Case note on T-201/04, Microsoft v Commission, Judgment of 17 September 2007

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Case T-201/04, *Microsoft* v. *Commission*, Judgment of the Grand Chamber of the Court of First Instance of 17 September 2007.

1. Introduction

The recent, long-awaited and high-profile, CFI judgment in the case of *Microsoft* – which was not appealed to the ECJ[1] – represents a victory for the Commission's approach to the application of the EC competition rules to dominant companies operating on high technology markets. It is extremely significant for the application of Article 82 EC to refusals to disclose technological standards covered by intellectual property rights regarded by competitors as "indispensable" to operate on the market. Moreover, it reaffirms the existing case law governing tying, without, however, directly addressing the specific issues raised by cases of technological integration in a market characterized by network and learning effects.[2]

Initiated in 2001, the Commission's case against Microsoft added to the antitrust scrutiny under which that company had been for a number of years in the US. Central to the bundle of allegations made by the US Department of Justice was that Microsoft's tying of its own internet browser (Internet Explorer) to the Windows PC operating system (hereinafter: "OS") would have allowed it to extend its monopoly power on the OS market to that for internet browsers, to the detriment of existing competitors.[3] Although this case was eventually settled out of court, the decision of the District of Columbia Court of Appeals[4] was extremely significant since it advocated a move from the "modified per se approach" hitherto applicable to unlawful tying under Section 1 of the Sherman Act[5] to the application of a "rule of reason" standard.[6] The court justified its stance in the light of the need to take into proper account the "sui generis" nature of the software market and especially the consumer ben-

1. See also "Commission welcomes CFI ruling upholding Commission's decision on Microsoft's abuse of dominant market position", 17 Sept. 2007, MEMO 07/359.

2. *Inter alia*, Geier, *United States* v. *Microsoft Corporation*, 16 *Berk. Tech. L. J.* (2001), 297 at 302.

3. *Inter alia*, Apon, "Cases against Microsoft: similar cases, different remedies", 28 ECLR (2007), 327 at 327–328.

4. *US* v. *Microsoft*, (1998) 147 F. 3d 935.

5. See, *inter alia*, *Jefferson Parish Hospital District No 2 et al.* v. *Hyde*, (1984) 466 US 2, 104 S. Ct. 1551, pp. 1556–1558.

6. *US* v. *Microsoft*, (1998) 147 F. 3d 935, pp. 950–951.

efits stemming from the technological integration of new features in an OS, albeit a dominant one.[7]

In the EU, the Commission started proceedings in respect of two distinct allegations of anti-competitive conduct. First, a number of Microsoft's competitors complained that, by refusing to disclose sufficient interface information to independent producers of workgroup server OS, Microsoft had been pursuing a strategy to drive them out of that market by exploiting its near monopoly on the PC OS market. And second, Microsoft was accused of having illegally tied its Windows Media Player software to its dominant PC OS and, consequently, due to its overwhelming dominance on the PC OS market, of leveraging its dominant position to the market for media player software. It was alleged that by offering WMP pre-installed on all Windows-operated PCs, which accounted for above 95 percent of worldwide machines, Microsoft was availing itself of a privileged channel of distribution for its media player facility which was not available to its competitors on the media player market. As a result, it was restricting the freedom of choice of consumers as to which media player to employ, with detrimental effects for competing software providers.[8]

The case was considered of utmost importance, due to the strategic role of the market for operating systems in the development of a global market for information technology and e-commerce. Speaking about the allegations made against Microsoft, the then Commissioner for Competition, Mario Monti, stated:

> "Server networks lie at the heart of the future of the Web and every effort must be made to prevent their monopolisation through illegal practices. The Commission also wants to see undistorted competition in the market for media players. These products will not only revolutionise the way people listen to music or watch videos but will also play an important role with a view to making Internet content and electronic commerce more attractive. The Commission is determined to ensure that the Internet remains a competitive marketplace to the benefit of innovation and consumers alike."[9]

The Commissioner's statements, made at the time administrative proceedings were started, demonstrated the strong willingness of the EU authorities to keep a "watchful eye" on Microsoft so as to prevent its dominance on the PC OS

7. Id., pp. 951–952, 954. See also *US* v. *Microsoft*, 253 F.3d 34, pp. 96–97.

8. "Commission opens proceedings against Microsoft's alleged discriminatory licensing and refusal to supply software information", Press Release IP/00/906, 3 Aug. 2000.

9. "Commission initiates additional proceedings against Microsoft", Press release IP/01/1232, 30 Aug. 2001.

market extending to neighbouring markets and therefore dampening any existing competition in the IT industry.[10]

After a brief outline of the Commission Decision, this case note will examine the judgment of the CFI in *Microsoft*. With respect to the refusal to license interoperability information, it will be shown that the CFI judgment raises relevant questions concerning the interpretation of the condition that the information be "indispensable", the "new product" requirement and the concept of "objective justification".[11] Having regard to the assessment of abusive tying, this note will argue that the CFI's approach appears to have overlooked the circumstance that Windows Media Player could "co-exist" with software supplied by Microsoft's competitors and performing the same function, and will suggest that this approach may not be entirely suitable to the assessment of forms of technological integration that are commonplace in new economy markets. In conclusion, the case note will assess the more general issue of whether the position adopted in the judgment constitutes the appropriate response to the need to foster innovation and thus to provide better-quality products to the benefit of consumers in high technology markets.

2. Factual and legal background: the *Microsoft* decision

The 2004 *Microsoft* decision[12] has been widely debated[13] and the limited scope of this work does not allow for its detailed consideration. The Commission found that firstly, Microsoft had unlawfully refused to disclose – or, more accurately, had stopped disclosing[14] – interoperability information to independent suppliers on the separate market for work-group server OS; secondly, it

10. Apon, op. cit. *supra* note 3, at 336.

11. Cf. Case C-418/01, *IMS Health Co GmbH & Co* v. *NDC Health GmbH & Co KG*, [2004] ECR I-5039. For commentary, see, *inter alia*, Ong, "Building brick barricades and other barriers to entry: abusing a dominant position by refusing to licence intellectual property rights", 26 ECLR (2005) 215.

12. Commission Decision of 24 March 2004, notified under document number C (2004)900, Case COMP/C-3/37.792 – Microsoft, Decision 2007/53/EC, O.J. 2007, C 32/23. This Decision as published in the O.J. includes only a summary of the infringement, remedies and fines. A non-confidential version of the full text is available through the Commission website.

13. See, *inter alia*, Pardolesi and Renda, "The European Commission's case against Microsoft: Kill Bill?", 27 W. Comp. (2004), 513; Leveque, "Innovation, leveraging and essential facilities: Interoperability licensing in the EU Microsoft case", 28 W. Comp. (2005), 72; Gerardin, "Limiting the scope of Article 82: what can the EU learn from the US Supreme Court's judgment in *Trinko* in the wake of *Microsoft*, *IMS* and *Deutsche Telekom*?", 41 CML Rev., (2004) , 1519. Cf. Vezzoso, "The incentives balance test in the EU Microsoft case: a pro-innovation", economic-based approach?", 27 ECLR (2006), 382.

14. Commission Decision, *supra* note 12, paras. 573–75; see also paras. 578–583.

had illegally tied its Windows Media Player facility (hereinafter: "WMP") to its operating system and, as a result of the ubiquity of its Windows OS, had impeded independent manufacturers of analogous software to enter into and viably compete on the market. (Decision, paras. 793 et seq. and 844–848).

With respect to the refusal to disclose interoperability information, the Commission argued that, given Microsoft's dominance on both the PC operating and the work group server OS market and the "strong commercial and technical associative links" between the two markets, the refusal to provide the necessary information to design compatible work group server OS with Window's own architecture for network servers risked eliminating competition from that market by preventing independent software providers developing software that could "seamlessly integrate" with Microsoft-run servers (Decision paras. 541, 572, 586, 665, 692–694).

