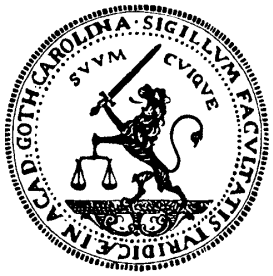

FACULTY OF LAW
University of Lund

Susanne Bidgel

Tying
- Time for a New Assessment

Master thesis
20 points

Field of study
EC-law

Semester
HT 1998

Table of contents

Summary

Tying arrangements have been controversial and regarded with suspicion for a long time both within the EC competition law and within the US antitrust law. Tying is a vertical restraint and can be described as an obligation to accept the purchase of an unwanted or unnecessary product or service in order to be able to purchase a wanted product or service. A tying arrangement presupposes an element of coercion being present between the buyer and the seller and that the purchase involves two distinct products.

Tying arrangements are used by undertakings to maintain control over his product also after entering into a vertical agreement. The upstream undertaking has an incentive to control the downstream undertaking since the latter often transforms the product and/or markets it. By inserting a vertical restraint such as a tying arrangment, the upstream undertaking is able to exert the same control as it had integrated the downstream undertaking. The vertical control is important when explaining why tying is used, but the economical advantages are also prominent. Tying can be used to increase efficiency, create economies of scale and avoid price regulations. It can also be used to ensure the quality of the product and to meter usage of a machine.

The traditional objection to tying arrangements is that they exclude competitors and potential entrants from the tied product market. The foreclosure of potential rivals thereby restricts competition.

However a new approach towards vertical restraints is developing both within the EC and the US. In EC competition law the previous approach has been sharply criticised for being too formalistic and mechanistic. A more flexible analysis, which focuses on the facts of the case and reflects the commercial reality is wanted. Therefore the analysis must view tying arrangements in the agreement's legal and economical context. An

assessment involving several factors must be accomplished to establish whether the tying creates anticompetitive effects and if so, if these can be outweighed by its procompetitive effects.

The previous US approach was very liberal and now a more strict approach is expected to develop. The US and EC systems differs essentially in their underlying objectives and can therefore never become identical. However, the new approaches have in common that they both need to attain a more wellbalanced and flexible analysis of tying arrangements.

2 Abbreviations

CFI	Court of First Instance
EC	European Community
ECJ	European Court of Justice
OECD	the Organisation for Economic Co-operation and Development
US	United States of America

3 Introduction

The EC competition policy concerning tying arrangements is currently changing. Tying has previously been looked upon with great suspicion, since it has been regarded as foreclosing potential rivals on the market, instead of a way of maintaining control after entering into a vertical agreement. With a development on the approach concerning all vertical restraints towards a more extensive economic analysis, it must be questioned if also tying arrangements can generally be justified and accepted.

This examination paper aims at describing tying arrangements in its economical and legal context, by examining the legal regulations concerning tying and the subsequent case law. It will focus on the problems when assessing tying arrangements' legality. Since tying arrangements constitute a subgroup to vertical restraints, it will also include general discussions on vertical restraints. A comparison of the American antitrust laws and case law is included to show another perspective, since the American approach differs from the one within the EC.

The purpose of the examination on the American legal system is not to provide a complete description of the legal regulations and case law. The American system has developed the foundation of the approach on tying and it is included to compose material for a comparison. Since the per se rule and the rule of reason are distinct features of the American system, they are briefly described in this examination paper to provide a basic understanding. However, it is limited to a brief description since the issue could be developed into a separate paper.

4 Tying in general

A basic understanding of its signification is relevant to simplify the understanding of the problems concerning tying arrangements and to place in its context. The European and American definitions are formally different, but due to the differences in the applications they still have the same signification. Tying arrangements constitute part of vertical restraints and discussions concerning vertical restraints can therefore be applied to tying arrangements. The leverage theory constitutes the theoretical background to tying arrangements and has been the foundation of the ECJ's judgements as well as the US Supreme Court's.

4.1 Definition

In the OECD Glossary a tying arrangement is defined as:
"An agreement or practice whereby as a condition of the furnishing of any product, service, patent or technology, or of obtaining the same of preferential terms, a purchaser, lessee or licensee is required to take one or more other products, services or patents or other technology".[1]

This definition deviates from the US Federal Supreme Court's definition, which was stipulated in the *Northern Pacific Case* [2]. In contrast to the OECD definition, the American definition includes so-called tie-outs, which makes its scope more extensive. However, it is of crucial importance to remember that the enumerations in Article 85 and 86 in the Treaty of Rome are not an exhaustive list of which practices that constitute violations. The various practices must be regarded as indicating under which circumstances the Articles are applicable. Tie-outs can therefore be seen as an example of a practice, which is not included in Article 86 d), but still comes within the

[1]OECD Glossary C-10
[2]Northern Pacific Railway Co, V US 356 US 1 5f (1958)

Article's scope as a whole.[3]

A tying arrangement presupposes an element of coercion to be present between a buyer and a seller. The buyer must be required or obligated to accept purchasing unwanted or unnecessary products or services in addition to the original subject of the agreement. Tying must be differentiated from lawful arrangements, which are just examples of normal commercial practices. "Package licences" and "bundling" can be used as examples of arrangements where sellers combine two or more products and offer them to the buyers as a unit at a reduced price. Such conduct is not unlawful as long as the buyers are free to purchase each product alone.[4]

In order for a tying arrangement to be demonstrated, it is crucial to establish that the case involves two distinct products and not a combination of different components in a single product. The Commission has on several occasions[5] in its decisions, refused to accept the undertaking's defence that the alleged tying and tied products were part of a wider product system

4.2 Vertical restraints

Tying arrangements can be described as an example of a vertical restraint. Ordinarily, vertical restraints are considered to include all arrangements between undertakings, which operates at different levels of the manufacturing or distribution chain and have as their objective to restrict the conditions for products to be purchased, sold or resold.[6] Their main purpose is to provide the manufacturer or the distributor with a possibility to maintain control over the product also after they have entered into a vertical agreement. Vertical restraints can therefore be defined as "contractual

[3]Fejö Jens, Monopoly Law and Market, p.297
[4]Ibid, p.287
[5]See for example the Hilti case or the Tetra Pak ll case.
[6]Carlin, Fiona M, "Time for Change?" [1996] 5 ECLR p.283

responses to supply and distribution problems".[7] Although vertical restraints are of major practical importance, since they compose an essential part of the way an undertaking chooses to organise his business, the EC competition policy is still indistinct in this area.

4.3 The leverage theory

The leverage theory has gained significant importance since it has been the foundation for both the European Commission's, the ECJ's and the American Supreme Court's position on tying.

According to the theory, the use of tying arrangements enables an undertaking with monopoly power in one product market to extend that monopoly to any tied product as well to receive additional profits. The extension is possible due to the economic strength from the presumably lawful monopoly, e.g. deriving from a patent.

The theory has been a target of substantial criticism ever since Professor Turner first presented it in 1958. Richard Posner has argued that one of its weaknesses is that it fails to require any proof that it is the tying arrangement, which has caused the monopoly of the tied product.

Another essential weakness of the theory is that it does not give any reasons for why an undertaking having one monopoly would want to monopolise complementary products too. Although it might seem like two monopolies would be more profitable than only one, this is not the case. It must be presumed that the two products in the tying arrangement are to be used in conjunction with each other. Then if the seller is charging a higher price than on the open market for the tied product, the buyer will experience the

[7]Lugard HH Paul "Vertical Restraints under EC Competition Law: A Horizontal Approach?" [1996] 3 ECLR p.170

price difference as an increase in the price of the final product and will demand less and subsequently also buy less of the tying product. This would imply that a monopolist would not obtain any additional profits from monopolising a complementary product by imposing a tying arrangement. However, this must be differentiated from when tying is used as a method of price discrimination, which can increase the monopolist's profits.[8]

[8]Posner Richard A., Antitrust Law, An Economic Perspective, p.172-173

5 Why are undertakings using tying arrangements?

In order to comprehend an undertaking's underlying reasons for including tying arrangements it its agreements, it is useful to see the tying as part of a greater whole. The reasons for undertakings to use tying arrangements are several. Naturally the use can provide the undertakings with economic advantages, such as increasing efficiency, avoidance of price regulations, giving secret discounts. Tying can also be used as a mean to assure the product's quality and meter usage.[9] However, a tying arrangement should also be viewed as constituting part of an undertaking's business strategy and organisation.

5.1 The industrial organisation theory

Every undertaking's main objective is to be profitable by creating value for its customers. The profits are determined by the product's value to customers, the intensity of competition and the bargaining power at different levels in the production chain. Industrial organisation economics is the theory, which explains the relationship between the industry structure, the competitive behaviour and the industry profitability.[10]

In accordance with the theory of industrial organisation, an undertaking's returns are determined by the structure of the industry, which the undertaking falls within. The industry's structure has several key attributes, which affect the undertaking's returns. The existence of barriers to entry, the size of firms, the product differentiation and the elasticity of demand can be mentioned as such key attributes. In order for an undertaking to obtain high returns on its investments, it must create and/or modify the structural

[9] Turnbull Sarah, "Barriers to Entry, Article 86 EC and the Abuse of a Dominant position: An Economic Critique of European Community Competition Law" p.99
[10] Grant Robert M. Contemprorary Strategy Analysis, p.55-57

characteristics of its industry.[11]

But most undertakings do not have the strong market positions, which are needed to accomplish changes in their industry's structure. Instead undertakings' business strategies focus on obtaining a competitive advantage over rivals, otherwise the undertakings would not be able to prosper and survive the competition.

5.2 Vertical control

When an upstream undertaking (for instance a manufacturer) includes a tying arrangement in an agreement with a downstream undertaking (for instance a distributor), he attempts to maintain control over his product. A vertical agreement between two undertakings differs from an agreement between an undertaking and a consumer, since the downstream undertaking not only consume the product, but also often transform and/or market it. This results in that the upstream undertaking has incentives to include certain restraints on the downstream undertaking. Because the profits of the upstream undertaking is affected by the downstream undertaking's further decisions, the upstream undertaking will want to exert control to the extent it can be regarded as feasible. Instead of integrating vertically, the upstream undertaking can by including a vertical restraint like a tying arrangement achieve the same vertical control.[12]

5.3 The transaction cost approach

The limit for the extent of vertical control is reached when it is more efficient for the upstream undertaking to vertically integrate the downstream undertaking.

