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## The Evolution of Classical Evaluation Standards in Competition Law: The Legal Assessment of Tying in View of Challenges Raised by Digital Markets

### Introduction

One of the greatest challenges to the effective enforcement of competition law rules is the need to adapt the existing regulations to constantly changing market conditions. Protecting competition, and thereby safeguarding consumers, is becoming an issue that is discussed increasingly frequently and widely in public debate. The European Commission and national competition authorities are required to respond dynamically to any practices that generate a risk of anti-competitive effects. Law enforcers must be effective in monitoring the conduct of dominant undertakings and genuinely safeguard the interests of weaker market participants. Having better business performance than competitors is not illegal, but companies with disproportionately great market power should be especially aware of the responsibilities deriving from their dominance. Therefore, ensuring compliance with competition law rules and constantly reviewing the potential effects on rivals and consumers remains a fundamental duty, bearing in mind that a single decision implementing an anti-competitive strategy may sometimes lead all the rivals to cease operating on the market, with no other potential competitor willing to take their place.

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In considering the need for detailed analysis of the evaluation methodology for infringements of European Union's competition law, this paper will review the legal standards for qualification of tying. In that regard, not only the perspective of the law enforcer will be presented, but also the challenges faced by the undertaking defending its legal interests. Thus, the legal qualification as of the prohibition of tying will be presented, along with a review of the commonly recognized criteria, conditions and methods for its legal assessment. Particular attention will be paid to upcoming challenges presented by the development of digital markets. Well-established assessment standards will be compared with modern practices in terms of an analysis of European Commission's Prohibition Decision of 18 July 2018 in Case AT.40099 – Google Android<sup>1</sup> (hereinafter: Google Android Prohibition Decision (AT.40099)). Various dynamic changes are currently taking place, and especially on digital markets, thus making them highly sensitive to any anti-competitive strategies.

In the view of these practices, many potential sources for structural competition problems have led to structural risks to competition or even a structural lack of competition. Hence, it is not surprising that the conduct of companies on the digital market are the focus of attention for the European Commission and national competition law enforcers. However, the use of traditional legal instruments is hindered by the unique characteristics of digital markets.<sup>2</sup>

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<sup>1</sup> Case AT.40099, *Google Android Prohibition Decision* of 18 July 2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (hereinafter: "*Google Android Prohibition Decision* (AT.40099)").

<sup>2</sup> Among the most significant sources for structural competition problems are network effects, which mainly refer to the scenarios in which the value of the service increases depending on the number of users. Market tipping is also frequently observed in the digital markets. In these scenarios, the number of customers is a key element of success. If a company achieves the critical threshold of customers, it instantly gains a disproportionate advantage in reaching the others. In effect, only one or just a few companies will remain in the affected market in the long term perspective. Among other sources for structural competition problems, extreme economies of scale could be found, in which the cost of generating a product or a service decreases with larger volumes. It is also important to mention the frequently encountered zero pricing. Companies offer their products or services to consumers at zero price and generate income through other means (usually via advertisements). Among other common phenomena on the digital market we can also encounter high customer switching costs, pricing algorithms, high degree of vertical integration and self-preferencing. See more explanation on that issue

Ongoing observation of the growing uncertainty in the application of competition law provisions on digital markets necessitates a comprehensive analysis of the today's and tomorrow's challenges. Despite the intense interest in the issues of BigTech and competition law, this article is intended to provide a unique look at the legal qualification of tying and modern practices of the dominant players on digital markets. Thus, its primary purpose is to demonstrate that hitherto well-established mechanisms, standards and criteria can be used for tying practices to be classified as abuse of dominance. However, it is essential to apply them in a unique perspective for each case and to be innovative in considering the objectives and effects of the practices in question, which sole implementation classical methods are unable to identify. Providing key observations in this regard can support both law enforcers and dominant undertakings in assessing the lawfulness of the practice in question and seeing the consequences it may bring.

## 1. Initial remarks on tying and bundling

While the packaged sale of goods or services under normal circumstances does not in itself give rise to antitrust concerns, tying and bundling can violate competition law when used by a company holding a dominant position in order to exclude competitors and harm consumers. The mechanism of this type of abuse is based on taking advantage of market power in the supply of one product to create packed offerings capable of excluding competition from superior rival solutions.<sup>3</sup> As a result, barriers to entry can be established and there is significantly lower motivation for competitors to develop their products in a particular market segment.

The relevant prohibiting norm is stated under Article 102(d)<sup>4</sup>, where tying falls within the scope of "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." The interpretation of this

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in "Questionnaire for the public consultation on a New Competition Tool" European Commission, Public consultation, 2020.

<sup>3</sup> Th. Graf, D.R. Little, *Tying and Bundling*, in: *EU Competition Law Volume V – Abuse of Dominance: Under Article 102 TFEU*, ed. by F.E. Gonzalez-Diaz, R. Snelders, Claeys and Casteels 2013, p. 515.

<sup>4</sup> Treaty on the Functioning of the European Union OJ C 326, 26 X 2012, pp. 47–390.

provision may be relatively broad and might produce various difficulties in assigning certain abuse to prohibiting a given norm. However, that will not be the subject of a critique, because the intention of the legislator was to make the scope of the regulation as broad as possible. A more specific enforcement perspective for tying and bundling can be found in the *Guidance Paper*<sup>5</sup>, which describes the most important matters related to tying, including distinction of products, coercion, anti-competitive foreclosure in the tied and tying market, multi-product rebates, and also efficiencies. Moreover, the literature points out the possibility that in some situations tying may also constitute a separate abuse under the general provisions of Article 102, even when the supplementary obligations do have a connection, by nature or according to commercial usage, to the main contract.<sup>6</sup>

The term “tying” must also be distinguished from “mixed bundling”. Tying takes place when one product, the “tying product”, is being sold only with another product, the “tied product”. Bundling, on the other hand, occurs when the supplier sells the product both separately and in a packaged set, although the discount for combined products is at such a level that it is economically unrealistic for a customer to obtain the two products separately.<sup>7</sup> That is a highly significant distinction, although sometimes it is still difficult to find a clear demarcation between tying and different forms of bundling, since the literature also provides the term “pure bundling”, where none of the products included in the bundle is offered separately.<sup>8</sup>

## 2. Motives for tying and the Economic perspective

Tying and bundling have become the subject of dispute among researchers, mostly those representing the Chicago School. According to the view of this part of doctrine, tying strategy is economically unprofitable, because it sacrifices sales of the tying product. Selling a tying product at a price which extracts the full monopoly profit makes

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<sup>5</sup> Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

<sup>6</sup> Van Bael & Bellis, “Competition Law of the European Union”, Kluwer Law International, 2021, p. 823.

