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ABUSE OF DOMINANT POSITION: ABUSIVE TYING PRACTICES UNDER EUROPEAN UNION AND UNITED STATES OF AMERICA COMPETITION LAW

MASTER THESIS

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Introduction

The competition law of the European Union is one of the priority areas of the EU. Competition law, or antitrust law[1] as it is known in the USA, regulates the exercise of market power by companies.

For the past few decades large number of antitrust investigations in the EU and USA concerned various kinds of tying practices by undertakings with dominant position was carried out. The impact of tying on competition in the relevant market was analysed both by the CJEU and the Supreme Court. The CJEU in Tetra Pack II[2]and Hilti[3]analysed the possible anti-competitive effect of the tying practices and possible outcomes to the market. In USA courts analysed effects of the tying in such landmark cases as Northern Pacific Railway v. United States[4] and Jefferson Parish[5].

Tying is ubiquitous business practices[6] which came to light in 20th century, when marketing strategies and mass production evolved. The tying practice has been given a limited amount of attention within EU and USA case law. However, there have been some interesting rulings which have originated in intense discussions on the area.

Problem of the Research. Tying is one of a few conducts which can be assessed either as restrictive agreement (under the TFEU[7] and Section 1 of the Sherman Act[8]) or as an abuse of dominant position under competition law provisions (Article 102 (d) of the TFEU and Section 3 of Clayton Act).

The dogmatic problem of the tying practices arises from the fact that case law of tying is not consistent and comprehensive in both jurisdictions. In recent years one of the most famous cases in competition law history was brought to light in EU and USA. The debate of this case lied in the type of tying, namely the technological tying and the different outcome of the case in EU and USA. Although the factual situation and the legal assessment were practically identical in these jurisdictions- sentences were completely controversial, which brought massive attention from the media and business society. The question was raised in regards of the legal assessment of tying, its anti-competitive effect and economic benefits of the tying.

[1] Authors note: In order to maintain unity of the terms in the thesis antitrust will be named as competition law.
[2] Tetra Pak International SA v Commission of the European Communities, Case C-333/94 P of 14 November 1996.
[3] Hilti AG v Commission of the European Communities, Case T-30/89 of 12 December 1991.
[4] Northern Pacific R. Co. v. United States, 356 U.S. 1 of 10 March 1958.
[5] Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 of 27 March 1984.
[6] R. O'Donoghue, A.J. Padilla, The Law and Economics of Article 82 EC, Hart Publishing, 2006.
[7] Treaty on Functioning of the European Union, 1 December, 2007, C83/57.
[8] Sherman Antitrust Act of 1890 as 15 U.S.C.

This analysis is crucial for the assessment whether same factual situations bring the same legal outcome for the undertakings.

Object and Subject of the Research. The object of this thesis is to define the legal concept of tying. The thesis also seeks to analyse the economic rationale behind the tying concepts. The subject matter of thesis is analysis of elements of the tying cases under EU and USA case law in order to understand what causes the different case law in these jurisdictions. Ultimately, the thesis attempts to find out similarities and differences between EU and USA positions in Microsoft case.

Aim and Objectives of the Research. The aim of this thesis is to analyse and define the concept of 'tying' under the EU and USA competition law and to give legal assessment of the tying in these jurisdictions.

This thesis pursuit following aims:

1) To perform a comparative study of the EU competition rules and USA competition rules on tying practices.
2) To define concept of tying and most common types of tying practices in case law.
3) To define and clarify elements of tying abuse under European Union law and United States of America law.
4) To provide comparative analysis in the light of tying elements of Microsoft tying abuse.

Defending statement (hypothesis). The different outcome in EU and USA case law in tying practices occurs not because of different elements of tying, but because of the approach of the courts while assessing the tying cases.

Methods of the Research. In order to implement the aims of this thesis following methods are used:

1) Method of Systematic Analysis. Systematic Analysis allows properly analyse the relevant material for the thesis laws and case law. In addition to that, this method allowed revealing relationship between Article 102 (d) of the TFEU and Section 3 of the Clayton Act (legal assessment through restrictive agreement of the tying in USA can have relevance to the collective dominance in EU under Article 102 of the TFEU).
2) Historical Method. This method is applied to analyse the evolution of the tying practices before and after the Microsoft decision in order to show changes of the dogmatic approach.
3) Comparative Method. This method is used through entire thesis as the tool to identify similarities and differences between EU and USA view on tying.

4) Linguistic Method. Linguistic method allowed understanding and interpreting the legal norms of the competition law provisions.

All methods were applied in complex in order to provide detailed analysis of the subject.

Scientific Novelty an Importance of the Research. The tying practices an abuse of a dominant position in the light of the EU and USA competition law was not analysed in the academic society of Lithuania. The only academic research on the tying in Lithuania was made by Dr. Daivis Švirinas and Dr. Ana Novosad in their Article[9]. Within the EU scholars tying practices was analysed by Robert O' Donoghue, A. Jorge Padilla, Ioannis Lianos, Nicolas Petit, Norman Neyrinck and others.

Author proclaims that this research is necessary for the academic society as it shows modern business practices in the light of EU and USA laws.

Structure of Thesis. The thesis is comprised from introduction in which the scope of the thesis research is provided, four chapters and conclusions. The first chapter focuses on the legal comparison of the EU and USA competition law which is necessary to understand the tying elements in both jurisdictions. The second chapter focuses on the definition of tying as form of abuse of dominant position and provides brief analysis on economic rationale behind tying practices. The third chapter consists from legal assessment of the tying practices under EU and USA law, namely on comparative analysis of the elements of tying practice. The final fourth chapter contains legal comparative analysis of the one most famous tying case in the world - Microsoft tying case which shows us how tying element are assessed in EU and USA. Conclusion contain summary of the results of the thesis research and proven statement. Annexes are added as well in the form of the tying scheme under EU and USA laws.

Delimitations. The focus of the thesis is put on the practice of tying through the EU and USA competition law perspective. The case law of the Competition Council of Lithuania and Lithuanian courts is excluded as no relevant case law exists to date and Lithuanian competition law is based on the EU competition rules.

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 of this thesis is to provide a sufficient legal analysis.

Although tying may be assessed under provisions regulating restrictive agreements and provisions regulating abuse of dominant position in both jurisdictions, in order to maintain the

[9] D. Švirinas, A. Novosad, Tying of Products as a Form of an Abuse of a Dominant Position, Jurisprudence 2010, 2(120), p. 305–323.

theme of the thesis, tying will be analysed only from the point of view of abuse of dominant position. Possibility of a tying arrangement as a restrictive agreement will be only constituted as possible.

Abbreviations

EU – the European Union

USA– the United States of America

TFEU – Treaty on the Functioning of the European Union

TEU – Treaty on European Union

CJEU – Court of Justice of the European Union

GC – General Court

CFI – Court of First Instance

Supreme Court – Supreme Court of the United States of America

Court of Appeals – Court of Appeals of the United States of America

Commission – European Commission

WMP – Windows Media Player

PC OS – Personal Computer Operating System

I. European Union Competition Law and USA Antitrust Law- Main Differences and Similarities from Legal Standpoint

Issues of the fair competition in the markets were brought to attention already in ancient Egypt and Greece[10]. Historians claim that the monopolistic practices already existed more than 3,000 years BC[11]. It is believed that one of the first acts prohibiting anti-competitive behaviour was adopted a few centuries BC in ancient Rome and India[12].

Adam Smith in Wealth of Nations[13] wrote about the necessity of regulation of competition in order to achieve fair competition in the market: 'A monopoly granted either to an individual or to a trading company has the same effect as a secret in trade or manufactures. The monopolists, by keeping the market constantly understocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate. The price of monopoly is upon every occasion the highest which can be got. The natural price, or the price of free competition, on the contrary, is the lowest which can be taken, not upon every occasion, indeed, but for any considerable time together. The one is upon every occasion the highest which can be squeezed out of the buyers, or which, it is supposed, they will consent to give: the other is the lowest which the sellers can commonly afford to take, and at the same time continue their business.'

Abuse of dominant position by the undertaking can take various forms. Both EU and USA laws grant us only with the exemplary list of possible abuses, it is up to the competition authorities and the courts to decide whether certain conduct can be constituted as an abuse.

In spite of the early origin of the competition law, the modern competition rules appeared only at the end of the nineteenth century in North America[14].

The Legal Grounds of EU and USA Competition law

Antitrust laws in the USA were passed after industrial revolution, in particular – after the development of a national railway network. These changes transformed the USA union from political to economical union. In the USA legal system there are two basic antitrust laws– the Sherman Act[15] and the Clayton Act[16].

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[10] D. Geradin, A.Layne-Farrar, N. Petit, EU Competition Law and Economics, Oxford University Press, 2012.
[11] Ky P. Ewing, Competition Rules for the 21st Century: Principles from America‘s Experience, Kluwer Law International, 2003.
[12] D. Geradin, A.Layne-Farrar, N. Petit, EU Competition Law and Economics, Oxford University Press, 2012.
[13] A. Smith Wealth of Nations (1776, reprinted Penguin 1979).
[14] Canada and USA according to the N. Petit were the first countries where modern competition law appeared.
[15] Sherman Antitrust Act of 1890 at 15 U.S.C.
[16] Clayton Antitrust Act of 1914 at 15 U.S.C.

Sherman Act was passed on 2 July 1890. The purpose of this legal act was 'to protect the consumers by preventing arrangements designed, or which tend, to advance the cost of goods to the consumer'[17].

It was the first Federal statute (actually it was the one of the first[18] competition law legislation at that time) to limit cartels and monopolies. Today it still forms the basis for most antitrust litigation by the United States Federal Government.[19]

EU competition policy was adopted because of economic integration. Europe introduced competition law provisions with its founding act, the Treaty of Rome[20]. The encouragement for the draft of the provisions of the competition law within EU arose together with the ideas of united Europe. The famous Spaak Report[21] among other things expressed concerns relating to the loss of competitive position of the European countries to the USA production. Spaak Report foresaw the importance of competition rules as a necessary element of the common market[22].

Competition policy of EU differs significantly from the traditional policies of the original six Member States. At the time EU did not have any national competition law provisions which could be grounds for EU competition provisions[23].

The question, why EU did not used Sherman Act of the USA as a prototype for the Articles 101 and 102 is discussed widely between competition law scholars. If EU had based its competition policy on USA antitrust law provisions the two most important law jurisdictions for the undertakings in international business would have same grounds and same principles applied. In addition to that, at the time when EU competition law provisions were been drafted, Sherman Act was already in force for a several decades[24] which ensured the efficiency of those provisions. According to the E. Rousseva[25] the reasons why the founding fathers of the EU did not relay on the wording of Sherman Act was the political ones. First, the circumstances adopting the Sherman Act and drafting the EU rules were completely different – Sherman Act was adopted as a response to industrial revolution which led to the emergence of the big corporations in the

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[17] Anti-trust legislation is one of Sherman family legacies, Suntimes News, April 5, 2012, last visited 12/27/2012 7:48 PM at http://beaconnews.suntimes.com/news/sherman/11693517-418/anti-trust-legislation-is-one-of-sherman-family-legacies.html

[18] According to the N. Petit Canada had the first antitrust modern legislation.

