



MICROSOFT on TRIAL

*Legal and Economic Analysis
of a Transatlantic Antitrust Case*

Edited by LUCA RUBINI

NEW HORIZONS IN COMPETITION LAW AND ECONOMICS

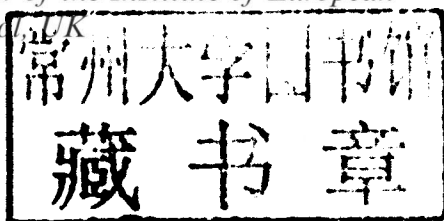
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Luca Rubini

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Microsoft on Trial

NEW HORIZONS IN COMPETITION LAW AND ECONOMICS

Series Editors: Steven D. Anderman, *Department of Law, University of Essex, UK* and Rudolph J.R. Peritz, *New York Law School, USA*

This series has been created to provide research based analysis and discussion of the appropriate role for economic thinking in the formulation of competition law and policy. The books in the series will move beyond studies of the traditional role of economics – that of helping to define markets and assess market power – to explore the extent to which economic thinking can play a role in the formulation of legal norms, such as abuse of a dominant position, restriction of competition and substantial impediments to or lessening of competition. This in many ways is the *new horizon* of competition law policy.

US antitrust policy, influenced in its formative years by the Chicago School, has already experienced an expansion of the role of economic thinking in its competition rules. Now the EU is committed to a greater role for economic thinking in its Block Exemption Regulations and Modernisation package as well as possibly in its reform of Article 102. Yet these developments still raise the issue of the *extent* to which economics should be adopted in defining the public interest in competition policy and what role economists should play in legal argument. The series will provide a forum for research perspectives that are critical of an unduly-expanded role for economics as well as those that support its greater use.

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Microsoft on Trial

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'Far-off, most secret, and inviolate Rose,
Enfold me in my hour of hours'
(W.B. Yeats, *The Wind Among the Reeds*, 1896)

To Barbara

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Luca Rubini
Birmingham, 20 July 2010

Abbreviations

AD	analogue-to-digital
API	applications programming interface
CD	compact disc
CFI	Court of First Instance
CIFS	Common Internet File System
CODEC	coder/decoder or compressor/decompressor
COM	component object model
CORBA	Common Object Request Broker Architecture
DA	digital-to-analogue
DAP	Directory Access Protocol
DCE	distributed computing environment
DCOM	distributed component object model
Dfs	Distributed file system
DG Comp	Directorate General for Competition, European Commission
DLL	dynamic-link library
DOJ	US Department of Justice
DRM	digital rights management
DVD	digital versatile disc
EC	European Communities
ECJ	European Court of Justice
EEA	European Economic Area
EU	European Union
FTC	US Federal Trade Commission
GUI	graphical user interface
HTML	HyperText Markup Language
IDL	Interface Definition Language
IE	Internet Explorer
IETF	Internet Engineering Task Force
IP	intellectual property
IPR	intellectual property right
IPv4	Internet Protocol version 4
IT	information technology
JVM	Java Virtual Machine
KCC	knowledge consistency checker

KDC	key distribution centre
LAN	local area network
LDAP	Lightweight Directory Access Protocol
LINFO	Linux Information Project
MS-DOS	Microsoft Disc Operating System
NTLM	New Technology Lan Manager
OECD	Organisation for Economic Co-operation and Development
OEM	original equipment manufacturer
OSF	Open Software Foundation
OSI	open systems interconnection
PAC	privilege access certificate
PC	personal computer
PDA	personal digital assistant
R&D	research and development
RAM	Random Access Memory
RMI	remote message invocation
RNI	Raw Native Interface
RPC	remote procedure call
SAM	security accounts manager
SASL	Simple Authentication and Security Layer
SDK	software developer kit
SMB	Server Message Block
SSO	standard setting organization
TCP	Transport Control Protocol
TCP/IP	Transport Control Protocol/Internet Protocol
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference for Trade and Development
US	United States
WMP	Windows Media Player
WSPP	Work Group Server Protocol Programme
WTO	World Trade Organization

