Chapter 6
Antitrust Applied to ICT: Granting Access, Promoting Consumers’ Welfare and Enhancing Undertakings’ R&D Investments

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ABSTRACT

This chapter analyses how Antitrust is applied to ICT, in order to grant access to so-called “essential facilities,” promote consumers’ welfare and enhance undertakings’ R&D investments. Our contentions are underscored by the recent Microsoft ruling. First, we summarize the basic principles underlying Article 82 EC Treaty, and the way in which European antitrust authorities are trying to “reshape” it in order to achieve a more economic understanding of abusive practices, specifically refusals to deal. We then focus on the protection of IPRs, essential to the pivotal role ICT plays in our modern and developed world, and –closely linked to it- the consequences of this landmark case in incentives for innovation and investment. In addition to these, there is the always-present concern for consumers’ welfare, which of lately has become the cornerstone for antitrust decisions; which is also addressed here.

INTRODUCTION

Article 82 of the EC Treaty prohibits any abuse of a dominant position in the Common Market, and is frequently compared with the declaration in Section 2 of the American Sherman Act, that it is unlawful “to monopolize” (15 U.S.C. § 2). Both provisions deal with the behavior of single firms. “Monopoly” seems comparable to “dominant position”. Both the wording and the goals of these provisions seem quite close.

However, the differences arise sooner than expected. The well known examples listed of “abuse” (to which we will refer in detail in a following section) reflect a variety of public policies that have led European antitrust authorities in several directions simultaneously, while it seems that in the United States efficiency is the only power driving enforcement of “monopolization” cases. Also, the ways in which both antitrust agencies as courts apply this provision suggest a higher
regulatory policy of control of the adverse effects of market power in the EU than in the US. Finally, a more formalistic approach is perceived in the European enforcement, and the way both the Commission and the Courts have interpreted the different provisions of Article 82 than the typical effects-based approach that characterizes American view of Section 2.

It is not the aim of this chapter to do a lengthy and full comparison between the two systems, but the reference to the other side of the Atlantic will be underpinning our study of Article 82 EC Treaty, concerning the so-called “duty-to-deal” as regards disclosure of essential specification for certain protocols that Windows workgroup servers use, since it provides a quite adequate analytical framework.

The lack of guidance in this field both for undertakings and enforcers led the European Commission to issue in 2005 the well known Discussion Paper on exclusionary abuses; although also announced, a further notice on the so-called exploitative abuses is still waited. We are, therefore, in a critical juncture in the reform of EU policy on abuse of dominance; against this backdrop, the recent Microsoft landmark ruling may—or may not—shed some light and clarify both the law and the policy to a great extent.

A fact which speaks for itself as to what extent we lack that clarity, is the recent issuing by the Commission of a second document, the Guidance on the Commission’s Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (Brussels, 3 December, COM 2008). Its precise scope and weight is yet to be seen.

The proposed “change” in the understanding competition policy regarding Article 82 can be summarized in the shift from a form-based approach to an effects-based approach. Such an approach would focus on the presence of anti-competitive effects that harm consumers, rather than searching for behaviors that are listed in a certain category of prohibited conducts. It is based on an examination of each specific case (based on sound economics and grounded on facts) and, consequently, advocates for a rule of reason enforcement rather than establishing a series of per se prohibitions. Finally, it avoids Type I and II errors (as long as it ensures that anti-competitive behaviour does not outwit legal provisions, as well as guarantees that the statutory provisions do not unduly thwart pro-competitive strategies).

In addition to it—and this is an issue we want to underscore here, since it’s going to be one of the main topics dealt with in this chapter—this new economic approach should led competition authorities to avoid the “regulatory temptation”, and therefore refrain from intervening against monopolistic pricing in itself (absent demonstrable adverse welfare effects). Only when the dominant firm is owner of assets considered indispensable for other competitors to operate business—such as the so-called essential facilities, whenever properly identified as such—anti-trust intervention may be required. However, the ongoing supervision—when behavioral remedies are imposed—is a task for which regulatory agencies are better equipped.

The Court of First Instance’s ruling in the Microsoft saga represents one of the latest “big” Article 82 cases decided by European antitrust authorities; it involves one of the most controversial anticompetitive practices in the abusive catalogue, refusal to deal; it has happened to occur in one of the paradigmatically characterized markets of “our time” (in terms of network effects, involvement of Intellectual Property Rights, high sector-specific regulation, etc.): software industry. This is why we will deal with this case specifically to illustrate the contentions we present in this chapter.

The general organization of this chapter goes as follows. After this introduction, the next section summarizes the basic principles underlying Article 82 EC Treaty, and the way in which European antitrust authorities are trying to “reshape” it in order to achieve a more economic understanding of abusive practices. We’ll focus—in the next section—
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