TYING CONCERN UNDER US AND EC MERGER CONTROL

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ABSTRACT

The paper describes under which circumstances, is tying or bundling considered to be a reason to enjoin the proposed merger in the by the antitrust authorities in the United States of America (US) and the European Commission (Commission). This paper identifies through the analysis of the jurisprudence of the European Court of Justice and United States Supreme Court as well as the practices of the respective competition authorities the conditions that give rise to tying and bundling concerns. Although the policy of both jurisdictions substantially overlaps, nevertheless there exist some important differences. The European policy is much clearer and predictable then the policy of the United States. The European policy covers much broader scale of situation that can bring tying and bundling issues and thus parties to the concentration that will have community dimension shall consider present issue under the European rules in the first place.

INTRODUCTION

Even in the almost perfect situation on the market, it is inevitable that over some time one or more companies would be more successful among the competitors and would gain more share on the market and therefore more power and profit. It is only reasonable that such a company would try to expand its business. Although fairly gained dominant position on the market, could sometimes however lead to situations where behavior of these dominant companies would cause great harm for the market and for the customers. This is reason why even free market economies need to be regulated by state or state-like power. The same danger as described above is in the case where one dominant company acquires another one or two or more companies merge. And that is exactly the reason why “a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market“[1] by a respective competition authority.

There are several possibilities what conduct can the concentration adopt which would lead to the impediment of the effective competition. This thesis is focused on the situation when the concentration will be most likely involved in the bundling or tying of its product as its post-merger practice. In modern global world the largest market provide European Union and United States. In order to protect their markets, there was given extraterritorial jurisdiction to their respective competition authorities[2]. Therefore, large companies, even though incorporated only in one of these jurisdictions, in order to operate in these markets, they need to comply with rules of both territories

[1] OJ L 24, 29.1.2004, p. 1–22 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Art. 2 (3)
[2] For more information on antitrust jurisdiction see Holloway Sarah, *International merger control: globalization or global failure?*, DENV.J.INT’L. L.& POL’Y (2006), http://www.accessmylibrary.com/article-1G1-171535717/international-merger-control-globalization.html

In order to explain what needs to be considered in the case of international merger or acquisition with focus on the problem of tying or bundling, this work shows how the treatment of these issues differs in respective legal regimes. It comments on the attitudes towards tying problem and explains under what circumstances is tying a concern in the proposed transaction in respective jurisdictions.

The topic of different treatment of the problem of tying in the US and EU merger regulations has become increasingly relevant and subject to many discussions mainly after European Commission enjoined a merger of *GE and Honeywell*[3] in 2001, while US authorities approved. This case started a great discussion and criticism towards the European Commission. The huge criticism from many commentators against the tying as a concern under the merger control followed especially from US jurisdiction.[4] It is common to claim that "[a]ny rule that condemns a merger, probably efficient, because a tying arrangement . . . is "likely" to occur, is overdeterrent by a wide margin."[5] This thesis claims that as well as European, also United States antitrust authorities recognize tying as a worry in approving the merger.

However, it is not possible for all types of mergers to be involved in tying as well as it is not possible to regulate all types of tying under merger rules. The following chapter will describe the notion and types of tying and bundling. The second chapter will analyze the history and relevance of applicable legislation in the United States and European Union. The third chapter explains how tying and bundling is treated by competition authorities in practice and what

[3] Case COMP/M.2220 General Electric/ Honeywell
[4] See Antitrust Division Submission For OECD Roundtable On Portfolio Effects In Conglomerate Mergers Range Effects: The United States Perspective (2001), http://www.justice.gov/atr/public/international/9550.htm
[5] Hovenkamp Herbert, Federal Antitrust Policy: The Law of Competition and Its Practice, 506 (Hornbook Series, West Publishing Co., 1994).

judicial interpretation was given to these practices, particularly which circumstances will in practice give rise to enjoin the merger on the basis of the tying problem. The last chapter will comment on the main findings, compare the situation in both jurisdictions and thus provide brief guidelines of what to focus on when planning international merger which could affect either United States or European Union or both of these jurisdictions.

1 BASIC TERMINOLOGY

1.1 Tying vs. bundling

Tying or sometimes also called pure or forced bundling occurs when company makes the sale of one product or service, the tying product or service, contingent to the sale of the second, different product or service, tied product or service. The incentive of such behavior called leveraging is to use market power in order ”to increase sales of a product in one market (the ‘tied market’ or ‘bundled market’), by virtue of the strong market position of the product to which it is tied or bundled (the ‘tying market’ or ‘leveraging market’.”[6] It means that those products are not any more offered separately, but only as a bundle. In order to be successful with compelling customers to buy both products and raise anticompetitive concern, the company needs to have sufficient market share in the tying product or service market.

Mixed bundling arises when though products are offered for sale separately but they are also offered together for discounted price. In this scenario, merging companies do not need to have that high market share as in the case of pure bundling in order to increase market share in the second market because they may attract customers with cheaper price.

Technical bundling means adaptation of the tying product that it would be operational either exclusively or more effectively with the tied product or changing it in a way that it would not be operational with other complementary products in the market. Technical bundling is sometimes hard to reach under the Article 102 Treaty on the Functioning of the European Union (hereinafter TFEU), because it may be difficult to discover it or remedy in the future.

[6]OJ 2008/C 265/07 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 22,n1

1.2 Non-horizontal vs. conglomerate merger

Tying is logically concern in the concentration of the undertakings that are not competing. This means that they either operate on different product[7] or geographical[8] market or are on the different level of the industrial chain. There is thus recognized “pure conglomerate merger, [where] the products of the merging firms are not related on either the demand or supply side”[9] and vertical mergers. The vertical and conglomerate merger used to be considered by the US antitrust authorities separately[10], but now they are considered non-horizontal mergers and there is focus on vertical mergers.[11] In Europe, on the other hand, Commission according to its guidelines will have its primer focus with regards to tying concern particularly on conglomerate mergers.[12]

If the tying concerns are to be raised in pure conglomerate, the merging undertakings usually must produce complementary products or services. Sometimes “weak substitutes” are to be considered as complementary products as well.[13] The advantage of conglomerate mergers usually lies in the fact that they produce a huge range of products in their portfolio. Therefore tying and bundling are many times discussed under the “range effects”[14] or “portfolio effects”[15] headings. The threat under these effects is that corporations offering large scale of products or services can afford to sell bundle of their products for much cheaper price, even for the stake of the loss that smaller competitors cannot match. The conglomerates would benefit from such behavior from the sale of bigger volume and thus compensate for the losses occurred.

