

62. This is more likely to be profitable in markets where product differentiation responds to each buyer's desire for product variety rather than to buyers having different tastes and preferences. In the latter situation, buyers would tend to focus their purchases on one or a small number of suppliers even if there were no fidelity discounts pushing them in that direction.

NOTE DE RÉFÉRENCE

Par le Secrétariat

1. Introduction

La concurrence par les prix peut-elle être trop vive ? La plupart des autorités de la concurrence répondront sans doute par la négative, sauf dans de rares affaires de pratiques de prix d'éviction ou concernant des marchés sur lesquels les consommateurs éprouvent énormément de difficulté à évaluer la qualité des produits offerts. Le présent document traite du phénomène peut-être moins bien connu des remises et primes de fidélité (« remises de fidélité »). Ce sont les remises de fidélité qui ont été jusqu'ici à l'origine de certaines des amendes les plus fortes infligées pour comportement anticoncurrentiel non lié à un cartel.

Dans le présent document, les remises de fidélité désignent les structures tarifaires offrant des prix plus bas en contrepartie du consentement ou de l'engagement de fait d'un acheteur à s'approvisionner en grande partie auprès de l'entreprise qui accorde la remise. Les remises de fidélité pourraient avoir des effets favorables et défavorables sur la concurrence, dont certains ne sont pas toujours évidents sur-le-champ. Le présent document examine ces effets et analyse les politiques qui ont été élaborées relativement aux remises de fidélité.

Le présent document commence par définir les remises de fidélité et examine leurs effets favorables et défavorables sur la concurrence. Il examine ensuite de manière approfondie un exemple concret (les remises de fidélité visées dans la récente affaire Virgin/British Airways) ainsi que certaines questions de fond intéressant les pouvoirs publics. Il formule enfin un certain nombre d'observations à caractère synthétique.

1.1 Principaux points abordés dans le document

- les remises de fidélité incitent chaque acheteur à s'approvisionner auprès d'un plus petit nombre de fournisseurs (effet de concentration) et à comparer moins souvent les prix ;

- l'ampleur de l'effet de concentration dépend de la structure exacte d'une remise de fidélité donnée (c'est-à-dire du degré de non-linéarité introduit dans la structure tarifaire) ;

- en concentrant les achats de chaque acheteur, les remises de fidélité pourraient modifier le mode de concurrence prédominant sur un marché, en transformant par exemple une rivalité à la marge en une concurrence qui aurait pour but de répondre à la totalité ou à la presque totalité des besoins d'un acheteur ;

- les remises de fidélité pourraient entraîner d'importants effets anticoncurrentiels, notamment : diminution des motivations des fournisseurs à livrer une concurrence par les prix, en raison de la réduction de la transparence des prix sur le marché ; probabilité accrue

d'une interaction coordonnée ; et préjudice tel causé aux concurrents existants ou nouveaux que la concurrence proprement dite s'en trouve perturbée ;

- le préjudice causé aux concurrents est d'autant plus susceptible d'affecter la concurrence que : *a*) les remises de fidélité sont généralisées sur le marché ou octroyées par des entreprises dominantes ; et *b*) un trop petit nombre d'entreprises sont en mesure d'entrer en concurrence à des conditions à peu près égales si la concurrence a dorénavant pour objet de répondre à la totalité ou à la presque totalité des besoins d'un acheteur ;

- la probabilité que les remises de fidélité aient pour effet de restreindre exagérément le nombre d'entreprises capables de soutenir la concurrence sur le marché augmente considérablement lorsque les entreprises qui les accordent possèdent un avantage concurrentiel supplémentaire significatif si la concurrence porte sur la totalité ou la presque totalité des besoins de chaque acheteur ;

- les remises de fidélité ont pour effet proconcurrentiel évident de réduire les prix et d'offrir dans certains cas d'autres avantages associés notamment aux accords d'exclusivité ; et

- en raison de leurs effets favorables et défavorables potentiels considérables sur la concurrence, qui sont étroitement liés aux caractéristiques spécifiques des remises et des marchés concernés, il semble justifié d'examiner les remises de fidélité cas par cas.

2. Définition et description

Les remises de fidélité sont assorties d'une exigence explicite ou implicite, selon les cas, d'exclusivité entière ou partielle d'achats. Par exemple, si l'acheteur 1 achète normalement 50 unités d'un produit donné (défini comme un groupe de substituts proches) par mois, un producteur peut s'attacher la totalité de sa clientèle pendant l'année à venir en lui offrant une remise de 50 pour cent à la condition qu'il achète au moins 600 unités pendant l'année. La remise de fidélité serait encore plus évidente si ce producteur accordait une remise identique à un client plus petit mais fixait le seuil d'achat déterminant à 360 unités par an.

Il est parfois difficile de faire la distinction entre une remise de fidélité et une simple remise de quantité. Par exemple, une remise de 50 pour cent subordonnée à l'achat d'une quantité minimum pendant une certaine période et offerte exactement selon les mêmes conditions à tous les acheteurs peut, selon les cas, constituer ou non une remise de fidélité. Le facteur déterminant serait que la quantité minimum achetée corresponde à la totalité ou à la presque totalité probables des besoins d'un nombre significatif d'acheteurs pendant la période considérée.[1]

La notion de besoins est liée à une autre notion importante. La plupart des remises de fidélité sont en effet accordées en fonction d'une « période de référence » établie pour le calcul du pourcentage de la remise.[2] La période de référence est en général beaucoup plus longue que la période qui s'écoule normalement entre les achats des acheteurs. Par exemple, un opérateur de taxi qui travaille en moyenne 24 jours par mois et achète 40 litres d'essence par jour pourrait recevoir une remise de fidélité de dix pour cent s'il achète plus de 900 litres par mois auprès d'un distributeur d'essence particulier. La période de référence serait d'un mois et les besoins de la compagnie de taxi seraient établis à 960 litres par mois.[3] Plus formellement, les besoins d'un acheteur correspondent à la totalité de ses achats estimés d'un produit défini adéquatement (c'est-à-dire en incluant les substituts appropriés) pendant la période de référence utilisée pour déterminer l'admissibilité à une remise de fidélité particulière.

Les remises de fidélité peuvent prendre des formes variées allant au-delà d'une simple baisse de prix ou d'une réduction de pourcentage. Elles se présentent parfois sous la forme de produits offerts « à titre gracieux ». En contrepartie d'un achat de 20 litres d'essence ou plus, une station service peut, par exemple, remettre une des vingt figurines représentant des joueurs de football connus. Le désir d'acquérir l'ensemble complet peut engendrer le même comportement qu'une remise de fidélité, en particulier si l'offre se termine au bout, par exemple, de six mois. Il en irait de même pour les différents jouets offerts par les fabricants de céréales pour le petit déjeuner.

3. Effets anticoncurrentiels des remises de fidélité

La présente section a pour postulat central que les remises de fidélité peuvent avoir des effets anticoncurrentiels lorsqu'elles réduisent la transparence des prix, facilitent la coordination anticoncurrentielle, ou conduisent à l'exclusion ou à la limitation des concurrents. Elle a pour postulat complémentaire que les effets anticoncurrentiels sont plus susceptibles de se produire s'il existe un type particulier d'asymétrie en faveur d'une ou plusieurs entreprises qui octroient des remises de fidélité. Même si cette asymétrie accroît les risques d'effets anticoncurrentiels, elle ne les entraîne pas automatiquement. Selon un axiome de la politique de la concurrence, le préjudice causé aux concurrents n'entraîne pas nécessairement un effet nuisible pour la concurrence et, par conséquent, une diminution du bien-être économique.

3.1 Effets des remises de fidélité sur les obstacles à l'entrée et l'expansion de concurrents nouveaux ou existants

Comme on l'a vu, les remises de fidélité incitent les acheteurs à concentrer leurs achats auprès du fournisseur qui les octroie. Ce résultat est généralement obtenu comme suit : la tarification non linéaire réduit les prix à la marge et les prix moyens lorsque la quantité totale achetée pendant une période de référence donnée augmente.

Le fournisseur qui souhaite vendre un produit à un acheteur auquel un fournisseur concurrent a offert une remise de fidélité peut envisager deux possibilités. La première est de concurrencer à la marge, c'est-à-dire pour de petites portions seulement des besoins d'approvisionnement de l'acheteur. L'autre est d'être en concurrence pour la totalité des besoins de l'acheteur.

La concurrence à la marge peut être très peu rentable étant donné que le fait d'accorder une remise de fidélité peut réduire considérablement le prix marginal. Ce prix pourrait même être négatif si le pourcentage de remise augmente par sauts discrets et s'applique rétroactivement à toutes les unités achetées durant la période de référence afférente. De fait, les acheteurs qui franchissent les seuils fixés obtiennent, pour leurs achats antérieurs, un rabais qui pourrait dépasser le montant qui leur est facturé pour les unités additionnelles achetées. C'est pourquoi les remises de fidélité peuvent modifier la concurrence sur un marché en transformant une concurrence continue à la marge en rivalité périodique pour répondre à la totalité des besoins de chaque acheteur.

La modification du mode courant de concurrence n'a pas nécessairement d'effet anticoncurrentiel. Ainsi, il se peut qu'un grand nombre de concurrents puissent rivaliser à forces à peu près égales pour répondre aux besoins d'approvisionnement de chaque acheteur. Il se peut également, en revanche, qu'une ou plusieurs entreprises qui octroient des remises de fidélité détiennent un avantage qui devient beaucoup plus significatif si les remises de fidélité réussissent à modifier le mode de concurrence. Cet avantage constitue ce que nous appellerons une « asymétrie significative ». A cause d'elle, les remises

de fidélité pourraient contribuer à rendre insuffisant le nombre de concurrents de force à peu près équivalente sur le marché.

La réputation est un exemple possible d'asymétrie significative. S'ils sont forcés de choisir, par exemple, entre attribuer la totalité de leur volume d'achats au cours de l'année à venir à une entreprise réputée ou bien à un nouveau concurrent à toutes fins utiles inconnu, de nombreux acheteurs pourraient accorder leur préférence au premier même si celui-ci pratique des prix un peu plus élevés que le nouveau venu. Ce type d'asymétrie peut aussi s'observer lorsqu'une entreprise qui consent des remises de fidélité offre une variante beaucoup plus attrayante d'un produit différencié. Encouragés à se passer de la variété des produits en raison de l'effet de concentration des remises de fidélité, les acheteurs pourraient privilégier fortement le fournisseur qui offre la variante la plus populaire. Dans certains cas, la variante supérieure d'un produit est un produit qu'un distributeur« doit impérativement avoir en stock », une composante pour laquelle un fabricant ne possède pas de substitut ou encore, quoique plus rarement, un produit pour lequel de nombreux consommateurs expriment une demande minimum, et pour lequel il n'existe pas de substitut.

Des exemples hypothétiques des effets mentionnés ci-dessus sont fournis en annexe du présent document.

Les effets des asymétries significatives, lorsqu'ils se conjuguent à ceux des remises de fidélité, sont considérablement amplifiés sur les marchés fragiles. Ces marchés sont enclins à déboucher rapidement sur une situation de monopole ou de position dominante. La fragilité peut être imputable à des économies d'échelle substantielles au niveau de la production. Elle peut également tenir à des conditions du côté de la demande, par exemple aux effets de réseau associés à des frais élevés de changement de fournisseur.[4] Sur ces marchés, il existe souvent une vive concurrence « pour » le marché, mais celle-ci s'atténue beaucoup lorsque le marché est parvenu à maturité, c'est-à-dire lorsqu'il y a très peu de concurrence « sur » le marché. Le marché des systèmes d'exploitation informatique est un bon exemple de marché fragile.[5]

Sur un marché fragile, une légère avance initiale sur les concurrents peut être convertie en avantage durable grâce à la mise en œuvre rapide d'une stratégie de remises de fidélité. Plus l'entreprise qui jouit d'une avance réussit à utiliser les remises de fidélité pour obtenir des engagements de fait d'approvisionnement exclusif, plus les concurrents existants auront tendance à se résigner sans lutter.

L'octroi de remises de fidélité sur des marchés fragiles est par nature susceptible de favoriser la concurrence plutôt que de la défavoriser. Pour savoir ce qu'il en est à cet égard, il faut essentiellement répondre à deux questions. La première est de savoir si l'entreprise qui prend la tête du peloton retire un avantage qui n'est pas que passager. Sinon, la remise de fidélité pourrait aider une entreprise à l'emporter sur un marché même si une autre entreprise plus efficace l'aurait emporté en l'absence de remises de fidélité. La deuxième question, beaucoup plus importante, étant donné que la première se résume à la survenue de ce qu'on pourrait appeler un« accident », est de savoir si la remise de fidélité a eu pour effet de porter les prix subséquents à un niveau inférieur à ce qu'ils auraient été en d'autres circonstances.

Même si les remises de fidélité, conjuguées avec des asymétries significatives, freinent considérablement les concurrents, le préjudice qui en résulte ne joue pas en défaveur de la concurrence et des consommateurs s'il reste un nombre suffisant de concurrents non limités ou potentiels sur le marché. La limitation de la concurrence pourrait également avoir pour effet de créer ou de renforcer une position dominante, ce qui entraînerait une hausse des prix ou les empêcherait de chuter pendant une période plus longue qu'elle n'aurait été s'il n'y avait pas eu de remises de fidélité. Il se pourrait également que des barrières plus élevées à l'entrée ou à l'expansion créent les conditions préalables à une coordination anticoncurrentielle. C'est ce qui se produirait, par exemple, sur les marchés où la menace d'une nouvelle

arrivée est l'unique raison qui empêche un nombre restreint de concurrents de relever les prix en ayant recours à une certaine forme de coordination anticoncurrentielle. Les remises de fidélité pourraient contribuer à supprimer cette contrainte.

Les remises de fidélité peuvent avoir deux autres effets en cas de coordination anticoncurrentielle. Premièrement, pour autant que le nombre d'acheteurs soit suffisamment petit, la concentration des achats suscitée par les remises de fidélité pourrait faciliter la détection de la tricherie.[6] Si un acheteur se détourne de son fournisseur habituel à la suite d'une offre secrète de remise supplémentaire, le montant du chiffre d'affaires soustrait à ce fournisseur sera plus important que si l'acheteur effectuait autrefois ses achats auprès de tous les vendeurs qui agissaient de façon coordonnée. Comparativement à ce qui se produirait en l'absence de remises de fidélité, le vendeur isolé lésé serait plus enclin à imputer la perte à une tricherie qu'à une mutation normale du marché. Deuxièmement, les tricheurs feraient en sorte d'offrir une réduction secrète des prix, de réaliser rapidement une forte augmentation de leurs profits jusqu'à ce qu'ils soient découverts, puis de pratiquer des prix coordonnés plus élevés pour éviter des pénalités ou réduire leur sévérité. Les frais de changement de fournisseur associés aux remises de fidélité invalident ce type de stratégie. Il faudrait que les remises secrètes soient fortes au point de compromettre la rentabilité, ou soient plutôt offertes seulement à la fin de périodes de référence variées et vraisemblablement non synchronisées. Ce dernier argument est doublement valable. Alors que les remises de fidélité rendent la tricherie moins rentable (ou exigent qu'elle s'étale sur une longue période, ce qui est risqué), elles augmentent la pénalité (ou en allongent la durée).

L'analyse des remises de fidélité devient plus complexe lorsque l'engagement concerne une remise en pourcentage plutôt qu'une palette de prix spécifique. Au bout d'un certain temps, l'entreprise qui octroie ce type de remise de fidélité est confrontée à une décision stratégique. D'une part, elle veut élever le prix de « base » (c'est-à-dire le prix pratiqué avant la remise) afin de tirer parti de consommateurs déjà « captifs ». D'autre part, il s'exerce sur elle une pression compensatrice pour qu'elle maintienne ou même baisse le prix de base pour se ménager une clientèle plus étendue qu'elle pourra rentabiliser ultérieurement.[7]

La pression compensatrice qui s'exerce sur l'entreprise pour qu'elle baisse ses prix pourrait se révéler très insuffisante pour assurer la protection de la clientèle captive. Cela est d'autant plus vrai quand l'entreprise qui accorde des remises de fidélité est en mesure d'établir une différenciation par les prix entre ses clients nouveaux et anciens ou si le nombre de nouveaux clients que des prix plus bas sont susceptibles d'attirer est infime.

Les programmes pour grands voyageurs instaurés par les compagnies aériennes constituent un exemple bien connu de remises de fidélité. Indépendamment du fait que la personne qui accumule les points de fidélité (« air miles ») n'est pas nécessairement celle qui paie le billet, la « remise » consiste essentiellement en primes accordées en fonction de seuils particuliers, ou nombre de miles parcourus. En général, les miles accumulés ne peuvent pas être vendus mais seulement échangés contre des voyages gratuits lorsque leur nombre est suffisant. Plus le voyageur approche d'un seuil, moins il envisage de voyager sur une autre compagnie, même à plus bas tarif. En choisissant le tarif inférieur pratiqué par un concurrent, le voyageur diffère indéfiniment l'obtention d'un voyage gratuit, en particulier si les miles accumulés sont perdus lorsqu'ils ne sont pas utilisés dans un délai fixé d'avance. Les frais de changement de fournisseur pourraient être augmentés par la convexité des primes, par exemple s'il est possible d'échanger 10 000 miles contre un vol dont le prix était à l'origine fixé à 400 dollars, 15 000 miles contre un vol à 800 dollars et 20 000 miles contre un vol à 1 600 dollars, etc.

Comme pour d'autres remises de fidélité, les asymétries jouent un rôle important dans la détermination des effets probables des programmes de fidélisation des grands voyageurs. Prenons l'exemple des compagnies aériennes qui se font concurrence pour fournir un service entre les villes A et B.

Supposons ensuite que certaines d'entre elles possèdent des réseaux étendus. Si ces compagnies aériennes commencent à offrir des programmes grands voyageurs, il se peut que les compagnies dont les réseaux sont plus petits ne soient pas en mesure de soutenir la concurrence même si leur efficacité est supérieure. Un vol gratuit pour chaque ensemble de quatre vols payés entre les villes A et B aura beaucoup moins de valeur pour un voyageur s'il relie les points A et B plutôt que le point A et un choix de dix autres destinations assurées à peu près au même coût par les compagnies aériennes.[8]

La question de savoir si la concurrence inter-réseaux encouragée par un programme grands voyageurs est moins vigoureuse dépend essentiellement de la vigueur de la concurrence inter-réseaux, qui peut varier considérablement d'une ville à l'autre. Dans certaines villes, l'aéroport fonctionne en tant que pivot pour un seul réseau de compagnie aérienne. Aux yeux des passagers qui habitent près d'une ville pivot, la compagnie aérienne qui exploite ce pivot et qui dispose d'un programme grands voyageurs peut avoir un avantage significatif non seulement sur les compagnies aériennes qui ne possèdent qu'un réseau très limité ou qui ne possèdent pas de réseau du tout, mais aussi celles qui possèdent des réseaux étendus comparables et qui utilisent d'autres villes comme pivot. Cela s'explique par le fait que les passagers préfèrent les vols directs aux vols avec correspondance, plus longs et moins commodes.[9]

La possibilité que la concurrence inter-réseaux suscitée par les programmes grands voyageurs entraîne à la longue des effets anticoncurrentiels serait nettement moindre si les aéroports pouvaient servir de pivot pour plusieurs réseaux différents. Le problème est que peu d'aéroports ont le volume de trafic et les « créneaux » disponibles requis pour servir de pivots à deux ou plusieurs réseaux de compagnies aériennes à peu près aussi étendus.[10] Ces contraintes pourraient engendrer une asymétrie significative qui expliquerait pourquoi les programmes grands voyageurs sont susceptibles de réduire la concurrence sur les marchés des compagnies aériennes.

Avant de clore l'examen des programmes grands voyageurs, il convient de noter que leurs effets sur le bien-être tout comme ceux des remises de fidélité, de façon plus générale, ne concernent pas simplement le degré de concurrence entre des entreprises qui offrent des remises à peu près équivalentes. Les effets sur le bien-être sont également très tributaires du fait que les produits offerts « gratuitement » ou offerts à un prix très inférieur sont évalués à un prix supérieur à leur coût de production, et/ou créent une possibilité de discrimination par les prix favorable ou non à la concurrence.[11]

3.2 Remises de fidélité et discrimination par les prix

Il existe un type de discrimination par les prix qui est liée à la nature intrinsèque d'une certaine catégorie de remises de fidélité, et qui intervient lorsque le même acheteur doit payer un prix différent pour différentes unités de coût unitaire identique (y compris les coûts de commercialisation). Par exemple, un acheteur pourrait devoir payer dix dollars l'unité pour les cent premières unités achetées, neuf dollars l'unité pour les cent unités suivantes et huit dollars pour chaque unité supplémentaire. La discrimination par les prix au sens plus classique de pratique de prix différents pour le même produit vendu à différents acheteurs pourrait aussi être associée aux remises de fidélité, par exemple lorsque différents acheteurs qui obtiennent une même remise de fidélité choisissent d'acheter des pourcentages différents de produits au fournisseur, ou lorsque différents acheteurs obtiennent des remises de fidélité configurées différemment.

Les effets de bien-être de la discrimination par les prix sont complexes et dépassent quelque peu le cadre de la présente note.[12] Le seul principe qui serait à peu près applicable de manière générale est que la discrimination par les prix n'accroît le bien-être que si elle augmente la quantité vendue totale.[13] Il se peut que la tarification personnalisée non linéaire associée aux remises de fidélité accroisse la quantité vendue à chaque acheteur. Il est assez peu probable, en revanche, que les remises de fidélité conduisent à un modèle efficace de discrimination par les prix parmi les acheteurs. Pour cela, il faudrait que la

différence des prix reflète l'écart des élasticités-prix de la demande (c'est-à-dire des prix plus bas consentis aux acheteurs qui présentent les élasticités de la demande les plus élevées).[14]

On présume souvent que le pouvoir de marché et l'aptitude du vendeur à empêcher ou à limiter la revente entre les clients sont des conditions nécessaires de la discrimination par les prix.[15] Il ressort cependant que le pouvoir de marché n'est peut-être pas une condition nécessaire de la discrimination par les prix si d'importantes économies d'échelle sont réalisées.[16] Il serait donc erroné de conclure que le fait que des remises de fidélité s'apparentant par certains aspects à de la discrimination par les prix constituent des preuves suffisantes du pouvoir de marché de l'entreprise qui y a recours.

Cela pourrait induire en erreur, comme le fait d'exiger que les entreprises qui pratiquent la discrimination par les prix soient en mesure d'empêcher la revente. La revente de certains produits, les services personnels, par exemple, est impossible. Sur certains marchés, également, les coûts élevés des transactions (y compris les coûts de recherche) assurent que la revente par les acheteurs ne constitue pas une menace à une discrimination par les prix rentable. Les remises de fidélité pourraient bien jouer un rôle à cet égard. L'instauration de formules de remises de fidélité complexes ou confidentielles pourrait bien réduire la transparence des prix et, partant, accroître les coûts des transactions et faciliter la discrimination par les prix.

3.3 Remises de fidélité et transparence des prix

Si un degré très élevé de transparence des prix peut nuire à la concurrence, il est vrai également qu'une très faible transparence des prix peut entraîner des effets anticoncurrentiels en rendant la comparaison des produits difficile pour les acheteurs.[17] Certaines remises de fidélité, en particulier celles qui ne s'accompagnent pas d'engagement ferme sur les prix, pourraient contribuer à réduire la transparence des prix et, partant, les incitations, pour les fournisseurs, à s'engager dans la concurrence par les prix.[18]

Outre le fait que les remises de fidélité exigent une totale exclusivité, la transparence et la comparabilité des prix pourraient poser un véritable problème. Comment un acheteur peut-il savoir avec certitude que les achats qu'il effectue auprès du fournisseur A représenteront X pour cent de ses achats d'une année ? Il est encore plus difficile, pour un acheteur, de savoir avec certitude qu'il atteindra un résultat de quantité au cours de l'année, ou accroîtra, d'une année sur l'autre, ses achats auprès de l'entreprise qui offre des remises de fidélité. Ce problème pourrait se poser avec une acuité particulière pour les acheteurs de services ou de produits qui ne sont pas entreposables comme les billets d'avion.

Les remises apparentées à des programmes grands voyageurs posent des problèmes particuliers de transparence. Un voyageur inscrit à un programme grands voyageurs aurait beaucoup de difficulté à déterminer le prix véritable d'un billet. Il pourrait tout au plus évaluer la valeur moyenne du prix. Cette valeur moyenne serait peut-être fortement diluée en fonction de scénarios différents, où seraient pris en compte la probable admissibilité à un vol gratuit, la destination finalement choisie et le prix de vente au moment où la prime est utilisée. Le fait que la compagnie aérienne soit libre de modifier le prix des vols requis pour pouvoir se prévaloir de la remise rendrait l'exercice encore plus complexe. Le voyageur qui participerait à plusieurs programmes grands voyageurs de compagnies aériennes dont les réseaux ne se recoupent pas parfaitement aurait encore plus de difficulté à comparer les prix des billets.[19]

3.4 Problèmes potentiels liés aux accords d'exclusivité entre fabricants et distributeurs

L'instauration d'accords d'exclusivité de fait ou de droit nécessite parfois l'octroi d'une certaine forme de remise. Les distributeurs ont en effet plus de difficulté à attirer des volumes de ventes suffisants

si les produits proposés ne proviennent que d'un seul fournisseur. Les distributeurs qui concluent des accords d'exclusivité s'exposent également à des risques commerciaux accrus.

Bien que les accords d'exclusivité auxquels donnent lieu les remises de fidélité puissent engendrer des effets proconcurrentiels considérables que nous examinerons dans la prochaine section, ils peuvent également avoir d'importants effets anticoncurrentiels. Pour que ceux-ci se fassent sentir, l'accord d'exclusivité doit d'abord porter préjudice aux concurrents existants ou potentiels en limitant leur accès aux canaux de distribution. Cela ne risque guère de se produire, à moins qu'un accord d'exclusivité donné n'affecte une part considérable du marché concerné, en d'autres termes qu'il soit mis en oeuvre par une entreprise dominante, ou généralisé sur le marché. De même, il est peu probable que ces accords entraînent des effets anticoncurrentiels, sauf si les concurrents ayant subi des restrictions sont déficitaires, même à un niveau de production plus bas ; s'il existe des obstacles à l'entrée dans le secteur de la distribution ; ou s'il est tout simplement trop onéreux ou risqué de s'engager simultanément dans deux activités plutôt que de se concentrer sur une activité à la fois.

Il importe de souligner qu'un accord d'exclusivité, même s'il nuit aux concurrents, n'a pas nécessairement pour effet d'entraver la concurrence et, partant, de réduire l'efficience économique. Cela est particulièrement vrai lorsque le préjudice causé aux concurrents est imputable à la généralisation de l'accord d'exclusivité plutôt qu'au fait qu'il est mis en oeuvre par une entreprise dominante. Si un nombre suffisant de fournisseurs n'est pas limité par les accords d'exclusivité conclus par leurs rivaux, les consommateurs pourraient être convenablement protégés contre la tarification anticoncurrentielle.[20]

3.5 Résumé des effets anticoncurrentiels

La probabilité qu'une remise de fidélité ait des tendances anticoncurrentielles dépend essentiellement du degré auquel les remises, le cas échéant :

1. réduisent la transparence des prix ; et/ou

2. excluent les concurrents existants ou potentiels et, partant, facilitent la coordination anticoncurrentielle ou créent ou renforcent une position dominante.

On ne peut évaluer ces facteurs sans prendre en compte les détails exacts des remises et les caractéristiques des marchés sur lesquels elles sont offertes.

En ce qui a trait aux remises proprement dites, il faut examiner attentivement : le degré de non-linéarité (c'est-à-dire la rapidité et la facilité avec lesquelles les remises augmentent à mesure que l'acheteur s'approvisionne auprès de l'entreprise qui les octroie) ; le prix, par comparaison avec le pourcentage de la remise ; la durée de la période de référence ; et le degré de synchronisation ou de décalage des périodes de référence entre les acheteurs.

Plus la période de référence est avancée, moins l'acheteur qui bénéficie de remises de fidélité est susceptible de changer de fournisseur. L'allongement des périodes de référence pourrait par conséquent accentuer les effets anticoncurrentiels d'une remise de fidélité.[21] La non-synchronisation des périodes de référence entre les acheteurs comporte également des effets anticoncurrentiels.

En présence d'économies d'échelle significatives dans une industrie, la non-synchronisation des périodes de référence augmenterait les effets anticoncurrentiels associés à une remise de fidélité. La réalisation d'une économie d'échelle minimum efficace pourrait être considérablement retardée si de nouveaux arrivants, pour prendre un exemple extrême, n'avaient la possibilité d'entrer en concurrence que

pour emporter la clientèle d'un acheteur sur 365 un jour donné de l'année. Leur position serait meilleure si toutes les périodes de référence commençaient et se terminaient le même jour pour tous les acheteurs du marché.

Pour ce qui est des caractéristiques du marché, ce qu'il importe avant tout de déterminer est l'existence d'une asymétrie significative qui différencie la ou les entreprises qui proposent des remises de fidélité de leurs concurrents existants ou potentiels. Le type d'asymétrie à laquelle nous pensons ici est tout avantage dont jouissent les entreprises qui accordent des remises de fidélité et qui deviendra beaucoup plus important si la concurrence, exercée au départ continuellement à la marge, se transforme en lutte menée acheteur par acheteur pour fournir un produit correspondant de près à la totalité des besoins de chacun. Les remises de fidélité risquent alors de restreindre encore plus les concurrents existants ou potentiels en raison de l'avantage détenu par l'entreprise qui accorde des remises de fidélité. La question de savoir si cet inconvénient se transformera en effet anticoncurrentiel dépend d'éléments comme : le pouvoir de marché initialement détenu par la ou les entreprises qui introduisent les remises de fidélité ; la généralisation des remises de fidélité sur le marché ; et l'existence et l'importance des économies d'échelle, des effets de réseau et des frais de changement de fournisseur. Il faut également prendre en compte les éventuels effets proconcurrentiels des remises de fidélité.

4. Effets proconcurrentiels des remises de fidélité. Aperçu des effets proconcurrentiels et des effets anticoncurrentiels

4.1 Effets généraux

L'effet proconcurrentiel potentiel le plus évident des remises de fidélité est commun à toutes les formes de remise. Les remises, en particulier lorsqu'elles ont tendance à couvrir l'ensemble d'un marché, font habituellement en sorte d'aligner davantage les prix sur les coûts marginaux et de concentrer les achats auprès des entreprises les plus efficaces. Il en résulte une plus grande efficience allocative (c'est-à-dire moins de « pertes sèches ») et des gains d'efficience technique (c'est-à-dire des économies de ressources au niveau de la production ou de la distribution). Il peut également y avoir des gains d'efficience dynamique étant donné que les remises servent parfois à convaincre les acheteurs d'acheter de nouveaux produits.

Avant d'attribuer les qualités précitées aux remises de fidélité, il convient cependant de se demander si l'octroi d'une remise de fidélité signifie de fait que les prix sont plus bas qu'ils ne le seraient si la tarification n'était pas structurée. Si l'on prend en compte l'impact immédiat, autrement dit avant de considérer les effets proconcurrentiels et anticoncurrentiels à long terme, il se peut que la suppression des remises de fidélité n'entraîne aucun changement de prix. Une remise de fidélité pourrait, par exemple, être tellement bien personnalisée en fonction des besoins des différents acheteurs d'une entreprise, que la totalité d'entre eux pourrait à tout moment obtenir, dès l'achat de la première unité, le même « bas » prix de X dollars l'unité. Rien n'autorise alors à penser que le prix dépasserait X dollars l'unité une fois supprimées les remises de fidélité.

4.2 Remises de fidélité et accords d'exclusivité entre fabricants et distributeurs

Nous avons déjà noté que les remises de fidélité peuvent faciliter considérablement les accords d'exclusivité, qui ont parfois des effets anticoncurrentiels. Envisageons maintenant la possibilité que les accords d'exclusivité et, partant, les remises de fidélité qui les sous-tendent, aient aussi des effets proconcurrentiels.

Les accords d'exclusivité, bien qu'ils aient tendance à réduire la concurrence inter-marques chez un distributeur particulier, peuvent l'améliorer dans son ensemble. Cela tient à ce que la promotion de certains produits est parfois mieux assurée par certains fournisseurs que par les distributeurs. Il peut toutefois être difficile, lorsqu'aucun accord d'exclusivité n'a été conclu, d'empêcher d'autres fournisseurs de bénéficier de ces efforts promotionnels sans verser de contrepartie. Par exemple, un fabricant d'ordinateurs personnels peut, grâce à une campagne de publicité massive, inciter les consommateurs à se rendre chez leur distributeur, mais si ce dernier obtient une meilleure marge de profit des fabricants qui ne font pas de publicité, il dirigera les clients vers d'autres fabricants.[22]

Il existe un type d'accord d'exclusivité qui n'est pas toujours traité comme tel. C'est celui en vertu duquel un détaillant s'engage à réserver une certain espace de linéaire ou un emplacement déterminé du magasin aux produits d'un certain fournisseur. En contrepartie de cet engagement, ou simplement du consentement à tenir en magasin le produit d'un fournisseur, le détaillant peut facturer un montant correspondant à une « redevance d'emplacement ». Le paiement de cette redevance fait en sorte que le fournisseur facture un prix non linéaire pour ses produits. Le paiement pourrait être considéré comme une remise de fidélité ayant pour caractéristique inhabituelle que la remise en pourcentage diminue au lieu d'augmenter avec la quantité achetée. En tout état de cause, les redevances d'emplacement sont parfois présentées comme un moyen de transférer une partie des risques inhérents au lancement de nouveaux produits des détaillants vers les fournisseurs, qui sont sans doute mieux en mesure d'évaluer et de supporter les risques. Comme les formes plus classiques d'accords d'exclusivité, les redevances d'emplacement améliorent la concurrence inter-marques si elles facilitent le lancement de nouveaux produits sur le marché.[23]

Sur certains marchés, un type de remise de fidélité, que l'on pourrait peut-être appeler plus judicieusement accord d'exclusivité à l'initiative de l'acheteur, peut améliorer l'efficience économique sans promouvoir la concurrence inter-marques. Prenons l'exemple d'un parc thématique qui vend des glaces à différents comptoirs prévus à cet effet. Supposons qu'aucun des fournisseurs de glaces n'enregistre de surprofit. Le parc thématique ne pourrait pas obtenir une remise d'un fournisseur, quel que soit le pouvoir de négociation déployé en promettant de tenir la gamme de produits de ce seul fournisseur pendant une certaine période. Par conséquent, ce parc thématique ferait normalement plus de profit, compte tenu des coûts de transaction et d'inventaire, en s'approvisionnant auprès d'un certain nombre de fournisseurs différents.

L'exemple de la glace se trouve considérablement modifié si les fournisseurs ont un pouvoir de marché significatif et sont engagés dans une certaine forme de rivalité oligopolistique. Dans ce cas, en acceptant pendant une certaine période (comparable à une période de référence) de vendre la gamme de produits d'un seul fournisseur, le parc thématique serait peut-être en mesure de négocier un prix plus bas, qui serait assimilable à une remise de fidélité. Dans la mesure où le parc thématique ne détient pas de pouvoir de marché du côté de la vente, toutes les remises de fidélité qu'il recevrait se traduiraient probablement par une baisse du prix des glaces vendues dans le parc. La question de savoir si cela entraînerait une amélioration nette du bien-être des consommateurs dépend entre autres choses du « coût » de la différenciation réduite des produits sur le marché considéré.[24] Il faudrait également tenir compte de la vigueur des différents effets anticoncurrentiels potentiels déjà évoqués des remises de fidélité, et d'autres effets liés notamment à l'exercice du pouvoir d'achat.[25]

5. Résumé des effets proconcurrentiels et anticoncurrentiels des remises de fidélité

Comme les remises authentiques constituent à l'origine un avantage pour les acheteurs, elles n'ont un effet défavorable que s'il résulte de leur introduction que les prix ajustés en fonction de la qualité

sont au bout du compte plus élevés qu'ils ne l'auraient été s'il n'y avait pas eu de remises.[26] Pour évaluer la probabilité de cet effet nocif, il faut déterminer si et dans quelle mesure les remises de fidélité :

- réduisent la transparence des prix ; et /ou

- excluent les concurrents existants ou potentiels et, partant, facilitent la coordination anticoncurrentielle ou créent ou renforcent une position dominante.

Lorsque les préoccupations suscitées par la concurrence concernent la création ou le renforcement d'une position dominante, la probabilité d'une nocivité à long terme n'existe que si soutes les conditions ci-après sont réunies :

- aucun rival existant ou nouvel entrant ne peut égaler l'aptitude de l'entreprise qui accorde des remises de fidélité à entrer en concurrence pour la totalité ou la quasi-totalité des besoins d'un nombre significatif d'acheteurs ;

- les concurrents actuels, s'il en existe, seront forcés de réduire leurs ventes ;

- une fois qu'elle sera soumise à un nombre moins élevé de contraintes par ses concurrents existants ou potentiels, l'entreprise qui offre des remises de fidélité trouvera rentable de relever ses prix (en supposant que les coûts assumés par cette entreprise n'auront pas reculé au point où une augmentation des prix ne serait pas rentable) ;

- les acheteurs ne peuvent utiliser un pouvoir compensatoire pour maintenir les prix à un niveau égal ou inférieur à celui où ils se situaient avant l'introduction des remises de fidélité ;

- il n'y aura vraisemblablement pas d'entrée ou de retour d'entreprises, ni d'accroissement des parts de marché des entreprises à la suite des augmentations des prix à des niveaux supérieurs à ceux qui prévalaient avant l'instauration des remises ;

- les gains réalisés initialement par les acheteurs grâce aux remises sont inférieurs à ce qu'ils perdent ultérieurement en payant plus cher qu'avant l'instauration des remises.

En raison de l'incertitude entourant la probabilité et l'ampleur des effets anticoncurrentiels nets, une approche cas par cas semble indiquée en ce qui a trait à la politique de concurrence applicable aux remises de fidélité. Ce type d'approche permettra de prendre entièrement en compte les importantes différences de structure des remises de fidélité et des caractéristiques des marchés considérés.

6. Exemple : l'affaire Virgin/British Airways

6.1 Parties

Virgin Atlantic Airways Limited (Virgin) est une entreprise privée qui exploite des services réguliers de transport de passagers sur un certain nombre de liaisons internationales entre Londres et les Etats-Unis, Hong Kong, Athènes et Tokyo. En 1997, Virgin occupait la vingt et unième place mondiale par le nombre de passagers-kilomètres transportés sur des vols internationaux réguliers, et la trente et unième en ce qui concerne les passagers-kilomètres transportés sur les vols internationaux et intérieurs confondus.

British Airways PLC (BA) a été privatisée en 1987. BA est la plus grande compagnie aérienne britannique. Elle exploite une vaste gamme de services de transport intérieur et international, régulier et charter. Le réseau de ses liaisons régulières dessert 15 destinations au Royaume-Uni et assure une couverture mondiale avec 155 destinations dans 72 pays. En 1997, BA occupait la première place mondiale par le nombre de passagers-kilomètres transportés sur des vols internationaux réguliers et la neuvième en ce qui concerne les passagers-kilomètres transportés sur les vols réguliers internationaux et intérieurs confondus.

6.2 Allégations de rabais anticoncurrentiels

En 1993, Virgin a déposé une plainte contre BA auprès de la Commission européenne (CE) en vertu de l'actuel article 82 du traité CE. En 1994, elle a également engagé une action en justice contre BA aux Etats-Unis en vertu des articles 1 et 2 du Sherman Act, 15 U.S.C. Les autorités antitrusts américaines ne sont pas intervenues dans cette affaire.

L'affaire portée devant les tribunaux américains concernait la nature et les effets des systèmes d'incitation offerts aux entreprises et aux agents de voyage (c'est-à-dire les programmes de super commission des agents de voyage). Ces programmes d'incitation entraient dans la catégorie de ce que nous avons appelé les remises de fidélité, bien que dans la jurisprudence de l'Union européenne, ils soient plus précisément appelés « ristournes d'objectif ».[27] La décision de la CE ne traite pas des systèmes de remises de BA destinées aux entreprises clientes.[28]

Les systèmes d'incitation de BA ont été décrits comme suit :

> British Airways soutient notamment la concurrence dans le secteur du transport aérien en ayant recours à des accords d'incitation conclus avec des agences de voyage et des entreprises clientes. Cette pratique serait répandue, au moins trois transporteurs établis aux Etats-Unis ayant semble-t-il recours à des pratiques d'incitation analogues. Comme British Airways le décrit dans ses propres accords, les commissions ou remises sont accordées lorsque des seuils spécifiés de vente sont atteints, mais les accords ne comportent pas de volume de ventes minimum obligatoire. En règle générale, les accords d'incitation reposent exclusivement sur des mesures comme les parcours desservis ou les recettes réalisées. Dans certains contrats, on prendra en compte les voyages effectués vers n'importe quelle destination sur British Airways, alors que dans d'autres, certaines liaisons sont précisées. Des dispositions autorisent que la remise ou le rabais s'applique rétroactivement à toutes les ventes visées par l'accord une fois qu'un objectif de performance a été atteint.[29]

En dépit de l'affirmation selon laquelle les programmes d'incitation « seraient » répandus, nous n'avons pas trouvé de mention indiquant que Virgin y ait recours.

En ce qui concerne les trois programmes de super commission des agents de voyage, appelés accords commerciaux, accords mondiaux et système de primes de résultat, la Commission européenne (1999, par. 29) décrit une caractéristique commune importante des systèmes de commissions applicables aux agents de voyages et donne un exemple fictif pour l'illustrer :

> Dans les deux cas, la réalisation des objectifs de progression des ventes entraîne une augmentation de la commission versée sur tous les billets vendus par l'agent de voyages considéré, et pas seulement sur les billets vendus une fois les objectifs atteints. Dans les accords commerciaux, la gratification versée sur chaque billet à l'agent de voyages augmente pour tous les billets vendus. Dans le cadre du système de primes de résultat, le pourcentage de commission

> versé augmente pour tous les billets vendus par l'agent. Cela signifie que, lorsqu'un agent est sur le point d'atteindre l'un des seuils requis pour bénéficier d'un accroissement du taux de commission, la vente de quelques billets BA supplémentaires peut avoir un effet très sensible sur le montant des recettes qu'il perçoit sous forme de commission. Inversement, un concurrent de BA qui souhaiterait accorder à un agent de voyages un avantage pour l'inciter à vendre ses billets d'avion à la place de billets BA devrait, pour neutraliser cet effet, offrir un pourcentage de commission bien supérieur à celui qu'offre BA sur tous les billets vendus par cet agent.

L'exemple cité montrait comment les programmes de super commission des agents de voyages de BA pouvaient rendre la concurrence à la marge très difficile pour les concurrents de BA.[30]

Dans un affidavit très détaillé, l'expert économique de Virgin, B. Douglas Bernheim qualifie de pratique d'éviction les remises de BA :

> Il se trouve que BA a recours à des accords d'incitation abusifs (c'est-à-dire à des incitations qui font en sorte que BA vend certains produits marginaux à des prix inférieurs à ses coûts marginaux) pour inciter très fortement certaines entreprises clientes et certains agents de voyages à traiter les différentes liaisons de BA comme un produit unique global, plutôt qu'à acheter séparément le service sur chaque liaison de la compagnie. Les obstacles à l'entrée qui existent à Heathrow empêchent les concurrents de BA de reproduire, même approximativement, le réseau de BA. Comme les pratiques d'incitation de BA sont abusives, il arrive souvent que Virgin ne puisse de façon rentable inciter les agents de voyages ou les entreprises clientes à dissocier les liaisons individuelles sur lesquelles Virgin rivalise avec BA du reste du réseau de BA. Pour ce faire, Virgin devrait égaler ou dépasser les incitations fondées sur le réseau de BA, ce qui l'obligerait à vendre ses services à des coûts inférieurs à ceux de BA. Par conséquent, même si Virgin est aussi efficace ou plus efficace que BA sur une liaison particulière, elle est évincée et commercialement incapable de soutenir la concurrence pour ce qui concerne une grande partie des activités de BA qui sont couvertes par les programmes d'incitation.
>
> Etant donné que ses accords d'incitation abusifs incitent de manière anticoncurrentielle beaucoup de clients à traiter le réseau de liaisons de BA de façon plutôt groupée au lieu d'acheter le service aérien sur des liaisons individuelles, BA a pu détourner des recettes considérables de ses concurrents, notamment Virgin, qui ne peuvent rivaliser que sur un ensemble restreint de liaisons. Ces recettes détournées ont réduit les profits potentiels de Virgin, et l'ont forcée à retarder ou à différer son entrée ou son expansion sur de nombreuses liaisons entre les Etats-Unis et le Royaume-Uni. Comme Virgin est un transporteur de grande qualité qui pratique des prix peu élevés et que son arrivée oblige BA à baisser ses tarifs et à améliorer la qualité de son service, les consommateurs ont subi un préjudice. Plus précisément, les consommateurs ont été forcés de payer des tarifs excessifs et ont reçu un service de moindre qualité par suite du comportement de BA. Si BA n'avait pas empêché l'entrée de Virgin, les consommateurs auraient payé moins cher et bénéficié d'un service de meilleure qualité. Simplement, le comportement d'éviction de BA a favorisé son pouvoir monopolistique et exclu la concurrence au détriment des consommateurs.[31]

Bernheim conclut que le « comportement d'éviction » de BA a sans doute différé le projet de Virgin de prendre de l'expansion ou d'offrir un service au départ de Londres (Heathrow) vers plusieurs villes des Etats-Unis comme New York, Washington, Chicago, Los Angeles et San Francisco, et que cela avait entraîné des effets défavorables pour les consommateurs.[32]

Bernheim s'est penché brièvement sur une importante asymétrie résultant du fait que BA exploite un réseau étendu en utilisant Heathrow comme pivot. En raison du nombre insuffisant de créneaux, Virgin n'a pas pu reproduire ce réseau. Si la concurrence s'était exercée point à point, cette asymétrie n'aurait

sans doute pas constitué un obstacle majeur à l'expansion de concurrents comme Virgin. Cependant, les remises de fidélité ont peut-être eu pour effet de remplacer la concurrence point à point par la concurrence réseau à réseau, et d'amplifier considérablement la portée concurrentielle de l'asymétrie observée au détriment de Virgin et, présumément, des consommateurs.[33]

Il y avait des raisons de penser que les programmes de remises de BA n'avaient peut-être pas eu d'effet très sensible. Par exemple, la Cour d'appel des Etats-Unis a observé :

> Les graphiques établis par British Airways montrent qu'en 1995-1996, les ventes aux entreprises ont représenté 1.96 pour cent des réservations du Royaume-Uni sur les liaisons entre le Royaume-Uni et les Etats-Unis. Il n'y a pas de chiffres concernant les ventes aux entreprises réalisées aux Etats-Unis. Les agences de voyages qui ont effectué 80 pour cent ou plus de leurs réservations entre les Etats-Unis et le Royaume-Uni sur British Airways ont représenté 3.01 pour cent des billets vendus aux Etats-Unis et 33 pour cent des billets vendus au Royaume-Uni.
>
> En ce qui a trait aux liaisons individuelles sur lesquelles Virgin prétend avoir dû différer son entrée, les ventes réalisées par British Airways auprès des entreprises ont représenté en 1995-1996, les pourcentages suivants des réservations du Royaume-Uni : 2.42 pour cent entre Heathrow et New York ; .71 pour cent entre Londres et Los Angeles ; 3.22 pour cent entre Londres et Chicago ; 1.7 pour cent entre Londres et San Francisco ; et 3.79 pour cent entre Londres et Washington, DC. Pour ce qui est des ventes réalisées au Royaume-Uni par le biais d'agences de voyages pendant la même période, les agences qui ont effectué 80 pour cent ou plus de ventes de billets British Airways sur une liaison particulière ont représenté les pourcentages suivants : .25 pour cent entre Heathrow et New York ; .34 pour cent entre Londres et Los Angeles ; 1.05 pour cent entre Londres et Chicago ; 1.3 pour cent entre Londres et San Francisco ; et 3.11 pour cent entre Londres et Washington, DC.
>
> Pour les ventes aux Etats-Unis, les agences de voyages qui ont effectué 80 pour cent ou plus de leurs réservations sur British Airways ont représenté les pourcentages suivants des réservations au départ de Londres : 1.12 pour cent à destination de New York ; 1.82 pour cent à destination de Los Angeles ; 2.65 pour cent à destination de Chicago ; 1.85 pour cent à destination de San Francisco ; et 2.53 à destination de Washington, DC.[34]

La décision de la Commission européenne comporte en outre des données indiquant que BA a probablement perdu une part de marché en faveur de Virgin et d'autres concurrents pendant la période comprise entre 1992 et 1998.[35]

6.3 Décision et directives de la Commission européenne

Comme on l'a vu, cette décision portait sur les effets sur la concurrence observés sur le marché britannique des services des agences de voyages aériens, sur lequel la CE a déterminé que BA est un acheteur détenant une position dominante. La CE a également déclaré que BA était un partenaire commercial obligatoire pour les agents de voyages britanniques.[36] D'après son analyse de la loi et des faits se rapportant à cette affaire, la CE a conclu que les super commissions des agents de voyage de BA représentent « …des rabais de fidélité déjà condamnés dans les affaires Michelin et Hoffmann-La Roche et une discrimination abusive entre les agents de voyage ».[37] Selon la CE : « Ensemble, ces deux arrêts posent le principe qu'une entreprise occupant une position dominante ne peut accorder de rabais qu'en contrepartie de la réalisation de gains d'efficience et non pour récompenser la fidélité. »[38] La CE a conclu

que les super commissions versées aux agents de voyages par BA récompensaient manifestement la fidélité plutôt que des gains d'efficience.[39]

La CE n'a pas entériné l'opinion selon laquelle les concurrents avaient d'autres possibilités viables d'acheter des services d'agences de voyages aériens auprès d'agents de voyages, faisant observer qu'au Royaume-Uni, ces agents effectuent quelque 85 pour cent des ventes de voyages aériens.[40] Cela a conduit la CE à conclure que les super commissions des agents de voyages de BA avaient de graves effets pour les transporteurs aériens concurrents. La CE fait également observer :

> L'effet exclusif des systèmes de commissions affecte l'ensemble des concurrents de BA et tout nouvel arrivant potentiel. Ils nuisent donc à la concurrence en général et, partant, aux consommateurs, et pas uniquement à certains concurrents qui, intrinsèquement, ne sont pas capables de concurrencer BA.
>
> Malgré ces systèmes de commissions exclusifs, les concurrents de BA ont pu prendre des parts de marché à BA depuis la libéralisation des marchés des transports aériens au Royaume-Uni. On ne saurait en déduire que ces systèmes n'ont eu aucun effet. Cela laisse simplement supposer que le succès des concurrents en question auraient été plus grand en l'absence de ces systèmes de commissions abusifs.[41]

La Commission européenne a également estimé que les super commissions versées aux agents de voyages par BA (les accords commerciaux et les systèmes de primes de résultat en particulier) étaient discriminatoires :

> Deux agents de voyages qui traitent le même nombre de billets BA et assurent exactement le même niveau de service à BA recevront un taux de commission différent, autrement dit, ils seront rémunérés à un prix différent pour leurs services d'agences de voyages aériens, si leurs ventes de billets BA n'étaient pas identiques l'année précédente. Inversement, deux agents de voyages qui n'écoulent pas le même nombre de billets BA et assurent un niveau de services différent à BA pourraient très bien recevoir le même taux de commission, c'est-à-dire être rémunérés au même prix par BA pour leurs services d'agences de voyages aériens, si leurs ventes de billets BA ont enregistré le même taux de progression par rapport à l'année précédente.[42]

En se fondant sur le constat selon lequel BA s'est livrée à une exploitation abusive de sa position dominante et ainsi enfreint l'article 82, la CE a imposé une amende de 6.8 millions d'euros à BA et lui a interdit de continuer son comportement. BA a fait appel de cette décision.

Le jour où elle a fait connaître sa décision dans l'affaire Virgin/BA, la CE a également publié un ensemble de principes directeurs relatifs aux super commissions des agents de voyages. La CE était d'avis que l'application de ces principes, élaborés avec l'assistance de BA, garantirait que les super commissions versées aux agents de voyages par les compagnies aériennes seraient conformes à la législation européenne sur la concurrence.[43] Ces principes exigeaient que les différences entre les commissions versées soient justifiées par les coûts. En outre, les périodes de référence prévues pour les commissions supplémentaires ne devaient pas dépasser six mois et les commissions ne devaient pas être subordonnées à l'atteinte d'objectifs d'augmentation des ventes par rapport à une période précédente. Enfin, les commissions supplémentaires devaient augmenter de manière linéaire par rapport au niveau de référence indiqué dans un accord (portant vraisemblablement sur les ventes), l'augmentation des remises ne pouvait s'appliquer à tous les billets vendus par une agence et les agences de voyages doivent être libres de vendre les billets de toutes les compagnies aériennes.

Les principes proposés ont apparemment été ignorés par au moins une compagnie aérienne. Environ deux ans après que la décision eut été rendue dans l'affaire BA, l'autorité italienne de la concurrence a déterminé que Alitalia-Linee Aeree Italiane S.p.A (« Alitalia ») était une entreprise dominante qui avait enfreint l'article 82 de manière sensiblement analogue à BA. L'autorité de la concurrence a estimé que les super commissions versées aux agences de voyages visaient à exclure des concurrents du marché du transport en les empêchant d'accéder au canal de vente de billets des agences de voyages. Le communiqué de presse publié relativement à la décision rendue déclarait :

> Un concurrent d'Alitalia qui souhaite rémunérer une agence pour qu'elle vende ses billets plutôt que ceux d'Alitalia devrait offrir à cette agence des commissions équivalant à environ 30 pour cent de la valeur de ses billets d'avion.[44]

Le communiqué de presse précisait que les primes de fidélité avaient des effets discriminatoires pour les agences de voyages et notait :

> …en raison de ce comportement abusif, le système de tarification utilisé par les compagnies aériennes, qui était déjà opaque, l'est devenu encore plus, et ce au détriment des consommateurs.

Alitalia a reçu l'ordre de mettre fin à ce comportement prohibé et s'est vu infliger une amende correspondant à 1.3 pour cent de son chiffre d'affaires de 2000 se rapportant à ses services de transport aérien à destination et en provenance de l'Italie.

6.4 Décision rendue par la Cour d'appel des Etats-Unis

La Cour d'appel des Etats-Unis a rejeté l'appel de Virgin à la suite d'une ordonnance en référé en faveur de BA. Elle a estimé que Virgin n'apportait pas de preuve suffisante établissant les pratiques d'éviction de BA. La Cour a également déterminé que Virgin « …n'avait pas démontré comment la concurrence de British Airways était préjudiciable aux consommateurs. »[45] L'affaire portait en particulier sur cinq liaisons sur lesquelles Virgin estimait subir un préjudice, à savoir les liaisons entre Londres (Heathrow) et New York, Washington, Chicago, Los Angeles et San Francisco.

La Cour d'appel a également rejeté la plainte de Virgin selon laquelle BA avait eu recours à la concertation, ce qui avait eu pour effet de restreindre indûment le commerce et, partant d'enfreindre l'article 1 du Sherman Act. La Cour d'appel a motivé le rejet par deux raisons. Premièrement, il a été noté que Virgin avait admis en appel que l'affaire portait sur le comportement unilatéral de BA. Deuxièmement, la Cour a déclaré que Virgin n'avait pas fourni la preuve que la concurrence, par opposition aux concurrents, avait subi un préjudice.

Après avoir analysé au regard de l'article 1 des remises consenties aux entreprises et des super commissions versées aux agences de voyages par BA (c'est-à-dire en considérant ces remises, pour les besoins de l'argumentation, comme si elles étaient le résultat d'un accord), la Cour d'appel a statué :

> Ces accords permettent aux entreprises de récompenser leurs clients les plus fidèles. Récompenser la fidélité des clients contribue à promouvoir la concurrence véritable. Puisque ces accords d'incitation visent à favoriser la concurrence, Virgin doit démontrer que cet objectif peut être atteint sans restreindre la concurrence.

La Cour n'a pas expliqué son jugement : « Récompenser la fidélité des clients contribue à promouvoir la concurrence véritable. » En ce qui a trait aux moyens permettant d'obtenir les mêmes avantages sans restreindre la concurrence, la Cour a conclu : « …le fait que Virgin n'ait pu répondre à cette

question n'invalide en rien la preuve de l'utilité des accords d'incitation de British Airways pour la concurrence. »[46] Il semble que cette preuve tienne à la présomption que les remises sont intrinsèquement proconcurrentielles. En tout état de cause, la Cour a conclu son analyse au regard de l'article 1 comme suit :

> Même si Virgin estime avoir été désavantagée par ces accords, les préjudices causés à un concurrent ne peuvent être réputés constituer la condition *sine qua non* d'une infraction à l'article 1. Le Sherman Act et les autres lois antitrusts visent à protéger la concurrence et non les concurrents individuels.

Pour prouver ses allégations de tentative de monopolisation en vertu de l'article 2 du Sherman Act, la Cour a noté que « …Virgin doit établir *(1)* que [BA] a eu un comportement d'éviction ou anticoncurrentiel dans *(2)* l'intention spécifique d'exercer un monopole et *(3)* était presque assurée d'exercer un pouvoir monopolistique. »[47] Elle a ensuite décrit les éléments essentiels de la théorie relative au comportement d'éviction. Notant qu'elle était dérivée de la théorie des prix d'éviction, la Cour a soutenu que pour prouver ses allégations, « …un plaignant doit apporter deux élément de preuve : *(1)* que les prix faisant l'objet de la plainte sont en dessous d'une mesure appropriée des coûts des concurrents »,…et *(2)* que le rival qui se livre à des pratiques d'éviction est « presque assuré » de récupérer son investissement par le biais d'un mécanisme de tarification en dessous des coûts…. »[48]

La Cour a estimé qu'il n'y avait pas de preuve suffisante établissant que BA a pratiqué une tarification en dessous des coûts. Cela est principalement dû au manque de preuve réelle, par opposition à une simple déduction, indiquant que BA avait ajouté des vols supplémentaires seulement parce que des passagers supplémentaires s'étaient ajoutés par suite de ses différents programmes d'incitation.[49] Après avoir établi ce fait crucial, la Cour a pu rejeter les calculs établis par Virgin, selon lesquels les présumés vols supplémentaires n'étaient pas rémunérateurs à la marge et constituaient donc la preuve qu'il existait une tarification en dessous des coûts.

