

Bundling Beyond Borders

BY RICHARD M. STEUER

BUNDLED DISCOUNTS CONTINUE to bedevil courts and commentators. Even worse, the confusion keeps growing and is spreading around the world. Providing sound advice in this environment is no small challenge, but it can be done.

In the United States, courts have applied half the contents of the antitrust toy chest to bundled discounts—predatory pricing, exclusive dealing, and tying theories under Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. Each case seems to present a different assortment of claims and a different mode of analysis.¹

In Europe, the courts have applied a foreclosure analysis to bundled discounts, similar to that applied to exclusive dealing and tying in the United States, while the European Commission is adopting a price/cost-based approach closer to predatory pricing analysis.²

In other jurisdictions there have been fewer rulings,³ but the reliance that enforcement authorities and courts in other countries commonly place on the learning in the European Union and United States does not bode well for universal certainty any time soon.

Some commentators have criticized every one of these approaches, while other commentators have defended each of them. The academic debate, sometimes conflated with expert testimony, has been heated, with no clear winners or losers.⁴

To add to the confusion, the industries in which bundling issues arise have been as varied as the legal theories, making it even harder to glean rules of general applicability. Leading decisions have involved such diverse products as vitamins, automobile tires, air travel, pharmaceuticals, medical devices, hospital services, and office supplies.⁵ Recent cases have been brought against Intel, Microsoft, and the maker of Transitions eyeglass lenses.⁶

If this were not enough, the complexity is compounded when dealing with global sellers and global buyers. In this age of multinational manufacturers, wholesalers, and retailers, decentralized production, container ships, and the Internet, it has become common for multinational companies to solicit bids to supply them with products everywhere. This can

make it more than a little challenging to comply with all the world's laws on bundling at once.

It would be easy in this dizzying environment for a supplier's counsel to "just say no" to bundled discount programs. The reality, though, is that the biggest buyers often demand bundles with favorable pricing across the board. Large buyers may host bidding contests for bundles of products.⁷ Buying groups stake their very existence on their ability to secure better pricing for their members and routinely try to leverage that buying power across all the products their members buy.⁸

The reality on the manufacturer's side is that bundled discount programs provide sellers the hope of reducing their prices without necessarily hurting their bottom line—provided that the programs result in greater sales. Such programs also can provide the most effective means to match rival offers. Manufacturers' sales executives typically want to be able employ every available technique to build sales, within the limits of the law.

Knowing where those limits lie is not easy in any country, given the unresolved issues in each jurisdiction today. Yet it is child's play compared with defining those limits for global deals, given the kaleidoscope of bundling law across this planet.

So, how does a supplier with global customers stay competitive and stay out of trouble? First, it needs to understand the meaning of bundled discounts and their anticompetitive potential. Second, it needs to understand the techniques for eliminating or minimizing that potential. Third, it must understand which jurisdiction's laws may apply. Fourth, it needs to develop a plan to comply with all of those laws. Nobody said it was simple.

What Are Bundled Discounts and Why Do They Attract Criticism?

"Bundled discounts" or "bundled rebates"—often referred to by courts simply as "bundling"—involve the offer of discounts or other inducements applicable to a bundle of products.⁹ It is like tying, but is not the same because ordinarily the customer is not actually required to buy a second product in order to qualify for a discount on the first product.¹⁰ It is like exclusive dealing to the extent that it discourages the customer from purchasing competing products—and it may have the practical effect of inducing exclusive dealing—but is not quite the same if it does not prohibit purchases of competing products outright. It may mimic predatory pricing from the perspective of a competitor that can only offer a portion of the products included in the bundle, but only if the competitive products (i.e., the products both competitors offer) are effectively being sold in the bundle at a loss, making it impossible for the rival to compete.

