

## What counts as a procompetitive justification?

1.

Eight laptop manufacturers representing 79% of the market agree on a set of standards for a cable and port system called USB-Ultra, which is three times faster than current USB. The standards are to ensure compatibility. Additionally, the manufacturers agree they will not market anything as USB-Ultra compatible unless it meets those standards, and they agree that at least 50% of laptops they ship next year will have USB-Ultra, which was determined to be the minimum commitment to get mutual buy-in.

Sounds procompetitive, because it is giving consumers additional choice—a new USB system. Also, it is increasing efficiencies -- with something faster and better, and something that has some assurance of working, which may be counted as procompetitive.

2.

Eight laptop manufacturers representing 79% of the market agree to limit the manufacture of laptops with non-replaceable batteries in the next year to no more than three-quarters of the number of such laptops manufactured last year. Their reason for doing this is that laptops not having the capacity for battery replacement leads to the quicker obsolescence of laptops, which harms the environment by creating more e-waste. Meanwhile, equipping laptops with replaceable batteries tends to increase their weight and their per-unit cost. That's why the agreement is necessary -- without it, firms will be compelled to ship worse-for-the-environment products in trying to chase consumers with lower-weight, lower-priced laptops.

This sounds like it is not procompetitive. It does not increase consumer choice. Instead, it seems like a social welfare justification. What is more, it sounds like the argument is that unrestricted competition is ruinous of the environment, and the Sherman Act already represents Congress's policy choice of favoring competition. It might be condemned as a per-se illegal horizontal market cap.

3.

A society representing 86% of surgeons agree that they will make available to the public statistics for each surgeon of how many of their surgeries were considered successes, and in how many cases a patient of theirs died within 30 days following surgery.

This sounds like it has a procompetitive justification, because it increases consumer information, which should aid consumer choice.

4.

A society representing 86% of surgeons agree that they will not make available to the public any statistics for each surgeon regarding how many of their surgeries were considered successes or in how many cases a patient died within 30 days following surgery. They state that publishing such information leads surgeons to refuse to operate in difficult cases or on patients in poor overall health, because doing so might lower their stats. Empirical studies commissioned by the society demonstrates this leads overall to the undertreatment of serious medical conditions and poorer patient outcomes.

On the one hand, this sounds anticompetitive, because it takes away information that can help consumer choice. On the other hand, it may be procompetitive because it may be working to increase surgery options for patients that otherwise would be denied. Also, it's a professional body, and that always seems to count in favor of the defendant.

5.

Cardiothoracic surgeons agree that they will not provide any pricing information on open-heart surgery to prospective patients. Rather, they will only provide surgery prices after a careful in-person examination of the patient done in the context of a confidential doctor-patient relationship, and after a review the patient's history and all relevant lab and imaging studies. This is to ensure that surgeons will not offer low prices upfront and then hurry through surgery that ends up being more complicated than originally believed.

This sounds anticompetitive, like an attack on the market-price system itself. And it sounds exactly like NSPE. This may be condemned on quick-look rule of reason.

6.

Cardiothoracic surgeons agree that they will maintain a centralized list of anesthesiologists whom they've observed to be intoxicated during procedures, and the surgeons agree to refuse to operate with an anesthesiologist on the list. Empirical studies in the medical literature show that neither hospitals, through their privileging, nor state medical boards through their licensure system, have stopped intoxicated anesthesiologists from practicing. In the collective judgment of the cardiothoracic surgeons, their system is necessary to prevent more than a dozen needless deaths a year.

This sounds anticompetitive in the abstract. But when it comes to professionals/experts, bona fide safety standards can be counted as procompetitive, particularly where there is no financial interest for those undertaking the agreement.