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Abuse of a dominant position

The legal position of tying practices within European Competition Law

Bachelor's thesis within European Competition Law

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Abstract

This thesis intends to analyze and clarify the legal position regarding abuse of a dominant position and particularly tying practices. The practice is central within European competition law and has been highly discussed in literature recently. In Article 102 TFEU it is explicitly stated that supplementary obligations which have no connection with the subject of such contracts, shall be considered as a way of abusing a position of strength. Although the method is often reasonable and very common within many business areas, it might be pursued as a tactic of excluding competition. The General Court's decision in *Microsoft* led to some confusion as regards to the European approach towards tying practices. Prior to that judgment, the EU Courts appeared quite negative to the practice and seemed determined that the practice was in fact anticompetitive. For an example, in *Hilti* the Court found it sufficient that the company had deprived its costumers of a choice. The effects on competition were not analyzed in great detail and in most cases the EU Courts fined the undertaking involved in such business methods. However, in *Microsoft* the General Court took a new approach and focused on the actual effects that followed from the practice. Many argues that European competition law has moved from a *per se* approach to a *rule of reason* approach. In my opinion however, it seems relatively unclear whether or not this new approach shall apply to all versions of tying or if it was applied due to the certain circumstances involved in *Microsoft*. The tying practice involved a form of technical tying, i.e. an integration of two distinctive products. Cases prior to *Microsoft* mostly concerned a form of contractual tying and were treated very differently by the EU Courts. My opinion on the matter is therefore that it is not possible to declare a clear legal position regarding the practice of tying. There is a need for new judgments and official guidelines since the current situation deprives companies of legal security as concerns the practice of tying within European competition law.

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Abbreviations

CJ	Court of Justice
EU	European Union
e.g.	Exempli. Gratia, For an example
GC	General Court
i.e.	Id. Est, That is
Ibid.	Ibidem
p.	Page
Para.	Paragraph
TFEU	Treaty on the Functioning of the European Union
WMP	Windows Media Player

1 Introduction

1.1 Background

European competition law is one fundamental area of law within the European Union (EU). It exists in order to maintain a fair and competitive market and to promote welfare throughout the Union.[1] However, it is often difficult to determine the demarcation between unfair competitive behavior and a normal usage of market control. In Article 102 of the Treaty on the Functioning of the European Union[2] (TFEU) it is stated what type of measures shall constitute abuse of a dominant position. The aim with the article is to prevent undertakings with a dominant position from abusing their dominance on the market. Still, the article does not cover all type of potential breaches and it cannot be read out from the wording of the article what shall be considered to actually constitute abuse of a dominant position.[3]

One common business method is by providing the buyer with supplementary obligations. This type of practice is known as tying. The practice has been given a limited amount of attention within European competition law. However, there have been some interesting rulings which have originated in intense discussions on the area. Tying occurs when a buyer cannot buy product A without also buying product B, and is thereby forced to purchase a non intended service or product. The method can take different forms. The stipulation is that the purchase of product A is conditional. A company can make considerable savings in production, distribution and transaction costs when applying a tying practice. The purpose might also be to use the market power in one market and thereby giving itself an advantage in another.[4] The most famous case within European competition law is the *Microsoft*[5], where Microsoft sold its operating system *Windows* along with the media player *Windows media player* (WMP). Due to Microsoft's

[1] Consolidated version of The Treaty on The Functioning of the European Union, O.J of the European Union C 115.9.05.2008, preamble.

[2] Ibid.

[3] Wyatt and Dashwood, *European Union law,* Thomson, Fifth Edition 2003, London, p. 1034.

[4] Commission notice, *Guidelines on vertical restraints*, (2000/C 291/01), para. 216.

[5] Case T-201/04, *Microsoft Corp v. Commission*, [2007] ECR II-3601.

dominant position (market share of 90 percent) and their method of tying, they were considered to have abused their position on the market.

1.2 Purpose

The purpose of this thesis is to examine when usage of tying practices constitutes abuse of a dominant position and in particular if it is possible to determine a clear legal position within European competition law. How has the question been treated by the EU Courts and are they consistent in their reasoning?

1.3 Method

The thesis has Article 102 TFEU as its base. Chapter 2, 3 and 4 apply a descriptive method in order to explain the legal background to European competition law and Article 102. Regarding chapters 5 and 6, more focus is on case law due to the limited amount of information in the article. When applying case law, a comparative method is used in order to determine whether the reasoning made by the EU Courts in different cases is in compliance with each other.

Relevant literature is used in order to clarify certain terms and to hear different approaches regarding relevant case law. In the analysis of case law, the judgments itself is the main source with appurtenant comments. Furthermore, the *DG Discussion Paper*[6] is used to a large extent. This document was released by the European Commission in order to clarify certain terms regarding the assessment of tying.

In chapters 5 and 6, literature is given a great deal of attention in order to illustrate different views on the area and if and why the EU Courts has been criticized in their judgments. The thesis is moreover using literature as a complement in finding the purpose of determining a clear legal position.

1.4 Delimitation

The focus of the thesis is on the practice of tying through an EU law perspective. The practice of bundling is excluded in this thesis since relevant case law only concerns tying practices. The economic approach of tying is only touched briefly since the purpose

[6] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses*, Brussels, 2005.

is to declare a clear legal position within European competition law. Different methods of using a dominant position are more or less excluded from the thesis and general competition law is only treated briefly. An explanation of the circumstances in used case law is only treated shortly and focus is on the legal matters and important aspects of the reasoning in the EU Courts judgments.