Conceptually, a bundled discount is similar to a loyalty discount, which applies back to "dollar one" but is conditioned on the customer buying all or most of its requirements of only a single product, rather than multiple products, from

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one supplier.¹¹ Where a customer has no choice but to purchase some quantity, but not all, of its requirements of a single product from a particular supplier, the dynamics of a loyalty discount and a bundled discount become almost indistinguishable because the quantity the customer needs to buy becomes the equivalent of a must-have product while the remaining quantity does not. For example, where a particular brand of the product is specified by one of a customer's downstream accounts, that portion of the customer's requirements for the product will have to be purchased from the manufacturer of that particular brand while the rest of the customer's requirements for the product could be purchased from other manufacturers, as though there were two categories of products, only one of which is a must-have.¹²

The element all these devices have in common is leverage—the ability to use market power in one product to obtain market power over another. Without leverage, there is little concern over bundled discounts, whether they are analyzed as tying, exclusive dealing, or monopolization/abuse of dominance through predatory pricing.¹³ But to complicate the analysis further, leverage is as complex a concept as bundling because there are two kinds of leverage. A seller of a must-have product can exert leverage over any customers that genuinely must have that particular product. The seller can induce those customers to buy more of that product (if they only need to buy a portion of their requirements for the product from that particular seller), or to buy other products, in order to get the best price on the must-have product that they need to buy from that seller no matter what. But buyers of multiple products can exert leverage too. A buyer with enough purchasing power can exert leverage over sellers, inducing them to offer lower prices on everything that buyer purchases in order to sell anything to that customer at all.¹⁴

Consistent with this, the effects of bundled discounts are multifold. Bundling may foreclose competitors that are not in a position—either alone or with others—to offer the same bundle or an alternative but equally attractive bundle. However, bundling also may induce competitors to broaden their lines or to partner with others to offer broader bundles, enhancing competition. Bundling may enable customers to use their buying power to secure better pricing, lowering their costs. Of course, in some circumstances, this may provide those customers a competitive advantage over competing customers with less buying power. And in the long run, bundling also may force enough sellers to exit to allow the remaining seller or sellers to raise prices, making all buyers—even those with the greatest leverage—worse off.

These complex dynamics raise the same issues in every jurisdiction: Should customers enjoying bundled discounts be “saved from themselves” or should they be allowed to demand bundled discounts today and assume the risk that they may face a less competitive cadre of sellers and higher prices tomorrow? Should sellers be permitted to provide greater incentives to customers who buy a variety of their products, or does the nurturing of competition necessitate

There are two basic approaches for global enterprises to contain the risks of bundling. The first is to compartmentalize the practice geographically, and separately comply with the law in each jurisdiction. If geographic compartmentalization is impossible, the second approach is to design a program that will comply with the law in every jurisdiction that is affected.

that sellers with appreciable market power over any must-have products be required to offer each of their products in isolation from their other products even if that may result in higher prices?

The debate over these issues has been fierce. In several jurisdictions, the applicable legal theories—monopolization, abuse of dominance, tying, exclusive dealing—and dueling economic theories have generated a torrent of opinion as to the proper approach.¹⁵ The only certainty is that this debate is not nearly over. There are legal scholars lined up on both sides and precedent to cite in both directions. As one court recently observed, “There is limited judicial experience with bundled discounts, and academic inquiry into the competitive effects of bundled discounts is only beginning.”¹⁶ What to do?

How to Contain the Risks of Bundled Discounts

There are two basic approaches for global enterprises to contain the risks of bundling. The first is to compartmentalize the practice geographically, and separately comply with the law in each jurisdiction. If geographic compartmentalization is impossible, the second approach is to design a program that will comply with the law in every jurisdiction that is affected.

Either way, before deciding how best to minimize risk, there are a number of initial questions that need to be addressed.

Is there really a must-have product in the bundle? Some products have been classified as “must have” because they perform a function for which there is no substitute,¹⁷ while others have been classified as “must have” because they command a high market share and have unparalleled consumer appeal.¹⁸ The strength of the product may not be the same everywhere, however. For example, a unique patented product may be a must-have product in one jurisdiction but face competition in other jurisdictions that do not recognize the same patent rights. A product with a high market share and overwhelming consumer demand in one jurisdiction may enjoy far less popularity among consumers in other jurisdic-

tions. To answer this question requires an assessment of uniqueness and the degree of market power actually created by any uniqueness.¹⁹ It also requires an assessment of the relevant market in which the potential must-have product competes, and a determination of its market share as an indication of market power.²⁰ In each instance, the ultimate question is whether the product is so truly unique or so popular that customers genuinely “must have” it.

