

## European General Court Rules (again) on Mandatory Access and Interoperability in Software Industry

### IN SHORT

**The Ruling:** A recent European General Court decision provided valuable guidance on applying abuse of dominance rules (Article 102 TFEU) in the context of software products and provided some welcome clarifications regarding the market definition for software products and the indispensability criteria, an essential element for finding an abusive refusal to supply.

**The Result:** The General Court rejected a vendor-specific product market definition. It also held that interface information is not indispensable for downstream competitors, if customers can obtain the information themselves through licensing.

**Looking Ahead:** The GC's judgment is of particular interest for software companies. It shows the GC's willingness to take into account the reality of the software sector in applying general competition law principles and raises an additional hurdle for narrow market definitions. It also confirmed the EC's restrictive interpretation of the indispensability criteria in the software sector, which lowers the prospects of success for potential future claims of abusive refusal to supply in the sector.

The European General Court's ("GC") decision relates to a complaint filed with the European Commission ("EC") by Contact Software, a German software supplier of Product Data Management ("PDM"). Contact Software alleged an abuse of dominance by Dassault Systèmes and Parametric Technology Corp., as they refused to provide Contact Software with interface information on their computer-aided design ("CAD") software.

PDM software allows businesses to store and organize all data related to a given product, including data related to CAD software products. CAD software is a standard tool for developing and manufacturing any finished industrial product. It is used by design professionals, architects, and engineers to design models of buildings and equipment.

PDM and CAD software, together with other components, form the Product Lifecycle Management ("PLM") of a business. PDM and CAD software must be interoperable with each other to have an effective PLM.



The 'indispensability' requirement must be satisfied before a refusal to supply will be considered illegal under EU competition law and established case law on the essential facilities doctrine.



Contact Software's main claim was that, by refusing to provide interface information on their CAD software, Dassault and Parametric prevented interoperability between their CAD software and Contact Software's PDM product. This refusal was, according to the complainant, an abuse of the dominant positions allegedly held by Dassault and Parametric in their respective "supplier-specific" CAD software markets. The Commission's October 2016 decision rejected the complaint for lack of sufficient interest for the EU to open an investigation.

The EC's decision centered on the following findings: (i) the non-existence of either a "supplier-specific" CAD software market or separate markets for interface information for each supplier's CAD software and (ii) the failure to establish the indispensability of the interface information on the CAD software for the PDM software market. Contact Software appealed the EC decision before the GC with regard to Dassault's alleged abuse of dominance. The GC judgment upheld the EC decision and, in particular, its market definitions.

The main takeaways of the GC's judgment are the following.

#### Contact Software's Vendor-Specific Market Definitions—Rejected

##### The Cost and Duration of Switching From One Supplier's Product to Another Supplier's Product Is Irrelevant

While switching CAD software can be costly and time-consuming, the GC found that this does not mean that each CAD software product is a separate market. The GC found that the EC's decision had identified two instances in which customers went through the burdensome process of switching from one CAD software product to another. This demonstrated that no supplier-specific product market existed, even though the switching process had been costly. The GC also observed that customers of CAD software suppliers generally have significant buyer power and technical knowledge. They are well equipped to determine, at the time of their initial choice, the length of time and cost of switching from one product to

another.

The GC noted that Contact Software's arguments advocated supplier-specific product markets based on the idea that customers are tied in once they have chosen a specific CAD software. However, the GC found that this did not account for new customers, who can still choose among all CAD software products available on the market.

### **The GC Was Reluctant to Adopt a Market Definition for a Secondary Product that Would Automatically Trigger a Dominant Position**

The GC judgment indicates that no separate product markets exist for interface information for the CAD software of every supplier. The GC confirmed the EC finding that such a market definition would be too narrow, as it would lead to finding any CAD software supplier as dominant on this market, even when the supplier holds only an insignificant market share in the CAD software market.

### **Indispensability Criteria—Not Satisfied**

#### **Whether Other Means of Access Are Available Is Relevant in Assessing the Indispensability Requirement**

The "indispensability" requirement must be satisfied before a refusal to supply will be considered illegal under EU competition law and established case law on the essential facilities doctrine. The GC upheld the finding that Contact Software's claimed need for direct access to interoperability information failed to satisfy this requirement, as Contact Software's customers could obtain the interface information through a licensing process.

#### **Indispensability Criteria Are Not Met if Sufficient Interoperability Is Attainable by Other Means**

The EC's decision regarding the failure to meet the indispensability criteria was further based on the fact that other PDM software vendors (competing with Contact Software) had stated that even without the interface information for CAD software products, they nonetheless reached an interoperability degree of 8/10. The GC agreed with the EC that this demonstrated that the interface information was not indispensable for Contact Software to compete on the PDM software market. This assessment appears to be more flexible than the EC's *Microsoft* decision, which considered that alternatives must allow for 100 percent interoperability.

### THREE KEY TAKEAWAYS

1. The GC's judgment is of particular interest for software companies. It shows the GC's willingness to take into account the reality of the software sector in applying general competition law principles.
2. The judgment raises an additional hurdle for narrow market definitions and demonstrates that the GC (and the EC) are reluctant to adopt market definitions for secondary products that automatically result in dominant positions, even if market share for the primary product is insignificant.
3. The judgment confirmed the EC's restrictive interpretation of the indispensability criteria in the software sector. This element lowers the prospects of success for potential future claims of abusive refusal to supply in the sector.

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