SOME CONSIDERATIONS ON ABUSE OF DOMINANT POSITION

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Abstract: *Article 82 (formerly 86) EC contains four essential elements (an undertaking, a dominant position, an abuse of that position and the abuse must affect trade between member states). The term undertakings is subject to the same broad interpretation as that applied to article 81 (formerly 85) EC and covers the same activities, both public and private.*

The Community interest must be also taken into account. Although it is not clear precisely what this element of article 86 requires, it will clearly curtail the scope of the exception provided under this article.

Although abusive behavior of undertakings in a dominant position is prohibited, it must be recalled that merely being in a strong position is not a problem in itself. It is necessary for major players in a market to be aware of their position because practices which would not fall foul of article 82 (formerly 86) EC, where an undertaking is not dominant, will do so where dominance is established. A refusal to deal by a non-dominant undertaking would not be an abuse within article 82 (formerly 86) EC, but it will be so where the undertaking is dominant.

Keywords: *Concentration of economic power, dominant position, abuse manifestation, forms of the abuse, jurisprudence*

Introduction

A threat to ensuring a free and fair competition is represented by the adverse impact of the concentration of economic power.

Competition and trade among states within (inside) the European Union can be adversely affected not only by "cartels" (agreements between companies, decisions of company associates and concerted practices), but also by "dominant positions", that is by companies situated on quasi-monopoly positions.

For this reason, the control of the powerful economic positions held by those capable of dominating the market was taken into consideration, along with a follow-up on the advantages deriving from such a position.

Definition

Article 82 (formerly 86) EC considers that any action of one or several companies consisting of a dominant position abuse on the Common Market or on a considerable share thereof is incompatible with the Common Market as long as such action can affect trade between the member countries.

The aforementioned article does not define the concept of dominant position abuse. What the laws of the European Community condemn is not the dominant

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position itself but rather the misuse of a dominant position. Therefore, it becomes necessary to distinctly analyze the two components of the dominant position abuse, i.e. dominant position and the abusive application thereof.[1]

The first attempt to elaborate a definition of the concept of dominant position can be found in Art. 66, paragraph 7 of the CECO (CECA) Treaty, which corresponds to Art. 82 (former 86) EC. This text shows that: "If the High Authority considers that public or private companies, which as of right or as of fact, hold or acquire a dominant position on the market of a relevant product placed under its jurisdiction, where such position eludes an actual competition on a significant share of the common market, and if such companies use such position for purposes that are in contradiction with the objectives of this Treaty, then the High Authority will address the appropriate recommendations thereto in order to ensure that such position is not used for such purpose."[2]

A similar definition is the one contained in Art. 22, paragraph 1 of the German Law dated July 27, 1957, which provides: "a company is deemed to hold a dominant position on the market as long as there are no competitors or no notable competitors on such market". The definition was modified in 1973 in the sense that the company holding a dominant position "has a preponderant standing on the market in respect of its competitors".[3]

Other definitions were formulated by the European Commission and the Court of Justice of the European Communities.

In a memorandum dated December 1, 1965, concerning concentrations on the common market, the Commission placed less emphasis on the status of the market and on the lack of pressure exercised by the company, and insisted more on the capacity to exercise an influence on other companies."[4]

The text of the Commission illustrates that "It is mainly all about economic power, i.e. the ability to exercise an important influence on the operation of a market and, in principle, a predictable influence, as far as the dominant company is concerned. Such economic capability of a dominant company influences the economic conduct and decisions of other companies, whether used or not in the manner presented. A company which can defeat other competing companies on the market at its discretion, can already hold a dominant position and can determine, in a decisive manner, the conduct of other companies even though its own share of the market is still relatively unstable."

At a first glance, there is the tendency to oppose two definitions, one based on the market status and company power, the other on the independent nature of the company conduct.

Reference to the strength of the company does not eliminate the necessity to take into consideration the framework of competition on the market. In the Zoja case (JOCE/L no. 299 dated December 31, 1972), the Commission retained as a decisive element the suppluy structure of the ethambuthol market. The situation existing on the market constitutes a clue to the dominant position, not one of its definition elements.

