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“Bottle-next” in ICT: access to IPR, interoperability and competition. Do we need more regulation?

di
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1. Market development and innovation in the ICT and in the broadband and multiplatform distribution of contents and services requires the maintenance of healthy competitive dynamics in the market that assure innovation and consumer wellbeing without proposing (or re-proposing) forms of vertical integration that can end up foreclosing subsequent innovation or creating walled gardens that bring with them lock-in effects and higher switching costs for customers who wish to pass to a competitor.

Those practices may harm access by users and service providers to a wide range of contents as well as access by content service providers to end users. And those effects are ever more risky and likely precisely because of the fact that the entire world of access to and the distribution of contents is converging towards a system marked by potential strong network effects and the further fact that aspects of vertical integration and market power leverage not only can become commonplace (like Microsoft’s complaint against Google before the European Commission would seem to bear out) but can also produce ever greater effects.

In fact, if it is true that innovation in industry proceeds at dizzying speed and thus makes any market position ephemeral and contestable (as is demonstrated by the rapid success of today’s leading search engine over its predecessor Yahoo!), it is also true that these competitive dynamics and distortive effects on the market, be they just temporary, shape not only the prices and quality of products but the very quality of life and fundamental goods such as culture, information and in the final analysis social participation itself.

2. The set of remedies that jurists can rely on to combat those risks would seem to offer two avenues.

2.1. The availability of contents and information on a multiplatform broadband distribution system may be helped by some legislative-regulatory solutions.

2.1.1. This is the case, for example, of a rule contained in the Audiovisual and Radiophonic Media Services Law (article 5.1.f). However, the latter operates only when the licensor is a broadcaster or a supplier of audiovisual media services and does not constitute a veritable ‘must offer’ but rather a restriction on freedom of contract in negotiations so as to avoid excessive prices or discriminatory practices.

It is also the case generally of the recent detailed rules on the centralised selling of sports rights which lays down a detailed set of rules for the sale of exclusive rights aimed at avoiding distortion and promoting competition among distribution platforms and set out specific ‘must offer’ rules for rights to sports events guaranteed to emerging platforms by Legislative Decree No. 9 of 9 January 2008 (see, especially article 14) on a non exclusive basis.

2.1.2. Furthermore one must bear in mind that access to content signifies and will signify ever more often interoperability between services and that such frequently passes through interoperability between software. Indicative of this would appear to be one of the charges levelled by Microsoft against Google in the proceedings before the European Commission relating to discrimination in terms of interoperability between You Tube and Microsoft Windows Phone systems unlike what is by contrast guaranteed to Android and Apple systems.

Interoperability (and possible anti-competitive practices in connection therewith) will also be a crucial aspect of “being in the cloud” because the customer of a cloud computing service provider can be locked in by a lack of interoperability with competitor’s services, together with the bundling of many services (including, for instance, search tools). Interoperability can also jeopardise the transfer of data from one system to another, given that the knowledge of companies may be developed to deal with a specific cloud system, etc. There will also be rising significant switching costs to pass from a system to a competitor’s one.

Therefore, some already significant legislative indications must be borne in mind.

2.2. It is well known that computer software has been brought within the scope of copyright through Directive 91/250/CEE, of 14 May 1991, as amended by Directive 2009/24/CE of 23 April 2009, transposed into Italian law by article 2.8 and 64-bis to 64-quarter of the Copyright Law. The specificness of the phenomenon and what is essentially copyright technology gave rise to a need to introduce some correctives to the exclusive rights granted to the author since copyright law was ontologically devoid of them (dealing with creative works whose substitutability – not by type but by single work – is generally high) unlike the patent paradigm, where access for innovation purposes is guaranteed by the combination of publication of the description and license for derivative inventions.

In that way access to a work (so called *reverse engineering*) is envisaged solely for interoperability purposes. Access must concern solely the parts of the program that are necessary for interoperability (so-called ‘interface’, although on this point there is a difference of opinion between those who advocate that such an assessment is one for the owner of the software and those who argue that it must be the decompiler who decides what interface

is necessary for the interoperability of the programs). Finally, access must not be used to create programs that are substantially similar in their expression.

Interoperability is a cardinal principle (and the subject of numerous provisions) of the framework of electronic communications EU Directives in both the original ones of 2002 and even more so in the 2009 amendments. A set of rules for dominant and non dominant operators.

2.2.1 The second avenue would seem to be competition law as, for example, in the European Commission's decision in the *News Corp - Telepiù* merger case (COMP/M.2876 of 2 April 2003).

In this case the issue was to avoid the anticompetitive effects of the market position on the demand side (essentially a monopsony).