[7] Case COMP/ M.938 Guinness / Grand Metropolitan OJ L 288/24
[8] Case JV.37 B Sky B / TV
[9] Jeffrey Church, Conglomerate Mergers, 2 Issues In Competition Law And Policy, ABA Section of Antitrust Law, 1503, 1506 (2008)
[10] The US 1968 Merger Guidelines, http://www.justice.gov/atr/hmerger/11247.htm
[11] The US 1997 Merger guidelines, http://www.justice.gov/atr/public/guidelines/2614.htm, section 4
[12] Id. 6 at 22, par 93
[13] T-5/02, Tetra Laval BV v Commission, 192
[14] Id. 4
[15] Infra. 16

Arguably tying concern is hardly an issue in the vertical mergers, nevertheless there are few cases that it occurred. It is important to notice that in the case of vertical concentration it should be the undertaking on the lower position in the chain of production which market share is relevant to raise the tying issue.[16]

1.3 Entrenchment vs foreclosure

Procter & Gamble[17] was the most relevant case for the evolution of the US doctrine of entrenchment. The US Supreme Court affirmed the findings of the Federal Trade Commission that "mergers could be condemned if they strengthened an already dominant firm through greater efficiencies or gave the acquired firm access to a broader line of products or greater financial resources, thereby making life harder for smaller rivals"[18], that could not match this rival's strategy and they would exit the market.

Nowadays, the primer focus of competition authorities in both jurisdictions is on the possible effect of the merger to raise barriers to entry. "In certain circumstances, the[tying] practices may lead to a reduction in actual or potential rivals' ability or incentive to compete."[19] The ways recognized by respective authorities are for example that the merged entity would "use its market power in one market to foreclose competitors in another . . . by conditioning sales in a way that links the products in the separate markets together"[20] or that the merger would

[16]Turner/ Time Warner/TCI (1995) in Eric R. Emch, *"Portfolio effects" in merger analysis: differences between EU and U.S. practice and recommendations for the future*, 55, 79 – 81, 49 The Antitrust Bulletin 1-2 (2004)
[17] F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 87 S. Ct. 1224 U.S. Ohio 1967.April 11, (1967)
[18] Antitrust Division Submission For OECD Roundtable On Portfolio Effects In Conglomerate Mergers Range Effects: The United States Perspective (2001), http://www.justice.gov/atr/public/international/9550.htm, 2
[19] Ec nonhorizontal guidelines
[20] Id. 6 at 22par 95

case that in order to enter the market, one would have to enter on both levels of industrial chain[21].

[21] Id. 11 par4.21

2 MERGER CONTROL LEGISLATION REGULATING TYING

2.1 US MERGER CONTROL LEGISLATION REGULATING TYING

The relevant legislation for the US merger control enforcers is Sherman Act, Clayton act and in some level Merger Guidelines.

2.1.1 Sherman act

First legislation adopted to protect competition in US was Sherman Act. "The drafters of the Sherman Act intended that it would curb the power and monopolistic abuses of the trust that had come to dominate the American economic scene in the late 19th century. They also assumed that the Sherman Act would be largely self-enforcing, because of the general belief that prohibitory legislation would be followed by the business community as a matter of course, with private treble damage actions acting to deter further any potential violators."[22] This assumption had, however, turned out to be wrong. Although the Sherman act made illegal "[e]very . . . combination in the form of trust or otherwise . . . in restraint of trade or commerce"[23] and "monopoliz[ation] or attempt to monopolize any part of the trade or commerce"[24]

In the early period of 20th century the courts inclined to interpret the Sherman act and restraint of trade as per-se rule, meaning that each merger of the competing companies would amount

[22] Earl W. Kintner, Joseph P. Bauer Federal Antitrust Law, 4-9 (Roderick J. Mortimer rev. Vol. 3, Anderson Publishing Company, 1983) in Andersen R. William & C. Paul Rogers III, Antitrust Law: Policy and Practice (3rd ed., Matthew Bender & Co., Inc., 1999).
[23] Sherman Act § 1, 15 U.S.C. § 1
[24] Sherman Act § 2, 15 U.S.C. § 2

the breach of the Sherman Act[25]. That however condemned only horizontal mergers and was not applicable to mergers of non-competitors. This policy is still eminent in US antitrust enforcement where horizontal mergers represent main concern rather than auxiliary non-horizontal mergers.[26] Furthermore in *Sidney Winslow*[27] case made US Supreme Court clear that Sherman Act does not cover merger of companies producing complementary products which raise the problem of tying by stating that "[i]t is as lawful for one corporation to make every part of a steam engine, and to put the machine together, as it would be for one to make the boilers and another to make the wheels."[28] In 1911 the US Supreme Court furthermore incorporated the "rule of reason" test into the Sherman Act[29] making "the reach of the Act with regards to the mergers . . . seriously undermined."[30]

2.1.2 Clayton act

The Congress responded by the adoption of the Clayton Act which in its Section 7 prohibited mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[31] Words "may be" imply that not only factual but also future potential harm to the trade is to be prevented. The aim of the congress was to allow government agency to prevent the restraints of the trade in its very beginning, "[b]ecause a violation of the Sherman Act could not be proved until an actual, completed restraint of trade occurred, many believed that the tactics of the trusts could not be attacked successfully under the provisions of the Sherman Act." [32]

[25] See Northern Securities Co. v. U.S. 193 U.S. 197, 24 S.Ct. 436 U.S. 1904 March 14, (1904)
[26] See Id. 11 where are considered horizontal effects of non-horizontal mergers
[27] United States v. Winslow 227 U.S. 202, 33 S.Ct. 253 U.S. 1913 February 03 (1913), at 218
[28] Id. 27
[29] Standard Oil Co. of New Jersey v. U.S. 221 U.S. 1, 31 S.Ct. 502 U.S. 1911 May 15 (1911)
[30] Langer Jurian, Tying and Bundling as a Leveraging Concern under EC Competition Law, 184 (Sutton Alastair ed., Kluwer Law Int., 2007)
[31] Clayton Act §7, 15 U.S.C. § 18
[32] Id. 22 at 23

The Clayton Act however carried four problems:

1. Clayton Act prohibited acquisition of "the whole or any part of the stock or other share capital"[33] As noted by William R. Anderson and C. Paul Rogers III in Antitrust law: Policy and Practice, only acquisition of the share capital was covered and thus companies very quickly adopted practices to acquire the asset of the company and hence evade the applicability of the act[34]
2. By stating that the illegal effect is the "lessen[ing] the competition between the corporation whose stock is so acquired and the corporation making the acquisition"[35], the Clayton Act excluded from its reach merging entities which were not competitors. It was thus applicable only to horizontal mergers, what was contra the intention of the US Congress.
3. The language of the act mentioned only corporations while on the market, there are other business entities, e.g. partnerships.
4. The Clayton Act conditioned its applicability on the corporations engaged in commerce. Although some company's activity may affect the commerce, if "acquired companies did not participate directly in the sale, purchase, or distribution of goods or services in interstate commerce, they were not 'engaged in commerce" [36] and thus out of the Clayton Act reach.

