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Abstract

Antitrust Analysis of Exclusionary Arrangements Involving Slotting Allowances and Fees: Issues and Insights

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The author examines issues and questions in the antitrust analysis of slotting allowances and fees. Focus is given to those circumstances where suppliers employ their payment in ways that disadvantage rivals and have the effect of limiting competition and ultimately harming consumers. Under such circumstances, antitrust concerns center on the potential that a dominant supplier may condition its payment of certain types of slotting fees to retailers on requirements that disadvantage the supplier's rivals, leading to anticompetitive *exclusion*. Answering the call for more specific understanding of such arrangements, the author attempts to extend their extant analysis in antitrust through application of insights and understanding from marketing and related disciplines.

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INTRODUCTION

Over the past decade arrangements involving *slotting allowances and fees*[1] have attracted considerable attention within the marketing community and yielded vigorous public and private debate in antitrust as to their ultimate effects for competition and consumers. In an effort to inform this debate, academics from various fields have studied them applying analytic models, through field surveys and other methodologies. In addition, public policymakers and others have addressed them in their proceedings, and studied them through their activities. The courts, acting in their capacity as "triers of fact," have also analyzed arrangements involving slotting allowances and fees and drawn conclusions across a number of disputes. Together, these activities and developments have yielded considerable insights and enhanced our understanding of the nature and effects of slotting allowances and fees for competition and consumers.

An important conclusion, however, that may be drawn from this growing body of thought is the understanding that in contrast to a *general* theory (e.g., what *will* happen), a number of *possibility* theories (e.g., what *could* happen) continue to exist and explain the effects of slotting allowances and fees for competition and consumers. For example, as stated by then Federal Trade Commission (FTC) Chairman Pitofsky, slotting allowances and fees involve a set of practices that in some situations may "make great business sense and contribute to consumer welfare" but in others can present "competitive problems," (FTC 2001, 2-3 and ft. 6). More recently, reporting on the results of an indepth analysis of slotting allowances and fees in five grocery product categories, the FTC (2003, p. 63) concluded:

> The study's findings do not allow us to eliminate any of the theories of slotting allowances or to determine which, if any, is most important. Virtually all, if not all, of the theories of slotting allowances appear to be consistent with the observed variation in slotting fees, *i.e.*, considerable variation across retailers, across product categories, and within a product category for a given retailer.

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[1]Slotting allowances and fees describe a family of marketing practices that involve payments and other incentives (e.g., free product or services) given by manufacturers to downstream channel members to stock, display, and support their products (Bloom, Gundlach and Cannon 2000). Although estimates vary and information about the magnitude of these payments and incentives is difficult to obtain, the Federal Trade Commission (FTC 2003) recently reported they believe up to $9 billion is spent annually by foodmakers for slotting fees involving *new* (versus existing) products alone. Others estimates, relying on definitions that go beyond new products put the annual amounts spent on slotting fees and related payments much higher. According to one analyst, "slotting fees are part of promotional allowances that probably run about $50 billion per year in payments from food manufacturers to food retailers" (Alexander 2003). Including slotting payments in industries beyond food products where they are known to be found no doubt adds considerably to these estimates.

Reflected in what have been termed the "Efficiency School" and the "Market Power School" these various theories describe how, depending on the circumstances, slotting allowances and fees may, at times, be employed in ways that yield procompetitive outcomes and at other times in ways that yield anticompetitive outcomes (Bloom, Gundlach and Cannon 2000).[2]

Given this state of affairs, antitrust attention has increasingly focused on more specifically identifying, distinguishing and elaborating upon those circumstances wherein arrangements involving slotting allowances and fees may limit competition and result in harms to consumers (*See*, Federal Trade Commission 2001, 2003). A key circumstance identified to date includes where suppliers employ the payment of slotting allowances and fees in ways that disadvantage rivals and have the effect of limiting competition and ultimately harming consumers. Under such circumstances, antitrust concerns center on the potential that a dominant supplier may condition their payment of certain types of slotting fees to retailers on requirements that disadvantage the supplier's rivals leading to anticompetitive *exclusion*. According to economists and others, consensus exists that anticompetitive exclusion of this form is a real and significant concern (FTC 2001, p. 42). Indeed, the FTC (2001, p. 68) has indicated that such arrangements "warrant the closest attention" and "should be carefully reviewed to determine whether they threaten a harm to competition" (p. 63).

The current manuscript focuses on anticompetitive exclusion involving slotting allowances and fees. Addressing the call for more specific understanding of such arrangements,[3] it attempts to extend their extant analysis in antitrust through application of insights and understanding from marketing. The approach employed is to (1) identify and focus on key questions and issues that attend the analysis of anticompetitive exclusion involving slotting allowances and fees, (2) organize them within the larger

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[2]As described by the FTC (2003, p. 4):

> In summary, the slotting allowance literature has identified theoretical environments in which slotting allowances may be pro-competitive, and others in which they may be anti-competitive. .... As a result, the available literature does not permit conclusions about which, if any, of these theories explain observed uses of slotting allowances. There is clearly a need for more empirical work in this area.

[3]According to the FTC (2001, p. 65), research is needed to "... look more specifically at how slotting allowances and pay-to-stay fees may have tended to foster anticompetitive exclusion. (FTC 2001, p. 65).

context of a framework for their antitrust analysis proposed by the FTC, and (3) help to further inform their assessment through identification and application of insights and understanding from marketing.

Together, the approach and findings should help to advance current knowledge of slotting allowances and fees through enhancing understanding regarding those circumstances wherein such arrangements may be employed to achieve anticompetitive exclusion. In addition, the approach and findings demonstrate the benefits of integrating concepts and theory from marketing with extant perspectives and understanding in antitrust to inform the public policy analysis of marketing practices. In this fashion, the obtained insights should help to provide a broadened basis for further development of competition policy toward slotting allowances and fees and serve as an aid to those working in the public policy community.[4] These insights should also be helpful to marketing practitioners engaged in such practices or attempting to better understand them as competitors. Finally, the approach and findings should be useful to scholars in marketing interested in furthering antitrust analysis through integrating theory and insights from marketing.

ANTITRUST ANALYSIS OF SLOTTING ALLOWANCES AND FEES

Because academic research involving slotting allowances and fees has not been wholly dispositive as to their ultimate effects for competition, analysis in antitrust has proceeded with an understanding that such arrangements can provide benefits to interfirm interaction, yet do possess anticompetitive potential under particular circumstances and where employed to achieve such outcomes. With the potential of varying effects, antitrust analysis of slotting arrangements has centered on identifying the distinctive pathways through which these allowances and fees may result in harm to competition and consumers. This includes analysis of the locus from which such harms may emanate, how such harms may occur, and the effect of such conduct on competition and consumers.

[4] As described by the FTC (2001, p. 64), “Such research could provide useful support for enforcement programs and perhaps ultimately serve as a foundation for additional business guidance.”

A key locus and pathway through which slotting arrangements allegedly may result in concerns for competition and consumers include their anticompetitive misuse by suppliers.[5] Concerns in this context focus on the use of certain types of slotting arrangements by dominant suppliers as a competitive mechanism against rivals.[6] Attention centers on the prospect that a dominant supplier, through contract or other arrangements, may condition their payment of certain types of slotting fees on requirements to retailers that disadvantage the dominant supplier's rivals in ways that foreclose competition, leading to anticompetitive exclusion.

Anticompetitive Exclusion

Although all firms, including dominant suppliers are entitled generally under the antitrust laws to compete in a vigorous fashion, including to exact favorable terms from their downstream customers, some contracts and other vertical arrangements (including slotting arrangements) may be sufficiently restrictive of competition to violate the antitrust laws (Antitrust Law Developments 2002, p. 253).[7] In the recent case, *United States v. Microsoft Corp* (2001), addressing vertical arrangements that restrict competition, the court identified a number of principles that have emerged, based upon a century of case law, for the identification of unlawful exclusionary conduct on the part of a monopolistically dominant firm. These include: (1) the monopolist's act must have an anticompetitive effect; (2) the plaintiff has the burden of proving this; (3) if a plaintiff successfully establishes a prima facie case, then the monopolist may proffer a procompetitive justification for its conduct and, if it does, the burden shifts back to the plaintiff to rebut the claim; (4) if the defendant's justification is unrebutted, then the plaintiff must demonstrate that the

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[5]As noted by the FTC (2001, p. 69), for example, "problematic misuses of slotting arrangements in the form of competitive exclusion are often initiated by manufacturers ..."

[6]According to the FTC (2001, p. 44), " . . . if a dominant firm's use of slotting allowances, pay-to-stay, or exclusionary contracts reduces the number of competing firms sufficiently or otherwise sufficiently hinders rivals' ability to compete, it can harm competition."

