IS THERE A CONSENSUS ON THE ANTITRUST TREATMENT OF SINGLE-FIRM CONDUCT?

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Enforcement officials and commentators suggest that there is a growing consensus on appropriate standards for single-firm conduct. This Paper reviews that contention and considers its applicability for the antitrust treatment of bundled discounts. Unfortunately, the claims are premature for there remain wide differences within the antitrust community on many policy questions. These differences are readily apparent in both judicial decisions and editorial comment in regard to bundled discounts.

INTRODUCTION

Enforcement officials and commentators have suggested that there is a growing consensus within the antitrust community on appropriate standards for single-firm conduct. The purpose of this Paper is to review that contention and consider its applicability to the antitrust treatment of bundled discounts.

At the start of the recent Department of Justice–Federal Trade Commission (DOJ-FTC) hearings on this subject, Chairman Deborah

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Majoras of the FTC stated that “we start with some substantial consensus about core underlying principles and factors that should underlie any evaluation of unilateral conduct.” While acknowledging that there may be differences over details, she was “optimistic” that there was agreement on most of the single-firm-conduct issues that her agency faced. The extent to which this optimism is well founded is the subject of this Paper.

Single-firm-conduct issues are adjudicated under section 2 of the Sherman Act, which condemns monopolizing conduct. This conduct is evaluated under a rule of reason, and current enforcement officials remind the public that it is often difficult to distinguish procompetitive actions from their anticompetitive and exclusionary counterparts. The critical issue is where to draw the line between these two types of conduct.

A major problem that contributes to the ongoing debate over section 2 issues is that the presence of monopoly power by itself does not violate the antitrust laws, even while actions taken to create, preserve, or extend that power are generally considered to violate this provision. The distinction between preexisting monopoly power and current actions taken on its behalf is another reason why enforcement decisions are particularly difficult.

I. CORE ANTITRUST VALUES

The first question to be addressed is whether there are prospects for consensus even in regard to general principles. Majoras proposes three such principles that she suggests engender wide agreement. The first is that “the only type of unilateral conduct that should implicate the antitrust laws is conduct that produces durable harm to competition, leading to higher prices, reduced output, lower quality or lower rates of innovation.” In her lexicon, competition is promoted to advance the interests of consumers, so she applies a consumer-welfare standard for competition. Maintaining the competitive process is not relevant by itself but only to the extent that it has effects on consumers.

4. Sherman Act Section 2: Joint Hearing, supra note 1, at 16.
Majoras’s second point is that “the health of [particular] companies themselves is not the concern of antitrust law.”\(^5\) The number of competitors, like the competition process itself, matters little. Competition is defined entirely by outcomes.

This matter is particularly relevant for single-firm-conduct issues where sometimes an efficient competitor can be excluded without leading directly to higher prices or lower outputs. Although there may be a general consensus that antitrust enforcement should not be used to protect inefficient rivals, that consensus does not extend to whether dominant firms should be permitted to exclude equally efficient rivals where higher-price or reduced-output effects cannot be demonstrated. Alternatively, some commentators argue that the presence of more competitors in a market leads generally to lower prices in the long run, even if not immediately.

Majoras goes on to suggest two more principles and maintains that there is wide consensus on each of them. Her next point is that “antitrust standards . . . must not in themselves deter competition, efficiency, or innovation.”\(^6\) Current law is appropriately clear that vigorous competition by itself does not violate the antitrust laws even if rivals are excluded. Producing better products or selling them at a lower price are clearly procompetitive actions. However, suppose certain actions have the effect of excluding an equally efficient rival so that prices can be increased thereafter. What should be appropriate standards in those circumstances?

Majoras’s final point is that “the standards for evaluating unilateral conduct must be clear and practical to administer.”\(^7\) While, again, that appears to be an obvious objective, it actually runs counter to the need to tailor policy actions to individual circumstances. Where circumstances differ, a single standard cannot usefully be applied, so this condition is not so easily met. Where different firms face widely different market conditions, proposing a single rule will lead to wrongheaded results in many of them. There is a need to tailor specific policy actions to the circumstances at hand, which makes it difficult to develop a simple set of standards.

