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**MAY A REFUSAL TO LICENSE AN INTELLECTUAL PROPERTY RIGHT  
AMOUNT TO AN ABUSE OF A DOMINANT POSITION? : THE  
MICROSOFT CASE.**

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## INTRODUCTION

During the last decades new laws and organizations have appeared to watch over Intellectual Property Rights. The reasons? Several, the first and probably the most important: encouragement and protection of “R&D” (research and development). Why? Simple: by protecting IP rights we motivate creation and investment in creation, obtaining better quality in every sense (welfare for consumers). An inventor would not be motivated if he knew that by inventing something he would not be recompensed, or a company would not invest in R&D if they did not expect to get profits from it. That is why most countries protect or try to protect IP rights. However, what happens when a company, which invested in R&D, has monopolized a market thanks to its rightful gained IP rights? Can it always refuse to license its IP rights? Then we have to deal with Competition Law and concepts as “abuse” and “dominant position (article 82 of the European Community Treaty). Refusal to licence an intellectual property right is not considered in normal circumstances to be an abuse of Article 82, since owners of intellectual property rights have the right to decide how best to exploit these rights. However there have been some cases where the European Commission and the European Commission have ruled on the other way; that is to say, they have determined that a company is indeed abusing its dominant position by refusing to license its intellectual property rights.

In order to approach our topic, I have decided to focus particularly on the Microsoft Case, in which the European Commission just decided to fine Microsoft as we can see in a statement of the European Commission (1): *“The European Commission has concluded, after a five-year investigation, that Microsoft Corporation broke European Union competition law by leveraging its near monopoly in the market for PC operating systems (OS) onto the markets for work group server operating systems and for media*

*players. Because the illegal behaviour is still ongoing, the Commission has ordered Microsoft to disclose to competitors, within 120 days, the interfaces required for their products to be able to 'talk' with the ubiquitous Windows OS. Microsoft is also required, within 90 days, to offer a version of its Windows OS without Windows Media Player to PC manufacturers (or when selling directly to end users). In addition, Microsoft is fined € 497 million for abusing its market power in the EU.*

*"Dominant companies have a special responsibility to ensure that the way they do business doesn't prevent competition on the merits and does not harm consumers and innovation " said European Competition Commissioner Mario Monti. "Today's decision restores the conditions for fair competition in the markets concerned and establish clear principles for the future conduct of a company with such a strong dominant position," he added.*

Due to the importance and influence of the rulings coming from American Courts, I will try briefly to distinguish the American and the European approach concepts as “abuse”, “dominant position”, “relevant market” and “essential facilities”, which are relevant to our study. Microsoft has during the 90's become the biggest operating systems company not only within Europe but World Wide. Today its owner, Mr. Bill Gates is considered to be one of the richest men of the world, its profits are increasing everyday, in few words: it is one of the most successful companies of the planet. However, during the last five years it has faced several lawsuits, the most important being confabulated by the Competition Authorities of the United States and the European Union. But how have these authorities approached their cases? And most important, how have the American and the European Courts dealt with these issues? In the European Union, Microsoft has just been fined for two reasons: the tie-in of its Windows Media Player to its Windows and for its refusal to supply information concerning its operating

systems. Our study complies the Microsoft Case in the European Union, focusing essentially in the refusal to supply. Nevertheless, a background of the tie-in complaint will be provided, just as a brief summary of Microsoft's Case in the United States. Thus, the present investigation has the aim of identifying the elements that must be analysed in order to determine if an undertaking, in this case Microsoft, is or not abusing of its dominant position by refusing to license its IP rights, in accordance to the European Institutions.

## **CHAPTER 1: LEGAL BACKGROUND**

### **1.1 RELEVANT MARKET**

Defining the relevant market for a competition case where dominance is to be proved is probably one of the most important issues due to its complexity and subjectivity, in fact in most of the dominance cases before the Court, parties will try to demonstrate that first of all they do not hold a dominant position by attacking the relevant market definition achieved by the Commission or the Competition Authorities.

As we will see in the European Union, the Commission will normally consider dominance if an undertaking holds a market share of more than 40% of the relevant market, and the Competition Authorities in the United States will usually assume there is monopoly power if the firm possesses a market share of more than 70% of the relevant market.

So, basically the importance of defining a relevant market is to be able to define the market share that an undertaking holds. But how do we define a relevant market?

First of all, we need to establish that a market is the virtual or real space where the consumer of one good meets the producer of that good, implying that all producers manufacture “substitute” products.

Now, In order to be able to define a relevant market we must first define the relevant product market and the relevant geographic market, that is to say, it needs to be established what are the products that will be considered to be in the same market than that one which is being evaluated, and where, the area where such product will be compared.

So as to facilitate the definition of relevant markets the Commission has published some guidelines, for example, in the Commission Notice on the definition of the relevant market for the purposes of Community competition law (2), we can see that in the regulation 4064/89 on the control of concentrations of a Community dimension, the relevant market product and the relevant geographic market were defined as follows:

*"A **relevant product market** comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."*

*"The **relevant geographic market** comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas".*

According to the Telecommunications Antitrust Guidelines (3) “...a **product market** comprises the totality of the products which, with respect to their

*characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products in terms of price, usage and consumer preference. An examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration”.*

In accordance with the COMMISSION NOTICE on the definition of the relevant market for the purposes of Community competition law (4), there are three competitive restraints used that are normally used by the Commission, the most used is the Supply Substitution, which is brought by the Commission on its Draft Notice on Market Definition, which states that “...*the basic principles of demand substitution is on practice implemented by postulating a small, non-transitory change in relative prices and evaluating the likely reactions of customers to that increase. The formulation of this is intended to provide clear indications as to the evidence that is relevant to define relevant markets*”; this is in my view a very efficient method to obtain the relevant product market and the relevant geographical market, essential data required to establish the relevant market.

In other words, the Commission is talking about the SSNIP test (also known as the 5% test), which was originated by the US Department of Justice and the FTC Merger Guidelines, which defines the relevant market as “*a collection of products over which a single firm would find it profitable to increase prices by a small but significant (for example five per cent) increase*”. Usually the method is quite accurate because if we rise the price of a product in a certain place, then by analyzing the effect on the demand of the other products, we will be able to know what the “*competence*” to such

product is and where it has an impact, defining then both the relevant product and geographic product.

However, concepts as vertical and horizontal differentiation must be taken into account.

Vertical differentiation takes place when price and income are similar, then consumers would opt for a product due to an objective difference, that is to say, its quality.

Horizontal differentiation occurs when in the same situation, similar price and income, people chose because of a subjective difference, meaning the people's taste.

It also must be clear that the products do not have to be the same kind to be considered within the relevant product market, in fact we can arrive to this conclusion thanks to this method, for example a pub, a restaurant and the movie theater may be comprised in the same market, depending on the consumer preferences. Nike for example argues that its number one competitor in the market is Island Records (5) since, according to them, people when buying tennis shoes also consider buying music discs.

The second competitive restraint is the Supply Substitution, and is useful when an undertaking manufactures different kinds of products, to see if theses different products are or not in the same relevant market. The method consists in observing if a company is able to switch its production from a product to another kind without suffering high costs or risks. If such company is proved to be able to do so then we can consider that both products, even from a different kind, are in the same relevant market. An



example provided by the Commission on its notice I the one of the paper production, that works with different types of paper, but with the same machinery, if it can change its production from paper “a” to paper “b” without suffering many losses, then it will be considered that both paper “a” and “b” are in the same relevant market. Nevertheless, the Commission does not very often implement this method.

And finally we have the Potential Competition method, which is hardly required because of its particular circumstances; it would only be implemented in a second stage, once the position of the companies to the relevant market is defined.

Therefore, in order to analyze the relevant product and geographic market, the Commission will conduct an investigation considering several factors, such as: the views of the customers, competitors and consumers; barriers and costs linked with switching demands; different categories of customers and price discrimination; current geographic pattern of purchases; past evidence of diversion of orders to other areas; barriers on switching costs associated to divert orders to companies located in other areas; evidence of substitution in tests based on similar prices, estimating elasticity and cross prices elasticity; and basic demand features, such as national preferences, culture, language, etc.

To conclude, once we have reached the definition of the relevant market, we calculate the market share by analyzing the sales of the relevant product market in the relevant geographic market.