[19] Department of Justice information, last visited 12/27/2012 7:52:19 PM at http://www.justice.gov/atr/about/antitrust-laws.html

[20] Treaty establishing the European Economic Community, 25 March, 1957.

[21] Intergovernmental Committee of the Messina Conference, Report by the Heads of Delegations to the Foreign Ministers (Spaak Report) 21 April 1956.

[22] E. Rousseva, Rethinking ExclusionaryAbuses in EU CompetitionLaw, 2010, HartPublishing.

[23] Please note that Germany was the only one country at the time in Europe which had competition regulating legal norms.

[24] E. Rousseva, Rethinking ExclusionaryAbuses in EU CompetitionLaw, 2010, HartPublishing.

[25] Ibid.

USA, while EC treaty was result of a conscious intention to promote the growth of business[26]. Secondly, it would be politically inappropriate for the EU if EC Treaty[27]would reply Sherman Act.

Nevertheless, at the first glance it may seem that competition law of the EU and USA antitrust law are very similar ones. Article 101 of the TFEU prohibits agreements and concerned practices between undertakings which can hinder the competition, while Section 1 of the Sherman Act[28] prohibits agreements which can restrain the trade. The basic legal framework concerning restraints of competition is in principle the same. The difference between EU and USA in regards to the restrains (prohibited agreements) is within the dogmatic approach. EU has possibility of exemption through the justification and the USA has distinguished between per se restrains and rule of reason restrains.

EU and USA competition policy also have same objectives. Both these legal systems in relevance to the competition rules seek to promote the interests of the consumers, to protect free market and to ensure entrance into market for competitors. However, the historical circumstances discussed in the earlier paragraph influenced some differences between these competition law systems. The differences lie in particular in competition law enforcement, policy and legal acts.

Objective of the EU and USA Competition Law

As mentioned before, two main legal acts of the USA competition system are the Sherman Act and the Clayton Act. However, USA competition policy originates from various acts which were adopted at different periods in the USA history, making the goals of the USA competition policy not identical[29].

USA competition policy is considered for protection consumers, however rights of the undertakings to be free of coercion are ensured as well. The other core element of the USA competition system is the economic analysis. USA competition law system is based on economic efficiencies in the market.

Competition law policy of the EU is based on the economic integration of the EU Member States. Competition policy reflects a principle of the necessity of free movement of goods and persons. In comparing the free movement of goods in the USA was ensured through commerce clause of the Constitution of the US.

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[26] Ibid.

[27] Ibid.

[28] Sherman Antitrust Act of 1890 at 15 U.S.C.

[29]Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.

It can be stated that economic analysis in the EU does not play significant role determining the possible abuse. Article 101(3) proclaims that ‘the provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’

As we can see, the exact wording is ‘which to improving the production or distribution of goods or to promoting technical or economic progress’[30], which perfectly shows that economic analysis in the EU competition law does not have ‘deciding voice’ when it comes to the infringement of competition rules.

Similarity of these two jurisdictions of the competition law is that they both claim that they have wide international reach. One of the most adequate proofs of that is the Hoffmann-LA Roche[31]case. The case was price-fixing cartel which had negative effects on the USA market. After undertaking was fined, he ‘returned’ to the USA for trial.

Today it is even more effective as mostly all multimillion corporations are present in the USA market and in the EU market as well thus making competition law violations unable to escape the sentence.

Enforcement System within the EU and USA

If these two jurisdictions systems have similar goals and objectives, when it comes to the enforcement of the competition rules - different approaches exist.

Within EU enforcement of the competition law provisions has been delegated to the Commission.[32] The Commission is responsible for ensuring the application of Articles 101 and 102 TFEU and of investigating suspected infringements of these Articles.[33] Article 105 of TFEU grants the Commission with the investigative powers including the power to carry out dawn raids

[30] Article 101 (3) of the TFEU.
[31] Hoffmann-La Roche & Co. AG v Commission of the European Communities, Case 85/76.
[32] Article 105 of the TFEU.
[33] P. Craig,G. de Burca, EU Law, Oxford University Press, 2011.

on the premises of suspected undertakings and private homes or vehicles of the management of these undertakings.

After the Modernisation Regulation 1/2003[34] the Commission does not have a monopoly in regards to the on enforcement of competition policy. Second amendment of mentioned Regulation is possibility for the private parties to bring suits in national courts. However, despite this requirement under European law to establish an effective legal framework enabling victims to exercise their right to compensation, victims of the European Union competition law infringements to date very often do not obtain reparation for the harm suffered. Therefore, the European Commission has taken a number steps since 2004 to stimulate the debate on that topic and prompt feedback from interested parties on a number of possible options which could enable competition damages actions.

As to the concept of the enforcement institutions in the USA it could be stated that it is similar to EU system as, at a national level competition law is enforced through competition authorities, namely Federal Trade Commission and United States Department of Justice Antitrust Division, as well as private enforcement. The distinction lies within the powers of the private enforcement. In the USA antitrust law cases private civil suits are quite common. They may be brought in states or federal courts.

The legality of the private suits was confirmed by the Supreme Court in the case law[35]: 'every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigour, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation.'

Other distinctive feature of the USA policy enforcement is the sanctions - in the USA, contrary to the EU competition enforcement, not only fines can be imposed but also, criminal liability is in question.

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[34] Council Regulation (EC) No 1/2003 of 16 December 2002, L 1.
[35] Hawaii v. Standard Oil Co. of California. No. 70-49, 1972.

In order to fully understand the exclusivity of tying practices under EU and USA legal acts at this point, it should be underlined that under USA law only Sherman Act imposes criminal sanctions.

The most important outcome of this is that if at first EU and USA have more differences (methodology of assessing cases, sanctions, priorities), if we will speak about tying – this two jurisdictions have more similarities. This will be shown by analysis of tying concept in next chapter.

II. Tying as an Abuse of Dominant Position from Standpoint of the EU Competition Law and USA Antitrust Law

Definition and Types of a Tying Practise

Robert H. Bork[36] wrote[37]: 'Every person who sells anything imposes a tying arrangement. This is true because every product or service could be broken down into smaller components capable of being sold separately, and every seller refuses at some point to break the product down any further.'

Shoes are sold in pairs, hotels offers breakfast with the accommodation, basketball clubs sells seasonal tickets and MacDonald's offers extra value meals[38].

Tying is business practice when an undertaking supplies a product or a service (the tying product) on conditions that the customer purchases other item or service (the tied product) from the supplier as well[39]. This definition was supported by both EU and USA courts in the case law[40]. The outcome of tying arrangement is that two products are sold in one purchase.

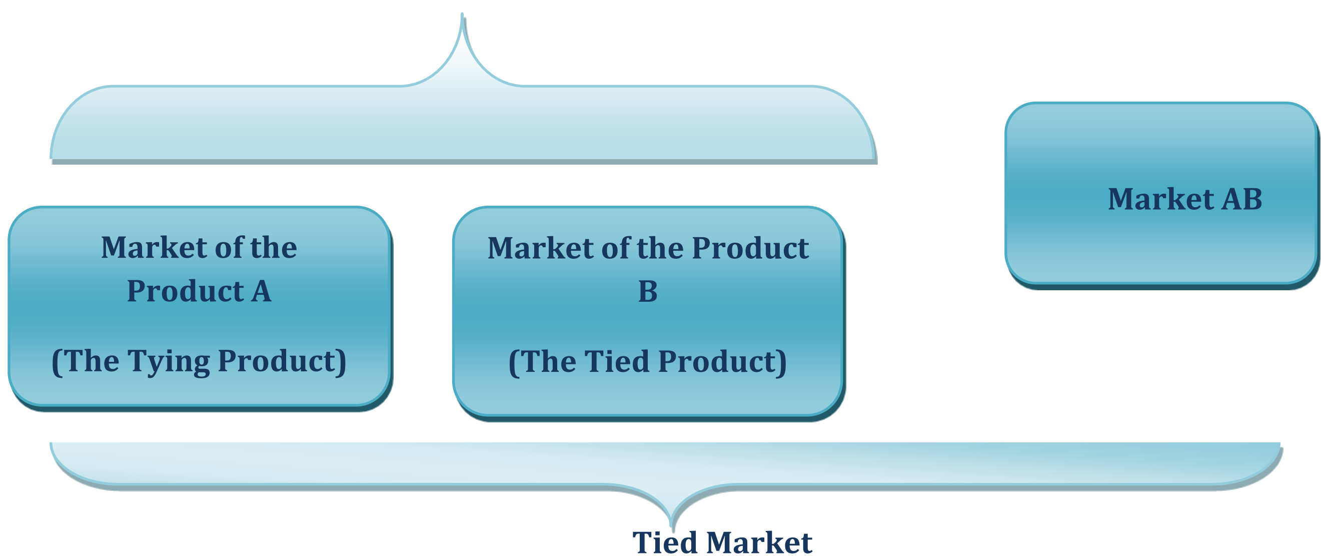

Figure 1.The scheme of a tying practice.

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[36] Author of the The Antitrust Paradox, Simon & Schuster, 1993. Well known competition law scholar, Yale Professor.

[37] Robert H. Bork, The Antitrust Paradox, Simon & Schuster, 1993.

[38] For example - MacDonald's meals which come as a set.

[39] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.

[40] Ibid.

First of all, if we are trying to analyse legal meaning of the tying we should lay down some basic definitions in regards to the tying. In many literature of competition law we can find two concepts – tying and bundling. Tying is very similar to the bundling. Bundling refers to the practice when two products are being sold jointly in portions.

The main difference between tying and bundling is that in case of bundling practice, unlike tying, no element of the 'coercion' or 'force' upon the customer to buy the bundled product is imposed. Other difference between tying and bundling is that the tied product can be sold separately, but not under bundling. In other words the distinction between tying and bundling is more technical.[41]

Moreover, tying is a legal concept whereas bundling is primarily an economic concept.[42] Many competition law authors do not distinct bundling and tying in their works, because legal assessment of these two practices are basically the same[43]. According to the view[44] of the Commission, laid down in Microsoft case, such forms of bundling as pure bundling are synonyms with tying[45].

When it comes to the actual definition of the tying various definitions can be found. The Discussion Paper states[46] that 'tying' is understood as an obligation to purchase of one product or service conditional upon the purchase of another product or service. It is the most basic way for the dominant undertaking to increase its market power in other product markets.

Authors J. Faull and A. Nikpay tying define[47] as follow '[…] a company that holds a dominant position forces its customers to purchase the goods or services for which it is dominant together with other goods or services for which it is not'.

