# Evidentiary issues in abuse of dominance cases: non-pricing practices

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Workshop on evidentiary issues in antimonopoly cases
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*The views expressed here are personal and do not necessarily reflect those of the Italian Competition Authority*

# Outline

1 General considerations

2 Exclusive dealing (and conditional rebates)

3 Tying

4 Refusal to supply

# General considerations

## How is anticompetitive foreclosure assessed?

- Anticompetitive foreclosure
  - foreclosure that is likely to have an adverse impact on consumer welfare
  - a “theory of harm” is needed
  - the identification of likely consumer harm will rely on qualitative as well as, where possible and appropriate, quantitative evidence

| | |
|---|---|
| **Position of the dominant undertaking** | Strength of the dominant position |
| **Conditions on the relevant market** | Conditions of entry and expansion |
| | Economies of scale and/or scope and network effects |
| **Position of the dominant undertaking's competitors** | This includes the importance of competitors for the maintenance of effective competition |

# General considerations

## How is anticompetitive foreclosure assessed?

| | |
|---|---|
| **Extent of the allegedly abusive conduct** | The percentage of total sales in the relevant market affected by the conduct |
| | Duration |
| | Regularity |
| **Direct evidence of any exclusionary strategy** | Under EC competition law, the concept of abuse is an objective one: there cannot be any finding of abuse based on intent only |
| | However, internal documents or business plans of the dominant undertaking might suggest that there is a strategy foreclose competitors |
| **Possible evidence of actual foreclosure** | Increase in prices |
| | Reduction in overall output |
| | Increase in market share |
| | Exit |
| | Deterred entry |

# General considerations

## How are efficiencies taken into consideration?

- The conduct is objectively necessary (and proportionate)
- The conduct leads to efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise
  - The efficiencies have been or will likely be realised as a result of the conduct
  - The conduct is indispensable in order to realise these efficiencies
  - The likely efficiencies outweigh the likely negative effects of the conduct
  - The conduct does not eliminate effective competition

# Exclusive dealing
# and conditional rebates

# Exclusive dealing

## What is exclusive dealing?

- Exclusive dealing
  - a buyer is required to purchase all, or a large extent, of its requirements from one (dominant) seller
  - a supplier is required to sell all, or a large extent, of its products/services to one (dominant) buyer
- Contractual or *de-facto* exclusivity
- Provisions that create direct/indirect disincentives to turn to alternative sources of supply or distributional channels (e.g. conditional discounts)

# Exclusive dealing

## How are anticompetitive effects evaluated?

- Foreclosure
  - foreclosing specific distribution channels
  - preventing rivals from operating at an efficient scale

- Buyers may be compensated for the loss in competition deriving from exclusivity, but this does not imply that customers as a whole benefit from exclusivity

- Factors taken into consideration to assess the degree of foreclosure
  - Market coverage
  - Importance of dominant undertaking as a trading partner
  - Competitors' (in)ability to compete on equal terms for each individual customer's entire demand
  - Duration of the exclusive dealing arrangements
  - Existence of alternative sources of supply or alternative means of access to the market
  - Economies of scale

# Exclusive dealing

## What efficiencies might arise?

- Possible efficiencies
  - Encourage distributors to promote a manufacturer's product more vigorously
  - Encourage suppliers to help distributors by providing services or information benefiting consumers
  - Address problems of free-riding between suppliers
  - Address "hold-up" problems for customer-specific investments
  - Allow suppliers to control distribution quality more easily
- Assessment
  - Type of product/service
  - Relevance of non-price competition/ pre-sale services
  - Specificity of investments and their relevance

# Conditional rebates

## Foreclosure

- Conditional rebates are rebates granted to customers to reward them for a particular form of purchasing behaviour
  - e.g. discounts for purchases that exceed a certain threshold over a defined reference period
  - retroactive or incremental
- Risk of anticompetitive foreclosure similar to exclusive purchasing obligations
  - in general, retroactive rebates may foreclose the market significantly, as they may make it less attractive for customers to switch small amounts of demand to an alternative supplier, if this would lead to the loss of the rebate