What else is in the bundle? The parties potentially disadvantaged by bundled discounts are competitors that cannot offer the must-have product but are trying to sell substitutes for the other products in the bundle, so it is important to assess what those other products include. Again, the answer may not be the same everywhere. Some of the other products in the bundle may not be available in every jurisdiction, due to prohibitive shipping costs, inadequate distribution channels, regulatory barriers, or other barriers, or because the local demand already may be completely satisfied by local products. For other products in the bundle, there simply may be little or no demand in certain jurisdictions at all. In each instance, the issue is whether competitors are being foreclosed from an appreciable share of a relevant market for any of the other products in the bundle due to the strength of the must-have product or products.

What are the market concentrations and entry conditions for each product in the bundle? Regardless of the jurisdiction, and whether the issue is market power, monopoly power, dangerous probability of achieving monopoly power, or possession of a dominant position, the risk of bundling cannot be assessed under any of the potentially applicable legal theories without defining the relevant markets, estimating the seller’s market shares as well as competitors’ shares,²¹ and evaluating the conditions of entry for the must-have product and the other products in the bundle. These elements may be crystal clear from prior cases or a complete mystery, but they are always relevant to the analysis and must be evaluated.

How much are customers required to purchase in order to take advantage of the benefits provided by the bundle? Must the buyer purchase all of its requirements of every product in the bundle in order to get the best terms (including, of course, the best price)? If not, how much can the buyer purchase from other suppliers and still qualify for the best terms? Also, how much better are the best terms than the next best terms, and any other terms that may be available? In other words, how powerful is the inducement and how large a percentage of the customer’s purchases would be tied up if the inducement succeeds?²² Once again, the answers may not be the same in every jurisdiction. Offers may vary, depending upon the strength of the must-have product, the assortment of other products in the bundle, the strength of demand for these products, the strength of competitors, and other factors. The determinative question in each instance is whether, regardless of the strength of the must-have product and the variety of other products included in the bundle, the require-

ments placed on customers to take advantage of a bundling offer are unreasonably anticompetitive.

If all of the inducements are applied to the products in the bundle for which the seller faces competition, are those products being sold above or below cost? This is what sometimes has been called the “discount attribution” test. It begs the predicate questions, i.e., which costs and which products, and it is not applied in every jurisdiction, but it needs to be addressed. Several courts and regulators have articulated versions of this rule, but there is no consensus as to what measure of cost to apply or whether to require a showing of the probability of recoupment.²³ It also is not entirely clear whether a competitor offering only one product in the bundle may ask a court to attribute the entire bundled discount to that one product, while another competitor offering two of the products in the bundle may only ask a court to attribute the discount to those two products.²⁴ Ultimately, the analysis turns on the presumed costs of competitors—specifically, whether an equally efficient competitor for the products in the bundle other than the must-have product can be competitive without selling below cost. If the answer is “No,” the program will be suspect whether or not a particular enforcer or court applies a presumption that sales above cost are not anticompetitive.

Are there “carve outs” or other exceptions for the benefit of competitors unable to offer a comparable bundle? It may be possible to make exceptions from bundled discount requirements for a customer’s purchases of competing products from those competitors of the seller that are unable to offer substitutes for the must-have product, either by making such substitutes themselves or obtaining them from another source. There is precedent recognizing that such a carve out can counteract the potential for foreclosure that a bundled discount program may create.²⁵ Alternatively, as noted above, it may be possible to limit that potential for foreclosure simply by limiting the portion of their requirements for competitive products that customers are required to purchase from the seller with the must-have product in order to earn the best discounts. Such limitations and carve outs can be combined in the same program. Exceptions and limitations of this kind can enable competitors lacking the must-have product to compete for a portion of customers’ requirements for other products without having to make up the discounts that the customers would stand to lose on the must-have products and other products in the bundle.²⁶