The first two problems were dealt with by Celler-Kefauver Amendment in 1950, in order to improve the Clayton Act from these problems. The new version of the Section 7 has broadened the statute's scope to the acquisition of "the whole or any part of the assets"[37] and

[33] Id. 31
[34] Andersen R. William & C. Paul Rogers III, Antitrust Law: Policy and Practice, 436 (3rd ed., Matthew Bender & Co., Inc., 1999)
[35] 1914 version Clayton Act §7, 15 U.S.C. § 18
[36] U. S. v. American Bldg. Maintenance Industries 422 U.S. 271, 95 S.Ct. 2150U.S.Cal. 1975.June 24, 1975
[37] Id. 31

deleted words: “between the corporation whose stock is so acquired and the corporation making the acquisition”[38], to capture also vertical and conglomerate mergers. “Most recently, by virtue of the Antitrust Improvement Act of 1980, the Section’s coverage was expanded from corporations to include persons . . . and to activities affecting commerce as well as in commerce.”[39]

2.1.3 Merger guidelines

Merger Guidelines nevertheless did not play vital role in the merger enforcement in the US. As in *Fruehauf Corp.* court observed, “the purpose of [the Merger Guidelines is the] indicati[on] to the business community, legal profession and the public generally when the Department may question the legality of a merger. . . But just as these guidelines do not preclude governmental challenge to a merger which does not fall within all the terms of the guidelines . . . so the guidelines do not establish the illegality of a merger which does fit the criteria used by the Justice Department in deciding whether to challenge a merger. The guidelines, therefore, simply reflect the considered view of the Justice Department as to which mergers are most likely to create a reasonable probability of substantially lessening competition and which may therefore warrant the institution of legal action.“[40] Nevertheless if parties to the proposed transaction want to evade court proceeding, they would be motivated to follow Merger Guidelines and practice of the Federal Trade Commission.

Explicitly was tying, addressed in the 1968 Merger Guidelines of antitrust division of the Department of Justice of the US. According to these guidelines “the Department will ordinarily investigate the possibility of anticompetitive consequences, and may in particular

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[38] Id. 35

[39] Andersen R. William & C. Paul Rogers III, Antitrust Law: Policy and Practice, 439 (3rd ed., Matthew Bender & Co., Inc., 1999).

[40] Fruehauf Corp. v. F. T. C. 603 F.2d 345 C.A.2, 1979 June 28 (1979) at 353-354

circumstances bring suit, where an acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market. Examples of this type of merger include [i.a.] . . . (ii) a merger of firms producing related products which may induce purchasers, concerned about the merged firm's possible use of leverage, to buy products of the merged firm rather than those of competitors".[41] However, the most recent 1984 Merger Guidelines do not address separately neither tying/bundling concerns nor conglomerate mergers, rather are focused on horizontal effects of non-horizontal merger. Despite that tying concerns played role in recent activity of the Federal Trade Commission.[42]

[41] Id. at 20
[42] See e.g. Id. 16

2.2 EU MERGER CONTROL LEGISLATION REGULATING TYING

European Commission recognized the threat that large companies of richer Member States can impose on the smaller companies from the poorer Member States and that it may have adverse effect on common market. The commission addressed this issue “[i]n 1966 the Commission published a memorandum on concentrations, which considered the prospects of controlling those which affected competition at Community level through the use of Articles 81 (current Article 101 of TFEU) and 82 (current Article 102 of TFEU).[43] At that time, however, the Commission considered Article 81 unsuitable as a means of control.”[44] It was so mainly because Commission saw Article 81 as directed at agreements or concerted practices between undertakings,[45] but these remained after the conclusion of the agreement economically independent. As Cook John and Christopher Kerse in EC Merger Control described, merger control is concerned primarily with permanent changes in market structure. This position was ultimately upheld by ECJ in *Philip Morris*[46]. “The Commission challenged a number of merger cases under Article 82EC. It interpreted that provision liberally, preventing, for instance, a dominant undertaking from acquiring a direct competitor.”[47]

This Uncertainty around the regulation of the concentrations finally compelled Member States to adopt the 4064/89 Regulation. This Regulation enjoined a concentration which “creates or strengthens a dominant position as a result of which effective competition would be

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[43]After the Lisbon coming into the force, it change the numbers of the articles, therefore when in citation I refer to Article 81 it is Article 102 and when referring to Article 82 it is Article 102 of the current version; Different situation was for coal and steel industry because ECSC Treaty in its Art 66 contained regulation of concentrations which now, after its expiry are also regulated under 139/2004 Regulation
[44] Cook John & Christopher Kerse, EC Merger Control, 3 (4th ed., Sweet & Maxwell, 2005)
[45] OJ C115/ 2008 TFEU Article 102
[46] Joined cases 142 & 156/84 British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v Commission of the European Communities; Cook John & Christopher Kerse, EC Merger Control 4 (4th ed., Sweet & Maxwell, 2005)
[47] Langer Jurian, Tying and Bundling as a Leveraging Concern under EC Competition Law, 186-187 (Sutton Alastair ed., Kluwer Law Int., 2007).

significantly impeded".[48] That test has been, however, amended when new Regulation 139/2004 came into the force with the "significant impede[ment of] effective competition"[49] test. Under the new Regulation the dominant position is not legal requirement anymore. Dominance is mentioned in the new Regulation only as one example of impediment.

In its ruling in the case *Tetra Laval BV* European Court of Jjustice implicitly confirmed that tying and bundling issues can be addressed under the Merger Regulation. On the other hand Article 102 TFEU cannot be completely disregarded while making assessment of the proposed concentration under the Regulation. The Court here also suggested that if foreseen illegal practice can be caught by the Article 102, the Commission must evaluate whether or how the incentives to employ illegal conduct are diminished by their prohibition by the law.[50] As Langer further notices, problem of Article 102 TFEU is when dominant company is the one which is being acquired and hence the transaction escapes from the reach of its applicability. [51]

Thus tying and bundling practices as a foreseen post-merger conduct that would significantly impede competition, could be reason to block a merger particularly if neither of the merging entities or the acquired undertaking was dominant. Such scenario would fall outside the scope of the article 102 TFEU and thus would have to be particularly within the pre-merger control.