# Conditional rebates

## The “as efficient competitor test” (1/2)

- The “as efficient competitor test”
  - The key question is whether the rebate system is capable of hindering entry/expansion even by competitors that are equally efficient by making it more difficult for them to supply part of the requirements of individual customers
- Estimate the effective price a competitor would have to offer in order to compensate the customer for the loss of the rebate in she switches part of its demand (the “relevant range”) away from the dominant undertaking
  - The effective price that the competitor will have to match is not the average price of the dominant undertaking, but the normal (list) price less the rebate the customer loses by switching, calculated over the “relevant range” of sales
  - The “relevant range” depends on the specific circumstances of the case and on whether the rebate is incremental or retroactive

# Conditional rebates

## The “as efficient competitor test” (2/2)

- Compare the effective price to various measures of costs
  - AAC: average avoidable cost
  - LRAIC: long-run average incremental cost

| | |
|---|---|
| Effective price < AAC | rebate is generally capable to foreclose an equally efficient competitor |
| AAC < Effective price < LRAIC | other evidence must be considered |
| Effective price > LRAIC | rebate is generally not capable to foreclose an equally efficient competitor |

# Conditional rebates

## The European case law

- Pure quantity/volume-based are generally not abusive

- Exclusivity rebates constitute an abuse of a dominant position if there is no objective justification for granting them
  - They are not based – save in exceptional circumstances – on an economic transaction which justifies such a financial advantage, but are designed to remove or restrict the purchaser's freedom to choose his sources of supply and to deny other producers access to the market
  - There is no need to make an assessment of the circumstances of the case in order to show that the rebates actually or potentially had the effect of foreclosing competitors from the market

- Other rebates (e.g. individualised retroactive rebates)
  - May be fidelity-building/abusive
  - Need individual examination and demonstration of potential foreclosure

# Tying

# Tying

## What is tying?

- A dominant firm selling one product only on the condition that the buyer also purchases a different product or agrees that it will not purchase the tied product from another supplier

- It also includes the sale of products or services that could be viewed as separate but are only sold together as a bundle

- Tying may result in consumer harm in a number of ways
  - exploitative
  - exclusionary (in the tying and/or tied market)

- Action under Article 102
  - dominance in the tying market
  - the tying and tied products are distinct products
  - the tying practice is likely to lead to anticompetitive foreclosure

# Tying

## How is tying assessed?

- Are the two products/services separate?
  - Two products are distinct if, in the absence of tying or bundling, a significant number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product
  - Direct evidence that, when given a choice, customers purchase the tying and the tied products, separately from different sources of supply
  - Indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product
- Is there anticompetitive foreclosure?
  - Foreclosure in the tying and/or the tied market
  - Commitment to tying (e.g. through technical tying)
  - Harm can be to both intermediate and final consumers
  - Supply-side conditions: marginal and fixed costs
  - Demand-side conditions: proportion of customers with demand for both products; identity of customer subject to the tie; customer size; scope for product differentiation

# Tying

## What efficiencies might arise?

- Possible efficiencies
  - Savings in production or distribution that would benefit customers
  - Reduction of transaction costs for customers, who otherwise would be forced to buy the components separately, and allow savings on packaging and distribution costs for suppliers
  - Combining two independent products into a new, single product might enhance the ability to bring such a product to the market to the benefit of consumers
  - Tying practices may also allow the supplier to pass on efficiencies arising from its production or purchase of large quantities of the tied product

