



# UNILATERAL CONDUCT WORKBOOK CHAPTER 5: EXCLUSIVE DEALING

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**Presented at the 12<sup>th</sup> Annual ICN Conference**  
Warsaw, Poland  
April, 2013

# ICN Unilateral Conduct Workbook

## CHAPTER 5 – Exclusive dealing

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## I. Introduction

1. The term “exclusive dealing” is generally used to describe an arrangement through which an upstream seller’s goods are sold to a distributor or retailer under the condition that the distributor or retailer does not sell similar competing products. The term exclusive dealing may also describe an arrangement by which a downstream purchaser requires an upstream seller not to sell its product to any competing downstream purchasers. This Chapter focuses on the first type of exclusive dealing arrangement.
2. Exclusive dealing arrangements can take a number of forms. One possibility is a contract between the seller and buyer that requires the buyer to purchase all units of a particular product from the seller (sometimes called a “requirements contract”). More typically, however, a reseller agrees to sell only the product sold by the seller or a downstream manufacturer agrees to use only the seller’s input in goods sold downstream. The exclusivity need not be expressly stated in a formal agreement but may rather be the *de facto* result of agreements or a seller’s policy not to deal with a purchaser that purchases its rivals’ products.
3. Among the practices considered in this chapter under the rubric of “exclusive dealing arrangements” are those that do not contractually require total exclusivity but have many of the same characteristics. Such arrangements include provisions that require a distributor or retailer to purchase a high percentage (rather than all) of its needs for a particular good and/or provide for limited exceptions to selling only the product of the upstream seller. For example, this may be the case with a stocking requirement or a minimum purchase requirement.
4. In addition, exclusive dealing may be enforced through creating direct or indirect disincentives to turn to alternative sources of supply or distribution channels, for example if discounts are made conditional on exclusivity, either explicitly or in effect.

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5. Competition laws may allow exclusive dealing arrangements to be challenged under laws prohibiting anticompetitive agreements or laws prohibiting single-firm abuse of dominance. Notwithstanding the requirement to demonstrate dominance under abuse of dominance laws,<sup>1</sup> for the most part, the economic and legal analysis of exclusive dealing arrangements is similar under either type of law.<sup>2</sup> This workbook considers exclusive dealing where it is a form of unilateral conduct. It therefore deals primarily with the evaluation of exclusive dealing arrangements under abuse of dominance or monopolization provisions in competition law.
  
6. Exclusive dealing arrangements are evaluated in most jurisdictions on the basis of actual or likely competitive effects, rather than being condemned categorically (or “per se”).<sup>3</sup> Consequently, the likely effect of an exclusive dealing arrangement on competition should be carefully evaluated. First, in the absence of dominance by a party to an exclusive dealing arrangement, an exclusive dealing arrangement is less likely to affect a sufficiently large amount of the trade in any relevant market to have an anticompetitive effect. Indeed, in certain jurisdictions this is a reason for limiting prohibitions on exclusive dealing arrangements to those involving firms that hold dominant positions or substantial market power.<sup>4</sup> Second, even when a dominant firm is involved, the particular exclusive dealing arrangement may not affect a large enough proportion of the relevant distribution channels to produce an anticompetitive effect. Third,

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<sup>1</sup> This may in practice lead to a higher threshold of intervention than for laws relating to vertical agreements

<sup>2</sup> Some courts in the United States have found that different statutory provisions create different standards of legality. *See, e.g.*, *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 197 (3d Cir. 2005). Likewise, the EU rules for Article 101, *eg*, the Block Exemption Regulation, tend to apply lower market share thresholds than under Article 102.

<sup>3</sup> ICN Exclusive Dealing Report, at 5, available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc355.pdf>

<sup>4</sup> For specific guidance on the assessment of “dominance,” see Chapter 3 of the Workbook, available at:

[www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc752.pdf).

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exclusive dealing arrangements can be efficient and beneficial to consumers.

7. Exclusive dealing arrangements can promote efficiency and benefit consumers because suppliers and their distributors or retailers are in a vertical relationship and perform complementary functions in serving downstream customers. Thus, they may be thought of as a “team,” which may act most effectively when neither member of the team has divided loyalties or incentives to act in support of a rival team. Indeed, exclusivity may stimulate distributors to concentrate their efforts on promoting the supplier’s products, thus increasing interbrand competition. In some industries, the most efficient and most effective distribution arrangement may be to have suppliers deal with distributors on an exclusive basis.
8. Among the collective activities these vertically aligned teams may engage in are promotions, marketing, pre-sale customer service, and expansion into new areas or products. The exclusive dealing arrangement can be used to ensure that both suppliers and distributors can capture the full benefit of their collective efforts without the risk that other suppliers or distributors will free-ride on their efforts. Such arrangements can also prevent “hold-up” problems, for example where a supplier needs to make a relationship specific investment to sell to a particular customer. Moreover, an exclusive arrangement may be preferable to other contractual arrangements, such as requirements of certain levels of service, because contracting and monitoring costs may be lower. The various ways in which these efficiencies may arise are covered in more detail in Section V.B of this Chapter.
9. Exclusive dealing arrangements also can promote efficiency and benefit consumers by creating intense competition in the process of forming teams. Suppliers may compete with each other by offering better terms to potential distributors. In some cases competition among suppliers would be less effective were the resulting distribution relationship non-exclusive.

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10. Exclusive dealing can, however, have anticompetitive effects, which may occur in several different ways. Agencies should be open to consider different theories of harm on their individual merits. Two ways more commonly considered are raising the costs of rivals either by foreclosing specific distribution channels or through preventing rivals from operating at an efficient scale.
11. Under the first mechanism, exclusive dealing may prevent rivals of the dominant firm from serving particular customers in a relevant market through a preferable (typically more efficient or lower cost) distribution channel. Alternatively it may make it difficult for rivals to obtain an important input. This in turn is likely to induce the rival to charge a higher price than it otherwise would. In addition, preventing consumers from having access to certain goods or services may create harm to consumers.
12. A second mechanism through which exclusive dealing may harm competition is by causing rivals to operate at a lower output that prevents them from operating on an efficient scale. Thus, exclusive dealing may make it more difficult for a dominant firm's competitors to cover their fixed costs of operation and operate profitably. That is, they will either need to charge a higher price to remain profitable or, if they charge a comparable price to the dominant firm, they may not be profitable in the long run.
13. Any exclusive dealing arrangement inherently "forecloses" rival suppliers from particular distribution channels or outlets to at least some degree, in that some channels or outlets are made unavailable. This foreclosure, however, need not have anticompetitive consequences when the rivals still have adequate access to other distributors or retailers. Therefore, in order to likely harm competition, the degree of foreclosure must be sufficiently great. Harm can occur because the exclusive dealing leads to exit of an existing competitor (or prevents entry by a new rival) or through increases in prices or decreases in innovation. Foreclosure may also harm competition by relaxing the competitive constraint imposed by rivals

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without fully eliminating them from the market. That is, it may weaken the ability of competitors to charge as low a price as they might otherwise do. Moreover, potential entrants, not just incumbent competitors, may be among the affected rivals.

