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UNFAIR COMPETITION AMONG BUSINESS IN THE MARKETPLACE -Abuse of a Dominant Position-

Ovaj rad je naučna studija koja pokazuje pravno i direktno predstavljanje Evropske Komisije, sa ciljem ukazivanja na beztakmičarski pristup ponašanja na tržištu, na osnovu zakona i procedura koja se nalaze u Zakonu za zaštitu konkurencije Evropske Unije. U ovom specifičnom slučaju protiv Majkrosofta, koje prikazuje monopolističko ponašanje i zloupotrebu pozicije od strane ove kompanije na tržištu, rezultirace do različitih mišljenja i procena u definisanju pravog značenja termina zakona o antipoverenju, posebno povrede Člana 82 Zakona o konkurenciji, i pitanja granica ponašanja vodećih kompanija, u relaciji sa zloupotrebom dominantne pozicije na tržištu Rad predstavlja nastavak, II deo rada koji je objavljen u prethodnom broju, broju 2. časopisa SPŽ.

Ključne reči: *Zakon o konkurenciji, Evropska Komisija, Zloupotreba dominantne pozicije, Intelektualna svojina, povreda Člana 82, Slučaj zakona o nepoverenju protiv Majkrosofta.*

Chapter 3 - The Antitrust Microsoft Case

Case Ň-201/04, Microsoft Corp. v. Commission of European Communities
Antitrust Microsoft Case

3.1 THE FACTS ABOUT THE CASE

1. Microsoft Corp. established in Redmond, Washington (United States) is a multinational computer technology corporation with 79,000 employees

in 102 countries and global revenue of $51.12 billion as of 2007. It develops, manufacturers, licenses and supports a wide range of software products for computing devices. Its best selling products are the Microsoft Windows operating system and the Microsoft Office suite of productivity software. These products have prominent positions in the desktop computer market; with market share estimates as high as 90% or more as of 2003 for Microsoft Office and 2006 for Microsoft Windows, in line with Gates' vision to get a workstation running our software onto every desk and eventually in every home.[1]

2. The case originated with a complaint by Sun Microsystems[2] alleging that Microsoft was refusing to supply it with interoperability information necessary to interoperate with Microsoft's dominant PC operating system.

On 10 December 1998, Sun Microsystems logged a complaint with the Commission. The complaint related to Microsoft's refusal to supply the Company with the information necessary to allow interoperability of its work group server operating system with Windows.

Factual Background of the case

The case originated with a complaint from Sun Microsystems alleging that Microsoft was refusing to supply it with interoperability information necessary to interoperate with Microsoft's dominant PC operating system.'[3]

On 10 December 1998, Sun Microsystems, Inc., established in Palo Alto, California (United States), lodged a complaint with the Commission. The complaint related to Microsoft's refusal to supply Sun Microsystems, Inc. with the information necessary to allow interoperability of its work group server operating systems with Windows.

Brief History:

In March 1996, Microsoft and Sun entered into a Technology License and Distribution Agreement also known as "TLDA", for Java. Java was a computer language Sun developed to enable the writing of programs that

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[1] Information about Microsoft Company available at the site of Corporation, at www.microsoft.com

[2] Sun Microsystems, Inc., established in Palo Alto, California (United States), developed to enable the writing of programs that work on any computer operating system. See detailed information at the official site of the Company, at www.sun.com

work on any computer operating system. Based on this agreement Microsoft agreed to pay Sun $ 3. 75 million a year for broad rights to use the computer language. In exchange, Sun granted Microsoft a non-exclusive license to make, access, use, copy, view, display, modify, adapt, and create Derivative Works of the technology in Source Code form, and to make, use, import, reproduce, license, rent, lease, offer to sell, sell or otherwise distribute to end users as a part of the product offer. The license agreement was negotiated on a rushed basis in 1996, and by 1997; both Microsoft and Sun had developed what they believed to be significant improvements to Java. The problem occurred when the Sun as original maker of the Java became concerned that Microsoft as a partner was distributing a polluted version of the computer language, in other words creating a version of Java that was completely incompatible with Sun's standards.