Même si cela n'était pas rigoureusement indispensable pour les besoins de la décision, la Cour a ensuite pris en compte la question de la récupération des coûts. Elle a résumé comme suit l'argument présenté par Virgin à cet égard :

> La théorie relative au comportement d'éviction de Virgin comporte un second volet visant à démontrer la tentative de monopolisation, à savoir que British Airways a immédiatement récupéré les pertes sur des billets vendus en dessous des coûts en surtarifiant des billets « groupés » vendus simultanément sur une liaison sur laquelle elle exerçait un monopole. Berhheim définit la « vente groupée » comme la « pratique commerciale consistant à vendre deux ou plusieurs produits distincts uniquement de façon groupée ou en forfait en pratiquant un prix unique pour la totalité du groupe de produits ». British Airways aurait groupé la vente de billets sur ses vols en offrant des tarifs à rabais aux entreprises clientes et accru les commissions versées aux agences de voyages qui participaient aux accords d'incitation. Selon Bernheim, pour inciter ces entités à « dégrouper » des liaisons particulières et à envisager d'acheter des billets auprès d'une autre compagnie aérienne pour une liaison d'un voyage comportant des liaisons multiples, il aurait fallu que Virgin propose une valeur monétaire équivalente aux accords d'incitation de British Airways, et, par conséquent, vende ses services en dessous des coûts. Comme cette option n'est pas viable commercialement et que Virgin ne peut reproduire le réseau offert par British Airways, elle estime qu'elle ne peut concurrencer équitablement pour les passagers qui souhaitent effectuer la portion transatlantique de leur voyage sur une autre compagnie aérienne que British Airways.

La Cour a de fait étendu la définition de vente groupée (pure) donnée par Bernheim et y a intégré la vente groupée mixte, qui consiste à octroyer des remises aux clients qui achètent un groupe de produits dont ils acceptent de vendre les éléments séparément et a simplement appelé cette pratique « vente groupée ». Elle a ensuite rejeté la plainte de Virgin pour insuffisance de preuve appuyant la notion selon laquelle la vente groupée avait forcé un nombre suffisant de passagers à ne pas acheter les billets auprès de Virgin sur les cinq liaisons auxquelles la plainte se rapportait, ou avait du moins rendu cette possibilité économiquement non rentable.

Dans son analyse de la récupération des coûts, la Cour s'est parfois demandé si la pratique de vente groupée de BA supposait le subventionnement de prix inférieurs sur certaines liaisons, sur lesquelles BA affrontait la concurrence, grâce à des profits supplémentaires provenant de l'augmentation des prix sur des liaisons où la concurrence était moins vive ou inexistante.[50] La Cour a estimé qu'il y avait insuffisance de preuve à cet égard. Elle a également observé qu'avant de grouper des produits, BA pratiquait une tarification sans doute aussi élevée que possible sur les marchés où elle détenait un pouvoir de marché et qu'il lui aurait sans doute été impossible d'augmenter davantage les prix sur certaines liaisons dans le cadre d'une stratégie visant à subventionner des prix plus bas ailleurs.

Récapitulant son analyse de la récupération des coûts, la Cour observe :

> A défaut de preuve de récupération des coûts, un enquêteur pourrait seulement conclure que British Airways a réduit ses tarifs dans le cadre de ses accords d'incitation, mais non que les lois antitrusts ont été enfreintes…. En l'absence de preuve de récupération des coûts, la pratique de prix d'éviction aboutit à des prix agrégés plus bas dont bénéficient les consommateurs.

Dans la dernière partie de sa décision, la Cour s'est penchée sur l'utilisation d'un monopole comme levier, pratique qu'elle définissait initialement comme « …le recours au pouvoir de monopole sur un marché pour renforcer une part de monopole sur un autre marché. »[51] La Cour s'est demandé si l'utilisation d'un monopole comme levier s'applique au fait d'avoir recours à « …un pouvoir de monopole sur un marché pour conquérir un avantage concurrentiel sur un autre marché, même sans tenter de monopoliser le second marché. » La Cour n'a finalement pas eu à statuer sur ce point parce qu'elle reconnu que le préjudice causé à la concurrence, c'est-à-dire des prix plus élevés ou une baisse de la qualité ou de la quantité produites, est un élément essentiel de l'utilisation d'un monopole comme levier en vertu de la législation américaine. La Cour a estimé que Virgin n'avait pas pu apporter de preuve sur ce point.

6.5 Observations sur les décisions

Il apparaît que l'affaire Virgin/BA corresponde au cas où une entreprise détenant un pouvoir de marché a recours à des remises de fidélité pour changer le mode de concurrence (c'est-à-dire pour susciter une concurrence inter-réseaux) d'une manière qui lui est avantageuse. Le comportement de BA peut aussi avoir eu pour effet d'introduire une part de discrimination par les prix. Il n'est pas certain que ce comportement ait vraiment été préjudiciable à la concurrence et, partant, aux consommateurs de services de voyages aériens également.

La décision de la CE reposait sur le principe selon lequel la législation de la CE relative à la concurrence interdit aux entreprises dominantes de récompenser la fidélité en offrant des remises plutôt que des gains d'efficience. Même si cette décision faisait référence à un préjudice causé aux concurrents qui entraînait à son tour un préjudice à la concurrence, ce thème n'a pas été approfondi. Si la preuve réelle d'un préjudice causé à la concurrence n'est pas demandée, d'aucuns pourraient affirmer que la législation de la CE relative à la concurrence a adopté une approche quelque peu tronquée des remises de fidélité

pratiquées par des entreprises dominantes, qui va de pair à certains égards avec l'approche adoptée par la CE en matière de prix d'éviction.

La décision de la Cour d'appel des Etats-Unis établit que, du moins en ce qui concerne les articles 1 et 2 du Sherman Act, les remises de fidélité sont illicites en vertu de la législation américaine seulement lorsqu'elles ont pour effet de nuire à la concurrence, ce qui pourrait comprendre le fait de différer l'introduction de conditions plus concurrentielles. Il faut donc apporter la preuve que les remises de fidélité ont porté préjudice aux consommateurs, et non seulement aux concurrents. Dans cette décision, il n'a pas été envisagé d'appliquer le Robinson-Patman Act (relatif à la discrimination par les prix) au comportement de BA.

La décision américaine étonne du fait que dans l'équilibrage des effets anticoncurrentiels et proconcurrentiels des remises de fidélité, une simple remise est considérée comme ayant un effet proconcurrentiel. Dans l'affaire Virgin/BA, au moins une partie des remises ont fait en sorte que certains acheteurs ont bénéficié de prix plus bas que d'autres. La législation américaine n'a peut-être pas encore établi si un effet proconcurrentiel serait également présumé en l'absence de cet élément.[52]

La décision américaine laisse également perplexe, du fait que le traitement de la récupération des coûts n'approfondit pas pleinement la question de savoir si les remises équivalaient à sacrifier une partie de surprofits continus dans l'espoir non pas de les récupérer ultérieurement mais simplement de prolonger la période pendant laquelle la partie restante des surprofits pourrait être réalisée.

7. Observations relatives à l'action gouvernementale

7.1 Approche tronquée des remises de fidélité octroyées par des entreprises dominantes

L'exemple Virgin/BA soulève la question de l'opportunité d'adopter, en matière de remises de fidélité, une approche tronquée, c'est-à-dire qui éviterait une comparaison en bonne et due forme des effets proconcurrentiels et anticoncurrentiels. Dans une réflexion menée sur le bien-fondé d'une approche tronquée des affaires de création de monopoles aux Etats-Unis (c'est-à-dire des affaires régies par l'article 2 du Sherman Act), Timothy Muris note :

> …les réglementations les plus efficientes réduisent au minimum le total du coût des erreurs et des dépens des parties et des tribunaux. Les dépens comprennent tous les frais associés aux conseils, aux enquêtes et aux frais de justice. Les erreurs concernent aussi bien les résultats faussement positifs (affaires dans lesquelles la loi condamne à tort une pratique commerciale efficiente) que les résultats faussement négatifs (affaires dans lesquelles le comportement nuisible aux consommateurs est exonéré). L'analyse tronquée, comme la règle de l'illicité automatique qui s'applique aux ententes flagrantes sur les prix, est plus appropriée lorsque l'établissement de la preuve d'un préjudice réel causé aux consommateurs représente un coût élevé dans des affaires individuelles et que le préjudice est fortement lié à un comportement facilement observable. Dans ces cas, la forte corrélation fait que la subordination de la responsabilité au comportement réduit les coûts de mise en œuvre, y compris d'observation de la loi, sans entraîner d'importantes pertes d'efficience dues aux condamnations prononcées par erreur.[53]

L'opportunité d'appliquer une approche tronquée aux remises de fidélité pourrait varier selon les pays puisqu'elle concerne en partie les « dépens » spécifiques aux différents pays. Cependant, il y aura vraisemblablement peu de pays, si tant est qu'il y en aura, où la balance penchera fortement en faveur d'une approche tronquée dans tous les cas. Cela tient au fait qu'il y a des effets proconcurrentiels et

anticoncurrentiels associés aux remises de fidélité. Il est donc possible qu'une approche tronquée aboutisse à des résultats « faussement positifs ». En outre, l'existence et l'ampleur d'un préjudice net ne sont peut-être pas suffisamment corrélés avec un comportement facilement observable, c'est-à-dire avec la simple existence d'une remise de fidélité. Autrement dit, la possibilité d'un préjudice net peut varier considérablement d'une affaire à l'autre selon les caractéristiques particulières de la remise en cause et des conditions du marché considéré.

L'approche tronquée des remises de fidélité est d'autant plus justifiée si elle s'applique seulement aux entreprises dominantes, car la situation dominante tend à accroître le risque d'effets anticoncurrentiels sans augmenter la possibilité d'un impact proconcurrentiel. Cela est particulièrement vrai si la situation dominante tient à l'asymétrie mentionnée ci-dessus entre les entreprises qui consentent des remises de fidélité et leurs rivales.

En plus d'adopter une approche tronquée pour conduire l'analyse des remises de fidélité, il conviendrait de clarifier et de simplifier la législation relative aux remises de fidélité par l'adjonction d'un moyen de défense formel fondé sur l'efficience. A cette fin, l'autorité de la concurrence pourrait devoir apporter la preuve initiale qu'une remise de fidélité a eu ou aura des effets anticoncurrentiels significatifs.[54] Si la preuve initiale est faite, l'entreprise qui consent des remises éviterait une sanction seulement s'il était établi que : *a)* ses remises ont eu des effets proconcurentiels plus que compensatoires, et *b)* il n'existait pas de moyen moins anticoncurrentiel de concrétiser ces effets bénéfiques.

7.2 Rapport entre remises de fidélité et prix d'éviction et ventes groupées

Dans la synthèse présentée ci-dessus des effets proconcurrentiels et anticoncurrentiels des remises de fidélité, nous avons noté que lorsque les problèmes de concurrence portent sur l'exclusion anticoncurrentielle (c'est-à-dire la création ou le renforcement d'une position dominante), le préjudice à long terme est susceptible de se produire seulement dans des conditions analogues à celles associées à la vente groupée de produits ou à la pratique de prix d'éviction. Citant l'affaire Virgin/BA, Bernheim (1997) range ces préoccupations sous la rubrique « comportement d'éviction ». Il note que même si les remises accordées par BA allaient de pair avec une tarification en dessous des coûts (au moins à la marge), ce comportement différait de plusieurs façons importantes de l'éviction classique:

> Premièrement, le comportement d'éviction vise à dissuader et/ou à différer l'entrée ou l'expansion d'un concurrent, plutôt que de chasser des concurrents existants du marché. Deuxièmement, lorsqu'une entreprise adopte un comportement d'éviction, elle récupère immédiatement ses pertes sur les ventes qui sont effectuées à un tarif inférieur aux coûts en réalisant d'autres ventes à des prix de beaucoup supérieurs aux coûts. Troisièmement, les conditions économiques qui permettent à une entreprise de se livrer rentablement à un comportement d'éviction diffèrent fondamentalement de celles qui permettent à une entreprise de pratiquer des prix d'éviction.

Ce que Bernheim a qualifié de comportement d'éviction est à certains égards mieux défini par l'appellation vente groupée mixte anticoncurrentielle. Cette appellation est particulièrement appropriée lorsqu'une remise de fidélité est offerte en rapport avec des achats d'une sélection de produits (par exemple une sélection de voyages à destination de certaines villes) plutôt que d'un seul produit. Elle s'applique également, cependant, à un produit unique sauf que dans ce cas, l'accent porterait sur le fait qu'il s'agit de vente groupée mixte plutôt que de vente groupée pure.[55]

L'application d'une notion d'éviction tend à orienter l'analyse vers la tarification en dessous des coûts et la récupération des coûts. D'autre part, la vente groupée peut être anticoncurrentielle même si les prix se situent au-dessus des coûts.[56]

Prenons l'exemple d'une entreprise qui a recours à une stratégie de vente groupée pour réaliser des surprofits et prolonger la période pendant laquelle elle peut réaliser un faible niveau de surprofits. Cet exemple hypothétique est déjà décrit dans la section II de la présente note. Même si les remises de fidélité ont tendance à faire baisser les prix, du moins pour les acheteurs auxquels elles sont offertes, l'entrée ou l'expansion découragées par ces remises auraient sans doute fait baisser les prix encore davantage.[57] C'est ce qui serait probablement survenu dans l'affaire Virgin/BA déjà mentionnée, même si aucune preuve suffisante n'a été apportée à cet égard.

7.3 Nécessité de veiller à ce que les entreprises dominantes ne soient pas remplacées par des entreprises moins efficientes

La définition d'une politique optimale en matière de remises de fidélité, en particulier celles qui sont offertes par des entreprises dominantes, exige la prise en compte de l'inefficience qui pourrait résulter du fait que les entreprises dominantes et leurs concurrents soient soumis à des règles différentes en matière de concurrence par les prix. Cette inefficience se concrétiserait si la différence de traitement entraînait un transfert de parts de marché vers des entreprises moins efficientes et que les pertes consécutives d'efficience productive n'étaient pas surcompensées par des bénéfices résultant des prix plus bas. Dans le pire des cas, les prix pourraient en fait être supérieurs à ce qu'ils auraient été si l'entreprise dominante avait été plus libre de soutenir la concurrence.

Certains pays reconnaissent ce problème et prévoient un moyen de défense axé sur la lutte à armes égales. On en trouve l'exemple dans l'article 2(b) du Robinson-Patman Act des Etats-Unis. Selon Bruckmann (2000, p. 293) :

> La défense axée sur la nécessité de « lutter à armes égales » permet à un vendeur d'offrir des remises sélectives ou des avantages promotionnels à un client particulier pour autant que les remises ou les avantages soient offerts de bonne foi pour équivaloir aux prix ou à la promotion d'un concurrent (et non les surpasser).

Spinks (2000, p. 669-670) suggère que la législation de la CE pourrait aussi prévoir une défense reposant sur le besoin d'égaler la concurrence en ce qui a trait à l'interdiction des remises non justifiées par les coûts pratiquées par des entreprises dominantes, mais ajoute toutefois que cette éventualité n'a pas encore été bien définie.

On pourrait prévoir que l'application de la défense aux remises poserait des problèmes complexes, liés notamment à la disposition demandant que la remise ne constitue pas une offre meilleure que celle du concurrent.

8. Synthèse

Indépendamment de leurs autres caractéristiques, les remises de fidélité constituent une forme de concurrence par les prix. En tant que telles, elles auront tendance, du moins au début, à représenter un apport positif au bien-être économique.

En plus d'aborder les avantages évidents des prix plus bas favorisés par les remises de fidélité, la présente note a traité un certain nombre d'autres façons dont celles-ci peuvent engendrer des gains d'efficience économique. Ces gains sont parfois dérivés des accords d'exclusivité, ou prennent la forme d'avantages plus subtils : discrimination par les prix favorisant l'expansion des ventes ; gains réalisés par l'exercice du pouvoir d'achat ; avantages qui peuvent être obtenus sur certains marchés si les remises de fidélité permettent de réduire une offre excédentaire de produits différenciés.

Abstraction faite de leurs différents avantages potentiels, les remises de fidélité peuvent parfois avoir un effet anticoncurrentiel net et occasionner des pertes d'efficience sur certains marchés. Cet effet peut se produire essentiellement de deux façons. Premièrement, la complexité inhérente à certaines remises de fidélité, éventuellement associée à un certain degré de secret, pourrait réduire significativement la transparence des prix. Cette réduction pourrait dans certains cas rendre un marché moins concurrentiel. Deuxièmement, les remises de fidélité pourraient accroître la rentabilité prévue de l'interaction coordonnée, d'une part en élevant des obstacles à l'entrée (ou à l'expansion) et d'autre part en facilitant la détection de la tricherie. Troisièmement, les remises de fidélité pourraient causer un tel préjudice à un nombre significatif de concurrents, que la concurrence proprement dite pourrait en souffrir. L'évaluation de cette éventualité nécessite une analyse similaire à celle qui a été effectuée pour les pratiques alléguées de prix d'éviction ou de ventes groupées anticoncurrentielles.

Les remises de fidélité sont plus susceptibles de nuire aux concurrents sur les marchés où il existe une forme particulière d'asymétrie, liée notamment au changement du mode prédominant de concurrence. Les remises de fidélité encouragent les acheteurs à concentrer leurs achats auprès d'un groupe de fournisseurs unique ou beaucoup plus restreint que cela aurait été le cas s'il n'y avait pas eu de remises. Cette tendance fait en sorte que les remises de fidélité modifient la concurrence à la marge, qui s'exerce sous forme de petits déplacements de clientèle, en une rivalité qui s'exerce sur la totalité des besoins de chaque client. Certaines entreprises qui accordent des remises de fidélité bénéficient d'un avantage supplémentaire quand la concurrence se fait sous cette forme, mais le gain de part de marché qui s'ensuit pour elles ne reflète pas nécessairement une quelconque supériorité économique.

Pour évaluer correctement les effets nets des remises de fidélité sur la concurrence, il faut examiner leurs effets connus, le cas échéant, et estimer leur capacité de réduire la concurrence ou de différer un accroissement de la concurrence. La structure exacte d'une remise de fidélité et les caractéristiques du marché sur lequel elle est pratiquée sont essentielles dans l'évaluation de son potentiel anticoncurrentiel. Il faut examiner attentivement les éléments suivants : rapidité de la baisse du prix marginal lorsque l'acheteur est sur le point de faire la totalité de ses achats auprès de l'entreprise qui accorde des remises de fidélité ; durée des périodes de référence ; synchronisation ou non des périodes de référence entre les acheteurs. S'agissant des caractéristiques des marchés concernés, il faut examiner attentivement : le pouvoir de marché initial de la ou des entreprises qui introduisent les remises de fidélité ; la généralisation des remises de fidélité sur le marché ; et l'existence et l'importance des économies d'échelle, des effets de réseau et des frais de changement de fournisseur.

L'effet proconcurrentiel manifeste et important des prix plus bas, combinés avec une variabilité considérable des effets anticoncurrentiels potentiels des remises de fidélité, militent contre une approche tronquée lorsque la législation relative à la concurrence est appliquée à ces remises. Une approche cas par cas mettant en équilibre les effets proconcurrentiels et anticoncurrentiels apparaît plus indiquée. Si une approche tronquée est malgré tout adoptée pour sauvegarder les ressources de mise en œuvre ou pour renforcer la certitude juridique, elle devrait sans doute être réservée aux entreprises dominantes. Même dans ces cas, il serait possible d'invoquer l'efficience en tant que moyen de défense.

ANNEXE

EXEMPLES HYPOTHÉTIQUES DE REMISES DE FIDÉLITÉ

Supposons qu'un fournisseur monopoleur (« fournisseur A ») ayant des coûts moyens (y compris un rendement de l'investissement normal ajusté en fonction du risque) de 40 dollars l'unité demande initialement 55 dollars l'unité pour son produit. Supposons que le fournisseur A, croyant que de nouveaux opérateurs sont sur le point de faire leur entrée sur le marché, décide d'offrir la remise de fidélité suivante :

- 55 dollars - si les achats annuels sont inférieurs à 1 001 unités ;

- 50 dollars - si les achats annuels sont égaux ou supérieurs à 1 001 unités.

Compte tenu de ces prix, supposons qu'un acheteur représentatif, l'acheteur 1, décide d'acheter 90 unités par mois au prix de 50 dollars l'unité. Peu après, constatant que le fournisseur A réalise des surprofits, le fournisseur B envisage d'entrer sur ce marché. Supposons que le fournisseur B puisse atteindre le seuil de rentabilité (tout en obtenant un rendement approprié de son investissement) en percevant un prix légèrement inférieur à 50 dollars l'unité. Supposons en outre que pour diversifier ses fournisseurs, l'acheteur 1 souhaite acheter neuf unités par mois au fournisseur B tant que cela n'augmente pas le montant qu'il dépense pour ce produit. Si le fournisseur A demandait simplement 50 dollars l'unité, le fournisseur B serait en mesure d'emporter des ventes de 108 unités par année et les ventes annuelles du fournisseur A à l'acheteur 1 chuteraient à 972. Cette possibilité est exclue, cependant, en raison de la remise de fidélité offerte par le fournisseur A. L'acheteur 1 refuserait d'acheter neuf unités par mois au fournisseur B parce que ce faisant, le prix de ses 1 080 unités par année augmenterait, passant de 54 000 à 58 860 dollars. De fait, pour qu'un achat de neuf unités par mois présente de l'intérêt, il faudrait que le prix unitaire soit inférieur à cinq l'unité.[58]

Prenons ce même exemple pour illustrer une autre caractéristique importante des remises de fidélité. Supposons qu'au lieu de réagir à l'offre de remise de fidélité en achetant 1 080 unités, l'acheteur 1 achète 1 001 unités par année. Combien paie-t-il la dernière unité achetée ? Pour 1 000 unités, il paierait 55 000 dollars et pour 1 001 unités, seulement 50 050 dollars. La dernière unité aurait un prix marginal négatif et il en irait de même pour une certaine tranche de produits dont les quantités se situent autour des seuils fixés. Pour une gamme de produits encore plus grande, le prix marginal ne serait plus négatif mais serait quand même très bas. Si la remise fonctionnait de façon continue plutôt que par sauts discrets, ou si un autre prix était facturé pour chaque tranche de quantité achetée,[59] cela garantirait seulement que le prix marginal soit toujours positif.

L'exemple fourni à l'aide de chiffres suppose implicitement une certaine asymétrie entre les fournisseurs A et B parce qu'il soulève la question de savoir pourquoi le fournisseur B n'emporte pas la totalité des ventes du fournisseur A lorsqu'il offre un prix unitaire inférieur à 50 dollars. L'asymétrie pourrait s'expliquer par un certain nombre de raisons différentes. L'une des plus simples à schématiser est celle de l'avantage procuré par la réputation, c'est-à-dire que le fournisseur A a une réputation établie sur le marché, ce qui n'est pas le cas du fournisseur B. Cette asymétrie est une caractéristique normale de nombreux marchés et ne porte pas nécessairement préjudice au bien-être économique.[60] La remise de fidélité pourrait toutefois modifier cet état de fait, en augmentant considérablement le pouvoir que confère au fournisseur A l'avantage de sa réputation. Forcé de choisir entre donner la totalité de sa clientèle l'année suivante au fournisseur A, qu'il connaît bien, ou tenter un essai avec le fournisseur B et économiser un peu d'argent, il se peut que l'acheteur 1 préfère rester fidèle au fournisseur qu'il connaît, en particulier s'il semble avoir de meilleures chances de poursuivre ses activités pendant toute la période de référence.[61]

Pour résoudre le problème que pose l'avantage de la réputation du fournisseur A, qui est aggravé par les effets de la remise de fidélité, le fournisseur B devrait entrer sur le marché en proposant un prix de beaucoup inférieur et selon une échelle considérablement supérieure à celle qui aurait été nécessaire sans l'octroi d'une remise de fidélité par le fournisseur A. Cela signifie, pour le fournisseur B, des bénéfices moindres (et peut-être même des pertes) et un risque accru, ce qui l'incitera peut-être à se tenir hors du marché.

Cet exemple hypothétique montre qu'en instaurant une remise de fidélité et en renonçant en même temps à une partie de ses surprofits, un fournisseur en situation de monopole pourrait prolonger son monopole même si de nouveaux arrivants potentiels seraient en mesure d'atteindre le seuil de rentabilité en vendant leur produit à un prix plus bas. Il conserverait ce monopole jusqu'à l'arrivée d'une entreprise qui pratique des coûts si bas que son entrée est rentable malgré des barrières élevées dues au fait qu'une remise de fidélité augmente l'avantage initial dont jouit le monopoleur. Dans l'intervalle, le monopoleur enregistrerait des bénéfices supérieurs à ceux de la concurrence et le bien-être économique diminuerait en raison de la perte sèche associée au fait que les acheteurs achètent en quantité moindre qu'ils ne l'auraient fait si les prix avaient été plus bas.

Examinons maintenant une situation dans laquelle des fournisseurs multiples et de taille inégale offrent des produits différenciés. Supposons en outre que toutes les entreprises atteignent tout juste le seuil de rentabilité mais pourraient avoir des coûts plus bas (en raison de charges fixes importantes) sur des productions plus élevées, et qu'à l'origine, les acheteurs achètent des produits auprès de tous les fournisseurs afin de bénéficier des avantages de la variété des produits. Dans cette situation hypothétique, le fournisseur ayant le plus gros chiffre d'affaires, sans doute celui qui a la variante de produit la plus populaire, pourrait accroître sa part de marché et ses bénéfices en relevant son prix mais en offrant simultanément une remise de fidélité.[62] Les acheteurs qui acceptent de renoncer à la variété des produits en contrepartie d'un prix plus bas voudront probablement concentrer davantage leurs achats sur la variante de produit la plus populaire. Là encore, nous voyons que les remises de fidélité pourraient accentuer l'effet d'une asymétrie initiale du marché (en l'occurrence une variante de produit supérieure). Il pourrait en résulter une perte de bien-être économique car la part de marché initiale fait l'objet d'une nouvelle répartition, non pas en raison d'une modification des goûts ou des charges, mais simplement de l'introduction des remises de fidélité. Soulignons toutefois que les remises de fidélité peuvent avoir facilité un déplacement vers un nouvel équilibre du marché où les charges et les prix sont plus bas du côté des entreprises qui pratiquent les remises de fidélité et où la variété de produits est moindre en termes d'habitudes de consommation individuelle.

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NOTES

1. Dans une décision récente concernant la *Deustche Post*, la Commission européenne a réfléchi à la distinction qu'il convient de faire entre les rabais de quantité et ce que la Cour de justice européenne appelle « rabais de fidélité » dans sa décision relative à l'affaire *Hoffman-LaRoche*. Selon la Commission, la Cour a opéré les distinctions suivantes :
   - le rabais de quantité est exclusivement lié au volume des achats effectués auprès du producteur. Il est calculé en fonction des quantités fixées objectivement et qui valent de la même façon pour l'ensemble des acheteurs
   - le rabais de fidélité n'est pas lié à l'achat d'une quantité déterminée, mais aux besoins respectifs du client, ou à la plus grande partie d'entre eux. Dans ce cas, le rabais est consenti en tant que « contrepartie » de l'exclusivité des achats,
   - même lorsque le rabais de fidélité est lié à une quantité donnée, il n'est néanmoins pas accordé en fonction de cette quantité, mais simplement parce qu'il a été calculé que cette quantité constituait une évaluation de la capacité d'achat supposée du client concerné, le rabais n'étant pas lié à la quantité la plus grande possible, mais au pourcentage le plus élevé possible des besoins. [Commission européenne (2001, par. 33)]
2. Peuvent sans doute faire exception les produits qui peuvent être entreposés à peu de frais, et qui peuvent donc être achetés d'avance. Prenons l'exemple des petites bouteilles de liquide utilisé pour le nettoyage des lentilles de contact, normalement achetées une fois par mois. Le producteur peut obtenir un effet de fidélité équivalent soit en offrant six bouteilles emballées ensemble pour le prix de cinq, soit en offrant une sixième bouteille gratuitement si l'acheteur se procure cinq bouteilles au cours des cinq prochains mois.
3. Dans les marchés portant sur des services, la période de référence pourrait être définie de façon similaire ou prendre la forme d'une période pour laquelle les acheteurs doivent s'engager pour bénéficier de la remise. Par exemple, un fournisseur de service Internet offrant des contrats mensuels à tarif uniforme pourrait consentir des prix plus bas en contrepartie de l'engagement de l'acheteur dans un contrat de six mois.
4. On ne peut affirmer le caractère significatif des effets de réseau du point de vue de la concurrence sans faire référence aux frais de changement de fournisseur. Si un moyen peu onéreux peut être trouvé, par exemple, pour permettre aux acheteurs qui utilisent le système d'exploitation « A » d'utiliser le logiciel mis au point pour le système d'exploitation « B », une partie des effets de réseau pertinents disparaîtrait. Bien évidemment, les remises de fidélité peuvent elles-mêmes équivaloir à des frais de changement de fournisseur.

   On trouvera un examen des frais de changement de fournisseur et une analyse de leur incidence sur les bénéfices et sur le bien-être économique dans Klemperer (1984) et Klemperer (1995). Dans le document de 1995, l'auteur fait observer que les frais de changement de fournisseur sont le résultat « …de la volonté d'un consommateur de rendre compatible l'achat du moment avec un investissement antérieur. » (p. 517)
5. La structure tarifaire des systèmes d'exploitation informatiques présente des coûts fixes très élevés, mais des coûts marginaux négligeables (essentiellement les coûts de réalisation d'une copie numérique). En outre, la valeur que représente pour les acheteurs un système d'exploitation particulier s'accroît avec le nombre d'acheteurs qui le choisissent, et ce pour deux raisons. Premièrement, un système d'exploitation commun peut faciliter le partage des données et des programmes ainsi que la mise en réseau des ordinateurs. Deuxièmement, plus les utilisateurs d'un système d'exploitation donné sont nombreux, plus le profit potentiel associé à l'élaboration de logiciels conçus pour ce système d'exploitation est élevé. Enfin, plus le logiciel compatible est efficace et peu onéreux, plus les utilisateurs attachent de prix au système d'exploitation.
6. Voir Klemperer (1984, p. 2). On trouvera un examen général plus récent des effets susceptibles d'être anticoncurrentiels des frais de changement de fournisseur, notamment ceux qui sont engendrés par certaines remises de fidélité, dans Klemperer (1995).
7. Pour un examen plus approfondi de l'arbitrage qui en découle, voir Klemperer (1995).
8. Selon les réglementations antitrusts, les marchés des compagnies aériennes sont normalement considérés comme des paires de villes – voir la note de référence de l'OCDE (2000, p. 28). On trouvera également dans cette note de référence, p. 35-38, un examen des différentes façons dont les compagnies aériennes haussent les frais de changement de transporteur afin d'accroître la position dominante de leur réseau.

Outre les programmes grands voyageurs, les compagnies aériennes qui possèdent des réseaux étendus consentent des remises aux entreprises et offrent des commissions de fidélisation aux voyagistes. Ces deux types d'initiatives sont abordés plus loin à l'occasion de l'examen de l'affaire *Virgin/BA*.

9. Pour un examen approfondi de la concurrence des compagnies aériennes, voir ibid., p. 32-45.

10. Dans le secteur aéroportuaire, un « créneau » est une période de temps attribuée à une compagnie aérienne dans un aéroport donné pour effectuer des décollages et des atterrissages. Une compagnie aérienne doit avoir un créneau de départ et un créneau d'arrivée pour exploiter un vol.

11. Borenstein (1996) fait une analyse économique des programmes de fidélisation des acheteurs réguliers en général et des programmes grands voyageurs en particulier. Morrison et Whinston (1995) traitent également des effets des programmes grands voyageurs. Fait intéressant, ils soulignent que les effets anticoncurrentiels de ces programmes peuvent d'une certaine façon être contrebalancés par la plus grande fidélisation dont bénéficient généralement les petites compagnies aériennes.
Voir note 59 ci-après. De nombreuses remises de fidélité consistent de fait à offrir des produits gratuits à des acheteurs admissibles.

12. Pour une analyse détaillée des effets bénéfiques de la discrimination par les prix, voir Varian (1989). Carlton et Perloff (1989) présentent un aperçu général de la discrimination par les prix. Pour plus de détails sur la tarification non linéaire (parfois appelée « discrimination par les prix du deuxième degré », voir Wilson (1993). Armstrong et Vickers (2001) analysent les effets bénéfiques de la discrimination par les prix en situation d'oligopole.

13. Hausman et MacKie-Mason (1988, p. 255) soulignent :

> A partir d'hypothèses assez générales, on peut montrer qu'indépendamment de toutes externalités d'incitation, une condition *nécessaire* (mais non *suffisante*) pour que la discrimination par les prix augmente la rente marshallienne statique des consommateurs et des producteurs est que la production totale augmente. On suppose simplement que si différents clients paient des prix différents pour un produit, leur évaluation marginale est dissociée. Par conséquent, la discrimination par les prix mène nécessairement à des inefficiences allocatives. Pour que le bien-être augmente, la production totale doit augmenter suffisamment pour que les gains excédentaires qui en résultent excèdent les pertes allocatives.

Par « pertes allocatives », les auteurs n'entendent pas les pertes sèches pour l'économie. Ils font plutôt référence à l'inefficience due au fait que les acheteurs attribuent différentes valeurs relatives à des paires de produits, c'est-à-dire à ce que l'on appelle souvent « l'inefficience distributive ».

14. On pourait considérer que les remises de fidélité sont une tarification non linéaire personnalisée en fonction de chaque acheteur. En cherchant à maximiser les profits, les entreprises qui accordent des remises de fidélité peuvent personnaliser leurs offres de manière à refléter à peu de choses près ce qu'elles connaissent des différences entre les élasticités-prix de la demande des acheteurs. Cela pourrait se faire, par exemple, en adoptant une non-linéarité suffisante liée aux besoins connus de chaque acheteur de manière que la presque totalité d'entre eux décident de s'approvisionner exclusivement auprès de l'entreprise qui octroie des remises. Les prix offerts en contrepartie de cette fidélité pourraient alors être ajustés pour tenir compte des élasticités-prix de la demande de différents acheteurs.

15. Voir Carlton et Perloff (1989, 437), Varian (1989, 599), et Scherer et Ross (1990, 489). Cette sagesse conventionnelle trouve son illustration dans le fait que la discrimination par les prix est souvent décrite en posant comme hypothèse que le vendeur est un monopoleur. Armstrong et Vickers (2001) font exception et mettent plutôt l'accent sur les oligopoles qui pratiquent une discrimination par les prix.

16. On trouvera un examen de la discrimination par les prix sans position dominante dans Frank (1983) et Levine (2000). Dans une analyse de la discrimination par les prix sous forme de remises anticipées consenties par les compagnies aériennes, Dana (1998) fait également observer que la discrimination par les prix peut se produire en l'absence de position dominante sur le marché. Borenstein (1998) semble convenir que la position dominante sur le marché serait nécessaire pour que la discrimination par les prix s'applique à des produits homogènes mais non à des produits hétérogènes :

> La concurrence entre marques hétérogènes et l'absence de barrières à l'entrée n'empêchent presque jamais la discrimination par les prix, même lorsqu'elle fait en sorte que les profits à long terme sont réduits à zéro. De fait, lorsqu'il existe un mécanisme de tri utilisable, une entreprise pourrait être forcée d'effectuer une discrimination par les prix pour éviter les pertes résultant de la concurrence entre d'autres entreprises qui pratiquent cette discrimination. (p. 381)

L'hétérogénéité des marques peut constituer un bon mécanisme de tri et faciliter la discrimination par les prix.

17. En ce qui a trait aux effets proconcurrentiels et anticoncurrentiels de la transparence des prix, voir la note de référence de l'OCDE (2001).

18. Dans l'affaire *Michelin contre la Commission*, par exemple, la Cour de justice européenne a observé (au paragraphe 14) à quel point le manque de transparence des remises de Michelin avait aggravé les effets anticoncurrentiels.

19. Calkins (1990) traite des effets négatifs de la réduction de la transparence des prix qu'entraînen les programmes grands voyageurs.

20. On trouvera plus de détails sur les effets sur la concurrence des accords d'exclusivité et des pratiques étroitement associées comme les ventes liées, les ventes groupées et l'obligation de tenir un assortiment complet, dans Whinston (1990) et Carlton (2001). Ces points sont également abordés dans la note de référence de l'OCDE (2002).

21. Supposons que les remises soient structurées de telle sorte que les clients sont très peu susceptibles de changer de fournisseur au cours des deux derniers tiers d'une période de référence donnée. Si la période de référence est de six mois, le fournisseur B pourrait devoir attendre jusqu'à quatre mois pour obtenir la clientèle de l'acheteur 1. Cette période est doublée à huit mois si la période de référence est de un an.

22. Voir Marvel (1982).

23. Pour ce faire, ils pourraient transférer au producteur sans doute le mieux informé une plus grande part du risque associé au lancement d'un nouveau produit. On trouvera un examen détaillé des effets des redevances d'emplacement sur la concurrence dans Tom (1999).

24. On trouvera un examen plus approfondi des questions soulevées dans l'enquête réalisée par l'autorité de la concurrence du Royaume-Uni (United Kingdom Competition Commission (2000)) sur le marché spontané des glaces. Ridyard (2002) a reproché à cette enquête ses conclusions défavorables en ce qui concerne les remises de fidélité :

> Même si cette enquête était principalement axée sur les différentes restrictions verticales pratiquées dans le secteur, une question d'intérêt secondaire intéressante concernait la pratique des parcs thématiques et d'autres grands sites de loisirs consistant à conclure des contrats d'approvisionnement à long terme exclusifs avec un seul fournisseur de glace par le biais d'un processus d'appel d'offres. Même si Unilever détenait une grande part de marché et était considérée comme dominante, il est évident, compte tenu de la volonté des clients d'organiser des appels d'offres de cette manière, qu'ils étaient disposés à envisager de conclure un accord exclusif avec Nestlé, Mars, ou un des petits fournisseurs.
>
> En fait, l'autorité de la concurrence du Royaume-Uni a statué qu'il devrait être interdit de conclure ce type d'accords avec Unilever et d'autres grands fournisseurs. Il est difficile de voir comment cette solution simplifiera d'une quelconque façon les choses pour ces rivaux, et plus encore de voir comment le fait de retirer aux clients un outil de négociation clé va dans leur intérêt. (p. 15, bibliographie omise).

25. On trouvera un examen des effets du pouvoir de l'acheteur dans la note de référence de l'OCDE (1999). A ce sujet, voir O'Brien (1994), qui constate qu'en empêchant que la discrimination par les prix nuise aux détaillants en concurrence, le *Robinson-Patman Act*, aux Etats-Unis, pourrait rendre « …le pouvoir de négociation des détaillants inutile en diminuant le pouvoir de marché des fabricants. Il en résulterait une augmentation des prix des facteurs pour tous les détaillants et une augmentation de tous les prix de détail. » (296)

Bruckmann (2000) donne un aperçu général de l'incidence que pourrait avoir le *Robinson-Patman Act* sur les remises de fidélité.

26. « Ajusté en fonction de la qualité » doit être interprété au sens large comme incluant une différenciation réduite des produits.

27. Dans la jurisprudence de la CE, « rabais de fidélité » est réservé aux remises de fidélité offertes en contrepartie de l'accord d'un client de donner la totalité ou la presque totalité de sa clientèle à l'entreprise qui pratique la remise. Les ristournes d'objectif, au contraire, offrent une remise en contrepartie de l'atteinte par le client d'une certaine quantité ou d'une augmentation des objectifs de quantité.

28. Commission européenne (1999a, paragraphe 5)

29. *Virgin v. BA* (2001, page 4 de la version téléchargée de la décision)

30. L'exemple était celui-ci :

> Prenons un agent de voyages qui réalise, au cours de l'année de référence, 100 000 livres sterling de ventes de billets internationaux. S'il vend pour 100 000 livres sterling de billets internationaux BA au cours d'un mois donné, il recevra la commission de base de sept pour cent et une « prime de résultat » de 0.5 pour cent ((100 moins 95) x 0.1 pour cent), ce qui donne des recettes totales, sous forme de commission sur les ventes de billets d'avion internationaux, de 7 500 livres sterling (100 000 x (7 % + 0,5 %)). Si ce même agent consacrait un pour cent de ses ventes de billets internationaux à un concurrent de BA, sa « prime de résultat » serait ramenée à 0,4 pour cent ((99 moins 95) x 0.1 %) et ce taux réduit serait appliqué à toutes ses ventes de billets BA. Les recettes qu'il percevrait sous forme de commission pour la vente de billets internationaux BA tomberaient ainsi à 7 326 livres sterling (99 000 x (7 % + 0,45)). Un recul de 1 000 livres sterling des ventes de billets internationaux BA fait baisser de 174 livres sterling les recettes provenant des commissions. Le taux « marginal » de commission serait donc de 17,4 pour cent. En pratique, cela signifie qu'un concurrent de BA à même d'offrir des vols qui combleraient les 1 000 livres sterling de ventes de billets BA non réalisées devrait proposer une commission de 17,4 pour cent sur ces billets pour dédommager l'agent de voyages de sa perte de recettes (c'est-à-dire des commissions non versées par BA). Même si BA doit aussi accorder ce taux marginal élevé pour augmenter ses ventes de billets, elle dispose d'un atout par rapport à son concurrent qui, lui, doit octroyer ce taux de commission élevé sur la totalité de ses ventes.
>
> Cet effet est amplifié si le nombre de billets en question est un pourcentage plus faible des ventes de référence de billets BA réalisées par l'agent de voyages. Il en va de même si l'agent de voyages touche non seulement des commissions supplémentaires dans le cadre du système de primes de résultat, mais aussi des primes en vertu d'un accord commercial (paragraphe 30, référence omise).

31. Bernheim (1997, paragraphes 6 et 7)
32. Ibid., par. 129.
33. L'amplification est d'autant plus forte que le pourcentage de voyageurs intéressés par des destinations multiples plutôt qu'à des destinations uniques est élevé. Pour les passagers qui ne s'intéressent qu'à une destination, une remise sur l'ensemble du réseau équivaut à une remise sur une liaison précise et pourrait sans doute être exactement égalée par un transporteur qui n'offrirait que la destination unique. On suppose en cela qu'il n'y a pas d'économies d'échelle significatives du côté de l'offre et dont bénéficierait un opérateur de réseau.
34. *Virgin v. BA* (2001, page 4 de la version téléchargée de la décision)
35. Voir Commission européenne (1999a, paragraphes 33 à 43).
36. Ibid., par. 90 et 92.
37. Ibid., paragraphe 96, citations concernant les affaires omises. Voir aussi au point 27 *supra* la définition que donne la CE de « rabais de fidélité », et l'utilisation de « rabais de fidélité » pour décrire les supercommissions des agents de voyages de BA.
38. Ibid., paragraphe 101.
39. Ibid., paragraphes 101 et 102. La CE a déjà noté plus haut au paragraphe 58 :

    > BA a également produit des éléments de preuve attestant qu'elle fait des économies en vendant des billets par l'intermédiaire d'une agence qui réalise un important chiffre d'affaires. Elle précise que certains coûts liés aux relations d'affaires qu'elle entretient avec une agence sont soit des coûts fixes indépendants de la taille de l'agence, soit des coûts qui n'augmentent pas de manière directement proportionnelle au chiffre d'affaires, en volume, réalisé par l'agence, de sorte qu'elle fait des économies en traitant avec les grandes agences. Elle cite, à titre d'exemple, les coûts de marketing et de communication, liés par exemple à l'édition de brochures et à la formation sur les produits, les coûts d'exploitation découlant du traitement des demandes de renseignements émanant des agences, les coûts de vérification et de saisie des commandes provenant des agences, les coûts associés à la communication des tarifs aux agences et les coûts commerciaux liés à l'établissement et à la gestion de relations contractuelles avec les agences. Les économies découlent, pour la plupart, des relations d'affaires établies avec une chaîne d'agences de voyages, de préférence un agent de voyages local isolé.

40. Ibid., paragraphe 103.
41. Ibid., paragraphes 106-107.
42. Ibid., paragraphe 109.
43. Commission européenne (1999b)
44. Autorité italienne de la concurrence (2001).

45. *Virgin v. BA* (2001), page 2
46. Ibid., page 8.
47. Loc. cit., citation omise.
48. Loc. cit., citation omise.
49. Voir Bernheim (1997, paragraphes 96-111).
50. Ibid., pages 12-15
51. Ibid., page 13
52. Il est toujours possible que tous les acheteurs soient admissibles aux mêmes remises de fidélité, et dans ce cas il n'y aurait pas de différence entre les prix payés par les acheteurs.
53. Muris (2000a, p. 701-702, citations omises).
54. Certains pays peuvent choisir simplement de présumer ces effets négatifs lorsque l'entreprise qui accorde des remises est dominante.
55. Prenons l'exemple d'un acheteur qui se voit offrir de payer 80 pour cent de ses besoins d'achats 10 dollars l'unité, ce prix passant à 8 dollars l'unité si ses achats dépassent le seuil de 80 pour cent fixé. La première tranche représentant 80 pour cent des besoins peut être considérée comme un des produits groupés, et les unités supplémentaires achetées comme l'autre produit groupé. Les unités supplémentaires offertes à prix négatif pour les premières unités achetées ne peuvent être achetées indépendamment de la première tranche de 80 pour cent, et le concept de vente groupée mixte ne s'applique donc pas.
56. Voir Tom *et al.* (2000, p. 637-638), Nalebuff (1999), et Nalebuff (2000). On trouvera un examen approfondi des effets anticoncurrentiels potentiels des ventes groupées pures et mixtes dans la note de synthèse de l'OCDE (2002).
57. Sinon, l'entreprise qui accorde des remises de fidélité a apparemment fait une erreur ou a délibérément choisi de ne pas optimiser ses profits. L'analyse devient toutefois beaucoup plus complexe si les remises ont été octroyées avant que l'entrée sur le marché ait lieu, en l'absence de remises. Lorsque des remises de fidélité sont accordées avant l'entrée sur le marché, les échelles sont stimulées de manière que les remises entraînent des gains plutôt que des pertes d'efficience économique.
58. Pour que l'acheteur n'essuie pas une perte en transférant 108 unités par année de ses achats vers le fournisseur B, le montant total payé pour 1080 unités par année ne doit pas dépasser 54 000 dollars. L'achat de 972 unités par année auprès du fournisseur A coûterait 53 460 dollars, ce qui ne laisserait que 540 dollars à dépenser sur les unités du fournisseur B. Par conséquent, le fournisseur B doit facturer un montant inférieur à 540 dollars pour 108 unités, soit 5 dollars l'unité, pour inciter l'acheteur 1 à lui donner sa clientèle à raison de 9 unités par mois.
    On peut aussi considérer sous cet angle la remise de fidélité offerte par le fournisseur A : pour autant qu'ils achètent plus de 1000 unités par année, les acheteurs peuvent payer 910 unités 55 dollars chacune, recevoir 91 unités gratuitement et acheter d'autres unités 50 dollars chacune.
59. Par exemple, 55 dollars pour chacune des 1000 premières unités par année et 50 dollars pour chacune des unités supplémentaires achetées la même année.
60. On trouvera un examen du rôle de la réputation dans le processus concurrentiel dans Shapiro (1983) et Klein et Leffler (1981).
61. C'est ce qui peut expliquer l'effet des remises de fidélité visées dans les affaires Hale et Waterous introduites par la *Federal Trade Commission* des Etats-Unis. Voir Tom *et al*. (2000, p. 619).
62. Cela est plus susceptible d'être rentable sur les marchés où la différenciation des produits correspond à la recherche par chaque acheteur d'une variété de produits plutôt qu'aux goûts et préférences variés des acheteurs. Dans ce dernier cas, les acheteurs auraient tendance à concentrer leurs achats auprès d'un fournisseur ou d'un petit nombre de fournisseurs, même s'ils n'y étaient pas incités par des remises de fidélité.

QUESTIONNAIRE SUBMITTED BY THE SECRETARIAT

(Editor's note – Some countries used this questionnaire to structure their submissions)

1. Introduction

If your law, regulations, enforcement guidelines, or jurisprudence contains a definition of fidelity discounts (or something analogous), please provide that definition. Would your definition include a straightforward quantity discount, i.e. one that grows with the quantity purchased in each separate transaction? Would it include discounts on services linked to buyers committing themselves to buy such services over an extended period of time?

2. Possible Procompetitive or Efficiency Effects of Fidelity Discounts

1. *In your view, what procompetitive or efficiency benefits could be associated with fidelity discounts? How and why might your assessment of these benefits be influenced, if at all, by whether the discounts are instigated by buyers as opposed to sellers?*

2. *How, if at all, does your law and/or enforcement policies treat procompetitive or efficiency benefits of price discrimination achieved through fidelity discounts? More particularly, when a dominant firm practises price discrimination through fidelity discounts, what defences/exceptions are afforded it?*

3. *Would a fidelity discount be enough to create an exclusive dealing arrangement under your law, or is something more required? Please explain.*

3. Possible Anticompetitive Effects of Fidelity Discounts

1. *In your view, what anticompetitive effects could be associated with fidelity discounts and how would you go about assessing the probability that they are actually occurring?*

2. *Please explain how certain characteristics of a fidelity discount or the market where it arises tend to increase the probability and significance of any pro- and/or anticompetitive effects associated with the discount? Examples of possibly pertinent characteristics could be: length of time over which the discount is calculated; units of purchases covered by the discount (such a discount may or may not be restricted to the incremental purchases required to qualify for the discount); degree to which it is explicitly tied to a buyer's requirements; and degree to which it rises with the quantity or percentage of requirements purchased. Examples of market characteristics that might be relevant include the presence or absence of a dominant firm, the degree to which fidelity discounts are widespread in the market, and the existence and importance of economies of scale, network effects, and buyer switching costs.*

3. *When anticompetitive effects are suspected because a fidelity discount restricts or excludes competitors, what conditions must prevail before one can confidently predict that such restrictions or exclusions will also at least eventually harm consumers?*

4. *How, if at all, might fidelity discounts lead to less price transparency in markets and how and under what circumstances would that tend to affect competition?*

3.1 Case examples

Please provide case examples illustrating the pro- and/or anticompetitive effects of fidelity discounts. When both types of effects were present, how did your authority balance them against each other? What remedies, if any, in addition to fines and/or blanket prohibition orders, were adopted in these cases and how effective did they prove to be?

4. Policy Issues

1. *Although fidelity discounts would commonly be characterised as unilateral behaviour, there might be circumstances where they amount to vertical agreements (e.g. exclusive dealing arrangements). How does your competition authority deal with this issue?*

2. *In your jurisdiction, how if at all do laws or enforcement policies as regards fidelity discounts differ depending on whether or not they are offered by firms having significant market power, or are widespread in the market?*

3. *Suppose you are dealing with a fidelity discount structured in such a way that marginal sales are made at "prices" below whatever cost standard you might employ in applying prohibitions against predatory pricing, but the average price charged exceeds that cost standard. How (and why) would your treatment of such pricing differ from your approach to predatory pricing where all units are being offered at a price below your cost standard?*

4. *In your jurisdiction, under what circumstances, if any, are firms with substantial market power permitted to offer fidelity discounts, i.e. what defences/exceptions are provided? Two possible examples of such defences/exceptions are: demonstrating that the discounts are cost-justified; or showing that they have been adopted to meet competition. What special difficulties, if any, have you encountered in dealing with the defences/exceptions pertinent in your jurisdiction?*

5. *Please provide any further comments you wish on any aspects of this topic that have not been drawn out in the questions found in this or previous sections.*

4.1 Case examples

Please provide any case examples illustrating your approach to policy issues related to fidelity discounts.

QUESTIONNAIRE SOUMIS PAR LE SECRÉTARIAT

(Note du rédacteur – quelques soumissions écrites font référence à ce questionnaire)

1. Introduction

Si votre droit, réglementation, décrets d'application ou jurisprudence contiennent une définition des primes de fidélité (ou de quelque chose d'analogue), veuillez fournir cette définition. Est-ce que votre définition comprendrait une remise directement quantitative, c'est-à-dire augmentant avec la quantité achetée lors de chaque transaction ? Est-ce qu'elle comprendrait des remises sur des services sous réserve que les acheteurs s'engagent à acheter ces services pendant une certaine durée ?

2. Effets favorables à la concurrence ou à l'efficience des primes de fidélité

1. *A votre avis, quels avantages pour la concurrence ou l'efficience pourraient être associés aux remises de fidélité ? Comment et pourquoi votre estimation de ces avantages risquerait d'être influencée, le cas échéant, si les remises étaient à l'initiative des acheteurs plutôt que des vendeurs ?*

2. *Comment votre droit et vos mesures d'application des lois traitent-ils, le cas échéant, les avantages pour la concurrence et l'efficience de la discrimination par les prix réalisée au travers des primes de fidélité ? Plus précisément, lorsqu'une entreprise dominante pratique une discrimination de prix au moyen de primes de fidélité, quels sont les moyens de défense ou les exceptions qui peuvent être invoqués ?*

3. *Est-ce qu'une remise de fidélité serait suffisante pour créer un accord d'exclusivité selon votre législation, ou faut-il quelque chose de plus ? Veuillez expliquer.*

3. Effets anticoncurrentiels des remises de fidélité

1. *A votre avis, quels effets anticoncurrentiels pourraient être associés aux primes de fidélité et comment vous y prendriez-vous pour évaluer selon quelle probabilité ils se produisent effectivement ?*

2. *Veuillez expliquer comment certaines caractéristiques d'une remise de fidélité ou du marché sur lequel elle apparaît tendent à accroître la probabilité et l'importance de n'importe quel effet en faveur de et/ou hostile à la concurrence associé à la remise ? Parmi les exemples de caractéristiques éventuellement pertinentes, on peut citer : la longueur de la période sur laquelle est calculée la remise ; les unités d'achats que couvre la remise (une telle remise peut ou non être limitée aux achats supplémentaires nécessaires pour ouvrir droit à cette remise) ; à quel point elle est liée de façon explicite aux besoins de l'acheteur ; et à quel point elle augmente avec la quantité ou le pourcentage d'achats destinés à satisfaire les besoins. Parmi les exemples de*

caractéristiques de marché qui pourraient être pertinentes, citons la présence ou l'absence d'une entreprise dominante, le degré de diffusion des remises de fidélité sur le marché, et l'existence/l'importance des économies d'échelle, des effets de réseau et des frais de changement de fournisseur à la charge de l'acheteur.

3. *Lorsqu'on soupçonne des effets anticoncurrentiels parce qu'une prime de fidélité restreint la concurrence ou exclut des concurrents, quelles sont les conditions qui doivent prévaloir avant qu'on puisse prévoir avec certitude que de telle restrictions ou exclusions vont finalement nuire aussi aux consommateurs ?*

4. *Comment les remises de fidélité peuvent-elles, le cas échéant, diminuer la transparence des prix sur les marchés, et comment et dans quelles circonstances cela pourrait avoir tendance à influer sur la concurrence ?*

3.1 Exemples

Veuillez fournir des exemples de cas illustrant les effets favorables et/ou défavorables à la concurrence exercés par les primes de fidélité. Lorsque les deux types d'effets sont présents, comment vos autorités font-elles la part des uns et des autres ? Quels remèdes, le cas échéant, en plus des amendes et/ou des décrets-cadre d'interdiction, ont été appliqués et quelle a été leur efficacité ?

4. Problèmes qui se posent aux pouvoirs publics

1. *Bien que les remises de fidélité se caractérisent généralement par un comportement unilatéral, il peut y avoir des cas où elles équivalent à des accords verticaux (par exemple, accords d'exclusivité). Comment vos autorités de la concurrence traitent-elles cette question ?*

2. *Dans votre pays, est-ce que les lois ou les mesures d'application concernant les remises de fidélité diffèrent selon qu'elles sont offertes par des entreprises ayant ou non une puissance de marché, ou qu'elles sont largement répandues sur le marché, et dans l'affirmative en quoi diffèrent-elles ?*

3. *Supposons que vous ayez affaire à une remise de fidélité conçue de telle manière que les ventes marginales se fassent à des "prix" inférieurs à n'importe quelle norme de coût que vous pourriez employer en interdisant la fixation de prix abusifs, alors que le prix moyen pratiqué dépasse la norme de coût. Comment (et pourquoi) traiteriez vous ce prix différemment de prix abusifs lorsque toutes les unités sont offertes à un prix inférieur à votre norme de coût ?*

4. *Dans votre pays, dans quelles circonstances les entreprises disposant d'un important pouvoir de marché sont-elles autorisées à offrir des primes de fidélité, c'est-à-dire quelles protections/exceptions sont prévues ? Deux exemples possibles de ces moyens de défense/exceptions sont : prouver que les remises sont justifiées par les coûts ; ou montrer que ces remises ont été décidées pour faire face à la concurrence. Quelles difficultés particulières avez-vous rencontrées, le cas échéant, s'agissant des interdictions/exceptions pertinentes dans votre pays ?*

5. *Veuillez ajouter tout autre commentaire que vous souhaiteriez faire sur des aspects de ce sujet qui n'apparaissent ni ici, ni dans les questions des sections précédentes.*

4.1 Exemples

Veuillez fournir tous les exemples de cas illustrant votre façon d'aborder les problèmes posés aux pouvoirs publics en liaison avec des primes ou remises de fidélité.

AUSTRALIA

1. Introduction

In most developed economies, including Australia, oligopolistic markets are the most common, if not the predominant, market structure. Firms operating in such markets frequently seek to engage in strategic behaviour aimed at securing for themselves a long term commercial advantage over their rivals. Generally such conduct is procompetitive rather than anticompetitive.

A firm may seek to reduce the price elasticity of demand of consumers for its products, thereby acquiring some (often short-lived) market power. This may be achieved in a variety of ways. The most obvious is, of course, by differentiating its products so as to add value. This may take the form of improved technical characteristics, improved packaging/presentation and the like. Subject to any relevant intellectual property rights, the firm's competitors may be able to replicate this and so negate its impact on consumers quite quickly. Alternatively, a firm may seek to build goodwill with customers by offering reliable supply and/or providing additional service (sales finance, after sales service and the like). In either case, although the aim of the firm is to reduce the price elasticity of demand for its own product/s and hence to increase its market power, typically such conduct would be pro competitive and it is likely to confer a benefit on consumers. Any market power acquired in this way is likely to be transitory and so of little concern from a competition perspective.

