



*Robert Schuman*

**Microsoft Corporation  
vs.  
The U.S. Court of Justice and the European Community**

**Francisco J. Lorca**



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**Microsoft Corporation**  
**vs.**  
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**Francisco J. Lorca<sup>♦</sup>**

Quousque tandem abutere, *Microsoft*, patientia nostra?<sup>1</sup>  
(How long, o Microsoft, will you abuse our patience?)

**Introduction**

Microsoft was founded on April 4, 1975 by Bill Gates and Paul Allen to develop and sell BASIC interpreters for the Atari 8000. Thirty years later, Microsoft is a global company with presence in almost every country in the world with annual revenues of \$60.43 billion. Although it develops, manufactures, and licenses a wide variety of software products for computing devices, Microsoft is best known for its Windows operating System and Microsoft Office suite. Nonetheless, Microsoft is also responsible for products such as the Xbox 360, Windows Live, and Windows Mobile, and has a strong presence in other markets via the MSNBC cable television network, the MSN Internet portal, or the Microsoft Encarta multimedia encyclopedia launched in 1993.

Microsoft became an international company when it opened in Japan in 1978 and it became a public company when the company launched its first Initial Public Offering (IPO) in 1986. The initial plan was to offer 2.5 million shares at \$21 per share; however, the demand was such that the initial offering had to be raised to 3.095 million shares. The closing price for Microsoft shares on the first day of trading was \$27.75.<sup>2</sup> This meant that at the first day of trading, there were two new billionaires; Gates who owned 45 per cent of the company's outstanding shares worth \$233.9 million and Allen who owned roughly 25 per cent.<sup>3</sup> By the year 2000, Microsoft had created approximately 10,000 millionaires.<sup>4</sup>

The company trades in the NASDAQ under the MSFT ticker symbol and it employees almost 96,000 employees worldwide with a net income of \$17.68 billion as of June 30, 2008. Figure 1 shows the evolution of Microsoft's price since its IPO in 1986.

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<sup>1</sup> This is a Latin phrase that originally says: Quousque tandem abutere, Catilina, patientia nostra? It was written by Marcus Tullius Cicero as the introductory phrase of his first speech against Catilina that translate as "How long, o Catiline, will you abuse our patience?"

<sup>2</sup> Carol Smith Monkman. 1986. Microsoft stock is red hot in first trading day. *Microsoft Blog*. <http://blog.seattlepi.nwsource.com/microsoft/archives/102018.asp> (accessed February 2, 2009)

<sup>3</sup> Evan L. Marcus. 1999. The world's first trillionaire. *Wired*. Issue 7, 09. <http://www.wired.com/wired/archive/7.09/trillionaire.html> (February 27, 2009).

<sup>4</sup> Julie Bick. 2005. The Microsoft millionaires come of age. *The New York Times*. May 29. <http://www.nytimes.com/2005/05/29/business/yourmoney/29millionaire.html>



However, Microsoft has been accused of market domination, predatory tactics, and bullying the competition, allegations that have ended in a number of antitrust litigations not only in the U. S. Court of Justice but in the European Commission. Microsoft’s litigation problems are both governmental and private. While at the governmental level Microsoft has been ruled against by both the U.S. Court of Justice and the European Commission, at a private level, Microsoft has had legal disputes with Apple, and Alcatel-Lucent among others.

### **From Albuquerque to dominating the World Wide Web**

Microsoft began to forge its future when it launched Microsoft Word, or “Word” alone, in 1983. *Word’s* success rested, on the one hand, on the fact that it was the first user-friendly application capable of displaying text in what became known as WYSIWYG – What You See Is What You Get. On the other hand, it used a rather innovative distribution system bundling free demos with the November 1983 issue of PC World.<sup>5</sup> However, Microsoft sealed its future when it developed the *Disc Operating System* (DOS). Microsoft joined forces with IBM in 1981 and signed a contract by which Microsoft were to provide IBM’s Personal Computer (PC) with a version of the CP/M operating system. Microsoft bought a CP/M clone from Tim Paterson of *Seattle Computer Products* and renamed it PC-DOS to be used in IBM’s PC. In 1983, Microsoft decided to create, with the help of other companies, its own home computer system called MSX which contained Microsoft’s version of DOS operating system. Consequently, the MSX-DOS was born when many companies were flooding the “home computers market” with different versions of the IBM PC. This is when the “home computers industry” and market became a reality and the quest began when Microsoft realized that the new market for home computers was the market to conquer.