E. Rousseva tying states[48] that 'tying occurs when one product or service is offered on the condition that another product or service is purchased along with the first one.

Other authors – R. O'Donoghue and A. J. Padilla, who analysed tying practices thoroughly in theirs works defined[49] tying 'as a ubiquitous business practices. […] Tying and bundling generally refer to the combined sale of more than one product'.

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[41] E. Rousseva, RethinkingExclusionaryAbusein EU CompetitionLaw, 2010, p. 219.
[42] Ch. Ahlborn, D. Baileyand H. Crossley, An Antitrust Analysis of Tying: Position Paper, GCLC Research papers on Article 82 EC - July 2005, p. 167.
[43] R. Whish, N. Petit, D. Geradin and others.
[44] Microsoft Corp. v. Commission of the European Communities, Case T-201/04.
[45] Ch. Ahlborn, D. Baileyand H. Crossley, An Antitrust Analysis of Tying: Position Paper, GCLC Research papers on Article 82 EC - July 2005, p. 167.
[46] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses,
[47] J. Faull and A. Nikpay, The EC Law of Competition Law, Oxford University Press, 2007, p. 368.
[48] E. Rousseva, Rethinking Exclusionary Abuses in EU Competition Law, 2010, p. 219.
[49] R. O'Donoghue, A. J. Padilla, The Law and Economics of Article 82 EC, 2006, p. 477.

As we can see various authors defines tying in different ways. Only one common element of definition can be named – the selling of the two products jointly.

Author does agree that tying can take form as a refusal to deal in some cases, for example Hugin case[50] when it is easier for the competition authorities prove refusal to deal rather than tying.

When it comes to the forms of tying abuse we can see the true exclusivity of a tying in competition law. As we will see in the further analysis of the case law on both sides of Atlantic, the tying practises can be achieved by imposing the vertical agreement restrictions, through abuse of dominant position by refusing to supply products and through abuse of dominant position by imposing tying arrangements. Tying is one of a few conducts which in competition law can be asses either under restrictive agreements (Article 101 of the TFEU and Section 1 of the Sherman Act) or under abuse of dominant position regulating provisions, namely Article 102 (d) of the TFEU and Section 3 of Clayton Act. The legal assessment of the tying practice depends on the form of tying. Tying practices can take various forms; there are no exhaustive list in the legal acts of EU and USA.

Section 1 of the Sherman Act, and Section 3 of the Clayton Act, deal with the tying practices. A tying agreement is subject to both these provisions and although the wording in the two sections differs, both of them apply a similar substantive standard. Section 1 of the Sherman Act prohibits 'every' agreement in 'restraint of trade', depending upon the 'unreasonableness' of such a restraint. Section 3 of the Clayton Act forbids tying agreements when 'the effect may be to substantially lessen competition or tend to create a monopoly.'[51] At first glance on the two sections, it does not appear that the two acts set a different standard for analysing as to whether a particular conduct is anti-competitive or not.[52]

As mentioned in the previous section, the USA competition policy differs from EU in light of the sanctions which can be imposed. Under Sherman Act 1 Section criminal sanctions are a possibility, however, if we will speak about

The definition of a tying practise is not the only thing that differs in competition law scholars works – the methods of the research differs as well. For example, Faull and Nikpay analyse[53] tying as a type of other exclusionary abuse – refusal to deal. However, such methodology of analysis question tying as a separate type of abuse. In authors view such methodology can be questioned, because tying in modern competition law is a separate type of exclusionary abuse. This statement can be supported in the light of Commission, CJEU and Supreme Court decisions

[50] Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commissionof the European Communities, Case 22/78.
[51] Section 3 of the the Clayton Antitrust Act of 1914 at 15 U.S.C.
[52] U.S. Department of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law, September, 2008.
[53] J. Faull and A. Nikpay, The EC Law of Competition Law, Oxford University Press, 2007, p. 368.

through years. Moreover, one of the famous competition law scholars, who devoted many works to the analysis of exclusionary abuses, E. Rousseva analyse tying as a separate type of exclusionary abuse.

In modern competition law we can find various forms of the tying practice. The competition authorities both in the EU and in the USA clearly distinct[54] two types of the abuse of dominance by tying practices – contractual and technological[55].

One of the forms that tying practices can take is the contractual tying. Contractual tying occurs when the customer who purchases the tying product undertakes also to purchase the tied product (and not the alternatives offered by the competitors)[56]. For example, undertaking 'Pear' produces both computers and computer software. 'Pear' holds dominant position in computer market but the computer software market is competitive. Customers will need to get software if they want to use computer. If 'Pear' refuses to supply computer unless customers purchase software as well that is a contractual tie.

One of the most famous contractual tying cases within the EU is the Hilti[57] case. In case of the contractual tying the theory is that customers would have purchased the tied product from other seller if that had been possible[58]. In other worlds in contractual tying cases tying practice actual restriction is involved which leads to the market foreclosure. It should be noted that some authors[59] note that the tying practice are analogous to the exclusive dealing cases, as the outcome from consumers point of view is the same.

The Eurofix-Bauco v Hilti case dealt with certain power-actuated fastening systems, used in the construction industry. Hilti was the largest producer of nail guns in the Europe (market share above 50%). Nail guns use nails and cartridge strips, which are specifically adapted to a particular brand of nail gun. Hilti had patent protection for its guns, its cartridge strips and its nails[60]. This patent protection had not prevented, however, several manufacturers from producing a range of nails having similar characteristics for specific use in Hilti nail guns. Competing nail manufactures complained to the Commission that Hilti was conducting abusive practices, thus limiting their penetration into the market for Hilti – compatible nails. These

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[54] R. O'Donoghue, A.J. Padilla, The Law and Economics of Article 82 EC, 2006, p. 478.

[55] Some authors use "technical" as a term. Technological tying can be achieved by putting technological restrictions on the product. The example can be the technological tying of the Apple iPod to music purchased from the Apple iTunes Music Store. In other words technological tie is a selling of portioned products jointly.

[56] 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.

[57] Hilti AG v Commission of the European Communities, Case -T-30/89 , 1990.

[58] R. O'Donoghue, A. J. Padilla The Law and Economics of Article 82 EC, Hart Publishing, 2006, p. 492.

[59] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.

[60] Hilti AG v Commission of the European Communities, Case -T-30/89 , 1990.

practices included, among other things, the tying of the sale of nails to the sale of cartridge strips.[61]

In its analysis, the Commission identified three different product markets, namely (a) nail guns, (b) Hilti-compatible cartridge strips and (c) Hilti-compatible nails[62]. Commission took into view that Hilti was dominant in all three relevant markets[63]. The Commission concluded that tying the sale of cartridge strips to the sale of nails constituted an abuse of the dominant position, because these policies leave the consumer with no choice over the source of his nails and as such abusively exploit him. Moreover, these policies had the object or effect of excluding independent nail producers who may threaten the dominant position which Hilti held[64].

One of the most famous cases in the USA considering contractual tying arrangements was the Jefferson Parish case[65]. In this case the USA Supreme Court took a really hostile approach towards the contractual tie. The case was about the tying of hospital and anasthesiological services. East Jefferson Hospital had entered into an agreement with a professional medical corporation, Roux & Associates, to supply the hospital all of its anasthesiological services.

The Supreme Court's approach to the test for 'tying'of two separate products in Jefferson Parish has been reaffirmed later by the Court in Eastman Kodak.[66]

Tying also can take form of other abuse - refusal to supply. In such cases the effect of a tying practice occurs where a dominant undertaking refuses to supply the tying product unless the customer purchases the tied product as well. Competition law scholars state that it is not easy to decide whether a practise constitutes a tying, refusal to supply or both at the same time.

In Hugin[67] case there was no explicit tying practice but the facts of the case show that Hugin refused to supply its spare parts because the undertaking wanted to establish a tying arrangement. In spite the fact the Hugin was a major producer of cash registers the company did not have dominant position in the competitive market of the cash registers. Hugin terminated the supplies of spare parts for its cash registers to a small distributor active in the business of servicing, repairing and reconditioning cash registers. The Commission found that Hugin's spare parts constituted an independent market on which Hugin had a monopoly. This monopoly position in turn conferred on Hugin a dominant position on the market for repair services for the

[61] Ibid.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 1984.
[66] Eastman Kodak Co. v. Image Technical Services, Inc. - 504 U.S. 451, 1992.
[67] Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission of the European Communities, Case 22/78.

performance of which spare parts are needed. Hugin's refusal to supply spare parts was found to result from Hugin's policy keeping the maintenance and repairs services of its own cash register machines for itself, which would have resulted in Hugin de facto tying its services to its cash registers. However the Commission treated such behaviour as refusal to supply. This is because the case might have been more difficult to argue as a tying case because Hugin did not have dominant position in the tying market for cash registers (but on the market for the tied services).
In USA the already mentioned case Jefferson Hospital[68] dealt with the refusal to supply as well. In this case, the Supreme Court made one of the most relevant for the tying cases case law remarks. The Supreme Court stated that 'not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively, a conduct that is entirely consistent.'[69]
Technological tying occurs when the tying product is designed in such way that it only works properly with the tied product (and not with the alternatives offered by the competitors)[70] or where the two products are physically integrated so they can only be sold together. The authorities on the both sides of Atlantic seem to be interested more in the contractual tying than the technological one.[71] This can be explained by the fact that technological tying cases are more difficult as the grounds for case are not entirely legal but the technical one. Sometimes the separation of the product can be difficult. R. O'Donoghue and A. J. Padilla find[72] that 'although both types [contractual and technological] of tying may have similar anticompetitive effects, technological tying may give rise to significant efficiencies, which are likely to benefit consumers and which could not be obtained by other means'.

One of the most famous cases which show us the technological tie in the world is the Microsoft cases in EU and USA. As these cases will be reviewed further on in the thesis, they are not being analysed as an example in this section.

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[68] Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 1984.
[69] Ibid.
[70] Ibid.
[71] This sentence can be upheld by the argument that the contractual tying are more brought to courts than the technological one.
[72] R. O'Donoghue, A.J. Padilla, The Law and Economics of Article 82 EC, Hart Publishing, 2006, p. 478.

The outcome of the tying can be quit severe for the market. Tying practices are being under scrutiny of the competition authorities in the EU and USA because they may have foreclosure effect on the market. If the seller is dominant in the market for the tying product, the customer has difficulty going elsewhere for that product[73].

The Commercial and Economic Rationale for Tying

In order to fully understand the legal assessment and outcome of tying it is optional to analyse commercial and economic rationales behind tying practices.

Tying is makes a good commercial and economic sense for reasons that are not entirely anti-competitive. From strictly economical point of view, selling tied products can benefit both the seller and the customer.

