

# Pros & Cons 2018

**A transactions cost analysis of rebates  
and non-linear pricing  
A comment on prof. Joshua D. Wright's  
presentation**

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# KKV prioritisation policy

- » “[KKV] prioritises [conduct] capable of excluding or foreclosing firms, which are able to exercise effective competitive pressure on some level of the market.
- » [with] particular consideration to:
  - » the share of the market that is affected by the conduct  
[...]
  - » whether the pricing is capable of foreclosing a competitor which is, hypothetically, as efficient as the dominant firm.”

# Loyalty rebates and the "as-efficient competitor"

- » AEC *principle* guides our thinking on all price-based abuse
- » AEC *test* a useful tool for assessing:
  - » sacrifice (indicative of exclusionary intent) in *predatory pricing cases*
  - » whether exclusionary effects of a *rebate* are anticompetitive (harmful to consumers)
- » Loyalty rebates:
  - » Like exclusive dealing, may deprive rivals of minimum efficient scale
  - » Price-cost test measures capability to foreclose AEC
- » Caveat: in markets with significant economies of scale, strict reliance on AEC test may prevent *potential* as-efficient competitors from reaching minimum efficient scale

# KKV cases on rebates – since COM Guidance Paper

## » Posten (381/2009)

- » All-unit (retroactive) rebate for bulk mail consignments over 300 000 items
- » Rival's distribution network reached ca. 50 % of households (contestable share)
- » AEC test
- » Case closed (cf. outcome of civil litigation)

## » Elitfönster (463/2010)

- » Multi-product rebates ("mixed bundling") for windows and doors for pre-fabricated homes
- » Case closed by reference to Commission Guidance, AEC and KKV prioritisation policy

# KKV cases on rebates – since COM Guidance Paper

## » Posten II (262/2011)

- » Annual volume-based rebates conditional upon exclusivity
- » AEC test + analysis of customers' typical demand
- » Case closed, reference to Commission Guidance

## » Arla (663/2015)

- » Delivery bonuses to retailers of dairy products
- » Standardised (not individualised) bonus triggers, retroactive over very short periods (one week)
- » Case closed, reference to AEC

# KKV cases on rebates – post *Intel* (CJEU)

## » ASSA ABLOY (494/2013)

- » Various rebates on market for locksmith wholesale services
- » Suspected margin squeeze

## » Fredahl Rydéns (318/2017)

- » Rebate scheme with bonus thresholds on market for supply of coffins to burial firms
- » No indication that rebate levels or terms were loyalty-inducing or capable of locking in customers
- » Fragmented customer base meant each customer's entire demand contestable

# AEC analysis in ASSA ABLOY

- » *”Copiax’s customer contracts included a number of price models, including volume commitments, loyalty rebates, rebates subject to a condition of exclusivity and various customer loyalty schemes. The contracts are concluded for one year and are negotiated individually with each customer. [...]*
- » *[...] if ASSA ABLOY’s pricing has had the ability to foreclose an equally efficient competitor to Copiax. The AEC test has been conducted in order to analyse if a hypothetical undertaking with Prokey’s purchase costs for products from any of the companies within the ASSA ABLOY group, but with Copiax’s cost structure in all other respects, would be able to compete with Copiax’s end customer prices [...]*
- » *In this design, the test analyses any possible foreclosure effects of the suspected margin squeeze as well as any possible foreclosure effects of Copiax’s customer contracts. The results of the AEC test do not show that the prices applied have been capable of excluding an equally efficient competitor.*

# ASSA ABLOY: evidence of actual foreclosure?

- » *Furthermore, the Competition Authority has analysed whether Copiax has enforced the relevant clauses in the customer contracts, and if the customers have respected the clauses, to such a degree that their application could have resulted in anticompetitive foreclosure.*
- » *The analysis of Copiax's customer contracts shows that the contracts cover a not insignificant share of customers in the locksmith wholesale services market. These customers represent an even bigger share of the locksmith wholesalers' total sales.*
- » *Furthermore, the analysis shows that the volume commitments cover a substantial share of the contracted customers' total annual purchases. On the other hand, the analysis shows that many of Copiax's contracted customers were also customers of Prokey.*
- » *Furthermore, the analysis did not show that Copiax has been withholding bonuses from customers who did not achieve their volume commitments. Nor [...] that Copiax gives preferential treatment to customers who make all of their purchases from Copiax compared to customers who purchase from both Copiax and Prokey.”*

- 22 November 2017

# KKV:s experience with AEC test

- » Can be applied with limited *administrative burden* (does not in itself require advanced quantitative analysis)
- » Contributes to *transparency* and *predictability*
- » Main challenges:
  - » Measuring the dominant firm's relevant costs
  - » Determining contestable share
  - » Determining market coverage relevant for understanding foreclosure effects
- » A useful tool in combination with other investigative measures