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ABUSE OF A DOMINANT POSITION IN EUROPEAN COMMUNITY COMPETITION LAW: EXCLUSIVE DEALING

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INTRODUCTION

Under the legal regulation of European Community any abuse of a dominant market position is prohibited.[1] The non exhaustive list of the forms of abusive conduct of a dominant undertaking can primarily be found in the Article 102[2] of Consolidated version of the Treaty on the Functioning of the European Union (hereinafter „Treaty“)[3]. Unfortunately, the notion of exclusive dealing as a distinct form of abusive conduct of dominant undertaking is neither expressly defined in the Treaty itself, nor in any other European Community legally binding act[4]. According to Melamed A.D., exclusive dealing agreements are agreements in which one party promises to deal exclusively with another and, thus, not to deal with competitors of the other.[5] Though the definition of exclusive dealing was developed and ultimately established by the European judicial practice and doctrine, the criteria when the dominant undertaking's conduct is considered abusive are still problematic. The fact that this kind of conduct can be abusive and incompatible with the objective of undistorted competition within the common market was firstly recognized by the Court of Justice of European Community in the case of *Hoffmann-La Roche*[6] and after that there were more prominent cases where the European Commission and courts decided whether exclusive dealing contracts fell under the regulation of Article 102 of the Treaty.

Exclusive dealing presents a challenge in an antitrust enforcement. The problem is that on one hand such agreements are potentially harmful, but on the other hand they may bring considerable benefits not just for the parties of the agreement but also for consumers.

Novelty of the topic. Though the exclusionary conduct of dominant undertakings is a popular field of various researches, exclusive dealing as a separate form of conduct has been

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[1] This prohibition is expressly established in the Article 102 of Consolidated version of the Treaty on the Functioning of the European Union: "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."

[2] All references to Articles 81 and 82 EC should be respectfully understood as references to the current Articles 101 and 102 of the Consolidated version of the Treaty on the Functioning of the European Union and *vice versa* // OJ 2008/C 115/01

[3] Consolidated version of the Treaty on the Functioning of the European Union // OJ 2008/C 115/01

[4] Though the notion of exclusive dealing can be implied from "The Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings" // OJ 2009/ C 45/7, the Commission emphasizes that this 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 Court of First Instance.

[5] Melamed A. D. Exclusive Dealing Agreements and Other Exclusionary Conduct – Are There Unifying Principles? // Antitrust Law Journal. 2006

[6] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities //* [1979] ECR 461

comprehensively analyzed only by a few scholars.[7]. The novelty of the topic is also determined by the fact that in 2005 the European Commission decided to reform Article 102 of the Treaty and abandon its historical and highly criticized *form-based* approach towards more economic so-called *effects-based* approach. According to it, the assessment of an exclusionary conduct of dominant undertaking should be based on measurable effects on the market of such conduct. In other words, by applying the *effects-based* approach the Commission set a task to carefully discern competitive conduct that harms competition from conduct that advances it. Thus, before making conclusion that exclusive dealing agreements concluded by dominant undertakings infringe competition, the Commission stated that convincing evidence and sound economic analysis should be required. To this end in 2005 the European Commission issued a comprehensive Discussion Paper[8] which rejected formalistic approach in favor of aforementioned *effects-based* approach. After a long public consultation, the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings was adopted in 2009.[9]

However, despite the Commission's formal efforts to reform the application of Article 102 of the Treaty, the contradictory decisions in the latest *Intel*[10] and *Tomra*[11] cases demonstrated that the assessment of exclusive dealing agreements concluded by dominant undertakings is still ambiguous.

Finally, the topic is also relevant because there are scarcely any articles by Lithuanian scholars which would analyze exclusive dealing before or after the reform of the Article 102 of the Treaty. Although some Lithuanian scholars[12] issued several publications in relation to abuse of dominance in European Community competition law, exclusive dealing as such has not been comprehensively analyzed.

Problem. Legal certainty is one of the most important general principles of law meaning that laws should provide clear rules and that person should not remain in a situation with uncertainty about the legal outcome. Thus, in our opinion, to encourage dominant undertakings to plan their business activity or to refrain from abusive conduct, clear boundaries what is legal and what is illegal should be established.

[7] E.g. Jones A., Sufrin B., O'Donoghue R., Padilla J. A., Whish R.
[8] Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses // http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf, access time: 24 November 2011
[9] The Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings // OJ 2009/ C 45/7
[10] Case COMP/C-3/37.990 – *Intel* of 13 May 2009
[11] Case COMP/E-1/38.113 – *Prokent/Tomra* of 29 March 2006; Case T – 155/06, *Tomra Systems ASA and Others v European Commission* // OJ 2010/C 288/31
[12] Moisejevas R., Novosad A., Švirinas D., Volochova A.

Hypothesis. Neither European Union legal acts nor established case law provide dominant undertakings with any safe harbor to determine whether their exclusive dealing agreements are compatible with European competition law.

The object of this paper is the concept and forms of exclusive dealing as well as conditions under which the dominant undertaking is considered abusing its dominant position through the conduct leading to explicit or *de facto* exclusive dealing.

The goal of this paper is to comprehensively analyze how the assessment of exclusive dealing as abusive conduct has been formed in European Commission's and courts' practice and how it has changed (if at all) after the reform of the Article 102 of the Treaty.

In order to reach aforementioned goal it is needed:

1. To reveal the concept of exclusive dealing and distinguish main forms of this phenomenon found in practice.
2. To contemplate the implications of the Reform of Article 102 of the Treaty in regards to safe harbor.
3. To determine if reform of Article 102 of the Treaty brought some actual changes into European case law by analyzing European Commission's and courts' related practice before and after the reform.
4. To make an overview of Lithuanian judicial practice related to the topic.

In collecting and processing the necessary information for this paper these methods were employed:

- *Qualitative analysis of documents* – to critically analyze legal acts, cases and doctrine related to the exclusive dealing;
- *Comparative method* – to compare the most important European judicial practice related to exclusive dealing. This method was also used in comparing various publications of different scholars that analyzed the most problematic issues related to the topic.
- *Logical methods* such as systemic and analytical methods were used to reveal the content and correlation of legal documents, cases and doctrine related to the exclusive dealing phenomena.

All methods mentioned above were also employed in making conclusions and generalization of whole paper.

1. CONCEPT OF EXCLUSIVE DEALING

1.1.Notion of exclusive dealing

In the sense of Article 102 of the Treaty exclusive dealing arrangements are commonly defined as arrangements that require a buyer to purchase all of its requirements or a large extent thereof from one dominant seller, or a supplier to sell all of its products or services or a large extent thereof to the dominant firm.

When discussing generally about exclusive dealing contracts we should point out that in business world such contracts between supplier and customer is a common practice and they are usually lawful. Most exclusive dealing contracts are beneficial because they minimize efficiency costs, encourage marketing support for the supplier's brand, promote more effective distribution by increasing dedication and loyalty, minimize free riding, improve product quality and ensure customers as well as suppliers a reliable source of supply. Nevertheless, as practice shows, such contracts may be potentially harmful if they are concluded by dominant undertakings. For instance, exclusive contracts may be used to deny a competitor access to distributors or retailers without which the competitor cannot make sufficient sales to be viable. Another dangerous situation may occur when a dominant undertaking is a buyer and with its exclusive contracts intends to tie up most or all sources of supply, forcing competitors to leave the market. Because of the aforementioned reasons exclusive dealing is attributed to a form of "exclusionary abuses".[13] In other words, as Gravengaard M.A. and Kjærsgaard N. define, "exclusionary abuse" is a conduct capable of preventing others, in whole or in part, from profitably entering or remaining on a given market, and which will ultimately be harmful to consumers.[14]

For the practical purposes it is important to emphasize that in some texts the term of exclusive dealing contracts may be replaced by the term of "single branding", "exclusive purchasing" or "non-compete obligations".[15] For instance, in the Discussion Paper the Commission employed the definition of "single branding obligation" and defined it as the obligation which requires the buyer on a particular market to concentrate its purchases to a large extent with one

[13] The other form of anti-competitive conduct is "exploitative abuse" which can directly harm consumers such as excessive pricing.

[14] Gravengaard M.A. and Kjærsgaard N. The EU Commission guidance on exclusionary abuse of dominance – and its consequences in practice // European Competition Law Review, Issue 7, 2010, page 288

[15] Whish R. Competition Law. 6th edition. // Oxford: Oxford University Press, 2009, p. 674

supplier.[16] Later in its Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC to Abusive Exclusionary Conduct by Dominant Undertakings (hereinafter the "Guidance Paper") the Commission explained that "a dominant undertaking may try to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates, together referred to as exclusive dealing.[17] Nevertheless, despite the variety of terms, the idea of such agreements always rests the same – dominant undertaking seeks to prevent its costumers from dealing with its rivals and thus to maintain or strengthen its dominant position by foreclosing its rivals from the market. In recent years, however, some manufacturers have begun to use subtle arrangements in which incentives replace requirements and partial exclusivity replaces total exclusivity. Some authors give an example, whereby rather than requiring absolute exclusivity, a manufacturer simply may give a more favorable price to customers who purchase more than a certain percentage of their requirements from the manufacturer.[18] Maybe this was the reason why the Commission in its Guidance Paper analyses exclusive dealing arrangements and rebates together under the title of "Exclusive Dealing". Thus, one can assume that under EC Competition law similar principles could be applied to clauses whereby a customer agrees to source "most" of its requirements from a dominant firm[19] or the latter makes payment of a discount under condition that the customer is dealing exclusively, or mainly, with the dominant firm. The main reasoning is that in reality both partial exclusivity clauses and various loyalty rebates lead to *de facto* exclusive dealing and potentially may have the same effect on competition as pure exclusive dealing. However, a careful analysis of European courts' practice shows that the outcome of each case depends not on the particular form of exclusivity but on the deeper examination of various factors as a whole. For instance, in *Hoffmann-La Roche* some of the contracts contained a specific obligation by the purchaser to obtain exclusively from Roche either "all or almost all" of its requirements or expressed purchaser's "intention" to obtain its supplies exclusively from Roche or purchaser's agreement to recommend its subsidiaries to do the same. In the other contracts the purchasers undertook to buy "the major part" of their requirements or to "give preference to Roche".[20] For those contracts that did not have express clauses requiring customers to source "all" or "most" of

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[16] Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses // http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf >, p. 39, access time: 24 November 2011

[17] The Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings // OJ 2009/ C 45/7, para. 32

[18] Tom W. K.., Balto D. A., Averitt N. W. Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing // 67 Antitrust L.J. 615, 2000

[19] See Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities //* [1979] ECR 461, para. 121

[20] Ibidem. para. 83 – 84.

their requirements from Roche, the Court examined their factual context and concluded that they too were conditional on the customer sourcing "a major part" of its requirements from Roche.[21]

It is worth mentioning that exclusive dealing could be subject under both Article 101 and Article 102 of the Treaty. As Whish R. has noted, the difference between the application of Article 101 and Article 102 of the Treaty to such agreements is that, where an agreement infringes Article 101, both (or all) of the parties to the agreement will have committed an infringement, since the offence lies in the fact of the agreement. On the contrary, in the case of Article 102 it is the dominant firm that infringes the competition rules, since the Article 102 applies to the dominant firm's *unilateral* behavior. [22] However, exclusive dealing has historically been subject to much stricter treatment under the Article 102 than under the Article 101 of the Treaty.[23] Both the European Commission and courts were hostile to such practices and exclusive dealing was considered as *per se* illegal. This approach reflected in a number of prominent cases.[24] For instance, in *Hoffmann-La Roche* Court held that: "An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102] of the Treaty [...]"[25]

With the case of *Van den Bergh Foods*[26] the approach of the Commission and Court of First Instance to exclusive dealing became less strict and more consistent under the Articles 81 and 82 EC. In this case the Court applied rule-of-reason analysis under the Article 81 of the Treaty. Even if the exclusive agreements tied up the market to a large extent (40%), in applying the paragraph 3 of the Article 81 EC the Court balanced their harmful impact on the competition and possible efficiencies.

An important remark should be made that even nowadays Article 102 of the Treaty does not provide any possibility for dominant undertakings to justify their conduct in the case of abuse.

[21] O'Donoghue R., Padilla J. The Law and Economics of Article 82 EC // Hart Publishing, 2006, page 358
[22] Whish R. Competition Law. 6th edition. // Oxford: Oxford University Press, 2009, page 674
[23] O'Donoghue R., Padilla J. in their book The Law and Economics of Article 82 EC. // Hart Publishing, 2006, stressed out that under Article 81 EC exclusive dealing is subject to an effects analysis that requires proof of material anticompetitive effects and, if such effects are shown, an assessment of countervailing efficiencies. Given the ubiquity of vertical restrains, and the need of legal certainty, Article 81 EC has also introduced various block exemptions setting out certain „safe harbors", whereby arrangements between parties that do not possess market power are presumed legal, absent hardcore restrains.
[24]Cases 40/73 *Suiker Unie v Commission //* [1975] ECR 1663, [1976] 1CMLR 295; *Case 85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities* // [1979] ECR 461; Case *BPB Industries plc v Commission of the European Communities* // [1993] ECR 11-389 and others.
[25] *Case 85/76, Hoffmann-La Roche & Co. AG v Commission of the European Communities* // [1979] ECR 461, para. 89.
[26]*Van den Bergh Foods Ltd* // OJ 1998 L 246/1, on appeal *Case T-65/98 Van den Bergh Foods Ltd v European Commission* // [2003] ECR II-4653

However it's worth mentioning that in its Guidelines on Vertical Restrains, addressing the issue of single branding, the Commission has recognized the possibility for a dominant undertakings to justify their allegedly abusive practices by stating that "dominant companies may not impose non-compete obligations on their buyers unless they can objectively justify such commercial practices within the Article 82"[27]. In addition, in *Van den Bergh Foods* case the Commission and Court made significant steps adopting rule-of-reason approach to exclusive dealing under the Article 82 EC, similar to that applied under Article 81 EC. This approach was explicitly recognized in the Discussion Paper[28] where the Commission expressed its position by stating that "Articles 81 and 82 of the Treaty both pursue, with regard to exclusionary practices, the aim of maintaining effective competition on the market and, according to settled case law, can be applied simultaneously. Consistency requires that Article 81(3) be interpreted as precluding any application of this provision to restrictive agreements that constitute an abuse of a dominant position. However, a company holding a dominant position may also benefit from an exemption under Article 81(3) of the EC Treaty when its conditions are fulfilled. Therefore, if the conduct of a dominant company generates efficiencies and provided that all the other conditions of Article 81(3) are satisfied, such conduct should not be classified as an abuse under Article 82 of the EC Treaty."

