

Where Do We Stand on Discounts?

– A Nordic Perspective



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Introduction

Discounts are a commercial requirement, however it seems increasingly more difficult to draw up clear legal principles. This represents a key challenge for law practitioners as well as private corporations in the Nordics and Europe. In this book, you get an outline of where competition law and policy currently stands on discounts and pricing practices under EU (EEA) and Nordic rules on abuse of dominance. EU practice and practice from the three Nordic countries Denmark, Norway and Sweden is critically analyzed and compared. Moreover, a separate section is allotted to the matter from an economic perspective. This involves the following five separate contributions that can be read in conjunction or independently:

1. An economic review of rebates. Here it's described what role rebates play in different markets and how they can have both pro-competitive and anti-competitive effects. It's also described how rebates have been analysed in case law and how the guidance paper on prioritisation of abuse of dominance cases suggests to analyse rebates. The economic chapter is authored by Partner Ph.D Henrik Ballebye Okholm and Managing Economist Torben Thorø Pedersen from Copenhagen Economics A/S.
2. An analysis of EU and Danish practice on discounts. Danish companies would normally be governed by both and the latter has been aligned to the former, thus providing general guidance on EU practice. Moreover, there is a very substantial Danish practice on discounts and hence many lessons to be extracted from this. The Danish part has been provided by

Associate Professor Christian Bergqvist, ph.d. University of Copenhagen, Faculty of Law.

3. An analysis of EU and Norwegian practice on discounts. The prohibitions on abuse of dominance in the EEA Agreement and in the Norwegian Competition Act correspond to and shall in principle be interpreted in line with EU competition law. The Norwegian practice on discounts and pricing practices is analysed and compared with EU law and policy. The Norwegian part has been provided by Associate Professor Eirik Østerud, ph.d. University of Oslo, Faculty of Law.
4. An analysis of the application of EU and Swedish competition law to discounts. In this chapter, it is discussed how the Swedish practice, more or less, has been aligned to the EU Competition rules, and to what extent the legal analysis of discounts in Swedish cases conforms with economic theory. The Swedish part has been provided by Associate Professor Vladimir Bastidas Venegas, Uppsala University, Faculty of Law.

Although difficult to identify a consistent approach to discounts under both Article 102 of the EU Treaty and the national equivalents, the combined Nordic experience does offer some notable features. Hence, much can be learned on the matter of discounts in competition law from the national experiences.

Copenhagen, November 2017
Christian Bergqvist

Chapter 1

Where do we stand on rebates? —An economic view

Henrik Ballebye Okholm & Torben Thorø Pedersen

In this chapter, we take an economic view on the current legal treatment of rebates under the EU competition rules. Our main conclusion is that economics and EU competition law is gradually becoming more and more aligned in terms of assessing rebates. Traditionally, EU competition law has applied a form-based approach to rebates offered by dominant firms. Certain forms of rebates have been termed illegal without looking at the conditions of the specific case. However, during the last 10-15 years, we have gradually seen a new effects-based approach to rebates develop, where it is accepted that rebates, irrespectively of their form and the market position of the firm, may have both pro-competitive and anti-competitive effects. We explain the reasons why we see this new effects-based approach as a step forward in terms of getting competition law and economics more aligned. In addition, we give some guidance to firms on how to conduct a preliminary screening of their rebates by answering a few relatively specific questions about the firm's market position, the form of the rebates and how they work.

Almost any firm operating in a competitive market uses rebates or discounts (hereafter 'rebates') to increase sales and customer loyalty. Rebates are part of firm's standard competitive toolbox.

Even so, the competition authorities in the EU have intervened against rebates offered by dominant firms. Doing this, the competition authorities have traditionally applied a so-called *form-based* approach to rebates where certain forms of rebates have been termed illegal without looking at the circumstances of the specific case. Specifically, they have considered exclusivity rebates and retroactive volume rebates offered by dominant firms to be incompatible with Article 102.¹

During the last 10–15 years, however, we have gradually seen a new approach develop. EU competition law is gradually moving away from its traditional *form-based* approach towards an economic *effects-based* approach to rebates. Starting with a discussion paper² from 2005 and fueled by the *Enforcement Paper* from 2009,³ the European Commission (hereafter the Commission) has accepted that rebates may have both pro-competitive and anti-competitive effects.

The Commission has applied the effects-based approach in the Intel case from 2009. The Commission found that Intel had violated EU competition law by granting rebates to five PC manufacturers and one retailer that Intel conditioned on the purchase of all or most of the customer's microprocessors from Intel.⁴ The Commission considered that 'by their very nature' the rebates were restricting competition. The new thing was that the Commission also analysed the competitive effects of the rebates. Based on an economic analysis, the Commission concluded that the rebates were exclusionary and therefore anti-competitive.

Since then the big question has been how the EU courts will receive the Commission's new approach. As the case is still pending in the appeal system, we are still waiting for the final answer.

However, with the ruling of the European Court of Justice from September 2017, we see some reason to believe that the effects-based

1. Reference (for example) to Case COMP T-155/06, *Tomra*.

2. EU Commission, 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses', December 2005.

3. EU Communication, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', 2009/C 45/02.

4. Case COMP/C-3/37.990, *Intel*. See a summary of the decision in the Official Journal C 227 of 22 September 2009, p. 13. See also Commission press release IP/09/745 of 13 May 2009 and MEMO/09/400 of 21 September 2009.

approach is finding increasing support in the EU Court system. By judgement in 2014, the General Court dismissed Intel's appeal of the Commission's decision. The General Court concluded that the rebates offered by Intel were presumptively unlawful and that there was no need to consider the economic arguments and evidence put forward by Intel.⁵ Intel went on and appealed the case to the Court of Justice and in September 2017, the Court of Justice set aside the judgment of the General Court. The Court of Justice rejected the view that certain categories of conduct are *per se* illegal. The Court of Justice accepted Intel's argument that the General Court erred in failing to consider whether the discounts in question were capable of excluding an equally efficient competitor. Therefore the Court of Justice sent the case back to the General Court so that it can reconsider the case.⁶

In this chapter, we consider rebates from a competition economics point of view. We ask if the new effects-based approach to rebates is more in line with competition economics than the traditional form-based approach.

Our short answer to this question is 'yes'. We find that the Commission's application of a more effects-based approach is an improvement. Competition economics prescribe a balanced approach where both pro-competitive and anti-competitive effects for rebates are considered. The experiences with the effects-based approach in courts are still rather limited, but taking the economics view, we would be happy if the EU Courts to follow suit and endorse the effects-based approach.

We have structured the chapter as follows. In *section 1*, we describe that rebates are normal practice in competitive markets. In *section 2* we explain that an effects-based approach is more in line with competition economics than a form-based approach. In *section 3*, we discuss how over the last 10–15 years we have seen a gradual alignment of competition law and competition economics, which we expect and hope, will continue going forward. Finally, in *section 4*, we suggest how firms can assess their rebates and screen for potential illegal rebates.

5. Case T-286/09, *Intel v Commission*; see also Press Release No 82/14.

6. Case C-413/14, *Intel v Commission*; see also Press Release No 90/17.

1. Rebates are normal practice in competitive markets

We all know rebates. We buy two pairs of shoes and get a third pair free. We expect that holiday travel and cinema tickets is cheaper during non-peak periods. Likewise, at certain markets, we are used to getting a volume rebate (2 for the price of 1) or a rebate for haggling, see Figure 1.



Market haggling



Holiday travels cheaper in off-peak time



Cinema tickets prices



Consumer goods

Figure 1. Rebates in action—some common examples. Source: Copenhagen Economics.

We take rebates for granted because they are a normal part of all competitive markets. Firms in all industries use rebates to compete against their rivals and increase or maintain their sales.

This goes for small firms with no or limited market power. It also goes for large firms with greater or large market power. In fact, it is perfectly normal (and expected) that a firm that have enjoyed monopoly power and been able to price above competitive levels, for

example because it has been protected by regulation, will respond to entry or the threat of entry by cutting its prices and giving rebates.

1.1. Firms offer many types of rebates

Some rebates are simple. An example is a supermarket offering a half price on unit number two.

Other rebates are more complex. For example, volume rebates can be retroactive. Here, customers obtain a rebate, say 10%, on all the quantities purchased if their purchase is above a certain volume threshold.⁷

A two-part tariff price scheme is another more complex rebate system. Here the seller charges a flat fee for the right to purchase units of a good or service and then charges an additional per-unit price for the good or service itself. Common examples of two-part tariffs include cover charges and per-drink prices at concerts and bars, entry fees and per-ride fees at amusement parks (e.g. Disneyland and Legoland), wholesale club memberships, public utilities and in vertical contracts between producers and distributors.

In addition, rebates can be part of a self-selection scheme, which companies use to identify customers with high willingness to pay. For example, many car rental firms offer their customers to skip the waiting line conditioned on an additional charge.

In the enforcement paper from 2009,⁸ the Commission puts rebates into two groups: Unconditional and conditional rebates.

Unconditional rebates are rebates given independently (unconditioned) of the purchasing behaviour of a specific customer. Instead, these rebates differentiate the price between customer groups. An example is kids and students getting cheaper bus and train fares, see Figure 2.⁹

Conditional rebates are, in contrast, rebates where the eligibility depends on (is conditioned upon) the purchasing behaviour of the specific customers, see Figure 2.

7. Rebate schemes may have multiple thresholds, but for simplicity reasons we focus on the case of a single threshold.

8. See EU Commission, 'DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses', December 2005.

9. An unconditional rebate cannot be available to all customers as it would otherwise be a general price decrease.

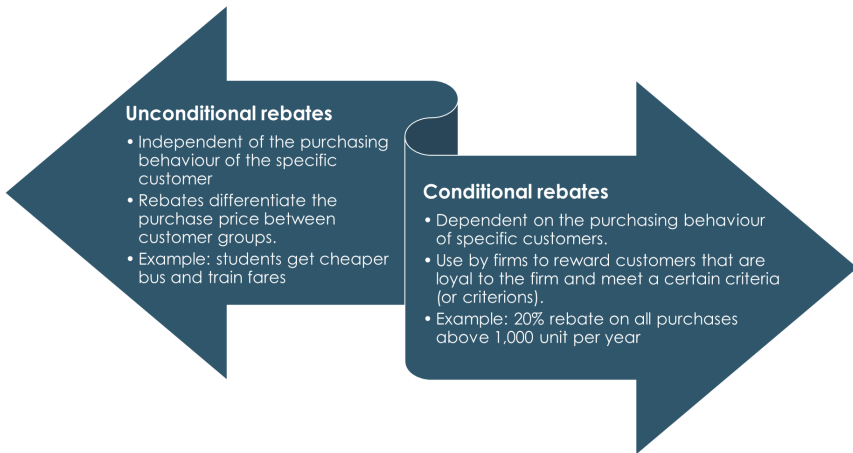


Figure 2. Comparison of unconditional and conditional rebates. Source: Copenhagen Economics based on DG Competition Enforcement Paper.

Firms typically use conditional rebates to reward customers that are loyal and meet certain criteria.

The firm may, for example, condition the rebate upon the purchase above a given volume or amount within a given period, for example a rebate for buying minimum 1,000 units within a year (a so-called single product loyalty rebate).

The firm may also demand exclusivity or that the customer buys at least a certain share of its total demanded quantity from the supplier in order to obtain the rebate.

Last, but not least, the firm may demand that the customer buys at least two or more different products from the supplier to qualify for the rebate. This is a so-called bundled rebate, also sometimes referred to as tying and bundling.

1.2. Most rebates create incentives to purchase more and/or to concentrate purchases on one or few suppliers

A key observation is that by offering a reduced price for an additional purchase, most rebates create an economic incentive for the customers purchase more units or to concentrate their purchases on one or few suppliers. It is evident that this incentive may affect competition because it may impede new competitors in entering a market.

The strength of the incentive depends on the size of the rebate. For example, a 5% rebate on the next unit gives a stronger incentive than a 1% rebate.

In addition, the strength depends on the design of the rebate. A retroactive rebate, where customers pay a lower price on all units purchased after reaching a certain threshold, creates stronger incentives than an incremental rebate, where the rebate only applies to the additional units above the threshold.

For example, assume a list price of EUR 100 and a volume rebate of 20% for volumes above nine units.

With an *incremental volume rebate* of 20%, the marginal price or the extra cost to the customer of buying an additional unit is EUR 100 for the first nine and EUR 80 for all additional units, see Figure 3.

With a *retroactive volume rebate*, the marginal price is still EUR 100 for the first nine units, but for the 10th unit the marginal price drops as low as EUR -100 because the 20% rebates not only applied to the 10th unit, but also the nine already bought units. For the additional units above 10 the marginal price is EUR 80 as for the incremental volume rebate, see Figure 3.

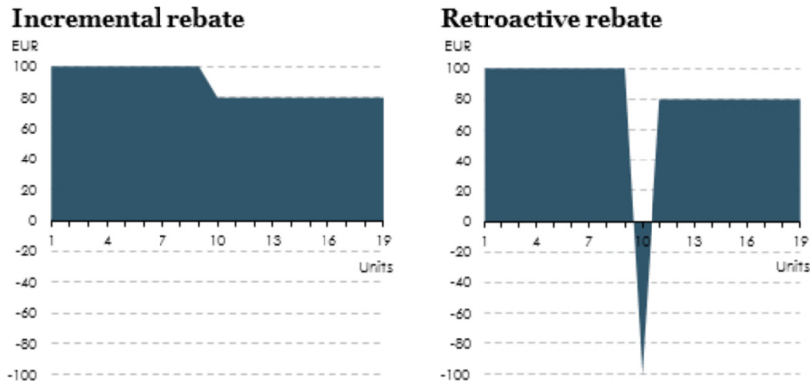


Figure 3. Marginal price with a list price of EUR 100 and 20% rebate for purchases above 9 units (illustrative example). Source: Copenhagen Economics.

1.3. Rebates imply price discrimination

Another key observation is that rebates generally result in some kind of price differentiation among customers, often referred to as price discrimination.

Price discrimination occurs when different customers pay different prices for the same product or service and the differences in price are not solely due to cost differences for the supplier.

Price discrimination generally requires that the selling firm knows that there are different ‘types’ of customers with different marginal willingness to pay and that arbitrage is impossible (or very difficult) for the customers.¹⁰

Under these conditions, price discrimination comes in three different versions called first, second and third degree price discrimination,¹¹ see Figure 4.

In theory, firms can implement all three forms of price discrimination. However, in practice, most firms face some information-related

10. For example, when Microsoft sells their student versions at reduced price, it requires that students cannot re-sell it to business users paying the higher full price.

11. For good explanation of the different types of price discrimination, reference is made to Konkursverket, ‘The Pros and Cons of Price Discrimination’, 2005.

limitations, which prevent them from implementing first-degree price discrimination. To implement first-degree price discrimination, firms must know all individual customers' willingness to pay and tailor the prices to each customer. In practice, such precise information is very seldom present.

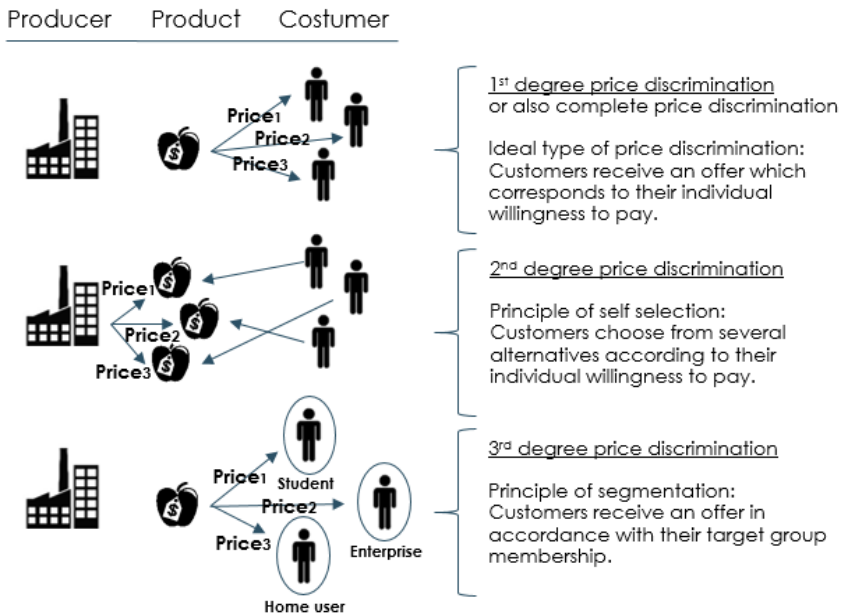


Figure 4. Three types of price discrimination. Source: Copenhagen Economics based on Frank Linde (2009) 'Pricing information goods', *Journal of Product & Brand Management*, Vol. 18 Issue: 5, pp. 379–384.

In contrast, second-degree price discrimination is very prevalent. Many firms offer customers a palette of packages with different prices from which the customers can self-select into different pricing categories based on their willingness to pay. The rebates used may be simple volume rebates or two-part tariffs. This is second-degree price discrimination implemented in practice.

The airline industry is a heavy user of second-degree price discrimination through self-selection schemes. Travellers buying airline tickets several months in advance often get cheaper fares than those purchasing the day before the flight. When the demand for a particular flight is high, the airline raises the prices of available tickets. In addition, as many travellers prefer flying home Sunday afternoon or evening, a Sunday evening flight is often more expensive than a Sunday morning flight.

Many firms also use rebates to implement third degree price discrimination. Here they charge different prices to different groups of customers (segments) depending on how sensitive they normally are to price increases (their elasticity of demand). Common examples are lower train fares for students and elderly people and reduced parking fees in cities during nights and holidays. Branded goods sold at different price levels in different geographical areas is another example.

2. Competition economics calls for an effects-based approach to rebates

A classic insight from economics is that the welfare effects of price discrimination essentially depend on whether price discrimination expand total sales or not.¹² Accordingly, if rebates lead to a price discrimination that leads to more sales, we can assume a positive welfare effect of the rebate.

Another classic insight is that price discrimination is most likely to expand total sales where the seller has declining average total costs. If price discrimination results in higher total sales, it allows firms to spread fixed costs over a large number of units.¹³

However, these classic results are static in the sense that they ignore the possibility that a rebate may have a negative impact on competition. For example, although the rebate may increase sales in the short-term, the total long-term welfare impact may still be negat-

12. See for example Damien Geradin & Nicolas Petit, 'Price Discrimination under EC Law: The Need for a Case-by-Case Approach', *The Global Competition Law Centre Working Papers Series, GCLC Working Paper 07/05*.

13. See Damien Geradin & Nicolas Petit, 'Price Discrimination under EC Competition Law: The Need for a case-by-case Approach', *The Global Competition Law Centre Working Papers Series GCLC Working Paper 07/05*.

ive if in the long run the rebate leads to reduced competition, e.g. due to foreclosure of equally efficient competitors.

In this section, we assess rebates from a competition economics point of view. We consider the most common pro-competitive and anti-competitive effects of and motivations behind rebates. In addition, we explore the conditions for the pro-competitive effects to be dominating. We conclude that the overall effects on competition generally depends on the specific market conditions. This calls for an effects-based approach to rebates.

2.1. Pro-competitive effects of rebates

Competition economists agree that firms generally offer rebates, including retroactive rebates, as a normal part of a competition on the merits. Several observations support this view.

One observation is the prevalence of rebates amongst smaller firms without market power and without ability to foreclose competitors. Competition economists generally accept that firms with no market power do not act on anti-competitive motivations.

Another observation is that most consumers value, and often expect, rebates when purchasing a bundle of products. For example, consumers more or less expect free bread served with meals at a restaurant. Likewise, many consumers expect a volume rebate for buying a 10-trip train ticket instead of just one ticket.

Looking at firms' motivations for offering rebates, competition economists agree that firms use rebates as a tool to attract new customers and to maintain existing customers. In order to increase sales, at least in the short term, it is often more attractive for firms to offer rebates to selected customers than giving all customers a general price reduction.

The reason can often be simple. With a general price reduction, the price and profit on all the units that are already sold (at the higher price) drops. In contrast, with a rebate the firm is able to keep the price constant for the already sold units and only lower the price for the new sales, see Figure 5. This is clearly better in terms of profit.

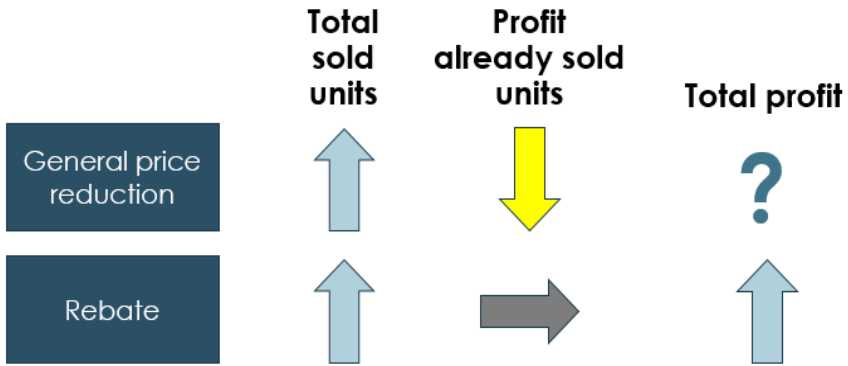


Figure 5. Comparison of a firm's profit gain from a general price reduction and a targeted rebate. Source: Copenhagen Economics.

Taking a deeper look at the pro-competitive motivations for firms to offer rebates, competition economists have pointed to several reasons why firms chose rebates to boost sales and profit. Most explanations refer to efficiencies and recognise that firms often see rebates as tools to realise existing efficiencies and/or to create new efficiencies, see Figure 6. These motivations are the key to understanding the pro-competitive effects of rebates.

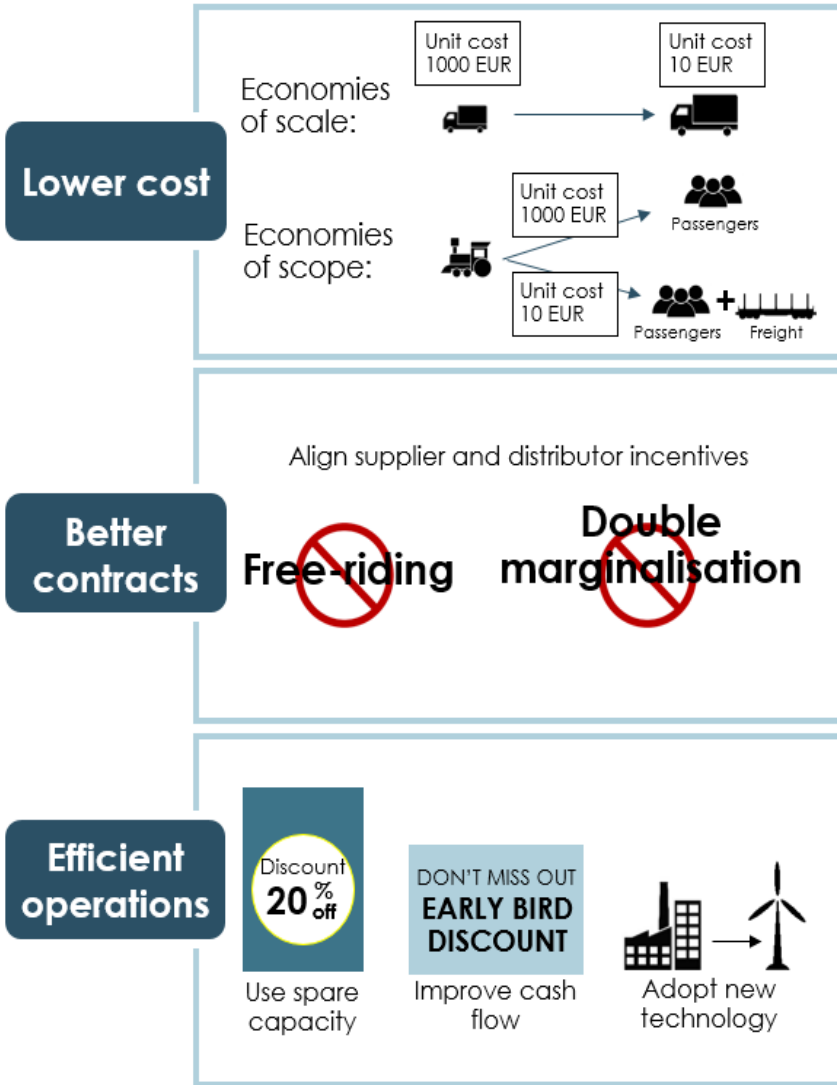


Figure 6. Pro-competitive effects of rebates. Source: Copenhagen Economics.

2.1.1. Economies of scale and scope

The most referred motivation for offering rebates is that firms realise cost savings when producing or selling more units of one product or selling more products. This implies that firms can offer a rebate to costumers buying large quantities. Consequently, a rebate is the tool to pass on such saving, which economists are often referring to as economies of scale or economies of scope, see Figure 6.

Economies of scale are realised when the average unit cost drops when the firm produce or sell more units. This is especially the case in markets characterised by a combination of large fixed costs and constant marginal costs in production. Rebates are often an important driver for economies of scale as they can be an effective tool for firms to increase their sales.

Take an airport-parking firm with two types of costumers. One type with a high willingness to pay and one type with a low willingness to pay. With a uniform price based on all costumers' willingness to pay, only the type with a high willingness to pay will buy the service. The other type will park elsewhere. With pricing according to each type's willingness to pay, both types will buy the airport parking service and economies of scale may be realised.

Efficiencies may also come in the form of economies of scope. This refers to situations when selling two or more types of products to the same customers generates savings or efficiencies. Economies of scope play an important role in many industries, e.g. the airline industry. Carrying cargo (freight) and passengers in the same flight results in economies of scope and saving for airlines as opposed to flying in separate aircrafts. Aircraft operators can use rebates to optimise the load between passengers and freight.

2.1.2. Better contracts

Competition economists also recognise that firms use rebates as a tool to improve contracts.

An example is a situation where the supplier has limited information about the customer's preferences (i.e. a situation with asymmetric information). Here both the seller and the buyer may be better off with a contract that includes a rebate scheme with a menu of pricing options, from which the buyer can select. The result may be both additional sales and more satisfied customers because customers gen-

erally appreciate being able to choose the terms and conditions that they prefer.

Another situation where rebates can improve a contract involve vertical contracts between an upstream producer or supplier and a downstream distributor or retailer. Such contracts are often prone to two types of efficiency problems that a rebate scheme can reduce, or even solve.¹⁴

The first problem is a free-riding problem. It may arise when downstream retailers provide a range of promotions efforts that in the interest of both the upstream seller and all downstream sellers, but are not fully appropriable, e.g. advertising, pre-sale advice, and show rooms.

The fact that these efforts are not fully appropriable imply that all retailers benefit of the efforts made by one retailer. For example, the sales of one retailer may increase if the other retailers invest in advertisement or pre-sales services. This creates an incentive for each retailer to free ride of the efforts done by the other retailers. The result of such free riding may be under-provisioning of these promotions efforts and ultimately lower sales to the detriment of both the upstream producer and all downstream retailers.

The upstream supplier can use rebates to reduce the free-rider problem. By increasing the retail margins on additional volumes, rebates can encourage retailers to promote the product themselves. While a uniform reduction in the wholesale price might have the same impact on retailers' incentives, it would be more costly for the supplier. Hence, rebates allow and encourage upstream suppliers to provide incentives at a lower cost and to create more competition between the retailers.

The second problem is a problem of double marginalisation. It refers to situations where both the upstream supplier and the downstream retailer have some market power on their respective markets.

Here the problem is that both will add a mark-up to their costs without taking the impact on the profits of other firms into account. The result is an inefficiently high price level resulting in depressed sales and a joint lower profit.

14. Reference made to for example, Rey & Verge, 'The Economics of Vertical Restraints', March 2005.

The upstream supplier can solve the double marginalisation problem with a contract that includes a rebate scheme in the form of a two-part tariff.¹⁵ If the upstream supplier charge a fixed fee and variable price per unit equal to the marginal cost of producing the product, there will be no double marginalisation. However, to solve the problem fully, the upstream supplier must also be able to subtract its part of the profit by setting the fixed fee at the right level.

2.1.3. Efficient operations

Rebates can also optimise the internal operations of firms and thereby reduce costs, see Figure 6.

Examples are last minute and early bird rebates. Such rebates can help firms to exploit unused capacity. In addition, such rebates can decrease the impact of seasonal or permanent drops in demand, which may save setup cost in production and reduce inventory costs.

Another example is promotional pricing where a firm offers a temporary below-cost price in order to penetrate the market with a new and unknown product or brand.

Similarly, firms can also use rebates to promote efficient technologies or wanted consumption patterns, sometimes backed by policy makers.

2.2. Anti-competitive effects of rebates

While firms often have pro-competitive motivations for giving rebates, competition economists also recognise that there can be anti-competitive motivations (and effects) as well. Most importantly, firms may use rebates to foreclose existing or potential competitors from the market. In addition, firms may use rebates to reduce or dampen the degree of competition in the market, see Figure 7. In the following, we explain the two problems in more detail.

15. As mentioned above in section 2, a two-part tariff is a scheme with a fixed and a variable payment, where the first unit releases the fixed payment and therefore it is much more expensive than the subsequent units are.

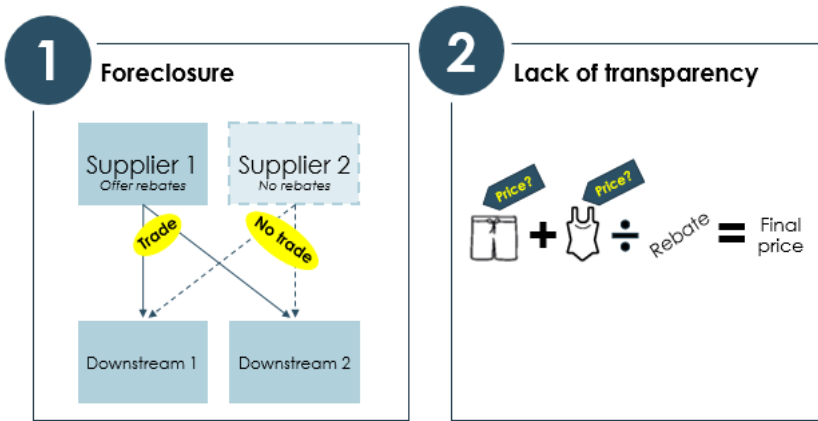


Figure 7. Anti-competitive explanations for rebates. Source: Copenhagen Economics.

2.2.1. Foreclosure of existing or potential competitors

From a competition point of view, the main problem is that the dominant firm’s rivals act as a substantial impediment to existing or potential competitors to the dominant firm. Competition practitioners refer to such horizontal exclusionary effects as primary line discrimination.

For primary line discrimination, the underlying competition concern is that a rebate may create a strong economic incentive to concentrate purchases to one single firm.¹⁶ The Commission calls this effect a loyalty enhancing ‘suction effect’. When a rebate system creates strong economic incentives to concentrate purchases to the dominant firm, the system effectively makes it expensive for the customer to buy from multiple suppliers. This may result in customer lock-in and foreclosure of actual or potential competitors from the market. The risk is naturally higher the larger share of the potential customers that the rebate covers. If a firm with a small market share offers rebates, loyalty enhancing suction effects are generally no problem.

16. We have based the following on the Commission’s enforcement paper from 2008.

The assessment of anti-competitive horizontal foreclosure can be difficult. A key difficulty is that foreclosure behaviour is natural and legitimate pricing behaviour. Offering a rebate in response to entry or the threat of entry is exactly the competitive response that one would normally expect from a firm that had been enjoying more than a competitive level of profits (see section 1). The challenge for enforcement agencies is thus to distinguish between ‘good’ and ‘bad’ rebates.

2.2.2. Distortion of downstream competition

Another potential competition concern is that a dominant firm’s rebates may distort the competition among the dominant firm’s customers. Here the underlying concern is that the rebates create a discrimination between downstream competitors, which is so powerful that it may exclude or impede certain competitors in a downstream market. Competition practitioners often refer to such exclusionary effects, caused by a dominant firm’s rebates in a downstream market, as secondary line discrimination.

An example of such secondary line discrimination is a vertical integrated firm where the upstream firm supplies to both its own and other downstream buyers and it gives larger rebates and better prices to its own downstream buyers. Another example is an upstream supplier with two different kinds of downstream buyers (e.g. large and small) that gives large buyers a competitive advantage by providing them with a larger rebate. This could potentially distort downstream competition and foreclose e.g. small customers. Here a remark is that, in theory, only a vertically integrated dominant firm has an incentive to distort competition in the downstream market.

Traditionally, competition authorities have been concerned with price discrimination *per se*, regardless of whether the dominant firm was using price discrimination to foreclose its own competitors (either in the same market or in a downstream market). The concern was that price discrimination would distort competition in a downstream market.

Price discrimination and distortion of competition among buyers was the theory of harm in a case against Post Danmark. In this case, the European Court of Justice issued a preliminary ruling, whereby Post Denmark’s pricing was not seen to be exclusionary. It was based on the argument that

“*price discrimination*”, that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same [...] *cannot in itself suggest that there exists an exclusionary abuse*.¹⁷

Since this ruling, it is clear that price discrimination is only problematic if the dominant firm uses it as a tool to foreclose its own competitors. In Denmark, this practice follows from a response about KMD's prices, where the Danish Competition and Consumer Authority underlined that dominant firm's price discrimination is not *per se* problematic. The competition authority acknowledged that rebates was a sign of healthy competition. The competition authority wrote:

‘that the dominant undertaking’s discounts and price differentiation among its customers lead to the elimination of competition, the authority believes that there are several factors suggesting that *a dominant undertaking should be able to discriminate between its customers*. Assuming that there is no exclusionary conduct, it is considered, *precisely because of the abovementioned advantages of discounts, that discrimination will not be problematic by default when it is the result of the parties’ bargaining power*.¹⁸

2.2.3. Design of rebate scheme affects risk of foreclosure

The design of the rebate or discount system is an important factor when considering the economic effects and the risk of foreclosure.

First, it matters whether the rebate is incremental or retroactive, i.e. whether the rebate applies to all purchases across a referenced period as opposed to those purchases exceeding certain threshold(s). Where a rebate is ‘retroactive’, the risk of foreclosure is particularly

17. ECJ (2012), Judgment of the court, 27 March 2012, in case C 209/10 Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0209&from=EN>>.

18. Danish Competition and Consumer Authority (2013), Vejledende udtalelse om KMD's prisdifferentiering over for kommunale kunder, 12/10728, 22 April 2013 Available at: <<http://www.kfst.dk/Afgoerelsesdatabase/Konkurrenceomraadet/Vejledende-udtalelser-og-indskaerpelser/2013/20130422-vejledende-udtalelse-om-KMDs-prisdifferentiering-over-for-kommunale-kunder?tc=D1AC0ACCB-F9243D6843737ACCC56E28D>>.

high, as the pressure exerted upon the customer is likely to be stronger than for an incremental rebate.

Second, the length of the reference period is a feature of interest. If the period is relatively long (for example a year), this may increase the pressure on the buyer towards the end of the period to reach the threshold needed to obtain the discount or to avoid suffering the expected loss for the entire period (the ‘suction’ effect).

Third, if the concern is that an upstream supplier discriminates between different types of buyers (see above) an important design feature is if the rebate scheme contains any type of anti-arbitrage rule that makes discrimination easier. It implies that the firm grants the rebate to the individual customer and that it prohibits intermediaries, e.g. consolidators, to aggregate the individual purchases in order to receive the same high rebate as a large customer. The existence of such a ‘per-customer rule’ may create suspicions about anti-competitive discrimination between end-customers and intermediaries (consolidators) because it may prevent consolidators from acting in the market.

To illustrate the per-customer rule, suppose that a consolidator groups together the purchases from three customers. Without a per-customer rule, the consolidator’s rebate would get a rebate based on the total quantity from the three customers. Let us say that the consolidator would obtain a high rebate of, say, 20%. Let us also say that with individual purchases each of the three customers would only have qualified for a low rebate of, say 10%. With the per-customer rule, the same consolidator would not be able to get a rebate based on the total quantity of the three customers. With a per-customer rule, the consolidator would only qualify for the low 10% rebate that each customer taken separately would obtain.

Some postal operators use per-customer rebates (often referred to as per-sender rebates). In the postal sector, per-sender rebates are volume rebates, under which a consolidator is entitled to volume rebates calculated based on the respective volumes of mail of each of its customers taken separately.

Following a detailed economic analysis of effects, in the *bpost* case from 2015, the EU Court of Justice concluded¹⁹ that the per-

19. CJEU Case C-340/13, *bpost SA v Institut belge des services postaux et des télécommu-*

sender volume rebates applied by bpost did not distort business mailers' choice of postal services provider.

The national regulatory authority for postal services in Belgium ('the IBPT') raise the case in 2011. The IBPT held that the 'per sender' model resulted in a difference of treatment as between individual bulk senders and consolidators for the calculation of quantity discounts, although the two categories were in a comparable situation with regard to the postal services delivered by bpost.²⁰

The ECJ noted that this difference in treatment between senders and consolidators would be illegal if (i) the senders and consolidators are in comparable situations on the postal distribution market; and (ii) there was no objective justification for the difference in treatment. The ECJ found that senders and consolidators are not in comparable situations. In addition, the ECJ acknowledged that the system had an objective justification in stimulating demand in postal services. The quantity rebates aim to encourage senders to hand over more mail to bpost, which enables bpost to make economies of scale as its turnover increases.

2.2.4. Less price transparency may strengthen the exclusionary effects of rebates

Reduced price transparency that may make it more difficult for consumers to compare offers across firms is a potential impact of rebates that may strengthen the exclusionary effects of rebates. This goes for both primary and secondary line discrimination.

Rebates are often part of a loyalty program in which the consumers face a combination of fixed and variable payments. Such programs often make it difficult for customers to assess the exact price that they pay per unit and compare it with the price offers from alternative suppliers. Often the rebate schemes are not even public information. Consequently, they also make the price level less transparent. The result may be less active consumers that pay less attention to the price, which may in turn make it more difficult for new competitors to enter the market.

nications (IBPT).

20. See paragraph 23, CJEU Case C-340/13, *bpost SA v Institut belge des services postaux et des télé-communications (IBPT)*.

At first glance, an obvious remedy would be to force firms to make their rebates public. If all rebates were public consumers would be better equipped to compare offers from competing firms, which in turn would make entry easier.

However, the challenge is that increased price transparency is not always good for competition. Economic theory is ambiguous on whether price transparency is good or bad to competition. Increased price transparency may strengthen the competitive pressure in the market, but in some cases, it may have the opposite impact.

In the evaluation, it is relevant to distinguish between whether the information flows increase price transparency on both the supply and the demand side or only one side of the market. In general, anti-competitive effects of price transparency are primarily likely if the prices only become more transparent on the supply side.²¹ In contrast, pro-competitive effects of price transparency are more likely if the prices only become more transparent on the consumer side.

In conclusion, we must keep in mind that one reason why firms find rebates attractive is that they decrease the level of price transparency on the demand and thus the level of competition in the market.²² For dominant firms, this may be part of an abusive strategy.

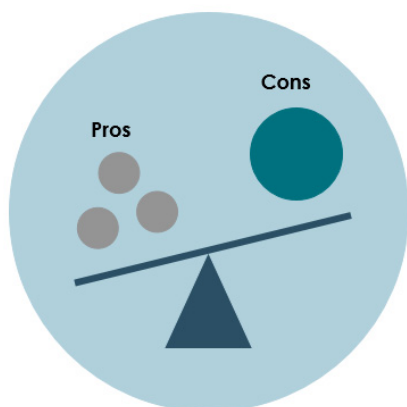
2.3. Balancing pro-competitive and anti-competitive effects

From an economic point of view, the key issue is to distinguish between rebates that are part of a healthy competition in the market and rebates that are part of an abusive strategy of the dominant com-

21. A historic Danish gives a clear historical example of how increased transparency in a market can lead to anti-competitive effects. In 1990s, the Danish Competition Authority decided to increase transparency in the market for ready-mixed concrete expecting that increased transparency on the demand side could increase the competitive pressure in the market. However, average prices did not drop following the decision. Within a year, they increased by 15–20 per cent and in addition the prices became much more aligned. According to P.B. Overgaard, & H.P. Møllgaard, 'Information Exchange, Market Transparency and Dynamic Oligopoly', *Centre for Industrial Economics Discussion Papers* 11-2005, the improved transparency on the supply side had led to improved coordination of the pricing policies.

22. See for example, OECD Competition Policy Roundtables, *Information exchanges between competitors under competition Law* (2010).

pany. It complicates the distinction that rebates may have both pro-competitive and anti-competitive effects. The challenge is to balance these effects against each other to reach the right conclusion, cf. Figure 8.



*Figure 8. Economics calls for a balancing of the pros and cons of rebates.
Source: Copenhagen Economics.*

Balancing of pro-competitive and anti-competitive effects is not always easy. We have no one-size-fits-all economic tool that we can always apply to calculate the net economic effect of a rebate. We can use quantitative test to examine both pro-competitive effects, e.g. efficiencies, anti-competitive effects, e.g. foreclosure. However, by the end of the day, we must take a qualitative approach to assess and balance the combined impact of all effects. In doing so, we recommend assessing the effects of rebates using a three-stage approach, see Figure 9.

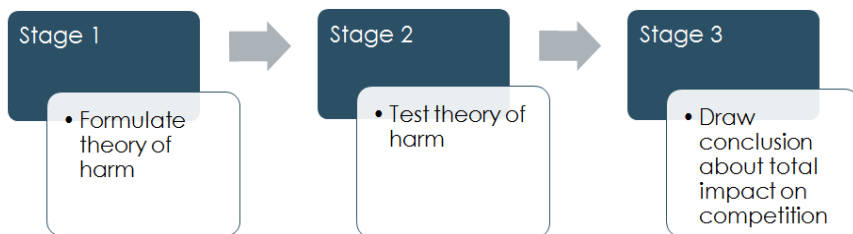


Figure 9. The three-staged competition assessment. Source: Copenhagen Economics.

In the first stage, we formulate a theory of harm. Without a theory of harm, we should dismiss the case.

As foreclosure is the main competition, in the search for a theory of harm, we should assess if the firm is in a position where it could use a rebate to foreclose a potential or existing competitor.

As suggested by the Commission’s enforcement paper, we agree that it is relevant to use a so-called as-efficient-competitor-test to investigate whether the rebate implies an effective price below the dominant firm’s own costs and thus is capable of excluding a competitor, which is as efficient as the dominant firm is.²³ Reduced price transparency for customers could add to a foreclosure problem, but in itself, it would realistically not create a competition case.

In this second stage, we should test if the theory of harm holds or not. In doing so, we will look at various market surveys and performance measures. For example, if the rebate has been in place for some time and there has been examples of entry, it is a clear sign that anti-competitive foreclosure is not a problem. Likewise, the development in market share over time and the entry costs are relevant factors to include. Based on the results, we will be able to assess the possible anti-competitive effects of the rebates with more certainty.

Finally, *in the third stage*, we will finalise the assessment of the effects on competition. The question now is whether we can accept the risk of anti-competitive effects, because pro-competitive effects

23. We will describe the as-efficient-competitor test (the AEC test) in details below.

outweigh this risk. Doing this, one should consider the evidence on the possible anti-competitive and pro-competitive effects of the rebate. In the end, we must conclude whether the evidence show that, on balance, the rebate is a pro-competitive rebate or an anti-competitive rebate.

3. Competition law and economics are becoming more aligned

In order to get the maximum effect of competition policy, competition authorities and the court system should go from the traditional form-based approach to rebates towards a more effects-based approach. They should recognise that rebates might have both pro-competitive and anti-competitive effects and they should only intervene against rebates that are on balance anti-competitive.

This is the key messages from competition economists to the competition law regime in the EU. Therefore we are positive to see signs that the current competition law regime in the EU is gradually moving in this direction.

First, we observe that non-dominant firms do not have to worry. Competition authorities and courts are only focusing on rebates offered by dominant firms. Non-dominant firms are fully free to offer whichever rebates they want. This is, however, not without challenges for firms. Sometimes it requires a substantial analysis for assess whether a firm is dominant or not, and the firms can face a risk that competition authorities disagrees and concludes that the firm is dominant.

Second, the competition law regime seems to be shifting towards a more economic and effects-based approach to rebates offered by dominant firms. Coming from a tradition of applying a more form-based approach to rebates offered by dominant firms, the Commission has for the last 10–15 years been paving the road for an effects-based approach, which in broad terms is consistent with competition economics.

3.1. The two analytical approaches to rebates

In competition law practice, there are broadly speaking two different analytical approaches to rebates. The form-based approach and the effects-based approach.

Both approaches begin with an assessment of the relevant firm’s market position. Under both approaches, the attention is limited to rebates offered by dominant firms. Non-dominant firms are thus free to use rebates as they want.

Under the form-based approach, the target is to give dominant firms clear, transparent guidance on what constitutes a legal rebate, and what constitutes an illegal rebate. In order to achieve this, the form of the rebate is in focus, e.g. retroactivity, size of rebate and reference periods. The impact is less important, see Figure 10.

