

CASES AGAINST MICROSOFT: SIMILAR CASES, DIFFERENT REMEDIES

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Cases: United States v Microsoft Corp 253 F. 3d 34 (2001) (DC Cir (US))

Microsoft Corp (COMP/C-3/37.792) (Unreported, March 24, 2004) (CEC)

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Abstract: Compares the US and EC proceedings against Microsoft, based on allegations that its Windows operating system incorporated additional software contrary to competition rules against tying practices.

*327 Introduction

In the past years, Microsoft has been under heavy antitrust scrutiny. The company has been accused of several forms of anti-competitive behaviour. These accusations led to cases in, among others, the United States and the European Union (EU). In both cases claims of unlawful tying played an important role. In the United States, Microsoft was accused of having unlawfully tied its browser Internet Explorer (IE) to its operating system (OS) Windows. In the EU, it was accused of unlawfully tying its media player Windows Media Player (WMP) to its OS. So the alleged behaviour, tying an application to an OS, is very similar. Additionally, the aim of both authorities, promoting consumer welfare, is identical. Therefore one would expect the remedies to be very similar too. This is not the case however.

The European Commission decided that technological unbundling would be the best remedy. The European Commission forced Microsoft to redesign its OS; it had to eliminate the code-commingling of its media player with Windows. Along with a version of Windows with WMP, Microsoft also had to offer a version without it. Microsoft appealed against this decision, the Court has yet to rule. The case in the United States ended with a settlement in which Microsoft had to give original equipment manufacturers (OEMs) the right to remove user access to a variety of Windows features so that the OEMs could feature substitute software from Microsoft's rivals. The remedy chosen by the European Commission is clearly tougher than the remedy of the Court in the United States (after this: the Court).

This article will explain why the chosen remedies are so different, even though the cases and the aims of the authorities are so similar. To do this, a short overview of the two cases will be given. Following this, the tests used by the two authorities to determine whether tying should be deemed as anti-competitive in a specific case will be explained. Subsequently a review of the way the two authorities took the key terms associated with the new economy into account will be given. The impact of the tests used and the interpretations of the terms on the chosen remedies will also be discussed. Before the final remarks will be presented, more speculative explanations for the differences in the remedies will be given.

Overview of the two cases

In this section a short overview of the cases in the EU and the United States, focusing on the tying issues, will be given.

Case(s) in the United States

In 1991 the first investigations into Microsoft's potentially anti-competitive behaviour were started. These investigations led to three court cases. After the first two cases, known as Microsoft I [FN1] and Microsoft II, [FN2] for the this article crucial third case, Microsoft III [FN3] was started. In this third case, Microsoft was accused of hurting consumers by stifling competition in the software marketplace, particularly at the expense of the Netscape browser. [FN4] A complaint was put forward, the goal was *328 to: "(...) enjoin Microsoft from selling certain products and engaging in certain sales practices". [FN5]

The complaint contained four claims for relief [FN6]:

1. unlawful exclusive dealing and other exclusionary agreements in violation of s.1 of the Sherman Act;
2. unlawful tying in violation of s.1 of the Sherman Act;
3. monopolisation of the PC operating systems market violation of s.2 of the Sherman Act; and
4. attempted monopolisation of the internet browser market in violation of s.2 of the Sherman Act. The

judge decided that only the first claim could not be proven sufficiently and decided that Microsoft had to be split into two separate companies: a company for the OSs and one for applications and other businesses. This would lead to a revival of competition, because Microsoft's anti-competitive behaviour would be ended for once and all. [FN7]

Microsoft appealed against the ruling. The Court of Appeals decided that only the third, monopolisation, claim could be proven. The trial court had to look at the tying claim, again, on remand, because the wrong test had been used to determine whether the tying arrangement was anti-competitive or not. [FN8] On remand a remedy should be chosen that would: "(...) effectively pry open to competition a market that has been closed by a defendant's illegal restraints". [FN9] The Department of Justice (DoJ) decided not to continue to seek to break-up Microsoft or to pursue the key claim that the company had unlawfully tied its browser to its dominant OS. [FN10] The reason given for this decision was that it wanted to obtain a remedy: "as quickly as possible". [FN11]

Before the trial court could present its ruling, the parties reached a final settlement on November 2, 2001.