Pursuing the latter approach O'Donoghue R. and Padilla J.A. made a conclusion that the fact of dominance clearly affects the assessment, but it cannot justify an *a priori* assumption that exclusive dealing by dominant firms is always anticompetitive.[29] In other words, though a dominant position has a considerable importance in such cases, there shouldn't be any presumption that exclusive dealing contracts are *per se* illegal under the Article 102 of the Treaty. It is worth to mention that courts were more cautious when deciding if a particular conduct of dominant undertaking may be considered as an abuse by assessing the real impact of dominant position. Keeping this careful position courts several times quoted *Michelin I* case by stating that "although a finding that an undertaking has a dominant position is not in itself a recrimination, it means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".[30] Despite the preliminary statement that dominant position is not illegal in itself

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[27] European Commission.notice: Guidelines on Vertical Restraints // Official Journal C 291, 13/10/2000 P. 0001 – 0044, para. 141

[28] Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses [interactive] // 2005, Brussels [seen 24 November 2011] < http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf >

[29] O'Donoghue R., Padilla J. The Law and Economics of Article 82 EC // Hart Publishing, 2006, page 358.

[30] Case 322/81 *Michelin v. Commission* // [1983] ECR 3461, para. 57

one can assume that this statement was disadvantageous for dominant undertakings because usually it has been employed as an additional and decisive argument when assessing if dominant undertaking's conduct which otherwise would be a standard business practice was compatible with the European Community competition law. In addition, as the detailed analysis of exclusive dealing cases will show, both the European Commission and courts widely applied hostile *per se* illegality approach towards implicit and explicit exclusive dealing employed by dominant undertakings.

It is also important to emphasize that cases related to exclusive dealing differ in both their content and their conditions. Thus, to provide a common model of exclusive dealing cases is complicated or even impossible. In some cases exclusive dealing may coincide with other forms of abuse, such as tying and bundling or refusal to deal. For instance, in the *Lorain Journal* [31]case which had been settled in the United States the defendant newspaper refused to sell advertising to buyers who bought advertising from the defendant's radio rival. According to the facts of the case a newspaper publisher for 15 years enjoyed a substantial monopoly of the mass dissemination of local and national news and advertising in its community, and 99% coverage of the community's families. After the establishment of a competing radio station, the publisher refused to accept local advertising from those who advertised over the radio station. The purpose of the publisher was to destroy the broadcasting company and thus the actions of dominant publisher comprised features of exclusive dealing and refusal to deal at the same time.

Though some principles in examining different exclusive dealing cases may be the same, the differences and peculiarities of each form of practice cannot be ignored. As it has been already mentioned, exclusive dealing is attributed to the conduct of "exclusionary abuses". To better understand the possible ways leading to exclusion, in the beginning it is purposeful and useful to distinguish between two different areas where exclusive dealing may take place. O'Donoghue R. and Padilla J.[32] define them as exclusive dealing which may have an impact on downstream market and as exclusive dealing which may affect upstream market.[33] The first one is a common practice which concerns exclusive dealing that limits competitors' access to downstream selling market by binding intermediaries and/or final retailers to the dominant undertaking. Alternatively, when a dominant undertaking denies competitors' access to key inputs by obtaining an exclusive supply from the manufacturer, it forecloses downstream rivals from that part of the upstream market. The

[31] Case *Lorain Journal Co. v. United States* // 342 U.S. 143, 155 (1951)
[32] O'Donoghue R., Padilla J. The Law and Economics of Article 82 EC // Hart Publishing, 2006, page 358.
[33] Similar distinction is made by Myong-Hun Chang in its article Exclusive Dealing Contracts in a Successive Duopoly with Side Payments // Southern Economic Journal, 1992. The only difference that sometimes instead of the expression "downstream" and "upstream" markets the author uses expressions "downward" and "upward" markets respectfully.

practical use of such distinction is that it serves in the assessment of the scope of possible foreclosure and in the verification of necessary conditions that should be proved in each case. In other words, if dominant undertaking denies its competitors from the downstream selling market, the assessment should include the examination whether any alternative distribution strategies are possible for the competitors. Alternatively, if dominant undertaking limits the access of its competitors to key inputs, the assessment of the ability of the competitors to seek for other alternative sources or to manage without the use of such input altogether should be made.

Further in this section we will seek to distinguish and describe how dominant undertakings employ different forms of exclusive dealing in competition with their rivals in practice. To this end, we will partly invoke the distinction made by A. Jones and B. Sufrin[34], as well as the information provided in the Commission's official issues.[35]

1.2. Forms of exclusive dealing most commonly employed in practice

1.2.1. Single branding obligations

As it was already mentioned, single branding obligations is a common practice in commercial world. Usually such practices have a lot of pro-competitive effects and are useful for both the supplier and the customer. Jacobson J.M. and Sher S.A. argue that "exclusive dealing is typically output-enhancing. Sellers may pursue exclusive dealing arrangements for a number of pro-competitive reasons, such as to achieve dedicated distribution, to avoid free riding or to ensure a customer base sufficient to achieve economies of scale. Buyers, on the other hand, may desire exclusive arrangements to encourage competitive bidding among their suppliers, to secure sufficient quantities of supply, or to ensure they receive high quality products from a known source."[36]

Unfortunately, some problems may occur when such practices are exercised by dominant undertakings because in such cases the line between the normal competitive practice and abuse of market position is very thin. European Commission's and courts' decisions have already showed that dominant undertakings had several times employed this strategy to maintain or strengthen their dominant market position. The ways how such obligations may be imposed on customers differ in

[34] Jones A., Sufrin B. EC Competition Law: Text, Cases, and Materials. Third Edition // Oxford: Oxford University Press, 2008, pages 475-528

[35] Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses, para. 134 // 2005 and The Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings, para. 32 // OJ 2009/ C 45/7.

[36] Jacobsen J.M., Sher S.A. „No Economic Sense" Makes No Sense for Exclusive Dealing // 2006, Antitrust Law Journal 73, No. 3, p. 779

their form and content. But as it was already pointed out, the idea of such conduct and the reason why competition authorities are preoccupied is always the same – the risk of competitors' exclusion, which finally may end with consumers' harm.

The first and probably the most obvious way is that exclusivity clause may be explicitly established in the contract. As it was already mentioned, in that case two different situations may occur. On one hand the dominant market power may be maintained by the supplier, thus in this case the customer will be contractually obliged to buy all or almost all of his requirements from a dominant undertaking.[37] On the other hand, there may be several competing suppliers with no market power and one dominant buyer seeking to foreclose its rivals by preventing them from the key inputs. In other words, dominant undertaking enters into exclusive dealing contracts with the principal suppliers by imposing them an obligation not to supply to its rivals. More subtle way employed to reach the same effect as exclusive dealing contract is the supply contract under which the specific high quantities of key inputs must be supplied. One of the recent examples could be the case related to the supply of rough diamonds.[38] De Beers Group of companies (hereinafter "De Beers"), the largest diamond producer in the world, and Alrosa Company Limited (hereinafter "Alrosa"), the leading Russian supplier of rough diamonds, concluded a 5 years contract under which Alrosa have obliged to supply rough diamonds to the value of USD 800 million per annum to De Beers. This amount represented about half of Alrosa's output and corresponded in practice to the quantities of rough diamonds Alrosa had been exporting in the previous year outside the Former Soviet Union through similar contracts with De Beers. Although the exclusive dealing contract did not contain exclusivity clauses, the Commission's preliminary assessment was that De Beers held a dominant position in the world-wide rough diamonds market and that by entering into the contract with Alrosa, its largest competitor, De Beers would gain control over a significant source of supply on the rough diamonds market, enabling it to acquire additional market share on that market and to obtain access to an extended range of diamonds otherwise not accessible to it. This would eliminate Alrosa as a source of supply on the market outside Russia and would enhance the already existing market power of De Beers with the effect of hindering the growth or maintenance of competition in the rough diamond market. The Commission also noted that as a result of the latter contract, De Beers, the largest diamond producer in the world, would act as a distributor of about half the

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[37] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* // [1979] ECR 461; Case T-65/89 *BPB Industries and British Gypsum Ltd v. Commission* // [1993] ECR II-389, [1993] 5 CMLR 32

[38] Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case COMP/E-2/38.381 — *De Beers–Alrosa* // OJ 2005 C 136/32

production of its largest competitor. In view of the fact that quantities traded would be substantial and the agreement is made between the two largest undertakings on the rough diamonds market, competition on this market as a result of such contract would be substantially weakened.

Although the Commission's concerns were settled by De Beers giving commitments[39], and later the Court of First Instance annulled the decision mainly on the grounds of lack of proportionality[40], the whole process showed that to be non-abusive the contracts concluded by dominant undertakings must not be just on paper, but in fact. Even if the contract does not contain explicit exclusivity clause, the Commission would then assess the actual effect of the contract, and if there would be enough information on potential or actual harm to competition, such contract may be condemned under Article 102 of the Treaty.

In the field of downstream market foreclosure, the exclusivity effect may be reached in several ways. For instance, dominant supplier may offer some specific investments to the customers in exchange for exclusivity. As Osterud E. correctly observes this kind of conduct may also be defined as "indirect exclusive dealing".[41] The ideal example is the case of *Van den Bergh Foods*[42] related to freezer cabinets for ice-cream where Commission and the Court of First Instance condemned such practice as contrary to the former Article 82 EC. In this case an impulse ice-cream supplier HB Ice Cream Ltd (hereinafter "HB") concluded several distribution contracts for its impulse ice-cream supply to the retailers in Ireland. Besides, HB also provided special freezer cabinets to store and display HB's ice-cream. These freezer cabinets were provided either without any direct charge or leased for a nominal amount which usually wasn't collected. However, under the terms of the contracts such freezer cabinets were available for the retailers only on the condition that they would be used exclusively for HB's products.

Despite the fact that the Court of First Instance for the first time applied rule-of-reason[43] when assessing the conduct of dominant undertaking, the outcome of the case was not in favor of HB. The Court of First Instance rejected the argument of HB that the provision of freezer cabinets

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[39] Pursuant to Article 9 of the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty // OJ 2003 / L 001, the parties offered a set of commitments under which De Beers has agreed to reduce the quantities purchased from Alrosa to a level that the Commission considered would be non-exclusionary.

[40] Case T-170/06 *Alrosa v. Commission* // OJ 2010 / C 234/3

[41] Osterud E. Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: the Spectrum of Tests // [2010] Kluwer Law International, p. 68

[42] *Van den Bergh Foods Ltd* // OJ 1998 L 246/1, on appeal *Case T-65/98 Van den Bergh Foods Ltd v European Commission* // [2003] ECR II-4653

[43] Even though the Court mainly assessed the exlusive dealing clause from the perspective of the Article 101 (ex Article 85) of the Treaty, it was an important shift in European judicial practice providing an opportunity for dominant undertakings to justify their allegedly abusive conduct.

on a condition of exclusivity constitutes a standard practice on the relevant market by stating that "business conduct which contributes to an improvement in production or distribution of goods and which has a beneficial effect on competition in a balanced market may restrict such competition where it is engaged in by an undertaking which has a dominant position on the relevant market."[44] In addition, the Court maintained the same position as in *Hoffmann La-Roche*[45] that even voluntarily concluded agreements between the dominant supplier and the buyer may also be considered abusive. The Court stated that "the fact that an undertaking in a dominant position on a market ties de facto ─ even at their own request ─ 40% of outlets in the relevant market by an exclusivity clause which in reality creates outlet exclusivity constitutes an abuse of a dominant position within the meaning of Article [102] of the Treaty."[46]

Another anticompetitive practice employed by dominant undertakings is so called "English clauses". In Commission's Guidelines on Vertical Restraints[47] English clauses are defined as "clauses requiring the buyer to report any better offer and allowing him only to accept such an offer when the supplier does not match it". As Commission stressed out in its Discussion Paper "English clauses can be expected to have the same effect as a single branding obligation as the dominant company will only have to lower its price where there is a risk that customers switch. The foreclosure effect may be especially strong when the buyer has to reveal who makes the better offer, as this may discourage competitors to make competing offers to the dominant companies' customers."[48] Faul J. and Nikpay A. support Commission's position and argue that "English clauses enhance transparency in the market and increase the likelihood that a competitor lowering prices will not gain market share but will prompt the incumbent supplier to match the lower price."[49] In *Hoffmann-La Roche* the Court of First Instance was very critical of English clauses emphasizing that "even in the most favorable circumstances, the English clause does not in fact remedy to a great extent the distortion of competition caused by the clauses obliging purchasers to obtain their requirements exclusively from Roche and by the fidelity rebates on a market where an undertaking in a dominant position is operating and where for this reason the structure of competition has already been weakened[50]". In the same case the Court of First instance also pointed out that "the fact

[44] Case T-65/98 *Van den Bergh Foods Ltd v European Commission* // [2003] ECR II-4653, para. 159
[45] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities //* [1979] ECR 461, para. 89;
[46] Case T-65/98 *Van den Bergh Foods Ltd v European Commission* // [2003] ECR II-4653, para. 160
[47] Commission's Guidelines on Vertical Restraints // OJ C 2010/C 130/0
[48] Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses // http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf >, p. 39, access time: 24 November 2011, para. 150
[49] Faul J., Nikpay A. The EC Law of Competition // Oxford University Press, 2007, page 368.
[50] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities //* [1979] ECR 461, para. 107

that an undertaking in a dominant position requires its customers or obtains their agreement under contract to notify it of its competitor's offers, whilst the said customers may have an obvious commercial interest in not disclosing them, is of such a kind as to aggravate the exploitation of the dominant position in an abusive way."[51]

To sum up, when assessing actual effects of English clauses we could make a conclusion that such clauses may not only pursue the aim of binding customers to the dominant firm, but also enhance barriers to entry and thus enhance or contribute to anti-competitive effects of exclusive dealing arrangements.

As it was indicated before, usually exclusive dealing obligations are explicitly applied to all or to a substantial part of dominant undertaking's customers. However, as we will see from European courts' and Commission's practice, more often instead of explicit exclusivity clauses in the contract dominant undertaking choose to employ various kind of discount and rebate schemes. It is important to emphasize that such schemes have been treated in a similar way as explicit exclusive dealing by both the European Commission and courts and were usually condemned of their actual effect to enhance loyalty of buyers and thus to exclude dominant undertaking's rivals from the market. Such kind of schemes will be analyzed in the following section of this paper.

1.2.2. Discount and rebate schemes

As it was already mentioned in a previous section of this paper, the other possible way how the customers may be encouraged not to buy from the dominant undertaking's rivals is some schemes of loyalty discounts or rebates[52] offered by the supplier to the customer for not buying elsewhere. In other words, as Elhauge E. and Gerardin D. correctly pointed out, "any loyalty or rebate could equally be called a disloyalty penalty imposed on buyers who refuse to restrict purchases from the seller's rivals".[53]

Jones A. and Sufrin B. explain that even though "technically a discount is a deduction from a price list and a rebate is a refund granted later, but the terms are used more or less synonymously in competition cases." In this paper we will follow aforementioned approach.

