

The Antitrust Treatment of Loyalty Discounts and Rebates in the EU Competition Law: in Search of an Economic Approach and a Theory of Consumer Harm *

Danilo Samà[†]

LUISS “Guido Carli” University of Rome

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Abstract

In the paper, the fundamental question is under what conditions loyalty discounts and rebates adopted by a dominant firm cause anti-competitive effects. Fidelity schemes, although extremely frequent in the market, if applied by a dominant firm, are likely to be judged as illegal per se, as demonstrated by the EU case-law delivered so far and the severe scrutiny reserved by the national competition authorities. As a result, the paper first provides an analytical overview of loyalty structures, focusing in particular on retroactive rebates, and elaborates on important economic implications, such as the lock-in and the suction effect. The work then discusses the novelties introduced by the Guidance Paper on the Application of Art. 102 of the TFEU, which calls for an effects-based analysis of exclusionary abuses. Therefore, after an in-depth evaluation of the as-efficient competitor test, the new approach of the European Commission towards loyalty discounts and rebates is discussed in details with reference to a controversial antitrust case recently examined at EU level (*Tomra*). The paper finally proposes a systematic economic framework for analysing the effects, and therefore the legality, of fidelity schemes, in the light of a consistent theory of consumer harm.

Keywords: Fidelity Discounts, Loyalty Rebates, Abuse of Dominant Position, As-Efficient Competitor Test, Consumer Harm, Exclusive Dealing, Foreclosure, Monopolization, Non-linear Pricing, Predation, *Tomra*.

JEL Classification: K21; L12; L42

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[†]Ph.D. Candidate and Researcher in Economic Analysis of Competition Law and Law & Economics LAB Research Fellow at LUISS “Guido Carli” University of Rome, Faculty of Economics, Viale Romania 32, 00197 Rome (Italy) (E-Mail: ds@danilosama.com - Web-Site: www.danilosama.com).

«Where did we come from? Where are we going? Is there possibility of a group discount?»

Woody Allen

1 The Definition of Loyalty Discounts and Rebates

In general terms, loyalty discounts and rebates may be defined as a reduction in the list price of a relevant product which a seller or supplier offers to a buyer or distributor as an explicit or implicit reward in exchange for a relationship of substantial exclusivity. As a result, the key difference respect to the standard form of price discounting is that a loyalty scheme is structured, on one side, to provide significant benefits to the customer in case it maintains or raises its purchasing expenditure towards a particular supplier, and, on the other side, to impose heavy penalties on the customer in case it switches its purchasing expenditure towards a rival supplier. In fact, since in common practice the supplier does not grant the price premium to the customer if it moves even only a limited part of its purchasing requirements to another competitor, the two types of loyalty structures may entail an effect similar to an exclusive dealing, which, as it is known, forces the customer to purchase the entire or a significant part of its total supply from a specific supplier.

Nevertheless, as demonstrated by the fact that these practices are extremely frequent in the market, loyalty discounts and rebates are normally not problematic. If competitors are able to compete on equal terms against rivals and if customers are able to respond actively to the incentives proposed, loyalty schemes are unlikely to be anti-competitive and instead may represent pro-competitive instruments in support of price competition, which in turn may increase the total level of social welfare. On the contrary, in the presence of a dominant firm, loyalty structures may cause crucial problems from a competition policy perspective. Within this context, the present work is therefore intended to develop a critical and extensive economic analysis of the issue, in the light of the latest guidelines on abuse of dominant position published by the European Commission and the most recent EU case-law in regard.

Although in common language a distinction between the concepts of discount and rebate appears often absent, the main characteristic shared is that the granting of both is conditional on the achievement of a certain amount of purchases within a given reference period. The main difference is that for the former the premium is applied directly to the list price and for the latter the premium is awarded indirectly in a rebate cheque. However, even if in the presence of a dominant undertaking it is not sufficient to examine the form of the discount or rebate in order to carry out a correct evaluation of its loyalty effect from an antitrust standpoint¹ (as it will be demonstrated in the next section), as a preliminary matter, it is necessary to consider how the structure of a generic discount or rebate may change in terms of three primary features².

Firstly, according to the type of threshold, it is possible to distinguish between fidelity and target discounts and rebates. In the first case, the threshold set by the supplier that the customer must achieve is defined by a percentage of growth in the customer's purchasing expenditure calculated in comparison with a past period (i.e. growth discounts or rebates), by a percentage of the customer's purchasing requirements (i.e. market share discounts or rebates) or by an exclusivity obligation (i.e. exclusive discounts or rebates). In the second case, the threshold set by the supplier that the customer must reach is defined by an individualized or standardized volume of units (i.e. quantity discounts or rebates). Nonetheless, in the common experience, the threshold is typically set such as to correspond to the entire or significant part of the customer's demand. This is the case, in addition to the fidelity discounts and rebates, also for the target category, or at least for the individualized variant, which generates more problems from a competition law point of view (as it will be shown in the next section). Thus, the two loyalty schemes tend to produce substantially the same economic effects.

Secondly, according to the scope of application, it is possible to distinguish between incremental discounts and rebates, which are applied forward-looking, i.e. only on the additional units purchased above the threshold (also known as prospective discounts or rebates), and retroactive discounts and rebates, which are applied

¹For the traditional assessment of loyalty discounts and rebates in the EU case-law: O'Donoghue, R., Padilla, A.R. (2006), *The Law and Economics of Article 82 EC*, Hart Publishing, Oxford, United Kingdom and Portland, United States, pp. 374-406.

²Ahlborn, C., Bailey, D. (2006), *Discounts, Rebates and Selective Pricing by Dominant Firms: A Trans-Atlantic Comparison*, in Marsden, P. (eds.), *Handbook of Research in Trans-Atlantic Antitrust*, Edward Elgar, Cheltenham, United Kingdom and Northampton, United States, p. 197.

backward-looking, i.e. not only on the additional units purchased above the threshold, but also on the previous ones (also known as all-unit, back to one, roll-back discounts or rebates).

Thirdly, according to the scope of products, it is possible to distinguish between single item discounts and rebates, which are applied to the units of a single product purchased (also known as single product discounts or rebates), and bundled discounts and rebates, which are applied to the units of a range of products purchased (multi-product discounts or rebates).

As regards its methodological setting, the current economic assessment is primarily focused on the discounting practice with the form of a single-product retroactive rebate for three principal reasons. Firstly, it constitutes one of the most frequent agreement adopted in commercial transactions. If employed by a dominant firm, it is likely to be deemed as illegal per se, as demonstrated by the EU case law delivered so far and the severe scrutiny reserved by the national competition authorities. Secondly, it represents a topic that remains relatively unexplored, as proved by the limited number of academic papers that has been published in the light of the new effects-based approach promoted by the Commission and the controversial cases recently examined at EU level. Thirdly, the present work does not significantly alter the conclusions that may be drawn for the other less relevant types of loyalty discounts and rebates.

2 The Economic Analysis of Loyalty Discounts and Rebates

A rebate may be defined as retroactive if, as mentioned in the previous section, the customer obtains the discount on all the quantities purchased, after having reached a certain amount of purchases within a given reference period. As a result, the discount is applied retroactively to all the previous purchases made by the customer and not exclusively to the purchases realized above the threshold, as in case of incremental rebates. Hence, the purchasing target corresponds to the quantity of units that, if it is purchased by the customer before the expiry of the reference period, triggers retroactively the discount on all the previous purchases. In most cases, the main advantage of using a retroactive rebate rather than an incremental rebate, which in turn justifies its higher frequency, is that the former allows to adopt a price

discrimination scheme more easily than the latter. Through this price discrimination, large customers pay a lower price while small customers pay a higher price, as a recompense of the different level of loyalty shown, which in turn allows the firm to benefit from economies of scale.

However, in case of retroactive rebates, since the discount affects retroactively the total amount of units purchased in the reference period, the customer is subject to a so-called “lock-in effect” in the form of a switching cost. In fact, if the customer chooses to switch its supplier source, it risks not to reach the threshold, losing the discount otherwise determined on all the previous purchases. Given that the supplier is generally able to define an individualised rather than standardised purchasing target that reflects the buyer’s total requirements, the customer would be less likely to switch to other suppliers, since it would be more complex for it to cross the threshold within the reference period³.

In addition to the loyalty-enhancing effect, retroactive rebates raise a further problem, i.e. the so-called “suction effect”, arising in proximity of the purchasing target. In fact, once the customer has reached an amount of purchases very close to the threshold, a slight increase in the quantity of units purchased would be enough to trigger retroactively the discount on all the previous purchases. Thus, the incremental price, which a customer must implicitly correspond for the marginal units necessary to achieve the threshold, may be inferior to the discounted and list price (cf. Formula 1)⁴. Furthermore, given the non linear and retroactive nature of the rebate, the total expenditure borne by the customer faces a discontinuity in correspondence of the threshold. In fact, if the purchasing target is reached, the total expenditure may decrease to a level lower than the one prior to the achievement of the threshold. As a result, it is possible to state that the incremental price: firstly, it may be below cost or negative, even though the average discounted price may be not predatory (cf. Example 1)⁵; secondly, it decreases as the discount rate, the marginal and the total units necessary to reach the threshold increase (cf. Figure 1)⁶.

³Faella, G. (2008), *The Antitrust Assessment of Loyalty Discounts and Rebates*, Journal of Competition Law & Economics, Vol. 4, Issue 2, Oxford University Press, Oxford, United Kingdom, p. 377.

⁴Rigaud, F.P. (2005), *Switching Costs in Retroactive Rebates - What's Time Got to Do with It?*, Competition Law Review, Vol. 26, No. 5, Sweet & Maxwell, London, United Kingdom, p. 274; *supra* note 3, p. 378.

⁵Federico, G. (2005), *When are Rebates Exclusionary?*, European Competition Law Review, Vol. 26, No. 9, Sweet & Maxwell, London, United Kingdom, p. 477.

⁶Maier-Rigaud, F.P. (2006), *Article 82 Rebates: Four Common Fallacies*, European Compe-

Formula 1 - *Incremental Price*

$$P^I = P^L [X_m - (r \times X_t)] / X_m$$

P^I = incremental price

P^L = list price

r = discount rate

X_m = marginal units necessary to reach the threshold

X_t = total units necessary to reach the threshold

Example 1 - *Incremental Price and Predatory Price*

The firm sells to the customer a unit of product, whose average total cost is of 0.90€, at a list price of 1€. Furthermore, the firm grants a retroactive rebate of 5% if the customer reaches a volume threshold of 1,000 units. Thus, if the customer increases the amount of units purchased from 999 to 1,000, the total expenditure decreases from 999€ to 950€, which in turn implies that the incremental price calculated on the last unit is negative (applying the analytical formula above shown: $1 [1 - (5\% \times 1,000)] / 1 = -49$), although the final and total average discounted price, which is equal to 0.95€ (950€/1,000 units), results not predatory, being higher than the average total cost of 0.90€.