1.5 Outline

In chapter 2, a general explanation of the current legal position in European competition law is presented. The intention with the chapter is to clarify certain legal terms and the background to Article 102. Chapter 3 focuses on the practice of tying and a brief clarification is given to its relevance in case law. Chapter 4 provides the reader with a background to different approaches applied in case law. The intention is to clarify certain important aspects that are crucial in order to fully understand the following chapter. Chapter 5 is intended to give the reader an understanding of how the Court has reasoned in different case law and to provide a relevant background to the dispute. The chapter is completed with a conclusion regarding the development in case law. In chapter 6 the analyzing parts of the thesis take place, where a comparison is made between all relevant case law and if it is possible to determine a clear legal position. The most vital parts are gathered, and all relevant aspects of the thesis are being brought together and the questions stated in the purpose is answered.

2 European competition law

2.1 Article 102 TFEU

The EU shall have as its purpose to promote welfare and to have exclusive competence in establishing competition rules for the functioning of the internal market.[7] It is the EU's task to guarantee a balanced trade and a fair competition throughout the Union.[8] Two central articles, regulating European competition, can be found in article 101 and 102 TFEU. While Article 101 regulates competition rules regarding agreements and decisions by associations of undertakings, Article 102 focuses on undertakings in a dominant position.

In article 102 TFEU it is stated:

"Any abuse by one or more undertakings[9]*of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

[7] Consolidated version of The Treaty on The Functioning of the European Union, O.J of the European Union C 115.9.05.2008. Article 3.

[8] Ibid, preamble.

[9] In Case C-41/90, *Höfner and Elser v. Macroton GmbH,* [1991] ECR I-1979, para. 21 the ECJ defined an undertaking as "*every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity*".

(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."

It shall be noted that the article does not prohibit market control or monopoly per se, but abuse of this market power.[10] Neither is the article exhaustive but only set up examples of what shall particularly constitute abuse of a dominant position.[11] More distinctive information is not given from the wording of the article but the Court of Justice (CJ) has clarified the interpretation of the article in case law. In order to ascertain whether or not an undertaking is in breach of Article 102, a step-by-step test must be made. Firstly the relevant market must be established, secondly the undertaking must be in a dominant position, thirdly it has to be ascertained if there has been abuse and lastly the act has to affect trade between Member States.[12] Accordingly, the chapter will be structured in accordance with that step-by-step method.

2.2 Relevant market

2.2.1 A combination of markets

From the wording of Article 102 does not follow any clear definition regarding when an undertaking shall be deemed to be in a dominant position. An undertaking normally obtains market power in one particular market. Consequently, in order to establish whether or not an undertaking is in a dominant position, the determination of the relevant market must first be made. The relevant market is generally divided into two types of markets, *the product market* and the *geographic market.*[13]

2.2.2 The product market

When defining the product market, it is crucial to establish what particular goods or services are supplied. The CJ seem to focus on the term *interchangeability*. A product

[10] Case C- 322/81, *Nederlandsche Banden-Industrie Michelin NV* v. *Commission* [1983] ECR I-3461, para. 57.

[11] Wyatt and Dashwood, *European Union law,* Thomson, Fifth Edition 2003, London, p. 1034.

[12] Walter, Cairns, *Introduction to European Union Law,* Cavendish Publishing Limited, Second Edition 2002, London, p. 229-230.

[13] Case C-85/76 *Hoffman-La Roche & CO v. Commission* [1979] ECR I-979, paras. 32 and 37.

market exists when a specific product is interchangeable in the context of the demand and the supply side of the market.[14] The product shall accordingly be identical with the other product or at least to be considered as similar by consumers in order for it to be seen as a part of the same product market. The measurability will be made in the context of the products characteristics, price and intended use.[15] The CJ has also used the method of *Cross-elasticity*. The method is used when the price of a product increase. The product shall be deemed as similar if the markup will make consumers buy different but similar products.[16]

The problem of establishing the relevant product market has been discussed in a severe amount of case law. The leading case is the *United Brands*[17] where the CJ was to establish whether bananas was a market of its own or a part of the fresh fruit market. The CJ held that bananas constituted a market which was sufficiently distinct from the other fruit market. A banana was considered to have certain characteristics, e.g. appearance, taste and softness and thereby did not fulfill the criteria of interchangeability on the fruit market.[18]

2.2.3 The geographic market

For Article 102 to be applicable, an undertaking must hold a dominant position within the internal market or in a substantial part of it. Some products may be similar but still be in two different markets. One product can have huge differentiation while others may be very limited. Accordingly, a determination regarding what constitutes "a substantial part" of the common market must be made. It shall be noted that an undertaking may have a dominant position a side of the EU. However, it is only breach against Article

[14] *Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law* (OJ C 372, 9.12.1997), para 7.

[15] Ibid.

[16] Craig, Paul & De Búrca,Gráinne, *EU law text, cases and materials*, Third Edition, 2003, Oxford University Press, Oxford, p. 993-996.

[17] Case C-27/76 *United Brands Company v. Commission* [1978] ECR I-207.

[18] Ibid, paras. 29-31.

102 if the undertaking posses a dominant position within the EU or a substantial part of it.[19]

There is no precise test of what shall be considered as a substantial part of the common market. However, the CJ has declared that important aspects to consider are the pattern and the volume of the production and consumption of the product. Furthermore, the habits and the economic aspects of the undertaking and the costumers must be given attention.[20] The Commission stated in its report that it is essential that the undertaking is involved in the supply and demand of the product or services and that neighboring markets can be distinguished from that particular market.[21] The CJ seem to have narrowed the expression why the geographic market shall be applicable with precaution.[22] Furthermore the CJ has established that in lack of special factors, the geographic market shall be the entire EU.[23]An example of a special circumstance was given in *Napier Brown/British Sugar* where the Court declared that the geographic market for the sale of sugar in the UK shall only be the UK. The decision was motivated by the fact that the imports into Britain were very limited.[24]

2.3 Dominance

Once the relevant market has been established, the assessment of the undertakings market control may be ascertained. What actually constitutes a dominant position has been established by the CJ in the *United Brands*[25] where a classic definition was given.

