Voluntary Submissions

Analytical Framework Teleconference Series

What Conduct Is Exclusionary?

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An Error Cost Approach to Unilateral Exclusionary Conduct

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In response to the call of the Unilateral Conduct Working Group (UCWG), I am pleased to present one United States NGA's perspective on unilateral exclusionary conduct, rooted in "error cost" analysis. Error cost analysis seeks to maximize the social value of applying competition law, consistent with sound public administration principles. *Although my focus is on United States competition ("antitrust") law, the error cost concerns I set forth are generally applicable to all competition law regimes.* (They are also relevant to joint exclusionary conduct, although the risk of error is particularly high in the unilateral context.)

In this essay, I assume that the firm whose actions are being assessed is "dominant," but I do not define dominance. Nor do I seek to specifically define the specific features of unilateral conduct that render it "exclusionary."[2] The purpose of this essay is, rather, to describe an optimal decision-making *process* – error cost analysis – for assessing conduct that is alleged to be exclusionary.

After introducing the nature of antitrust error cost analysis, I explain why false positives should be given particular weight in the context of unilateral conduct. (The utility and applicability of the error framework itself, however, is independent of whether one believes that false positives should be given greater weight than false negatives.) I then give concrete examples of this approach, as exemplified in key U.S. Supreme Court decisions dealing with unilateral conduct. Following these examples, I conclude.

I. The Error Cost Approach to Antitrust Analysis

U.S. antitrust consists of a body of law that attempts to maximize competition (best understood in terms of long-run quality-adjusted market output)[3] and is quite general in its literal prohibitions, becomes "fleshed out" by expert agencies and generalist courts adjudicating largely

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[1] The views set forth herein are solely attributable to the author.

[2] As a general matter, it is my view that conduct is exclusionary if it is "not on the merits" – in that it undermines the competitive process and may be expected to bring about an inefficient long-term reduction in economic welfare.

[3] Expert commentators have advanced a variety of alternative candidates for the goal U.S. antitrust law should seek to advance, most of them centered on some notion of maximizing economic welfare or competition. Prominent competing formulations include, for example, total welfare, consumer welfare, and promotion of the competitive process. See, e.g., Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, THE ANTITRUST SOURCE (Aug. 2015), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug15_jacobson_7_21f.authcheckdam.pdf. A focus on policies that tend to maximize long-term quality-adjusted output is an approach that would tend to promote consumer welfare (a goal most often emphasized by the U.S. courts), as well as promote the competitive process and efficiency (desiderata often stressed by U.S. courts). The promotion of the competitive process goal has been explained in detail by Gregory Werden and also endorsed by Jonathan Jacobson.

private disputes, and is highly attractive to private plaintiffs (and plaintiffs' lawyers) seeking treble damages. Taken together, these features constrain the social value antitrust regulation can ultimately create. To see why that is so, consider the difficulties facing antitrust adjudicators and the costs those difficulties produce.

Antitrust adjudication poses hard questions. Challenges to non-per-se concerted conduct – potential collusion[4] -- are often perplexing because many output-enhancing business arrangements (for example, joint ventures) involve cooperation among independent economic actors, often competitors. Adjudicators must determine whether the coordinated arrangement at issue is likely to increase market output, in which case the trade-restraining agreement is reasonable, or reduce it, in which case the requisite unreasonableness exists. In Unilateral exclusionary conduct cases (monopolization and attempted monopolization), adjudicators must determine if conduct that won business for the defendant vis-à-vis its rivals was just vigorous competition or crossed into unreasonable exclusion territory. To draw the necessary distinctions, enforcement officials, judges, and juries generally must assess conflicting testimony from economic experts and reach conclusions on such complicated subsidiary issues as the contours of the relevant market, the existence and size of entry barriers, and the elasticities of demand and supply for the product at issue.

There are thus significant costs in simply reaching a decision as to whether a particular course of conduct violates the antitrust laws. If the conduct is challenged in court or in an administrative tribunal, the parties themselves, with the aid of lawyers and economic experts, must gather, process, and present a large amount of complex data. The jury or judge must then deliberate over the information presented and decide both subsidiary issues (for example, what exactly is the relevant market?) and the outcome-determinative question (for example, is the conduct "unreasonably" exclusionary?). Even before any court challenge, business planners must assess the likelihood that their contemplated conduct may be deemed to violate the antitrust laws. Taken together, the costs that business planners, litigating parties (including enforcement officials), and adjudicators face in assessing and establishing the legality or illegality of a conduct constitute antitrust's "decision costs."

Those are not the only costs associated with antitrust adjudication. Given the difficulty of distinguishing collusion from output-enhancing cooperation and unreasonably exclusionary conduct from vigorous competition, adjudicators will certainly make mistakes in deciding antitrust cases. Those mistakes, then, will themselves impose social costs. A mistaken acquittal of an anticompetitive practice – a false negative or "Type II error" – will tend to permit market power that causes resources to be allocated away from their highest and best uses. A mistaken conviction of a procompetitive practice – a false positive or "Type I error" – will squander social welfare by denying market participants the benefit of the efficient, wrongly condemned business

[4] I do not refer here to "naked" hard core collusion, as carried out by cartels that reduce welfare and do not generate plausible efficiencies.

practice. In short, both false convictions and false acquittals tend to reduce social welfare, imposing "error costs."

In my view, Type I error is likely to be more damaging in the long run.[5] Whereas market power, the result of a Type II error, tends to self-correct as firms enter the market and expand output in response to higher prices,[6] judicial condemnation of an efficient practice will have economy-wide, not just market-wide, effects[7] and may be corrected only by a subsequent judicial decision or a legislative fix.[8]

Error cost is especially significant in the assessment of unilateral conduct. As Judge Frank Easterbrook observed, with regard to unilateral conduct, "[a]ggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike."[9] Exclusive dealing, for example, may be used to encourage beneficial investment by the parties while also making it more difficult for competitors to distribute their products. Price discounting will benefit consumers and is typically procompetitive, but may in some instances predatorily drive out equally efficient competitors and lead to welfare-reducing monopolization. In pondering the implications of the large risk of misdiagnosing unilateral conduct, it should be recalled that aggressive unilateral action lies at the heart of the competitive process and often drives disruptive innovation, which is the most important factor in raising economic welfare, for consumers and producers.[10] Being able to reap the gains from a monopoly position attained

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[5] As Judge (and former Professor) Frank Easterbrook pointed out,

> "[T]he conditions for useful legal intervention may be met when we know a lot about the practice and can condemn or approve it out of hand. But when we know but little the risk of error goes up, and the risk of false positives may be substantial. People are quick to condemn what they do not understand. Hasty or uninformed judgments may condemn novel practices just because of their novelty. Often it takes a decade or more to determine what a business practice really does. The law moves too fast for our own good, because courts act in advance of the explanation. Judges move slower than markets but faster than the economics profession, a deadly combination."

Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?*, 23 HARV. J. L. & PUB. POL'Y 5, 8–9 (1999).

[6] Of course, the existence of artificial impediments to entry (the most pernicious and long-lasting of which stem from restrictive government regulation) may undermine the ability of firms to respond to market signals, enter, and compete effectively.

[7] In particular, it may dissuade a wide variety of businesses from pursuing efficient, welfare-enhancing business practices that resemble the condemned conduct, thereby precluding the beneficial creation of economic surplus.

[8] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984) (contending that false convictions create greater social loss than false acquittals).

[9] Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 345

[10] Innovation is far more important than static efficiency gains. As Easterbrook explained, "an antitrust policy that reduced prices by 5 percent today at the expense of reducing by 1 percent the annual rate at which innovation lowers the costs of production would be a calamity. In the long run a continuous rate of change, compounded, swamps static losses." Frank H. Easterbrook, *Ignorance and Antitrust*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 119, 122-23 (Thomas Jorde & David Teece eds. 1992).

through a hard-fought competitive battle, or to maintain that position through continued competitive vigor, may be crucial to motivating the firm to innovate in the first place. Rules that overdeter unilateral conduct, therefore, undermine the incentive structure that competitive markets rely upon to produce innovation, as the U.S. Supreme Court has emphasized.[11] For these reasons – added to the concerns, already mentioned, that harm due to failure to prosecute is more readily subject to market correction than harm due to incorrect prosecution – the costs associated with false positives would appear to be particularly acute in the unilateral context, justifying a greater emphasis on false positives than on false negatives.

Taken together, antitrust's decision and error costs comprise, in Easterbrook's words, "the limits of antitrust."[12] They ultimately constrain what the body of law can accomplish because they are in inexorable tension: efforts to reduce one type of cost will tend to raise another. For example, courts cannot streamline the factual inquiry required to assess whether some practice should give rise to antitrust liability, thereby lowering decision costs, without increasing the likelihood of error and thus error costs. If they try to reduce the risk of false conviction (Type I error) by making it harder for a plaintiff to establish liability or easier for a defendant to make out a defense, they will increase the likelihood of false acquittal (Type II error). And if they ease a plaintiff's burden or cut back on available defenses in order to reduce false acquittals, they will tend to enhance social losses from false convictions.

