

# Rebates, Bundling and Tying

## EU Guidance on Enforcement Priorities under Article 102

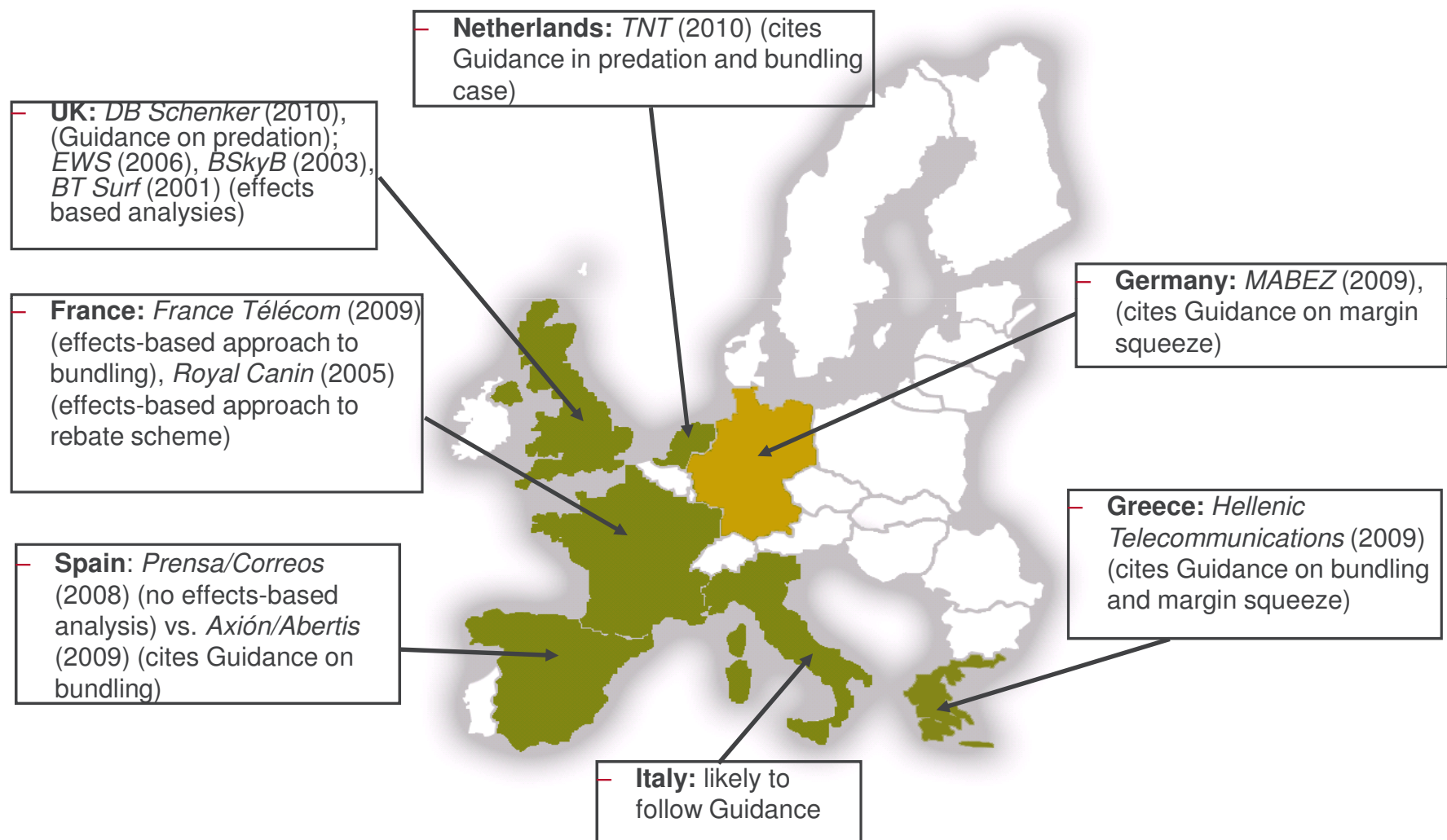
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Bill Batchelor  
Baker & McKenzie, Brussels

## Bundling/Tying Investigations by Industry

Industry	Examples of jurisdictions where bundling/tying has been considered by authorities
Telecoms	France, Germany, Greece, Ireland, Latvia, Luxembourg, Sweden, UK, EU, US
Media	Belgium, Denmark, France, Sweden, UK
Information Technology	France, UK, EU, US
Pharma	Belgium, US
Newspapers	France, Sweden

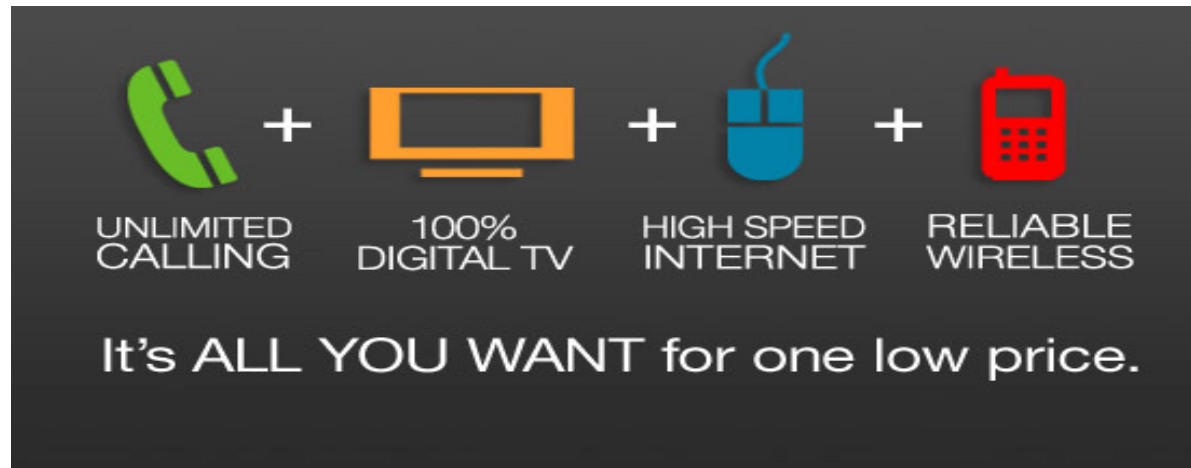
# Likely Adherence to Guidance?



