ARTICLES

TYING AND BUNDLING IN EU COMPETITION LAW

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Abstract: Tying and bundling within EU Competition Law are complex aspects of antitrust regulation focused on market competitiveness and consumer welfare. Tying involves selling products or services together, while bundling offers multiple goods as a single package.

This entry explores the legal framework, implications for market dominance, innovation, and consumer choice. It reviews landmark cases and regulatory developments in the EU, highlighting the balance between legitimate business strategies and anticompetitive behavior, and assessing their potential impact on competition and consumers.

Keywords: unilateral anti-competitive business strategies, tying, bundling, integrated products, anticompetitive foreclosure, the as efficient competitor test.

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Introduction

In modern commerce, the interplay between market dominance and fair competition is a key concern for competition law authorities. In the EU, competition law principles ensure a level playing field and protect consumer welfare[1]. Tying and bundling practices, often used by dominant entities, significantly influence consumer choices and market dynamics.

Article 102 of the Treaty on the Functioning of the European Union (TFEU) aims to curb dominance abuses that stifle competition and harm consumers. Tying (linking the purchase of products) and bundling (offering products as a single package) are central to this legal framework.

I. Concept and Typology

Tying involves the interlinking of products or services, wherein the acquisition of one product necessitates the purchase or usage of another.[2] In contrast, *bundling* refers to offering multiple products or services as a single package, often at one price point.[3] These practices can enhance efficiency and convenience but also raise concerns about their impact on market competition and consumer welfare.

Tying can manifest in various forms, including:

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[1] L. ACHY, S. LAHCEN, P. JOEKES, *Competition Policies and Consumer Welfare: Corporate Strategies and Consumer Prices in Developing Countries*, Edward Elgar Publishing, Cheltenham, 2016, p. 24.

[2] D. RUTHERFORD, *Routledge Dictionary of Economics*, Taylor & Francis Publishing, London, 2013, p. 299.

[3] J. PARSON, *Economics*, Lotus Press, New Delhi, 2004, p. 36.

- *Contractual Tying*: Involves contractual provisions obliging customers to purchase two or more separate products.[4] An example is the *Hilti* case[5], where Hilti was found to have tied the sale of its nail cartridges to the purchase of Hilti nails, thus abusing its dominant position.
- *Technological Tying*: Uses technological means to tie products, often justified by the argument that separate sales would compromise functionality.[6] The *Microsoft* case[7] exemplifies this, where Microsoft was found to have abused its dominant position by tying its Windows Media Player with the Windows operating system, limiting competition in the media player market.
- *Tying of Products and Related Services*: Links a product with a related service, often raising concerns when the tied service is offered at non-competitive prices.[8] The *IBM* case in the 1970s[9] illustrated concerns over tying the leasing of hardware with software, restricting market competition.

Bundling can be divided into:

- *Pure Bundling*: Products or services are offered exclusively as a package, without the option for separate purchases.[10] While not inherently illegal, it raises concerns if used by a dominant undertaking to restrict competition. In the *Tetra Pak II* case[11], Tetra Pak was found to have bundled its aseptic

[4] A. MAZIARZ, *'Tying and bundling: applying EU Competition rules for best practices,' International Journal of Public Law and Policy*, Vol. 3(3) (2013), pp. 266.

[5] GENERAL COURT, 12.12.1991, Case T-30/89, *Hilti AG v. Commission*, ECLI:EU:T:1991:7.

[6] A. MAZIARZ, *Tying and bundling…*, p. 267.

[7] GENERAL COURT, 17.09.2007, Case T-201/04, *Microsoft Corp. v. Commission*, ECLI:EU:T:2007:289.

[8] A. MAZIARZ, *Tying and bundling…*, p. 271.

[9] *United States v. IBM Corp*., Federal Supplement, Vol. 471/1979, p. 507.

[10] H. SCHMIDT, *Competition Law, Innovation and Antitrust: An Analysis of Tying and Technological Integration*, Edward Elgar Publishing, Cheltenham, 2009, p. 10.