In relation to the reference period, the switching cost due to the suction effect is moderately low for first purchases and extremely high close to the threshold, when it may lead to a negative incremental price (cf. Example 2)⁷. In the extreme case where the purchasing target is defined by the supplier at a level superior to the real customer's requirements, the suction effect may be even more severe, since it would push the customer to purchase a quantity of units that it neither needs nor would purchase absent the retroactive rebate. In conclusion, the present section demonstrated from an economic perspective how the suction effect due to a retroactive scheme may potentially generate a reduction of the contestable portion of the demand, which in turn, if a dominant firm is involved, may entail an anti-competitive foreclosure on actual or potential competitors, as it will be further explained in the next section.

tition Journal, Vol. 2, No. 2, Hart Publishing, Oxford, United Kingdom and Portland, United States, p. 87.

⁷Kallaugher, J., Sher, B. (2004), *Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Article 82*, European Competition Law Review, Vol. 25, No. 5, Sweet & Maxwell, London, United Kingdom, p. 267.

Figure 1 - *Incremental Price and Suction Effect*

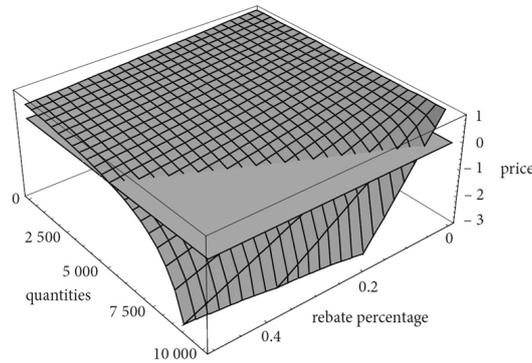


Figure 1 illustrates the suction effect related to a retroactive rebate which presents the following characteristics: 1. discount rate ranging from 0% to 50%; 2. normalized price base of 1; 3. volume threshold of 10,000 units. The area squared represents the price a competitor must match in order to leave the customer indifferent between its offer and the retroactive rebate proposed by the rival firm. As shown, the price the competitor must match decreases as the discount rate offered and the level of sales made by the rival firm increase, becoming negative when it falls below the solid colour plan.

Example 2 - *Incremental Price and Reference Period*

The firm sells to the customer a unit of product at a list price of 100€. Furthermore, the firm grants to the customer a retroactive rebate of 5% if the customer reaches an annual threshold of 1,000 units. At the same time, the customer is willing to purchase 500 units from a new entrant. However, if the customer purchases 500 units from the new entrant, it would not be able to reach the purchasing target set by the incumbent firm. Therefore, what should be the price the rival firm must offer to the customer to compensate it of switching part of its sales? The rival firm should return to the customer the total discount lost from the incumbent firm, that is equal to 5,000€ (discount rate applied to the total sales made at the list price: 5% of $100€ \times 1,000$). Nevertheless, the discount rate the rival firm should offer to the customer depends on the quantity of units over which it can recover and spread the total discount, which in turn depends on the period of the year during which the rival firm is able to convince the customer to switch. Assuming that the customer purchases on average the same quantity of units each month, it follows that: during the first month (500 units available - 12/12 of 500), the rival firm would need to compensate the total discount of 5,000€ offering a unit discount of 10€ ($5,000€ / 500$), which is equal to a discount rate of 10% ($10€ / 100€$); at half year (250 units available - 6/12 of 500), the rival firm would need to compensate the total discount of 5,000€ offering a unit discount of 20€ ($5,000€ / 250$), which is equal to a discount rate of 20% ($20€ / 100€$); during the last month (42 units available - 1/12 of 500 units available), the rival firm would need to compensate the total discount of 5,000€ offering a unit discount of 119€ ($5,000€ / 42$), which is equal to a discount rate of 119% ($119€ / 100€$). It is important to note that in proximity of the end of the reference period the rival firm is induced to offer a negative price and thus to incur a loss, being the net price (-19) equal to difference between the list price of 100€ and the unit discount of 119€.

3 The Guidance Paper on the Application of Article 102 of the TFEU

In the Guidance Paper on the application of Article 102 of the Treaty on the Functioning of the European Union (TFEU)⁸, whereby the European Commission provides essential guidelines to apply an effects-based analysis to exclusionary abuses of dominant position, an “As-Efficient-Competitor” test has been developed to evaluate whether a rebate structure granted by a dominant undertaking presents actual or potential foreclosure effects. After the further confirmation of the per se prohibition against dominant firm’s retroactive rebates established in the renowned cases *British Airways*⁹ and *Michelin II*¹⁰, a significant number of academic commentators has started to show that, despite the loss of a complete but imperfect legal certainty, an economic approach was definitely more suitable to correctly implement an antitrust assessment of the commercial practice at issue, especially considering its potential efficiencies and its regular use in all the industrial sectors. In fact, if a retroactive rebate causes only a minimal and negligible exclusionary impact, a form-based rule would impede behaviours beneficial for the competitive process, such as, for instance, elimination of double marginalization, prevention of free-riding and recoument of fixed costs of production.

Accordingly, the Commission states in its enforcement guidelines that the anti-competitive nature of a conduct can be deduced without carrying out a detailed examination only if the practice generates no efficiencies and hampers competition (Guidance Paper, paragraph 22). In particular, following intense discussion preceding its publication, the enforcement guidance has proposed a variant of the predation test for the evaluation of discount structures. In a nutshell, the price-cost test designed at EU level consists of a two-phase model, which basically aims at verifying if an equally efficient competitor would be able to contest the price resulting from the application of a rebate scheme by a dominant firm, persuading the customer involved to renounce to the economic conditions proposed by the latter.

⁸European Commission (2009), *Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, Official Journal of the European Union, 2009/C 45/02, 24 February 2009.

⁹Commission Decision of 14 July 1999, *Virgin-British Airways*, Case IV/D-2/34.78, Official Journal of the European Communities, 2000/74/EC L 30/1, 4 February 2000.

¹⁰Commission Decision of 20 June 2001, *PO - Michelin*, Case COMP/E-2/36.041, Official Journal of the European Communities, 2002/405/EC L 143/1, 31 May 2002.

In general terms, it is important to underline that in its recent guidelines the Commission, although it remains rather careful in the assessment of rebate schemes, makes a significant breakthrough towards the adoption of a real economic approach. On one side, it affirms that a discount system may produce foreclosure effects comparable to those produced by exclusive purchasing obligations, even without resulting in a profit sacrifice. It also asserts that a dominant firm may monopolistically exploit the non-contestable share of the customer's demand as leverage to reduce the price on the contestable share, increasing its total profits (Guidance Paper, respectively paragraphs 37 and 39)¹¹.

On the other side, it openly admits that loyalty and suction effects are maximum in proximity of the threshold. In practical terms, the mere existence of product volumes sold at a very low discounted price, which in turn might be the result of a negative incremental price, does not constitute a sufficient condition (cf. the two above-mentioned cases) to declare that an equally or even more efficient competitor would be subject to an anti-competitive foreclosure. On the contrary, it is necessary to perform a complete assessment of the impact of the dominant firm's rebate system, in order to ascertain if there is the risk of an exclusionary effect on actual or potential competitors (Guidance Paper, paragraph 40).

Furthermore, the Commission correctly emphasizes that the evaluation of a rebate structure strongly depends on the nature of the threshold, which may be individualized or standardized. Analogously to exclusive purchasing obligations, in case of individualised threshold, which is typically defined as a percentage of the customer's purchasing requirements or as a specific volume target, the loyalty-enhancing effect is maximum, since the dominant firm is assumed to be able to set the threshold at a level that corresponds to the customer's entire demand. Instead, in case of standardized threshold, which is usually expressed as a generic target equal for all customers, the loyalty-inducing effect may be high for smaller customers and low for larger customers. As it should be, the Commission is then likely to intervene only if the standardized threshold reflects the purchasing requirements of a substantial proportion of the total demand (Guidance Paper, paragraph 45).

¹¹For an alternative and further analytical assessment of the leverage effect that permits to a dominant firm to profitably tie the non-contestable portion of the customer's demand (brand product as monopolized sub-market) to the contestable portion (generic product as competitive sub-market): Greenlee, P., Reitman, D. (2005), *Competing with Loyalty Discounts*, U.S. Department of Justice, Economic Analysis Group, Discussion Paper 04-2, Washington D.C., United States, pp. 26-28.

3.1 The First Phase of the As-Efficient Competitor Test: the Estimation of the Contestable Demand

In the first phase of the price-cost test, for an incremental rebate, the relevant range of sales that is necessary to consider in order to verify the pro-competitive or anti-competitive nature of the discount scheme is normally equal to the part of sales made above the threshold. On the contrary, for a retroactive rebate, it is required to estimate the contestable portion of the customer's demand, that is the part of sales for which a rival firm could realistically compete against the dominant firm. If customers could switch large part of the demand to an actual or potential competitor, then the relevant range would be large. On the contrary, if customers could switch only small part of the demand, then the relevant range would be small. As practical guidelines, for an existing competitor a helpful indication of the relevant range may come from the data related to the fluctuations of sales over time, whereas, for a potential competitor, a useful suggestion may derive from the evaluation of the scale of sales that a new entrant would reasonably be able to reach. In case this calculation were difficult, it is advised to observe the past trend registered by new entrants in the same or similar markets (Guidance Paper, paragraph 42).

The essential condition for a retroactive rebate to cause a risk of anti-competitive foreclosure is the control by the dominant firm of a substantial share of the customer's requirements, i.e. the so-called "assured base of sales". As in case of exclusive dealings, the key factors which allow a dominant undertaking to benefit from an inelastic portion of the demand may be several, such as, brand loyalty due to the necessity for dealers and retailers to offer must-stock items produced by dominant firms, capacity constraints faced by rival firms, reputational effects which prevent competitors from selling high amounts of units before their own product has been tested by customers, switching costs suffered by consumers (Guidance Paper, paragraph 36). Therefore, assuming that rival firms may not be able to compete for the entire demand since dominant firms play generally the role of an unavoidable trading partner, in case of retroactive rebates the enforcement guidance requires estimating the volume of sales which can be judged contestable.