Accordingly, Easterbrook contended, tribunals should give up trying to eliminate antitrust's inevitable and inexorable decision costs and error costs and should instead attempt to optimize antitrust – that is, to craft liability and procedural rules aimed at minimizing the sum of decision and error costs.[13] Doing so will require tribunals to account for several factors. A proffered rule's error costs are a function of both the probability that it will lead to an incorrect judgment and the magnitude of loss that will result from that sort of error. Its decision costs are a function of its informational requirements and the ease with which it can be applied. An optimizing approach, then, would account for (1) the likelihood that the proposed liability rule will produce an incorrect judgment, (2) the magnitude of losses from the various errors that the rule might generate, and (3) the difficulty of administering the rule. By carefully considering these factors and crafting liability rules calculated to minimize the sum of decision and error costs, tribunals could ensure that the inherently limited antitrust enterprise generates as much social value as possible. *Easterbrook's error cost guidance applies equally well to antitrust (competition law) enforcers, who should factor in both error costs administrative complexities in order to carry out their tasks in a manner that promotes social welfare.*

[11] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004).
[12] *See id*. at 4.
[13] *Id.* at 16 ("The legal system should be designed to minimize the total costs of (1) anticompetitive practices that escape condemnation, (2) competitive practices that are condemned or deterred, and (3) the system itself.").

II. Error Cost Considerations in U.S. Supreme Court Case Law[14]

In recent years, the U.S. Supreme Court has decided two cases involving unilateral conduct alleged to be unreasonably exclusionary in violation of section 2 of the Sherman Act. In each, the Court embraced clear, administrable liability rules that are likely to reduce the sum of error and decision costs.

The issue in the Court's *Weyerhaeuser* decision[15] was what standard should govern "predatory bidding" claims. In a predatory bidding case, a buyer bids up the price of some input higher than the level necessary to acquire all the buyer needs. Its purpose in doing so is to drive out rival input buyers who cannot afford to pay the higher input price. Once rival buyers are eliminated, the bidder may gain monopsony power (buyer-side market power), enabling it to drive input prices below competitive levels. The issue before the Court was whether plaintiffs complaining of predatory bidding should need to show (1) that the defendant's bidding behavior caused its output to be priced below cost (given the inflated prices the defendant paid for inputs), and (2) that the defendant could likely recoup its losses from below-cost output prices by paying monopsonistic (artificially low) prices after driving out rival input buyers. The Court of Appeals had rejected that rule, which mirrors the liability rule that the Supreme Court adopted for predatory pricing in its *Brooke Group* decision.[16] The lower court instead approved a jury instruction that would have imposed liability had the defendant "purchased more [inputs] than it needed or paid a higher price for [inputs] than necessary, in order to prevent [rival buyers] from obtaining the [inputs] they needed at a fair price."

In reversing the Court of Appeals and endorsing the two-part liability rule set forth above, the Court expressly invoked concerns about error costs. It began by observing that the analogous *Brooke Group* liability rule for predatory pricing was itself premised not on a belief that low but above-cost pricing can never be anticompetitive, but instead on a desire to avoid error costs from false convictions of procompetitive discounting:

> "The first prong of the [*Brooke Group*] test – requiring that prices be below cost – is necessary because "[a]s a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control." We were particularly wary of allowing recovery for above-cost price

[14] For economy of exposition, I provide initial footnote citations to the Supreme Court cases I discuss, but forgo listing page-specific references for the various specific quotations drawn from those cases.

[15] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).

[16] *See* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993) (holding that plaintiff complaining of predatory pricing must establish that (1) "the prices complained of [were] below an appropriate measure of its [defendant] rival's costs," and (2) there was a "dangerous probability" at the time of the below-cost pricing that the rival would eventually "recoup[] its investment" in the predation by charging supracompetitive prices).

> cutting because allowing such claims could, perversely, "chil[l] legitimate price cutting," which directly benefits consumers."

The Court then observed that bidding up the price of inputs, like lowering the price of one's output, might occur for "myriad legitimate reasons – ranging from benign to affirmatively procompetitive." To avoid chilling non-harmful instances of aggressive input buying or bidding, the Court reasoned, the liability rule should include a safe harbor for any input bidding that an equally efficient output producer could match. If the defendant's output was still priced above the defendant's cost even after the defendant had bid up input prices, then any equally efficient output producer could match the purportedly inflated input price and should not be excluded by the bidding behavior. Thus, the Court concluded, a predatory bidding plaintiff should have to prove that the complained of bidding resulted in below-cost pricing in the output market. Not only would this rule reduce error costs by providing a safe harbor for procompetitive input-bidding, it would also lower decision costs. After all, the alternative rule imposing liability if a defendant "purchased more [inputs] than necessary, in order to prevent [input market rivals] from obtaining the [inputs] they needed at a fair price" would open the door to long and costly expeditions to establish the number of inputs "needed," the price "necessary" to obtain such a quantity, the motives of the defendant in making its bids, and the "fair" price that should have been guaranteed to the defendant's rivals. *Weyerhaeuser* thus had the effect of lowering the sum of error and decision costs in predatory bidding cases.

Soon after deciding *Weyerhaeuser*, the Court applied Easterbrook's directive to so-called "price squeezes." Suppose that a firm (1) sells both some finished product (for example, fabricated aluminum pieces) and an input that goes into creating that product (for example, aluminum ingot), and (2) possesses monopoly power in the input (upstream) market. If such a "vertically integrated monopolist" were simultaneously to raise the price of its input and lower, or perhaps hold constant, its price in the output (downstream) market, then it could "squeeze" the profit margins of its downstream market rivals; they would have no choice but to buy its high-priced input, yet would be constrained from raising their output prices. In an early and famous monopolization decision, Judge Learned Hand held that such a price squeeze could amount to unreasonably exclusionary conduct.[17]

In *Pacific Bell Telephone Co. v. LinkLine Communications, Inc.*,[18] the Supreme Court disagreed. It held that there can be no liability based on a mere price squeeze when (1) the defendant does not have an independent antitrust duty to deal with upstream rivals seeking to buy its input and (2) the price of the defendant's output remains above-cost. In reaching that conclusion, the Court relied on two precedents, both of which reflect concerns about error and decision costs.

[17] *See* United States v. Aluminum Co. of America, 148 F.2d 416, 436–37 (2d Cir. 1945) (Hand, J.).
[18] 555 U.S. 438 (2009).

The first of those precedents was the Court's 2004 *Trinko* decision,[19] which declined to impose on upstream monopolists a general duty to deal with their downstream rivals (for example, a monopolist producer of aluminum ingots who also sells fabricated aluminum products has no general antitrust duty to sell ingot to rival producers of fabricated aluminum products). In so holding, the Trinko Court invoked concerns about error costs and decision costs. With respect to the former, it observed that a broad rule requiring monopolists to deal upstream with their downstream rivals could generate numerous and costly errors by encouraging collusion and reducing downstream firms' incentives to innovate. A broad forced-sharing rule would also entail high decision costs, for "[e]nforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing – a role for which they are ill suited." Because the sum of error costs and decision costs would be higher under a general rule requiring vertically integrated monopolists to deal in the upstream market with their downstream rivals, the *Trinko* Court wisely rejected such a rule.

The other precedent on which *LinkLine* was based was *Brooke Group*, which also reflects limits of antitrust thinking. As observed above, Brooke Group's holding that there can be no predatory pricing liability absent below-cost pricing and a likelihood of recoupment was premised not on a belief that low but above-cost prices can never be anticompetitive but instead on skepticism about the judiciary's ability to regulate such prices without chilling procompetitive price competition. That is ultimately a concern about error costs. In addition, the *Brooke Group* test constrains decision costs, for inquiries into whether a defendant's prices are below its costs and whether recoupment would be likely within the market at issue, though complicated, are likely to be less costly than an inquiry into whether the defendant has attempted to preclude entry by pricing below its profit-maximizing level, which is extremely difficult to ascertain.

In short, the *LinkLine* Court reasoned that a plaintiff complaining of neither a violation of some particular duty to deal with rivals (there is no general antitrust duty to do so) nor predatory pricing cannot succeed by claiming that the defendant simultaneously sold to the plaintiff (with which it had no duty to deal at all) at too high a price and to downstream purchasers at too low a price. As Chief Justice Roberts explained,

> "Plaintiffs' price-squeeze claim . . . is . . . nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price both of these services in a manner that preserves its rivals' margins."

Because each of the decisions precluding liability on the two parts of a price squeeze plaintiff's claim – *Trinko* and *Brooke Group* – was crafted to reduce the sum of error and decision costs, so was *LinkLine* itself.

[19] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398.

III. Conclusion

In conclusion, I have sketched an error cost framework for application to antitrust enforcement in general and to unilateral conduct in particular, with specific examples provided of how this approach is consistent with important U.S. Supreme Court unilateral conduct decisions. I submit that this framework would prove of general utility to all competition enforcement regimes and tribunals, as they seek to develop an optimal approach to competition law evaluation of unilateral conduct.