# Refusal to supply

# Refusal to supply

## What is a refusal to supply?

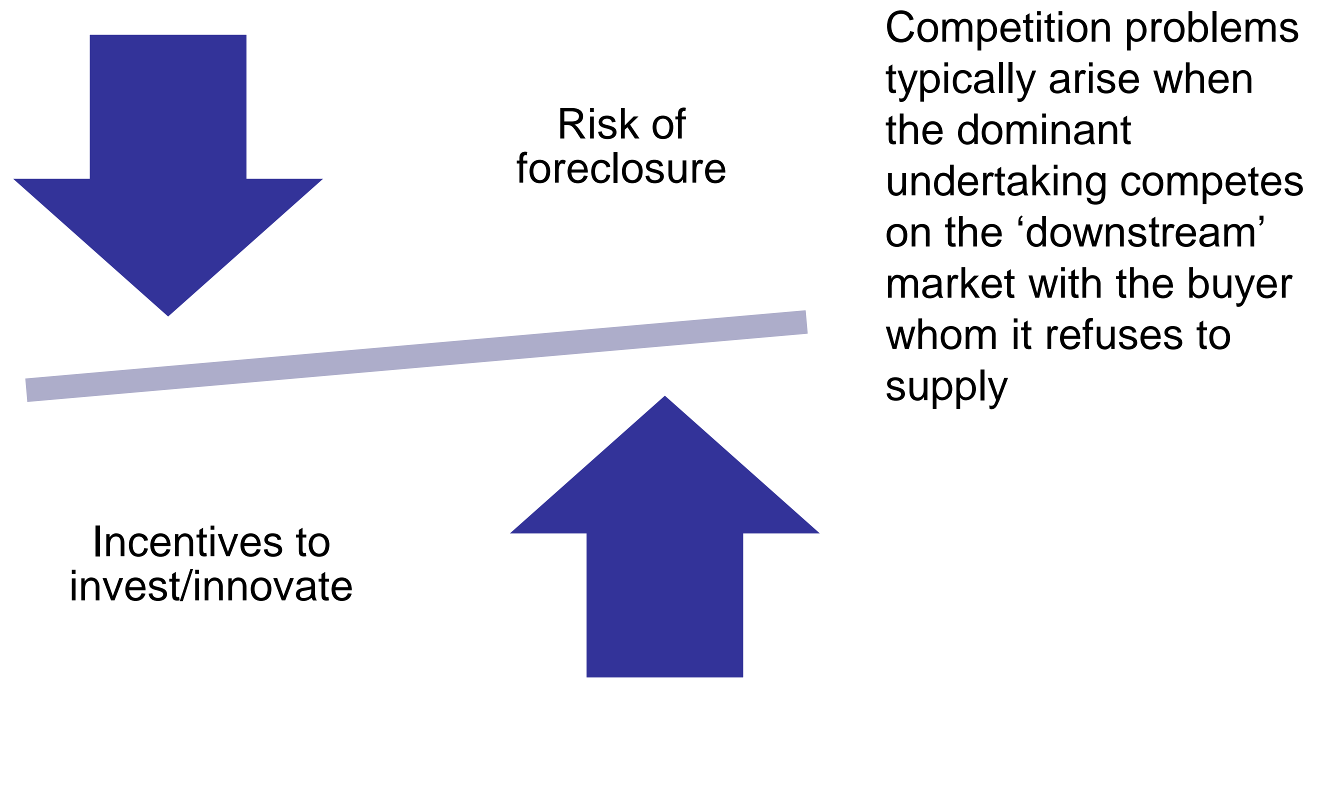
- The concept of refusal to supply covers a broad range of practices
  - refusal to supply products to existing or new customers
  - refusal to license intellectual property rights (including interface information)
  - refusal to grant access to an essential facility or a network

- The refusal to supply can take many forms
  - outright refusal
  - unduly delaying or otherwise degrading the supply of the product or involve the imposition of unreasonable conditions in return for the supply (“constructive refusal)
  - instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (“margin squeeze”).

# Refusal to supply

## Why should we worry about (intervening against) refusals to supply?

- In general, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property → intervention on competition law grounds requires careful consideration where it would lead to the imposition of an obligation to supply on the dominant undertaking




The existence an obligation to supply may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers

# Refusal to supply

## Indispensability

- The refusal relates to a product or service that is **objectively necessary** to be able to compete effectively on a downstream market
  - does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market
  - an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter — at least in the long-term — the negative consequences of the refusal
  - assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future
  - the notion of duplication means the creation of an alternative source of efficient supply that is capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market
  - the termination of an existing supply arrangement is more likely to be found to be abusive than a de novo refusal to supply

# Refusal to supply

## Elimination of effective competition and consumer harm

- The refusal is likely to lead to the **elimination of effective competition** on the downstream market
  - The market share of the dominant undertaking in the downstream market
  - The degree of capacity-constraint of the dominant undertaking relative to competitors in the downstream market
  - The degree of substitutability between the dominant undertaking's output and that of its competitors in the downstream market
  - The proportion of competitors in the downstream market that are affected
  - The likelihood that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking

- The refusal is likely to lead to **consumer harm**
  - Where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be stifled
  - By excluding competitors on the downstream market through a refusal to supply, is able to extract more profits in the unregulated downstream market than it would otherwise do

# Thank you!

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