The existence of an assured base of sales on which the dominant firm holds a significant market power implies that the customer would buy in any case a certain amount of its purchasing requirements from it, despite the fact that a rival firm could offer a product of higher quality at a lower price. Nevertheless, an anti-competitive foreclosure arises only if an equally or even more efficient competitor is unable to

compete not for the entire size of the customer’s demand, but just for the portion of demand which is not monopolized by the dominant firm. The principal purpose of the price-cost test is therefore to ascertain if an “as-efficient” competitor would be capable of competing on the contestable part of the demand without incurring any loss with the price following the implementation of a dominant firm’s retroactive scheme.

3.2 The Second Phase of the As-Efficient Competitor Test: the Estimation of the Effective Price

In the second phase of the price-cost test, in case of retroactive rebates, it is required to estimate the average price that a competitor would need to propose to the customer to compensate the loss of the discount offered by the dominant firm (in case of incremental rebates, the effective price is simply equal to the discounted price granted to the additional units purchased above the threshold)¹². In this regard, it is worth noting two characteristics concerning the compensating price the rival firm must match. Firstly, it is not equal to the discounted price proposed by the dominant firm, which instead is equal to the list price minus the premium recognized on all the previous purchases. In fact, the rival firm can refund the customer of the rebate lost from the dominant undertaking only relying on the contestable demand. Hence, the effective price the rival firm must offer to match the dominant firm’s discounted price would certainly be lower than the latter. Secondly, it increases alongside of the level of sales made by the rival firm and thus the size of the contestable demand, because the competitor is progressively in a better position to recoup the discount lost by the customer over a higher number of units.

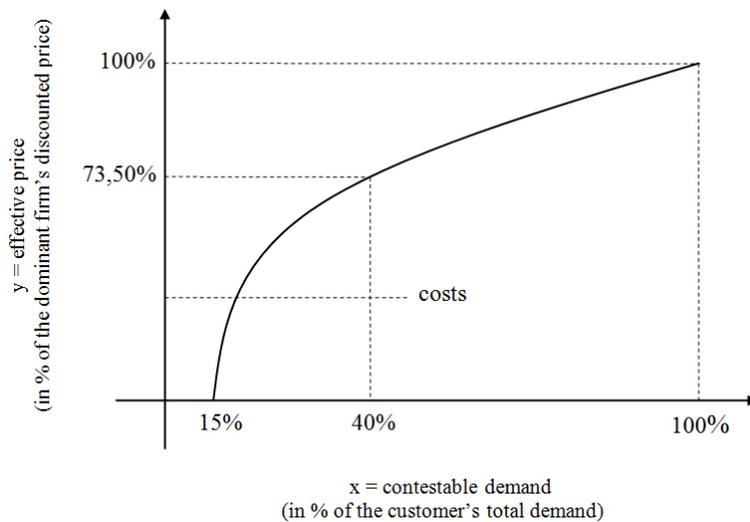
Accordingly, it is possible to show graphically the relationship between the effective price (in percentage terms of the dominant firm’s discounted price) and the level of sales (in percentage terms of the customer’s total demand) that the rival firm respectively has to offer and make in order to leave the customer indifferent (cf. Figure 2)¹³. Nevertheless, the level of sales a rival firm may realize is constrained by and depends on the contestable portion of demand. Assuming for instance in the

¹²Federico, G. (2011), *The Antitrust Treatment of Loyalty Discounts in Europe: Towards a more Economic Approach*, Journal of European Competition Law & Practice, Vol. 2, Issue 3, Oxford University Press, Oxford, United Kingdom, p. 278.

¹³*Supra* note 12, p. 284.

graph below that the contestable demand is equal to 40% of the total demand and that the discount rate offered by the dominant firm is equal to 15% of the list price, the curve representing the effective price indicates that the rival firm would need to offer a compensating price equal to 73.50% of the discounted price and to 62.50% of the list price, which in turn is equal to a 37.50% discount on the list price. From the example, therefore, it is possible to observe how the existence of a limited portion of contestable demand strongly influences the capacity of a competitor to compete. In fact, the rival firm would need to more than double the discount offered by the dominant undertaking in order to remain competitive in the market concerned.

Figure 1 - *Incremental Price and Suction Effect*



In analytical terms, the effective price a rival firm must offer to match the dominant firm's rebate scheme may be expressed by the following equation (cf. Formula 2)¹⁴. As a result, in relation to the effective price it is possible to state that: it decreases as the discount rate and the non-contestable share of demand increase; it increases as the contestable share of demand increases; it is positive if the contestable share of demand is higher than the discount rate; it is equal to zero if the discount rate is equal to the contestable share of demand.

Furthermore, from the formula shown below, it is possible to understand why a discount system does not generate distortions and thus problems from a competition

¹⁴*Supra* note 4, p. 274.

law point of view if a rival firm can compete on an equal footing with the dominant firm for the total customer's purchase requirements. In fact, if the dominant firm cannot benefit from an assured base of sales, implying that a distinction between contestable and non-contestable demand is not necessary, then the price the rival firm must offer to remain competitive in the relevant market is exactly the same as the dominant firm's discounted price. Consequently, the type of price competition that follows benefits rather than reduce the general level of consumer welfare.

Formula 2 - *Effective Price*

$$P^E = P^L [X - r (X + Y)] / X$$

$$D = X + Y = 1$$

$$P^E = P^L [1 - (r / X)]$$

P^E = effective price

P^L = list price

r = discount rate

D = total demand

X = share of demand contestable

Y = share of demand non-contestable

As the ultimate objective of the price-cost test is to evaluate whether the effective price following the adoption of a rebate scheme by a dominant firm may be matched by an equally or even more efficient competitor using the contestable portion of demand, it is necessary, as the final step, to compare the value of the compensating price with a correct cost benchmark. In this test, as in the case of price discrimination, the measures of cost to be used to distinguish between pro-competitive and anti-competitive forms of discounting are those relative to the dominant firm.

The essential motivations that support the employment of the cost structure of the dominant firm and not of the rival firm as term of comparison are: the price-cost test aims to safeguard only competitors that are as-efficient as the dominant undertaking; the use of the cost structure of the dominant firm as the key parameter permits to establish whether its conduct entails a profit sacrifice, in which case it is possible to judge the latter as exclusionary, since its only economic justification is the desire to reduce the level of competition; the fact that a dominant firm cannot know the costs of production borne by its competitors, therefore the obligation to respect a measure of cost sustained by rival firms would cause an excessive legal uncertainty.

In this context, there are two main rules for the assessment of the exclusionary effect produced by a retroactive rebate on actual or potential competitors: if the effective price associated to the contestable demand is below the Average Avoidable Cost (AAC) of the dominant firm, then the retroactive rebate is considered capable of foreclosing an equally or even more efficient competitor, thus it must be judged abusive; if the effective price is between the Average Avoidable Cost (AAC) and the Long Run Average Incremental Cost (LRAIC) of the dominant firm, then the retroactive rebate would not be normally capable of generating an anticompetitive foreclosure, since an equally or even more efficient competitor would be able to compete despite the presence of the dominant firm's retroactive rebate.

In the latter case, the Guidance Paper calls for the opening of a further investigation by the Commission, in order to verify if any other available element confirms or rejects the obstruction to the entry or the expansion by an as-efficient firm in the relevant market. Therefore, the enforcement guidance requires considering all the effective and realistic counterstrategies that are at disposal of competitors to compete with the dominant undertaking, such as, for instance, the power to use the non-contestable portion of demand of the own customers as a leverage to reduce the price linked to the contestable portion of demand (Guidance Paper, paragraph 44).

It should be noted that the use of cost-based measures needs the definition of a time frame for the evaluation of the conduct. Obviously, for a discount scheme, the relevant period over which it is applied represents the most appropriate temporal benchmark to realize the comparison between the level of effective price and the level of avoidable costs. Nevertheless, as the reference period increases, costs become more avoidable and incremental. Consequently, it is extremely important to be able to determine the exact reference period, which is critical to assess whether the effective price is above or below the relevant cost based measures and thus crucial to judge the potential foreclosure of actual or potential competitors¹⁵.

As a result, cost-based rules remain a helpful but imperfect tool to measure the exclusionary nature of the commercial practices at issue (even though the estimation itself of costs of production remains problematic). Therefore, a broader fact-based

¹⁵Office of Fair Trading (2005), *Selective Price Cuts and Fidelity Rebates*, Economic Discussion Paper, A report prepared for the Office of Fair Trading by RBB Economics, London, United Kingdom, p. 63.

analysis capable of estimating the competitive harm seems not only desirable, but also indispensable, as it will be examined in details in the next sections.

4 Critical Assessment of the As-Efficient Competitor Test

Although part of the criticisms addressed to the price-cost test designed by the European Commission in its Guidance Paper appears rather reasonable (in essence the complexity to estimate the effective price), the proposal frequently advanced in the academic debate by numerous commentators to abolish completely the model based on the concept of contestable demand and to adopt, along the lines of the US antitrust system, a standard predatory test¹⁶, applying the latter on the quantity of units that once reached triggers retroactively the rebate scheme, seems to be not justified from an economic perspective. Even though a standard predatory test would certainly be much more straightforward to implement, at the same time it would risk to be excessively simplified and to cause false-negative errors, judging lawful a conduct that instead is direct to foreclosure and eliminate a competitor (cf. Example 3)¹⁷.

Example 3 (Part I) - *Contestable Share Test and Standard Predatory Test*

The dominant firm sells to the customer a unit of product, whose average total cost is of 0.90€, at a list price of 1€. Furthermore, the customer's total demand is equal to 120 units and the dominant firm grants a retroactive rebate of 5% if the customer reaches a volume threshold of 100 units. At the same time, an as-efficient competitor, which may potentially attract a maximum of 40 (i.e. customer's contestable demand) of the 120 units available (i.e. customer's total demand) is willing to enter in the market. However, applying a standard predatory test on the threshold volume, the retroactive rebate proposed by the dominant firm would not be judged exclusionary, since the latter would be able to bear total costs of 90€ (total sales times average total cost: $100 \times 0.90\text{€}$) and to obtain total revenues of 95€ (total sales made at the list price, minus discount rate applied to total sales: $100 \times 1\text{€} - 100 \times 5\%$), for a positive level of profits of 5€. Thus, the retroactive rebate, not entailing a profit sacrifice, would be considered lawful.

¹⁶Sher, B. (2009), *Leveraging Non-Contestability: Exclusive Dealing and Rebates under the Commission's Article 82 Guidance*, Antitrust Chronicle, Vol. 2, Issue 1, Competition Policy International, Boston, United States, p. 8.

