

Grand designs, competition 'by other means' and new Vistas

Dr. Jonathan Fitchen

Department of Law and Criminology, University of Wales, Aberystwyth

Email: jcf@aber.ac.uk

1. The grand design and the complaints of Microsoft's rivals

This paper has been provoked by ideas which were formed in the wake of the regulatory responses of the EU's competition law authorities to Microsoft's development and launch of its new and long-delayed operating system, "Vista". The regulatory responses were themselves a consequence of, inter alia, objections raised by Microsoft's competitors who variously claimed that Vista would either damage or cripple their own software businesses. The complainants represented a wide cross-section of the software industry and comprised: Adobe; Nokia; Sun Microsystems; IBM; Oracle; Corel; Red Hat; Opera; Linspire and RealNetworks.¹ Their complaints all generally related to what they claimed amounted to Microsoft increasing its dominance of the software market: the actual complaints may be broadly summarised as falling into three categories.

- Firstly, it was maintained that Vista's 'Security Center' (sic) would act to 'shut-out' Microsoft's competitors given that various details concerning the system's architecture were originally unknown to Microsoft's competitors.²
- Secondly, it was claimed that Microsoft was indirectly attempting to dominate the internet market by replacing the standard HTML with an improvement or variation upon HTML called XAML.³
- Thirdly, it was argued that Microsoft sought to replace the existing Open Document Format (ODF) with its own Open XML (OOXML) document format which was (unlike the application neutral ODF) designed to run most efficiently only upon Microsoft's own Office applications.⁴

Before attempting to take any of these objections further, it is worth noting that the complaints which have just been summarised are ones which the competition authorities of the EU have sought to address in a manner which is suggestive of considerable procedural informality. As a consequence of this approach, it does not seem to be unreasonable to describe the European Commission as finding itself propelled by both the complaints and its earlier jurisprudence into a dual, and contradictory, role as 'mediator' and also 'interested party'. The lack of formality has meant that there have been no new detailed economic investigations of the relevant markets. The dominance of Microsoft has been assumed, largely it seems from the earlier investigations into Microsoft's media player bundling and forays into the server sector which had already lead to formal Commission findings adverse to Microsoft.⁵ That this 'informal' method of procedure is both unwise, inefficient and possibly even an illegitimate exercise of the Commission's regulatory powers is at the heart of the argument advanced by

¹ See Reuters IT Management News, 'Rivals accuse Microsoft of Bullying tactics', http://news.zdnet.co.uk/itmanagement/0_1000000308_39285666_00.htm (accessed 07/02/2007).

² Particularly Symantec. See 'Microsoft Vista gets criticism before its launching in Europe', <http://www.edri.org/edriagram/number4.18/vista> (accessed 07/02/2007). In response to representations from the European Commission Microsoft subsequently disclosed various details relating to this objection.

³ See International Herald Tribune, 'Rivals Accuse Microsoft before Vista's Introduction', <http://www.ihf.com/articles/2007/01/26/business/vista.php> (accessed 07/02/2007).

⁴ See Reuters IT Management News, 'Rivals accuse Microsoft of Bullying tactics', http://news.zdnet.co.uk/itmanagement/0_1000000308_39285666_00.htm (accessed 07/02/2007).

⁵ See COMP/C-3/37.792, currently under appeal to the Court of First Instance as case T-201/04.

this paper. At this point it is probably as well to indicate that this paper, and its critiques, are principally examined from the perspective of the European Commission's use of competition law and, in particular, Article 82 EC. As will be seen, the author is of the opinion that the European Commission is currently misusing Article 82 EC within the software sector and consequentially failing in the proper execution of its regulatory task.

