Art. 102 TFEU - specific abusive conduct - tying and bundling

1. Concept

“Tying” is a commercial practice whereby a supplier makes the sale of a product conditional upon the purchase of another distinct product from the same supplier. [1] The requirement for the customer to purchase both products can be on a technical basis (e.g. printers which are compatible only with certain cartridges) or contractual (e.g. when the contract between the supplier and the purchaser obliges the latter to buy the second product). “Bundling” describes a situation where two or more products are offered as a package. This practice can be “pure bundling” when the products are sold only jointly, or “mixed bundling”, where they are sold separately, but the price for the bundle is lower.

2. Positive and negative aspects

Not all of the effects of the tying and bundling are anti-competitive. In fact, the practice is used quite often by undertakings as a tool to lower the distribution and transaction costs, to increase the savings in production, or to improve the quality. Furthermore, it allows undertaking to achieve economies of scale or to spread the risk by market entry[2].

However, it is likely also that anticompetitive concern may rise from tying and bundling, such as foreclosure of suppliers of the product that is tied, or lack of customer choice.

3. Prohibition

Article 102 (d) TFEU explicitly refers to the practice of tying and bundling as an example of abusive behaviour of a dominant undertaking[3].

The European Commission established four elements in the presence of which this practice is prohibited, and the Court confirmed them in the Microsoft[4] case: (1) the tying and tied products are two separate products; (2) the undertaking concerned is dominant in the market for the tying product; (3) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; (4) the practice in question forecloses competition.

It follows from the criteria that in first place there should be two distinct products. From a practical perspective it is important to distinguish when two products should be regarded as different. The Commission explains in the Guidance paper[5] that the distinction depends on customer demand and relies on a test which examines whether, without the tying and bundling, a substantial number of customers would still purchase the product from the same supplier. This conclusion can be based on direct empirical evidence that show that when given the choice, customers would buy the tying and tied products from different sources of supply. However, indirect evidence such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product can also serve for the purpose of practical distinction between the products.

The second important aspect is that the supplier is offering goods or services on two different markets, whereby it possess dominant position in the market of one of the products (the tying market) and is active, but not dominant on the market of the other product (the tied market). The aim of the undertaking is to use its dominance on the tying market in order to receive higher profits (or to enter) in the tied market, which can lead to anticompetitive foreclosure. In other word, the undertaking is leveraging its position on the tying market, which, as pointed out above, does not necessarily lead to anticompetitive effects. Only when other undertakings, competing on the tied market, are foreclosed or the competition on that market is lessened to a substantial degree, the tying and bundling will be considered as an infringement of Art. 102 TFEU. The Commission offers an effect-based approach in the assessment of the foreclosure and points out that such effect is more likely to occur in situations where the dominant firm’s strategy is lasting over long period of time, [6] when there are more products in the bundle, [7] or where there is insufficient number of customers who would buy the tied products separately. [8]

4. Case law

4.1. Contractual tying

One of the cases with major importance on the issue of tying of products is Hilti. [9] In this case Hilti, a producer of nail-guns, cartridges for the nail-guns (for both of which it has patents) and nails, has dominant position in the markets for all of the products. However, there are number of small, independent manufacturers of nails, compatible with the Hilti cartridges. The company undertook various contractual actions in order to tie the nails to the cartridges, e.g. reducing discounts cartridges when the nails are not ordered, making the sale of cartridges conditional on taking a complement of nails etc. The Commission found that this behaviour is anticompetitive and is preventing or limiting the entry of independent producers of nails, compatible with the Hilti cartridges into the market.[10] The decisions was upheld by the General Court and affirmed by the European Court of Justice.[11]

Another important case is Tetra Pak II. [12] Tetra Pak was an undertaking, dominant in the markets for aseptic packaging machines and cartons and sought to increase its market position on the markets of non-aseptic machines and cartons by tying the non-aseptic packaging machines with the cartons. The Court rejected the arguments that there is a natural link between the machines and the cartons.[13] The theory of harm in this case was linked to the ability of smaller firms to compete more than to the efficiency and market structure.

4.2. Technological tying

In 2004 the Commission issued a decision[14] against Microsoft for an abuse of dominant position by tying Windows Media Player to the operation system Windows. The detrimental effect in this particular case was found to be that the installation of the player in Windows is in fact more efficient distribution system in compare to the competitors, which could lead to “ubiquity” of the player. Second, by tying the products Microsoft induces the content providers and software developers to use the player format which detriments the technologies of the competitors. Thirdly, there were network effects arising from the practice that would result in “tipping” to the player. [15]
In the judgement following the action of Microsoft of annulment of the decision the Court focused its reasoning on the structure of competition and founded that the balance is appreciably altered in favour of Microsoft[16]. The other effect based conclusions of the Commission weren’t examined. No justifications for the business model of the company were found and therefore the decision of the commission was confirmed.

5. Efficiencies

The Commission has taken into account also the likely positive effects of the tying and bundling of products, therefore allows for an efficiency defence by referring to the general conditions for efficiency justification of abusive conduct. [17]

[3] the exact wording of the Treaty is: “making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts”
[6] ibid., para. 53
[7] ibid., para. 54
[8] ibid., para. 55
[10] ibid., para. 101
[13] ibid., para. 36
[17] Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, para. 62 in conjunction with para. 30