The Influence of Antimonopoly Law on the Abuse of Dominant Position and the Regulation of Bundling Sales

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Abstract: To explore the impact of antimonopoly law on the abuse of dominant position and bundling sales, the European Union's lawsuit against Microsoft is analyzed. Combined with the previous intellectual property cases, the issues are divided into the issue of denial of authorization and the issue of illegal bundling. The whole event is analyzed and the reasoning of the European Commission is refuted.

1. Introduction

In the European Commission's lawsuit against Microsoft, the Commission holds that, as Microsoft dominates the client operating system market, if Microsoft does not disclose the necessary interface information for client server interoperability, competitors in the working group server operating system market will find themselves excluded from the relevant market. In addition, the Commission expands the scope of the case and investigates Microsoft's alleged improper bundling of Windows with media streaming application, Windows media player. The Committee believes that this situation has greatly weakened the survival of the fittest competition in the media player market, and competitors will be gradually excluded from the market, making it possible for Microsoft to monopolize the media market with inferior products, lack of motivation for further innovation, resulting in a decline in social efficiency and ultimately damaging the interests of end users [1].

To sum up, it is believed that the decision is flawed from the beginning when the relevant market is determined and the market share is calculated. The following discussion is generally divided into two categories, followed by the concluding observations: denial of authorization and illegal bundling. On the issue of denial of authorization, to make interoperability information become a necessary facility, under established case law, there are a number of special circumstances that need to be met, which the Commission has blatantly ignored. It will be demonstrated below. It will be noted that the Commission's decision is inconsistent with the case law of the Court of Justice. Then, there is neither solid empirical evidence nor reliable economic analysis to support the dumping effect of media player market bundling in the decision, nor the past experience of the Court of Justice. In this regard, the argument of technologies integration is put forward to refute its unreliable theory [2]. Although the Committee argues that it follows the method of rational rules, from the known situation, its method basically coincides with the revised illegal laws. In addition, the actual effect of remedies for improper bundling is questionable, because Microsoft has no obligation to sell unbound operating systems at a price different from the official version. Instead, they are sold on the same basis. Moreover, consumer demand is still ignored and negligible. Before commenting on the story of the committee, it is necessary to refer to the development of case law in each section as the basis for further analysis.

2. Denial of authorization

2.1 Abuse competition

The Commission is not troubled but pleased with the fact that it is gaining dominance through competitive advantage over competitors and organic growth. However, the case law of the Court of Justice also requires the dominant company to have a special responsibility and not to abuse its position and interfere with the competitive structure of the market. The refusal of a dominant enterprise to issue a license does not constitute an abuse of the dominant position. However, under special circumstances, the exercise of exclusive rights by intellectual property rights holders may be abuse. The series of cases involving intellectual property rights include the cases of Maxicar v. Renault, Volvo v. Veng, Ladbroke, Magill and IMS Health [3].

Until now, the court has unified the previous case law and ruled that refusal of a permission is anti-competitive abuse, which must meet five cumulative criteria: the incumbent must occupy a dominant position in the relevant market (which is a prerequisite in any article 82 case); input is indispensable; input is allowed to create a new product with consumer demand; refusal is not objective and it is possible to eliminate all competition in the secondary market.

2.2 Comments on the reasons for the Commission's refusal to issue licenses

(1) Related markets with problems in finding dominance and calculating market share

As the first step in determining dominance, the relevant products and geographical markets must be identified. In order to implement this practice of refusing permission, it is necessary to first solve the problem of defining the two markets in this case, namely, the upstream market and the downstream market. It is not difficult for the committee to find its dominant position in the primary client operating system market, which everyone will disagree with [4]. In addition, in terms of measuring the sales revenue of Microsoft's server operating system, the committee also uses the method of combining low price segment and workload differentiation to measure the value, which seems to limit the relevant market to a very limited range, thus overestimating the real market share and real market power of Microsoft in the relevant market.

(2) Testing of infrastructure

The statement of the Court of Justice in the Bronner case on the possibility of copying the distribution system is as follows. In order to prove that the establishment of such a system is not a realistic potential alternative, the use of existing systems is essential and it is not enough to argue that it is economically infeasible because of the small circulation of one or more daily newspapers to be published. The condition of comparable competitors constitutes an objective condition, rather than a subjective condition that only considers the needs of competitors. Only when a competitor of comparable circulation considers it economically infeasible to repeat the second round of door-to-door delivery, which constitutes the necessary facilities, can the dominant enterprise be responsible for supply. Otherwise, it will not be considered a "necessary" facility.

(3) Prevent the emergence of new products

In Magill case, the court rules that the emergence of new products on demand should be frustrated in order to identify abuse of dominant position in the case of a refusal of permission. If the standard for this new feature compared to a brand new product is upheld by the Court of Justice, it will be too easy for the dominant company's competitors to meet the standard and infringe their intellectual property rights.

(4) Unreasonable eliminating all competition and abuse of power in the secondary market.

Market data show that forcing enterprises to provide key investment to competitors may hinder investment and innovation. Easy hitchhiking will weaken the innovation and investment motivation of competitors and be unfavorable to leading enterprises. In this case, Microsoft refuses to disclose the interface information that it has exclusive rights, which is objectively reasonable.