The reader may well ask, 'Why should the Commission's regulatory response be characterised in such a negative fashion?' There are a number of reasons for such a characterisation, many of which neatly coalesce in relation to a significant but, at least within Europe, seemingly little known potentiality for antitrust and competition laws to be applied so as to actually subvert competition. This potentiality, it will be argued, is very relevant in relation to the computer software sector and is well-illustrated by the disputes concerning the various launches of Vista. Before turning to a detailed consideration of this potentiality it may be useful to elaborate the argument with some competitive contrast by briefly setting out the archetypal role of competition law. A comparison of this archetype with the current reality of the software sector may help to indicate the distinctions between the two and thereafter to set the scene for the later discussion of the potential subversion of European competition law in the software market.

The competition law archetype

At its core, competition law is intended to preserve a certain level and type of competition within a given market. To this end the European Commission has been given extensive powers under Article 81 EC to dismantle and fine cartels and, under Article 82 EC,⁶ to restrain and fine those undertakings which, whilst being possessed of a dominant position within the EU, commit market abuses. This paper is only explicitly concerned with the use of Article 82 EC, abuse of a dominant position, as the complaints made against Microsoft's launch of Vista were all based upon the alleged infringement of this provision.

In the event that Microsoft, or for that matter any other dominant undertaking, should be discovered by the Commission to be abusing a dominant position by attempting to force its competitors out of the European market, it would be incumbent upon the Commission to act to prevent such abuse and to seek to preserve such competition as was necessary to prevent the total monopolisation of the industry. By so acting the Commission would seek to maintain or even increase consumer choice, benefit and hopefully the potential for greater product innovation. Such a positive role for competition law is however predicated upon certain assumptions concerning the nature of the relevant market and, more pertinently, the nature of the competitors within the market subject to the particular forms of competitive regulation.

For competition law to produce the positive effects which have just been outlined it would be necessary for a 'classical' economic market to be dominated, almost to the point of total monopoly, by a given undertaking. Absent such near total dominance there would actually be little chance that a generalised finding of relative dominance would necessarily suffice to allow competition law to easily play its archetypal role to significantly increase consumer choice as outlined above. This is simply because rather than a tendency towards absolute monopoly, most classical markets actually have a tendency towards relative forms of oligopoly. That is to say that a relatively few 'big' undertakings will tend to dominate the market and will tend, for reasons of individual interest, to mirror each other's actions.

Before we consider the market for software within the EU, there are a few important preliminary observations which must first be made. The most important of which is that the market for computer software is most assuredly not an exact example of what has been referred to as a 'classical' economic market. Rather the software market falls into what Posner has called, 'The New Economy'.⁷ That the software market is fundamentally different

⁶ The enforcement application of both articles is currently detailed by Regulation 1 / 2003.

⁷ 'The ... industries that make up what I am calling the new economy differ markedly from most of the ones in which antitrust doctrine developed, and particularly from the production and distribution of traditional physical goods ... [t]he traditional industries are characterised by multiplant and multifirm production (indicating that economies of scale are limited at both the plant level and the firm level, or in

to the markets which caused the formation and development of traditional antitrust and competition law principles is something which should also be at the forefront of our minds. This is not to say that the regulatory task should never employ the older 'tools' and concepts; but only to caution against the assumption of their necessary aptness for the task in hand. Assumptions can be misleading, especially if they are unthinking assumptions. The competitive regulation of the European software market should be preceded by an appreciation that this market is fundamentally different to those which the European Commission has formerly been charged with regulating. In particular the Commission should beware of assuming that seemingly high levels of dominance within the software sector can be equated with the levels of durable market power which one would assume to apply in connection with an undertaking originating from the 'old economy'.⁸

Turning now to the EU software market, the most obvious candidate for the role of the dominant software undertaking would, because of its size, currently fall to Microsoft. So far so good. The archetypal monopoly situation mentioned above seems, thus far, to be born out. It is however when one comes to consider the appropriate classification of the rest of the software industry that matters become more complicated and problematic.

