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Articles

Don't Be a Software Giant in Europe!
—A Critical Analysis of *Microsoft v. Commission*

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Abstract

The *Microsoft* judgment concern three software markets, namely the markets of client PC operating systems, work group server operating systems, and streaming media players. Microsoft had dominance in the first two markets. Microsoft was found to have been engaged in two abuses. First, Microsoft refused to offer interoperability information to its competitors in the work group server operating systems market. Second, Microsoft tied the sales of the Windows Media Player software to those of the Windows client PC operating systems. This Article has analysed the significant flaws of the reasoning adopted by the Court in the *Microsoft* judgment. As to the first abuse, it should be emphasised that, first, the "risk

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doctrine" should not have been employed to judge whether any effective competition was excluded. No clear causal link exists between the refusal of Microsoft and elimination of effective competition on the relevant market. The Court should have, at very least, looked at the market shares that Microsoft had gained, if any, during the years prior to March 2004. Second, the "new product doctrine" developed by the Court is flawed. This doctrine focuses only on whether the refusal of Microsoft would appreciably reduce the incentives of Microsoft's competitors to develop new products. The Court did not realize that making the interoperability information available to the competitors of Microsoft would reduce Microsoft's incentives to develop new products. As regards the second abuse, the Court overestimated the effect of the fact that Microsoft offered OEMs, for pre-installation on client PCs, only the version of Windows bundled with Windows Media Player. As to the judgment of whether the competition on the streaming media player market was foreclosed, the Court should have considered whether the tying in question had previously resulted in substantial negative impact, excluding competition on the market. The analysis in this Article indicates that it is doubtful whether Microsoft has diminished the competition on the relevant markets. What is certain is that first, the *Microsoft* judgment has significantly reduced the economic incentives of software market leaders in Europe. In the circumstances where most successful high-tech enterprises refuse to become as successful as they can be, the industry and consumers will eventually suffer. Second, the judgment, most unfortunately, discourages the competitors of Microsoft from competing with this software giant.

Keywords: The *Microsoft* Case, Trade Secrets, Abuses of Dominant Positions, Interoperability Information, Indispensable Products or Services

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歐洲電腦軟體巨擘之競爭法風險——以批判之角度評析歐洲法院 *Microsoft v. Commission*案之判決

謝國廉**

摘 要

本研究發現，首先，歐洲法院未能於歐盟微軟案的判決中有效證明，微軟已然破壞工作群組伺服器作業系統市場與串流媒體播放器市場的競爭秩序。該判決已對電腦軟體製造商造成極大的負面影響，大幅降低廠商競逐歐洲市場領導地位的誘因。長此以往，若多數的高科技企業，皆憂心優異的經營績效可能招致濫用獨占地位的處罰，因而放棄爭取市場龍頭的意願，則此發展顯非高科技產業與消費者之福。其次，此案判決不僅未能鼓勵微軟的競爭對手積極從事電腦軟體的研發工作，與微軟競逐市場占有率，反而可能強化競爭對手「坐收漁翁之利」的心態，以檢舉各個電腦軟體市場領導者作爲手段，要脅已取得獨占地位的軟體製造商，就特定的軟體產品進行技術授權。

關鍵詞：微軟案、營業秘密、濫用獨占地位、互動資訊、不可或缺的產品或服務

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1. PROBLEMATIC TRENDS

The Court of First Instance (hereinafter as the "Court") on September 17, 2007 adopted the long-awaited decision of *Microsoft v. the Commission*.[1] This judgment confirmed the fine of over €497 million imposed by the Commission of the European Union (EU).[2] The disputes relating to the *Microsoft* judgment concerned three separate markets of software products, i.e. the markets of client PC operating systems, work group server operating systems, and streaming media players. Microsoft Corporation had dominant positions in the first two markets. The Court upheld the decision of the Commission that Microsoft had engaged in two abuses. The Court held that Microsoft had refused to offer "interoperability information" to its competitors in the work group server operating systems market, and that Microsoft had also tied the sales of the Windows Media Player software to those of the Windows client PC operating systems.

The Microsoft announced a month after the judgment that it would not appeal the decision to the European Court of Justice.[3] The software giant has stated that

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1 Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601.

2 Commission Decision 2007/53/EC of 24 March 2004 relating to a proceeding pursuant to Article 82 EC and Article 54 of the EEA Agreement against Microsoft Corp., 2007 O.J. (L 32) 23.