¹⁷Lang, J.T., Renda, A. (eds.) (2009), *Treatment of Exclusionary Abuses under Article 82 of the EC Treaty*, Centre for European Policy Studies, Brussels, Belgium, pp. 46-48.

As a matter of fact, a standard predatory test would risk to neglect the importance of the factor “scale of production”, not performing a correct As-Efficient Competitor analysis. In fact, a rival firm is unlikely to be able to remain competitive in the market relying only on the quantity of units corresponding to the difference between the customer’s total demand and the dominant undertaking’s threshold volume. Even if it aims to sell exclusively the incremental units above the threshold, being consequently constrained to match only the dominant firm’s discounted price but not to offer the much lower effective price that would recompense the customer for the loss of the discount proposed by the dominant firm, the rival firm would probably not survive, since it would be incapable to achieve an efficient scale of production. Therefore, it is plausible to assume that the competitor, in order to reach an optimal scale of operations, would be forced to supply a quantity of units higher than the incremental units above the threshold and thus it would be obliged to convince the customer to switch, renouncing to the dominant firm’s retroactive rebate.

Example 3 (Part II) - *Contestable Share Test and Standard Predatory Test*

Since the customer’s total demand is equal to 120 units and the threshold set by the dominant firm is equal to 100 units, if the rival firm competes just for the quantity of units above the threshold, i.e. 20 units, the customer can still continue to buy 100 units and to benefit from the dominant firm’s retroactive rebate. Thus, the price the rival firm must match is equal to 0.95€, i.e. the price discounted the customer pays to the dominant firm for the incremental units once the threshold has been crossed. However, the rival firm, in order to achieve its minimum efficient scale of production and to remain competitive in the market, could be forced to sell more than the incremental units above the threshold. Nevertheless, counting only on the contestable demand, which is equal to 40 of the 120 total units, the rival firm would be obliged to offer to the customer an effective price of 0.85€ (applying the Formula 2 above shown: $1 [1 - (5\% / 33\%)]$), being the contestable portion of demand equal to $40/120$), which is not sufficient to cover the average total cost of 0.90€. Likewise, the effective price of 0.85€ can be calculated as difference between the total amount the customer would pay if it satisfies its total demand from the dominant firm ($120 \times 0.95\text{€} = 114\text{€}$) and the total amount the customer would pay if it satisfies only its non contestable portion of demand from the dominant firm switching its contestable portion of demand to the rival firm ($120 - 40 \times 1\text{€} = 80\text{€}$), all divided by the contestable demand ($34/40 = 0.85\text{€}$). As a result, the rival firm would bear total costs of 36€ (total sales of the units of the contestable demand times average total cost: $40 \times 0.90\text{€}$) and would obtain total revenues of 34€ (total sales of the units of the contestable demand times effective price: $40 \times 0.85\text{€}$), for a final and negative level of profits of 2€. In fact, the rival firm would need to sell at least 60 units ($[1 - (5\% / 50\%)] = 0.90\text{€}$, being 50% ($60/120$) the market share the rival firm must supply to reach its minimum efficient scale of production), in order to offer a price equal to the average total cost and to not suffer a loss, despite the fact it faces potentially the same costs as the dominant firm (average total cost per unit of 0.90€ for both firms).

As the example shows, although the retroactive rebate granted by the dominant undertaking does not entail a profit sacrifice, the rival firm, given that it can rely only on the contestable portion of demand, is forced to offer an effective price below cost, which in the long-term would oblige the same firm to exit from the market. Therefore, notwithstanding the competitor is as-efficient as the dominant firm, the fact that the contestable demand is not large enough to permit to the rival firm to achieve the minimum efficient scale of production would make it unable to compete even for the portion of market still left open to competition. Thus, the application of a standard predatory test would be erroneous, since it is likely to judge lawful a retroactive rebate offered by a dominant undertaking, even though, as it has been demonstrated in the example, it is actually capable of foreclosing an equally efficient competitor. In theory, a standard predatory test could be applied only in industrial sectors with no or low economies of scales, which is in practice an improbable scenario when a dominant firm is present. In this regard, it is worth to remind that such an evaluation is neither required by the test promoted by the Commission, which is based on the cost structure of the dominant firm.

Nevertheless, at least in the critical cases where the effective price is between the AAC and the LRAIC, the antitrust assessment of a dominant firm's retroactive rebate, in order to be sound from an economic point of view, should always evaluate whether the portion of the market still left open to competition allows an as-efficient competitor to achieve its optimal scale of production. After all, it is reasonable to assume that a dominant firm is generally able to act distinguishing the monopolized portion of the customer's demand from its contestable share, at least for the largest customers. As a result, albeit the estimation of the contestable share as well as of the loss of the rebate are more difficult to determine than the measurement of the same costs of production, this does not exempt the EU institutions from the duty to bear the higher workload the new approach (with its possible adjustments) requires to reach a more precise result.

5 EU Case-Law: Tomra

In 2006, the European Commission imposed a fine of 24 millions euro on the multinational corporation Tomra for violation of the EU antitrust rules on abuse of dominant position (Art. 102 TFEU) by engaging in a combination of prohibited conducts capable to exclude competitors from the market of the so-called "reverse-vending machines", which are generally installed in outlets and supermarkets to facilitate the

collection of empty and used beverage containers for recycling purposes. The infringements, committed by Tomra and detected by the Commission after a complaint lodged by the German manufacturer Prokent, consisted in the implementation of a system of commercial contracts including practices classifiable as exclusivity agreements, individualized quantity commitments and individualized retroactive rebates, employed in the sale of the machines to large retail chain operators active in 5 national markets (i.e. Austria, Germany, Netherlands, Norway, Sweden), where the Norwegian group operated through its local subsidiaries¹⁸.

The Commission determined that, during the period of the infringement (1998-2002) and in the countries under examination, on average Tomra's market shares were approximately 80 percent and the practices in question foreclosed about 40 percent of the total demand. The investigations undertaken by the Commission eventually concluded that the unilateral conducts adopted by Tomra impeded or at least made more difficult the market entry of new competitors, although in some cases rival suppliers were completely eliminated through acquisitions or insolvencies. In 2006, Tomra filed an appeal to the General Court for annulment of the Commission Decision. In the claim, the company complained that the decision was based on elements which could not satisfactorily prove the exclusionary intent of the practices objected. The General Court substantially confirmed and upheld the evaluation carried out by the Commission¹⁹.

The particular interest generated by the *Tomra* case in the antitrust community is due to the fact that it represents the first proceeding where the European institutions deal with the new effects-based approach to loyalty discounts designed in the Discussion Paper (2005)²⁰ and embraced in the Guidance Paper (2009). However, in the light of a critical assessment of the decision issued by the Commission and the judgements rendered by the General Court and the Court of Justice²¹, it is possible to state that the test proposed to verify the presence of an exclusionary conduct has been only partially carried out.

¹⁸Commission Decision of 29 March 2006, *Prokent-Tomra*, Case COMP/E-1/38.113, C(2006)734.

¹⁹Judgment of the General Court of 9 September 2010, *Tomra Systems and Others v Commission*, Case T-155/06, Official Journal of the European Union, 2010/C 288/31, 23 October 2010.

²⁰European Commission (2005), *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, Brussels, Belgium.

²¹Judgment of the Court (Third Chamber) of 19 April 2012, *Tomra Systems and Others v Commission*, Case C-549/10, Official Journal of the European Union, 2012/C 165/6, 9 June 2012.

5.1 The Decision of the European Commission (2006)

In an article published in the Competition Policy Newsletter of the Directorate General for Competition (DG COMP)²², members of the case team working on the *Tomra* case offer the possibility to better comprehend and reconstruct the economic reasoning developed by the Commission (in fact, at paragraphs 364-390, the text of the decision describes only in a formal manner the theoretical model proposed by Tomra, whereas the article reports also a numerical example submitted by Tomra as response to the statement of objections, although in both cases the logic remains of course the same). The combined analysis of the two documents results therefore essential to evaluate the application made in this case of the new effects-based approach towards retroactive rebates adopted in the Guidance Paper. Thus, in the present section, the focus will be on the economic assessment introduced and realized by the Commission, while in the next section, the focus will be on the legal assessment confirmed and extended by the General Court.

5.1.1 The Economic Reasoning developed by Tomra

The economic report presented by Tomra assumes the following scenario. A dominant firm sells to the customer a unit of product at a list price of 1€. Furthermore, the customer's total demand is equal to 120 units and the dominant firm grants a retroactive rebate of 10% if the customer reaches a volume threshold of 100 units. Moreover, the economic report assumes the extreme situation where the suction effect produced by the retroactive rebate is maximum, that is in correspondence of the last unit before the threshold (i.e. an amount of units purchased by the customer equal to 99). Hence, if the customer increases the quantity of units purchased from 99 to 100 triggering the discount of 10%, the customer pays a negative price of 9€ for the 100th unit and the total revenues for the firm fall from 99€ to 90€. Therefore, counting only on the contestable demand, which is equal to 21 of the 120 total units, the rival firm would be obliged to offer to the customer an effective price of 0.43€ (applying the Formula 2 above shown: $1 [1 - (10\% / 17.5\%)]$), being the share of contestable demand equal to 21/120). Likewise, the effective price of 0.43€ can be calculated as the difference between the total amount the customer would pay if it satisfies its total demand from the dominant firm ($120 \times 0.90\text{€} = 108\text{€}$)

²²Maier-Rigaud, F.P., Vaigauskaite, D. (2006), *Prokent/Tomra, A Textbook Case? Abuse of Dominance under Perfect Information*, EC Competition Policy Newsletter, Issue 2, European Commission, Brussels, Belgium, pp. 23-24.

and the total amount the customer would pay if it satisfies only its non-contestable portion from the dominant firm switching the contestable portion to the rival firm ($120-21 \times 1\text{€} = 99\text{€}$), all divided by the contestable demand ($9/21 = 0.43\text{€}$). Thus, according to Tomra, even if calculated on the last unit, the effective price the rival firm should match would be feasible for any competitor, being sufficient to cover the average total cost of production (the report suggests that the average total cost of production borne by Tomra is lower than 0.43€).

