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Hide It or Unbundle It: A Comparison of the Antitrust Investigations Against Microsoft in the U.S. and the E.U.

SUE ANN MOTA*

I. INTRODUCTION

Microsoft Corporation, the world's largest software company,[1] has been facing antitrust scrutiny globally. In the U.S., after what's been called the antitrust trial of the century,[2] a consent decree was reached between Microsoft, the United States government,[3] and several states,[4] that closely resembled the litigated remedy that the remaining states received. Only Massachusetts appealed the litigated remedy, which was approved by the appeals court on June 30, 2004.[5] In the United States, Microsoft was required to hide, but not remove, the Internet Explorer browser on the Windows Operating System.[6]

While antitrust litigation was ongoing in the United States against Microsoft, the European Union ("E.U.") was also investigating Microsoft under E.U. antitrust law.[7] In March, 2004, after a five year investigation, the European Union Commission fined Microsoft 497 million euros, required Microsoft to offer the Windows operating system without Windows

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1. Hoover's Online, *Microsoft Corporation*, http://www.hoovers.com/microsoft/--ID__14120--/free-co-factsheet.xhtml (accessed Apr. 24, 2005).

2. Kenneth G. Elzinga et al., *U.S. v. Microsoft: Remedy or Malady?*, 9 Geo. Mason L. Rev. 633, 633 (2001).

3. *U.S. v. Microsoft Corp*., 231 F. Supp. 2d 144 (D.D.C. 2002); *see infra* n. 59 and accompanying text.

4. *N.Y. v. Microsoft Corp*., 224 F. Supp. 2d 76 (D.D.C. 2002); *see infra* nn. 60-66 and accompanying text.

5. *Mass. v. Microsoft Corp*., 373 F.3d 1199, 1202 (D.C. Cir. 2004); *see infra* nn. 74-77 and accompanying text.

6. *Id*.

7. *Treaty Establishing the European Economic Community* art. 82 (Feb. 26, 2001), http://europa.eu.int/comm/competition/legislation/treaties/ec/art82_en.html. *See generally* Amanda Cohen, *Surveying the Microsoft Antitrust Universe*, 19 Berkeley Tech. L.J. 333 (2004); Justin O'Dell, Student Author, *Trouble Abroad: Microsoft's Antitrust Problems Under the Law of the European Union*, 30 Ga. J. Intl. & Comp. L. 101 (2001); *see infra* n. 79.

Media Player, and required Microsoft to disclose interfaces to competitors.[8] On December 22, 2004, the E.U.'s Court of First Instance denied Microsoft's request for a stay of this order, and ordered Microsoft to comply;[9] the full appeal is pending at the time of this publication.

This article will examine, compare, and contrast the protracted antitrust litigation that Microsoft has faced in the U.S. and the E.U. This article will then examine what further antitrust problems Microsoft may be facing.

II. *U.S. v. MICROSOFT*

When one thinks of the *United States v. Microsoft* antitrust litigation, one usually thinks of the recently concluded action[10] brought by the U.S. Department of Justice and twenty states in 1998. Microsoft's antitrust investigation was initiated by the Federal Trade Commission ("FTC") starting in 1990. In 1993, the FTC's Commissioners voted twice whether to take action against Microsoft, and the vote was tied two-to-two both times. Consequently the FTC took no action.[11] The Department of Justices' Antitrust Division then investigated Microsoft, and in 1994 filed a complaint against Microsoft for violating the Sherman Act sections one[12] and two[13]

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8. *Microsoft*, COMP/C-3/37.792, http://europe.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf (Mar. 24, 2004) [hereinafter COMP/C-3/37.792]; *see infra* nn. 85-98 and accompanying text.

9. *Microsoft v. Commn. of the European Communities*, T-201/04R2, 2004 E.C.R. ___ (Ct. First Instance 2004) (available at 2004 WL 2951977); *see infra* nn. 99-102 and accompanying text.

10. *See supra* nn. 3-7 and accompanying text.

11. *U.S. v. Microsoft Corp.*, 159 F.R.D. 318, 321 (D.D.C. 1995); *see generally* Sue Mota, *U.S. v. Microsoft – The Antitrust Sage Continues*, 1999 UCLA J.L. & Tech. 1 (1999) (providing more information on the prior Microsoft antitrust investigation and litigation).

