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In 1957, the founders of what is now the European Union included the following provision in the Treaty establishing the European Economic Community:

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 it may affect trade between Member States.¹

The European prohibition of abuse of dominance originates in the Ordoliberal theory, which was born in Germany after the Second World War and focused on the responsibility that large social and economic structures had with respect to small ones. They were to be held liable for the survival of the weak as a matter of philosophy. In line with this spirit, the European Court of First Instance (CFI) said, in *Michelin*:

[F]inding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a *special responsibility* not to allow its conduct to impair genuine undistorted competition on the common market.² (emphasis added)

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¹ The current Article 82 of the European Community Treaty (the “EC Treaty”) is its old Article 86 of the Treaty establishing the European and Economic Community.

² Case 322/81, *NV Nederlandsche Banden Industrie Michelin v. Commission*, 1983 E.C.R. 03461, ¶57.

The European Economic Community developed quickly due to, among other factors, the role of policy builder carried out by the European Court of Justice (ECJ). The European Commission, developing its role as “Centinelle of the Treaties”, has consistently reinforced the European architecture by developing community policies, including policies on competition, and has always been regarded as a basic pillar of the single market. Once this mission was ensured, other important objectives of competition policy became desirable.

During the 1990s, the European Commission started to reform the competition system, gradually leading it towards a more economic approach. This resulted in the publication of guidelines on vertical restraints and the application of Article 81(3) of the EC Treaty, the entry into force of Regulation 1/2003, and the enactment of the new Merger Control Regulation in 2004. However, something was missing and both companies and practitioners insisted on the European Commission giving guidelines on how to interpret one of the most obscure provisions of the EC Treaty: the prohibition of abuses of dominant positions.³

Following this request, the European Commission launched the debate in 2005 with the publication of the discussion paper on the application of Article 82 of the EC Treaty to exclusionary abuses (“Discussion Paper”).⁴ The Discussion Paper confirmed the difficulty of applying this provision. Focusing on exclusionary abuses, it suggested

³ Judicial precedents had not been clear, starting with a per se rule in Case 85/76, *Hoffmann La-Roche and Co AG v. Commission*, 1979 E.C.R. 461, and finishing with cryptic reasoning in Case 203/01, *Manufacture française des pneumatiques Michelin v. Commission*, 2003 E.C.R. II-4071.

⁴ EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (Dec. 2005), *available at* <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>.

overruling the formal approaches of the European Commission and the ECJ and proposed using an effects-based approach, including the efficiency defense as a possible defense argument for dominant firms.

While the debate on the interpretation of Article 82 was under way, the European Commission adopted one of its most important decisions on the topic: it fined Microsoft with the highest fine ever imposed on a company after holding it to have abused its dominant position in the market of operating systems. More precisely, it considered that Microsoft had abused its dominant position by (i) refusing to license a fully functional interface to its Windows operating system, and (ii) tying the Windows Media Player to Windows. In its reasoning, it followed the spirit of the Discussion Paper and, although rejecting all arguments related to efficiencies, it carried out a much more serious and deep economic analysis of the facts.⁵

Microsoft appealed the European Commission's decision and, due to the uncertainty of the final resolution of the CFI, the reform was put on hold. The CFI, despite confirming the move to an effects-based approach by considering that Microsoft's tying of two products was not enough to establish an abuse of its dominant position, refused to make an extensive economic analysis of the foreclosure test as suggested in the Discussion Paper.⁶

Once the enigma was solved of whether the CFI would countersign the Discussion Paper's approach, the legal community and market operators have once again

⁵ Commission Decision 2007/53/EC of 24 May 2004, Case COMP/C-3/37.792 — Microsoft, 2007 O.J. (L 32) 23.

⁶ Case T-201/04, Microsoft v. Commission (not yet reported) (judgment of Sep. 17, 2007).

asked the European Commission to put the debate back on track. Although, in the beginning, some officials confirmed the European Commission's willingness to push the reform forward,⁷ it is now clear that the review of Article 82 is not a priority for the EC Commissioner for Competition, Neelie Kroes. In her recent speech on competition policy objectives to the Economic and Monetary Affairs Committee of the European Parliament, Commissioner Kroes did not mention the issue when listing her priorities for the future.⁸ On the contrary, she was pleased by the ruling of the CFI in the *Microsoft* case, which confirmed the European Commission's approach, while omitting any reference to the reform of Article 82.

This position is confirmed by the European Commission's recent moves relating to dominance abuses. The new investigation against Microsoft⁹ might indicate that the European Commission is comfortable with the stricter approach set up by the CFI and will continue to enforce this approach without publishing any further guidelines.

Decisions in pending cases such as *Qualcomm*¹⁰ and *Rambus*¹¹ may shed light on the approach the European Commission is willing to adopt to enforce Article 82.