The methods to obtain the market share used by the Competition Authorities are different in the United States to the ones from the European

Commission. These methods are in a way based in the same concept: the Yardstick Competition, which is based on the comparison of the undertakings to its competitors, however there is a very important difference between the two systems. This difference basically consists in their concentration indices.

The Commission's system, called the CR2 index, only comprises two factors, the market shares of two most important competitors of the market, while the US system, known as the Hirshman Index (HHI), considers the market shares all or at least of most of the competitors.

So, by implementing both systems to the exact same situation we can obtain different results, essentially by considering all or most of the market competitors, the HH Index is more flexible and is a reflex of the Chicago School Approach. To conclude this, it must be said that there is a very important pressure from the private sector to the Commission for this one to change from the CR2 index to the HHI index.

The European Court of Justice has also had an important role defining this concepts, for example as for product market, in the United Bananas Case (6) the Court decided that bananas formed a single market different from the fresh fruit market because of *"...special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible"* arguing this because of the uniqueness of its *"...taste, softness, seedlessness, easy handling, and a constant level of production, which enable it to satisfy the constant needs of . . . the very young, the old, and the sick"*. But the Court did not base its decision only because of the interchangeability, but also because of the *"cross elasticity demand examination"* that also showed the

banana does not share a single market with fresh fruit. This method, as we have already seen, refers to the extent to which the price of the product is influenced by other products that compete with it. It is determined by looking at the manner in which such influence occurs, if at all. In the United Bananas Case, the bananas only had a certain competence in the summer with the season fruits and in the winter with the oranges, factors that the Court considered to be insufficient to consider bananas in the same market to the rest of fresh fruit. The American courts have implemented the same method as we can see in the *United States v. E.I. duPont de Nemours & Co.*, where the issue was whether the relevant market was cellophane, or all flexible packaging material, applying also the interchangeability and cross elasticity demand systems they achieved their sentence. However, they have gone one step ahead by narrowing the product market into sub-markets: *"to examine the effects of a merger in each such economically significant sub-markets to determine if there is a reasonable probability that the merger will substantially lessen competition"*, this was brought in the Brown Shoe Case, which was decided in the Harvard School time pursuing to keep a balance in the market structures.

As for **geographic market definition**, the Courts have also been active. In the United Bananas Case, the Court decided to exclude the markets of the United Kingdom and France because of its import preferences and to Italy due to its quota restrictions, establishing that the definition of the geographic market depends on the significance of any barriers to intra-Community trade, such as consumer preferences or legal limitations. In the Swayne Case (7) the 9<sup>th</sup> Circuit of the USA Court followed the same criteria by also considering some barriers to entry for the geographic market definition, such as the commercial realities of the industry, the presence of an "effect" on a

market by price disadvantages due to transportation costs, and the presence of an "effect" on the market by the availability of a buyer to supply.

On the other hand, the American Courts have gone further by including in the “effects test” import markets, that is to say that the US Courts amplified their jurisdiction, on competition issues, to foreign undertakings whose performance might affect the American market.

In 1982 this provision was codified in the amendments of the Sherman Antitrust Act and of the Federal Trade Commission Act.

After some years, there was a ruling from the 9<sup>th</sup> Circuit that established certain rules about the amendment, known as the Timberlane Approach (8), it was decided that in order to determine if the effect on the US commerce was substantial enough for extraterritorial jurisdiction there was necessary a “tripartite analysis”.

In 1993, in the Hartford Fire Case, the American Supreme Court of Justice supported this decision by concluding that, an US Federal Court will conduct no extraterritorial jurisdiction, unless it had been proved that the US Law and the Foreign Law are in “true conflict”. All these rulings were implemented in the Antitrust Enforcement Guidelines for International Operations.

These terms are nowadays similar to the ones implemented by the European Competition Authorities, which also considers import markets for the “effects test”.

## 1.2 DOMINANT POSITION

The article 82 of the European Communities Treaty establishes 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 insofar as it may affect trade between Member States...*” however it does not specify what it means with dominant position; therefore the objective of this section will be to define and to study the concept of dominant position.

According to the Practical Guide on the Competition Policy and the Citizen (9), a firm holds a dominant position if its power enables it to operate on the market without taking account of the reaction of its competitors or of intermediate or final consumers.

However the concept is much more complex than that, and this has been shown in numerous cases before the European Court of Justice, which has also defined the concept in several cases, being the first time in 1978 in the United Bananas Case, where the Court found the concept of dominance as follows: “The position of economic strength employed by an undertaking enabling it...to behave to an appreciable extent independently of its competitors and customers and ultimately of its consumers”. In this case, United Bananas was considered to be dominant because of its ability to react to variations in demand at each one of the stages of the production and distribution process, this thanks to its mega structure that allowed them not to be affected by demand changes. In few words, they were capable of planting (they owned the lands), transporting (2/3 of its production by its ships), preparing the product and advertising it (as “Chiquita” brand name).

A year later, in the Hoffman la Roche Case (10), the European Court of Justice dealt with a different subject, in this case the Commission considered the company as dominant because of its size and the volume of turnover that it provided, the Court did not accept that size and turnover alone was enough to determine its dominance arguing that they had had that market size for a long time and that if it was like this it could be due to its capacity to compete, to its efficiency. At the end the Court defined a dominant position as follows: *“...The dominant position...relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its costumers and ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment. ...The existence of a dominant position may derive from several factors which taken separately are not necessarily determinative among these factors a highly important one is the existence of very large market shares”*.

The concept of dominance is not limited to big size market, for instance in the General Motors Case (11), the Commission dealt with a case of exclusive rights, GM was accused of charging excessive prices for granting approvals for manufactured cars in Germany to be used in Belgium. It must be said that this was being carried out under the Belgium legislation and it was only about 5 cars, consequently, the relevant market was the provision of such approved services by GM in Belgium.

The Court denied dominance due to two important reasons, first GM proved its concerning at lowering the mentioned prices after receiving the complaints. And second, the Court established in this case that “...*Any undertaking which holds an exclusive legal right for the performance of a statutory duty, delegated by a State or public authority, is subject in carrying out its duties not to abuse the powers conferred in a way that may enhance other objectives...*” such as rendering less attractive the possibility of parallel imports, as this was the GM case. In conclusion, the dominance is not exclusive of large scale markets, it also may be found in markets that are very narrow and where one undertaking maintains a monopoly or a very strong position which is totally or in a very high degree lessening competition. Another example that can be mentioned is the one of Kodak that even though nowadays has no longer a very strong position in the photo-camera market, it stills sustains, as a result of its Intellectual Property Rights, a quasi-monopoly in the lenses used by high-tech laboratories.

Following a sequence in 1992 in the Hilti Case (12), the Court of First Instance ruled that there is an abuse of a dominant position for a company owning a patent, subject under national legislation to grant a license of right, “...*to demand six times higher than that ultimately awarded by the Controller of Patents, thereby prolonging the proceedings needlessly*”.

In Volvo vs. Eric Veng Ltd Case (13) and in the Renault Case (14), cases related to ownership of intellectual property resulting in a dominant position (registered designs covering a front wing panel for a particular Volvo model and ornamental body panels registered by Renault under the Italian legislation), both Volvo as Renault were refusing to grant a license to other companies to manufacture the above mentioned parts. The Court basically said that if these monopoly rights were implemented legally under the

respective national legislations, the dominance obtained thereby was not alone sufficient to claim a violation to the article 86, (nowadays 82) establishing that a monopoly or a quasi-monopoly could not be challenged by itself but its abuse.

In the Magill Cases , that we will analyze deeper in the chapter of the European Court Resolutions related to our Microsoft case, we can see that the control of a certain market may arise from another national legislation. In these cases, the Copyright Law conferred the BBC and the ITP in the United Kingdom, and the RTE in the Republic of Ireland a total power of the all set of program schedules for radio and television, which allowed them not to permit the use of these schedules to others.

It is important to be known that although there is nothing set in the article 82 of the EC Treaty and the Court has not set a record, in order to be considered dominant, a company has to have a market share of no less than 25%, this in accordance with the Merger Regulation 4064/89, which sets out that a fusion of two companies or more companies can not be created if together they have a market share superior to 25 per cent. Now, in the practice, the lowest market share considered by the Court to be dominant has been 38 per cent, in the British Airways Case in 1999.