Assistant Attorney General for Antitrust Thomas Barnett takes a similar position. At the outset of these same hearings, Barnett reiterated that “injury to competitors does not demonstrate competitive harm.”\(^8\) As with Majoras, his point is that it is not harm to competitors but

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5. Id.
6. Id.
7. Id. at 17.
8. Id. at 36 (statement of Thomas O. Barnett, Assistant Att’y Gen. for Antitrust, U.S. Dep’t of Justice).
rather harm to consumers that represents harm to competition. Barnett’s position also is that the antitrust laws are not concerned with the process of competition but entirely with achieving certain results. Interestingly, this approach has a distinct regulatory flavor in that it is concerned with the results achieved and not with the process by which they are achieved. This Paper considers these issues in the context of whether there is really a widespread consensus on the treatment of single-firm conduct under the antitrust laws.

II. THE ROLE OF MARKET POWER

The Sherman Act provisions dealing with single-firm conduct are triggered when there is a high probability of success that enhanced market power can follow from particular actions.\(^9\) This condition creates a market-power screen in that firms in highly competitive markets are generally unable to demonstrate that result. On the other hand, firms that have already gained some level of market power are considered more likely to be able to extend their power. Therefore, even if market power by itself is not unlawful, it is often a critical element for the successful prosecution of exclusionary conduct.

The economic concept of market power is long established, so what is at issue is how it relates to the antitrust requirement for monopoly power.\(^10\) As a matter of economics, it is measured by the Lerner Index, which is defined by the percentage difference between price and marginal cost, or \((P - MC)/P\). Of course, the index equals zero when price \(P\) equals marginal cost \(MC\) which is the hallmark of a firm operating in a perfectly competitive market. On the other hand,

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\(^9\) H.E. Frech points out that preexisting market power is not a necessary condition for exclusionary conduct that creates market power. He suggests, as an example, the prospect that one of a number of firms selling identical products in a competitive market may be able to have a standard-setting body set different market-wide standards to a different product that it can produce cheaper than its rivals but no cheaper than the average cost of the current products. In such circumstances, its actions create market power even where none existed previously. Conversation with H.E. Frech, Professor, University of California, Santa Barbara (unpublished source, on file with the Wisconsin Law Review); see also Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, Monopoly Power and Market Power in Antitrust Law, 76 GEO. L.J. 241, 250 (1987).

\(^10\) In their well-known treatise on antitrust law, Professors Areeda, Hovenkamp, and Solow define market power as the ability “(1) to price substantially above the competitive level and (2) to persist in doing so for a significant period without erosion by new entry or expansion.” PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW 111 (3d ed. 2007). There is some question about how this definition relates to the oft-stated judicial standard that “[m]onopoly power is the power to control prices or exclude competition.” United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).
when prices greatly exceed marginal cost, the index approaches unity. It therefore varies between zero and one.\footnote{11}

This definition is critical because a fundamental theorem of industrial economics is that the Lerner Index equals the reciprocal of the firm's elasticity of demand, or \( L = 1/e \), where \( L \) is the Lerner Index and \( e \) is the elasticity of firm demand. Following this theorem, the Lerner Index is higher as firm demands are more inelastic and lower as firm demands are more elastic. Moreover, the index approaches zero when firm demand curves become horizontal, which only occurs in a world of perfect competition.

The importance of this result is that since nearly all firms face demand curves that are downward sloping to some extent, practically all firms exercise some degree of market power. This result applies to nearly all firms except for the proverbial wheat farmer operating in a perfectly competitive market. What is at issue is the degree of market power exercised by the individual firm. According to the relevant economic concepts, therefore, market power is pervasive, even though its degree can vary widely across firms.

To be sure, as previously noted, the mere presence of market power does not violate the antitrust laws. As a result, there is much market power that is not remediable under the antitrust laws. It results from the normal exercise of the competitive process. However, that fact does not alter the traditional market-power screen that is applied to exclusionary conduct. Existing degrees of market power are often sufficient for exclusionary actions to be successfully employed. This result is critical because it is widely believed that some modicum of market power is required for exclusionary conduct to be effective. The importance of the earlier observation on the pervasiveness of market power is not that it should trigger remediable actions on its own but rather that it affects our conclusions about the prospects for successful exclusionary conduct.