Preface

A little elephant is very keen on skating. She practises on and on, improves and begins participating in various contests taking place on the little village lake in winter time. With age (and practice) our little elephant grows and grows and becomes quite a physical presence on the little lake and in the speed and free skating competitions. In the local rural community, skating is a very much practised and extremely dreamed of activity. Worries and complaints about the weight and size of the elephant are increasingly voiced by contenders and viewers. Although big she is very fast and agile in both speed and free racing and often outclasses her competitors. Her magnitude, however, is often seen as a serious obstacle to contenders and a danger to the solidity of the ice level. Local villagers have mixed views. They enjoy the muscular and confident style of the elephant to which they are very much accustomed. At the same time, they seem to share the same worries about the fairness of the races and the overall condition of their lake. They want to keep enjoying this old, good sport. What shall be done? Should the elephant be prohibited to participate in skating sports altogether or, less drastically, should the rules of the game be reviewed to allow a fairer and less perilous sporting activity that is appreciated by so many? And, if so, how should the skating sports in this mountain lake be regulated? Is there a dramatic choice between punishing the elephant because it is ultimately an elephant and safeguarding the sport that is so dear to all involved? Or (following a more or less magical intervention) shall we, and our once little elephant, hope in her transformation into a little, less menacing mouse? In fairy-tale style, this story and its ensuing questions sum up the main antitrust issues raised by the transatlantic legal review of Microsoft's conduct.

This book offers the opportunity to analyse one of the most difficult topics in antitrust laws: the regulation of unilateral conduct of dominant players. The legal disputes that saw Microsoft, its products and commercial strategies subject to competition law scrutiny represent a paradigmatic example of the difficulties raised by unilateral conduct and the economic and legal assessment of its impact on competition and society's welfare, particularly in the context of a complex technical scenario.

In simple terms, the various strands of litigation on both sides of the Atlantic concerned two issues: on the one hand, the extent to which

Microsoft should be obliged to supply details of how to reproduce certain features of its server technology so that other servers could function smoothly within a Windows network (EC case); on the other hand, to what extent the bundling of (depending on the views) extra products or features, like a web-browser (US case) or a media player (EC case), with the Windows operating system significantly restricted the commercial opportunities of producers of competing products or features.

After reading both the US and EC cases that involved Microsoft, it could be argued that the title of the book is not really appropriate. In fact it could easily be rephrased as 'unilateral conduct on trial' or better 'anti-trust regulation of unilateral conduct on trial'. In other words, for several reasons the Microsoft cases represent excellent *test-cases* of the 'anti-trust' and 'efficiency' paradoxes highlighted by Robert Bork¹ and Eleanor Fox² respectively. Their interest is certainly not confined to the specific facts of the litigation, or to the vicissitudes of a major company. The real interest derives from the economic and legal issues raised, and their treatment under (EC and US) antitrust laws. As we try to sketch in these brief introductory notes, the extraordinary commercial position of Microsoft and the characteristics of a crucial sector like information technology may help in explaining the case. Most crucially, however, one is left to wonder as to the broader implications of these cases, and particularly the EC one, on the future development of competition law and policy. Further, despite turning on a previously unreached level of technical difficulty, these cases (like any important one) raise grander questions as to the attitude and purpose of competition policy in both the European Union and the United States.³

This book has its origin in two events (a research workshop and a conference) organized by the Institute of European Law of the Law School of the University of Birmingham in 2008. This 'Microsoft initiative' provided the opportunity to bring to Birmingham high-profile speakers, often directly involved in the EC case. This represents the core of the project underlying this book which attempts to build and expand on this solid base and make available to the wider public the interesting debate that took place in the West Midlands.

What the editor has attempted to do is to gather various experts who could each provide their own perspective on the EC and US cases and cover all the

¹ R.H. Bork, *The Antitrust Paradox* (2nd edition, New York: Free Press, 1993).

² E.M. Fox, 'The Efficiency Paradox' in R. Pitofsky (ed.), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (Oxford: Oxford University Press, 2008, p. 77).