Under the effects-based approach, the target is to maximise consumer welfare and thus evaluate rebates based on their actual impact on competition and consumer welfare. The form of the rebates is less relevant and only used in an initial screening, see Figure 10.

Approach	Primary focus	Target
Form-based	The form of rebates	Clear and transparent rules
Effect-based	The effect of rebates	Impact on consumer welfare

Figure 10. Form-based v effects-based approach to rebates. Source: Copenhagen Economics.

3.2. Focus on dominant firms is consistent with competition economics

We find it overall consistent with competition economics that both approaches only pay attention to rebates offered by dominant firms.

In terms of potential impact on competition and consumer welfare, there is as such no reason to limit the attention to non-dominant firms. All competitive firms, large or small, are, in theory, motivated by maximising profits. They may achieve this either by being more efficient than its competitors are or by making the customers more loyal to its products. These incentives are as such not different for dominant and non-dominant firms.

From an economic point of view, the relevant question is if rebates have the ability of significantly impact competition in the market. Here the market position of the firm that offers the rebates is a relevant factor, because firms without dominance presumably cannot distort the competition in the market.

3.3. The effects-based approach is supported by competition economics

Looking at the approach to dominant firms' rebates taken by the competition law regime the EU, we see an on-going and gradual movement from a form-based to an effects-based approach. From a competition economics point of view, we see this movement as positive and a step in the right direction.

The competition law regime in the EU has historically applied a form-based approach to rebates offered by dominant firms. Beginning with the *Hoffmann-La Roche* ruling in 1979,²⁴ the competition authorities have intervened against some types of rebates based on their very nature. For other types of rebates, they have accepted them without considering the details of the specific cases. Even though the distinction is not clear-cut, the EU case law has generally distinguished between three categories of rebates.

The first category is *simple volume or quantity rebates*. These are incremental volume rebates, i.e. where the dominant firm only grants

24. Case 85/76, *Hoffmann-La Roche & Co AG v Commission*, 1979 E.C.R. 461, 100 (European Court of Justice).

a rebate on orders that exceed the required minimum volume, not on previous units. In addition, the dominant firm offers the same rebate to all customers without any exclusivity requirement, i.e. rebates are not (directly or indirectly) conditioned on the volume of purchases from competitors. The competition authorities usually regard such rebates as pro-competitive rebates that reflect cost savings or other efficiencies from producing or selling higher volumes.²⁵

The other categories *loyalty rebates and exclusivity rebates*. They are the potentially problematic rebates. The type of loyalty rebate that has received most attention is the retroactive rebates, where the rebate applies not only to the customer's incremental purchases above the target, but also retroactively to all purchases. Exclusivity rebates, on the other hand, are rebates that are conditional on the customer obtaining all or most of its requirements from the dominant company. Exclusivity does not have to be explicit. It is sufficient that the customers have an impression of an exclusivity obligation. Both retroactive and exclusivity rebates have been presumed to have the ability to foreclose smaller rivals rather than passing on cost-based efficiencies and have therefore been deemed *per se* anti-competitive.

Traditionally EU case law has intervened on a *per se* basis against retroactive rebates and exclusivity rebates. Retroactive rebates have been ruled as illegal in a number of high profile cases, including *Michelin I+II*,²⁶ *BA/Virgin*,²⁷ and *Tomra*.²⁸ Likewise, exclusivity rebates have consistently also been categorised as illegal and incompatible with competition rules. The *Tomra* case is an example where both the Commission and the two Courts applied the traditional form-based approach, cf. Box 1.

Box 1. The Tomra case:²⁹

The Tomra case dates back to March 2001, where Prokent AG complained to the Commission that Tomra Systems and a number

25. A large incremental rebate can lead to predatory pricing, where the discounted price is below costs.

26. Case 322/81, *Nederlandsche Banden-Industrie Michelin v Commission*, 1983 E.C.R. 3461 (European Court of Justice), and *Michelin II*, 2003 E.C.R. II-4071.

27. *BA/Virgin*, 2003 E.C.R. II-5917.

28. Case T-155/06, *Tomra Systems and Others v Commission*, 2010 E.C.R. II-297

29. Source: Copenhagen Economics based on Case T-155/06, *Tomra Systems and Others v Commission*, 2010 E.C.R. II-297.

of its group companies (together, ‘Tomra’), had abused a dominant position by preventing Prokent AG from entering the market for reverse vending machines (‘RVMs’).

RVMs are machines for recycling drinks packaging, which automatically calculate and reimburse the correct amount of money to the customer who deposits a used container.

In 2006, the Commission gave Tomra a € 24 million fine for abusing a dominant position in the RVM market contrary. Based on a traditional form-based approach, the Commission found that Tomra’s use of loyalty rebates, including retroactive rebates, constituted an abuse of its dominant position in breach of Article 102.

Tomra appealed to both EU Courts, but with no success.

With the Enforcement paper from 2009, the Commission signalled a shift towards a more effects-based approach to enforcement of the law on abuse of dominance. According to the Commission, the intent was to introduce a more economics based approach to dominant firm’s pricing, ensuring that dominant firms are always entitled to meet competition and compete on the merits.

The Commission outlined an economic analytical framework under which a rebate would only be illegal if it could foreclose equally efficient competitors. With the so-called ‘as-efficient-competitor test’ or the ‘AEC test’, the Commission suggested a framework for evaluating whether a rebate effectively is capable of foreclosing competitors.

In short, the intuition behind the test is that a dominant undertaking is not likely to exclude competitors from the market if the effective price charged for the contestable volume covers the production costs for an as efficient competitor. The test can be described in four steps, see Figure 11.



Figure 11. The as-efficient competitor test—four steps. Source: Copenhagen Economics based on the Commission’s Enforcement paper.

The *first step* involves calculating the contestable volume or relevant range. The contestable volume is the volume that the customers of the dominant firm can realistically switch to the competitor. In contrast, the customer must or will buy the non-contestable volume from the dominant firm regardless of the price, for example because it is a ‘must-have’ brand. In other words, a competitor can effectively only compete for and win this volume.

With an incremental rebate, calculating the contestable volume is simple. Here, the contestable volume always equals the incremental purchase as by shifting to another supplier the customer only loses the rebate on the incremental purchase. For example with a list price of EUR 100 and an incremental rebate of 10 EUR for all units above nine, the contestable volume is all purchases above nine.

With a retroactive rebate, the contestable volume may be more complicated. Here it must be assessed how large a part of customer’s purchase requirements can realistically be switched to a competitor. According to the Commission, this part varies across customers and time. It depends on several factors, some of which may be hard to quantify, including the following factors:

- **Presence of ‘must-have’ brands or products:** The contestable volume may be reduced if there are leading brands or products that are essential for various categories of customers. For example, a sporting goods store may in practice have to stock Adidas and Nike because they are the most popular consumer brands.
- **Capacity constraints:** Even when customers are willing and able to switch to alternative suppliers, competing suppliers may not have the capacity to deliver. The existence of such capacity constraints will imply a secured base to the dominant firm (at least equal to the total demand minus the maximum available capacities of its rivals). For existing competitors, the capacity to expand sales to customers may indicate the contestable volume. For potential competitors, the contestable volume will depend on the scale at which entrants would realistically be able to enter the market. The historical growth record of new entrants could give useful insight.

- **Single-source supply:** In sectors where transaction costs savings are of critical importance, customers may prefer to buy from a single supplier that is able to supply them with the full, or at least a large part, of the range of the products they need. This may prevent suppliers with a narrow range of products from serving such customers.
- **Switching costs:** If some customers face high switching costs, these customers may be locked-in and the contestable volume will tend to be small. Switching costs may effectively have the same impact as a strong must-have brand.

The *second step* is a calculation of the average effective price for the contestable volume. The effective is the price that a competitor must offer to match the rebate offered by the dominant firm, see Box 2. The lower the estimated effective price is in comparison with the dominant supplier's normal price, the stronger is the impact of the rebate.

Box 2. Calculation the effective price:³⁰

We can illustrate the calculation of the effective price with a hypothetical example. The below figure illustrates an example where we assume that a dominant firm sells a product at a list price of EUR 100. The firm offers customers a retroactive rebate of EUR 5 per unit for purchases of at least 100 units. The firm's product has a strong brand so that all customers must buy at least 50 units to compete in the market, so that the contestable volume that the competitor can win from a customer buying 100 units is 50 units (= 100-50 units).

To a customer purchasing 100 units for the dominant firm, the effective price that a competitor must match is EUR 90. To see this, look at two options: 1) Buy all 100 units from dominant company and 2) Split the purchase 50/50 between dominant company and a competitor.

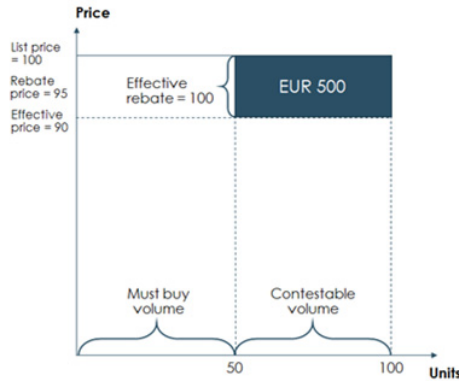
Option 1: Buying all 100 units from the dominant company implies a total purchasing price of EUR 9,500. $((100-5)*100 = 9,500)$.

Option 2: Splitting the purchase implies a total payment of EUR 5,000 for the 50 units bought from the dominant firm

30. Source: Copenhagen Economics.

($50 \times 100 = 5,000$). This in turn implies that the competing firm must offer the 50 units at total price of EUR 4,500 to make the customer indifferent between buying all 100 units from the dominant firm and splitting the purchase 50/50 between the dominant firm and the competitor.

This implies that the unit price offered by the competitor must be EUR 90 or below. At a unit price above EUR 90, it is cheaper to buy all 100 units from the dominant firm.



The *third step* consists of calculating the costs that an equally efficient competitor will incur by supplying the contestable share. As the focus is on the cost for an equally efficient competitor, the relevant cost is based on the dominant firm’s costs. The benchmarks that firms must calculate are the Average Avoidable Cost (AAC) and the Long Run Average Incremental Cost (LRAIC), see Box 3.

Box 3. The relevant cost benchmarks:³¹

The cost benchmarks that the Commission is likely to use are average avoidable cost (AAC) and long-run average incremental cost (LRAIC). Firms can calculate both benchmarks both ex ante for compliance reasons and by firms and authorities ex post in specific cases.

31. Source: ICN Unilateral Conduct Working Group, *Report on Predatory Pricing* (2008).

AAC

This benchmark includes all costs that the firm could have avoided if it had not produced the relevant output. Unlike variable costs, avoidable costs include both variable costs and any fixed costs that the firm incurs only because of the decision to produce the relevant output. The time horizon is normally 3–5 years.

LRAIC and ATC

This benchmark comprises all the costs of producing a given, discrete increment of output, usually a particular (new) product or service in a multiproduct context. This, long-run average incremental cost (LRAIC) is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. Unlike average variable costs (AVC), it includes all fixed costs, including sunk costs, specific to producing the given product. Unlike AAC, LRAIC includes costs associated with development of a new product or service and other product specific fixed costs made before the period in which the allegedly abusive conduct took place (i.e. sunk costs).

As such, LRAIC is typically higher than AAC. LRAIC and average total cost (ATC) are the same in case of single product firms. If multi-product firms have economies of scope, LRAIC will be lower than ATC for each individual product, as true common costs are not included in LRAIC.

The *fourth step* is a comparison of the effective price and the dominant firm's costs. Based on this comparison, we can assess if the rebate has the potential of foreclosing a competitor as efficient as the dominant firm, see Figure 12.

Based on the Commission's enforcement paper and case law (in particular *AKZO*³² and *Post Danmark I*³³), our interpretation is that a rebate is not capable of anticompetitive foreclosure if the effective price is higher than the ATC. This follows from the AKZO criteria³⁴,

32. *Akzo v Commission*, C-62/86

33. ECJ (2012), Judgment of the court, 27 March 2012, in case C 209/10 Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0209&from=EN>>.

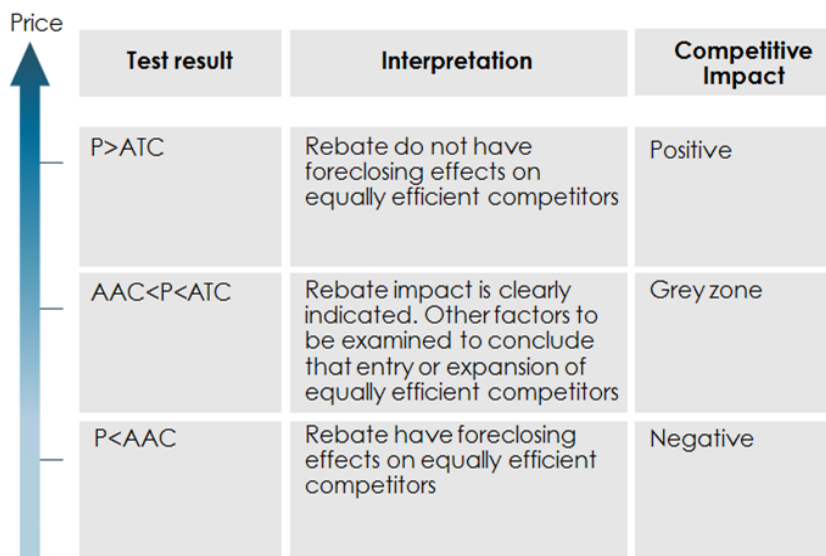
34. Case 62/86, *AKZO Chemie BV v Commission* [1991].

because prices above ATC enables efficient competitors to cover both incremental and common costs in the long run.³⁵

If the effective price is below AAC, an equally efficient competitor would not profitably be able to offer a price equal to the effective price. Such a rebate is capable of foreclosing an equally efficient competitor.

Finally, if the effective price is between AAC and ATC, we are in a grey zone. Here we must investigate whether other factors point to the conclusion that entry or expansion even by equally efficient competitors is affected. In this context, as the Commission notes, we must investigate whether competitors have realistic and effective counterstrategies at their disposal. Where this is not the case, the Commission will consider that the rebate scheme is capable of foreclosing equally efficient competitors, cf. Figure 12.

35. This is also in line with the General Court's ruling in *Post Danmark I* from 2012 (Case C-209/10), where the General Court concluded: 'Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. [...].'



	Test result	Interpretation	Competitive Impact
P > ATC		Rebate do not have foreclosing effects on equally efficient competitors	Positive
AAC < P < ATC		Rebate impact is clearly indicated. Other factors to be examined to conclude that entry or expansion of equally efficient competitors	Grey zone
P < AAC		Rebate have foreclosing effects on equally efficient competitors	Negative

Figure 12. Interpretation of the as-efficient-competitor test. Source: Copenhagen Economics based the Commission's enforcement paper.

The Commission has applied the effects-based approach in a rebate case. This is in the *Intel* case from 2009,³⁶ which (late 2017) is still processing in the court system.

In 2009, the Commission fined Intel EUR 1.06 Billion for allegedly foreclosing its competitor AMD from the market for x86 CPU microprocessors (CPUs). The Commission identified various abuses, including exclusivity rebates to computer manufacturers on condition that they purchase all, or almost all, their CPUs from Intel.

The Commission held that such rebates were *per se* illegal, but it also put forward the results of an as-efficient-competitor test showing that a hypothetical equally efficient competitor would not have been able to compete against the prices and rebates offered by Intel.

In addition, the Commission presented evidence that due to the significance of economies of scale in the semiconductor industry, the

36. Case COMP/37.990, *Intel* (Commission decision of 13 May 2009).

rebates offered by Intel had the ability to foreclose competitors in the market.

Since then, the two Courts (the General Court and the Court of Justice) have considered the Commission's approach in a number of other cases. They seem gradually to get closer to a more effects-based approach to rebates. The most direct signs of this have come with the rulings from the EU courts on the Intel case where the Commission, as mentioned above, first applied the AEC test.

In 2014, the General Court came with its ruling in the Intel case. The General Court held that the Commission's economics analysis of effects, including the AEC test, was unnecessary, stating that exclusivity rebates granted by a dominant firm are 'by their very nature' capable of restricting competition.³⁷ The General Court has since assessed that same issue in the *Post Danmark II* judgment³⁸ (2015). The Court of Justice confirmed that the AEC test was not necessary, but that it is 'one tool among others for the purposes of assessing whether there is an abuse of a dominant position in the context of the rebate scheme'.³⁹

However, with its ruling in the Intel case from September 2017, it became clear that the Court of Justice disagrees with the view of the General Court. Upon Intel's appeal, the Court of Justice set aside the General Court's judgment. The Court of Justice did not go into the details of the AEC test, but it referred the case back to the General Court for failure to account for Intel's critique of the Commission's AEC test.

By doing so, the Court of Justice has sent a signal, which we see as a step towards an effects-based approach to rebates. Even though the ruling does clearly not give green light to any exclusivity or retro-active rebate passing the AEC test, it does suggest that if the defendant submits an effects-based evidence supporting that the rebates are not anti-competitive then the Commission must review and consider this evidence. Even though it does not say explicitly what is required to lift the burden of proof, this judgment is a step toward an eco-

37. Case T-286/09, *Intel Corp. v Commission*, judgment of 12 June 2014, paragraph 85

38. Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, judgment of 6 October 2015 (Post Danmark II).

39. Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, judgment of 6 October 2015 (Post Danmark II), paragraph 61.

conomic analysis of rebates being more in line with competition economics than the classic form-based approach.

4. Screening for possible illegal rebates

Advocates of the form-based approach argue that an effects-based approach is not practical because it does not provide sufficiently clear directions as to what constitutes acceptable behaviour under Article 102.

However, as competition economists, we endorse the new effects-based approach because of the more nuanced view on the potential efficiency benefits associated with rebates. Based on economics, it is clear that all rebates may be motivated by both pro-competitive and anti-competitive effects and that the balance between the different effects cannot be assessed solely based on the formalistic design of the rebates.

We suggest firms to pay close attention to their market position and the design of their rebates. The fact that the Commission based its AEC test on the dominant firms' own costs makes it possible for firms to conduct a self-assessment of their rebates. Together with their legal and economic advisors, firms can conduct such a self-assessment by answering a few relatively specific questions about the firms' market position, the form of the rebates and the effects of the rebates.

Firstly, we urge all firms to conduct a dominance assessment. Our experiences show that competition authorities often define the relevant market more narrow than firms have imagined. Consequently, when the competition authorities initiate a competition case some firms will unexpectedly experience that the competition authorities consider them dominant even though they do not experience any large commercial market power, see Figure 13.

Secondly, we recommend that all firms that are dominant or potentially dominant conduct a self-assessment of the competition impact of its rebates. Such a self-assessment begins with an assessment of the form of the offered rebates. If they include potentially exclusionary rebates, firms should also conduct an AEC test and potentially a quantification of the efficiencies that the rebates create. Depending on the outcome, the firm may have to reconsider the offered rebates, see Figure 13.

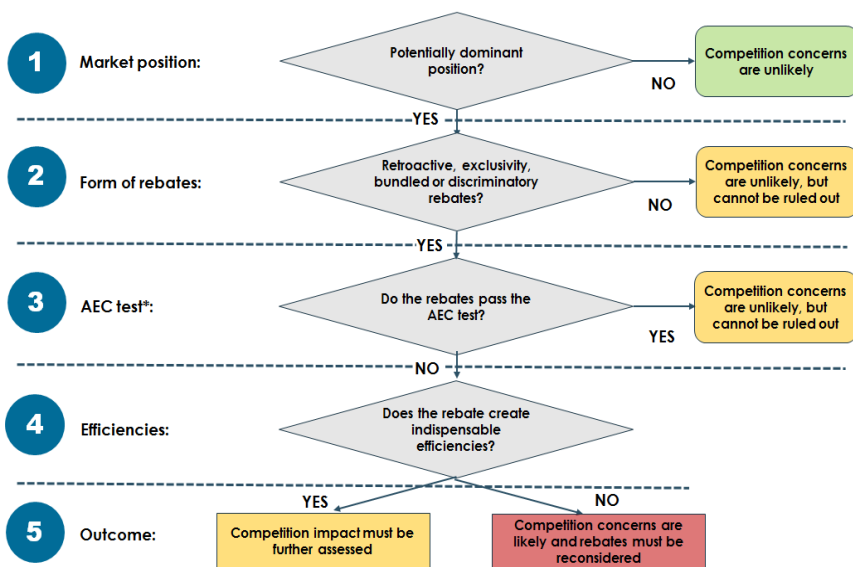


Figure 13. Screening for possible illegal rebates under Article 102 (the AEC test refers to the ‘as-efficient’ competitor test as described above). Source: Copenhagen Economics.

As a final remark, we emphasise that in terms of easiness, firms may not like effects-based approach. It is by far not an easy approach to apply in practice. Our endorsement of the effects-based approach rests upon the assumption that we can assess the pro-competitive and anti-competitive effects with a certain quality.

The main problem of the form-based approach is that by only looking at the form of the rebates it does not incorporate the specific conditions of the case. The advantages is legal certainty as firms know that some types of rebates are always illegal or legal, but the cost is a risk of intervention against rebates that are not anti-competitive (type I error or a false positive).

However, with effects-based approach, the challenge is to identify the core economic concern, and then to create a transparent and workable tool that makes it possible both for competition authorities to apply and for dominant firms to know if their rebates

are legal. Here the risk is that if the assessments are not precise enough, we may end up both intervening against rebates that are not anti-competitive and not intervening against rebates that are anti-competitive (type II error or false negative). This may not be an improvement in terms of making better decisions.

So far, we are, however, confident that the effects-based approach is indeed a step in the right direction in terms of making better decisions. Therefore, we endorse the effects-based approach. We urge the competition authorities to adopt it and we believe it is also to the benefit of the firms and consumers.

Chapter 2

Where do we stand on discounts?—A Danish perspective

Christian Bergqvist

In this chapter, discounts and pricing practices under rules prohibiting the abuse of market dominance are discussed from a Danish competition law perspective. The objective is to investigate how the Danish Competition Authority and Danish courts have distinguished abusive discounts from legitimate price competition. In contrast to Norway and Sweden there is a very substantial Danish practice on abusive discounts that can offer guidance on the reading of Article 102 as Danish Competition Law has been aligned fully with EU. Moreover, in a large number of Danish cases selective discounts have been held discriminatory. However, it's questionable if this practice represents a correct reading of EU case law and it appears that the Danish Competition Authority with some delay has accepted this. Finally, Danish practice appears to have anticipated the outcome of the Court of Justice ruling in Intel reviewing even a clear loyalty discount under a (limited) effect analysis taking all the circumstances into consideration.

Over the years it has been difficult, if not impossible, to establish a clear red line on the approach to discounts under Article 102 of the

EU Treaty and the Danish equivalent, paragraph 11.¹ Moreover, there is also inconsistency and substantial confusion about the actual enforcement of both regulations. In particular in respect to the underlying economic theories, which are generally favourable to discounts,² and the much more balanced approach demonstrated to non-dominant undertakings agreements under Article 101 of the EU Treaty and the Danish equivalent, paragraph 6. Differences it's difficult to provide a single and clear explanation for, as the dominant undertakings can share the same need to conclude, e.g. long term arrangement for product optimizing and planning purposes, as non-dominant undertakings. Nevertheless, so far it is only the latter which has benefited from the more balanced approach enshrined by the new distinction between agreements that per *object* restrict competition and those that only do this by *effect* and therefore warranting further and substantial analysis.³

While it might be too early to settle the matter, there are nevertheless indicators that some of the same considerations lately have been extended to Article 102, making certain forms of single company behavior subject to a *rigid review standard*, whilst others only can be condemned following a more substantial *effect* analysis. However, the translation is neither clear nor complete, and has furthermore been cast into doubt following the Court of Justice September 2017 overturn of the General Court' ruling in *Intel*.⁴ A move that in the longer perspective might pave the way for a more coherent, and effect based, appraisal, but in the short term has blurred the line between behaviors subject to a rigid and formal analysis and those meriting further considerations, perhaps even eliminated the need for a dis-

1. In contrast has discount traditionally not merited much interest in USA cf. Note by the United States for the 'Roundtable on loyalty or fidelity discounts and rebates', 29 May 2002 OECD. However, lately the discussions have re-emerged, as detailed by Damien Geradin, 'Loyalty Rebates after Intel: Time for the European Court of Justice to Overturn Hoffman-La Roche', *Journal of Competition Law & Economics* 2015 (11), section D.

2. For more on the economic approach to discounts see e.g. Francisco Enrique Gonzalez-Diaz & Robbert Snelders, *Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels 2013), pp. 334–347.

3. Cf. Richard Whish & David Bailey, *Competition law* (8th Edition, Oxford 2015), pp. 120–145.

4. Case C-413/14 P, *Intel*, overturning case T-286/09, *Intel*.

tion. However, it will take some years before any conclusive can be reached on the matter leaving some open ended questions.

1. Discounts and competition law

While a complete list of competition law problems related to discounts and other favours extended from the dominant undertaking never can be made, a number of issues of interest can be identified from a practical perspective, including:

- a) The dominant undertaking's ability to award discounts and other advantages in general.
- b) The special problems and challenges in respect to the handling of economics of scale and scope, and the use of discounts for the purpose of securing these.
- c) Horizontal foreclosure of a direct competitor or the creating of artificial access barrier or switching cost for the purpose of retaining market exclusivity including 'discriminatory' foreclosure.
- d) Distorting competition downstream by reserving discounts for selected customers ('real' discrimination).
- e) Favours offered to subsidiaries or vertically integrated activities.

Rather than representing different doctrines, the listing would represent situations and potential conflicts that could emerge for the dominant undertakings when contemplating to offer discounts. From a practical perspective a distinction should be made between a), b) and c) contra d) and e), as the latter two are only applicable in relation to the question of discrimination. Nevertheless, an attempt to deal with all of these issues and problems within the same framework shall be attempted. Furthermore, rather than using the words *exclusion* and *exclusionary effect*, the word *foreclosure* is preferred in order to underline how an anti-competitive effect can emerge without actual exclusion.⁵ The disciplinary effect of e.g. selective discounts can be equally

5. Cf. *Enforcement Paper*, recital 68. See also the Danish case *LK A/S grossistaftaler*, Competition Council Meeting 20. November 2000, and the EU case T-286/09, *Intel*, recital 150. Both deals with the creation of strategic access barriers through

detrimental to the interest of consumers and competition and therefore in need of containment. Furthermore, because Danish undertakings are normally governed by both EU and Danish competition law and the latter is aligned with the former, Danish and EU practice are incorporated into the same paper.⁶

Where possible the EU-Commission's *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* from 2009, hereafter 'Enforcement Paper'⁷ is utilized, predominantly in relation to loyalty discounts. Regrettably, the *Enforcement Paper* does not include principles on discriminatory discounts,⁸ but many of its principles can be recycled and guidelines be extracted from these nevertheless. Further, the legal standing of the *Enforcement Paper* is somewhat ambiguous. While the EU-Commission has rebutted the analytical framework as neither mandatory nor part of the abuse standard,⁹ the Court of Justice¹⁰ has adopted a more balanced approach by concluding the tabled as-efficient-competitor test as neither a necessary condition for a finding an anti-competitive effect, hence an infringement, nor without some relevance for the appraisal. Perhaps even concluding that the AEC-test cannot be entirely ignored but must be taken into consideration when reviewing all of the circumstances.¹¹ An approach already adopted by the Danish Competition and Consumer Authority, enforcing competition law in Denmark, as early as 2009.¹²

discounts.

6. Danish practices pre-dating the EU alignment have been summarized in *Prisdiskriminering i relation til konkurrenceloven*, Danish Competition and Consumer Authority 1998.
7. The prior *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse* is incorporated where relevant.
8. The Commission originally appears to have intended to issue a parallel paper on discrimination cf. MEMO/05/486, *Commission discussion paper on abuse of dominance—frequently asked questions*.
9. See COMP/C3/37.990, *Intel*, e.g. recitals 1002 and 1760. A more limited reading emerges from case C-549/10 P, *Tomra*, recital 81, and case T-286/09, *Intel*, recital 155, rebutting any retroactive application for cases predating the adoption of the paper.
10. Case C-23/14, *Post Danmark v Konkurrencerådet*, recitals 58 and 62.
11. A reading that can find support in case C-413/14 P, *Intel*, recitals 138–139.
12. See *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 482, note 96. An issue challenged subsequently and tabled before the European Court of Justice, as case C-23/14, *Post Danmark A/S v*

All of these elements create, by their very nature, a level of uncertainty in respect to the legal standing of the paper and its principle. In addition, traditionally Danish practice has been governed by an outdated and negative approach to discrimination, including discounts, which results in the victimizing of small and medium sized companies, indicating a difference compared to EU practice supposedly governing its application.¹³ On the other hand, a much more relaxed approach has been taken in regard to discriminatory discounts targeting end-users or which incorporate a geographical discriminatory element. Both of these have been very negatively appraised by the EU-Commission under EU practice, and have triggered prompt and harsh reactions.

Finally the Court of Justice in September 2017, as already noted, did overturn and correct the General Court' ruling in *Intel*.¹⁴ An unexpected, but most welcome move, as the latter specifically had rebutted the relevance of the AEC-test. It remains open how to read this as two options are available. Either can abuse no longer be found if an AEC-analysis shows no foreclosure risk. Alternately, cannot enforcers first undertake an AEC-test, and then refuse to defend and discuss its merits and any potential flaws. Regardless will *Intel* be incorporated where appropriate with required reservations and carve-outs.

2. Discounts and competition law—doctrines and sub doctrines

From an *academic* perspective, 5 issues of special interest could be identified when dealing with discounts as noted above. From a more *legal* perspective, these could be narrowed down to 3 situations and the discounts ability to be:

1. Create a foreclosure of competitors through an artificial loyalty and in replace of e.g. a traditional exclusive agreement (Art-

Konkurrencerådet.

13. As detailed later, there lacks a theoretical framework for condemning discounts victimizing small and medium sized undertakings, making the traditional approach problematic.
14. Case C-413/14 P, *Intel*, overturning T-286/09, *Intel*.

- icle 102(b) and Danish Competition Act paragraph 11(3) No. 2).
2. Discriminatory in a manner thwarting competition downstream (Article 102(c), and Danish Competition Act paragraph 11(3), No. 3).
 3. Conditioned upon acquiring of complementary products or services (bundling discounts), incorporating a combined exploitation of end-users and foreclosing of competitors (Article 102(d) and Danish Competition Act paragraph 11(3) No. 4).

There is a large area of overlap between the three situations and their respective subparagraphs.¹⁵ In the two EU cases *Suiker Unie*¹⁶ and *Hoffmann La Roche*,¹⁷ the discounts infringed both Article 102(b) and Article 102(c) due to their combined loyalty inducing and discriminatory effect. Likewise, where a combined discriminatory and bundling element included in the EU case *British Sugar/Napir Brown*,¹⁸ and the Danish *Scandlines rabatvilkår ved udstedelse af kombinationsbilletter til lastbiler*.¹⁹ In the first case, customers were denied a discount for self-pickup and in the latter awarded a discount subject to using the same shipping company when crossing two separate straights.²⁰ Furthermore, selective discounts can overlap with predatory pricing. This can happen as either standalone abuse or part of exclusionary discrimination, where discounts are reserved for certain customers. As neither Article 102 nor Danish Competition Act paragraph 11 represents an exhaustive list, its not critical to link a discount scheme to one of the subparagraphs. Only the effect should matter.²¹

15. See e.g. case E-29/15, *Sorpa v The Icelandic Competition Authority*, recital 116-117 for a recent example where the overlaps between discriminatory discounts, tying and predatory pricing specifically are pointed out. Even an overlap with margin squeeze is noted.

16. United cases C-40–48, 50, 54–56, 111, 113, and 114–73, *Suiker Unie*, recitals 518–528.

17. Case C-85/76, *Hoffman La Roche*, recital 90.

18. Case IV/30.178, *Napir Brown/British Sugar*, O.J. 1988L 284/41.

19. *Scandlines rabatvilkår ved udstedelse af kombinationsbilletter til lastbiler*, Competition Council Meeting 28 January 1998.

20. See also case C-85/76, *Hoffman La Roche*; case T-30/89, *Hilti*, and the Danish *DBC medier as*, Competition Council Meeting 22 June 2005.

21. Cf. e.g. case C-95/04, *British Airways*, recital 58.

Below, loyalty discounts will be discussed first, followed by the discriminatory. As already indicated, the division is artificial and should not be obscured by overlaps. Further, it's not entirely clear how to approach selective price cuts which provide for some recurrences. Bundling discounts under Article 102, subparagraph d and Danish Competition Act paragraph 11(3) No. 4 are only treated sporadically and somewhat superficially due to the fact that they have not created much confusion. Further, despite that the wording of Article 101 and older Danish practice indicate that vertical discount arrangements also could be reviewed under Article 101 if they incorporate a discriminatory element, this has not been commented upon. Essentially, as it appears to be manifestly wrong.²² From a more practical point of view, an overlap between Articles 101 and 102 and their Danish equivalents might exist nevertheless, in particular with respect to vertical or horizontal agreements reserving favourable, and hence discriminatory conditions for a limited number of companies.²³

3. The concept of abuse and discounts

It follows from *Hoffmann-La Roche*²⁴ and *AKZO*²⁵ that the concept of abuse is an objective concept, rendering the effect the primary, and in principle, only consideration relevant for the appraisal. Furthermore, it is the potential anti-competitive effect, i.e. the ability to directly or indirectly restrict competition, that is subject to review and condemnation. An approach incorporated in a Danish case, *TV 2's priser og betingelser*,²⁶ from 2005 disregarding the need to identify an actual

22. It is unclear if the Danish Competition Authority has accepted this. In *Daniscos salg af industrisukker – rabatordninger og terminskontrakt*, Competition Council Meeting 26 May 2004, and *Fritz Hansen A/S' partneraftale*, Competition Council Meeting 20 December 2006, interventions were made against a non-dominant undertakings discounts.

23. See e.g. the Danish cases *Anmeldelse af lægemiddelgrossisternes rabataftale*, Competition Council Meeting 30. September 1998, *EKKO's klage over diskriminerende fragttillæg*, Competition Council Meeting 27 October 1999, and *Clearing af taxiboner og kontokort i Storkøbenhavn*, Competition Council Meeting 31 May 2006.

24. Case C-85/76, *Hoffman La Roche*, recital 91.

25. Case C-62/85, *AKZO*, recital 69.

26. *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005 recital 183. See also case T-203/01, *Michelin II*, recital 239, and United cases C-40-48, 50, 54-56, 111, 113, and 114-73, *Suiker Unie*, recitals 518-528.

impediment to competition. It was sufficient that the discounts had as an objective to or effect of restricting competition, which made these discounts potentially problematic. Perhaps even more restrictively, it was expressed in *SuperGros' samhandelsbetingelser*²⁷ from 2007, another Danish case in which it was held that, in the absence of an objective reason, (any) discount system would be considered abusive. While the latter might not be fully aligned with the principles later developed by the Court of Justices rulings in *Post Danmark I* and *Post Danmark II*, as detailed below, the former does largely pre-empt these by finding it sufficient to establish a *potential* anti-competitive effect.

As a consequence of the objective nature, any subjective motives, including good faith, should in principle be irrelevant.²⁸ A position taken by the EU-Commission in *PO/World Cup 1998*²⁹ dismissing the need for any advantages for the dominant undertaking.³⁰ On the other hand, nevertheless subjective elements may be relevant. Cost reductions should e.g. be accepted as a valid defence regardless of an anti-competitive effect³¹ while malicious foreclosure intent could be considered an aggravating factor.³² However, following *Michelin II*,³³ a cost reduction defence would only be admissible subject to rigid evidence requirements, making the anti-competitive effect, including the potential effect, the starting point for any appraisals regardless of more subjective motives.³⁴

27. *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007, recital 140.

28. See case T-271/03, *Deutsche Telekom*, recitals 295–298. However, the Advocate General in case C-681/11, *Schenker*, appears more positive about good faith as a mitigating factor.

29. Case IV/36.888, *PO/World Cup 1998*, O.J. 2000L 5/55, recital 102.

30. See also case C-549/10 P, *Tomra*, recital 73, disregarding that no loss was endured.

31. Cf. case C-413/14 P, *Intel*, recital 140.

32. Cf. case 549/10 P, *Tomra*, recital 20, case C-413/14 P, *Intel*, recital 139, and *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 494.

33. Case T-203/01, *Michelin II*.

34. See also *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007, recitals 140–142, indicating limited room for discounts with no objective purpose.

The tabled positions were summarized by the Court of Justice in *Post Danmark II*,³⁵ from 2015 into:

‘In that regard, it first has to be determined whether those rebates can produce an exclusionary effect, that is to say whether they are capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for the co-contractors of that undertaking to choose between various sources of supply or commercial partners. It then has to be examined whether there is an objective economic justification for the discounts granted.’

Which later leads the Court to note how:

‘[...] the anti-competitive effect of a particular practice must not be of purely hypothetical.’

And that a decision should be made against:

‘[...] all the relevant circumstances, [including] the extent of [the] dominant position and the particular conditions of competition prevailing on the relevant market.’

Consequently, discounts, regardless of their form, can be abusive if capable of making either (a) entry of new competitors difficult or (b) hampering customers from choosing suppliers. Moreover, the foreclosure must be likely or plausible in light of all of the circumstances and the condition of the market. Finally, in principle it should rest upon the enforcers³⁶ to establish the anti-competitive effect and no abuse will happen if only less efficient competitors are foreclosed³⁷ or if the conduct yield considerable benefits that can be shared with consumers.³⁸

35. Case C-23/14, *Post Danmark v Konkurrencerådet*, recitals 30, 31, and 65.

36. The allocation of the burden of proof can be discussed. While in principle resting with the enforcers it tends to shift when it comes to exclusivity arrangements as articulated in case C-413/14 P, *Intel*, recital 137.

37. See e.g. case C-413/14 P, *Intel*, recital 133.

38. See e.g. case C-413/14 P, *Intel*, recital 140.

3.1. A broad concept of discounts have been developed and applied

Practice has only indicated a limited need for a distinction between different sorts of discounts,³⁹ condemning advantages as *target discounts*, *bonus*, *forward booking discounts*,⁴⁰ *cash payment*,⁴¹ *marketing contributions*,⁴² and *selective price cuts*.⁴³ Further, price differences have been labelled as a discount⁴⁴ and it doesn't matter if the discounts are widely offered or limited to a geographical area or to selected customers.⁴⁵ Hence, the abusive elements of discounts appear to be the price reductions offered without countervailing advantages, for the purpose of creating either a foreclosure (loyalty discounts), discrimination (discriminatory discounts) or an artificial link between products or services (bundling discounts). Moreover, under the concept of a single and continuous infringement it might be possible to capture several (minor) elements of anticompetitive conduct that combined can lead to a foreclosure.⁴⁶ Even where these in isolation might be less troublesome. However, following the EU case *Intel*,⁴⁷ a differentiation between (a) *quantum discounts*, normally *per se* legal, (b) *loyalty discount*, normally *per se* illegal and (c) *other forms of discounts* e.g. target discounts subject to further investigation was introduced.⁴⁸ The full

39. Cf. *Hoffmann La Roche*, recital 96, case C-95/04, *British Airways*, recital 68, and case T-203/01, *Michelin II*, recital 91.

40. See *Daniscos salg af industrisukker – rabatordninger og termiskontrakt*, Competition Council Meeting 26 May 2004, and *LK A/S grossistaftaler*, Competition Council Meeting 20 December 2000, for cases involving advanced booking discounts.

41. Case T-286/09, *Intel*, recitals 199–207.

42. Marketing contributions where revived and condemned in the Danish cases *Arla Foods rabatter og markedsføringsstilskud*, Competition Council Meeting 30 March 2005, recitals 70–73, and *Carlsbergs standardaftaler med horeca-sektoren*, Competition Council Meeting 26 October 2005, recital 167. In the latter the contributions amplified other elements.

43. United cases C-40–48, 50, 54–56, 111, 113, and 114–73, *Suiker Unie*, recital 513, where the discounts were awarded as price reductions.

44. See e.g. the Danish case *Københavns Lufthavne A/S' terms of use for CPH GO*, Competition Council Meeting 21 December 2011.

45. Cf. case T-228/97, *Irish Sugar*, recital 22, and case C-23/14, *Post Danmark v Konkurrencerådet*, recitals 43–47.

46. Case T-286/09, *Intel*, recitals 193 and 1561–1562.

47. Case T-286/09, *Intel*, recitals 75–78.

48. Pablo Ibáñez Colomo, 'Beyond the "More Economics-Based Approach": A Legal

range of this is still subject to some unclarity, in particular as the Court of Justice decided to overturn the General Court,⁴⁹ and refer the case back, for failure to review available analysis of the effect. Regardless of the overturn the differentiation could indicate a need to evaluate loyalty discounts, including direct surrogates, separate in particular as it mirrors e.g. *Post Danmark II*,⁵⁰ from 2015 where the Court of Justice noted how the applied discount system were neither:

‘a simple quantity rebate linked solely to the volume of purchases. [nor] “coupled with an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark, a point which served to distinguish it from loyalty rebates [making it ...] 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 rebate tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.’

Or to put it more clear. As the rendered discount was neither (a) *quantum discounts* nor (b) *loyalty discount* it had to be appraised on a case by case basis under some kind of effect analysis taking all the circumstances into consideration. A reading that can be perfectly aligned with the Court of Justice’s ruling in *Intel*, in principle only dealing with discount type (b).

Thus, any discount has to be appraised under some kind of effect analysis considering all the circumstances. However, the scope of this might differ depending on the nature of the discount as detailed below reserving the full analysis to (c) *other forms of discounts* as suggested by the General Court in *Intel*.

Perspective on Article 102 TFEU Case Law’, *CML Rev* 2016, p. 733, identifies in contrast four categories of discounts subject to different legal doctrines, by singling out target discounts as a fourth category abusive if loyalty inducing.

49. Case C-413/14 P, *Intel*, recitals 138–145.

50. Case C-23/14, *Post Danmark v Konkurrencerådet*, recitals 28 and 29.

3.2. The legal test for evaluating discounts

While the General Court in *Intel*⁵¹ had rebutted the need for any effect analysis when confronted with loyalty discounts, it's difficult not to read the Court of Justice's ruling as a criticism of this position. Of course the outcome might have been tainted by the fact that the EU-Commission initially had undertaken a full analysis of the discounts ability to foreclose an as efficient competitor (AEC) but then rebutted the relevance of this, including a number of alleged errors in the analysis. Consequently, it must be accepted that all discounts have to be appraised under some sort of effect analysis. A position already articulated into Danish practice. In *Post Danmark – Magasinpost III*,⁵² from 2017 the postal incumbent (Post Danmark) had conditioned extra discounts upon loyalty. Not explicitly, but indirectly through pre-negotiated targets, corresponding to expected annual requirements, and withdrawal of the scheme against customers sourcing services from competitors. In its assessment, the Danish Competition Council held that in accordance with the General Court ruling in *Intel* it was not obliged to make any effect assessment. Regardless it made an assessment based upon *Hoffmann La Roche*⁵³ and *Michelin I*,⁵⁴ taking '[...] all the circumstances' into consideration, which in the specific case were (i) the wide divergence between market shares v the competitors, (ii) variations in the discounts, (iii) the length of the reference periods, (iv) the loyalty inducing element, and (v) absence of transparency in the award criteria.

Thus, a possible reading of practice, incorporating the Court of Justice' ruling in *Intel*, would be that in the legal appraisal of discount, a distinction can be made between:

- *Loyalty discount*, that directly or indirectly induce an artificial loyalty, which is appraised taking *all the circumstances* into consideration and some kind of *ability test* cf. the Danish *Post Danmark – Magasinpost III*.

51. Case T-286/09, *Intel*, recitals 151 and 166.

52. *Post Danmarks individuelle rabatter til magasinpostkunder i perioden 2007-2009 (Magasinpost III)*, Competition Council Meeting 31. May 2017, recitals 455–501.

53. Sag C-85/76, *Hoffmann-La Roche*, recital 90.

54. Sag C-322/81, *Michelin I*, recital 73.

- *Customer tyings*, that while short of any loyalty inducing elements still makes it unattractive to source products and services from competitors, and thus potentially create a foreclosure, which is appraised under a more substantial *effect test* that could utilize *Enforcement Paper* and the AEC-test.

The line between the two groups is somewhat blurred and in particular practice predating *Enforcement Paper* is not easy to ‘squeeze’ into them. E.g. has Danish practice traditional aligned *target discount* with *loyalty discounts* which following *Intel* nor longer is viable. Moreover, as a consequence of the Court of Justice’s (unexpected) ruling in *Intel* it’s in principle somewhat open how to appraise discounts in general. A possible reading could be that all discounts are to be reviewed under a substantial *effect test* utilizing *Enforcement Paper* and the AEC-test.⁵⁵ Alternately, that the AEC-test can be used to rebut a presumption of foreclosure and thus can serve as a defence.