Generally, loyalty discounts or rebates are given to the customers only if their purchases over a defined reference period exceed a certain threshold. Discounts or rebates may be granted on all

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[51] Ibid., para. 107.
[52] Jones A., Sufrin B. EC Competition Law: Text, Cases, and Materials. Third Edition // Oxford: Oxford University Press, 2008, page 481
[53] Elhauge E., Gerardin D. Global Competition Law and economics // Hart Publishing, 2007, page 570

purchases (retroactive rebates) or only on those made in excess of those required to achieve the threshold (incremental rebates). According to O'Donoghue R. and Padilla J. though the details of the schemes vary, but they have the feature that the discount is conditional upon the customer achieving a certain share or quantity of sales with the dominant firm over a period that exceeds the normal purchase frequencies in the industry concerned.[54] The same approach is upheld by the European Commission, which stated that single product loyalty discounts and rebates are characterized by their conditionality because they are conditional on the customers' engaging in loyal purchasing behavior.[55] A perfect example is provided by O'Donoghue R. and Padilla J. that in order to get a discount "the customer may have to increase annual sales of the dominant firm's products by a quantity or percentage that is higher than the customer achieved in the previous year with the dominant firm."[56] However, after the deeper analysis of existing case law we must agree with the European Commission which in its Discussion Paper observed that "rebate systems can be formulated and modulated in many ways and it is therefore not possible to provide an exhaustive list."[57]

As the economists also analyze loyalty rebates and provide their explanations on how rebate schemes work in practice, in our opinion, it is useful to understand what kinds of discount and rebate structures may be employed by dominant undertakings. To this end we will invoke the classification provided by economist Ridyard D.[58]:

1) The first category is **volume rebate schemes**. Volume rebates are offered to all customers on a condition that their purchase exceeds a certain threshold level. The objective is to encourage the purchaser to buy additionally over a given period. As Ridyard D. explains, "this kind of volume-based rebate is commonly found in real world markets and since such discounts treat like customers in the same way, they are non-discriminatory (i.e. there is no "dissimilar treatment for equivalent transactions", to use the Article [102] wording), and the criteria for achieving the volume discounts are transparent and open to anyone whose purchase volumes meet them."[59]

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[54] O'Donoghue R., Padilla J. The Law and Economics of Article 82 EC // Hart Publishing, 2006, page 374

[55] International Competition Network Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws // 8th Annual Conference of the ICN Zurich, Switzerland, June 2009

[56] O'Donoghue R., Padilla J. The Law and Economics of Article 82 EC // Hart Publishing, 2006, page 374-375

[57] Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses // http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf >, p. 39, access time: 24 November 2011, para. 136

[58] Ridyard D. Exclusionary Pricing and Price Discrimination Abuses Under Article 82 – Economic Analysis // ECLR, 2002, pages 286, 288-289

[59] Ridyard D. Exclusionary Pricing and Price Discrimination Abuses Under Article 82 – Economic Analysis // ECLR, 2002, page 286

2) The second category is **sales target rebate schemes**. In this case a supplier provides a small discount to any customer whose purchases in the current year exceed its previous year's purchases by some sales growth target. The goal of such a target rebate scheme is to induce customers to buy more and thus increase their purchases on the firm's product. The main difference between volume rebate scheme and sales target rebate scheme is that the first one is generally offered for additional purchases over a given period, whereas the latter one is offered in comparing the current year purchases with the last year's amounts. As Ridyard D. explains, the reason why such target rebates are objectionable by competition authorities is their tendency to affect competition negatively by "rewarding loyalty", "foreclosing competitors" and acting in other potentially exclusionary ways.
3) The third category is **discounts in return for exclusivity**. In this case the supplier offers the additional discount to the customer who obliges to purchase all its requirements of the product in question from the supplier.
4) Final category distinguished by Ridyard D. is **discounts or rebates "targeted" against competing suppliers**. This kind of discounts is usually offered to a certain class of customer that is considered as being most likely to switch to a competing supplier due to geographical, quality or other reasons. There could be an example when the customer's location is near the border and competing products are imported or as in *BPB Industries*[60]case when a dominant undertaking faced competition from relatively lower zone prices in a geographically limited area.

It is important to note that loyalty rebates have been consistently condemned by European Commission and courts because of their ability to foreclose. However, in later cases both institutions recognized that loyalty rebates may be legal if they are based upon an "economically justified consideration"[61], "objective economic justification"[62] or "economically justified countervailing advantage"[63]. Later possible defenses have been established in Discussion Paper where the European Commission stated that "in case […] a rebate system is likely to have an appreciable

[60] Case *BPB Industries plc v Commission of the European Communities* // [1993] ECR 11-389
[61] See e.g. CFI Case T-219/99 *British Airways v. Commission* // [2003] ECR II-5917, para. 247, see also para 271
[62] See e.g. Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, para. 8
[63] Ibidem. Para 59.

foreclosure effect, the dominant company may argue that it can justify its […] rebate system because of efficiency consideration."[64]

In various publications[65] we may find several examples of pro-competitive effects that loyalty rebates may produce. Such an example may be economies of scale, incentive for the dominant supplier to make certain relationship-specific investments, elimination of double marginalization, efficient recovery of fixed costs, stimulation of dealers' sales efforts, prevention of free-riding, etc. One can assume that because of aforementioned pro-competitive reasons, loyalty rebates is a normal business practice and when an undertaking is not dominant they are even not discussed. However, in our opinion, even though the Commission and courts recognized dominant undertaking's right to justify its allegedly abusive conduct, these possible objective justifications are structured in such a way that these defenses are unlikely to succeed in practice.

It should be emphasized that historically European Commission and courts have been harshly criticized by various scholars[66] for being too "formalistic" when applying Article 102 of the Treaty to exclusionary conduct of dominant undertakings, especially in case of rebates. Petit N. correctly observed that in order "to reach findings of unlawful abuses, the Commission would not scrutinize whether the impugned course of conduct generates actual, or probable, anticompetitive effects on the market. Rather, following a cursory examination of practice's formal features, the Commission would infer that the dominant firm's conduct has, by its very nature, the ability to cause anticompetitive effects on market."[67]

In addition, the economists argued that *form-based* approach generally failed to protect consumer interests, not least by discouraging pro-competitive practices.

One can assume that to address all the criticism, the Commission engaged to modernize the application of Article 102 of the Treaty. This reform is presented bellow in the following chapter of

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[64] Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses // http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf >, p. 39, access time: 24 November 2011, para. 172

[65] See e.g. O'Donoghue R., Padilla J. The Law and Economics of Article 82 EC // Hart Publishing, 2006, pages 400-403; Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses // http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf >, p. 39, access time: 24 November 2011, para. 172-176; Miguel de la Mano Presentation on Competitive Effects of Rebates: Seeking Economic and Legal Consistency // http://www.crai.com/ecp/assets/CRA_Conference_2010_Miguel_de_la_Mano.pdf, accecc time: 27 November 2011

[66] For instance, Gerardin D., Neven D.J., O'Donoghue R. and Padilla J., Petit N. and others

[67] Petit N. From Formalism to Effects? – The Commission's Guidance on Article 82 EC // http://lawprofessors.typepad.com/files/from-formalism-to-effects---the-commissions-guidance-on-article-82-ec---final-2.pdf, access time: 24 November 2011

this paper by briefly discussing the main Commission's official acts[68] reforming its priorities in enforcing Article 102 of the Treaty.

2. REFORM OF THE ARTICLE 102 OF THE TREATY

In our opinion, the aforementioned criticism is sound. Firstly, as the following case law analysis will demonstrate, exclusive dealing employed by dominant undertaking were virtually considered as *per se* illegal by both the European Commission and courts. Secondly, it should be emphasized that when assessing the presence of abuse it was tended to focus on the form of the conduct rather than its anti-competitive effects. Finally, neither the European Commission nor courts have taken seriously efficiency claims by the defendant as well as claims that consumers have not been harmed.

The first significant step was the issue of Discussion Paper[69] where the Commission discussed the competitive analysis of conduct of dominant firms that might constitute exclusionary abuse. It is worth to mention, that only a few months before the publication of Discussion Paper, the Commissioner Kroes N. in her official speech expressed her opinion to modernize the enforcement of Article 102 of the Treaty by stating that "the exercise of market power must be assessed essentially on the basis of its effects in the market, although there are exceptions such as the per se illegality of horizontal price fixing. […] Article [102] enforcement should focus on real competition problems: In other words, behavior that has actual or likely restrictive effects on the market, which harm consumers. […] However, low prices and rebates are, normally, to be welcomed as they are beneficial to consumers."[70] It important to note that the Commissioner summarized its speech by setting an ambitious task "to search sensible "rules" that would enable to reach preliminary conclusions about when conduct may exclude competition, yet at the same time allow companies to know when they are on safe ground."[71] In our opinion, the most important thing that has been

[68] Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses // http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf, access time: 25 November 2011; The Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings // OJ 2009/ C 45/7

[69] Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses // http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf, access time: 25 November 2011

[70] Kroes N. Speech at the Fordham Corporate Law Institute, New York "Preliminary Thoughts on Policy Review of Article 82" // http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/537, access time: 26 November 2011

[71] Ibid.

expected from the Commission by both dominant undertakings as well as their lawyers, and which seemed to become true after the promising speech of the Commissioner, was an appropriate level of clarity when assessing if a certain conduct was compatible with European competition law. However, while the new *effects-based* principles established in Discussion Paper were notably welcome[72], it should be emphasized that this document was also highly criticized by various scholars[73] because of its contradictive nature as well as formalistic assessment of some categories of conduct and especially in the field of loyalty rebates.

It took almost 3 years for the Commission to take further steps until the Guidance was adopted. During that period the European Commission and courts continued to investigate and condemn alleged infringement of Article 102 by applying the same principles established in previous case law.

As the content of the Guidance Paper has already been discussed and analyzed in detail by numerous commentators[74], in following paragraphs we will briefly present its most relevant provisions in connection to the topic of this paper.

To the delight of dominant undertakings and their lawyers the introduction of the Guidance Paper announces that "alongside the Commission's specific enforcement decisions, it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission under Article [102]."[75] This statement of the Commission was highly welcome as for the past 40 years, the hostile approach and unclear assessment criteria towards exclusive dealing and loyalty rebates employed by dominant undertakings prevailed.

[72] It is important to mention that there were also some cautious opininions that some principles established in the Discussion Paper were too radical. For instance, in respond to the Commission's Discussion Paper, Spanish competition authority observed that „the Commission's objectives are laudable, but it should try to achieve them without destroying the system of rules which have created fifty years of case law, and without causing even more damage to legal certainty in this area." See the Comments regarding the Discussion Paper on the application of Article 82 of the EC Treaty to exclusionary abuses //http://www.aedc.es/archivos/documentos/5_1_AEDC_Comments_Discussion_Paper.DOC, access time: 26 November 2011

[73] See Bishop S. and Marsden P. Editorial: The Article 82 Discussion Paper: A Missed Opportunity // http://www.biicl.org/files/1103_marsden_and_bishop_on_article_82_discussion_paper.pdf, access time: 11 October 2011;

[74] See e.g. Gutermuth A. Article 82 Guidance: A Closer Look at the Analytical Framework and the Paper's Likely Impact on European Enforcement Practice // Competition Policy International, 2009; Gravengaard M.A. and Kjærsgaard N. The EU Commission guidance on exclusionary abuse of dominance – and its consequences in practice // European Competition Law Review, Issue 7, 2010; Motta M. The European Commission's Guidance Communication on Article 82 // http://www.barcelonagse.eu/tmp/pdf/motta_ecguidance82.pdf, access time: 28 November 2011;

[75] The Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings // OJ 2009/ C 45/7, para. 2

Despite the fact that the scope of the Guidance Paper was narrower than it was provided by the Discussion Paper[76], dominant firms may benefit at least from the fact that Commission's approach to exclusionary conduct was established in a single document. However, in our opinion, the most negative aspect about the Guidance Paper is that it does not provide dominant undertakings and their lawyers with any safe harbor when deciding about the legally of their conduct.

When defining the presence of *dominance* the Commission relies on existing case law and adopts an economic definition when it states that "an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant".[77] The Commission does not provide any certain market share above with dominance would be presumed, but instead it lists a number of factors that will be taken into account when assessing the presence of dominance. Such factors include "constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors), constraints imposed by the credible threat of future expansion by actual competitors or entry by potential competitors (expansion and entry), constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power)."[78]Unfortunately, these factors which are not based on any measurable criteria provide little help for leading undertakings to decide if their commercial practice is still compatible with Article 102 of the Treaty. Their situation is even worsened by the Commission's ambiguous statement that "dominance is not likely if the undertaking's market share is below 40 % in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations."[79] Of course, proponents of the Guidance Paper may claim that by this statement the Commission took a high burden of proving dominance whenever the undertaking has less than 40% market share.

However, in our opinion, this ambiguity established in the Guidance Paper is not compatible with the main goal established in the introduction of this document to help undertakings better assess whether certain behavior is likely to result in intervention by the Commission under Article 102. Providing for instance that unless a firm has at least 40% market share it will not be

[76] Guidance Paper does not provide any enforcement priorities in connetion to market definition, collective dominance and abuse of collective dominance, refusal to license intellectual property rights and other

[77] The Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings // OJ 2009/ C 45/7, para. 11

[78] Ibidem. Para. 12

[79] Ibidem. Para. 14

investigated for abusive conduct would be advantageous for both the Commission which could reserve its time and costs to more likely anticompetitive cases and for undertakings that would be provided with legal certainty.

The following important question is related to the assessment of *anti-competitive foreclosure* witch in the Guidance Paper is defined as “a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.”[80] One make a conclusion that this definition presupposes that in order the dominant undertaking’s conduct to be considered anticompetitive the Commission should firstly prove the presence of foreclosure and then to provide evidences that such foreclosure will likely harm consumer welfare. Thus, one can assume that consumer harm has become a decisive factor for an intervention by the Commission. On one hand, this interpretation may be considered advantageous for dominant undertakings because it suggests that it is not sufficient to prove the allegedly abusive conduct’s impact on the structure of the market. As a result, only foreclosure of less efficient competitors without any impact on consumer welfare “whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice”[81] should not be considered as abusive in the context of Article 102 of the Treaty. On the other hand the wording “likely consumer harm” may be interpreted ambiguously because it is a criterion of subjective nature.