12. The Sherman Act section one states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1991).

13. The Sherman Act section two states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

by engaging in various activities such as entering into unlawful contracts which unreasonably restrained trade[14] and monopolizing the market for personal computer operating systems.[15]

The same day that the complaint was filed in 1994, the Department of Justice and Microsoft filed a consent decree, which prohibited, among other things, the following: licenses with original equipment (hardware) manufacturers which lasted longer than one year; licenses with original equipment manufacturers that prohibit the manufacturers from selling or licensing any non-Microsoft operating system; and licenses with minimum commitments for the original equipment manufacturers, whereby the manufacturer had to license the minimum amount of Microsoft software whether the manufacturer met the minimum commitment of sales or not.[16] In the consent decree, Microsoft was specifically not prohibited from developing integrated products;[17] this provision was pivotal in the subsequent 1998 litigation.[18] Interestingly, the European Union was involved in the consent decree as a joint settlement. All three sides signed a stipulation agreeing to the consent decree.[19]

Under the Antitrust Procedures and Penalties Act, the Tunney Act, the proposed consent decree had to be published for comment before a hearing was held to determine whether the decree is in the public interest.[20] District Court Judge Stanley Sporkin held in 1995 that the consent decree was not in the public interest because it was too narrow and did not go far enough against Microsoft's anticompetitive behavior.[21] Both the Department of Justice and Microsoft appealed.

In 1995, the Court of Appeals for the District of Columbia Circuit reversed, holding that the consent decree was in the public interest, and remanded for reassignment to another judge to enter an order approving the decree, as per Microsoft's request.[22] In 1997, the Department of Justice

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15 U.S.C. § 2 (1999).

14. This action, according to the Department of Justice, violates section one of the Sherman Act.

15. This behavior violated section two of the Sherman Act, according to the Department of Justice.

16. 59 Fed. Reg. 42845, 42845 (Aug. 19 1994) (detailing the Proposed Final Judgment in *U.S. v. Microsoft*). The consent decree was to run seventy-eight months.

17. *Id.* at 42855.

18. *See infra* n. 22 and accompanying text.

19. *See generally* Laura E. Keegan, *The 1991 U.S./EC. Competition Agreement: A Glimpse of the Future Through the U.S. v. Microsoft Corp. Window*, 2 J. Intl. Leg. Stud. 149 (1996).

20. 15 U.S.C. § 16(b) (1994).

21. *U.S. v. Microsoft Corp.*, 159 F.R.D. at 318. Judge Sporkin gave the following four reasons for his decision: First, the government failed to provide the court with the proper information needed to make a public interest determination. Second, the decree was too narrow; it covered only MS-DOS and Windows, not all of Microsoft's operating systems. Third, the decree did not constitute an effective antitrust remedy. Fourth, the enforcement and compliance mechanisms were not deemed satisfactory.

22. *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1463-65 (D.C. Cir. 1995). The case was reassigned because Judge Sporkin could reasonably cause an objective observer to question his impartiality by

returned to federal court asking that Microsoft be held in contempt of court for violating the consent decree by requiring original equipment manufacturers to license and distributing Microsoft Internet Explorer ("IE") as a condition of licensing Windows 95; Microsoft responded that IE was allowed as an integrated product.[23] The district court issued a preliminary injunction and appointed a special master.[24] Microsoft appealed. In 1998, the Court of Appeals for the D.C. Circuit removed the special master and reversed the preliminary injunction, giving Microsoft a legal victory.[25]

Also in 1998, the recently concluded antitrust case began when the Department of Justice and twenty states[26] filed suits against Microsoft alleging violations of the Sherman Act sections one[27]and two[28] and requesting an injunction. Microsoft was alleged to violate section one by agreements with original equipment manufacturers ("OEMs") destructing modification of PC start-up sequences, and agreements with Internet Service providers ("ISPs"), Internet Content Providers ("ICPs"), and others whereby they would not license or promote non-Microsoft products.[29] Again, it was alleged that tying IE to the Windows operating system also violated the Sherman Act section one.[30] Microsoft was alleged to violate the Sherman Act section two for unlawful maintenance of a monopoly in the operating system market and unlawful monopolization of web browser market. District Court Judge Thomas Penfield Jackson denied Microsoft's request for summary judgment,[31] and a bench trial ensued on the "fast track" for the consolidated federal and state cases. The trial lasted from October 19, 1998 until June 24, 1999.[32]

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doing the following: He inquired into allegations outside the complaint; he relied on the book *Hard Drive* not introduced into evidence; he did not fulfill his duty to consider the impact of the anonymity of amici; he accepted *ex parte* submissions; and he made several comments which evidenced his distrust of Microsoft's lawyers and showed his poor view of Microsoft's practices.