This point is inherent in the positions taken by current enforcement officials. As Barnett acknowledges, "[I]ndividual firms with market [or] monopoly power can act anticompetitively and harm consumer welfare . . . ."\footnote{12} What he did not say, but is implicit, is that firms without market power are unlikely to gain anticompetitive results even from exclusionary actions. For this reason, the preexisting degree of market power is considered important for the antitrust evaluation of single-firm conduct. The significance of this market-power screen for

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\item \textit{Sherman Act Section 2: Joint Hearing}, supra note 1, at 35.
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exclusionary conduct makes the question of the prevalence of market power critical for discussion of the antitrust treatment of single-firm conduct.

III. MARKET OR MONOPOLY POWER

At the start of the DOJ-FTC hearings on single-firm conduct, Professor Dennis Carlton remarked that “market power could simply be that price is in excess of marginal cost” but found that although this “is a logical definition. . . . [y]ou might want to define it by how much before you say it is something that triggers some action.”13 Indeed, this reservation is the refuge of many. Because downward-sloping firm demand curves are pervasive, and therefore so is market power as an economic concept, many commentators adopt Carlton’s caveat. This results-driven refuge is that market power is not meaningful or significant unless there is enough of it.

Another example of this approach is the recent Antitrust Modernization Commission (AMC) Report that seeks to distinguish monopoly power from market power and argues that monopoly power is represented by the presence of “substantial market power.”14 In other words, the AMC Report adds a quantitative component to an economic concept, which is that there must be enough of it to be considered relevant in particular circumstances.

Although this position is often taken, there is rarely much consideration given to how much market power is needed for it to indicate monopoly power. Is it the 5 percent figure used in the DOJ Merger Guidelines for market-definition purposes,15 or is it something else? The striking feature of most discussions of this approach is their failure to go beyond a mere reference that substantial degrees of market power are required for it to be meaningful. While some commentators might require near market dominance to reach the requisite degree of monopoly power, others acknowledge instead that any departure of price from marginal cost represents some degree of monopoly power. In large measure, the lack of consensus over single-firm-conduct results directly from the lack of agreement over which departures of price from marginal cost represent meaningful monopoly power.

13. Id. at 81 (statement of Dennis Carlton, Professor of Economics, University of Chicago).
The problem faced by some enforcement officials is that market power, when measured by the classic Lerner Index of Monopoly, is pervasive, and they do not like that result. And in particular, they do not like the implication for antitrust enforcement toward single-firm conduct that it implies. They have therefore searched for an alternate approach.

IV. A DISTINCTION BETWEEN ECONOMIC AND ANTITRUST MARKET POWER?

Some commentators do not dispute the economic concept of market power but rather argue that it should be distinguished from antitrust market power. In their lexicon, there is a conceptual rather than merely a quantitative difference between the two concepts.

Professor Benjamin Klein takes this position in a recent paper entitled “Price Discrimination and Market Power.”\(^\text{16}\) Klein maintains that these concepts are conceptually different and that the presence of economic market power does not necessarily indicate antitrust market power. This conclusion is relevant since he recognizes that nearly all firms “face negatively sloped demands, where an increase in price will lead to a loss of some but not all a firm’s sales. In these circumstances firms have some discretion over the prices they charge.”\(^\text{17}\) As a result, he acknowledges that nearly all firms have some degree of economic market power. But he argues that this does not mean that nearly all firms possess antitrust market power.

Although the economic concept of market power is long established, that is not so for Klein’s concept of antitrust market power. He attributes the latter “not to the ability of a firm to influence its own prices, but [to] the ability of a firm to influence market prices.”\(^\text{18}\) His approach therefore differs from prior efforts to define antitrust market power in terms of sufficiently high levels of economic market power.

Klein gives two sets of reasons for his rejection of the conventional economic construct. First, he observes that even firms with highly


\(^{17}\) See Klein, \textit{supra} note 16, at 3–4.

