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Super Mario vs. Microsoft: The story of a ready-made ruling

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Microsoft CEO Steve Ballmer had no reason to worry as he landed in Brussels, nine time zones ahead of his much-loved city of Seattle. It was March 16th, eight days before the deadline for the announcement of EU Competition Commissioner Monti's ruling on the software giant¹. Ballmer was to meet with the head of the EU Competition Directorate-General, Philip Lowe, for the final round of negotiations. Microsoft's top executive

planned to officially announce some good news to Lowe: to avoid conflict, the US company was willing to comply with all the demands made by Monti's men. When he got the news, Lowe indicated he was happy with this². But the final decision was not up to him. As his right hand man prepared to celebrate the agreement, commissioner Monti asked the meeting to adjourn. A few hours later, Microsoft's lawyers were summoned to

¹ Dombey (2004c).

² Dombey (2004d).

discuss the antitrust regulator's new demand, never raised before. In brief, every new component of the next Windows release was to have the European Commission's prior approval. In other words, every upgrade of Windows is basically to be illegal until proven otherwise³. A demand of this kind could only lead to failure of the negotiations. But then, that was Mario Monti's intention – as he himself admitted.

“In the end, I had to decide what was best for competition and consumers in Europe. I believe they will be better served with a decision that creates a strong precedent,”⁴ he declared.

Microsoft was found guilty of abuse of dominant position. It will have to pay a fine equivalent to €97m, twice the estimated amount. The EU antitrust commission took Microsoft's behaviour in the United States into consideration in the sentence, despite the fact that US antitrust authorities had already filed their previous charges⁵. As for server software, some Windows source code must be disclosed – and therefore given away – to competitors. Due to the objections raised to the bundling of new applications in the operating system, a version of Windows will have to be created without Media Player and sold at a lower price⁶. Competitors couldn't have hoped for more. “This decision is fundamentally significant,” exulted RealNetworks. “The ruling would make it easier for RealNetworks to compete”. What's more, the decision “certainly ... has not come too late” to help the company rebuild its market shares⁷.

While it is true that a precedent has been set, it is equally true that a unilateral decision of this kind opens the doors to recourse to the European Court, a move already announced by Microsoft⁸. If the company manages to obtain suspension of the sanctions while awaiting trial, as many believe it will, Monti's

³ Gray (2004).

⁴ European Commission (2004b)

⁵ Dombey (2004e)

⁶ European Commission (2004c)

⁷ Milliken (2004)

⁸ Microsoft Corp. (2004).

KEY FINDINGS

- ✍ The European investigation of Microsoft was encouraged by the company's biggest competitors, to whom the EU merger task force listened with interest.
- ✍ EU Competition Commissioner Mr. Monti rejected a good agreement with Microsoft purely out of pride.
- ✍ Mr. Monti's decision is to be brought before the European Court, which has repeatedly rejected his cases and economic analyses.
- ✍ The orders against Microsoft raise the juridical issue of protection of intellectual property rights, a software house's most important asset.
- ✍ The antitrust case against Microsoft is founded upon theories that disregard the true nature of competition.
- ✍ Mr. Monti's decision is based upon complaints raised by competitors of Microsoft, and favours them rather than consumers.
- ✍ Mr. Monti's decision weakens European business, setting a precedent for what has been called “a welfare state for losers”.
- ✍ The decision creates a dangerous spread between the US and EU antitrust policies authorities with regard to competition policy.

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verdict will be frozen for three to five years⁹. And the antitrust commissioner has a bad record in the courts. The European Court of First Instance has repeatedly expressed doubts as to the validity of the economic reasoning underlying the antitrust authority's decisions, and its dubious protection of accused companies' right to defend themselves. This time, all the doubts should be resolved, or rather should not even come up, as Microsoft is guilty almost by definition. But one inescapable question remains. "Just how important is Europe's Microsoft case anyway?" What's the sense of this show? Why a sentence, even one suspended on the thread of an appeal, rather than an agreement? This is what the Financial Times asks. "Will the Commission's decision alter things all that much? Will it, as the old saying goes, change the price of fish?". No, that much is obvious. But the financial daily bets that "the answer may well be in the decision itself rather than the concrete measures that the Commission is recommending"¹⁰. Super Mario wanted to demonstrate his power. And he's done it.