As regards the allegation of abusive tying, the Commission rejected the view that bundling WMP with Microsoft Windows OS constituted a case of technological integration giving rise to a "new product" and found that, by doing so, Microsoft had attempted to extend its near-monopoly position on the market for PC OS to the neighbouring market for media players. Although WMP was available to customers at no extra charge and individual users could choose not to run the application and instead employ a competing media player, the mere fact that Windows OS was not available "unbundled" amounted to "coercing" "customers or suppliers of complementary software and content" into adopting WMP "at the expense of competing unbundled products" (Decision paras. 803–806, 811, 830–832). The Commission concluded that, because of the ubiquity of Microsoft's OS, WMP would become the "platform of choice for complementary content and applications", without any countervailing competitive restraint (Decision paras. 843–844, 860–866). As a result, it imposed a fine of Euro 497 million on Microsoft and, in order to bring the infringement to an end, ordered it to disclose to its competitors the interoperability information necessary for the supply of compatible work group server OS (paras. 998 et seq.). It also required the company to offer an "unbundled" version of Windows, i.e. a version of the OS without its own media player (paras. 1011 et seq.).[15]

To oversee compliance with these obligations, the Commission desired the appointment of a "Monitoring Trustee", chosen from a list of potential candidates suggested by Microsoft and subject to requirements regarding ability to discharge the functions outlined in the Commission's mandate (Decision, para 1043 et seq.). The Trustee was to be primarily responsible for issuing opinions

15. See also "Commission concludes on Microsoft investigation, imposes conduct remedies and a fine", Press Release IP/04/382, 24 March 2004.

on whether Microsoft had fulfilled its obligations under the Decision, either *proprio motu* or upon request from the Commission or from a third party. He was also entrusted with dealing with individual complaints as far as possible informally or through an ad hoc procedure.[16] To discharge his tasks the Trustee enjoyed the power to obtain access to documents retained by Microsoft, which would be under a duty to cooperate with these inquiries, unless it believed that handling confidential information would adversely affect its legitimate interests.[17] It was incumbent on Microsoft to finance the establishment and the functioning of the Monitoring Trustee, whereas the Commission oversaw the Trustee's compliance with its Mandate and Work Plan.[18]

The 2004 Decision attracted significant criticism.[19] Microsoft brought an application against the Decision, and also lodged an interim application seeking the suspension of its effects.[20] The interim application failed on the basis of lack of "urgency", but the CFI already highlighted key issues for reconsideration at the merits stage, such as whether the interoperability information sought by Microsoft's competitors could be considered "indispensable", whether the refusal to disclose it could prevent the emergence of a "new product", as outlined by the relevant case law, and whether the requirement of "objective justification had been established by the applicant.[21] As regards the allegation of abusive tying, the interim order appeared to be sceptical of the Commission's conclusions that, given the "indirect network effects" characterizing the industry, the market for media player would eventually "tip" in favour of WMP.[22]

The judgment on the merits emerged as a turning point not only because it tests the approach adopted by the Commission *vis-à-vis* the allegations against Microsoft, but also for its implications for more general issues concerning the interpretation of Article 82 EC as regards refusal to license and tying.

16. Commission Decision of 28 July 2005, C(2005) 2988 final, paras. 23–25.
17. Id., para 33.
18. Id., para 32.
19. See e.g. Pardolesi and Renda, op. cit. *supra* note 13, at 514; Appeldoorn, "He who spareth his rod, spareth his son? Microsoft, super-dominance and Article 82 EC", 26 ECLR (2005), 653 at 655–656; Arts and McCurdy, "The European Commission's media player remedy in its Microsoft decision: compulsory code removal despite the absence of tying or foreclosure?", 25 ECLR (2004) 694 at 703–705.
20. Case T-201/04 R, *Microsoft* v. *Commission*, [2004] ECR II-4663, paras. 71–72.
21. Id., paras. 248 et seq.; paras. 406 et seq.; paras. 206–207; paras. 212–213.
22. Id. paras. 206–207.

3. The CFI judgment

3.1. *The remedy and the fine imposed on Microsoft*

Before examining the CFI's judgment of September 2007 as to the competition law infringements involved, we address, albeit briefly, the Court's assessment of the remedies demanded by the Commission, in particular the monitoring mechanism and the fine imposed. On this point, it is noteworthy that, whereas the CFI confirmed the amount of the financial penalty, it quashed the part of the Decision providing for the establishment, functioning and financing of the Trustee.[23] According to the CFI, the Commission retained the power to oversee compliance with its antitrust decisions and ensure their full and timely implementation, if necessary by relying on an independent expert. However, the CFI held that by conferring on the Monitoring Trustee a "proactive role" in fulfilling his tasks, and especially by entrusting him/her with an independent role beyond that of reporting to the Commission, the Commission had overstepped the limits of its powers under Council Regulation No 17/62.[24]

The CFI pointed out that the Commission lacked the authority to delegate to the Trustee powers of investigation akin to those it enjoyed under Regulation 17 and to impose on Microsoft the financial burden associated with the monitoring of the compliance with the Decision. The Court took the view that it would be inconsistent with the responsibility of the Commission to ensure the implementation of the EC antitrust rule "to depend on … the willingness or the capacity of the addressee of the decision to bear such costs."[25] Accordingly, it concluded that the Commission had exceeded its powers of investigation and enforcement in ordering the appointment of the Monitoring Trustee equipped with independent, ad hoc powers of investigation and decision-making, financed by the applicant.

Commentators have argued that this outcome illustrated the inherent difficulties arising from the monitoring by the Commission and, more generally, by antitrust enforcement agencies, of "behavioural commitments".[26] Although in this case Microsoft did not appeal against the CFI judgment and agreed to take practical steps in implementing the obligations imposed on it by the Commission,[27] if similar issues arise in future cases, the Commission is likely

23. Judgment, paras. 1326–1365.

24. Judgment, paras. 1265, 1269–1270. That Regulation is now replaced by Reg. 1/2003.

25. Id., para 1275.

26. Howarth and Macmahon, "Windows has performed an illegal operation: the Court of First Instance's judgment in Microsoft v. Commission", 29 ECLR (2008), 117 at 132.

27. "Antitrust: Commission ensures compliance with 2004 decision against Microsoft", Press Release IP/07/1567, 22 Oct. 2007.

to look for other options to ensure the oversight of compliance with its decisions.[28]

3.2. *The characteristics of the software market: brief remarks*

Although a detailed examination of their features is beyond the scope of this paper, some of the characteristics of high-technology markets deserve specific attention. In this respect, suffice it to say that the market for the supply of software is characterized by the presence of "high direct and indirect network effects" and by a resulting trend toward the emergence of a dominant product which will constitute for a time the "de facto standard" in that industry.[29] Since software programmes, by their very nature, do not function in isolation but are designed to interact with other software,[30] "the utility that a user derives from the consumption" of a particular programme is destined to increase with the number of its users.[31] Consequently, it has been argued that the wide acceptance of a particular programme will inevitably result in that product becoming entrenched as the format of choice for end users in a particular market.[32]

According to the 4th Circuit of the US Court of Appeals in *Re: Microsoft Antitrust Litigation*,[33] in a market characterized by network effects, the share held by a supplier is destined to expand due to a "feedback effect", resulting from the circumstance that "the attractiveness of a product to consumers increases with the number of persons using it".[34] Consequently, due to the ever-expanding customer base, users will adopt the "entrenched" programme as their "interface of choice". And software developers, on the other side, will "opt to write application software" in that format, in order to reach the broadest possible "audience", thus eventually excluding any competing formats from the relevant market: this is what is termed "tipping".[35]

28. Howarth and Macmahon, op. cit. *supra* note 26, at 132.
29. Montagnani, "Remedies to exclusionary innovation in the high-tech sector: s there a lesson from the Microsoft saga?", 30 W. Comp. (2007), 623 at 625.
30. Pardolesi and Renda, op. cit. *supra* note 13, at 526–527.
31. Montagnani, op. cit. *supra* note 29, at 625.
32. Ibid.
33. *In re: Microsoft Corporation Antitrust Litigation – Sun Microsystem Inc* v. *Microsoft*, 333 F. 3rd 517.
34. Per curiam, p. 521, note 1.
35. Ibid. For commentary, see, *inter alia*, Montagnani, op. cit. *supra* note 29, at 625.

3.3. *Preliminary issues*

Before addressing the content of the Commission Decision and the applicants' arguments, the CFI made some remarks on the scope of the judicial scrutiny it should exercise. It held that a "comprehensive review" would have to be carried out only as regards the "question as to whether or not the conditions for the application of the competition rules are met", and stated that it would limit the "review of complex economic appraisals made by the Commission" to examining whether the relevant rules of procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error or assessment or a misuse of powers" (para 87). In the light of the margin of appreciation enjoyed by the Commission in respect of "technical matters", it would focus its scrutiny on whether the evidence adduced was "accurate, reliable and consistent", provided for "all the relevant data" and was "capable of substantiating the conclusions drawn from it" (paras. 88, 89).[36]

The CFI thus clearly defined the scope of its powers of review in accordance with the principles enshrined in the existing case law on judicial review in antitrust matters.[37] The ECJ had earlier affirmed, in *Remia*, that in appraising "complex economic matters", that Court would limit its scrutiny to "whether the relevant procedural rules have been complied with, whether the statement of the reasons … is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers."[38]

3.3. *"Compatible" or "cloned"? The obligation to disclose interoperability protocols*

When it came to the questions of substance, the CFI examined, first of all, whether the applicant's refusal to disclose the interconnection protocols to its competitors on the work group server OS market constituted an abuse of its dominant position and addressed the degree of interoperability required to ensure effective competition (para 229). It stated that "indissociable" links existed between client/client and client/server interoperability protocols in the context of Microsoft's own network architecture (para 231). Accordingly, it

36. For commentary, see, *inter alia*, Howarth and Macmahon, op. cit. *supra* note 26, at 133–134.

37. See e.g. Case 42/84, *Remia BV* v. *Commission*, [1985] ECR 2545; Joined Cases 142 & 156/84, *British American Tobacco and RJ Reynolds* v. *Commission*, [1987] ECR 4487; also, Case C-12/03 P, *Commission* v. *Tetra Laval BV*, [2005] ECR I-987, para 38.