3 It is worth noting that "[o]n 1 March 2007 the Commission, by means of a Statement of Objections, warned Microsoft of further penalties (of up to €3 million per day) over its unreasonable pricing of the interoperability information (IP/07/269)." The Commission later reached the conclusion that up until 21 October 2007 Microsoft had failed to comply with its obligation pursuant to the Commission decision to offer access to the interoperability information on reasonable and non-discriminatory terms. As a result, on 27 February 2008, the Commission adopted a decision pursuant to Article 24(2) of Regulation 1/2003, imposing on Microsoft a penalty payment of €899 million for non-compliance with its obligations. The relevant period of non-compliance runs from 21 June 2006 to 21 October 2007. European

the "Microsoft committed to taking any further steps necessary to achieve full compliance with the Commission's decision."[4] Nonetheless, this announcement does not mark an end of the debates over the reasoning adopted by the Court in the Microsoft judgment. As a matter of fact, this judgment has since then raised many questions and triggered harsh criticism.[5] For instance, Professor Daniel Spulber has noted that the dynamic effects of this judgment pose a substantial risk to the incentive to innovate in several ways. He has stated that "[f]irst, mandatory licensing and unbundling of the elements of an invention erode intellectual property rights. Second, the targeting of multinational corporations by the European Union creates barriers to international trade whose impacts extend across the global econ-

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Commission, Microsoft Case, http://ec.europa.eu/competition/antitrust/cases/microsoft/implementation.html (last visited Apr. 20, 2009).

4 Microsoft has stated on 22 October 2007 in a press release that:

At the time the Court of First Instance issued its judgment in September, Microsoft committed to taking any further steps necessary to achieve full compliance with the Commission's decision. We have undertaken a constructive discussion with the Commission and have now agreed on those additional steps. We will not appeal the CFI's decision to the European Court of Justice and will continue to work closely with the Commission and the industry to ensure a flourishing and competitive environment for information technology in Europe and around the world (emphasis added).

Microsoft Statement on Compliance with European Commission 2004 Decision, http://www.microsoft.com/Presspass/press/2007/oct07/10-22MSStatement.mspx (last visited Oct. 22, 2009).

5 Dr. Philip Marsden has put forward 10 interesting questions relating to the *Microsoft* judgment, though he did not answer these questions in the short article. For example, he has asked whether "tying by dominant firms is now a per se offence in Europe?" He has also asked what the next big abuse case could be. "Intel, Rambus, Qualcomm, Google? Do these cases really have anything to do with the CFI judgment in Microsoft apart from the general deference given to the Commission in abuse cases?" *See* Philip Marsden, *Picking Over the CFI* Microsoft *Judgment of 17 September, 2007*, 20 LOY. CONSUMER L. REV. 172, 174-75(2008).

omy."[6] In addition, he adds that the interpretation of the Court "of 'abuse of a dominant position' focuses on market outcomes rather than on anticompetitive conduct, thus penalizing successful innovators and rewarding their competitors."[7]

Professor Spulber has focused on the issues relating to the interests of Microsoft, namely the incentive of the successful innovator to invest on software development.[8] Nevertheless, the incentive for competitors of Microsoft to develop software should not be ignored. Do the commercial practices of Microsoft diminish the incentive of its competitors to innovate? Does the *Microsoft* judgment encourage the competitors of Microsoft to invest on software development? All these are the main themes considered in this Article.

This Article has five main parts. The following and second section considers the reasoning adopted by the Court in the 249-page judgment. This section identifies the scopes of relevant markets in the *Microsoft* case before evaluating the market power of Microsoft. Also, the abuses of dominant positions by Microsoft are taken into serious consideration in this section. The third section examines the opinions of the Court in a critical manner. This part of research analyses the flaws

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6 Daniel Spulber, *Competition Policy and the Incentive to Innovate: The Dynamic Effects of* Microsoft v. Commission, 25 YALE J. ON REG. 247, 247 (2008).

7 *Id.*

8 Professor Spulber has also analysed the relationships between the *Microsoft* judgment, international trade, and the incentive to innovate. He has reminded the EU that, by rejecting international IP protections, the *Microsoft* judgment reduces the beneficial effects of international trade on the incentive to innovate. In addition, he has noted that competition policy that weakens IP rights affects the incentives to innovate for firms in practically any industry. The result is less innovation at the margin and harm to consumer welfare. He adds that "competition policy that weakens international IP protections reduces the diffusion of innovation across international borders and diminishes the potential gains from trade associated with international markets for technology. Competition policy that targets successful firms reduces the returns to invention." *See id.* at 300-01.

of the reasoning, on which the conclusions of the Court and the Commission are based. The fourth section argues that it is doubtful whether Microsoft has indeed diminished the competition on the relevant markets. The two features of the *Microsoft* judgment are also considered in the section. First, the judgment has significantly reduced the economic incentives of software market leaders such as Microsoft. Second, the judgment discourages the competitors of Microsoft from competing with this software giant. The fifth and final section draws together certain important issues and considers them systematically.

2. How *Microsoft v. the Commission* Affects Intellectual Property Rights

2.1 Identification of Relevant Markets

The disputes relating to the *Microsoft* case concerned three separate worldwide product markets, namely the markets for, respectively, client PC operating systems, work group server operating systems, and streaming media players.[9] The first relevant market is the market for client PC operating systems. Operating systems were defined as "system software" that controlled the basic functions of the computer and enabled the user to make use of the computer and run application software on it.[10] Client PCs were defined as general-purpose computers designed for use by one person at a time and capable of being connected to a network.[11]

As regards the second market, namely the market of work group server operating systems, the contested decision defined work group server operating systems as operating systems designed and marketed to deliver collectively "basic infra-

9 Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601, paras. 22-23.