<sup>7</sup> Th. Graf, D.R. Little, op. cit., p. 516.

<sup>8</sup> I. Małobęcki, *Sprzedaż wiązana i pakietowa jako potencjalne naruszenie europejskiego prawa konkurencji – ekonomiczna i prawna analiza problemu*, Warszawa 2013, p. 8.

it impossible to leverage monopoly power across markets, because it raises the effective price beyond consumers' maximum willingness to pay for the tying product.<sup>9</sup> The aforementioned single monopoly profit theory has been criticized for not considering economies of scale, or the dynamic and strategic incentives for tying.<sup>10</sup> Given the approach of the Chicago School, where motives are either pro-competitive or irrelevant for competition, it should be noted that critics of this School do not merely list the negative effects of tying. Many of the Chicago School's insights have been appreciated and recognized as persuasive, which sets up a general rule that per se illegality is inappropriate for tying.<sup>11</sup> Many companies tie and bundle their products or/and services, which very often should not be controversial from the perspective of competition law, because in many cases it leads to cost savings and quality improvements.<sup>12</sup>

A comprehensive list of the most important motives for tying, which are widely recognized in the literature, would include:

- i. cost savings – for example, regarding production, packing, or marketing. These can easily refer to software programs installed on one device, instead of distributing them separately;
- ii. system assembly and system quality – this is highly important for the development of products, especially software, because if the system is better protected against malfunctioning, a supplier of both products can guarantee that system will work as intended, and also, the bundled whole can be greater than the sum of its individual parts<sup>13</sup>;

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<sup>9</sup> A. Director, H. Levi, *Law and the Future: Trade Regulation*, "Northwestern University Law Review" 1956, vol. 51, no. 281, pp. 281, 286; R. Schmalenese, *Commodity Bundling by Single-Product Monopolies*, "Journal of Law and Economics" 1982, no. 25, pp. 67–71.

<sup>10</sup> B. Nalebuff, D. Majerus, *Bundling, Tying, and Portfolio Effects*, "DTI Economics Paper" 2003, no. 1, p. 19.

<sup>11</sup> R. Wish, D. Bailey, *Competition Law*, 8th ed., Oxford 2015, p. 730.

<sup>12</sup> B. Nalebuff, D. Majerus, op. cit., p. 31.

<sup>13</sup> G. Niels, H. Jenkins, J. Kavanagh, *Economics for Competition Lawyers*, 2nd ed., Oxford 2016 ("A further reason for suppliers to engage in tying is to protect their reputation by maintaining control of the quality of the product. Tying a maintenance contract to a complex piece (p. 206) of machinery or IT system is common practice. It ensures that maintenance or upgrades are carried out by trained personnel, giving the supplier confidence to offer its customers a longer warranty. With this form of tying, the supplier does not have to worry that a complementary good outside its control (maintenance) will damage customers' perceptions of the quality of its main product (the machinery or IT system)"); see also: Th. Graf, D.R. op. cit., p. 520.

iii. pricing strategies – for the purpose of implementing more effective pricing. An example could be retaining the benefits of lowering the price of a tying product<sup>14</sup>;

iv. excluding competitors – this is the most significant motive from the competition law perspective, and must be discussed separately. Dominant companies can exclude competitors by applying tying on different markets, which ultimately is to the detriment of consumers.

In the vast majority of cases, tying occurs in order to extend the dominant position on the tied product market, where the usual aim here is to share the large customer group of a tying product with a product less desired by customers. That in effect leads to the ‘leveraging’ of a strong market position from one market to another.<sup>15</sup> The best way to verify this practice is to find out whether consumers would also be willing to buy another product if the tying did not occur. Therefore, it is important to take into consideration the level of consumption of both products, but also the network effects and economies of scale. This is because “as the number of users of that second product grows, its costs per user decrease and its utility for users may increase, generating positive network externalities to the benefit of the dominant company. Concurrently, the tie may increase the costs and degrade the relative quality of rival products by diminishing or limiting the size of their networks”.<sup>16</sup>

Tying can also have its expansion implications for the tying market, so the dominant position on this market is protected by the creation of barriers to entry. That might be the case when it is necessary to actively operate in the tied product market to supply the tying product effectively. Again, economies of scale can play a significant role here, especially with regard to financing supply on tying market. In this scenario, which often takes place in the digital sector, the tied market becomes a gate to operate on the tying market effectively.<sup>17</sup> Costly entry into a tying market or the requirement of big data sets can be extremely important factors in these scenarios. Network effects in the tied market can also play a significant role, especially when they are needed by competitors to

<sup>14</sup> B. Nalebuff, D. Majerus, *op. cit.*, p. 61; see also: Th. Graf, D.R. Little, *op. cit.*, p. 520.

<sup>15</sup> J. Faull, A. Nikpay, *The EU Law of Competition*, 3rd ed., Oxford 2014, p. 68.

<sup>16</sup> Th. Graf, D.R. Little, *op. cit.*, p. 524, 8.25; see also: B. Nalebuff, D. Majerus, *op. cit.*, p. 55.

<sup>17</sup> E.g. Commission Decision of 24 III 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 *Microsoft*), paras 973 and 974, where, according to the Court, Microsoft established barriers to entry on client PC operating system market by foreclosing competition in media players.

operate actively on the tying market. Moreover, if the sales performance of both products is diversified, the dominant position of a company can remain the same when the demand for the tying product declines. Competitors who do not depend on tying might have significantly lower possibilities to endure demand changes and mitigate losses.

