



INTERNATIONAL COMPETITION NETWORK

Report on Tying and Bundled Discounting

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Executive Summary

This paper was prepared by the ICN Unilateral Conduct Working Group (UCWG) for the 8th Annual Conference of the ICN in June 2009. In 2008-09 the group continued its work on analyzing specific types of unilateral conduct. Working Group members developed and responded to a questionnaire on the analysis of tying, bundled discounting and single-product loyalty discounts and rebates by ICN member jurisdictions.¹ This paper on tying and bundled discounting is based on the responses covering 35 jurisdictions.

In the majority of these jurisdictions both tying and bundled discounting are covered by general unilateral conduct rules and policies. However, in several of these jurisdictions the competition law explicitly lists tying or bundled discounting as an example of potentially illegal unilateral conduct.

Definition of tying and bundled discounting

Tying is commonly defined as 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. To determine whether two products or services are separate many agencies focus on the analysis of the demand side and whether there is sufficient (consumer) demand for the allegedly tied product or service. In various jurisdictions supply side aspects are also of relevance, such as technological possibilities and industry practice.

Bundled discounting is commonly defined as offering discounts or rebates based on a buyer's purchase of two or more different products or services. Bundled discounting arrangements do not prevent buyers from purchasing individual products separately, although the aggregate price of the individual components is typically higher than the price of the bundle.

Effects

The assessment of anticompetitive effects is an important element in the analysis of both types of conduct. More specifically, many replies show that jurisdictions are concerned that tying and bundled discounting may harm competition or lead to anticompetitive foreclosure and contribute to the maintenance or strengthening of market power.

With respect to the assessment of bundled discounting many agencies reply that a price-cost comparison is used in the analysis or that such a test may be used. On the other hand, some agencies also indicate that such a test is not required to show that bundled discounting may be illegal.

¹ The questionnaire and responses are available at <http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/unilateral-conduct/questionnaire>.

Intent

The majority of responses indicated that intent is not required, but is often considered a relevant factor – particularly in assessing the competitive effects of the practice. In a few jurisdictions, agencies may consider intent when establishing fines.

Justifications and defenses

The responses indicate that justifications and defenses are, in general, available to dominant firms. Several agencies mention efficiencies to both suppliers and consumers.

According to a number of competition agencies, justifications and defenses must have an objective basis. Benefits that are purely speculative, or would arise only at some time in the distant future, are to be disregarded. Most competition agencies agree that it is up to the competition agency to show the anti-competitive effects, whereas the firm has the burden to prove efficiencies and show that the conduct is justified.

I. INTRODUCTION

This report addresses policy and practice of ICN member agencies with respect to tying and bundled discounting and is based on 44 responses covering 35 jurisdictions.² Thirty-seven of the replies were provided by competition agencies, 7 by NGAs.³

1. Definition of tying

ICN members were asked if, in their jurisdiction, the term tying is used in a manner different from the definition in the introductory paragraph of the questionnaire. The questionnaire defined tying as a dominant firm (or firm with substantial market power) selling one product (the tying product) only on the condition that the buyer also purchases a different (or tied) 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.

Agencies from 26 jurisdictions reply that the definition used in their jurisdiction does not differ from the one used in the questionnaire.⁴ The Taiwan Fair Trade Commission reports, that while its law addresses the situation where a dominant firm sells one product on the condition that the buyer purchase a different product, it does not address the situation where an enterprise sells a product only on the condition that the buyer agrees not to purchase the tied product or service from other suppliers. In Canada, the definition of tying includes offering the tying product on more favourable terms if the customer agrees to purchase a tied product or agrees not to purchase the tied product from any other supplier.

² Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Croatia, Czech Republic, Denmark, European Commission, France, Germany, Hungary, Ireland, Israel, Italy, Jamaica, Japan, Jersey, Korea, Lithuania, Mexico, Netherlands, New Zealand, Poland, Romania, Russia, Serbia, Singapore, Slovak Republic, Switzerland, Taiwan, Turkey, United Kingdom, and United States (The references to U.S. DOJ throughout this report are based on its November 2008 questionnaire response and do not necessarily reflect DOJ's current views.).

³ Barbosa, Müssnich & Aragão Advogados (Brazil), Damien Geradin (EC), Gianni, Origoni, Grippo & Partners (Italy), Paul Lugard and Martin Jongmans (Netherlands), Stoica & Associates (Romania), Hoffet, Meinhardt, Venturi (Switzerland), ABA Section of Antitrust Law's Unilateral Conduct Committee (United States).

⁴ See agency responses from Belgium, Brazil, Bulgaria, Chile, Czech Republic, France, Germany, Ireland, Israel, Italy, Jamaica, Jersey, Korea, Lithuania, Mexico, Netherlands, Poland, Romania, Russia, Singapore, Slovak Republic, Switzerland, Russia, Taiwan, United Kingdom, and United States.

2. Definition of bundled discounting

In the introductory paragraph of the questionnaire, bundled discounting was defined as offering discounts or rebates based on a buyer's purchase of two or more different products or services. Bundled discounting arrangements do not prevent buyers from purchasing individual products separately, although the aggregate price of the individual components is typically higher than the price of the bundle.

Agencies from 24 jurisdictions state that in their jurisdiction the same definition is used.⁵ ⁶ Other agencies did not reply to the question so that it cannot be said if definitions in their jurisdictions differ from the one in the questionnaire.

II. LEGAL BASIS and ENFORCEMENT EXPERIENCE

1. Legal Basis

A. General v. Specific Provisions

All responding agencies note that their competition law provisions address tying and bundled discounting practices either under general competition law or, in some cases, under unfair trading practices or consumer protection law.⁷ For example, in addition to their unilateral conduct rules, competition agencies from Belgium and Bulgaria may investigate tying or bundled discounting practices under unfair practices law.

In 32 jurisdictions, general antitrust laws address tying and bundled discounting.⁸ In many of these jurisdictions, however, competition law explicitly lists tying⁹ or bundled discounting¹⁰ as examples of potentially illegal unilateral conduct. Some jurisdictions also provide for specific provisions prohibiting tying.¹¹

Most of the unilateral conduct laws that cover tying and bundled discounting apply only to dominant firms. Further to that, competition agencies from Canada, Denmark, Germany, Jamaica, Japan, Korea, New Zealand, and Taiwan indicate that their jurisdiction provides for

⁵ Belgium, Canada, Chile, Croatia, Czech Republic, Denmark, European Commission, France, Germany, Israel, Jamaica, Jersey, Lithuania, Mexico, Netherlands, New Zealand, Romania, Russia, Singapore, Switzerland, Taiwan, United Kingdom, and United States.

⁶ Note that several agencies report that they also use the term "bundling" in their jurisdiction which is broader than the concept of "bundled discounting" as defined in the questionnaire (see responses from Canada, Denmark, the European Commission, France, and Mexico). The agencies indicate that they distinguish between pure bundling and mixed bundling. Pure bundling means that the products are only sold jointly and consequently are not available separately, mixed bundling means that products are also sold separately. The Canadian Competition Bureau and the European Commission point out that in the latter case the sum of the prices when sold separately is higher than the bundled price (*i.e.* the dominant undertaking offers a discount when the bundle is purchased).

⁷ The Brazilian Council for Economic Defense (CADE) indicates that tying may also be considered as a violation of consumer protection law, that individuals may challenge, even in cases of non-dominant firms, when harmed individually.

⁸ Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Croatia, Czech Republic, European Community, France, Germany, Hungary, Ireland, Israel, Italy, Jamaica, Japan, Jersey, Korea, Lithuania, Netherlands, New Zealand, Poland, Romania, Russia, Serbia, Singapore, Switzerland, Taiwan, Turkey, United Kingdom, and United States. Note that competition agencies from EC member states apply article 82 EC in case the practices at stake may affect trade between EC Member States in addition to their national provisions, which are generally similar to Article 82 EC. Note also that some jurisdictions that are not EC member states have modeled their unilateral conduct law after Article 82 EC, *e.g.* Israel and Jersey.

⁹ Czech Republic, Denmark, European Community, France, Hungary, Japan, Lithuania, Romania, Serbia, Slovak Republic, Switzerland, Taiwan, and Turkey.

¹⁰ Russia.

¹¹ Canada, Colombia, Mexico, Russia, and Slovak Republic.

laws that cover tying and bundled discounting by non-dominant firms as well. For example, Section 77 of the Canadian Competition Act, which refers *inter alia* to tied selling engaged in by a “major supplier of a product in a market”, seems to require a lower threshold than dominance. By the same token, the New Zealand Commerce Commission indicates that Section 36 of the Commerce Act requires the firm to have “a substantial degree of power” which, in the view of the Commission, is likely to apply to a greater number of persons and to a wider range of markets than the concept of dominance. The German Bundeskartellamt reports that the German Act against Restraints of Competition may apply to undertakings that do not have a dominant position but have relative market power. The Japan Fair Trade Commission reports that tying and bundled discounting practiced by a firm can be examined under provisions addressing “private monopolization” and “unfair trade practices” of the Japanese Antimonopoly Act. Of these provisions, the provision concerning “unfair trade practices” applies also to firms that do not have a dominant position or significant market power.

