



European Commission

Competition

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Abuse of dominance and the Internet (ICT)

JM. Carpi Badia*
Case Manager
DG Competition, European Commission

**All views expressed are personal and do not necessarily reflect the official position of the European Commission*



Outline

- The Microsoft Case
- The Intel Case
- The Qualcomm case



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The Microsoft Case



Why intervene?

- Competition for the market *vs* competition in the market
- Specifics of the IT sector
 - High R&D costs
 - Interoperability
 - Lock-in due to network effects and switching costs



Microsoft I

- Very serious antitrust infringement - two abuses:
 - Refusal to supply interoperability information
 - Tying Windows Media Player to Windows
- Fine of 497 million Euro confirmed
- The CFI upheld all substantive findings of the Commission Decision

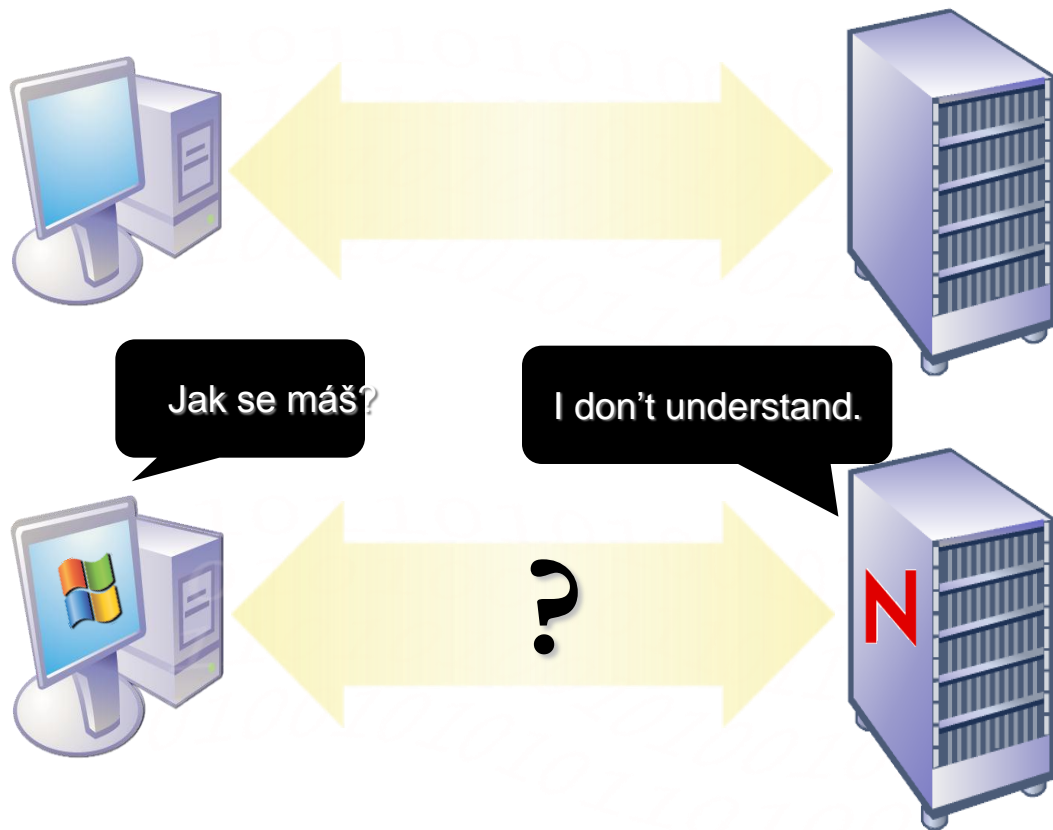


Refusal to supply under Article 102 TFEU

- Indispensability of information that is refused for activity on neighbouring market
- Elimination of competition on that market
- Refusal prevents appearance of a new product for which there is potential consumer demand
- No objective justification



What is “interoperability”?