[11]Barney J.B."Types of Competition and the Theory of Strategy: Toward an Integrative Framework " p.792
[12]Tirole Jean, Theory of Industrial Organization p.167-170

In accordance with Ronald Coase's theory, the limit of an undertaking's size is reached when the costs of organising a transaction equal the costs of realising it on the market. The theory's objective is to explain why undertakings exist. In order to explain this, he introduced the term "transaction costs", which can be described as the costs for being able to realise a transaction on the market. There are costs for obtaining information and finding a partner, contracting, executing and enforcing the transaction. The transaction costs will therefore be decisive for if an undertaking will realise the transaction on the open market by entering into an agreement with another undertaking or if it will realise the transaction within its own organisation.[13]

The transaction cost approach is based on the factors, bounded rationality and opportunism. Bounded rationality refers to economic agents who only are able to receive, store and process a limited amount of information. Opportunism is undertakings' self-interest in obtaining personal advantages. These two factors must be taken into account when an undertaking determines its organisation. It needs to "organise transactions in such a way as to economise on bounded rationality while simultaneously safeguarding the transactions in question against opportunism".[14]

If the transaction cost approach can be accepted within competition law, the analysis of vertical restraints would have to change. Instead of focusing on anticompetitive effects of a vertical restraint, the analysis should assess whether efficiency gains could plausibly be achieved from the arrangement. First then the anticompetitive effects should be investigated. Oliver Williamson contends that only if certain structural conditions are met, anticompetitive effects can arise. If vertical restraints are used as strategic behaviour to disadvantage small competitors and potential entrants or to

[13]Coase Ronald, Företaget, marknaden & lagarna p.14-15
[14]Williamson Oliver, Antitrust Economics: Mergers, Contracting and Strategic Behavior p.126-127

create oligopolistic interdependence, the arrangements may be prohibited.[15]

5.4 Why is tying prohibited?

The traditional objection to tying arrangements is that they exclude competitors and potential entrants from the tied product market and thereby is competition restricted. Tying arrangements' anti competitive effect arises from the exclusion by disadvantaging or foreclosing potential rivals. The exclusion can also occur as a result from weakening rivals or reducing their ability to discipline the exercise of market power. Although tying arrangements can be used implicitly and indirectly, they still restrict competition by their exclusionary effect on competitors.

Another objection has been that a manufacturer might induce a distributor to accept the additional conditions by offering him part of anticipated supracompetitive profits. These supracompetitive profits could be obtained if the manufacturer competitors were excluded from the market and thereby the manufacturer's market power was preserved or even increased. An example of the supracompetitive profits could be charging a high price for distribution services. If the anticipated supracompetitive profits would seem large enough, the distributor might accept the restraint even if it is not efficient.[16]

In addition to the exclusionary effect of tying arrangements, their impact on inter-brand competition is also important. By imposing a tying arrangement in a distribution agreement, it will be more difficult for the competitors in the tied product market to supply the distributors.[17] Within EC Competition law, the Commission has accentuated the need for protecting the alternative

[15] Williamson p.128-130
[16] Melamed A Douglas, "Exclusionary Vertical Agreements" p.2-5
[17] Whish Richard, Competition Law, p.536-537

sources of supply.[18]

Finally, the time factor must be considered when elaborating tying arrangements. If the tying arrangements are viewed from the long run, it has far-reaching anti competitive effects on the free market conditions. When a tying arrangement has been imposed for a long time period, its competitors on the tied product market might give up and stop offering the product.[19]

[18] Carlin Fiona M., p.284
[19] Fejö p.304

6 EC law on tying

6.1 Introduction

Within EC law, the Commission and the ECJ have approached tying with suspicion. This is reflected in both the legislation and the case law.

Both Article 85 and Article 86 of the Treaty enumerates tying as a prohibited conduct and considers it as incompatible with the attainment of the Common Market. The Articles contain the identical wording when describing the prohibited conduct:
"...Making the conclusion of contracts subject of 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".

Since tying arrangements are common in agreements concerning licences of industrial property rights, provisions on tying can be found in the Technology Transfer Regulation 240/96. Despite the legislative measures taken against tying, the case law on tying is very limited. This is a striking contrast to the US, where the case law began to develop around the beginning of our century.

6.2 Article 85 and Article 86 in the EC Treaty

In order to be able to establish that a tying arrangement constitutes a violation of Article 85 (1) (e) or Article 86 (d), it is crucial that the general criteria's of the Articles are fulfilled.

The application of Article 85 (1) presupposes that:
- an agreement, decision or concerted practice can be established

- it may affect the trade between Member States
- its object or effect prevents, restricts or distorts competition.

In the same way, the application of Article 86 presupposes:

- an undertaking having a dominant position
- abuse of its dominant position
- it may affect trade between Member States

There have been discussions among commentators whether an individual tying arrangement can be contrary to Article 85(1). Nobody contests that Article 86 includes individual tying arrangements, but in order to establish a violation of Article 85(1), all its conditions must be fulfilled. One of the conditions set out in the Article is that an agreement, decision or concerted practice is concluded. Now some commentators argue that for Article 85(1)(e) to be applicable to agreements, the agreements' effect is that tying provisions are inserted in third-party agreements. At the same time other commentators disagree and claim that the Article includes agreements which force the buyer to accept future supplementary obligations by the supplier, since these agreements have the same anti competitive effects as an exclusive purchasing agreement.[20]

The purpose of Article 86 is to preserve the contractual freedom of parties, who enter into agreements with a dominant undertaking. It aims at preventing the dominant undertaking from coercing the other contracting party into accepting obligations to purchase unwanted products in addition to the products subject to the agreement. Not only products can be used for tying arrangements; it might as well be services that are used. One example can be that when a machine is bought, the buyer is obligated to accept a maintenance program from the seller.[21]

Tying arrangements are enumerated as an example of practices, which can constitute abuse of a dominant undertaking. If the tied product or service has

[20]Fejö p.297-298
[21]Raybould DMand Firth Alison, Law of Monopolies-Competition Law and Practice in the

no connection with the subject of the contract, the tying is considered as an abuse of dominance. Under Article 86 (d), there is a distinction between the making of the agreement and the purchase of supplementary goods or services. These two are considered as forming two separate transactions and for a tying arrangement to be present, a casual relationship must exist between the two transactions.[22] It is therefore of essential importance to examine whether an objectively justifiable connection between the tying and tied products can be demonstrated. Technical and economical grounds are considered to compose justifications for a tying arrangement.[23]

The connection between the subject of the contract and the tied product can either be due to its nature and/or its commercial usage. In order to determine whether a connection exists or not between the products, two different tests are used under Article 86 (d). Under the first test, the nature of the product is evaluated. This test examines the products' construction, composition, durability and use. If no organic or functional connection between the products can be established, the products are considered as different. In the second test an assessment of the commercial usage takes place. Under this test, the well-established practices in the market at large is decisive, not the practices of the dominant undertaking.[24]

6.3 The Technology Transfer Regulation 240/96

Provisions on tying arrangements are a natural part of this Regulation, since they are commonly found in licensing agreements. On April 1,1996 the Regulation entered into force and replaced both the Patent Regulation [25] and

---

USA,EEC,Germany and the UK, p.345
[22]Fejö p.296-297
[23]Green, Nicholas p.593
[24]Raybould and Firth p.345
[25]Regulation 2348/84 on patent licensing agreements

the Know How Regulation [26]. This block exemption is an instrument within the Community's competition policy, which aims to enhance the distribution of know-how and to promote the development of technically improved products.

In comparison with the former Patent Regulation, the present Regulations has involved some alterations. In the Patent Regulation, tying was white-listed when it was necessary to ensure technically satisfactory products [27]. In order for the Commission to accept a tying arrangement, no other sources of supply were to be available. But the including of tying on the black list circumscribed this Article's scope. If the tying resulted in that a licensee had been induced to accept unwanted products or services, the block exemption was no longer applicable to the licensing agreement.[28] The Commission's assessment of tying was therefore determined by whether potentially substitutable products or services were available from other sources which could permit a "technically correct" exploitation of the licensed patent and how demanding the licenser was due to this requirement.[29]

Under the Technology Transfer Regulation tying is still white-listed if necessary for the technically satisfactory exploitation of the technology or when respected by the licenser and other licensees.[30] This Article's similarity with the Article in the Patent Regulation is natural since both reflect the prohibition laid down in the Treaty's Article 85(1)(e).

One far-reaching alteration has occurred in the Technology Transfer Regulation. Tying arrangements are no longer subject to the black list. Instead Article 2(1)(5) is limited by Article 4(2)(a) if the licensee is coerced to accept unwanted products, services or quality specifications, the tying is

[26]Regulation 556/89 on know-how licensing agreements
[27]Article 2.1.1
[28]Article 3.9
[29]Venit James S "In the wake of Windsurfing: patent licensing in the Common Market" 1986 Fordham Corporate Law Institute (B.Hawk ed 1987) p.578-579
[30]Article 2.1.5

subject to the opposition procedure.[31]

Briefly, the signification of the opposition procedure is that if the Commission within four months does not oppose a notified agreement, the agreement is exempted.[32] The Commission's intentions with the procedure were to simplify the assessments of agreements and to shorten the waiting period. But its usefulness has been questioned since its legal status is not defined. As a result, its consequences have not been established and this creates uncertainty among undertakings.[33] It has been suggested that this alteration from the black list to the grey list might indicate that the Commission's previous so harsh approach now has softened.[34]

6.4 The case law

Although tying arrangements are strictly regulated within EC law and both the Commission and the ECJ have adopted a negative approach towards them, the case law on this subject is limited.