Are agreements conditioned on bundling terminable on reasonably short notice? Even when a bundling offer requires exclusivity, either explicitly or by having the “practical effect” of compelling exclusive dealing,²⁷ there is broad recognition that exclusive dealing contracts lasting no more than one year ordinarily are not unreasonable.²⁸ Presumably, if a competitor that can offer a comparable or equally attractive bundle has a fair opportunity to compete for the customer’s business at least once a year, there can be only limited foreclosure. Of course, a limited duration will not resolve

the issues for competitors unable ever to offer the must-have product, or another must-have product, in its own bundle. Also, a contract term permitting termination within a year or less may be illusory in some situations, where customers are unable to switch suppliers for other reasons.²⁹ Nevertheless, a contract term providing for expiration in no more than a year, or termination on short notice, can help to minimize potential foreclosure and establish reasonableness.

It also is relevant to ask what business rationale exists for offering a bundled discount—such as the creation of efficiencies—and who instigated the bundle—the manufacturer or the customer. Good intentions will not save an anti-competitive program, but evidence of procompetitive effects should be persuasive to agencies and courts in conducting an analysis under any applicable test. Likewise, where the customer itself wanted a bundled discount for its own purposes, the customer's judgment as to the pros and cons of such a discount should merit consideration by agencies and courts in assessing the reasonableness of that discount.³⁰

By answering all these questions, a manufacturer should be ready to design a program that responds both to customers' insistence on bundled discounts and to its own sales executives' pleas for freedom to make more attractive offers, while still complying with the law. Striking the right balance will depend upon the strength of the must-have product, the seller's market shares for each product in the bundle, the relative strength of competitors, and the ability of other suppliers to enter into supplying each product and competing.

Moreover, these questions need to be addressed regardless of whether a bundling program can be customized for individual jurisdictions or a single program will be implemented worldwide. If discrete programs can be tailored to discrete jurisdictions, the answers may vary and so may the programs. If it is impossible to contain the effects of a bundling program within discrete jurisdictions, the answers may apply across borders, requiring a single program that will comply with the laws of every jurisdiction that apply. The pivotal step is to determine how many jurisdictions' laws are likely to apply.

Which Jurisdictions' Laws Apply?

Evaluating which jurisdictions' laws are likely to apply to bundled discounts can most easily be done from the perspective of potentially disadvantaged competitors. If a competitor is precluded from selling to customers in a particular jurisdiction because it is unable to match the attraction of a bundled discount program, it likely will be able to enlist the assistance of antitrust enforcement authorities there. It also might be able to institute legal action itself, assuming that it satisfies the jurisdiction's requirements for injury and standing. Such enforcement could be aimed against the manufacturer of the products in the bundle, if it is present in the jurisdiction, or against an intermediary distributing the manufacturer's products in the jurisdiction.

The fact that the bundled discounts are being provided to customers within the jurisdiction likely will provide a basis

for the seller's competitors to complain regardless of whether those competitors are local or are from outside the jurisdiction. So long as they are trying to compete in the jurisdiction and arguably are being foreclosed, they can be expected to be afforded standing to complain.

Customers themselves are less likely to complain because they frequently are the beneficiaries of bundled discounts, and often they instigated those discounts in the first place. Theoretically, if bundled discounts succeed in driving competing suppliers out of the market, thereby enabling the seller of the bundle to raise prices in order to recoup prior losses, customers facing those higher prices could have grounds to complain, but typically bundling has been challenged by competitors or enforcers while customers continue to enjoy the benefits of lower prices.³¹

The facts are not always so simple, however. A manufacturer in one jurisdiction may sell a bundle of products to a customer for delivery in a second jurisdiction, which products the customer uses in a third, fourth, and fifth jurisdiction. Competing manufacturers might want to sell products to that customer for use in the third, fourth, or fifth jurisdiction, but are precluded because of the inducements provided outside those jurisdictions. Assuming that the competing manufacturers believe the first manufacturer is bundling a genuine must-have product with the products they are trying to sell, and that the terms of the bundled offer make it impossible for them to compete, where can they complain? Is the manufacturer susceptible to suit in the third, fourth, and fifth jurisdictions? Could the competitors complain in the first or second jurisdiction?

