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Microsoft (EC) and Duty to Deal: Exceptionality and the Transatlantic Divide

Eleanor M. Fox

This article examines Microsoft's offense in withholding full information to its workgroup server operating systems rivals so that they could not interoperate with Microsoft's systems as seamlessly as Microsoft could. This article agrees with John Vickers' observation that the Court stretched each of the *Magill/IMS* criteria defining circumstances so exceptional that they warrant a duty to deal, and thus created confusion as to the limits of exceptionality. It argues that the Court should have resorted to concept rather than factors (principles rather than rules) to define exceptionality, and that, doing so, it might have reached the same outcome, but in a more principled way. The article concludes, however, that the duty-to-deal outcome in *Microsoft* is not the only logical one; indeed, where a court ends is a function of where it begins.

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I. Introduction

This article examines Microsoft's offense in refusing to give full information to its workgroup server operating systems (WGSOS) rivals so that they could interoperate as seamlessly with Microsoft's PC and WG server operating systems as Microsoft could.[1] It follows John Vickers' excellent paper[2] comparing the1980's *IBM* case with the EC *Microsoft* case, and it responds to his call for greater clarity in the duty-to-deal standard in EC law.

It is well-known that firms, even monopolies, have no general duty to deal, and this is especially true when a claim is made that the firm must share its intellectual property (IP). A dominant firm has a duty to deal only in the event of exceptional circumstances. The question is: Did the *Microsoft* facts involve "exceptional circumstances"?

> DID THE *MICROSOFT* FACTS INVOLVE "EXCEPTIONAL CIRCUMSTANCES"?

Microsoft was preceded by two important IP precedents on duty to deal: *Magill*[3] and *IMS*.[4] This essay agrees with John Vickers that the Court of First Instance (CFI) in *Microsoft* purported to apply the criteria laid down in *Magill* and *IMS*, but pushed the round peg of the *Microsoft* facts into the square boxes of *Magill* and *IMS*, thus leaving one to ponder whether those square boxes are any constraint at all. This article proposes abandoning the square boxes and resorting to concept rather than rules to determine when circumstances are so exceptionally important to consumers and the market that a duty should arise. Resorting to concept, and given the general perspective of EC competition law, an EC court would probably find a duty. But is there a transatlantic divide?

II. The Precedents and Their Limits

The European Court of Justice (ECJ) attempted to chart the territory in two important cases: *IMS* and *Magill*. In *Magill*, the Court found that owners of copyright in their TV schedules had a duty to license the schedules to a consolidated TV guide because consumers wanted a consolidated TV guide and the refusals blocked its emergence. In *IMS*, the Court found that the owners of copyright in a grid system demarking geographic boundaries for the collection of pharmaceutical sales data would have a duty to license the grid system if (reciting the *Magill* factors):

1 Case T-201/04, Microsoft v. Commission (not yet reported) (judgment of Sep. 17, 2007) [hereinafter CFI judgment].

2 John Vickers, *A Tale of Two EC Cases:* IBM *and* Microsoft, 4(1) COMPETITION POL'Y INT'L 3 (Spring 2008).

3 RTE, ITP & BBC v. Commission, 1995 E.C.R. II-485 [hereinafter *Magill*].

4 Case C-418/01, IMS Health v. NDC Health, 2004 E.C.R. I-5039 [hereinafter *IMS*].

1) the access was indispensible to enable an undertaking to carry on business on a market;

2) the refusal prevented the emergence of a product for which there is a potential consumer demand; and

3) the refusal excluded any competition on a secondary market.

The three criteria were, said the Court, "sufficient" to trigger the exceptional circumstances exception from the principle of no duty to deal, absent an objective justification.

IMS and *Magill* are formalistic judgments. The *Magill* case was special because people wanted a consolidated TV guide and could not get it unless the broadcasters provided the necessary inputs. The refusal blocked the market. The controlling factors set forth in *Magill* simply describe the facts of the case. In *IMS*, the Court simply held that it was for the national court to apply the *Magill* factors.

The CFI concluded that the *Microsoft* facts qualified as "exceptional circumstances" and, finding no justification, it ordered a duty to deal.

Then along came *Microsoft*. The problem was whether, under the circumstances, Microsoft was obliged to give seamless interoperability information to the WGSOS providers. The CFI examined the question under the *IMS* and *Magill* criteria and gave an expansive construction to each of the three factors:

1) The CFI found (or rather upheld the Commission finding) that rivals' access was indispensable. But access to the information not already provided by Microsoft was not really indispensible to enable the undertakings to carry on business; rather, denial of full information "just" handicapped them.

2) The CFI found that the refusal prevented the emergence of a new product that consumers demanded. But Microsoft's withholding of some protocols did not prevent the emergence of a new product in the sense that BBC's and ITP's refusals precluded the emergence of a TV guide; rather, it "just" significantly undermined the rivals' incentives to innovate (and sounded the death knell to a few of their products).