³ *Ibid.*

major issues raised by them. The background of the contributors is varied, ranging from information technology to law and economics. They come from both sides of the Atlantic, from practice and academia, and some of them are immediately associated with the European dispute. Although the emphasis lies particularly on the more recent EC case, US litigation is analysed as well, for its own significance and as representing a necessary basis for comparison of the EC case. Indeed, the US and EC cases can be seen as steps in one single *saga*. Although they obviously involved different authorities applying different laws, and with different approaches, both cases were confronted not only with similar claims but also with similar issues. This is clearly exemplified by the European investigation into the bundling of the Windows Operating System with Internet Explorer which intriguingly echoes the subject of the US case of ten years ago. This recently closed (and final?) chapter in the saga thus seems to rehearse its starting point.⁴

Both the US and EC cases have been highly controversial, politically charged, dramatic (with judges being replaced), even theatrical (with robes worn even when this is not usually done) – and for various reasons. Before briefly presenting the various contributions to this book, and showing their place within its scheme, we thus outline five factors which in our view define the ‘Microsoft case’.

First, Microsoft is not like any other company. It is a very successful and powerful enterprise, created and led for many years by one of the true gurus of this age, and operating in a crucial and sensitive sector affecting every aspect of everyday life of the large majority of the world population. It is fair to say that virtually anyone who uses a personal computer at the beginning of the twenty-first century is conversant with one or more Microsoft products. Windows, its PC operating system, is omnipresent. Hence, the commercial decisions of this company affect virtually everyone. Indeed, modern literacy is defined by the familiarity with software, and more generally information technology.

Secondly, beneath user-friendly graphic interfaces and (more or less) intuitive functions, software is extremely complex. This is a key element of the Microsoft case, and more generally of any economic/legal assessment of information technology scenarios. The motto for a sound approach to the analysis of the various issues of the Microsoft case is therefore

⁴ In fact, the European saga is not completely closed. The EUR 899 million fine imposed on Microsoft with Commission Decision C(2008) 764 final of 27 February 2008, for failure to comply with the obligation to supply the required interoperability information, is currently subject to judicial review before the General Court (formerly the Court of First Instance). See *Microsoft v Commission* (case T-167/08) action brought on 9 May 2008 [2008] OJ C171/41.

'technical issues first'. If the technicalities are not properly understood, one seriously risks raising up a fine castle built on very shaky foundations. It could be grand and beautiful in appearance but it would lead to wrong legal and economic conclusions. Eventually, it would not resist the effects of a close and comprehensive scrutiny. The reader is therefore advised of the importance of properly understanding the basic technology aspects of the case.

Thirdly, economics is not always univocal in the determination of the welfare effects of behaviour in markets such as information technology, denoted by complex dynamics and resting on network effects, standardization and integration, fast pace of innovation and obsolescence. As a consequence, an economic-informed antitrust law may be affected by different readings of the efficiency of the scenario under scrutiny.

Fourthly, fluidity (if not lack of clarity) of the law is another important factor. Antitrust is a powerful tool that allows governments to interfere with market functioning. By its own nature, however, its normative framework is far from elaborate and precise. In both the United States and the European Union, the fundamental provisions, including those regulating unilateral conduct, are basic, even skeletal. The old language of Article 82 EC (1957) and sections 1 and 2 of the Sherman Act (1890) is general and broad. It simply outlines the unclear boundaries within which lawyers and economists must operate. Further, antitrust rules are often, and increasingly, based more on 'standards' requiring a case-by-case analysis rather than on predetermined 'rules' of immediate, almost automatic application. And this is particularly so with respect to the most controversial cases of commercial behaviour – and those at issue in the Microsoft cases are paradigmatic in this respect – which are very often unilateral. This open nature, together with the changing attitude towards antitrust policy, has meant that through decades and years, the interpretation and application of the same provisions have changed, often dramatically, to reflect the prevailing antitrust philosophy. More specifically, both the EC and US antitrust systems are currently undertaking a review of the treatment of unilateral behaviour.

Fifthly, as hinted at the end of the previous paragraph (and even before), attitudes towards a more or less interventionist use of antitrust law may develop and change. This ultimately depends on the *conceptions* of competition law prevailing in a certain society, on the *goals* that are assigned to it. It is interesting to ask whether the US and/or EC cases represented a shift towards a more robust antitrust intervention, or otherwise. What is in any case clear is that the competition policy visions underpinning the parties' positions in the case were different and informed by different views of what antitrust law should be about.

These are, in our view, the main keys to interpretation of the Microsoft saga.

