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The Party is Over and Microsoft Have Lost: The Key Issues and Ramifications of the Microsoft Judgement

Introduction

The Microsoft Case is a battle between Microsoft, the global software giant, and the European Commission. The Commission found Microsoft to be in breach of Article 82 of the EC Treaty because of their refusal to supply interoperability information in the Work Group Server (WGS) market and tying in Windows Media Player (WMP) with Windows. Microsoft appealed to the European Court of First Instance (CFI) where they lost their nine year battle on 17 September 2007. Microsoft will not be appealing the decision[1]. The case is a modern day David and Goliath with the Commission coming out the champion. This edition of Law in Brief will look at the main outcomes of the decision and its likely impact in particularly on future clashes of competition law and intellectual property law within the European Union (EU).

What is Article 82?

Article 82 regulates competition law in the common market. It prohibits the abuse of a dominant position. For Article 82 to apply there has to be an undertaking, i.e. an organisation or individual carrying out some kind of economic activity, that is in a dominant position. The undertaking must then be found to abuse that position[2] and the abuse must have the potential to affect trade between EU Member States. For an undertaking to be dominant it has to have sufficient economic strength to act independently of its competitors. There is no exact formula for calculating or assessing when an undertaking has sufficient economic strength. Factors taken into consideration would include the market share of the undertaking in question and the market share of its nearest rivals.

For an undertaking to be dominant for the purpose of Article 82 it has to be dominant in the relevant market[3]. The assessment of relevant product markets was therefore essential to the decision in Microsoft. In considering the relevant product market two areas need to be examined carefully. These are the demand-side substitutability of the product - whether customers will switch to an identical or similar product - and the supply-side substitutability - whether there are substitute *suppliers*[4]. In other words, the Commission looks at how interchangeable the product is[5]. The narrower the product market, the easier it is for the Commission to find an undertaking to be dominant[6]. In the Microsoft case, the Commission identified three relevant product markets: PC Operating Systems, WGS, and WMP. Microsoft contested dominance in the WGS and WMP markets but admitted dominance in relation to PC Operating Systems.

Article 82 of the EC Treaty

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Market Shares

Once the three separate product markets had been established, the Commission had to consider the market share held by each product[7]. The size of the share is a strong indicator of the undertaking's market power[8]. There is no set cut off for when a market share is enough for an undertaking to be dominant. In PC Operating Systems, Microsoft holds an over 90% market share[9] and is super – dominant[10]. In WGS, Microsoft held a 55 – 60% share[11]. The nearest competitors were Netware, 10 -25%, Unix and Linux 5 -15%. Therefore, there was a presumption of dominance in the

WGS market. The barrier to entry to the market for WGS was the refusal to supply the required interoperability information; the specific protocols of file, print and user administration services[12]. In the third relevant market, WMP, the market share was based on WMP being tied with Windows and therefore automatically available with the purchase of Windows[13]. The Court also considered the length of time Microsoft had held its market shares as a significant factor in making the decision[14].

The Relevant Geographical Market

The application of the Relevant Geographical Market (RGM) is based on the notion that for EC Competition law to apply there has to be dominance within the common market or a substantial part of it[15]. The RGM can be the whole EU or be limited to a single Member State[16]. For Microsoft the RGM is the world. Thus, where the Commission is in favour of applying very narrow definitions of relevant product markets, the opposite can be said for the RGM[17].

WGS: Refusal to Supply v Objective Justifications

The refusal to supply interoperability information by Microsoft was defined as an anticompetitive abuse[18]. By not providing the specifications of the protocols Microsoft is eliminating the competition (Garrod 2005). A server that does not provide the common necessary functions will not be any competition for Microsoft. The Commission held that Microsoft's refusal was eliminating competition on the work group server operating systems market. In finding an abuse the Commission ordered Microsoft to make the interoperability information available, therefore ordered compulsory licensing[19]. The objective justification from Microsoft was that it had valid patents. The Court assessed Microsoft's intellectual property rights against its abuse of a dominant position. For this it looked at the Software Directive[20]which deals with the legal protection of computer programs. . Microsoft's claim on this was clear, by not upholding their intellectual property rights; the Court would be undermining the effect of the Directive. The Court however highlighted that the Directive was secondary community legislation and therefore did not take priority over Article 82. The court specifically referred to recital 27 of the directive which states:

