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Whither Antitrust Regulation of Loyalty Rebates in China: The *Tetra Pak* Decision and Lessons from the EU

Xingyu YAN*

On 16 November 2016, China issued the trailblazing Tetra Pak decision, which introduced the concept of loyalty rebates into the Chinese Anti-Monopoly Law. This article is aimed at critically assessing the loyalty rebates analysis in this decision and discussing how the law could develop thereon. It argues that, while breaking the ground for an effects-based approach to loyalty rebates in China, this decision failed to establish a solid theory of harm. This destined that the decision-maker would not be able to engage in a contextualized effects-analysis it had envisaged. By comparing this problem to a similar one in EU competition law, this article suggests that the exclusive dealing analogy should be employed for loyalty rebates analysis.

1 INTRODUCTION

For the past two decades, there has been an intense discussion about antitrust regulation of loyalty rebates on both sides of the Atlantic, but limited attention has been paid to the Asian Continent. The situation is likely to change now. On 16 November 2016, the Chinese State Administration for Industry and Commerce (SAIC), one of the three Chinese Anti-Monopoly Law (AML) enforcement agencies,¹ published a prohibition decision against the multinational *Tetra Pak* for its abuses of dominance. This is by far the most time-consuming case in the AML enforcement history: Officially launched on 17 January 2012, it took the SAIC almost five years to close the case.² The result was a forty-seven-page decision, the

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¹ The SAIC is responsible for antitrust enforcement against non-price-related conducts. For a more thorough inspection of the responsibilities assigned to the three enforcement agencies, see Qian Hao, *The Multiple Hands: Institutional Dynamics of China's Competition Regime*, in *China's Anti-Monopoly Law: The First Five Years* 15, 27–34 (Adrian Emch & David Stallibrass eds, Wolters Kluwer 2013).

² The SAIC, *Competition Enforcement Announcement 2016 No. 10: The Case of Tetra Pak's Abuse of Dominance* (竞争执法公告2016年10号 利乐滥用市场支配地位案) (16 Nov. 2016), the SAIC Web Site, http://www.saic.gov.cn/fw/bsdt/gg/jzzf/201611/t20161116_231631.html (in Chinese) (accessed 15 Oct. 2017).

longest AML enforcement decision ever, with a CNY 667.7 Million (approximately USD 97 Million) fine, so far the largest amount of fine imposed by the SAIC.³

By the time of this decision, the AML had been in force for more than eight years. The AML enforcement has reached a stage of normalization and substantive expansion.⁴ The *Tetra Pak* decision is a precise embodiment of that expansion. The *Tetra Pak* decision is trailblazing for introducing the concept of loyalty rebates into the AML. To achieve that, the SAIC invoked Article 17(1)(g) of the AML, the catchall provision addressing the types of abuse of dominance to be prohibited, as the legal basis for its loyalty rebates regulation.⁵ This article examines the loyalty rebates analysis in this decision, and discusses how future analyses could develop on top of this decision.

This article is structured as follows. Section 2 describes the SAIC's analysis on loyalty rebates in *Tetra Pak*. Section 3 discusses the characteristics and competitive effects of loyalty rebates. Section 4 introduces three analogical approaches that can be of use to the antitrust assessment. Section 5 appraises the *Tetra Pak* analysis, pointing out its merits and a problem concerning the theory of harm. Section 6 compares this problem to a similar one in EU competition law, and suggests the exclusive dealing analogy as a solution. Section 7 draws the conclusion.

2 THE ANALYSIS ON LOYALTY REBATES IN *TETRA PAK*

The SAIC started its analysis by identifying two types of loyalty rebates in this case:

*Retroactively cumulative rebates.*⁶ They are defined by the SAIC as 'price discounts conditional upon a client's purchase reaching a certain quantity threshold within a

³ Huang Wei, Zhu Fan & Wendy Zhou, *Loyalty Rebates in China: A Look at Tetra Pak*, Law360 (30 Nov. 2016), <https://www.law360.com/articles/865038/loyalty-rebates-in-china-a-look-at-tetra-pak> (accessed 15 Oct. 2017); Johnny Zhao & Meng Yi, *China's Hefty Penalty on Tetra Pak: A Significant Step forward in Antitrust Enforcement*, TaylorWessing (16 Dec. 2016), <https://china.taylorwessing.com/en/china-s-hefty-penalty-on-tetra-pak-a-significant-step-forward-in-antitrust-enforcement> (accessed 15 Oct. 2017).

⁴ Qian Hao, *An Overview of the Administrative Enforcement of China's Competition Law: Origin and Evolution*, in *Procedural Rights in Competition Law in the EU and China* 39, 49–53 (Caroline Cauffman & Qian Hao eds, Springer 2016). See also Adrian Emch, *Chinese Competition Law: The Year 2016 in Review*, 10(1) *Global Competition Litig. Rev.* 37, 38 (2017); Michael Han & David Boyle, *Antitrust Enforcement: China Ups the Ante*, *Competition Pol'y Int'l* (9 Dec. 2014), <https://www.competitionpolicyinternational.com/antitrust-enforcement-china-ups-the-ante/> (accessed 15 Oct. 2017).

⁵ Art. 17(1) of the Anti-Monopoly Law of the People's Republic of China (《中华人民共和国反垄断法》) (adopted by the Standing Committee of the National People's Congress on 30 Aug. 2007, effective on 1 Aug. 2008), the official English version, <http://english.mofcom.gov.cn/article/policy-release/Businessregulations/201303/20130300045909.shtml> (accessed 15 Oct. 2017).

⁶ See at 34–35 of the *Tetra Pak* decision. For the full text of this decision, see the SAIC, *The SAIC Administrative Punishment Decision [2016] No. 1* (国家工商行政管理总局行政处罚决定书 工商竞争案字[2016]1号) (hereinafter 'the *Tetra Pak* decision') (9 Nov. 2016), The SAIC Web Site, <http://www.saic.gov.cn/fw/bsdt/gg/jzzf/201611/P020170301799948519294.pdf> (in Chinese) (accessed 15 Oct. 2017).

certain period of time and applied retroactively to all units of purchase within that period'. As the purchase reaches a higher threshold, the discounts rate will also increase, thereby being cumulative. The SAIC made two subcategories: (1) 'Single retroactively cumulative rebates', which are applied to clients purchasing a single type of packaging materials, and (2) 'Compound retroactively cumulative rebates', which offer uniform or additional discounts to clients purchasing two or more types of products on the basis of single retroactively cumulative rebates.

*Individualized target rebates.*⁷ They are defined by the SAIC as 'discounts offered individually to certain clients on the condition that their respective purchase reaches or exceeds a particular portion of total demand or a customized quantity threshold'.

On that basis, the SAIC stated that loyalty rebates should be prohibited if they are carried out by a dominant undertaking and result in anticompetitive effects.⁸ To assess such anticompetitive effects, it identified the loyalty 'inducing effect' as the key.

Regarding the first type of rebates, the SAIC stated that the 'retroactiveness of time' and the 'cumulativeness of quantity' distinguished it from an ordinary quantity rebate scheme, as the latter is applied only to the part of purchase that exceeds the threshold and will never lower the price of a marginal unit to zero or negative. Meanwhile, the former will result in a discount so large that, after exceeding the threshold, a client's total amount of payment would be reduced even though the purchase quantity has increased.⁹ Therefore, customers will be strongly motivated to buy as much as possible from *Tetra Pak*, just so they can reduce the total payment. The SAIC identified the 'threshold interval' and the 'discount rate' as the key elements for retroactively cumulative rebates to generate such loyalty-inducing effects.¹⁰

Regarding the second type of rebates, the SAIC simply stated that their customization for individual clients would directly generate the loyalty-inducing effect.¹¹

The SAIC proceeded with the analysis by putting the two types of loyalty rebates into the particular market context. But before that, it distinguished the 'non-contestable share of demand' and the 'contestable share of demand' of the customers, stating that the supposed anticompetitiveness of loyalty rebates is the leverage of market power from the former to the latter.¹² On that basis, the SAIC

⁷ *Ibid.*, at 36–37.

⁸ *Ibid.*, at 37.

⁹ *Ibid.*, at 38.

¹⁰ *Ibid.*

¹¹ *Ibid.*, at 38–39.