In this settlement Microsoft allowed OEMs to remove all prominent means of end-user access to portions of middleware functionality integrated into Microsoft's OS so as to encourage the installation of third party middleware. [FN12]

Case in Europe

Before the case was settled in the United States, Microsoft already knew that a case against it was pending in Europe. On August 30, 2001 the European Commission decided to initiate proceedings against Microsoft. The European Commission believed that Microsoft had possibly acted illegally by incorporating its media player in Windows. Several companies developed media players, but only Microsoft had access to the possibility of distribution by tying the product to its own OS with a near monopoly. OEMs and consumers were deprived of a free choice over which products they wanted to have on their PCs, especially now that they could not uninstall or remove WMP. Competitors were artificially deprived of the opportunity to compete with Microsoft's products on technical merits alone. This could lead to a weakening of effective competition in the market, a reduction of consumer choice and less innovation. [FN13]

On April 21, 2004 the European Commission decided that Microsoft had abused its monopoly and broken EU law by using its "near monopoly" of Windows to squeeze out rivals in other kinds of software. [FN14] The European Commission believed that technological unbundling would be the best remedy and therefore required Microsoft to remove part of the software code from Windows. This would make it possible for Microsoft to offer a version of Windows without WMP to OEMs within 90 days. So OEMs could decide which applications they wanted to bundle with Windows: "As a result of the commission's remedy, the configuration of such bundles will reflect what consumers want, and not what Microsoft imposes". [FN15] Microsoft was however *329 still allowed to sell a version of Windows with its media player. The company was also fined ##497 million. Microsoft appealed against the decision on June 8, 2004. The Court has yet to rule.

Tests used to determine whether the tying arrangement was anti-competitive

Mainly American authors have claimed that the test used in the EU was very different from the test used in the United States. [FN16] If this is true, it could explain the differences in the remedies. The tests used by both authorities will be discussed in this section.

In the United States the so-called "modified per se test" that was introduced during the Jefferson Parish case was used during the first part of the Microsoft case. [FN17] The test was developed to determine whether a tie would be beneficial or harmful. The test consisted of four conditions [FN18]:

1. the defendant has market power in the tying product market;
2. the tying and tied goods are two separate products;
3. the defendant affords consumers no choice but to purchase the tied product from it; and
4. the tying arrangement forecloses a substantial volume of commerce.

It is assumed that if the conditions are met the competitive harm of tying will be greater than the efficiency gains, without a further inquiry into the specific anti-competitive and pro-competitive effects or a balancing test. [FN19]

The Court of Appeals decided that the test could not be used in the Microsoft case because too many novel issues were raised. [FN20] The Court believed:

"(...) that integration of new functionality into platform software is a common practice and that wooden application of per se rules in this litigation may cast a cloud over platform innovation for PCs, network computers and information appliances". [FN21]

The Supreme Court had warned in an earlier case that: "(...) it is only after considerable experience with certain business relationships that courts classify them as per se violations". [FN22] The Microsoft case was the first case that dealt with technological integration and a claim that the: "(...) tie improved the value of the tying product to users and to makers of the complimentary goods". [FN23] Therefore the Court decided that judicial experience provided little basis for believing that:

"(...) because of their pernicious effect on competition and lack of any redeeming virtue a software company's decisions to sell multiple functionalities as a package should be 'conclusively' presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm that they have caused or the business excuse for their use." [FN24]

The Court replaced the modified per se test with a rule of reason in which all the specifics of a tying case, especially possible efficiencies, could be better taken into account. [FN25] As said, the trial court did not have to use the rule of reason on remand, because the parties decided to settle.

Before the European Commission's decision in the Microsoft case, it had only made three previous decisions concerning tying. [FN26] None of them dealt with technological tying. [FN27] Therefore the European Commission had to find a way to determine whether tying should be considered unlawful or not. A test that consisted of five conditions was constructed. The *330 first four conditions are almost a carbon copy of the four conditions of the

modified per se test that was abandoned in the United States during the Microsoft case. The fifth condition is new however:

5. Absence of an objective and proportionate justification for the coercion.

If all the requirements had been met, the tie was considered to be unlawful. [FN28] Because the fifth condition was added, it became possible to take all relevant efficiency defences into account. This means that the issues the Court had with the modified per se test, causing it to abandon it, have been taken into consideration in the test developed by the EU; making the test almost identical to the rule of reason that the Court introduced in the Microsoft case. So the tests that both authorities used appear to be identical. When the tests are examined in more detail there are however several small but distinct differences.

Differences regarding the second condition of the tests

The Court decided not to use the modified per se test while applying the second condition of the test. This condition is known as the "separate demand test". The relevant question in this test is whether there is potential customer demand for the tied product on a stand alone basis, from a different source than the tying product. [FN29] The separate demand test was regarded as "backward looking" by the Court and therefore could not play a role in examining integration of new software functionality and capability. [FN30] The test assumed that if there were two products now, there would always be two products, irrespective of a potential technological push. [FN31] Applying the test could lead to the conclusion that a welfare enhancing tie was unlawful. [FN32] The test was regarded as a poor proxy for net efficiency from newly integrated products.

In Europe the authorities disagreed with this vision. The European Commission believed that the test was indeed backward looking, but added that four years after integrating the software, there was still noninsignificant consumer demand for alternative media players. [FN33] Therefore the test would lead to reliable results and using the test would not chill innovation.

