

Title: Exclusive Dealing Agreements and Other Exclusionary Conduct – Are There Unifying Principles

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Abstract

Exclusionary conduct -- that is, conduct that might injure competition by excluding rivals from the market or impairing their effectiveness as competitors -- poses a difficult challenge for the antitrust laws, principally because such conduct often provides both benefits and harms. In theory, the benefits and harms could be measured, and the conduct could be condemned if the harms exceed the benefits; but such comprehensive, case-by-case balancing is not practical for courts or for firms, which need to know in real time whether their conduct will violate the antitrust laws. More arbitrary or intuitive rules would save transaction costs and perhaps reduce uncertainty, but only at the price of bad outcomes and undermining the deterrence function of the law. A set of rules that treat different categories of exclusionary conduct differently would increase transaction costs, invite judicial error and distort market behavior by creating incentives for firms to change the formal trappings of their conduct in order to increase the likelihood that it will fall into a preferred category. The "sacrifice principle," which would condemn only conduct that is unprofitable and would make no business sense for the defendant but for the prospect that it would create additional market power, might thus be the best alternative -- a workable, unifying principle that comports with widely held norms about "competition of the merits" and is likely to achieve sound results in most cases. The various criticisms that have been expressed about the sacrifice principle are incorrect, overstated or based on a misunderstanding of the principle.