38. *Remia*, previous footnote, para 34.

held that competing software providers should obtain access to both sets of protocols to be able to offer an OS that can "interoperate with Windows domain architecture on equal footing" with work-group servers operated by Microsoft OS (paras. 230, 237). The CFI denied that so wide an obligation would allow the emergence of competing "clones" of the dominant work group server OS, as claimed by Microsoft (para 212). It took the different view that the information in question was limited to the interconnection protocols and did not extend to Microsoft's "source codes", i.e. those specifications which would allow other software suppliers to develop software governed by the same "logic" as that of Microsoft's OS (paras. 241, 259–260).

The Court then examined whether Microsoft's refusal to disclose that information, on the ground that it was covered by copyright, constituted abusive behaviour (paras. 310, 312). As a general point, it held that, although in principle dominant undertakings are free to choose their business partners and especially to decide whether and to whom to grant a licence to use input covered by their intellectual property rights, there may be "exceptional circumstances" in which a refusal to license could constitute an abuse of a dominant position (para 319).

The CFI stated that in accordance with the existing case law,[39] such "exceptional circumstances would involve a refusal to grant a licence" which concerned a product "the supply of which was indispensable to the exercise" of a business activity and prevented the appearance of a new product that was not currently supplied and for which potential consumer demand existed (para 324). Once the Commission had established that these requirements were met, the denial of a licence would therefore constitute an abuse of a dominant position unless it could be objectively justified. It was noted, in particular, that the "new product" condition had only been applied to cases regarding the exercise of IP rights (paras. 333, 334).

In relation to the requirement of "indispensability", the CFI recalled that, in the light of its limited powers of scrutiny of the Commission's assessment of "complex economic matters", its review would be limited to verifying whether the Commission had made a manifest error in concluding that the availability of the interoperability information was "indispensable" for the suppliers of competing work group server OS to remain viable on the market, namely, it was an element of "significant competitive importance" for undertakings active on this market (paras. 369 et seq., 381).[40]

39. See e.g. Case 238/87, *VOLVO* v. *Veng*, [1988] ECR I-6211; Joined Cases C-241 & 242/91 P, *RTE and ITP* v. *Commission*, [1995] ECR I-743; Case C-7/97, *BronnerGmbH & Co* v. *Mediaprint*, [1998] ECR I-7791.

40. See e.g. *Bronner*, previous note, para 47.

The Court held that, contrary to Microsoft's assertions, the findings of the Commission were accurate. It pointed to a number of factors, such as the nature of computer software as a product "designed to communicate with other computer programmes and hardware", especially in network environments, and the exceptional nature of Microsoft's dominant position on the PC OS market (paras. 382, 383, 387). In the light of the "extraordinary features" of the case, it was concluded that the ability of non-Microsoft work group OS to "participate in the Windows domain architecture … on an equal footing" with Windows-operated machines was essential to ensure their viability and their attractiveness to consumers (paras. 389–390). The Court stated that due to the "privileged links" between the client PC and the server OS, Microsoft would be able to impose its own domain architecture as "the de facto standard for work group computing" and, as a result, the absence of interoperability would eventually reinforce Microsoft's dominant position to the detriment of its competitors (paras. 392, 422).

The additional circumstance that the more an OS became established on the market as the dominant one, the easier it would be for users to find appropriately skilled support and assistance for it, because technicians will be inevitably more inclined to develop the skills necessary to support a "popular system" constituted a factor increasing the "lock-in" effect on users.[41] The CFI took the view that the downward trend characterizing the market shares of Microsoft's competitors in the period following Microsoft's refusal to supply the interoperability protocols demonstrated that customers had been in fact discouraged from "switching" to competing OS and that this, in turn, had strengthened Microsoft's position (paras. 567–68, 580, 587, 591, 592–593, 618).

The Court went on to examine whether Microsoft's refusal to license the interoperability protocols prevented the emergence of a "new product" currently not offered by the owner of the IP right (para 621 et seq.).[42] After recalling that this requirement could only be found in the case law concerning the refusal to license IP rights, the CFI rejected Microsoft's argument that "the addition of a feature taken from a competitor's product" did not amount to the creation of a "new product" and held:

> "In the balancing of the interest in protection of the IP right and the economic freedom of its owner against the interest to the protection of free competition the latter can prevail only when the refusal to grant a licence prevents the development of a secondary market." (para 646)

41. Judgment para 619. For commentary, see Ong, op. cit. *supra* note 11 at 222 and 224.
42. See, e.g. *IMS Health*, *supra* note 11, para 49.

That would be the case, according to the CFI, not only when the refusal prevented the emergence of a novel product, namely one which "although in competition with those of the owner of the right, answers specific consumer requirements not satisfied by existing goods or services",[43] but also when it merely hampered technical development (para 647).

In the light of the above, the CFI concluded that the Commission had not reached an erroneous conclusion in stating that Microsoft's refusal to disclose interoperability information had prevented its competitors from developing sufficiently compatible workgroup server OS, with a detrimental impact both on competition, since its conduct had impeded the emergence of competing products, and on consumer welfare, since users' preferences had been "channelled" toward the dominant software, although customers regarded non-Microsoft OS as "better alternatives" to the dominant software (paras. 651, 652).

The CFI also confirmed the Commission's findings that the disclosure of the interoperability information to competitors would not have allowed other software suppliers to "clone" Microsoft's own server OS, due to the limited nature of the protocols and to the lack of any commercial incentive to "replicate" the dominant software. The Court held that, once having obtained the necessary protocols, Microsoft's competitors would "have no other choice if they [wished] … to maintain a profitable presence on the market, than to differentiate their products from Microsoft's products …." (paras. 657, 658).

In relation to the condition that the refusal must be such as to exclude all competition from a secondary market, the applicant had argued that the Commission had applied a wrong test in assessing whether this requirement had been met. According to Microsoft, the Commission had erred in law by proving only a "risk" that competition on the secondary market for the supply of work group server OS would have been eliminated and, instead, should have been required to prove the existence of a "high probability" that competition on that market be eliminated as a result of its refusal to grant an IP licence (paras. 437–439). However, the CFI rejected this plea as being only "one of terminology" and held that the Commission had been entitled to intervene "before the elimination of competition on the work group server OS had become a reality"; it emphasized that, due the "network effects" characterizing the market, the elimination of any remaining constraints on Microsoft would have been "difficult to reverse" (paras. 519, 561, 562).

On that basis, the CFI found that the conclusions reached in the Decision were correct and had been confirmed by the evidence. The Court took the view

43. Cf. Opinion of A.G. Tizzano, para 62 in *IMS Health*, *supra* note 11; see also paras. 53–56 of the judgment in *IMS Health*.

that the analysis of the development of the market shares of the applicant and of its competitors indicated that the refusal to make available the necessary interconnection protocols to manufacture compatible server OS had resulted in the "competitors' products [being] confined to marginal positions or even made unprofitable." Any remaining competition was barely significant and did not therefore constitute a "credible threat" to Microsoft's position on that market. (See paras. 593–594)

Finally, the CFI examined the Commission's findings as regards the absence of "objective justification" for Microsoft's behaviour. Microsoft had argued that its refusal to disclose the interoperability information was justified since it constituted the legitimate expression of its exercise of its copyright over information which was "secret …, of great value … and … [contained] significant innovation." The applicant had also criticized the "balancing test" adopted by the Commission for the refusal to license and had argued that its application resulted in dominant undertakings having less incentive to innovate since they could be required to "share the fruits of their efforts with their competitors" at some point in the future (paras. 666, 667, 670).

The Court, however, took the different view that the sole fact that the protocols were covered by copyright could not represent an objective justification for the denial to grant a licence. Despite acknowledging that "a simple refusal" even by a dominant undertaking to license IP rights to a third party did not constitute conduct prohibited by Article 82 EC Treaty, the Court held that to accept the applicant's argument would be tantamount to denying outright the application of the exception recognized by the ECJ in its *Magill*[44] and *IMS Health*[45] judgments (paras. 690, 691).

The Court also rejected the applicant's argument that the Commission had applied an incorrect test to assess the nature of the conduct. It held that the Commission had considered whether, in the exceptional circumstance of the case, the forced disclosure of the interconnection protocols could have had a negative impact on Microsoft's incentives to innovate and had correctly found that the disclosure of that information, a common practice in the industry, had had no detrimental impact on the supplier's drive to technical development (paras. 696, 702, 710). The Court agreed with the Commission that, quite to the contrary, such disclosure allowed the undertakings concerned to improve the quality and attractiveness of their products and thus concluded, on the merits, that Microsoft had not established any "objective justification" for its refusal to license the protocols (para 711).

