

HAMBURG CONGRESS 2008 - LIDC

QUESTION A

FIDELITY DISCOUNTS AND REBATES NOT JUSTIFIED BY THE COSTS : IN WHICH CASES SHOULD A DOMINANT ENTERPRISE BE FORBIDDEN SUCH PRACTICES

CONCLUSION

The International League of Competition Law, meeting in Hamburg on 26-27 September 2008, held an extensive discussion on the standards to be applied in determining abuse as regards fidelity discounts and rebates not justified by the costs. The discussion is particularly relevant in the context of the on-going EC Commission review of its enforcement practice on abusive exclusionary conduct. As a result of the discussion the following concluding remarks were made:

- 1) The discussion underlined the importance of economic analysis in identifying the exclusionary nature of discounts. However the standard of assessment should be clear and easy to apply as a legal test.
- 2) It was acknowledged that showing that an “as efficient competitor” would be excluded from the market, as suggested by DG Competition in the draft discussion paper on the application of article 82 to exclusionary conduct, could become the standard to be applied in the enforcement of article 82 to rebates. However, for many members of the LIDC the “as efficient competitor” test is only an intermediate objective of competition law, while consumer welfare (or consumer benefit) is the final objective, so that any enforcement action could be assessed with respect to the attainment of this final objective. Moreover, evidence (i.e. showing that new competitors had successfully entered the market or have increased their market share) should be considered before concluding that a rebate is abusive.
- 3) In the case of bundled discounts (where the firm is dominant only over some of the products it sells) the exclusionary nature of discounts could be assessed by allocating the full discounts to the products over which the firm faces competition.
- 4) The relevance of intent in proving the exclusionary nature of discounts was highly debated. Some, recognizing that competition is always trying to achieve exclusion of competitors, suggested that intent may be considered only as an aggravating circumstance in calculating the fine. Others recognised that, where there is evidence that the dominant undertaking considers that a discount scheme is likely to have exclusionary effect, that is evidence of abuse.
- 5) It was suggested that any guidelines issued by a competition authority should not be limited to the exclusionary nature of discounts, but be extended to include the treatment of discrimination (in particular, in the downstream markets). Otherwise, the guidelines would provide information on what is an exclusionary discount, but would be completely silent on what an abusive discriminatory discount might be.
- 6) To provide a safe harbour for the specific issue of fidelity rebates, greater certainty could be achieved by a more rigorous definition of dominance in that respect. Furthermore, in determining whether or not a rebate or discount is exclusionary, greater relevance should be given to the degree of dominance.