B. Civil v. Criminal Enforcement

ICN members were asked whether tying or bundled discounting by a dominant firm may be a civil or criminal violation of antitrust laws in their jurisdiction. In this context, the term “civil violation” is used for systems that do not investigate anticompetitive behavior under their criminal laws, *i.e.* including administrative systems.

Agencies from 26 jurisdictions indicate that anticompetitive tying or bundling practices are only subject to civil law.¹²

In 7 jurisdictions, tying and bundling practices may be both civil and criminal offenses.¹³

The Danish competition authority indicates that tying and bundled discounts constitute criminal violations of its antitrust law.

2. Agency Enforcement - Cases challenging tying or bundled discounting

Agencies were asked to indicate the number of tying or bundled discounting cases investigated beyond a preliminary stage in the last ten years. Not all agencies are in a position to give a precise number of all the cases reviewed.¹⁴

Few agencies have conducted five or more in-depth investigations concerning tying¹⁵ or bundled discounting.¹⁶ Several agencies have investigated at least one tying¹⁷ or bundling case.¹⁸

¹² Belgium, Bulgaria, Canada, Brazil, Chile, Columbia, Croatia, Czech Republic, the European Commission, Germany, Hungary, Italy, Jamaica, Jersey, Lithuania, Netherlands, New Zealand, Poland, Romania, Russia, Serbia, Singapore, Switzerland, Turkey, United Kingdom, and United States.

¹³ France (however, in practice, no criminal conviction on abuse of dominant position has ever been rendered in 20 years), Ireland (although criminal prosecutions are not envisaged in practice), Japan (although no criminal prosecutions have ever been brought in practice), Korea (where an infringement is deemed to be serious enough, criminal sanctions may be applied), Mexico, Slovak Republic (no criminal conviction at present), and Taiwan (the tying or bundling case is referred to criminal prosecution if the infringement to anticompetitive law has not been rectified).

¹⁴ See agency replies from Chile, Colombia, Croatia, European Commission, Hungary, and Russia.

¹⁵ Agencies from Brazil (9), Bulgaria (6), Japan (8), Russia (12-15 per year), the Slovak Republic (5), Turkey (8), and U.S. DOJ (11).

¹⁶ See reply from the competition authority in France (15).

¹⁷ Agencies from Belgium (3), Czech Republic (1), Denmark (3), Germany (1), Ireland (1), Korea (1), Netherlands (2), Poland (4), Romania (1), and Switzerland (3).

¹⁸ Agencies from Bulgaria (1), Germany (3), Jersey (1), Netherlands (1), Poland (2), the United Kingdom (1), and U.S. DOJ (4).

Without differentiating between tying and bundling, the Canadian Competition Bureau indicates that it has conducted six formal inquiries related to allegations of tied selling/bundling under Sections 77 and/or 79 of the Act. By the same token, the Croatian Competition Agency reports five cases, the European Commission seven cases, and Taiwan Fair Trade Commission twenty-nine.

With respect to criminal enforcement, the French Competition Authority indicates that in one case (the case which also led to Council decision n°06-D-16), criminal proceedings were brought before the Tribunal Correctionnel in Paris against certain individuals and that the individual were found not to be guilty. No other criminal cases are reported.

A. Agency decisions and judicial review in administrative systems in the last ten years

In many of the cases investigated beyond a preliminary stage by competition agencies in administrative systems, the conduct was not found to be illegal.

With regard to tying, the following agencies report cases in which they have found tying to violate their unilateral conduct laws: Belgian Competition Authority (3); Bulgarian Commission on Protection of Competition (5); Croatian Competition Agency (1); Czech Republic Office for the Protection of Competition (1); Danish Competition Authority (1); European Commission (1); French Competition Authority¹⁹ (4); Japan Fair Trade Commission (8);²⁰ Korea Fair Trade Commission (1); Competition Council of the Republic of Lithuania (1); Polish Office of Competition and Consumer Protection (2); Federal Competition Commission Mexico (3) Romanian Competition Council (1); Russian Federal Antimonopoly Service (12-15 cases per year); Antimonopoly Office of the Slovak Republic (3); and Turkish Competition Authority (2).

The following agencies report cases in which bundled discounting was found to be illegal: Croatian Competition Agency (1); Danish Competition Authority (3); European Commission (2); French Competition Council (8); Jersey Competition Regulatory Authority (1); Netherlands Competition Authority (1); and Polish Office of Competition and Consumer Protection (2).

Agencies indicate the following numbers of decisions concerning tying practices that were challenged in court: Bulgarian Commission on Protection of Competition (5 challenged, all upheld); Czech Republic Office for the Protection of Competition (1 challenged and upheld); European Commission (1 challenged and upheld); Korea Fair Trade Commission (1 challenged, appeal withdrawn before court ruling); Polish Office of Competition and Consumer Protection (2 challenged, 1 upheld, 1 pending); Federal Competition Commission Mexico (3 challenged, 1 upheld, 2 pending); Romanian Competition Council (1 challenged and upheld); Russian Federal Antimonopoly Service (1-2 challenged per year, all upheld); Antimonopoly Office of the Slovak Republic (1 challenged, case is pending); Taiwan Fair Trade Commission (1 challenged and upheld); and Turkish Competition Authority (2 challenged, both pending).

With respect to bundled discounting, agencies report the following numbers of decisions challenged in court: French Competition Authority (6 challenged, 2 decisions upheld, 1 upheld with respect to the most salient elements, 1 overturned, 1 still pending, 1 application withdrawn by parties); Netherlands Competition Authority (1 challenged and upheld); and Polish Office of Competition and Consumer Protection (1 challenged and upheld).

¹⁹ Created in January 2009 by way of transformation of the French Competition Council (Conseil de la concurrence) into an agency vested with full jurisdiction for enforcing competition law and policy.

²⁰ 1 decision, 1 warning, and 6 cautions.

B. Decisions in judicial systems in the last ten years

Agencies from jurisdictions with judicial systems report the following cases that resulted in a final court decision that the tying practice violated competition law or a settlement with relief: Canada (1 case) and U.S. Department of Justice (U.S. DOJ) (1 case).²¹ Concerning bundled discounting, the Netherlands Competition Authority reports 1 case where illegality of the practice was found in court.

C. What prompted the investigations?

ICN members were also asked to indicate what prompted the investigations. According to the replies investigations on tying and bundled discounts were prompted by competitor or consumer complaints in the great majority of the cases reported by agencies. Agencies in Bulgaria, Croatia, France, Japan, Mexico, Russia and Serbia also commenced proceedings on their own initiative. In Turkey, cases were also prompted by complaints of buyers, dealers, municipalities, foundations, or notification by the parties to the relevant agreements. In France, 6 out of 23 investigations were prompted by complaint of the Ministry for Economy. The French Telecommunications Regulatory Authority has also forwarded a complaint.

3. Private Enforcement - Cases challenging tying or bundled discounting

According to the responses, all jurisdictions allow private parties to challenge tying or bundled discounting in court. Several replies report, however, that private parties can only challenge tying or bundled discounting in court to obtain reparation of the harm suffered by an anticompetitive conduct (as opposed to the possibility of additionally, or alternatively, requesting a cease and desist order).²² In Colombia, parties can either challenge tying or bundled discounting before the agency or through a “popular legal action” (similar to a class action, but without the possibility of a claim for private damages), should competition be considered a collective interest in the said jurisdiction. In Switzerland private parties are allowed to challenge tying or bundled discounting in court but the case must be referred to the Competition Commission for an opinion. In Mexico and Singapore a private challenge may be brought only after the agency has acted and found a violation and, in the case of Singapore, after an appeal has been addressed by the court.

In general, private cases are rather rare in most jurisdictions covered by the survey. 14 agencies answered that no cases have been brought by private parties yet, several agencies did not answer the question.²³ Agencies from 4 other jurisdictions indicated that private cases have been brought in their jurisdictions.²⁴

With regard to statistics, the Canadian Competition Bureau reports that one case has been brought by private parties. In Japan, there have been two cases, and Germany has had at least five cases. In Japan, the two cases brought in private litigation concerning tying were challenged as “unfair trade practices.” The German Bundeskartellamt mentions that, indeed, the most important decisions concerning tying and bundled discounts in the last ten years were rendered in cases brought by private parties.²⁵ In the United States, some of the most important judicial decisions regarding tying - and all of the judicial decisions regarding

²¹ See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

²² See agency replies from Bulgaria, Chile, Croatia, Lithuania, Mexico, Romania, and United Kingdom.

²³ See agency replies from Colombia, Czech Republic, Denmark, France, Hungary, Ireland, Israel, Jersey, Korea, Netherlands, Poland, Romania, Slovak Republic, and Taiwan.

²⁴ Canada, Germany, Japan, and United States.