After launching *Word*, Microsoft introduced *Microsoft Works* in 1987. *Works* was a limited office program which, in 1989, was “substituted” by *Microsoft Office*, the company’s best selling product. However, Microsoft had not forgotten the importance of a potent operating system and, in

<sup>5</sup> Roy A. Allen. 2001. Microsoft in the 1980s. In *History of the Personal Computer: The People and the Technology*. Allan Publishing. <http://www.retrocomputing.net/info/allan/eBook12.pdf> (accessed January 10, 2009).

1990, launched Windows 3.0<sup>6</sup> which soon not only began to generate more revenues for Microsoft than MS/DOS but also became the preferred PC platform. By 1992 Microsoft was already the market leader with Microsoft Office when it released *Microsoft Windows 3.1*, overcoming competitors with products such as WordPerfect and Lotus 1-2-3. In 1995 *Microsoft Windows 95* was launched with millions of copies sold in just days after it was available to the public.

However, Microsoft had not realized the importance of the Internet and when Windows 95 was released, since the company lacked a web browser to go with it, it improvised and turned to a web browser called *Mosaic* which was licensed to a company called Spyglass.

Spyglass, Inc was an Internet software company founded in 1990 whose aim was to commercialize various technologies during the early days of the World Wide Web. In 1995, it licensed the source code for Mosaic to Microsoft and thus, Internet Explorer was born.<sup>7</sup>

While both companies were associated, the browser was called *Mosaic Explorer*. However, Spyglass accused Microsoft of not respecting the terms of an agreement which according to Spyglass meant that Microsoft had to pay a royalty for every copy sold. Microsoft did not sell any copies since it provided it for free with its operating system. A lawsuit forced Microsoft to change the name of the product to *Internet Explorer 1.0* in its *Windows 95 Plus* pack launched in 1995.<sup>8</sup> In 1997, with the released of *Microsoft Office 97* and *Internet Explorer 4.0*, Microsoft positioned itself as the leading company in the market. Further, the fact that Microsoft was to provide *Internet Explorer* to *Apple Computers* strengthened Microsoft's hegemonic positioning.

In 2007 *Windows Vista* and *Microsoft Office 2007* were launched and a year later it made an unsolicited bid to purchase one of Microsoft major internet services competitor, *Yahoo!* The bid was for \$44 billion all payable in cash but the offer was rejected and the offer was withdrawn.<sup>9</sup> Nonetheless, Steve Ballmer—chief executive officer of Microsoft—stated that “[w]e continue to believe that our proposed acquisition made sense for Microsoft, Yahoo! and the market as a whole. Our goal in pursuing a combination with Yahoo! was to provide greater choice and innovation in the marketplace and create real value for our respective stockholders and employees.”<sup>10</sup>

## **Microsoft and the U.S. Court of Justice**

At the beginning of the 1990s, Microsoft bundled its Internet Explorer web browser within its Windows operating system which helped it acquire a dominant position in the web browser market.

From Microsoft's point of view, putting these two products together was a way to be “user friendly” for those consumers that were not computer savvy. In reality, all that this really accomplished was making it harder for consumers to choose a different web browser other than Internet Explorer. The company reasoned that due to innovation and competition, both products had become essentially one, and thanks to this synergy it provided consumers with double the benefits for free. Competitors, such as Netscape, stated that the browser was a distinct and separate product so there was no reason for it to be automatically bundled with its operating system. Further,

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<sup>6</sup> Windows, “Windows history,” <http://www.microsoft.com/windows/winhistorydesktop.mspix> (accessed January 10, 2009).