# (1) Lack of Impact?

Lack of Foreclosure if Limited Proportion of the Market Affected (Guidelines, para. 20)		
Limited Duration	Limited Common Pool of Customers	Limited % of Market
<p><i>Canal Plus/TPS:</i> short duration of offer (5 months) and limited marketing actions (Conseil de la Concurrence, 18 March 2005, Decision no. 05-D-13)</p>	<p><i>EU Discussion Paper (2005):</i> “If only a third of customers ... buy [bundled] products, tying may pose less of a risk” (para. 198)</p> <p><i>nCipher</i> (OFT ME/3780/08), paras. 50-54; <i>JC Decaux/Titan</i> (OFT ME/4470/10), paras. 39-48</p>	<p>T-155/06 <i>Tomra</i>, para. 243 (&gt; 40% relevant markets)</p> <p>T-65/98 <i>Van den Bergh Foods</i>, para. 160 (approx. 40% outlets alleged <i>de facto</i> tied)</p> <p>Compare Verticals 30% safe harbour</p>
<p><b>Compare C-85/76 <i>Hoffmann-La Roche</i>, para. 123: “any further weakening of the structure of competition may constitute an abuse” (cf <i>Claymore</i> [2005] CAT, para. 307)</b></p>		

## (2) Do Competitors Have Countermeasures?



- Bundle to bundle competition
- Strategic alliance or teaming agreements
- Individual negotiation with component suppliers
  - See, eg, Case M.5529 *Oracle/Sun* (January 2010), paras. 955/956, 960/961, nCipher (OFT ME/3780/08, paras. 50-54)

### (3) How Aggressive is the Bundled Price?

- Tying - Must buy Y with dominant product X
  - % of customers buy both products?
  - Competitors access similar bundles
- Price bundling – discount for bundle
  - each product price less bundled discount > cost
- Technical integration
  - justify tie by efficiency benefits of integration

#### Example: Bundled Rebates

**Promotion:** X and Y each EUR 5 standalone or EUR 8 in combination.

	X	Y
Price	5	5
(Discount)	2	2
(Cost)	3	4
=	✓0	✗ -1

## BUT Increasingly Hard to Satisfy Test over Multiple Products

Product:	A	B	C	D	E
Cost	8	7	4	4	5
Standalone Price	10	8	5	7	10
Allocated Discount	5	5	5	5	5
Below Cost?	✗ -3	✗ -4	✗ -4	✗ -2	✓ 0

- NB (1): *Nielsen/IRI* (1996), the multi-country bundling problem
- NB (2): *Hoffmann La Roche* (1979) the product range problem

**Standalone cost: 40**  
**Bundled discount: 12.5%**



## (4) Identifiable Cost Savings?

### *Digital Equipment Undertaking (1997)*

- Bundling of software and hardware support permitted
- Efficiencies assumed (with little analysis)
- Up to 10% bundled discount permitted



## (5) Show No Harm to Competition?

### 1. **Successful competitor in the market**

- Canal Plus offered a single subscription for its Canal+ and Canal Satellite channels, as well as a series of discounts and promotions
- Competition Council found that bundling is not per se illegal and it was necessary to establish an anti-competitive object or effect
- TPS was already a successful competitor in the market
- Canal Plus's joint offer could have generated significant costs savings that could be passed on to subscribers
- The joint offer was only available for 5 months
- The discounts were a competitive response to a series of special offers that TPS launched shortly after its start-up (Conseil de la Concurrence, 18 March 2005, Decision no. 05-D-13)

## (5) Showing No Harm to Competition?

### 2. Not possible to create a direct competitor

- OFT found that BSkyB's bundling of television channels did not foreclose entry to any rival
- BSkyB held the majority of rights to the relevant premium film content rights. Therefore, even if BSkyB's bundling had the hypothetical ability to foreclose, the particular circumstances of the upstream market meant that the bundling could not produce this effect (OFT CA98/20/2002, para. 599)

### 3. Individual negotiation strategy possible?

- no evidence that customers perceived the ability to purchase two types of encryption products through a “one stop shop” as being a better option in terms of negotiating prices and discounts – customer could have achieved the same price by negotiating for individual products
- if customers were to require bundled products then a number of firms would be able to offer competing bundles
- large number of customers only buy one type of product (OFT ME/3780/08, paras. 50-54)



## Conclusion on Counselling Points

- Check for lack of impact:
  - *de minimis* impact (e.g. <15% market affected or likely to want tied products)?
  - Counter strategies (e.g. competitors have same portfolio or strategic alliance)?
- Check maths of bundled pricing
  - Bundled prices are above cost even when discount applied to each bundle component
  - Genuine cost savings
- Safer options:
  - Standalone options available
  - Discount bundles less aggressive



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