# Federal Trade Commission

**"Some Views on the European Microsoft Case"**

**Remarks of Commissioner J. Thomas Rosch**[1]
**McGill University Faculty of Law Symposium**
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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 have read about the subject that does not extravagantly praise or damn the decision.[3] To be sure, Professor Larouche is critical of the decision, but his criticisms are tempered and moderate. Second, I comment on his paper not so much as a Commissioner of the Federal Trade Commission, but as some one who litigated antitrust cases in the United States courts for over forty years before I came to the Commission. I emphasize that because litigators sometimes have a different perspective than others do about how the antitrust laws are or ought to be

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[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 decision, which concerns the EC's claim that Microsoft violated Article 82 by refusing to share certain interoperability information. Third, I will focus on the second part of the decision, which covers the EC's claim that Microsoft violated Article 82 by engaging in tying certain applications software to its operating system software. In all three instances, I will comment on Professor Larouche's observations, but again, I want to stress that although I will be voicing some disagreements with some of those observations, in general I felt his paper was commendable.

**2. General Remarks**

First, the CFI and D.C. Circuit cases against Microsoft were not ordinary cases. For one thing, because of its size and its role in the global economy, Microsoft was a unique defendant. More specifically, it was strongly arguable that it enjoyed monopoly power in the operating system software market in which it did business, regardless of how the geographic market was defined. For another thing, some pretty outrageous emails, other documents, and executive statements illuminated the firm's intent in engaging in the practices being challenged. That

[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.

all" rules of legality or illegality. That was one of the problems that three of us at the Federal Trade Commission had with the Report on Section 2 of the Sherman Act which the United States Justice Department issued in September.[9] The Report prized certainty and predictability in the law virtually above all else, and thus embraced a series of safe harbors and rules of per se legality which we felt might shelter from liability a firm with monopoly power in the event it employed practices in a fashion that would foreclose competitors and thereby insulate the firm from competitive constraints it might otherwise face. That would be inimical to consumer welfare, which both the EC and our Supreme Court have declared should be the goal of the antitrust laws.[10]

Finally, I don't think the CFI decision uniquely second-guessed the EC. It seems to me the European courts have been ready, willing and able to do that regularly in recent years.

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[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>.

[10] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,*509 U.S. 209, 221 (1993) (referring to "the antitrust laws' traditional concern for consumer welfare and price competition."); *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set."); Commission Discussion Paper on the Application of Article 82 of the EC Treaty to Exclusionary Abuses (Dec. 2005), *available at*: <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>, at ¶ 4 ("the essential objective of Article 82 . . . is the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources.").

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.

most valuable. Indeed, it is not even clear that the two forms of competition are binary.[20] It may be that incremental innovation leads to breakthrough innovation. Moreover, it is arguable that focusing too narrowly on breakthrough innovation will make public enforcers too timid in enforcing Article 82 and Sherman Act Section 2.

Second, and more significantly, it is by no means clear, as a matter of law, that enforcement of either Article 82 or Sherman Act Section 2 should turn on whether the challenged practice of a dominant firm or a firm with monopoly power forecloses "competition for the market" instead of "competition in the market." On the one hand, Professor Larouche appears to feel that the practice is more pernicious if it does the former. Our Supreme Court suggested in its *Trinko* decision[21] that monopoly power was a good thing because it would attract more innovation.[22] If one views "competition for the market" and "breakthrough innovation" as more valuable than "competition in the market" and "incremental innovation" in this respect, then the *Trinko* decision would also seem to view the foreclosure of the former as more serious than foreclosure of the latter. But the Supreme Court has never said so. Nor, for that matter did the European courts draw such a distinction in the *IMS* line of cases.

Third, *Trinko's* suggestion that monopoly power was a good thing because it would attract more innovation is vulnerable. For one thing, it was dictum, not holding. For another thing, it appears at odds with the views of the framers of Sherman Act Section 2, who apparently regarded monopoly power with great suspicion. And it is clearly at odds with the views of the

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[20] *Id.* at 15.

[21] *Verizon Comms. Inc., v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

[22] *Id*. at 407.

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 and they are always vulnerable on appeal (unless you are our Supreme Court, from which there is no appeal).

Second, I was not offended by the CFI's conclusion that the practice would violate Article 82. Even though the foreclosure adversely affected "competition in the market" instead of "competition for the market" I could see how it could injure consumers if it were employed by a dominant firm and thereby operated to insulate the firm from exercising its dominance.

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[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.

**4. Specific Remarks re: Tying (or Technological Tying)**

Professor Larouche's principal criticism about the way the CFI decided this claim is that the court simply ignored the European Commission's arguments.[25] More particularly, he opines that the Commission's arguments were not rooted in European case law at all, whereas the CFI decided the claim on the basis of the teaching in the *Hilti*[26] and *Tetra-Pak*[27] cases. As one who argued several appeals to Judge Posner in our Seventh Circuit Court of Appeals only to have his panel decide the case on an entirely different ground than the one I argued, I'm not bothered by that either. In fact, I suppose the same thing could be said about the D.C. Court of Appeals' decision in the *Microsoft* case. The court there applied a rule of reason analysis more commonly applied in a Sherman Act Section 1 case in assessing the government's claim that Microsoft had violated Section 2 by tying certain applications software to its operating system software.[28]

The most relevant question, I would suggest, is whether the courts' decisions were *sound*. I think they were. Of all the practices that may be challenged under Article 82 or Sherman Act Section 2, technological tying may be the one that is most prone to mistaken inferences. On the one hand, it may be said that the practice is exclusionary: for example, in the late 80s I represented a firm that made computer chips to which a math coprocessor could be affixed to perform complex math; that firm then invented and sold a new chip that incorporated a math

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[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.

[28] *United States v. Microsoft Corporation*, 253 F.3d 34, 84-85 (D.C. Cir. 2001).

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 fashioned rules of liability recognizing the anticompetitive potential of the practice when employed by a dominant firm or a firm with monopoly power, but permitting such a firm to escape liability if it could justify the practice.

That is a segue to my final point about Professor Larouche's paper. It has to do with his concern that as a practical matter, proof of efficiencies is impossible once anticompetitive effects have been proved. That's probably true in many cases, but I'm not as troubled by it as he is. Under the Horizontal Merger Guidelines issued jointly by the Justice Department and the Federal Trade Commission, efficiencies is a defense – the burden is on the defendant to prove them.[29] Moreover it is a very narrow defense. Among other things, the defendant must prove that the efficiencies are "merger-specific," which means that it must prove that the merger was necessary in order to achieve them;[30] and the defendant must also prove that they are so substantial that they will offset any anticompetitive effects, which generally means that all or most of them must be passed along to consumers.[31] It seems to me appropriate that the same stringent requirements should apply to practices challenged under Article 82 or Sherman Act Section 2. That is to say, once liability is found, efficiencies are a defense only if the defendant

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[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.