Nevertheless, the Commission has allowed mergers at such a extent that the new entity would easily be considered as dominant, as in the Merger between Alcatel and Telettra (1991), in which even the new firm got a new market share of 81% in the first market and of 83% in the second one, the Commission did not considered that merger to create a dominant position because of the monopsony power of the national network operator that was expected to encourage market entry.



In conclusion we can say that there will be a dominant position when an undertaking had a market share of more than 38%, being the undertaking capable of prevent effective competition by having the power to adopt strategies that enable it to overcome competitive attacks, in other words when effective competition is absent.

Therefore we can say that the EC Competition Law is closer to the Harvard School than to the Chicago School.

There are several differences between the concept of a dominant position seen by the EU Competition Law and the USA Antitrust Law. The Sherman Antitrust Act requires that a firm have the ability to control price or to exclude competition to qualify as possessing "monopoly power". Again it is a very simple definition that the USA Courts have had to "develop".

The most important difference may be the way the European Courts and the USA Courts have dealt with the concept. To start we can say that in order to decide if an undertaking has a monopoly power, the American Courts have focused on the undertaking's market share alone and not in the market share from its competitors, as the ECJ did in the United Bananas Case, that is to say that the US Courts have considered market shares as primary determinant of monopoly power.

We can appreciate this "policy" as looking the Alcoa Case (15), where the Judge Learned Hand of the Second Circuit stated that great industrial consolidations are undesirable and that the USA Courts would only tolerate them if they were obtained honestly, saying also that if they were reached through *"superior skill, foresight and industry, then no offence has been*

*committed*". The Court punished Monopoly Power alone because Alcoa had 90% of the Virgin Ingot Aluminum Market. This was a clear example of the Harvard School Approach that as we have seen facilitated less concentrated market structure where economic power is dispersed.

However, due to the arrival of the Chicago School Approach, the "way of ruling" has changed. Nowadays, as established by the Chicago School, they believe that through concentration, economy efficiency is more easily achieved, being a consequence of this, price and cost reduction. Therefore the Courts have, since the middle of the seventies, began to change their minds, as we can see in the *Reiter vs. Sonotome Corporation* Case 1979, where the Supreme Court established that the Sherman Act goal is to provide consumer welfare, and that and that this was best achieved through the economic efficiency (i.e. lower costs and prices) that concentration provides.

This is the reason why, currently the Courts are so permissive regarding market shares, we can say that in contrast with the EC Competition Law; where four years ago was established the minimum percentage as 38% of market share for an undertaking to be considered as dominant; these days in the US Courts an undertaking to be considered in possession of a monopoly power, it would have to have a market share of no less than 70%.

Decisions under the Harvard School Approach are no rendered anymore, unless the market share of a firm gets to a level that due to its high concentration, it virtually retarded free and fair opportunities to its competitors to actually because of barriers to entry.

### **1.3 ABUSE**

Being dominant is not enough in order to be considered as contrary to the Competition Law, there are so many undertakings that are indeed clearly dominant but that are in accordance to the competition rules. Apart from the dominance element, there has to be the “abuse” element, this one is found in the EC treaty in the article 82 (before 86):

“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 insofar 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.”

So, as we can imply from the article it is the abuse that is punished by the Competition rules, the dominant position is only a requirement to implement this article.

Nevertheless the article establishes specific cases where for the definition of “abuse”, the Court has interpreted giving it a wider scope, and nowadays we can consider that the following are abuse cases, as we will see:

1. Refusal to Deal.
2. Discriminatory Pricing.
3. Excessive Pricing.
4. Discounts and Rebates.
5. Abuses by Individual Owners of Intellectual Property Rights.
6. Abuses by Collective Owners of Intellectual Property Rights.
7. Strengthening dominant position by mergers.

One example of refusing to deal as a conduct of “abuse” we find it in the United Bananas, where the abuse consisted in cutting off the supplies to Olesol, the largest importer of “Chiquita” bananas in Denmark, a customer that was a large ripener/distributor. United Bananas argued that their behavior was justified because it was a response to an attitude of Olesol, which after being refused a preferential treatment from Chiquita, provided a better treatment to its competitors. The Court determined this action, even though had the goal of protecting Chiquita’s interests, was unreasonable as it had the effect of increasing the enterprise’s dominance. By ruling so, the Court showed its tendency to favor desconcentration.

Another example of refusal to deal is the Commercial Solvents Case (16), where the accused companies were denying dealing with a third company after it failed its merger negotiations with Istituto Chemioterapeutico, which is a subsidiary of Commercial Solvents. So, in “revenge” these companies increased the price of a chemical product that because of its complexity and

singularity can be obtained only by the accused companies, even their patent is already expired. As a result of these actions the third company saw its business power remarkably decreased, the Commission acted fining the above mentioned companies, which accepted to deal again with that company, the Court supported the Commission performance.

Another reason why United Brands was considered to be abusive is that it was providing different prices in different member states, for example the price of bananas in Belgium was 80% more expensive than the price in Ireland. United Bananas argued that there were different prices because there were different costs (taxation, transportation, etc); however the Court in this case sustained that this pricing practice constituted an obstacle to the freedom of movement of goods (contained in the current article 23 of the EC Treaty) introducing the study of article 23 (ex 9) to the analysis of the abuse definition regarding article 82.

In the Hoffman Case (17) the Court provided a definition for “*abuse*:...the behavior of an undertaking in a dominant position . . . may amount to an abuse if it bestows upon the undertaking a competitive advantage, regardless of whether the conduct emanated from the dominant position.” Answering so to what La Roche argued that was that an abuse is possible only when is the result of a dominance position. In this case the abuse consisted in providing a system of fidelity rebates that was found to be abusive because its price discrimination based on loyalty comprised dissimilar conditions (different prices) to equivalent transactions (same products). The Court also implied on its ruling that article 82’s goal protection is not only to protect consumers but also to protect the structure of an effective competition.

In the Continental Can Case (18) the European Court of Justice established that the list of abuse cases provided by the article 82 of the EC Treaty was not exhaustive adding saying that in the case of a merger by an undertaking also constituted an abuse because it was detrimental to the consumer and because its negative effect to the competition structure “...*would jeopardize the proper functioning of the Common Market.*” Concluding basically that strengthening a dominant position was indeed an abuse.

So, in conclusion we can say that the ECJ has had a “*Harvard School Approach*” on its rulings, and that this is the tendency followed by the Commission.

On the other hand the American Courts have had a tendency for the “*Chicago School Approach*”. That is to say that their only objective is preserving the competition conditions and not protecting competitors as in Europe. It must be reminded that in the beginning the US Courts followed the Harvard School Approach, as we can appreciate in the Alcoa Case, where the judge determined that in order to consider a firm as monopolistic, in accordance with the Sherman Antitrust Act, it must have both, the power to and the intention of monopolizing.

So, based on the Alcoa Case, the American Court interpretations of the term “*monopolize*” required some unlawful monopolizing conduct in addition to monopoly power to support a finding of monopolization. To be considered so, consistent to the Sherman Act, a conduct must amount to predatory conduct implemented to injure the firm’s competitors or involve exclusionary prices that might be deemed to create barriers to entry to the market.

Thereby, it is clear that by caring for the small and medium firms, the American Courts were closer to the Harvard School Approach. Nowadays, their perspective and objective have changed, the US Antitrust Law does not care anymore about protecting competitors, and it is focused in protecting the competition factors. This is of course because they have adopted the Chicago School Approach, and they think that competition needs to ensure the consumer's best option, and as we know, the Chicago Boys are convinced that concentration is good for efficiency and for consumers, therefore, the American Courts have changed their tendency.

However, they have not changed the evaluation of the conduct, what they did is they added two main exceptions to the rule, establishing that such a conduct shall not be prosecuted if it is consistent with a legitimate business purpose and provides economic efficiency. That is why the United Bananas Case (ruled by the ECJ) would have had a different result in the United States, because the Courts of the last country might have said that it fulfilled the requirements of the last exceptions.

For example, a very important difference between the American and the European System is that the first does not consider an abuse when two undertakings with a dominant position merge. Their argument would be that since it will provide economic efficiency, it is in accordance to the antitrust rules. Again, the result of the Continental Case would have been different in the United States.

