



Exclusive purchasing



Exclusive dealing (i)

- Exclusive dealing
 - Exclusive purchasing obligations; or
 - Rebates (see other slides)
- Exclusive purchasing obligation
 - Requires a customer on a particular market to purchase exclusively or to a large extent only from the dominant undertaking
 - Other obligations, including stocking requirements, may lead to the same effect

Exclusive dealing (ii)

- General rule – dominant companies are able to agree contract terms with other companies
- BUT Article 102 will apply to exclusive dealing contracts when entered into by an undertaking in a dominant position
- Applies even if the customer of a dominant undertaking has no objection to the exclusive purchase obligation and is happy with the contract terms
- Consequence for the dominant firm – fines, damages suits, unable to enforce the offending provisions in the agreement

Exclusive dealing (iii)

- The ECJ agrees with this view:
 - *“An undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102] of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate.”* (Hoffmann-La Roche v. Commission – Case 85/76 [1979] 3 CMLR 211, para 89)

Exclusive dealing efficiencies/justifications

- Encourage dealers/retailers to promote manufacturer/supplier's products
- Address interbrand free-riding
- Assured supply and possible price protection for dealers/retailers, encouraging efficiency enhancing planning and investments
- Encourages suppliers to provide services and information to dealers/retailers that benefit consumers
- Assured outlet for manufacturer/suppliers, encouraging efficiency enhancing investments/scale economies



Van den Bergh Foods

'Ice cream wars'



Exclusive purchasing

Van den Bergh Foods – Facts (i)

- Van den Bergh Foods (“VDB”) (owned by Unilever) – main supplier of ice-cream products in Ireland
- VDB supplies retailers freezer cabinets “free of charge” for “impulse ice-creams”
- VDB retains ownership in the cabinets and maintains them
- Retailer must only stock the freezer cabinets with VDB ice cream
- Retailers with VDB freezer cabinets started to stock Mars ice cream – which was trying to enter the Irish market
- VDB approx. 90% market share in impulse ice-cream in Ireland
- VDB – sought to enforce its exclusivity clause in the Irish Courts
- Mars lodged a complaint against VDB with the European Commission

Exclusive purchasing

Van den Bergh Foods – Facts (ii)

- Contract did not restrict the retailers from:
 - Buying other freezer units; or
 - Stocking other ice cream in non VDB freezers
- Large number of contracts – creates a network effect
 - Foreclosure and barriers to entry issues arise with network (query: at what point do we have a harmful network effect?)
- Evidence of actual foreclosure
 - Performance of VDB and inability of Mars to effectively enter and compete, also internal VDB documents showing intent to foreclose

Commission's decision (i)

- VDB held a dominant position for single-wrapped items of impulse ice-cream in Ireland
- VDB's network of agreements had the effect of restricting the ability of retailers to sell products of VDB's competitors – resulting loss of choice
- Restrictive effect – consequence of space constraints
 - 40% of outlets – only had a VDB freezer
 - Only 17% of outlets – DID NOT have a VDB freezer
- High barriers to entry
 - Persuading retailer to replace existing VDB cabinet; or
 - Installing an additional freezer cabinet (lack of space)

Commission's decision (ii)

- Evidence of VDB strategy from VDB documents:
 - *"make every effort maintain cabinet exclusivity"*
 - *"Denying Mars distribution is the key immediate response to their entry"* (paras. 65 to 68)
- Exclusive purchase agreements were an abuse of VDB's dominant position
- VDB is required to remove the "VDB products only clause" and retailers are able to use the VDB cabinet for products produced by competitors
 - Disproportionate?

VDB's defence/justifications

- VDB provided the broadest range of products with the greatest consumer appeal – the freezers fulfilled consumer demand
- VDB provided to retailers high quality product delivery, cabinet provision, maintenance and advertising and promotional support
- Freezer-cabinet agreements – normal business practice for this product area
- Two-month notice period – retailers can get out anytime
- Prevents free-riding by competitors – why should they get to share our freezer?
- VDB justified in protecting its property from being used by competitors
- Encourages investment in distribution and services to retailers
- VDB could efficiently buy freezers in bulk, cheaper than retailers

CFI's view (i)

- VDB appealed to the CFI
- CFI accepted VDB's argument that the freezer-cabinet agreements were normal business practice
- BUT – this does not mean that it amounts to normal competition by a dominant undertaking – “special responsibility” (paras 158 -159)
- CFI finds that the exclusive purchase agreements:
 - prevented retailers from selling other brands; and
 - prevented competitors from gaining access to the markets
- CFI finds that the Commission rightly held that VDB was abusing its dominant position as a result of the exclusive purchase agreements (para 159)

CFI's view (ii)

- VDB also claimed that the Commission's decision unlawfully infringed its right to property
- CFI finds that the Commission's decision does not deprive VDB of its rights of property
 - The right to property is not an absolute right
 - The Commission's decision requiring that space be made available in VDB's freezer cabinets for the competition did not amount to a disproportionate interference with its property rights (paras 170 – 171)
- VDB appealed to the ECJ
- ECJ found that each of VDB's claims was either manifestly inadmissible or unfounded.

Another example

- Coca-Cola
 - Coolers where provided rent-free
 - Customers did not have capacity to install other chilled beverage capacity
 - Commission accepted commitments whereby Coca-Cola and various bottling companies agreed to allow customers to use at least 20% of beverage coolers for other carbonated soft drinks
- Common issue worldwide in beer, soft drinks



This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.

