Exclusive Dealing/Single Branding

Response of Members of the Unilateral Conduct Committee of the ABA Section of Antitrust Law[1]

This questionnaire seeks information on the analysis and treatment of exclusive dealing (referred to as single branding in some jurisdictions) by ICN member competition authorities. For purposes of this questionnaire, we refer to "exclusive dealing" and "single branding" as conduct that requires or induces customers or suppliers to deal solely or predominantly with that firm. Nevertheless, this questionnaire does not cover tying, bundling, loyalty discounts, rebates or related practices, which your responses should therefore not address. Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

Legal Basis and Specific Elements

1. Please provide the main relevant texts (in English if available) of your jurisdiction's laws and guidelines on exclusive dealing/single branding.

Sherman Act § 1, codified at 15 U.S.C. § 1

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

---

[1] This response was drafted by Ron Davis, Ankur Kapoor, Thomas Lambert and Daniel Sokol on behalf of the ABA Section of Antitrust Law's Unilateral Conduct Committee, a nongovernmental advisor to the ICN Unilateral Conduct Working Group. However, please note that this is not an official ABA submission, as it has not been reviewed, approved or endorsed by the ABA Section of Antitrust Law.

Sherman Act § 2, codified at 15 U.S.C. § 2

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

Clayton Act § 3, codified at 15 U.S.C. § 14

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

2. Please list your jurisdiction's criteria for an abuse of dominance/ monopolization based on exclusive dealing.

Exclusive dealing arrangements can violate § 2 of the Sherman Act's proscriptions on monopolization and attempted monopolization if (1) there is a finding that the defendant has monopoly power, *i.e.*, power over price in a well-defined relevant market, and (2) the arrangements have an anticompetitive effect or "reasonably appear[] to be a significant contribution to maintaining monopoly power," such as by preventing rivals from "posing a real threat" to the defendant's monopoly.[2]

---

[2] *See* United *States v. Dentsply International Inc.*, 399 F.3d 181, 187, 193 (3rd Cir. 2005).

In contrast, the inquiry under § 1 of the Sherman Act, which prohibits concerted restraints of trade, is whether the exclusive dealing arrangement effects a substantial foreclosure of the market to competition. Absent other factors, a foreclosure of around 40 percent of the relevant market is necessary, but not sufficient by itself, to find a violation § 1.[3] Although there is no set percentage threshold at which a court can make a per se determination regarding exclusive dealing, the courts have created a general "rule of thumb" scale. Usually, single-firm market foreclosure percentages of less than 30 percent will be found harmless to competition. Foreclosure percentages above 50 percent are frequently condemned by the courts. However, it should be noted that even a high foreclosure percentage does *not* mean that the exclusive agreement is per se illegal.[4]

Other factors considered under both § 1 and § 2 include: (1) the duration of the contracts; (2) the existence of comparably efficient distribution alternatives remaining available; (3) the extent to which other firms in the market also employ exclusive dealing; (4) barriers to entry into the market; (5) the likelihood that the exclusive dealing will facilitate collusion; and (6) any other anticompetitive or procompetitive effects of the exclusive dealing.[5]

Exclusive Purchasing and Supply Arrangements

3. How does your jurisdiction define single branding or exclusive dealing? For example: Must a firm require that all purchases come from it or that all sales go to it? Can something less than "all purchases" or "all sales" be considered single branding or exclusive dealing? Please specify (providing actual percentages, as relevant).

An exclusive dealing arrangement is any arrangement between a buyer and a seller that prohibits the buyer from purchasing the good from any other seller. It need not be formalized in a written agreement.[6]

---

[3] *United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001) ("[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

[4] 11 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1821(d)(3), at 176-77 (2d ed. 2006).

[5] *Dentsply*, *supra*; *Beltone Electronics Corp*., 100 F.T.C. 68, 204, 210 (1982); 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1821(d), at 183-88 (2d ed. 2006); *see* Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* 443-44 (3d ed. 2005)..

[6] *Dentsply, supra.*

"De facto" exclusive dealing, i.e., where the seller requires the buyer to take some percentage of purchases (rather than all), may also be unlawful, and generally is evaluated in the same manner as "all sales" arrangements.[7]

4. Is the duration of the arrangement relevant to your assessment? Yes/No

Yes.[8]

a. If so, please explain how and why, providing examples.

Even if a defendant's exclusionary conduct has foreclosed a significant percent of the market, that conduct may still be lawful if the period covered by the exclusive dealing arrangement is short in duration.[9] In addition to the time period, courts look at the ability of a buyer to cancel its contract and switch to another seller.[10]

For example, assume a seller has two-year exclusive dealing contracts with thirty buyers, which account for 30 percent of the market. However, assume half the buyers signed the contract in 2006 and the other half in 2007, and that the contract does not place significant burdens on a buyer from switching. In this example, half of the dealer's contracts will become available for bidding each year. Therefore, although the seller appears to control 30 percent of the market in the short-term, its mid-term foreclosure is 15 percent.[11]

5. Must the firm's use of such arrangements cover a substantial portion of the market? Yes/No

a. If so, how do you interpret this requirement, including any relevant percentage thresholds for the purchase or supply covered, and the evidence needed to determine whether this is met?

