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The Legal Standards for Determining the Illegality of Bundling Practices in Open Source and the Improvement of Related Systems

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Abstract. Open source has rapidly developed as a model of technological innovation in recent years. Driven by technological advances, the open source market has expanded rapidly; however, its characteristics have also given rise to potential monopolistic risks. Tying, one of the most common monopolistic practices in open source, poses challenges in assessing its legality and lacks a unified standard for evaluation. Therefore, it is necessary to analyze this issue by integrating traditional legal frameworks with the unique features of open source: on one hand, applying conventional consumer demand principles to determine whether tied products are independent and whether the tying is compulsory; on the other hand, considering the positive effects of open source, such as promoting innovation and providing free features, along with the implications of tying behavior. By addressing these two dimensions, this study aims to clarify the standards for assessing the legality of tying in open source contexts and to enhance the regulatory framework governing such behaviors.

Keywords: Open source, Antitrust regulation, Tying behavior, Legality determination

1. Introduction

In recent years, open source has been widely applied across various fields, such as business and technology, as a development model centered on sharing and collaboration. Its ability to facilitate free distribution and relatively low costs has significantly accelerated the pace of technological iteration. Open source has, to some extent, transformed traditional profit models by breaking down technological barriers and establishing new business systems. In this context, tying represents the most direct way to integrate open source with closed source and has become a common business strategy within the open source domain [1]. Due to the inherently free nature of open source, tying practices in this environment are often more subtle than traditional ones. From the perspective of consumer rights and long-term market benefits, tying behavior may also generate positive efficiencies [2]. Therefore, more comprehensive standards and diverse analytical perspectives are needed to assess the legality of tying practices in this new environment.

Accordingly, this paper discusses the characteristics and identification challenges of tying behavior under open source, analyzes the standards for determining its legality, and compares them

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with existing case standards in Europe and the United States. The goal is to provide a more refined set of assessment criteria by integrating the current legal framework.

2. Characteristics of tying in open source and challenges in determining its legality

The distinctive business model of the open source market makes it more challenging to define monopolistic behaviors, such as tying, compared to traditional markets. "Technology tying," common in conventional tying practices, is the primary form of tying behavior in the context of open source. However, significant differences in legal judgments regarding the illegality of technology tying across regions give rise to the following characteristics and identification challenges in open source.

2.1. Tying behavior in open source exhibits high concealment and difficulty in determination

Tying occurs when a seller combines two unrelated products for sale, typically in the form of "buy A, must buy B," which often contradicts consumer preferences. A prerequisite for tying is that the tied product and the tying product must be independent. In traditional markets, product independence can be demonstrated in multiple ways, such as whether consumers are willing to purchase them separately or whether it is feasible for sellers to offer them independently. Moreover, the long sales history of traditional products allows for easier validation of the independence of tied and tying products through prior case law and other sources. Thomas D. Morgan argues that to determine whether two products are truly distinct, there must be an inherent economic foundation between them; at a minimum, some consumers must wish to purchase them separately and independently [3]. However, this perspective does not fully apply to tying behavior in the open source domain, particularly in open-source artificial intelligence. On one hand, the free nature of open source diminishes the inherent economic foundation between tied and tying products, reducing the traditional incentives associated with lowering production and sales costs. On the other hand, tying behavior in open source is not entirely opposed by consumers; multifunctional bundled products can lower switching costs and increase user preference. As a result, traditional consumer demand theories fail to adequately assess product independence [4]. Additionally, due to the novelty of open source tied products and the lack of direct monetary loss for consumers, demonstrating the compulsory nature of tying behavior is difficult. Therefore, tying behavior in open source exhibits strong concealment and poses significant challenges for legal determination.

2.2. Ambiguity of legality in tying behavior within open source

2.2.1. Characteristics of the open source market lead to legal ambiguity

Unlike traditional markets, the open source market possesses characteristics such as being free and freely distributable, which differentiate tying behavior within it from conventional tying practices. Due to the free nature of open source projects, tying behaviors in this context often resemble specific discounts rather than traditional tying sales. Additionally, tying in the technology-driven open source domain exhibits duality, frequently producing both negative impacts and positive effects. A significant portion of opinions suggests that, under certain circumstances, tying behavior does not harm competition and may even enhance economic efficiency. In the open source market, which encourages technological innovation [5], tying is more likely to be framed as "promoting technological development." This dual nature further contributes to the ambiguity regarding the legality of tying practices in the open source realm.