The first decisions and resolutions adopted by the Court used varied wording.[5]

[1] *B. Goldman, A. Lyon-Caen, A: Vogel Droit Commerciel Europeen, Paris, Dalloz, 1994, pg. 411*
[2] *B. Goldman, A. Lyon-Caen, A: Vogel Quoted work, pg. 410*
[3] *B. Goldman, A. Lyon-Caen, A: Vogel Quoted work, pg. 410*
[4] *B. Goldman, A. Lyon-Caen, A: Vogel Quoted work, pg. 410*
[5] *B. Goldman, A. Lyon-Caen, A: Vogel Quoted worj, pg. 412*

In the Sirena resolution dated February 18, 1971, the Court described the concept of dominant position by "taking into consideration the individual existence and position of manufacturers or distributors of similar or substitute products."

In the Continental Can decision dated December 9, 1971 (JOCE no. 7 of January 8, 1972), "global independence of conduct" was used as a definition.

In the United Brands decision dated February 14, 1978, the Court considered that the existence of competition does not rule out the existence of a dominant position, as the latter implies the capacity to act autonomously.

This definition is retained and acknowledged by a more recent resolution, Hoffmann-La Roche dated February 13, 1979. According to such resolution, "The dominant position contemplated herein refers to the status of the economic power held by a company, which confers it the authority to set barriers against the maintenance of an actual competition on the market, thus making possible the existence of an extensively independent conduct in respect of competitors, clients and consumers."[6]

It was still in the Hoffmann-La Roche case that the Court formulated a general definition of the abuse of dominant position, namely "an objective concept regarding the conduct of a company placed in a dominant position, of such nature so as to influence the market structure, and as a result of the presence of that company, the degree of competition is already weakened, having as outcome the creation of obstacles using various means meant to stand in the way of a normal competition of products and services between operators, or in the way of a competition degree already existing on the market, or in the way of the development of such competition."[7]

In order to assess a dominant position, three categories of factors are used.[8]

The structure criteria take into account the organization of the markets, such as company size, market share distribution or conditions of access to markets.

The conduct criteria illustrate the conduct of companies on the market, such as relations with consumers (clients) and price determining.

Conduct criteria show the effects of the company's conduct.

Most often than not, the authorities of the EC use the structure criteria, particularly the market share held by the company at stake. However, the utilization of the structure criteria requires two conditions, namely: non-limitation to market share analysis and also consideration of company dynamics.

The use of structure criteria involves special issues when the term of dominant position is attributed to a company holding monopoly on a certain market. In this case, there are two possibilities. The first is the possibility of a monopoly as of right granted to a private or public company by the public authorities and the second is that of exclusivity resulting from an intellectual property right. In such situations we are not dealing with a dominant position.

The analysis of dominant position misuse implies that the constitutive elements of such misuse be first and foremost taken into consideration. In this respect, we are dealing with conduct abuse and result abuse.[9]

[6] *B. Goldman, A. Lyon-Caen, A: Vogel Quoted work, pg. 412*
[7] *C. Gavalda, G. Parleani Droit des Affaires de l'Union Europeene, Ed. Litec, Paris, 1995, pg. 276*
[8] *B. Goldman, A. Lyon-Caen, A: Vogel Quoted work, pg. 413*
[9] *B. Goldman, A. Lyon-Caen, A: Vogel Quoted work, pg. 422*

Conduct abuse implies an action or lack of action that causes prejudice to the competitors. A dominant position is defined as the power to conduct oneself independently, without regard for the competitors, or the possibility of setting obstacles that stand in the way of an actual competition.

Result abuse implies an action or lack of action that causes prejudice to clients, suppliers or consumers. In this respect, it can be asserted that a concentration operation cannot be deemed an abuse of dominant position if it does not cause direct prejudice to users or suppliers.

Abuse may have effects not only on the dominant market, but also on other markets. The impact on other markets is not subject to sanctions by the laws of the European Community.[10]

In order to assess abuse, a distinction must be made between "normal" and "abnormal" competition of the dominating company.

"Normal" competition means that the company is not prohibited to defend its interests and that it must manifest a moderated aggressiveness. In this sense, the courts of the EC showed that "the existence of a dominant position does not deprive the company placed in such position of defending its own interests exposed to possible threat... such company has the possibility, to a reasonable extent, to take the actions it deems fit in order to defend its own interests."[11]

Normally, a company holding a dominant position seeks to develop and attract new clients. In this respect, it can practice cost and price reduction.