Autorité de la Concurrence (France)

WHAT MAKES CONDUCT EXCLUSIONARY?

a) A variety of exclusionary practices

1. Exclusionary conducts include numerous and various practices, which all have in common to impede competition by "excluding" some competitors from the markets. The Guidance on the European Commission's enforcement priorities in applying Article [102] of the EC Treaty to abusive exclusionary conduct by dominant undertakings describes four broad forms of exclusionary conducts : (i) exclusive dealing (including exclusive purchasing and conditional rebates), (ii) tying and bundling, (iii) predation and (iv) refusal to supply and margin squeeze. Some of these practices are also listed in the EC guidelines on vertical restraints (exclusive dealing, tying and bundling). Many other forms of exclusionary conducts exist and have been fined or identified by competition authorities, although they are not listed in this guidance: denigration[1], exclusionary discrimination[2], price differentiation between "on net" and "off net" calls in the mobile telephony sector[3], non-price exclusion[4], pay-for-delay[5], most favoured nation clauses[6], exclusive use of datasets by former public monopolies, inducing confusion in the minds of consumers regarding the perimeter of public monopoly, etc.

b) Actual versus potential effects

2. Identifying exclusionary practices on the basis of their actual effects is particularly difficult. Very often, exclusionary practices make it difficult for competitors to grow as quickly as they would have absent the practices. Furthermore, foreclosure effects can also materialize in the absence of entry, while absent the conduct, there would have been entries on the market. But defining a proper counterfactual and estimating the actual exclusionary effects can be very difficult. In particular, it can be very hazardous to distinguish between the various causes of the observed situation and therefore to establish the causality between the practice and the observation. Therefore, an observation of concrete foreclosure effects is not necessary to demonstrate the exclusionary effect of a particular conduct, although it may be used as supporting evidence.

[1]See decision 13-D-11 and 13-D-21 of the French Autorité.
[2]See for example decision 15-D-20 of the French Autorité, regarding a discrimination in the access to information concerning the operation of local loops.
[3]See decisions 09-D-36 and 12-D-24 of the French Autorité.
[4]See decision 14-D-02 of the French Autorité.
[5]See decision AT.39226 – *Lundbeck* of the European Commission dated 19/06/2013.
[6]See decision 15-D-06 of the French Autorité.

3. Yet, circumscribing the analysis of exclusionary conducts to their potential effects does not solve all difficulties. Indeed, contrary to horizontal competition softening practices, many of which, such as cartels, can be more straightforward to analyze, distinguishing pro-competitive conducts from exclusionary conducts and thus drawing the line between lawful and unlawful practices, can be difficult. Indeed, the willingness to keep or win market shares, which is pro-competitive in general, also has the effect of excluding or of limiting the development of competitors.

4. In this context, choosing the appropriate criteria for each type of practice requires to take into account two possible risks: that of condemning a practice that proves to be pro-competitive, that of not condemning a practice that proves to be anticompetitive.

5. As a result, the identification of exclusionary conducts is a complex exercise that needs to take into account various aspects.

c) A multifold approach

6. Depending on the conduct under examination, the following aspects may be taken into account. The weight given to each of them may also vary with the type of conduct under examination.

The type of conduct

7. When assessing potentially exclusionary conducts, a first distinction has to be made between those conducts that are likely to have legitimate objectives and those that are not (“naked restrictions”). Naked restrictions should be treated with great severity in order to deter future conducts of a similar kind and the demonstration of their potential effects only requires to consider whether the practice under examination has indeed been implemented and its relationship with the dominant position of the company implementing the conduct. Such is the case of denigration for instance.

8. On the opposite, price-related exclusionary strategies often consist in proposing *low* prices, which, by their very nature, could result from strong competition between the dominant company and its competitors. Therefore, great caution should be taken when considering these conducts in order not to condemn fierce, competition-enhancing, pricing strategies. To identify price-related strategies detrimental to competition, price-cost tests can be helpful. Although these tests are not exempt from limitations and are not compulsory for all types of conduct, they remain an important and useful tool to assess the potential for exclusionary effects.

9. Between price-related conducts and naked agreements lies a wide variety of conducts. Very often, these conducts have the common point of imposing some sort of constraint on commercial partners or customers (think of tied sales or exclusive agreements) but could also generate efficiency gains so that their potential effects on competition need to be assessed carefully.

The market power of the company implementing the conduct

10. The more market power a company has, the more difficult it is for its rivals to replicate successfully its conduct. Think for instance of exclusive contracts. While a company with a strong market power can convince its customers to buy only its products, rivals may be unable to proceed to similar exclusive contracts or to convince customers not to accept the dominant company's exclusive contracts. This is particularly so if the dominant company has "must have" products or services or if the rivals face important capacity constraints.

11. For some exclusionary conducts (but not all the conducts listed above), even if dominance is not established, substantial market power is sufficient. Hence, some vertical restraints may be anticompetitive even if there is no dominance: this is the case of exclusive dealing or of most favoured nation clauses for example. The effects of such conducts may also be derived from the cumulated effects of these contracts. Conversely, for some other exclusionary conducts (loyalty rebates, margin squeeze, refusal to deal, discrimination), a strong dominance may be needed so that the practice can have a substantial foreclosure effect.

The replicability of the conduct

12. Considering whether as-efficient competitors are able to replicate the conduct implemented by the company is very important in price-related cases, in order to disentangle low prices which are compatible with competition on the merits (because they can be matched by as-efficient rivals) from those that are not. However, such price-cost tests have well-known limitations, regarding the measurement of costs, the assessment of contestable market share (when considering fidelity rebates), the notion of as-efficient competitors itself (for instance, in interpreting how scale economies could matter in the results) so their results should not be taken at face value and the robustness of the test has to be carefully assessed.

13. Replicability is also examined in a wide variety of non-price-related cases. For instance, various forms of exclusive agreements may not generate exclusionary effects on markets where customers usually purchase from a single provider, because rival companies from the dominant undertaking should equally be able to attract customers. On the opposite, conducts

implemented by former public monopolies have long been treated with a specific severity, because these undertakings often relied on assets that could not be replicated by new entrants and that were not the result of competition on the merits (for example, the exclusive access to customer's databases or the brand, which may induce confusion in the minds of the consumers regarding the scope of the remaining legal monopoly).

The scope of the conduct

14. The likelihood of exclusion also depends on the scope of the conduct. For instance, a conduct may not yield significant exclusionary effects if it is restricted to few, randomly chosen and untargeted customers. Exclusive agreements and tied sales may not have exclusionary effects if they concern only a very marginal share of the market. The same holds for loyalty rebates, whose thresholds are not necessarily crossed. Finally, the conducts related to discriminatory access to some input may not generate exclusionary effects if there is a possibility to circumvent this input or if the price difference to have access to it makes only a minor difference on the selling price of the competitors.

The economic rationale of the conduct

When a conduct entails a cost or some lost profits to the dominant company, there may be no other motives for incurring this cost or foregoing these profits than the willingness to exclude a competitor. Frequently, price-costs tests can be used to assess the economic rationality of the conduct absent any exclusionary effect. For instance, prices below avoidable costs implemented by a dominant company are presumed to be anticompetitive as no straightforward justifications can explain that a company supports losses on every additional unit it sells. However, in some cases, the cost borne by the company is mainly an opportunity cost, not a "real cost" in the sense of negative margins and losses. Such a sacrifice is sometimes captured through internal documents.

Market dynamics

In some instances, the market may be such that even conducts which have a limited scope could be deemed anticompetitive. For instance, in a situation where competitors have much less market power than the dominant company, or if they are able to conquer only a small share of the market, or if they need to acquire know-how, reputation or a critical size to benefit from economies of scale or network effects, even conducts that are harmful to these competitors in a marginal way should be deemed anticompetitive. Furthermore, the bias of the price-cost test towards the dominant company, due to scale economies for instance, should also be taken into account to reach a conclusion on the lawful or unlawful nature of the conduct.

Efficiency gains

A close look should be cast on efficiency gains related to an exclusionary conduct. This is particularly necessary in at least two kinds of cases.

First, there are cases in which the nature of the conduct is, almost in itself, a demonstration of its exclusionary nature. Think for instance of the exclusive agreements implemented by a very dominant company. The fact that potential effects of the conduct need not be considered in greater details to condemn the conduct calls for a close examination of whether the efficiency gains frequently brought forward by the defendant company are valid or not. Obviously, these efficiency gains will only be accepted if they are sufficiently important to offset the anticompetitive effects and if the conduct is necessary to generate these efficiencies.

Second, there are cases where potential exclusionary effects are present but may be marginal enough to be offset by efficiency gains. Again, of course, these efficiency gains will avert a condemnation by the competition authority of the conduct at stake only insofar as said conduct is necessary to generate these efficiencies.

Fair Trading Commission (Jamaica)

VOLUNTARY SUBMISSION ON
'WHAT MAKES CONDUCT EXCLUSIONARY?'

By email dated 03rd March 2016 the Unilateral Conduct Working Group invited voluntary submissions for its upcoming analytical framework teleconference on "What Makes Conduct Exclusionary." The invitation posed a series of questions to be answered in the submissions. Pursuant to this invitation the Jamaica's Fair Trading Commission (FTC) hereby submits the following analysis for consideration:

<u>QUESTION 1</u>

1. What does it mean to assess the competitive effects of conduct? Can it mean different things in different cases?

The concept of competition is inextricably linked with the concept of a market. As one tribunal explained: "a market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them..."[1] Therefore conceptually, to assess the "competitive effects" of firm conduct can mean an assessment of the effect of that conduct in the relevant market. More specifically, the term "competitive effects" suggests that the assessment should focus on the effect on competition, as a process in the relevant market, as opposed to the effect on competitors (although this is also relevant).

