Refusals to Deal, Tying and Standard-Setting in the EU and U.S.

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Dominant Firm - Refusal to Deal Standards

- In *Microsoft*, CFI reiterated objective test:
  - Concerned with protecting competition in *neighboring* market:
    - Product/service must be indispensable to competition in neighboring market
    - Refusal must be “liable to” or “likely to” eliminate effective competition in the neighboring market
  - Prevention of new product analysis emphasized “consumer harm”*
  - Allowed for business justification defense
  - Did not expressly require prior course of dealing

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* Appears to apply only with regard to IP licensing

Tying-Leveraging

- CFI endorsed broad view of foreclosure
  - Focus on *competitive advantage* enjoyed by Microsoft:
    - Ubiquity of Media Player
    - Competitors unable to position their products exclusively with PC manufacturers
  - Are competitors entitled to equally advantageous distribution?
- Recent US enforcement trend is to treat technology ties with caution – recognizing potential efficiencies

Comparison of Remedies

- CFI adopted strict remedial measures:
  - Two way interoperability protocol for servers
  - Non-Media Player version of OS required
- U.S. remedy less demanding:
  - One way communication
  - Limitation on “favoring” home product in practical applications

What to Make of the Differences?

- Isolated case or broader trend?
- Reflective of a truly different approach?
- Will this hurt relations between US and EC enforcers?
- Are we in a “most aggressive enforcer” paradigm for international firms?

Standard-Setting

- In US, general recognition of potential benefits of standard-setting in technology industries
- Rule of reason treatment in most settings
- Patent Ambush
  - FTC cases vs. Dell, Rambus
  - Complex issues – What is RAND?
- Ex Ante Disclosure
  - Potential antidote to Ambush problem
  - General recognition of procompetitive aspects by FTC, DOJ
    - Majoras, Pate speeches
    - DOJ Business Review
  - Desire for more certainty from SSO community

Standard-Setting

Advice:

- Be able to demonstrate procompetitive aspects
- Minimize opportunity for anticompetitive conduct/effect