A €500m fine is not a big deal for Microsoft, with \$53 billion in available cash¹¹. Business bank Goldman Sachs wrote that this fine would not be "material to Microsoft's balance sheet, is not a major concern" and the other orders would not in any case result in "a serious change in Microsoft's business model"¹². The sanction is not even the maximum that the European merger task force commission could have inflicted. It could have been up to \$3.2 billion, but the task force did not want to take Monti's battle that far¹³. As the accuser is also the judge under the European antitrust system, no one could contest the commissioner's economic

analysis – except, perhaps, those who attempted to file down his claws, such as his fellow commissioner Frits Bolkestein¹⁴.

The long hot summer

Gazing through the plate glass wall of his private office in the Breydel building, the European Commission's modern general headquarters, Mario Monti thought of the short vacation he had been able to take that summer of 2001. He had come a long way since taking over the helm of the European Competition Directorate General almost two years earlier. His prestige was unchallenged after his veto on so many announced mega-mergers. On July 3rd he had announced his veto of the GE-Honeywell operation, the biggest merger ever, already authorised by the antitrust division of the US Department of Justice¹⁵.

Washington's competition authority had made itself noticed in recent years for its big witch hunt around the Microsoft case. It was back in 1996 that investigation of the software house in Redmond, just outside Seattle, first began. It took two whole years, in search of every pretext, before the American antitrust division presented its accusations. On October 19th, 1998 the first instance trial began, before a judge that the company found hostile right from the start. On June 7th, 2000 the ruling was announced. The judge severely condemned Microsoft, going so far as to ask that it be split into two separate companies, one concerned with operating systems and the other with Internet-linked business.

The inevitable appeal process began on October 2nd of the same year¹⁶.

On June 28th, 2001 a most unexpected appeal ruling was announced. Microsoft was not the big, bad monster it was made out to be. This new ruling overturned practically all the conclusions of the lower court, and did away



⁹ Mitchener (2004).

¹⁰ Dombey (2004b)

¹¹ Microsoft Corp. (2003).

¹² Mitchener (2004).

¹³ Dombey (2004e).

¹⁴ Dombey (2004a).

¹⁵ European Commission (2001°).

¹⁶ Wired Magazine (2002).

with the idea of dismantling the company forever. The company and the Department of Justice were to negotiate an agreement based on the sentence issued by the court of appeal. In essence, the powerful US antitrust authority had been forced to admit defeat¹⁷. Monti couldn't believe it.

The commissioner immediately issued orders to intensify the investigation into Microsoft, which had been in the sights of the EU merger task force ever since Monti first arrived in Brussels¹⁸. The new file was ready by the end of August¹⁹. A series of accusations were made in two areas: the "secret code" of Windows

the presence of Media Player in the second



2000, and the presence of Media Player in operating system. The

issue, which had never been mentioned before, was particularly interesting. Simply replace the words "Media Player" with "Internet Explorer", and you had the charge that had been made in the US: the accusation that had led to the defeat of the US antitrust authority in Washington. But the rules of the game are different in Brussels.

For while in the US the antitrust authority had to make its accusations before a third party, a judge who passed judgement following debate between the prosecution and the defence, in Europe the accuser himself is also the judge. If the European merger task force decides that a company's reply does not entirely solve the problems raised in contesting the accusations, the company is found guilty. With no judges or further steps. The end of the Microsoft story had already been written: it was clear that it would be found guilty.

A good start

And to think that the European Commission's relationship with Microsoft got off to the best possible start. The new European executive began its work with the pleasure of a visit

from Bill Gates²⁰. That was in October of 1999. The newspapers were publishing learned dissertations on the new economy. Bill Gates, the man symbolising the new entrepreneurial class, had received an invitation from Commission president Romano Prodi – and went home thinking he could work on some great projects with the European government. These initial hopes foundered within only four months. Mario Monti had just begun preparing a file²¹. The European merger task force, just like its better-known American counterpart, had opened an investigation into Microsoft. The accusation was abuse of the dominant position of Windows in the PC operating systems sector to achieve a new position of dominance in operating systems for servers. According to Monti, the Windows 2000 operating system was best used only when connected to a server using similar Windows software. Microsoft's competitors, who did not have full access to Windows source code, were therefore at a disadvantage in competition.

