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WHEN DISCOUNTS MEET COMPETITION: EVALUATING LOYALTY AND CONDITIONAL REBATES ACROSS INDIA, THE EU, AND THE US

AUTHORED BY - KANISHKA SOMNI,
SWECCHA GUPTA & ANIMISHA DWIVEDI

Abstract -

Loyalty rebates have a contentious place in competition law since they can both produce real efficiency and prevent competitors from accessing the market. This research paper tracks the transition from formalistic assumptions to effects-based scrutiny by analysing how these schemes are handled in India, the US, and the EU. Through comparative US-EU jurisprudence and doctrinal analysis of CCI v. Schott Glass, the article makes the case that thorough, evidence-driven evaluation, as opposed to categorical condemnation, is the most effective way to differentiate between exclusionary behaviour and normal business behaviour.

Keywords: Loyalty rebates, abuse of dominance, effects-based approach, Competition Act 2002, Article 102 TFEU, predatory pricing**.**

INTRODUCTION

The practice of granting rebates entails that a purchaser ultimately pays a reduced price for the goods or services acquired. While the overarching aim of competition law is to promote efficiency and consumer welfare—often achieved through lower prices—this creates a conceptual tension in treating rebate schemes by dominant undertakings as potentially abusive. The underlying rationale becomes evident where the rebate is conditioned upon loyalty-inducing or near-exclusive purchasing commitments on the part of the buyer. Such arrangements may operate to foreclose rival suppliers from market access, thereby threatening their viability and, in some instances, precipitating market exit to the long-term advantage of the dominant seller. Although loyalty discounts can, in principle, align the incentives of suppliers and customers and reflect efficiency-driven practices, they also pose significant risks: impeding entry, constraining the expansion of rivals, or even facilitating below-cost pricing strategies. The jurisprudential challenge, therefore, lies in delineating pro-competitive rebate schemes—capable of being matched by rivals—from exclusionary forms that function as instruments of market foreclosure. Given their ubiquity across sectors and jurisdictions, loyalty discounts and rebate practices continue to raise complex questions at the intersection of commercial strategy and competition policy.

Loyalty rebates typically operate as refunds or price reductions offered in return for a customer's commitment to purchase exclusively, or predominantly, from a particular supplier. In the Indian e-commerce sector, such arrangements often appear in the form of cashbacks, which can later be redeemed for future purchases from the same platform. Similarly, airlines frequently provide additional travel miles to passengers for every mile flown, which may subsequently be used to purchase tickets with that airline. Other businesses issue credits that function like cash equivalents, redeemable only within their ecosystem. These strategies not only attract consumers by lowering effective prices but also strengthen customer retention.

For firms possessing significant market power, the use of discount schemes carries the potential risk of scrutiny under competition or antitrust regimes across jurisdictions. Enterprises lacking such dominance generally face little concern in extending preferential pricing to loyal customers, but dominant undertakings must be cautious, as enforcement authorities and courts have adopted varying analytical frameworks in this context. Much of the debate centers on so-called *market-share discounts*—a type of loyalty rebate granted when buyers commit to sourcing a defined proportion of their total requirements from a single supplier. Since the fundamental purpose of antitrust law is to safeguard the competitive process—thereby fostering innovation, efficiency, and lower consumer prices—courts and agencies have historically approached price reductions with caution, recognising them as a hallmark of healthy competition.

Rebates are essentially price reductions or rewards that sellers offer to buyers, often linked to the quantity purchased, the functions performed by the buyer, or the level of loyalty shown towards the seller. While they may appear as simple cost-saving mechanisms, in competition law they raise complex questions because some forms of rebates can stimulate healthy competition and benefit consumers, while others may restrict choice and entrench dominance. Broadly, rebates can be classified into **volume or quantity-based rebates**, **functional rebates**, and **loyalty or market-share rebates**—each carrying different competitive implications.

This project begins with a brief introduction to the concept of rebate schemes, outlining their meaning and the different types commonly used by enterprises in the market. It then illustrates how such schemes are treated across jurisdictions, depending on their form and competitive effects. A dedicated section follows on the possible justifications or defenses advanced in favour of rebate schemes worldwide.

The discussion then turns to *CCI v. Schott Glass*, a landmark judgment in which the Supreme Court of India recently examined the nature of rebate schemes and adopted an effects-based test to assess their potential anti-competitive impact. This is supplemented with an analysis of earlier Indian cases on discount schemes, highlighting how courts have historically interpreted their nature as pro- or anti-competitive and what justifications, if any, were accepted.

The project then undertakes a comparative analysis of rebate schemes in the US and EU. The EU section traces the evolution from a formalistic approach to an effects-based analysis, while the US section examines the varied approaches taken by American courts over the years, resulting in a comparatively uncertain legal position on rebates.

Finally, the conclusion and suggestions underscore that the divergence between the two jurisdictions lies in their underlying theories of competition: the US adopts a more open, pro-competitive stance, whereas the EU places greater emphasis on stricter market regulation.

REVIEW OF LITERATURE

Antitrust Treatment of bundled discounts in US: A case Analysis[1]

This article proved highly relevant to the US segment of this project. It traces the historical development of rebate and bundled discount schemes under American antitrust law, thereby providing valuable insights by analysing key US cases and illustrates the shifting standards applied to loyalty, quantity, and bundled rebates. It helped me identify that US antitrust law regarding discounts is evolving, with lower courts showing inconsistency in their ruling.

Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws prepared by The Unilateral Conduct Working Group[2]

This provided a valuable cross-jurisdictional perspective on the treatment of rebate schemes. Drawing on the practices of thirty-four jurisdictions, the report highlighted that most competition authorities do not presume loyalty rebates to be unlawful but instead assess their effects, particularly the risks of foreclosure when applied by dominant firms. The discussion on the use of price-cost tests, the role of foreclosure analysis, and the cautious enforcement

[1] LKS, 'Anti-Trust Treatment Of Bundled Discounts In Us: A Case Analysis' (18 May 2011) < Antitrust Treatment of Bundled Discounts in US: A Case Analysis | Lakshmikumaran & Sridharan Attorneys > accessed 07 September 2025.

[2] International Competition Network 'Report on the Analysis of Loyalty Discounts and Rebates under Unilateral Conduct Law' (June 2009) available at<https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/07/UCWG_SR_LoyDisRebates.pdf> accessed 7 September 2025.

stance of agencies enriched the comparative dimension of this project.

The EU General Court's 2022 Intel Judgement: Back to Square one of the Intel Saga[3]

This article was pivotal in understanding the recent stance of the EU courts on rebate schemes. It examined how the Intel judgment moved away from a rigid presumption of illegality and reaffirmed the need for an effects-based analysis, particularly by requiring an assessment of whether the rebate actually forecloses competition. This case clarified that economic evidence and context must guide the evaluation of rebates, rather than automatic condemnation.

Loyalty Rebates under EU Competition and US Antitrust Law by Viktoria H.S.E. Robertson[4]

This article was instrumental to my project as it provided a comparative understanding of how EU and US competition law diverge in their treatment of loyalty rebates. By tracing the evolution of the EU's formalistic stance towards a more nuanced, effects based analysis in Intel and contrasting it with the US's pro-competitive presumption rooted in predatory pricing and exclusive dealing doctrines, the article clarified the foundational differences between the two jurisdictions. Since my project aims to compare US, EU, and Indian jurisprudence on rebate schemes, this piece offered critical insights into the analytical benchmarks applied in EU and US cases, which in turn enabled a more structured assessment of India's recent shift towards an effects-based framework.