¹² *Ibid.*, at 39–40.

considered the market context from three aspects: (1) Customers' reliance on *Tetra Pak's* production line, which contributed to the formation of the non-contestable share of demand; (2) the tie of packaging material with packaging equipment and with technical services, which further expanded the scope of the non-contestable share; (3) the combo-implementation of multiple types of rebates, for example the combination of category discounts and special discounts¹³ with retroactive rebates.¹⁴

In that market context, the SAIC adopted an economic equation to demonstrate the extra burden created by the loyalty rebates in question on those competitors wishing to compete for the contestable share of demand:¹⁵

$$k = \Delta d \frac{Q}{Q_2}$$

Supposedly, Q is the total quantity of demand of a customer, and d (%) is the discount rate offered by *Tetra Pak* to this customer if *Tetra Pak* is the only supplier of Q . Q_2 is a variable, referring to the contestable amount of demand that the competitors are winning over ($0 < Q_2 < Q$). According to the SAIC's definition, as a customer's purchase from competitors (Q_2) increases, the discount rate (d) offered by *Tetra Pak* on the remaining purchase ($Q - Q_2$) will decrease. In that regard, Δd (%) represents the decrement of d as Q_2 increases ($0 < \Delta d < d$). Therefore, the real discount rate offered to customers by *Tetra Pak* is $d - \Delta d$. The SAIC defined k ($k > 0$) as the discount rate that *Tetra Pak's* competitors would have to offer – in addition to the same discount rate offered by *Tetra Pak* ($d - \Delta d$) – in order to successfully compete for Q_2 .

In other words, the more a customer buys from *Tetra Pak's* competitors, the less discounts it would get from *Tetra Pak* on the remaining purchase, the majority of which is taken up by the non-contestable share of demand. Consequently, to successfully compete for the contestable share, the competitors would not only need to match *Tetra Pak's* proclaimed price offers, but would also have to fully compensate the customers for their losses of discounts on the non-contestable share.¹⁶ Ultimately, this means these competitors would have higher costs.

Accordingly, the SAIC held that the implementation of compound retroactively cumulative rebates, part of which were rebates conditional on the purchase of completely non-contestable products, further enhanced the anticompetitive

¹³ *Ibid.*, at 37.

¹⁴ *Ibid.*, at 40–41.

¹⁵ *Ibid.*, at 41.

¹⁶ *Ibid.*, at 41–42.

effects, because these compound rebates required the competitors to compensate not only the discount loss on the non-contestable part of the contestable products, but also the discount loss on those non-contestable products.¹⁷ The SAIC found the implementation of these compound rebates to have corresponded with *Tetra Pak*'s sales increase in 2011 and 2013, therefore stating that the anticompetitiveness of these compound rebates was confirmed.¹⁸

Lastly, the SAIC held that individualized target rebates are obviously anticompetitive, for they are designed to turn contestable demands into non-contestable demands.¹⁹

In an effort to substantiate the theoretically established anticompetitive effects in actual circumstances, the SAIC looked at the industry status from 2009 onwards, and considered the low profitability of small and medium manufactures of packaging materials from 2009 to 2013 to be enough evidence. Ultimately, it concluded that the two types of loyalty rebates implemented by *Tetra Pak* have violated Article 17(1)(g) of the AML.

3 THE CONCEPT OF LOYALTY REBATES

The SAIC defined loyalty rebates as 'discounts offered by business operators to counterparties, conditional upon the volumes, values, and shares of trade within a certain period of time, or based on other indicators of loyalty level'.²⁰ This definition is aligned with the commonly identified characteristics of loyalty rebates and their effects on competition.²¹

3.1 CHARACTERISTICS

3.1[a] *Retroactiveness*

The concept of loyalty rebates is a legal concept based on economic characterizations.²² The most notable feature of a loyalty rebate scheme is its retroactiveness, which means, once the required threshold is met, the rebate

¹⁷ *Ibid.*, at 43.

¹⁸ *Ibid.*, at 43–44.

¹⁹ *Ibid.*, at 44.

²⁰ *Ibid.*, at 34.

²¹ Joshua D. Wright, *Simple But Wrong or Complex But More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts* 3, Remarks at the Bates White 10th Annual Antitrust Conference, Washington DC (3 June 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf (accessed 15 Oct. 2017).

²² Miguel de la Mano, Renato Nazzini & Hans Zenger, *Article 102*, in *The EU Law of Competition* 329, 424–425 (Jonathan Faull & Ali Nikpay eds, Oxford U. Press 2014) (originally published 1999).

scheme will be applied to all purchase units of a certain period. By being retroactive, a rebate scheme could entail significant price cuts.²³ As time progresses, the closer that a customer's purchase gets to the threshold, the more attractive the discounts would become. As observed by the SAIC, the discounts would become the most attractive when a customer is about to exceed the threshold, for they entail a situation of 'total payment steep-drop', where the purchased units are increasing while the total amount of payment is decreasing.²⁴ The implication is that the customers would be strongly motivated to meet the required threshold, because failing to do so would result in the loss of those discounts.²⁵

The opposite of retroactive rebates are incremental rebates, namely rebates applied only to the units of purchase exceeding the required threshold. Incremental rebates generate weaker incentives to purchase, because although they would make a customer's overall expenditure increase at a declining rate,²⁶ they would never result in zero or negative price of a marginal unit.²⁷ Therefore, incremental rebates are generally considered less problematic than retroactive rebates.²⁸ The SAIC, as well as the Court of Justice of the European Union (CJEU), agrees with this when it comes to quantity rebates.²⁹

3.1[b] *Individualization/Standardization*

Loyalty rebates can be either individualized or standardized. Either of these two features coexists with retroactiveness.³⁰

Individualized rebates are rebates granted on conditions tailored to the situation of each customer. Individualization essentially means treating customers

²³ Case C-549/10 P *Tomra Systems ASA and Others v. European Commission* (hereinafter 'Tomra') EU: C:2012:221, para. 15.

²⁴ The *Tetra Pak* decision, *supra* n. 6, at 38. For more illustrations of the steep slope of the expenditure curve caused by retroactive rebates, see Hans Zenger, *Loyalty Rebates and the Competitive Process*, 8(4) J. Competition L. & Econ. 717, 743 (2012).

²⁵ Case C-23/14 *Post Danmark A/S v. Konkurrencerådet* (hereinafter 'Post Danmark II') EU:C:2015:651, para. 32.

²⁶ Zenger, *supra* n. 24, at 731–732.

²⁷ The *Tetra Pak* decision, *supra* n. 6, at 38.

²⁸ *Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings* (hereinafter 'the Commission Guidance Paper'), OJ C45/7 (24 Feb. 2009), para. 46.

²⁹ The Court of First Instance (CFI) of the CJEU in *Michelin II* adopted the concept of quantity rebates, which essentially means standardized incremental rebates. See Case T-203/01 *Manufacture française des pneumatiques Michelin v. Commission of the European Communities* (hereinafter 'Michelin II') [2003] ECR II-4071, para. 58. See also Case T-286/09 *Intel Corp. v. European Commission* (hereinafter 'Intel') EU: T:2014:547, para. 75.

³⁰ The Commission Guidance Paper, *supra* n. 28, para. 45. See also Nicholas Economides, *Tying, Bundling, and Loyalty/Requirement Rebates*, in *Research Handbook on the Economics of Antitrust Law* 121, 132–134 (Einer R. Elhauge ed., Edward Elgar 2012).

discriminatorily. Because of the discriminatory nature, individualized rebates have been subject to strict scrutiny in the EU. This is exemplified by the CJEU's ruling on quantity rebates – which are supposed to be economically benign – that quantity rebates are presumed legal only if they do not result in '*the application of dissimilar conditions to equivalent transactions with other trading parties*' as stipulated in Article 102(c) of the Treaty on the Functioning of the European Union (TFEU).³¹ The SAIC seems to have taken a similar stance, as it provided little analysis on the so-called individualized target rebates, practically making them *per se* illegal.³²

The opposite is standardized rebates, namely rebates granted on equal conditions for all customers. Standardized rebates are considered less problematic generally, but they still need to be assessed in specific circumstances.³³ In that regard, the CJEU has ruled that, '*the mere fact that a rebate scheme is not discriminatory does not preclude its being regarded as capable of producing an exclusionary effect*'.³⁴

3.1[c] *A Single-Product Scenario and a Multi-Product Scenario*

Loyalty rebates can appear in both a single-product scenario and a multi-product one. Single-product rebates refer to price discounts applied to the sales of one particular type of product. Meanwhile, multi-product rebates, also known as bundled rebates, refer to discounts applied to the sales of two or more types of products, for example rebates requiring that a customer buying product A also buys certain percentage of its needs in product B from the seller.³⁵

3.2 EFFECTS ON COMPETITION

3.2[a] *Anticompetitive Effects*

The primary concern about loyalty rebates is the foreclosure of competition.³⁶ There are two mutually complementary explanations on how this could happen. The first one is raising rivals' costs. From the perspective of rivals, this explanation suggests that, backed up by the non-contestable share (or product), loyalty

³¹ Case C-163/99 *Portuguese Republic v. Commission of the European Communities* [2001] ECR I-2613, paras 50 and 53. See also *Michelin II*, *supra* n. 29, para. 58.