²⁵ See BGH (Federal Court of Justice), Case KZR 16/02, WuW/E DE-R 1206 – *Strom und Telefon I*; Case KZR 38/02, WuW/E DE-R 1206 – *Strom und Telefon II*; and Case KZR 1/03, WuW/E DE-R 1283 – *Der Oberhammer*.

bundled discounting - have come as a result of private challenges. A recent survey conducted by U.S. FTC staff estimated that between January 2000 and July 2007, at least 53 cases involving tying and 25 cases involving bundled discounting were brought in the United States by private parties.²⁶ However, many of these cases were dismissed or settled before trial.

III. ANALYSIS OF TYING AND BUNDLED DISCOUNTING AGREEMENTS

1. Specific criteria for analyzing tying or bundled discounting/basic elements of the analysis

Several respondents indicate that their jurisdiction does not provide for specific criteria for analyzing tying or bundled discounting.²⁷ Other agencies identify, in broad terms, the following criteria used when assessing tying and bundled discounts under unilateral conduct rules²⁸: the existence of a dominant position or substantial market power;²⁹ separate products or services; tying or bundling of those products or services; negative effects on competition; and a lack of countervailing justifications. This report does not address the assessment of dominance/substantial market power³⁰ but focuses on the other criteria mentioned.

Some agencies mention guidelines or other types of policy statements they have published to give guidance on their approach to analysing unilateral conduct, including tying and/or bundled discounts.³¹

2. Competitive concerns associated with tying and bundled discounting

ICN members were asked to explain the competitive concerns generally associated with tying and bundled discounting in their jurisdiction. As examples, the questionnaire mentioned maintaining dominance/substantial market power; distortion of, or harm to, competition; exploitation of consumers; exclusion of competitors; and price-discrimination. In their replies, agencies from Croatia, Jersey and Netherlands state that all of the examples in the questionnaire are relevant in their jurisdiction. Several agencies mention distortion of, or

²⁶ This survey, which also covers many types of unilateral conduct in addition to tying and bundled discounting, is discussed in an FTC Policy Staff Working Paper which is available at www.ftc.gov/os/sectiontwohearings/index.shtm.

²⁷ Agencies from Belgium, Bulgaria, Croatia, Denmark, Czech Republic, Hungary, Italy, Lithuania, Netherlands, New Zealand, Serbia, and Slovak Republic.

²⁸ See, in particular, responses by agencies from Canada, European Commission, France, Germany, Korea, Romania, Singapore, Switzerland, Taiwan, Turkey, and United States.

²⁹ In the following, the terms dominance and substantial market power are used interchangeably, cf. ICN Recommended Practices on dominance/substantial market power analysis pursuant to unilateral conduct laws, available at

http://www.internationalcompetitionnetwork.org/media/library/unilateral_conduct/Unilateral_WG_1.pdf.

³⁰ For a survey on the assessment of dominance/substantial market power, see 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%20of%20Unilateral%20Conduct%20May%202007.pdf.

³¹ *E.g.* Canadian Competition Bureau has released an updated version of its Enforcement Guidelines on the Abuse of Dominance Provisions (Section 78 and 79 of the Competition Act) for public comment (available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html>), European Commission (Article 82 Discussion Paper, available at <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>, and Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, available at <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>), Jersey (Guideline on Abuse of Dominance), and U.S. DOJ ("Competition and Monopoly – Single-Firm Conduct under Section 2 of the Sherman Act", available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>).

harm to, competition;³² harm to, or exclusion of, competitors;³³ or harm to consumers in general³⁴ as their primary concerns with tying and bundling practiced by dominant firms.

Several respondents state that the specific conduct may allow the dominant firm to use its market power in one market to obtain market power in another market.³⁵ This may raise barriers to entry and foreclose the market for competition.³⁶ Furthermore, respondents also mention that tying may allow the dominant firm to maintain its market power in the tying product market.³⁷

3. How is it determined if two products or services are separate?

In determining whether two products or services are separate rather than a single integrated product, agencies from 22 jurisdictions indicate that they focus on analysing the demand side and whether there is sufficient (consumer) demand for the alleged tied product or service.³⁸

Many agencies refer to the importance of an independent demand for each product.³⁹ For example, according to the European Commission, two products are considered 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.⁴⁰

The U.S. DOJ observes that a key consideration is whether “there is a sufficient demand for the purchase of [the tied product] to identify a distinct product market in which it is efficient to offer [the tied product] separately.”⁴¹ Product-design decisions are not generally considered illegal ties under U.S. antitrust law unless the product design serves no purpose other than to disadvantage rivals and harms the competitive process.

In order to establish whether sufficient demand for the separated product or service exists agencies from Canada, Croatia and the Netherlands expressly refer to the hypothetical monopolist test, whereby the agency starts with the combined product and investigates whether a virtual small but significant price rise of one of the components would push market participants into buying/selling the components as separate products. If this is the case, there are two different products.

³² See replies from Bulgaria, Germany, Italy, Japan, Korea, Lithuania, Turkey, and United States.

³³ See replies from Bulgaria, Czech Republic, Denmark, Japan, and Turkey.

³⁴ See replies from Bulgaria, Chile, Czech Republic, European Commission, Hungary, Jamaica, Japan, Korea, Lithuania, Russia, and Turkey.

³⁵ See replies from Brazil, Canada, Chile, France, Germany, Israel, Korea, Mexico, New Zealand, Slovak Republic, Turkey, United Kingdom, and United States.

³⁶ See, in particular, replies from Belgium, Brazil, Chile, Denmark, European Commission, Germany, Israel, Italy, Korea, New Zealand, Poland, Slovak Republic, United Kingdom, and United States.

³⁷ See for example agency replies from Denmark, Germany, Japan, Korea, Mexico, Netherlands, New Zealand, Poland, Taiwan, Turkey, United Kingdom, and United States.

³⁸ See replies from Brazil, Bulgaria, Canada, Denmark, Germany, Ireland, Italy, Jamaica, Japan, Jersey, Mexico, Netherlands, New Zealand, Poland, Romania, Russia, Singapore, Slovak Republic, Taiwan, Turkey, United Kingdom, and United States.

³⁹ See replies from Korea, Romania, Russia, Slovak Republic, Chile, Brazil, Jamaica, and Israel.

⁴⁰ CFI, Case T-201/04 *Microsoft Corp. v Commission*, not yet reported, paragraphs 917, 921, 922. The Belgian Competition Authority indicates no specific test is used, but generally follows EC law. The Bulgarian Commission on Protection of Competition also uses the product market test. The Czech Republic’s Office for the Protection of Competition follows EC practices, as would the agencies from Hungary and Jersey.

⁴¹ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-22 (1984). The Japan Fair Trade Commission also checks if products are sold or purchased separately (*Fujitaya Co Ltd.* Decision No. 2 of 1992). The Canadian Competition Bureau has a similar test.

Various ICN members mention industry practice as an indicator of whether there are two separate products or services.⁴² In Germany the Federal Court of Justice analysed in the *Oberhammer* case whether the products “objectively belong together” or whether there is an industry practice to sell two products only together. In the case, the court found the provision of an ISDN connection as the necessary infrastructure for telecom services on the one hand, and the provision of internet services on the other hand to be distinct.⁴³

In Denmark the Competition Council noted in the *Viterra Energy* case that there were examples that the products were actually sold individually by other suppliers on the market.⁴⁴

The French Competition Council examined whether two services were separate or a single integrated product in its decision about multiple play (TV, internet access and telephone) offers by ADSL operators (i.e. operators of “Asymmetric Digital Subscriber Line”, a data communications technology that enables faster data transmission over copper telephone lines than a conventional voiceband modem) . The Competition Council’s examination of the practice of selling France Télévisions “catch up TV” programs as part of an alleged dominant firm’s ADSL television services without offering the possibility of separating access to these two services was based on two considerations: (i) whether this global offer was standard within the market; and (ii) whether it was technically possible to separate the services. It was found in this case that the products belonged to the same relevant market and there was no tying.⁴⁵ The French Competition Authority points out that, indeed, any multiplay service offered by ADSL operators requires an internet access subscription containing a basic package of channels that cannot be separated.

Technical possibilities for separating a bundle are also investigated.⁴⁶ The Turkish Competition Authority mentions the inseparable nature of the components in the bundle as one of the standards it may apply.”

Several ICN members, such as the United Kingdom’s OFT, mention that the appropriate definition depends on the facts of the case.⁴⁷ For example in aftermarkets, if a firm increases the price of its tied secondary products – the OFT analyses if enough consumers switch away from the primary product (with consequential impact on sales of secondary products) to make such a price rise unprofitable when only considering profits of the secondary product. In this case, there is potentially one market and consequently no separate products.

