Antitrust Regulation of Loyalty Rebates in China: How Groundbreaking Is the Tetra Pak Decision?

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Abstract

For the past decade, there has been an intense discussion on the 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, as in November 2016, the Chinese State Administration for Industry and Commerce (SAIC), one of the three Chinese enforcement agencies of the Anti-Monopoly Law (AML), issued a landmark antitrust decision on Tetra Pak. This decision is groundbreaking in many regards, including its introduction of the concept of loyalty rebates into the AML.

This decision came at a time when there has been an abundance of studies on the AML’s legal framework and institutional settings, but focused studies on the developments of the AML are still in shortage. This article addresses this gap by introducing and critically assessing the SAIC’s analysis on loyalty rebates in this decision. It first gives an overview of this Tetra Pak decision, including the background and its structure, and then a nuanced description of the SAIC’s analysis. Subsequently, this article discusses loyalty rebates in a theoretical context, where their characteristics are depicted and three analogical approaches to their antitrust analysis are introduced. On that basis, this article appraises the SAIC’s analysis, and finds that it has laid the ground for an effects-based approach to loyalty rebates. However, the failure to fully take into account all three analogical approaches determined that the SAIC would be unable to engage in a contextualized effects-analysis it had intended to.

1 INTRODUCTION

On November 16, 2016, the Chinese State Administration for Industry and Commerce (SAIC), one of the three Chinese Anti-Monopoly Law (AML) enforcement agencies,1 published an antitrust decision against the multinational Tetra Pak for its abuses of dominance. This decision is by far the most time-consuming case in the AML enforcement history: Officially launched on January 17, 2012, it took the SAIC almost five years to close the case.2 The result was a forty-seven-page decision, the longest

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1 The SAIC is in charge of non-price-related antitrust enforcement. For a more detailed introduction of the responsibilities of 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), Nov. 16, 2016, the SAIC Web Site,
AML enforcement decision ever, with a ¥667.7 Million (approximately $97 Million) fine, so far the largest amount of fine imposed by the SAIC.³

At the time of this decision, the AML has been in force for more than eight years.⁴ Its enforcement went from an initially dormant stage in the beginning five years, to an enforcement peak around 2014, and now to a stage where the enforcement activities are normalized and substantively expanding.⁵ The Tetra Pak decision is a precise embodiment of that expansion.

The Tetra Pak decision is trailblazing, in the sense that the SAIC introduced the concept of loyalty rebates into Chinese law, where there had never been any case about loyalty rebates before. This decision shows that the SAIC is trying to catch up with the global trend of antitrust, at a time when a new wave of discussion on rebates regulation is being spurred. There has been an abundance of studies on the AML’s legal framework and institutional settings, but nuanced studies on the new developments of the AML are still in shortage. This article addresses this gap by critically assessing the SAIC’s analysis on loyalty rebates in this decision.

To that end, this article is structured as follows. Part 2 introduces the Tetra Pak decision and its background, followed by a thorough description of the SAIC’s analysis on loyalty rebates. Part 3 looks at loyalty rebates in a theoretical context, discussing the characteristics of loyalty rebates and the three analogies that can be of use to approach loyalty rebates. A comparative perspective is adopted, mainly referring to the EU competition law. Part 4 points out the merit and the problem of the SAIC’s analysis, as well as the cause of that problem. Part 5 draws the conclusion.

2 THE TETRA PAK DECISION AND THE ANALYSIS ON LOYALTY REBATES

2.1 THE INSTITUTIONAL BACKGROUND

The AML was promulgated on August 30, 2007, and came into force on August 1, 2008. Pursuing to the legislative custom, the AML itself did not designate any enforcement agencies. Instead, it entrusted the State Council to establish the AML enforcement agencies. At the eve of the AML’s coming into force, the State Council issued three Three Designation Orders, which divided the AML enforcement responsibilities into three parts, and entrusted them to three central administrative agencies. Consequently, a tripartite regime was established for the public enforcement of the AML:

- The Ministry of Commerce (MOFCOM) is exclusively responsible for reviewing mergers;  
- The National Development and Reform Commission (NDRC) is responsible for regulating price-related anti-competitive agreements and abuse of dominant position;  
- The State Administration for Industry and Commerce (SAIC) is responsible for regulating anti-competitive agreements and abuse of dominance that are not price-related.

Currently the SAIC has fifteen internal departments, and the one in charge of the AML enforcement is the Anti-Monopoly and Anti-Unfair Competition Enforcement

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Bureau. Scholars revealed that the SAIC suffers from constant manpower shortage, with only eight people in Beijing being responsible for antitrust enforcement. Despite the capacity constraints, the SAIC’s enforcement has improved tremendously, comparing to that of the NDRC and of the MOFCOM. For example, since July 2013, the SAIC has been regularly disclosing the enforcement decisions by itself and local AICs on its website. This level of information disclosure is yet to be achieved by the other two agencies.

Tetra Pak is only the second case handled by the SAIC, with most of its cases delegated to local AICs. Shortly after this decision was issued, Tetra Pak announced that it accepted this decision with no intention to appeal. This decision is record setting in terms of the time consumed: This case was officially launched on January 17, 2012, but scholars suggested that the investigation could even date back to 2004, when the SAIC entrusted scholars to look into the food packaging industry after receiving tip-offs.

2.2 THE STRUCTURE OF THE TETRA PAK DECISION

The Tetra Pak decision consists of the following parts:
- Listing the addressees, including Tetra Pak International, Tetra Pak China, and four packaging subsidiary companies of Tetra Pak in China.
- Defining the relevant markets. The relevant product markets are (1) the market for paper-based aseptic packaging equipment, (2) the market for technical services for paper-based aseptic packaging equipment, and (3) the market for paper-based aseptic packaging materials. The geographic scope is limited to the Chinese mainland.
- Establishing dominance in the relevant markets. The SAIC considered four sets of criteria, including (1) market share and the competitive situation in the market, (2) market control power, (3) the level of dependence on other operators, and (4) entry barriers of the relevant markets.
- Proving abuse. The SAIC accused Tetra Pak of committing three types of abuse:
  - Tying the sale of packaging materials with the supply of packaging equipment, and with the supply of technical services;
  - Exclusive dealing. Namely, Tetra Pak limited its supplier of raw materials for packaging material production from supplying other packaging material producers;
  - Loyalty rebates that induced restrictive effects on competition in the packaging material market.

