

Art. 102 TFEU - specific abusive conduct - exclusive dealings

A. Definition

Exclusive dealings are exercised under the conditions of a vertical agreement, in which undertakings, at different levels of the production or distribution chain, agree "to the conditions under which the parties may purchase, sell or resell certain goods or services".



Unbekanntes Makro: 'footnote'

Exclusive dealings can be categorized as exclusive purchasing agreements or conditional rebates.

Under the realm of purchasing agreements, in regard to distribution, either an exclusive or selective distribution agreement may be made. In either case, the supplier agrees to sell its products to only one or a specific number of authorized distributors. In the case of exclusive distribution, the agreement holds that resale is in a particular territory. While a selective distribution agreement holds criteria linked to the nature of the product and restriction on any



Unbekanntes Makro: 'footnote'

sales to non-authorized distributors.

Additionally, under the realm of purchasing agreements, in regard to supply, agreements may be made which entail "an exclusive supply obligation, restricting the supplier to sell to only one buyer..., but may...also



Unbekanntes Makro: 'footnote'

take the form of quantity forcing on the supplier".

With regard to conditional rebates, "the customer is given a rebate if its purchases over a defined reference period exceed a certain threshold,...or only on those made in excess of those required to achieve



Unbekanntes Makro: 'footnote'

the threshold".

B. Art 102 TFEU

Under the guidance of Article 102 TFEU, exclusive dealings may be found in violation specifically when "a dominant undertaking may try to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates".



Unbekanntes Makro: 'footnote'

Unless an undertaking, "by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers" is able to provide otherwise.



Unbekanntes Makro: 'footnote'

Since there are many variables within each individual agreement it is difficult to generalize about the overall effect, as a whole, which exclusive dealings have on competition, whether positive or negative. "The Commission's guidelines under Article 101 TFEU recognise that exclusive dealing...can have important procompetitive features....Exclusive dealing may also have anticompetitive effects, but the



Unbekanntes Makro: 'footnote'

guidelines recognise that it is necessary in each case to evaluate the net effects of the agreement".

As provided in the Commission's Guidance Paper, on an individual basis, in consideration of the position of the dominant undertaking, the conditions on the relevant market, the position of the dominant undertaking's competitors, the position of the customers or input suppliers, the extent of the allegedly abusive conduct, possible evidence of actual foreclosure and direct evidence of any exclusionary strategy, the Commission is able to analyze the form and effect of



Unbekanntes Makro: 'footnote'

each vertical agreement.

C. Case Law

Originally, many exclusive dealing agreements were considered abusive *per se* under Article 102 TFEU, for example, as found in *Suiker Unie*



Unbekanntes Makro: 'footnote'

and *Hoffmann-La Roche*.



Unbekanntes Makro: 'footnote'

Overtime the view has changed, as in *Van den Bergh*, "with the result that exclusive dealing under Article 102 TFEU is now more aptly characterised as based on the rule of



Unbekanntes Makro: 'footnote'

reason". At an international level, it is also supported that consideration based upon the rule of reason is the best approach, as in the case of the U.S. Supreme Court decision in *Board of Trade of City of Chicago*.



Unbekanntes Makro: 'footnote'

D. Summary

Overall, the practice of exclusive dealing cannot immediately be considered illegal in relation to Art 102 TFEU, but must be reviewed case by case with the application of variable measures and the rule of reason in order to determine the form and effect of each agreement.



Unbekanntes Makro: 'display-footnotes'



Publication Notice

Responsible: Freie Universität Berlin, by its President

Author: Amelia Bryant Shakocius

Stage of work: final