"Abnormal" competition clashes with the particular responsibility of a dominant company. It can practice high or discriminatory prices in order to eliminate its competitors from the market; it can set up barriers in the way of access on certain markets. A dominant company has the obligation to treat all clients equally and without discrimination.

The abuse of dominant position materializes in:[12]

- Directly or indirectly imposing inequitable sale or purchase prices, or other unfair commercial conditions;
- Restricting production, sale market or technical developments to the detriment of their beneficiaries;
- Applying different conditions to equivalent transactions concluded with other commercial partners and placing them in positions of commercial disadvantage;
- Determining that agreements be signed subject to conditions of acceptance by the other party of certain additional obligations which, by nature or according to commercial practice, are not related to the object of such agreements.

As an introductory consideration, it must be ascertained that abuse of dominant position has been more frequently encountered at EC level, thus generating the reaction of EC institutions.

Abuse of dominant position represents an anti-competition and unilateral activity, distinguishing itself from the situations regulated by Article 81 (formerly 85) EC, which are bilateral or multilateral activities.[13]

The provisions of Article 82 (formerly 86) EC equally apply to both private and public sector (if the respective

[10] *C. Gavalda, G. Parleani Quoted work, pg. 277*
[11] *C. Gavalda, G. Parleani Quoted work, pg. 278*
[12] *Octavian Manolache Legal regime of competition in EC law, Ed. All, 1997, pg. 132*
[13] *Octavian Manolache Quoted work, pg. 133*

structures act in their commercial capacity), as well as to all economic sectors in a uniform manner, the agricultural sector included. There are exceptions to the application thereof, namely coal and steel, and also the defense sector.

According to the practice of the Court of Justice, articles 81 (formerly 85) EC and 82 (formerly 86) EC aim to achieve the same scope at different levels, i.e. maintain competition on the common market. Thus, the limitation of competition, prohibited if it is the result of the conduct provided by Art. 81 (formerly 85) EC, does not become permissible by the mere fact that such conduct is the result of the influence of a dominating position and generates the merger of the companies concerned.

First of all, we also need to evidence the fact that, should one or several companies hold a dominant position at the level of the EC market, this shall not automatically lead to the attributing of abusive practices. Occasionally, a dominant position is the consequence of an activity equally profitable for the companies and the beneficiaries, an activity carried out over the years through high quality product and service supply that meets the requirements of consumers.

The practice of the Court also shows that, upon ascertaining the fact that a company holds a dominant position, it shall not constitute in itself an accusation, this meaning that, notwithstanding the reasons for the dominant position, the company concerned has a particular responsibility whereby it does not allow its conduct to affect the actual undistorted competition. As the jurisprudence of the Court would have it, the mere creation of a dominant position by granting an exclusive right, as such is defined under Art. 86 (formerly 90) EC paragraph 1, is not incompatible with the provisions of Article 82 (formerly 86) EC.

A member state comes in conflict with the regulations of Articles 81 (formerly 85) EC and 82 (formerly 86) EC only if, by merely exercising an exclusive right, it cannot avoid misusing such dominant position.

In a material case, it was shown that the provisions of Art. 5, 86 and 90 of the Treaty do not prevent the national laws from reserving retail sale of tobacco manufactured products to distributors who were authorized by the state. This is true to the extent that the company holding the exclusive rights and issuer of the operation licenses for retail traders does not misuse (particularly to the disadvantage of consumers) the dominant position it enjoys on the market in terms of the distribution of such merchandise.

In the same way, it was also shown that a company holding a dominant position is entitled to defend and gain market shares, provided that the company maintains itself within the limits of a normal competitive conduct and of a lawful competition. However, Art. 82 (formerly 86) EC prohibits only the conducts of a dominating company that aim to eliminate a competitor, thus strengthening its position by resorting to means other than those pertaining to competition in its essence.

The provisions of Article 82 (formerly 86) EC are directly applicable, and the reality of such fact is confirmed also by the dispositions of Article 1 of Regulation no. 17/62, which prohibits abuse of dominant position, no prior decision being required for this purpose.

Furthermore, the Court practice specifies that the interdictions provided by Article 82 (formerly 86), in relation with the provisions of Art. 86(formerly 90) EC grant the concerned parties rights which must be

safeguarded by the national courts of law. The national courts of law can admit actions for damages or actions whereby certain resolutions provide payment of fines (penalties).

