

Dawid Miąsik, Tadeusz Skoczny, Małgorzata Surdek (eds.),
Sprawa Microsoft – studium przypadku. Prawo konkurencji na rynkach
nowych technologii [Microsoft – Case Study. Competition Law on New
Technology Markets]
Wydawnictwo Naukowe
Wydziału Zarządzania Uniwersytetu Warszawskiego
[University of Warsaw, Faculty of Management Press], Warszawa 2008, 377 p.

The publication entitled *Microsoft – case study. Competition Law on New Technology Markets* presents a comprehensive, analytical discussion of the widely discussed decision of the European Commission in its proceedings concerning the abuse by Microsoft of its dominant position on PC software and workgroup server software markets as well as on related issues. The charges brought by the Commission (and upheld by the CFI following an appeal) alleged that Microsoft was limiting market access for other business enterprises by refusing to grant access to technical information concerning its own products necessary for other software providers to achieve interoperability with the Windows system and by tying the Windows operating system with Windows Media Player. The Microsoft case posed important competition law and intellectual property rights (IPR) questions and provided food for thought as regards the definition of “tying sales”. Moreover, it illustrated the practical workings of the “more economic approach” principle professed to by EU authorities.

The book opens with a chronological summary of the actions taken in this case by EU authorities, followed by an exhaustive overview of the relevant factual circumstances. This extensive introduction is very useful for the readers. It not only renders the subsequent parts of the publication much easier to understand but also makes it possible for those, who are not familiar with all the details of the case, to follow the particular elements of the ruling and the presented analysis. The book is then thematically divided according to the individual competition-inhibiting practices which the European Commission accused Microsoft of engaging in.

The authors analyse first Microsoft’s refusal to release to its competitors the necessary information (source codes) which would make it possible for them to ensure the compatibility of their operating systems with servers using the Windows platform. They analyse the decision of the Commission and the judgment of the CFI and consider their impact upon cases where a dominant business enterprise refuses to grant a licence. The authors explain that the very nature of Microsoft’s

actions called for the delineation of the boundaries within which prohibitions on competition-inhibiting practices could – and should – interfere with the classic formulation of copyright. For comparative purposes, the authors include an analysis of other decisions concerning refusal to grant copyright licences; they also include their projections as to how the Microsoft case might shape further judicial practice at the nexus of competition law and IPR. In doing so, they quite correctly point out that issues arising at the junction of competition law and IPR have already been the object of many papers and publications.

They set the stage for their following discussion by stating that there are no *a priori* grounds for giving precedence to one branch of a legal system over another. The European as well as American legal systems enshrine IPR as a constitutional right of the entitled party. At the same time, exercise of such rights may be subject to certain limitations arising from competition law. As a general rule, IPR provisions – primarily designed to safeguard the interests of patent holders – are recognised as being conducive to innovation and contributing to the development of more advanced or new products. So, from the perspective of market development, stringent IPR protection is beneficial and desirable.

The situation might be different however if an undertaking, which is perfectly entitled to IPR, exercises them by refusing to contract with an entity seeking a licence. The objective of market and technological development, improved efficiency and innovation may be thwarted in such cases giving rise to the need for competition law to step in. The authors cite here the economists O'Donoghue and J. Padilla in arguing that the legal duty of contract (also as regards extension of licences), resulting from the application of competition law, should only be imposed under exceptional circumstances since it amounts to an interference with the very essence of ownership rights. According to the authors, such exceptional circumstances would include, in particular, situations where the sought-after licence is necessary for developing a new (another) product and where, if the licence is withheld, such development is prevented and competition in a neighbouring market is distorted.

The authors undertake an analysis of American jurisprudence concerning the relationship between IPR and competition law arguing that the approach of US courts has been a fairly liberal one. They conclude that the invocation of IPR constitutes sufficient grounds for a legal refusal to grant a licence with respect to those rights, unless that is, the IPR are invoked only as a pretext or a *post factum* justification. The authors continue on to demonstrate that the European Commission's original decision in the Microsoft case and (consequently) the CFI ruling, are far from the above. The EU authorities abandoned the concept of a "new product" in favour of a criterion of stunting technical progress to the detriment of consumers. The impediment of technical progress clearly comprises the prevention of the perfection of competing software because, given the lack of inter-operability with the Windows system, Microsoft's competitors were unable to sell their products no matter what their other virtues may have been. Thus, competing software developers had their motivation to work on newer, better products significantly undermined, with the end result that consumer interests suffered.

Be that as it may, the Microsoft ruling – as the authors duly point out – concentrates on protecting the interests of competitors operating in the relevant market. In other words, the ruling extended antitrust protection over a desired structure of the market because it was this very structure that was seen as guaranteeing consumer welfare. Thus, in the Commission’s first decision and the CFI ruling upholding it, the premises of the Chicago school, which concentrates on direct benefit to consumers rather than on upholding a market structure, are only considered to a limited extent, and in an oblique fashion at that. The authors include a concise and well-chosen remark by a official of the US Department who stated in this context that “in the United States, companies are allowed to make their way in the market ‘cowboy style’ while the EU expects its enterprises to compete in a ‘gentlemanly’ fashion”.