³² The *Tetra Pak* decision, *supra* n. 6, at 38.

³³ The Commission Guidance Paper, *supra* n. 28, paras 45–46.

³⁴ *Post Danmark II*, *supra* n. 25, para. 38.

³⁵ Nicholas Economides, *Loyalty/Requirement Rebates and the Antitrust Modernization Commission: What Is the Appropriate Liability Standard?* 54(2) *Antitrust Bull.* 259, 259–261 (2009). For a more nuanced analysis on these two types of rebates, see Economides, *supra* n. 30, at 130–136.

³⁶ Daniel A. Crane, *Formalism and Functionalism in the Antitrust Treatment of Loyalty Rebates: A Comparative Perspective*, 81 *Antitrust L.J.* 209, 213–217 (2016).

discounts implemented by a dominant undertaking can prevent rivals from achieving minimum efficient scale (MES) by foreclosing the output/input; consequently rivals would be eliminated or weakened for not being able to reduce costs.³⁷ This explanation presumes several market conditions, including significant economies of scale, barriers to entry, and capacity constraints of the rivals.³⁸

The second explanation is from the customers' perspective. It suggests that loyalty rebates discourage the customers from switching to rivals, because the loss of rebates may outweigh the gain of lower prices offered by rivals.³⁹ Moreover, when there is intense competition among the customers, those contemplating about switching may not do so for the fear of being disadvantaged by the incumbent lowering the price charged to their competitors.⁴⁰ In that regard, a secondary concern about loyalty rebates is that they could weaken downstream market competition by facilitating collusion between distributors.⁴¹

Supporters of the exclusive dealing analogy provided these explanations. Supporters of the predatory pricing analogy seem to agree with these explanations, although they think the anticompetitive effects are much less likely to happen.⁴² Both analogies are discussed in section 4.

3.2[b] *Pro-Competitive Effects*

It is suggested that loyalty rebates can generate pro-anticompetitive effects similar to those of exclusive dealing. For example, when offered to downstream distributors, they can induce vertical aligning, thus intensifying downstream competition and addressing double-marginalization problems.⁴³ Moreover, loyalty rebates reduce free riding of competing producers.⁴⁴ When individualized, loyalty rebates, as a form of price discrimination, may also increase outputs and possibly overall welfare.⁴⁵

³⁷ Assaf Eilat, David Gilo & Guy Sagi, *Loyalty Discounts, Exclusive Dealing and Bundling: Rule of Reason, Quasi-Per-Se, Price-Cost Test, or Something in between?* 4 J. Antitrust Enforcement 345, 348 (2016).

³⁸ Wright, *supra* n. 21, at 9.

³⁹ *Ibid.*, at 7–8.

⁴⁰ Patrick DeGraba & John Simpson, *Loyalty Discounts and Theories of Harm in the Intel Investigations*, 2(1) J. Antitrust Enforcement 170, 173 (2014).

⁴¹ Eilat, Gilo & Sagi, *supra* n. 37, at 349.

⁴² Benjamin Klein & Anders V. Lerner, *Price-Cost Tests in Antitrust Analysis of Single Product Loyalty Contracts*, 80(3) Antitrust L.J. 631, 661 (2016).

See also Herbert J. Hovenkamp, *Discounts and Exclusions*, U Iowa Legal Studies Research Paper No. 05-18, 6–7 (Aug. 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=785966 (accessed 15 Oct. 2017).

⁴³ Wright, *supra* n. 21, at 11.

⁴⁴ Eilat, Gilo & Sagi, *supra* n. 37, 350.

⁴⁵ *Ibid.* See also Hovenkamp, *supra* n. 42, at 20.

For those who support the predatory pricing analogy, loyalty rebates, as a normal means of business expansion, also have the direct pro-competitiveness of price reduction.⁴⁶ But to verify that, questions have to be asked regarding whether such price reductions could be passed on to end-consumers, and whether the conditionality of those discounts could entail consumer disadvantages that outweigh the benefits of price-reduction.⁴⁷

4 THREE ANALOGIES TO ANTITRUST ANALYSIS OF LOYALTY REBATES

Considering the complex characteristics and ambivalent effects of loyalty rebates, it is crucial for antitrust enforcers to construe a theory of harm, which can underpin the line of reasoning to prove the anticompetitiveness of the rebates in question. To that end, this section introduces three analogies to loyalty rebates analysis.

4.1 TYING AND BUNDLING

Firstly there is the analogy of tying and bundling. This analogy is commonly applied to multi-product rebates, namely bundled rebates.⁴⁸ On that basis, it was argued that this logic is also applicable to rebates in a single-product scenario, in the sense that a dominant undertaking leverages its market power from the non-contestable share of demand to the contestable share of demand.⁴⁹

The most distinctive feature of tying is ‘coercion’, meaning the dominant undertaking gives customers wishing to buy the tying product no other choice but to also buy the tied product.⁵⁰ However, that is not the basis of this analogy. Firstly, the element of coercion may not be present in many rebate cases, because giving the customers financial incentives strong enough to make them stay, as most rebate schemes do, is not the same as eliminating their choices of supply.⁵¹ Secondly, the element of coercion by itself is not anticompetitive.⁵² As demonstrated in the

⁴⁶ Klein & Lerner, *supra* n. 42, at 647–648.

⁴⁷ Steven C. Salop, *The Raising Rivals’ Cost Foreclosure Paradigm, Conditional Pricing Practices and the Flawed Incremental Price-Cost Test* 11 and 42, Georgetown Law Faculty Publications and Other Works 1620 (9 Nov. 2016), <http://scholarship.law.georgetown.edu/facpub/1620> (accessed 15 Oct. 2017).

⁴⁸ Economides, *supra* n. 35, at 261.

⁴⁹ Economides, *supra* n. 30, at 136. The EU Commission embraces such an application, *See* the Commission Guidance Paper, *supra* n. 28, para. 39.

⁵⁰ de la Mano, Nazzini & Zenger, *supra* n. 22, at 445.

⁵¹ Sean P. Gates, *Antitrust by Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts*, 79(1) *Antitrust L.J.* 99, 109 (2013). *See also* Christian Ahlborn & David Bailey, *Discounts, Rebates and Selective Pricing by Dominant Firms: A Trans-Atlantic Comparison*, 2(1) *Eur. Competition J.* 101, 106 (2006).

⁵² de la Mano, Nazzini & Zenger, *supra* n. 22, at 446.

Microsoft I case, the existence of coercion does not necessarily entail anticompetitive foreclosure, and the lack of coercion may still deserve further scrutiny.⁵³

What really underlies this analogy is the common foreclosure-inducing nature of bundling and loyalty rebates, for they offer customers financial incentives (in the form of discounts) that the competitors cannot offer.⁵⁴ In other words, this analogy applies only when a tying or bundling scheme fits the description of ‘a package of two or more products at a discount compared to the aggregate prices of the products when sold separately’.⁵⁵ The ability to offer such discounts derives from the market power of a dominant undertaking, leveraged from the tying market to the tied market.⁵⁶ Thus it was proposed that, when applying this analogy to rebates, the assessment should come down to whether the rebates would make it ‘economically irrational’ for the customers to choose other suppliers.⁵⁷ In that regard, the tying and bundling analogy alone cannot support the anticompetitive analysis of rebates, and other theoretical contributions are needed.