The CJ held that a dominant position is:

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[19] Korah Valentine, *An Introductory Guide to EC Competition Law and Practice*, 9th edition, 2007, Hart Publishing, Oregon. p. 127.

[20] (40/73 and others), Coöperatieve Vereniging UA v. Commission [1975] ECR I-663, para 371.

[21] *Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law* (OJ C 372, 9.12.1997), para. 8.

[22] Craig, Paul & De Búrca,Gráinne, *EU law text, cases and materials*, Third Edition, 2003, Oxford University Press, Oxford, p. 998-1000.

[23] Case C-53/92P, *Hilti AG v. Commission* [1994] ECR I-667.

[24] Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178, *Napier Brown - British Sugar*)

[25] Case C-27/76 *United Brands Company v. Commission* [1978] ECR I-207.

"...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers".[26]

In the case, United Brands controlled approximately 40 percent of the market. However, the fact that United Brands controlled a large part of the market does not put them automatically in a dominant position. When making the determination, attention must be sought in the number of competitors and their ability to compete in the same market.[27] Nevertheless, the CJ has stated that an undertaking with a market power of 50 percent shall be considered to be in a dominant position unless exceptional circumstances are presented.[28] Other factors of relevance when making the determination is technical differences between the competitors, sales network, barriers to entry and the lack of competition.[29]

2.4 Abuse

As mentioned above, in Article 102 it is regulated what shall constitute abuse of a dominant position. However, this list is not complete and a unanimous regulation does not exist.[30] Nevertheless, the CJ has tried to define the term in several cases. In *Hoffman-La Roche*[31] the ECJ stated:

"Abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial op-

[26]Case C-27/76 *United Brands Company v. Commission* [1978] ECR I-207, para 65.

[27] Ibid, paras 109-112.

[28] Case C-62/86, *Akzo Chemie BV* v. *Commission* [1991] ECR I-3359, paras 59-61.

[29] Case C-85/76 *Hoffman-La Roche & CO v. Commission* [1979] ECR I-1979, para 48.

[30] Case C-6/72 *Europemballage Corporation & Continental Can v. Commission* [1973] ECR I-215 , para. 26.

[31] Case C-85/76 *Hoffman-La Roche & CO v. Commission* [1979] ECR I-1979.

erators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition"[32].

Consequently, an individual test must be made in every case in order for the court to ascertain whether or not there has been abusive behavior. It shall be noted that an undertaking is always preserved the right of protecting its interest. However, the undertaking cannot actively pursue activities in order to extend and strengthen its market power.[33]

2.5 Effect on trade between Member States

An abuse of a dominant position might affect trade between Member States in several manners. The effect shall with regard to its impact have some sort of influence of international trade. The impact shall, regardless of whether or not the effect has actually happened, be deemed as a breach against trade on the common market.[34] Furthermore, the CJ has expressed its view regarding indirect effect on trade. The CJ stated that there is no requirement for the Member State to show direct effect. It shall be considered sufficient with merely showing that the measure will have some effect on the common market.[35]

[32] Case C-85/76 *Hoffman-La Roche & CO v. Commission* [1979] ECR I-1979., para. 91.

[33] Case C-27/76 *United Brands Company v. Commission* [1978] ECR I-207, para. 189.

[34] Faull & Nikpay, *The EC Law of Competition,* Oxford University Press 1999, p. 198.

[35] Case C- 6 and 7/73 *Commercial Solvents v. Commission* [1974] ECR I-223.

3 Tying in general

3.1 Introduction

In Article 102 it is stated that the business method of tying shall in certain cases be prohibited in so far as it is pursued by an undertaking in a dominant position. The article particularly constitutes that an anticompetitive practice of tying shall be regarded as incompatible with European competition law:

"Such abuse may, in particular, consist in:

102 (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."

Normally, tying is divided into two different categories. The practice might be a technical tying[36] which was the case in *Microsoft*[37] where Microsoft integrated its products into one program. Consequently, two distinctive products must be physically integrated with each other in order for technical tying to occur. The other is called contractual tying,[38] which was the case in *Hilti*[39] and *Tetra Pak II*[40]. In this case, the dominant undertaking leaves the customer without any choice of buying the two products separately. Contractual tying is the classic version while technical tying is a relatively new concept within European competition law. However, chapter 3 does not treat any certain form of tying but the practice of tying in general.

3.2 Tying

Tying occurs when a buyer purchase one product under the condition that he pledge to buy an additional one from the same supplier. The latter product is called the tied prod-

[36] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses,* Brussels, 2005, p. 55.

[37] Case T-201/04, *Microsoft Corp v. Commission,* [2007] ECR II-3601.

[38] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses,* Brussels, 2005, p. 55.

[39] Case T-30/89 *Hilti AG v, Commission* [1991] ECR II-1439, Case 53/92P *Hilti AG v. Commission* [1994] ECR I-667.

[40] Case C-333/94P, *Tetra Pak International SA. v. Commission* [1996] ECR 1-5951.

uct and shall be distinctive.[41]However, the tying can take various forms and it does not necessarily require that the supplementary obligation is direct. The important factor is that the purchase is conditional in some way.

Typically there are four ways of tying:[42]

Technical: The two different products are dependable of each other and have to be bought together, e.g. the operating system Microsoft and Windows Media Player (WMP).

Complementary products/ Contractual: The customer cannot buy the tied product alone why the dominant undertaking forces the customer to buy them as an entity.

Financial: When buying the two products as a package, the purchaser is redeemed with a discount.