10 *See id.* para. 24.

11 *See id.*

structure services" to relatively small numbers of client PCs connected to small or medium-sized networks.[12] The third market identified in the contested decision was the streaming media player market. Media players were defined as software products capable of reading audio and video content in digital form, that was to say, of decoding the corresponding data and translating them into instructions for the hardware (for example, loudspeakers or a display). Streaming media players were capable of reading audio and video content "streamed" across the Internet.[13]

2.2 Evaluation of Market Power

The Court, according to the judgment, agreed with the Commission on how the three separate worldwide product markets were identified and on the ways in which the market power of Microsoft is evaluated.[14] Both institutions held the view that Microsoft had dominant positions on the first two markets, i.e. the market of client PC operating systems and the market of work group server operating systems.[15]

(1) The dominant position on the client PC operating systems market: In the contested decision, the Commission found that Microsoft had a dominant position on the client PC operating systems market since at least 1996.[16] This conclusion was based on the consideration of the following factors:

—The market shares of Microsoft were over 90 percent;

—The market power of Microsoft had "enjoyed an enduring stability and continuity";

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12 *See id.* para. 25.
13 *See id.* para. 28.
14 *See id.* para. 22.
15 *See id.*
16 *See id.* para. 30.

—There were significant barriers to market entry, owing to indirect network effects.[17]

(2) The dominant position on the work group server operating systems market: In the contested decision, the Commission found that Microsoft had a dominant position on the work group server operating systems market since 2002.[18] As regards this market, the Commission relied, in substance, on the following factors:

—The market share of Microsoft was, at a conservative estimate, at least 60 percent;

—The position of Microsoft's three main competitors on that market was as follows: Novell, with its NetWare software, has 10 to 25 percent; vendors of Linux products have a market share of 5 to 15 percent; and vendors of UNIX products have a market share of 5 to 15 percent;

—The work group server operating systems market was characterised by the existence of significant entry barriers, owing in particular to network effects and to Microsoft's refusal to disclose interoperability information.[19]

As to the market of streaming media players, Microsoft did not have a dominant position in this market. It is worth noting that the market shares of Microsoft and those of its competitors in this market were not revealed in the judgment.

2.3 Identification of Abusive Conducts

The Court agreed with the Commission on that Microsoft had engaged in two kinds of abusive conduct.[20] The first abuse was the refusal of Microsoft to offer "interoperability information" to its competitors in the market of work group oper-

17 *See id.* para. 31.
18 *See id.* para. 30.
19 *See id.* para. 33.
20 *See id.* para. 22.

ating systems, and the other was the tying of sales of the Windows Media Player software to those of the Windows client PC operating systems. This subsection, on the one hand, considers the reasons on which the contested decision was based, and on the other hand, analyses how the Court responds to the arguments of Microsoft justifying its refusal to provide the interoperability information.

2.3.1 Refusal to Supply Crucial Information

2.3.1.1 The Dispute

The first abusive conduct in which Microsoft was found to have engaged consisted in its refusal to supply its competitors with "interoperability information" and to authorise the use of that information for the purpose of developing and distributing products competing with Microsoft's own products on the work group server operating systems market, between October 1998 and March 2004, the date of notification of the contested decision.[21] What were the relationships between the refusal of Microsoft to offer interoperability information to its competitors and the developing and distributing of new work group operating systems? This was obviously a question that the Commission and the Court must answer.

For the purposes of the contested decision, "interoperability information" is the "complete and accurate specifications for all the protocols [implemented] in Windows work group server operating systems."[22] To put it differently, interoperability information is the "dialogue mechanism" that makes possible the communication between the Microsoft work group server operating systems and the non-Microsoft ones. In the circumstances where Microsoft had a dominant position in the market of work group server operating systems, it was almost impossible that the businesses or other institutions, which have taken up the

21 *See id.* para. 36.
22 *Id.* para. 37.

Microsoft products, would turn to purchase the non-Microsoft products not able to integrate with the Microsoft ones.

Microsoft stated before the Court that its refusal to offer interoperability information did not constitute a violation of Article 82 EC. This article provides that:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Microsoft argued that its refusal to supply interoperability information did not constitute an abuse of a dominant position within the meaning of Article 82 EC because, "first, the information is protected by intellectual property rights (or constitutes trade secrets) and, second, the criteria established in the case-law which determine when an undertaking in a dominant position can be required to grant a

licence to a third party are not satisfied in this case."[23]

2.3.1.2 The Ruling

The Court, according to the judgment, agreed with the Commission on that the refusal of Microsoft to supply interoperability information constituted an abuse of dominant position within the meaning of Article 82 EC. The Court emphasized, first of all, that "[t]he refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC."[24] The Court stated that "[i]t is only in exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such an abuse."[25] It is then necessary to consider what the exceptional circumstances are. According to the judgment, it followed from case-law that:

> [T]he following circumstances, in particular, must be considered to be exceptional:
> — in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighboring market;
> — in the second place, the refusal is of such a kind as to exclude any effective competition on that neighboring market;
> — in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand.[26]

The first circumstance concerned whether the interoperability information was indispensable to the exercise of a particular activity on a neighboring market. The

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23 *Id.* para. 312.
24 *Id.* para. 6.
25 *Id.* para. 331.
26 *Id.* para. 332.