Similarly to the assessment of dominance, the Commission established several factors that should be taken into account when deciding if a particular conduct led or may lead to anti-competitive foreclosure. The Commission considers the following factors to be generally relevant to such an assessment: the position of the dominant undertaking, the conditions on the relevant market, the position of the dominant undertaking's competitors, the position of the customers or input suppliers, the extent of the allegedly abusive conduct, possible evidence of actual foreclosure, and direct evidence of any exclusionary strategy.[82]We agree with Geradin D. who accurately points out that “the majority of these factors relate to the “structure of the market”, which is surprising considering the Commission’s apparent attempt to move away from the ordoliberal perspective. Second, none of these factors relate to the assessment of the presence of consumer harm which is again quite surprising considering the emphasis placed on consumer harm in the definition of anti-

[80] Ibidem. Para. 19
[81] Ibid.
[82] Ibidem. Para. 20

competitive foreclosure provided for in the Guidance Paper."[83] In this context, Petit N. observes that as non-price restrictions of competition cannot be quantified, the Commission might be tempted to perform an impressionistic, and perfunctory, analysis of consumer harm.[84] In our opinion, as the Commission did not establish any clear criteria how the likely consumer harm should be measured, legal uncertainty and the absence of safe harbor when assessing dominant undertaking's conduct still remains. Furthermore, as Petit N. correctly pointed out, to the detriment of dominant undertakings "the Guidance does not condition a finding of abuse upon proof that "consumer harm" is caused by – or is the result of – the "foreclosure of competition" and not by other market developments."[85] As a result, one can understand that by leaving this question unsolved the Commission reduce the value of its statement that "the aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare".[86]

Another important issue is that the EU Commission states that "it will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking."[87] The Commission will examine economic data relating to cost and sales prices of the dominant undertaking and, if not available, of competitors. If this data suggest that an efficient competitor can compete effectively with the pricing conduct of the dominant firm, the Commission is unlikely to intervene. The Guidance Paper explicitly refers to long-run average incremental cost (LRAIC) and average avoidable cost (AAC) as the main cost benchmarks that it is likely to use in assessing whether price-based exclusionary conduct is abusive or not. As a general rule, if prices remain above the LRAIC of the dominant undertaking, the Commission will presume that an efficient competitor can compete profitably and that there is therefore no abuse. On the other hand, when a price is below AAC, the Commission will likely view a dominant undertaking as sacrificing profits

[83] Geradin D. Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful? // http://www.intertic.org/BookPapers/Geradin.pdf, access time: 29 November 2011, p. 6-7

[84] Petit N. From Formalism to Effects? – The Commission's Guidance on Article 82 EC //http://lawprofessors.typepad.com/files/from-formalism-to-effects---the-commissions-guidance-on-article-82-ec---final-2.pdf, p. 4-5

[85] Ibidem. P. 5

[86] The Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings // OJ 2009/ C 45/7, para. 19

[87] Ibidem. Para. 23

and foreclosing an equally efficient competitor.[88] From the first sight this "as efficient test" looks advantageous for dominant undertakings which may serve as a safe harbor in order to assess if a particular conduct is compatible with European competition law. However, from the practical point of view the application of such test may raise significant difficulties for dominant undertakings to self-assess their conduct. For instance, the Commission proposes an analytical approach for analysis of exclusive purchasing obligations and loyalty rebates. According to the Commission "as with exclusive purchasing obligations, the likelihood of anti-competitive foreclosure is higher where competitors are not able to compete on equal terms for the entire demand of each individual customer. A conditional rebate granted by a dominant undertaking may enable it to use the 'non contestable' portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the 'contestable' portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitute."[89]Various commentators agree with the fact that determination of the "contestable" part is extremely difficult and thus creates significant risks of mistakes in the assessment of dominant undertaking's conduct. For instance, Geradin D. explains that "while dominant firms obviously know their cost structure, they are in no position to know the costs of their competitors and thus could not self-assess their pricing practices."[90] Following similar point of view members of law firm Cleary Gottlieb observe that "a dominant company could not determine the "contestable share", "the relevant range" or the "effective price" without confidential information about customers and rivals that it is unlikely to have."[91]

The Guidance Paper indicates that the Commission will also examine claims put forward by a dominant undertaking that its conduct is *objectively justified* or produces substantial *efficiencies* which outweigh any anticompetitive effects on consumers."[92]

In the context of *efficiencies*, "the dominant undertaking will generally be expected to demonstrate, with a sufficient degree of probability, and on the basis of verifiable evidence, that the following cumulative conditions are fulfilled: 1) the efficiencies have been, or are likely to be,

[88] Ibidem. Para. 24-27
[89] Ibidem. Para. 39
[90] Geradin D. Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful? // http://www.intertic.org/BookPapers/Geradin.pdf, access time: 29 November, supranote 53
[91] Publication of Cleary Gottlieb Steen & Hamilton LLP Guidance On The Commission's Enforcement Priorities In Applying Article 82 Ec Treaty To Abusive Exclusionary Conduct by Dominant Undertakings // http://www.cgsh.com/commission_enforcement_priorities_in_applying_article_82_ec_treaty/, access time: 2 December 2011, page 12-13
[92] Ibidem. Para. 28-31

realized as a result of the conduct; 2) the conduct is indispensable to the realization of those efficiencies; 3) the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; 4) the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition."[93] As one should have noticed, the criteria that the Commission will use in assessing efficiencies mirror those that it applies under Article 101 of the Treaty. In our opinion, the fact that the Commission officially recognizes dominant undertaking's possibility to defend exclusionary conduct is a step forward. However, as Geradin D. correctly points out, it is doubtful that the actual dominant companies would succeed in satisfying all aforementioned conditions. [94]

3. EXPLICIT AND DE FACTO EXCLUSIVE DEALING PRACTICES FOUND IN EUROPEAN CASE LAW

As it was already demonstrated in the first chapter, dominant undertakings may employ various exclusive dealing types in their business practice. This kind of conduct may be used in both upstream and downstream markets. However, some particular forms of exclusive dealing, such as "English clauses"[95], investment related exclusivity[96], exclusive purchasing in upstream market[97] were not common in European case law. Question why there is no large case law related to such practices is left open for discussions. One can assume that dominant undertakings did not employ such practices because they were considered as *per se* illegal by both the European Commission and courts and thus less attractive for dominant undertakings. Another possible answer may be that such kind of practices, if used without any financial advantages, did not seem attractive for costumers. Nonetheless, it is important to note that most of the case law was related to the mixture of both explicit exclusive dealing and more subtle loyalty rebate schemes. Thus, in our opinion, because of their loyalty enhancing nature it is more purposeful to analyze both practices together in the light of a particular case. As we have already demonstrated in previous chapter of this paper, it is possible to

[93] Ibidem. Para 30
[94] See e.g. Geradin D. Is the Guidance Paper on the Commission's Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct Useful? // http://www.intertic.org/BookPapers/Geradin.pdf, access time: 29 November, page 9
[95] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* // [1979] ECR 461
[96] *Van den Bergh Foods Ltd* // OJ 1998 L 246/1, on appeal *Case T-65/98 Van den Bergh Foods Ltd v European Commission* // [2003] ECR II-4653
[97] Case COMP/E-2/38.381 — *De Beers–Alrosa* // OJ 2005 C 136/32

identify several forms of naked exclusive dealing[98] as well as classify loyalty rebates into four distinct types[99]. However, we think that in order to comprehensively analyze the existing case law, it is more purposeful to distinguish only two types of situations illustrating how dominant undertakings used to employ aforementioned measures in their commercial practice.

As in a bigger part of the cases dominant undertakings used to seek exclusivity through the rebate schemes, and usually explicit exclusive dealing clauses have been only a part of a combined practice, it would be more practical, in our opinion, to provide a distinction of cases based on the nature of rebate scheme. This distinction could be made as follows:

- individualized progress bonus schemes;
- rebates in return for exclusivity.

To better demonstrate the evolution of European Commission's and courts practice we have decided to analyze the most important existing case law attributed to aforementioned types. In every distinct group cases will be presented in chronological order. As it was already emphasized, where it is possible, both the naked exclusive dealing and loyalty rebates will be analyzed together with respect to a particular legal case.

Each section of this chapter will be divided into two parts. Firstly, we will analyze in detail some decisions of the European Commission and courts that were taken before the reform of Article 102 of the Treaty. In doing so, we will primarily focus on the main principles regarding the assessment of implicit and *de facto* exclusive dealing. Secondly, in order to provide a comprehensive picture of the current European judicial practice and possible trends, we will critically analyze the latest decisions adopted in the context of the reform of Article 102 of the Treaty.

3.1. Individualized Progress Bonus Schemes

In the first situation, which was quite often condemned by European Commission and courts, dominant undertakings did not apply any explicit exclusive dealing (full or partial) conditions attached to the rebate schemes, instead the customers were rewarded by rebates on the condition that their purchases would increase as compared with a previous time period. The main similarity with the rebates in return for exclusivity is that in this situation the estimation was also focused on

[98] For instance, contractual obligation to purchase all or almost all of the requirements, obligation not to purchase from the dominant undertaking's rivals, "English clause".
[99] 1) volume rebate schemes; 2) sales target rebate schemes; 3) discounts in return for exclusivity; 4) discounts or rebates "targeted" against competing suppliers.

costumers' purchase requirements and tailored to each costumer that needed to reach certain individualized volume target in order to benefit from the rebates. In other words, target discounts were granted to customers who reached or exceeded specific sales targets. The sales targets were usually based on the customer's purchases during a past reference period and these purchases were usually taken as an estimate of the customer's future requirements. Practically, this kind of situation would coincide with the second category described by economist Ridyard D. and shortly could be named as *individualized progress bonus schemes*. Due to their individualized and conditional nature, such rebate schemes were harshly criticized by European Commission and courts in many prominent cases such as *Michelin I*[100]*, Virgin/British Airways*[101] and in *Michelin II*[102]. It is important to emphasize that all the decisions of this type of cases have been adopted before the publication of the Commission's Guidance Paper. As a partial exception may be considered *Virgin/British Airways* case because the judgment of ECJ was adopted in the middle of the reform of Article 102 of Treaty, i.e. after the publication of the Commission's Discussion Paper.

Note that individualized progress bonus schemes employed by dominant undertaking were firstly condemned by European Commission and courts almost 30 years ago in *Michelin I*[103] case. Beside other alleged infringements of European competition law, Michelin NV has been also accused of abusing its dominant position by tying tyre dealers to itself through the granting of selective discounts on an individual basis conditional upon "sales targets" and discount percentages. According to the facts of the case, the discount system in question involved an annual variable discount which was determined according to the dealer's turnover in Michelin products in the previous year. Important thing was that this annual variable discount was not obtained until the dealer achieved during the year in question a sales target which was expressed as a number of products sold and was fixed or agreed at the beginning of the year.

In this case such schemes were considered as loyalty inducing because they put pressure on the customer to stay loyal in order to obtain the discounts for the whole reference period. Usually such discount schemes encouraged customers to buy even in excess of their last year's purchases in order to get a higher target discount. As a result such schemes have been condemned by the Court as

[100] Case 322/81 *Michelin v. Commission* // [1983] ECR 3461
[101] CFI Case T-219/99 *British Airways v. Commission* // [2003] ECR II-5917, conf. ECJ Case C-95/04 P [2007] ECR I-2331
[102] CFI Case T-203/01 *Michelin v. Commission II* // [2003] ECR II-4071;
[103] Case 322/81 *Michelin v. Commission* // [1983] ECR 3461

having an exclusionary effect. Referring to its previous decisions in similar cases[104], that will be analyzed in following section of this chapter, the Court once again applied the distinction between quantity [105]and loyalty rebates made in those cases by stating that „in contrast to a quantity discount, which is linked solely to the volume of purchases from the manufacturer concerned, a loyalty rebate, which by offering customers financial advantages tends to prevent them from obtaining their supplies from competing manufacturers, amounts to an abuse within the meaning of article [102] of the Treaty.“[106] However, the Court elaborated previous case law by observing that „this system does not amount to a mere quantity discount linked solely to the volume of goods purchased since the progressive scale of the previous year's turnover indicates only the limits within which the system applies.“[107] Although from the Court‘s point of view „the system in question did not require dealers to enter into any exclusive dealing agreements or to obtain a specific proportion of their supplies from Michelin NV“[108]this did not prevent the dominant undertaking from punishment. The main objections to the Michelin NV rebate scheme were:

- it was based on the basis of a progressive discount scale and required its customers to buy excessive amounts comparing with the preceding period;[109]
- targets were individualized for each customer;[110]
- it had a relatively long reference period (a year), which from Court‘s point of view „has the inherent effect, at the end of that period, of increasing pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period“[111];
- it was of predatory nature because exclusionary effect of target rebate schemes was “accentuated still further by the wide divergence between the dominant undertaking's market share and those of its main competitors which must take into account the absolute value of the dominant undertaking's annual target discount and fix their own

[104] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* // [1979] ECR 461; Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, *Coöperatieve Vereniging “Suiker Unie” UA and other v Commission* // [1975] ECR 1663 and others
[105] This form of rebates theoretically coincides with the first type of rebates, distinguished by Ridyard D., so-called „volume rebate scehemes“
[106] Case 322/81 *Michelin v. Commission* // [1983] ECR 3461, para. 71
[107] Ibidem. Para. 72
[108] Ibidem.
[109] Ibidem. Para. 66
[110] Ibidem. Para. 67
[111] Ibidem. Para. 81

discount at a percentage which, when related to the dealer's lesser quantity of purchases from them, is very high…"[112]

- it was not transparent and thus „dealers were left in uncertainty and on the whole could not predict with any confidence the effect of attaining their targets or failing to do so."[113]

In our opinion, in this case the Court made a step forward comparing with previous case law because it established a detailed guidance what also should be assessed when determining the presence of abuse of dominance by observing that "in deciding whether an undertaking has abused its dominant position in applying a discount system providing for an annual variable discount depending on the attainment of sales targets, it is 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 buyers' 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".[114]

When interpreting the latter argument of the Court one can assume that even though the target rebate schemes are loyalty inducing, they shouldn't be treated as *per se* illegal if they do not require customers to purchase "all" or "almost all" of their requirements from the Michelin NV as in *Hoffmann-La Roche*. However, even though the rebate schemes applied by Michelin NV did not contain exclusivity features in a strict sense, the Court condemned such target rebates with the same formalistic approach by simply stating that "neither the wish to sell more nor the wish to spread production more evenly can justify such a restriction of the customer's freedom of choice and independence. The position of dependence in which dealers find themselves and which is created by the discount system in question, is not therefore based on any countervailing advantage which may be economically justified."[115]

In *Virgin/British Airways*[116] case British Airways (BA), which is the largest United Kingdom airline, was condemned abusing its dominant position by operating some loyalty enhancing performance bonus schemes for travel agents meeting certain individualized volume target during a

[112] Ibidem. Para. 82
[113] Ibidem. Para. 83
[114] Ibidem. Para. 14
[115] Ibidem. Para. 85
[116] CFI Case T-219/99 *British Airways v. Commission* // [2003] ECR II-5917, conf. ECJ Case C-95/04 P [2007] ECR I-2331

reference period. In addition to basic commission system, BA concluded agreements with International Air Transport Association (IATA) travel agents comprising three distinct systems of financial incentives: marketing agreements, global agreements and, finally, a performance reward scheme.[117] Under the marketing agreements which were in principle reserved for United Kingdom IATA travel agents, the reference period was a year. Under the global agreements concluded with three IATA travel agents entitling them to receive additional commissions calculated by reference to the growth of BA's share in their worldwide sales, this reference period was a quarter (for instance, for the 1992/1993 winter season). Payment of the performance reward or the special bonus was subject to travel agents increasing their sales of BA tickets from one year to the next. Later this scheme was changed with a new system of performance rewards measured by comparing the total flown revenue arising from the sales of BA tickets issued by an agent in a particular calendar month with that achieved during the corresponding month in the previous year.

