INTERNATIONAL COMPETITION NETWORK

Report on Single Branding/Exclusive Dealing

Prepared by

The Unilateral Conduct Working Group

Presented at the 7th Annual Conference of the ICN

Kyoto, April 2008

TABLE OF CONTENTS

Executive Summary

This paper was prepared by the ICN Unilateral conduct Working Group (UCWG) for the 7th Annual Conference of the ICN in April 2008. In 2007-08, the Working Group began its second phase of work focussing on the analysis of specific types of unilateral conduct. Working Group members developed and responded to a questionnaire on the analysis and treatment of predatory pricing and exclusive dealing by ICN member competition agencies. This paper on single branding/exclusive dealing is based on the responses covering thirty-three jurisdictions.

In the majority of these jurisdictions exclusive dealing is covered by general unilateral conduct rules and policies. Some jurisdictions have specific rules governing exclusive dealing. Some of these rules, however, apply not only to dominant firms but to all undertakings.

The responses broadly identify the following elements used in the assessment of exclusive dealing under unilateral conduct rules: the existence of a dominant position or substantial market power; existence of an exclusive dealing arrangement according to the statutory provisions or case law; anti-competitive effects; and justifications and defences.

Definition of exclusive dealing

Exclusive dealing arrangements are commonly defined as arrangements that require a buyer to purchase all of its requirements or a large extent thereof from one (dominant) seller, or a supplier to sell all of its products or services or a large extent thereof to the dominant firm. Many jurisdictions indicate that exclusive dealing arrangements may, but do not necessarily have to cover 100% of the purchases or sales of the non-dominant party to the arrangement, while a few jurisdictions state that arrangements will be held to be exclusive only if the arrangement covers all purchases or sales.

Effects

The assessment of anticompetitive effects is an important element in the analysis of exclusive dealing arrangements. A majority of jurisdictions indicate that actual or likely foreclosure effects - defined by several agencies as hindrance of actual or potential competitors' access to the market and thereby weakening competition - must be shown for a finding of an abuse, while in several other jurisdictions, agencies are not required to show foreclosure effects.

In some jurisdictions, other effects, such as on consumer welfare, must be shown.

Justifications and defenses

The majority of jurisdictions indicate that justifications/defenses, including efficiencies, are, in general, available to dominant firms. As regards efficiencies, agencies mention, *inter alia*, relationship-specific investments, facilitating innovation and cost reduction.

In many jurisdictions, objective justifications including benefits following from efficiencies must outweigh anticompetitive effects of the conduct under investigation. Other jurisdictions require that restrictions from the conduct be proportionate to the reasons claimed to justify the conduct.

I. INTRODUCTION

This paper addresses conduct referred to in the introductory paragraph of the questionnaire as "conduct [by a dominant firm or a firm with significant market power[1]] that requires or induces customers or suppliers to deal solely or predominantly with that firm".

The paper is based on thirty-six responses to the respective part of the questionnaire[2] covering thirty-three jurisdictions. Thirty-two of the answers were provided by competition agencies, four by NGAs[3].

II. LEGAL BASIS AND ENFORCEMENT

All respondents to the questionnaire indicate that their competition law provisions address single branding/exclusive dealing (in the following, the terms single branding and exclusive dealing are used interchangeably). The following focuses on answers concerning conduct entered into by a dominant firm noting where respondents have addressed conduct of other firms.

1. Specific v. general provisions

In twenty-nine jurisdictions exclusive dealing is covered by general unilateral conduct rules[4]. Eight replies state that their jurisdictions have specific rules governing exclusive dealing[5]. Some of these provisions, however, do not only apply to dominant firms but to all undertakings[6].

Unilateral conduct rules govern conduct entered into by a single firm. As regards exclusive dealing, however, it must be stressed that such conduct is mostly based on agreements entered into by at least two parties. It is thus not surprising that many replies reference antitrust law, regulations, guidelines and jurisprudence concerning vertical agreements, which apply not only to dominant firms[7].

---

[1] The terms dominant firm and firm with substantial market power are synonymous for the purposes of this report. For ease of reference, the report uses the term dominant firm.

[2] In addition to the replies, subsequent comments have been taken into account.

[3] Christopher (Australia), Davis, Kapoor, Lambert & Sokol (United States), Hoffet, Meinhardt & Venturi (Switzerland), and Pera (Italy).

[4] Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, European Commission, France, Germany, Israel, Italy, Jamaica, Japan, Jersey, Kenya, Korea, Latvia, Lithuania, New Zealand, Norway, Peru, Russia, Singapore, Slovak Republic, Switzerland, Taiwan, Turkey, United Kingdom, and United States.

[5] Australia, Canada, Jamaica, Japan (In Japan, exclusive dealing is covered under "unfair trading practices" which include a specific exclusive dealing provision.), Mexico, New Zealand, South Africa, and United States (In addition to Section 1 and Section 2 of the Sherman Act, which are general statutes covering exclusive dealing, the U.S. also has a statute, Section 3 of the Clayton Act, which specifically addresses certain types of exclusive dealing arrangements that may substantially lessen competition or tend to create a monopoly.).

[6] Australia, Jamaica, Japan, and New Zealand.

[7] Such laws, regulations, guidelines and jurisprudence are used in many jurisdictions as initial guidance when assessing conduct of dominant firms that involve exclusive dealing.

2. Basic elements of the analysis

In very broad terms, taken as a whole, the responses identify the following elements used when assessing exclusive dealing under unilateral conduct rules[8]: the existence of a dominant position or substantial market power; existence of an exclusive dealing arrangement according to the statutory provisions or case law; anti-competitive effects; justifications and defenses[9].

Several respondents indicate that it is not necessary in their jurisdiction to show anticompetitive effects and/or that justifications/defenses are not admitted[10]. In some jurisdictions where anti-competitive effects of exclusive dealing arrangements need not be shown such effects are[11] or seem to be presumed[12]. In a couple of jurisdictions, exclusive dealing arrangements may be exempted from statutory prohibitions after notification with the competition authority[13]. As regards justifications/defenses, generally speaking, those jurisdictions that assess the effects of an exclusive dealing arrangement also allow for justifications or defenses[14]. On the other hand, two jurisdictions that do not assess effects allow for justifications[15].

The assessment of dominance/substantial market power is dealt with in the Report the Working Group presented at the 6th Annual Conference of the ICN in Moscow in 2007[16]. This section addresses the remaining three steps in the assessment, that is the existence of an exclusive dealing arrangement, anti-competitive effects and justifications/defenses.

3. Enforcement

In twenty-seven jurisdictions represented in the replies, exclusive dealing can be addressed both by agencies and in private litigation[17]. On the other hand, the replies by Kenya and Mexico state that their jurisdictions do not allow private cases.

---

[8] See in particular the responses by Australia, Brazil, Bulgaria, Canada, Chile, Czech Republic, European Commission, France, Germany, Italy, Jamaica, Japan, Jersey, Korea, Lithuania, New Zealand, Singapore, South Africa, Taiwan, Turkey, and United States.

[9] Note that some jurisdiction do not assess effects but take into account justifications/defenses (Mexico, Russia).

[10] See further below under IV. and VI.

[11] See, e.g., Russia's response.

[12] Kenya.

[13] Australia (Exemptions from liability under section 47 can be obtained by either lodging a notification or obtaining an authorization from the Australian competition regulator, the ACCC. Authorization requires the applicant to show that the public benefit from the conduct outweighs any anti-competitive effects), Israel.

[14] Australia, Brazil, Canada, Chile, European Commission, France, Germany, Italy, Jamaica, Japan, Jersey, Korea, New Zealand, Singapore, South Africa, Turkey, and United States.