4. Discounts that lead to foreclosure

Hoffmann La Roche, recital 89, established that discounts with the same effects as a formal exclusive agreements are to be treated accordingly, which in particular will be relevant if the discounts are conditional upon sourcing the entirety of the requirements from the dominant undertaking and hence loyalty inducing.⁵⁶ From *Intel*,⁵⁷ it follows that exclusivity doesn’t have to be explicit. It’s sufficient that the customers are given the impression of an exclusivity obligation. Cf. *Tomra*⁵⁸ it is the sum of circumstances which decides if expressions and statements of a decision to become or remain ‘[...] preferred, main or primary supplier [...]’ have real and anti-competitive elements, and if the elements of a discount program support this. Likewise, it follows from e.g. *Intel*,⁵⁹ that it is immaterial if the initiative

55. This reading can e.g. found support in the absence of references to case C-23/14, *Post Danmark v Konkurrencerådet (Post Danmark II)* in the ruling.

56. Confirmed as lately as case C-413/14 P, *Intel*, recital 137.

57. See COMP/C3/37.990, *Intel*, recitals 217–218, 235–237, 268, 306, 348–349, 360, 627–658, and 689 for references to the subjective impression of the customers.

58. Case COMP/E-1/38.113, *Prokent/Tomra*, recitals 114–118. Confirmed with T-155/06, *Tomra*, recital 59.

59. Cf. COMP/C3/37.990, *Intel*, recitals 920 and 964 with references to further prac-

for linking discount and loyalty comes from the customers. The dominant undertaking is subject to a special obligation not to impede competition. Finally, it follows from *Hoffmann La Roche*,⁶⁰ *Michelin I*,⁶¹ and the most recent *Post Danmark II*,⁶² that other forms of discounts are reviewed against:

‘[...] all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market [...]’

In practice, progressive retroactive discounts with steps, where the discounts are calculated against the entire sale in the relevant period, and the bonus level increases with each step, have merited particular interest and intervention.⁶³ In the Danish case *SuperGros’ samhandelsbetingelser*,⁶⁴ any loyalty inducing effect was to be specifically assessed against the size of the discounts, the use of discount steps, retroactive element and the reference period.⁶⁵ The loyalty element induced by the use of progressive and retroactive discounts were further enhanced by the linking of two market segments, allowing purchases within one to provide for a scale lift on the other,⁶⁶ and a general lack of transparency and clarity in the calculation of the discounts.

tice. See also case C-413/14 P, *Intel*, recital 137.

60. See recital 90.

61. Case C-322/81, *Michelin I*, recital 73.

62. Case C-23/14, *Post Danmark v Konkurrencerådet*, recitals 28 and 29.

63. See also ruling of the High Court of Eastern Denmark 22 June 2009, regarding TV 2 prices and conditions, e.g. pp. 124 and 125 noting how the involved company (TV 2) in practice had always secured a basis turnover, calling for the discount to be assessed against its marginal effects and thus in practice being progressive and retroactive.

64. *SuperGros’ samhandelsbetingelser*, Competition Council Meeting 30 August 2007. Closed against commitment and therefore in principle undecided on the matter of any abuse.

65. See recitals 144 and 184–205.

66. See recitals 14 and 213–215.

In addition to exclusive discounts and surrogates, practice has dealt with target discounts with cumulative retroactive elements,⁶⁷ conditioned upon meeting of predefined (individualized) targets e.g. a 10% increase over last year's purchases or acquisitions across different product categories. Such discounts have the effect of making it disproportionately expensive to source minor requirements from alternative suppliers, foreclosing these, and have been reviewed and condemned in classic EU cases. In *Hoffmann La Roche* the discounts were offered as target discounts, estimated in advance and subject to an increase in accordance with the level of requirements sourced from the dominant undertaking. In *Michelin I*⁶⁸ the discounts incorporated a variable yearly discount, calculated against a combination of last year's procurements and the meeting of pre-fixed sales targets, also calculated against last year's procurements. When appraising the latter, the Court of Justice noted how discounts calculated against a long reference period could place the customers under considerable distress, especially at the end of a year, to meet the defined turnover targets, concluding that:

'Such as situation is calculated to prevent dealers from being able to select freely at any time in the light of the market situation the most favourable of the offers made by the various competitors and to change supplier without suffering any appreciable economic disadvantage. It thus limits the dealers' choice of supplier and makes access to the market more difficult for competitors. Neither the wish to sell more nor the wish to spread product more evenly can justify such a restriction of the customer's freedom of choice and independence. Therefore the position of dependence in which dealers find themselves and which is created by the discounts system in question, is not based on any countervailing advantage which may be economically justified.'

A loyalty discount identical to *Michelin I* was reviewed in the Danish case *Opel Danmarks rabatsystem*,⁶⁹ where an annual bonus was condi-

67. Meaning that the discount is calculated against the entire procurement, including past acquisitions, providing for a negative marginal price for certain acquisitions.

68. Case C-322/81, *Michelin I*, recitals 81–86.

69. *Opel Danmarks rabatsystem*, Competition Council Meeting 28 November 2001.

tioned upon meeting predefined turnover figures; not merely in general but within three different product categories and within each of the years quarters. In its appraisal the Danish Competition Council found that the bonus was designed for the purpose of inducing retailers to consolidate their procurements with the dominant undertaking, thus preventing alternative suppliers' access to the market. The foreclosure effects were in particular caused by the use of⁷⁰ (a) last year's procurements as a starting point for calculation of this year's sales targets, (b) a progressive scale and (c) bonuses only being awarded subject to the meeting of all targets, including targets specific to each category and quarter. Following a dialogue with the Danish Competition Council, the dominant undertaking accepted to adjust the awarding, allotting separate discounts in each product category and only for one quarter at a time. A largely identical discount, conditioned upon the expansions of procurement, was appraised and condemned in the Danish cases *Konkurrencebegrænsninger på markedet for ortopædiske sko*⁷¹ and *Post Danmarks – Magasinpost III*⁷² and the EU case *British Airways*.⁷³ However, quarterly bonuses allotted in accordance with a sliding scale with limited progression have been accepted in Danish practice.⁷⁴

A variation on individualized target discounts, with the same effects and subject to the same level of condemnation, is different forms of top-slice discount. Under such a system the discounts are allotted on extras exceeding the basis amount sourced from the dominant undertakings, and thus are potentially sourceable from a third party. Such a system was appraised in the two EU cases *Soda/Solvay*⁷⁵ and *Irish Sugar plc*.⁷⁶ However, top-slice discounts should be considered abusive only if incorporating cumulative elements, where pre-

70. Recitals 29–34. See also the Danish case *Skandinavisk Motor Co A/S – ekstrabat-system*, Competition Council Meeting 19 June 2002.

71. *Konkurrencebegrænsninger på markedet for ortopædiske sko*, Competition Council Meeting 23 February 2000.

72. *Post Danmarks individuelle rabatter til magasinpostkunder i perioden 2007-2009 (Magasinpost III)*, Competition Council Meeting 31 May.

73. Case C-95/04, *British Airways*.

74. See e.g. the Danish case *Skandinavisk Motor Co A/S – ekstrabatssystem*, Competition Council Meeting 19 June 2002, recital 95.

75. Case COMP/33.133, C: *Soda/Solvay*, O.J. 2003L 10/10, recitals 64 and 153–160.

76. Case T-228/97, *Irish Sugar plc*.

vious procurements are also taken into consideration or within the context of *predatory pricing*.⁷⁷

A third variation on target discounts and their foreclosure effects was subject to appraisal in the Danish case *LK A/S grossistaftaler*.⁷⁸ Here, the discounts came in the form of advance booking discounts with progressive elements. While the first was conditioned upon the placing of orders for the forthcoming year prior to 30 November, the latter was allotted in a manner that was isolated from any cost reductions by the dominant undertaking. A third discount, which was considered to amplify the effects of the advance booking discounts rather than representing a separate infringement, was a discount offered on extras over the estimation. Extras that, however, were less advantageous and thereby encouraged the provision of a qualified estimation. The Danish Competition Appeals Board therefore labelled the discounts, especially the booking discount, as having a lock-in effect, specifically because the later couldn't be adjusted and was estimated jointly with the dominant undertakings. Consequently, and in the absence of an economic justification,⁷⁹ the discount functioned as an exclusive agreement,⁸⁰ and therefore merited condemnation as abusive.⁸¹

A fourth variation on target discounts was reviewed in the Danish case *Post Danmarks direct mail*,⁸² involving a standardized discount system. However, following a closer review of the customers entry

77. Accepted by the Commission in *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recitals 168–169, but only partly reflected in Enforcement Paper. The consideration might be identifiable in recital 41, 2nd sentence defining the effective price in conjunction with recital 43 and abuse as prices below AAC.

78. *LK A/S grossistaftaler*, Competition Council Meeting den 20 December 2000. Largely confirmed by Danish Supreme Court ruling dated 7 January 2008.

79. See in contrast *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005, recital 238, and *Daniscos salg af industrisukker – rabatordninger og terminskontrakt*, Competition Council Meeting 26 May 2004, both accepting different forms of cost reduction as defences for the advance booking.

80. See recitals 109–125 and 113.

81. However, advanced booking discounts were accepted in *Daniscos salg af industrisukker – rabatordninger og terminskontrakt*, Competition Council Meeting 26 May 2004.

82. *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recitals 521–529.

points, i.e. the systems' effects in practice, a problematic sucking in effect was uncovered encouraging these to retain or expand their procurement. Consequently, while labelled as a standardized system, the applied system nevertheless displayed the characteristics of the individualized target discounts with a strong foreclosure effect. The Competition Appeals board, when reviewing the decision of the Danish Competition Council, could therefore conclude that these discounts mirrored the effect of loyalty discounts because they were calculated against the aggregated annual trade with a retroactive perspective.⁸³ Likewise, the Danish High Court notes that, when reviewing *TV 2's priser og betingelser*,⁸⁴ regardless of their objective and standardized form, the applied discounts did in practice function in an individualized manner.

In accordance with these principles, different forms of marketing contributions and payments were condemned in the EU case *Intel*⁸⁵ and the Danish case *Arla Foods rabatter og markedsføringstilskud*,⁸⁶ while selective price cuts and amalgamate discounts were condemned in the two Danish cases *Post Danmark – adresseløse forsendelser*⁸⁷ and *Scandlines rabatvilkår ved udstedelse af kombinationsbilletter til lastbiler*.⁸⁸ In all of these cases, it was the foreclosure effects of the discounts that led to condemnation, regardless of their legal form and name. In

83. Decision by the Competition Complaint Board 10 May 2010 in *Post Danmark v Konkurrencerådet*, p. 187.

84. High Court of Eastern Denmark 22 June 2009 in *TV 2 priser og betingelser*, e.g. p. 125.

85. See e.g. COMP/C3/37.990, *Intel*, recital 615, 1641, and 1677–1681, for a detailing of the payment. Payment referred to as *naked restrictions*.

86. *Arla Foods rabatter og markedsføringstilskud*, Competition Council Meeting 30 March 2005, recitals 70–73, labeling marketing contributions as non-cost based discounts. See also the Danish case *Carlsbergs standardaftaler med horeca-sektoren*, Competition Council Meeting 26. October 2005, e.g. recital 167, where marketing contributions were held to amplify the effect of an exclusive agreement.

87. *Post Danmark – adresseløse forsendelser*, Competition Council Meeting 29 September 2004, overruled by Danish Supreme Court ruling 15 February 2013 following the EU Court of Justices ruling in C-209/10, *Post Danmark v Konkurrencerådet*. See also the EU case C-40–48, 50, 54–56, 111, 113, and 114–73, *Suiker Unie*, recital 513.

88. *Scandlines rabatvilkår ved udstedelse af kombinationsbilletter til lastbiler*, Competition Council Meeting 28 January 1998, where a discount was allotted to customers using Scandlines ferries when crossing two different straits.

*Intel*⁸⁹ some of the contributions had an indirect nature because they targeted the retailers rather than the direct customer, but were nevertheless made subject to review after the principles laid down for other discounts. Further, confusion and unpredictability has been contemplated as a separate form of abuse, but should rather be viewed as amplifiers,⁹⁰ as it puts the customers under pressure to respect the exclusivity.⁹¹ Finally, it should be noted, as detailed below, that there is no requirement that an anti-competitive effect be caused by the loyalty discounts. In EU cases as *British Airways*,⁹² *Michelin II*,⁹³ and *Intel*,⁹⁴ an abuse was identified regardless of indications of lack of effect in respect to inducing loyalty and exclusivity. Loyalty discounts are condemned if *capable* of creating a foreclosure effect regardless of its name or form.⁹⁵ The same approach was applied by the Competition Appeals Board, in the Danish case *Post Danmark – Magasinpost II*,⁹⁶ which noted that individualized target discounts and minimum conditions were reviewed against their ability to create an appraisable loyalty effect. Following the Court of Justice's rulings in *Post Danmark I* and *Post Danmark II* the exclusionary effect must, however, be real or at least plausible in some sort of effect analysis.⁹⁷ Moreover, Danish practice displays a tendency to consider individual-

89. See e.g. COMP/C3/37.990, *Intel*, recitals 179–181. In recital 615 it was noted how the marketing contribution was not linked to specific marketing activities and therefore appeared as loyalty inducing.

90. Cf. case IV/34.621, 35.059/F-3, *Irish Sugar plc*, O.J. 1997 L 258 p. 1, recital 150. In the Danish case *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007, recital 210, a non-transparent discount system is merely considered an amplifier rather than separate infringement. See also COMP/C3/37.990, *Intel*, recital 945

91. Cf. case C-322/81, *Michelin I*, recital 83, and most likely Danish Competition Appeal Boards decision 10 May 2010 in *Post Danmark v Konkurrencerådet*, p. 187.

92. Case T-219/99, *British Airways*, recital 293, and the Court of Justices ruling in case C-95/04, recitals 92–98.

93. Case T-203/01, *Michelin II*, recital 239.

94. COMP/C3/37.990, *Intel*, recitals 268, 919, and 922.

95. Cf. e.g. case T-286/09, *Intel*, recital 103, and case C-23/14, *Post Danmark v Konkurrencerådet*, recitals 65–68.

96. Danish Competition Appeal Boards decision 8 December 2011 in *Post Danmark v Konkurrencerådet*, p. 24.

97. For further see e.g. Pablo Ibáñez Colomo 'Appreciability and De Minimis in Article 102 TFEU', *Journal of European Competition Law & Practice* 2016, vol 7, No 10, pp. 651–660.

ised discounts as loyalty inducing *per se* and thus abusive which cannot be fully aligned with EU practice as *Intel*.

4.1. Pure loyalty discounts

The fundamental criteria established in *Hoffmann La Roche* and *Michelin I* have been retained and subsequently developed and indicate that there is a limited scope for offering discounts if these serve as surrogates for formal exclusivity agreements. That would in particular occur if the discounts are individualized and calculated against a longer reference period, typically more than 3 months,⁹⁸ or only allotted against *de facto* exclusivity, replacing a formal agreement.⁹⁹ Of relevance would also be if the discount has a retroactive element which is calculated against earlier procurements or is limited to the current procurement. The latter could hardly be loyalty-inducing but i.e. be appraised as predatory pricing if it fails to cover the direct incremental costs.¹⁰⁰ After the outlined practice, in particular *Michelin II*, a discount would cover all forms of advantages or considerations of an economic value offered by the dominant undertakings in exchange for loyalty. Furthermore, the effects could be amplified by special market conditions e.g. a large spread in market shares between the

98. Following the ‘1990 Coca Cola settlement’, cf. IP/90/7, The Commission accepts a formal undertakings from the coca-cola export corporation regarding its commercial activities in the community soft drinks market. 3 month reference period has been presumed acceptable. Danish practice has partly picked up on this cf. *Opel Danmarks rabatsystem*, Competition Council Meeting 28 November 2001. However, in *Skandinavisk Motor Co A/S – ekstrarabatsystem*, Competition Council Meeting 19 June 2002, even quarter discounts were held abusive. Further, in the Danish case *TV 2’s priser og betingelser*, Competition Council Meeting 21 December 2005, recital 143 it’s stated that the acceptable length of the reference period shall be calculated on a case-by-case basis followed by condemnation of a 12 month reference period. See also case T-203/01, *Michelin II*, recital 85.

99. See e.g. the Danish Competition Appeal Boards decision of 16 January 2001 in *MD Foods Amba v Konkurrencerådet*, recital 5.

100. Cf. case T-203/01, *Michelin II*, recital 85. The Danish case *TV 2’s priser og betingelser*, Competition Council Meeting 2 December 2005, recital 143, formulates a presumption of progressive discounts as loyalty-inducing. A case ultimately upheld by Danish Supreme Court ruling 18 March 2011. However, following case C-209/10, *Post Danmark v Konkurrencerådet*, the opinion looks problematic and it would most likely be more correct to disregard selective price cuts as loyalty-inducing unless below costs.

dominant undertaking and its competitor,¹⁰¹ special rights awarded by law¹⁰² or the customers preference for a single supplier. In case of the latter it could be anti-competitive if some products are available only from one provider¹⁰³ potentially foreclosing other.

The wideness of the discount concept can be illustrated by EU cases such as *Van den Bergh Foods*,¹⁰⁴ *Intel*, and the Danish case *Tele Danmark Mobils standard storkundekontrakt*.¹⁰⁵ In the first case it was considered abusive that the dominant undertaking had reserved the use of freezers, supplied free of charge for its own products,¹⁰⁶ while the abuse in *Intel*¹⁰⁷ involved cash donations to customers in exchange for stalling the marketing of computers utilizing processors produced by a named competitor. In the latter case, *Tele Danmark Mobils standard storkundekontrakt*, it was held that a bonus convertible to extra acquisitions and allotted if certain targets were met, functioned as a loyalty discount, regardless of its form and name.

The wide approach to loyalty-inducing discounts can also be illustrated by the Danish case *EjendomsAvisens annonceaftaler*,¹⁰⁸ where it was the cumulative effects of a network of loyalty discounts that restricted competition. The case was appraised under the Danish equivalent to Article 101, and should consequently be used with some caution. On the other hand, the case does illustrate how a parallel network of vertical agreements could limit competition jointly and merit intervention under Article 101. Transposed onto Article 102, it

101. See e.g. Case C-322/81, *Michelin I*, recital 82.

102. See e.g. the Danish case *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recitals 579–590.

103. See e.g. the Danish cases *Tilsagnsaftale for Biblioteksmedier A/S*, Competition Council Meeting 18 June 2008, recital 71, and *DBC medier as*, Competition Council Meeting 22 June 2005, recitals 8 and 150.

104. Case T-65/98, *Van den Bergh Foods*.

105. *Tele Danmark Mobils standard storkundekontrakt*, Competition Council Meeting 16 June 1999. The case relates to the Danish equivalent of Article 101 but could reasonably be translated to Article 102 in respect to the example used.

106. The EU Commission considered it unlikely that more than one freezer would be squeezed into each retailers shop, thereby *de facto* creating an exclusionary effect. See also the Danish case *Carlsbergs standardaftaler med horeca-sektoren*, Competition Council Meeting 26 October 2005, recital 158, and COMP/39.116, *Coca Cola*, for examples of these principles applied to the supply of beers and soft drinks.

107. See COMP/C3/37.990, *Intel*, recital 1641–1681. Despite supporting other forms of abusive discounts the cash contribution was held as separate infringement.

108. *EjendomsAvisens annonceaftaler*, Competition Council Meeting 21 June 2000.

could create a situation where market conditions outside the control of the dominant undertaking amplify the effect of the allotted discount, creating an anti-competitive effect. A principle already incorporated under the articulated concept of a single and continuous infringement as detailed initially. Moreover, the latest EU cases *Tomra*¹⁰⁹ from 2006 and *Intel*¹¹⁰ from 2009, and the Danish *Post Danmarks – Magasinpost III*¹¹¹ from 2017 offer notable considerations. In the first case, the EU-Commission links the concepts of *switching cost* and *foreclosure*, identifying an abuse if discounts or other advances increase the costs of switching from the dominant supplier to another supplier. In the second case, the perception of the customers were taken into consideration, making it sufficient that they got the impression that it would have consequences to source requirements from a third party. Finally, in the last unspecific treat of consequences for failure to meet agreed turnover targets translated the discount into a loyalty discount subject to a rigid test.

4.2. When to consider foreclosure plausible?

Despite discounts being allotted against the entire procurement, i.e. incorporating a retroactive and cumulative effect, or in another way having a loyalty inducing nature, a discount should not *per se* be considered able to create a foreclosure and hence abusive. No foreclosure would be rendered from a (very) small discount which is unfit to induce loyalty,¹¹² in particular if allotted on procurement that would have been sourced anyway from the dominant undertaking, in accordance with a sliding scale subject to limited progression.¹¹³ On

109. Case COMP/E-1/38.113, *Prokent/Tomra*, recital 329.

110. See inter alia COMP/C3/37.990, *Intel*, recitals 268, 306, 348–349, 627–658, and 689, for references to the subjective impressions of the customers.

111. *Post Danmarks individuelle rabatter til magasinpostkunder i perioden 2007-2009 (Magasinpost III)*, Competition Council Meeting 31 May 2017, recitals 312–317.

112. However, cf. case C-23/14, *Post Danmark v Konkurrencerådet*, recital 73, no *de minimis* defence appears available under Article 102, indicating how even very small discounts could be abusive. For further on the matter, including a different reading of these cases, see Pablo Ibáñez Colomo, ‘Appreciability and De Minimis in Article 102 TFEU’, *Journal of European Competition Law & Practice* 2016, vol 7, N0 10 pp. 651–660.

113. Cf. e.g. *Skandinavisk Motor Co A/S – ekstrarabatsystem*, Competition Council Meeting 19 June 2002, recital 95.

the other hand, high thresholds for the allotting of the discounts would involve the ‘free’ part of the market, which is potentially sourceable from a third party, and hence be loyalty-inducing. When appraising the discounts, it would also be relevant to consider if these are awarded on the entire procurement, whilst only a limited part of the market, e.g. due to capacity constraints is contestable.¹¹⁴ In such a situation, even a small discount rate in % could have a strong suction effect on the contestable part of the market.

In order to provide guidance, the EU-Commission published its *Enforcement Paper* in 2009, suggesting the use of the effective price per unit and a competitors ability to match this, as a proxy for a foreclosure risk and hence an abuse.¹¹⁵ When calculating this, distinctions are made between:¹¹⁶

1. *Incremental discounts*, allotted only on procurements exceeding a defined level, where the effective price is calculated only on the specific procurement, and
2. *Retroactive discounts*, also allotted against earlier procurements, requiring adjustments if part of the market is *de facto* locked to the dominant undertaking and therefore uncontestable. Here the effective price is calculated against the ‘free market’, otherwise called the contestable share.

Following these calculations, a presumption test was then formulated and presented in the *Enforcement Paper*, under which an effective price covering:

- the dominant undertaking’s *Long Run Average Incremental Cost* (LRAIC) is incapable of leading to a foreclosure,

114. Cf. case C-322/81, *Michelin I*, recital 81–82; case T-203/01, *Michelin II*, recitals 87–91, and case T-219/99, *British Airways*, recitals 272–273.

115. See recital 36–45. In the previous *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 155–157, a number of additional approaches utilizing concepts such as *Required Market Share* (RQS) and *Commercially Viable Share* (CVS) were used. It is unclear if these concepts represent a different approach.

116. Recital 36.

- while the reverse is presumed for prices below *Average Avoidable Cost* (AAC).

For prices in between this spread, further analyses are stipulated.¹¹⁷ Implicit in the presumption test lies the idea that only the foreclosure of an efficient competitor (AEC) should be considered abusive.¹¹⁸ Furthermore, the usage of the dominant undertaking's own costs provides, at least in theory, for self-assessment prior to the launch of a new discount scheme.¹¹⁹

The principles laid out by the *Enforcement Paper* represent a significant simplification compared to the principles suggested in the prior *Discussion Paper*,¹²⁰ but are not supplemented by practical examples as in this. Furthermore, the use of a somewhat loosely defined concept as a *contestable share* makes self-assessment in practice complex, if not impossible.¹²¹ The EU-Commission even reserves the right to intervene in unspecified situations, despite leaving room for an as efficient competitor.¹²² Finally, the competition authority is allowed a somewhat arbitrary assessment when determining the contestable level of the market. In *Intel*,¹²³ the EU-Commission e.g. limited itself by labeling Intel as an 'unavoidable trading partner', and therefore making the contestable market very limited. Consequently, the testing was carried out against a very low market portion, leading to an equally low effective unit price. Some of the same elements can be

117. Recital 43. The test only establishes a presumption, allowing for intervention despite securing coverage for LRAIC. For further, including an example see Svend Albaek & Adina Claiici, 'The Velux Case—an in-depth look at rebates and more', *Competition policy newsletter* 2009-2, pp. 46–47. While writing in a personal capacity the expressed views does offer an insight to the Commissions approach to the matter.

118. In the Danish case *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recitals 502–507 it's noted how the foreclosure of less efficient competitors could be considered abusive.

119. In recital 24 the Commission reserves the right to use the competitors cost should it not be possible to calculate the dominant undertakings.

120. *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*.

121. More applicable principles have been suggested by Lars Kjølbye, 'Rebates under article 82EC, Navigating uncertain waters', *ECLR* 2010, pp. 66–80.

122. See recital 23.

123. COMP/C3/37.990, *Intel*, recital 1010. An indirect analysis can be found in recitals 1717–1731.

identified in the Court of Justice's approach in *Tomra*,¹²⁴ which basically required the entire market to be open for competition.

Regardless of its shortfalls, any attempt to provide an analytical framework for the assessment of discounts, and a move away from the *per se* condemnation of e.g. retroactive or loyalty discounts should be welcomed. Furthermore, the *Enforcement Paper*¹²⁵ actually summarises the most notable elements of the appraisal, e.g. the market position of the dominant undertaking vis a vis the competitors, the latter's ability to counter the effect, substantial barriers and the scale of the abuse. It even signals a willingness to consider any efficiency arguments listed in defence of the discounts as a mitigating factor.¹²⁶ Consequently, conceptually the principles outlined in *Enforcement Paper* can easily be aligned with the requirement cf. *Hoffmann La Roche*¹²⁷ and *Michelin I*,¹²⁸ to take '[...] all the circumstances [...]' into consideration. Furthermore, does the Court of Justice in *Intel*¹²⁹ not only correct the General Courts on the obligation to review submitted economic analysis, but it also embrace the principles outlined above by stating how:

'[...] the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.'

While the Court of Justice doesn't articulate a (clear) obligation to undertake an effect analysis cf. the *Enforcement Paper*, it might have

124. Case C-549/10 P, *Tomra*, recital 42.

125. See *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 20.

126. See *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 21.

127. Case C-85/76, *Hoffmann-La Roche*, recital 90.

128. Case C-322/81, *Michelin I*, recital 73.

129. Case C-413/14 P, *Intel*, recitals 138–140.

done that indirectly by citing the principles laid down by this. While the actual wording might differ the content is remarkably identical.

Regardless of any obligation, the principles from the *Enforcement Paper* were put to use by the EU-Commission in *Tomra*¹³⁰ from 2006 and *Intel* from 2009, where dominant undertakings, through i.e. retroactive discounts, had foreclosed the market for vending machines and CPU units. Likewise, were the principles applied in the Danish cases *Post Danmark – Magasinpost I* from 2007,¹³¹ as a supplement, and *Post Danmarks direct mail*¹³² from 2009 as an integrated part of the abuse analysis. Moreover, the latter eventually ended up before the Court of Justice as *Post Danmark II* confirming the relevance of effect considerations without tabling an absolute obligation to undertake substantial analysis of the matter.¹³³ In particular *Intel* shows the challenges involved in the suggested framework, e.g. the scope of the free market for the purpose of calculating the contestable market share. Here the EU-Commission ended up finding this somewhat limited.¹³⁴ Furthermore, *British Airways*¹³⁵ and *Post Danmark II* indicates, as

130. Case COMP/E-1/38.113, *Prokent/Tomra*, recitals 131–133, and the subsequent analysis in recitals 134–270, in particular recitals 159–166; recitals 180–187; 218–226; recitals 234–240, and recitals 264–270. See also the provided summary in recitals 271–329, in particular recitals 314–329. In addition to retroactive discounts, Tomra had also applied traditional exclusive agreements cf. recitals 114–130, supported by a discount program.

131. *Forbruger-Kontakts klage over Post Danmarks priser og vilkår for magasinpost (Magasinpost I)*, Competition Council Meeting 30 August 2007, recitals 335–362. The offered consideration on the marginal price can also be seen in Danish cases as *Skandinavisk Motor Co A/S – ekstrarabatsystem*, Competition Council Meeting 19 June 2002, recital 76, and *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007.

132. *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recitals 205–272 and 482–633. Disregarding the AEC-test where rationed with massive economic of scale and scope and reserved rights vesting the incumbent substantial advantages and potentially providing a wrong picture by the test. Nevertheless calculations were made cf. recitals 250–251 confirming a foreclosure effect even under the AEC-test.

133. It's unclear if the Court of Justice rebutted the requirement in general or was merely influenced by the super dominant position of the involved undertaking. The national enforcer had specifically referred to the risk of producing over-optimistic results in light of this.

134. COMP/C3/37.990, *Intel*, recital 1012.

135. See e.g. case T-219/99, *British Airways*, recital 293, and case C-95/04, *British Airways*, recitals 68–69.

already explained, that the need for an effect-based approach might be overemphasized. If a discount or discount scheme appears capable of creating a foreclosure, it will be considered abusive, regardless of its actual effect. The same would most likely be applicable to traditional target discounts awarded subject to meeting specified sales targets.

In particular *Tomra* and *Intel* show the way by elevating the *Enforcement Paper* to an instrument of verification. In *Tomra*, the EU-Commission had built its case on a traditional form based analysis, using the effect analysis from the later *Enforcement Paper*, to rebut lack of foreclosure ability. Neither the General Court nor the Court of Justice had any reservations against this and the latter even noted in recital 72, that:

‘[...] Contrary to what is claimed by the appellants, the invoicing of “negative prices”, in other words prices below cost prices, to customers is not a prerequisite of a finding that a retroactive rebates scheme operated by a dominant undertaking is abusive.’

Followed by recital 79 detailing the offered considerations:

‘[...] the loyalty mechanism was inherent in the supplier’s ability to drive out its competitors by means of the suction to itself of the contestable part of demand. When such a trading instrument exists, it is therefore unnecessary to undertake an analyse of the actual effects of the rebates on competition given that, for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to demonstrate that the conduct at issue is capable of having an effect on competition.’

The same approach was used in *Intel*, when the EU-Commission opens *Intel*¹³⁶ with a traditional analysis cf. e.g. *Hoffmann La Roche*, followed by an effect analysis as coined by the *Enforcement Paper*. The EU-Commission did, however, explicitly maintain neither to be obligated to perform such testing nor to consider them part of the abuse standard.¹³⁷ Furthermore, it is even ignored that part of the dis-

136. See COMP/C3/37.990, *Intel*, recitals 920–1001.

137. COMP/C3/37.990, *Intel*, recitals 1002 and 1760. See also *Enforcement Paper*, re-

counts might have been in vain, as some customers (unpunished) had shifted away from the dominant undertaking and the competitor thus gained market shares.¹³⁸ The General Court confirmed this approach and the rendered arguments stating that, in light of the discount's nature, no effect analysis was required.¹³⁹ It was sufficient that third parties' market access had been disturbed, rebutting actual foreclosure or a negative margin as a requirement for an abuse. However, it's difficult not to read the Court of Justice's ruling as anything short of an overturn of this. Either in general or in the specific case where the EU-Commission initially had undertaken a substantial effect analysis using the AEC-test tabled with the *Enforcement Paper*.

4.2.1. A possible frame for reviewing discounts

A prudent conclusion, joining the effect based approach tabled by the *Enforcement Paper* with the rigid form based approach from e.g. *British Airways*, might be to consider the effect analysis as a defence, rather than part of the abuse standard. Alternatively, an analytical framework for verifying other analyses and presumptions, including identification of more troublesome discount systems. Under the first doctrine, potentially abusive discounts could be legitimized by the same principles as other forms of objective justifications,¹⁴⁰ while the latter could secure condemnation of standardised and innocent looking discount systems, if these are loyalty inducing and hence anti-competitive.¹⁴¹ Furthermore, simple discount systems, void of top-slice & individualized elements or other elements of the loyalty discounts trades, might only be condemnable following an effect analysis cf. *Enforcement Paper* as indicated initially. Moreover, this could be aligned with most possible readings of the Court of Justice ruling in *Intel* and the embedded criticism of the General Court refusal to contemplate a no anti-competitive effects argument. Consequently, it would be recommendable for plaintiffs and defendants to structure

cital 3 and the Danish case *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24. June 2009, recital 482, note 96.

138. See e.g. COMP/C3/37.990, *Intel*, recitals 267–268.

139. Case T-286/09, *Intel*, recitals 146–150.

140. Support for this can be found in case C-413/14 P, *Intel*, recital 140.

141. See e.g. the Danish case confirmed by the ruling of High Court of Eastern Denmark 22 June 2009 regarding TV 2 prices and conditions, pp. 124–125.

their submissions before the Competition Authority in accordance with the *Enforcement Paper*, including an explanation of how the discount affects competition (negatively) and how it fails to meet this, respectably. Furthermore, in light of the tendency in case law to resort to subjective elements as malicious intent or an overall foreclosure plan,¹⁴² it would be recommendable to avoid all indications, direct or indirect, of a loyalty obligation attached to the discounts. Of course general recommendation of own products would be still be possible,¹⁴³ but anything beyond should be avoided.

Support for the suggested conclusions and recommendations can be found in newer cases such as *Tomra* and *Intel*. In *Tomra*,¹⁴⁴ the Court of Justice rebutted the need for economic analysis when the discounts, incidentally, could foreclose competitors and it appears that the General Court came to the same conclusions in *Intel*¹⁴⁵ with its differentiation between (a) *quantum discounts* (b) *loyalty discounts*, and (c) *other form of discounts*. While the first was subject to a *per se* presumption of legality, the opposite was applicable to the second, rendering the third subject to further analysis, perhaps as tabled by the *Enforcement Paper*. However, as the rendered conclusions were overturned by the Court of Justice it might be dangerous to extract too much from the case. On the other hand, the relevance of the *Enforcement Paper* was also rebutted in *Post Danmark II*,¹⁴⁶ a ruling that surprisingly is ignored by the Court of Justice in *Intel*.¹⁴⁷ That would provide for an alternative reading of the *Enforcement Paper*, where this could serve as supplementary parallel to normal and restrictive practices. Either to confirm or rebut other analysis indicating an ability to foreclose an as efficient competitor. A reading that in particular finds

142. See e.g. case 413/14 P, *Intel*, recital 139.

143. Cf. case T-286/09, *Intel*, recital 1334, the dominant undertaking can recommend its own product over the competitors in addition to discouraging sourcing from the later, provided its kept in general terms. Furthermore, it follows from recital 1547 that it is not considered evidence of a loyalty inducing purpose that certain words, associated with this, are actively avoided. However, an attempt to conceal this could be held as an indicium.

144. Case C-549/10 P, *Tomra*, recital 79.

145. Case T-286/09, *Intel*, recitals 74–78 and 80–89.

146. Case C-23/14, *Post Danmark v Konkurrencerådet*, recital 62.

147. Case 413/14 P, *Intel*.

support with the Court of Justices critic in *Intel*¹⁴⁸ of the General Court failure to review submitted AEC-analysis. Either in general or in the specific case where the EU-Commission initially had applied the AEC-test.

The review of discounts would then follow a two-step analysis, where the first step involves identifying loyalty elements and an evaluation of the effects. Void of any direct loyalty element a second step follows appraising the foreclosure risk cf. the *Enforcement Paper*, including the creation of strategic access barriers. Under this two-step approach a discount program could utilize top-slide, discriminatory and lock-in discounts, even incorporating retroactive elements.¹⁴⁹ Perhaps even loyalty elements provided they lack anti-competitive effect.

4.3. Mixed bundling

A variation of the loyalty discount is a different form of bundling discount, normally called *mixed bundling*, which is allotted subject to the sourcing of complimentary products or services. In *Hoffmann La Roche*, a special discount was only available if the entire assortment was acquired, and traditionally such discounts have been appraised as a variation of loyalty discount. In the Danish case *DBC medier*,¹⁵⁰ a discount was reserved for customers sourcing more than one product, thereby creating an artificial link between products, without any economic justification.¹⁵¹ From the later observation it would follow that mixed bundling is acceptable only if objectively justifiable. However, following the wording utilized in *Intel*, it might be that mixed bundling, short of being a traditional loyalty discount, would merit further

148. Case 413/14 P, *Intel*, recital 141.

149. On the other hand, the Court of Justice did, in case C-95/04, *British Airways*, recital 73, label retroactive discounts as particularly capable of creating loyalty, thus meriting some caution. Some of the same considerations appeared in case C-23/14, *Post Danmark v Konkurrencerådet*, recitals 33–36. An attempt to consider the potential window for retroactive discounts can be found with Svend Albaek & Adina Claici, ‘The Velux Case—an in-depth look at rebates and more’, *Competition policy newsletter* 2009-2, pp. 46–47. While writing in a personal capacity the expressed views do offer an insight to the Commissions approach to the matter.

150. *DBC medier as*, Competition Council Meeting 22 June 2005, recitals 132–167.

151. See also the Danish case *Rukos markedsadfærd*, Competition Council Meeting 19 December 2001, recitals 59–64.

considerations before being deemed abusive. These considerations could include e.g. the effective sale price and an efficient competitor's ability to meet these, as suggested in the *Enforcement Paper*. Thus, mix bundling can only be held abusive if a foreclosure is likely under the AEC-test.

4.4. Quantum discounts

As stated by the General Court in *Intel*,¹⁵² separate from loyalty discounts, a category of quantum discounts can be identified, which is normally subject to a *per se* presumption of legality. Here, discounts are allotted on the basis of each procurement, and in accordance with a standardized and proportional scale, representing a presumption of cost reductions for the dominant undertaking. These cost reductions can then be passed onto the customers in order to induce them to assist the process. The considerations can trace their lineage back to *Hoffmann La Roche*, recital 90, separating these from loyalty discounts '[...] quantity rebates exclusively linked with the volume of purchases from the producers [...]'. A consideration expanded further with *Michelin II*, recital 58 finding how:

'Quantity rebates are [...] deemed to reflect gains in efficiency and economies of scale made by the undertaking in a dominant position.'

Consequently, where an objective (economic) explanation can be provided in defence of a discount, a much more lenient appraisal becomes available.¹⁵³ The burden of proof falls with the dominant undertaking.¹⁵⁴ Further, each step or element in the rendered discount

152. Case T-286/09, *Intel*, recitals 75–78.

153. Normally this would involve a cost reduction. However the Danish case *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005, recital 163, provides for broader consideration—including efficiencies. See also the EU case C-163/99, *Portugal v Commission*, recital 52, referring to added volume and economics of scale. In the Danish case *Nissan Motor Danmark A/S indfører nye rabat-betingelser*, Competition Council Meeting 28 August 2002 it was accepted that converting to weekly orders would represent a cost reduction that could be passed onto the customers.

154. Cf. case T-228/97, *Irish Sugar*, recital 188, case T-219/99, *British Airways*, recital 281, and case T-203/01, *Michelin II*, recital 107. See also the Danish case *Klage*

system should be explainable.¹⁵⁵ From the Danish *Post Danmark – magasinpost II*,¹⁵⁶ it most likely follows that this doesn't involve a cent-per-cent assessment requiring proof of every cent passed onto the customers. In reviewing the case, the Competition Appeals Board accepted that certain savings were available to the customers, criticizing the Competition Authority for failing to take these into consideration. On the other hand, *Michelin II* recital 95 indicates how nevertheless even quantity discounts could have the '[...] characteristics of a loyalty-inducing discount system' if the following elements are incorporated:

'[...] there is a significant variation in the discount rates between the lower and higher steps, which has a reference period of one year and in which the discount is fixed on the basis of total turnover achieved during the reference period [...]'

In defence of the operated discounts, Michelin had inter alia referred to a different form of economic of scales linked to an expansion of turnover, and therefore indirect cost reductions for the dominant undertaking. The General Court found these too general and unspecified,¹⁵⁷ indicating that discounts claiming to be quantity rebates, should be allotted in accordance with a simple progressive scale and represent a cent-by-cent saving.¹⁵⁸

Under the same principles as *Michelin II*, a loyalty-inducing quantity discount was reviewed and condemned in the Danish cases *Post Danmarks direct mail*¹⁵⁹ and *TV 2's priser og vilkår*.¹⁶⁰ Despite being

over Post Danmarks direct mail-rabatsystem, Competition Council Meeting 24 June 2009, recital 469 with further reference.

155. Cf. case C-163/99, *Portugal v Commission*, recital 56, and *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005, recital 140.

156. Decision by the Competition Complaint Board 8. December 2011 in *Post Danmark v Konkurrencerådet*, p. 26.

157. See recitals 108–109.

158. For further on *Michelin II* and the involved issues see e.g. Christian Roques, 'CFI Judgement, Case T-203/01, Manufacture Francaise des Pneumatiques Michelin v Commission', *ECLR* 2004, pp. 688–693.

159. *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recitals 521–529 and Decision by the Competition Complaint Board 10 May 2010 in *Post Danmark v Konkurrencerådet*, p. 187.

160. High Court of Eastern Denmark 22 June 2009 in *TV 2 priser og betingelser*, pp.

cloaked as a standardized discount system, it was in both cases held that they could create a lock-in effect through the use of individualized target and retroactive elements calculated over annual reference periods. However, as indicated earlier, an alternative reading of *Intel* could lead to the interpretation that quantity discounts, regardless of any arbitrary or dubious elements, are only condemned following an effect analysis utilizing some of the principles laid down by the *Enforcement Paper*. A presumption largely confirmed with the suggested readings of *Intel* and *Post Danmark II*.

4.4.1. Quantum discounts, economics of scale and quasi-monopolies

As already indicated, it follows from cases such as *Michelin II*, that the actual windows for utilizing discounts for the purpose of securing economies of scale through larger sales are somewhat limited. This is true even in sectors where a large portion of the cost base is fixed and the defence might hold some merits.¹⁶¹ The *Enforcement Paper*¹⁶² nevertheless makes an attempt to offer some guidelines by summarizing practices, as detailed above, followed by some principles offering guidance henceforth. This involves making a distinction between discounts:

- which are granted for every purchase independent of the customers purchasing behavior and hence *unconditional*, even if reserved for certain groups of customers,
- which are subject to the meeting of certain requirements and purchasing behaviors, and hence *conditional*, which in particular involves the ‘problematic’ target and retroactive discounts.

124–125.

161. For an undertaking with falling or low marginal costs and a large portion of fixed costs, it would often be beneficial to expand production for the purpose of securing economies of scale. This could involve discounts and in theory provide for a legitimate explanation.

162. See recitals 36–45. *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, provided for much more detailed guidelines.

Provided the discount is neither selective nor discriminatory,¹⁶³ and thereby loyalty-inducing, the *Enforcement Paper* signals a positive approach to discounts unless a foreclosure would be plausible. This situation is unlikely unless it involves a significant portion of customers or customers of particular importance, and the discount represents a substantial reduction over list price.¹⁶⁴ In assessing this, it would be required to take into consideration that:

- normally competitors would need to secure a minimum market share (minimum efficiency scale) in order to find it profitable to remain in the market and
- the price should not fall below the dominant undertakings LRAIC.¹⁶⁵

There is a link between the two considerations as LRAIC would ultimately be conditioned upon the size of the customer base required to support the costs, indicating that the conditions are in reality formulated to secure an efficient competitor market access, and prevent that the securing of economies of scale come at the price of a foreclosure.¹⁶⁶

Only a few elements can be extracted from practice in respect to economies of scale and discounts. In *Intel*,¹⁶⁷ the EU-Commission determined the competitors to be equally efficient, followed by an evaluation of their ability to enter the market at a lower output, which later involved a proportionality test stipulating ‘[...] that the legitimate objective pursued by Intel should not be outweighed by

163. A selective discount, reserved for certain customers, would normally serve a strategic objective implying an anti-competitive purpose. However, following case C-209/10, *Post Danmark v Konkurrencerådet*, it might not be possible to identify an abusive directly.

164. See, in particular, the general principles outlined in recital 20 in conjunction with recitals 36–45, proving comments on the use of discounts.

165. See e.g. *Enforcement Paper*, recitals 43–44. In *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recitals 154–157, where a higher standard was suggested by indicating a foreclosure risk if the price failed to cover ATC.