[11] GENERAL COURT, 6.10.1994, Case T-83/91, *Tetra Pak International SA v. Commission*, ECLI:EU:T:1994:246.

packaging machines and cartons, which the Commission deemed as an abuse of dominance.

- *Mixed Bundling*: Combines elements of pure bundling and individual sale, allowing products to be purchased separately, albeit usually at a higher price[12]. The *British Airways* case[13] demonstrated mixed bundling practices, where British Airways provided discounts for travel agencies purchasing multiple services, restricting competition.

II. Theories of Harm in Tying and Bundling

Tying and bundling can constitute exclusionary or exploitative abuse when practiced by dominant undertakings, impacting both the primary and related markets.[14] The main theories of harm in tying abuses include:

- *Leveraging Theory*: A dominant undertaking uses its power in one market (the tying market) to restrict competition in the market for the tied product.[15] This was a central concern in the *Google Android* case,[16] where Google tied its search engine and other apps to the Android operating system, leveraging its market power to restrict competition.
- ***Single Monopoly Profit Theorem***: This theorem suggests that a monopoly in one market does not necessarily result in additional monopolistic exploitation in the tied product market. In *Hoffmann-La Roche*

[12] R. O'DONOGHUE, J. PADILLA, *Law and Economics of Article 102 TFEU*, Bloomsbury Publishing, Oxford, 2020, p. 742.

[13] ECJ, 15.03.2007, Case C-95/04 P, British Airways v. Commission, ECLI:EU:C:2007:166.

[14] K.N. HYLTON, *Antitrust Law: Economic Theory and Common Law Evolution*, Cambridge University Press, Cambridge, 2003, p. 15.

[15] W.S. BOWMAN, *'Tying Arrangements and the Leverage Problem,' Yale Law Journal*, Vol. 67/1957, p. 21.

[16] EUROPEAN COMMISSION, 18.07. 2018, Case AT.40099, *Google Android*.

case[17] while the ECJ did identify tying as potentially abusive, it clarified that an infringement occurs only if tying restricts competition or has a foreclosure effect on the tied market. The mere existence of a monopoly in one market does not automatically mean the undertaking is extending its dominance to another market without evidence of anti-competitive effects.

Theories of harm in digital markets focus on network effects, platform envelopment, and multi-sided market dynamics. In the *Apple App Store* case,[18] Epic Games accused Apple of tying its payment processing services to the App Store, limiting competition and exploiting its dominance in the digital app distribution market.[19] In digital markets, tying often appears as part of product ecosystems. A dominant undertaking can tie products, locking consumers into its ecosystem, which may limit the ability of new entrants to compete.[20] The *Microsoft* case serves as a key example, as Microsoft tied its Internet Explorer browser to the Windows operating system, exploiting its ecosystem to foreclose competition.[21] Authorities examine factors such as standalone offerings, consumer demand, and internal documents regarding product compatibility.[22] In the *Google Shopping* case,[23] Google was found to

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[17] ECJ, 13.02.1979, Case C-85/76, *Hoffmann-La Roche & Co. AG v. Commission*, ECLI:EU:C:1979:36.

[18] UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 10.09.2021, Epic Games, Inc. v. Apple Inc., Federal Supplement, Third Series, Vol. 559/2021, p. 898.

[19] OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *Global Forum on Competition: Abuse of Dominance in Digital Markets*, December 2020, DAF/COMP/GF(2020)4, p. 41.

[20] A. MAZIARZ, *Tying and bundling…,* p. 267.

[21] GENERAL COURT, 17.09.2007, Case T-201/04, *Microsoft Corp. v. Commission*, ECLI:EU:T:2007:289.

[22] OECD, DAF/COMP/GF(2020)4, p. 43.

[23] EUROPEAN COMMISSION, 27.07.2017, Case AT.39740 *Google Search (Shopping)*.

have favored its own comparison-shopping service by tying it to its dominant search engine, impacting market competition and consumer welfare.