[15] Mexico and Russia.

[16] ICN Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, available at http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Objectives of Unilateral Conduct May 07.pdf.

[17] Australia, Brazil, Bulgaria (in the framework of the general rules on tort), Canada, Chile, Czech Republic, Denmark (a damage claim based on the abuse of a dominant position can be brought in private litigation both as a "stand alone" and a "follow-on" action), European Commission, France, Germany, Israel, Italy, Jamaica, Japan, Jersey, Korea, Latvia, Lithuania, Norway, Peru (not entirely clear whether a case can be brought in private litigation or whether private companies only have the possibility to report cases to the competition authority that will then conduct an administrative proceedings), Russia, Serbia (Note that in Serbia private enforcement (only) allows for damages and loss of profit claims.), South Africa, Switzerland, Turkey (note that in Turkey, private litigation is possible in theory but not very common), United Kingdom, and United States.

The agencies covered by the responses have investigated a number of exclusive dealing cases beyond a preliminary stage in the last ten years. However, not all agencies are in a position to give a precise number of all the cases reviewed[18]. Nine agencies reply that they have investigated more than ten cases (Brazil (60), Canada (19), France (in 27 cases violations were found), Germany (19), Japan (39), Kenya (40), Mexico (13), Taiwan (15), USDOJ (24)). Nine agencies state that they have investigated less then ten but at least one case (Chile (1), European Commission (EC) (violations found in five cases), Italy (5), Jamaica (6), Korea (1), Latvia (1), Lithuania (5), Norway (1), Peru (2), Switzerland (2), USFTC (2)). Seven agencies responded that they have never investigated an exclusive dealing case beyond a preliminary phase (Bulgaria, Czech Republic, Jersey, New Zealand, Serbia, Singapore, Slovak Republic).

According to the responses, agencies or courts have found violations in a total of one-hundred-eighty cases[19]. Ninety-three of these cases resulted in agency or court decisions and seventy-six investigations in a settlement with relief. In fifty-seven cases the agency determined that that the practice did not violate antitrust rules[20].

In a total of twenty-nine cases the agency decision or settlement was challenged in court where nineteen cases were confirmed and ten cases overturned[21].

As regards private litigation, most replies only indicate whether private litigation may be pursued in the respective jurisdiction without giving more details or representative examples. New Zealand mentions as an example the case *Bond & Bond Ltd v Fisher & Paykel Ltd*[22] which involved an application for an interim injunction which was not granted. The Russian FAS points out that, in practice, plaintiffs find it more efficient to apply to the FAS to take action against an abusive practice, even though in theory they may apply to the court which in turn would require the FAS' opinion to make its judgment. The Canadian Competition Bureau explains that exclusive dealing under section 77 of its law can be challenged by private parties pursuant to private access to the Competition Tribunal. The available remedies in such proceedings are limited to cease and desist orders; the Tribunal is not empowered to make an award of damages. The Bureau states that to date, only two applications under section 77 have been made[23]. The German Bundeskartellamt estimates that about five to ten cases a year based on abusive exclusive dealing are brought in private litigation in Germany. Two private cases worth mentioning concerned *Stadtwerke Aachen* (2001) and *Gasversorgung Süddeutschland* (2002), in which the Bundeskartellamt was actively involved as *amicus curiae* before the German Federal Court of Justice. These cases were important steps in

---

[18] Note also that not all of the cases mentioned in the following were based on provisions that apply only to dominant firms.

[19] Brazil (51), Canada (2), Chile (1), Denmark (4), European Commission (5), France (27), Germany (14), Italy (3), Jamaica (2), Japan (2), Kenya (40), Korea (1), Lithuania (5), Mexico (8), Norway (1), Peru (2), Taiwan (8), Switzerland (2), United States (2). Note that these and the following numbers do not cover Australia, Israel, Russia, South Africa, Turkey, and the United Kingdom, since their responses do not indicate any case numbers.

[20] For further details, please refer to the charts in the annex to this document. The difference between the total of one-hundred-eighty cases, in which violations were found and the sum of decisions and settlements results from the fact that Denmark, Italy, and Peru have mentioned cases in which violations were found without specifying whether these cases resulted in agency decisions or settlements with relief.

[21] For further details, please refer to the charts in the annex to this document.

[22] (1986) 2 TCLR 79; (1987) 1 NZBLC 102,622.

[23] Both applications were corollary to applications made under s. 75 (refusal to deal). In *B-Filer vs. Bank of Nova Scotia* (2007) the Tribunal granted leave only under s. 75, and in *Construx vs. GM Canada* (2005), the Tribunal did not grant leave at all.

developing the principles applied in the long-term gas supply contracts case[24]. Other typical cases involve the sealing off of sources of supply in certain distribution channels.

III. EXCLUSIVE PURCHASING AND SUPPLY ARRANGEMENTS

1. Definition

Exclusive dealing arrangements are commonly defined as arrangements, which require a buyer to purchase all of its requirements or a large extent thereof only from one (dominant) seller, or, respectively, as arrangements, which require a supplier to sell all of its products or services or a large extent thereof to the dominant firm[25].

2. Arrangement and relevance of English clauses and other contractual provisions

A. No formal requirements

The US NGA reply states expressly what transpires from the other answers as well: Exclusive dealing obligations need not be formalized, e.g., in a written agreement.

Furthermore, the German Bundeskartellamt points out that an exclusive dealing obligation does not need to arise from only one contract establishing exclusivity between the business partners. The same effect can be achieved by concluding a number of contracts, which add up to cover all or a substantial part of the supply or demand (so called contract stacking). In the long-term gas supply contracts case, the Bundeskartellamt accordingly treated a number of such contracts as one contract[26].

Generally, the duration of the exclusivity arrangement is relevant when assessing the anti-competitive effects[27], *i.e.* a given duration of an arrangement does not, in principle, bring about *per se*-illegality. However, in some jurisdictions, the law provides that the agency shall not take action if exclusive dealing is only engaged in for a reasonable period of time to facilitate entry of a new supplier or a new product in the market[28].

The EC points out that Article 82 EC not only covers *de jure* but also *de facto* exclusivity[29]. In the *Van den Bergh* case[30] the Commission concluded that although retailers were not legally prevented from selling impulse ice cream other than that of the dominant supplier HB who had supplied freezers to retailers free of charge they were *de facto* restricted from doing

---

24 As to the *Stadtwerke Aachen* case, see press release at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_11_07.php.

25 See, *e.g.*, European Commission, France, Germany, Italy, Turkey, and United Kingdom.

26 Bundeskartellamt, 13 January 2006, Case B 8 – 113/03, *Long-term gas supply contracts*, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B8-113-03.pdf, see also press release in English at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2006/2006_01_17.php. The decision was confirmed by the Düsseldorf Higher Regional Court, 4 October 2006, *E.ON/Ruhrgas*, see WuW/E DE-V, 1147.

27 See further below under IV.

28 See section 77 (4) of the Canadian Competition Act and Section 33 (a) (i) of the Jamaican Fair Trade Act.

29 See also the examples given in the reply of the French Competition Council and the response of Bulgaria (which refers to a case that concerned a vertical agreement).

30 Case T-65/98 *Van den Bergh Foods Ltd* v *Commission* [2003] ECR II-4653.

so by the commitment not to use the freezers for selling competing brands (most outlets do not have space or means to have a second freezer[31]).

B. Relevance of English clauses and other contractual provisions

Thirteen replies indicated that the use of clauses such as English clauses is of importance when assessing exclusive dealing arrangements in their jurisdiction[32]. English clauses require the customer to report any better offer to the supplier and prohibit the customer from accepting it unless the supplier does not match it.

