

When competition law becomes another commercial tool

By Prof. Spyros Pappas¹

The ICT sector's dynamism over in the past decade has been a mixed blessing for its companies: though the industry is much solicited by governments seeking to boost broader economic growth, its success and importance have also prompted calls for tighter regulation. This sort of unwelcome attention naturally falls most heavily on successful companies in the sector, a fact that has not escaped the notice of competitors who may be on the look-out for extra weapons in their commercial strategies. A good example of this is Adobe's recent threat to complain to the EU antitrust authorities about Microsoft's decision to introduce as "save as PDF" functionality in Office 2007, to be released later this year.

PDF is a key technology, and has become a standard. PDF files can be read without modification by every user having a PDF-reader program. Until now, the leading actor Adobe has been offering the PDF specification for free, and has always let other developers' software create PDFs without claiming fees. Corel's WordPerfect Office, OpenOffice.org or Apple's Mac OS X are examples of competing products that enable to read or write PDF files.

Strangely enough, Microsoft has lagged behind on this market. It is now preparing its own PDF format, provisionally named XPS, based on specifications that have been publicly released as an open and royalty-free standard by Adobe. The new versions of Office and Windows will give users the choice between saving PDF documents in Adobe's or Microsoft's document formats. However, these two competing capabilities won't be included in Microsoft's Office 2007 and Windows Vista as shipped, but instead will be available as free and separate downloads for Microsoft's customers. Microsoft has decided to let PC manufacturers, known as Original Equipment Manufacturers (OEMs), decide if they want to include XPS in Windows Vista or not.

Naturally, the arrival of Microsoft on the market does not please Adobe. Taking advantage of the company's political vulnerability in Brussels (pending issuance of the Court of First Instance's judgement on the Windows Media Player case, DG Competition sees no reason to temper its approach to the Redmond giant), Adobe made headlines two weeks ago by demanding that Microsoft charge its customers for its implementation of the PDF standard. Moreover, Adobe has apparently threatened to lodge a complaint with the Commission if Microsoft refuses.

In doing so, Adobe contends that for Microsoft to market its XPS technology would run counter to the Commission's 2004 decision on Media Player, and thus violate European competition rules. Quite on the contrary, it seems to me that Adobe's argument has no legal grounds, and is based on an erroneous assumption. Even if the Court of First

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Instance were to confirm the 2004 decision, it is clear that the “precedent” does not apply in this case. The XPS format that will be available for Office 2007 and Windows Vista will have to be downloaded separately, and will not be automatically present on a Windows-loaded PC. Contrary to what was reproached to Microsoft in the Media Player case, Microsoft’s customers will not be “obliged” to obtain the XPS technology with their new Windows Vista. Consequently, Microsoft clearly does not intend to tie its XPS format to Office 2007 and Windows Vista and does not infringe Article 82 of the EC Treaty by abusing its dominant position .

Furthermore, it should be stressed that the hundreds of third-party implementations of Adobe’s PDF format that will be competing with XPS are leaders and can also be downloaded free of charge . Consequently, by asking Microsoft to charge its costumers , Adobe itself has discriminated against Microsoft.

Unfortunately, Adobe’s threat to bring a competition complaint in Brussels is only one of the numerous side-effects of the Microsoft Decision of 2004. In fact, each time Microsoft will try to integrate a supplementary technology in to its PC operating system – even if it is a technology that is widely used by competitors and if it is indispensable for the competitiveness of the Microsoft PC operating system since consumers expect it to be there – competitors will be tempted to allege that competition is threatened. In this way, Microsoft seems to be condemned to stagnate or to yield to the pressure, and place inferior products on the market . Hopefully, it will resist both of these courses .