- **Imposing penalties.** Firstly, the SAIC specified the rules that Tetra Pak violated, including Article 17(1)(d) (on exclusive dealing), Article 17(1)(e) (tying and bundling), and Art 17(1)(g) (other forms of abuse) of the AML. Subsequently, it took a note on the fact that Tetra Pak adjusted its conduct and cooperated with the authority during investigation and offered rectification measures before the case was closed. Finally, based on Art 47 of the AML (the applicable measures of penalty), the SAIC imposed the penalties, including: (1) the requirement to discontinue such violations, and (2) the imposition of a ¥667.7 Million fine, which is 7% of Tetra Pak’s 2011 annual turnover in the relevant markets.

### 2.3 THE SAIC’S ANALYSIS ON LOYALTY REBATES

The most noticeable part of this decision is the SAIC’s analysis on loyalty rebates. By issuing this decision, the SAIC progressively broke the ground for antitrust regulation of loyalty rebates, when neither the AML nor any secondary legislation said anything on loyalty rebates. The SAIC invoked Art 17(1)(g) of the AML, the catchall rule governing the types of abuse of dominance to be prohibited, as the legal basis for its rebates regulation. 14

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

- **Retroactively cumulative rebates.** 15 The SAIC defined this type of rebates as ‘price discounts that are conditioned by the client reaching a certain quantity threshold within a certain period of time and are applied retroactively to all units of purchase within that period’. As the quantity reaches higher thresholds, the discounts rate will also increase, thereby being cumulative. Then the SAIC made two subcategories:

  - ‘Single retroactively cumulative rebates’, which applies to clients’ purchases of a single type of packaging materials, and
  - ‘Compound retroactively cumulative rebates’, which offers uniform or additional discounts to a client purchasing two or more types of products on the basis of single retroactively cumulative rebates.

- **Individualized target rebates.** 16 The SAIC defined this type of rebates as ‘discounts offered individually to certain clients on the condition that their purchase quantity reaches or exceeds a particular portion or an individually-set quantity threshold’. The SAIC viewed this kind of rebates as highly targeted, because it is customized for the situation of each particular client.

On that basis, the SAIC concentrated on analyzing the anticompetitive effects of these two types of rebates. It stated that loyalty rebates should be prohibited if they are

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14 Article 17(1)(a)–(f) of the AML list several types of abusive conducts by dominant undertakings that shall be prohibited, including excessive pricing, predatory pricing, refusal to deal, exclusive dealing, tying and bundling, and price discrimination. Article 17(1)(g) states that other abusive conducts of dominant position, as identified by the AML enforcement agencies, shall also be prohibited. See the AML, supra n. 6, at Article 17(1).

15 Ibid. at pp. 34–35.

16 Ibid. at pp. 36–37.
carried out by dominant undertakings and result in obviously anticompetitive effects.\textsuperscript{17} To that end, it identified the loyalty ‘inducing effect’ as the key. According to the SAIC, the ‘retroactiveness of time’ and the ‘cumulativeness of quantity’ of the first type of rebates distinguished it from a normal quantity rebate scheme, as the latter is applied only to the part of purchase quantity 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 payment amount would be reduced even though the purchase quantity has increased.\textsuperscript{18} Therefore, customers will be strongly motivated to buy as much as possible from Tetra Pak just so they can reach the threshold and thereby reduce the total payment. The SAIC identified the ‘threshold interval’ and the ‘discount rate’ as key elements for retroactively cumulative rebates to generate such loyalty-inducing effects.\textsuperscript{19} Regarding the second type of rebates, the SAIC only gave a brief statement that their customization for individual clients would directly result in the inducing effect.\textsuperscript{20}

The SAIC proceeded with the analysis by attempting to put these two types of loyalty rebates into the particular market context. But before that, it distinguished the ‘contestable share of demands’ and the ‘non-contestable share of demands’ of the customers. According to the SAIC, the former can either be supplied by the dominant undertaking or its competitors, but the latter can only be supplied by the dominant undertaking due to a number of possible reasons, such as patent restriction, capacity limitations of competitors, contractual obligations or incentives imposed by the dominant undertaking, and cumulated brand reputation, etc.\textsuperscript{21} In that light, the SAIC stated that the supposed anticompetitiveness of loyalty rebates is the leverage of market power from the non-contestable share of demand to the contestable share of demand. On that basis, the SAIC considered the market context from three aspects:\textsuperscript{22}

- Customers’ reliance on Tetra Pak’s production line and production capacity, which contributes to the formation of the non-contestable share of demand;
- The tie of packaging material with packaging equipment and with technical services, which further expanded the scope of the non-contestable share of demand;
- The implementation of multiple types of rebates. The SAIC considered that the implementation of individual target rebates effectively expanded the scope of the non-contestable share of demand. Also, other discounts, such as category discounts and special discounts,\textsuperscript{23} when coupled with retroactively cumulative rebates, enhanced the latter’s anticompetitive effects.


\textsuperscript{18} Ibid. at p. 38.

\textsuperscript{19} Ibid.

\textsuperscript{20} Ibid. at pp. 38–39.

\textsuperscript{21} Ibid. at pp. 39–40.

\textsuperscript{22} Ibid. at pp. 40–41.

\textsuperscript{23} Ibid. at p. 37.
In that context, the SAIC adopted an economic model to demonstrate the extra burden created by the loyalty rebates in question on competitors wishing to compete for the contestable share of demand.\(^{24}\) The economic model was expressed as an equation:

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

Supposedly, \(Q\) is the total quantity demand of a customer, and \(d\) (%) is the discount rate offered by Tetra Pak to this customer if it purchases all the quantity from Tetra Pak. \(Q_2\) is a dynamic concept, 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 \((Q - Q_2)\) decreases. In that regard, \(\Delta d\) (%) 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, because of the rebates, 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 of demand, competitors would not only need to match Tetra Pak’s proclaimed price offers, but would also have to fully compensate the customers for their loss of discounts on the non-contestable share of demand.\(^{25}\) Ultimately, this means these competitors would have higher costs than Tetra Pak because of the rebates schemes.