III. Case-law and Legal Framework of Tying and Bundling

The interpretation of tying and bundling practices as potentially abusive conduct under Article 102 TFEU has been shaped by several landmark cases in EU courts:

- In *Hilti*[24] a manufacturer of nail guns, was found to have tied the sale of nails and nail cartridges to its nail guns. The ECJ ruled that this practice amounted to an abuse of dominance, as it restricted market access for competitors producing nails, impacting both the tying and tied markets;[25]
- In *Tetra Pak II*,[26] Tetra Pak was found to have tied its aseptic packaging machines with cartons, leveraging its dominance in the machinery market to foreclose competition in the carton market. The Court emphasized that tying can have anti-competitive effects, particularly when a dominant undertaking restricts access to a related market[27];
- In *Microsoft*[28], one of the most significant cases concerning technological tying, Microsoft was found to have abused its dominant position by tying its Windows Media Player to the Windows operating system. The Commission argued that this conduct foreclosed competition in the media player market, as computer manufacturers had little choice but to include Windows Media

[24] GENERAL COURT, 12.12.1991, Case T-30/89, *Hilti AG v. Commission*, ECLI:EU:T:1991:7.

[25] *Idem,* para 69.

[26] GENERAL COURT, 6.10.1994, Case T-83/91, *Tetra Pak International SA v. Commission*, ECLI:EU:T:1994:246.

[27] *Idem,* para 124-125.

[28] GENERAL COURT, 17.09.2007, Case T-201/04, *Microsoft Corp. v. Commission*, ECLI:EU:T:2007:289.

Player with their devices. The decision emphasized that technological integration of products can be abusive if it prevents competition and reduces consumer choice;[29]

- While not solely focused on tying, the case of *British Telecommunications (BT)*[30] highlights how bundling in the telecommunications sector can be seen as an abuse. BT was found to have bundled services in a manner that discouraged competitors from entering the market, illustrating how bundling can create market foreclosure.
- In *Tomra*[31] a dominant supplier of reverse vending machines, was found to have engaged in a series of exclusionary practices, including tying and bundling. The Court upheld the Commission's decision, emphasizing that such practices can limit market access for competitors and distort competition if applied by a dominant undertaking.[32]
- Recently, in *European Commission v. Google*[33]*,* Google was fined for tying its search engine and Chrome browser to its Android operating system, requiring manufacturers to pre-install these services if they wanted access to the Play Store. The Commission argued that this practice cemented Google's dominance in general internet search, restricting competition in both the search and web browser markets.[34] The decision further solidified the understanding that tying in digital markets, especially when carried out by a dominant gatekeeper, can have significant anti-competitive effects.

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[29] *Idem,* para 907-908.

[30] EUROPEAN COMMISSION, 4.07.2007, Case COMP/38.784, *Wanadoo España v. Telefónica*, 2007.

[31] GENERAL COURT, 9.09.2010, Case T-155/06, *Tomra Systems ASA v. Commission*, ECLI:EU:T:2010:370.

[32] *Idem,* para 222-224.

[33] EUROPEAN COMMISSION, 18.07. 2018, Case AT.40099, *Google Android*.

[34] *Idem,* para 685-687.

The *primary legal framework* governing tying and bundling practices within the European Union is established under Article 102 TFEU. Specifically, Article 102(d) states that:

> 'Such abuse may, in particular, consist in (...) 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.'

Before evaluating tying and bundling conduct, defining the relevant market is essential. On February 8, 2024, the European Commission adopted a revised *Market Definition Notice*,[35] offering guidance on market definition, especially for bundles and digital ecosystems.[36] The Commission notes that consumer preferences for bundled products can create a distinct 'bundle market',[37] particularly in digital markets influenced by network effects, switching costs, and multi-homing decisions.[38] In 'after-markets' involving primary and secondary products, the Commission considers customer behavior, substitutability, and supplier specialization to determine market boundaries.