23. 59 Fed. Reg. at 42855.

24. *U.S. v. Microsoft Corp*., 980 F. Supp. 537 (D.D.C. 1997).

25. *U.S. v. Microsoft Corp*., 147 F. 3d 935, 956 (D.C. Cir. 1998). The district court's preliminary injunction was granted without adequate notice to Microsoft and was based on an erroneous reading of the consent decree concerning integrated products. *Id.* at 948. There were no exceptional circumstances to warrant a special master. *Id.* at 956.

26. *U.S. v. Microsoft Corp.*, 1998 U.S. Dist. LEXIS 14231 (D.D.C. Sept. 14, 1998). The states initially included New York, California, Connecticut, Florida, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, Ohio, South Carolina, Utah, West Virginia, Wisconsin, and the District of Columbia. One state withdrew and another settled, leaving eighteen remaining states. The states alleged additional violations under their state unfair competition laws and alleged claim of monopoly "leveraging," by using its unlawful monopoly in the operating system market to obtain a competitive advantage in the browser market.

27. 15 U.S.C. § 1.

28. 15 U.S.C. § 2.

29. *U.S. v. Microsoft Corp*., 1998 U.S. Dist. LEXIS 14231 at *4.

30. *Id.*

31. *Id.* at *91.

32. *U.S. v. Microsoft Corp*., 84 F. Supp. 2d 9, 12 (D.D.C. 1999) (findings of fact).

On November 9, 1999, Judge Jackson issued his extensive findings of fact, which stated that while Microsoft benefited consumers by including Internet Explorer with Windows at no extra charge, Microsoft also acted to the detriment of consumers by engaging in a series of actions to protect barriers to entry into the market, and this protected Microsoft's monopoly from other middleware threats, such as Netscape's Navigator and Sun's Java.[33] This in turn caused "serious and far-reaching consumer harm by distorting competition."[34] Additionally but less directly, consumers were also hurt by less innovation.[35] Most harmful, according to Judge Jackson in his findings of fact, was the message that Microsoft's action had conveyed due to its treatment of Intel, IBM, Compaq, Netscape, and others; Microsoft proved it would use its "market power and immense profits" to harm anyone that would compete with Microsoft.[36]

Before the conclusions of law were issued, Judge Jackson appointed Chief Judge Posner of the Court of Appeals for the Seventh Circuit to act as mediator between the parties. While both parties agreed to mediation and to the mediator, the mediation failed after four months.[37]

On April 3, 2000, District Judge Jackson gave his conclusions of law that Microsoft violated section one of the Sherman Act[38] by unlawfully tying its web browser to its operating system, but did not, as a matter of law, violate section one by exclusive dealings.[39] Microsoft violated section two of the Sherman Act[40] by "maintain[ing] its monopoly power by anti-competitive means and attempt[ing] to monopolize the Web browser market."[41] Microsoft was also liable under state law.[42]

On June 7, 2000, Judge Jackson issued the remedy: Microsoft was required to split the Operating Systems and Application businesses.[43] Microsoft appealed all three legal conclusions,[44] the factual foundations upon which they rested,[45] and the break-up remedy.[46] Microsoft further requested the judgment vacated since, according to Microsoft, Judge Jackson

33. *Id.* at 110-11.
34. *Id.* at 111. (Microsoft forced OEMs to ignore consumer demand for another browser by either shipping hardware with an operating system that only had IE, or by shipping hardware with an operating system that would return IE to the default browser.).
35. *Id.* at 112.
36. *Id.*
37. *U.S. v. Microsoft Corp.*, 253 F.3d 34, 47-48 (D.C. Cir. 2001) (en banc).
38. 15 U.S.C. § 1.
39. *U.S. v. Microsoft Corp.*, 87 F. Supp. 2d 30, 35 (D.D.C. 2000) (conclusions of law).
40. 15 U.S.C. § 2.
41. *Microsoft*, 87 F. Supp. 2d at 35.
42. *Id.*
43. *U.S. v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64, (D.D.C. 2000) (final judgment).
44. *Supra* nn. 37-40 and accompanying text.
45. *Supra* nn. 32-36 and accompanying text.
46. *Microsoft*, 87 F. Supp. 2d at 35.