Another definitional approach is to consider the assessment of competitive effects in contra-distinction to the other major way of assessing firm conduct, that is, by assessing the form of that conduct. One distinction between a form-based assessment and an effects-based assessment is that under the former there is a default premise regarding the merit, or lack of merit, of the conduct in question so that the assessment tends to focus on identifying the conduct in the circumstances and then categorizing same in accordance with the default premise. On the other hand, assessing the competitive effects of conduct means that there is no such default premise so that the assessor must do more than merely identify the conduct in the circumstances.

1 Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited (1976) 8 ALR 481.

The question of what does it mean to assess the competitive effects of conduct can also be interpreted as a reference to the implications of such an assessment. To do such an assessment can imply any or all of the following:

a. A focus on the outcome of the conduct as opposed to the conduct itself or the motivations of the firm;

b. A consideration of consumer welfare or total welfare in determining the outcome;

c. Application of a *rule of reason* standard of proof as opposed to a *per se* standard; or

d. A preference for limited intervention in the relevant market in order to address the effects of the conduct.

QUESTIONS 2 AND 3

The following questions will be discussed together because they involve consideration of similar concepts.

1. Can the character of conduct ever be such that it is necessarily constitutes lawful competition on the merits? If so, what conducts? Why?

2. Can the character of conduct ever be such that it is necessarily abusive? If so, what conduct? Why?

In substance both questions raise the issue of whether or not an *a priori* view of unilateral firm conduct can be taken. Specifically, whether unilateral firm conduct can be categorized, from an *a priori* position, as either "competition on the merits" or "abusive". In other words, phrased in the language of competition law legal standards, the issue here is whether or not a *per se* standard can be used to judge unilateral firm conduct as either "competition on the merits" or "abusive".

Based on the analysis below, in sum, the answer to the two questions posed is that while the character of conduct *can* be viewed as *necessarily* either "competition on the merits" or "abusive", doing so will involve conceptual and analytical problems. These problems will now be discussed below.

Unilateral firm conduct that is usually the subject of competition law scrutiny includes but is not limited to: refusals to supply or deal, tying and/or bundling, and retailing below costs. The activities that constitute such conduct have been identified, both in the economic literature and from the experience to be derived from decided cases. Furthermore, both economic theory and experience suggest that they can be problematic.

Arguably therefore, if the objective is to save time or investigation costs or to achieve legal certainty in enforcement, a competition agency *can* take the view that such conduct (where the constitutive activities are proven to have occurred), is either "meritorious" or "abusive" independent of any effect(s) in the relevant market. In other words, such a competition agency can adopt a *per se* standard of proof towards the conduct in question. An example of this view, codified in legislation, is section 33 of the Fair Competition Act, 1993 of Jamaica. Section 33 defines the constitutive elements of tied selling and then makes it an offence subject to being prohibited by the Commission.

Section 33 does not require any investigation into the economic effects of tied selling in the relevant market, nor does it permit any defence based on objective justification or the generation of efficiencies. Arguably therefore, the legislature, has in effect deemed tied selling to be necessarily abusive. One possible rationale for this could be that the legislature viewed as necessarily abusive, the risk of reduction in consumer welfare due to tied selling.

Although section 33 is an example of one type of unilateral firm conduct (namely tied selling) being treated as necessarily abusive; the section is also an example of the problem with such an approach. Section 33 is a free standing provision separate from the abuse of dominance provisions of the Fair Competition Act (which are sections 19 - 21). It prohibits tied selling without any requirement to establish the dominance of the firm under investigation. This is problematic because tied selling by non-dominant firms is *unlikely* to produce substantial anti-competitive effects in the relevant market; and may even be, in some cases, supportable on the ground of objective justification such as the protection of its legitimate commercial interests.

Therefore, although an *a priori* view of unilateral firm conduct can be taken, doing so without conducting a dominance assessment in specific cases can be problematic especially from the perspective of agency enforcement priorities. Yet, arguably, to the extent that a dominance assessment (as a pre-requisite for taking an *a priori* view of the conduct in question) involves some element of rule of reason analysis, it may be doubted whether unilateral firm conduct can properly be viewed as *necessarily* "meritorious" or "abusive".

Even where dominance has been established, another problem in viewing firm conduct in this way becomes apparent when the question is asked: "what is meant by 'competition on the merits' and 'abusive'?" Having reviewed the literature, there appears to be no agreed, specific definition of "competition on the merits." The following general description of the concept has been suggested: "generally, the expression 'competition on the merits' implies that a dominant enterprise can lawfully engage in conduct that falls within the area circumscribed by that phrase, even if the consequence of that conduct is that rivals are forced to exit the market or their entry or expansion is discouraged" (OECD, 2006).

Yet, as the Organization for Economic Co-operation and Development notes: "...both the perimeter of that area and the underlying principles that ought to define it remain largely unclear" (OECD, 2006). It is important to resolve this conceptual ambiguity because, presumably, conduct which falls outside the area circumscribed by the phrase may be categorized as "abusive". In this way, the concepts of "competition on the merits" and "abusive" conduct may be described as two sides of the same coin.

This conceptual ambiguity reveals the nature of the problem of viewing firm conduct as *necessarily* one thing or the other. In this regard, the absence of an agreed, specified framework for identifying whether particular conduct falls within or outside "competition on the merits" suggests that the accuracy of such an *a priori* view of firm conduct can be challenged. In other words, in specific cases, a position that the identified conduct is necessarily "meritorious" or "abusive", independent of any assessment of its effects in the relevant market, may produce outcomes that do not align with the predictions of the economic theories that identify such conduct as potentially problematic in the first instance.

This problem of accuracy has led to the utilization of various analytical tests in order to distinguish between "meritorious" or "abusive" firm conduct. The more standard tests include the: "profit sacrifice test", "the equally efficient firm tests" and various consumer welfare balancing tests. The Jamaica Fair Trading Commission generally utilizes the "equally efficient firm" test. Yet these tests involve analyzing the economic effects of firm conduct on competitors and/or consumers. Therefore, while these tests may produce greater accuracy (thus resolving some of the ambiguity in "competition on the merits"), they may nonetheless lead to an analysis that is less *a priori* and more *a posteriori*. In other words, it is difficult to maintain a *necessary* view of the "meritorious" or "abusive" character of conduct in general, when in specific cases the analytical tools of the investigation do require a non-judgmental view until the effects of the conduct are established in the particular circumstances.

QUESTION 4

2. Should a welfare standard be used in developing the rules or analytical framework for particular practices? Should an error-cost analysis be used, and if so, how are error costs evaluated?

A welfare standard takes into consideration the benefit to society from the production of goods and services from the resources of the society. This benefit is generally shared between consumers and producers. Competition legislation worldwide has tried to achieve goals such as economic efficiency, dispersion of economic power, economic integration and fairness. Competition agencies, however, are relying more on economic analysis which has as its goal economic efficiency. Thus, a competition agency should abstain from meeting non-economic goals. An economic efficiency goal can be met by using a welfare standard in developing the rules or analytical framework for particular practices.

Most, if not all, jurisdictions use a welfare standard in developing competition law and policies; specifically, a consumer welfare standard. There is an ongoing debate on whether a consumer welfare standard or a total welfare standard should be used. Under a consumer welfare standard, the agency aims to maximise consumer welfare while under a total welfare standard, the agency aims to maximise the sum of consumer and producer welfares. It must be noted that the economic tools that are relied on are geared towards maximising total welfare which may not necessarily result in an outcome where consumers are benefitted. As a matter of fact, there are some outcomes where the maximisation of total welfare results in consumers being worst off. It is likely that it is for this reason competition agencies try to find a balance between achieving economic efficiency and protecting consumers by using a consumer welfare standard.

If competition agencies, however, want to achieve economic efficiency they must adopt a total welfare standard and let other government agencies implement policies better suited for achieving non-economic goals. For example, a tax agency uses tools that are better geared at achieving goals of income for distribution.

Turning to the issue of error-cost analysis, such analysis should be should be used since it ensures rules and outcomes are welfare enhancing. Under an error cost analysis, economic theory and empirical evidence are used to make presumptions regarding the cost and likelihood of errors resulting from condemning welfare-increasing business practices (Type I error) or condoning welfare-reducing ones (Type II). Based on these presumptions, the agency should select the legal rule which will minimize the cost of errors.[2]

The rest of the explanation summarises Evans' and Padilla's approach in conducting an error-cost evaluation.

The three presumptions under error-cost evaluation are:

- Unilateral practices that have raised anticompetitive concerns are used in competitive markets and presumably lead to efficiencies.
- Dominant firms have little incentive to harm consumers while non-dominant firms have the bigger incentive to do so.
- Condemning procompetitive practices is likely more costly than exonerating anticompetitive practices.

In designing legal rules, the associated error-costs lie on a spectrum between the cost of condemning procompetitive practices and cost of accepting anticompetitive practices. A rule that

[2] Evans, David S. and A. Jorge Padilla. (2004). "*Designing Antitrust Rules for Assessing Unilateral Practices: A neo-Chicago Approach*"

reduces one invariably increases the other. The social objective is to find the rule that minimises the expected cost of these errors.

The first presumption indicates that most unilateral practices that raise concern are likely to be procompetitive. Intuitively, the error rate in evaluating these cases will result in a greater number of errors. Thus, competition agency must choose stricter standards to lower the rate of falsely condemning procompetitive practices while accepting increased false acquittal.