STATEMENT OF PROBLEM

Rebate and discount schemes can either have pro-competitive effect by enhancing operational efficiency on the supply side and consumer welfare on the demand side, or, alternatively, foreclose markets and limit competition. Under these circumstances, determining the boundary between pro-competitive and anti-competitive conduct remains challenging.

HYPOTHESIS

An effects-based approach to rebate schemes, supplemented by rigorous evidence, can effectively distinguish lawful commercial practices from anti-competitive conduct.

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[3] Miroslava Marinova, 'The EU General Court's 2022 Intel Judgement: Back to Square one of the Intel Saga' 2022 VII (2) European Forum 627, 639.

[4] Viktoria H S E Robertson, 'Loyalty Rebates under EU Competition and US Antitrust Law' in Pınar Akman, Or Brook and Konstantinos Stylianou (eds), Research Handbook on Abuse of Dominance and Monopolization (2023) 200, 221< https://ssrn.com/abstract=3873148 >accessed 7 September 2025.

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METHODOLOGY

This research paper has been made using the doctrinal method of research. Various primary sources such as statutes, parliamentary reports etc as well as secondary sources like textbooks, journal articles, and commentary articles were accessed to make this project. The information thus collected was thoroughly studied and critically analysed.

DISCUSSION AND ANALYSIS

Loyalty rebates can be characterised either as **pricing abuses**, where the focus lies primarily on the discounted price itself, or as **non-pricing abuses**, where the central concern is the exclusionary structure of the scheme rather than the price reduction.

Volume or "Target" Discounts: These rebates are directly linked to the quantity purchased over a defined period. For instance, a large supermarket chain purchasing ten thousand sacks of rice may obtain a lower per-unit price compared to a small retailer buying only a few sacks. Such quantity-based discounts are generally considered harmless, provided they are made available to all buyers on equal and transparent volume thresholds.[5]

Functional Discounts: These arise when the purchaser undertakes additional functions on behalf of the seller—such as warehousing, local advertising, or after-sales service. In such cases, the seller compensates the buyer for performing these supplementary tasks. A common example is airlines paying commissions to travel agents for marketing flights. Where the rebate merely offsets the costs of performing such functions and is open to any purchaser willing to assume the same responsibilities, it is usually regarded as compliant with competition law.[6]

In most jurisdictions, competition law does not expressly define loyalty rebates or discounts. Instead, enforcement agencies typically describe them as price reductions tied to the volume or share of a customer's purchases of a single product. The central feature, as highlighted by the European Commission, is **conditionality**—the rebate is contingent upon the buyer's demonstration of loyalty, usually measured against a purchase threshold within a specified reference period. Such rebates may apply either retroactively to all purchases once the threshold is met or incrementally only to purchases exceeding that threshold.[7]

Comparative perspectives reveal variations in scope. For instance, U.S. antitrust authorities

[5] Competition Commission of India V. Schott Glass India Pvt. Ltd. 2025 INSC 668.
[6] Competition Commission of India V. Schott Glass India Pvt. Ltd. 2025 INSC 668.
[7] International Competition Network 'Report on the Analysis of Loyalty Discounts and Rebates under Unilateral Conduct Law' (June 2009) available at < https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/07/UCWG_SR_LoyDisRebates.pdf > accessed 7 September 2025.

adopt a narrower definition, generally restricting the term to rebates applied across all units purchased once a certain threshold is reached (e.g., a 10% rebate on all 100 units purchased). This contrasts with broader interpretations that also cover incremental discounts, where the reduction applies only to units purchased beyond the qualifying level.

The Court in *Post Danmark II*[8] adopted a similar framework, though expressed in less explicit terms, by classifying rebate schemes into three broad categories. The first consists of **purely quantity-based rebates**, which are generally considered non-problematic from a competition law perspective, provided they are not structured in a manner that compels customer loyalty. The second category comprises **loyalty rebates**, which are typically treated as an abuse of dominance and, therefore, amount to a near per se prohibition—though the possibility of an objective justification remains open. The third category encompasses **rebates requiring a more detailed, effects-based assessment** to determine whether they are capable of producing exclusionary or anti-competitive outcomes. In this context, the dominant undertaking may still defend its rebate scheme by demonstrating that any potential anti-competitive harm is offset, or outweighed, by efficiencies.[9]

PRO-COMPETITIVE AND ANTI-COMPETITIVE DIMENSIONS OF LOYALTY REBATES

At the core of antitrust law lies the protection of competition, aimed at ensuring better products and services at fairer prices. Since price reductions are considered the essence of competitive conduct, courts and competition authorities have traditionally been hesitant to penalize them. For instance, the Canadian Competition Bureau observes that practices lowering consumer prices are generally pro-competitive, as they encourage rivalry not only on price but also on quality and variety, with low prices often seen as a hallmark of healthy competition.[10] Similarly, the U.S. ABA Antitrust Section notes that loyalty discounts and rebates are widespread in the United States and can enhance consumer welfare by lowering costs, increasing output, and improving efficiency, even when implemented by dominant firms.[11]

Recognizing this potential, many agencies adopt a cautious stance toward enforcement. The Canadian Bureau emphasizes restraint to avoid discouraging legitimate price competition,

[8] Case C-23/14 Post Danmark A/S v Konkurrencerådet EU:C:2015:651, paras 27–29.
[9] Case T-286/09 Intel Corp v Commission EU: T:2014:547, paras 74–78.
[10] International Competition Network, Report on the Analysis of Loyalty Discounts and Rebates Under Unilateral Conduct Laws (2018) accessible at < Microsoft Word - UCWG Loyalty Discounts Rebates FINAL with annex _3_.doc > accessed 07 September 2025.
[11] ibid.

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while the U.S. Department of Justice stresses that excessive intervention in loyalty or bundled discounting risks deterring beneficial price cuts—an outcome that would run contrary to the objectives of competition law.

The Irish Competition Authority adopts an **effects-based approach** when assessing single-product loyalty discounts and rebates. This methodology stems from its concern that a rigid, form-based or presumptive analysis could inadvertently deter legitimate, pro-competitive behaviour by firms. By focusing on consumer harm as the central criterion, the Authority seeks to minimize both the risks and costs associated with misdiagnosing rebate schemes.