Tying of WMP with Windows

"the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability"

Through the tying of WMP with Windows, no version of the Windows PC Operating system came without WMP. The tying of WMP restricts competition in the media players market[21]. The issue arising from this is that the tying of WMP was actually the most effective means of distribution. The Commission ordered Microsoft to offer Windows without WMP, and also highlighted Microsoft could not use indirect means to achieve tying, such as commercial or contractual means. On appeal the main argument by Microsoft was that the Commission had failed to show Windows and WMP as being two separate products within their own product markets. Microsoft argued that media player technology was a natural evolution in the Internet age Also the media player is available for free and as such there is no direct economic benefit of tying the two products (Dixon 2007). The Commission concentrated on Article 82(d) in regard to making conclusions on contracts subject to acceptance of additional terms[22]. The key issue for the Commission was that WMP was a product that had its own relevant market consumer. As a result, the abuse through indirect network effects was upheld on appeal. For Microsoft the tying had the capability of negatively effecting competition in the common market for media players. The Court found Microsoft's abusive tying started in May 1999. It was found to affect trade between member states from this date.

"*the Court ruling confirms the clear principles which govern the conduct of such dominant companies, and which are designed to protect the competitive process and hence consumers"*. Neelie Kroes, European Commissioner for Competition Policy

Impact of Decision on Microsoft

Initially the reactions are that this is an exceptional case and the ruling is so specific to Microsoft that it does not mean a great deal outside the world of Microsoft. However the ruling does mean a great deal not only to Microsoft but to the I.T sector as a whole and to the CFI asserting its stance on upholding Competition law policy in the common market over holder of IP rights when the two conflict.

The first main effect of the ruling is that the Commission will continue to apply very narrow definitions of product markets in relation to computer software. Microsoft have maintained through their statistical analysis since the judgement that there has been no negative effect on its trading. The trademark that is Microsoft has such high market strength that in looking at the commercial reality of the decision very few will say they expected any kind of substantial effect on the I.T giant. Microsoft has been hurt; the loss is more to do with Microsoft now losing its persona of being untouchable (Salkever 2004). It is very unlikely there will be a floodgate of challenges against Microsoft or indeed other I.T industries. However if Microsoft had won in its appeal there would have been an unsaid rule that Microsoft can never be challenged. Instead the ruling means that the Commission is willing to take on global multinationals like Microsoft and can win.

The Commission has shown, where the judgement allows, it will also adjudicate in providing a fair fight for the smaller competitors. Microsoft will now face real competition in the sense that by refusing the interoperability information, it was not facing any competition (Bell 2004).

The ruling in Microsoft does little to further clarify where I.T industries stand in relation to competition law (Marsden 2007). This is because all rulings in this area are geared more towards a case by cases analysis as oppose to aiming for certainty and clarity that can provide a detailed framework for future cases. .

The market definitions in Microsoft are very narrowly construed and raise questions on the coherence of a competition system (Turney 2005). The narrow definition of the product markets affects all undertakings in the I.T sector. Intellectual Property is a key right for all companies. The rights are in patents, design rights, and patents. Many technology companies are reluctant to disclose specific interoperability information and tying products is common practice (Garrod 2005).

The judgement "*sends a clear signal that super-dominant companies cannot abuse their position to hurt consumers and dampen innovation by excluding competitors in related markets.* Neelie Kroes, European Commis-

The Wider Implications

The most important effects of the decision are on the moral rights of the inventor, and on innovation. This has caused further tensions between Intellectual Property Law and Competition Law (Canetti 2004). Prior to *Magill,* the *existence – exercise dichotomy* was applied to undertakings with IPR's. This meant the *existence* of an IPR was not challengeable under competition law, but the way it was *exercised* could be challenged (Fitzgerald 1998). The change made by the Microsoft decision is the *existence* of an IPR can now be challenged under exceptional circumstances. However this undermines Intellectual Property Law (Marsden 2007). A patent is a national monopoly which is granted in return for the publication of the invention. The inventor is rewarded with an exclusive right and innovation is encouraged (Korah 2006). Recent decisions by the ECJ have focused on a balancing of IPR's and Competition Law[23]. The problem that arises for IPR holders is when the Commission will apply a narrow market definition then the market share will be high as the through the IPR, the holder has a legal monopoly (Vrins 2001). Therefore, the likelihood of being found dominant in the product market is very high.