The third presumption prompts us to consider the social cost of a false conviction versus that of a false acquittal. Thus, the error with the larger cost should be decreased. Base on the presumption, a stricter standard is required to decrease false conviction which is the more costly.

To further minimize the expected cost of error, agencies utilize a screening process. Economics is used to determine the necessary conditions required for a unilateral conduct to be anticompetitive. If all the necessary conditions are not met then the practice is not suspect. If, however, the condition is met then the anticompetitive effects are balanced against the procompetitive effects to determine if the practice is deemed anticompetitive overall.

QUESTION 5

3. Should a welfare standard be used in assessing the facts of particular cases? Should this be done only in some cases? If so, in which cases? Why?

A welfare standard should be used in all such cases. While it can be costly to apply welfare standard to assess the facts of cases, incorrectly prohibiting a unilateral conduct as anticompetitive has a greater cost to society. This was discussed in the previous question.

DATED 4th APRIL, 2016

Japan Fair Trade Commission

What Makes Conduct Exclusionary

March 10, 2016

Japan's Contribution Paper to the ICN Unilateral Conduct Working Group

Preface

In this paper, we would like to introduce Japanese legislation, guidelines and cases regarding the topic "What Makes Conduct Exclusionary" in order to contribute to the discussion in the ICN Unilateral Conduct Working Group.

I. Japanese Legislation on Exclusionary Conduct

Section 5 of Article 2 of the Antimonopoly Act (hereinafter referred to as "AMA") defines "Private Monopolization" as a conduct which "excludes the business activities of other entrepreneurs" [1] (hereinafter referred to as "Exclusionary Conduct"), "thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade." Then, Section 3 of the AMA prohibits Private Monopolization (hereinafter referred to as "Exclusionary Private Monopolization").

II. View and Enforcement Policy of the Japan Fair Trade Commission (hereinafter referred to as "JFTC") on Exclusionary Private Monopolization

1. Provisions of the AMA

In the provisions of the AMA, there is no concrete definition on methods or means of Exclusionary Conduct.

On the other hand, with respect to "thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade," "particular field of trade" refers to almost same concept as 'relevant market.'

In addition, with regard to "thereby causing a substantial restraint of competition," a court has issued a verdict that it means "formation, maintenance or enhancement of the situation where an entrepreneur can control a market by partially freely changing price, quality, quantity and other various conditions on its will, along with decrease of competition."[2]

2. The JFTC's Interpretations on Exclusionary Conduct[3]

(1). Basic View on Exclusionary Conduct

(a). Exclusionary Conduct refers to various conducts that would cause difficulty for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities.

[1] "Private Monopolization" defined by Section 5 of Article 2 of the AMA also covers a conduct which "controls the business activities of other entrepreneurs." However, we do not touch upon it in this paper.

[2] Tokyo High Court Judgement on May 29, 2009 (Nippon Telegraph and Telephone East Corporation (hereinafter referred to as "NTT East") appeal court decision)

[3] Since Exclusionary Private Monopolization became a subject of surcharge payment order by the amendment of the AMA which took effect in January 2010, the JFTC formulated in October 2009, the "Guidelines for the Exclusionary Private Monopolization under the Antimonopoly Act" (hereinafter referred to as "Guidelines") for the purpose of ensuring further transparency of law enforcement and improving predictability for entrepreneurs by clarifying the requirements for Exclusionary Private Monopolization. This part is mainly based on the Guidelines.

On the other hand, to constitute Exclusionary Conduct, a conduct of an entrepreneur does not have to result in the actual elimination of business activities of other entrepreneurs from the market or complete block of business activities of new market entrants.

(b). In cases where an entrepreneur supplies a low-cost and high-quality product by its own efforts such as improving efficiency, and if such conduct would make it difficult for competitors to continue their inefficient business activities, it does not fall under Exclusionary Conduct.

(c). An exclusionary intent as a subjective element is not necessary to find Exclusionary Conduct, but can be an important fact to presume that the alleged conduct is Exclusionary Conduct.

(d). Exclusionary Conduct includes not only direct but also indirect conduct via its trading partner against the said other entrepreneurs. Moreover, such conduct also includes a conduct committed by multiple entrepreneurs in combination or in conspiracy with each other.

(2). Types of Exclusionary Conduct

There are four typical conducts which fall under Exclusionary Conduct; (i) “Below-Cost Pricing,” (ii) “Exclusive Dealing,” (iii) “Tying,” and (iv) “Refusal to Supply/Discriminatory Treatment.” Each type of conduct does not immediately fall under a conduct with exclusionary effect in violation of the AMA. Only in the case where a conduct within these four types would cause difficulty for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities, it becomes a conduct with exclusionary effect in violation of the AMA.

(a). Below-Cost Pricing

Generally, if an entrepreneur sets a price where the entrepreneur cannot recover “the cost that would not be generated unless the product was supplied[4],” such a conduct lacks economic rationality since the amount of loss grows larger as the supply of product increases. Thus, such a level of price can affect the business activities of equally or more efficient competitors who are forced to set a price at the same level.

Therefore, setting such a price is not generally deemed to reflect the business effort or normal competition process and, if it causes difficulty in the business activities of an equally or more efficient competitor, such a conduct may cause a problem as an Exclusionary Conduct.

Assessment over what costs are regarded as “the cost that would not be generated unless the product was supplied” is made from the viewpoint of whether or not the cost will increase or decrease depending on the supply quantity of the product (e.g. variable expense) and/or whether or not the cost is closely related with the supply of the product (e.g. the sum of the production cost, the sum of the purchasing cost).

Whether or not such a conduct would cause difficulty in business activities of an equally or more efficient competitor is determined through comprehensive consideration of (i) the conditions of the entire market of the product, (ii) the positions of the said entrepreneur and competitors in the market, (iii) the period of the conduct and turnover and quantity of the product, (iv) the intent and purpose of the entrepreneur, and (v) the conditions of the conduct.

For example, where an entrepreneur with a large scale of operation engages in below-cost pricing while compensating for the loss with profits from the sales of other products or with other sources of money, excessive below-cost pricing can continue for a long period, making it difficult even for an efficient entrepreneur to compete by normal business efforts. Therefore, such a case

[4] According to the Guidelines, the JFTC will substitute “the cost that would not be generated unless the product was supplied” for average avoidable cost on a practical level.

would be more likely to be deemed to cause difficulty in the business activities of an equally or more efficient competitor.

(b). Exclusive Dealing

When an exclusive dealing makes competitors unable to easily find an alternative trade partner, which causes difficulties in the business activities of competitors who are, such conduct may fall under Exclusionary Conduct.

Whether or not such conduct would cause difficulty in the business activities of the competitors who are unable to easily find an alternative trade partner is determined through comprehensive consideration of (i) the conditions of the entire market of the product, (ii) the positions of the said entrepreneur and competitors in the market, (iii) the period of the conduct, (iv) the number of the trade partners and their market share, and (v) the conditions of the conduct.

For example, where the said entrepreneur’s product has strong brand value, demand for it would be more likely to be strong, and it would become more important for its trade partners to be supplied with the products from the said entrepreneur. Therefore, in such a case, an exclusive dealing would be more likely to be deemed to cause difficulty in the business of the competitors who are unable to easily find an alternative trade partner.

By the way, rebates generally have procompetitive effects to stimulate the demand or to, as an element of prices, promote formation of prices that reflect the actual market situation. However, rebate to the trade partners on the condition for the proportion of amount of purchase from the alleged entrepreneur etc., which has effect in restraining the trade partners’ dealing of competitors’ product, may have the same effect as an exclusive dealing.

(c). Tying

Adding new value by offering multiple products tied or integrated together to the trade partners is one of methods of technological innovation and sales promotion. However, when supplying one product (tying product) only on the condition that the trade partner also purchases another product (tied product) causes difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product, it falls under Exclusionary Conduct.

Whether or not such a conduct would cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product is determined through comprehensive consideration of (i) the conditions of the entire market of the tying and the tied products, (ii) the positions of the said entrepreneur in the market of the tying product, (iii) the positions of the said entrepreneur and its competitors in the market of the tied product, (iv) the period of the conduct, (v) the number of the trade partners and quantity of transaction and (vi) the conditions of the conduct.

For example, where the entrepreneur has large share of the tying product, the more tied products from the entrepreneur would be more likely to be supplied through the tying than where the entrepreneur’s share is not large. Therefore, such a case would be more likely to be deemed to cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product.

(d). Refusal to Supply/Discriminatory Treatment

An entrepreneur basically has the discretion to select to whom and on what conditions it supplies products.

However, if an entrepreneur carries out, beyond reasonable degree, refusal to supply or applies discriminatory treatment, such as a case where the price of product is significantly low, without reflecting the appropriate differences in costs depending on the trading conditions between purchasing entrepreneurs, such a conduct may cause difficulty in the business activities in the downstream market of the trading customers who are unable to easily find an alternative supplier in the upstream market and falls under Exclusionary Conduct.

Whether or not such a conduct causes difficulty in business activities in the downstream market of the trading customers who are unable to easily find an alternative supplier is determined through comprehensive consideration of (i) the entire conditions of the upstream market and the downstream market, (ii) the positions of the said entrepreneur and its competitors in the upstream market, (iii) the positions of the trading customers in the downstream market, (iv) the period of the conduct and (v) the conditions of the conduct.