The answers will depend on the facts as well as the law of each jurisdiction and will not always be easy, but in today's global economy, the manufacturer must assume that it or one of its subsidiaries may be subject to jurisdiction in one or more countries whenever a competitor accuses it of foreclosing competition through bundling. This may include instances in which the law of one country may be applied for the benefit of claimants in other countries.³² For example, some non-U.S. claimants have sought to recover in U.S. courts under U.S. antitrust law by claiming to have been injured by activity that injures U.S. competition,³³ while other non-U.S. claimants have sought to recover in U.S. courts under non-U.S. law,³⁴ and there is no end to the possibilities that might arise around the world. This requires the manufacturer to devise a strategy to comply with the law everywhere that its bundling may affect competition.

How to Comply with the Laws of Multiple Jurisdictions?

Once it is determined which jurisdictions' laws apply, the question becomes how to comply with them. Where customers operate locally and there is reasonable certainty that products sold for consumption within a jurisdiction will stay within that jurisdiction, it should be possible for suppliers to tailor their programs individually to each jurisdiction. For

example, if the products are highly perishable or are designed to meet specifications or labeling laws unique to a single jurisdiction, such certainty may exist. Likewise, if customers are contractually bound to limit resale and use to the confines of a single jurisdiction and that limitation effectively can be monitored and enforced, such certainty may also exist.

For each such country, the manufacturer can determine whether any of its products are “must haves” there, and then identify competitors and assess their market power for all the products that might be included in a bundle. Equipped with this information and an assessment of the applicable antitrust or competition law, the supplier can decide which products to include in a bundle, what discounts or other inducements to offer (making sure not to sell below cost), what purchasing requirements to impose, what carve outs to allow, and what duration to specify. Depending on local conditions, this may result in considerable variation among the supplier’s programs in different jurisdictions.

Where customers themselves operate in multiple countries, however, a supplier offering a bundled discount must recognize that it might be accused of foreclosing competitors that want to sell competing products to those customers for use in a multitude of countries, even if the supplier has only one global agreement with each customer. In these circumstances, it is prudent for the supplier to structure its bundling program with such customers to comply with the laws of all of the jurisdictions in which those customers use or resell the products. This means that a supplier with a product that could fairly be characterized as must-have for some group of customers, and that commands an appreciable market share in a relevant market or markets, should structure its bundling program with global customers to assure that competitors in each of the jurisdictions in which the customers use its products are not being foreclosed from competing for that business.

For example, if a global customer purchases a bundle of products in one country for use in its factories located in countries around the world, the potential for foreclosure of the supplier’s competitors in each of those countries may vary considerably. However, it may be difficult for the supplier to tailor its bundling program to each country in which the products ultimately are consumed if the customer makes one global purchase for all of its needs and only later determines how much to consume or resell in each country. In such instances, the supplier must assume that the product ultimately will be consumed in any country in which the customer operates and make a judgment as to how much is reasonably likely to be consumed in each locale.

In circumstances of this kind, the supplier needs to assess the surrounding facts of each jurisdiction—including the “must have-ness” of its products and the capabilities of competitors—and structure its bundling program to comply with all of them. There can be tremendous variation in the facts of different situations, but in each instance the supplier must assess the likely impact on competitors in each region and

ensure that the bundle offered to a global customer will withstand legal challenge in every jurisdiction in which its products are found. Sometimes, it might be possible to carve out quantities used by a customer in a particular jurisdiction—comparable to carving out sales to short-line customers—so that purchases of competing products in that jurisdiction will not have a negative impact on the price the customer pays anywhere. Of course, this requires reliable information as to where the product actually is used. Where a carve out is impractical, it may be necessary simply to satisfy the most restrictive test among those in use in any of the affected jurisdictions.