violated his duty of impartiality by ethical violations such as making impermissible public statements while the case was pending and having impermissible *ex parte* contacts.[47]

The Court of Appeals for the District of Columbia Circuit in 2001 agreed in part and disagreed in part.[48] The Court affirmed in part the district court's ruling that Microsoft monopolized the market of operating systems for personal computers[49] in violation of section two of the Sherman Act.[50] The Court of Appeals reversed the district court's conclusion of law that Microsoft violated section two in attempting to monopolize the browser market.[51] The Court remanded the tying issue[52] under section one of the Sherman Act.[53] Finally, the final judgment on the break-up remedy was vacated because Judge Jackson had made impermissible *ex parte* contacts by holding secret meetings with the media and made offensive comments about Microsoft officials outside the court room.[54] The case was remanded to yet a different, third, district court judge.[55] The United States Supreme Court denied the petition for writ of certiorari.[56]

On remand, United States District Court Judge Keller-Kotelly ordered settlement discussions,[57] which resulted in the United States and nine states reaching a consent decree with Microsoft.[58] A hearing was held on a revised consent decree, with the Computer and Communications Industry Association ("CCIA") and the Software and Information Industry Association ("SIIA") participating as *amici curiae*, but not as interveners.

On November 1, 2002, the district court held that the revised consent decrees with the United States,[59] and the settling states,[60] would be approved as in the public interest under the Tunney Act,[61] if they were

47. *U.S. v. Microsoft*, 253 F.3d at 46, 48.

48. *Id.* at 46.

49. *Id.* at 46, 52-54 (The appellate court agreed with the district court's definition of the relevant market as the "licensing of all Intel-compatible PC operating systems worldwide." The district court also properly excluded middleware from that definition of the relevant market.).

50. 15 U.S.C. § 2.

51. *U.S. v. Microsoft*, 253 F.3d at 80.

52. 15 U.S.C. § 1; *U.S. v. Microsoft*, 253 F.3d at 84.

53. 15 U.S.C. § 1.

54. *U.S. v. Microsoft*, 253 F.3d at 46 (The district court also did not hold an evidentiary hearing on the remedy and did not give adequate reasons for the remedy.). The district court did not explain how the remedy would unfetter a market from anticompetitive conduct.

55. *Id.*

56. *Microsoft Corp. v. U.S.*, 534 U.S. 952 (2001).

57. *U.S. v. Microsoft Corp.*, 2001 U.S. Dist. LEXIS 24272 at *8 (D.D.C. Sept. 28, 2001).

58. Illinois, Kentucky, Louisiana, Maryland, Michigan, New York, North Carolina, Ohio, and Wisconsin settled. 66 Fed. Reg. 59452 (Nov. 28, 2001). Over 32,000 public comments were received, and modifications were made to the consent decree. 67 Fed. Reg. 23654 (May 3, 2002).

59. *Microsoft Corp.*, 231 F. Supp. 2d at 201.

60. *N.Y. v. Microsoft Corp.*, 224 F. Supp. 2d at 277.

61. *See* Keegan, *supra* n. 19.

slightly modified to allow the court to take action *sua sponte* concerning the enforcement of the decree. The final consent decree was entered.[62]

The district court analogized applying a remedy in this case to shoeing a galloping horse.[63] The consent decree agreed upon provides that Microsoft's licenses with OEMs for the Windows operating systems will be uniform and will not restrict the OEM's ability to install or display icons for non-Microsoft middleware, distribute or promote non-Microsoft middleware, or launch non-Microsoft middleware, among other things. Microsoft must also disclose the necessary documentation for middleware to generate with a windows operating system product, for that sole purpose. Microsoft may not retaliate or threaten retaliation against OEMs independent hardware vendors, or Internet service providers. The consent decree is in effect for three years.[64]

In approving the consent decree, the district court needed the appellate court's direction to have the remedy fit the wrong.[65] The district judge chided the plaintiffs for gathering and bringing all existing complaints against Microsoft before the court at this late stage, and for not respecting the parameters set out by the appellate court.[66] Conversely, according to the court, Microsoft has a tendency to minimize the effects of its illegal conduct, and the remedy is imposed despite Microsoft's view.[67]