44. *RTE and ITP*, *supra* note 39.
45. *IMS Health*, *supra* note 11.

The *Microsoft* judgment thus raises considerable issues with respect to the interpretation of the requirements laid down by the case law concerning whether the refusal to grant competitors a copyright licence covering "valuable" information constitutes an abuse of dominant position.

3.4. *Tying in "New Economy" markets: Old standards for innovative goods?*

It is recalled, from section 2 above, that in the 2004 Decision, the Commission found that Microsoft's practice of tying its WMP to Windows OS constituted an abuse of its dominant position on the PC OS market. It was stated that due to the presence of Windows on more than 90 % of PCs worldwide, WMP had enjoyed an "unrivalled" advantage over competing media players by becoming as "ubiquitous" as the OS thanks to a "privileged channel" for its distribution.[46] The decision also sought to establish that due to the "indirect network effects" characterizing this market, Microsoft had foreclosed any significant competition on the media player market since WMP was most likely to become the "format of choice" for users and providers of media content to the detriment of competing products.[47]

The CFI took as its starting point on this issue the case law of the ECJ according to which tying constitutes an abuse of a dominant position when, in the absence of an objective justification, four conditions are satisfied: first, there must be two separate products; second, the respondent undertaking must be dominant on the market for the tying product; third, it must not be possible for customers to obtain the tying product without the tied product ("coercion"); and finally, the practice in question must be able to foreclose competition (paras. 842, 859).[48]

As regards the "separate product" requirement, the CFI held that, although in principle it could not be excluded that the constant evolution characterizing high tech markets could result in "what initially appear to be separate products … being regarded as forming a single product, both from the technological aspect and from the aspect of the competition rules", this was not the case for WMP. The Court emphasized that the two programmes fulfilled different consumers' needs and that separate demand existed for OS without media functionality. This finding was confirmed by Microsoft's commercial practices as well as by the presence of independent suppliers of media players, such as

46. See Commission Decision, *supra* note 12, para 841.

47. Ibid.; see also judgment, para 846.

48. See e.g. Case C-53/92 P, *Hilti* v. *Commission*, [1994] ECR I-667; Case C-333/94 P, *Tetra Pak* v. *Commission*, [1996] ECR I-5921.

Apple or RealNetworks (see paras. 913 924–925 926–927). The CFI also rejected the argument that the integration of a media player constituted a normal step in the evolution of PC OS or that it was justified on the basis of "commercial usage": not only had the applicant failed to provide convincing evidence of the existence of "technical constraints" preventing it from seeking an alternative way of distributing the product, but it had also not demonstrated that this practice was common in the industry (paras. 936, 941). The second condition (dominance) was not contested.

Having regard to the third requirement, of "coercion", the CFI confirmed that "the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations" had already been fulfilled on the sole ground that Windows was not available to customers without WMP due to the contractual practices adopted by Microsoft and the technical impossibility to uninstall WMP (paras. 961–963) . Nor was it significant that end users were not charged any extra price for the media player or were free to acquire competing software fulfilling the same function: according to the Court, neither Article 82 EC nor the case law required compulsion on customers to use the tied product or the imposition of an ad hoc charge for it (paras. 967–970).

With respect to the fourth requirement that tying must be capable of foreclosing competition on the market for the tied product, the CFI noted that, by bundling WMP to the OS, the applicant, which was already dominant on the OS market, had achieved a level of penetration of the neighbouring market for media players which could not by matched by any other supplier and without having to engage in any "competition on the merits" (paras. 1038–1039). In fact, as a result of WMP being pre-installed, customers would be less likely to seek an alternative media player and exposed to a risk of "confusion" between the different media functionalities available (paras. 1041–1042). Moreover, original equipment manufacturers (hereinafter: "OEMs") themselves, despite being in principle allowed to download other media software on the OS they installed, would not use that opportunity due to the costs involved and the fact that the machines would be deprived of significant hard disk space just to provide a programme performing the same functions as the preinstalled one, which could not be removed (paras. 1044–1045).

The CFI also confirmed the Commission's conclusions that other methods to acquire competing software, such as downloading from the Internet or purchasing in addition to the Microsoft package, did not constitute viable alternatives to pre-installation in view of the uncertainties and the additional costs associated with their acquisition. It was therefore concluded that by tying WMP to its PC OS, Microsoft had abused its dominant position on the OS market since that practice had conferred on WMP an "unparalleled advantage" in its distribution as a result of which the tied product had become as ubiqui-

tous as Windows and without competing with alternative software on grounds of quality (paras. 1053–1058).

Thereafter, the CFI examined whether the economic theory elaborated by the Commission justified the conclusion that the market had been foreclosed. As was already explained above, the markets for the supply of software are characterized by a trend toward "tipping" in favour of a specific programme: in other words, the market share of the supplier of a specific format is destined to increase as a result of the circumstance that the attractiveness of that programme grows with the number of its users.[49] The Commission, therefore, sought to establish that due to that "positive feedback effect" WMP would have eventually become the "standard of choice" of both users and media content providers.[50]

The CFI found that these findings were correct in the light of the evidence on which they had been based. It took the view that "the percentages of installation and use of media players" indicated a trend for media content providers to adopt WMP as their standard for the development of their products, since that would have allow them "to reach the great majority of client PC users", and thus would eventually "entrench" that format as the "standard of choice" in the industry. The Court also pointed out that the costs associated to the adoption of alternative encoding formats constituted a significant deterrent for media content providers against producing content in different standards. Accordingly, it was concluded that the Commission had correctly established that, as a result of the tying, Microsoft's dominant position would have been strengthened through methods other than competition "on the merits", and thus contrary to Article 82 EC. (See paras. 1061–1070)

With respect to "objective justification", the CFI held that the alleged advantages of tying did not fulfil that condition. Although it could not be excluded that the "*de facto* standardisation" arising from the tying could benefit software developers and media content providers, due to the uniform presence of WMP on more than 90 percent of PCs worldwide, it was, according to the Court, most likely to lead to the foreclosure of the relevant market (paras. 1146, 1151). The practice could not even be regarded as indispensable for OEMs to provide the media functionality required by Microsoft's users, because that software could equally be supplied by Microsoft "on an independent basis" (para 1156).

49. *Supra*, section 3.2, at note 31 and accompanying text. See e.g. *In re: Microsoft Corporation Antitrust Litigation – Sun Microsystem Inc* v. *Microsoft*, 333 F. 3rd 517, per curiam, p. 521, note 1.

50. Commission decision, *supra* note 12, para 882.

Finally, the CFI rejected the plea that by obliging it to offer version of Windows without WMP alongside the "integrated" one, Microsoft's economic freedom to exploit its unique business model had been unduly restricted. The Court stated that the Commission had only taken objection to the circumstance that Microsoft did not offer an additional, "unbundled" version of Windows and that, accordingly, the applicant remained free to offer a version of the OS to which WMP was tied, according to its business model (paras. 1149–1150). It added that the applicant had failed to adduce sufficient evidence that harmful consequences, especially for users, arose from the alleged "fragmentation" of Windows and pointed out that, to the contrary, it had been possible to "unbundle" WMP from Windows without affecting the integrity of the OS (para 1165).

The above summary illustrates that although the CFI took as its starting point of its reasoning the established case law,[51] its interpretation of some of the requirements for abusive tying gives rise to controversial issues. Perhaps most importantly, the Court's conclusions seem to suggest that the existing principles may not be entirely suitable to the competition issues arising in high-tech markets.[52] These questions will be addressed in the following sections.

4. Comment

4.1. *The CFI's Microsoft judgment: A more lenient approach to refusals to license?*

As was shown above,[53] the CFI, despite recognizing that interoperability is essentially a matter of degree, preferred a wide interpretation of that concept to allow the "seamless integration" between Microsoft work group server OS and competing software, as a result of which, to ensure effective competition on the work group server market, non-Windows operated machines should be able to act both as client and as domain controller in the communication within and between networks.[54] However, it could be argued that this notion of the degree of interoperability appears to be, at least in part, inconsistent with previous practice. In 1984, the Commission, in the *IBM Undertaking* concerning

51. *Hilti supra* note 48; *Tetra Pak*, *supra* note 48.

52. Cf. *US* v. *Microsoft Corp*, DC Court of Appeals, 147 F. 3d 935, per curiam, pp. 948–949.

53. *Supra*, section 3.3, at note 40 and accompanying text.