2.2.2 But what happens when it is the right holders themselves (such as a movie producer but also a software house) who impede or condition access to content and in general IPR in an anticompetitive manner? Specifically, when the possible exclusionary abuse is based on the exercise of an intellectual property right that by its very nature envisages a monopolistic power to exclude competitors.

It is necessary to refer to piecemeal developments over the years in the sensitive area of the relationship between intellectual property and competition. It is well known that this is rather delicate systematic legal ground where two needs that *prima facie* appear (or initially appeared) to be polar opposites and irreconcilable meet (or clash): the promotion of creativity and innovation through granting a monopoly (more or less long and whose precise length depends on whether patents or copyright is involved) over the creation or promoting following innovation by open IPR to competitors.

In drawing the line between what is lawful and unlawful initial Community caselaw centred on a "natural" use (exercise) of the right that had to correspond to its "essential function" (in this sense see not only ECJ judgments of 5 October 1988 in case C-238/87, *Volvo*, and case C-53/87, *Renault*, but also the famous CFI judgment in case T-69/89, *RTE - Magill*). But the ECJ's judgment in *Magill* (6 April 1995, joined cases C-241/91 and C-242/91) represents a significant step forward because in a certain sense it enunciated, let's say, "the principle of competitive compatibility of the management of an intellectual property right".

As is known, in identifying the point of equilibrium between 'propulsive' exclusivity and 'restrictive' exclusivity, recourse is made to a rather pressing tool from the antitrust sphere, the essential facility doctrine.

As we know from this doctrine and the antitrust cases which utilized it abuots fysical facility a) the facility must be an indispensable instrument for access to the market (same, downstream?); b) the facility must not be duplicable from a reasonable standpoint (or objective?); c) a refusal must

damage the market; d) the facility must be technically accessible; e) there must be no justification for refusal (technical, commercial and efficiency).

Utilising this tool in *Magill* the ECJ concluded that the exclusionary exercise (refusal to deal) of an intellectual property right may constitute an abuse of dominant position when that right is an essential facility and (note the use of “and” and not “or”, as the European Commission had attempted to argue in *IMS-Health*) when a series of exceptional circumstances occur.

Therefore, the asset that the intellectual property rights concern (in *Magill*, weekly listings of television programmes) must be essential to operate on the downstream market and the refusal to grant access is unlawful if

i) there is no justification for it;

ii) there is an exclusion of all downstream competition;

iii) it prevents the appearance of a new product for which there is a potential demand.

In subsequent caselaw, regarding precisely access to Microsoft computer programs and specifically access for interoperability purposes to the codes of Microsoft client pc operating systems so as to enable the development of work group server applications, the CFI confirmed all of the *Magill* evaluation and requirements.

In particular, through the so-called ‘incentive balance test’, a fundamental check is carried out on the intersection between intellectual property rights and competition law. What best fosters innovation, protection of the exclusionary right of the incumbent or subsequent innovation through access to that right? In the 2007 *Microsoft* case the challenge was facilitated by the fact that it was not an actual case of refusal to deal but in reality an interruption of supply meaning that the effects of subsequent innovation could be more easily seen or predicted in a less discretionary manner.

Despite the fact that the conceptual scheme of two distinct markets (in *IMS-Health* reference is also made to the “hypothetical” market) and the leverage effect between the two in order to constitute an abuse is reiterated in the judgments cited above, that scheme is nonetheless a debateable assumption. As the patent system demonstrates, the competing interest of opening up the patent to third parties to enable them to make a derivative invention does not presuppose that the derivative invention must relate to a new product that can be placed in a different relevant market. The pro-openness effect of these competing interests of the patent system is by contrast typically horizontal.

As the above mentioned antitrust cases shows, access to IPR is more arguable when involves technology copyright (as the competition law be, for instance, the extended arm of that, clearly pro- competitive, access rules for interoperability of the law of copyrighted software). In this case the technological aspect of copyrighted work involved makes more easy to introduce an evaluation to the essentiality of the copyrighted work and of

the incentive to innovation of the disclosure duty. It is more difficult to pass through the EFD when involved typical copyrightable works (like movies or sports events). As seen, here the possibility of substitution may be higher. In this case the exact delimitation of relevant market and the quantity of the IPR hold by the undertaking on the supply side could be crucial.

3. If those are the tools, let us see how they could work through some examples.

3.1. Let's take the case of the lawsuit in the US courts against Apple. Two markets involved: upstream, online music download, and downstream, hardware. A vertical integrated operator, Apple, who jeopardises interoperability between devices so that consumers buying music from the i-tunes store are unable to play it on devices other than the Apple's own ones (i-pod, i-phone and i-pad). It is a classic case of leveraging from an upstream market (music library) to a downstream market (devices to play that music).