[35] *Communication from the Commission - Commission Notice on the definition of the relevant market for the purposes of Union competition law* (C/2024/1645), OJ C 1645, 22.02.2024, p. 3-35.

[36] *Idem,* para 99 onwards.

[37] *Idem,* para 102.

[38] *Idem,* para 103.

The *2005 Discussion Paper*[39] on the application of a more economic, effects-based approach towards abuse of dominance cases marked a significant step toward protecting EU markets from dominant undertakings' exclusionary behavior. Tying and bundling were identified as forms of exclusionary, non-price-based abuses[40], which can affect competitors from upstream, downstream, or related markets.[41] The Paper proposed an assessment methodology for tying and bundling practices, requiring that the undertaking be dominant in the tying market or in at least one of the bundled markets.[42] It also outlined potential defenses, such as the objective necessity of tying and bundling to secure product quality or consumer health.[43]

The 2008 *'Guidance on the Commission's enforcement priorities'*[44] built upon case law, outlining the Commission's approach to enforcing Article 102 TFEU. It emphasized that tying and bundling could restrict competition if they foreclose market access for competitors or harm consumer welfare, particularly when not objectively justified by efficiency gains.[45] The Guidance noted that complex bundling involving multiple products increases the risk of

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[39] *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses*, Burssels, December 2005, online: https://www.concurrences.com/IMG/pdf/m5496_20090622_20212_en-80.pdf?11277/daa83c8e6636c3336295ca785d1c4567d0565df5027e34a1489c951344465532.

[40] *Idem,* para 52, 61.

[41] *Idem,* para 69.

[42] *Idem,* para 184.

[43] *Idem,* par.185.

[44] *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, OJ C 45, 24.2.2009, p. 7-20.

[45] *Idem,* p. 12-13.

anti-competitive impact and can reduce competition, potentially leading to higher prices for consumers.[46]

The *Commission's new Communication* issued on March 27, 2023,[47] revises the 2008 Guidelines to reflect developments in case law and market realities, particularly in digital markets. The new guidance continues to adopt an effects-based approach, further clarifying the conditions under which tying and bundling by dominant undertakings may constitute an abuse. It places increased emphasis on the analysis of market foreclosure effects and consumer harm, especially in the context of technological and digital ecosystems. The updated guidelines also provide more detailed criteria for assessing the impact of tying and bundling practices, such as the role of network effects, switching costs, and the potential for consumer lock-in in digital markets.[48] This marks a significant step toward ensuring that enforcement aligns with the current dynamics of digital markets while providing greater legal certainty for market participants.

The *Digital Markets Act (DMA)*[49] provides a more sector-specific regulation of tying practices, though outside the direct scope of Article 102 TFEU. The DMA introduces ex-ante obligations for gatekeeper platforms, specifically targeting practices that could distort fair competition. Article 5(7) prohibits gatekeepers from requiring business or end-users to use their web browser engine, identification, or payment services. Similarly, Article 5(8)

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[46] *Idem,* p. 15.

[47] C(2023)1923 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=pi_com%3AC%282023%291923.

[48] Brussels, 27.3.2023 C(2023) 1923 final, p. 8-9, https://competition-policy.ec.europa.eu/system/files/2023-03/20230327_amending_communication_art_102_annex.pdf.

[49] *Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector, OJ L 265, 12.10.2022, p. 1–66.*

prohibits gatekeepers from requiring businesses or end-users to subscribe to one core platform service as a condition for accessing another.[50] Although the DMA does not operate under a dominance-based framework, it addresses similar concerns by aiming to prevent exclusionary effects in digital markets.