Differences regarding the fourth condition of the tests

Because the Court replaced the modified per se test with a rule of reason after having discussed the second condition of the test, it is not possible to compare the remaining conditions. It is however possible to add several comments about the remaining conditions of the test used by the European Commission. This leads to the second difference: in the United States the Court had decided, even before the modified per se test had been abolished, that the fourth condition could only have been met if the tying arrangement had already led to a foreclosure of the market. [FN34]

In the EU all that had to be proven was that the abusive conduct was capable of having the effect of restricting competition. [FN35] The European Commission feared that it would be too late to act after competition had already been foreclosed. [FN36] Therefore it was necessary to predict the future effects of Microsoft's behaviour. [FN37]

Differences regarding the rule of reason/fifth condition of the test used in the EU

Microsoft could have shown in Europe that the fifth condition had not been met if it had been able to prove that the tie would lead to certain pro-competitive benefits, that these benefits could not have been achieved in other ways and that the benefits were bigger than the anti-competitive effects (i.e. the foreclosure of competition). [FN38]

Microsoft claimed that there were two types of benefits relating to the tying of WMP with Windows:

- There would be efficiencies of distribution in terms of lower transaction costs for consumers; a set of default options in a PC "out of a box" would reduce time and confusion and therefore transaction costs of consumers. [FN39]

- *331 • Application developers and content providers would benefit from the fact that WMP would be installed on almost every computer. It would save them programming time and effort and allow them to concentrate on the innovative features of their own products. [FN40]

The European Commission discussed these two advantages claimed by Microsoft.

If OEMs were allowed to install the media player of their choice, the same "out of the box" benefits, claimed by Microsoft in its first justification, would be achieved. OEMs were, unlike Microsoft, subject to strong competition, and would thus ensure that their products: "(...) will reflect what the consumers want, and not what Microsoft imposes". [FN41] Microsoft's second justification that application developers benefited from the ubiquitous presence of WMP, was seen by the European Commission as a description of the reason why Microsoft's tying behaviour was anti-competitive. Application developers and content providers knew that they could count on the presence of WMP on all Windows PCs; this created artificial incentives for them, unrelated to price and quality, to develop exclusively for this media platform. If the argument would have been accepted, it would mean that Microsoft would have carte blanche to extend its monopoly.

The European Commission concluded that the fifth condition of the test had not been met because: "Microsoft has failed to supply evidence that tying of WMP is indispensable for the alleged pro-competitive effects to come into effect". [FN42]

On the other side of the Atlantic authors have claimed that the "indispensability demand" may well be like a unicorn: "(...) in the sense that it's a kind of mythical beast, unlikely ever to be found by an antitrust regulator in the real world". [FN43] It appears to them that it is almost impossible for a company to prove that the tie is indispensable to reach the benefits, regardless of how modest the harm (i.e. a decrease in one competitor's relative market share) or how great the benefits may be. [FN44] It has also been remarked that the difficulty with an indispensability criterion for assessing efficiencies is that it shifts the focus of the inquiry from the question as to whether, on balance, the tying is welfare enhancing to whether the tying is more efficient than various hypothetical alternatives.

In the United States the Court of Appeals gave guidelines for the trial court to apply the rule of reason on remand. It is striking that the rule of reason, just as the test designed by the European Commission, requires the defendant to prove that the tie will lead to pro-competitive benefits and that these benefits could not have been

achieved in any other way. Contrary to the test in the EU, the defendant does not have to prove that the pro-competitive effects are bigger than the anti-competitive effects; it is up to the plaintiff to prove the opposite.

The Court of Appeals mentioned that the results of applying the rule of reason may well have been very similar to the results reached in the EU:

"(...) of course, these arguments may not justify Microsoft's decision to bundle Application platform interfaces in this case, particularly because Microsoft did not merely bundle with Windows the APIs from IE, but an entire browser application". [FN45]

In this section it has been shown that the tests used are very similar, the European Commission only seems to have applied it in a much stricter way than the Court did when it comes to efficiencies and justifications. It seems to be very hard, to say the least, for a company to meet the requirements, especially of the fifth condition of the test used in the EU. As discussed, it is however unlikely that in this specific case a stricter application can be used to explain the differences in the remedies. The fact that in the European Commission it is enough for the conduct to be capable of restricting competition may however be able to do this.