6.4.1 The Campari case

This case [35] can be considered as one of the leading cases concerning tying arrangements contained in trademark licences.
The background of the case was that Campari had licensed the exclusive right to use its name and to manufacture the famous beverage to a network of licensees. In its agreements, Campari obligated the licensees to follow its instructions on the manufacturing process of the product and on the quality of ingredients. It also required them to obtain certain secret raw materials, such as the colouring matter and the herbal mixture, from Campari.

[31]Korah Valentine, Technology transfer agreements and the EC Competition Rules, p.174-176
[32]Lidgard Hans Henrik, Licensavtal i EU, p.332-333
[33]Lohmann Niklas, The new EC Technology Transfer Regulation 240/96 - prevailing controversies at the intellectual property right/competition law interface, p.58-59
[34]See Korah p.177 and Lohmann p.59
[35]Campari [1978] 2 CMLR 397

In the Commission's decision[36], the importance of the trademark was emphasised. The Commission stated that the proprietor of a trademark had the exclusive right to use the distinctive mark on first sale and to protect the product against infringement of the mark without Article 85(1) being applicable.

This tying arrangement was surprisingly not held to fall under Article 85(1). The Commission noticed:
"...control over the quality of the products manufactured under the licence and over their similarity to the original Italian product is in the present case very important for the licenser, in the sense that it is again bound up with its interest in the maintenance of quality, which is referable to the existence of the trademark right".[37]
In other words, the Commission thought the quality control of the product was crucial to the licenser in order to be able to ensure the products' unique attributes being secured. The colouring matter and the herbal mixture were unique, since their contents were a trade secret and could not be required under Community law to be revealed to the licensees. As a result from the tied products were considered as unique, no interference of competition could be established, since there was no other potential supplier on the market.

It has been suggested that the Commission applied a form of rule of reason under Article 85, since the tying arrangement was not considered to fall under Article 85(1). Instead of exempting the tying under Article 85(3), the Commission did not find the tying having any anti-competitive effect, although the licensees' supply sources were restricted. Apparently, the Commission found the need for quality control to suffice as economic justification for the tying arrangement.[38]

[36]Commission's decision 78/253/EEC, December 23,1977, O.J. 1978 L70/69
[37]Ibid. p.74

6.4.2 The Vaessen / Moris case

The case [39] involved a tying arrangement in a patent licensing agreement. Mr Moris was the holder of a Belgian patent concerning a method and a device for manufacturing a sort of sausages, *saucissons de Boulogne*. He was also the owner of an undertaking, ALMO, which manufactured and sold casings for the sausages, but his patent did not cover the casings. The method was licensed to several Belgian sausage manufacturers and the device was placed at their disposal free of charge, under the condition that they bought the casings from ALMO.

The Commission intervened against the tying clause in the patent licensing agreements after Vaessen, who was a Dutch competitor, made a complaint. Vaessen claimed that the tying arrangement entailed difficulties for him to penetrate the casings market, although he could offer the casings to a lower price than ALMO.[40]

The Commission found the tying clause constituted an infringement of Article 85(1), due to the fact that the clause deprived the licensees of their commercial freedom to obtain the casings from other suppliers, perhaps on more favourable terms. In the Commission's decision, a central element was the statement that the clause amounted to an unlawful extension of the monopoly given by the patent. This statement reflected the "leverage theory". Applied in this case it meant that, by requiring the licensees to buy the casings from ALMO, Moris had extended his market power over the device to the market for casings.[41]
In other words, the tying was not regarded as indispensable for the technically perfect exploitation of the patent, which was required to receive an individual exemption according to Article 85(3).

This case was the first case where the Commission did not accept a tying

---

[38]Raybould and Firth p.261-262
[39]Commission's decision 79/86/EEC January 10,1979 O.J. L19/32
[40]Zanon Lucio, "Ties in patent licensing agreements" (1980) 5 ELR 391

arrangement in a patent licensing agreement and the criticism against the Commission's decision was extensive.
The outcome of the decision was rather unexpected since the Commission only a few years earlier had accepted a similar clause in the *Campari* case. Campari had received royalty payments, in some instances per bottle and in other it was included in the total price of the delivered product.

Since Moris was the only holder of the patent on the method and the device, no potential competitor was foreclosed from the market. Then it could have been argued that it should not have mattered if Moris' licensees had to pay for the casings or paid a royalty for using his device.[42]

Lucio Zanon published shortly after the decision blistering criticism towards the Commission's analysis.[43] He pointed out justifications for the tying from the patentee's point of view. He objected to the Commission's statement that the tying clause deprived the licensees of the possibility to obtain the casings from other suppliers for two reasons. Firstly, the licensees were not completely deprived, since they still had the choice to obtain casings from competitors at a lower price, but then they could not use the more efficient patented device. Secondly, Vaessen's lower price was due to the fact he had not had the costs of inventing and developing the manufacturing device. Therefore the comparison made between Moris and Vaessen should not have concerned the prices charged for casings, but rather the cost saving from using ALMO's patent and the cost saving deriving from Vaessen's lower price. But as Zanon pointed out, the problem with such comparison was that these two could not be compared to each other, since the amount of Vaessen's price advantage over ALMO was unknown. He still concluded that it would have been unlikely if the cost saving from Vaessen's lower price would have outweighed the benefits from using a more efficient device. This conclusion could be supported with the fact that most of the manufacturers freely chose to continue their co-operation with ALMO.

[41]Raybould and Firth p.261
[42]Lidgard p.201

6.4.3 The Hilti case

The presentation of this case will not have ECJ's judgement [44] as its basis, but the Commission's decision [45]. Since the ECJ only dismissed the appeal against CFI's judgement (which had upheld the Commission's decision), it will be more interesting to present the Commission's assessment of the case.

In this case it became evident that it was not easy for an undertaking to convince the Commission that a tying arrangement should have been justified on technical grounds. Instead the Commission emphasised that a less restricting alternative could have been used to achieve the same objective, especially since a technical relationship between the two products was present.[46] The Commission established that an undertaking's practices to maintain safety standards did not constitute any justification for a tying arrangement. It initiated an investigation against the British undertaking after two competitors, Eurofix and Bauco, had filed a complaint. Hilti produced fastening systems used in the building industry. The systems consisted of nail guns and cartridge strips and Hilti held a mixture of patent and copyright protection over the cartridge strips. In its decision the Commission identified three relevant markets (nail guns, Hilti-compatible cartridge strips and Hilti-compatible nails) and found Hilti to be dominant in all three.[47]

It decided that Hilti's policy to require certain end-users or distributors to purchase its nails in order for Hilti to supply the cartridge strips, constituted an abuse of dominance according to Article 86. In its legal assessment the Commission found the policy to exploit the consumers since their choice of supply sources had been restricted and it had excluded independent nail

---

[43]Zanon p.391-399
[44]Eurofix Ltd and Bauco Ltd v Hilti AG [1994] 4 CMLR 614
[45]Eurofix Ltd and Bauco Ltd v Hilti AG 88/138/EEC, December 22 1987,O.J. 1988 L65/19
[46]Green p.592
[47]Downing Robbie"Hilti: The Final Nail" [1995]1 ECLR 53

makers from penetrating the nail market.[48]

Hilti tried in its defence to justify the tying arrangement by maintaining that its practices were motivated by the desire to ensure the safe and reliable operation of its products and not by gaining any commercial advantages.[49] The manufacturer could only ensure this objective if the nail guns, nails and cartridges were considered as a unified system. Independent consumable producers could not be considered as being able to guarantee the system's integrity if he only produced an individual item of the system. Hilti also alleged that the nails produced by Eurofix and Bauco were impaired by significant deficiencies and therefore they could not be used together with the Hilti system without endangering the safety.[50]

The Commission did not accept Hilti's defence, but observed that Hilti had not taken any legal or other action that normally could have been expected from an undertaking, which was purely motivated by safety concerns. It continued with pointing out alternatives of action, which could have been taken and concluded that Hilt's actions reflected a commercial interest to prevent its competitors from penetrating the market.[51]

Although the Commission rejected Hilt's defence it allowed Hilti to include a legal disclaimer as part of the undertaking given by Hilti. The disclaimer contained a statement by Hilti that:
"...Hilti decline all responsibility for loss, damage or injury which may arise through the use of these cartridges in guns not manufactured by Hilti of for purposes other than those for which they are recommended by Hilti or with nails which are not fit for the purposes."
The disclaimer could be interpreted as an indication that the Commission did not consider tying as an appropriate way of ensuring the safety of the product. Instead other less far-reaching alternatives, such as notices,

[48]The Commission's decision para.75
[49]Ibid. para.88
[50]Ibid. para.87.4-87.5
[51]Ibid. para.89.4-90

warnings or disclaimers, could have been used to attain the objective.[52]

6.4.4 The Tetra Pak II. case

This case[53] received a lot of attention when the Commission's decision was published. Tetra Pak was fined ECU 75 million for abusing its dominant position. It was then the highest fine ever. Later both the CFI and the ECJ confirmed the decision.

The case encompasses a variety of anti-competitive practices, which have entailed a vivid debate on several legal issues, but this presentation will focus on the assessment of the tying arrangement Tetra Pak had imposed.

