REFUSAL TO SUPPLY (SOFTWARE): THE MICROSOFT CASE (2)

Subject: Abuse of dominant position
Discrimination
Licensing restrictions
Refusal to supply

Industry: Computer software

Parties: Microsoft Corporation

Source: Commission Statement IP/00/906, dated 3 August 2000

(Note. Each time there is a reference to Microsoft in these pages a distinction has to be drawn between the case in the United States, the EC case earlier this year and, now, the present case. The distinction is emphasised in the report below. The present case is fundamentally important to Microsoft's operations in Europe: the Commission is squarely accusing Microsoft of abusing a dominant position on the European Union market, refusing to supply essential technology to other parties, except on a discriminatory basis, and relying on intellectual property rights to protect its licensing powers. Judging by previous cases, and in particular the IBM case, the prospects for Microsoft in the present case are bleak. The authorities in the European Union tend to be less sympathetic to the intellectual property argument than their opposite numbers in the United States; and intellectual property owners have been surprised and dismayed to find that they cannot always plead their intellectual property rights in defence of a refusal to supply. This was the classic outcome of the Magill case. Nevertheless, it remains to be seen whether Microsoft can put forward a successful defence of its business practices when the oral hearing takes place.)

The Commission has sent a statement of objections to Microsoft for allegedly abusing its dominant position in the market for personal computer operating systems software by leveraging this power into the market for server software. The Commission's action follows a complaint by American software company Sun Microsystems that Microsoft breached European Union anti-trust rules by engaging in discriminatory licensing and by refusing to supply essential information about its Windows operating systems.

Microsoft has a market share of about 95% in the market for personal computer (PC) operating systems (OS) and thus enjoys a practically undisputed market dominance. Most PCs today are embedded into networks, which are controlled by servers. Interoperability, that is, the ability of the PC to talk to the server, is the basis for network computing: it can function only if the operating systems running on the PC and on the server can talk to each other through links or so-called interfaces. To enable competitors of Microsoft to develop server operating systems which can talk to the dominant Windows software for PCs, interface information - technical information and even limited parts of the software source

code of the Windows PC OS - must be known. Without interoperating software and as a result of the overwhelming Microsoft dominance in the computer software market, computers running on Windows operating systems would be de facto obliged to use Windows server software if they wanted to achieve full interoperability.

Sun Microsystems alleged, in a complaint in December 1998 and in subsequent submissions, that the near monopolistic position of Microsoft in the PC operating system market created an obligation on Microsoft to disclose its interfaces to enable interoperability with non-Microsoft server software. This obligation would cover the OSs distributed by Microsoft at the time when Sun's request for disclosure of interface information was refused in October 1998, that is, Windows 95, 98, NT 4.0 and all subsequent updates. Sun alleges that the launch of Windows 2000 on 17 February 2000, was a final step in Microsoft's strategy to strengthen the effects of its refusal to supply interface information with the intention of driving all serious competitors out of the server software market. Sun claims that Microsoft has applied a policy of discriminatory licensing by distinguishing between its competitors according to a so-called "friend-enemy" scheme. The Commission was given evidence that Microsoft did not carry out its obligation to disclose sufficient interface information about its PC operating system. The Commission believes that Microsoft gave information only on a partial and discriminatory basis to some of its competitors. It refused to supply interface information to competitors like Sun Microsystems.

Resolution of this case is of the utmost importance as operating systems for servers constitute a strategic sector in the development of a global market for information technology and e-commerce. The Commissioner, Mr. Monti, said that the Commission welcomed all genuine innovation and advances in computer technology -wherever they came from - as highly positive developments for consumers and industry alike. "Effective protection of copyrights and patents is most important for technological progress. However, we will not tolerate the extension of existing dominance into adjacent markets through the leveraging of market power by anti-competitive means and under the pretext of copyright protection. All companies that want to do business in the European Union must play by its antitrust " (In February 2000, at the instigation of small and medium-sized firms active in the information technology sector and competitors of Microsoft, the Commission opened an ex officio procedure against Microsoft for alleged abuse of dominance linked to its Windows 2000 software.)

The subject of the US proceedings against Microsoft and the allegations the Commission is investigating are different. The allegations being examined by the Commission are that Microsoft extended its dominance in the PC operating systems market to the server operating systems market. The proceedings launched by the US Department of Justice revolve around Microsoft protecting its dominance in PC operating systems through measures aimed at weakening Netscape's Navigator Internet browser and Sun's Java system. A US Court has found that Microsoft, by virtue of its conduct, has attempted to monopolise the Internet Browser market. At the European Union level, the Commission will continue to examine the two pending cases. ■