4.2 PREDATORY PRICING

There is also the analogy of predatory pricing. This analogy is based on the fact that both predatory pricing and rebate schemes are pricing practices, and the observation that rebate schemes are a typical and benign form of price discrimination.⁵⁸ The anticompetitive concern is that, by offering customers discounts, rebates could result in below-cost prices and therefore drive out equally efficient competitors who cannot match those prices.⁵⁹ This analogy leads to the conclusion that a rebate scheme can foreclose competition – and therefore be anticompetitive – only if it

⁵³ Case T-201/04 *Microsoft Corp. v. Commission of the European Communities* [2007] ECR II-3601, paras 974 and 1037–1062. Here, the Court of First Instance (CFI) made a distinction between two issues: (1) customers being forced to install Windows Media Player, and (2) customers being not prevented from installing rivals’ media player programs, and relied on totally non-coercion-related factors to assess the foreclosure.

⁵⁴ Eilat, Gilo & Sagi, *supra* n. 37, at 351.

⁵⁵ *Ibid.*

⁵⁶ Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123(2) *Harv. L. Rev.* 397, 413 (2009).

⁵⁷ Gates, *supra* n. 51, at 110. See also at 17 of *Brief for the United States as Amicus Curiae at 17, 3M Co v. LePage’s Inc* (28 May 2004), <https://www.justice.gov/atr/case-document/file/517156/download> (accessed 15 Oct. 2017) (‘For example, the applicability of tying concepts depends on whether the structure of the discounts results in coercion of the buyer, and that in turn requires consideration of price and cost factors.’).

⁵⁸ Zenger, *supra* n. 24, at 745–746.

⁵⁹ Hovenkamp, *supra* n. 42, at 9–10 (arguing that the anticompetitiveness of pricing above costs is far too dubious to invoke antitrust intervention and therefore the law should only focus on predatory concerns). See also Gates, *supra* n. 51, at 111 (‘The courts’ approach to predatory pricing reflects a deep-seated concern that the antitrust laws should not interfere with procompetitive price competition.’).

results in pricing below costs.⁶⁰ It is the most defendant-friendly one of all three analogies, for arguing that such pricing practices would have to be recoupable and weighed against the presumptively pro-competitive price-cuts.⁶¹ It was suggested that this analogy should be applied to loyalty rebates,⁶² and probably also to bundled rebates and rebates with exclusive-dealing requirements.⁶³ It was observed that this analogy gained popularity in the US.⁶⁴

To assess whether the price of a rebate scheme is below costs, the as-efficient-competitor (AEC) test is commonly adopted.⁶⁵ The presumption that equally efficient competitors will not be excluded when a seller offers above-cost discounted prices is deeply embedded in the predatory pricing analogy.⁶⁶ The AEC test centres on the dominant undertaking itself, assessing whether the discounts would result in below-cost prices that cannot be matched by as-efficient competitors.⁶⁷ Admitting that loyalty rebates are unlikely to render below-cost prices in the classic form of predation because of the non-contestable share of demand,⁶⁸ some supporters of the predation analogy calibrated the price-cost test by attributing the discounts only to the contestable share.⁶⁹ But the difficulty is to determine the portions of the contestable and non-contestable units.⁷⁰

4.3 EXCLUSIVE DEALING

Finally there is the analogy of exclusive dealing. This analogy emphasizes the conditionality of loyalty rebates, so much so that it sees exclusive dealing as a polarized form of loyalty rebates.⁷¹ It contradicts the predation analogy, arguing that loyalty rebates do not have to be below costs (according to whatever price-cost measurement) to foreclose competition, due to the exclusive or quasi-exclusive conditions.⁷²

⁶⁰ Zenger, *supra* n. 24, at 748–749.

⁶¹ Salop, *supra* n. 47, at 8.

⁶² Denis Waelbroeck, *Michelin II: A Per Se Rule against Rebates by Dominant Companies?* 1(1) J. Competition L. & Econ. 149, 167 (2005).

⁶³ Giacomo Calzolari & Vincenzo Denicolò, *Competition with Exclusive Contracts and Market-Share Discounts*, 103(6) Am. Econ. Rev. 2384, 2405 (2013); Gates, *supra* n. 51, at 117–118.

⁶⁴ Gianluca Faella, *The Antitrust Assessment of Loyalty Discounts and Rebates*, 4(2) J. Competition L. & Econ. 375, 383 (2008); Zenger, *supra* n. 24, at 719; Gates, *supra* n. 51, at 112.

⁶⁵ Gates, *supra* n. 51, at 113–114.

⁶⁶ Hovenkamp, *supra* n. 42, at 6–7.

⁶⁷ Klein & Lerner, *supra* n. 42, at 667. See also Alberto Heimler, *Below-Cost Pricing and Loyalty-Inducing Discounts: Are They Restrictive and If So, When?* 1 Competition Pol’y Int’l 149, 155–156 (2009).

⁶⁸ Klein & Lerner, *supra* n. 42, at 661 and 666.

⁶⁹ *Ibid.*, at 667. See also Damien Geradin, *Loyalty Rebates After Intel: Time for the European Court of Justice to Overrule Hoffman-La Roche*, 11(3) J. Competition L. & Econ. 579, 605 (2015).

⁷⁰ Geradin, *supra* n. 69, at 606. See also Wright, *supra* n. 21, at 18–19.

⁷¹ Salop, *supra* n. 47, at 39.

⁷² Wright, *supra* n. 21, at 20.

Application of this analogy to loyalty rebates is not so obvious at first glance. The reason is similar to that of the tying analogy: The most distinctive feature of exclusive dealing is the exclusivity requirements, but this element may be missing in the rebate schemes that do not contain any exclusivity requirements. In those cases, the trading parties are not obliged to, but only financially incentivized to choose the dominant undertaking.⁷³

Nonetheless, this becomes less of an issue when those financial incentives are perceived as de facto exclusivity inducing. A convincing economic explanation has been provided for that perception: The only difference between an exclusive dealing clause and a loyalty rebate scheme is that the latter offers the customers a portion of the monopoly profits as an extra incentive to go along with the exclusionary agenda, while the former is usually implemented through contractual obligations.⁷⁴ In fact, it was observed that, by creating an externality among buyers, loyalty rebates are just as effective as exclusive dealing when it comes to foreclosing competition.⁷⁵ This means, to employ the exclusive dealing analogy, further contextualized analysis should be performed.⁷⁶

5 APPRAISING THE *TETRA PAK* DECISION

5.1 AN EXCLUSIONARY EFFECTS-BASED APPROACH LOOMING

The SAIC's analysis on loyalty rebates was three-fold:

- Introducing the notion of loyalty-inducing effect, to illustrate the suction ability of loyalty rebates derived from their retroactiveness and individualization.
- Ascertaining whether this loyalty-inducing effect can indeed be anti-competitive, based on the leverage theory and the consideration on market conditions.
- Looking at the market status quo, to confirm the existence of anti-competitive effects.

⁷³ Hovenkamp, *supra* n. 42, at 8.

⁷⁴ A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct – Are There Unifying Principles?* 73(2) *Antitrust L.J.* 375, 404 (2006).

⁷⁵ Einer Elhauge & Abraham L. Wickelgren, *Robust Exclusion and Market Division Through Loyalty Discounts*, 43 *Int'l J. Indus. Org.* 111, 116 (2015). See also David Spector, *Loyalty Rebates: An Assessment of Competition Concerns and a Proposed Structured Rule of Reason*, 1(2) *Competition Pol'y Int'l* 89, 99 (2005) (explaining that, when there is no coordination among buyers, a monopoly can deter entry without any costs by putting buyers into a prisoners' dilemma, and when there is buyer coordination, the monopoly can still deter entry by offering more generous contracts).

⁷⁶ Patrick DeGraba, *Naked Exclusion by a Dominant Input Supplier: Exclusive Contracting and Loyalty Discounts*, 31 *Int'l J. Indus. Org.* 516, 524 (2013).

This three-fold analysis signified the adoption of an effects-based approach. The SAIC's overall reasoning was consistently focused on exclusionary effects. Throughout the decision, the SAIC repeatedly adopted phrases such as 'obvious anticompetitive effect' and 'effects of excluding and restricting competition'.⁷⁷ These phrases, in light of the three-fold structure, essentially mean exclusionary effects on competition. Meanwhile, the SAIC had no mentioning of whether the form of rebates should play a part in the analysis.

