Tying Clause in a Franchise Contract from the View of Competition Law: A Comparative Study in Iran and US Law

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Abstract

The main principle governing any contract is freedom of contracts. A contract may contain restraint or a limitation clause for one or both parties. Franchise is a complex and detailed contract having different limitations along with its subject matter. In the case of franchising, the tying product is till' franchise itself and the tied products are the supplies the franchisee must purchase to operate his business.

Product tying is the practice of selling one product or service as a mandatory addition to the purchase of a different product or service. In legal terms, a tying sale makes the sale of tying good to the de facto customer conditional on the purchase of a second distinctive good (the tied good). Tying is often illegal when the products are not naturally related. It is related to but distinct from freebie marketing, a common and legal method of giving away (or selling at a substantial discount) one item to ensure a continual flow of sales of another related item.

The tying doctrine has generally been applied to franchising in cases in which the franchisor's licensing of his trademark or name was conditioned on agreement by the prospective franchisee to purchase additional products from him (A New Approach, 1981, p. 1271).

Some kinds of tying, especially tying created by contract, have historically been

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regarded as anti-competitive practices. The basic idea is that consumers are harmed by being forced to buy an undesired good (the tied good) in order to purchase a good they actually want (the tying good), and so would prefer that the goods be sold separately. The company doing this bundling may have a significantly large market share so that it may impose the tie on consumers, despite the forces of market competition. The tie may also harm other companies in the market for the tied good, or who sell only single components. The main question that arises is as following; is it legal for franchisors to have purchase requirements or tying agreements?

In 1970, Congress enacted section 106 of the Bank Holding Company Act Amendments of 1970 (BHCA) known as the anti-tying provision, which is codified at 12 U.S.C. § 1972. The statute was designed to prevent banks, whether large or small, state or federal, from imposing anticompetitive conditions on their customers. Tying is an antitrust violation, but the Sherman and Clayton Acts did not adequately protect borrowers from being required to accept conditions to loans issued by banks, and section 106 was specifically designed to apply to and remedy such bank misconduct (Tying (commerce), https://en./wiki/Tying_(commerce)).

In the US, both the Sherman Antitrust Act and Section 3 of the Clayton Act have considered tying sale from the view of competition. We can use this legal context for developing Iranian competition and consumer protection law.

In this paper, we are discussing one of the prevalent restraint clauses in franchise contracts. This survey is done thorugh doing a comparative study on the law of the United States and Iranian competition law. A tying sale makes the sale of one good (the tying good) to the customer conditional on the purchase of a second distinctive good (the tied good).

While the courts have usually considered such pricing arrangements as an extension of monopoly from the market for the tying good to the tied-good market, economists have generally rejected this view, preferring instead to view the tie-in from the perspective of alternative hypotheses.

Key Words: Franchise contract, Competition law, Competition law, Tying (Tie-in) sale, The law of the United States

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References (in Persian):

Elsan, M. (2014). *Electronic commerce law*. Tehran: Samt Publications. [in Persian]

Rahbari, I., & Jafari Chalashtari, M. (2015). Refusal to license patent: Comparative review of competition law approaches in American, EU, and Iranian law. *Encyclopedia of Economic Rights*, 22(7), p. 24. [in Persian]

Sadeghi, M., & Mahmoudi, A. (2007). Interaction and cooperation license agreements, intellectual property rights, and competition law. *Business Studies, 43,* p. 275. [in Persian]

Ghasemi, H., Salimi, F., & Aghababaei, F. (2012). Damage to the consumer in a competitive market, p. 117. *Legal Studies Journal, 57,* . [in Persian]

Law of the fourth economic, social and cultural development plan of the Islamic Republic of Iran. (2007). Tehran: Islamic Consultative Assembly. [in Persian]

Electronic commerce law of the Islamic Republic of Iran. (2003). Tehran: Islamic Consultative Assembly. [in Persian]

Consumer protection act of the Islamic Republic of Iran. (2003). Tehran: Islamic Consultative Assembly. [in Persian]

Norozi Shams, M. (2010). Conspiracy of economic units from the viewpoint of competition law: The European Union and Iran. *Business Studies Journal*, 56, p. pp. 113-114. [in Persian]

References (in English):

A new approach to the legality of franchising tie-ins. (1981). *University of Pennsylvania Law Review, 129*(5), 1267-1306.

Ahlborn, C., Evans, D. S., & Padilla, A. J. (2004). The antitrust economics of tying a farewell to per se illegality. *Antitrust Bulletin*, *49,* p. 290 .

Averill, L. H. (1965). Antitrust consideration of principle distribution restrictions in franchise agreement. *The American University Law Review, 15,p. 45.*

Benoliel, U. (2010). The behavioral law and economics of franchise tying contract. *Rutgers Law Journal, 41*(3), p. 527-530.

Blair, R. D., & Lofontaine, F. (2005). *The economics of franchisin*g. Cambridge: Cambridge University Press.

Clayton Antitrust Act of 1914.

Craswell, R. (1972). Tying requirements in competitive markets: The consumer protection issues. *Boston University Law Review, 62,* p. 681.

Federal Trade Commission Act 1914.

Hensley, W. M. (1981-1982). Franchise tying: Gauging the economic power of a trademark. *University of California at Davis Law Review, 15,* p. 412.

Klein, B., & Saft, L. F. (1985). The law and economics of franchise tying contracts. *Journal of law and economics, 28,* No.(2), p. 347.

Liebowitz, S. J. (1983). Tie-in sales, risk reduction and price discrimination. Economic Inquiry, 21(3), pp. 387-39.

Organization for economic cooperation and development. (1994). *Competition Policy and Vertical Restraints: Franchising Agreements*. Paris: OECD.

Pearson, R. N. (1965). Tying arrangement and antitrust policy. *Northwestern University Law Review, 60, p. 60.*

Sherman Antitrust Act (Sherman Act, July 2, 1890).

Cases:

United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001)

International Salt Co. v. United Statas .332 U.S. 392(1947)

Northern Pacific Railway v. United States (356 U.S. 1, 1958).

ILC Peripherals Leasing Corp. v. IBM Corp., 448 F. Supp. 228 (N.D. Cal. 1978).

Jefferson Parish Hospital District No. 2 v. Edwin G. Hyde, 466 U.S. 2 (1984).

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 457-58. (1992).

United States v. Jerrold Electronics Corp. 187 F. Supp. 545 (E. D. Pa 1960).

Norman E. Krehl et al. v. Baskin-Robbins Ice Cream Co. et al, 664 F.2d 1348 (1982).

Siegel v. Chicken Delight, 448 F.2d 43 (9th Cir. 1971).

Susser v. Carvel Corp., 332 F.2d 505 (2d Cir.), cert. granted 379 U.S. 885, 85 S.Ct. 158, 13 L.Ed.2d 91 (1964).

Siegel v. Chicken Delight, 448 F.2d 43 (9th Cir. 1971).

Seligson v. Plum Tree, Inc., 361 F.Supp. 748 (E.D. Pa.1973).