There are many scholar works[74] devoted for the debate of tying economic and commercial benefits. In early tying cases[75] USA Supreme Court took a strict per se illegality position towards tying arrangements. This approach by the USA courts was based on the leverage theory. According to the leverage theory, tying 'provides a mechanism whereby a firm with monopoly power in one market can use the leverage provided by this power to foreclose sales in, and thereby monopolize (dominates), a second market'[76]

However this approach was criticized by later 'the Chicago School'[77] – the critics were based on the statement that a monopolist can earn its monopoly profit only once, and that if it has monopoly power over product A, it cannot increase its profit by leveraging its position into product B.[78] This theory of the Chicago School was persuasive and gave results in tying cases. In the USA courts moved[79] from strict per se rules towards the modified per se rule. Moreover, the evolution of the modification of per se rule in USA went even further – now it is generally recognised that per se illegality is inappropriate for tying: it is now subjected in the USA to the rules of reason set down in Microsoft case[80].

This rules of reason was 'invented' by the economist based on the benefits that tying can bring. It is believed that tying may be used to maintain the efficiency of the tying product – for example

[73] Ibid.

[74] See, eg., Tirole, The Anlaysis of Tying Case: A Primer, Competition Policy International, 2005; Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.

[75] See, eg. United States v. Standard Oil Co. of California, 332 U.S. 301, 1947.

[76] Michael D. Whinston, ,Tying, Foreclosure and Exclusion, The American Economic Review, September 1990, Vol. 80, No. 4, p. 837.

[77] H. Bork, The Antitrust Paradox, Simon & Schuster, 1993.

[78] R. Which, Competition Law, Oxford University Press, 2012, p. 690.

[79] In Jefferson Hospital case the modified per se approach was applied by Supreme Court.

[80] Microsoft Corp. v. Commission of the European Communities, Case 204/7, para 1158.

a piece of material can function only with particular chemical substance which is available only from manufacturer of that piece because of the patent or other important know-how. Another reason for tying practice to be under assessment of the rule of reason is that it can bring economies of scale to be achieved. The example can be found in the business of photocopy machines – a manufacturer which also supplies ink, paper and spare parts will be able to reduce costs if all these items are delivered to customers at the same time, thus tying of mentioned products can lead towards the lower prices for the customers ultimately[81].

However, in recent years some theorists[82] see the vitality of the leverage theory as they seem to stressed out that tying in modern world can lead towards the market foreclosure. This theory is known as the 'post-Chicago' theory. The post-Chicago scholars agree with the major statements made by the Chicago scholars but find the Chicago model not enough general. This is because Chicago model takes only a static perspective of the market and is concerned only with short-run profit maximisation. The post-Chicago scholars do not agree with the Chicago theory that tying used as a price discriminating instrument is beneficial to the consumers.[83]

However the Court and the Commission have not proved receptive to the latter justification for tying. [84]

The USA Supreme Court also is skeptical of the economic benefits of tying. In its case law[85] court stated that 'the basic point is that firm that monopolizes some essential component of a treatment can extract the whole monopoly profit by charging a suitable price for the component alone. If the monopolist gets control of another components as well and tries to jack up the price of that item, the effect is the same as setting as excessive price for the monopolized component.'

III. Legal Approach towards the Tying Practices

Elements of the Tying as an Abuse of Dominant Position under EU and USA law

The grounds for the tying concept as an abuse of dominant position under the EU competition law are laid down in the Guidance Paper[86]:

[81] R. Whish, Competition law, Oxford University Press, 2012, p. 690.
[82] D. Whinston, Tying, Foreclosure and Exclussion, American Economic Review, 1980.
[83] E. Rousseva, Rethinking ExclusionaryAbuses in EU Competition Law, HartPublishing, 2010, p. 241.
[84] Hilti AG v Commission of the European Communities, Case -T-30/89 , 1990.
[85] Schor v Abbott Laboratories No. 05-3344, 7th Circuit, 2006.
[86] 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.

‘48. ‘Tying’ usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis. ‘Bundling’ usually refers to the way products are offered and priced by the dominant undertaking. In the case of pure bundling the products are only sold jointly in fixed proportions. In the case of mixed bundling, often referred to as a multi-product rebate, the products are also made available separately, but the sum of the prices when sold separately is higher than the bundled price.’

As mentioned in the previous chapter prohibition in Article 102 of the TFEU establishes the grounds for the undertakings not to abuse their dominant position. In order to constitute that certain undertaking abused dominant position in the sense of the Article 102 few elements must be established. It should be stressed out that as the Commissions’ approach to the tying practices, it should be noted that tying practices of the Commission regarding tying is not been constrained by the wording of Article 102 (d) of the TFEU. Therefore general approach and principles are being applied when determining the abuse of dominant position.

For tying practices to be prohibited under Article 102 of the TFEU, following five criteria need to be established[87]:

1. Undertaking is dominant in the tying market;
2. The tying and tied products are distinct;
3. Coercion, i.e. conduct forcing customers to buy the tied product together with the tying product;
4. The tying practice is likely to have a market- distorting foreclosure effect;
5. The tying practice is not justified objectively or by efficiencies.

Under the USA legal doctrine tying as an abuse of market power is assessed under the Section 3 of the Clayton Act[88]. Section 3 of the Clayton Act forbids tying agreements when ‘the effect may be to substantially lessen competition or tend to create a monopoly.’

For tying practices to be qualified as a per se tie under USA competition law provisions, according to the case law of the Supreme Court[89]following criteria need to be established:

1. Existence of market power;
2. Existence of separate products;
3. Coercion;
4. Non-existence of ‘not insubstantial’ amount of interstate commerce;

[87] E. Rousseva, Rethinking Exclusionary Abuse in EU Competition Law, Hart Publishing, 2010.
[88] U.S. Department of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law, September, 2008.
[89] Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 1984.

5. Non-existence of objective justification.

From the first glance, in both jurisdictions elements of tying are the same in their content. However differences in level of applicability can be found.

- **Dominant position of the undertaking**

It is the EU's task to guarantee a balanced trade and a fair competition throughout the Union. 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.

Article 102 of TFEU complements the provisions of the TFEU which regulates free competition within the EU by placing certain limitations on the unilateral conducts of the undertakings.

Article 102 of the TFEU states that 'any abuse by one or more undertakings 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: […] (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.'

The first sentence of Article 102 of TFEU does not give us clear vision of the objective of the prohibition. The only clear two requirements are a) dominant position must be within the internal market, and b) the abuse is prohibited only if it may affect trade between Member States[90]. However these requirements are only thresholds for the jurisdiction, their purpose is to clear what norms will be applied – EU or the national. These requirements do not define the elements of a dominant position or an abuse. Instead, they establish the circumstances in which an abuse of a dominant position becomes relevant under EU law and under Article 102 of TFEU.

Following such wording of the Article, establishing dominance is an essential step determining abuse of dominant position. The meaning of the dominant position was clarified by the CJEU in the United Brands case - dominant position is 'a position of economic strength enjoyed by the enterprise which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its

[90] Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, C101/07, 2004.

competitors, customers and ultimately of its consumers.'[91] This early CJEU concept of dominance in the United Brands case[92]implied such thresholds[93]:

a) the control to prevent 'effective' competition being sustained;

b) the control to behave 'to an appreciable extent' independently of its competitors, customers and consumers.

However, during the years this threshold was altered by the CJEU itself. In the Continental Can[94] case CJEU constituted a necessity third threshold – power to control prices[95]. This criterion can be considered as one aspect of the power to behave independently of others.

As to the element of the abuse list laid down in Article 102 does not provide an exhaustive definition of conduct that may be an abuse[96]. This is clear from the text of the provision which follows 'such abuse may, in particular, consist in […]'. Therefore, the CJEU has consistently held that the practices listed in Article 102 of TFEU must be assessed in the context of Article 102 as a whole[97].

In order for Article 102 of TFEU to be applicable to tying practices the supplier must be dominant in at least the tying market[98]. The mentioned Discussion Paper lays down three other cumulative conditions which must be met in order for such practices to be considered abusive under Article 102 of TFEU:

1) the tying product and the tied product must be 'distinct' products;

2) the practice must be likely to have a 'market distorting foreclosure effect';

3) the practice must not be justified objectively or by efficiencies.

Dominance is a precondition for any determination of an abuse under Article 102 of the TFEU. Therefore, the first requirement in the case of an alleged abusive tying is to establish whether undertaking in question has a dominant position in the market for the tying product. An analysis

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[91] United Brands Company and United Brands Continentaal BV v Commission of the European Communities. Case 27/76.
[92] Ibid.
[93] Some Aspects of Abuse of Dominant Positions in European Community Antitrust Law, John Temple Lang, Fordham International Law Journal, 1979.
[94] Europemballage Corp and Continental Can Co. Inc. v Commission, Case 6/72.
[95] United States v. E. I. du Pont de Nemours, 351 U.S.377, 391. 1956.
[96] Europemballage Corp and Continental Can Co. Inc. v Commission, Case 6/72
[97] R. Nazzini, The Foundations of European Union Competition Law -The Objective and Principles of Article 102, Oxford University Press, 2012.
[98] F. Etro, The EU Approach to Abuse of Dominance, U.C.S.C., Department of Economics, ECG and Intertic, 2006.

of dominance is dependent upon prior findings in the relevant markets in which both the tying and the tied product are sold[99].

It should be stressed out that the mare holding of the dominant position is not prohibited under Article 102 of the TFEU. It is believed that dominant undertaking has a special responsibility not to allow its conduct to impair undistorted competition on the common market[100].

If the undertaking is dominant in the market for the tying product, it may render the practice of tying more likely to be liable of distorting competition for the tied product. Customers dependent on the tying product must acquire the tied product irrespective of its merits. This may cause a risk of excluding competition. On the other hand, if there is effective competition in the market of the tying product, customers has alternatives to the tied product and no competitive concerns should arise[101].

It should be noted that among undertakings which do not hold a dominant position, tying is a common practice because existing competition between those undertakings guarantee that only ties generating real benefits for consumers will thrive in the market[102].

- **Market power**

Under USA legal acts the monopolization is not an offense as such, only the abuse of market power is. The long-standing test for monopolization, articulated in United States v. Grinnell Corp.[103]., consists of two elements:

a) the possession of monopoly power in the relevant market; and

b) The wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[104]

Regarding the first element, it is ‘settled law’ that the offense of monopolization requires ‘the possession of monopoly power in the relevant market.’[105] Monopoly power in USA means

[99] A.Jones, B. Sufrin, EU Competition Law: Text, Cases & Materials, Oxford University Press, 2010.
[100] Ibid.
[101] J. Faull and A. Nikpay, The EC Law of Competition Law, Oxford University Press, 2007, p. 368.
[102] Ibid.
[103] United States v. Grinnell Corp., 384 U.S. 563, 1966.
[104] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.
[105] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP - 02-682, 2003.

substantial market power that grants the ability for undertaking to raise prices profitability above those that would be charged in a competitive market.[106]

But, as the second element makes clear, 'the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.'[107] Such conduct often is described as 'exclusionary' or 'predatory' conduct. This element includes both conduct used to acquire a monopoly unlawfully and conduct used to maintain a monopoly unlawfully. A wide range of unilateral conduct has been challenged under Section 2 of Sherman Act, and it often is difficult to determine whether the conduct of a firm with monopoly power is anticompetitive.