On October 7, 1997, Sun filed a suit against Microsoft, alleging, trademark infringement, unfair competition, and a breach of a contract. In November 1997, Sun moved for a preliminary injunction bearing Microsoft from using Sun's Java Compatible logo on products that failed Sun's compatibility test (Compatibility test is based on a compatibility requirements, section 2.6 which requires Microsoft to produce compatible implementations of Java within six months of the date that Sun creates a significant upgrade to Java). Section 2.6 provides that Microsoft shall make available only products that are compatible implementations). Microsoft did not appeal the injunction concerning the compatibility requirement. In addition, Sun amended its complaint to add a claim for copyright infringement and filed motions for a preliminary injunction under 17 U.S.C S 502 for copyright infringement (included an order immediately prohibiting Microsoft from distributing its development kit for Java programmers, and enjoining it from distributing Internet Explorer or Windows unless it could show within 90 days that those products passed Sun's compatibility test), and under California Business & Professions Code S 17200 for unfair competition (abusing the dominant position in the software market) .[4]

Microsoft appealed.

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[3] Data about the case available at the site of European Commission, at www.ec.europa.eu

[4] The process of the case provided at the site of the Europe Community, court of First Instance, at www.europa.eu

In February 2000, following information obtained from the market, the Commission broadened the scope of its investigation to examine Microsoft's conduct with regard to its Windows Media Player product. Starting and opening the investigation, better known as the 'Microsoft's Antitrust Case'.

3.2 UNDERSTANDING OF THE COURT

In February 2000, the Commission of the European Communities was examining the impact Windows 2000[5] had on its competition. The reasons for this investigation were the allegations that the Commission as a main investigator received from the Microsoft's competitors. Competitors were arguing that due to the unwillingness of Microsoft to supply them with the information for the interfaces, the Microsoft was putting them in a significant competitive disadvantage[6] by extending its dominance in PC Operating Systems into the closely related markets for server operating system software and middleware. In this way, Microsoft was ensuring the full exploitation of functionalities embedded in Windows 2000 for PCs by using an indirect way of influencing the consumers,[7] and their purchase orientation towards the Microsoft's products.

On August 2000, 7 months after the initial investigation started, the Commission opened proceedings against Microsoft for alleged discriminatory licensing and refusal to supply necessary information to its rivals. Based on initial investigation, Microsoft Corp. was sending a First Statement of Objections supposedly abusing its dominant position in the market for personal computer operating systems software. Commission's action was

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[5] Microsoft's product that the Company released in 1999 as the latest version of the Windows NT Operating System, See the explanation at the *Microsoft's Company Profile*, www.microsoft.com

[6] Microsoft, by virtue of Windows 2000, has bundled its PC operating system with its own server software and other Microsoft software products in a way, which permits only Microsoft's products to be fully interoperable. Explanation available at the site of the European Commission, *Key Issues, Antitrust case*, www.ec.europa.eu

[7] Customers would *de facto* be obliged to purchase Windows 2000 for servers, due to the small amount of offered products by the Microsoft's competition. Detailed Explanation available at the site of the European Commission, *Key Issues, Antitrust case*, www.ec.europa.eu

followed by the complaint from Sun Microsystems arguing that the Microsoft was creating a final step in its strategy, because it wanted to strengthen the effects of its refusal to supply interface information with the intention of driving all serious competitors out of the server software market.[8]

The Commission was given evidence that supported the claim brought by Sun Microsystems[9] that showed that Microsoft was not carrying out its obligation for disclosing sufficient interface information about its PC Operating Systems. Based on the evidence, the Commission decided that Microsoft was refusing to supply interface information to the competitors like Sun Microsystems.[10]

Then, on the August 2001, the Second Statement of Objections was sent to Microsoft that was confirming and extending the interoperability objections of the First Statement[11], taking into account Windows 2000 generation of PC and server operating systems, and it was alleging Microsoft's anti-competitive tying of its Windows Media Player product with its Windows PC Operating System. The reason why Commission sent the Second Statement to Microsoft was it believed, that the Company was withholding from vendors of alternative server software key interoperability information that was needed to enable vendor's products to connect with Microsoft's dominant PC and server software products. Furthermore, Commission also believed that Microsoft had reinforced this strategy of extending its dominance from the PC to the server trough operation of an abusive licensing policy for Windows 2000.[12] Finally, the Commission also believed that Microsoft might have acted illegally by incorporating its new Media Player

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[9] Sun Microsystems was the first American software company that complaint against Microsoft and that lead to the establishment of the Antitrust Microsoft Case. See Information about the Case Sun vs. Microsoft at the Historical Background, Ch 3

[10] See Source of data at the site of the European Commission, *Key Issues, Antitrust case*, www.ec.europa.eu

[11] See the First Statement of Objections, p. 26

[12] Under the Microsoft scheme, if customers choose not to use an all-inclusive Microsoft scenario for PCs and servers, but decide to use competing server products, they are forced to bear a double cost. The effect of this policy may be to drive customers towards Microsoft server products, reducing choice to the detriment of the final customer. Dee the Explanation at the site of the European Commission, *Key Issues, Antitrust case*, www.ec.europa.eu

product into its Windows PC operating system. [13] The result of this action conducted by Microsoft was weakening effective competition in the market, reducing consumer's choice, and less innovation which all of that contributed to the higher demand for Microsoft products.