14. When the degree of foreclosure is slight, significant anticompetitive effects are likely to be absent. For example, if downstream customers subject to the exclusive dealing account for a small fraction of total market sales, the supplier's rivals in general are unlikely to suffer any competitive handicap.<sup>5</sup> Hence, the extent of foreclosure often is the first issue addressed in an exclusive dealing investigation. More generally, the specific facts of each industry, and each exclusive dealing arrangement, are important in determining the effects on competition and consumers. Identifying the evidence relevant to determining whether the foreclosure likely harms competition is explained in Section IV of this chapter.

## II. Framework for Assessing Exclusive Dealing

### A. Legal Basis

15. Competition regimes typically deal with exclusive dealing under one of two approaches, or a combination of the two. Under the first approach, exclusive dealing can be addressed under abuse of dominance/monopolization provisions in antitrust laws.<sup>6</sup> These laws require that one of the contracting parties to the exclusive dealing arrangement has substantial market power or is dominant.<sup>7</sup> They may not

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<sup>5</sup> Though as discussed below, there may be exceptions, such as where a dominant undertaking applies a practice of exclusive dealing only to selected customers or input suppliers who may be of particular importance for the entry or expansion of competitors.

<sup>6</sup> ICN Report on Single Branding/Exclusive Dealing, April 2008, p. 4.

<sup>7</sup> As explained in the Workbook chapter on assessment of dominance, jurisdictions have differing definitions of the concept of dominance. A recurring feature of the concept is a high degree of market power both with respect to the level to which price can be profitably raised and to the duration for which price can be maintained at such a level. Dominance can also be described by a firm's ability to behave with appreciable independence from competitive discipline. See generally ICN Unilateral Conduct

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explicitly set out conditions for establishing the existence of anticompetitive exclusive dealing, but may have provisions for exclusionary conduct in general.

16. Under the second approach, exclusive dealing can be addressed under rules relating to anticompetitive agreements, or more specifically vertical agreements. For the most part the factors used in the analysis of exclusive dealing are the same, although the applicable law may require different elements (such as proof of an agreement or the degree of market power required to be demonstrated).
17. Less typically, some jurisdictions have laws with specific provisions in place for exclusive dealing in addition to or even independent of the above.<sup>8</sup>

### **B. Summary of Evaluative Criteria**

18. Exclusive dealing arrangements, like many vertical relationships, are common and not necessarily anticompetitive. They are not condemned categorically, but in certain contexts may harm competition. As a first step, an agency will need to identify a theory of harm whereby exclusive dealing arrangements have resulted in substantial foreclosure which has harmed or is likely to harm competition. A common way in which substantial foreclosure may be anticompetitive is if it denies to rivals sufficient share of distribution to achieve a minimum efficient scale, thus raising the costs of those rivals. Alternatively it may raise rivals' costs by preventing them from accessing particular inputs or distributions channels. However, these are not the only ways in which substantial foreclosure may result in anticompetitive effects. What is important in general is for the agency to develop a robust theory of harm that connects the exclusive

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Workbook Chapter 3: Assessment of Dominance, at 2 (2011); ICN Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws, Recommended Practices, 1 (2008).

<sup>8</sup> ICN Report on Single Branding/Exclusive Dealing, April 2008, p. 4.

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dealing conduct with anticompetitive effects and seeks the appropriate evidence to support the theory.

19. In developing its theory of harm an agency may wish to consider certain evaluative criteria, which, all else equal, would make the arrangements more or less likely to result in harm. It will also need to consider whether there are pro-competitive benefits to the arrangements that on balance outweigh any anticompetitive effects.
20. The appropriate criteria may vary from market to market and situation to situation, but their assessment is likely to include some or all of the following steps: the existence of an exclusive dealing arrangement; definition of the relevant market and the supplier's market power within that market; the extent of anticompetitive effects from the arrangement; and consideration of offsetting pro-competitive justifications and defenses. This section sets these out at a high-level to present an overall framework. The following sections of the chapter then discuss each step in more detail.
21. The steps described below need not be followed in the order they are presented. An agency should investigate such arrangements in a way that efficiently resolves whether the arrangements harm competition or improve efficiency. For example, an agency may be able to easily determine that the arrangement involves significant efficiencies or no anticompetitive harm. Resolving particular investigations in this way minimizes the expenditure of both the agency's and the target's resources.

### *Market Definition and Substantial Market Power*

22. An exclusive dealing matter that is being investigated as a potential abuse of dominance requires a finding that the firm involved is dominant, or has substantial market power, in a relevant market, or that the firm is likely to acquire such power through exclusive dealing. Even where exclusive dealing arrangements are investigated as anticompetitive agreements, where an assessment of dominance is often not formally required, a logical

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first step may still be an assessment of market power.<sup>9</sup> In general, exclusive dealing is more likely to harm competition where there is market power. Further, market power will often be of direct relevance to the specific theory of harm whereby the exclusive dealing is alleged to have an anticompetitive effect.

23. Market power is not explicitly considered in Section IV below as the standards and process for analyzing market power and assessing dominance are discussed extensively in Chapter 3: Assessment of Dominance.

### *The Existence of an Exclusive-Dealing Arrangement*

24. As discussed in Section III, an exclusive-dealing arrangement may come in many forms: it may be *de jure* or *de facto* and it may be completely exclusive or partially exclusive. Indeed, from a practical standpoint, in many jurisdictions, the precise definition of the arrangement is less important than whether the arrangement is, in fact, anticompetitive.

### *The Extent of Anticompetitive Effects*

25. Determining whether the arrangement has anticompetitive effects is often the most difficult question that an investigating agency will face. Answering the question correctly is crucial, since challenging arrangements without anticompetitive effects may create harm not only to the parties to the arrangement, but to competition more generally, because it will make parties less likely to enter pro-competitive exclusive dealing arrangements in the future.
26. The question of whether or not an arrangement has anticompetitive effects typically requires an agency or court to determine whether it creates substantial foreclosure within the relevant market at issue. This

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<sup>9</sup> In addition, some laws relating to vertical agreements, such as EU law, may stipulate market share thresholds below which agreements are presumed not to be harmful to competition.