For example, where the products of an entrepreneur have strong brand value in the upstream market, the trading customers will not easily find an alternative supplier in the upstream market. The supply of the products by the entrepreneur in the upstream market will, therefore, be more critical for the business activities of the trading customers. Accordingly, such a case would be more likely to be deemed to cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market.

(3). Exclusionary Conduct which does not constitute Exclusionary Private Monopolization

Even when exclusion of competitors does not cause a substantial restraint of competition in any particular field of trade, if the conduct falls under certain types of conduct (Refusal to Trade, Discriminatory Pricing, Unjust Low Price Sales, Trading on Exclusive Terms, etc.) and has tendency to impede fair competition, it falls under "Unfair Trade Practices" which are defined in Section 9 of Article 2, then, prohibited by Article 19 of the AMA.

3. Enforcement Policy of the JFTC

As pointed out in IV-B of ICN Unilateral Conduct Workbook Chapter 1 (see paragraph 41 and below), all types of assessment of unilateral conduct are at risk for errors in enforcement (over-enforcement or under-enforcement). Although there are not so many Exclusionary Private Monopolization cases in Japan, in most of those cases, the entrepreneurs who were subject to the JFTC's investigation had a large share of the market for the product related to Exclusionary Conduct. In most cases where an entrepreneur's conduct can effectively exclude business activities of other entrepreneurs and foreclose the market, the share of the product of the said entrepreneur is to some extent large. Moreover, if the entrepreneur's product has a larger share, the alleged Exclusionary Conduct would be highly effective to cause a substantial restraint of competition in a particular field of trade. In light of these experiences, the JFTC focuses attention on the share of an entrepreneur as one of the indications in order to minimize the risk mentioned above.

Specifically, the JFTC expresses that, when deciding whether to initiate a case investigation against alleged Exclusionary Private Monopolization, it will prioritize a case where the share of the product that the said entrepreneur supplies exceeds approximately 50% after the commencement of such conduct and where the conduct is deemed to have a serious impact on the lives of our citizen. And whether it is deemed to have a serious impact on the lives of our citizen or not is determined through comprehensive consideration of the market size, the scope of business activities of the said entrepreneur, and the characteristics of the product etc.

By the way, after the JFTC has carried out an investigation from the viewpoint mentioned above, if they find that the alleged conduct does not fall under Exclusionary Private Monopolization but Unfair Trade Practices mentioned in 2 (3) above, the JFTC may issue a Cease and Desist Order as a violation of the AMA.

For example, where an influential entrepreneur:

(i). refuses to trade as a measure to achieve an unjust purpose under Antimonopoly Act, such as exclusion of competitors from the market (Refusal to Trade),

(ii). sells products at a low price only in areas and to customers in which and for which the said entrepreneur compete with competitors (Price Discrimination), or, without justifiable grounds, continuously supplies goods or services at a price far below the cost incurred to supply them and tends to cause difficulties in the business activities of other entrepreneurs (Unjust Low Price Sales),

(iii). unjustly trades with another party on condition that the said party shall not trade with competitors and tends to reduce trading opportunities for the said competitors and cause difficulty to the competitors in finding an alternative trade partner (Trading on Exclusive Terms),

if it is not deemed to cause a substantial restraint of competition in any particular field of trade but it has tendency to impede fair competition, it can be a subject to a Cease and Desist Order by the JFTC.

III. Case Examples

1. NTT East Case (the Supreme Court Decision on December 17, 2010)

(1). Outline of the Case

NTT East owned an optical-fiber network and provided a FTTH service for detached houses in east Japan area. It had a significant market share both in the quantity of the optical-fiber network and in the number of subscriptions of the FTTH service for detached houses in almost every region of east Japan area.

Then, competitors of NTT East needed to connect the optical-fiber network owned by NTT East in order to provide a FTTH service to their users.

In these circumstances, NTT East charged its competitors a higher interconnection fee than the price for the FTTH service which it charged to its users.

In other words, this ‘margin squeeze’ by NTT East put the competitors in a situation where they would always incur a loss when they provided their FTTH services at the same or lower prices than the one which NTT East charged to its users.

In this regard, the Supreme Court decided that this conduct by the NTT East violated Article 3 of the AMA as it made it difficult for the competitors to provide their FTTH services for detached houses.

(2). Points of the Case

(a). The Supreme Court ruled that in order to find a certain conduct is referred to an Exclusionary Conduct defined in Section 5 of Article 2 of AMA, the following two considerations shall be made: (i) whether or not the conduct in question has artificiality that deviates from the scope of normal competition methods in terms of the formation, maintenance and enhancement of its market power, (ii) whether or not the conduct has an effect to make it extremely difficult for the competitors to enter into the relevant market.

(b). To be more specific as to the paragraph (a) above, the Supreme Court said it would make a comprehensive evaluation of various factors, including:

(i). the possibility for the competitors to find alternative source of interconnection,

(ii). the conditions of the conduct in question, and

(iii). the difference in the market positions and competitive conditions between NTT East and its competitors in the FTTH service market.

(c). Based on the above, in this case, the Supreme Court found that:

(i). there was no alternative source of interconnection available for the competitors except the network owned by NTT East,

(ii). due to the conduct, the competitors were put in a situation where they would always incur a loss no matter how efficient they ran their businesses, if they provided their FTTH services at the same or lower prices than the one which NTT East charged to its users, and

(iii). there was a considerable difference in the market positions and competitive conditions between NTT East and its competitors because NTT East took a lead in the market of the FTTH service and because it utilized its own optical-fiber network in providing its FTTH service.

Thus, the Supreme Court concluded that the conduct in question had artificiality and an effect to hinder the entry of competitors into the market described in the point (a) above and were considered to be an Exclusionary Conduct defined in Section 5 of Article 2 of the AMA.

2. JASRAC Case (the Supreme Court Decision on April 28, 2015)

(1). Outline of the Case

The Japanese Society for the Rights of Authors, Composers and Publishes (hereinafter referred to as "JASRAC") had been the sole management business operator of music copyrights (hereinafter referred to as "Management Business Operator") in Japan from 1939 to 2001. After then, in October 2001, accompanying with taking effect of the Law on Management Business of Copyright and Neighboring Rights, new entrants became able to run management business of music copyrights only by notification to the government. Based on this legislative change, four companies entered into management business of music copyrights, still the JASRAC has entrusted with the management of a majority of music copyrights.

In this case, with regard to the JASRAC's conduct to collect broadcasting royalty from broadcasters based on a fixed percentage of their annual broadcast revenue (such conduct is hereinafter referred to as "Comprehensive Collection"), the Supreme Court, with fact finding as follows, ruled that the JASRAC’s Comprehensive Collection would constitute an Exclusionary Conduct defined in Section 5 of Article 2 of the AMA, unless there are exceptional circumstances[5].

With respect to the JASRAC’s Comprehensive Collection, it would be beyond expectation for the broadcasters not to sign blanket license agreements with the JASRAC, who is still entrusted with the management of a majority of music copyrights. Under such circumstances, because the JASRAC’s broadcasting royalty did not reflect the ratio of its managing musical works in total number of musical works used in broadcasting, for the broadcasters, the total amount of broadcasting royalties would increase in the event where they paid broadcasting royalties to other Management Business Operators.

In addition, due to the fact that musical works are essentially substitute goods for the purposes of broadcasting, the usage of musical works managed by other Management Business Operators could be restrained. In fact, a significant number of broadcasters have avoided or tries to

[5] As of March 10, 2016, the JFTC resumed hearings in the JASRAC case in accordance with the Supreme Court decision.

avoid using musical works managed by other Management Business Operators, and the amount of broadcasting royalties collected from the broadcasters by other Management Business Operators remains de-minimis.

Furthermore, having regard to the provision of such broadcasting royalties and royalty collection and the mechanism of causing the restriction of selection and deterrence of the use of musical works, from the viewpoint of formation, maintenance or enhancement of its market power, it would be appropriate to determine that the JASRAC's Comprehensive Collection should have artificiality that deviates from the scope of normal competition methods.

(2). Points of the Case

(a). Following the NTT East decision as delineated in (1) above, the Supreme Court held that, whether the JASRAC's conduct constitutes an Exclusionary Conduct defined in Section 5 of Article 2 of the AMA, should be determined by the following perspectives:

(i). from the viewpoint of formation, maintenance or enhancement of market power, whether or not the JASRAC's conduct has artificiality that deviates from the scope of normal competition methods, and

(ii). whether or not the JASRAC's conduct poses significant difficulties in its competitor's entry into the relevant market of licensing of music copyrights for broadcasters.

(b). Having said that, with regard to the artificiality described in (a) above, the Supreme Court determined that, the JASRAC's conduct setting expensive royalty for individual use of managing musical works under the tariff for use of musical works, made broadcasters choose to sign the licensing agreements with Comprehensive Collection with the JASRAC, which means that broadcasters' choice of collecting methods is virtually restricted. Then, the Court ruled that, in light of such restriction of the choice of collecting methods and inhibition of broadcasters from using competitors-managing musical works (for detail, please refer to (c) below), from the viewpoint of formation, maintenance or enhancement of market power, unless there are exceptional circumstances, the JASRAC's conduct would have artificiality that deviates from the scope of normal competition methods.