Yes. *See* Response to Question #2.

---

7 *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1058-59 (8th Cir. 2000).*

8 *Beltone Electronics Corp.*, 100 F.T.C. 68, 204 (1982).

9 11 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1821(d)(3), at 185 (2d ed. 2006).

10 *Id.*

11 *See id.* at 186.

6. **Does it matter whether the arrangement was requested by the non-dominant customer or supplier? Yes/No**

   a. **If so, how and why?**

   Yes, although it is not dispositive of the legality of the arrangement. An exclusive arrangement offered by a seller in response to a non-dominant buyer's request is an example of a seller responding to its customer's interests, and therefore is an indication that the arrangement is procompetitive.[12] Absent other facts, it cannot be said that the seller has acted with the intent to exclude competition. In such a situation, an attempt to monopolize claim cannot lie, because such a claim requires the specific intent to monopolize or exclude competition.[13] For claims of unlawful acquisition of monopoly power or claims of monopoly maintenance, the dispositive inquiry is into the effects of the exclusive arrangement, not the intent. *See* Response to Question #2.

7. **Might otherwise legal exclusive dealing/single branding arrangements be deemed abusive if they contain other provisions, *e.g.,* an "English Clause" (requiring *e.g.,* the customer to report any better offers to the supplier, and prohibiting the customer from accepting the offer unless the supplier does not match it), rights of first refusal (right of, *e.g.,* the supplier to enter into an agreement with the customer according to specified terms, before the customer is entitled to enter into an agreement with a third party)?**

   a. **If so, please explain and provide examples.**

   No, however, such clauses, as well as "most-favored nation" or "MFN" clauses, can facilitate the exchange of competitors' pricing information. Therefore, exclusive dealing arrangements containing such clauses may be more likely to facilitate collusion in the relevant market than exclusive arrangements that do not contain such clauses, especially where a large share of the relevant market is covered by such clauses.

Presumptions and Safe Harbors

8. **Are there circumstances under which a firm's use of single branding or exclusive dealing arrangements is presumed illegal?**

   No.

---

[12] *Menasha Corp. v. News America Marketing In-Store*, 354 F.3d 661, 663 (7th Cir. 2004).

[13] *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (attempted monopolization claims require a showing of only a "dangerous probability" of achieving monopoly power; showing actual monopoly power is unnecessary).

a. **If so, please identify the circumstances.**

b. **Is the presumption rebuttable? Yes/No**

i. **If so, what must be shown to rebut the presumption?**

9. **Is there a "safe harbor" from a finding of liability under your single branding/exclusive dealing provisions? Yes/No**

No.

a. **If so, please explain, including its terms.**

Effects

10. **Must a market foreclosure effect be shown for an abuse? Yes/No**

Yes. See Response to Question #2.

a. **How is market foreclosure defined in your jurisdiction?**

b. **Which factors are taken into account to assess a market foreclosure effect (level of dominance, percentage of market demand/purchases or supply covered by the arrangement, existence of alternative sources of supply, entry barriers, scale economies, possibility and practicability of switching, others)? Please specify the factors considered, including, as relevant, the percentage of demand/supply covered.**

c. **What evidence is used to demonstrate these effects and must the effects be actual, likely or potential effects?**

11. **Must other effects, *e.g.,* on consumer welfare, be shown for an abuse? Yes/No**

Yes.

a. **If yes, please specify what must be demonstrated and the evidence required.**

Exclusive arrangements employed by a dominant firm violate the Sherman Act's prohibitions on monopolization where the arrangements reasonably appear to be a significant contribution to the dominant firm's maintaining power over price or the ability to restrict output. See Response to Question #2.

Justifications/Defenses

12. What justifications/defenses are available to the dominant firm, *e.g.,* an efficiency, meeting competition or objective necessity defense? Please specify.

A majority of courts allow a defendant to prove that it had a reasonable justification for its exclusive dealing.[14] Typically, a justification is reasonable if it helps to reduce the defendant's costs or risks, or reduces the possibility of free-riding.[15]

a. **If there is an efficiencies defense, what efficiencies are considered (*e.g.*, relationship-specific investments, facilitating innovation, reduced transaction costs)? How are claims of improved service quality or reputation assessed?**

Most efficiency defenses involve the defendant showing why the exclusive dealing arrangement has helped to reduce its costs and/or risks. In addition, a defendant may provide data to indicate that the exclusive arrangement helps to prevent free-riding. In the case of a buyer's agreement not to purchase competing products, the exclusive may be necessary to prevent the buyer from free-riding on investments made by the seller. In the case of a supplier's agreement not to supply the buyer's competitors, the exclusive arrangement may be necessary to prevent other dealers from free-riding on investments made by the buyer, *e.g.*, service or promotion.[16]

b. Are efficiencies balanced against competitive harm to determine whether liability attaches, or do they provide a complete defense without consideration of harm?