Interpretation of the key terms associated with the new economy

The cases dealt with technological tying of software products, so they are "new economy" cases. Both authorities had to decide in what way they would take the specific characteristics of software products into account. The two authorities did this in a very similar way. There are however three important differences:

*332 Tipping of the market

Both authorities valued healthy competition on the market for applications. Therefore they investigated whether Microsoft's behaviour would cause the market to tip towards Microsoft's applications. The European Commission believed that Microsoft's conduct seriously jeopardised the persistence of a sufficient degree of competition in the relevant market [FN46]:

"As regard the market for streaming media players, the abuse has already contributed to Microsoft achieving a leading position in that market. Evidence described in this Decision suggests that the market may already be tipping in favor of WMP." [FN47]

Contrary to the European Commission, the Court refused to accept that the market would tip, because it could not be proven that: "(...) the tipping of the market is imminent". [FN48]

Incentives to innovate

According to the European Commission, the dominant position of Microsoft on the market for applications would have a negative impact on the level of innovation by Microsoft, but more importantly by competitors: "Tying will deter innovation in the whole market to which the integrated product belongs". [FN49] This would lead to a reduction in the talent and capital invested in innovation of media players and thus to slower cycles of innovation:

"Microsoft's conduct affects a market which could be a hotbed for new and exciting products springing forth in a climate of undistorted competition". [FN50]

The Court however did not agree with the European Commission; because Microsoft had invested heavily in the past and there were incentives for Microsoft to keep investing heavily in innovation despite its dominance:

- Innovation would make PCs attractive to more consumers and those consumers less sensitive to the price of Windows, so innovations would translate into increased profits for Microsoft.
- The more Microsoft would innovate, the harder it would be for potential entrants to compete successfully with Microsoft's products. [FN51]

The authorities in the United States believed that because Microsoft had enough incentives to invest heavily, even if it would become the sole supplier of one or more applications. So there was no need to assume that the incentives to innovate for society as a whole would diminish, even if competitors would innovate less. Because the European Commission focused on the negative effects of Microsoft's dominance on the incentives of competitors to innovate, it has been said that its decision only held that Microsoft's conduct stifled innovation of competitors, without showing that innovation in the society as a whole had been retarded. [FN52]

Defensive and offensive leveraging

Both the European Commission and the courts in the United States believed that Microsoft had strategic reasons for tying its products. Microsoft was accused of having used leveraging strategies with a negative impact on consumer welfare. The Court believed that Microsoft had engaged in defensive leveraging. Netscape's browser, in conjunction with the program Java, developed by Sun, could, in theory, perform the same functions as an OS. [FN53] Microsoft wanted to eliminate this specific threat by using its dominant OS's position; Microsoft tied its browser to its OS, so its browser would be distributed on every single computer sold on which Windows was

installed. Netscape would not be able to distribute its browser in such an efficient way and would therefore be set at a big disadvantage.

The European Commission believed that Microsoft had also engaged in offensive leveraging, as it had not only used the position of its dominant OS on the market for media players to defend the position of Windows, *333 but also to become dominant on the market for media players. By tying its media player to its dominant OS, competing media player developers would not be able to successfully compete and leave the market. Microsoft's behaviour:

"(...) undermin(ed) the competitive structure in the market for media players and risk(ed) (...) spill-over effects in adjacent markets (such as) server software (and) handhelds where streaming media is going to play an increasingly important role". [FN54]

So in the United States, Microsoft was accused of trying to push only one browser of the market, while in the EU it was believed that Microsoft tried to eliminate all competition in the market for media players.

If all the three differences in the way the two authorities interpreted the terms associated with the new economy are taken into account, the following conclusions can be drawn:

The authorities in the United States believed that Microsoft had only engaged in defensive leveraging, by not allowing OEMs to remove "end-user access" to its browser, therefore making it impossible for Netscape to efficiently distribute its browser. The chosen remedy ended this strategy, because Microsoft's browser would no longer be automatically installed on all new Windows PCs. As the European Commission believed that Microsoft had engaged in offensive and defensive leveraging, the threat posed by Microsoft's behaviour was conceived to be bigger: Microsoft's behaviour would lead to diminished incentives to innovate and a market for media players that would tip in Microsoft's favour, causing competition and not just one competitor to be threatened. Ending the integration would be the only real solution, so the European Commission felt that it had to go for a much tougher remedy.

Discussion

In this section several explanations for the differences in the remedies chosen by the two authorities of a more speculative nature than the explanations discussed in the previous sections will be given.

- Special responsibility for dominant companies

Just like the Court of Justice in the EU had done during the Michelin case, [FN55] Mario Monti, at that time the Competition Commissioner in the EU, noted after the decision had been made in the Microsoft case, that: "Dominant companies have a special responsibility to ensure that the way they do business doesn't prevent competition". [FN56] Therefore a dominant company's behaviour will be found harmful even when the same behaviour would not have been found harmful if conducted by a non-dominant company. [FN57] Also, efficiency defences would less likely be accepted if put forward by a dominant company. [FN58] In the United States such a special burden does not appear to be present, no court has ever mentioned it.