Figure 3 - *The Economic Reasoning developed by Tomra*

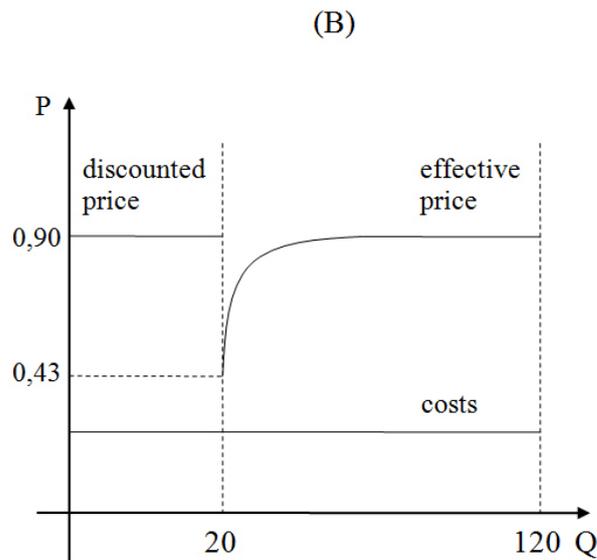
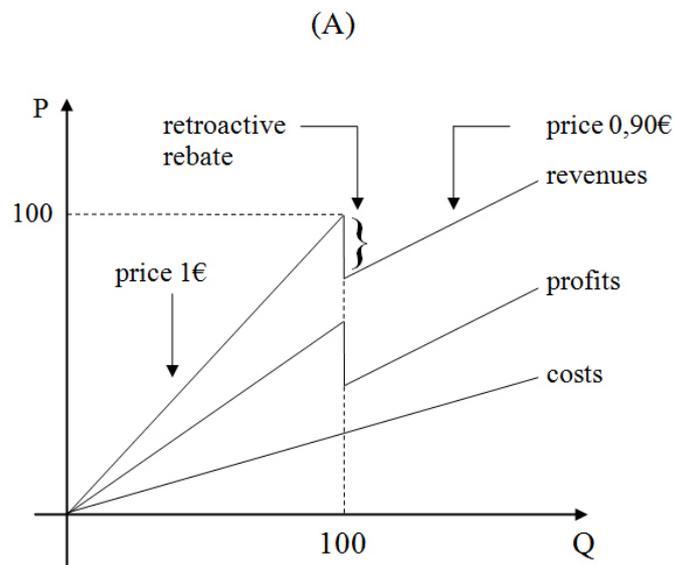


Figure 3(B) illustrates the effective price that the rival firm must offer to recompense the customer in case of loss of the discount proposed by the dominant undertaking. Furthermore, the graph shows two other extreme cases. On one side, if the rival firm competes just for the quantity of units above the threshold, i.e. 20 units, then the customer can still continue to buy 100 units and to benefit from the dominant firm's retroactive rebate. Thus, the price the rival firm has to match is equal to 0.90€, i.e. the price discounted the customer pays to the dominant firm for the incremental units once the threshold quantity has been reached. On the other side, if the rival firm is able to compete for the entire size of the customer's demand, i.e. 120 units, then the retroactive rebate granted by the dominant firm loses its loyalty effect, turning into a price cut. Again, the price the rival firm must match, in order to take away all customers from the dominant firm, is equal to 0.90€²³.

Between the two extreme cases, the rival firm is obliged to offer to the customer an effective price below 0.90€. In particular, the more units the rival firm sells, the higher is the price it can charge, being gradually in a better position to recoup over a larger number of units the retroactive rebate lost by the customer. On the contrary, in the worst scenario, that is where the rival firm has only an additional unit over which to spread the discount (i.e. 21 units sold by the rival firm and 99 units sold by the dominant firm), the rival firm must cut the price until the minimum level of €0.43, in order to leave the customer indifferent between its offer and the one proposed by the dominant undertaking.

In conclusion, the defence presented by Tomra is essentially based on the analysis of the average price the rival firm must offer to compete with the retroactive rebate granted by the dominant undertaking: the focus is on the average price per unit (theoretically, the rival firm could adopt a non-linear pricing, setting a certain price for the 20 units above the threshold and a different price starting from the 21st unit onward). However, the final aim of the economic reasoning developed by Tomra is to demonstrate that an as-efficient competitor would be able to compete profitably, covering the costs of production even in the worst case, that is when it sells just the sufficient quantity of units that prevents the customer from benefiting from the

²³RBB Economics (2007), *Tomra: Rolling Back Form-Based Analysis of Rebates?*, RBB Brief 21, available on the web-site www.rbbecon.com, pp. 1-2.

retroactive rebate and that obliges the rival firm to offer the lowest effective price possible in order to compensate the customer for the discount lost.

5.1.2 The Economic Reasoning developed by the European Commission

The Commission rejects the analysis proposed by Tomra, since the behaviour of the rival firm would not be profit maximizing (although, it is important to underline, it does not mean that it would not obtain a positive profit in case it matches the retroactive rebate granted by the dominant undertaking selling 21 units). In fact, for the rival firm would be more convenient and rational to forego the last unit and to sell exclusively the incremental units above the threshold (i.e. 20 instead of 21 units), being constrained to match only the dominant firm's discounted price (i.e. 0.90€) but not to offer the much lower effective price that would compensate the customer for the loss of the discount (i.e. 0.43€).

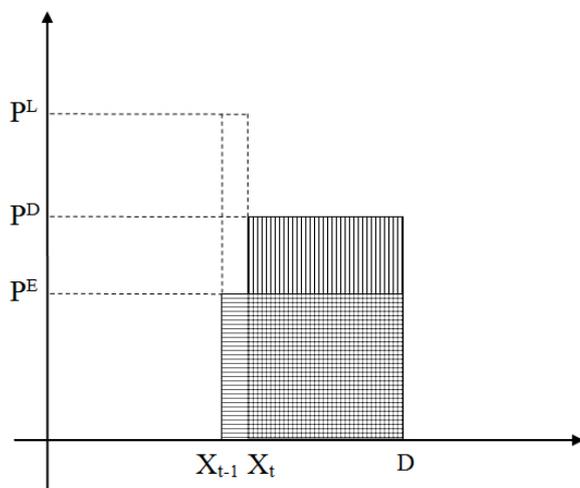
As a result, renouncing to offer the last unit, the rival firm would obtain total revenues of 18€ (total sales of the units above the threshold times discounted price: $20 \times 0.90\text{€}$), instead of 9€ (total sales of the units above plus last unit before the threshold, times effective price: $21 \times 0.43\text{€}$). Furthermore, not only the rival firm would lose revenues selling the marginal unit at a negative price, but it would dispense the dominant firm from granting the rebate, increasing the revenue gap between the two competitors)²⁴.

Figure 4 illustrates the higher level of total revenues the rival firm would obtain in case it renounces to the last and marginal unit and sells only the units above the threshold at the discounted price (i.e. area shaded by vertical lines), in comparison with the lower level of total revenues the rival firm would obtain in case it sells also the last and marginal unit at the effective price, matching the retroactive rebate granted by the dominant firm (i.e. area shaded by horizontal lines)²⁵.

²⁴The Commission explains in the following terms why compensating and matching the retroactive rebate, bearing a loss at the margin, does not make economic sense, being against the individual rationality: “*Selling all $D-(T-1)$ units implies making profits of $(D-T)p^*$ minus the negative price of the marginal unit before the threshold. This clearly violates individual rationality. [...] It makes no sense to behave like this because by taking the unnecessary loss of selling the marginal unit, the incumbent avoids paying out the rebate. In fact, stepping in with a negative price saves the incumbent from paying out the rebate*”, (paragraphs 388-389 of the Commission Decision).

²⁵*Supra* note 18, p. 150.

Figure 4 - *The Economic Reasoning developed by the European Commission*



p^L = list price
 p^D = discounted price
 p^E = effective price
 D = total demand
 X_t = total units necessary to reach the threshold

5.1.3 Critical Assessment

The prohibition decision issued by the Commission in the *Torma* case is mainly based on the observation that the retroactive rebate granted by the dominant undertaking would be potentially able to force the rival firm to adopt an irrational behaviour, obliging it to bear an unnecessary loss and to renounce to a higher level of profits. However, the approach adopted by the Commission, since it appears to focus exclusively on the last unit prior to the threshold and to consider a negative price for the marginal unit equal to an exclusionary foreclosure, risks to establish a per se prohibition for any type of retroactive rebate.

As it has been demonstrated above in the economic analysis of loyalty discounts and rebates, the incremental price, which a customer has indirectly to pay for the marginal units necessary to reach the threshold, is most of the times negative. Given the non linear and rollback nature of the rebate, the total expenditure borne by the customer faces a discontinuity in correspondence of the threshold. As a result, an assessment that focuses solely on the units in proximity of such discontinuity seems

incomplete because it ends up stating that the retroactive rebate is exclusionary just because it entails a negative price for the units close to the purchasing target. In fact, the same DG Competition Discussion Paper had already suggested in 2005, even before the publication of the final Guidance Paper in 2009, that: “*The suction effect in principle is strongest on the last purchased unit of the product before the threshold is exceeded. However, what is relevant for an assessment of the loyalty enhancing effect is not competition to provide an individual unit, but the foreclosing effect of the rebate system on commercially viable amounts supplied by (potential) competitors of the dominant supplier*” (paragraph 154 of the Discussion Paper, substantially reproduced in the paragraph 40 of the Guidance Paper).

Furthermore, as it has been explained above in the critical assessment of the As-Efficient Competitor test, a retroactive rebate causes an anti-competitive foreclosure only if the dominant firm faces an inelastic portion of the demand, which in turn prevents the rival firm from reaching its minimum efficient scale of production (as shown, the contestable portion of the customer’s demand would oblige the rival firm to offer a below cost price). It is therefore extremely important in detecting the anti-competitive effect of a retroactive rebate to demonstrate the presence of an assured base of sales, which however must not be assumed to exist just because there is a dominant firm in the relevant market.

As a result, regarding the theoretical example advanced by Tomra and rejected by the Commission, two critical considerations appear necessary. Firstly, assuming for the purpose of the present critical assessment that the average total cost per unit is equal to 0.30€, only if the assured base of sales is at least equal to 86 units, the retroactive rebate would oblige the rival firm to offer a below cost price (applying the Formula 2 above shown: $1 [1 - (10\% / 14\%)] = 0.29\text{€}$, being the share of contestable demand equal to 14/100). It is worthy to note that in our analysis, as a conservative assumption, we count only the contestable units below the threshold (i.e. 14 units) and not, as instead Tomra assumes, also the units above the threshold (i.e. 20 units, being the customer’s total demand equal to 120 units and the threshold set by the dominant firm equal to 100 units, for a total of 34 contestable units, as Tomra would suppose, over which the rival firm could recoup the retroactive rebate). Considering the units above the threshold as not foreclosed, one could argue that it is not correct to count these units before as not closed to competition and then to use the same units to deny the existence of an anti-competitive foreclosure, as Tomra seems to do with its “average” logic.