Is it the case that the rivals of Microsoft are either insignificant in size or are teetering on the edge of extinction because of Microsoft's near total dominance and mastery of the software market within the EU? When one considers complainant companies such as Adobe, IBM or RealNetworks such arguments seem difficult to sustain.⁹ The reality is that the market for the supply of software is divided between a variety of companies of varying sizes along something resembling oligopolistic lines. Yes, Microsoft may currently be the biggest if the market is defined in a particular fashion.¹⁰ It is not however immune to competition from those already within the market, nor is the market in question closed to new entrants, for example, the provision of a 'Googleised' version of 'Office' like applications potentially represents a very significant threat to Microsoft's current level of dominance within the business software sector. The recent emergence and current ubiquity of Google, despite the presence of undertakings such as Microsoft, is a good example of the speed at which matters may change within the New Economy.

In other words, we should be slow to assume that because Microsoft is currently found to be 'dominant' it must therefore follow that the other players inside the market are either powerless, or, somehow because of their opposition towards Microsoft therefore motivated by an altruistic desire to improve the lot of the consumer. The bottom line for such companies is to improve their own market shares and to become the new and improved 'Microsoft' - just as Microsoft eventually acquired much of the market share of IBM. From this more realistic appreciation of the nature of the European market for software it is possible to proceed to address the latent potentiality, adverted to above, this being that competition law itself may be applied so as to produce anticompetitive and generally deleterious effects upon a given market.

other words that average total costs are rising at relatively modest output levels), stable markets, heavy capital investment, modest rates of innovation, and slow and infrequent entry and exit. The new-economy industries tend to lack these features. They are characterised instead by falling average costs (on a product, not firm basis) over a broad range of output, modest capital requirements relative to what is available for new enterprises from the modern global capital market, very high rates of innovation, quick and frequent entry and exit, and economies of scale in consumption (also known as 'network externalities'), the realisation of which may require monopoly or interfirm cooperation in standards setting'. R. A. Posner, *Antitrust Law*, (2001) (2nd ed Chicago) at p.245-6.

⁸ For example, the regulatory assumptions applicable to a producer of a valuable chemical having a market share of 90% should not unthinkingly be equated with a software producer currently blessed with a similar market share.

⁹ This is of course to say nothing of the existence of 'left-field' alternatives such as Linux based programmes which appear to thrive despite conditions which are frequently represented to be inimical to such enterprises.

¹⁰ 'Not until 1998 did Microsoft's software sales exceed IBM's. In 1999 Microsoft became the most valuable company in the world by stock-market valuation, but its total revenues (\$19.7 billion) were dwarfed by IBM's (\$84.4 billion)', p. 232, 'From airline reservations to Sonic the Hedgehog: a history of the software industry', M. Campbell-Kelly 1st ed (2003 MIT Press).

2. Competition 'by other means': Anticompetitive effects produced by competition laws.

That competition law is capable of producing anticompetitive effects is something which has been widely acknowledged within the literature of this subject for a number of years.¹¹ The typical focus of this potentiality has however generally been located within the realm of private US Antitrust cases which, it has been argued, may, if either opportunistic, spiteful, or otherwise vexatious, produce the unfortunate effect of retarding competition and promoting stagnation within a given market. When might we expect to detect such a possibility? A quotation from Baumol & Ordover may help to elucidate matters:

'Whenever a competitor becomes too successful or too efficient, whenever his competition threatens to become sufficiently effective to disturb the quiet and easy life his rival is leading, the latter will be tempted to sue on the grounds that the competition is "unfair." Every successful enterprise comes to expect almost as a routine phenomenon that it will sooner or later find itself the defendant in a multiplicity of cases. It is an enchanted topsy-turvy world in which vigorous competition is made to seem anticompetitive and in which "fair competition" comes to mean no competition at all'.¹²

It is the contention of this paper that if one substitutes the word 'complain' for the word 'sue' in the quotation above, one has exactly understood something basic in relation to both the motivation for the Vista complaints – which essentially amount to the surreal claim of 'Predatory Innovation' – and the inappropriate nature of the regulatory responses of the European Commission in continuing to entertain such opportunistic and rent-chasing complaints.¹³