- The remedy in the United States had not led to the desired results

The European Commission believed that the remedy chosen in the United States had not led to revived competition on the market for browsers. After the ruling, Microsoft had a near monopoly on the market for browsers, something it did not have at the beginning of the case. The market share of WMP would continue to rise as long as WMP would be installed on every single Windows PC. [FN59] The remedy in the United States made it possible for OEMs to install competing browsers and to remove user access to Microsoft's browser. It is however unlikely that OEMs would actually do this; consumers expect Microsoft's browser to be installed on their computers and many see browsers as almost perfect substitutes.

The European Commission believed that a decision similar to the ruling in the United States would not solve the underlying problem; the tipping of the market for media players towards WMP. [FN60]

*334 In the United States the authorities did not agree with this view:

"The United States' Final Judgment provides clear and effective protection for competition and consumers by preventing affirmative misconduct by Microsoft that would inhibit competition in 'middleware' programs, such as the web browser that was the subject of the United States' lawsuit and the media player that is the subject of the EC's action today." [FN61]

- Different views on harm and benefits of code removal

The remedy chosen by the European Commission, a code removal approach, had been explicitly rejected by the Court since it was believed to disrupt the industry, lead to less innovation and thus harm consumers.

In a rather direct attack, the Assistant Attorney-General for Antitrust of the DoJ said after the European Commission decision had been presented:

"The U.S. experience tells us that the best antitrust remedies eliminate impediments to the healthy functioning of competitive markets without hindering successful competitors or imposing burdens on third parties." [FN62]

It has also been remarked that a code removal had never been considered in the United States, not even during the period the DoJ was seeking a break-up. Microsoft was being forced to remove innovative features from its browser and thus to offer a product that performed worse than the original product, even though there were no reasons to assume that consumers would actually want such a product. [FN63]

What has to be mentioned however is that although the decision requires Microsoft to offer a version of Windows without its media player, Microsoft is also allowed to offer a version with WMP. The accusation that the

remedy chosen in the United States would lead to less innovation is also debatable. Microsoft was not the inventor of either media players or browsers, it only made non-drastic derivative innovations to these products. Even if this kind of innovation by Microsoft would be chilled by the decision, the decision may well lead to a revival of innovation by competitors, leading to more relevant drastic new innovations. [FN64]

It seems that the Court was more concerned about making sure that its ruling would not hinder Microsoft's innovation than about innovation by competitors, while the European Commission wanted to ensure innovation by competitors.

- Protecting competition or competitors

The DoJ in the United States has accused the European Commission of protecting competitors and not competition:

"(...) chilling innovation and competition even by 'dominant' companies should be avoided at all time, since protecting competitors, not competition, could ultimately harm competition and the customer who benefit from it." [FN65]

However, in the decision it is explicitly mentioned that:

"Under Community competition law an undistorted competition process constitutes a value in itself as it generates efficiencies and creates a climate conducive to innovation". [FN66]

In the United States, authors have claimed that in the EU, the authorities worried too much about the actual existence of a sufficient number of competitors and the relation between promoting consumer welfare and the amount of competitors. [FN67] They noted that the decision exhibited an old habit of the European Commission; it focused on preserving rivalry rather than on efficiency [FN68]; the European Commission wanted to keep competitors in the game, even if it made Windows a less reliable and versatile platform.

[FN69] This led to a gradual overlapping of harm to competition with harm to competitors:

"[This] explains why in dealing with dynamic knowledge-based industries, the EU competition authorities have exhibited a more worrying lack of confidence (in companies) than their counterparts on the other side of the Atlantic". [FN70]

*335 These reasons led, according to the authors mentioned before, the European Commission to choose a remedy that was, according to them, too tough.

Not only the European Commission, but also the Court has been accused of protecting competitors and not competition:

"[Microsoft was found] liable without requiring a showing that there has been significant harm to either consumers or to competition. Instead, they have found defendants liable based only on evidence that some harm to competitors has resulted, from which harm to the competitive process and consumers is inferred". [FN71]

The Court of Appeals simply assumed that each of Microsoft's challenged actions that it did not find legal, had sufficiently reduced Netscape's potential ability to compete with Windows so as to injure competition and thus harm consumers.

- Settlement in the United States v decision in the EU

In the United States the case ended with a settlement, while in the EU the case ended with a final decision. In a settlement a solution is reached that is agreeable for both parties. It is debatable whether mediation, with its time pressure, is the way to go in such a complex and extensive case. In such a case mediation can:

"(...) magnify the disadvantages in technical expertise and knowledge that government officials have in negotiating with a defendant over the ins and outs of its business". [FN72]

- Not pursuing the tying issues v decision

As said before, four claims were put forward by the DoJ against Microsoft. Only one of these claims dealt with tying. The government spent most time and effort on trying to prove the monopolisation claim. The other three claims, including the tying claim, were slightly neglected. Trial transcripts of the DoJ's closing argument, for example, show that these claims were barely mentioned. [FN73]

