



International
Competition
Network

ICN Unilateral Conduct Regional Workshop

The Analytical Framework

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What's it all about?

- What do we mean by “unilateral conduct?”
- *“Unilateral conduct laws prohibit dominant enterprises from misusing their market power to distort competition.”* (ICN Workbook)
- Anti-competitive exclusionary conduct
- Firm seeking to protect, increase or extend their market power by excluding competition
- Not “plain vanilla monopoly pricing” – but price structure may be exclusionary
- Not coordinated conduct – but exclusion may support coordination and/or be coordinated

Why does it matter?

- Anti-competitive exclusion is a core antitrust issue
- Conduct which undermines the competitive process and all the benefits that brings for consumers and economic efficiency
- Baker refers to exclusion as an “involuntary cartel”

Range of Conduct

- Many ways in which anti-competitive exclusionary conduct can manifest itself:
 - predatory pricing
 - exclusive dealing
 - bundling and tying
 - refusal to deal
 - loyalty pricing
 - raising rivals costs
 - input hoarding
 - sabotage
 - sham litigation
- All forms of anti-competitive exclusion involve making entry or competitive conduct more costly or risky

Distinguishing anti-competitive exclusion

- Forms of conduct that may be anti-competitive in some circumstances may be pro-competitive and/or efficiency enhancing in other circumstances:
 - predatory pricing or competitive pricing?
 - exclusive dealing to prevent free riding and incentivise distributors or to exclude competitors?
 - bundling in response to consumer demand or to exclude competition?
- Challenge for enforcement agencies is to distinguish where conduct is anti-competitive and where it is pro-competitive or benign
- Danger of over enforcement and deterring pro-competitive conduct
- But also danger of under enforcement

What is going on here?

- All important question given the risk of error
- What is the firm trying to achieve?
- Is anti-competitive exclusion rational?
- Is there an alternative explanation for the conduct?
- Is the conduct expected to be profit maximising through excluding competition or by promoting efficiency and/or competition?
- Is there harm to *competition* and consumers or just to individual *competitors*?
- Strong analytical framework and factual complexity
- What may appear to be clearly exclusionary often turns out not to be

Legal Framework

- Limited scope for short cuts and per se breaches given error risks and complexity
- Legal framework differs across countries
 - Some countries have multiple tests
 - Some common elements reflect error risk and complexity
- Often include a dominance/substantial market power threshold
- Anti-competitive effect/purpose test
- Whatever the legal framework, critical issue is to distinguish where there is harm to competition and consumers and where there is not

Relevance of Dominance/SMP

- Dominance/SMP (substantial market power) is often a threshold test
- Firm lacking market power lacks the ability and/or incentive to exclude and cannot SLC
- Market power is not binary – degrees/dimensions
- Anti-competitive exclusion often associated with “fragile market power”
 - market power which is under threat of competition
 - or extension/leveraging of market power
- Analysis of market power needs to be integrated with theory of harm to competition (*Salop’s First Principles*)
 - market power to do what?
 - does the firm have the market power to engage in the alleged conduct and cause harm to competition?
 - How does the alleged conduct increase/maintain/leverage market power as compared to the world absent the alleged conduct?
- Jiyoung will focus on the assessment of dominance in the next presentation

Exclusive dealing and exclusion

- The hypothetical which we are using in this workshop involves exclusive dealing
- Exclusive dealing epitomises the difficulty of analysing unilateral conduct
 - extremely common
 - generally benign or pro-competitive, aligning the incentives of suppliers and distributors and limiting free riding
 - may involve anti-competitive exclusion
- *Standard Fashions* classic case of anti-competitive exclusive dealing
- Adrian will focus on the assessment of exclusive dealing in the third presentation of this session