DOMINANT POSITION (COMPUTERS) THE MICROSOFT CASE

Subject: Abuse of dominant position
Tying arrangements
Interoperability
Remedies

Industry: Personal computers; operating systems
(Some implications for other industries)

Parties: Commission of the European Communities
Microsoft

Source: Commission Statement IP/03/1150, dated 6th August 2003

(Note. This is the latest instalment in the long-running saga of the European case, as distinct from the American case, against Microsoft. It appears from the remedies proposed by the Commission that the case has narrowed substantially and may realistically offer a prospect of settlement without recourse to an adverse decision.)

Final Statement of Objections

The Commission has given Microsoft a final opportunity to comment before it concludes its antitrust probe. The Commission has gathered additional evidence from a wide variety of consumers, suppliers and competitors. This evidence confirms and in many respects bolsters the Commission's earlier finding that Microsoft is leveraging its dominant position from the PC into low-end servers and that Microsoft's tying of Windows Media Player to the Windows PC operating system weakens competition on the merits, stifles product innovation, and ultimately reduces consumer choice. The Commission also invites Microsoft to submit its comments on a series of remedies it intends to impose in order to bring the antitrust infringements it has identified to an end. As this complex investigation draws to a close, the Commission will continue to ensure a meticulous respect of due process. Therefore, the Commission has addressed to Microsoft a final Statement of Objections, saying that this Statement of Objections, which includes the identification of appropriate remedies, gives Microsoft a last opportunity to comment before the Commission concludes the case and reaffirming the Commission's determination to ensure that the final outcome of the case is to the benefit of innovation and consumers alike.

The evidence collected

The Commission's Statement of Objections sets out to inform Microsoft of the results of its last extensive market enquiry. The evidence gathered in this market enquiry confirms the allegations concerning lack of interoperability and tying already outlined in the Commission's two previous Statements of Objections. In

the light of this evidence, the Commission's preliminary conclusion is that Microsoft's abuses are still ongoing.

In the field of interoperability, the Commission's evidence confirms that Microsoft is leveraging its overwhelmingly dominant position from the PC into low-end servers, the computers which provide core services to PCs in corporate networks. The Commission contacted a significant number of small, medium and large enterprises selected from all industrial sectors and from across the entire EEA, and requested information on whether interoperability considerations were a factor in their purchasing choices, and whether non-disclosures of such information by Microsoft influenced their purchase decisions. An overwhelming majority of customers responding to this market enquiry highlighted that Microsoft's non-disclosure of interface information - necessary for competing servers to "talk" properly with Windows PCs and servers - did indeed artificially alter their choice in favour of Microsoft's server products. This behaviour is detrimental to competition on the merits.

Tying arrangements

As regards tying, the Commission contacted a large number of suppliers in various segments of the market. The companies constitute a representative sample of randomly selected content owners, content providers, and software developers across the EEA and the United States. All companies were asked to provide information on the specifics of their industries, and what factors determined their business decisions. The replies highlighted that the ubiquity of Windows Media Player on PCs artificially skews their development incentives in favour of Microsoft. This confirms the Commission's preliminary conclusion that Microsoft's tying of Windows Media Player to the Windows operating system weakens competition on the merits, stifles product innovation, and ultimately reduces consumer choice.

Remedies

As regards remedies, the Commission has provisionally identified the core disclosure obligations that would be indispensable for Microsoft's competitors in low-end servers to achieve full interoperability with Windows PCs and servers. Microsoft would be obliged to reveal the necessary interface information so that rival vendors of low-end servers are able to compete on a level playing-field with Microsoft.

With respect to tying, the Commission has set out two alternative proposed remedies. The first would be the untying of Windows Media Player from Windows, whereby Microsoft would be required to offer a version of Windows without Windows Media Player included. This is the normal remedy for a tying infringement. The second would be a "must-carry" provision, whereby Microsoft would be obliged to offer competing media players with Windows. Both solutions seek to ensure that consumers have a fair choice as regards media players. ■