This could explain why the Court of Appeals found so many shortcomings and reversed the ruling regarding the tying claim. Examples of shortcomings were the failure to define a relevant browser market and the failure to undertake an extended analysis of the competitive effects of tying. [FN74] The DoJ had expected the Court to use the modified per se test, so there was no need for such an analysis. The Court of Appeals however decided that a rule of reason should have been used. Therefore the trial court would have been required to consider Microsoft's reasons for software integration as well as the possible anti-competitive effects on remand, which meant a fact-intensive inquiry should have taken place. [FN75]

Another reason for the fact that the tying claim was neglected, can be that the tying and monopolisation claims are very similar in nature, both claims depend on almost the same facts and harm to consumers: "Winning any one would win the case". [FN76] Unique evidence of conduct to support the claim is however needed. Given the complexity and volume of the claims it is possible that the DoJ decided to focus on just one claim. This would streamline the case, so the proceedings would not be prolonged and the imposition of relief would not be delayed. [FN77]

On the other hand, the DoJ did invest a considerable amount of time in trying to prove the tying claim and undoubtedly mistakes were made. The Court of Appeals made it clear that these mistakes could probably not have been corrected on remand. [FN78] So, although the DoJ claimed that it did not want to delay a ruling any further, it

is quite likely that a second reason for neglecting the tying issue was that the DoJ believed that it had made so many mistakes that the claim regarding tying could no longer be proven.

After the Court had accepted the settlement, it said that the settlement reached could not be interpreted as: "(...) a form of absolution for Microsoft from any liability for the illegal tying of two distinct products based upon the design of its Windows operating system product" and

*336 "(...) cannot curtail the ability of a court to determine that Microsoft has illegally tied two products which are separate under the antitrust laws". [FN79]

So although the settlement dealt with the tying issue, the issue was left open.

In the EU the tying issue was not left open and no crucial mistakes were made. Maybe the remedy chosen in the United States would have been very different if the DoJ had done its work properly.

- New president v new Europe

The largest portion of the case in the United States took place during the Clinton administration; the remedy was however presented during the first G. W. Bush administration. It has been claimed that the new administration did not completely support the case and that a more laissez-faire remedy was preferred. [FN80] The change in attitude after the installment of the new administration can be used to explain why the approaches used by both authorities were quite similar, but the remedies very different. Maybe the remedy in the United States would have been very different if a Democrat (A. A. Gore) had been elected.

Another explanation could be that the remedy chosen in the United States did not change after the installment of the Bush administration, but that the European Commission chose to go for a tougher remedy after Bush had been elected:

"(...) [there] is certain paranoia that the onset of the Bush administration essentially means the death of effective antitrust enforcement. There seems to be an unspoken desire to ratchet up the enforcement on this side of the Atlantic to prove that effective antitrust enforcement isn't dead". [FN81]

Closing remarks

In the previous sections several explanations have been given for the fact that even though the behaviour Microsoft was accused of and the aim of both authorities was very similar, the chosen remedies were so different.

The question is however whether in practice the remedies are different at all. In the United States, OEMs are "allowed" to remove end-user access to Microsoft's applications and to install competing applications. In the EU, OEMs "can" decide to install a version of Windows without WMP and consumers "can" also buy such a version.

But will this "allowed" and "can" ever take place? Why would an OEM remove user access to a popular browser? And why would consumers want to have a computer without Microsoft's well-known media player? There is certainly no evidence that after the remedies were presented by the authorities, radical changes regarding the distribution of Microsoft's or competitor's applications have occurred. So in practice, the effects of the remedies may be very similar.

The authorities in the EU have never the less given a clear(er) signal: Microsoft's behaviour is being carefully watched and the European ommission is not afraid to make far reaching decisions. This could have a tempering effect on Microsoft's behaviour.

FN This article represents the personal views of the author.

FN1. United States v Microsoft Corp (Microsoft I), 56 F.3d 1448, Case Numbers 95-5037 & 95-5039, US Court of Appeals for the District of Columbia, June 16, 1995.

FN2. United States v Microsoft Corp (Microsoft II), 147 F.3d 935, U.S. Court of Appeals for the District of Columbia, June 23, 1998.

FN3. United States v Microsoft Corp (Microsoft III Appeals) 253 F.3d 34, Case number 00-5212 Consolidated with Case Number 00-5213, US Court of Appeals for the District of Columbia, June 28, 2001.

FN4. J. Brinkley, "US Judge Says Microsoft Violated Antitrust Laws with Predatory Behavior", April 4, 2000, at p.2. www-cpr.maxwell.syr.edu/faculty/smeeding/classes/ecn109/nytimesapril4article1.pdf.

FN5. Microsoft II (1998).