The issue underlying the Commission's reasoning regarded intellectual property rights. It is clear that software source code is Microsoft's only major asset. To ask the company to give away source code to its competitors didn't make sense either economically or legally. Competitors would never offer source code for their products to Microsoft.

The theme of "compatibility" seems to be mainly an excuse to get one's hands on precious confidential information so as to be able to copy the most innovative solutions. In truth, it isn't even a matter of how the state ought to protect an individual's intellectual property; it is simply a matter of an individual's right not to share information that is dear and important to him, rather like a great chef's freedom to keep his recipes to himself. If we attempt to force open the chef's locked recipe chest (in an economy such as ours, which admits no other protection of the rights in question), the result is foreseeable: in

¹⁷ Kehoe (2001).

¹⁸ European Commission (2000a).

¹⁹ European Commission (2000b).

²⁰ European Commission (2000b).

²¹ European Commission (2000a).

the short term there may be better cakes for everyone, but in the long term there will no longer be any incentive for the chef to experiment with the new ingredients or daring combinations that would attract customers to his restaurant. Abandoning the metaphor, the lesson is that we end up with less innovation. And only in Europe, of course.

Right from his first official statement, commissioner Monti admitted that the accusations against Microsoft originated primarily with its competitors. Scripta manent: the investigation, it read, had been opened on the basis of information received “from Microsoft’s competitors”²². Just as in the GE-Honeywell case, Commission officials seemed very interested in collecting evidence against the company under investigation – without taking any real precautions before considering files prepared by the competition.

The next month, along came another reason to attack the Seattle software house. The company had joined forces with telecommunications group AT&T to take over Telewest, a British cable network company. “The Commission has raised serious doubts” about the proposal “because of its impact on competition in the market for software for digital set-top boxes”²³. It seems strange to think that there is an industrial sector concerned solely with the programmes that run the boxes for decoding digital TV, especially in Great Britain alone. It is even more curious to note how the accusation of monopolisation targeted Microsoft, which was potentially interested in only a minimal part of Telewest’s business, while the communications giant AT&T was left untouched by the investigation.

The affair seemed to be, above all, a way of increasing the pressure on Microsoft. When the company replied with a series of assurances as to Telewest’s freedom to choose the best software for its set-top boxes, the Commission judged the responses

²² European Commission (2000a).

²³ European Commission (2000b).

received insufficient. In Monti’s opinion, Microsoft should have renounced its share in the British firm²⁴. And that is what it did. Rather than open up a new front for the battle with the European merger task force, the Redmond company announced its intention of giving up on the deal. Without Microsoft as a partner, AT&T gave it up too, and Telewest went back to its old system²⁵.

On June 7th, 2000 news of the heavy sentence against Microsoft in the US court of first instance arrived²⁶. Feeling that the wind was right, Mario Monti decided to speed up the pace of his investigation. On August 3rd the EU MTF served Microsoft its first statement of objections²⁷. The content was already known, but now it was clear who was making the

accusations. It had all started with Sun Microsystems, Microsoft’s biggest competitor on the server software market. The Commission was happy to follow Sun’s lead in the battle against Microsoft²⁸. Mario Monti unsheathed his sword: “All companies that want to do business in the European Union must play by its antitrust rules and I’m determined to act for their rigorous enforcement”²⁹.

The power of Super Mario

The August 30th, 2001 escalation came, as we have seen, in the wake of the ruling that saved Microsoft from its troubles with the US antitrust authority. The new statement of objections not only took up the old accusation regarding servers again, but contained a new key point: the role of Media Player in Windows. According to the Commission, inclusion of this tool as a function of the operating system “deprived PC

²⁴ Monti (2000).

²⁵ European Commission (2000c).

²⁶ Wired Magazine (2002).

²⁷ European Commission (2000c).

²⁸ Id.

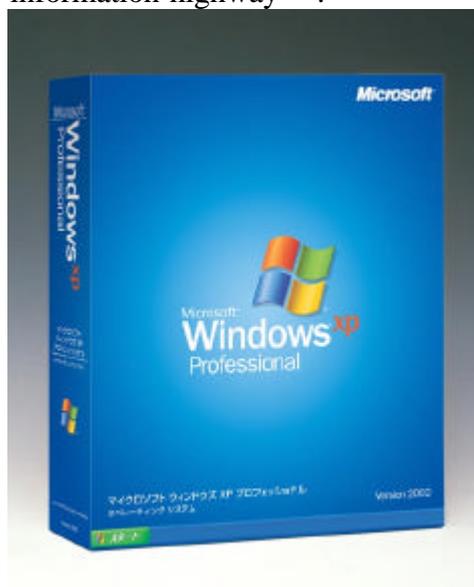
²⁹ Id.

manufacturers and final users of a free choice”³⁰.