(c). In addition, the Supreme Court made a judgement in connection with the " effect of causing particular difficulties for market entry" mentioned in (b) above, holding that the JASRAC's conduct caused particular difficulties for other Management Business Operators to enter into the relevant market for the following reasons:

(i) as the JASRAC is still entrusted with the management of a majority of music copyrights, it would be beyond expectation for broadcasters not to sign the blanket license agreements with the JASRAC. Under such circumstances, the JASRAC adopted a method of collection of broadcasting royalty which did not reflect the ratio of its managing musical works in total number of musical works used in broadcasting, for the broadcasters, the total amount of broadcasting royalties would increase in the event where they paid broadcasting royalties to other Management Business Operators. In addition, having regard to the fact that musical works are essentially substitute goods for the purposes of broadcasting, the JASRAC's conduct should be deemed to have a restraining effect on the broadcasters from using musical works managed by other Management Business Operators,

(ii) the scope of restraint covers almost all of the broadcasters in Japan, and

(iii) the JASRAC's conduct has been lasting for a relatively sustained period of time.

3. Intel Japan Case (the JFTC Decision on April 13, 2005)

(1). Outline of the Case

The Japanese subsidiary of Intel Corporation (hereinafter referred to as “Intel Japan”) had a strong brand power in the CPU market and Intel’s CPUs accounted for a majority of the gross domestic sales of CPUs in Japan. After around 2000, Japanese PC manufacturers were in the situation where they had a strong desire to receive rebates and/or certain funds from Intel Japan in order to procure Intel’s CPUs on the favorable terms as far as possible, because of the fiercer competition caused by sluggish demand of PC.

Under such circumstances, based on the situation where the market share of competitors’ CPUs in Japan had increased from about 17% to about 22% in the period between 2000 and 2002 by their competitiveness in price, Intel Japan was concerned about the possibility of continuing growth of sales of competitors' CPUs. Then, in order to maximize the ratio of Intel’s CPUs, Intel Japan made commitments to provide rebates and/or certain funds with the five major Japanese PC manufacturers on any of the following conditions:

(a). to make the ratio of Intel’s CPUs 100% and refrain from adopting competitors' CPUs,

(b). to make the ratio of Intel’s CPUs 90%, and limit the ratio of competitors' CPUs up to10%, or

(c). to refrain from adopting competitors' CPUs for PCs which belong to the line-ups with relatively larger sales.

Based on this conduct, the ratio of competitors' CPUs in Japan declined sharply from about 24% in 2002 to about 11% in 2003.

Since Intel Japan’s conducts made the five major Japanese PC manufactures refrain from adopting competitors' CPUs and excluded its competitors' business activities related to the sales of CPUs to the five major Japanese PC manufactures, the JFTC judged that the Intel Japan’s conduct fell under Exclusionary Private Monopolization and violated Article 3 of the AMA.

(2). Points of the Case

Because provision of rebates and/or certain funds in this case is with the condition to restrict trade with competitors under a certain ratio, it has the effect to restrict handling of the competing products, then, falls under Exclusionary Conduct (Exclusive Dealing mentioned in II, 2, (b) above).

Turkish Competition Authority

What Makes Conduct Exclusionary

May 6, 2016

Turkey's Contribution Paper to the ICN Unilateral Conduct Working Group

Preface

In this paper, we would like to address the question of "*Can the character of conduct ever be such that it is necessarily abusive? If so, what conduct? Why?*" in the context of "*What Makes Conduct Exclusionary*?" in order to contribute to the discussion in the ICN Unilateral Conduct Working Group.

I. What is "Exclusionary Abuse"?

Abuse –

An abuse refers to exclusionary or other strategic acts that are designed to extend or maintain the dominant undertaking's market power, to the detriment of consumers.[1] The reoriented definition of abuse in Post Danmark A/S[2] which was originated from the decision of the European Court of Justice (ECJ) in Hoffmann-La Roche[3] is that Article 102 "applies, in particular, to the conduct of a dominant undertaking that, through recourse to the methods different from those governing normal competition on the basis of the performance of commercial operators, has effect to the detriment of consumers of hindering the maintenance of the degree of competition existing in the market or the growth of that competition."[4] Therefore what constitutes an abuse does not only depend on the (anticompetitive) conduct but also and particularly that conduct being implemented by a dominant undertaking. In this respect a dominant undertaking has a *"special responsibility" not to allow its conduct to impair genuine undistorted competition in the market*.[5] What's more, the dominant undertaking's special responsibility increases with its degree of dominance. *The actual scope of the dominant firm's special responsibility must be considered in relation to the degree of dominance held by the firm and to the special characteristics of the market which may affect the competitive situation.*[6] Even though the Commission's super-dominance definition was not adopted by the European Courts, they mentioned some substitute definitions referring the level of dominance as "quasi-monopoly" position in *Tetra Pak*

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[1] O'Donghue R. and Paddilla J. (2013), The Law and Economics of Article 102 TFEU, p. 214.

[2] Case C-209/10, Post Danmark A/S v Konkurrenceradet, [2012] ECR I-nyr, para. 24.

[3] Case 85/76, Hoffmann-La Roche & Co AG v. Commission [1979], ECR 461, para. 91.

[4] The original definition is as follows: "The concept of abuse in an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from which condition normal competition in products or services on the basis of the transactions of commercial operations, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

[5] Case 322/81, NV Nederlandsche Banden-Industrie Michelin v. Commission [1983] ECR 3461, para. 57.

[6] Case COMP/C-1/36.915 Deutsche Post AG-Interception of cross border mail, OJ L 331 [2001].

II[7] or “extensive” dominant position in *Irish Sugar*[8]. This paves the way for a non-dominant undertaking conduct with very serious anticompetitive effect potential escape any enquiry while any other conduct of a dominant undertaking with less harm potential being penalized.

Exclusionary abuse –

Exclusionary abuses are recognized as the most common category of abuse which are given enforcement priority. They account for strategic acts of dominant undertaking directed against rivals that accordingly cause consumer harm. Exclusionary abuse is named as “anticompetitive foreclosure” in the Guidance Paper[9] which is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.[10]

According to Article 102 (b) of TFEU, which is the main legal basis for enforcement to exclusionary conduct, “limiting production, markets or technical development to the prejudice of consumers” is illegal. Thus exclusionary conduct has two elements: i) limiting production and ii) consumer harm as a consequence of limiting production. Exclusionary conducts involve limitation of either dominant undertaking’s production or that of rival’s via foreclosure or marginalization of them. As a matter of appropriateness, limiting production refers to a conduct that makes competitors’ products or services less attractive or less available, rather than making the dominant undertaking’s product or services better or more available.[11] Consumer harm, on the other hand, is an objective justification phase for the conduct under scrutiny limiting rival’s production.

Standard of exclusionary abuse-

As regards to concluding an exclusionary abusive effect, it is essential to determine the standard. Is it actual/concrete effects or likely/possible effects to demonstrate? There are arguments that in this wide spectrum actual or concrete effects are at one end, potential effects are at the other end and likely effects are in between. It is plausible to merge likely, possible or potential effects and drop the standard of capability for anticompetitive effects. It is not either fair or correct to ask for the proof of actual effects in every case since for instance it might not be wise to wait for the actual effects to emerge. In addition to that, in cases where abusive conduct aims to maintain the current dominant position of the undertaking in a way contrary to the entrance, penetration or expansion of rivals, there would be no perceptible additional effects at

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7 Tetra Pak v. Commission (Tetra Pak II), Case C-333/94P, [1996] E.C.R. I-5951, ¶¶ 28, 31, 48.

8 Irish Sugar v. Commission, Case T-228/97, [1999] E.C.R. II-2969, ¶ 185.

9 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/2.

10 Ibid. Para. 19.

11 O’Donghue R. and Paddilla J. (2013), The Law and Economics of Article 102 TFEU, p. 243.

least for some time.[12] Nevertheless there is a need for some demonstration of anticompetitive effects.

One of the main obstacles to categorizing the conduct under scrutiny automatically as either legitimate or illegitimate is that distinguishing competition on the merits from exclusionary abuse is mostly problematic as their consequences in the market are very likely to be similar and there is not an exhaustive list of exclusionary conduct.

In order for competition authorities to establish an automatic mechanism to detect exclusionary abuse corresponds to installment of a *per se* illegality tool. However, a *per se* rule is generally appropriate only after courts and authorities have had long experience with a certain practice, and have concluded that the practice produces many pernicious results outweighing the beneficial ones.[13] In such a case the risk of false negatives need to be so higher than false positives that there is no point in wasting the limited resources of relevant authorities in order to weigh the opposite effects of the conduct.
On the other hand, the rule of reason is a non-automatic legal approach where an attempt is made to evaluate the pro-competitive features of a unilateral conduct against its anticompetitive effects in order to decide whether or not the practice should be prohibited. This weighing might be either straightforward so that actual effects could be analyzed or in an indirect way through evaluation of various structural, empirical elements. Therefore an inquiry may be structured, in the sense that conduct is evaluated through a series of screens to distinguish lawful and unlawful conduct, or unstructured in that harm and benefit are simply assessed and compared.[14] Considering that it is not possible in every case to conduct actual effect analyze due to either data unavailability or high error probability, both unstructured and structured rule of reason approaches are effect-based approaches indeed.