\(^{18}\) In this setting Klein is explicit in his rejection of a quantitative requirement for transforming economic market power into a level that is relevant for antitrust purposes. He writes directly, “Antitrust market power, therefore, does not refer to a point along the economic market power continuum, that is, a point where a firm’s demand becomes sufficiently inelastic that the firm is labeled as possessing antitrust market power.” \textit{Id.} at 4.
inelastic demands often compete in markets where easy entry conditions prevent prices from being much above average costs.\textsuperscript{19} Even if prices exceed marginal costs, they may not be much above average costs. His position is that antitrust-relevant market power requires the presence of super-normal returns, which in turn requires departures from average costs rather than marginal costs. In effect, he defines antitrust market power by the ability to earn excess profits.

Klein’s second reason may be more important. He emphasizes the distinction between “a firm’s ability to influence its own prices and a firm’s ability to influence market prices” where the latter reflects antitrust market power.\textsuperscript{20} This second criterion turns on the extent to which the prices or output decisions of one rival affect or are affected by the corresponding decisions of others. Where these interactions are largely absent, individual firms make their price and output decisions independently and have little impact on their rivals. Since they would then have little ability to affect market prices, such firms could have little antitrust market power.

However, in those circumstances firms are largely free from competitive restraints and empowered to set high prices relative to costs. Even though they may exercise little antitrust market power, according to Klein’s definition, each firm can effectively act as an autonomous monopolist and set prices according to its own cost and demand conditions. The problem with this approach is that it emphasizes interactions among firms rather than effects on consumers. For this reason, Klein’s approach cannot capture the essential elements of the legal definition of market power, which emphasizes a firm’s power over price.

Acknowledging an essential point of Klein’s approach, which is that market power from many sources is not remediable under the antitrust laws, this Paper disputes his contention that it is necessary to dispense with the conventional economic paradigm altogether. It is not appropriate to reject standard concepts simply because one does not like their implications.

A primary detail that disrupts any consensus over the antitrust treatment of single-firm conduct is the differing judgments regarding the prevalence of market power. Since firms in most markets typically face downward-sloping demand curves, they typically have some degree of market power. The effort to evaluate single-firm conduct under the assumption of perfect competition has little relevance on how these actions affect competition in the real world.

\textsuperscript{19} Id. at 21.

\textsuperscript{20} See id.
V. COMPETITION AS A PROCESS

As previously noted, current enforcement officials emphasize the distinction between promoting competition and protecting competitors, where the difference between them turns on the resulting effects on consumers. In this lexicon, competition is enhanced when there are improvements in consumer welfare but not otherwise. And the corresponding presumption is that consumers are harmed by actions taken to protect competitors.

This effort to create a consumer-welfare standard for antitrust actions has some support in the case law. Thus, a 1995 decision by the United States Court of Appeals for the Ninth Circuit defines competition in the following manner: “Competition consists of rivalry among competitors. Of course, conduct that eliminates rivals reduces competition. But reduction of competition does not invoke the Sherman Act until it harms consumer welfare.”21 Here also, the critical matter is the effect on consumer welfare.

While this dichotomy has some appeal, it disguises important issues. Foremost among them is the appropriate time dimension for measuring consumer effects. Suppose that with only a single firm in a relevant market, consumer prices in the short run can be lower, perhaps because of economies of scale or substantial capacity levels that lead to lower unit costs. In that case, exclusionary actions carried out by this firm are protected from antitrust liability under a promoting-competition standard. However, it can also be true that the absence of rivalry diminishes the dynamics of an industry and detracts from its long-term performance so that more limited rivalry among firms reduces consumer welfare over time.22 As a result, there can be a conflict between long-run and short-run consumer benefits, and there are no easy means to resolve these differences. Protecting competitors can sometimes benefit consumers as well.