Microsoft's arguments

- Interoperability information is IP protected (Patents, Copyright, Trade Secrets)
- Other means to ensure interoperability (reverse engineering)
- There is competition in work group servers (Linux)
- Competitors would “clone” Microsoft's products
- Damage to incentives to innovate



Follow-up cases

- Penalty Payment Decision of 12 July 2006
 - Incomplete and inaccurate Interoperability Information
 - EUR 280.5 million
- Penalty Payment Decision of 27 February 2008
 - Reasonable Pricing of the Interoperability Information
 - EUR 899 million



A precedent for Microsoft ?

- Microsoft's CEO Steve Ballmer confirmed the benefits of interoperability disclosures:

(Herald Tribune, 3 March 2008)

- *"[...] what we are permitting is more innovation around our products, more interoperability, maybe also more potential for third parties to cannibalize what could have been Microsoft business," [...] "But it is a path we have committed ourselves to because we think it is good for customers and is consistent with our legal obligations."*



A precedent for the software industry?

- Negative impact of proprietary de facto standards
 - Imposed on the industry by a dominant company or agreements between competitors
 - Undisclosed technology
 - Inaccessible IPR
 - Possible negative effects on competition
 - Lack of interoperability
 - Lock-in due to network effects and switching costs
 - Negative impact on innovation and consumer choice



Benefits of Open Standards

- Various definitions of 'open'
 - Specification is publicly available
 - FRAND/Royalty-Free IPR access
 - Standard enables competing implementations by multiple vendors
- Use of Open Standards by the industry benefits competition
 - Enables interoperability
 - Avoids lock-in
 - Lowers barriers to entry



A precedent for Article 102 enforcement?

- Generally, freedom to choose partners
 - Reflects ‘exceptional circumstances’ test
- Objective necessity of input to compete downstream
- Likely elimination of effective competition downstream
- Likely to lead to consumer harm
- No objective justification



Conclusions on Microsoft I

- The case is an important precedent
 - But not for every company in every industry
 - Precise factual analysis relating to specific circumstances (Microsoft is super dominant and can create de facto standards)
- Misleading to claim that the ‘floodgates’ will open after Microsoft
- Competition must always be assessed on the merits of the products
 - Consumer choice and innovation are key, particularly in the IT sector



Microsoft II

- Strategic importance of web browsers
- Web browsers are a gateway to web based applications
- Web based applications could lower applications barrier to entry
- Web browsers are entry points for internet search



Assessment of tying under Article 102

- Case law, e.g. Hilti, Tetra Pak II, Microsoft I
- Dominance in tying product (PC OS)
- Two separate products
- No choice for customers
- Liable to foreclose competition
- No objective justification



Potential Foreclosure of Competition

- Tying gives Internet Explorer unparalleled distribution advantage
- This creates disincentives for OEMs and consumers
- Competition on the merits prevented
 - Microsoft's competitors are a priori at a disadvantage even if their products are inherently better
- Downloading cannot offset the effect of tying
 - Consumer and enterprise surveys; information deficit and status quo bias



Potential Foreclosure of Competition

- Indirect network effects
 - Artificially induces content providers and software developers to code for Internet Explorer
- Tying has a detrimental impact on innovation
 - Internet Explorer smallest common denominator as regards web content (HTML 5)
- Tying protects Windows as Internet Explorer is not cross platform



Commitments

- OEMs
 - OEMs will be free to pre-install any web browser(s) of their choice
 - Turn off Internet Explorer
 - No retaliation from Microsoft
- Must inform remedy for users
 - Choice Screen; distributed via Windows Update also to installed base (Windows XP, Vista and 7)



Choice screen

The screenshot shows a Windows Internet Explorer window titled "Information Regarding Web Browsers - Windows Internet Explorer". The address bar displays "http://www.browserchoice.eu/". The main content area features the heading "Select your web browser(s)" and a grid of five browser options:

Google Chrome	Opera software	Firefox 3	Windows Internet Explorer 8	Safari 4 Free download For Mac + PC
Google Chrome: a new web browser for Windows.	Opera browser 10 is Internet browser innovation.	Can a browser really make the Web better? Try Mozilla Firefox and see for yourself.	The world's most popular browser – designed by Microsoft for Windows	Introducing Apple Safari 4.0. See the web in a whole new way.
Install	Install	Install	Install	Install
Tell me more	Tell me more	Tell me more	Tell me more	Tell me more

At the bottom of the page, there is a "Select Later" button and a link for "Further information, Terms of Use and Privacy statement."



