



Vertical Restraints Part 2 (Tying)

Antitrust
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Tying

For competitive purposes, a monopolist may use forced buying, or 'tie-in' sales, to gain sales in other markets where it is not dominant and to make it more difficult for rivals in those markets to obtain sales. This may limit consumer choice for buyers wanting to purchase one ("tying") product by forcing them to also buy a second ("tied") product as well. Typically, the "tied" product may be a less desirable one that the buyer might not purchase unless required to do so, or may prefer to get from a different seller. If the seller offering the tied products has sufficient market power in the "tying" product, these arrangements can violate the antitrust laws.

(verbatim from FTC "Tips & Advice")

What's the “tied” and “tying” products?

- The “tying” product is the good one, the one consumers want, the one the defendant can use as leverage, the one in which the defendant might have market power.
- The “tied” product is the not-so-good one, the one consumers are being made to take, the one for which the defendant doesn't have leverage or in which the defendant doesn't have market power.

What's the “tied” and “tying” products?

- The “tying” “yummy”(?) the good one, the one consumers want, the one the defendant can use as leverage, the one in which the defendant might have market power.
- The “tied” “icky”(?) is the not-so-good one, the one consumers are being made to take, the one for which the defendant doesn't have leverage or in which the defendant doesn't have market power.

FTC Example: Blood monitoring and schizophrenia drug

The FTC challenged a drug maker that required patients to purchase its blood-monitoring services along with its medicine to treat schizophrenia. The drug maker was the only producer of the medicine, but there were many companies capable of providing blood-monitoring services to patients using the drug. The FTC claimed that tying the drug and the monitoring services together raised the price of that medical treatment and prevented independent providers from monitoring patients taking the drug. The drug maker settled the charges by agreeing not to prevent other companies from providing blood-monitoring services.

(verbatim from FTC's "Tips & Advice")

FTC on the changing tides of tying ...

The law on tying is changing. Although the Supreme Court has treated some tie-ins as per se illegal in the past, lower courts have started to apply the more flexible "rule of reason" to assess the competitive effects of tied sales. Cases turn on particular factual settings, but the general rule is that tying products raises antitrust questions when it restricts competition without providing benefits to consumers.

(verbatim from FTC's "Tips & Advice")

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
- Guard a monopoly in the tying product against incipient competition ← e.g., *Microsoft & United Shoe*
- 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
 - Guard a monopoly in the tying product against incipient competition
 - 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

(Note that people could debate about much of the above.)

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 as unreasonable 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**
- Remember that a tying arrangement can still be condemned under the rule-of-reason even if the defendant escapes per-se illegality for tying.

Tying - per-se illegality

Four elements for per-se illegal tying:

1. Separate products: There are separate tying and tied products.

- This is determined by consumer demand.
- *Consider: cars and motors; photocopiers and service*

2. Coercion/conditioning: The sale of the tying product is conditioned upon the sale of the tied product, or the buyer is otherwise coerced to purchase the tied product with the tying product.

- Even if sale of one is not expressly 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.

What's the "tied" and "tying" products?

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- The [redacted] product is the not-so-good one, the one consumers are being made to take, the one for which the defendant doesn't have leverage or in which the defendant doesn't have market power.

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Tying - per-se illegality

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

3. Market power: There must be sufficient economic/market power.

- What's 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.

4. 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.

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