European Commission arguably possesses margin discretion in making its assessment, "that does not mean that the Community Courts must refrain from reviewing the Commission's

[48] OJ L 395 , 30/12/1989 P. 0001 – 0012 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, Art 2
[49] O J L 024 , 29/01/2004 P. 0001 – 0022 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings art 2
[50] T-5/02,Tetra laval BV at 218-219
[51] Id. at 186-7

interpretation of information of an economic nature."[52] The commission's application of the 139/2004 Regulation can be thus reviewed by the ECJ, despite that the commission recent Non-horizontal guidelines have fairly persuasive force.[53] In these guidelines foreclosure effect is addressed as a main problem and tying is under the guidelines dominant concern as a way to reach this anticompetitive situation on the market. Guidelines represent very solid and reliable document particularly because they correctly reflect rulings of the ECJ as described in the next chapter.

[52] C12-03 Tetra laval BV v Commission at 1
[53] Id. 6

3 SUBSTANTIVE ASSESSMENT OF MERGERS UNDER CASE STUDY

3.1 United States approach

3.1.1 US assessment generally

As stated above, the US Supreme Court made clear that Sherman act is not applicable to conglomerate mergers, because it considered unlikely that merger of companies producing complementary products not competing ones, would allow impediment of the competition on their respective markets[54]. The respond of the US Congress in the form of the Clayton Act enabled US antitrust authorities to control concentrations more effectively and block them if anticompetitive behavior could have been foreseen in the future. As US Supreme Court noticed, "The mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency [cannot be avoided]"[55], and hence "effect of acquisition [that] may substantially lessen competition, or tend to create a monopoly"[56] need not be immediate but Clayton Act covers also acquisitions where the substantial lessening of competition can be foreseen in the future.

The most significant anticompetitive behavior, foreseen by US antitrust authorities, which also addressed tying and bundling issues, was under entrenchment theory.[57] This theory stated that "anticompetitive effects may also flow from the acquisition of a company by a firm of significantly greater size and strength. Such an acquisition may "entrench" the smaller target company, making competition by its competitors more difficult, raising barriers to entry, and making it less likely that other companies will enter the target's market. This anticompetitive

[54] Id. 27 at 217-218
[55] Brown Shoe Co. v. U.S. 370 U.S. 294, 82 S. Ct. 1502 U.S. Mo. (1962) at 346
[56] Id. 31
[57] Id. 30 at 188; Id. 17

effect may occur because the acquiring company has greater access to capital or to certain scarce material and personnel resources than the smaller company's competitors. . . Its size may give it the resources and the willingness to withstand temporary losses in certain markets (the so-called "deep pocket")."[58] The "deep pockets" thus enable those mergers to adopt bundling practices and offer e.g. discounted bundle even for the stake of suffering losses in some markets.

Despite this, tying and bundling issues were addressed only rarely whether by antitrust authorities or private complainants and usually not as a main concern.[59] Nevertheless, as correctly expressed by Jurian Langer in his Tying and bundling as a leveraging concern under EC competition law, tying and bundling were accepted, although only in presence of some other motives, as a basis to block the merger.[60]

Even from those few cases can be deduced, though in some case by analogy, some attributes necessary to describe US attitude towards tying under merger control. One may say that on some occasions Courts addressed tying indirectly. If we generalize idea of tying it may be said that it is inducing buyer by strong undertaking to buy second product with the first and hence strengthen position in the second product's market. Merger would be considered of having anticompetitive consequences if it "can afford a dealer, with regard to service, credit and billing, the incentive to treat [tied] . . . products favorably following a merger with him".[61] It is very unlikely that merger would adopt tying practices in industry of highly expensive and technical products and its customer "a corporation considering such a purchase is likely to

[58] Joseph P. Bauer, *Government Enforcement Policy of Section 7 of the Clayton Act: Carte Blanche for Conglomerate Mergers*?, 71 CAL. L. REV. 348, 353-354 (1983).
[59] Id. 30 at 188-189
[60] Id. 30 at 190
[61] United States v. Wilson Sporting Goods Co. 288 F.Supp. 543 D.C.Ill. (1968) at 555

make a rational and well-considered choice as to which [product] . . . best suits its requirements rather than yield to a salesman's blandishments.“[62]

“Supreme court’s decisions since the late 70’s have been far less hostile toward tying arrangement than earlier decisions, and have acknowledged their potential efficiencies. This reduces even further the need to condemn conglomerate mergers simply because they make tying possible.“[63] This attitude lead to reviewing of the 1968 merger guidelines and to the issuance of new, narrower oriented 1984 non-horizontal merger guidelines. In contrary to the 1968 guidelines, US competition authorities now do not consider “conglomerate merger as a separate category of analysis.“[64] The assessment of mergers that are not horizontal is described in the chapter “horizontal effect from non-horizontal mergers” of the 1984 Merger Guidelines and the passage which covered tying was thus deleted from the new Guidelines. That did not mean that tying was not concern for US antitrust authorities in the merger assessment process anymore as some authorities suggest.[65]

The US attitude best describe Areeda and Turner in their Antitrust law treatise, by stating that “serious doubt that very substantial foreclosure would often come about via tying that is too vague to catch the eye or to be proved.”[66] They argue that tying issues shall be regulated ex post and express no concern towards too speculative “undetectable or unreachable tying.”[67] Despite this I agree with E. R. Emch’s statement that ”ex ante enforcement could be called for in cases in which an anticompetitive outcome is particularly clear and immediate at the time

[62] Butler Aviation Co. v. C. A. B. 74 P.U.R.3d 437, 389 F.2d 517 C.A.2, (1968) at 374
[63] Id. 5 at 506-507
[64] Id. 30 at 191
65 Id. 4
[66] Areeda and Turner Antitrust law treatise (1980)¶1134, at 208 cited in Antitrust Division Submission For OECD Roundtable On Portfolio Effects In Conglomerate Mergers Range Effects: The United States Perspective (2001), http://www.justice.gov/atr/public/international/9550.htm
[67] Id. 66 at ¶1109d3, at 41.

of the merger and when the offending behavior would be difficult to detect an/or remedy ex post.“[68] The ignorance towards tying and bundling would not be the best practice to adopt.