Art. 82 (formerly 86) EC prohibits in all cases the misuse of dominant position, even if such misuse is encouraged by a national regulation.

The court resolved that in order to evaluate the compatibility of national measure effective implementation or preservation with the provisions of Art. 86 combined with Art. 3 lett. f of the Treaty (currently Art. 3 lett. g) and paragraph 2 of Art. 5 of the same Treaty, when, through such measure, the prices established by the manufacturers or importers must be accepted upon sale of the merchandise to a consumer, it is necessary to determine whether such act of effective implementation or preservation is advantageous for trade carried out among states, taking into consideration the barriers that may be generated as a result of the nature of tax covenants to which the merchandise is subject, but without taking into account any abuse of dominant position that such covenants may encourage.

The Court of Justice also considered that the company which holds a dominant position on the market of raw materials exploits this position when, in order to reserve the raw material for its own production of derivate products, it refuses to deliver the raw materials to a client (who is also a manufacturer of derivate products), with the purpose of eliminating any competition from the client.

A dominant position is not condemnable in itself. What should be condemned is the misuse of a dominant position. There can be no exemption, and no notification obligation constrains the companies, but there may be a request for negative attestation. We find here concepts similar to those that prevail in the national law.

The list of abuse types is presented in Art. 82 (ex 86) EC, similar to that presented in Art. 81 (ex 85) EC, both having an enunciative nature.

Forms of the Abuse of Dominant Power

a) Abuse consisting in "directly or indirectly imposing purchase or sale prices or other inequitable conditions" (Art. 82, ex. 86, letter a, EC).[14]

This practice concerns the imposing of low prices (lower than costs) in order to eliminate weaker competition. The term "price" also comprises elements correlated to reduction according to quantity, bonuses, discounts according to cash payment etc. Abuse can mean (as in the General Motors case) "charging an exaggerated price as compared to the economic value of the performance rendered, such measure having as result the halting of analog imports". Therefore, a price is deemed exaggerated if the proportion between such price and the economic value of the service rendered is not reasonable and if the company holding a dominant position "used means by which it obtained advantages and transactions that would not have been obtained in circumstances of a workable and efficient competition". A situation of abuse is the one in which a company imposes on an airline company the application of very high or very low fees, as well as a unique price per one line.

In the United Brands resolution, the Court showed the difficulties in defining

[14] *Gerard Druesne Droit Material et politiques de la Commmunaute europeene, PUF, 1991, pg. 194*

prices inequitably increased. The Commission stressed the fact that, in respect of the Danish, German and Dutch clients, the sale prices were exaggerated, a 15 per cent reduction of such prices being required. The decision, deemed insufficient, was annulled by the Court.[15]

The Court used two criteria in estimating to what extent the price was exaggerated, namely the excessive disproportion between the actual cost borne and the actual price charged, as well as the comparison between competing products.

The use of the first criterion implies two difficulties (the comparison between a company placed in a dominant position and another company bearing competition pressure, as well as payment of intellectual property rights).

The comparison between competing products is also difficult to make due to their different characteristics.[16]

b) Abuse consisting in "limiting the creation of outlets or the technical development to the disadvantage of consumers" (Art. 82 ex 86,letter b, EC)[17]

Unlike Article 81 (ex 85) EC, there is no reference to production control, technical progress or technological development, which are supposed to be exercised by companies connected to one another on covenant basis, or by company associates. There is no reference to investments.[18]

The compiling difficulties derive from the fact that the abuse of dominant position is not the result of a covenant. The freedom of action of a company is not restricted if it holds a dominant position.

We are dealing with the refusal to sell and the attempts to keep clients by means of exclusive procurement undertakings combined or not with reductions, for the sake of loyalty. In the Suiker Unie case, the Court ascertained that it misused its dominant position in relation with a refinery, forcing "negotiators to channel their exports to determined consignees or destinations and to impose such restrictions on their clientele", thus limiting the outlets and the buyers of the negotiators. In the Hoffman-La Roche case, the Court noted the illegal nature of an exclusive procurement clause, inserted at the buyers' request, as such covenants are not based on "economic performance justifying such advantage, but rather they tend to drive the buyers away or reduce options with respect to procurement sources and block the access of other manufacturers to the market.".