166. See also *Enforcement Paper*, recital 20, referring to different forms of economic of scale as qualifying elements.

167. COMP/C3/37.990, *Intel*, recital 1002.

the exclusionary effect.¹⁶⁸ Embedded in this appears to be a requirement that the securing of economies of scale shouldn't lead to a foreclosure. However, the wording of Court of Justice in *Intel*¹⁶⁹ doesn't support this as the court states that the anti-competitive exclusionary effect can be '[...] counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.' Consequently, it might no longer be possible to protect the less effective competitors. The Danish case *Post Danmarks direct mail*,¹⁷⁰ that ended up as the EU case *Post Danmark II* had held this, if plausible that in the long run the less efficient competitor could be equally efficient. Furthermore, and much more explicit, it was held that in this case the securing of economic of scale should not lead to foreclosure of the entire market.¹⁷¹

This concept of a monopolization prohibition limiting super dominant companies was fully incorporated in the Danish case *Post Danmark – magasinpost II*,¹⁷² where the Competition Appeals Board, when reviewing the case, found that in light of the super dominant position¹⁷³ (more than 80% market share), an efficiency defence could only be permissible to a very limited extend. A reading that could be aligned with the Court of Justice ruling in *Intel*¹⁷⁴ as this specifically

168. See recital 1624 with reference to further cases and case T-340/03, *France Telecom*, recital 217. While not dealing with discounts, the latter offers some considerations as to what can be considered legitimate objectives.

169. Case 314/14 P, *Intel*, recital 140.

170. *Klage over Post Danmarks direct mail-rabatsystem*, Competition Council Meeting 24 June 2009, recital 502–507 referring to *Enforcement Paper*, recital 23.

171. See recital 621.

172. Decision by the Competition Complaint Board 8. December 2011, in *Post Danmark v Konkurrencerådet*, p. 25.

173. While no super dominance theory can be formulated, as detailed by Christian Bergqvist, *Between Regulation and Deregulation* (DJØF 2016), pp. 46–48, it nevertheless appears that companies in such a situation might be appraised under a more rigorous abuse standard, limiting their ability to award discounts even further. This implies that companies in super dominant market positions, in particular if originating from a former legal monopoly, should be cautious in awarding discounts outside the narrow window of pure quantum discounts. Alternative, which might be extracted from case C-23/14, *Post Danmark v Konkurrencerådet*, recital 30, that such companies cannot rely on *Enforcement Paper* as the use of the AEC-test might produce overoptimistic results.

174. Case C-314/14 P, *Intel*, recital 139.

refers to the need to review ‘[...] the extent of the undertaking’s dominant position [...]’.

4.5. Selective price cuts and discounts

Nevertheless despite being subject to the same principles as other loyalty discounts, selective price cuts and discounts merit separate comments. Factually, as they are not conditioned upon certain purchases, and legally, as it follows from *AKZO*¹⁷⁵ and *Post Danmark I*,¹⁷⁶ that pricing covering AVC/AIC are legal. Further, *Intel* and *Post Danmark II* indicates the availability of a different and more lenient treatment of discounts not conditional upon loyalty. However, as outlined earlier, selective discounts share an overlap with predatory pricing and could, in principle, be viewed as either a variation or a form of exclusionary discrimination when the discounts are reserved for selective customers. If viewed as the former, abuse would require pricing below AAC cf. *Enforcement Paper*,¹⁷⁷ while the principles for discrimination would govern the latter.¹⁷⁸

While not articulated explicitly in the *Enforcement Paper*, it appears to view selective price cuts as a form of conditioned discounts subject only to condemnation if, as detailed above section 4.2, prices fails to cover LRAIC, and perhaps AAC. The Court of Justices ruling in *Post Danmark I*,¹⁷⁹ appears to confirm this. Firstly, by refusing to consider price discrimination as exclusionary *per se*, and secondly, by rebutting a foreclosure risk when the price, despite being below Average Total Cost, secured coverage of the Average Incremental Costs.¹⁸⁰ While it might be too early to close the book on the matter, it appears that selective price cuts and discounts granted without any loyalty statements are only considered abusive if likely to lead to a foreclosure under the effect doctrine tabled by the *Enforcement Paper*. A reading further entrenched by the Court of Justice rul-

175. Case C-62/86, *AKZO*.

176. Case C-209/10, *Post Danmark v Konkurrencerådet*.

177. Cf. recitals 43 and 64.

178. See case C-23/14, *Post Danmark A/S v Konkurrencerådet*, recitals 37–38 for some unclear considerations on the interaction with the concept of discrimination.

179. Case C-209/10, *Post Danmark v Konkurrencerådet*, recitals 30 and 37.

180. The Court might not agree on the utilized methods for calculating incremental costs cf. recitals 32, 33 and 34 but accept the involved principles nevertheless.

ing in *Intel* referring to the ability (or lack) to foreclose an as efficient competitor.

4.6. Defensive discounts

It has been accepted that even the dominant undertaking should be allowed to defend its customer base against competitors preying on these, the so-called *meeting the competition defence*.¹⁸¹ In practice, the EU-Commission appears somewhat reluctant to embracing the defence in respect to discounts. In *Irish Sugar*,¹⁸² intervention was deemed merited against discounts favoring customers geographically located in specific yet marginal areas, most likely to switch to competitors should one of these chose to enter the Irish market. While no actual competitors had been excluded, the pre-emptive foreclosure of the market was held to be abusive regardless of the defensive nature of the discounts. However, in *BPB*,¹⁸³ it was accepted that price cuts had been concentrated to areas subject to a level of competition. When reviewing the case, the General Court found it relevant to note that it would not be permissible under this doctrine to entrench the dominant position, indicating a somewhat limited scope for its invocation.¹⁸⁴ Furthermore, in the Danish case *Post Danmark – magasin-post II*,¹⁸⁵ only a limited scope could be accepted for the super dominant undertakings. However, it was accepted in the Danish case *C.K. Chokolades samhandelsbetingelser og bonusaftaler*,¹⁸⁶ on the grounds of buying power.¹⁸⁷

181. For an outline of EU practice see Claire Simpson, ‘Dominant firms and selective discounting in EU: When is “meeting competition” a defence?’, *European Competition Journal* 2016. Vol. 12, No 1, pp. 1–27.

182. Case T-228/97, *Irish Sugar plc*.

183. *BPB Industries*, O.J. 1989L 10/50, recitals 131–134.

184. Case T-65/89, *BPB Industries*, recital 69.

185. Decision by the Competition Complaint Board 8 December 2011 in *Post Danmark v Konkurrencerådet*, p. 25.

186. *C.K. Chokolades samhandelsbetingelser og bonusaftaler*, Competition Council Meeting 28 April 1999. The case is related to Article 101 and the Danish equivalent and should thus be used with some caution.

187. However, in the Danish case *Konkurrencebegrænsninger på markedet for ortopædiske sko*, Competition Council Meeting 23 February 2000, it was not taken into consideration that most likely the buyer held a dominant position on the procurement market.

While the meeting competition defence is real, its actual scope is therefore subject to lacunas and most likely limited to very specific situations,¹⁸⁸ perhaps unavailable for undertakings with positions of quasi monopoly. Further consideration on the use of discounts in a defensive manor is available in the *Enforcement Paper*.¹⁸⁹ This includes e.g. exclusivity arrangement, including discounts, to secure the financial viability of a novel or customer specific investments or in response to market power downstream.¹⁹⁰

4.7. Summing up on loyalty discounts and the way forward

While the legal standing of the *Enforcement Paper* and its tabled approach to the review of discounts and foreclosure risk is subject to many lacunas, it has provided a better link between theory and practice. Normally, condemnation should be reserved for discounts capable of creating a foreclosure risk, and it falls upon either the competition authorities to prove this or the dominant undertaking to refute it, depending on one's understanding of case law. Further, companies with super dominant market positions should be particularly careful before offering discounts outside the window linked to pure quantum discounts, normally considered legal *per se*. Perhaps more notable is the distinction introduced by EU cases such as *Tómra*, *Intel*, and *Post Danmark II*, between discounts subject to a restrictive review, and those meriting further considerations, as it mirrors the *object* versus *effect* analysis rendered available under Article 101. Finally, it would be difficult not to read the Court of Justice ruling in *Intel* as establishing a requirement for reviewing all discounts under some sort of effect test.

5. Discrimination

It follows from Article 102(c), and the Danish equivalent, section 11(3) no. 3, that it's abusive to apply '[...] dissimilar conditions to

188. See also COMP/C3/37.990, *Intel*, recitals 1626–1631.

189. See recital 45. The availability of an efficiency defence were latest confirmed with case C-23/14, *Post Danmark v Konkurrencerådet*, recitals 47–49.

190. Downstream market power should not be confused with buying power.

equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage', hence to discriminate. As discounts from a practical point almost always involve a discriminatory element, the provision is of paramount importance for the ability to award them.

Conceptual discrimination could be price or non-price based and involve either:¹⁹¹

- applying *dissimilar* conditions to *equivalent* transactions, which could involve that some customers got better terms, or
- applying *equivalent* conditions to *dissimilar* transactions, which could involve that all customers are offered identical terms regardless of differences e.g. in the quantum they source.

The decisive factor is the non-objective difference, placing the trading partners in a competitive disadvantage position. As a consequence of the effect-based approach contained in the *Enforcement Paper*, not to mention the wording of the provisions, some kind of appreciable effects should, however, be required for an infringement to emerge.¹⁹²

5.1. Discrimination and other forms of abuse

Despite being singled out by Article 102 and paragraph 11 as separate abuses, (price) discrimination often forms part of other infringements e.g. excessive or predatory pricing,¹⁹³ often targeting a limited number of companies. The price drops in classic EU predatory pricing cases as *AKZO*¹⁹⁴ and *Tetra Pak II*,¹⁹⁵ had e.g. been reserved for a limited number of customers, thereby *de facto* incorporating a discriminatory element. Conceptually, there is however, no direct link between *price discrimination* and *predatory pricing* save for the simple fact that

191. See e.g. case COMP/A.36.568/D3, *Scandlines Sverige AB v Port of Helsingborg*, recital 276, for a recent case reciting this.

192. The *Enforcement Paper* offers no guidance on discrimination. However, as detailed below, discrimination often entails foreclosure, making the principles applicable. Further, it would create some confusion by tabling a request for more effect based enforcement and then confine this to exclusionary behaviour.

193. Or even margin squeeze cf. the EU case AT.39678/AT.39.731, *Deutsche Bahn I/II*.

194. Case C-62/85, *AKZO*.

195. Case 333/94 P, *Tetra Pak International SA*.

pricing below cost might only be feasible if possibly limiting its scope to selected customers. Furthermore, as the purpose of a predatory strategy would often be *discipline* rather than actual *exclusions*, a broad application is rarely required. For publicly owned companies, where profitability might be of less importance, a strategy of preferential treatment of national or local customers might also be implemented¹⁹⁶ and even private undertakings might find it beneficial to implement geographical price discrimination.¹⁹⁷ Consequently, there is an overlap between discrimination, other forms of abuse, and the Single Market provisions. Further, even the concept of discrimination contains an overlap, as explained by the EU-Commission in *BdKEP/Deutsche Post AG*,¹⁹⁸ noting how:

‘The wording [of Article 102] covers three types of discrimination, the first two of them exclusionary and the last one exploitative: (i) the customer of the dominant firm is placed at a competitive disadvantage vis-à-vis the dominant firm itself; (ii) in relation to other customers of the dominant firm; or (iii) the customer suffers commercially in such a way that its ability to compete in whatever market is impaired. It is obvious that type (i) and (iii) do not require a competitive relationship between the two comparator groups.’

Therefore when appraising discrimination it is conceptually relevant to differentiate between:

- *Horizontal exclusionary discrimination*, sometimes referred to as *primary-line-discrimination*, or *horizontal foreclosure* initiated for the purpose of *foreclosing* competitors by targeting actual or

196. See e.g. case C-18/93, *Corsica Ferries*, recital 45, case 95/364/EC, *Brussels National Airport*, O.J. 1995L 216/8, and case No IV/35.703, *Portuguese Airports*, O.J. 1999L 69/31. For Danish cases illustrating the same issues see e.g. *Forespørgsel om lovligheden af takstdifferentiering på færgepriser*, Competition Council Meeting 26 May 1999, and *fastlæggelse af færgetakster*, Competition Council Meeting 16 December 1998.

197. See e.g. cases as C-27/76, *United Brands Company*, case 333/94 P, *Tetra Pak*, case T-228/97, *Irish Sugar plc*, and case C-226/84, *British Leyland*, for examples of geographical price discrimination held to be abusive.

198. Cf. e.g. COMP/38.745, *BdKEP/Deutsche Post AG*, recital 93.

potential customers with selective price reductions or different forms of single branding agreements. Moreover, this includes vertical foreclosure secured by preferential treatment of subsidiaries and internal departments of the vertically integrated company.

- *Vertical exclusionary discrimination*, sometimes referred to as *secondary-line-discrimination*, or *vertical foreclosure* initiated for the purpose of *twisting* competition in another market e.g. for the benefit of a preferred trading partner (but not a subsidiary).
- *Exploitative discrimination* which essentially is traditional exploitive practices and thus subject to the legal standard of such.

Despite the textual framing of Article 102 and paragraph 11, referring to '[...] trading parties [placed ...] at a competitive disadvantage', the provisions are not limited to *vertical exclusionary discrimination*. On the contrary, as *horizontal exclusionary discrimination*, is included as established with epic EU cases as *Suiker Unie* and *Hoffmann-La Roche*, and maintained in newer cases as *Michelin II* and the Danish case that ended up as *Post Danmark I*.¹⁹⁹ Neither could the two forms be considered mutually exclusionary and would in practice often overlap. In the EU case *BPB Industries Plc & British Gypsum Ltd*,²⁰⁰ a discount was retracted from customers also sourcing products from a new competitor but expanded to those remaining loyal. The General Court noted in recital 119 that:

‘Such a practice, by virtue of its discriminatory nature, was clearly intended to penalize those merchants who intended to import plasterboard and to dissuade them from doing so, thus further supporting BG’s position in the plasterboard market.’

In reality, both horizontal cf. *supporting BG’s position in the plasterboard market* and vertical cf. *penalize those merchants who intended to import plasterboard* discrimination can be extrapolated by the

199. *Post Danmark – adresseløse forsendelser*, Competition Council Meeting 29 September 2004.

200. Case T-65/89, *BPB Industries Plc & British Gypsum Ltd*.

offered rationale.²⁰¹ However, in theory, the focus of Article 102(c) and section 11(3) No. 3 should be on *vertical exclusionary discrimination*, as *horizontal exclusionary discrimination* would be covered by Article 102(b) and section 11(3) No. 3.²⁰² Furthermore, as indicated by *BdKEP/Deutsche Post AG* it is possible to deduce a third form of discrimination involving exploitive practices that in practice has involved national based discrimination. However, this might be misplaced under Article 102, in general, and Article 102(c) in particular, as detailed later.

5.2. Unclear framework for the analysis

Despite falling within what should be the core of Article 102 and the Danish equivalence section 11, there are many ambiguities in our understanding of the concept of abusive discriminations. E.g. is it accepted (in economic theory) that the ability to price differentiate across markets and customer groups could be welfare enhancing,²⁰³ or an instrument for recouping large fixed costs and thereby, in the case of unusual cost structure, securing the servicing of low-income customers.²⁰⁴ In particular, undertakings subject to different forms of Universal Services Obligations might find it beneficial to contemplate price discrimination void of sector regulation and compensation models. Consequently, discrimination would often be a perfectly rational decision, objectively justifiable on business grounds rather

201. See also case T-219/99, *British Airways plc*, and *Post Danmark – adresseløse forsendelser*, Competition Council Meeting 29 September 2004, recitals 128–185. The later outlines the two concepts and application.

202. That is not the same as concluding that vertical exclusionary discrimination should be an enforcement priority as the non-vertically integrated undertaking would lack a reason to discriminate. Consequently, it have been contemplated if vertical foreclosure actually infringes Article 102 as illustrated by case C-525/16, *Servicos de Comunicacvoes e Multimedia S:A. v Autoridade da Concorrenca*, O.J. 2017C 14/20.

203. Cf. Simon Bishop & Mike Walker, *The Economics of EC Competition Law: Concept, Application and Measurement* (Sweet & Maxwell, 2002), pp. 194–205, and Massimo Motta, *Competition Policy, Theory and Practice* (Cambridge, 2004), pp. 491–511.

204. See Massimo Motta, *Competition Policy, Theory and Practice* (Cambridge, 2004), pp. 495–497, and Derek Ridyard, ‘Exclusionary Pricing and Price Discrimination Abuses under Article 82—An Economic Analysis’, *ECLR* 2002, pp. 286–303 for further.

than *unreasonable* and *anti-competitive* as the concept might initially indicate. Furthermore, historically, the prohibition embedded in Article 102(c) and the Danish equivalent, section 11(3) No. 3, might have been to protect small and medium sized undertakings from getting less favourable terms than larger competitors. This is an ambition that might be misplaced under competition law as no consumer harm would be caused by this.²⁰⁵

In light of the ambiguities, it should come as no surprise that the treatment of abusive discrimination, including discounts, is at best blurred. Furthermore, in concentrated markets, prohibiting price differentiation could promote collusion²⁰⁶ and thereby be anti-competitive. Following the Court of Justice's ruling in *Post Danmark I*,²⁰⁷ it might also be that primary-line discrimination isn't a separate infringement but merely exclusionary conduct subject to the principles outlined above in section 4.²⁰⁸ A presumption particularly strong as the case originated in the Danish case *Post Danmark – adresseløse forsendelser*,²⁰⁹ identifying both primary- and second-line discrimination as abusive and separate infringements.²¹⁰

205. Cf. Robert O'Donoghue & Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd Edition, Hart 2013), p. 249.

206. For further see e.g. Damien Geradin & Nicolas Petit, 'Price Discrimination under EC Competition Law: The need for a case-by-case Approach', *GCLC Working Paper* 07/05, pp. 22–23, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* O.J. 2004C 31/5, recital 48, and Massimo Motta, *Competition Policy, Theory and Practice* (Cambridge, 2004), p. 343.

207. Case C-209/10, *Post Danmark v Konkurrencerådet*.

208. This was e.g. accepted in the Danish case fx *Forbrugers-Kontakts klage over Post Danmarks priser og vilkår for magasinpost*, Competition Council Meeting 30 August 2007, recital 440.

209. *Post Danmark – adresseløse forsendelser*, Competition Council Meeting 29 September 2004.

210. Revisiting COMP/38.745, *BdKEP/Deutsche Post AG*, recital 93 it could even be contemplated that there is no room for discrimination as separate abuse under Article 102, as the decision refers to exclusionary and exploitative effects and not discriminatory effects. This option will, however, not be developed further in this paper but might be cleared with C-525/16, *Servicos de Comunicacvoes e Multimedia S:A. v Autoridade da Concorrenca*, O.J. 2017C 14/20 currently pending before the Court of Justice.

5.2.1. The principles can be extracted from the wording

A number of requirements of a legal nature can be extracted directly from the words utilized in Article 102(c) and the Danish equivalent, section 11(3) No. 3, listing four qualifications before labelling discrimination abusive:

- *Applying dissimilar conditions*: The nature of the non-objective differentiated treatment is irrelevant, price or non-price based. Void of an objective explanation, abusive could come in the form of selective discounts,²¹¹ tying,²¹² increased or uniformed prices²¹³ or any other advantages with a monetary value. In practice, however, non-cost based discounts with loyalty inducing elements have attracted particular attentions and intervention.
- *Equivalent transactions*: The concept of discrimination requires the involved undertakings and transactions to be comparable. In *United Brand*²¹⁴ and *Tetra Pak II*,²¹⁵ geographical price differences were held as abusive through the applying of different conditions to comparable customers.²¹⁶ The same conclusion was reached in the Danish case *Afhentning af økologisk mælk på Samsø*,²¹⁷ where only organic milk producers were levied a surcharge due to their location in a peripheral area. In contrast, it was accepted in the Danish case *Klage over prisdiskriminering*,²¹⁸ that two customers couldn't be compared due to differences in the size of orders and hence the associated costs for serving

211. See e.g. United Cases C-40-48, 50, 54-56, 111, 113 & 114-73, *Suiker Unie*, recital 522, for example of selective loyalty discounts labeled discriminatory.

212. See e.g. case T-30/89, *Hilti*; case IV/30.178, *Napir Brown/British Sugar*, O.J. 1988L 284/41, and case IV/34.073, IV/34.395, and IV/35.436, *Van den Bergh Foods Limited*, O.J. 1998L 246/1 for examples of abusive bundle discounts.

213. Uniformed prices could be abusive by denying quantum discounts to larger buyer or different form of self-service discounts.

214. Case C-27/76, *United Brands Company*, recital 234.

215. Case 333/94P, *Tetra Pak International SA*, and T-83/91, *Tetra Pak International Sa*. See recitals 170–173 of the later for reference to Article 102(c).

216. See also case T-228/97, *Irish Sugar plc*, and case C-226/84, *British Leyland*, for examples of discriminatory discounts fragmenting the single market and free movement.

217. *Afhentning af økologisk mælk på Samsø*, Competition Council Meeting 26 September 2001.

218. *Klage over prisdiskriminering*, Competition Council Meeting 26 August 1998.

them. However, embedded in *Afhentning af økologisk mælk på Samsø*, might be that all milk producers (organic or non-organic) could be levied the same surcharge regardless of their geographical location and hence that it would elude condemnation (under Danish practice) to distribute extra cost endured by different universal service obligations; even if this entails that some undertakings will have to endure higher prices. In addition to prices, preferential treatment e.g. extended credit time, early or preferential delivery in case of deficiency²¹⁹, could be abusive as these have a monetary value. However, discrimination is not merely a question of identical treatment but could also require dissimilar conditions. In the EU case *British Sugar/Napir Brown*,²²⁰ the applied conditions didn't allow for customers to collect directly at the factory, compelling a downstream competitor to pay extra for services he didn't require, eventually putting him in a disfavorable position. It therefore becomes imperative what can be considered similar and comparable and if any differences are accepted. The latter holds some significance, as pricing against willingness to pay and price sensitiveness could be welfare enhancing. While geographical price differences were in general held to be abusive in *United Brand*,²²¹ it was nevertheless accepted by the Court of Justice that '[...] differences in transport costs, taxation, customs duties, the wages of the labor force, the condition of marketing, the differences in the parity of currencies, the density of competition may eventually culminate in different retail selling prices according to the member states.' Embedded in this is not only that prices may vary from market to market for cost reasons, but of much more pivotal consequence, also due to differences in 'the density of competition', and that thereby it might not be abusive to capitalize on (some) customers' ability to pay a premium. This was more clearly embraced by the General

219. In case C-77/77, *Benzine en Petroleum Handelsmaatschappij Bv*, recital 32 some preferential treatments were held non-abusive.

220. Case IV/30.178, *Napir Brown/British Sugar*, O.J. 1988L 284/41. However no reference to Article 102(c) is made.

221. See Case C-27/76, *United Brands Company*, recital 228.

Court in *Deutsche Bahn*,²²² considering, but ultimately rebutting, that the differences in terms and prices could be attributed to the density of competition downstream.²²³ The same conclusion would appear to stem from the EU case *Scandlines Sverige AB v Port of Helsingborg*,²²⁴ accepting that demand related conditions could explain (and justify) price differences. This might open more broadly for differences between customers acquired under a tender process and those not, and prices targeted to a consumer's willingness to pay or negotiate.²²⁵

- *Trading parties*: Abusive discriminations cover preferential treatment of own interests on a secondary market, as well as those of selected trading partners and have even been expanded to foreclosure of the primary market as initially detailed. However, no abuse could emerge void of at least a potential competition situation between the companies offered different terms.²²⁶ Therefore it must be established that the party that benefits from a discount scheme is competing with those placed at a competitive disadvantage position. In *Tiercē Ladbroke*,²²⁷ no discrimination was identified e.g. as Belgian undertakings, denied a license, was not competing with the Germans who were granted a license, making it imperative to define the market correctly and very clearly.²²⁸ The same conclusion was drawn in the Danish case *Klage over taksterne ved lastning af olie ved Fredericia*

222. T-229/94, *Deutsche Bahn AG*, recital 91.

223. See also case IV/34.621, 35.059/F-3, *Irish Sugar plc*, O.J. 1997L 258/1, recital 146. Differentiated prices could perhaps be held exploitive cf. *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 141. For further see Claire Simpson, 'Dominant firms and selective discounting in EU: When is "meeting competition" a defence?', *European Competition Journal* 2016. Vol. 12, No 1, pp. 8–9.

224. Case COMP/A.36.568/D3, *Scandlines Sverige AB v Port of Helsingborg*, recital 241.

225. For an analysis on the matter see Claire Simpson, 'Dominant firms and selective discounting in EU: When is "meeting competition" a defence?', *European Competition Journal* 2016. Vol. 12, No 1, pp. 1–27.

226. Cf. case COMP/38.745, *BdKEP/Deutsche Post AG*, recital 93, and case E-29/15, *Sorpa v The Icelandic Competition Authority*, recital 110.

227. Case T-504/93, *Tiercē Ladbroke*. See also case COMP/38.096, *PO/Clearstream (Clearing and settlement)*, recital 311.

228. See e.g. Valentine Korah, 'The Ladbroke Saga', *ECLR* 1998, pp. 169–176 for further. See also case E-29/15, *Sorpa v The Icelandic Competition Authority*, recital 110.

Havn,²²⁹ absent competition between the different ships subject to the discriminatory terms. Concluding that abusive discrimination requires the undertakings to be active in the same market, an open question emerges when markets convert e.g. for technical reasons.²³⁰

- *Placing them at a competitive disadvantage*: It follows directly from the wording of the provisions that an appreciable negative effect on competition is required.²³¹ However, implementing this in practice has been complex and does not appear to have attracted much interest of enforcers.²³² Significantly, more interest has been shown regarding objective justification,²³³ most significantly in respect to cost reductions.²³⁴ While this might create the same result, there is a significant difference between *thwarting competition* and *objective justification*. However, recent Danish practice might, as detailed below, have corrected this and the question has also attracted some attention before the EFTA court²³⁵ and Court of Justice.²³⁶

229. *Klage over taksterne ved lastning af olie ved Fredericia Havn*, Competition Council Meeting 26 March 2003.

230. See *Notice on the application of the competition rules to access agreements in the telecommunications sector—Framework, relevant markets and principles*, O.J. C 1998 265/2, recital 121 for further on this.

231. In case COMP/38.096, *PO/Clearstream (Clearing and settlement)*, recital 302 the Commission notes ‘The existence of discrimination therefore presupposes that the condition be dissimilar, that transactions—in this case, the services provided—be equivalent, and the through its behaviour the dominant undertaking places trading parties at a competitive disadvantage.’

232. Cf. Jonathan Faull & Ali Nikpay, *The EC Law of Competition* (Oxford 1999), p. 176, Damien Gerardin, ‘Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities’, *GCLC Research papers on Article 82 EC*, pp. 122–123, and Gunnar Niels & Helen Jenkins, ‘Reform of Article 82: Where the Link Between Dominance and Effects Breaks Down’, *ECLR* 2005, p. 608.

233. Damien Gerardin, ‘Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities’, *GCLC Research papers on Article 82 EC*, pp. 123–125.

234. See e.g. *Klage over Post Danmarks prisforhøjelse på distriktsbladsomdelingen*, Letter dated 23 March 1999 to the plaintiff, and *Nissan Motor Danmark A/S indfører nye rabatbetingelser*, Competition Council Meeting 28 August 2002. In the latter it was e.g. accepted that use of weekly orders represented a cost reduction that could justify a discount.

235. See case E-29/15, *Sorpa v The Icelandic Competition Authority*.

236. A question has been tabled on the matter as case C-525/16, *Servicos de Comunicacões e Multimedia S:A. v Autoridade da Concorrência*, O.J. 2017C 14/20.

Further requirements can be extracted from the general principle of an appreciable effect on competition, e.g. that a products or service *essential* for access to the downstream market,²³⁷ representing a substantial part of the value of the final products must be involved.²³⁸ A recent example of the latter can be seen in the Danish case *CPH GO*²³⁹ from 2011, where a discount reserved for certain operators in Copenhagen Airport amounted to between 34% and 43% of the profit margin and was therefore distorting. Furthermore, as part of the essentiality discussion, the presence or absence of barriers to the primary market should be contemplated for the purpose of considering the ability to counter any abuse.²⁴⁰ Notable would also be the use of progressive steps beyond the insignificant. The Danish case *SuperGros' samhandelsbetingelser*,²⁴¹ was e.g. closed with a commitment agreement providing for (minor) steps indicating that mathematic equality is not required.

A somewhat cryptic phrase was offered in the Danish case *Klage over prisdiskriminering*²⁴² by labeling it abusive that a discount system had been designed with the effect that only large purchasers could benefit from it. Only a short press release is available on the case, limiting the conclusions to be extracted. A possible reading is, however, that the Danish enforcer finds that all undertakings should be secured access to a discount system. On the other hand it was accepted in the Danish case *Prisdiskrimination på Århus Sporvejes abonnementskort*,²⁴³ that discounted transportation tickets could be reserved for local residents. In support of this conclusion, it was stated that

237. See e.g. case COMP/38.096, *PO/Clearstream (Clearing and settlement)*, recital 224 and recitals 226–227 for what looks like an acceptance of this by the labeling the abuser as ‘[...] an unavoidable trading partner’.

238. See e.g. case IV/35.613, *Alpha Flight Services/Aéroports de Paris*, O.J. 1998L 230/10, recital 109 for what looks like an acceptance of this.

239. *Københavns Lufthavne A/S' terms of use for CPH GO*, Competition Council Meeting 21 December 2011, recital 485.

240. See e.g. the Danish case *Klage over Post Danmarks prisforhøjelse på distriktsbladsomdelingen*, Letter to Plaintiff dated 23 March 1999, rebutting an abuse in the absence of entry barriers.

241. *SuperGros' samhandelsbetingelser*, Competition Council Meeting 30 August 2007, recital 263, 266, and 270.

242. *Klage over prisdiskriminering*, Competition Council Meeting 26 August 1998.

243. *Prisdiskrimination på Århus Sporvejes abonnementskort*, letter to Århus Sporveje dated 9. February 1999.

geographical discrimination created neither a loss of welfare nor twist of competition. Embedded in this might be that only discrimination targeting *undertakings* are abusive, while discrimination of *consumers* normally would elude condemnation. A somewhat different approach was demonstrated by the EU-Commission in *PO/World Cup 1998*²⁴⁴ where discrimination of consumers was singled out as a particular heinous form of abuse. Some remarks on this issue will be offered later.

5.3. Horizontal discrimination—foreclosure of a competitor

The dominant undertakings' ability to target customers with attractive (and selective) offers for the purpose of retaining or gaining their loyalty, hence *horizontal exclusionary discrimination*, falls within the core of abusive discrimination. Moreover, this covers two forms of anti-competitive behavior:

- Discrimination of downstream trading parties for the purpose of securing an upstream foreclosure, targeting a direct competitor, and
- Discrimination in favour of vertically—integrated or group—affiliated down-stream interests, for the purpose of securing a downstream foreclosure.

Consequently, the benefiter of any discrimination could also be a subsidiary or vertically integrated division giving the foreclosure a vertical nature. Furthermore, this also covers different forms of preemptive foreclosure, where no actual competitor has accessed the market, but this might be eminent as demonstrated by the EU case *Irish Sugar*.²⁴⁵ Here the discount had been reserved for customers in border areas and hence those most likely to switch to a non-domestic supplier, should this decide to enter the Irish market. In reality, a clear line can be traced from early practice as *Suiker Unie* and *Hoffmann-La Roche* to newer cases as *Compagnie Maritime Belge Trans-*

244. Case IV/36.888, *PO/World Cup 1998*, O.J. 2000L 55/5, see recital 102.

245. Case T-228/97, *Irish Sugar*.

*ports*²⁴⁶ and *Michelin II*, in the condemnation of non-cost based discounts under Article 102(c). The anti-competitive effect of selective and discriminatory discounts with a loyalty inducing element was identified already with *Hoffmann-La Roche*, making the Court of Justice align loyalty discounts with a formal exclusive agreement, as detailed earlier.

Utilizing these principles, discounts conditioned upon meeting predefined turnover figures (target discounts) were held as discriminatory, and hence abusive, in *Michelin I*. Abusive discrimination was also identified in *Compagnie Maritime Belge Transports*,²⁴⁷ where selective price cuts fell short of the concept of predatory pricing, but nevertheless had targeted a named competitor, and therefore merited condemnation in the opinion of the EU-Commission. In contrast to the EU-Commission, neither the General Court nor the Court of Justice referred to Article 102(c) and it remains unknown if this was done intentionally.²⁴⁸

The framework for analyzing discriminatory discounts was established by the Court of Justice in *Michelin I*, recital 73, noticing that the appraisal should:

‘[...] consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer’s freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transaction with other trading parties or to strengthen the dominant position by distorting competition’.

Additional to the foreclosure risk, the absence of cost based justification appears to have motivated the critique of the offered discounts. However, following *Post Danmark I*,²⁴⁹ this might have been mitigated.

246. United cases C-395/96P & C-396/96 P, *CMB*.

247. Selective price cuts targeting a competitor were also used in case T-30/89, *Hilti*. While labeled discriminatory, no reference is made to Article 102(c).

248. See case IV/32.448 and IV/32.450, *Cewal, Cowac, Ukwal*, O.J. 1993L 34/20, recital 83. In *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuse*, recital 129 this is labeled a form of predatory pricing.

249. Case C-209/10, *Post Danmark v Konkurrencerådet*, recitals 30 and 37.

Here, the Court of Justice expressed some hostility toward the concept of *primary-line-discrimination* and pricing below Average Total Cost as abusive *per se*, solely based upon the discriminatory element. Void of other loyalty-inducing elements, *Post Danmark I* might have reserved condemnation of selective price cuts to prices failing to cover Average Avoidable Cost and embedded in this that horizontal exclusionary discrimination is neither a competition law concept nor a separate abuse. A position accepted in Danish practice with *Post Danmark – Magasinpost I*,²⁵⁰ noting how horizontal exclusionary discrimination (referred to as primary-line discrimination) was a form of exclusion not involving a separate abuse.

5.3.1. A narrow window if foreclosure is plausible

Recent practice has followed the path laid down with *Michelin I* requiring a cost explanation for discounts. In *Michelin II*, the use of discounts to incentivize retailers to invest in the presentation of products and services was held to be abusive discrimination infringing Article 102(c),²⁵¹ void of an objective justification. In *Wanadoo*,²⁵² a defence involving economic of scale and scope was rebutted against allegations of predatory pricing. While not involving discrimination, the case indicates that production optimizations arguments are only permissible if involving clearly identifiable cost reductions. The restrictive approach has been confirmed by *British Airways*,²⁵³ where the Court of Justice refused the relevance of declining market shares falling from 46% to 40% and thereby potentially a limited effect. However, *Michelin II* might have been over-interpreted if presumed to preclude all non-cost based discounts. Despite criteria

250. *Forbruger-Kontakts klage over Post Danmarks priser og vilkår for magasinpost*, Competition Council Meeting 30 August 2007, recital 440.

251. For more on the case and the restrictive principles applied see e.g. Denis Waelbroeck, 'Michelin II: A per se rule against rebates by dominant companies', *Journal of Competition Law and Economics* 1 (1), 2005, pp. 149–171.

252. Case COMP/38.233, *Wanadoo Interactive*. See recital 309 noting that 'Thus, while the search for scale economies and learning effects may be included among the rational justifications for predatory behaviour, it may not serve to legitimise that practice from the point of view of competition law since it has the effect of conferring a more favourable cost structure on the dominant undertaking to the detriment of its competitors.'

253. Case C-95/04, *British Airways*.

which appear objective and transparent, the General Court found the actual awarding discretionary and able to create a pressure on the retailers to meet predefined sales targets which might have tainted the outcome. In recital 140 the Court notes that:

‘The granting of a discount by an undertaking in a dominant position to a dealer must be based on an objective economic justification (Irish Sugar v Commission, cited at paragraph 54 above, paragraph 218). It cannot depend on a subjective assessment by the undertaking in a dominant position of the extent to which the dealer has met his commitments and is thus entitled to a discount. As the Commission points out in the contested decision (recital 251), such an assessment of the extent to which the dealer has met his commitments enables the undertaking in a dominant position to put strong pressure on the dealer [...] and allow[s] it, if necessary, to use the arrangement in a discriminatory manner.’

This is followed by recital 244, concluding how the applied discounts *de facto* had created a loyalty effect and artificial entry barriers for competitors and recitals 108–109 rebutting general references to economic of scale and cost reductions. Rather than concluding that only cost reductions are admissible in defence of discriminatory abuse allegations, it would be more plausible to read the ruling as requiring more firm evidence in support of such claims. The same conclusion would most likely stem from *Wanadoo*,²⁵⁴ where the EU-Commission had used the opportunity not only to rebut the presented arguments of economic of scale and scope, but also to point out that other, less anti-competitive instruments had been available had the interest been genuine. It sounds plausible to presume that the outcome of the cases was influenced by these considerations.

Cases such as *Michelin II*, *Wanadoo*, and *British Airways* have indicated a very narrow window for discounts and selective discounts not directly linked to quantum, reflecting a cent-by-cent cost reduction if discriminatory.²⁵⁵ However, accepting that horizontal exclu-

254. COMP/38.233, *Wanadoo Interactive*, recitals 306–309.

255. *Michelin II* stands out as very restrictive by requiring an actual cost reduction. In the Danish case *TV 2's priser og betingelser*, Competition Council Meeting 21 December 2005, recital 163, broader efficiency gains were accepted, and in the EU case C-163/99, *Portugal v Commission*, recital 52, increase of turnover and eco-

sionary discrimination is another word for foreclosure, the principles developed earlier should be applied, reserving condemnation to discriminatory discounts able to foreclosure an as efficient competitor. In particular, *Post Danmark I*²⁵⁶ is supportive of this by refusing to label horizontal exclusionary discrimination merely on the grounds of pricing below ATC. A standardized discount system void of arbitrary and subjective award criteria, as in *Michelin II*, might be permissible unless the effective price falls below AAC regardless of any discriminatory elements.

5.3.2. Preferential treatment of own interest

In contrast to the uncertainty clouding the non-integrated undertakings interest in discriminating between customers, a level of consensus has emerged on the need to prevent favorable treatment of own affiliated undertakings.²⁵⁷ In particular, the implementation of a vertical integration should not be accepted as a loophole allowing circumvention of the discrimination prohibition.²⁵⁸ However, the basic requirements detailed above must still be met, requiring a product or service essential for downstream access and representing a (large) portion of the final products value. Furthermore, as detailed earlier, *incentive* and *ability* are not the same and the vertically integrated undertaking might not always find it interesting to discriminate.

In practice, different forms of discrimination in favour of affiliated undertakings have been condemned in EU cases such as *Deutsche Bahn*²⁵⁹ and *Clearstream*.²⁶⁰ While neither of these relate to discounts, they nevertheless show how Article 102(c) can be used

conomic of scale was accepted.

256. Case C-209/10, *Post Danmark v Konkurrencerådet*, recital 30 and 37. See also case C-413/14 P, *Intel*, recital 133.

257. Cf. EU cases as 33.941, *HOV SVZ/MCN*, O.J. 1994L 104/34, recitals 245–247, and case C-260/89, *Elliniki Radiophonia*, recitals 36–38.

258. See e.g. John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors, and Access to Essential Facilities* (Fordham Corporate Law Institute, 1994), p. 280, and Damien Geradin & Nicolas Petit, 'Price Discrimination under EC Competition Law: The need for a case-by-case Approach', *GCLC Working Paper* 07/05, p. 33. The latter suggest the use of Article 102(b) as an alternative.

259. Case T-229/94, *Deutsche Bahn AG*.

260. Case COMP/38.096, *PO/Clearstream (Clearing and settlement)*.

against price policies which favour group-affiliated undertakings. The Danish case *Song Networks*,²⁶¹ involved discounts favoring larger customers, of which the largest ‘accidentally’ happened to be a vertically integrated subsidiary. Further, in the EFTA case *Sorpa*,²⁶² certain discounts had been reserved for the owners of a waste disposal company thereby potentially placing these in a competitive advantageous situation over their competitors. However, void of a direct competition situation the court suggested it to be less likely that competition could be thwarted negating the need to specify when to consider preferential treatment abusive.

5.3.3. Sectors with unusual cost structures

As detailed earlier, it might be welfare enhancing to allow undertakings with a large portion of fixed costs to implement different forms of price discrimination for the purpose of creating an incentive to service low income groups.²⁶³ Regardless of the embedded discrimination of those compelled to pay a higher price, no consumer welfare losses are created by this *per se*. Consequently, even undertakings void of competitors might have an objective reason for price discrimination e.g. in the form of selective discounts that should not be ignored. However, so far no cases have emerged involving this ‘defence’.

5.4. Vertical discrimination—foreclosure of a customer

Vertical exclusionary discrimination covers, as explained by the EU-Commission in *BdKEP/Deutsche Post AG*, discrimination of downstream trading parties, which, in the absence of a better word, could perhaps be labeled as ‘real discrimination’. In contrast should the concept be avoided for discrimination in favour of vertically—Integrated or group—affiliated downstream interests as this essentially is a foreclosure following the principles laid down for *horizontal exclusion-*

261. *Song Networks’ klager vedr. Erhvervstelemarkederne*, Competition Council Meeting 28 April 2004, recital 221.

262. Case E-29/15, *Sorpa v The Icelandic Competition Authority*, recitals 112–115.

263. For further information see Derek Ridyard, ‘Exclusionary Pricing and Price Discrimination Abuses under Article 82—An Economic Analysis’, *ECLR* 2002, pp. 286–303.

ary discrimination.²⁶⁴ Furthermore, void of elements thwarting the Single Market, e.g. nationality based discrimination, the EU-Commission appears somewhat unwilling to react against vertical exclusionary discrimination. In contrast, a number of cases have been decided in Danish practice on the matter, which often condemns any dissimilarities in the offered terms and conditions.

5.4.1. Discrimination of downstream trading parties

Discrimination of downstream operators and customers has, from a practical perspective, attracted special interest under Article 102 and the Danish equivalent, section 11. In the EU case *Portugal v Commission*,²⁶⁵ it was held to be abusive under Article 102(c) when a linear and quantum discount had *de facto* benefited national air operators. This was not because some got better terms than others, as this is inherent in quantum discounts, but was due to high thresholds that could only be met by a few particularly large partners and the absence of linear progression in the increase of the quantity discounts. Of interest is also *British Airways*, where only travel agencies that had increased sales and met defined sales targets were allotted special discounts. In defence of this it was argued, with no success, that travel agencies meeting defined sales targets had a higher value for the dominant undertaking and should not be compared with those failing to do this.²⁶⁶ An interesting consideration was rendered in the EU-case *PO/World Cup 1998*²⁶⁷ labeling (national) discrimination of consumers as a particularly aggressive form of discrimination under Article 102 not subject to a requirement of effect on the structure of competition. Finally the issue was contemplated in *Sorpa*,²⁶⁸ a ruling delivered by the EFTA court in 2016, involving a (discriminatory) discount reserved for the owners of a waste disposal company.

264. However, in case E-29/15, *Sorpa v The Icelandic Competition Authority*, the issue attracted some attention and the case indicate that the line is somewhat blurred.

265. Case C-163/99, *Portugal v Commission*, recitals 51–53.

266. See recitals 136–141.

267. Case IV/36.888, *PO/World Cup 1998*, O.J. 2000L 55/5, recitals 102 and 227. There is an element of inconsistency in the case as Article 102, *litra c* refers to the twisting of competition between trading parties and thus appears to exclude condemnation of situations involving an end-users.

268. Case E-29/15, *Sorpa v The Icelandic Competition Authority*, recital 110.

However, void of a competition situation, between these and those denied the discounts, the court held it unlikely that competition could be thwarted.

The principles established by EU-practice, and outlined above, have been applied in Danish cases. In *Song Networks*,²⁶⁹ the use of progressive increases was held abusive by discriminating between large and small customers and impose a competitively disadvantageous position on the later by higher costs. Without challenging the conclusion, the offered rationale might have missed a central element of *Portugal v Commission*, reserving condemnation for discounts with a selective element, making it insufficient that some get better terms. Consequently, the translation into Danish practice has been somewhat troublesome.

5.4.1.1. The requirements follow the general conditions

Preferential treatments of customers are abusive subject to the general criteria listed above in section 5.2.1, requiring that a product or service be essential for market access downstream, representing a substantial part of the value of the final product and void of objective justifications. A number of Danish cases can further illustrate this.²⁷⁰ In *Klage over Post Danmarks prisforhøjelse på distriktsbladsomdelingen*,²⁷¹ differences in the underlying costs for servicing rural areas v cities could explain the offered differences in terms and prices while no such explanation was found in *CPH GO*.²⁷² Further, in *Klage over taksterne ved lastning af olie ved Fredericia Havn*,²⁷³ no discrimination was identified void of competition between the different ships subject to the ‘discriminatory’ treatments. In *Klage over prisdiskriminering*,²⁷⁴ it

269. *Song Networks’ klager vedr. Erhvervstelemarkedene*, Competition Council Meeting 28 April 2004, recitals 226–228.

270. In contrast, the matter has attracted little interest in EU practice unless part of other forms of abuse as exclusionary discounts cf. case C-95/04, *British Airways*, or national based discrimination cf. case C-163/99, *Portugal v Commission*.

271. *Klage over Post Danmarks prisforhøjelse på distriktsbladsomdelingen*, Letter dated 23. March 1999 to plaintiff.

272. *Københavns Lufthavne A/S’ terms of use for CPH GO*, Competition Council Meeting 21 December 2011, recitals 505–562.