An important case solved by the Supreme Court of the North American country was the Aspen Skiing Case (19), where the first company owned three of four skiing mountains in Aspen, Colorado, being Highlands the proprietor of the fourth. These firms when making a deal to sale skiing

passes disagreed in a percentage, next thing happening was Aspen Skiing trying to block Highlands business by refusing to deal about a ski pass. The Court ruled that this conduct was unlawful as it was not bringing any economic efficiency and clearly intended to harm a competitor. The Supreme Court remarked that the refusal to deal is allowed, if it was going to bring economic efficiency.

Continuing with the different perspectives, the different geographic price discrimination that we saw in the United Bananas Case would have been solved in a diverse manner by the American Authorities. In essence, Americans do not punish secondary price discrimination, because they do not protect competitors, who would be the damaged ones in this conduct. However it does penalize primary price discrimination, if it was intended to maintain monopolistic power, criteria that still is closer to the Harvard School Approach in my view, but that in my opinion will follow the Chicago School tendency.

Finally, another important difference is the consideration to price differentials from the American Courts and Antitrust Law. Basically, since they consider that reducing prices is beneficial for the consumers, they allow this conduct, and for example the Vitamins Case might have had a different end in that country.

## **1.4 ESSENTIAL FACILITIES**

Essential Facilities Doctrine has its origins in the United States Antitrust Case Law applying the Sherman Antitrust Act from 1890, in the Terminal Railroad Decision of the Supreme Court of Justice in 1912, where a group of railroads companies were controlling the market impeding the entry of any



competitors. The Supreme Court declared the railroads as essential facilities forcing these oligopolistic companies to deal with new competitors about the use of the railroads, doing so in order to allow the entrance of new competitors.

It basically consists of declaring a facility owned by a monopolistic undertaking or by some oligopolistic firms, as essential, obliging it to deal allow its competitors to use it through a deal.

However due to political and economical interests, as we will see, the doctrine is applied exceptionally either in Europe as in the United States.

The European Commission has defined it (20) as: "a facility or infrastructure, without access to which competitors cannot provide services to their customers, and which cannot be replicated by any reasonable means".

The European criterion implemented by the European Commission and by the European Court of Justice has been that in order to declare a facility as essential the next requirements must be met:

- 1) The Facility, an infrastructure or an infrastructure with services must be complementary to an economica activity in a related but separate market, goods and immaterial property may only in exceptional cases be considered. (As the ECJ established in the Magill Case).
- 2) Competitors lack to a realistic ability to duplicate the facility.
- 3) Access to the facility must be necessary in order to compete in the related market.

In the United States of America, four requirements were identified by the Seventh Circuit (21) so that to declare a facility as essential:

- 1) The Facility must be controlled by a monopoly.
- 2) Inability of the competing firms to duplicate the essential facility.
- 3) Denial to use of the facility to the competitors.
- 4) Impossibility to compete in the market by the competitor without having access to the essential facility.

As we can see the American requirements and the European requirements to apply the essential facilities doctrine are almost the same, however these requirements have been applied in a very strict way by both Courts, the European and the American.

In the theory it should be applied only when it would significantly increase competition, and never if incentives for investments decrease because of its application. This is a very important topic because critics to this doctrine attack it arguing that it deprives private property and in some cases, discourages research and development investment.

It must be reminded that physical as immaterial property may be declared essential facilities, however declaring immaterial property, as for example intellectual property rights essential facility is more difficult due to the argument that it will discourage research investments. Therefore, nevertheless there have been cases related to IP rights, these have been a few, and the application has been stricter. And the reasons are evident, calling a railroad or a port an essential facility requires less evidence of one of the requirements: the inability or impossibility to duplicate the facility. If a company X has the property of the Marseille Port, and refuses to deal with competitors using it all for itself in a clear monopoly case, then it will be very easy for a Court to declare that indeed, its competitors can not duplicate a

port that allows them to compete. But if we talk about Microsoft, a clear monopolistic undertaking, and its IP rights, they will always argue that if their intellectual property rights are declared essential facilities they will be discouraged to invest in research and development, but will they? I do not think so, but we will see this in detail in the Microsoft chapter.

The essential facilities doctrine is to be applied when competition is expected to increase considerably having as direct effect the reduction of costs and prices

There are several concepts that are very important when dealing with essential facilities, for example the non-substitutability element of the competing products, which leads us to the concept of the relevant market, concepts that we have already dealt with in the past chapters.

In the definition of essential facilities itself, the concept implies one very important element, the existence of two markets: the downstream and the upstream market. We need to define the first with the purpose of stating if the dominant undertaking and the seeking access undertakings are or not competitors. Then we must define the upstream market, which is the one where the facility lies. The accused undertaking must be in both markets being dominant in the upstream market, where there must be barriers to entry (essential facilities).

As we have mentioned, access to facility must be considered to be essential for the competitor to try to compete in the relevant market. Then the issue comes to what is essential? Probably is one of the most important issues to solve an essential facilities case. Specially regarding the strong negative to apply the doctrine when this application is contrary to the long run efficiency.

The problem has been solved in most of the cases that deal with physical property facilities, but it has not been properly defined in the case of immaterial facilities. In fact this issue remains controversial even up to today, in both European Competition Law and American Antitrust Law.

The first time that the Commission dealt with the Essential Facilities Doctrine was in the Sea Containers Case (22), where it basically established that a firm which owns an essential facility, and which both administers that facility as well as competes in downstream markets using that facility, has a heightened duty to deal on a non-discriminatory basis with downstream competitors. That is to say that an undertaking owning an essential facility can not take advantage of this position to impose disadvantages to competitors, because it is not only the owner of the facility but also the competitor to the others in the upstream market. In the case, Sealink owned a port in Holyhead and a ferry service, and Sea Containers wanted to establish a ferry service from Holyhead to Ireland. Sealink owned the essential facility (the port) and also competed in the upstream market (ferry service), when Sealink was imposing it too many difficulties, this was seen as a clear act to try to distort competition.

As we will see in the ECJ Cases chapter, in the ruling of the Brooner Case solved by the European Court of Justice, we can observe that the Court made it stricter to declare essential facilities, by introducing a new condition: the requirement for the monopolized market to be unable to sustain more than one firm, developing or making stricter the requirement of competitors lacking a realistic ability to enter the market. In other words, the existence of a duopoly must be not possible. One example of this criterion could be observed in the Commercial Solvents Case.

It must be said that the Chicago School and the Harvard School Approaches have influenced a lot the “essential” concept, we only have to remember that essential facilities doctrine must be applied for the welfare of the consumer, and that according to the “Chicago Boys”, concentration is good because it reduces costs, prices and benefits to consumer. As we have already seen the American courts have changed their tendencies in the last decades from the Harvard to the Chicago School Approach.

About the criteria to deal with intellectual property rights as essential facilities in the United States, we have several important cases:

First of all, it must be said that after several cases, the jurisprudence has made it clear that the essential facilities doctrine also applies to Intellectual Property as well as to Intangibles; this can be verified in the Bell South Case (23), where Bell South claimed copyright protection over some telephone listings, which were declared at the end as essential facilities.

Also it is important to remark that according to recent cases Intellectual Property Rights do not shield a monopolistic from antitrust liability for refusal to deal in an essential facility. This was obtained from cases such as the Image Technical Services Inc. Case (24), in which the Court was faced with confronting two principles: the first establishing that patents nor copyrights holders are immune from antitrust liability against the principle which institutes that patent and copyright holders may refuse to sell or to license protected work.

After confronting both reasonings, the Court concluded that Intellectual Property protection provided only a *“presumptively valid business justification”* for unilateral refusal to deal. *“a firm can be subject to antitrust*

*liability for refusal to deal in protected intellectual property where the presumption of valid reason not to license was rebutted by evidence of anticompetitive intent.”*

This reasoning was supported by the Court of Appeals for the Federal Circuit in the Intergraph Case (25), where the Court concluded that essential facilities could be declared in the case of a refusal of an intellectual property owner to license or to sell its work, only if this refusal is demonstrated to be an anticompetitive intent.