Tying may also extend into third markets, which are adjacent to both markets, for tying and tied products. This scenario occurs most often when the demand for the tied and adjacent goods is complementary. With tying, a company can increase or decrease the demand for consumption of the complementary product, so any change in consumption for tied product will also have an impact on other products provided by a dominant company. The scenario of tying which has an impact on other products of markets is not that rare.<sup>18</sup> A similar situation could be observed on the market for online advertising, where companies' results are highly dependent on the brand of search engine used, internet browsers or other mobile applications (e.g. Google Search correlated with Google Ads).

### 3. Legal analysis of tying as a breach of European Union's competition law

Considering the reasons for tying and market situations conducive to it, the main focus should now be on a legal analysis of this action. The key starting point is to note that tying is not illegal per se. In many cases, it does not lead to any anti-competitive concerns, and it might be beneficial for consumers. This is why each assessment of such a strategy must be evaluated carefully, with special attention given to the effects (following the generally used *effect based approach*) and also potential efficiencies.

A special list of cumulative conditions is provided in the fundamental model for the assessment of unlawfulness of tying. This was first fully

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<sup>18</sup> The *Microsoft* Case could be presented as an example, where the Court found that: "The media player market is, in fact, a strategic gateway to a range of related markets, on some of which high revenues can be earned. [...] gaining a pre-eminent position in the media player market will provide Microsoft with a significant advantage in other business areas such as those for content encoding software, format licensing, wireless information device software, DRM solutions and online music delivery." Commission Decision of 24 III 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 *Microsoft*), para. 975.



introduced in the 2004 Commission Decision addressed to Microsoft<sup>19</sup>, stating that: “Tying prohibited under Article 82 of the Treaty requires the presence of the following elements: (i) the tying and tied goods are two separate products; (ii) the undertaking concerned is dominant in the tying product market; (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (iv) tying forecloses competition”.<sup>20</sup> It is very important to discuss these conditions in detail.

### 3.1. The possible distinction of two separate products

While the assessment of a dominant position does not differ much from the methods and standards generally used for determining other abuses (except for the specific characteristics of defining dominance on a tying market, while tied market dominance remains irrelevant), attention should be switched directly to the condition of the existence of two separate products. According to the literature<sup>21</sup>, the origins of the use of the ‘distinct products’ criterion – that a tying claim must involve two separate relevant product markets – should be sought in *Michelin v. Commission*, where the ECJ rejected a tying claim because the Commission had failed to establish that the company made “a benefit granted on sales on one market dependent upon the attainment of a target for sales on another market”.<sup>22</sup> In that regard, it is also important to mention that the burden of proving that two products are the subject of a tie is on the competition authority or the claimant in proceedings before a national court.<sup>23</sup>

In order to distinguish separate products from the components that form a single product, various determinative criteria must be considered. The general rule, as stated in the case-law and the *Guidance Paper*, is that distinctiveness should be assessed by reference to customer

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<sup>19</sup> Commission Decision of 24 III 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 *Microsoft*).

<sup>20</sup> *Ibidem*, para. 794.

<sup>21</sup> Van Bael & Bellis, “Competition Law of the European Union”, Kluwer Law International, 2021, p. 824.

<sup>22</sup> Judgment of the Court of 9 November 1983. *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*. Case 322/81. European Court Reports 1983-03461, ECLI identifier: ECLI:EU:C:1983:313, para. 98.

<sup>23</sup> R. Wish, D. Bailey, *op. cit.*, p. 732.



demand.<sup>24</sup> The *Guidance Paper* says that: “[t]wo products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product”.<sup>25</sup> The *Guidance Paper* also refers to the direct

and indirect evidence for a distinct product, when “customers purchase the tying and the tied products separately from different sources of supply”, and when there are in this market undertakings specializing in the manufacture or sale of the tied product without the tying product, or there are undertakings with little market power in competitive markets which tend not to tie such products.

The literature distinguishes different factors of the separation of products. Th. Graf and D.R. Little list the following:<sup>26</sup>

- i. the existence of independent suppliers, which does not comprehensively imply the distinction of products;
- ii. the difference in functionality of the products in question;
- iii. customer conduct – whether prior to the tying the customers bought these products separately;
- iv. the company’s conduct – regarding distinct offerings (including stand-alone versions), distinct licensing conditions, or separate marketing;
- v. rationale for tying – e.g. the existence of any technical reasons;
- vi. commercial usage – in line with Article 102(d) TFEU the commercial usage, like the nature of an obligation called into question, may become the relevant indicator of an abuse;
- vii. the complementarity of both products – two important notes here: complementarity does not indicate the integral nature of the products in every case, and complementarity should be assessed in view of customer demand for both products from different sources.

It should be emphasized, however, that none of these criteria is definitive. Moreover, it should be pointed out that the possibility of distinguishing separate markets for both products being analyzed does not necessarily mean that these items are not components of a single product.

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<sup>24</sup> Case T-201/04 Judgment of the Court of First Instance (Grand Chamber) of 17 IX 2007. *Microsoft Corp. v Commission of the European Communities*, para. 917.

<sup>25</sup> Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), para. 51.

<sup>26</sup> Th. Graf, D.R. Little, *op. cit.*, pp. 533–535.

In the practice of applying various tests, the Commission and the Court mostly rely on the assessment of manufacturing and distribution levels. In the *Microsoft* case, the supply of an operating system and media player to PC OEMs became a significant point of reference. The Commission hypothesized the potential cooperation between PC OEMs and other developers of media players if tying did not exist. In addition to the manufacturing and distribution levels, the Commission and Court also needed to examine the presence of companies specializing in the sales of one specific product, and also the existence of secondary after-markets for the components or products being questioned (focusing on the interaction between the primary and secondary markets). In both cases, however, the outcomes of these analyses do not fully imply the tying of separate products.<sup>27</sup>

Thus, it should be noted that a number of doubts and difficulties remain in demonstrating the key conditions for the existence of tying. No criterion or test can clearly answer the question whether the products are separate and, therefore, infringing. Only a complex multivariate analysis can support a particular conclusion. Furthermore, such analyses must be conducted with reference to a given period of time and with any other specifically defined aspects demonstrating the market and technical situation at that time. According to the Court in the *Microsoft* judgement: "It is by reference to the factual and technical situation that existed at the time when, according to the Commission, the impugned conduct became harmful, and therefore the period after May 1999, that the Court must assess whether the Commission was correct to find that streaming media players and client PC operating systems constituted two separate product".<sup>28</sup>

The most important point of reference, however, still remains substantial integration value, which shall be assessed in terms of consumer demand. Therefore, acquiring the components separately needs to be compared as a potential substitute to obtaining the product in an integrated form. In the situation where the integration value is not sufficiently high to preclude the need to acquire the components from separate sources, the two components qualify as separate products.<sup>29</sup> However, the undertaking's right to provide objective justifications for tying still remains possible.