Some responses indicate that the use of such clauses may, in the first place, result in a finding that an exclusivity relationship exists. In this respect, Denmark indicates that it found a clause providing for a right of first refusal to result in *de facto* exclusivity in agreements entered into by the Carlsberg Brewery covering all beer supply agreements in the horeca-segment (hotels, restaurants and catering)[33].

Several responses underline that while such clauses do not render an arrangement illegal *per se* (since most jurisdictions focus on effects rather than on the form of the arrangement), the agency considers them to have the same effect as an exclusive dealing obligation[34], especially if the buyer has to reveal who makes the better offer since this may discourage competitors to make competing offers to the dominant firm's customers[35].

The Italian competition authority refers to cases where it found that English clauses resulted in exclusionary effects and were abusive[36].

Furthermore, the Italian NGA response and the Canadian Competition Bureau point out that rights of first refusal, evergreen (automatic renewal) clauses, English clauses or most favoured nation clauses may also pursue the aim of binding customers to the dominant firm or enhance barriers to entry and thus enhance or contribute to anti-competitive effects of exclusive dealing arrangements[37].

---

31 *Ibid.*, at paragraph 264.

32 Brazil, Canada, Chile, Czech Republic, France, Germany, Italy, Jamaica, Japan, Jersey, Lithuania, Peru, and Russia.

33 Similarly, in cases decided by the Lithuanian Competition Council concerning the oil refinery *Mazeikiu Nafta*, various provisions taken together seem to have resulted in the finding that an exclusivity arrangement existed. Likewise, the Bundeskartellamt treats arrangements that contain clauses resulting in an exclusive supplier-purchaser relationship like contract containing explicit exclusivity clauses. The Bundeskartellamt refers to the decision of the Higher Regional Court Düsseldorf, 7 July 2003, Case VI-U (Kart) 24/99, *SW Krefeld/Europower* and the *Hoffmann-LaRoche* judgment of the European Court of Justice, Case 85/76, [1979] ECR 461, paragraphs 102 *et seq*.

34 See in particular replies by Brazil, Chile, European Commission, France, Germany, and Jamaica.

35 See, e.g., the reply by the European Commission.

36 Cases *Unapace/Enel* and *Comportamenti abusive di Telecom Italia.*

37 Canada refers to *Laidlaw* where Laidlaw's long-term exclusive contracts for waste disposal services also involved evergreen clauses, excessive damages for termination, meet-or-release clauses, and negative-option pricing. In *NutraSweet*, meet-or-release clauses and most-favoured-nation clauses were used as well. In *Nielsen*, the Tribunal held long-term contracts with most-favoured-nation clauses and strict termination conditions, combined with staggered contract renewals to significantly increase barriers to entry and to be anti-competitive.

The responses of seven jurisdictions state that clauses such as English clauses do not make an otherwise legal exclusive dealing arrangement illegal[38]. The U.S. agencies response states that an otherwise legal exclusive dealing arrangement does not become anticompetitive because the agreement also contains additional provisions of these types. U.S. antitrust laws do not prohibit contractual provisions such as these or most favored nation clauses as exclusive dealing arrangements. Such provisions may, however, have anticompetitive effects because they can, in certain circumstances, either facilitate coordinated pricing or discourage procompetitive price-cutting.

3. 100% exclusivity and coverage of requirements to a large extent

The replies concerning twenty-two jurisdictions covered by the responses state that the exclusivity arrangement may, but does not need to cover 100% of the purchases or sales of the dominant firm's business partner[39]. The Danish, EC and UK agencies, in this respect, refer to the *Hoffmann-La Roche* judgment of the European Court of Justice that treated such agreements alike which cover all or most of the requirements of a buyer or seller[40].

Concerning the question what is meant by most of the purchases or sales, the German Bundeskartellamt points out that it has, in its practice, taken some guidance from Regulation 2790/1999/EC on Vertical Agreements, even though this Regulation does not apply to unilateral conduct[41]. Article 1 lit. b of the Regulation treats agreements causing a buyer to purchase from the supplier more than 80% of its purchases of the contract goods on the relevant market as non-compete obligations. Accordingly, in its long-term gas supply case, the Bundeskartellamt treated arrangements that covered more than 80% of the total demand of a purchaser as equivalent to such arrangements covering 100% because their effect is comparable[42]. Such exclusive dealing obligations have the effect of hindering a successful market presence or market entry of actual or potential competitors because they limit the possibilities of competitors of the dominant firm to supply (potential) customers to small amounts which do not allow them to gain a standing as suppliers of bigger amounts or even as exclusive suppliers. Likewise, the French Conseil has found in the *KalibraXE/EDF* decision[43] that a seller's requirement that its customers buy at least 80% of its energy consumption from the seller amounted to quasi-exclusivity[44]. The responses of Denmark, Jersey and Turkey agree that, generally, arrangements that cover more than 80% of the requirements by a buyer can be treated as an exclusive agreement. That does not, however, rule out that arrangements with a coverage of less than 80% of the requirements may also considered as exclusivity arrangements.

---

[38] See, however, the response of the European Commission that states that English clauses and single branding can be expected to have the same effects and to reinforce each other.

[39] Australia, Bulgaria, Canada, Chile, Denmark, European Commission, France, Germany, Italy, Jamaica, Japan, Jersey, Korea, Latvia, Lithuania, New Zealand, Serbia, Switzerland, Taiwan, Turkey, United Kingdom, and United States.

[40] See Case 85/76 *Hoffmann LaRoche v Commission* [1979] ECR 461.

[41] Commission Regulation of 22 December 1999 on the application of Article 81 (3) of the Treaty to categories of vertical agreements and concerted practices, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/1999/l_336/l_33619991229en00210025.pdf. The Regulation also covers exclusive supply agreements. Other responses also refer to the said Regulation (Bulgaria, France and Latvia).

[42] Bundeskartellamt, 13 January 2006, Case B 8 – 113/03, *Long-term gas supply contracts*.

[43] Competition Council decision n° 07-MC-01 of 25 April 2007, *KalibraXE/EDF*.

[44] The French Conseil explains that French Courts and competition authorities distinguish "total exclusivity" (all sales or purchases of a seller/buyer) and "quasi-exclusivity" (significant amount of sales or purchases).

The agency responses from Mexico and Russia indicate that they will find exclusivity only if a firm requires that all purchases come from it or all sales go to it, so that there are no commercial relations concerning a given product with a third party.

4. Exclusive supply arrangements

Many responses did not address agency practice concerning exclusive supply (or distribution) arrangements (*i.e.* arrangements that require a supplier to deal solely or predominantly with a dominant purchaser).

Other replies indicate, however, that the definition of exclusive dealing or the respective (in most jurisdictions general) provisions addressing abusive conduct of the dominant firm also cover exclusive supply arrangements[45].

The EC points out that exclusive supply obligations are only likely to result in anti-competitive foreclosure if most of the input suppliers are tied and if firms willing to purchase the respective product are unable to find alternative sources of supply, e.g. by way of upstream integration[46].

Furthermore, the Canadian Competition Bureau indicates that while section 77(2) of the Canadian Competition Act only addresses exclusive dealing whereby a supplier of a product requires a customer to deal only or primarily in products supplied by the supplier or his nominee, arrangements requiring a supplier to sell only to a dominant buyer could be the subject of a remedy under the abuse of dominance provision in section 79.