However, market power may be less transitory if the firm introduces a sales strategy that specifically links the terms on which the product is available to the purchase of the same product at another time. Linking sales inter temporally might be achieved by methods such as rebate offers based on the volume of sales over a specified time, for example.

Arrangements that link the supply of one product to another include tying (supply of two or more of the producer's products is linked) and full line forcing (where a purchaser is required to take all of the supplier's product range). Alternatively, the sale of the supplier's product may be linked to that of another supplier (third line forcing).

A customer loyalty or fidelity program is at one end of a continuum of arrangements intended to create a closer link between a particular supplier and its customers than will result from an arms length transaction based on price and product attributes. The effect may be to lessen competition, for example by reducing consumer search costs or increasing switching costs, or it may be motivated by achieving cost savings by increasing sales to spread fixed costs, or to justify expensive capital expansion based on highly specialised assets.

The aim of a customer loyalty program is to retain existing consumers and to attract new consumers by offering something that will result in these consumers in future returning to the same supplier. The basis for this is not merely the quality of the firm's products or the associated service, it is some other benefit to the consumer, including a specific reward.

A customer loyalty program may be differentiated from other arrangements because it does not relate to one-off transactions and it confers some reward on the loyal customer, generally after a number of purchases have been made. It is termed a program and this implies an ongoing relationship, either through membership or until a reward is obtained. A supplier may discount product, for example to clear stock or build sales, but this type of discount would not be regarded as a customer loyalty scheme, although clearly it is intended to attract sales.

A distinguishing characteristic of these schemes is that they are structured to encourage or reward repeat purchases. Consequently, a supermarket chain whose parent company also owned petrol outlets, might offer petrol at a discounted price to customers who could produce a supermarket invoice over a minimum value. This may result in third line forcing, but might not be regarded as a loyalty scheme. There is a reward element (cheaper petrol) but the loyalty element may be almost non existent – anyone can get the discount so long as they buy groceries valued in excess of the specified minimum from a related store. However, given the significance of petrol in the typical household budget, it may be argued that the reward encourages all supermarket items to be purchased from a particular supermarket chain and that it therefore provides an ongoing incentive to shop at a particular supermarket chain. Nevertheless, the reward is available on a sale-by-sale basis.

However, if a supermarket offers a coupon for grocery sales over a certain amount and a certain number of these coupons can then exchanged for a reward (e.g. china mugs) this is more of a loyalty program. Similarly, the coffee shop that offers customers a card on which purchases are marked until a certain number has been achieved and then offers the next cup free requires no membership but does entail an ongoing association. The relationship between sales and rewards aims to retain existing customers and to attract new customers. A loyalty or fidelity program implies a temporal element.

Customer loyalty programs vary from fairly informal arrangements to arrangements that are formally structured and require significant resources to operate them. An informal arrangement might take the form of negotiating discounts with a long term supplier or being offered a discount by a supplier based on past purchases. This often occurs in supplying materials to the building and construction industry; or discounts on magazine subscriptions based on the length of time for which the subscription is taken out (similar arrangements for mobile phone contracts). At least in relation to the former, discounts are often negotiated on an ad hoc basis, influenced partly by the level of activity at the time of the purchase.

More structured or certain is the use of cards to be stamped or clipped for each sale until a certain number or value of sales is reached thereby entitling the cardholder to free or discounted product, a free cup of coffee, or some other benefit. More formal, and involving more valuable rewards, are the discounts, upgrades and free stays offered by major hotel chains for repeat visits, and the airlines' frequent flyer programs and other programs related to these. In some cases, as in the case of the Qantas frequent flyer scheme, the scale of the scheme is such that its operation is out-sourced to professional managers.

2. Australian loyalty programs

Airlines, hotels, credit card providers, bookshops, car rental companies, video stores and telcos offer loyalty programs either separately or jointly to Australian consumers and businesses. Rewards range from the coffee cards just referred to, to free hotel accommodation or room upgrades, to free flights. Those associated with credit cards generally include rewards in the form of frequent flyer points. Three programs stand out as the largest and most significant.

2.1 Fly Buys

This scheme began in 1993 and was sponsored by Coles Myer Australia's largest retailer, the Shell Petrol Company, and the National Bank of Australia. Membership is free. Points accrue based on the value of purchases from the three companies and their affiliates (there are approximately twenty participating retailers). Points are collected with everyday retail purchases such as transactions at supermarkets, petrol stations and department stores. Points can be exchanged for air travel, accommodation packages, restaurant dinners, shows and store vouchers. The program is out-sourced. This is the largest loyalty scheme in Australia with over two million households being members.

2.2 Frequent flyer programs

Until recently, the two major domestic airlines in Australia, Qantas and Ansett each operated a frequent flyer program. In September 2001 Ansett Australia went into receivership and frequent flyer members lost their entitlements, although like other creditors they may eventually recover a few cents in the dollar when the company assets are finally sold.

Qantas began offering a Frequent Flyer program to its customers in 1987. The structure of the scheme has altered somewhat over the period since then and the reach of the scheme has expanded well beyond airline passengers. Indeed, many other businesses, especially those offering credit cards, have entered into arrangements with Qantas and have thus been able to reward their customers with points towards free flights.

The program offers the opportunity to earn reward points that may then be used to obtain free air travel or to upgrade airline tickets, as well as other selected rewards, such as car hire and accommodation. Rewards earned by flying with Qantas (or a partner airline) vary with the distance travelled, the class of travel, as well as according to special offers such as double points and the like over certain periods.

In addition, the Qantas Frequent Flyer program, like the equivalent programs of other airlines, uses the accrual of status or tier credits as a second form of loyalty reward, one that can be accrued only through travel. Frequent flyers are differentiated according to their travel frequency and additional benefits are offered to more frequent users (additional luggage allowances, different check-in counters, lounge access and the like).

Like most frequent flyer programs around the world, the Qantas program is linked to various international airlines such as British Airways, Cathay Pacific and American Airlines. Qantas frequent flyers earn points on flights with these airlines. These airlines are described as 'program partners', defined as organisations that fold their brand into another organisation's loyalty program, rather than (or sometimes in addition to) their own loyalty scheme. In addition, there are also 'program affiliates', these enable members of non airline loyalty programs to have the option of transferring points into the Qantas frequent flyer program. Qantas has a large number of credit card and hotel affiliates. It appears that more frequent flyer points are earned from transactions that do not involve purchasing airline tickets than are accrued by those actually flying.

2.3 Coles Myer Shareholder Discount Card

Probably the third largest loyalty scheme in Australia is the Coles Myer Shareholder Discount Card. A somewhat different scheme, this is designed to reward the shareholders who provide equity funds for the company. The scheme was introduced in 1993 and it offer shareholders holding at least

500 company shares a discount of six percent on purchases at all Coles Myer stores, including supermarkets and department stores. Between 1993 and 2001 the number of Coles Myer shareholders increased from 62 000 to 565 000 and of these, 400 000 hold between 500 and 1 000 shares.

In October 2000 the scheme was suspended for new shareholders and in early 2002 it was announced that the scheme would be gradually phased out for all shareholders by 2004.

3. Unilateral conduct

Complaints about any anticompetitive aspects of a loyalty program introduced by a single firm and not involving agreements with other firms are most likely to relate to price discrimination or raising rivals' costs. Section 49 of Australia's competition law, the Trade Practices Act 1974 (TPA), related to price discrimination but was removed in 1995 so these claims would now be assessed under s.46 of the TPA, which prohibits the misuse of market power.

Even if it could be established that the provisions of a loyalty scheme resulted in price discrimination, a number of other conditions would need to be established before action could be taken under s.46 of the TPA. First, it would be necessary to establish that the firm engaging in the price discrimination possessed a substantial degree of market power. In a competitive market there are typically a number of firms selling similar products. Any attempt by one of the firms to sell its product at more than the market price would cause consumers to desert the high priced firm in favour of its competitors. To avoid this, the firm must possess some market power. Nevertheless, whilst there is no requirement to establish monopoly power under s.46, the degree of market power required to engage in price discrimination may be less than what the court would view as 'a substantial degree of market power', the threshold specified in s.46.

Second, it would be necessary to establish that the firm had taken advantage (used) its market power and this requires establishing a causal connection between the firm's market power and its conduct. The High Court of Australia has taken the view that this will be achieved if it can be shown that the conduct at issue would not be commercially rational in a competitive market.

Finally, it must be shown that in engaging in the conduct the firm had one of three proscribed anticompetitive purposes. It is relatively unlikely that the purpose (or a substantial purpose) of a loyalty scheme would be anticompetitive. More likely, the purpose was to gain a long term commercial advantage for the firm and that, it could be argued, is procompetitive.

The only defences available to an alleged breach of the misuse of market power provision of the TPA is to establish that the firm (*1*) does not have substantial market power, (*2*) has not taken advantage of that power and (*3*) did not have an anticompetitive purpose for the conduct. There is no efficiency defence as such but if the conduct is designed to increase efficiency or to protect an efficient arrangement, the court is unlikely to find that the firm has taken advantage of its market power, nor is it likely to find that the firm had an anticompetitive purpose. No exemption is available from the prohibitions contained in s.46 based on public benefit.

Allegations of price discrimination resulting from a loyalty program are not the only claims that could see such programs investigated as an exercise of market power. It might be claimed, for example, that a particular loyalty program, involving only unilateral conduct, locked consumers in to that particular supplier and thereby raised barriers to entry.

A variant of this would be a scheme that offered discounts at an increasing rate as the volume of purchases/sales increased, providing an incentive for exclusive supply/acquisition. This is reminiscent of the concerns that arose in the Hoffman – La Roche case in Europe, and may reflect arrangements common in the travel industry in relation to the commission earned by travel agents.

However, even if it could be established that such arrangements were anticompetitive, this would more likely relate to effect, not purpose. Substantial discounts to large customers, designed to retain their business, may give rise to claims of predatory pricing.

To establish misuse of market power, first, it would be necessary to establish that the price differential was not reflective of lower supply costs to such customers. Secondly, a proscribed anticompetitive purpose would have to be established. Under the TPA even very substantial discounts associated with product promotion would be unlikely to be found to breach s.46 assuming that their purpose was to build the business.

4. Tying, excluding third line forcing

As noted earlier, loyalty programs may be structured such that a purchaser is required to acquire one or more of the other products supplied by the same supplier (or a seller is required to supply the full range). This conduct will be assessed under s.47 of the TPA that prohibits conduct that has the purpose or has the effect or likely effect of substantially lessening competition. Thus, a loyalty program scrutinised under this section will be subject to a competition test, unless the conduct represents third line forcing (see below). Given earlier comments about the likely difficulty of establishing purpose under s.46 of the TPA, the emphasis in any such assessment is likely to be on effect.

Loyalty programs aim to turn consumers into (loyal) customers. This may be achieved in part because the scheme decreases transaction costs, in particular search costs. Transaction costs are those costs incurred as a result of engaging in market exchange. They include the cost of discovering market prices (search costs), the cost of providing market information (advertising), as well as the cost of specifying and monitoring contracts. A customer loyalty program may reduce consumer search activity by reducing the perceived benefits from it. The market price of a product becomes less relevant to the consumer who is a member of a loyalty program as the true price is one that also takes account of the ultimate reward available when points are redeemed for free flights or upgrades, or some other benefit.

With less price transparency in the market, the market mechanism may work less effectively. The consumer may regard the product as more valuable at the market price (possessing a greater consumer surplus) because in purchasing a particular product now, in future he/she will be entitled to product free of charge or at a discount. If consumers engage in less search, they may be unaware that others are offering cheaper prices. If this is the case, the price differential required to cause substitution of one source of supply for another may be considerably larger than in the absence of the scheme. This may raise barriers to entry into the relevant market, particularly where program members have incomplete information concerning the value of the scheme to them or overestimate its value.

Switching costs are those costs incurred when a consumer or producer shifts from one product to another or from one source of supply to another. A loyalty program is likely (indeed has the purpose) of raising switching costs. Switching between suppliers may mean slower accumulation of points, especially when there is a limited period for redemption of points after which points are lost, or reduced access to some other reward.

Against these considerations, loyalty schemes may help a firm to build its customer base thereby conferring economies of scale and possibly of scope. In addition, a more stable customer base may encourage investment resulting in better quality and/or cheaper products that better meet consumer requirements. However, unless it can be shown that these efficiency benefits are procompetitive, they would not be considered as part of a competition assessment of a loyalty scheme.

There is, however, provision for exemption from s.47 in the form of authorisation or notification (see below).[1] It appears that there has been no litigation under this section involving a loyalty program, nor have their been any notifications.

5. Third line forcing

Third line forcing is caught under s.47(6) of the TPA and it is a *per se* offence. Thus, if a loyalty scheme intends to link the products of two companies, to avoid being in breach of the TPA, authorisation could be sought, or the conduct may be notified. The role of authorisation or notification is to enable the proposed conduct that would or could otherwise be in breach of Part IV of the TPA (relating to restrictive trade practices) to be granted an exemption. The basis for this exemption is that the conduct creates sufficient public benefit that it is desirable, even though it may also give rise to some anticompetitive effects (public detriment). There are three separate authorisation tests in the TPA but in relation to third line forcing, authorisation will be granted if there is such a benefit to the public that the conduct should be allowed.

The TPA provides no definition of the term 'public benefit'.[2] Absent a statutory definition, understanding of the term "public benefit" in the context of the TPA has come mainly from the authorisation decisions of the courts, Trade Practices Commission (now the ACCC), and the Trade Practices Tribunal (now the Australian Competition Tribunal). On this basis, public benefit is assessed against a broadly interpreted consumer welfare standard. Essentially this means that to the extent that conduct increases producer welfare only, it will be judged as not giving rise to a public benefit, although clearly it is likely to produce private benefits. However, in applying a consumer welfare standard, care should be taken that the indirect effects of the conduct that produces the private benefits are not ignored, as often these effects result in significant benefits to consumers.

In relation to third line forcing, the ACCC states in its published guide on the subject that:

- The Commission is unlikely to be concerned where potential purchasers have a genuine choice, based on quality and price, whether or not to purchase product A alone or to accept the supplier's third line forcing terms for the package of products A and B.

- In particular, third line forcing conduct under which customers can buy the package of products of A and B at a real saving on the total price of the products bought separately in competitive markets, has positive benefits in terms of competition and consumer welfare and would not be opposed by the Commission.

Several notifications have been lodged in relation to third line forcing arising from the operation of loyalty programs. These are briefly outlined below.

5.1 Australian Independent Retailers Pty Ltd Notification (trading as Woolworths + Plus Petrol' or Safeway + Plus Petrol')

Australian Independent Retailers (AIR) is a wholly owned subsidiary of Woolworths, engaged in business as a petroleum operator and seller of petrol and other fuels. It was proposed that sales of petrol would be offered at a discount (2c per litre off the displayed price) subject to a condition requiring the purchase of grocery products to a value of no less than AUD$30 from Woolworths or Safeway supermarkets. As the two companies were separate legal entities, although both were subsidiaries of Woolworths Limited, the proposed arrangement was technically third line forcing.

The applicant claimed that the arrangement was neither anticompetitive nor against the public interest because:

- the tie between petrol and groceries would be clearly disclosed;
- consumers would continued to have a wide choice of purchase options in the fuel market;
- the company should be allowed to present a package offering, as well as supplying each product separately, given that the two companies, are subsidiaries of Woolworths Limited;
- consumers would still able to buy petrol and groceries separately;
- AIR did not possess market power in petrol retailing (it competed with four major oil companies).

It was claimed that the proposed arrangement conferred a benefit on the public because:

- those taking up the offer would obtain cheaper petrol;
- AIR had only a minimal share of petrol sales so the proposal could not be anticompetitive;
- competition among petrol sellers would be enhanced.

In October 1996 the ACCC decided not to oppose Woolworths' petrol notification. The ACCC regarded the entry of Woolworths into petrol retailing as pro competitive and likely to encourage restructuring of the petrol industry. However, the ACCC required any conditions attached to supply (such as the minimum AUD$30 purchase of groceries) to be clearly and openly displayed.

5.2 BankWest

In May 2000, the ACCC granted immunity to BankWest for an agreement with Ansett Australia in relation to a home loan product to be offered by the bank to be linked to Ansett's frequent flyer program. Members would earn points upon the drawdown of a specially designated home loan, as well as on the anniversary of the initial loan drawdown so long as the loan remained outstanding. Consumers would not be compelled to acquire both products together; they could acquire each separately but without the relevant frequent flyer points.

It was argued that the arrangement was unlikely to have an adverse impact on competition because:

- BankWest did not have a major share of the national home loan market;
- Ansett was in competition with Qantas in the national market for the provision of air passenger transport services; and
- each airline has a frequent flyer program.

The public benefit claimed for the arrangement was that it was a competitive response by BankWest and Ansett to existing Qantas arrangements.

5.3 Qantas Airways Ltd

In November 2001, Qantas lodged a notification with the ACCC in respect of exclusive dealing arising from the offer of discounted Qantas frequent flyer membership and 1 000 Qantas frequent flyer point to Diners Club members applying to become new Qantas frequent flyer members during the first year of the relaunch of the Diners Club loyalty program. (Diners Club had previously been aligned with the Ansett Australia frequent flyer scheme, but Ansett had gone into receivership in September 2001).

Diners Club proposed to offer its card holders the opportunity to participate in Diners Club Rewards and earn points for each dollar spent with the card. Diners Club members would be able to redeem rewards points for services or products that Diners Club purchased from or arranged with various suppliers. In its application Qantas noted that similar loyalty programs are offered by many financial institutions in connection with their credit and charge cards. The arrangement between Diners Club and Qantas was intended to enable Diners Club members to convert their reward points into Qantas frequent flyer points at the option of the member. However, to earn frequent flyer points, it is required that the Diners Club member became a member of the Qantas Frequent Flyer Program. Although anyone can become a member of the Qantas Frequent Flyer Program, the membership fee is AUD$82.50. Qantas agreed to offer Diners Club members seeking Frequent Flyer membership a discounted fee of AUD$50 and to supply 1 000 Qantas Frequent Flyer Points to each new member.

Whilst Qantas stated that it viewed the arrangement as outside of the scope of s.47(6), it nevertheless notified the ACCC of the arrangement. The application argued that there was not likely to be any adverse effect on competition as the market for credit and charge cards is highly competitive. It made no comment on competition in the market for passenger air services in Australia (it did not narrow the market down to air passengers). However, it stated that some but not all airlines offer frequent flyer programs and that the discounts were not likely to have a detrimental impact on competition in the air services market as the offer could be easily replicated by others. The benefits claimed were lower cost membership and increased competition in the credit and charge card market. The notification was not challenged by the ACCC.

6. Consumer protection issues

There has been no litigation in Australia arising out of the establishment and operation of customer loyalty programs. However, one of the problems created by these schemes is the expectation that they create the potential for claims of misleading and deceptive conduct pursuant to s.52 of the Trade Practices Act. This section states that:

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

More specifically, s.53(c) of the TPA prohibits representations concerning performance characteristics, uses or benefits that services do not have.

Some claims of misleading and deceptive conduct concerning the operation of customer loyalty schemes have been made, that relate mainly to the award of frequent flyer points.

In June 2000 the ACCC announced that in response to a stream of complaints, it would investigate the frequent flyer schemes of the major airlines. In particular, concern was expressed about whether there was adequate disclosure of the terms and conditions relating to the frequent flyer programs. The main complaint received related to the inability to redeem points due to lack of available seats. Offering rewards without intending to supply them as represented may be misleading and deceptive and may give rise to litigation under s.52 of the TPA. In response, the airlines stated that frequent flyer points are offered on the basis that there are restrictions and that these are clearly disclosed.

In March 2001, Qantas announced significant changes to its frequent flyer scheme. These included points to be accrued on miles rather than on kilometres flown, an increase in the points required to earn certain reward flights (e.g. the 30 000 points required for a round Australia air ticket was increased to something more in the vicinity of 90 000 points, depending on the number of stops during the journey), but points would no longer have an expiry date while members remained active. These changes resulted in significant benefits for some members, but losses for others. In this context, the ACCC again investigated consumer complaints about:

- the limited availability of frequent flyer award seats;
- the airlines' cancellation with limited notice of specific reward offers;
- frequent flyer program customer service levels and standards; and
- the blackout periods for flight awards.

Whilst the ACCC worked with Qantas to achieve greater simplicity and clarity of the scheme, the ACCC's investigation is continuing.

Clearly, changes to loyalty schemes can cause complaints. In January 2001 the ACCC announced its findings in relation to claims that customers had been misled by an offer based on purchases from Shell service stations and Best Western motels and hotels. The offer was for 2000 bonus Fly Buy points for customers who spent a minimum of AUD$100 within the promotion period spread over the two. However, the promotional material failed to make this clear and customers believed they were entitled to the points based on minimum purchases from one of the two rather than both. Some 34 000 customers were affected and they were compensated with the 2 000 points, worth around AUD$20 each, thereby costing a total of around AUD$700 000.

7. Conclusions

Loyalty programs are a marketing tool intended to attract new customers and to help retain them by enhancing the value of the firm's offering. They are part of the firm's strategic positioning in the market and although they may in certain circumstances have anticompetitive effects, this may not necessarily be their purpose.

The operation of major loyalty schemes in a small economy like Australia may have different consequences for competition than in large economies where there are more competitors in particular markets and a greater range of independent loyalty programs. Economies of scale and/or scope may restrict the number of independent schemes to just one or two. In Australia, loyalty schemes are heavily oriented towards the major domestic airline, Qantas. Although there does not appear to be any restriction on other companies affiliating their loyalty program with Qantas, the programs have ceased to be a point of differentiation. The costs of affiliation are not publicly available but they are certainly passed through to customers whether or not they wish to participate in the company's loyalty program. Further, recent experience in Australia indicates that changes to program arrangements or concern on the part of members that the program is not operating as promised, may result in significant adverse publicity for the company concerned or may be found to result in misleading or deceptive conduct. It seems that there has been little research to discover whether the substantial costs associated with the operation of a major loyalty program actually yield a net benefit either to the firm or the customer.

NOTES

1. Authorisation may be sought from all sections of Part IV of the TPA except s.46. Notification is only available for s.47 and differs from authorisation primarily in that the onus is on the ACCC rather than the applicant to show that the conduct does not confer a net public benefit.

2. Nevertheless, when s.50 of the TPA was amended in 1992, to change the competition test from dominance to a substantial lessening of competition, export development, import replacement and other impacts on international trade were mandated as public benefits to be taken into account when determining whether to authorise a merger.

BRAZIL[1]

1. Introduction

Fidelity discounts typically link lower prices to an increase in the share of a buyer's requirements sourced with the discounter. Some fidelity discounts explicitly refer to shares of buyer requirements; others do not but clearly have the same effect of rewarding loyalty. The simplest form of fidelity discount is a percentage discount that grows with the quantity purchased, where the threshold quantities are chosen with some notion of the buyer's normal requirements in mind.[2]

Although the Brazilian legislation provides no definition of loyalty or fidelity discounts and rebates, the analysis of these practices doesn't differ from the analysis of vertical conducts, more specifically, fidelity discounts can be understood as a type of second-degree price discrimination, in other words, this type of price discrimination occurs when prices differ depending on the number of units of the good bought, but not across consumers.

The second-degree price discrimination is also known as non-linear pricing, since it means that the price per unit is not constant, depending on the amount that one buys. Each consumer faces the same price schedule, but that schedule involves different prices for different amounts of the good purchased. Quantity discounts or premia are the obvious examples.[3]

If the consumer with the highest demand pays a price in excess of marginal cost, the monopolist could lower the price charged to the largest consumer by a small amount, inducing him to buy more. Since price still exceeds marginal cost, the monopolist would make a profit on these sales. Furthermore, such a policy wouldn't affect the monopolist's profits from any other consumers, since they are all optimised at lower values of consumption.[4]

In addition, some types of fidelity discounts can also be interpreted as a type of exclusive dealing, another vertical restrictive practice, even if there is not any type of formal commitment from the buyer and/or from the firm, in other words, there is nothing that forces the buyer to acquire certain goods or services from a single supplier, but there is an incentive in remaining faithful since larger benefits are acquired, either in terms of discounts, better terms of payments, prolongation of periods, or some other type of benefit.

The Brazilian legislation submits vertical restrictive practices to a judgement based on the rule of reason. Such procedure possesses a solid economic justification, given that:

- these kinds of practices generate anticompetitive effects only if certain conditions are present in the relevant market;

- these practices frequently incorporate contractual mechanisms that augment economic efficiency in the co-ordination of the agents' located at different stages of the value chain.

1.1 Legal Framework

The Brazilian Antitrust Law (Law #8884) is recent, from 1994. There is no definition of fidelity discounts, but article 20 says:

1.1.1 Article 20. Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order:

- to limit, restrain or in any way injure open competition or free enterprise;
- to control a relevant market of a certain product or service;
- to increase profits on a discretionary basis; and
- to abuse one´s market control.

1.1.2 Article 21. The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:

- to pose difficulties for the establishment, operation or development of a competitor company or supplier, purchaser or financier of a certain product or service;
- ...
- to discriminate against purchasers or suppliers of a certain product or service by establishing price differentials or discriminatory operating conditions for the sale or performance of services.

2. Possible Anticompetitive Effects and Efficiencies

2.1 Possible Procompetitive or Efficiency Effects of Fidelity Discounts[5]

In addition to immediately benefiting buyers, a fidelity discount could have an efficiency enhancing effect if it reduces transaction costs. The same could be true, however, of a straightforward quantity discount not having a fidelity aspect. Potential efficiencies that are less obvious but more exclusively linked with fidelity discounts include things like reducing sales variability thereby tending to promote investments in new or improved capacity while simultaneously reducing the needed amount of inventories or the amount of surplus production capacity maintained to meet peak demands. In addition, fidelity discounts might be a good way to spread fixed costs by taking account of the fact that buyers' price elasticities of demand normally increase with the quantity purchased. Fidelity discounts might moreover permit other forms of efficiency enhancing price discrimination, especially in markets where suppliers have substantial fixed costs. Finally, fidelity discounts could be used to achieve the same efficiencies sometimes associated with exclusive dealing and tied-selling.

The probability and significance of procompetitive or efficiency effects associated with fidelity discounts depend heavily on how the discounts are structured and on certain market characteristics.

2.2 Possible Anticompetitive Effects of Fidelity Discounts

Fidelity discounts tend to raise switching costs and could therefore affect the existence and magnitude of the discounter's market power. They could also, for reasons analogous to some exclusive dealing arrangements, constitute a facilitating practise when found in certain oligopoly markets. In addition fidelity discounts could amount to *de facto* introduction or maintenance of exclusive dealing or bundling/tying arrangements. Such practices, if they are sufficiently wide-spread in a market or undertaken by firms enjoying significant market power could have anticompetitive effects if they significantly constrain existing new firms or raise barriers to entry (including switching costs). There could also be cases where fidelity discounts are structured in such a way that they amount to below cost selling on sales at the margin, thereby having the same effects as predatory pricing. In addition, there might be instances where fidelity discounts enable firms to engage in price discrimination having net anticompetitive effects. Finally, in markets where economies of scale or network effects combined with high switching costs are so significant that competition is better described as "for" rather than "in" the market, i.e. the markets are prone to a "winner takes all" outcome, fidelity discounts have the potential to short circuit competition. The result could be that a firm obtains the whole market without necessarily being the most efficient supplier.[6]

As with procompetitive effects, the probability and significance of anticompetitive effects associated with fidelity discounts depend heavily on how the discounts are structured and on certain market characteristics.

In the specific case of exclusive dealing, in fact, it is an alternative way of accomplishing vertical integration – it is a "contractual" integration. And just as vertical integration concerns the courts because of possible foreclosure of rivals, exclusive dealing is believed to have the same anticompetitive effect. On the other hand, just as vertical integration is often the most efficient organisational form because it reduces transactions costs, the same can be said in favour of exclusive dealing.[7]

The foreclosure of rivals and potential competitors happens when: *a*) the firm that implements the practice increases its market power when hindering consumers' access to competitors' products; *b*) the entry barriers are higher with the practice, since an eventual entrant would have to invest in two stages of the productive chain, or to incur co-ordination costs to guarantee the simultaneous entrance of new distributors (that are not committed, by contracts, or through incentives - fidelity discounts, for instance - with the suppliers already existent).

When this happens at the distribution level, the foreclosure of rivals generated by the exclusive dealing can be expressed in terms of raising rivals' costs: (*i*) costs of vertical integration, referring to the assembly of a distribution net; or (*ii*) search costs and of coordination with alternative distributors, not involved in the practice, necessary as much for the producer as for the potential entrant excluded from the distribution chains.

For foreclosure of rivals to generate significant damage to competition it is necessary that two conditions be met: (*i*) existence of market power (dominant position) on the part of the firm that implements the practice; and (*ii*) that the portion of the market reached by the practice be significantly large.

3. Some cases of fidelity discounts in Brazil

In Brazil, the practice of fidelity discounts is common in certain markets such as:

- the mileage programs (frequent flyer programmes) offered by the main Brazilian air companies. In those programs, generally the members accumulate bonus points when making trips or purchases with the airline carrier, with one of its alliance partners, or with other business associates, such as credit cards, hotels, car companies and restaurants. The number of points accumulated varies with the distance and with the fare class. When a certain amount of points is accumulated, they can be exchanged for free air tickets, hotel accommodation, service upgrades etc.

  We can understand such practice as a quantity (volume) discount, as in the second-degree price discrimination, where, for instance, to each ten accomplished trips, the consumer wins a trip free.

  It is important to mention that this kind of mileage program was common in the Brazilian air market even when this sector was totally regulated. Last year, the air tariffs were deregulated and the prices became free.

  At the present moment, there are two main air companies in the Brazilian passenger carriers market and, last year, we had a new entrant in this market. In only one year, this new air company, called Gol, already achieved four percent of the market. Gol does not have a frequent flyer program since it concentrates its services in the economic class, but this is already enough evidence that this program is not a significant barrier for new companies to enter the market.

  As the Brazilian Competition System (SBDC) never analysed any conduct of fidelity discounts, to garantee that this kind of practice would not be harmful to competition or to the Brazilian consumer, a deeper analysis would have to be done, based on the rule of reason. But, at first, it seems that it would not be harmful to the consumer.

- another example is a fidelity program offered by automobiles´ assemblers. Fiat, for instance, presented the pioneer program in the Brazilian automobile sector, the “Revisão Fiat Fiel”, that works in the following way: whenever the consumer purchases his programmed maintenance within the Fiat dealer network, he receives a stamp that is worth discounts. With that stamp, the consumer receives discounts on labour and parts the next time that he purchases maintenance or repairs from the dealer. At each programmed maintenance visit, the stamp is changed and the consumer is entitled to progressive discounts that can reach up to 50 percent in labour and eight percent in parts.

  Usually, after the consumer acquires an automobile, he becomes “hostage” to that assembler, since it is not a common practice in the market for one dealer to render maintenance or repair services for automobiles not carried by the dealer. Therefore, this fidelity program practised by Fiat tends to benefit the consumer, given that he no longer has the option of choosing the services other than those offered by one of Fiat’s concessionaries.

- there is a fidelity card denominated "Smart Club", where the consumer accumulates points whenever he makes purchases in the associated establishments in the program, being able, depending on the amount of accumulated points, to exchange these for several types of prizes. Smart Club is an award form that gives points to all customers without contests or lotteries. Being faithful or, in other words, concentrating your purchases on the establishments and participant companies, the consumer accumulates points in the Smart Club card and when he has the requisite number of points, he can exchange them for several prizes. Such practice, in theory, does not harm the consumer, since it is not prevented from

buying from other firms not associated to the program, but is awarded prizes that the program offers.

– finally, also very common in Brazil are quantity discounts practised by the publishers of newspapers and magazines in their subscriptions. Usually, the longer the period of the subscription, the lower is the unitary value of the publication.

Example of a subscription of a magazine of great circulation in Brazil

	2 YEARS	**1 YEAR**
A single copy costs today	R$ 4,90	R$ 4,90
Buying detached, you would pay	R$499,80	R$ 249,90
With a signature, you win a discount of	18%	12%
Only one payment	R$ 409,50	R$ 219,00
Through debit or credit card	**9x R$ 45,50**	**6x R$ 36,50**
Through bank deposits	5x R$ 81,90	3x R$ 73,00

Even with a subscription, the consumer is not prevented from buying other publications, more important, the Brazilian Consumer Defense Law (Law # 8078) establishes that if the consumer needs (or wants) to cancel the contract, he has the right to receive proportionally what he has already paid for and has not yet received. It seems that this practice does not harm consumers since they do not incur any "exit cost", but it seems to be beneficial once the publication' price per unit is lower.

4. Conclusion

The Brazilian Competition System has never analyzed any fidelity discounts. However, as mentioned previously, the analysis, in theory, would be similar to the one applied for other vertical restrictive practices, such as price discrimination and exclusive dealing, based on the rule of reason, confronting anticompetitive risks with possible efficiencies. In case the costs are superior to the benefits, the conduct should be condemned.

In all those markets mentioned previously, where the buyer is the final consumer, the practice of fidelity discounts is very common and, at first, it seems that none of them would be harmful to the consumer. However, to guarantee this practice would not be harmful to competition or to the Brazilian consumer, a deeper analysis would have to be done, based on the rule of reason.

On the other hand, if the practice happens between a supplier and a distributor, or between a supplying company of inputs and another that consumes the input and transforms it in a "final product", the practice can generate anticompetitive effects, such as foreclosure of rivals and higher entry barriers. However, so that such effect of foreclosure of rivals is verified and that it generates significant damages to competition it is necessary that two conditions be present: (*i*) existence of market power (dominant position) of the firm that implements the practice; and (*ii*) that a significant portion of the relevant market is affected.

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CHINESE TAIPEI

1. Introduction

Chinese Taipei's Fair Trade Law (the FTL) was enacted in 1992. The FTL covers a wide range of antitrust as well as unfair competition concerns. The antitrust part of the Law includes: abuse of monopolistic (oligopolistic) position; mergers where detriment outweighs public benefit; horizontal agreements; resale price maintenance; vertical restraints which are likely to restrain competition or obstruct fair competition.

Although the FTL does not have specific provisions on fidelity discounts, Article 19 of the Law does prohibit any enterprise causing the trading counterpart of its competitors to do business with itself by coercion, inducement with interest, or other improper means where such actions are likely to lessen competition or to impede fair competition.

The Fair Trade Commission (the FTC) interprets the meaning of "inducement with interest" as enterprise taking advantage of the customers' propensity toward luck and instant profits, so that the enterprise could entice customers rather than using quality, price, and service to vie for customers.

In 2000, the FTC, facing the liberalisation of the telecommunications industry, when issuing its Notes for Regulating the Telecommunications Industry, considered the abovementioned rules and the characteristics of that industry, defines "fidelity discounts" as "discount offered to customers that is accompanied by provisions prohibiting the customers from switching trading counterparts, or to big discount offered to customers who might switch trading counterparts, so as to prevent such switches. Since specific enterprises use such discounts to "lock on" to customers, trade opportunities of competitors are thus restricted."

2. Procompetitive or Efficiency Effects of Fidelity Discounts

How competition authority views the fidelity discount is very important in promoting competition. If the competition authority wants to decide whether certain fidelity discounts could achieve procompetitive effects, such as ensuring effective price competition and minimizing the instability of the manufacturer's sales volume and inventory problems, it has to carefully analyse the structure of the relevant market first.

If the competition authority can elucidate clearly the structure of the market concerned, clearly state the types of fidelity discount that might be unlawful, and not excessively restrict promotions that foster competition, then the market could possibly enjoy the benefits of fidelity discounts through a well-functioning market mechanism.

In Chinese Taipei, for example, there are a large number of banks issuing credit cards to individual customers. That relevant market's concentration is very low. Credit card issuing banks used to deploy fidelity discounts like doubling bonus points for using credit card to consume beyond a certain

amount, or waiving annual fee for using that card every month to entice customers. The FTC is convinced that the fidelity discounts deployed by banks in the credit cards market could create competitive advantage, improve brand loyalty, and foster competition among the brands.

3. Price discrimination

Although price discrimination might erode consumer surplus and allows firms to gain more profit, it can also stimulate consumption, reduce dead-weight loss of social welfare, and improve the business efficiency of a firm. For these reasons, price discrimination is not deemed *per se* illegal in Chinese Taipei.

Dominant enterprises that use fidelity discounts to implement price discrimination may claim it provides the following benefits: price discrimination allows consumers more choices, the different combinations of quantity and price stimulate the consumers' willingness to consume, price discrimination increases sales volume which in turn increases use of manufacturing resources, price discrimination does not tie customers to specific enterprises, and competitors can continue to participate in competition.

3.1 Exclusive dealing arrangement

Enterprise can achieve exclusive dealing arrangements through fidelity discounts. For instance, special discounts or reward money may be given for transactions reaching certain amounts, special discounts may be given when regular transaction is maintained over a certain period, or special discounts may be given in restricting the distributors' sales territory.

In determining whether exclusive dealing arrangements are unlawful, the totality of factors such as the trading method used, intent, market position, characteristics of the goods, and the impact of such restrictions on market competition should all be considered. In market where there is no dominant firm, exclusive dealing arrangement could enhance inter-brand competition, and therefore should not be deemed as *per se* anticompetitive.

4. Anticompetitive Effects of Fidelity Discounts

From the perspective of economic efficiency, although fidelity discounts can stabilise the production and trade relations of an enterprise and effectively reduce inventory, it could still easily influence the buyer to take advantage of the discount and purchase too much goods just to avail of the discount. If the sales channels cannot be increased correspondingly or if there is no increase in the number of end-consumers, the excess inventory will become a waste of resources, which distorts the efficient allocation of resources.

Fidelity discounts that are anticompetitive rather than procompetitive readily exist in an oligopoly market. Enterprises enjoying dominant positions often use such discounts to eliminate competition. If the fidelity discounts deployed by dominant enterprises are accompanied by penalty provisions for violation of contract, and if the cost of such penalty is obviously higher than the cost of changing transaction partners, the customer will be "locked" to the enterprise. Such fidelity discount is obviously anticompetitive and should be prohibited.

5. Price transparency

The mechanics of fidelity discount are sometimes complicated, it is easy to disguise the unit price of products or services and difficult to realise competition through quality and performance. Besides, due to the characteristics of asymmetric information, the seller can usually discriminate against disloyal buyers. Such instances will alter the buyer's purchasing decision and indirectly affect fair competition in the market.

When a dominant enterprise in the market offers discounts, it should also provide reasonable, generalised, non-preferential trading conditions to enable the consumers to make price comparisons among the different suppliers and make the most appropriate choice.

6. Policy Issues

Exclusive dealing arrangements or vertical agreements are not considered *per se* illegal in Chinese Taipei. In accordance with Article 25 of the Implementing Rules to the Fair Trade Law, in determining whether such restrictions are improper, the Fair Trade Commission should consider factors such as the enterprises' intent, purposes, market position, the structure of the market, the characteristics of the goods, and the impact of carrying out such restrictions on market competition.

More attention should be given to fidelity discounts offered by enterprises with substantial market power. During the initial stages of market liberalisation, such fidelity discounts are at risk of impeding new enterprises to access markets.

For fidelity discounts widespread in the market, if there is low market concentration, low switching costs, and high transparency in pricing, then fidelity discounts may be considered as a means of enhancing price competition and does not cause competition concerns.

Measurement of the anticompetitive and procompetitive effects of fidelity discount may differ due to the market structure, product characteristics, and trading habits involved in the case at issue. It is difficult to clearly formulate a definite standard. But if the discount provider attempts to use long-term contract to exclude new players from the market, or use the high cost of switching products or service providers to discourage the buyer from switching, such acts should be construed as detrimental to competition or to the consumers.

7. Predatory pricing

Predatory pricing is uncommon in real business operations. Although methods to determine predatory pricing exist in theory, violations are rarely found because calculation of cost is difficult. If the average selling price of a supplier is higher than the cost, even if the marginal sales are lower than cost, profit is still possible; hence, such practice conforms to normal business pricing. The increase in sales should be considered as an effective use of production capacity, and not subject to reproach.

In industries that derive benefits from joint production (also known as economies of scope) such as the telecommunications industry, if the marginal sales are lower than the cost, its effect on market competition has to be examined to determine whether the practice is an effective use of production capability or an attempt to eliminate competition.

Based on Chinese Taipei's experience in handling such cases, enterprises with substantial market power that offer fidelity discounts could not be exempted from the application of the Fair Trade Law. Enterprises offering fidelity discounts should present concrete defence demonstrating that the discounts are cost-justified or showing that the discounts have been adopted to meet competition.

To ensure the competitive benefits of fidelity discounts and minimize their adverse effects on competition, the Commission carries out investigation and legal analysis focusing on the buyers' cost of changing trading counterparts and on whether competition is restricted during the discount period.

8. Case: Petroleum Market

When Chinese Taipei officially abolished its restriction on petroleum import in 2002, both incumbent suppliers, Chinese Petroleum Co. and Formosa Petrochemical Co., attempted to sign long-term supply contracts, for ten to 15 years, with gas station operators on very favorable terms before the government's policy came into effect. If the contract period can extend into the period of liberalisation, then new players will be excluded from the markets, considering there would be few gas stations selling the new brand. The intention of eliminating competition is thus apparent and the fidelity discount has been used anticompetitively.

To ensure free and fair competition in this newly liberalised petroleum supply market, the FTC explicitly stated its position that the effective period of petroleum supply contracts between the suppliers and gas station operators shall not extend into the period after the liberalisation of petroleum product imports. The gas station operators have the right to re-negotiate with the new providers of petroleum. Otherwise, it might cause competition concerns and the FTC would open its investigation right away. The measure adopted effectively prevents the exclusion of new players from accessing the petroleum market and protects the objectives of the liberalisation policies.

9. Case: Telecommunications Market

Another example is the telecommunications market. After Chinese Taipei liberalised its fixed line services market in 2001, operators were able to provide local telephone services in addition to long-distance and international telephone services. Prior to market liberalisation, the incumbent Chunghwa Telecom was the sole fixed line operator in Chinese Taipei.

In vying for large-account customers, the company offered different preferential plans to subscribers who enter into one-year, two-year, and three-year subscription contracts for its international telephone service and who agreed to maintain specific amounts of usage. However, subscribers who fail to maintain a specific amount of calls or terminate the contract prematurely had to compensate Chunghwa Telecom an amount equivalent to a specific percentage of the discounts received.

In determining whether the fidelity discount in this case was unlawful, the Fair Trade Commission examined whether the penalty for breaching or terminating the contract was higher than the cost of switching service providers, or whether subscribers are protected by law to ensure their freedom to switch service providers.

If the subscribers had no obvious difficulty in changing service providers, Chunghwa Telecom's long-term contract and the cost of switching service providers would not have actual restrictive effects after market liberalisation. Since the new fixed line service providers still could win over subscribers through quality and pricing, such preferential discount had limited anticompetitive effects.

In the case relating to the telecommunications market, the FTC reminded Chunghwa Telecom and requested it to abide by the Telecommunications Law after other fixed line service providers have entered the market. Chunghwa Telecom was likewise reminded not to impose penalties for breach of contract on customers who wish to switch service providers, so that the consumers can freely change their trading counterpart to ensure fair competition in the telecommunications market.

FINLAND

1. General introduction

1.1 Legal framework

The Finnish Act on Competition Restrictions includes a ban (Article 7) on the abuse of a dominant market position, defining such abuse as, among other things:

- the application of business terms that are not based on fair trading conditions and that restrict;
- the freedom of action of the customer; and
- application of a pricing practice that is likely to be unreasonable or likely to restrict competition.

The provision sets forth certain limits for the behaviour of a company enjoying a dominant market position and it may be applicable to fidelity discounts as well.

However, intervention in the matter of fidelity discounts or other anticompetitive rebate schemes may not necessarily be limited to the pricing practice of dominant firms only. Based on Article 9 of the Competition Act, actions may be taken in respect of rebate schemes, applied by any company or companies, if it, in a manner inappropriate for "sound and effective competition", decreases or is likely to decrease efficiency within the economy, or prevents or hinders the conduct of business by another (rule of reason approach).

Under this provision, the Market Court (formerly the Competition Council), on proposal by the Finnish Competition Authority (FCA), may forbid the application of anticompetitive practice if such restrictions are not lifted voluntarily as a result of negotiations between the FCA and the company applying the restrictions. The application of this provision is usually conceivable if the company applying such competition restrictions exercises at least some market power, or if it is a matter of the cumulative effects of several companies applying restrictions in a given commodity market.

1.2 Definition of fidelity discount

The Act on Competition Restrictions provides no definition of a fidelity discount. On the other hand, discounts that promote customer loyalty are not automatically forbidden by the Competition Act (i.e. no *per se* prohibition in the law itself).

As a methodology, it is a useful tool to divide discounts into fidelity discounts, tying discounts, target rebates etc., but we are of the opinion that legal consequences should not be associated with mere

definitions. Instead, any arrangement is clearly reprehensible, from the point of view of competition, if a discount granted in practice by a company exercising considerable market power treats buyers purchasing identical volumes and incurring identical costs differently, by rewarding those who purchase all or a greater part of the commodities they need, in proportion to their total purchases, from the company granting the discount. On the one hand, such practice leads to a distortion in the competitive position of the client companies, and on the other hand, it may restrict the freedom of action of the competitors of the company granting the discount. Depending on the scale of market power involved, it is either a matter of an abuse of dominant market position or a matter of an arrangement subject to the scope of application of the rule of reason principle expressed in Article 9.

According to Finnish legal praxis, if a company enjoying a dominant market position charges different prices to different customers, the main issues considered are that the dominant company does not thereby exclude competitors artificially, that it does not discriminate among its trading partners by contributing to a distortion of competition in the downstream market, and that prices are not set arbitrarily (e.g. lack of transparency, predictability, and consistency). For the sake of clarity, it should be pointed out, however, that competition law is not designed to serve as a price control tool.

> "Considering the objectives and purpose of the Act on Competition Restrictions, the Competition Council is not in a position to determine a "right" or maximum price to be charged by a business undertaking for a given commodity" (FCA/Helsinki Energy, Competition Council decision 18.6.2001).

1.3 Cost-based requirement

In dominance cases, the rule of thumb in the rulings handed down by the Supreme Administrative Court is cost accountability. The price charged to each individual customer for a commodity must correspond to the cost incurred by the seller for the inputs required for manufacture and sales. An exemption from cost accountability is allowed only if it is necessary in order to ensure competition and the equality of competitors, or if an accurate definition of costs would be an exhausting task considering any potential benefits. Even so, the discounts must be clearly identifiable, definite and reasonable and may not be used to artificially distort mutual competition between customers of different sizes (Supreme Administrative Court, SAC in Neste/SEO case 30.11.1995).

1.4 Burden of proof

Another issue concerning the acceptability of rebate schemes relates to the burden of proof in court proceedings. A company in a dominant market position is required to present the criteria for its rebate scheme so clearly as to permit an evaluation of the legality of pricing. After this, the Finnish competition authorities are obliged to show that the pricing system is contrary to the law (Competition Council in the matter of Valio 24.10.1997).

For instance, in the above-mentioned case of Neste vs. SEO (1995), the SAC first of all held that a company in a dominant position may, in principle, differentiate prices, for example in the form of a functional or integration discount. However, the company failed to submit a report to either the FCA or the SAC that would have allowed them to evaluate the general criteria for the acceptability of the rebate scheme applied by this dominant firm. Consequently, the defence offered no explanation for the difference in the prices charged to its wholesale customers and, it was ruled that differential pricing constituted an abuse of a dominant market position.

2. Procompetitive or Efficiency Effects of Fidelity Discounts

The position of the Finnish Competition Authority is that it is difficult to link efficiency effects, which are so significant that they would offset the anticompetitive impact, with fidelity discounts of dominant firms. This follows from our basic premise that firstly, a fidelity discount does not fulfil the criteria for cost accountability and, secondly, a central motive for its application is the foreclosure of competitors. However, as far as the FCA is concerned, the threshold for intervention rises when the issue at hand relates less to dominance and more to the sphere of the rule of reason principle (i.e. Article 9 of the Competition Act). Additionally, it is worth noting that, a fidelity discount may also be similar to a quantity rebate, to a binding obligation or to an exclusive contractual obligation, in which case the efficiency arguments may be valid.

In a ruling concerning the footwear business (FCA/Kenkä-Kesko, 27.12.1994), involving the application of the rule of reason principle, the FCA accepted a fidelity discount agreed between the retailers in the chain and the central unit. The central unit acquired the private label footwear for the chain from abroad and granted the retailers a “centralisation” discount, the rate of which was determined by the percentage of the chain's own private label range in the retailer's total purchases. Consequently, the discount led to discrimination - a customer buying shoes from several sources paid more than a customer concentrating his purchases, even if the volumes of purchase from the central unit were equal. The central unit's motive in applying the concentration discount was to encourage retailers to buy the private label products in order to ensure that sufficiently large orders could be place with the footwear factories. In the FCA's case history, the decision to accept the discount was exceptional - normally the central unit would have been required to achieve its purposes by granting discounts based directly on the quantities purchased.

In this particular situation, quantity rebates could not be used. The retail outlets in the chain varied considerably in size. Quantity rebates would not have provided a sufficient incentive for small retailers to buy the private label products, when at the same time their purchases (based on the sheer strength of numbers) would have been decisive in securing mass orders from the footwear factories. Because the FCA found that the “private label range” of this particular footwear chain promoted inter-brand competition and thus there was no reason to assume that the arrangement would distort competition, even in the wholesale market, the discount could be accepted.

3. Anticompetitive Effects of Fidelity Discounts

3.1 Case: Abloy Oy – Lock Business

A central goal or consequence of fidelity discounts is the foreclosure of competitors, and the use of discounts is often associated with efforts to defend a dominant market position or market power in a situation where the party granting the discount fears that its position is being jeopardised by competition. A typical example of a classic arrangement aimed at strengthening customer loyalty is an issue decided by the FCA in 1993 concerning the lock business (Abloy Oy, 23.7.1993).

In this case, a lock manufacturer had a rebate scheme that defined two to three target levels for purchases in a total of ten product categories for lock retailers. To earn the discount granted for the highest target level, it was necessary to attain the highest target level in all product categories. The lock factory defined the target levels specifically for each individual retailer. The lock manufacturer held a dominant position in the market for mechanical lock systems for buildings, but faced competition in the door-closer market. If a retailer had bought door closers from a competitor in numbers that fell short of the target level,

it would have been deprived of discounts in the large-volume lock products and would lose its competitiveness in the lock installation market in various installation projects.

From the point of view of the lock manufacturer, the strategy served two inter-related purposes: firstly, it could extend the market power it wielded in one product market to the market for products where competition was intense, and secondly, it could cut off all competitors from contacts with lock retailers, meaning that a company planning to enter into the market would have been compelled to establish a nation-wide network of installation firms and service outlets. The lock manufacturer ceased applying the rebate scheme but no competition infringement fine could be imposed because the restriction on competition was discontinued before the ban became enforceable.

3.2 Case: Grocery markets

The Finnish Competition Authority has ruled in several cases involving competition restrictions designed to uphold customer loyalty in the grocery trade. In Finland, the grocery markets are highly concentrated, with four groupings accounting for 90 percent of the total volume of business. They operate wholesale companies that handle the procurement of merchandise and organise the retailing chains within the groupings. The wholesale companies possess significant buying power in respect of most food manufacturers.

As a rule, the retailers within the groupings are independent firms and not subsidiaries of the wholesale companies of the groupings. Such a market structure is, in itself, enough to create problems with competition, which are further aggravated by vertical agreements and rebate schemes among the wholesale companies and food processors on the one hand, and among the wholesale companies and the retailers on the other.

Typically, the rebate schemes applied in the distribution channels for perishable goods have two goals: the processing industry grants discounts in order to get its products accepted into circulation, and the wholesale company seeks to ensure the competitiveness of its retail trade. No matter how acceptable these goals were in theory, the practical application of the rebate schemes led to a situation in which the wholesale companies tended to exploit their position as gatekeepers controlling access to the distribution system. To this end, manufacturers granted fidelity discounts to retailers, as a result of which (and other contributing factors) they required that direct deliveries to the shops be billed through the wholesale company. Conversely, the industry sought to ensure the loyalty of the wholesalers by paying compensation in various forms (such as marketing subsidies) and even billing their raw material deliveries to other food processing companies through the wholesalers (e.g. sugar purchases by the confectionery industry).

In the context of this market structure and trading practices, fidelity discounts led, in certain cases, to the foreclosure of competitors, to the distortion of supply relative to consumer demand (particularly in respect of the more expensive products billed through the wholesalers), to a decline in competition on the wholesaling level, as the retailers were unable to test the efficiency of their wholesale supplier by buying their products directly from manufacturers or other wholesalers, and to the concentration of decision-making in the grocery business into four wholesalers, thus resulting in related problems typical of an oligopolistic market.

3.3 Case: PHP - Telecom markets

In August 2002, the Supreme Administrative Court issued a ruling on a regional telephone company named PHP. It held a dominant market position in fixed-line telecommunications in its local area of operation.

Traditionally, local fixed line operators such as PHP have been formed in such a way that their customers are, at the same time, their owners ("owner-customers"). The customers have (in their capacity as owners) invested money in the operator, which has used it for investments in its telecommunications network. In return, the owner-customers have received discounts on telephone charges. The discount has served as a sort of compensation for the investments made by the customer in the operator. In particular, customer-ownership has been typical of operators incorporated as co-operatives.

Over the past few years, many local fixed line operators have later made a clear distinction between a customer relationship and ownership. This means that ownership has no longer been a prerequisite for being a customer. In addition, if the customer also wanted to become an owner, he was paid a normal dividend on the invested capital but has no longer been compensated through a rebate.

PHP, a co-operative and dominant fixed line operator, still decided to act differently. PHP had owner-customers to whom it granted a discount based on ownership. The discount applied to the basic charge for fixed line subscriptions and was only given to PHP's owners.

In August 2001, the Supreme Administrative Court (SAC) ruled that this arrangement constituted a fidelity rebate scheme that was to be regarded as an abuse of dominant market position. One of the arguments for this decision was that the owner discount was not cost-accountable. After the ownership-discount, the basic service charge covered not even the fixed costs incurred by PHP. The SAC held that it was unlikely that PHP's competitors could sell fixed line services at a price that was lower than fixed costs, as PHP was doing. This meant that the owner rebate scheme was bound to reduce the likelihood of PHP's customers switching to another operator and so it complicated entry into the market. The point was that PHP held a dominant market position and offered services for "customer loyalty" at a price that undercut fixed costs.

3.4 Case: Ajasto - Calendar Markets

Until the end of 1994, Helsinki University had the exclusive right in Finland to manufacture, publish, distribute and import calendars in the Finnish language (and Swedish, which is the other official language in the country). The University also had the right to licence these functions to private entrepreneurs. Ajasto was the company, that from 1992 had the licence to exclusively manufacture, publish, distribute and import calendars, until Helsinki University (and thereby Ajasto) lost its exclusive right and the calendar markets became open to competition.

In 2000, the SAC ruled that Ajasto, a company operating in the calendar market, had abused its dominant position in the calendar markets in 1996-1998. Ajasto granted discounts to customers based on total purchases during the preceding year. An Ajasto customer was entitled to a three percent discount if his advance order exceeded 70 percent of the previous year's purchases. This practice was regarded as a target rebate that limited the entry of competitors into the market.

Ajasto defended the practice by arguing that securing advance orders and encouraging retailers to place them was important because of the seasonal character of the calendar market. If Ajasto knew the number of calendar orders in advance, it could better predict required future output, which improved cost-

efficiency. Ajasto argued that, without its advance order system, it would probably have printed ten percent more calendars because it would have no advance indication of the calendar choice that would be in greatest demand.

The Competition Council accepted Ajasto's argument for the usefulness of the advance order system and, in principle, the policy of granting discounts based on advance orders. However, the practice of tying the discounts to the previous year's order volumes (through fidelity rebates) or to targets based on purchase volumes in the preceding year (through target rebates) was found to constitute an abuse of dominant market position because it made it more difficult for other companies to enter into the calendar markets and to set up optional distribution channels. For example, Ajasto had stated in an internal memo that "steps should be taken to prevent the access of competitors to the distribution system". The SAC imposed a competition infringement fine of € 336 000 on Ajasto.

3.5 Case: Vapo - Peat fuel

On 5 September 2000, the Competition Council ruled that Vapo Oy had abused its dominance in the peat fuel market in Finland. Its share of the peat fuel market was then approximately 90 percent (currently 80 percent) and, in reality, most customers requiring peat fuel were compelled to do business with Vapo because the other smaller suppliers could not deliver the material in similar quantities (due peat delivery and thereby output restraints). For example, each of the 30 largest users bought most of their peat from Vapo.

Vapo applied top-slice pricing in its business operations. Firstly, Vapo agreed with the customer on the amount of peat that it would supply per year. When the customer had purchased, say, 90 percent of the agreed annual deliveries, Vapo started charging a lower price for the peat, taking into consideration only the variable cost of its peat production. In other words, Vapo, a company in a dominant market position, set the price of the last ten percent of the peat needed by the customer without taking into account the fixed costs of peat production. At the point when the customers were buying the last ten percent of their peat requirement, Vapo's small competitors were also in a position to compete with these deliveries. However, Vapo's rebate scheme made it clearly more difficult for small peat producers to compete.

Vapo sought to justify this practice with reference to a number of factors related to production costs. The FCA held that, with its rebate scheme, Vapo primarily attempted to bind its customers to Vapo's deliveries. The FCA considered this abuse of dominant market position comparable to fidelity discounts. Subsequently, Vapo modified its policy to the extent that the FCA was able to determine that such abuse had ended.

4. Policy Issues: Meeting Competition Defence

4.1 Case: Valio – Milk products

Valio holds a dominant market position in Finland in liquid milk products. The Competition Council ruled in October 1997 that Valio, by applying a binding rebate scheme, was guilty of an abuse of dominant market position.

Again, the Competition Council stated that it is not permissible for a company in a dominant market position to grant discounts without cost accountability. Apart from binding price-setting, Valio was found guilty of an abuse of dominant market position because it offered marketing subsidies to companies

that could choose between Valio and its competitors. Valio argued that the marketing subsidies were cost-accountable and that the retailers that had received such subsidies had taken marketing action on Valio's behalf.