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determination, discussed in the first part of Section IV, typically includes an analysis of both quantitative and qualitative factors. A common starting point is an examination of the extent of foreclosure in a properly defined relevant market. A typical first step to this followed by many courts and agencies is to simply consider the proportion of the relevant market covered by the exclusivity arrangements.

27. Other factors include, most prominently, the length of the arrangements and the ability of the contracting parties to terminate them. For example, exclusive dealing arrangements that operate through contractual bans on dealing with rivals are less likely to foreclose rivals when they are short in duration, or as a practical matter may be easily terminated by either party. This is because competitors are able to compete for the contract at regular intervals, or if either party can terminate the exclusive dealing arrangement at any time, at short notice and without incurring prohibitive costs. However, where the dominant firm in question is an unavoidable trading partner for the other party, for instance because it owns a must have brand or because of limited production capacity on the part of its competitors, foreclosure may also arise even if exclusive arrangements are of a short duration or can be terminated at short notice.
28. A court or agency may also consider whether the challenged arrangements are with distributors or end-users. If they are with distributors, depending upon the market in question, competitors may be able to develop new methods to sell their products to end-users, thus diminishing the arrangement's actual market impact.
29. An agency should also consider how substantial foreclosure may harm competition and what evidence exists that this is likely to occur or has occurred. Furthermore, understanding why the parties entered the arrangement will add important context to the analysis and may support a finding that anticompetitive effects have arisen. The latter part of Section IV discusses evidence relevant to this question.

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### *Offsetting Pro-Competitive Justifications and Defenses*

30. If a court or agency considers that an exclusive dealing arrangement harms competition in a relevant market, it should examine possible justifications and compare the competitive harm to any pro-competitive effects arising from the arrangement.
31. For example, the following competitive benefits could, depending upon the particular circumstances, justify or offset competitive harm from an exclusive arrangement: (1) Encouraging distributors to promote a manufacturer's products more vigorously (2) Encouraging suppliers to help distributors by providing services or information benefiting consumers (3) Addressing problems of free-riding between suppliers; (4) Addressing "hold-up" problems for customer specific investments; and (5) Allowing suppliers to control distribution quality more easily.
32. In analyzing efficiencies, the agency should consider whether they are relationship specific, whether the parties can achieve them through less restrictive means and whether the efficiencies outweigh any anti-competitive effects on consumers.

### **III. Means to Create Exclusivity**

33. There are different ways to create and enforce an exclusive dealing relationship between a firm and its suppliers or customers. It may be enforced either through explicit contractual terms or through creating direct or indirect disincentives to turn to alternative sources of supply or distribution channels. In particular special discounts or rebate schemes may induce buyers to obtain all or most of their requirements from a single supplier. A *de facto* exclusivity may arise not only if obtaining discounts is conditional on the customer's purchasing of all or a very substantial part of its requirements from a particular supplier, but also in cases where the buyer is induced to deal exclusively with the supplier, because it is afraid

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of negative unilateral actions such as termination of the supply agreement or refusal to honour guarantees if competing products are used.

### A. De Jure Exclusivity

34. Exclusivity is clearly established where an explicit contractual obligation is imposed on the buyer to purchase a particular type of goods or services only from a specific supplier. The same is the case if the buyers promise to obtain all or most of their requirements from the dominant firm. Regardless of the terminology used – “exclusive purchasing”, “single branding”, “requirements contract”, or “non-compete obligation” – the common characteristic is that the buyer is explicitly prevented from purchasing competing products from other suppliers.

### B. De Facto Exclusivity

35. *De facto* exclusivity may arise if buyers have strong inducements not to purchase from alternative sources of supply even where no specific obligation not to do so exists. *De facto* exclusivity may arise from the provision of financial or other incentives that would be withdrawn if the buyer makes use of an alternative source of supply.
36. One way in which *de facto* exclusivity can arise is where a dominant supplier adopts a policy of refusing to supply any buyer that is also supplied by a rival supplier. *De facto* exclusivity may also arise from arrangements that limit the shelf space available to rivals. For example, a dominant ice-cream producer induced outlets to, in fact, become the exclusive sellers of its products by including a provision in supply agreements stipulating that the freezer cabinets which it supplied free on loan to retail outlets could only be used for its ice cream products . This

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*de facto* exclusivity resulted from the fact that retailers actually did not have the space to install more than one freezer cabinet on their premises.<sup>10</sup>

37. The existence of an exclusive dealing arrangement may also be inferred from the volume or quantity that is specified in a supply agreement. If it specifies that a quantity must be bought and this quantity is equivalent or close to the customer's total requirements, *de facto* exclusivity may be created.

38. A supplier may induce a buyer not to buy or use competing products by creating financial incentives to concentrate its demand, for example by providing discounts conditional on exclusivity. It may also discourage purchases of other products by practices such as threatening to refuse to honour guarantees if competing products are purchased by the buyer.

39. The different ways of creating *de facto* exclusivity may also have an influence on the degree of potential foreclosure effects. This should be taken into account, together with other factors, when assessing the actual or likely competitive effects of the arrangement.

### C. Scope of Coverage — Total or Partial

40. An arrangement may be deemed to be exclusive dealing even if the arrangement does not cover the entirety of the purchases or sales of the dominant firm's business partner. This is because an arrangement that covers most but not all of the sales or requirements of a contracting partner may still lead to substantial foreclosure of a relevant market. Even without full exclusivity, rivals may still not be able to achieve minimum efficient scale to effectively discipline the dominant entity engaging in the partially exclusive contract.

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<sup>10</sup> See *Commission*, OJ 1998 L 246/1 ; recitals 263-270 – *Van den Bergh Foods*. Similarly, providing rent-free cooling machines by a dominant bottling company for carbonated soft drinks may induce exclusivity in cases where the customer does not have the capacity to install other coolers for chilled beverages; cf. *Coca Cola*, OJ 2005 L 253/21.

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41. It is important, however, that the agency take into account the fact that the arrangement is not fully exclusive. The agency can do so in at least two ways: First, the quantitative economic analysis of foreclosure will itself take the partial exclusivity into account. Second, a contract that is not fully exclusive may be of a different nature, requiring different considerations, than a fully exclusive contract. For example, these agreements may arise out of incentive pricing or discounts at one or more tiers of purchase percentages.
42. Competition issues arising from arrangements that create near-exclusive purchasing based upon discounts or incentive pricing are complicated and often require a unique analysis based upon the specifics of the market and the contracts at issue. An agency with concerns relating to partially exclusive contracts may begin its analysis with the exclusive dealing framework of analysis, but should keep in mind that the ultimate analysis may require a more complicated inquiry into the market structure and the effects of the contracts. These types of arrangements may sometimes be analyzed more appropriately under a loyalty discount framework, which will be addressed in another chapter of the Workbook.