A related concern is that advanced by Professor Eleanor Fox in a recent article.23 She takes issue with Judge Robert Bork’s contention

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22. See Michael Porter’s findings on this point. He writes, “Among the strongest empirical findings from our research is the association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry. . . . In global competition, successful firms compete vigorously at home and pressure each other to improve and innovate.” Michael E. Porter, The Competitive Advantage of Nations 117 (1990).
that firm actions not designed to restrict industry output “must be
designed to make the conduct of their business more effective. No third
possibility suggests itself.”24 On the contrary, Fox suggests that there is
a third alternative, which includes actions “that place roadblocks in the
path of rivals, but do not necessarily exploit consumers.”25 This
category contains conduct that restrains competition on the merits so
that it falls under the purview of section 226 but that does not have a
direct effect on consumers in the short run. In effect, her concern is
with promoting competition as a process even where there are few
demonstrable effects on consumer welfare.27

Following her approach, exclusionary actions are liable under the
antitrust laws even without demonstrating adverse consumer-welfare
effects so long as this outcome is not reversed through a demonstrated
efficiency defense. In effect, the burden of proof would shift to
defendants to demonstrate the prospective gains from their conduct
rather than being given to plaintiffs to prove consumer harm. The
adjudication of single-firm-conduct issues would then look very
different from what is currently put forth by current enforcement
officials.

VI. THE CASE OF BUNDLED DISCOUNTS

The issues raised earlier are well illustrated by the case of bundled
discounts. There has been substantial controversy regarding the
appropriate antitrust treatment of these discounts, and it is useful to
review the source of this controversy.

A. The Judicial Decisions

Much of the recent discussion on this topic has been engendered
by the decision in *LePage’s Inc. v. 3M*.28 The court ruled that a
dominant firm with a market share exceeding 90 percent of the relevant

24. *Id.* at 71 (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 221 (D.C. Cir. 1986) (Bork, J., dissenting)).
25. *Id.* at 73.
27. In another article, Professor Fox describes her third category in a different
manner. She writes, “[D]efining competition not only in terms of outcomes but also in
terms of openness and access to markets on the merits, and defining harm to
competition in terms of degrading or undermining the market mechanism, thus
including unjustified exclusionary practices . . . .” *Eleanor M. Fox, We Protect
Competition, You Protect Competitors*, 26 *World Competition* 149, 150 (2003).
28. 324 F.3d 141 (3d Cir. 2003).
market had excluded a smaller rival “through the use of [a] multi-tiered ‘bundled rebate’ structure, which offered higher rebates when customers purchased products in a number of . . . different product lines.”

Furthermore, the defendant was a monopolist, and “a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist’s behavior.”

Finally, it ruled as well that “a monopolist will be found to violate § 2 of the Sherman Act [dealing with single-firm conduct] if it engages in exclusionary or predatory conduct without a valid business justification.” This decision emphasizes that the evaluation of firm conduct depends critically on the degree of market power.

The primary conduct at issue was the provision of bundled rebates to the defendant’s customers. Those rebates were considered akin to creating an exclusive-dealing arrangement because the discounts provided an incentive for customers to meet all their requirements from a single firm in order to maximize their rebates. As a result, there would be less demand for the output of single-product firms, and the discounts would thus have substantial exclusionary effects.

More recently, however, another court adopted a different approach. At the start it acknowledged that the primary competitive harm from these discounts is the prospect “for a firm to use a bundled discount to exclude an equally or more efficient competitor and thereby reduce consumer welfare in the long run” and that “a bundled discounter can achieve exclusion without sacrificing any short-run profits.” However, unlike the earlier LePage’s decision, the court relied on cost factors to reach a decision. This court ruled instead that bundled discounts violate the Sherman Act only “when the full amount of the discounts given by the defendant is allocated to the competitive product or products, [and] the resulting price of the competitive product or products is below the defendant’s incremental cost to produce them.” The more recent decision thereby provides a very different basis for evaluating the competitive effects of these discounts than the earlier one.

29. Id. at 145.
30. Id. at 151–52.
31. Id. at 152.
32. Id. at 154.
33. See infra Part VI.B–C.
34. Cascade Health Solutions v. Peacehealth, 502 F.3d 895 (9th Cir. 2007).
35. Id. at 906.
36. Id. at 907.
37. Id. at 919.
Still, a third approach is contained in the recent report of the AMC. This report actively disparaged the earlier LePage’s decision and complained that it was likely “to discourage firms from offering procompetitive bundled discounts and rebates to consumers.” Instead, the report proposed some alternate tests by which to consider these discounts but which would effectively immunize them from antitrust scrutiny. Because of the considerable controversy that surrounds this practice, it offers a useful example to consider the degree of consensus present in the antitrust treatment of single-firm conduct.