It is important to mention that the Commission‘s decision was appealed not only to the Court of First Instance (CFI) but also to European Court of Justice (ECJ). CFI upheld Commission‘s decision. Later, in 2007, ECJ upheld the decision of CFI, even though the timing of the judgment was somewhat ironic as it essentially reinforced the Commission’s traditional enforcement policy at a time when the Commission was seeking to move towards a more effects-based approach[118].

In its decision the Commission reminded what kind of rebates are considered legal and what kind illegal under competition law rules by stating that “*Hoffmann-La Roche* and *Michelin* establish the principle that a dominant supplier can give discounts that relate to efficiencies, but cannot give discounts or incentives to encourage customer loyalty”[119]. In other words, The Commission wanted to say that such schemes may have an equivalent effect to an exclusivity requirement in a supply contract and so constitute an abuse if practiced by a dominant supplier. CFI supported Commission’s statement by observing that “a rebate granted by an undertaking in a dominant position by reference to an increase in purchases made over a certain period, without that rebate being capable of being regarded as a normal quantity discount, constitutes an abuse of that dominant position, since such a practice can only be intended to tie the customers to which it is granted and place competitors in an unfavorable competitive position”.[120] In addition, the CFI once again

[117] CFI Case T-219/99 *British Airways v. Commission* // [2003] ECR II-5917, para. 4
[118] Taking into account Commission's Discussion Paper on the application of Article 82 EC to exclusionary abuses // 2005
[119] Commission Decision 2000/74/EC of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty (IV/D-2/34.780 ─ Virgin/British Airways) (OJ 2000 L 30, p. 1), para 101
[120] CFI Case T-219/99 *British Airways v. Commission* // [2003] ECR II-5917, para. 263

demonstrated its formalistic approach to the assessment of abuse of dominant position by stressing out that "Article [102 of the Treaty] does not require it to be demonstrated that the conduct in question had any actual or direct effect on consumers. Competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected."[121] This is a very important aspect of this case which clearly demonstrates Court's priorities of protection when assessing the alleged abuse of dominance. As we will see later from the analysis of the Commission's Discussion Paper and Guidance Paper, aforementioned principle to protect the market structure and that there is no need to demonstrate any impact on consumer welfare contradicts with the priorities set by the Commission in these documents.

It is also important to note, that the CFI disregarded BA's efficiency justification by concluding that "the abuse was committed since the extra commissions were not related to any cost savings or efficiency gains made by BA in its dealings with travel agents, but rather depended on the extent to which the latter met or exceeded their previous year's sales of BA tickets regardless of the size or efficiency of the travel agents or the services provided by them to BA."[122]

As it was mentioned before, the ECJ surprisingly upheld the decision of the CFI. By rejecting BA's argument that the CFI wrongly failed to base its argument on the criteria in subparagraph (b) of the second paragraph of Article [102 of the Treaty] in assessing whether the bonus schemes at issue were abusive, the ECJ observed in its decision that "the list of abusive practices contained in Article [102 of the Treaty] is not exhaustive, so that the practices there mentioned are merely examples of abuses of a dominant position"[123]. The ECJ also referred to the previous case-law[124] and stressed out that the list of abusive practices contained in Article 102 of the Treaty does not exhaust the methods of abusing a dominant position prohibited by the Treaty. The ECJ concluded that the assessment of the abuse must be made in line with the underlying factors established in previous case law. In other words, when considering whether a system of discounts or bonuses constitutes an abuse, it first has to be determined whether those discounts or bonuses can produce an exclusionary effect. According to the ECJ, the relevant questions are whether the discounts or bonuses are capable, firstly, of making market entry very difficult or impossible for

[121] Ibidem. Para. 264
[122] Ibidem. Para. 267
[123] ECJ Case C-95/04 P *British Airways v Commission* // [2007] ECR I-2331, para 57
[124] Case C‑333/94 P *Tetra Pak v Commission* [1996] ECR I‑5951, para. 37; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, para. 26; Joined Cases C‑395/96 P and C□396/96 P *Compagnie maritime belge transports a.o. v Commission* [2000] ECR I□1365, para. 112

competitors of the dominant undertaking and, secondly, of making it more difficult or impossible for its customers to choose between various sources of supply or commercial partners. [125]

Despite the fact that ECJ's position in this case was rigorous and the decision was disadvantageous for dominant undertaking, the positive step of the ECJ was that by following its practice established in *Michelin*[126] case it also applied the "rule-of-reason" with regard to loyalty rebates. ECJ stressed out that the "assessment of the economic justification for a system of discounts or bonuses established by an undertaking in a dominant position is to be made on the basis of the whole of the circumstances of the case [...] It 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. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse."[127]

The latest example of individualized rebates schemes may be found in *Michelin II*[128]. Beside other infringements, Michelin was also accused of abusing its dominant position on tyre market in France by applying towards its dealers a complex system of discounts, refunds and/or other financial advantages. In the context of this paper the reference should be made to "quantity rebates" (later changed by "invoice rebates") and rebates dependent on increases in new product sales ("progress bonus", later changed by "achieved target bonus", "end-of-year rebates" and a "multiproduct rebate"). Herein below we will discuss only the latter scheme of rebates.

Under the facts of the case "the "'progress bonus" was intended to reward dealers who agreed at the beginning of the year to undertake in writing to exceed a minimum base (expressed in numbers of casings purchased per annum) fixed by mutual agreement, depending on past performance and future prospects, and who managed to exceed it."[129] Additionally, "dealers who, during two consecutive financial years, exceeded a fixed maximum turnover with the applicant could negotiate a "commercial cooperation agreement" (known as an 'individual agreement'), which entitled them to additional rebates."[130] It's worth to mention that comparing with previous practices employed by dominant undertakings in other cases, this type of rebates was quite flexible because it

[125] ECJ Case C-95/04 P *British Airways v Commission* // [2007] ECR I-2331, para 58-77
[126] Case 322/81 *Michelin v. Commission* // [1983] ECR 3461, para. 71
[127] ECJ Case C-95/04 P *British Airways v Commission* // [2007] ECR I-2331, para 86
[128] Case T-203/01 *Michelin v Commission* [2003] ECR II□4071
[129] Ibidem. Para. 11
[130] Ibidem. Para. 12

allowed dealers to choose on what basis they wanted to measure their minimum target depending on which was most favorable to the dealer: their purchases from the previous year, the average purchases for the two previous years or the average purchases for the three previous years. An "achieved-target bonus" of their net annual invoiced turnover, was paid at the end of February, if the target was reached.

By condemning such scheme as infringement of Article 102 of the Treaty, the Commission formally stated that "progress bonus" (later replaced by "achieved target rebates") was unfair, loyalty-inducing and market-partitioning.[131]

It should be noted that even though the Commission did not refer to case law, it was quite obvious from the statement that "it is inherent in any system of rebates granted on the basis of quantities sold during a relatively long reference period that pressure increases on the purchaser, at the end of the reference period, to achieve the level of purchases necessary for obtaining the rebate.."[132], the Commission's argumentation was based on previous *Michelin*[133] case. It is important to note that this time the Commission finds relevant the length of the reference period which was not an issue in other post *Michelin* cases. Finally, the Commission concluded that "the achieved-target bonus was in itself abusive within the meaning of Article 82 of the Treaty since it was unfair and loyalty-inducing."[134]

In this case both the Commission and the Court applied the same form-based approach without any economic analysis. By simply referring to the principles established in the previous case law neither the Commission nor the Court have made effort in trying to formulate a coherent theory of why Michelin's rebate schemes (even non-individualized quantity discounts) had anti-competitive effects.

As the analysis of case law has demonstrated the application of individualized progress bonus schemes required dominant undertakings to make some estimations of their customers' future purchase requirements during a given reference period. Both the European Commission and courts condemned such schemes as leading to *de facto* exclusive dealing because they were tailored to the requirements of each customer. In contrast, rebates in return for exclusivity, which will be analyzed in the following section of this paper, contain explicit or easily implied exclusive dealing condition.

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[131] 2002/405/EC: Commission Decision of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO — Michelin), para. 264
[132] Ibidem. Para. 287
[133] Case 322/81 *Michelin v. Commission* // [1983] ECR 3461
[134] 2002/405/EC: Commission Decision of 20 June 2001 relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO — Michelin), para. 295

One should notice that when analyzing individualized rebate schemes, the Commission argued that with this kind of rebates dominant undertakings bundle their customers for a certain reference period. Despite the fact that the reference period ranged from one month to one year, not in all cases the length of reference period was taken into account when assessing the presence of abuse. It is important to note that with respect to the reference period the Guidance Paper do not provide any safe harbor as well. In our opinion, as reference period is one of the criteria for assessing the degree of foreclosure, the absence of clarity in this field causes huge uncertainty for dominants undertakings. Of course, even if there would be officially established any exact numbers, mere existence of particular reference period shouldn't be decisive in the assessment of likely anti-competitive foreclosure. However, in our opinion, reference period combined with other parameters should be assessed in each case.

Furthermore, taking into account the aforementioned fact that rebate schemes may have several pro-competitive effects for both dominant undertaking and its customers, and as a result may be beneficial to consumer welfare, a *form-based* approach is no longer tolerable. Instead, a *rule-of-reason* should be applied, where first the exclusionary potential of rebates is analyzed, and then possible pro-competitive explanations are considered, and if appropriate balanced against the anti-competitive ones.

To conclude these reflections regarding individualized progress bonus schemes, it is important to note, that according to existing case law such kind of rebates have consistently been condemned as illegal. Several arguments used by the court are worth mentioning. Firstly, the court argued that such kind of rebates put pressure on the customer to stay loyal in order to obtain the discounts for the whole reference period. In addition, loyalty rebates tend to prevent customers from obtaining their supplies from competing manufacturers by offering them financial advantages. The court established the principle that a dominant supplier can give discounts that relate to efficiencies, but cannot give discounts or incentives to encourage customer loyalty.

3.2. Rebates in Return for Exclusivity

In the second and probably the most common situation analyzed by European Commission and courts, the dominant undertakings used to offer loyalty rebates to their customers in return for a full or partial exclusive dealing arrangements. From the theoretical and comparative point of view this kind of situation would consist with the third category that was previously distinguished by the economists Ridyard D. and was shortly described as *rebate in return for exclusivity*. It is important to mention that in this kind of situation the rebates will coincide with the dominant firm's share of the customer's total purchases. In the United States such type of discounts is known as "market share" discount and is often viewed as a weaker version of exclusive-dealing arrangement. In European case law there were several famous cases in which such rebates had been condemned as fidelity enhancing and thus contrary to competition rules. Firstly, in this section we will analyze cases of *European Sugar Cartel,*[135] *Hoffmann-La Roche*[136]*, Hilti*[137]*, British Plasterboard*[138]*, Solvay*[139]*, ICI*[140] and *Deutsche Post*[141]. All decisions of aforementioned cases were adopted prior to the reform of Article 102 of the Treaty. After that we will analyze the latest *Intel*[142] and *Tomra*[143]cases as these cases could have been a perfect opportunity for the Commission to apply its new *effects-based* approach established in its Guidance Paper with respect to exclusive dealing and loyalty rebates.

The case law on the assessment of loyalty rebates schemes in return for exclusivity began almost 40 years ago with the case of *European Sugar Cartel*[144]. Although the decision in this case was mainly related to a cartel between European sugar producers, the European Commission also challenged a rebate scheme of one dominant undertaking to be an abuse of dominant position. According to the scheme all customers that undertook to purchase their annual requirements exclusively from that undertaking have been awarded by annual "quantity" rebate. Actually this scheme was a loyalty rebate and Commission considered it as *de facto* exclusive dealing agreement. In its decision Commission stated: "The granting of a rebate which does not depend on the amount bought, but only on whether the annual requirements are covered exclusively by the SZV, is an unjustifiable discrimination against buyers who also buy sugar from sources other than SZV."[145] Firstly, by its statement *"an unjustifiable discrimination"* the Commission expressed its opinion that such kind of activities is illegal irrespectively of any beneficial effects. In addition, the Commission asserted the view that "… if a fidelity rebate of this kind is granted by an undertaking which holds a

[135] Cases 40/73 *Suiker Unie v Commission //* [1975] ECR 1663, [1976] 1CMLR 295
[136] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities //* [1979] ECR 461;
[137] Case T-30/89 *Hilti v. Commission* // [1991] ECR II-1439
[138] Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389
[139] Case T-32/91 *Solvay* // [1995] ECR II-1825
[140] Case T-37/91 *ICI* // [1995] ECR II-1901
[141] Case COMP/35.141, *Deutsche Post AG*, 2001 O.J. (L 125) 27
[142] Case COMP/C-3/37.990 – *Intel* of 13 May 2009
[143] Case COMP/E-1/38.113 – *Prokent/Tomra* of 29 March 2006; Case T – 155/06, *Tomra Systems ASA and Others v European Commission //* OJ 2010/C 288/31
[144] Cases 40/73 *Suiker Unie v Commission //* [1975] ECR 1663, [1976] 1CMLR 295
[145] 73/109/EEC: Commission Decision of 2 January 1973 relating to proceedings under Articles 85 and 86 of the EEC Treaty (IV/26 918 - European sugar industry) // Official Journal L 140 , 26/05/1973 P. 0017 – 0048, para. 3

dominant position in order to limit opportunities for imports still further and to strengthen that dominant position, it constitutes an abuse, which is likely to affect trade between Member States."[146] This position of the European Commission would appear to clearly apply an approach of *per se* illegality of such type of exclusivity.

