

# **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
<b>Average Variable Cost</b>	\$1.50	\$2.50	\$1.25
<b>Separate Price</b>	\$2.00	\$4.00	\$2.00
<b>Package Price</b>	\$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.