

# Legal and economic assessment of exclusive dealing

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Presented by  
ICN Unilateral Conduct Working Group



International  
Competition  
Network

# Exclusive dealing

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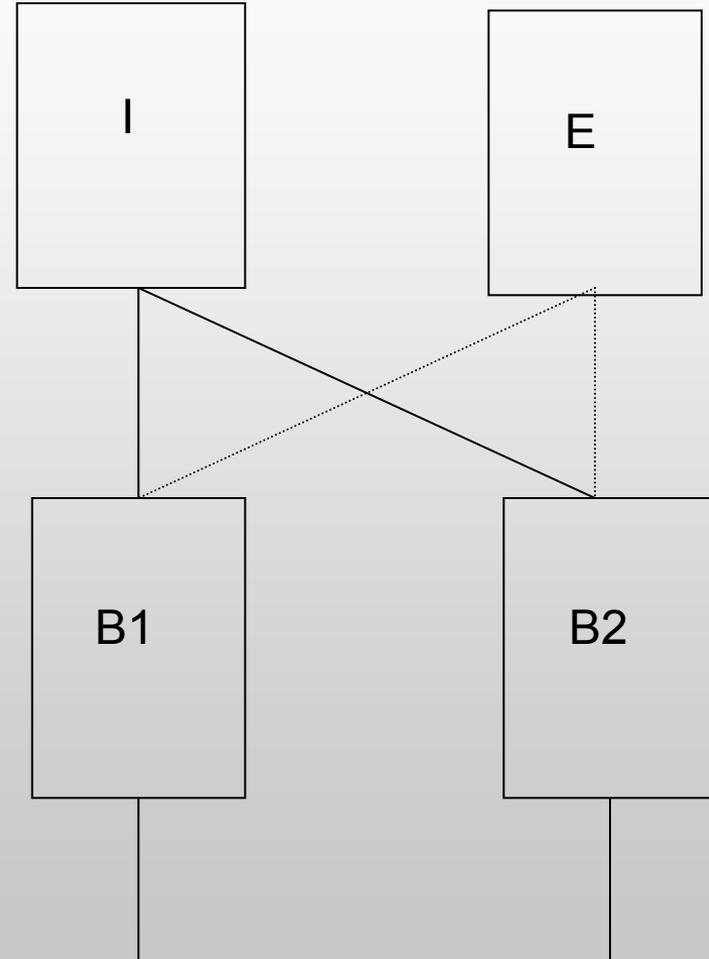
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# Overview of key principles

- Exclusive dealing can be understood within wider framework of exclusionary abuse
- Critical questions are around understanding incentives, mechanisms and effects
- About abuse of substantial market power (SMP)
- With exclusive dealing, customers (also could be suppliers) of a dominant firm sign up to exclusive deals and agree not to deal with rivals
  - If there is effective rivalry upstream, then even with exclusive deals there will be competition between vertically integrated groupings
  - But, in the case of SMP, agreements appear anti-competitive, as they undermine rivalry?

Suppose I want to exclude E,  
different practices are possible,  
including:

- Exclusive dealing
  - Price discrimination
  - Rebates (quantity discounts)
  - Predatory pricing
- a form-based approach does not make sense – need to understand effects
  - ‘pigeon-holing’ conduct may not be helpful
  - can understand circumstances where maybe rebuttable presumptions as to effects



# Exclusive dealing

- Why would the customer of the dominant firm agree to such a deal?
    - dominant firm must be providing a benefit to the customer to enter into the deal, outweighing loss to customer from being subject to single supplier
    - Chicago school: should presume exclusive deals do not have anti-competitive effects; agreements are only reached because of efficiencies
  - Efficiencies may be substantial
    - stimulating investments (overcoming free-riding)
    - addressing opportunism, facilitating specific investments
    - But, may be other ways to realise efficiencies
- Understand conditions/tests for assessing exclusive deals

# When might customers enter exclusive deals that foreclose actual/potential effective competitors?

- Weak upstream competition (entry/effective rivalry uncertain), requires little compensation for buyer to accept exclusivity
- Multiple uncoordinated buyers
- Network and/or scale economies, meaning entrant's success depends on being able to get a base of customers
- Mean buyers accept some 'compensation' for exclusivity, as believe entry unlikely - each believes other buyers will accept, even if they do not
- Greater likelihood if can discriminate between buyers, 'bribe' some key buyers, or if staggered contracting, the 'early' buyers
- Imperfect information and uncertainty about entrant's offering makes it more risky to reject exclusive offer
- Note: may not be absolute exclusivity but partial, or de facto (loyalty rebates)

# Illustrations from SA cases

- Under SA Act can be viewed as: restrictive vertical practice (s5(1)) and/or requirement or inducement not to deal with a competitor (s8(d)(i))
- *Patensie* packaging and distribution of citrus fruit
  - Tribunal found that farmers (also shareholders in the company, a former co-operative) locked into indefinite exclusive supply arrangement with Patensie Citrus, thus excluding potential competitors from the market for the packing and distribution of citrus fruit in the Gamtoos River Valley
- *Astral – Elite* poultry case
  - Referred by Commission in June 2008, still to be heard by Tribunal
  - Country Bird required to source 90% plus of parent stock requirements from Elite JV/partnership (controlled by Astral). Elite sources grandparent stock from Ross, also controlled by Astral.
  - Country Bird unilaterally exited arrangement and supported entry of rival breeding business
- Both cases are where collective arrangements to ensure investment now may be anti-competitive, considerable time after the investments made

# Computicket

- Alleged anti-competitive conduct, 3-year exclusive contracts by incumbent ticketing agent (Computicket) with inventory providers:
  - Events organisers (concerts, live festivals), Theatres, Sports events
- Referred to the Competition Tribunal in 2010, not yet heard
- Dominance, market power and market share?
  - Computicket with almost all of outsourced ticket sales
  - Alternatives? Own ticket sales (box office)
  - Entry barriers? Low costs of establishing internet business?
- Scale and network effects?
  - Customer awareness, web presence, retail network
  - Risk-aversity of customers (inventory providers), reputation
  - Significance of big buyers (inventory providers) by segment
- Efficiencies?

# Summary of South Africa approach

- Effects-based tests stipulated in Act
- Tribunal has established tests for exclusion based on:
  - Foreclosure of substantial proportion of the market
  - Effects on consumers
- Also considered evidence on actual effects on rival(s)
- Balance against efficiency/pro-competitive justifications
- Typically extensive economic evidence led
- Note other cases related to exclusivity: SAA (loyalty rebates); JTI-BATSA (display space)