B. The Simple Economics of Bundled Discounts

The essential features of these discounts are easily described by means of an example. While easily constructed, for convenience, consider one used by Professors Janusz A. Ordover and Greg Shaffer in their testimony at the DOJ-FTC hearings. They posit a two-product firm that enjoys a dominant position in one market (“Market A”) but faces competition from an equally efficient firm in a second market (“Market B”). The two products are complements in that most consumers seek to purchase both of them together to achieve their objectives, which is relevant because bundled discounts are most effective in such circumstances.

In the Ordover-Shaffer example, the two-product firm’s marginal costs are $12 and $7, respectively, and the single-product firm’s marginal costs of B are also $7. Then the former sets a price for A of $14 but a price for the bundle, which includes both goods, of $20. As these professors observe, “Although the bundle price is above cost for the multi-product firm, a B-only competitor would have to price at $6 or lower (below cost) if it is to sell to consumers who would otherwise buy the bundle.” At a price for B of $6, the single-product firm of course does not cover its marginal costs. The impact therefore of the bundled discount would be to exclude an equally efficient, single-product firm for buyers who require both products. And if most buyers did so, this firm would quickly leave the market.

One view of these discounts is that they effectively enforce a tying arrangement between the two products. Although customers are permitted to purchase A from the two-product firm and B from its

38. Antitrust Modernization Comm’n, supra note 14, at 94.


40. Id. at slide 7.
single-product rival, they will do so only if they are willing to pay more for the privilege of buying from two different sellers. Otherwise, for customers who want to minimize costs, and so long as the single-product producer of B sets a price no lower than its marginal costs, the discounts create an effective tie between the two products. In this case, the economic effects of these discounts are effectively the same as those achieved through an explicit tying arrangement.

None of this is new, and all of this is well known. It has long been acknowledged that bundled discounts can lead to an effective tie. As a result, it is more instructive to evaluate them as a form of a tying arrangement rather than as a form of predatory pricing. Note that the exclusionary effects are present even when all prices lie above costs, as they do in the example at hand. Total marginal costs for A and B together are $19 while the bundled price is $20.

There are effectively two economic literatures that seek to explain the motivations and consequences of bundled discounts. The first focuses largely on why these discounts might arise even in the absence of exclusionary motives. These papers consider how such discounts can increase efficiency and promote competition. Many of them suggest that if one firm can offer these discounts, others can do so as well, and consumers will benefit from the overall result. Of course, single-product firms are unable to do so.

An example of this literature is the paper by Professors Howard Marvel and H. Yang, who demonstrate that bundled discounts can be used to expand competition by making all customers relevant for the competitive process rather than only those at the margin, as typically is the case with linear-pricing regimes. A related paper by Marvel and Peck suggests that similar rebates can be used to induce retailers to carry a broader product line than they would otherwise do. These papers indicate that there can be economic advantages from certain kinds of bundled discounts that lead to more competitive outcomes.

There is, however, a second literature, which describes how bundling by a multiproduct firm can also be employed to exclude an

41. Professor Brennan takes a similar position in arguing that “the antitrust inquiry regarding a bundled rebate should be whether it serves to monopolize access to a previously (more) competitive complement market . . . and should not be whether a bundled rebate is akin to predation.” Timothy J. Brennan, Bundled Discounts as Exclusion, Not Predation 18 (Nov. 21, 2007) (unpublished manuscript, on file with author).


equally efficient single-stage rival. The most well-known paper of this type is by Professors Dennis W. Carlton and Michael Waldman.\textsuperscript{44} Such papers are part of an extensive literature that describes the circumstances under which bundling by multiproduct firms can be used to exclude efficient rivals and retard competition.