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2.2.2. Variations in legal systems lead to ambiguities in legality

Although the "inherent illegality" of tying behavior can be relatively easy to establish, the dominance of the Chicago School in U.S. antitrust law has led to the application of the efficiency principle, resulting in a certain relaxation of antitrust regulations regarding corporate management. While the European Union continues to apply a "quasi-inherently illegal" standard for technical tying, the United States regulates such behavior using a "reasonableness" standard [6]. However, rational analysis of technical tying, particularly in the open source field, is highly complex and time-consuming. The existence of different legal systems with varying evaluation standards has resulted in a lack of unified, rigid criteria for assessing the legality of tying in open source, further obscuring its legal status. For example, Google's practice of making the core Android system (AOSP) open source while requiring mobile manufacturers wishing to provide a complete experience to pre-install closed-source Google Mobile Services was fined €4.125 billion by the EU in 2018. The court deemed this practice as restricting competition [7]. However, it is undeniable that this strategy established the world's largest mobile ecosystem, offering consumers significant convenience. This outcome aligns with the efficiency-centric approach favored in the United States while contradicting the fairness principles promoted by the European Union. This case illustrates the diversity of legal standards for judging the legality of tying in open source, which relies heavily on case-by-case analysis rather than a unified standard.

In China, Article 17, Section 1, Item 5 of the current Anti-Monopoly Law states that "operators with market dominance are prohibited from tying products without justifiable reasons." The definition of "justifiable reasons" is inherently ambiguous and can often be interpreted as "promoting resource sharing and technological development" in the context of open source, making the legality of tying difficult to determine. Furthermore, the revised Anti-Unfair Competition Law of 2025 no longer includes general prohibitions against tying practices. While this aims to prevent overlaps between unfair competition law and antitrust law, it also reflects China's respect for business autonomy and encouragement of commercial model innovation, indicating a relative leniency toward tying behavior. In the rapidly evolving open source field, tying practices have significantly diverged from traditional tying behaviors, yet the standards for their identification and penalties remain unclear and non-uniform, resulting in persistent ambiguity regarding the legality of tying in open source contexts.

3. Normative analysis of the standards for determining the legality of tying behavior in open source

The rise of the open source model, with its unique economic logic and market competition dynamics, poses unprecedented challenges to traditional antitrust analytical frameworks. China's current antitrust system draws heavily from the Chicago School, emphasizing economic efficiency and consumer welfare. Since tying is a common monopolistic tactic in the open source market, existing standards for determining its illegality remain somewhat ambiguous. Considering the inherent requirements of tying—namely, product independence and compulsory sale—this paper conducts a normative analysis from four aspects: product independence assessment, proof of coercion, evaluation of anti-competitive effects, and the definition of relevant markets.

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3.1. Product independence assessment

Tying behavior requires that the tied and tying products be independent. Assessing product independence in open source contexts is generally more challenging than in traditional markets. This assessment can be approached from two perspectives: technical independence and legal independence.

3.1.1. Technical independence

In the open source market, tying often involves bundling open source products with closed source products, making independence difficult to establish. However, because the open source market relies heavily on technology, technical independence serves as a key criterion in this assessment. Technical independence can be demonstrated through code independence, functional independence, and the nature of open source licenses. For example, GPL (GNU General Public License) modules are freely usable, modifiable, and distributable. When GPL modules are bundled with closed source modules, one can determine whether the GPL module depends on the closed source system by evaluating code independence. Similar analyses apply to weakly infectious licenses, such as EPL, LGPL, and MPL, where examining plugin mechanisms and front-end/back-end separation designs can help determine technical independence between the open source tied product and the tied product. In the Microsoft case, U.S. courts found that the interaction between Windows and Internet Explorer code constituted a non-independent product; their bundling added value, categorizing it as product integration rather than tying. Therefore, evaluating technical independence is crucial for assessing the independence of tied products in an open source context.

3.1.2. Legal independence

Traditionally, product independence has been assessed based on consumer demand. Unless consumers have a substantial separate demand for both the primary and tied products, tying is not deemed to exist [6].This principle remains applicable in open source contexts. Whether consumers have the right to use only one of the bundled products—for instance, uninstalling product A after acquiring an AB bundle to use only B—can serve as a criterion for evaluating legal independence. However, the concept of “integrated products” in technological tying blurs the distinction between independent products in the open source market, closely linking legal independence with technical independence. Accordingly, open source licenses can help determine legal independence. Although source code is publicly available, the functionalities provided by different code components are distinguishable. By analyzing license infectivity, one can assess whether bundled products have derivative relationships based on functional connections, thereby evaluating their legal independence.

