The Copyright Challenge to the European software industry

ECIS (European Committee for Interoperable Systems)

Solvay Library 1 December 2011

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- I am pleased that you have invited me to this event celebrating ECIS' 20 anniversary. This provides me with an excellent opportunity not only to commend ECIS' members for their valuable contributions to the debate on interoperability issues over the last 20 years but also to highlight the importance the Commission attaches to fostering interoperability for the benefit of competition and European consumers.
- 20 years ago ECIS was founded at the end of a heated debate on the software copyright directive. The topic of software interoperability featured very prominently in this debate with some arguing for broad interoperability exceptions from copyright and others seeing no need for such exceptions at all. As you all know the debate ended with a compromise and the adoption of Articles 5 and 6 of the directive which I think after 20 years can still be considered a landmark piece of EU legislation in terms of interoperability which other jurisdictions (such as the US) don't have and possibly envy us for.
- That was 20 years ago but, as the recent SAS case shows, issues around the interpretation of the software copyright directive remain highly topical today. The recent opinion of AG Bot in the SAS case could, if followed by the Court, provide welcome clarifications on the interpretation of the directive. AG Bot's view that the functionalities of a computer programme and the programming language cannot be protected under copyright and the confirmation that Article 5(3) of the directive can be invoked in order to determine the ideas and principles underlying a programme willcertainly prove useful in future cases on interoperability. But of course it is for the Court to decide. DG Competition is subject to the scrutiny of the Court of Justice and the General Court in all of its cases so their guidance on these issues will be very much welcomed.

- However the debate on interoperability nowadays has moved on beyond copyright issues. It is undeniable that with the arrival on the markets of smartphones, tablet computers and especially cloud computing services interoperability between various devices and services has become more critical then ever for consumers but also enterprises and governments in order to avoid vendor lock-in and to benefit from competition.
- The debate today, at least within the EU institutions, is therefore not anymore on whether interoperability is necessary but on how and through which policies to best achieve it. To unleash the benefits of software interoperability in terms of more choice and competition is today a commonly accepted policy goal within the EU institutions.
- It is sometimes argued (when discussing the role of antitrust authorities) that competition law enforcement does not provide the right tools for intervention in fast moving high technology markets and that antitrust regulators should be very careful with interventions in order not to stifle innovation and punish successful first movers.
- In fact, high tech industries are often prone to network and lock-in effects, which may in turn lead to the creation of market power and incentivise companies to abuse such power, and there may indeed be a need to be particularly vigilant in this sector.
- In the recent the TeliaSonera judgment the European Court of Justice exactly underlined this point in stating that: "*Particularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible, to prevent the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking which has a dominant position on that market or on a closely linked neighbouring market, in other words it requires*

action before the anti-competitive effects of that strategy are realized (Judgment C-52/09, TeliaSonera, para. 108)

- The refusal by a dominant company to share interoperability information with its competitors, in particular when the technology of the dominant company has become a de facto standard, might be an instance where competition law intervention is merited in order to avoid lock-in and to preserve consumer choice.
- Having said that (and adding to the complexity of this matter) non-compatibility of competing products is however not necessarily a competition issue if there is no abuse of a dominant position.
- If one looks at the different eras of computing over the last decades it is remarkable that in every era from mainframes to distributed computing there was intervention by antitrust regulators in order to ensure interoperability. In 1984 the Commission settled a case with IBM, which dominated the computer market with its mainframes. IBM's undertaking foresaw the disclosure of software and hardware interfaces in order to ensure interoperability with its mainframes. In 2004 the Commission adopted the Microsoft decision which ordered Microsoft to disclose interoperability information for its PC and server operating system. More recently in the Intel/McAfee merger the Commission ensured by means of remedies that interoperability information would be available to competing security software vendors.
- In all these interventions the Commission was careful to strike a balance between the incentives to innovate of the concerned companies and the need to ensure fair competition.
- In Microsoft the General Court agreed with the Commission that the disclosure of the interoperability information would not have had any impact on Microsoft's incentives to innovate. This is actually confirmed by Microsoft's

statements and actions after the Court's judgment. I have noted with interest that Microsoft has recently contributed code to the Samba open source project which works on interoperability with Windows servers.

- I make reference to these examples of past interventions in order to show that competition law enforcement has its role to play in fostering interoperability, but I should also stress that prevention is generally better then healing.
- As I said earlier interoperability will become more important in future especially in the wake of cloud computing so as too make sure that the markets remain open and users can benefit from competition. One way to achieve more interoperability without antitrust intervention is certainly to use open standards. The Commission has recently in the new Horizontal Guidelines set out the main features of a standardisation process in order to be compliant with competition law, namely a transparent process with unrestricted participation and availability of the result on FRAND terms. The use of standards that are created under such conditions should go a long way of ensuring interoperability in particular in view of the development of various cloud computing services.
- However antitrust authorities will have to remain vigilant as to possible abuses of the standard setting process and/or standard essential intellectual property. We witness at the moment what is referred to in the media as a "patent war" in the mobile telephony markets. I understand that in some of the lawsuits between various market players patents which are essential to an interoperability standard (3Gmobile telephony) and on which a FRAND commitment has been given during standard setting, are invoked against competitors. I would say that these are circumstances which merit closer scrutiny from antitrust authorities in order to make sure that innovation is not stifled.

- I hope that my on purpose short intervention has shown that there is still a lot to be done in the area of interoperability. I am therefore sure that ECIS and its members will not be idle in the next 20 years.

Thank you very much for your attention.