3.1.2 *Efficiency justification*

The most common argument in favor of the merger and disregarding tying concerns is the efficiency that merger can bring. The overriding argument that is never used against merger is that consumers would benefit out of tying or bundling.[69] “Apart from the ‘leverage’ possibility, there is unlikely to be any prejudice to rivals at all, for they too can usually arrange packages or one-stop service when buyers demand them. And if they cannot, then the merged firm’s provision of those new services valued by customers is not a social evil but a contribution to their welfare.”[70] The Document on range effects: the United States perspective also stressed the importance of the consumers’ benefit and went even further by suggesting on the basis of the Case law that if consumers could benefit from bundling and tying but competition suffers the proposed merger would not be enjoined. [71] Furthermore “possible efficiencies of tying and bundling practices are recognized and do not weight against the merger as they sometimes do in portfolio effect cases, and instead are used as justification for making the prohibition against bundling as narrow as possible while remedying the feared harm.“[72]

On the other hand, though one may be mislead that efficiency is general defense against the prohibition of the merger by the antitrust bodies. However, efficiency that merger brings for customer cannot be mistaken with efficiencies or better said economies merger brings to

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[68] Eric R. Emch, *“Portfolio effects” in merger analysis: differences between EU and U.S. practice and recommendations for the future*, 55, 76, 49 The Antitrust Bulletin 1-2 (2004)
[69] Id. 68
[70] Id. 66 at ¶1109d, at 36
[71] Id. 4 at 11
[72] Id. 16 at 80

itself. It is indispensable to argue that anticompetitive effect of tying can be justified solely by the fact that offering ties or bundles would give economic efficiency to the merger. "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[73]

3.1.3 Reasonable probability

"The standard under Section 7 [of the Clayton act] is that of reasonable probability."[74] The reasonable probability test is satisfied in the presence of two conditions. Firstly, it would be reasonable probable that tying would occur and secondly, it would also have anticompetitive effects

Being reasonable probable for tying to occur is stronger then just mere possibility. There must exist certain level of certainty that merged entity will adopt tying practices. As Federal Trade Commissioner Mary L. Azcuenaga correctly argued in her dissenting opinion in the Time Warner case, "challenging the mere potential to engage in such conduct appears to fall short of the reasonable probability standard under Section 7 of the Clayton Act. [The federal trade commission does] . . . not seek to enjoin mergers on the mere possibility that firms in the industry may later choose to engage in unlawful conduct. It is difficult to imagine a merger that could not be enjoined if mere possibility of unlawful conduct were the standard. Here, the likelihood of anticompetitive effects is even more removed, because tying, the conduct that might possibly occur, in turn might or might not prove to be unlawful."[75] In doing so it must

[73] Id. 17, at 580
[74] D.M. Raybould, and Alison Firth, Comparative laws of monopolies 142 (1st vol. Graham & Trotman, 1988)
[75] dissenting statement of commissioner Mary L. Azcuenaga in Time Warner Inc., Docket C-3709, http://www.ftc.gov/os/1997/02/c3709azcu.htm

be also paid attention to the discouraging effect of legal consequences on incentives to adopt the tying practices. "[76]

In deciding whether tying in post merger practice would have anticompetitive effect, one has to bear in mind that under US doctrine of "Congressional concern with protection of competition, not competitors and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition".[77] This is interpreted in a way that if merger makes life harder to other competitors it will not be immediately illegal. There must be further element present such as new barriers to entry to that market, etc.

3.1.4 Recent cases

The tying and bundling concerns are not big concern, nevertheless they are not excluded completely from assessment of proposed transaction. Although complementary product of horizontal mergers may be not considered to be disrupting for the competition[78], the complementary products or services in vertical line may still raise tying and bundling concerns. "The Supreme Court has condemned vertical mergers that threaten to lessen competition in upstream or downstream markets."[79]

This position seems to be followed also by the Federal Trade Commission which in the present would challenge merger that would raise entry barriers in a way that would compel potential competitors to enter the market in both levels simultaneously.[80] Such scenario would

[76] Id. 75
[77] Id. 55 at 320
[78] Id. 27
[79] J. Thomas Rosch Commissioner, Terra Incognita: Vertical And Conglomerate Merger And Interlocking Directorate Law Enforcement In The United States, (2009), http://www.ftc.gov/speeches/rosch/090911roschspeechunivhongkong.pdf
[80] Id. 11at4.211

be very likely in the industry where the sale of bundle is typical, such a cable TV, and if the product distributor would have strong market position and it would merge with several of its supplier. The antitrust authorities would foresee that the provider would then “tie sales of its lesser channels to its marquee channels which [distributor] could not do without”[81]

“US authorities have attacked a much more narrow set of concerns involving prospective tying that is through t to raise rivals‘ costs and soften competition in the short run.”[82]

Procter & gamble, even old case, but yet not overruled implies also that deep pockets of acquiring company were concern that it could compete aggressively and sell with price that smaller competitors could not match. This was one of the most important reasons to block the merger. It is understandable that it was subject to many critics, particularly because US Supreme Court states the competition policy as “protection of competition, not competitors”.[83]

[81] Id. 16 at 79
[82] Id. 16 at 86
[83] Id. 77

3.2 EU approach

3.2.1 Generally

The European court of justice described the conglomerate merger as "… a merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers. Mergers of this type does not give rise to true horizontal overlaps between the activities of the parties to the merger or to a vertical relationship between the parties in the strict sense of the term. Thus it cannot be presumed as a general rule that such mergers produce anti-competitive effects. However, they may have anti-competitive effects in certain cases. "[84]

From this definition is obvious that tying concern arises in conglomerate mergers since the concept of tying is based on the situation that the dominant undertaking would leverage its dominant position to the second market. This threat does not exist in the horizontal mergers, since they operate on the same market and hence future bundling of their product would not allow them to leverage their position to second market.

In assessing merger the European Commission may block merger only if it can establish "through convincing evidence and with a sufficient degree of probability that there is a real likelihood that competitors would be foreclosed in the near future if the merged entity were to engage in the alleged anti-competitive practices."[85] The ECJ shares its view with its US colleges on the probability of the foreseen conduct because it ruled that "basis of convincing evidence and with a sufficient degree of probability, not only that any conduct foreseen by it will take place in the relatively near future but also that the conduct will result in the creation

[84] Case T-5/02 tetra laval BV p.142
[85] Id. 30 p 211

or strengthening of a dominant position in the relatively near future"[86] is necessary to enjoin the proposed transaction.