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<sup>27</sup> Th. Graf, D.R. Little, op. cit., pp. 533–535.

<sup>28</sup> Case T-201/04 Judgment of the Court of First Instance (Grand Chamber) of 17 IX 2007. *Microsoft Corp. v Commission of the European Communities*, para. 914.

<sup>29</sup> Th. Graf, D.R. Little, op. cit., pp. 533–535.

### 3.2. The lack of choice to obtain the tying product without the tied product

This lack of choice may be described as a coercion, which has the effect of forcing consumers to obtain both products together in the absence of their will to do so. An analysis of the case-law demonstrates a very broad range of such practices, e.g. IBM offering its most powerful range of computers only together with a capacity of main memory and the basic software included in the price.<sup>30</sup> The consumers' need to use the tied product remains irrelevant, although it can demonstrate the effects of an infringement, since it could be seen as evidence of rivals' difficulties with reaching the client. There are various methods, direct or indirect, of denying the choice, which are briefly presented below.

The most important one, whose prohibition is defined under Article 102(d), is the establishment of contractual obligations which do not allow contracting party to obtain the tying product without the tied product. This practice can definitely include the conclusion of contracts subject to the acceptance of supplementary obligations unrelated to the subject of the contract being questioned.

The act of refusal to supply is no less important and is also closely related to contractual tying obligations. This term covers all ways of denying access and making the tying product unavailable without the tied product. However, refusal to supply the tying product must be distinguished from the classical meaning of refusal to supply, which in many cases might be just a refusal to deal with other rivals. Tying refusals exhibit more indirect characteristics, effecting foreclosure through coercion of consumers.

The third very important type of denying a choice to obtain the tying product without the tied products is financial coercion. This method is more indirect, and it can be more difficult to prove its unlawfulness. The classic use of financial coercion is based on setting prices for stand-alone tying products so high that from an economic perspective the probability

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<sup>30</sup> IBM, Fourteenth Report on Competition Policy, points 94–95; see also other examples mentioned on p. 826 of Van Bael & Bellis, "Competition Law of the European Union", Kluwer Law International, 2021 – e.g. making the sales of machines and cartoons subject to accepting additional services such as maintenance and repair and the provision of spare parts by Tetra Pak (Judgment of the Court of First Instance (Second Chamber) of 6 X 1994. *Tetra Pak International SA v Commission of the European Communities*. Case T-83/91. European Court Reports 1994 II-00755, ECLI identifier: ECLI:EU:T:1994:246).

of the prevalence of buying separate products is almost non-existent. Considering the many possible rebates, discounts, bonuses and rewards for packaged sales, the distinction between tying and bundling seems to be less visible. However, financial coercion can take the form of paying your contracting parties. This is a new form and one that is still not particularly widespread. This undoubtedly took place in the Google Android<sup>31</sup> scenario, where the shared revenue granted to OEMs and MNOs became a standard and essential part of income to remain competitive on a market, where all other competitors are granted this payment. Without going into the topic of paying consumers not to use rivals' products, it should be noted that not having to pay for a tied product is an argument frequently made. However, in the *Microsoft* case the Court went beyond that argumentation and denied the validity of this justification, stating that the price does not have to be individually determined for the tied product, in which case it can be included in the price for the tying product.<sup>32</sup>

### 3.3. The existing anti-competitive foreclosure

The effect of tying on competitors is the last point of this conduct assessment, before the possible objective justifications are evaluated.

The Commission's Guidance on the application of Article 82 pays greater attention to the issue of foreclosure.<sup>33</sup> According to the Guidance Paper, the scope of anti-competitive effects may reach not only the tied market or the tying market, but even both at the same time. The results of the comprehensive analysis on both markets could have their basis in the variability of the demand for both products and their sales performance<sup>34</sup>, on which the company's dominant position depends. Moreover, the effects do not necessarily take place, but it is enough to prove that they are likely to occur. For this purpose, it is necessary to examine whether the conduct is capable of foreclosing rivals.

<sup>31</sup> *Google Android Prohibition Decision* (AT.40099).

<sup>32</sup> Case T-201/04, Judgment of the Court of First Instance (Grand Chamber) of 17 IX 2007. *Microsoft Corp. v Commission of the European Communities*, paras 966–969.

<sup>33</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), paras 52–58.

<sup>34</sup> Tying can be harmful to the market situation of tying products in a way that there are less consumers willing to buy it.

The Guidelines also list the circumstances in which tying will lead to stronger effects that can be harmful to competitors, to a greater extent. An example of this is technical tying, which can be very costly to reverse in the long term, and may also reduce resale on the markets of individual components. Technical tying is a topic frequently raised in various articles and publications, and this is due to the new characteristics of products and unprecedented terms of their distribution on a market. As B. Vesterdorf points out, the conditions for market intervention should only be limited to situations where the tying product characteristics do not create any benefits for consumers and is aimed solely at foreclosing competitors.<sup>35</sup> It is difficult to disagree with this approach, given that innovation and development is very fragile, which can easily be held back by an overly rigorous approach by regulators and competition law enforcers. However, innovation of such products and their distribution (even in the form of tying) should not be equated with innovative methods of eliminating rivals, and should immediately meet with the reaction of competition authorities. As an aside, it is worth noting in this paper, with regard to software products, that the Court has already stated that the ability to download and install on an individual basis is not an alternative distribution channel possibility for software products of competitors.<sup>36</sup>

The guidelines also highlight the issues of substitutability and price changes for both products<sup>37</sup>, as well as the duration of conduct itself in terms of the persistence of the effects. Thus, the issue of consumer

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<sup>35</sup> B. Vesterdorf, *Article 82 EC: Where do we stand after the Microsoft judgement?*, "Global Antitrust Review" 2008, no. 1, pp. 1–14.