Court gave a positive answer, holding that:

> [T]he absence of such interoperability with the Windows domain architecture has the effect of reinforcing Microsoft's competitive position on the work group server operating systems market, particularly because it induces consumers to use its work group server operating system in preference to its competitors', although its competitors' operating systems offer features to which consumers attach great importance.[27]

The Court continued to note that "Microsoft itself has recognized, both in its written pleadings and in answer to a question put to it at the hearing, that none of its recommended methods or solutions made it possible to achieve the high degree of interoperability which the Commission correctly required in the present case."[28]

The second circumstance concerned whether the refusal of Microsoft increased the risk that the effective competition on that neighboring market would be excluded. The Court stated that "the Commission *did not make a manifest error* of assessment when it concluded that the evolution of the market revealed a *risk* that competition would be eliminated on the work group server operating systems market"[29] (emphasis added). The Court also agreed with the Commission on its opinion that "there was a risk that competition would be eliminated on that market because the market has certain features which are likely to discourage organizations which have already taken up Windows for their work group servers from migrating to competing operating systems in the future."[30]

The third circumstance was about whether or not the refusal of Microsoft pre-

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27 *Id.* para. 422.
28 *Id.* para. 435.
29 *Id.* para. 618.
30 *Id.* para. 619.

vented the appearance of a new work group server operating system. The Court gave a positive answer to this question. The Court, first of all, emphasized that "the fact that the applicant's conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in 'limiting production, markets or technical developments to the prejudice of consumers.'" The Court stated that "the Commission was correct to consider that the artificial advantage in terms of interoperability that Microsoft retained by its refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features, to the prejudice, notably, of consumers."[31] The Court noted that "[t]hat refusal has the consequence that those competitors are placed at a disadvantage by comparison with Microsoft so far as the merits of their products are concerned."[32] According to the Court,

> Microsoft's argument that it will have *less incentive* to develop a given technology if it is required to make that technology available to its competitors is of *no relevance* to the examination of the circumstance relating to the new product, where the issue to be decided is the impact of the refusal to supply on the incentive for Microsoft's competitors to innovate and not on Microsoft's incentives to innovate[33] (emphasis added).

In addition, as to whether the refusal of Microsoft diminishes the interest of consumers, the Court stressed that:

> [I]t is settled case-law that Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly preju-

31 *Id.* para. 653.
32 *Id.*
33 *Id.* para. 659.

> dice them by impairing an effective competitive structure .... In this case, Microsoft *impaired the effective competitive structure* on the work group server operating systems market *by acquiring a significant market share* on that market[34] (emphasis added).

The Court reached the conclusion that "the *Commission's finding* to the effect that Microsoft's refusal limits technical development to the prejudice of consumers within the meaning of Article 82(b) EC is *not manifestly incorrect*"[35] (emphasis added). The Court, as a result, held that the circumstance relating to the appearance of a new product is present in this case.[36]

2.3.2 Tying

2.3.2.1 The Dispute

The second abusive conduct in which Microsoft was found to have engaged had consisted in the fact that from May 1999 to March 2004, Microsoft made the availability of the Windows client PC operating system conditional on the simultaneous acquisition of the Windows Media Player software.[37] The Commission, as a result, considered that this conduct satisfied the conditions for a finding of a tying abuse for the purposes of Article 82 EC.[38] The Commission put forward four reasons to support this viewpoint:

(1) Microsoft had a dominant position on the client PC operating systems market.[39]

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34 *Id.* para. 664.
35 *Id.* para. 665.
36 *See id.*
37 *See id.* para. 43.
38 *See id.* para. 665.
39 *See id.* para. 854.

(2) That streaming media players and client PC operating systems were two separate products.[40]

(3) Microsoft did not give customers the choice of obtaining Windows without Windows Media Player.[41]

(4) The tying of Windows Media Player foreclosed competition in the media players market.[42]

2.3.2.2 The Ruling

The Court stated that the opinions of the Commission regarding the constituent elements of bundling were correct, being consistent both with Article 82 EC and with the case-law.[43] The Court focused its attention on Point C above, elaborating on the condition that the conclusion of such contracts was made. The Court noted that "in consequence of the impugned conduct, consumers are unable to acquire the Windows client PC operating system without simultaneously acquiring Windows Media Player, which means that the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations must be considered to be satisfied."[44] The Court, as a result, concluded that the Commission was correct to find that the condition relating to the imposition of supplementary obligations was satisfied in the present case.[45]

In addition, as to Point D above, the Court elaborated on the characteristics of the streaming media player market through the analysis of the relations between Microsoft and Original Equipment Manufacturers (OEMs). OEMs combine hard-

40 *See id.* para. 855.
41 *See id.* para. 856.
42 *See id.* para. 857.
43 *See id.* para. 859.
44 *Id.* para. 961.
45 *See id.* para. 975.