FN6. United States v Microsoft Corp, Case Number 98-CV-1232 Consolidated with 98-1233, Department of Justice Original Complaint, US District Court for the District of Columbia, May 18, 1998, at [130]-[141]

FN7. United States v Microsoft Corp, 87 F. Supp. 2d 30, Conclusions of Law, April 3, 2000, at [15]-[20].

FN8. *ibid.*, the tests will be discussed in the next section.

FN9. International Salt Co v United States, 332 U.S. 392, 401 (1947) quoted in: Government's Memorandum in opposition to defendant's motion to alter or amend the final judgment December 20, 2001.

FN10. Department of Justice, Press Release, "Justice Department Informs Microsoft of Plans for Further Proceedings in the District Court", September 6, 2001.

FN11. *ibid.*

FN12. Executive Summary of the Memorandum and Order, November 1, 2002, at p.19. <http://download.microsoft.com/download/5/3/2/53239546-efee-460c-a583-11c20cdea9ab/98-1233summary.pdf>.

FN13. European Commission, Press Release, "Commission Initiates Additional Proceedings Against Microsoft", IP/01/1232, August 30, 2001.

FN14. Commission Decision, C(2004)900 final, Case COMP/C-3/37.792, April 21, 2004.

FN15. European Commission, Press Release, "Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine", IP/04/382, March 24, 2004.

FN16. See, for example, R. Hule, S. Houck, D. Melamed and J. Watershed, "The EC Decision Against Microsoft: Windows on the World, Glass Houses, or Through the Looking Glass", *The Antitrust Source*, September 2004; C. Ahlborn, D. S. Evans and A. Jorge Padilla, "The Antitrust Economics of Tying: A Farewell to Per Se Illegality", March 2004: www.aei-brookings.org/admin/authorpdfs/page.php?id=243; and "Microsoft Spells it Out", April 24, 2004, <http://p2pnet/story/1288>.

FN17. *Jefferson Parish Hospital Dist. No.2 v Hyde*, 466 U.S. 2 (1984).

FN18. See *Eastman Kodak Co v Image Technical Services, Inc*, 112 S.Ct. 2072, 2080 n.9 (1992). and *Jefferson Parish Hospital Dist. No.2 v Hyde*, cited above.

FN19. A. J. Meese, "Monopoly Bundling in Cyberspace: How Many Products does Microsoft sell?" (1999) 44 *Antitrust Bulletin* 65 at p.69 and *Jefferson Parish Hospital Dist. No.2 v Hyde*, cited above, at [20]-[22].

FN20. The general reasons for abandoning the test will be discussed here. The more specific reasons will be discussed later.

FN21. *Microsoft III Appeals*, cited above, at section IV.B.

FN22. *ibid.*, at section IV.B, quoting: *United States v Topco Assocs., Inc.*, 405 U.S. 596, (1972), at [607]-[608].

FN23. *Microsoft III Appeals*, cited above, at section IV.B.

FN24. *ibid.*, at section IV.B.

FN25. The rule of reason will be discussed in more detail later.

FN26. Commission Decision 88/519, *Napier Brown v British Sugar* [1988] O.J. L284/41; Commission Decision 88/138, *Eurofix-Bauco v Hilti* [1988] O.J. L65/19; and Commission Decision 92/163, *Tetra Pak II* [1992] O.J. L72.

FN27. European Commission, Fourteenth Report on Competition Policy, 3 CLMR 147. Brussels-Luxembourg: Office for Official Publication of the European Communities (1984), at para.94

FN28. Commission Decision, C(2004)900 final, at para.799.

FN29. M. Dolmans and T. Graf, "Analysis of Tying Under Article 82 EC: The European Commission's Microsoft Decision in Perspective" (2004) 2 *World Competition* 225.

FN30. *Microsoft III Appeals*, cited above, at 82.

FN31. M. A. Lamley and D. McGowan, "Could Java Change Everything? The Competitive Propriety of a Proprietary Standard" (1998) 3-4 *Antitrust Bulletin* 715. (1998), at para.II.A.

FN32. *Microsoft III Appeals*, cited above, at 89.

FN33. Commission Decision, C(2004)900 final, at [806]-[808].

FN34. Microsoft III, appeals (2001), at 95, quoting: Jefferson Parish Hospitals Dist. No.2 v Hyde, at [29]-[31].

FN35. Commission Decision, C(2004)900 final, at [838].

FN36. *ibid.*, at [946].

FN37. M. Dolmans and T. Graf, cited above, at p.234.

FN38. *ibid.*

FN39. Commission Decision, C(2004)900 final, at [956]-[957].

FN40. *ibid.*, at [962].

FN41. *ibid.*

FN42. *ibid.*, at [963].

FN43. R. Hule quoted in: R. Hule, S. Houck, D. Melamed and J. Watershed, cited above, at p.6.

FN44. Microsoft Spells it Out, cited above.

FN45. Microsoft III Appeals, cited above, at 83.