How is the consumer injured by Microsoft's attempted improvement and even replacement of HTML? How does the adoption of a new version of an ODF reduce or otherwise necessarily injure consumer choice? Why should Microsoft have been required to disclose details of its security system kernel so as to effectively give its competitors within the computer security sector a 'free-ride'? The answers to such important questions have not been clearly provided by the informal regulatory responses attempted by the European Commission in relation to the Vista complaints.¹⁴ Accordingly, the suspicion remains that the fact that the subject of the complaints was Microsoft was entirely sufficient from what appears to be the worryingly uncritical perspective of the European Commission.¹⁵

In the event that the argument above is accepted, the European Commission may actually have colluded, albeit unwittingly, with Microsoft's competitors to stifle and retard the innovative aspects of Vista. The advancement of such an argument is quite shocking. Not simply because of the possibility that what is sometimes reputed to be the modern archetype of an anticompetitive company should itself have been a 'victim' of anticompetitive behaviour involving a competition law authority, but because of the seeming commercial naivety of the

¹¹ See, inter alios, R. A. Posner, *Antitrust Law: An Economic Perspective*, (1976) (1st ed Chicago) at p. 228, and the updated and revised second edition of this text, R. A. Posner, *Antitrust Law*, (2001) (2nd ed Chicago) at p. 274 -5; E. A. Snyder & T.E.Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, (1991) 90 Mich. L.Rev. 551; W.J. Baumol & J.A.Ordover, *Use of Antitrust to Subvert Competition*, (1985) 28 J.L. & ECON 247.

¹² W.J. Baumol & J.A.Ordover, *Use of Antitrust to Subvert Competition*, (1985) 28 J.L. & ECON 247 at 252.

¹³ The reader may be more familiar with the phrase 'predatory pricing' which refers to the practice of cutting prices below marginal cost levels so as to drive one's competitors out of the market, thereafter to allow the predatory undertaking to raise its prices to reap super-profits. The term 'Predatory Innovation' is used by Baumol & Ordover at p252 above.

¹⁴ In part this is because the complainants and the regulator have used Article 82 EC. This provision being currently out-of-step with the European Court imposed requirement that proceedings under either Article 81 EC (or the Merger Regulation) be justified and rational in terms of their economic impact: thusfar Article 82 EC has seemingly escaped this requirement.

¹⁵ See J Appeldoorn, *He Who Spareth His Rod, Hateth His Son? Microsoft, Super-Dominance and Article 82 EC*, E.C.L.R. (2005), 26 (12), 653-658.

European competition law regulators when confronted by competitors antagonised by an innovative product. After all, is it not the case that one of the goals of competition law is to encourage innovation and progress within any given market?

'Predatory Innovation' in the software sector

The concept referred to above as 'Predatory Innovation' is, at one level, an almost entirely surreal example of 'abusive' anticompetitive behaviour by a dominant undertaking contrary to Article 82 EC. In essence the mischief consists of 'rocking-the-boat' and thereby inconveniencing one's business rivals by means of a product innovation which they have yet to understand or adopt.

The surreal aspects of predatory innovation arise from the fact that the 'abuse' which the predatory undertaking commits takes the form of the technological development of a given product so as to move its development beyond the point at which its competitors can easily and immediately continue to directly compete. For example, the development and patenting of the MP3 music format and player was particular to one European undertaking,¹⁶ did the members of the music industry run to the Commission maintaining that this innovation was 'predatory' in the sense that it sought to drive them out of their existing music based businesses? Of course not. Such a claim of 'predation' would be transparently ridiculous. The true nature of such complaints of the competitor undertakings could neither be camouflaged by altruism nor otherwise disguised by asserting a general concern for the interests of the consumer. Why then is it different within the software sector?