This article is not the place for a galaxy-wide survey of the various laws applicable to bundled discounts, but a supplier must acquaint itself with the laws of the countries in which its products compete to assure that it complies. This may seem onerous, but given the intensity of the interest in bundling today and the growing sophistication among enforcers around the world, the risk of ignoring any jurisdiction’s law is not inconsequential.

Conclusion

The law on bundled discounts is a moving target in every jurisdiction. Complying with bundling law around the world requires a combination of peripheral vision and clairvoyance. So long as powerful customers that buy a variety of products from the same supplier expect a discount on the entire bundle in return, however, suppliers will need to keep an eye on that moving target or they will become targets themselves. ■

¹ See, e.g., *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group*, LP, 592 F.3d 991 (9th Cir. 2010); *Masimo Corp. v. Tyco Health Care Group*, L.P., 350 Fed. App’x 95 (9th Cir. 2009); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); *LePage’s v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001); *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978).

² See generally Nicholas Economides & Ioannis Lianos, *The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases*, 76 ANTITRUST L.J. 483, 501–06 (2009). The European Commission’s approach follows from the adoption of the paper on Article 82 EC (now 102 TFEU) in February 2009, Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45), 24/02/2009 P. 0007-0020. The price/cost based approach has only been applied so far to the *Intel* case, Case COMP/37990.

³ E.g., *Commissioner of Competition v. Canada Pipe Co.*, [2006] F.C.A. 236 (Canada); *Director of Investigation and Research v. NutraSweet Co.*, 32 C.P.R. (3d) 1 (Canada Comp. Trib. 1990).

⁴ See Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 450 et seq. (2009); Timothy J. Brennan, *Bundled Rebates as Exclusion Rather than Predation*, 4 J. COMPETITION L. & ECON. 335 (2008); Patrick Greenlee, David Reitman & David S. Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts*, 26 INT’L J. INDUS. ORG. 1132 (2008); Timothy J. Muris & Vernon L. Smith, *Antitrust and Bundled Discounts: An Experimental Analysis*, 75 ANTITRUST L.J. 399

