Refusal to deal and essential facilities

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Refusals to deal (i)

- General rule – dominant companies are free to choose their commercial trading partners:
- "*the right to choose one's trading partners and freely to dispose of one's property are generally recognised principles in the laws of the Member States, in some case with constitutional status*"

  (Opinion of AG Jacobs in Oscar Bronner v. Meidaprint, 56)

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Refusals to deal (ii)

- No precise boundaries exist with respect to when a dominant undertaking's refusal to deal will constitute an abuse of dominance
- BUT it is established that in certain circumstances dominant companies may have a legal obligation to:
  - supply products; and/or
  - license intellectual property rights
- Obligation to deal – a trade off
  - Short-run competition v. Long-run investment and innovation

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Commercial Solvents – refusal to supply inputs

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Refusal to supply
Commercial Solvents – Facts

- Commercial Solvents Corporation ("CSC") – dominant in the supply of raw materials (the "Raw Materials") used in the manufacture of anti-tuberculosis ("TB") drug "ethambutol"
- Zoja was active on the downstream anti-TB drug market and received its Raw Materials from CSC
- A CSC subsidiary developed its own anti-TB drug and started selling them in competition with Zoja (i.e., CSC moves downstream)
- Zoja tried to find alternative Raw Materials, but failed
- CSC refused to continue to supply Zoja which threatened Zoja's ability to compete with CSC

Refusal to supply – analysis (i)

- Four key issues:
  1. the defendant undertaking must have a dominant position in an "upstream" market;
  2. the product to which access is sought must be indispensable to an undertaking wanting to compete in the "downstream" market;
  3. the refusal to supply must result in the elimination of effective competition in the downstream market; and
  4. no objective justification/overriding efficiencies exist.

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Commercial solvents – analysis (ii)

- CSC held a dominant position in Raw Materials – Zoja failed to find alternatives
- CSC supplied the Raw Materials to existing customers and potential competitors (once CSC had developed a rival product)
- CSC's refusal to supply came after CSC had entered the downstream market to compete with Zoja
- Zoja could not compete without access to the Raw Materials; CSC ceased all Raw Material supply to anyone
- CSC provided no convincing objective justifications

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Commercial Solvents – classic vertical foreclosure

- The Court of Justice confirmed the Commission's decision on appeal and concluded that:
  - *"[CSC] had decided to limit, if not completely to cease, the supply of [the Raw Materials] to certain parties in order to facilities its own access to the market for the derivatives*."
  - *"[A]n undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufactures of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question, would amount to eliminating one of the principal manufacturers of ethambutol in the Common Market*"

    (*Commercial Solvents v. Commission* [1974] ECR 223 – paragraphs 24 and 25)

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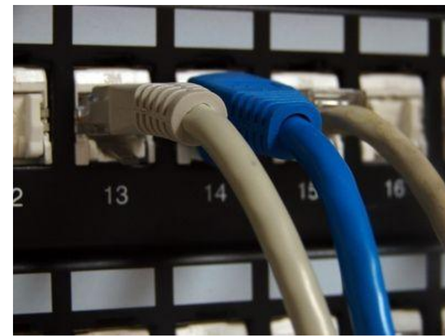
Microsoft – refusal to supply: IP



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The Economist – 27 March 2004

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Refusal to license - Microsoft

- Commission decision: 2004
- Appeal to the CFI by Microsoft
- CFI judgment: September 2007
- Two abuses investigated:
  - Bundling of media player with operating system (see tying/bundling presentation)
  - Refusal to supply information regarding server software inter-operability

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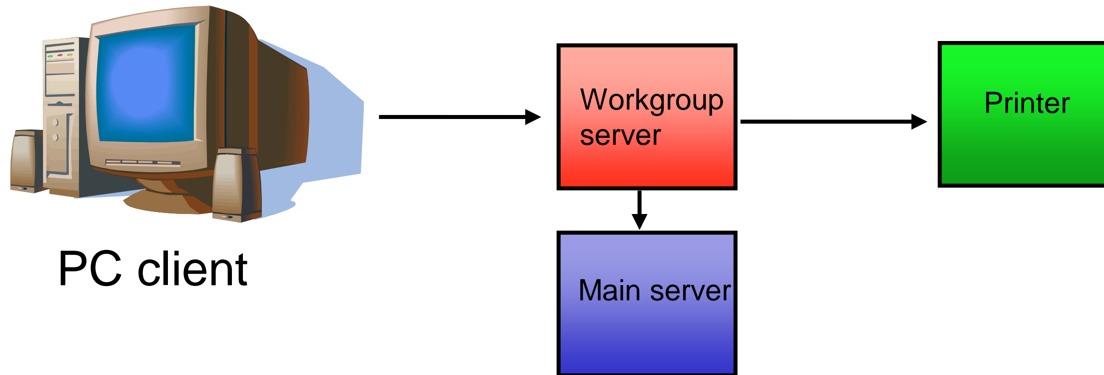
Microsoft – Facts