Although loyalty discounts and rebates may generate efficiencies and consumer benefits, their use by dominant firms can, in certain situations, produce harmful effects on competition. The Canadian Competition Bureau notes that such schemes are generally acceptable but may become problematic when they drive prices to predatory levels, impose exclusionary or disciplinary conditions, or significantly reduce competition. Similarly, the Russian Federal Antimonopoly Service recognizes loyalty discounts as largely pro-competitive, but warns that they can turn anti-competitive if employed for predatory pricing or discriminatory practices.[12]

The **German Bundeskartellamt** emphasizes that the assessment of single-product loyalty discounts and rebates should focus on whether they create a "suction effect," i.e., an enhanced customer loyalty that may negatively impact competition by foreclosing rivals or raising barriers to entry. It cautions against limiting the analysis solely to predatory pricing, as rebates can still distort competition even when prices are not predatory.[13]

Some jurisdictions have yet to develop specific criteria for evaluating such schemes. However, many authorities agree that loyalty discounts may become anti-competitive if they foreclose a significant portion of the market, thereby excluding competitors or restricting new entry and expansion.[14]

The **European Commission** similarly analyses these schemes by examining their potential to cause anti-competitive foreclosure and consumer harm. Its approach relies on both qualitative and, where possible, quantitative evidence. Importantly, the Commission distinguishes conditional rebates from predation, noting that rebates may have foreclosure effects without requiring the dominant firm to incur a direct sacrifice.

[12] ibid.
[13] ibid.
[14] ibid.

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INDIAN LAW ON REBATES AND DISCOUNTS

- **STATUTORY FRAMEWORK**

The Competition Act, 2002[15] does not expressly prohibit rebate or discount schemes, including fidelity and loyalty rebates. In fact, such practices are generally recognized as legitimate means of competing on the merits, provided they are commercially justified and aimed at improving efficiency or consumer welfare. However, when structured or applied in a manner that distorts competition, creates entry barriers, or forecloses market access, they fall within the scrutiny of the Competition Commission of India (CCI).

Section 3 – Anti-Competitive Agreements: Section 3 of the Act prohibits agreements that cause or are likely to cause an appreciable adverse effect on competition (AAEC). While the Act does not specifically mention rebates or discount schemes, Section 3(4), dealing with vertical agreements, becomes relevant. Loyalty rebates or exclusive discount schemes may amount to exclusive supply or distribution agreements or refusal to deal, which fall within the scope of Section 3(4)(a) and Section 3(4)(b) respectively. The CCI examines whether such schemes foreclose competition by tying customers to one supplier and limiting rivals' access to the market.[16]

Section 4[17] – Abuse of Dominant Position: Section 4(1) prohibits any abuse of dominant position by an enterprise. Rebates and discount schemes attract scrutiny under this provision particularly when offered by dominant players:

Section 4(2)(a): Such schemes may be assessed as imposing unfair or discriminatory prices or conditions.

Section 4(2)(b): They may also be viewed as limiting or restricting market access for competitors.

For instance, fidelity rebates by a dominant firm could create exclusionary effects by incentivising customers to source exclusively from the dominant supplier, thereby raising barriers for competitors.

- **CASE LAWS**

CCI v SCHOTT GLASS[18]:

BACKGROUND OF THE CASE:

The dispute originated in 2010 when Kapoor Glass India Pvt. Ltd., a converter of glass tubing

[15] The Competition Act, 2002 (12 of 2003) ("The Competition Act").
[16] The Competition Act s 3.
[17] The Competition Act s 4.
[18] Competition Commission of India V. Schott Glass India Pvt. Ltd. 2025 INSC 668.

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into pharmaceutical containers, filed information before the Competition Commission of India (CCI) under Section 19(1)(a) of the Competition Act, 2002, against Schott Glass India Pvt. Ltd. (Schott India), the principal domestic manufacturer of neutral USP-I borosilicate glass tubing. Kapoor Glass alleged that Schott India had abused its dominant position in the market for neutral USP-I borosilicate glass tubing, both clear and amber, by offering exclusionary volume-based discounts, imposing discriminatory contractual terms on converters, and engaging in selective refusals to supply. The CCI, upon forming a prima facie view, directed the Director General (DG) to investigate the matter.

The DG's report concluded that Schott India had contravened the provisions of Section 4 of the Act. It found that Schott India's volume-based discounts were discriminatory and exclusionary in effect. DG reported that the target discount scheme offered by Schott India operated on multiple slabs ranging from 2% to 12%, determined by the volume of NGC/NGA purchased by converters. Purchases of Fiolax were counted only for deciding the applicable slab, but no discount was granted on Fiolax itself. An exception was made for Schott Kaisha, the respondent's joint venture, which received target discounts on both NGC/NGA and Fiolax—benefits not extended to other converters. Further, while converters received these discounts quarterly, subject to submission of sales certificates and clearance of invoices, Schott Kaisha was allowed to avail them on a monthly basis.[19]

The DG had noted that Schott India provided an **8% functional discount bonus** to converters, but only if they complied with strict conditions: they had to purchase an agreed annual quantity of Schott tubing, refrain from using Chinese tubing (and submit proof of this), and maintain "fair pricing" of ampoules and vials made from Schott tubing. From 2010 onwards, converters were further required to sign a **Trademark License Agreement** and a **Marketing Support Agreement** to qualify for the discount. However, converters reported that these functional discounts were not applied uniformly, suggesting selective or inconsistent implementation.

DG further concluded that the pricing arrangements under the Long-Term Tubing Supply Agreement (LTTSA) with its downstream affiliate Schott Kaisha amounted to a margin squeeze that impaired the ability of rival converters to compete effectively. The DG also reported that Schott India's practice of supplying Neutral Glass Clear (NGC) only with Neutral Glass Amber (NGA) tubes amounted to tying. However, the investigation process was criticized for procedural lapses, notably the denial of Schott India's request to cross-examine witnesses whose statements formed a significant part of the evidence.[20]

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[19] Kapoor Glass v Schott Glass CCI
[20] Competition Commission of India V. Schott Glass India Pvt. Ltd. 2025 INSC 668.

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Relying on the DG's findings, the CCI held Schott India guilty of abuse of dominance. By its order dated 29 March 2012, it imposed a penalty of INR 5.66 crores (4% of Schott India's average turnover for 2007–08 to 2009–10) and directed the company to cease-and-desist from applying dissimilar conditions when granting discounts to Schott Kaisha compared to other converters. The CCI also concluded that Schott India's rebate schemes, functional discounts, and LTTSA foreclosed competition, that its tying practices were unlawful, and that it had temporarily curtailed supplies to certain converters.

Schott India challenged this order before the Competition Appellate Tribunal (COMPAT), arguing that the investigation was procedurally flawed and that no appreciable adverse effect on competition had been demonstrated. Kapoor Glass also appealed before COMPAT, reiterating its refusal-to-supply grievance and seeking broader relief. The COMPAT, however, set aside the CCI's penalty and cease-and-desist directions, holding that there was no proof of discriminatory rebates, margin squeeze, or tying. It emphasized that the CCI had committed serious procedural errors by failing to allow cross-examination of key witnesses. Accordingly, Schott India's appeal was allowed, and Kapoor Glass's appeal was dismissed with costs of INR 1,00,000.

Dissatisfied with this outcome, both the CCI and Kapoor Glass approached the Supreme Court, seeking restoration of the CCI's original findings on Schott India's abuse of dominance and market foreclosure in the relevant market of neutral USP-I borosilicate glass tubing in India.

<u>BEFORE SUPREME COURT</u>

In the appeals filed by the CCI and Kapoor Glass against the COMPAT Order, the Supreme Court distinguished between two separate upstream product markets: Neutral Glass Clear (NGC) and Neutral Glass Amber (NGA). Considering Schott India's significant market share, economic strength, vertical integration, and the absence of effective competitive constraints or countervailing buyer power, the Court determined that Schott India occupied a dominant position in both these markets.