3) The CFI found that the refusal excluded any competition on a secondary market. But the refusal did not exclude all workgroup server operating system competition; rather, it "just" created a risk that competition would be excluded in the future. More accurately, it seriously undermined competition on the merits.

The CFI concluded that the *Microsoft* facts qualified as "exceptional circumstances" and, finding no justification, it ordered a duty to deal.

II. The *Microsoft* Facts

In *Microsoft*, the Commission's story was simple (even while factually complex). It began some years before the investigation was initiated. Microsoft controlled the PC operating system, occupying more than 95 percent of the market. It had great power; it was the world standard. Its operating system hosted many applications, and some were potential platforms for challenging Microsoft's operating system power.

Microsoft developed strategies to use its leverage to protect its power. For example:

- Netscape pioneered the browser. Before Microsoft had a browser of its own, it welcomed Netscape on its desktop. Microsoft then made its own browser and took actions to "cut[ ] off Netscape's air supply."[5]

- RealNetworks pioneered the media player. Before Microsoft had a media player of its own, Microsoft shared the desktop with RealNetworks. Microsoft then made a media player of its own and bundled its media player with its operating system.

- Novell and Sun Microsystems pioneered workgroup server operating systems. Microsoft facilitated the flow of information to them to interoperate seamlessly with Microsoft's Windows. Microsoft then made its own workgroup server operating software and turned the spigot to cut back the interoperability information flow to the (now) rivals.

DID MICROSOFT HAVE A DUTY NOT TO TURN OFF THE FAUCET?

In its investigation, the Commission conducted a survey. The survey results showed that, over a wide range of products, users rated the rivals' workgroup systems more favorably than they rated Microsoft's on reliability, availability, security, ease of use, and speed; but, Microsoft (of course) surpassed all others on interoperability because it held the knob to the faucet and, seamless interoperability was the one quality that many users could not do without. As a result, products of rivals that users liked dropped from the market.[6]

The Commission's ammunition also included the Computer Software Directive.[7] In this directive, the Community legislature attached high importance to the interoperability of computer software. By the Commission's account, the directive regarded interoperability as of the essence for effective computer use.

5 *See* Mike France, *Decoding the Trial: Microsoft Misses its First Shot*, BUSINESSWEEK ONLINE, Jan. 29, 1998, *available at* http://www.businessweek.com/microsoft/updates/up90129a.htm.

6 CFI judgment, *supra* note 1, at paras. 572 & 573.

7 Council Directive on the Legal Protection of Computer Programs 91/250/EEC of 14 May 1991, 1991 O.J. (L 122) 42.

This means, in the context of Community policy, that computer interoperability may be valued more than exclusive proprietary rights in interface protocols.

Did Microsoft have a duty not to turn off the faucet?

III. The Safe Approach, the Irony, and the Other Path

Applying the *IMS* and *Magill* factors was undoubtedly a safe approach for the CFI if the *Microsoft* facts fit the factors; it could simply apply the rules. I argue that the *Microsoft* facts did not fit the factors; however, they did fit the concept of essentiality much better than the facts of either *IMS* or *Magill*. *Magill* was only about a consolidated TV guide in Ireland. *IMS* was only about boundaries of territories in Germany for assembling sales data. What great power over the lives of people did BBC or IMS wield by keeping their proprietary information to themselves? *Microsoft*, on the other hand, is about people's access, worldwide, to the best computing systems possible. The irony is that a literal applier of the rules of *IMS* and *Magill* would have held that Microsoft did not abuse its dominance, even though the benefits to consumers from a duty to deal was (according to the fact-finding) exponentially greater in *Microsoft* than in the paradigm cases decreeing a duty to deal.[8]

How much more satisfying it would have been for the Court to have asked the important questions:

1. Are consumers and the market seriously disadvantaged by denial of full access to interoperability information?

   No access would be ordered unless the disadvantage to consumers and the market is qualitatively of a very serious order, in view of the general principle that there is no duty to share one's property.

If the answer is "yes":

2. Would the respondent and the market be seriously disadvantaged by a duty to grant access?

If the undertaking has engaged in anticompetitive acts and strategies rather than just saying "no", the case is not simply an essential facilities case and the case for the plaintiff is strengthened.

In *Microsoft*, was the computer user disadvantaged by Microsoft's refusal and acts? According to the Commission's fact-finding, the computer user was serious-

8 *See* E. Fox, *Monopolization, Abuse of Dominance, and Refusal to License Intellectual Property to Competitors—Do Antitrust Duties Help or Hurt Competition and Innovation? How Do We Know?*, in EUROPEAN COMPETITION LAW ANNUAL 2005: WHAT IS AN ABUSE OF A DOMINANT POSITION? (C.-D. Ehlermann & I. Atanasiu, eds., 2006).

ly disadvantaged by lack of full interoperability. Microsoft was the standard in a network market. Rival providers were subject to the power and incentive of Microsoft to "throw noise" into their interconnection. The Commission's evidence that users preferred certain rivals' products on all qualities except interoperability, and had to forego first choices because interoperability problems were serious, was powerful testimony. Moreover, Microsoft engaged in affirmative strategies to handicap rivals that threatened its power.