But how can competition law deal with this case? Does Apple enjoy market power somewhere? It seems that it is not actually the case. Neither upstream (where the market appears to be spread among different operators: the i-tunes online music catalogue holds around 20 million tracks, Google's catalogue holds around 13 million tracks and Amazon's one around 17 million, etc.) nor downstream (for devices since Apple's world of user technologies is just one of many).

Access obligations to competitors can take the shape of access to the technology to manage contents. So competitors can enter the music market through being able to run their content on Apple's devices (something very similar to access to dominant CAS system for competing pay TV platform providers) or enter the device market through a guarantee that their customers can also play i-tunes music on the devices (something, again, very similar to access obligations on CAS intellectual property rights for manufacturers of pay TV decoders). But even then in such cases, access to copyrightable technologies such as software and/or technologies protected by intellectual property rights would – as we have seen – need to go through a test of essentiality of such technology and an evaluation of the negative effects on competition and innovation.

3.2. A few words about search engines.

I will not talk about the usage by search engines of copyrighted works, giving users free access to such contents (as has been discussed both in relation to Google News and Google Books), whether that usage competes with the use granted to right holders by copyright law, whether it could be deemed as fair use and to what extent broad agreement with right holders to pay them royalties can affect competition by giving the search engine enormous power on the supply side, which, even if not actually wielded by

selling users the copyrighted works, could nonetheless be used to strengthen the market position of the search engine.

I will focus on the antitrust case brought by Microsoft before the European Commission and on the alleged six main anticompetitive practices engaged in by Google that Microsoft has complained about.

First of all has to be stressed that, obviously, an anticompetitive practice to be relevant under article 102 of the TFEU must be engaged in by a dominant undertaking. Which means that one has to first pinpoint a relevant market where that undertaking is actually dominant.

This seems to be a first issue.

Among the above mentioned six Microsoft complaints, one of them, already cited, affects competitors' access to Google content (i.e. YouTube) by hindering in an anticompetitive and discriminatory way interoperability among contents and competitor's mobile devices. Moreover, it seems that Microsoft's Bing search engine cannot display accurate search results for YouTube contents. In addition, competitors ability to search orphan works is also said to be controlled.

The others practices affect the online advertising market.

i) Prohibiting its client advertisers from using the data in an interoperable way so that they can advertise also using different search engines. This has the effect of increasing switching costs for advertisers from one platform to another, creating a typical lock-in effect (a quite dangerous practice because given the "essentiality" of Google most advertisers will choose to use only that service and because from the other side of the market, the ad platform will have few advertisers to offer to its publishers who will be few too, harming access to content for that platform).

ii) Exclusive agreements with websites to host Google's search tool (I will return to this point later).

iii) Finally, using the sophisticated, efficient and fascinating ADWord system (online advertisement space auctions) to discriminate against competitors lowering their ranking in the general search and manipulating the ranking of "sponsored links" (by means of using some factors like quality score involved in the ranking process of advertisements. In this case, considering that the ADWord system is based on two parameters that interact with each other, the bid and the quality score, to determine the cost per click (the price of the ad) and that with a lower quality score an advertiser could maintain the same position with a higher bid, in a certain way it appears something very similar to a practice of increasing rivals' costs (in managing an integrated infrastructure, the ADWord system, offered to competitors, if deemed such, against payment of commission) [1].

The relevant market in question is that of the provision of online advertising space on a national scale. This is to be distinguished from advertising on other media (on this point see the Communications

Authority (AGCOM) [2], the Competition Authority (AGCM) and the European Commission) [3]. The characteristics of the product (possibility of targeting, profiling and reporting on users) and the pricing terms (possibility to pay for effective contact, whether in the form of cost per click or cost per thousand impressions depending on the type of ad) make substitutability on the demand side with other tools very difficult.

The Italian Communications Authority would seem to have considered the internet advertising market as a two-sided platform, in line with what is the case for other information means, where an undertaking that operates on the internet offers contents or services to end users free of charge so as to gain visibility (contacts), which it can then sell to advertisers. On the supply side (the publishers) there would be content providers, portals, social networks, electronic communications operators (but not in their capacity as access providers) browsers and search engines.

With regard to Google's market position both the European Commission and the Competition Authority identify not only the above mentioned provision of online advertising space market but also the intermediation in online advertising market, which is of Community dimensions. In the *Google News* proceedings, the Competition Authority maintains that "Google appears to have a dominant position in both the provision of online advertising space market and in that for intermediation in online advertising".

There was some debate as to whether the provision of online advertising space market should be further segmented into search and non-search ads (the Italian Authority seems to have signalled a necessity to examine the point more closely) [4].

As regard web searches reference is made to online search services in which Google is said to be "by far the main operator" [5].

Included in the anticompetitive behaviour complained of by Microsoft, again related to the online advertising market, are exclusive agreements with websites to host a search tool which prevent competing search engines from accessing the market (as it seems, in a typical *United Brands* philosophy). It should be considered that this behaviour can build significant barriers to competitors to enter the search advertisement market and may affect substitutability for publishers between search and non-search advertisements.

