

Product Strategy & Antitrust: A Consumer Choice Perspective

Ross D. Petty, Babson College¹

Traditionally antitrust law is strongly tied to price theory economics so that prices, costs, profits and profit sacrifice are typically examined in antitrust cases. This paper proposes broadening traditional antitrust analysis to also explicitly examine the likely effect of allegedly anticompetitive conduct on product options and consumer choice. In order to accomplish this task, this paper proposes that various aspects of marketing strategy should be considered when examining product strategies that are accused of being anticompetitive.

This paper further suggests that the current list of inconsistently and poorly defined product strategies used by the courts be replaced by three more straight forward but overlapping categories based on impact on consumer choice: Lock-Outs, Lock-Ins, and Hold-Ups. Lock-Out and Lock-In tactics restrict the ability of new innovations to enter the market either directly or indirectly by tying up customers. Hold-Up tactics attack or “hold up” rival efforts to innovate. Each of these categories includes some strategies involving collusion by competitors that may be condemned without market analysis because any possible pro-competitive explanation is unlikely. However, most of these product strategies require market analysis to see if the accused firm(s) is likely to be able to restrict the level or degree of competition.

If the likely effect of the conduct in question is to reduce consumer choices then that effect should be balanced against possible consumer benefits such as offering a new or different product with qualities that should be of interest to consumers. In some cases, this balancing analysis will be straightforward and the conduct when done by one or more market dominating firms will be readily praised or readily condemned. In other cases, the balance between loss of some consumer choices but the arguable increase in other desirable choices will be more difficult to judge. In such close cases, product strategies that arguably increase consumer variety and choice should not be condemned for fear of interfering with innovation.

¹ Professor of Marketing Law and Faculty Scholar, Division of Accounting and Law, Luksic Hall, Babson College, Babson Park, MA, 02457, USA. Phone: 781-239-5529. Email: petty@babson.edu