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Articles

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

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Abstract

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

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

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