It is tempting, having illustrated it, to dismiss the concept of predatory innovation as inherently ridiculous; however, to do so would be to miss an important and telling connection between this astonishing concept and the current justification for the involvement of the European Commission in its attempts to regulate competition within the European market for software.

The concept of predatory innovation as a consequence of the current involvement of the European Commission in the European software market.

The development and marketing of innovative new computer software protected by intellectual property rights by market leaders such as Microsoft has a latent potential to 'lock-out' the software of those who would otherwise be its competitors. Such a lock-out potential raises commercial concerns amongst Microsoft's competitors and additionally appears to raise regulatory concerns, not only as a consequence of lobbying, within the competition law authorities of the US and the EU. This paper does not seek to question the concerns of the competitors, which are of course (as a matter of business) legitimate; however, the proper response of the regulatory authorities is altogether a different matter. From the particular regulatory perspective adopted by the EU's competition authorities it seems that it is possible to understand that product innovation by an undertaking large enough to be classed as possessed of 'dominance', such as Microsoft, must be viewed as a de facto form of market abuse if the undertaking will not consent to share its intellectual property rights in a manner of which the regulator approves.¹⁷

The regulatory assumptions underlying such a perspective are themselves worthy of consideration. To justify such innovatory actions as 'abuses' it is necessary for the regulators to believe that their regulatory task consists of the preservation of that which they perceive to be the software market (as defined at some unspecified point in time located in the past) in either aspic, formaldehyde, or some yet more formidable substance, so as to achieve and maintain a given level of 'competition'. This is not to say that the Commission's assumptions require that all progress should be resisted, but only that innovations should, broadly speaking, be 'shared' or somehow 'equitably' distributed, despite the existence of the developer's intellectual property rights, amongst the would-be members of a given industry. It is almost as if the Commission is attempting to impose a crude 1970's version of something

¹⁶ Fraunhofer Gesellschaft.

¹⁷ See S. Vezzoso, The Incentives Balance Test In The EU Microsoft Case: A Pro-Innovation "Economics Based" Approach, E.C.L.R. (2006) 27 (7), 382-390.

vaguely reminiscent of old style 'harmonisation' upon the European software industry. From the perspective of the Commission it seems that the correct regulatory balance can only be struck by insisting that the 'dominant' undertaking either distributes or otherwise 'neuters' 'its' innovation within the market. At the risk of appearing to be facetious, the EU's regulatory authorities appear to be instructing the dominant firm to 'play nicely' and let the other undertakings in the market do as they will with the dominant undertaking's shiny new toys.

As will be seen below, the author is not convinced that the European Commission's chosen regulatory approach to the software sector is either efficient or effective, however, in the meantime it will suffice to note again that at the moment the European Commission is awaiting the outcome of appeals concerning its earlier formal decisions by which it found Microsoft to be in breach of Article 82 EC by reason of bundling its media player with its Windows operating system, and, in relation to its behaviour in connection with the market for servers.¹⁸ Both decisions were predicated upon the ideas that the European Commission could, in response to complaints from Microsoft's competitors, a) identify the 'abuse' implicit in the 'illicit' furtherance of Microsoft's market domination as a consequence of its refusal to surrender its intellectual property¹⁹, and then, b) render decisions, orders and impose fines which have the effect of cancelling out such abuses.²⁰ The outcome of the appeals against these decisions may provide some guidance as to the accuracy of each contention, however, for the present at least it appears to be plain that the Commission is convinced that because software protected by intellectual property rights *could* be designed to foreclose competition, it should therefore continue to attempt to police the software market by formal and less formal means so as to try to prevent or dismantle any such 'innovation barriers' to what it appears to consider to be 'effective' competition.

One unfortunate consequence of explicitly or implicitly equating innovation with anticompetitive abuse: 'defensive' software development.