To find whether Schott Glass had abused this dominant position, the Supreme court framed five issues for adjudication, out of which, two focused on target-discount schemes and functional-discount schemes and whether either of these schemes amounted to discriminatory or exclusionary cost on consumers, thereby attracting Section 4(2)(a) and Section 4(2)(b) of the Act. Both of these issues are discussed in detail in the following section:

a. Target-based discount scheme and violation of Section 4(2)(a) and (b) of the Competition Act

The Supreme court explained that under Section 4(2)(a) of the Competition Act, price-based abuse arises only if a dominant firm treats equivalent transactions differently in an unfair or discriminatory manner. A comparison must therefore show that similarly placed customers were subjected to unequal treatment. Such conduct is not abusive where the differentiation has a valid commercial justification or where the same terms are openly available to all comparable buyers.

Referring to *British Airways v Commission* (CJEU, 2007), the court reiterated that dominant firms must not selectively favour or disadvantage trading partners. However, price variations are problematic only when they lack objective justification or prevent equally placed customers from accessing identical conditions. Discounts or bonuses must be assessed to see if they hinder competitor entry or customer choice. If so, the dominant undertaking can still defend its scheme by proving an economic rationale.

Applying these principles, the court noted that Schott India had circulated a uniform rebate system based solely on purchase volumes, with fixed slabs (2%, 5%, 8%, 12%) applied equally to all converters. The rebate increased mechanically with tonnage, was transparent to all buyers, and contained no hidden or selective concessions. Since the scheme was volume-based and uniformly available, it was not found to be discriminatory.

The court acknowledged that larger buyers, like Schott Kaisha, regularly obtained the 12% rebate tier because of their higher purchase volumes, while smaller converters secured lower rebates. However, this difference arose naturally from the disparity in quantities purchased, not from unequal treatment of equivalent transactions. No evidence was presented to suggest that any buyer matching Schott Kaisha's tonnage was denied the same rebate level.

The court further highlighted the technical and commercial realities of borosilicate glass production. Since furnaces operate continuously at extremely high temperatures and cannot be shut down without serious damage, consistent high-volume orders are essential for efficiency and cost recovery. The volume-linked rebate system, therefore, reflected genuine scale economies and passed part of these efficiencies on to downstream pharmaceutical customers. Such objectively justified incentives could not be categorised as "unfair."

Additionally, there was no proof that the rebate slabs foreclosed competing suppliers or restricted output in breach of Section 4(2)(b)(i) of the Act. On the contrary, market data showed that between 2007–08 and 2011–12, most converters expanded both their purchases from Schott India and their sourcing from other suppliers, while container prices to pharmaceutical companies remained largely stable. These facts contradicted claims of exclusionary or restrictive effects.

The court rejected the claim that quarterly crediting of rebates discouraged buyers from sourcing from multiple suppliers. It clarified that quarterly settlements were introduced for cash-flow convenience and merely reconciled purchases with the annual rebate ladder; they neither penalised nor restricted purchases from rival producers. The judges also dismissed reliance on untested declarations alleging preferential treatment for Schott Kaisha, noting that such ex parte statements could not override the uniform rebate circulars, nor could they substitute the legal requirement of proving unequal treatment of equivalent transactions.

In conclusion, the slab-based rebate scheme was found to be neutral and uniformly applied, justified by genuine efficiency considerations, and not shown to hinder competitor output, reduce imports, or distort downstream pricing. Consequently, the allegation of abuse under Section 4(2)(a) or (b) of the Competition Act did not stand.

b. Functional-discount scheme and violation of Section 4(2)(a) and (b) of the Competition Act

Schott India had put in place a uniform functional rebate scheme from 2007–08 onwards. Under this scheme, a flat 8% rebate was available to converters who fulfilled three conditions:

Meeting their annual purchase commitments (to ensure stable furnace operation),

Avoiding the use of Chinese tubes (a temporary measure due to safety concerns over chemical properties), and

Following traceability and fair-pricing requirements (to safeguard quality and brand integrity).

Later, from 2010, these conditions were incorporated into a Trade-Mark Licence Agreement (TMLA) and a Marketing-Support Agreement. This allowed converters to emboss the "SCHOTT" brand on their finished products without paying royalty, subject to limited inspections and a security guarantee of ₹70 lakh (which was only to be encashed in case of proven trademark misuse — and never actually invoked).

The central allegation was that these qualifying conditions were exclusionary and discriminatory and attracted Section 4(2)(a) of the Act. For this purpose, the IP must have shown imposition of unequal or dissimilar condition to similar transaction, however the data produced by the OP, which was observed and relied on by the COMPAT failed to highlight any such instance where two convertors were subjected to different prices despite perfroming similar functions. The only difference among the convertors was timing of credit which was naturally tied- up with the audit cycle and volume of order that it used to undertake.

The appellant had argued that the 3 essential conditions which were pre-requisite to get the benefit of the scheme were themselves exclusionary. Addressing each of the condition, the court noted that their lied an objective justification of each condition. So for instance, the purchase-plan clause was necessary for maintaining continuous furnace operations, which cannot be idled without severe damage. The restriction on Chinese tubes was based on mixing-risk highlighted by laboratory testing, and it was later withdrawn in 2010. The inspection rights were minimal, pre-declared, and a standard practice in trademark licensing.

Further, Market data showed no restrictive effect under Section 4(2)(b)(i). Rival suppliers like Nipro-Triveni increased their market share, imports grew substantially, and two new container plants entered production. At the downstream level, ampoule and vial output rose by 38% and independent converters' profitability improved. These trends of rising volumes, entry, and higher margins contradict the claim that Schott India's practices restricted capacity or foreclosed competition.

In sum, all converters who accepted the same traceability and quality requirements were granted identical economic benefits. The additional conditions had valid justifications, and the record indicates no exclusion of competitors or reduction of output. Accordingly, the functional rebate and subsequent agreements cannot be considered violative of Section 4(2)(a) or Section 4(2)(b)(i) of the Act, leading to a negative finding on Issue II.

To conclude, the rebate scheme was <u>not designed to exclude rivals or distort the market</u>. Instead, it reflected <u>legitimate efficiency and safety concerns</u>, applied <u>equally to all willing participants</u>**,** and even coincided with greater competition and output in the industry. Therefore, the functional rebate and its successor agreements did not violate Section 4(2)(a) (price discrimination) or Section 4(2)(b)(i) (market foreclosure) of the Competition Act.

PAWAN KUMAR AGRAWAL v RASHTRIYA IPSAT NIGAM LTD[21]

The opposite party, a PSU headquartered in Visakhapatnam, was engaged in the manufacture of steel products such as TMT, rounds, wire rods, structures, and billets in various grades and sizes. These products were sold both directly to small-scale industries (SSIs) and through State Small Scale Industries Corporations (SSICs) and the National Small Industries Corporation (NSIC), in accordance with directions issued by the Ministry of Steel.

It was alleged that the opposite party, being the sole supplier of plain round steel and value-added steel of certain specifications, in South India with a market share exceeding 90 per cent, had abused its dominant position by imposing unilateral, unfair, and discriminatory conditions in its sale guidelines applicable to SSIs and small buyers, including the informant. Small-scale industries and direct consumers in regions such as Coimbatore were found to be entirely dependent on the opposite party, since no alternative suppliers were available.