In line with that logic, 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 effects, because these compound rebates required 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.\(^{26}\) The SAIC found the implementation of these compound rebates to have corresponded with Tetra Pak’s sales increase in 2011 and 2013, and therefore stated that the anticompetitiveness of these compound rebates was confirmed.\(^{27}\)

Lastly, the SAIC held that individualized target rebates are obviously anticompetitive, because they are designed to turn contestable demands into non-contestable demands.\(^{28}\)

In an effort to substantiate the 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 Art 17(1)(g) of the AML.

3 LOYALTY REBATES IN A THEORETICAL CONTEXT

\(^{24}\) Ibid. at p. 41.
\(^{25}\) Ibid. at pp. 41–42.
\(^{26}\) Ibid. at p. 43.
\(^{27}\) Ibid. at pp. 43–44.
\(^{28}\) Ibid. at p. 44.
3.1 THE CHARACTERISTICS OF LOYALTY REBATES

Antitrust law is heavily influenced by economics, especially in aspects such as the characterization of conducts and the jurisprudence on their harm.\textsuperscript{29} The same is true for the concept of loyalty rebates. It is a legal concept based on economic characterizations.\textsuperscript{30} This Section discusses what this concept means by looking at some of the commonly identified characteristics of loyalty rebates.

3.1.[a] Retroactiveness

The most notable feature of a loyalty rebate scheme is its retroactiveness, which means, once the required threshold is exceeded, the rebate scheme will apply to all purchase units of a certain period (for example one year). By being retroactive, a rebate scheme could entail price discounts that are too significant for the customers to ignore.\textsuperscript{31} In fact, as time progresses, the closer that a customer’s purchase gets to the threshold, the more attractive the discounts would become. As have 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 purchase units are increasing while the total amount of payment is decreasing.\textsuperscript{32} The implication is that, a retroactive rebate scheme gives the customers incredibly strong incentives to exceed the required threshold, because failing to do so would result in the loss of those attractive discounts.\textsuperscript{33}

The opposite of retroactive rebates are incremental rebates, namely rebates applied only to the units of purchase exceeding the required threshold. Incremental rebates produce weaker incentives for the customers, because although they would make a customer’s overall expenditure to increase at a declining rate,\textsuperscript{34} they would never result

\textsuperscript{29} Herbert Hovenkamp, \textit{The Antitrust Enterprise: Principle and Execution} 21–22 (Harv. U. Press 2008) (noting that it was the neoclassical economics that guided the US antitrust law to classify anticompetitive restraints into three general groups and thereby to explore their harm to competition respectively). Also see John Kallaugher & Brian Sher, \textit{Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse under Art 82}, 25(5) European Competition Law Review 263, 273 (discussing how ordoliberalism has contributed to the conception and effect-analysis of rebates in the EU case law).


\textsuperscript{31} Case C-549/10 P Tomra Systems ASA and Others v European Commission (hereinafter ‘Tomra’) EU:C:2012:221, para. 15.

\textsuperscript{32} See the Tetra Pak decision, supra n. 15, at p. 38. For an economic illustration of the steep slope of the expenditure curve caused by retroactive rebates, see Hans Zenger, \textit{Loyalty Rebates and the Competitive Process}, 8(4) Journal of Competition Law and Economics 717, 743 (2012) (using a diagram to illustrate the steep slope of the expenditure curve caused by retroactive rebates).

\textsuperscript{33} Case C-23/14 Post Danmark A/S v Konkurrencerådet (hereinafter ‘Post Danmark II’) EU:C:2015:651, para. 32.

\textsuperscript{34} See Zenger, supra n. 32, at 731–732 (explaining the mechanism and effects of incremental rebates when combined with monopoly).
in zero or negative price of a marginal unit. Therefore, incremental rebates are generally considered less problematic than retroactive rebates. The SAIC, as well as the Court of Justice of the European Union (CJEU), agrees with this when it comes to quantity rebates.

3.1. [b] Individualization/standardization

Loyalty rebates can be either individualized or standardized. The characteristics of individualization and standardization coexist with retroactiveness.

Individualized rebates are rebates granted on conditions that are tailored to the situation of each customer. Individualization essentially means discriminatory treatment of customers. Because of this 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 provided by Art 102(c) of the Treaty on the Functioning of the European Union (TFEU). The SAIC seems to have taken a similar stance, as it provided little analysis on the so-called individualized target rebates, therefore practically making them per se illegal.

The opposite is standardized rebates, which means rebates granted on equal conditions for all customers. Generally, standardized rebates are considered less likely to be problematic, but they still need to be assessed in specific circumstances. In that regard, the CJEU has ruled that, when considered as part of the circumstances, a standardized rebate scheme “does not preclude its being regarded as capable of producing an exclusionary effect.”

3.1. [c] A single-product scenario and a multi-product scenario

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35 See the Tetra Pak decision, supra n. 15, at p. 38.
36 See 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 (Feb. 24, 2009), para. 46.
37 The Court of First Instance (CFI) of the CJEU in Micheline 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.
38 See the Commission Guidance Paper, supra n. 36, at 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) (categorizing rebates as standardized ones and individualized ones, and correlating such a categorization with ‘rebates applied to incremental units’ and ‘rebates applied to all units’).
40 See the Tetra Pak decision, supra n. 15, at p. 38.
41 See the Commission Guidance Paper, supra n. 36, at paras. 45–46.
42 See Post Danmark II, supra n. 33, at para. 38.
Loyalty rebates can appear both in a single-product scenario and a multi-product one. Single-product rebates refer to price discounts applied to the sale of one particular type of product, such as rebates based on the requirement that the purchase of a customer meets a particular quantity threshold or a percentage threshold. Meanwhile, multi-product rebates, also known as bundled rebates, refer to discounts applied to two or more types of products, such as rebates based on a requirement that a customer buying product A also buys certain percentage of its needs in product B from the seller.\(^{43}\)

3.1.[d] A distinction between loyalty rebates and exclusivity rebates

The concept of loyalty rebates in the Chinese law context is largely in line with that in the EU law context. The SAIC in Tetra Pak concisely defined loyalty rebates as ‘discounts that are given by business operators to counterparties, based on the conditions of the quantity of purchase, the amount of transaction, and the share of transaction within a certain period of time, or other indicators of the loyalty level’. Such a definition reflects the key elements of retroactive rebates and individualized rebates.\(^{44}\) In comparison, the CJEU defined loyalty rebates as ‘rebates designed, through the grant of a financial advantage, to prevent customers obtaining their supplies from competing producers’.\(^{45}\) This definition focuses more on the potential anticompetitiveness of loyalty rebates.