[7]Such conduct may violate Section 2 of the Sherman Act. According to the Supreme Court, "The offense of monopoly under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willfull acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" (United States v. Grinnell Corp. (1966, p. 570-571).

anticompetitive harm of the conduct outweighs the procompetitive effect; and (5) the focus should be on th effect of the conduct and not on the intent behind the effect; intent is relevant only to the extent that it helps the finder of fact understand the likely effect of the monopolist's conduct (Antitrust Law Developments 2002, p. 250)[8]. Included among the type of restrictive conduct that may result in unlawful exclusionary conduct on the part of a monopolistically dominant firm are vertical agreements that foreclose or exclude competition including those involving slotting allowances and fees.

FTC framework for analysis. Extending the various principles identified for the identification of unlawful exclusionary conduct, the FTC recently advanced a framework for analyzing arrangements involving slotting allowances and fees alleged to be exclusionary. According to the FTC (2001, p. 6; cf., 35-36), antitrust analysis of anticompetitive exclusion involving such arrangements:[9]

> [B]egins with a consideration of the extent of disadvantaging that rival suppliers would likely experience and their ability to avoid or mitigate that disadvantage. To show harm to competition … [t]he analysis then inquires about the likely impact on competition in markets in which the disadvantaged suppliers seek to compete. Finally, if anticompetitive harm is likely, the analysis asks whether the practice produces competitive benefits that likely would offset the harm and whether similar benefits could be obtained by practical, significantly less restrictive means …[and] whether there are special countervailing circumstances that would diminish [the] likelihood of competitive harm on some particular set of facts."

According to the FTC, as an approach for analyzing anticompetitive exclusion through arrangements involving slotting allowances and fees, "considerable consensus" exists (FTC 2001, p. 6).

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[8]As to the element of causation, the court held that an inference of causation may be made from the fact that a defendant has engaged in anticompetitive conduct that "reasonably appear[s] capable of making a significant contribution to ... maintaining monopoly power" (United States v. Microsoft Corp 2001, 253 F. 3d 34 (D.C. Cir.) at 79, see also, Antitrust Law Developments 2002, p. 250-1).

[9]Beyond the FTC approach, some analysts have attempted to examine allegedly exclusionary slotting arrangements as "exclusive dealing" arrangements. While related, exclusive dealing arrangements do not necessarily include slotting allowances and fees and more often require that the supplier who is a party to such arrangements be the *only* supplier in the store. As discussed in the following section, more common to slotting arrangements are forms of "partial" exclusion involving foreclosure of rivals' merchandising and communication in the store. For this reason, exclusive dealing arrangements and analysis methodologies focusing narrowly on such arrangements are best characterized and analyzed as an extreme form of exclusion that may be contained within a

MARKETING INSIGHTS FOR UNDERSTANDING

Like many areas of modern antitrust, policymakers and the courts rely on insights and theory drawn from economics, and to a great degree neoclassical price theory, to inform their thinking on antitrust issues including slotting allowances and fees. For some, the careful definitions and parsimonious logical structure of economic concepts and theory is thought to yield the required intellectual rigor sufficient for fully understanding and assessing competitive behavior. Others contend, however, that the field of antitrust can benefit from inclusion of less aggregate approaches and more interpretive concepts and theory for understanding and explaining competitive conduct (Gundlach 2001).[10] This includes sources of wisdom having relevance to and informing our understanding of competition and competitive behavior found in marketing, business strategy and the other business disciplines.

Embracing marketing's prospective role in antitrust and focusing on concerns for anticompetitive exclusion involving slotting arrangements, in this section a number of key questions and issues that surround their extant antitrust analysis are examined drawing on theory and insights from marketing and its related disciplines. These questions and issues are organized within the larger context of the analysis framework proposed by the FTC (2001) and others for their antitrust analysis. As a basis for informing their clarification or resolution, each is elaborated upon and discussed drawing on key insights.

Disadvantages Experienced by Rivals

As described, according to the FTC (2001, p. 6), analysis of slotting arrangements allegedly involving exclusion "[B]egins with a consideration of the extent of disadvantaging that rival suppliers would likely experience." Focus on the disadvantages experienced by rival suppliers is important for understanding the nature of restrictions to the competitive process that may ultimately result from a slotting arrangement.

[10]Scholars have long suggested antitrust may be best served through acknowledgment of its interdisciplinary foundations and the integration of varying points of view including those from the business disciplines. As economist Oliver Williamson (1979) observed over a quarter of a century ago: "Antitrust is an interdisciplinary field that is best served by acknowledging that a deeper understanding of the issues will result by addressing the subject from several points of view." In this respect, many sources of wisdom have been suggested to have relevance to antitrust including the other social sciences, the humanities and traditional legal analysis

slotting arrangement.[11] Such inquiry involves assessing whether or not effective competition remains in a market as a result of the disadvantages experienced by rivals.[12] Thus, understanding the nature and extent of disadvantages experienced by those rivals involved in the competitive process is important.

"Total" versus "partial" exclusion. On the one hand, rivals may be disadvantaged through slotting arrangements that totally eliminate them from the store. Such arrangements for outright exclusivity, as noted, are commonly labeled *exclusive dealing* arrangements and are more appropriately characterized as an extreme form of the type of vertical arrangements found in marketing practices involving slotting fees.[13]

While reportedly some slotting arrangements do provide for "total" exclusivity from the store, more often such arrangements contain requirements that yield lesser levels of exclusivity in the form of "partial" exclusion.[14] Slotting arrangements that partially exclude rivals can involve requirements that disadvantage and restrict their ability to compete across virtually every element of competition at retail. These can include, among others, limitations on rivals access, placement and communication in the store. For example, a slotting arrangement may preclude rivals' products from being accepted into the store,

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(Sullivan 1977).

[11]The basic economic theory describes how dominant firms may undermine the competitive process through engaging in conduct that ultimately raises the costs of their rivals' ability to compete either through absolutely excluding a sufficient number of rivals or otherwise sufficiently disadvantaging them in ways that impair effective competition – a phenomenon known as "raising rivals' costs" (Krattenmaker and Salop 1986).

[12]According to FTC (FTC 2001, ft. 122), "[s]ubject to consideration of likely procompetitive benefits, a likelihood of competitive harm may be established from an analysis of market structure and of the market participants' abilities and incentives to behave anticompetitively following the exclusionary conduct. It also might be inferred from evidence that a competitor's constraining influence on the market has been diminished."

[13]It should be noted that under some circumstances, partial exclusion may lead to total exclusion where rivals are so limited as to make it not cost effective for them to continue in the store.

[14]Reflecting this distinction, the FTC (2001, p. 68) has counseled that as a class of cases, exclusive dealing contracts should be "flexibly construed to include partial exclusive dealing contracts, preferential shelf-space arrangements, and other payments made to limit rivals' distribution." The Canadian Competition Bureau (2002) has also recognized the distinction of full versus partial exclusion. According to the Bureau, "Where a firm, or a group of firms, dominate a market for a product, the Bureau would be concerned if the payment of a slotting allowance is being used by the dominant firm(s) to acquire exclusivity or to tie up enough of the available shelf space to preclude other competitors from entering or expanding into the market." (p. *)

limit their access to shelves, tables in the store or certain positions on the shelf, or restrict promotions of their products during certain times. Given the "partial" nature of such exclusion, a key antitrust question regards the extent to which competitors are disadvantaged in their ability to compete through the imposition of less than "total" forms of foreclosure.

Research in marketing that examines the nature and impact of instore marketing provides a helpful starting point for understanding the competitive impact of partial forms of exclusion including that obtained through slotting arrangements. This research, for example, investigates the impact of instore environments (Soars 2003) and how such environments affect purchase behavior (Sherman, Mathur and Smith Belk 1997) including through overall store space allocation (Buttle1984), point of purchase environments generally (Phillips and Bradshaw 1993), amount of shelf space (Dreze, Hoch, and Purk 1994), vertical shelf position and number of facings (Dreze, Hoch, and Purk 1994), relative product position with respect to rivals (Landry 1996), cross category merchandise (Dreze, Hoch, and Purk 1994), product variants (Kalpesh and Ratneshwar 2003) and store and national brands (Morton Scott and Zettelmeyer 2004), point of purchase displays (Areni, Duhan and Kiecker 1999), floor displays (Gagnon and Osterhaus 1985), and point of purchase posters (Zhou and Wong 2003). An important finding of this research is that, in general, instore environments are a key component of marketing and merchandising strategy at retail.

Anecdotal evidence of the importance of marketing and merchandising strategy at retail can also be drawn from observing manufacturer's increasing use of trade promotion over time relative to direct media advertising and consumer promotions (See Shimp 2000, p. 510). Industry surveys show, for example, that manufacturer expenditures have been increasingly shifting out of advertising budgets to build up trade promotion budgets for some time (See Jenkins 1999). According to Cannondale Associates trade promotion in the packaged goods industry steadily increased its share of the total marketing budget, rising from less than 35% in 1983 to 53% in 1999 (Donnelley Marketing 1997; Cannondale Associates 2000, both cited in Ailawadi 2001).