On 6 August 2003, because of additional evidence that the Commission had gathered, a Third Statement of Objections confirming both the interoperability and tying objections of the Second Statement of Objections was sent to Microsoft.

In the Third Statement, Microsoft was informed about the results that Commission had gathered in its market enquiry in which the groups of consumers were asked whether the interoperability considerations were a factor in their purchasing choices, and whether non-disclosures of such information by Microsoft influenced their purchase decisions.

Concerning the tying, the Commission contacted a large number of suppliers in various segments of the market.[14] The outcome confirmed the Commission's preliminary conclusion that Microsoft's tying of Windows Media Player to the Windows operating system had weakened competition on the merits, subdued product innovation, and ultimately reduced consumer choice. After Commission gathered all the results, from both suppliers and consumers, confirming the claims from the Microsoft's competitors it sent the last Statement elaborating the overall situation to Microsoft, for which Microsoft requested an Oral Hearing.

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[13] Media players are software products, which allow consumers to see and hear audio and video files without lengthy download times on their PCs. These innovative products are developed and manufactured by several companies, including Microsoft itself. However, Microsoft's ties its Media Player to its ubiquitous Windows operating system, a channel of distribution, which is not available to competing vendors of media players. Microsoft may thereby deprive PC manufacturers and final users of a free choice over which products they want to have on their PCs, especially as there are no ready technical means to remove or uninstall the Media Player product. Competing products may therefore be a priori set at disadvantage, which is not related to their price or quality. Explanation of the Microsoft's scheme available at the site of the European Commission, Competition Policy, Legislation, www.ec.europa.eu/competition/legislation

[14] The companies constitute a representative sample of randomly selected content owners, content providers, and software developers across the United States. All companies were asked to provide information on the specifics of their industries, and what factors determined their business decisions. The results of the enquiry can be seen at the site of the European Commission, www.ec.europa.eu

Court's Decision:

The European Commission had concluded, after a five-year investigation, that Microsoft Corporation broke European Union competition law by leveraging its near monopoly in the market for PC Operating systems (OS) onto the markets for Work Group server operating systems and for Media players. [15]

The European Commission adopted a decision finding that Microsoft had infringed Article 82 of the EC Treaty by abusing its dominant position by engaging in two separate types of conduct.

The first type of conduct found to constitute an abuse consisted in Microsoft's refusal to supply its competitors with 'interoperability information' and to authorize them to use that information to develop and distribute products competing with its own products on the work group server operating system market, between October 1998 and the date of adoption of the decision. By way of remedy, the Commission required Microsoft to disclose the 'specifications' of its client/server and server/server communication protocols to any undertaking wishing to develop and distribute work group server operating systems.

The second type of conduct to which the Commission took exception was the tying of Windows Media Player with the Windows PC operating system. The Commission considered that that practice affected competition on the media player market. By way of remedy, the Commission required Microsoft to offer for sale a version of Windows without Windows Media Player.[16]

In addition, the Decision ordered Microsoft to first provide, within 90 days, a version of Windows, which did not include Windows Media Player and second ordered Microsoft to disclose, within 120 days, complete, and accurate interface information, which would allow rival vendors to interoperate with Windows, and to make that information available on reasonable terms.[17]

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[15] See decision of the European Commission, www.ec.europa.eu

[16] Note: See the judgment of the Court of First Instance, *Press Release*, 2007, at www.curia.europa.eu

[17] Information available at the site of European Commission, *Microsoft Key Issues*, at www.ec.europa.eu/comm/competition/antitrust/cases/microsoft/implementation.html

3.3 CONCLUSION OF FIRST PART – EUROPEAN COMMISSION ELABORATION, FINDINGS

The government's antitrust suit against Microsoft Corp. in the beginning raises important economic and public policy issues about the dynamics of monopoly power in industries undergoing rapid technological change.

Decision made by European Commission for infringing Article 82 of abusing dominant position in the market provided many questions that rose between the undertakings and its operations. Was the Microsoft Corp. playing a role of a Monopolist? Was the Company conducting its operations, by eliminating the competitors from the market?