An interesting aspect in light of the E.U. Microsoft antitrust litigation is the ruling that Microsoft need not unbundle its own applications software from Windows operating systems. The plaintiff's only economic expert did not endorse a remedy removing software code.[68] According to the district court, "[t]he case law is unwavering in the admonition that it is not a proper task for the court to undertake to redesign products."[69]

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62. *U.S. v. Microsoft Corp.*, 2002 WL 31654530 at *16 (D.D.C. Nov. 12, 2002). The court left enforcement to the parties and the court. Non-parties should not have direct access to the enforcement mechanism, according to the district court. *N.Y. v. Microsoft Corp.*, 224 F. Supp. 2d at 181-82.

63. *N.Y. v. Microsoft Corp.*, 224 F. Supp. 2d at 184; *see generally*, Mark Geier, Student Author, *Antitrust: U.S. Microsoft*, 16 Berkeley Tech. L.J. 297 (2002); Thomas M. Lenard, *Creating Competition in the Market for Operating Systems: Alternative Structural Remedies in the Microsoft Case*, 9 Geo. Mason L. Rev. 803 (2001); Adam MacLuckie, Student Author, *United States v. Microsoft: A Look at the Balancing Act Between Copyright Protection for Software, Intellectual Property Rights and the Sherman Antitrust Act*, 2 Hous. Bus. & Tax L.J. 415 (2001/02).

64. *N.Y. v. Microsoft Corp.*, 224 F. Supp. 2d at app. B. The disclosures will likely prove beneficial to the development of middleware. *Id.* at 193.

65. *U.S. v. Microsoft*, 253 F.3d at 107.

66. *N.Y. v. Microsoft Corp.*, 224 F. Supp. 2d at 192.

67. *Id.* at 194. The court stated that it will hold Microsoft to its promises made during litigation to change its predatory practices which were part of its business strategy.

68. *Id.* at 157.

69. *Id.* at 158.

Nine states did not agree with the consent decree,[70] and instead litigated a remedy that closely paralleled the consent decree.[71] These states would have preferred a broader remedy including open source licensing for Internet Explorer and auctioning to a third party the right to move Microsoft Office to other non-Microsoft operating systems.[72] After a thirty-two day hearing on the remedy, a parallel consent decree to the negotiated plea was entered by the district court.[73] Only the Commonwealth of Massachusetts appealed.

The Court of Appeals for the District of Columbia Circuit in 2004 said, "well done" concerning the district court's remedy, which went right to the heart of the problem that Microsoft had created.[74] The appeals court rejected Massachusetts's claim that the district court abused its discretion by rejecting the open-source IE remedy.[75] The appellate court held that the remedy of allowing other rival browsers was adequate.[76] The remedy was affirmed.[77] Thus, the governmental action against Microsoft ended in the United States in the summer of 2004, unless and until further action is brought. Private antitrust actions against Microsoft have been settled.[78]

III. *MICROSOFT V. COMMISSION*

In 1998, Sun Microsystems of Palo Alto, California lodged a complaint against Microsoft of Redmond, Washington with the European Commission alleging that Microsoft had a dominant position in the PC operating system market, and that Microsoft violated section eighty-two of

70. California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, West Virginia, and the District of Columbia did not sign the consent decree. *Mass. v. Microsoft Corp.*, 373 F.3d at 1205.

71. *Id.*

72. *Id.* at 1206-07.

73. *Id.* at 1205.

74. *Id.* at 1210.

75. *Id.* at 1204.

76. *Id.* at 1222.

77. *Id.* at 1250. The order approving the consent decree was also affirmed. The order denying the right of the CCIA and the SIIA was reversed, however. Robert Bork argued for CCIA with Kenneth Starr on the brief.

