

TROUBLE ABROAD: MICROSOFT'S ANTITRUST PROBLEMS UNDER THE LAW OF THE EUROPEAN UNION

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I. INTRODUCTION

The European Union, after receiving complaints from software manufacturers, has announced it will begin proceedings against Microsoft Corporation for abuse of a dominant position through discriminatory licensing and refusal to supply information regarding its software.¹ This action pursued by the European Union presents both similarities and differences with the pending antitrust action being pursued by the U.S. Justice Department.² The U.S. antitrust action charges, *inter alia*, that Microsoft improperly tied its operating system and its internet browser in order to preserve its market power and leverage its way into the web browser market.³ The allegations made by the European Union involve Microsoft's actions in extending its dominance in the personal computer operating systems market into the server operating systems market.⁴ Microsoft will face a very different legal challenge in Europe compared to its current legal problems in the United States since the two systems of antitrust law have developed in dramatically different ways.⁵ However, based on the findings of fact in the U.S. District Court, it is possible to predict what an ultimate determination in the European Union would be against Microsoft.

Historically, actions pursued on both sides of the Atlantic Ocean provide a background from which to predict further the outcome of the action. In the 1950s, the United States brought an antitrust suit against International

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¹ See *Dominance: EU Accuses Microsoft of Abusing Dominance to Squeeze Out Rivals*, BNA ANTITRUST & TRADE REGULATION DAILY, Aug. 14, 2000, at D6 [hereinafter *Dominance*].

² See *id.*

³ See Dustin Rowles, *Is it a Tie-in or an Integration? U.S. v. Microsoft Weighs In*, 6 B.U. J. SCI. & TECH. L. 12, 1 (2000).

⁴ See *Dominance*, *supra* note 1, at D6.

⁵ See generally Spencer Weber Waller, *Understanding and Appreciating EC Competition Law* 61 ANTITRUST L.J. 55 (1992) (stating that, unlike the U.S. economy, which was largely integrated and continental in scope at the time of the passage of the Sherman Act in 1890, the EC was created in 1957 in order to establish a new European common market and to promote harmony and increase the standard of living).

Business Machines (IBM).⁶ The prosecution of IBM would continue in various forms until 1982, with some issues not ultimately resolved until 1995.⁷ IBM also faced prosecution on similar grounds by the European Union.⁸ The outcomes of the cases were dramatically different, and this difference can be used as an historical example of antitrust practices of each of the respective regions and a possible indicator of potential results in the pending Microsoft actions. An analysis of European Union statutes, case law and public policy goals can also provide a framework for predicting the outcome of the current action. Through this prediction, comparisons between the U.S. and E.U. antitrust systems can be drawn. Given the combination of these factors, it is likely that, while the American case continues into its eleventh year, European courts will find Microsoft in violation of competition laws or force Microsoft into a quick settlement.

II. MICROSOFT

The actions currently pending in the United States and European Union court systems are another (and not likely final) chapter in the evolving story of Microsoft and antitrust prosecutors. A brief overview of the past enforcement actions and resolutions establishes the basis for the current U.S. case against Microsoft. A synthesis of the current case against Microsoft, now partially remanded to the D.C. District Court, also provides assistance in

⁶ See *In re Int'l Bus. Machs., Corp.*, 45 F.3d 641, 642 (2nd Cir. 1995) [hereinafter IBM1995].

⁷ See *id.*

⁸ See Case 60/81, *Int'l Bus. Machs., Corp. v. Commission*, 1981 E.C.R. 2639. The Commission of the European Communities in the European Court of Justice initiated the proceedings. At the time the proceedings were initiated, the European Union was known as the European Economic Community. *Id.* The E.E.C. was formally established by the Treaty Establishing the European Economic Community. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, March 25, 1957, 298 U.N.T.S. 11, *amended by* TREATY ON EUROPEAN UNION, Feb. 7, 1992, 31 I.L.M. 247, [1992] 1 C.M.L.R. 719 (1992). Although some differences do exist between the two entities, for the purposes of this discussion, the reference will be made to the European Union, which was formally established by treaty in 1992. See TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C 224) 1 [1992], 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY], *amended by* TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, O.J. (C 340) 1 (1997) [hereinafter AMSTERDAM TREATY]. The Amsterdam Treaty reconfigured and renumbered the original European Union Treaty. The newly numbered Articles that will be applied in this article are Article 81 (ex 85) and Article 82 (ex 86). The new numbering system went into effect on July 1, 1999, thus some sources involved in this article use the old numbering system.

establishing the most likely outcomes at home and abroad. Finally, in order to make a prediction of the end result in the European Union, the findings of fact entered by the Hon. Judge Penfield Jackson sitting in the D.C. District Court and the review of those findings by the Circuit Court of Appeals should be used as a basis for the courts and Commission of the European Union, although different conclusions of law will be drawn.

A. *Microsoft History*

Microsoft began providing Microsoft Disk Operating System (MS-DOS) software in 1981 for IBM personal computers; from this date forward, Microsoft's competitors began alleging anticompetitive practices by the company.⁹ After considerable urging, the Federal Trade Commission began an investigation in 1990.¹⁰ The FTC, however, reached an ultimate deadlock regarding whether or not to bring an action against Microsoft and, as a result, the Antitrust Division of the Department of Justice began an investigation of its own.¹¹ In 1994, following an investigation into its practices, Microsoft entered into a consent decree with the Department of Justice.¹²

Though initially viewed as ineffectual, the consent decree appears to have more than minimal bite when, in 1997, the Justice Department successfully pursued an action against Microsoft for violations of portions of the consent decree.¹³ The victory proved short-lived, however, as a court of appeals in a split decision reversed the holding of the district court.¹⁴ Essential to the court's ruling was a finding that Microsoft's Internet Explorer and Windows 95 were "integrated products" and thus protected by a portion of the consent decree which otherwise generally prohibited bundling practices.¹⁵ Furthermore, the court of appeals ruled that Microsoft had adequately demonstrated the facially plausible benefits of the Windows 95 and Internet Explorer combination.¹⁶ The ruling would ultimately have lingering affects on the

⁹ See John Cassidy, *The Force of an Idea*, NEW YORKER, January 12, 1998, at 32.

¹⁰ See *id.*

¹¹ See Norman W. Hawker, *Consistently Wrong: The Single Product Issue and The Tying Claims Against Microsoft*, 35 CAL. W. L. REV. 1,1 (1998).

¹² See *id.* Judge Stanley Sporkin felt that the decree presented the message that "Microsoft is so powerful that neither the market nor the Government is capable of dealing with all of its monopolistic practices," and initially refused to enter the settlement, but was overturned on appeal. See Cassidy, *supra* note 9, at 36.

¹³ See *United States v. Microsoft Corp.*, 980 F. Supp. 537 (D.D.C. 1997).

¹⁴ See *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998).

¹⁵ See Hawker, *supra* note 11, at 2.

¹⁶ See *id.* at 3.

follow up Department of Justice action alleging tying practices regarding Internet Explorer and Windows 98.¹⁷

B. Current Microsoft Situation

In May 1998, the federal and state governments asserted violations of sections 1 and 2 of the Sherman Antitrust Act¹⁸ by monopolization coupled with anticompetitive conduct and attempted monopolization.¹⁹ Judge Thomas Penfield Jackson issued findings in November 1999 that Microsoft held a share of over ninety percent of the relevant market, that high barriers to entry protect the dominant market share, and that customers do not have a commercially viable alternative to Windows operating system.²⁰ In April 2000, Judge Jackson issued conclusions that Microsoft had maintained monopoly power in the relevant market through anticompetitive practices in violation of section 1, had attempted to monopolize the web browser market in violation of section 2, and had illegally tied its web browser to its operating system in violation of section 1.²¹ Judge Jackson also ruled that Microsoft's licensing arrangements with computer manufacturers and other companies were not illegal exclusive dealing violations of section 1.²²

Judge Jackson did not hold any hearings on remedies, but instead entered a final judgment in June ordering the split of Microsoft into two organizations, a remedy stayed until the case reached a conclusion.²³ Microsoft immediately appealed the case²⁴ to the D.C. Circuit Court of Appeals and the Justice

¹⁷ See *id.*

¹⁸ See 15 U.S.C. §§ 1 - 2. The relevant portions of the Sherman Act for this discussion will be sections 1 and 2. 15 U.S.C. § 1 provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 2 provides, "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 . . ." The remainder of each section provides for punishment both by fine and criminally.

¹⁹ See *Antitrust: Microsoft Brief Charges 'Infected' Trial, 'Profound Misunderstanding' of Antitrust*, BNA CORP. COUNSEL DAILY, Nov. 29, 2000, at D4 [hereinafter *Infected*].

²⁰ See *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (Findings of Fact).

²¹ See *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (Conclusions of Law).

²² See *id.*

²³ See *Infected*, *supra* note 19, at D4.

²⁴ On appeal Microsoft alleged various errors committed by the district court including: the narrow limitation of the relevant product market to PC operating systems, the finding of monopoly maintenance through maximizing Internet Explorer's usage at Netscape's expense,

department moved for immediate Supreme Court review.²⁵ In reviewing the issues, the Supreme Court denied the direct appeal sought by the Department of Justice and held that the D.C. Circuit Court of Appeals should hear the case.²⁶ The circuit court heard the case en banc with the exception of three of the ten judges who recused themselves for conflicts of interest.²⁷ Microsoft then reached a settlement with Sun Microsystems regarding the use of Java.²⁸ The settlement terminates all Java licenses held by Microsoft and prevents Microsoft from using the "java compatible" trademark.²⁹

In late June, 2001 the D.C. Circuit Court of Appeals entered an opinion reversing in part, affirming in part and remanding the case for further proceedings.³⁰ The ruling was considered a victory for Microsoft even though it upheld the district court's findings of fact and the conclusion that Microsoft held and unlawfully preserved monopoly power.³¹ The decision did reverse the conclusions finding attempted monopolization of the browser market and a per se violation based on a tying arrangement.³² The court harshly criticized the out-of-court conduct of Judge Jackson, including his comments to members of the media throughout the trial, as evidencing an appearance of bias.³³ The same appeals court then rejected a motion filed by Microsoft to rehear various elements of the case, sending the case promptly back to the district court for remedy proceedings.³⁴

the finding of no causal connection between the alleged anticompetitive conduct and Microsoft's maintenance of a monopoly, the holding that Internet Explorer is unlawfully tied to Windows when Navigator can be and is used with Windows, the holding that agreements and licensing arrangements violated section 2, failing to hold hearings on relief, and the violation of the Code of Conduct for Judges by making extrajudicial communications with the press concerning merits of the case. See *Antitrust: Citing Complexity of Trial Record, Microsoft Urges Justices To Send Appeal To D.C. Circuit*, BNA CORPORATE COUNSEL DAILY, July 28, 2000, at D2 [hereinafter *Complexity*]. For more of Microsoft's appellate brief, see *Microsoft Press Pass*, at <http://www.microsoft.com/presspass/trial/appeals/11-27brief-guide.asp> (visited Dec. 22, 2000).