Mario Monti was on the warpath: “The Commission also wants to see undistorted competition in the market for media players”. These products will “revolutionise the way people listen to music or watch videos”³¹.

The new accusation didn’t seem particularly appropriate. The media player function has been included in Windows since 1990³². Nothing prevents a user from installing an alternative media player on a PC with Windows – RealPlayer, for example. And as any user who downloads music from the internet knows, having an MP3 player integrated in the operating system is a great convenience, an indispensable luxury in the age of digital entertainment. Apple knows this too, and, not unlike Microsoft, gives away its own media player, iTunes, with the Mac Os. A user who gets tired of either of them can simply go to one of the many internet sites concerned with media players and download another software product free of charge. In either case, the consumer benefits: two players are better than one. So why did Mario Monti choose this particular accusation, one which seems so weak on first sight? There is a reason: the analogy with the American case. The Washington antitrust authority set up its inquisition into Microsoft entirely on the basis of illegal “bundling”. In short, the company was accused of having included the Internet Explorer function in Windows 98 to limit competition from other producers of internet browsers, such as Netscape. After a lengthy legal battle, Judge Jackson was defeated. Bundling was considered acceptable in the US. In practical terms, after all, inclusion of Internet Explorer in Windows 98 had not meant the death of the Internet Explorer competitor. Then too, Microsoft’s competitors had evoked worrying scenarios, the possibility that Gates’ company would gain “total control over the Internet” – with the obvious consequence that its suppression was

necessary “to ensure access and availability of information technology and the internet”³³. Ohio Attorney General Betty Montgomery spoke in the name of the whole world when she expressed the concern that Microsoft aimed to transform the “information highway” into a “toll highway”³⁴. In any case, not only did Netscape survive Internet Explorer’s assault unharmed (it was purchased at great expense by America Online in 1998, not exactly the destiny one would expect for a programme doomed to extinction), but numerous alternative browsers are available today, most of them freely downloadable over the internet. The fate of Microsoft Network (MSN) was similar, although it underwent a major transformation after getting off to a tough start; even though it was on the desktop of every computer running on Windows 95, it never managed to do away with AOL’s supremacy. And yet at the time, even “Business Week” was crying scandal: MSN was Bill Gates’ tool for taking over control of the “information highway”³⁵.



But let us look at things from the consumers’ point of view. Before MSN was launched on the market, AOL asked American users to pay \$54.20 for twenty hours of use a month. MSN debuted offering the same services for under \$20. Then AOL in turn dropped to \$20, and

³⁰ European Commission (2001b).

³¹ Id.

³² Microsoft Corp. (2001a).

³³ Thierer (1997).

³⁴ Schmidt (1999).

³⁵ Business Week (1995).

now programmes of this kind require no subscription at all³⁶. In short, Microsoft's joining the market did not result in higher prices for consumers, as it ought to have if it had really exercised "monopolising power", but instead caused prices to fall until they finally... well, disappeared altogether.

Considerations of this kind did not enter the mind of Commissioner Monti when he played his "bundling" card. Perhaps he wanted to demonstrate that he could even defend a case that had proven impossible to defend on the other side of the Atlantic.

In the meantime, the legal battle was coming to a head. And a few months later, a piece of news came that caused Monti's expectations to rise. On November 2nd, 2001 Microsoft and the US Department of Justice, of which the antitrust division is a part, reached an agreement. The pact set a number of limitations on how programmes were developed and sold, relations with software makers, and availability of information regarding internal programme features³⁷. Microsoft's competitors complained, as they gained no competitive advantage out of the agreement³⁸. Monti, who was used to working in close contact with the competitors of companies subjected to his scrutiny, smiled at the thought.

In any case, the European Commissioner's attention was about to turn in a new direction. In June 2002, the European Court began to overturn his most important decisions.