78. Microsoft has reportedly spent more than $3 billion to settle lawsuits. In November 2004 Microsoft reportedly paid $536 million to Norvell to settle, and settled with other litigants including Sun and Time Warner. John R. Wilke, *Microsoft Faces Allegations on Conduct*, Wall St. J. (N.Y.C., N.Y.) A3 (Nov. 17, 2004). Microsoft has also settled with the CCIA, *see Mass. v. Microsoft Corp.*, 373 F.3d at 1205, and the CCIA agreed not to seek U.S. Supreme Court review. Wilke, Wall St. J. at A3; *see generally*, Ramona Mateiu, Student Author, *Antitrust: Private Antitrust Suits: In Re Microsoft Antitrust Litigation*, 17 Berkeley Tech. L.J. 295 (2002).

the Treaty Establishing the European Community[79] by keeping confidential the information that work group server operating systems need to fully interoperate with Microsoft's PC operating systems.[80] In 2000, the Commission began an investigation on its own concerning Microsoft's incorporation of Windows Media Player into Windows PC operating systems. Two Statements of Objections on these two issues were sent by the Commission to Microsoft in 2000 and 2001; Microsoft responded to both by commenting on the Commission's preliminary finding of fact and law,[81] and Microsoft additionally submitted forty-six customer statements in response. The Commission itself in 2002 requested information from these forty-six customers.[82]

In 2003, the Commission engaged in a wider market inquiry of seventy-five E.U. randomly selected firms.[83] Microsoft requested and got an oral hearing in 2003, and had access to the file five times during this process.[84]

On March 24, 2004 the Commission issued a thorough and exhaustive decision concluding that Microsoft has a dominant position under article 82 of the Treaty in the market for work group server operating systems.[85] Article 82 applies because Microsoft's conduct affects trade between member states.[86] The relevant product market is the market for operating systems for client PCs[87] and the relevant geographic market is worldwide. The Court of Justice defines a dominant position under article 82 of the Treaty as:

> [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

79. *Treaty Establishing the European Economic Community*, *supra* n. 7, at art. 82. Under article 82 of the Treaty, any abuse by one or more undertaking having a dominant position within the common market or in a substantial part of it is prohibited as incompatible with the common market insofar as it may affect trade between member states.

80. COMP/C-3/37.792, at 2. Sun had previously requested from Microsoft the complete information necessary for Sun to provide support for Windows operating system. Sun requested the specifications for the protocols used by Windows work group server to provide services to Windows work group networks. *Id.* at 54. Microsoft's response was that the information is already available to Sun and every other software developer through the Microsoft Developer Network. *Id.* at 56.

81. *Id.* at 5.

82. *Id.* at 6.

83. *Id*. Seventy-one responded.

84. *Id.* at 7-8.

85. *Id.* at 146.

86. *Id.* at 88.

87. *Id.* at 92.

> appreciable extent independently of its competitors, its customers and ultimately of the consumers.[88]

The Commission determined that Microsoft has a high market share in the market for work group server operating systems.[89] This high market share, along with barriers to entry and links to the client PC operating system market, led Microsoft to a dominant position in the work group server operating system.[90]

Having a dominant position, however, is not contrary to E.U. competition rules, unless that position leads to abuse.[91] The Commission further determined that Microsoft had abused its dominant position by refusing to supply the specifications for protocols used by Windows work group server to Sun and other competitors.[92]

In addition, Microsoft had a 93.8% market share for PC operating systems.[93] By tying Windows Media Player to the windows operating system, Microsoft further abused its dominant position.[94]

When the Commission finds article 82 has been violated, it may impose fines and remedies.[95] The Commission held that the natural remedy for Microsoft's abusive refusal to supply was an order to supply that had been refused.[96] Microsoft was ordered to supply interoperability information within 120 days to allow competitors work group server operating systems products to work with Windows operating systems.[97] Further,

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88. *Id.* at 118.
89. *Id*. at 146.
90. *Id.* at 146.
91. *Id.* at 146. The Court of Justice defined abuse as:

> [A]n objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

Id. at 146.

92. *Id.* at 147.
93. *Id*. at 223.
94. *Id*. at 275.
95. *Id.* at 275.
96. *Id.* at 276. Microsoft argued that this remedy would violate the WTO's Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement, but the Commission found no inconsistency. *Id.* at 291-92.
97. *Id.* at 299. The term interoperability is defined by the Software Directive as follows:

> Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose a logical and, where appropriate, physical interconnection and interaction is required to permit all ele-

within ninety days, Microsoft must offer a full-functioning version of windows PC operating system without Windows Media Player.[98] Finally, the Commission (having the ability to impose a fine up to ten percent, based on the gravity and duration of the infringement) assessed a fine to Microsoft in the amount of 497 million euros,[99] or nearly $613 million, a record fine for that body.