Tetra Pak is one of the world's leading packagers of liquid and semi-liquid foods in cartons. On the market for equipment and cartons for packaging liquid aseptically, Tetra Pak was found to be dominant, since it had 90 to 95 per cent of the sales. The remaining part was held by the only competitor, PKL. There were no potential competitors who could enter the market due to the technological barriers and Tetra Pak's possession of the patents.[54]
In the non-aseptic markets Tetra Pak was not found dominant. Instead the Commission was able to condemn Tetra Pak's conduct on the non-aseptic markets by relying on associative links between the two markets. This could be interpreted as an extension of the scope of the Article's application and it was unprecedented, but later confirmed by both the CFI and the ECJ.[55]

In Tetra Pak's standard contracts for the sale or lease of machines a tying arrangement had been inserted. It meant that the users of the Tetra Pak packaging systems were obligated to only use Tetra Pak cartons on the machines and to obtain their supplies exclusively from Tetra Pak. The Commission found the clauses in conjunction with the other clauses aimed

[52]Green p.592-593
[53] Tetra Pak International SA v. Commission [1997] 4 CMLR 662
[54]Levy Nicholas "Tetra Pak 2:Stretching the Limits of Article 86?" [1995] 2 ECLR 104
[55]Korah Valentine "Tetra Pak 2-Lack of Reasoning in Court's Judgement" [1997] 2 ECLR

at making the market in cartons completely dependent on that in machines to eliminate any possibility of competition. Not only was the inter-brand competition affected by the tying arrangement, but also the intra-brand competition.[56]

In the decision, references were made to previous decisions and judgements. As in *Hilti,* the Commission held that consumables, such as nails in the *Hilti case* or cartons in this case, should be considered as a separate market.[57]

Tetra Pak did not accept the Commission's definition as a supplier of packaging equipment and containers, but of "integrated distribution systems". These systems included not only the equipment and containers, but also know-how, servicing and training. Tetra Pak also alleged that the tying arrangement could be justified on several grounds.

First of all, Tetra Pak pointed out the economical advantages, such as the economies of scale and the cost savings of the raw materials and distribution, which could be derived from the tying arrangement since it meant stable relations with the customers.

Secondly, Tetra Pak wanted to justify the tying for technical reasons. The high technology of its machines demanded the use of its cartons, since these were specifically designed for the machines. Here Tetra Pak also tried to establish the existence of a "natural link" between the machines and the types of packaging used. This link would entail synergistic effects at the level of R&D and after-sales services.

Furthermore, Tetra Pak claimed the tying arrangement benefited both users and consumers. The tying involved a comprehensive performance guarantee and a single source of responsibility. Consumers' health was also stated as a justification. The tying was considered as necessary to prevent the

---

98
[56]Commission's decision para.116-117

emergence of public health problems, especially in the aseptic sector.

Finally, Tetra Pak claimed it had inserted the clauses as a defence of its reputation in view of the technical and public-health aspects it had presented.

The Commission did not accept any of the justifications Tetra Pak had presented. It rejected the reasons one by one and then verified that the tying constituted an infringement of Article 86. In its conclusion the Commission stated that even if technical and public-health problems would arise, they were not problems for an undertaking to solve by contractual means. Instead there were the possibilities of publishing standards and specifications and a legal framework available as less restricting alternatives. In addition, the tying arrangement was contradictory to the proportionality rule, unless it could have been regarded as indispensable.[58]

The Commission's decision and the subsequent judgements by both of the courts raised severe criticism from among others Valentine Korah. She criticises the lack of reasoning in the ECJ's reasoning. Instead of presenting the reasoning behind the judgement, ECJ only states its conclusions. If the ECJ had assessed the underlying causes for the contractual clauses more thoroughly, a different conclusion could have been the result. Korah suggests that the tying could have been used to charge intensive users of the equipment more. If Tetra Pak had chosen to charge a royalty on each carton, this would not have been considered as discriminatory or abusive. If this argumentation can be accepted, it can be questioned why the tying was considered as abuse. However, it can be difficult to introduce economic considerations into competition law for different reasons, but it would make the ECJ's reasoning considerably more evident for the undertakings.[59]

[57]Whish p.612
[58]Commission's decision para.119
[59]Korah p.98-103

6.4.5 The IBM settlement

When IBM introduced its System 370 central processing units, it included the capacity of main memory and the basic software in the sale. The Commission regarded this "memory bundling" and "software bundling" as a tying arrangement and initiated an investigation under Article 86. But IBM altered its practices before the Commission took any formal decision and the case was solved by a settlement [60]. In its undertaking, IBM was willing to offer its System 370 in the EC without a main memory or only with the sufficient memory, which was needed for testing. IBM also agreed to take further measures in order for competing undertakings to be able to attach hardware as well as software products of their design to IBM's System 370.[61] Since IBM allegedly held 70 per cent of the world market for main frame computers, the Commission feared that IBM's bundling would result in competing producers would not be able to enter the market.[62]

[60]IBM settlement, Fourteenth Report on Competition Policy, points 94-95
[61]Bael and Bellis p.611
[62]Green p.593

7 Tying in the US

7.1 Introduction

The complexed nature of tying arrangements is reflected in the somewhat, if not unique, at least unusual, solution of this legal dilemma. Under US Antitrust policy, tying can be considered as either per se illegal, illegal under the rule of reason or, even legal.[63]
The Federal Supreme Court has chosen to deviate from its general application of the per se rule. Ordinarily under the per se rule, no assessment will be carried out, but when dealing with tying, the Supreme Court has tried to established the scope of the per se rule in its case law. In order to determine into which category a tying arrangement will be placed, an analysis of different factors such as the business purpose and the arrangement's effects will be accomplished.[64] Naturally this has caused an animated discussion, but also some uncertainty and confusion concerning the legal status of tying.

Tying arrangements can under the American antitrust legislation be subsumed under Section 3 of the Clayton Act and under Sections 1 and 2 of the Sherman Act.[65]
Under both of the Acts, a considerable case law has developed.

7.2 The relevant US legislation

The American antitrust laws emerged as a legal response to the need for regulating the economic development. In the end of the nineteenth century, railroad companies established powerful trusts, which eliminated

[63] Fejö p.288-289
[64] Gellhorn p.313
[65] Fejö p.289

competition.[66] In order to suppress this unwanted form of co-operation, the Sherman Act was passed in 1890 as the first antitrust act in the world.[67]

The Sherman Act is divided into different sections, of which Section 1 and Section 2 constitutes the most important and fundamental ones. Section 1 prohibits common practice between two or more parties which results in a restraint of trade, which is connected with commerce among the several states, or with foreign nations. Section 2 prohibits monopolisation and its different varieties.[68]

The language of the Sherman Act is vague and this entailed a development of interpretation in the courts.[69] But it also resulted in legislation, in 1914 the Clayton Act was introduced. Its objective was to supplement the Sherman Act and to define its content and strengthen its enforcement.[70]

7.3 The rule of reason and the per se rule

The rule of reason and the per se rule are of essential importance in the American antitrust law.
Together they constitute two well-functioning instruments in developing the antitrust law. Both of the rules are legal principles deriving from the courts' practice and are consequently not part of the American statute law. The principles emerged as a response to the developing economic situation, which needed to become regulated by legal rules. In order for the economic system to work as efficient as possible, the courts adopted the principles as a flexible system.[71]

[66] Whish p.16-17
[67] Fejö p.22
[68]
[69] See part on rule of reason
[70] Fejö p.23-24
[71] Fejö p.79-80

7.3.1 The rule of reason

When a judge applies the rule of reason in a pending case, he will consider all the circumstances and details that encompass the case in order to be able to determine whether a violation of the antitrust laws is to hand. In order to be able to establish the violation, the anti- and pro competitive effects of the agreement are balanced against one another.[72]

Section 1 of the Sherman Act states that every contract, combination, or conspiracy in restraint of trade is illegal. This wording created dilemmas concerning the section's scope and application, in that agreements' essence are to bind and restrain.[73] The form and language of Section 1 created a need for supplementing specifications and limitations. This was accomplished by the judges' application of the law and by those means the law could be developed and defined.

In 1897, the concept of a rule of reason appeared for the first time, in a case concerning price agreements concluded by a railway association.[74] In the case, the dissenting Justice White repudiated a strict interpretation of Section 1 of the Sherman Act and held that reasonable agreements should not be considered as restraining trade. His statement was founded on that prior to the Sherman Act a rule of reason had existed, and since the Sherman Act was a codification of common law, the rule of reason should be applied. He also stated that the term „restraint of trade" should in accordance with earlier decisions, only be applied to illegal arrangements.[75]

Later, as Chief Justice, White confirmed his concept of the rule of reason in the case *Standard Oil*[76]. In this case, the rule of reason was actually applied and designed. The case dealt with agreements attempting to monopolise and restraining trade within different oil products. After analysing the

[72] Whish p.207
[73] Craig and de Burca p.899-900
[74] US v Trans Missouri Freight Ass´n 166 US 290 (1897)
[75] Fejö p. 82-83
[76] Standard Oil Co of New Jersey v US,221 US 1 (1911)

agreement's provisions and their purpose, Chief Justice White held that only undue or unreasonable restraints were to be found prohibited in accordance with the rule of reason.[77] The required analysis embraced an extensive economic survey of the market to determine whether the restrictions of competition should be considered as unreasonable to the market as a whole.[78] In *Standard Oil* the rule of reason was finally recognised, but it also created a need for further development in how to apply it in specific cases. The uncertainty that appeared, resulted in the new legislation in 1914.[79]

7.3.2 The per se rule

The principle of the per se rule emerged through the development of the rule of reason analysis. Already in the *Standard Oil* case, Chief Justice White indicated that certain restraints are by their nature unreasonably restrictive and should be prohibited. This was later confirmed in *American Tabacco*[80], where Chief Justice White held that:
"the Sherman Act banned all acts or contracts or agreements or combinations...which, either because of their inherent nature of effect or because of the evident purpose of the acts, etc., injuriously restrained trade..."[81]

However, it was not until the *Trenton Potteries* case[82] in 1927, that the principle of the per se rule was actually adopted. The case dealt with a horizontal price-fixing agreement, and it was established that certain conduct is unreasonably restrictive and thereby in itself illegal and no exemption can be granted in accordance with the rule of reason.[83]

When a court applies the principle of the per se rule to an undertaking's

[77] Fejö p.86
[78] Craig and de Burca p.900
[79] Fejö p.87
[80] American Tabacco 221 US 106,179
[81] Fejö p.86-87
[82] US v Trenton Potteries Co., 273 US 392 (1927)

conduct, it must only establish that the conduct will fall into one of the categories of conduct which are held to be illegal per se. The court is not obliged to make any further assessment of the market's structure, the purpose of the conduct or the effects. Thus, the per se rule is less time-consuming and costly compared to the substantial analysis which is required under the rule of reason.[84]

Both of these rules have been subject to criticism. Ever since the rule of reason was adopted, its scope and purport have been questioned.[85] Also the per se rule has been contested, by the Chicago School, with Robert H Bork and Richard A Posner as its main advocates. The Chicago School asserts that the goal of the antitrust policy should be economic efficiency. Other objectives, such as social or political goals, should not be included when the courts develop the law, Instead, the courts should base their decisions on economic theory and aim to prevent insufficient allocation of resources.[86] In this connection, the Chicago School has also questioned whether the application of the per se rule is advisable.[87]

7.4 The case law

The American case law concerning tying arrangements started its development early after the antitrust laws were promulgated.
An extensive case has developed and has been the foundation of the approach on tying arrangements. This description will present the foundation and will also include two current cases to illustrate the topicality of the issue.