Economists agree that there are no *per se* Article 102 TFEU violations and accordingly, a rule of reason approach is the proper way to deal with unilateral conduct. Many competition authorities are criticized for dealing with unilateral conduct in a formalistic instead of an effect based way. However, in fact, the difference between a "*per se"* and a "rule of reason" standard lies in how much we need to know before we can make a decision about a conduct.[15] Therefore neither *per se* is black nor is rule of reason white. There is a spectrum of some various shades of gray between two ends. Every inquiry is cut off at some point and *per se* actually refers to a class of situations where we decide to truncate the inquiry at a relatively early stage as, for us, what we have found so far is sufficient in order to come to a conclusion. If the cost of obtaining certain information through any analysis is much higher and the chance is small that it will make the final decision more accurate, the rational decision maker will not seek

12 Ibid, p. 269.
13 Hovenkamp, H. (2005), "Federal Antitrust Policy The Law of Competition and Its Practice, Third Edition", p. 276-277.
14 O'Donghue R. and Paddilla J. (2013), The Law and Economics of Article 102 TFEU, p. 225.
15 Ibid., p. 255.

the additional information.[16] That's why, it would not be correct to label a case readily as *per se* or rule of reason case in which various analysis are implemented as well as some formalistic approach throughout the decisional practice of Article 102 TFEU. Nonetheless, there are certain exclusionary practices with some features persistently being found abusive, as though they are labeled *per se* illegal.

Per se **or quasi** ***per se*** **illegality-**

Naked Restriction -

Despite recent efforts aimed at heading towards effect-based approach by EU Commission with respect to assessment of unilateral conduct, there is a character of conduct that is found necessarily abusive without any need for further assessment. The Commission stated that: "*There may be circumstances where it is not necessary for the Commission to carry out a detailed assessment before concluding that the conduct in question is likely to result in consumer harm. If it appears that the conduct can only raise obstacles to competition and that it creates no efficiencies, its anti-competitive effect may be inferred. This could be the case, for instance, if the dominant undertaking prevents its customers from testing the products of competitors or provides financial incentives to its customers on condition that they do not test such products, or pays a distributor or a customer to delay the introduction of a competitor's product.*"[17]

The Commission dealt with such a conduct in its *Intel*[18] decision and labeled relevant practices as "naked restriction". The Commission considers that there is no link to any criterion which could potentially be a legitimate objective justification concerning payments by Intel to delay, cancel or restrict the commercialisation of a specific AMD-based product.[19] The Commission concluded that AMD-based products for which there was a customer demand did not reach the market, or did not reach it at the time or in the way they would have in the absence of Intel's conduct. As a result, customers were deprived of a choice which they would have otherwise had and competition on the merits was harmed.[20] As a matter of fact, in *Irish Sugar*[21], the Court of First Instance concluded that it constituted an abuse when the dominant undertaking agreed *"with one wholesaler and one retailer to swap competing retail sugar products, for its own product*."[22] The Court of First Instance found that "*the applicant undermined the competition structure which the Irish retail sugar market might have acquired through the entry of a new product, sugar of the Eurolux brand, by carrying out an exchange of products, in the circumstances referred to above, on a market in which it held more than 80% of the sales volume.*"[23] A naked restriction in this context corresponds to an anticompetitive foreclosure that either has already concrete effects or likely effects in the market aganist consumer benefit.

Exclusionary Strategy/Object-

16 Ibid., p. 255.
17 Guidance Paper, para. 22.
18 Case COMP/37.990, Intel.
19 Ibid, para. 1676.
20 Ibid. Para. 1679.
21 Case T-228/97 *Irish Sugar v Commission.*
22 Ibid., para. 226.
23 Ibid., para. 233.

It can be interpreted that the naked restriction concept is noticably more than a pure exclusion strategy, yet, it involves that strategy or the object of exclusion as an essential element as well. The Court Of First Instance stated that, “for the purposes of applying Article 82 EC, establishing the anti-competitive object and the anti-competitive effect are one and the same thing (see, in that regard, Irish Sugar v Commission, paragraph 170). If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect.”[24] On the other hand, the Commission argues that the direct evidence of any exclusionary strategy may be helpful in interpreting the dominant undertaking’s conduct.[25] In this respect, an exclusionary strategy is an important factor taken into account along with other important factors mentioned in the Guidance Paper as the conditions on the relevant market, the position of the dominant undertaking and its competitors, the position of the customers or input suppliers, the extent of the allegedly abusive conduct.[26] Such a strategy along with supporting abovementioned factors might enable the competition authority to truncate the inquiry and conclude a likely anticompetitive foreclosure. Because for many non-price abuses, intent is part of the substantive test for an infringement of Article 102 TFEU.[27]

Exclusive Dealing & Conditional Rebates-

Exclusive dealing and loyalty rebates have been subject to a *per se* illegality in cases like *Suiker Unie*[28] and *Hoffmann-La Roche*. In *Hoffmann-La Roche* The Court of Justice stated that a dominant firm which ties purchasers –even if it does so at their request-by an obligation or promise on their part to obtain all or most of their requirements exclusively from the dominant firm abuses its dominant position. The Court also held that the same conclusion applies where a dominant undertaking, without tying the purchasers by a formal obligation, applies a system of fidelity rebates (rebates conditional on the customer’s obtaining all or most of its requirements from the dominant undertaking)[29].
It seems to say that dominant firms cannot enter into exclusive purchasing agreements and cannot operate rebate schemes which have the same effect as an exclusive purchasing agreements. It does not depend on assessing the effect of the rebate in the particular case, as it is assumed that if a dominant firm rewards customers for not buying elsewhere, rather than for buying certain amounts from itself (so rewarding negative rather than positive behaviour) it is bound to have an exclusionary effect on competitors[30].

In *Michelin II*[31] discounts and rebates given by dominant undertaking therefore fall into one of two categories: economically justified quantity rebates (lawful) and loyalty-inducing rebates (unlawful). Quantity rebates which are not linked to a

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24 Case T-203/01, *Michelin II*, op. cit, paragraph 241.
25 Guiidance Paper, para. 20.
26 Ibid.
27 O’Donghue R. and Paddilla J. (2013), The Law and Economics of Article 102 TFEU, p. 281.
28 Joined Cases 40-48,,50,54,56,111,113 and 114-73, Coöperatieve Vereniging “Suiker Unie” UA and others v Commission [1975] ECR 1663.
29 Case 85/76, Hoffmann-La Roche and Co AG v Commissiom [1979], ECR 461, para: 89.; O’DONOGHUE, R. and PADILLA, J. (2013), “The Law and Economics of Article 102 TFEU”, Hart Publishing, 2nd Edition, page 472.
30 JONES, A. and SUFRIN, B. (2008), page: 487.
31 Case T-203/01, Manufacture Française Des Pneumatiques Michelin v. Commission [2004] 4 CMLR 923.

demonstrable economic justification are loyalty-inducing. All loyalty-inducing rebates are classed with the exclusivity linked discounts condemned in Hoffmann-La Roche and appear to be *per se* abuses.

In Tomra[32], rebates with the targets set by the agreements corresponded at least to somewhere between 75% and 80% of the customer's total demand were found abusive. The Commission considered that individualized purchase targets were akin to exclusive dealing commitments since the quantities corresponded entirely or almost entirely to the actual purchase requirement of customers.[33]

Although *Van den Bergh Foods*[34] and the Guidance Paper stand for a salient example of a rule of reason approach regarding exclusive dealing and conditional rebates under Article 102 TFEU, the successive decision General Court in *Intel* and the one of the court of Justice in *Post Danmark II* seem to persist on sort of near *per se* approach. In *Intel* the General Court of European Union considered those rebates granted to original equipment manufacturers as exclusive rebates and concluded that the capability of tying customers to the dominant undertaking in inherent in exclusivity rebates and it is not necessary to examine the circumstances of the case to determine whether these rebates are aimed to prevent customers from obtaining their supplies from competitors.[35] Likewise, the Court of Justice in *Post Danmark II* noted that "Article 82 EC must be interpreted as meaning that, in order to fall within the scope of that article, the anti-competitive effect of a rebate scheme operated by a dominant undertaking, such as that at issue in the main proceedings, must be probable, there being no need to show that it is of a serious or appreciable nature." On the other hand, despite finding as efficient competitor test irrelevant, the Court ruled that "in order to determine whether a rebate scheme, such as that at issue in the main proceedings, implemented by a dominant undertaking is capable of having an exclusionary effect on the market contrary to Article 82 EC, it is necessary to examine all the circumstances of the case, in particular, the criteria and rules governing the grant of the rebates, the extent of the dominant position of the undertaking concerned and the particular conditions of competition prevailing on the relevant market." It can be interpreted that it is not necessary to demonstrate actual effects for exclusive dealing and loyalty rebates to be found abusive but likely effects in the context of a structured rule of reason analysis.

In conclusion, setting aside the naked restrictions, it might be argued that exclusive dealing agreements and loyalty-inducing rebates are not found directly (quasi) *per se* illegal but subject to a structured rule of reason in order to demonstrate likely effects for anticompetitive foreclosure.

32 Case T-155/06, Tomra Systems ASA and others v Commission [2011] ECR II-4361.
33 O'DONOGHUE, R. and PADILLA, J. (2013), pages 475-76.
34 Case T-65/98, Van den Bergh Foods Ltd v Commission [2003] ECR II-4653.
35 Case T-457/08, Intel v Commission, [2014] ECR II-0000.