<sup>7</sup> Windows, “The Story of Internet Explorer.” <http://www.microsoft.com/windows/ie/community/columns/historyofie.mspix> (accessed January 10, 2009).

<sup>8</sup> Windows, “The story of Internet Explorer.” <http://www.microsoft.com/windows/ie/community/columns/historyofie.mspix> (accessed February 23, 2009).

<sup>9</sup> MSNBC. 2008. Microsoft makes unsolicited bid for Yahoo! *MSNBC.com*. February 1. <http://www.msnbc.msn.com/id/22947626/> (accessed February 25, 2009).

<sup>10</sup> Steve Ballmer. 2008. Microsoft withdraws proposal to acquire Yahoo! *Microsoft Press Pass*. May 3. <http://www.microsoft.com/presspass/press/2008/may08/05-03letter.mspix> (accessed March 1, 2009).

Microsoft was accused of altering its application programming interfaces to favor Internet Explorer. Competitors alleged that if Internet Explorer was sold for the Mac OS, why it had to be tied for free with Windows. It was further alleged that the price of Windows remained too high mainly because it was taking into account the cost of the operating system.

The trial for these allegations began on May 1998 and Judge Thomas Penfield Jackson issued his “Findings of Fact” on November 5, 1999. In Point 132 the Judge concluded that “Microsoft’s interactions with Netscape, IBM, Intel, Apple, and Real Networks all reveal Microsoft’s business strategy of directing its monopoly power toward inducing other companies to abandon projects that threaten Microsoft and toward punishing those companies that resist.”<sup>11</sup> (66) Furthermore, he concluded that he saw no technical reason that explained Microsoft’s refusal to license Windows 95 without Internet Explorer. Similarly, Judge Jackson argued that there was “no technical justification for Microsoft’s refusal to license Windows 95 to OEMs with Internet Explorer 3.0 or 4.0 uninstalled, or for its refusal to permit OEMs to uninstall Internet Explorer 3.0 or 4.0” (87). Finally, the trial proved that once Internet Explorer was installed, it was very difficult to add any other browser due to configuration problems. In fact, Point 10 in the “Findings of Fact” reads:

Microsoft licenses copies of its software programs directly to consumers. The largest part of its MS-DOS and Windows sales, however, consists of licensing the product to manufacturer of PCs (known as “original equipment manufacturers” or “OEMs”), such as the IBM PC Company and the Compaq Computer Corporation (“Compaq”). An OEM typically installs a copy of Windows onto one of its PCs before selling the package to a consumer under a single price.<sup>12</sup>

Judge Jackson ruled that many of the tactics that Microsoft has employed have harmed consumers indirectly by unjustifiably distorting competition which violated Sections 1 and 2 of the Sherman Act. Basically, Microsoft was found guilty of breaching the Sherman Antitrust Act (1890), name after its author, Senator John Sherman, which limits cartels and monopolies. Based on the Sherman Act, Microsoft was found guilty of suppressing competition, but not by the use of illegal means. Competitors agreed that Microsoft used technical barriers as a predatory tactic which made it seem as if competitor products did not work with the Windows operating system. In fact, Civil Action No. 98-1232 (CKK) agreed that “Microsoft’s operating system monopoly is protected, in part, by the applications barriers to entry.” (2) This ruling corroborated the difficulty to use other browsers, which helped Internet Explorer quickly acquire a dominant market position.

This dominant position in the market brought an antitrust case against the company since it discourages competition because software developers that enjoy a small market quota will have no incentive to develop applications for an operating system that has imposed technical barriers to free entry into the industry. This situation would reduce the variety of applications available to consumers who will most likely not switch to any competing systems, thus, destroying competition and competitiveness. For this reason, the introduction of the Civil Action No. 98-1232 (CKK) against Microsoft Corporation (1) read:

[t]he Final Judgments aim to eliminate Microsoft’s illegal practices, to prevent recurrence of the same or similar practices and to restore the competitive threat that middleware products posed prior to Microsoft’s unlawful conduct ... The Final Judgment have safeguarded the ability of software developers to develop, distribute, and promote competing middleware products.<sup>13</sup>

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<sup>11</sup> United of State District Court for the District of Columbia. Civil Action No. 98-1232 (TPJ). 2004. <http://www.usdoj.gov/atr/cases/f3800/msjudge.pdf> (accessed March 3, 2009).