[83] Fejö p.88
[84] Craig and de Burca p.901
[85] Craig and de Burca p.900
[86] Whish p.17
[87] Fejö p.97-98

7.4.1 The IBM case

IBM was in 1936 one of the first undertakings to become investigated on the suspicion of violating Section 3 of the Clayton Act. The undertaking had developed a business machine, which was capable of performing mechanical tabulations and computations without any intervention by manual operation. Together with another undertaking, named Remington Rand, IBM completely dominated the market of business machines. The Supreme Court considered IBM's business practice to require its customers to purchase IBM's unpatented tabulating card as a condition for IBM to lease the business machines as a tying arrangement.

Since IBM together with Remington Rand, dominated the market of business machines (the tying product market), the Supreme Court held in its judgement[88] that IBM had used its market power to restrict competition and at the same time to monopolise the market of tabulating cards (the tied product market). The Supreme Court applied a rule of reason analysis, firstly in order to assess whether the seller (IBM) possessed market power in the tying product. This was of importance because if the seller did not possess any market power in the tying market, the tying arrangement would not involve any effect on the tied product market.
Secondly, the Supreme Court examined the tying arrangement's quantitative effect on the sales in the tied market. Since the sales of the tied product represented a substantial part of IBM's total business, the tying arrangement could result in competition being substantially lessened, and by that a violation of Section 3 of the Clayton Act was established.

The Supreme Court paid little attention to IBM's objections that the tying arrangement was necessary. IBM asserted that they could only guarantee the business machines' functioning if they were used together with their tabulating cards, since all cards were specifically designed to match every machine. This objection was rejected by the Supreme Court, referring to the

[88] International Business Machines v. US,289 U.S.131 (1936)

fact that there were other less restrictive alternatives for the undertaking to make use of. The undertaking was free to market the advantages of using their own cards together with the business machines and warn about the danger of not using it.

IBM also stated in their defence that the tying arrangement was necessary in order to maintain an efficient way of distributing the business machines. But the Court also rejected this and held that this could only have been accepted if no other reasonable and less harmful alternatives were to be found.[89]

7.4.2 The International Salt case

This case [90] would together with the *IBM* case, come to constitute the foundation of the antitrust laws regarding tying arrangements. Here the Supreme Court was to determine whether an undertaking's way of using its patents amounted to restricting competition.
International Salt, which was the largest producer of salt for industrial uses in the USA, owned the patents on two machines, which were used to exploit salt products.

When International Salt leased their machines, the lessee was also obligated to purchase the salt that was required for operating the machines. The undertaking's arrangement of tying the lease of the patented machines to the purchase of all the salt used, was found to violate both Section 3 of the Clayton Act and Section 1 of the Sherman Act.

Compared with the *IBM* case, the Supreme Court here assumed a more strict approach regarding tying. The Supreme Court's ruling amounted to a general per se prohibition and the Supreme Court stated :
"It is unreasonable, per se to foreclose competitors from any substantial market. "[91]

[89] Gellhorn p.315-317
[90] International Salt Co v US,332 US 392 (1947)
[91] Raybould and Firth p.46

In its ruling the Supreme Court accepted that International Salt enjoyed a limited monopoly deriving from their patents, which allowed them to restrict others from exploiting the patented machines. But the possession of the patents did not grant the tying arrangement any kind of special immunity or confer the right to restrain competition regarding the unpatented salt.[92]

In the *International Salt* case, as well as in the *IBM* case, the Supreme Court's rulings were founded on the controversial leverage theory.[93] Another similarity with the *IBM* case, was the Supreme Court's rejection of the undertaking's objection implying the necessity of the condition to protect the product goodwill. But the Supreme Court referred to the undertaking's possibility to issue objective specifications and stipulating obligations could only be accepted if the realisation of specifications could be considered as impractical and unreasonable.[94]

7.4.3 The Times Picayune case

„The Times Picayune" was the only morning newspaper in New Orleans in 1953. The paper was owned by the Times Picayune Publishing Company, which also owned one of the tow existing evening papers, called „The States". As a condition for the advertisers to buy lineage, the undertaking demanded the advertisers to buy in both of its papers at the same time. This condition entailed the government to take action on the basis of a violation under the Sherman Act, Sections 1 and 2. The tying arrangement was claimed to foreclose the advertising market of competitors, since there was another evening paper in New Orleans.[95]

In this case[96] the Supreme Court had to assess and establish the legality of a tying arrangement and under which circumstances tying were considered as

[92] Ibid. p.49
[93] Gellhorn p.318
[94] Raybould and Firth p.75
[95] Gellhorn p.320-321

illegal per se. The Supreme Court settled the question of the legality by giving a standard.

„*When the seller enjoys a monopolistic position in the market for the „tying product",* or *if a substantial volume of commerce in the „tied product" is restrained, a tying arrangement violated the narrower standards expressed in §3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred.*"[97]

Then the Supreme Court continued to the question concerning when tying was to be considered as illegal per se.

„And because for even a lawful monopolist it is unreasonable, per se, *to foreclose competitors from any substantial market, a tying arrangement is banned by §1 of the Sherman Act whenever* both *conditions are met.*"[98]

These two statements by the Supreme Court would imply that different standards were used under the Clayton Act and the Sherman Act when assessing tying arrangements. If the seller had a monopolistic market position in the tying product market *or* if a substantial volume of trade in the tied product was restrained, Section 3 of the Clayton Act was violated. But if both of these two conditions were fulfilled, the tying arrangement had infringed Section 1 of the Sherman Act.[99]

This would signify that tying arrangements were less likely to be found illegal under the Sherman Act than under the Clayton Act. The standard set by the Court in this case could be interpreted as having raised the level of burden of proof needed to establish a violation under the Sherman Act compared to the earlier case law. It was now not sufficient to show the existence of the undertaking's power in the tying product market. The undertaking must be proven to possess dominance or overwhelming power, which must be considered as a more qualified requisite. Concerning the

[96] Times Picayune publishing Co v US , 345 US 594 (1953)
[97] Times Picayune Publ. Co v US 345 US 594, 608f (1953)
[98] Ibid. 609
[99] Fejö p.290

quantitative effects on the competition in the tied market, it had been sufficient in the *IBM* case to establish that the sales represented a substantial part of IBM's total business. This was now altered to actual effects on the market was now to be presented, only demonstrating the dollar volume on the sales in the tied market was not considered to be sufficient.[100]

The Supreme Court also held that Times Picayune did not occupy a monopolistic position in the tying product and considered the sales of advertising space in the to papers as constituting sales of one product. By those means, it was not a matter of a tying arrangement and a rule of reason was to be applied, but since no effects on the competition were established, there was no violation of the antitrust laws. [101]

7.4.4 The Northern Pacific case

The Northern Pacific Company had purchased large areas of land surrounding its railway line to facilitate its construction. When the railway line was completed, the undertaking sold and leased a substantial part of the land. The sales contracts and lease agreements contained clauses, which forced the purchasers / lessees to only use the undertaking's rails when shipping their commodities produced on the land. The preferential routing clauses applied if the undertaking's rates and services were equivalent with the two existing competing railway companies.[102]

The Supreme Court[103] analysed the preferential routing clauses under Section 1 of the Sherman Act. (Section 3 of the Clayton Act was not applicable in this case, since its application is limited to commodities and land was not considered as a commodity.)[104] The Supreme Court started out by defining a tying arrangement:

"...as an agreement by a party to sell one product but only on the condition

[100] Gellhorn p.321
[101] Fejö p.290-291
[102] Fejö p.291
[103] Northern Pacific Railway Co. V US 356 US 1 (1958)

that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product form any other supplier."[105]

Thereafter it deviated from its earlier rule of reason approach towards the per se rule. It demonstrated its reluctance against tying by accentuating that tying arrangements serve hardly any other purpose than suppressing competition. Then it turned to point out that the use of tying arrangements could result in competitors were denied their free access to the market of the tied product. The foreclosure of the competitors did not occur because of a better product or a lower price, but as a result of the undertaking's power or leverage in another market. An additional consequence of tying arrangements was the buyer's reduced possibility of being able to choose between competing products.[106]

An important departure from the Supreme Court's earlier judgement in the *Times Picayune* case, was the weakening of its standard regarding proof of substantial market power in the tying product. In the previous case the Supreme Court had required dominance or overwhelming power to be presented. But in this case it held that market power was present since the undertaking had „sufficient economic power" to exclude its competitors. If this condition was fulfilled and the interstate trade was restricted, the tying arrangement was to be considered as per se illegal.[107]

7.4.5 The Loew's case

This case[108] involved the development of the Supreme Court's concept of market power regarding tying arrangements. In the *Northern Pacific* case, it had set the standard to „sufficient economic power", now it had to define the standard's purport.