Competition among companies with different systems tends to eventually produce a single network standard that connects practically all users, the way Microsoft's Windows had managed to get about 95% of the market for operating systems. There is a growing call for government regulation of networks when inefficient systems become standard because aggressive companies gain an early adoption of their systems.[18]

According to the European Commission in elaborating the findings concerning Microsoft share in the market, Microsoft had a market share of about 95 % in the market for personal computer (PC) operating systems (OS) and thus enjoyed practically undisputed market dominance. Most PCs are embedded into networks, which are controlled by servers. Interoperability, i.e. the ability of the PC to talk to the server is the basis for network computing. Interoperability can only function if the operating systems running on the PC and on the server can talk to each other through links or so-called interfaces. To enable competitors of Microsoft to develop server operating systems, which can talk to the dominant Windows software for PCs, interface information and even limited parts of the software source code of the Windows PC OS, must be known. Without interoperating software and because of the overwhelming Microsoft dominance in the computer software market, computers running on Windows operating systems would be *de facto* obliged to use Windows server software if they wanted to achieve full interoperability. This phenomenon is referred to as the client (PC) dragging the serve. [19]

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[18] See the information in the Press Release of the European Commission at www.curia.europa.eu

[19] www.ec.europa.eu/microsoftantitrustcase/

The only reasonable way to explain why Microsoft's principal market and political adversaries – Sun, IBM, and Oracle – pressed the government to bring the case is that Microsoft was acting not like a monopolist, but like an aggressive competitor as well. Microsoft's monopoly status also claimed that Microsoft was guilty of being 'brutally competitive'.[20] Microsoft came very close of being the single seller that is often associated with monopoly power, given that 95 % of all computers run on Windows.[21]

The competitors were expressing their concerns not just for the Microsoft's way of operations in the present case but also for the future developments when for example, by continuing this way of doing business Microsoft could result in controlling 100 percent of the market for operating systems and web browsers, which will result in curb sales by charging truly monopoly prices.[22]

The main point of the case was not about Microsoft's huge market share in operating systems, but alleged that Microsoft used that market power to unfairly damage rivals in software applications. Simply being a monopoly is not necessarily against antitrust law however, using that monopoly to compete in other fields is. And for that reason, the European Commission characterized Microsoft as a monopolist that abused its dominant position in the market, and infringed Article 82 of the EC Treaty.

Chapter 4. Updates: The End of the Anti-Trust Battle

On 27th February 2008,

Commission imposed 899 million penalty on Microsoft for non-complaining with March 2004 Decision:[23]

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[20] See the statement by the Microsoft's competitors in the Press Release of the European Commission at www.curia.europa.eu

[21] See Source: Analysis of Microsoft's products at www.microsoft.com

[22] www.curia.europa.eu

[23] **March 2004 Decision -** Microsoft Corporation broke European Union competition law by leveraging its near monopoly in the market for PC operating systems (OS) onto the markets for work group server operating systems and for media players. Because the illegal behavior is still ongoing, the Commission has ordered **(1)** Microsoft to disclose to competitors, within 120 days, the interfaces required for their products to be able to 'talk' with the ubiquitous Windows OS. Microsoft is also required, **(2)** within 90 days, to offer a version of its Windows OS without Windows Media Player to PC manufacturers (or when selling directly to end users). In addition, Microsoft is **(3)** fined € 497 million for abusing its market power in the EU, http://ec.europa.eu/comm/competition/antitrust/cases/ index/by_nr_75.html#i37_792

4.1 THE FINALIZATION OF THE "LONG" MICROSOFT BATTLE:

On the 22nd December 2005, The European Commission sent the last official Statement of Objections to Microsoft Corp. for non-compliance with the decision in 2004. The reason for sending the statement by the Commission was the Microsoft's failure to disclose complete and accurate interface documentation to allow non-Microsoft workgroup servers to achieve full interoperability with Windows PCs and servers, despite its obligation "*to do so"* under the terms of the Commission's March 2004 decision that Microsoft was abusing its dominant market position[24]

The European Commission had at the end fined US computer giant Microsoft for defying sanctions imposed on it for anti-competitive behavior.

The final payment that Microsoft had to pay had then increased from original 497 million for abusing its market power in the EU to the now stated 899 million for non-complaining with the 2004 ruling by the European Commission in 2004.

In its official published document the European Commission stated that Microsoft was the first company in fifty years of EU competition policy that had to be fined for failure to comply with an antitrust decision.