54. See Commission decision, *supra* note 12, paras. 572, 665, 692–694.

System 370,[55] imposed a duty on the investigated company to license interface information to competing suppliers of hardware and software. Nevertheless, that duty was limited only to those protocols which were necessary to manufacture "compatible products" to the new OS, namely, software and hardware which could be "attached" to, and interact with, machines operated by System 370.[56] By contrast, *Microsoft* appears to have gone a step further by advocating an obligation to disclose all the interconnection protocols that are necessary to ensure "full interoperability" between work group servers operated by Microsoft and non-Microsoft OS and especially to allow non-Microsoft operated machines to act as "domain controllers" as well as "clients" in the context of the Microsoft architecture.[57]

It has been argued that the solution proposed by the Commission and now approved by the Court and accepted by Microsoft, despite stopping short of obliging the dominant company to disclose its source code, could *de facto* allow Microsoft's competitors to manufacture software which perfectly emulates the dominant one[58] and eventually stifle, rather than encourage innovation.[59]

As was briefly explained above,[60] high tech markets are characterized by "network effects": since computer programmes generally, and OS in particular, by their very nature are designed to work "in partnership" with other software or hardware, their value is destined to increase along with the number of users that choose them Consequently, end users, on the one hand, will exhibit a stronger preference for "established" software and installers, on the other hand, will channel their resources in supplying programmes that have an established "customer installed base". Also, each OS is designed to interact with customers through a specific interface. Consequently, each user will invest time and often resources to learn and train others in how to use it and, once they have acquired that knowledge, they will consider switching to an alternative OS "irrational" in consideration of the sunk costs they have borne in the process. In the light of the above, it has been suggested that high technology markets are very likely to be characterized by a trend toward "tipping" in favour of the emergence of a single product, which will come to dominate the

55. *IBM (System 370)*, see (1984) *EC Competition Policy Newsletter*, 94–95.

56. *Inter alia*, Jones and Sufrin, *EC Competition Law: text*, *cases and materials*, 2nd ed. (2005, OUP), p. 512.

57. Judgment, para 237.

58. Pardolesi and Renda, op. cit. *supra* note 13, at 551.

59. Id., p. 552. See Press Release MEMO 07/359, available at: europa.eu/rapid/press ReleasesAction.do?reference=MEMO/07/359&format=HTML&aged=0&language=EN&gui Language=en.

60. *Supra*, section 3.2, at note 29 and accompanying text.

market for at least one generation and, consequently, in a race for the market rather than in competitors striving to win over each other in the market.

Some authors argued that these trends could result in significant benefits for consumers because, until the emergence of a new "de facto industry standard", the market will be characterized by fast paced innovation and strong competition between suppliers who strive to manufacture the next "best software". Furthermore, once that "standard" has become established, consumer welfare is likely to be enhanced by the standard's widespread presence and the resulting ability of users to interconnect with a growing customers' base.[61] Other commentators, however, pointed out that although innovation in highly technological industries should be protected and encouraged, technological advancement and the resulting consumer welfare can only be safeguarded "by preserving the competitive process in the long run".[62] Accordingly, it was argued that especially when a dominant firm controls "the last advancement in technology", antitrust intervention may be justified to prevent behaviour liable to hamper future innovation and eventually consumers.[63]

Concerns were raised at the possibility that dominant undertakings may "take advantage" of the otherwise welfare-enhancing network effects to pursue strategies aimed at "locking in" existing users,[64] such as by designing and promoting their "entrenched product" in such a way that the latter become "dependent" on it and then using its IP rights to prevent access to the market by would-be competitors. It could be argued that a refusal to grant an IP licence concerning an "essential input" such as a "de facto industry standard",[65] coupled with other forms of "loyalty inducing" conduct would probably constitute an abuse of dominant position.[66]

However, it must be acknowledged that the imposition on a dominant company of a duty to grant a licence for "essential inputs" covered by IP rights should be carefully assessed and, in any event, allowed only in exceptional circumstances[67] to ensure that the appropriate balance is struck between rewarding and promoting innovation and preserving competition.[68]

Against this background, it is submitted that the emphasis placed by the CFI on "full interoperability", on the one hand, is likely to boost the position of

61. Pardolesi and Renda, op. cit. *supra* note 13, at 526–529.
62. Montagnani, op. cit. *supra* note 29, at 630–631.
63. Ibid.
64. Ong, op. cit. *supra* note 11, at 221–222.
65. See e.g. *IMS Health*, *supra* note 11, para 49
66. See Case 237/98, *VOLVO* v. *Erik Veng*, [1988] ECR I-6211, paras. 8–9; for commentary, Ong, op. cit. *supra* note 11 at 216–217 and 221.
67. Ong, op. cit. *supra* note 11, 223.
68. Montagnani, op. cit. *supra* note 29, at 630–631.

competing suppliers, who would be able to continue manufacturing compatible products in the short term. On the other hand, however, by enabling Microsoft's competitors to supply compatible products on the basis of the available interoperability information in the short term, it could result in consumers no longer be able to benefit from the "race for the market" since it could cause innovation to be chilled in the long term.[69]

It could also be doubted whether this outcome is consistent with the existing case law of the ECJ. In the *Bronner* judgment, the Court of Justice held that a refusal to grant access to an "indispensable input would be abusive only if it "was likely to eliminate all competition on the part of [the] undertaking" seeking to obtain that input and accordingly suggested that forced access should aim at protecting the existing degree of competition.[70] By contrast, it is submitted that, by imposing on the applicant such a wide obligation to disclose interoperability information, the CFI appears to be concerned with safeguarding and enhancing the position of Microsoft's competitors on the market,[71] a conclusion which, however, is not easy to reconcile with the rather restrictive interpretation adopted by the ECJ.[72]

The CFI judgment also raises significant questions for the assessment of the requirement of "indispensability" of the information. It is remarkable that the decision did not address in detail the alternative solutions to the compulsory disclosure of the interconnection protocols, namely, whether the information already available to Microsoft's competitors, the availability of open source specifications and the possibility of "reverse engineering" could ensure a sufficient degree of interoperability.[73] It is recalled that, according to the ECJ case law, the requirement of "indispensability" is satisfied only once it is established that there is "no actual or potential substitute for" the input access to which is sought.[74] That condition was interpreted by Advocate General Jacobs in *Bronner* as meaning that a refusal would constitute abusive behaviour only if the party seeking access demonstrated that "duplication … is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy" or when the costs associated with that duplication were such as "to deter any prudent undertaking from

69. Pardolesi and Renda, op. cit. *supra* note 13 at 528–529.

70. *Bronner*, *supra* note 39, para 38.

71. Hatzopoulos, "Refusal to deal: the EC Essential facilities doctrine", in Amato and Ehlermann (Eds.), *EC Competition Law: a critical assessment* (2007: Oxford, Portland/Oregon, Hart Publishing), p. 348.

72. *Bronner*, *supra* note 39, para 38; for commentary, see Hatzopoulos, op. cit. *supra* note 71, pp. 340–341.

73. Judgment, paras. 434–435. Cf. Pardolesi and Renda, op. cit. *supra* note 13 at 537–541.

74. *Bronner*, *supra* note 39, para 41.

entering the market".[75] Against this background, it is regrettable that the CFI did not address the question whether the interoperability information at the heart of the forced disclosure imposed on Microsoft was "indispensable" in the sense outlined in *Bronner* and instead limited its appraisal to the "valuable" nature of the protocols, both for the dominant company and for its competitors.[76] This approach would appear to have resulted in a departure, at least partial, from the restrained position hitherto adopted by the ECJ, according to which the financial costs, unless they were so high as to deter a "prudent undertaking" from attempting to enter the market, would not in principle render an input "indispensable".[77]

It is submitted that two factors appear to have played a considerable part in the CFI's reasoning, namely the position of "near-monopoly" of Microsoft on the PC OS market and the "network effects" characterizing that market. It could be argued that, given the ubiquity of Windows, the "special responsibility" imposed by Article 82 EC on Microsoft would be far more extensive than in other circumstances and would therefore justify the wide obligation of disclosure provided by the decision.[78] It could also be queried whether the relation of "dependency" existing between the dominant supplier and its customers[79] due to the "entrenchment" of Windows as "industry standard"[80] could warrant the forced disclosure of interoperability information to minimize the adverse consequences of the "lock in" effect and thus preserve any remaining competition.[81] It is submitted that although these arguments may not be dismissed in principle, a closer analysis of the requirement of "indispensability" would have been necessary in any event in the light of the factual evidence and the existing principles.

However, the most controversial issues arise from the CFI's interpretation of the concept of "new product". In its judgment the CFI expressly recognized that this requirement could only be found in cases concerning the refusal to grant a licence for the use of inputs or information covered by IP rights.[82] As the ECJ pointed out in the *IMS Health* preliminary ruling, the function of this condition is to allow for the "balancing of the interest in protection of the IP

75. Opinion of A.G. Jacobs, paras. 65, 66.

76. Judgment, paras. 694, 702–703; see also paras. 383–85.

77. *Bronner*, *supra* note 39, Opinion of A.G. Jacobs, para 66.

78. *Inter alia*, Korah, *Intellectual property rights and the EC competition rules* (2006, Oxford/Portland, Oregon, Hart Publishing), p. 154; see e.g. *mutatis mutandis*, Case C-395/96 P, *Compagnie Maritime Belge Transport SA and others* v. *Commission*, [2000] ECR I-1365, paras. 119–120.