One difference is that the CJEU’s usage of this concept sometimes appears to have a larger scope. Namely, in a number of judgments, there is another type of rebates—‘rebates conditional on the customer’s obtaining all, or most, or a given portion of their requirements exclusively from the manufacture’—also referred to by the CJEU as loyalty rebates.\(^{46}\) In that light, this article refers to this type of rebates as ‘exclusivity rebates’.

\(^{43}\) Nicholas Economides, Loyalty/Requirement Rebates and the Antitrust Modernization Commission: What Is the Appropriate Liability Standard? 54(2) The Antitrust Bulletin 259, 259–261 (2009) (Distinguishing rebates in a single-product case and rebates in a multi-product case, and on that basis discussing respectively their appropriate assessment approach). For a more nuanced analysis on these two types of rebates, see Nicholas Economides, supra n. 38, at 130–136 (explaining the function mechanism and possible anticompetitive effects of loyalty bundling programs and then pointing out the similarity of those programs with loyalty pricing of a single good).

\(^{44}\) See the Tetra Pak decision, supra n. 15, at p. 34.

\(^{45}\) When the CJEU used the concept of loyalty rebates to refer to this type of rebates in a series of judgments, the term ‘loyalty rebates’ was used interchangeably with the term ‘fidelity rebates’, and sometimes more specifically with ‘retroactive rebates’. See Case C-40/73 Coöperatieve Vereniging “Suiker Unie” UA and others v Commission of the European Communities [1975] ECR 1663, para. 518 (referred to as ‘loyalty rebate’); 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 rebate’); 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 rebate’); Tomra, supra n. 31, at paras. 73–78.

\(^{46}\) See Hoffmann-La Roche, supra n. 45, at paras. 89–90; Michelin I, supra n. 45, at para 72; Case C-95/04 P British Airways plc v Commission of the European Communities [2007] ECR I-2331, para 65; Michelin II, supra n. 37, at para. 56; Tomra, supra n. 31, at para. 70 (The CJEU in this case characterized the rebates in question as ‘retroactive rebates’, but it actually corresponded to the concept of loyalty-inducing rebates established by the
for their distinctive nature, and separates them from loyalty rebates within the meaning in the previous paragraph.

3.2 THREE ANALOGIES TO THE ANTICOMPETITIVE ANALYSIS OF LOYALTY REBATES

Considering the complexity of loyalty rebates, it is crucial for antitrust enforcers to establish an analytical framework, which can offer a theoretical basis and a convincing line of reasoning to prove the anticompetitiveness of the rebates in question. To that end, this Section introduces three analogies for the analysis of rebates, and discusses to what extent they can be of use.

3.2.[a] Tying

Firstly there is the analogy of tying. The central concern of tying is that a dominant undertaking can leverage its market power from the tying market to the tied market, thereby excluding competitors from the tied market. This approach is commonly applied to rebates in a multi-product scenario, namely bundled rebates. On that basis, it was argued that the tying logic should also be applied to rebates in a single-product scenario, in the sense that the dominant undertaking leverages its market power on the non-contestable share of demand to the contestable share of demand. The EU competition law embraces such an application, as the Commission states:

“A conditional rebate granted by a dominant undertaking may enable it to use the ‘non contestable’ portion of the demand of each customer (that is to say, the amount that would be purchased by the customer from the dominant undertaking in any event) as leverage to decrease the price to be paid for the ‘contestable’ portion of demand (that is to say, the amount for which the customer may prefer and be able to find substitutes).”

The most distinctive element of tying is ‘coercion’, in the sense that the dominant undertaking gives customers who wish to buy the tying product no other choice but to

CJEU in previous case law, since the rebates referred to by the CJEU in this case also had general characteristics of rebates such as individualization and retroactiveness, (para. 75) and since the CJEU focused the harm-analysis of such rebates on its loyalty mechanism and suction effect. (paras. 78 and 79) Meanwhile, the concept of loyalty rebates was construed by the CJEU in this case as referring only to “rebates conditional upon the customer obtaining all or most of its requirements from the dominant undertaking”. (para. 70); Post Danmark II, supra n. 33, at paras. 27–28 (as ‘loyalty rebate’, and using the phrase of ‘all or a given proportion of’, instead of ‘all or most of’).

47 Einer Elhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory, 123(2) Harvard Law Review 397, 413 (2009) (discussing how tying can impede competition in the tied market when assumptions supporting the single monopoly profit theory were relaxed).

48 See Nicholas Economides, supra n. 43, at 261.

49 See Nicholas Economides, supra n. 38, at 136 (arguing that, in a single-product scenario, loyalty discounts are equivalent to bundling of incontestable and contestable units of a single good).