Since 1940 case in Supreme Court of International Salt Co. v. United States[108] where court stated that 'it is unreasonable, per se, to foreclose competitors from any substantial market'[109] Supreme Court was consistent with its approach. Only in Jefferson Parish[110] case court acknowledged that 'many tying arrangements are fully consistent with a free, competitive market.'[111] In this case the Supreme Court also focused on the concept of sufficient economic power[112]. The Supreme Court stated that a market share of 30% was not sufficient to constitute the requisite market power. This threshold was set down in order to filter the cases of possible abuse by tying.[113]

- **The tying and tied products are distinct**

The second requirement is establishing whether products A and B are separate products[114]. According to the Commission[115] the core standard while analysing whether two products are separate or integrated is the view of the consumer demand for the tied product (B product)[116]

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[106] United States v. Grinnell Corp., 384 U.S. 563, 1966.
[107] U.S. Department of Justice, Federal Trade Commission, Report on Antitrust Enforcement and Intellectual Property Rights, 2007.
[108] International Salt Co., Inc. v. United States, 332 U.S. 392, 1947.
[109] Ibid.
[110] Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 1984.
[111] U.S. Department of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law, September, 2008.
[112] U.S. Department of Justice, Federal Trade Commission, Report on Antitrust Enforcement and Intellectual Property Rights, 2007.
[113] Ibid.
[114] See Figure 1.
[115] 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.
[116] See Figure 1.

individually, from a different source than for the tying product (A product)[117]. The quite tricky question when analysing tying business practices from competition law perspective is if B is a separate product, then is whether there demand for A product as a separate product. Are there consumers prepared to pay a price to acquire product A without product B attached?[118] If consumers are willing to pay to buy A product without B product, then A and B are separate products. When there is no demand from consumers to buy separate from different sellers, then no competition-related issues under Article 102(d) of TFEU arises. In other words tying occurs when the products are genuinely distinct[119]. One of the strongest indicators that the certain product is a separate one is the undertakings marketing strategy - the undertaking promotes and advertises the tied product as a distinct product or it applies different commercial conditions for the tying and the tied products.

It should be stressed out that these distinct products not necessary belong to the two separate relevant markets. The test of the separate product is merely for the assessment of the tying, and do not depend on the relevant market in the sense of the competition law.

However the separate product test has been criticised. The argument put forward in this regard is that the test does not function because consumer's market understanding changes over time. Separate demand for two different products might fade if tying creates true benefits. It is equally possible that demand for separate components will remain stable if there are benefits in the separate components. For example, car radios are still available separately because there are quality differences in them, and it is not that burdensome to offer them separately. It is important that the choice to buy separately is present and that anti-competitive behaviour does not distort the market[120].

- **Two separate products**

Supreme Court mentions the two separate products in 1953 in the Times-Picayune Publishing Co. v United States case[121].Before Times-Picayune it was believed that 'requirement that a practise involve two separate products before being condemned as an illegal tie was a purely linguistic requirement: unless products are separate, one cannot be 'tied' to other'[122]. Only after more than 30 years the Supreme Court defined the element of separate products in Jefferson

[117] Ibid.
[118] E. Rousseva, Rethinking Exclusionary Abuse in EU Competition Law, Hart Publishing, 2010.
[119] Ibid.
[120] J. Faull and A. Nikpay, The EC Law of Competition Law, Oxford University Press, 2007.
[121] Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 1953.
[122] E. B. Wulff, S. A. McIntosh, The Separate product Test in Franchise Tying Cases: Through the Microsoft Lens of Reason, Franchise L. J., 70, 2002.

Parish case[123] by stating that 'separate consumer demand, rather than a functional relationship is the appropriate means for determining whether one or two products is present'[124].

In other word the Supreme Court stated that the test of separate two products in tying cases depends on there is a separate demand for the tied product. The Supreme Court went even further in Eastman Kodak case[125] analysing the element of separate products. Kodak based its defence on the statement, concluded by the court in Jefferson Parish, that there needs to be separate demand of customers two find two products. However, the Supreme Court find this argument irrelevant by stating, that 'we have often found arrangements involving functionally linked products, at least one of which is useless without the other, to be prohibited tying devices.'[126]

- **Imposition of the obligation**

Coercion is a key element of a tying claim, without coercion a tie could not have an impact on competition. Coercion arises if the dominant undertaking denies customers the realistic choice of buying the tying product without the tied product. It may be contractual, financial through prohibitive discounts or by removing certain benefits, or through technical bundling practices[127].

The language of Article 102 (d) of the TFEU suggests that a component of the abuse of tying is that the customer is coerced into acquiring the tied product by 'making the conclusion of contracts to subject to acceptance by other party of supplementary obligations'.[128]

It should be noted that E. Rousseva comes to conclusion that in classic tying cases[129] coercion is the affirmed condition for the tying arrangement to be assessed under Article 102 of TFEU. However, in author's opinion, coercion is not a standard of proof but more likely a result of the tying abuse. This view was supported by the GC in Microsoft case.

Other authors J. Faull and A. Nikpay state[130] that coercion is an element, but it has three stages, depending on the level of imposition.

The authors J. Faull and A. Nikpay finds that the abuse will occur when the customers of a dominant undertaking are pressured into purchasing two products together against their will.[131]

According to the authors the most extreme degree of the coercion when condition to purchase only ties products is absolute, i.e. there are no possibilities to buy these products separately. The

[123] Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 1984.
[124] E. B. Wulff, S. A. McIntosh, The Separate product Test in Franchise Tying Cases: Through the Microsoft Lens of Reason, Franchise L. J., 70, 2002.
[125] Eastman Kodak Co. v. Image Technical Services, Inc. - 504 U.S. 451, 1992.
[126] Ibid.
[127] Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 1984.
[128] R. Which, Competition Law, Oxford University Press, 2012, p. 694.
[129] E. Rousseva names as classical tying cases such as Hilti, Tetra Pak, and British Sugar.
[130] J. Faull and A. Nikpay, The EC Law of Competition Law, Oxford University Press, 2007, p. 370.
[131] Ibid.

most common example in such type of coercion in the imposition of the obligations in the contract with suppliers. This type of coercion we can see in Hilti[132] case, in which CJEU took very strict approach towards the abuse.

The second degree of the coercion is withdrawal of the benefits for the customers unless they purchase tied products. The most obvious example of such coercion is withdrawal of the guarantee for the product if the customer refuses to buy spare parts from the manufacturer. This type of coercion was analysed by CJEU in Novo Nordisk case[133], where manufacturer of an insulin-injecting pen disclaimed liability for the malfunction of its pen products when they were used together with the complementary products of the competitor.

Third degree of coercion could be imposed on customers through rebates. The most common example of such behaviour undertakings is discounts for the 'combined products'.

- **Coercion**

Coercion as an instrument of proof tying abuse in USA case law for the first time was used by Second Circuit Court in case American Manufacturers[134] case where court held that 'there can be no illegal tie unless unlawful coercion by the seller influences the buyer's choice'. In this case coercion was used as a mean of 'economic power'.[135]

E. Rousseva states[136] that USA courts have problems when it comes to the establishment of coercion. This can be supported by the fact that Supreme Court actually never used word 'coercion' as a necessary element for constituting abuse[137].

One of the most famous antitrust scholars Phillip E. Areeda, Herbert Hovenkamp in USA state[138] that coercion, raises an abstract and extraneus and metaphysical questions about whether the buyer acted willingly or voluntarily while in fact every purchase is voluntary in that buyers prefers in to the other available options.'

Because of such dogmatic approach the USA competition scholars are tend to find coercion not as an element necessary for the establishment of illegal tying, but as a result of such arrangement.

[132] Hilti AG v Commission of the European Communities, Case -T-30/89 , 1990.
[133] J. Faull and A. Nikpay, The EC Law of Competition Law, Oxford University Press, 2007, p. 371.
[134] American Manufacturers Mutual Insurance Co v American Broadcasting-Paramount Theatres Inc., 388, 2nd Cir, 1967.
[135] E. Rousseva, Rethinking Exclusionary Abuse in EU Competition Law, Hart Publishing, 2010, p. 237.
[136] Ibid.
[137] Ibid.
[138] P. Areeda, H. Hovenkamp, Fundamentals of Antitrust Law, Vol II, Aspen Law and Business, 2003.

H. Hovenkamp explains[139] that, because of such dogmatic approach, the courts in USA have not focused on this issue of coercion in tying abuses. Some courts simply assume that consumer exploitation brought about by price discrimination ties is anticompetitive[140].

It should be noted, that H. Hovenkamp, distinguish also, as J. Faull and A. Nikpay in EU, few types of coercion degree. He calls it 'degree of price discrimination'[141]and distinguishes three types of price discrimination. But to the contrast of the J. Faull and A. Nikpay classification of the degree of coercion, the Hovenkamp provides classification not based on the level of extreme forcing to purchase, but on the sellers ability to foresee the price that customers are willing to pay for tied products.[142] For example, H. Hovenkamp calls[143] 'perfect' price discrimination, a seller is able to identify the maximum customer willingness to pay for each unit of each good that it is selling. The example can be the so-called Dutch auction, in which the auctioneer starts with a very high price and then announces lower prices until a bidder accepts.

- **Distortion of competition**

Factual evidence of foreclosure is not necessary as a constituent element of tying under Article 102 (d) of TFEU, but it is enough to show that tying may have a possible foreclosure effect on the market[144].

The Guidance Paper adopts an effects based approach when it comes to tying practices.[145]

An assessment of the risk of foreclosure shall use substantiated evidence to determine whether a negative impact on competition occurs. Numerous factors can be substantiating evidence, such as comparing shares of sales development before and after the tie, effects of previous tying practices by the same undertaking in neighbouring markets, the degree of market power exercised by the dominant undertaking, the customer's dependence on the tying product or the characteristics of the market for the tied product[146].

J. Faull and A. Nikpay state[147] that in order to be considered an abuse, tying must affect the competition in the tied market. In Hilti[148] case the competition was affected because competitors were unable to enter into the market of for Hilti-compatible nails.

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[139] H. Hovenkamp, Tying and the Rule of Reason: Understanding Leverage, Foreclosure, and Price Discrimination, 2011.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] E. Rousseva, Rethinking Exclusionary Abuse in EU Competition Law, Hart Publishing, 2010.
[145] A.Jones, B. Sufrin, EU Competition Law: Text, Cases & Materials, Oxford University Press, 2010.
[146] E. Rousseva, Rethinking Exclusionary Abuse in EU Competition Law, Hart Publishing, 2010.
[147] J. Faull and A. Nikpay, The EC Law of Competition Law, Oxford University Press, 2007, p. 371.
[148] Hilti AG v Commission of the European Communities, Case -T-30/89 , 1990.