Research in consumer behavior that investigates instore purchase decision making is also helpful for understanding the impact of partial exclusion. This research suggests, for example, that disadvantages

toward rivals are likely to be more acute in categories where consumers place greater dependence on information and understanding gained in the retail store for their decision processes.

Considerable research in consumer behavior investigates the nature and incidence of instore purchase decision making finding that consumers do make a number of their purchase decisions while in the store. This research investigates, for example, the concept of impulse purchase behavior (Bayley and Nancarrow (1998) and the percentage of purchase decisions made in store as distinguished by product involvement (Hoyer 1984), store category (Bellenger, Robertson and Hirschman1978; McGoldrick1982) and product category (Cobb and Hoyer 1986). In addition, extensive ongoing research on in-store decision making conducted by the Point-of-Purchase Advertising Institute (POPAI) reports, for example, that an increasing number of purchase decisions are made in the store with up to 70% of all brand purchase decisions being made at retail (Botsford 2002).

Other evidence suggests that the harm from "partial" forms of exclusion may be more acute in those product categories where regulation or other constraints limit the availability of information in forums other than at retail. For example, tobacco products are constrained in their ability to promote their products in ways that are commonly available to other products.[15] As a result, tobacco companies rely on in-store promotion to communicate information about their products. As a point of interest, this factor may be a primary reason for cases involving allegations of exclusion involving slotting arrangements have surfaced with greater frequency in tobacco-related categories.

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[15]The marketing options of cigarette manufacturers have long been narrowed by Federal legislation that prohibits cigarette manufacturers from advertising on television and radio. See Cigarette Labeling and Advertising Act (1965). Furthermore, 27 states also have one or more cities with merchandising and/or signage restrictions. These restrictions may include bans on outdoor advertising, prohibitions on vending machine sales in certain areas, bans on the distribution of hand coupons, and limitations on giving away free product. The Master Settlement Agreement of 1998 (MSA) further narrowed the marketing options banning all outdoor billboard advertising and restricts sponsorship to one event a year per manufacturer. The MSA also prohibits certain forms of promotion such as the giving or selling of branded merchandise (items with tobacco products' brand names or that have a function other than advertising tobacco products). The distribution of free product samples is also limited to adult-only facilities. Legislation and the MSA also restrict what manufacturers can do at retail. For example, the MSA limits the size of outdoor signage to 14 square feet and bans the use of branded functional point-of-sale (POS) merchandise. In addition to limitations extending from the MSA, several states (e.g., Florida, Texas, Colorado, Minnesota, Idaho and others); and many localities now restrict the sale of cigarettes to non-self-service or back bar locations.

Explicitly versus implicitly stated disadvantages. Whether involving total or partial exclusivity, accepted understanding in marketing (and more generally) suggests that disadvantages from a slotting arrangement that affect rivals may arise in various ways.[16] On the one hand, some disadvantages may result directly through arrangements that *explicitly* condition payments to retailers on the requirement that rivals be disadvantaged in their ability to compete. For example, an arrangement may contain overt terms that specifically restrict the ability of rivals to gain access to, merchandise or communicate in the store. In addition to payments explicitly conditioned on the requirement that rivals be disadvantaged in their ability to compete, disadvantages toward a rival may also manifest *implicitly*.

In relation to *implicitly* obtained disadvantages, some slotting arrangements may result in rivals being disadvantaged because of how the arrangement is structured induces the retailer to make decisions that ultimately yield this outcome. For example, an arrangement may contain language that provides for disproportionally greater payments to retailers for reaching higher and higher sales levels of the firm's products (*See*, Balto 2004). Where resources like shelf space are limited, the graduated nature of the payments can induce retailers to make shelf space decisions that favor the firm's products and ultimately disadvantage rivals. Under other circumstances, payment of a flat amount in the form of an extraordinarily large slotting fee and/or agreeing to make the payment of slotting fees upfront prior to the product's sale, may induce retailers to act similarly. Thus, consideration of the extent of disadvantages likely to be experienced by rivals resulting from a slotting arrangement must be cognizant of those obtained through both explicit and implicit means.

Directly versus indirectly obtained disadvantages. Similar to those distinctions identified for implicitly versus explicitly stated disadvantages, disadvantages to a rivals ability to compete arising from a slotting arrangement may also be obtained both *directly* and *indirectly*. On the one hand, an arrangement may contain, for example, terms requiring that only 20% of the available shelf space be given to rivals where such products are arguably deserving of more shelf space because of their sales and/or other factors - thus *directly* disadvantaging rivals. However, rivals may also be impacted through

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[16]Observing this potential, the FTC (2001, p. 69) notes, " . . . de facto exclusivity may sometimes result

arrangements that *indirectly* disadvantage their ability to compete. For example, in the same arrangement, the aforementioned terms may specify that 80% of the available shelf space be provided to the dominant supplier thereby disadvantaging rivals indirectly through leaving access to only 20% of the shelf space. In each case, the outcome is the same -- the dominant supplier obtains 80% of the shelf space with rivals being disadvantaged through their access too only 20% of the shelf space. As such, in analyzing slotting arrangements, care must be given to distinguish and understand the true nature of disadvantages that ultimately result versus the language that is used to obtain such a result.

Role of Retailers in Disadvantages

Although not directly stated as an element of the FTC's approach, an important consideration in evaluating slotting arrangements alleged to be exclusionary of competition, is the role downstream retailers play in disadvantages toward rivals. Apart from the overtures of an upstream dominant supplier intent on disadvantaging its rivals, a common understanding is that a retailer responding to market conditions may independently choose to limit the number and/or merchandising of suppliers in their stores. Given limited resources being pursued by many suppliers, the retailer may not be capable of, or desire to accommodate all brands or all suppliers in a category. A key question, however, is whether the presence of resource constraints and the potential of independent decision making based on market conditions should be inferred to establish that a retailer cannot be induced by the overtures of a dominant upstream supplier to go along with the supplier's attempt to disadvantage its rivals to the detriment of its customers.

In relation to this question, one view is that retailers, facing competition, always make decisions in the interests of their final consumers and therefore cannot be persuaded by an upstream supplier to exclude its rivals unless such exclusion was originally in the consumer interest. In this respect, allegations of harm on the part of an upstream supplier against its rivals are sometimes attempted to be characterized in this fashion – as simply the outcome of retailer decision making in the consumer interest versus the anticompetitive exploits of a dominant upstream supplier. However, as described below, drawing on insights cultivated from economics, marketing and related disciplines, considerable

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from agreements expressed in different terms."

understanding and research suggests that retailers may be induced to cooperate with a dominant firm's request to disadvantage its rivals for a variety of reasons.

Sources of influence. In purely transactional terms, economic theory suggests that to induce a retailer to go along with its exclusionary objectives, a dominant firm may simply share enough of its anticipated supracompetitive profits to offset the retailer's potential losses from restricting the number of suppliers or their merchandising.   In this respect, economists have long understood, that a monopolistically intent, dominant supplier can pay a number of retailers enough to compensate them for the loss of competitive variety in their stores (FTC 2001, p. 40).   The supplier can then make money on the monopoly that it achieves with respect to others (FTC 2001, p. 40). Further, economists point out that a single retailer may ignore the effect of its own behavior on the success of other existing or potential retailers (FTC 2001, p. 40). As such, and as a matter of economics, for the reasons stated, it cannot be assumed that a retailer's self-interest will preclude it from being induced by a dominant supplier to go along with its request to disadvantage its rivals.

Beyond an economic perspective and based upon the inducement arising from a dominant supplier's sharing of monopoly profits, research in marketing focusing on channels of distribution suggests that retailers may also be induced to limit the number and merchandising of rival suppliers because of their overall dependence on the supplier in the category and/or other categories. In this regard, considerable scholarship in marketing focuses on the structure (i.e. symmetry and magnitude) and nature of interdependent relations and its effects for distribution channel arrangements. This literature[17] investigates, for example, the nature, conceptualization and measurement of interdependence (cf., Li and Dant 2001; Gundlach and Cadotte 1994; Eyuboglu, Ryu and Tellefsen 2003; Keysuk Kim and Hsieh 2003) and its effects for various relevant outcomes including coordination (Clark, and Lee 2000), cooperation (Robicheaux and El-Ansary 1976), conflict (Robicheaux and El-Ansary 1976; Kumar, Scheer and Steenkamp, 1995; Gundlach and Cadotte 1994), trust (Kumar, Scheer and Steenkamp, 1995), commitment (Kumar, Scheer and Steenkamp, 1995; Geyskens, Steenkamp, Scheer and Kumar1996)

[17]Selected citations are provided. An exhaustive list is beyond the scope of this paper.

performance (Clark and Lee 2000; Gundlach and Cadotte 1994), vertical promotional strategies (Erdem and Harrison-Walker 1997) punitive capabilities and actions (Kumar, Scheer and Steenkamp (1998) and the use of coercive and noncoercive influence strategies (Gundlach and Cadotte 1994). Overall, this literature suggests that some retailers may more readily acquiesce to the demands of a dominant supplier in a category because of their dependence on the overall sales and profits of the supplier's brand for that category. It also suggests that where a dominant supplier is present across multiple categories carried by the retailer, a retailer's dependence may be higher overall and thus provide the dominant supplier with aggregated influence in any one category (Foer 2001).

