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The Court of First Instance's *Microsoft* decision[1] provided the Court with an opportunity to express its views on several aspects of the current debate on the interpretation of Article 82 of the EC Treaty.

In this short note, we will focus on the "refusal to deal" part of the decision to derive some conclusions on the advisability and the possibility for the European Commission to adopt guidelines on the enforcement of Article 82. These same conclusions would have been reached if we had focused on the "tying" part of the decision.

In particular, the conditions under which a dominant firm could refuse to deal with potential competitors have been debated in the context of the discussion on the modernization of the interpretation of Article 82.

The EAGCP report stated that:

> [E]ven if a refusal to deal harms consumers in the short-run, it may be socially beneficial in the long-run. If the bottleneck is the result of investment or

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[1] Case T-201/04, Microsoft v. Commission, [2007] 5 C.M.L.R. 846 [hereinafter *Decision*].

> innovation activities of the dominant firm then forcing the firm to give its competitors access to the bottleneck […] may reduce the incentives to innovate.
>
> […]
>
> If the bottleneck is due to an intellectual property right, the competition authorities should be particularly reluctant to interfere.[2]

Following this report, economists have proposed a variety of tests to assess the anticompetitive nature of dominant position exclusionary practices. Depending on which test they use (e.g., the profit sacrifice test, the no economic sense test, the equally efficient test, the consumer surplus test, or the Elhauge test), competition authorities are likely to arrive at different decision about the legality of a given practice. Unfortunately, economists do not necessarily agree on which test should be used for which practice.

Because the use of different tests may lead to different conclusions about the legality of practices, some commentators have suggested that the Commission should let it be known which standard it will use. The EAGCP report stated:

> [T]he competition authority should have clear guidelines for the assessment of refusal-to-deal cases, providing well-specified standards by which to compare exclusionary concerns and concerns about returns on investments.[3]

Following the EAGCP report, the European Commission has issued a discussion paper on the application of Article 82 of the Treaty to exclusionary abuses.[4] This paper

[2] Jordi Gual et al., Report by the EAGCP, An economic approach to Article 82 44 (Jul. 2005) (on file with European Commission, DG Competition) [hereinafter EAGCP report], *available at* http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.

[3] *Id.* at 46.

[4] EUROPEAN COMMISSION, DG COMPETITION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (2005), *available at* http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

states that normally five conditions have to be fulfilled in order for a refusal to start supplying to be abusive:

1. the behavior can be properly characterized as a refusal to supply;
2. the refusing undertaking is dominant;
3. the input is indispensable;
4. the refusal is likely to have a negative effect on competition; and
5. the refusal is not objectively justified.

With respect to the third condition, the discussion paper states that:

> In the case of IPRs [intellectual property rights] it must not be possible for competitors to turn to any workable alternative technology or to "invent around" the IPR. Such a requirement would likely be met where the technology has become the standard or where interoperability with the rightholder's IPR protected product is necessary for a company to enter or remain on the product market.[5]

With respect to the fourth condition, the same document states that an abuse may arise only when the exclusion of competitors is likely to have a negative effect on competition in the downstream market. "This should however not be understood to mean the complete elimination of all competition."[6]

The legality of a refusal to deal by a dominant firm holding IPRs will therefore depend crucially on the competition authority's or the court's assessment of the "necessity" of interoperability for the competitors' ability to remain on the market and on the assessment of the impact of the refusal of supply on "competition".

[5] *Decision*, *supra* note 1, at para. 230.

[6] *Id.* at para. 231.

The comments offered in the discussion paper for the third and the fourth conditions suggest that the EC standard for refusals to deal is wider than the "no economic sense" standard. It is also wider than "the equally efficient test" (suggested by the discussion paper for evaluating tying practices by dominant firms) as it will lead the competition authority to consider that practices which are not caught by this test should nevertheless be considered illegal if they reduce (static) competition between the dominant firm and its competitors (which can happen even if the competitors are less efficient than the dominant firm).

Behaviors by dominant firms impairing competition in the short run may contribute to economic progress (or to long-term improvement of competition). The decision on the legality of a refusal to supply access to an intellectual property right should therefore depend on an assessment of the possible trade-off between the static and dynamic efficiency effects of the practice. This trade-off was in the mind of the U.S. Department of Justice (DOJ) when it criticized the European Commission's *Microsoft* decision and stated:

> Sound antitrust policy must avoid chilling innovation and competition even by 'dominant' companies. A contrary approach risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it.[7]

In the *Microsoft* case, the Court of First Instance remained silent (and deferred to the Commission's decision) on the most crucial issues: the issue of interoperability, the assessment of the effect of the refusal to deal on static competition, and the assessment of

[7] Press Release, U.S. Department of Justice, Assistant Attorney General for Antitrust, R. Hewitt Page, Issues Statement on the EC's Decision in Its Microsoft Investigation (Mar. 24, 2004) (on file with the DOJ).

the trade-off between the effect of the refusal to deal on static competition and innovation.