### IV. Evaluating Competitive Effects

#### A. Foreclosure of Competition

43. In the competition law context, “foreclosure” describes a situation in which a firm uses one or more forms of exclusive dealing arrangements to eliminate or impede actual or potential competitors’ profitable access to upstream supplies or downstream distribution channels. Such foreclosure may have an impact on competition if it is substantial enough to make alternative sources of supply or distribution unavailable, more expensive or less effective.
44. A specific theory of competitive harm outlining the mechanism by which the harm occurs is a central aspect of an exclusive dealing case. In

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supporting such a theory of harm, it is helpful to distinguish between the evidence concerning the reach of the arrangements on the market, the percentage of the market foreclosed by exclusive dealing arrangements and their duration, which may predict anticompetitive harm, and the evidence of actual anticompetitive effects.

45. The first type of evidence is to determine whether the conditions that must be present for or are conducive to harm to occur are actually present. Such evidence could come from independent or even official sources, such as sectoral regulatory authorities. Additionally, market shares and other market information, facts and data gathered from the parties to the investigation, customers and competitors could be used to establish that an arrangement by virtue of its nature and appearance has the ability to foreclose or has, in fact, foreclosed rivals from a substantial portion of the relevant market. Part B discusses factors relevant to this type of evidence. The second type of evidence relates to the anticompetitive effects potentially resulting from foreclosure. These are discussed in part C below.

### **B. Factors taken into consideration in assessing whether there is market foreclosure**

46. Listed below are factors to consider in determining an arrangement's capacity to foreclose in a relevant market, and thereby result in or contribute to anticompetitive effects. To assess the extent of market foreclosure these factors should not be considered in isolation, but rather considered together, taking into account of how they may interact. Not all of the factors will necessarily be relevant in all cases. Moreover, while they are some of the most frequently cited as being potentially relevant in exclusive dealing cases, this list is not exhaustive of every potentially relevant factor.

#### *Market coverage*

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47. For exclusive dealing arrangements to harm competition, they must foreclose a substantial portion of the relevant market. The analysis of the degree of the relevant market foreclosed considers how much of each customer's requirements are subject to the exclusive dealing arrangement in question (i.e., whether it covers all purchases or fewer than all purchases) plus the cumulative coverage of all such exclusive dealing arrangements in the relevant market.
48. Exclusive dealing arrangements are more likely to result in anticompetitive effects the larger the proportion of the relevant market that is subject to the conduct. For example, exclusive dealing arrangements covering a large portion of the relevant market may mean that competitors do not have sufficient means to supply their product in a cost effective manner. Conversely, exclusive contracts affecting only a small fraction of the relevant market may be less likely to foreclose competitors from customers or sources of supply.
49. There is no specified degree of market coverage under which an exclusive dealing arrangement should necessarily be deemed anticompetitive. Having a relatively low proportion of the relevant market subject to the exclusive dealing arrangement suggests that there may be comparable alternative sources of supply or distribution available to competitors. This may be a strong indication that the arrangement does not have anticompetitive effects. However, exclusive arrangements that foreclose a lower proportion of the total relevant market may still be anticompetitive if they are applied to distribution channels or sources of supply that are particularly important to potential entry by new competitors or expansion by existing competitors. Other factors that determine this may include the existence of alternative means of market access, barriers to entry, the duration of the exclusive dealing arrangement, and the ability in practice of a purchaser to cancel the arrangement.

### *Duration of the Exclusive Dealing Arrangements*

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50. Even exclusive dealing arrangements that cover a large portion of the relevant market may still not significantly foreclose rivals if they are for a short duration. That is, even if the customer's demand is subject to an exclusive dealing obligation, if that obligation is only for a short duration, that demand may not be appreciably foreclosed to competition.
51. All else being equal, the longer the duration of an exclusivity obligation, the stronger its potential for foreclosure. What is considered a "long" and "short" duration likely depends on the context and dynamics of the relevant market.
52. Analysis of duration also should consider penalties for early termination of the contract or arrangement in question. An apparently long-term exclusive dealing arrangement may be illusory if the buyer can readily terminate the arrangement. The factors to consider may include the time period or notice required for termination, and whether termination triggers financial or other economic penalties to the terminating party (and, if so, the severity of such penalties).
53. In addition to duration, the conditions for the arrangements' renewal should also be considered, such as whether they are all renewed simultaneously and whether they are automatically renewed or subject to conditions for renewal. Contracts with a relatively short duration but with automatic renewal provisions effectively may have a longer term, depending on other factors such as the penalties and procedures for termination.
54. It is also relevant to consider the extent to which exclusive dealing arrangements overlap. If several exclusive dealing arrangements in a relevant market are staggered so that only very few come up for renewal in any given year, this may contribute to foreclosure since only a small portion of the entire demand is contestable in any given year. This may be particularly important where there are significant economies of scale, as if

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a rival cannot compete effectively for sufficient contracts, it may not be able to reach efficient scale profitably within a reasonable time period.

55. As noted above, consideration should be given to how the duration relates to other factors. Even an arrangement with a shorter term and without penalties for termination may still foreclose if, as a matter of commercial reality, the customer cannot practically change suppliers, or has little or no incentive to switch. For example, exclusive arrangements of shorter duration or where there is a right to terminate the arrangement on short notice may lead to foreclosure if there are no adequate substitutes for the dominant firm's product for a large part of demand in the relevant market, or if customers have a strong incentive to continue carrying the product. This could be the case if the product is a "must stock" item.

### *Existence of Alternative Sources of Supply or Alternative Means of Access to the Market*

56. Another potentially relevant factor is the feasibility of competitors finding or developing alternative sources of supply or alternative distribution channels, including direct sales to customers.
57. For example, even if a supplier has long-term distribution arrangements with a substantial portion of distributors in a relevant market, there may not be significant foreclosure if competing suppliers can effectively bypass distributors and offer their products to customers directly. Analysis of this should compare the cost, ease and efficacy of distribution through distributors versus direct distribution to determine if the latter is comparably efficient and offers an effective substitute for the former. The preferences of customers are also important. If many customers strongly prefer to purchase through distributors, direct distribution may be ineffective.
58. The ability of competitors to develop new sources of supply or distribution outlets, or vertically integrate upstream or downstream, may also be

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relevant. Such alternative means could allow rivals to compete on a comparably effective basis with the entity imposing the exclusive dealing arrangements.