- Large installed base of servers and PCs using Microsoft – more than 90% share of PC operating systems
- Competitors' software needed to be able to "talk to" Microsoft software on existing PCs and servers
- Microsoft refused to supply certain technical information to competitors:
  - Claimed information was proprietary to Microsoft
  - Fruits of Microsoft's investment and innovation
  - Why should Microsoft have to share its trade secrets with competitors?
  - Obligation to release trade secrets undermines incentives to innovate

Microsoft – the interoperability issue



- The Commission was concerned that Microsoft could extend dominance on PC OS market into workgroup server OS market by preventing rivals' OS products working as well with Windows servers and PCs
- The Commission required Microsoft to license "interoperability information" to rival manufacturers of workgroup server operating systems to ensure sufficient client/server and server/server interoperability
- Encourages competition for workgroup server OSs

Refusal to deal

- Freedom to choose business partners is the general rule – even for dominant companies
- Refusal to grant a licence is not in itself an abuse
- Only depart from these rules in "*exceptional circumstances*" which are strictly construed
- Exceptional circumstances tightly linked to goals of competition

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Legal test

- Microsoft – appeal (CFI) decision
  - Refusal to license IP rights by dominant company not abuse in itself
  - An abuse only in "**exceptional circumstances**"
    - Refusal must relate to a product or service **indispensable** to the exercise of an activity on a neighbouring market;
    - Refusal must be of such a kind as to **exclude effective competition** on that market; and
    - Refusal must **prevent the appearance of a new product** for which there is potential consumer demand.
    - **Unless** objective justification
  - **CFI**: "*It is only in exceptional circumstances that the exercise of the exclusive right by the owner of the IPR may give rise to such an abuse*"

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"Exceptional circumstances" justifying compulsory licensing

Condition 1	IP/information is indispensable to compete viably in neighbouring market
Condition 2	Refusal risks eliminating all effective competition on that market
Condition 3	Refusal prevents emergence of a new product for which there is unmet consumer demand
Condition 4	Objective justification

Microsoft – Indispensability

- IP/information is indispensable to compete viably in neighbouring market:
  - CFI**:** since rival OSs *"cannot continue to be marketed if they are incapable of achieving a high degree of interoperability with Windows",* effectively requiring interoperability *"**on an equal footing** with Windows"* to compete viably (para. 421)
  - Microsoft: requiring us to let others clone our product

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Microsoft – Elimination of competition

- Refusal risks eliminating all effective competition on that market:
  - The evolution of the market revealed **a risk** that competition would be eliminated
  - CFI: "*What matters … is that the refusal … is liable to, or is likely to, eliminate all effective competition … the fact that competitors … retain a marginal presence in certain niches … cannot suffice*" (para. 563)
- Microsoft: others are on the market and competing – does compulsory licensing assist the less efficient?
  - Remember - fast moving IT market – Linux, Apple

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Microsoft – "New product"

- "New product" or "differentiated product"
- CFI held:
  - "*The circumstance relating to the appearance of a new product…cannot be the only parameter which determines whether a refusal to license an IPR is capable of causing prejudice to consumers within the meaning of Article [102](b)….such prejudice may arise where there is a limitation not only of production or markets, but also of technical development*." (para 647)
  - No specific new product needed - possibility of something new emerging is enough
  - Process rather than product oriented - transferring technology to ensure viable competition going forward
- Microsoft's view:
  - Expanding the "new product" test?
  - Rival workgroup server operating systems were present on the market, therefore no unmet demand for a new product

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Microsoft – objective justification

- Objective justification?
- Microsoft's view:
  - It is essence of IP to allow the owner to reap rewards and choose partners; this is secret innovative info, not like Magill/IMS
- CFI held:
  - "*it is for the dominant undertaking concerned, and not for the Commission … to raise any please of objective justification and to support it with arguments and evidence." (para 688)*
  - IP right not blanket justification; disclosure would not reduce incentives to innovate
- What would qualify?

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The remedy….

- Microsoft had to:
  - provide a full specification of the protocols used by Windows work group servers to deliver work group server services to Windows work group networks; and
  - Allow its use for the purpose of developing and distributing interoperable work group server operating system products
- The remedy is a compulsory licence of the technology on "*an ongoing basis*"; perpetual and royalty-free for most of the licensed technology
- Time consuming and costly for Microsoft…

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Essential facilities

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Essential facilities

- Essential facilities doctrine:

"An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility … and which refuses other companies access to competitors only on terms less than those which it gives its own services, infringes Article [102] if the other conditions of that Article are met."

Sea Containers/Stena Sealink

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Essential facilities

- What is an essential facility?
  - Advocate General Jacobs in his Opinion in the *Oscar Bronner* case stated that:

"*An essential facility can be a product such as a* ***raw material or a service****, including provision of access to a place such as a telecommunications network. In many cases the relationship is vertical in the sense that the dominant undertaking reserves the product or service to, or discriminates in favour of, its own downstream operation at the expense of competitors on the downstream market. It may however also be horizontal in the sense of tying sales of related but distinct products or services.*"

Commercial Solvents and *Microsoft* can (and have been) also be characterized as "essential facility" cases.

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This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.

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