50 See the Commission Guidance Paper, supra n. 36, at para. 39.
also buy the tied product.\textsuperscript{51} This element may not be directly identifiable in most rebate cases, because giving the customers a financial incentive strong enough to make them stay, as most rebate schemes do, is not the same as eliminating their choices of supply.\textsuperscript{52} Therefore, it was pointed out that although the element of coercion distinguishes tying from other abusive practices (including rebates), the element of coercion, by itself, is not anticompetitive.\textsuperscript{53} In other words, the existence of coercion may not necessarily entail anticompetitive foreclosure, and the lack of coercion may still deserve further anticompetitive scrutiny, as demonstrated in the Microsoft I case.\textsuperscript{54} Thus it was proposed that, if the tying analogy were to be applied to rebates cases, the analysis of anticompetitiveness should come down to whether the rebates would make it ‘economically irrational’ for the customer to choose other suppliers. In other words, the tying analogy alone cannot fully support the anticompetitive analysis of rebates, and other theoretical contributions are needed. This seems to be the reflected in the EU competition law, where the tying analogy supplied the leverage theory to be part of the jurisprudence on rebates, but not much else.

3.2.[b] 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 classical and benign form of price discrimination.\textsuperscript{56} The

\textsuperscript{51} See Miguel de la Mano, Renato Nazzini & Hans Zenger, supra n. 30, at 445.
\textsuperscript{52} Sean P. Gates, Antitrust by Analogy: Developing Rules for Loyalty Rebates and Bundled Discounts, 79(1) Antitrust Law Journal 99, 109 (2013) (finding in the US case law the courts’ refusals to associate rebate systems with tying when examining the evolution of the tying analogy applied to bundled discounts). See also, Christian Ahlborn & David Bailey, Discounts, Rebates and Selective Pricing by Dominant Firms: A Trans-Atlantic Comparison, 2(1) European Competition Journal 101, 106 (2006) (suggesting that bundled discounts are less restrictive than tying because customers can merely foregoes the discount, which is not a penalty if a competitor is willing to match the discounted price).
\textsuperscript{53} See Miguel de la Mano, Renato Nazzini & Hans Zenger, supra n. 30, at 446.
\textsuperscript{54} Case T-201/04 Microsoft Corp. v Commission of the European Communities [2007] ECR II-3601, paras 974 and 1037–1062. Here, the CFI of the CJEU made a distinction between two issues: (1) customers being forced to install Windows Media Player, and (2) customers not being prevented from installing rivals’ media player programs, while relying on totally non-coercion-related factors to assess the foreclosure.
\textsuperscript{55} See Sean P. Gates, supra n. 52, at 110 (examining the evolution of the tying analogy applied to bundled discounts in the US case law). See also, p. 17 of Brief for the United States as Amicus Curiae at 17, 3M Co v LePage’s Inc (May 28, 2004) (available at https://www.justice.gov/atr/case-document/file/517156/download) (accessed Mar. 21, 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.”).
\textsuperscript{56} Gianluca Faella, The Antitrust Assessment of Loyalty Discounts and Rebates, 4(2) Journal of Competition Law and Economics 375, 398 (2008) (“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
anticompetitive concern here is that, by offering customers discounts, rebates could result in pricing below costs and therefore drive out equally efficient competitors who cannot match that price.\textsuperscript{57} This analogy leads to the conclusion that a rebate scheme can foreclose competitors—and therefore be anticompetitive—only if it results in pricing below costs.\textsuperscript{58} To analyze whether a price is below costs, the as-efficient-competitor test (AEC test) is commonly adopted.\textsuperscript{59}

It was observed that this analogy prevailed in the US antitrust law.\textsuperscript{60} The EU competition law seems to be less receptive to this analogy, despite scholarly suggestions that the predatory pricing reasoning should be applied to loyalty rebates,\textsuperscript{61} and possibly to exclusivity rebates and bundled rebates as well.\textsuperscript{62} The CJEU explicitly discarded the predatory pricing approach to loyalty rebates, by ruling in \textit{Tomra} that pricing below cost is not a necessary condition to establish a finding of exclusionary effect.\textsuperscript{63} The Commission also made similar statements in the Enforcement Priorities Guidance on competitors.”). \textit{See} also, Zenger, \textit{supra} n. 32, at 745–746 (demonstrating the pro-competitiveness of retroactive rebates).

\textsuperscript{57} Herbert J. Hovenkamp, \textit{Discounts and Exclusions} (U Iowa Legal Studies Research Paper No. 05-18, Aug. 2005) [available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=785966], pp. 9–10 (arguing that the anticompetitiveness of pricing above costs are far too dubious to invoke antitrust intervention and therefore the law should only focus on predatory concerns). \textit{See also}, Sean P. Gates, \textit{supra} n. 52, at 111 (“The courts’ approach to predatory pricing reflects a deep-seated concern that the antitrust laws should not interfere with precompetitive price competition.”).

\textsuperscript{58} \textit{See} Zenger, \textit{supra} n. 32, at 748–749 (associating pricing below costs with anticompetitive foreclosure and arguing that retroactive rebates are unlikely to impair effective competition when pricing below costs did not happen).

\textsuperscript{59} \textit{See} Sean P. Gates, \textit{supra} n. 52, at 113–114 (introducing some of the US case law that used the AEC test to examine rebate cases).

\textsuperscript{60} \textit{See} Gianluca Faella, \textit{supra} n. 56, at 383 (claiming that in the US there is “a very strong presumption of legality of discounts and rebates, provided that they are not predatory or bundled”). \textit{See also}, Zenger, \textit{supra} n. 32, at 719 (“in the US, a strong presumption of legality prevails for single-product rebates, unless they are predatory”), and Sean P. Gates, \textit{supra} n. 52, at 112 (observing that in evaluating rebate cases, US courts “have relied heavily on the analogy to predatory pricing”).

\textsuperscript{61} Denis Waelbroeck, \textit{Michelin II: A Per Se Rule against Rebates by Dominant Companies?} 1(1) Journal of Competition Law and Economics 149, 167 (2005) (introducing the stance of the UK competition authority that, when there is no exclusivity or tying requirements, discounts will be problematic only if they are predatory).

\textsuperscript{62} Giacomo Calzolari & Vincenzo Denicolò, \textit{Competition with Exclusive Contracts and Market-Share Discounts}, 103(6) The American Economic Review 2384, 2405 (2013) (suggesting that the standards of predatory pricing cases should be applied to exclusive contracts, because exclusive contracts are generally benign but can be anticompetitive when economies of scale are important); \textit{see also}, Sean P. Gates, \textit{supra} n. 52, at 117–118 (discussing the applicability of the predatory pricing logic to rebate cases by introducing two contradictory US court precedents).