Valio also argued that the practice was about meeting competition defence. The Competition Council issued the following statement in the matter:

> "Even a company in a dominant market position shall have the right to protect its commercial interests when they are threatened. It is unreasonable to assume that a company holding a dominant market position should act as if its hands were tied in a situation in which a competitor makes an offer to a regular customer of the dominant company. If the principle of cost accountability were rigorously applied, retaining the customer would require that the company reduce its prices charged to customers of similar size across the board to a level that would undercut the competitor's offer, something that is seldom possible in reality. In such an individual concrete case, a company in a dominant market position will have the right, the ban on competition restrictions notwithstanding, to respond to such competition in order to retain the customer involved. However, the measures taken to meet competition defence should be reasonable and aimed at retaining an existing customer relationship. Thus, responding to competition is a defensive action and it may not be abused to punish smaller competitors or to win back former customers or to win new customers. The limits of reasonableness are exceeded, for example, if the company in a dominant position starts systematically discriminating between customers based on the competition it faces, or if the countermeasures assume the nature of predatory pricing. Nor may meeting competition defence lead to the foreclosure of smaller competitors."

The Competition Council emphasised that while due consideration may be given to "meeting competition defence", a company in a dominant market position bears a specific responsibility for ensuring that competition in the marketplace is not further reduced, distorted or prevented as a result of its actions. For example, an action designed to further strengthen the dominant market position is not permissible.

In the case of Valio, the Competition Council held that it was not a matter of meeting competition defence. It substantiated its view by, among other things, reference to 14 individual cases in which Valio had offered marketing subsidies to the customer only after a competing liquid milk supplier had made an offer to the same customer. In 1988, the Supreme Administrative Court upheld the decision of the Competition Council, saying that Valio had abused its dominant market position, and imposed a competition infringement fine of € 841 000.

FRANCE

L'étude de la jurisprudence du Conseil de la concurrence français fait apparaître que les remises et rabais de fidélité, auxquelles peuvent être associées les remises de couplage, sont des remises quantitatives. Elles sont très courantes dans la vie des affaires et destinées essentiellement à faire bénéficier d'une partie des gains de productivité du vendeur le client qui s'engage à acheter une certaine quantité de biens ou de services. La vocation de ces remises est également de fidéliser une clientèle, notamment quand celle-ci n'est pas captive et que le produit est relativement substituable.

Les remises de fidélité, de par leur diversité, peuvent revêtir différentes qualifications en droit de la concurrence et dès lors être soumises à des régimes distincts selon l'étendue des effets que ces dernières provoquent sur le marché. La première catégorie de pratiques, dans lesquelles les remises de fidélité peuvent être appréhendées en droit français de la concurrence, sont les pratiques restrictives de concurrence, dont les effets sont appréciés dans les rapports bilatéraux entre parties : cette catégorie de pratiques ne sera pas abordée dans la présente note[1]. La seconde catégorie de pratiques attrait aux pratiques anticoncurrentielles (entente, abus de position dominante et prix abusivement bas), dont les effets sont appréciés au regard du fonctionnement concurrentiel du marché. Cette distinction revêt une grande importance car elle détermine le champ de compétence du Conseil de la concurrence. En effet, le Conseil n'est compétent qu'en matière de pratiques anticoncurrentielles affectant le fonctionnement du marché. Mais il est, en revanche, la seule autorité qui peut, à la fois, apprécier les effets pro- ou anticoncurrentiels d'une pratique sur un marché et prononcer des sanctions pécuniaires et des injonctions pour rétablir l'ordre public économique sur le marché en cause.

Pour cette raison, cette note ne traitera que des pratiques dans lesquelles ont été mises en œuvre des remises de fidélité susceptibles d'être qualifiées d'ententes ou d'abus de position dominante par le Conseil de la concurrence depuis 1986, à une exception près remontant à 1978. Il convient de souligner que l'étude de la jurisprudence du Conseil montre que les remises de fidélité anticoncurrentielles se rencontrent essentiellement dans le cadre d'abus de position dominante, à travers des pratiques discriminatoires (*1*) ou destinées à entraver l'entrée d'un concurrent sur un marché, notamment lorsque celui-ci est en phase d'ouverture à la concurrence (*2*). L'ensemble des décisions citées ci-après ont été publiées au Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes (B.O.C.C.R.F) puis, chaque année, dans le rapport annuel du Conseil de la concurrence, publié par la direction des journaux officiels.

1. Les remises de fidélité discriminatoires

La première affaire dans laquelle se posait la question de remises de fidélité discriminatoires concernait le marché des briques et des tuiles en Alsace. Dans cette affaire, le Conseil de la concurrence a sanctionné une société en position dominante, pour avoir appliqué de manière discriminatoire ses remises de fidélité. Le Conseil a en effet considéré que les conditions générales de vente des sociétés en cause ne comportaient aucune mention concernant les critères d'attribution et le niveau des remises, ni aucun barème d'écart. Cette politique commerciale, dépourvue de transparence, ne permettait pas de vérifier l'objectivité des critères retenus pour l'attribution des remises de fidélité ni les modalités de leur application. En outre, les remises dites "de fidélité" étaient calculées non exclusivement en fonction de quantités fixées

objectivement et valables pour l'ensemble des acheteurs éventuels. Mais elles étaient établies au cas par cas pour chaque client. Le Conseil a alors conclu que ces pratiques mises en oeuvre par des sociétés disposant d'une position dominante vis à vis de négociants, qui sont leurs partenaires obligés pour un certain nombre de produits de grande notoriété, affectaient le fonctionnement global de la concurrence, dans la mesure où elles faussent le jeu de la concurrence entre les négociants et entravent l'accès au marché dans des conditions de compétition normale de produits concurrents et constituaient donc une exploitation abusive de ladite position dominante. Le Conseil de la concurrence a, en conséquence, enjoint aux sociétés en cause d'inclure dans leurs conditions générales de ventes des critères précis et objectifs d'attribution des remises de fidélité[2].

Le second cas de ce type a concerné une décision relative aux pratiques de la société Coca-Cola. Le Conseil de la concurrence a considéré que le système d'attribution des primes non prévues au tarif général s'apparentait aux remises dites de fidélité, calculées non exclusivement en fonction des quantités fixées objectivement et valables pour tous les entrepositaires-grossistes et donnait un avantage financier substantiel aux négociants qui s'engageaient à ne pas commercialiser au-delà du seuil de 15 pour cent les produits du seul concurrent de Coca-Cola. Ces pratiques, mises en œuvre par une société en position dominante, ayant pour objet et pouvant avoir effet de dissuader les débitants de boissons qui auraient cherché à diversifier leur approvisionnement revêtaient, pouvaient avoir un caractère abusif.

Pour apprécier le dommage causé à l'économie, le Conseil de la concurrence a tenu compte de l'importance des marchés concernés, de leur forte expansion, du fait que le produit était de consommation courante, particulièrement appréciés des jeunes consommateurs et de l'entrave faite à l'accès au marché et au développement d'un concurrent émergent, qui sont par nature graves. Le Conseil note, en outre, que l'absence de barrières techniques ou capitalistiques à l'entrée sur le marché vient renforcer la gravité des pratiques[3].

2. Les remises de fidélité destinées à entraver l'entrée sur le marché de concurrents

Bien que la plus ancienne affaire de remise anticoncurrentielle destinée à entraver l'entrée de concurrents sur le marché n'ait pas été traitée par le Conseil de la concurrence, il apparaît utile de la citer ici pour mémoire, car il s'agit de la seule affaire dans laquelle une pratique de remises de fidélité ait été qualifiée d'entente anticoncurrentielle. En 1978, l'organe qui a précédé institutionnellement le Conseil de la concurrence, la Commission de la concurrence[4], avait relevé une entente anticoncurrentielle dans la commercialisation des briquets non rechargeables. Ces briquets avaient pour caractéristiques principales d'être des produits récents, standardisés, confectionnés en grande série et bon marché et de se trouver sur un marché arrivé à saturation. La Commission de la concurrence a considéré que les contrats d'exclusivité conclus par un fabricant de briquets en position dominante avec des grossistes, assortis de remises notamment d'objectifs liées au volumes des ventes, avaient eu pour effet majeur d'interdire à de nouveaux fabricants d'accéder au marché tout en fournissant aux grossistes groupés une rente de situation. Cette politique de coopération n'avait donc globalement pas bénéficié au consommateur, notamment par un abaissement des prix.

Pour revenir aux cas des pratiques de remises anticoncurrentielles dans le cadre d'abus de position dominante, trois cas de figure peuvent être distingués dans l'expérience jurisprudentielle du Conseil de la concurrence depuis le 1er janvier 1987, date d'entrée en application du droit de la concurrence actuel :

- les situations dans lesquelles les comportements des firmes détentrices ou anciennes détentrices de droits exclusifs ou spéciaux (i.e. monopoles publics) ont exercé des pratiques

de remises anticoncurrentielles à l'occasion de l'ouverture de leurs secteurs à la concurrence ;

- les cas dans lesquels des firmes détentrices de droits de propriété intellectuelle (brevets) ont abusé de ces droits, particulièrement dans le cas des industries pharmaceutiques ;

- les cas dans lesquels le Conseil a considéré que les remises octroyées n'étaient pas anticoncurrentielles.

2.1 Remises pratiquées par des opérateurs détenteurs ou anciens détenteurs de droits exclusifs ou spéciaux

Plusieurs affaires sont intervenues notamment dans les secteurs de l'énergie, des télécommunications et de l'audiovisuel.

En matière d'énergie, un avis relatif aux problèmes soulevés par la diversification des activités d'Electricité de France (EDF) et Gaz de France (GDF) au regard du droit de la concurrence a permis au Conseil de la concurrence de relever des risques d'abus de position dominante de la part d'EDF et de GDF. Ces risques résultaient de l'attribution par EDF et GDF de remises de fidélité ayant pour effet de procurer un avantage financier substantiel aux clients qui s'engagent à ne pas commercialiser des produits de substitution. Le Conseil de la concurrence a noté que ce type de remise est d'autant plus dangereux au regard du droit de la concurrence, qu'une telle fidélisation des clients, au moyen de sa situation de monopole sur certains marchés, s'opère sur des marchés qui s'ouvrent à la concurrence et est susceptible de créer des obstacles aux concurrents sur le marché[5].

Concernant le secteur des télécommunications, dans un avis relatif aux propositions tarifaires de France Télécom de 1997, le Conseil de la concurrence a considéré que l'existence d'une remise de fidélité pouvait être anticoncurrentielle lorsqu'elle est de nature à inciter les demandeurs à contracter immédiatement avec l'opérateur historique et à les dissuader de s'adresser à un concurrent lorsque les deux services seront ouverts à la concurrence. Tel est particulièrement le cas des entreprises qui ont besoin d'un service lié comprenant, d'une part, une prestation pour laquelle France Télécom dispose encore d'un monopole (le "trafic externe") et une prestation d'ores et déjà ouverte à la concurrence (le "trafic interne"). Ce type de remise a donc été jugé susceptible de limiter l'exercice de cette concurrence sur ce nouveau marché.

Le Conseil a rappelé par ailleurs que "l'octroi de remises couplées pouvait, dans certains cas, diminuer artificiellement la compétitivité des concurrents et être 'de nature à limiter la concurrence sur le marché et que les remises de fidélité accordées par une entreprise en position dominante pouvaient être anticoncurrentielles en ce qu'elles entravaient l'accès au marché dans des conditions de compétition normales"[6].

Les principes posés dans l'avis pré-cité ont été mis en œuvre deux ans après dans une décision relative à des pratiques mises en œuvre par la société France Télécom à l'occasion d'une offre sur mesure lancé en 1999 par la société Renault. Dans cette décision, le Conseil de la concurrence a estimé que France Télécom avait abusé de sa position dominante sur les marchés des télécommunications, en tentant d'entraver l'accès de nouveaux concurrents au marché des clients "grands comptes".

Le Conseil a en effet considéré, que l'offre globale proposée par France Télécom, alors en monopole sur la boucle locale et consistant à lier les réductions tarifaires consenties et le volume global des communications (locales et nationales) avait pour effet de subordonner les réductions consenties sur les

communications locales à la décision de Renault de lui confier l'ensemble des communications, excluant ainsi les opérateurs pouvant intervenir sur les marchés déjà ouverts à la concurrence (communications nationales et internationales).

Il a également sanctionné France Télécom pour avoir mis en œuvre des pratiques créant un effet de ciseau et interdisant ainsi toute concurrence effective. France Télécom a, en effet, proposé une offre de tarifs comportant des réductions au volume pour les communications fixes vers mobiles Itinéris (Groupe France Télécom). Un opérateur concurrent, qui aurait souhaité présenter une telle offre aurait dû payer quant à lui un prix supérieur par minutes pour ce même acheminement du fixe vers le mobile. Dans ces conditions, les opérateurs concurrents se trouvaient dans l'impossibilité de proposer des tarifs compétitifs, de part l'effet de ciseau résultant du monopole que détenait toujours France Télécom sur la boucle locale et donc sur une partie de l'acheminement du fixe vers mobile. Le Conseil a par conséquent prononcé à l'encontre de France-Télécom une sanction pécuniaire de 6 098 millions d'euros (40 000 000 F).

Cette amende a été évaluée notamment au regard de la gravité des pratiques. Le Conseil de la concurrence a en effet tenu compte du fait que les pratiques ont été mises en œuvre par l'opérateur dominant du secteur des télécommunications sur le plan national, lors de la deuxième année faisant suite à l'ouverture du secteur de la téléphonie fixe nationale. Pour l'appréciation du dommage causé à l'économie, le Conseil de la concurrence a pris en compte l'impossibilité pour les concurrents de contester l'offre globale en cause, l'effet de ciseau crée par la pratique, dressant ainsi des barrières à l'entrée sur les marchés de la téléphonie « grands comptes », mais aussi le fait que la durée des pratiques n'a pas excédé une année[7].

Sur un marché connexe à celui des télécommunications, dans une décision relative notamment aux remises de couplage suivie par la société ODA à l'occasion de la commercialisation des espaces publicitaires dans les annuaires départementaux et locaux, le Conseil de la concurrence a relevé que cette société, régisseur exclusif de la publicité dans les annuaires départementaux de France Télécom et disposait jusqu'alors d'une position dominante sur le marché concerné. Cette société, qui s'est trouvée confrontée à l'arrivée d'un concurrent sur le marché local, décida d'accorder une remise de couplage aux annonceurs qui acceptaient de souscrire simultanément de la publicité dans les annuaires départementaux et les locaux.

Le Conseil de la concurrence a considéré que cette remise de couplage entre les espaces publicitaires insérés dans les annuaires départementaux et locaux pouvait avoir pour effet de dissuader les annonceurs clients des annuaires départementaux et locaux de s'adresser à la société concurrentes pour de la publicité dans les annuaires locaux, car ils étaient assurés de perdre le bénéfice de la remise de couplage s'ils s'adressaient au concurrent. Ainsi, la remise de couplage offerte par l'ODA était assimilable à une prime de fidélité destinée à récompenser les clients annonceurs qui, faisant de la publicité dans les annuaires départementaux et souhaitant en faire dans un annuaire local. Cette tarification, qui a pour effet de limiter l'accès au marché d'une société concurrente sur un marché qui s'ouvre à la concurrence et caractérisé par l'existence de fortes barrières à l'entrée, a été jugé comme constituant un abus de la part de la société ODA, en position dominante[8].

Enfin, dans le secteur audiovisuel, à l'occasion d'une décision relative aux pratiques constatées plus particulièrement sur le marché de la vente d'espaces publicitaires télévisuels, le Conseil de la concurrence a sanctionné les pratiques de rabais proposés par la chaîne de télévision TF1 consentis à condition que l'annonceur consacre à TF1 une part substantielle de ses dépenses de publicité télévisuelle, nettement supérieure à la part d'audience de la chaîne. Ainsi, en 1996, TF1 Publicité cherchant à préserver sa part de marché, compte tenu d'un contexte d'audience plus difficile, a affiché une nette progression des prix dégressifs dès lors que les annonceurs consacraient 53 pour cent de leur budget en publicité télévisuelle à la chaîne TF1. La chaîne faisait en outre des tarifs différents selon qu'il s'agissait des secteur

lourds tels que l'alimentation, la toilette/beauté, ou des secteurs moins captifs à l'offre de publicité. Le Conseil a, par conséquent, considéré que TF1, qui détenait la part d'audience la plus élevée pour les prix les plus élevés, détenait une position dominante sur le marché de la publicité télévisuelle. Et le fait pour TF1 de proposer des remises fondées sur les parts de marché conduit les annonceurs à affecter le budget publicitaire minimum qui leur est imposé à la chaîne qui leur consent cet avantage, pour pouvoir en bénéficier. Le Conseil en conclu qu'une telle remise, qui s'apparente à une remise de fidélité, fait obstacle à la fluidité des investissements publicitaires entre les différentes chaînes hertziennes. Ainsi, cette pratique, de la part d'une entreprise en position dominante, constitue un abus de position dominante[9].

2.2 Remises anticoncurrentielles pratiquées par des opérateurs détenteurs de droits de propriété intellectuelle : le cas de l'industrie pharmaceutique

Dans la décision relative aux remises octroyées par la société Lilly France sur le médicament dont elle avait le monopole en 1996, le Conseil s'est prononcé sur les conditions imposées aux clients de cette société (les Hôpitaux de l'Assistance Publique de Paris) pour qu'ils s'engagent également à lui acheter un autre médicament pour lequel il existait désormais des concurrents. Cette remise de couplage entre les achats d'un médicament en monopole (couvert par un brevet) et en concurrence (générique) avait pour objet et a eu pour effet de dissuader les pharmacies d'établissements hospitaliers de s'adresser à des entreprises concurrentes pour obtenir séparément celui existant sur le marché en concurrence à un prix plus bas. Cette remise de couplage offerte par la société Lilly France était assimilable à une prime de fidélité destinée à récompenser les clients qui, devant acheter le médicament sous brevet (en monopole) qu'ils ne pouvaient obtenir qu'auprès de la société Lilly France, renonçaient à s'adresser aux laboratoires concurrents pour leurs autres achats. Une telle tarification a ainsi eu pour objet et pour effet d'entraver l'accès au marché du médicament pour lequel il existait une concurrence.

Pour apprécier la gravité des pratiques, le Conseil de la concurrence a retenu le caractère captifs de la demande dans ce secteur, l'importance mondiale et la notoriété de l'entreprise en cause. En outre, le Conseil a relevé la durée très longue (de trois ans) pendant laquelle les pratiques ont été mises en œuvre[10]. Des pratiques identiques ont également été sanctionnées quatre ans plus tard, en 2000, à l'encontre de la société Glaxo Wellcome concernant le Zinnat[11].

Encore en 2001 dans le secteur pharmaceutique, dans des conditions similaires à celles qui viennent d'être décrites, sur le marché de l'Isoflurane, le Conseil de la concurrence a considéré que des pratiques mises en œuvre par la société Abbott constituaient une exploitation abusive de sa position dominante. Tel a été le cas lorsque cette firme a proposé des remises au moment où son brevet sur l'Isoflurane est tombé dans le domaine public et qu'une société concurrente tentait d'entrer sur le marché, en proposant des produits génériques. Le Conseil a en effet estimé que le fait d'offrir aux centrales d'achat hospitalières, en contrepartie d'une exclusivité d'achat, une ristourne à la fois progressive et générale, calculée en fonction du taux d'accroissement de la consommation réelle par rapport à la consommation globale estimée dissuadait les clients de se fournir auprès de concurrents entrant sur le marché avec un produit générique concurrent. Ainsi, il a été réaffirmé que la fixation par une entreprise en position dominante de conditions de vente qui portent sur la totalité des besoins d'un ensemble de clients pour une période donnée constitue une pratique de fidélisation de nature à fausser le jeu de la concurrence. En revanche, les remises conditionnées au seul volume des achats, dont le caractère fidélisant n'est pas démontré, constituent de simples rabais de quantité.

Pour évaluer la gravité des pratiques, le Conseil a pris en compte notamment le fait que cette dernière visait à empêcher la diversification et la fluidité du marché et pour le dommage causé à l'économie. Le fait que la pratique a retardé l'entrée d'un médicament générique sur le marché a également été pris en compte[12].

2.3 Cas dans lesquelles les remises n'ont pas été jugées anticoncurrentielles

Dans deux décisions intéressantes mettant en cause des remises de fidélité dans le secteur des télécommunications et des cartes d'abonnement aux salles de cinéma, le Conseil n'a pas retenu le caractère anticoncurrentiel de ces remises.

Dans la décision relative aux pratiques mises en œuvre par la société France Télécom à l'occasion d'une offre sur mesure conclue en 1998 à l'occasion d'une offre sur mesure de téléphonie conclue en 1998 avec la société Renault, le Conseil de la concurrence a considéré, qu'au moment des faits, bien que France Télécom ait détenu un quasi monopole sur les marchés de la téléphonie fixe, l'offre que cette dernière avait proposé ne présentait pas de caractère abusif.

L'enquête a en effet montré que l'offre en question ne comportait pas de remises de couplage entre les différentes prestations (local, voisinage et national), subordonnées à l'octroi de la totalité du trafic téléphonique de Renault. Il a alors prononcé un non-lieu.

En effet, l'offre de France Télécom de 1998, d'une part, n'a pas empêché son concurrent Cegétel de remporter une partie substantielle du marché de Renault et, d'autre part, contenait des conditions tarifaires plus avantageuses que l'offre qu'elle avait proposé fin 1997 et qui concernait par contre l'ensemble du trafic téléphonique de Renault. En outre, aucun élément du dossier n'a permis d'établir que la remise accordée sur chaque segment (local, voisinage et national) ait été subordonné à une engagement global de Renault sur les trois volets[13].

Dans la décision relative aux cartes d'abonnement illimitées aux cinémas, le Conseil a estimé que ces cartes proposées par un exploitant de salles de cinéma en position dominante, destinées à fidéliser sa clientèle n'étaient pas en elles-mêmes susceptibles d'être regardées comme une pratique anticoncurrentielle de détournement de clientèle. En effet, le Conseil de la concurrence considère que le fait, pour une entreprise, de tenter de fidéliser sa clientèle n'est pas en tant que tel condamnable au regard du droit de la concurrence, seule une telle pratique de fidélisation acquise au moyen d'une pratique anticoncurrentielle est susceptible d'être appréhendée par le droit de la concurrence[14].

3. Conclusion

Pour conclure, il apparaît que les remises de fidélité, qui sont particulièrement courantes dans le monde des affaires, soulèvent seulement un contentieux occasionnel en matière de pratiques anticoncurrentielles. Elles demeurent cependant un moyen efficace de capter la clientèle sur un marché concurrentiel au moyen de la rente dont dispose certaines firmes sur des marchés en cours d'ouverture à la concurrence (démonopolisation).

NOTES

1. Il convient de préciser qu'une pratique, dès lors qu'elle est qualifiée de pratique restrictive de concurrence relève de la compétence du juge de droit commun (le juge civil et commercial), qui peut également connaître des pratiques anticoncurrentielles, mais dont les pouvoirs sont limités au règlement du différent existant entre deux parties et non pas à rétablir le bon fonctionnement du marché.

2. Conseil de la concurrence, décision 90-D-27 du 11 septembre 1990, IV° Rapport annuel d'activité (1990).

3. Conseil de la concurrence, décision 96-D-67 du 29 octobre 1996, XX° Rapport annuel d'activité (1996). La Cour d'Appel a finalement annulé cette décision du Conseil pour des motifs de procédure, mais les analyses du Conseil en matière de rabais et remise n'a pas été remise en cause par le juge de l'Appel.

4. Commission de la concurrence, avis du 11 mai 1978 relatif aux pratiques anticoncurrentielles dans la commercialisation des briquets non rechargeables.

5. Conseil de la concurrence, avis 94-A-15 du 10 mai 1994, VIII° Rapport annuel d'activité (1994).

6. Conseil de la concurrence, avis 97-A-05 du 22 janvier 1997, XI Rapport annuel d'activité (1997).

7. Conseil de la concurrence, décision 01-D-46 du 23 juillet 2001, BOCCRF N° 14 du Lundi 24 septembre 2001, p. 872.

8. Conseil de la concurrence, décision 96-D-10 du 20 février 1996, X° Rapport annuel d'activité (1996).

9. Conseil de la concurrence, décision 00-D-67 du 13 février 2001, XIV° Rapport annuel (2000).

10. Conseil de la concurrence, décision 96-D-12 du 5 mars 1996, X° Rapport annuel d'activité (1996). La décision a été confirmée par le juge de l'Appel.

11. Conseil de la concurrence, décision 00-D-16 du 12 avril 2000, XIV° Rapport annuel d'activité (2000).

12. Conseil de la concurrence, décision 01-D-23 du 10 mai 2001, BOCCRF, N° 8 du Jeudi 24 mai 2001, p. 499.

13. Conseil de la concurrence, décision 01-D-66 du 10 octobre 2001.

14. Conseil de la concurrence, décision 00-MC-13 du 25 juillet 2000, XIV° Rapport annuel (2000), décision cependant provisoire, ne statuant pas au fond.

GERMANY

1. Introduction

Fidelity discounts are the reward for repeated purchases made at one particular company. As they are not explicitly mentioned in the Act against Restraints of Competition (ARC) the Act does not provide an exact definition. The German Discount Law which was applicable until 2001 set tight limits to the companies' scope for granting discounts.

From a competition point of view fidelity discounts can raise concerns if they are used by companies with considerable market power. There is the threat that this could constitute a barrier for customers wishing to switch their supplier so that residual competition would be eliminated. The following text will first give a brief overview of the legal basis for intervention by the Bundeskartellamt. Some recent cases will then be discussed as examples.

2. Taking up fidelity discounts under the ARC

Under the Act against Restraints of Competition fidelity discounts can be taken up on the basis of two different norms: abuse of a dominant position (Section 19 of the ARC) and the prohibition of unfair hindrance or discrimination (Section 20 of the ARC). With regard to an assessment of fidelity discounts both provisions can be applied in parallel. The following text will mainly focus on the abuse of a dominant position.

2.1 Abuse of a dominant position

Under Section 19 of the ARC the abusive exploitation of a dominant position by one or several undertakings shall be prohibited. An abuse exists in particular if a dominant undertaking impairs the ability to compete of other undertakings in a manner affecting competition in the market and without any objective justification (Section 19(4) no. 2 of the ARC).

In principle, besides the ban on cartels and merger control, the prohibition of abusive practices constitutes the third foundation of the ARC. In contrast to other legal systems there is no general ban on monopolisation under German law. In principle the ARC does not object to the creation of dominant positions resulting from internal corporate growth and thus from superior productive capacity. Such positions are, however, subject to abuse control.

It is not intended to generally restrain dominant companies in their scope of action. Such a course of action would enable smaller companies to live "in the shadow" of the fettered dominant company without competitive pressure. Therefore it is not intended to establish continuous control of the conduct of dominant companies. The prohibition of abusive practices merely imposes additional obligations on dominant companies to act considerately. In this way they are not obliged to discontinue conduct which is

in line with the principles of competition, but merely under the obligation not to abuse their market power. This is meant to counteract a further deterioration of competitive conditions.

The cartel authorities are thus faced with the problem of how to define a dominant company's conduct which is in line with competition in contrast to abusive conduct. The definition of the ban on hindrance and discrimination embodied in the ARC does not provide a secure distinguishing criterion. Under the ARC dominant companies may not hinder another company in an unfair manner (or treat them differently from similar companies without any objective justification). According to the practice of the courts it is necessary to weigh up the interests of the dominant company against the interests of the hindered company in order to be able to establish the existence of inequity. The standard to be applied in this consideration is the ARC's objective to protect the freedom of competition. Primary consideration shall be given to the question of whether a certain measure can still be considered as a legitimate use of competitive parameters or whether its anticompetitive effects are large enough to require a prohibition.

In order to make it possible to weigh up interests in such a manner, the criterion of " non-productive competition" was developed by the jurisdiction. Measures taken by a dominant company which do not fall under the category of "productive competition" and, at the same time, lead to a continuous threat to residual competition in a market already dominated, are to be subject to abuse control. Measures which lead to increased market performance and a better supply in the interest of consumers are considered as "productive competition". These include for example measures to improve the quality of services and products. Competitive practices which may impede the comparison of performance and result in a hindrance of competitors instead of a parallel rivalry for customers are classified as "non-productive competition".

The criterion of "non-productive competition", however, has come under heavy criticism as it is difficult to clearly classify individual measures. It is still impossible to draw a secure line between abusive conduct by a dominant company and conduct which is line with competition. There is therefore no realistic alternative to a consideration of interests in each individual case. The assessment can be facilitated by establishing concrete categories of cases. One of these case categories are fidelity discounts.

2.2 Abuse through fidelity discounts

Discounts used by dominant companies can develop anticompetitive effects by which they are classified as abuse through hindrance.

Fidelity discounts can constitute a form of exclusive dealing agreements. Their objective is to concentrate demand on one company. They will cause competitive concerns if they are used by dominant companies and if they can achieve a "stifling effect" on competition in individual cases. There is the danger of a suction effect which would result in a further deterioration of the market structure by giving customers an incentive not to switch over to different companies any more when purchasing a certain product. In accordance with the general description of abuse fidelity discounts were classified under the category of "non-productive competition" in the past. The reason given for this was that at least a long-term fidelity discount would only be granted with the intention to restrict a customer's possibility to freely choose the most favourable offer and to switch over to another market partner without incurring any disadvantages. Under "productive" competition conditions, however, primary consideration is given to winning customers over through better performance and not through building up barriers.

Ultimately, however, there is no other possibility than to weigh up interests in each case in order to identify individual fidelity discounts as actual abuse cases. It should be taken into account, however, that

if this measure is applied by dominant companies, it is aimed at excluding competitors from the market. If this measure is of quantitative importance, a violation against Section 19 of the ARC is likely.

In the previous assessment of the discounts various criteria have been developed which are relevant to the examination: the quantitative effect of the bonus, the likelihood of an impediment of a customer's ability to switch to another company, and the question of whether this was a reactive measure taken by the dominant company, i.e. whether the company was obliged by market circumstances to grant a discount in order to avoid losing customers. The period of time during which a fidelity discount is offered also plays a role. If a fidelity discount is only offered during a short period of time it is not very likely to lead to competitors being permanently excluded from the market.

In some cases companies argued that, for example, a fidelity discount served the purpose of balancing incoming orders in certain time intervals, thus optimising the utilisation of capacities. Further advantages are feasible for the companies in question. Such arguments are part of the process of weighing up interests in the examination under cartel law. The standard for evaluating these interests must, however, take into account the objective of the law, i.e. the protection of the freedom of competition.

3. Relationship between fidelity discounts and exclusive dealing agreements/the prohibition of below-cost prices

Under Section 16 of the ARC exclusive dealing agreements are subject to abuse control. They are defined as agreements between companies which impose upon one of the parties restrictions on the purchase of other goods from third parties. The Bundeskartellamt can prohibit such agreements if they substantially impair competition. As fidelity discounts generally do not constitute such an agreement, but merely an incentive, they are not covered by Section 16 of the ARC.

Under Section 20(4) of the ARC dominant or powerful companies are not allowed to unfairly hinder smaller competitors by offering their products below cost price. This only applies if sales below cost price occur not merely occasionally and cannot be objectively justified. The reduction through discount systems must be fully taken into account in the determination of the sales price. If ultimately only one group of customers, i.e. those who are able to collect an extraordinarily high amount of bonus points, must pay a price which is below the cost price, there will have to be an examination in this specific case as to whether such a provision actually causes an unfair hindrance of smaller competitors.

4. Statements and Proceedings of the Bundeskartellamt with respect to Fidelity Discounts

4.1 Miles and More

Deutsche Lufthansa, the largest German airline, offers the frequent flyer bonus programme Miles & More. Passengers can collect bonus points on the basis of the number of miles travelled. Credits are not only granted for Lufthansa flights, but also for using the services of Lufthansa's subsidiaries and partners. In the same way credits can both be exchanged for Lufthansa services and services of its partners among which are not only other airlines, but also for example car rental firms and golf courses. One of the bonus programme's special features is that the credits will always be gained by the individual passenger, and not by the firms which paid for their employees flights. This means that many business travellers who travel at the expense of their companies will prefer Lufthansa flights in order to be able to collect miles for private use. There is therefore the risk that decisions in favour of Lufthansa offers will not be taken due to superior market performance. The mechanism of competition will thus be partially eliminated in favour of

Lufthansa. In order to prevent companies which will have to pay the possibly more expensive business travels of their staff from turning against the bonus programme, they are often granted sales discounts by Lufthansa. Other airlines and alliances also offer similar bonus programmes.

Following complaints by Lufthansa's competitor Eurowings the Bundeskartellamt initiated proceedings in 1997. In the Bundeskartellamt's view Lufthansa has a dominant position at least in partial areas of the domestic German air traffic. The complaint was followed by discussions between the Bundeskartellamt and the parties which particularly focussed on the possibility of including Eurowings in the frequent flyer programme. In this context the protection of Eurowings' customer data and an adequate compensation for Miles & More credits issued by Lufthansa caused problems. After lengthy negotiations Lufthansa made an offer to include Eurowings in the frequent flyer programme. The competent Decision Division argued that this decision was appropriate in terms of its content (accounting modalities, data protection provisions) and that Eurowings could reasonably be expected to accept the compensation provided for. A hindrance of smaller competitors was not found to exist any more at that point. An anticompetititve effect was furthermore reduced by the fact that Lufthansa had created a possibility for companies to inspect the Miles bonus collected by their staff in the course of official business travels.

The proceedings were therefore suspended for the time being. However, the Bundeskartellamt also held further talks with the parties as there were various concerns regarding the exact modalities of opening up the programme. In 2000 Lufthansa notified the Bundeskartellamt of the proposed merger with Eurowings. The examination of the project concluded that the merger could be cleared subject to obligations. One obligation also referred to the general opening-up of the Miles & More programme. The Decision Division did not prohibit the programme being used for example in the case of single domestic air traffic routes. In the view of the Decision Division such a prohibition would only slightly reduce existing customer loyalty, because customers would continue to be able to collect miles on longer international routes. Neither could a comprehensive prohibition of the programme be considered as Lufthansa competes with other airlines on an international level and is thus not dominant. A partial prohibition regarding individual routes would therefore hardly be able to compensate for competitive disadvantages incurred by smaller competitors. To include Eurowings in the programme was therefore considered to be a better solution.

4.2 Happy Digits

Happy Digits is a customer loyalty programme offered by Deutsche Telekom AG. Customers participating in this programme are supposed to be able to collect points or "digits", for example by purchasing Deutsche Telekom terminal equipment or by using its Internet, mobile telephone, data transmission or voice telephone services. Several subsidiaries of Deutsche Telekom participate in this programme. Digits can also be collected for services unrelated to turnover, e.g. for replying to questionnaires. Once 500 digits (€ 5) have been collected, these can be paid out or exchanged for a premium. Furthermore, digits can be donated or given away as a present.

As Deutsche Telekom is still dominant in some telecommunications markets it is subject to regulation in respect of certain services by the Regulatory Authority for Telecommunications and Posts. The Bundeskartellamt may comment on the draft decisions made by the Regulatory Authority.

Deutsche Telekom had applied for approval by the Regulatory Authority of its plans to grant customers a three percent discount, or at least a one percent discount alternatively, under its programme "Happy Digits". In its statement on this issue the Bundeskartellamt agreed with the Regulatory Authority's decision not to grant the main application, but merely the alternative application (one percent discount).

The Bundeskartellamt suggested, however, to grant approval subject to the condition that premiums should not be awarded below cost price. This suggestion was taken up by the Regulatory Authority.

The reason stated for the approval was that discount systems of dominant companies could only be prohibited if an excessive suction effect was to be expected. A discount of merely one percent was not considered to have such an effect. In the light of previous experience, the incentive to purchase all services in demand from Deutsche Telekom if a one percent discount were granted is not considered to be high enough to result in a suction effect that would give rise to competition concerns. However, the Bundeskartellamt may still take up possible abusive effects in service sectors which do not come within the competences of the Regulatory Authority (Internet, mobile telephony). For this purpose the effects of this current customer loyalty programme will first be observed.

4.3 Payback

In 1998 Deutsche Lufthansa and two private investors set up a joint venture, the Loyalty Partner company. Meanwhile the Metro merchandising group has also become an associate. Loyalty Partner offers businesses to run a customer loyalty programme on their behalf. The company was set up with the intention to take full advantage of the new business opportunities provided by the abolition of the Discount Law.

The company issues a so-called payback card. All businesses which participate in this customer loyalty programme offer bonus points with their products to be collected by customers on their payback cards. Each company determines by itself the amount of bonus credits offered. Later on these bonus points can be exchanged for cash or premiums. Apart from Metro's subsidiary Galeria Kaufhof (department store) the dm drugstore chain, the car rental firm Europcar and the optician chain Apollo-Optik participate in this programme. Furthermore, points can be collected at DEA filling stations and for purchases made at several other businesses. Lufthansa does not participate in the bonus programme.

The competent Decision Division does not consider such cross-sector customer loyalty systems to be generally inadmissible. Competition law problems can arise if competitors agree on the level of discounts. At present there are no indications of such a conduct. A customer loyalty system could give rise to problems if it were joined by dominant companies which would then trigger suction effects to the detriment of residual competition as described above. In such a case abuse proceedings would have to be instituted by the Bundeskartellamt.

4.4 Karstadt Quelle/Deutsche Telekom

In late 2001 Deutsche Telekom and the Karstadt/Quelle merchandising group announced the creation of a new programme designed to compete with the payback system described above by setting up a joint venture. The new programme is designed to interlink the bonus programmes of both groups, i.e. Karstadt card and Happy Digits. From the point of view of merger control there were no objections to the joint venture. At that point a suction effect in favour of Deutsche Telekom was not evident in the market for voice telephony as the discounts approved by the Regulatory Authority still merely amounted to one percent.

Nevertheless further developments must be observed. It is conceivable that advantages for all participating companies could also arise from an increased number of participants in customer loyalty programmes. An extension of the Happy Digit programme to include Karstadt and possibly further companies later on, would further increase the incentive for customers to use the services of Deutsche

Telekom, even if this would not enable them to collect large amounts of Digits. It remains to be observed whether further partners will possibly be included and whether such effects will then actually occur in future.

ITALY

The Italian Competition Authority has dealt with cases involving rebates and loyalty discounts on several occasions. As illustrated in the brief summaries provided further below in this note, most such cases concerned conduct by current or former legal monopoly operators. In this respect, discount schemes and practices appeared to clearly aim at securing the position of the dominant incumbent and preventing entry by new competitors in liberalised markets.

In evaluating whether a discount scheme had exclusionary effects, attention was first of all paid to whether it amounted in practice to a predatory pricing strategy. The exclusionary nature of fidelity rebates was particularly clear in the case Associazione Italiana Internet Providers/Telecom, where the dominant firm, besides offering discounts to strategic customers, was also granting rebates that, in certain cases, resulted in prices for the liberalised services equal to zero.

When the firm adopting the rebates was a legal monopolist and the rebate was having an effect on a liberalised market, the Authority took a stricter view, considering abusive a rebate which was proportional to all services supplied, including those under legal monopoly. In fact such a pricing policy was impossible to match by a competitor that could operate only in the liberalised part of the market. This was the case in Albacom/Executive Service, where discounts were applied on all services supplied by Telecom Italia including those where the company enjoyed a legal monopoly. In this case customers had an incentive to adhere to the package discount offered, since it allowed them to get price reductions on services for which there was no competition. The price reduction scheme was difficult to match, since competitors would have had to offer on a single service the rebate which Telecom Italia was applying on a bundle of services which was overwhelmingly made up of monopoly services.

The exclusionary strategies adopted by dominant firms in order to impede or restrict entry included the granting of target discounts which, at the margin, led to prices below costs. Indeed, particularly where the market share held by the dominant operator is significantly larger than those of its largest competitors, the longer the period over which discounts are aggregated, the higher the burden imposed on new entrants or smaller competitors for them to match the discounted price. This was the case in Assoviaggi/Alitalia, where the discounts granted by Alitalia to travel agencies were calculated on the basis of the annual amount of tickets sold and if matched by competitors would have led to ticket price reductions of more than 50 percent. Where discounts are instead based on sales made over a shorter period, it becomes easier for smaller competitors to effectively match the discount scheme adopted by a dominant operator.A similar scheme was also adopted by Coca-Cola, in the PepsiCo Foods and Beverages International-IBG Sud/Coca-Cola Italia case; in addition, Coca-Cola was found to have abused its dominant position by granting selective discounts, depending on whether clients also distributed Pepsi's products, as well as by granting higher or special discounts to clients accepting to only sell Coca-Cola products.

1. The Cases

1.1 ALBACOM/Executive Service

In May 1997, the Italian Competition Authority concluded a proceeding against Telecom Italia (the Italian dominant telecom operator), initiated upon a complaint filed by Albacom (a joint-venture created by British Telecommunications and Banca Nazionale del Lavoro, a major national bank, which owns and operates a data transmission private network in Italy). The complainant considered itself to be damaged by Telecom's behaviour in the supply of the Executive Service (a service equivalent to a system of vocal telephony for closed groups of customers, i.e. customers with a common professional interest). In particular, Telecom had set up a system of discounts for executive service customers which was based on the total traffic of that customer with Telecom Italia, including services at that time still under legal monopoly.

The Executive discount system was introduced after the Ministerial Decree of May 16th, 1996 had established rate reductions for high volumes of telephone calls. Such discounts could only be applied by Telecom, as the legal monopoly operator of the public switched telephony network. Telecom was thus able to undercut and impede entry by competitors by offering to provide liberalised services at terms and conditions that rivals were unable to replicate, for they could not apply rate reductions on telephone call traffic managed through the public switched network.

For these reasons, the Authority held that Telecom had attempted to extend its dominant position to the provision of liberalised services by means of discounts that were not cost-related. The Authority deemed that the rate mechanism set out in the above mentioned Ministerial Decree could facilitate anticompetitive conduct. Furthermore, the Authority held that Telecom's behaviour, in particular the way rebates were applied, did not fully comply with the provisions laid down in the Decree and was to be considered as an independent business conduct infringing the Competition Act.

However, following the concerns raised by the Authority during the investigation, Telecom acknowledged the potential anticompetitive effects of the Executive Service and modified its conduct substantially. In particular, Telecom accepted that other telecom operators be given access to the public network at terms and conditions at least equal to those applied to its own customers, so as to remove the discriminatory effect of the discount scheme.

In view of these commitments, the Authority decided not to fine Telecom, even though the company's conduct was declared unlawful. Furthermore, in a report sent to the Ministry of Postal and Telecommunications Services the Authority suggested the need to revise the rate mechanism provided for under the Ministerial Decree so as to make it more consistent with the liberalisation of telecom services and with the principles laid down in the competition law.

1.2 PEPSICO Foods and Beverages International-IBG SUD/COCA-COLA ITALIA

In December 1999 the Competition Authority found the Italian subsidiaries of the Coca-Cola Company and a number of independent Coca-Cola bottling companies liable of abusive commercial practices pursuant to section 3 of the Competition Act. The Authority considered the infringement to be serious and imposed a fine of around 15 million euro, equivalent to three percent of turnover from the sales of drinks with a cola flavour.

The Italian Coca-Cola companies and the bottling companies were found to hold a dominant position both on the market for cola drinks and on the larger market for non-alcoholic sparkling beverages, with a combined share (in volumes) of around 80 percent of the national market for colas and more than 40 percent on the national market for non-alcoholic sparkling beverages.

The Authority ruled that the conduct by Coca-Cola, consisting of granting clients very strong discounts and other incentives to convert their PepsiCo draught beverage equipment to deliver Coca-Cola products, was an abuse, leading to much higher costs for the competitor to match Coca-Cola's offer. Similarly, the fact that Coca-Cola made use of a system of discriminatory discounts (partnership, target and extra) and loyalty bonuses based on a selective and non-transparent classification of wholesalers was also considered to be an abuse.

In particular, the partnership system of discounts was a flexible system of selective discounts applied arbitrarily in different ways to individual wholesalers, aimed at inducing them to discontinue their purchases of Pepsi's products. In fact, other things being equal, wholesalers also buying non Coca-Cola products received a smaller discount. Furthermore, the partnership discount was formally calculated on the basis of some services (as co-operation in the distribution of advertising material), but its amount was substantially higher than the economic value of such services and, for this reason, non-transparent and aimed at tying up wholesalers.

Target discounts were quarterly rebates proportionate to the achieved increase in turnover or volume of sales relative to the same quarter of the previous year. They made it very difficult for competitors to compete at the margin, considering their small market share.

In view of the Community case-law principle concerning the particular responsibility of a dominant undertaking with regard to aggressive behaviour, the Authority referred to the Court of First Instance jurisprudence in the Irish sugar case according to which in order to determine "whether or not special rebates to customers facing competition constitute a reaction that is compatible with that responsibility, in so far as the prices in question are not predatory within the meaning of the case-law", it is important that the dominant firm "not only deliberately chose to offer a special rebate selectively to certain retailers but suspected that such a practice was illegal". After discovering an e-mail written by a marketing manager of Coca-Cola, the Authority held that the company was indeed fully aware of the unlawfulness of the discount scheme being implemented.

Finally, the Authority held that the application of loyalty discounts to wholesalers and the discounts offered by Coca-Cola to large retail distribution chains in exchange for setting aside minimum display areas constituted an abuse of dominant position as it was designed to pre-empt display areas to the detriment of competitors.

1.3 Associazone Italia Internet Providers/TELECOM

In January 2000, Telecom Italia was found to have abused its dominant position in the market for Internet services to both residential and business customers, at the end of an investigation initiated upon a complaint filed by the Italian Association of Internet Providers (AIIP). As the former legal monopoly operator, Telecom Italia operated all telephone lines, both switched and dedicated, as well as Internet access links for residential customers, and was the main supplier of network infrastructure services to other competing Internet Service Providers. In particular Telecom Italia had imposed discriminatory conditions for the supply of Internet connectivity services originating from very generous loyalty discounts schemes.

This practice had a clear exclusionary purpose and was aimed at tying some clients into long-term contracts by means of discounts, sometimes as large as the deregulated part of the fee. Furthermore, over the same period and in the context of an increasing demand, Telecom Italia had strengthened its dominant position by providing interbusiness services at a loss.

In order to restore real competition on the Internet access services market, in the course of the investigation Telecom Italia concluded an agreement with AIIP, whereby it undertook to give all competing Internet Service Providers, upon request, some of its revenues from dial-up links developed since 1998, and to reduce the cost of the direct digital circuits leased by Internet providers.

In view of these commitments, the Authority considered that Telecom Italia had terminated its anticompetitive behaviour in the marketing of Internet access services.

Taking into account the gravity of Telecom Italia's conduct but also its commitments to restore the conditions for a genuine competition on the market, the company was imposed a fine of around 600 000 euro.

1.4 ASSOVIAGGI/ALITALIA

In June 2001, the Competition Authority held that Alitalia had abused its dominant position on the market for air travel agency services, by adopting schemes under which loyalty rebates were awarded to travel agents. This abusive conduct was considered to be such a serious violation of article 82 of the EC treaty as to warrant a fine of around 25 million euro, equivalent to 1.3 percent of the company's annual turnover from the sale of international air transportation services from and to Italy.

In particular, the investigation showed that the practice used by Alitalia of giving incentives to travel agencies calculated in terms of the sales targets achieved, was designed to make it more difficult for rival air transportation companies to get access to the travel agency channel. A competitor with a five percent market share willing to match the benefits granted by Alitalia to travel agencies would have had to offer them commissions between 30 and 60 percent of the air ticket price.

The Authority also ruled that the awarding by Alitalia of loyalty bonuses to travel agencies between 1997 and 2000 had produced discriminatory effects against the agencies, which received dissimilar incentives for equivalent services, without any efficiency justification. Given the dominant position held by Alitalia, this conduct was also considered to be a serious violation of competition law.

Alitalia was ordered to immediately desist from the abusive conduct and to submit to the Authority, within 90 days, a report on the measures adopted to fully comply with the decision.

In this case, the Authority noted that the major effect of the Alitalia scheme was to protect or strengthen its dominant position in the market of air transportation services. In particular, the conduct was not directed to achieve greater efficiency, but only to increase customer loyalty. Furthermore, this effect was strengthened by threatening clients with the withdrawal of a plaque (necessary to issue tickets for national flights), if they failed to reach the target level of sales of international flights tickets.

JAPAN

1. Viewpoint

When we examine the actual circumstances of manufacturer rebates provided to distributors (in general, billing price refers to the monetary amounts classified as paid to another party systematically or for each separate transaction), we find a variety of rebates for the purpose of sales promotion that have the character of an adjustment to billing prices. Accordingly, because rebates may be offered for a variety of purposes and also have the aspect of promoting price formation in keeping with actual conditions in the market as one element of price, the act of offering rebates itself is not a problem under the Antimonopoly Act. Depending upon how rebates are offered, however, they may restrict the business activities of distributors, in which case such rebates will be illegal under the Antimonopoly Act.

In order to prevent illegal conduct by firms and trade associations that will violate the Antimonopoly Act before it occurs, and to play a role in the development of appropriate activities, in 1991 the Fair Trade Commission published its Guidelines Concerning Distribution Systems and Business Practices. These guidelines clarify which kinds of distribution systems and business practices in Japan promote fair and free competition, and which are conduct that violate the Antimonopoly Act. The following is a summary of the Commission's views based upon the Antimonopoly Act concerning the provision of rebates, which are explicitly outlined in these guidelines.

1.1 Rebates as a means of restriction on distributors' business activities

The determination of illegality in cases where a company uses the rebates offered to distributors as a means of restrictions on distributors' sales price, handling of competing products, sales territory, customers or other aspects of a distributor's business, through actions such as reducing the amount of the rebate if the distributors do not sell products at the price indicated by the manufacturer, will be based upon factors such as the effectiveness of the price restricting measure and influence on market competition (Dealing on Exclusive Terms, Resale Price Restriction or Dealing on Restrictive Terms).

Furthermore, the conduct of discriminating the provision of rebates depending upon factors such as the price at which distributors sell or whether distributors handle competing products shall itself be illegal as an unfair trade practice if such conduct has the same or similar function as the imposition of illegal restrictions on distributors (Discriminatory Treatment on Transaction Terms, etc.).

1.2 Coverage rebates

A manufacturer sometimes provides rebates to its distributors according to the percentage of sales of the manufacturer's products in the total business of each distributor during a specific period, or according to the share that the manufacturer's products have in the display of all products at the distributors' stores ("coverage rebates").

In cases where the provision of rebates of these kinds are offered by manufacturers that are influential in the market, and if the provision of such rebates has the function of restricting distributors' handling of competing products and may as a result make it difficult for new entrants or existing competitors to easily secure alternative distribution channels, such provision is illegal as unfair trade practices (Discriminatory Treatment on Transaction Terms, etc., Dealing on Exclusive Terms or Dealing on Restrictive Terms).

1.3 Remarkably progressive rebates

In providing volume rebates, at times a manufacturer may set a rebate rate progressively according to a ranking of distributors, based on criteria such as the quantity of products supplied to each distributor during a certain period. While progressive rebates have the aspect of promoting price formation in keeping with actual conditions in the market, if the rate is remarkably progressive it has the function of encouraging the preferential handling of that manufacturer's products over the products of others. In cases where an influential manufacturer provides such rebates, such provision is illegal as unfair trade practices if the provision has the function of restricting distributors' handling of competing products and may result in making it difficult for new entrants or existing competitors to easily secure alternative distribution channels, (Discriminatory Treatment on Transaction Terms, etc., Dealing on Exclusive Terms or Dealing on Restrictive Terms).

2. Example of recent illegal conduct related to rebates (Provision of coverage rebates)

2.1 Case against the Yamaguchi Prefecture Economic Federation of Agricultural Co-operatives (1997, Order No. 6)

The Commission issued an recommendation to the Yamaguchi Prefecture Economic Federation of Agricultural Co-operatives, an organisation influential in the supply of agricultural chemicals and fertiliser to agricultural co-operatives in Yamaguchi Prefecture, stating that the granting of rebates when supplying agricultural chemicals and fertiliser to member agricultural co-operatives, based on criteria such as the percentage of purchases of the Federation's products in the total purchases of a member co-operative, may have reduced business opportunities between member agricultural co-operatives and competing suppliers, and were a violation of the provisions of the Antimonopoly Act.

KOREA

1. Korean Regulations on Fidelity Discounts

Korea has yet to experience a case where fidelity discounts emerged as a significant competition issue. There are no regulations in Korea's Monopoly Regulation and Fair Trade Act (MRFTA) which deal with fidelity discounts directly and they have never been ruled as anticompetitive practices. Nevertheless, it is becoming apparent that fidelity discounts are prevalent in particular Korean markets and that they influence market competition in a variety of ways.

Although there are no regulations dealing specifically with fidelity discounts, the MRFTA does include provisions enabling measures to be taken against fidelity discounts when they pertain to predatory pricing or abuse of market dominance.

With regard to anticompetitive price discounts, the current MRFTA prohibits abusive acts by market dominant firms aimed at eliminating competitors and unfair business practices by non-dominant/typical companies intended to exclude competitors.

A market dominant firm is defined as a company with enough market power allowing it to unilaterally determine trading terms such as the price and supply of products. If the market share of a single firm exceeds 50 percent or the combined market share of the top three firms is more than 75 percent, these parties in question are presumed to be market dominant firms. Should such a firm supply goods or services at unreasonably low prices relative to the normal transaction price, the practice would be regarded as an abuse of market dominant position aimed at excluding relevant competitors and accordingly be banned. Even if the firm is non-dominant, if goods or services are continually supplied at a price considerably lower than the supply cost without a justifiable reason, the practice will also be prohibited.

2. Fidelity discounts in Korea

Fidelity discounts are generally understood as a business practice providing benefits to customers who maintain 'good' relations with product sellers. The main recipients of these benefits are customers maintaining long-term business relations or making large purchases with the seller. Normally, the benefits are offered in a variety of forms including price reductions, free gifts or bonus services. However, fidelity discounts can be regarded as a type of sales strategy which applies price discounts, in that the effects of these rewards ultimately amount to price reductions. The only difference between common price reductions and fidelity discounts is that, in the latter, the offer and rate of price discount depends on the relationship established between the customer and the discounter, i.e. customer loyalty.

This form of price discount is a sale strategy commonly found in people's daily surroundings. Even though there are differences in degree, offering a diversity of benefits to loyal customers is seen as a usual sales practice. Nonetheless, experts have pointed out that the full-scale introduction of fidelity discounts as a business strategy is a fairly recent phenomena in Korea. They argue that the promotion of

fidelity discounts is closely related to the spread of marketing technique, CRM (Customer Relationship Management).

CRM refers to the differentiation of customers by accumulating and specifying customer information and using the derived customer data to undertake marketing practices in line with customer characteristics. It is based on the understanding that loyal clients are a source of stable, long-term profits and therefore puts forth the maintenance of long-term relations with loyal customers as a very important strategy. From this perspective, CRM strategies can be considered a broader concept of management strategy which includes fidelity discounts. While the application of this kind of CRM strategy is spreading across different industry markets, it is particularly outstanding in gas stations, airline services, high speed internet services and mobile phone services.

Internet shopping malls are able to categorise 'premium customers' whose purchasing record is relatively greater than the majority of purchasers and when the purchase amount or frequency exceeds an established threshold, a certain percentage of the purchase amount is credited to the customer in points. The reserved credit points are then converted into cyber-money to be used on the Internet. Gas service stations have a similar system. Points are summed up in proportion with a customers gasoline purchases and the amount of points are converted into various free prizes. Sometimes, the customer can receive a discount on the price of gasoline by using credit points.

In the airline services, mileage rewards have been in use for a long time. A customer is given flyer mileage with each flight and, when the mileage is more than a given target, it is exchanged for either a free airline ticket or class upgrade on a purchased ticket. Recently, airline companies have broadly entered joint service partnerships with restaurants, shopping centers, hotels, etc. so that purchasing services in the partner businesses will add to credits on the mileage cards issued by the airline. In Korea's mobile phone industry, price discounts are impossible because mobile phone charges are regulated by law. Nevertheless, in reality, price discounts have prevailed through subsidising mobile phone purchases. This point will be discussed in more detail on the following page.

A common characteristic of the markets introduced above is that they have enormous fixed costs resulting from large scale investment. Considering the fact that it is necessary to spread costs through sustained profits when fixed costs are high, fidelity discounts are certainly a very attractive business strategy for these industries.

3. Analysis of Anticompetitive Effects of Fidelity discounts in the Mobile Communications Market

The market for mobile communications in Korea experienced a tremendous burst of growth in the late 1990's. At present, despite opinions arguing that the market is reaching saturation point, it still maintains steady growth. Currently, the market has three competing firms and the no.1 firm has over 50 percent of the market share. This is therefore considered to be a monopoly market.

Although competition for subscriptions between firms is fierce, the natural monopoly nature of the mobile communications industry has led to numerous restraints such as frequency allocation, price controls and access price regulation. In particular, price competition between communications firms is effectively impossible, because mobile phone service charges are subject to approval by the Minister of Information and Communication. For this reason, mobile communications firms have been using other means of competition. A main example of this is the mobile phone subsidies paid by firms when customers subscribe for their services.

Mobile phone subsidies can be broadly categorised into two types: those paid to new subscribers, and those going to existing ones. Although subsidies to new subscribers were paid conditional on minimum subscription periods of one to two years, such conditions have not always been applied because of escalating competition. To existing subscribers, a type of mileage system is frequently applied. Points are given to customers according to their record of service use and, when the subscription duration exceeds a certain period, the customer's points can be converted to a subsidy for a free or low priced new mobile phone. There are also cases where a firm will temporarily rent out a phone without fees if an existing user's phone is lost or damaged.

Since the mobile communications market is an industry which requires large scale capital investment, securing a stable source of profits is very important in order for firms to cover the substantial amortisation on fixed costs. Furthermore, the market displays clear customer concentration effects due to network externalities, i.e. the more subscribers a firm already has the more new subscribers the firm will attract. As a result of such industry characteristics, securing loyal customers inevitably becomes a key strategy which determines the survival of a market player.

The benefits derived from the mobile phone subsidies are also considerable. First, the consumer can purchase expensive mobile phones at cheap prices. At the same time, the supplier firm can ensure steady profits by reducing the fluctuation of demand for its products. This may be regarded as a very significant condition for surviving in the mobile communications industry where it is essential to amortise heavy fixed costs of large scale capital investment. Especially because network externalities cause customer concentration effects in which customers tend to subscribe to companies who already have high subscription levels, maintaining the loyalty of customers can be a determining factor to increase company profits. Even in considering the national economy as a whole, high priced mobile phones can act as obstacles to the introduction of newly developed mobile communications services. So by eliminating these obstacles, technological innovation can be promoted in the mobile communications services.

