



TYING/BUNDLING UNDER ARTICLE 102 OF THE EU TREATY

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Competition



Tying/bundling and mixed bundling (1)

- Article 102(d) TFEU: Making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which (by nature or according to commercial usage) have no connection with the subject of such contracts.

Tying

- Tying product A sold only together with B.
- Product B can be purchased alone but not A.

Pure bundling

- Product A and product B can only be bought together.

Mixed bundling

- A and B sold together at discounted price, but can be bought also separately.

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Tying/bundling and mixed bundling (2)

- **Contractual tying:** condition to buy another product (tied product) or refusal to supply a product separately.
- **Technological tying:** the tying product works properly only together with the tied product.
- **Penalising** acquisition of the products separately.
- **Main difference between tying/bundling and mixed bundling:** the form of the restriction of choice of consumers to obtain the tying product without the tied product (coercion vs inducement) → reflected in different test!



When is tying an infringement?

- Dominance in the **tying** market.
- The practice concerns **distinct products**.
- The practice has likely anticompetitive effects
- There is **no objective justification** or outweighing **efficiencies**.

Dominance

- The extent to which a firm can behave independently of its competitors/customers.
- Relates to the degree of **competitive constraints** imposed by:
 - existing supply/position of actual competitors;
 - the threat of expansion of actual competitors and entry of potential competitors;
 - the bargaining strength of customers.
- Market share above 50% over a longer period of time, where competitors are considerably smaller, would be *prima facie* evidence of dominance (save in exceptional circumstances).

Distinct products (1)

- Not necessarily a relevant market test!
- Would a substantial number of customers purchase the tying product without the tied product **from the same** supplier?
 - Direct evidence that when given a choice customers purchase separately;
 - Indirect evidence from the supply side, e.g. existence of specialised undertakings in the tied market (*Tetra Pak II*) or tendency not to tie such products in case of non significant market power.
- **Complementary products may constitute distinct products** for the purposes of assessing tying under Article 102.

Distinct products (2)

Commission in Microsoft: *“the fact that the market provides media players separately is evidence for separate consumer demand for media players, distinguishable from the demand for client PC operating systems”.*

Microsoft argued that the Commission should have examined instead, if the tying product was regularly offered without the tied product or whether customers wanted Windows without media functionality.



The General Court agreed with the Commission and rejected Microsoft’s argument noting that, *“it is quite possible that customers will wish to obtain the products together, but from different sources.”*

Anticompetitive effects (1)

- Foreclosure:
 - **Harm in the tied market:** exit or marginalisation of competitors in the tied market leading to higher prices (leveraging).
 - **Harm in the tying market:** making entry in the tying market more difficult.
 - **Harm in both markets:** avoid substitution and raise prices.
- Greater risk of foreclosure when tying is difficult to reverse (technological tying).



Anticompetitive effects (2)

- Actual negative effects are not required. **Likely/potential harm** will suffice.
- **By object or by effect analysis?** See Commission in *Microsoft*: "*good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition.*"
- Examining effects **can be a qualitative analysis.**
- Intent can be a relevant, but is not a necessary factor.



Anticompetitive effects (3)

- The General Court in the *Microsoft* case:
 - **Leverage** of quasi monopoly from PC OS to Media Player (unparalleled advantage of distribution method) & risk of de facto standardisation of Windows MP.
 - **Restriction of consumers' access** to similar or better quality products than Windows MP.
 - **Erection of an entry barrier** given impact on behaviour of content providers and software designers due to indirect network effects.



Anticompetitive effects of mixed bundling

- Mixed bundling is a **multi-product rebate**.
- Establishing foreclosure effects in the case of mixed bundling is different than in non-price tying practices.



- **Test:** is the incremental price above the long run average incremental cost of including the product in the bundle?
- Foreclosure is likely to be stronger, if the undertaking is dominant for more than one of the bundled products.
- **Competition among bundles:** is the price of the bundle as a whole predatory?



Objective justification/efficiency defences (1)

- Tying and bundling may generate efficiencies (e.g. reduction in transaction costs for consumers; reduction of distribution and packaging costs for suppliers).
- **Two-pronged test** under Article 102 of the Treaty (step 1 likely negative effects; step 2 efficiencies).
- For efficiencies, the burden of proof is **on the undertaking** to show that the four conditions apply cumulatively:
 - the efficiencies are **the result of the conduct**;
 - the conduct is **indispensable**;
 - the efficiencies **outweigh the negative effects** for consumers;
 - the conduct **does not eliminate effective competition**.



Objective justification/efficiency defences (2)

- Although there are two distinct steps for the assessment of the conduct, it is an iterative process (which allows to take account of parties' arguments already in step 1).
- This might explain why there are not many examples out there of successful efficiency defences.
- Efficiency defence nonetheless important for safeguarding **rights of defence and avoiding enforcement errors.**