As for the American Antitrust Authorities, the current criterion goes in the same way to the one of the Court. This an extract of a Guidelines of the Commission (26): “If a patent or other form of intellectual property does confer market power, that market power does not by itself offend the antitrust laws... As in other antitrust contexts, however, market power could be illegally acquired or maintained, or even if lawfully acquired or maintained, would be relevant to the ability of an intellectual property owner to harm competition through unreasonable conduct in connection with such property.

## **1.5 MICROSOFT USA ANTITRUST CASE**

The Microsoft Antitrust case in the United States began in 1998 when the United States (the federation) and eighteen American states filed a lawsuit against the firm under the Sherman Act arguing the following violations:

- 1) Unlawful exclusive dealing arrangements.
- 2) Unlawful tying of Microsoft Internet Explorer Web browser to its Windows 95 and 98's operative system.

- 3) Unlawful maintenance of a monopoly in the market for PC operative systems.
- 4) Unlawful attempted monopolization of the Web Browser.
- 5) Plus other violations in various states.

On April the 3<sup>rd</sup> 2000, the United States District court for the District of Columbia found Microsoft liable on section 1 (tying) and section 2 (monopoly maintenance and attempted monopolization), founding as well insufficient evidence to support the violation of exclusive dealing.

The June the 7<sup>th</sup> of the same year, an interim restriction on Microsoft's commercial behavior was given. The District Court ordered approving plaintiffs proposed remedies. Microsoft appealed to such decision and on June the 28<sup>th</sup> 2001 the Court of Appeal had the next findings:

- 1) Microsoft had acted illegally protecting its monopoly (supporting the District Court's decision).
- 2) Microsoft had not illegally monopolized the Web Browser (against the District Court's decision).
- 3) The issue of whether Microsoft had illegally tied its dominant PC operative system with its web browser was sent back to the District Court for reconsideration.
- 4) Same thing happened with the issue about if the remedy imposed to Microsoft was appropriate or not.

On November the 2<sup>nd</sup> 2001, the United States (as a federation) reached an agreement with Microsoft. Seven days after (the 9<sup>th</sup>) nine states also signed it.

On November the first 2002, the United States District Court achieved a judgment adopting the settlement and rejecting the remedy proposals suggested by the nine non-settling states.

Massachusetts (one of the nine non-settling states) appealed this judgment and the resolution of this is still pending.

The agreement consisted of:

It must be said that the complaint began with the Clinton administration ended up in a very difficult time, economically speaking, for the Bush regime. Then it is very likely that even the District Attorneys had good opportunities to win a case, the Bush administration ordered its District Attorneys to withdraw accepting a deal in order to avoid a decision that would have divided Microsoft in at least two companies, or that would have declared much of Microsoft's Intellectual Property as essential facilities. This would have meant "weakening" the strongest company in the United States in an economical crisis time for this country, reason for which I think Mr. Bush followed the Chicago School Doctrine and preferred a world wide strong paying high taxes company.

However, up to now the situation is not clear for Microsoft in the United States. There are still many people, including the Massachusetts State, who think that the Giant is a danger for the consumer welfare and who will keep on fighting against it.

The question is what will happen in the European Union, will the European Commission and the European Court of Justice follow the same criteria? And how political will this decision be?



## **CHAPTER 2: MICROSOFT AND THE EU INSTITUTIONS**

### **2.1 ECJ CASES**

#### **2.1.A MAGILL CASE**

Appellants Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) vs. Commission Joined Cases C-241/91 P and C-242/91P (27).

This case is relevant for the current analysis because for the first time the ECJ imposed of a compulsory license on IP owners (copyrights).

The infringement comprised the exercise (by television broadcasters) of their exclusive rights under national copyright laws to prevent potential publishers of weekly television guides from copying their copyrighted weekly television guides. As doing this, the IP owners prevented potential competitors from entering the market of weekly television guides within Ireland and North Ireland.

Essentially, the facts were the next: Magill Ltd wanted to create a weekly television guide, RTE, ITP and BBC blocked Magill's attempt by not allowing Magill to use their programming, arguing copyrights protection. Magill complained to the Commission, which found RTE, ITP and BBC on a breach to article 86 of the EC Treaty (82 currently) ordering them to stop the breach "by supplying . . . third parties on request and on a non-discriminatory basis with their individual advance weekly programme listings and by permitting reproduction of those listings by such parties". RTE, ITP and BBC fought

along with IPO (Intellectual Property Owners, Inc.) the decision before the Court of First Instance, which stood by the Commission's decision. RTE and ITP appealed before the European Court of Justice, which established that even a mere ownership of intellectual property rights cannot confer a dominant position, as the appellants had indeed a monopoly of the listings, "The appellants are thus in a position to prevent effective competition on the market in weekly television magazines". The Court also determined that "the arguments of appellants and IPO wrongly presuppose that where the conduct of an undertaking in a dominant position consists of the exercise of a right classified by national law as "copyright", such conduct can never be reviewed in relation to Article 86 of the treaty", finding that "Refusal to grant a license, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position". "However, it is also clear . . . that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct". In summary, the European Court of Justice agreed with the Court of First Instance establishing that:

1. There was "no actual or potential substitute" for the weekly television listings published by the appellants. Appellants were "the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide. Appellant's refusal to provide the information "prevented the appearance of new products... Such refusal constitutes an abuse" under article 86.

2. "There was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines."

3. Appellants thus monopolized "the secondary market of weekly television guides by excluding all competition in that market since they denied access to the basic information, which is the raw material indispensable for the compilation of such a guide."

As a consequence of the content of this judgment, the standards to consider if a IP owner could abuse of its dominant position as refusing to license them, changed.

### **2.1.B BRONNER CASE**

In the same context the "Oscar Bronner Case" (28) is vital because in it, it is the continuation of Magill in the sense of setting standards for our topic. In its judgment of 26 November 1998, the Court clarified the way in which the principles established in Magill Case apply to the refusal by a dominant undertaking to grant access to a facility, which it controls, or to license its intellectual property rights.

In the Bronner Case the Court dealt with a national newspaper publisher with above 40% of the Austrian newspaper market, which had refused to give access to its nationwide home delivery service to a competing newspaper with about 6% of the market against payment of a reasonable fee. And its judgement shows that Magill had very exceptional features, confirming that IP owner's refusal to license their IP rights can be considered as an abuse only when certain criteria are met. Fundamentally, the Court found that for an infringement of Article 86 to be established in reliance on Magill, it would have to be shown that:

1) The refusal of access to the Mediaprint delivery service was likely to eliminate all competition in the Austrian daily newspaper market on the part of Bronner;

- 2) The refusal could not be objectively justified; and
- 3) The service in itself was indispensable to carrying on Bronner's business because there was no actual or potential substitute in existence for Mediaprint's home delivery scheme.

Thus, the most important of this case is to remark that the Court found that Magill the following exceptional circumstances had arisen:

- 1) The refusal had concerned a product (information on the weekly schedules of certain television channels) the supply of which was indispensable for carrying on a rival business (the publishing of a comprehensive television guide giving programming information on several television channels);
- 2) Without that information, the person wishing to produce a comprehensive television guide found it impossible to publish and offer the guide for sale (paragraph 53).
- 3) The refusal had prevented the appearance of a new product (the comprehensive tv guide) for which there was potential consumer demand (paragraph 54);
- 4) The refusal was not justified by objective considerations (paragraph 55); and this was a reference to the European Court of Justice under Article 177 of the EC Treaty from the Austrian court of first instance in competition matters. The proceedings before the Austrian court concerned a claim under the Austrian competition law provision which is modelled on Article 86 of the EC Treaty.

## **2.1.C IMS CASE**

On April 29<sup>th</sup> of this year, the European Court of Justice pronounced a judgement (29), which might have a direct effect in the Microsoft's Case.

IMS is a company that compiles interprets and sells medical prescription and sales information for pharmaceutical products in Germany, its presentation and analysis is based on a brick structure, which combines geographical parameters with structural factors. Basically NDC wants to use IMS's structure, in fact they did use it, resulting a lawsuit of IMS against NDC. Therefore NDC offered to pay a reasonable fee for using the mentioned structure, to which IMS refused, having as a result a complaint of NDC to the European Commission. The Commission ruled against IMS ordering them in an interim measure to license its IP rights to NDC. Then the Court of First Instance ruled in opposition to the Commission, suspending its decision. NDC appealed to this decision before the ECJ, which just ruled that there must be three "exceptional circumstances" that must be met in order to consider a dominant undertaking as abusing of its dominant position for refusing to license copyrighted material to competitors.