First, it stated in paragraph 87 that:

> [A]lthough as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.[8]

Next it stated in paragraph 88 that:

> [I]n so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's.[9]

Following a particularly strict "manifest error of appreciation standard", the Court of First Instance then comments on the findings of the Commission on indispensability.

Microsoft claimed that the interoperability information required by the Commission's decision was not indispensable to the activity of supplier of workgroup server operating systems. More specifically, Microsoft claimed it was not necessary for its competitors' workgroup server operating systems to attain the degree of interoperability required by the Commission in order for them to be able to remain viably on the market, and an error of law lies in using an "inappropriate, extraordinary and absolute standard when 'examining whether competition could exist'."[10]

[8] *Decision*, *supra* note 1, at para. 87.

[9] *Id.* at para. 88.

[10] *Id.* at para. 339.

On the error of fact, the Court of First Instance recognized that some competitors of Microsoft had been present on the workgroup server operating systems market for several years before Microsoft began to develop and market such systems and were still present on the market at the time of decision; it also recognized that Novell had a considerable technological advantage over Microsoft. The Court of First Instance nevertheless noted that the market share of Microsoft's competitors was falling and held that "[t]he fact that competition is eliminated gradually and not immediately does not contradict the Commission's argument that the information at issue is indispensable."[11]

On the error of law, the Court of First Instance stated that "the Commission's analysis of that question in the contested decision is based on complex economic assessments and […] accordingly, it is subject to only limited review by the Court"[12] before deciding that Microsoft has not established that the Commission's assessment was manifestly incorrect.

On the issue of whether Microsoft's refusal to deal prevented competition, the Court of First Instance stated that it was not necessary for the Commission

> to demonstrate that all competition on the market would be eliminated. What matters, for the purpose of establishing an infringement of Article 82 EC, is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It must be made clear that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition.[13]

[11] *Id.* at para. 428.

[12] *Id.* at para. 379.

[13] *Id.* at para. 563.

Finally, on the issue of whether Microsoft's practice had limited technical development to the prejudice of consumers within the meaning of Article 82(b) EC, the Court of First Instance noted that:

> [T]he Commission considered that Microsoft's refusal to supply the relevant information limited technical development to the prejudice of consumers within the meaning of Article 82(b) EC (recitals 693 to 701 and 782 to the contested decision) and it rejected Microsoft's assertion that it had not been demonstrated that its refusal caused prejudice to consumers (recitals 702 to 708 to the contested decision).[14]

In the following paragraph, the Court of First Instance flatly stated that it found "that the Commission's findings at the recitals referred to in the preceding paragraph are not manifestly incorrect."[15]

What we learn from the preceding considerations:

- First, the Court of First Instance decision in the *Microsoft* case basically tells us that the Court will limit itself to a minimal manifest error of appreciation standard in the review of the Commission's decisions dealing with cases which are technically or economically complex. One of the reasons for this could be the inherent difficulty for a court to assess the value of complex economic or technical arguments. An unfortunate alternative reason could be that the Court of First Instance feels that the complex economic issues underlying antitrust law enforcement are policy issues, best left to the Commission, rather than issues of law.

[14] *Id.* at para. 648.

[15] *Id.* at para. 649.

- Second, as a consequence, we cannot expect a substantial review of the Commission's decisions in most of the abuse of dominance cases in high-tech industries which necessitate complex technical and economic assessments and are the cases where the costs of mistakes are likely to be the most important for global welfare.
- Third, there are thus at least three good reasons why the Commission, which has been wavering on the adoption of guidelines in the area of exclusionary practices of dominant positions, should move forward:
    1. It is all the more necessary for dominant firms to know what reasoning the Commission will use to assess their practices, as they cannot, on narrow questions of law, expect a close review of the Commission's decision.
    2. It is all the more necessary for the Commission to have guidelines since, as was mentioned earlier, the area of exclusionary abuses of dominance is complex and can lead to economically unsound decisions in sectors of great economic importance. A public commitment on the part of the Commission to follow best economic practices in this area is in everyone's best interest (including the interest of the Commission to put to rest allegations of incompetence, strategic behavior, etc.).
    3. The adoption of guidelines by the Commission, which would make clear how it will proceed to assess complex economic and technical factors when dealing with allegations of abuse of dominance, is made easier precisely by the fact that the Court of First Instance abstains from

> substantially reviewing the Commission's decisions when they involve complex technical or economic analysis. Indeed, the scope for conflict between the case law of the Court of First Instance and such guidelines is limited by the fact that the guidelines address issues for which the Court defers to the Commission's analysis.

However, the *Microsoft* decision could have two perverse effects. The first would be to give an incentive to the Commission to adopt a "strategic" enforcement policy, targeting abuses of dominance cases in highly complex industries so as to avoid the scrutiny of the Court of First Instance. The second would be to give an added incentive to the Commission to defer adopting guidelines in order to enjoy fully the freedom and the discretion given to it by the Court of First Instance.

Let us hope that common sense will prevail.