But the fundamental point (that which gives rise to greatest concern) would appear to be the success of the search engine and the repercussions that it can have in other sectors that the search engine starts to move into in accordance with a progressive form of vertical integration (ranging from the contents of YouTube, Google Music, Google TV, Google+ social network, Google Chrome browser, operating systems for Android devices and the devices themselves through the agreement with Samsung for Android smart phones and tablets).

In fact, it seems that most, even if not all, of Google's alleged anticompetitive practices (if Microsoft's claims are upheld by the European Commission) seem to have a specific target: a competing search engine that could harm Google's supremacy.

The European Commission and the Italian Competition Authority acknowledge Google's leading role in search services (more than 90% of searches in Europe use Google's services). But some argue that it does not mean that Google is dominant somewhere (which, as mentioned before, is the starting point for any abuse). And this is simply because search services are not technically a market due to the fact that they are given to users for free.

So, it seems that from an antitrust point of view (one of the two avenues available to grant access to contents as mentioned above) what we have is either a two-sided online advertising market where search services give power from "the side" of (search) advertisement or, as someone argue, a search engine - on a stand-alone basis - as an infrastructure useful to access contents, information, advertisement, services and everything else on the web and that can be delivered by the web. Also if not considered as a market (something similar to the ECJ in *IMS* about the brick system).

The target of Google's anticompetitive practices, as alleged by Microsoft, would confirm somehow that search technologies are crucial for the future of the online environment just as broadcasting infrastructure was in the past. Because it is the way to attract users in the web and manage to deliver anything that they need. So it seems also that access and interoperability and management of web search services will be a crucial task in the future for either competition law or regulation, whichever one of them will be best able to tackle the issue.

4. It seems finally that if we wish to avoid the above described effects, also because they affect consumer welfare in a wider sense, involving access to contents and information so as to create (and specially preserve) an open playing field for newcomer's innovation, then we are very close to the dilemma of the first step of the liberalisations in telecommunications infrastructure and services.

Is it competition law enough? Or do we need an *ex ante* regulation. Are the requirements of the access to content statute drawn by competition law (dominant position, leverage effects, essential facility, premium contents etc.) still good instruments to face new problems of a wide, multiplatform, distribution of contents ?

In the case of telecommunication, as we know, there was a relevant aspect influencing such evaluation: the openness of the market was not a day zero. Big players were already in the market. So *ex ante* access obligations were imposed on dominant operators. Even if at the beginning, since the 2002 review, the ONP framework considered a 25% market share as

significant market power so that, for instance, some obligations applied also to new entrant mobile operators.

But the philosophy of telecommunications regulation was also (and still is) that competition law enforcement could only get to the anticompetitive practices when it was already too late. So it seems that in a market where the speed of innovation is very high on the one hand and where innovation is always harming market positions on the other hand, that long antitrust cases produce their effects when the possible foreclosure has already taken place. Which in a market with strong network effects could be decisive.

Notes:

[1] The same practices for ranking in general searches will affect the order in which the sponsored links are shown by the operation of the click to rate parameter as a component of the quality score.

[2] Above all the Authority analysed the market (as a submarket of the integrated communications system - SIC) of electronic publishing on the Internet. Indeed, it highlighted that that goods classification was a legislative imposition because it would be more correct to analyse an internet market and specifically the one for the provision of online advertising space. See Resolution No. 555/10/CONS.

[3] See European Commission, *Google/DoubleClick*, COMP/M.4731; AGCM, *FIEG/Google* proceedings A420, Decision No. 21959 of 22 December 2010; AGCOM, Resolution No. 555/10/CONS.

[4] It would seem in fact that the key role of the search engine, as well as the system for indexing and targeting ads based on research, are properties that make this system difficult to substitute with the other one mentioned. The Communications Authority seems to have expressed itself in this way. The European Commission in *Google/DoubleClick* concluded for the absence of two distinct markets while during the proceedings it was stressed that “search and non-search ads from an advertiser’s perspective have different effects and serve different purposes”: “for search ads the targeting is based on the user’s precisely revealed interests (via the search query) for non-search ads targeting is connected with less precise definition”. In fact, the Commission maintains that from a demand-side perspective and from a technical point of view, the differences between the different types of ads seem to be diminishing and from a supply-side perspective there is no substitutability but simply complementarity because a publisher can pass from one system to another simply by adding a search tool bar on its own web page, which does not mean that it loses space to allocate to a non-search ad because the search-generated advertising space appears not on the same web page but in a search page generated by the search query entered by the user on the publisher’s webpage.

[5] AGCM, *FIEG/Google*.