The three "exceptional circumstances (30) are the following:

- 1) If the refusal prevents the emergence of a new product or service for which there is a potential demand;
- 2) If it has no "objective justification";
- 3) If the license was so indispensable that withholding it could eliminate all competition in the relevant market.

It must be said that the Court basically followed the opinion of Advocate General Tizzano (31), who had concluded that “if an intellectual property right holder in a dominant position in a secondary market refuses to grant a licence to a third party this constitutes abuse where:

- 1) There is no objective justification for such a refusal;
- 2) The third party’s use of the intellectual property is indispensable for it to operate on the secondary market;
- 3) The refusal of licences eliminates all other competition in that market;
- 4) The product to be offered by the third party has different characteristics to the product of the right holder;
- 5) The third party product meets a need in the market which is unsatisfied.”

As we can appreciate the first three requirements set by the Antonio Tizzano are similar to the ones established by the Court, which is just a reminder of the transcendence of the opinion of the Advocate General in the decisions emitted by European Court of Justice.

Both Microsoft and the Commission think this ruling can benefit them, the Commission said through Amelia Torres (32) that she believed that the requirements established in the IMS Case “*have been met, too, in the Microsoft Case*”; on the other hand there was a statement by Microsoft establishing that: “*We do not believe that the Commission’s case meets with the strict criteria laid out by the Court*”.

Essentially, Microsoft is arguing that its case does not meet the imposed requirement mentioned in the IMS: The refusal to be considered as it breaches EC Competition Law must be “...capable of eliminating all competition of the relevant market...”

According to Microsoft, since its competitors have successful products in the relevant market, it is evidenced that its refusal is not eliminating “all” competition; argument which might be qualified as ironic because 95% of the PC’s of the world run on Windows.

## **2.2 THE COMPLAINT**

On December 10<sup>th</sup> 1998 Sun Microsystems (33) complained before the European Commission of Microsoft (34), specifically Sun argued that Microsoft was abusing its dominant position on the PC operating systems market by refusing to provide information necessary for Sun Microsystems to be able to create products that would “match” the Windows PCs and therefore to compete on equal circumstances in the market of group server operating systems, alleging that these conducts were infringements of the article 82 of the EC Treaty. The complaint was registered as Case IV/C-3/37.345.

However, it must be remarked that in February 2000 the European Commission decided itself to enlarge the investigation to study the effects on the tying of Microsoft’s Windows Media Player with the Microsoft’s Windows 2000 PC Operating Systems. This investigation was registered as the Case COMP/C-3/37.792.

## **2.3 THE INVESTIGATION**

According to article 3 of Regulation 17, the Commission initiated proceedings against Microsoft.

On August the 1<sup>st</sup> 2000, the Commission sent to Microsoft its First Statement of Objections, which comprised basically the interoperability issues set up by the Sun Microsystems's complaint. Microsoft responded to it on November 17<sup>th</sup>, 2000.

On August 30, 2001, the Commission emitted its Second Statement of Objections that dealt with the incorporation of Windows Media Player in Windows 2000 (issue that the Commission investigated by its own initiative). On November 16<sup>th</sup>, 2001 Microsoft responded to this second statement.

Microsoft submitted in both of its responses a survey (for the second statement) and statements of 46 customers supporting its objections to the issues of interoperability and incorporation of Media Player to Windows 2000.

From April to June 2003, the 2003 market inquiry took place. It implied two questionnaires to more than 100 companies, which were requested information under the article 11 of the Regulation 17. Because of the findings of these questionnaires, on August 6<sup>th</sup>, 2003, there was a supplementary statement of objections emitted by the Commission, in which it refined and consolidated its arguments established on the first and second statement of objections. On October 17<sup>th</sup>, 2003, Microsoft replied to this new statement of objections; submitting its material at the end of the same month, which contained two surveys (made by Mercer Management Consulting).



Microsoft requested an oral hearing, which was granted by the Commission taking place on November 12-14 2003. Basically during this hearing, where Sun Microsystems and Linux also participated, it was proved that Windows Media Player could easily exist without being incorporated to Windows 2000, and that the functioning of Windows or of its Media Player was not to be affected if they were apart, tearing down Microsoft's principal argument.

Microsoft had access to its file 5 occasions during the investigation: August 28<sup>th</sup>, 2000.

September 14<sup>th</sup>, 2001.

February 14<sup>th</sup>, 2002.

December 6<sup>th</sup>, 2002.

August 7-8, 2003.

January 16<sup>th</sup>, 2004.

On January 16<sup>th</sup>, 2004, the Commission sent a communication to Microsoft inviting it to present its conclusions. On February 7<sup>th</sup> of this year Microsoft did so.

## **2.4 NEGOTIATIONS**

Microsoft tried to achieve a deal with the European Commission in order to avoid any sanction, basically the giant undertaking offered to supply all EU countries with free software licenses; however the Commission did not accept this ironic offer that would "help" Microsoft to increase its dominance considering that all EU countries governments would use Microsoft's software, which would be in my opinion an insult for complainant Linux,

which is used only in the government offices from France and recently Germany.

Microsoft also announced on December the third, 2003 (35) a new policy on Intellectual Property: “In response to the need of customers and business partners for greater access to technology, Microsoft today announced an updated policy on intellectual property (IP) that will clearly articulate Microsoft's position on licensing IP. Microsoft already leads the technology industry in investment in research and development, and the new IP policy makes Microsoft technology even more accessible, providing opportunities for expanded innovation across the industry. In addition to increased technology access, Microsoft will license IP to interested parties in a commercially reasonable fashion under terms standard in the industry”. The following is a statement of Marshall Phelps, Corporate Vice President and Deputy General Counsel, Intellectual Property responding the next question: What IP will you license under this policy?

“We want to convey that Microsoft is open for business when it comes to IP licensing. In the past, we readily admit that our IP approach was much more closely held and less structured. In retrospect, we realize that our approach caused frustration and confusion for the industry and for our customers. Microsoft's new IP policy embraces an approach that is intended to increase access for reasonable licensing requests.

Microsoft's highest priorities and commitments are the ones that involve our industry, partners and our customers. Microsoft considers the new IP policy a viable means for continuing fair and balanced practices for licensing our IP where it makes sense for our customers, our industry partners, and for Microsoft.”

There is no coincidence in this new “policy” being released just a month before the European Commission was to decide Microsoft’s Case, it was a clear attempt to demonstrate “good will”, in the United States Microsoft’s offer to provide free software might have been successful, but it did not work in the European Union, where Mr. Mario Monti firmly rejected it, what the Commissioner wanted was Microsoft to reveal all the software code that competitors would need in order to make a server system as compatible with Windows as Microsoft’s own server software.

## **2.5 COMMISSION DECISION (36)**

Microsoft’s arguments to defend its posture were basically the following:

- First they kept on affirming that Microsoft’s innocence establishing that Microsoft has not infringed any provision of the EC treaty.
- Secondly the giant firm stated that by considering Microsoft’s refusal to supply and its tying issue as abuses, the Commission is applying “new rule of law”.
- Thirdly Microsoft says that the “novel theories of liability” are not “apparent” to Microsoft or any software business.
- Finally the immense undertaking claimed that since its multimedia playback function has been integrated to Windows since 1992, there is no convincing element to say that the abuse started in 1999.

The Commission responded as follows to those arguments:

- To the first argument, the Commission answered that they have enough evidence to sustain Microsoft's infringement of article 82 of the EC Treaty and 54 of the EEA Agreement.
- As for the second argument, the Commission claimed that they are definitely not applying any "new rule of law", adding that refusal to supply has already been punished by the European Court of Justice in the Commercial Solvents, Telemarketing and Magill Cases. As for the tying abuse they offered as evidence the Hilti and the Tetrapack Cases.
- In response to the firm's third argument the Commission made it clear that there are not any novel concepts of competition law, and that the software industry is not exempted from applications of Competition Law.
- For the last undertaking's argument the Commission replied that the only effect that this might have to the present case is to consider the amount of the fine, and since it is considering a late date for the beginning of the abuse, this cause no damage to Microsoft, on the contrary it even benefits the undertaking. Besides, it is irrelevant for imposing or not the fine.