IV. Conditions for sanctioning tying and bundling

A. Existence of Dominance

Assessing dominance is key when evaluating tying practices under competition law. Dominance refers to a company's ability to act independently of competitors, customers, and consumers. In *United Brands v. Commission,*[51] the ECJ defined dominance as 'a position of economic strength' that allows a undertaking to 'prevent effective competition'.[52] Similarly, in *Hoffmann-La Roche*,[53] dominance was described as the power to act without considering competitors.[54] Undertakings with dominant market positions are subject to specific EU competition rules to prevent abuse.[55]

Market shares often indicate dominance, but other factors like network effects, brand loyalty, entry barriers, and structural ties between

[50] I. GRAEF, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility*, Kluwer Law International, Aalpeh aan den Rijn, 2021, p. 145.

[51] ECJ, 14.02.1978, Case C-27/76 *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*, ECLI:EU:C:1978:22.

[52] *Idem,* para 65.

[53] ECJ, 13.02. 1979, Case C-85/76, *Hoffmann-La Roche & Co. AG v. Commission of the European Communities*, ECLI:EU:C:1979:36.

[54] *Idem,* para 38-39.

[55] B. SUFRIN, BRENDA *et al., Jones and Sufrin's EU Competition Law: Text, Cases, and Materials*, Oxford University Press, Oxford, 2023, p. 285.

markets are also crucial.[56] For example, in *Eurofix-Bianco v. Hilti* Case,[57] Hilti held a dominant position on the tying market for Hilti-compatible nails (70-80% market share), but also was dominant on the market for nail guns (55%). In *Microsoft I,*[58] Microsoft was dominant on the market of operating systems for PC's (above 90% for 8 years) in the tying case related to the tying of Windows Media Player to Windows Operating System. In *Google Android*[59] Google was considered dominant in three different markets, the market for general Internet search services (via Google Chrome), on the market for app stores for the Android Mobile Operating Systems (via Play Store) and on the market of licensable smart mobile operating systems (via Google Android).[60]

B. The distinct character of products being the object of tying and bundling practice

In order to determine whether two products are distinct in a given case, the Commission usually applies the independent demand test. For the existence of two distinct products we need to identify: the existence of independent demand from consumers for each of the component products of an integrated product (where the tying and tied products meet distinct consumer needs and have different functionalities in the eyes of the consumer); the existence of stand-alone suppliers for the product in case

[56] I. LAZĂR, *Dreptul Uniunii Europene în domeniul concurenţei*, Universul Juridic, Bucharest, 2016, p. 279.

[57] OJ L 65, 11.3.1988, p. 19-44.

[58] GENERAL COURT, 17.09.2007, Case T-201/04, *Microsoft Corp. v. Commission*, ECLI:EU:T:2007:289.

[59] GENERAL COURT, 14.09.2022, Case T-604/18 *Google and Alphabet c. Commission*, ECLI:EU:T:2022:541.

[60] A. JONES, B, SUFRIN, N. DUNNE, *EU Competition Law: Text, Cases and Materials*, Oxford University Press, Oxford, 2019, p. 281.

which can satisfy the consumer demand as efficiently as the supplier of the integrated products; the significantly different character of the tying product reported to the tied products, for what reason the two products cannot be considered a unitary product; the lack of existence of technical integration, the two products being manufactured separately and not being the result of a technical integration resulted via technological development. In this regard statistical and technical data will be analyzed, alongside data regarding consumer preferences, data regarding production, or suppliers of a certain products etc.

For example, in Hilti Case[61] the Commission had found out the nails, cartridges and nail guns are separate products, these being produced by manufacturers who for decades were producing nails, without manufacturing also nail guns. In *Microsoft I*,[62] the PC operation system had the function to control the PC and permit consumers to run different applications, while the Media Player enabled consumers to listen or watch audio or video content. As well, In *Microsoft II*[63] the operating system was a different product reported to the web browser, which enabled consumers to see Internet pages. However, in the *Android Case*, while Google Search, Google Chrome, the Play Store, and the Android Operating System exhibited traits of distinct products, it was determined that external suppliers would face significant challenges in providing these products separately. The conclusion of this assessment was that Google's tying practices effectively restricted competition by leveraging its dominance in the Android operating system market to strengthen its position in the markets for general search and web browsers. This conduct ultimately led the Commission to conclude that Google had abused its

[61] ECJ, 12.12.1991, Case T-30/89, *Hilti AG v. Commission*, ECLI:EU:T:1991:7.

