Private Action in Competition Law

A response to the consultation submitted by:

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The Open Source Consortium (OSC) is a trade association/special interest group

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Thank you for offering the opportunity to participate in this consultation. We understand that this consultation is essentially one discussing the advantages and disadvantages of legal approaches to achieving proper redress in competition law cases but hope that our consultation response will provide background material that will assist you in developing your conclusions. .

Our reply is mostly applicable to your last question. Accordingly we have not used your official response form.

We consider the issue of timely and cost effective private action to be particularly important to providers of services based on Open Source Software (OSS), arising from the nature of software generally and the low barrier to entry/exit model of OSS (also Free Software, collectively F/OSS) specifically.

Your records should show that our attempts to interest national regulatory bodies gives rise to the prioritisation problem – and this issue has never been a high enough priority.

The particular problem for F/OSS is that of interoperability and the wider market structures of the digital economy (we do not claim specialised expertise in either competition law or the economics of anti-trust but hope that we are sufficiently accurate to allow you to “interpret” where necessary).

The market structure problems for F/OSS lie in the network effect for software as the government itself recognised in BIS Economics Paper No 15 Innovation and Research Strategy for Growth[1]:

> Competitive markets are important for innovation to thrive and deliver growth. Competitive conditions [enable] allocation of resources from less to more efficient firms, [and] the freedom of consumers to choose new suppliers, often on the basis of new products and services. […]
>
> The relationships between competition and innovation are all the more complex as they are likely to differ across industries and sectors, and in some industries collaboration must be encouraged.
>
> With network externalities, for instance, the more users join a particular telephone network, the more valuable the network becomes to those users, as they are able to contact more people as the size of the user base increases. This can lead to very large market shares for leading firms and products and high barriers of entry.
>
> **ICT-enabled forms of collaboration […] exhibit scale economies. As virtual networks grow, the control of interface and compatibility standards, amongst other issues, also increase in importance.**

The network effect is particularly important when taken with the externalities that arise with the public sector "digital by default" (or, worse, digital by compulsion). We have written extensively on these externalities[2] [3] [4].

As well as looking for an opportunity to enable specific redress we believe that effective mechanisms for private action:

- provide an **institutional response** to the actions and behaviours, intentional or otherwise, of large undertakings in direct or parallel markets affecting F/OSS services.
- will **lead automatically** to **better working and more effective markets**.

1 http://www.opensourceconsortium.org/content/view/194/89/
2 http://www.opensourceconsortium.org/content/view/168/89/
3 http://www.opensourceconsortium.org/content/view/154/89/
4 http://www.opensourceconsortium.org/content/view/192/89

The possible of threat of action (analogous to threat of entry in the market place) is likely to lead to better outcomes for small firms (and consumers) as the actions of large undertaking are more likely to to take into account the potentially more immediate consequences of effective and timely private action compared to the long drawn out processes compared to the possibility of attracting the attention of regulatory authorities who eventually might decide the the aggregation of small issues will amount to something sufficiently important (see attachment).

These matters arise regularly – see appendix for one such example

Neelie Kroes discussed the difficulties in a speech on software and interoperability :

> "Complex anti-trust investigations followed by court proceedings are perhaps not the only way to increase interoperability. The Commission should not need to run an epic antitrust case every time software lacks interoperability.
>
> Wouldn't it be nice to solve all such problems in one go?
>
> Whereas in ex-post investigations we have all sorts of case-specific evidence and economic analysis on which to base our decisions, we are forced to look at more general data and arguments when assessing the impact of ex-ante legislation."

In all competition law matters, for the weaker smaller party being right doesn't add up to much. Time is of the essence.

The law suit initiated in Slovakia against the public administration and its software choices for on-line public services proves that it is possible to initiate action [5] for the SME undertakings involved but this is effectively a protest rather than an action for redress.

This was expressed in a more pragmatic way a report provided in relation to Civil Action 98-1233 (CKK) in the United States District Court of the District of Columbia[6]. The report relates to the effectiveness of the final judgment. As the report states the fundamental purpose of an anti-trust decree is “to ensure competition”[7] and quotes anti-trust scholar, Professor Herbert Hovenkamp[8]:

5 http://www.opensourceconsortium.org/content/view/198/89/

6 http://www.antitrustinstitute.org/Archives/First_on_EU_Microsoft.ashx retrieved 8 Nov 2008

7 Kathleen Foote, Office of the Attorney General of California, California Group's Report on Remedial Effectiveness, 30th August 2007

8 Quoting: New York v Microsoft Corp, 224 F.Supp.2d 76, 184 (D.D.C 2002)

> "The D.C. Circuit stated the goals for an antitrust remedy in *Microsoft.* It must "seek to 'unfetter a market from anticompetitive conduct,' to 'terminate illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future..." [...] By the time each round of the *Microsoft* litigation had produced a "cure" the victim was already dead"

In general terms as the Office of Fair Trading publication "Services of General Economic Interest Exclusion"[9] (Section 1.9)

> The OFT will interpret the exclusion strictly. Undertakings seeking to benefit from the exclusion will have to demonstrate that all the requirements of the exclusion are met. In considering whether the exclusion applies, the OFT will, in particular, need to be satisfied that the undertaking has been 'entrusted' with the operation of a service of general economic interest, and that the application of the Competition Act prohibitions or Articles 81 and 82[10] would obstruct the performance, in law or in fact, of the particular task entrusted to it.

And in the discussion of the role of competition law in relation to the state (Section 2) OFT states, among other things:

> The policy of successive UK governments has been to expose the activity of parts of the public sector to competition or economic regulation, sometimes coupled with privatisation. It is therefore possible that, over time, functions that may once have been considered to be exclusively administrative or social will come to be regarded as economic.

9 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft421.pdf
10 Now 101,102 TFEU http://europa.eu/legislation_summaries/competition/firms/l26092_en.htm

Analogous to CFI recognising[11] the parallel markets effect of Windows Media Player creating a requirement for the underlying Windows OS:

> by means of the bundling, Microsoft may expand its position in adjacent media-related software markets and weaken effective competition, to the detriment of consumers *(recital 982)*

if one is required to file online with HMRC (and other public sector bodies) and one is required to use a particular operating system[12] then similar issues arise.

These are not new issues and spread across the public and private sectors, but they are getting more problematic for the still emerging F/OSS sector in the UK.

Private actions should enable remedies that are meaningful to the complainant and not merely to create grist or succour for the underlying principle.

11 http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04
12 http://www.opensourceconsortium.org/content/view/169/89/

Appendix – UEFI

An emerging problem for F/OSS is the future requirement for motherboards to used signed loading for newer versions of Microsoft operating systems[13] [14]

While we do not wish to infer that UEFI amounts to anti-competitive behaviour we can certainly see how it is going to present a future barrier to entry for SME F/OSS if not all market participants. We should not have to rely on the mechanisms such as the Open Innovation Network[15]. Meritorious though it is, at best its effect is akin to getting protection from one's elder sibling in the school playground, fine as long as it lasts. At worst is is a large firms club.

Our experience suggest that regulatory authorities prefer to deal on an outcome based approach rather than risk based issue avoidance.

13 http://www.opensourceconsortium.org/content/view/172/89/
14 http://mjg59.dreamwidth.org/9844.html
15 http://www.openinventionnetwork.com/