4. In what market(s) must effects be shown?

Agencies were asked in what market(s) effects, if any, must be shown to demonstrate an illegal tie. The replies indicate that, in 17 jurisdictions, agencies must demonstrate effects in either the tying or the tied market in order to show that the tying practice can be illegal.⁴⁸ In 10 jurisdictions agencies need to show effects on the tied market,⁴⁹ while in 1 jurisdiction effects on the tying market would need to be shown.⁵⁰

⁴² See also replies from Poland, Taiwan, and Turkey.

⁴³ BGH (Federal Court of Justice), Case KZR 1/03, WuW/E DE-R 1283 - *Der Oberhammer*.

⁴⁴ Danish Competition Council decision of 31st May 2000 – *Viterra Energy Service*. See also response by the Taiwan Fair Trade Commission.

⁴⁵ Decision no. 08-D-10, *ADSL*.

⁴⁶ See submissions from Germany and the Slovak Republic.

⁴⁷ See also replies from Colombia and Mexico.

⁴⁸ Bulgaria, Croatia, Denmark, European Commission, France, Germany, Italy, Jamaica, Japan, Jersey, Korea, Mexico, Netherlands, New Zealand, Romania, United Kingdom, and United States.

⁴⁹ Belgium, Canada, Chile, Czech Republic, Denmark, Lithuania, Singapore, Slovak Republic, Switzerland, and Taiwan.

⁵⁰ Russia.

The Israel Antitrust Authority indicates that tying practiced by a dominant firm, in a manner inconsistent with accepted trading practices, creates an irrebuttable presumption of a violation of unilateral conduct rules. In Turkey, although the Turkish Competition Authority has taken into account restrictive effects in the tied product market in some of its decisions, it may be said that such effects need not be shown (if the competition authority is able to show anticompetitive intent it is not necessary to demonstrate anticompetitive effects).

5. What specific types of effects must be shown?

Agencies were asked to specify the types of effects that must be shown to demonstrate an illegal tie or an illegal bundling practice. Many agencies' replies echo the competitive concerns generally associated with tying and bundling in the respective jurisdictions (see above III.2). More specifically, replies mention the following types of effects that must be shown to find practices involving tying or bundled discounting to be in violation of antitrust policy and law:⁵¹ harm to competition or anticompetitive foreclosure⁵² leading to the maintenance or strengthening of market power.⁵³ Several agencies answer more generally and explain that the conduct must negatively affect competitors or competition, and lead to market distortion or consumer harm.⁵⁴

A. Tying

The Canadian Competition Bureau explains that subparagraph 77(2)(a) and (c) of the Competition Act requires that the tie is likely to have an exclusionary effect on a competing product or firm through the impedance of entry or expansion, or by any other means. The Bureau adds that this is consistent with abuse of dominance under subparagraph 79(1)(b) of the Competition Act which requires "an intended negative effect on a competitor that is exclusionary, disciplinary or predatory." Under both provisions the Bureau must demonstrate a substantial lessening of competition. To this end, it applies a "but for" test and analyses whether, but for the practice in question, there would be substantially greater competition in the relevant market in the past, present or future. In its assessment, the Bureau analyses the degree to which the anti-competitive acts enhance or preserve barriers to entry or expansion but may also consider other factors, including whether or not consumer prices might be significantly lower; product quality; innovation; consumer choice; and significantly more switching in the absence of the practice.

The Turkish Competition Authority also mentions a variety of factors that have been relevant in its analysis of tying practices, such as risk of foreclosure of the market for competitors of the tied product, distortion of competition providing competitive advantage in favor of an undertaking, providing competitive advantage in favor of an undertaking and complicating

⁵¹ Please note that some agencies may have mentioned in their replies only those effects that are of most importance to them so that the following should not be read as a comprehensive overview of all relevant effects in the respective jurisdiction.

⁵² See replies from Belgium, Brazil, Canada, Chile, Croatia, European Commission, France, Germany, Hungary, Jamaica, Mexico, Netherlands, New Zealand, Poland, Romania, Singapore, Taiwan, Turkey, United Kingdom, and United States.

⁵³ See replies from European Commission, Germany, Netherlands, New Zealand, Poland, Romania, Taiwan, and United States.

⁵⁴ Please note that several agencies stress that in addition to showing negative effects on competition or competitors, harm to consumers needs to be demonstrated. See, *e.g.*, reply by the European Commission (likely harm).

activities of rivals, furthermore the negative impact on consumer welfare via limitation of choice for the relevant product and obligation to purchase a single product.⁵⁵

The French Competition Authority states that it must determine that the practice has the effect, or could have the effect, of harming consumer welfare by foreclosing an efficient competitor from the tied market or the tying market or the effect of foreclosing either of these markets. The Authority reports the university hospital of Nantes case as an example of market foreclosure.⁵⁶ The case concerned a call for tenders relating to hospital waste disposal. The procedure was divided into three parts, the first relating to hospital waste disposal, the second to the rent of trucks for transport of waste, and the third – an alternative to the second – relating to the sale of trucks for transport of waste. Valorena, a firm which held a dominant position on the market for hospital waste disposal in four regional administrative districts, was the only bidder on the first two parts, whereas the company Zargal was the only bidder on the third one. The university hospital wanted to accept Valorena's offer concerning the first part and Zargal's offer concerning the third, since it was cheaper to buy Zargal's truck than to rent Valorena's. However, Valorena refused to allow trucks of other companies to transport waste to its incineration plant, so the hospital finally decided to accept Valorena's offer to rent trucks rather than buy trucks from Zargal. The Council concluded that Valorena's conduct that prevented Zargal from selling its trucks to the university hospital hindered competition on the market for the supply of trucks and that Valorena had abused its dominant position.

With regard to assessing market foreclosure, the European Commission indicates that it will address foreclosure causing likely harm to both intermediate and final consumers:⁵⁷ An undertaking which is dominant in one product market (or more) of a tie (the tying market) can harm consumers through tying by foreclosing the market for the other products that are part of the tie or bundle (the tied market) and, indirectly, the tying market. Even when the aim of the tying is to protect the dominant undertaking's position in the tying market, this is done indirectly through foreclosing the tied market.⁵⁸ To establish that a tying practice infringes Article 82 of the EC Treaty the Commission will investigate whether it leads to likely anticompetitive foreclosure, *i.e.* foreclosure that is likely to have an adverse impact on consumer welfare, whether in the form of higher price levels than would otherwise have prevailed, or in some other harm such as limiting quality or reducing consumer choice. The identification of likely consumer harm will rely on qualitative as well as, where possible and appropriate, quantitative evidence.

The German Bundeskartellamt focuses on whether tying practiced by the dominant firm has the effect of hindering (*e.g.* by foreclosing the tied product market) the maintenance of the degree of competition still existing in the market or the growth of that competition. The

⁵⁵ Cf. the following cases: *Coca Cola/Efes Pilsen* dated 19.10.2004 and numbered 04-66/951-229; *Teleon* dated 26.9.2005 and numbered 05-61/900-243; *TFF/Digiturk/Atlas*, dated 7.9.2006 and numbered 06-61/822-237; *Turkuaz* dated 23.01.2003 and numbered 03-06/59-21.

⁵⁶ Decision n°03-D-61 relating to practices implemented in the market for the supply of trucks for waste transport in the university hospital of Nantes.

⁵⁷ The European Commission explains that the concept of 'consumers' encompasses all direct or indirect users of the products affected by the conduct, including intermediate producers that use the products as an input, as well as distributors and final consumers both of the immediate product and of products provided by intermediate producers. Where intermediate users are actual or potential competitors of the dominant undertaking, the assessment focuses on the effects of the conduct on users further downstream.

⁵⁸ The European Commission notes, for example, that an undertaking that is dominant in a market (tying market) may fear that competitors in another market (the tied market) enter into, or expand in, the tying market and erode its dominant position. This could happen if the two markets are close to each other from a technological point of view. By tying it can prevent this from happening.

Bundeskartellamt understands market foreclosure as a situation where actual or potential competitors of the dominant firm are completely or partially denied profitable access to a market and thereby the degree of competition or the growth of competition in the market is hindered. The Bundeskartellamt also analyses whether tying practices may help a dominant firm to maintain market power in the tying market. The Bundeskartellamt underlines that both under European and German law it is not necessary for a certain conduct to cause direct consumer harm. Rather it is sufficient that the conduct is detrimental to competition and to an effective competition structure and thus harms consumers indirectly.

The United Kingdom's Office of Fair Trading argues for a unified approach to tying, bundled discounting and loyalty discounts viewing them all as forms of conditional discounting. When considering whether such conditional discounts have an anti-competitive effect the OFT takes into account whether 1) competitors are able to compete across all of the sales made by a firm to a customer and 2) if they cannot do so, whether competitors can nevertheless have a similar quantity of assured sales as the firm offering the conditional sales. Furthermore, if those two tests are not satisfied, the OFT would consider whether the tie had a foreclosing effect either in the tying or tied market. In that respect, the OFT states that it is important to determine whether any foreclosure effect would exclude or drive from the market a firm equally efficient to the allegedly dominant undertaking. This impact should be sustained or durable and not merely transitory.