Tying by a dominant undertaking may distort competition if the undertakings rely on the dominance in theirs tying product in order to promote sales of the tied product, instead of competing in the tied market. Competition in the market for the tied product will be foreclosed because customers for the tied product that also need the tying product will be driven away from third party suppliers. The more consumers of the tied product are dependent on the dominant product, the more negative impact the tying practice will have[149].

- **Non-existence of 'not insubstantial' amount of interstate commerce**

In USA case law Supreme Court in Jefferson Parish case[150] stated that tying arrangements are unreasonable when a 'not insubstantial' amount of interstate commerce is affected, thus setting difference between EU and USA elements of tying. The fourth element in EU in tying cases is the distortion of the competition. It should be noted that 'substantial' means substantial enough in terms of dollar-volume[151].

The Supreme Court has said in FortnerEnters case that 'whether a total amount of business substantial enough in terms of dollar volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie-in.'[152] In Loew's Inc case, the Supreme Court held that as little as $60,000 was not insubstantial.[153]

In author's view, in spite of the fact that Supreme Court never had stated so, this threshold of non-substantial amount can be compared to EU element of competition distortion. This can be upheld by the Supreme Court's ruling analysing the fourth element – the threshold in Jefferson Parish where court said that 'not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts. Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively—a conduct that is entirely consistent.'[154]

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[149] J. Faull and A. Nikpay, The EC Law of Competition Law, Oxford University Press, 2007, p. 371.
[150] Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 1984.
[151] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.
[152] Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 501,1969.
[153] United States v. Loew's Inc., 371 U.S. 38, 49, 1962.
[154] A. Gupta, Concept of Tying and bundling and its Effects on Competition: A Critical Study of it in Various Jurisdictions, Competition Commission, India, 2012.

Therefore it can be concluded, that fourth element of USA tying test is similar to the EU element of competition distortion.

- **Justification of the tying**

The practice of tying can be justified on legitimate grounds. However, if the Commission manages to prove the existence of the first four elements, the burden of proof for objective justification for the practice of tying shifts to the undertaking[155].

A substantiated justification for the tying practice must outweigh the possible anti-competitive effects of that practice by subjecting the tying practice to a proportionality test[156]. There are three elements to the proportionality test: first, tying must effectively allow the undertaking to achieve the benefits; second, the practice of tying has to be necessary to achieve those benefits and third, it is impossible to achieve the benefits by any less restrictive means[157].

The most obvious way to try to defend tying for the undertaking is the efficiency argument. In other words, undertaking should proof that that it will be more costs, which increase the price for consumers, to make and distribute products separately.

Second argument for the justification can be insurance of the product quality, i.e. guaranty of the products. This argument can have weight for the justification of the tying when manufacturer seeks to provide spare parts in order to ensure quality if its products.

However, there CJEU and Commission never had agreed to this arguments in the past.

- **Existence of objective justification**

To the contrary of EU case law, USA courts have, in certain circumstances, accepted justifications for tying arrangements that would otherwise be caught by the prohibition.[158]

According[159] to the J. Padilla, during the development period of a new industry, a tying arrangement was held to be justified on the basis that selling an integrated system would help in assuring the effective functioning of the complex equipment.[160]

In USA case law we can see the tendency that 'contractual tying' cases are being dealt with more severe and strict approach than the 'technological tying' cases. According to the J. Padilla such situation occurred of the technological prosperity in the USA and the importance of the new age technology to develop.

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[155] J. Faull and A. Nikpay, The EC Law of Competition Law, Oxford University Press, 2007.

[156] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.

[157] Ibid.

[158] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.

[159] Ibid.

[160] Ibid.

In ILC Peripherals Leasing v. IBM[161], for example, IBM"s integration of magnetic discs and a head/disc assembly was not held to amount to an unlawful tying arrangement because of the efficiency that this tying could bring.

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As we can see from the comparative analysis of EU and USA elements of tying, which arose from the case law of both jurisdictions, there are very similar.

Both in EU and USA certain power of undertaking, which enables it to controls the market, must be assessed. The case law on this element also does not provide significant differences.

Second element of both this jurisdictions – existence of two separate products is similar as well. The historic evolution of this element, however, differs, but this does nave any influence on the existing approach.

Third element at first glance is the same. The coercion element exists in both jurisdictions, however, in academic world coercion in EU and USA has different meaning. If in EU coercion is a necessary element, in USA it is believed to be a result of a tying but not a condition.

As stated above, in spite of the fact that at first glance the EU's foreclosure element is not similar to the USA's element of the non-substantial part of amount, the purpose of both this elements is the same - to see whether such arrangement affects market.

And finally, fifth element is a supplementary element to tying test in both jurisdictions. In EU and USA justification in not a necessary element of tying case- it is only a possibility of defence for the undertaking. However, emphasis on the fact that in EU there are no tying cases which would be dismissed on the justification grounds, in the USA we have some examples, especially when it comes to technological ties.

The following chapter is addressed to the analysis of the most famous tying case – Microsoft in both jurisdictions in the light of the stated elements. If elements of the tying test are the same, therefore the decision should be the same as well?

IV. Microsoft Tying Cases

The Microsoft case on the both sides of Atlantic is probably the most famous and important tying cases as abuse of dominant position in the world nowadays. Although it passed over 10 years in both cases from the decisions, still there are widely discussed[162] amongst the scholars of competition law.

[161] ILC Peripherals Leasing Corp. v. IBM Corp., 448 F. Supp. 228, 1978.

[162] Many articles on Microsoft case for this thesis are from years 2010-2012, which is unusual as the decisions were passed in 2001 and 2004.

In the EU, in 2004 the GC analysed tying arrangements of the Microsoft in which huge fine was imposed on the undertaking. However the GC provided a substantial analysis on the possibility of dominant undertakings to enter in tying arrangements.

In USA in 2001 Court of Appeals issued a decision in Microsoft III case[163], in which the court took the efficiency effects of tying into account, adopted a rule-of-reason approach to the analysis of tying cases with respect to computer software platforms.

Microsoft Case in the EU

On 24 March 2004, the Commission concluded by way of decision that Microsoft had violated Article 102 of TFEU by abusing its dominant position in client PC operating systems in two ways. First, it had illegally refused to supply interoperability information[164] which was indispensable for competitors to compete in the work group server operating systems market. Secondly, it had illegally tied its WMP product to its Windows PC OS. In its decision the Commission also imposed a fine of almost EUR 500 m[165].

On 7 June 2004, Microsoft appealed the Commissions' decision to the GC. The GC on 17 September 2007 upheld the Commissions' decision.

In its decision the GC amongst other findings stated that the article 102 does not give an exhaustive list of abuses: 'it must be borne in mind that the list of abusive practices set out in the second paragraph of Article 82 EC is not exhaustive and that the practices mentioned there are merely examples of abuse of a dominant position.'[166]

The GC judgement made clear that in order to find an undertaking engaged in illegal tying, following elements must be found[167]:

- The tying and tied goods are two separate products;
- The undertaking concerned is dominant in the tying product market;
- The undertaking concerned does not give customers a choice to obtain the tying product without the tied product;
- Tying forecloses competition;
- The tie is not objectively justified.

Existence of two products in Microsoft case

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[163] United States v. Microsoft Corp., 254 F3d 34, D.C. Cir., 2001.

[164] L. Rubini, Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case, Edward Elgar Publishing, 2010.

[165] Commission Decision 2007/53/EC, L32/23, 2007.

[166] Microsoft Corp. v. Commission of the European Communities, Case 204/7, para 860.

[167] Ibid, para 862.

Microsoft tried to argue that the Commission failed to establish the existence of two separate products because the alleged tying product (Windows OS PC) and alleged tied product (WMP) constitute a single, integrated product. Microsoft claimed that the WMP is only an integrated feature of the Windows OS. In this respect Microsoft based its view on the example of shoes and shoe laces, laid down in the Vertical Restrains Guidelines[168]: 'Whether products will be considered as distinct depends on customer demand. Two products are distinct where, in the absence of the tying, 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. Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence on the market of undertakings specialised in the manufacture or sale of the tied product without the tying product, or evidence indicating that undertakings with little market power, particularly on competitive markets, tend not to tie or not to bundle such products. For instance, since customers want to buy shoes with laces and it is not practicable for distributors to lace new shoes with the laces of their choice, it has become commercial usage for shoe manufacturers to supply shoes with laces. Therefore, the sale of shoes with laces is not a tying practice.'

Microsoft repeatedly pointed out during judicial and administrative proceedings that there is no evidence that any of its customers want to purchase PC OS without streaming media functionality at issue.[169]

And secondly Microsoft claimed that the Commission's argument is wrong as a matter of principle.[170] Microsoft claimed that even dominant undertakings must be allowed to design their products to meet customers demand and match the supply of the competitors' products,

In its judgement the GC began with stating that what initially appear to be separate products may be regarded as forming a single product over time.[171] The GC also stated that the distinctness of products for the purpose of Article 102 'has to be assessed by reference to customer demand'[172]. Stating that the GC agreed also with the Commission that the reference to 'customer demand' in tying cases meant that there must be separate demand for the tied product (therefore it is irrelevant whether there is also demand for the tying product without the tied product).

[168] Commission Guidelines on Vertical Restrains, C130/01, 2010.
[169] L. Rubini, Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case, Edward Elgar Publishing, 2010, p. 138.
[170] Ibid., p. 140.
[171] Microsoft Corp. v. Commission of the European Communities, Case 204/7, para 913.
[172] Ibid. para 917.

Coercion

In regards to the coercion element, the Microsoft argued that this Commission's argument was incorrectly applied. In Microsoft's view, this element is intended to reflect whether there is a consumer harm, of which there was none because end-users are not required to pay anything extra for the media functionality in Windows. Moreover, the end-users were not forbidden to use other third party media players.[173]

GC, however, concluded that it was irrelevant that Microsoft did not charge an extra fee or force the end-consumers to use only WMP.[174] The coercion, according to the GC decision, developed because customers were unable to purchase PC OS without the WMP[175].

