The European Court of First Instance Upholds the European Commission's Finding that Microsoft Abused its Dominant Position

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Yesterday, the European Union's second highest court, the Court of First Instance (CFI) affirmed the European Commission's March 2004 decision holding that Microsoft had abused its dominant position on the market for PC operating systems by (i) refusing to supply its competitors with 'interoperability information' and (ii) tying Windows Media Player with the Windows PC operating system.

The CFI, however, annulled the Commission's decision insofar as it ordered Microsoft to submit a proposal for the appointment of a 'monitoring' trustee and to pay for all the costs associated with such monitoring.

Nevertheless, the CFI upheld the fine imposed by the Commission in 2004, which remains unchanged at EUR 497 million (~$690 million). Microsoft now has two months from the date of the CFI's decision to lodge an appeal with the European Court of Justice, the EU's highest tribunal.

Compulsory License of Proprietary Information

The CFI rejected Microsoft's argument that European competition law precedent was ill-suited to addressing the competitive dynamics in quickly evolving, high technology industries. On the contrary, the CFI applied the principles set forth in existing decisions (including *Magill* and *IMS Health*) in holding that, although dominant companies are as a rule free to choose their business partners, in certain exceptional circumstances a refusal to license an intellectual property right can be characterized as an abuse of a dominant position. These "exceptional circumstances" are

(i) the refusal must relate to a product or service indispensable to the exercise of an activity in a neighboring market;

(ii) the refusal must be of such a kind as to exclude any effective competition on that market; and

(iii) the refusal must prevent the appearance of a new product for which there is potential consumer demand.

When all three of these conditions are met, the CFI held that the refusal to grant a license will be considered abusive unless it can be objectively justified. The CFI upheld the Commission's conclusion that the work group server operating systems of Microsoft's competitors must be able to interoperate with Windows' domain architecture on an equal footing with Microsoft's PC operating systems if they are to provide any effective competition to Microsoft on the market for PC operating

systems, on which Microsoft has a virtual monopoly. By refusing to supply its competitors with this interoperability information, the CFI agreed with the Commission that Microsoft had abused its dominance and found no objective justification for Microsoft's position that requiring it to make such information available would have negative effects on Microsoft's incentives to innovate.

Moreover, in a worrying sign for legal certainty in this area, the Commission asserted in its 2004 decision that these "exceptional circumstances" may not be exhaustive and that whether or not a refusal is abusive must be looked at on a case-by-case basis. This may suggest that the Commission is willing to pursue dominant firms for practices that fall outside the established case-law.

The Tying of Windows Media Player to Windows PC Operating System

The CFI upheld the Commission's finding that Microsoft's tying of its Media Player to its PC operating system was unlawful. The Commission relied on the following four conditions to establish abusive tying:

(i) Microsoft is dominant on the market for PC operating systems;

(ii) PC operating systems (the tying product) and Media Player (the tied product) are in separate product markets;

(iii) Microsoft did not give consumers a choice to obtain the tying product without the tied product; and

(iv) This practice foreclosed competition on the market for the tied product.

The CFI upheld the Commission's finding of unlawful tying even though (i) customers pay nothing for the media function of Windows; (ii) customers are not obliged to use the Media Player functionality; (iii) customers are not prevented from installing and using competitors' media players. This aspect of the CFI's decision stands in stark contrast to the settlement that Microsoft reached in the US where, as regards its Media Player, Microsoft was only required to remove the Windows Media icon which appears on the screen and to disable the automatic implementation of Media Player in preference to competitors' products. Media Player could remain pre-installed and Microsoft was not forced to sell its PC operating system without the Media Player.

Annulment of the Proposal for the Appointment of a Monitoring Trustee

In its decision, the Commission had, *inter alia*, as part of the remedial measures that Microsoft had to undertake, required that Microsoft propose an independent monitoring trustee within 30 days of the decision and that the trustee's expenses were to be borne entirely by Microsoft. In particular, the monitoring trustee was to have access to Microsoft's assistance, information, documents, premises and employees, and to the source code of the relevant Microsoft products.

The CFI held that the Commission had no power to appoint a monitoring trustee with such powers or to require that Microsoft should be responsible for all the costs associated with the appointment of

such a trustee. The CFI stated that it is for the Commission, in its capacity as the authority responsible for the application of the EU's competition rules, to pursue the implementation of behavioral remedies.

Conclusion

In light of its recent losses in the merger context (*e.g.,* Sony/Bertelsmann), this decision, and its endorsement of the Commission's investigation on all points of substance, represents a significant victory for the Commission. Although Microsoft has the possibility to appeal this decision within two months, given the CFI's strong backing of the Commission's investigation and the comprehensive nature of the CFI's decision (running to over 1,300 paragraphs) and the relatively narrow scope of review undertaken by the European Court of Justice, Microsoft faces an uphill battle on appeal.

Moreover, the CFI's decision does, however, leave several issues open. These include

(i) the extent to which dominant firms' behavior will be treated differently by the US and EU antitrust authorities;

(ii) whether the Commission will impose any further fines on Microsoft for any non-compliance with the undertakings imposed in 2004; and

(iii) whether the Commission will pursue dominant firms for activities that fall outside the "exceptional circumstances" set out in the established case-law.

Nevertheless, the decision does not appear to represent significant new ground in EU law in the strict sense. Rather, it reaffirms that existing EU case-law on abuse of dominance is equally applicable to high technology industries. It does, however, highlight the different approaches in the US and the EU to dominant companies, and signals that Europe, not the US, may be emerging as the *de facto* regulator of acceptable conduct by dominant global firms. At it minimum, it will certainly give the European Commission confidence that it has both the authority and the tools to examine other high technology issues.

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