The dispute arose particularly in connection with the 2010–11 sale policy, which, for the first

[21] Pawan Kumar Agrawal v Rashtriya Ipsat Nigam Limited (case no 20 of 2010).

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time, laid down detailed conditions for the sale of the opposite party's products. According to the informant, several of these clauses were unilateral and discriminatory, as they placed direct buyers at a disadvantage compared to those purchasing through NSICs and SSICs. The contested conditions included among others a discount policy that linked the rate of discount to the volume purchased, thereby disproportionately favouring large buyers while providing negligible benefits to small ones.

In its defense, the opposite party argued that the allegations concerning discriminatory discounts were misleading. It further maintained that its quantity-based discounts had been structured to safeguard the interests of both consumers and actual users. While discounts to retailers were determined by the absolute quantity of purchases, the discounts to actual users were governed by Memoranda of Understanding (MoUs). On this basis, the opposite party denied that there was any discrimination in its discount policy or any preferential treatment to larger buyers, and asserted that the discount structure was a legitimate commercial practice designed to ensure efficiency and fairness across different categories of buyers.

The CCI observed that volume discounts were generally a result of the stronger bargaining position of large buyers, who purchased in bulk and could negotiate better terms. Such practices, by themselves, could not be regarded as unfair or discriminatory in the purchase or sale of goods. It was further noted that although the informant was a small-scale industry unit, it had chosen not to procure its requirements through NSIC or SSIC, channels specifically meant to extend certain benefits to small industries. Instead, the informant opted to purchase directly from RINL, and in doing so, forewent the discounts otherwise available through the NSIC/SSIC route.

The majority of the Commission also held that the discounts availed by large traders, being tied to the movement of substantial volumes of product and inventory, could not be characterised as unfair or discriminatory. In its view, the informant ought to have availed the institutional framework of NSIC or SSIC for its purchases rather than sourcing materials directly from RINL's stockyard.

BHARTI AIRTEL LIMITED V. RELIANCE INDUSTRIES LIMITED AND OTHERS, CASE NO. 03 OF 2017[22]

The Competition Commission of India has generally refrained from objecting to high-value loyalty rebates or heavy discounts offered by enterprises. In the Reliance Jio case, it was

[22] Bharti Airtel Ltd. v. Reliance Industries Ltd. and Reliance Jio Infocom Ltd. (2017 SCC OnLine CCI 25).

emphasised that without the presence of dominance in the relevant market, the issue of abuse under the Competition Act does not arise. For such pricing practices to be considered anti-competitive, it must be established that they result in the reduction or elimination of competition, coupled with proof of dominance and anti-competitive intent.

The informant, in this case was a global telecommunications company operating 4G services across India. The opposite party, Reliance Jio (OP-1), was one of the largest private enterprises in the country in terms of assets, revenue, and financial capacity. Infotel Broadband Services Private Limited (IBSL) had originally won spectrum in the 2300 MHz band during the 2010 auction. OP-1 subsequently acquired a 96% stake in IBSL, later renamed Reliance Jio Infocomm Limited (OP-2). At present, OP-1 held 99.4% stake in its subsidiary, OP-2, which provided internet services and a complete range of telecom services, including voice calls, across all 22 telecom service areas in India.

When OP-2 launched its services, it introduced the “Jio Welcome Offer,” providing customers free access to data, voice, video, and bundled Jio applications. It was the only telecom operator to commit to free voice calls, SMS, and roaming, regardless of usage volume, despite the regulatory requirement under the “calling party pays” regime, which obligated payment of 14 paise per minute for off-network calls. These offers, later extended under the “Happy New Year Offer,” effectively resulted in zero pricing and included free lifetime voice calls.

The informant alleged that by providing services below average variable cost, OP-2’s strategy was aimed at driving out competitors. According to the informant, such offers could not be justified as competitive responses since no other operator in the market was offering comparable free or below-cost services, and TRAI regulations explicitly prohibited predatory pricing practices.

The informant’s primary grievance was that OP-2 had been offering free services which was alleged to amount to predatory pricing under Section 4(2)(a)(ii) of the Competition Act. To assess such a claim, however, it was necessary to first determine whether OP-2 held a dominant position in the relevant market. The Commission observed that in the absence of such dominance, the question of abuse would not arise, which happened in the present case, that is, the commission could not identify the dominant position of the Opposite Party.

Although the informant argued that OP-2’s below-cost offers had rapidly increased its subscriber base—around 72 million in just four months—the Commission noted that no evidence was provided to demonstrate a reduction of competition, elimination of competitors, or an intent to exclude rivals. It further emphasised that offering free services is not inherently anti-competitive unless carried out by a dominant firm with exclusionary intent.

In the present case, the telecom sector already included well-established players with significant financial strength and market presence. Within such a competitive environment, an entrant's short-term promotional strategies, such as free offers to attract customers and build its subscriber base, were considered legitimate business practices. The Commission therefore concluded that no prima facie case of abuse of dominance under Section 4(2)(a)(ii) was made out against OP-2.

M/S FAST TRACK CALL CAB PRIVATE LIMITED V. M/S ANI TECHNOLOGIES PVT. LTD.[23]

Facts:

Ola Cabs, operated by the respondent company, entered the Bengaluru market in late 2011. Initially, its growth was modest, but from 2014 onwards, Ola began offering substantial discounts to customers and attractive incentives to drivers. The informant alleged that these strategies amounted to predatory pricing under Section 4 of the Competition Act, with the ultimate aim of monopolising the radio taxi services market in Bengaluru.

CCI's Findings:

The Commission initially formed a prima facie view that Ola's conduct could amount to abuse of dominance and directed the Director General (DG) to investigate. However, based on the investigation and available evidence, the CCI held that Ola did not hold a dominant position in the relevant market for radio taxi services in Bengaluru. Accordingly, no contravention of Section 4 was established.

NCLAT's Decision on Appeal:

On appeal, the NCLAT examined indicators such as the active fleet size (measured by the number of vehicles securing at least one booking per day), the number of rides, and other factors under Section 19 of the Act. It concluded that Ola was still in the process of building its brand and was simultaneously facing strong competition from players like Meru, Fast Track, and later Uber. Thus, it could not be said to hold a dominant position capable of engaging in abusive practices. Although Ola's share of trips rose significantly; the DG noted that fleet size alone could be misleading due to issues of multiple counting. Moreover, Ola's market share plateaued and began to decline after January 2015, further reinforcing that it was not in a position of dominance.

The Tribunal observed that Ola's pricing strategy did not amount to sustained below-cost or

[23] Fast Track Call Cab Private Limited v ANI Technologies Pvt Ltd. 2015 SCC ONLINE CCI 70.

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predatory pricing. The discounts to customers and incentives to drivers, introduced from mid-2014 to late 2015, were aimed at generating demand, expanding supply, and building Ola's brand rather than eliminating competitors. Such expenditure was characterised as variable cost, incurred as part of a broader market penetration strategy.

At the time these discounts were introduced, Ola's market share was relatively modest (around 20%), and it was not in a dominant position. Its subsequent growth was attributed to a combination of factors beyond pricing, including user-friendly technology, visible branding, safety assurances, and benefits offered to drivers, which collectively enhanced consumer confidence.