²⁵ See *Complexity*, *supra* note 24.

²⁶ See Jon Baumgarten et al., *Washington Watch*, 5 CYBERSPACE LAWYER No. 8, at 21 (Nov. 2000).

²⁷ See *id.*

²⁸ See Elizabeth Montalbano, *It's Java War, Round Two*, COMPUTER RESELLER NEWS, Jan. 29, 2001, at 10.

²⁹ See *id.*

³⁰ See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

³¹ See John Wilke et al., *Microsoft Scores a Big Legal Victory*, WALL ST. J., June 29, 2001, at B1.

³² See *id.*

³³ See *id.*

³⁴ See John Wilke, *Microsoft Case Heads Back to Trial Court*, WALL ST. J., Aug. 3, 2001, at A3.

C. Microsoft and the European Union

The European Union also began an investigation regarding Microsoft and filed a formal complaint at the same time that the 1994 U.S. action began.³⁵ The investigation also centered around the licensing restrictions set forth by Microsoft.³⁶ The European Union eventually agreed to a consent decree with Microsoft identical to the settlement entered in the United States.³⁷ The Commission of the European Union originally wanted to place stronger restrictions on Microsoft, but agreed to the less stringent decree negotiated by the Department of Justice, possibly in the spirit of transatlantic cooperation.³⁸ The European Union is again facing pressure and potential criticism as the Microsoft case begins to erode in the U.S.³⁹

D. Microsoft Findings of Fact

Judge Jackson found the following facts to have been proved by a preponderance of the evidence, and these facts were not determined to be clearly erroneous by the court of appeals.⁴⁰

1. Background

In 1981, Microsoft Corporation began producing an operating system⁴¹ known as MS-DOS, which became the predominant operating system for Intel-compatible personal computers (PCs).⁴² In 1985, Microsoft began producing Windows and followed, in 1995 and 1998, with Windows 95 and Windows 98 respectively, both marketed as operating systems for PCs with

³⁵ See Sarah Biggers et al., *Intellectual Property and Antitrust: A Comparison of Evolution in the European Union and United States*, 22 HASTINGS INT'L & COMP. L. REV. 209, 218 (1999).

³⁶ See *id.*

³⁷ See *id.*

³⁸ See Per Jebsen & Robert Stevens, *Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*, 64 ANTITRUST L.J. 443, 448 n. 17 (1996).

³⁹ See Deborah Hargreaves, *Break-Up Overturned – European Investigation Left Out on a Limb*, FIN. TIMES, June 29, 2001.

⁴⁰ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (Findings of Fact); *United States v. Microsoft, Corp.*, No. 00-5212, 2001 WL 722502 (D.C. Cir. 2001).

⁴¹ Operating systems are software programs that control allocation and use of computer resources and support software programs (applications) that perform user-oriented tasks. See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 12 (D.D.C. 1999).

⁴² See *id.* at 13.

graphical user interface features.⁴³ Microsoft generates revenue through the licensing of Windows programs both directly to consumers and on a larger scale to manufacturers of PCs.⁴⁴ The manufacturers then install Windows onto the computer, allowing them to sell the entire, ready to use package to consumers.⁴⁵

2. *Relevant Market*

No products currently exist, and no products are likely to exist in the near future, that could act as a substitute to Windows for Intel-compatible PC operating systems.⁴⁶ No other firm could begin to produce Intel-compatible marketing systems in a way that would provide consumers with an alternative within a reasonably short period of time.⁴⁷ Any firm controlling the licensing of Intel-compatible PC operating systems would be able to charge a price substantially above competitive levels and leave the price as such without losing enough customers as to make the action unprofitable.⁴⁸

Consumers are faced with little substitutability with regard to server operating systems or non-Intel compatible PC operating systems.⁴⁹ Server operating systems are not able to support the broad scope of applications allowed by Intel-compatible PC operating systems.⁵⁰ Non-Intel-compatible PC operating systems are not an alternative product because the cost of switching operating systems would also include the purchase of a non-Intel-compatible PC.⁵¹ Operating systems used in other devices (hand-held computers, telephones, television boxes and game consoles) can not act in combination to substitute for an Intel-compatible PC operating system.⁵² Neither a single product nor all types in the aggregate provide the same

⁴³ *See id.* The graphical user interface enables users to perform tasks by selecting icons and screen items with a mouse. The Windows system was similar to the operating system MACOS used by Apple Computers. *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 14 (D.D.C. 1999). Intel Compatible PC operating systems are those designed to function with Intel Corporation's Pentium family of microprocessors or compatible processors. *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.* at 14-15.

⁵⁰ *See id.*

⁵¹ *See id.* at 15.

⁵² *See United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 15 (D.D.C. 1999).

features and convenience consumers obtain through a PC.⁵³ Network computer systems lack the hardware resources required to support Intel-compatible PC operating systems.⁵⁴

Firms not currently engaged in the production of Intel-compatible PC operating systems could begin such production and compete with Microsoft Windows.⁵⁵ However, firms are precluded from doing so as the result of the "chicken & egg" problem (also called "applications barrier to entry").⁵⁶ Users are only likely to buy an operating system for which there exists a substantial and diverse number of applications; meanwhile, new applications are only likely to be written for operating systems that are widely used.⁵⁷

3. Market Power

Microsoft's power in the market of Intel-compatible PC operating systems is affected by three main factors. First, the market share of Microsoft is large and highly stable.⁵⁸ In each year since 1990, Microsoft has possessed over ninety percent of the Intel-compatible PC operating systems market.⁵⁹ Secondly, high entry barriers guard the market.⁶⁰ The applications barrier to entry results from consumers favoring operating systems with the ability to run high numbers of applications, and software producers producing applications for the most widely used operating systems.⁶¹ Finally, the consumers of Intel-compatible PC operating systems lack realistic alternative products.⁶²

4. Actions of Microsoft

Over the course of several years, Microsoft has engaged in conduct that is evidence of monopoly power and conduct of an anticompetitive nature.⁶³ The

⁵³ *See id.* at 15-16.

⁵⁴ *See id.* at 16.

⁵⁵ *See id.* at 18.

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See* United States v. Microsoft, Corp., 84 F. Supp. 2d 9, 19 (D.D.C. 1999).

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² Judge Jackson also noted that even if Apple's Mac OS were to be included into the relevant market under a broader definition, the market share of Microsoft would still be over eighty percent. *See id.* at 22.

⁶³ *See id.* at 28.

conduct includes actions taken toward other firms and actions involving other markets without sufficient justifications.

Netscape's Navigator web browser⁶⁴ and Sun Microsystems' Java both presented a potential threat to Microsoft's barriers to entry.⁶⁵ Browsers such as Navigator have the potential to weaken Microsoft's position because the browser can be installed on a Windows based operating system and gain widespread use as a complementary application.⁶⁶ However, a browser also has the capability to run other software applications within it, allowing applications to run on different operating systems.⁶⁷

Sun Microsystems presented a similar threat to Microsoft through its development of Java Technologies.⁶⁸ Java would ultimately enable applications written in Java to function on a variety of operating systems.⁶⁹ Netscape and Sun entered into an agreement in 1995 providing that Java would be included with every copy of Navigator.⁷⁰ The agreement allowed Navigator to become the vehicle by which Java reached computers with Windows operating systems.⁷¹

In response to the perceived threat, Microsoft first attempted to persuade Netscape not to distribute Navigator as platform-level browsing software.⁷² Unable to procure a comprehensive response, Microsoft then attempted to offer Netscape a "special relationship" agreement giving Netscape access to the technical information necessary to develop Navigator on the condition that Netscape develop mainly server-based applications rather than a more comprehensive platform of network applications.⁷³ Following Netscape's refusal to enter the arrangement, Microsoft delayed or withheld the technical information Netscape needed to complete the Windows 95 compatible version of Navigator.⁷⁴

⁶⁴ Netscape began production of the first widely popular graphical browser, Navigator in December 1994. *See United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 14 (D.D.C. 1999).

⁶⁵ *See id.* at 28.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ Java is a programming language in which applications are written; programs can then be compiled into libraries and, finally, the libraries are translated and run on underlying operating systems. *See id.* at 29.

⁶⁹ *See id.*

⁷⁰ *See United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 29 (D.D.C. 1999).

⁷¹ *See id.*

⁷² *See id.* at 30.

⁷³ *See id.* at 31-33.

⁷⁴ *See id.* at 33.

Microsoft engaged in similar conduct when other potential competitors made threats to the market.⁷⁵ Intel Corporation began a move away from its traditional microprocessor production into software development.⁷⁶ Microsoft pressured the original equipment manufacturers (the major customers dependent on Windows) into not installing the Intel NSP software on PCs.⁷⁷ Without the cooperation of the equipment manufacturers, Intel was forced to surrender promotion of its software.⁷⁸

Apple Computer, Inc. created versions of Quicktime, a software program capable of playing multimedia, which was compatible with both MacOS and Windows.⁷⁹ Quicktime presented a threat to the applications barrier to entry as a cross-platform program.⁸⁰ Microsoft returned with a proposal similar to the offer made to Netscape, which Apple ultimately rejected.⁸¹ In response, Microsoft threatened further development and marketing of multimedia tools in competition with Apple and limited the compatibility between Quicktime and Windows.⁸²

IBM PC Company operates primarily as an original equipment manufacturer and is a large purchaser of Microsoft Windows.⁸³ However, IBM's software division marketed OS/2 operating systems as an alternative to Windows.⁸⁴ Microsoft refused to deal with IBM on terms similar to those offered to other IBM competitors as long as IBM developed and marketed a competing operating system.⁸⁵ As an alternative, Microsoft proposed a "Frontline Partnership," which would give IBM advantageous dealings along with Microsoft's cooperation in marketing and technical information.⁸⁶ In return, IBM would abandon its OS/2 operating system.⁸⁷ IBM rejected the proposal and began promoting its own software products and operating

⁷⁵ See *id.* at 34.

⁷⁶ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 34 (D.D.C. 1999). Intel's Native Signal Processing (NSP) software had enhanced video and graphics performance and was being developed for non-Microsoft operating systems. Thus, NSP presented a threat to the barriers to entry.

⁷⁷ See *id.* at 35.

⁷⁸ See *id.*

⁷⁹ See *id.* at 36.

⁸⁰ See *id.*

⁸¹ See *id.* at 36-37.