Super Mario in court

When Monti went to Brussels, he made it clear right away that his administration was going to break with the past, when the primary concern was avoiding legal mistakes. He immediately said that his five-year mandate would be characterised by interventionism. The first concrete signal was given when he stopped the Airtours-First

Choice merger only a few days after his arrival³⁹.

The statistics deserve some attention. By the end of 2001, after two years on the job, Mario Monti had vetoed eight mergers and takeovers. Before then, in the 10-year period of its history from 1990 on, the European MTF had stopped only ten. The average had risen from one to four vetoes a year. And the scale of the operations Monti had stopped must be taken into account. GE-Honeywell alone was of impressive economic value. Out of the eight deals that were halted, one had been withdrawn, while appeal sentences were pending on four more. But the European MTF's verdicts had never been overturned by the European Court.



Impending disaster was in the air in Brussels on June 6th, 2002. It was as if a dyke had collapsed. Ever since 1990, when the EU MTF was set up, appeals of the European executive's decisions by companies intending to merge had always been fruitless, to the extent that it had become unusual to appeal the decisions of the EU competition directorate general. At least until that fateful day⁴⁰. The European Court of First Instance, before which Commission acts are appealed, pronounced its judgement on Airtours' appeal of the September 1999 decision forbidding it to merge with First Choice Holidays. The Court accepted Airtours' appeal, overturning the competition authority's decision⁴¹. Nothing like this had ever happened before. The Court wrote: "The Commission prohibited the transaction without having proved to the requisite legal standard that the

³⁶ Kopel (2001), pp. 138-139.

³⁷ Department of Justice (2001).

³⁸ Abrahams (2001).

³⁹ European Commission (1999a).

⁴⁰ Hofheinz (2002).

⁴¹ Court of First Instance (2002a).

concentration would give rise to a collective dominant position of the three major tour operators” and that it would have “impeded effective competition”. Monti’s decision was not based on “effective evidence”, but flawed by a series of errors of judgement⁴². The ruling underlined the errors, incomplete analyses, and lack of evidence supporting the decision. For example, the Court said that when it asked the Commission to produce a market survey, all it got was a one-page extract from a memorandum sent by one of Airtours’ competitors.

The outcome of Monti’s merger decisions			
N.	Decision	Merger	EU Court Decision
1	22/9/1999	Airtours – First Choice	Overtaken on appeal, June 6 2002 judgement
2	14/3/2000	Volvo – Scania	No appeal made
3	28/6/2000	Mci Worldcom – Sprint	Merger cancelled prior to EU decision
4	31/1/2001	2001 SCAMölnlycke-Metsäe	No appeal made
5	3/7/2001	GE-Honeywell	Awaiting appeal verdict (2004)
6	10/10/2001	Schneider – Legrand	Overtaken on appeal, 22/10/2002 judgement
7	17/10/2001	CVC – Lenzing	No appeal made
8	30/10/2001	Tetra Laval – Sidel	Overtaken on appeal, 25/10/2002 judgement

NB: The Commission has not vetoed any more mergers since November 2001.

Mario Monti had not yet recovered from the shock of the June decision when, on October 22nd, 2002, his worst nightmare came true. The Court of First Instance had struck again. This time it had overturned Monti’s decision

to stop the Schneider-Legrand merger⁴³. Monti had made this decision in the “hot” month of October 2001, when he stopped three mergers in twenty days. In his opinion, Schneider

Electric and Legrand, two French manufacturers of electrical materials, had not provided adequate responses for authorisation of their transaction.

The text of the grounds for the decision was even harsher. In its opinion, “the Court considers the errors, omissions and inconsistencies which it has found in the Commission’s analysis of the impact of the merger to be of undoubted gravity”. It stated that the EU merger task force had presented the information available to it “selectively” and therefore maliciously. It also stated that the two companies had not been offered sufficient opportunities to reply to the objections. The Court reported procedural irregularities constituting a violation of the right to defence, with reference to the discrepancy between the contesting of the accusations and the Commission’s decision⁴⁴, as if to say that Monti had turned the tables while the game was underway.

And that wasn’t the end of it. Three days later, on October 25th, 2002, before the incredulous eyes of all economic and political Europe, the Court of First Instance announced its decision on the appeal of the Tetra Laval-Sidel merger case. For the third time in five months, and for the second time in a single week, the Court had rejected one of Monti’s decisions⁴⁵.