Foreclosure

The one of the most substantial arguments by Microsoft in this case was the element of foreclosure, if to be exact – non-existence of this element. Microsoft argued that this case was not similar to other tying cases because it did not have any foreclosure effects on the market. This statement of Microsoft was supported by the fact that Microsoft did not prevent customers to use another media player of their choosing. In contrast, in Tetra Pak II[176] tying issue involved a contractual obligation. The Microsoft based its defence in this case on this argument pointing out that the Commission itself admitted that the case differed from 'classical' tying cases such as Hilti[177] and Tetra Pak II[178]. The Commission stated that 'while in classical tying cases, the Commission and the Courts considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product, in the case at issue, users can and do to a certain extent obtain third party product for free. There are indeed good reasons not to assume that the tying of WMP constitutes conduct which by its very nature is liable to foreclose competition.'[179] According to such Commission statement we can see that foreclosure theory was not based on the same type direct foreclosure that was found in the cases like Hilti[180] or Tetra Pak[181].[182]

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[173] L. Rubini, Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case, Edward Elgar Publishing, 2010, p. 144.

[174] Microsoft Corp. v. Commission of the European Communities, Case 204/7, para 968.

[175] Ibid., para 961.

[176] Tetra Pak International SA v Commission of the European Communities, Case C-333/94 P.

[177] Hilti AG v Commission of the European Communities, Case -T-30/89 , 1990.

[178] Tetra Pak International SA v Commission of the European Communities, Case C-333/94 P.

[179] Commission decision Case COMP/C-3/37.792 Microsoft, para 841.

[180] Hilti AG v Commission of the European Communities, Case -T-30/89 , 1990.

[181] Tetra Pak International SA v Commission of the European Communities, Case C-333/94 P.

[182] L. Rubini, Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case, Edward Elgar Publishing, 2010, p. 145.

However, in spite of the reassuring arguments of the Microsoft on the non-existence of the element of foreclosure, the GC found that Microsoft incorrectly interpreted the Commission's theory of foreclosure.[183] The GC stated that the Commission's foreclosure theory was consisted from 3 stages[184]:

'In the first stage, it [Commission] establishes that the tied sale ensures that Windows Media Player is ubiquitous on client PCs worldwide.[185]

In the second stage, the Commission examines the effects of that bundling on content providers and software developers, and on certain adjacent markets. The Commission considers, in substance, that in view of the indirect network effects that obtain in the media player market, 'the ubiquitous presence of the [Windows Media Player] code provides [that media player] with a significant competitive advantage, which is liable to have a harmful effect on the structure of competition in that market'.[186]

Last, in the third stage, the Commission examines market development in the light of market surveys carried out by Media Metrix, Synovate and Nielsen/NetRatings. In substance, the data obtained in those surveys 'consistently point to a trend in favour of usage of [Windows Media Player] and Windows Media formats to the detriment of the main competing media players (and media player technologies)'.[187]

The GC stated that Microsoft arguments on the foreclosure are selective and inaccurate. The main argument of the GC was that Microsoft distorted competition on the merits in the market through its tying because it had created a distinctive for consumers and PC manufacturers to use and install alternative media players.[188]Therefore the Microsoft achieved that no third-party media player could achieve such level of market penetration without having the advantage in terms of distribution that WMP enjoyed.[189]

Justification

Microsoft in regards to the justification stated that the decision of Commission directly challenged Microsoft's ability to engage in beneficial conduct. This is because the decision in Microsoft view imposed limits on Microsoft's ability to meet the customers and market's needs. The main Microsoft's argument of the justification of tying was that tie was necessary to

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[183] Microsoft Corp. v. Commission of the European Communities, Case 204/7, para. 1033.
[184] Ibid., para. 978-988.
[185] Ibid., para 979.
[186] Ibid., para 983.
[187] Ibid., para 988.
[188] Ibid., para 1041-1048.
[189] N. Banasevic, P. Hellström, Windows into the World of Abuse of Dominance: An Analysis of the Commission's 2004 Microsoft Decision and the CFI's 2007 Judgment, 2010.

improve technological developments of the Microsoft PC OS and WMP (the so called argument of 'platform efficiencies'). The Microsoft stated that Commission's decision freezes the development of WMP and PC OS combined functionality.[190] However the GC declined this reasoning of Microsoft on the grounds that Microsoft failed to prove this point.

The GC's concussions on the foreclosure are truly significant[191]. The GC found that Microsoft defensive argument of platform efficiencies was not reliable, as Microsoft, in court opinion, did not provided any sufficient proof. Moreover, the GC stated that, 'if costumers were interested in streaming media player, they would obtain it by themselves'.[192]

From the first glance we can see from the GC decision approach, the elements used to asses tying of WMP to Microsoft PC OS are the same that can be found in the Commission's Guidelines or early case law, namely Hilti[193] and Tetra Pak[194]. However, author does agree with the E. Rousseva[195] and LucaRubini[196] that Microsoft case in EU goes further in analysing the elements of the tying abuse.

The most important novelty in the analysis carried out by the Commission and affirmed by the GC is the development of the 'foreclosure effect'[197]. In recital 841 of its decision the Commission recognised that 'there are indeed circumstances relating to the tying of WMP which warrant a closer examination of the effects that tying has on competition in this case. While in classical tying cases, the Commission and the Courts considered the foreclosure effect for competing vendors to be demonstrated by the tying of a separate product with the dominant product, in the case at issue, users can and do to a certain extent obtain third party media players through the Internet, sometimes for free. There are therefore indeed good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition.' Thus, the Commission found that, although there was currently competition in the media player market, the alleged tying arrangement had the potential to foreclose competition. While ones[198] states that the foreclosure element in Microsoft decision in

[190] L. Rubini, Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case, Edward Elgar Publishing, 2010, p. 157.
[191] A. Andreangeli, Tying, techniologicalintegrationandarticle 82: where do we go after Microsoft case?, 2010.
[192] Microsoft Corp. v. Commission of the European Communities, Case 204/7, para 1158.
[193] Hilti AG v Commission of the European Communities, Case -T-30/89 , 1990.
[194] Tetra Pak International SA v Commission of the European Communities, Case C-333/94 P.
[195] E. Rousseva, Rethinking Exclusionary Abuse in EU Competition Law, Hart Publishing, 2010, p. 252.
[196] Ibid.
[197] Ibid.
[198] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.

EU is far too per se, Nicholas Bensasevic[199] finds that GC examined in detail the nature of Microsoft's conduct and the analysed whether this would be liable to have detrimental effect in the market.

In authors opinion the GC decision in this case can be understood as GC step towards to the modernisation of the tying cases within EU. This decision was based not only on the legislative norms but based on the economics approach as well[200].

Microsoft Case in the USA

First of all it should be noted, that in USA Microsoft was accused not of tying media player, but on tying Internet Explorer to the PC OS. Second of all, this case, in spite of tremendous focus of the authorities in USA, was settled, i.e. Microsoft did not suffer any damages in spite of the fact that tying arrangement was found.

In its 2001 decision in Microsoft III, the Court of Appeals, took the efficiency effects of tying into account thus adopting a rule-of-reason approach to the analysis of tying cases with respect to computer software platforms.[201]

Market power

In 2001 the Court of Appeals affirmed the District Court's ruling that there exists market power, as enjoyed by Microsoft because of two reasons, first, that Microsoft enjoys extremely high market shares, which are suggestive of dominance; and second, the fact that there exists, significant barriers to entry. Also, Microsoft was found to have monopoly power in the relevant market.[202]

Separate products

In regards to the separate products in the case, Court of Appeals in Microsoft III pointed out, 'the requirement that a practice involve two separate products before being condemned as an illegal

[199] N. Banasevic, P. Hellström, Windows into the World of Abuse of Dominance: An Analysis of the Commission's 2004 Microsoft Decision and the CFI's 2007 Judgment, 2010.
[200] E. Rousseva, Rethinking Exclusionary Abuse in EU Competition Law, Hart Publishing, 2010, p. 249.
[201] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.
[202] A. Gupta, Concept of Tying and bundling and its Effects on Competition: A Critical Study of it in Various Jurisdictions, Competition Commission, India, 2012.

tie started as a purely linguistic requirement: unless products are separate, one cannot be ‘tied’ to the other.’[203]

While the Supreme Court in Jefferson Parish viewed its separate product test predominantly as an element for competitive harm (on the basis that tying arrangements do not foreclose manufacturers of tied products if there is no consumer demand for the stand-alone tied products in the first place), the Court of Appeals in Microsoft III pointed out that the separate-products test could also be viewed as a proxy for the net welfare effect of a tying arrangement. The reasoning of the Court of Appeals runs along the following lines:

First, consumers value choice: ‘assuming choice is available at zero cost, consumers will prefer it to no choice.’[204] For consumers to relinquish choice and to buy products as a tie, tying must provide efficiencies (e.g. reduced transaction costs or better performance) that compensate for the reduction in choice.

The Court of Appeals also recognised that the per se rule’s ‘direct consumer demand and direct industry custom inquiries are, as a general matter, backward looking and therefore systematically poor proxies for overall efficiencies in the presence of new and innovative integration’[205]. It therefore concluded that there was merit to Microsoft’s broader argument that Jefferson Parish’s consumer demand test would ‚chill innovation to the detriment of consumers by preventing firms from integrating into their products new functionality previously provided by standalone products — and hence, by definition, subject to separate consumer demand.‘[206]
It should be noted that Microsoft claimed that Internet Explorer was giving crucial functionality to its operating system and had every right to include it in Windows under the terms of the 1995 consent decree which allowed addition of functions and features to Windows.[207]
After establishing the existence of two products the Court of Appeals took a revolutionary step and stated, that tying test of five steps is irrelevant to this case and made following conclusion[208]: the view that judicial ‘experience’ provides little basis for believing that, ‘because of their pernicious effect on competition and lack of any redeeming virtue’ a software firm’s decisions to sell multiple functionalities as a package should be ‘conclusively’ presumed to be unreasonable

[203] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.
[204] Ibid.
[205] Ibid.
[206] Ibid
[207] N. Economides, The Microsoft Antitrust Case, Journal of Industry, Competition and Trade: From Theory to Policy, 2001.
[208] A. Gupta, Concept of Tying and bundling and its Effects on Competition: A Critical Study of it in Various Jurisdictions, Competition Commission, India, 2012.

and therefore illegal without elaborate inquiry as to the precise harm that they have caused or the business excuse for their use.'[209] In other words, the conclusion of the ruling is that the existing four point test for the application of the per se rule is inadequate in this case, because its fails to consider the innovative component of tying of Internet Explorer with Windows, and the possible welfare advantages deriving from a close integration of these two products.[210]
However, the Court of Appeals, did not state that elements of tying, set down in Jefferson Parish case were wrong for tying cases, the court only said that those elements are not right for the Microsoft case.

Author must agree with the famous EU competition law scholar Rosa Greaves[211] on view of the outcome of Microsoft case in USA that this case in USA had political element and therefore was settled down without following the elements of tying abuse. R. Greaves makes remark that due to the fact that under USA legal acts on competition law criminal sanctions exists, it is common that courts take a more flexible approach towards the unlawful conduct.