5. Does it matter if the arrangement was requested by the non-dominant business partner?

Nineteen[47] of twenty-five jurisdictions that responded answered that it did not matter whether the arrangement was requested by the non-dominant customer or supplier[48]. The EC points out that although it may be in the individual interest of certain customers to enter into the exclusive purchasing obligation with the dominant firm, this does not mean that all such obligations in a given market when taken together, are beneficial for the whole category of customers concerned. The JFTC and the KFTC remark that an exclusivity arrangement, requested by the non-dominant firm is not justified if it forecloses competitors or is anticompetitive.

The replies from the Canadian and the U.S. agencies underline that they may not find an exclusive dealing arrangement illegal when the arrangement was requested by the non-dominant firm: Canada points out that, if exclusive dealing is engaged in at the insistence of a non-dominant trading partner, such a circumstance might suggest that there was no “intended

---

[45] See the replies by Canada, European Commission, France, Germany, Japan, Kenya, Korea, Lithuania, Mexico (see Article 10 IV of the Federal Law of Economic Competition), South Africa (see Section 8(d)(i) of the Competition Act), and Turkey.

[46] See Commission’s decision in case COMP/E-2/38.381 *De Beers/Alrosa*.

[47] Australia, Brazil, Chile, Denmark, European Commission, France, Germany, Israel, Jamaica, Japan, Jersey, Kenya, Korea, Latvia, Lithuania, Mexico, South Africa, Taiwan, and Turkey.

[48] Many European agencies reference the ECJ’s *Hoffmann-La Roche* judgment and the Court of First Instance’s *Van den Bergh* judgment, some also jurisprudence of their countries’ courts (United Kingdom cites the CAT’s ruling in *Claymore Dairies*, Germany the Düsseldorf Higher Regional Court’s decision of 20 June 2006, VI-2 Kart 1/06 (V) in the *long-term gas supply* case).

negative effect on a competitor" and therefore fall outside the definitions of an anti-competitive act under section 79(1)(b) or "exclusive dealing" under section 77(1)(a). The U.S. agencies' reply notes that when a non-dominant customer proposes the exclusive arrangement, it increases the likelihood that the arrangement has been created so that both parties, and in particular the proponent of the arrangement, are obtaining procompetitive efficiencies from the exclusivity and, correspondingly, reduces the likelihood that the dominant supplier entered into the exclusive arrangement for anticompetitive purposes.

The replies from the Czech Republic, France, Jersey and Latvia draw attention to the fact that exclusivity arrangements may be sanctioned not only under unilateral conduct rules, but under provisions prohibiting anti-competitive agreements.

IV. EFFECTS

1. Foreclosure effects

Replies from twenty-two jurisdictions indicate that foreclosure effects must be shown for the finding of an abuse under unilateral conduct rules governing exclusive dealing [49]. On the other hand, five replies state that such effects need not to be shown[50].

A. What does foreclosure mean?

The responses from the agencies in Bulgaria, the EC, France, Germany, Italy, Russia and Turkey define foreclosure generally in terms of conduct by the dominant firm which is hindering or eliminating actual or potential competitors' profitable access to the market, thereby weakening competition.

The Italian Competition Authority describes market foreclosure as a restriction both of market access possibilities for potential competitors and of a competitor's ability to erode the market share of incumbent.

The Turkish Competition Authority's response states that market foreclosure means foreclosing an appreciable part of the market to competitors as a result of which competition in the market is weakened.

The EC points out that foreclosure can occur even if the foreclosed rivals are not forced to exit the market. Similarly, the JFTC describes foreclosure as a situation where it is made difficult for other undertakings to continue their business activities or where other undertakings are prevented from entering the market.

---

[49] See responses by Australia (section 47 (10) states that for the "ordinary" cases of exclusive dealing it is necessary to show anti competitive effects or intent), Brazil, Bulgaria, Canada, Chile, Czech Republic, European Commission, France, Germany, Italy, Jamaica, Japan, Jersey, Korea, Latvia, Lithuania, New Zealand (Section 36 is, however, concerned with anti-competitive purpose rather than effects.), Singapore, South Africa, Turkey, United Kingdom, and United States.

[50] Denmark (Note, however, that Denmark indicates that abuse is normally demonstrated by market analysis showing de facto foreclosure. Furthermore, Denmark expects to implement a more effects based analysis in the future), Kenya, Mexico (The agency must either show intent or effects), Russia, and Switzerland.

B. Which factors are taken into account to assess a market foreclosure effect?

Respondents answering the question which factors were taken into account to assess a market foreclosure effect indicate that they take all or most of the factors listed in the questionnaire into account *i.e.* 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 practicality of switching.

Specifically, in assessing a market foreclosure effect, the Italian Antitrust Authority has focused on whether the exclusive arrangement, because of its duration and the share of market involved, is likely to exclude actual or potential competitors from the market. Market specific aspects, such as the characteristics of the input under exclusive dealing agreement, or technological change are taken into account, too.

The U.S. agencies cite a number of factors used in assessing whether an exclusive arrangement is anticompetitive, including: the degree of market foreclosed; whether the degree of market foreclosure deprives a competing firm of the ability to obtain economies of scale that are sufficient to enable it to act as an effective competitor that could erode existing monopoly power; the availability of alternative distribution channels; the level of the distribution chain at which there is exclusivity; the duration of the arrangement; the relationship between the parties that deal exclusively; and whether the product is the type for which the consumer is likely to comparison shop.

In assessing a market foreclosure effect, the JFTC takes into account the structure of the market (market concentration, characteristics of the product, degree of product differentiation, distribution channels, difficulty in the market entry, etc.); the position of the firm in the market; the market share of parties affected by the conduct at issue and their positions in the market; and the impact of the conduct on business activities of the affected parties.

The French response emphasizes that the Competition Council considers the magnitude of the market shares of a dominant firm in the relevant market, the scope of the exclusivity and the cost of an early termination or shifting of costs to a non-dominant party to be key factors when assessing whether there is a market foreclosure effect.

For the German Bundeskartellamt, the percentage of the market demand/purchases covered by the arrangement and duration of the exclusive dealing obligation are the two most important factors to assess the possibility of foreclosure effects. They then assess whether there are, nevertheless, alternative sources of supply and possibilities of switching and significant barriers to entry.

The Mexican CFC states that any demonstration of a foreclosure effect will draw from the substantial market power determination that enables such practice to take place with an anticompetitive effect, which includes an examination of market shares, the firm's ability to set prices, barriers to entry, and access to inputs.

The Canadian Competition Bureau states its requirement to show that the conduct must be likely to have an exclusionary effect on a competing product or firm by impeding entry or expansion, or by any other means and that the exclusive dealing arrangement be likely to lessen competition substantially (namely, have an effect on competition).

The EC states that the extent of anti-competitive foreclosure is likely to be stronger if at the level of the dominant firm there are significant scale economies or learning curve effects and if the dominant firm is an unavoidable trading partner (e.g. because the relevant product is a must stock item or alternative suppliers face capacity constraints).

The most frequently mentioned factors in the responses are the percentage of the demand/supply covered by the arrangement (in many cases closely related to the level of dominance/market position), the duration of the exclusive dealing obligation (in many cases closely related to switching possibilities, *i.e.* possibility for early termination, and costs)[51], the existence of alternative sources of supply and the possibility and practicality of switching and barriers to entry and expansion[52].

(1) Market coverage

Substantial market coverage is cited by many respondents to be of importance when assessing foreclosure effects arising from the arrangement[53].

The EC notes that it can be expected that an exclusive dealing arrangement is more likely to result in anti-competitive foreclosure the larger the part of the market covered by the conduct taken cumulatively (the total tied market share) and the higher the percentage of individual customer's purchases required by the obligation. The U.S. agencies' reply points out that dealing affecting only a small fraction of a market cannot have the requisite effect on competition[54].