And to think that before the Super Mario era the EU competition directorate had won in every appeal. It was a true earthquake for the Commission, even more so for Monti’s men. Yet again the Court’s verdict harshly criticised the antitrust authority’s economic analysis. “The Commission committed manifest errors of assessment”. It also had harsh words for Monti’s theories regarding the harmful effects of conglomerates on competition (also applied in the GE-

⁴² Court of First Instance (2002a).

⁴³ Court of First Instance (2002b).

⁴⁴ Court of First Instance (2002b).

⁴⁵ Court of First Instance (2002c).

Honeywell veto): “Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition”, the EU merger task force ought to conduct a “particularly thorough” analysis and provide “convincing evidence” that the merger would harm competition⁴⁶. The Court stated that the fact that the company performing the takeover would acquire a dominant position was not in itself sufficient to lead to the conclusion that a reduction of potential competition would constitute strengthening of the company’s position⁴⁷.

Following the announcement of the third contrary verdict, Mario Monti called a press conference to face the storm. “This judgement is a major setback for us,” the commissioner admitted. But he rejected the idea of resigning. The Economist reported: “The rulings have done huge damage to Mr. Monti’s already shaky credibility”. It had called the commissioner “the corporate equivalent of Saddam Hussein” ever since he blocked the GE-Honeywell merger⁴⁸.

The first to go was general director Alexander Schaub. The German director accepted commissioner Bolkestein’s invitation, moving into the offices of the general internal market director. Monti asked Philip Lowe from Britain to replace him. The new Monti-Lowe leadership’s priority was avoiding any further embarrassing incidents. That’s why, after three killer setbacks in 2002, the EU has blocked no more mergers out of the more than 500 cases it has looked at⁴⁹. Not even the most controversial ones. Carnival’s bid for P&O Cruises (\$5.6 billion) was authorised without hesitation, and there were no problems when GE, Brussels’ old enemy, purchased Instrumentarium medical equipment (\$2.3 billion) and British diagnostics group Amersham (\$6.6 billion)⁵⁰. While awaiting the European Court’s verdict on the GE-Honeywell appeal, due to be

announced in 2004, Monti’s last defeat came in the Volkswagen case. On December 3rd, 2003 the Court of First Instance accepted the German automobile manufacturer’s appeal of the \$37m fine imposed by the EU merger task force in 2001⁵¹.

The accusation regarded business relations between the parent company and its German dealers aimed at keeping the price of the Passat sedan high. The Court of First Instance stated that the Commission had failed to prove the existence of “any actual acquiescence by the dealers” regarding the alleged anti-competition practices⁵².

The most interesting aspect of this verdict was the reaction of Mario Monti’s office.

The EU merger task force expressed its “exasperation” at the Nth contrary sentence by the European Court⁵³. Monti’s spokesman Tilman Lueder declared ferociously: “If the Court says we have to prove more, then we cannot do these kinds of cases anymore in the future”⁵⁴. While awaiting the end of his mandate, Monti has also been careful not to step on the accelerator regarding fines for practices harmful to competition. All his energies were to be concentrated on the grand finale with Microsoft.

A ready-made ruling

The competition commissioner knew perfectly well that on May 1st, 2004, two major innovations were to be introduced in the operation of the EU antitrust office: reform of the way the Commission investigates



companies, the so-called “Monti code”, and a requirement that measures to be imposed against corporations be agreed with ten new

⁴⁶ Court of First Instance (2002c).

⁴⁷ Col angelo (2003).

⁴⁸ Economist (2002).

⁴⁹ European Commission (2004°).

⁵⁰ Fleming (2003).

⁵¹ Court of First Instance (2003).

⁵² Idem.

⁵³ France Presse (2003).

⁵⁴ Geitner (2003).

commissioners⁵⁵. Some of them might have expressed doubts about Monti's last great sensation. So it was important to get the plot of the Microsoft drama moving. The commissioner set an ultimatum in a press conference on August 6th, 2003. The title said it all: "Commission gives Microsoft last opportunity to comment before concluding its antitrust probe"⁵⁶. In fact "the Commission's preliminary conclusion is that Microsoft's abuses are still ongoing".