⁸² See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 36-37 (D.D.C. 1999).

⁸³ See *id.* at 38-39.

⁸⁴ See *id.*

⁸⁵ See *id.* at 39. Microsoft charged IBM higher prices, delayed or withheld license rights for Windows 95 and denied technical and marketing support.

⁸⁶ See *id.*

⁸⁷ See *id.*

system.⁸⁸ Microsoft retaliated by delaying IBM's license to Windows 95 with an audit and refusing to provide important technical information.⁸⁹

In addition to pressuring potential competitors away from the development of software that could lessen the applications barrier to entry or foster competing operating systems, Microsoft also began developing and vigorously promoting its own programs.⁹⁰ Wide usage of the applications promoted by Microsoft would prevent competing applications from becoming widely used, thus minimizing their ability to undermine the applications barrier to entry.⁹¹ Microsoft's major focus in this behavior was the development of Internet Explorer as competing web browsing software.⁹² In developing Internet Explorer, Microsoft's goal was to make a browser at least as attractive to consumers as Netscape Navigator and use other devices to induce the use of Internet Explorer rather than Navigator.⁹³ Despite the possible opportunity to profit from the licensing of Explorer, Microsoft gave the browser away with each copy of Windows.⁹⁴

In order to further its own browser usage and inhibit the growth of Netscape Navigator, Microsoft also began a campaign to limit Netscape's access to distribution channels.⁹⁵ The major distribution channels for Internet browsers are original equipment pre-installation and Internet Access Provider bundling.⁹⁶ Microsoft, knowing that these channels were the prime distribution channels, began to bundle Internet Explorer to Windows to exclude Navigator.⁹⁷

In order for the action to be correctly regarded as a bundling arrangement, it must first be determined that the web browser (Internet Explorer) is a separate product from the operating system (Windows).⁹⁸ Unlike operating systems, a web browser provides a user with specific functionalities, such as

⁸⁸ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 39-40 (D.D.C. 1999).

⁸⁹ These delays caused IBM to miss two major selling seasons and cost substantial revenue. Competitors of IBM in PC production, working in cooperation with Microsoft, saw their sales grow rapidly. See *id.* at 41.

⁹⁰ See *id.* at 43.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 44 (D.D.C. 1999).

⁹⁵ See *id.* at 46.

⁹⁶ See *id.* at 47.

⁹⁷ See *id.* at 47-48.

⁹⁸ This portion of Judge Penfield Jackson's findings of fact was the most essential to his findings of wrongful conduct by Microsoft and was remanded on appeal. See Richard A. Epstein, *Phew!*, WALL ST. J., June 29, 2001, at A10.

the ability to select, retrieve and perceive resources on the World Wide Web.⁹⁹ These functionalities are distinct from those provided by an operating system.¹⁰⁰ Consumers prefer to separate their choice of web browser from their choice of operating systems in order to obtain browsers that fit their specific needs or even refrain from having a browser at all.¹⁰¹

Microsoft's bundling campaign became more extensive as the company became more focused on ensuring that Netscape Navigator would not be a threat.¹⁰² In 1995, Microsoft began including a clause in the license agreement with original equipment manufacturers (OEMs) preventing the modification or removal of any part of Windows 95, including Internet Explorer.¹⁰³ In 1996, Microsoft increased the strength of the tie on technical levels, making it more difficult to remove Internet Explorer from Windows 95 and complicating running Navigator on the operating system.¹⁰⁴ The upgrade version, Windows 98, had its release delayed so that Internet Explorer could be more tightly bound to it.¹⁰⁵

Although regarded for a long time as the arena Microsoft was willing to leave to Netscape, Apple computers would also eventually be foreclosed as a browser distribution channel.¹⁰⁶ Microsoft threatened to cancel Macintosh Office (a certainly fatal blow to Apple) unless the company began distribution and promotion of Internet Explorer rather than Navigator.¹⁰⁷ Apple reluctantly agreed to the agreement and made Internet Explorer the default browser for its machines.¹⁰⁸

Microsoft's overwhelming efforts to exclude Netscape and maximize usage of Internet Explorer paid off. The use of Internet Explorer has increased dramatically since 1996.¹⁰⁹ From 1996 to 1997, Internet Explorer's share of the browser market increased from five to thirty-six percent, while Navigator's share fell from eighty percent to fifty-five percent.¹¹⁰ By keeping Netscape in

⁹⁹ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 48 (D.D.C. 1999).

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.* at 49.

¹⁰³ See *id.*

¹⁰⁴ See *id.* at 50.

¹⁰⁵ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 51-52. Judge Jackson focused intently on communications between Microsoft executives surrounding the need to use the Windows base as leverage for the Internet Explorer market. See *id.*

¹⁰⁶ See *id.* at 94.

¹⁰⁷ See *id.* at 95.

¹⁰⁸ See *id.* at 97.

¹⁰⁹ See *id.* at 98.

¹¹⁰ See *id.* at 98-99.

check, Microsoft was able to hold off a serious threat to its applications barriers to entry.¹¹¹

Microsoft engaged in a similar response to the threat Sun's Java programming posed to the Windows applications barrier to entry. Microsoft obtained a licensing agreement for Sun's Java programming language that allowed Microsoft to make certain modifications.¹¹² Microsoft used the agreement to make its own Java tools and a Windows compatible environment that preserved the difficulty in porting between operating systems.¹¹³ Microsoft then persuaded developers to use the Microsoft-implemented Java format rather than the broader Sun-compliant version.¹¹⁴ Microsoft then bundled the Windows Java within the Windows operating system and Internet Explorer.¹¹⁵ Software vendors were given incentives to use Microsoft's Java version rather than the Sun-compliant one.¹¹⁶ The result of Microsoft's actions regarding Sun was that it impeded Java's progress toward greater portability between Windows and other operating systems, lowering the applications barrier to entry.¹¹⁷

5. *Effects on Consumers*

Microsoft has shown that its actions have resulted in positive effects for consumers; Netscape was forced to innovate and improve Navigator at an accelerated rate and the lack of charge for Internet Explorer decreased public costs while familiarity with the Internet increased.¹¹⁸ However, Microsoft's actions also had detrimental effects on consumers. Microsoft preserved its applications barrier to entry, resulting in protection of monopoly power.¹¹⁹ Consumers were denied the right of choice in pre-installed browser applications from equipment manufacturers.¹²⁰ By increasing technical ties between

¹¹¹ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 103 (D.D.C. 1999).

¹¹² See *id.* at 105. The eventual termination of this licensing agreement in the recent settlement. See Montalbano, *supra* note 28.

¹¹³ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 105 (D.D.C. 1999) (the original motivation behind Sun's Java was the exact opposite in that the programs were initially designed to greatly enhance porting between operating systems, thus limiting application barriers to entry).

¹¹⁴ See *id.* at 107.

¹¹⁵ See *id.* at 107-08.

¹¹⁶ See *id.* at 108.

¹¹⁷ See *id.* at 110.

¹¹⁸ See *id.* at 110-11.

¹¹⁹ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 111 (D.D.C. 1999).

¹²⁰ See *id.*

Windows and Internet Explorer, Microsoft increased consumer confusion and customer service requirements.¹²¹ The campaigns against Navigator and Java also stifled the innovation of those markets by lessening competition and making cross-platform technology less feasible.¹²² Finally, Microsoft has established that any efforts toward innovation in the computer industry that could potentially weaken Microsoft's barriers will be met with threats and pressure leveraged by Microsoft's high market power.¹²³

III. HISTORY: IBM CASE

A review of a major antitrust case pursued both in Europe and the United States likely will serve as the most accurate predictor of the result in the Microsoft action. The United States and the European Union both brought antitrust actions against IBM for similar conduct. The approaches to the actions and eventual outcomes, however, were much different. Obvious similarities exist between the actions against IBM and those currently being litigated involving Microsoft.

A. *The U.S. Case*

In 1952, the United States launched a civil antitrust action against IBM.¹²⁴ The suit resulted in a consent decree that was amended several times.¹²⁵ The United States filed a second antitrust suit in 1969.¹²⁶ That case alleged monopolization by IBM in violation of section 2 of the Sherman Act.¹²⁷

In the second lawsuit, the government alleged that IBM held seventy-four percent of the market for digital computers.¹²⁸ The government did not sue based on IBM's acquisition of dominant market position; instead, the case charged that the monopoly power in the relevant market was maintained through anticompetitive acts.¹²⁹ The violations alleged by the U.S. govern

¹²¹ *See id.*

¹²² *See id.* at 111-12.

¹²³ *See id.* at 112.

¹²⁴ *See* IBM1995, 45 F.3d at 642.

¹²⁵ *See id.*

¹²⁶ *See* United States v. Int'l Bus. Machs., Civil Action No. 69-200 (S.D.N.Y.) [hereinafter IBM1969].

¹²⁷ *See* 15 U.S.C. § 2 (1994).

¹²⁸ *See* John E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L.J. 145, 147 (2000).

¹²⁹ The government did not necessarily believe that the power of IBM was acquired through lawful means, but ironically decided not to pursue such a claim because proving it would take

ment were that IBM had engaged in predatory pricing,¹³⁰ illegally bundled hardware, software and support services (also called product tying),¹³¹ and announced new products prematurely in order to injure competition, a practice known as “vaporware”¹³².¹³³

The case moved through endless filings and discovery procedures for over thirteen years.¹³⁴ Six years of discovery were followed by a trial spread over seven years; over 104,400 pages of transcript were produced.¹³⁵ Five presidents, nine Attorneys General, and seven Antitrust Division Chiefs took office while the case was proceeding.¹³⁶ It is estimated that the case cost the government \$16.8 million and IBM \$50 to \$100 million.¹³⁷ The case has been referred to as the “Antitrust Division’s Vietnam.”¹³⁸ Finally, in 1982, the Assistant Attorney General, William F. Baxter, filed a motion to dismiss the case.¹³⁹ Baxter stated that his staff had conducted a review of the trial record and proceedings and ultimately concluded that the case was without merit and should be dismissed.¹⁴⁰

too long. See Lewis Bernstein, *Big Blue: A Personal Reaction*, ANTITRUST, Winter 1988, at 40.

¹³⁰ No consensus has been formed on an actual definition for predatory pricing. However, various cases and commentators help form the general operating ideas. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986) predatory pricing was defined as either “pricing below the level necessary to sell their products or pricing below some appropriate measure of cost.” A successful predatory pricing campaign requires that the predator be able to absorb the market share of its rivals once prices have been cut. Despite the fact that such conduct occurs with some level of frequency, American courts have considered the action as something rarely attempted. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 113 S. Ct. 2578 (1993).