The German Bundeskartellamt and the EC also state that they take into account situations where there is a network of similar obligations which results in a substantial portion of the market being covered by exclusive dealing obligations[55].

According to the EC, it further also matters whether the dominant firm applies the single branding obligation selectively to buyers which are of particular importance for potential entrants or expansion by existing competitors even if the tied market share may be rather modest.

The German Bundeskartellamt, in the long-term gas supply contracts case found that 70% of the customers were tied to the dominant supplier through long-term contracts with quantities amounting to 100% of their respective demand. The Bundeskartellamt concluded that this resulted in anti-competitive foreclosure.

The EC indicates that, in the *Van den Bergh case,* the Court of First Instance held that the fact that an undertaking with a market share of more than 75% tied 40% of outlets in the relevant market by an exclusivity clause which in reality created outlet exclusivity, constituted an abuse[56].

---

[51] Brazil, European Commission, France, Germany, New Zealand, and Taiwan.

[52] See responses by Brazil, Canada, European Commission, France, Germany, Italy, Lithuania, Mexico, New Zealand, and Turkey.

[53] Chile, France, Germany, Italy, Korea, Mexico, Turkey, and United States.

[54] See *United States v Microsoft Corp.*, 252 F.3d 34, 69 (D.C. Cir. 2001) (en banc).

[55] See also the reply of the French Competition Council referring to its *Jean Mineur* decision (Competition Council decision n°06-D-18 of 28 June 2006, *SA Médiavision et Jean Mineur / SARL Technic Publicité.*

[56] CFI, Case T-65/98 *Van den Bergh Foods Ltd* v *Commission* [2003] ECR II-4653.

The U.S. agencies response states that exclusive dealing involving a significant degree of foreclosure is neither automatically nor presumptively illegal. Courts consider a wide variety of factors in addition to the degree of foreclosure. In general, exclusive dealing will not be found illegal under U.S. antitrust law if it does not foreclose more than 30% of all effective distribution channels. Indeed, in most instances, foreclosure must be above 50% in order to raise any competitive concern.

(2) Duration of the obligation

The replies of twenty jurisdictions indicate that the duration of the exclusive dealing arrangement is relevant to their assessment[57]. Fourteen agencies observe that duration is important for the assessment of foreclosure effects[58]. Many agencies point out that, in general, the longer the duration of the obligation, the stronger the likely foreclosure effects, in particular if new entrants are affected[59].

The German Bundeskartellamt observes that the supplier or purchaser which is bound to a single business partner cannot enter into business relationships with other suppliers. Consequently, for the duration of the contract it may be difficult for new competitors to sell their goods or services or to find a supplier.

On the other hand, as the U.S. response notes, arrangements with a shorter duration are less likely to have anticompetitive effects.

However, the EC states that even in case of a short duration - or if there is a right for the customer of the dominant firm to terminate supply at short notice – an exclusive purchasing obligation can lead to foreclosure, in particular if there are no adequate substitutes to the dominant supplier's product for a large part of demand in the market[60] or, as the U.S. agencies' response indicates, if dealers have a strong incentive to continue carrying the product in question[61].

C. What degree of likelihood is needed?

Respondents were asked whether the effects needed to demonstrate unlawful exclusive dealing were "actual, likely or potential". While the responses indicate the level of likeliness

---

[57] Brazil, Canada, Chile, Czech Republic, European Commission, France, Germany, Israel, Italy, Jamaica, Japan, Jersey, Kenya, Latvia, Lithuania, Peru, New Zealand, South Africa, Switzerland, Turkey, and United States.

[58] Chile, Czech Republic, European Commission, France, Germany, Italy, Japan, Jersey, Korea, Latvia, Lithuania, Mexico, South Africa, and Turkey.

[59] See the replies by Bulgaria, Czech Republic, France, the European Commission, Italy, Japan, Jersey, Korea and the United States. Italy mentions the case *Stream/Telepiù* where the incumbent in the pay-TV market entered into new contracts with the most popular soccer team under the condition of exclusivity for up to six years, so altering the customary practice in sport broadcasting rights dealing when a new competitor was entering the market.

[60] See the European Commission's responses which references the decision of the Court of First Instance (CFI), Case T-65/89 *BPB Industries plc and British Gypsum Ltd*. v *Commission* [1993] ECR II-39 paragraphs 68 and 73 in which the CFI held that where an economic operator holds a strong position in the market, the conclusion of exclusive supply contracts in respect of a substantial proportion of purchases constitutes an unacceptable obstacle to entry to that market.

[61] *United States v Dentsply International Inc.*, 399 F.3.d 181, 193-94 (3rd Cir.2005).

needed in many jurisdictions, they do not provide any useful differentiation between the terms or any way to compare standards across jurisdictions. In particular, it is not clear from the answers whether there is a substantial difference between the standards "likely" and "potential".

The German Bundeskartellamt, in its practice, focuses on the likely market effects of a prima-facie abusive behaviour. It adds that actual effects can and should be taken into account if the conduct has already begun. However, as those effects can originate from a multitude of reasons the Bundeskartellamt indicates that the standard of proof for agencies should still be a persuasive demonstration of the likely market effects. Germany understands "likely" in the way of probability, meaning that the agency is convinced about the foreclosure effect but not beyond reasonable doubt.

D. What evidence is used to show foreclosure effects?

Agencies from Brazil, EC, France, Japan and Turkey state that they may employ both direct and indirect evidence, *i.e.* market information, facts and data collected via various resources including market players (including internal documents such as policy documents, studies on sales and marketing, internal correspondence and correspondence with third parties), customers, the complainant, oral and written statements of personnel of the dominant undertaking, competitors and customers as well as qualitative/quantitative studies[62].

In New Zealand, the Council needs to apply a "counterfactual test" to determine whether a firm has used its position of dominance. This means that if a dominant firm is acting in the same manner as a non-dominant firm in the same position would have acted in a competitive market it cannot be said to be using its dominance to achieve the purpose that is prohibited[63]. The U.S. response notes that anticompetitive effects are typically proven through the use of expert economic testimony.

2. Must other effects be shown?

The replies of six jurisdictions state that other effects, e.g., on consumer welfare, must be shown[64]. Several of these replies indicate that, in their jurisdictions, the assessment of these effects is equivalent to or overlaps with the assessment of market foreclosure effects[65].

The U.S. agencies response states that to be unlawful, exclusive dealing must have an anticompetitive effect; it must harm the competitive process and thereby harm consumers, not merely competitors.

The Canadian Competition Bureau's reply shows that the focus in the Bureau's assessment is on the negative effects on a competitor that are exclusionary, disciplinary or predatory[66]. The Bureau will have regard to the degree to which the anti-competitive acts at issue enhance or

---

62 See in particular the responses of Brazil, European Commission, France, Japan, and Turkey.

63 *Carter Holt Harvey Building Products Group Ltd v CC* [2006] 1 NZLR 145; (2004) 11 TCLR 200 (PC) paragraph 66.

64 Canada, European Commission, Italy, Jamaica, Jersey, and United States. Furthermore, Bulgaria mentions that effect on consumers is not a requisite but normally part of the analysis to the extent that the consequences for consumers may be predicted in at least a general way.

65 See responses by Canada, European Commission, Jersey, and Italy. Jersey expressly states that other effects, e.g., on consumer welfare, "would [in virtually all cases] form part of the market foreclosure effect".

66 S. 79(1)b). S. 77(2) and 79(1)(c) require that the arrangement be likely to lessen competition substantially.

preserve barriers to entry as well as whether or not consumer prices might be significantly lower, or product quality, innovation, or choice significantly greater in the absence of the practice.