The U.S. FTC cites an early case where the U.S. Supreme Court held that “[tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market.”⁵⁹ Similarly, in a more recent case the Court explained that “the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. . . . [I]f [the seller's] power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures. This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product.”⁶⁰ The U.S. agencies note that a tie can be illegal under U.S. law if it harms competition in either the tied-product market or the tying-product market and stress that for a tie to be illegal, harm to competition - as opposed to mere harm to competitors - must be demonstrated.

Brazilian Council for Economic Defense (CADE) and European Commission describe the way tying practices may be used by firms that operate in regulated markets. CADE notes that tying arrangements may affect regulated industries by means of cross subsidizing. By the same token, the European Commission explains that tying may allow the dominant firm to raise prices in the tied market in order to compensate for losses of revenue caused by regulation in the tying market.

B. Bundled Discounting

With regard to specific effects resulting from bundling practices, the Canadian Competition Bureau explains that bundled discounting can raise competitive concerns in two ways. First, by discounting two or more products that comprise a bundle, bundled discounting may constitute predatory conduct. Second, to the extent that bundling may raise the cost of non-bundling rivals, it may become more difficult to compete in the market for standalone products, leading to possible exclusion or disciplining of competitors, as with tying. The

⁵⁹ *Northern Pacific Railway v. United States*, 356 U.S. 1, 6 (1958).

⁶⁰ *Jefferson Parish Hosp. Dist. No 2 v. Hyde*, 466 U.S. 2, 14 (1984) (footnote omitted).

exclusionary effect of bundling can arise when competitors to a bundling firm are unable to offer the bundler's additional products, making it more difficult for non-bundling firms to compete. With respect to predation, a bundling firm could cut prices to a bundle below cost in order to drive competitors out, and if barriers to entry are present, recoup losses by raising the price of the product. Where a bundle is properly classified as a separate relevant product market, the Bureau says it will analyze it as predatory conduct to determine whether the bundle, as a single product, is being sold below its average avoidable cost.

The European Commission indicates that, in the case of bundled discounting, the undertaking may be in a dominant position for more than one of the products of the bundle. The anticompetitive foreclosure is likely to be stronger the greater the number of such products in the bundle. This is particularly true if the bundle is difficult for a competitor to replicate, either on its own or in combination with others.

The German Bundeskartellamt reports that in the *Stadtwerke Düsseldorf*⁶¹ case the Higher Regional Court Düsseldorf held that the dominant firm, a municipal utility, had abused its dominant position by linking a better price for the supply of long-distance heating (a market in which it had a dominant position) to the bundled supply with other forms of energy. *Stadtwerke Düsseldorf* had announced that it was not willing to supply the potential customer with long distance-heating if that customer wished to purchase gas from another supplier. The court found that this conduct maintained and fortified barriers to entry in the gas market (where the firm was also dominant).

In order to determine whether discounts are anticompetitive, according to the UK Office of Fair Trading, it is necessary to consider whether the dominant firm has the ability to foreclose, has an incentive to foreclose (in practice, this will necessitate at least a theoretical analysis of whether recoupment is possible, - otherwise there is likely no incentive to foreclose), whether the discounts have a likely substantial impact on effective competition and there are any countervailing efficiency benefits that outweigh the anti-competitive effect. When assessing any likely anti-competitive effect, the OFT looks at whether 1) competitors are able to compete across all of the sales made by a firm to a customer and 2) if not, whether they can nevertheless have a similar quantity of assured sales as the firm offering the conditional discounts, so that competition between firms is symmetric and all firms appear to be able to achieve a minimum efficient scale. The OFT considers it important whether any foreclosure effect would exclude or drive from the market a firm equally efficient to the allegedly dominant undertaking. This impact should be sustained or durable, not only transitory.

The U.S. agencies state that for bundled discounting to be illegal under U.S. antitrust law, actual or probable harm to competition, as opposed to mere harm to a competitor, must be demonstrated. The DOJ adds its view that, where bundle-to-bundle competition is reasonably possible, harm to competition would be demonstrated by showing both that the price of the bundle is below an appropriate measure of cost of the bundle and that recoupment is likely.

C. What degree of proof is required?

Respondents were asked what degree of proof is required and whether effects must be actual, likely, or potential. Five agencies replied that they would need to show actual negative effects on competition to prove that a tying or bundling practice violates unilateral conduct laws.⁶²

⁶¹ OLG (Higher Regional Court) Düsseldorf, Case VI-2 U (Kart) 8/06, WuW/E DE-R 2287 – *Stadtwerke Düsseldorf*.

⁶² See responses by the agencies from the Czech Republic, Canada (“but for”-test), Denmark, Russia, and United Kingdom (Competition Commission).

The replies indicate that in 24 jurisdictions it suffices to show potential, probable or likely effects.⁶³

The German Bundeskartellamt indicates that the requisite standard of proof in German competition law depends on the type of proceeding. In an administrative fine proceeding (where the Bundeskartellamt may issue a decision imposing a fine) the violation of antitrust law needs to be shown with “no reasonable doubt” (note that, as far as can be seen, the Bundeskartellamt has not yet conducted such proceedings with respect to tying or bundled discounting). In an administrative proceeding (where the Bundeskartellamt may issue a cease and desist order), the standard of proof can be described with “probability” or “balance of probabilities.”

6. Does intent play a role?

ICN members were asked whether a firm’s intent is relevant in examining tying and bundled discounting cases. Overall, for the majority of jurisdictions submissions indicate that intent is not required, but is often considered as a relevant factor, particularly in assessing the effects of the practice. Three agencies respond that they did not have the experience necessary in assessing the practices to submit a response.⁶⁴

Six agencies indicate that they are required, when examining tying and bundled discounting practices, to show a firm’s intent to distort competition or, more specifically, the dominant firm’s purpose to employ such practices to reinforce or maintain its dominant position.⁶⁵ For example, in Canada, for tying to be considered to be an anti-competitive practice, the Competition Bureau must demonstrate that its purpose “is an intended negative effect on a competitor that is exclusionary, disciplinary or predatory.”⁶⁶

Another 8 agencies indicate that intent is not relevant.⁶⁷ The submissions from 15 jurisdictions indicate that although intent is not required in establishing tying and/or bundled discounting as an offence, it may be taken into consideration during the analysis of the conduct, particularly in assessing effects.⁶⁸ For example, the European Commission notes, “Under EC competition law, the concept of abuse is an objective one: there cannot be any finding of abuse based on intent alone. However, we may look at internal documents or business plans of the dominant undertaking that suggest that there is a strategy whereby tying is used to foreclose competitors. This may be relevant for the assessment of the likely effects

⁶³ Belgium (actual or potential), Brazil (actual or potential), Bulgaria (actual or potential), Chile (actual or likely), Croatia (actual or potential), European Commission (likely), France (likely), Germany (actual, likely or potential), Hungary (likely), Italy (likely), Jamaica (actual or likely), Japan (no actual exclusion required but high (under the private monopolization rules) or abstract (under the unfair trade practices provisions) probability is sufficient), Jersey (actual or likely), Lithuania (actual or potential), Mexico (likely), Netherlands (likely), Poland (actual or potential), Romania (actual or potential), Singapore (actual or potential), Slovak Republic (potential), Taiwan (likely), Turkey (actual, likely or potential), United Kingdom (likely), and United States (actual or probable).

It is not possible to conclude from the replies received whether and, if yes, to what extent those standards, and in particular, the standards “likely”, “probable” and “potential” differ.

⁶⁴ Serbia, Jersey, and Switzerland. Jersey indicates that the issue of intent has not yet been addressed in the jurisdiction, however it would be expected that any future discussion of intent would be consistent with the view taken by the European Commission.

⁶⁵ See responses by Canada, Croatia, Korea, Mexico, New Zealand, and Taiwan.

⁶⁶ This analysis applies exclusively in the context of assessing conduct under s. 79 of the Competition Act, the Abuse of Dominance provision. Please note that under s. 77 of the Act, intent is not relevant.

⁶⁷ Intent is not relevant in Brazil, Bulgaria, the Czech Republic, Denmark, Jamaica, Hungary, Lithuania, and the Slovak Republic.

⁶⁸ Intent *may* be relevant in Belgium, Chile, Columbia, in the analysis by the European Commission, France, Germany, Israel, Japan, Romania, Singapore, Netherlands, Poland, Turkey, the United Kingdom, and the United States.

of the tying practice.”⁶⁹ The Turkish Competition Authority states that tying may be regarded as an abuse if the dominant firm engages in its behavior “with the purpose to restrict, prevent or distort competition.” The U.S. agencies explain that intent to increase sales by taking competitors' customers or otherwise is not relevant to whether a tie is legal under U.S. antitrust law, but evidence of the business purpose behind the conduct is relevant in assessing the competitive effects of challenged conduct.