¹³¹ A tying arrangement is the sale of one product by a party on the condition that the buyer purchases a different product. Such an arrangement can be held a violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1994). See Morgan Chu & Steven Kang, *Antitrust Basics for IP Attorneys: Part One*, 6 NO. 10 INTELL. PROP. STRATEGIST 1 (July 2000).

¹³² The practice of vaporware allows a dominant firm to sabotage its rival’s products by announcing that it is about to come out with a similar product, when the actual launch date is months or years away. The potential existence of such a product will persuade buyers to wait for the dominant firms product rather than switch to a new supplier. See Cassidy, *supra* note 9, at 32.

¹³³ See Lopatka, *supra* note 128, at 147.

¹³⁴ See *id.* at 145.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ Robert Bork, *THE ANTITRUST PARADOX* 432 (1993).

¹³⁹ The motion also followed dramatic changes in the U.S. political climate.

¹⁴⁰ *In re Int’l Bus. Machs.*, 687 F.2d 591, 594 (2d Cir. 1982) [hereinafter IBM1982].

The case in review is illustrative of American antitrust policy and procedures. Early American antitrust law took a "big is bad" approach,¹⁴¹ and the decision to drop the case may have represented a desire to shuck that label toward a more favorable approach with regard to dominant firms.¹⁴² Baxter felt that section 2 of the Sherman Act should not "be regarded as creating a status offense."¹⁴³ The decision to bring the case at all has been viewed as flawed given current American antitrust values, many of which seem familiar in light of the proceedings against Microsoft.¹⁴⁴

The investigation against IBM began at the urging of competitors, whose views and allegations are usually biased by their interest in damaging their rival.¹⁴⁵ Secondly, IBM teaches that allegations of bundling within the technological industry will be difficult to prove due to efficiency justifications.¹⁴⁶ Also, critics of the IBM litigation feel that U.S. antitrust cases should only be brought when a remedy can be foreseen and the remedy will be beneficial to consumers, especially when the proposed relief is structural.¹⁴⁷

Perhaps the most important effect the IBM case carried into U.S. antitrust law today and onto the Microsoft litigation is the belief that the free market is a better check on behavior than the courts, especially in highly innovative markets such as the technology industry.¹⁴⁸ Quite often, such markets exhibit a pattern where one dominant product gives way to another, giving a large market share for a short period and leading to a loss of dominance due to failure in innovation.¹⁴⁹

¹⁴¹ The government brought a variety of cases with mixed success from 1940-1970. The focus of many cases was on market structure and targeted large producers. *See generally* *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (condemning dominant aluminum producer); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) (upholding the conviction of a combination of major tobacco firms); *United States v. Griffith* 334 U.S. 100 (1948) (condemning activity of dominant motion picture theater owner); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D.Mass. 1953), *aff'd per curiam* 347 U.S. 521 (1954) (condemning conduct of major shoe manufacturer); *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956) (finding no liability for major producer of cellophane).

¹⁴² *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2nd Cir. 1979).

¹⁴³ *See Lopatka, supra* note 128, at 148.

¹⁴⁴ *See Gary S. Becker & Kevin M. Murphy, Rethinking Antitrust*, WALL ST. J., Feb. 26, 2001, at A22.

¹⁴⁵ *See Lopatka, supra* note 128, at 149.

¹⁴⁶ *See id.* at 152.

¹⁴⁷ *See id.* at 159.

¹⁴⁸ *See Richard M. Brunell, Appropriability in Antitrust: How Much is Enough*, 69 ANTITRUST L.J. 1, 27 (2001).

¹⁴⁹ *See Lopatka, supra* note 128, at 156. Lopatka believes that American antitrust law is not capable of distinguishing anticompetitive innovation from procompetitive innovation and thus

B. *The European Union IBM Case*

The approach to the IBM case was very different on the opposite side of the Atlantic Ocean. Initially, the United States attempted to dissuade the European Union from even taking the case.¹⁵⁰ However, the case was ultimately brought against IBM for violations of Article 86 (now 82) of the Treaty of Rome involving abuse of a dominant position.¹⁵¹ The European Union was able to accomplish what the Antitrust Division of the United States could not. The case in Europe ended relatively quickly and resulted in a settlement by which IBM agreed to grant licenses and access to technical information.¹⁵²

The European Union approach to IBM avoided many of the pitfalls that trapped the courts of the United States. European competition law is not restricted by market definition, but instead requires only a dominant position.¹⁵³ Thus, IBM's contentions of a contrived market definition would likely have fallen on deaf ears because of IBM's obviously dominant position. The main reason, however, for IBM's inability to succeed in European courts comes as a result of those courts' focus on the right of competition, especially for small to medium size firms.¹⁵⁴ IBM's alleged pricing practices and bundling procedures had erected obvious entry barriers.¹⁵⁵ Under U.S. antitrust law, such practices can be offset by market efficiency justifications,

should refrain from intervening. In his words, "[t]he costs of antitrust are minimized when claims that should fail are never brought." *Id.* at 154. Such an approach is in contrast to the much less permissive approach in Europe.

¹⁵⁰ See ELEANOR M. FOX & LAWRENCE A. SULLIVAN, *CASES AND MATERIALS ON ANTITRUST* 237-44 (1989).

¹⁵¹ See *Int'l Bus. Machs., Corp. v. Commission*, 1981 E.C.R. 1857.

¹⁵² See James B. Kobak, Jr., *Running the Gauntlet: Antitrust and Intellectual Property Pitfalls on The Two Sides of the Atlantic*, 64 *ANTITRUST L.J.* 341, 347 (1996).

¹⁵³ See Mercer H. Harz, *Dominance and Duty in the European Union: A Look Through Microsoft Windows at the Essential Facilities Doctrine*, 11 *EMORY INT'L L. REV.* 189, 198 (1997). Harz's article is an attempt to examine the essential facility doctrine of the European Union using the alleged anticompetitive behavior of Microsoft for illustration. Harz's article, published in 1997, lacked both the specific findings of fact regarding Microsoft and any serious action having been taken by the European Union. Using this information, this article can provide comparisons through a prediction of the outcome of the lawsuit filed in the European Union. The Harz article, while informative, lacks information from current events. Thus, the positions advanced by Harz when cited must be understood to have been made in 1997, prior to the ruling by the United States District Court and before the current substantive action was undertaken by the European Union.

¹⁵⁴ See *id.* at 196.

¹⁵⁵ See *id.*

especially due to the highly innovative nature of the technology industry.¹⁵⁶ European Union law, however, places less emphasis on market efficiency.¹⁵⁷ For these reasons, the European Union had little difficulty in condemning the actions of IBM.

The European Union also was able to proceed against IBM with a clear idea of redress. Rather than pursue the structural relief sought by the American courts, the European Union, having found violations, imposes a major fine.¹⁵⁸ Although remedies in the United States might initially seem more severe, the penalties are also in issue and thus, the subject of litigation.¹⁵⁹ The fact that the European remedy is clear causes less litigation over the issue and thus, the remedy can be imposed with greater frequency.¹⁶⁰ More importantly however, the European Union (through the European Commission) acts in a regulatory or protective manner.¹⁶¹ This manner is unlike the U.S. Justice Department, which can be viewed as a retroactive policing agency.¹⁶² In the case of IBM, the threat of action was likely enough to elicit a settlement from IBM providing access to its information.¹⁶³ Whereas, in pursuing structural relief the U.S. Antitrust Division forced IBM to fight to remain whole.¹⁶⁴

IV. EUROPEAN UNION ANTITRUST SYSTEM

The antitrust enforcement and regulatory systems of the European Union differ greatly from those in the United States. The unique framework of the system provides for different, yet often consistent results. An analysis of European Union statutory provisions covering antitrust and the judicial as well regulatory systems provides the framework for court decisions, including the case against Microsoft. Finally, a review of European Union public policy

¹⁵⁶ See Lopatka, *supra* note 128, at 162.

¹⁵⁷ See Harz, *supra* note 153, at 197.

¹⁵⁸ See Jebesen & Stevens, *supra* note 38, at 447.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See Kobak, *supra* note 152, at 347.

¹⁶⁴ See Jebesen & Stevens, *supra* note 38, at 448. Jebesen and Stevens note that American businessmen and their legal advisors are willing to deal with the American antitrust regulators on an adversarial or confrontational basis, but that in dealing with the regulatory bodies of the European Union avoidance of confrontation is almost always essential, given the enormous discretionary powers of the regulators. See *id.*

goals and emphases regarding antitrust regulation will help foster an accurate prediction of Microsoft's future abroad.

A. Structure

With regard to antitrust regulation, the European Union is divided into three relevant institutions: the European Commission, the European Court of Justice and the Court of First Instance. All play an active role in European Union competition law.¹⁶⁵ The EC Treaty¹⁶⁶ established the European Commission as the executive branch of the Community.¹⁶⁷ The Commission proposes legislation and monitors compliance with legislation and treaties.¹⁶⁸ As the executive, it has control over mergers, cartels, abuses of dominant positions and state measures interfering with competition.¹⁶⁹ The Commission also has the authority to institute formal procedures such as inspections, filing of objections, oral hearings and publications of final decisions.¹⁷⁰

The European Community Treaty also established the European Court of Justice (ECJ).¹⁷¹ The court consists of fifteen judges with jurisdiction over cases regarding failure to fulfill a Treaty obligation, annulments and legality of acts of Community institutions, failures to act, actions for damages, staff cases and interpretations of Community law.¹⁷² The court is also the appellate court for the Court of First Instance.¹⁷³ The Court of First Instance (CFI) was created by the European Commission to ease the caseload burden on the ECJ.¹⁷⁴ The CFI consists of fifteen members who focus on actions that require a more detailed examination of facts, or complex factual situations.¹⁷⁵

¹⁶⁵ See Scott M. Kareff, *Tetra Pak International SA v. Commission (Tetra Pak II): The European Approach to Monopoly Leveraging*, 28 LAW & POL'Y INT'L BUS. 549, 564 (1997).

¹⁶⁶ See EC TREATY arts. 164-88.

¹⁶⁷ See Kareff, *supra* note 165, at 564.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See EC TREATY arts. (old) 164-88.

¹⁷² See Kareff, *supra* note 165, at 565-66.

¹⁷³ See *id.* at 566.

¹⁷⁴ See Council Decision 88/591, 1988 O.J. (L 319) 1; 88/591, 1989 O.J. (L-241) 4.

¹⁷⁵ See Kareff, *supra* note 165, at 567.