The EC states that Article 82 EC prohibits conduct which leads to anti-competitive foreclosure and thus harms consumers (the concept of consumers including direct and indirect users of the product covered by the conduct): Conduct, which does not harm consumers, is not prohibited by Article 82 EC. The European Court of Justice (ECJ) has expressly confirmed in its recent *British Airways* judgment that Article 82 EC is aimed not only at practices which may cause prejudice to consumers directly but also at those which are detrimental to an effective competition structure and thus harm consumers indirectly[67]. Similarly, the Italian competition authority points out that it is the ultimate aim of the authority to promote consumer welfare by promoting effective competition. Thus, in the cases *Unapace/Enel*, *Enel Trade/Clienti Idonei* and *Comportamenti Abusivi di Telecom Italia* the agency demonstrated that the alleged violator, a former monopolist, engaged in a exclusionary conduct that had the effect of preventing entry in liberalized markets, thus undermining the effects of the liberalization process to the detriment of consumers.

France indicates that indirect effects need not to be shown but are taken into account by the Competition Council. Reduction of consumer welfare may in particular be considered in cases relating to products or services for end users[68].

In Jamaica, the agency must demonstrate that consumers are not getting or would not get a fair share of the resulting benefits of the exclusive dealing.

V. PRESUMPTIONS AND SAFE HARBORS

In nineteen jurisdictions neither presumptions nor safe harbors exist[69]. Three jurisdictions provide for a presumption[70] and two replies indicate a safe harbor[71].

1. Presumptions

According to the Russian FAS, exclusive dealing entered into by a dominant firm is presumed illegal without giving the firm the possibility to rebut the presumption.

Israel indicates that an exclusive dealing agreement to which a monopoly is party is subject to a presumption that the agreement constitutes a "restrictive arrangement" forbidden by Article 2B of the Law. The parties to the arrangement may file a request for a clearance of the arrangement to the IAA or the Antitrust Tribunal. Only at this stage the IAA or the Tribunal

---

[67] ECJ, Case C-95/04 P *British Airways . Commission*, not yet reported, paragraphs 106 *et seq*. Thus, the demonstration of consumer harm is not necessary to establish liability under Article 82 EC.

[68] See for instance maintenance of mobile phones in the Bouygues Telecom Caraibe case, Competition Council decision n° 04-MC-02 of 9 December 2004, *Bouygues Télécom Caraibe / Orange*.

[69] Brazil, Bulgaria, Canada, Chile, European Commission, France, Germany, Italy, Japan, Jersey, Korea, Latvia, Lithuania, Mexico, New Zealand, South Africa, Switzerland, Taiwan, and Turkey. Note that, furthermore, Denmark, Israel, Kenya, Peru, and Russia stated that in their jurisdictions there is no safe harbour. As to six jurisdictions no answer concerning presumptions and safe harbors was provided (Czech Republic, Norway, Serbia, Singapore, Slovak Republic, and United Kingdom).

[70] Denmark, Israel, and Russia.

[71] Jamaica and the United States (but see further below). Note, that responses indicating that a safe harbor exists if the firm under investigation is not dominant were treated as having answered that no safe harbor exists.

will take into consideration the negative and positive effects of an arrangement and decide whether to grant the clearance.

Denmark states that a rebuttable presumption of an abuse exists if the dominant firm under investigation has a market share of 50% or above and the structure of the market indicates that the competitors' market shares are only minor.

2. Safe harbors

The response from Jamaica indicates that a safe harbor exists whenever exclusive dealing is entered into by an enterprise that is not a major supplier and the conduct is not widespread in the market; or the conduct persists for only a reasonably short period to facilitate the entry of a new supplier or a supplier of new goods into a market.

The explicit language of the U.S. antitrust statutes does not establish a safe harbor. However, case law shows that foreclosure levels below 50% rarely lead to liability. Exclusive dealing involving a significant degree of foreclosure is neither automatically nor even presumptively illegal under U.S. law.

VI. JUSTIFICATIONS AND DEFENSES

Agencies from twenty-two jurisdictions responded to some or all of the questions concerning justifications and defenses: Brazil, Canada, Chile, Denmark, EC, France, Germany, Israel, Italy, Jamaica, Japan, Jersey, Kenya, Korea, Lithuania, Mexico, New Zealand, Russia, Singapore, South Africa, Switzerland, Turkey, and the U.S. In addition to that three NGAs also replied to this section[72].

1. Do competition law rules provide for justifications and defenses?

Twenty-one[73] jurisdictions state that justifications/defences are, in general, available to dominant firms.

The EC states that any conduct including exclusive dealing, which may otherwise be abusive, may escape the prohibition if the dominant firm provides an objective justification which outweighs the possible anti-competitive effects.

The German Bundeskartellamt refers to balancing the interests of the undertakings involved, *i.e.* especially the economic and competitive interests of the dominant firm and its competitors when applying the national provisions found in its Act. This balance takes into account objective necessities and efficiencies.

The Conseil de la Concurrence of France integrates all efficiencies convincingly evidenced by firms in its analysis. In Canada if a valid business justification such as a credible efficiency or pro-competitive rationale for the impugned conduct is established, the Tribunal may find that the conduct was not undertaken for anti-competitive purpose.

---

[72] Davis, Kapoor, Lambert & Sokol (United States), Hoffet, Meinhardt & Venturi (Switzerland), and Pera (Italy).

[73] Brazil, European Commission, Canada, Chile, Denmark, France, Germany, Israel, Italy, Jamaica, Japan, Jersey, Korea, Mexico, New Zealand, Russia, Singapore, South Africa, Switzerland, Turkey, and the United States.

The Turkish response explains that the Competition Board takes into account whether there are objectively justified reasons for the conduct by the dominant firm and/or the conduct is connected to internal efficiency of the dominant firm. If one of these justifications is available, then there is a second element to be satisfied, namely the proportionality principle meaning that the conduct should be proportionate to the justified reason claimed for the conduct.

The U.S. agencies indicate that U.S. courts today focus on whether an exclusivity arrangement allows a firm to maintain or acquire monopoly power, taking procompetitive effects into account.

Agencies from Chile, Jersey, Korea, and New Zealand indicate that although there is no special provision on justifications available in their laws, conduct based on an objective justification is unlikely to be considered abusive.

The agencies from Singapore and Turkey indicate that the dominant undertaking will still have to show that it behaved in a proportionate manner in defending its legitimate commercial interest.

The agencies from Canada, Italy and Korea underline positive effects on consumer welfare.

2. Efficiency defense

The responses from various jurisdictions indicate that exclusive dealing may have certain efficiency enhancing effects. The most frequent type of efficiencies cited are those related to relationship-specific investments and conduct that facilitates innovation and/or reduces transaction costs. In many jurisdictions, efficiencies are considered with the safeguards that they must be relationship-specific[74] and/or that the efficiencies must counterbalance or outweigh the potential or likely anti-competitive foreclosure effects of the conduct under investigation[75].

A. What efficiencies are considered?

In general, several jurisdictions[76] state that they consider all efficiencies and they do not have an exhaustive list as to objective justifications in this regard.

Among these jurisdictions, Italy mentions that all kind of efficiencies can be taken into consideration during the analysis as long as they have a positive effect on consumer welfare. Meanwhile, South Africa underlines that efficiency defenses are available to dominant firms according to their law.

However, specifically, relationship-specific investments are mentioned by EC[77], Denmark, Germany, and Turkey. Moreover, six[78] jurisdictions refer to cost reduction and three[79] refer to technology and expertise issues.

---

[74] See responses by Denmark, European Commission, Germany, and Japan.

[75] See responses by Canada, Denmark, European Commission, France, Germany, Italy, Israel, Jamaica, Korea, Mexico, and Russia.

