

Exclusive Dealing: Substance and Process

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FTC/DOJ Hearings

November 15, 2006

Well-Informed Analysis

- Both efficiency and anticompetitive effects/explanations are very possible
- On each side, analysis is subtle
 - Efficiency: for example, investment-incentive theory
 - Anticompetitive: for example, divide-and-conquer theory

Investment Incentives

- Segal/Whinston (Rand J. Econ. 2000)
- Relationship-specific investments are NOT an efficiency rationale for exclusivity
- Investments with spillover to customer-entrant deals MIGHT BE – it is very complex
 - Who invests, how it spills over, bias absent ED
- How well could one disentangle this?

Divide-and-conquer exclusion

- RRW-SW (Amer. Econ. Rev. 1991/2000) shows that such exclusion can (profitably and harmfully) work against end users
- Usually exclusive dealing is with firms who then compete to sell to end users
 - That can seriously affect buyer incentives

Divide-and-conquer

- Fumagalli and Motta (Amer. Econ. Rev.)
- Simpson and Wickelgren; Yong; Shaffer?
- Which is right and when?
 - My attempted diagnosis and their reaction
 - Presumably an intellectual resolution will emerge
 - How likely is one to be able to prove?

Antitrust under Uncertainty

- (Bayesian thoughts)
- Role of presumptions and burdens of proof
- The two presumptions

Two presumptions

- *Laissez-faire*: don't intervene unless reasonably sure intervention will help
- *Competition*: protect "competition" unless reasonably sure alternative is better

“Competition”

- Have drifted towards making “competition” simply mean “the good outcome”
 - Towards, not yet “to”. Eyebrows, but not guffaws, at “pro-competitive monopoly”
- Law protects “competition,” so tautologically that linguistic shift would be good if we knew all
- But a *presumption* in favor of competition then has no meaning!
 - Merger between major rivals must be proven to be “loss of competition”? [Philadelphia Bank...]

The shoe on the other foot

- What if “laissez-faire” were redefined as “the good outcome”?
 - Explicating idea, not proposing policy
- Would redefine “intervention” as “bad intervention”
 - Opponents of intervention would have to *prove how it is bad*
 - Strict government rules would be “not necessarily intervention”
- Pretty stupid, huh?
 - Words should mean what they mean...

Antitrust Intellectual History

- The bad old days
- The good new days
- The not so good new days??!
- International perspective

Dark Matter

- Good idea: intervene only if intervention benefits efficiency/consumers
- Maybe not such a good idea: only if *can specifically prove that* it would do so
- Benefits of competition
 - Concrete, predictable, provable price effects
 - Dark matter

Words and Presumption

- “Competition” means competition
- Competition usually serves efficiency and consumers, but that’s a fact, not a definition
- Pretending it’s a definition, while helpful in some ways, guts the crucial antitrust *presumption*

What *does* “competition” mean??

- Hard question
 - Part of motive to redefine as “good stuff”
 - Exclusive dealing as example
 - But that has huge dangers, maybe coming to roost
- Beyond the study of words...
 - Want laissez-faire presumption
 - Want pro-competition presumption too
 - What to do?