Conclusions

- Key technology market
- Swift resolution
- Potential immediate impact on competition
- More consumer choice and innovation



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The Intel Case



Context

- Key segment of the high-tech sector
- Pricing-based abuse
 - Case-law
 - Enforcement priorities / impact on competition
- “Naked” abuse
- Remedies and deterrence
- Global backdrop



The Intel Decision

- Conditional rebates and payments to four major OEMs and one PC retailer
- Specific payments to prevent/delay rival products
- Cease and desist order
- Euro 1.06 billion fine



Background

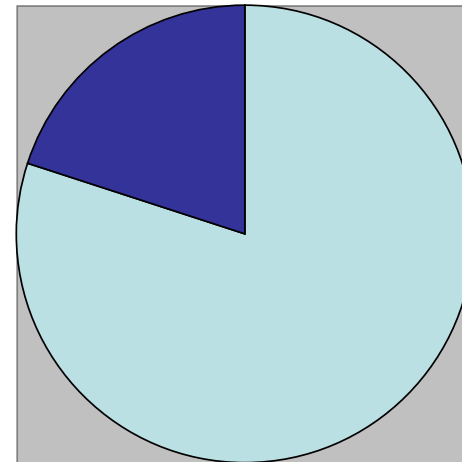
- Product concerned
 - Central Processing Unit of x86 architecture
- Relevant market
 - x86 CPU for desktops, laptops and servers
 - Worldwide





Intel's dominance

- Market features
 - high barriers to expansion and entry
 - CPUs incorporated into computers by OEMs
 - strategic importance of main OEMs
- Market shares



□ INTEL ~ 80%
■ AMD ~ 20%



AMD's growing threat

- AMD improved its products in 2001/2002
 - contemporaneous evidence in the file
- Recognized by both OEMs and Intel
- Intel responded by targeting key suppliers
- Intel submission to the Commission:
 - *“AMD improved its product offerings dramatically with the introduction of its successful Opteron processor”*



Email from Intel executive

“There is so much ingrained 'bad habits' and inertia that has developed over the past decade (which has been hidden/tolerated because we've had a money printing machine with really no competition until recently)”



Conditional rebates

- DELL: conditional on it purchasing exclusively Intel CPUs (12/02-12/05)
- HP: conditional on it purchasing at least 95% of its business desktop CPUs from Intel (11/02-05/05)
- NEC: conditional on it purchasing at least 80% of its CPUs from Intel (10/02-11/05)
- LENOVO: conditional on it purchasing its notebook CPUs exclusively from Intel (01/07-12/07)
- MSH: payments conditioned on exclusive sales of PCs based on Intel CPUs (10/02-12/07)



Proof of conditionality

- Extensive file
 - 141 companies questioned / 21 company sites inspected
 - file is several hundred thousand pages
- Findings based on broad range of evidence
 - contemporaneous e-mails
 - corporate statements
- Evidence Intel sought to conceal the conditions associated with its payments



Legal and economic analysis

- Conditional rebates/payments fulfill the conditions of the Hoffmann-La Roche case-law
- Coherent story in the market
 - Intel recognized AMD's growing threat
 - targeted OEMs to contain AMD
- As efficient competitor test
- Importance of key OEMs
- No objective justification



As efficient competitor test

- Hypothetical exercise
- Capability of the rebates to foreclose an equally efficient competitor
- Four elements of the test:
 - Size of conditional rebate
 - Contestable share
 - Time horizon
 - Measure of viable cost



Specific example

- HP wanted to switch towards AMD
- Intel makes rebate payment conditional on % requirement
- AMD offers HP 1 million CPUs for free
- HP only takes 160 000 of the free CPUs to stay within the Intel limit
- HP confirms that the reason was the market share limit