This Paper does not review the extensive literatures on both sides of this matter. The economic models employed are often quite complicated and largely demonstrate that different results can be found depending on which market circumstances are considered. There are quality papers on both sides of the debate, which are generally correct on their own terms. What the economic literature correctly demonstrates is that there are circumstances where bundled discounts can be procompetitive and promote efficiency and others where they have exclusionary effects and reduce competition. The prospect that either situation can arise is clearly indicated.\textsuperscript{45}

What these two literatures do not say, and indeed cannot say, is how common or frequent is one set of circumstances as compared with the other. Most authors of course suggest that the circumstances explored in their own papers are particularly likely to occur. But what these authors do not say, or could not say, is which circumstances are more prevalent. While many suggest the need for empirical evidence to permit selection between the alternate viewpoints, those types of studies are not available or likely to become available. There is no clear way to survey the available universe to determine the relative prevalence of the different results. All that can accurately be said is that it is probable to find circumstances where bundled discounts are procompetitive and others where they are anticompetitive.

\textbf{C. Bundled Discounts as De Facto Tying Arrangements}

Although bundled discounts often create de facto tying arrangements, they also raise pricing issues that are not present with explicit ties. These issues arise from the reasons why consumers purchase both products from the same multiproduct seller in the first place, which is that the bundled discount provides a lower price than

\textsuperscript{44} Dennis W. Carlton & Michael Waldman, \textit{The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries}, 33 RAND J. ECON. 194 (2002).

\textsuperscript{45} When the \textit{LePage}’s case was before the Supreme Court, the DOJ and FTC together filed an amicus brief in which they advised the Court not to review the case in order “to allow the case law and economic analysis to develop further.” Brief for the United States as Amicus Curiae at 19, \textit{3M Co. v. LePage’s Inc.}, 542 U.S. 953 (2004) (No. 02-1865). Their recognition that the economic literature, then as now, points in both directions was apparently troublesome to the enforcement authorities.
would be paid if the products were purchased separately. As a result, consumers pay less with these discounts than without. It is therefore argued that there must be consumer gain from this process even though efficient firms are excluded from the market. Then, relying on the dictum that the antitrust laws are concerned with promoting competition—as reflected in consumer gains—and not with protecting competitors, some enforcement officials and others argue that these discounts must be procompetitive. In essence, that is the position taken by both the DOJ and the AMC.46

These pricing issues are readily explored by means of the Ordover-Shaffer example. Recall that the original separate prices of the two products are $14 for A and $7 for B, where the latter price equals its marginal cost. The bundle price is $20, which is lower than the sum of the two separate prices, so consumers gain from the discount as compared with buying the products separately. Indeed, this price advantage is required for the discount to have any effect.

Because of this price advantage, some observers conclude that bundled discounts must be procompetitive. Consumer welfare is enhanced by the discounts, at least in the short run, and the exclusion of an equally efficient rival does not change that result. The reason why bundled discounts work is that lower prices are charged, so consumers must receive some benefit.

The difficulty with this argument is that it rests on a presumption of what the stand-alone prices would be with and without the bundled discounts. Referring to the prior example, suppose instead that the original price of A was $12.50 and the original price for B was $7, with the marginal costs unchanged at $12 and $7 respectively. Now let a bundled discount be introduced at $20 while at the same time the price of A alone is increased to $14. In that case, consumers are worse off with the bundled discount, and also an equally efficient rival is excluded.47

Other examples can be constructed where consumers are worse off, or no better off, with the bundled discount than they were

46. In the DOJ-FTC brief in LePage’s, these officials commented that “[b]undled rebates are widespread and are likely, in many cases, to be procompetitive.” Id. at 12. The leading basis for that position is the point noted here. See also ANTITRUST MODERNIZATION COMM’N, supra note 14, at 94–100.

47. As reported in the press, both AT&T and Verizon have recently increased the prices of individual services by far more than that of bundled services. “Since January, the phone companies’ rates for certain features have soared as much as 350% for those who don’t buy bundled services.” James S. Granelli, AT&T Raises Rates on Features, L.A. TIMES, July 17, 2007, at A1. While the motivation here may or may not be to exclude single-service rivals, this example does describe circumstances where the prices of single-product services changed along with the bundle prices.
originally, and yet a de facto tie is enforced. Furthermore, if entry is restricted by means of bundled discounts, there would likely be higher prices of B in the future following the exclusion of its competitive single-product producer. If prospective entrants are aware that they can be excluded by their multiproduct rivals, they are less likely to bear the costs and risks of entry. Again, all this is well known and laid out clearly in the Ordover-Shaffer testimony at the DOJ-FTC hearings.