„In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers (3). In practice, these factors are often examined together as they are closely intertwined."[87]

It can be implied from the case law of the Eureopean court of Justice that the following conditions must be present in order to block merger on the grounds of tying or bundling concerns:

1. **Type of product**
2. **Wider portfolio**
3. **Must stock/dominant position**[88]
4. **Time of purchase**[89]
5. **Other reasons**
6. **Same customers**[90]
7. **Efficiencies**
8. **Rivals can also tie**
9. **Buyer's power**
10. **Article 102 and commitments**
11. **Previous practice**

[86] Case T-210/01 GE/Honeywell at 429
[87] Id. 6 at 94
[88] Id. 6 at 99
[89] Id. 6 at 98
[90] Id. 6 at 98

12. **Keep in longer term**

3.2.2 Type of the product – complementary, neighboring and unrelated product

I agree with Günther Hirsch that usually tying is a concern when pre-merger undertakings operate on complementary markets, because "such mergers involve the risk that the merged enterprise forecloses competitors from the market via package offers for products and services.[91] When products are highly complementary, it is very likely that merged undertaking would have incentives towards pure bundling.[92] "The more customers tend to buy both products (instead of only one of the products), the more demand for the individual products may be affected through bundling or tying."[93] Nevertheless if in order to make complementary products compatible with each other, the merged undertaking would have to "involve considerable shifting costs"[94], the tying concerns would be unlikely.

Good example of possibility of tying practices provides case *Astra Zeneca* In situation where merging of the companies of complementary product raises the tying concerns. The situation where products of pre-merged undertakings can be bought separately and customers mix them but also there are on the market premixed products. "The merger of such companies would have an adverse effect on the ability to compete of those competitors who currently have co-operation agreements with the parties or who have an interest in concluding such agreements, as the possibilities to combine with products from other competitors are limited in number and scope. The merged entity has the ability to leverage its position further by means of strategies that are feasible and make economic sense. Such strategies are, for example, the withdrawal of straight strobilurin products (product where undertaking has strong market

[91] Hirsch, Günther. & Säcker, Franz-Jürgen. Et al., Competition law : European Community practice and procedure : article-by-article commentary 2077 (Sweet & Maxwell, 2008.)
[92] Case COMP/M.3732 PROCTER & GAMBLE / GILLETTE p. 117
[93] Non-horizontal merger guidelines p. 100
[94] Case COMP/ M.1736 UIAG / CARLYLE / ANDRITZ p. 13

position), containing only strobilurin active substance, and their replacement by formulated products with substances of other chemical classes within the merged entity's product portfolio. As a consequence, other competitors will lose the opportunities they currently have to sell their non-strobilurin products as a tank-mix partner with AstraZeneca's straight strobilurin." [95]

However, the same scenario stands if the product and service market are weak substitutes[96] i.e. operate on neighboring market. When pre-merger undertakings operate on neighboring markets and one of the undertaking holds one or more of must-stock brand, that means that buyer "could not afford not to stock the brands . . . it would be much easier for [merger] ... to induce [buyers] ... to adopt [its] ... brands as pouring brands (that is, the brand offered when a customer fails to specify a brand by name), thus increasing their sales volumes and public awareness."[97] "[The] leveraging from one market into another is [i.a.] possible when . . . a product in one market and a product in another market are merely technical substitutes. . . . leveraging may be carried out when the products in question are ones which the customer finds suitable for the same end use . . . [and] market investigation confirms the willingness of those [buyers] . . . to use simultaneously both types of [product]."[98]

It is highly improbable that merger of undertaking producing unrelated product would cause tying concerns because it is hard to bundle unrelated products or services, especially when there are different customers group. Though in this situation, the pure bundling or technical bundling is very unlikely, the merged entity can still have incentives to use mixed bundling

[95] Case COMP/M.1806 par.223, 362
[96] T-5/02 Tetra Laval BV Commission at 34
[97] COMP/ M.938 GUINNESS / GRAND METROPOLITAN p. 101
[98] T-5/02 Tetra Laval BV Commission at 196

“to foreclose competitors from access to the retailers‘ limited shelf space or to hinder entry of new products to the market.“[99]

The type of the product is relevant also within the meaning of the value of the product. “It is unlikely that the merged entity would be willing to forego sales on one highly profitable market in order to gain market shares on another market where turnover is relatively small and profits are modest.“[100]

3.2.3 Wider portfolio

With the type of product are closely related portfolio or range effects. The concerns arising from conglomerate mergers exist because these mergers usually have very broad range of product and this enable them to adopt economic strategies their competitors with narrower portfolios cannot compete with. For instance buyer prefers to deal with one party which can supply him with more products because from such dealing can benefit from lower costs.

Other strategy adopted by conglomerates with broad range of products is so called Cournot effect. It is “when producers of complementary goods are pricing independently, they will not take into account the positive effect of a drop in the price of their product on the sales of the other product. Depending on the market conditions, a merged firm may internalize this effect and may have a certain incentive to lower margins if this leads to higher overall profits.”[101]In order to benefit from such situation even more, merger would very likely limit decreased price only to purchases of bundle of both products. When undertaking from ties product will also gain access to other company “deep pockets” and thus can afford compete aggressively even to sell tied product with loss and thus make exit competitors from the market. It must be

[99] COMP/M.3732 PROCTER & GAMBLE / GILLETTE p. 115
[100] Id. 6 at 107
[101] Id. 6 at 117

however foreseen “with a sufficient degree of probability, that the merged entity would have engaged in mixed bundling after the merger.“[102] It is not enough that the proposed merger would have the possibility of introducing bundling practices to establish that it would introduce such practices in the future without any supporting reasons.[103]

Nevertheless, tying concerns are very unlikely when “the product markets in which the portfolio is held widely diverge from each other, thus, making tying sales unprofitable.” [104] On the other hand, if post-merger holds more complete product range of complementary products than its competitors, from indirect narrow assortment supplier would become direct full assortment supplier and this could lead to exit of competitors from the market.[105]

3.2.4 Must stock/dominant position

Although the new wording of Article 2 par. 3 of the 2004 Merger Reg. abandoned the creation or strengthening of the dominant position test and introduced the significant impediment of effective competition test, nevertheless the market would not allow to post-merger undertaking adopt effectively tying and bundling practices without having strong position in one of the markets or having must stock product in its portfolio, as recognized on several occasions by Commission and European Court of Justice (ECJ).[106] It means that even though the dominance itself is not necessary factor, certain market strength must be present. When product is must-stock type, it may prevent its competitors from “obtaining access to the quantity and quality of shelf space“[107] and hence create barrier to competition with the tied product, because “merger would enable parties to impose weak brands on their customers and foreclose competitors from access to retailer’s limited shelf-space. As well as hinder entry of