Beyond dependence induced through accounting for the direct sales and profits obtained from a dominant supplier, anecdotal evidence also suggests that some leading brands offered by dominant suppliers are often a "must carry" brand that the retailer cannot do without or suffer a competitive disadvantage. Such brands may generate more demand than their actual sales and profits reveal through creating generic demand for the category as a whole and fueling sales of complementary products. In this fashion, such brands may yield considerably more dependence on the part of a retailer toward the supplier than their direct brand sales and profits reflect.

In addition to the structural nature and implications of dependence, further research in marketing focuses on the nature of relationships and strategies for ongoing interaction among firms within a distribution channel. For example, this research investigates the nature of distribution channel relationships (Robicheaux and Coleman 1994), the use of negotiation strategies (Ganesan 1993) and promotion strategies (Erdem and Harrison-Walker 1997) by channel partners, strategies for managing and controlling small firms within a distribution channel (Wren, Simpson and Paul 1998) and the effects of interfirm strategies (Li and Dant 1999) including factors leading to the termination of an ongoing relationship (Weiss and Kurland 1997). In general, this literature suggests that the dynamics of maintaining ongoing business relations and insuring adequate supply and services from a dominant firm can bear heavily on retailer decision making and may result in their acquiescence to a dominant supplier's requests. A lack of cooperation may damage relations and increase the risk and uncertainty of supply and

service received by the retailer. Thus, the desire to reduce uncertainty through maintaining an ongoing business relationship may result in considerable influence over a retailer by a dominant supplier.

In addition to the above factors, at a more tactical level, for some retailers, the timely receipt of an upfront, lump-sum slotting payment (a common form of payment in slotting arrangements), prior to the sale of the firm's goods, may provide a sufficient incentive to induce a retailer to go along with a dominant suppliers wishes, including to disadvantage its rivals. Such payments received are a ready source of funds that offset the retailer's uncertainty and delay in receiving profit returns on the retail sale of the firm's products. These effects may be more acute in the case of retailers with lower financial resources (e.g., smaller, independent retailers).

Strategies of cooperation. Beyond the sources of influence that may lead to a retailer cooperating with an upstream supplier to disadvantage rivals, research in marketing on the management of distribution relationships suggests that such cooperation may be managed in various ways. Research in marketing has studied at length the strategies of interfirm interaction within distribution settings. This research investigates, for example, the nature and forms of influence strategies available to firms (Frazier and Summers 1984), the determinants that impact the choice of such strategies including the design of the distribution channel (Miles, White and Arnold 1994), attitudes and behaviors of the boundary personnel of the target (Frazier and Sheth 1985), the dependence (Kale 1989), sources of power available to (Miles, White and Arnold 1994) and held power of the firms (Frazier and Rody 1991), the moderating (Keysuk 2000) and direct (Boyle, Dwyer, Robicheaux and Simpson 1992) effects of relationalism and the reciprocal use of strategies between firms (Frazier, Gill and Kale 1989). This research also examines the effects that result from the use of influence strategies including for satisfaction (Mayo, Richardson and Simpson 1998) and conflict (Frazier and Rody 1991). Together, this research indicates that cooperation may be obtained both through, for example, payments that *reward* retailers for their cooperation, as well as arrangements that "*punish*" or otherwise discipline firms for their lack of cooperation including through withholding payments. Retailers who receive slotting payments and consider them to be a source of profit may find it very difficult to no longer receive such funds. As a result, the prospect that such payments will no longer be provided can yield considerable influence.

In slotting arrangements, payments may be employed to punish or otherwise discipline uncooperative firms in various ways. For example, the retailer may fail to follow a supplier's instructions to allocate shelf space in the amount specified under their arrangement, directly resulting in a reduction in slotting payments. Indirect, yet similar results may also occur when a retailer fails to continue to achieve some predetermined performance level contained in their arrangement. For example, some arrangements may be structured to induce retailer compliance through increasing and incremental payments for higher levels of sales performance. However, these same arrangements may not possess the same decreasing increments as sales fall. In fact, amounts paid may decrease by greater increments than by which they increased, therefore providing sufficient inducement to retailers to cooperate with the suppliers' arrangements.

Governance of arrangements. Finally, retailer cooperation to disadvantage rivals may be administered employing a variety of different governing arrangements. In some instance, retailer cooperation may be evidenced by contracts such as found in formal Category/Calendar Marketing Agreements[18] (CMA's). In other instances, cooperation may be evidenced through arrangements involving handshake deals with little formality and documentation beyond a marketing presentation, a signed planogram or receipts for payments made and received.

In law, questions of whether an agreement has been established bear upon a determination of whether a "meeting of the minds" has been sufficiently established, considering the evidence, to implicate the understandings of contract. However, it is important to recognize that such evidence does not require a signed contract and that formal arrangements are not always the norm with handshake deals and less documented forms of agreements often representing the arrangements in question.

Although legal contracts can result in binding cooperation enforceable by either party under the law, scholars studying interfirm governance in marketing and law show that less formal arrangements can also be as binding given they involve understandings and agreements enforced through such mechanisms as social norms, personal ethics, reputation and the desire for future business interaction. This research

[18] CMAs are arrangements between manufacturers and retailers to schedule promotions and other aspects of

focuses on the governance of exchange relationships including, for example, the structure or architecture of institutions applied to govern an exchange (cf., Williamson 1985, 1996), the various governance processes that may take place in the management of an ongoing exchange (cf., Heide 1994) and, in addition, the specific mechanisms or instruments of governance (including legal contracts) that may be relied upon by managers in their governance activities (Gundlach 1994)

Assessing retailer independence. Determining whether a retailer has been induced to accept the overtures of a dominant manufacturer to exclude its rivals to the detriment of its customers requires careful consideration of the specific slotting arrangement at issue. Where the arrangement is specified as part of a legal contract the retailer has *contractually* relinquished its independence and is legally obligated to the terms contained in the agreement, including terms that may disadvantages rivals. Under such circumstances, the supplier may enforce the contract and its terms even if the retailer disagrees and seeks to alter the arrangement. Thus, in antitrust analysis, the receipt of slotting payments contractually conditioned on the retailer disadvantaging rivals should bear heavy scrutiny.

In the absence of a formal contract, where a retailer in making a decision to limit and/or disadvantage suppliers also receives slotting payments from an upstream supplier, as shown by marketers and others studying infirm influence, care must be taken in determining whether the retailer's decisions are truly the product of independent decision making or simply induced through the receipt of such payments.[19] Evidence of inducement may include for example, that but for the receipt of payments, the *retailer* would not act to limit suppliers in the fashion alleged. In addition, an understanding of whether the retailer has been induced may also be informed through assessing whether the *supplier* would offer such payments, but for the exclusion of rival suppliers.

At minimum, retailer testimony that they have acted independently of their receipt of slotting payments should not be considered nor accepted as the testimony of a disinterested party. In this regard, a strategic approach employed by some defense counsel is to obtain declarations from retailers that their

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merchandising such as shelf placement, and special displays such as end caps (Balto 2004).

[19]As observed by the FTC (2001, p. 68) slotting arrangements involving "exclusive dealing may a particular concern if . . . the retailer is induced by slotting allowances or other practices to carry fewer lines than it

decisions to limit rival suppliers were made independent of slotting payments and in favor of serving their customers, etc. In such instances, declarations of this sort should be carefully scrutinized for their validity given they cannot be claimed to have been made by a disinterested party.[20]

Extent of Disadvantages Toward Rivals

As implied by the FTC methodology, for analyzing slotting arrangements alleged to be exclusionary, an important question is the extent to which such disadvantages are present in the marketplace. Disadvantages that are widespread impact competition more broadly than those that are more narrowly contained. Moreover, where disadvantages are more narrowly found in a defined market, rivals may be in a better position to overcome them. Therefore, the extent to which disadvantages present in the marketplace becomes of antitrust concern hinges on their potential impact on competition.[21]

Breadth and depth of disadvantages. Ultimately, the extent of disadvantages imposed by a dominant supplier through slotting arrangements should be based upon some representation of the number of consumer transactions that take place in the defined arena of competition and the subset that are affected by the disadvantages. Although appearing straightforward, some analysts have proffered arguments that look to the number of contracts, versus the actual extent of disadvantaging reflected through assessment of the number of retailers and their sales transactions. As may commonly occur in retailing, a single contract with a retail firm can represent hundreds (or even thousands) of stores in a given market, thus providing a vastly different picture of the extent of disadvantages. Thus, it it is important to distinguish between the actual number of contracts with retailers, the actual number of retailers represented through the contracts, and their sales transactions in the defined market.

