



**LATEST DEVELOPMENT IN THE MICROSOFT CASE IN THE EUROPEAN  
UNION: MICROSOFT OFFICIALLY ALLOWS BROWSER CHOICE TO  
CUSTOMERS**

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**I. INTRODUCTION**

With a recent press release<sup>1</sup> from March 2, 2010, the European Commission approved of Microsoft's implementation of its commitment to allow consumers a wider choice of Windows-compatible web browsers. In December 2009, the Commission passed a decision<sup>2</sup> that gave binding force to these commitments offered by Microsoft. This is the latest follow-up to the controversial Microsoft case, considered a seminal case in European antitrust law regarding abuse of dominant market position. The exclusionary conduct and the tying of products that are subject to the antitrust litigation in this case are examples of abuse of dominant market position under Article 102 of the Treaty on the Functioning of the European Union (T.F.E.U.), and have played a considerable role in the history of the Microsoft case that dates back to the Commission decision from 2004. The current Article will first focus on some basic aspects of the abuse of dominant market position within the meaning of Article 102 T.F.E.U. (former Article 82 E.C. Treaty) and will then examine the already mentioned exclusionary conduct in terms of Microsoft's abusive dominant behavior.

**II. BASIC TERMS DEFINING THE ABUSE OF DOMINANT MARKET POSITION  
PURSUANT TO ARTICLE 102 T.F.E.U.**

*A. Dominant (Market) Position*

The market share and the turnover of a certain company can be strong indicators that a certain company has reached a dominant position within the market, but in the reality of the complex business world, they are not always enough. Another important aspect is the relative position of the monitored company in relation to its competitors. Thus, the direct interaction between the market players is observed and the assessment of the situation is based on practical results and not only on theoretical postulates that do not clearly reflect the circumstances at hand.

The judicial practice of the European Court of Justice (E.C.J.) followed a similar line of argument in the cases *United Brands* (1978),<sup>3</sup> *Hoffmann-La Roche* (1979),<sup>4</sup> and *Michelin* (1983).<sup>5</sup> Market

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<sup>1</sup> Press Release, Eur. Comm'n, Antitrust: Comm'n Welcomes Microsoft's Roll-Out of Web Browser Choice (Mar. 2, 2010), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/216&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>2</sup> Press Release, Eur. Comm'n, Antitrust: Comm'n Accepts Microsoft Commitments to Give Users Browser Choice (Dec. 16, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1941&format=HTML&aged=0&language=EN>.

<sup>3</sup> Case C-27/67, *United Brands Co. & United Brands Cont'l BV v. Comm'n*, 1978 E.C.R. 207.

dominance can take two basic forms. In one form, an undertaking actively violates the fair competition on the relevant market. In the other, the current economic situation places the monitored company in a position in which it does not have to pay attention to the other market actors when forming its own behavior on the relevant market.<sup>6</sup> In its *United Brands* decision, the E.C.J. gave a definition of the dominant position that corresponds to the latter alternative and stresses the independent formation of business conduct.<sup>7</sup>

Different criteria such as market structure, limitations on market entry, specific characteristics or qualities of the monitored company, and the market behavior of the company have to be observed in their entirety in order to determine whether there is market dominance in a certain case. A very important indicator is the market share, whereby 50%, as shown in the 1991 *AKZO* judgment of the E.C.J.,<sup>8</sup> is sufficient to create market dominance. Nevertheless, the E.C.J. has not set a fixed percentage that shall define market dominance. The issue is resolved on a case-by-case basis, although an undertaking shall certainly not possess an insignificant market share.<sup>9</sup> A market share under 25% is considered to be insignificant and does not establish market dominance.<sup>10</sup>

### B. Relevant Market

The definition of the relevant market is crucial to determine the boundaries within which the behavior of the monitored company will be assessed. The offered products must be either appropriate for the satisfaction of certain needs in a similar way or readily interchangeable with each other.<sup>11</sup>

Considering the definition of the dominant position, it must be stated that market dominance exists only when there is no other appropriate replaceable product in the market. Only in such an environment does a dominant company not have to pay attention to the behavior of the other actors or the consumers in the market because the latter are forced to purchase the products of this company.

### C. Abuse

Article 102 T.F.E.U. does not contain any definition of actual abuse.<sup>12</sup> However, it is important to define such abuse in order to set out the criteria that describe behavior that violates free

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<sup>4</sup> Case C-85/76, *Hoffmann-La Roche & Co. AG v. Comm'n*, 1979 E.C.R. 461.

<sup>5</sup> Case C-322/81, *NV Nederlandsche Banden Industrie Michelin v. Comm'n*, 1983 E.C.R. 3461.

<sup>6</sup> THOMAS EILMANSBERGER ET AL., *MATERIELLES EUROPARECHT [SUBSTANTIVE EUROPEAN LAW]* 246 (2008).

<sup>7</sup> Case C-27/67, *supra* note 3, at ¶¶ 63–66.

<sup>8</sup> Case C-62/86, *AKZO Chemie BV v. Comm'n*, 1991 E.C.R. I-3359, ¶ 60.

<sup>9</sup> EILMANSBERGER ET AL., *supra* note 6, at 250.