However, the anticompetitive harm caused by subsidising mobile phone purchases is also expected to be quite substantial. Before anything, the mobile communications industry shows network externalities and consequent customer concentration effects. If a firm attempts to secure customers through excess mobile phone subsidies in such a market environment, a "winner-take all" type monopoly condition can result. In addition, when a leading incumbent undertakes heavy subsidies on mobile phone purchases using their large financial capacity, their practices can act as barriers of entry against new market players.

The Ministry of Information and Communication is currently pursuing legislation completely banning such practices of subsiding mobile phones. It has already been two years since mobile communications firms were made to include the statement that they do not provide subsidies for the purchase of mobile phones in the terms and conditions of their contracts and the government has maintained strict controls by imposing fines on violators.

However, such steps by the Ministry of Information and Communication appear to be focusing more on the inefficiencies found on the national economic level than on the anticompetitive harms generated by subsidising mobile phone purchases. Firstly, mobile phone subsidies bring about a waste in resources by promoting indiscriminate mobile phone use by subscribers. Secondly, it is also believed that the financial structures of communications firms have seriously deteriorated because of excessive mobile phone subsidies. Thirdly, the subsidies provided to the consumer is calculated as costs to the firm which are ultimately shifted to consumers through increases in user charges. Finally, the practice of subsidising mobile phone purchases can cause the current monopoly market structure to be firmly embedded. Should the no.1 firm endeavour to provide excess mobile phone subsidies with the support of the firm's superior financial capacity, the customer concentration towards the no.1 firm will be further accelerated.

Contrary to this, some argue that if the government bans even the mobile phone subsidies in the mobile communications market when actual competition tools are already excluded by the price approval system, in effect, there will be no remaining means of competition and the current monopoly structure will be completely fixed.

MEXICO

1. Introduction

Article 10 of the Federal Law on Economic Competition (FLEC) prohibits vertical restraints and other practices that unduly displace agents from the market or those aimed to establish exclusive advantages:

> "ARTICLE 10 - Subject to verification of articles 11, 12 and.13 of this Law, relative monopolistic practices are deemed to be those acts, contracts, agreements or combinations, whose aim or effect is to improperly displace other agents from the market, substantially hinder their access thereto, or to establish exclusive advantages in favour of one or several entities or individuals, in the following cases:
> (…)
> VII - In general, all the actions that unduly damage or impair the process of competition and free access to production, processing, distribution and marketing of goods and services."

The Regulations to the Federal Law on Economic Competition (FLEC), add in Article 7:

> "ARTICLE 7 - Practices included in Article 10, Section VII, of the Law are deemed to include the following, without excluding others:"
> (…)
> "II - The granting of discounts by producers or suppliers to purchasers with the requirement of exclusivity in the distribution or marketing of the products or services, when such cannot be justified in terms of efficiency."

Although straightforward quantity discounts or discounts on services linked to purchasers committing themselves to buy over an extended period of time, are not included explicitly in the above definition, both are considered in Article 10, of the FLEC quoted above.

2. Possible Procompetitive or Efficiency Effects of Fidelity Discounts

The Federal Competition Commission (FCC) has considered that fidelity discounts can have some efficiency benefits, like giving stability to the demand faced by a particular producer. However, fidelity discounts increase the cost of switching faced by consumers and raise barriers to entry by reducing mobility and the potential demand to be covered by new suppliers.

Pursuant to articles 10, 11 and 12 of the FLEC, in order to consider these kinds of conduct as anticompetitive practices (relative monopolistic practices[1]), the FCC has to prove that the economic agent has market power. Without market power, the efficiency effect derived from the discounting scheme is transmitted to the consumer by the competition process. The main premise is that freedom of choice for the consumer assures a permanent beneficial effect for society.

Once the market power of the presumed transgressor has been established, the FCC would assess if efficiency gains dominate the anticompetitive effects of the practice. The best way to do this is to prove that, to some extent, the efficiency gains will be transmitted in a permanent way to the consumer. According to the Regulations to the Federal Law on Economic Competition:

> "ARTICLE 6 - Economic agents may accredit before the Commission whether the gains in efficiency deriving from a relative monopolistic practice have a favourable influence on the process of competition and free participation in the market. They must be taken into consideration in the evaluation of the conduct referred to in Article 10 of the Law. Such gains in efficiency are deemed to include the following, among others:
>
> – economising in resources, that allow the accused/alleged violator, on a permanent basis, to produce the same quantity of the goods at a lower cost, or a greater quantity at the same cost;
>
> – obtaining lower costs if two or more goods or services are produced jointly, than when produced separately;
>
> – the significant reduction of administrative costs;
>
> – that it implies a transfer of production technology, or knowledge of the market; and
>
> – lowering production or marketing costs derived from the expansion of an infrastructure or distribution network."

It is very important to show that efficiency benefits are transmitted to the consumer permanently and to a significant extent. For example, if a dominant firm is granting discounts with the purpose of extending the lengths of contracts subscribed with its clients, and such contracts are available to all the clients on non-discriminatory terms, it can be deemed that the practice is procompetitive as it lowers the costs caused by fluctuations in demand. But if discounts are applied only to those segments of the market in which 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 anticompetitive.

In order to consider the fidelity discounts as a form of exclusive dealing arrangement, it has to be shown that the incentives created by the practice cancels any form of rational freedom of choice of the purchaser.

3. Possible Anticompetitive Effects of Fidelity Discounts

An anticompetitive effect could be that the dominant economic agent succeeds in preventing the entry of other low cost producers. If the discount is very significant, and the market where it is applied lacks important returns to scale, the FCC would consider it an indicator of anticompetitive conduct. As said before, the discounts are also considered as an anticompetitive strategy, when they are targeted at a particular segment of the market in order to deter the entrance of new suppliers.

The FCC does not oppose the application of fidelity discounts when the economic agent applying them does not have market power, unless the discounts are part of a collusive agreement between competitors. On the other side, when an agent with market power offers fidelity discounts the concerns of the FCC have been significant. If the discounts are associated with an exclusivity commitment, there is high probability that the efficiency gains do not offset the anticompetitive effects. Similar effects can be

expected when the discounts are associated with a commitment to increase purchases, or to extend the contract length. In these examples, fidelity discounts tend to artificially reduce participants in the market because of the existence of factors that are not related to efficiency in the production process.

When a firm with market power applies discounts that do not produce efficiencies to be transmitted to the consumer, a high probability exists that market prices without discount are close to a monopoly price. Rising switching costs faced by consumers will make it difficult and more costly for non-dominant companies to achieve a similar market share as the dominant firm. At the end, the result for society would be higher equilibrium prices.

Summarising, fidelity discounts constitute a practice that harms real or potential competitors when applied by agents with market power, and are a strategy aimed to maintain the dominant agent´s market power. It is important to have in mind, that the discounted price does not need to reach a predatory level to make the strategy harmful. Based on these arguments, the FCC has concluded that fidelity discounts, combined with market power and the absence of technological efficiencies do harm consumers.

Given that real or potential competitors do not have complete information about the production costs of the dominant supplier, discounts on the volume of sales could be interpreted by the new competitors as the dominant's capacity and willingness to fight for the market, discouraging entrance or the development of competition.

4. Policy Issues

Vertical arrangements among companies, like brand competition, are beneficial to the society because they allow to decentralise power in smaller firms without loosing flexibility and unity required to react to changes in market conditions. Notwithstanding, it is important that vertical agreements are disciplined by competition, like brand competition or franchise agreements in competitive markets. Fidelity discounts are considered problematic when carried out by dominant agents because the existence of market power suppresses the incentives to transmit the benefits and efficiencies to the consumer.

As was mentioned before, according to the FLEC, fidelity discounts are only considered as monopolistic practices when companies or agents that apply them have substantial market power in the relevant market.

The relevant price for a purchaser is the average price. Therefore, if that price is above the relevant measure of cost, the practice cannot be considered a predatory price. Fidelity discounts can be very harmful to competition, but based upon the FCC´s experience, the harm caused by their implementation stems from increased switching costs, which is less harmful to competition than predatory pricing.

NOTES

1. Relative monopolistic practices are subject to a *rule of reason* approach.

NORWAY

1. Legal framework

The explicit objective of the Norwegian Competition Act is the efficient utilisation of society's resources. Effective competition is a means to this end.

Being based on an intervention principle rather than on a prohibition principle, Norwegian Law does not in general require proof that conduct constitutes abuse of dominant position, in order for the Norwegian Competition Authority (NCA) to be able to intervene against the practice. According to Section 3-10 of the Norwegian Competition Act, it is sufficient for the NCA to show that an action is liable to restrict competition, contrary to the purpose of efficient resource utilisation, in order for the NCA to intervene.

Thus, under Norwegian Law, there is no general prohibition on fidelity or loyalty discounts, nor is there an explicit definition. However, in 1994 the Norwegian competition authority laid down a set of guidelines on how such cases should be handled. Without offering a very stringent definition of fidelity discounts, the guidelines provide examples of discounts that fall inside or outside the concept of fidelity bonuses.

Ordinary quantity rebates are given dependent on the size of a particular order. They are considered unproblematic in relation to competition.

Volume discounts, on the other hand, typically depend on the total amount of purchases of a single product made by a single client during a certain period. They are often progressive, i.e. the percentage discount is somehow made to increase with the sales volume. These discounts are loyalty inducing. A particular type of volume discount makes the percentage discount depend on increasing sales relative to the previous period.

Concentration bonuses (budget share discounts) are given dependent on the proportion of the client's purchases that is made with the discounter. Some exclusivity discounts require a 100 percent budget share. These discount schemes are obviously loyalty inducing and, if used by a dominant firm, harmful to competition.

Aggregate rebates depend on the total purchases, across all products, from the discounter during a certain period. These discount schemes include an element of tying. A supplier with a dominant position in one market may use such discounts to achieve dominance also in other markets. On account of this, they are viewed with scepticism by Norwegian competition authorities.

2. Price discrimination – a conceptual framework

One possible perspective – more or less appropriate – on the practice of discounting may be the theory of price discrimination. There are, in principle, three degrees of such discrimination (Varian 1989).

Under first degree discrimination, the seller charges a different price for each unit, so that the price of each unit equals maximum willingness to pay. This scheme, which is more theoretical than practical, leads to an optimal amount of output and hence to no loss of efficiency. Under the total surplus standard implicit in Norwegian Competition Law, there is no reason to intervene against this kind of discrimination. If there are large economies of scale, scope or density, such discrimination may be crucial in achieving a minimum viable scale of production, without which the product may not be offered at all.

Under second degree discrimination, each consumer faces the same price schedule, but the schedule involves different prices for different amounts of the good purchased.

Third degree price discrimination implies that different consumers are charged different prices, but each consumer pays a constant price for each unit of the good bought. This type of discrimination could be either quite innocuous or highly anticompetitive, depending on how customers are selected for smaller or larger discounts.

Fidelity discounts could be interpreted as an instance of second degree discrimination, although the price discrimination aspect of such schemes may be considered immaterial compared to the loyalty inducing effect. The economic and competitive effects of fidelity discounts will depend, *inter alia*, on the size of the switching cost threshold. They may represent important barriers to entry.

Price discrimination based on versioning (Shapiro and Varian 1998) implies that all consumers are facing the same price schedule. They can choose to buy an expensive, high quality version or a cheap, lower quality version. Technically, this can also be viewed as a case of second degree price discrimination: more quality costs more. In practice, versioning is often used as a marketing tool allowing the supplier to charge a higher price from the less price elastic customers, who are led to purchase the high quality version. Airline tickets are a well-known example. The better the supplier is able to tune the price to the customer's price elasticity, the closer will the versioning scheme come to first degree discrimination. As such, it may not be detrimental to welfare – indeed, in certain cases it may enhance welfare.

3. Possible Procompetitive or Efficiency Effects of Fidelity Discounts

In the view of the Norwegian Competition Authority, there are few, if any, procompetitive or favourable efficiency effects of fidelity discounts *per se*.

However, in certain case fidelity bonuses may provide a useful marketing tool, which allows the discounter to save costs. Many fidelity discount schemes provide the discounter with information, such as a client database, that facilitates the flow of information to current and potential customers, allowing the discounter to rationalise his marketing efforts. Rather than directing its advertising to the general public, the company may target its information to the most susceptible group of clients and consumers. In order to have a maximum share of its current and potential clients enrol in this database, it may be necessary for the company to offer the clients an incentive, in the form, e.g., of a fidelity bonus.

In this case, the fidelity discount scheme may be said to contribute indirectly to cost savings and hence also to efficiency. This is, however, true only if the enhanced marketing efficiency achieved by the discounter is not offset by an increased need for advertising etc. and higher marketing costs among the competitors. In this context, one should bear in mind that the private economic benefit derived from an increased market share for a particular firm is not necessarily a benefit to society. This is especially true if an increased market share for a dominant firm is related to market exit for a smaller competitor.

4. Possible Anticompetitive Effects of Fidelity Discounts

In a recent, joint study by the Nordic competition authorities (Fridstrøm et al. 2002), several barriers to competition within the airline industry are discussed. Two marketing strategies that may fall within the scope of loyalty or fidelity discounts are (*i*) frequent flyer programmes (FFPs) and (*ii*) corporate discount schemes.

4.1 Example 1: Frequent Flyer Programmes

Frequent Flyer Programmes were introduced as a new marketing strategy by American Airlines in the early 1980's. Other US carriers were quick to follow suit. European airlines took up their example in the early 1990s. Today almost every major airline has its own programme or is connected to one.

Most FFPs have the following characteristics in common:

- Membership is free and open to any traveller.

- Members accumulate bonus points when making (certain types[1] of) trips or purchases with the airline carrier, with one of its alliance partners, or with other business associates, such as, e.g., a car rental company or a hotel chain.

- The number of points accumulated varies with the distance and with the fare class. Travellers on long distance flights collect more points than short-haul passengers. Business class passengers earn more points than economy class travellers.

- When a certain amount of points is accumulated, they can be exchanged for free air tickets, hotel accommodation, service upgrades etc. Travellers who have accumulated large amounts of points receive various forms of preferential customer treatment.

- "Discounts" are, in other words, granted, not in the form of money, but in the form of free services. However, the service provided "for free" is not necessarily of the same type or quality as the one purchased. To most customers, bonus trips are available only on certain flights. Moreover, although the customer may have earned her frequent flyer points buying fully flexible tickets, the bonus tickets are generally inflexible from the time they are issued. A bonus trip is, in other words, in several respects different from an ordinary monetary rebate.

- To obtain free flights to more or less distant destinations, the customer needs to surpass certain thresholds in terms of travel purchases within a certain time period (say, five years). The closer the customer gets to a threshold, the stronger is her incentive to buy another flight from that particular airline or alliance. The programmes have, in other words, a non-linear (progressive) structure, conferring upon the customer an incentive to concentrate her purchases to one or a few providers.

- In all FFPs, membership is individual and personal. The points are awarded to the traveller and, as a rule, only the traveller and his or her closest family or travel companion can make use of them. In the case of business travel, the traveller tends to differ from the purchaser. This may give rise to a pronounced principal-agent problem, by which the traveller (agent) is faced with a quite different set of incentives from those of her employer (principal).

- Although in principle taxable in many countries, the private use of frequent flyer points earned by an employee is in practice rarely taxed, for lack of information on the part of the tax authorities. This tax loophole is likely to aggravate the principal-agent problem.

- FFPs become more attractive the more extensive a network can be offered for bonus point redemption. Alliance airlines therefore merge their FFPs for mutually enhanced competitiveness.

Although such an interpretation is not obvious, a frequent flyer programme might be regarded as an example of second degree price discrimination. The consumers are rewarded for large purchases, and they receive a special kind of volume discount.

In a situation with only one airline, and disregarding the principal-agent problem, Steen and Sørgard (2002)[2] show that the frequent flyer programmes have an ambiguous effect on the consumer surplus. In the first instance, it may lead to a higher willingness to pay and hence to a larger consumer surplus for a given price. But the airline's response may be to set a higher price, in order to exploit this higher willingness to pay. The extent to which price or quantity goes up will depend on the price elasticity of demand. Among relatively inelastic customers, such as business travellers, the price is likely to increase more than the quantity.

If one takes the principal-agent problem into account, it becomes overwhelmingly likely that the FFP will lead to distorted decision making and resource allocation. Since the employer is paying for a benefit accruing, not to the company, but to the employee, the bonus programme may drive a wedge in between the personal interest of the business traveller and the economic interest of her company. The two of them are facing different prices or rewards. While the company may want to limit its travel costs, e.g. by replacing physical trips by other forms of communication, and by choosing – whenever travelling – the most inexpensive travel modes, routes and carriers, the business traveller will have an interest in frequent travelling by her assigned FFP membership airline, preferably using expensive, business class tickets.

This is not to say that all business travellers will act disloyally to their employer, or that the fringe benefits accruing from an FFP membership may not be a deliberate part of the company's remuneration policy and in this sense implicitly internalised by the employer. But even in these cases, the tax subsidy connected to bonus point redemption is liable to distort decisions: benefits from FFPs become a cheaper way to compensate employees than the ordinary, taxable payroll. In theory, this should lead to an excess consumption of travel by air and to a certain welfare economic loss.

In the literature, it is pointed out that frequent flyer programmes are loyalty programmes.[3] The consumers acquire an incentive to be loyal to one firm, so as to accumulate a maximally valuable amount of frequent flyer points. On the other hand, firms compete to attract new consumers that can become loyal. Although the net effect is ambiguous in theory, Klemperer (1995) concludes that loyalty programmes are typically detrimental to welfare.

In a telephone interview survey undertaken for SAS by the Norwegian market research organisation MMI Interactive in 2001, members of SAS' frequent flyer programme were asked how they would react to a ban on the frequent flyer programmes as practiced in the domestic Norwegian market. 42 percent of the members interviewed answered that they would then probably prefer another airline than SAS on international flights. This suggests that the loyalty effect of such a programme is substantial. Furthermore, more than half of those who had completed a free bonus flight, answered that they would not have made the trip if they had had to pay for it. This suggests that the consumer surplus accruing from the bonus flights might be limited.

Proussaloglou and Koppelman (1995) model air carrier demand, identifying and measuring the relative importance of factors that influence air travel demand. They show, among other things, the importance of a carrier's frequency (number of flights) in a city pair market and the importance of a frequent flyer programme for a passenger's choice of airline. They demonstrate in the empirical part of their study the dramatic impact of frequent flyer programmes on carrier choice for individual flights. Furthermore, they found that these effects are particularly strong among the frequent business travellers.

FFPs enhance the customer loyalty by imposing an indirect switching cost on any airline or alliance. The phenomenon of switching cost is not uncommon. It is likely also to appear in the industry of mobile phones, when a person changes phone from one operator to another, or in the software industry, when a person changes from one computer operating system to another. The switching costs between airlines are somewhat different from the other types of switching costs, because they are artificial, caused by a deliberate marketing strategy rather than by a difference in the technical systems.

If there were no switching costs, the demand for one journey would be independent of the demand for other journeys. When there are switching costs, on the other hand, travellers care about the full range of products sold by each firm, in this instance the airlines' destinations and extra services. The switching costs will induce a person to use the same airline every time, or as often as possible. The demand for different flights in time and space is thereby linked together, and a situation of synthetic economies of scope on the demand side is created. The FFPs thereby favour airlines with more extensive networks, because such airlines are able to offer a bigger variety of departures and routes.

When FFPs are no longer innovations but something that every airline has or participates in, one might argue that the overall marketing advantage for the airline will disappear. It will no longer be an efficient instrument to capture travellers from the other airlines. Yet no airline will unilaterally revoke the programme, even if such an action would save costs, since it will mean a loss of that particular carrier's market shares, especially in the corporate segment. Each carrier finds itself in a "prisoner's dilemma". European flag carriers acknowledge that they have a common interest in keeping up the existing structure, which allows each of them a dominant position in their respective "home" market. This structure is effectively reinforced by the hub-and-spoke mode of operation. Together, the FFPs and the hub-and-spoke networks allow the larger airlines to divide large parts of the European market between them.

In summary, frequent flyer programmes must be expected to have welfare decreasing and anticompetitive effects. In particular, there is reason to be aware of such effects in a setting with one (or a few) established firm(s) and a potential entrant. If incumbent carriers have been able to recruit a large part of the potential clientele into their frequent flyer programmes, a new entrant may find it exceedingly difficult to capture an economically viable market share.

4.2 Example 2: Corporate discount schemes

Airlines conclude discount agreements on air travel services with their major customers, such as corporations and the public sector. Usually, the agreements are not very binding for the customer. They typically contain a mention that the customers seek to concentrate their air travel purchases to the airline in question, or that the customer promises the carrier a so-called preferred airline status in its travel procurement.

Discounts are typically given on the total amount of purchases made during the agreement period and on tickets obtained for separately agreed routes. Target sums may be set for discounts granted from the total amount of purchases, usually containing one to three steps. When the customer has reached a certain

step, the airline commits itself to paying a compensation, defined as a certain percentage off the value of purchases.

Negotiated prices are usually considerably lower than the prices published by the airlines. Discounts of 30 to 50 percent are common on business class tickets. Further discounts may be granted to corporate customers at the time of purchase.

These kinds of agreements are examples of third degree price discrimination. On account of their cumulative, non-linear structure, they may be strongly loyalty inducing.

Although corporate discount schemes amount, in essence, to a set of quantity rebates, many of them do have tying effects. Agreements are usually concluded for one to three years at a time, the terms being affected by the volume of purchases effectuated the previous period. Often, the structure of the agreement or the development of negotiations provide the airline customers with an incentive to concentrate as many of their flights as possible to one single airline.

Usually, price competition will be more intense in some market segments than others. Large private and public customers – say, segment A – may be able to exploit buying power by triggering competition between the producers for an exclusive contract involving large discounts. By allowing for such price discrimination, one may actually trigger intense price rivalry in the affected segment.

In spite of this, such price discrimination may be detrimental to welfare, for the following reasons. Among other customers – say, segment B – there may be no buying power present and hence no discounts available. The price setting in this segment is no longer constrained by the competition for large corporate consumers. The company may increase the price in segment B, without losing business in segment A.

The net welfare effect of the price discrimination scheme will depend on the respective price elasticities of demand in the two segments. Steen and Sørgard (2002) show that if segment A is comparatively inelastic, even a limited price increase in segment B may lead to a loss of output and welfare that outweighs the welfare gain in the segment with intense price rivalry.

Unlike the differentiation between business class and economy class tickets, corporate discount schemes usually discriminate between customers not on the basis of price elasticity, but on the basis of buying power. At least this tends to be so under effective competition. Thus there is no guarantee that the more price elastic segment receives the lower price – in fact the opposite may seem more likely. This increases the risk that the welfare gain among large customers (segment A) will be more than outweighed by the loss affecting all other clients (segment B).

Steen and Sørgard (2001) examine the partial correlation between listed prices and corporate discounts on four domestic Norwegian routes. Interestingly, the published prices were higher, ceteris paribus[4], on duopoly routes than on monopoly routes. This finding could probably be explained by the effects of corporate discount schemes. Under monopoly, the airline customers have a poor bargaining position, resulting in small corporate discounts. Under duopoly, however, there is rivalry for the corporate clients, resulting in large discounts. To compensate for this loss or revenue, and/or to dampen the effect of a given nominal rebate off a listed price, airlines are led to increase their published fares. The larger the number of corporate discount agreements concluded on certain routes, and the larger the discounts granted to companies, the stronger is the pressure on airlines to raise their listed prices.

So far we have assumed the same degree of competition both before and after the introduction of third degree price discrimination. Note, however, that such discrimination may wipe out profits among the

firms involved in price rivalry. If so, competition may no longer be viable. Then the alternatives to consider are (*i*) competition without price discrimination and (*ii*) monopoly. In most cases, welfare will be higher under effective competition than under monopoly, implying that society as a whole is better off with no third degree price discrimination in a competitive environment.

In summary, corporate discount schemes have ambiguous effects on welfare. Discounts may tend to be large in segments with quite inelastic demand. This is not an optimal way for the airlines to cover their fixed costs. Moreover, selective discounts may lead to intense price rivalry between suppliers. Large customer discounts may therefore lead to exits from the market, because not all the airlines are able to cover their fixed costs. In a similar manner, potential entrants might be deterred, knowing that the incumbent airline is able to meet any challenger by offering selective discounts to large, attractive clients. Since these discounts may be directed exclusively to a small set of customers, without affecting market prices in general, such price discrimination serves to make predation much less expensive for the dominant supplier, and hence a more credible threat to potential entrants. This suggests that corporate discount schemes are anticompetitive, especially in a setting with a dominant, incumbent carrier and smaller potential entrants.

5. Competition Policy in Practice

The guidelines of the Norwegian Competition Authority generally acknowledge discounts as a form of price rivalry and hence as a legitimate and effective means of competition.

Loyalty and fidelity discounts are, however, seen as harmful to competition and to economic efficiency, when practised by a dominant firm. These schemes typically create lock-in effects and artificial switching costs.

Over the past decade, the NCA has intervened against a number of fidelity discounts schemes within a variety of sectors. In 1990, a paint factory was forbidden to grant concentration bonuses to its wholesale clients, and a similar prohibition was applied in relation to a producer of diapers and sanitary pads. In 1992, the Norsk Hydro factory was barred from granting progressive discounts on its sales of artificial fertilisers.

In 1994, the NCA considered the corporate discount schemes then practised by the two larger domestic airline carriers. Subsequent to discussions with the NCA, the carriers accepted not to practise cumulative or progressive volume discounts. Later, the NCA intervened in the public procurement agreements concluded between SAS and the Government, requiring that these contracts not contain exclusivity or preference clauses, that would prevent public servants from using cheaper or better air travel services offered by some other carrier.

The discount schemes of the petroleum companies, allowing private consumers certain rebates on their petrol purchases etc., were taken into consideration in 1992. In spite of their somewhat progressive structure, these schemes were accepted by the NCA, on account of the fact that the lock-in effects were found to be weak.

The NCA also considered, in 1996, a prohibition on the use of concentration bonuses, rewarding growth in relation to the previous period, practised by the Coca-Cola Company. In the end, no prohibition was issued, mainly because the competitors did not seem hurt by the scheme.

More recently, the NCA has considered intervention against frequent flyer programmes, against the budget share discounts practised by a TV station, and against the discount programme of a dominant cell phone company.

5.1 Case 1: Frequent Flyer Programmes

On 18 March 2002, the Norwegian Competition Authority (NCA) decided to disallow the SAS air carrier group to award frequent flyer points on any domestic Norwegian routes. The prohibition was issued pursuant to Section 3-10 of the Norwegian Competition Act. It becomes effective on 1 August 2002, unless overturned by the Norwegian Ministry of Labour and Government Administration, which, as of May 2002, is handling the case in their capacity as instance of appeal foreseen by the Competition Act.

The SAS group will still be allowed to award frequent flyer points on international trips and to offer their customers any kind of services, including bonus trips inside Norway, in redemption of frequent flyer points already earned.

To our knowledge, the NCAs general prohibition on domestic bonus point collection will, if upheld by the Ministry, be the first of its kind within the aviation industry.

After the SAS-Braathens merger in December 2001, the SAS group has an approximate 98 percent market share in domestic Norwegian aviation. The NCA views the present intervention as an essential step towards reopening the Norwegian market for competition. In view of the country's relatively large aviation market, the NCA believes that there is ample room for competition on numerous domestic routes, once an important barrier to entry has been removed. Operations based on smaller aircraft might turn out to be profitable even on the less dense routes.

Unlike the situation in Sweden, the prohibition in Norway applies on all domestic routes, competitive or not. The NCA considers that such an all-out ban may be necessary in order to dismantle the barriers to entry and reopen the market for competition. Although the relevant markets consist of individual city pairs, a ban affecting only certain routes would, on account of the important network economic effects at play, still mean that the dominant network airline would retain an important competitive advantage, even on those routes that are subject to a ban on bonus point collection.

The SAS group has expressed concern that a unilateral restriction on their FFP would put the carrier at a substantial competitive disadvantage in the international market. The NCA has paid careful attention to this argument, but finds it exaggerated. In the opinion of the NCA, whether or not the SAS group would lose international competitiveness depends largely on the company's own business strategy. Of particular importance would be whether and how the company chooses to reallocate the domestic frequent flyer points now "saved" to its international routes. Among Norwegian customers, more than half the bonus points are earned on domestic routes. Thus, by reallocating "vacant" domestic points to their international flights to or from Norway, the SAS group would, in principle, be able to more than double their assignment of frequent flyer points on these routes, thus enhancing the carrier's competitiveness in these city pairs. Although competing airlines might then choose to respond by similarly boosting their bonus point assignment, they cannot, like SAS, do this without incurring extra costs.

Even if the SAS group was to face intensified international competition, the NCA has expressed that it fails to see this as a valid argument against the prohibition. Enhanced competition on routes to and from Norway would benefit consumers and the economy in general.

5.2 Case 2: Budget share discounts on TV advertising

In April 2002, the NCA issued a preliminary warning of intervention against the volume discount agreements practised by TV2, the country's dominant[5] commercial TV channel.

If implemented in accordance with the warning, the ruling would forbid TV2 to reward clients for reserving a certain share of their TV advertising budget for TV2. This budget share could be 100 percent, or lower.

Such agreements implicitly punish advertisers for buying advertising time with the competing, smaller TV channels. In the view of the NCA, they therefore amount to an abuse of dominant position, in a way that restricts competition.

As a precaution against circumvention, TV2 may also be barred from eliciting information from its customers as to their total advertising budget.

In its preliminary assessment, the NCA has expressed concern that the budget share discounts may not only be liable to force the smaller commercial channels out of the market. They may also constitute an important barrier to innovation in terms of TV content production, because, in order for smaller channels to take the risk of introducing novel TV programmes, they need assurance of interest from major advertisers.

As of May 2002, the case is still pending before the NCA.

5.3 Case 3: Discount schemes for cell phone users

The Norwegian Competition Authority has recently been handling a case concerning the discount programme launched by Telenor Mobil, the dominant[6] provider of cell phone services in Norway.

Any private consumer subscribing to Telenor's cell phone service may become a member of the discount programme. Corporate subscribers are, however, not eligible for membership. Unlike the frequent flyer programmes, Telenor's discount programme therefore does not give rise to any principal-agent problem.

Bonus points are awarded according to the member's amount of cell phone use. Each bonus point has a cash equivalent corresponding to a ten-15 percent discount on the service used. The structure of bonus point accumulation is basically linear, i. e. there are no significant progressive elements or returns to concentration.

Telenor Mobil describes the discount programme as an important marketing tool, providing a much more efficient channel of communication to their clientele than ordinary advertising campaigns. Such channels can be of vital importance in a network industry, since new services will typically not become economically sustainable until a critical mass of users is reached. Telenor Mobil claims that its discount programme will help shorten the period needed to reach a critical mass. It therefore provides important efficiency gains, and could make a decisive difference in connection, e.g., with the introduction of UMTS cell telephony.

The Norwegian Competition Authority (NCA) has considered these assertions and generally found them valid and reasonable.

However, the switching costs introduced by the discount programme is a matter of considerable concern to the NCA. A certain amount of bonus points is lost if and when the user decides to switch to another provider. Moreover, since bonus points may be used to buy cell phone terminals, and since terminals are rarely purchased without an accompanying subscription, the discount programme is liable to restrict the competition between mobile telephony service providers.

The NCA is therefore considering a solution that would allow the company to reap the efficiency benefits foreseen, however without creating loyalty effects restricting competition. In the event of discontinued subscription, the company may be required to honour, in cash, and without cost or effort on the part of the customer, all bonus points accumulated. The exchange of bonus point for cell phone terminals, or for discounts thereon, may be explicitly prohibited.

As of May 2002, the case is still pending before the NCA.

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NOTES

1. On some carriers, passengers collect bonus points on tickets within every fare class. Other carriers award points only on business class tickets or similar.

2. In the sequel, parts of their text are used more or less verbatim.

3. See, for example, Klemperer (1984, 1995) and Carns and Galbraith (1990).

4. The authors run a regression model controlling for: distance (kms), aircraft kms, airborne hours, fuel cost per seat km, passenger tax per seat km, wage costs per seat km, population in city pair, employment in city pair, tax revenue in city pair, and the consumer price index.

5. TV2 holds an approximate 65 percent market share in terms of advertising revenue.

6. Telenor Mobil holds an approximate 65 percent market share in terms of subscriptions.

SWEDEN

1. Introduction

Deregulation and liberalisation of markets has become increasingly important in recent years. In Sweden a number of deregulations have been implemented in the last decade – taxi, telecommunications, postal services, airlines, railways and electricity. An important reason for the deregulation that has been carried out in monopoly markets is the desire to increase the efficiency of production in the companies concerned by exposing these markets to the pressure of competition. Consumers have an interest in companies competing with each other, since this increases supply and puts downward pressure on prices.

However, dominant firms on markets characterised by deregulation often have an interest in using loyalty discounts, which limit competition and the possibilities for new companies to enter the market. The Swedish Competition Authority has also experienced that the former monopolies try to gain a competitive advantage in new markets by the use of loyalty discounts.

The focus of this paper will be newly deregulated markets and the abuse of fidelity discounts. The reason is that in most cases concerning fidelity discounts that the Swedish Competition Authority has encountered, the abusing firm has been a former monopoly[1] in a newly deregulated market. We will focus on Frequent Flyer programmes (FFPs), since we are one of few countries that have taken a decision on limiting the use of such programmes. Furthermore, FFP:s are discussed in the Nordic Report – "Competitive Airlines: Opening the Sky in Northern Europe", which will be published at the end of May 2002. Moreover, in its meeting in Athens in April 2002 the European Competition Authorities decided to start a working group to investigate the competition problems in the European aviation market.

The outline of the paper is the following. First we review the Swedish competition law to establish where the abuse of loyalty discounts may come in, and then we go through three cases from three newly deregulated markets where the former monopoly has abused its dominant position by using loyalty discounts.

2. Article 19 of the Swedish Competition Act, Prohibition against abuse of a dominant position

This Article is based on Article 82 of the EC Treaty:

- any abuse by one or more undertakings of a dominant position on the market shall be prohibited.

Such abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

- limiting production, markets or technical development to the prejudice of consumers;

- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts.

The first paragraph of Article 19 in the Swedish Competition Act contains prohibitions against abuse of a dominant position by one or more undertakings on the market. Having a dominant position is not in itself prohibited, what is prohibited is the abuse of market power. Having a dominant position means that an undertaking has a strong economic position making it possible for the undertaking in question to prevent effective competition by acting independently of its competitors and customers and ultimately of consumers.

As a rule a dominant position is based on a number of factors, each of which in itself does not necessarily have to be critical. Examples of factors that are important are financial strength, barriers to entry on the market, access to capital goods, patents and industrial property rights as well as technology and other knowledge-oriented advantages. An important factor is the market share of the undertaking on the relevant market. A market share of between 40 and 50 percent is regarded as being a clear indication of a dominant position. If the market share exceeds 65 percent, the presumption of a dominant position is virtually conclusive.

3. Aviation Market - Frequent Flyer programmes – loyalty discounts restricting competition

Swedish domestic civil aviation was deregulated July 1st 1992. Prior to this the national carrier SAS had a monopoly on the primary routes, i.e. those routes that were part of domestic route network of the company. The monopoly position was, however not legally determined but rather based on praxis. The aim of the deregulation was to create a more "consistent" transport policy i.e. a policy where different types of transport would be created equivalently. In addition, the view was that deregulation would favour consumers by increasing customer orientation and efficiency, increasing flexibility and provide better developmental opportunities for the industry. An additional reason for deregulation was that the new market situation would strengthen the competitiveness of Swedish companies prior to the forthcoming European deregulation.

As in other newly liberalised sectors, there is an ever-present danger that the incumbent companies might use unfair methods to protect their vested interests in their home markets. In particular, it should be avoided that airlines make abuse of the dominant positions they may still have on certain markets to foreclose or distort the development of free competition. One major area of concern is loyalty schemes.

A frequent flyer program (FFP) operated by a dominant carrier at its hub is certainly attractive to customers because its large network at the hub allows in particular business travellers to collect more points and to redeem these points on a wider number of destinations. Since, in addition, the business traveller is usually not paying for the ticket, but is benefiting from the FFP free flight, it will be difficult for a new entrant without a competitive FFP or without a developed network at the hub in question to attract business customers for its flights.

3.1 The Eurobonus case

The Swedish flag carrier SAS uses a FFP called Eurobonus. In November 1999 the Swedish Competition Authority ruled that SAS's Eurobonus scheme constituted an infringement of Article 19 of the Swedish Competition Act since it had a significant loyalty-inducing effect and made it more difficult for other airlines to start or maintain competing domestic air services.

SAS appealed to the Market Court, the final instance of appeal. In its ruling in February 2001, the Market Court ordered SAS, on penalty of a fine, not to apply its Eurobonus scheme, or participate in schemes of a similar nature, in such a way as to enable passengers earning points to redeem them as bonus awards or the equivalent. The ruling applies to domestic air travel in Sweden between cities where SAS, or airlines co-operating with SAS on the scheme, encounters competition through existing or newly established scheduled air passenger traffic.

The Court considered the question of whether the practice constituted an abuse of SAS's dominant position, and concluded that a bonus scheme undoubtedly has a loyalty-inducing effect. The very purpose of introducing a bonus scheme must surely be to give travellers an incentive to use the services of the Airline Company in question. The appeal of such a scheme is even greater if the airline company concerned has a network of routes that offers travellers good opportunities not only for earning points but also for using them for attractive travel.

In the years before deregulation, SAS and its affiliate/subsidiary Linjeflyg were the dominant players on the Swedish domestic civil aviation market. In the spring of 1992, SAS acquired Linjeflyg and thus obtained a very strong position when deregulation came into effect. In 1994 SAS had a market share of 70 percent. After the deregulation, many airline companies – i.e. Transwede, Braathens Saafe, Malmö Aviation, Nordic European, and around a dozen of regional airlines companies, started operating scheduled passenger flights on the Swedish domestic market. However, many of the newcomers have been forced to leave the market and prices have increased. Many of these airline companies are point-to-point carriers or with less complete networks than SAS and only a few of them have been able to offer the travellers a FFP. In 1998 SAS and its partners had strengthened their position and held a market share of 80 percent. Due to the market conditions for Swedish domestic air travel, opportunities for new actors and for competition are limited. As a result of its previous monopoly in this area, SAS has a strong position in the market. The basic structural conditions therefore lead to a market situation in which competition *per se* is limited.

The Eurobonus scheme applied by SAS was deemed an attractive programme from a loyalty viewpoint as it offers people the chance to earn points and redeem them as a result of SAS's extensive route network both domestically and abroad and of SAS's participation in the Star Alliance. The Star Alliance is the largest airline alliance in the world. The attraction of the scheme was further increased by the fact that business travel is paid for by the employer whereas the points accrue to and may be redeemed by the individual traveller. As the Eurobonus scheme pays the greatest dividends to those travellers who concentrate their travel to SAS or to the alliance of which the company is a part, a significant loyalty-inducing effect is engendered. The Court concluded that the loyalty to SAS and it partners that the Eurobonus scheme promotes, therefore, restricts the possibilities of companies outside the scheme attracting passengers to their services and also makes it more difficult for new actors to become established in the Swedish domestic aviation market.

The Eurobonus scheme applied by SAS, with its significant loyalty-inducing and entry-impeding effects, is placing further obstacles in the way of proper maintenance and development of existing competition on the market. Under these circumstances, SAS's application of the Eurobonus scheme could not be considered an acceptable competitive practice. In reaching its decision, the Market Court attached considerable importance to the structural state of the market for Swedish domestic air travel and the lack of

adequate competitive conditions there. In such a situation, the application of a practice that has a significant loyalty-inducing effect was not an acceptable means of competition.

The Swedish Competition Authority is planning a follow up on the market after the decision has been into force for a year, i.e. October 2002. However, the Authority has observed that some new airline companies have entered the market.

Other fidelity rebates are loyalty driven travel agency schemes used by a dominant carrier create illegal market entry barriers. Since most travellers use travel agents to arrange their air travel, it is essential that travel agents are not tied to any particular airline and that they are interested to offer to travellers the full scale of available competitive services. Similar loyalty effects can also result from corporate discount. Corporate deals might constitute a barrier to entry on certain individual routes. On certain markets, the presence of a network carrier, which has the possibility to grant corporate discounts across its whole network, makes it indeed difficult for point-to-point carriers or for carriers with less complete networks to enter or stay in the market.

3.2 Fidelity discounts in the Postal services sector

The Swedish market for the distribution of mail was deregulated on 1st January 1993. At this time there was no legislation regulating the operation of postal activities, but instead a set of rules for steering the activities of the public utility, The National Post Administration. On 1st March 1994, a Postal Services Act was introduced in Sweden and The National Post Administration, was transformed into a wholly owned state commercial enterprise – Sweden Post AB.

The Swedish Competition Authority has experienced that Sweden Post in markets where it faced competition from other companies has tried to eliminate the competition with substantially lower prices. Sweden Post has, moreover, used different kinds of fidelity rebates in its agreements with customers. Customers, who use Sweden Post to cover all their distribution, needs receive better conditions compared to customers using other distributors as well. In several cases, the Swedish Competition Authority has found that Sweden Post has abused its dominant position.

In one case, it was found that Sweden Post entered into exclusive agreements with customers obliging them to buy all or most of their mail order distribution from Sweden Post. It was also found that different types of rebates and sales targets schemes with fidelity effects were put into practice. The sales target schemes were designed in such a way that the customers would get a rebate if they bought a volume that practically equalled the total volume demanded by the customer. The arrangements resulted in a situation where customers had limited or no possibilities at all to use Privpak, a new player in the field of mail order distribution. The market share of Sweden Post was at the time around 90-95 percent and the total value of the market around SEK one billion. This practice unfairly strengthened Sweden Post's dominant position on the market and was found to constitute an abuse. Sweden Post appealed against the decision to the court of first instance, the Stockholm City Court which ordered Sweden Post to pay SEK 3.8 million in competition fines or contravening prohibitions in the Competition Act.

3.3 The Telecommunication market and the use of joint discounts

The background of the deregulation of the telecommunications market was the rapid technological development and international liberalisation in the area. It is worth mentioning that there has never been – in contrast to what has been the case in most other countries – a legal monopoly or obligation to obtain a licence to establish a telecommunications network or to provide telecommunications services in

Sweden. The Swedish telecommunications administration (Televerket) had however a de facto monopoly in large parts of the telecommunications market. On 1st July 1993, a Telecommunications Act was introduced in Sweden. At the same time the public utility, Televerket, was transformed into a state-owned commercial enterprise – Telia AB.

In the case of mobile telecom the Authority has received complaints and investigated alleged combination offers from Telia of the mobile analogue network (NMT) and the digital network (GSM).

In one case, which was decided in 1996, the Authority held that the relevant market could be divided between the market for GSM and the market for NMT communication. On the basis of Telia's almost complete dominance of the analogue mobile market the Authority required Telia to discontinue to offer joint discounts for NMT and GSM subscriptions. The Authority stated that Telia, by offering such a discount system in order to strengthen its position on the GSM market, abused its dominant position on the NMT market and thus violated the Competition Act. By offering GSM customers discounts based on the customer's purchases of NMT services, Telia exploited its monopoly position on the NMT market to gain an advantage in the GSM market. Telia appealed the decision to the Stockholm City Court who upheld the decision. In 1999 the Competition Authority lifted the order against Telia with regards to the development of the digital mobile phone nets. NMT was then considered to experience a substantial competitive pressure from GSM suppliers. The two different mobile solutions, NMT and GSM, were therefore considered to be parts of the same market on which Telia was not a dominant firm.

4. Conclusions

Incumbent firms with a dominant position on a deregulated market often have an interest in using loyalty discounts, which limit competition and the possibilities for new companies to enter the market. The Swedish Competition Authority has also experienced that the former monopolies try to gain a competitive advantage in new markets by the use of loyalty discounts.

Well-functioning competition can be obtained on deregulated markets. One condition for this, however, is that the former monopolies are monitored closely so that they do not try to abuse their dominant position. Otherwise the goal of the deregulation can be at risk.

Rebates and similar pricing practices are a normal part of business life and is an important competitive tool. As Competition Authorities are well aware of, a dominant supplier can of course give discounts that relate to efficiencies, for example discounts for large orders that allow the supplier to produce large bats of the product, but cannot give discounts or incentives to encourage loyalty, that is for avoiding purchases from a competitor of the dominant supplier.

Competition rules on pricing practices must ensure that all firms – including dominant ones – are able to compete on price: at its most simple, competition law is about delivering lower prices to consumers. However, not all price competition is legitimate. Competition practices on the part of dominant firms that go beyond "competition on the merits" and that are detrimental to the competitive process must be curbed by the Competition Authorities.

NOTES

1. SAS is partly owned by the Swedish, Danish and Norwegian Governments.

UNITED KINGDOM

1. Introduction

The guidelines to the Competition Act 1998 (CA98) published by the Office of Fair Trading (OFT) state that offering discounts to customers is a form of price competition, and so is generally to be encouraged. As with its approach to price discrimination, the OFT suggests that discounts will infringe the Chapter II prohibition only if they are anticompetitive, for example being set at a predatory level or with the effect that a market is foreclosed.[1]

The following discussion primarily addresses issues which are most applicable to investigations of an abuse of a dominant position. The CA98 guidelines define fidelity discounts as those discounts conditional on customers buying all or a large proportion of their purchases from a dominant undertaking.[2] The guidelines do not set out in further detail what might constitute a fidelity discount. We consider that rather than debating whether a particular discount in question might fit in with a pre-specified definition of a "fidelity discounts", it is preferable to focus on whether or not the effect of the discount is anticompetitive.

This paper considers several aspects of fidelity discounts: various definitions; potential procompetitive effects; and potential anticompetitive effects. We conclude that while anticompetitive effects are undoubtedly possible when loyalty discounts are set by firms with market power, there are also important procompetitive effects that seem to be achievable only through the use of loyalty discounts. This suggests that loyalty rebates would be best viewed on a case-by-case basis.

2. Potential types of fidelity discounts

This section addresses possible definitions of fidelity discounts. We use the terms "loyalty" and "fidelity" interchangeably and "discount" and "rebate" interchangeably. We discuss: discounts based on the share of a buyer's needs purchased from a supplier; discounts based on the growth in a buyer's purchases from a supplier; hybrid schemes; and other types of loyalty discount scheme.

2.1 Share of buyer's needs

A commonly cited definition of a fidelity discount is taken from the ECJ's judgement in Hoffmann-la Roche:[3]

> "…discounts conditional on the customer's obtaining all or most of its requirements –whether the quantity of its purchases be large or small – from the undertaking in a dominant position".

What can distinguish a loyalty discount from a volume discount is that the discount does not increase in relation to the absolute size of the order but in relation to the share of the buyer's needs purchased from the supplier. For example, so long as it purchases most of its requirements from a supplier,

a small buyer may be able to obtain the same discount as a very large buyer, even though the absolute amounts purchased are very different.

2.2 Discounts based on sales growth

There are various ways that the supplier can estimate what the buyer's total requirement will be. For example, where it is the only supplier, the supplier in question might base its expectation of a buyer's purchasing requirements on the quantity that the buyer purchased in a previous time period (for example the previous quarter or the previous year).

Where a buyer purchases from more than one supplier, then the supplier setting the loyalty discount may take this into account as well. For example, a buyer may not qualify for a discount unless it increases its purchases compared to the previous period by a certain amount. Where increases in purchases cannot be met by growth in the overall market, this sort of a discount may provide an incentive for the buyer to reduce its purchases from other suppliers and increase its purchases with the supplier in question.[4]

2.3 Hybrid schemes

We can also envisage hybrid discount schemes which combine different types of discounts. For example, a combination of a loyalty discount and product bundling would be where a buyer qualifies for a reduced price on good X if it reaches a target level of purchases on a related good Y. In the early 1990s, some car suppliers in the UK offered lower list prices on new motor cars to their dealers where those dealers achieved target levels of sales of spare parts.[5]

2.4 Other types of discount

We define below some other types of loyalty discount schemes which will be discussed later in the paper:

- Time related – discounts are related to number of time periods the buyer has purchased from a particular supplier.

- Incremental loyalty discounts – having achieved a target level of purchases, the discount applies only to those purchases in excess of that target.

- Rollback loyalty discounts – having achieved a target level of purchases, the discount applies to all purchases.

- Lump sum rebates – where the loyalty rebate is provided as a lump sum as opposed to a lower unit price.

3. Efficiencies and procompetitive effects

We now turn to possible efficiencies and procompetitive effects of loyalty discounts. As noted in the introduction, the OFT's guidelines to the Competition Act 1998 state that offering discounts to customers is a form of price competition, and so is generally to be encouraged. For example, where one firm sets a loyalty discount to encourage a buyer to substitute a rival's product for its own, that rival may

respond with competing discounts. This process can lead to lower input costs for buyers which are eventually passed on to consumers in the form of lower prices.

Under CA98 there are no powers to grant exemptions from the Chapter II prohibition (and so there is no efficiency defence as such). Nevertheless, it is useful to question whether a discount scheme is either the best way, or the way the least restrictive of competition, to generate any claimed efficiencies or procompetitive effects. This helps address the "legitimacy" of the business practice under question.[6]

We consider how loyalty discounts may help achieve the following: price according to volume related costs; ensure Ramsey pricing; reveal useful information; raise retailer effort; and enhance downstream competition. We expect that some of these procompetitive effects, especially the last one, are particular to loyalty rebates and so unlikely to be replicable by other types of discount structure. This leads us to argue against a *per se* prohibition of loyalty discounts, since such a policy would rule out some potentially important procompetitive strategies.

3.1 Cost related volume discounts

It is worth noting that, in some circumstances, cost related volume discounts and loyalty rebates may appear similar, particularly when there is only one buyer, or where all buyers are of an identical size.[7] In this instance (if it were desirable), we would expect that the rebate scheme could be restructured in a way that is more directly related to volumes, as opposed to loyalty rebates.

3.2 Information revelation relevant for Ramsey pricing

Suppose that a loyalty rebate is structured to benefit retail buyers that increase year on year sales. This scheme can allow a supplier to identify those retailers facing the most price sensitive ("elastic") demand for the supplier's product. This is because those retailers who think that they can pass on these discounts to generate greater sales and profits in the downstream market will be the ones who are most likely to take up the discount.[8] If so, and the supplier faces fixed costs, the supplier is able to lower costs for buyers that serve more "elastic" downstream demands, in keeping with the Ramsey pricing principle that fixed costs are recovered disproportionately from those segments of final consumption with the lowest elasticity of demand.

In this example, we note that loyalty rebates would not always lead to Ramsey pricing because the buyers with the most elastic firm level demand (and hence most likely to take up the discounts), may be the ones who can turn to rival suppliers and these buyers will not necessarily serve the most elastic components of final demand. Furthermore, we would imagine that Ramsey pricing could often be achieved with alternative discount structures to loyalty rebates.

3.3 Reducing asymmetric information

Another example on the information revelation theme, would be where suppliers try to encourage loyalty as a way of learning more about their suppliers or buyers. For example, if a banker learns more and more about the risks faced by a borrower as their relationship develops over time, the banker may start off with a high loan rate and then renegotiate a lower the rate of interest on the loan over time. This might appear to be rewarding loyalty over time. On the other hand, it could simply be viewed as a cost related discount where more and more information on cost is revealed over time.

3.4 Incentivise retailer effort

Suppose that the buyer is a retailer and that it has private information on retail demand conditions and/or can influence retail demand conditions by promotional or some other effort. If the supplier cannot set a contract based on the retailer's effort in promoting its good, then it may wish to use a loyalty discount scheme to incentivise such effort. For example, the supplier might use simple adaptive model whereby if the retailer's sales this year exceed last year's sales the retailer receives, by means of a rebate, some of the extra profit that its sales have generated for the supplier. Alternatively, a supplier that deals with many retailers might set a purchase target based on a different, but similar, retailer's sales in the previous period – analagous to "yardstick" competition. Both schemes might look similar to a loyalty rebate.

In this case, the rebate structure may enhance either interbrand competition, intrabrand competition or both. This sort of argument is well known from the literature on vertical restraints and we would expect that many of the usual arguments in defence of vertical restraints can be adapted to suit loyalty rebates. The vertical restraint literature suggests that vertical restraints should be assessed on a case-by-case basis and, to the extent that the analysis carries over to loyalty rebates, the same policy rule seems relevant.[9]

3.5 Promoting downstream competition

Since fidelity rebates allow large and small firms to benefit from the same discounts this might promote a "level playing field". This could enhance competition downstream because the downstream sellers would have a similar level of marginal cost (assuming discounts are not lump sum rebates). As a result, the smaller buyers may exert a stronger competitive constraint on the larger buyers when they compete in the downstream market than would have been the case with volume discounts.[10]

This final effect is important because it seems particular to loyalty rebates. The procompetitive effect is achieved by a discount structure which is not related to the volume of purchases but allows large and small buyers to purchase on a "level playing field". Therefore, a *per se* prohibition of loyalty rebates might prevent a dominant firm that wished to provide discounts from providing them in a way that did not distort competition among downstream firms. We would expect that an incremental rebate system should suffice to achieve this procompetitive effect.[11]

4. Analysis of loyalty rebates and foreclosure

We now turn to the most important issue of what effect a discount scheme has on the process of competition. This section considers under what conditions an alleged dominant firm might anticompetitively foreclose a market through the use of loyalty rebates. To focus the analysis we consider a situation where the alleged dominant supplier sets loyalty rebates for a representative target buyer. We also assume that there is one rival supplier, that can secure sales only through the target buyers, and which alleges that it is foreclosed from the market as a result of those rebates.

We might expect rollback rebates to be more likely to be used to foreclose a market. This is because these discounts allow the supplier to target a critical area of sales that are potentially open to competition with very low prices or even negative prices, without having to set low prices for further sales beyond that point. In contrast, when incremental rebates are set, prices either fall or remain stable as a buyer purchases more of its needs from the supplier. Incremental rebates mean that there is no scope to target low prices over a range and then raise price again – once prices are set below cost, they remain below cost. Appendix 1 sets out our argument in more detail.[12]

We note that all of the following conditions are likely to apply if a rollback loyalty scheme is to be shown to be anticompetitive:

- the alleged dominant supplier will have an assured base of sales;
- the alleged dominant supplier will price below its average variable cost over a part of that range of output that is potentially open to competition (i.e. where "potentially open to competition" means a range of sales that is not part of the assured base of sales);
- the assured base of sales will be large in relation to the target buyer's total needs; and
- the rival supplier will need to achieve a minimum efficient scale that is large in relation to the range of output that is potentially open to competition;
- the rival supplier will not have access to enough buyers who are not "loyal" to the alleged dominant supplier to achieve these economies.

4.1 Dominant supplier has an assured base of sales

Loyalty discounts mean that a target buyer obtains a discount only after a certain target has been achieved. With rollback rebates, a buyer qualifies for a rebate on all of its purchases from an alleged dominant supplier once it has reached a target level of purchases. Therefore, the buyer will have a strong incentive not to buy from a rival supplier when it is close to meeting its purchase target. The further away is a buyer from meeting its purchase target, the less it is likely to be affected by the pecuniary benefits from meeting its target. Therefore, a rival supplier can undermine the incentive effects of an alleged dominant firm's rollback loyalty rebate in two ways. First, it can win so many sales from the buyer that the buyer does not get near enough to its target to have its incentives distorted. Second, it can offer its own loyalty rebate system, and compete head on with the alleged dominant supplier.

It follows that the ability to foreclose a market relies on buyers having a strong preference for purchasing the core requirements from the alleged dominant supplier. Some examples of why a rival might not be able to win the alleged dominant supplier's core business are as follows:

- the alleged dominant supplier might be in possession of a "must-have" input (e.g. if the alleged dominant supplier is a manufacturer and the buyers are retailers, the alleged dominant supplier might be a supplier of a leading brand which is so popular with final consumers that buyers find it profitable to stock a minimum quantity of that product);
- the alleged dominant supplier might be assured of a core amount of sales because its buyers face high switching costs;
- the alleged dominant supplier is more efficient than its rival. This is an important point to keep in mind when making the competition assessment. We need to understand why the target buyer chooses to lock itself in to a contract with the alleged dominant supplier. There may be no anticompetitive inducement – the alleged dominant supplier may simply be offering the best deal on the market due to its lower costs.

Suppose our investigation finds good evidence that the alleged dominant supplier can generate a core amount of sales for reasons other than because the rival is not (potentially) as efficient as the alleged dominant supplier. This evidence, in conjunction with other factors (such as further evidence of entry

barriers), would make it more likely that the supplier is actually dominant.[13] This is not to argue that the use of a loyalty rebate by a dominant firm is necessarily anticompetitive. Evidence of how the loyalty rebates harms the process of competition would still be required.

4.2 "Cross subsidy" and targeted pricing below variable cost

The process of competition is more likely to be harmed if there is evidence that the alleged dominant firm's discount scheme diminishes the ability of an equally or more efficient supplier to compete. Given that the alleged dominant firm has an assured base of sales, foreclosure would be possible by "leveraging" its power from the assured base of purchases into that range of purchases over which it faces competition. One way to do so would be where the supplier charges high prices over the assured range of purchases and uses these revenues to "cross subsidise" the segment where it potentially faces competition. We use the term "cross subsidy" to mean that the "subsidised" prices are lower as a result of the ability to charge higher prices to assured base of sales.[14] The strongest evidence of anticompetitive intent would be where prices are below the alleged dominant firm's average variable cost.[15]

4.3 Relation between foreclosure and the assured base of sales

We would expect that larger the share of output that is potentially subject to competition (i.e. the smaller the assured base of sales in relation to total buyer needs), the less likely there is to be foreclosure of a rival that is as efficient as the alleged dominant supplier. This is because the more the alleged dominant supplier tries to leverage its power over "locked-in" purchases into "competitive" ranges of purchases, the more "costly" (e.g. because prices are below average variable cost) that this is likely to be.

It is worth noting that where (partial) foreclosure harms competition, this does not simply require that the alleged dominant firm's discount scheme keeps a rival smaller than it otherwise would have been. We would also have to show that, as a result of being smaller, the rival is a less forceful competitor with the result that consumers would likely end up being worse off.