B. Statutes

Antitrust law in the European Union is derived mainly from the treaty of Rome, articles 81 (ex 85) and 82 (ex 86).¹⁷⁶ The focus of the case against Microsoft is in regard to violations of article 82 (ex 86), which focuses on unilateral acts of dominant firms.¹⁷⁷ Article 82 (ex 86) provides:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.¹⁷⁸

It is first important to note that the article itself is a portion of a treaty and that antitrust in the European Union is governed by treaty law, not the legislative or parliamentary action of a national government.¹⁷⁹ The treaty is

¹⁷⁶ See EC TREATY arts. 81-82 (ex 85-86). Article 81 (ex 85) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states. The article continues by non-exhaustively listing prohibited conduct such as (1) fixing prices, (2) limiting or controlling market supply, (3) sharing markets or sources of supply, (4) applying dissimilar conditions to similar transactions, and (5) making contracts subject to acceptance of supplementary obligations not connected to the transaction. Article 81 (ex 85) reaches formal and informal agreements and only a potential effect on trade between member states need be shown. The alleged conduct of Microsoft would not fall under Article 81 (ex 85) since the actions were unilateral. For continued analysis on Article 81 (ex 85) see VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 41-75 (6th ed. 1997).

¹⁷⁷ See KORAH, *supra* note 176, at 3.

¹⁷⁸ See EC TREATY art. 82 (ex 86).

¹⁷⁹ See Kobak, *supra* note 152, at 352.

a political instrument built on political considerations.¹⁸⁰ The European Union itself was formed with the goal of a unified common market.¹⁸¹ The Treaty of Rome set forth policy goals to further this goal.¹⁸² The fundamental aspects of the treaty are the promotion of agreements furthering the integration or strengthening of the Community.¹⁸³ As a means to the end, the Treaty restricts arrangements that divide the Community or maintain economic boundaries on national lines.¹⁸⁴ The full breadth of article 82 (ex 86) of the Treaty can be understood by an examination of the elements of the provision.

1. *Geographic Market*

First is the geographic market element. The Treaty prohibits abuse “within the common market or in a substantial part of it.”¹⁸⁵ The common market has been held in very general regard, and typically the accusing party finds little difficulty in meeting this element.¹⁸⁶ The “market” is usually found to be “a clearly defined geographic area” where generally the competitive conditions are similar enough for all traders so as to evaluate the economic power concerned.¹⁸⁷ However, it is possible to draw lines not on geographic terms but based on other factors dividing customers.¹⁸⁸ The geographic market, in practice, has been defined narrowly.¹⁸⁹ The ECJ, in *United Brands Co. v.*

¹⁸⁰ *See id.*

¹⁸¹ *See Waller, supra* note 5, at 55.

¹⁸² *See id.* at 56.

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ EC TREATY art. 82 (ex 86).

¹⁸⁶ *See Jebsen & Stevens, supra* note 38, at 463.

¹⁸⁷ *See id.* at 464 (citing Case 27/76, *United Brands Co. v. Commission*, 1 C.M.L.R. 1429 (1978)).

¹⁸⁸ *See KORAH, supra* note 176, at 94 (citing *Pigs & Bacon Comm'n v. McCarren* (177/78) [1979] E.C.R. 2161 (1979)).

¹⁸⁹ *See Thomas E. Kauper, The Problem of Market Definition Under EC Competition Law*, 20 FORDHAM INT'L L.J. 1682, 1714 (1997). The terms “narrow” and “broad” can become especially confusing with regard to antitrust enforcement. In general practice, a defendant seeks to narrow the application of the law; however, with regard to antitrust cases the defendant will seek broad definitions in virtually every element, while the plaintiff will attempt to advance narrow definitions. *See generally FOX & SULLIVAN, supra* note 150. The reasoning becomes incredibly important. The more narrowly the plaintiff is able to define various elements such as product or geography, the greater share of such market can be attributed to the defendant, thus increasing the defendant's market share/power. *See id.* As will be discussed, the degree of breadth the court accepts is often determinative with regard to the case. *See id.*

Commission,¹⁹⁰ found the relevant geographic market not to be all of the European common market, but only the Benelux¹⁹¹ countries. In an even narrower interpretation, the court in *Michelin N.V. v. Commission*,¹⁹² rejected the arguments that the geographic market should be worldwide or at least community-wide.¹⁹³ Instead the court held that although Michelin operated on a worldwide basis, the operations of its subsidiary in the Netherlands could themselves form a relevant geographic market.¹⁹⁴ The court continued the willingness to narrow the geographic market as far as national lines in *Irish Sugar plc v. Commission*.¹⁹⁵ The court limited the relevant geographic market to the country of Ireland.¹⁹⁶

2. Product Market

As part of the geographic market element, the proper product market must be shown. Adhering to the strict regulatory position regarding the common market, the product market has also been defined narrowly.¹⁹⁷ In order to find a product within the common market, the statute has been interpreted to include products with a limited interchangeability¹⁹⁸ and those for which there exists a cross-elasticity¹⁹⁹ of demand or demand substitutability.²⁰⁰ In *United*

¹⁹⁰ See Case 27/76, *United Brands Co. v. Commission*, 1978 E.C.R. 207, [1978] 1 C.M.L.R. 429 (1978) [hereinafter *United Brands*]. See also Case T-30/89 *Hilti AG v. E.C. Commission*, 1991 ECR II-1439, [1992] 4 C.M.L.R. 16 (Ct. of First Instance 1992) [hereinafter *Hilti AG*]. Cf. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) (providing geographic definitions in U.S. antitrust law).

¹⁹¹ The Benelux countries include Belgium, the Netherlands, and Luxembourg.

¹⁹² See Case 322/81, *Michelin N.V. v. Commission*, 1983 E.C.R. 3461, [1985] 1 C.M.L.R. 282 (1985) [hereinafter *Michelin N.V.*].

¹⁹³ See *id.* at 302.

¹⁹⁴ See *id.*

¹⁹⁵ See Case T-228/97, *Irish Sugar plc v. Commission*, 1999 E.C.R. II-2969 (1999) [hereinafter *Irish Sugar*]. But see Case T-65/96, *Kish Glass & Co. Ltd. v. Commission*, 2000 E.C.R. 0 (refusing to limit market to Ireland due to community-wide trade) [hereinafter *Kish Glass*].

¹⁹⁶ See *Irish Sugar*, 1999 E.C.R. II-2969 (1999).

¹⁹⁷ See Kauper, *supra* note 189, at 1689-90.

¹⁹⁸ Interchangeability has been divided into functional and practical subdivisions. See *Jebsen & Stevens*, *supra* note 38, at 468-72. Functional interchangeability occurs when either of the two products at issue can perform the same function. See *id.* Practical (also reasonable) interchangeability exists when consumers will be willing to switch between the two products should price differences arise. See *id.* For a case turning on interchangeability distinctions see *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956).

¹⁹⁹ Cross elasticity of demand or demand substitutability is measured by the percent shift in quantity demanded caused by a one percent change in price. Demand is elastic if a one percent

Brands v. Commission, the court adopted a relevant product market consisting only of bananas rather than the broader overall fruit market.²⁰¹ The Court has continued to define product markets narrowly in recent cases. In *Tetra Pak International SA v. Commission*,²⁰² the court viewed the market for cartons not as a single market, but as two separate markets: aseptic and non-aseptic.²⁰³ The narrow market proved critical in *Tetra Pak II* for a finding of a dominant position.²⁰⁴

3. Dominant Position

The next element that must be shown is that the accused is in a dominant position.²⁰⁵ The European Union determines dominance with regard to article 82 (ex 86) as the power "to prevent effective competition and the power to behave independently of competitors and customers to an appreciable extent."²⁰⁶ This power is determined mostly by finding the market share of the alleged offender with regard to the relevant product(s).²⁰⁷ The European Union has been very liberal in finding a market share adequate to constitute dominance.²⁰⁸ Even market shares that are neither facially large nor measured over time have been held to suffice.²⁰⁹ Undertakings with a market share of less than fifty percent have constituted dominance.²¹⁰ The Commission has even issued a report indicating that market shares of twenty to forty percent cannot be ruled out with regard to dominance.²¹¹ In cases where the market

price rise will cause more than a one percent demand shift. Two products are cross elastic if the one percent shift moves between them. See FOX & SULLIVAN, *supra* note 150, at 139.

²⁰⁰ See *Jebsen & Stevens*, *supra* note 38, at 470; *Cf. United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956).

²⁰¹ See *United Brands Co. v. Commission*, 1978 E.C.R. 207, [1978] 1 C.M.L.R. 429, 439 (1978). The court literally ruled that it is improper to compare apples and oranges (with bananas). See also *Hilti AG v. Commission*, 1991 E.C.R. II-1439, [1992] 4 C.M.L.R. 16 (1991) (similarly narrow market definition).

²⁰² See Case C-333/94, *Tetra Pak International SA v. Commission*, 1996 E.C.R. I-5951, [1997] 4 C.M.L.R. 662 (1996) [hereinafter *Tetra Pak II*].

²⁰³ See *id.*

²⁰⁴ See *id.* at 682.

²⁰⁵ See *Waller*, *supra* note 5, at 68.

²⁰⁶ *Jebsen & Stevens*, *supra* note 38, at 480.

²⁰⁷ See *id.* at 481.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ Commission of European Communities, Tenth Report on Competition Policy (1981). Compare the United States position regarding market power where ninety percent is enough to

share is lower, if high barriers to entry guard the market share, a dominant position may be inferred.²¹²

The *United Brands* court found a market share of approximately forty-five percent of the relevant banana market to be sufficient enough to constitute a dominant position even though strong competitors existed.²¹³ After drawing a distinction between aseptic and non-aseptic cartons, the *Tetra Pak II* court found a dominant position based on market shares of ninety to ninety-five percent and fifty to fifty-five percent in each of the carton markets.²¹⁴ Finally, in *Michelin*, the court found Michelin to be in a dominant position.²¹⁵ Although Goodyear (a major competitor) held more market share worldwide, the court's narrow geographic market moved Michelin into a position as the dominant firm in the Dutch market.²¹⁶

4. Abuse of Dominant Position

The final element of article 82 (ex 86) is the most important. It prohibits any "abuse" of a dominant position.²¹⁷ Abuse could include any conduct injurious to competitors or consumers, regardless of whether or not the actions would be lawful if done by a firm without a dominant position.²¹⁸ The European Union has dictated that those firms with a dominant position owe a "special responsibility" to competitors and to consumers.²¹⁹ Acts by a firm as simple as reaping the competitive rewards of its success could possibly give rise to violations²²⁰ under this standard of objectivity since intent is

constitute a monopoly, sixty percent is doubtful and thirty-three percent is certainly not. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945).

²¹² See *KORAH*, *supra* note 176, at 89.

²¹³ See *United Brands*, [1978] 1 C.M.L.R. at 458.

²¹⁴ See *Tetra Pak II*, [1997] 4 C.M.L.R. at 682.