The Court upheld a Commission's decision, and for the first time made a distinction between quantity rebates and loyalty rebates by stating:

"The rebate at issue is not to be treated as a quantity rebate exclusively linked with the volume of purchases from the producer concerned but has rightly been classified by the Commission as a 'loyalty' rebate designed, through the grant of a financial advantage, to prevent customers obtaining their supplies from competing producers."[147] In other words, as Osterud E. explained, the Court "made a distinction between legitimate and abusive rebates on the basis of whether the rebate was formally categorized as a quantity or as a loyalty rebate".[148]

This rigorous approach against exclusivity rebates was also maintained some years later in *Hoffmann-La Roche*[149] case. As it was already mentioned, in this case Hoffmann-La Roche was found to have dominant position on markets for certain vitamins, and to have abused that position by entering into exclusive agreements or agreements containing exclusionary fidelity rebates with purchasers of vitamins. Although contracts concluded by Roche and its customers were drawn up at different times and in terms which were not always identical, some common features of such contracts might have been distinguished as follows:

- Some of them contained a specific undertaking by the purchaser to obtain exclusively from Roche either:
  - all or almost all of its requirements of bulk vitamins manufactured by Roche;
  - on all its requirements of certain vitamins therein expressly mentioned;
  - on a percentage stipulated in the contract of its total requirement;
  - on "the major part" of its requirements of vitamins or of certain vitamins;
- In some of the contracts the purchaser undertook to "give preference to Roche" or expressed its "intention" to obtain its supplies exclusively from Roche or agreed to

[146] Ibid.
[147] Para. 518 of the jugment in cases 40/73 *Suiker Unie v Commission //* [1975] ECR 1663, [1976] 1CMLR 295
[148] Osterud E. Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law: the Spectrum of Tests // [2010] Kluwer Law International, p. 70
[149] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities //* [1979] ECR 461;

recommend its subsidiaries to do the same, either in respect of all their vitamin requirements or of certain vitamins therein specified;[150]

Almost all the above-mentioned contracts provided for the grant, under various names, of discounts or rebates calculated on the total purchases of vitamins, whatever group the latter belong to, during a given period of usually a year or six months.

Similarly like in *European Sugar Cartel* case[151], both Commission and Court maintained very strict position towards the actions of Roche. In its decision Court observed: "An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102] of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate."[152] In this context, Court condemned exclusive dealing contracts as *per se* illegal without any possibility to justify such practice. Following its initial argumentation in connection to exclusive dealing obligations the Court continued: "The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements – whether the quantity of its purchases be large or small – from the undertaking in a dominant position."[153] By this statement Court approved that fidelity rebates should be considered as *de facto* exclusive dealing obligations and thus they should be treated *per se* illegal as well. In paragraph 90 of its decision the Court added: "Obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the Common Market". In following argumentation, similarly as in *European Sugar Cartel* case[154] the Court once again made a distinction between individualized fidelity rebates and quantity rebates by condemning the former because of its discriminatory nature and loyalty enhancing as well as exclusionary effect by stating: "The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through

[150] Ibidem, para.82-84.
[151] Cases 40/73 *Suiker Unie v Commission //* [1975] ECR 1663, [1976] 1CMLR 295
[152] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities //* [1979] ECR 461, para. 89;
[153] Ibidem.
[154] Cases 40/73 *Suiker Unie v Commission //* [1975] ECR 1663, [1976] 1CMLR 295

the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers. Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply. Finally these practices by an undertaking in a dominant position and especially on an expanding market tend to consolidate this position by means of a form of competition which is not based on the transactions effected and is therefore distorted."[155]

Unfortunately, in this case the Court did not deal with the question of when such rebate schemes create an incentive which is powerful enough to give rise to concerns under Article 102 of the Treaty and thus not only stated but actually confirmed its hostile approach to such practices employed by dominant undertakings. As Roche was in a dominant position, in this context, it is difficult not to agree with Alese F. which criticized Court's decision by stating that "the overall picture of the decision appears to be directed not in an outright manner to specific considerations of exclusive dealing, but tentatively towards the general issue of maintenance of dominance through improper means. This is reflected in aspects of the decision considering the use of bundling as a rebate measure, and cemented by the English clause… <…> The decision would have provided a clear lead were it to have demonstrated how the probable effects of these practices would have led to the exclusion of equally efficient producers…"[156]. As we will see in following chapters of this paper, even though this issue was touched and was tried to be solved in later case law as well as by Commission's official statements, even nowadays it remains problematic for dominant undertakings to find some safe harbor with respect to rebate schemes and exclusive dealing arrangements.

Few years later with the *Hilti*[157] case hostile practice established in previously mentioned cases was confirmed. Both the European Commission and the Court of First Instance condemned rebates schemes applied by a dominant company named Hilti acting in nail guns and their accessories market. Even though this case is more known as an illustration of tying cases, it may also be used in order to give another example of *de facto* exclusive dealing. According to the facts of the case, Hilti had employed several rebate schemes in order to impede further penetration of its competitors acting in a nail market. One of the essential infringements of Hilti in this field was that it put some customers in a less favorable position by reducing discounts and adopting other

[155] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* // [1979] ECR 461, para. 89;
[156] Alese F. Federal antitrust and EC competition law analysis // Ashgate Publishing, 2008, 322 p.
[157] Case T-30/89 *Hilti v. Commission* // [1991] ECR II-1439

discriminatory policies when cartridge strips were bought without nails. In other words, in this case rebate policy was directed to induce customers to buy from Hilti and not from independent nail producers. In its decision the Commission stated that “making the sale of patented cartridge strips conditional upon taking a corresponding complement of nails constitutes an abuse of a dominant position, as do reduced discounts and other discriminatory policies described above on cartridge-only orders. These policies leave the consumer with no choice over the source of his nails and as such abusively exploit him. In addition, these policies all have the object or effect of excluding independent nail makers who may threaten the dominant position Hilti holds.”[158] In addition, Commission also condemned the policy of rebates because “unsupported” categories of Hilti’s customers were simply informed of a reduction in their rate of discount without any attempt to explain the criteria on which the decision was based.[159]

Court of First Instance upheld Commission’s decision by concluding that “the actions of Hilti AG in pursuing against independent producers of nails for Hilti nail guns, courses of conduct intended either to hinder their entry into and penetration of the market for Hilti-compatible nails or to damage directly or indirectly their business or both, constitute an abuse of a dominant position within the meaning of Article [102] of the [TFEU].”[160] In our opinion, such an importance attributed to the subjective element of intent could be criticized as possibly eliminating the legitimate discretion of the dominant undertaking to compete.

One can assume that by this decision the Court of First Instance implicitly demonstrated its position established in *Michelin I*[161] that commercial conduct which is, in general, accepted for a non-dominant undertaking may become objectionable when engaged in by a dominant company.

In *British Plasterboard*[162] case besides other infringements of competition law British Gypsum Ltd (BG) was accused abusing its dominant position in the supply of plasterboard in Great Britain through a scheme of payments to builders' merchants who agreed to purchase plasterboard exclusively from British Gypsum Ltd. In addition, BPB Industries plc, through its subsidiary British Gypsum Ltd was considered abusing its dominant position in the supply of plasterboard by a series

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[158] 88/138/EEC: Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty // OJ L 65, 11.3.1988, para 75.
[159] Ibidem. Para 82
[160] Ibidem. Para 8
[161] In this case ECJ stated that a dominant undertaking “has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.” See Case 322/81 *Michelin v. Commission* // [1983] ECR 3461, para. 57
[162] Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389

of rebates on BG products supplied to builders' merchants in Ireland and Northern Ireland conditional on their not handling any imported plasterboard from France and Spain.

Relying generally on its arguments established in *Hoffmann-La Roche* and *Michelin I,* the Commission condemned BG loyalty enhancing rebate schemes by stating that "in any event, the exclusivity arrangements meant that the merchants tied themselves to BG for the future." Even though from the Commission's decision it is not clear how exactly non obligatory rebate schemes that were employed by BG "tied" the customers "for the future", in our opinion, by this argument the Commission was trying to express its approach that when the rebates are granted for the past period (in BG's case the rebate was a percentage of all annual purchases and was applied retroactively), the customers which had an interest to get such rebate were induced to buy all or almost all of their requirements from that dominant undertaking until the end of the agreed future period. In addition it is important to emphasize that the Commission condemned the rebate schemes of BG because they were also applied "across-the-board" to all gypsum products, not just plasterboard. Dabbah M.M. defined such practice as "referring to the situation where a dominant firm producing a range of products offers a rebate to its customers when they acquire the whole range."[163]According to the previous case law such rebates schemes were unlawful because they were "conditional on exclusivity". Similar position was held in *Hoffmann-La Roche* case where the Court observed that "such practice created particularly attractive incentive for purchaser to buy all of their requirements if the purchaser wanted to approach a competing producer for a particular product he will however be prevented from doing so because he would thereby lose the benefit of the rebate on all the other products which he continues to buy from Roche." [164]

The Court upheld the Commission's decision in *British Plasterboard* case by observing that "where an economic operator holds a strong position in the market, the conclusion of exclusive supply contracts in respect of a substantial proportion of purchases constitutes an unacceptable obstacle to entry to that market."[165] Thus, in this case the Court once again expressed its hostility to loyalty rebates employed by dominant undertakings and confirmed already existing approach that such practices were *per se* illegal. As an additional argument in this context the Court pointed out that "the application by a supplier who is in a dominant position, and upon whom as a result the customer is more or less dependent, of any form of loyalty rebate through which the supplier

[163] Dabbah M. M. EC and UK competition law– commentary, cases and materials // Cambridge University Press, 2004, p. 362

[164] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities //* [1979] ECR 461, para. 109-111

[165] Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, para. 3

endeavors, by means of financial advantages, to prevent its customers from obtaining supplies from competitors constitutes an abuse within the meaning of Article [102] of the Treaty."[166]

Even though BG's practices were treated by the Commission and Court with the same strict attitude as in previously analyzed cases, in our opinion, the difference of this case is that BG's actions were more spontaneous without any estimates of its customers' monthly purchase requirements or calculations on a scale of rebates which would increase with the volume bought. This conclusion is raised by the facts described in the Commission's decision[167]. For instance, in a note to BG's group operating director dated 1st May 1985, under the heading „Plasterboard Competition - Sales and Pricing Strategy", the managing director set out the conditions BG would negotiate in connection with their support for large merchant groups. The first condition was „exclusivity", whereby the merchant would undertake to buy all his plasterboard and related products from BG. Under this heading it is stated: „It is difficult to quantify how we would benefit from this action. On one hand, it will prevent our losing more of our existing customers and hence loss of revenue - on the other hand, it could get back market from our competition who would either accept a reduced level or attempt to take back that share elsewhere."[168] Very similar conclusion was made by Gyselen L. which stated that "the payments [made by BG] appeared to be more of a defensive move against increasing imports from France and Spain than part of pro-active, well structured rebate scheme based on estimates of future purchase requirements."[169]

In *Solvay*[170] *and ICI*[171] cases both companies employed an illegal rebate schemes to exclude competitors and tie in customers and thus from the point of view of European competition institutions had infringed Article 102 of the Treaty.

Note that the Court of Justice recently has set aside the judgments of the General Court and has annulled the Commission's decisions imposing fines on Solvay for its anti-competitive conduct on the soda ash market because the Commission failed to respect Solvay's right of access to the procedural file and its right to be heard[172]. However, it is still very important to analyze initial decisions in Solvay case together with ICI case in order to better understand the main principles

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166 Ibidem. Para. 8

167 89/22/EEC: Commission Decision of 5 December 1988 relating to a proceeding under Article 86 of the EEC Treaty // Official Journal L 010

168 Ibidem. Para 59.

169 Gyselen L. Rebates: Competition on the Merits or Exclusionary Practice. // http://www.eui.eu/RSCAS/Research/Competition/2003/200306COMP-Gyselen-sII.pdf, access time: 15 September 2011, p. 14-15

170 Case T-32/91 *Solvay* // [1995] ECR II-1825

171 Case T-37/91 *ICI* // [1995] ECR II-1901

172 Case C□109/10 P. *Solvay SA. v. European Commission* // [2010] Official Journal of the European Union. 19.6.2010

established in the case law. Following the main subject of this paper we will focus on rebates schemes condemned in both cases.

In those cases Solvay and ICI had allegedly abused their dominant position in different geographical markets in soda ash, a chemical product used in the manufacture of glass. Both ICI and Solvay had put into effect a system of exclusionary "top slice" rebates. Most large users of soda ash had one main supplier for their "core" requirements (about 80% of their needs) but would have liked to have a secondary supplier for the rest of their requirements as a counterbalance against the dominant supplier. In order to minimize the competitive effect of such supplies, both Solvay and ICI developed a two-tier pricing system where the "core" tonnage was sold at normal prices but the additional quantities (or "top slice") which the customer would otherwise buy from a second supplier were offered at a substantial (and secret) discount. Differently from ICI, Solvay gave for its customers not only a 20% discount but also a variable cheque rebate "dependent upon the customer's obtaining all or almost all of its requirements from Solvay."[173]

In its decision the Commission summarized that Solvay's, which holds a dominant position in the market for soda-ash in the Community[174], practices have had the object and effect of tying the said customers to Solvay for the whole of their requirements and of excluding competitors. As the Commission and courts have always stressed that the giving of exclusionary rebates by dominant producers is a serious breach of Article 102 of the Treaty, the Commission this time did not even enter into a great detail when analyzing the alleged infringements. It simply referred to the internal documents demonstrating the specific intention to ensure the loyalty of the customer and exclude or limit competition.[175] In addition, the Commission stated that the net price of marginal ton offered by Solvay was "far below any economic price which the other Community producers could have offered."[176]

In *ICI* case the Commission concluded that the rebate brought ICI's prices under the minimum price at which its U.S. competitors have had to sell their soda ash. Thus the discount scheme was effective in foreclosing business opportunities for competitors and had an exclusionary effect.[177] Similarly as in Solvay case when assessing the presence of an infringement the Commission also applied form-based approach without any deeper economic analysis by stating

[173] 91/299/EEC: Commission Decision of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty, para. 13
[174] Excluding the United Kingdom and Ireland, where ICI maintained dominance
[175] Ibidem. Para. 52
[176] Ibidem. Para. 52
[177] 91/300/EEC: Commission Decision of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty, para. 4

simply that “it is obvious both from the nature of the system itself and from the terms of ICI's own internal documentation that the “top-slice” rebates were intended to exclude effective competition.”[178]

The interesting fact that appears from the Commission’s decision is that almost decade before this case ICI had already had some issues with the Commission. At that time ICI applied in its practice exclusive supply agreements, so-called “evergreen contracts”, i.e. contracts running for an indefinite period with a two-year notice of termination and which stipulated that the buyer obtain the whole of its requirements from ICI.[179] And even though a bit later ICI began to offer to its customers a range of contract options which included running contracts on a total requirements basis but terminable on shorter notice (three to six months notice after one year), the Commission however considered that the total requirements clause even for short periods was unacceptable in terms of Community competition rules. The Commission also objected to certain aspects of ICI's “'English clause” as then drafted since it would effectively have excluded the possibility that any competitive offer could ever succeed.[180] Even though the file was closed without any formal decision, in our opinion, the arguments used by the Commission during the examination illustrate the same hostile approach towards exclusive dealing arrangements and English clauses that has been established in *Hoffmann-La Roche*.[181]

