

Antitrust Analysis of Bundled Discounts

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Agenda

- Why are bundled discounts troubling?
- Summary and critique of leading evaluative approaches
- An alternative proposal

The Problem: Exclusion of an Equally Efficient, But Less Diversified, Rival

	Mfr. A		Mfr. B
	Shampoo	Conditioner	Shampoo
Average Variable Cost	\$1.50	\$2.50	\$1.25
Separate Price	\$2.00	\$4.00	\$2.00
Package Price	\$5.00 ($\$1 > AVC$)		No package avail. Shampoo price must be $< \$1$.

Per Se Legality

- Legal if discounted price of bundle exceeds aggregate cost of products within the bundle.
- Critique:
 - May be the best approach in the long run, but...
 - The search may be worth the cost.
 - Easy to imagine a/c exclusion.
 - Administrable “weeding device” is available.

Raising Rivals' Costs (Unjustifiably)

- Discounts illegal if they unjustifiably usurp so much business from rivals that their costs are raised.
- Critique: How determine what's "unjustifiable"?
 - Case by case? Chilling effect.
 - Elhauge approach?
 - Prevents price-cutting by monopolist at MES.
 - Tough to administer.
 - Chilling effect.

The *LePage's* Approach

- Bundled discount is presumptively exclusionary if discounter is bundling products not sold by rivals and is winning business from those rivals.
- Discounter may rebut presumption if it proves a “business reasons justification” (must show that bundling saves costs approaching amount of discount).
- Critique:
 - Price umbrella for less efficient rivals.
 - Will chill bundling, which has many pro-comp. benefits.

The *Ortho Diagnostic* Approach

- Bundled discount illegal if plaintiff shows either:
 - that bundle is priced below AVC, or
 - that plaintiff is at least as efficient a producer of competitive product but cannot match discount without pricing below cost on that product.
- Critique: Overly difficult to administer b/c plaintiff must prove its and defendant's costs, where there are joint costs.

The “Original” *Antitrust Law* Approach

- Illegal if the bundled discount would exclude a hypothetical equally efficient single-product rival, without adequate business justification.
- Critique: Easier to administer, but...
 - Prevents discount cross-subsidization (e.g., Seller’s cost of A, B, and C is \$4 each, sells them separately for \$5 each, sells bundle for \$13.50).
 - No requirement that foreclosed market be capable of monopolization.

The “Revised” *Antitrust Law* Approach

- Analogize to tying: There’s a tie-in if the price is below cost when entire discount is attributed to competitive product. BUT not if another “significant rival” sells all products.
- After finding “tying,” apply ROR.
- Critique: Why involve tying at all?

An Alternative Proposal: Goals

- Condemn bundled discounts that could eliminate competitive rivals and result in price increases.
- Do not condemn others.
- Be easy to administer.
- So:
 - Complaining rival must have exhausted competitive options.
 - Complaining rival must have ability to match efficiency.
 - Foreclosed market must be capable of monopolization.

An Alternative Proposal: Rule

- Above-cost discount is per se legal unless plaintiff could not match without pricing below cost and:
 - (1) Barriers to entry exist in (a) product mkt in which plaintiff doesn't participate, and (b) market for competitive product.
 - (2) Collaborative bundle impracticable.
 - (3) Good faith supply offer rejected.
- Defendant may rebut by showing that supply offer was not attractive.

Goals Met?

- **Complainant exhausted competitive options?**
 - Showings 1(a), 2, and 3 establish.
- **Complainant capable of equal efficiency?**
 - Defendant's failed rebuttal oppty establishes.
- **Mkt. capable of monopolization?**
 - Showing 1(b) establishes.