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otherwise desired."

[20]Indeed, in relation to slotting arrangements involving exclusive dealing the FTC (2001, p. 41) has cautioned that "one should distinguish between situations in which a retailer unilaterally decides that it is efficient to carry a single brand and situations in which a retailer has been induced to carry a single brand by an opportunity to share in monopoly profits, finding competitive concerns in the latter setting."

[21]For example, the FTC has suggested that exclusive dealing contracts involving slotting fees can be anticompetitive if they tie up so many retailers that other suppliers cannot reach customers at all, or can do so only at increased costs and if this results in an impairment of effective competition (FTC 2001, 7).

In addition to assessing the actual number of retail stores and transactions involved, it is also important to observe differences in the nature of sales represented across stores.[22] In this respect, research on retailing in marketing identifies the varying nature of retail formats and explores the factors that affect their growth (Goldman, Ramaswami and Krider 2002) and how different formats impact store choice (Messinger and Chakravarthi 1997; Rousey and Morganosky 1996, patronization (Bhatnagar and Ratchford 2004) and spending behavior (Fox, Montgomery, and Lodish 2004) on the part of consumers.

This research shows that retailers may vary in a multitude of respects and therefore cannot be considered homogeneous in either their marketing, competitive strategies, clientele or the resultant number of transactions accounted for in the market, making some more integral to competition in the marketplace. While physically available and accessible to the disadvantaged rival, some alternatives may be less efficient and/or less effective because they are not patronized by consumers, more costly to operate in, or are otherwise considered unattractive making them unrealistic alternatives.

Period of disadvantages. In addition to the above considerations, the period or duration of disadvantaging is also an important consideration. For example, some slotting arrangements are terminable at will, others are annual or multi-year programs and still others may be of a set duration, but "evergreen" in the sense of being renewable with little effort on the part of the parties. To some, short-term arrangements that disadvantage rivals may be viewed as less worrisome because they allow rivals more frequent opportunities to competitively "bid" for presence or merchandising in the store.

From an economic perspective, however, short-term arrangements can raise concerns because a dominant firm may anticipate monopoly returns through its exclusion of competitors and therefore may

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[22]Recognizing the nature of variation in retailers that may exist in a market the FTC has stated that "if the dominant manufacturer . . . obtains exclusive dealing contracts with a high percentage of the *desirable retailers in a relevant market*, . . . competitive harms might occur (FTC 2001, p. 36, emphasis added). Further, the FTC has noted "that if a manufacturer obtained a high percentage of the shelf space for a particular product in all *major retailers in a region*, rivals might not have enough sales exposure for that product to maintain an efficient level of operation. (FTC 2001, p. 37, emphasis added). Finally, according to the FTC, if the dominant manufacturer " . . . obtains exclusive dealing contracts with a high percentage of the desirable retailers in a relevant market, or if rivals are excluded from retail outlets with an *importance to manufacturers disproportionate to their numerical share of the market*, competitive harms might occur (FTC 2001, p. 36). As intimated across the different characterizations provided by the FTC, attention should center on those retailers that may affect competition and consumers in a substantial way.

use its resources to consistently outbid its competitors on every occasion, achieving a long term outcome (FTC 2001, p. 40-41) . Moreover, for reasons known to marketers and those who study transaction cost economics, the bid of a dominant incumbent may have greater value to the retailer because of the transaction and additional costs associated with accepting the bid of an alternative supplier and changing the status quo.[23] These costs can be higher given the expense of adding additional suppliers and/or increasing their merchandising. Finally, as a matter of market penetration and retail distribution, new firms may find it particularly difficult to gain access to a threshold number of stores necessary to assure a viable scale of distribution. In contrast, a dominant incumbent need not worry about such threshold issues and need only focus on maintaining sufficient distribution in its existing outlets.

Concept of "space to sales." Finally, in relation to understanding and assessing the nature and extent of disadvantages associated with a slotting arrangement, the concept of "space to sales" is often referenced. The allocation of space based upon a product's sales is a marketing "rule of thumb" employed by some members of the retail industry to determine their inventory needs. The approach itself has been the subject of considerable research on retailing including attempts at improving it through consideration of additional variables. This research, for example, examines the general principles of retail space allocation (Buttle 1984) and suggests improvements to the space to sales concept through focus on direct product profitability (Corstjens, and Doyle 1981) and a host of other variables (see generally Bookbinder and Zarour 2001) including, for example, direct and indirect cross elasticities (Bultez and Naert 1988; Bultez, Naert, Gijsbrechts, Els and Abeele 1989), inter-item differences in sales, margins, and costs of storing, transporting, shelving, and labor-intensive merchandising activities (Borin and Farris 1990), assortment considerations (Borin. Farris and Freeland 1994), intuition and market research data (Singh, Cook and Corstjens 1988) and even inter-department and seasonality considerations (Rinne, Geurts and Kelly 1987). Apart from these improvements, the original space to sales concept has been employed as a basis for the contention that if a supplier has more space than current sales, the supplier has

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[23]Scholars in marketing have extended the basic theory of transaction cost economics and explored at length the impact of transaction costs on managerial decision making including channel structure (e.g., integration) (Klein, Frazier, and Roth 1990) and contracting (Dwyer and Oh 1988) practices. For an excellent overview of the

unfairly excluded its rivals. Similarly, the concept has been employed to refute the allegation that a supplier excluded its rivals if it has less space than its current sale.

The advantage of the original space to sales concept is that as a "rule of thumb" it equates inventory requirements with existing or past demand and is easy to understand and apply. Its disadvantages are, however, that it is a static (versus dynamic) approach to managing shelf space that favors the status quo.[24] As a result its application does not consider future trends and changes in the marketplace typically accommodated in merchandising decisions. Moreover, it does not consider the role of new products. For example, applying the concept to a new product's introduction would result in little or no space to a promising new product. As a result, while providing a useful benchmark, application and reliance on the concept of "space to sales" in analyzing slotting arrangements is limited and can lead to results that encourage the status quo, are unresponsive to changing marketplace conditions and restrict innovation reflected in desirable new product introductions.

Injury to Competitors From Disadvantages.

As with any antitrust cause of action, a key requirement implied by the FTC's methodology is that the disadvantages incurred by competitors be also the proximate cause of any claimed injury on their part. Questions of causation ultimately focus on the cause and effect relationship between the alleged anticompetitive conduct and the injury to the competitor and competition.

In assessing causation, a question that may arise is if the rival must, as a prerequisite, have been in the retailer's stores prior to incurring disadvantages on the part of a dominant supplier. This question, however, fails to consider the nature of competition and how competitors may be affected through such disadvantages. As understood in marketing and law, the dynamics of potential competition is a powerful influence and may have similar effects toward a firm's marketing strategy as existing competition. Moreover, while rivals may be disadvantaged through the inability to continue in their efforts to compete within a store in which they are already present, rivals may also be disadvantaged because they are not

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application of transaction cost to distribution related decisions in marketing see, Rindfleisch and Heide (1997).

[24]As stated in the Canadian Competition Bureau's publication (2002, p. *), this rule of thumb is "likely to substantially lessen or prevent competition as it reduces the ability of competitors to expand their presence in the

able to gain access to a store in order to compete to begin with. Barriers to entry can disadvantage potential rivals in the same manner that constraints on existing rivals' ability to compete can harm rivals and competition.

Rival's Ability to Mitigate Disadvantages

Under the FTC methodology, once it is established that rivals are disadvantaged through a dominant firm's use of slotting arrangements, consideration is given to whether rivals are able to mitigate such disadvantages. Although not articulated, essentially such inquiry focuses on whether rivals may overcome the disadvantages (1) in the stores where they are disadvantaged and/or (2) through seeking alternatives for marketing and distributing their products to consumers.

In the store. Inquiry into whether a rival may overcome disadvantages imposed on them in stores where they compete involve questions of whether a rival may surmount an existing arrangement. Such questions pivot on the nature of the arrangement itself. As noted, slotting arrangements may be reflected in a variety of different forms ranging from formal contracts to less formal understandings and handshake deals.

Obviously, a rival's ability to surmount a signed contract containing terms that disadvantage rivals and extending over a period of years creates considerable challenges. Where such contracts contain terms that disadvantage rivals, in the absence of legal intervention or an agreement between the supplier and retailer to terminate the contract, these terms are enforceable under the contract. Less formal arrangements may prove less difficult to mitigate but depend further on the extant circumstances involved.