[76] Such as Canada, France, Jersey, Italy, Mexico, New Zealand, Singapore, South Africa, and Turkey.

[77] An investment is considered relationship-specific if after termination of the contract with that particular supplier or customer, the investment cannot be used by the dominant firm and can only be sold at a loss. General or market-specific investments in extra capacity are normally *not* regarded as relationship-specific.

The U.S. agencies' response notes that over the past thirty years, economists have identified many efficiencies that can flow from exclusive dealing and that the agencies increasingly take those efficiencies into account when assessing the legality of an exclusive dealing arrangement. The agencies specify that any proven efficiencies that result in lower costs, better products or improved quality are considered. More specifically, the response identifies procompetitive justifications for exclusive arrangements as including: encouraging dealers to promote a manufacturer's products more vigorously (*e.g.*, by addressing significant problems of interbrand free riding); providing retailers with assured supplies and protection from price increases, both of which allow for longer term planning and efficiency-enhancing investments by retailers; encouraging manufacturers to help dealers by providing services or information benefiting consumers; and ensuring a steady, reliable outlet of supply for a manufacturer so that it can make investments that increase efficiency or permit scale economies.

B. Are efficiencies balanced against competitive harm or do they provide a complete defense?

Twelve agencies[80] indicate that efficiencies are balanced against anticompetitive effects of the conduct and do not provide a complete defense by themselves.

The German Bundeskartellamt points out that in its practice, efficiencies such as investor-specific investments and cost reductions were often not sufficient to outweigh the negative effects of exclusive dealing obligations.

The response from Jamaica states that efficiencies would have to be balanced against consumer harm.

The agencies in New Zealand and Turkey answered this question negatively.

Singapore and Turkey mention that Competition Board has to apply the proportionality principle which requires that the conduct be proportionate to the reasons claimed to justify the conduct. Turkey furthermore points out that "if the dominant undertaking has justified reasons for its conduct and/or its conduct is connected to its internal efficiency, then the conduct should not be considered as abuse even if it distorts competitive conditions in disfavour of the competitors. Therefore, efficiency may be regarded as a complete defense without consideration of harm. Thus, it may not be wrong to conclude that efficiencies are not balanced against anticompetitive harm to determine whether liability attaches".

The U.S. agencies state that efficiencies are taken into account in determining whether anticompetitive harm has been established, but are not a complete defense without consideration of harm.

---

[78] European Commission, France, Germany, Korea, Mexico, and Switzerland.
[79] Mexico, Russia, and Switzerland.
[80] Canada, Denmark, European Commission, France, Germany, Israel, Italy, Korea, Mexico, Russia, Singapore, and United States.

3. Meeting competition defense

Eleven agencies replied that no meeting competition defense exists in their jurisdictions[81], whereas some jurisdictions state that there is a meeting competition defense[82]. Four[83] jurisdictions mention that they do not have a developed case law on this issue.

The EC and the German Bundeskartellamt which refuse to allow meeting competition defense for a justification for exclusive dealing cases put forward the idea that it makes no sense to counter a competitor's competitive strategy with exclusive dealing contracts. They argue that while every dominant company can pursue its own commercial interests as a legitimate aim, competition law cannot allow this behaviour if it leads to market foreclosure.

On the other hand, there are these agencies which affirmatively answer this question such as Denmark, France and Turkey. Turkish agency says in one case it has taken into account *ex officio* whether meeting competition might be a valid defense but concluded that the act by the dominant undertaking of prolonging the duration of exclusive dealing agreements as a response to another undertaking willing to enter the market with serious investments was disproportionate, therefore constituting an invalid defense in this case. In Canada, exclusive dealing lasting for a reasonable period in order to facilitate new entry can not be regarded as anti-competitive and exercising valid intellectual property rights can not be prohibited as abuse. Therefore, such instances provide statutory exemptions for provisions prohibiting exclusive dealing.

4. Standard of proof applicable to defenses

Agencies responding to the question relating to the standard of proof applicable to defenses approached their answers in different ways. Some framed their answers in terms of which side had the burden of proof. For instance, the agencies from Chile, EC, Korea, Mexico, Singapore, and the United Kingdom indicate that there is a burden of proof on the undertaking allegedly abusing its dominant position.

Other agencies, such as those from Denmark, Germany, the EC, and Korea, answered the question more in terms of the amount of evidence that must be presented by a competition agency to prove that the conduct at issue is abusive. For example, the German Bundeskartellamt mentions that in proceedings which would lead to imposition of fines, the standard of proof is "no reasonable doubt" or "serious doubt", whereas in proceedings terminated with a cease and desist order, the standard changes to "probability" or "balance of probabilities". Therefore, for instance, the dominant undertaking can only be fined if there are no reasonable doubts that it abused its dominant position. The EC's response cites standard of proof as "sufficient degree of probability". For instance, the dominant firm has to prove that alleged efficiencies have been realized or will likely be realized. According to the Danish Authority, the evidence to establish a meeting competition defense and to prove specific investments generally consists of purely economic analysis so that the standard of proof is "quite substantial". The Korean response says that there is no standard of proof applicable to defense of exclusive dealing and the concerned firm is required to present and prove appropriate evidence to defend its engagement in exclusive dealing.

---

[81] Chile, European Commission, Germany, Japan, Kenya, Korea, Latvia, Mexico, South Africa, Switzerland, and United States.

[82] Denmark, New Zealand, Russia, and Turkey.

[83] France, Italy, Jersey, and Singapore.

5. Type of evidence required in defenses

Brazil mentions that although they do not have an expressive number of cases, all legal types of proofs admitted in the Brazilian Law such as quantitative/qualitative studies, hearings, documents, inspections, etc can be applicable to defense. Similarly, Chile and Korea mention that all relevant evidence is admitted.

According to the EC's response, the dominant firm should prove existence of efficiencies with independently verifiable evidence. According to the EC, the dominant firm has to show that i) the efficiencies have been or will likely be realised as a result of the conduct, ii) that the conduct is indispensable in order to realise these efficiencies, iii) that the likely efficiencies outweigh the likely negative effect and, iv) that the conduct does not eliminate effective competition. For the Danish Authority, the type of evidence to be provided to demonstrate the defense, in general, consists of purely economic analyses.

ANNEX

Single Branding/Exclusive Dealing — Legal Provisions/Features of Arrangement

Country	Legal provisions: Specific rules	General rules	Arrangement: 100% coverage?	Primarily enough?	Duration important?	Substantial market coverage?	Request matters?	Poss. illegal via English clauses?
Australia NGA	1	x	0	1	0	0	0	N/A
Brazil	0	1	x	x	1	1	0	1
Bulgaria	0	1	0	1	x	x	x	x
Canada	1	1	0	1	1	1	1	1
Chile	0	1	0	1	1	1	0	1
Czech Republic	0	1	x	x	1	1	1	x
Denmark	0	1	0	1	0	0	0	1
EC	0	1	0	1	1	1	0	0
France	0	1	0	1	1	1	0	1
Germany	0	1	0	1	1	1	0	1
Israel	0	1	x	x	1	0	0	x
Italy	0	1	0	1	1	1	no case	1
Jamaica	1	1	0	1	1	1	x	1
Japan	1	1	0	1	0	1	0	1
Jersey	0	1	0	1	1	0	0	1
Kenya	0	1	x	x	0	0	0	N/A
Korea	0	1	0	1	1	1	0	0
Latvia	0	1	0	1	1	1	0	0
Lithuania	0	1	0	1	1	1	0	1
Mexico	1	0	1	0	1	0	0	0
New Zealand	1	1	0	1	1	1	1	not yet considered
Norway	0	1	x	x	x	x	x	x
Peru	0	1	x	x	1	1	not clarified	1
Russia	0	1	1	0	0	1	x	1
Serbia	x	x	0	1	x	x	x	x
Singapore	0	1	x	x	x	x	x	x

Slovak Republic	0	1	x	x	x	x	x	x
South Africa	1	x	x	x	1	x	0	0
Switzerland	0	1	0	1	1	1	N/A	N/A
Taiwan	0	1	0	1	0	not clarified	0	0
Turkey	0	1	0	1	1	1	0	x
United Kingdom	0	1	0	1	x	x	0	x
United States	1	1	0	1	1	1	1	0
Total	**8**	**29**	**2**	**22**	**21**	**19**	**3**	**13**

Note:
1=Yes, 0=No, N/A=not applicable, x=no answer provided.

