



Vertical Restraints Part 2 (Tying)

Antitrust
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Tying - why?

Why would a business want to tie purchases together?

- Efficiency/convenience
- Extend a monopoly in one market to a monopoly in another market
- Price discrimination to get more profits
- Evade price controls in a regulated market
- Make sure products work correctly to ensure successful product launches
- Protect image/reputation/goodwill

Tying - business and economics

- How is tying potentially anticompetitive?
 - Extend a monopoly in one market to a monopoly in another market
 - Price discrimination that decreases consumer welfare
 - Evade price controls in a regulated market
- How is tying potentially procompetitive/efficient?
 - Provides value/convenience for customers
 - Protects goodwill/reputation to enhance interbrand competition
 - Price discrimination that increases output

Tying - the applicable law

- Tying can qualify as exclusionary conduct for monopolization under § 2 or an unreasonable vertical restraint under § 1
- Either way, tying can be challenged as “per-se illegal” or under the rule-of-reason.
- Per-se illegality for tying is completely different than the per-se treatment we saw for horizontal restraints under § 1 (which is why it has been called “quasi per-se” or “so-called per-se” illegality).
- Per-se illegal tying has its own, peculiar analytical structure.

Tying - per-se illegality

Analytical structure for per-se illegal tying:

- Four elements for per-se illegal tying:
 1. Separate products
 2. Coercion/conditioning
 3. Market power
 4. Affecting a substantial amount of commerce
- A tying arrangement under the rule-of-reason even if the defendant escapes per-se illegality.

Tying - per-se illegality

Four elements for per-se illegal tying:

- **Separate products**: There are separate tying and tied products.
 - This is determined by consumer demand.
 - *Consider: cars and motors; photocopiers and service*
- **Coercion/conditioning**: The sale of the tying product conditioned upon the sale of the tied product or is the buyer otherwise coerced to purchase the tied product with the tying product.
 - Even if sale of one is not conditioned on sale of the other, if one is free or is bundled at such a low price that it's economically infeasible not to purchase one without the other, that counts as coercion.

Tying - per-se illegality

Four elements for per-se illegal tying (continued):

- **Market power:** There must be sufficient economic/market power.
 - Relevant is the market power the defendant has in the tying product.
 - Alternatively courts may focus on the defendant's power to force upon the buyer a choice the buyer wouldn't make in a competitive market.
- **Affecting a substantial amount of commerce:**
 - This generally requires only more than a de minimis amount.
 - The threshold here can be quite low. Just \$60,800 has been found to be not insubstantial and thus qualifying for a per-se illegal tying arrangement.

Tying - per-se illegality

Defenses:

Even if the tying arrangement qualifies as prima-facie per se illegal, a business justification can be a defense.

- Courts have held that tying arrangement can be justified in the launching of a new business to make sure that new products or services work correctly.
- Microsoft held that the per-se rule shouldn't apply to software that serves as a platform for third-party applications where the tied product is some kind of software functionality.

Then remember: There's always the ability to challenge a tying arrangement under the rule of reason even if the defendant escapes per-se illegality.