3.2. Proof of coercion in tying behavior in open source

Tying behavior requires demonstrating that the bundled sale is compulsory, thereby limiting consumer choice. China’s Anti-Monopoly Law, Article 17, provides a legal foundation for proving coercive tying practices in the open source sector—for example, requiring acceptance of specific terms to access core functionalities. However, tying in open source is often more covert, and its inherently free nature can cause consumers to overlook the erosion of their choice rights. In the context of generative artificial intelligence, tying behaviors often involve inducement rather than direct coercion [8]. Therefore, when proving coercion, the focus should shift from consumer choice

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deprivation to objective coercion. For instance, if operators embed additional applications into generative AI services through default settings, technical bundling, or algorithmic recommendations that cannot be bypassed—making it difficult for users to select third-party services—this constitutes objective coercion [4]. Such evaluative standards can be extended to other open source markets. Moreover, open source licenses can assist in analyzing coercion from a technical perspective.

3.3. Evaluation of anti-competitive effects

Assessing tying behavior also requires demonstrating that it restricts market competition for the tied product. Despite the unique characteristics of open source, limitations on competition and consumer choice remain relevant in evaluating anti-competitive conduct. For example, in the European Union's 2018 antitrust investigation against Google, the company leveraged the open-source nature of the Android system to rapidly expand market share and then reinforced its position through tying and other measures. The EU clarified that market dominance is not inherently illegal; however, abusing that dominance to exclude or restrict competition constitutes an illegal act, resulting in a €4.34 billion fine for Google [9]. In cases of tying between open source and closed source products, traditional legal frameworks remain largely applicable.

Beyond existing regulations, the characteristics of the open source market can inform evaluations of anti-competitive effects from a market structure perspective. For instance, applying the "equally efficient competitor test" in the context of generative AI can determine whether tying behavior excludes competitors with equivalent technological efficiency [10]. If the market environment allows competitors to enter and tying does not impede entry, the behavior may be deemed non-substantially harmful. Conversely, if entry is obstructed, substantial harm is indicated. This approach can be generalized to other open source domains. Furthermore, the core value of open source lies in promoting innovation through sharing, which enhances welfare and efficiency. Therefore, when evaluating the anti-competitive effects of tying in open source, both rationality and efficiency analyses are essential. Potential positive efficiencies should not be overlooked.

3.4. Definition of relevant markets

The starting point for analyzing the legality of tying behavior is the definition of relevant markets, which significantly influences subsequent assessments of market dominance and anti-competitive effects. In the open source sector, competition often manifests through services, quality, and innovation, combined with the market's unique free features, making the definition of relevant markets both complex and crucial. This article uses the case of Qihoo 360 Technology Co., Ltd. vs. Tencent Technology (Shenzhen) Co., Ltd. and Shenzhen Tencent Computer Systems Co., Ltd., concerning the abuse of market dominance, to illustrate the challenges of defining relevant markets in the context of tying behavior in open source. First, it is necessary to consider whether the "hypothetical monopolist test" (HMT) is applicable in open source contexts. The court affirmed that HMT is a universally applicable analytical tool for defining relevant markets. In practice, HMT can be applied through methods such as price increases (SSNIP) or quality decreases (SSNDQ). Because internet instant messaging services are free, users are highly sensitive to price, making SSNIP unsuitable, as it could result in overly broad market definitions. Instead, quality-decrease hypothetical monopolist testing (SSNDQ) should be employed for qualitative analysis [11]. In open source scenarios, where market equilibrium prices are effectively zero, the SSNIP method is inapplicable, though adaptable forms of the method may still be used. SSNDQ provides a qualitative analytical approach suitable for these contexts. In this case, the court applied SSNDQ testing and

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determined that QQ instant messaging services and security software do not constitute the same market. It concluded that Tencent's tying behavior did not eliminate competition and dismissed Qihoo's appeal. This case demonstrates that analyzing the illegality of tying behavior in open source can begin with defining relevant markets. It is important to note that while defining relevant markets is a crucial analytical tool, it is not an end in itself. In some instances, legal judgments can be made even without a formal market definition.

4. Comparative study on the legality of bundling behavior in open source

Different legal systems currently apply varying standards for determining and penalizing bundling behavior in open source. Some emphasize efficiency standards, while others prioritize fairness. This divergence has resulted in two main approaches to assessing the legality of bundling in open source: one focuses on direct analysis of illegality, while the other evaluates whether the practice benefits consumers and market competition in the long term. This paper conducts a comparative study of these two approaches in conjunction with relevant past cases.