<sup>36</sup> Case T-201/04, Judgment of the Court of First Instance (Grand Chamber) of 17 IX 2007. *Microsoft Corp. v Commission of the European Communities*, paras 1049–1052.

<sup>37</sup> "55. The tying may lead to less competition for customers interested in buying the tied product, but not the tying product. If there is not a sufficient number of customers who will buy the tied product alone to sustain competitors of the dominant undertaking in the tied market, the tying can lead to those customers facing higher prices. 56. If the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products the dominant undertaking may seek to avoid this substitution and as a result be able to raise its prices. 57. If the prices the dominant undertaking can charge in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market in order to compensate for the loss of revenue caused by the regulation in the tying market" – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

detriment is also raised. The number of transactions based on tying and the number of units sold or distributed will also be a highly relevant factor for assessing the effects. The question of whether competitors can effectively respond to tying is also of importance. At this point, it is necessary to consider the possibility of offering not only the same tied products, but also other ways of reaching the consumer and being able to compete. The Guidelines do not neglect the importance of the review of general factors, such as long-term and superior dominance on the market, rivals' performance, economies of scale and scope, barriers to entry and expansion, network effects, or data dependency.

The literature on the matter of foreclosing competition points out the relevance of factors identified by the Commission in *Rio Tinto Alcan*<sup>38</sup> for the assessment of whether tying is likely to lead to anti-competitive effects. These factors are the following: dominant position in the relevant markets, high barriers to entry in the tied market, the importance of dominant undertaking's customers in the tied market, the dominant undertaking's reaction to market entry, this company's share and pricing strategy in the tied market, economies of scale, continuing viability of competitors, and finally, the likely consequences for the future marginalization and exit of competitors.<sup>39</sup>

Summarizing these considerations, it should be noted that the foreclosure assessment is not so much concerned with the complementarity of products and their features but with the overall manner in which they are marketed, with considerable reference to the harm caused to rivals and to consumers. A wide range of factors shall be considered, including the accompanying legal arrangements, since the non-competition obligations in respect of the tied product can demonstrate that the possible foreclosure effect is increased.<sup>40</sup> Tools which are both general and specific to tying are used for the assessment of foreclosure. As with other forms of abuse, an effect-based approach is used. However, one prominent and unique aspect is the identification of two different markets (for tying and for tied product) and the analysis of the interaction between them.

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<sup>38</sup> Case AT.39230, European Commission's decision of 20 XII 2012 (*Rio Tinto Alcan*), recitals 68–83.

<sup>39</sup> Van Bael & Bellis, "Competition Law of the European Union", Kluwer Law International, 2021, p. 827.

<sup>40</sup> D. Bailey, V. Rose, *European Union Law of Competition*, 7th ed., Oxford 2013, p. 480.

#### 4. Specific efficiencies for tying

Although an analysis of various factors may reveal the existence of abuse that should be sanctioned, an accused company is empowered with the right to defend itself by being able to provide justification for its conduct. The burden of proving this is on the company, and the competition authority should review and address each of these claims in a diligent manner. This is because there are situations in which tying products can ultimately generate significantly positive effects.

As with the general concept of abuse, such a justification can be based on either “objective necessity” (e.g. health or safety reasons) or “efficiencies” (which create benefits passed on to consumers). The Guidance Paper only presents specific examples of efficiencies in the context of tying. These are:<sup>41</sup>

1. savings in production or distribution that would benefit customers;
2. reduced transaction costs for customers, who would otherwise be forced to buy the components separately, and substantial savings on packaging and distribution costs for suppliers;
3. combining two independent products into a new, single product enhances the ability to bring such a product to the market to the benefit of consumers;
4. allowing the supplier to pass on efficiencies arising from its production or purchase of large quantities of the tied product.

In the list presented above, the point of reference is mainly made to the benefit of consumers, which in some situations may be achieved indirectly through the benefits gained by suppliers. This is not surprising, given that the current approach in competition law policies is heavily focused on the final (sometimes “likely”) effects of the conduct and on protecting the consumer on the market. These efficiencies must create sufficient benefits to consumers, and should minimize the potential harm to competitors, thus overall they just outbalance foreclosure, without creating the risk of absolute elimination of rivals. While presenting the argumentation for the existence of legitimate efficiencies, for each justification, the company must prove that there were no other less anti-competitive methods possible to achieve the set objective, i.e. that so-called “necessity” occurred. Moreover,

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<sup>41</sup> Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), para. 62.



the company must clearly demonstrate that this bundling effectively achieves the goal of consumer benefit, which is termed “effectiveness”. Finally, according to Th. Graf and D.R Little, “The final limb of the proportionality test requires the dominant company to demonstrate that the balance of interest militates in favour of the tie. There is a presumption that the interests of preserving undistorted competition outweigh the interests of the dominant company”. This is termed “the balance of interests”.<sup>42</sup>

It is important to point out that “*own commercial interests*” efficiency has been discussed several times in case-law. It can be used as an important gateway for demonstrating justification, but still to a limited extent. Such limitations on the protection measures that are undertaken (such as the proportionality, appropriateness and reasonability) have been presented in cases like *BPB Industries and British Gypsum v Commission* and *United Brands*, excerpts of which are cited sequentially here: “Whilst the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked and whilst such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behavior cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it”<sup>43</sup>, and “even if the possibility of a counter-attack is acceptable that attack must still be proportionate to the threat taking into account the economic strength of the undertakings confronting each other”.<sup>44</sup>

Besides the protection of “*own commercial interests*”, there is also a possible justification based on “property rights”. However, it also faces certain limitations and sometimes even almost complete denial of the possibility to exercise these rights, as it was done by the Court in the *Microsoft* case, whereby the dominant undertaking’s refusal to license a third party to use a product covered by an intellectual property right constituted an abuse of a dominant position in this scenario.<sup>45</sup>

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<sup>42</sup> Th. Graf, D.R. Little, *op. cit.*, para. 8.83.

<sup>43</sup> Case T-65/89, Judgment of the Court of First Instance (Second Chamber) of 1 April 1993. *BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities*, para. 69.