<sup>10</sup> IVO VAN BAEL & JEAN-FRANÇOIS BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 111 (5th ed. 2010); SIR CHRISTOPHER BELLAMY, *EUROPEAN COMMUNITY LAW OF COMPETITION* 927 (Peter Roth & Vivien Rose eds., 6th ed. 2008).

<sup>11</sup> An important case that adds to the E.C.J. cases mentioned *supra* in notes 3, 4, and 5 is *Continental Can*. Case C-6/72, *Europemballage Corp. & Cont'l Can Co. Inc. v. Comm'n*, 1973 E.C.R. 215.

<sup>12</sup> VAN BAEL & BELLIS, *supra* note 10, at 797; BELLAMY, *supra* note 10, at 947.

competition in the market. As adjudicated in the *Continental Can* case,<sup>13</sup> the examples listed in Article 102 are not exhaustive.<sup>14</sup>

Reaching and attaining dominant market position is in principle not prohibited. It is, in fact, encouraged by fair competition in the market.<sup>15</sup> Smaller companies must have the opportunity to grow and increase their market share, and bigger companies should be able to retain the high levels of development they have reached. However, a company that has reached a dominant position in the relevant market must always respect the free competition on the market and refrain from behavior that could distort relations within the market functioning in a sound competitive environment. Prohibited is the actual abuse of the dominant position that could lead to foreclosure of the market and could severely damage the business interests of the other actors. Furthermore, it is possible that the mere increase of the market share can be classified as an abuse in the sense of Article 102 T.F.E.U. when it does not leave free space for competition and the other undertakings are dependent on the dominant one.<sup>16</sup> In practice, actual abuse can take different forms, such as the imposition of unfair prices or other trading conditions, exclusive dealing, tying of products, predatory pricing,<sup>17</sup> or denial of access to essential facilities.<sup>18</sup>

### III. MICROSOFT CASE—EXCLUSIONARY CONDUCT IN TERMS OF REFUSAL TO SUPPLY INTEROPERABILITY INFORMATION TO COMPETITORS

The *Microsoft* case is a recent seminal case that defines abuse in terms of refusal to supply essential information to third parties and tying of products.<sup>19</sup> In its decision, the Court of First Instance (C.F.I.) confirmed the Commission's finding that Microsoft had abused its dominant position in the PC operating system market by 1) refusing to disclose interoperability information and protocols<sup>20</sup> that would enable its competitors to fully interoperate with Windows PCs and servers, and 2) tying Windows Media Player with its dominant Windows PC operating system.

The refusal to disclose interoperability information and protocols to other operating system developers is abusive and makes it impossible for them to come up with competitive products. Thus, the competition is limited by the conduct of Microsoft, and potential rivals in the market are foreclosed. In addition, customers are prevented from having a choice of a wider variety of operating systems that would best respond to their needs. In that sense, the C.F.I. is right to condemn the exclusionary conduct of Microsoft. The objective of the decision in the *Microsoft*

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<sup>13</sup> *Europemballage Corp. & Cont'l Can Co. Inc. v. Comm'n*, *supra* note 11, ¶ 26.

<sup>14</sup> PETER FISCHER ET AL., *EUROPARECHT* 1786 (4th rev. ed. 2002).

<sup>15</sup> EILMANSBERGER ET AL., *supra* note 6, at 532; FISCHER ET AL., *supra* note 14, at 1787; VAN BAEL & BELLIS, *supra* note 10, at 797.

<sup>16</sup> FISCHER ET AL., *supra* note 14, at 1787; Cases C-6/73 & 7/73, *Istituto Chemioterapico Italiano S.p.A. & Commercial Solvents Corp. v. Comm'n* 1974 E.C.R. 223.

<sup>17</sup> Case T-340/03, *France Telecom SA v. Comm'n*, 2007 E.C.R. II-107; *AKZO Chemie BV v. Comm'n*, *supra* note 8.

<sup>18</sup> Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, 1998 E.C.R. I-7791; *Istituto Chemioterapico Italiano S.p.A. & Commercial Solvents Corp. v. Comm'n*, *supra* note 16.

<sup>19</sup> Case T-201/04, *Microsoft v. Comm'n*, 2007 ECR II-1491.

<sup>20</sup> *Id.* ¶ 192.

case is exactly to enable and foster such competition.<sup>21</sup> The actions that Microsoft has undertaken now show a clear line of conduct that will promote competition in this highly technical area and will bring to the table more benefits to the customers and better satisfaction of their individual needs. Since March, Windows PC users who previously had Internet Explorer as their default web browser have been given “a browser Choice Screen, designed to give them an effective and unbiased choice between their default and competing web browsers.”<sup>22</sup>

The incumbent competition commissioner Joaquin Almunia welcomed Microsoft’s endeavor and expressed his expectation of more productive competition in the field of web browsers and more consumer benefits.<sup>23</sup> From a legal perspective, the actions of Microsoft are important in terms of fighting the exclusionary conduct resulting from a refusal to share necessary technical information in the technology sector. Their positive effect is expected in the years to come.

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<sup>21</sup> *Id.* ¶ 236.

<sup>22</sup> Press Release, *supra* note 1.

<sup>23</sup> *Id.*