²¹⁵ See *Michelin N.V.*, [1985] 1 C.M.L.R. at 288-89.

²¹⁶ See *id.*

²¹⁷ See EC TREATY art. 82 (ex 86).

²¹⁸ See *Waller*, *supra* note 5, at 71.

²¹⁹ See *Jebsen & Stevens*, *supra* note 38, at 488.

²²⁰ The stance of the United States is much different. It has been held that a large firm does not violate section two of the Sherman Act simply by reaping the competitive rewards attributable to its efficient size. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). See also *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (indicating that U.S. courts will not condemn acts or acquisition of monopoly power related to "superior skill, superior products, natural advantages, economic or technological efficiency, low margins of profit . . . or licenses conferred by, and used within, the limits of law"). *Id.* at 342.

irrelevant.²²¹ Article 82 (ex 86) includes several particular practices through which such abuses may be found.²²² The abuses need not be confined to or occur in the market in which the dominant position is held.²²³

a. Pricing

The first of these abuses relates to pricing.²²⁴ The European Union has deemed the practice of predatory pricing illegal when coupled with an abusive intent.²²⁵ In *Tetra Pak II*, the court found a predatory pricing campaign to have been both rational and successful.²²⁶ Unlike American courts, the court did not set forth a burden of proof that the predatory pricing campaign had a dangerous likelihood of success.²²⁷ Practices involving pricing at different levels between the country members are also in violation of article 82 (ex 86).²²⁸ Among the conduct alleged in *United Brands* was the practice of charging distributors within different member states considerably different prices.²²⁹ The court found the conduct to be abusive as discriminatory pricing.²³⁰

²²¹ See *Jebsen & Stevens*, *supra* note 38, at 489.

²²² See EC TREATY art. 82 (ex 86).

²²³ See *Tetra Pak II*, [1997] 4 C.M.L.R. at 694. The *Tetra Pak II* case summarized previous case law into five categories regarding abuse under of article 82 (ex 86): (1) the dominant position and the abuse are confined to the same market; (2) the abuse takes place on the dominated market but its effects are felt on another market on which the undertaking does not hold a dominant position; (3) the abuse is committed on a market on which the undertaking does not hold a dominant position in order to strengthen its position on the dominated market; (4) the abuse takes place on a market separate from, but related to and connected with, the market dominated by the undertaking (*Tetra II* case); and (5) the dominant position and the abuse are on different and unrelated markets. Following the *Tetra* holding, the scope of Article 82 (ex 86) can only fail to reach the fifth category. See *id.* at 694.

²²⁴ See EC TREATY, art. 82(a) (ex 86(a)).

²²⁵ See *Waller*, *supra* note 5, at 70 (noting that pricing below cost is prohibited as well as any pricing that is deemed discriminatory or unfair discounting).

²²⁶ See *Tetra Pak II*, [1997] 4 C.M.L.R. at 680.

²²⁷ See *id.* at 706. Cf. *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 113 S.Ct. 2578 (1993) (a predatory pricing claim requires both pricing below a measure of cost and likelihood that short-term losses will be recouped). See also *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (stating that "predatory pricing schemes are rarely tried and even more rarely successful."). *Id.* at 589.

²²⁸ See EC TREATY art. 82(a) (ex 86(a)).

²²⁹ See *United Brands*, [1978] 1 C.M.L.R. at 435.

²³⁰ See *id.*

b. Restrictions on Production or Market Development

The second practice provided as action of illegal abuse is with regard to limits on production or market development.²³¹ The provision largely makes output restrictions or practices to stunt innovation illegal.²³² The *United Brands* case also involved requirements that distributors not be allowed to resell bananas while the products were still green.²³³ The court found this conduct constituted a limit on production or output regulation that amounted to abuse of a dominant position.²³⁴

c. Discrimination

The third abusive practice governing differential dealings set forth in the latter provisions of the article has been interpreted broadly. The clause has been held to require that in situations where differential pricing exists, the firm must be able to put forth an objective justification for the difference in prices or conditions governing the sale.²³⁵ In this context, refusals to supply have been condemned.²³⁶ Since the European Union places the "special responsibility" on dominant firms to deal with competitors and consumers, any refusal will require an objective justification.²³⁷ The justification becomes even more important when it is found that the dominant firm controls an "essential facility."²³⁸ When in control of an essential facility the justifications must be substantial in order to overcome the larger societal concerns of the community.²³⁹ The *United Brands* dealings also involved different pricing levels between various distributors and a refusal to supply a Danish firm with bananas.²⁴⁰ The court found both actions to be abuses of a dominant

²³¹ See EC TREATY art. 82(b) (ex 86(b)).

²³² See *id.*

²³³ See *United Brands*, [1978] 1 C.M.L.R. at 435.

²³⁴ See *id.*

²³⁵ See *Jebsen & Stevens*, *supra* note 38, at 497.

²³⁶ See *KORAH*, *supra* note 176, at 103.

²³⁷ See Stephen McShea, *The "Dominant Position" Doctrine and the European Union's Response to the British Airways/American Airlines Alliance*, 23 B.C. INT'L & COMP. L. REV. 71, 79. Cf. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) (stating the American principle that, absent monopolistic intent, a private businessman may deal freely with whomever he chooses).

²³⁸ See generally Harz, *supra* note 153 (for an extensive look at essential facilities doctrine).

²³⁹ See *id.* at 223.

²⁴⁰ See *United Brands*, [1978] 1 C.M.L.R. at 435.

position.²⁴¹ Similarly, in *Irish Sugar*, the firm's attempt to protect the "home" market by offering border rebates and selective low pricing was characterized as abuse of a dominant position.²⁴²

d. Tying

The final provision of article 82 (ex 86) particularly condemns tying arrangements.²⁴³ Early European interpretations treated tying arrangements very strictly.²⁴⁴ Many cases held tying arrangements to be per se illegal.²⁴⁵ In *Tetra Pak II*, the court found the requirement that only Tetra cartons be used on Tetra filling machines had the effect of making a consumer totally dependant on Tetra.²⁴⁶ Given Tetra's dominant market position in the carton market, the tie constituted an abuse in violation of the statute.²⁴⁷ The court also listed several factors for consideration as to whether two markets are sufficiently linked so as to find a tying arrangement.²⁴⁸ Modern trends in European Union law tend to allow for a balancing of pros and cons with regard to tying arrangements in intellectual property settings.²⁴⁹

C. Public Policy

The decisions of the courts of the European Union are also highly reflective of and influenced by the social values of the community as a whole. U.S. antitrust enforcement is often coined as a system preserving "competition, not competitors";²⁵⁰ however, as previously indicated, the focus of the European Union enforcement is not on efficiency.²⁵¹ The public goals of the enforce-

²⁴¹ See *id.*

²⁴² See *Irish Sugar v. Commission*, 1999 E.C.R. II-2969 (1999) ¶¶ 105-108.

²⁴³ See EC TREATY, art. 82(d) (ex 86(d)).

²⁴⁴ See Biggers, *supra* note 35, at 263.

²⁴⁵ See, e.g., Case T-30/89, *Hilti AG v. Comm'n*, 1991 E.C.R. II-1439, [1992] 4 C.M.L.R. 16 (Ct. of First Instance 1992) (tying of nail guns to nail cartridges and nails).

²⁴⁶ See *Tetra Pak II*, [1997] 4 C.M.L.R. at 703.

²⁴⁷ See *id.* at 704.

²⁴⁸ See *id.* at 677. The factors listed are: the supply and demand structure of the markets, the characteristics of the products, the use by the dominant undertaking of its power on the dominated market in order to penetrate the linked market, the market share of the dominant undertaking on the non-dominated market, and the degree of control of the dominated market by the dominant undertaking. See *id.*

²⁴⁹ See Biggers, *supra* note 35, at 263 (noting that this approach is more in line with the U.S. approach to tying).

²⁵⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

²⁵¹ See Kareff, *supra* note 165, at 554.

ment system are to preserve and protect individual traders, marketplace fairness, equality and opportunity for all, and the interests of workers, users and consumers.²⁵² An additional dominant element in European Union antitrust law is the prohibition of activity that hinders the free flow of goods throughout the community.²⁵³

The overall aims are established in the treaties. The competition policy seeks to establish a common market, approximate economic policies, promote harmonious growth, raise living standards and bring the Member States closer together.²⁵⁴ These public policy goals must be viewed in the extraordinarily broad context in which they are to be achieved. The courts must embrace these diverse objectives while balancing policies of different nations led by different forms of government.²⁵⁵ In the recently published "White Paper on Modernisation of the Rules Implementing Articles 81 and 82 of the EC Treaty,"²⁵⁶ the commission considered the notion of adopting a "rule of reason"²⁵⁷ approach to antitrust similar to that in the United States. In response, the Commission noted that pro-and anticompetitive effects are already considered to a limited extent and the effect of formally incorporating a rule of reason would cast aside the articles and divert them from their purpose.²⁵⁸ Overall, the courts' decisions, unfettered by constraints of case precedents, have moved across the spectrum trying to further the policy goals.²⁵⁹

²⁵² *Id.*

²⁵³ See REIN WESSELING, *THE MODERNIZATION OF EC ANTITRUST LAW* 87 (2000).

²⁵⁴ See *Jebsen & Stevens*, *supra* note 38, at 450.

²⁵⁵ See *id.* at 449.

²⁵⁶ See Opinion of the Economic and Social Committee on the 'White Paper on modernization of the rules implementing Articles 81 and 82 of the EC Treaty—Commission Programme No 99/207,' 2000 O.J. (C 51/55) [hereinafter White Paper].

²⁵⁷ Generally, antitrust violations in the United States are considered to be per se infringements (unlawful regardless of their effect on competition) or subject to a rule of reason (typically only horizontal or agreement cases are evaluated under a rule of reason). Under the rule of reason analysis, the court will consider (either in a quick look or fuller analysis) the pro-competitive justifications, the rule of reason analysis then essentially balances the pro- and anti-competitive effects of the conduct. See generally FOX & SULLIVAN, *supra* note 150 (overview of per se vs. rule of reason analysis). See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (per se analysis); *Bd. of Trade v. United States*, 246 U.S. 231 (1918) (rule of reason); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.* 441 U.S. 1 (1979) (rule of reason); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Oklahoma*, 468 U.S. 85 (1984) (rule of reason).

²⁵⁸ See WESSELING, *supra* note 253, at 102.