*The level of the distribution chain at which there is exclusivity – e.g., suppliers vs. distributors vs. end users*

59. Entry barriers and other market conditions may differ depending on the level of trade. For instance, entry barriers at the wholesale level may often be lower than at the retail level, which may make foreclosure at the wholesale level less likely. Foreclosure of access to end users will generally be more difficult to counter for competitors than foreclosure of access to a particular distribution channel. Similarly, compared to final consumers, buyers at an intermediate level may be more professional and better able to guard themselves against a harmful loss of choice and competition.

*Whether the Customer Requested the Exclusivity*

60. In general, the fact that a customer requested an exclusive arrangement does not mean that an arrangement, taken cumulatively with other similar arrangements in the relevant market, cannot foreclose rivals. However, the fact that the customer requested the exclusive dealing arrangement could inform other parts of the overall analysis. It may indicate that the arrangement is in the customer's interest and contributes to increases in efficiency in the relevant market. In addition, it may show that the firm had no intent to use the arrangement to foreclose competitors, to the extent that its intentions are relevant to the analysis. However, this consideration is at best only suggestive and does not directly determine whether the effect of the exclusivity is to weaken competitors and harm competition.

*Ease of Entry and Market Dynamics*

61. Analysis of the factors listed above should not be conducted in isolation, but rather be carried out within the context of the economic considerations

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and dynamics of the relevant market. Relevant considerations in this regard include entry barriers and ease of entry, rate of market growth (or decline) and/or rate of innovation.

62. Long term exclusive arrangements covering a substantial portion of a relevant market may still not harm competition in circumstances where barriers to entry are low, demand is expanding, or innovation is rapid. Under such circumstances, the foreclosure that occurs in the short run may not create sustained harm to competition in the future, so a dynamic analysis of the competitive effects may be necessary. The extent to which the firm carrying out the exclusive dealing has substantial market power may be important in considering whether foreclosure is likely to lead to sustained harm to competition.
63. One analytical approach is to examine whether the exclusive arrangements may have materially altered the likelihood or feasibility of entry, such as whether, but for the exclusive dealing arrangements, an effective competitor or group of competitors could have emerged within a reasonably short period of time (e.g. 2 years) to challenge the dominant firm's market power.

### *Scale Economies*

64. Depending on the circumstances, denying a competitor access or partial access to the market may prevent or hinder it from obtaining the economies of scale necessary to allow it to grow into an effective competitor. This may mean preventing it from obtaining the minimum efficient scale necessary to be profitable, or simply from obtaining the scale economies enjoyed by the incumbent, thereby making it difficult for the rival to be competitive in the market. This in turn prevents the competitor from growing and eroding the market power enjoyed by the incumbent.

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65. Two slightly different but related factors that may be taken into consideration when assessing if there has been foreclosure are the existence of network effects and/or incumbency advantages. These factors have an effect similar to scale economies since a dominant firm can use exclusive deals to exploit such market dynamics in order to deprive a competitor of the means of gaining the required critical mass of sales or credibility with customers. One case where such dynamics were relevant was that heard by the Canadian Competition Tribunal against A. C. Nielsen, a provider of scanner data.<sup>11</sup> Through signing staggered exclusive contracts with retailers, the incumbent firm made it very difficult for a rival to enter the market, since the entrant would have been forced to sign up retailers one at a time. This caused a credibility problem since retailers were reluctant to give their data to a company that had no other major retail clients.

### C. Evidence of competitive effects

66. Most exclusive dealing cases involve complainants and enforcement agencies claiming consumer harm from exclusive dealing. Meanwhile companies using such arrangements claim the exclusive dealing results in efficiencies. Therefore, an important question is, “what kind of evidence can authorities and courts rely upon to establish the extent of competitive harm from foreclosure?”
67. Given that most investigations will involve the introduction of an exclusive (or near exclusive) arrangement in a market, and that such investigations typically are initiated at the request of a competitor and/or customer who claims to have experienced harm as a result of the exclusive arrangement, there may be a period of time during which the arrangement has had an effect on the market. Investigators should attempt where

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<sup>11</sup> Reasons for Order in case CT 94/1, 1994, p.87.

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possible to determine if these effects are consistent with harm to competition or suggest an efficiency.<sup>12</sup>

68. Evidence of anticompetitive effects in exclusive dealing cases will generally be similar to that used in other exclusionary abuse of dominance cases. The most probative evidence is generally direct evidence, such as historical evidence that overall output has decreased in the relevant market or that prices have increased as a result of reduced competition. The most convincing evidence is consistent with predictions based on a specific theory of harm, where the predictions differ from those of a theory claiming the exclusive arrangement promoted efficiency. For example, an efficiency explanation typically predicts increased output and lower prices relative to the counterfactual, while an anticompetitive explanation will typically predict the opposite.
69. Evidence concerning the effects of the arrangements on the market structure, such as evidence showing the exit of some or all competing firms, raising the barriers to entry, or a reduction in the competitive significance or market shares of existing competitors may also be probative. Evidence that new entrants emerged or expanded and were able to compete effectively by disciplining the price or output setting of the dominant firm during the period of the alleged abuse can be a strong indication that the exclusive arrangements did not foreclose competition or have an anticompetitive effect. Indirect and circumstantial evidence, for example, relating to market share fluctuations over time could also be relevant. Finally, the agency or court may resort to qualitative and quantitative studies (such as customer responses) and expert economic testimony.

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<sup>12</sup> Even if the theory of harm involves a discrete occurrence such as that a competitor will be driven from the market in the future, it is likely that such a competitor will have begun to experience a reduction in profit, which would foreshadow its exit. Of course, such a reduction by itself is not necessarily a proof of harm as such loss in profits could also occur if the exclusive dealing were pursuant to some efficiency enhancing activity.

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70. This section first describes observable market outcomes that could directly indicate harm to competition from an exclusive dealing arrangement and then discusses "indirect" evidence that may show harm to competition.

*(i) Increase in prices*

71. Anticompetitive effects can involve increased prices associated with a decrease in output. Below are specific examples of market observables that could directly indicate harm to competition from an exclusive dealing arrangement. It is important to bear in mind, however, that a comparison that accurately accounts for all relevant variables is not always possible.

72. Higher prices charged by the dominant firm after the onset of foreclosure (although not necessarily immediately) can constitute strong evidence of harm to competition if not explainable by other supply and demand factors. However, higher prices may also be explained by other factors such as an increase in services provided by downstream resellers as a result of the exclusivity that would cause end users to be willing to pay more. Alternatively they may be explained by an increase in overall market demand due to some independent factor such as a decrease in the price of a complementary good, or a favorable change in consumer preferences. It should also be kept in mind that many of the exclusive dealing efficiency arguments directly or indirectly relate to improved quality in the product's functionality or downstream service, which would likely increase prices.