273. *Klage over taksterne ved lastning af olie ved Fredericia Havn*, Competition Council Meeting 26 March 2003.

274. *Klage over prisdiskriminering*, Competition Council Meeting 26 August 1998.

was held to be abusive when a discounts system (intentionally) was limited to larger customers precluding minors. Only a short press release is available, but the case does indicate that under Danish practice, all had to be secured access to a discount system. More explicit are *Song Networks*,²⁷⁵ condemning discounts favouring large customers, while this also appears to emerge from *Knud Wexøe A/S' vilkår for levering af kabelkanaler*.²⁷⁶ In this case, a somewhat selective policy for granting of a wholesale discount was determined to be discriminatory. However, no formal discussion was rendered. In *Téle Danmark Mobils standard storkundekontrakt*,²⁷⁷ an ober dictum is offered, indicating that it could be abusive to apply a discount system with high turnover figures. This consideration was followed through in *LK A/S grossistaftaler*,²⁷⁸ where an advanced ordering discount was held to be discriminatory as it could lead to different prices for comparable customers and orders.²⁷⁹

The cited Danish cases indicate that the Danish enforcers perceive that all customers, void of an objective justification, must be offered equal access to a discount system.²⁸⁰ In particular it would be abusive if, cf. *Song Networks* large customers are offered better terms than small customers. If this perception is solely based on the ambition of protecting small and medium sized undertakings, lacking the bargaining power of larger competitors, it would be misplaced in competition law.²⁸¹ However, practice is not consistent. In *Klage over*

275. *Song Networks' klager vedr. Erhvervstelemarkederne*, Competition Council Meeting 28 April 2004, recitals 226–228.

276. *Knud Wexøe A/S' vilkår for levering af kabelkanaler*, Competition Council Meeting 30 August 2000.

277. *Téle Danmark Mobils standard storkundekontrakt*, Competition Council Meeting 16 June 1999.

278. *LK A/S grossistaftaler*, Competition Council Meeting 20 December 2000, recital 111.

279. In the Danish case *Nissan Motor Danmark A/S indfører nye rabatbetingelser*, Competition Council Meeting 28 August 2002, it was accepted that the adoption of weekly orders could merit a discount.

280. See also *TV 2's priser og betingelser*, Competition Council Meeting 29 November 2000 recital 4, and *Håndværksrådet har trukket sin klage over PBS Multidatas gebyrstigninger tilbage*, Competition Council Meeting 24 September 2003.

281. Cf. Robert O'Donoghue & Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2nd Edition, Hart 2013), p. 249.

ændrede forhandler vilkår for Nilfisk støvsugere,²⁸² it was held to be acceptable that a discount was conditioned upon the meeting of minimum turnover figures. More importantly is that the rendered conclusions not are comparable with the principles derived from the EU case *Portugal v Commission*, reserving condemnation to discounts with a selective element, making it insufficient that some get better terms. *KMD's prisdifferentering overfor kommunal kunder*²⁸³ from 2013, might have corrected this by rebutting that it is *per se* discriminatory that larger customers get better terms than small and medium sized customers. Furthermore, improvements have been made through *CPH GO*²⁸⁴ from 2011, where the Danish Competition Council determined it to be discriminatory that a discount accounting for between 34% to 43% of the (profit) margin had been reserved for selected customers. This is a most important rationale, by clarifying that only discrimination capable of twisting competition downstream should be held abusive. However, accepting this, would make Danish cases predating *KMD's prisdifferentering overfor kommunal kunder* and *CPH GO* obsolete.

5.5. National based discrimination

As noted earlier, a practice has emerged in EU cases condemning national based discrimination, including different forms of discounts reserved for national or local undertakings. This practice can be seen in cases such as *Corsica Ferries*,²⁸⁵ where the local association of harbor pilots had reserved the most favorable tariffs for ships under Italian flag. This was held to be abusive and discriminatory by the Court of Justice. Other examples can be seen in EU cases such as *Brussels National Airport*²⁸⁶ and *Portuguese Airports*,²⁸⁷ where tariffs for the use of airports had been designed with the purpose of securing better terms for domestic operators. Essentially the same issue was involved in the

282. *Klage over ændrede forhandler vilkår for Nilfisk støvsugere*, Competition Council Meeting 25 February 1998.

283. *KMD's prisdifferentering overfor kommunal kunder*, informal statement 3 April 2013.

284. *Københavns Lufthavne A/S' terms of use for CPH GO*, Competition Council Meeting 21 December 2011, recital 485.

285. Case C-18/93, *Corsica Ferries Italia Srl*, recital 45.

286. Case 95/364/EC, *Brussels National Airport*, O.J. 1995L 216/8.

287. Case IV/35.703, *Portuguese Airports*, O.J. 1999L 69/31.

two Danish cases *Forespørgsel om lovligheden af takstdifferentiering på færgepriser*,²⁸⁸ and *Fastlæggelse af færgetakster*,²⁸⁹ where the offered tariffs for the use of ferries had favoured locals undertakings by awarding these a special discount. A case of reverse national discrimination can be seen in the Danish case *Aalborg Portlands cementpriser*.²⁹⁰ Here it was held to be discriminatory when domestic customers were levied a higher price than non-domestic.

A particularly aggressive form of discrimination in EU practice is discrimination of end users cf. *PO/World Cup 1998*.²⁹¹ Here, French football fans were secured preferential access to a number of tickets not accessible to non-domestic fans. The EU-Commission found this policy so heinous that it was not required to identify an anticompetitive effect. This is interesting, as Danish practice has not embraced this. In *Prisdiskrimination på Århus Sporvejes abonnementskort*,²⁹² it was accepted that discounted transportation tickets could be reserved for local residents, as it neither thwarted competition nor created a welfare loss. Under Danish practice, only discrimination by undertakings which are able to twist competition would be abusive, in contrast to EU practice. While national based discrimination and preferential treatment of local undertakings would often hamper the single market, and the single market project, placing these under Article 102(c) might be less obvious.²⁹³ Consequently, Danish practice might be right when limiting abuse to situations where there is a clear thwarting of competition.

288. *Forespørgsel om lovligheden af takstdifferentiering på færgepriser*, Competition Council Meeting 26 May 1999.

289. *Fastlæggelse af færgetakster*, Competition Council Meeting 16 December 1998.

290. *Aalborg Portlands cementpriser*, Competition Council Meeting 17 June 1998 and 28 October 1998.

291. Case IV/36.888, *PO/World Cup 1998*, O.J. 2000L 55/5, see recital 102.

292. *Prisdiskrimination på Århus Sporvejes abonnementskort*, letter to Århus Sporveje dated 9 February 1999.

293. For further see Massimo Motta, *Competition Policy, Theory and Practice* (Cambridge, 2004), p. 493 and Damien Gerardin, *Price Discrimination under Article 82(c) EC: Clearing up the Ambiguities* (GCLC Research papers on Article 82 EC), p. 132.

5.6. The somewhat unclear approach on discriminatory discounts

Despite the outlined principles indicating how discrimination should be appraised, there are still a number of troublesome uncertainties when it comes to discriminatory discounts.

- Firstly, it is not evident that price discrimination in the form of selective discounts should be held abusive. For non-dominant undertakings it is welfare maximizing to price differentiate targeting the individual customers' willingness to pay and case law might also be susceptible when it comes to the dominant undertaking's ability to pursue the same.²⁹⁴ Moreover, economic theory is positive on the matter, in particular in sectors with large fixed costs and a need to recoup these. Here price discrimination could be an instrument for securing universal service in the absence of sector regulation and direct compensation models. Furthermore, in sectors prone to collusion and uniformed pricing, prohibiting price differentiation and (secret) discounts could entrench this. Regrettably, it is difficult to draw a clear red line through case law, which unifies it with the economic theory.
- Secondly, cases decided under Article 102(c) and Danish Competition Act section 11(3) No. 3, have in contrast to other provisions not embraced a requirement of an anti-competitive effect. This is regardless of the utilized wording of the provision actually citing such a requirement. In particular (older) Danish practice disregards this, condemning discounts favouring larger customers almost *per se*, while on the other hand, EU practice shows little understanding for national based discrimination favouring domestic customers. Both are therefore in need of clarification.
- Thirdly, the concept of abusive discrimination has been developed beyond the wording of the provisions by also regulating exclusionary conduct and national based discrimination.

294. See e.g. case C-27/76, *United Brand*, recital 228 and case T-229/94, *Deutsche Bahn*, recital 91.

Consequently, it is not only difficult to establish a coherent practice, but other forms of abuse, failing to meet the defined standards, might be pursued under Article 102(c) and the Danish Competition Act section 11(3) No. 3. Predatory pricing, loyalty discounts, margin squeeze and refusals to supply are not only abuses in their own right, but also sharing an overlap with (pure) discrimination, making it attractive to pursue them as such if failing to meet the defined standards. Case law demonstrates several examples of this as detailed above.

- Fourthly, the theoretical foundation for condemning discrimination is somewhat unclear. Moreover, there are even indications of a non-alignment between Danish and EU practice, and an EU approach void of a clear link to the economic theory supposedly governing competition law. Consequently, it's not only unclear what to condemn but also how to view discrimination in general as it could be a form of foreclosure or exploitation.

In light of the many problems of establishing a clear coherent approach to discrimination, it would be much appreciated if the EU-Commission would table its guidance paper on discrimination as promised in 2005.²⁹⁵ Regrettably, there are no indications of any such interest. Consequently, we are left. Not only with a number of open and unsolved issues on when to consider discrimination abusive but also a potential double non-alignment between Danish and EU practice and the latter with (sound) economic theory. Some somewhat unsatisfactory positions.

295. Cf. MEMO/05/486, *Commission discussion paper on abuse of dominance—frequently asked questions*.

Chapter 3

Where do we stand on discounts?—A Norwegian perspective

Eirik Østerud

In this chapter, discounts and pricing practices under rules prohibiting the abuse of market dominance are discussed from a Norwegian competition law perspective. The objective is to investigate how the Norwegian Competition Authority and Norwegian courts have distinguished abusive discounts from legitimate price competition. In its limited decisional practice, the Norwegian Competition Authority has arguably applied a more effects-based approach to identify abusive market behaviour than required pursuant to the European Court of Justice's case law and set out to 'overprove' the finding of an infringement. Nevertheless the authority's decisions have been repealed or annulled. It is argued that the authority's unsuccessful enforcement efforts may be attributed to the authority ultimately failing to explain and establish that the dominant undertakings' market behaviour should be considered different from normal and legitimate competition on merits. Perhaps the Norwegian experience can summarily be described as an effects-based approach to legitimate conduct.

1. Introduction

The topic of this article is discounts and pricing practices under rules prohibiting the abuse of market dominance examined from a Norwegian competition law perspective. The objective is to investigate and discuss how the Norwegian Competition Authority ('NCA' or 'authority') and Norwegian courts have distinguished abusive discounts from legitimate price competition.¹

Norwegian law contains two prohibitions on abuse of dominance: Section 11 of the Norwegian Competition Act and Article 54 of the European Economic Area ('EEA') Agreement.² The prohibitions correspond to and shall in principle be interpreted in line with Article 102 of the Treaty on the Functioning of the European Union ('TFEU'). The prohibitions only apply to dominant undertakings. The concept of an 'undertaking', the notion of 'dominance', and applicable jurisdictional criteria will not be dealt with in detail here. The article will concentrate on the interpretation of the concept of 'abuse' and its application to discounts and pricing practices.

According to the European Court of Justice³, the general concept of abuse consists of two elements. *The first* element relates to the conduct involved. Certain types of market behaviour by dominant undertakings—referred to as methods different from normal competition based on performance or merits—are potentially abusive. Performance- or merits-based forms of competition are, however, considered legitimate means of competition. *The second* element concerns the effects of the dominant undertaking's market behaviour. A negative impact on competition must be connected with the conduct. Accordingly, only non-performance-/merits-based forms of competition that have a sufficient link to anti-competitive effects are considered unlawful pursuant to the European Court of Justice's general notion of abusive behaviour.

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1. Discounts and pricing practices here refer to all forms of potentially anti-competitive pricing behaviour whether in the form of rebates, remunerations, reimbursements, price reductions, etc. Exploitative pricing abuses, such as excessive pricing, fall outside the scope of the discussion.
 2. Between the EFTA states (Norway, Iceland and Liechtenstein but not Switzerland) and the EU.
 3. Court of Justice of the European Union.

The elements of the general concept of abuse reflect the policy discussion on how to identify unilateral, anti-competitive and illegitimate conduct by undertakings with substantial market power. In broad terms, the discourse has centred on the pros and cons of (more or less) form-based and effects-based tests to distinguish lawful from unlawful competition. Proponents of form-based, legalistic methods of legal analyses tend to emphasise advantages in the form of increased legal certainty and predictability and reduced enforcement costs. Proponents of effects-based legal analyses often stress benefits, such as increased economic precision and reduced costs of erroneous decisions. Ultimately, the difficulty is to identify, quantify and balance the costs and benefits of alternative legal rules and standards applicable to various types of market behaviour that can have mixed economic effects.

The objective with this article is not to provide a general, normative contribution to the classic competition law debate on *form v effects*. The ambition is far more modest. The aim is to use the European Court of Justice's general concept of abuse in Article 102 TFEU and its application to various forms of discounts and pricing practices as a reference point for an investigation of Norwegian practice and case law concerning (potentially) abusive discounts and pricing practices.

Section 3 will therefore present the European Court of Justice's general concept of exclusionary abuse.

The interpretation of Article 102 TFEU has been further developed in relation to specific types of conduct. Examples include pricing practices such as loyalty (-inducing), predatory and discriminatory discounts. The interpretation and application of the concept of abuse to such pricing practices is presented in *section 4*. Although the European Court of Justice's and the General Court's case law is considerable, the presentation will be kept brief. Accordingly, the presentation will not provide an extensive analysis of the European Court of Justice's awaited and recent ruling in *Intel*.⁴ Nevertheless the chapter will suggest some implications of the ruling for the interpretation and application of Article 102 TFEU to discounts and pricing practices.

4. Case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632.

Section 5 discusses the Norwegian experience with discounts, pricing and abuse of dominance. The interpretation and application of the two elements of the general concept of abuse will be considered. In other words, both the forms of discounts that have been considered in Norwegian abuse of dominance cases and the approach adopted to the issue of effects will be assessed. The Norwegian cases dealing with discounts and pricing practices will be compared and contrasted to the EU courts' interpretation of Article 102 TFEU.

The experience with abuse of dominance cases under the Norwegian Competition Act is limited. Only a handful of decisions by the NCA and judgments by Norwegian courts concern discounts and rebates. The EFTA Surveillance Authority ('ESA') has decided significant cases on Article 54 EEA, but these decisions do not directly concern abusive discounts and pricing practices.

The limited number of cases makes it difficult to draw robust, general inferences from the Norwegian experience with abuse of dominance and discounts and pricing. Nevertheless a preliminary observation seems to be that the NCA and the Norwegian courts have on several occasions conducted and endorsed relatively extensive analyses of competitive effects when distinguishing abusive from legitimate conduct. Despite the NCA's efforts to analyse and prove restrictive effects on competition, the authority's decisions in abuse of dominance cases can hardly be described as successful competition law enforcement. The NCA's decisions have either been repealed or annulled by the courts. A potential explanation for the authority's unsuccessful enforcement efforts is that the dominant undertakings' conduct was rather competition based on merits or performance than on potentially abusive market methods. Accordingly, while analyses of the effects of dominant undertakings' behaviour have been embraced, the conduct initially condemned as abusive was on appeal considered as legitimate price competition. *Section 6* therefore asks whether the Norwegian experience can summarily be described as *an effects-based approach to legitimate conduct*.

The following section provides an overview of Norwegian and EEA rules and practice regarding abuse of dominance.

2. Norwegian rules and practice regarding abuse of dominance

Prohibitions on abuse of dominance in Norwegian law are found in the EEA Agreement⁵ and in the Norwegian competition act.⁶

Article 54 EEA corresponds to Article 102 TFEU and is sought interpreted in conformity with that provision.⁷ Article 53 EEA prohibits anti-competitive agreements and is equivalent to Article 101 TFEU. The prohibitions are enforced by the ESA and the European Commission (the ‘Commission’). Article 56 EEA allocates jurisdiction between the two agencies. The NCA and Norwegian courts also enforce Article 53 and 54 EEA. Rules on decentralised enforcement are found in the Surveillance and Court Agreement⁸ and the Norwegian EEA Competition Act.⁹

The (current) Norwegian Competition Act came into force in May 2004. The act contains prohibitions on anti-competitive agreements (section 10) and abuse of dominance (section 11). Norwegian substantive antitrust law was thus brought in line with the equivalent prohibitions in EU/EEA competition law. The act’s preparatory works emphasise that case law and practice under the corresponding TFEU and the EEA prohibitions shall be given considerable weight when interpreting sections 10 and 11.¹⁰

Section 11 prohibits any abuse by one or more undertakings of a dominant position. The prohibition only applies to dominant undertakings. By comparison, Article 102 TFEU requires that the undertaking in question has a dominant position ‘within the internal market or in a substantial part of it.’ Similarly, Article 54 EEA sets out that the undertaking in question must be dominant ‘within the territory

5. The EEA Agreement is incorporated in Norwegian law through the Norwegian EEA Act (1992) (Act of 27 November 1992, no. 109, on the implementation of the main part of the EEA Agreement.)

6. Act of 5 March 2004, no. 12, on competition between undertakings and control of concentrations.

7. See, for example, the EFTA Court’s judgment in case E-15/10, *Posten Norge v ESA*.

8. Protocol 4 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice.

9. Act of 5 March 2004, No. 11, concerning implementation and enforcement of the competition rules of the EEA Agreement.

10. Ot. prp. nr. 6 (2003–2004), p. 68 and pp. 224–225.

covered by the EEA Agreements or in a substantial part of it.’ Article 102 TFEU and Article 54 EEA also only apply provided trade between Member States/Contracting Parties is affected. The territorial scope of the Competition Act is set out in section 5: the act applies to actions that are undertaken, have an effect or are liable to have an effect in Norway. The notion of *abuse* in section 11 and Article 54 EEA shall be interpreted and applied in accordance with the corresponding concept in Article 102 TFEU. The broader EU/EEA objectives, including the creation of an internal European market should, however, arguably not be given equivalent weight under section 11. Section 1 of the Norwegian Competition Act states that the purpose of the act is to further competition and thereby contribute to the efficient utilisation of society’s resources. Moreover, when applying the act, special consideration shall be given to the interests of consumers.¹¹

ESA has decided two cases imposing fines for infringements of Article 54 EEA. In *Norway Post/Privpak* from July 2010, ESA imposed a EUR 12.89 million fine on the national postal operator Posten Norge AS.¹² ESA concluded that the undertaking had infringed Article 54 EEA by abusing its dominant position in the market for business-to-consumer parcel services with over-the-counter delivery in Norway in 2000–2006. ESA found that Posten Norge AS had entered into exclusive agreements with retail groups and outlets (grocery stores, kiosks and petrol stations) to establish a Post-in-Shop network and that these agreements hindered competitors from establishing competing delivery networks. In 2012, the EFTA Court upheld ESA’s finding of an infringement. However, the court reduced the fine to EUR 11.112 million as the duration of ESA’s investigation was excessive.¹³ In December 2011, ESA issued a decision against *Color Line*. The case concerned ferry operator Color Line’s short haul passenger ferry services with tax-free sales between Sandefjord in Norway and Ström-

11. The Norwegian Supreme Court has pointed out that the harmonisation does not mean that the Norwegian authorities’ practice will be identical to the practice in the EU/EEA. Different objectives, scopes of application and sources of law may lead to different outcomes (see Rt. 2011 s. 910, *TINE v Konkurransetilsynet*, paragraph 63, with references to Ot. prp. nr. 6 (2003–2004), p. 68.)

12. Case 34250, *Norway Post/Privpak*.

13. Case E-15/10, *Posten Norge AS v ESA*.

stad in Sweden. ESA held that Color Line's long-term harbour agreements with the municipality of Strömstad infringed Articles 53 and 54 EEA and imposed a fine of EUR 18.811 million.¹⁴ Color Line did not challenge the decision before the EFTA Court. ESA's decisions do not directly concern discounts and pricing practices and will not be further considered here.¹⁵ The EFTA Court's recent judgment in the *Holship* case¹⁶ concerning *inter alia* the relationship between EEA competition law and collective agreements also does not concern the application of the concept of abuse to anti-competitive discounts and pricing.

Norwegian undertakings have also been the subject of decisions by the Commission finding infringements of EU/EEA competition law. For example, in *Tomra*, the Commission held that the Norwegian parent company Tomra ASA, as well as several of its Norwegian and European subsidiaries, had violated Article 102 TFEU and Article 54 EEA.¹⁷

The NCA has decided only a few cases finding infringements of the prohibitions on abuse of dominance. Since the Competition Act came into force, section 11 has been held violated in three decisions. In 2004, the NCA in *Nettbuss* ordered a dominant bus company to terminate two separate pricing practices (a round-trip discount and a so-called customer card discount) considered contrary to section 11.¹⁸ Fines were not imposed. In *SAS* from 2005, the NCA fined airline SAS NOK 20 million for having violated section 11 by predatory pricing on the route between Oslo and Haugesund.¹⁹ In *TINE* from 2007, the Norwegian dairy company TINE was fined NOK 45 millions for infringing section 11 and section 10 (prohibiting anti-com-

14. Case 59120, *Color Line*.

15. On 1 February 2016, ESA sent a Statement of Objections to the Norwegian telecom undertaking Telenor. According to a press release, ESA is concerned that Telenor may have abused its dominant position in Norway by obstructing competitors in two markets involving the provision of mobile communications services to Norwegian users. See <<http://www.eftasurv.int/press-publications/press-releases/competition/nr/2635>>.

16. Case E-14/15, *Holship Norge AS & Norsk Transportarbeiderforbund*.

17. COMP/E-1/38.113, *Prokent-Tomra*.

18. Case V2004-29, *Nettbuss Sør AS*.

19. Case V2005-9, *SAS*.

petitive agreements).²⁰ The unlawful behaviour took place during TINE's negotiations with the grocery chain REMA 1000 in 2004 and resulted in TINE becoming the sole supplier of certain types of cheese to REMA 1000. The NCA also found that TINE violated the prohibition on abuse of dominance during negotiations with the grocery chain ICA. Notably, none of the three decisions by the NCA were upheld. The decision in *Nettbuss* was later repealed.²¹ The SAS-decision was annulled in court.²² Subsequently, the NCA revised its initial decision and decided not to impose a fine.²³ The decision in *TINE* was finally annulled by the Supreme Court.²⁴ Accordingly, the NCA has not imposed any definitive fines for abuse of dominance.²⁵ Moreover, since 2007 the NCA has not decided any cases finding an infringement of section 11. The three cases will be discussed in more detail in sections 5 and 6.

The prohibition on abuse of dominance in section 11 of the Competition Act has also been dealt with in private litigation.²⁶ The private litigation cases, however, shed limited light on the Norwegian courts' interpretation and application of the concept of abuse to discounts and rebates. These cases will not be discussed further here.²⁷

20. Case V2007-2, *TINE*.

21. Case V2004-34, *Omgjøring av vedtak om pålegg om opphør av rabattordninger*.

22. *SAS v Konkurransetilsynet*, case 05-111347TVI-OTIR/06.

23. Case V2007-28, *SAS AB – Omgjøring av overtredelsesgebyr i vedtak V2005-9 – konkurranseskadelig underprising på ruten Oslo–Haugesund*.

24. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*.

25. In the same period, the NCA decided approximately a dozen cases, imposing fines for violations of the prohibition on anti-competitive agreements. In comparison, there are approximately 100 decisions where the NCA has imposed fines for violating the obligation to notify of concentrations and the prohibition against implementing concentrations under the merger control rules. The high number of decisions can likely be explained by a combination of very low turnover thresholds for mandatory notification (raised from 1 January 2014), the NCA's very expansive and problematic interpretation of section 19 of the competition act and the NCA's enforcement priorities.

26. See, for example, *Lynghaug & Lynghaug v Torget i Bergen* (case LG-2004-5524), *Benair AS v Oslo Lufthavn AS* (RG 2009 s. 188), *MP Media Norge AS v Interpress AS* (case 11-007278TVI-NERO), *Telenor v Network Norway* (case 12-051158TVI-AHER/2), *CargoNet AS v Cargolink AS* (LB-2011-164879), *Hovden Alpingsenter AS v Arne Johan Mosfeld* (Rt. 2014 s. 36).

27. For an analysis of court cases concerning sections 10 and 11 of the competition act, see Lars Sørgard & Erling Hjelmeng, *Konkurranseret i domstolene*, in K. Sunnevåg (ed.): *Handlingsrom for konkurransepolitikken*, *Festskrift til*

Finally, it should be mentioned that an additional tool to intervene against anti-competitive conduct is available under the Competition Act. Under section 14, the King (in Council) may, if necessary to promote competition, by regulation intervene against terms of business, agreements, or actions that restrict or are liable to restrict competition. Such regulations may, for example, prohibit certain types of unilateral conduct, even by non-dominant undertakings. The competence has been delegated to the ministry.²⁸ In 2013, a regulation prohibiting bonus systems for domestic air travel was repealed. The only regulation currently in force requires undertakings offering Internet real estate advertising services to give non-discriminatory access to third parties.²⁹

3. The general concept of abuse

3.1. Introduction

The European Court of Justice's classic description or definition of the notion of anti-competitive or exclusionary abuse³⁰ in *Hoffman-LaRoche v Commission* from 1979 is as follows:

'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of

Christine Meyer, Grieg Forlag, pp. 27–43.

28. Regulation 14 June 2013 no. 634 (Delegering av myndighet til Nærings- og fiskeridepartementet etter konkurranseloven).

29. Regulation 9 September 2009 no. 1169 (Forskrift om tilgang til boligannonsering på Internett).

30. Although the European Court of Justice's general definition of the concept of abuse relates to anticompetitive conduct, abusive exploitation of customers is also contrary to the prohibition. The wording of the prohibition states that abusive behaviour may also consist of 'imposing unfair purchase or selling prices or other unfair trading conditions' (litra a).

competition still existing in the market or the growth of that competition.³¹

The European Court of Justice, General Court and the Commission regularly refer to this general concept in abuse of dominance cases.³²

Pursuant to the definition, the notion of abusive market behaviour includes two elements.³³ The first element relates to the form of a dominant undertaking's behaviour. Only 'methods different from those which condition normal competition in products or services' qualify as abusive. Therefore the prohibition applies only to certain types of conduct. The second element relates to effects. To qualify as abusive, the dominant undertaking's conduct must be 'such as to influence the structure of the market' and/or have 'the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'.

These two elements are discussed further in the following subsections.

31. Case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36, paragraph 91.

32. See, for example, case C-62/86, *AKZO v Commission*, ECLI:EU:C:1991:286, paragraph 69, case C-457/10, *AstraZeneca v Commission*, ECLI:EU:C:2012:770, paragraph 74, case C-52/09, *Konkurrensverket v Teliasonera*, ECLI:EU:C:2011:83, paragraph 27, case C-549/10, *Tomra v Commission*, ECLI:EU:C:2012:221, paragraph 17, case C-23/14, *Post Danmark II*, ECLI:EU:C:2015:651, paragraph 26, COMP/C-3/37.990, *Intel*, paragraph 914. In relation to Article 54 EEA, see, for example, ESA's decision case 59120, *Color Line*, paragraph 553.

33. According to the European Court of Justice, the concept of abuse is also objective. The indication is that subjective considerations, such as a dominant undertaking's intention to harm competitors or competition, should not generally render otherwise legitimate competition unlawful (see case C-549/10, *Tomra v Commission*, ECLI:EU:C:2012:221, paragraphs 20 and 21). Nevertheless, for certain types of potentially abusive conduct, the dominant firm's intention is an integrated part of the legal analysis. (For example, in relation to predatory pricing see case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, and in relation to vexatious litigation see case T-111/96, *ITT Promedia v Commission*, ECLI:EU:T: 1998:183.) The conduct of a dominant undertaking can, however, constitute an abuse even in the absence of any fault (see case 6/72, *Continental Can v Commission*, ECLI:EU:C:1973:22, paragraph 29).

3.2. Conduct: methods different from normal competition based on performance or merits

The general definition of abuse prescribes that only certain forms of market behaviour can constitute an abuse of a dominant market position. The European Court of Justice has described such conduct as methods different from ‘normal competition’. Similarly, the Court has referred to methods different from those based on ‘performance’,³⁴ ‘quality’,³⁵ or ‘merits’³⁶ when describing the notion of abuse.

Pursuant to the European Court of Justice’s concept of exclusionary abuse, certain forms of competition are legitimate and beyond the scope of the prohibition. Other types of conduct are potentially abusive. Consequently, the form or type of conduct adopted by a dominant undertaking may be decisive when distinguishing lawful from unlawful practices. The general idea seems to be that a dominant undertaking is allowed to compete against and even outcompete its competitors on the basis of price, quality, innovation, business acumen and the like. As explained by the European Court of Justice, ‘not every exclusionary effect is detrimental to competition [...]. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.’³⁷

The Norwegian Supreme Court has adopted the European Court of Justice’s notion of exclusionary abuse. According to the Supreme Court’s majority in *TINE v Konkurransetilsynet*, dominant undertakings can generally compete, and also compete hard, as long as competition is based on quality, price etc., often referred to as competition ‘on the merits’ or on the basis of ‘better performance’. However,

34. Case 322/81, *Michelin v Commission*, ECLI:EU:C:1983:313, paragraph 70.

35. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, paragraph 70 and case C-202/07, *France Télécom v Commission*, ECLI:EU:C:2009:214, paragraph 106.

36. Case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289, paragraph 1070 (with further references).

37. Case C-209/10, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2012:172, paragraph 22. See also case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632, paragraph 134.

dominant undertakings cannot affect competition by means other than those considered normal when offering goods or services.³⁸

An attempt directly to apply the European Court of Justice's notion of exclusionary abuse to concrete cases and facts would be inherently difficult. The terms used are vague and ambiguous and do not provide clear guidance when drawing the line between abusive and lawful competitive behaviour. Methods different from normal competition based on performance or merits do not describe or refer to specific types of market conduct. The general definition does not even specify clear criteria to delineate competition based on performance or merits from potentially abusive conduct. As an administrable and workable legal test for distinguishing abusive from legitimate behaviour by dominant undertakings, the European Court of Justice's general definition appears inadequate. The general description of exclusionary abuse can arguably rather be described as a flexible principle than as a directly applicable rule or standard.

The European Court of Justice has complemented the general definition with more concrete legal tests for assessing various forms of market behaviour by dominant undertakings. Different types of conduct can qualify as abusive. Examples from the case law include exclusivity obligations, tying and bundling, refusals to deal and to license intellectual property and pricing practices, such as loyalty discounts, predatory pricing and price discrimination. The case law dealing with such practices describes forms of conduct that can qualify as non-performance-based competition. Moreover, the case law defines more specific conditions that must be satisfied to establish an abuse of a dominant market position.

The concept of performance- or merits-based competition can imply an all-or-nothing approach to dominant undertakings' conduct. Such conduct is by consequence lawful and beyond the scope of Article 102 TFEU. If, however, a dominant undertaking has engaged in non-performance-based competition, the conduct is by implication inherently suspicious or at least potentially abusive.

The European Court of Justice has developed legal tools that add flexibility to the application of the concept of abuse. The

38. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*, paragraph 68. See also case V2007-2, *TINE*, section 6.1.

European Court of Justice has established that even *prima facie* abusive practices can be justified if the conduct is a proportionate means of protecting the dominant undertaking's commercial interests. Therefore the European Court of Justice has acknowledged that 'the fact that an undertaking is in a dominant position cannot disentitle it from protecting its commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests'.³⁹ However, such behaviour 'cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it'⁴⁰ and 'even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat'.⁴¹

3.3. Effects: restriction of competition

The general definition of exclusionary abuse also refers to the competitive effects of a dominant undertaking's market behaviour. Effects come into play only in so far as the dominant undertaking has applied methods different from normal competition based on performance or merits. The European Court of Justice's general concept of abuse implies that competitive conduct based on merits or performance does not qualify as abusive, regardless of the effects.

To the European Court of Justice, the concept of abuse relates to behaviour that is 'such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened' and that 'has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition'.⁴² The European Court of Justice's description indicates that there must be a link between the dominant undertaking's conduct and a negative impact on competition in the market.

The Norwegian Supreme Court has briefly touched upon the requirement of effects. The Supreme Court's majority in *TINE v Konkurransetilsynet* held that when applying section 11, and in light of

39. Case 27/76, *United Brands v Commission*, ECLI:EU:C:1978:22, paragraph 189.

40. Case 27/76, *United Brands v Commission*, ECLI:EU:C:1978:22, paragraph 189.

41. Case 27/76, *United Brands v Commission*, ECLI:EU:C:1978:22, paragraph 190.

42. Case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36, paragraph 91.

EU/EEA competition law, it must be considered whether the dominant undertaking's behaviour is such as to have an appreciable anti-competitive effect.⁴³

A legal requirement of effect should ideally specify at least the relevant type of effects, the required likelihood that the effects will materialise (or have materialised) and the standard of significance.

The European Court of Justice's general concept of abuse suggests that the relevant type of effect is the impact on the market structure. An effect on efficiency or consumer welfare is not mentioned. With regard to the required likelihood that relevant effects will materialise, the European Court of Justice's general definition merely refers to behaviour that is 'such as' to lead to restrictive effects on competition. The terms 'such as' could arguably refer to standards as different as 'potential', 'possible', 'capable', 'likely', 'highly likely' and 'actual' effects. As to the issue of significance, the general definition does not address whether a standard of appreciability or a *de minimis* threshold for establishing an abuse applies.

Being vague and ambiguous, the European Court of Justice's description of effects has the inherent advantage of being compatible with various diverging and more concrete standards.

The required standard of effects has been operationalised by the European Court of Justice in connection with various forms of conduct. Therefore the case law on Article 102 TFEU specifies both the forms of conduct that qualify as non-performance-based competition and the standard of effects that must be satisfied in relation to such forms of conduct.

The required effects for establishing an abuse vary depending on the type of conduct in question. For example, for a refusal to licence intellectual property to constitute an abuse, it must be established that the refusal prevents technical development and that the refusal restricts all (effective) competition.⁴⁴ In comparison, exclusivity agreements have, at least in the past, been held to be abusive seemingly

43. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*, paragraph 64.

44. Joined cases C-241/91 and C-242/91, *RTE & ITP v Commission (Magill)*, ECLI:EU:C:1995:98, case C-481/01, *IMS Health v NDC Health*, ECLI:EU:C:2004:257, and case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289.

without the need for a more concrete assessment of market-specific effects.⁴⁵

Therefore the European Court of Justice's practice can be described as a non-universal approach to the identification of abuse of dominance. The European Court of Justice has adopted and described different legal tests applicable to different types of practices. The elements of the conduct-specific tests largely correspond to the elements of the general definition of abuse. First, they describe conduct different from normal competition based on merits or performance. Second, they typically refer to some standard of effects. Certain types of conduct are subject to strict standards and almost qualify as abusive *per se*. Other practices are treated more leniently and only constitute an abuse in specific or exceptional market circumstances.

Efficiencies do not appear relevant under the prohibitions on abusive behaviour. Neither the wording of the prohibitions nor the European Court of Justice's general definition of exclusionary abuse set out an exemption equivalent to the third paragraph of Article 101 TFEU, Article 53 EEA and Section 10 of the Norwegian Competition Act. Nevertheless the European Court of Justice has recognised that *prima facie* abusive practices may be 'objectively justified'. To the European Court of Justice, '[i]t has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.'⁴⁶ It is for the dominant undertaking to support an argument that its conduct is objectively justified and therefore legitimate with evidence.⁴⁷ The European Court of Justice has therefore acknowledged that countervailing efficiencies that compensate consumers can justify *prima facie* abusive conduct.

45. Case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36.

46. Case C-95/04, *British Airways v Commission*, ECLI:EU:C:2007:166, paragraph 86. See also case C-209/10, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2012:172, paragraph 41, case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, paragraph 31 and case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632, paragraph 140. In relation to section 11 of the Norwegian competition act, see case V2007-2, *TINE*, section 6.1.

47. Case T-201/04, *Microsoft v Commission*, ECLI:EU:T:2007:289.

4. Discounts and abuse of dominance—EU

4.1. Introduction

The European Court of Justice's general description of exclusionary abusive behaviour has been operationalised by more conduct-specific legal tests. Therefore this section will present the interpretation and application of the concept of abuse in Article 102 TFEU to various forms of discounts and pricing practices. Both elements of the general concept of exclusionary abuse will be dealt with. First, discounts and pricing practices considered different from normal competition on the merits will be presented. Second, the applicable standard of effects will be considered. The aim is not to provide a thorough analysis of the EU courts' case law on discounts and pricing practices and its development under Article 102 TFEU. Rather, the objective is merely to give a brief presentation of how the two elements of the concept of abuse have been interpreted and applied in relation to such conduct. This will serve as a basis for assessing the Norwegian practice and case law.⁴⁸

4.2. Conduct: discounts and pricing different from normal competition based on performance or merits

4.2.1. Introduction

Discounts and price reductions by dominant undertakings should in general arguably be considered pro-competitive and legitimate competition. Advocate General Fennelly has stressed that '[p]rice competition is the essence of the free and open competition which it is the objective of Community policy to establish on the internal market. It favours more efficient firms and it is for the benefit of consumers both in the short and the long run. Dominant firms not only have the right but should be encouraged to compete on price.'⁴⁹

48. See section 5.

49. Opinion of Advocate General Fennelly, joined cases C-395/96 etc., *Compagnie Maritime Belge Transports SA and Others v Commission*, ECLI:EU:C:1998:518, paragraph 117.

Nevertheless, certain price reductions by dominant undertakings can qualify as abusive conduct. Bearing in mind there is no exhaustive list of (potentially) abusive forms of conduct, discounts and pricing practices considered different from normal competition on performance or merits can be grouped into three broad categories. *First*, certain forms of pricing practices have been considered to create unreasonable customer loyalty, thus potentially foreclosing competitors and have therefore been classified as different from normal competition. *Second*, very low prices (or high discounts leading to very low prices) may be considered predatory and abusive in certain circumstances. *Third*, discriminatory pricing practices and discounts are also potentially abusive. These categories will be discussed in more detail in the following subsections.

It should be noted that the distinctions between the categories appear less clear today than they have in the past. The European Court of Justice’s ‘clarification’ of its previous case law provided in its judgment in *Intel* of 6 September 2017 arguably implies a more uniform approach to different types of rebates and pricing practices.

4.2.2. Loyalty discounts

Loyalty or loyalty-inducing discounts (broadly) refer to price reductions offered to customers who exclusively, predominantly or increasingly purchase goods or services from one seller. When the seller holds a dominant market position, loyalty (-inducing) discounts can constitute an abuse within the meaning of Article 102 TFEU. Such discounts have been considered different from normal competition based on merits or performance.

A substantial body of case law deals with loyalty and loyalty-inducing discounts and pricing practices under Article 102 TFEU.⁵⁰ The EU courts’ and the Commission’s application of the concept of

50. See inter alia joined cases 40–48, 50, 54–56, 111, 113 and 114–73, *Suiker Unie and others v Commission*, ECLI:EU:C:1975:174, case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36, case 322/81, *Michelin v Commission*, case C-95/04, *British Airways v Commission*, ECLI:EU:C:2007:166, case T-203/01, *Michelin II*, ECLI:EU:T:2003:250, case C-549/10, *Tómra v Commission*, ECLI:EU:C:2012:221, case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632.

abuse to such pricing practices has also been substantially criticised.⁵¹ One objection is that these discounts have been subjected to a strict and formalistic legal assessment. By consequence, dominant undertakings may be prevented from engaging in efficient price competition.

Arguably the legal approach to loyalty (-inducing) discounts under Article 102 TFEU has been the result of a form of analogical reasoning deriving from the application of the concept of abuse to exclusive dealing arrangements. Exclusivity agreements have been considered abusive based on the argument that dominant undertakings should not restrict customers' freedom to choose different suppliers. In turn the argument has justified an almost *per se* prohibition of such agreements.⁵² The strict treatment of exclusivity obligations has been extended to some forms of discounts that can lead to loyalty or *de facto* exclusivity. Discounts obtained by exclusivity or loyalty undeniably have similarities with exclusivity obligations. Such discounts, however, also share similarities with other pricing practices, such as predation. The economic insights that lie behind the identification of illegal predatory pricing have not, however, had a substantial impact on the EU courts' assessment of loyalty (-inducing) discounts under Article 102 TFEU.

Only pricing practices and discounts different from normal competition based on merits or performance can qualify as abusive under Article 102 TFEU. Pursuant to the case law, quantity discounts, exclusivity/loyalty discounts and loyalty-inducing discounts/target rebates should be distinguished.

To the European Court of Justice, a *quantity rebate* exclusively linked with the volume of purchases from the dominant undertaking is considered a normal, merits-based and lawful price reduction.⁵³ Therefore a generally applicable and incremental (as opposed to retroactive) discount awarded for increased purchases is not considered a loyalty or loyalty-inducing discount but as legitimate price competition that is beyond the scope of Article 102 TFEU. The European

51. See, for example, Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010), pp. 173–218.

52. See case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36.

53. Joined cases 40–48, 50, 54–56, 111, 113 and 114–73, *Suiker Unie and others v Commission*, ECLI:EU:C:1975:174, paragraphs 517–518.

Court of Justice in *Post Danmark II* from 2015 explained that ‘[i]t is [...] settled case-law that, in contrast to a quantity discount linked solely to the volume of purchases from the manufacturer concerned, which is not, in principle, liable to infringe Article [102 TFEU], a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining all or most of their requirements from competing manufacturers, amounts to an abuse within the meaning of that provision’.⁵⁴

Loyalty or exclusivity discounts, however, have been considered different from normal competition based on merits or performance. The European Court of Justice in *Hoffmann-LaRoche* held that a dominant undertaking that ties purchasers by an obligation or promise to obtain all or most of their requirements exclusively from the dominant undertaking abuses its market position. To the European Court of Justice, it was irrelevant whether the obligation was stipulated without further qualification or whether it was undertaken in consideration of the grant of a rebate. The court further held that the same applies if the undertaking applies discounts conditional on the customer’s obtaining all or most of its requirements, whether the quantity of its purchases be large or small, from the dominant undertaking.⁵⁵ According to the European Court of Justice, such loyalty discounts, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, are designed to prevent customers from obtaining their supplies from competing producers.⁵⁶ Subsequent case law has confirmed that discounts granted in return for exclusivity are generally not considered legitimate performance-based competition.⁵⁷

Loyalty may also be induced by discounts granted to customers that reach certain sales targets. *Retroactive target rebates* have been con-

54. Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, paragraph 27 (with references to case 322/81, *Michelin v Commission*, EU:C:1983:313, paragraph 71, and case C-549/10 P, *Tomra v Commission*, EU:C:2012:221, paragraph 70).

55. Case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36, paragraph 89.

56. Case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36, paragraph 90.

57. See, for example, case T-155/06, *Tomra v Commission*, ECLI:EU:T:2010:370, paragraphs 208–209 and 295–296, upheld in case C-549/10, *Tomra v Commission*, ECLI:EU:C:2012:221. See also case T-286/09, *Intel v Commission*, ECLI:EU:T:2014:547.

sidered loyalty-inducing and therefore different from normal performance-based competition. Retroactive target rebates or discounts are awarded to customers that meet certain sales targets and apply (also) to previous sales prior to reaching the target. Therefore the effective price for the sale of products reaching the sales target may be very low or even negative. In *Michelin I*, the European Court of Justice found that Michelin abused its dominant position by applying a system of retroactive target rebates where the sales targets were fixed individually for different customers.⁵⁸ A generalised, retroactive target discount system was considered loyalty-inducing and abusive by the General Court in *Michelin II*.⁵⁹

The European Court of Justice's approach to loyalty and loyalty-inducing discounts was summarised in the preliminary ruling in *Post Danmark II*.⁶⁰ The case concerned a standardised, conditional and retroactive discount scheme operated by Post Danmark in 2007 and 2008. In explaining the general, analytical approach to applying the prohibition against abuse of dominance to discounts and rebate schemes, the European Court of Justice referred to the general definition of exclusionary abuse⁶¹ before apparently distinguishing between three types of discounts. *First*, the European Court of Justice held that it is settled case law that a quantity discount linked solely to the volume of purchases from the manufacturer is not, in principle, liable to infringe Article 102 TFEU. *Second*, the European Court of Justice held that it is also settled case law that a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining all or most of their requirements from competing manufacturers, amounts to an abuse within the meaning of that provision.⁶² *Third*, the European Court of Justice held that the rebate scheme rel-

58. Case 322/81, *Michelin v Commission*, ECLI:EU:C:1983:313. An individualised, retroactive bonus system was also considered abusive in case T-219/99, *British Airways v Commission*, ECLI:EU:T:2003:343. See also case C-549/10, *Tomra v Commission*, ECLI:EU:C:2012:221.