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[209] Ahlborn, Evans, Padilla, The Antitrust Economics of Tying – A Farewell to Per se Illegality, The Antitrust Bulletin/Spring-Summer, 2004.
[210] A. Gupta, Concept of Tying and bundling and its Effects on Competition: A Critical Study of it in Various Jurisdictions, Competition Commission, India, 2012.
[211]Rosa Graves, presentation on the Competition Law Summer School at European Academy of Law, Proffessor at University of Glasgow, at summer school on Competition law, 2012 June.

Comparison of the EU and USA Case Law on Tying in the Light of Microsoft Case

EU competition law uses almost the same analytical framework for tying as USA competition policy. This however does not mean that the EU approach towards tying is substantially the same as the USA approach. As USA competition has clearly demonstrated, the same framework allows for a wide range of different policies.
In the media debates between EU competition authorities and USA competition authorities can be found. USA in all times focused its laws for the protection competition and not competitors, thus blaming EU of the opposite.[212]

As we saw in previous chapter, the elements of tying are the same in both jurisdictions, but the outcome of the Microsoft cases, which are the both tying cases, was different at all. There are a lot of similarities between Article 102 and of Section 1 of the Sherman Act and Section 3 of the Clayton Act. However, there also exist some differences between the two jurisdictions in both sides of the Atlantic:

- The Commission and CJEU had moved away from strict formalism but its determination on elements of tying shows us that EU authorities approach tying practices more hostile. In USA elements of analysis of tying practices through the time were re-interpreted thus shifting from per se illegality towards a modified per se rule and, in certain circumstances, a rule of reason approach.
- CJEU follows its case law and moves forward with very slow pace thus ensuring the gradual evolvement of case law. On the contrary to the EU, it seems that USA courts take more flexible approach to the elements of tying, although they are set down in the settled case law.
- The outcome of the Microsoft cases in both jurisdictions showed us that in spite the fact that elements in their concept are the same of tying abuses; the approach towards tying practices is different. In EU – court followed the consisted case law and followed all elements, and in USA court did not follow consisted case law and took different approach towards tying.
- The test actually applied by the Commission in Microsoft included a fifth condition, i.e. the consideration of objective justifications and efficiencies, which is more characteristic of a rule of reason analysis.

[212] E. M. Fox, We Protect Competition, You Protect Competitors, World Competition 2, 2003.

Conclusions

Summing up the completed analysis of the tying concept within the EU and USA, in authors view, it can be stated that the different outcome in EU and USA case law in tying practices occurs not because of different elements of tying, but because of the approach of the courts while assessing the tying case. Following concluding remarks are constituted:

1. The aim, objective and legal grounds of the European Union and United States of America competition policy have the same objectives such as to protect and promote free competition in the market and ensure that all competition restrictions would be punished. The enforcement system, however is different, European Union has strict limitations when it comes to the enforcement of competition policy and rights of competition authorities, and in United States of America enforcement of the competition policy can be carried out by more subjects, i.e. by private persons. Moreover, United States of America courts can impose criminal sanctions for the breach of competition rules under Sherman Act.
2. In both jurisdictions tying can be assessed either under legal acts regulating restrictive agreements, or under legal acts regulating unilateral conducts of the undertakings. However, differences in the applying of these provisions seem to appear in both of these jurisdictions. Authorities, in both jurisdictions choose to apply this provisions towards tying practices on different grounds – in the EU Commission seems to have strict rules when it comes to the competition policy and appliance the TFEU provisions while in the USA authorities seem to have more flexible policy when it comes to the choice of the provision on which grounds tying will be assessed.
3. Both in the European Union case law and in the United States of America case law tying concept is based on the commercial rationale of the undertakings to promote their products. Authorities and legal scholars in both these jurisdictions acknowledge the relevance of the economic arguments in tying practices.
4. Tying in both jurisdictions is understood as a business practice which can have both positive and negative effects on the market. For tying to be assessed as an abuse of dominant position the producer with strong market power in tying market must tie two separate products that and force customers to buy only the tie products together, without any options to buy one of the product separately.
5. In spite of the fact that approaches in case law differs and at first glance one of the element of tying is different, namely the foreclosure effect in the market, it could be

stated that only the wording of the definition of element is different, but in their concept elements in both jurisdictions are the same, namely:

- Market power in the tying market;
- Existence of two separate products;
- Coercion to purchase those products together;
- Distorting foreclosure effect;
- Non-existence of the objective justification.

6. The different outcome of the Microsoft case in both jurisdictions shows us, that despite the fact that in both jurisdictions the elements of tying are the same, the approach towards tying practices depends on the courts position as well.
7. European Union General Court looked at Microsoft case in more strict approach, thus ensuring continuances of previous case law of European Union. In it clear that European Union competition authority and courts follow strict wording of the Treaty on the Functioning of the European Union and other legal acts, thus ensuring consistent case law and functionality of the principle of equality. In the United States of America Court of Appeals looked at Microsoft case in more flexible case, thus breaking the settled case law of the United States of America tying cases traditions. Court of Appeals did not follow legal assessment of the tying elements set down in earlier case law and conducted separate analysis, which led to the Microsoft partial winning.

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Summary

Abuse of Dominant Position: Abusive Tying Practices under European Union and United States of America Competition Law

This thesis deals with abusive tying practices and its concept under European Union law and United States of America law. Author tries to define concept of abusive tying practices and find necessary elements for legal assessment of tying. Moreover, author carries on the comparative analysis of the Microsoft tying cases in European Union and in United States of America, in order to find whether same elements of tying practices conditions the same outcome in the case law.

Tying is considered to be ubiquitous business practices which came to light in 20th century, when marketing strategies and mass production evolved. In order to fully understand the concept of tying author provides a scheme which shows the movement of good in tying cases.

Author defines the elements of tying necessary for the legal assessment of tying conduct under the Article 102 of the Treaty on the Functioning of the European Union and under Section 3 of the Clayton Act. The research showed that the elements of tying in both jurisdictions are the same, namely: existence of market power, existence of two separate products, coercion, market foreclosure and non-existence of objective justification.

However, the research also showed that in spite the fact that the element of tying in European Union and in United States of America, the outcome of the Microsoft case was different due to the different approach by the courts in both these jurisdictions.

Author in analysis of tying elements also provides a comparative analysis of each of element under European Union and United States of America case law.

Santrauka

Piktnaudžiavimas dominuojančia padėtimi: piktnaudžiaujantys susiejimo veiksmai pagal Europos Sąjungos ir Jungtinių Amerikos Valstijų konkurencijos teisę

Šis darbas nagrinėja piktnaudžiaujančio susiejimo praktiką ir jos sąvoką pagal Europos Sąjungos ir Jungtinių Amerikos Valstijų teisės aktus. Autorė bando nustatyti piktnaudžiaujančio susiejimo veiklos koncepciją ir rasti susiejimo teisiniam įvertinimui reikalingus elementus. Be to, autorė atlieka lyginamąją analizę Microsoft susiejimo bylos Europos Sąjungos ir Jungtinių Amerikos Valstijų teismuose, su tikslu nustatyti ar tie patys elementai abiejose jurisdikcijose lemia tapačią teismų praktiką.

Pabrėžtina, jog susiejimas yra laikomas verslo praktika, kuri atėjo į šviesą 20-atme amžiuje, kai išsivystė rinkodaros strategijos ir masinė gamyba. Norėdama atskleisti susiejimo sampratą, autorė pateikia susiejimo rinkos schemą, kurioje įvardijamą kaip prekės juda esant susiejimo atvejams.

Autorė nurodo susiejimui būtinus elementus teisiniam įvertinimui pagal Sutarties dėl Europos Sąjungos Veikimo 102 straipsnio bei Clayton aktą 3 skyriaus straipsnio. Analizė parodo, jog abiejų šalių jurisdikcijose susiejimo elementai yra tapatūs, būtent: rinkos galios egzistavimas, buvimas dviejų atskirų produktų, prievarta pirkti abu produktus kartu, rinkos uždarymas bei objektyvaus pateisinimo nebuvimas.

Tačiau darbo analizė taip pat parodė, kad, nepaisant to, kad Europos Sąjungos ir Jungtinių Amerikos Valstijų susiejimo elementai yra tapatūs, Microsoft bylos rezultatas skiriasi dėl skirtingų teismų požiūrių abiejose šiose jurisdikcijose.

Autorė, analizuodama susiejimo elementus, taip pat, atlieka kiekvieno elemento lyginamąją analizę pagal Europos Sąjungos bei Jungtinių Amerikos Valstijų susiklostančią teismų praktiką.

Annexes

Annex No 1.

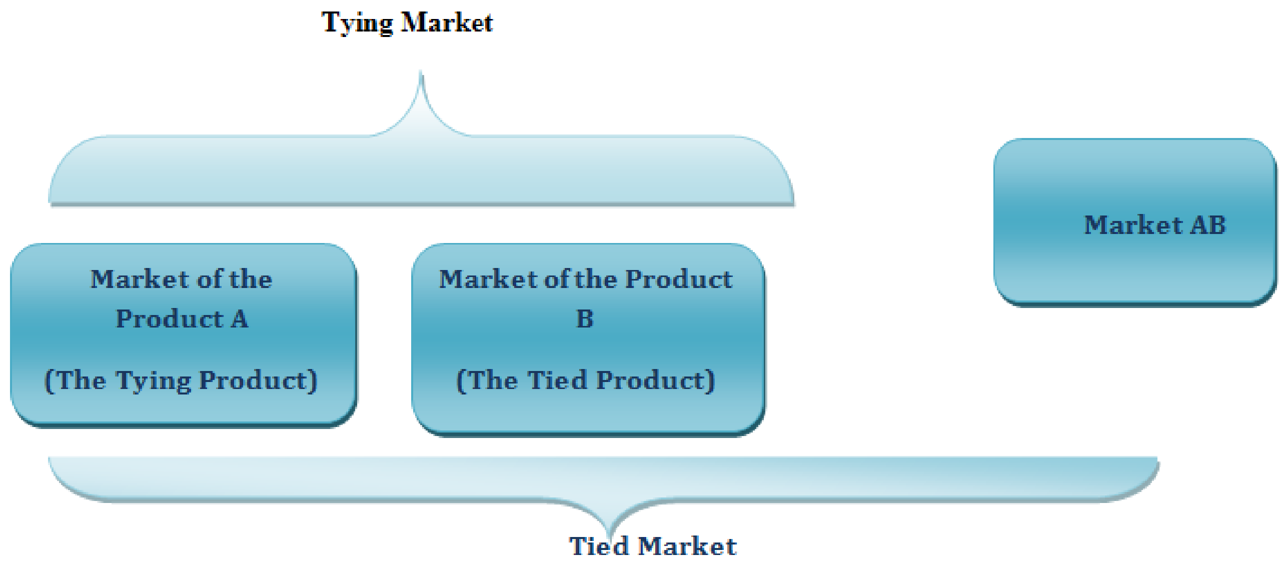

Figure 1.The scheme of a tying practice.