Secondly, assuming a more realistic scenario where the inelastic portion of the customer's demand is at a lower level than the one supposed in the extreme scenario proposed by Tomra and analysed by the Commission, such that an as-efficient competitor could compete at least for 32 units, the result would be a higher level of profits for the rival firm in case it matches the retroactive rebated granted by the dominant firm compensating the customer for the discount lost, than in case it sells only the units above the threshold. In fact, in the first case, the rival firm would obtain total profits of 12.4€ (total units below the threshold times effective price, $32 \times 0.69\text{€}$, all minus the relative costs, $32 \times 0.30\text{€}$; applying the Formula 2 above shown, the effective price is equal to: $1 [1 - (10\% / 32\%)] = 0.69\text{€}$, being the share of contestable demand equal to $32/100$), instead of 12€ (total units above the threshold times discounted price, $20 \times 0.90\text{€}$, all minus the relative costs, $20 \times 0.30\text{€}$).

Also here, it is worthy to note that, given the conservative assumption above-mentioned, we count only the contestable units below the threshold (i.e. both the dominant and rival firm would remain totally free to compete for the units above the threshold, over which however we do not spread the loyalty discount for the calculation of the effective price). Thus, in a more realistic scenario, the rival firm, through the margins gained from the expansion of production on the incremental units, would be able to more than compensate the discount lost by the customer, earning a level of profits higher than if competing just for the 20 units above the threshold.

Even in the extreme scenario where the dominant firm sets the threshold level perfectly equal to the customer's demand, the rival firm could profitably match the retroactive rebate granted by the dominant undertaking. In fact, if the average total cost is lower than 0.43€, the rival firm, selling 21 units, would obtain a positive profit, despite the fact that the implicit price of the first units would be negative. The critical assessment here developed demonstrates therefore how, in the theoretical example advanced by Tomra and rejected by the Commission, the focus on the last marginal unit amounts to a partial analysis, which does not permit to express a complete judgement about the possibility for the rival firm to contest the retroactive rebate granted by the dominant firm (as it has been show, in fact, the loss of profit in correspondence of the cross from the 20th to the 21st unit could be more than compensated in a more realistic scenario).

In conclusion, the main problem in the economic reasoning developed to reject the Tomra's defence is the generalisation and overestimation of an evident and nar-

row result, to state that the rebate system granted by the dominant undertaking is capable of foreclosing actual or potential competitors. However, if the price a rival firm has to contest is calculated only on very limited portion of contestable demand, the risk is to protect inefficient firms from a healthy and lawful price competition.

5.2 The Judgement of the General Court (2010)

In the *Tomra* case, the General Court, losing the opportunity to launch the envisaged application of an economic analysis to unilateral conducts by dominant firms, confirmed the established case-law, considering unnecessary the evaluation of the actual effects produced on the relevant markets by the alleged abuses. Entirely consistently with the position adopted by the Commission in relation to the key points of the case in question, the General Court essentially based its judgment on the mere capability of the strategies undertaken by the Norwegian group of foreclosing its main competitors. In the light of these premises, the General Court itself, in the course of its ruling, disregards any in-depth examination of the economic assessment carried out by the Commission to ascertain the unlawful nature of the practices objected to Tomra, dismissing the appeal made by the company, mainly founded on economic arguments.

5.2.1 Intention to Foreclosure vs Intention to Harm

The judgement rendered by the General Court starts by making the following observations: a rebate scheme which has a foreclosure effect on the relevant market must be considered abusive if it is applied by a dominant firm (paragraph 211); in order to evaluate whether a rebate scheme is to be deemed abusive, it is necessary to verify if, “*following an assessment of all the circumstances*”, it is “*capable*” or “*intended*” to restrict the level of competition on the concerned market (paragraph 215). Therefore, although the General Court, like the Commission, seems to recognize a rule of reason rather than a per se rule given the requisite to evaluate “*the circumstances*” and “*the context*” in which the practice takes place, its ruling actually does not explain the elements that an examination of the “*the circumstances*” and “*the context*” of the case is to incorporate. The General Court, approving with no *caveats* the approach endorsed in the Commission Decision, does not provide any further and specific guidance in this regard. In addition, this clarification appears to be in contrast to what rightly declared in relation to the intention to harm. The General Court states that the Commission has not based its decision against Tomra

neither on its internal documentation, nor on its premeditated actions, being merely facts useful to contextualize the alleged practices, but without any substantial impact on the finding of abuse (paragraphs respectively 39 and 40).

5.2.2 As-Efficient Competitor Test

In its appeal, Tomra affirms that the Commission, in order to establish the existence of an anti competitive foreclosure, has erroneously focused on the “*content*” of the agreements rather than on the “*context*” of the markets (paragraph 200). Consequently, the applicant advances the economic argument according to which the coverage of its agreements was not sufficiently large to be capable of having an exclusionary effect on an as-efficient competitor, demonstrating that its practices affected only a limited part of the market, whereas the residual part continued to be completely contestable (on average around 61% for the five national markets). Furthermore, the company emphasizes the fact that the Commission, contrary to what advocated in the Discussion Paper, has not verified whether the market situation was such as to allow one or more competitors to compete profitably, neither estimating the contestable portion of the customer’s demand and the minimum viable scale, nor performing a quantitative price-cost test to prove empirically the capability of the alleged practices of foreclosing competitors and harming consumers. On the contrary, it has merely calculated the incremental price a rival firm would need to offer to match the retroactive rebate granted by the dominant firm on the last units. In particular, in the opinion of Tomra, the Commission Decision has not shown the capability of retroactive rebates of forcing the main rivals to set a below-cost price (paragraphs 247-249).

Even though the claim filed by Tomra was based on an solid background in line with the Guidance Paper, the General Court completely rejected the plea, asserting that the foreclosure of a substantial part of the relevant market cannot be defended by displaying that the size of the contestable market is large enough to permit to a limited number of rival firms to compete. In this regard, the three principal motivations provided by the General Court are: firstly, “*the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market*” (paragraph 241); secondly, “*the competitors should be able to compete on the merits for the entire market and not just for a part of it*”, as well as “*it is not the role of the dominant undertaking to dictate how many viable competitors will be allowed to compete for the remaining contestable portion of demand*” (paragraph 241); thirdly, “*it is difficult to concur with the ap-*

plicants' argument that a competitor may offset the lower prices that it is obliged to charge a customer for units below the threshold by selling additional units to the same customer (above the threshold). In fact, that customer's remaining demand is at best limited, so the competitor's average price will remain structurally unattractive" (paragraph 270). These statements seem to resemble what assumed by the Commission in its decision, that is, given the presence of a retroactive rebate, if the customer's demand is higher than the threshold level then all units below the latter are foreclosed, or if the if the customer's demand is lower than the threshold level then the entire customer's demand is foreclosed (paragraphs 365-377).

However, it is important to notice that the three lines of reasoning above-mentioned appear to be affected by many flaws. In the first statement, the General Court does not focus on the market foreclosure but on the customer foreclosure, therefore it seems to consider that also a customer foreclosure itself is an abusive conduct (such a reasoning, for instance, would be particularly risky in case of exclusive dealings)²⁶. In the second statement, it seems to assume that any retroactive rebate entails an abusive foreclosure, when instead it should be presumed only in case it is granted on the entire demand. Such a reasoning, in extremis, would lead also a 1 percent coverage under the scrutiny of the Art. 102 TFEU . Despite this, the fact that a loyalty scheme generates a foreclosure effect resides in its nature, but it certainly does not mean that it is anti-competitive and thus able to influence the entry or exit decision of a rival firm. In the third statement, which appears as the most problematic, it seems to suppose that, given the existence of a retroactive rebate and the fact that the price set by the dominant firm for the incremental units before the threshold is likely to be very low, the compensating price the rival firm must offer would remain "*structurally unattractive*", even in the case the rival firm is able to use the units above the threshold as leverage to counterbalance the lower price to be offered for the units below the threshold²⁷.

As it has been shown in the previous sections, the Guidance Paper expressly states that to correctly evaluate the exclusionary nature of a retroactive rebate is not enough to focus exclusively on the marginal incremental unit before the thresh-

²⁶Ryan, A. (2011), *Case T-155/06 Tomra v. Commission. What exactly are the Rules?, in Rebates Law Revisited? The General Court's Ruling in Tomra v. Commission*, Global Competition Law Centre, Brussels, Belgium, 21 January 2011, p. 7.

²⁷Federico, G. (2011), *Tomra v Commission of the European Communities: Reversing Progress on Rebates?*, European Competition Law Review, Vol. 32, No. 3, Sweet & Maxwell, London, United Kingdom, p. 140.

old (and in more general, on the last units, as the General Court seems to do), but instead it is necessary to realize a complete examination of the rebate structure (Guidance Paper, paragraph 40: “*what is in the Commission’s view relevant for an assessment of the loyalty enhancing effect of a rebate is not simply the effect on competition to provide the last individual unit but the foreclosing effect of the rebate system*”). For this purpose, it is thus required to calculate the effective price a rival firm would need to set to match the dominant firm’s rebate system (Guidance Paper, paragraph 41: “*the Commission will estimate what price a competitor would have to offer in order to compensate the customer for the loss of the conditional rebate if the latter would switch part of its demand (the relevant range) away from the dominant undertaking*”). Only doing this, it is possible to verify whether an equally efficient rival would be able to compete profitably, relying on the contestable portion of the customer’s demand (Guidance Paper, paragraph 42: “*it will generally be relevant to assess in the specific market context how much of a customer’s purchase requirements can realistically be switched to a competitor*”).

As it has been demonstrated above in the economic analysis of loyalty discounts and rebates, even if the average price a rival firm must offer to the customer is lower than the discounted price proposed by the dominant firm, it does not absolutely mean that for the former would not be profitable, using the contestable portion of the customer’s demand at its disposal, even at the cost of bearing a negative incremental price for the units around the threshold. The presumption on which the third statement is based appears therefore to be not justified from an economic standpoint. Only after having applied a price-cost test such as the one designed by the Commission and performed in the *Intel* case (section 4.2.3 of the Commission Decision, where it is shown that the contestable share at disposal of the main rival ADM was not sufficient to contest the discount scheme offered by Intel²⁸, a similar conclusion could be reached, showing that the effective price a rival firm would need to match is below cost. As a result, being in sharp contrast to the new approach recommended in the Guidance Paper, this passage can be indubitably considered as the least satisfactory part of the analysis made by the two EU institutions.