²⁵⁹ See *Jebsen & Stevens* *supra* note 38, at 450. *Jebsen and Stevens* note that to an American such a system may seem initially unworkable, but when viewed from the perspective of a European skeptic, the American system proves overly simplistic. Rather than the American

V. ANALYSIS

A. U.S. Findings Under European Union Law

The facts of the Microsoft case, when placed in the framework of the European Union, would likely lead to conclusions that Microsoft has acted in abuse of a dominant position and in violation of the Treaty of Rome. When applied to the U.S. findings of fact regarding relevant market, market power, conduct and consumer effects, previous European Union case law, statutes and policy goals all point to conclusions condemning Microsoft. Furthermore, the structure of the European system makes it unlikely that Microsoft will be able or will desire to lengthen the legal battle through an appeals process.

Finally, the IBM case provides a historical example of a strikingly similar case, proceeding along similar lines and bolstering the notion that much like IBM, Microsoft will be either unwilling or unable to fight the European Commission.

1. Geographic Market

The court must first find that the actions of Microsoft have occurred within the common market or a significant part of it.²⁶⁰ This element should not be difficult for the court to meet given Microsoft's dominant presence within Europe. Even under a community-wide market finding, Microsoft has resale partners in virtually every member country and technology partners in all European Countries.²⁶¹ Additionally, the consumers in the European Union using Microsoft Windows and other products are estimated in the millions.²⁶² Clearly, the court will have little trouble concluding that actions undertaken by Microsoft had effects on the European common market. The court may, however, choose to narrow the geographic market definition to further increase Microsoft's dominant position. Michelin Corp., much like Microsoft, held a global and community-wide position; however, the court was willing

simplistic approach that has dominated the century in a variety of areas (drugs, Vietnam, crime, and Haiti), the Europeans prefer to approach complex problems with complex solutions. *See id.*

²⁶⁰ *See* EC TREATY art. 82 (ex 86).

²⁶¹ *See Microsoft Partners in Europe*, available at http://www.microsoft.com/freedomtoinnovate/fin_europe_partners.htm (visited Dec. 22, 2000). Totals include 251,504 Resale Partners and 6,891 Technology Partners. Technology Partners include PC manufacturers, software manufacturers, and Microsoft Certified Solutions Providers.

²⁶² *See id.*

to limit its defined area along national lines.²⁶³ A finding of such a position with regard to Microsoft would strengthen the case of the Commission further by bolstering the dominant position.

2. Product Market

The relevant market in the European Union has often been defined narrowly in keeping with strict regulation of the common market.²⁶⁴ The U.S. findings of fact limited the relevant product market to Intel-compatible PC operating systems and excluded non-Intel-compatible PC operating systems as well as other non-computer devices.²⁶⁵ The finding by the United States district court narrowed the product market dramatically. It is also likely that the European courts will find the market at least as equally narrow given the policies of the European Union evidenced in the holding of *United Brands*.²⁶⁶ The holding in *United Brands* narrowed the relevant product market based on the lack of interchangeability between bananas and other fruits.²⁶⁷ Viewing other relevant products in the Microsoft case from a threshold of interchangeability, it becomes clear that the narrow definition would be the likely result. Servers are deemed non-interchangeable due to higher prices and differing power requirements without the ability to support a broad scope of applications.²⁶⁸ Network systems and other devices (television, telephone and game consoles) also are non-interchangeable because they lack the applications ability and convenience of an Intel-compatible PC operating system.²⁶⁹ The product market at issue in Microsoft is not likely to be viewed as dissimilar to *Tetra Pak II* with regard to leveraging. The server market in which portions of Microsoft's abuses were alleged to have been committed would not be considered as a portion of the product market definition. The rejection of servers as part of the product market greatly strengthens the Commission's case since Microsoft arguably does not possess a dominant server position.

²⁶³ See *Michelin N.V.*, [1985] 1 C.M.L.R. at 282.

²⁶⁴ See *United Brands*, [1978] 1 C.M.L.R. at 429.

²⁶⁵ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 14-18 (D.D.C. 1999).

²⁶⁶ See *United Brands*, [1978] 1 C.M.L.R. at 429.

²⁶⁷ See *id.* at 439.

²⁶⁸ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 14 (D.D.C. 1999).

²⁶⁹ See *id.* at 15-16.

3. *Dominant Position*

Having found a definition of product market at least as narrow as the U.S. court, the European courts must find that the firm holds a dominant position, which is largely determined by market share and market power.²⁷⁰ In keeping with policies of preserving the common market the courts have been liberal in finding adequate market shares.²⁷¹ Microsoft's share with regard to operating systems markets has grown incredibly rapidly. In 1999, the desktop market for Windows operating systems was approximately ninety percent.²⁷² Microsoft also controls an estimated thirty-seven percent of the server operating systems market.²⁷³ Since a portion of the commission's investigation involves a leveraging complaint by Sun Microsystems, a competitor in the server market, both market shares will prove highly relevant to European courts, even though a dominant position in the server market is not required.²⁷⁴

As indicated in *Michelin*, the courts can determine market power by a corporation's freedom of action regarding competitors and the ability to affect competition.²⁷⁵ The European courts could further establish market power when viewing the entry barriers protecting Microsoft's market share. The applications barrier to entry largely gives Microsoft the ability to leverage its way into other markets and set and maintain anticompetitive prices.²⁷⁶ When viewed in conjunction with high market shares, the European courts will likely be able to find that Microsoft is in possession of a dominant position. The importance of the applications barrier to entry in preserving market power can be further inferred by the variety of actions undertaken by Microsoft to preserve it.

²⁷⁰ See KORAH, *supra* note 176, at 77-95.

²⁷¹ See *Jebsen & Stevens*, *supra* note 38, at 481. Because of the strict view regarding market power, Microsoft's arguments on the relevant market may be immaterial. It is quite likely that even if all PC operating systems were included in the relevant market, Microsoft's overall share would not fall below twenty to forty percent, which the Commission has indicated cannot be ruled out with regard to dominance. See Commission of European Communities, *supra* note 211.

²⁷² See *Microsoft Replies to Licensing Accusations*, WORLD REP., Nov. 27, 2000.

²⁷³ See *id.*

²⁷⁴ See *Dominance*, *supra* note 1.

²⁷⁵ See *Michelin N.V.*, [1985] 1 C.M.L.R. at 288-90.

²⁷⁶ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 19 (D.D.C. 1999).

4. *Abuse of Dominant Position*

The European courts should also be able to readily find conduct of Microsoft that constitutes an abuse of the dominant position given that the European Community requires a special responsibility of dominant entities toward competitors.²⁷⁷ The actions of Microsoft can be placed into several of the specified abuses outlined in article 82 (ex 86) of the treaty itself.²⁷⁸

a. *Pricing*

The abuses under article 82(a) (ex 86(a)) involve pricing and predatory pricing.²⁷⁹ Microsoft's actions surrounding the distribution of Internet Explorer are likely to be found as such an abuse. Internet Explorer presented Microsoft with a profitable opportunity.²⁸⁰ Microsoft, however, chose to forego profits in order to increase the market share of Internet Explorer at Netscape Navigator's expense.²⁸¹ The European Union courts can regard this action as predatory.²⁸²

b. *Limits on Production or Market Development*

Article 82(b) (ex 86(b)) prohibits abuses involving limits on production or market development.²⁸³ Since the provision covers restricting innovation, this is the provision Microsoft will likely have violated on numerous occasions. By limiting the compatibility between Windows and Navigator and preserving the applications barrier to entry,²⁸⁴ Microsoft stifled innovation in the browser market. When presented with threats to competition from original equipment manufacturers like Intel and IBM, Microsoft withheld technical information, causing those producers to abandon their expansion into competing products or delay their release.²⁸⁵ The clear effect of such activity was to limit production and innovation within the market.

²⁷⁷ See McShea, *supra* note 237, at 79.

²⁷⁸ See EC TREATY art. 82(a)-(d) (ex 86(a)-(d)).

²⁷⁹ See EC TREATY art. 82(a) (ex 86(a)).

²⁸⁰ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 33 (D.D.C. 1999).

²⁸¹ See *id.*

²⁸² See *Tetra Pak II*, [1997] 4 C.M.L.R. 662.

²⁸³ See EC TREATY art. 82(b) (ex 86(b)).

²⁸⁴ See *U.S. v. Microsoft*, 84 F. Supp. 2d 9 (D.D.C. 1999) ¶¶ 90-91.

²⁸⁵ See *id.* at 34-35, 38-39.

Finally, Microsoft prohibited other innovations in the market in order to preserve its applications barrier to entry. Sun's Java programming language and Apple Quicktime both represented cross-platform threats. With regard to Sun, Microsoft persuaded developers not to develop Sun-compliant programs.²⁸⁶ The result impeded Java's progress in developing portability between Windows and other operating systems.²⁸⁷

Although not discussed in the current U.S. case, a portion of the European Union case involves allegations by Sun that Microsoft has improperly leveraged itself into the server market.²⁸⁸ By using its dominant position to increase its share of another market, Microsoft has limited the growth of Sun and others in that server market. Such actions will also be found to constitute an abuse of a dominant position. The actions toward Apple and Quicktime were similar. Microsoft developed its own multimedia program and limited the compatibility between Quicktime and Windows.²⁸⁹ Microsoft's conduct resulted in stunted market innovation and limited production. The abuses by Microsoft are analogous to the abuses found in *United Brands*²⁹⁰ with regard to the post sale requirements on distributors.

c. Discrimination

The third provision of article 82 (ex 86) categorizes price discrimination as an abusive undertaking.²⁹¹ Again, a variety of actions by Microsoft are likely to fall under the scope of this provision. Microsoft's withholding of information from Netscape following the rejection of its "special relationship" proposal can be considered a refusal to deal.²⁹² Microsoft similarly withheld technical information or refused to grant favorable dealing terms to IBM²⁹³ and Apple.²⁹⁴ The practice of charging different prices based on compliance in competitive markets is an example of discriminatory pricing and is likely to face condemnation by European courts. The situation is analogous to *United Brands*, where the court found the practice of charging different price levels

²⁸⁶ See *id.* at 107.

²⁸⁷ See *id.* at 110.

²⁸⁸ See *Dominance*, *supra* note 1.

²⁸⁹ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 36-37 (D.D.C. 1999).

²⁹⁰ See *United Brands*, [1978] 1 C.M.L.R. at 435.

²⁹¹ See EC TREATY art. 82(c) (ex 86(c)).

²⁹² See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 33 (D.D.C. 1999).

²⁹³ See *id.* at 39.