[62] ECJ, 17.09.2007, Case T-201/04, *Microsoft Corp. v. Commission*, ECLI:EU:T:2007:289.

[63] EUROPEAN COMMISSION, Case COMP/C-3/39.530.

dominant position, resulting in a significant fine and the imposition of remedies to restore competitive conditions.

C. The likely exclusion from the market of as efficient competitors

According to the new Guidance adopted by the Commission regarding the enforcement priorities of Article 102,[64] there is a likelihood of Commissions' intervention in cases when the alleged abusive behavior might cause anti-competitive exclusion. The latter concept doesn't solely refer to actions resulting in complete exclusion, or marginalization of competitors, but also includes conduct that weakens the existing competitive structure without fully eliminating competition. In light of the amended Guidance, *as efficient competitors* are considered *competitors having the same cost structure, offering the same quality and interchangeable products and having in general good business strategies, deploying the same level of innovation as the dominant. undertaking*.[65] The existence of an as-efficient competitor must be proven and generally not merely presumed. However, as stated in the literature, requiring evidence of the exclusion of as-efficient competitors might lead to insufficient enforcement. Instead, actions should focus on protecting the dynamic nature of competition, fostering entry and

[64] *Communication from the Commission Amendments to the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,* OJ C nr. 116 from 31.03.2023.

[65] *Idem,* para 3.

expansion opportunities.[66] Additionally, case law, such as *Post Denmark II,*[67] and the Commission's guidance suggest that even less efficient competitors can exert competitive constraints on the behavior of a dominant player. The enforcement of competition law, therefore, should not solely hinge on the exclusion of as-efficient competitors but also consider the potential impact on market dynamics and the ability of smaller or less efficient rivals to contribute to competitive pressure.

Historically in the ECJ case-law several factors were taken into consideration when analyzing the existence of foreclosure of as efficient competitors in cases of tying:

- *The market share of the dominant undertaking on the tying market* - a high market share indicates substantial dominance, making it easier for the dominant undertaking to engage in exclusionary practices. If the dominant undertaking holds a significant market share, it may have the power to foreclose competition by leveraging its dominance to tied or bundled products, potentially excluding equally efficient competitors from the market. For example, in *Microsoft I*[68] Microsoft's market share on the tying PC operating systems market was above 90% for several years;
- *Reduced Incentives for Separate Purchase*: - When consumers have little incentive to buy the tied product separately, it suggests that the tying strategy is foreclosing competition by leveraging demand for the primary product. This restricts equally efficient competitors from competing effectively. For

[66] G. MONTI, M. BOTTA, P. L. PARCU, *Economic Analysis in EU Competition Policy: Recent Trends at the National and EU Level*, Edward Elgar Publishing Limited, Cheltenham, 2021, p. 7.

[67] ECJ, 6.10.2015, Case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, ECLI:EU:C:2015:651.

[68] GENERAL COURT, 17.09.2007, Case T-201/04, *Microsoft Corp. v. Commission*, ECLI:EU:T:2007:289.

example, in *Microsoft I*, consumers were disincentivized from installing an additional media player since Microsoft's product was offered for free.

- *Lack of efficient strategies of competitors to offset the tying and bundling practices of the dominant company* – if as efficient competitors are unable to effectively counteract the tying or bundling practices of the dominant company with their own competitive strategies, the dominant undertaking's actions may be significantly hindering competition and can lead to reduced innovation, higher prices, and overall harm to consumer welfare.
- *Market Characteristics* like network effects, brand loyalty, and intellectual property rights significantly impact competition. In markets with strong network effects, dominant undertakings may bundle products to exclude competitors. High brand loyalty can make consumers less likely to switch to alternatives, reinforcing the tying undertaking's dominance. Intellectual property rights, as in Tetra Pak,[69] can create entry barriers, enhancing the undertaking's ability to exclude competitors.
- *General analysis of market development* - the increase of the company's market share on the tied market after applying the tying practices and a decrease in the nearest competitors market shares could be a relevant indicator of the success of the exclusionary behavior. For ex. in *Microsoft I* market studies could show an increase of MS's market power on the tied media player market as an effect of the tying practice.