79. Ong, op. cit. *supra* note 11, at 221.

80. Montagnani, op. cit. *supra* note 29, at 625.

81. Ong, op. cit. *supra* note 11, at 222.

82. Judgment, para 334.

rights and the economic freedom of its owner against the interest in protection of free competition".[83] In that decision the ECJ held that "the latter could prevail only where the refusal to grant a licence prevents the development of a secondary market to the detriment of consumers."[84] In the light of the above, it was concluded in *IMS* that the notion of "new product" should be read not as a "mere duplicate" of the products already available on the market, but rather as "new good or services not offered by the owner of the right and for which there is potential consumer demand."[85]

The CFI in *Microsoft*, instead, appeared to take the different view that this requirement should be read as requiring "a limitation not only of production or markets, but also of technical development."[86] Accordingly, the Court concluded that Microsoft's refusal to allow access to its interoperability protocols constituted conduct prohibited by Article 82 EC Treaty since it prevented the appearance of work group server OS that would be compatible with Microsoft's own architecture to a degree sufficient as to constitute a "realistic" alternative to Microsoft's own software for individual users, who would "otherwise be 'locked in' a homogenous Windows solution." The "appearance of a new product" was therefore not regarded as indispensable to determine whether the conduct of the dominant undertaking would be likely to cause prejudice to the welfare of consumers. Rather, the CFI held that a "limitation of technical development" would be sufficient to determine that prejudice.[87]

However, the Court did not examine in detail whether the "upgrade" of available software, resulting from the efforts of the licensees, as advocated by the Commission, would be sufficient to constitute a "new product". Instead it limited its scrutiny to accepting the Commission's views that, once the interoperability protocols had been disclosed, Microsoft's competitors would be in a position to "offer work group server OS which, far from merely reproducing the Windows system … [would] be distinguished from those systems with respect to parameters which consumers consider important."[88]

It could be argued that cases such as *Magill* dealt with very specific factual circumstances and that the ECJ was especially concerned with stopping the appellants from reserving for themselves a monopoly position over a "secondary market", by preventing the emergence of a completely novel good for

83. *IMS Health*, *supra* note 11, para 48.
84. Ibid.
85. Id., para 49. See also Opinion of A.G. Tizzano, para 62.
86. Judgment, para 647.
87. Id., paras. 650, 647.
88. Id., para 656.

which there was unsatisfied consumer demand.[89] It is also recognized that, as the *IMS Health* preliminary ruling showed, there are inherent difficulties in assessing what constitutes a "new product".[90]

However, it must be acknowledged that the test applied by the CFI in *Microsoft* appears far less exacting than that enshrined in the ECJ case law. It is submitted that a more detailed assessment of whether the denial of access to the interoperability information resulted in impeding the emergence of novel products would have been necessary due to the peculiar characteristics of the dynamics of competition on the relevant market and especially of the need to avoid hampering the "welfare-enhancing" effects stemming from the "race for the market" characterizing this competitive process.[91]

Finally, with respect to the issue whether the refusal to disclose the interoperability information was objectively justified, it is acknowledged that this is perhaps the least developed condition of the *IMS* test. According to the Commission 2005 Discussion Paper on Article 82, prima facie abusive conduct will not be caught by that prohibition only if there are "objective factors", independent from the dominant undertaking's action, that render the conduct in question necessary,[92] if that behaviour constitutes a loss-minimizing reaction to competition from others or if it leads to the realisation of efficiencies which outweigh its negative impact on the relevant market.[93]

Having regard especially to the efficiency defence, according to the Commission, four conditions must be satisfied: the conduct must result in, or be likely to lead to, efficiencies, it must be indispensable to attain them, consumers must reap the benefits of its effects and finally, it must not be able to eliminate competition from a substantial part of the relevant market.[94] However, even though similar considerations have played a part in the assessment of

89. *RTE and ITP*, *supra* note 39, at paras. 53–54. See, *inter alia*, Ong, op. cit. *supra* note 11 at 219–220.

90. *Inter alia*, Hatzopoulos, op. cit. *supra* note 71, p. 354.

91. Pardolesi and Renda, op. cit. *supra* note 13 at 528–529.

92. Commission, DG Competition Discussion Paper on the application of Article 82 EC Treaty to exclusionary abuses, Brussels, December 2005, available at: ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf (hereinafter: Article 82 Discussion Paper), paras. 78, 80. See e.g. Case 77/77, *BP plc* v. *Commission*, [1978] ECR 1513. For commentary, see Albors-Llorens, " The role of objective justification and efficiencies in the application of Article 82 EC", 44 CML Rev. (2007), 1727, and Rousseva, "Abuse of dominant position defences: objective justification and Article 82 in the era of Modernisation", in Amato and Ehlermann, op. cit. *supra* note 71, p. 388.

93. Article 82 Discussion Paper, para 78; see also paras. 81–82, 84. See further Rousseva, op. cit. *supra* note 92, p. 404.

94. Article 82 Discussion Paper, para 84.

other types of abuse, such as discount schemes,[95] no judgment to date has recognized that exclusionary conduct could be objectively justified on these grounds.[96] Consequently, it could be argued that the conclusions reached by the CFI in *Microsoft* are not surprising.[97] It is recalled that, according to Microsoft, the refusal to grant a licence in respect to the copyright covering the interoperability protocols was "objectively justified" as a legitimate form of exercise of IP rights and a means to preserving Microsoft's incentive to innovate.[98] However, the CFI rejected this argument and held that the mere circumstance that "the technology concerned was covered by IP rights" could not in itself constitute an "objective justification" for a refusal to license once the "exceptional circumstances necessary for a finding of abuse of a dominant position had been satisfied".[99]

The *Microsoft* judgment therefore appears to suggest that, once all the other conditions for the finding of a violation of Article 82 EC have been met, the protection of the interests of the holder of IP rights would not constitute a "sufficient reason" to counterbalance the needs of free competition.[100] "Something more" would thus seem to be required to refute the Commission's conclusions that the refusal to grant a licence infringed Article 82 EC.[101] However, according to the CFI, the applicant had failed to provide sufficient evidence that its conduct would safeguard its incentive to innovate to such a degree as to outweigh the "exceptional circumstances" of the case. The Court endorsed the Commission's finding that the refusal in question concerned only limited information, whose disclosure was common practice in the industry, and was not therefore of such nature as to allow Microsoft's competitors to "clone" the dominant OS.[102] Although it could be argued that the CFI's findings may have been partly justified by the generic pleas raised by the applicant, it is submitted that the Court's approach may be open to question since it does not seem to take into full account the competition dynamics of the relevant market.

95. See, e.g. Case C-163/99, *Portugal* v. *Commission*, [2001] ECR I-2613, para 51: "… it is the very essence of a system of quantity discounts that larger purchasers of a product or users of a service enjoy lower average unit prices …". See e.g. Rousseva, op. cit. *supra* note 92, p. 407–408.

96. See e.g. Joined Cases T-191/98, 212–214/98, *Atlantic Container Line AB and others* v. *Commission*, [2003] ECR II-3275, paras. 1111–1112. See Rousseva, op. cit. *supra* note 92, p. 414.

97. Judgment, para 670. See also Albors-Llorens, op. cit. *supra* note 92, at 1749–1750.

98. *Supra*, section 3.3; judgment, paras. 593–594 and 670.

99. Judgment, paras. 689, 691.

100. See, *mutatis mutandis*, *IMS Health*, *supra* note 11, para 48.

101. Judgment, para 697.

102. Id., paras. 698, 708–710.

It is suggested that, given the importance of innovation and R&D characterizing high-tech industries, a closer consideration of the "efficiency enhancing" effects arising from Microsoft's exercise of its IP rights covering interconnection protocols would have been appropriate.[103] It is submitted that such an analysis, despite the difficulties stemming from the balancing approach characterizing it,[104] would have reflected more adequately the economic reality and the positive implications for consumers arising from competition based not exclusively on the availability of a number of "similar" products, but rather on the emergence over time of a "de facto standard" designed to meet the consumers' needs and thus to "win the market" for a generation.[105]

4.2. *The implications of Microsoft for the assessment of abusive tying*

Section 3.4 showed that the requirements of "coercion" and "foreclosure" of competition on the market for the tied product constituted "crunch points" in the light of the characteristics of the relevant market. In its *Tetra Pak International* judgment, the CFI had accepted that a clause having as its object to "make the sale of machines and cartons subject to accepting additional services of a different type" could be considered to be abusive in itself, unless it could be "objectively justified" in relation to commercial usage.[106] However, this plea was rejected in that case on the ground that, contrary to the applicant's submissions, there had been a long-standing and established practice of supply of "Tetra Pak compatible" cartons by independent producers and that, accordingly, tied sales of machinery and consumable packaging were not "the general rule" in that industry. The Court added that even if such "commercial usage" could have been established, it would not have been "sufficient to justify recourse to a system of tied sales by an undertaking in a dominant position", as a result of which competition is already weakened, since it would have deprived customers of the possibility to approach other suppliers, which were thus prevented from accessing the market.[107]