In the absence of a formal contract or where such a contract has expired, some observers contend that rivals should be able to mitigate the potential disadvantages by out paying the dominant firm to gain the retailer's patronage. Analogizing the competition that takes place between firms vying for the patronage of retailers as "competitive bidding," they contend that such bidding will yield an outcome that is efficient in the sense that the firm with the most valued products will ultimately gain favor with the retailer. Others, however, disagree arguing a dominant incumbent firm might be willing and expected to

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market."

bid higher to protect its monopoly power, than a firm attempting to gain entry and achieve a competitive rate of return. The basis of this expectation is the understanding that the dominant firm will place significant value on retaining its monopoly power (FTC 2001, p. 36, ft. 117).

From a marketing and retail management perspective, explaining the choice of a supplier based on their proposal too pay the most in slotting fees may underestimate the breadth of factors pertinent to the decision. A number of factors, such as forecasted product sales and profits, the nature and extent of other marketing support provided for the product and predicted overall customer satisfaction are also generally considered to be important in determining the merits of accepting a supplier's product. Such factors may not be captured nor signaled through payment of a slotting fee. Thus, as counseled by the FTC (2001, p. 30) and others, careful scrutiny should be given to assessing any argument that rivals may engage in bidding to mitigate disadvantages imposed on them through a slotting arrangement.

Through marketing and distribution alternatives. Questions arising in relation to a disadvantaged rival's ability to mitigate harms imposed on it also encompass the availability of *other* alternatives for marketing and distributing their products to consumers. In this respect, any inquiry into the availability of other stores and, more broadly, alternative channels of distribution should carefully consider the consumer patronage actually given to these alternatives. Just as it is important to focus on the extent to which rivals are disadvantaged in those stores where competition for consumer patronage actually takes place and may be harmed, it is also important that alternatives be considered viable forums for competition to take place.

Channels of distribution can vary considerably in their effectiveness and efficiency for serving targeted consumer segments. Although physically available and accessible to the disadvantaged rival, some alternatives may be less efficient and/or effective because they are not patronized by consumers, more costly to operate or are otherwise considered unattractive making them unrealistic alternatives. In this regard, considerable research on distribution channel management in marketing examines the choice of distribution channel on the part of both manufacturers interested in distributing their products and consumers making consumption decisions in the marketplace. This research may be helpful for informing the assessment of alternatives given it examines (1) the factors that drive manufacturers' choice

of distribution channel (Coughlan 1987) and the necessity of manufacturers adopting a strategic perspective in their decision (Anderson, Day and Rangan (1997) and (2) the drivers of distribution channel choice on the part of consumers (Schoenbachler and Gordon 2002) including factors affecting their channel switching behavior (Reardon and McCorkle 2002), their criteria for store choice (Baltas and Papastathopoulou 2003) and consumers response to new store formats (Rousey and Morganosky 1996).

Harms to Competition From Disadvantages

The primary concern for exclusionary slotting arrangements is that such practices can impair the health of the competitive process leading to consumer harm. For this reason, an important consideration under the FTC approach involves "inquiry into the likely impact on competition in markets in which the disadvantaged suppliers seek to compete," (FTC 2001, p. 35-36). Antitrust harm to competition from exclusionary conduct can take many forms including reduced output, increased prices, diminished product quality, retarded innovation and diminished product variety and choice (FTC 2001, p. 38). Each provides an important consideration under the FTC framework.

Output, price, quality, innovation, variety and choice. Reduced output and higher prices can result from exclusionary conduct where rivals that would otherwise provide effective competition are no longer present or are sufficiently disadvantaged through limited access and/or restricted merchandising and communication. Diminished quality and reduced innovation may also result if firms with more innovative products are not able to gain access to and/or effectively merchandise and communicate their new products or are otherwise disincented from doing so.

If rivals are unable to gain access to distribution for their products because they are fully or partially excluded, consumers may also be harmed through a more limited range of product choices and a more limited assortment of choices among those choices made available. A more limited range of products means fewer products are in the marketplace. Fewer products can mean less competition overall with the potential effect of higher prices and less innovation. Consumers may also be harmed through the reduced assortment among choices that are made available.

In general, a more limited assortment of products means that variation in consumer demand may not be met in the same way that it might be through the availability of greater assortments of products.

While reducing the search costs of those consumers whose brands remain available, some consumers may be worse off because their consumption needs are not met in the fashion they might otherwise be through access to products that better meet their needs. Of course, providing sufficient assortment in the marketplace to meet all the variations in consumer demand can be costly. Ultimately, these costs must be weighed against the added benefit of providing such variety.

For understanding these tradeoffs and their effects considerable consumer based research in marketing has studied retail variety and assortment. This literature provides a broad foundation for understanding including, for example, the nature of demand for variety (Kim, Allenby, and Rossi 2002), factors affecting consumers' perceptions of variety and assortment (Amine and Cadenat 2003), how consumer perceptions of variety and assortment effect consumer consumption (Kahn and Wansink 2004), the effects of reducing variety and assortment on consumers (Boatwright and Nunes 2001) consumer perceptions (Broniarczyk, Hoyer and McAlister 1998) and sales (Boatwright and Nunes 2001), the effects of assortment and variety on brand preference (Chernev 2003), brand choice (Seggev 1970), purchase decisions (Koelemeijer and Oppewal 1999; Simonson 1999), brand cannabalism (Bultez, Naert, Gijsbrechts and Vanden Abeele 1989), consumer satisfaction (Huffman and Kahn 1998), future brand choice (Kahn and Lehmann 1991), store patronage (Mittelstaedt and Stassen 1990), the comparative effects of assortment and variety versus other aspects of retail merchandising (Fox, Montgomery and Lodish 2004), the combined effects of assortment and variety attributes together with spatial location (Hoch, Bradlow and Wansink 1999) and the effects of out-of-stocks within assortments on consumer buying habits (Campo, Gijsbrechts and Nisol 2003; Campo, Gijsbrechts and Nisol 2004; Verbeke, Farris and Thurik 1998). The literature also explores the varying methodologies that may be employed to examine such effects (Needel 1998) and the overall challenges of modeling assortment and variety (Mahajan Ryzin 2001; Baltas, and Doyle 1998).

Dynamics of harm. Although competitive harms that emanate from slotting arrangements that disadvantage rivals may manifest in various ways, they are often first visible through reductions to variety, as rivals are excluded from the store or their merchandising is restricted. In this respect, it is important to note that the effects of anticompetitive conduct on output/price may be preceded by reduced

variety and diminished innovation. These results occur because a dominant firm's ability to restrict output and raise price is, in part, conditioned on the lack of available alternatives in the market (e.g., variety) and the inability of rivals to gain entry into the market with valued alternatives (e.g., innovation). Therefore, constraints on variety that result from a dominant firm's disadvantaging of its rivals may take place prior, and be a precursor to output/price effects manifesting in a market. Recognizing this potential is important when assessing injury to competition from an exclusionary slotting arrangement.

Offsetting Benefits to Competitive Harms

As identified under the FTC framework, an important consideration when assessing the anticompetitive effects of exclusionary arrangements involving slotting fees is the potential that such arrangements may ultimately be ambiguous in their effects on competition – at the same time yielding harms as well as benefits to competition. Benefits of the form contemplated are commonly referred to as "efficiencies" in competition policy parlance in that they can result in cost savings or other advantages that may potentially, and sufficiently offset disadvantages found in an arrangement and ultimately yielding, on balance, procompetitive outcomes, more efficient competition and net benefits to consumers.[25] As described, slotting arrangements may yield benefits to competition and consumers in various ways.

Distinguishing benefits to competition. When assessing potentially offsetting benefits in a slotting arrangement that disadvantages rivals, care should be given to distinguish benefits that arise from the specifically complained of disadvantage incurred by rivals from benefits more generally found in the arrangement. In this respect, some analysts may view slotting payments as inseparable from any complained of disadvantage. Such an approach, however, fails to consider that within a slotting arrangement, disadvantages (e.g., exclusionary terms) toward rivals may often be separable from the inducement (e.g., slotting payment) offered to compel retail cooperation to achieve them. Generally, such distinctions may be made through careful reference to the slotting arrangement itself and its specific terms.

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[25]Efficiencies do not include, however, pecuniary gains that result from the transfer of wealth from one

A key exception to the above distinction is where the inducement in the form of a slotting payment is also the complained of disadvantage. Recall, this may result where a slotting payment provided to a retailer, but unaccompanied by specific requirements that disadvantage rivals, has the same effect because it is structured to induce the retailer to act to disadvantage the supplier's rivals. Under such circumstances, the analysis of any offsetting benefits to competition arising from the arrangement should include the slotting payment itself.

