



SOME COMMENTS ON RUDOLPH PERITZ'S AND ROBERTO PARDOLESI'S VIEW OF THE EUROPEAN MICROSOFT CASE

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Of course I have no time to enter into the details of the case, although it would be quite challenging for me. Since quite diverging views were expressed by the two discussants, I just want to highlight a couple of issues, mostly addressed to the students that came to this Seminar.

First, most of the arguments that Professor Pardolesi has brought to your attention are referred to technical aspects of the Commission's scrutiny of the case, such as the way in which the Commission assessed the facts of the case, how the markets were defined, how the shares were measured, whether there was going to be more or less competition in this or that specific area. Now, this is something that has to be assessed really looking at the facts. However, there is something else that might prove important for the audience and in particular for students, namely the principles that the case might have applied and the consistency of these principles with models of interpretation that you have studied as well as with doctrines and theories that you well know. Now, here a crucial dilemma occurs, since from the States - where the Chicago school is still dominant - the representative of a

highly deserving minority has come here, and had said to us that after all Chicagoans exhibit a sort of static methodology, due to which consumer welfare and the role of innovation are considered and assessed on the basis of a quite shortsighted view, which does not take into account the longer-term effects of what happened. Adopting a dynamic methodology might also allow us to consider whether something that we do not prohibit today might produce a substantial impact tomorrow, significantly stifling competition. I haven't heard professor Pardolesi directly and bluntly challenging this view. And this is interesting. However, Roberto said something that is relevant in relation to this basic point. If we look at the medium term, while we are deciding on a past conduct – since this is an abuse of dominant position – aren't we regulating future markets instead of deciding on what has already happened? The regulation of future markets is something that we necessarily face when we deal with mergers, because mergers have to be assessed on the basis of the expected impact on future markets; but this is not the case for cartel agreements and therefore abuses of dominant position. So, how important is it to be very careful with facts when we open this dynamic perspective that lead us to decide on the future, and not on the past? In my opinion, this might be a sort of common background for our two discussants today.

The second point that might be relevant for our discussion is represented by a question that was raised by professor Peritz and has remained unanswered: is by the way Windows an essential facility? Of course you have already a negative answer, but several people think that it tends to

become an essential facility. Indeed, only if it were an essential facility, certain very heavy obligations could be imposed upon it, because only an essential facility necessarily is subject to mandatory disclosure, sometimes also of compulsory licensing, which is quite a heavy kind of remedy. Do we have elements to conclude that at the moment Windows is an essential facility, provided that it is a system, not just a simple commodity? I am not quite sure. After all, also cars are systems, but no one would dare to say that a car is an essential facility: a Bill Gates of automobiles might have invented the single car, the unique car, but anyhow, this did not occur. As a result, we have to keep in mind the distinction between obligations and burdens that can be allowed in those very exceptional cases where an essential facility exists, and the rest of the markets, where certain limitations should in principle be excluded. Once again, this might be yet another common background between our two discussants.

Well, this is for the next debate: it was really enjoyable for us to have the passion of Roberto so American against the post-Chicago approach of Rudolph, so European. This is really helpful for the Transatlantic relations, in this difficult time for the relationship. And I wish to express our gratitude to the Law and Economics Lab that prepared this meeting. I am sure you will prepare many other meetings in the future because, let me tell the students: there are several areas that you can choose for your future, but **if you want to have intellectual gratifications as well as monetary gratifications, law and economics is your field!**