73. However, if the evidence does not support any other cause for a price increase, this may suggest it results from harm to competition. As described more fully below, changes in quantity can help determine the nature of a price increase. A price increase accompanied by a quantity increase, all else equal, is consistent with a procompetitive impact, while an accompanying quantity decrease suggests an anticompetitive impact.

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74. If the exclusive dealing arrangement is employed in some geographic markets and not others, evidence of harm to competition would be that the dominant firm has higher prices in areas with the arrangement than in those without the arrangement and that these differences are not explainable by other supply or demand conditions, such as sellers providing a higher level of service in the exclusive dealing geographies. If demand conditions are different across areas, comparing price levels may be misleading. However, larger price *increases* in the area in which exclusive dealing was used relative to other areas might also provide useful evidence of anticompetitive effects.
75. Comparing price levels across time periods or across geographies can occasionally be a fairly straightforward process. Sometimes the parties' own internal analysis of pricing will indicate significant price differences. However, the need to account for other factors that might affect prices may require the work of an economic or industry expert. When looking at prices before and after the institution of an exclusive arrangement one must account for underlying changes in the market over time. For example, in high tech industries where products can change as quickly as every quarter, the effects from exclusivity must be disentangled from effects of new product introductions and changes in consumer demand over time, as well as changes in costs over time. When comparing prices across areas one must be able to separate out differing supply and demand characteristics in the different locations.

### *(ii) Reduction in Overall Output*

76. A complementary analysis to analyzing price changes is analyzing quantity changes. A reduction in the overall market output may suggest that the exclusive arrangement has harmed competition, provided that it is not explained by exogenous decreases in demand or increases in the prices of inputs. Specifically, all else equal, it may be difficult to reconcile an efficiency claim that exclusivity has improved services or quality with a reduction in quantity. Thus, in the absence of other explanations it would

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be reasonable to infer that an exclusive arrangement was reducing competition.

77. Evidence of output reductions may be obtainable from parties' ordinary course of business documents regarding sales or production. For large industries, third party or government sources may track industry production or sales.

### *(iii) Increase in market share*

78. After an exclusive dealing arrangement is implemented, an increase in a dominant firm's market share that cannot be explained by a reduction in the dominant firm's relative prices or by supply and demand factors such as an increase in dominant firm's product's relative quality (due perhaps to the exclusive arrangement) or change in consumer taste, can provide evidence that the arrangement has an exclusionary effect. Market share data can be constructed from parties' production and sales data in ordinary course of business documents. For some large industries, third-party data providers track sales and report market shares. Of course, it is essential to consider the possibility that the dominant firm gained market share by increasing the efficiency of its distribution system or creating incentives for its distributors or retailers to work harder.

### *(iv) Exit*

79. Exit by an existing competitor as a result of an exclusive dealing arrangement also suggests an anticompetitive effect. Exit by a firm when there are some costs to re-entering or some significant time lag means that any competitive pressure that the firm would have exerted on the dominant firm is gone while it is not in the market. The reduction in competitive pressure may result in increased prices or decreased quality for consumers. However, great care must be taken in attributing the exit of an existing competitor (or failure to enter of a potential rival) to the dominant firm's exclusive dealing arrangement. Inefficient rivals may

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exit as a result of their own shortcomings. In addition, an exclusive dealing arrangement may precipitate exit by a rival because the arrangement generates benefits to consumers. Therefore, determining if the exit is an anticompetitive effect may require determining if overall output in the market fell after exit and prices increased as a result of the exit. Similarly, exit with no evidence of quality improvement in the dominant firm's product or complementary services suggests that the exit likely harmed end users.

### *(v) Deterring Entry*

80. The focus of the types of evidence above is on the elimination of existing competition. However, exclusive dealing can prevent entry by potential competitors and thereby reduce the competitive constraint on the dominant firm in that way.
81. Predicting whether a firm would have entered a market absent the exclusive dealing arrangements is difficult. The best types of evidence include finding that the firm had committed substantial resources to developing and/or producing a product for entry, had committed resources to the distribution of the new product, and has had success in the past or in different geographic markets introducing similar products. For example, evidence that a firm that had an ongoing and successful R&D programme to develop a new product that was suspended after the introduction of exclusive arrangements may suggest that entry was likely, although such evidence would not be conclusive
82. A firm having entered into arrangements with distributors to carry a new product would suggest entry was likely or at least expected in the normal course of business. The likelihood would increase if the firm were already making a similar product and selling it in different geographies, or if, for example, the firm operated in a high tech industry that was characterized by the introduction of new products on a regular basis and this firm typically introduced new products consistent with the industry trends. The

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prospect of entry into the market should be timely, likely, and sufficient to provide a competitive constraint on the dominant firm for some time period but for the exclusive arrangement.

### *Other evidence of harm to competition*

83. The timing of the introduction of an exclusive dealing arrangement can be significant in determining its intended and likely effects. An exclusionary motivation may be suggested when the arrangement seems to have been a response to competitive inroads by existing competitors or the appearance of new entry threats. However, exclusive dealing arrangements adopted under such circumstances could also be reasonable responses to actual or newly threatened free-riding on investments made by a dominant firm. As a general matter, the importance of any one piece of evidence can be determined only in the context of other evidence.
84. Documents created by the dominant firm in the ordinary course of business that shed light on reasons for an exclusive arrangement and the competitive situation can inform the assessment of the intended and likely effects of the exclusive dealing arrangement.
85. Documents consistent with anticompetitive effect include those which recognise an anticompetitive intent, those that are consistent with there being no other reasons for the exclusivity other than to harm competition, and those documents that recognise elements of the theory of harm.
86. The dominant firm's business documents may refer to a desire to prevent entry or otherwise harm competition.<sup>13</sup> For example documents created by a dominant wholesaler indicating that the exclusive adoption of its product by its largest retailers has stabilized prices in the wholesale or retail market would be consistent with the exclusion causing harm. Conversely, documents indicating that the inability to sign all major

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<sup>13</sup> This is different from the desire to harm rivals. Care should be taken when interpreting such statements.

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customers to exclusive agreements has destabilized prices may also indicate harm to end users.