Moreover, in this respect, the General Court makes a further questionable assertion in the section of the judgement where it seems to implicitly affirm that one of the essential aim of Art. 102 TFEU is the protection of competitors, in parallel to

²⁸Commission Decision of 13 May 2009, *Intel*, Case COMP/C-3/37.990, D(2009) 3726.

and separately from the protection of consumers (paragraph 206: “*the prohibition laid down in that provision is - also - justified by the concern not to cause harm to consumers*”, emphasis added). Consequently, according to the General Court, both the protection of competitors or the protection of customers would be a sufficient reason to find an abuse, when instead the Commission in its Guidance Paper affirms that it is necessary to detect simultaneously an anti-competitive foreclosure leading to consumer harm. In fact, what matters is “*protecting an effective competitive process and not simply protecting competitors*”, as well as “*to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare*” (Guidance Paper, respectively paragraphs 5 and 19).

5.2.3 Form-Based Approach vs Effects-Based Approach

As a matter of fact, in the Commission Decision, it must be recognized that an economic analysis of the actual effects of the alleged practices is not totally absent. However, in the present assessment, for form based analysis we do not simply mean that a certain conduct is presumed abusive if it presents predetermined and specific characteristics, but rather the absence of a deep examination of the conduct in terms of consumer and competition harm. In fact, the analysis carried out by the Commission appears limited to: the comparison between the tied markets shares and the market shares held by the Norwegian group (on the base of the equation: the higher the former, the more stable the latter, the less strong the competitors); the fact that the prices set by Tomra, despite the rebates granted, did not fall but rose; the observation of the Prokent’s insolvency. In its petition, Tomra contests these findings, showing on the contrary that: the diagrams illustrating the suction effect contained mathematical errors; most of the results provided by the Commission were contradicted by empirical evidence; the prices did not increase and were not negative, even considering only the last unit before the threshold; the relationship between the tied markets shares and the market shares held by Tomra was statistically inconsistent; the German supplier left the market only after the termination of the alleged abuses.

Nonetheless, it is the same General Court to eventually clarify the matter, explicitly admitting that the Commission has not based its finding of abuse on the actual impact of the alleged practices, but it has “*merely complemented*” it with a “*brief examination*” of the effects produced by the contested practices on the national markets (paragraph 288, which is in open contrast to the paragraph 219, where the General Court states that “*the Commission, even though the case-law does not*

require it, also analysed, in the light of market conditions, the actual effects of the applicants' practices", analysis that as mentioned appears substantially limited in the text of the decision). Recalling the traditional case-law, the General Court reminds once again that, in order to establish an infringement, it is not compulsory to prove that the abusive conduct causes a competitive impact on the relevant market, but it is sufficient to show that it "*tends to restrict competition*" or "*is capable of having that effect*" (paragraphs 288-289)²⁹.

In the opinion of the General Court, considered that the analysis realized by the Commission "*merely complemented its finding of infringement*", some errors (although actually most of the graphs contained fundamental mistakes) in the same analysis cannot be used to invalidate its decision (paragraphs 268 and 290). The General Court seems to mean that even a wrong analysis of the actual effects could not be used to confute the conclusions reached by the Commission in regard to the foreclosure nature of Tomra's retroactive rebates. In fact it affirms that "*the fact that the retroactive rebate schemes oblige competitors to ask negative prices from the applicants' customers benefiting from rebates cannot be regarded as one of the fundamental bases of the contested decision in showing that retroactive rebate schemes are capable of having anti-competitive effects*" (paragraph 258), statement that summarizes and underlines how the evaluation of the two EU institutions is particularly distant from the price-cost test proposed in the Guidance Paper. Once again, the General Court appears to attach more importance to the loyalty effect of the practice itself rather than to its actual capability of excluding competitors from the market, as demonstrated by the fact that the General Court rejects entirely Tomra's proof regarding the absence of actual foreclosure and instead focuses only on the potential nature of the alleged conducts to foreclose competition. Nonetheless, such a reasoning seems to be particularly worrying, since a dominant firm would be in any case incapable to prove the lack of actual effects and thus unable to contrast a finding of abuse.

²⁹The Court in the paragraph 288 of the judgement delivered for the *Tomra* case quotes the rulings rendered for the *British Airways* and *Michelin II* cases, where itself had already stated that: "*The effect referred to in the case-law (...) does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article [102 TFEU], it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect*" (paragraph 239 of the *Michelin II* judgement which is conceptually equal to the paragraph 293 of the *British Airways* ruling).

5.2.4 Pro-Competitive vs Anti-Competitive Practices (Theory of Consumer Harm)

As a result, it appears clear that the General Court does not fully address the complaint presented by Tomra, according to which a correct and proper foreclosure analysis should be necessarily based on a detailed economic-oriented examination, in line with the test proposed by the same Commission in the Guidance Paper. The General Court affirms only in general terms that, foreclosing on average approximately 40 percent of the total demand and thus involving a substantial part of the market, the practices at stake were capable of reducing the number of rivals operating in the market. Therefore, an assessment of the circumstances and the context of the case, such as the one carried out by the Commission, is enough to determine whether the practices of a dominant undertaking are capable of excluding competitors (paragraphs 242-243). In a subsequent paragraph, the General Court seems to consider even possible to presume (despite it does not mean to ascertain) the exclusionary potential of a retroactive rebate simply taking into account a set of generic and qualitative elements typical of a rebate structure, such as its individualised and retroactive nature, as well as its application to a large portion of customers (paragraphs 260-261).

However, in the passages above-mentioned, the main concern derives from the exclusive focus on the ability of the practices of decreasing the number of competitors, which actually should be deemed only as a necessary but not sufficient condition to judge the alleged conducts as anti-competitive. In fact, the risk is to make an erroneous distinction between pro-competitive and anti-competitive practices, as well as to safeguard a certain and existing market structure only because any variation is presumed to cause consumer harm, while instead it could be the result of a price competition among firms which would increase the consumer welfare.

In the light of the critical assessment developed in the previous section (where it has been demonstrated that a standard predatory test would not be suitable in case of loyalty discounts), it is necessary to recognize that the General Court in its judgement correctly asserts that a retroactive rebate granted by a dominant firm must not entail a profit sacrifice for it to be considered anti-competitive. The justification provided is that a loyalty discount can be spread over a large amount of units such as to allow the dominant firm to set an average price above cost (paragraph 267), statement which in turn seems to remind what declared by the Commission in its Guidance Paper (paragraph 39: “*a conditional rebate granted by a dominant*

undertaking may enable it to use the non-contestable portion of demand of each customer [...] as leverage to decrease the price to be paid for the contestable portion of demand”, reasoning adopted as well in the *Intel* decision at the paragraphs 1005 and 1612). Thus, according to the General Court, Tomra on one side has foreclosed part of its main competitors through the implicit setting of a very low incremental price, and on the other side has imposed its retroactive rebates on customers, depriving them of the possibility to benefit from the offers proposed by other competitors.

In this regard, the main criticism to the leverage effect theory has been the following one. It is certainly true that if a dominant firm grants a retroactive rebate spread on both the non-contestable and contestable portion of the customer’s demand, then the rival firm must match it only using the contestable share. Anyway, this would not mean that the dominant firm has an absolute advantage on the contestable share, for which both firms set the same effective price and that the resulting foreclosure does not entail a profit sacrifice (reason why, in order to condemn the alleged conduct, it should be proved the possibility of a future recoupment)³⁰.

Nevertheless, as above shown, the main problem is not so much the leverage effect, but the impossibility for an as-efficient rival to reach its minimum efficient scale of production given the presence of a monopolized portion of demand, which can entail an anti-competitive foreclosure even though the dominant firm does not bear a profit sacrifice. Moreover, the leverage effect itself is not enough to have the practices in question to be considered not only anti-competitive, but also leading to consumer harm. Indeed, in particular in a case such as *Tomra* where, as often underlined, the contestable portion of the demand was rather substantial, the presence of other rivals firm could be likely to impede the dominant firm from engaging in exclusionary conducts able to generate a consumer harm. Hence, in such a scenario, an incomplete and partial analysis could easily result in a false-negative error, judging unlawful a conduct that instead is beneficial rather than harmful to consumers.

Apart from this, although the two EU institutions seem rightly to not embrace a predatory theory of harm, on the other hand neither the Commission nor the General Court have explicitly adopted a specific theory of harm to evaluate the alleged

³⁰Federico, G., Regibeau, P. (2010), *Exclusionary Discounts under Article 102: In Search of the Right Theory of Harm*, in *Competition with Non-Linear Pricing and Loyalty Discounts*, Centre for Law and Economics, Alma Mater Studiorum - Università di Bologna, Bologna, Italy, 6 November 2010, p. 14.

conducts. The mere fact that around 60% of the total demand was fully contestable would have required not only to carry out a complete effects-based analysis of the practices contested, but also an empirical assessment of the harm suffered by consumers, taking into account of course the approximations that such a evaluation would entail (among the lines of what realized in the *Intel* case, where, beyond the as-efficient competitor test, it has been provided abundant qualitative and quantitative evidence of consumer harm - cf. section 4.2.6 of the Commission Decision).

5.2.5 Serious Infringement vs Very Serious Infringement

Finally, even though the amount of the fine is rather small in comparison with those imposed in other cases, if its value is measured in proportion of the turnover of the firm, it constitutes the highest sanction ever levied for an abuse of dominant position in the EU case-law. It appears particularly significant therefore the fact that for a company which results only 57th in terms of size in its country, as well as for a such narrow industrial sector, the Commission has decided to impose against a “*serious infringement*” a fine equal to 8 percent of the Tomra’s turnover, while in earlier cases it has decided to impose against a “*very serious infringement*” a fine equal, for instance, only to 1,5 percent of the Microsoft’s turnover (paragraph 305).

Though the General Court reminds that fines imposed in other cases must not be considered source of comparison having a binding effect (paragraph 314), one could argue that, after the several criticisms received for the formalistic approach utilized in the past for fundamental cases in the field of loyalty discounts and rebates, through the *Tomra* case, the main intention of the Commission was to create a “*textbook case*” (as it has been defined by the same officers working in the case). The aim has been to test what was previously proposed in the academic community, subsequently designed in the Discussion Paper and ultimately adopted in the Guidance Paper, although, as the present section has shown, its application has not been fully satisfied, being particularly distant from an analytical and quantitative approach.