[102] Case T-210/01 GE/Honeywell v Commission at 462
[103] Supra at 466
[104] COMP/M.1355 NEWELL / RUBBERMAID p.19
[105] COMP/M.1313 DANISH CROWN / VESTJYSKE SLAGTERIER p. 198
[106] COMP/M.1355 NEWELL / RUBBERMAID p.19; COMP/M.3304 GE / AMERSHAM p. 38
[107] COMP/ M.794 - COCA-COLA/AMALGAMATED BEVERAGES GB p.190

new products to the market using bundling practices to oblige their customers to buy weak products together with a strong must stock product (pure bundling) or if they might grant better conditions for the joint purchase of bundled products (mixed bundling)”.[108]

On the other hand, if the product concerned is not must stock, it will not raise tying concerns.[109] Sometimes even if the undertaking has 100% market share in the market of the tying product, it would not be considered to be possible to threaten the competition if the price of the tying product is nominal comparing to the price of the tied product and there would be possible inferior substitute on the market for tying product.[110]

Although it may be in most of the cases that the acquirer is the dominant undertaking, there is no requirement for acquirer to be the dominant undertaking, it may easily be the non-dominant undertaking which acquires dominant and would have incentives to use the position of the market of the acquired undertaking to improve its position on the market.

3.2.5 Time of purchase

It was made clear on several occasions that the time of the purchase of the product is relevant factor in deciding the possibility of tying the products of merged undertakings. When supply of both of the products are contracted for long periods, it does not create possibility of tying if the likelihood that these contract would end at the same time in different market is low.[111] Similar situation arises when one of the products is procured more often and in higher volume and the second product is purchased in longer terms and in lower volume.[112] In latter situation, particularly if most of the buyers already use one of the product on the market, and

[108] COMP/M.3732 PROCTER & GAMBLE / GILLETTE p. 115, 116
[109] COMP/ M.2276 THE COCA-COLA COMPANY / NESTLE / JV p.37
[110] Case T-210/01 GE/Honeywell v Commission at 423
[111] COMP/JV.37 B SKY B/ KIRCH PAY TV par.87,88
[112] COMP/M.3304 GE / AMERSHAM p. 35, 36

are thus not interested in bundle but only in the complementary product and when that one can be obtained from the competitor, it is not possible that customers could be forced to pure bundling or consider mixed bundling[113] The situation on the market can however also be that relevant products are to be used one after another in time and this scenario creates possibility of tying.[114] These conclusions can be however attacked by the argument that legal systems usually recognize the doctrine of the conclusion of the future contract, which could circumvent these ideas.

3.2.6 Same customers

In order for tying to be possible the relevant products of pre-merger undertakings must be logically addressed to the same customers or at least same group of the customers.[115] Particularly "pure bundling is conceivable only where the customers are the same for each product"[116]

3.2.7 Efficiencies for customers

Though arguably controversially, efficiencies for consumer can under specific circumstances be still considered being a reason to block a merger. By the way of an example, consumer would prefer to use only one means of receiving several services instead of the cost or inconvenience of having two means. As a result, such product of dominant undertaking would become standard means to receive different services.[117] And if it is not possible for competitors to provide their services via that means of the dominant undertaking it would lead to creation of dominant position in the second market and eventually even to the foreclosure of the second market. [118]

[113] COMP/M.3304 GE / AMERSHAM p. 43
[114] COMP/M.1681 - AKZO NOBEL / HOECHST ROUSSEL VET p.40
[115] COMP/M.1681 - AKZO NOBEL / HOECHST ROUSSEL VET p. 32
[116] T-210/01 GE/Honeywell at 418
[117] COMP/JV.37 B SKY B / KIRCH PAY TV p. 78, 80
[118] COMP/JV.37 B SKY B / KIRCH PAY TV p. 79

On the other hand if situation on the market evolved to the state that customers demand product packages the post-merger bundling would be justifiable.[119]

3.2.8 Rivals can use the tying practices

The tying concerns are dismissed in market structure with several conglomerates which can offer similarly broad portfolios. It is highly unlikely that if one undertaking would adopt bundling practices the competitors would not respond appropriately. It is rather controversial argument that anticompetitive behavior is not presumed in principle where competitors can also adopt such behavior. Notwithstanding that the argument is valid and upheld on several occasions. [120]

However, the opposite situation is on markets where despite of the operation of more undertakings with broad portfolio, the portfolio of the rivals is weaker then portfolio of post-merger undertaking would be.[121]

3.2.9 Buyers' power

The incentives of adopting tying practices vary besides the strength of the rivals also according to the negotiation position of the potential buyer as the future party to tying agreement. In businesses where "retailers perform an important gatekeeper function for suppliers, since they serve as a one-stop-shop for the parties' products, the tying or bundling would be unlikely. If a retailer refused to carry a brand of the parties, the brand would risk disappearing from the customers' awareness."[122] The same is truth for very sophisticated and technical dealings because such buyers "would only allow the technical bundling of

[119] IV/ M1335 DANA/GLACIER At.15; Id. 6 at 104
[120] COMP/ M.3732 PROCTER & GAMBLE / GILLETTE p. 12; COMP/M.1681 AKZO NOBEL / HOECHST ROUSSEL VET p.98, 103
[121] COMP/M.938 GUINNESS / GRAND METROPOLITAN p. 108
[122] COMP/ M.3732 PROCTER & GAMBLE / GILLETTE p. 125

[products] . . . to take place if it was to their own advantage.“[123] The lack of market power in one of the markets and strong consumer preferences for products of competitors of tying products[124]would be other reason to dismiss bundling or tying concerns. It has been recognized that when for customers price is not relevant factor in purchase of the product, mixed bundling through cheaper bundled offer would not give rise to anticompetitive behavior in post-merger conduct.[125]

3.2.10 Article 102 and commitments

”The Commission [shall] . . . indeed . . . taken into account the deterrent effect which the possibility of penalties imposed for an abuse of a dominant position under Article [102] . . . EC might have on a merged entity . . . The failure to take that factor into account in the contested decision further undermines its assessment with regard to mixed bundling.“[126] Although Commission can address tying or bundling issues in assessing proposed merger, it shall however pay close attention to the fact that these issues can amount prohibited conduct in the form of abuse of the dominant position under Article 102 TFEU and merged entity can be discouraged to adopt such practices accordingly. It does not mean that anticompetitive behavior foreseen and supported by convincing evidence shall be disregarded in the assessment of the proposed transaction if it can be caught later by Article 102 Treaty. Commission must only use it as one of the factors, though very strong one, in the merger evaluation. It is suggested that commission should address mainly mixed bundling because this practice is not forced but nevertheless may lead to impediment of the competition. [127]

[123] COMP/ M.1601 ALLIED SIGNAL / HONEYWELLp.113; 120
[124] Id. 30 at 203-204; COMP/M.1879 BOEING / HUGHES p. 93, 87
[125] COMP/ M.3304 GE / AMERSHAM p. 35, 36
[126] Id. 86 at 468
[127] T5-02 Tetra laval BV v Commission at 218-219

The same is truth when merging undertaking proposes commitments in order to diminish anticompetitive threat it can impose. Commission cannot disregard such commitments without valid reason. [128]

3.2.11 Previous practice

There must be convincing evidence about previous practice. The fact that the merged undertaking was involved only once, even though it had only short period of time to introduce similar bundling practices in past does not constitute sufficient evidence of previous practices as a reason to presume such practices in the future.[129] Court however did not go further to provide some guide what would be sufficient amount of previous practices in order to establish convincing evidence. Since the Commission bears the burden of proof of sufficient probability, it may be assumed that it should be periodical behavior in the past and only harmful behavior.