Further, Ola was not operating independently of competitors. Uber, which had entered the Bengaluru market in 2013, employed similar discounting and network strategies. NCLAT therefore accepted Ola's defence that its pricing conduct was primarily a competitive response to rival strategies and a legitimate attempt to consolidate its presence in the market, not an abuse of dominance.

US JURISPRUDENCE ON REBATES

US law on loyalty rebates and bundled discounts remains unsettled, as courts have adopted differing approaches and the Supreme Court has not addressed the issue since *Brooke Group* (1993). This has resulted in doctrinal uncertainty, with rebate schemes examined either under a theory of predatory pricing or as a form of exclusive dealing.

Statutory Framework

Section 2[24] of the Sherman Act prohibits monopolization and attempted monopolization. While it does not expressly regulate loyalty rebates, such schemes are assessed through existing theories of harm: predatory pricing, exclusive dealing, or tying. Where the post-rebate price falls below cost, the predatory pricing framework applies; where the price remains above cost but forecloses competition, the exclusive dealing analysis is used. Bundled discounts—discounts contingent on purchases of multiple products—can also be challenged as tying arrangements.

Section 1[25] of the Sherman Act subjects exclusive-dealing type arrangements to the "rule of reason," while Section 3 of the Clayton Act prohibits discounts or rebates conditioned on a purchaser not dealing with competitors if the effect is to substantially lessen competition or

[24] Sherman Antitrust Act 1890, § 2 (15 USC § 2).
[25] Sherman Antitrust Act 1890, § 2 (15 USC § 1).

create monopoly power. Courts have clarified that even contracts which indirectly induce exclusivity fall within the scope of Section 3.

Rebates and Predatory pricing:

Loyalty rebates may become anti-competitive when they result in below-cost pricing. For a rebate scheme to amount to predatory pricing, it must not only drive prices below cost but also present a likelihood that the rebate provider will later recoup the profits it initially sacrificed. The benchmark for establishing predatory pricing in such cases is the Brooke standard, laid down by the US Supreme Court in 1993. Under this standard, a claimant must prove that a firm with monopoly power priced below an appropriate measure of cost and that there was a 'dangerous probability' of recovering the losses incurred through predation. Since US antitrust law seeks to protect the competitive process rather than individual competitors, less efficient rivals are not entitled to protection under the Sherman Act.

Rebates as exclusive dealing:

Exclusive dealing, as an alternative theory of harm, may amount to an antitrust violation even when the threshold of predatory pricing is not met. It is immaterial whether the exclusivity is expressly written into an agreement or arises de facto, as loyalty-inducing rebate schemes may still fall within this framework. Exclusive dealing is regarded as anti-competitive when it results in substantial foreclosure. However, relatively few rebate cases have been successfully pursued under this line of argument. There remains considerable support for applying a straightforward predatory-pricing test to loyalty discounts, under which they would only be condemned if they result in below-cost pricing and there exists a strong probability that the firm granting the discount could recoup its losses after competitors are forced out of the market. This remains the most lenient standard under discussion. A modification of this approach, widely adopted in Europe, segments the market into contestable and non-contestable portions.

<u>CASE LAWS:</u>

1. **BARRY WRIGHT CORP. V. ITT GRINNELL CORP.[26]**

   Pacific Scientific, which controlled over 80% of the snubber market, offered Grinnell substantial discounts in exchange for purchasing most, though not all, of its projected requirements over a two-year period. This arrangement discouraged Barry Wright from entering the market, leading to an antitrust suit under Section 2 of the Sherman Act. Both the district court and the First Circuit dismissed the claim. The court reasoned that

[26] Case T-219/99 British Airways plc v Commission EU:T:2003:343, para 299.

the discounted prices remained above both incremental and average costs, and therefore did not amount to predatory pricing. It further stressed that antitrust rules should avoid deterring legitimate, pro-competitive price cutting, warning that searching for merely theoretical harms could end up undermining the very competition the law seeks to protect.

2. **CONCORD BOAT CORP. V. BRUNSWICK CORP., 207 F.3D 1039 (8TH CIR. 2000)[27]**

Several boat builders challenged Brunswick's market-share discount program on stern-drive engines, alleging violations of § 1 (restraint of trade) and § 2 (monopolization) of the Sherman Act. Brunswick, which held nearly 75% of the market, offered rebates to builders who committed to purchasing a specified percentage of their engine requirements from it. Because many end-customers preferred Brunswick engines, the boat builders were effectively compelled to source a significant share of their needs from Brunswick, and plaintiffs argued that the discount scheme constituted *de facto exclusive dealing* designed to foreclose rivals. They contended that the program allowed Brunswick to both exclude competitors and charge higher prices. Brunswick, on the other hand, defended the program as *pro-competitive business conduct* aimed at boosting sales.

The Eighth Circuit ultimately rejected the claims, stressing that Brunswick's prices under the program remained above cost, and thus consistent with competition. It found that the discounts were not unlawful exclusive-dealing agreements, since buyers could still purchase up to 40% of their requirements from competitors while retaining Brunswick's loyalty discounts. Other engine makers were also able—and did in practice—to compete by offering better discounts. The court acknowledged that Brunswick's scheme might amount to *de facto* exclusive dealing but not exclusive contracts per se. In some instances, purchasers were only required to buy 80% of their needs from Brunswick to qualify, yet chose to procure 100% voluntarily. The court reasoned that had Brunswick charged supra-competitive prices, buyers would have turned to rival suppliers for the remainder of their needs. Moreover, customer responses to changes in the discount program led Brunswick to reduce the required purchase percentages, demonstrating that it could not sustain a truly anti-competitive rebate arrangement.

[27] Concord Boat Corp v Brunswick Corp, 207 F 3d 1039, 1044 (8th Cir 2000).

In closing, the court of appeals relied simply on Brunswick's justification—that it was trying to sell its product—and reiterated that above-cost discounting, even when aggressive, generally reflects the "very essence of competition" rather than unlawful exclusion.

3. **ZF MERITOR, LLC V. EATON CORP.**[28]

The Meritor case arose in the market for heavy-duty truck transmissions, where Eaton had long been the dominant supplier until Meritor entered and captured around 17% of sales. In response, Eaton introduced long-term supply agreements with truck manufacturers that contained rebate provisions tied to purchase volumes. Eaton offered conditional rebates if manufacturers obtained between 70% and 97.5% of their requirements from Eaton. Although purchases were not formally mandated, Eaton could terminate the agreements if the targets were missed and even claw back contractual savings and up-front payments. The program ensured that Eaton's prices always remained above cost, yet its loyalty discounts halted and eventually reversed Meritor's market growth, ultimately contributing to Meritor's exit.

Before the U.S. Court of Appeals for the Third Circuit, the central issue was whether such a loyalty rebate scheme could contravene the Sherman Act even when post-rebate prices exceeded costs, thereby falling outside the Brooke standard for predatory pricing. Eaton argued that Meritor's complaint was essentially a predatory pricing claim, but the Court rejected this view, noting that price was not the "predominant mechanism of exclusion." Instead, the Court applied the rule of reason, under which exclusive dealing is unlawful if its probable effect is to substantially lessen competition. The Court stressed the need to demonstrate significant market power, substantial foreclosure, sufficiently durable contracts that impede rivals, and evidence of actual or likely anticompetitive effects balanced against any procompetitive justifications. The Court also considered factors such as coercive conduct, the ability to terminate contracts, and the extent of similar practices by competitors.