4.4 Economies of scale, network effects and learning by doing

Foreclosure is most likely to harm consumers when the rival firm needs to achieve a certain size to benefit from economies of scale, network effects, or learning by doing (see Appendix 1). In this case, the alleged dominant firm would not need to price below its average variable cost on the whole range of sales for which competition is possible, but only over a range that is large enough to prevent the rival securing a minimum efficient scale.[16]

In order to focus the discussion, our explicit assumption in the analysis has been that the rival supplier must deal with the target buyers. In practice, it is essential to assess whether the rival supplier has access to other buyers who are not "loyal" to the alleged dominant supplier and whether the rival supplier has alternative means of selling its product.[17] Where these alternatives are not possible, consumers might suffer from the loyalty rebate scheme either because it leads to the exclusion of an efficient entrant, or because a potentially efficient rival is constrained to produce at an inefficient scale (and hence price at a higher level).

5. Switching costs

This section discusses how loyalty rebates can create switching costs. Switching costs can have adverse effects on competition in much the same way as foreclosure. It follows from the above discussion that for the practice to be anticompetitive, we would have to show that the loyalty rebate in question raised rivals' costs with the effect that the process of competition is harmed.

5.1 Switching costs with explicit *lock-in*

A discount scheme may explicitly lock-in the buyer. For example, suppose that the supplier discusses with the buyer the likely amount of purchases it will need over three years. Suppose that the supplier also gives the discount up front, in the expectation that the buyer will eventually reach its sales target. The supplier may then require that the buyer signs a contract that establishes that if it stops purchasing from the supplier before it has achieved its three year sales target, then it must refund the difference plus an administration fee to the supplier.[18] The buyer would then face a switching cost which would make it less willing to switch to a new supplier.[19,20] Whether, as a result of this cost, competition is harmed would require further analysis.[21]

5.2 Switching costs with implicit *lock-in*

Loyalty schemes can also create switching costs where buyers build up some form of loyalty tokens over time which are then redeemable, such as loyalty points at a supermarket and frequent flier programmes (FFPs) with an airline. In the case of FFPs, a target number of airmiles is required before the loyalty reward is useful (e.g. enough airmiles for an international flight). To obtain these airmiles, an individual will need to make a certain number of journeys. If the individual has not yet acquired enough airmiles for a useful trip, he or she may be reluctant to fly with another airline since the opportunity cost of doing so would be the foregone airmiles. Even if a rival airline is cheaper, if the price difference is less than the opportunity cost of the foregone airmiles then the individual may not fly with the rival airline. However, while FFP's may lead to switching costs once a buyer has committed itself to a particular programme, if there is competition among airlines (and alliances of airlines) which offer FFP's then there FFP's need not necessarily have anticompetitive effects and may enhance competition.

5.3 Exclusive purchasing

It is worth noting here that the effect of a discount scheme which is so powerful that the buyer is unwilling to buy from any other suppliers at all could also be viewed as an "exclusive purchasing" contract. We can therefore draw on this literature when analysing loyalty rebates. For example, where a buyer (e.g. a retailer) is the most efficient distributor, a supplier might be able to raise its rivals' costs by inducing that distributor not to distribute any one else's goods. On the other hand, the exclusive purchasing contract may be procompetitive, e.g. where it provides an environment for the contracting firms to make specific investments.

5.4 Theory versus practice

It is clear that it is easy to think of theoretical examples of how loyalty rebate schemes create switching costs and so make it harder for rivals to win the business of locked in customers. However, this does not necessarily mean that schemes found in practice are anticompetitive. This is because we could just

as easily devise examples of switching costs that arise from loyalty rebates being procompetitive. Economic theory thus supports the view that a case by case analysis of loyalty rebates is required.

5.4.1 Competition dampening

Foreclosure issues typically relate to behaviour by an alleged dominant firm. We now turn to facilitating practices that might dampen competition among suppliers. This section discusses how bonus schemes, which were similar in nature to loyalty rebates, dampened competition among car suppliers in the UK. At Appendix 2, we provide some speculative examples on how loyalty rebates could facilitate collusion.

The UK Competition Commission noted that car suppliers used bonus schemes which reduced the scope for parallel trade and weakened competition by reducing the incentives for their dealers to import cars from abroad. Dealers were set targets at levels that they could not easily reach. Furthermore, sales of imported cars did not count towards the target.[22] Therefore UK suppliers were able to focus their dealers' attentions on selling higher priced domestic cars to consumers.[23] Since many suppliers had similar discount policies, it seems likely that UK suppliers were able to co-ordinate on higher prices than would have been possible had there been more imports.

The UK competition authorities examined the above case under the complex monopoly provisions of the Fair Trading Act. This provision provides the UK competition authorities with the possibility of addressing industries where groups of firms adopt similar practices which have an adverse effect on competition, even if these were not caught by CA98. Here, the Director General of Fair Trading may make a reference to the UK Competition Commission in order to establish whether a monopoly situation operates, or may be expected to operate, against the public interest.[24]

6. Conclusion

Offering discounts to customers is a form of price competition, and so is generally to be encouraged. We conclude that, while anticompetitive effects are undoubtedly possible when loyalty discounts are set by firms with market power, there are also potentially important procompetitive effects that seem to be achievable only through the use of loyalty discounts. This suggests that loyalty rebates would be best viewed on a case-by-case basis.

We have also noted some preliminary views which may guide policy. First, rollback rebates, where discounts apply on all purchases, are more likely to be harmful to competition than incremental loyalty rebates. Second, we suggest conditions that – when all apply – are most likely to be conducive to using loyalty discounts to foreclose a market. In particular, the competition analysis would likely have to demonstrate the following. A rival firm has no alternatives than to deal with "target" buyers who are "loyal" to a dominant firm. That dominant firm, benefiting from an assured base of sales that covers a significant part of its buyers' needs, uses its scheme to target – by means of pricing below its average variable cost – a critical range of its buyers' purchases that was potentially subject to competition. This critical range would likely be those sales required by a potentially equally efficient rival to achieve a minimum efficient scale. By constraining the rival to a lower output level, this leads to prices being higher than they otherwise would have been.

APPENDIX 1

BUYER'S INCENTIVES UNDER INCREMENTAL AND ROLLBACK REBATE SCHEMES

This appendix compares the incentives facing a target buyer under two types of discount scheme – incremental and rollback rebates. It also considers how the use of sliding scale discounts with rollback schemes can extend a dominant supplier's influence over a buyer. It argues that rollback rebate schemes provide more scope for profitable foreclosure than incremental rebate schemes.

1. Simple example

The incentives are best demonstrated by using a simple example. We assume that there is one incumbent supplier (the alleged dominant supplier) and one potential supplier (the rival supplier). We also assume that the buyer in question requires a total of 110 units of input.

Incremental discounts - scheme 1. This scheme applies the discount to incremental purchases beyond a target. Suppose the target is 100 units,[25] the starting price is £10 per unit and the discount ten percent. If, within the qualifying time period, the buyer purchases 110 units, it pays £10 per unit for the first 99 units and £9 per unit for the next eleven units – a total outlay of £1 089.

Rollback discounts - scheme 2. This scheme applies the discount to all purchases, once a target is passed (these are sometimes also called "retroactive" payments). If the starting price is £11 per unit, the target is 110 units and the ten percent discount applies on all units once 110 units have been purchased, then a buyer that purchases 110 units pays £9 90 for all units. This is a total outlay of £1 089 (the same as under scheme 1).

Compare the power of the two above schemes. Suppose that the buyer has purchased 99 units under both schemes. Suppose it then has the choice of purchasing 11 units from its alleged dominant supplier or 11 units from another supplier. Under the first scheme, if the buyer purchases 11 units from its alleged dominant supplier its incremental cost is £99 (i.e. £1 089 less £990). Under the second scheme the incremental cost is zero. It costs just as much to buy 99 units as it does to buy 110 units.

Now assume that the firm would have bought the 99 units from its alleged dominant supplier anyway – for sake of argument, we shall assume they are "locked-in" to purchasing 99 units. This is the alleged dominant supplier's "assured base of sales" (see discussion in the main text). Therefore, there is the potential for competition only on the next 11, "incremental", purchases.

In this case, under scheme 1, an equally efficient rival supplier can offer a competing deal for the 11 incremental units by setting its unit price at £9 (assuming its costs are less than £9 per unit and it does not need to achieve a minimum efficient scale of production). However, even though the buyer's outlay is the same under both schemes, the second scheme provides a stronger incentive for the buyer to stick with its alleged dominant supplier. Under the second scheme, a rival supplier would not be able to make any sales unless it gave away the 11 units that are potentially open to competition.

2. Further ways to extend influence over a range of output that is open to competition

We have just shown one way that rollback rebates can be used to by the alleged dominant supplier to extend its influence over the range of purchases that are potentially open to competition. We now consider a second way, which is the use of sliding scale discounts.

Consider a small change in our example. Suppose that the buyer's needs are now 150 units instead of 110 units and so there are potentially 51 units open to competition. Scheme 1 means that the alleged dominant supplier prices all of the 51 units that are open to competition at £9 per unit. Under scheme 2, it follows from the above discussion that it is unlikely that a rival would win the first 11 units of the 51 potential units. However, because the unit price is £9 90 under scheme 2 once 110 purchases have been made, the rival supplier would be better placed to sell the last 40 units to the target buyer. In other words, rollback rebates mean that the buyer has a very strong incentive to just meet the target of purchases in order to qualify for the large discount. Thereafter, however, the alleged dominant supplier and its rival compete on price.

Now suppose that the rollback rebate scheme is not applied at a single point, but is spread out over a range of outputs as in a sliding scale rollback scheme. For example, suppose under the rollback rebate scheme the first target is set at 100 but the discount is only 0.5 percent instead of ten percent. Suppose that for each additional unit purchased the discount increases by half a percentage point until the unit price falls to £9.90 (i.e eventually the total discount is ten percent on the original unit price of £11).

The effect of the discount scheme is set out in the table below. Notice that the outlay under the second scheme always exceeds that under the first. However, under scheme 2, the incentives to buy from the alleged dominant supplier are much stronger over the range of the 100^{th} to the 120^{th} unit. This is because the incremental price falls steadily from £5 50 to £3 98, until it bounces back up to £9 90 for the 121^{st} unit.

Therefore, provided that the alleged dominant supplier has an assured base of sales of 99 units, it can induce the target buyer to pay more under a rollback scheme and still make it very hard for a rival to make sales over a significant range of output that would potentially be open to competition.

3. Relation to foreclosure where there are economies of scale

This example has shown that rollback rebates provide the potential for an incumbent to target declining marginal prices over a certain range of output. If this range is crucial for a rival to achieve economies of scale (or other economies such as network effects, learning by doing, etc.) then foreclosure is possible for example because prices fall below the average variable cost of an equally efficient rival.

Of course, incremental discounts could also be used to price below average variable cost. However, with such schemes, once the unit price has fallen to a low level, it remains at that low level. In contrast, we have shown that a rollback rebate scheme allows targeted low cost pricing over a critical range and then a bounce back to a higher unit price. This allows the supplier to establish very sharp falls in a buyer's marginal outlay – even to the extent that prices are negative over a certain range. This is in some ways analogous to predatory pricing, whereby once a rival has been forced out of a market, losses are recovered because the predator raises its prices. Here, we would argue that the discount scheme keeps prices low over the range critical to foreclosing the market. With foreclosure successful, prices rise on those units beyond the critical range.

Finally, we note that while rollback rebate schemes would appear, in theory, to be a more profitable way of foreclosing a market, whether the incumbent has the necessary information to succeed with such a strategy is another matter. Furthermore, in this example, economies of scale are crucial to the foreclosure effect and so the competition authority might be expected to show that such economies exist and that foreclosure has harmed the process of competition, e.g. by excluding an efficient rival.

TABLE TO APPENDIX 1: COMPARISON OF MARGINAL PRICES UNDER A ROLLBACK AND INCREMENTAL REBATES

	Rollback rebate scheme			**Incremental rebate scheme**	
Quantity	Unit price, £	Outlay, £	Incremental price	Outlay, £	Incremental price
98	11.00	1078.00	11.00	980.00	10.00
99	11.00	1089.00	11.00	990.00	10.00
100	10.95	1094.50	5.50	999.00	9.00
101	10.89	1099.92	5.42	1008.00	9.00
102	10.84	1105.25	5.34	1017.00	9.00
103	10.78	1110.51	5.26	1026.00	9.00
104	10.73	1115.68	5.18	1035.00	9.00
105	10.67	1120.78	5.10	1044.00	9.00
106	10.62	1125.80	5.02	1053.00	9.00
107	10.57	1130.74	4.94	1062.00	9.00
108	10.51	1135.60	4.86	1071.00	9.00
109	10.46	1140.38	4.78	1080.00	9.00
110	10.41	1145.09	4.71	1089.00	9.00
111	10.36	1149.72	4.63	1098.00	9.00
112	10.31	1154.28	4.56	1107.00	9.00
113	10.25	1158.76	4.48	1116.00	9.00
114	10.20	1163.17	4.41	1125.00	9.00
115	10.15	1167.51	4.34	1134.00	9.00
116	10.10	1171.77	4.26	1143.00	9.00
117	10.05	1175.96	4.19	1152.00	9.00
118	10.00	1180.08	4.12	1161.00	9.00
119	9.95	1184.14	4.05	1170.00	9.00
120	9.90	1188.12	3.98	1179.00	9.00
121	9.90	1198.02	9.90	1188.00	9.00
122	9.90	1207.92	9.90	1197.00	9.00
123	9.90	1217.82	9.90	1206.00	9.00
124	9.90	1227.72	9.90	1215.00	9.00
125	9.90	1237.62	9.90	1224.00	9.00
etc	etc	etc	etc	etc	etc

APPENDIX 2

INTERBRAND COMPETITION: SOME SPECULATIVE, THEORETICAL IDEAS

This appendix sets out some ideas as to how loyalty rebates could, in theory, dampen competition. These are speculative examples which are not based on UK or European cases.

First we consider lump sum rebates. Suppose that the buyer is a retailer and that it demands that its suppliers provide it with a lump sum rebate when it increases sales on a year on year basis. This would look similar to a loyalty rebate. Furthermore, suppose that there are only a few buyers and that they all make similar requirements of their suppliers. Where competition among suppliers means that suppliers earn zero profits, it must be the case that in order to afford lump sum rebates, they supply their goods to retailers at a price above marginal cost. Since all retailers face prices above marginal cost this can dampen competition in the downstream market by inducing retailers to set higher prices than they otherwise would have done.[26] In this example, the buyers set the terms and not the suppliers.[27] The example is based on the theoretical idea that slotting allowances can be used by retailers to dampen competition.[28]

Our second example of how loyalty rebates can dampen competition is as follows. Firms may create or exploit switching costs through using them to signal to each other that they will focus on their own locked-in consumers rather than competing effectively with each other. In this example, collusion seems less likely to be effective when there is a large pool of footloose consumers in each period.[29]

NOTES

1. CA98 has two prohibitions. The Chapter I prohibition relates to agreements which prevent, restrict or distort competition and which may affect trade within the United Kingdom. The Chapter II prohibition relates to conduct by undertakings which amounts to an abuse of a dominant position in a market which may affect trade within the United Kingdom. Section 60 of the Act sets out principles which provide for the United Kingdom authorities to handle cases in such a way as to ensure consistency with Community Law.

2. The Chapter II Prohibition, OFT 402, March 1999, paragraph 4.17.

3. Hoffman-La Roche (Vitamins), OJ 1976 L223/27; [1976] 2 CMLR D25; on appeal Case 85/76, paragraph 89.

4. Turnover related discounts were an issue in Michelin v. Commission [1983] ECR 3461 [1985] 1 CMLR 282. The ECJ found the discount system, based on turnover in the previous year, to prevent dealers from changing supplier without suffering an appreciable economic disadvantage. Rebates were given on total purchases not just incremental purchases.

5. Motor car parts: a report on the wholesale supply of motor car parts within the United Kingdom, Cm 1818, 5.2.92, paragraph 8.71. The Competition Commission found that the discounts were not against the public interest because they did not make a substantial contribution to dealer bonuses and were not used by many suppliers.

6. The EC Commission considered efficiencies in *Virgin/BA* where it found that BA's discount policy was not related to any efficiencies that may have accrued from dealing with a travel agent that sold a large amount of BA tickets. This was because the scheme allowed small travel agents to qualify for the same discounts as large ones. See OJ [2000] L 30/1, [2000] 4 CMLR 677, paragraph 102.

7. Suppose that there are 5 identical buyers who each need to purchase 100 units. Suppose also that the supplier has unit costs of £10 when it produces 100 units, £9 when it produces 200 units, and so on up to 500 units when the unit cost is £6. If the supplier sets the starting unit price at £10 and offers a rebate of £1 for each 20 percent of buyers needs purchased from the supplier, the scheme would be closely related to its structure of costs provided that all five buyers purchase exclusively from the supplier.

8. Thus the discount is a form of second degree price discrimination with buyers who can pass on the lower prices and generate further sales "self-selecting".

9. Potential justifications for vertical restraints are discussed in "Vertical Restraints and Competition Policy", by P W Dobson and M Waterson, December 1996, OFT Research Paper 12.

10. A supplier might want more competition downstream if this ensures that it has many outlets for supply and so reduces downstream buyer power. Whether consumers benefit or not is ambiguous, but they will do if – as might often be the case – greater downstream competition is more important in securing lower prices for the final good than buyer power. This would be because while buyer power might allow buyers to secure a lower input price, that buyer power is often associated with downstream market power. This reduces the amount of pass through to consumers. See Margaret Bloom, "Retailer Buyer Power", paper presented to the Fordham Law Corporate Institute 27th Annual Conference on International Antitrust Law and Policy, October 2000.

11. We might therefore be more a suspicious of rollback rebate schemes as being more likely to have anticompetitive effects which are not outweighed by efficiencies. See the appendix for a theoretical discussion of how rollback schemes might be more likely to be used to foreclose a market than incremental rebate schemes.

12. This is not to argue that incremental discount schemes cannot foreclose a market when prices at the margin are set very low and new entrants are likely to need to achieve a minimum efficient scale. In *Soda Ash*, OJ 1991 L152/21, the Commission found that ICI and Solvay had carved up the European Soda Ash market for themselves. Furthermore, their discounts were structured so that on core sales there would be little discount from the list price. However, discounts were available on additional tonnage (so called "top slice rebates") that would typically have been sourced from US suppliers. In some cases discounts were structured so that incremental tonnage was supplied at half price or less, with the effect that US producers could not make headway in the European market. See "Europe – Abuse of Dominant Position", by Julian M Joshua, Morgan Lewis Competition News and Views, April 2001.

13. Alternatively, the firm might be part of a group which has a collective dominant position.

14. In the case of rollback rebates (see appendix), the cross subsidy argument is quite subtle. Suppose that buyers end up paying the same price per unit on all sales because they qualify for a rollback discount on all sales once they achieve their purchase target. Here the alleged dominant supplier exploits that fact that buyers would have been willing to pay higher prices for those units that they are "locked-in" to. By setting a high "notional" price for these units, the supplier is then able to offer what appear to be larger discounts on incremental sales subject to competition.

15. We might note that, at least in theory, the foreclosure of an equally efficient firm need not require the alleged dominant firm to price below its own incremental cost as the following two examples demonstrate. First, there is the case where the incumbent commits to pricing below cost *only* if a new entrant comes into the market (therefore it can price above cost secure in the knowledge that a potential new entrant would not dare enter). Second, where the incumbent cannot commit to an aggressive response to new entry, foreclosure will require pricing below the *rival's incremental cost*. Both suppliers may potentially have the same variable costs but the rival may have a higher incremental cost on account of a sunk cost of entry.

16. We might make a similar argument if the buyer has a large transaction cost of dealing with more than one supplier and so only wishes to deal with suppliers that deal in large quantities.

17. For example, suppose that the buyers "loyal" to the alleged dominant retailer are retailers. If the rival supplier can sell its product directly to consumers or establish its own retail outlets, it may be able to get around the problem of "loyal" buyers and so achieve its desired minimum efficient scale.

18. As the length of lock-in increases, this may have the effect of weakening competition from rival suppliers. For example, if contracts are renegotiated infrequently, rival suppliers will have fewer opportunities to win contracts from the incumbent supplier. On the other hand, we should ask ourselves why a buyer would restrict itself to deal with only one supplier for a long time. It may be that there are some efficiencies that it would benefit from.

19. Switching costs can be avoided if the buyer does not claw back any underspend by the buyer. For example, in its press release on British Gypsum (BG), the EC Commission cleared a discount scheme based on projected sales over the coming year (and so this involved a shorter time period than our example above). Under the scheme, BG would not claw back any payment from a customer whose purchases fell below the projected level for the year. OJ No C321 p. 9, 1992/12/08 Notice 92/C321/04.

20. The following example explains how a switching cost might be created. Suppose that the target is 210 units and the buyer is expected to purchase 70 units per year. The supplier's price per unit is £10 for the first £100, £9 on all units for purchases of 101-200 units, and £8 on all units for purchases of 201-300 units. The supplier offers the buyer a price of £8 per unit, in the expectation that eventually it will buy 210 units. However, after two years the buyer wishes to break the contract. The buyer has only purchased 140 units and so should have been on a rate of £9 per unit instead of £8 per unit. It must therefore refund £140 to the supplier plus some fee for breaking the contract. The £140 plus the fee for breaking the contract is a switching cost. It may mean that the buyer is locked in to the supplier for three years.

21. The contract would be anticompetitive if it made it harder for a more efficient new entrant to gains sales. A theoretical example of how this could occur is given by Aghion P and Bolton P (1987), "Contracts as a barrier to entry", American Economic Review, 77, 388-401.

22. New cars, A report on the supply of new motor cars within the UK, Competition Commission, April 2000, Cm 4660.

23. Occasionally this reinforced a more draconian constraints on dealers, whereby a supplier might terminate a dealer's franchise if it were to import new cars from abroad (paragraph 2.318).

24. A complex monopoly situation exists where a group of companies, which are not connected and which together account for at least one quarter of the supply of any particular description of goods or services in all or part of the UK, engage in conduct which has or is likely to have the effect of restricting, distorting or preventing competition. The Major Provisions, OFT 400, March 1999, section 13. The Enterprise Bill when enacted would replace the complex monopoly test with a more straightforward competition test based on preventing, restricting or distorting competition.

25. In the following discussion we assume that once the buyer reaches its target, it qualifies for the discount.

26. For example, if a higher marginal cost for all downstream firms leads to lower quantities produced, output will be restricted and downstream profits will increase (so long as total output does not fall below the monopoly level). Note that the higher marginal cost does not reduce downstream profits since the rebate is used to extract all the supplier's profit.

27. This raises issue of whether it is more of a problem if buyers or suppliers set the terms of what looks like a fidelity rebate. There is no clear cut answer on this although it is more likely to be a problem where buyers also have market power as sellers in the downstream market. See Bloom (2000), op cit.

28. See Greg Shaffer, "Slotting allowances and resale price maintenance: a comparison of facilitating practices", RAND Journal of Economics, Vol 22, No. 1, Spring 1991.

29. To see why, note the following. Where price discrimination occurs, with locked-in consumers paying higher prices than new consumers, as the pool of footloose consumers increases, this makes it more likely that there will be competition for their trade (e.g. "cheating" on the collusive agreement is more profitable). Where price discrimination is not possible, a high growth of new consumers is more likely to lead to a lower price overall. Intuitively, pricing low to attract new customers becomes more beneficial. Without price discrimination, the growth of new consumers can also facilitate entry. This is because incumbents cannot both exploit locked-in consumers with high prices and deter new entrants with low prices. See sections 4.2, 7.1 and 7.3 of Paul Klemperer, "Competition when Consumers have Switching Costs: An Overview with Applications to Industrial Organisation, Macroeconomics, and International Trade", Review of Economics Studies (1995), 62, 515-539.

UNITED STATES

Firms offer a wide range of discounting programs, from straight quantity discounts to programs involving minimum share requirements and/or multiple products. Such programs typically have procompetitive effects. The potential for anticompetitive effects will depend upon the specific details of the programs and the market power of the firms involved. It is thus important not to use terms such as "fidelity" discounts too loosely. If the term is meant generically to apply to any type of discount program, it cannot be used to infer that there is a likelihood of competitive harm from such discounts. If the term is meant to apply only to those types of programs that have the potential for competitive harm, it is important to distinguish what types of programs would be covered. Even in the latter case, a detailed, fact-based investigation of any particular program would be needed to assess its actual competitive effects. The US antitrust agencies cannot recall any enforcement actions challenging "market share" discount schemes, but a number of recent private suits have started to develop the law in this area. In this paper, we summarise the private suits and then discuss some of the applicable economic theory with regard to discount programs. The US agencies do not necessarily endorse the reasoning of the cases described, but the cases illustrate the issues well.

1. US Antitrust Cases on Discount Programs

1.1 Single Product Discounts

The few American antitrust decisions that have dealt with simple discounts or rebates illustrate both the importance of factual evidence of an anticompetitive effect (rather than simply of an effect on a competitor) and the substantial judicial concern about deterring beneficial price cuts. Courts are generally unwilling to assume these discounts are anticompetitive, even if the discounter has market power; they are reluctant to force monopolists to charge high prices.

In Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983), Pacific had most of the market for "snubbers" used in nuclear power plants because it was the only acceptable producer of mechanical scrubbers for US nuclear plants. Grinnell, which accounted for about half of US snubber purchases, had been working to help Barry Wright become an alternative source of these snubbers. Pacific then offered Grinnell a large discount on its total snubber purchases if Grinnell would promise to buy large quantities of snubbers from Pacific; Pacific offered the discount to get Grinnell's loyalty as a purchaser of snubbers. Grinnell agreed, with the result that Wright abandoned its attempt to enter the snubber business. Wright sued, alleging a violation of Section 2 of the Sherman Act. Both the district court and the court of appeals rejected this claim because, then Judge (now Supreme Court Justice) Breyer explained for the court of appeals, under conventional price/cost tests for predatory pricing, Pacific's discount was not predatory — the resulting price was above any relevant measure of Pacific's cost, and 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. But even if that were not determinative, Judge Breyer noted that there was evidence that the discount enabled Pacific to operate its production capacity more efficiently, because it led to a firm order for an increased quantity.

Barry Wright is unusual in that the discount was offered only to a single customer. Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000), may be a better example. Brunswick manufactured and sold stern drive engines for recreational boats; it had a large share of the market (e.g., 75 percent in 1983). Beginning in the early 1980s, Brunswick (like its competitors) offered market share discounts. Boat builder customers who agreed to purchase a certain percentage of their engine requirements from Brunswick for a period of time (often a year, sometimes longer) received a discount off the list price for all engines purchased — for example, an agreement to buy 70 percent of engine requirements from Brunswick might result in a three percent discount, agreement for 65 percent a one percent discount, and an agreement for 60 percent a one percent discount. Since the boat builders' customers often preferred Brunswick engines, as a practical matter, boat builders had to purchase a reasonable percentage of their engine needs from Brunswick; the discounts might well have led them to purchase significantly higher percentages from Brunswick than they otherwise would have.

Some of the boat builders sued Brunswick, alleging among other claims that these discount programs excluded competing stern drive engine manufacturers from the market and amounted to monopolisation in violation of Section 2 of the Sherman Act. The court of appeals did not quite say that the failure to show that Brunswick's prices were below its cost was fatal to the claim, but relied on a strong presumption that prices above costs are lawful and represent competition on the merits. And it found nothing to overcome that presumption, particularly since the agreements, which left the buyers free to purchase 40 percent of their requirements from other engine sellers while still receiving loyalty discounts from Brunswick, were not exclusive dealing agreements. And the court found that other engine sellers could compete with Brunswick by offering superior discounts. Brunswick offered testimony that the discounts served procompetitive purposes (beyond simply lowering prices) by increasing the predictability of demand and thus lowering manufacturing costs, but the court of appeals did not rely on this evidence, instead saying that "Brunswick's business justification in this case is that it was trying to sell its product" (207 F.3d at 1062) by cutting prices.

The discount programs in Virgin Atlantic Airways Ltd. v. British Airways PLC, 69 F. Supp. 571 (S.D.N.Y. 1999), aff'd, 257 F.3d 256 (2d Cir. 2001), received similar treatment. British Airways (BA) used incentive programs that provided travel agencies with commissions, and corporate customers with discounts, for meeting specified thresholds for sales of BA tickets (sometimes expressed in market share terms, sometimes not). The discounts or commissions, if earned, applied to all sales — including those made before the targets were met. Virgin Atlantic claimed that the result was below cost pricing on certain transatlantic routes where Virgin and BA competed, with BA's attendant losses subsidised by monopoly pricing on other BA routes. Virgin alleged that the below cost pricing slowed its expansion on the competitive routes. These Section 2 claims foundered as both the district court and the court of appeals concluded that Virgin had failed to show below cost pricing. To show below cost pricing, Virgin's expert had compared the cost of incremental flights he assumed were entirely attributable to the incentive schemes with the incremental revenues the flights generated. The comparison depended on the assumption, and the courts were not sufficiently persuaded that the assumption reflected reality.[1]

1.2 Multiproduct (Bundled) Discounts

Several well-known cases have dealt with a more complex form of discount programs. The firm offering the discount sells multiple products, has significant market power with respect to one or more of the products (but not all of them), and faces competition in a product or product line where it lacks significant market power. The firm bases the discount or rebate not solely on the product facing competition, but on other products as well. The practice is generally found not to constitute unlawful tying, because the seller is willing to sell the products separately. But courts examine these practices

carefully to determine, based largely on the facts regarding competitive impact, whether there is a violation of Section 2 of the Sherman Act.

SmithKline Corp. v. Eli Lilly & Co., 427 F. Supp. 1089 (E.D. Pa. 1976), aff'd, 575 F. 2d 1056 (3d Cir. 1978), is the first and most influential of these cases. In what was found to be the relevant market of sales of a class of antibiotics known as cephalosporins to non-profit hospitals in the United States, 575 F.2d at 1058, Lilly sold four drugs on which it held the patent; it was the only lawful source of these drugs, *id*. at 1059. Like other pharmaceutical firms, Lilly used a volume rebate scheme for these products, intended to increase sales, at least in part at the expense of other antibiotics. *Id.* at 1059-60. Then, SmithKline licensed cefazolin, another cephalosporin, from a foreign company, and began selling it as Ancef; Lilly subsequently licensed the same drug, selling it as Kefzol. *Id.* at 1059. Cefazolin could substitute for Lilly's market-dominating cephalosporin Keflin and was cheaper, because Lilly and SmithKline competed. *Id.* at 1061. Since Lilly's profits on its patented Keflin were much higher than on its brand of cefazolin, Lilly would benefit from discouraging that substitution. *Id.*

Lilly responded by including Kefzol in a modified version of its pre-existing rebate scheme. The new scheme reduced the basic rebate rate on the volume of Lilly cephalosporins a hospital bought by roughly three percent. But it added a "bonus dividend" of three percent on total Lilly cephalosporins purchases provided the hospital bought specified minimum quantities of each of any three of Lilly's five cephalosporins. 427 F. Supp. at 1105. (The group charged with devising Lilly's response had been instructed that the new scheme should cost Lilly no more money than did the pre-existing rebate program. *Id.*) Lilly expected that almost all hospitals would buy the specified minimum quantities of Lilly's two most dominant patented cephalosporins, and that almost none would buy the specified minimum of the other two. *Id*. at 1106. Thus, whether a hospital received the three percent rebate on its total Lilly cephalosporin purchases depended on whether the hospital bought the specified minimum of Kefzol; Lilly viewed this rebate as an "inducement," *id.* to buy Kefzol rather than Ancef. And Lilly expected that SmithKline, which a had higher cost of goods than did Lilly for cefazolin, *id.* at 1102, could match that inducement only by offering a rebate of more than 20 percent on sales of its only significant cephalosporins, Ancef, *id*. at 1106, since SmithKline's percentage rebate applied only to sales of the one product, unlike Lilly's.

This scheme had consequences for SmithKline and market competition. The court credited evidence that, absent the scheme, SmithKline would have had a pretax return on sales too low to justify staying in the market unless there were a potential for significant improvement, yet with the lower costs likely to result from greater manufacturing experience, the pretax return on sales in the future would be enough to justify staying in the business. *Id.* at 1122-23, 1108-09. Given the rebate scheme, however, SmithKline's return on sales was negative because it needed very large rebates to compete effectively, and even if it lowered its cost of goods to Lilly's level, SmithKline's Ancef could never be sufficiently profitable to justify remaining in the market. *Id*. at 1123.

In other words, the court concluded the evidence showed that Lilly used its "monopoly power" in two cephalosporins, *id.* at 1121, in a manner that not only excluded the less efficient SmithKline from the market, but would have excluded SmithKline if it were an equally efficient producer of cefazolin. And it did not matter that Lilly may have sold each of its products at a price above its average cost, because the unlawful conduct was not the pricing of individual products. *Id.* at 1128. The two opinions mention no efficiencies attributable to Lilly's revision of its rebate scheme. Lilly was held to have wilfully maintained its monopoly power in violation of Section 2 of the Sherman Act. We think the decisions turn on the scheme's ability to exclude an equally efficient competitor, but although the district court carefully established that the scheme could do so, neither court explicitly identified that as the appropriate standard.

A somewhat similar pricing scheme was held not to violate Section 2 in Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F. Supp.455 (S.D.N.Y. 1996), because the evidence of competitive effect was quite different. The products were five "assays" used to test blood for the presence of various viruses. Blood donor centers (BDCs) require all five. *Id.* at 458. Only defendant Abbott made and sold all five; it accounted for from 70 to 90 percent of the sales of each of four of them. *Id.* at 459. (For purposes of summary judgement, the court accepted the inference of market power. *Id.* at 463-65). Its only significant competitor, Ortho, sold four assays, although one lacked widespread customer acceptance. *Id.* at 459. The Council of Community Blood Centers, to which many BDCs belong, solicited bids on a contract to supply assays (and certain equipment not discussed here) to member BDCs who chose to buy on the terms specified in the winning contract. The solicitation called for different pricing schedules depending on whether the BDC bought all the assays from the chosen seller or only any two or three of them. *Id.* at 459-60. Abbott won the contract, with pricing schedules that gave significant discounts on each of the assays for buying all of them from Abbott. *Id.* at 460. Particularly because, as a practical matter, BDCs had to buy from Abbott at least the two assays only Abbott supplied, the discount scheme created a very significant incentive to buy all five from Abbott and none from Ortho - in Ortho's view, the scheme effectively forced buyers to pay a financial penalty for buying any assays from Ortho, *id.* at 461. Ortho alleged the pricing scheme violated Section 2.

The court concluded that Ortho's Section 2 claims failed if Abbott's pricing was "legitimately competitive" because the offenses Ortho alleged all required a showing of "predatory or anticompetitive conduct or an inappropriate use of monopoly power by the defendant." *Id.* at 465. But what is "legitimately competitive" pricing? The court noted that the conventional "below cost" component of tests for unlawful predatory pricing is designed to identify pricing that threatens to "drive equally efficient competitors out of business, thus setting the stage for recoupment at the expense of consumers." *Id.* at 466. Ortho did not even contend that Abbott had priced below the conventional average variable cost standard. *Id.* at 467. But the court, drawing on SmithKline, concluded that "a firm that enjoys a monopoly on one or more of a group of complementary products, but which faces competition on others, can price all of its products above average variable cost and yet still drive an equally efficient competitor out of the market." *Id.* at 467. It thus held that liability for a multiproduct pricing scheme could be based not only on pricing below average variable cost, but also on other pricing that makes it unprofitable for an equally efficient producer of the defendant's competitive product to continue to produce that product. *Id.* at 469. Ortho, however, did not claim that Abbott's pricing left Ortho unable to sell its products at a profit, *id.* at 470, and so Abbot's pricing scheme would not exclude an equally efficient producer from the marketplace. Ortho also argued that the pricing of the five assay package would be legitimate only if the "incremental net revenue from selling the two additional tests is greater than the revenue forgone as a result of the price cuts of the three original tests." *Id.* at 470. The court neither accepted nor rejected this test (which somewhat resembles both the conventional predatory pricing cost test and the incremental cost test advocated by the DOJ in the American Airlines case) because Ortho, in evaluating Abbott's pricing, looked only at the prices charged, while ignoring any revenues attributable to increased sales volume induced by the price reductions. *Id.* at 470-71. That is, Ortho did not show that Abbott failed the test Ortho had proposed. The court accordingly concluded that Abbott's pricing was legitimately competitive. *Id.* at 471. There was, therefore, no need to consider any procompetitive benefits (beyond the simple fact of a lower price).

The latest prominent case in this line, LePage's Inc. v. 3M, 2000 WL 280350 (E.D. Pa. March 14, 2000), aff'd in part, rev'd in part, and remanded, 227 F.3d 365 (3d Cir. 2002), reh'g en banc granted and opinion vacated (Feb. 25, 2002), is still in litigation. 3M's Scotch brand dominated the transparent tape market in the United States, and 3M sold many other products as well. In the 1980s, LePage's and Tesa Tuck, Inc. became increasingly successful selling "second brand" and private label tape to chains like Staples and WalMart. Growth of this segment would hurt 3M's profits even if 3M supplied the tape, since margins on second brand and private label tape were significantly lower than 3M's margins on Scotch tape. LePage's claimed that 3M responded with rebate schemes, based on multiple products,

that served to eliminate LePage's (and Tesa Tuck) as competitors in transparent tape. 3M's various schemes in general provided across the board rebates to customers who met growth targets 3M set for purchases of various kinds of consumer goods, the size of the rebate dependent on the number of goods categories in which the buyer met the target. Failure to meet the target in even one product line could result in a significant rebate loss. The result, allegedly, was that, as a practical matter, customers would lose significant benefits unless they stopped buying tape from LePage's, in whole or significant part. And, as with the pricing schemes in SmithKline and Ortho, it would be difficult for LePage's to offer rebates on transparent tape alone that could offset the rebates a customer would lose on multiple products by buying tape from LePage's. Tesa Tuck left the market, and LePage's business in the market dropped substantially.

A jury found 3M liable for unlawful maintenance of monopoly power. The district court refused to throw out the verdict despite 3M's argument that, under SmithKline, LePage's was required to, but did not, show that it at least approached 3M's efficiency as a tape producer. The district court found no such requirement in SmithKline. It instead rested liability on the more general standard that "exclusionary conduct and predatory conduct comprehends, at the most, behaviour that not only… tends to impair the opportunity of its rivals, but also… either does not further competition on the merits, or does so in an unnecessarily restrictive way."

On appeal, a divided three judge panel reversed, mainly because "LePage's did not demonstrate that 3M's pricing was below cost and, in the absence of such proof, the record does not supply a basis on which we can uphold the judgement." The court rejected the argument the district court had accepted, that LePage's did not have to show that 3M's pricing scheme could prevent an equally efficient firm from profitably competing, and then concluded that LePage's had failed to make the required showing. (The court hinted, however, that such a showing might not suffice if the defendants' prices were above average variable cost). And the court suggested that there might have been legitimate, procompetitive, business justifications for the pricing scheme ("other than the obvious reasons such as increasing bulk sales, market share and customer loyalty, there are several other potential 'procompetitive' or valid business reasons for 3M's pricing structure and bundled rebates: efficiency in having single invoices, single shipments and uniform pricing programs for various products"), although it did not point to any evidence supporting these justifications.

The dissenting judge disagreed about almost everything. She read SmithKline as turning on simply the pricing scheme's linkage of a product facing competition with products facing none. She thus rejected any requirement that LePage's demonstrate that an equally efficient competitor could not profitably compete, given the pricing scheme - although she also thought the evidence showed that LePage's could not compete profitably. Moreover, she rejected the majority's suggestion that there can be no liability absent pricing below costs - in a multiproduct situation or otherwise, since she read the relevant Supreme Court decision, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 US 209 (1993), as not addressing pricing by "a monopolist with unconstrained market power."

The full Third Circuit agreed to rehear the case en banc, which has the effect of vacating the opinion of the panel. But the court will not hear argument until late October, so we will not know the result for perhaps a year. If the full court agrees with the panel's dissenting judge, the result could conceivably be what amounts to a rule that a monopolist in one product may not use discounts of this kind, the kind of rule that the other decisions discussed seem to have rejected.

Finally, the Virgin Atlantic case already discussed included a claim involving bundled airline routes. Some of the incentive agreements involved bundles of routes, so, allegedly, a customer who flew on BA monopoly routes had an incentive, because of bundling and the discounts, also to fly BA on routes where British Airways faced competition, even though the competing carrier charged less; to avoid this, the competing carrier (Virgin) would have to reduce the price of the tickets to match the incentive

discounts involving other routes, and that would require it to sell below its cost. However, Virgin had little or no evidence that this theoretically possible situation ever actually arose in the exceedingly varied pattern of bundling that existed, and the courts found theory alone inadequate to hold British Airways liable.

2. Procompetitive and Anticompetitive Effects of "Market Share" Discounts

Some discount programs take the form of "market share"discounts where "market share" refers to the percentage of the customer's total purchases. To encourage customers to buy more from the discounting seller and less from rival sellers, a seller may grant discounts to a customer where the discount is tied to the proportion of the customer's total purchases from that seller. This was the discount scheme used in the Brunswick boat engines case described above. Thus a buyer might get a five percent discount from the seller if it buys fifty percent of its purchases from that seller, a ten percent discount for sixty percent, a twenty percent discount for seventy percent, etc.

Frequently market share discounts increase more rapidly than the market share thresholds. In this instance, for example, the discount increased by fifty percent (from ten to fifteen percent) when the market share threshold rose by only sixteen percent (from sixty to seventy percent). For customers seeking to meet market share thresholds, market share discounts may have disproportionately large effects in discouraging purchases from rival sellers. The rival seller must compete not simply on the price of the marginal unit purchased but must also compensate the customer for discounts lost on each inframarginal unit purchase. As market share thresholds increase and discounts deepen, rival sellers may find it very difficult to compensate customers for lost discounts.

Market share discounts can have either anticompetitive or procompetitive effects. In order for market share discounts to have an anticompetitive effect, the firm offering such discounts must have market power in a relevant market. Thus the first step in investigating whether loyalty discounts have anticompetitive effects is to determine whether the firm offering such discounts has market power.

However, the fact that a firm has market power is not sufficient to prove that its loyalty discounts are anticompetitive. Here are some ways in which loyalty discounts, i.e., market share discounts, can be procompetitive:

- When the manufacturer has significant fixed costs, average costs of production will exceed marginal costs, at least up to full capacity utilisation. The manufacturer can reduce price and increase profits if the margin at the current price exceeds the inverse of the firm's own elasticity of demand. However lowering price (below current price) in order to sell more units of output can be even more profitable if the manufacturer can avoid lowering price on all units of output. The manufacturer could use volume discounts or loyalty discounts to avoid lowering the price on all units. Loyalty discounts will be more profitable and more efficient than volume discounts when customers' sales quantities vary greatly across customers (regardless of the size of the seller's fixed costs). Small customers may not be able to purchase sufficient quantities to trigger volume discounts but can receive loyalty discounts by committing to purchase a certain percentage of its inputs from the manufacturer. Indeed to the extent that disproportionate discounts under the loyalty program encourages the buyer to pass along those cost reductions, society may benefit from greater production due to the loyalty discount than would occur with a volume discount or an across-the-board price reduction. (To the extent however that loyalty discounts simply shift purchases amongst buyers, discriminating according to their demand elasticity without increasing total production, these shifts are simply transfers from one buyer to another and do not represent production efficiencies).

- Society can also benefit if loyalty discounts also reduce costs of production. For example, suppose that loyalty discounts are introduced for market share levels at or near current levels. The effect will be to reduce the manufacturer's sales fluctuations. The reduced variance in sales will lower the manufacturer's inventory costs. If marginal costs are increasing with capacity utilisation, then reduced variance in sales will also lower production costs. (For example, the average cost of production will be less if capacity utilisation is at a steady eighty percent per year rather than if it fluctuates unpredictably between seventy and ninety percent). Finally the manufacturer's future sales (and profits) can be increased if loyalty discounts increase sales stability and prevent the manufacturer from being caught short by an unexpected increase in demand that harms its reputation for service and supply reliability.

On the other hand loyalty discounts can serve to exclude competitors and harm consumers. The necessary conditions include not only market power in the relevant market but also:

- Market share discounts would be sufficiently deep and triggered at market share thresholds close to 100 percent so that if the buyer attempted to buy a portion of its supplies from another supplier, the net effect of such a purchase would be a very large increase in price from the discounting manufacturer. The necessary condition is that the structure of the market share discounts have the effect of forcing the buyer to purchase a very large proportion, if not all, of its supplies from the manufacturer offering the discount or shifting a very large proportion, if not all, of its purchases to another supplier.

- Buyers must be unwilling or unable to rely upon alternative suppliers exclusively, thus remaining tied to the discounting manufacturer.

- Rival suppliers can't vertically integrate downstream into the business of the purchaser. If suppliers can so integrate, then the OEM stage is not the critical bottleneck that the discounting manufacturer would like it to be. Vertical integration of course requires that rivals have sufficient resources (including capital) to make the needed acquisitions. It also requires that the rivals can successfully make sales to final consumers relying on their own manufactured products rather than the products of the discounting manufacturer.

- No single buyer, or group of buyers, is willing to purchase sufficient volumes from an equally efficient rival of the discounting manufacturer to make sure that the rival survives. The discounting manufacturer can exacerbate this problem if it can create barriers that inhibit buyers from searching to find an alternative and equally efficient rival supplier and thereby circumvent the anticompetitive effects of loyalty discounts.

Discount programs can also appear in the form of unilateral practices such as the seller bundling its product (3M) and its services (British Airways). The effect of requiring the customer to purchase a bundle of products and services may be the same as requiring a market share commitment. The customer may find in either case that attempting to purchase from rival suppliers causes it to lose the savings associated with bundling or discounting and thus make the effective price of supplies from a rival supplier unacceptably high.

Antitrust enforcers are concerned whenever a firm as efficient as the most efficient in the market exits. We naturally wonder if there is some practice associated with one or more firms in that market that caused the exit. And we object if we find some practice adopted by such firm(s) that is responsible. However, as the checklist above suggests, it will be difficult to prove that a practice such as loyalty discounts or bundling is in fact responsible for such exit. Moreover, depending on the extent to which such

bundling leads to lower prices, as it very well can, antitrust enforcers must acknowledge that consumers may benefit despite the exit of the efficient competitor.

Recently three commentators argued that "market share discounts structured to produce total or partial exclusivity should be judged according to the same economic principles that govern exclusive dealing" and should be condemned under existing case law "if they produce anticompetitive effects without counterbalancing procompetitive effects."[2] Those commentators noted in particular that "if the financial benefits of a market-share discount are effectively concentrated on the decision whether to buy a relatively small number of marginal units, even prices that technically are 'above cost' on average may be below cost as to those marginal units."[3] Where these discounts effectively lock up such a large portion of available business that competitors cannot achieve a minimum viable scale, the authors suggest that a rule of reason analysis might lead to the conclusion that on balance the antitrust laws should prohibit them. A response by Professor Dennis Carlton to this argument acknowledged that non-linear pricing could achieve the same ends as exclusive dealing, but suggested that antitrust intervention "should be used rarely and apply only to extreme pricing conditions (such as ... where the marginal price [of incremental purchases] is zero) where marginal pricing below marginal cost is unambiguous."[4] Volume discounts are very common, and "non-linear pricing can reflect real economic savings that are difficult to measure (lower inventory, promotional, or production costs) or simply may be ways that firms choose to compete for the most desirable customers. Attacking such common competitive behaviour would likely create much turmoil and chill competition."[5] We believe that the Carlton response should be accorded substantial weight, given the strict conditions that must be met for a showing of anticompetitive harm stemming from a market share discount program.

All this suggests that antitrust enforcement be well advised to analyse each case on its own merits, recognising that discount and bundling programs typically have procompetitive features. Not all firms engaging in discount or bundling programs have market power and not all discount or bundling programs have an anticompetitive effect. The programs may be efficient and procompetitive even in instances where the firm offering discounts and bundles possesses market power in the relevant market. The use of a *per se* rule outlawing such practices will be unnecessary in the first case and anticompetitive in the second.

NOTES

1. The court of appeals rejected Section 1 claims based on the same conduct because the agreements did not constrain the buyers — Virgin admitted on appeal that it was challenging unilateral conduct, a Section 1 conspiracy. 257 F.3d at 263. But in an unnecessary discussion of what would be necessary to sustain a Section 1 claim had there been a conspiracy, the court added, "the efficiency argument in favour of incentive agreements like those used by British Airways is obvious… These kinds of agreements allow firms to reward their most loyal customers. Rewarding customer loyalty promotes competition on the merits." *Id.* at 255. The court did not otherwise explain this point.

2. Willard K. Tom, David A. Balto, & Neil W. Averitt, Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing, 67 Antitrust L.J. 615 (2000).

3. Id. at 636.

4. Dennis W. Carlton, A General Analysis of Exclusionary Conduct and Refusal to Deal - Why Aspen and Kodak are Misguided, 68 Antitrust L.J. 659, 664 (2001).

5. Id.

EUROPEAN COMMISSION

1. Introduction and definitions

The OECD questionnaire refers to the classic distinction between loyalty discounts and quantity discounts. In EC competition law, this distinction between loyalty and quantity discounts goes back to Hoffmann-La Roche[1]. In that case, the European Court of Justice (ECJ) defined quantity discounts as being solely linked to the customer's absolute volume of purchases from the supplier. By "absolute" is meant: quantities fixed objectively and applicable to all possible purchasers (paragraph 100). Usually, quantity discounts are not considered to generate competition problems on the assumption that they are justified by cost savings and cost efficiencies directly flowing from the purchases in question.

Further, according to the ECJ, loyalty discounts are not linked to the absolute volume of purchases but refer to the customer's purchase "requirements" or a proportion of the said requirements: the discount is granted in return for the customer's (total or partial) exclusive coverage of such requirements from the supplier (paragraphs 95 and 96).

1.1 Classic loyalty discounts

Classic loyalty or fidelity rebates are financial inducements given to purchasers who obtain all or at least a certain large proportion of their requirements for the product from a certain supplier. The incentive to buy as much as possible from that one supplier could be provided through variable and fixed elements, as clarified for instance in the Hoffmann-La Roche judgement.

While the discount scheme found in Hoffmann-La Roche was directly related to the customer's total or almost exclusive purchase requirements, loyalty discounts can also have the form of so-called target discounts. This type of discount was for example found in Michelin I, Irish Sugar and Virgin/British Airways.[2] Target discounts are granted to customers who reach or exceed specific sales targets. The sales targets are usually based on the customer's purchases during a past reference period and these purchases are usually taken as an estimate of the customer's future requirements ("capacity of absorption").

The table below gives an example of a growth discount grid. A growth discount is a sort of target discount. In the example, the supplier grants the customer a discount amounting to 0.3 percent of his total purchases from that supplier if the customer buys three percent more in the next reference period as compared to the past reference period. The discount scale contains several steps. At the upper end, the customer obtains a one percent reduction on all his purchases from the supplier if he increases his purchases by 18 percent compared to the past reference period.

Increase in customer's total purchases from the supplier vs. past reference period	Percentage discount on the customer's total purchases from the supplier
+ 3.0%	0.3%
+ 4.0%	0.4%
+ 6.0%	0.5%
+ 8.0%	0.6%
+ 10.0%	0.7%
+ 12.5%	0.8%
+ 15.0%	0.9%
+ 18.0%	1.0%

1.2 Quantity discounts with possible loyalty-enhancing effects

In Hoffmann-La Roche, the ECJ itself already suggests that the distinction between loyalty and quantity discounts may not be obvious. It observes that even in a case where the discount is at first sight linked to the absolute volume of purchases, such a discount may in fact be based on a volume which reflects an estimate of the customer's requirements ("capacity of absorption"). In such a case, the supplier does not seek to achieve that his customers buy maximum quantities but rather that they buy the maximum of their requirements from him (paragraphs 98 and 100).

Moreover, even quantity discounts which are purely related to absolute volumes are not necessarily without competition problems. Quantity discounts may for example have loyalty-promoting effects when they reward purchases of a certain volume over a relatively long reference period (as opposed to firmly committed, transaction-based purchases)[3] and of a relatively broad product range or when the discount grid appears in fact to be tailored to favour specific customers (e.g. where the entry threshold is high or where the discount scale is not linear).[4]

2. Possible procompetitive or efficiency effects of loyalty discounts

The Commission has so far usually accepted cost savings/efficiency gains as an objective justification for granting discounts. Loyalty discounts (including target and growth discounts) have, however, not been seen as an adequate way to pass on such cost savings/efficiency gains.[5]

More generally, to assess whether a discount scheme gives rise to any competitive concerns, it is necessary to consider the following questions: *a*) Are there any efficiency gains, i.e. economies of scale, in the production or distribution of the respective goods, arising from the supply to the recipient of the discount? *b*) If such efficiency gains exist, does the discount grid reflect them accurately and are the rules governing the discount scheme objective and transparent? *c*) If the discount grid does not or does not only reflect efficiency gains, does it lead to a restriction of competition? (For example, to what extent will the discount restrict the customer's commercial likelihood of purchasing future supplies from a competitor or to what extent is the discount likely to strengthen a dominant position?), *d*) In case of non-dominant companies, is the anticompetitive effect so strong that the preservation of competition has to have priority?

In any event, if the purchase of larger quantities generates cost savings in the supplier's production or distribution, such cost savings are far more likely to be of such a nature that they are accurately expressed by discounts based on the customer's absolute volume of purchases from the supplier

(quantity discounts) and not by discounts based on the customer's past purchases or his requirements of a given product (loyalty discounts).

Loyalty discounts granted by non-dominant companies are dealt with under the Block Exemption Regulation 2790/1999[6] ("BER") and the related Vertical Guidelines.[7] The BER defines "single branding" as a non-compete arrangement which is based on an obligation or incentive scheme which makes the buyer purchase all or most of its requirement on a particular market from only one supplier.[8] The BER exempts "single branding" when the supplier's market share does not exceed 30 percent, subject to a limitation in time of five years if it concerns a non-compete obligation.[9] When the supplier's share exceeds 30 percent a "rule of reason" approach is applied to weight the possible foreclosure effects against the possible efficiency gains. There is no presumption of illegality for fidelity discounts above this threshold. A competition problem may in particular arise where such discounts constitute a network of vertical restraints implemented by several competing suppliers, leading to market foreclosure.[10]

The "meeting competition" argument may constitute a valid defence for dominant companies in a very specific market context which is characterised by a "the winner takes it all" situation. In such a market context, it may be procompetitive to leave a higher degree of discretion to dominant companies in determining their pricing policy to meet competing offers. However, even in such a market context, any procompetitive effects have to be weighted against any exclusionary or discriminatory effects which may result from such a pricing policy. Serious exclusionary effect may for example result from loyalty discounts aiming at extending contract periods. This reduces the scope of competition which takes place through periodic bidding contests.

3. Possible anticompetitive effects of fidelity discounts

The OECD questionnaire rightly states that "fidelity discounts tend to raise switching costs and could therefore affect the existence and magnitude of the discounter's market power" and that "Such practices, if they are sufficiently widespread in a market or undertaken by firms enjoying significant market power could have anticompetitive effects if they significantly constrain existing new firms or raise barriers to entry (including switching costs)".

3.1 Parameters for measuring anticompetitive effect

The following criteria can be taken into account to analyse the competitive effects of loyalty discounts. The exclusionary effect of loyalty discounts increases:

- the higher the discount;
- the steeper the discount scale (a progressive discount scale is for example illustrated by a one percent discount for an increase in purchases by ten percent, a three percent discount for an increase in purchases by 20 percent, a six percent discount for an increase in purchases by 30 percent etc.);
- the closer the customer is to attain the next step in the growth scale (see Commission's decision in Virgin/ British Airways, paragraphs 29-30);[11]
- the larger the turnover on the basis of which the discount percentage is calculated (cf. a growth discount calculated on total turnover and not just on incremental turnover compared to a past reference period);

- the wider the divergence between the market share of the dominant company granting the discount and those of its main competitors;[12]

- the longer the reference period, i.e. a reference period of one or several years is in principal more loyalty-promoting than a monthly or quarterly reference period;[13]

- the broader the range of products which are included in the calculation of the sales target.

In Irish Sugar[14], the Court of First Instance condemned a growth discount and observed *inter alia*: "…a rebate granted by an undertaking in a dominant position by reference to an increase in purchases made in a certain period, without that rebate being capable of being regarded as a normal quantity discount […] constitutes an abuse of that dominant position, since such practice can only be intended to tie the customers to which it is granted and place competitors in an unfavourable competitive position".

3.2 Discrimination

Loyalty discounts are usually discriminatory. They lead to a situation in which the supplier applies dissimilar conditions to equivalent transactions, thereby placing some trading parties at a competitive disadvantage. Art. 82(c) explicitly qualifies arrangements leading to such discrimination as abusive.

In Virgin/British Airways,[15] British Airways' scheme for growth discounts was judged abusive precisely on the grounds that it led to a situation in which "two travel agents handling the same number of BA tickets and providing exactly the same level of service to BA will receive a different commission rate, that is a different price for their air travel agency services if their sales of BA tickets were different in the previous year".

4. Policy issues

The short answers to each of the four questions raised by the OECD questionnaire are as follows:

- Fidelity discounts come close to non-compete/exclusive dealing arrangements where the customer is required to purchase a high percentage of his requirements from the supplier. In Deutsche Post,[16] such percentages could be as high as 100 percent.

- Fidelity discounts have so far been an issue mainly in the case of dominant companies. However, they can also be dealt with under Article 81§1 in case the fidelity discounts act as a form of single branding.

- If a fidelity discount is structured in such a way that marginal sales are made at "prices" below marginal costs this can be considered abusive. While "classical" predatory pricing below average costs cannot be a long-term strategy to exclude competitors pricing of marginal sales below marginal costs may be applied as long-term strategy by dominant companies.

- As noted above, under EC competition law, there is a tendency not to permit fidelity discounts in the case of companies with substantial market power. Loyalty discounts have not been seen as an adequate way to pass on cost savings to customers. The "meeting competition" defence may be applicable in specific market circumstances, but even then

procompetitive effects have to be weighted against any exclusionary or discriminatory effects possibly arising from discretionary price setting.

ANNEX I

CASE STUDY N°1: VIRGIN/BA

This case arose from a complaint from Virgin against BA's system of commissions for UK travel agents. Acting upon this complaint, the Commission investigated BA's incentives schemes. This investigation resulted in the adoption, on 14 July 1999, of a decision with fines finding that the incentive schemes BA had operated for UK travel agents were in breach of Article 82 of the EC Treaty.

In the decision, the Commission defined the relevant product market as the market for travel agency services, which are purchased from travel agents by airlines. The relevant geographic market was considered to be national as travel agents mainly operate on a country-by-country basis.