[69] GENERAL COURT, 6.10.1994, Case T-83/91, *Tetra Pak International SA v. Commission*, ECLI:EU:T:1994:246.

V. Objective Justifications and Efficiency Defenses in Tying and

A. Bundling

Tying and bundling practices are often scrutinized under Article 102 TFEU because of their potential to foreclose markets and harm consumer welfare. However, these practices can also pursue legitimate objectives and generate efficiencies that might justify their use. The assessment of tying and bundling involves a two-tier test: first, evaluating the potential negative effects, and second, examining any objective justifications or efficiency defenses.[70] The recently revised Commission Notice on market definition[71] adds further depth to this analysis by considering non-price factors such as innovation and quality in digital markets, where tying and bundling practices are increasingly prevalent.

B. Objective Justifications

Objective justifications relate to non-economic reasons for tying and bundling practices, such as *quality assurance, product safety, or interoperability*. The *Eurofix-Bauco/Hilti* case[72] is a key example where Hilti argued that tying the sale of its nail guns to its nails ensured safety and system reliability. However, both the European Commission and the Court of First Instance (CFI) rejected this defense, as they found that tying was not the least

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[70] K.N. HYLTON, *Antitrust Law…,* p. 220.

[71] *Communication from the Commission - Commission Notice on the definition of the relevant market for the purposes of Union competition law* (C/2024/1645), OJ C 1645, 22.02.2024, p. 3-35.

[72] *Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (IV/30.787 and 31.488 - Eurofix-Bauco v. Hilti)*, OJ L 65, 11.3.1988, p. 19–44.

restrictive means to achieve the stated objective.[73] The case underscored that tying can sometimes be justified on quality grounds, provided it meets certain conditions.

Another recognized objective is *standardization*. In sectors like technology, standardization through tying can ensure compatibility across products.[74] This was partly acknowledged in the *Microsoft* case,[75] where Microsoft argued that integrating Windows Media Player with its operating system improved user experience and interoperability. Although the Commission ultimately rejected this argument due to its disproportionality, it acknowledged the role of product integration in potentially enhancing technological performance.[76]

The revised Commission Market Definition Notice (2024) further elaborates that objective justifications can also involve maintaining product interoperability and innovation in digital ecosystems.[77] For example, in digital markets where products need to interact seamlessly, tying can facilitate smooth operation.[78] However, such practices must be suitable for achieving the objective, be the least restrictive means available, and must not eliminate effective competition.

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[73] GENERAL COURT, 12.12.1991, Case T-30/89, *Hilti AG v. Commission*, ECLI:EU:T:1991:7.

[74] L. RITTER, W. D. BRAUN, *European Competition Law: A Practitioner's Guide*, Kluwer Law International, Aalphen an den Rijn, 2005, p. 341.

[75] GENERAL COURT, 17.09.2007, Case T-201/04, *Microsoft Corp. v. Commission*, ECLI:EU:T:2007:289.

[76] G. MONTI *et al., Economic Analysis in EU Competition Policy…,* p. 102).

[77] *Communication from the Commission - Commission Notice on the definition of the relevant market for the purposes of Union competition law* (C/2024/1645), OJ C 1645, 22.02.2024, p. 3-35. See para 99-103.

[78] A. JONES, B. SUFRIN, *EU Competition Law…,* p. 489.