Framework of analysis

- Case-law is important
 - Legal certainty
- Consistent with enforcement priorities and analyzing effects on competition
 - As efficient competitor test can be a good way of measuring effects
 - Need to ground cases in a real-world analysis



Role of case-law

“The prohibition on ‘infringements of competition by object’ resulting from Article [101(1)] is comparable to the risk offences (Gefährungsdelikte) known in criminal law: in most legal systems, a person who drives a vehicle when significantly under the influence of alcohol or drugs is liable to a criminal or administrative penalty, wholly irrespective of whether, in fact, he endangered another road user or was even responsible for an accident.”

“In the same vein, undertakings infringe European competition law and may be subject to a fine if they engage in concerted practices with an anti-competitive object; whether in an individual case, in fact, particular market participants or the general public suffer harm is irrelevant.”

T-Mobile Opinion of AG Kokott



What kind of rebates are OK?

- Genuine volume-based rebates
 - Reflect scale for larger purchasers
 - Incentivize more sales based on merit
 - Allow for competition on the merits from rivals
- But not de facto conditional rebates “dressed up” as volume rebates
 - Michelin I



Naked restrictions

- Three OEMs:
 - Payments conditioned on postponement or cancellation of AMD-based products
 - Payments imposing distribution restrictions of AMD-based products
- Legal analysis based on *Irish Sugar*
- Directly prevents innovative products reaching consumers: effect is to limit consumer choice



Single strategy

- Individual abuses are a part of a single strategy aimed at foreclosing AMD
- The infringement runs from October 2002 to December 2007
- Consumers are harmed due to limited choice and impact on innovation
 - Strong support from several consumer organisations



The fine

- Perspective is important
- Case-law is consistent and clear
- Intel tried to hide its conduct
- Starting percentage is 5%
- Sales calculation is conservative
- Less than 5% of annual turnover



The global context

- JFTC (2005)
- KFTC (2008)
- EU (2009)
- New York Attorney General (opened in 2009)
- US FTC (settled in 2010)



Conclusions

- Great importance of x86 CPU market
 - Market generated revenues of \$30 billion in 2007
- Intel engaged in a series of anticompetitive practices aimed at foreclosing AMD - its only competitor
- Rebates not a problem - the conditions were
- Case-law and effects-based analysis
 - Consumers' choice limited
 - Innovation harmed



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The Qualcomm Case



Qualcomm Incorporated

- US chipset manufacturer
- Holder of intellectual property rights in the CDMA and WCDMA standards for mobile telephone
 - WCDMA standard forms part of the 3G standard for European mobile phone technology ("UMTS")
 - Qualcomm charges royalties since its patented technology became part of Europe's 3G standard



Procedure

- Complaints
 - Ericsson, Nokia, Texas Instruments, Broadcom, NEC and Panasonic
 - Allegations that allege that Qualcomm's licensing terms and conditions are not Fair, Reasonable and Non-Discriminatory ("FRAND")
- Formal proceedings opened on October 1st, 2007
- Commission closed formal proceedings on November 24th, 2009:
 - All complainants withdrew their complaints
 - Commission did not adopt formal conclusions; decision not to invest further resources in this case



Focus of the investigation

- Main allegations of the complainants:
 - The economic principle underlying FRAND commitments is that essential patent holders should not be able to exploit the extra power gained as a result of having technology based on their patent incorporated in the standard.
 - Charging non-FRAND royalties could lead to final consumers paying higher handset prices, a slower development of the 3G standard and inhibited growth of the standard, negatively affecting the standard setting process and the adoption of the 4G standard
- Pricing of technology and terms of licensing after its adoption as part of an industry standard: exploitative practices
 - Is Qualcomm dominant?
 - Are licensing terms and royalties imposed by Qualcomm fair, reasonable and non-discriminatory? Are licensing terms imposed by Qualcomm in breach of its FRAND commitment?