



Seminar Syllt

30.09. – 2.10.2009

Die Erfassung missbräuchlicher
Praktiken marktbeherrschender
Unternehmen (tying, bundling,
wirtschaftlicher Bezugszwang)
gemäß Art. 82 EG

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I. Tying and bundling- definitions

1. **Tying**: The practice of making the sale of one good (the tying good) conditional on the sale of another good (the tied good)
2. **Bundling**: The practice of joining related products together for the purpose of selling them as a single unit.
 - a) **Pure bundling**: selling products only as a bundle, not individually;
 - b) **Mixed bundling**: selling products as a bundle and individually.

The dominant undertaking induces the consumers to purchase the bundle of products through granting bonuses, rebates, discounts or any other commercial advantage.

II. Economic Analysis

1. **Classical Tying Approach** - Tying is (almost) always harmful
2. **Chicago School** - Tying is (almost) always benign
3. **Post-Chicago** - Tying is frequently benign but can be harmful in certain circumstances

III. Tying and bundling in the context of abuse of dominant position

1. Legislation:

- **EU Law** – Art. 82(2)(d) EC
- **US Law** - Sherman Antitrust Act, and Section 3 of the Clayton Act

Focus on EU Law

III. Tying and bundling in the context of abuse of dominant position

2. Abuse (Objective concept, holder of a dominant position)

i) Exclusionary abuses – *Hoffman- La Roche* definition- elements:

- methods used different from those which condition normal competition
- such methods should have the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

ii) Exploitative abuses

III. Tying and bundling in the context of abuse of dominant position



IV. Concept of tying

1. Art. 82(2)(d) and definition of tying

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

[...]

(d) 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.

IV. Concept of tying

2. Elements of the abuse

- a) Dominance in the tying market
- b) Tying of two distinct products or services
- c) Coercion to purchase two products or services together

Varying degrees of coercion:

- absolute condition (contractual, de facto)
- withdrawal of some benefits (withdrawal of the guarantee)
- pricing incentives (if those pricing incentives are so powerful that no rational customer would choose to buy a product separately- effect can be similar to tying)

- d) Distortion of competition in the tied market
- e) Absence of an objective justification

Objective reasons (case law):

- efficiency enhancing (productive efficiency, distribution efficiency)
- quality
- safety
- good usage.

IV. Concept of tying

3. Types of tying (most common types)

- a) Tying of products with their accessories (*Hilti, Tetra Pak*)
- b) Tying of complementary products (*Windsurfing*)
- c) Tying of products in the same range (*Hofmann-La Roche*)
- d) Tying of product and related services (*British Sugar*)
- e) Tying of the same product in different geographic market (*IRI/Nielsen*)

V. Bundled Pricing (Bundling)

1. The concept

- The practice of joining related products together for the purpose of selling them as a single unit.
- The dominant undertaking **induces** the consumers to **purchase the bundle** of products **through granting bonuses, rebates, discounts or any other commercial advantage**
- Similarities to tying and discriminatory pricing
- Situation of applying equivalent conditions to non-equivalent transactions (*Napier Brown, Van den Bergh Foods*)

V. Bundled Pricing (Bundling)

2. Types of “bundled” rebates

- a) “Across-the-board” rebates (*Hoffmann- La Roche, Hilti, De Post-La Poste, Michelin I*)
- b) Combined volume rebates (*Coca-Cola, Interbrew*)
- c) Geographically bundled rebates (*IRI/Nielsen*)
- d) Other special rebate incentives (*Michelin II*)

VI. Possible justifications

Commission's Guidance Art. 82

The dominant undertaking will generally be expected to demonstrate, **with a sufficient degree of probability**, and **on the basis of verifiable evidence**, that the following **cumulative** conditions are fulfilled:

- the efficiencies have been, or are likely to be, realised as a result of the conduct.
- the conduct is indispensable to the realisation of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies;
- the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets;
- the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

VII. Conclusions

- Tying and bundling are not abusive practices by definition, but might be considered as such under the certain circumstances
- Diligent economic analysis and assessment needed on a case by case basis
- Commission's December 2005 Discussion paper
- Commission Guidelines on Article 82



Thank you for your attention