Where the focus of inquiry centers on specific disadvantages incurred by rivals in relation to restrictions on access, merchandising and communication, offsetting benefits for competition may also be present depending on the nature of the arrangement and other factors. For example, having fewer suppliers in the store may provide benefits where space is limited and merchandising multiple brands provides few marginal benefits to consumers. In addition, in arrangements involving both exclusivity and partial exclusivity, competition may benefit by limiting the opportunities for "free-riding" off of another supplier's in-store services and promotion. Free riding of this form is commonly referred to as *interbrand* free riding (Hovenkamp 1985, p. 244). Reducing the potential and occurrence of interbrand free-riding is generally thought to provide incentives to suppliers to provide such services and promotion that they might not otherwise. Further, restrictions contained in short-term contracts can provide benefits by reducing the costs of repeated negotiations that might take place in their absence. The effects of these costs have been studied in both economics and marketing. This work, for example, examines and provides evidence of the effects of transaction costs for contract choice (Artz and Norman 2002), individualized contracts (Levy and Vukina 2002) and contractual incompleteness (Bernheim and Whinston 1998). In each instance of an offsetting benefit, care should be given to identifying those benefits that may arise from, and potentially offset the complained of disadvantages.

Under those circumstances where the focus of inquiry is the slotting payment itself (e.g., the slotting payment is also the complained of disadvantage), a number of potential benefits have been identified. For example, slotting payments have been suggested to help to improve distribution efficiency and stimulate competition through serving as a mechanism that suppliers use to signal product quality and

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party to another through the exercise of market power (Chicago Professional Sports v. NBA (1992).

demand, and that retailers rely on to screen new products (Chu 1992; Kelly 1991; Lariviere and Padmanabhan 1997). Benefits are also seen in the way that these payments may lead to more productive cost and risk sharing between suppliers and retailers (Kelly 1991; Lariviere and Padmanabhan 1997; Desai 2000; Sullivan 1997), better shelf-allocation decisions (Toto 1990), and the more effective apportionment of the supply and demand for new products (Sullivan 1997). As with benefits arising from the complained of disadvantage in a slotting arrangement, when the complained of disadvantage is the slotting payment itself, care should be given to identifying such benefits as well.

Identifying and documenting benefits. When considering the potential benefits of slotting arrangements, it is important that they not be pretextual in nature and that tangible evidence of the existence of these benefits be actually identified and documented. Depending on the nature of these benefits, documenting their existence may be difficult in some instances. For example, slotting payments have been described to aid in compensating a retailer for the risk of introducing a new product. However, from a marketing perspective, quantifying the risk of introducing a new product may be difficult in any particular circumstance given it may vary widely and may often be affected by a host of factor including the marketing efforts of both the supplier and retailer. Extensive research in marketing and related fields examines the factors that impact the risk, success, investment, decision making, acceptance and competitive advantage of new products. In general a wide range of factors have been identified in this literature (See for example, Di Benedetto 1999; Lawless and Fisher 1990; Robert 1980). Alternatively, slotting payments intended to cover the actual costs associated with placing a product on the shelves in terms of inventory, shelf-placement, computer updates, etc. may be more easily calculated. Given such difficulties, care should be taken in distinguishing those respective offsetting benefits that arise in theory from those that can also be actually documented.

Less Restrictive Options For Obtaining Competitive Benefits

As observed by the FTC (2001, p. 39), where slotting arrangements disadvantage rivals, in ways that, on balance, benefit competition, their analysis turns to “whether the conduct at issue is reasonably necessary to achieve the procompetitive benefits” and whether the same benefits may be obtained through

alternative less restrictive means. If there are practical and significantly less restrictive ways in which the same benefits could be achieved, the conduct should not be justified.

Distinguishing options. When evaluating potentially less restrictive options, care should be given to distinguish and focus on options that relate to the actual complained of disadvantage incurred by rivals. As noted, some slotting arrangements may contain explicit language that conditions the supplier's payment on the retailer taking steps that disadvantage the supplier's rivals. Slotting arrangements that do not contain such explicit terms may also serve to disadvantage rivals implicitly because their structure induces the retailer to make decisions that ultimately render the same outcome. As with benefits, distinguishing between such arrangements is important because less restrictive options in the first instance must address the explicit disadvantaging conditions separately from the means in which they are obtained. Alternately, in the second instance the complained of disadvantage and focus of inquiry regarding a less restrictive option is the slotting payment itself.

When the complained of disadvantage involves explicit and incorporated restrictions of a rivals' retail access, placement and communication that on balance benefits competition inquiry into less restrictive options should include consideration of options that produce the same benefits but do so without imposing such restrictions on rivals. Alternately, when the complained of disadvantage is the slotting payment itself, the focus of inquiry centers on alternatives to how the payment is currently structured and/or alternatives to the payment itself that might still allow for achievement of the identified benefits. For example, some slotting arrangements provide for disproportionally greater payments to retailers for reaching higher and higher sales levels of the firm's products. Other slotting payments involve a flat amount in the form of an extraordinarily large slotting fee paid upfront prior to the product's sale. From a marketing perspective, depending on the nature of identified benefits, potential alternatives for structuring the payment might include the use of per-unit introductory allowances on products actually sold (e.g. scandowns), per unit discounts, buy-back guarantees and failure fees among others (see also, FTC 2001, p. 17-18).

Beyond alternatives to how the slotting arrangement is structured, consideration should also be given to whether alternatives exist to the payment itself that would result in the same benefits.

Reportedly, for example, some retailers (e.g., Wal-Mart and Costco) do not charge slotting fees, instead believing it is in their best interest to obtain the best possible price without requiring allowances or fees (FTC 2001, p. 18). Some contend also that the claimed benefits achieved through the use of slotting fees for allocating products, reducing risk, signaling, etc., may be achieved more readily in other ways that do not result in the type of competitive disadvantages described. Indeed, as stated in the FTC report some commentators believe: "....consumer interests will be better protected if retailers looked to expressions of actual consumer demand, rather than to proxies based on manufacturer payments, which can serve exclusionary rather than procompetitive objectives," (FTC 2001, 44-45, ft 148). As is understood in marketing, expressions of actual consumer demand include market research and other information about what consumers actually desire to purchase. Suggested alternatives in this realm include in the context of a new product, the use of test stores which might allow the retailer to try a new product in a few locations before deciding on a larger commitment (see also, FTC 2001, p. 16).

Special Countervailing Circumstances and Other Considerations

The FTC framework for the analysis of supplier exclusion employing slotting arrangements also includes consideration of special countervailing circumstances that would diminish or make less likely the potential of competitive harm in some particular set of facts. Selected circumstances that may have this result are examined in this section.

Role and impact of private label brands. Private label or "store" brands have become an increasingly visible part of the retail landscape. Although reportedly experiencing slow growth during the early 1980's (Peckham 1983), recent studies indicate private label sales have grown and, in some instances outperformed many national brands. For example, a recent study by JP Morgan shows total private label sales in 85 food categories in supermarket and drug channels grew 7.8% during the four year period ending June 2003 (see, Anonymous, 2003). A contention of some observers is that because of their "store" brand nature, private label brands are often not part of slotting arrangements. As a result, the substantial presence of private label brands on store shelves can help to countervail the potential of

competitive harm that may arise where slotting arrangements with dominant suppliers disadvantage branded rivals because they yield sufficiently effective competition against a dominant firm.[26]

Although this result may occur and is ultimately an empirical question, an important consideration in any inquiry is, "who is the supplier of the private label brand?" Private label brands can be produced and supplied by national brand suppliers. In such instances, the dominant supplier whose conduct is at issue may also supply the retailer's private label brands. Depending on the arrangement, such a private label supplier may have minimal or extensive input and influence over how the store brand is merchandised and sold. At minimum, because the supplier stands to benefit directly from its own brands and indirectly from sales of the store brand, the "effectiveness" of competition thought to result from the presence of the store brand should be carefully assessed.

Frequency of exclusion. Finally, the frequency of slotting arrangements that disadvantage rivals has been stated by some to be "rare." For example, in surveying seven major retailers, the FTC (2003, p. viii) found six of the seven retailers reported that for the product categories studied (e.g., fresh bread, hot dogs, ice cream and frozen novelties, shelf-stable pasta, and shelf-stable salad dressing) "exclusive dealing arrangements are rare" and that the seventh retailer "provided one agreement that provided a supplier with approximately 50% of the shelf space for one product." The FTC study further reports that "both surveyed retailers and surveyed suppliers reported that, [in] the five product categories studied, pay-to-stay fees were rare" (FTC 2003, p. viii). In comparison, findings of slotting arrangements that disadvantage rivals through either partially or fully exclusive agreements may be considered contrary and, therefore, bear special consideration and scrutiny for their nature and effects in the marketplace.

DISCUSSION

Rather than a general theory, extant understanding of arrangements involving slotting allowances and fees indicates that, depending on the circumstances, such arrangements may be employed to achieve

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[26]For an excellent discussion of the countervailing role and strategy of private labels in relation to suppliers and national brands, see Steiner (2004) and Hughes (1997). Steiner (2004) and others (Kim and Parker 1999), however, caution that although providing a countervailing influence to national brands, the exercise of such influence may ultimately result in collusion on the part of private label and national brand suppliers (see, Steiner 2004; Kim and Parker 1999).

procompetitive as well as anticompetitive outcomes. Given this potential, attention in antitrust has increasingly focused on identifying, distinguishing and elaborating upon those particular circumstances wherein such arrangements may limit competition and result in harms to consumers.