<sup>44</sup> Case 27/76, Judgment of the Court of 14 II 1978. *United Brands Company and United Brands Continental BV v Commission of the European Communities. Chiquita Bananas*, para. 190.

<sup>45</sup> Case T-201/04, Judgment of the Court of First Instance (Grand Chamber) of 17 IX 2007. *Microsoft Corp. v Commission of the European Communities*.

## 5. Tying and digital markets – the example of the Google Android Prohibition Decision (AT.40099)

### 5.1. Initial remarks

The methods and criteria previously presented for assessing the legality of tying should at this stage be referred to the most prominent example of tying in recent years. *Google Android* has become one of the biggest competition law cases, and with the highest fine ever imposed (on the day of issuance) by the European Commission on undertaking for a breach of competition law, amounting to €4 342 865 000.

According to the European Commission's assessment of Google's conduct, agreements regarding Android, Google mobile applications and other services constituted a single and continuous infringement of Article 102 of the Treaty on the Functioning of the European Union ("TFEU") and Article 54 of the Agreement on the European Economic Area ("EEA Agreement").<sup>46</sup> The Commission decided to assess simultaneously Google's conduct as four separate infringements<sup>47</sup> of Article 102 TFEU and Article 54 of the EEA Agreement, which ultimately constituted one single and continuous infringement.

These infringements are the following:

- tying the Google Search app with its smart mobile app store, the Play Store;
- tying its mobile web browser, Google Chrome, with the Play Store and the Google Search app;
- making the licensing of the Play Store and the Google Search app conditional on agreements that contain anti-fragmentation obligations, preventing hardware manufacturers from: (i) selling devices based on modified versions of Android ("Android forks"); (ii) taking actions that may cause or result in the fragmentation of Android; and (iii) distributing a software development kit ("SDK") derived from Android; and
- granting revenue share payments to original equipment manufacturers ("OEMs") and mobile network operators ("MNOs") on condition that they pre-install no competing general search service on any device within an agreed portfolio.<sup>48</sup>

<sup>46</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 1, para. 2.

<sup>47</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 1, para. 3.

<sup>48</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 1, para. 4.

The allegations in respect of the first two are grounded on the Commission's observations and understanding of actual state, where since at least 1 January 2011 the tying of Google Search app with the Play Store was the first action which constituted an abuse of its dominant position in the world market (excluding China) for Android app store<sup>49</sup>, while the second tying conduct occurred after 1 August 2012 and in this case Google has tied Google Chrome with the Play Store and the Google Search app in the worldwide market (excluding China) for Android app stores and the national markets for general search services.<sup>50</sup>

The European Commission decided to follow the evaluation of tying with regard to the previously formulated statements and assessment conditions for tying in the Court's decision against Microsoft<sup>51</sup>, and the contested practices was included in the catalog of forms of abuse of dominant position provided by point (d) of Article 102 of TFEU. The European Commission indicated that all the conditions were met. The overview of the Commission's considerations on that matter will be discussed in the following sections. In view of the resemblance between both tying infringements, the tying of the Google Search app with the Play Store seems to be a sufficient matter to be analyzed for the purpose of this paper. Importantly, the Commission uses the same mechanisms in both of these scenarios and mainly invokes analogous circumstances.

## 5.2. Product distinction condition

As regards the product distinction of Play Store and Google Search app prerequisite, the Commission outlined the basic functionalities of these two applications, where Play Store is an application which allows users of devices running on the Android operating system to download and install mobile applications. On the other hand, app developers can distribute them via Play Store. This leads to the assumption that Play Store is a two-sided platform for distributors and end users of the mobile application. There is no doubt that the functionality of Play Store varies from that provided by Google Search, which, generally speaking, is an application enabling users to submit a search query and obtain the

<sup>49</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.2, para. 752.

<sup>50</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.2, para. 753.

<sup>51</sup> Case T-201/04 *Microsoft v Commission*, EU:T:2007:289, paras 859, 862, 864, 867, 869, and 1144–1167.

desired result of information or a link. The Commission explains the functional characteristics of both applications, and that remains undisputed by Google.<sup>52</sup>

Considering the importance of the condition of product distinction, the relative passivity to challenge this point seems to make it more difficult to defend Google in the subsequent allegations. Despite the fact that it is difficult to see a clear functional relationship between these two applications, Google could have claimed that Google Search app is an important part of Android ecosystem, whose existence improves the consumers' experience. As indicated in the general theoretical discussion of distinctiveness of products, many factors can become different points of reference for the assignation of integrity of products, including technical rationale. As a result, system integrity could be raised by Google, while also proving the demand due to which the consumer would desire such pre-installation.

### **5.3. Dominance in the market for Android app store condition**

This condition shall be analyzed separately and in the most detailed and professional manner with respect to the economic methodology. Considering that this is a purely legal analysis of the case, it is particularly noteworthy for this paper that the Commission follows the conditions referring solely to the dominance in the tying market, which is the app store market. The conclusions of the market data established in Section 9.4 of the Google Android Prohibition Decision (AT.40099), on which the Commission assessed Google's dominant position on the relevant market as dominant, has not been contested by Google.<sup>53</sup>

### **5.4. No Play Store without the Google Search app condition**

This point refers to the characteristics of the relationship between Google and its market contractors, whereby prohibition was imposed on Original Equipment Manufacturers via Mobile Application Distribution Agreements. This allegation refers directly to the condition of

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<sup>52</sup> *Google Android Prohibition Decision (AT.40099)*, *supra* note 10, sec. 11.3.1, paras 757–761.

<sup>53</sup> *Google Android Prohibition Decision (AT.40099)*, *supra* note 10, sec. 11.3.2, para. 763.

a lack of choice to obtain the tying product without the tied product. To precisely understand the allegations, the Commission contends in the assessment of this particular condition that:

1. OEMs can pre-install the Play Store on their Google Android devices only if they license and pre-install the GMS bundle, including the Google Search app.

2. Users cannot obtain the Play Store without simultaneously obtaining the Google Search app.

3. OEMs that wish to install a different general search app on their GMS devices can do so only alongside the Google Search app.

