

Exclusionary Conduct Discussion Outline

Note: Italicized text is based on questions on which the Commission requested comment from the public.

I. <i>Should the substantive standards for determining whether conduct is exclusionary or anticompetitive under either Section 1 or Section 2 of the Sherman Act be revisited?</i>
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[1] In general, standards for applying the Sherman Act's broad proscriptions against anticompetitive conduct should be clear and predictable in application, administrable, and designed to minimize both over-deterrence and under-deterrence, both of which impair long-run consumer welfare.

[2] Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. In particular, while it is possible to disagree with the decisions of particular cases, in general, the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors is not generally improper, even for a "dominant" firm and even where competitors might be disadvantaged.

[3] While existing standards are generally appropriate, additional clarity and improvement is desirable, particularly with respect to [i] bundling, and/or [ii] whether and under what circumstances (if any) a monopolist has a duty to deal with rivals, where there is currently a lack of clear and consistent standards. The Supreme Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004), for example, neither accepted nor rejected the profit sacrifice or any other test for distinguishing lawful from unlawful single-firm conduct. The lack of clarity means that firms must decide either to forego practices that would improve their competitive standing (and benefit consumers) or risk becoming embroiled in costly litigation.

If so:

[a] Such additional clarity and improvement is best achieved through the continued evolution of the law in the courts, rather than through legislation.

[b] Public discourse (such as occurred in the Commission hearings) and continued research will also aid in the development of sound and clear standards. The U.S. Department of Justice and Federal Trade Commission are commended for and encouraged to continue their efforts to further the development of the law in the United States as well as in other jurisdictions the laws of which may affect U.S. companies. They should continue to look for opportunities to improve the law through the filing of *amicus* briefs in appropriate cases, particularly cases involving [i] duty to deal and/or [ii] bundling.

[4] Existing standards for determining whether single-firm conduct is unlawfully exclusionary are too permissive.

[5] Existing standards regarding bundling, as expressed in cases such as *LePage's*, prohibit conduct that is procompetitive or competitively neutral and thus may actually harm long-term consumer welfare.

[6] Existing standards regarding unilateral refusals to deal prohibit conduct that is procompetitive or competitively neutral and thus may actually harm long-term consumer welfare.

II. <i>Should there be a presumption of market power in tying cases where there is a patent or copyright? What significance should be attached to the existence of a patent or copyright in assessing market power in tying cases and in other contexts?</i>
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[7] The Supreme Court's decision in *Independent Ink v. Illinois Tool Works*, 126 S. Ct. 1281 (2006), appropriately held that market power should not be presumed from a patent in antitrust tying cases.

[8] Courts similarly should not assume market power from a copyright.

[9] Contrary to the Supreme Court's holding in *Independent Ink*, there should be a rebuttable presumption in antitrust tying and other cases that a patent or copyright confers market power.