Achieving interoperability in the absence of standards: a new policy under the Digital Agenda?

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Background

- Interoperability: ability of a system to work with another system
- Companies may not be willing to share specifications implemented in a system that enable interconnection with other services
- Problem particularly relevant for technologies not protected by obligatory standards
  - no clear legal framework requiring the licensing of interoperability information, but rules in several regimes may be applicable
European competition law: merger control

• Undertakings may offer commitments in order to eliminate competition concerns

• Merger Notice:
  when control of key technology leads to concerns of foreclosure of competitors, commitments to grant competitors access to the necessary information may render the concentration compatible with the common market
  → interoperability commitment

• Intel/McAfee merger:
  - Acquisition of McAfee (security technology company) by Intel (central processing unit and chipset producer)
  → complementary product markets
  - European Commission concerned about possible future lack of interoperability between Intel CPUs and non-McAfee security solutions and between non-Intel CPUs and McAfee security solutions
  - Intel offered commitments that ensured interoperability of future products of the merged entity with those of competitors

• Interoperability remedies effective to alleviate competition concerns, but can only be used in case of a proposed merger
European competition law: abuse of dominance

• Article 102 TFEU: abuse of a dominant position prohibited
  – Refusal to give access to a facility

• Microsoft case:
  – Complaint by competitor in 1998
  – Commission decision in March 2004
  – Judgment of the General Court (at that time Court of First Instance) in September 2007
  – Dominant position in the market for PC operating systems: Windows had market share of over 90%
  – Abuse: refusal to give access to information that so-called work group server operating systems need to interoperate with Windows

• Conclusion:
  – Lengthy (whole procedure took 9 years!) and complex procedure
  – Precedential value of Microsoft judgment unclear
Other legal mechanisms

• Decompilation exception in the Computer Programs Directive (Art. 6 of Directive 2009/24):
  – Decompilation allowed for the purpose of achieving interoperability
  – Considerable efforts with uncertain chances of success
  – Conclusion: no effective solution for interoperability problems in the ICT sector
Other legal mechanisms

- Interoperability obligations in the electronic communications framework:
  - Recommendation relevant markets European Commission
  - Three criteria-test:
    - High and non-transitory barriers to entry
    - Market structure does not tend towards effective competition
    - Application of competition law alone does not suffice
  - National regulatory authorities may impose access obligations:
    → this may include granting ‘open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services’
  - However, scope of application is limited:
    - Latest recommendation only mentions markets related to telephone networks or infrastructure access
    - Do ICT markets fulfill the three criteria-test? Fast-moving and innovative character
    - ICT markets not characterised by former monopolies and not confined to national borders
  - Conclusion: doubtful whether electronic communications regime is well-suited to deal with interoperability problems in ICT markets
Problems regarding enforcement of interoperability in the ICT sector

• Lack of legal certainty about the situations in which current rules require disclosure of interoperability information:
  – *Microsoft* very case-specific and gives no clear guidance to the industry
• No effective way for competitors to get access to interoperability information:
  – Interoperability commitments in merger control only in case of a proposed merger
  – Decompilation exception and electronic communications framework not suitable
  – Abuse of dominance regime only applies ex post
• Conclusion: a more structural approach to remedy interoperability problems in the ICT sector is welcome
Interoperability under the Digital Agenda

New initiative:

- Action 25: the Commission is considering ‘the feasibility of measures that could lead significant market players to license interoperability information while at the same time promoting innovation and competition’
- Speech Commissioner Kroes on 10 June 2010: ‘complex antitrust investigations followed by court proceedings are perhaps not the only way to increase interoperability’ (reference to Microsoft case)
- Initiative seems to aim to achieve interoperability between ICT products without having to conduct proceedings under competition law
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• Effects of the enforcement of interoperability on competition and innovation:
  – Interoperability should not be seen as an end in itself, but as a means to achieve other goals
  – In general, interoperability will have positive effects (increased network effects and less customer lock-in) but it also has costs:
    – Decrease in innovation incentives of first movers
    – Decrease in incentives for competitors to enter the market and introduce a rival product
  – Two trade-offs have to be made:
    – Trade-off between short term benefits for consumers and long term innovation incentives for first movers
    – Trade-off between stimulating inter-system and component innovation
  – Therefore: European Commission should be careful to apply a general rule mandating interoperability
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• Mandatory ex ante rules as policy option: Directive or even a Regulation:
  – Require strict rules about the circumstances in which interoperability should be mandated:
  – Is a one-size-fits-all approach suitable considering complex relationship between goals underlying interoperability?
  – Risk causing irreparable harm on competition and innovation in the long run:
  – In the absence of interoperability the market may self-correct the situation, but harm caused by erroneously mandating interoperability is more difficult, if not impossible, to overcome
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• Soft law instrument as policy option: Commission Communication
  – Allows for more flexibility, while still providing legal certainty to the industry
  – No strict enforcement possible, but it would allow the Commission to monitor the effects of adopting a form of ex ante regulation
  – After evaluation of the effects of the soft law measure, Commission may still impose mandatory ex ante rules
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• What could a Commission Communication look like?
  – ‘Best practice principles’
  – Several models containing guidelines adapted to stage of development of the market:
    – In early phases of market development, duty to disclose interoperability information only in very limited circumstances
      → Competition between systems beneficial for innovation in early phases of market development
    – In later stages of market development, duty of disclosure on a more general basis
      → Need for mandated interoperability increases as the prevailing system continues to dominate the market
Conclusion

• New initiative of the European Commission in the framework of the Digital Agenda should be welcomed
• Commission should be careful in regulating interoperability in the ICT sector on the basis of mandatory rules
  → Interoperability not appropriate in all circumstances
• Commission Communication most balanced policy option
• Competitors may still rely on Article 102 TFEU as ex post safety net
Thank you for your attention!

Questions?

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