59. Case T-203/01, *Michelin II*, ECLI:EU:T:2003:250.

60. Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651.

61. Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, paragraph 26.

62. Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, paragraph 27 (with references to case 322/81, *Michelin v Commission*, EU:C:1983:313, paragraph 71, and case C-549/10, *Tomra v Commission*, EU:C:2012:221, paragraph 70).

evant to the case was neither a quantity discount nor a loyalty/exclusivity discount but a retroactive target rebate. To determine whether such a rebate scheme constitutes an abuse, it was necessary to ‘consider all the circumstances’.⁶³

Loyalty (-inducing) discounts have qualified as non-performance-based competition without the need to analyse whether the pricing practice could exclude from the market competitors that are as efficient as the dominant undertaking. Such analyses require a comparison of the dominant undertaking’s costs and prices. To the European Court of Justice, the application of the as-efficient-competitor test has not constituted a necessary condition for a finding that a rebate scheme is abusive under Article 102 TFEU.⁶⁴

The European Court of Justice’s ruling in *Intel*⁶⁵ of 6 September 2017 is however ambiguous as to the necessity to conduct an as-efficient-competitor analysis in relation to loyalty (-inducing) discounts. The ruling’s numerous references to the as-efficient-competitor standard⁶⁶ suggest that loyalty (-inducing) discounts are only considered different from normal competition on performance or merits if they are capable of excluding competitors at least as efficient as the dominant undertaking itself. However, the Court annulled the General Court’s judgment because the as-efficient-competitor test had played an important role in the Commission’s assessment and ‘[i]n those circumstances, the general Court was required to examine all of Intel’s arguments concerning that test.’⁶⁷ The inference would then seem to be that the as-efficient-competitor standard is merely an evidentiary element in a more open-ended effects-analysis. The latter view is supported by the Court’s ‘clarification’ that loyalty rebates and discounts are presumptively abusive. The burden of providing evidence of anti-competitive effects is only placed on the Commission where the undertaking concerned submits evidence during the administrative procedure ‘that its conduct was not capable of restricting competition

63. Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, paragraph 29.

64. Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, paragraph 62. See also case C-549/10, *Tomra v Commission*, paragraphs 67–82.

65. Case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632.

66. Case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632, *inter alia* paragraphs 133, 134, 136, 139.

67. Case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632, paragraph 144.

and, in particular, of producing the alleged foreclosure effects.⁶⁸ While being unclear in its details, nevertheless the European Court of Justice's ruling in *Intel* implies that the as-efficient-competitor test is relevant for the legal assessment of loyalty (-inducing) discounts. This brings the application of Article 102 TFEU to such pricing practices more in line with the approach taken to predatory prices and discounts.

4.2.3. Predatory discounts

Predatory pricing practices and discounts constitute the second category of pricing conduct considered different from normal competition based on merits or performance. Predatory pricing refers to strategies where an undertaking offers (very) low prices to exclude competitors from the market. The exclusion or foreclosure of competitors can enable a subsequent price increase and recoupment of the profit sacrifices caused by the initial price reductions.

The application and operationalisation of the concept of abuse in Article 102 TFEU to predatory pricing was articulated in 1991 by the European Court of Justice's judgment in *AKZO*.⁶⁹ The European Court of Justice referred to the general concept of abuse described in *Hoffmann-LaRoche* and explained that it follows that Article 102 TFEU 'prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, however, not all competition by means of price can be regarded as legitimate.'⁷⁰ Accordingly, even price competition can qualify as different from normal competition based on performance or merits.

The European Court of Justice then set out more specific criteria for identifying abusive predation based on the relationship between the dominant undertaking's prices and costs. First, '[p]rices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive.'⁷¹ The

68. Case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632, paragraphs 138–139.

69. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286.

70. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, paragraph 70.

71. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, paragraph 71.

court explained that a dominant undertaking has no interest in applying such prices except that of eliminating competitors to enable it subsequently to raise its prices by taking advantage of its monopolistic position. The reason is that each sale generates a loss, namely the total amount of the fixed costs (costs that remain constant regardless of the quantities produced) and at least part of the variable costs relating to the unit produced.⁷² Second, the European Court of Justice stated that ‘prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.’⁷³ The court held that such prices can drive undertakings from the market that are perhaps as efficient as the dominant undertaking but that, because of their smaller financial resources, are incapable of withstanding the competition waged against them.⁷⁴ The criteria for identifying abusive predatory pricing have later been confirmed and clarified in subsequent case law.⁷⁵

The recoupment of losses from the predation period has not been considered a requirement for abusive predatory pricing under Article 102 TFEU. In *Tetra Pak II*, the European Court of Justice held that it would not be appropriate in the circumstances of the case to require proof that the dominant undertaking had a realistic chance of recouping its losses.⁷⁶ In *France Télécom*, the European Court of Justice more generally stated that proof of the possibility of recoupment of losses does not constitute a necessary precondition for establishing abusive predation.⁷⁷ Nevertheless the European Court of Justice held that such proof could be a relevant factor in excluding an

72. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, paragraph 71.

73. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, paragraph 72.

74. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, paragraph 72.

75. See inter alia case C-333/94 P, *Tetra Pak International v Commission*, ECLI:EU:C:1996:436, case C-202/07 P, *France Télécom v Commission*, ECLI:EU:C:2009:214, and case C-209/10, *Post Danmark v Konkurrenserådet*, ECLI:EU:C:2012:172.

76. Case C-333/94 P, *Tetra Pak International v Commission*, ECLI:EU:C:1996:436, paragraph 44. See also Case T-83/91, *Tetra Pak International v Commission*, ECLI:EU:T:1994:246, paragraph 150.

77. Case C-202/07 P, *France Télécom v Commission*, ECLI:EU:C:2009:214, paragraph 110.

objective economic justification other than the elimination of a competitor.⁷⁸

The European Court of Justice has acknowledged that dominant undertakings are allowed to take proportionate steps to protect their commercial interests if they are attacked.⁷⁹ Therefore a dominant undertaking may have the right to align its prices with its competitors even if it entails below-cost pricing.⁸⁰ Dominant undertakings' defensive right to protect their commercial interests adds flexibility to the otherwise rigid legal tests for identifying abusive predatory conduct.

The AKZO-test for predatory pricing suggests that above-cost price cuts should be considered competition based on merits or performance and is beyond the scope of Article 102 TFEU.⁸¹ Selective, above-cost price cuts and discounts have nevertheless been considered abusive in some cases.⁸² For example, in *Compagnie Maritime Belge*, the European Court of Justice found that the CEWAL shipping conference violated the prohibition on abuse of dominance by lowering their freight rates for vessels sailing on the same date as their most important competitor, even though the rates covered CEWAL's costs.⁸³ The practice was referred to as 'fighting ships'. More recent case law, however, indicates that selectively targeted price cuts are generally not abusive as long as the dominant undertaking's average total costs are covered. In *Post Danmark v Konkurrencerådet*, the European Court of Justice held that prices at a higher level than average total costs could not be considered anti-competitive.⁸⁴

78. Case C-202/07 P, *France Télécom v Commission*, ECLI:EU:C:2009:214, paragraph 111.

79. Case 27/76, *United Brands v Commission*, ECLI:EU:C:1978:22, paragraphs 189–190.

80. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, paragraphs 133–140. See also case T-340/03, *France Telecom v Commission*, ECLI:EU:T:2007:22, paragraph 187.

81. Provided the above cost pricing practice does not constitute a potentially abusive practice on other grounds, for example, because it is loyalty (-inducing) or discriminatory.

82. Case T-30/89, *Hilti v Commission*, ECLI:EU:T:1991:70, and case T-228/97, *Irish Sugar v Commission*, ECLI:EU:T:1999:246.

83. Joined cases C-395/96 etc., *Compagnie Maritime Belge Transports v Commission*, ECLI:EU:C:2000:132.

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

Price-cost comparison tests based on rationales similar to predatory pricing may also be applicable to other forms of pricing practices and discounts. One example is *margin squeeze*. Margin or price squeeze is a practice where a vertically integrated undertaking's margin between its prices for the upstream input and the downstream products or services is so low that competitors buying the upstream input cannot effectively compete on the downstream market. A margin squeeze can be implemented by charging a high price upstream, a low or discounted price downstream or a combination. The objection under Article 102 TFEU is that dominant undertakings may restrict competition in downstream markets by reducing their competitors' profit margins to uncompetitive levels. With reference to its own judgment in *AKZO*, the European Court of Justice pointed out in *Deutsche Telekom* that a dominant undertaking cannot drive from the market undertakings that are perhaps as efficient as the dominant undertaking but that, because of their smaller financial resources, are incapable of withstanding the competition waged against them.⁸⁵ The test is generally based on a comparison of the dominant undertaking's own prices and costs.⁸⁶

Another potential example is *multi-product or bundled discounts* whereby a dominant undertaking offers a reduced price to customers buying several products. The Commission, in its *Enforcement Paper (2009)*, explains that a multi-product rebate may be anti-competitive on the tied or the tying market if it is so large that equally efficient competitors offering only some of the components cannot compete against the discounted bundle.⁸⁷ The Commission notes that enforcement action may be warranted if the incremental price customers pay for each of the products in the bundle is below the dominant undertaking's long-run average incremental costs (LRAICs). The rationale is that even an equally efficient competitor may then be foreclosed from the market.⁸⁸ If the dominant undertaking and its competitors

85. Case C-280/08, *Deutsche Telekom v Commission*, ECLI:EU:C:2010:603, paragraph 199.

86. Case C-280/08, *Deutsche Telekom v Commission*, ECLI:EU:C:2010:603, paragraph 202. See also case C-52/09, *Konkurrensverket v TeliaSonera*, ECLI:EU:C:2011:83, and case C-295/12, *Telefónica v Kommisjonen*, ECLI:EU:C:2014:2062.

87. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, paragraph 59.

88. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC*

sell identical bundles of products, the Commission will generally regard this as a bundle competing against a bundle. To the Commission, the question is then whether the price of the bundle as a whole is predatory.⁸⁹ However, it should be noted that the European Court of Justice has treated bundled discounts analogous to the non-pricing practice of contractual tying and considered the practice abusive by reference to the example in Article 102(d) TFEU.⁹⁰

Predatory pricing has been condemned as non-performance-based competition using a different rationale than the approach to loyalty and loyalty-inducing discounts (at least prior to the *Intel* judgment). The European Court of Justice's approach to loyalty discounts and loyalty-inducing arguably derives from the strict treatment of exclusivity agreements. The reasoning has been that both exclusivity agreements and loyalty discounts can restrict customers' freedom of choice, create unreasonable customer loyalty and foreclose the dominant undertaking's competitors from the market. The approach to predatory pricing practices, however, is based on the inference that low prices that make no economic sense except to exclude competitors and that can exclude equally efficient competitors from the market tend to harm competition and consumer welfare in the long run. Therefore, such pricing practices have been considered different from normal competition based on performance or merits.

4.2.4. Discriminatory discounts

Discriminatory discounts and pricing practices constitute a third group of pricing practices considered to be different from normal competition based on merits or performance.

Article 102(c) TFEU states that an abuse may also consist of 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. The wording indicates that applying discriminatory conditions, including discriminatory prices or discounts, can constitute abusive conduct.

Treaty to abusive exclusionary conduct by dominant undertakings, paragraph 60.

89. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, paragraph 61.

90. Case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36, paragraphs 109–110.

Abusive discrimination consists of two elements relating to conduct and effects.⁹¹ Regarding *conduct*, the dominant undertaking must engage in unjustified discrimination. Article 102(c) TFEU refers to ‘applying dissimilar conditions to equivalent transactions with other trading parties’. The European Court of Justice has explained that discrimination consists of either treating similar situations differently or different situations identically.⁹²

The basic objection to discrimination pursuant to Article 102(c) TFEU is the potentially negative consequences for the downstream market (so-called secondary line injury). Prohibiting dominant undertakings from discriminating between customers can, however, lead to an over-broad application of the concept of abuse. Requiring dominant undertakings to charge the same price to all customers could, for example, result in a high uniform price for all. The result could be reduced rather than increased competition.

The wording of the example in *litra* (c) of Article 102 TFEU suggests a far-reaching application of the concept of abusive discriminatory (pricing) conduct. In practice, price discrimination has been considered abusive by the Commission and the EU courts only in more limited circumstances. *First*, price discrimination may be contrary to the objective of establishing a single market. Discrimination based on nationality⁹³ and therefore geographic price discrimination intended to partition national markets⁹⁴ has been found abusive. *Second*, Article 102(c) TFEU has been applied in cases concerning other forms of abusive exclusionary conduct, such as loyalty discounts.⁹⁵

As a stand-alone form of abusive anticompetitive conduct, (price) discrimination has little support in the case law of the

91. With regard to effects, the discrimination must result in trading parties being placed ‘at a competitive disadvantage’, see section 4.3.

92. Case 13/63, *Italy v Commission*, ECLI:EU:C:1963:20, paragraph 4.

93. Case C-163/99, *Portugal v Commission*, ECLI:EU:C:2001:189, case C-18/93, *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova*, ECLI:EU:C:1994:195.

94. Case 27/76, *United Brands v Commission*, ECLI:EU:C:1978:22, case T-83/91, *Tetra Pak International v Commission*, ECLI:EU:T:1994:246.

95. See for example joined cases 40–48, 50, 54–56, 111, 113 and 114–73, *Suiker Unie and others v Commission*, ECLI:EU:C:1975:174, case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36, and case C-95/04, *British Airways v Commission*, ECLI:EU:C:2007:166.

European Court of Justice.⁹⁶ A possible reason may be that acknowledging discriminatory conduct as a separate form of exclusionary, anti-competitive abuse could effectively render the European Court of Justice's established tests for identifying non-performance-based competition superfluous. For example, the European Court of Justice's criteria for identifying abusive refusals to deal and license IPRs and for predation and margin squeeze could effectively be circumvented by competition authorities or private plaintiffs if the mere discrimination of a downstream customer and/or competitor qualified as non-performance-based competition.⁹⁷ The European Court of Justice has notably stressed that 'the fact that the practice of a dominant undertaking may [...] be described as 'price discrimination', that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.'⁹⁸

4.3. Anti-competitive effects: identical v conduct-specific standards

The European Court of Justice's description of exclusionary abuse refers to conduct that is 'such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened' and that has 'the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.'⁹⁹ The references to effects in the general description of exclusionary abuse are vague, inconclusive and compatible with several more specific standards.¹⁰⁰

96. See to the contrary, however, the EFTA Court's Advisory Opinion in Case E-29/15, *Sorpa v The Icelandic Competition Authority and Commission Decision COMP/38.745. BdKEP/Deutsche Post*.

97. Thus, in case T-301/04, *Clearstream v Commission*, ECLI:EU:T:2009:317, an unjustified and discriminatory refusal to provide access did not mean that the general criteria for identifying abusive refusals to deal did not apply.

98. Case C-209/10, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2012:172, paragraph 30.

99. Case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36, paragraph 91.

100. See section 3.3.

The applicable required standard of effects should be investigated in conjunction with the European Court of Justice's treatment of the various forms of discounts and pricing practices classified as different from normal competition based on merits or performance.

In relation to *loyalty/exclusivity discounts*, the European Court of Justice articulated a strict and interventionist standard. The judgments in *Suiker Unie* and *Hoffmann-LaRoche* implied that discounts conditional upon the customers obtaining all or most of their demand from a dominant undertaking qualify as abusive, without the need for any assessment of concrete effects.¹⁰¹ The European Court of Justice's recent judgment in *Post Danmark II* confirmed that 'a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining all or most of their requirements from competing manufacturers, amounts to an abuse'.¹⁰²

The European Court of Justice's case law also indicates a strict, formalistic approach to *loyalty-inducing, retroactive target discounts*. The Court in *Michelin I* held that it was 'necessary to consider all the circumstances, particularly the criteria and rules for the grant of the discount, and to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition'.¹⁰³ The statement that it is 'necessary to consider all the circumstances' may seem to suggest a more effects-based standard. However, the objective of the analysis is to determine whether the discount 'tends to' have four alternative implications. A 'tendency' appears sufficient to establish an abuse. Moreover, relevant types of effects are also 'to restrict the buyer's freedom to choose his sources of supply' and 'to

101. Joined cases 40–48, 50, 54–56, 111, 113 and 114–73, *Suiker Unie and others v Commission*, ECLI:EU:C:1975:174, case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36

102. Case C-23/14, *Post Danmark v Konkurrenserådet*, ECLI:EU:C:2015:651, paragraph 27.

103. Case 322/81, *Michelin v Commission*, ECLI:EU:C:1983:313, paragraph 73. See also case T-219/99, *British Airways v Commission*, ECLI:EU:T:2003:343, case C-95/04, *British Airways v Commission*, ECLI:EU:C:2007:166 and case T-203/01, *Michelin II*, ECLI:EU:T:2003:250.

apply dissimilar conditions to equivalent transactions'. Such effects can arguably be established by investigating only the criteria and rules for granting the discount. Therefore an assessment of anti-competitive market effects appears superfluous. By consequence, loyalty-inducing, retroactive discounts have therefore also been subject to a strict and interventionist standard.¹⁰⁴

The judgment by the European Court of Justice on in *Post Danmark II* is somewhat inconclusive as to the applicable standard of effects to loyalty-inducing, retroactive target discounts. On one hand, the Court held that it was 'necessary to take into account, in examining all the relevant circumstances, the extent of Post Danmark's dominant position and the particular conditions of competition prevailing on the relevant market.'¹⁰⁵ The court further held that 'only dominant undertakings whose conduct is likely to have an anticompetitive effect on the market fall within the scope of Article [102 TFEU]'.¹⁰⁶ On the other hand, the court also stated that 'fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anti-competitive practice is by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates.'¹⁰⁷ Without any threshold or standard of significance, the need to further examine and establish (any) anti-competitive effects to identify an abusive loyalty-inducing, retroactive target rebate is questionable.

Advocate General Wahl argued in his opinion in *Intel v Commission* that 'an abuse of dominance is never established in the abstract: even in the case of presumptively unlawful practices, the Court has consistently examined the legal and economic context of the

104. In case C-549/10, *Tomra v Commission*, ECLI:EU:C:2012:221, paragraph 42, the European Court of Justice notably stated that 'customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it.'

105. Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, paragraph 30.

106. Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, paragraph 67.

107. Case C-23/14, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2015:651, paragraph 73.

impugned conduct. In that sense, the assessment of the context of the conduct scrutinised constitutes a necessary corollary to determining whether an abuse of dominance has taken place. That is not surprising. The conduct scrutinised must, at the very least, be able to foreclose competitors from the market in order to fall under the prohibition laid down in Article 102 TFEU.¹⁰⁸

Largely in line with the Advocate General's opinion, the European Court of Justice in *Intel v Commission* held that the case-law on loyalty rebates 'must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.'¹⁰⁹ In such circumstances, the Court in Grand Chamber specified that 'the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market'.¹¹⁰

When it comes to *predatory discounts*, the European Court of Justice in *AKZO* held that prices below average variable costs 'by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive.'¹¹¹ For prices between average variable costs and average total costs, a plan for eliminating competitors must also be determined.¹¹² Establishing more concrete anti-competitive effects, or even the possibility of recoupment, is not required. Therefore abusive predatory predation under Article 102 TFEU can be identified by assessing the costs, prices and strategy of the dominant undertaking.

108. Opinion of Advocate General Wahl in case C413/14, *Intel v Commission*, paragraph 73 cont.

109. Case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632, paragraph 138.

110. Case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632, paragraph 139.

111. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, paragraph 71.

112. Case C-62/86, *AKZO Chemie v Commission*, ECLI:EU:C:1991:286, paragraph 72.

For abuse in the form of a *margin squeeze*, the European Court of Justice in *Deutsche Telekom* held that ‘the anti-competitive effect which the Commission is required to demonstrate [...] relates to the possible barriers which the appellant’s pricing practices could have created for the growth of products on the retail market’.¹¹³ Such a weak standard will arguably be satisfied by the mere implementation of margin squeeze by a dominant undertaking. The European Court of Justice explained: ‘Admittedly, where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze of its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article [102 TFEU]. However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary if it does not make their market penetration any more difficult.’¹¹⁴ Similar statements are found in the European Court of Justice’s judgments in *TeliaSonera*¹¹⁵ and *Telefónica*.¹¹⁶

For discriminatory discounts, the wording of Article 102(c) TFEU refers to the effect of ‘placing [trading parties] at a competitive disadvantage’. It appears that the relevant type of effect is the disadvantage inflicted on individual customers. Harm to competition or economic efficiency is not mentioned. This literal interpretation of the required effect under Article 102(c) TFEU has been confirmed by the European Court of Justice. In *British Airways*, the European Court of Justice explained that there must be a finding not only that the behaviour of a dominant undertaking is discriminatory but also that it tends to distort that competitive relationship; in other words to hinder the competitive position of some of the business partners of that undertaking in relation to the others.¹¹⁷ Notably, the relevant type of effect is the competitive disadvantage between the dominant

113. Case C-280/08, *Deutsche Telekom mot Kommisjonen*, ECLI:EU:C:2010:603, paragraph 252.

114. Case C-280/08, *Deutsche Telekom v Kommisjonen*, ECLI:EU:C:2010:603, paragraph 254.

115. Case C-52/09, *Konkurrensverket v TeliaSonera*, ECLI:EU:C:2011:83, paragraphs 60–67.

116. Case C-295/12, *Telefónica v Kommisjonen*, ECLI:EU:C:2014:2062, paragraph 124.

117. Case C-95/04, *British Airways v Commission*, ECLI:EU:C:2007:166, paragraph 144.

undertaking's trading parties. Article 102(c) is therefore not applicable to discrimination that places a customer at a competitive disadvantage relative to the dominant undertaking's own downstream operations. Furthermore, the European Court of Justice held that 'there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the business partners taken individually.'¹¹⁸ The standard of likelihood and the standard of significance are accordingly quite weak.

It can be noted that the Commission's enforcement policy with regard to exclusionary abusive conduct is set out in its *Enforcement Paper (2009)*. The document describes the enforcement priorities that will guide the Commission when applying Article 102 TFEU to exclusionary conduct.¹¹⁹ It states that the Commission will focus on those types of conduct that are most harmful to consumers.¹²⁰ According to the document, the Commission will normally intervene where the allegedly abusive conduct is likely to lead to 'anticompetitive foreclosure'.¹²¹ The notion of anticompetitive foreclosure is 'used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices

118. Case C-95/04, *British Airways v Commission*, ECLI:EU:C:2007:166, paragraph 145. See also case T-301/04, *Clearstream v Commission*, ECLI:EU:T:2009:317, paragraph 193.

119. The document 'is not intended to constitute a statement of the law and is without prejudice to the interpretation of Article 82 by the [European] Court of Justice or the [General Court]'. See *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, paragraph 3.

120. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, paragraph 5.

121. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, paragraph 20.

to the detriment of consumers.¹²² Although the case law has developed stricter and formalistic tests to identify exclusionary abuses, the Commission's enforcement policy is to conduct a more comprehensive assessment of whether the conduct is likely to lead to 'anticompetitive foreclosure'.

To sum up, *loyalty/exclusivity discounts* have traditionally been subject to a strict, formalistic legal test. In the past *loyalty-inducing, retroactive target discounts* have been subject to a similar standard. The recent judgment in *Intel v Commission* represents (albeit depending on one's view of the previous state of the law) a shift towards an effects-based approach to such discounts. For *predatory, below-cost discounts*, concrete anti-competitive effects have not been considered necessary to establish an abuse. In *margin-squeeze* cases, the articulated standard of effects refers to possible entry barriers. Such a low threshold has arguably limited practical significance. For *discriminatory discounts*, a tendency to distort the competitive relationship between the dominant undertaking's trading parties is sufficient. Accordingly to the European Court of Justice, the standard of anti-competitive effects for discounts and pricing classified as non-performance-based forms of competition is generally quite low. Nevertheless there are nuances both with regard to the relevant type of effects, the required likelihood that the effects will manifest and the standard of significance. Therefore the European Court of Justice's case law has resulted in various discount-specific standards of effects for identifying abusive pricing under Article 102 TFEU. An unbold prediction, however, is that the European Court of Justice's statements on the relevance of effects under Article 102 TFEU in *Intel v Commission*, will be invoked and may have a bearing on future cases dealing with all types of discounts and pricing practices considered different from normal competition on the merits.

122. *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, paragraph 19. The expression "increase prices" includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition—such as prices, output, innovation, the variety or quality of goods or services—can be influenced to the advantage of the dominant undertaking and to the detriment of consumers.' (paragraph 11).

5. Discounts and abuse of dominance—Norway

5.1. Introduction

In this section, the Norwegian experience with discounts and pricing practices under section 11 of the Competition Act will be investigated. Both elements of the concept of exclusionary abuse are considered. First, the types of discounts and pricing practices dealt with in the Norwegian cases will be examined. Subsequently, the issue of competitive effects will be discussed.

5.2. Conduct: discounts and pricing in Norwegian cases

5.2.1. Introduction

The NCA has identified infringements of the prohibition on abuse of dominance in only three cases. In two of the cases, the NCA found that the respective dominant undertakings had each engaged in two separate forms of abusive practices. In total, five different practices have been held to be abusive and contrary to section 11 by the NCA.¹²³

In the following subsections, the forms of pricing practices and discounts dealt with in Norwegian practice regarding abuse of dominance will be identified and considered.

5.2.2. Round-trip discounts

The *Nettbuss* case was decided only a few months after the Competition Act came into force in 2004.¹²⁴ It was the first decision by the NCA dealing with the prohibition on abuse of dominance. Nettbuss Sør AS ('Nettbuss') was ordered to terminate two separate pricing practices held to be contrary to section 11. Fines were not imposed.

The NCA found that Nettbuss, a Norwegian bus company, held a dominant position on the market for passenger transport with express bus and train between Kristiansand and Oslo. Until 2002, Nettbuss was the only undertaking operating such services on the

123. The NCA did not find that Article 54 EEA had been violated in any of the decisions.

124. Case V2004-29, *Nettbuss Sør AS*.

route. The same year, Risdal Touring AS ('Risdal') started a competing bus service. The NCA further concluded that Nettbuss had abused its dominant position by offering passengers two types of exclusionary discounts.

The preparatory works of the Competition Act stress that practice under article 102 TFEU should be given considerable weight when interpreting and applying section 11. However, the NCA's decision did not have any references to the European Court of Justice's general concept of abuse or to case law or practice dealing with abusive pricing practices.

Nevertheless the authority gave general statements on the interpretation of the concept of abuse of dominance. The NCA held that a dominant undertaking that exploits its position on the market in a way that is harmful to competition may be acting contrary to section 11. To the NCA, the question was whether the dominant undertaking engages in conduct that eliminates or reduces competition.¹²⁵

The NCA's description of the concept of abuse suggests that the type of conduct adopted by the dominant undertaking is irrelevant when distinguishing abusive from legitimate competition. The only decisive issue seems to be whether the result is anti-competitive. Any practice by a dominant undertaking that has such an effect will seemingly be considered abusive. Consequently, even competition based on merits or performance having such an effect will constitute a violation. If anti-competitive means foreclosure, exclusion or a similar market structural effect, then a dominant undertaking that outcompetes its rivals with superior efficiency, prices or quality to the benefit of consumers will violate section 11 nevertheless. Such an interpretation is inconsistent with Article 102 TFEU. It would also arguably result in an overly broad interpretation of section 11, reducing effective competition that benefits consumers rather than protecting it.

The first identified abusive pricing practice took the form of a *round-trip discount*. Nettbuss' passengers who also purchased a return ticket were given a 29% discount on the round trip. Passengers could choose when to use the return ticket.

The NCA reasoned that the discount meant that the effective price of the return ticket was the difference between a round-trip-

125. Case V2004-29, *Nettbuss Sør AS*, section 6.2.

ticket and a one-way-ticket. The NCA calculated the effective price of a return ticket Oslo-Kristiansand to NOK 160 (the round-trip-ticket at NOK 540 subtracted the one-way-ticket at NOK 380). The round-trip-ticket therefore offered the passengers a relative benefit exceeding NOK 200 (the difference between a one-way-ticket at NOK 380 and the effective price at NOK 160). The inference was the passengers had an economic incentive to choose discounted round-trips over one-way-tickets.¹²⁶

To the NCA, Nettbuss' discounted round-trip ticket also had a restrictive effect on competition.¹²⁷ Nettbuss had more frequent departures than its competitor Risdal. The NCA explained that for passengers who had not decided or did not know when they would return, the frequency of the undertakings' departures would affect the value of a round-trip ticket. The undertaking with more frequent departures would have an advantage.¹²⁸ The essence of the NCA's argument was seemingly that passengers would prefer Nettbuss' round-trip discount because the undertaking had more frequent departures than its competitor, thus leading to a restrictive effect on competition.

The decision did not further explain why such a pricing practice was problematic under section 11. By omitting any reference to the European Court of Justice's general concept of abuse, the NCA failed to explain why the round-trip discount should be considered different from normal competition based on performance or merits. Moreover, the NCA did not compare the discount to non-performance-based forms of price competition under Article 102 TFEU. A discount granted for multiple trips can, depending on its characteristics, potentially constitute non-performance-based competition, for example, in the form of loyalty (-inducing), predatory or discriminatory discounts. The NCA's decision, however, did not assess whether that was the case. Based on the NCA's description, the round-trip discount seems rather to have the characteristics of a legitimate quantity discount than of non-performance-based price competition.

The NCA's decision suggested that dominant undertakings that offer discounts and provide better services than their competitors abuse their market position contrary to section 11. To the NCA,

126. V2004-29, *Nettbuss Sør AS*, section 6.2.

127. See section 5.3 below.

128. V2004-29, *Nettbuss Sør AS*, section 6.2.

Nettbuss' round-trip discount gave passengers an economic incentive to choose discounted round trips over one-way tickets. Moreover, the advantage was reinforced by Nettbuss having more frequent departures than its competitor. Seemingly, Nettbuss' lower prices and superior services constituted an abuse. Notably, the NCA ordered Nettbuss to terminate the use of the round-trip discount, as well as other rebates with an *equivalent effect or object*.¹²⁹ Any price reduction or discount by Nettbuss would then apparently be prohibited. Such an application of section 11 would in effect prohibit dominant undertakings from competing on price.

Nettbuss brought a formal complaint, arguing *inter alia* that its pricing practices constituted legitimate quantity discounts and not abusive loyalty discounts. After a renewed assessment, *the NCA repealed the prohibition decision*.¹³⁰ The new decision upheld the initial findings with regard to market definition and dominance. As to the issue of abuse, the NCA found that the round-trip discount did not qualify as abusive behaviour.

In its repeal decision, the NCA first assessed whether the round-trip discount had 'loyalty inducing effects'.¹³¹ To the NCA, the question was whether the round-trip discount entailed economic advantages that gave travellers incentives to exclusively or predominantly purchase travel from Nettbuss. The NCA referred to the General Court's judgment in *Michelin II*, where the court had stated that '[a] quantity rebate system has no loyalty-inducing effect if discounts are granted on invoice according to the size of the order'.¹³² As the round-trip discount was linked to the number of trips bought and not to previous sales, the NCA held that the discount could not be said to have loyalty-inducing effects contrary to section 11.

However, this was not the end of the NCA's renewed assessment. The NCA held that the discount would nevertheless affect competition. The argument was that Nettbuss had more frequent departures than Risdal. Travellers would therefore have more flexibility with

129. V2004-29, *Nettbuss Sør AS*, operative part.

130. Case V2004-34, *Nettbuss Sør AS – Omgjøring av Konkurransetilsynets vedtak V2004-29 om pålegg om opphør av rabattordninger på Sørlandsekspressen*.

131. Case V2004-34, *Nettbuss Sør AS – Omgjøring av Konkurransetilsynets vedtak V2004-29 om pålegg om opphør av rabattordninger på Sørlandsekspressen*, section 8.2.

132. Case T-203/01, *Michelin II*, ECLI:EU:T:2003:250, paragraph 85.

regard to the date and time of the return trip by purchasing a round-trip ticket from Nettbuss. This meant that travellers choosing between the same round-trip discounts from the two undertakings would prefer Nettbuss. The NCA held that if passengers were to prefer Risdal, Risdal was forced to set a lower price on their round-trip tickets than Nettbuss. The conclusion was that Nettbuss' round-trip discount had the same effect as a loyalty rebate. The NCA's reasoning is not easy to follow.

Once again, the NCA apparently disregarded the legal significance of the form of a dominant undertaking's conduct. The argument appeared to be that a dominant undertaking that offers discounts in combination with a better quality product or service will be regarded as having offered a potentially abusive loyalty rebate. In other words, attracting customers with lower prices and superior quality is loyalty-inducing.

Despite the finding that the round-trip discount should be considered a non-performance-based loyalty rebate, the NCA concluded that it did not constitute an abuse. This, however, was due to a finding of an insufficient exclusionary, anti-competitive effect. The implication of both the NCA's initial and renewed decision was therefore that the form of conduct—a round-trip discount—qualified as loyalty-inducing, non-performance-based competition.

5.2.3. Customer card discounts

The second form of conduct held to be abusive by the NCA in the *Nettbuss* case¹³³ was a so-called *customer card discount*. Nettbuss sold customer cards that were valid for one year for NOK 450. Passengers with customer cards were given a 33% discount when buying a one-way ticket, provided the journey covered a distance of at least 100 kilometres.¹³⁴

The decision explained that for passengers with customer cards, the price for a Kristiansand-Oslo ticket would be NOK 254,60. Compared to a full price ticket, passengers with customer cards would save NOK 125,40. Over a year, passengers would have to buy the

133. Case V2004-29, *Nettbuss Sør AS*.

134. The customer card discount could not be combined with the round-trip discount.

equivalent of at least four one-way Kristiansand-Oslo tickets to recoup the price of a customer card. The NCA noted that for passengers holding customer cards, it would always be cheaper to travel with Nettbuss because Nettbuss' prices were then lower than those of its competitor, Risdal. The NCA deduced that customer cards had a lock-in effect on customers.¹³⁵

As with the round-trip discount, the NCA did not explain why the customer card discount qualified as potentially abusive and unlawful conduct within the meaning of section 11. The NCA did not mention or clarify the distinction between competition based on performance or merits and abusive competition. Moreover, the NCA did not compare Nettbuss' discount to loyalty (-inducing), predatory or discriminatory discounts considered potentially abusive forms of conduct in the case law under Article 102 TFEU. The NCA found that the customer card discount had a lock-in effect. The implication was seemingly that dominant undertakings that charge lower prices than their competitors can violate section 11 due to a lock-in effect. Price competition by dominant undertakings would consequently be significantly curtailed.

The NCA pointed out that the departure frequency affects the value of customer cards because travellers prefer flexibility. Therefore customer cards give operators with frequent departures a competitive advantage. The NCA noted that Nettbuss had more departures than Risdal. Therefore a customer card discount offered by Risdal would not be valued as greatly as a customer card discount offered by Nettbuss.¹³⁶

The assumption that the demand for customer cards is affected by the frequency of departures is undeniably plausible. However, the decision did not explain the legal significance under section 11. Lower prices and better service attract customers and increase demand. That does not, without qualification, constitute potentially abusive conduct. As previously noted, the European Court of Justice has explained that 'not every exclusionary effect is detrimental to competition [...]. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that

135. Case V2004-29, *Nettbuss Sør AS*, section 6.2.

136. Case V2004-29, *Nettbuss Sør AS*, section 6.2.

are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.¹³⁷

The NCA's assessment of the customer card discount may be explained by the lack of references to the European Court of Justice's concept of abuse. Pursuant to consistent case law under Article 102 TFEU, the concept of abuse refers to methods different from competition based on performance or merits. To the NCA, however, any conduct that can exclude competitors could seemingly also violate section 11. Moreover, the decision did not discuss whether the customer card discount constituted a potentially abusive loyalty (-inducing), predatory or discriminatory discount. To the NCA, it was sufficient to establish an abuse whereby the discount gave passengers cheaper travel.

Subsequent to Nettbuss' formal complaint, *the NCA repealed the decision*, finding that Nettbuss abused its dominant market position. In its renewed assessment, the NCA held that the customer card did not incentivise customers to purchase tickets from Nettbuss if the competitor's price was lower than Nettbuss' discounted price. Accordingly, there was no loyalty-inducing effect pursuant to the case law from the European Court of Justice.¹³⁸ The implication was that the customer card discount was not potentially abusive under section 11. The NCA also found that the customer card discount did not have anti-competitive effects.¹³⁹

5.2.4. Meeting competition discounts/prices

In its *SAS* decision from 2005, the NCA fined the airline company SAS NOK 20 million for violating section 11 of the Competition Act.¹⁴⁰ The decision was later annulled by Oslo City Court, which did not find sufficient evidence that SAS had abused its dominant market position. Prior to the main hearing in the further appeal, the NCA and SAS settled the case. The NCA subsequently revised its initial

137. Case C-209/10, *Post Danmark v Konkurrencerådet*, ECLI:EU:C:2012:172, paragraph 22.

138. Case V2004-34, *Nettbuss Sør AS – Omgjøring av Konkurransetilsynets vedtak V2004-29 om pålegg om opphør av rabattordninger på Sørlandsekspressen*, section 8.3.

139. See section 5.3 below.

140. Case V2005-9, *SAS*.

decision, upholding the finding of abuse but reversing the decision to impose a fine.¹⁴¹

While the NCA held that SAS had engaged in abusive, predatory below-cost pricing, Oslo City Court found that SAS' practice should not be classified as predatory but that it was rather normal, legitimate and justified competitive conduct in the specific circumstances of the case.

To the NCA, SAS' infringement took the form of predatory behaviour regarding the Oslo–Haugesund route in May and June 2004, resulting in SAS' only actual competitor on the route (Coast Air) being forced to withdraw its service.¹⁴²

Compared to the decision in *Nettbuss*,¹⁴³ the SAS decision provided a much more comprehensive account of both the European Court of Justice's general concept of abuse and the more specific, applicable legal test. After presenting the general notion of abuse, the NCA gave a thorough description of EU case law and practice dealing with the AKZO-test for predatory pricing.¹⁴⁴ The NCA also gave an elaborate account of how it perceived the test should be applied in the air transport sector.¹⁴⁵

The NCA concluded that SAS' prices did not cover its average variable costs in May and June 2004.¹⁴⁶ Therefore to the authority, there was a presumption that SAS had sought to eliminate Coast Air from the market contrary to section 11.¹⁴⁷ As SAS' prices were found to be below its average variable costs, it was not necessary also to establish that its pricing policy was part of a plan to reduce competition.¹⁴⁸ Nevertheless the authority pointed to several circumstances con-

141. Case V2007-28, *SAS AB – Omgjøring av overtredelsesgebyr i vedtak V2005-9 – konkurranskedelig underprising på ruten Oslo–Haugesund*.

142. The NCA defined the relevant market as air passenger transport between Oslo and Haugesund. SAS was found to have a dominant position based on its high market shares (> 80%) and identified entry barriers.

143. Case V2004-29, *Nettbuss Sør AS*.

144. Case V2005-9, *SAS*, section 8.2.

145. Case V2005-9, *SAS*, section 8.3.

146. The new competition act came into force 1 May 2004.

147. Case V2005-9, *SAS*, section 8.5.

148. As would have been necessary if the prices were between average variable costs and average total costs; see section 4.2.3 above.

sidered indicative of such a plan.¹⁴⁹ The NCA moreover rejected SAS' argument that its pricing practice was the result of increased competition. To the authority, Coast Air's market entry could not be used as a justification for SAS' below-cost prices.

SAS challenged the NCA's decision in court. In its judgment from July 2006, *Oslo City Court* concluded that it had not been established that SAS had engaged in abusive conduct and annulled the decision.¹⁵⁰ To the court, SAS' pricing practice was legitimate and justified price competition under the prevailing circumstances and market conditions.

The court also referred to the European Court of Justice's AKZO-test for predatory pricing.¹⁵¹ Unconventionally, the court did not, however, assess whether SAS' prices had been below the applicable cost benchmarks. Instead, the court merely assumed that SAS had priced below average variable costs and thus failed the initial test.

The court could then proceed without first having conducted the (factually complex) price-cost comparison exercise. The court went on to investigate whether SAS' (presumed) *prima facie* abusive practice was rebutted by evidence that showed that SAS' strategy had not been to eliminate a competitor and that its conduct was objectively justified.

Among other circumstances, the court noted that there was no explicit evidence that SAS' strategy was to force Coast Air to abandon the route. To the contrary, the evidence showed that SAS presupposed Coast Air's continued presence in the market. Moreover, reduced demand and increased competition by low-price carriers had forced SAS to lower its prices, reduce costs and offer one-way tickets.

149. The NCA *inter alia* noted that Coast Air's weak financial situation increased SAS' chances of successful predation, that SAS had maintained significant capacity on the route and held that financial estimates indicated that SAS would be able recoup its losses.

150. *SAS v Konkurransetilsynet*, case 05-111347TVI-OTIR/06.

151. The court noted that insofar as SAS' prices did not cover its average variable costs, SAS would be able to rebut a presumption of unlawful predation by proving that the absence of profits was objectively justified. If SAS' prices did not cover its average total costs, additional proof of a plan for eliminating a competitor was necessary to establish an abuse. See *SAS v Konkurransetilsynet*, case 05-111347TVI-OTIR/06, section 10.

To the court, SAS' generally implemented measures to increase profitability could not justify the finding of a predation strategy on a single route. The court further held that SAS' prices were decided within the framework of the undertaking's revenue management system and should not be considered a specific measure to exclude Coast Air and restrict competition on the Oslo–Haugesund route. It was also noted that SAS' compliance strategy was not to undercut its competitors' prices. The court concluded that even assuming that SAS' prices were below relevant cost benchmarks, its practice was nevertheless objectively justified and legitimate.

Ultimately, the court did not accept the NCA's classification of SAS' pricing practice as predatory and abusive, even assuming that SAS's prices did not cover its average variable costs. To the court, SAS' prices constituted normal, acceptable and legitimate competition in response to reduced demand and increased and changing competition.

The court's decision not to investigate whether the dominant undertaking had actually failed the AKZO-test, but to merely assume that the test had been failed, is unusual. The European Court of Justice does, however, acknowledge that a dominant undertaking is allowed to take proportionate measures to protect its commercial interests and that *prima facie* abusive conduct can nevertheless be objectively justified. While the exact scope and application of this legal rebuttal mechanism has not been altogether settled by the European Court of Justice. It does, however, invite a more flexible, concrete and holistic approach than the conduct-specific legal tests for identifying abusive conduct may indicate. In the end, Oslo City Court was not convinced that SAS' pricing practice should be classified as predatory. To the court, SAS' market behaviour was rather a form of legitimate meeting of competition in the specific circumstances of the case.

5.2.5. Joint marketing discounts/remunerations

In its *TINE* decision, the NCA fined Norwegian dairy company TINE NOK 45 millions for violating the competition rules.¹⁵² The identified unlawful behaviour took place during TINE's annual negotiations

152. Case V2007-2, *TINE*.

with grocery chain REMA 1000 in 2004. Subsequent to the negotiations, TINE became the sole supplier of certain types of cheese to REMA 1000. The decision concluded that both section 10 (anti-competitive agreements) and 11 (abuse of dominance) had been violated. The NCA also found that TINE abused its dominant position during negotiations with grocery chain ICA.¹⁵³ The NCA's competitive concern was that TINE's conduct would exclude its only actual competitor (Synnøve Finden) from the market, resulting in reduced competition leading to higher prices, less consumer choice and lack of innovation.

The case made its way through the Norwegian court system. The NCA's decision was first annulled by *Oslo City Court* in 2009, which found that REMA 1000 had made a unilateral decision to remove Synnøve Finden from its stores.¹⁵⁴ Upon appeal, the *Borgarting Court of Appeal* concluded that TINE's conduct in its negotiations with REMA 1000 qualified as abuse of dominance and set the fine at NOK 30 millions.¹⁵⁵ Finally, in 2011, the *Supreme Court's* majority (3:2) finally confirmed *Oslo City Court's* ruling and acquitted TINE.¹⁵⁶

Central to the case was both the interpretation and application of the concept of abuse and the characteristic price components in contracts between producers and grocery chains. The contracts typically combine prices per unit/quantity and remunerations (for example, in the form of discounts or bonuses) from the producers to the grocery chains. Such remunerations can refer to a variety of different services (at times not clearly defined), and the terminology can vary (e.g. 'bonuses', 'joint marketing discounts' etc.). The size of the remunerations and the conditions under which they apply often play an important role in the negotiations.

To the NCA, REMA 1000 had early in the negotiations communicated to TINE a wish to reduce its number of cheese suppliers. Such a decision would require that TINE increase its remunerations. During the course of the negotiations, TINE did increase its remunerations. An agreement was reached in September 2004. In January

153. Discussed in section 5.2.6 below.

154. *TINE v Konkurransetilsynet*, case 07-063120TVI/OTIR/07.

155. *Konkurransetilsynet v TINE*, case 09-089085ASD-BORG/02.

156. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*.

2005, TINE's competitor Synnøve Finden was removed from REMA 1000's assortment.