\textsuperscript{63} \textit{See} \textit{Tomra}, \textit{supra} n. 31, at paras. 73 and 78.
Article 102 TFEU. Nonetheless, the EU competition law has adopted the AEC test as an optional approach to analyze the effects of rebates.

3.2.[c] Exclusive dealing

Finally there is the analogy of exclusive dealing. For a starter, it has been argued that this approach is obviously applicable to exclusivity rebates, because an exclusive dealing clause and an exclusivity rebate scheme are both restraints on a trading party’s choice. Therefore, a rebate scheme should be found anticompetitive if it leaves a trading party no other choice but to trade exclusively with the dominant undertaking. The EU law agrees with this argument. As repeatedly held in the CJEU case law, the reason that exclusivity rebates stand out from other types of rebates and are presumed to be illegal is precisely because they have exclusive or quasi-exclusive trading conditions, thereby constituting de facto exclusive dealing.

Application of this analogy to other types of rebates is less 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 exclusivity element may not be found in 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.

Nonetheless, this becomes less of an issue if 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. In fact, it was observed that, by creating an externality among buyers, loyalty rebates are just equally effective as exclusive dealing when it comes to foreclosing potential competition. Therefore, to

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64 See the Commission Guidance Paper, supra n. 36, at para. 14.
65 See Post Danmark II, supra n. 33, at paras. 57–58. See also, Julia Molestina & Peter Picht, Conditional Rebate Scheme and the More Economic Approach: Back to the Future? 46(2) International Review of Intellectual Property and Competition Law 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.").
66 See Sean P. Gates, supra n. 52, at 105–107 (demonstrating the link between exclusive dealing and loyalty rebates with examples in the US case law).
67 See Intel, supra n. 37, at paras 77–78 and 84.
68 See Herbert J. Hovenkamp, supra n. 57, at p. 8.
69 A. Douglas Melamed, Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles? 73(2) Antitrust Law Journal 375, 404 (2006) (arguing that, although exclusive dealing contracts are generally a means to improve efficiency, they can also function as a means to induce anticompetitiveness by compensating the customers through the sharing of monopoly profits, in the form of loyalty rebates).
70 Einer Elhauge & Abraham L. Wickelgren, Robust Exclusion and Market Division through Loyalty Discounts, 43 International Journal of Industrial Organization 111, 116 (2015) ("The reason that loyalty discounts have such robust anti-competitive effects is that they create a negative externality among buyers even without economies of scale."). See also, David Spector, Loyalty Rebates: An Assessment of Competition Concerns and a Proposed
employ the exclusive dealing analogy, further contextualized analysis should be required, and to that end, the AEC test stands out as the most available option.71

To sum up at this stage, antitrust regulation of loyalty rebates is a complex issue, for which the assessment of contextualized effects must be carried out. However, none of the three proposed analogies can single-handedly provide a satisfactory analytical framework. Instead, the analytical framework on loyalty rebates is more likely to be a synthesis of all three analogies:
- The tying analogy 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 predatory pricing analogy correctly highlights the pricing nature of rebates, but it overlooks that fact that, by imposing an exclusivity requirement or providing an incentive tempting enough, a rebate scheme can still foreclose an equally efficient competitor while keeping the price above costs.
- The exclusive dealing analogy is undoubtedly applicable to exclusivity rebates because of the coercive element. It may also be applicable to loyalty rebates, if one perceives the offering of financial incentives as de facto exclusivity inducing. However, to confirm such a perception, a case-by-case assessment is necessary. For such an assessment, the AEC test supplied by the predatory pricing analogy can be a useful but not decisive tool.

4 APPRAISING THE SAIC’S LOYALTY REBATES ANALYSIS

Based on the description in Part 2, this Part appraises the SAIC’s analysis on loyalty rebates, pointing out its merit and problem, and based on the theoretical discussion in Part 3, it identifies the cause of that problem.

4.1 AN EXCLUSIONARY EFFECTS-BASED APPROACH TO LOYALTY REBATES LOOMING LARGE

The SAIC’s analysis on loyalty rebates was three-fold:
- Firstly, the SAIC introduced the notion of loyalty-inducing effect, which fairly illustrated the suction ability of loyalty rebates because of the retroactiveness and the individualization.
- This is followed by the SAIC’s examination of whether such a loyalty-inducing effect can indeed be anticompetitive, based on the theory of leveraging non-contestable to contestable share of demand and the consideration of particular market conditions.
- Finally, the SAIC looked into the actual market situation in order to substantiate the existence of anticompetitive effects.

This three-fold analysis signified the adoption of an effects-based approach. Overall, the SAIC’s reasoning was consistently focused on exclusionary effects. Throughout the decision, the SAIC repeatedly referred to generalized phrases such as ‘obvious anticompetitive effect’ and ‘effects of excluding and restricting competition’,\(^{72}\) which, in light of the three-fold structure, essentially mean exclusionary effects on competitors. Meanwhile, the SAIC had no mentioning of whether the form of rebates should play a part in the analysis. By doing so, it sidestepped an ongoing debate in other jurisdictions such as the EU, where the assessment of actual effects of rebates have been repeatedly ruled as not necessary,\(^{73}\) and the relevance of the forms of rebates is still under dispute.\(^{74}\)

By adopting this approach, the SAIC effectively reoriented of the analytical focus in abuse of dominance cases. For a long time, there has been a mismatch between the legal concerns underlying the abuse cases and the actual harm of abusive practices. This is exemplified by the Regulation on the Prohibition of Conduct Abusing a Dominant Market Position,\(^{75}\) a secondary law adopted by the SAIC in 2010 to assist the AML’s application to abuse of dominance cases. This Regulation has four Articles addressing the types of abusive conducts, but only one of them, namely Art 5 regarding exclusive dealing, implies exclusion of competitors as the underlying harm. The rest of them are limited to concerns of unfair or discriminatory treatment of customers.\(^{76}\) As a consequence, of all the eight abuse of dominance cases, which were handled by local AICs under the delegation of the SAIC prior to Tetra Pak, only one—a refusal to deal case—was unequivocally focused on the harm suffered by competitors; meanwhile, the rest of them, with limited substantive analysis, focused exclusively on the harm on customers and end consumers.\(^{77}\)

\(^{72}\) See the Tetra Pak decision, supra n. 15, at pp. 37, 40, 41, 43, and 44.

