Federal Trade Commission

"Some Views on the European Microsoft Case"

Remarks of Commissioner J. Thomas Rosch[1]
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1. Introduction

I have been asked to comment on Professor Pierre Larouche's thought-provoking paper respecting the European Court of First Instance's decision in the *Microsoft* case.[2] Before doing so, however, I would like to make several things clear. First, the paper is the first one I

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners.

[2] Pierre Larouche, The European *Microsoft* Case At The Crossroads Of Competition Policy And Innovation (SSRN, May, 2008) TILEC Discussion Paper No. 2008-021, *available at:* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1140165> [hereinafter "Larouche paper"].

[3] *C.f.* Christian Ahlborn and David S. Evans, The Microsoft Judgment And Its Implications For Competition Policy Towards Dominant Firms In Europe (SSRN, April 2008), *available at:* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115867>.

applied, and it's important that you know where I am coming from. Third, although I did not participate directly or indirectly in the *Microsoft* litigation in the D.C. Court of Appeals in the United States,[4] like many other United States antitrust practitioners, I read that Court's decision carefully when it was issued. Thus, I cannot help but compare the two decisions, which grappled with similar practices and claims.

My remarks will be threefold. First, I have some general observations to make about the CFI decision and about the paper. Second, I have some remarks that focus specifically on the first part of the dec

[4] *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

evidence in turn could be considered to illuminate the effects of the practices.[5] Put succinctly, the courts could treat the cases as involving practices by a firm with monopoly power whose purpose and effect were to foreclose competition and thereby insulate the firm from constraints on its exercise of that power. The length and the content of those decisions indicate that that is how the courts viewed the cases.

Second, I therefore respectfully disagree with Professor Larouche's criticism that the CFI decision was too long on facts.[6] It is common in the United States for courts to insulate their decisions from appellate review by basing them primarily on the facts, which are less susceptible to second-guessing than decisions based on the law. For example, in *United States v. Oracle,*[7] a merger case, the federal district judge based his decision against the government largely on the facts, and for that reason the government decided not to appeal it. Additionally, Article 82 decisions, like Sherman Act Section 2 decisions in the United States, are bound to be pretty fact-specific because liability under both provisions largely depends on the effects of the challenged practices.

Third, nor do I agree that the CFI decision is too short on the law.[8] I would suggest that the law under Article 82 and Sherman Act Section 2 is not susceptible to sweeping "one size fits

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[5] *Aspen Skiing Co. v. Aspen Highlands Skiing* Corp., 472 585, 602 (1985)("evidence of intent is . . . relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . or 'predatory.'"); *United States Football League v. NFL*, 842 F.2d 1335,1359 (2d Cir. 1988)("Evidence of intent and effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices.").

[6] Larouche paper at 1-2.

[7] 331 F. Supp.3d 1098 (N.D. Cal. 2004).

[8] Larouche paper at 3.

[9] *See* U.S. Dep't of Justice, Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act (2008), *available at:* <http://www.usdoj.gov/atr/public/reports/236681.pdf>; and Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice, September 8, 2008, *available at:* <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,509 U.S. 209, 221

Consider, for example, the decisions in *Tetra Laval*,[11] *Schneider-Le Grand*,[12] and *Impala*.[13] To be sure, these were merger cases, but I don't consider that to have been the reason why the courts were willing to depart from the EC.

3. Specific Remarks re: the Refusal to Supply Interoperability Information

To begin with, I share Professor Larouche's view that this claim was essentially a refusal to license intellectual property claim, and his view that the European courts had addressed such claims in the *Magill*,[14] *Bronner*,[15] and *IMS*[16] cases.[17] However, I do not share his view that in assessing Microsoft's liability for this practice, the CFI should have focused on whether the practice foreclosed "competition for the market" instead of "competition in the market."[18] More specifically, Professor Larouche opines that the former is more likely to create "breakthrough innovation" than the latter, which is only likely to create "incremental innovation."[19] There are several reasons why I disagree with both his premises and conclusions.

First, as Professor Larouche acknowledges, it is not clear which form of competition is

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[11] ECJ, 15 February 2005, Case C-12/03 P, *Commission v. Tetra Laval*, [2005] ECR-1987.

[12] CFI, 11 July 2007, Case T-351/03, *Schneider/Legrand* (not yet reported).

[13] CFI, 13 July 2006, Case T-464/04, *Impala v. Commission* [2006] ECR II-2289.

[14] *Magill, RTE and ITP v Commission*, Joined Cases C-241/91 P and C-242/91 P, [1995] ECR I-743.

[15] *Bronner*, Case C-7/97, [1998] ECR I-07791.

[16] *IMS Health*, Case C-418/01, [2004] ECR I-05039.

[17] Larouche paper at 6.

[18] *Id.* at 8.

[19] *Id*. at 10.

[20] *Id.* at 15.

European Commission, which has stated with respect to enforcement of Article 82 that "an undistorted competitive process constitutes a value in itself…"[23] Thus, the *Trinko* premise must arguably be advanced to legislators instead of to judges.

Additionally, Professor Larouche is troubled that the CFI decided this claim on a ground not argued by the European Commission. More specifically, whereas the EC contended that the factors listed in the *IMS* line of cases that would make such a refusal to license intellectual property illegal was not exhaustive, the CFI concluded that those factors were present in the *Microsoft* case – including that the practice prevented rivals from introducing a "new" product.[24]

First, again that is what United States courts frequently do in order to avoid appellate reversal. That is to say, they decide cases on narrow grounds that are consistent with prior precedent instead of breaking new ground. Indeed, that is something that I would applaud. Cosmic pronouncements (such as the one made in *Trinko*) may be satisfying to some, but they are often dictum [illegible]

[23] Commission Decision 2007/53 of 24 March 2004, Case COMP/C-3/37.792, *Microsoft* [2007] OJ L 32/23 at para. 969.

[24] Larouche paper at 9-10.

[25] *Id*. at 2-3,15.

[26] CFI, 12 December 1991, Case T-30/89, *Hilti AG v. Commission* [1991] ECR II-1439, upheld by ECJ, 2 March 1994, Case C-53/92, *Hilti AG v. Commission* [1994] ECR I-667.

[27] CFI, 6 October 1994, Case T-83/91, *Tetra Pak International v. Commission* [1994] ECR II-755, upheld by ECJ, 14 November 1996, Case C-333/94, *Tetra Pak International v. Commission* [1996] ECR I-5951.

coprocessor and thus eliminated virtually all of the manufacturers of stand-alone math

coprocessors. On the other hand, the practice may be highly beneficial to consumers,

eliminating as it does the need to buy two separate products. Both the D.C. Circuit and the CFI

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employ buy [illegible]

[29] U.S. Dep't of Justice and Federal Trade Comm'n, *Horizontal Merger Guidelines* (issued April 2, 1992 and revised April 8, 1997), § 4, *available at:* <http://www.ftc.gov/bc/docs/horizmer.htm>.

[30] *Id.*

[31] *See, e.g.*, *FTC v. Staples*, 970 F. Supp. 1066, 1090 (D.D.C. 1997); *FTC v. Swedish Match N. Amer. Inc.*, 131 F. Supp. 2d 151, 172 (D.D.C. 2000).

can show that the challenged practices were necessary to achieve them and that they are so substantial that they offset the foreclosure effects of the practices. I have trouble concluding that the D.C. Court and the CFI were wrong, as a matter of law, in holding that Microsoft failed to meet those stringent requirements.