4. It is irrelevant that OEMs may not be required to pay anything extra for the Google Search app.<sup>54</sup>

As the Commission claims in this section, again as with the previous conditions, Google has not objected to any of these points<sup>55</sup>, not even the last one, stating the irrelevance of the requirement of extra payment for the Google Search app, which potentially could be a possible argument in favor of Google.

As far as the lack of choice itself is concerned, this is primarily contractual coercion but is also financial. The agreements clearly specified the pre-installation requirements. Concurrently, the commercial aspect of lack of profits of not installing the tied applications meant that MNOs and OEMs had to opt for pre-installation in order to remain competitive by providing as rich an offer as possible.

In addition, shared revenues created a significant incentive for MNOs and OEMs to pre-install tied products. Moreover, no other company could offer more than Google, and at the same time, there was no interest in installing other search tools, not to mention create its own search engines.

## 5.5. Restriction of competition condition

While analyzing the condition of anti-competitive foreclosure, it must be noted that the Commission's reasoning for the assessment of restriction of competition is based on two allegations. According to the Section 11.3.4 of Google Android Prohibition Decision (AT.40099),

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<sup>54</sup> *Google Android Prohibition Decision (AT.40099)*, *supra* note 10, sec. 11.3.3, paras 765–768.

<sup>55</sup> *Google Android Prohibition Decision (AT.40099)*, *supra* note 10, sec. 11.3.3, para. 772.

Google's conduct of tying the Google Search app with Play Store leads to the restriction of competition, because it:

1. provides Google with a significant competitive advantage that competing general search services providers cannot offset; and
2. helps Google to maintain and strengthen its dominant position in each national market for general search services, increases barriers to entry, deters innovation and tends to harm, directly or indirectly consumers.<sup>56</sup>

This approach makes an interesting distinction, since both allegations are difficult to dissociate. The first group of effects seems to refer to already existing participants on a market, while the second group mainly refers to potential ones and also external effects for consumers and industry.

### 5.5.1. Significant competitive advantage

The argument referring to significant competitive advantage that competing general search services providers cannot offset is based, according to Commission, on five reasons: (1) the growth in the number of general searches done by users via smart mobile devices; (2) the importance of pre-installation as a distribution channel; (3) the impossibility of uninstalling the Google Search app; and (4) the inability of competitors to offset Google's competitive advantage achieved from tying, which is also consistent with the evolution of market shares.<sup>57</sup>

While the reason for the growth of general searches is the subject of economic studies<sup>58</sup>, the importance of pre-installation as a distribution channel requires particular attention. For that reason, the Commission refers to the remuneration provided by Google to OEMs and MNOs for pre-installing their apps, placing them in the best areas and setting them as default.<sup>59</sup> In particular, the last two – premium placement and setting default – are, in the Commission's view, highly profitable for Google. The Commission recalled the responses of third parties with

<sup>56</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.3.4, para. 773.

<sup>57</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.3.4.1, para. 775.

<sup>58</sup> General search queries carried out worldwide with Google Search on mobile devices accounted for 20–30% of all Google Search general search queries in 2012, 50–60% in 2015 and 50–60% in 2016.

<sup>59</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.3.4.1, para. 779.

regard to emphasizing the impact of default settings and premium placement.<sup>60</sup> Users are very rarely active in replacing installed apps with others, especially for applications of app developers with a less known brand. Through these two facilities, pre-installed applications on the device have significantly easier access to the user's attention, and consequently, better performance in comparison to competitive applications. Referring to these reflections to tying of Google Search app with Play Store, it is very easy to observe Google's aim and its method for achieving it, which are enshrined in the clauses of the contested agreements.

As previously noted, the impossibility of uninstalling by OEMs and MNOs the Google Search app has also been enumerated among the reasons for the significant competitive advantage that competing general search services providers cannot offset. That leads to a situation in which users always had to install at least two general search applications if they wanted to download and use another general search application. While Google claims that this is irrelevant, the Commission shows that although users have the possibility of installing another application, in most cases they do not do so, thus the anti-competitive effect of the impossibility of uninstalling Google Search app has a real impact on the market.<sup>61</sup> Considering the fact that a foreclosure assessment shall be conducted that focuses on the overall manner in which goods are marketed, the impossibility of uninstalling the Google Search app might constitute a crucial moment for the evaluation.

As regards the inability of competitors to offset Google's competitive advantage achieved from tying, the Commission mentions two possible actions that competitors can take – downloads and agreements with developers of mobile web browsers – although these cannot lead to effective competition with Google.<sup>62</sup> According to the Commission, downloads are ineffective because users are not likely to be active in replacing already pre-installed applications with new ones. On the issue of agreements with other developers, the Commission denies that this kind of agreement could offset Google's competitive advantage

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<sup>60</sup> Nokia's non-confidential response to Question 17 of the request for information of 29 VI 2015 to app developers (Doc ID 4360); Yandex's non-confidential response to Question 35.1 of the request for information of 12 VI 2013 to app developers (Doc ID 4601).

<sup>61</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.3.4.1, paras. 801–803.

<sup>62</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.3.4.1, paras. 801–804.



and refers to the fact that the Google Search app is set as a default on Chrome web browser, which holds a usage share of approximately 75% of non-OS-specific mobile web browsers in Europe.<sup>63</sup>

### **5.5.2. Maintaining and strengthening dominant position, increasing barriers to entry, deterring innovation and harming consumers**

Following the further considerations of the Commission, it needs to be noted that the Commission explicitly assessed Google's tying conduct, along with maintaining and strengthening dominant position, as in effect increasing the barriers to entry, deterring innovation and harm directly or indirectly consumers.<sup>64</sup> These allegations are extremely important for the anti-competitive assessment of the conduct and refer to the main principles of rightfulness of the antitrust proceedings, and to the need to prohibit this conduct and restore the market.

The issue of barriers of entry mostly concerns Google's earned revenue and accumulated data. The increasing number of search queries translates into more precise algorithms, more accurate search results, a better search service, more users, more advertisements viewed, more revenue to share with hardware manufacturers, and finally, a stronger position in the market. The Commission also recognizes these correlations, at the same time pointing out that without intervention it is practically impossible to compete with Google. Exclusionary agreements play a very important role in this mechanism and are highly effective in preventing competition in general search services.<sup>65</sup> These agreements result not only in challenging entry barriers but also in stagnation of innovations in general search services. The example to which the Commission refers could be reduced innovation and quality of searching service for specific user groups.<sup>66</sup> These could affect lawyers, for example, who very often search for cases or acts using Google Search instead of professional search services from different providers. The quality of both services is low, because Google provides results from almost every possible webpage, while professional legal searching tools

<sup>63</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.3.4.1, para. 818.