Tying with products and related services: When buying the tying product, the costumer pledge to buy an additional service, e.g. when buying spare parts to a car, the buyer must also purchase the repairing services.

3.3 Reasons for tying

Usage of tying practices is not in itself a breach against European competition law. In fact, it is a typical economic activity practiced by many undertakings. A company can make considerable savings in production, distribution and transaction costs.[43] Furthermore the method can have effect on quality, the reputation of the company and might improve the usage of their products.[44] Other incentives for practicing tying is measuring usage, avoiding regulations and excluding smaller firms.[45]

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[41] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses*, Brussels, 2005, p. 54.

[42] Faull & Nikpay, *The EC Law of Competition,* Oxford University Press, 1999, Oxford, p. 169.

[43] Commission notice, *Guidelines on vertical restraints*, (2000/C 291/01), para. 216.

[44] Commission notice, *Guidelines on vertical restraints*, (2000/C 291/01), para. 216.

[45] Korah, Valentine, *An Introductory Guide to EC Competition Law and Practice,* 9th edition, Hart Publishing 2007, p. 166-167.

3.4 Breach against Article 102 TFEU

3.4.1 Four elements of the abuse

Generally there are four requirements which must be met in order for tying to compose a breach against Article 102:[46]

1. The undertaking shall have a dominant position regarding the tying product.
2. The tied product shall be distinctive from the tying product.
3. An element of coercion.
4. An element of anticompetitive behavior

If these four requirements have been fulfilled, it constitutes a breach against Article 102. A company may still be able to validate their practice if they are able to show that the practice is objectively justified.[47] As will be explained in chapter 5, the aspect of anti-competitive behavior and objective justifications has only been treated briefly in cases prior to *Microsoft.*[48] Nevertheless, this chapter will be distributed in accordance with the process of establishing whether or not the practice constitutes abuse of a dominant position. However, since the element of a dominant position has already been treated in chapter 2.3 it will not be given any more attention in this chapter. It shall moreover be noted that when speaking of dominance in the respect of tying, it is dominance of the tying product that must be fulfilled.[49] In addition, a review of possible justifications will be presented.

3.4.2 Distinct products

An accused company will often argue that the two products involved in the tying are not distinct. A practice of tying occurs when a company forces the buyer to purchase two distinctive products in some form of package. Consequently, the practice of tying does not exist when the two products compose an entity. When defining a product as distinc-

[46] Faull & Nikpay, *The EC Law of Competition,* Oxford University Press 1999, Oxford, p. 166-169.

[47] Ibid.

[48] See discussion in chapter 5.

[49] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses,* Brussels, 2005, p. 55.

tive, guidance shall primarily be sought in the market demand.[50] Two products shall consequently be deemed as distinctive if they are purchased in two different markets. However, this condition is not absolute. It is sufficient that the two products would or could be bought separately. Furthermore, an indication that tying does not exist is by establishing the technical difficulties of selling two products separately (e.g. selling shoes separately from shoelaces).[51]

In addition, the Commission has given numerous examples of indications when products shall be seen as distinctive. Inter alia, when given a choice, the costumer would normally purchase the two products separately. Another indication would be if a smaller company on the same market would chose to sell the two products separately. The reason would naturally be that the smaller company does not estimate tying as a preferred way of purchase in a costumer perspective. Guidance can also be sought in other geographical markets. If there is existence of specialized companies merely selling the tied product, it would be an indication of distinctiveness.[52]

3.4.3 Coercion

One element of the abuse is the coercion of buying two products or services together. Since a company naturally is free to sell two products or services together, there has to be some sort of coercion for the undertaking to be considered abusive. The aim is that the costumer shall be left without any choice when making the purchase.[53]

There are different degrees of coercion when tying a product. The coercion may take form in the sense that the dominant company simply will not sell the tying product separately. This condition can be written into the contract, either towards its costumers or its distributors. It can also be applied de facto by the dominant company and the costumer cannot buy the tying product separately.[54]

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[50] Commission notice, *Guidelines on vertical restraints*, (2000/C 291/01), para. 216.

[51] Ibid.

[52] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses*, Brussels, 2005, p. 54-55.

[53] Faull & Nikpay, *The EC Law of Competition,* Oxford University Press, 1999, Oxford, p. 167.

[54] Ibid.

Another less extreme degree of coercion would be by making the purchase beneficial when buying the two products as a package. One common way of this practice is to withdraw the guarantee when using spare parts from the manufacturer's competitors.[55] Another possible withdrawal could be that the purchase of the products separately would be far more expensive in comparison with buying them in a package. Such condition would deprive most costumers of a choice when buying the product.[56]

3.4.4 Anticompetitive effect / Foreclosure

As mentioned above, tying is a common method of creating savings in the respect of production, distribution and production costs. However, the practice of tying might in some cases have an anticompetitive effect. Those possible effects are especially foreclosure, price discrimination or higher prices.[57] As will be further explained in chapter 5, the assessment of the foreclosure effect has not really been made in cases prior to *Microsoft.*

Particularly the effect of foreclosure has been given a great deal of attention in literature and was treated in detail in *Microsoft*. Foreclosure has the effect of excluding companies from entry to a specific market. Hence, it hinders potential competitors from gaining entry and thereby creates a closure on the market. The positive effects, from the dominant company's point of view, are that the foreclosure might create larger profits and a way for the dominant company to strengthen and protect its position. Furthermore, the foreclosure might exclude competitive products since the tying forces costumers to buy that product from a company in a dominant position.[58]

There are generally two different aspects when assessing foreclosure. Firstly it has to be examined which customers actually have been tied to the product. The intention is to see which costumers are being separated from the competitors of the dominant company. Secondly, an assessment of whether or not the comprised costumers compose a suf-

[55] Faull & Nikpay, *The EC Law of Competition,* Oxford University Press, 1999, Oxford, p. 167-168.