The "inequitable sale prices" contemplated by Art. 82 (ex86) EC can be "prices abusively reduced" (Court of Justice, decision dated July 3, 1991, Akzo Chemie case). There are abuses of dominant position occurring on markets that differ from the securities market and there are massive and prolonged price cuts. The Court confirmed its jurisprudence in the Tetra Pak case on November 14, 1996.[19]

The Court of Justice, in its resolution dated February 13, 1979 (the Hoffmann-La Roche case) showed that the concept of abusive utilization is an objective concept which views the conduct of a company in dominant position, meant to influence the structure of the market or the extent of competition (already low) and which have

[15] *B. Goldman, A. Lyon-Caen, A:Vogel Quoted work pg. 421*
[16] *B. Goldman, A. Lyon-Caen, A:Vogel Quoted work. pg. 428*
[17] *Gerard Druesne, Quoted work, pg. 186*
[18] *B. Goldman, A. Lyon-Caen, A:Vogel Quoted work, pg. 429*
[19] *Alain Guedj Praqtique du droit de la concurrence national et communautaire, LITEC 2000, pg. 78*

as effect the act of preventing (by resorting to means other than those governing a regular competition of products or services, based on the performance of economic operators) the maintenance of the competition extent still existing on the market or the development of such competition.[20]

As such, Article 82 (formerly 86) EC prohibits a dominant company to eliminate a competitor and thus strengthen its positions by resorting to methods other than those illustrating fair competition. From this standpoint, the competition of prices cannot, however, be considered legitimate. Prices lower than the average of variable costs (i.e. prices varying according to product quantities), by which a dominant company seeks to eliminate a competitor, must be considered as abusive. A dominant company has no interest whatsoever in practicing such prices unless the purpose is to eliminate competitors, in pursuit of power, and then reveal its prices, obtaining gains from its monopoly status since each sale generates a loss, and learn information on the total of fixed costs (i.e.. the costs that remain unaltered whatever the product quantities) and at least part of the variable costs related to the unit manufactures. In fact, prices lower than the average of the total costs, which include fixed costs and variable costs, but higher than the average of variable costs, must be deemed abusive if they are established as part of a plan aiming to eliminate a competitor. Such prices can, in fact, determine the elimination from the market of companies that may be as efficient as the dominant company but which, due to less financial capabilities, are not able to stand up to the competition."

c) Abuses consisting in "application, in relation with commercial partners, of unequal conditions for equal performance, thus generating a disadvantage in competition" (Art. 82, formerly 86, letter c, EC)[21]

It refers to discriminatory conditions imposed, i.e. application of discriminatory prices which affect one client more than they affect another client, for the same performance. In its decision dated June 2, 1971, the Commission condemned the German company GEMA for the fact that it requested importers of magnetic tape recorders and magnetoscopes a bigger royalty than the one owed by the German manufacturers, without admitting the grounds according to which the control cost was much more important in the first case than in the second. In the GVL case, the Court of Justice considered the refusal of this company to offer its services to certain persons, because of their nationality or residence, to be a discriminatory treatment and therefore an abuse.[22]

The merits of the United Brands case allowed the Court to elaborate specifications regarding performance equivalence. United Brands applied a different sale price every week, depending on the member country involved or on the clients.

In order to defend itself against the discrimination indictment, the company responded that, in the absence of a unique banana market, it had to take into consideration the various variable situations regarding clients. The conclusion of the Court was simple, in the sense that within the market United Brands was the supplier, while the various re-sellers represented the

[20] *Louis Vogel Droit de la concurrence et concentration economique, Ed. Economica, 1988, pg. 139*
[21] *Gerard Druesne Quoted work, pg. 187*
[22] *B. Goldman, A. Lyon-Caen, A:Vogel Quoted work. pg. 428*

demand, and the prices practiced by the dominant company needed to be assessed at the level of the entire market and not at the level of each individual market where the resellers were in turn suppliers.[23]

d) Abuse consisting in "subordinating the signing of agreements to supplementary performance which, by nature or according to commercial practice, are not related in any way to such agreements" (Art. 82, formerly 86, letter d, EC)[24]

The misuse of dominant position consists, in this situation, in subordinating the signing of an agreement to the acceptance by clients of other products and services that are not related in any way to the object of such agreement. Therefore, it refers to the act of preventing a company from expanding by using the advantages conferred to it as a result of the control exercised on certain products, thus forcing the client to buy another product manufactured by the company but competing with the products offered by other manufacturers.

