



# European Competition Law Update 2008

Thursday 18 September 2008

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# Abuse of Dominance – Recent EC Developments

Nina Niejahr, B&M Brussels

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# Covering

- Quick recap
- Guidelines – where are we?
- Tying - Microsoft
- Refusal to License - Microsoft
- Margin Squeeze – Telefonica
- Current cases

# Article 82 – Quick recap

- Dominance
  - Market shares >40% possible, >50% presumed
  - Competitors' size, barriers for new entrants
- Abuse
  - Exclusionary, e.g. bundling, loyalty rebates
  - Exploitative, e.g. excessive pricing
- Need for reform
  - Case law driven by subjective ideas of fairness and exploitation, not economics
  - Emerging thinking that abuse must be judged by effects, not form

## Guidelines – Where are we?

- Discussion Paper – December 2005
- No firm promise about guidelines
- Deals only with exclusionary behaviour, not exploitative
- Guidelines partly applied in cases by the Commission (*Tomra*) and European Courts (*BA/Virgin*)

# Refusal to Supply

*“A rebuttable presumption that continuing these relationships is pro-competitive.”*  
Discussion  
Paper, para. 217



# Refusal to Supply (Not IP)

- Existing Customer:
  - presumed anticompetitive if DomCo present downstream and terminates one of “few” competitors
  - lawful if termination of one of many competitors and DomCo not present downstream
  - justified if DomCo can show benefits of vertical integration
- New Customer – further criteria
  - “essential facility”
  - also anticompetitive if stifles emergence of new product
  - justified during investment period, if investment would not otherwise have been made
- For IP, Discussion Paper superseded by *Microsoft*

## *Microsoft (1)*

- Decision - March 2004 – €497m fine
- CFI judgment September 2007
  - Largely upheld the decision
  - Not appealed to ECJ
- Ongoing debate re: compliance
  - Compliance only achieved in October 2007
  - Further “final” fine - €899m - for failure to comply (February 2008)



## *Microsoft (2)*

- Refusal to license is an abuse by a dominant company only in “exceptional circumstances”
- BUT “exceptional circumstances” substantially easier to prove?
  - indispensability of information – partial interface and reverse engineering were not sufficient substitutes
  - “tends to eliminate” competition – likely or “liable to” exit or be marginalised, not actual exit
  - the existence of a “new” product – but “new product” can also be the same product with “new features”
  - a lack of objective justification – no evidence mandatory interface licensing would harm innovation incentives

# Tying

*“Common practices that often have no anticompetitive consequences,”*  
Discussion  
Paper, para. 177



## Current Law

- Tying and bundling rarely permitted
- Price bundling
  - can reflect savings/benefits
- Technical integration
  - innovation argument rejected in *Microsoft*

# Discussion Paper

- Tying - Must buy Y with dominant product X
  - <33% of customers buy both products?
  - competitors access similar bundles
  - importance of tied customers, network effects
- Price bundling – discount for bundle
  - each product price less bundled discount > cost
- Technical tying
  - integration leads to market shift so that demand for independent products withers
  - justify tie by efficiency benefits of integration

# *Microsoft: Technical Tying of PC Operating System and Windows Media Player*

## Dominant supplier - illegal tie:

- (i) Ties a separate product – court excluded evidence that there was no standalone demand for Windows without WMP
- (ii) Does not allow standalone purchase
- (iii) Practice excludes competitors from tied market – free download or retail sales of rival media players no substitute for tying to the OS (iTunes success via alternative channels not considered)
- (iv) No objective justification
  - Microsoft's evidence of integration benefits (faster running, text to voice conversion) insufficient
  - “Windows standardisation” not a cognisable benefit
  - No examination of the costs to Microsoft of continuing to sell an obsolete product (OS without WMP)

## Margin Squeeze - *Telefonica*

- What is a “margin squeeze”?
- Complaint by France Telecom Nov 2003
- Decision July 2007 – €151.8m fine
- Telefonica attacked for
  - excessive pricing of wholesale access
  - predatory pricing at retail level
  - constructive “refusal to supply”?

# EU - Current cases (1)

EC mainly focus on:

- key sectors (high tech, energy and telecom) and key types of abuse:
  - licensing of IPR (interoperability)
  - rebates to force competitors out of market
  - margin squeeze
  - tying
- which may seriously damage consumer welfare (in terms of price, choice and innovation)

## EU - Current Cases (2)

### *Intel*

- SO issued in July 2007
- Accused of three abuses of its dominant position in the Computer Processing Units (CPU) market, aimed at excluding competitor AMD:
  - Giving substantial rebates to various OEMs on condition that they obtain all / most of their CPU requirements from Intel
  - Making payments to induce OEMs to delay or cancel the launch of a product line which incorporates a CPU produced by AMD
  - Offering CPUs on average below cost when bidding against AMD-based products for contracts with strategic customers



## EU - Current Cases (3)

### *Intel* (cont.)

- February 2008 - the Commission raided Intel, CPU manufacturers and computer retailers in Europe
- July 2008 – supplementary SO issued accusing Intel of three further abuses :
  - substantial rebates to a PC retailer conditional on selling only Intel-based CPU
  - payments to induce an OEM to delay the launch of a product line which incorporates a CPU produced by AMD
  - offering substantial rebates to that OEM conditional on obtaining all of its laptop CPU requirements from Intel
- Despite intense lobbying from AMD, US authorities have not taken on the case
- Privately litigated in Taiwan and Japan

## EU - Current Cases (4)

### *Qualcomm*

- Proceedings opened in October 2007
- Complaints by mobile phone companies
- Standards for 3G Networks
- Licensing of IPRs on FRAND standards

## EU - Current Cases (4)

### *Microsoft x 2*

- Proceedings initiated in December 2007
  - Tying
  - Refusal to supply interoperability information
- May 2008 Microsoft announces support of ODF in Microsoft Office
- Commission states it will investigate whether this will provide interoperability

## EU - Current Cases (5)

### *Rambus*

- SO issued July 2007
- Patent ambush
- Allegations that Rambus has charged unreasonable royalties for DRAMs subsequent to a patent ambush
- Commission claims that Rambus should have revealed the fact they had the patent
- FTC has also investigated, issued opinion 5 Feb 2007

# EU – Current Cases (6)

## Energy Focus

- *RWE* – access to pipelines/capacity hoarding
- *ENI* – capacity hoarding; under investment
- *Electrabel/EDF* – long-term exclusive supply
- *EON* – vertical integration issues
- *Gaz de France* – long-term reservation of transport capacity and network of import agreements; under investment

## Three points to take away

1. Microsoft judgment could suggest a “plaintiff friendly” approach to Art. 82 assessment, but query how limited to its facts?
2. Don’t expect definitive Commission guidance anytime soon but emerging trend re enforcement priorities – key sectors and economic approach in practice
3. Litigation and national level enforcement likely to increase in importance

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