A key circumstance and important avenue of antitrust inquiry focused upon in this manuscript involves their misuse by suppliers in the form of anticompetitive exclusion. Answering the call for more specific understanding of such arrangements, it draws on insights from marketing to examine and inform a variety of key questions and issues surrounding the antitrust assessment of exclusion involving slotting allowances and fees.

Following the general framework advanced by the FTC for analyzing such arrangements, these questions and issues were examined and elaborated upon in an effort to inform their application in a given circumstance. This process reveals both the inherent complexity of understanding required to properly assess the effects of a particular arrangement but also the benefits of incorporating understanding from marketing together with extant understanding in antitrust to inform the assessment of such arrangements. More broadly, the approach provides an illustration of how insights from marketing and its related disciplines may be applied to inform the analysis of antitrust issues involving marketing practices.

Insights and Implications

Our examination suggests that insights from marketing and its related disciplines are relevant and do provide useful input across the elements of the FTC's framework for assessing exclusionary slotting arrangements. These insights provide the basis for both complementing and extending extant antitrust understanding in a number of important ways. For example, despite recognition of the distinction of exclusion that results in a rival being totally excluded from the store versus circumstances involving partial exclusion, the nature of partial exclusion and specific merchandising elements through which partial exclusion may result has not been extensively examined. As demonstrated, considerable research in marketing focuses on the role of instore environments and the nature of instore purchase decision making and therefore provides a foundation for understanding the nature and impact of these elements. In addition, although prior understanding in antitrust has emphasized a dominant supplier's sharing of monopoly returns as a mechanism for obtaining the acquiescence of a retailer to its exclusionary

strategies, research in marketing reveals additional understanding of the sources of and pathways through which such outcomes may be achieved and the nature and specific strategies of coordination and governance that may be employed to obtain such outcomes. Further, drawing heavily on economic theory, extant understanding in antitrust emphasizes the impact of anticompetitive conduct (including exclusionary slotting arrangements) on output, its resultant impact on price and dynamic considerations relating to innovation. Less, but growing emphasis focuses on the impact of anticompetitive conduct for choice and variety. Difficult questions attend the antitrust assessment of choice and variety. To this end, the considerable research in marketing that studies retail variety and assortment provides a helpful base of understanding. Finally, extant research in both economics and marketing identifies and elaborates upon a number of benefits to competition that may arise from an exclusionary slotting arrangement and potentially offset such competitive harms. Added understanding of how these benefits may be distinguished in a given slotting arrangement, identified and documented is provided through marketing insights that examines aspects of each.

Beyond the contributions of marketing identified above, a number of more pragmatic insights were also identified and appear useful for informing antitrust analysis of slotting arrangements under the FTC framework. These include the subtleties of explicitly versus implicitly stated and directly versus indirectly obtained disadvantages toward rivals that may result in a slotting arrangement. They also include the importance of understanding the nature of contracting practices by retailers, the varying nature of retail formats and benefits and limitations of the "space to sales" concept for understanding the breadth and depth of disadvantages obtained through an allegedly exclusionary slotting arrangement. Further, they include insights in relation to the questions and issues that, given an exclusionary slotting arrangement, can arise in assessing a rival's ability to mitigate disadvantages in the store and through other marketing and distribution alternatives. Still further, they include the practical distinctions and related options that arise in association with the assessment of less restrictive options for obtaining any competitive benefits that may arise from an exclusionary slotting arrangement. Finally, they include the nature and effects of potential countervailing circumstances and other considerations such as private label brands and the frequency of exclusion in practice.

Together, application of the insights identified from marketing and its related disciplines should be helpful to policymakers responsible for developing policy toward slotting allowances and fees, litigants involved in disputes over this marketing practice and marketers who may be paying or receiving these allowances and fees. For policymakers charged with developing policy toward slotting allowances and fees, as noted, these insights possess the potential for complementing extant economic thinking through providing more particular knowledge regarding the practice and effects of slotting allowances and fees. Together with the FTC framework, the application of these insights should aid in the development of more informed public policy. For litigants involved in disputes over slotting arrangements, application of these insights through the FTC's analysis framework is likely to pay dividends through more informed understanding of the issues. Such understanding should be beneficial across and at each stage of the assessment process. Finally, for marketers involved with slotting allowances and fees, application of the marketing insights identified and their organization through the FTC framework should serve to further enhance understanding of slotting arrangements, facilitate the recognition of issues and concerns regarding their use, aid in providing a pathway for making decisions that benefit competition and recognizing when conduct may yield antitrust scrutiny.

Extensions and Future Research

The current analysis emphasized selected issues and questions arising within the FTC framework and the benefit of integrating insights from marketing for assessing exclusionary slotting arrangements. Other issues and questions may be identified. Moreover, other bodies of thought beyond marketing may provide additional insights. For example, a considerable literature in the field of business strategy addresses the nature of interfirm strategy. Incorporation of insights from this discipline is likely to provide added understanding of exclusionary arrangements involving slotting allowances and fees.

Beyond supplier induced exclusionary slotting arrangements, examination of other areas of antitrust concern toward slotting allowances and fees is also needed. For example, recent interest in antitrust focuses on the implications of the increasing concentration and power held by downstream members of our distribution systems (e.g., buyer power). Although debate continues as to the occurrence

of such a “shift” in power, considerable evidence documents that retailers have achieved increasing influence over their upstream suppliers in many sectors of our economy.

In relation to slotting allowances and fees, the shift in power from suppliers to retailers has been cited as a major factor in the increasing occurrence of such practices. In this regard, some observers contend that beyond anticompetitive concerns for dominant suppliers’s use of slotting arrangements to exclude rivals, dominant retailers may require payment of slotting allowances and fees in ways that ultimately limit competition and harm consumers.

The antitrust concern is that a dominant retailer may use its relative bargaining position[27] in the form of *buyer power* against upstream suppliers to extract “extraordinary” slotting fees and other terms from a sufficient number of suppliers so as to result in such harms.[28] On the one hand, such fees may result in the retailer receiving, in the short term, a net lower input price for their purchases (e.g., the supplier’s price to the retailer is reduced by amount of the slotting fee) with the possibility of these savings being passed on to consumers in the form of lower prices and/or better services. However, because of their magnitude and other terms, such fees can also create barriers to entry for suppliers who do not have, or otherwise cannot obtain the resources to pay. The amount and terms may also affect suppliers’ incentives to engage in production, innovation and other welfare enhancing activities. Retailers may also not share their savings with consumers because of a lack of retail competition or other factors. When this occurs, consumers can be harmed through higher prices. Consumers may also be harmed in the event suppliers increase their prices to retailers to pay for the fees and these increases are passed on to consumers through higher retail prices.

[27]According to the FTC, a retailer may possess bargaining power because of its importance to suppliers in getting their products to market as in the case of the retailer accounting for a large share of the retail market and the lack of fully equivalent substitute outlets (FTC 2001, 55-56). Other less aggregate sources of bargaining power may also be present due to information asymmetries, geographic location, etc.

[28]Related concerns include that a dominant retailer (1) will use market power in the form of monopsony power (e.g., the counterpart to monopoly power) - *reducing its quantity of purchases* from suppliers to force lower input prices and (2) will use market power in the form of “gatekeeper” power - *using its critical importance in the market* to force lower input prices. (FTC 2001, 57-58). The exercise of monopsony power can lead to the same types of concerns that result from the exercise of monopoly power (e.g., restricted output leading to higher prices). The exercise of gatekeeper power can lead to upstream suppliers being held to below minimum efficient scale and in

Finally, beyond slotting allowances and fees, other trade promotion practices may also be employed to exclude and limit competition in ways that ultimately harm consumers. Although a considerable literature in marketing examines the nature and practice of trade promotion and, as described, its use relative to other forms of promotion is increasing, our understanding of the competitive effects of differing trade promotion practices remains underdeveloped. Research that comprehensively examines trade promotion practices and their effects is likely to pay dividends in the form of enhanced understanding for both antitrust and marketing.

CONCLUSION

Arrangements involving slotting allowances and fees continue to attract considerable attention and research as to their ultimate effects for competition and consumers. Focusing on the FTC's recently advanced framework for assessing exclusionary slotting arrangements and selected issues and questions in its application, the current research contributes to this growing body of thought through the identification of insights from marketing and its related disciplines that may be helpful for understanding and assessing a given circumstance. Application of these insights should be helpful to policymakers, litigants and practitioners in marketing.

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addition downstream, consumers not having access to variety they might otherwise (FTC 2001, 57-58).

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