The Commission's Decision of March 2004 required Microsoft to disclose complete and accurate interoperability information to developers of work group server operating systems on reasonable terms. In response to this decision, Microsoft as a category for accepting this ruling was demanding a royalty rate of 3.87% of a licensee's product revenues for a patent license (the "patent license") and of 2.98% for a license giving access to the secret interoperability information (the "information license"). This was a hidden way of Microsoft showing that the decision ruled in 2004 was not acceptable for them. In response to this, The Commission set out its concerns regarding Microsoft's unreasonable pricing by sending Statement of Objections. As a result Microsoft decided to lower its guard by reducing its royalty rates to 0.7% for a patent license and 0.5% for an information license, while leaving the worldwide rates unchanged.

Only as from 22 October 2007 did Microsoft provide a license giving access to the interoperability information for a flat fee of 10 000 and an

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[24] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/49&format=HTML&aged=0&language=EN&guiLanguage=en

optional worldwide patent license for a reduced royalty of 0.4 % of licensees' product revenues.[25]

According to the European Commission the royalties that Microsoft charged for the information license – i.e. access to the interoperability information - prior to 22 October 2007 were unreasonable. Microsoft therefore failed to comply with the March 2004 Decision for three years, thereby continuing the behavior confirmed as illegal by the Court of First Instance.

The Commission has based its conclusions as to the unreasonableness of Microsoft's royalties prior to 22 October 2007 on the lack of innovation in a very large proportion of the unpatented interoperability information and a comparison with the pricing of similar interoperability technology.

4.2 THE FINAL CONCLUSION OF THE MATTER:

The Antitrust Microsoft case was labeled in the eyes of the public and the EU Law itself as a legal and most direct approach of addressing the non-competitive behavior in this dynamic market. It can be said that these principles of the judgment by the European Commission will not just apply to the Microsoft case itself in the future assessment of the higher developed Companies. They will apply to any dominant company that engages in the same behavior.

In a way this case just open the door of the law awareness to other companies that are acting in an abusive way as Microsoft did starting in 1998 and until now, 2008, a decade later. It provides legal certainty now as to what a dominant company can and can't do in relation to information it possesses and make it available to companies who compete in the same environment (enabling them to be a viable competitor). After 10 years of fighting and arguing their right to demonstrate and protect their monopoly, Microsoft as a leading Company in the technology market for PC Operating systems, thought that ignoring the antitrust regulations can be very dangerous. The past decade of different struggle and changes has brought a lot of alterations for the Company as well as the entire industry.

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[25] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/318&format=HTML&aged=0&language=EN&guiLanguage=en

> 'We believe it's important at this stage to focus all of our energies on complying with our legal obligations and strengthening our constructive relationship with the European Commission, said Erich Andersen, European General Counsel for Microsoft. At the time the Court of First Instance issued its judgment in September, Microsoft committed to taking any further steps necessary to achieve full compliance with the Commission's decision. We have undertaken a constructive discussion with the Commission and have now agreed on those additional steps. We will not appeal the CFI's decision to the European Court of Justice and will continue to work closely with the Commission and the industry to ensure a flourishing and competitive environment for information technology in Europe and around the world.'[26]
>
> ' As we demonstrated last week with our new interoperability principles and specific actions to increase the openness of our products, we are focusing on steps that will improve things for the future' Microsoft said. [27]

Apparently worried that it might not be so lucky the next time, the Company has moderated its behavior. It still dominates the operating system and browser markets — and it is still a 'fierce technical competitor', but its business and legal behavior is more moderate. Though the law moves slowly — this case showed that *Companies are not immune to its discipline just because they are in high-tech markets*.

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[26] See the full press release statement, Microsoft Statement on Compliance with European Commission 2004 Decision at the site of the Microsoft, http://www.microsoft.com /Presspass/press/2007/oct07/10-22MSStatement.mspx

[27] Official statement, quote www.microsoft.com

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The paper is based a case study, presenting the legal and direct approach by the European Commission of addressing the non-competitive behaviour in the marketplace within the rules and procedures of European Competition Law. In this specific Anti-Trust Microsoft case, arguing Microsoft's monopolistic direction and abuse in the market, leads to different opinions and evaluations by both, business and legal bodies, in defining the right application of the antitrust rules, specifically the breach of the Article 82 of the EC Treaty and their boundaries regarding giant companies, in relation to the abuse of a dominant position in the marketplace.

Key words: *Competition Law, European Commission, Dominant position, Intellectual property, breach of the Article 82 EC, Anti-Microsoft Case.*

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