[56] Case C-52/92P *Hilti AG v. Commission* [1994] ECR 1-667.

[57] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses,* Brussels, 2005, p. 54-55.

[58] Ibid, p. 56-57.

ficient part of the market.[59] In addition, the measurement of the foreclosure must also consider the practice in detail, its application on the market and the market power of the company. Hence, an overall evaluation must be made on a case-by-case basis.[60]

Regarding the effect of increasing prices, particularly three situations can be distinguished. Firstly when both products are partly substitutable. Secondly when the usage of the tying product depend on the tied product, which consequently creates the possibility to increase the price. Thirdly when the contract run over a long term, which eliminates costumers from foreseeing the consequences with the tying.[61]

3.4.5 Justifications

In the case that all prerequisites have been fulfilled, an undertaking might argue that the practice of tying is objectively justified. If the court agrees, the undertaking cannot be considered to have breached Article 102. The burden of proof lies on the defendant and it is up to them to show that the positive effects outweigh the anticompetitive effects.[62]

There are several justifications possible which are regularly argued by the accused undertaking. One justification often referred to is that the tying is necessary in the context of quality, usage or safety of the product. [63] However, the Commission has stated that it is not the dominant company's responsibility to guarantee the safety of other company's products.[64]

Another relates to the advantages with tying mentioned above. Most of all the dominant undertaking will argue that the measure is justified with regards to efficiency savings, i.e. savings in production, distribution and transactions. For an example, it would not be reasonable to sell computer programs that depend on each other in the view of production costs. Neither would it be reasonable to sell a pair of shoes separately as regards to

[59] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses,* Brussels, 2005, p. 54-55.

[60] Ibid.

[61] Commission notice, *Guidelines on vertical restraints,* (2000/C 291/01), para. 217.

[62] Case T-203/01, *Manufacture Francaise Des Pneumatiques Michelin v. Commission,* [2003] ECR II-4071, paras. 107-109.

[63] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses,* Brussels, 2005, p. 60.

[64] Case C-53/92P *Hilti AG v. Commission* [1994] ECR I-667, paras. 102-107.

distribution costs.[65] However, in the *DG Discussion paper* it is stated that four requirements must be met in order for the efficiency claim to be acceptable.

"For this defence the dominant company must demonstrate that the following conditions are fulfilled:

i) that efficiencies are realised or likely to be realised as a result of the conduct concerned;
ii) that the conduct concerned is indispensable to realise these efficiencies;
iii) that the efficiencies benefit consumers;
iv) that competition in respect of a substantial part of the products concerned is not eliminated.
Where all four conditions are fulfilled the net effect of such conduct is to promote the very essence of the competitive process, namely to win customers by offering better products or better prices than those offered by rivals".[66]

In conclusion, there are several grounds of justifications possible for the undertaking accused of anticompetitive behavior. In addition, in order for the dominant company to be successful it must show that the practice is proportionate. The aim with the practice of tying cannot be reached with another method, which is less restrictive and do not involve any possible anticompetitive behavior.[67] However, the EU Courts have been very restrictive with approving justification grounds argued by the accused company.

[65]Faull & Nikpay, *The EC Law of Competition,* Oxford University Press, 1999, Oxford, p. 168.

[66] European Commission, *DG Competition discussion paper on the application of article 82 of the treaty of exclusionary abuses,* Brussels, 2005, p. 26.

[67] Ibid, p. 60.

4 Approaches towards tying

4.1 The EU approach

The purpose with this thesis is above all to examine if there exists a clear legal position regarding when the practice of tying is in conflict with Article 102. In order to answer this question, the EU approach on the practice must be examined. Generally two different types of approaches seem to dominant the reasoning in the EU Courts. Most of all, the *per se* approach and the *rule of reason* have been practiced.

4.2 Per se

The classic approach within the EU has been that tying agreements shall be prohibited *per se.* Hence, there is rarely any need for a case-by-case assessment. A per se prohibition is nearly absolute and possible defenses are limited.[68] Consequently, the EU Courts have historically not considered the damage to consumers and competitors which could follow by the practice. When applying the *per se* approach, focus seems to be on the form of the practice rather than its actual effect on competition. With such an approach, the Court seems to have decided that tying practices are in fact anticompetitive.[69]

4.3 Rule of reason

An approach in the contrary to the *per se* prohibition is the *rule of reason.* In this case the Court determines whether or not the tying practice is in breach with European competition law through a case-by-case assessment. Consequently, the Court will determine that the practice should be prohibited with regards to its negative effects or if it shall be permitted with regards to its beneficial effects. It is up to the current authority making the assessment in determining if the positive effects outweigh the negative effects.[70] In conclusion, the rule of reason provides a more flexible assessment when looking upon tying agreements and its possible breach against Article 102.

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[68] Crossely, Ahlborn and Bailey, *An Antitrust Analysis of Tying: Position Paper*, GCLC Research Papers on Article 82 EC, July 2005, p. 177.

[69] Ibid, p. 185.

[70] Ibid.

5 Tying in case law

5.1 Introduction

The numbers of cases regarding tying practices in relation to Article 102 are so far very limited. As has been established above, case law is essential in order to understand how Article 102 (d) shall be applied. However, there are a few cases that provide some guidelines in making the assessment. The leading cases on the area have been *Microsoft, Hilti, Tetra Pac* and to a certain extent *Napier Brown/British Sugar*. This chapter is intended to provide the reader with guidelines of how the practice has been looked upon by the EU Courts. The chapter will start with a brief review of relevant case law in order to clarify when and how the practice of tying has been applied in coherence with Article 102. Finally a conclusion will be presented regarding the development in case law.