Subsequent to the investigation, the European Commission achieved the next conclusions:

- In order to apply a fine, the Commission must take in account the nature of the infringement, the actual impact on the market and the size of relevant geographic market.

- The nature of infringement consists of two different abuses: a refusal to supply (Sun Microsystems Complaint) and the tying of Windows Media Player to Windows.
- Microsoft possesses a dominant position in the PC operating systems market, as holding above 90% of the market share, considering the client PC operating system market, therefore accomplishing to demonstrate with the first element of article 82 (dominance).
- Microsoft has abused of its dominant position in two different ways:
  - 1) *“As regards the refusal to supply abuse, Microsoft has engaged in a general pattern of conduct which focuses on the creation and sole exploitation of a range of privileged connections between its dominant client PC operating system and its work group server operating system, and on the disruption of previous levels of interoperability. The interoperability information at stake is indispensable for competitors to be able to viably compete in the work group server operating system market. Microsoft’s abuse enables it to extend its dominant position to the market for work group server operating systems”.* The Commission also established that the effects of the refusal to supply seem mostly detrimental to competition law, because by refusing Microsoft is enlarging the barriers to entry to the client PC operating systems market, favouring its mentioned dominance. In this conclusion we can appreciate that the Commission is not for the Chicago School Approach, and that they made it clear that no IP rights owners can refuse licensing in order to eliminate competition, because by doing so they are eliminating competition which is not good for consumers, who are the “protected” person of competition law. To achieve this conclusion they had to put in a balance the right that an IP owner has to license or not his IP rights against the rules of competition law.

2) As for the second abuse, the tying of Windows Media Player to Windows, the Commission basically established that this was against competition law because Microsoft's tying conduct ensures that its media player shares the ubiquity of its client PC operating system, stating that this behaviour complies negative effects regarding competition law, such as discouraging competitors that as a matter of fact have launched media players which are similar or of a better quality to Microsoft's media player, therefore it can be said that this conduct is affecting consumers. The Commission even says that: *"Microsoft's strategy could lead to a situation where any company wishing to sell (audio or video) in digital form, in a secure way, would need to pay a toll to Microsoft"*.

- The Commission affirmed that the mentioned abuses have contributed to Microsoft becoming dominant in the client PC operating system market and to Microsoft obtaining a leader position in the Media Player market.
- As for the size of the relevant geographic market, for the purpose of the fine, the Commission established all the Europe Economic Area countries.
- For the gravity, the Commission simply considered that because of the said abuses Microsoft has become almost a monopoly in the operating systems market and a prominent leader in the media player market; eliminating competition and with an evident risk to eliminate its competitors even though their products may have a similar or even higher quality. The Commission also considered Microsoft's economical power.

- Regarding the duration of the abuses, the Commission established October 1998 as for the beginning of the refusal to supply abuse and May 1999 for the starting of the tying abuse.
- The Commission did not find any aggravating or attenuating circumstances.
- Therefore, the Commission decided to impose Microsoft a fine of EUR 497,196,304. The highest fine ever applied by the European Commission.

However, due to Microsoft's economical power, this fine is not what worries the undertaking the most. Microsoft is concerned because of the obligations imposed. Those duties are the next:

- Regarding the abuse consistent of the refusal to supply, Microsoft must make its interoperability information available to any undertaking with an interest in either developing or distributing work group server operating systems products. This must be made on reasonable and non-discriminatory terms. To accomplish this obligation Microsoft counts with 120 days and with 60 to propose the Commission an appropriate measure.
- As for the tying abuse, Microsoft is condemned to offer its Windows without its Windows Media Player integrated. They can offer this last one, but separately. For this duty, Microsoft has a time of 90 days after the notification of the decision.

The next is the original decision taken by the on March 24<sup>th</sup> 2004, (37):

*"Article 1*

*For the purpose of this Decision, the following definitions shall apply:*

(1) the term Interoperability Information means the complete and accurate specifications for all the Protocols implemented in Windows Work Group Server Operating Systems and that are used by Windows Work Group Servers to deliver file and print services and group and user administration services, including the Windows Domain Controller services, Active Directory services and Group Policy services, to Windows Work Group Networks;

(2) the term Protocol means a set of rules of interconnection and interaction between various instances of Windows Work Group Server Operating Systems and Windows Client PC Operating Systems running on different computers in a Windows Work Group Network;

(3) the term Timely Manner with respect to disclosure of protocol specifications means as soon as Microsoft Corporation has developed a working and sufficiently stable implementation of these specifications; by way of illustration, for protocols supported in a service pack or in a new version of a product, Timely Manner means as soon as the service pack or the new version is made available outside Microsoft Corporation for beta testing purposes;

(4) the term Windows Client PC means a PC connected to a network and on which a Windows Client PC Operating System is installed;

(5) the term Windows Client PC Operating System means any of the software products marketed by Microsoft Corporation as Windows 98, Windows 98 Second Edition, Windows Millennium edition, Windows NT Workstation 4.0, Windows 2000 Professional, Windows XP Home and Windows XP Professional, and updates (including, without limitation, security patches), upgrades and successors to the latter, as well as updates and upgrades of such successors;

(6) the term Windows Media Player means the media code which Microsoft Corporation currently distributes as WMP in Windows XP



*Embedded (thus including components that support the Windows Media codecs, Windows Media file formats, WMDRM and the WMP User Interface); for future versions of the Windows Client PC Operating System, the term Windows Media Player shall cover the foregoing components;*

*(7) the term Windows Work Group Network means any group of Windows Client PCs and Windows Work Group Servers linked together via a computer network;*

*(8) the term Windows Work Group Server means a computer connected to a network and on which a Windows Work Group Server Operating System is installed;*

*(9) the term Windows Work Group Server Operating System means any of the software products marketed by Microsoft Corporation as Windows NT Server 4.0, Windows 2000 Server and Windows Server 2003 Standard Edition, and updates (including, without limitation, security patches), upgrades and successors to the latter, as well as updates and upgrades to such successors.*

## *Article 2*

*Microsoft Corporation has infringed Article 82 of the Treaty and Article 54 of the EEA Agreement by:*

*(a) refusing to supply the Interoperability Information and allow its use for the purpose of developing and distributing work group server operating system products, from October 1998 until the date of this Decision;*

*(b) making the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player from May 1999 until the date of this Decision.*

## *Article 3*

*For the infringement referred to in Article 2, a fine of EUR 497,196,304 is imposed on Microsoft Corporation.*

*The fine shall be paid, within 3 months of the date of notification of this Decision, into Bank account No 001-3953713-69 (Code SWIFT GEBABEBB, Code IBAN BE71 0013 9537 1369) of the European Commission with FORTIS Bank, Rue Montagne du Parc 3, 1000 Brussels.*

*After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision was adopted, plus 3.5 percentage points, namely 5.50%.*

#### *Article 4*

*Microsoft Corporation shall bring to an end the infringement referred to in Article 2 in accordance with Articles 5 and 6.*

*Microsoft Corporation shall refrain from repeating any act or conduct described in Article 2 and from any act or conduct having the same or equivalent object or effect.*

#### *Article 5*

*As regards the abuse referred to in Article 2 (a):*

*(a) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, make the Interoperability Information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, unreasonable and non-discriminatory terms, allow the use of the Interoperability Information by such undertakings for the purpose of developing and distributing work group server operating system products;*

*(b) Microsoft Corporation shall ensure that the Interoperability Information made available is kept updated on an ongoing basis and in a Timely Manner;*

*(c) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope*

and terms of use of the Interoperability Information; as regards this evaluation mechanism, Microsoft Corporation may impose reasonable and non-discriminatory conditions to ensure that access to the Interoperability Information is granted for evaluation purposes only;

(d) Microsoft Corporation shall, within 60 days of the date of notification of this Decision, communicate to the Commission all the measures that it intends to take under points (a), (b) and (c); that communication shall be sufficiently detailed to enable the Commission to make a preliminary assessment as to whether the said measures will ensure effective compliance with the Decision; in particular, Microsoft Corporation shall outline in detail the terms under which it will allow the use of the Interoperability Information;

(e) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, communicate to the Commission all the measures that it has taken under points (a), (b) and (c).