87. Alternatively the dominant firm's business documents may suggest that the exclusive dealing arrangement could not be expected to produce net benefits for it without weakening competition from its rivals. For example, internal documents of the dominant supplier may indicate that securing exclusivity would require substantial costs, e.g., compensating distributors or retailers for foregone sales opportunities of competing goods, but result in no (or insignificant) additional sales of the dominant firm's goods in the short term. This may suggest that the arrangement would make economic sense to the upstream party only if it weakened competition in the dominant firm's market. That is, the most reasonable inference from such facts may be that the dominant firm benefitted from not having to lower its prices to compete with other sellers.
88. Other relevant documents that are consistent with the theory of harm can include documents referring to one of the dominant firm's most important strategic assets as its size or "must have" status. They can also include those of the target firm assessing its strength and the strength of its competitors, or the importance of (certain) retailers for competitors, strategy documents of distributors or retailers assessing the strength of the products they sell and that determine which products to carry, and independent comparative evaluations of products that recognize competitors have a superior product.
89. It may raise concerns if a dominant supplier of a good add a requirement to an existing contract with a downstream distributor that it not carry a competing product, but makes no other changes to the terms of the contract nor any other changes to the business relationship. It would be difficult to argue that such exclusivity was promoting some efficiency

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since there are no new relationship specific investments.<sup>14</sup> Similar reasoning applies if a dominant firm agree with a downstream firm to engage in joint development of a product to be sold in market A, only if a set of downstream firms handled the dominant firm's products exclusively in an unrelated market B. Again it is difficult to infer that the exclusive arrangement supported some efficiency since markets A and B are not related.

90. Complaints by distributors or retailers need to be considered carefully. Firms will often complain that exclusivity arrangements take away profit opportunities, but this is not evidence of competitive harm. The mere fact that a firm complains about exclusivity does not mean it is anticompetitive.
91. Distributors can benefit from both pro-competitive and anticompetitive arrangements. It is therefore important to bear in mind that when distributors favor exclusive dealing arrangements, the reason may be that the arrangements are anticompetitive and the resulting additional profits are shared among the parties to the arrangement.

### *Sources of relevant evidence*

92. Documentary evidence may be obtained from the firm under investigation, its customers and competitors. Each source may provide information that is relevant to various aspects of the case, and particularly whether the degree and nature of foreclosure is sufficient to harm competition. In addition, testimonial evidence may be of similar value.
93. The firm under investigation may have documents such as business plans, strategic plans, or marketing plans that may show the purposes and effects

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<sup>14</sup> It might be the case that a downstream firm began to free ride on an already existing relationship specific investment and the exclusive is a way to stop such behavior. In this case one would expect to see other evidence of the dominant firm trying to protect some existing relationship specific investment. This would constitute an efficiency if the exclusive arrangements were necessary for the dominant firm to continue such investments into the future.

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of the exclusive dealing arrangement, including whether it has a legitimate business justification or is motivated by a desire to foreclose competitors. Similarly, the firm under investigation may have documents that it used to persuade its customers to agree to an exclusive dealing arrangement, or that explain the details of the arrangement to senior management.

94. Distributors and retailers may have documents relevant to their decision to enter into the exclusive dealing arrangement. Similarly, these documents may show any benefits they derive from the exclusive dealing arrangement.
95. Competitors of the firm under investigation may also have documents that shed light on the competitive effects of an exclusive dealing arrangement. In particular, business planning documents as well as business records regarding sales may help to establish the effects on individual competitors from an exclusive dealing arrangement. For example, such documents may help to determine whether the exclusive dealing deprives competitors of scale economies to such a degree that competition may be harmed. Conversely, these documents may help establish whether there are adequate alternative sales channels for competitors to use.
96. Price data typically can be obtained from the selling parties. Such information may be contained in business documents that track sales, sales contract summaries, or strategic documents relating to pricing strategies. For some products, third-party firms may keep track of industry data such as sales levels and average price levels.

## V. JUSTIFICATIONS AND DEFENCES

### A. Introduction

97. When exclusive dealing appears to harm competition, parties to the arrangement may raise justifications and defences to show that it also has

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positive competitive or economic effects, so that the conduct ought not be condemned.

98. A number of potential efficiency benefits can result from exclusive dealing. Some of the more common efficiency arguments raised as defences for exclusive dealing include addressing problems of interbrand free riding and investment hold-up problems by providing a better alignment of incentives and more stable market conditions within which manufacturers and retailers can make longer-term investments.
99. An agency should not necessarily refrain from considering possible efficiencies until after a determination of plausible or likely anticompetitive effects has been made. In many cases it will be advantageous for the agency to consider possible efficiencies from the outset. They may be relevant both for decisions on the prioritisation of cases and also to how the agency formulates and thinks about its theory of harm and the evidence needed to support it.

### **B. Potential efficiencies**

*Encouraging dealers to promote a manufacturer's products more vigorously*

100. Most justifications of exclusive dealing turn, at least in part, on the theory that such arrangements effectively align the interests of suppliers with their distributors. One way in which this may be useful is where a supplier wants to rely on a distributor to promote its product to customers. While the supplier will have the incentive to promote the specific benefits of its product relative to the alternatives available, a distributor that sells multiple competing products may be relatively indifferent as to whether a customer chooses that specific supplier's product or a competing product. Alternatively it may wish to promote the product on which it earns the highest margin. A supplier may therefore legitimately wish to align the

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interests of the distributor with its own in order to ensure its product is sufficiently promoted by the distributor.

101. This alignment of interests can be achieved, at least theoretically, by a detailed contract, specifying for example types of promotion, advertising rules or display requirements, necessary investment in marketing and personnel, hours of operation and required dedication of effort to the brand. However, contracts of this sort (rather than a simple contract of exclusivity) can be expensive to administer and monitor and may still be incomplete and imperfect.
102. By making the relationship exclusive, it may be possible to better ensure that the distributor's interest is aligned with that of the manufacturer. The exclusivity effectively creates the incentive for the distributor to be more "loyal" to the supplier and the brand, and to commit its resources to the promotion of the specific brand. As a result, in some circumstances it could result in more effective interbrand competition between suppliers of competing products than would occur if each distributor represented a number of suppliers.

*Encouraging suppliers to help distributors by providing services or information benefiting consumers*

103. A related potential efficiency is that exclusive dealing can provide incentives for suppliers to assist distributors. If assistance provided by the supplier will benefit not only sales of its own product, but sales of competing products, incentives to assist will be minimized, but if the improvements will only benefit the supplier, then the willingness of the suppliers to assist distributors will be greater.
104. This assistance can take many forms depending on the product in question. It can involve financial support by way of equity investments, loans, loan guarantees or similar types of financial support. It can involve transfer of expertise through product or sales training. It can involve the loan of

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personnel to assist the distributor. It can involve efficient joint promotion, marketing or advertising between the supplier and its various distributors.

105. These types of assistance may represent an efficient way to balance the marketing of the product between the supplier and distributor. For example, the supplier may be able to access capital at lower cost than the distributor. The supplier may have greater technical expertise with respect to the product that it can share with the distributor. It may also have the ability to advertise its goods more efficiently. However, without the alignment of interests created by the exclusive dealing arrangement it may be more difficult to take advantage of these opportunities.