5.2 Leading Cases

5.2.1 Hilti[71]

Hiliti AG was a Liechtensteinische company, leading on the market of nail guns and for the nails and cartridge strips of those guns. In the case it was indisputable that Hilti pursued a dominant position on the market with market shares of 55 percent. Furthermore, Hilti possessed a patent regarding those particular nail guns. Two of Hilti´s competitors accused Hilti of having abused its leading position on the market and thereby to be in breach with Article 102. The accused anticompetitive behavior included a practice of tying regarding the nail guns and the nails. The practice was not absolute, but a financial way of tying in the sense that when buying the nails and nail guns as a package, the purchaser was redeemed with a discount. The competitors considered this practice of having the effect of excluding competitors from the market and were made in order to increase Hilti's market power. The prerequisite of distinctive products was relatively clear since there existed separate manufacturers to the nails and the nail guns.[72]

The Commission held that Hilti should be considered to be in breach with Article 102 and thereby having abused their dominant position since Hilti's practice was considered to have left the customers into a dependable position. Furthermore, the Commission al-

[71] Case C-53/92P *Hilti AG v. Commission* [1994] ECR I-667.

[72] Case T-30/89 *Hilti AG v, Commission* [1991] ECR II-1439, para. 66.

so held that Hilti´s behavior had the effect of excluding competition and thereby strengthened their position as a dominant undertaking.[73]

Hilti appealed to the General Court (GC) and argued that the measure was objectively justifiable on the grounds of safety and their responsibility as a manufacturer. According to Hilti, the nails provided by other companies did not comply with the nail guns provided by Hilti. Hence, Hilti used their practice of tying in the respect of safety for the customers.[74] The GC rejected this argument due to lack of evidence. Furthermore, the GC held that it was not Hilti´s responsibility of securing their costumers towards other products.[75] Regarding the safety aspect, the Commission also referred to earlier cases. The Commission stated that both in *Windsurfing*[76] and in *British Leyland*[77] it was acknowledge that abuse within the meaning of Article 102 cannot be justified due to safety and reliability aspects.[78] Hilti appealed to the CJ, without any success.

5.2.2 Tetra Pak II[79]

Another case similar to *Hilti* concerned the Swedish company Tetra Pak International SA. The company pursued business within packaging and selling of liquid products in cartons. Tetra Pak was considered to occupy a dominant position within the common market, and was accused of having abused its position of strength. The tying was practiced in the sense that Tetra Pak sold its filling machines under the condition that the buyer pledged to use Tetra Pak's packages in the machines and that these where exclusively purchased from Tetra Pak.

The Commission held that Tetra Pak had taken advantage of its monopolistic position and was thereby considered to be in breach with Article 102.[80] Consequently, Tetra Pak

[73] Commission Decision of 22 December 1987 relating to a proceeding under Article 86 of the EEC Treaty (Case IV/30.787 and 31.488 - *Eurofix-Bauco v. Hilti*), para. 75.

[74]Case T-30/89 *Hilti AG v, Commission* [1991] ECR II-1439, paras. 102-107.

[75] Ibid, para 118.

[76] Case C-193/83, *Windsurfing International v. EC Commission* [1986] ECR I-611.

[77] Case C-226/84, *British Leyland Public Limited Company v Commission* [1986] ECR I-3263.

[78] Case C-53/92P *Hilti AG v. Commission* [1994] ECR I-667, para. 109

[79] Case C-333/94P, *Tetra Pak International SA. v. Commission* [1996] ECR 1-5951.

[80] Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 - *Tetra Pak II*), para. 169.

was obliged with a fine of 75 million Euros.[81] Tetra Pak appealed to the GC and the CJ without any success. In the CJ Tetra Pak argued that the two products were not distinctive. Tetra Pak argued that their practice was motivated in accordance with customer service. Other companies were allegedly supplied with support and repairmen of equipment and spare parts. Consequently, their practice was a reasonable way of serving the customer. According to Tetra Pac, the two products constituted a natural link between each other why there was not a question of tying practices.[82] The CJ however held that the two products were distinct and could not be considered to be in a natural link with each other since there was existence of specialized manufactures.[83] Furthermore, the CJ stated that even if there was a natural link between the two products, it did not necessary exclude appliance of Article 102.[84]

5.2.3 Napier Brown/British Sugar[85]

The British company Napier Brown was the leading sugar supplier in the UK. The company used tying in the respect of purchase of products and related services. In the case, Napier Brown only sold their sugar under the condition that they were also given the right to transport the sugar. The company was accused of having abused their position of strength by excluding other delivering companies on the market. The Commission took the view that the practice was abusive in the sense that it deprived the customers of the choice between buying on an ex-factory or delivered price basis. According to the Commission, the measure led to an elimination of competition which seems sufficient in order for the tying to be considered abusive.[86]

[81]Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 - *Tetra Pak II*), para. 184.

[82]Case C-333/94P, *Tetra Pak International SA. v. Commission* [1996] ECR 1-5951, para. 35.

[83] Ibid, para. 36.

[84]Ibid, para. 37.

[85] Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 Napier Brown - British Sugar).

[86]Commission Decision of 18 July 1988 relating to a proceeding under Article 86 of the EEC Treaty (Case No IV/30.178 Napier Brown - British Sugar), paras. 74-76.

5.2.4 Microsoft[87]

A case that has been highly discussed within European competition law is the Courts decision in *Microsoft*. In the case, Microsoft sold its operating system *Windows* along with the media player *Windows media player* (WMP). The practice was a form of technical tying in the sense that the two programs were physically integrated with each other. Several aspects were considered in the case. However, this thesis only treats the practice of tying why the other conflicts are not given any further notice.