As in the *SAS* decision, the NCA referred both to the European Court of Justice's general description of exclusionary abuse as well as to case law dealing with specific types of market behaviour. The NCA noted that to qualify as abusive, the conduct of a dominant undertaking must deviate from normal competition in products or services. The NCA further specified that agreements and practices leading to exclusivity could constitute abusive conduct.¹⁵⁷

The NCA held that the illegal behaviour consisted of TINE obtaining a position as REMA 1000's sole supplier of hard white and brown cheese. The NCA found that TINE's increased remunerations to REMA 1000 constituted payment for obtaining a position as exclusive supplier of cheese. TINE argued that the remunerations constituted legitimate price competition and that they were not linked to or conditional upon exclusivity. Nevertheless, the NCA considered that TINE had paid for exclusivity and sought to conceal that the parties had agreed on TINE as exclusive supplier. To the NCA, there had been an agreement or a joint understanding that TINE should be REMA 1000's sole supplier of such products. As TINE held a dominant position in the Norwegian market for supplying hard white and brown cheese to the grocery sector, the conduct was considered an abuse of a dominant market position and an unlawful anti-competitive agreement.¹⁵⁸ Even though the NCA did not clearly distinguish between agreements or negotiations resulting in a position as an exclusive supplier (which could be the result of perfectly legitimate competition based on merits) and agreed exclusivity, the finding of an infringement was seemingly based on the finding of an agreement or a joint understanding on exclusivity.

Oslo City Court annulled the NCA's decision.¹⁵⁹ The court did not extensively discuss the interpretation of sections 10 and 11 of the Competition Act. The court based its assessment on the premise that absent any agreement or understanding between TINE and REMA 1000 to exclude Synnøve Finden or any payment in exchange for the

157. Case V2007-2, *TINE*, section 6.1. With references to inter alia case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36.

158. Case V2007-2, *TINE*, section 6.5.1.

159. *TINE v Konkurransetilsynet*, case 07-063120TVI/OTIR/07.

exclusion of Synnøve Finden, no violation had taken place. The court did not find that TINE and REMA 1000 had agreed that REMA 1000 should no longer have Synnøve Finden as a supplier of cheese. Although TINE knew that it would likely become REMA 1000's sole supplier, the decision only to rely on TINE was found to be REMA 1000's alone.¹⁶⁰ Accordingly, there was no violation of the competition rules.

Contrary to the city court, the *Borgarting Court of Appeal* found that TINE had abused its dominant position.¹⁶¹ The appeals court referred to the general concept of abuse developed in the case law under Article 102 TFEU. However, the court did not pay much attention to how the general concept of abuse has been interpreted and applied to different types of conduct.¹⁶²

The appeals court found that it had not been proved that the parties had agreed on exclusivity. Accordingly, there was no violation of section 10. Nevertheless in finding that TINE's conduct qualified as abusive under section 11, the court noted that TINE, by increasing its remunerations, had contributed to REMA 1000's decision not to obtain supplies from Synnøve Finden. The court further held that TINE had not done anything to preserve remaining competition in the market. The agreement with REMA 1000 meant that TINE had strengthened its dominant position at Synnøve Finden's expense. Moreover, TINE's conduct was disproportionate in that it was intended to protect its commercial interests. The court also pointed to other ways TINE had contributed to REMA 1000's choice not to have Synnøve Finden as a supplier of cheese. TINE had provided REMA 1000 with a memo presenting the advantages of having a

160. In finding that it had not been proven that the parties had entered an exclusivity agreement or that the remunerations were payment for obtaining exclusivity, the court emphasised three circumstances. First, REMA 1000 faced increased competition from hard discount grocery chain Lidl. Abandoning Synnøve Finden as a supplier of cheese was consistent with REMA 1000's overall strategy of reducing the number of suppliers to face increased competition. Second, TINE's increased remunerations could not be taken as evidence that TINE had paid for anything abnormal. Such remunerations were consistent with ordinary price competition in the market. Third, compared with the remunerations TINE had made to other grocery chains, there was no indication that TINE had paid REMA 1000 for anything extraordinary, such as exclusivity.

161. But not section 10 regarding anticompetitive agreements.

162. *Konkurransetilsynet v TINE*, case 09-089085ASD-BORG/02, section 13.

single supplier of milk and cheese (the so-called Genius memo). TINE had also made a visual presentation (a planogram) displaying how REMA 1000's shelves and cabinets would look with only TINE's products. Moreover, TINE had confirmed that it could produce REMA 1000's private label cheese. To the court, these practices did not protect residual competition in the market. TINE's conduct during the negotiations with REMA 1000 therefore qualified as abusive in that the effect was also appreciably anti-competitive.¹⁶³

The court of appeal seemingly disregarded the legal distinction between conduct different from normal competition based on performance or merits and legitimate competition. TINE's increased remunerations and the promotion of benefits from having a single supplier were considered abusive behaviour. The reason was that TINE had not fulfilled its alleged responsibility to protect and preserve residual competition. However, dominant undertakings do not have any responsibility to shield competitors from normal competition based on the basis of performance or merits. To the court of appeal, potentially abusive conduct appeared to be any practice that could incentivise customers to prefer the dominant undertaking's products or services. In effect, any competitive practice by a dominant undertaking would be inherently suspicious and potentially abusive.

In a split decision (3:2), the *Supreme Court* confirmed Oslo City Court's finding that TINE had not abused its dominant position.¹⁶⁴

Where the appeals court had held that dominant undertakings must ensure that their conduct does not harm residual competition in the market, the Supreme Court's majority stressed that dominant undertakings are allowed to compete hard as long as competition is based on performance or merits.¹⁶⁵ Also in contrast to the appeals court, the majority compared TINE's market behaviour with forms of conduct, discounts and pricing practices considered non-performance-based competition by the European Court of Justice.¹⁶⁶ The

163. *Konkurransetilsynet v TINE*, case 09-089085ASD-BORG/02, section 13.

164. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*.

165. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*, paragraph 68. With reference to the European Court of Justice's general concept of abuse as described in Case 85/76, *Hoffmann-LaRoche v Commission*, ECLI:EU:C:1979:36.

166. The majority noted that TINE and REMA 1000 had not entered an exclusivity

majority noted that TINE 1000 had not entered an exclusivity agreement with REMA 1000, *de facto* restricted REMA 1000's choice of suppliers or offered loyalty (-inducing) or predatory discounts.

The question was then whether TINE, knowing that REMA 1000 wished to reduce its number of suppliers, abused its dominant position by increasing its remunerations. The Supreme Court's *majority* noted that TINE's remunerations were first and foremost meant to compensate REMA 1000 for more extensive marketing campaigns, for handling larger volumes, for including TINE's new products in its assortment and for using TINE's planograms. The court did not, however, rule out that TINE's offer was motivated by the prospect of supplying larger quantities.¹⁶⁷ Nevertheless TINE had explicitly rejected paying for a position as exclusive supplier. In such a situation, TINE could not be prevented from giving a good offer even though the likely result was that REMA 1000 would only have one supplier.¹⁶⁸ The Genius note, the planograms and the private label cheese production was not given particular importance by the court's majority.

It may be noted that the Supreme Court's *minority* voted to uphold the court of appeal's finding of abuse. Compared to the majority, which had emphasised that abusive conduct relates to unacceptable means of competition, the minority rather appeared to hold the effects on the market structure and the future competition decisive.¹⁶⁹ Normal competition based on merits or performance can, however, obviously affect the market structure and future competition. That does not mean that such practices are abusive and illegal. The minority's 'overall approach' seemingly combined the outcome of the negotiations (TINE becoming REMA 1000's sole supplier after TINE had increased its remunerations) with the Genius note, the offer to produce REMA 1000's private label cheese and TINE's planograms. In sum, TINE's conduct was not considered 'normal' and acceptable competitive behaviour considering TINE's responsibility

agreement or *de facto* restricted REMA 1000's choice of suppliers. Moreover, TINE had not offered abusive discounts within the meaning of EU case law. The court also noted that TINE's prices and discounts were not predatory.

167. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*, paragraphs 78–79.

168. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*, paragraph 81.

169. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*, paragraph 92.

to maintain residual competition. Such a legal reasoning, where the combination of individually legitimate forms of competitive conduct are in sum considered a violation of competition law, has sometimes been coined ‘monopoly broth’ under US antitrust law.¹⁷⁰ A risk is that the combination of several individually legitimate business practices does not necessarily result in anti-competitive and efficiency-reducing outcomes.

The *TINE* case illustrates the significance of the distinction between legitimate competition based on merits and potentially abusive forms of conduct. The Supreme Court’s majority came to the conclusion that TINE had not abused its dominant market position even though it had obtained a position as exclusive supplier to REMA 1000. TINE’s increased remunerations to compensate REMA 1000 for more extensive marketing campaigns were also considered lawful competition and not a loyalty (-inducing) or predatory pricing practice.

5.2.6. Contingent and rejected replacement discounts/remunerations

In the same decision,¹⁷¹ the NCA also concluded that TINE’s conduct in negotiations with ICA violated the prohibition on abuse of dominance. This part of the decision was also annulled. Both Oslo City Court¹⁷² and Borgarting Court of Appeal found that TINE’s conduct in relation to ICA did not constitute an abuse of a dominant position.¹⁷³ The Supreme Court did not admit this part of the case, rendering the Borgarting Court of Appeal’s judgment final.

TINE’s actions vis-à-vis ICA raised questions of both fact and law. The issue of whether TINE had offered ICA payment/remunerations conditional upon exclusivity and, if so, whether such a rejected or unaccepted offer could qualify as abusive behaviour was significant.

170. See *City of Mishawaka v Am. Elec. Power Co.*, 7th Cir., 616 F.2d 976 and Daniel A. Crane, ‘Does Monopoly Broth Make Bad Soup?’, *Antitrust L. J.* 76, no. 3 (2010), pp. 663–676.

171. Case V2007-2, *TINE*.

172. *TINE v Konkurransetilsynet*, case 07-063120TVI/OTIR/07.

173. *Konkurransetilsynet v TINE*, case 09-089085ASD-BORG/02.

To the NCA, in the course of the negotiations TINE had developed a document¹⁷⁴ with calculations of what TINE was willing to pay/remunerate ICA for substituting competing products with TINE's products in various categories of cheese. The document had been presented to ICA, but an offer had not been accepted. TINE had explicitly stressed that it did not wish a monopoly situation as sole supplier of cheese to ICA. Nevertheless the decision held that TINE had abused its dominant position contrary to section 11 by attempting to enter an exclusive dealing agreement with ICA (albeit limited to the ICA group's RIMI-branded grocery stores).¹⁷⁵ To the NCA, TINE had presented ICA with a legally binding offer, which, *if* it had been accepted, would have resulted in Synnøve Finden being excluded from ICA's RIMI stores. Therefore TINE had done what was necessary and sufficient from TINE's side to establish an agreement on exclusivity. The fact that ICA did not respond or had rejected the offer did not mean that TINE's conduct was legitimate. Moreover, there was no evidence that TINE had revoked the offer. The NCA held that putting forward a binding offer to replace almost all Synnøve Finden's products qualified as unilateral conduct covered by section 11, at least when remunerations were offered in return for exclusivity. The conduct was characterised as different from normal competition in that it was intended to restrict competition. TINE's conduct was also found to satisfy the required standard of anti-competitive effects.¹⁷⁶ To the NCA, by presenting a binding offer to ICA TINE had committed a unilateral act covered by section 11.¹⁷⁷

Oslo City Court annulled the NCA's decision.¹⁷⁸ TINE had argued that the disputed document was not a binding offer to remunerate ICA for exclusivity. Instead, the document merely contained calculations of TINE's potential profits if ICA/RIMI chose TINE as a supplier. The document had been developed upon ICA's request. TINE described it as a working document concerning TINE's potential gains from substitution and not as a binding offer to reimburse ICA

174. Called a 'dubleringsnotat' or 'dubleringstilbud'.

175. Case V2007-2, *TINE*, operative part.

176. See section 5.3.

177. Case V2007-2, *TINE*, section 6.5.2.

178. *TINE v Konkurransetilsynet*, case 07-063120TVI/OTIR/07.

in return for exclusivity.¹⁷⁹ Based on the evidence, the court found that it had not been proved that TINE had offered ICA discounts or remunerations in return for exclusive supplies of cheese. There was no written evidence to suggest that the relevant document should be understood as offering payment for exclusivity. The court further pointed to several considerations supporting its conclusion. *First*, as a response to newcomer Lidl's hard discount strategy, other grocery chains (including ICA/RIMI) considered reducing the number of suppliers to face the increasingly vigorous price competition. TINE's document should be understood against this general background. *Second*, the document in question did not mention Synnøve Finden's products specifically but rather concerned general categories of products. *Third*, TINE's representatives had explicitly communicated to ICA that TINE was not willing to purchase and pay for reduced competition. The court consequently concluded that TINE had not engaged in any conduct contrary to section 11.¹⁸⁰ The decisive issue appeared to be that the court did not find sufficient evidence that TINE had offered ICA/RIMI discounts/remunerations conditional upon exclusivity/loyalty.

The *Borgarting Court of Appeal* upheld the city court's finding that TINE had not abused its dominant position during the course of its negotiations with ICA.¹⁸¹ The appeal court found that TINE's document represented an offer that had been presented to ICA. The court stated generally that anti-competitive offers given by dominant undertakings may in principle violate section 11. Nevertheless the court came to the conclusion that TINE's conduct did not constitute abuse. The court noted that the offer was contingent on the parties reaching an overall agreement. Moreover, the offer had quickly been put to the side and not been subject to further negotiations. TINE's offer therefore did not qualify as an abuse of a dominant position.¹⁸² Whether the court found TINE's offer to reimburse ICA/RIMI to be conditional on exclusivity or linked to volume is not entirely clear. While the court of appeal's reasoning was brief, the implication was seemingly that a contingent and rejected offer of a replacement dis-

179. *TINE v Konkurransetilsynet*, case 07-063120TVI/OTIR/07, page 17.

180. *TINE v Konkurransetilsynet*, case 07-063120TVI/OTIR/07, page 74.

181. *Konkurransetilsynet v TINE*, case 09-089085ASD-BORG/02.

182. *Konkurransetilsynet v TINE*, case 09-089085ASD-BORG/02, section 16.

count/remuneration did not qualify as abnormal, non-performance-based competition. An alternative path to reaching the same outcome, however, could possibly have been that a rejected offer would not satisfy the applicable standard of anti-competitive effects.

5.3. Anti-competitive effects: harmonisation v overproving the case

In this section, how competitive effects have been dealt with in Norwegian cases concerning discounts and pricing under section 11 of the Competition Act is examined in more detail.

In the *Nettbuss* case, the NCA in the initial decision only briefly touched upon the discounts' concrete impact on competition, while the repeal decision involved a closer examination of effects.¹⁸³

With regard to the *round-trip discount*, the NCA's initial decision merely held that it incentivised passengers to purchase round-trip tickets and stated that it had a restrictive effect on competition because Nettbuss had more frequent departures than its competitor.¹⁸⁴ The repeal decision more extensively assessed the discount's competitive impact by *inter alia* considering its market coverage.¹⁸⁵ The authority held that the round-trip discount would have the same effect as a loyalty rebate. It was further noted that the exclusionary effect depends on how strong the loyalty-inducing effect is on each individual customer and on the proportion of the market that is tied up. The decision emphasised that a considerable part of the market was not affected by the discount. The conclusion was that the round-trip discount did not cause sufficient exclusionary effects to violate section 11.¹⁸⁶

With regard to the *customer card discount*, the initial decision merely held that it had a lock-in effect on customers which, in combination with more frequent departures, gave Nettbuss a competitive advantage not justified by efficiencies. In the repeal decision, the

183. Case V2004-29, *Nettbuss Sør AS*.

184. Case V2004-29, *Nettbuss Sør AS*, section 6.2.

185. Case V2004-34, *Nettbuss Sør AS – Omgjøring av Konkurransetilsynets vedtak V2004-29 om pålegg om opphør av rabattordninger på Sørlandsekspressen*.

186. Case V2004-34, *Nettbuss Sør AS – Omgjøring av Konkurransetilsynets vedtak V2004-29 om pålegg om opphør av rabattordninger på Sørlandsekspressen*, section 8.2.

NCA found that the discount did not have loyalty-inducing effects. It was also noted that a large proportion of the market was not affected by the discount. The discount accordingly did not have exclusionary effects.¹⁸⁷

In *SAS*, the NCA found that SAS' prices had not covered its average variable costs.¹⁸⁸ Therefore pursuant to the European Court of Justice's AKZO-test, it was not necessary to also establish that SAS' prices were part of a plan to eliminate a competitor.¹⁸⁹ Nevertheless the decision contained an elaborate assessment of SAS' plan or objective, as would have been necessary if its prices were between its average variable and its average total costs. The authority found that there was clear evidence that SAS intended to eliminate Coast Air and that SAS' pricing policy was part of a long-term plan to force its competitor out of the market. SAS' prices had been below its average variable costs since Coast Air started operating the route. SAS had moreover suffered a substantial loss of profits compared to when it was the sole operator on the route. Instead of reducing costs, SAS had maintained capacity and even lowered its prices further. The NCA also held that SAS had a realistic chance of recouping its losses, pointing to an internal document forecasting a substantial economic improvement on the route subsequent to Coast Air's exit.¹⁹⁰ Upon appeal, *Oslo City Court* annulled the decision, concluding that it had not been established that SAS had abused its dominant position. This conclusion, however, was not due to a finding that the NCA had failed to prove sufficient anti-competitive effects. To the court, SAS' conduct constituted a legitimate and justified means of competition regardless of the concrete effect on competitors or competition.¹⁹¹

In *TINE*, the NCA conducted a comprehensive assessment of the effects of TINE's conduct in relation to REMA 1000 and ICA/RIMI.¹⁹² As to the applicable standard, the authority held that it is not necessary to establish concrete effects on the market. It was suffi-

187. Case V2004-34, *Nettbuss Sør AS – Omgjøring av Konkurransetilsynets vedtak V2004-29 om pålegg om opphør av rabattordninger på Sørlandsekspressen*, section 8.3

188. Case V2005-9, *SAS*.

189. See section 4.2.3.

190. Case V2005-9, *SAS*, section 8.9.

191. *SAS v Konkurransetilsynet*, case 05-11134TTVI-OTIR/06.

192. Case V2007-2, *TINE*.

cient that the conduct could potentially restrict competition. To the NCA, the decisive issue was whether the conduct is such as to or probably will have an anti-competitive effect and consequently whether the conduct can or will have a harmful effect on consumers. The NCA further noted that pursuant to the European Court of Justice's case law, exclusivity agreements and equivalent practices leading to exclusivity were treated strictly under Article 102 TFEU. With regard to the facts of the case, the NCA emphasised that the relevant market was characterised by TINE's strong dominant position, high and stable market shares, significant entry barriers and insufficient countervailing buyer power. As a result of TINE's behaviour, its only competitor (Synnøve Finden) had been excluded from one of four grocery chains and an attempt was made to exclude it from yet another grocery chain. The conclusion was that TINE's conduct was liable to and probably would have had an anti-competitive effect.¹⁹³ Despite holding that only a cursory assessment of the market structure was necessary, the decision nevertheless proceeded with a more extensive investigation of the practices' likely effects on consumers. The decision concluded that TINE's conduct would likely result in higher prices, less choice, reduced cost efficiencies and reduced product development.¹⁹⁴

In the subsequent court judgments concerning the *TINE* decision, the issue of effects was secondary to whether TINE's conduct could even potentially qualify as a violation of the competition rules. *Oslo City Court* held that REMA 1000's decision to remove Synnøve Finden from its stores was REMA 1000's unilateral choice and did not find proof TINE had offered ICA discounts or remunerations in return for exclusivity. Regardless of the applicable standard of effects, there was no need to proceed with such an analysis. The *Borgarting Court of Appeal* held that in negotiations with REMA 1000 TINE had not done enough to preserve remaining competition. As to the question of effects, the court noted apparently inconsistent statements from the EU courts' case law. Based on legal theory, the court

193. Case V2007-2, *TINE*, section 6.5.3. Even under the weak standard of effects, it was nevertheless not clear how TINE's identified failed attempt to exclude Synnøve Finden from ICA/RIMI could be considered liable or likely to result in anti-competitive effects.

194. Case V2007-2, *TINE*, section 6.5.3.

nevertheless concluded that a concrete finding of *likely and appreciable anti-competitive effects* was required.¹⁹⁵ A partial exclusion of Synnøve Finden from the market as a result of TINE's behaviour in negotiations with REMA 1000 was considered to lead to such effects.

The Supreme Court finally concluded that TINE had not applied unacceptable and abusive methods of competition. The court's majority held that it had to be considered whether the dominant undertaking had acted in a way that is covered by the prohibition and whether this conduct was *such as/liable to have an appreciable anti-competitive effect*.¹⁹⁶ However, because TINE's market behaviour was classified as legitimate competitive conduct it was not necessary to consider factual effects. The court's minority found that the combination of TINE's various actions was unacceptable but did not find it necessary to specify the applicable standard of effects, as any alternative would have been satisfied.

Before attempting to summarise the treatment of competitive effects in Norwegian cases on discounts and pricing practices under section 11, it is worth repeating that to the European Court of Justice, an exclusionary abuse refers to non-performance-based competition linked to an effect on competition. However, the applicable standard of effects under Article 102 TFEU has varied depending on the form or type of conduct in question.¹⁹⁷ Bearing in mind the case law and practice under Article 102 TFEU, several observations can be made regarding the treatment of effects in Norwegian abuse of dominance cases.

The NCA's analyses of concrete market effects vary from being almost non-existent (the initial *Nettbuss* decision) to comprehensive (*TINE*). Moreover, the authority seems to have largely endorsed the European Court of Justice's non-universal and conduct-specific approach to competitive effects. In *SAS*, the NCA based its analyses on the price-cost comparison test for predation articulated by the European Court of Justice, while in *TINE* the NCA noted that pursuant to the European Court of Justice's case law, exclusivity agreements and equivalent practices were treated strictly.

195. *Konkurransetilsynet v TINE*, case 09-089085ASD-BORG/02, section 14.

196. Rt. 2011 s. 910, *TINE v Konkurransetilsynet*, paragraph 64.

197. See sections 3.3 and 4.3.

In several cases, the NCA has conducted more comprehensive analyses of competitive objectives and effects than arguably was legally required. In the repeal decision in *Nettbuss*, the NCA assessed the discounts' market coverage even though market coverage was, held largely irrelevant under the European Court of Justice's earlier judgments on loyalty (-inducing) discounts.¹⁹⁸ In *SAS*, the authority assessed whether SAS' prices were part of an exclusionary plan, even though SAS' prices were found to be below average variable costs. In *TINE*, the NCA conducted an extensive assessment of effects while stressing that such an investigation was not necessary. The NCA has arguably set out to 'overprove' the standard of anti-competitive effects in abuse of dominance cases. Therefore the decisional practice in abuse of dominance cases suggests that the NCA has taken a somewhat more effects-based approach than traditionally required by the European Court of Justice's case law. Notably, the authority's decisional practice occurred prior to the Commission publishing the articulation of its effects-based approach in the *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009)*.

Regarding the Norwegian courts, the *Borgarting Court of Appeal* articulated a standard where a concrete finding of *likely and appreciable anti-competitive effects* is required.¹⁹⁹ Neither the articulated probability of anti-competitive effects nor the standard of significance corresponds directly to the European Court of Justice's general concept of abuse. *The Supreme Court's majority* in the *TINE* judgment articulated a general standard of *appreciable anti-competitive effects*. As *TINE's* conduct was considered performance-based competition, the majority did not address the issue of effects any further. The minority vote implicitly acknowledged that the standard of effects can vary depending on the form or type of conduct in question.

6. The Norwegian experience: an effects-based approach to legitimate conduct?

According to the European Court of Justice, the notion of abusive, exclusionary market behaviour under Article 102 TFEU consists of

198. See section 4.3.

199. *Konkurransetilsynet v TINE*, case 09-089085ASD-BORG/02, section 14.

two elements. The first element relates to the form of a dominant undertaking's market behaviour. Only 'methods different from those which condition normal competition' based on performance or merits can qualify as abusive. Therefore the prohibition only applies to certain types or forms of conduct. The second element relates to effects. Potentially abusive methods must be 'such as to influence the structure of the market' and/or have 'the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' to violate the prohibition.

The European Court of Justice has operationalised the general concept of abuse in relation to specific forms of conduct. When it comes to exclusionary prices and discounts, three (broad) categories have been considered different from normal competition based on merits or performance. These are loyalty (-inducing), predatory and discriminatory prices or discounts. As to the issue of effects, the applicable standard has varied depending on the form or type of conduct. The European Court of Justice has traditionally articulated largely formalistic legal tests to loyalty (-inducing), predatory and discriminatory pricing practices, where actual or likely appreciable anti-competitive effects have not been necessary to establish an abuse. The European Court of Justice's recent ruling in *Intel*,²⁰⁰ however, articulates a more effects-based approach to discounts and pricing practices. The Commission's enforcement priority is also abusive conduct that results in anti-competitive foreclosure.

The European Court of Justice's case law on Article 102 TFEU shall be given considerable weight when interpreting and applying section 11 of the Norwegian Competition Act.²⁰¹

The NCA's enforcement of the prohibition on abuse of dominance has been limited. The authority has adopted only three decisions finding infringements of the prohibition. The 2004 decision against *Nettbuss* was later repealed. The decision against *SAS* from 2005 was quashed by Oslo City Court. The NCA's decision in *TINE* from 2007 made its way through the Norwegian court system and was finally annulled by the Supreme Court. Accordingly the NCA has not

200. Case C-413/14, *Intel v Commission*, ECLI:EU:C:2017:632.

201. Ot. prp. nr. 6 (2003–2004), p. 68 and pp. 224–225.

imposed any fines for infringements of the prohibition on abuse of dominance that have not been repealed or annulled.

The NCA's lack of success in section 11 cases can generally not be attributed to inadequate economic analyses or failure to establish necessary anti-competitive effects. The authority has rather taken a more diligent approach to the issue of effects than required by the European Court of Justice's interpretation of the concept of abuse when dealing with discounts and pricing practices.

The NCA's decisions have instead been repealed or annulled because the dominant undertakings' practices were ultimately considered legitimate competition based on performance or merits. In *Nettbuss*, the authority did not explain why the *round-trip discounts* and the *customer card discounts* constituted non-performance-based price competition, such as loyalty (-inducing), predatory or discriminatory pricing. The repeal decision implied that at least the customer card discount qualified as a legitimate form of price competition. The initial *SAS* decision on predatory pricing was annulled by Oslo City Court, which held that SAS' conduct was rather a form of legitimate competition and a proportionate means of protecting its commercial interests. Similarly, the decision against *TINE* was quashed by the courts not because the authority had failed to establish adequate anti-competitive effects but because it had not been established that *TINE*'s conduct qualified as an abusive method of competing.

To summarise, in its limited decisional practice regarding discounts and pricing practices, on several occasions the NCA has applied a more effects-based approach to identify abusive market behaviour than required pursuant to the European Court of Justice's case law or set out to 'overprove' the finding of an infringement by conducting additional analyses. Nevertheless the NCA's decisions to impose fines for abuse of dominance have been repealed or annulled. An important reason for the authority's unsuccessful enforcement efforts relates to the conduct element of the general notion of abuse. Only non-performance-based forms of market behaviour qualify as abuse according to the European Court of Justice. In several cases, the authority ultimately failed to explain and establish that the dominant undertakings' market behaviour should be considered different from normal and legitimate competition on merits.

Chapter 4

Where do we stand on discounts?—A Swedish perspective

Vladimir Bastidas Venegas

In general, the assessment of discounts in Swedish cases from the Swedish courts and the Swedish Competition Authority have mainly relied on the formalistic approach applied in EU Competition Law before Intel. While the Swedish Competition Authority seems to have shifted its view subsequent to the publication of the Commission's Enforcement Paper, the Market Court upheld a formalistic assessment by rejecting the argument that the AEC-test had to be applied. Although the exact implication of Intel is an open ended question, it seems as an assessment of loyalty discounts also require the comparison to an effective competitor if the dominant undertaking presents a defence based on the application of the test. As concerns a comparison between the Swedish case law and economic theory, the latter seems to give support that the discounts system in the individual cases could have had an anticompetitive effect. However, the most problematic aspect is the level of analysis applied in assessing the relevant factors to establish anti-competitive effects. While the Swedish courts and the Swedish Competition Authority have identified the 'structural' factors, such as market power and the non-contestable nature of the dominated market, they have been poor in justifying the finding of foreclosure, both in terms of how the discount system has had the capability of pressuring the prices of rivals and the likely effects in the market. Rather,

the case law indicates that these negative effects have been presumed to follow from the structural factors.

This chapter explores the assessment of discount systems under Swedish Competition Law. On a general level, the first observation that must be made, is that there are few cases on rebates from the Swedish courts and the Swedish Competition Authority, Konkurrensverket, (KKV). This is not something specific for rebates but rather a consequence of the limited amount of case law in Swedish competition law. Accordingly, it is perhaps less strange that there are only three cases on rebates from the (previous) highest court in competition law cases, the Market Court, 'Marknadsdomstolen' (MD).¹ A few more cases have also been decided by the KKV, but many of these stem from the time period as far back as when Sweden just had entered the European Union (EU). The latest case, *Bring Citymail*, was controversial and decided in the shadow of the ongoing *Intel* case (at the General Court) as well as the Commission's newly adopted *Enforcement Paper*.² As demonstrated below, *Bring Citymail* is illustrative of the 'formalistic' approach normally applied to discount systems following the CJEU's case law, rather than the Commission's more economic approach expressed in the *Enforcement Paper*. While subsequent EU cases, such as the *Post Danmark II*,³ *prima facie* gave some support for the MD's approach, this is no longer the case after *Intel*.⁴

In order to understand the context of the case discussed in this chapter, the first subsection provides a brief overview of the Swedish competition rules as well as the enforcement system (1). The second subsection addresses the cases at Swedish courts and the KKV (2). The third subsection analyses Swedish cases on discount systems in

1. MD 2011:14 *Bring Citymail* (*Bring Citymail*); MD 2001:4 (*Eurobonus I*); MD 1999:12 (*CEKAB*).

2. MD 2011:14 *Bring Citymail*; Case T-286/09, *Intel Corp. v European Commission*, ECLI:EU:T:2014:547 (*Intel, General Court*); Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C 45/7 (*Enforcement Paper*).

3. Case C-23/14, *Post Danmark A/S v Konkurrenserådet*, ECLI:EU:C:2015:651 (*Post Danmark II*).

4. Case C-413/14 P, *Intel Corporation v European Commission*, EU:C:2017:632 (*Intel*).

the light of EU case law on discounts and economic theory (3). The final subsection summarizes the conclusions (4).

1. A brief overview of Swedish Competition Law

For those unfamiliar with the Swedish Competition Law, the basic rules should briefly be addressed in this subsection to facilitate the understanding of the discussion on specific cases. In short, the Swedish rules are a blueprint of the EU Competition rules. These rules have also applied since Sweden adapted its rules to the EU Competition Law, which occurred with the Competition Act of 1993, *Konkurrenslagen* (1993:20) (KL 1993). The current legislation, the Swedish Competition Act, *Konkurrenslagen* (2008:579) (KL), is from 2008, which did not change the material content of the antitrust rules, but only made material changes to the rules on Merger control which are not the focus of this chapter.⁵

As concerns the material antitrust rules, there is firstly a prohibition on agreements restricting competition in chapter 2, section 1 KL and a possibility for an exemption in chapter 2 section 2 KL. The provisions replaced sections 6 and 8 KL 1993. These provisions correspond to Article 101(1) and (3) Treaty of the functioning of the European Union (TFEU) with the difference that there is no requirement that the agreement in question has an effect on trade between Member States. The prohibition contains the same non-exhaustive examples of possible restrictions of competition as Article 101(1) TFEU. Secondly, Chapter 2, section 7 KL contains a prohibition on abuse by a dominant position. This provision replaced section 19 KL 1993. In principle this provision is also a copy of the prohibition in Article 102 TFEU. Naturally, the requirements of effect on trade between Member States and that the dominant position must cover at least a substantial part of the internal market do not apply. As concerns possible abuses, Chapter 2, section 7 KL contains the same non-exhaustive list of examples as Article 102 TFEU.

As in EU Competition Law, discounts are most problematic under the prohibition of abuse of dominance and have thus mainly

5. Chapter 4, section 1 KL deals with concentrations that meet the turnover thresholds in the provision while not reaching the turnover thresholds set by the EU Merger Regulation.

been addressed in cases on Chapter 2, section 7 KL. However, as seen below, discounts have also been addressed under Chapter 2, section 1 KL. There are a small number of discounts on rebates from the Swedish Competition Authority, Konkurrensverket (KKV), the Stockholm City Court, Stockholms Tingsrätt, and the Market Court, Marknadsdomstolen (MD).

It is also important to emphasize that, in principle, Swedish Courts are supposed to follow the interpretations made by the Court of Justice of the European Union (CJEU) on Articles 101 and 102 TFEU. While this guiding principle has not been formally stated in the Competition Act, it was stated in the *travaux préparatoires* to the KL 1993 and is still applicable today.⁶ To the extent that conditions in the Swedish market are peculiar, it may require a departure from the interpretations made in the case law of the CJEU. This applies in particular to issues such as market definition, in particular the geographical dimension of the relevant market. Thus, on a general level, Swedish courts are expected to follow the case law of the CJEU, and not seldom, the KKV will follow the viewpoint expressed by the Commission, although there is no formal obligation to do so.

As regards public enforcement, the Swedish Competition Authority, Konkurrensverket (KKV), is the body in charge. The KKV has no right to take its own decision on fines but may take a decision imposing a cease and desist order.⁷ In cases of fines, the KKV has to bring a claim before the court of first instance in competition cases concerning public enforcement. It should also be noted that there is a peculiarity in the enforcement of competition law, a subsidiarity right of complainants to take cases to court when the KKV has refused to pursue an investigation in an individual case.⁸ Similar to EU Competition Law, the KKV has a certain amount of discretion in the selection of cases. However, unlike EU Competition Law, complainants do not to have a right to appeal the decision of the KKV rejecting a complaint. Instead, the complainant may use its subsidiary right to pursue the case on its own. While this may be an oddity that can be seen as a sidetrack to the focus in this chapter, as argued below, this may have had an actual impact on the leading case on discounts.

6. Prop. 1992/93:56, p. 21; prop. 2007/08:135, pp. 77–78.

7. Chapter 3, section 1 KL.

8. Chapter 3, section 2 KL.

As regards the courts in charge of handling public enforcement cases on competition law, it should be noted that the court system regarding competition law cases was changed in September 2016. Before the reform, in cases regarding fines, the KKV had to go to the Stockholm City Court, Stockholm Tingsrätt. Appeals of those judgments were subsequently made at the MD, which constituted the highest court in competition law cases. As stated above, in cases concerning a cease and desist order the KKV could take such a decision on its own, which subsequently could be appealed directly to the MD. The reform of 2016 meant that two new courts were introduced: the Patent and Market Court, Patent- och marknadsdomstolen (PMD), and the Supreme Patent and Market court, patent- och marknadsöverdomstolen (PMÖD).⁹ In short, the PMD will replace the Stockholm City Court as the first instance in fining cases, while the PMÖD is the highest instance. While the reform, which purports to gather cases on intellectual property rights and market law, including competition law, at one and the same court is an interesting topic as such, it affects competition law to a very little extent. Importantly, the cases discussed below are all from the time before the reform in 2016 and thus, the law has been shaped by two courts that are no longer in place. However, as the reform did not intend to impact the material interpretation and application of the competition rules, it could be expected that the PMÖD and PMD will follow the case law from the MD.

2. Swedish Cases on Discounts

This subsection will describe the cases on discounts from the Market Court as well as those handled by the KKV. In general, the court cases, except for *Bring*, are to a certain extent odd and may be difficult to fit into the general classifications of cases on discounts systems. Moreover, the judgments from the courts and the decisions by the KKV are to some extent non-transparent as regards the reasoning justifying the finding of a restriction of competition or abuse. It should also be noted that the majority of cases were handled under the KL 1993 and that accordingly the description below refers to those provisions in some cases. Subsections 2.1-2.4 deal with cases

9. See Act (2016:188) on Patent and Market Courts.

from the courts while subsection 2.5 contains a summary of a selection of KKV decisions. In subsection 2.6 a few conclusions are made.

2.1. Telia Mobiltel

A first interesting case is *Telia Mobiltel*.¹⁰ The case concerned aggregated discounts given across two product markets. Telia, the *de facto* former monopolist for most telecommunication services, was active in the market for providing both analogue (NMT-standard) and digital (GSM-standard) mobile telecommunication services. In principle, Telia was the only provider in the market for analogue mobile telecommunication services, the NMT-standard. The customers, which mainly consisted of the State and state authorities, were given a discount based on the total amount of subscriptions (both analogue and digital) they would purchase from Telia. The discount was further based on the amount of subscriptions per year. The KKV found that this would create a loyalty inducing effect at the customer level. Moreover, the KKV found that there was no economic justification for the discounts given and that they would create an exclusionary effect for competitors in the market for digital mobile telecommunication services.

This case was later upheld by the Stockholm City court on appeal.¹¹ The Court conceded that Telia did not have a dominant position in the market for GSM-services were it was facing effective competitors. However, Telia was *de facto* not contested on the NMT-market as there was no room for more competitors (due to the lack of available frequencies). Customers using the NMT-standard were also likely to purchase GSM-services not to forego discounts on the total number of subscriptions (both NMT and GSM). Thus, it was found that Telia was leveraging its market power into the GSM market. Notably, the court concluded that the discount system had a loyalty inducing effect without discussing whether it was also likely that the discount system would have such effects on the market.

10. KKV decision no. 63/94 (*Telia Mobiltel*).

11. Stockholms Tingsrätt, case no. Ä 8-94-96 (*Telia Mobiltel*).

2.2. CEKAB

CEKAB concerned a collaboration through a joint venture between the largest banks in the handling of ATM-withdrawals as well as card transactions.¹² The joint venture gave discounts to largest customers, which had been claimed to be discriminating and exclusionary by the KKV according to section 6 KL 1993 (now Chapter 2, section 1 KL).¹³ Accordingly, the KKV took a decision rejecting a request for a negative clearance.

The joint venture, CEKAB, was owned by the largest banks in Sweden. CEKAB offered services regarding ATM-withdrawals and card transactions in exchange for a fixed fee and a tariff on the actual service to the owners of the joint venture as well as third parties, which were smaller banks. In addition, depending on the number of transactions, the customer would get a discount on the tariff for the individual services. CEKAB claimed that the system was characterized by high fixed costs for setting up the system and that variations in the quantity of transaction had little effect on variable costs.

The KKV stated that the market regarding financial services had an oligopolistic structure and that it was essential not to let the big banks to maintain advantageous conditions as regarded the necessary infrastructure. ATM and card services were found to constitute such infrastructures. Moreover, the KKV assessed that differences in prices for the transactions could not be motivated by costs, as the volume of transactions did not affect the costs of transactions. Instead, the KKV found that the price difference was mechanism to keep the larger banks as customers, as otherwise they would set up their own systems handling the transactions in question. Finally, it was also found by the KKV that giving the same discounts for smaller banks would hardly impact the total revenue made by CEKAB. Based on these circumstances, the KKV found that the agreement discriminated between different customers and thus was in breach of section 6 KL 1993.

The Market Court disagreed with the KKV's assessment. The court conceded that the discount system resulted in a higher fee for smaller banks. However, it also found that the effects on competition

12. MD 1999:12 CEKAB (*CEKAB*).

13. KKV Decision no. 1567/93 (*CEKAB decision*).

would be marginal and thus with little effect for the small banks. According to the court, the necessity of a certain volume of transactions in order to carry out the bank services in question could justify the granting of higher rebates to high volume customers. It seems as the Court accepted the argument made by the banks that without higher discounts for higher volumes there would be a strong incentive for the bigger banks to choose another bank transaction system, which in turn would affect its profitability.

Obviously, too far reaching conclusions should not be drawn from this case. It concerned primarily discrimination through restrictive agreements and not abuse of a dominant position. Furthermore, the case is of age and was handled under the previous notification system. The most interesting part is that the fact that the MD accepted the cost justification for the rebate system, which may still be used in analogy to abuse cases. Naturally, it could be argued that the court would have reached a different conclusion if the justification could be offset by the negative effects caused by a dominant position and foreclosure effects.

2.3. EuroBonus

A third case concerns SAS' frequent flyer program, the EuroBonus system, which it applied for domestic flights in Sweden.¹⁴ The case concerned a variety of different practices directed at end-consumers, travel agents and customers. The KKV also found in its decision that SAS had engaged in the use of loyalty discounts as well as conditional rebates such as target rebates, and retroactive rebates.¹⁵ However, as the company revised or abolished most of its practices following the KKV's investigation, the KKV did not take any measures against the other systems of discounts except for the EuroBonus system.

Regarding the EuroBonus system the KKV found that SAS was in a dominant position on the market for domestic flights in Sweden.¹⁶ Even though the market had been deregulated, SAS had maintained its position and no other company was able to offer a bet-

14. MD 2001:4 SAS EuroBonus (*EuroBonus I*).

15. KKV Decision no. 902/1998 (*EuroBonus decision*).

16. *EuroBonus decision*, recital 111.

ter range of different destinations in domestic flights.¹⁷ In addition, the company also had other advantages such as advantageous slot times at the airports.¹⁸ Moreover, the KKV found the EuroBonus system to be loyalty inducing and thus an abuse under section 19 KL 1993 (now Chapter 2, section 7 KL). The KKV considered that the Swedish market already was weakened because of SAS' strong position. Moreover, it held, that dominant undertakings like SAS have a special responsibility not to restrict competition even further.¹⁹ Additionally, the special responsibility must be assessed in the light of the specific facts of the case in accordance with *Tetra Pak II*.²⁰ In this context, it was argued that the bonus system induced individuals to focus all their purchases to SAS. This applied in particular to business travellers who did not pay for their own flights and who to a certain extent were price insensitive and more prone to increase their bonus points.²¹ This locked in end-consumers, an effect that was reinforced by SAS' large market share. Additionally, there was no other airline, which could compete with SAS in terms of an equivalent frequent flyer program. The KKV also found that there was no objective justification for the SAS use of the EuroBonus program. The fact that other international airlines applied similar programs for international travels did not justify the use of the frequent flyer program domestically when the effects of the program were so strongly negative on competition.²² The KKV did not find any other ground for justification and did not discuss possible economic benefits of the program.²³

The Market Court more or less concurred with the KKV and upheld the decision.²⁴ The court also found that SAS had a very strong position in the market. It was noted that although the market had been liberalized (in 1992), SAS had not only managed to maintain its initial strong position through a brief period of more intensified competition, but also had strengthened its position during the

17. *EuroBonus decision*, recital 88.

18. *EuroBonus decision*, recital 89.

19. *EuroBonus decision*, recital 117.

20. Case C-333/94 P, *Tetra Pak International SA v Commission of the European Communities*, EU:C:1996:436 (*Tetra Pak II*), paragraph 24.

21. *EuroBonus decision*, recitals 107–108.

22. *EuroBonus decision*, recital 118.

23. *EuroBonus decision*, recital 118.

24. MD 2001:4 SAS Eurobonus (*SAS EuroBonus I*).

period before the KKV's decision. In principle, there was only one other contender on the Swedish market and its position was much weaker than SAS. The Market Court agreed with the KKV that the bonus system had a loyalty inducing effect, which diminished price competition. Thus competitors had difficulties to establish themselves in the market for domestic flights. The court also discarded any claim as an objective justification that a weaker position for SAS in the market for domestic flight, by the prohibition of the bonus system, would also weaken the company's competitive position in the market for international flights. Interestingly, the court also conceded that bonus points would not result in considerable costs for SAS as bonus points were used for occupying unused flight seats. However, neither SAS nor the court discussed this in terms of efficiencies. Thus, the Market Court found the EuroBonus system (for domestic flights) abusive.

It should also be added that the EuroBonus system was reintroduced by SAS in 2009. The bonus system was thus assessed again by the KKV following a complaint by Norwegian.²⁵ The KKV found that the conditions of competition in the Swedish market for domestic flights had improved considerably since the Market Court's judgment in 2001. In the light of the increased pressure from additional competitors as well as increased competition from train travel, the KKV concluded that the EuroBonus system did not constitute an abuse. Arguably, the reassessment underlines the importance of the degree of dominance in the Market Court's judgment of 2001.