- (2008); Herbert Hovenkamp, *Discounts and Exclusion*, 2006 UTAH L. REV. 841 (2006); Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 EMORY L.J. 423 (2006); Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688 (2005); David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 YALE J. ON REG. 37 (2005).
- ⁵ See *supra* note 1; see also Case 85/76, *Hoffmann-LaRoche v. Comm'n*, 1979 E.C.R. 461 (Eur. Ct. Justice) (vitamins); Case T-203/01, *Manufacture Francaise des Pneumatiques Michelin v. Comm'n (Michelin II)*, 2003 E.C.R. II-4071 (Ct. First Instance) (automobile tires).
- ⁶ See *supra* note 1; see also Intel Corp., FTC Docket No. 9341 (Dec. 16, 2009) (Complaint), available at <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf>; *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 E.C.R. II-3601 (Ct. First Instance); *Transitions Optical, Inc.*, FTC File No. 091 0062 (Apr. 27, 2010), available at <http://www.ftc.gov/os/caselist/0910062/index.shtml>.
- ⁷ See, e.g., *White and White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 498–99 (6th Cir. 1983).
- ⁸ For these reasons, courts have recognized the benefits that bundling can offer. *Cascade Health*, 515 F.3d at 895 (“Bundled discounts generally benefit buyers because the discounts allow the buyer to get more for less.”); *Microsoft*, 253 F.3d at 87 (noting that sellers benefit from bundling because “[b]undling obviously saves distribution and consumer transaction costs” and permits sellers to “capitalize on certain economies of scope”).
- ⁹ One court has observed that “[a] bundled discount occurs when a firm sells a bundle of goods or services for a lower price than the seller charges for the goods or services purchased individually.” *Cascade Health*, 515 F.3d at 894; see also *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1020 (7th Cir. 2002).
- ¹⁰ Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 234 (2005) (“in tying, the buyer is forced to buy the tied product as a condition of obtaining the tying product”).
- ¹¹ Most bundled discounts apply back to dollar-one, although a bundled discount could be structured to apply only to incremental purchases.
- ¹² See *Director of Investigation and Research v. NutraSweet Co.*, 32 C.P.R. (3d) 1 (Comp. Trib. 1990). This can occur, for example, when only one brand is approved by a government regulator for use by the downstream account in its own products.
- ¹³ In the United States, the offense of monopoly leveraging requires not only the exercise of monopoly power over one relevant market, but the dangerous probability of achieving monopoly power in a second relevant market. See *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004); *Schor v. Abbott Labs.*, 457 F.3d 608, 613 (7th Cir. 2006). However, leverage also is implicated in the offenses of tying and exclusive dealing.
- ¹⁴ See Richard M. Steuer, *Customer-Instigated Exclusive Dealing*, 68 ANTITRUST L.J. 239 (2000).
- ¹⁵ See 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 749a, at 306–10 (3d ed. 2008).
- ¹⁶ *Cascade Health*, 515 F.3d at 908.
- ¹⁷ See, e.g., *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1064 (3d Cir. 1978) (specific antibiotic; “[p]articularly significant in terms of practical interchangeability is the fact that cephalosporins are effective against certain organisms where other anti-infectives are not, and vice versa”).
- ¹⁸ See, e.g., *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 447–48 (6th Cir. 2007); *LePage's*, 324 F.3d at 144–46.
- ¹⁹ Cf. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 44–46 (2006) (patents do not necessarily confer market power).
- ²⁰ Market share is sometimes a surrogate for consumer demand. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13–14 (1984); *LePage's*, 324 F.3d at 146; *NicSand*, 507 F.3d at 466–68 (Martin, J., dissenting).
- ²¹ *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 594 (7th Cir. 2008) (noting that market power “is key” in any such analysis).
- ²² Of course, every sale is a restraint on competition in that once a seller makes a sale, no other seller can make that very same sale. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence”). See also *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.) (“virtually every contract to buy ‘forecloses’ or ‘excludes’ alternative sellers from some portion of the market, namely the portion consisting of what was bought”).
- ²³ *Cascade Health*, 515 F.3d at 903–10 (surveying case law analyzing appropriate measure of costs, and holding average variable cost to be proper metric); Elhaug, *supra* note 4, at 462–63.
- ²⁴ See Richard M. Steuer, *Bundles of Joy*, ANTITRUST, Spring 2008, at 25.
- ²⁵ *Applied Med. Res. Corp. v. Ethicon Inc.*, No. 03-1329, 2006 U.S. Dist. LEXIS 12845, at *7–*10 (C.D. Cal. Feb. 2, 2006).
- ²⁶ Whether a carve out will suffice to make an unreasonably exclusionary bundling program reasonable will, of course, depend upon the size of the carve out and the dimension of the remaining foreclosure.
- ²⁷ *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 325–26 (1961).
- ²⁸ See *Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir. 1996); *Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984).
- ²⁹ See, e.g., *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l, Ltd.*, 2009-2 Trade Cas. (CCH) ¶ 76,815, at 115,645 (D. Mass. 2009); but see, e.g., *Allied Orthopedic*, 592 F.3d at 997 (finding easy terminability).
- ³⁰ See Steuer, *supra* note 14.
- ³¹ See, e.g., *St. Francis Med. Ctr. v. C.R. Bard, Inc.*, 657 F. Supp. 2d 1069 (E.D. Mo. 2009).
- ³² See *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004) (the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a, “remov[es] from the Sherman Act’s reach, (1) export activities and (2) other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States”).
- ³³ See *id.*
- ³⁴ See *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 U.S. Dist. LEXIS 97365 (E.D.N.Y. Aug. 21, 2009); *In re Urethane Antitrust Litig.*, 2010 U.S. Dist. LEXIS 5791 (D. Kan. Jan. 25, 2010).

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