\(^{73}\) The CJEU in Tomra ruled that for assessing the anticompetitiveness of loyalty rebates, it is not necessary to analyze the actual effects of such rebates on competition; instead, it is sufficient to demonstrate that the conduct at issue is capable of having an effect on competition. See Tomra, supra n. 31, at para. 79. The CJEU made it clearer in Post Danmark II that the anticompetitive effect does not necessarily have to be concrete, but it also cannot be purely hypothetical. See Post Danmark, supra n. 33, at paras. 65–66.

\(^{74}\) It is still an on-going debate as regards to whether exclusivity rebates, namely rebates conditional on the customer’s obtaining all, or most, or a given portion of their requirements exclusively from the manufacture, should be subject to a presumption of unlawfulness. The debate is currently revolving around the Intel case, in which the General Court of the CJEU referred back to Paragraph 89 of Hoffmann-La Roche and attempted to establish a per se abusive doctrine on exclusivity rebates. See Intel, supra n. 37, at paras. 81 and 84.


\(^{76}\) The other three are: Article 4 (refusal to deal), Article 6 (tying), and Article 7 (discrimination of customers). Id. at Articles 4–7.

\(^{77}\) 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), Oct. 28, 2015, The SAIC Web Site
The problem here is that the jurisprudence behind this Regulation missed the imminent harm in most abuse cases, which is the exclusion of competitors. 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."\(^{78}\)

This Article clearly stated that legal concern in abuse of dominance cases should be the restriction of competition, which essentially translates to the anticompetitive harm suffered by competitors. It is just vague on whether proof of effects is required to ascertain such harm, but this vagueness is now clarified by the SAIC’s consistent focus on exclusionary effects in this case.

In that light, the SAIC’s invocation of the catchall clause becomes understandable: It had to bypass its own secondary Regulation because this Regulation could not underpin a sound economic reasoning that it intended to adopt.

In a broader context, the SAIC’s adoption of an effects-based approach corresponds to the Chinese Supreme Court’s ruling in Qihoo 360 v Tencent, so far the most well known AML civil case.\(^{79}\) In 2010, Qihoo 360, an anti-virus software company, filed a lawsuit against Tencent, a conglomerate Internet company, before the High Court of Guangdong Province, claiming that Tencent committed 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’). In March 2013, Guangdong High Court dismissed all of Qihoo’s claims, on the ground that there was no dominance.\(^{80}\) Qihoo appealed to the Chinese Supreme Court, which delivered the final judgment on October 16, 2014.\(^{81}\) The Supreme Court dismissed Qihoo’s claims entirely. The Supreme Court in this judgment developed an effects-oriented analytical framework. Most notably, it held that when analyzing whether a conduct is abusive, the undertaking’s motives and the pro-competitive effect of the conduct should be taken into account. In that regard, it was suggested that this judgment initiated a shift towards a competitor-focused analysis, and emphasized the importance of proof of actual effects.\(^{82}\) Considering the Supreme Court’s authority and the landmark nature of this

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\(^{78}\) See the AML, supra n. 6 at Article 6.


\(^{80}\) The full text of the Guangdong High Court judgment is available at (in Chinese) http://wenku.baidu.com/link?url=goW3Mx80Y22Hd8hDmuI9j2_ha42-cubAvFgi8NLCU4pwrFUdlXjGBige6VEWjvcltjnQYGzwyPz0-SaRhNFenwE033EYRXVbt2WATyrp0u0 (accessed Mar. 21, 2017).


judgment, it is very likely that this judgment inspired the Tetra Pak decision. In that sense, the SAIC’s commitment to an effects-based approach is likely to persist.

4.2 THE LACK OF CONTEXTUALIZED EFFECTS-ANALYSIS

Committing to an effects-based approach is one thing; choosing what kind of effects to analyze is another. This article argues that the SAIC failed to carry out an effects-based analysis that it had promised, in the sense that the SAIC’s analysis was mostly theoretical instead of contextualized. A major part of its analysis was taken up by the first fold to explain the concept of the loyalty-inducing effect and how it can be anticompetitive in a theoretical setting. Its consideration of particular market conditions in the second fold started to become very abstract and largely unsubstantiated. Effects-analysis in the actual market, namely the third fold, was practically hypothetical. There, although the SAIC did try to incorporate some empirical evidence regarding the deterioration of Tetra Pak’s competitors before drawing the conclusion, such evidence actually undermined the conclusion as opposed to supporting it, because the SAIC did not establish the causal link between Tetra Pak’s rebate scheme and those undertakings’ business suffering.

This is especially the case regarding individualized target rebates, the type of loyalty rebates 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. Such a rushed conclusion bordered on a presumption of illegality. Consequently, the alleged anticompetitive effects were not substantiated by circumstantial evidence.

There was also a detectable lack of efficiency justification. The SAIC briefly mentioned at the beginning of the decision that the absence of efficiency defense was because Tetra Pak did not submitted any, despite being informed with the right to be heard. Plea bargains may have been made during the investigation in exchange for Tetra Pak’s compliance, but for outsiders, it is difficult to ascertain due to the lack of information disclosure. Nonetheless, considering the inadequate contextualized effects-analysis, it is hard to imagine to what extent efficiency justifications would have been taken into account had Tetra Pak raised any. The lack of efficiency defense is particularly problematic when it comes to individualized target rebates, which are practically made per se illegal by the SAIC.

4.3 THE UNDERDEVELOPED ANALYTICAL FRAMEWORK ON LOYALTY REBATES

(discussing the implications of the substantive analysis in this judgment in comparison with pre-judgment and post-judgment decisions).