²⁹⁴ See *id.* at 36-37.

to different distributors to constitute an abuse of a dominant position.²⁹⁵ The court also condemned discriminatory pricing similar to that of Microsoft in *Irish Sugar*.²⁹⁶

d. Tying

The final provision involving abuse covers tying arrangements.²⁹⁷ The major focus of the tying claim involves the bundling of Internet Explorer to the operating system. Given that Explorer and Windows have been found to be separate products,²⁹⁸ the court can make a determination regarding the existence of a tie or leverage into another market. The court in *Tetra Pak II* listed the factors for determining whether markets are linked.²⁹⁹ First, the structure of the markets is such that demand for operating systems and browsers are similar although not interchangeable.³⁰⁰ Secondly, Microsoft has a high market share in the dominant operating system market³⁰¹ and a large and increasing share of the browser market.³⁰² Finally, the characteristics of the products are such that they can be linked together, as evidenced by Microsoft's bundling arrangement. Under this analysis, the conduct of bundling Internet Explorer to Windows constitutes an unlawful tie and thus an abuse of a dominant position.

5. *Tetra Pak II* Categories

The *Tetra Pak II* case provides a synthesis of abuses involving competition covered by article 82 (ex 86);³⁰³ use of this case can provide the court guidance from which to view the actions of Microsoft in each of the above circumstances. The withholding of technical information to the detriment of Netscape can be placed into the second category of abuse involving a dominated market where the effects are felt on another market in which Microsoft does not hold a dominant position. The refusals to deal with original equipment manufacturers who began to compete with Microsoft or

²⁹⁵ See *United Brands*, [1978] 1 C.M.L.R. at 435.

²⁹⁶ See *Irish Sugar*, 1999 E.C.R. II-2969 (1999).

²⁹⁷ See EC TREATY art. 82(d) (ex 86(d)).

²⁹⁸ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 48-49 (D.D.C. 1999).

²⁹⁹ See *Tetra Pak*, [1997] 4 C.M.L.R. at 677 (factors listed *supra* note 223).

³⁰⁰ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 48 (D.D.C. 1999).

³⁰¹ See *Dominant position*, *infra* Part V.A.(3).

³⁰² See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 98-99 (D.D.C. 1999).

³⁰³ See *Tetra Pak II*, 4 C.M.L.R. at 677 (categories listed *supra* note 201).

threatened the barriers to entry fall into the first category covering abuses in the same market as the dominant position.

The tying arrangement and pricing actions surrounding the development and marketing of Internet Explorer could be placed either into the third category, involving abuses committed in markets where there is no dominant position in order to strengthen a position in a dominated market, or the fourth, involving abuses in a market separate from but related to and connected with the dominated market.³⁰⁴ Finally, the actions toward Sun Microsystems could be covered by either the second (same as Netscape) or the fourth (same as the Explorer tying arrangement) categories. When any one, few, or all of the above actions are found to be an abuse of a dominant position, Microsoft could face a significant fine for violation of European Union laws, a penalty which is less likely appealed or negotiated than the structural remedies often proposed in the U.S. courts.

A. *Essential Facility Doctrine*

The courts of the European Union also have the possibility of condemning Microsoft for abuse of control of an essential facility. Windows operating system and the technical information accompanying it can be considered an asset necessary for the participation in a market, an essential facility.³⁰⁵ Any refusal of access to the facility would be anticompetitive, and furthermore the use of control over the essential facility to create advantages over competitors can be condemned as abuse of a dominant position.³⁰⁶ Microsoft's repeated denials of access to information³⁰⁷ and use of Windows to leverage into other markets or prevent others from doing so,³⁰⁸ constitute use of an essential facility to procure advantages over competitors. It is also noteworthy that European law often requires intellectual property rights to yield to larger societal concerns, such as market preservation.³⁰⁹ The policy goals of preserving the common market would prevent Microsoft from arguing that access to Windows and related information on a non-discriminatory basis would interfere with its rights and ability to compete.

³⁰⁴ This fourth category is the same category that covered the abuses condemned in the Tetra case.

³⁰⁵ See Harz, *supra* note 153, at 223.

³⁰⁶ See *id.*

³⁰⁷ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 35, 39, 47-48, 54 (D.D.C. 1999).

³⁰⁸ See *id.* at 35, 39-40, 46.

³⁰⁹ See Harz, *supra* note 153, at 223.

B. *Lack of Justification*

Several of Microsoft's arguments against the findings are also likely to prove unsuccessful in the European courts even if the court is persuaded into using a balancing test. Whether viewed from an essential facilities perspective or not, it is unlikely that Microsoft will be able to justify the actions taken as a proper exercise of its intellectual property rights. Since the European system places a special responsibility on dominant firms in dealing with competitors, it is clear that abuses damaging the common market are given greater concern than interference with property rights.

The European courts can equally dismiss other justifications. Microsoft has argued that the activities such as bundling Internet Explorer with Windows and encouraging other developers to make Windows-compatible products increases efficiencies.³¹⁰ The justification will prove as unsuccessful in the European courts as in the U.S. district court. Additionally, the justification, even if accepted, is still insufficient to override the policy of market protection in the European Union. The court is more likely to value preservation of competitors and businesses over market efficiencies.³¹¹

Microsoft also contends that its actions promoted innovation by encouraging the development of additional Windows-compatible technologies and forcing firms such as Netscape to continually reexamine their products.³¹² The argument follows that increased innovation furthers competition and provides an overall benefit to consumers. The European court is likely to reject innovation as an argument for reasons similar to the rejection of arguments surrounding efficiency. The focus of the enforcement of articles 81 (ex 85) and 82 (ex 86) is to preserve competitors before competition.³¹³ Finally, arguments that the technology industry is rapidly changing and no firm can truly hold a dominant position will also fail. Unlike American courts, the European courts are not as concerned with how the dominant position came to be acquired or could be lost, but rather they focus on whether a firm is in a position of market power and has abused that position.³¹⁴

³¹⁰ See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 57 (D.C.C. 1999).

³¹¹ See *KORAH*, *supra* note 176, at 10.

³¹² See *United States v. Microsoft, Corp.*, 84 F. Supp. 2d 9, 57 (D.D.C. 1999).

³¹³ See *Kareff*, *supra* note 165, at 554.

³¹⁴ See *Jebsen & Stevens*, *supra* note 38, at 488.

C. Structure

The structure of the European courts also points to a result against Microsoft. The fact that article 82 (ex 86) is given such broad interpretation and application and the courts are given a broad grant of authority increases the likelihood that Microsoft can be reached and condemned under their authority. Furthermore, since the European Union generally does not pursue structural relief like the United States but instead imposes a fine,³¹⁵ it is unlikely that Microsoft will desire to spend large amounts of capital in a vigorous and lengthy European court battle.³¹⁶

D. History

The most interesting and perhaps most reliable basis from which to draw predictions and comparison is history itself. When compared to the case involving IBM, a quick result against Microsoft is more likely to occur. Much like IBM in the 1960s and 70s,³¹⁷ Microsoft shows no sign of ending the rather lengthy process that has become the U.S. antitrust action, now in its eleventh year.³¹⁸ The government undertook both the Microsoft claim and the IBM claim rather begrudgingly, following the urging or the filing of complaints by competitors.³¹⁹ In continuance of the pressure on the Department of Justice regarding Microsoft, America Online and other competitors have filed a brief continuing to argue in favor of a Microsoft breakup.³²⁰

Although the trouble in the European courts appeared less severe than in the United States, the case was much more clearly stacked against IBM; Microsoft now faces the similar situation. The arguments with which IBM was attempting to justify its actions are the same arguments Microsoft is advancing: market efficiency, innovation and competition.³²¹ IBM settled likely from the realization of the ineffectiveness of these arguments in

³¹⁵ The fine imposed by European Courts should not be trivialized as "soft." The courts can impose fines up to ten percent of the company's turnover in addition to injunctive relief. In the case of Microsoft the amount could reach \$230 million. See *Dominance*, *supra* note 1.

³¹⁶ See *Jepsen & Stevens*, *supra* note 38, at 448.

³¹⁷ See *Lopatka*, *supra* note 128, at 145.

³¹⁸ See *Cassidy*, *supra* note 9.

³¹⁹ See *Hawker*, *supra* note 11, at 1; *Lopatka*, *supra* note 128, at 149.

³²⁰ See *Clare Haney*, *AOL, Others File Brief Arguing in Favor of Microsoft Breakup*, INFO WORLD DAILY NEWS, Jan. 15, 2001.

³²¹ See *Lopatka*, *supra* note 128, at 156; see also *Microsoft Appellate Brief at Microsoft Press Pass*, *supra* note 24.

European courts that are focused on the preservation of a community market and of small and medium businesses; Microsoft's arguments will prove no more persuasive. The European courts were also able to pursue IBM with a clear idea of redress, thus lessening the chance of a lengthy fight.³²² With the high likelihood that Microsoft will be found to have abused its dominant position, the penalties established by the European system remain clear-cut.

Parallels to the IBM dismissal in the United States can also be drawn from recent political developments. The European antitrust procedure, based upon treaty law, is governed much more by the discretion of courts and thus is less affected by changes in national political climates. The recent election of George W. Bush as President of the United States led to the appointment of John Ashcroft as Attorney General³²³ and Charles James as Justice Department Antitrust Chief.³²⁴ Although most experts agree that the case has gone too far to be completely dropped, critics argue that should Microsoft continue to prevail the case would not be appealed by the government or the entire case could be settled on terms favorable to Microsoft.³²⁵ The IBM case was similarly dismissed following a shift to the right in the political climate. Following the dismissal of IBM, the European courts continued to proceed and are likely to continue to proceed against Microsoft resulting in a condemnation or a quick, yet strict settlement.

VI. CONCLUSION

Given Microsoft's global presence, it is unlikely that its antitrust problems will cease any time in the near future. The United States appears doomed to (or arguably already has) repeat its past mistakes and drag an enforcement action over decades with no clear sign of relief. Following the filing in the United States other countries and regions have begun investigations of their own. Although a certain forecast of every outcome is impossible, a prediction can be made as to the result that is most likely to occur in the E.U. given several factors.

Past examples of antitrust enforcement of massive technological firms on both sides of the Atlantic Ocean reveal a pattern the current action is likely to follow. The findings of fact of the U.S. district court can be applied to the

³²² See Jebson & Stevens, *supra* note 38, at 447.

³²³ See Kelly Zito, *Ashcroft Unlikely to Drop Microsoft Case, But Experts Say He Might Turn Down the Heat*, S.F. CHRON., Jan. 16, 2001, at D1.

³²⁴ See Larry Margasak, *Gov't, Microsoft to Battle in Court*, ASSOCIATED PRESS, Feb. 26, 2001.

³²⁵ See *id.*

European structural system and conclusions can be drawn based on European case law and policy goals. When combined, it becomes apparent that Microsoft is likely to either settle the European case quickly to avoid public condemnation or will receive an unfavorable verdict and be subjected to the requisite penalties. The case would therefore show again the ability of the European Union to accomplish what U.S. antitrust enforcers either should not attempt or cannot conclude.