FN46. Commission Decision, C(2004)900 final, at paras 835-878.

FN47. *ibid.*, at para.1071.

FN48. See Sun Microsystems' private action; The District Court believed that: "(...) the market for middleware products might well 'tip' in favor of Microsoft's (...) middleware program and away from Sun's competing (...) product;" in *Re Microsoft Corp. Antitrust Litigation*, 237 F. Supp. 2d 639 (2003), at [527]-[530] the ruling was reversed, the Court claimed that the District Court had failed to find that the tipping of the market was imminent.

FN49. Commission Decision, C(2004)900 final, at [961].

FN50. *ibid.*, at [962].

FN51. United States v Microsoft Corp, 84 F. Supp. 2d 9, Findings of Fact, November 5, 1999, at [61]. <http://www.dcd.uscourts.gov/ms-findings2.pdf>

FN52. N. Le, "Microsoft Europe and Switching Costs" (2004) 4 World Competition 567 at p.570.

FN53. T. F. Bresnahan, "Network Effects and Microsoft", August 2001, at p.14. [www.stanford.edu/~tbres/Microsoft/Network Theory and Microsoft.pdf](http://www.stanford.edu/~tbres/Microsoft/Network%20Theory%20and%20Microsoft.pdf)

FN54. European Commission quoted in: R. J. R. Peritz, "Re-Thinking US v Microsoft in Light of the EC Case", NYLS Legal Studies Research Paper No.04/05- 4, 2004, at p.9.

FN55. Case 322/81, Michelin v Commission [1983] E.C.R. 3461; [1983] 1 C.M.L.R. 282 at [10].

FN56. Mario Monti quoted in: C. Risen, "Split Decision", March 30, 2004. www.tnr.com/doc.mhtml?i=business&s=risen033004

FN57. Tying arrangements between non-dominant firms (those with a market share of less than 30%) are presumed to be lawful pursuant to: European Commission 1999.

FN58. See C. Ahlborn, D. Bailey and H. Crossley, "An Antitrust Analysis of Tying: Position Paper in GCLC Research Papers on Article 82 EC", Global Competition Law Centre, July 2005, at pp.166-218.

FN59. Commission Decision, C(2004)900 final, at para.877.

FN60. R. Hule, S. Houck, D. Melamed and J. Watershed, cited above, at p.11.

FN61. Department of Justice, Press Release, "Assistant Attorney General for Antitrust, R. Hewitt Pate, Issued statement on the EC's Decision on its Microsoft Investigation", March 24, 2004.

FN62. S. Houck quoted in: R. Hule, S. Houck, D. Melamed and J. Watershed, cited above, at p.11.

FN63. Microsoft Spells it Out, cited above.

FN64. R. Hule, S. Houck, D. Melamed and J. Watershed, cited above, at p.11.

FN65. *ibid.*

FN66. Commission Decision, C(2004)900 final, at [969].

FN67. See, for example, R. Hule, S. Houck, D. Melamed and J. Watershed, cited above, and R. Pardolesi and A. Renda, "The European Commission's Case Against Microsoft: Kill Bill?" (2004) 4 World Competition 513.

FN68. R. Hule, S. Houck, D. Melamed and J. Watershed, cited above, at p.19.

FN69. R. W. Hahn, "The Microsoft Case: Lessons from Europe", AEI-Brookings Joint Center, April 2004. www.aei-brookings.org/policy/page.php?id=180

FN70. R. Pardolesi and A. Renda, cited above, at p.566.

FN71. H. H. Chang, D. S. Evans and R. Schmalensee, "Has the Consumer Harm Standard Lost Its Teeth?" in High Stakes Antitrust--The Last Hurrah? (R.W. Hahn ed., Washington, D.C., AEI-Brookings Joint Center for Regulatory Press, 2003), at pp.86.

FN72. S. Houck quoted in: R. Hule, S. Houck, D. Melamed and J. Watershed, cited above, at 12.

FN73. R. J. R. Peritz, cited above, at p.3.

FN74. Microsoft III Appeals, cited above, at 86.

FN75. R. J. R. Peritz, cited above, at p.4.

FN76. *ibid.*

FN77. Department of Justice, Press Release 2001.

FN78. Microsoft III Appeals, cited above, at 86.

FN79. United States v Microsoft Corp, Memorandum and Order Accompanying Final Judgment Regarding Case Number 98-1232, Consolidated with Case Number 98-1233, June 7, 2000, at paras 30-31.

FN80. R. J. R. Peritz, cited above, at p.1.

FN81. P. Alexiadis, an antitrust attorney with Squire, Sanders and Dempsey in Brussels, quoted in: J. Wilcox, "Microsoft Faces Tougher Battle in Europe", July 3, 2001. <http://news.com.com/2100-1001-269434.html?legacy=cnet>

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