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

Hence, in his “Conclusions of Law” of April 3, 2000, Judge Jackson ruled that Microsoft had to be broken into two separate units, one in charge of producing the operating system and the other in charge of software development. In fact, he ordered:

[t]he separation of the Operating Systems Business from the Applications Business, and the transfer of the assets of one of them (the "Separated Business") to a separate entity along with (a) all personnel, systems, and other tangible and intangible assets (including Intellectual Property) used to develop, produce, distribute, market, promote, sell, license and support the products and services of the Separated Business, and (b) such other assets as are necessary to operate the Separated Business as an independent and economically viable entity.<sup>14</sup>(1)

Microsoft appealed and the D.C. Circuit Court of Appeals overturned Judge Jackson’s ruling against Microsoft. Immediately after, the Department of Justice announced in September 2001 that it was no longer seeking to break up the company in two, so the case was settled although a vast number of States did not agree with the settlement sanctions.

### **Political Fallout in the U.S.**

All these judicial matters took place when the Clinton Administration was about to leave office. The incoming Bush administration was against the break up.<sup>15</sup> In fact, with the benefit of hindsight, the change of administration together with a change in legal counsel worked wonders for Microsoft. By 2000, Microsoft had learnt the hard way the importance of having a strong lobby presence in Washington. Jack Krumholt had represented Microsoft’s interests in Capital Hill since the early 90’s, however, when the Justice Department filed the lawsuit against the company, “Microsoft – a company famous for its disdain for government—undertook the largest government affairs makeover in corporate history.”<sup>16</sup>

To begin with, Microsoft teamed up with Tech Central Station (TCS). TCS was launched by Charles Frances and prominent Republican lobbyist James K. Glassman who “envisioned an entity that would cover the nexus between science and technology on the one hand and public policy on the other.”<sup>17</sup> In fact, after Microsoft became a sponsor of TCS and its post, a significant number of references against the company breakup were reported. Further, Microsoft substituted William Neukon as deputy general council and Brad Smith took his place. Smith’s experience “as general council would transform how Microsoft interacted with governments and usher in an era of negotiation, where legal problems were dispatched as quickly as possible.”<sup>18</sup> In fact, it was reported that Microsoft has realized the importance of a solid and sound lobby effort. According to OpenSecrets.org which traces political contributions and lobbying spending by the Center for Responsive Politics, “Microsoft is projected to spend more than \$10 million on lobbying in 2008. In 2007, Microsoft spent \$9 million in lobbying.”<sup>19</sup>

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<sup>14</sup> Ibid.

<sup>15</sup> Bush administration no longer interested in breaking up Microsoft. 2001. *CourtTV News*. September 6. [http://www.courtstv.com/archive/news/2001/0906/microsoft\\_ap.html](http://www.courtstv.com/archive/news/2001/0906/microsoft_ap.html) (accessed March 1, 2009).

<sup>16</sup> Jeffrey H. Birnbaum and Melanie Nayer. 2002. How Microsoft Conquered Washington By spending lots of money--of course--but also by doing lots of creative lobbying you don't know about. *CNN Money*. April 29. [http://money.cnn.com/magazines/fortune/fortune\\_archive/2002/04/29/321995/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2002/04/29/321995/index.htm) (accessed February 27, 2009).

<sup>17</sup> Nicholas Confessore. 2003. How James Glassman reinvented journalism--as lobbying. *Meet the Press*. December. <http://www.washingtonmonthly.com/features/2003/0312.confessore.html> (accessed March 3, 2009).