83 See the Tetra Pak decision, supra n. 15, at pp. 37–40.
84 Supra n. 15, at pp. 40–41.
85 Supra n. 15, at pp. 44–45.
86 For a discussion on the importance of presenting such a causal link, see Joshua D. Wright, Moving beyond Naïve Foreclosure Analysis, 19(5) George Mason Law Review 1163, 1181–1182 (2012) (proposing a but-for test for attributing the alleged anticompetitive results to the suspected exclusionary conduct).
87 See the Tetra Pak decision, supra n. 15, at p. 44.
88 Supra n. 15, at p. 3.
As demonstrated in Part 3, the complexity of loyalty rebates requires full-fledged circumstantial analyses, for which none of the three analogical approaches can single-handedly provide a satisfactory analytical framework. This article argues that the SAIC failed to take into account all three analogical approaches, and as a result, the SAIC’s analytical framework on loyalty rebates was theoretically underdeveloped. This analytical framework was supposed to offer theoretical basis and a convincing line of reasoning to establish the anticompetitiveness of the rebates in question, but instead it appeared to be rather obscure and inadequate, failing to demonstrate how the loyalty-inducing effect of loyalty rebates could turn out to be anticompetitive. Such an underdeveloped analytical framework is precisely the reason why the SAIC failed to live up to its promise of an effects-based approach to loyalty rebates.

There are several indications that the SAIC relied mainly on the tying analogy. The first one is the adoption of the leverage theory. In an effort to explain how the loyalty rebates in question could function anticompetitively, the SAIC resorted to the notions of contestable and non-contestable share of demand, stating that these loyalty rebates can help Tetra Pak to leverage the market power from the non-contestable part to the contestable part.\(^{89}\) Secondly, when describing the relevant market conditions, the SAIC considered the influence of tying, which was established as another abuse in this case,\(^{90}\) similar to the logic of the General Court of the CJEU in Intel.\(^{91}\) Thirdly, when trying to prove the anticompetitive effects of retroactively cumulative rebates, the SAIC took a note on the combined 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 competing products, but also the non-contestable products.\(^{92}\) However, the SAIC did not provide any separate analysis on those bundled rebates.

As mentioned earlier, the tying analogy was of limited use. The leverage theory helped the SAIC to explain that loyalty rebates could indeed functions as anticompetitive mechanisms, but it did not address under what conditions and to what extent those rebates could be anticompetitive.

One may argue that the SAIC also relied on the exclusive dealing analogy but just did not acknowledge it. Indeed, prior to the analysis of loyalty rebates, the SAIC spent an entire section establishing the anticompetitiveness of Tetra Pak’s exclusive dealing contracts with its packaging material supplier.\(^{93}\) However, it should be point out that the analysis on those exclusive dealing contracts was incredibly weak. In this case, the main harm of those exclusive dealing contracts is supposed to be the input foreclosure suffered by Tetra Pak’s competitors (in the packaging material market), but the SAIC did not assess how those competitors’ business situations were restrained by the lack of packaging material supply and therefore competition in the market was impeded, nor did it conduct a thorough analysis of why there could be no alternative supplies.\(^{94}\)

\(^{89}\) Supra n. 15, at p. 40.
\(^{90}\) Supra n. 15, at p. 40.
\(^{91}\) See Intel, supra n. 37, at para. 181.
\(^{92}\) See the Tetra Pak decision, supra n. 15, at p. 43.
\(^{93}\) Supra n. 15, at pp. 28–34.
\(^{94}\) The only reference on this point was the brief mentioning that transforming the packaging material technology into mass manufacturing requires substantial
Instead, it jumped to the conclusion that the exclusive dealing contracts would impede the long-term and overall development of the packaging material industry.⁹⁵ Therefore, even if the SAIC did consider the exclusive dealing analogy, such considerations would be too superficial to support any contextualized effects-analysis.

Similar observations can also be made regarding the predatory pricing analogy. To a certain extent, the SAIC’s analysis showed some traces of the predatory pricing analogy. For example, it followed the reasoning that loyalty discounts made it much more difficult for competitors to match the dominant undertaking’s price offers, because competitors would have to fully compensate the customers for their loss of discounts.⁹⁶ However, the SAIC did not take any step further, in the sense that no price-cost comparisons were conducted from thereon. Consequently, no effects-analysis could be yield by this analogy either.

Therefore, the lack of a well-developed analytical framework determined that the SAIC would not able to carry out an effects-based approach even if it wanted to. Admittedly, the SAIC is not at all obliged to adopt any of the above-mentioned analogies, but considering the complexity of loyalty rebates, a synthesis of all three analogies would be the best solution.

5 CONCLUSION

After more than four years of investigation, the SAIC closed the Tetra Pak case with a prohibition decision, which was record setting in many aspects of the AML enforcement. The most notably one would have to be its groundbreaking ruling on loyalty rebates, which is critically described in this article.

The Tetra Pak decision came at a time when antitrust regulation of loyalty rebates has been globally debated, because the complex characteristics of loyalty rebates make it impossible to formulate a clear-cut solution. This article examines three analogical approaches to loyalty rebates analysis, and suggests that the best solution is to synthesize all three analogies and use them to assess the anticompetitive effects in individual cases.

In that light, this article finds the SAIC’s analysis plausible for its commitment to an exclusionary effects-based approach. However, there is a major problem: Contextualized effects-analysis, which was supposed to be the embodiment of an effects-based approach, was largely missing in the SAIC’s analysis. This article argues that the cause of this problem is that, while relying mainly on the tying analogy, the SAIC largely overlooked the exclusive dealing and the predatory pricing analogy. Therefore, the SAIC failed to construct an analytical framework in which contextualized effects-analysis could be carried out systematically. In that sense, the Tetra Pak decision may have introduced loyalty rebates to the Chinese antitrust regime, but for it to become a true landmark of loyalty rebates regulation in China, continuing efforts need to be made towards enhancing this effects-based approach.

transformation costs and relies heavily on long-term, steady, and huge demand. See the Tetra Pak decision, supra n. 15, at p. 31.

⁹⁵ Supra n. 15, at pp. 33–34.
⁹⁶ Supra n. 15, at pp. 41–42.