By adopting this approach, the SAIC effectively reoriented the analytical focus in the AML abuse of dominance cases. For a long time, there has been a mismatch between the legal concerns underlying abuse cases and the actual harm of abusive practices in China. This is exemplified in the *Regulation on the Prohibition of Conduct Abusing a Dominant Market Position*, a secondary law adopted by the SAIC in 2010 to assist the AML's application to abuse cases.⁷⁸ This Regulation has four Articles addressing the types of abuse, but only one of them, namely Article 5 regarding exclusive dealing, implies the exclusion of competitors as the underlying harm. The rest of them are limited to concerns of unfair or discriminatory treatment of customers.⁷⁹ Consequently, of all the eight abuse of dominance cases handled by the SAIC prior to *Tetra Pak*, only one – a refusal to deal case – was unequivocally focused on the harm suffered by competitors; the rest of them, with limited substantive analysis, discussed only the harm on customers and end consumers.⁸⁰

The problem here is that the jurisprudence behind this Regulation overlooked the imminent harm of most abuse cases, which is the exclusion of competition. To a certain extent, it also misconstrued Article 6 of the AML, the general rule governing abuse of dominance cases:

*Undertakings holding a dominant position on the market may not abuse such position to eliminate or restrict competition.*⁸¹

This Article clearly stated that the legal concern in abuse cases should be the restriction of competition, which should be manifested in the exclusionary harm suffered by competitors. Indeed, it was vague on whether proof of effects is

⁷⁷ The *Tetra Pak* decision, *supra* n. 6, at 37, 40–41, 43–44.

⁷⁸ The Regulation on the Prohibition of Conduct Abusing a Dominant Market Position (工商行政管理机关禁止滥用市场支配地位行为的规定) (promulgated by the SAIC on 31 Dec. 2010, effective on 1 Feb. 2011), available at (in Chinese) http://www.saic.gov.cn/fldyfbzdzjz/zcfg/xzgz/201101/t20110107_233538.html (accessed 15 Oct. 2017).

⁷⁹ The other three are: Art. 4 (refusal to deal), Art. 6 (tying), and Art. 7 (discrimination of customers). *Ibid.*, at Arts 4–7.

⁸⁰ For the decision of this refusal to deal case, see Chongqing AIC, Chongqing AIC Administrative Punishment Decision [2015] No. 15 (重庆市工商行政管理局行政出发决定书 渝工商经处字[2015]15号) (28 Oct. 2015), The SAIC Web Site http://www.saic.gov.cn/fw/bsdt/gg/jzjf/201512/t20151222_231619.html (in Chinese) (accessed 15 Oct. 2017).

⁸¹ The AML, *supra* n. 5, Art. 6.

required to ascertain that harm, but that vagueness has now been clarified by the SAIC's consistent focus on exclusionary effects in this case.

In that light, the SAIC's activation of the catchall provision becomes understandable: It had to bypass its own secondary Regulation, because this Regulation could not provide a legal basis for the effects-analysis it had in mind.

In a broader context, the SAIC's adoption of an effects-based approach corresponded to the Chinese Supreme Court's ruling in *Qihoo 360 v. Tencent*, the most well-known AML civil case so far.⁸² This case is about *Qihoo 360*, an anti-virus software company, suing *Tencent*, a conglomerate Internet company for abuse of dominance in the instant messaging (IM) software market by forcing consumers to choose between *Tencent's* IM product ('QQ') and *Qihoo's* anti-virus software ('360'). The Chinese Supreme Court delivered the final judgment on 16 October 2014, dismissing *Qihoo's* claims entirely.⁸³ The Supreme Court constructed an effects-oriented analytical framework, and held that when assessing an abusive conduct, the undertaking's motives and the pro-competitive effects of the conduct should be taken into account. It was suggested that this judgment launched a shift towards a competitor-focused analysis and an increasing emphasis on actual effects.⁸⁴ It is very likely that this landmark judgment has inspired the *Tetra Pak* decision. In that sense, the SAIC's commitment to an effects-based approach is likely to persist.

5.2 THE INSUFFICIENCY OF CONTEXTUALIZED EFFECTS-ANALYSIS

An effects-based approach being promised is one thing; to what extent this approach is carried out is another. This article argues that the SAIC failed to carry out the effects-analysis it had envisaged, based on the observation that the SAIC's analysis was mostly theoretical as opposed to contextualized.

A major part of its analysis was taken up by the first analytical fold to explain the concept of loyalty-inducing effect and how it could be anticompetitive in a theoretical setting.⁸⁵ Its consideration of market conditions in the second fold started to become very abstract and largely unsubstantiated.⁸⁶ Effects-analysis in

⁸² For a case introduction, see David Evans & Vanessa Yanhua Zhang, *Qihoo 360 v. Tencent: First Antitrust Decision by The Supreme Court*, Competition Pol'y Int'l (20 Oct. 2014), <https://www.competitionpolicyinternational.com/qihoo-360-v-tencent-first-antitrust-decision-by-the-supreme-court/> (accessed 15 Oct. 2017).

⁸³ The full text of the Supreme Court judgment is available at (in Chinese), <http://file.chinacourt.org/f.php?id=2331&class=file> (accessed 15 Oct. 2017).

⁸⁴ Adrian Emch, *Effects Analysis in Abuse of Dominance Cases in China: Is Qihoo 360 v. Tencent a Game-Changer?* 12(1) Competition L. Int'l 11, 25–26 (2016).

⁸⁵ The *Tetra Pak* decision, *supra* n. 6, at 37–40.

⁸⁶ *Ibid.*, at 40–41.

the actual market, namely the third fold, was basically hypothetical. There, although the SAIC did try to incorporate some empirical evidence regarding the deteriorating situation of *Tetra Pak's* competitors,⁸⁷ such evidence actually undermined the conclusion instead of supporting it, because the SAIC failed to establish the causal link between *Tetra Pak's* rebate schemes and those undertakings' business decline.⁸⁸

This is especially the case regarding individualized target rebates, which were viewed by the SAIC as 'retroactively cumulative rebates with one threshold'. Without any further inquiry, the SAIC concluded that this type of rebates had obviously anticompetitive effects.⁸⁹ Such a rushed conclusion bordered on a *per se* rule of illegality. Consequently, the alleged anticompetitive effects were not confirmed by circumstantial evidence.

There is also a detectable lack of efficiency justification. The SAIC briefly mentioned at the beginning of the decision that the absence of efficiency defence was because *Tetra Pak* did not submit any, despite being informed with the right to be heard.⁹⁰ This might be the result of informal plea bargains made before the decision, but for outsiders, it is difficult to verify due to the lack of information disclosure. Nonetheless, considering the insufficient contextualized effects-analysis, it is hard to imagine to what extent efficiency justifications would have been taken into account had *Tetra Pak* raised any. This is especially the case for individualized target rebates.

As demonstrated in section 3, loyalty rebates need full-fledged circumstantial analyses. In that sense, the SAIC failed to live up to its promise of an effects-based approach to loyalty rebates.

5.3 AN UNDERDEVELOPED THEORY OF HARM

This article argues that the underdeveloped theory of harm in *Tetra Pak* was the cause of that failure. This theory of harm was supposed to offer a convincing line of reasoning to establish the anticompetitiveness of the rebates in question, but instead appeared to be rather obscure and inadequate, failing to demonstrate how the loyalty-inducing effect of loyalty rebates could be anticompetitive in accordance with (one of) the three analogies.

There are several indications that the SAIC relied mainly on the tying analogy. The first one is the adoption of the leverage theory. To explain the anticompetitive

⁸⁷ *Ibid.*, at 44–45.

⁸⁸ For a discussion on the importance of presenting such a causal link, see Joshua D. Wright, *Moving beyond Naïve Foreclosure Analysis*, 19(5) *Geo. Mason L. Rev.* 1163, 1181–1182 (2012).

⁸⁹ The *Tetra Pak* decision, *supra* n. 6, at 44.

⁹⁰ *Ibid.*, at 3.

mechanism of loyalty rebates, the SAIC employed the notions of contestable and non-contestable share of demand, stating that these loyalty rebates could help *Tetra Pak* to leverage the market power from the non-contestable part to the contestable part.⁹¹ Secondly, when describing the relevant market conditions, the SAIC considered the influence of tying, which was established as another abuse in this case,⁹² a logic similar to the one of the General Court (GC) of the CJEU in *Intel*.⁹³ Thirdly, when trying to prove the anticompetitive effects of retroactively cumulative rebates, the SAIC took a note on the combo-implementation of single-product rebates and multi-product rebates, stating that this combination further enhanced the foreclosure because competitors would then have to compensate customers' discount loss on not only the non-contestable part of the contestable products but also the non-contestable products.⁹⁴ However, the SAIC did not provide any separate analysis on those bundled rebates.