<sup>18</sup> Joe Wilcox. 2008. *Mr. Smith Goes to Washington*. *Eweek Microsoft Watch*. June 5. [http://www.microsoft-watch.com/content/corporate/mr\\_smith\\_goes\\_to\\_washington.html](http://www.microsoft-watch.com/content/corporate/mr_smith_goes_to_washington.html) (accessed March 5, 2009).

<sup>19</sup> Roy Mark. 2008. Microsoft Leads Tech Lobbying Pack. June 4. <http://www.eweek.com/c/a/Government-IT/Microsoft-Leads-Tech-Lobbying-Pack/> (accessed February 24, 2009).

Many scholars and politicians linked these events with the lack of interest in the Bush administration to breakup the company in two and the fact that on September 26, 2001, Judge Colleen Kollar-Kotelly “ordered Microsoft and the government into a new round of intensive negotiations to settle the long-running antitrust case.”<sup>20</sup> On November 1, 2002 the case was finally settled and the agreement aimed to

- ensure Microsoft does not enter into exclusive deals that could hurt competitors
- demand that computer makers develop uniform contract terms
- enable customers and computer makers to remove icons for some Microsoft features
- demand that Microsoft releases some technical data to help software developers to write programs that work well with Windows benefit consumers, according to the US Justice Department.<sup>21</sup>

However, in 2003-2004 the European Commission began to look into the bundling of Window Media Player into Windows. This time, Microsoft’s legal problems had just begun in the old continent where neither Smith nor the most powerful lobbying mechanism could change the fate of the company in the European Union (EU).

### **Microsoft and the EU**

Microsoft’s legal problems in the EU began on December 10, 1998 when Sun Microsystems filed a complaint with the European Commission (EC) regarding Microsoft’s refusal to provide interoperability; that is, obstructing the ability of two or more systems or components to exchange information and to use the information that has been exchanged.<sup>22</sup> Sun Microsystems alleged that Microsoft had a dominant position in the market of operating systems for personal computers and it was reserving to itself information that was necessary for other software products in order to fully interoperate with Microsoft’s operating System. In light of this accusation, Microsoft had infringed Articles 85 and 86 of the Treaty establishing the European Community.

In particular, the Treaty Establishing the European Community (Treaty of Rome) states in Article 102 that “The Member States and the Community shall act in accordance with the principle of an open market economy with free competition, favoring an efficient allocation of resources, and in compliance with the principles set out in Article 3a.”

The Treaty of Rome included in its Part Three, Title V on “Common Rules on Competition, Taxation and Approximation of Laws.” Chapter 1 is titled “Rules on Competition” and its Section I covers Articles 85 through 90 on “Rules Applying to Undertakings.” Based on this, Microsoft was accused of not complying with Articles 85 and 86. Article 85 reads:

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1. The following shall be prohibited as incompatible with the common market; all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention restriction or distortion of competition within the common market, and in particular those which:
    - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
    - (b) limit or control production, markets, technical development, or
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<sup>20</sup> Ibid.

<sup>21</sup> Kevin Anderson. 2002. Microsoft wins battle but war continues. November 1. <http://news.bbc.co.uk/2/low/business/2390189.stm> (accessed March 8, 2009).

<sup>22</sup> Paul Miller. Interoperability: What is it and why should I want it? <http://www.ariadne.ac.uk/issue24/interoperability/intro.html> (accessed March 1, 2009).

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investment;

- (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) make 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.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
  3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
    - any agreement or category of agreements between undertakings;
    - any decision or category of decisions by associations of undertakings;
    - any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
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Article 86 reads:

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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 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.
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Since Microsoft had infringed these two Articles, the Commission—under Council Regulation No. 17 of 6 February 1962<sup>23</sup>—was allowed to implement Articles 3 and Article 15(2). In particular,

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<sup>23</sup> Council Regulation No 17 (6 February 1962). <http://www.ena.lu/council-regulation-17-february-1962-020002433.html> (accessed February 28, 2009).

Article 3 of this Regulation empowered the Commission to bring infringement to an end. Further, Article 15 (2) of this Regulation set the fine to be imposed.