This table is based on the replies to the questionnaire but takes subsequent comments into account.

Single Branding/Exclusive Dealing Presumptions, Safe Harbors and Effects

Country	**Presumptions**		**Safe harbors**	**Effects**			
	Presumptions	**Rebuttable**	**Safe Harbors**	**Market foreclosure needed?**	**Evidence**	**Degree of likelihood**	**Consumer harm?**
Australia NGA	1	N/A	N/A	1	N/A	N/A	N/A
Brazil	0	N/A	0	1	x	potential or likely	0
Bulgaria	0	N/A	0	1	x	potential	0
Canada	0	N/A	0	1	x	actual or likely	1
Chile	0	N/A	0	1	x	actual or potential	0
Czech Republic	x	x	x	1	x	x	x
Denmark	1	1	0	0	x	actual, likely or potential	0
EC	0	N/A	0	1	direct, indirect	actual or likely	1
France	0	N/A	0	1	direct, indirect	actual or potential	0
Germany	0	N/A	0	1	x	likely (actual or potential)	0
Israel	1	0	0	x	x	x	x
Italy	0	N/A	0	1	x	likely	1
Jamaica	x	x	1	1	x	likely or potential	1
Japan	0	N/A	0	1	direct, indirect	x	0
Jersey	0	0	0	1	x	actual or likely	1
Kenya	1	0	0	0	N/A	N/A	0
Korea	0	N/A	0	1	direct, indirect	actual or potential	0
Latvia	0	N/A	0	1	x	x	0
Lithuania	0	N/A	0	1	x	actual or potential	0
Mexico	0	N/A	0	0	x	likely or potential	0
New Zealand	0	N/A	0	1	counterfactual	purpose, likely effects	0
Norway	x	x	x	x	x	x	x
Peru	x	x	0	x	x	x	x
Russia	1	0	0	0	N/A	N/A	0
Serbia	x	x	x	x	x	x	x
Singapore	x	x	x	1	x	x	0
Slovak Republic	x	x	x	x	x	x	x

South Africa	0	N/A	0	1	x	x	x
Switzerland	0	N/A	0	0	N/A	N/A	0
Taiwan	0	N/A	0	0 (lessening of comp)	x	x	x
Turkey	0	N/A	0	1	direct, indirect	actual or potential	0
United Kingdom	x	x	x	1	x	x	0
United States	0	N/A	1	1	econ. testimony	actual or likely	1
Total	**5**	**1**	**2**	**22**			**6**

Note:
1=Yes, 0=No, N/A=not applicable, x=no answer provided.

This table is based on the replies to the questionnaire but takes subsequent comments into account.

Agencies answering that inexistence of market power or low market shares constitute a safe harbor were treated as having stated that there is no safe harbor (as the questionnaire deals with conduct of dominant firms only), e.g. Brazil (below 20 per cent), Canada (below 35 per cent), Jersey (below 25%), Russia (below 20%).

Country	**Justifications**				
	Justifications?	**Efficiency defense?**	**Balancing eff./ competitive harm?**	**Meeting comp. defense?**	**Standard of Proof**
Australia NGA	1	N/A	N/A	N/A	N/A
Brazil	1	x	x	x	x
Bulgaria	1	x	x	x	x
Canada	1	1	1	x	x
Chile	1	1	x	0	x
Czech Republic	x	x	x	x	x
Denmark	1	1	1	1	substantial (economic analysis)
EC	1	1	1	0	sufficient degree of probability
France	1	1	1	no case	x
Germany	1	no spec. defense	1	0	sufficient degree of probability
Israel	1	1	1	x	x
Italy	1	eff. taken into account	1	no case	x
Jamaica	1	1	1	x	x
Japan	1	N/A	N/A	0	x
Jersey	1	x	x	x	x
Kenya	0	0	0	0	N/A
Korea	1	1	1	0	appropriate evidence
Latvia	x	x	x	0	x
Lithuania	not yet clarified	x	x	x	x
Mexico	1	1	1	0	x
New Zealand	1	1	0	1	x
Norway	x	x	x	x	x
Peru	x	x	x	x	x
Russia	1	1	1	1	x
Serbia	x	x	x	x	x
Singapore	1	1	x	x	x

Slovak Republic	x	x	x	x	x
South Africa	1	x	x	0	x
Switzerland	x	x	x	0	x
Taiwan	x	x	x	x	x
Turkey	1	1	x	1	x
United Kingdom	x	x	x	x	x
United States	1	1	x	0	sufficient evidence
Total	**22**	**14**	**11**	**4**	

Note:
1=Yes, 0=No, N/A=not applicable, x=no answer provided.

This table is based on the replies to the questionnaire but takes subsequent comments into account.

Single Branding/Exclusive Dealing Enforcement

Country	Enforcement							Private enforcement
	Cases reviewed	Violation	Decision	Settlement	Clearance	Challenged Overturned	Confirmed	Private cases allowed?
Australia NGA	x	x	x	x	x	x	x	1
Brazil	60	51	50	1	9	x	x	1
Bulgaria	0	0	0	0	0	0	0	1
Canada	19	2	1	1	12	N/A	N/A	1
Chile	1	1	1	0	0	1	1	1
Czech Republic	0	0	0	0	0	N/A	N/A	1
Denmark	x	4	x	x	x	x	4	0
EC	x	5	3	2	x	1	1	1
France	x	27	18	9	5	6	8	1
Germany	19	14	2	12	0	0	1	1
Israel	x	x	x	x	x	x	x	1
Italy	5	3	x	x	0	0	3	1
Jamaica	6	2	0	2	4	0	0	1
Japan	39	2	2	x	15	0	0	1
Jersey	0	0	0	0	0	0	0	1
Kenya	40	40	0	40	0	0	0	0
Korea	1	1	1	0	0	0	0	1
Latvia	1	0	0	0	0	0	0	0
Lithuania	5	5	2	3	0	1	1	1
Mexico	13	8	5	3	5	1	N/A	0
New Zealand	0	0	0	0	0	0	0	1
Norway	1	1	1	0	0	0	0	1
Peru	2	2	x	x	0	x	x	?
Russia	x	x	x	x	x	x	x	1
Serbia	0	0	0	0	0	0	0	1
Singapore	0	0	0	0	0	0	0	x

Slovak Republic	0	0	0	0	0	0	0	x
South Africa	x	x	x	x	x	x	x	1
Switzerland	2	2	1	1	0	1	0	1
Taiwan	15	8	6	2	7	0	0	0
Turkey	x	x	x	x	x	x	x	1
United Kingdom	x	x	x	x	x	x	x	1
United States	26	2	0	0	0	0	0	1
Total	**256**	**180**	**93**	**76**	**57**	**10**	**19**	**25**

Note:
1=Yes, 0=No, N/A=not applicable, x=no answer provided.

This table is based on the replies to the questionnaire but takes subsequent comments into account.