Applying this framework, the Court concluded that Eaton's program amounted to de facto exclusive dealing, finding that it was structured "not to meet customer demand, but to take pre-emptive steps to block potential competition." The Supreme Court declined review, leaving in place a judgment that undercut the general principle that above-cost pricing practices are not anticompetitive.

[28] ZF Meritor, LLC v Eaton Corp, 696 F 3d 254, 270 (3d Cir 2012).

EUROPEAN UNION JURISPRUDENCE

Article 102 of the Treaty on the Functioning of the European Union (TFEU)[29] prohibits the abuse of a dominant position in the relevant market. One of the forms of abusive conduct expressly mentioned is the application of dissimilar conditions to equivalent transactions, which may encompass individualised rebate schemes that are not uniformly applied. Article 102 TFEU also operates as a general prohibition against conduct that either excludes competitors or exploits customers. In its earlier decisions, both the European Commission and the EU Courts—the General Court and the Court of Justice of the European Union—adopted a form-based approach in assessing rebates. More recently, however, the Commission has shifted towards, and the Court of Justice has accepted, a more effects-based analysis. Despite this development, there is still no definitive legal benchmark for determining when a rebate scheme infringes Article 102 TFEU. In particular, the significance of the as-efficient-competitor (AEC) test, advanced by the Commission in its soft law instruments, remains a subject of ongoing debate.

Early Cases

The EU Courts' initial approach to rebates has often been described as formalistic.[30] Nonetheless, it reflected the understanding that loyalty-inducing rebates tend to foreclose the market by locking in purchasers to the dominant seller. While the Court acknowledged that loyalty rebates may, in exceptional cases, be objectively justified, the case law does not establish a per se prohibition of such rebates under Article 102 TFEU.[31]

Quantity Rebates

The jurisprudence has consistently clarified that purely volume-based, incremental quantity rebates do not, in themselves, amount to an abuse of dominance. Such rebates are permissible provided they are directly linked to the volume of purchases, correspond to cost savings realised by the supplier, and are granted on a non-discriminatory basis in line with Article 102(c) TFEU. However, the Court has cautioned that schemes presented as quantity rebates may still fall within the scope of Article 102 where they confer unjustified advantages on certain purchasers or are structured in a way that produces loyalty-inducing effects. For instance, rebates calculated on total turnover or tied to extended reference periods may not be

[29] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 art 102. ("TEFU).
[30] Case 85/76 Hoffmann-La Roche & Co AG v Commission EU:C: 1979:36. ("Hoffmann-La").
[31] ibid no.5.

regarded as purely volume-based, since they can restrict competition by discouraging customers from sourcing from alternative suppliers.

Loyalty-Inducing Rebates

The Courts have consistently expressed concern about loyalty rebates that result in exclusive purchasing. In a series of landmark rulings, such rebates have been found abusive under Article 102 TFEU, particularly where share-of-need rebates (market-share discounts awarded only if the buyer sources a specified proportion of its requirements from the dominant undertaking) were held to restrict buyer choice and foreclose rival access to the market. Importantly, the foreclosure effect need not be proven to have materialised; it suffices that the rebate is capable of producing such an outcome.

Even absent an explicit exclusivity condition, rebates may be deemed abusive if they effectively induce buyer loyalty. In *Michelin I*[32], the Court identified factors relevant to this assessment, including the rules governing the rebate, its potential to restrict buyer freedom of choice, its foreclosure effects on competitors, and whether it applies dissimilar conditions to equivalent transactions or strengthens the dominant firm's position. Similarly, in *Irish Sugar*[33], location-specific rebates and selectively granted fidelity rebates were found abusive, while in *British Airways*[34] the Court stressed that assessing rebates not clearly falling within either the category of pure quantity rebates or the fidelity rebates under *Hoffmann-La Roche*[35] requires evaluating whether the scheme is capable of exclusionary effects or impedes purchasers' ability to choose among competing suppliers.

Conditional Rebates and the Effects-Based Approach in EU Competition Law[36]

The European Commission's 2009 Guidance Paper on enforcement priorities under Article 102 of the Treaty on the Functioning of the European Union (TFEU) signalled a shift towards a more effects-based approach to assessing abuse of dominance. It introduced the as-efficient competitor (AEC) test, designed to evaluate whether a rebate scheme is capable of foreclosing competitors that are equally efficient as the dominant undertaking. However, the document only reflected the Commission's own enforcement priorities and was not binding on the EU

32 Case 322/81 NV Nederlandsche Banden-Industrie Michelin v Commission ("Michelin I") EU:C:1983:313,para.
33 Case T-228/97 Irish Sugar plc v Commission EU:T:1999:246, para 173–225.
34 Case C-95/04 P British Airways plc v Commission EU:C:2007:166, para 68.
35 Case 85/76 Hoffmann-La Roche & Co AG v Commission EU:C: 1979:36. ("Hoffmann-La").
36 Commission of the European Communities, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC to Abusive Exclusionary Conduct by Dominant Undertakings' [2009] OJ C 45/7.

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Courts or national competition authorities. The later case law revealed that the AEC test would not displace the established legal benchmark, which remained centred on the "capability" of rebates to produce anti-competitive foreclosure.

FORMALISTIC APPROACH REINFORCED IN TOMRA SYSTEMS V COMMISSION[37]

The case of *Tomra Systems and Others v Commission* (Case C-549/10 P)[38] illustrates the resilience of the traditional approach. Tomra, a dominant supplier of reverse vending machines, had entered into exclusivity and de facto exclusivity agreements with customers. These agreements included individualised quantity commitments and retroactive rebates with an exclusivity-enhancing effect. In its 2006 decision, the Commission found that Tomra had engaged in a strategy designed to exclude rivals and maintain dominance, relying on settled jurisprudence from *Hoffmann-La Roche*,[39] *Portugal v Commission*,[40] and *Michelin I*.[41] Although the Commission supplemented its reasoning with an effects-based assessment, showing that Tomra's strategy helped stabilise its market share, this was not decisive for the infringement finding. On appeal, the General Court held that established case law only required proof that the rebates were capable of producing exclusionary effects, not that they actually had such effects.[42] The Court therefore dismissed the relevance of the Commission's additional effects analysis. The case thus reinforced the traditional per se approach: loyalty-inducing rebates are unlawful where they are capable of restricting competition, regardless of demonstrated market impact.

POST DANMARK II AND THE AEC TEST

In *Post Danmark II* (Case C-23/14),[43] the Court of Justice was asked in a preliminary ruling to clarify the role of the AEC test in assessing rebate schemes under Article 102 TFEU.[44] The referring court raised concerns about whether the Guidance Paper had effectively introduced a new legal requirement. The Court of Justice responded by rejecting the notion that the AEC test was mandatory. While it could serve as a useful analytical tool, it was only "one tool

[37] Ibid no. 5.
[38] Commission Decision (COMP/E-1/38.113) Prokent-Tomra [2008] OJ C 219/11. (Tomra).
[39] Hoffmann-La n55.
[40] Case C-163/99 Portuguese Republic v Commission of the European Communities EU:C:2001:189.
[41] Michelin I
[42] Case T-155/06 Tomra Systems ASA and Others v Commission EU:T:2010:370, para 289.
[43] Case C-23/14 Post Danmark A/S v Konkurrencerådet EU:C:2015:651, paras 57–58, 61.
[44] Ibid.