The second effect of the decision is on innovation. Microsoft was unsuccessful in arguing the decision had a negative impact on their incentive to innovate. Nevertheless, the IP rights in question obviously have some value; otherwise rivals would invent them themselves (Marsden 2007). By ordering compulsory licensing, the Commission is taking away certain rights from Microsoft. If the principles behind Intellectual Property Law are considered then a distinction can be drawn between Microsoft's rights and the encouragement of innovation. By ordering compulsory licensing, the Commission are first of all giving competitors a level playing field and secondly by giving the smaller competitors a level footing, the Commission are in fact encouraging innovation. The problem for Microsoft is the innovation might not be by them as whereas the smaller competitors were trying to catch up to Microsoft, they can now invest in further innovations.

The wider implications raise serious concerns on the conflict of Intellectual Property Law and Competition Law. The two areas of law cannot be easily reconciled. Whereas the CFI have made a landmark Competition Law case in finding Microsoft to be abusing a dominant position, in *Re Astron Clinica Ltd*[24]*,* the High Court broadened the circumstances under which a computer program can be granted a patent. This is very significant. In *Re Astron* a category that was previously exempt from patent protection was given the right to be patented. Therefore, if both Intellectual Property Law and Competition Law continually broaden their application of the respective law, there can only be more cases involving a conflict between the two.

Notes

[1]T 201/ 04 Microsoft Corporation v Commission of the European Communities

[2]Hoffmann-la Roche & Co. AG v Commission (Case 85/76) [1979] ECR 461at para 91

[3]Europemballage Corp and Continental Can Co. Inc. v Commission (Case 6/72)

[4]C(2004)900final at para 322

[5]Istituto Chemioterapico SpA v Commission (Cases 6 & 7/73)

[6]Hugin Kassarefister AB v Commission (Case 22/78); dominant in specific area of supplying spare parts; British Brass Band Instruments v Boosey and Hawkes [1988] 4 CMLR 67; dominant in specific market of British style brass bands; Istituto Chemioterapico v Commission (Cases 6 & 7/73)

[7]T -62/98 Volkswagen AF v Commission [2000] ECR II – 2707 at para 230; the relevant product market and market share provides the framework for the Commission to analyse if an undertaking is abusing a dominant position.

[8]DG Competition Discussion Paper at para 28 – 32 available at http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf

[9]C(2004)final at 431

[10]In previous case law the Commission has identified firms which have a very high market share owe a greater responsibility towards Competition; Cases C-395 and 396/96 P Compagnie Maritime Belge Transports SA v Commission [2000] ECR I-1365

[11]C(2004)900final at 491

[12]T-201/04 at 33

[13]C(2004)900final at 835

[14]High market shares over a considerable period of time can be a strong indicator of dominance; Hoffmann-la Roche & Co. AG v Commission (Case 85/76) [1979] ECR 461 at para 41

[15]Article 82 EC Treaty

[16]British Leyland v Commission (Case 226/84) [1986] ECR 3263

[17]This links back to the concept of competition law to encourage competition within the common market and prohibit one undertaking from abusing its market strength to weaken competition.

[18]C(2004)900final at 547 - 791

[19]Under Competition Law an undertaking is normally free to choose who it wants to go into business with, by ordering compulsory licensing the CFI are not allowing Microsoft to decide who it will give the licensing of the protocols to. Principle is seen in a number of cases; Hoffmann-La Roche v Commission (Case 85/76) [1979] ECR 461, United Brands v Commission (Case 27/76) [1976] ECR 425, and Joined Cases 6 and 7-73, Commercial Solvents and Others v Commission [1974] ECR 223, at paragraph 25.

[20]Council Directive 91/250/EEC

[21]T 201/04 at 44

[22]C(2004)900final at 792

[23]Joined Cases C-241/91 P and C-242 /91 P, RTE and ITP v Commission [1995] ECR I – 743 and
IMS Health GmbH & Co. OHG v NDC Health GmbH & Co KG [2003] C -418/01

[24]Re Astron Clinica Ltd and others [2008] EWHC 85 (Pat); [2008] WLR (D) 12

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