The abuse situations can be differentiated in two categories, anti-competition abuses and exploiting abuses.

Anti-competition abuses (which affect current or potential competitors) take the form of blocking measures meant to eliminate new competitors from the market of the dominant company, as well as measures whereby prejudices are caused to the current competitors (prices reduced in an unfair manner, refusal to do business with a competitor).

Exploiting abuses consist in imposing excessive prices, selling merchandise on the condition that other merchandise less demanded on the market is purchased (sometimes at a lower price), imposing different prices in different geographical areas (when such differences in prices cannot be grounded on cost differences).

The English clause can also be considered an abuse of dominant position. By means of the English clause, buyers have the obligation under contractual clause, to inform the seller of the most favorable offer made to them by the competitors. Thus, it will become very easy for the seller to identify its rival and to obtain highly valuable information for putting together a market strategy.[25]

If a company placed on a dominant position requests the buyers or obtains, on agreement basis, the consent of such buyers to notify them with respect to the competitors' offers, this shall constitute a deepening of the severe nature of dominant position abusive use (buyers have an evident commercial interest of not disclosing the competitors' offers and they are free to procure their supplies from the competitors of that company in case the latter does not adjust its prices to such favorable offers).

In case of companies that enjoy exclusive rights granted by a member state (therefore holding a dominant position), it is considered that such companies resort to practices of dominant position abuse (opposing Art. 82 ex 86, EC) if they request payment for unsolicited service, invoice disproportional prices, refuse to use modern technology or grant price reductions to certain users, simultaneously compensating such reductions by increasing prices on the invoices of other users.

In practice, it was shown that we are dealing with a dominant position abuse if a

[23] *B. Goldman, A. Lyon-Caen, A:Vogel Quoted work. pg. 428*
[24] *Gerard Druesne Quoted work, pg. 197*
[25] *Octavian Manolache, Quoted work, pg. 137*

company imposes on those purchasing its machinery the obligation to procure raw materials for such machinery from it or from suppliers designated by it.

When a company placed in a dominant position directly or indirectly forces its clients under an exclusive procurement obligation, this shall constitute an abuse since the clients are deprived of the possibility to choose their procurement source, while other traders are refused access to the market. Whether such a sale is consistent with the commercial practice or not is irrelevant, because a commercial practice accepted in normal circumstances on a competitive market cannot be accepted on a market where competition is already limited.

On the other hand, it was shown that, although it is acceptable for a company placed in a dominant position to sell at loss, it is unacceptable in case of eliminatory sales.

Although the EC competition law admits that a company placed in a dominant position is entitled to take reasonable steps in order to protect its trade interests, still, actions actually aimed to strengthen and misuse the dominant position are prohibited. Art. 82 (formerly 86) EC particularly prohibits a company placed in a dominant position to eliminate a competitor by practicing price competition, as such is not included in the range of quality-based competition.

From a classical approach, the provisions of Article 82 (formerly 86) EC were applied solely to practices that produced effects on the market conditions and were meant to cause prejudices to beneficiaries or commercial partners, i.e. solely in terms of conduct on the market and not conduct causing changes in the competition structure of the market.

The Court of Justice did not adopt this distinction showing that at stake was solely the issue of whether the term "abuse" comprises only practices of companies that affect the market directly and cause prejudice to production and sales (for buyers or sellers), or it comprises also changes in the structure of a company leading to the hindering of competition on a substantial share of the Common Market. The distinction between measures referring to the company structure and practices that affect the market is not definite.

Examples from EC jurisprudence (Microsoft case)

The most recent and eloquent example of dominant position abuse is the case of the American company Microsoft.

After five years of investigation, the European Commission reached the conclusion that Microsoft violated the European laws on competition (Art. 82 formerly 86 EC), by coming close to a monopoly situation on the market of PC operating systems, media systems and servers.

The investigation began in 1998 following a complaint filed by a company also of American origin, Sun Microsystems.

Pursuant to the decision of the Commission dated March 24, 2004, the Commission ordered the American corporation Microsoft to disclose, within a 120 days' term, the interfaces needed by the competitors to operate with the Windows system. At the same time, within, and not later than, 90 days, Microsoft had the obligation to provide PC manufacturers with a version of the Windows OS (without Windows Media Player). Finally it was forced to pay a fine of 497 million Euros.