Seven responses were received from NGAs addressing tying and bundled discounts. These responses are consistent with their respective agency responses, citing intent as a relevant factor in examining the effects of the conduct. The Swiss NGA Group comments with respect to intent that it may be relevant in assessing the competitive effects of tying by a dominant firm. The Group notes, “In the ‘Documed’ case, the Swiss Competition Commission held that with tying practices dominant undertakings ‘aim’ (‘bezwecken’) to achieve a foreclosure effect. That said, based on this precedent, it is not possible to assess whether, in the view of the SCC, the purpose of foreclosure must be deemed as an additional condition to be met in order for a tying practice to be held unlawful.”⁷⁰

In addition to considering intent while examining the effects of the anti-competitive conduct in question, the Chilean Fiscalía Nacional Económica, the German Bundeskartellamt and the Polish Office of Competition and Consumer Protection also comment that intent can be considered in the establishment of fines and monetary penalties levied against a dominant firm.

Generally, for all jurisdictions covered by the responses, the relevance of intent in an examination under unilateral conduct laws does not differ depending on the practice in question. Agencies take the same approach to the importance of intent, whether examining allegations of tying or bundled discounting.

7. Evaluation of bundled discounting: Does price-cost comparison play a role?

Agencies were asked whether price-cost comparison plays a role in the evaluation of bundled discounting. The Polish Office for Competition and Consumer Protection and the German Bundeskartellamt state that price-cost comparison is generally not necessary to show a violation of unilateral conduct rules. Several other agencies respond that they have no or little experience with price-cost comparison in bundling cases.⁷¹ The agencies indicate, however, that price-cost comparisons may be of relevance in the analysis of bundled discount practices or that they have been used in individual cases.

The French Competition Authority, for example, indicates that price-cost comparison does not constitute a preeminent criterion. The Authority notes that it often analyses discounts by calculating the percentage of discounting.⁷² For bundled discounts, the comparison is between purchase price of the separate items and of the bundle.⁷³ Thus, the efficiency gains of the discount associated with the bundle in comparison with the separate sales of the concerned products constitutes the relevant test. In the *Sandoz* case, the French Competition Council concluded that the bundled discounts had an anticompetitive effect since the prices of the

⁶⁹ See the European Commission’s response.

⁷⁰ See the Swiss NGA Group response.

⁷¹ See agency responses from Chile, France, Israel, Japan, Jersey, Lithuania, Mexico, Romania, and Taiwan.

⁷² See Decision n°03-D-35, 24 July 2003, *Laboratoires Sandoz*, point 49 “(...) the discount was of 0.25% to 2% of the total turn-over (the hospital concerned had with Laboratoires Sandoz)”; decision n°99-D-14, 23 February 1999, *TDF*.

⁷³ See Decision n° 00-D-47, 22 November 2000, *EDF-Citelum*; Decision n°03-D-35, 24 July 2003, *Laboratoires Sandoz*.

separate items offered by competitors were lower than those of the bundle offered by the dominant firm.

The German Bundeskartellamt indicates that when assessing potential foreclosure effects, German competition authorities and courts analyse *inter alia* the possibilities and incentives of companies to switch to other suppliers. In this context, the Bundeskartellamt examines the quantitative effects of the discount, *i.e. inter alia* the discount percentage, the discounts associated with certain thresholds, the turnover on the basis of which the discount percentage is calculated, individualised sales targets, as well as potential losses that switching would bring about. The Bundeskartellamt states that if price-cost data is readily available, it might possibly be used in the assessment.

Agencies from 12 jurisdictions reply that price-cost tests are relevant and would be used in the analysis.⁷⁴

The Canadian Competition Bureau mentions that if the bundle is one product, then the analysis is whether the conduct is predatory, *i.e.* price would need to be below AAC. Similarly, the Russian Federal Antimonopoly Service would apply a price-cost test to each product in the bundle and apply a predatory pricing analysis.

The European Commission states that where sufficiently reliable data is available or can be obtained, the Commission will apply a price-test, based on the as-efficient-competitor test. The Commission states that it would be ideal but complex to assess the effect of the rebate by examining whether the incremental revenue covers the incremental costs for each product in the undertaking's bundle. In practice, the Commission would, in most situations, use the incremental price as a good proxy. If the incremental price that customers pay for each of the dominant undertaking's products in the bundle remains above the long-run average incremental costs ("LRAIC") to the dominant firm of including this product in the bundle, the Commission will normally not intervene since an as-efficient-competitor with only one product should in principle be able to compete profitably against the bundle. Enforcement action may, however, be warranted if the incremental price is below the LRAIC, because in such a case an as-efficient-competitor may be prevented from expanding or entering. If the evidence suggests that competitors to the dominant undertaking are also selling identical bundles, or could do so timely without additional costs, the Commission will generally regard this as bundle competing against bundle, in which case the relevant question is not whether the incremental revenue covers the incremental costs for each product in the bundle, but rather whether the price of the bundle as a whole is predatory.

The United Kingdom's Office of Fair Trading strongly supports the use, where possible, of an empirical assessment involving an examination of the effective price for contestable sales and comparing it to an appropriate cost benchmark. Where the effective price for contestable sales is less than the cost benchmark, a presumption of effect can be found, while, where this is not the case, a presumption of no effect would be established. With regard to the most appropriate cost benchmark, the OFT states that this may often be the AAC test.

The U.S. agencies' responses state that price-cost tests have played a role in most judicial decisions. In the DOJ's view, price-cost tests should play a role and the particular price cost comparison depends on whether bundle-to-bundle competition is possible. If yes, the predatory pricing standard including the analysis of recoupment should be applied.

⁷⁴ See agency responses from Canada, Croatia, Czech Republic, Denmark, European Commission, Ireland, Japan, New Zealand, Romania, Russia, United Kingdom, and United States. Furthermore, in Singapore, price-cost tests may be relevant and used in the analysis in the context of showing a causal link between a practice and effects on competition.

The role of recoupment

ICN members were asked to indicate if recoupment plays a role in the evaluation of bundled discounts and, if so, what role it plays. Many agencies did not answer the question.

Four agencies indicate that recoupment is generally not relevant in their analysis.⁷⁵ In 5 jurisdictions, the analysis of recoupment is relevant.⁷⁶ For example, the United Kingdom's OFT points out that an analysis of incentive to commit abuse required at least a theoretical analysis of recoupment. The U.S. DOJ states that, where bundle to bundle competition is possible, a predatory pricing standard should be employed including the analysis of likely recoupment. The European Commission comments that recoupment is related to the likely effects of an abuse: If conduct is likely to enable the dominant firm to maintain or increase market power, then it can recoup the losses.

IV. PRESUMPTIONS AND SAFE HARBORS

1. Presumptions

Most agencies indicate that their unilateral conduct law and policy does not provide for a presumption of illegality,⁷⁷ *i.e.* circumstances under which tying or bundled discounting is held to be illegal.

Several replies, however, describe presumptions that exist in their jurisdictions. The Belgian Competition Authority states that tying is always prohibited in sales to consumers by articles 54-62 Unfair Trade Practices and Consumer Protection Act.⁷⁸ In Colombia, tying is considered *per se* illegal. The Israel Antitrust Authority indicates that, if a monopoly practices tying (contract is subject to conditions and those conditions are unrelated to the subject matter of the contract according to accepted trading practices), there is an irrebuttable presumption of illegality. In Jamaica, tying is a *per se* offence under Section 32(2) of the Fair Competition Act,⁷⁹ with no possibility to rebut the presumption. The Russian Federal Antimonopoly Service notes that tying is presumed illegal (with no possibility to rebut the presumption) when exercised by a dominant firm and when the tie obviously negatively affects the interests of consumers. The Turkish Competition Authority points out that according to the *Turkuaz* decision⁸⁰ tying is presumed to be illegal if two separate products are sold together, *i.e.* the buyer is obliged to buy a product that he does not want, the seller's market power in the tying product is adequate to cause restriction of competition in the tied product market and the restrictive effects occur in the tied product market. The United Kingdom's Office of Fair Trading states that, with respect to bundled discounting, where the effective price of contestable sales is less than the cost benchmark (which in many cases may be AAC), a presumption of effects could be found.

⁷⁵ See responses from Denmark (The Danish Competition Authority indicates that recoupment would be relevant in predatory pricing cases.), Germany (The German Bundeskartellamt specifies that if evidence showing recoupment of losses would be readily available, this might be used in the analysis.), Mexico, and Poland.

⁷⁶ Canada, Croatia, European Commission (if conduct is analyzed under predatory pricing standards), United Kingdom, and United States.

⁷⁷ See responses from Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Croatia, Czech Republic, Denmark, European Commission, France, Germany, Hungary, Ireland, Italy, Jamaica (concerning bundled discounting), Japan, Jersey, Korea, Lithuania, Mexico, Netherlands, New Zealand, Poland, Romania, Singapore, Slovak Republic, Switzerland, Taiwan, United Kingdom, and United States.

⁷⁸ The Belgian Competition Authority mentions that a proposal to delete these provisions is being discussed.

⁷⁹ Note that there is no such presumption under Sections 19-21, which address unilateral conduct by dominant firms.