As for the consequences of the judgement, Monti clearly listed his diktats. Microsoft was to "reveal the necessary interface information so that rival vendors of low-end servers are able to compete on a level playing-field". There were two alternative solutions to the bundling problem: "untying of Windows Media Player from Windows" or "offering competing media players with Windows"⁵⁷. These requests are particularly interesting in view of the failure to reach an agreement with Microsoft after the Redmond company had accepted precisely these conditions in Steve Ballmer's March 16th, 2004 meeting with the EU merger task force⁵⁸. Microsoft was to testify before the European merger task force on November 12th. When they appeared before Monti's staff, the Americans realised right away that there were few possible solutions. The worst came when the task force reported that the outcome of its meetings with Microsoft behind closed doors would be discussed with others. With the competition. With Sun, first of all, which had convinced the Commission to start the suit, along with the lobby group it had set up to fight Microsoft, the Computer and

Communications Industry Association⁵⁹. And then with two direct competitors, Real Networks and Novell⁶⁰.

In an attempt to speed things up, Monti "unofficially" released the text of the proposed ruling against Microsoft to the press⁶¹. The ruling was ready. The European merger task force demanded unconditional surrender. On February 16th Microsoft brought its last proposal for an agreement before the Commission: it admitted defeat and agreed to give away a CD-ROM containing its competitors' media players with every Windows package. An unprecedented concession, almost self-injuring⁶². But apparently it was not enough. The MTF rejected the proposal on the grounds that not all users would actually install the CD-ROM. Monti's staff seemed to consider it necessary to make sure that all consumers used a media player other than the one incorporated in Windows⁶³.

As for the accusations regarding the compatibility of Windows on PCs and servers, unexpected last-minute help arrived for Microsoft. Alexander Schaub, the Commission's internal market director general, had been the top authority on the European merger task force until 2002, and had worked with Mario



Monti on the first stages of the Microsoft investigation. Now, working alongside the commissioner for the internal market, Frits Bolkestein, the German manager felt it was his duty to intervene. The orders announced against Microsoft were intolerable. Specifically, the idea of requiring the

⁵⁵ Brivio (2004a).

⁵⁶ European Commission (2003).

⁵⁷ Id.

⁵⁸ Dombey (2004d).

⁵⁹ Id.

⁶⁰ Dombey (2003).

⁶¹ AFX News (2004).

⁶² Geitner (2004).

⁶³ Meller (2004).

company to reveal Windows source code would have caused the Commission to violate international laws governing intellectual property rights, exposing itself to a big lawsuit by Microsoft with potentially disastrous effects⁶⁴. Schaub's arguments convinced commissioner Bolkestein to intervene and convince Monti not to embark on such a dangerous course⁶⁵.

In the meantime, the Microsoft team continued its visits to the European merger task force's offices. Its last offer, accepting in full all the solutions proposed by the Commission beginning in August 2003, provided Microsoft's competitors with access to technical protocols used by the company to link its Windows products for PCs and servers. The company's proposal even permitted inclusion of two competing media players in Windows. A "sensible compromise", the New York Times called it⁶⁶. But Monti said no, arousing the criticism of the most authoritative voices on the other side of the Atlantic. The Wall Street Journal was clear: "Simply put, this ruling is bad for technology, bad for the competitive marketplace, bad for European-US relations, and bad for consumers". What was more, "The EU has now made it very clear that it will put the interests of Microsoft's competitors above the interests of consumers, competition and economic growth"⁶⁷.

For once the New York Times agreed with the city's financial daily: "Mr. Monti's demands would threaten Microsoft's business model, and, more important, harm consumers. The very definition of a computer operating system would essentially be frozen where it is today"⁶⁸.

The London Financial Times compared the antitrust authorities on each side of the Atlantic. "Far from promoting consumer interests, the latest EU order transforms antitrust regulation into a corporate welfare programme for market losers. The

implications will not be confined to the Microsoft case." That means, if the antitrust rules do not change, the result will be "special interests pursuing their favourite antitrust forum in an effort to exercise the most political clout. The real costs: fewer jobs, less innovation, inferior products and higher prices"⁶⁹.

The commissioner did not respond to the attacks. He let them go with obliging elegance. Of course, he knows it is not up to him to handle the next steps, the appeal, the blow-by-blow battle in a court of justice. He will be going back to his nice house in Milan, waiting to choose a new post. His reputation is intact, and sparkles in the little heroes' pantheon. He will diminish, and go into the West, and remain Super Mario.

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