C. Efficiency Defenses

Efficiency defenses focus on the economic benefits resulting from tying and bundling practices. In *Post Danmark I,*[79] the Court of Justice of the European Union (CJEU) set out the criteria for an efficiency defense: the dominant undertaking must prove that the efficiency gains outweigh the negative effects on competition and consumer welfare, are a direct result of the conduct, are necessary for achieving those gains, and do not eliminate effective competition.

The 2024 Guidelines on Article 102 (replacing the 2008 version) and the revised Commission Notice[80] provide updated criteria for assessing efficiencies, particularly in digital markets. The Guidelines maintain an effects-based approach, considering factors such as:

- **Savings in Production or Distribution**: Efficiencies must result in tangible savings that benefit consumers, with an emphasis on market efficiency, especially in digital markets.[81]
- **Reduction of Transaction Costs**: The Commission assesses whether integration through tying or bundling reduces transaction costs for customers, acknowledging the complexities of digital ecosystems.[82]

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[79] ECJ, 6.10.2015, Case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, ECLI:EU:C:2015:651.

[80] *Communication from the Commission - Commission Notice on the definition of the relevant market for the purposes of Union competition law* (C/2024/1645), OJ C 1645, 22.02.2024, p. 3-35.

[81] See *Idem,* para 62.

[82] *Idem,* para 63.

- **Substantial Packaging and Distribution Cost Savings**: The Guidelines evaluate whether the practices lead to significant cost savings, particularly relevant for digital products.[83]
- **Enhancing Market Access**: The combination of products is seen as pro-competitive if it adds consumer value, including improved functionality in digital services.[84]
- **Passing on Efficiencies to Consumers**: The Commission examines if efficiencies from large-scale production or purchase are passed on to consumers, considering their impact on innovation and user experience.[85]

The 2024 Guidelines also stress that the dominant undertaking must provide verifiable evidence that the efficiencies are indispensable, proportionate, and directly linked to the tying or bundling practices.[86] This approach aims to balance market dynamics in the digital era while ensuring consumer welfare.

The revised Commission Notice (2024) adds that in digital markets, the analysis of efficiency defenses must account for network effects, switching costs, and the lock-in effect that may arise from tying and bundling, especially in digital ecosystems.[87] This nuanced assessment aims to capture the dynamic efficiencies present in technology-driven markets.

For both objective justifications and efficiency defenses to succeed, they must satisfy several cumulative conditions. These include the presence of dominance in the tying market, the existence of distinct products, and the

[83] *Idem,* para 64.

[84] *Idem,* para 65.

[85] *Idem,* para 66.

[86] *Idem,* para 67.

[87] *Idem,* para 99-103.

likelihood of exclusionary effects on equally efficient competitors.[88] The 2008 Guidelines and the revised Commission Notice reinforce the requirement that the efficiencies claimed must be indispensable, proportionate, and verifiable.[89] Moreover, the burden of proof lies with the dominant company to demonstrate that the benefits to consumers outweigh any potential anti-competitive effects.

Conclusions

Tying and bundling practices are subjects of scrutiny under EU competition law. While they can enhance innovation, efficiency, and consumer convenience, they may also lead to anti-competitive effects like market foreclosure and consumer harm. EU law seeks a balance, allowing legitimate use of tying and bundling while preventing the abuse of market dominance.

Authorities assess these practices through a rigorous analysis, considering whether they create artificial barriers, limit consumer choice, or unfairly leverage market power. Recent cases and guidelines reflect the EU's adaptation to the complexities of modern, digital markets. The main goal remains fostering fair competition, innovation, and consumer welfare in evolving market landscapes.

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[88] L. LAZĂR, *Abuzul de poziție dominantă. Evoluții și perspective în dreptul european și national al concurenței*, CH Beck, București, 2013, p. 215.

[89] T. VIJVER, O. Van Der DESIDERIUS, *Objective justification and Prima Facie anti-competitive unilateral conduct: an exploration of EU Law and beyond*, University of Leiden, online: Https://Hdl.Handle.Net/1887/29593, p. 170.

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