4.1. Direct analysis of the illegality of bundling behavior in open source

4.1.1. Judging by market dominance

China's Anti-Monopoly Law, Article 17(5), stipulates that enterprises engaging in bundling behavior must possess market dominance. Market dominance is a prerequisite for determining the illegality of bundling and influences the assessment of competitive effects. Historically, structural factors have been widely regarded as accurately reflecting the essence of market dominance, a standard upheld in many countries [12]. In the United States, a 70% market share threshold is used to determine market power [13], while Japan's Act against Private Monopolization and Maintenance of Fair Trade defines "monopoly status" in Article 2(7). Similarly, China's Anti-Monopoly Law, Articles 18 and 19, provides presumptions regarding market position based on market share [14]. In the context of open source, these traditional criteria for assessing market dominance remain valid. Article 18 of China's Anti-Monopoly Law emphasizes considering various factors comprehensively. In the open source domain, driven by technological innovation, non-structural factors such as service quality should also be considered. A precedent exists in the Google Android bundling case. Google held over 90% of the global market share for the Android operating system (according to EU data) and further reinforced its dominant position through pre-installation of Google Mobile Services (GMS). The European Commission recognized Google's dominance in both the "Android operating system app store market" and the "general search service market," forming the basis for penalties. Therefore, the presence of market dominance can serve as a direct standard for analyzing the illegality of bundling behavior in open source; however, it is not the sole standard.

4.1.2. "Presumed illegality" standard from the consumer perspective

Most bundling behaviors in open source fall under "technical bundling." The European Union has taken a firm stance on technical bundling in past cases, applying a consumer-oriented "presumed illegality" principle. The EU Guidelines on Abuse of Market Dominance define technical bundling as the practice of designing products to work only when used together with the main product, such that they cannot integrate with competitors' substitutes [15]. This concept is widely applicable in the open source context. For example, the EU penalized Microsoft for bundling Windows Media Player (WMP) with Windows, in contrast to the United States, where the efficiency of software bundling

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was considered. The EU Commission based its decision solely on the "presumed illegality" standard. Similarly, the substantial €4.34 billion fine imposed on Google exemplifies the EU's strict approach. Although some voices criticize the EU's relatively absolute judgment standard, the "presumed illegality" principle remains an important standard for directly analyzing the illegality of bundling behavior in the open source environment, which generates value primarily through services, innovation, and other abstract means.

4.2. Analyzing long-term consumer and market competition benefits and efficiency

In addition to direct illegality analysis, the "reasonable principle" approach primarily considers whether bundling behavior benefits consumers in the long term and enhances efficiency. Influenced by the Chicago School, U.S. courts often apply this principle in cases of technical bundling, prioritizing efficiency. In the landmark Kayed case, the court established that if the defendant can demonstrate that the integration of two products resulted in "valid and non-trivial technological improvements," they would not bear legal liability for effectively creating a new product [16]. In assessing whether technological improvements from product integration created a new product, "technological motivations" rather than "marketing motivations" should be considered. Defendants must therefore show that product integration produced genuine efficiencies, not merely specific advantages. In the innovation-driven open source environment, the conditions for applying the reasonable principle and efficiency standards are not highly restrictive, allowing them to be broadly applied when determining the legality of bundling behavior. Despite over 30 years of U.S. judicial practice regulating software bundling, courts have remained cautious in establishing clear legal rules or specific precedents for the illegality of software bundling [6]. Nevertheless, the relative abstraction of the efficiency standard serves as a critical criterion for evaluating the legality of bundling behavior in open source.

In conclusion, significant differences exist in the standards for penalizing bundling behavior in open source across legal systems. The European Union tends to emphasize fairness principles, while the United States prioritizes the reasonable principle and efficiency. Each evaluation standard has distinct advantages and limitations, and no unified global standard has emerged. As a result, case-by-case analysis remains the primary method for assessing the legality of bundling behavior in open source.

5. Suggestions for improving the determination of illegality of bundling in open source

In recent years, monopolistic practices in open source have attracted considerable attention. Among proposed solutions, some scholars advocate a "dual governance framework," which recommends regulating open source externally through antitrust law while resolving issues internally via intellectual property rights [1]. Bundling, as one of the monopolistic tools in open source, can be addressed effectively using this framework. This section provides suggestions for improving the determination of the illegality of bundling in open source, analyzing the issue from two perspectives: the characteristics of open source and traditional legal frameworks, and the negative and positive effects of bundling behavior.