⁷ In his presentation, Joos Stragier (DG Competition) affirmed that the European Commission was trying to give priority to procedures against most harmful practices and tackling new forms of abusive conduct on the basis of a flexible—yet predictable—methodology. See Joos Stragier, Current issues under Commission's Article 82 review, Remarks at the 11th Annual Competition Conference, International Bar Association, Fiesole, Italy (Sep. 2007).

⁸ Neelie Kroes, Competition policy objectives, Address to Economic and Monetary Affairs Committee of the European Parliament, Brussels (Mar. 26, 2008).

⁹ On August 30, 2001, the European Commission made public that it had initiated investigations against Microsoft's conduct for tying Windows with Microsoft Office and Internet Explorer. See Press Release IP/01/1232, European Commission, Commission initiates additional proceedings against Microsoft (Aug. 30, 2001), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1232&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹⁰ On October 1, 2007, the European Commission made public that it had initiated formal proceedings against Qualcomm Incorporated for the terms and conditions under which it licenses its intellectual

However, the debate on the interpretation of dominant abuses should continue and, more importantly, result in guidelines. The European Commission should not forget that a transparent and clear competition policy is necessary for European companies to compete strongly in a worldwide economy. An increasing number of companies are concerned about their (pre-)dominant market positions, and the absence of legal certainty jeopardizes the ability of European-based companies to carry out coherent and global commercial policies. Although these companies are few in number, we should not forget that most of the small and medium companies are directly related to them.

This issue is particularly sensitive if we consider the divergences in this area on both sides of the Atlantic.¹² Apart from the different responses to Microsoft's conduct, the comparison between the U.S. Supreme Court's ruling in *Trinko*¹³ and the European Commission's decision in *Telefonica*¹⁴ underlines the disparities between both systems. In *Trinko*, the U.S. Supreme Court gave considerable weight to the ex ante regulation in

property rights in the CDMA and WCDMA standards for mobile telephone. See European Commission MEMO/07/389, Commission initiates formal proceedings against Qualcomm (Oct. 1, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/389&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹¹ On August 23, 2007, the European Commission made public that it had sent a statement of objections to Rambus for abuse of a dominant position by claiming unreasonable royalties for the use of certain patents for "Dynamic Random Access Memory" chips subsequent to a so-called "patent ambush". See European Commission MEMO/07/330, Commission confirms sending a Statement of Objections to Rambus (Aug. 23, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/330&format=HTML&aged=0&language=EN&guiLanguage=en>.

¹² Despite convergences in certain aspects, such as the move from a per se rule to a rule of reason approach, EC antitrust law is very concerned about market structure and encouraging rivalry between firms to enhance competition. The U.S. approach, on the contrary, focuses on analyzing the effects of conduct in the market on consumer welfare.

¹³ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

¹⁴ Commission Decision of 4 July 2007, Case COMP/38.784 – Wanadoo España v. Telefónica, 2008 O.J. (C 83) 05.

its analysis of a possible infringement of Section 2 of the Sherman Act; whereas, in *Telefonica*, although the specific behavior at stake was compatible with sectorial regulations and supervised by the Spanish Telecoms Authority, this did not prevent the European Commission from finding that it was an abuse of Telefonica's dominant position and imposing a heavy fine.

The different approaches to the need to evaluate the effects of the conduct of dominant firms might explain such disparities. In the United States, Section 2 of the Sherman Act forbids monopolizing or attempting to monopolize, which necessarily implies an analysis of the degree of foreclosure resulting from the conduct, while Article 82 of the EC Treaty prohibits the abuse of dominance. European case law shows a consistent tendency to use a formal approach where the analysis of the effects, whenever considered, has been confined to evaluating a possible objective justification for the—already qualified—abuse of dominance.¹⁵

Convergence in this field would give more certainty to global players. Commissioner Kroes has already pointed out the benefits of sharing similar enforcement principles amongst competition authorities.¹⁶ But the principles are not similar in the area of dominance, and the debate concerning the reform of Article 82 of the EC Treaty is the

¹⁵ This could also explain why there are many more infringements related to dominant firms in the European Community than in the United States.

¹⁶ See Neelie Kroes, European Competition Policy in the age of globalisation – towards a global competition order?, Speech at the First Symposium in Innsbruck, Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb (FIW) Innsbruck (Feb. 7, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/61&format=HTML&aged=0&language=EN&guiLanguage=en> (“Strong competition authorities across the globe sharing similar enforcement principles have a crucial role to play in global governance in the interest of businesses and consumers everywhere.”).

best framework to address these divergences, bearing in mind that the general principles inspiring both Section 2 and Article 82 are very similar.