This case was registered as Case IV/C-3/37.345. On August 2000 and after the first investigation, the Commission sent Microsoft the “First Statement of Objections” in which the Commission agreed that Microsoft had abused its dominant position failing to disclose information necessary to allow competition.

On February 2000, following information obtained from the market, the Commission broadened the scope of its investigation and launched an “ex officio” investigation to examine Microsoft’s conduct with regard to the bundling of its Windows Media Player product with Windows 2000. This case was filed as Case IV/C-/37.792. The Commission on August 2001 decided to merge both cases and the Commission broadened the case against Microsoft. In the *Second Statement of Objections* that the Commission sent to Microsoft on August 2001, the Commission included concern on both interoperability and anti-competitive practices by tying its Windows Media Player product with its Windows PC operating system.

Microsoft responded to Statements of Objections one and two by submitting a total of 46 statements from customers and system integrators to support its defense against both Statements. However, the Commission “engaged in a wider market enquiry (“the 2003 market enquiry”) ... in the light of the findings of the market enquiry and how they related to the Commission’s existing objections, a supplementary Statement of Objections was issued on August 6, 2003.”<sup>24</sup> (6-7) After the market enquiry, the Commission sent Microsoft a third “Statement of Objections” and based on the findings of the market enquiry which confirmed and consolidated the allegations already stated in the two previous Statement of Objections. Upon receiving this Third Statement of Objections, Microsoft requested an Oral Hearing that took place on November 2003.

The end result was that on March 2004 Microsoft was in Case COP/C-3/37.792 condemned for refusing to supply competitors with the necessary information for their products to interoperate with Windows. This hindered their possibility to compete viably in the market. Further, Microsoft was condemned for harming competition through the tying of its separate Windows Media Player product with its Windows PC operating system. The Commission, in order to restore the conditions of fair competition, imposed the following remedies<sup>25</sup>:

As regards to interoperability, Microsoft was required, within 120 days, to disclose complete and accurate interface documentation which would allow non-Microsoft workgroup servers to achieve full interoperability with Windows PCs and servers. This would enable rival vendors to develop products that could compete on a level playing field in the workgroup server operating system market. The disclosed information would have to be updated each time Microsoft brought to the market new versions of its relevant products.

As regards to bundling, Microsoft was required within 90 days to offer PC manufacturers a version of its Windows client PC operating system without the WMP. The untying remedy did not mean that consumers would obtain PC’s and operating systems without media players. Most consumers purchase a PC from a PC manufacturer which has already put together on their behalf a bundle of an operating system and a media player. As a result of the Commission's remedy, the configuration

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<sup>24</sup> Commission of the European Communities. Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COPM/C-3/37.792 Microsoft). 2004. [http://www.microsoft.com/presspass/download/legal/EuropeanCommission/ECSO\\_6\\_Annex%204%20-%20Broj%20Report%20\(NC%20Version\).pdf](http://www.microsoft.com/presspass/download/legal/EuropeanCommission/ECSO_6_Annex%204%20-%20Broj%20Report%20(NC%20Version).pdf) (accessed March 1, 2009).

<sup>25</sup> Commission concludes on Microsoft investigation, imposes conduct remedies and a fine. Europa. March 24, 2004. <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/382&format=HTML&aged=1&language=EN&guiLanguage=en> (accessed March 6).

of such bundles would reflect what consumers wanted, and not just what Microsoft imposed.

Basically, the Commission found that Microsoft had abused its dominant position in violation of EC law against monopoly behavior in the market for PC operating systems within both the market for media players and for workgroup server operating systems. The Commission concluded that Microsoft had infringed both Article 82 and 86 of the treaty Establishing the European Community and Article 54 of the EEA Agreement.