As mentioned earlier, the tying analogy was of limited use. It is applicable to loyalty rebates in a multi-product scenario, but when it comes to single-product rebates, its use is limited to supplying the leverage theory for understanding how rebates can effectuate foreclosure. The same is true in this case. The leverage theory helped the SAIC to demonstrate that loyalty rebates could indeed function anticompetitively, but it did not indicate under what conditions and to what extent those rebates would be anticompetitive.

One may argue that the SAIC also relied on the exclusive dealing analogy, seeing that prior to the loyalty rebates analysis, the SAIC spent an entire section of this decision to establish the illegality of *Tetra Pak's* exclusive dealing contracts with its packaging material supplier.⁹⁵ However, the analysis on those exclusive dealing contracts was incredibly weak. The main harm of those exclusive dealing contracts was supposed to be the input foreclosure suffered by *Tetra Pak's* competitors, but the SAIC did not assess how those competitors were starved by the lack of supply and therefore market competition was impeded, nor did it conduct a counterfactual analysis on why there could be no alternative supplies.⁹⁶ Instead, it jumped to the conclusion that the exclusive dealing contracts would impede the long-term development of the packaging material industry.⁹⁷ Therefore, even if the SAIC did consider the exclusive dealing analogy, its

⁹¹ *Ibid.*, at 40.

⁹² *Ibid.*

⁹³ *Intel*, *supra* n. 29, para. 181.

⁹⁴ The *Tetra Pak* decision, *supra* n. 6, at 43.

⁹⁵ *Ibid.*, at 28–34.

⁹⁶ The only reference on this point was the brief mentioning that transforming the packaging material technology into mass manufacturing requires substantial transformation costs and relies heavily on long-term, steady, and huge demand. The *Tetra Pak* decision, *supra* n. 6, at 31.

⁹⁷ *Ibid.*, at 33–34.

consideration would be too superficial to support any contextualized effects-analysis.

Similar observations can also be made regarding the predatory pricing analogy. The SAIC's analysis showed some traces of the predation analogy. For example, it adopted the reasoning that loyalty discounts made it much more difficult for competitors to match a dominant undertaking's price offers, because the competitors would have to fully compensate the customers for their loss of discounts.⁹⁸ However, the SAIC did not take any step further, in the sense that no price-cost comparison was conducted. Consequently, no contextualized effects-analysis could be yield either.

Overall, the lack of a well-developed theory of harm destined that the SAIC would not be able to carry out an effects-based analysis even if it wanted to.

6 CONSTRUCTING A THEORY OF HARM: THE CASE OF THE EU

6.1 THE CONCEPT OF LOYALTY REBATES IN EU COMPETITION LAW

It is not difficult to detect the EU competition law influence in the SAIC's analysis. For example, the SAIC adopted a categorization of rebates similar to that of the EU Commission.⁹⁹ This is not surprising, as the substantive provisions in the AML are to a large extent transplanted from EU competition law, and the AML enforcers have been closely watching the EU law developments.¹⁰⁰

The concept of loyalty rebates in *Tetra Pak* is largely aligned with that in the EU law context as well. While the SAIC's definition of loyalty rebates focuses on the anticompetitive mechanisms of retroactiveness and individualization,¹⁰¹ the CJEU defined loyalty rebates as 'rebates designed, through the grant of a financial advantage, to prevent customers obtaining their supplies from competing producers',¹⁰² a

⁹⁸ *Ibid.*, at 41–42.

⁹⁹ *Ibid.*, at 38. Cf. the Commission Guidance Paper, *supra* n. 28, para. 37.

¹⁰⁰ Giacomo Di Federico, *The New Anti-Monopoly Law in China from a European Perspective*, 32(2) *World Competition* 249, 255–262 (2009); Yichen Yang, *Price-Related Cartels Under the Chinese Anti-Monopoly Law Regime: The Need to Clarify Four Substantive and Procedural Issues*, 39(3) *World Competition* 479, 497 (2016).

¹⁰¹ The *Tetra Pak* decision, *supra* n. 6, at 34.

¹⁰² When characterizing this type of rebates in a series of judgments, the CJEU used the term 'loyalty rebates' interchangeably with the terms 'fidelity rebates' and 'retroactive rebates'. See Case C-40/73 *Coöperatieve Vereniging 'Suiker Unie' UA and others v Commission of the European Communities* (hereinafter '*Suiker Unie*') [1975] ECR 1663, para. 518 (as 'loyalty rebates'); Case C-85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities* (hereinafter '*Hoffmann-La Roche*') [1979] ECR 461, para. 90 (as 'fidelity rebates'); Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities* (hereinafter '*Michelin I*') [1983] ECR 3461, para. 71 (as 'loyalty rebates'); *Tomra*, *supra* n. 23, paras 73–78 (as 'retroactive rebates').

definition that focuses more on the potential anticompetitive effects but nonetheless means the same.

The only discrepancy is that the EU case law also put exclusivity rebates, namely ‘rebates conditional on the customer’s obtaining all, or most, or a given portion of their requirements exclusively from the manufacture’,¹⁰³ under the category of loyalty rebates.¹⁰⁴ However, there are some inconsistencies, or at least ambiguities. For example, the distinction between loyalty rebates and exclusivity rebates was not so clearly defined in *Michelin II*, where the Court of First Instance (CFI) seems to have intentionally mixed their definitions together.¹⁰⁵ In *Post Danmark II*, the CJEU distinguished rebates with and without exclusivity requirements,¹⁰⁶ but it did not say whether the concept of loyalty rebates incorporates both kinds of rebates (as indicated in paragraphs 71–72 of *Michelin I*), or it covers only rebates with an exclusive-dealing requirement (as indicated in paragraph 70 of *Tomra*).¹⁰⁷ The situation became even less clear after *Intel*, where the GC expressly established three types of rebates, with vastly divergent assessment routes assigned to each type.¹⁰⁸

For argument’s sake, this article sees loyalty rebates as incorporating exclusivity rebates.

6.2 EXCLUSIONARY EFFECT AS THE CORE HARM

The EU case law has held from the outset that the legality of a loyalty rebates scheme depends on its effects. When the concept of loyalty rebates was initially brought up in *Suiker Unie*, the CJEU construed the anticompetitiveness as the ‘dissuasive effect’,¹⁰⁹ which would lead to two types of harm: the discrimination of customers¹¹⁰ and the foreclosure of competitors.¹¹¹ In *Hoffmann-La Roche*, the

¹⁰³ *Intel*, supra n. 29, para. 76.

¹⁰⁴ *Hoffmann-La Roche*, supra n. 102, paras 89–90; *Michelin I*, supra n. 102, para. 72; Case C-95/04 P *British Airways plc v. Commission of the European Communities* (hereinafter ‘*British Airways*’) [2007] ECR I-2331, para. 65; *Michelin II*, supra n. 29, para. 56; *Tomra*, supra n. 23, para. 70 (as ‘loyalty rebates’); *Post Danmark II*, supra n. 25, paras 27–28 (as ‘loyalty rebate’, and using the phrase ‘all or a given proportion of’, instead of ‘all or most of’).

¹⁰⁵ *Michelin II*, *ibid.*

¹⁰⁶ The distinction between them is made on the basis of whether the rebates are ‘coupled with an obligation for, or promise by, purchasers to obtain all or a given proportion of their supplies from Post Danmark’. *Post Danmark II*, supra n. 25, para. 28.

¹⁰⁷ *Ibid.*, para. 27.

¹⁰⁸ *Intel*, supra n. 29, paras 76 and 78. See also Gunnar Niels, Helen Jenkins & James Kavanagh, *Economics for Competition Lawyers* 189–190 (2d ed., Oxford 2016).

¹⁰⁹ *Suiker Unie*, supra n. 102, para. 513.

¹¹⁰ *Ibid.*, para. 523.

¹¹¹ *Ibid.*, para. 526.