2.3 Committee reasoning

As mentioned above, it is disappointing that the committee's reasoning has not been well done.

First, the related market of server operating system is fictitious and the market share is calculated. Then, it does not prove that Microsoft's refusal behavior hinders the emergence of new products. Its interoperability information is not an indispensable input to competitors, and its refusal is also unreasonable objectively. These are all cumulative conditions that must be met in the consideration of the refusal of permission case. In addition, the Commission requests Microsoft to provide not only server to client information, but also server to server interoperability information, which belongs to an independent secondary market [5]. None of the cases mentioned above support this practice, and the court has never asked existing enterprises to remedy the secondary market. Instead, the required behavior takes place only in the primary market.

3. Illegal bundling sales

3.1 Mechanical applications from Hilti to Tetra Pak II and Committees

The Hilti and Tetra Pak II cases involve the tying of consumables and primary products. According to the precedents of the Commission and the court in this regard, five elements need to be met in order to determine the tying act in violation of article 82 of the European Community [6].

(1) The dominant position of the seller in the "tying products" market.

(2) There are "tying products" independent of "tying products".

(3) Consumers are forced to buy tying products when buying bundled products at the same time, which makes consumers unable to choose to buy alone. As long as it can effectively influence consumers' ability to decide not to buy bundled products, it can take various forms.

(4) It has a restrictive effect on the market competition of tying products.

(5) Coercion lacks objective and proportionate reasons.

In the judgment of Microsoft case, after considering all these factors in turn, the committee is glad to believe that Microsoft's bundling behavior may lead to the media market inclining towards Microsoft, thus violating article 82. On the surface, this analysis seems to be completely logical and consistent with past case law. However, the court only applies this method to tangible and independent products, which will endanger the development of new economic industries.

3.2 Situation analysis

(1) The universality of fusion bundling and the impossible overturning effect

Technologies integration is almost universal, and both superior enterprises and small enterprises are using it, which proves that bundling must improve efficiency in general. Although under certain conditions, it may become anti-competitive. The Committee adopts the theory of indirect network effect. The reason is that it is worried about the future actions of other participants but not competitors, that is, the actions of content providers and software providers, which will enhance the widespread existence of WMP by encoding content in their formats and using their API to write new programs, thus making the media player market possible but unlikely to tilt towards Microsoft [7].

It can also be seen as a benefit enhancement, because software vendors can save a lot of cost by not having to write interoperability features if they know their API is bundled. The Commission's approach is essentially different from the classical bundling cases mentioned above, and the damage effect of the latter comes directly from the compulsory measures to exclude competitors. In this case, competitors are not excluded because free download and fast installation will not bring too much burden to consumers. In fact, they are willing to do so, and they do not charge consumers for purchasing WMP, because WMP can also be used for free on the Internet, or they may be accused of discriminating against consumers.

(2) The comparison between the rule of illegality and the rule of rationality

Reasonable rule analysis needs to first examine whether the facts of a particular case indicate that there may be anti-competitive effects of bundling, and then balance these anti-competitive effects with the benefits of bundling policy. In each case, the effect and benefit of anti-competition need to be supported by detailed factual evaluation, which may be proved to be extremely difficult

by the antitrust authorities. However, there is no reason to risk healthy competition in order to reduce the more onerous workload and to make it easier to apply the rules of balancing relevant facts that are not needed by themselves. As for the actual effect of tying, there are differences in economic literature, which needs strong evidence to support. As technologies integration is the general trend of the platform software market and has produced huge economic benefits, the Committee has not considered the technology tying problem thoroughly and mechanically followed a backward approach.

4. Conclusion

In short, the committee's analysis does not seem to hold water. On the part of refusal of a permission, the Committee mistakenly determines the relevant market of server operating system, calculates the relevant market share, fails to prove that Microsoft's refusal prevents the emergence of new products, and fails to prove that its interoperability information constitutes an indispensable input for competitors. Its refusal is objectively unreasonable, since these are required when deciding the refusal of a permission case. In this regard, the remedial measures that the Committee asks Microsoft to take have an excessive spillover effect on the secondary market of server operating system. The inhibitory effect of this decision on innovation of other enterprises, industries or the whole society can almost be expected.

For the second part of bundling, the Commission lost its direction in the face of technology bundling. The reason is that in a dynamic and diversified competitive industry, technology bundling is obviously different from traditional bundling. There is no solid evidence and reasonable economic analysis to support the dumping effect of media player market bundling. On the contrary, economic literature has strongly shown that this kind of bundling can bring huge benefits to the society and ultimately benefit consumers. Although the Committee argues that it follows the method of rational rules, from the analysis of this exploration, its method is actually based on the revised illegal rules. In fact, the Court of Justice has never had experience in dealing with technical ties cases, which leaves a gap in its case law. It is hoped that in the future there will be a corrective case to adopt this urgently needed rational rule.

In addition, the actual effect of remedial measures proposed for improper bundling is questionable, because if consumers have no real demand for the unbound version, selling two different versions at the same price will eliminate any expected remedial effect. However, the Committee seems to be indifferent or simply ignore it. Moreover, since this remedy only happens in Europe, the situation of European consumers is far worse than that of consumers all over the world. As the last guardian and final brake of legal community, the court must come up with a more justified decision to end the dangerous trend of the Commission and return due protection to competition.

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