⁸⁰ Number 03-06/59-21 of 23.01.2003.

2. Safe harbors

With regard to safe harbors, *i.e.* circumstances under which there is a presumption of legality, most replies state that their unilateral conduct laws and policies do not provide for safe harbours.⁸¹

The European Commission specifies, with respect to bundling practices, that there is no hard safe harbor. However, if the price is above the relevant cost benchmark, there is a soft safe harbour that the bundling does not violate Article 82 EC. The United Kingdom's Office of Fair Trading states that, with respect to bundled discounting, where the effective price of contestable sales is above the cost benchmark (which in many cases may be ACC), the OFT advocates a presumption of no effect. The U.S. agencies' note that it is difficult, due to limited case law, to state whether there *is* a price-cost safe harbor for bundled discounting in the U.S.

V. JUSTIFICATIONS AND DEFENSES

The responses to the questionnaire confirm that most competition agencies accept justifications and defenses in relation to tying and bundled discounting. Differences exist however in the type of justifications and defenses which are identified by the competition agencies and the conditions under which they can be accepted.

Several competition agencies do not distinguish between the justifications and defenses that apply in cases of tying and those that apply in case of bundled discounting.⁸² The United Kingdom's OFT even "advocates a unified approach to tying, bundling and loyalty discounts, viewing them all as forms of conditional discounting."

Certain competition agencies provide some guidance by stating that the justifications should relate to "economic efficiency considerations" (Chilean Fiscalía Nacional Económica), "reasonable business justifications" (Canadian Competition Bureau) or "accepted trading practices" (Israel Antitrust Authority).⁸³

It appears from the responses to the questionnaire that, in some jurisdictions, specific justifications and defenses have been codified in laws or regulations, whereas in other jurisdictions they are based on the competition agencies' policy, or have been established by case law.⁸⁴ For instance, the Canadian Competition Act and the Mexican Federal Law Economic Competition (FLEC) both contain specific statutory justifications and defenses in relation to tying.⁸⁵ By contrast, in the United States, justifications and defenses are primarily based on policy and case law.

⁸¹ Belgium, Bulgaria, Canada, Chile, Croatia, Czech Republic, European Commission, France, Germany, Hungary, Ireland, Israel, Italy, Jamaica, Japan, Korea, Lithuania, Mexico, Netherlands, New Zealand, Poland, Romania, Russia, Singapore, Slovak Republic, Switzerland, Taiwan, United Kingdom, and United States.

⁸² The Danish competition agency, however, identifies a specific justification concerning bundled discounting. If the discount is cost based it would not consider the discount to be illegal.

⁸³ This also applies to the competition agencies of Turkey and Switzerland. The Columbian competition agency only accepts tying and bundled discounting if the conduct has as its object the "defense of the stability of the basic sector of production of goods and services of interest to the general economy of the country".

⁸⁴ It is not uncommon that justifications and defenses are based on a mixture of legal provisions, policy and case law. This would for instance be the case in Canada.

⁸⁵ In subsection 77(4) of the Canadian Competition Act a dominant firm engaged in tied selling cannot be subject to an order of the Tribunal if the practice is for instance i) engaged in is reasonable having regard to the technological relationship between or among the products to which it applies". See also Article 10 of the FLEC.

There is consensus amongst competition agencies that tying and bundled discounting may lead to cost efficiencies for both suppliers and consumers.⁸⁶ Cost savings achieved by suppliers are often attributed to economies of scale and of scope.⁸⁷ The Canadian Competition Bureau emphasizes in particular the economies of scope, which can lead to "higher quality products, or lower total prices, than if each product were forced to be sold separately, and may also prompt firms to broaden product offerings in order to maintain as complete a set of products as that offered by competitors."

A number of agencies explicitly refer to cost savings which may be achieved by consumers. Such cost savings would, for instance, relate to the fact that it is more convenient and cheaper for customers to purchase a package rather than to search for each individual product. The U. S. DOJ and FTC refer in particular to a reduction of costs for consumers in negotiating terms of sale, in transportation costs, and in integration costs.⁸⁸

Apart from pure cost related advantages, competition agencies also identify non-cost related justifications and or defenses that they would consider acceptable.

Some competition agencies believe that tying and bundled discounting may ensure product quality and service levels particularly in the aftermarkets,⁸⁹ while others refer to the wider choice of products that will be available for consumers⁹⁰ and the quicker adoption of new technology and new products, which may stimulate innovation.⁹¹ The Japan Fair Trade Commission and one NGA argue that tying may be justified to secure health and safety.⁹² Few agencies explicitly refer to the "meeting the competition justification."⁹³

A number of competition agencies point out that they would be open to consider justifications and defenses which are based on the limited anti-competitive effect of a particular tying or bundled discount scheme.⁹⁴ The French Competition Authority and the Turkish Competition Authority argue that tying and bundled discounting that is limited to a relatively short period of time may not significantly affect competition and should therefore not be prohibited. The Turkish Competition Authority refers to the *Türk Telekom/Microsoft/Intel* case in which it was held, among other things, that if the scheme only affects a relatively limited amount of sales this may limit its anticompetitive effect and the need for a competition agency to intervene.⁹⁵

Several competition agencies indicate that justifications and defenses can only be accepted if they fulfill certain (cumulative) conditions.⁹⁶

A number of competition agencies stress that justifications and defenses can only be accepted if they have an objective basis.⁹⁷ Therefore, benefits which are purely speculative or would

⁸⁶ The competition agencies from France, the United States, Croatia, Denmark, and the European Commission explicitly refer to cost savings in their responses.

⁸⁷ This point is put forward in the responses of the Canada Competition Bureau, the European Commission, and the competition agencies from Mexico, the United Kingdom, and the United States.

⁸⁸ The European Commission refers in this respect to a reduction in transaction costs.

⁸⁹ This point is put forward by the Canadian Competition Bureau.

⁹⁰ See the submission of the competition agency from Croatia.

⁹¹ See the submissions of competition agencies from Denmark, the European Commission, and Mexico.

⁹² See the submission of the Japan Fair Trade Commission referencing the Osaka High Court decision of July 30, 1993 and the submission of the NGA Prof. Geradin.

⁹³ See for instance the submissions of the Czech Republic and Denmark. The Danish competition authority accepted the meeting the competition defense in the *DBC medier* case, but was overruled by the Danish Competition Council (decision of 22 June 2005).

⁹⁴ See the submissions of the United Kingdom's OFT, and the competition agencies from France, Turkey, and Germany. The Jersey Competition Regulatory Authority states that for conduct to be considered abusive, an actual or likely detrimental effect in the market is necessary.

⁹⁵ Dated 8.02.2007 and numbered 07-13/96-26.

⁹⁶ See, e.g., responses by agencies from Serbia and Switzerland.

only arise at some time in the distant future are to be disregarded. Others indicate that it has to be demonstrated that there is a causal link between the efficiency and the tying or bundling discount.⁹⁸ The United Kingdom's OFT adds to this condition that even if the causal link is clear it would have to be demonstrated that the same beneficial effect would not have occurred without the tying scheme or bundled discount.⁹⁹ The European Commission refers to this condition as the indispensability of the conduct for the benefits to be obtained.

Several agencies indicate that a justification and defense can only be accepted if there is no less anti-competitive alternative for the conduct at issue.¹⁰⁰

Furthermore, competition agencies state that weighing the pro- and anti-competitive effects plays a key role in the assessment of the justifications and defenses of tying and bundled discounting.¹⁰¹

Several agencies stress that a justification or defense can only be accepted if the benefits outweigh the anti-competitive effects.¹⁰² As the United Kingdom's OFT points out, "the balancing of the pro- and anti-competitive effects is not an easy task as tying and bundling practices may be ambiguous, potentially having both benefits for customers and an adverse effect on competition." The European Commission states that the process of weighing the positive and negative effects of a dominant firm's conduct would be largely similar to the weighing of such effects in the context of anticompetitive agreements.¹⁰³ The German Bundeskartellamt indicates that in Germany there are relatively few cases where the parties have been able to successfully demonstrate that the benefits outweigh the anti-competitive effects. This may be the result of a strict scrutiny of the alleged benefits of the tying and bundled discounting by the courts. The U.S. FTC looks to whether the anticompetitive harm "outweighs" the pro-competitive effects.

Other agencies indicate that they apply a proportionality test and seek to determine whether the anticompetitive effects of a tying or bundled discounting practice are proportionate to the benefits flowing from the conduct.¹⁰⁴

Some competition agencies also indicate that it is required that efficiencies and cost savings which result from the tying or bundled discount will ultimately benefit the consumer.¹⁰⁵ The Mexican Federal Competition Commission adds to this that such efficiency benefits must be transferred to the consumer "on a permanent and significant basis."

Finally, there are a number of competition agencies which impose the condition that a justification and defense can only be considered if it does not eliminate competition by removing all or most of existing sources of actual or potential competition.¹⁰⁶ It is argued by the European Commission that where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible precompetitive efficiency gains.

