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Antitrust Actions in IT Domain

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Abstract: Antitrust actions must aim at bringing an infringement of competition or the distortion of free markets to an end, prevent the recurrence of such behavior, and prevent the defendant the benefits of its statutory violation. The Information Technology sector, a vital one for the world economy, offered and continues to offer numerous cases of antitrust actions. In this paper, we outline characteristics of the Information Technology sector that can raise serious concerns about monopolization, and identify a number of important recent antitrust cases involving Information Technology firms.

Keywords: antitrust; IT; software; microprocessor; intellectual property rights

1. Introduction

“Antitrust” refers to a field of economic policies and legislation aimed at the monopolistic practices⁴. Antitrust regulations address issues arising from the actions of firms operating under certain market structure conditions and their effects on economic performance; they also have as their primary objective the retention of markets to a standard defined by a set of theoretical characteristics that suggest the status of “perfect competition.” These features include the presence of multiple buyers and sellers, perfect information, homogeneous products and the inability of a offerer to significantly influence the price of the products or services.⁵

Laws that govern economic competition can be detected from antiquity; so we can talk about *Lex duilia de Annorta* (in effect during the Roman Empire, protected the grain trade, imposing great fines on those who directly, deliberately and insidiously stopped the ships that ensured the supply), the *Edict* of 301 of Emperor Diocletian (who punished with the death of those who violated the tariff system), etc.⁶

The law on competition in the modern era begins with the *Sherman Act* of 1890 and the *Clayton Act* of 1914, both adopted by the US, which targeted the major monopolies perceived as a threat to democracy and the market economy.

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⁴ See (Kaplou & Shapiro, 2007).

⁵ In 2009, in the US, the Department of Justice collected over \$ 1 billion in fines from antitrust, while the international total for the same year was \$ 3.6 billion - see details at <http://www.mainjustice.com/2010/01/06/antitrust-division-collected-more-than-1-billion-in-fines-last-year/>.

⁶ See <http://www.wikipedia.org>, on *Competition Law*.

In the European Union, Article 7 of Regulation 1/2003 sets out the European Commission's competence in the field of infringement of European antitrust law: to impose proportionate behavioral or structural remedies to complete the infringement action in the field.

The information technology sector is a very important one in the world economy, as it is but also for its contribution and effects in other economic sectors. Among the most common monopolistic practices in the field of information technology are horizontal or vertical mergers (which aim at holding a single firm at different stages of a production process), pricing policies aiming at removing competitors from the market predatory pricing, exclusive contracts (for example, Original Equipment Manufacturer¹ contracts), interoperability or computerization actions (with earlier versions, with software produced by the same firm, or with software produced by different firms, blocking compatibility, or expanding control by manipulating interfaces), manipulating user expectations on software features, influencing market performance, providing software as a “package.”

The information technology sector is an important component of intellectual property, with a number of practices that may fall under the competition laws: acquisition of intellectual property rights through mergers, technology licensing arrangements, cooperative arrangements (including patent associations) and refusal to technology licensing. Moreover, there have been cases in which firms have concealed the existence of intellectual property rights until proprietary technologies have been embedded in standard formats.²

Monopolistic practices in the field of information technology can have negative consequences on markets and competitors, due to the network effect and wide spread of these technologies (inter alia) in virtually all areas of activity. In order to remove and prevent the undesirable effects of anticompetitive practices, over the years there have been many antitrust actions in this area.

In the past, in cases in this area, IBM was at the forefront (accused, among other things, of sabotaging Fortran standards, the installation of functional products in the central unit that reduced the value of peripheral equipment, manipulation of interfaces and the refusal to do so available to competitors, etc.) (Kaplow & Shapiro, 2007, p. 29); Nowadays, other corporations, such as Microsoft and Intel, attract the most attention, even if IBM remains a subject of antitrust action.

In the following section, we propose to present some of the very recent antitrust actions involving IT firms that have revealed a number of essential issues specific to the field.

2. Antitrust Actions

2.1. Datel vs. Microsoft

On November 20, 2009, in the Northern District of California, Datel Holdings Ltd. and Datel Design & Development, Inc. have launched an action against Microsoft Corporation, the allegations concerned the Xbox Video Game Accessory Market for violation of Sections 1 and 2 of the Sherman Act (15 USC §§1-2) and Section 3 of the Clayton Act (15 USC §14) unfair and deliberate interference with prospective economic benefits (Microsoft's actions being described as oppressive, malicious and / or fraudulent, justifying punitive damages).