However, on June 7, 2004, Microsoft filed an appeal with the European Court of First Instance (CFI) against the European Commission's Decision. In this appeal, Microsoft claimed that

the implementation of the Decision would: (i) harm its intellectual property rights; (ii) interfere with its commercial freedom; and (iii) irreversibly alter market conditions. As regards the tying remedy, Microsoft claimed that the implementation of the Decision would: (i) interfere with Microsoft's commercial freedom by forcing it to abandon its "*basic design concept*" for the Windows PC operating system; and (ii) damage Microsoft's reputation as "*a developer of quality software products*."<sup>26</sup>

On September 17, 2007, the CFI delivered its judgment upholding the findings of abuse in the Commission's decision and further maintained unchanged the fine of €497 million imposed by the EC for infringement of Articles of the Treaty. Competition Commissioner Neelie Kroes stated that

The Court has upheld a landmark Commission decision to give consumers more choice in software markets. That decision set an important precedent in terms of the obligations of dominant companies to allow competition, in particular in high tech industries. The Court ruling shows that the Commission was right to take its decision. Microsoft must now comply fully with its legal obligations to desist from engaging in anti-competitive conduct. The Commission will do its utmost to ensure that Microsoft complies swiftly.<sup>27</sup>

This fine was paid in full on June 29, 2004; however, in July 2006 the Commission again fined the company for not complying with the 2004 ruling. In fact, the Commission imposed a daily fine of €1.5 million from December 16, 2005 to June 20, 2006, totaling €280.5 million, for its failure to disclose interoperability information. Finally, in October 2007 the Commission announced that Microsoft was in full compliance with the 2004 decision.<sup>28</sup>

### **The EU's Quest to Defend Competition within the EU**

The EC fought this case tooth and nail for both political and economic reasons. On the political side, the EC wanted to make sure that the EU was taken seriously. In each Treaty, the EU remarks the importance of free competition to bust and enhance labor competitiveness which is the number one pillar for a strong economic performance and is tightly linked to economic growth.

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<sup>26</sup> European Commission. Microsoft Case: Court Procedures.

<http://ec.europa.eu/competition/antitrust/cases/microsoft/court.html> (accessed January 10, 2009).

<sup>27</sup> Antitrust: Commission welcomes CFI ruling upholding Commission's decision on Microsoft's abuse of dominant market position. Europa. September 21, 2007.

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/359&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed February 6, 2009).

<sup>28</sup> Ibid

The Competition Commission oversees eight major sectors: one of them is the Information and Communication Technologies (ICT) which, according to Neelie Kroes, Competition Commissioner, has become a cornerstone of the Lisbon Strategy.<sup>29</sup> The Lisbon Strategy states that the “ICT represents both a major challenge and a significant opportunity for job creation.”<sup>30</sup> Further, as new members started to join the EU, the Commission released a communication titled: “A proactive competition policy for a competitive Europe.”<sup>31</sup> In this document, the importance of competition as a major milestone for competitiveness and economic growth was reinstated. In fact, the communication stated that “the new competition regulatory framework which entered into force on the day when 10 new Member States joined the EU, i.e. 1 May 2004, enhances the basis for a pro-active competition policy” (1)

For the Commission, Microsoft’s actions were hindering EU’s efforts to create jobs and foster competitiveness, innovation, and entrepreneurship in making the EU attractive to investors and workers. However, Microsoft counter attacked publically stating that the EC was clearly attacking the right to private property, hence destroying the incentive to innovate, and ultimately hurting consumers.

In any case, this battle is not over yet. The EC is still scrutinizing Microsoft’s every move to the point that the EC is now investigating Microsoft’s dominance in desktop applications such as Word and Excel. The Commission has found that government documents should be created in the Open Document Format (ODF) which is a direct competitor to the proprietary format used in Microsoft Word. In fact, during the recent German Presidency, a “Workshop on Open Documents Exchange Formats (ODEF)”<sup>32</sup> took place in Berlin which concluded with a “strong consensus on the necessity to opt for ODEF, as these formats were assessed as guaranteeing “openness” for the participation of stakeholders and the freedom of choice.” If across the board users begin to work with ODF, Microsoft will suffer a tremendous loss of its market share.