5.1. Analysis combining open source characteristics and traditional legal frameworks

Although the open source market has distinct characteristics compared to traditional markets, consumers in open source remain consumers. Therefore, traditional standards based on consumer

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demand remain applicable. Compared with businesses, consumers generally have less access to information, which underscores the need for antitrust law to safeguard consumer rights even when consumers are at a relative disadvantage. As noted in the literature, “The consumer welfare orientation in antitrust law has gained support in most countries and regions around the world and has become an international trend in the interpretation of 'public interest’” [17] “The ultimate aim of economic efficiency is consumer welfare.” [18] Thus, protecting consumer interests is a core objective of antitrust law. TThe principle of consumer demand aligns closely with this core objective, giving it rationality and legitimacy compared with other standards [19]. One of the key challenges in determining the illegality of bundling under open source—namely, proving product independence—can be addressed using consumer demand theory. Traditionally, the presence of specialized companies producing the bundled goods indicates independent consumer demand for these items. In the context of open source, evaluating “independence” from the consumer demand perspective remains feasible. Although bundling in open source is primarily technical in nature, courts can relatively easily assess whether such behavior satisfies the criterion of “independence between bundled products” and proceed with further legality analysis. Given the open source market’s characteristics—being free, technologically dynamic, and highly competitive—assessing the anti-competitive effects of bundling is often time-consuming and complex. Therefore, integrating traditional consumer demand theory provides a practical and efficient method for evaluating the legality of bundling behavior in open source.

5.2. Analyzing the negative effects and positive impacts of bundling behavior to assess its illegality

Influenced by the Chicago School, the principles of reasonableness and efficiency play a central role in determining the legality of bundling. In an open source environment that fosters innovation and reduces technological barriers, both the potential positive impacts and the negative effects of bundling should be considered in legality assessments. The Chicago School critiques of traditional bundling theories focus on two main aspects. First, bundling can provide convenience to consumers and reduce transaction costs. From this perspective, bundling promotes efficiency, which is considered the principal justification for its widespread occurrence. Second, bundling can represent an inefficient use of a monopolist’s market power. A company dominant in one product market may have the ability to monopolize another market, but doing so may not increase overall benefits and could instead reduce profits [20]. The ultimate goal of antitrust sanctions against bundling is to protect consumer rights. Given the highly competitive nature of the open source market and the primarily technical nature of bundling behavior, the principle of consumer reasonableness is crucial in assessing legality. Consumer welfare refers to ensuring that consumers operate in a fair and free competitive environment, enjoying lower prices, more choices, and better product quality. When evaluating the legality of bundling in open source, economic methods can be combined with a holistic approach that considers overall, rather than individual, consumer welfare levels to assess anti-competitive effects [19].

Conversely, the free and innovation-driven nature of open source complicates illegality determinations. Encouraging innovation means that bundling may incur short-term losses while generating long-term gains. For example, Google’s bundling of Android expanded its market share, but Google’s investment in and maintenance of the Android open source platform have also contributed positively to technological innovation and societal progress [1]. Consequently, assessing the illegality of bundling in open source may benefit from a “dual governance strategy,” which

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observes substantial changes in market structure to balance short-term efficiency losses against long-term innovation gains.

To improve the penalty system for bundling behavior in open source, traditional consumer demand theory can be integrated to address the “independence judgment dilemma” and challenges in proving coercion. Simultaneously, the anti-competitive effects of bundling should be analyzed in light of open source characteristics, including its free nature and innovation-promoting role, alongside consumer demand principles and economic evidence. Importantly, any potential long-term positive efficiencies arising from bundling should be considered when determining its legality.

6. Conclusion

The widespread application of open source has profoundly impacted fields such as artificial intelligence and software technology. Its free nature has also stimulated activity in traditional markets. The emergence of open source communities has facilitated the breakdown of technological barriers and promoted the development of new productive forces. However, monopolistic issues within open source have gradually become more prominent. One common monopolistic practice in this context is bundling, which presents challenges including difficulty in legal analysis and the absence of unified standards.

Fortunately, principles derived from traditional consumer demand, fairness, and efficiency, when refined and integrated, can help address some of the difficulties in determining the legality of bundling practices under open source. As the open source market matures, case studies have provided valuable templates for analysis, demonstrating that the law is not the only tool for addressing monopolistic issues in open source. Open source communities are closely tied to technology, and monopolistic practices are deeply intertwined with economic considerations. The SSNIP analysis method, as illustrated in the Tencent case, exemplifies the integration of economic reasoning with existing legal frameworks. This suggests that technical methods and economic modeling will play a crucial role in developing analytical approaches and improving regulatory systems for bundling practices and broader monopolistic concerns in open source. Empowering the legal framework with technical criteria and economic model analyses can be seen as a Promethean solution for addressing the challenges of monopolies in open source.

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