---

[104] Gellhorn p.322
[105] Nothern Pacific Railway Co v US 356 US 1 5f. (1958)
[106] Raybould and Firth p.46-47
[107] Fejö p.292

The background to the case involved film distributing companies selling feature films to local television stations. The distributing companies required the buyers to buy packages of films, including films, which the buyer was not interested in.[109]

Once again the Supreme Court expressed its reluctance against tying arrangements and maintained its per se approach. Then the Supreme Court discussed the concept of market dominance and economic power. By way of introduction, it was necessary to be able to show that the seller occupied such a level of market power to exercise coercion or pressure over the buyer to purchase another product. The economic power of the seller was not only decided upon its market dominance. Also other factors, such as the tying product's desirability to consumers or the uniqueness of its attributes, could amount to the requisite economic power being fulfilled.[110]

Finally the Supreme Court concluded that economic power was presumed when the tying product was patented or copyrighted. If a valid patent protected the tying product, a sufficient distinctiveness could be established to stipulate that the tying arrangement would create anti competitive effects on the market.[111]

7.4.6 The Jefferson Parish Hospital case

This case[112] concerned a large acute-care hospital's way of requiring its patients to use the hospital's anaesthesiologists when having an operation. A competing anaesthesiologist, who was excluded form the market, complained and claimed that the hospitals tying arrangement prevented him from obtaining privileges of practice. The hospital refuted the complaint by stating that it bundled its services to be able to reduce costs and improve

[108] US v Loew´s Inc. 371 US 38 (1962)
[109] Fejö p.292
[110] Raybould and Firth p.47
[111] Fejö p.292
[112] Jefferson Parish Hospital District No 2 v Hyde 466 US 2 (1984)

quality of care.[113]

In its ruling, the Supreme Court found the hospital services and the anaesthesiological services form two separate product markets. But it did not find adequate evidence of that the hospital had forced the patients to use its anaesthesiological services. Because it had be shown that the hospital occupied market power in the tying product to pressure or force the purchaser into accepting something he would not have done in a competitive market. Although it was shown that the hospitals conduct involved widespread consumer ignorance and lack of price-consciousness, the Supreme Court did not find this restraining competition and upheld the tying arrangement.[114] However, the Supreme Court was not unanimous on the reasons for its standpoint. Five of the Supreme Court's members stated that tying arrangements fall under the per se rule, but subsequently continued with examining the product markets, the market power of the hospital and effects on competition. Four members of the Supreme Court advocated for a rule of reason to be adopted.[115]

To summarise this case, in order for a tying arrangement to be held as illegal per se, some conditions has to be fulfilled. It must be demonstrated that the two products or services constitute separate product markets. Further, the seller must occupy substantial market power in the tying market. In addition, an element of forcing or coercion of the purchaser must be present in order to show that the purchaser had to accept buying a product he had no interest in or on terms he would not had accepted elsewhere.

7.4.7 The Microsoft case

Since the Supreme Court has not decided this case, the purpose of this presentation is not to constitute a complete analysis of the case. Instead its only purpose is to illustrate the immediate interest of tying arrangements

[113]Gellhorn p.326
[114]Raybould and Firth p.47-48
[115]Gellhorn p.326-327

and the Department of Justice's current position on the issue.

On May 18,1998 the Department of Justice filed a lawsuit against Microsoft. The undertaking was charged with *"engaging in anti competitive and exclusionary practices designed to maintain its monopoly in personal computer operating systems and to extend that monopoly to internet browsing software".*[116]

The diversified anti competitive and exclusionary practices Microsoft engaged in comprised inter alia:

In 1995 Microsoft became aware of that a competitor in the internet browser software market, Netscape Communications Corporation, composed a threat to Microsoft's monopoly on the same market. Instead of competing on the merits, Microsoft tried to persuade Netscape to enter an illegal conspiracy in order to divide the browser market. Microsoft's purpose was naturally to maintain its monopoly by becoming the sole supplier of browsers for use with Windows 95 operating systems. In return, Netscape would become the sole supplier of browsers for non-Windows 95 operating systems, but Netscape refused to participate in the division of the browser market. Then Microsoft changed its strategy into attempting to eliminate Netscape from the market.

Furthermore, Microsoft obligated PC manufacturers to accept licensing and installing Microsoft's browser in order to obtain license for the Windows 95 operating system. Moreover the Department of Justice has found that Microsoft has intended to tie its IE internet browser software to its new operating system, Windows 98. Microsoft has also used its monopoly in the operating system market to require PC manufacturers to agree on adopting a uniform "boot-up" or "first screen" sequence. If the condition was not accepted, the PC manufacturers would not be able to acquire a license to the Windows operating system. In order to foreclose competing browsers from

the distribution channels, Microsoft has entered into anti competitive agreements with all of the major internet and on-line service providers.[117]

The Department of Justice has moved for a preliminary injunction to force Microsoft to discontinue its anti competitive practices. Microsoft's monopoly in the operating system market has enabled it to "eliminate competition, deter innovation and restrict consumer choice".[118]
Instead of competing on the merits and letting the consumers be able to choose between competing products, Microsoft's practices has aimed at making the consumers use its browser by leveraging its monopoly in operating systems. In order to ensure true equality and real consumer choice, the consumer must have access to both Microsoft's and Netscape's browser and the PC manufacturers must not be obligated to market unwanted products of restrained by anti competitive contract obligations.[119]

7.5 The vertical restraints Guidelines

In 1985, these Guidelines were issued by the Department of Justice to illustrate its enforcement policy towards non-price vertical restraints, including tying arrangements. Although the Guidelines were not binding on any court or necessarily reflected the courts' current legal standards, they were still considered by the courts when examining and deciding matters involving these matters. The Guidelines also produced some certainty for undertakings in that the Federal Trade Commission's activities followed them.

In the Guidelines, the application of a rule of reason was proposed in preference to a per se rule. Already in this statement the Guidelines' benevolent position concerning the non-price vertical restraints could be

[116]Department of Justice's press release on May 18,1998
[117]Ibid.
[118]Statement by Assistant Attorney General Joel I Klein on May 18,1998
[119]Ibid.

perceived.[120]

The foundation of the Guidelines' permissive policy derived from its premise that *"vertical restraints that only affect intrabrand competition generally represent little anti competitive threat and involve some form of economic integration between different levels of production or distribution that tend to* create *efficiencies".*[121] Concerning tying arrangements, it was stated that they "*often served pro-competitive or competitively neutral purposes".*[122] Then the Guidelines contained an enumeration of such legitimate purposes. A manufacturer could use a tying arrangement to protect his reputation, or to introduce new products, or to achieve price discrimination.

The Guidelines also introduced a standard for assessing tying arrangements, which was based on the Supreme Court's decision in the *Jefferson Parish Hospital* case[123]. In that case the term "dominant market power "was used by the Supreme Court.

In order to determine whether the seller had "dominant market power", the Guidelines provided a definition of the term. It was defined as "a degree of market power in the tying market that approaches monopoly proportions". The term was of importance in the assessment of whether a rule of reason analysis should be accomplished or the per se rule should be applied to tying arrangements. The Guidelines stipulated a presumption which implied that if the seller occupied a market share in the tying product that exceeded 30 % and had dominant market power, the per se rule would apply. But if the seller's market share was not dominant but still over 30%, a rule of reason analysis would be applied. The market share standard could only be overcome if it was shown that the tying arrangement unreasonably

[120]Raybould and Firth p.55
[121]Address by Assistant Attorney General Anne K Bingaman on October 21,1993
[122]Raybould and Firth p.58
[123]Jefferson Parish Hospital District No 2 v Hyde 466 US 2 (1984)

restrained competition in the market for the tied product.[124]

In 1993, Assistant Attorney General Anne K Bingaman announced that the Guidelines were to be rescinded. Ever since the Guidelines were promulgated, they had been controversial and subject to extensive criticism. The Congress and the National Association of Attorneys General had denounced them. The business world never adopted their concept and the Department of Justice seldom enforced them.[125]

Much of the criticism originated in the Guidelines oversimplification of the application on agreements. Instead of analysing the facts of the case, the Guidelines' methodology focused on theoretical standards. Another weakness was the Guidelines' discrepancy from the existing case law.

When the Guidelines were repudiated, it was also stated that henceforth the vertical price fixing restraints would be treated as per se illegal and non-price fixing would be analysed under a meaningful rule of reason. At the same time, it was held that vertical restraints now would be evaluated in a more balanced manner than had been accomplished according to the Guidelines.[126]

Later in March 1995, the US National Association of Attorneys General revised its Vertical Restraints Guidelines. The signification of the revision was its statements regarding its approach towards non-price vertical restraints. The Attorneys General would be *"unlikely to challenge a non-price vertical restraint when the markets involved, in all of the relevant levels of distribution, have [Herfindahl - Hirschmann Indexes]*[127] *less than 1000, or when all of the relevant parties to a non-price vertical agreement*

[124]Raybould and Firth p.58
[125]Prepared remarks by Robert Pitofsky, Chairman of the Federal Trade Commission on October 16-17,1997
[126]Anne K Bingaman
[127]HHI is a tool used to determine whether a merger should be prohibited. The HHI is the sum of the squares of the market shares of every company in the relevant market.

have less then [10 %] of their respective market".[128]

The current legal status of tying arrangements is uncertain. Discussions about the development continue while awaiting a decision from the Supreme Court or a statement from the Department of Justice.

[128]Carlin Fiona: "Vertical Restraints: Time for Change?" [1996] 5 ECLR

8 Comparing EC competition law and US antitrust law

Due to the fact that the American antitrust laws and the subsequent case law have in several ways affected the development of EC competition law, it is natural to include a comparison in this examination paper. The two systems are linked through German competition law, which was influenced by the American antitrust system when it was formulated after World War 2. Also the American system have had an effect, since it has existed for a longer time period and developed further. [129]

By comparing the two legal systems and their laws' similarities, parallels can be drawn to provide solutions to the various legal dilemmas, which emerge when a legal system develops. However, some caution is well-founded when making a comparison. Legal systems have different backgrounds, are founded on different underlying policies and have different structures. This gives a legal system its distinctive features, which must be acknowledged when drawing a comparison.