ware and software from different sources in order to offer a ready-to-use PC to the end user.[46] From May 1999, Microsoft offered OEMs, for pre-installation on client PCs, only the version of Windows bundled with Windows Media Player had the inevitable consequence of affecting relations on the market between Microsoft, OEMs and suppliers of third-party media players by appreciably altering the balance of competition in favour of Microsoft and to the detriment of the other operators.[47] As a result, the Court concluded that the tying of Windows Media Player had foreclosed competition in the media players market.[48]

3. CRITICAL ANALYSIS

The Court stated that the refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of a dominant position, and only in exceptional circumstances that the exercise of the right might give rise to such an abuse. According to the Court, the analysis of the case law indicated that three circumstances must be considered exceptional.[49] These exceptional circumstances have constituted a three-part test. The Court employed the three steps of this test to de-

46 *See id.* para. 923.

47 *See id.* para. 1034.

48 *See id.* para. 1090.

49 Some academic writers have focused their attention on the changes of the CFI approaches to refusals to grant intellectual property licences. For instance, Arianna Andreangeli has noted that "the CFI decision appears to have significantly changed the approach to refusals to deal and especially to grant IP licences covering proprietary information, by *de facto* 'downgrading' some of the requirements of the test enshrined in the existing case law from 'necessary' to merely 'sufficient' conditions for the finding of an abuse of dominant position." *See* Arianna Andreangeli, *Case T-201/04,* Microsoft v. Commission, *Judgment of the Grand Chamber of the Court of First Instance of 17 September 2007*, 45 COMMON MKT. L. REV. 863, 893-94 (2008).

termine whether the refusal of Microsoft constituted an abuse of dominant position on the work group server operating system market.[50] The first part of the test concerns the characteristics of the product, which the dominant firm refuses to licence to a third party. The key issue is about whether the product is indispensable to the exercise of a particular activity on a neighbouring market.[51] In the circumstances

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50 The *Microsoft* decision reveals that this three-part test can be applied to deal with the exercises of any intellectual property rights that give rise to abuses of dominant positions. Nevertheless, Dr. Katarzyna Czapracka has criticised the Court and the Commission for disregarding the features of trade secrets. She has noted that ordering disclosure of the interoperability information not only destroys trade secrets, but also precludes the proprietor from obtaining a patent on the invention at stake, and eliminates the incentives to innovate. "The Commission disregards special features of trade secrets such as the ease of misappropriation, the need to protect secrecy, and the fact that their existence does not preclude competitors from developing or reverse engineering the information at stake." She has also stated that "[t]he application of EU antitrust laws has increased the uncertainty surrounding the status of trade secrets in Europe. It is unfortunate that the Court of First Instance did not take the opportunity to clarify the principles of competition law applicable to trade secrets in its September 2007 Microsoft judgment. Insufficient protection of trade secrets may forestall innovation and limit the dissemination of new technologies." Katarzyna A. Czapracka, *Antitrust and Trade Secrets: The U.S. and the EU Approach*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 207, 267, 272 (2008).

51 Dr. Haris Apostolopoulos, a competition lawyer, has made an effort in the search for a common legal or economic language in the field of comparative competition law. He has noted that the phrase "*de facto* monopoly on the downstream market" instead of "indispensability" are, or at least could be, commonly perceived objectively both in the U.S. and EU. He has also argued that terms, like "possibility of competition by substitution" instead of "new product in the downstream market," and an economic efficiency test—balancing the pro- and anti-competitive effects—instead of "unjustified refusal to give access" or "objective/legitimate business justification of the refusal" are commonly perceived on the two sides of the Atlantic. *See* Haris Apostolopoulos, *Refusal-to-Deal Cases of IP Rights in the Aftermarket of US and EU Law: Convergence of Both*

where the product is not indispensable, the poor performance of the firms in the neighbouring industry is not attributable to the refusal of Microsoft. In addition, the two other parts of the test concern the results of the refusal. What the Court considered was whether the refusal excluded effective competition and prevented the appearance of a new product.

This Article now turns to analyse the opinions of the Court. As to the first part of the test, the Court rightly pointed out that the absence of the interoperability with the Windows domain architecture had the effect of reinforcing Microsoft's competitive position on the work group server operating systems market. Also, the absence of the interoperability induced consumers to use its work group server operating system in preference to its competitors' operating systems. Nonetheless, as far as the second part of the test is concerned, the Court failed to elaborate on why the refusal of Microsoft excluded all effective competition on that neighbouring market.

3.1 The "Risk Doctrine" Is Ineffective

The second part of the test concerns whether the refusal excludes any effective competition on that neighbouring market. As to this point, first of all, it is necessary for the Court to define the phrase "effective competition." The failure to do so could prevent the Court from ensuring whether or not effective competition on the work group server operating systems market is indeed excluded by the refusal of Microsoft. Secondly, in order to determine whether any effective competition is eliminated, the Court should consider whether the refusal of Microsoft has already resulted in significant negative impact that damages effective competition. Or, the

Law Systems Through Speaking the Same Language of Law and Economics, 5 DEPAUL BUS. & COM. L.J. 237, 254 (2007).