Microsoft misused its power on the market by intentionally restricting

interoperability between Windows PCs and non-Microsoft servers, as well as by connecting Windows Media Player, a program confronted by competition, with the Windows operating system.

This illegal conduct allowed Microsoft to acquire a dominant position on the servers market and significantly reduced competition on the media players market.

Such abuse caused prejudice to the competition climate and to consumers, who found themselves faced with less options and higher prices.

Microsoft filed an action for annulment against the decision of the Commission with the Court of First Instance on June 7, 2004 (case T-201/04, JOCE 179/36 dated July 10, 2004).

First of all, the petitioner claimed that the Commission committed an error in invoking Art. 82 (formerly 86) EC. In the petitioner's opinion, the conditions imposed by the EC court on a company placed in a dominant position, to obtain a license for its own intellectual properties are not met in the case at stake. The technology for which license procurement was required is not indispensable in obtaining interoperability with Microsoft PC operating systems, and the refusal to provide the technology could not have prevented the appearance of new products on secondary markets or the elimination of competition on secondary markets.

Microsoft showed that within the European Economic Area no license for the development of the software had ever been applied for. The petitioner pointed out the Commission's failure to fulfill the obligations imposed by the World Trade Organization under the TRIPS (Trade Related Aspects of Intellectual Property) Agreement when the present case was subject to the provisions of Art. 82 (ex 86) EC. Secondly, the petitioner invoked error on part of the Commission when it invoked violation of Art. 82 (ex 86) EC, owed to the fact that it considered the availability of Microsoft's own PC systems conditioned by (related to) the concurrent purchase of the Windows Media Player system.

According to Microsoft, the ECJ decision is based on theoretical speculation whereby the distribution of media functionality under Windows can lead, in the future, to a situation in which suppliers and manufacturers of software would encode their products in Windows Media format. It is further shown that the theory is in contradiction with the decision of the Commission in the AOL/Time Warner concentration case.

The petitioner claims that the decision does not meet the conditions required in order to have a case of violation of Art. 82 (formerly 86) EC, particularly of letter d of the article. It is pointed out that Windows and its media functionality are not two distinct products.

Finally, the petitioner claimed the disproportionate nature of the sanctions (compensations, measures) imposed on it, as well as the excessive amount of the fine enforced.

In spite of all the above, Microsoft paid the fine to the Commission on June 29, 2004.

On June 25, 2004, the American company requested the suspension of the measures ordered by the Commission and the application of transitory measures, on the grounds that such measures could cause serious and irreparable (irreversible) damages. Following the petition, the Commission informed the president of the Court of First Instance that it has no intention to enforce the measures until the application for suspension is not settled.

On December 22, 2004, the president of the EC instance dismissed the application for suspension filed by Microsoft. Subsequently, due to the fact that Microsoft did not observe the decision issued by the Commission in 2004 and pursuant to another decision of this Community Instance dated November 10, 2005 (called the decision of "Article 24 (1) because it was adopted by virtue of the provisions of Art. 24 (1) of Regulation no. 1/2003), the Commission established the obligation of regular penalty payments for failure to observe the 2004 decision. A new decision, C (2006) 3143, dated July 12, set such penalties to the amount of 280.5 million Euros for the period December 16, 2005 June 20, 2006.

The American company filed an action for the annulment of the latter decision with the Court of First Instance on October 2, 2006 (the T-271/06-JOCE no. 294 case, dated December 2, 2006). In the first place, the petitioner showed that the Commission did not provide it with clear information and instructions on the manner in which the 2004 decision should be observed. In the second place, it claimed that the EC institution did not present the standards to be followed by the petitioner in order to ensure the interoperability provided by the 2004 decision. In the third place, the Commission did not hear the petitioner prior to adopting the decision. In the fourth place, the petitioner considers that its rights have been violated by the Commission, due to the fact that it was refused access to the file, as well as to the communication between the Commission and its experts.

Finally, it is pointed out that the penalty amounts are excessive and disproportionate, and that the complexity of the obligations imposed on it was not taken into account, nor was the good-faith of the petitioner, manifested in observing the prior decisions of the Commission.

Up to the present day, none of the actions on the roll of the Court of First Instance has been concluded, which demonstrates the complexity of the case, as well as certain negative aspects of the Commission's actions, all of which are developing on the background of the economic and commercial conflict between the USA and the European Union.

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