In *Deutsche Post*[182] case, an undertaking offering services for remuneration on markets in a number of postal services Deutsche Post (DP) has been accused abusing its dominant position by entering in exclusive dealing contracts and offering loyalty rebates for its customers. DP was the only significant provider in Germany of nation-wide parcel and catalogue delivery services which met the specific requirements of the mail-order trade. According to the facts of the case, so-called cooperation partners were entitled to special prices conditional on the customer's declared readiness “to entrust all mail-order items suitable for package and parcel post to [DP]. Apart from the general terms of sale, applicable to all cooperation agreements, the following individual cooperation agreements granted the special price only in return for the customer's undertaking to send all or a significant part of his parcels or catalogues via DP.”[183] The Commission primarily based its decision with reference to *Hoffmann-La Roche*. When making distinction between quantity rebates and

[178] Ibidem. Para 52
[179] Ibidem. Para 12
[180] Ibidem. Para 12-13
[181] Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities //* [1979] ECR
[182] Case COMP/35.141, *Deutsche Post AG*, 2001 O.J. (L 125) 27
[183] Ibidem. Para. 23

loyalty rebates the Commission employed distinction already made in prior case law and stated that "the fidelity rebate is linked, not to a specific quantity, but to the customer's requirements or a large proportion thereof. The reduction is granted "in return" for the exclusivity in satisfying the demand."[184] The Commission also explained that "even where the fidelity rebate is linked to a specific quantity, it is given on the basis, not of that quantity, but of the assumption that the quantity represents an estimate of each customer's presumed capacity of absorption, the rebate being linked, not to the largest possible quantity, but to the largest possible percentage of the requirements."[185]

From Commission's point of view, all standard-form contracts, shortly called "cooperation contracts", concluded by DP were considered as obvious examples of fidelity rebates within the meaning of the judgment in *Hoffmann-La Roche*.[186] Even though explicit or implied exclusivity clauses varied from contract to contract, but the essence was always similar to the calculation employed in *Hoffmann-La Roche*. For instance, one "contract's wording referred, not to the quantity posted, which was estimated only roughly at [...] million, but to an increase in the percentage of the customer's requirements to be dispatched in future via DP."[187] Other cooperation contracts contained a provision which was linked, not to a specific quantity, but exclusively to the requirements of the customer concerned, and which granted the discount "in return" for the exclusive purchase of services from DP.[188]

Even though some contracts from the first sight contained pure quantity rebate schemes that are not forbidden and are considered as pro-competitive, but the Commission considered such schemes as target rebates and additionally stressed that "although the contract's reference to a volume of [...] million parcels at first sight is an element which appears to be of quantitative nature, [a further] examination of this contract reveals that this quantity corresponds to exactly [...] % of this customer's annual requirements [...]."[189]

As we may see from the analysis of some cases, the scope and forms of exclusivity clauses differed from case to case. However, usually the Commission and courts applied the same hostile approach when assessing the exclusive dealing conditions applied to "all or most all" of the customer's total requirements like in *European Sugar Cartel*, *Hoffmann-La Roche, British*

[184] Ibidem. Para. 33
[185] Ibidem.
[186] Ibidem. Para. 33-34
[187] Ibidem. Para. 34
[188] Ibid.
[189] Ibid.

Plasterboard, Hilti or *Deutsche Post* as well as to the exclusive dealing arrangements containing conditions of a narrower scope such as "top slice" or "marginal tonnage" like in *Solvay* and *ICI*.

In order to ascertain if the situation has changed after the publication of the Guidance Paper herein bellow we will analyze the latest decisions of European Commission and courts adopted in the field of exclusive dealing and loyalty rebates.

In 2009 the European Commission adopted a decision[190] finding that Intel Corporation (hereinafter – Intel) infringed Article 102 of the EC Treaty by abusing its dominant position on the x86 central processing unit (hereinafter – CPU) market.

The Commission found that Intel engaged in two specific forms of illegal practice. First, Intel gave wholly or partially hidden rebates to computer manufacturers on condition that they bought all, or almost all, their CPU from Intel. Intel also made direct payments to a major retailer on condition it would stock only computers with Intel CPU. Second, Intel made direct payments to computer manufacturers to halt or delay the launch of specific products containing competitors' CPUs and to limit the sales channels available to these products. The Commission found that these practices constituted abuses of Intel's dominant position on the CPU market that harmed consumers throughout the EEA. Following the topic of this paper we will focus of the first alleged abuse, i.e. conditional rebates. It is important to note that Intel challenged the Commission's decision in the European Court of First Instance.[191]

Note that in this case, the European Commission has applied Article 102 of the Treaty for the first time since the publication of its Guidance Paper. On one hand one may argue that this decision illustrates, to a certain extent, the change which is progressively emerging in the attitude of the Commission with respect to the application of Article 102 of the Treaty. However, various commentators[192] state that the Commission failed to solve the ambiguities and inconsistencies regarding the nature and the scope of that change.

Before the assessment of abuse in this case the Commission pointed out that it considers that the guidance paper does not apply to this case. However, the Commission later added that it takes

[190] Case COMP/C-3/37.990 – *Intel* of 13 May 2009. A full non-confidential version of the infringement decision is available on the Commission's website http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf
[191] Case T-286/09, Intel v Commission // OJ 2009/C 220/41;
[192] See Geradin D. The Decision of the Commission of 13 May 2009 in the Intel Case: Where i s the Foreclosure and Consumer Harm? // 2 Journal of European Competition Law & Practice, 2009; See also Crane D.A., Murciego G.M. Toward a Unified Theory of Exclusionary Vertical Restraints // University of Michigan Legal Working Paper Series. Empirical Legal Studies Center, 2010

the view that this decision is in line with the orientations set out in the Guidance paper.[193]Thus, one can assume that by this statement the Commission admitted to follow principles established in the Guidance Paper, despite the fact that proceedings in Intel case had been initiated before it was published. The most surprising issue in this case was that the Commission condemned Intel for allegedly granting conditional rebates by referring to the previous case law[194] which has been consistently criticized for several years by legal and economic commentators for pursuing a formalistic, *per se* approach. Contrary to what has been established in the Guidance Paper, the Commission stated that following the existing case law there is no necessity to look into the actual impact of the alleged anticompetitive conduct on the market in the analysis undertaken. In addition, the Commission pointed out that for the purposes of establishing an infringement of Article 102 of the Treaty, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct in question is capable of having or likely to have such an effect. Furthermore, the Commission rejected Intel's argument about the necessity to prove actual foreclosure. Finally, the Commission observed that a violation of Article 102 may also result from the anticompetitive object of the practices pursued by a dominant undertaking.[195]However, later the Commission tried to demonstrate its modern approach established in the Guidance Paper by stating that "although not indispensable for finding an infringement under Article [102] of the Treaty according to the case law, one possible way of showing whether Intel's rebates and payments were capable of causing or likely to cause anticompetitive foreclosure is to conduct an "as efficient competitor analysis"."[196] As it was already explained, the "equally efficient competitor test" is intended to assess whether the dominant firm itself would survive, given its cost structure, if it had to respond to the challenged pricing structures. Unfortunately, as some commentators observe the decision demonstrated that not only the test itself is conceptually complicated, but also neither the dominant company itself, nor its customers and competitors, can realistically use this approach to evaluate a proposed rebate scheme in advance.[197]

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[193]Case COMP/C-3/37.990 – *Intel* of 13 May 2009, para 916

[194] See e.g. Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461; Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389; Case T-203/01 *Michelin v Commission* [2003] ECR II-4071; Case T-219/99 *British Airways v Commission* [2003] ECR II-5917; Case C-95/04 P *British Airways v Commission* [2007] ECR I-2331

[195] Case COMP/C-3/37.990 – *Intel* of 13 May 2009, para. 922-923

[196] Ibidem. Para. 925

[197] See e.g. Memo Alert of Cleary Gottlieb Steen & Hamilton LLP Observations on the European Commission's Intel Decision// http://www.cgsh.com/files/News/bc121e26-ac14-42e1-8618-237d9504f2d0/Presentation/NewsAttachment/8900b82e-957f-4cf8-901a2645266a4f3b/CGSH%20Alert%20-%20Observations%20on%20the%20Commission's%20Intel%20Decision.pdf, access time: 2 December 2011, pages 5-6

It should be noted that there were a lot of discussions among various commentators[198] regarding the outcome of this decision and most of them agree that even if the Commission succeeded to prove the foreclosure of as efficient competitor, it still failed to demonstrate concrete effects of Intel's rebates on competition and consumers. As a result, despite the Commission's intent expressed in the Guidance Paper "to help undertakings better assess whether certain behaviour is likely to result in intervention by the Commission under Article [102]"[199], one can assume that after this decision dominant undertakings have been left in the same ambiguous situation as they were before.

In 2006 the European Commission found that Tomra Systems ASA (hereinafter – Tomra) had infringed Article 102 of the Treaty by implementing an exclusionary strategy to prevent market entry or expansion by smaller rivals on Germany, Austria, Sweden, the Netherlands and Norway markets of reverse-vending machines used to collect used beverage containers (hereinafter – RVM).[200] This strategy involved exclusive supply agreements, individualized quantity commitments, and/or individualized, retroactive rebate schemes in which the discount earned by reaching a specified target was applied retroactively to all purchases and not just to the purchases above the target. The decision has been appealed to General Court.[201]

It is important to note that *Tomra*[202] is the General Court's first decision on exclusive agreements and loyalty rebates since the adoption of the Guidance Paper and previously discussed Commission's *Intel*[203] decision. To everyone's disappointment the Court confirmed existing case law and rejected the need to analyze any actual foreclosure effects. Following the same formalistic approach towards rebate schemes and exclusive dealing agreements the Court stated that „a rebate system which has the potential to foreclose rivals will be regarded as contrary to Article 102 if it is applied by an undertaking in a dominant position"[204]. The Court also added „that in order to determine whether exclusivity agreements, individualised quantity commitments and individualised retroactive rebate schemes are compatible with Article [102 of the Treaty], it is necessary to ascertain whether, following an assessment of all the circumstances and, thus, also of the context in

[198] See e.g. Geradin D. The Decision of the Commission of 13 May 2009 in the Intel Case: Where i s the Foreclosure and Consumer Harm? // 2 Journal of European Competition Law & Practice, 2009; See also Crane D.A., Murciego G.M. Toward a Unified Theory of Exclusionary Vertical Restraints // University of Michigan Legal Working Paper Series. Empirical Legal Studies Center, 2010
[199] The Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings // OJ 2009/ C 45/7, para. 2
[200] Case COMP/E-1/38.113 – *Prokent/Tomra* of 29 March 2006
[201] As a result of unfavorable General Court's ruling, Tomra has appealed it to the European Court of Justice
[202] Case T – 155/06, *Tomra Systems ASA and Others v European Commission* // OJ 2010/C 288/31
[203] Case COMP/C-3/37.990 – *Intel* of 13 May 2009
[204] Case T – 155/06, *Tomra Systems ASA and Others v European Commission* // OJ 2010/C 288/31, para. 211

which those agreements operate, those practices are intended to restrict or foreclose competition on the relevant market or are capable of doing so."[205] One can notice that Court's assessment which is based on the form (*intent* or *capability*) of conduct and not on actual effects contradicts with the Commission's enforcement principles established in Guidance Paper. This is highly disappointing taking into account that dominant undertakings have been left in the same uncertain situation regarding exclusive dealing agreements and rebates.

The Court also rejected Tomra's argument that the Commission should have assessed whether contestable part of the market was large enough to allow competitors profitably to remain in the market by simply concluding that "the customers on the foreclosed part of the market should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it." Consistently following its previous case law relating to exclusivity and loyalty discounts the Court dismissed Tomra's arguments concerning the lack of actual foreclosure by stating that "it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets. It is sufficient in that respect to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect."[206]

In conclusion, the Commission in its Guidance Paper provided a detailed description on how to assess cases of alleged abuse of a dominant position. In addition, addressing the criticism regarding previous formalistic case law regarding Article 102 of the Treaty, it demonstrated a sounder analytical approach towards exclusionary conduct of dominant undertakings where economic analysis at least theoretically plays a much more predominant role than before. However, the analysis of *Intel* and *Tomra* cases has shown that the implementation of this new approach is likely to be challenging and complicated process, especially taking into account the 40 years legacy of *form-based* decisions adopted by European courts. Both aforementioned cases may be considered as a step backwards relative to the principles established in Guidance Paper. Nonetheless, one can expect that the European Commission's future decisions will be based on a stronger economic analysis regarding exclusionary abuses and that Community courts will support Commission's efforts to introduce new *effects-based* approach into this field by changing previous formalistic case law. In the meantime, companies must continue to assess their conduct and business practices

[205] Ibidem. Para 215
[206] Ibidem. Para. 289

relying on existent case law and reformed, if still very abstract, guidance provided by the European Commission.

4. EXCLUSIVE DEALING IN LITHUANIAN COMPETITION LEGAL PRACTICE

The primary source of competition law in Lithuania is the Law on Competition of the Republic of Lithuania[207] (hereinafter – the Law on Competition) which was significantly changed in 2004, when Lithuania became a member of the European Union. The Law on Competition and secondary legislation have been drafted closely following the principles set out in the Treaty, thus Article 9 of the Law on Competition which prohibits abuse of a dominant position and lists cases[208] of conduct likely to constitute an abuse is very similar to Article 102 of the Treaty.

Lithuanian judicial practice related to the topic is not large therefore to make any firm conclusions is difficult. Nonetheless, the analysis of some cases revealed that Lithuanian Competition Council and the national courts tend to rely on the European case law even when the case was based only on national law rules. As a result, we may find some cases where approach of the Competition Council towards exclusive dealing and rebates was very similar to the one applied by the European Commission. However, Lithuanian Competition Council has officially expressed that "a test of an equally efficient competitor and/or consumer welfare test should be the guiding principles when deciding which type of competition is on the merits and which is not".[209]

Since the adoption of the Law on Competition in 1999 there were just a few cases concerning exclusive dealing and loyalty rebates. The very first one was related to an investigation of actions of oil refinery AB „Mažeikių nafta"[210] (MN) with regard to a number of vertical agreements (written contracts) between the oil refinery MN and its major wholesalers of oil products. [211] MN concluded vertical agreements with five selected major wholesalers - with those which held import licenses and were actually importing fuel into the country. These agreements provided for discounts to wholesale companies in exchange for binding exclusive dealing obligations not to import the said oil products and only purchase them from MN. Practically it meant

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[207] Law on Competition of the Republic of Lithuania // Official Gazette, 1999, No. 30-856

[208] 1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; 2) limiting production, markets or technical development to the prejudice of consumers; 3) applying dissimilar (discriminative) conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; 4) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[209] Note by Lithuania on a Roundtable on Competition on the Merits // http://www.konkuren.lt/en/international/docs/cm_2005_02.pdf, access time 16 December 2011, para. 5

[210] Now known as Orlen Lietuva, AB

[211] Decision No. 8/b of May 18, 2001 On the compliance of actions of the *AB MAŽEIKIŲ NAFTA* and undertakings trading in oil products with the requirements of Art. 5 of the Law on Competition

that where any supposed actual or potential foreign oil refinery had had an intention to sell its products on Lithuanian market, the binding contractual obligations would have prevented the wholesalers operating therein from purchasing and distributing the products of such producer. As a result, these particular agreements caused damage to competition and consumers since the latter were being deprived of a possibility to acquire imported fuel at a lower price.