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amongst others"[45] and not essential to prove that a rebate scheme was abusive. The Court reaffirmed its existing line of authority that rebates are unlawful if they are capable of having foreclosure effects, even without a showing that they drive out an as-efficient competitor.

Together, *Tomra*[46] and *Post Danmark II*[47] demonstrate the limited impact of the Commission's attempt to embed a more economics-based framework into Article 102 enforcement. The EU Courts maintained their established standard that rebate schemes can amount to an abuse where they are capable of foreclosing rivals, irrespective of cost benchmarks or actual effects. While the Commission continues to employ effects-based reasoning in its practice, the jurisprudence reflects a cautious approach: economic tools like the AEC test may inform analysis, but the ultimate legal standard remains the Court's long-standing capability test.

THE INTEL CASES

The dispute in *Intel v Commission* represents a turning point in the jurisprudence on conditional rebates under Article 102 of the Treaty on the Functioning of the European Union (TFEU).

Commission Decision (2009).[48] The European Commission concluded that Intel abused its dominant position in the x86 CPU market by granting fidelity rebates to Dell, HP, NEC, Lenovo, and retailer MSH. These rebates were conditional upon sourcing all or nearly all requirements from Intel and formed part of a strategy to exclude Advanced Micro Devices (AMD), Intel's only competitor. The Commission fined Intel over one billion euros, holding that the conduct constituted a single and continuous infringement of Article 102 TFEU. While it carried out an *as-efficient competitor (AEC) test* to examine the effect of the rebates, the Commission emphasised that this was not necessary, since under settled case law it was sufficient that Intel's conduct was *capable* of restricting competition.

General Court Judgment (2014).[49] On appeal, the General Court upheld the Commission's findings and reaffirmed the categorisation of rebates into three types: quantity rebates, generally lawful; exclusivity rebates, presumed unlawful by their very nature unless objectively justified; and "other rebates," requiring a case-by-case analysis. The Court treated Intel's rebates as exclusivity rebates and confirmed that their anticompetitive effects could be presumed without showing actual foreclosure. It further held that the Commission was not required to establish a causal link between the rebates and their effects, nor to apply a price-

[45] Ibid.
[46] Commission Decision (COMP/E-1/38.113) Prokent-Tomra [2008] OJ C 219/11. (Tomra).
[47] Case C-23/14 Post Danmark A/S v Konkurrencerådet EU:C:2015:651.
[48] Commission Decision (COMP/C-3/37.990) Intel [2009] OJ C 227/13.
[49] Case T-286/09 Intel Corp v Commission EU:T:2014:547, paras 74–78.

cost test. This strict formalistic stance attracted significant criticism and was further appealed.

Court of Justice Judgment (2017).[50] The Court of Justice of the European Union (CJEU) overturned the General Court's ruling and referred the case back. While it did not abandon earlier case law on fidelity rebates, the Court injected an *effects-based dimension* into the analysis. It clarified that the purpose of Article 102 TFEU is to safeguard effective competition, not to protect less efficient rivals. A dominant undertaking is prohibited from adopting practices that have an exclusionary effect on *as-efficient competitors*, but it is not prevented from competing on the merits. Thus, not all price competition is legitimate if it results in foreclosing equally efficient rivals.

CONCLUSION & SUGGESTIONS

The hypothesis, that an effects-based approach to rebate schemes, supplemented by rigorous evidence, can effectively distinguish lawful commercial practices from anti-competitive conduct, is largely supported by jurisprudence in both the European Union and India. In India, the CCI evaluates rebates under Sections 3 and 4 of the Competition Act, 2002 by their real market impacts, including foreclosure, rather than assuming misuse, according to rulings like CCI v. Schott Glass and Pawan Kumar Agrawal v. RINL.

Under the Sherman Act, US courts apply a very lax, cost-based criterion. While ZF Meritor v. Eaton demonstrates that rebates designed to create de facto monopoly may still fail under rule-of-reason analysis, cases like Concord Boat v. Brunswick and Virgin Atlantic v. British Airways support above-cost loyalty incentives as genuine competition.

According to Article 102 TFEU, the EU enforces the strictest standards. When loyalty-inducing incentives could limit competition, they were deemed abusive by early case law, such as Michelin I and Irish Sugar. Although the 2022 General Court annulment demonstrates that this evidentiary burden is still stringent, this gradually relaxed during Post Danmark II and the Intel lawsuit, where the CJEU permitted dominant businesses to refute presumptions of illegality with reliable proof.

All three jurisdictions increasingly prefer methodical, evidence-based evaluation over categorical denunciation of rebate systems, notwithstanding varying thresholds.

Antitrust Assessment of Rebates – A Comparative Outlook

Predatory pricing, exclusive dealing, discriminatory treatment, and tying are some of the

[50] Case C-413/14 P Intel Corp v Commission EU:C:2017:632, para 133.

theories that might be used to evaluate rebates. EU and US strategies are very different when it comes to single-product loyalty rebates. While US law requires proof of considerable foreclosure or predation and permits aggressive rebates up to below-cost pricing or real exclusion, EU law prioritises exclusionary potential and discriminatory application, frequently regarding conditional loyalty rebates as presumed harmful. Examples of this difference include British Airways, Intel, and Qualcomm, where the US is more pragmatic and the EU is still more formalistic. However, convergence is beginning to emerge as US courts become more aware of de facto exclusivity and the EU adopts effects-based measures like the AEC test.

Across all jurisdictions, several key themes emerge:

- Uniformity and Transparency: Rebates or discounts applied uniformly and transparently are rarely deemed anti-competitive.
- Dominance Threshold: Scrutiny is heightened for dominant firms; non-dominant entities enjoy broader leeway in offering aggressive discounts.
- Efficiency Justification: Discounts tied to scale economies, operational constraints, or market penetration are considered pro-competitive.
- Foreclosure and Loyalty Effects: Conditional or fidelity rebates capable of foreclosing rivals attract the most scrutiny, particularly in EU law, but the presumption of illegality is now rebuttable.
- Analytical Tools: The AEC test in the EU and cost-based predation analysis in the US are not absolute but provide frameworks to examine foreclosure risks.

In conclusion, loyalty and conditional rebates are essential tools in modern competition, balancing efficiency and competitive incentives against potential exclusion. India’s pragmatic approach, the US’s economic-effect-driven pragmatism, and the EU’s cautious, formalistic standards collectively reveal the global complexity in assessing such practices. While divergences remain especially regarding presumptions of unlawfulness and emphasis on potential versus actual foreclosure—jurisprudence increasingly converges toward a fact-based, evidence-driven assessment, weighing both foreclosure risk and pro-competitive efficiencies. The Intel, Schott, and Eaton cases illustrate the need for careful scrutiny, but they also affirm that rebates, when justified and transparent, are legitimate competitive tools rather than automatic anti-competitive practices.

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