Court should at least look at whether the refusal would presumably exclude the effective competition on the relevant market. To put it differently, it was inappropriate to conclude that the refusal had excluded effective competition, while the refusal had not resulted in any significant negative influence or potential harmful impact on the effective competition of the market.

However, the relevant reasoning adopted by the Court has significant flaws. First of all, the Court did not define the term effective competition. Second, the Court did not seem to believe that the "significant negative impact" test is imperative. Third, in the determination of whether effective competition was eliminated, the Court focused merely on whether there is a *risk* that the competition on the work group server operating systems market could be excluded. What the Court stated was that "the Commission *did not make a manifest error* of assessment when it concluded that the evolution of the market revealed a *risk* that competition would be eliminated on the work group server operating systems market"[52] (emphasis added). The Court noted that it was satisfied with the view of the Commission that "there was a risk that competition would be eliminated on that market because the market has certain features which are likely to discourage organisations which have already taken up Windows for their work group servers from migrating to competing operating systems in the future."[53]

A number of important issues concerning the opinions of the Court must be analysed here. First of all, what does the phrase "discouraging features of the market" refer to? Second, had these features actually discouraged the organisations from migrating to purchasing the operating systems from the competitors of Microsoft? The Commission and the Court did not base their views on any economic

52 Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601, para. 618.
53 *Id.* para. 619.

facts. What was worse, the two institutions had neither identified whether there was significant detrimental impact of the Microsoft refusal, nor had the institutions managed to make certain whether this refusal would presumably reduce the effective competition of the market. The Court noted that there was a *risk* that competition would be eliminated on the relevant market. The Court was merely certain that the relevant market had some characteristics that could render the organisations, which had taken up Windows for their work group servers, lose their interest in purchasing non-Windows products.

It must be stressed that this "risk doctrine" should not have been employed to judge whether any effective competition was excluded. This assessment is not at all effective because, where competition does exist on the relevant market, various simple but effective marketing practices of Microsoft (price deduction, for instance) may still render the users of Windows lose their interest in buying non-Windows products. As a result, it is extremely difficult to determine whether it is the refusal of Microsoft or the fierce competition between Microsoft and its competitors that make the users of Windows decide not to purchase non-Windows products. In other words, no clear causal link exists between the refusal of Microsoft and elimination of effective competition on the relevant market.

The Court should have, at very least, looked at the market shares that Microsoft had gained, if any, during the years prior to March 2004. Or, where the market shares of Microsoft and those of its competitors had remained almost unchanged during this period of time, the Court should have focused on whether Microsoft had made use of the refusal or employed any business practices to deter its competitors from gaining market shares. Nonetheless, as a matter of fact, the Court had never considered the changes in the allocation of market shares during the period of time.

It is worth noting that the application of the risk doctrine has posed a great threat to the players in the computer software industry, in particular the successful

innovators. It has been extremely difficult, if not impossible, for the enterprises in the industry to identify the business practices that should be deserted because these acts could render customers lose their interest in purchasing products of competitors. Where it is almost impossible to carry out such an identifying task, the leading enterprises in the software industry would presumably abandon certain business practices, fearful that these acts could be considered by the Commission, or probably the Court, to be abuses of dominant positions.

3.2 The "New Product Doctrine" Is Flawed

The third part of the three-part test concerns whether the refusal of Microsoft prevents the appearance of a new work group server operating system for which there is potential consumer demand. This "new product doctrine" is intended to determine whether the refusal could halt the research, development, production, or even the market of work group server operating systems. The Court has rightly pointed out the issue of whether the Microsoft's conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in "limiting production, markets or technical developments to the prejudice of consumers."

As regards the present case, do the phrases "production" and "technical developments" in Article 82 EC refer to the production and development of all the products of work group server operating systems in the market, including those produced by Microsoft? Or, do these terms merely concern the products of the competitors of Microsoft? The answers to these questions are of great importance. This Article argues that the two phrases refer to all the products of work group server operating systems in the market, including those made by Microsoft. The reason is that, as to the objective of Article 82(b) EC, this provision is intended to prevent limitation of production, markets or technical developments from *under-*

mining the interests of consumers. As long as a dominant undertaking makes every effort to develop and manufacture quality products or to provide good service, consumers will definitely benefit from the results of the hard work. Such efforts, which ensure the effective production and significant technical developments, or guarantee the offer of quality service in the relevant markets, definitely meet the interests of consumers. It is worth noting that, just as each of its competitors, Microsoft manages to innovate in order to meet the interests of consumers.

As a result, the "new product doctrine" should have consisted of two tests. On the one hand, the Court must consider whether the refusal of Microsoft would appreciably reduce the incentives of Microsoft's competitors to develop new work group server operating systems. On the other hand, the Court should also have considered whether the refusal of Microsoft would ensure that the software giant has sufficient incentives to continue the development and production of new products. It is necessary to consider these two issues because the destruction of incentives of Microsoft or those of its competitors impedes the production, markets or technical developments of work group server operating systems. Such impediment definitely undermines the interests of consumers.