If the abovementioned rationale of the Commission for its forays into the software market is accepted, and formal and informal claims which are effectively based upon predatory innovation are to be entertained, this places the would-be software innovator in an extremely invidious position. Innovation which antagonises other members of the software industry will 'rock-the-boat' and probably generate complaints of anticompetitive conduct which Europe's competition authorities appear to be only too willing to take seriously. Such complaints may, if either investigated or upheld, lead to outcomes or orders that restrict or otherwise dissipate that which was truly innovative, and hence profitable, concerning the software in question. Assuming that the 'dominant' developer has no desire to become entangled in such potentially cumbersome proceedings, his or her rational response will be to tone-down the level of innovation involved in the creation of any particular piece of software for fear of otherwise being seen to 'rock-the-boat': in other words, the development of computer software subject to such anti-innovation regulatory interventions will increasingly become 'defensive' and 'tacitly collusive' in relation to the less innovative participants within the market. The term 'defensive' is used here in a sense analogous to the sense in which it has been employed to describe the practice of medicine by doctors who are frightened of incurring legal liabilities in the course of their medical practice.

Defensive medicine is primarily concerned with the avoidance of legal liabilities which might otherwise be incurred in the course of treating a patient. For example, a doctor who encourages a woman to give birth by way of a caesarean section rather than the more traditional method because she / he is aware that there are fewer immediate risks of litigation arising from a delivery by caesarean, is engaged in the practice of defensive medicine.

¹⁸ See COMP/C-3/37.792, under appeal to the CFI as case T-201/04, the hearings are completed and the decision is expected imminently.

¹⁹ Which in itself is to turn Article 82 EC on its head and make the acquisition of dominance the 'abuse'.

²⁰ Whatever may be the outcome of the appeals, it is at least clear that the Commission's order that Windows be made available without a bundled media player was spectacularly unsuccessful in practice. Consumer disinterest in the reputed competitive 'benefits' of the unbundled version of Windows and outright hostility from the retail sector having, by all reports, rendered the Commission's order effectively null. See J. Oates, How many copies of XP without media player have you seen?, Reg Developer, http://www.regdeveloper.co.uk/2006/04/24/ms_trial_first_morning/ (accessed 31/03/2007).

Medically speaking there are a number of problems associated with such defensive practices; the concern not to be sued inevitably places the well-being of the patient second to the doctor's liability concerns, the medical advice provided may well therefore not be in the best interests of the patient, and, the logical consequence of such defensiveness will be the atrophication and gradual abandonment of necessary and useful medical skills simply because they are deemed to carry a disproportionate risk of litigation.²¹

If transferred to the context of the software sector such defensive concerns would principally be manifested within the EU by the restriction of genuine innovation and those conceptual leaps by which such progress is usually characterised. After all where is the incentive to innovate and patent if one's discovery carries no reward additional to everyday returns? It is of course not likely that the global software market will be so easily encouraged by European practices to adopt a defensive posture in relation to the innovation of software.²² Thus, assuming the current European regulatory position to be constant, the consequence for the industry will be that the marketing of software within the EU will effectively be subject to those additional costs necessary to off-set such peculiarly European regulatory concerns.

It is difficult to see any particular benefits which such regulatory concerns can cause to accrue to either the consumer, the software design industry or the European market for software as a consequence of provoking such defensive trends within the European market. It is true that over the short term the less innovative members of the software industry might be provided with the means to 'keep-up' with their more innovative rivals, however such a tenuous benefit is difficult to justify or even to off-set against the efficiency and consumer losses arising from the general retardation of the marketing and development of innovative software within the European Union. To put matters simply, why should the regulatory authorities of the European commission seek to 'tax' the industry and the consumer to preserve the existence of second and third-rate software manufacturers? What is the advantage which flows from this regulatory attempt to halt 'evolution' within the European software market?

