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Bundled or Loyalty Discounts

- "Loyalty Discounts" v. "Choice Penalties" – Noncompliant Price $>$ But-For Price?
- Same economics as tying and exclusive dealing, both require implicit discounts.
- But are existing doctrines wrong b/c of single monopoly profit theory?

Death of Single Monopoly Profit Theory for Bundling

Assumption	Reality	Effect
Fixed Ratios	Variable Demand	Price Discrimination
Single Unit Purchasers	Multiple Unit Purchasers	Squeezing Out Consumer Surplus
Tied Marginal Cost Constant	Economies of Scale	Raising Rivals Costs
Tying Market Power Fixed	Entry, Partial Substitutes or Demand Shift	Can Protect Degree of Tying Power or Shift

Death of Single Monopoly Profit Theory for Exclusive Dealing

- Argument – Buyers would not agree unless better off – Ignores Following:
 - Intraproduct bundling of elastic and inelastic demand
 - consumable used with installed base
 - some downstream buyers inflexible
 - Externalities Even Without Bundling
 - Even if single buyer – on potential entrants
 - With multiple buyers – on other buyers
 - If very many buyers – collective action problems
 - If intermediate buyers – on downstream buyers

U.S. Law on Bundled or Loyalty Discounts

- Clayton text explicitly covers
- Old S.Ct. cases did not require below-cost pricing and held it no antitrust defense that:
 - buyers were not 100% precluded
 - could have avoided condition by paying more or terminating contract
- Recent lower courts cases split on
 - whether to require below cost pricing and near 100% exclusions for loyalty discounts
 - whether test on bundled discounts is
 - below-cost on incremental price
 - any price penalty on noncompliance
 - whether naked restraint when no procomp justification

EC Law on Bundled & Loyalty Discounts

- Caselaw – illegal without showing sub foreclosure if no justification
- Article 82 DP – Illegality turns on sliding scale of (1) nature of conduct; (2) incidence and (3) degree of dominance.
- Nature anticompetitive if incremental price < ATC. For loyalty discounts, assume (1) contestable share at each buyer = rival market share; (2) cannot fit that share in any headroom. 1st assumption especially odd when claim is capacity constraints. But both rebuttable and perhaps effect is to create safe harbor.

Problems with Cost-Based Tests

- Convert exclusionary agreements to predatory pricing cases.
- Ignores concern foreclosure impairs rival efficiency
- Defendant pricing responses can make cutting prices to cost irrational for EER rival.
- Foreclosing less efficient rivals can also cause harm
- Ignores concerns that foreclosure impairs rival expandability or aids in oligopolistic coordination;
- Ignores collusion between sellers and intermediate buyers to create and split monopoly profits
- Hard to obtain and assessing cost data; and
- What requires justification is not the pricing but the conditions

Alternative Tests

- If concern is coercion or squeezing out consumer surplus – price test
 - was the noncompliant price $>$ but for price?
- If concern is impairing rival competitiveness – foreclosure test
 - did price penalties on dealing with rival affect substantial share of market?
 - did this result in impairing rival competitiveness? – e.g., cause to stay below MES
- Either might be offset by efficiency justifications for conditions – without any, naked restraint?
- For either, direct price evidence relevant – however but-for price not = past price, so baseline often requires same inferences.