#### Article 6

As regards the abuse referred to in Article 2 (b):

(a) Microsoft Corporation shall, within 90 days of the date of notification of this Decision, offer a full-functioning version of the Windows Client PC Operating System which does not incorporate Windows Media Player; Microsoft Corporation retains the right to offer a bundle of the Windows Client PC Operating System and Windows Media Player;

(b) Microsoft Corporation shall within 90 days of the date of notification of this Decision communicate to the Commission all the measures it has taken to implement point (a).

#### Article 7

Within 30 days of the date of notification of this Decision, Microsoft Corporation shall submit a proposal to the Commission for the establishment of a suitable mechanism assisting the Commission in monitoring Microsoft

*Corporation's compliance with this Decision. That mechanism shall include a monitoring trustee who shall be independent from Microsoft Corporation.*

In case the Commission considers Microsoft Corporation's proposed monitoring mechanism not suitable it retains the right to impose such a mechanism by way of a decision.

*Article 8*

*The Commission may at its sole discretion and upon a reasoned and timely request by Microsoft Corporation grant an extension of the various time limits provided for in Articles 5 and 6.*

*Article 9*

*This Decision is addressed to Microsoft Corporation, One Microsoft Way, Redmond, WA 98052, United States.*

*This Decision shall be enforceable pursuant to Article 256 of the EC Treaty and Article 110 of the EEA Agreement.*

*Done at Brussels, 24.03.2004*

*For the Commission*

*Mario MONTI*

*Member of the Commission"*

The most relevant of this decision is definitely not the imposed fine, which is just a message expressing the Commission's posture against Microsoft's behaviour, fine that can be easily paid by the Giant Enterprise. The transcendental part of the decision are the remedies imposed, because they could really weaken the Giant, or in other words, they could really provide its competitors of an opportunity to truly compete Microsoft's market. I think the remedies are appropriate because they really represent a "danger" for Microsoft business, and a chance for the other players, which would result in better quality products. Unfortunately, Microsoft has become a danger for consumers and something has to be done.

## **CONCLUSION**

Unmistakably Microsoft has been enjoying of a dominant position in the operating systems market, a 90% market share makes it very clear, thus the “controversial issue” at the moment is only whether Microsoft has or has not committed “abuse”, and this is what the coming stage of the Microsoft Case will be about.

In my opinion it is evident that Microsoft has abused of its dominant position and plus, it is crystal that its behaviour has harmed and is harming consumers. Microsoft’s Windows Operating System is in at least 9 of each 10 computers of the world, in accordance to the “Chicago School” this concentration is supposed to be good for consumers, however we are getting used to listen about the “errors” of the “new” Windows after it has been released. On the other hand even in front of the Commission, Microsoft’s competitors have proved that their products are more efficient, so, where is the welfare for consumers? I totally support the responsible attitude of the European Commission, which has faced the problem and is willing to do what it is best for consumers, on the other hand it is quite clear that in the United States the American Competition Authorities were told not to sanction, I think Microsoft was lucky to deal in the middle of an economic crisis. However I think American Authorities, by dealing with Microsoft, did not do the best for consumers. Anyway due to a globalising world today the European Authorities are in a position to remedy their American Colleagues not-action.

Microsoft’s Windows Operating Systems must be shared with the competitors wishing to compete in the market not because we do not want to protect IP rights, we want to protect them, but because we want the best for consumers. I totally agree that IP rights protection must be enforced and

expanded, otherwise R&D would not be encouraged, however when this IP rights provide of a dominant position and an abuse of it, which not only hurts competition but also harms consumer welfare, then this welfare has to be more valuable than IP rights protection.

It is obvious that for obliging an IP rights owner to license its rights, certain requirements must be met, still in this case, it is clear that Microsoft's refusal to supply is preventing its competitors to create new products for which there is a huge demand, nowadays operating systems are a tool for almost everything; it is also obvious that Microsoft's refusal to license is eliminating almost all competition in the market, and finally the refusal has not been objectively justified, its anti-sharing IP is more than well known. Therefore I think that if Microsoft goes before the European Court against the Commission, it is to lose its trial.

Thus, Microsoft's operating system must be declared an essential facility, Microsoft is the only company that really knows how its operating system works and the unique enterprise that can arbitrarily change how that operating system works. We can no longer wait for the next Windows to be released and then wait for its errors to be published by the same Microsoft, it is not only harming but insulting consumers. The European Competition Authorities and the European Court of Justice must do the best for consumers, specially considering the tremendous importance of the market, which affects almost every productive sector in the world and education at all levels, not to mention entertainment. In other words it is a market that implies a huge responsibility, which has not been well managed by Microsoft. Not to forget that a ruling against this undertaking would also be a very important message for big monopolies: either you do what is best for consumers or you will be punished.

## END NOTES

(1) See the website [http://europa.eu.int/rapid/start/cgi/questen.ksh?p\\_action.gettxt=gt&doc=IP/04/382|0|RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/questen.ksh?p_action.gettxt=gt&doc=IP/04/382|0|RAPID&lg=EN)

(2) See the website [http://europa.eu.int/comm/competition/antitrust/relevma\\_en.html](http://europa.eu.int/comm/competition/antitrust/relevma_en.html), published in the Official Journal: OJ C 372 on 9/12/1997.

(3) Published by the Commission on September the 9<sup>th</sup> in 1991.

(4) Published in the Official Journal: OJ C 372 on 9/12/1997.

(5) Notes of Professor of Economics of Competition Law Thierry Sebaugh, lecturing at the University d'Aix-Marseille 3 within the LLM in European Business Law.

(6) United Bananas Case (1978) I CMLR 486, 487

(7) Swayne Co. v. Sunkist Growers, Inc. 1966.

(8) Timberlane Lumber Co. vs. Bank of America Case.

(9) Published by the European Commission in 2003.

(10) Case 85/76, better known as the "Vitamins Case".

(11) Case 26/75 of the ECJ.

(12) Case 30/89 of the ECJ.

(13) Case 238/87 of the ECJ.

(14) Case 53/87 of the ECJ.

(15) USA vs. Aluminium Corporation of America 1945.

(16) Istituto Chemioterapeutico Italiano and Commercial Solvents Corporation vs. Commission, Cases 6 and 7/73.

(17) Hoffman-La Roche Case 85/76

(18) Europemballage and Continental Can v. Commission 6/72, ruled in 1973.

(19) Aspen Skiing Co. vs. Aspen Highlands Skiing Corporation.

(20) Commission Decision IV/34.174 within the Sealink /B & I-Holyhead, in 1992.

(21) MCI Communications Corporation vs. AT&T Case.

(22) Sea Containers Casev. Stena Sealink.



(23) Bell South Adver. & Public. Corp. v. Donelly Info Public. Inc. ruled by the 11th Circuit in 1994.

(24) Image Technical Services Inc. v. Eastman Kodak Co., ruling dictated by the 9<sup>th</sup> Circuit in 1997.

(25) Intergraph Corp. v Intel Corp. Case, 1999.

(26) Department of Justice and the Federal Trade Commission's 1995 Guidelines for the Licensing of Intellectual Property.

(27) <http://www.curia.eu>

(28) <http://www.curia.eu>

(29) IMS <http://curia.eu.int/en/actu/calendriers/index.htm> Press Release No. 32/04, April 29 2004 Judgment of the Court of Justice in Case C-418/01.

(30) See page 15 of the International Herald Tribune of Friday, April 30 – Sunday, May 2, 2004.

(31) See the website [http://pharmalicensing.com/features/disp/1067456033\\_3fa0162198382](http://pharmalicensing.com/features/disp/1067456033_3fa0162198382)

(32) See page 15 of the International Herald Tribune of Friday, April 30 – Sunday, May 2, 2004.

(33) An American company based in Palo Alto California, with presence in all EU countries that provides network computing infrastructure solutions that comprise computer systems (hardware and software), network storage systems (hardware and software), support services and professional and educational services.

(34) A company based in Redmond, state of Washington, USA, with presence in all EU countries that manufactures, licenses and supports a wide variety of software products for many computing devices.

(35) See the website <http://www.microsoft.com/presspass/contactpr.asp>.

(36) Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) [www.europa.eu](http://www.europa.eu)

(37) See paragraphs 298-301 of the Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) [www.europa.eu](http://www.europa.eu)

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