3. New Vistas

The foregoing sections of this paper have criticised the formal and informal regulatory responses of the European Commission in relation to Microsoft's development of a new, and to some extent, innovative product: Vista. What then should be the regulatory response of the Commission when it is confronted by complaints generated by the next innovative software product, or 'new vista'? The final part of this paper will suggest and consider an alternative regulatory approach to that which is currently in vogue.

The regulatory responses of the European Commission, which have been the subject of this paper, were all based around the duty to enforce European competition law under articles 81 and 82 EC. However, neither provision was drafted with the intent of permitting the Commission to micro-manage *any* given European market. However, such micro-management is a fairly exact description of what the Commission currently appears to be attempting to undertake within the European software industry. That such a regulatory exercise employing Articles 81 and 82 EC is difficult should come as little surprise. That such a regulatory exercise is potentially hazardous to both competition and innovation within the European market may appear to be more surprising, however, as has been shown above, each possibility is real.

This paper proposes that the Commission should abandon its attempts to micro-manage the European software industry by means of competition laws, and in particular Article 82 EC, which were never designed for such a purpose. The distortion of the competition laws necessary to allow the attempted regulation of the industry is not only dubious as a matter of law but also directly involves the Commission as a 'player' within the given 'competitive' dispute. Such involvement is inimical to the effective and legitimate performance of a

²¹ An ironic consequence of such atrophication is that the unpracticed skills thereby become even more likely to generate mistakes which are then punished by litigation.

²² However, if antitrust laws are used in a similar fashion in the US, this unfortunate outcome could become more likely.

regulatory task. The Commission is currently acting not only as the investigator and the decision maker in a given cause, it is also acting as the maker of a highly interventionist and frankly partisan regulatory policy which has been formed in the wake of complaints made not by consumers but by Microsoft's business rivals. Such a collision of a partisan regulatory policy with the distortion of its existing regulatory tools is enough to raise serious concerns as to the current performance of the European Commission as a competition regulator within the European software market.

It has been suggested above that a significant factor in the formation of the Commission's current attitude to the activities of Microsoft has been the fear of the potential for an innovative piece of software protected by intellectual property rights to 'lock-out' other would-be participants from the industry, thereby maintaining and increasing the dominance currently enjoyed by Microsoft. Is this fear both valid and an excuse for the dubious means employed to achieve the seemingly laudable end of a more competitive software market for Europe?

The lock-out fear

This fear has been advanced as the main justification for the peculiarities of the current policy of the Commission towards the regulation of competitive behaviour within the European software industry. However, this fear begs a basic question: is the fear real or imagined? Is there evidence that Microsoft seeks to engulf Adobe's pdf? Is there evidence that Microsoft wishes to present a new operating system which essentially locks the user into only Microsoft products? As Microsoft does not make many of the programs of choice for those who are already active software consumers, is it in Microsoft's best interests to equate an investment or upgrade to Vista with the abandonment of all pre-existing non-Microsoft computer programmes?

The answer which this paper would offer in relation to the foregoing questions is a resounding, 'No'.²³ There are practical alternatives to Vista. There are even practical Microsoft based alternatives to Vista. For as long as there are such alternatives even a company as large as Microsoft is obliged to proceed cautiously with its product launches. If Vista was truly designed to operate as its most extreme critics would have us believe, it would be very likely to join other unsuccessful product launches such as the 'Ford Edsel' and 'New Coke' within the 'Black Museum' of marketing disasters committed by seemingly 'all-powerful' and dominant firms upon either indifferent or hostile consumers. It is worth remembering that whilst it is possible to effectively foist, at the point of purchase, a copy of Vista upon a member of the public buying an individual PC, it is altogether a different order of legerdemain to achieve the same result in relation to the purchase or upgrading of operating systems within the commercial sector.