⁹⁷ See, e.g., responses by the agencies from Denmark, Germany, and Switzerland.

⁹⁸ See, e.g., the submission by the European Commission.

⁹⁹ See also the submission of the Russian Federal Antimonopoly Service.

¹⁰⁰ See the submissions from Singapore, Russia, and the European Commission.

¹⁰¹ See responses from Belgium, European Commission, Germany, Korea, Mexico, and the United Kingdom's OFT.

¹⁰² See responses from Belgium, European Commission, Germany, Korea, and the United Kingdom's OFT.

¹⁰³ For further details, see Commission Notice Guidelines on the application of Article 81(3) of the EC Treaty, Official Journal C 101, 27/04/2004 p. 97-118, paragraph 83 *et seq.* available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427\(07\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427(07):EN:NOT).

¹⁰⁴ See responses from the competition agencies of Russia and Singapore.

¹⁰⁵ See for instance the responses by the Mexican and Russian competition agencies.

¹⁰⁶ See for instance the submissions of the European Commission and Russia.

Burden of proof

Most competition agencies agree that it is up to the competition agency to show the anti-competitive effects, but it is for the companies applying the schemes to substantiate and, if possible, prove the efficiencies.¹⁰⁷

VI. POLICY CONSIDERATIONS and ADDITIONAL COMMENTS

1. Policy considerations

ICN members were asked to indicate what policy considerations their jurisdiction takes into account with respect to tying and bundled discounts.¹⁰⁸

Many agencies stress that tying and bundling are neither held to be *per se* pro- nor anticompetitive.¹⁰⁹ These agencies state that they assess each individual case and would need to show that the respective practice has negative effects on competition or harms consumers in order to prove a violation of unilateral conduct law. The responses indicate that the approach towards tying may be stricter in several jurisdictions than the approach towards bundled discounting.

Many agencies share the view that tying and bundled discounting may raise serious competition concerns but only in certain circumstances. Several agencies stress that the mere fact that a firm holds a dominant position does not imply that tying and bundling practiced by that firm would be illegal *per se*.

In contrast, other agencies draw attention to the fact that they consider tying and bundled discounting practiced by dominant firms as problematic. The Korea Fair Trade Commission states that such practices would likely be held illegal. In Poland, tying is treated as a *per se* violation of unilateral conduct rules, provided that the practice is not customary.

Responses are divided as to whether tying and bundling are common or not. Some agencies state that such practices are not common,¹¹⁰ others indicate that complaints relating to tying and bundled discounting are not common¹¹¹ and some point out that those practices are common but often do not raise competition concerns.¹¹² The latter view may find some support in the enforcement statistics reported by the agencies contributing to the survey. These statistics broadly indicate that in-depth investigations concerning tying and bundled discounting are, with some exceptions, rather uncommon in most jurisdictions. Even more rare are decisions finding illegality of such practices (see II.2. above).

Several agencies emphasize that tying and bundled discounting are often pro-competitive.¹¹³ The Canadian Competition Bureau, for example, states that there are often strong cost efficiencies, in addition to other business rationales, that motivate these practices. The Danish Competition Authority states that the practices may lead to welfare benefits that outweigh competition problems, *e.g.* cost savings, opening markets for more consumers, more efficient

¹⁰⁷ See the submissions from Belgium, Croatia, Czech Republic, Denmark, the European Commission, Germany, Netherlands, Singapore, Switzerland, and the United States.

¹⁰⁸ ICN members were invited to address the following issues: Are tying and bundled discounting common? Does your jurisdiction generally consider them to be procompetitive? Does your answer depend on whether the firm is dominant? Does your jurisdiction view tying and bundled discounting by a dominant firm as generally anticompetitive? What competitive concern(s), if any, are generally associated with tying and bundled discounts in your jurisdiction? ICN members were also asked to provide any additional comments they would like to make, *e.g.* concerning significant changes in the criteria by which they assess tying and bundled discounting.

¹⁰⁹ See, for example, responses from Brazil, European Commission, France, Germany, Korea, and Romania.

¹¹⁰ See agency responses from Bulgaria, Jamaica, and Romania.

¹¹¹ See agency responses from Hungary, Russia, and Slovak Republic.

¹¹² See agency responses from Chile, Croatia, and United States.

¹¹³ See responses from Canada, Chile, Hungary, Poland, United Kingdom, and United States.

quality assurance or quicker dissemination of technology. The Competition Commission of Singapore mentions that, while tying is an example of a vertical restraint which may harm competition if imposed by a dominant firm, vertical restraints may generate benefits through promotion of efficiencies, non-price competition (to the benefit of consumers), investment, and innovation. The burden is on the dominant undertaking to show that the harmful effects by its conduct are proportionate to its benefits. By the same token, the Taiwan Fair Trade Commission argues that tying and bundled discounting can be means to increase the amount of sales, may facilitate a more efficient market and may in the short term result in lower prices. However, such practices may harm consumers in the long-run by foreclosing competitors that are as efficient as the discounter but do not sell as broad a line of products. The United Kingdom's Office of Fair Trading indicates that it considers very carefully where the balance of consumer harm in tying and bundling cases lies. The OFT says that there may be considerable consumer benefits arising from tying and bundling. Consumers may benefit particularly where packaged products are sold or where tying can avoid the need for expensive metering or can allow the supplier to achieve economies of scale or scope. The U.S. DOJ indicates that the practices have the potential to lower costs and maximize consumer welfare. The DOJ adds that the benefits and frequent use of tying and bundled discounting by non-dominant firms leads some commentators to conclude that similar consumer benefits are likely to result from those practices even when employed by firms with significant market power. The U.S. FTC also states that even if a firm has market or monopoly power – and, consequently, there is potential antitrust exposure - there is an increasing recognition that tying and bundled discounting may be pro-competitive in many instances.

2. Additional comments

Agencies were asked to provide any additional comments that they would like to make on their experience with tying and bundled discounts and enforcement in their jurisdiction.

With regard to enforcement policies, some respondents consider it important to avoid chilling effects on competition. The United Kingdom's Office of Fair Trading, for example, states that enforcement measures with the effect of chilling pro-competitive efficiencies could itself lead to consumer harm. The OFT therefore considers it critical to avoid any *per se* rules for tying and bundling. In terms of assessing whether intervening in a conditional discounting case is a matter of administrative priority, the OFT finds that it is important to have a well thought out theory of consumer harm.¹¹⁴ The German Bundeskartellamt, on the other hand, argues that, given its rather limited track record of tying and bundled discounting investigations and relatively few cases brought in civil litigation in recent years, over-enforcement and significant chilling effects seem to be highly unlikely.

With respect to developments in competition laws and policies, several agencies draw attention to the development of guidelines and to discussions reflecting their unilateral conduct policies including tying and bundling. The Canadian Competition Bureau reports that it will be issuing an updated version of its *Enforcement Guidelines on the Abuse of Dominance Provisions* in the near future,¹¹⁵ which will detail the Bureau's position on the enforcement of the *Act* where practices such as tying, bundling and bundled rebates are occurring. The Japan Fair Trade Commission is also drafting guidelines on private monopolization of the exclusionary type, which will cover tying. The European Commission mentions that it has been analyzing potential anticompetitive effects as part of its on-going

¹¹⁴ The OFT notes that the notion of “consumers“ is not necessarily limited to the final consumer but can, for example, include businesses who are the customers of the allegedly dominant undertaking.

¹¹⁵ The Canadian Competition Bureau published Draft Updated Guidelines for public comments on January 16, 2009.

reflection on the policy underlying the implementation of Article 82 EC and the way it should enforce that policy, which is guided by an effects-based approach. The U.S. DOJ states that tying has for many years been treated under a rule of modified *per se* illegality under U.S. law and adds that many view this as a vestige of the historical misunderstanding of tying's frequent pro-competitive effects and believe that *per se* treatment will be overturned by the Supreme Court. With regards to bundled discounting, the DOJ shares the view that the practice can be anticompetitive but observes that there is less consensus on how likely that is. The Brazilian Council for Economic Defense reports that the discussion concerning convergence in telecommunications is stimulating the debate on bundled discounting.

Other agencies mention that their laws may undergo revision in the near future. The Belgian submission states that the Competition Authority does not consider it either necessary or desirable from a competition law perspective to maintain the general prohibition of tying in consumer contracts provided for in the Unfair Trade Practices and Consumer Protection Act. The Croatian Competition Agency informs that a new competition law may contain detailed definitions and explanations concerning tying and bundling. The Japan Fair Trade Commission indicates that a new bill to amend the Antimonopoly Act to introduce a surcharge system against private monopolization by means of exclusionary conduct such as tying and bundled discounting was submitted to the Diet. The submission by the Romanian Competition Council points out that it is envisaged to revise secondary legislation in view of evolutions taking place on European Community level and mentions that a possible revision of antitrust legislation may lead to changes with respect to tying and bundling.