2.4. Bring Citymail

The most important case on discounts is *Bring Citymail*.²⁶ Posten, the Swedish former monopolist in the market for postal services, had applied a discount system for the sending of over 300 000 units of mail. The (operational) discount was given for mail that was pre-sorted by the companies. The discount was given for the whole amount of pre-sorted mail once the customer had exceeded the threshold and thus constituted a retroactive discount. The only competitor to Posten, Bring Citymail, submitted a complaint to the KKV which was

25. KKV Decision no. 595/2008 (*SAS EuroBonus II*).

26. MD 2011:14 *Bring Citymail (Bring Citymail)*.

rejected.²⁷ Importantly, the KKV based its assessment on the AEC-test in the Commission's *Enforcement Paper*.²⁸ Subsequently, Bring Citymail made use of its subsidiary right to bring a claim for a cease and desist order at the Market Court.²⁹

The Market Court found that Posten had an advantage by basing the discount on units of mail distributed outside the markets that were open to competition. Moreover, Posten had a very large market share, estimated to 85% of the market in 2009. In addition, the complainant Bring Citymail, was the only competitor in the urban areas. It was also concluded that the state of competition was 'fragile' as the market only allowed small margins. The court found that for a competitor to challenge Posten it had to compensate for the rebate, including the rebates given for the distribution outside the areas exposed to competition (the non-contestable part of the market). A potential customer of Bring Citymail needing mail deliveries to the whole country would have to divide up its deliveries between Posten and Bring Citymail, meaning that it would forfeit the discounts given by Posten above the 300,000 threshold. Thus, Bring would have to lower its prices considerably to provide its customers with the amount corresponding to the discounts that the undertaking would have otherwise been granted by Posten in those areas where Bring Citymail did not compete. As competition was already limited, the effect of discount system was found to exclude Bring from the market. It should also be noted that Posten presented a price-cost calculation when invoking the AEC-test. However, the court did not accept the calculation as the company failed to provide supporting cost data. Moreover, the court did not have access to the calculations made by the KKV based on the AEC-test.³⁰

As regards a possible efficiency defence, it was claimed by Posten that efficiencies would emerge at quantities above 150,000 units of mail and that it was only at quantities above 300,000 that it could be

27. KKV Decision no. 381/2009 (*Bring Citymail decision*).

28. T. Osen Bergqvist, 'Sweden', Chapter 12 in P. Kellezi, B. Kilpatrick & P. Kobel (ed), *Abuse of Dominant Position and Globalization & Protection and Disclosure of Trade Secrets and Know-How* (national report from LIDC Congress 2015), p. 201 (Osen Bergqvist), p. 210.

29. Chapter 3, section 2 KL.

30. Osen Bergqvist, p. 210.

assessed with certainty that the quantities would result in cost efficiencies. However, the submitted calculation made by Posten was not accepted as a matter of evidence. As the court found that an exclusionary effect had been established it was up to Posten to prove any efficiencies. As this had not been done, and it could not be excluded that alternative methods for giving a discount in order to compensate for cost efficiencies could have been applied, the rebate system was found to be abusive under Chapter 2, Section 7 KL.

There are several aspects of the case that are interesting. One factor was the fact that the competition authority had initially rejected the complaint made by Bring Citymail applying the as-efficient-competitor test (AEC-test) in the Commission's *Enforcement Paper*.³¹ The case shows that, at least at that time, there was a divergent view between the competition authority and the courts in term of the legal standard applying to discount cases. While the competition authority relied on a more 'modern' effects-based approach in line with the Commission's shift of view, the Market Court based its view on the older case law of the EU courts. Arguably, and as discussed below, the view of the Market Court has been subsequently confirmed by the General Court in *Intel* and the CJEU in *Post Danmark II*, but is probably in conflict with CJEU's judgment in *Intel*.³²

A second interesting aspect is that the court took into consideration the level of competition on the relevant market. The degree of dominance, which was connected to Posten's former position as a monopolist seems to have had great influence on the finding of abuse. The fact that Bring Citymail could only compete for particular sections in the market made it vulnerable for discounts which were also based on quantities of mail falling outside the area subject to competition. The Court referred to the special responsibility of dominant firms and how the degree of dominance would 'translate' into different degrees of 'responsibility'. However, apart from stating that Posten had a high degree of dominance (implying a high degree of

31. Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C 45/7 (*Enforcement Paper*).

32. Case T-286/09, *Intel Corp. v European Commission*, ECLI:EU:T:2014:547 (*Intel, General Court*); Case C-23/14, *Post Danmark A/S v Konkurrencerådet*, EU:C:2015:651 (*Post Danmark II*).

responsibility), it was not elaborated further by the Court how this, in fact, affected the application of the rules in the given case.

A third interesting aspect is that the case focused solely on the capability of the discount system to ‘tie up’ customers and did not involve an in-depth discussion on the effects on the market. In fact, the Court did also concede that the overall effects on customer behavior was not conclusive in the individual case, but that there were at least (anecdotal) evidence of larger individual customers not choosing Bring Citymail because of the inability of the latter to match the discounts of Posten. The court seems primarily to have based its finding that the discount system because of its perceived effect of tying up customer had the capability or tendency to restrict competition. The court also rejected, as previously done by the CJEU, the relevance of the argument that customers, or at least some, had requested the discount from Posten.³³ All in all, the court’s approach seems formalistic and its effects analysis can only be characterized as superficial at best.

Finally, it should also be pointed out that the Market Court was perhaps more lenient in its application of the standard of proof as the case concerned two private parties. The oddity in Swedish Competition Law that gives a subsidiary right for private parties to pursue the case to the Market Court following the rejection of a complaint by the KKV, has raised the issue of what standard of proof is required in these cases comparing to public enforcement cases of the KKV. The Market court has previously held that the standard of proof should be the same for the KKV and private parties that apply their subsidiary right to go to the Market Court.³⁴ Arguably, considering that private parties do not have the same available tools as a competition authority to gather information from the accused undertaking and effects on the market, it has nonetheless been discussed whether the standard of proof is set lower in these cases.³⁵ As stated above, the Market Court did not even find conclusively that all customers (or

33. Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36 (*Hoffman-La Roche*), paragraph 89.

34. MD 2007:26 Ekfors kraft (*Ekfors kraft*).

35. Henriksson, Lars, ‘Indispositiva tvistemål – handläggningsregler för tillämpning av konkurrenslagen’, *forthcoming in Amici Curiae Marknadsdomstolen 1971–2016*, (Jure 2017).

even a majority of them) would choose Posten over Bring Citymail because of the rebate system. Rather, it appears as if the court relied heavily on the mere possibility as well as the structural factors of the case, such as the market share and market coverage by the dominant undertaking. It seems at least questionable that the same arguments and evidences would have sufficed for a claim made by the KKV.

2.5. KKV decisions

There are a few cases that have been decided by the KKV. A selection of these are discussed below. Many of the cases have either followed the previous case law by the MD or have been settled swiftly by either the undertaking in question changing its behavior or making commitments without the KKV taking further actions.³⁶ In most decisions the reasoning by the KKV is also somewhat superficial and does not give a full picture of the application of law to the facts of the case. It should be underlined that a number of these cases are also of some age. Many stem from the previous enforcement system implemented with the KL 1993, which at the time relied on the notification system as applied in EU competition law enforcement.

2.5.1. Loyalty discounts

In an early case, *Posten*, the dominant undertaking gave discounts to mail order companies that would have Posten as the only supplier of distribution services.³⁷ The KKV found, with support in *Hoffman-LaRoche*, that such a requirement of exclusivity constituted an abuse under Article 102 TEUF (then Article 86 EEC).

The case *Flying Enterprise* also addressed loyalty discounts.³⁸ The case concerned an obligation on an airline company to purchase all its fuel from the supplier. After a complaint was made to the KKV, the supplier revised its agreement. The KKV found that the agreement constituted a loyalty discount, but abstained from taking meas-

36. A good example is the *Schneider* case where the KKV found that individual rebates constituted an abuse under Chapter 2, Section 7 KL. The case was resolved through commitments offered by the undertaking. KKV decision no. 797/2004 (*Schneider*).

37. KKV decision no. 152/94 (*Posten*).

38. KKV decision no. 23/96 (*Flying Enterprise*).

ures after the undertaking changed the agreements that had been applied for a very short time.

A third case, *Telia*, concerned loyalty rebates.³⁹ Telia had entered into an agreement with the city of Gothenburg regarding telecommunication services used by the city and its administration. The agreement gave Telia an exclusive right to provide those services in exchange for lower prices on each telephone call. The agreement was to last for at least three years. The KKV found that Telia was in a dominant position with a market share amounting to approximately 85% of the relevant market and that the arrangement constituted a loyalty rebate in line with *Hoffman-La Roche*. After Telia made changes to arrangement, the KKV dismissed the case.

2.5.2. Target discounts

In the aforementioned case, *Posten*, the KKV assessed under the KL 1993 a number of different practices by Posten, the former Swedish postal service monopolist, including exclusivity requirements and target discounts based on volumes and turnover.⁴⁰ The case concerned the distribution of parcels from mail order companies. It was found that Posten had a market share of over 90% in that market. Firstly, Posten applied discounts based on the annual volume of the companies' expected purchases which were granted beforehand. Secondly, an annual bonus was also granted if the customer reached an annual target which corresponded to the expected turnover for the particular customer. The KKV referring to *Hoffman-La Roche*, *Michelin I*, and *Suiker Unie*, stated that discount systems based on loyalty or with loyalty-inducing effects constituted abuse of a dominant position under EU Competition Law. The KKV found that the annual discount based on target volumes granted beforehand induced customers to purchase only from Posten. *Inter alia*, it was uncertain the penalty customers would face at the end of the year if they failed to reach the set targets, such as repayment of the discount. As for the discount based on the annual turnover target given at the end of the year, the KKV found that it pressured competitors to offer a price that would be lower than the average price for the dominant undertaking ser-

39. KKV decision no. 418/2000 (*Telia*).

40. KKV decision no. 152/94 (*Posten*).

vices corresponding to the discounted price for the last sold item. It follows that the KKV merely looked at the form of the discount system without making an in-depth assessment of the market.

2.5.3. Multi-product discounts

Apart from *Telia Mobiltel* discussed above, the KKV also dealt with multi-product discounts in *Linde Energi*, which concerned aggregated discounts over two different product markets.⁴¹ Linde Energi sold energy both in the form of heating as well as electricity. Customers, both companies and natural persons, would get a discount if they subscribed for both services, which was based on the total amount of energy purchased across both markets. The KKV found that as other suppliers of electricity did not provide heating energy they could not compete effectively with Linde Energi. It was found that customers had a strong incentive to purchase all their energy from the company, thus excluding competitors. Moreover, the KKV did not find that there were objective justification for the system of discounts. Thus, it was held to infringe Chapter 2, section 7 KL as a limitation of markets.

2.6. Conclusions on Swedish cases

It seems fair to say that the viewpoint of the courts and the KKV has been quite formalistic. Most KKV decisions and Court's judgments have focused primarily on the form of the discount systems, without carrying out an analysis of how foreclosure would actually be caused by the individual discount system in the particular case. What both the KKV and the Court have taken into account are the degree of dominance, the market share of the dominant undertaking as well as the part of the market, or the individual markets, that have been non-contestable. As regards the AEC-test, *Bring Citymail* marked a divergence between the Market Court and the KKV. Obviously, the Market Court preferred to apply the previous (more formalistic) case law of the CJEU, while the KKV adopted the Commission's approach. Notably, since the adoption of the *Enforcement Paper*, the KKV has also not intervened against discount systems.

41. KKV decision no. 409/2000 (*Linde Energi*).

3. Analysis

It is clear that there are not that many cases on discounts to analyze in Swedish Competition Law. Considering the shallowness of reasoning in judgments and decisions made by the courts and the KKV, conclusions cannot be drawn too far. In subsection 3.1 a comparison is made to the case law of the CJEU. In subsection 3.2, a comparison is made to the economic reasoning on discounts.

3.1. Comparison to EU law

As stated above, the guiding principle in Swedish Competition Law is to follow the interpretations made in the case law from the CJEU. Thus, an interesting issue is to what extent the case law of the courts and practice of the KKV follow EU Law. This section will also address the situation before the recent *Intel* case, as well as the situation after that case.⁴² This is a necessity for the comparison with Swedish case law that stems from the time before *Intel*. Moreover, as discussed more in detail below, the exact interpretation of *Intel* seems clearly open for discussion as the CJEU's judgment is hardly clear. At first glance, *Intel* seems to revise the previous case law on a number of points.

Thus, this subsection will first address the state of the law before *Intel* (3.1.1), and subsequently the implications of *Intel* (3.1.2). The analysis of Swedish cases is carried out on basis of two factors which are arguably the most interesting aspects of rebate cases: the taxonomy of rebate systems (3.1.3) and the application of an effects-based assessment (3.1.4).

3.1.1. A summary of discount cases under EU Law before *Intel*

Before analysing the Swedish cases on discounts it is important to reiterate the most important parts of the case law on rebates under Article 102 TFEU from the CJEU. In principle, it could be said that the case law on rebates before *Intel* was to a high degree formalistic.⁴³

42. Case C-413/14 P, *Intel Corporation v European Commission*, EU:C:2017:632 (*Intel*). The case was just recently decided before the finalization of this book chapter.

43. G. Federico, 'Tomra v Commission of the European Communities: reversing progress on rebates?' (2011), 32 *E.C.L.R.* 139 (*Federico*); J Kallaughner & B Sher, 'Rebates revisited: anti-competitive effects and exclusionary abuse under Article 82'

To begin with, the union courts had created a taxonomy of categories of rebate system, which, to a greater and lesser extent was applied in individual cases.⁴⁴ Even though this categorization of discount systems may have been revised by the CJEU in *Intel*, it is taken into account for the purpose of the analysis below.

It follows from *Post Danmark II* that there are three categories of discounts which also determine the application of Article 102 TFEU in individual cases.⁴⁵ To begin with, there are so-called quantity discounts.⁴⁶ These are defined as discounts granted incrementally as the amount of purchases from the supplier increases. With incremental it is meant that additional discounts are granted for incremental purchases, that the discounts are given to all undertakings, that the discount is not applied retroactively and that the rebate is given for individual orders.⁴⁷ In theory, it would be possible for such a discount system to constitute abuse, but only if the price, in fact, constitutes a predatory below cost pricing in line with the judgments in *AKZO* and *Post Danmark I*.⁴⁸ However, in such cases, it could be argued that it is not the discount system which is problematic but the level of the price itself. It should also be noted that the definition of quantity rebates clearly focuses on the form of the measure, meaning that for certain discounts that remain above costs there is a (very narrow) *per se* legality, at least under the case law on discount systems. It follows

(2004), 25 *E.C.L.R.* 263 (*Kallaugher & Sher*).

44. As expressed by the CJEU in *Post Danmark II* and the General Court in *Intel*. *Post Danmark II*, paragraphs 27–29; Case T-286/09, *Intel Corp. v European Commission*, EU:T:2014:547, (*Intel, General Court*), paragraphs 74–78.

45. *Post Danmark II*, paragraphs 26–29.

46. *Post Danmark II*, paragraph 27; Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36 (*Hoffman-La Roche*), paragraph 89; Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313 (*Michelin I*), paragraph 71.

47. *Post Danmark II*, paragraph 28.

48. Case C-62/86, *AKZO Chemie BV v Commission of the European Communities*, EU:C:1991:286 (*AKZO*), paragraphs 71–72; Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, EU:C:2012:172 (*Post Danmark I*), paragraph 27; see also the Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C45/7 (*Enforcement Paper*), paragraphs 63–74.

that the form of quantity discounts is *presumed* to be justified by the fact that the increased sales supposedly result in economics of scale.

The second category of discounts are the so-called loyalty, fidelity or exclusivity discounts (hereinafter as loyalty discounts).⁴⁹ These are defined as discount systems in which the customer agrees to purchase all or almost all products or services from one and the same supplier. The categorization assumes that there is no economic justification for the requirement of exclusivity in terms of the discount representing some form transfer of cost reduction from the supplier to the customer related to the increased volume of trade. This does not mean that there are no economic justifications for the exclusivity as such. Exclusivity may be justified by a number of reasons such as the prevention of free-riding from a distributor (the customer) or competing suppliers (see section 3.2). Looking at the case law of the Court, the focus lies on the form of the measure, the requirement of loyalty or exclusivity.⁵⁰ Once 'loyalty' is established there is no evaluation of the effects on the market. Instead, it is assumed that the measure will induce behaviour from customers which will have negative effects on competitors.

The third category of discount systems is the so-called conditional discounts.⁵¹ This type of discounts is not properly loyalty discounts, due to the fact that they do not include a requirement of exclusivity for the grant of the discount, but that they have similar effects. It would normally include an incentive mechanism for the customer to purchase from one supplier to the effect of excluding competing suppliers. By contrast to the assessment of loyalty discounts, the Court has stated that it is necessary to consider all the cir-

49. *Post Danmark II*, paragraphs 27; Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, EU:C:1979:36 (*Hoffman-La Roche*), paragraph 89; Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313 (*Michelin I*), paragraph 71; Case C-549/10 P, *Tomra Systems ASA and Others v European Commission*, EU:C:2012:221 (*Tomra*), paragraph 70.

50. *Intel*, AG Opinion, paragraphs 63–64. Even though AG Wahl claims that the court, in practice, has engaged in an assessment of 'all circumstances' in *Hoffman-La Roche*, he acknowledges that this is not what follows from the Court's explicit statement in the case.

51. Case 322/81, *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313 (*Michelin I*), paragraph 72.

cumstances, including the criteria governing the grant of the rebate, and an investigation whether the rebate in providing an advantage not based on any economic service justifying it, the rebate tends to remove or restrict the customer's freedom to choose his sources of supply, to bar competitors from market access, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition.⁵² It should also be noted in this context, that the courts have found that the lack of transparency for customers due to the complexity or changes made to the discount scheme may also increase the dependency on the dominant undertaking.⁵³ In addition, depending on the facts of the case, it may be necessary to assess the extent of the dominant position as well as the particular conditions prevailing in the relevant market.⁵⁴ This includes an assessment whether market entry is hindered or made more difficult, and whether it is either impossible or made more difficult for customers to choose other sources of supply.⁵⁵ What is clear from the Union courts' approach in these cases is the necessity of an assessment of market conditions and how those conditions are affected by the discount system. What remained contentious before *Intel* was the test that applied to determine whether the discount system would be loyalty inducing and how deep a market investigation had to be in order to establish the capability of the discount system to materialize in actual anticompetitive effects in the market. Consequently, there has been a debate whether the test for conditional rebates should be characterized as formalistic or effects-based.

Looking at the relevant test for establishing a loyalty inducing effect, the *Enforcement Paper* introduced the application of the as-efficient-competitor (AEC) test for conditional discounts. It constitutes a price-cost test that determines the effective price a rival to the dominant undertaking would have to offer in order to compensate customers for the loss of discounts on the uncontestable share of the market.⁵⁶ The test sets a high threshold for finding a loyalty inducing

52. *Post Danmark II*, paragraph 29; *Tomra*, paragraph 71.

53. *Michelin I*, paragraph 83; *Michelin II*, paragraph 111.

54. *Post Danmark II*, paragraph 30.

55. *Post Danmark II*, paragraph 31.

56. *Enforcement Paper*, paragraph 41.

effect on customers. However, it follows from *Post Danmark II* and previous case law that there is no absolute necessity to apply the AEC-test, as designed in the *Enforcement paper*, for establishing a loyalty inducing effect.⁵⁷ Instead the CJEU stated that the AEC-test could be used as one method to establish such an effect.⁵⁸ It follows from the previous case law, as well as *Post Danmark II*, that the courts have inferred such a loyalty inducing effect on basis of portion of the uncontestable part of the market and whether the discount system has been based on retroactive or target rebates.⁵⁹

As concerns the investigation of market effects, ignoring the statements made by the Court but focusing on what has actually been assessed, it seems that such an investigation has not been as deep going in abuse cases in comparison with the assessment made e.g. of exclusivity agreements under Article 101 TFEU.⁶⁰ Rather, the Court seems to infer factors such as barriers to entry or expansion, the viability to choose other sources of supplies, and the impact on rivalry on the strength of the supplier's dominant position. For instance, the Court has not accepted that there is a need to establish an appreciable effect on competition from the rebate system.⁶¹ Whether such an approach is legitimate or justifiable from an economic perspective may be debated, but what seems clear is that the extent of an effect-based test is much less detailed in these cases. It seems also relatively clear, that this more superficial market investigation is partly based on the notion of the dominant undertaking's special responsibility, meaning that there is negative obligation on the undertaking not to even distort competition a little or to push competitors to certain sections of the market.⁶²

Moreover, it follows from the case law that both second and third category discount systems may be rationalized under the doctrine of objective justifications.⁶³ What follows from the case law is that the courts have accepted the economics of scale justification only

57. *Post Danmark II*, paragraph 57; *Tómra*, paragraphs 73–74 and 80–81.

58. *Post Danmark II*, paragraph 61.

59. *Post Danmark II*, paragraphs 39–40, 46 and 59.

60. Subiotto & Coombs, pp. 323–326.

61. *Post Danmark II*, paragraphs 70–74.

62. *Post Danmark II*, paragraph 72; *Tómra*, paragraph 42.

63. Case C-95/04 P, *British Airways v Commission*, EU:C:2007:166 (*British Airways*), paragraph 69.

under the assessment of the abuse by excluding quantity discounts from the prohibition under Article 102 TFEU.⁶⁴ When the discount system has deviated from quantity discounts, the courts and the Commission require an additional justification for the particular design of the discount system.⁶⁵ So far, the use of the doctrine of objective justifications by dominant undertakings has been scarce and unsuccessful. For instance, in *British Airways*, it was claimed that high fixed costs could justify the application of target retroactive rebates (see section 3.2).⁶⁶ This claim has also received support by academics arguing that the Commission should have made a deeper inquiry into the effects.⁶⁷ While such a view may be supported, it must also be noted that the argument made by the dominant undertaking was not formulated as the price discrimination argument in economic theory. Moreover, the CJEU also objected to the use of increasing thresholds (for the individual customers) between reference periods which does not fit easily with the economic argument based on fixed costs. Thus, it is not possible to draw the conclusion that economic justification related to price discrimination and fixed costs was either applicable in the case, or that the economic argument was unjustly rejected by the Court. Moreover, in *Michelin II*, the dominant undertaking required a number of measures, including promotion, to induce marketing and sales by dealers. Arguably, both economic theory, as well as the Commission's previous practice, expressed a favourable view on discounts or bonus systems serving as remuneration mechanism for costs attributed to the promotion of the supplier's brand.⁶⁸ However, the dominant undertaking failed in explaining or structuring the argument so as to fit with the economic justifications based on aligning the incentives of dealers with the supplier (see section 3.2). It follows that while there has been a formal possibility objectively to jus-

64. *Michelin I*, paragraphs 71; Case T-203/01, *Manufacture française des pneumatiques Michelin v Commission*, EU:T:2003:250 (*Michelin II*), paragraph 58.

65. Case T-219/99, *British Airways v Commission*, EU:T:2003:343 (*British Airways, General Court*), paragraphs 281–286; *Michelin II*, paragraphs 59–60 and 107; Commission Decision, *Intel*, COMP/C-3/37.990, D(2009) 3726 Final (*Intel Decision*), paragraphs 1624–1640.

66. *British Airways*, paragraph 81; *British Airways, General Court*, paragraph 260.

67. O'Donoghue & Padilla, pp. 464–465.

68. O'Donoghue & Padilla, pp. 505–506; Case T-228/97, *Irish Sugar plc v Commission of the European Communities*, EU:T:1999:246 (*Irish Sugar*), paragraph 173.

tify discount system deviating from quantity discounts, this has remained mainly a *theoretical* option.

From a more general perspective the case law on the rebate systems indicates that quantity rebates (above costs) are simply seen as competition on the merits with no need to take a closer look on the effects of the measure. It is simply assumed that the discount reflects the cost savings made through economics of scale. The second category of discounts constitutes the contrary example, a form of competition that is to such a degree not on the merits, that there is also no need to take a closer look on the effects in the market. Obviously, a dominant undertaking still has the possibility to justify the exclusivity through objective justifications, but this has been utterly unsuccessful in real cases. In comparison to the two aforementioned categories of discount systems, the third category instead constitutes such an ambiguous measure that requires some form of effects assessment. It could be debated how far reaching this so-called effects-assessment actually is. It seems that the Court has mainly focused on the size of the non-contestable part of the market and the ‘lock-in’ or suction effect caused by the design of the discount system.

This taxonomy of discount systems has been strongly criticized by AG Wahl claiming that even cases on loyalty discount should include an effects-based approach.⁶⁹ This view is supported by economic theory that indicates that there are efficiency justifications also for loyalty discounts (see subsection 3.2). While the possible pro-efficiency arguments for loyalty and loyalty-inducing discounts are generally accepted, it does not necessarily imply that the assessment of these arguments should be considered when establishing a *prima facie* abuse. At least in theory, it could be argued that dominant undertakings may have the possibility to present such arguments for the second and third category of discount systems at the stage of objective justifications. However, looking at the state of the case law before *Intel*, such objective justifications have not been a viable way for dominant undertakings to escape Article 102 TFEU. This outcome may be due to two reasons. Either dominant undertakings have been incapable of effectively presenting such arguments, or the doctrine of

69. Opinion, AG Wahl, Case C-413/14 P, *Intel Corporation Inc. v European Commission*, EU:C:2016:788 (*Intel, AG Opinion*).

objective justifications has been construed so narrowly that it is nearly impossible to succeed with such an argument.⁷⁰ If the latter is true, there is a risk for type I errors, which would support the approach of AG Wahl to impose an additional burden on the Commission or other claimants to substantiate potential effects in the individual case.

3.1.2. Intel and its implications

The main question that emerges from *Intel* is how much of the taxonomy according to the previous case law, and its impact on the analysis of discount systems, remains. *Prima facie*, it seems as the judgment gives room for several interpretations. Firstly, the CJEU appears to have shifted away from the categorization of different discount systems described above. While restating the Court's previous statements on loyalty discounts, it made an important addition. The Court holds that if the dominant undertaking submits that its conduct was not able to restrict competition and result in foreclosure effects on the basis of supporting evidence in the administrative proceedings before the Commission, it gives rise to two important consequences for the assessment of the discount system.⁷¹

To begin with the Commission must, apart from the obligations to assess the conditions and arrangements of the discount system, the market share covered by the discount system and the extent of the dominant position, determine the possible existence of a strategy aiming at excluding competitors as efficient as the dominant undertaking itself.⁷² This seems to be an essential statement as the practical consequence would be that the Commission more or less has an obligation to carry out the AEC-test as soon as the dominant undertaking presents a submission that is not obviously lacking of any support. It seems also unlikely that the Commission would pursue with a fining decision without carrying out an AEC-test considering that the decision could subsequently be invalidated by the General Court due to an 'insufficient investigation'. Moreover, the Commission must carry out an investigation of the possible objective justifications,

70. Rey & Venit, p. 26; Hinted in O'Donoghue & Padilla, pp. 504–508.

71. *Intel*, paragraph 138.

72. *Intel*, paragraph 139.

which includes a balancing exercise between the impact of foreclosure effects and the favourable effects of the discount system.⁷³

Moreover, the General Court has an obligation to examine all the arguments made by the dominant undertaking challenging the assessment made by the Commission, which includes the in-depth analysis described above.⁷⁴ As held by the CJEU, the Commission made an analysis under the AEC-test in *Intel*, and which was also important for the Commission's findings.⁷⁵ Thus, the General Court had failed in its assessment of the Commission decision. It is difficult to see how the Commission may actually avoid the AEC-test and an assessment of all circumstances also in cases concerning exclusivity rebates. The general statement regarding the impact of claims made by the dominant undertaking during the administrative proceedings should effectively open up the door for dominant undertaking to press the Commission to engage in an effects-based assessment.

A second observation is that the Commission is effectively discouraged from using a formalistic approach not only as a stand-alone argument, but also as an alternative argument. In *Intel*, the Commission had a two-tier approach, basing itself on the formalistic argument, and alternatively, on an effects-based approach. However, there seems to be little purpose for the Commission to use the formalistic argument, if the General Court in the appeal stage is nonetheless forced to examine all arguments put forward by the dominant undertaking. Accordingly, even if the CJEU, in theory, leaves room for the use of a formalistic argument to the situation where the dominant undertaking abstains from defending itself with the use of some supporting evidence, it seems hardly likely that this would apply to many situations.

A third observation is that the CJEU judgment amends the structure of analysis of abuse in the Commission's administrative procedure. According to *Intel*, once the Commission has demonstrated a *prima facie* case, e.g. by a formalistic assessment in line with the previous case law on loyalty discounts, the dominant undertaking may 'trigger' a more in-depth investigation requiring the demonstration of effects. If the Commission demonstrates anti-competitive effects, the

73. *Intel*, paragraph 140.

74. *Intel*, paragraph 142.

75. *Intel*, paragraph 143.

dominant undertaking has to present an efficiency defence. Finally, the Commission would have to make a balancing exercise to show that the anti-competitive effects outweigh efficiencies.⁷⁶ An additional question is naturally if the application of such a structure of analysis is limited to the category of exclusivity discounts, while the previous case law still applies for the category of conditional rebates requiring a complete assessment of effects. However, previous case-law on the third category of discounts has also been characterized by a formalistic analysis without the need to perform the AEC-test. Thus, the structure of analysis envisaged in *Intel* is likely to be relevant also for the assessment of conditional discounts.

A final observation on *Intel* is that while the CJEU may have indicated the AEC-test to be applicable also to loyalty discounts, the judgment is not exhaustive as regards how that test should be performed. In this context, previous cases such as *Tomra* and *Post Danmark II*, could indicate that such a test does not necessarily have to be carried out through a price-cost test as applied in the Commission's *Enforcement Paper*.

3.1.3. The taxonomy applied in Swedish Competition Law in comparison to EU Competition Law

It seems as Swedish Competition Law on a general level follows the taxonomy applied in EU Competition Law. It should, however, be noted that neither the Market Court nor the KKV have explicitly defined the three categories found in CJEU's case law but that the taxonomy, more or less, has been followed in the individual cases.

Firstly, the KKV decisions in *Telia* and *Flying Enterprise* concerned obligations imposed on customers to purchase all or almost all their supplies from the dominant undertaking. The KKV also explicitly identified the practices in the cases as loyalty discounts. Moreover, in *Telia*, the KKV explicitly referred to the CJEU's case law on loyalty discounts as *Suiker Unie* and *Hoffman-LaRoche*.⁷⁷ In none of these cases, the KKV engaged in a deeper analysis of the market or effects. At most, the KKV explained the perceived exclusionary effects of loyalty discounts without engaging in an assessment

76. *Intel*, paragraph 140.

77. *Telia*, recitals 24–28.

whether such effects had taken place or were likely to take place in the market.

Secondly, on an overall level the Market Court and the KKV have also followed the CJEU's case law on the third category, conditional rebates. The Market Court conceded in *Bring Citymail* that the case fell neither within the first nor the second category, and accordingly applied that the standards follow the third category of cases such as *Michelin I* and *Michelin II*. While the Market Court paraphrased statements from CJEU's case law and formally examined all relevant circumstances, the degree of market analysis and effects seems questionable at best. As discussed above, this may be explained by the fact that the case was pursued through the subsidiary right of the complainant to take the case to the Court.

Moreover, all cases concerning multi-product discounts were all assessed under the standard applied to conditional rebates. In *Telia Mobitel*, the discount system was found to have a loyalty inducing effect, in particular for previous customers for telephone services under NMT-standard, as it created an incentive to also purchase services under the GSM-standard to benefit from the lower price. As it was not possible for competitors to *de facto* establish themselves in the market for NMT-services, it appears that the court saw the situation as a form of leverage. However, as discussed below, neither the KVV nor the court engaged in a discussion on actual or likely effects in the market. In *Linde Energi* the discount aimed at limiting competition in an adjacent market, a form of tying. The KKV conceded that nothing hindered, in theory, that customers could purchase their electricity from several suppliers.⁷⁸ In other words, formally, there was no explicit requirement to purchase all or almost all supplies from the dominant undertaking. However, in practice, customers would likely stick to one electricity supplier once the choice was made. As the discount system across markets gave strong incentives to purchase the electricity also from the dominant supplier, the situation seems to have been interpreted as a loyalty discount as the decision does not include any in-depth analysis of the market. However, this conclusion must be qualified considering that the cases were not further litigated through appeals.

78. *Linde Energi*, recital. 45.

Finally, it is also pertinent to address the use of the doctrine of objective justifications. It should be noted that the defendant in *Bring Citymail* mainly relied on cost benefits in the form of economies of scale for the retroactive discounts. The EU case law before *Intel*, however, seems to require an additional justification for a discount system that falls within the second and third categories of discount systems. Although the case turned on the failure by the dominant undertaking to prove the cost benefits of the discount system, the Market Court emphasized that the particular design of the discount system was also not justified in the light of the presented evidence. Such a view seems to fit well with the view of the Union courts.

In sum, on a general level the Swedish courts and the KKV seem to have followed the taxonomy of the court as applied before *Intel*. As further developed below, it could be discussed to what an extent ‘all circumstances’ have actually been assessed in the individual cases. On the other hand, the same type of criticism could also be presented against on the case law of the Union courts before *Intel*. Unsurprisingly, it seems also clear that this formalistic approach to discounts in Swedish Competition Law hardly fits well with the CJEU’s judgment in *Intel*.

3.1.4. To what an extent does an effects-based analysis apply in Swedish Competition Law?

It is obvious that there is no full scale assessment of effects of discount systems in Swedish Competition Law. Rather the KKV and courts have exhibited a formalistic approach. The interesting issue for the discussion in this subsection is to what an extent market factors have been taken into account in the assessment of the third category of discounts. As stated in the CJEU’s case law, it is necessary to assess all circumstances, including the degree of dominance, the market share of the dominant undertaking, the market coverage of the discount practice, and possible foreclosure effects.

In light of these factors, the courts and the KKV have considered the degree of dominance. In *Bring Citymail*, it was an important factor for the assessment of abuse that Posten had a very strong dominant position, because of its market coverage and thus its uncontested part of the market. The same fact was considered in *Eurobonus I* where competition on the market was seen as fragile also to a great degree

due to the coverage of the domestic flights in Sweden by SAS. It is noteworthy that when SAS reintroduced its bonus system later, the KKV, on basis of the changed market conditions, found that the bonus system did not result in restrictions of competition. Thus, the courts seem mainly to have focused on the market share of the dominant undertaking.

Moreover, the courts have also looked at the possibility to contest parts of the market. The Market Court underlined the fact in *Bring Citymail*, as well as the Stockholm City Court did in *Telia Mobilitel*, that the dominant undertaking had a subpart of the market which was uncontestable. In *Bring Citymail* this resulted in a greater discount than competitors could offer on basis of the contestable part of the market, while in *Telia Mobilitel*, it was found that it gave a greater discount and thereby a greater incentive for customers to choose the dominant undertaking. In *Eurobonus I*, this factor seems to have been a contributing factor also to the finding of the high degree of dominance.

Finally, as regards foreclosure effects, Swedish cases indicate that this assessment is quite superficial. The KKV decisions on target and multiproduct discount do not really investigate the effects of the discount systems on the market but merely address the 'lock-in' effect on customers. Moreover, in *Bring Citymail* the Market Court seems to have been satisfied with anecdotal evidence of the actual 'tie-in' effect of the particular retroactive discount system. Arguably, a more careful analysis of market conditions was made in *EuroBonus I* and *CEKAB*. In *EuroBonus I*, the judgment went more into depth regarding the competitive conditions and entry barriers, such as the allocation of advantageous slot times at airports, due to the 'meeting competition' defence invoked by SAS. In *CEKAB*, the Court focused on the probable market effects. However, this is probably due to the fact that the case constituted primarily a price discrimination case (under the prohibition against anti-competitive agreements) where it was necessary to establish that customers would suffer a competitive disadvantage amounting to an appreciable restriction of competition. Moreover, as speculated above, it is questionable whether the same conclusion could have been reached in a case concerning a dominant undertaking where competition on the market would already have been restricted.

3.2. Comparison to economic theory

A brief comparison between Swedish cases and the discussion in economic writing on discounts is made in this subsection. As the benefits of discounts by increased volumes of sales and potential economics of scale are obvious, this subsection will in particular focus on economic writing providing justifications for the those discount systems that are perceived as problematic, the loyalty and loyalty inducing discounts systems. It must also be stated that the description below of different economic theories rationalizing either the prohibition or the justification of discount systems is somewhat superficial. However, for the purpose of this subsection, which is to compare economic models with the reasoning applied in judgments and decisions, this is sufficient. As noted above, the arguments in judgments and decisions from the courts and the KKV are hardly elaborated, and thus, the task in this subsection is more to identify what theories could viably support the approach taken in Swedish cases, rather than establishing support with absolute certainty. In addition, it is also discussed to what an extent the individual factors relevant according to economic models have been assessed by Swedish courts.

Starting with the support for prohibiting loyalty-inducing discounts, the main theory relies in particular on the factor that the dominant undertaking has a non-contestable part of market. In such cases, competitors to the dominant undertaking have to offer not only a competitive price for the contestable part of the market, but also compensate the customers for discounts that are given by the dominant undertaking for the non-contestable part of the market. The higher the uncontestable part of the market, the more difficult it becomes for rivals to set a competitive price.⁷⁹ This effect may be so strong as to require competitors to offer negative prices. According to economic writing, it is also required that the discount system may hinder effective entry, by limiting rivals to such a small part of the market that impedes the minimum efficient scale of entry. Consequently, a market that is expanding may still negate the anti-competitive effects of the discount system as rivals could expand with the growing demand.⁸⁰

79. Subiotto & Coombs, p. 370.

80. O'Donoghue & Padilla, pp. 469–470.

Additionally, it is also argued that discount systems may result in a ‘lock-in’ effect due to bounded rationality. Customers which have incurred sunk costs and that are prone to loss aversion may keep to the dominant supplier to benefit from the discount even if it would be more beneficial to shift to another supplier. Moreover, lack of transparency may also result in the same effect.⁸¹

As concerns theories supporting positive effects of discounts, in particular loyalty or loyalty-inducing discounts, they indicate that such discount systems may be used for efficient (second degree) price discrimination, the reduction of double marginalization effects, the provision of incentives for better incentives for retailers, and the resolving of hold-up problems.⁸²

The justification based on price discrimination relies in particular on the demonstration that the supplier is burdened by high fixed costs and that sale volumes would suffer unless the supplier could price discriminate for supplies in the contestable part of its sales.⁸³

Regarding the double marginalization justification, it is necessary to show that both the supplier and retailer are in positions of market power.⁸⁴ Only in such a case, would the discount system induce the reseller to increase its sales volume reducing the double margin. An interesting insight from this model is that a retroactive rebate has been shown to be more effective in eliminating double marginalization.⁸⁵

The third and fourth justifications require that it is established that there are incentive problems in the relation between the supplier and the reseller. The third justification addresses the situation when

81. A Heinemann, ‘Behavioural Antitrust—A “More Realistic Approach” to Competition Law’, Chapter 11 in K Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer 2015), p. 211 (Heinemann), p. 226.

82. O’Donoghue, R., and J. Padilla, *The Law and Economics of Article 102 TFEU* (Hart 2013) (O’Donoghue & Padilla), pp. 464–468.

83. D Geradin, ‘A Proposed Test for Separating Pro-competitive Conditional Rebates from Anti-competitive Ones’ (2009), 32 *World Competition* 41 (Geradin), pp. 64–65. O’Donoghue & Padilla, p. 465.

84. O’Donoghue & Padilla, p. 467; R Subiotto and J Coombs, ‘Exclusive dealing: Exclusive obligations, Quasi exclusive obligations and Rebates’, Chapter 6 in F E Gonzalez-Díaz and R Snelders (ed.), *EU Competition Law Series, Volume V: Abuse of Dominance Under Article 102 TFEU* (Claeys & Casteels, Netherlands 2013), pp. 319–384 (Subiotto & Coombs), p. 340.

85. O’Donoghue & Padilla, p. 467.

the reseller would not have sufficient incentives to market, advertise or offer complementary services because profits for reseller are too low. A discount system would thus incentivize the reseller to take such measures and thus aligns the resellers' and suppliers' interests.⁸⁶ As concerns the fourth justification, it requires that the supplier makes investments into the specific relation with the reseller.⁸⁷ In such a case, if the reseller would focus its sales on competitors' products, e.g. because they are cheaper, the supplier's investments would benefit competing suppliers.⁸⁸ A discount system with loyalty inducing effects thus makes sure that the reseller focuses on the supplier's products which permits the latter to regain its investments.

Looking at Swedish cases on discounts, it follows that most of them have concerned a two-markets-situation where the dominant undertaking had a non-contestable market or at least a non-contestable part of the market. In *Bring Citymail*, the dominant undertaking only faced competition for mail services in urban areas. Likewise, in *Eurobonus I*, *Telia Mobiltel*, and *Linde Energi*, the dominant undertakings were the sole suppliers in the market for certain services in the market (certain flight destinations and analogue telecommunication services). At the outset, the theory indicating anticompetitive effects applied in these cases cannot be criticized for lacking support in economic theory.

However, a more interesting question is whether the Courts and the KKV have also relied on the same factors which should be assessed in order to establish anti-competitive effects according to economic theory. Obviously, market power was established in all these cases. Moreover, in all cases an assessment of the capability of the discount system to 'tie-in' customers has also been performed. In this regard, it should also be noted that the KKV also acknowledged in *Posten* that the lack of transparency in the conditions for granting a discount may result in a tie-in effect. The uncontestability seems also not to be open for discussion in *Bring Citymail*, *Telia Mobiltel*, and *Linde Energi* where there were clear technical, economic or legal barriers.

86. O'Donoghue & Padilla, p. 466.

87. Geradin, p. 65.

88. P Rey & J S Venit, 'An Effects-Based Approach to Article 102: A Response to Wouter Wils' (2015), 38 *World Competition* 3 (Rey & Venit), p. 20; Subiutto & Coombs, p. 339.

ers to entry in the non-contestable part of demand. In *Eurobonus I*, it seems also that there was strong support for that certain markets were non-contestable. Existing rivals on several flight destinations were affiliated to the dominant undertaking, which was the only airline that *de facto* would cover all of the Swedish market for domestic flights. All in all, it seems that the structural factors of market power and non-contestable part of the market have been considered and established in the case law.

The main criticism against the Swedish cases concerns the establishment of the capability of the discount system to pressure the price of rivals to such an extent that it would hinder them from effectively compete with the dominant undertaking. It is in this context where the comparison with an equally efficient competitor, such as the AEC-test used in the *Enforcement Paper*, becomes relevant as well as an assessment of the likely effects in the market. However, in *Bring Citymail*, the Market court relied on the case law previous to the *Enforcement Paper* and stated that there was no legal requirement to use AEC-test to establish abuse in individual cases. Nor did the Market Court engaged in a detailed assessment of the likely market effects when finding that the discount system would have such a foreclosure effect. Rather, the Market Court seems almost to have assumed that such a foreclosure effect would occur because of the non-contestable part of demand and the extent of the dominant position.

As concerns efficiency defences, it follows from the case law that the main argument has been general cost benefits rather than any of the elaborated theories described above. In *Bring Citymail*, the Market Court did not accept the evidence suggesting cost benefits presented by the dominant undertaking. In *CEKAB*, it seems that the Market Court accepted the argument on cost benefits, but the case was mainly decided on basis that the cooperating parties lacked market power. Accordingly, it is an open question whether the court would have reached the same conclusion in the presence of market power outweighing the benefits of the discount system. By contrast to these cases, in *Eurobonus I*, the dominant undertaking relied unsuccessfully on the argument that its competitiveness on the international market would be affected. All in all, it seems that Swedish cases show the same tendency found in EU competition law. While economic theory gives strong support for the benefits of loyalty and loyalty inducing

effects, these have hardly been relied upon by defendant dominant undertakings in individual cases. Moreover, none of the court cases seem to fit with the models described above. While it is prudent not to draw too far reaching conclusions based on the few Swedish cases, it could be speculated whether there is a disconnect between the reasons for applying a loyalty or loyalty inducing discount system in reality with the justifications presented in economic theory. Two possible conclusions could be drawn from this. Firstly, the models in economic theory are too elaborated and do not reflect the real reasons behind the application of discount systems by undertakings in real markets. Secondly, it may be crucial that the assessment of anti-competitive effects of discount system is subject to a rigorous analysis as it is almost impossible successfully to invoke an efficiency defence. Such rigorous analysis has clearly not been applied in Swedish cases.

4. Conclusions

In general, the assessment of rebates in Swedish cases from the courts and the KKV have mainly relied on the formalistic approach applied in EU Competition Law before *Intel*. While the KKV seems to have shifted its view subsequent to the publication of the Commission's *Enforcement Paper*, the Market Court has upheld a formalistic assessment by rejecting the argument that the AEC-test had to be applied. Although the exact implication of *Intel* is an open ended question, it seems as an assessment of loyalty discounts also require the comparison to an effective competitor if the dominant undertaking presents a defence based on the application of the test. As concerns a comparison between the Swedish case law and economic theory, the latter seems to give support that the discounts system in the individual case could have had an anticompetitive effect. However, the most problematic aspect is that the level of analysis applied in assessing the relevant factors to establish anti-competitive effects. While the courts and the KKV have identified the 'structural' factors, such as market power and the non-contestable nature of the dominated market, they have been poor in justifying foreclosure, both in terms of how the discount system has had the capability of pressuring the prices of rivals and the likely effects in the market. Rather, the case-law indicates that these negative effects have been presumed to follow from the structural factors.