Microsoft is certainly very much concerned about the second test. This test must be employed to determine whether the refusal renders Microsoft continue to be interested in producing and developing new work group server operating systems. It is not surprising that Microsoft argued it would have less incentive to develop a given technology if it was required to make that technology available to its competitors.

Unfortunately, the new product doctrine developed by the Court is flawed, because it only consists of the first test, focusing on whether the refusal of Microsoft would appreciably reduce the incentives of Microsoft's competitors to develop new products. The Court failed to notice that making the interoperability information

available to the competitors of Microsoft would to a large extent reduce Microsoft's incentives to develop new products. The Court held the view that the argument put forward by Microsoft was *irrelevant* to application of the new product doctrine. The Court stressed that the issue to be decided was the impact of the refusal to supply on the incentive for the competitors of Microsoft to innovate.

3.3 Is the Tying Appreciably Detrimental?

This subsection begins with the analysis of features of "bundling practices" in the computer software industry. On the one hand, most consumers of computer equipments would presumably support the common practice by computer marketers of incorporating various programmes with an operating system at a reasonable price. As Mr. James Ponsoldt and Mr. Christopher David have noted, "[t]he economies applicable when the system manufacturer holding a dominant position—Microsoft, for example—bundles Windows XP together with its media player and messenger services, save many consumers time and money."[54] On the other hand, such bundling practices could make it difficult for smaller software producers to enter and then compete in these ancillary software markets and provide additional innovation eventually.[55] As innovation markets expand worldwide,

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54 James F. Ponsoldt & Christopher D. David, *A Comparison Between U.S. and E.U. Antitrust Treatment of Tying Claims Against Microsoft: When Should the Bundling of Computer Software Be Permitted*, 27 NW. J. INT'L L. & BUS. 421, 421 (2007).

55 Mr. Ponsoldt and Mr. David have analysed the recent charges of the US and EU judicial approaches to tying which stem from software bundling. Their analysis indicates that neither approach is ideal. They have noted that "although the U.S. approach offers too little guidance to software manufacturers seeking to avoid liability and unduly discounts potential losses in innovation from excluded competitors, the E.U. approach stifles dominant software firm innovation and efficiency because the approach is too rigid and formalistic." *See id.* at 423.

the issue of whether competition agencies should permit or forbid a dominant firm in a technology market to bundle several products has become increasingly crucial.

As to the *Microsoft* case, the Commission puts forward four reasons to support its view that the tying constituted an abuse of dominant position on the market of client PC operating system. The Court fully agreed with the Commission. The first three points, which concerned the characteristics of the streaming media players market, are not at all controversial. Microsoft did have a dominant position on the client PC operating systems market, and streaming media players and client PC operating systems were indeed two separate products. Also, the Court and the Commission rightly pointed out the fact that Microsoft did not provide customers with the choice of obtaining Windows without Windows Media Player.

The Court, however, should not have agreed on the fourth reason put forward by the Commission, which was that the tying of Windows Media Player to Windows client PC operating system foreclosed competition in the media players market. As to whether or not competition was foreclosed, the Court should have considered whether the tying in question had previously resulted in substantial negative impact, excluding competition on the streaming media player market. Or, the Court should have, at very least, focused on whether the tying would presumably do harm to the competition on this market. It was inappropriate to conclude that the tying had foreclosed competition, while the tying had not created any significant negative influence or potential detrimental impact on the competition.

Nonetheless, the Court overestimated the effect of the fact that Microsoft offered OEMs, for pre-installation on client PCs, only the version of Windows bundled with Windows Media Player. The Court held that the practice of Microsoft had resulted in the inevitable consequence of affecting relations on the market between Microsoft, OEMs and suppliers of third-party media players by appreciably altering the balance of competition in favour of Microsoft and to the detriment of

the other operators. The Court concluded that the tying of Windows Media Player foreclosed competition in the media players market.

Indeed, the way in which Microsoft offered the version of Windows and Windows Media Players could to some extent alter the balance of competition between Microsoft and its competitors on the media players market. The factor of competition balance was of great importance, but what really mattered was whether the balance was appreciably changed. As to its conclusion that the balance of competition was appreciably altered in favour of Microsoft and to the detriment of its competitors, the Court should have based this opinion on the development of the relevant market rather than its hypotheses, if not imagination.

The Court failed to look at the market shares that Microsoft had gained, if any, in the streaming media player market during the years prior to March 2004. Or, if the market shares of Microsoft and those of its competitors had remained almost the same during this period of time, the Court should have focused on whether Microsoft had employed the conduct of tying or any other strategies to prevent its competitors from gaining more market shares in the streaming media player market. However, the figures concerning the market shares of Microsoft and those its competitors have never been referred to in the judgment, let along the changes in the allocation of market share during the period of time.