It is important to emphasize that even though MN was a dominant undertaking its actions in this case were assessed not under Article 9 prohibiting abuse of dominant position but under Article 5 of the Law on Competition which prohibits all agreements which have as their object the restriction of competition or which may restrict competition.[212] Thus, in this case not only MN but also other wholesalers involved were subject to fines and were obligated to terminate the agreements concerned. With this respect the whole analysis and the outcome of the case is quite strange. Taking into account that private parties should be free to decide whether to contract with each other or not, the assessment of the agreements under Article 5 of the Law on Competition is doubtful. On the other hand, it would be interesting to hear the argumentation of the Competition Council if the analysis of this case would have been performed under Article 9 of the Law on Competition. It should be mentioned that even though Article 5 of the Law on Competition does not require demonstrating any actual anticompetitive effects, Competition Council took account of factual effect of the agreements at issue by pointing out that aforementioned agreements resulted in the actual decrease of the volumes of imported oil products. However, in this situation it was not demonstrated if consumers have been actually harmed. The decision was later upheld by the Supreme Administrative Court of Lithuania.[213]

More interesting fact is that a few years later the Competition Council launched a new examination of allegedly abusive conduct of MN[214]. Despite the fact that situation was similar, this time the assessment was performed under the Article 9 of the Law on Competition and Article 102 of the Treaty. Note that in a previous case MN as a seller and another party as a purchaser had explicitly expressed their intent to cooperate with each other exclusively. Consequently, MN was enabled to enhance its market power and its buyer got lower prices. Such agreements included an exclusivity provision establishing obligation of the buyer not to deal with competitors of MN and not to buy form importers. Despite the fact that MN was a dominant undertaking and there were

[212] The wording of the Article 5 the Law on Competition is very similar to Article 101 of the Treaty.
[213] Decision of 21 October, 2011 of the Supreme Administrative Court of Lithuania No. A8-788-04
[214] Decision No. 2S-31 of December 16, 2010 On the compliance of actions of the *AB MAŽEIKIŲ NAFTA* with the requirements of Art. 9 of the Law on Competition

several buyers, all parties of agreements had been condemned as infringers of competition law rules. Surprisingly, even though in a new case as MN offered target rebate schemes in return for exclusivity virtually to the same buyers as in the previous case, this time it was considered as unilateral abusive conduct of MN.

Without entering into details of the case we would like to mention that besides some other infringements of the Article 9 of the Law on Competition, the anti-competitive actions by MN also included the economically unsubstantiated annual loyalty and non-competing obligations. According to the Competition Council the restricting actions by MN significantly limited the possibilities of other undertakings to operate in the market and inflicted damage upon them and, eventually, consumers. The Competition Council concluded that MN, by imposing some loyalty obligations sought "tying up" its consumers and restricting their free behavior in the market in respect of changes of oil product prices or other factors, rendering them free to choose other producers only in the cases when MN was not able to supply them with oil products. This actually resulted in a foreclosure of the Lithuanian gasoline and diesel markets from other producers, thus significantly restricting competition therein. On 15 April 2011, the Vilnius Regional Administrative Court upheld the decision of the Competition Council.

It is important to emphasize that Competition Council based its argumentation on European case law[215] and applied the same highly criticized *form-based* approach. As it was already mentioned, Lithuanian Competition Council has expressed it positive approach toward a necessity to apply a test of an equally efficient competitor and/or consumer welfare test when deciding if a particular conduct should be considered as an abuse. However, in this case both the Competition Council and national court have demonstrated that they sustain the position established in European case law.

In 2003 there was an interesting situation in *Švyturys*[216] case when after having received complaints from the local rival breweries the Competition Council opened the investigation concerning possible abuse of a dominant position by the leading brewery in Lithuania – UAB Švyturys-Utenos alus (hereinafter – Švyturys). It was claimed that dominant undertaking offered supply contracts with loyalty discounts (fidelity rebates) for the restaurants, hotels and cafes that

[215] See e.g. Case 322/81 *Michelin v. Commission* // [1983] ECR 3461; Case T-65/89 *BPB Industries and British Gypsum Ltd v. Commission* // [1993] ECR II-389, [1993] 5 CMLR 32; Case 85/76, *Hoffmann-La Roche & Co. AG v Commission of the European Communities* // [1979] ECR 461

[216] Decision No. 1S-175 of December 16, 2004 On the compliance of actions of the *UAB Švyturys-Utenos* alus with the requirements of Art. 9 of the Law on Competition

resulted in exclusionary effects. They alleged that because of such contracts the leading brewery was able to strengthen its dominant position, inflict harm on competitors and reduce consumers' choice.

The importance of this case is determined by the fact that Lithuanian Competition Council applied an economic *effects-based* approach when assessing practices employed by Švyturys.[217]The Competition Council decided that there was no infringement of competition law rules because the allegedly abusive conduct would not have a strong exclusionary effect. Despite the protracted process of the case which has reached even Supreme Administrative Court of Lithuania[218], the decision of Competition Council was not overruled.

Taking into account the fact that Lithuanian case law related to exclusive dealing and loyalty rebates is not vast, the decision of Lithuanian Competition Council to apply an economic effects based approach is welcome. However, it must be pointed out that the Chairman of the Competition Council in a Meeting of Directors General for Competition stressed that "an *effects-based* analysis requires serious knowledge of modern industrial organization".[219]Thus, it is not clear how such ambitions to consistently follow modern equally efficient competitor and/or consumer welfare tests will be implemented in practice.

[217] The analysis is provided in the Note by Lithuania on a Roundtable on Competition on the Merits // http://www.konkuren.lt/en/international/docs/cm_2005_02.pdf, access time: 16 December 2011

[218] Decision of 10 February 2006 of the Supreme Administrative Court of Lithuania, No. A7-783-06

[219] Meeting of Directors General for Competition, Agenda item: Article 82 policy review: the case of fidelity rebates // http://www.konkuren.lt/en/index.php?show=cases_9&cases9_doc=c9_20050929, access time 16 December 2011

CONCLUSION

In conclusion, we may state that after the analysis of existing case law, legal acts and doctrine the main goal and its tasks have been successfully implemented: we revealed the concept of exclusive dealing, distinguished main forms of this phenomenon found in practice as well as determined if the reform of Article 102 of the Treaty has brought some actual changes into European case law. The hypothesis that neither European Union legal acts nor established case law provide dominant undertakings with any safe harbor to determine whether their exclusive dealing agreements are compatible with European competition law has been sustained. Following conclusions have been made:

1. Exclusive dealing may be used in both upstream and downstream markets. In practice dominant undertakings employ various exclusive dealing types. Exclusive dealing obligations may be explicitly indicated in contracts as well as changed or supplemented with various de facto exclusivity clauses such as “English clauses”, investment related exclusivity clauses or various discount and rebate schemes.
2. Most of the European case law was related to the mixture of both explicit exclusive dealing and more subtle loyalty rebate schemes. In a bigger part of the cases dominant undertakings used to seek exclusivity through the rebate schemes, and usually explicit exclusive dealing clauses only have been a part of a combined practice. The analysis of case law demonstrated that the most common practices employed by dominant undertakings were rebates in return for exclusivity and individualized progress bonus schemes which have been consistently condemned by both the European Commission and courts.
3. When determining the presence of abuse in such cases the European Commission and courts applied formalistic approach and usually focused on the form of the conduct rather than on anticompetitive exclusion without any efforts to demonstrate actual or likely consumer harm and ingnoring possible procompetitive effects.
4. The Guidance Paper which is considered as a result of the reform of Article 102 of the Treaty is limited by its reliance on tests which are hard to implement in practice and its unwillingness to provide for safe harbor.
5. The Commission does not provide any certain market share above with dominance would be presumed, but instead it lists a number of factors that will be taken into account when

assessing the presence of dominance. Unfortunately, these factors which are not based on any measurable criteria provide little help for leading undertakings to decide if their commercial practice is still compatible with Article 102 of the Treaty.

6. From the first sight the "as efficient test" established in the Guidance Paper looks advantageous for dominant undertakings which may serve as a safe harbor in order to assess if a particular conduct is compatible with European competition law. However, from the practical point of view the application of such test may raise significant difficulties for dominant undertakings to self-assess their conduct because determination of the "contestable" part is expensive and complicated because dominant undertakings usually are not in a position to get confidential information about customers and rivals and this situation creates significant risks of mistakes in the assessment of legality of conduct.
7. The Guidance Paper provides that in order the dominant undertaking's conduct to be considered anticompetitive the European Commission should firstly prove the presence of foreclosure and then to provide evidences that such foreclosure will likely harm consumer welfare. As a result, only foreclosure of less efficient competitors without any impact on consumer welfare whether in the form of higher prices or in some other form such as limiting quality or reducing consumer choice should not be considered as abusive in the context of Article 102 of the Treaty. However, as the Commission did not establish any clear criteria how the likely consumer harm should be measured, legal uncertainty and the absence of safe harbor when assessing conduct of dominant undertaking still remains.
8. Though in its Guidance Paper the European Commission demonstrated a sounder analytical *effects-based* approach in the assessment of exclusionary abuses of dominant undertakings, the analysis of *Intel* and *Tomra* cases has shown that the implementation of this new approach is to be challenging and complicated process, especially taking into account the 40 years legacy of *form-based* decisions adopted by European courts. While there is no binding legal document in this field, the risk that the Commission will take advantages of its position not to be constrained in its ability to challenge dominant firm conduct still remains.
9. Lithuanian Competition Council and the national courts rely on the European case law and their approach towards exclusive dealing is similar to the one applied by the European Commission. However, Lithuanian Competition Council in Švyturys case demonstrated that it supports application of economic *effects-based* analysis.

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SANTRAUKA

PIKTNAUDŽIAVIMAS DOMINUOJANČIA PADĖTIMI EUROPOS BENDRIJŲ TEISĖJE: IŠSKIRTINIS PREKIAVIMAS

Pagrindinės sąvokos: konkurencija, dominuojanti padėtis, piktnaudžiavimas, išskirtinis prekiavimas, lojalumo nuolaidos.

Santraukos turinys

Darbe nagrinėjamas piktnaudžiavimas dominuojančia padėtimi per išskirtinio prekiavimo įsipareigojimus Europos Bendrijos konkurencijos teisėje. Darbe analizuojama Europos Bendrijų jurisprudencija bei Europos komisijos oficialūs žingsniai siekiant reformuoti Sutarties dėl Europos Sąjungos veikimo suvestinės redakcijos 102 straipsnį ir pereiti prie poveikio rinkai paremto požiūrio taikymo.

Santrauka

Šiame darbe nagrinėjami išskirtinio prekiavimo, susijusio su bet kokia praktika, kuria ūkio subjektas yra įpareigojamas arba skatinimas prekiauti išimtinai su dominuojančiu ūkio subjetu, teisiniai aspektai. Darbe akcentuojama Sutarties dėl Europos Sąjungos veikimo suvestinės redakcijos (toliaus – Sutartis) 102 straipsnio reforma, kurios metu Europos Komisija peržiūrėjo savo įgyvendinimo prioritetus taikant Sutarties 102 straipsnį dominuojančių ūkio subjektų piktnaudžiaujamam antikonkurenciniam elgesiui bei įsipareigojo atsisakyti formalistinio požiūrio ir pradėti taikyti analitiškesnį, poveikiu rinkai paremtą metodą. Šis naujas metodas grindžiamas kiekvienos bylos ekonomine analize daugiausiai dėmesio skiriant faktiniam ar tikėtinam antikonkurenciniam poveikiui, darančiam žalą vartotojams. Magistriniame darbe aptariama Europos Komisijos oficialių dokumentų, kuriais siekiama reformuoti 102 Sutarties straipsnį, reikšmė, ypač aspektai susiję su „saugiu uostu“. Darbo autorė taip pat analizuoja, kaip išskirtinio prekiavimo vertinimas buvo formuojamas Europos Komisijos ir teismų praktikoje, ir kaip jis pasikeitė po Sutarties 102 straipsnio reformos. Galiausiai, atsižvelgiant į Lietuvos nacionalinių konkurencijos teisės aktų derininimą su Europos Bendrijos *acquis communautaire*, darbe pateikiama trumpa apžvalga, susijusi su išskirtinio prekiavimo vertinimu Lietuvos jurisprudencijoje.

SUMMARY

ABUSE OF A DOMINANT POSITION IN EUROPEAN COMMUNITY COMPETITION LAW: EXCLUSIVE DEALING

Keywords: competition, dominant position, abuse, exclusive dealing, fidelity rebates, exclusionary conduct.

Summary content

This paper analyses abuse of dominant position through exclusive dealing obligations in European Community competition law. Paper is based on the analysis of European jurisprudence as well as European Commission’s formal steps to modernize application of Article 102 of the Consolidated of the Treaty on Functioning of European Union and move towards the application of *effects-based* approach.

Summary

This paper deals with legal aspects of exclusive dealing which refers to any practices that commit or induce an undertaking to deal exclusively with a dominant undertaking. The main focus of this paper is related to the reform of Article 102 of the Consolidated Version of the Treaty on Functioning of European Union (hereinafter – the Treaty) as the European Commission reviewed enforcement priorities in applying Article 102 of the Treaty to abusive exclusionary conduct by dominant undertakings and as a result, the Commission engaged to abandon its formalistic practice towards more analytical *effects-based* approach. This new approach is based on a sound economic analysis of each specific case and focuses on the presence of actual or likely anti-competitive effects that harm consumers. Paper discusses the implications of the European Commission’s official documents aiming to reform Article 102 of the Treaty, especially in regards to „safe harbor“. The author also analyzes how the assessment of exclusive dealing as a form of abusive conduct has been formed in European Commission’s and courts’ practice and how it has changed after the reform of the Article 102 of the Treaty. Finally, considering Lithuanian national competition laws‘ approximation to *acquis communautaire* of the European Community, a brief overview of Lithuanian jurisprudence related to the legal assessment of exclusive dealing is provided.