In the following part of the book, the authors present a thorough analysis of the other charges brought against Microsoft by the European Commission namely tying sales of two distinct products – the Windows operating system and Windows Media Player. They provide exhaustive definitions of tied and package sales which are helpful not only with respect to the discussed case but also in the broader context of antitrust law as applied to tied agreements. Conscientiously noted are the positive aspects of tied agreements in business dealing: the satisfaction of customer needs, the variety of business offer, increased revenue, economies of scale and cost savings. On this basis, the authors prove that tied agreements need not necessarily inhibit competition and that they do not warrant a blanket ban. Still, the fact is acknowledged that bans are necessary with respect to contracts which expand a monopolistic or dominant position onto new markets, close a market or exclude an enterprise from it, discriminate with regard to price or increase the operating costs of competitors.

As they embark on their treatment of tied sales in reference to the Microsoft case, the authors refer to other similar EU rulings (e.g. *Hilti* or *Tetra Pak II*) widening the context of the discussion and rendering their subsequent remarks more accessible for the readers. The analysis of the Microsoft case considers the “tying test” and the “distinctiveness test” adopted by the European Commission. In the latter case, the distinctiveness of a product is evaluated from the perspective of customers and of demand for the tied product. Such an approach is different from the test employed in US antitrust law which considers whether the tied product is normally sold separately (without the “companion”). As a result, EU jurisprudence concentrates on assessing the demand side on the market while US jurisprudence focuses on the supply side. Also here is it worth noting the more liberal attitude adopted by the American authorities, and the authors do this; as they do, they also weigh in favour of this “soft touch” as more desirable from the perspective of market development.

The publication focuses also on the exclusion of competition through bundling of Windows and Windows Media Player, dissecting the arguments put forth in this context by EU authorities. It is worth noting that neither the Commission nor the CFI deemed the notion relevant that users who have both Windows as well as Windows Media Player installed on their PCs benefit from the use of more than one playback programme. Similarly, the EU authorities were not impressed by the argument that,

despite the presence of Windows Media Player on every PC, Microsoft did not hold a dominant position on the multimedia player market.

The analysis of the Microsoft case concerning illegal tying of products concludes with an intriguing summary which provides the reader with a comprehensive insight into the attitude adopted by EU authorities in this regard. The reader's attention is drawn to the liberal approach taken by the EU to the application of competition protection laws. In line with the aforementioned treatment of Microsoft's refusal to grant a licence, EU's assessment of tying also concentrated on consumer protection rather than on competition, as an institutional phenomenon whose existence is supposed to directly serve consumer interests. It is this very goal which the application of competition protection laws ought to further.

One of the chapters of this publication is devoted to the history of antitrust proceedings conducted against Microsoft in the US. Discussed on this basis is the operation of the *per se* rule and of the rule of reason in antitrust cases. As the authors explain, these two principles lie at the foundation of the two basic types of analyses of whether a given behaviour does, or does not, amount to limitation of business dealing. The application of the *per se* rule is limited to those violations which do not necessitate a painstaking study in order to establish that they are anti-competitive in nature and are not mitigated by any broader benefits. Meanwhile, the rule of reason is an instrument for differentiating between permitted and forbidden anti-competitive behaviours in less obvious circumstances. Still, in actual market realities and day to day practice of competition watchdogs, the division between these two rules is not always clear-cut. The *per se* rule, as correctly noted by the authors, is generally applied in cases of grave breaches of competition rules such as price fixing among competitors, horizontal market division, irregular cooperation in tender procedures or collective boycotts. On the other hand, the application of the rule of reason is often based on the premise that the given behaviour can not, at the outset, be condemned as having a negative influence on competition (perhaps because some of its effects in the given relevant market are actually positive).

Also cited are the judgments of US courts in tied sales cases including *Northern Pacific* and *Jefferson Parish*. This provides the starting point for the authors' own analysis of Microsoft's actions and of the measures they elicited on the part of the US authorities. Along the way, the authors analyse tied arrangements as understood in the American legal system (citing the Department of Justice as well as the judiciary) as well as the concept of integrated products in the context of antitrust cases involving Microsoft. The care devoted in this publication to American law is a welcome contribution in this context because it facilitates a comparative analysis of the varying approaches followed in European and American practice to what are, in essence, very similar legal constructs.

As they discuss the finer points of the Microsoft case, the authors provide their readers with a helpful explanation of certain basic relationships and business mechanisms characterising the PC software industry. The usefulness of this additional information cannot be overestimated – while most readers with a legal background will readily grasp the legal concepts central to this publication, some will surely be

at a loss when it comes to the technical vocabulary of the IT sector. Apart from its comprehensive treatment of the Microsoft case in all its legal and economic aspects, the book also includes, on its margins so to speak, various pieces of trivia and anecdotes intended to illustrate the realities of antitrust law in practice (see, for instance, p. 157).

While dealing with a single major case, in doing so this publication manages to present a genuine compendium of knowledge concerning competition law in its various aspects. Its narration is matter-of-factly and densely supported by legal and economic information. The Microsoft case is not only discussed in a logical and coherent way, it is also placed in a wider historical context of proceedings involving not only Microsoft but also other companies charged with similar offences. This is certainly a book worthy of recommendation.

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