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

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<tbody>
<tr>
<td></td>
<td>Shampoo</td>
<td>Conditioner</td>
</tr>
<tr>
<td><strong>Average Variable Cost</strong></td>
<td>$1.50</td>
<td>$2.50</td>
</tr>
<tr>
<td><strong>Separate Price</strong></td>
<td>$2.00</td>
<td>$4.00</td>
</tr>
<tr>
<td><strong>Package Price</strong></td>
<td>$5.00 ($1 &gt; AVC)</td>
<td>No package avail. Shampoo price must be &lt; $1.</td>
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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.