8.1 Comparing two legal systems

Comparative work between two legal systems can be very useful when predictions about the future development within a specific legal area or a legal system are to be concluded. A comparison can provide enlightenment and guidance on how to avoid pitfalls and suggest solutions since many emerging problems are parallel in two systems. However, in order for a comparison to serve as a valuable tool, the existing differences between the two systems need to be identified and acknowledged. The differences

[129] Barry E Hawk, The American (Antitrust)Revolution:Lessons for the EEC? (1988)ECLR p.53-54

between the American legal system and the legal system within the EC are the result of historian, political and social factors.

The idea of a free, fair and competitive market system constitutes the foundation of both systems. Although the European Community was founded much later than the American antitrust laws were passed, both systems clearly demonstrate how valuable the maintenance of personal and economic independence is considered to be. But in order for the market system to remain competitive and efficient, legal regulations are needed to ensure that private undertakings are prevented from undermining the market system by entering into anti-competitive agreements or take other measures.[130] The competition rules must aim at preventing competition from being influenced by others than the market forces.[131]

Despite this similarity in the two systems' foundation, one crucial difference exists concerning the underlying objectives of the systems. The European Community was founded as having the establishment of a common market as its principal and overriding goal. This was never a starting point when the American antitrust laws were formulated, since the US was already a united and integrated society. The creation of the European Community entailed the harmonising of the Member States' legislation. In order to eliminate the national borders and create open trade between the Member States, a common competition policy was an essential instrument to achieve this.[132] The structural difference in the two systems' competition policies is prominent. Within the EC the aim is to alter the territorial nature of the market, while in the US the policy focuses on the shape of particular markets or industries.[133] As a consequence, the analysis in American antitrust cases primarily focuses on economic efficiency. Within the EC, this is not possible, since the attainment of a common market also embraces other concerns than promoting competition.

[130] Fejö p.12-13
[131] See Article 2 and the Preamble
[132] Mendes p.74
[133] Ibid., p.83

The concept of ”fairness in the market place” has been emphasised by the Commission. By imposing regulations, the behaviour of participants (whether undertakings or Member States) on the internal market is controlled to ensure that equal opportunities prevail, irrespective of their nationality or location within the market. Also the interests of workers, users and consumers are given special protection. However, these economic and social policies may not render competition ineffective on the market. The competition policy should not be viewed as forming a separate part of the system, but to the contrary interrelate with the other policies to enhance the completion of a common market.[134] As the endeavours towards the completion proceed, there is a tendency towards increasing the importance of including economic efficiency in assessments within EC competition law.[135]

A comparison of these two legal systems elucidates the existence of similarities as well as differences. The EC competition law bears close resemblance of the American antitrust laws. Violations according to Articles 85 and 86 are similar to the Sherman Act violations in their aims to prevent anticompetitive behaviour among participants on the market. The EC competition law has during the recent years developed its enforcement policy and by that approached the American system. The Commission is now using its powers to enforce its policies by taking action and imposing fines to emphasise the seriousness of its commitment. However, the differences in procedure can not be forgotten. In comparison with the American system, EC competition law contains a more regulatory and formalistic procedure. The absence of a formal and explicit rule of reason within EC competition law changes the analysis of vertical restraints considerably. Currently, undertakings are referred to obtaining an exemption, either by qualifying under a block exemption or receiving an

[134] Ibid., p.76
[135] Ibid., p.83-84

individual exemption after notifying the Commission.[136]

8.2 The approach towards vertical restraints

There is great controversy on how the Commission and the ECJ should approach vertical restraints. It is within these two institutions' competence to determine whether vertical restraints ought to be considered as restricting competition at all and also to make the distinction between acceptable and non-acceptable restrictions. In order to fall under the category of acceptable restrictions a vertical restraint should either be harmless to competition or at least have beneficial effects.

Historically, the Commission has interpreted Article 85(1) extensively and vertical restraints have as a result of the interpretation been assumed to restrict competition. In the analysis of the agreement, the Commission has applied a test called "the freedom of action test". This test has focused on whether any of the contracting parties' commercial freedom has been limited by the agreement and whether the agreement has caused any adverse effects for competitors or consumers.[137] The "freedom of action test" that presently takes place, contains several weaknesses. Firstly, it does not create an analytical framework with distinct legal rules. Secondly, it does not reflect but conflicts with the microeconomic framework. Thirdly, instead of protecting consumers and by that efficiency, it tends to favour traders and competitors. Finally, as pointed out above, it results in agreements which could be economically justified are considered as having anticompetitive effects.[138]

[136] Reynolds, Steven P, "Comparison of US Antitrust law and EC Competition law", **Fel! Hittar inte referenskälla.** .org/law/intlLaw.html 1998-03-19
[137] Lugard p.166
[138] Hawk p.977-978

This approach has been sharply criticised and different suggestions for a new approach has been presented. The Commission's traditional approach has been regarded as too formalistic and mechanistic. The criticism concerning the approach has had an effect on the Commission. Already in 1995, the Commission initiated an extensive revision of its policy towards vertical restraints. By publishing a Green Paper[139], containing several options, the Commission wanted to create a public discussion. A well-balanced common policy for the Member States is needed to ensure legal certainty, then it is natural for the members of the Community to be able to influence the development of a legal framework.

Today, the essential part of the economical analysis is accomplished under Article 85(3) to establish whether an exemption can be granted. This approach which results in many vertical restraints are considered as anticompetitive and reasons for them to be justified must be found in order to become exempted. A better result would be achieved if the economic analysis instead would be performed under Article 85(1).

This solution would not interfere with the Commission's exclusive competence to grant exemptions. Instead it would enable any national court or authority to apply a comprehensive and substantial analysis.[140]

The analysis would need to be more flexible and focus on the facts of the case in question. In the business world of today, economics and laws are not separated, but to the contrary, they increasingly interrelate. For an agreement to be efficient, it must mirror the commercial reality. By reason of this, the analysis of a competition case must include economic theory.

A certain vertical restraint, such as a tying arrangement, should not be considered as illegal per se. An assessment involving several factors must be accomplished to be able to establish whether it creates anticompetitive

[139] http://europa.eu.int/en/record/green/gp9701/vrsumen.htm#c2
[140] Hawk p.987

effects and if so, if these are justified due to its procompetitive effects. With this approach, the nature of the contractual relationship of the parties and the nature of the restraint need to become assessed.[141]

Also the nature of the products or services is important. However, the structure of the market is of outmost importance. The existing degree of interbrand competition must be evaluated, since there is a connection between the interbrand competition and the competitive effects of a vertical restraint. If there is a high degree of interbrand competition on the market, it is probable to assume that any occurring anticompetitive effects will be outweighed by the vertical restraints' procompetitive effects. On the other hand if the interbrand competition is already weakend and there are entry barriers, the anticompetitive effects can jeopardise the open market.[142]

The analysis should also include an assessment of the market power of the undertaking(s) involved in the case. It is equally important under Article 85 as it is under Article 86. This is a very complicated issue and this examination paper will only point out the importance of a correct assessment. When asessing a tying arrangement, the degree of market power should be included in the assessment. For an undertaking without a high degree of market power, the use of a tying arrangement can deminish the risk of entering into the market. The Commission has in the past protected small and mediumsized undertakings, but its reasons can be questioned. Because even if they increase competition, why should they enjoy a special protection? One reason that often is used is that they increase competition in the long run. However, the same economic analysis could be applied to small and mediumsized undertakings to assess whether their use of vertical restraints creates anticompetitive effects. If the anticompetitive effects are outweighed by procompetitive and can be justified, then the special protection is redundant and unnecessary.[143]

[141] Lugard p.167
[142] Green Paper on Vertical Restraints in EC Competition policy

Criticism has also been levelled against the lack of reasoning in the decisions of the Commission. Instead of explaining the underlying causes to its conclusions, the Commission has often chosen to only state the facts of the case and then give its legal appraisal.[144] This approach creates uncertainty among undertakings, which can not prepare or predict the future development. If the Commission's decisions were altered to contain a more cogent and solid reasoning, undertakings would be able to learn from the decisions. Currently, if undertakings are hesitant concerning an agreement's legal status, it has to go through the notification procedure to be granted an individual exemption or qualify under a block exemption. Both of these alternatives constitute a burdensome, costly and time-consuming process to undertakings. When weighing the pros and cons, undertakings might choose to pursue and conclude the agreement without the legal certainty of an exemption.

The Commission's and the Courts' diverging application of Article 85(1) has also amounted to criticism. Although both the CFI and the ECJ have altered their approaches, the Commission's approach has not changed. The ECJ has in the cases "*Delimitis"*[145] and the subsequent " *Lagnese-Iglo v Commission"*[146] acknowledged the need of considering an agreement in its entire legal *and* economic context to determine whether it creates anticompetitive effects.[147] This is obviously an improvement in the analysis. Still, it is the Commission that delivers the first decision in a case and many undertakings do not have the financial means and/or the time to appeal the decision to the CFI and the ECJ. For undertakings, it is important that the Commission would adapt the other two instances' approach to increase legal certainty.

---

[143] Hawk p.981
[144] Korah, Valentine, "An Introductory Guide to EC Competition Law and Practice" 6th Ed. 1997 p.301
[145] Case C-234/89 Stergio Delimitis v. Henninger Bräu [1991] l ECR 935
[146] Case T-7/93 Lagnese-Iglo v. Commission [1995] ll ECR 1533
[147] Carlin p.285

8.3 Is there a per se rule and/or rule or reason in EC law?

Since EC competition law is compared to the US antitrust laws, the distinct feature of the per se rule and the rule of reason should be noticed in this context. There have been, and still are, extensive discussions if EC law contains a per se rule and/or a rule of reason.

It is a fact that neither a per se rule or a rule of reason exist explicitly within EC law. If the relevant legislation, the Commission's decisions and the judgements of the CFI and the ECJ are examined, they can not be found anywhere. However, it may be that none of these actually have expressed a per se rule or a rule of reason, but still contain a resemblance of the American system.