CJEU ruled that the harm of loyalty rebates¹¹² include the foreclosure of competitors, the discrimination of customers, and the strengthening of the dominant position by means of a distorted form of competition.¹¹³

In *British Airways*, the CJEU refined those harms as the exclusionary effect, seemingly indicating that this is the ultimate harm of loyalty rebates.¹¹⁴ In *Tomra*, the CJEU phrased the harm more specifically as the effect of driving out competitors from competing the contestable part of demand.¹¹⁵ In *Post Danmark II*, the exclusionary effect was consistently and unequivocally identified as the source of illegality.¹¹⁶

The exclusionary effect as the core harm of loyalty rebates was buttressed in *Michelin II*, where the CFI held that a loyalty-inducing rebate scheme by a dominant undertaking violates Article 102, not because it is discriminatory but because its loyalty-inducing nature generates foreclosure effects.¹¹⁷ The CFI elaborated the exclusionary effect as the core anticompetitive concern from two aspects: limiting dealers' choices and making market access more difficult for competitors.¹¹⁸

6.3 THE 'ALL CIRCUMSTANCES' ASSESSMENT FRAMEWORK

Through a series of case law, the CJEU built an all-circumstances framework to assess the exclusionary effect. In *Michelin I*, the CJEU established that when assessing loyalty rebates, it is necessary to consider all circumstances, particularly to investigate whether the discount scheme tends to cause four problematic situations.¹¹⁹ In *British Airways*, this 'all circumstances' examination was refined into three aspects, including (1) whether the rebates foreclosed competitors, (2) whether they restricted the choices of customers, and (3) whether there was an objective economic justification.¹²⁰

The first aspect is central in this exclusionary effect assessment. In *British Airways*, this examination included considering the individualization and the

¹¹² The CJEU in this case adopted the expression of fidelity rebates, which means the same as loyalty rebates. *Hoffmann-La Roche*, *supra* n. 102, para. 90.

¹¹³ *Ibid.*, paras 89–90.

¹¹⁴ *British Airways*, *supra* n. 104, para. 77.

¹¹⁵ *Tomra*, *supra* n. 23, para. 79.

¹¹⁶ *Post Danmark II*, *supra* n. 25, paras 31, 42, and 46.

¹¹⁷ *Michelin II*, *supra* n. 29, para. 65.

¹¹⁸ *Ibid.*, para. 110.

¹¹⁹ These four situations include (1) removing or restricting a buyer's freedom to choose his or her sources of supply, (2) barring competitors from accessing the market, (3) applying dissimilar conditions to equivalent transactions with other trading parties, and (4) strengthening the dominant position by distorting competition. *Michelin I*, *supra* n. 102, para. 73.

¹²⁰ *British Airways*, *supra* n. 104, paras 68–69.

retroactiveness of the rebates in question,¹²¹ and the contrast of market share between the dominant undertaking and its competitors.¹²² In *Michelin II*, this examination revolved around whether the rebates in question were loyalty inducing.¹²³ In *Tomra*, the CJEU held that subjective factors should also be taken into account.¹²⁴ In *Post Danmark II*, the characteristics of the rebates in question were emphasized,¹²⁵ in addition to the particular market conditions¹²⁶ such as the entry barriers and the unavoidable-trading-partner situation,¹²⁷ resulting a finding of the ‘*suction effect*’¹²⁸ and eventually the anticompetitive effect of exclusion.¹²⁹

As the case law evolves, several important issues have also been clarified. Firstly, it is not necessary to prove any actual effect.¹³⁰ It is sufficient to demonstrate that the conduct in question is capable of having an effect on competition,¹³¹ although that capability cannot be purely hypothetical.¹³² Secondly, there is no need to establish a threshold of exclusion,¹³³ because the finding of dominance implies the special responsibility of the dominant undertaking and the already weakened market conditions.¹³⁴

6.4 THE UNCLEAR THEORY OF HARM AND THE *INTEL* DEBATE

An issue similar to the Chinese one is that the EU law did not specify its analogy to loyalty rebates. On the one hand, the CJEU in *Tomra* explicitly ruled that predatory pricing is not a necessary condition for exclusion,¹³⁵ because ‘*the exclusionary mechanism represented by retroactive rebates does not require the dominant undertaking to sacrifice profits*’.¹³⁶ The CJEU in *Post Danmark II* held that the AEC test is only an optional approach, because the particular market conditions in real cases can make ‘*the emergence of an as-efficient competitor practically impossible*’.¹³⁷ On the

¹²¹ *Ibid.*, paras 71 and 73.

¹²² *Ibid.*, para. 75.

¹²³ *Michelin II*, *supra* n. 29, paras 74–106.

¹²⁴ *Tomra*, *supra* n. 23, para. 19.

¹²⁵ *Post Danmark II*, *supra* n. 25, paras 22–25.

¹²⁶ *Ibid.*, para. 30.

¹²⁷ *Ibid.*, paras 39–40.

¹²⁸ *Ibid.*, para. 35.

¹²⁹ *Ibid.*, para. 42.

¹³⁰ *Tomra*, *supra* n. 23, paras 68 and 79.

¹³¹ *Ibid.*, para. 79.

¹³² *Post Danmark II*, *supra* n. 25, paras 65–66.

¹³³ *Tomra*, *supra* n. 23, para. 46.

¹³⁴ *Post Danmark II*, *supra* n. 25, paras 70–72.

¹³⁵ *Tomra*, *supra* n. 23, para. 73.

¹³⁶ *Ibid.*, para. 78.

¹³⁷ *Post Danmark II*, *supra* n. 25, paras 57–59.

other hand, the case law has not thoroughly followed the exclusive dealing analogy.¹³⁸

Lacking a coherent theory of harm induced the danger of the ‘all circumstances’ framework being compromised. This is exemplified in the *Intel* case, where the GC expressly established three types of rebates, including quantity rebates, exclusivity rebates, and loyalty (inducing) rebates, according to their level of ability to lockdown customers,¹³⁹ and ruled that exclusivity rebates should be *per se* illegal.¹⁴⁰ This ruling is arguably at odds with a string of precedents,¹⁴¹ where the CJEU seems to be intentionally ambiguous on how the legality of exclusivity rebates should be assessed.¹⁴²

Dissenters of the GC judgment, including the Advocate General of *Intel*, argued that the ‘all circumstances’ effects-based framework should apply to both loyalty rebates and exclusivity rebates, because the anticompetitiveness comes from their effects, not forms.¹⁴³ In an effort to justify the effects-assessment, some scholars holding that view resorted to the AEC test prescribed in the Commission Guidance Paper,¹⁴⁴ and somehow ended up revisiting the predatory pricing analogy.¹⁴⁵

Meanwhile, supporters of the GC judgment claimed that exclusivity rebates should be *per se* illegal. They argued that the exclusive conditions distinguish these rebates from other price-based exclusionary conducts, making them unfit for the predatory pricing analogy, and therefore should be treated separately.¹⁴⁶ They were against the AEC test being applied to exclusivity

¹³⁸ In another way, it can also be said that the law ‘borrows from both analogies, but fails to draw the logical consequence’ of either analogy. Geradin, *supra* n. 69, at 581 and 603.

¹³⁹ *Intel*, *supra* n. 29, paras 76 and 78.

¹⁴⁰ *Ibid.*, para. 84.

¹⁴¹ *Supra* n. 104.

¹⁴² *Post Danmark II*, *supra* n. 25, para. 27; *Michelin II*, *supra* n. 29, para. 56.

¹⁴³ Opinion of Advocate General Wahl (delivered on 20 Oct. 2016) in Case C-413/14 P *Intel Corporation Inc. v. European Commission* (hereinafter ‘*Intel* Opinion’), paras 91–92 and 105. See also Geradin, *supra* n. 69, at 600; Patrick Rey & James S. Venit, *An Effects-Based Approach to Article 102: A Response to Wouter Wils*, 38(1) *World Competition* 3, 19 (2015); James S. Venit, *Case T-286/09 Intel v. Commission – The Judgment of the General Court: All Steps backward and No Steps forward*, 10(2) *European Competition J.* 203, 216 (2014).

¹⁴⁴ The Commission Guidance Paper, *supra* n. 28, paras 23 and 40–47.