Would Microsoft and the market be disadvantaged by a duty of Microsoft to provide seamless interoperability information? According to the facts, they would not be. Recall that Microsoft provided the complete information under conditions of competition and changed its path only after it integrated. This is a telling indication that Microsoft was happy to provide the information before it developed a conflict of interest, and that the flow of information was optimal for the market.[9] Would a duty to provide full interoperability information undermine Microsoft's incentives to invent? Under EC law, Microsoft had the burden to prove it would, and Microsoft did not carry its burden. The interface was a by-product that Microsoft had to create for its own internal operability.

WOULD MICROSOFT AND THE MARKET BE DISADVANTAGED BY A DUTY OF MICROSOFT TO PROVIDE SEAMLESS INTEROPERABILITY INFORMATION? ACCORDING TO THE FACTS, THEY WOULD NOT BE.

IV. Across the Ocean

The structure of analysis proposed above aligns with the values and perspectives of EC law; but, it is not the only approach. U.S. law takes a different tack. The U.S. perspective may be derived from the U.S. Supreme Court's opinion in *Verizon v. Trinko*.[10]

In *Trinko*, Bell Atlantic, the incumbent telephone service provider in the northeast United States (later succeeded by Verizon), owned the elements of the local loop—bottleneck elements connecting long distance service to the local market. It did so under conditions of legal monopoly of local service areas. Technology changed, making local service competition feasible. The U.S. Congress passed the 1996 Telecommunications Act, easing the way for new entry into local service and requiring incumbents to give their rivals nondiscriminatory access to the local loop. Bell Atlantic—wanting to keep its customers to

9 The importance of this circumstance has been highlighted by Judge Robert Bork in THE ANTITRUST PARADOX (1978), and by Justice Antonin Scalia in *Trinko* (*see* note 10 *infra*).

10 Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004) [hereinafter *Trinko*]. *Trinko* is not an IP case. Recent IP case law underscores the principle of IP exclusivity. *See, e.g.,* In re: Independent Service Organizations Antitrust Litigation (CSU et al. v. Xerox Corporation), 203 F.3d 1322 (Fed. Cir. 2000), cert. denied, 531 U.S. 1143 (2001).

itself—gave its new rivals access to the local loop but disrupted their service. The rivals complained to the Federal Communications Commission, which agreed with their claims, penalized Bell Atlantic, and gave the rivals recompense. In an ensuing private suit, the question was whether Bell Atlantic's conduct was also an antitrust violation, which it might have been because the 1996 Act declared that it did not preempt the antitrust laws. The Court held that there was no antitrust violation. In doing so it set forth principles for analysis in Sherman Act duty-to-deal cases.

According to the U.S. Supreme Court, the first strong principle is: no duty to deal. The Court expressed antipathy to sharing duties, stating that they undermine investment and inventiveness. The Court treated the "exceptional circumstances" exception as very rare. It stated that the Supreme Court has never decreed that there is an essential facility doctrine, which would require the sharing of facilities even in the absence of anticompetitive conduct. It ruled that even if the doctrine exists it cannot be invoked where either the defendant has engaged in some dealing, as opposed to a total refusal, or where a regulatory agency (not antitrust) has the power to order dealing. Plaintiffs had relied on the *Aspen Skiing* case,[11] and the Court acknowledged this case as the exception to the no-duty rule. In *Aspen Skiing*, the dominant three-mountain ski resort had joined with the plaintiff in offering a four-mountain ski ticket, but then changed its course and refused to cooperate, sacrificing ticket revenues for supra-competitive profits later. The Court found a violation. The *Trinko* Court called *Aspen* the outer limits of the exception from the no-duty rule, and in fact implicitly overruled the approach and perspective of *Aspen*.[12] Indeed, extolling the principle of freedom to choose not to deal, the *Trinko* Court stated that antitrust does not impose affirmative duties just because it can be argued that consumers would be better off.[13]

Analysis would start with quite a different question: Why should Microsoft be ordered to share its property with anyone, let alone rivals?

Any analyst taking *Trinko* seriously would not start with the question: Are consumers seriously disadvantaged by lack of providers' seamless access to the standard operating system network? Analysis would start with quite a different question: Why should Microsoft be ordered to share its property with anyone, let alone rivals? U.S. courts generally presume that a duty to deal would seriously impair even a monopoly firm's incentives—to the harm of the market and inno-

11 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) [hereinafter *Aspen*].

12 *See* E. Fox, *Is There Life in* Aspen *After* Trinko*? The Silent Revolution of Section 2 of the Sherman Act*, 73 Antitrust L.J. 153 (2005).

13 *Aspen*, *supra* note 11, at 414.

vation.[14] Microsoft would not have the burden to prove that a duty to deal would impair its incentives. The presumption in favor of Microsoft would be difficult to overcome.

This, then, is the great transatlantic divide, even if and when a European court rises above rules to principles and asks the important question: What is the effect of the challenged behavior on consumers and the market?

14 *See* Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004), at 1215-25.