If the case law of the ECJ is investigated, it can be observed that the ECJ has emphasised that EC law does not contain a per se rule under Article 85(1). In the case „*La Société Technique Miniére v Maschinenbau Ulm*"[148], the ECJ interpreted Article 85(1) as not including or excluding certain categories of agreements due to their legal nature. In order to ascertain whether the conditions of Article 85.1 were fulfilled, the agreement should be assessed in its economical and legal context. This has later been confirmed by the case „*Delimitis*"[149].[150]

It can be claimed that under EC competition law, any restraint that results in an absolute territorial protection will be held illegal. Due to the fact that the

[148] Case 56/65 (1966) ECR 235
[149] Case C-234/89 Stergios Delimitis V Henninger Bräu (1991) ECR 1-935
[150]

Community was established to create a common market, such a restraint is incompatible to this primary goal. The restraint will not be held illegal because of its existence but due to its result.

The question whether a per se rule and a rule of reason exist or should be included in the assessment of vertical restraints should not be the primary objective of the discussion. Instead it should focus on creating a well-balanced and operable framework when assessing vertical restraints.

9 Conclusions

There has existed a possibility for a tying arrangement to be held legal formally under both Article 85 and 86 as well as in the Technology Transfer Regulation. The legality has been determined by the existence of a connection between the products and if an element of coercion has been present in the case. However, when put in practice in a case, the possibilities have been circumscribed by the Commission's and the Courts' high standards for justifications. When the assessments have been accomplished, tying arrangements have been considered with suspicion from the beginning. The decisions and judgements indicate that no further evaluation has been realised. The undertakings' justifications have not been thoroughly analysed, but only acknowledged and condemned.

In the above- mentioned *Campari* case, the ECJ accepted the tying arrangement, which was imposed to ensure the product's unique attributes and by that secure the product's quality. In this case the importance of a trademark proprietor's need to protect its trademark was emphasised. The tying arrangement was economically justified since no potential supplier foreclosed from the market. However, the ECJ did not accept Hilti's defence in the *Hilti* case, when the undertaking asserted that the tying arrangement had been used to ensure the safe and reliable operation of its products. In this case an alternative supplier existed and the ECJ referred to the possibility of using less restrictive means to maintain the safety of the product. Neither in the *Tetra Pak ll* case did the ECJ accept the technical justifications set forth by Tetra Pak. The undertaking referred to the high technology of its machines. The other justifications, which were asserted by Tetra Pak were also found unacceptable according to the ECJ. Neither the economical advantages, such as economies of scale and synergistic effects could justify the tying arrangement. Finally Tetra Pak referred to consumers' health as a justification. Otherwise the Commission's policy embraces a special concern for consumers, but here it was not enough to

justify the tying. These cases indicate the difficulties undertakings face when a tying arrangement is considered in isolation and not in the agreement's legal and economic context.

A new approach is currently developing concerning vertical restraints and by that also concerning tying arrangements. The previously stern approach towards tying is most likely changing. The extensive application of Article 85(1) entailed that many vertical restraints were found creating anticompetitive effects. Since the Commission has been very restrictive with granting exemptions, undertakings have had to alter their agreements to be in accordance with the block exemptions. This has resulted in that the most efficient solutions have been avoided when agreements have been concluded. Since there is no possibility of obtaining an exemption under Article 86, it is of essential importance that the assessment of determining the undertaking's dominant position is accurately elaborated.

Now unanimity seems to be prevailing regarding the need of an increased inclusion of economics into the assessments under Article 85 and 86. This is of particular importance when a tying arrangement is involved, since it is not only imposed to attain economical advantages but to maintain control after entering into a vertical agreement. In the business world of today much financial resources are spent on the trademark of the undertakings. It is therefore essential for undertakings to protect it by securing the product's quality. Hopefully, the upcoming approach on vertical restraints will contain a better analysis, which acknowledges quality control and economic advantages as acceptable reasons for imposing tying arrangements.

The change in the approach could already be noticed when the Technology Transfer Regulation was introduced and tying was moved from the black list to the grey. Indications also came with the ECJ's judgement in ”*Delimitis”*, where it recognised the need of assessing an agreement within its legal and economic context.

When comparing the EC competition policy and the American antitrust policy, parallels can be drawn between the two systems as long as the differences are acknowledged. The differences in the underlying aims and objectives are crucial. The attainment of a common market permeates the EC competition policy.

It is interesting to observe that the two legal systems' approaches concerning tying arrangements are diverging. The previous strict approach within the EC is changing towards a more liberal regulation, while in the US a more strict approach is assumed after the Guidelines were repudiated. One possible explanation to the changes might be that both of the systems' approaches were too extreme and now a more well-balanced assessment is wanted. The assessments can never be totally similar due to the differences in the objectives of the systems, but both should aim for a flexible and expedient analysis which creates legal certainty for the undertakings.

10 List of references

Bibliography

Van Bael Ivo and Bellis Jean-Francois	Competition law of the European Community, 3rd Ed, Oxfordshire, 1994
Bellamy & Child	Common Market Law of Competition, 4th Ed, London, 1993
Craig Paul and de Burca Graime	EC Law, text cases and materials, New York, 1995
Coase Ronald	Företaget, marknaden & lagarna, Värnamo,1992
Fejö Jens	Monopoly Law and Market, Deventer, 1990
Gellhorn Ernest	Antitrust Law and Economics in a nutshell, 3rd Ed, USA, 1986
Grant Robert M	Contemporary Strategy Analysis, 2nd Ed, Cambridge,1995,
Green Nicholas	Commercial agreements and competition law-practice and procedure in the UK and EEC, London,1986
Korah Valentine	An Introductory Guide to EC Competition Law and Practice, 6th Ed, Oxford, 1997
Korah Valentine	Technology transfer agreements and the EC Competition Rules, Oxford, 1996
Lidgard Hans Henrik	Licensavtal i EU, 1st Ed, Stockholm,1997
Lohmann Niklas	The new EC Technology Transfer Regulation 240/96 – prevailing controversies at the intellectual property right/competition law interface, Stockholm, 1997
Mendes Mario Marques	Antitrust in a world of interrelated economics, Brussels, 1991
Posner Richard A	Antitrust Law, An Economic Perspective, Chicago, 1976
Raybould DM and Firth Alison	Law of Monopolies-Competition Law and Practice in the USA, EEC, Germany and the UK, London,1991
Tirole Jean	The Theory of Industrial Organization, 6th printing, Massachussets, 1993
Whish Richard	Competition Law, 3rd Ed, London, 1993
Williamson Oliver	Antitrust Economics: Mergers, Contracting and Strategic Behavior, Oxford 1987

Articles

Barney JB, "Types of Competition and the Theory of Strategy: Toward an Integrative Framework" Academy of management Review 11 (4) 791-800

Downing Robbie, "Hilti: The Final Nail" [1995] 1 ECLR 53

Carlin Fiona M, "Vertical Restraints: Time for Change?" [1996] 5 ECLR

Hawk Barry E, “The American (Antitrust) Revolution: Lessons for the EEC?” [1988] ECLR

Levy Nicholas, “Tetra Pak 2: Stretching the Limits of Article 86?” [1995] 2 ECLR 104

Lugard HH Paul, “Vertical Restraints under EC Competition Law: A Horizontal Approach?” [1996] 3 ECLR

Valentine Korah, “Tetra Pak 2 – Lack of reasoning in Court’s Judgement”[1997] 2 ECLR 98

Venit James S, “In the wake of Windsurfing: patent licensing in the Common Market” 1986 Fordham Corporate Law Institute

Zanon Lucio “Ties in patent licensing agreements” [1980] 5 ELR 391

Other sources

Bingaman Anne K. “Change and continuity in antitrust enforcement” www.usdoj.gov/atr/speeches/93-10-21.txt, 1998-03-24

Department of Justice’s pressrelease “Action would give consumers more choices”
www.usdoj.gov/atr/press_releases/1998press/1764.htm, 1998-06-03

Klein Joel I, “Filing of antitrust suit against Microsoft”
www.usdoj.gov/atr/press_releases/1998press/1770.htm, 1998-06-03

Melamed Douglas A. “Exclusionary vertical agreements”
www.usdoj.gov/atr/speeches/1623.htm,1998-06-03

Pitofsky Robert, “Vertical restraints and vertical aspects of mergers-a US perspective”
www.ftc.gov/speeches/pitofsky/fordham7.htm 1998-03-19

Reynolds Steven P. “Comparison of US Antitrust law and EC Competition law”, www.antitrust.org/law/intlLaw.html, 1998-03-19

11 Table of cases

The European Court of Justice

Case 56/654	La Societe Technique Miniere v Maschinenbau Ulm [1966] ECR 235
Case C-234/89	Stergio Delimitis v Henninger Bräu [1991] 1 ECR 935
Case T-7/93	Lagnese-Iglo v Commission [1995] ll ECR 1533
Case L-65/19	Eurofix and Bauco Ltd v Hilti AG [1994] 4 CMLR 614
Case L-70/69	Campari [1978] 2 CMLR 397
Case C-333/94P	Tetra Pak International SA v Commission [1997] 4 CMLR 662

The European Commission

Campari 78/253/ EEC, December 23,1977, O.J. 1978

Vaessen /Moris 79/86/EEC January 10,1979 O.J. L19/32

Eurofix Ltd and Bauco v Hilti AG 88/138/EEC December 22 1987, O.J 1988

Elopak Italia Srl v Tetra Pak92/163/EEC 24 July 1991 O.J 1991

Settlement

IBM settlement, Fourteenth Report on Competition Policy points 94-95

The Federal Supreme Court of the United States

US v Trans Missouri Freight Assn 166 US 290 (1987)
Standard Oil Co of New Jersey v US 221 US 1 (1911)
US v Trenton Potteries Co 273 US 392 (1927)
American Tabacco 221 US 106,179
International Business Machines v US 289 US 131 (1936)
International Salt Co v US 332 US 392 (1974)
Times Picayune Publ. Co v US 345 US 594, 608f (1953)
Northern Pacific Railway Co v US 356 US 1 (1958)
US v Loew's Inc. 371 US 38 (1962)
Jefferson Parish Hospital District No 2 v Hyde 466 US 2 (1984)

Pending case

Microsoft