The CFI had also rejected Tetra Pak's arguments that, in view of the technical characteristics of the "packaging system" and especially of the alleged need to protect public health, machinery and cartons did not constitute separate products but rather, represented a new, "integrated" product. The Court

103. Pardolesi and Renda, op. cit. *supra* note 13 at 530–531.

104. Vezzoso, op. cit. *supra* note 13, at 386–387.

105. Pardolesi and Renda, op. cit. *supra* note 13 at 530–531.

106. Case T-83/91, *Tetra Pak International* v. *Commission*, [1994] ECR I-755, paras. 135, 136.

107. *Tetra Pak*, paras. 82, 137; see also Case 85/76, *Hoffmann LaRoche* v. *Commission*, [1979] ECR 461, paras. 89–90.

took the different view that, "whatever the complexity of the aseptic filling system", it was not the task of dominant suppliers "to decide that, in order to satisfy requirements in the public interest, consumable products … constitute, with the machines with which they are intended to be used, an inseparable integrated system." To allow dominant undertakings to engage in these practices would in fact amount to preventing independent suppliers, in the absence of any legal or technical obstacles, "from conducting an essential part of their business".[108]

Arguably, the CFI's conclusions in *Microsoft* remain consistent with the principles enshrined in *Tetra Pak*.[109] However, the Court did not address the question of whether the approach adopted by the ECJ in respect of "traditional" types of tying is suitable to cases of "technological integration" such as that at issue. The position under the EC Treaty competition rules may, however, be contrasted with that in US antitrust law. In its *Jefferson Parish* judgment, the Supreme Court of the US took the view that tying arrangements created "an unacceptable risk of stifling competition and therefore [were] unreasonable 'per se'",[110] providing that certain conditions are met. First of all, the arrangement must concern two or more products that "may be purchased separately in a competitive market" and, as a result, competing suppliers are deprived of the freedom to sell "either the entire package or its several parts."[111] Second, it must be established that the seller, through the arrangement, is exploiting "its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all or might have preferred to purchase elsewhere …."[112] Consequently, once it is proven that "the existence of forcing is probable", the arrangement will be found to infringe Section 1 of the Sherman Act without the need to enquire into its effects.[113]

However, in later judgments, the US Courts demonstrated a certain willingness to adopt a more relaxed approach in specific circumstances. In the *IBM* decision, the District Court for New Jersey took the view that the "per se" rule would not apply to prohibit the sale of the tying with the tied product when the latter "is required … as a pre-requisite for practical and effective use of the tying product."[114] The District Court acknowledged that the supply of "a sys-

108. *Tetra Pak*, paras. 79–84.

109. See judgment, paras. 859–860.

110. *Jefferson Parish Hospital District No 2 et al.* v. *Hyde*, 466 US 2, 104 S. Ct. 1551, at p. 1556.

111. Id., p. 1558.

112. Ibid.

113. Id., p. 1560.

114. *Innovation Data Processing* v. *IBM*, (1984) 585 F. Suppl. 1470, at p. 1475.

tem of technologically interrelated products"[115] would not amount to "per se" unlawful tying when "sufficient justification" existed for it in relation to customers' preferences and, most importantly, in relation to the technical characteristics of the product, but would have to be subject to a "rule of reason" appraisal. Accordingly it was held on the merits that IBM, in view of the features of the software in question and its function *vis-à-vis* the hard disk drive to which it had been tied, had been "justified in offering only an integrated version … as a single product and at a single price",[116] provided that, however, each of the components was also available on a standalone basis.

In the light of *IBM*, the Court of Appeals for the District of Columbia held in *US* v. *Microsoft*,[117] which concerned allegations of unlawful tying between Windows 95 OS and Windows Internet Explorer, that "genuine integration" between two hitherto distinct products would not amount to "per se" prohibited tying, but rather constituted a lawful expression of "technological innovation" provided that certain conditions were fulfilled. In accordance with a "rule of reason" approach, the supplier would have to establish that it is offering an "integrated product", namely: "A product that combines functionalities (which may also be marketed separately and operated together) in a way that offers advantages unavailable if the functionalities are bought separately and combined by the purchaser."[118] As a result, it was held that whereas such a finding should be excluded in cases "where the manufacture has done nothing more than to metaphorically 'bolt' two products together", it should be upheld when the "integration … is beneficial when compared to a purchaser's combination" and is therefore aimed at securing "some technologically beneficial result."[119] In the light of these principles, the Court of Appeals found that the respondent had proved the existence of "facially plausible benefits" stemming from its "integrated design", as opposed to a mere combination between Windows OS and a standalone web browser, both in terms of increased ease of use and of enhanced quality and functionality of the OS as a whole. It was therefore concluded that, on the merits, Microsoft had established a case of "genuine" integration between Windows 95 and Internet Explorer.[120]

In a separate opinion, Mr Justice Wald, partly dissenting, suggested that technological integration should be assessed in the light of a "balancing test" taking into account the "various efficiency gains" that could accrue to suppliers as well as consumers as a result of the tie and the weight of the "indepen-

115. Id., p. 1476.
116. Ibid.
117. *US* v. *Microsoft Corp*, 147 F 3d 935.
118. Id., p. 948.
119. Id., pp. 949–950.
120. Id., pp. 951 and 952.

dent evidence" that a separate market existed for each product. Consequently, to escape a finding that the arrangement was prohibited under the Sherman Act, Microsoft should have established "substantial synergies" which compelled OEMs to accept a new "integrated product that bridges those markets." In Wald J's view, such a test, far from "chilling innovation" in the software industry, would provide a "safe harbour" to those forms of integration constituting the expression of Microsoft's freedom "to design such products and market their benefits to OEMs such that OEMs overwhelmingly choose the new product".[121]

The "balancing test" was, however, rejected by the majority of the Court as being "not feasible in any predictable or useful way" due to the inability of judicial authorities to "evaluate the benefits of high-tech product design". The Court held that the position adopted in the separate opinion was destined "to thwart Microsoft's legitimate desire to continue to integrate products" and thus would eventually dampen its drive to innovation by requiring it "to counterbalance with evidence courts are not equipped to evaluate."[122]

The "rule of reason" approach to cases of technological integration was later reaffirmed by the same court in its other 2001 *Microsoft* judgment.[123] In that decision, the Court took the view that the application of a "per se" rule to tying, established in the *Jefferson Parish* case,[124] would not be appropriate to tying arrangements occurring in "novel" markets, such as that for the supply of computer software. [125] The Court of Appeals found that there was a high risk that this approach could lead to "inaccurate results" in cases such as that at issue and eventually "stunt valuable innovation". It was held that the integration of new functionalities on an existing "platform" was common in the industry and could, in such a "pervasively innovative" market, lead to efficiencies that had not hitherto been evaluated by the Courts.[126] Consequently, the District of Columbia Circuit concluded that the application of a "per se" rule to the case at hand could risk stifling the creation of efficiencies that are "common in technologically dynamic markets where product development is especially unlikely to follow an easily foreseen linear pattern", such as that for "platform software". The Court, instead, preferred to adopt a "rule of reason" approach, which, in its view, would grant "the first mover an opportunity to demonstrate that an efficiency gain" stemming from its practice could counter-

121. Id., per Mr J Wald, partly concurring, partly dissenting Opinion, p. 958–959.

122. Id., per curiam, pp. 952–953.

123. *US* v. *Microsoft*, 253 F.3d 34.

124. *Jefferson Parish Hospital District No 2 et al.* v. *Hyde*, 466 US 2, 104 S. Ct. 1551 at 1556.

125. *US* v. *Microsoft*, 253 F.3d 34 at 90–91.

126. Id., pp. 92–93.

balance any negative effects caused by the limitation on the freedom of choice enjoyed by the consumer and should therefore be allowed.[127]

Due to the limits of this case note, it is not possible to comment any further on the approach adopted by the US Courts as regards technological integration and the application of the Sherman Act to these cases of tying. However, the District of Columbia Court of Appeals' judgment could be interpreted as suggesting a more "benevolent", "deferential" attitude in the assessment of choices of technological design involving the integration of two distinct, albeit complementary, products, which would allow to evaluate the benefits accruing to consumers as a result of that integration.[128] On that basis, commentators argued that any obligation to "unbundle" software previously offered as part of a "whole" platform should be assessed carefully to avoid prejudicing innovation "by restraining functionalities of adjacent markets from being integrated in a sole product."[129]

Against this background, it is regrettable that the CFI did not consider whether the legal principles governing "classic" examples of tying constituted a suitable standard for the assessment of cases of technological integration such as in *Microsoft*. Instead, by embracing a restrictive test which is close to the "per se" rule rejected by some of the US courts, the Court has imposed an "almost insurmountable burden" on a dominant company wishing to provide an objective justification for the offer of new functionalities integrated into a main "platform",[130] without taking fully into account the needs of innovation on high-tech markets.