Efficiencies are balanced against the overall competitive harm of the exclusive arrangement. However, there is little case law, and therefore little guidance, on how to balance efficiencies against anticompetitive effects.

c. Is there a meeting competition defense? Yes/ No.

No.

i. If yes, please explain.

---

[14] 11 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1822, at 192 (2d ed. 2006).

[15] *Id*.

[16] *See id*. ¶ 1812(a), at 146.

d. What is the standard of proof applicable to these defenses? What type of evidence is required to demonstrate that the defenses are met?

Assuming that the plaintiff has proffered sufficient evidence of anticompetitive effects, the burden of proof then shifts to the defendant to provide sufficient evidence of a reasonable business justification. Both the plaintiff and the defendant must establish their cases by a preponderance of the evidence, *i.e.*, more likely than not.

Enforcement

13. Please provide the following information for the past ten years (as information is available):

a. The number of exclusive dealing/single branding cases your agency reviewed (investigated beyond a preliminary phase).

2

b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.

(i) 2 (ii) 0

c. The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction's exclusive dealing/single branding rules (*i.e.,* "clearance decisions").

d. Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision.

(iii) 2

14. Does your jurisdiction allow private cases challenging exclusive dealing/single? Yes/No

Yes.

a. Please provide a short description of representative examples, as available.

Under the *Sherman Act* (see above), a private party is entitled to bring a suit against another private party under either § 1 or § 2. One example is *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). In that case, Tampa Electric entered into a 20-year requirements contract, which obligated it to purchase all of its coal needs for one of its power stations from Nashville Coal.

Nashville refused to supply the coal, however, claiming that Tampa Electric had violated the antitrust laws.

Another example is *Concord Boat Corp. v. Brunswick Corp.,* 207 F.3d 1039 (8th Cir. 2000), which was an action brought by manufacturers of recreational boats against a stern drive engine manufacturer. The Eighth Circuit upheld Brunswick's market share discount program because boat manufacturers were not foreclosed from buying competing engines and there was a lack of entry barriers. *Id*. at 1062-63.

15. As relevant, please provide a short English summary of the leading exclusive dealing/single branding cases in your jurisdiction and, if possible, a link to the English translation of the decision, an executive summary or the press release of the case.

United States v. Dentsply International Inc., 399 F.3d 181 (3rd Cir. 2005)

In this case brought by the United States Department of Justice Antitrust Division, the Court of Appeals for the Third Circuit held that Dentsply International Inc., an artificial tooth manufacturer, had unlawfully maintained its monopoly in artificial teeth through exclusive arrangements with dental dealers, which prevented the dental dealers from distributing the products of Dentsply's competitors.[17]

Dentsply sold its teeth to the dental dealers, who in turn sold the teeth to dental laboratories.[18] The court held that direct sales to dental laboratories were not a comparably efficient means of distribution for Dentsply's competitors because the dealers provided valuable services that made them a "crucial point in the distribution chain."[19]. Thus, Dentsply's foreclosure of its rivals' access to these key distribution outlets "helps keep sales of competing teeth below the critical level necessary for any rival to pose a real threat to Dentsply's market share," and as such was "a solid pillar of harm to competition."[20]

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)

In *Microsoft*, the Antitrust Division challenged, *inter alia*, Microsoft's exclusive arrangements with Internet Access Providers pursuant to which the IAPs would

---

[17] 399 F.3d at 184.

[18] *Id*.

[19] *Id.* at 190. These valuable services included extension of credit, one-stop shopping, economies of scale, discounts, and returns processing. See id. at 192-93.

[20] *Id.* at 191.

distribute Internet Explorer as the default or sole Internet browser. The United States Court of Appeals for the District of Columbia Circuit held that this constituted unlawful monopoly maintenance because the exclusive arrangements foreclosed Netscape and other Microsoft rivals' access to one of the two major channels for distribution of browsers. 253 F.3d at 70-72. According to the court, Microsoft thereby kept "usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly."[21]

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

In *Jefferson Parish*, the concurrence by Justice O'Connor analyzed the case as an exclusive dealing case (in contrast to the majority opinion, which analyzed the case as a tying case). The plaintiff in the case was an anaesthesiologist. The defendant hospital did not permit plaintiff anaesthesiologist to practice at the defendant hospital, as the defendant hospital had an exclusive contract with an alternative anaesthesiological group. Justice O'Connor noted that Jefferson Parish was not the only hospital in the market and accounted for only 30 percent of admissions. Thus, there was no consumer injury because there was no substantial foreclosure.

16. Please provide any additional comments that you would like to make on your experience with exclusive dealing/single branding rules and their enforcement in your jurisdiction, including, as appropriate but not limited to whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess exclusive dealing/single branding, explaining these developments as relevant.

---

[21] *Id.* at 71.