¹ See details on contracts OEM in (Ioana Vasiiu & Vasiiu, 2009)

² Among the most prominent cases in this regard are Dell Computer, in conjunction with the main standard VI (a mechanism for transferring computer data between the central computer unit and peripherals such as the hard drive or monitor) and Motorola, in conjunction with the modem standard V.34, adopted by the International Communication Union - see details in (Kaplow & Shapiro, 2007, pp. 60-62).

Datel is a company that produces products that improve video games and develops and commercializes products for Microsoft's Xbox video game. One of the main Datel products is an Xbox memory card called XMAX Memory (the only company that still supplies Xbox memory cards to Microsoft).

In October 2009, Microsoft released an updated code Xbox 360. Datel sustains that through this code Microsoft has disabled retroactive memory cards Datel for Xbox 360, in order to protect their own sales, with no benefit to consumers. Such actions lead to the impossibility of the 50000 consumers who chose Datel to use them. These technological barriers are not product enhancements, but only a mechanism by which Microsoft wants to perpetuate market control.

2.2 European Commission vs. Microsoft Corporation

Among the incriminated Microsoft's actions anticompetitive restrictions are included in the OEM contracts, the integration of Internet Explorer browser with Windows, integration with Windows Media Player, misleading developers in Java programs, threats to Intel Corporation etc.

In the US, Microsoft Corporation has been the subject of several antitrust actions for violating §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

The European Commission has also initiated antitrust investigations against Microsoft Corporation. One of the investigations concerns the interoperability of computer programs and it was initiated following a complaint from the European Committee for Interoperable Systems (ECIS).

According ECIS, Microsoft has refused illegally to provide interoperability information for a range of products, including information on the Office suite (including new format Office Open XML, to see if it is interoperable with competitors' products), a number of server products and the so-called *NET Framework*. due

The second investigation relates “linking” separate software programs, due to a complaint from Opera *inter alia* (selling a browser competing with Microsoft's offer in this area, the Internet Explorer browser). Opera has argued that such actions by Microsoft, especially considering the new proprietary technologies introduced by Microsoft in its browser, reduce compatibility with Internet standards and therefore affect competition. Additionally, Microsoft was accused of linking other software (such as Desktop search and Windows Live) to its operating system, being dominant on the market.

The legal basis for these actions of the European Commission can be found in Article 11 (6) of Council Regulation No. 1/2003 and Article 2 (1) of Commission Regulation No. 773/2004.

According to the IP / 09/1941 (Brussels, December 16, 2009), the Commission found that Microsoft distorted competition by tying Internet Explorer and Windows, which gives Microsoft an artificial advantage in terms of distribution, regardless of the merits of this product, installed on more than 90% of personal computers.

In line with the commitments approved by the Commission for five years, starting in March 2010, Microsoft has created a “window of selection” in the European Economic Area (through a Windows update mechanism) to enable users of Windows XP, Windows Vista and Windows 7 to choose the browser (s) they want to install (in addition to or in place of Microsoft's Internet Explorer browser), configure them as default web browsers, and to disable Internet Explorer. In addition to Internet Explorer, Mozilla Firefox, Apple Safari, Google Chrome, Opera, AOL, Maxthon, K-Meleon, Flock, Avant Browser, Sleipnir, and Slim-1 are also available.

Also, in July 2009, Microsoft made proposals to disclose interoperability information that could improve interoperability between third party products and certain Microsoft products such as Windows, Windows Server, Office, Exchange and SharePoint (see MEMO / 09/352).

3. Conclusion

The information technology sector is a very important one in the world economy and has a very important component of intellectual property. A competitive situation allows consumers multiple options, lower prices and better or more functions.

Cases in this area show that certain features of IT make it difficult and subtle to apply antitrust policies. Analysts and practitioners continue to debate how we need to determine whether we are in the presence of monopolistic behavior or whether we only have a competitive situation. Unfortunately, antitrust seldom really remedies the situation that has triggered such actions (for example, the case of Microsoft Corporation).

We believe that approaches in this area need to be flexible, dynamic, tailored to the concrete situation and to pursue effective remedies. Remedies are effective only if they stop any behavior or action that affects competition in a particular economic sector, remove the benefits obtained by the accused after a monopolist behavior, and try to ensure that similar practices will not be possible in the near future.

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