3.2.12 Keep the anticompetitive sit in longer term

"It can also be noted that the scope for foreclosure tends to be smaller where the merging parties cannot commit to making their tying or bundling strategy a lasting one, for example through technical tying or bundling which is costly to reverse."[130]

[128] Supra at 218-219
[129] Id. 86 at 441
[130] Id.6 at 102

4 CONCLUSION

The paper reveals that tying and bundling issues are and should be generally regulated outside the merger control. However, there are situation which can reasonably with certain level of probability predict the harmful behavior in post-merger conduct of the undertakings, particularly if these are hard to reach after the creation of the concentration. These issues should be therefore also addressed in the time of the assessment of the proposed transaction.

The situation in the US is a little blurred due to the lack of recent case law on the subject matter. Because of no recent case law, there is no possibility to neither overrule old one nor check whether practices of Federal Trade Commerce are correct. The recent cases end up with agreement between the parties of the transaction and the Federal Trade Commission. The idea in the United States is that merger allowing bundling usually creates economic efficiencies and thus should be permitted. This, however, stands only if from those efficiencies benefit consumers. On the other hand, if it is only merger who would economically profit from the tying and bundling practices, its enjoinment would be in place.

It is clear that not mere possibility for merged entity to adopt tying or bundling practices would trigger this concern in its evaluation. There must be some reasonable probability that the undertaking will adopt them and that these will have anticompetitive effect on the market. The reasonable probability would exist according the US antitrust authorities if the entity will have enough resources and sufficient market power to do it. Nevertheless factors indicating that the concentration can be penalized for such behavior tend to diminish this probability.

Neither will be tying or bundling concerns rise if the type of the product is the one that its buyer is knowledgeable and pay a lot of attention to consideration of the purchase of the product or services. The presumption of the employment of the tying or bundling practices also stands according the US authorities if it is typical for the market to sell bundle of product or services in its ordinary performance of business. The relationship between the one or more of the merging corporation and its regular costumers is another important factor considered in US jurisdiction. The US authorities are especially concerned with the foreseen tying and bundling practice that leads to the raise of barriers to entry to the market, particularly by the creation of the market that compels the prospective competitors to the two level industry entries.

On the other hand, European Commission fears of the foreclosure as the harm to the market that tying or bundling can produce. In preventing that, it considers much broader scale of conditions that would predict future harmful tying or bundling practices with sufficient expectation. First of all, commission will examine what is the relation between the products or services of the merging undertakings. If these are complementary the presumption of tying and bundling will be very likely. The transaction provides the merger of wider range of product or services in its portfolio and that would make it attractive seller because of the costs that buyer gains by dealing with only one supplier for different product or service supplies. The product that represents the potential to be the tying product of the merging undertakings must be must stock product because otherwise it would be practically impossible for the undertaking to use tying of unknown products. The European Commission very correctly also focuses on the time and periodicity of the conclusion of the selling contracts of the relevant products or services. Sometimes the tying and bundling concerns are faded by the fact that though the products or services are neighboring, the designated customers' groups are nevertheless different.

The "European regime" recognizes efficiencies that sale of the bundle may provide for the economy. However, under certain circumstances even efficiency for consumers if they would lead to the impediment of competition would be reason to enjoin the concentration. The position of the rivals on the market is very relevant as well. If rivals on the market are capable to respond on the tying or bundling practices of the concentration the concern will not stand. The buyers' power plays also vital role in the Commission's examination. The Commission cannot stay blind towards the proposed commitments of the parties and cannot disregard other factors that would decrease incentives to adopt illegal behavior such as that this would be punishable by the application of the law. If parties to the proposed transaction were in the past involved in tying or bundling practices it will be presumed that they would do it again. But if they were involved only once it would be not considered.

From the above mentioned it may be seen that the policy on tying and bundling exists in both jurisdictions. However, they differ significantly in their scope. US authorities use much narrower scope of situations when they would consider tying or bundling concerns applicable. This work showed that there exist several overlaps in the policy of the US and EU competition authorities. Both jurisdictions demand reasonable or sufficient level of probability that the tying or bundling will occur. As well as US, the EU authorities will fear mostly dominant undertakings. Both authorities also agree on that that if the product is too technical and the buyer is knowledgeable or will invest a lot of money he would not be induced by tying or bundling practices.

On the other hand, there are also extreme contradictions in the respective policies. Although economic efficiencies that merger brings are generally recognized by both competition authorities as a pro-merger attribute, while in the US efficiencies for consumers are overriding pro-merger argument, in the EU they can be even considered to be a one of the reasons to enjoin the proposed concentration.

As present work shows, even if the concentration is planned by US companies that evade from the reach of the 139/2004 Regulation, it does not meant that they should completely disregard tying and bundling concerns but they need to consider narrow tying and bundling policy as applied by the US antitrust authorities. Nevertheless, concentration that falls into the scope of the 139/2004 Regulation must be aware of broader tying and bundling policy applied by the European Commission. It is mainly because concentration may be approved in the US because of the efficiencies that brings for the consumers; it can be nevertheless still blocked by the Commission, possibly because of the same efficiencies.

In the past commission was too harsh towards tying and thus several times unsuccessful arguing tying and bundling at the European Court of Justice. Its position nevertheless changed, about what the adoption of the current non-horizontal merger guidelines are evidence, because these provide coherent and clear policy on tying and bundling issues. The plausible fact about the guidelines is that they bear fair legal relevance because they reflect jurisprudence of the European Court of Justice. In the United States, on the other side, the situation is not really clear. It is because although it may seem that tying is not concern, the Federal Trade Commission time to time still raise, rather abruptly, this issue.

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