### *Addressing problems of free-riding between suppliers*

106. Exclusive dealing can also reduce the risk of free riding by one supplier on the efforts of another supplier. Free-riding between suppliers can occur where investment by suppliers at a distributor's premises may also attract customers for its competitors. For example, one supplier's product may bring customers into the distributor because it was vigorously advertised through the effort of the supplier. If at this point the distributor can then sell a competing supplier's product, on which it makes more profit, the manufacturer's willingness to invest may be undermined.

### *Addressing "hold-up" problems for customer-specific investments*

107. Sometimes a supplier may need to make investments, for example in special equipment or training, in order to supply particular customers. Where such investments need to be relationship-specific, such that the supplier cannot then use it to supply other customers, it may not want to commit the necessary investments before it is sure that the customer will commit to purchase solely from that supplier, or to purchase a certain quantity. In some circumstances an exclusive dealing arrangement may be necessary to provide the supplier with the required level of certainty needed to make the investment.

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### *Allowing suppliers to control distribution quality more easily*

108. Exclusive dealing has the potential to improve the supplier's ability to improve the quality of distribution in several ways. Firstly, if it reduces the number of distributors that the supplier has to deal with, it may make it easier for suppliers to monitor distributors. If each distributor deals with multiple products, each supplier has to incur costs to monitor the distributor in its representation of their product.
109. Secondly, if the distributor is exclusive, then the nature of the distributor's offering, such as the shop set-up, branding and presentation can be tailored to a particular supplier's product, so as to make it a more attractive offering to the public.
110. Thirdly, as discussed above, exclusive dealing can increase the distributor's incentives to promote a particular supplier's product. As a result, the supplier's need to monitor and police the distributor may be reduced.
111. In some circumstances, exclusive arrangements may also reduce, to at least some degree, the uncertainty from fluctuations in demand. This may be of particular benefit for products for which production and supply planning is important. Where distributors are committed exclusively to single suppliers, suppliers may have a stronger incentive to ensure that each distributor gets sufficient supply even in times of potential shortage. This incentive may be reduced if the distributor were also to sell competing products, as the supplier would face more uncertainty that its products (rather than competing products) would be sold. A related point is that an exclusive dealing arrangement may allow distributors to shift some of the risk of unexpected changes in demand to suppliers, by making it more attractive for the supplier to take on that risk.

### **C. Assessing Efficiencies**

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*Are the parties able to achieve the efficiencies through less restrictive means?*

112. Where a challenged exclusive dealing arrangement is defended by the parties on the basis that it gives rise to efficiencies, it is necessary to examine whether those efficiencies are related to the exclusive arrangement, and if there are other ways to achieve the efficiencies through less restrictive means. For example, a typical question would be whether efficiencies claimed as a result of the exclusive dealing arrangement might be achieved as effectively by a contract specifying quantities or by other contractual terms that did not require exclusivity. Are there other ways to effectively align the incentives which are assumed to be important? Are there other ways to deal with the risks of free riding?
113. The question of whether or not the efficiencies could be achieved in a less restrictive way is factually difficult. As a practical matter this issue will typically arise after the fact, when some challenger (whether an agency or private plaintiff) is suggesting that the arrangement is anticompetitive and is proposing a variety of possibly less restrictive approaches to achieve the goal. Care should be taken not to necessarily accept the effectiveness of these assertedly less restrictive approaches at face value. Similarly, care needs to be taken in assessing the efficiency justifications advanced by the contracting parties. Agencies need to be careful not to assume any justification offered is presumptively correct.
114. If it appears, upon careful examination, that there are obvious and significantly less restrictive alternatives than the exclusive dealing arrangement chosen, that may suggest that the efficiency justifications proposed are, at least to some degree, a pretext for an anticompetitive objective. On the other hand, if the procompetitive explanations for those restrictions seem plausible, or it is difficult to assess which alternative is less restrictive or more likely to give rise to the benefits, careful analysis may be required before second guessing a business decision that has already been taken.

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### *Balancing efficiencies against competitive harm*

115. Assuming that there are both anticompetitive effects and legitimate efficiencies created by the exclusive dealing or single branding arrangement, the question is, what does one then do? How does one decide the case?
116. The exclusive arrangements may, for instance, give rise to efficiencies in product promotion and marketing, as contemplated above, which it is reasonable to conclude would be difficult to replicate by detailed, prescriptive contractual provisions. Or, there may be a genuine danger of competing brands free riding on the product promotion efforts of the dominant supplier, absent an exclusive dealing arrangement. On the other hand, the exclusivity provision may also create serious difficulties for alternate suppliers to reach consumers. How should agencies take account of these competing effects of the conduct?
117. It is not right, at least as a matter of policy, that any efficiency, however minimal, outweighs any anticompetitive consequence, however large.<sup>15</sup> At the same time, the ability to accurately determine both anticompetitive harm and procompetitive efficiencies, let alone precisely calibrate them one against the other to determine which is larger is, as a practical matter, extremely difficult.
118. The general approach taken, at least in theory (since as a practical matter cases seldom arise where both significant competitive harm and efficiencies are expressly recognized) is to develop a sense of the importance of both types of effects (efficiency enhancing and anticompetitive). As noted above, while quantification is rarely done in practice, it may be possible to develop some appreciation for the relative magnitude of the efficiencies and of the anticompetitive effects. When the

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<sup>15</sup> ICN Report on Exclusive Dealing, *supra* note 7 at 19 (twelve of the responding agencies said efficiencies are balanced against anticompetitive effects; however, two countries, Turkey and New Zealand, indicated that efficiencies may not have to be balanced against competitive harms, see *ibid*).

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harm is likely materially greater than the efficiency, the practice tends to be condemned. When the efficiency is likely materially greater than the harm, the practice is not likely to be condemned. Where the harm and the efficiency both seem likely to be at the same level of magnitude, a general principle of non-interference in the market place may suggest that the practice not be condemned.<sup>16</sup> Alternatively, a presumption in favour of enhancing short-run rivalrous competition may suggest a different outcome in close cases.

119. In considering efficiencies and competitive harm from exclusive dealing, the agency should determine whether the efficiencies created, even if genuine, are likely to accrue only to the dominant firm, or are likely to be passed on to consumers. Whether this is relevant to an assessment of an efficiency 'defence' to exclusive dealing may turn on the particular competition regime in place in a particular jurisdiction. Most jurisdictions apply a consumer welfare standard and thus require that consumers overall benefit from the arrangement.

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<sup>16</sup> *ICN Report on Exclusive Dealing*, *supra* note 7 at 3 (many jurisdictions require objective justifications or defenses to outweigh the anti-competitive effects; others only require the negative impact be proportionate to the claimed justifications).