With respect to the requirement of coercion, it was noted in section 3.4 that the CFI relied almost entirely on the fact that Microsoft did not offer a version of Windows without the media player facility as a ground to establish the inability of customers, through the medium of the OEMs, to obtain the two products separately.[131] The Court declined to consider the circumstance that single users could obtain and install alternative media players which could be used on Microsoft operated machines as evidence of the absence of that "coercion".[132] However, it could be doubted that this approach would be ap-

127. Id. p. 92 and pp. 94–95.

128. *US* v. *Microsoft Corp*, 147 F 3d 935, pp. 949–950; also, *US* v. *Microsoft*, 253 F.3d 34, pp. 96–97. For commentary, see, *inter alia*, Pardolesi and Renda, op. cit. *supra* note 13 at 561–562.

129. *US* v. *Microsoft Corp*, 147 F 3d 935, per curiam, p. 952. For commentary, see, *inter alia*, Montagnani, op. cit. *supra* note 29, at 641.

130. Evans and Padilla, "Tying under Article 82 and the Microsoft decision", 27 *W. Comp.* (2004), 503 at 510. See also, *mutatis mutandis*, Albors-Llorens, op. cit. *supra* note 92, at 1759–1760.

131. Judgment, paras. 961–963.

132. Id., paras. 978–979.

propriate to the circumstances of the *Microsoft* case. It is recalled that in the *Hilti* decision the Commission had considered as abusive the dominant company's policy of reduction of discounts for customers who preferred to purchase nails separated from the cartridges necessary to operate the primary product on the ground that it had deprived the customer of any choice with respect to the source of the nails by denying her access to a significant financial advantage which it had reserved to customers willing to be "tied" to it for the purchase of all consumables.[133] In the light of *Hilti*, it was suggested that the proper test to assess whether a practice of tying – in this case, a "financial tie" – constituted abusive behaviour under Article 82 EC should focus on the extent to which the conduct of the dominant company allowed customers "a meaningful commercial choice to buy the products separately".[134]

Although Microsoft had not offered an "unbundled" version of Windows to customers, the evidence before the Commission and the Court indicated that single users could download standalone media players, such as iTunes and RealPlayer, on Microsoft operated machines and were not placed at a financial or technical disadvantage as a result of the tie, since WMP was provided free of charge as one of the features of Windows.[135] Moreover, users could opt for different software without adversely affecting any of the functionalities of the main OS or indeed the working of the chosen media player.[136] It is accordingly open to question whether the mere presence of WMP on all Microsoft-operated machines amounted to coercion for the purposes of Article 82 EC, since it did not affect the freedom of individual users to obtain an alternative and competing media player, unlike in "classic" tying cases.

With respect to the requirement of "foreclosure", according to the CFI in *Tetra Pak*, tied sales will constitute an abuse of a dominant position when they result in other suppliers being denied access to the tied product market resulting from the restriction placed on the freedom of their customers to seek sources of supplies other than the dominant undertaking.[137] As was stated in section 3.4 above, according to the CFI, given the ubiquity of Windows, WMP would have enjoyed an unparalleled advantage over competing software which

133. Commission Decision of 22 Dec. 1987, *Hilti/Eurofix*, *Bauco*, O.J. 1988, L 65/19, paras. 75 and 80.

134. Dolmans and Graf, "Analysis of tying under article 82: the Commission's Microsoft decision in perspective", 27 *W. Comp*. (2004), 225 at 231.

135. See e.g. Commission decision, *supra*, note 12, paras. 830–831, 955, 960.

136. See e.g. judgment, para 951.

137. Case T-83/91, *Tetra Pak International* v. *Commission*, [1994] ECR I-755, paras. 137, 140. For a discussion of the approach adopted by the Commission see the Staff Discussion Paper on the application of Article 82 to exclusionary abuses, above, note 203, paras. 188–189, 196–199.

could not be counterbalanced by any benefits stemming from the improved functionalities or more efficient distribution and, consequently, would have become the "format of choice" due to the behaviour of the OEMs, of Microsoft's customers and of media content providers.[138]

However, whether these foreclosing effects were such as to warrant the intervention of the Commission is open to question. It is submitted that the availability of competing media players, on the one hand, and, on the other hand, the circumstance that in markets for the supply of highly technological products competition appears to be a contest "for the market" rather than "in the market", could be taken as suggesting that no significant harmful effects would result for consumers. Commentators added that not only do end users remain able to obtain and use competing media players, but they could also benefit from the standardization resulting from the establishment of a new "industry standard" and from the "innovation-fuelled" competition characterizing a new "race for the market".[139] As was explained earlier,[140] in the software market, due to the existence of network effects, the customers who adopt the dominant OS as their "interface of choice" are likely to gain an advantage from their ability to communicate and interact with an increasingly extensive number of other users.[141] In addition, the circumstance that due to the "entrenchment" of that software competing suppliers are likely to concentrate their efforts in developing different, innovative products with a view of threatening the leadership of the "de facto standard" is going to encourage the emergence of better quality software, for the benefit of both media content providers and end users.[142]

Finally, it is argued that the case offered a "golden opportunity" to the CFI to provide clearer guidance on the extent to which efficiency benefits stemming from tying, especially because it enabled the dominant company to offer an innovative "integrated platform" to its customers, could constitute an objective justification for the behaviour at issue.[143] The Court, instead, emphasized Microsoft's near monopoly on the PC OS market and held that any resulting beneficial effects for customers would have been outweighed by the unparalleled advantage in market penetration enjoyed by WMP due to the tie and its standardization as the "format of choice" for both users and media

138. Judgment, paras. 1054, 1057–1058, 1061. *Supra*, section 3.4.

139. Pardolesi and Renda, op. cit. *supra* note 13, at 564.

140. *Supra*, section 3.2.

141. See, *inter alia*, Pardolesi and Renda, op. cit. *supra* note 13 at 526–528; also, Montagnani, op. cit. *supra* note 29, at 625–626.

142. E.g. Pardolesi and Renda, op. cit. *supra* note 13, 528–529; Montagnani, op. cit. *supra* note 29, at 630.

143. Judgment, para 1110.

content providers.[144] Although it is acknowledged that Microsoft's super-dominance probably constituted the principal motive at the basis of the CFI judgment, whether dismissing outright the claim of "objective justification" put forward by the applicant was entirely appropriate is open to question, especially in the light of the dynamics characterizing high-tech markets.

Furthermore, the views adopted by some of the US courts in cases of technological integration demonstrate an increasing awareness of the need to avoid stifling development by preventing even companies in a position of monopoly from adopting innovative business models.[145] It is submitted that the "narrow and deferential" approach adopted by the District of Columbia Court of Appeals in *US* v. *Microsoft*, as a result of which an antitrust violation is likely to be found only in cases in which the tying would not yield any "technologically beneficial results", would have been preferable since it would have taken into fuller consideration the developmental needs of innovation driven markets such as that for PC OS and other PC applications.[146]

It is therefore concluded that the position adopted by the CFI, while it may be consistent with the existing case law governing "classical ties", appears somewhat short-sighted since it does not sufficiently take into account the competition dynamics of the relevant market and especially the circumstance that in high tech industries there is a strong trend toward the emergence of "products … based on technological integration of new features",[147] which should therefore warrant a more "realistic" and flexible attitude to those forms of conduct.

4.3. *Conclusions: how "special" is the responsibility of dominant companies in high tech markets?*

The analysis conducted in the previous sections illustrated how the *Microsoft* judgment leaves open significant questions on the role of enforcement of the competition rules in New Economy markets and on the scope of the "special responsibility" imposed by Article 82 EC on dominant undertakings. It was argued that the CFI decision appears to have significantly changed the approach to refusals to deal and especially to grant IP licences covering proprietary information, by de facto "downgrading" some of the requirements of the test enshrined in the existing case law from "necessary" to merely "sufficient"

144. Id., para 1151.

145. See, *inter alia*, Pardolesi and Renda, op. cit. *supra* note 13, at 561. Cf. Vezzoso, op. cit. *supra* note 13, at 388–390.

146. *US* v. *Microsoft Corp*, 147 F 3d, 935, at pp. 950, 951. See also *US* v. *Microsoft*, 253 F.3d 34, pp. 96–97.

147. Evans and Padilla, op. cit. *supra* note 131 at 512.

conditions for the finding of an abuse of dominant position. Having regard to the tying of WMP with Windows, it was argued that the rather strained interpretation given by the Court to the concepts of "coercion" reflects the inability of the principles governing "classic" cases of tying to "cope" with the technological integration characterizing highly innovative industries, which, by its very nature, could warrant a more benevolent attitude on the part of antitrust enforcers.

Accordingly, while *Microsoft* can be read as the response of EU competition policy to the behaviour of a "super-dominant" company in an industry characterized by ad hoc competition dynamics, it is likely to have profound implications for the future interpretation of Article 82 EC in general, whose directions cannot be easily predicted and which could be potentially detrimental both for the coherence *vis-à-vis* the existing legal principles and the effective and appropriate competition enforcement.

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