5.3 The Judgment of the Court of the European Union (2012)

In 2012 the Court of Justice of the European Union confirmed the administrative sanction towards Tomra, rejecting entirely the appeal filed by the Norwegian multi-

national corporation against the judgment rendered by the General Court in 2010, which in turn had validated the decision provided by the Commission in 2006. Therefore, through the judgment of the Court in the third and last instance, a proceeding started a decade earlier finally comes to an end.

5.3.1 Objective Intent vs Subjective Intent

In its appeal, Tomra contests the fact that the Commission did not demonstrate the anticompetitive intent of the practices objected, as well as it did not take into account the evidence offered by the Scandinavian group related to its intent on competing on the merits. The Court then reminds that the notion of abuse of dominant position must be considered as an objective concept. In fact, the Commission did not base its decision exclusively on the evidence connected to the Tomra's subjective intent. Nevertheless, "*it is clearly legitimate for the Commission to refer to subjective factors, namely the motives underlying the business strategy in question*" (paragraph 19). Thus, the presence of an anticompetitive intent represents only one factor among several to be examined to ascertain the existence of an abuse, however it must not be considered binding. Therefore, according to the Court, the Commission was not obliged to attest the anticompetitive intent, rather to prove, considering all the relevant circumstances, that Tomra's conducts tended or were able to foreclose competitors. In other terms, according to the Court, if the conduct of a dominant firm is able to restrict competition, it is not necessary to analyze the concrete effects of such conduct. Furthermore, the Court affirms that the intent on competing on the merits, even in the case it is established, in any case cannot prove the absence of an abuse.

5.3.2 Foreclosure Threshold

In addition, the Norwegian group declares that the General Court did not provide sufficient evidence in order to demonstrate that the contractual agreements proposed by Tomra were able to cover a portion of the total demand such to restrict competition, as well as it did not explain what it meant for substantial part of the market. In fact, in the opinion of Tomra, the Commission should have applied an analytic test following objective benchmarks. The Court, recalling the traditional notion of dominant position constantly recurring in the European competition law, then declares, along the lines of what already stated by the General Court, that the foreclosure of a substantial part of the market by a dominant firm cannot be justified

showing that the contestable portion is enough to leave space to a limited number of competitors. Customers must always have the opportunity to benefit from whatever degree of competition is possible on the market, as well as competitors must always be in the conditions to compete for the entire market and not only for a part of it. Moreover, the Court rejects the possibility to apply a minimum viable scale test, since the definition of a foreclosure threshold above which the practices objected become illegal is deemed not necessary for the purposes of applying Art. 102 TFEU. As mentioned for the judgement rendered by the General Court, in our opinion, such statements appear not justified from an economic point of view. In fact, the risk is that any exclusive agreement, even if applied to a *de minimis* portion of the relevant market, is judged illegal. The Court seems aware of the weakness of its statements, such that it tries to head off plausible criticisms declaring that it is possible to determine the portion of the market above which the conducts of a dominant firm become illegal only after having implemented, following a case-by-case approach, an analysis of the circumstances similar to that one realized by the Commission for the case at issue.

5.3.3 Form-based Analysis vs Effects-based Analysis

Lastly, Tomra deems that the General Court committed a mistake not asking to the Commission to demonstrate that the retroactive rebates offered by the Norwegian group generated below cost sells. The Court then affirms that a fidelity scheme proposed by a dominant firm must be judged illegal if it prevents customers from switching supplier. Furthermore, the presence of negative prices must be not considered an essential requirement to judge abusive a loyalty discount. Hence, the Court approves the position taken by the General Court according to which, thanks to its suction effect, a fidelity discount itself is able to foreclose rivals from the contestable portion of the demand (for this reason, it is not necessary to apply a price-cost test). It was therefore sufficient for the Commission to demonstrate that the retroactive rebates offered by Tomra, which covered almost the total demand of the customers, together with their retroactive nature, provided strong incentives to the customers to satisfy the purchasing expenditure almost totally from Tomra (*“it is necessary to consider all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether, in providing an advantage not based on any economic service justifying it, the rebates tend to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, or to strengthen the dominant position by distorting competition”*, paragraph 71).

In the opinion of the Court, in correspondence of a similar fidelity effect, it was not necessary to demonstrate that the price set by Tomra were or not lower than the long run average incremental cost, as well as it was not necessary to realize an analysis of the real effects of the conducts objected, since, for the purposes of applying Art. 102 TFEU, it is enough to demonstrate that the conducts alleged are potentially able to restrict competition. Given that the judgment rendered by the Court presents again almost entirely the motivations advanced by the General Court, we judge such statements not justified from an economic standpoint for the reasons explained in the previous section.

5.4 Conclusions and Perspectives

The evaluation of Tomra's retroactive rebates carried out by the EU institutions, despite the fact that it is not based on a per se prohibition but tries to implement a sound economic methodology of analysis, still resembles to some extent the formalistic-legal approach that has characterized in the past decades the EU case-law, constantly leading to an artificial taxonomy and to different interpretations of commercial practices with the same market effects. On the basis of this case-law, the only form of rebate judged as not entailing anti-competitive effects has been that one having an incremental application to standardised volumes of units, even though it was necessary to demonstrate the presence of cost savings or other efficiencies in the distribution phase³¹.

In this context, the enforcement guidance offered by the Commission has certainly prospected a decisive and useful step towards a more solid economic background in the assessment of exclusionary practices. However, in the *Tomra* case, both the decision provided by the Commission and the subsequent judgements by the General Court and the Court highlight how the EU institutions are still not fully ready to leave behind the established case-law and to implement the policy reform of the enforcement of Art. 102 TFEU, probably frightened by the consistent workload that the new approach requires, as well as by the risk of more costly, lengthy and uncertain administrative proceedings.

³¹De La Mano, M. (2011), *Competitive Effects of Rebates: Seeking Economic and Legal Consistency*, in *Rebates Law Revisited? The General Court's Ruling in Tomra v. Commission*, Global Competition Law Centre, Brussels, Belgium, 21 January 2011, p. 5.

Nevertheless, all these reasons cannot prevent the Commission from performing a concrete estimation of the actual effects and consumer harm that an abusive conduct generates in a relevant market. Yet, it must be admitted that the economic reasoning at the base of the *Torma* case has probably been developed prior to the publication of both the discussion and guidance papers, and thus at a time where the as-efficient competitor test was only under discussion. Moreover, from a conservative perspective, one could argue that even today the price-cost test is suggested only as a possible, but not compulsory, tool.

Indeed, running cases without implementing an as-efficient competitor analysis would still be compatible not only with the recent EU case-law, but also with Commission general policies, since the Guidance Paper is a support document for internal priority setting purposes and is not intended to represent a statement of law. Nonetheless, such a line of reasoning would risk to compromise the establishment of an effects-based assessment, which, beyond any doubt, appears more and more necessary in the treatment of exclusionary abuses under the EU competition law³².

What seems to emerge is an institutional dyscrasia, typical of the enforcement of the EU rules. The Commission declares that it will carry out its analyses in a certain manner, described in a soft-law document (which explicitly states that it is not binding for the EU Courts) that moves away from the existing case-law (which is not *de jure* but only *de facto* binding). As a result, firms, even though they will comply with the new rules, will be condemned in any case. Therefore, the EU institutions, if not an opponent of the antitrust reforms, appear as laggards that will start to apply the new rules, finally renouncing to the old jurisprudence, only in a remote future.

It is absolutely true that evaluating empirically the contestable portion of a customer's demand, and more generally, the potential anti-competitive effects of an unilateral conduct is often a particularly complex task (as admitted by the Commission; Guidance Paper, paragraph 41: "*The Commission will take into account the margin of error that may be caused by the uncertainties inherent in this kind of analysis*"). However, an economic approach, even though not flawless, appears

³²Report by the Economic Advisory Group for Competition Policy (EAGCP) (2005), *An economic approach to Article 82*, available on the web-site www.ec.europa.eu/competition.

certainly more useful to distinguish between competitive and exclusionary conducts by dominant firms than a formalistic approach. In this sense, an as-efficient competitor test can definitely represent a helpful safe harbour, which should always be considered in any assessment involving loyalty schemes (Guidance Paper, paragraph 27: “If (...) the data suggest that the price charged by the dominant undertaking has the potential to foreclose equally efficient competitors, then the Commission will integrate this in the general assessment of anti-competitive foreclosure (...), taking into account other relevant quantitative and/or qualitative evidence”).

However, it could be argued that the principles set in the guidelines were already known by the stakeholders due to the public consultations. Furthermore, a timeline dividing pre and post 2009 seems to be arbitrary given that: firstly, the EU Courts have continuously stated that the concept of abuse must be considered objective; secondly, it appears extremely difficult to prove the objective nature of an abuse without implementing a scientific analysis of the effects produced by the conducts objected, such as the as-efficient competitor test (whose application would have been indispensable in a case such as *Tomra*, where both the General Court and the Court have deemed not necessary to evaluate the intent on competing on the merits by the Norwegian group).

In any case, the conclusions reached for the *Tomra* case are in contrast with the economic criterion recently adopted by the Court and the General Court themselves for some margin squeeze and predatory pricing cases³³ (in particular, in contrast with what established in the judgment rendered for the *Post Danmark* case, where the Court has asked to a Danish court, apart from considering all the relevant circumstances, to apply the as-efficient competitor test).

At the moment, it is difficult to forecast whether a national competition authority or a national court will prefer to adopt the approach followed by the EU Courts or that one followed by the Commission. In principle, if a national court is called to judge a loyalty discount case, both for a damage compensation or for an appeal related to a decision by a national competition authority, is obliged to apply the

³³Judgment of the Court (Grand Chamber) of 27 March 2012, *Post Danmark A/S v Konkurrencerådet*, Case C-209/10, Official Journal of the European Union, 2012/C 151/4, 26 May 2012; Judgment of the General Court (Eight Chamber) of 29 March 2012, *Kingdom of Spain v European Commission*, Case C-209/10; Judgment of the General Court (Eight Chamber) of 29 March 2012, *Telefónica, SA and Telefónica de España, SA v European Commission*, Case T-336/07.

law as interpreted by the Court. Therefore, the position adopted by the EU Courts cannot certainly be neglected.

As a result, along the lines of the *Intel* case, where the Commission endeavoured to evaluate whether the rebates granted were capable of having a foreclosure effect on an as-efficient competitor, the hope is that also in future abuse of dominance cases the EU institutions will be apt to adopt more explicitly an economic approach, as well as to rely more openly on the Guidance Paper.

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