On its own initiative, the Commission started an investigation against Microsoft's accused anticompetitive behavior where another approach against the interaction between the method of tying and European competition law was developed. In the case it was undisputable that Microsoft obtained a position of strength on the market, with a market share of 90 percent. The Commission found that Microsoft were engaged in anticompetitive behavior and fined Microsoft with nearly 500 000 000 Euros. Furthermore, Microsoft was obliged not to integrate the two programs with each other.[88]

The Commission stated that in order for the tying practice to be prohibited in accordance with Article 102, four elements of abuse must be fulfilled:[89]

> *"1.the undertaking concerned should be dominant in the tying product market; 2) the tying and tied goods should be two separate products; 3) the undertaking concerned should not give customers a choice to obtain the tying product without the tied product; and 4) the tying should foreclose competition".*

In their defense, Microsoft argued in the GC that the integration did not entail any coercion within the meaning of Article 102. Microsoft referred their argument to the fact that the costumers did not actually pay any extra for access of the WMP. Furthermore, Microsoft reminded the Court of the fact that the costumers were free to install other competitor's media players.[90] The GC rejected these arguments and held that Microsoft

[87] Case T-201/04, *Microsoft Corp v. Commission*, [2007] ECR II-3601.

[88] Commission decision of 24 March 2004 relating to the proceedings under Article 82 of the EC Treaty (Case COMP/C-3/37.792 *Microsoft)*, paras. 1078-1080.

[89] Ibid, para. 794.

[90] Case T-201/04, *Microsoft Corp v. Commission*, [2007] ECR II-3601, para. 960.

had left the customers without any choice when purchasing the operating system. Accordingly, the element of coercion had been fulfilled.[91]

Regarding the element of foreclosure the GC held that the practice of tying by a dominant undertaking cannot automatically be considered to constitute a foreclosure effect. Instead the GC focused on the actual effects on competition, arising from the behavior practiced by Microsoft.[92] Consequently, in contrast to earlier judgments the GC did in fact discuss the element of foreclosure. Regarding the fact that the WMP's was sold for free the GC held; "*There are therefore good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition".*[93] Although there was a discussion regarding the element of foreclosure, the Court did not approve of the practices made by Microsoft. The GC held that the behavior led to extreme barriers of entry on the market. New entry was considered to include extreme risks, high costs and large difficulties in general. With that said, the GC held that Microsoft's behavior had the effect of foreclosing competition.[94]

The GC had consequently established that all four requirements, mentioned above, had been fulfilled. Microsoft's last chance was to motivate their practice with an objective justification. Microsoft argued that the integration was necessary and indispensable in order for the costumers to take advantage of the effects arising from the integration. The Court rejected the argument and held that in that case, Microsoft is obliged to offer a product without integration.[95]

5.3 Conclusion

The reasoning made by the EU Courts has been criticized in literature.[96] The Courts have been accused for lack of reasoning, most of all due to the absence of discussion re-

[91] Case T-201/04, *Microsoft Corp v. Commission*, [2007] ECR II-3601, para. 961.

[92] Ibid, para. 868.

[93] Ibid, para.841.

[94] Ibid, para. 453.

[95] Ibid, para. 1144-1167.

[96] Temple, Lang and O'Donoghue, *The Concept of Exclusionary Abuse under Article 82 EC,* GCLC Research Papers on Article 82 EC, July 2005, 62-63.

garding possible justifications and the criterion of proportion. Some criticize the EU Courts incapability of foreseeing the practical consequences of the tying practices.[97] In addition the statement regarding the natural link in *Tetra Pac II* has been commented by several legal scholars.[98] The conclusion has been drawn that in that case, products can never be sold as a package even though there is existence of a natural link. This would mean that a company must always leave the costumers with the possibility of a choice.[99] In my opinion, the statement delivered by the Commission is very confusing and merely contributes to the difficulties of establishing when a natural link actually exclude appliance of Article 102.

It is apparent that crucial differences exist in the reasoning made by the EU Courts. While in *Hilti*, *Tetra Pac II* and *Napier* the judgment relies on the tying per se, the assessment in *Microsoft* is also sought in the effects on competition. The earlier judgments seem to lack a real discussion regarding the effect of foreclosure. As for an example, in *Hilti* the EU Courts declared that merely the practice of tying the nail and the nails guns was sufficient in order for the practice to be in breach with Article 102. Hence, the focus seems to be on the fact that Hilti deprived their costumers of a choice. Many question the thesis that European competition law has moved towards a *rule of reason* approach with regards to the decisions special circumstances compared to classic, contractual tying.[100] My opinion on the matter will be treated in the final chapter where some concluding remarks will be presented.

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[97] Temple, Lang and O'Donoghue, *The Concept of Exclusionary Abuse under Article 82 EC,* GCLC Research Papers on Article 82 EC, July 2005, p. 62-63.

[98] See for example: Rousseva, Ekatrina, *Modernizing by eradictating: How the Commission's new approach to article 81 EC dispenses with the need to apply article 82 to vertical restraints,* Common Market Law Review, June 2005, NO 42, p. 605.

[99] Ibid.

[100] See for example: Crossely, Ahlborn and Bailey, *An Antitrust Analysis of Tying: Position Paper*, GCLC Research Papers on Article 82 EC, July 2005, p. 197.

6 Analysis

6.1 Legal position

6.1.1 Initial remarks

The main purpose with this thesis is to examine if there exists a clear legal position regarding when tying practices are in conflict with Article 102. It is a fact that three elements of the abuse must always be applied when making the assessment. Those are distinctive products, dominance, and coercion. However, it is not entirely clear what attention shall be brought to the element of foreclosure. Furthermore, the relevant market must be established and the practice must have effect on trade between Member States in order for the practice to be in conflict with Article 102.