¹⁴⁵ Julia Molestina & Peter Picht, *Conditional Rebate Schemes and the More Economic Approach: Back to the Future?* 46(2) *Int’l Rev. Intell. Prop. & Competition L.* 203, 209 (2015) (‘Rebates which are not – as the ones mainly dealt with in *Tomra* and *Intel* – exclusive do require a very fact-sensitive approach, crucial part of which may be the AEC test.’); Faella, *supra* n. 64, at 398 (‘As a typical form of price competition, the grant of discounts should benefit from a presumption of legality, which should be rebutted only when the practice is capable of excluding equally efficient competitors.’); Liza Lovdahl Gormsen, *Are Anti-Competitive Effects Necessary for an Analysis under Article 102 TFEU?* 36(2) *World Competition* 223, 236–237 (2013).

¹⁴⁶ Wouter P. J. Wils, *The Judgment of the EU General Court in Intel and the So-Called ‘More Economic Approach’ to Abuse of Dominance*, 37(4) *World Competition* 405, 423 (2014).

rebates, arguing that the effects cannot be measured without increasing enforcement costs and legal uncertainty,¹⁴⁷ and that the concept of dominance and the special responsibility doctrine have already incorporated effects-consideration.¹⁴⁸

6.5 EXCLUSIVE DEALING AS THE SOLUTION

This article suggests that, by openly endorsing the exclusive dealing analogy, the two sides can find a common ground, where the effects-based approach can be defended with minimum disrespect to the GC's judgment. Exclusive dealing by a dominant undertaking has long been subject to a presumption of illegality under an expansive interpretation of the special responsibility concept.¹⁴⁹ Consequently, it may be difficult to disassociate the exclusive dealing analogy based on modern economics with the EU exclusive dealing case law, which has been unduly strict, but it is a step worth taking for the following reasons.

Firstly, the exclusive dealing analogy is better at reconciling the conflicts in the existing case law. Focusing on the conditionality of rebate schemes, it is aligned with the case law holding that anticompetitive foreclosure can occur even if the price is above costs.¹⁵⁰ Nonetheless, this analogy provides an alternative logic to the one of the GC supporters that just because exclusivity rebates do not fit the predatory pricing analogy, they would have to be subject to a *per se* rule of illegality.¹⁵¹ It does so by seeing all rebate schemes as incentive programs, whose anticompetitiveness could only come from the properly attributed and counterbalanced foreclosure effects, therefore leaving no room for *per se* rules.¹⁵² This is a point the GC failed to address.¹⁵³ Employing this analogy could also

¹⁴⁷ *Ibid.*, at 427–428.

¹⁴⁸ Paul Nihoul, *The Ruling of the General Court in Intel: Towards the End of an Effect-based Approach in European Competition Law?* 5(8) J. Eur. Competition L. & Prac. 521, 526 and 530 (2014).

¹⁴⁹ Alison Jones, *Distinguishing Legitimate Price Competition from Unlawful Exclusionary Behaviour: Reconciling and Rationalising the Case-Law*, in *Competition Law Challenges in the Next Decade* 123, 150 and 152–153 (Sofia Oliveira Pais ed., Peter Lang Publishing 2016). See also Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* 71–72 (Hart 2010) (discussing the supposed meaning of the special responsibility concept and demonstrating how the interpretation of this concept was overstretched in a number of cases after *Michelin I*).

¹⁵⁰ *Intel*, *supra* n. 29, para. 150; *Tomra*, *supra* n. 23, para. 73; *Gates*, *supra* n. 51, at 105–107 (demonstrating the link between exclusive dealing and loyalty rebates with examples in the US case law).

¹⁵¹ *Wils*, *supra* n. 146.

¹⁵² Derek W. Moore & Joshua D. Wright, *Conditional Discounts and the Law of Exclusive Dealing*, 22(5) *Geo. Mason L. Rev.* 1205, 1237–1238 (2015).

¹⁵³ *Geradin*, *supra* n. 69, at 602.

help with bridging the gap between the different treatments of exclusive dealing under Articles 101 and 102.¹⁵⁴

Secondly, it is more qualified than the predation analogy to offer the theoretical support that an effects-based approach to loyalty rebates needs.¹⁵⁵ The AEC test has been deemed as the most available option to assess the exclusionary effect under the ‘all circumstances’ framework.¹⁵⁶ In that context, it may be intuitive to go for the predation analogy, if one follows the AEC path. But as shown in the debate, that would contradict the case law.¹⁵⁷ Alternatively, the AEC test can be supported by the exclusive dealing analogy through the notion of MES. This notion is rooted in the exclusive dealing analogy.¹⁵⁸ It ascertains the substantial level of foreclosure, determining whether the foreclosure prevents rivals from achieving MES.¹⁵⁹ In that sense, the AEC test can be tailored to loyalty rebates analysis by being built around the counterfactual foreclosure assessment proposed under the exclusive dealing analogy.¹⁶⁰

7 CONCLUSION

While the EU has accumulated decades of experience in rebates regulation, China has just begun its exploration in this arena. Nonetheless, China may have a late-developing advantage. Thanks to the trailblazing *Tetra Pak* decision, it may be able to sidestep the turbulences occurred in the EU’s adjustment from a form-based approach to an effects-based one. But this decision is not flawless, as it failed to show enough contextualized effects-examination. This article argues that the reason for that failure is because the SAIC did not have a well-developed theory of harm for its analysis. As shown in the EU case law, not having a coherent theory of harm entails the risk of the effects-based approach being compromised in rebates cases.

To pass on the *Tetra Pak* torch, the SAIC and the Chinese courts need to adopt the exclusive dealing analogy to underpin their future loyalty rebates cases.

¹⁵⁴ Jones, *supra* n. 149, at 155; Pablo Ibáñez Colomo, *Intel and Article 102 TEFU Case Law: Making Sense of a Perpetual Controversy*, LSE Legal Studies Working Paper No. 29/2014, 24–25 (2014).

¹⁵⁵ Rey & Venit, *supra* n. 143, at 25.

¹⁵⁶ *Intel* Opinion, *supra* n. 143, paras 164–169.

¹⁵⁷ *Supra* n. 135 and n. 136.

¹⁵⁸ Wright, *supra* n. 88, at 1166–1167.

¹⁵⁹ Daniel A. Crane & Graciela Miralles, *Towards a Unified Theory of Exclusionary Vertical Restraints*, 84 S. Cal. L. Rev. 605, 639 (2011); Wright, *supra* n. 21, at 7 and 23.

¹⁶⁰ Wright, *supra* n. 88, at 1181; Pinar Akman, *The Reform of the Application of Article 102 TFEU: Mission Accomplished?* 81 Antitrust L.J. 145, 186–187 (2016) (observing that in the *Intel* decision, the Commission showed no discussion of a counterfactual in finding abuse, therefore contradicting the AEC approach set out in the Guidance Paper).

This requires firstly a more nuanced look at exclusive dealing conducts. Moving beyond the crude reasoning in *Tetra Pak*, in future cases the SAIC would have to elaborate to what extent competitors are foreclosed by exclusive dealing conducts, and whether the foreclosure outweighs the pro-competitive effects.¹⁶¹ In that regard, when drawing inspirations from the EU case law, the SAIC and the courts should hold a critical view on the EU case precedents regarding exclusive dealing and loyalty rebates, especially those with a *per se* rule of illegality and those whose theories of harm were about discrimination and consumer-choice restraints instead of competition foreclosure.

In a broader context, this also requires intensifying enforcement on exclusive dealing conducts. According to the officially disclosed information, so far *Tetra Pak* is the only case that addressed exclusive dealing and loyalty rebates, but these practices have raised antitrust concerns long before this decision.¹⁶² Admittedly, this has always been a fundamental concern about the AML regime: Inadequate enforcement would make the substantive law development a castle on sand.¹⁶³

¹⁶¹ Melamed, *supra* n. 74, at 406–410.

¹⁶² Xu Liu, *The Antitrust Enforcement Predicament Behind Tetra Pak's Five-Year Long-Distance Race* (利乐案五年长跑背后的反垄断执法困局), *The Paper* (24 Nov. 2016), http://www.thepaper.cn/newsDetail_forward_1567737 (in Chinese) (accessed 15 Oct. 2017).

¹⁶³ Angela Huyue Zhang, *Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope?* 51(2) *Stan. J. Int'l L.* 195, 212–215 (2015) (suggesting that the AML enforcement outcome is likely to be either delayed or selective, because the demand of regulation exceeds the supply of regulation).