We can now proceed with a brief presentation of the contents of the book. Part I, containing the chapter by Colin Jackson, sets forth the technical background of the two cases in an accessible and concise way. The proper understanding of the basic technology issues is of crucial importance to properly comprehend the case. The reader is therefore advised to ponder and treasure this primer. Part II includes contributions by those who were directly involved and litigated the EC case, on the side of the Commission and Microsoft. Although the authors speak in a personal capacity, it is clear that no-one else could have a more direct knowledge of the case. In various respects, therefore, Chapters 2 by Nicholas Banasevic and Per Hellström, 3 by Ian Forrester and 4 by Jean-François Bellis and Tim Kasten offer the reader an invaluable insight into the case. The full flavour of the litigation before the Court of First Instance (CFI) is captured by the documents that accompany this book and can easily be downloaded from the book's webpage (see below). As a conclusion of this review of the EC case, in Chapter 5, Jens Fejø provides a brief but systematic summary of the findings of the ruling of the CFI, as well as a few initial reflections.

The nine contributions to Part III are devoted to the full analysis of the EC case and also of the US one, with recurring parallels between the two. The examination is not only legal but also economic. Rudolph Peritz begins with a thorough analysis of the US case, providing also a comparison between US and EC approaches to interoperability in Chapter 6. This provides a good bridge to the following three chapters which concentrate on the interoperability issue. While Steven Anderman in Chapter 7 assesses the legal criteria used by the CFI, Eleanor Fox briefly scrutinizes them from an American perspective, intriguingly enquiring how a US court would have approached a similar question. Ann Walsh's Chapter 9 builds upon the analysis of interoperability with a comprehensive examination of its links with the two crucial aspects of standardization and innovation. Chapter 10 by Arianna Andreangeli shifts the focus towards the tying aspect of the EC case. The importance of technological integration is underlined and, again, a parallel is drawn with the approach of US anti-trust law to these cases. In the following two chapters, the three contributors (Maria Gil-Molto, Derek Ridyard and Markus Baldauf) examine the two sides of the EC case from the economic perspective. The various schools of thought are set forth and discussed, and an ingenious reading of tying is offered. Chapter 13 by Nicholas Economides and Ioannis Lianos, is devoted to the crucial issues raised by remedies. The focus of this detailed contribution is mainly on the EC case but ample reference and

parallels are made to the US counterpart too. Carlo Petrucci's Chapter 14 closes Part III, exploring the case for an international competition agreement regulating unilateral behaviour. This provides a timely opportunity to reconsider the 'conceptions' and 'purposes' of antitrust, that normative element which is of paramount importance to understanding the actual interpretation and application of positive antitrust laws. An Epilogue of Bo Vesterdorf, who presided over the CFI in the EC case, constitutes a fitting conclusion to the book.

The reader should be aware that during the production of this book the Treaty of Lisbon entered into force (1 December 2009). While introducing important amendments in many areas of European law, it has virtually left unchanged the main competition provisions (with the possible exception of a succulent but probably moot debate on whether competition policy has been upgraded to one of the 'objectives' of the European Union: see Article 3.2 of the Treaty on the European Union and its linked Protocol on the Internal Market and Competition). The numbering of the provisions of the now Treaty on the Functioning of the European Union (TFEU, previously European Community Treaty or EC Treaty or Treaty of Rome) has changed. For our purposes the former Articles 81 and 82 EC have become Articles 101 and 102 TFEU. Similarly, the names of the two main European Courts have changed (the Court of First Instance is now the General Court, while the European Court of Justice becomes the Court of Justice of the European Union). Since these changes are merely cosmetic, and not of substance, it has been decided not to amend the various chapters with the new numbering and nomenclature. The so far familiar jargon of European lawyers has been kept and the effort to adjust it to the current new cloth will be minimal.

To pay homage to information technology, as mentioned above, the book's webpage includes various documents concerning the US and EC litigation (and beyond), which can be downloaded and represent invaluable reference to a full understanding of the various arguments put forward in the two cases and their contexts.⁵ Some of these documents are not easily (if at all) accessible to the public – an additional motive to make them available to the eager and inquisitive reader.

LUCA RUBINI

Birmingham, 20 July 2010

⁵ See <http://www.e-elgar.co.uk/pdfs/rubini.pdf>.