6.1.2 The four elements of abuse

As has been stated, there are four elements that a company needs to consider when practicing tying. It must first be established if the company obtains a dominant position or not. A general answer is not possible but in case law it has been established that it is presumable that the undertaking is dominant if it has a market control over 50 percent. The element of coercion can take various forms and does not seem particularly complicated to foresee. If a company deprives its costumers of a choice, the element of coercion will always be considered fulfilled. When defining the element of distinctiveness, guidance shall primarily be sought in the market demand. If the two products are sold in different markets they will most likely be considered as distinctive. Other factors of importance are the technical difficulties in selling two products separately and whether or not there is existence of specialized companies.

As concerns the element of foreclosure it is not possible to guarantee the amount of attention that the element will be awarded. For companies that apply technical tying it is reasonable to believe that the Court will consider the effects and the possible distortion of competition followed by the practice. Thus, it cannot be applied in the sense that it constitutes barriers of entry to the market. When defining barriers to entry, important aspects are costs, risks and difficulties of entry in general. In addition, in the *DG Discussion Paper* it is stated that the assessment of foreclosure should include a two-step-test. The second criterion is that the costumers involved in the foreclosure must constitute a sufficient part of the market. However, any definition of what actually constitute a

sufficient part of the market is not provided in the report. Hence, in my opinion the test is not entirely clear and the report is on occasions somewhat vague.

6.1.3 Justifications

Regarding the aspect of possible justifications the Court previously did not seem to put any real effort in examining the justifications argued by the accused undertaking. As an example, in *Hilti* the accused undertaking argued that their practice was objectively justified with regards to the safety aspect. However, the Court did not really discuss the justification in itself, but rather dismissed it due to lack of evidence. A discussion whether or not it actually was a reasonable argument do not exist in the Courts decision. Neither did the CJ accept Tetra Pak's reason of serving the customer with regards to the general custom within the business area. In *Microsoft* the Court made a detailed examination regarding the indispensability between the operating system and the WMP. As has been stated, this argument was also rejected.

It is quite hard to draw any real conclusions regarding the chances of having the measure justified. In my opinion, the arguments in all these cases has been quite week and from time to time even seem desperate. Nevertheless, the European Courts have received some criticism regarding their incapability of foreseeing the practical consequences of the tying practices.[101] Despite the lack of approved justifications so far, the Commission has stated some typical justifications and when they shall be approved, e.g. the argument of efficiency savings.[102] In conclusion, there seem to be some chances of justifying a tying practice if yet very limited.

6.1.4 Per se or rule of reason?

Historically and prior to the judgment in *Microsoft* it appears relatively clear that the Court has made an assessment *per se*. In all cases the EU Court has distinguish three different elements of abuse. Firstly an assessment whether or not the products are distinctive are made, secondly an assessment of the market power and thirdly an assessment of coercion. Merely these criteria seem to be sufficient in order for the tying to constitute an abuse of a dominant position. The aspects of anticompetitive effects and

[101] See Chapter 5.3.

[102] See Chapter 3.2.4.

possible justifications do not seem particularly relevant. In *Napier/British Sugar* the Court did not really consider whether or not the practice actually resulted in foreclosure. The same practice was applied in both *Hilti* and *Tetra Pak II*. In conclusion, the judgments in the cases prior to *Microsoft* strongly suggest that the Court applied an approach *per se* even though that has not been officially confirmed by the EU Courts. This conclusion is also supported in most literature on the area.[103]

Another conclusion that has far more spreading opinions is the question whether or not the Court has made a transfer from the *per se* approach to the *rule of reason.* As mentioned above, the Court declared in *Microsoft* that four requirements must be fulfilled in order for the tying practice to be in breach with Article 102. Three of these are in compliance with the *per se* approach. The new prerequisite is the demand of foreclosure. This new prerequisite would suggest that the Court applies a *rule of reason* approach and acknowledges both the anticompetitive and precompetitive aspects of the tying practice. It is a fact that this is what the Court has actually done since it has been confirmed by the Commission.[104] Consequently, I do not question that this was the case in *Microsoft.* However, it is not entirely clear if this approach shall be applied in general or if it was applied due to certain circumstances. The practices in for example *Hilti* and *Microsoft* differ from each other in a significant way. While the tying practiced in *Hilti* concerned a traditional way of contractual tying, the tying in *Microsoft* was pursued by a relatively new term called technical tying.

Any case regarding the practice of tying has not yet been treated after *Microsoft.* Consequently, it is not possible to declare what the actual intention was regarding the approach towards tying. Did it apply to technical tying per se or to tying in general? In *Microsoft*, the Court acknowledges the factor that the practice is a technical tying. This might indicate that the new approach shall only be applied to technical tying. In the *DG Discussion Paper* however, the Commission treat the aspect of foreclosure in detail which would suggest that the approach should be applied in general. However, it might be done due to the increasing amount of technical integration when considering the fac-

[103] See for example: Crossely, Ahlborn and Bailey, *An Antitrust Analysis of Tying, Position Paper,* GCLC Research paper on Article 82 EC, July 2005, p. 181.

[104] Commission Press Release of 24 March 2004, MEMO 04/70.

tor that the decisions prior to *Microsoft* originate from a time where the computer and software market was not particularly developed.

The answer to my purpose and the question of whether there exists a clear legal position on the area will consequently be that it does not. There is a tendency in the literarily discussion that European competition law regarding the practice of tying has moved from a *per se* approach to a *rule of reason* approach. However, due to the absence of new case law and new guidelines it is not possible to declare a clear legal position. In the moment there is nothing to do but to await a new case regarding the practice of tying. Maybe then it is possible to declare a clear legal position within European competition law.

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