With a market share of around 40 percent of UK sales through travel agents in 1998, BA was found dominant on the UK market for air travel agency services. This share represented a multiple of that of any of its competitors. The Commission found that BA's dominant position on the UK market for air travel agency services arose from its position on the UK markets for air travel. BA was indeed very successful on these markets and offered significantly more routes to and from the UK than any other airline. The substantial proportion of slots BA held in the relevant airports was also found to reinforce the airline's position on the markets for air transport.

The Commission's conclusion therefore was that BA's position on the UK markets for air travel made it an obligatory business partner for UK travel agents. This was because, regardless of the conditions on which BA bought travel agents' services, the sales of BA tickets inevitably generated a large proportion of UK travel agents' income. As a consequence, BA was able to act, in its purchases of air travel agency services, independently of the other airlines which purchase travel agency services.

The Commission came to the conclusion that the incentive schemes operated by BA for UK travel agents represented abuses of that dominant position, insofar as they represented loyalty discounts as condemned in the Michelin[17] and Hoffmann-La Roche[18] cases and led to abusive discrimination between travel agents.

1. Case issues relevant to the OECD questionnaire

This section follows the structure of the OECD questionnaire in describing the approach to fidelity discounts adopted by the Commission in the Virgin-BA decision. This decision relies upon the principles laid down in the two above-mentioned judgements of the Court. In particular, the commission schemes which were operated by BA are very close in form to those condemned by the Court in the Michelin case.

1.1 Definitions

Article 82 of the EC Treaty prohibits the abuse of a dominant position. It is well established Community law that loyalty discounts, i.e. discounts based not on cost savings but on loyalty, constitute an abuse of a dominant position.

In the Hoffmann-La Roche case, the Court distinguished between legitimate quantitative discounts and the fidelity discounts granted to Hoffmann-La Roche, stating that, contrary to quantitative discounts, [fidelity rebates] "*are not dependent on quantities fixed objectively and applicable to all possible purchasers but on estimates made, from case to case, for each customer according to the latter's presumed capacity of absorption, the objective which is sought to attain being not the maximum quantity but the maximum requirements*".[19]

The Court underlined the exclusionary effect of fidelity rebates which, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, are designed "*through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers*".[20] The Court also stated in this case that certain incentive schemes might have an equivalent effect to an exclusivity requirement in a supply contract and so be an abuse if practised by a dominant supplier.

Under the scheme operated by Michelin, the rebates were given on a customer's purchases for a whole year in return for meeting sales targets set for each customer in view of its requirements. The Court underscored that in order to assess whether the incentive scheme was abusive, it had to determine whether "*in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose its sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition"*.[21] It came to the conclusion that the system operated by Michelin was such a scheme.

The incentive schemes operated by BA in this case were close in form to those operated by Michelin and the Commission relied on the definitions and principles laid down in this decision to assess BA's incentive schemes.

1.2 Possible procompetitive effects of fidelity discounts

Community competition law limits the type of discounts schemes that can be operated by a dominant firm. Fidelity discounts – as defined above – constitute an abuse of a dominant position under EC Competition Law. They have an exclusionary effect when operated by a dominant firm and therefore they cannot be considered as procompetitive. In addition, there is no efficiency defence under Article 82.

Discount schemes that are considered abusive when operated by a dominant firm might however be perfectly legitimate for an undertaking which is not in such position.

1.3 Possible anticompetitive effects of fidelity discounts

Exclusionary effect. The extra-commissions paid by BA to travel agents were dependent upon the travel agents meeting or exceeding their previous year's sales of BA's tickets. In order to qualify for the payment of an extra-commission, travel agents were forced to increase their sales of BA's tickets year after year. The incentives operated by BA therefore had the effect of discouraging travel agents from selling air transport services of other airlines. As a consequence, they were found to have an exclusionary effect on BA's competitors.

Discrimination. Under Article 82 of the EC Treaty, applying dissimilar conditions to equivalent transactions with other trading parties constitutes an abuse of dominant position. BA's loyalty-driven incentive schemes led to discrimination between travel agents as they were based on target sales set for

each travel agent in the light of its previous year's results. Under BA's incentive schemes, it was the agent's ability to meet these requirements which was rewarded. Two travel agents handling the same number of BA tickets and providing the same level of service to BA received a different commission rate if their sales of BA tickets were different in the previous year. As a consequence, the Commission took the view that BA had abused its dominant position by discriminating between travel agents.

1.4 Policy issues

In order to provide guidance for any other airline in a similar situation as BA, the Commission set out, on the occasion of the Virgin-BA decision, a certain number of principles concerning travel agents' commissions[22]:

- Commissions offered to different travel agents are differentiated to the extent that the differences reflect variations in the cost of distribution through different travel agents or variations in the value of the services provided to British Airways by different travel agents in the distribution of its tickets.

- Commissions increase at a rate which reflects savings in British Airways' distribution costs or an increase in the value of services provided by the travel agent to British Airways in the distribution of its tickets.

- Commissions relate to sales made by the travel agent in a period not exceeding six months.

- Commissions do not have targets that are expressed by reference to the sales made by the travel agent in a preceding period.

- Commissions increase on a straight line basis above any base line stated in the agreement.

- The commission paid on any ticket does not include any increase in the commissions paid on all other British Airways tickets issued by the travel agent.

- Travel agents are free to sell the tickets of any other airline and the goods or services supplied by any third party.

These principles are aimed at providing guidance to airlines which might be in a dominant position. The underlying reasoning is that a dominant airline will normally not fall under the scope of Article 82 if it abides by these principles. It does not mean however that the commission scheme of a dominant airline will automatically be considered abusive if it does not abide by each of these principles to the letter. It might be the case for some of them (e.g. principle n° 4, according to which the level of commissions might not depend on past performance) while the application of other principles will depend on the case at issue (e.g. principle n° 6, as explained below).

If there are objective reasons (e.g. savings in an airline's distribution costs) for an airline to pay an extra-commission above a certain threshold, it might be economically justified to pay this extra-commission on all the tickets and not only on those sold above the threshold. All tickets sold indeed contribute to the savings in the airline's distribution costs.

In this example, the key point would be to understand how the threshold is established. The system will be deemed acceptable if the threshold is objectively justified by reference to the cost savings which are generated for a specific airline above a certain volume of sales. However, if the threshold is

established on the basis of estimates made for each travel agent, according to its presumed capacity of absorption, it will be considered abusive. In this context, the payment of an extra-commission on all tickets, and not only on those sold above the threshold, would reinforce the loyalty effect of the incentive scheme. It would indeed increase the travel agents' incentive to reach the threshold and make it much more difficult for competitors to match the level of discount offered by the dominant airline.

ANNEX II

CASE STUDY N°2: MICHELIN

Tyre maker Michelin had been fined before for abusing its dominant position in the Netherlands (confirmed by the European Court of Justice in 1983). In 2001 the Commission fined it again for its abusive practice, with respect to its commercial arrangement with tyre dealers over the period 1990-1998, but this time with respect to the market for replacement truck tyres in France.

The Commission found a number of abusive practices in the commercial policies of Michelin. Some of these were straightforward fidelity rebates, others were found to have "loyalty inducing effects". Michelin's complex system of quantitative rebates, bonuses and other commercial practices illegally tied dealers and foreclosed the French market to other tyre manufacturers.

Michelin's "service bonus" and commercial agreements contain clear-cut fidelity elements. In the former, a system of points determined the magnitude of the rebate. Points were *inter alia* available for purchasing at least a minimum quantity of Michelin products, as a share of total purchases, whereby the threshold share was calculated from the regional average of Michelin sales as a share of total sales.

Among Michelin's commercial agreements was a "Club des amis Michelin" (Michelin Friends Club), which provided dealers with substantial advantages. However, for membership in the club, dealers had a de facto obligation to purchase at least 60 percent of products from Michelin. Formally, the member dealers were bound to promote Michelin products and not to divert "spontaneous customer demand" away from Michelin tyres. Spontaneous demand for Michelin products is very high, so that an obligation of this kind must necessarily be considered abusive, as it is aimed directly at eliminating competition on the part of other manufacturers, guaranteeing the maintenance of Michelin's position, and limiting competition on the market (in some Club agreements Michelin expressly reserved the right to monitor compliance with this clause).

Michelin's progress rebate, a target rebate, had a fidelity inducing effect. With many trigger points, the rebate schedule rewarded purchase increases over the base purchase quantity with large and increasing rebates. In the 1983 Michelin case, it had been established that target rebates can be abusive, in particular when the reference periods are long (e.g. one year, as was also the case in the 2001 Decision) and non-transparent.

Michelin's quantity rebates were found to have a fidelity inducing effect. The main finding was that the reference period for the quantity discounts was too long (para. 216). Three aspects of Michelin's rebate policy exacerbated this loyalty inducing effect. The fact that the rebate applied to the entire volume of goods purchased, rather than only the volume beyond the trigger point; the existence of many trigger points, which creates continuously incentives for the dealers to replace sales of Michelin's competitors by Michelin's; and the non-transparency[23] of the pricing system which, in combination with the very narrow margins prevalent in the tyre market, induced dealers to increase the sales of Michelin's products at the expense of competitors.

An element of the Michelin Decision is pertinent to the issues raised by the OECD secretariat. Fidelity discounts, especially in combination with other discounts/rebates, can contribute to a situation where prices are so unclear due to the complexity and subjectivity of the pricing system, that the practice can be deemed unfair:

"What the Commission is challenging in the system of quantity rebates is the uncertainty in which the dealer is placed with regard to the reference framework used (the final total amount of sales of Michelin products over one year), which was an unfair practice and created a loyalty-inducing effect. It is important to note, however, that the Commission considers that the "General conditions of sale" taken as a whole do constitute a non-transparent system since, as explained below, the service bonus and the progress bonus involve the earning of points and the definition of "bases" which rest not on objective, but on subjective factors." (paragraph 264 of the 2001 Michelin Decision)

NOTES

1. Cf. Case 85/76 - Hoffmann-La Roche & Co. AG v. Commission of the European Communities, ECR [1979] p. 461, paragraphs 95 - 100.

2. Cf. Case 322/81 - Nv Nederlandsche banden industrie Michelin v. Commission, ECR [1983], p. 3461, Commission Decision in Virgin/British Airways of 14 July 1999, OJ L 030, 4.2.2000, p. 1-24 and Case T-228/97 - Irish Sugar pcl v. Commission, ECR [1999], p. II-2969.

3. Cf. e.g. paragraphs 81 and 85 of the Michelin judgement (cit. note 2) and paragraph 216 of the Commission's decision in Michelin II (Commission Decision in Case no. COMP/36041 - PO - Michelin of 20 June 2001, not yet published)

4. Cf. e.g. Case 163/99 - Portuguese Republic v. Commission of the European Communities, ECR [2001], p. I-2613, paragraph 53

5. Cf. e.g. paragraph 73 of the Michelin judgement (cit. note 2)

6. Cf. Commission Regulation No. 2790/1999 of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreement and concerted practices OJ L 336 of 29.12.1999, p. 21-25.

7. Cf. Guidelines on Vertical Restraints, OJ C 291 of 13.10.2000, p. 1.

8. Cf. Guidelines, para. 138 - 160

9. Cf. Guidelines, para 139. "Non-compete" obligations are obligations that require the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 percent of the buyer's total purchases during the previous year of the contract goods and services and their substitutes (see the definition in Article 1(b) of the Block Exemption Regulation), thereby preventing the buyer from purchasing competing goods or services or limiting such purchases to less than 20 percent of total purchases", Guidelines, para 58

10. Cf. BER, Article 6

11. A continuous scale not consisting of single steps would in principal not lead to the marginal loyalty-promoting effect.

12. Cf. Case 322/81 - NV Nederlandsche Banden Industrie Michelin v. Commission, ECR [1983], p. 3461. paragraph 82.

13. Cf. Case 322/81 - NV Nederlandsche Banden Industrie Michelin v. Commission, ECR [1983], p. 3461, paragraph 81

14. Cf. Case T-228/97 - Irish Sugar pcl v. Commission, ECR [1999], p. II-2969, paragraph 213.

15. Cf. Commission Decision in Case no. IV/34780 - Virgin/British Airways of 14 July 1999, OJ L 030, 4.2.2000, paragraph 109-111

16. Cf. Commission Decision in Case no. Comp/35.141 - Deutsche Post AG of 20 March 2001, OJ L 125, 5.5.2001, paragraph 23

17. Case 322/81 Michelin [1983] ECR 3461

18. Case 85/76 Hoffmann-La Roche [1979] ECR 541

19. para.100

20. para. 90

21. para. 73

22. Press Release IP/99/504 of 14 July 1999

23. The pricing system was considered to be non-transparent for several reasons; first and foremost, dealers would not know the net price (net of the various rebates) at the time of their order, in a situation where the net price would typically be in excess of their vending price; secondly, the subjective elements in the rebate system added uncertainty; and thirdly the sheer complexity of the various rebate schemes.

SUMMARY OF THE DISCUSSION

The Chairman began by noting that in most contributions to the roundtable, it is acknowledged that loyalty and fidelity discounts (i.e. pricing structures offering lower prices in return for a buyer's agreed or *de facto* commitment to source a large share of his requirements with the discounter) come in many different forms and are used in many sectors. They can have complex effects on competition and efficiency and therefore should be analysed using a "rule of reason" approach. For example loyalty and fidelity discounts may reduce transaction costs and information asymmetries, align prices more with costs, and allow firms to better plan production or to benefit from economies of scale or scope. But they may also lead to harmful discrimination, foreclosure, reduced price transparency and greater risks of anticompetitive co-ordination.

The Chairman commented that there is much disagreement on what needs to be established to demonstrate that a fidelity discount has an anticompetitive effect. Similar cases are treated differently in different jurisdictions and sometimes the same case is treated differently by various courts in the same jurisdiction. The Chairman proposed to begin the discussion with the countries having the strictest views on fidelity discounts and then move to contributions where the economic analysis is more nuanced and efficiency-enhancing effects receive greater emphasis.

1. Frequent flyer programs

The Chairman drew attention to the Norwegian contribution which featured an extensive theoretical discussion of the pro- and anticompetitive impacts of fidelity discounts as well as their effects on efficiency. In March 2002, the Norwegian Competition Authority (NCA) made a landmark decision to prohibit the SAS air carrier group from awarding frequent flyer points on all its domestic Norwegian routes, irrespective of the presence or absence of competitors. He invited the Norwegian delegation to describe how it analyses fidelity discounts and why the NCA was so tough in the SAS case.

A Norwegian delegate noted that in 2001, the SAS group had 98 percent of the domestic air travel market. Even though Norway is a small country (4.5 million inhabitants), its air travel market is quite large, more than ten million passengers per year. Thus, there appears to be room for more than one carrier in the market.

Norway described the peculiar features of frequent flyer programs ("FFPs"). First, awards are given not in the form of money but as free services. Secondly, FFPs involve a certain non-linearity in that there are thresholds at which awards can be made. Thirdly, there is a principle-agent problem applying to business travel because the person travelling is not the person paying for the ticket. The significance of this is increased by FFP awards so far not being taxable. Finally, FFPs can create a competitive advantage for the airlines having the more extensive networks.

Norway noted SAS's argument that prohibiting domestic travel FFPs could create competitive disadvantages in international air travel markets due to network economies involved. The NCA was not persuaded that this was a significant effect and countered that with the imminent possibility of consolidation in European aviation, other countries should introduce efficient regulations over FFPs.

Norway concluded that vigorous application of competition policy is needed to enhance and preserve competition in the aviation sector.

The Chairman turned next to the contribution from Sweden which focused on abuses of fidelity discounts in newly deregulated markets (such as airlines, postal services and telecommunications). He also noted that in November 1999 the Swedish Competition Authority ("SCA") found that SAS's Eurobonus Frequent Flyer Program constituted an infringement of Article 19 of the Swedish Competition Act since it had a significant loyalty-inducing effect and made it more difficult for other airlines to start or maintain competing domestic air services. The Market Court upheld the SCA's analysis and in view of inadequate competitive conditions ordered the airline not to apply its FFP on domestic air travel in Sweden. Unlike the Norwegian case, the Swedish one seems to prohibit FFPs only on SAS routes where there is competition. The Chairman asked the Swedish delegation to comment both on the differences, if any, between the Norwegian and the Swedish decisions and on the importance of the principal-agent problem in the competition analysis of FFPs.

A Swedish delegate stated that Article 19 of the Swedish Competition Act is based on Article 82 of the EC Treaty. The first paragraph of Article 19 contains prohibitions against abuse of a dominant position by one or more undertakings on the market. In newly liberalised sectors, there is an ever-present danger that incumbent companies might use unfair methods to protect their vested interests in their home markets. The SCA has noticed that dominant firms (i.e. former monopolies) on recently deregulated markets try to gain a competitive advantage in new markets by the use of fidelity discounts, which limit competition and the possibilities for new companies to enter the market.

Swedish domestic civil aviation was deregulated on July 1st 1992. As a result of its previous monopoly in this area, the Swedish flag carrier SAS has a very strong position and a market share of 80 percent. SAS uses an FFP called Eurobonus. Already in November 1999 the SCA ruled that SAS's Eurobonus scheme constituted an infringement of Article 19 of the Swedish Competition Act since it had a significant loyalty-inducing effect and made it more difficult for other airlines to start or maintain competing domestic air services. The SCA ordered SAS not to apply its Eurobonus scheme, or to participate in schemes of a similar nature, in such a way as to enable passengers earning points to redeem them as bonus awards or the equivalent. The ruling applied to all domestic routes in Sweden. However, in its judgement, the Court of final appeal restricted the injunction to apply only on routes where SAS and its partners encounter competition through existing or newly-established scheduled air passenger traffic.

The Swedish delegate pointed out that a bonus scheme undoubtedly has a loyalty-inducing effect. The appeal of such a scheme is even greater if the airline company concerned has a network of routes that offers travellers good opportunities not only for earning points but also for using them for attractive travel.

As with other fidelity discounts, asymmetries play an important role in determining the probable effects of FFPs. An FFP operated by a dominant carrier at its hub is certainly very attractive to customers. A large network at the hub allows business travellers in particular to collect more points and to redeem them on a wider number of destinations than a competing airline with a point-to-point service or with a less complete network.

Moreover, the essence of the "discount" is that there are critical thresholds built into the rewards. In most cases the loyalty points ("miles") cannot be sold, just exchanged for free trips when a sufficient number of miles are accumulated. As a traveller approaches one of the miles thresholds, he is less and less willing to consider travelling with another airline even if a lower fare is offered, especially if the accumulated miles are lost if not redeemed within a set period of time.

Furthermore, the attraction of the FFP is further increased by the fact that the business traveller is usually not paying for the ticket, but is benefiting from the FFP free flight. Business customers are generally very important to the airline companies since time-sensitive travellers are less price-sensitive and are willing to pay more for a flexible ticket. Therefore it will be difficult for a new entrant without a competitive FFP or without a developed network at the hub in question to attract business customers for its flights.

For all these reasons, both the SCA and the Court of final appeal ruled that the application of an FFP by an airline company with a dominant position in the Swedish domestic aviation market constitutes an abuse of that dominant position.

The Chairman noted that the Bundeskartellamt ("BKA") has investigated the FFP program of Lufthansa (i.e. "Miles & More") including its effects on one of its competitors, Eurowings. In its contribution the German delegation writes: "The Decision Division did not prohibit the programme being used for example in the case of single domestic air traffic routes. In the view of the Decision Division such a prohibition would only slightly reduce existing customer loyalty, because customers would continue to collect miles on longer international routes. Neither could a comprehensive prohibition of the programme be considered as Lufthansa competes with other airlines on an international level. A partial prohibition regarding individual routes would therefore hardly be able to compensate for competitive disadvantages incurred by smaller competitors. To include Eurowings in the programme was therefore considered to be a better solution." (para. 19). When in 2000 Lufthansa and Eurowings merged, the merger was allowed subject to the general opening of the Miles & More program. Thus it appears that the analysis and conclusions of the BKA were quite different from those of Norway and Sweden. The Chairman invited the German delegation to comment on those differences and whether the solution it chose has proved satisfactory.

A German delegate mentioned that there were two different proceedings as regards Miles & More. First there was an abuse of dominance proceeding, and second a merger between Lufthansa and Eurowings. The Bundeskartellamt cleared Lufthansa/Eurowings subject to obligations, one of which was a general opening up of the Miles & More program to all interested competitors. The aim was not so much to remove an impediment to a particular competitor as it was to compensate for Lufthansa's enhanced market power. General access to the benefits of the Miles & More program was considered to be a more suitable means in this respect than prohibiting the program on selective individual routes. Opening up the Miles & More program was supplemented with a number of further obligations. For example, Lufthansa had to give up some slots, which the BKA considered to be more important than opening up Miles & More.

The general opening up of the Miles & More program has already had some positive effects. There is a new smaller competitor, European Air Express, which is already participating in Miles & More and a couple of regional carriers which are preparing to do so.

The Chairman stated that so far the Brazilian competition authorities have not investigated fidelity discounts even though they seem to be quite common in a number of sectors. The Brazilian contribution looks at such discounts as vertical practices and suggests that concern about foreclosure effects should be limited to cases in which there is market power and the portion of the market affected by the practice is large. In addition, the Brazilian contribution suggests that fidelity discounts when they are granted by a supplier to final consumers would *a priori* seem to be consumer welfare increasing, whereas exclusionary effects are more likely to be a source of concern in fidelity discounts between undertakings situated at different levels of the vertical chain. Of particular interest, given the previous discussion of FFPs, is the statement that: "At the present moment there are two main companies in the Brazilian passenger carriers market and, last year, we had a new entrant in this market. In only one year, this new air

company, called GOL, already achieved four percent of the market. GOL does not have a frequent flyer program since it concentrates its services in the economic class, but this is already enough evidence that this program is not a significant barrier for new companies to enter the market." (para. 16a). It would thus seem that the situation in Brazil is quite different from the situation in Norway or Sweden.

A Brazilian delegate noted that while Norway or Sweden had only one big airline company with an FFP at the time of deregulation, Brazil began with four middle size companies. All of them had fidelity discount schemes and their shares were respectively 35 percent, 30 percent, 20 percent, 15 percent. Following deregulation in 2000, the smallest company was driven out of business during a GOL initiated price war. GOL now has four percent of the market and the best financial situation. GOL competed on the basis of low costs and prices, i.e. 75 percent below those charged by some competitors. It did not need to employ FFPs. The biggest company, Varig, was the first to launch FFPs and is at the moment facing severe financial problems due to mismanagement.

The Brazilian competition authority did not find FFPs to be predatory, and therefore concluded they were not harmful to competition.

2. Other Fidelity Discounts

The Chairman commented that the practice of fidelity discounts by former legal monopolies seems to be fairly common in Italy. Often such rebates are a function of the customer's combined purchase of all the services provided by the former monopoly (monopolised services as well as services open to competition), making it particularly difficult for the competitors of the former monopoly to access the liberalised services markets. The Italian contribution presents two cases in which Telecom Italia was considered to have violated the competition law through abusive rebates. It also presents an interesting case against Coca-Cola which offered discounts to clients willing to convert their PepsiCo draught beverage equipment to deliver Coca-Cola products, and as well practised discriminatory discounting with wholesalers to encourage them not to deal in competing products.

An Italian delegate explained that in the cited cases, the fidelity discounts were viewed by the Competition Authority as aiming at excluding or preventing entry by new competitors or making it more difficult for actual competitors to expand their own operations.

In the first case, Telecom Italia was found to have abused its dominant position in the market for Internet services to both residential and business customers. In particular, Telecom Italia had imposed in relation to the supply of Internet connectivity services discriminatory conditions as a result of very generous fidelity discounts extending over both liberalised and monopolised services. The discount sometimes was as much as the price charged for deregulated services. In addition, some interbusiness services were apparently provided at a loss giving a predatory pricing character to the discounts. The case was resolved by Telecom Italia concluding an agreement with the Italian Association of Internet Providers under which it agreed to share with requesting competing Internet service providers revenues it made on dial-up links developed since 1998. Telecom Italia also undertook to reduce the cost of the direct digital circuits leased by Internet providers.

The second case also involved Telecom Italia and again featured a fidelity discount that extended to include services still under legal monopoly. The Competition Authority found that Telecom had attempted to extend its dominant position to the provision of liberalised services by means of discounts that were not cost related. Since the discounts included services still provided under a legal monopoly, competitors could not match them.

In both Telecom Italia cases, competition concerns about fidelity discounts had some predatory pricing aspects.

The third case mentioned involved target rebates offered by Alitalia to travel agents. Due to the structure of the discounts and Alitalia's large relative size, competitors could not feasibly match Alitalia's discounts. To do so would have required discounts on the order of 60 percent. Fines were imposed on Alitalia, and they were considerably more severe than in the EC's British Airways case.

The delegate concluded with cases focused on Coca-Cola's granting clients discounts and other incentives to favour Coca-Cola over its competitors. Coca-Cola was found to have a dominant position on the Italian market and to have abused it by offering a system of discriminatory and non-transparent discounts and loyalty rebates. When the Chairman asked why Pepsico was presumably unable to match Coca-Cola's discounts, the Italian delegate responded by noting that Coca-Cola had considerably greater volume than its competitors and this was important in determining that the discounts and incentives were anticompetitive. He also emphasised the importance of fidelity discounts being calculated over a relatively long period of time which itself tends to raise barriers to entry.

The Chairman noted that the French contribution canvasses a large number of decisions by the Competition Council in a number of sectors by businesses holding intellectual property and other exclusive rights. He focused in particular on a case in which Lilly France tried to limit the growth in market shares enjoyed by competing generic drugs. The Chairman was especially interested in a case arising in the Alsatian tile and brick market in which a dominant firm practiced certain fidelity discounts. In that case, the Council required the dominant firm to clarify the bases on which it offered fidelity discounts. This seems to indicate that the Council believes that even dominant firms can, in certain circumstances practice fidelity discounts. He turned to the French delegation to expand on that point.

A French delegate explained that Lilly was using fidelity discounts in the context of tying sales of patented products with those whose patents had expired, hence the competition from generics. The Competition Council treated this as a fidelity discount used to raise barriers to entry. Its prohibition was upheld on appeal. Two other similar cases were also touched on. The delegate then turned to a case where France Telecom used fidelity discounts to effectively tie a monopolised with a liberalised service. This was not found to be abusive in a case involving sales to Renault because it did not amount to tying and the practice had not effectively restricted competitors.

Concerning the Chairman's final question, the delegate stated that the Competition Council considers that fidelity discounts by dominant firms are illegal only if they are anticompetitive. In other words, when fidelity discounts by dominant firms are linked to exclusivity, the Council might penalise them.

The Chairman noted that the Finnish contribution presents the Finnish Competition Authority's ("FCA") methodology towards fidelity discounts illustrated with a number of cases the FCA has dealt with. One of the central concepts advanced by Finland's Supreme Administrative Court to deal with abuse of dominance cases is cost accountability. Thus "…discounts must be clearly identifiable, definite, and reasonable and may not be used to artificially distort mutual competition between customers of different sizes." (para. 8). Finland's contribution includes the Kenkä-Kesko case involving private branded footwear, in which the FCA found that the fidelity rebate had positive effects on efficiency and competition. The Chairman called on Finland to provide detail about this case, and to explain as well whether dominant firms would be permitted to practice cost-justified fidelity discounts.

A Finnish delegate first clarified that there was no question of dominance in the Kenkä-Kesko cases. Kenkä-Kesko, a central organisation of distributors, has 30 percent of the market and faces fierce

competition from other retailer chains and independent supermarkets. Kenkä-Kesko uses fidelity discounts to induce its retailers to increase their purchases to the point where it becomes profitable to offer a line of private branded imported footwear. Retailers' discounts depend on the share of requirements sourced with Kenkä-Kesko. An identical quantity discount offered to all retailers would not have the same overall effect on increasing sales of the private brand because there is a considerable variation in the retailers' requirements. A consequence of the fidelity discount is that different retailers could pay different prices for the same total quantity purchased (i.e. there could be price discrimination). Nevertheless, without the discount scheme, Kenkä-Kesko would not be able to increase competition in the footwear market through the introduction of its private brand.

As for the Chairman's question about dominant firms, if their fidelity discounts are truly cost-justified there should be no problem under Finnish competition law. The delegate doubted, however, whether a fidelity discount could ever be cost-justified.

The Chairman noted that, in the contribution from Japan, there is a reference to a case concerning the Yamaguchi Prefecture Economic Federation of Agricultural Co-operatives which seems, except for the resolution, to bear some resemblance to Kenkä-Kesko In the Yamaguchi Economic Federation of Agricultural Co-operatives case, the Federation supplied chemicals and fertilisers to affiliated co-operatives and granted them a discount based on the percentage of the purchases of the Federation's products in the total purchases of a member co-operative. The Federation of Agricultural Co-operatives was considered to have violated the Antimonopoly Act. The Chairman invited the Japanese delegation's comment on the Yamaguchi case as well as on its general approach to the problem of fidelity discounts.

A Japanese delegate noted that in 1991 the Japan Fair Trade Commission ("JFTC") published its "Guidelines Concerning Distribution Systems and Business Practices" in which it outlined what makes certain fidelity discounts illegal under the Antimonopoly Act. Focusing on the kind of discount featured in the Federation of Agricultural Co-operatives case, the Japanese Guidelines note that such an arrangement is illegal as an unfair trade practice if: the manufacturer is influential in the market (i.e. enjoys more than ten percent of shares or ranks third or higher in the market); and the provision of such rebates restricts distributors' handling of competing products with the result that new entrants or existing competitors find it difficult to secure alternative distribution channels.

The Yamaguchi Prefecture Economic Federation of Agricultural Co-operatives, having a predominantly large share in the supply of agricultural chemicals and fertiliser to agricultural co-operatives in Yamaguchi Prefecture, granted rebates based on criteria such as the percentage of purchases of the Federation's products in the total purchases of member co-operatives. Since the Federation was very influential in the market (i.e. it had between 80 and 90 percent of the market), the rebate scheme obviously reduced business opportunities of competing suppliers. The JFTC concluded that the Federation's scheme was illegal under the Antimonopoly Act.

[At this point there was a question and answer dealing with a case arising in Mexico. The Mexican delegation requested this be deleted from the summary of the discussion].

The Chairman next considered the contribution from the European Commission contribution in which he read: "…there is a tendency not to permit fidelity discounts in the case of companies with substantial market power." (para. 18). As with Finland's Competition Authority, the EC seems to consider that discount schemes which are cost justified are not anticompetitive. If discounts are not cost justified, then the question is whether they restrict competition through the creation of barriers to entry or through discrimination. The Commission suggests a methodology and a set of criteria to assess the anticompetitive impact of loyalty discounts. In light of its methodology, the Commission discusses the British Airways

system of commissions for travel agents (a loyalty discount system which, contrary to the previously mentioned FFP cases, involved no principal-agent problem).

In its contribution, the European Commission also states that: "The "meeting competition" argument may constitute a valid defence for dominant companies in a very specific market context which is characterised by a "the winner takes it all" situation. In such a market context, it may be procompetitive to leave a higher degree of discretion to dominant companies in determining their pricing policy to meet competing offers." (para. 12). The Chairman found this particularly intriguing because he thought a case could be made that in such situations fidelity discounts could be regarded as especially dangerous since the dominant firm would become very well entrenched. This appears to be the view expressed in some other delegations' submissions. The Chairman invited the European Commission to explain both its methodology and the British Airways case, and as well to expand on the meeting competition defence.

A European Commission delegate said that the EU heavily qualifies the meeting competition defence. For example, dominant firms in bidding market situations are forbiddent to use loyalty discounts to extend contract periods. The EU also will prohibit loyalty discounts amounting to predatory pricing, i.e. where marginal price is lower than marginal cost. In short, the meeting competition defence is not a means by which dominant firms can impose all kinds of loyalty discounts.

The delegate then turned to the British Airways case where BA sold tickets to travel agents and granted discounts as a function of their sales. This was a classic loyalty discount in which the discount depended on how current performance compared to performance in a past reference period. The discount was also granted not just on incremental but rather on total sales provided a necessary threshold condition was satisfied. Such a discount can have very strong exclusionary effects. If it is not cost-justified, it is considered an abuse of dominance. The lack of cost-justification in the BA case was partly evident in the fact that two travel agents could get different discounts despite making the same volume of BA ticket sales. The price discrimination was in itself considered to be abusive.

The Chairman next moved to the contribution from Korea. It discusses at length the mobile phone market and states; "…the anticompetitive harm caused by subsidising mobile phone purchases is expected to be quite substantial. [T]he mobile communications industry shows network externalities and consequent customer concentration effects. If a firm attempts to secure customers through excess mobile phones subsidies in such a market environment, a "winner take all" type monopoly condition can result. The Ministry of Information and Communication is currently pursuing legislation completely banning such practices…." (paras. 16 & 17). The Chairman asked the Korean delegation to comment on this apparent divergence with the EU, and particularly to note whether Korea is considering a *per se* ban on fidelity discounts in this kind of situation.

A Korean delegate began by explaining that in Korea normal price competition is impossible in the mobile phone market because prices for services are subject to Ministerial approval. Competition instead takes place through the provision of subsidised mobile phone units. Such subsidies are given to both new and current subscribers. For the former, a minimum subscription term is sometimes applied. For existing subscribers, a type of "mileage" discount is given; i.e. points are given according to a customer's total use of the service. When a threshold is reached, the points can be converted into a subsidy on a new mobile phone.

The Korean delegate stressed that the mobile communications market is a typical case of a market having network effects. A larger number of subscribers means more people can be contacted through the network, resulting in ever increased value for existing subscribers and generating demand side economies of scale which in turn attracts even more subscriptions. These effects are bolstered by the fact

that the average cost of providing network services declines as more people subscribe (i.e. there are important fixed costs in building a network).

Considering these characteristics in the mobile communications market, if a dominant firm resorts to excessive use of fidelity discounts, its market position can be strengthened faster and deeper than would be the case in other markets, especially if its competitors are financially weaker. The financial health of mobile phone operators is currently a point of concern to both the KFTC and Ministry of Information and Communication, but the latter puts more weight on industrial policy concerns than on competition policy issues. The Ministry takes the view that mobile phone subsides waste resources by promoting indiscriminate mobile phone use by subscribers, and undermines the financial viability of mobile communications firms.

There are no regulations in Korea's Monopoly Regulation and Fair Trade Act directly dealing with fidelity discounts, and they have never been ruled as anticompetitive practices in a specific case. With reference to mobile phones, the KFTC differs from the Ministry in opposing a complete ban on the existing subsidies. Such subsidies, provided they are not predatory, represent an important form of competition.

Turning to Australia, the Chairman noted that fidelity programs not involving tying seem to fall under article 46 of the Trade Practices Act which prohibits misuses of market power. However an anticompetitive purpose must be established for the practice to qualify as a misuse of market power, and trying to gain a long term commercial advantage for the firm seems to qualify as a procompetitive rather than an anticompetitive purpose. Loyalty programs requiring the consumer to buy other products from the same supplier are prohibited if they substantially lessen competition. Finally third line forcing is illegal *per se* (unless exempted by the ACCC). The ACCC has had some concerns with Qantas' FFP with which many other Australian companies are affiliated. The ACCC questions the wisdom of these affiliations and the Australian contribution ends with the rather startling comment that, "…there has been little research to discover whether the substantial costs associated with the operation of a major loyalty program actually yield a net benefit to the firm or the customer." (para. 58). Could it be that there is a massive rationality failure on the part of Australian firms?

An Australian delegate gave several examples questioning whether the operation of loyalty programs yields net benefits to firms or customers. Included among them was Coles Myer which currently makes about 20 percent of all retail sales in Australia. This firm recently announced that it was phasing out the fidelity discounts given to its shareholders. The fairly large discounts led to a massive growth in the number of shareholders in the company (60 000 to 560 000), almost all of whom had a small number of shares. Analysts were highly critical of Coles Myer's low rate of return on investment which was in turn linked to the fidelity discounts. The company's competitors did not offer similar discounts, were growing faster and were making a better return on investment. All this leads one to doubt the rationality of the fidelity discount program.

A second example was found in an airline FFP. In response to consumer complaints about inability to convert points into flights, the ACCC in 2001 began an investigation especially of the FFPs offered by Qantas and Ansett. During the course of the investigation, Ansett collapsed and left about one million customers holding about one billion A$ in debts related to unredeemed FFPs. These debts were one reason the company's administrator failed to get it back into business. This collapse also had important effects on companies such as various banks that were linked to Qantas' and Ansett's FFPs. The formers were winners but the latter had to scramble for affiliation with Qantas. The fact that Qantas' FFP is now alone in the field, has made it difficult for various affiliated loyalty schemes to differentiate themselves.

Another interesting element is that the ACCC and the Reserve Bank of Australia did a major enquiry into credit card interchange fees and found, *inter alia*, that the loyalty programs linking credit card use to FFPs actually distorted efficient payment mechanisms.

One of Australia's largest banks recently announced that it was retrospectively reducing the value of FFPs earned on credit cards. It backed down concerning retrospectivity under pressure from the ACCC, but a report by JP Morgan noted that administration of its credit card-FFP scheme was one reason for recent damage to its share price. This and the previous examples suggest that FFPs are not as straightforward in their effects as might be thought.

Under Australian competition law, the ACCC applies a *per se* approach when the loyalty program links two products (third line forcing) unless an exemption is obtained. Normally such an exemption will be granted where the consumer receives a lower price for the goods bought together. A recent exemption was given for example as regards Woolworth (a major supermarket) giving discounts on petrol purchased at a wholly owned subsidiary. The discount was conditional on customers purchasing a sufficient quantity of groceries from Woolworth. The affected petrol sales were a small share of the market, and it was thought the discounts would tend to increase competition in that market.

3. Possible procompetitive effects of fidelity discounts

The Chairman noted that the contribution from Chinese Taipei emphasises that a rule of reason approach is justified for fidelity and loyalty discounts and that such discounts when given by firms having market power may have anticompetitive effects. The contribution also presents pertinent cases in the telecommunication and the petroleum markets. This contribution stands out from the others in its greater emphasis on the possible positive effects of fidelity discounts on competition and efficiency. Two variables seem to be important in Chinese Taipei case law: the length of time required benefiting from the discount and the cost of switching for consumers. The Chairman invited the delegation of Chinese Taipei to expound on these.

A delegate from Chinese Taipei mentioned that his country's Fair Trade Law prohibits any enterprise from trying to win customers from its competitors by coercion, inducement with interest, or other improper means where such actions are likely to lessen competition or to impede fair competition.

In 2000, when dealing with the liberalisation and re-regulation of the telecommunications industry, the Chinese Taipei Fair Trade Commission (CTFTC) issued its "Notes for Regulating the Telecommunications Industry" which defines fidelity discount" as a "…discount offered to customers that is accompanied by provisions prohibiting the customers from switching trading counterparts, or [a] big discount offered to customers who might switch trading counterparts, so as to prevent such switches". It goes on to note that: "Since specific enterprises use such discounts to "lock in" customers, trade opportunities of competitors are thus restricted."

Fidelity discounts can have procompetitive effects such as ensuring effective price competition and minimising the instability of the manufacturer's sales volume and associated inventory problems. However, enterprises using fidelity discounts as a marketing tool may accompany them with exclusive dealing arrangements, high switching costs, and long-term contracts etc. to lock in customers. All these could give rise to competition concerns. If an incumbent dominant firm uses those marketing tools then it can easily eliminate competitors or impede competition. Although the CTFTC has not so far imposed a sanction in a fidelity discount case, it has warned some enterprises not to use fidelity discounts in combination with high switching costs or long-term contracts locking in customers.

The CTFTC determines the legality of fidelity discounts by considering factors such as the enterprises' intent and market position, the structure of the market, the characteristics of the goods, and the impact of carrying out such restrictions on market competition.

In the case of the telecommunications and petroleum product industries, existing dominant enterprises attempted to use favourable long-term contracts to win competitors' customers in advance of the relevant markets being liberalised. These practices were intended to prevent new players entering the market and thus defeating the objectives of the liberalisation policies. The CTFTC has consequently decided that when contracts extend into the post-liberalisation period, or the costs of switching suppliers are unreasonably high, an intention to eliminate competition can be assumed and fidelity discounts deemed anticompetitive.

The Chairman turned next to the contribution from the United Kingdom where the point is made that, "…while anticompetitive effects are undoubtedly possible when loyalty discounts are set by firms with market power, there are also important procompetitive effects that seem to be achievable only through the use of loyalty discounts." (para. 3). The UK contribution, after studying in detail the possible procompetitive effects of loyalty discounts, then turns to a set of rather forbidding conditions that have to be met before a "rollback" loyalty scheme would be considered to have anticompetitive foreclosure effects. The Chairman invited the UK to elaborate both on the potential procompetitive effects of fidelity discounts and on the conditions that have to be met to find them anticompetitive.

A United Kingdom delegate mentioned that loyalty discounts should be analysed on a case by case basis since they are likely to have both pro- and anticompetitive effects. Concerning the former, loyalty discounts are, to begin with, a form of price competition, hence generally desirable. There may also be more specific procompetitive effects such as the power of loyalty discounts to incentivise retailer sales efforts and to do so without distorting competition among distributors. With loyalty discounts, very different sized distributors could obtain the same percentage discount.

Regarding anticompetitive effects, rollback rebates deserve particular attention. With such discounts, if the required threshold is reached the discount is awarded on all rather than just incremental purchases. This would permit supplying a certain quantity at a very low price over a critical range of sales, with price rising again beyond that range. A straightforward quantity discount would not have that property and would tend to be less profitable than a fidelity discount as a means of foreclosing a market.

The UK delegate referred to his country's submission's list of conditions tending to make foreclosure more likely, although not necessarily certain. He framed this within a situation where there is a dominant supplier offering a fidelity discount, a rival seller complaining the discount is reducing his market share, and a representative buyer. The first condition to be met is that the (dominant) fidelity discounter has an assured, typically large, percentage of each buyer's requirements. Competition is confined then to the non-assured sales. In that situation, a fidelity discount offered over all units could distort competition since rivals would have to offer much larger percentage discounts to remain competitive. This does not necessarily mean, however, that consumers suffer. That will only happen if there is some kind of efficiency loss arising out of keeping rivals smaller, such as inability to obtain available economies of scale.

The Chairman next turned to the United States commenting that its contribution was another example of the procompetitive aspects being emphasised. The US delegation seems to endorse Dennis Carlton's view that antitrust intervention against non-linear pricing schemes should be used rarely and apply only to extreme pricing conditions where marginal pricing below marginal cost is unambiguous. Yet it seems that the courts have wavered on the appropriate standard to apply to fidelity rebates. From that

standpoint the tortuous story of the 3M/LePage's case is extremely interesting although the case is still pending.

A United States delegate began by emphasising that price-cutting is central to competition and ought generally to be protected rather than prohibited under antitrust law. In addition, the US doubts the ability of antitrust authorities and the courts to distinguish between price competition and pricing intended to exclude competitors. Reflecting those doubts, the US has applied two broad principles. First, price cutting by any firm other than one in a truly dominant position is *per se* legal. Second, when dealing with a monopolist or a firm having a dangerous probability of gaining a monopoly, a two part test is used: price cutting is lawful unless price is below average variable or marginal cost; and there is a dangerous probability of recoupment (i.e. after driving rivals from the market, the firm will be able to raise prices to a supra-competitive level). A loyalty or any other type of discount is not illegal if it amounts to limit pricing; i.e. permanent low pricing designed to prevent new entry into a market.

With respect to multi-product discounts, the situation is somewhat more complicated because the discounts might be on Product A in which the firm has market power and be designed to increase sales of Product B by excluding a rival from the Product B market. In those circumstances, some have argued that one must allocate the entire value of the discounts, both on A and B, to the Product B market in order to determine whether the discount amounts to below cost pricing having the effect of excluding an equally efficient rival offering Product B alone. Where there is such below cost pricing plus the possibility for recoupment, the discount would be illegal under this approach.

The 3M/LePage's case, which is highly complex, is an example of multi-product discounts. At this point is not possible to predict how the case will come out.

Returning to procompetitive benefits of loyalty discounts, the delegate stressed the benefits consumers derive from such discounts. They can be a form of price discrimination used in situations where it is difficult to identify the customers having the more elastic demands. Instead, the discounts allow buyers to self-select. It is well established in both the economics and legal literatures that rules against price discrimination tend to reduce price competition and harm consumers. The delegate also noted that loyalty discounts help provide an incentive for distributors to develop the market for a product. That too is likely to expand output and benefit consumers.

The US delegate concluded by stating that there should be a strong presumption against finding loyalty discounting illegal. The practice should be permitted unless there is strong evidence of anticompetitive effect in the sense of exclusion from the market, not just harm to a rival.

4. General discussion

Before opening the floor, the Chairman remarked that the roundtable began with two Nordic countries urging others to take a hard line against fidelity discounts and ended with a strong plea for a permissive approach. He therefore returned to Norway and Sweden to register their reactions to information presented in the roundtable.

A Swedish delegate commented that in the SAS case, a two parts or symmetric approach was adopted. SAS and its affiliates enjoy market dominance and have some 90 percent of the market. The Swedish Competition Authority has therefore been looking for ways to increase competition in this market and in that context found SAS' FFP to be an abuse of a dominant position. On the other hand it was considered necessary to allow new entrants to use FFPs if that would help them grow stronger.

Although the German experience in opening up Lufthansa's Miles and More program to competitors provided food for thought, the delegate remained convinced that the Swedish approach was correct for Swedish market conditions. She added that fidelity discounts are more likely to be harmful in markets where there are special kinds of asymmetries plus a principal-agent problem. At the Market Court, the Swedish Competition Authority compared SAS' Eurobonus plan to a type of bribe. There did not appear to be any other remedies besides prohibition for eliminating the principal-agent problem inherent in the FFPs.

A Norwegian delegate mentioned that FFPs must be understood in relation to the hub and spoke systems now pervasive in the airline industry. Most airlines with large networks centre their operations on one or a few hubs, but airlines choose different hubs with the result that at each airport there is only one hub airline. This airline enjoys considerable market power at the hub and on its spokes. This gives the hub airline a large competitive advantage that is strengthened by the FFP programs. In Norway there is ample evidence of the anticompetitive effects of FFPs. For example, several years ago the second largest Norwegian carrier was trying to get into the Oslo-Stockholm route, one highly profitable to SAS. They gave away 100 tickets to a large Swedish-Norwegian manufacturing firm, eighty of which were returned because the company's employees wished to earn FFPs with SAS. Also about four years ago there were three companies in the Norwegian airline market. The third and smallest went out of business after a year mainly because it could not compete with companies offering FFPs. Finally, the delegate noted that prior to the decision to prohibit domestic FFPs, the Norwegian Competition Authority was approached by an investor group that stated that the absolute pre-requisite for their entry into the airline market was that FFPs be banned. And now they are in the process of setting up operations in Norway.

The Norwegian delegate did not believe that Norway's view of fidelity discounts is incompatible with the American position because there is ample evidence that FFPs do act as barriers to entry.

A BIAC delegate emphasised the price competition aspect of fidelity discounts. He supported the American view that unless an equally efficient firm is being excluded from the market then there is likely to be little harm to consumers and lots of benefits, despite harm to competitors. The competition laws should defend consumers rather than competitors.

The BIAC delegate further noted that as consumers of airline services, businesses benefit from the discounts, as for example was seen in the Virgin/BA case which featured corporate discounts. Businesses are given a percentage discount in exchange for more business than what would otherwise have been given the airline. The Secretariat background paper suggests that this appears to fit the model of a fidelity discount practised in a way benefiting the discounter, BA, rather than the customer. The delegate offered an opposing view, namely that these corporate discounts granted a certain degree of procompetitive buyer power to business.

Businesses have hired professionals to negotiate corporate deals with the airlines. The strategy is to purchase in large volumes on a network basis. The threat of losing all the corporation's business can be used effectively to offset an airline's market power on a particular route. The corporate discounts also tend to commoditise airline services, i.e. to break down the price raising effects of product differentiation. The airlines in return get a more reliable, predictable demand for their services. In the US it is estimated that the average corporate discount is around 30 percent off published domestic and international fares. Many different sized corporations are using and benefiting from the discount programs.

A United States delegate commented that part of the explanation for differences in views around the table might be due to differences in institutions, in particular the possibility of treble damage awards in the US. These tend to enhance compliance but also make it necessary to have bright line tests in this area so as to constrain courts from too readily finding that price discounts violate antitrust laws. Many other

jurisdictions taking a less structured approach to fidelity discounts are applying a more administrative model. However, even under the administrative model, one of most important things is order of proof. Before putting the burden on the price cutter to show an efficiency justification for its discounts, it may make more sense to first ask those complaining about discounts to show that they will indeed harm consumers.

A delegate from the United Kingdom doubted that such institutional differences explain much of the variation in views on fidelity discounts.

A Danish delegate wondered whether differences around the table were a result of different philosophies or simply different cases being considered, although he noted that Denmark and other Nordic countries are willing to go beyond simply applying to fidelity discounts the rather strict US approach to predatory pricing. He also pointed out that cases arising in the "New Economy" sector could present some difficult problems in identifying what constitutes variable costs. Sometimes such costs are nearly zero. The US approach could easily lead to situations where problems cannot be addressed. He asked the US whether their approach was modified for new economy sectors.

A United States delegate conceded that Denmark had identified a real difficulty. Markets in which variable costs approach zero may be "winner takes all" situations. However, while rivalry is desirable, it can take many different forms and it is not uncommon to find in such markets that although one market is dominant for awhile, the market can flip to another firm which comes out with a better product. This happened, for example, in the market for spreadsheet programs. The US therefore focuses in such markets less on pricing and more on exclusionary tactics, such as those seen in the recent Microsoft case.

An Italian delegate noted general agreement with the US He also focused on a general tendency, especially in cases before the courts to argue that discounts must be cost justified. This seems a partial departure from the rule of reason approach and amounts to shifting the burden to defendants to demonstrate that a discount is cost justified. The delegate pointed out as well that cost justification raises problems concerning costs. A loyalty scheme might reduce a company's costs of retaining a client, including marketing costs. Cost justification could produce a different result depending on whether or not such costs are included in the calculation.

Germany agreed that costs are difficult to deal with. Competition authorities are in fact forced to rely on cost information provided by firms. Moreover, there is a thin line between regulating a market and maintaining competition in it and a focus on costs tends to push competition authorities towards a regulatory pole.

A BIAC delegate was concerned that if cost-justification is the rule of the day, discounts could be capped below what would otherwise be available in the market. Fidelity discounts are driven more by the cut and thrust of competition than simply by costs. He also commented on the meeting competition defence saying that it seems strange that fidelity discounts could be used against a competing discount but ought not to be used to compete in the first place.

A Canadian delegate questioned the US regarding its recoupment requirement. Canada often encounters markets with leaders and a competitive fringe. If someone in the fringe steps out of line, the dominant firm then uses discounts to discipline the competitor. Once the firm steps back into line, the discount program is discontinued or modified. There is no recoupment in a traditional sense. Would that be treated as recoupment? A United States delegate responded in the affirmative. He alluded to the case where it is alleged that American Airlines added capacity whose incremental revenue was less than the incremental costs of that added capacity. This was allegedly done as part of a strategy to drive out low cost

rivals, and then raise fares back up again. The recoupment requirement is allegedly satisfied in that case. This should be distinguished from limit pricing where permanently low pricing is used to keep out entrants. Such pricing is not treated as predatory.

A United Kingdom delegate noted that in theory discounting might be used to prevent someone from entering the market and depressing prices even further. How would recoupment, the delegate enquired, feature in that situation? A United States delegate noted that in such situations, the US Supreme Court has stated that pricing is not illegal unless it is below cost. There have been suggestions that in looking at price reductions, the entire discount should be allocated to the incremental units sold. If that is done, almost any price cut could be regarded as below cost.

An Italian delegate again returned to the US to ask whether the recoupment criterion would still be applied in situations where a fidelity discount has the effect that some units are sold below marginal cost but the average price remains above average variable cost. A United States delegate reiterated that this issue is before the courts in the American Airlines case. The US Department of Justice takes the view that since American Airlines added capacity, the predatory pricing analysis requires comparing the incremental revenues and costs associated with that added capacity.

5. Chairman's closing comments

The Chairman noted that he was especially interested by the final part of the discussion where delegations were exploring differences in views. A number of likely explanations for these differences were explored such as institutions, process, burden of proof etc. The Chairman, however, had the impression that there might be more to it than that. In particular, there might be a difference in the concept of competition.

On the one hand there seems to be a set of countries saying that a firm that is very dominant, i.e. enjoying say a 80-90 percent market share and a large competitive advantage, should not be allowed to make entry artificially difficult by using non-cost justified discounts. Such a strategy is tantamount to reducing what these countries see as competition.

On the other hand, some countries feel that cost justification should not be essential to establish the legality of a fidelity discount by a dominant firm. Starting from something closer to economic analysis and further from the concept of fairness perhaps included in what the first group of countries considers to be competition, the second group argues that fidelity discounts should not be prohibited unless there is actual foreclosure, and insists as well that associated efficiencies ought to be considered. Even if a firm cannot cost justify its discounts, that does not prove there is a competition problem. The fact that fidelity discounts make life more difficult for competitors is neutral as regards the second group of countries' concept of competition.

A reconciliation of these views through appeal to economics might not be possible. The Chairman noted, for example, that with regard to predation some economists say that marginal prices below marginal costs do not always indicate predation, while others note that prices above marginal costs can sometimes be predatory.

The Chairman also flagged the issue raised at the end of the roundtable by Germany and some other countries, i.e. the difficulty of formulating a rule that can actually be applied. In particular, is it possible to accurately measure marginal costs? If this involves competition authorities and courts in intractable problems, what then is the value of the more economic approach?

RÉSUMÉ DE LA DISCUSSION

Le Président fait d'abord remarquer que la plupart des contributions à la table ronde admettent que les remises de fidélité (c'est-à-dire les structures tarifaires offrant des prix plus bas moyennant le consentement ou l'engagement de fait d'un acheteur à s'approvisionner en grande partie auprès du vendeur qui accorde la remise) revêtent différentes formes et sont utilisées dans de nombreux secteurs. Les remises de fidélité peuvent avoir des effets complexes sur la concurrence et l'efficacité et il faut donc les analyser de façon empirique. Par exemple, les remises de fidélité peuvent réduire les coûts des échanges et les asymétries d'information, faire en sorte que les prix soient davantage alignés sur les coûts et permettre aux entreprises de mieux planifier leur production ou de tirer avantage d'économies d'échelle ou de gamme. Mais elles peuvent aussi aboutir à la discrimination préjudiciable, à l'éviction, à l'opacité des prix et à l'accroissement du risque de coordination anticoncurrentielle.

Le Président fait observer qu'il existe de nettes divergences d'opinions sur ce qui doit être établi pour démontrer qu'une remise de fidélité a un effet anticoncurrentiel. Des affaires similaires sont analysées différemment selon les autorités et il arrive qu'une même affaire soit traitée différemment par des tribunaux situés sur un même territoire. Le Président propose que le débat s'ouvre sur les contributions des pays qui ont le point de vue le plus strict sur les remises de fidélité et passe ensuite à celles des pays dont l'analyse économique est plus nuancée et qui accordent plus d'importance au rôle joué par les remises de fidélité dans l'accroissement de l'efficacité.

1. Programmes pour grands voyageurs

Le Président appelle l'attention sur la contribution de la Norvège, qui comporte un examen théorique approfondi des effets favorables et défavorables des remises de fidélité sur la concurrence et de leurs incidences sur l'efficacité. En mars 2002, l'autorité norvégienne de la concurrence a rendu une décision appelée à faire date interdisant au groupe de transport aérien SAS d'accorder des points aux grands voyageurs sur l'ensemble de ses liaisons intérieures en Norvège, que des concurrents y soient présents ou non. Le Président invite la délégation norvégienne à exposer son appréciation des remises de fidélité et à expliquer la raison de la sévérité de l'autorité norvégienne de la concurrence dans l'affaire SAS.

Un délégué de la Norvège fait remarquer qu'en 2001, le groupe SAS détenait 98 pour cent du marché du transport aérien intérieur. Même si la Norvège est un petit pays (4.5 millions d'habitants), le marché du transport aérien y est assez important, puisqu'il correspond à plus de dix millions de passagers par an. Il semble par conséquent qu'il y ait de la place pour plus d'un transporteur sur ce marché.

La contribution de la Norvège décrit les caractéristiques particulières des programmes pour grands voyageurs. Premièrement, les primes ne sont pas octroyées en argent mais sous forme de services gratuits. Deuxièmement, les programmes pour grands voyageurs se caractérisent par une certaine absence de linéarité puisque les primes sont accordées en fonction de seuils. Troisièmement, il se pose un problème lié au rapport de représentation dans le cas des voyages d'affaires puisque la personne qui voyage n'est pas celle qui paie le billet. Cet aspect a d'autant plus d'importance que les primes consenties dans le cadre des programmes pour grands voyageurs n'étaient jusqu'ici pas imposables. Enfin, les programmes pour grands

voyageurs peuvent procurer un avantage concurrentiel aux compagnies aériennes qui possèdent des réseaux plus étendus.

La contribution de la Norvège mentionne l'argument invoqué par SAS selon lequel l'interdiction des programmes pour grands voyageurs sur le marché national pourrait avoir des effets anticoncurrentiels sur les marchés du transport aérien international en raison des économies de réseau en jeu. L'autorité norvégienne de la concurrence n'était pas persuadée que cette interdiction aurait un effet significatif et a répliqué que vu l'imminence du regroupement du transport aérien européen, d'autres pays seraient tenus de mettre en place une réglementation efficace relative aux programmes pour grands voyageurs. Dans sa contribution, la Norvège conclut qu'une application stricte de la politique de la concurrence est nécessaire pour renforcer et protéger la concurrence dans le secteur du transport aérien.

Le Président mentionne ensuite la contribution de la Suède, qui porte sur les remises de fidélité abusives accordées sur les marchés récemment déréglementés (ceux du transport aérien, des services postaux et des télécommunications). Le Président fait également remarquer qu'en novembre 1999, l'autorité suédoise de la concurrence a estimé que le programme pour grands voyageurs Eurobonus de SAS constituait une violation de l'article 19 de la loi suédoise sur la concurrence parce qu'il induisait une fidélité significative et faisait en sorte que les autres compagnies aériennes avaient plus de difficulté à instaurer ou à maintenir des services de transport aérien intérieurs concurrentiels. Le tribunal de commerce a jugé que l'analyse de l'autorité suédoise de la concurrence était fondée et, en raison des conditions de concurrence insuffisantes, a ordonné à la compagnie aérienne de ne pas appliquer son programme pour grands voyageurs au transport aérien intérieur suédois. A la différence de la Norvège, la Suède semble interdire les programmes pour grands voyageurs seulement sur les routes où SAS exerce ses activités et où il y a de la concurrence. Le Président demande à la délégation de la Suède de formuler des observations sur les différences qui apparaissent le cas échéant entre les décisions rendues par la Norvège et la Suède et sur l'importance du problème lié au rapport de représentation pour l'analyse des programmes pour grands voyageurs du point de vue de la concurrence.