<sup>64</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.3.4.2, para. 858.

<sup>65</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.3.4.2, para. 861.

<sup>66</sup> *Google Android Prohibition Decision* (AT.40099), *supra* note 10, sec. 11.3.4.2, para. 862.

usually have underdeveloped algorithms resulting from a low number of queries, users or sources.

## Conclusion

An analysis of the literature and case-law highlights the fundamental mechanisms for conducting a legal assessment of tying. However, the use of these mechanisms will not be possible without their adaptation to the ongoing changes leading from technological development. Digital markets not only generate incremental revenues, but are also the sources of new or unusual legal arrangements. The best example could be the case of Google Android previously referred to, in which the contracts imposed on counterparties focused on the pre-installation and default placement of Google's mobile applications. There is no doubt that the Commission had to be innovative in considering the implications, especially of these two obligations imposed on MNOs and OEMs. Adapting the existing criteria to such nonstandard circumstances was a unique challenge for evaluating the objective and effects of a contested practice of tying. It is difficult to confirm definitively at this stage whether this was done correctly, as it is likely that some assessments were too subjective and not sufficiently supported by the relevant evidence. Moreover, the Commission has been remarkably consistent in concluding Google's justifications unfounded, such as the invoked right to monetize its investment in Android, which has been dismissed by the Commission due to other possible significant streams of revenue. The answers to many controversies will most likely be given in the upcoming judgment. On 9 October 2018, Google LLC and Alphabet, Inc. as applicants brought an action against the European Commission – *Google and Alphabet/Commission* (Case T-604/18). The claim aims to annul the Commission's decision, in the alternative, to annul or reduce the imposed fine, and in any event, order the Commission to bear the applicants' costs and expenses in connection with these proceedings.

Considering the broader perspective in this regard, existing provisions more frequently will not be able to accurately address every case or always provide a unanimous answer to a given doubt. In the context of the assessment of anti-competitive infringements, a thorough legal analysis should be carried out in conjunction with economic market analysis. Lawyers practising competition law will be able to

effectively and responsibly implement economic tools, considering that this interdisciplinary knowledge makes it more possible to determine with accuracy the dimension of a given practice on the relevant market.

No less important is the knowledge of the economic reality of digital business. Once the characteristics of digital markets are understood, and the participants of these are identified, the next step is to determine those practices which may pose a risk of violating competition law. This seems to be the most difficult challenge at the moment. Considering the previously analyzed evaluation mechanism of tying, it is still difficult to adapt these standards to modern infringements. Despite the fact that anti-competitive tying appears many times in the case-law, in the future it will not be possible to apply the legal concepts developed so far. However, as in the Google Android Prohibition Decision (AT.40099), an attempt was rightly made to give a new consideration of the four conditions proposed in the *Microsoft* case. Adapting to the new scenarios, the concepts developed already by the case-law seem to be one possible way to fulfill the predictability rule in competition law on digital markets. Following the example of Google Android Prohibition Decision (AT.40099), developing the new perspective on pre-installation conditions and premium placement of mobile applications might become a significant source of references in upcoming antitrust cases.

The future of competition law enforcement is expected to be determined by the newly introduced Digital Markets Act.<sup>67</sup> The legislative proposal is aimed to adapt the legal framework to contemporary market realities. The European Commission seek to broaden its powers to intervene at the earliest possible stage, before an undertaking would affect the competition on a market. This proposal imposes various obligations on providers of platform services, which mostly concern the relations with competitors, contractors and users. Considering the number of ongoing changes on digital markets, the implementation of new acts and further research into the enforcement tools of competition law is definitely necessary and would constitute important steps in that respect. The comparison of the concepts established in the literature and case-law with today's challenges of competition law enforcement indicates that further adaptation of legal instruments to digital markets is difficult, but definitely possible and necessary. Effective and timely

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<sup>67</sup> Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), Brussels, 15.12.2020, COM(2020) 842 final 2020/0374 (COD).

adaptation of the legal framework will protect not only competition on digital markets, but also safeguard consumer welfare, which invariably remains the ultimate value for the enforcement of competition law rules.

### THE EVOLUTION OF CLASSICAL EVALUATION STANDARDS IN COMPETITION LAW: THE LEGAL ASSESSMENT OF TYING IN VIEW OF CHALLENGES RAISED BY DIGITAL MARKETS

#### Summary

This paper provides a detailed review of evaluation standards for the legal assessment of tying. This practice, which constitutes an abuse of a dominant position, is a significant breach of competition law. The mechanism of this type of abuse is based on taking advantage of market power in the supply of one product to create packed offerings capable of precluding competition from superior rival solutions. Tying occurs when one product, the “tying product”, is sold only with another product, the “tied product”. In the prevailing number of cases, tying serves to consolidate the company’s dominant position on the tied product market, which usually aims to share the tying product’s large customer group with the less-desired product. However, tying is not illegal per se. In many cases, it does not lead to any anti-competitive concerns, and might be beneficial for consumers. This is why each assessment of this conduct must be carefully evaluated with special attention given to the effects, in accordance with the generally applied *effect-based approach*, and also potential efficiencies. An analysis of the case-law and literature reveals the basic mechanisms for conducting a legal assessment of tying. However, the use of these mechanisms will not be possible without their adaptation to the ongoing changes caused by technological development. Digital markets not only generate incremental revenues, but are also the sources of new or unusual legal arrangements. It will more frequently be the case that existing provisions will not be able to address every new practice accurately without new acts. The Digital Markets Act aims to adapt the existing legal framework to contemporary market realities and to become a modern tool for enforcing competition law rules on digital markets. The European Commission is seeking to broaden its powers to intervene at the earliest possible stage, before an undertaking affects the competition on a market.

**Keywords:** tying – competition law – antitrust – digital markets

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