4. THE OBJECTIVE OF THE COURT IS NOT REALISED IN THE JUDGEMENT

The analysis of the judgment indicates that the Court has made every effort to maintain the competition order on the markets of work group server operating systems and streaming media players. Just as Ms. Rita Coco of the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato*) has noted, compared to the experience of the United States, “the European experience is going

towards a system of competition at any cost—even at the cost of discouraging internal and international investments—as the escalation starting from Magill to Microsoft makes it clear."[56] Professor Daniel Spulber has also stated that "*Microsoft v. Commission* raises barriers to international trade by attacking entry of foreign firms into the European marketplace."[57] However, the analysis in this Article indicates that it is doubtful whether Microsoft has actually diminished the competition on the relevant markets.

What is certain is that the *Microsoft* judgment has two features. First, the judgment has significantly reduced the economic incentives of software market leaders such as Microsoft. Also, as Ms. Arianna Andreangeli has noted, "the *Microsoft* judgment can be read as the response of EU competition policy to the behaviour of a 'super-dominant' company in an industry characterised by *ad hoc* competition dynamics."[58] In order to cope with such a policy, software giants in Europe

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56 She has also noted that the approach of the United States differs from that of the European Union. In the United States, "there is a clear bent towards IP, and the antitrust policy and philosophy embodied in *Trinko* stand more for a permissive than restrictive approach towards dominant firms." Rita Coco, *Antitrust Liability for Refusal to License Intellectual Property: A Comparative Analysis and the International Setting*, 12 MARQ. INTELL. PROP. L. REV. 1, 47 (2008); *see also* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 401 (2004).

57 Professor Spulber has added that this judgment reduces the incentives of the foreign firms to innovate. "The European Union represents almost one third of total world Gross Domestic Product (GDP). The fines, legal costs, and regulatory sanctions associated with *Microsoft v. Commission* have the impact of non-tariff barriers to trade." *See* Spulber, *supra* note 6, at 249.

58 Ms. Andreangeli has added that the *Microsoft* judgment "is likely to have profound implications for the future interpretation of Article 82 EC in general, whose directions cannot be easily predicted and which could be potentially detrimental both for the coherence *vis-a-vis* the existing legal principles and the effective and appropriate competition enforcement." *See* Andreangeli, *supra* note 49, at 894.

may abandon the opportunity to become successful innovators. For instance, as regards the market of work group server operating system, Microsoft could get rid of approximately 15 percent of market share in the market, allowing its competitors, namely NetWare, Linux, and UNIX, to gain the total of 15 percent of market share. This was absolutely not an option of business strategy prior to the *Microsoft* judgment. Nevertheless, at present, the executives of the software firms would presumably take this option into serious consideration. As long as Microsoft abandons its dominance in the work group server operating system market, its refusal to share interoperability information with competitors does not constitute a violation of Article 82 EC. Nevertheless, where most successful high-tech firms refuse to become as successful as they are able to be, fearful that the dominance they can secure may end their plans to employ effective business practices, the industry and consumers will suffer in the long run.

Second, to the surprise of some people probably, the judgment discourages the competitors of Microsoft from competing with this software giant. At present, the competitors may be waiting for the future decisions of the Commission to punish market leaders. As Professor Daniel Spulber has noted, "[c]ompanies will be reluctant to invest in R&D if they face mandatory unbundling and disclosure of their inventions. Competitors will be discouraged from investing in R&D if they can obtain IP from leading firms by the threat of complaints to competition policymakers."[59]

5. CONCLUSION

The *Microsoft* judgment concern three software markets, namely the markets of client PC operating systems, work group server operating systems, and stream-

59 Spulber, *supra* note 6, at 300.

ing media players. Microsoft had dominance in the first two markets. Microsoft was found to have been engaged in two abuses. First, Microsoft refused to offer interoperability information to its competitors in the work group server operating systems market. Second, Microsoft tied the sales of the Windows Media Player software to those of the Windows client PC operating systems.

This Article has analysed the significant flaws of the reasoning adopted by the Court in the *Microsoft* judgment. As to the first abuse, it should be emphasised that, first, the "risk doctrine" should not have been employed to judge whether any effective competition was excluded. No clear causal link exists between the refusal of Microsoft and elimination of effective competition on the relevant market. The Court should have, at very least, looked at the market shares that Microsoft had gained, if any, during the years prior to March 2004. Second, the "new product doctrine" developed by the Court is flawed. This doctrine focuses only on whether the refusal of Microsoft would appreciably reduce the incentives of Microsoft's competitors to develop new products. The Court did not realise that making the interoperability information available to the competitors of Microsoft would reduce Microsoft's incentives to develop new products. As regards the second abuse, the Court overestimated the effect of the fact that Microsoft offered OEMs, for preinstallation on client PCs, only the version of Windows bundled with Windows Media Player. As to the judgment of whether the competition on the streaming media player market was foreclosed, the Court should have considered whether the tying in question had previously resulted in substantial negative impact, excluding competition on the market.

The analysis in this Article indicates that it is doubtful whether Microsoft has diminished the competition on the relevant markets. What is certain is that first, the *Microsoft* judgment has significantly reduced the economic incentives of software market leaders in Europe. In the circumstances where most successful high-tech

enterprises refuse to become as successful as they can be, the industry and consumers will eventually suffer. Second, the judgment, most unfortunately, discourages the competitors of Microsoft from competing with this software giant.

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