Un délégué de la Suède indique que l'article 19 de la loi suédoise sur la concurrence est fondé sur l'article 82 du Traité de la CE. Le premier paragraphe de l'article 19 comporte des interdictions relatives à l'abus de position dominante par une ou plusieurs entreprises présentes sur le marché. Dans les secteurs récemment libéralisés, il existe toujours un risque que les opérateurs historiques aient recours à des méthodes déloyales pour protéger leurs intérêts acquis sur le marché intérieur. L'autorité suédoise de la concurrence a remarqué que les entreprises dominantes (c'est-à-dire des entreprises qui détenaient autrefois un monopole) présentes sur les marchés récemment déréglementés essaient d'obtenir un avantage concurrentiel sur les nouveaux marchés en accordant des remises de fidélité, ce qui limite la concurrence et la possibilité qu'ont de nouvelles sociétés d'entrer sur le marché.

Le secteur de l'aviation civile intérieure suédoise a été déréglementé le 1er juillet 1992. En raison du monopole qu'il détenait auparavant dans ce secteur, le transporteur national suédois SAS était en position de force et détenait une part de marché de 80 pour cent. SAS propose des programmes pour grands voyageurs appelés Eurobonus. En novembre 1999 déjà, l'autorité suédoise de la concurrence avait statué que le programme Eurobonus de la SAS constituait une violation de l'article 19 de la loi suédoise sur la concurrence parce qu'il induisait une fidélité significative et faisait en sorte que les autres compagnies aériennes avaient plus de difficulté à instaurer ou à maintenir des services de transport aérien intérieurs concurrentiels. L'autorité suédoise de la concurrence a ordonné à SAS de ne pas mettre en œuvre son programme Eurobonus et de ne pas participer à des programmes comparables en vertu desquels les voyageurs pourraient gagner des points et les échanger contre des primes ou l'équivalent. La décision s'appliquait à toutes les liaisons intérieures suédoises. Un jugement de la Cour d'appel a cependant restreint cet ordre aux liaisons sur lesquelles SAS et ses partenaires font face à la concurrence au titre du trafic passagers régulier existant ou nouvellement établi.

Le délégué de la Suède fait observer qu'un programme de primes a certainement un effet de fidélisation. L'intérêt de ce type de programme est encore plus grand si la compagnie aérienne en question exploite un réseau de liaisons qui offre aux voyageurs de bonnes possibilités de gagner des points mais aussi de les utiliser pour faire des voyages attrayants.

Comme pour d'autres types de remises de fidélité, la prise en compte des asymétries contribue pour beaucoup à l'appréciation des effets probables des programmes pour grands voyageurs. Un programme pour grands voyageurs offert par un transporteur dominant à son aéroport-pivot présente certainement beaucoup d'intérêt pour les clients. Un réseau étendu depuis l'aéroport-pivot permet aux voyageurs d'affaires, en particulier, d'accumuler plus de points échangeables contre un plus grand nombre de destinations qu'une compagnie aérienne concurrente exploitant un service point à point ou un réseau moins étendu.

En outre, la « remise » est par définition fonction de l'atteinte de seuils déterminants. Dans la plupart des cas, les points de fidélité (les « air miles ») ne peuvent être vendus, mais seulement échangés contre des voyages gratuits lorsqu'ils sont accumulés en nombre suffisant. Le voyageur qui est sur le point d'atteindre l'un des seuils fixés est moins disposé à envisager de voyager sur une autre compagnie, même si cette dernière offre un tarif inférieur, en particulier si les air miles accumulés sont perdus lorsqu'ils ne sont pas échangés dans un délai prédéterminé.

Qui plus est, les programmes pour grands voyageurs présentent d'autant plus d'intérêt que le voyageur d'affaires ne paie habituellement pas son billet et bénéficie quand même du vol offert gratuitement. La clientèle d'affaires présente en général un très grand intérêt pour les compagnies aériennes étant donné que les voyageurs qui attachent de l'importance au facteur temps sont moins réceptifs aux prix et sont disposés à payer plus cher un billet assorti de conditions souples. Un nouvel entrant qui ne possède pas de programme pour grands voyageurs concurrentiel ou qui n'a pas de réseau développé depuis l'aéroport-pivot en question aura donc de la difficulté à attirer des clients d'affaires sur ses vols.

Pour toutes ces raisons, l'autorité suédoise de la concurrence et la Cour d'appel ont statué que l'utilisation d'un programme pour grands voyageurs par une compagnie aérienne occupant une position dominante sur le marché du transport aérien intérieur constitue un abus de position dominante.

Le Président fait remarquer que l'autorité allemande de la concurrence (Bundeskartellamt (BKA)) a examiné le programme pour grands voyageurs de Lufthansa (appelé « Miles & More ») ainsi que ses effets sur un de ses concurrents, Eurowings. Dans sa contribution, la délégation allemande indique : « La Division qui a rendu la décision n'a pas interdit le programme, par exemple sur les liaisons aériennes intérieures uniques. La Division est d'avis que cette interdiction aurait peu d'effet sur la fidélité des clients existants, qui continueraient d'accumuler les air miles sur les liaisons internationales, qui sont plus longues. D'autre part, on ne saurait non plus envisager l'interdiction complète du programme étant donné que Lufthansa est en concurrence avec d'autres compagnies aériennes au niveau international. Une interdiction partielle sur différentes liaisons parviendrait difficilement à compenser les préjudices subis par les petites compagnies rivales au plan de la concurrence. Il a donc été estimé que l'inclusion d'« Eurowings » dans le programme constituerait une meilleure solution » (par. 19). La fusion de Lufthansa et d'Eurowings, en 2000, a été autorisée sous réserve de l'ouverture générale du programme Miles & More. Il semble donc que l'analyse menée par l'autorité allemande de la concurrence et les conclusions auxquelles elle est parvenue soient très différentes de celles de la Norvège et de la Suède. Le Président invite la délégation allemande à présenter des commentaires sur ces différences et à indiquer si la solution qui a été retenue s'est révélée appropriée.

Un délégué de l'Allemagne indique que le programme Miles & More a été soumis à deux procédures distinctes. La première concernait l'abus de position dominante, et la seconde la fusion de Lufthansa et d'Eurowings. L'autorité allemande de la concurrence a disculpé Lufthansa/Eurowings à certaines conditions, l'une étant que le programme Miles & More fasse l'objet d'une ouverture générale à tous les concurrents intéressés. L'objectif n'était pas tant de retirer un obstacle posé à un concurrent en particulier, mais de compenser l'accroissement du pouvoir de marché de Lufthansa. L'accès généralisé aux avantages du programme Miles & More était considéré comme un moyen plus approprié à cet égard que l'interdiction du programme sur certaines liaisons individuelles choisies. L'ouverture du programme Miles & More a été complétée par un certain nombre d'autres exigences. Par exemple, Lufthansa a dû abandonner certains créneaux, ce que l'autorité allemande de la concurrence jugeait plus important que l'ouverture du programme Miles & More.

L'ouverture générale du programme Miles & More a déjà eu des effets positifs. Un nouveau concurrent de petite taille, European Air Express, participe déjà au programme et quelques transporteurs régionaux s'apprêtent à le faire.

Le Président déclare que jusqu'ici, l'autorité brésilienne de la concurrence n'a pas examiné les remises de fidélité, qui semblent pourtant très courantes dans plusieurs secteurs. La contribution du Brésil considère ces remises comme des pratiques verticales et propose que les préoccupations suscitées par les effets d'éviction se limitent aux cas où il existe un pouvoir de marché et qu'une grande partie du marché est affectée par cette pratique. La contribution du Brésil estime en outre que les remises de fidélité offertes par un fournisseur à des consommateurs finals semblent *a priori* accroître le bien-être des consommateurs et que les effets d'exclusion des remises de fidélité pratiquées entre des entreprises situées à des niveaux différents de la chaîne verticale sont plus préoccupants. Au regard de l'examen qui précède des programmes pour grands voyageurs, la remarque suivante revêt un intérêt particulier : « Il y a en ce moment deux grandes compagnies sur le marché du transport de voyageurs du Brésil et une nouvelle compagnie a accédé au marché l'an dernier. En un an seulement, cette nouvelle compagnie aérienne, appelée GOL, a pris quatre pour cent du marché. GOL n'a pas de programme pour grands voyageurs, étant donné qu'elle concentre ses services sur la classe économique, mais cela prouve déjà suffisamment que ce programme n'est pas un obstacle significatif à l'entrée de nouvelles compagnies sur le marché. » (par. 16a). Il semble donc que la situation au Brésil soit sensiblement différente de celle qui prévaut en Norvège ou en Suède.

Un délégué du Brésil fait remarquer que lors de la déréglementation, il n'y avait en Norvège ou en Suède qu'une grande compagnie aérienne offrant des programmes pour grands voyageurs, alors que le Brésil comptait quatre compagnies de taille moyenne. Celles-ci possédaient toutes des programmes de remises de fidélité et détenaient des parts de marché s'établissant respectivement à 35, 30, 20 et 15 pour cent. En 2000, après la déréglementation, la plus petite compagnie est sortie du marché à la suite d'une guerre des prix commencée par GO, laquelle détient maintenant quatre pour cent du marché et affiche la meilleure situation financière. La concurrence livrée par GOL reposait sur des faibles coûts et des bas prix, qui étaient de 75 pour cent inférieurs à ceux pratiqués par certains de ses concurrents. Elle n'a pas eu besoin d'avoir recours à des programmes pour grands voyageurs. Varig, la compagnie la plus importante, et qui a été la première à lancer des programmes pour grands voyageurs, fait face actuellement à de grandes difficultés financières dues à une mauvaise gestion.

L'autorité brésilienne de la concurrence n'a pas estimé que les programmes pour grands voyageurs étaient assimilables à un comportement d'éviction et a donc statué qu'ils n'étaient pas préjudiciables à la concurrence.

2. Autres remises de fidélité

Le Président fait observer que la pratique des remises de fidélité par d'anciens monopoles légaux semble très répandue en Italie. Souvent, ces remises sont fonction à la fois des achats d'un client et de l'ensemble des services fournis par l'ancien monopole (services monopolistiques et services ouverts à la concurrence), ce qui fait qu'il est particulièrement difficile pour les concurrents de l'ancien monopole d'accéder aux marchés de services libéralisés. La contribution italienne présente deux affaires dans lesquelles Telecom Italia a été réputée avoir enfreint la loi de la concurrence en ayant recours à des remises abusives. Cette contribution présente également une affaire intéressante mettant en cause Coca-Cola pour avoir offert des remises aux clients qui étaient disposés à modifier leur équipement de fabrication de boissons PepsiCo en fûts pour fabriquer des produits Coca-Cola, et pratiqué des remises discriminatoires auprès de grossistes afin de les inciter à ne pas commercialiser de produits concurrents.

Un délégué de l'Italie explique que dans les affaires citées, l'autorité de la concurrence considérait les remises de fidélité comme visant à exclure des concurrents, à empêcher l'entrée de nouveaux concurrents, ou à entraver davantage l'expansion de concurrents existants.

Dans la première affaire, Telecom Italia a été reconnue coupable d'avoir abusé de sa position dominante sur le marché des services Internet destinés aux particuliers et aux entreprises. Telecom Italia a notamment imposé, en relation avec la fourniture de services de connection Internet, des conditions discriminatoires induites par des remises de fidélité très généreuses accordées sur les services libéralisés et monopolisés. Les remises équivalaient parfois au prix facturé pour les services déréglementés. En outre, certains services interentreprises étaient manifestement fournis à perte, ce qui fait que les remises s'apparentaient parfois à des prix d'éviction. L'affaire a été réglée par la conclusion par Telecom Italia d'une entente avec l'association italienne des fournisseurs d'accès Internet, en vertu de laquelle elle a accepté de partager avec les fournisseurs de services Internet concurrents qui en faisaient la demande les bénéfices qu'elle tirait des liaisons commutées mises en œuvre depuis 1998. Telecom Italia s'est également engagée à réduire le coût des circuits numériques directs loués par des fournisseurs d'accès Internet.

La deuxième affaire, qui mettait également en cause Telecom Italia, portait sur une remise de fidélité qui englobait des services toujours couverts par un monopole légal. L'autorité de la concurrence a estimé que Telecom avait tenté d'étendre sa position dominante à la prestation de services libéralisés par le biais de remises non liées aux coûts. Comme les remises se rapportaient à des services encore fournis en vertu d'un monopole légal, les concurrents ne pouvaient les égaler.

Dans les deux affaires concernant Telecom Italia, les préoccupations relatives au caractère anticoncurrentiel des remises de fidélité comportaient certains aspects liés à la pratique de prix d'éviction.

La troisième affaire mentionnée concernait des primes de résultats offertes par Alitalia aux agents de voyages. La structure des remises et l'importante taille relative d'Alitalia faisaient en sorte que les concurrents ne pouvaient pratiquement pas les égaler, à moins de consentir des remises de l'ordre de 60 pour cent. Alitalia s'est vu infliger des amendes considérablement plus élevées que celles imposées à British Airways par la CE.

Le délégué termine en citant des affaires portant sur l'attribution à ses clients par Coca-Cola de remises et d'autres incitations à favoriser cette entreprise au détriment de ses concurrents. Il a été estimé que Coca-Cola avait abusé de sa position dominante sur le marché italien au moyen d'un système de rabais et de remises de fidélité discriminatoire et opaque. Le Président demande pourquoi Pepsico était présumée incapable d'égaler les remises de Coca-Cola et le délégué de l'Italie répond que Coca-Cola avait un volume beaucoup plus important que ses concurrents, ce qui a été déterminant pour l'établissement du caractère anticoncurentiel des remises et des incitations. Le délégué souligne également l'importance

revêtue par le fait que les remises de fidélité étaient calculées sur une période relativement longue, ce qui en soi constitue généralement un obstacle aux nouveaux entrants.

Le Président fait remarquer que la contribution de la France examine un certain nombre de décisions rendues par le Conseil de la concurrence dans plusieurs domaines relativement à des entreprises détentrices de droits de propriété intellectuelle et d'autres droits exclusifs. Il s'attache en particulier à une affaire dans le cadre de laquelle Lilly France a tenté de limiter la croissance des parts de marché détenues par des sociétés de médicaments génériques concurrentes. Le Président cite notamment une affaire concernant le marché des briques et des tuiles en Alsace, dans le cadre de laquelle une entreprise dominante accordait certaines certaines remises de fidélité. Dans cette affaire, le Conseil de la concurrence a demandé à l'entreprise dominante de préciser les critères d'attribution des remises de fidélité. Cela semble indiquer que le Conseil de la concurrence estime que même des entreprises dominantes peuvent, dans certains cas, attribuer des remises de fidélité. Le Président demande à la délégation française d'apporter des précisions sur ce point.

Un délégué de la France explique que la société Lilly pratiquait des remises de fidélité dans le contexte des ventes liées de médicaments sous brevet et de médicaments qui n'étaient plus sous brevet, ce qui limitait la concurrence des fabricants de produits génériques. Le Conseil de la concurrence a estimé qu'il s'agissait là d'une remise de fidélité visant à entraver l'accès au marché. Son interdiction a été reconnue fondée en appel. Deux autres affaires analogues sont mentionnées. Le délégué cite ensuite une affaire dans laquelle France Telecom octroyait des remises de couplage pour lier sensiblement un service en monopole et un service en concurrence. Cette pratique n'a pas été jugée abusive dans une affaire concernant des ventes à Renault parce qu'il a été établi qu'il ne s'agissait pas de remises de couplage et que la pratique n'avait pas entravé la concurrence.

A la dernière question du Président, le délégué répond que le Conseil de la concurrence estime que les remises de fidélité proposées par des entreprises dominantes sont illicites seulement si elles sont anticoncurrentielles. En d'autres termes, le Conseil de la concurrence peut pénaliser les remises de fidélité octroyées par des sociétés dominantes dans un but d'exclusivité.

Le Président fait remarquer que la contribution de la Finlande expose la méthode suivie par l'autorité finlandaise de la concurrence dans les affaires concernant des remises de fidélité en l'illustrant à l'aide de nombreuses affaires sur lesquelles cette dernière a statué. L'un des concepts centraux pris en compte par la Cour administrative suprême de Finlande lorsqu'elle a à se prononcer dans des affaires d'abus de position dominante est la transparence des coûts. Par conséquent, « …les remises doivent être clairement identifiables, définies, et raisonnables et ne doivent pas servir à fausser artificiellement la concurrence mutuelle pour des clients de tailles différentes. » (par. 8). La contribution finlandaise fait référence à l'affaire Kenkä-Kesko portant sur une marque privée de chaussures, dans le cadre de laquelle l'autorité finlandaise de la concurrence a estimé que la remise de fidélité avait des effets bénéfiques sur l'efficacité et la concurrence. Le Président invite la délégation finlandaise à apporter des détails sur cette affaire et à préciser si des entreprises dominantes seraient autorisées à accorder des remises de fidélité sous réserve d'une justification au plan des coûts.

Un délégué de la Finlande précise d'abord que les affaires concernant Kenkä-Kesko n'avaient pas trait à l'abus de position dominante. Kenkä-Kesko, une centrale de distributeurs, détient 30 pour cent du marché et fait face à la concurrence dynamique d'autres chaînes de détaillants et de supermarchés indépendants. Kenkä-Kesko accorde des remises de fidélité pour inciter ses détaillants à acheter davantage, et ce jusqu'au point où il est rentable d'offrir une ligne de chaussures importées de marque privée. Les remises accordées aux détaillants sont fonction de la part des achats effectués auprès de Kenkä-Kesko. Une remise quantitative identique offerte à tous les détaillants n'aurait pas le même effet général sur l'augmentation des ventes de la marque privée, parce que les demandes des détaillants varient

considérablement. La remise de fidélité est conçue de telle sorte que les différents détaillants pourraient payer des prix différents la même quantité totale achetée (autrement dit, elle pourrait entraîner une discrimination par les prix). Cependant, sans le programme de remises, Kenkä-Kesko ne serait pas en mesure d'accroître la concurrence sur le marché de la chaussure en introduisant sa marque privée.

En ce qui concerne la question du Président sur les entreprises dominantes, si les remises de fidélité consenties par ces dernières sont véritablement justifiées par les coûts, elles ne contreviennent pas à la loi finlandaise sur la concurrence. Le délégué se demande cependant s'il est de toute façon possible de justifier une remise de fidélité au plan des coûts.

Le Président fait remarquer que la contribution du Japon mentionne une affaire concernant la Fédération économique des coopératives agricoles de la Préfecture de Yamaguchi qui semble, sauf pour ce qui est de la manière dont elle a été résolue, présenter des points communs avec l'affaire Kenkä-Kesko. Dans l'affaire précitée, la Fédération a fourni des produits chimiques et des engrais à des coopératives affiliées auxquelles elle octroyait une remise fondée sur le pourcentage du total des achats effectués auprès d'elle par les coopératives membres. La Fédération a été convaincue d'infraction à la loi sur les monopoles. Le Président invite la délégation japonaise à formuler des observations sur cette affaire et sur son approche générale du problème des remises de fidélité.

Un délégué du Japon fait remarquer qu'en 1991, la Commission des pratiques commerciales du Japon a publié des lignes directrices relatives aux systèmes de distribution et aux pratiques commerciales, dans lesquelles elle expose en quoi certaines remises de fidélité contreviennent à la loi sur les monopoles. Ces lignes directrices, qui traitent essentiellement du type de remise pratiquée dans l'affaire de la Fédération des coopératives agricoles, font remarquer que ce type d'entente est illicite et constitue une pratique commerciale déloyale lorsque : le fabricant exerce une influence sur le marché (c'est-à-dire qu'il possède une part de marché supérieure à dix pour cent ou est l'un des trois premiers fabricants sur le marché) ; et que l'octroi de ces remises limite la commercialisation des produits concurrents par le ditributeur, ce qui a pour effet d'entraver la constitution d'autres canaux de distribution par les nouveaux arrivants ou les concurrents existants.

La Fédération économique des coopératives agricoles de la Préfecture de Yamaguchi, qui assure une part prédominante de la fourniture de produits chimiques et d'engrais agricoles aux coopératives agricoles de la préfecture de Yamaguchi, a accordé des remises fondées sur des critères comme le pourcentage du total des achats d'une coopérative membre effectués auprès de la Fédération. Comme la Fédération exerçait une forte influence sur le marché (c'est-à-dire qu'elle détenait de 80 à 90 pour cent du marché), le mécanisme de remises réduisait manifestement les débouchés des fournisseurs concurrents. La Commission des pratiques commerciales du Japon a statué que le dispositif de la Fédération était illicite en vertu de la loi sur les monopoles.

[Une question est posée et une réponse est donnée au sujet d'une affaire survenue au Mexique. La délégation du Mexique demande que la question et la réponse ne figurent pas au compte rendu].

Le Président examine ensuite la contribution de la Commission européenne, qui estime que les remises de fidélité ne sont généralement pas autorisées dans les affaires mettant en cause des sociétés ayant un pouvoir de marché substantiel. (par. 18). Comme l'autorité finlandaise de la concurrence, la CE semble être d'avis que les programmes de remises qui sont justifiés par les coûts ne sont pas anticoncurrentiels. En revanche, si les remises ne sont pas justifiées par les coûts, il faut se demander si elles restreignent la concurrence en entravant l'entrée ou en établissant une discrimination. La Commission propose une méthode et un ensemble de critères destinés à évaluer l'impact anticoncurrentiel des remises de fidélité. En se fondant sur cette méthode, elle examine le système de commissions accordées aux agents de voyages

par British Airways (un système de remises de fidélité qui, contrairement aux affaires déjà mentionnées de programmes pour grands voyageurs, ne pose pas de problème lié au rapport de représentation).

La Commission européenne affirme en outre dans sa contribution que l'argument relatif à la nécessité d'« égaler la concurrence » peut constituer une défense valable pour les sociétés dominantes dans des contextes de marché très spécifiques caractérisés par le fait que « tout va au vainqueur ». Dans ce type de contexte, il peut se révéler favorable, pour la concurrence, de donner une plus grande latitude aux sociétés dominantes pour ce qui est de déterminer leur politique tarifaire de manière à pouvoir égaler les offres des concurrents (par. 12). Le Président estime que cela est particulièrement curieux parce que dans ce type d'affaires, pense-t-il, on peut facilement faire valoir que les remises de fidélité peuvent être considérées comme particulièrement dangereuses, puisque l'entreprise dominante réussirait alors à très bien s'implanter. Il semble que cette opinion ait été exprimée dans les contributions de certaines délégations. Le Président invite la Commission européenne à expliquer sa méthode ainsi que l'affaire British Airways et à apporter des précisions sur l'invocation de la volonté d'égaler la concurrence comme argument de défense.

Un délégué de la Commission européenne indique que l'UE émet de fortes réserves quant à l'invocation de la volonté d'égaler la concurrence comme moyen de défense. Par exemple, dans les marchés d'appels d'offres, les entreprises dominantes ne peuvent avoir recours à des primes de fidélité pour prolonger la durée des contrats. L'UE interdit également les remises de fidélité qui sont assimilables à des prix d'éviction, c'est-à-dire la pratique d'un prix marginal inférieur au coût marginal. Autrement dit, la volonté d'égaler la concurrence n'est pas un moyen de défense que les entreprises dominantes peuvent invoquer pour pouvoir faire accepter toutes sortes de remises de fidélité.

Le délégué aborde ensuite l'affaire British Airways, mise en cause pour avoir vendu des billets à des agents de voyages et leur avoir accordé des remises fondées sur leurs ventes. Il s'agit là du cas classique de remise de fidélité octroyée en fonction de la comparaison de la performance courante et de la performance enregistrée pendant une période de référence passée. Par ailleurs, la remise n'était pas fonction d'une augmentation des ventes seulement, mais portait plutôt sur le total des ventes, à la condition qu'un certain seuil soit atteint. Ce type de remise peut avoir des effets d'exclusion très considérables. Si elles ne sont pas justifiées par les coûts, elles peuvent être considérées comme un abus de position dominante. L'absence de justification au plan des coûts, dans l'affaire BA, était en partie manifeste du fait que deux agents de voyages pouvaient obtenir des remises différentes même s'ils avaient vendu le même volume de billets. La discrimination par les prix fut considérée comme abusive en soi.

Le Président passe ensuite à la contribution de la Corée, qui fait remarquer, dans un examen approfondi du marché des téléphones mobiles, que « le préjudice porté à la concurrence par la subvention des achats de téléphones mobiles sera sans doute très substantiel.… [L']industrie des communications mobiles présente des externalités de réseau, ce qui induit des effets de concentration de la clientèle. Si une entreprise tente de s'attacher un client en accordant des subventions excessives à l'achat de téléphones mobiles dans un tel environnement commercial, un monopole du type « tout va au vainqueur » peut s'ensuivre.…Le ministère de l'Information et de la Communication prépare une loi qui interdira totalement ces pratiques…. » (par. 16 et 17). Le Président demande à la délégation coréenne de formuler des observations sur l'apparente divergence avec l'UE, et d'indiquer notamment si la Corée envisage une interdiction en soi des remises de fidélité dans ces cas.

Un délégué de la Corée commence par expliquer que dans son pays, la concurrence normale par les prix est impossible sur le marché des téléphones mobiles parce que les prix des services sont soumis à l'approbation du ministère. La concurrence intervient plutôt par le biais de l'octroi d'unités de téléphones mobiles subventionnées. Ces subventions sont accordées aux nouveaux abonnés, de même qu'aux abonnés courants. Pour les nouveaux abonnés, une période d'abonnement minimum est parfois imposée. Pour les

abonnés existants, une remise en fonction de la consommation est accordée, c'est-à-dire que des points sont octroyés suivant l'utilisation totale du service par le client. Lorsqu'un certain seuil est atteint, les points peuvent être convertis en subvention pour l'achat d'un nouveau téléphone mobile.

Le délégué de la Corée souligne que le marché des télécommunications mobiles est un exemple typique de marché présentant des effets de réseau. L'accroissement du nombre d'abonnés signifie qu'un plus grand nombre de personnes peuvent être jointes par le biais du réseau, ce qui accroît la valeur pour les abonnés existants et entraîne des économies d'échelle du côté de la demande, lesquelles attirent encore davantage d'abonnés. Ces effets sont amplifiés par le fait que les coûts moyens de prestation de services de réseau diminuent à mesure qu'augmente le nombre d'abonnés (c'est-à-dire que la constitution d'un réseau suppose des charges fixes importantes).

Compte tenu de ces caractéristiques propres au marché des télécommunications mobiles, si une entreprise dominante a recours de manière excessive aux remises de fidélité, sa position sur le marché peut être renforcée plus rapidement et plus solidement que ce ne serait le cas sur d'autres marchés, en particulier si les concurrents sont financièrement plus faibles. La santé financière des opérateurs de téléphonie mobile préoccupe l'autorité coréenne de la concurrence et le ministère de l'Information et de la Communication, mais ce dernier s'intéresse davantage aux problèmes liés à la politique industrielle qu'à ceux posés par la politique de la concurrence. Le ministère est d'avis que les subventions pour l'achat de téléphones mobiles gaspillent des ressources en encourageant l'utilisation sans discrimination du téléphone mobile par les abonnés, et mine la viabilité financière des entreprises de communications mobiles.

La loi coréenne sur la réglementation des monopoles et des pratiques commerciales ne traite pas directement des remises de fidélité, qui n'ont jamais été qualifiées de pratiques anticoncurrentielles dans une quelconque affaire. S'agissant des téléphones mobiles, l'autorité coréenne de la concurrence ne se range pas du même avis que le ministère et n'interdit pas entièrement les subventions existantes. Ces subventions, à la condition de ne pas entraîner d'effets d'éviction, constituent une forme très utile de concurrence.

Passant à l'Australie, le Président fait remarquer que les programmes de fidélité qui ne comportent pas de remises de couplage semblent relever de l'article 46 de la loi sur les pratiques commerciales (Trade Practices Act), qui interdit l'abus de pouvoir de marché. La loi exige cependant que l'objectif d'abus de pouvoir de marché soit établi pour que la pratique soit assimilable à un abus de pouvoir de marché, et la tentative de ménager un avantage commercial à long terme pour l'entreprise semble être considéré comme ayant un objectif proconcurrentiel, et non anticoncurrentiel. Les programmes de fidélité qui exigent que le consommateur achète d'autres produits auprès d'un même fournisseur sont interdits s'ils ont pour effet de réduire sensiblement la concurrence. Enfin, les ventes forcées sont illicites en soi (à moins d'une exemption de l'Australian Competition and Consumer Commision) (ACCC). L'ACCC s'est intéressée de près au programme pour grands voyageurs de Qantas, avec laquelle de nombreuses autres compagnies australiennes sont affiliées. L'ACCC se demande si ces affiliations sont appropriées et la contribution de l'Australie se termine par cette observation plutôt étonnante : « …peu de recherches ont été menées pour découvrir si les coûts substantiels associés à l'exploitation d'un important programme de fidélité se traduisent par un bénéfice net pour l'entreprise ou le client. » (par. 58). Cela signifie-t-il que toutes les entreprises australiennes sont dénuées de rationalité ?

Un délégué de l'Australie cite plusieurs exemples à partir desquels on peut se demander si la mise en œuvre de programmes de fidélité apporte des bénéfices nets aux entreprises ou aux clients. Parmi ces exemples, citons le cas de Coles Myer, qui réalise actuellement environ 20 pour cent de l'ensemble des ventes au détail en Australie. Cette entreprise a annoncé dernièrement qu'elle mettait progressivement fin aux remises de fidélité accordées à ses actionnaires. Ces remises, assez importantes, ont entraîné une augmentation massive du nombre d'actionnaires de la société (ils sont passés de 60 000 à 560 000), dont

près de la moitié détiennent un petit nombre d'actions. Les analystes ont fortement critiqué le faible rendement de l'investissement de Coles Myer, qui a été imputé aux remises de fidélité. Les concurrents de la société n'offraient pas de remises similaires, affichaient une croissance plus rapide et offraient un meilleur rendement de l'investissement. Cela permet donc de douter du caractère rationnel des programmes de remises de fidélité.

Un deuxième exemple est celui des programmes pour grands voyageurs instaurés par les compagnies aériennes. En 2001, suite aux manifestations des clients qui se plaignaient de l'impossibilité de convertir des points en vols, l'ACCC a entrepris une enquête portant en particulier sur les programmes pour grands voyageurs offerts par Qantas et Ansett. Au cours de l'enquête, Ansett s'est effondrée, sans avoir remboursé près d'un million de clients qui détenaient environ un milliard de dollars australiens de créances au titre des programmes pour grands voyageurs. Ces créances expliquaient entre autres l'impossibilité dans laquelle se trouvait l'administrateur de la compagnie à redémarrer l'entreprise. L'effondrement de Ansett a eu des incidences considérables sur d'autres sociétés, notamment les différentes banques qui étaient associées aux programmes pour grands voyageurs de Qantas et de Ansett. Qantas est sortie gagnante mais Ansett a dû se débattre pour s'affilier à Qantas. Comme le seul programme pour grands voyageurs actuellement offert est celui de Qantas, les différents programmes de fidélité des compagnies affiliées peinent à se différencier.

Un autre élément intéressant est que l'ACCC et la Reserve Bank of Australia ont mené une importante enquête sur les frais interdevises en matière de cartes de crédit et ont estimé entre autres que les programmes de fidélité associant l'utilisation de cartes de crédit aux programmes pour grands voyageurs faussaient les mécanismes de paiement efficaces.

L'une des plus grandes banques d'Australie annonçait récemment qu'elle réduisait rétroactivement la valeur des points au titre des programmes pour grands voyageurs accumulés au moyen des cartes de crédit. La banque a ensuite fait machine arrière sur la question de la rétroactivité sous les pressions de l'ACCC. Un rapport de JP Morgan indique toutefois que la mise en application de son programme pour grands voyageurs et de carte de crédit avait contribué à la baisse récente du prix de son action. Ce cas et les cas déjà mentionné laissent penser que les programmes pour grands voyageurs n'ont pas des effets aussi évidents qu'on pourrait le penser.

En vertu de la loi australienne sur la concurrence, l'ACCC interdit en soi l'association de deux produits dans un programme de fidélité (vente forcée), à moins d'une exemption. En règle générale, une exemption est accordée lorsque le consommateur paie moins cher les biens achetés ensemble. Une exemption a par exemple été récemment accordée à Woolworth (un grand supermarché) pour l'octroi de remises sur l'essence achetée auprès d'une filiale en toute propriété. La remise était accordée à la condition que les clients achètent une quantité suffisante de provisions auprès de Woolworth. Les ventes d'essence concernées représentaient une petite part du marché et on a estimé que les remises renforceraient la concurrence sur ce marché.

3. Éventuels effets proconcurrentiels des remises de fidélité

Le Président fait remarquer que la contribution du Taipeh chinois met l'accent sur le fait qu'une approche empirique est justifiée pour les remises de fidélité et que ces remises, lorsqu'elles sont octroyées par des entreprises qui détiennent un pouvoir de marché, peuvent nuire à la concurrence. La contribution expose également des affaires se rapportant à ces remises sur les marchés des télécommunications et du pétrole. Cette contribution se démarque des autres parce qu'elle met davantage l'accent sur les éventuels effets bénéfiques des remises de fidélité sur la concurrence et l'efficacité. Deux variables semblent importantes dans la jurisprudence du Taipeh chinois : le délai requis pour bénéficier de la remise et le coût

d'un changement de fournisseur pour les consommateurs. Le Président invite la délégation du Taipeh chinois à apporter de plus amples détails sur ces points.

Un délégué du Taipeh chinois mentionne que la loi sur les pratiques commerciales de son pays interdit à toute entreprise de tenter d'attirer les clients de ses concurrents en ayant recours à la coercition, à des avantages incitatifs ou à d'autres moyens abusifs susceptibles de réduire ou de fausser la concurrence.

En 2000, lorsqu'elle s'est occupée de la libéralisation et de la nouvelle réglementation du secteur des télécommunications, la commission des pratiques commerciales du Taipeh chinois a publié des « Notes en vue de la réglementation du secteur des télécommunications » qui définissent la remise de fidélité comme « …une remise offerte aux clients à certaines conditions, notamment l'interdiction de changer de fournisseur, ou [une] forte remise offerte aux clients qui sont susceptibles de changer de fournisseur, afin d'empêcher ce changement ». Il est ensuite précisé : « Comme des entreprises spécifiques pratiquent ces remises pour « rendre les clients captifs » les débouchés commerciaux des concurrents s'en trouvent restreints. »

Les remises de fidélité peuvent entraîner des effets proconcurrentiels en assurant une concurrence par les prix efficace et en réduisant au minimum l'instabilité du volume de ventes et les problèmes d'inventaire connexes d'un fabricant. Cependant, les entreprises qui ont recours aux primes de fidélité en tant qu'instrument de commercialisation peuvent y associer des accords d'exclusivité, des coûts de changement élevés et des contrats à long terme afin de rendre les clients captifs. Tous ces facteurs peuvent susciter des inquiétudes en ce qui a trait à l'effet des remises sur la concurrence. Si un opérateur historique dominant se sert de ces outils de commercialisation, il peut facilement éliminer ses concurrents ou fausser la concurrence. Même si la Commission des pratiques commerciales du Taipeh chinois n'a pas jusqu'ici imposé de sanction dans une affaire de remise de fidélité, elle a ordonné à certaines entreprises de ne pas utiliser les remises de fidélité en association avec des coûts de changement de fournisseur élevés ou des contrats à long terme qui rendent les clients captifs.

La Commission des pratiques commerciales du Taipeh chinois établit le caractère licite des remises de fidélité en prenant en compte l'intention des entreprises et leur situation dans le marché, la structure du marché, les caractéristiques des produits et l'impact de ces restrictions sur la concurrence.

S'agissant des secteurs des télécommunications et du pétrole, les entreprises dominantes existantes ont tenté d'utiliser des contrats à long terme avantageux pour attirer les clients des concurrents avant la libéralisation des marchés concernés. Ces pratiques étaient destinées à empêcher de nouveaux acteurs d'accéder au marché et à faire échec aux politiques de libéralisation. La Commission des pratiques commerciales du Taipeh chinois a donc décidé que lorsque des contrats seront encore en vigueur après la libéralisation, ou que les coûts du changement de fournisseur sont élevés sans raison valable, on peut présumer l'existence d'une intention de supprimer la concurrence et estimer que les remises de fidélité sont anticoncurrentielles.

Le Président passe ensuite à la contribution du Royaume-Uni, qui fait remarquer « …malgré l'indéniable possibilité que des remises de fidélité pratiquées par des entreprises détenant un pouvoir de marché entraînent des effets anticoncurrentiels, certains effets proconcurrentiels importants semblent impossibles à atteindre sans avoir recours aux remises de fidélité. » (par. 3). La contribution du Royaume-Uni examine de façon détaillée les effets proconcurrentiels possibles des remises de fidélité puis analyse les conditions assez peu propices qui doivent être réunies pour que les remises de fidélité rétroactives soient considérées comme ayant des effets anticoncurrentiels et entraînent l'éviction. Le Président invite le Royaume-Uni à apporter des précisions sur les effets proconcurrentiels potentiels des remises de fidélité et sur les conditions qui doivent être réunies pour que ces remises soient considérées comme anticoncurrentielles.

Un délégué du Royaume-Uni indique que les remises de fidélité devraient être analysées au cas par cas étant donné qu'elles sont susceptibles d'avoir des effets tant proconcurrentiels qu'anticoncurrentiels. En ce qui a trait aux effets proconcurrentiels, les remises de fidélité sont, tout d'abord, une forme de concurrence par les prix et constituent par conséquent, en règle générale, une pratique souhaitable. Les remises de fidélité peuvent entraîner des effets proconcurrentiels spécifiques, notamment celui d'encourager les efforts de vente des détaillants sans fausser la concurrence entre les distributeurs. Les remises de fidélité permettent à des distributeurs de tailles très différentes d'obtenir le même pourcentage de remise.

En ce qui a trait aux effets anticoncurrentiels les rabais rétroactifs méritent qu'on s'y attarde. Dans le cadre de ces remises, si le seuil exigé est atteint, la remise est accordée sur tous les achats plutôt que sur ceux qui dépassent le seuil fixé. Cela permettrait de fournir une certaine quantité à un prix très bas sur un éventail critique de ventes et d'augmenter le prix encore au-delà de cet éventail. Une remise quantitative directe serait dénuée de cette caractéristique et constituerait un moyen moins rentable d'évincer les concurrents sur un marché qu'une remise de fidélité.

Le délégué du Royaume-Uni renvoie à la contribution de son pays, qui énumère les conditions qui rendent la tentative d'éviction plus vraisemblable, mais pas nécessairement certaine. Il cite l'exemple d'une situation mettant en présence un fournisseur dominant qui offre une remise de fidélité, un vendeur rival qui se plaint que la remise réduit sa part de marché, et un acheteur représentatif. La première condition qui doit être remplie est que le fournisseur dominant qui accorde la remise de fidélité réponde de façon certaine à un pourcentage élevé des besoins de chaque acheteur. La concurrence porte donc seulement sur les ventes non assurées. Dans cette situation, une remise de fidélité qui serait offerte sur toutes les unités pourrait fausser la concurrence, étant donné que les fournisseurs rivaux devraient offrir un pourcentage de remise beaucoup plus élevé pour rester concurrentiels. Cela ne signifie pas pour autant, cependant, que les consommateurs pâtissent de la situation. Tel sera le cas seulement si une certaine perte d'efficacité est induite par le fait que les fournisseurs rivaux restent de petite taille, par exemple s'ils ne peuvent obtenir les économies d'échelles disponibles.

Le Président fait ensuite remarquer que la contribution des Etats-Unis met également en évidence les aspects proconcurrentiels des remises de fidélité. La délégation américaine semble faire sienne l'opinion de Dennis Carlton selon laquelle l'autorité antitrust devrait limiter ses interventions relatives aux mécanismes de tarification non linéaire et se borner aux conditions tarifaires excessives, où il est manifeste que le prix marginal est inférieur au coût marginal. Il semble cependant que les tribunaux ont hésité sur la norme qui devrait s'appliquer en ce qui concerne les rabais de fidélité. De ce point de vue, l'affaire complexe concernant 3M/LePage's, bien que toujours pendante, est très intéressante.

Un délégué des Etats-Unis commence par insister sur le fait que les réductions de prix sont essentielles à la concurrence et devraient en général être protégées et non interdites par les lois antitrusts. Les États-Unis doutent en outre de la capacité des autorités antitrusts et des tribunaux d'établir une distinction entre concurrence sur les prix et pratique de prix d'éviction. C'est pourquoi ils ont retenu deux grands principes. Premièrement, les réductions de prix par une entreprise qui n'est pas une entreprise vraiment dominante sont licites en soi. Deuxièmement, lorsqu'une entreprise exerce un monopole ou est fortement susceptible d'acquérir un monopole, l'appréciation porte sur deux aspects : les réductions de prix sont licites, sauf si le prix est inférieur au coût variable moyen ou au coût marginal ; d'autre part, il doit y avoir une forte probabilité de récupération (c'est-à-dire que lorsque les rivaux auront été évincés, l'entreprise pourra relever ses prix à un niveau supraconcurrentiel). Une remise de fidélité ou d'un autre type n'est pas illicite si elle équivaut à limiter les prix pratiqués, comme c'est le cas du recours permanent à des bas prix pour empêcher de nouveaux concurrents d'entrer sur le marché.

En ce qui a trait aux remises portant sur des produits multiples, l'appréciation est un peu plus complexe, étant donné que les remises peuvent porter sur le produit A, sur lequel l'entreprise dispose d'un pouvoir de marché, et avoir été mises en place afin d'augmenter les ventes de produit B, en excluant un rival du marché de ce dernier produit. Dans ces circonstances, certains argumentent d'affecter alors la valeur entière des remises consenties sur les produits A et B au marché du produit B afin de déterminer si la remise équivaut à une tarification inférieure au coût et a pour effet d'exclure un rival d'efficience équivalente et qui n'offre que le produit B. La remise serait illicite sous cette approche si la tarification est inférieure au coût et s'il y a une possibilité de récupération.

L'affaire 3M/LePage's, qui est d'une grande complexité, est un exemple de remises portant sur des produits multiples. Il n'est pas encore possible d'en prévoir l'issue.

Revenant aux avantages proconcurentiels des remises de fidélité, le délégué souligne les avantages que les consommateurs retirent de ces remises. Celles-ci peuvent constituer une forme de discrimination par les prix exercée lorsqu'il se révèle difficile d'identifier les clients dont la demande est la plus élastique. Les remises permettent alors aux acheteurs d'effectuer une autosélection. Il est bien établi chez les économistes et les juristes que la réglementation interdisant la discrimination par les prix diminue généralement la concurrence sur les prix et est préjudiciable aux consommateurs. Le délégué fait également observer que les remises de fidélité aident les distributeurs d'incitations à développer le marché d'un produit. Cela aussi peut contribuer à accroître la production et profiter aux consommateurs.

Le délégué américain termine en affirmant qu'il faudrait se montrer très prudent avant de juger illicites les remises de fidélité. La pratique de ces remises devrait être autorisée sauf si tout porte à croire qu'elle a un effet anticoncurrentiel consistant à exclure des rivaux et non pas simplement à leur nuire.

4. Débat général

Avant de lancer le débat, le Président note qu'au début de la table ronde, deux pays nordiques ont recommandé instamment aux autres pays de prendre des mesures sévères à l'encontre des remises de fidélité et qu'à la fin, un autre pays a fait un plaidoyer énergique en faveur d'une approche permissive. Le Président donne donc à nouveau la parole aux délégations de la Norvège et de la Suède afin de prendre note de leurs réactions à l'information fournie pendant la table ronde.

Une déléguée de la Suède fait remarquer que dans l'affaire SAS, une approche à deux volets, ou approche symétrique, a été adoptée. SAS et ses compagnies affiliées occupent une position dominante et détiennent quelque 90 pour cent du marché. L'autorité suédoise de la concurrence a par conséquent cherché des moyens de renforcer la concurrence sur ce marché et estimé à cet égard que les programmes pour grands voyageurs de SAS constituaient un abus de position dominante. Elle a par ailleurs jugé nécessaire d'autoriser les nouveaux entrants à avoir recours à des programmes pour grands voyageurs si cela devait leur permettre de devenir plus solides.

Même si l'initiative allemande d'ouverture du programme Miles and More de Lufthansa aux concurrents a donné matière à réflexion, la déléguée est convaincue que l'approche de la Suède était adaptée au contexte suédois. Elle ajoute que les remises de fidélité sont plus susceptibles d'être nuisibles sur les marchés présentant des types particuliers d'asymétrie et un problème lié au rapport de représentation. Au Tribunal de commerce, l'autorité suédoise de la concurrence a comparé le programme Eurobonus de SAS à une forme de pot-de-vin. Il ne semblait pas y avoir d'autres solutions que celle de l'interdiction pour éliminer le problème lié au rapport de représentation posé par les programmes pour grands voyageurs.

Un délégué de la Norvège mentionne que les programmes pour grands voyageurs doivent être vus en rapport avec les réseaux en étoile maintenant généralisés dans le secteur du transport aérien. La plupart des compagnies aériennes ayant un réseau étendu centralisent leurs activités dans un ou plusieurs aéroports-pivots mais ne choisissent pas toutes le même aéroport, et chaque aéroport n'est donc le pivot que d'une seule compagnie aérienne. Cette dernière dispose d'un pouvoir de marché considérable à l'aéroport-pivot ou sur les liaisons radiales et jouit d'un important avantage concurrentiel que renforcent les programmes pour grands voyageurs. En Norvège, les effets anticoncurrentiels des programmes pour grands voyageurs sont tout à fait manifestes. Par exemple, il y a plusieurs années, le deuxième transporteur norvégien a tenté d'assurer la liaison Oslo-Stockholm, très rentable pour SAS. Sur les cent billets donnés dans ce but à une grande société de fabrication suédoise-norvégienne, quatre-vingts ont été retournés parce que les salariés de la société voulaient accumuler des points accordés dans le cadre du programme pour grands voyageurs de SAS. Il y a environ quatre ans, le marché norvégien du transport aérien comptait trois compagnies. La plus petite d'entre elles et troisième en importance a fermé ses portes au bout d'un an, principalement parce qu'elle ne pouvait rivaliser avec les compagnies qui offraient des programmes pour grands voyageurs. Le délégué fait enfin remarquer qu'avant de prendre la décision d'interdire les programmes pour grands voyageurs sur les vols intérieurs, l'autorité norvégienne de la concurrence a été approchée par un groupe d'investisseurs qui posait l'interdiction de ces programmes comme condition absolue de son entrée sur le marché du transport aérien. Ce groupe s'apprête actuellement à entreprendre des activités en Norvège.

Le délégué de la Norvège ne pense pas que la façon dont la Norvège perçoit les remises de fidélité soit incompatible avec la position américaine, car il est tout à fait manifeste que les programmes pour grands voyageurs constituent des obstacles à l'entrée.

Un délégué du BIAC met l'accent sur l'aspect des remises de fidélité qui concerne la concurrence par les prix. A l'instar de la délégation américaine, il estime que sauf dans les cas où elles entraînent l'exclusion d'une entreprise dont l'efficacité est comparable, les remises de fidélité ne sont guère susceptibles de nuire aux consommateurs et, au contraire, peuvent leur apporter de nombreux avantages, même si elles sont préjudiciables aux concurrents. Le droit de la concurrence devrait protéger les consommateurs et non les compétiteurs.

Le délégué du BIAC fait en outre remarquer que comme les consommateurs de services de transport aérien, les entreprises tirent parti des remises, comme on l'a vu dans l'affaire Virgin/BA relative à des remises octroyées à une entreprise. Ces remises en pourcentage sont accordées en contrepartie d'un plus grand recours aux services de la compagnie aérienne que cela n'aurait été le cas autrement. Le document de référence du Secrétariat donne à penser que dans cette affaire, la remise de fidélité profite à la compagnie qui l'accorde, en l'occurrence BA, plutôt qu'au client. Le délégué exprime un avis divergent, à savoir que les remises octroyées aux entreprises confèrent à celles-ci un certain degré de pouvoir d'achat qui est proconcurrentiel.

Les entreprises ont recruté des professionnels pour négocier des contrats avec les compagnies aériennes. Leur stratégie consiste à acheter en grands volumes sur une base de réseau. La menace de perdre toute la clientèle de l'entreprise peut neutraliser sensiblement le pouvoir de marché de la compagnie aérienne sur une liaison en particulier. Les remises consenties aux entreprises tendent à uniformiser également les services de transport aérien de marchandises, c'est-à-dire qu'elles contribuent à faire cesser l'effet d'augmentation des prix entraîné par la différenciation des produits. Moyennant ces remises, les compagnies aériennes font face à une demande plus fiable et plus prévisible de leur services. Aux États-Unis, les remises consenties aux entreprises représenteraient environ 30 pour cent des tarifs nationaux et internationaux publiés. De nombreuses entreprises de toutes tailles utilisent les programmes de remises et en bénéficient.

Un délégué des États-Unis fait observer que les divergences d'opinion exprimées autour de cette table ronde tiennent peut-être en partie aux différences qui existent entre les institutions, en particulier à la possibilité d'accorder des dommages et intérêts triples aux États-Unis. Cette possibilité favorise en général la conformité mais exige également des évaluations très rigoureuses pour éviter que les tribunaux ne concluent trop facilement que les remises contreviennent à la législation antitrust. De nombreuses autres juridictions dont l'approche est moins structurée à l'égard des remises de fidélité suivent un modèle à plus grande teneur administrative. Mais même dans ce cas, le critère le plus important est celui de la preuve. Avant d'imputer la charge de la preuve à celui qui accorde des remises pour qu'il en justifie l'efficacité, il convient peut-être davantage de demander d'abord à ceux qui les mettent en cause de prouver qu'elles seront effectivement préjudiciables aux consommateurs.

Un délégué du Royaume-Uni doute que les différences institutionnelles soient la principale explication aux divergences sur les remises de fidélité.

Un délégué du Danemark se demande si les divergences d'opinion des personnes présentes tiennent à des manières de voir différentes ou simplement à des différences entres les affaires considérées, même si, comme il le fait remarquer, le Danemark et les autres pays nordiques ne souhaitent pas se borner à appliquer aux remises de fidélité l'approche plutôt stricte des États-Unis à l'égard des prix d'éviction. Il fait également observer que les affaires qui surgissent dans le secteur de la « nouvelle économie » pourraient poser des problèmes difficiles à résoudre en ce qui a trait à la définition des coûts variables. Il arrive que ces coûts soient presque nuls. L'approche des États-Unis pourrait facilement donner lieu à des situations où il ne serait pas possible de remédier aux problèmes. Le délégué demande aux États-Unis si leur approche a été modifiée pour les entreprises de la nouvelle économie.

Un délégué des États-Unis fait remarquer que le délégué du Danemark a mis le doigt sur une réelle difficulté. Sur les marchés où les coûts variables sont quasiment nuls, on risque de voir « tout va au vainqueur ». Et bien que la rivalité soit souhaitable, elle peut prendre différentes formes et il n'est pas rare, sur ces marchés, qu'une entreprise soit dominante pendant un certain temps et cède ensuite la place à une autre entreprise qui offre un meilleur produit. Cela s'est produit, par exemple, sur le marché des tableurs. Aux États-Unis, on s'intéresse donc moins, sur ces marchés, à la tarification qu'aux manœuvres d'exclusion, comme en témoigne la récente affaire Microsoft.

Un délégué de l'Italie indique que sa délégation est globalement d'accord avec la position des États-Unis. Il appelle également l'attention sur une tendance généralisée, notamment devant les tribunaux, à exiger que les remises soient justifiées par les coûts. Il semble que cela s'écarte en partie de l'approche empirique, la charge de la preuve incombant dès lors aux accusés, auxquels il est demandé de prouver que la remise est justifiée par les coûts. Le délégué de l'Italie fait enfin observer que la justification des remises au plan des coûts soulève des problèmes quant aux coûts pris en compte. Un programme de fidélité peut réduire les coûts que doit assumer une société pour garder un client, notamment les coûts de commercialisation. La justification au plan des coûts pourrait donner des résultats différents selon que ces coûts sont ou non compris dans le calcul.

Un délégué de l'Allemagne convient que les coûts sont un aspect difficile à traiter. Les autorités de la concurrence sont de fait forcées de se fier à l'information que leur fournissent les entreprises. De plus, la distinction est très fine entre réglementer un marché et y maintenir la concurrence, et en centrant leur attention sur les coûts, les autorités de la concurrence ont tendance à s'orienter vers le pôle réglementaire.

Un délégué du BIAC craint que si la justification au plan des coûts est la règle, le plafond des remises se situe en dessous de ce qui aurait pu être offert sur le marché. Les remises de fidélité visent plus à supprimer la concurrence qu'elle ne sont motivées par des raisons liées aux coûts. Le délégué formule

une observation au sujet de l'invocation de la volonté d'égaler la concurrence comme moyen de défense, et fait remarquer qu'il est étrange que les remises de fidélité puissent être autorisées pour contrer des remises consenties par des concurrents mais soient interdites comme simple moyen d'entrer en concurrence.

Un délégué du Canada pose une question à la délégation des États-Unis en ce qui a trait au critère de récupération posée par leur pays. Au Canada, les marchés sont souvent composés d'un chef de file et d'une frange concurrentielle. Si un concurrent de la frange concurrentielle franchit la ligne de démarcation, l'entreprise dominante a recours à des remises pour le discipliner. Lorsque le concurrent repasse la ligne de démarcation pour regagner sa position initiale, le programme de remises est interrompu ou modifié. Il n'y a pas de récupération au sens courant du terme. Cela serait-il considéré comme une récupération ? Un délégué des États-Unis répond par l'affirmative. Il mentionne une affaire mettant en cause American Airlines, qui aurait augmenté sa capacité dont les bénéfices marginaux étaient inférieurs aux coûts. L'entreprise aurait agi de la sorte dans le cadre d'une stratégie visant à évincer des rivaux à faibles coûts pour ensuite relever ses tarifs. Dans cette affaire, le critère de récupération serait rempli. Il faut faire la part entre cette manœuvre et la tarification limite, qui consiste à pratiquer des bas prix permanents pour empêcher de nouveaux entrants d'accéder au marché. Ce type de tarification n'est pas considéré comme une pratique d'éviction.

Un délégué du Royaume-Uni fait remarquer qu'en théorie, les remises peuvent servir à empêcher un concurrent d'entrer sur le marché, et faire baisser les prix encore davantage. Comment aborder la récupération si ce genre de situation se présente ? Un délégué des États-Unis fait remarquer que la Cour suprême des États-Unis a déjà statué dans ce genre de situation que les prix pratiqués ne sont pas illicites sauf s'ils sont inférieurs aux coûts. Il a été proposé que dans le cadre de l'examen des réductions de prix, la totalité de la remise soit affectée aux unités additionnelles vendues. Dans ce cas, presque toutes les réductions de prix pourront être considérées comme étant inférieures au coût.

Un délégué de l'Italie demande à la délégation des États-Unis si le critère de la récupération continuerait de s'appliquer lorsqu'une remise de fidélité fait en sorte que certaines unités sont vendues en dessous du coût marginal mais que le prix moyen reste supérieur au coût variable. Un délégué des États-Unis indique à nouveau que cette question est actuellement devant les tribunaux dans le cadre de l'affaire American Airlines. Le ministère de la Justice estime que comme American Airlines a augmenté sa capacité, l'analyse visant à établir si la compagnie a pratiqué des prix d'éviction exige une comparaison des bénéfices marginaux et des coûts associés à cette augmentation de capacité.

5. Observations de clôture du Président

Le Président fait part de l'intérêt particulier que lui paraît revêtir la dernière partie du débat, pendant laquelle les délégations ont analysé leurs divergences d'opinion. Un certain nombre d'explications plausibles à ces divergences ont été examinées, celles qui tiennent par exemple aux institutions, aux procédures, à la charge de la preuve, etc. Le Président a toutefois l'impression qu'il y a d'autres explications. En particulier, il se peut que le concept de concurrence soit différent.

Il semble qu'un certain nombre de pays estiment qu'une entreprise très dominante – disposant par exemple d'une part de marché de 80 à 90 pour cent et d'un important avantage concurrentiel - ne doit pas être autorisée à entraver artificiellement l'accès à un marché en ayant recours à des remises non justifiées par les coûts. Ce faisant, ces pays restreignent la définition de la concurrence.

D'autres pays estiment quant à eux que la justification au plan des coûts ne devrait pas être essentielle pour établir le caractère licite d'une remise de fidélité octroyée par une entreprise dominante. A partir d'une appréciation relevant davantage de l'analyse économique et d'une acception élargie du concept

d'équité correspondant sans doute à ce que le premier groupe de pays estime être la concurrence, le second groupe fait valoir que les remises de fidélité ne devraient pas être interdites, sauf en cas d'éviction réelle, et insiste pour que les efficiences associées soient prises en compte. L'impossibilité dans laquelle se trouve une entreprise de justifier ses remises au plan des coûts ne constitue pas la preuve de l'existence d'un problème de concurrence. Le fait que les remises de fidélité rendent la vie plus difficile aux concurrents a une signification neutre au regard de la définition que le second groupe de pays donne à la concurrence.

La science économique ne permet sans doute pas d'opérer un rapprochement entre ces opinions. S'agissant des comportements d'éviction, le Président fait remarquer, par exemple, que certains économistes n'associent pas toujours des prix marginaux inférieurs aux coûts marginaux à une pratique d'éviction, alors que d'autres assimilent parfois des prix supérieurs aux coûts marginaux à des prix d'éviction.

Le Président attire l'attention sur la difficulté, soulevée par les délégués de l'Allemagne et d'autres pays à la fin de la séance, de formuler une règle qui soit effectivement applicable. En particulier, est-il possible de mesurer précisément les coûts marginaux ? Quelle est l'utilité de l'approche davantage centrée sur le raisonnement économique si elle a pour effet de confronter les autorités de la concurrence et les tribunaux à des problèmes insolubles ?