## Final Word

This paper has attempted to summarize Microsoft’s business practices and litigation problems in both the U.S. and the EU. While in the U.S. the case seems to be over and no further actions are expected to be taken, the EC is still on the case in setting the record straight.

The Bush administration broke one of the most sacred political tenets: *separation of powers between the judicial branch and the other two branches of government, particularly the executive*, by not allowing Judge Jackson judgment and *sentence* to be implemented. This action totally hindered competition and was a direct attack to the constituents who elect governments whose primary goal should be, in turn, to defend and improve citizens’ well-being. The Bush administration allowed Microsoft to maintain its dominant position and gave powerful lobbyists group the right to guide the destiny of a primordial sector which is the Information and Communication Technology one. Hence, Microsoft’s monopoly and faulty business practices are the clear winner and citizens are the losers in this long fought battle. To add insult to injury, their illegal market practices have sent both Bill and Melissa Gates to stardom since, as of 2007, they ranked as the second most generous *philanthropists* in America, having given over \$28 billion to

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<sup>29</sup> European Commission. Information Communication Technologies (ICT).

[http://ec.europa.eu/competition/sectors/ICT/overview\\_en.html](http://ec.europa.eu/competition/sectors/ICT/overview_en.html) (accessed February 19, 2009).

<sup>30</sup> The Lisbon Special European Council (March 2000): Towards a Europe of Innovation and Knowledge. Europa. <http://europa.eu/scadplus/leg/en/cha/c10241.htm> (accessed March 2, 2009).

<sup>31</sup> Commission of the European Communities. Communication from the Commission.

A pro-active Competition Policy for a Competitive Europe. April 4, 2004. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0293:FIN:EN:PDF> (accessed February 5, 2009).

<sup>32</sup> Eleni Karfaki. Open Document Exchange Formats Workshop. February 28, 2007. <http://ec.europa.eu/idabc/servlets/Doc?id=28871> (accessed March 8, 2009).

charity.<sup>33</sup> Billions of dollars that come from profits obtained from selling overpriced product in a non-competitive market in which Microsoft has managed to outcast competitors and all in the name of “defending intellectual property.” Hopes that free competition practices were to be ever operating in this sector is not going to come from the new guest of the White House who is fighting a brutal economic recession in the United States.

It seems that the EU, free from hidden and obscured lobbies’ interests working to advance Microsoft’s case among politicians, are fighting to force Microsoft to comply with fair competition practices. The case against Microsoft has turned a tough fight that the EC is not ready to drop anytime soon for two reasons. First of all, the reputation of the EC was put in jeopardy when it was reported that Microsoft was not complying with the 2004 decision. Secondly, by allowing Microsoft to maintain its monopoly, governments are preventing other companies from offering products to the market; products whose quality and value-added to the market should only be decided by consumers and not by Bill Gates and Microsoft.

Despite facing a tough challenge, the EU has realized that it should take charge to properly safeguard this sector. In this sense, the EC should make sure that neither the free market system nor a single powerful company is limiting either consumer choice or technological development and possible breakthroughs. In order to do so, the EC should follow three paths. First of all, it should insulate itself from certain practices that have never been, so far, part of the European business culture; i.e. lobbies companies which have become a powerful actor in Washington. Secondly, the EC should properly regulate a pivotal sector which has become today a cornerstone to economic and social development and prosperity. The same way that the financial market is about to suffer new regulations to avoid further fraud and abuses, the EC should regulate this sector to foster fair free competition, new product innovation and development, and honest entrepreneurship. Finally, it should make sure that private and personal data and information is safely guarded by companies that are neither under profit pressure nor at the mercy of one company which has auto proclaimed itself as the “*decider*” of what should or should not be produced and offered to consumers.

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<sup>33</sup> Business Week. “The 50 Most Generous Philanthropists.”  
[http://bwnt.businessweek.com/interactive\\_reports/philanthropy\\_individual/](http://bwnt.businessweek.com/interactive_reports/philanthropy_individual/) (accessed March 1, 2009).