CASE STUDY 10 SEPTEMBER 2013

MICROSOFT'S ABUSE OF DOMINANCE, KOREA*

Forum:

Korea Fair Trade Commission (KFTC)

Legislative Provisions referred:

Monopoly Regulation and Fair Trade Act, 2011[1]

1. Article 3-2- *"Prohibition on the Abuse of Market Dominance"*
2. Article 23- *"Prohibition on Unfair Business Practices"*

Parties to the Case:

1. U.S Microsoft Corporation
2. Korea Microsoft Limited (*Hereinafter referred to as 'Korea Microsoft'*)
3. KFTC
4. Daum Communications
5. Real Networks

Facts of the Case:

The case involves U.S. Microsoft Corporation and Microsoft, which sold its server operating system and PC operating system, bundled with media server program, and media player and messenger program respectively, in Korea. Daum Communications filed a complaint against the tie-in-sale of Windows PC Operating System bundled with messenger program. During the investigation, Real Networks also filed a complaint of unfair practices against Microsoft in 2004.

Issues and Arguments Advanced:

Issue 1: Bundled Sales of Windows Server Operating System (OS).

KFTC:

Microsoft had 78% share in the PC Server Operating System Market, between 2001-2003. Windows Server and WMS4.1 for Windows NT server OS is an integrated product as on several previous occasions Microsoft has provided both the products separately through downloading. Also, there are a number of independent developers and servers of media server program only. Thus, this integration doesn't leave consumers with an alternate choice while buying Windows and they are not free softwares as argued by Microsoft, as the sales price is inclusive of their price. Evidently, from the above practices of Microsoft, consumers perceived WMS to be the most appropriate and stable application program for Windows and thus the growing distribution of WMS led competition in the low definition streaming program, to be blocked. The share of WMS's video streaming program reached 96% in 2005.

Issue 2: Bundled sales of Windows PC Operating System (OS) and WMP.

KFTC:

Microsoft has a share of about 99% in Korea. However, the concept of 'Transitory monopoly' which is often taken as defence by monopoly powers, is not applicable to this case because Microsoft has for the past 3 decades engaged deeply to maintain its monopoly which is also reflected by the number of anti-trust disputes against it. As far as, separateness of Windows PC OS and WMP is concerned, they are separate products in terms of demand, as the former performs the function of management between computer resources and the latter is an application program, playing digital contents. For supply, other companies such as Real Networks and Gretech were developing and selling media player programs. Again,

[1] Hereinafter referred to as 'the Act'.

* Microsoft's Abuse of Dominance, Decision 2006-042, available at http://eng.ftc.go.kr/bbs.do, last accessed on 30.09.2013.

this left the consumers with no choice but to buy WMP, even if against their will. This anti-competitive practice restricted competition for other contents and application programs, as WMP was most widely distributed. Thus, bundled sales provided Microsoft with a competitive advantage, though, other products were equal or better in quality.

Issue 3: Bundles sales of Windows PC Operating System (OS) and Messenger Program.

KFTC:

The former is system software, used to manage hardware, while the latter is an application, used to send messages and files, and separately downloaded by consumers, but for most of them it is inconvenient to use the Internet and PC, due to the embedded messenger and required it to be deleted from Windows. This practice led to ubiquity and decrease in market shares of competitors such as Daum Communications, Buddybuddy and Dreamwiz and NateOn, blocking entrants, such as MSN, which was more preferred by users. It restricted innovation and impaired consumer benefits.

MICROSOFT:

Microsoft denied each element based on the rule of reason. It said that the integration was a natural trend and should be left to the choice of the OS developers. The Media Player and messenger program were embedded in the OS, were separate and free of cost. Thus there was no coercion to buy the products. Also, the market share was due to the product excellence. The bundled sales were not unlawful as the efficiency effects and consumer benefits outweighed the possible anti-competitive effects.

DECISION OF KFTC:

The KFTC decided that the bundles sales violated the Act. Microsoft abused its dominant position and caused unreasonable interference with the business activities of other enterprises, also found to constitute tie-in-sales. KFTC imposed corrective measures to separately sell WMS and Windows server OS. For Windows OS, it allowed Microsoft to sell it with installation of the competitor's product, as it was not difficult technically. Microsoft was ordered to supply Windows XP KN version which separates WMP and Messenger Program from Windows XP. It allowed Windows XP K version to be sold with internet link to 'Media Player Center' and 'Messenger Center' and delete icons of access tools. KFTC prohibited legally evasive and retaliatory actions by Microsoft which would undermine the order, which would remain effective for 10 years and allowed reconsideration by Microsoft after 5 years. It also had consultative bodies for implementation and monitoring.

Implications of the Order:

In 2005, Real Networks and Daum Communications withdrew their complaints after compensation paid to them by Microsoft. The appeal filed by Microsoft in Seoul High Court was also rejected, however, was withdrawn by Microsoft before the Court's ruling.

Observations:

The above case reflects KFTC's adherence to global standards of economic analyses and legal reasoning. KFTC weighed the case on anti-competitive effects or negative impacts on market performance, than behavioural unfairness standards, which is a desirable direction for Korea's competition law enforcement. This case also shows that KFTC was capable to handle high profile cases between foreign companies, as both respondents were US companies and the case saw the involvement of a large number of foreign lawyers too.

The implications of this case were impactful, as Microsoft was penalised for abuse of dominance in several other jurisdictions too. This is a landmark case and shall serve as a deterrent for other dominant market players.

Prepared by Rishika Mishra, CIRC.