The strong AMC presumption against antitrust liability for bundled discounts ignores these prospects. As Ordover and Shaffer conclude in their testimony, “The Chicago school presumption that as a matter of theory unilateral business arrangements between consensual buyers and sellers are likely to be efficiency-enhancing does not hold up,” and, also, “Loyalty rebates can . . . facilitate better extraction of the monopoly rent that is potentially available to the seller.” The AMC presumption may apply to a world of perfect competition, where prices are always set equal to costs, but not necessarily to a world where competitive and monopolistic factors interact. And that conclusion does not apply to a world where demand curves are generally downward sloping.

Toward the end of the Carlton-Waldman paper, the authors caution against turning the prospect of anticompetitive harm from tying arrangements, whether achieved through bundled discounts or more directly, “into a prescriptive theory of antitrust enforcement.” To this end, they write, “[T]he courts would have to weigh any potential efficiencies from the tie with possible losses due to foreclosure . . . .” That statement describes the common balancing task generally required for antitrust enforcement.

VII. THE ROLE OF ECONOMICS

Consider again the significance of economic arguments for policy decisions related to single-firm conduct. While the applicability of a consumer-welfare standard for antitrust actions is not necessarily linked to economics, the importance of economic arguments has contributed to the wide acceptance of this standard. In particular, consumer welfare has been defined in economic terms. And as noted earlier, this standard

48. ANTITRUST MODERNIZATION COMM’N, supra note 14, at 94–100.
49. Economics of Loyalty Rebates: Where Are We Now?, supra note 39, at slide 29.
51. Id.
is embraced by current enforcement officials. For this reason, it is appropriate to respond to some recent contentions of Professor Tim Muris, prior chair of the FTC, before the AMC.53

Muris’s comment focuses directly on the antitrust treatment of bundled discounts, so it is particularly appropriate for this discussion. In his comment, Muris reviews the various models that economists have constructed to explain how bundled discounts can have anticompetitive effects but finds these theories to be unpersuasive, lacking empirical foundation, or both.54

Muris is undoubtedly correct that there is little empirical evidence about the general applicability of many of the economic models he reviews. However, that critique is a two-edged sword because it applies as well to the economic models that emphasize the efficiency implications of these discounts, upon which his policy judgments rely. This critique applies as much to theories of the efficiency-promoting functions of these discounts, which he supports, as to the various theories of their possible anticompetitive effects, which he finds unpersuasive.

Empirical studies of the relative importance of both sets of models are extraordinarily difficult to do and therefore generally lacking. While more could perhaps be done to promote empirical evaluations of alternate models, perhaps by making greater use of the Bureau of Economics at the FTC, that factor does not take this analysis very far since policy decisions must be made before the studies are complete.

Muris’s second point is that he finds many of these studies to be “unpersuasive.”55 The difficulty with that critique is that it is difficult to know what it actually means. Does it mean that the particular circumstances described in the model could never exist, or are they not likely to exist? So long as the logic of these models is consistent, then this judgment may have a large empirical component. However, it is not a judgment that is based on empirical evidence because that evidence is lacking. Perhaps what Muris is really saying is that certain economic models agree with his view of how the economy operates, but not others.

The most interesting point that Muris makes in his comments appears in a footnote toward the end of his statement. He writes, “[T]he theoretical economics literature provides no guide for policy. Modern industrial organization justifies concern about virtually any

54. Id. at 12.
55. Id.
practice.”56 That is a striking comment, for it disputes the common reliance of so many on economic arguments made for policy judgments. After having been told for so long that we should rely on economic models to frame policy decisions, these sentences are surprising.

CONCLUSION

The lack of consensus regarding the antitrust treatment of single-firm conduct is clearly indicated by the conflicting views present on the question of bundled discounts. The AMC Report recommendations essentially provide for their per se legality. The AMC’s proposed screens to evaluate bundled discounts would be difficult for plaintiffs to surpass. That report rejects the more conventional balancing test where anticompetitive and proefficiency factors are set off against each other.

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56. Id. at 26 n.73.