On December 22, 2004, the Court of First Instance denied Microsoft's request for interim relief.[100] The full appeal is pending at the time of this writing. The Court had the ability to suspend the Commission's actions.[101] While the Court addressed the case, CCIA and Novell withdrew their intervention.[102] The Court ultimately denied the application for Microsoft's interim measure; Microsoft's request for confidential treatment, however, was granted.[103]

In a statement at its web site, updated February 7, 2005, Microsoft states that the Microsoft Work Group Server Protocol Program License Agreement grants to licensees certain Microsoft European intellectual property rights for the purpose of interoperability.[104] Further, "Microsoft will also comply with the European Commission direction to release versions of Microsoft Windows XP in Europe that do not include certain Windows multimedia technologies."[105]

> ments of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function;
>
> Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as 'interfaces';
>
> Whereas this functional interconnection and interaction is generally known as 'interoperability'; whereas such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged.

Id. at 12. Microsoft unsuccessfully argued that the Commission went beyond this Software Directive on interoperability in this case. *Id.*

98. *Id.* at 300.

99. *Id.* at 292-93, 297.

100. *Microsoft v. Commn. of the European Communities*, Case T-201/04, 2004 E.C.R. ___ (Ct. First Instance 2004) (available at WL, EU-ALL database).

101. *Id.* at ¶ 70.

102. *Id.* at ¶ 78; *see supra* n. 78 and accompanying text (concerning the settlements by CCIA and Novell with Microsoft).

103. *Microsoft*, Case T-201/04 at ¶ 478.

104. Microsoft, *Microsoft Implementation of European Commission Decision*, http://www.microsoft.com/MSCorp/legal/eudecision/ (last updated Mar. 22, 2005).

105. *Id.*

IV. CONCLUSION

Two cases were started on two continents against Microsoft for antitrust violation in 1998. The U.S. case resulted in Microsoft having to hide its browser;[106] the E.U. case at the time of this writing has resulted in Microsoft having to remove its media player, license the code necessary for interoperability to competitors, and pay a hefty fine.[107] In some ways, differing results can be expected due to the application of different laws applied differently.[108] U.S. District Judge Kellar-Kotelly adhered to the admonition not to redesign products; notably, the plaintiffs' own economic expert did not request any product redesign type remedy.[109] Likewise, the E.U. Commission held that the natural remedy is an order to supply what has been refused.[110] Thus, the Commission ruling reveals the more aggressive E.U. approach to Microsoft's antitrust violations.

The E.U. Commission has taken on a proactive role in antitrust enforcement. For example, after the GE/Honeywell merger was approved in the U.S., the Commission disallowed the merger as being incompatible with the common market.[111] This was the first time that a merger of two U.S. firms, approved in the U.S., was disallowed in the E.U. Although at the time of this writing the disallowance is being appealed to the Court of First Instance, the merger did not occur. In another merger blocked by the Commission, the Court of First Instance held on September 28, 2004 that the Commission's blocking of MCI WorldCom's purchase of Sprint in 2000 was erroneous.[112] It remains to be seen whether the Court of First Instance will again reverse the Commission in the Microsoft case.

In the meantime, Microsoft's antitrust woes are not over. In July, 2004, Japan's Fair Trade Commission issued a warning against Microsoft for suspected anti-monopoly violations over restrictive contracts with companies using Windows operating systems. This case could go to the Tokyo High Court.[113] Microsoft's antitrust problems seem to be spreading and may now be shifting to Japan.

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106. *See supra* nn. 74-78 and accompanying text.

107. *See supra* nn. 78, 99-102 and accompanying text.

108. Sections 1 and 2 of the Sherman Act were applied in the U.S. actions. See *supra* nn. 12-13 and accompanying text. Article 82 of the Treaty was applied in the E.U. action. *See supra* n. 79 and accompanying text.

109. *See supra* nn. 68-69 and accompanying text.

110. *See supra* n. 95 and accompanying text.

111. *Gen. Electric/Honeywell* COMP/M.2220, http://europa.eu.int/comm/competition/mergers/cases/decisions/m2220_en.pdf (Mar. 7, 2001).

112. *MCI, Inc. v. Commission*, Case T-310/00, 2004 E.C.R. ___ (Ct. First Instance 2004) (available at WL, EU-ALL database).

113. *Japanese Commission Warns Contracts May Violate Law*, 244 Wall St. J. (N.Y.C., N.Y.) D5 (July 14, 2004).