The means to an end

Possibly though it could be argued that attempts to establish the veracity of the lock-out fear misses the relevant point. There could be a line of regulatory reasoning which would concede, and even tolerate, fundamental weaknesses in the rationale of the lock-out fear by reason of the fact that the regulatory end which was thus served, i.e. restraining the dominance of Microsoft, justified the use of even dubious means against such a dominant and uncooperative undertaking. Such lines of reasoning can work particularly well with what is currently understood to be Article 82 EC. The reason for this alleged synergy between the argument that the ends justify the means and Article 82 EC is attributable to what is currently the lamentable condition of the Article 82 jurisprudence. The biting point of Article 81 EC is

²³ A very basic point is that the very long development period which was attached to Vista was, in part, a consequence of the need to ensure that the new operating system be sufficiently backwards-compatible to allow earlier programmes – authored by Microsoft and authored by others – to continue to function when Vista is installed. Such actions do not seem to be particularly indicative of the lock-out intent which some would claim to deduce from the launch of Vista. See also the highly sceptical magazine article by S. Liebowitz & S. Margolis, Chicken Little Comes Home To Roost: a Misplaced and Flawed Theory Bedevils Microsoft, Upside, Sept 1995 (this article is available from Microsoft – which tends to disclose the tenor of the piece – at <http://wwwpub.utdallas.edu/~liebowit/upside.html>).

directly related to the lot of the consumer.²⁴ In its turn the European Court of Justice has, since the 1990s, required that Commission decisions upon Article 81 EC be based upon sound economic data which relates back to the interests of the consumer.²⁵ The Court of First Instance has continued this necessary trend by enforcing similar requirements of the Commission in relation to the operation of the Merger Regulation.²⁶ The jurisprudence concerning Article 82 EC has, however, largely escaped this process, there being no exemption from this provision and hence a less obvious linkage directly to the lot of the consumer. Thus Article 82 EC is, given dominance, capable of being applied to what are essentially theoretical or conceptual examples of abusive conduct within a given market: for example, the market abuses supposedly 'threatened' by the launch of Vista or even more innovatory software.

4. Conclusion.

Leaving on one side the cases which are currently pending before the CFI, it may be worthwhile to note that Article 82 is currently undergoing an internal process of examination which may possibly lead to its reformulation along the more objective lines of Article 81 EC.²⁷ Should such an outcome transpire it would hopefully mark the end of the European Commission's attempts to engineer the market for software in Europe in accordance with either the selfish interests of Microsoft's competitors, or, in relation to its own dubious preconceptions concerning the proper conduct of an undertaking possessed of intellectual property rights. If we are really fortunate, it may be that the new competitive vista will be one in which the interests of the consumer rather than the interests of either the regulators or the competitors will predominate.

²⁴ Exemption from the illegality generally imposed upon cartels requires that some benefit to the consumer be demonstrated.

²⁵ See the change in tone from the earlier decision in the Article 81 EC Dyestuffs case (Case 48/69 ICI v Commission [1972] ECR 619) to the later Article 81 EC decision in Woodpulp (No 2) (Case C-89/85 [1993] ECR I-1307) where the Commission's poor economic investigation, and astonishing failure to notice the presence of an up-stream oligopsony, lead to the quashing of most of its decisions.

²⁶ This trend of requiring good economic data and its relation to consumer interests has been continued by the Court of First Instance in relation to the merger regulation, witness the quashing of various Commission decisions concerning mergers (see, inter alia cases T-5/02 Tetra Laval v Commission [2002] ECR II-4381 (which quashed the prohibition decision) and Tetra Laval v Commission [2002] ECR II-4519 (which quashed the order of divestiture).

²⁷ Such a reform along rational economic lines has been widely supported: see J. Vickers, Abuse of Market Power, (2005) 115 (504) Economic Journal 244, B. Sher, The Last of The Steam-Powered Trains – Modernising Article 82, [2004] 5 E.C.L.R. 243. See also the report commissioned by DG Comp itself from the Economic Advisory Group for Competition Policy, available via http://ec.europa.eu/comm/competition/publications/studies/note_eagcp_july_05.pdf