

## Article 82 EC: Where do we stand after the *Microsoft* judgement?

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*Several months have now passed since the European Court of First Instance (CFI) handed down its much anticipated judgment in the Microsoft case. The judgment proved to be the final say in this highly important case as there was no appeal to the European Court of Justice (ECJ).*

*This article offers some reflections on the judgment and considers the key question of where we stand in relation to Article 82 EC after the judgment. The article begins with a brief introduction and preliminary observations on the relationship between competition law and the field of intellectual property (Parts 1 and 2). It then considers in Part 3 some of the key pre-Microsoft decisions. In Part 4 the article examines the judgment closely. This is followed with some reflections in Part 5. Finally, Part 6 concludes.*

### 1. INTRODUCTION

The acquisition and use of intellectual property rights (IPRs) have often given rise to competition concerns on the part of competition authorities around the globe. Such concerns appear to be on the increase, as illustrated by the sector enquiry recently launched by the European Commission into the practices concerning the use of IPRs within the pharmaceutical industry. At the same time however, the application of competition rules by the competition authorities appear to have engendered legitimate concerns on the part of holders of IPRs. The existence and importance of these two different parts of the legal systems of most industrialised countries make it necessary for the authorities to strike a balance between the *existence* and *exercise* of these rights; something that courts and legislators of several countries have in fact attempted to do.

It is important to bear in mind that even if the central element of an IPR is to give the holder an exclusive right and thus the possibility to restrain competition, the *existence* and *exercise* of that right nevertheless play a very important part in effective competition in the market place to the good of consumer welfare. Without the protection offered by IPRs, as created by legislation, an important part of innovation might be endangered because of the often considerable economic investments required to innovate. And precisely because of the protection offered to the inventor, others will in turn also need to innovate in order to try and compete on the same market. Hence it is worth reminding the public in particular that IPRs are of fundamental importance not only to the holder but also to society in general.<sup>2</sup> On the other hand, precisely because of the protection afforded by legislation to IPRs and the inherent right to exclusivity, it is important that the substantive criteria for acquiring the exclusive right do not become too easy to fulfil, especially as regards patents.<sup>3</sup>

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<sup>1</sup>Case T-201/04 *Microsoft v. Commission* (judgement delivered on 17 September 2007).

<sup>2</sup>See for a thorough analysis of the balance between copyright and competition the opinion of the Advocate General in *Magill*, Case C-241/91P and Case C-242/91P, *RTE and ITP v. Commission* [1995] ECR I-743.

<sup>3</sup>One may for example wonder how the compilation of television programme listings in *Magill* could represent creativity worthy of copyright protection. The same applies to the *IMS Health* case, cited in note 11 below.

I believe it is also imperative that the limits to the acquisition and exercise of IPRs, which the competition rules impose, are proportionate and kept to the minimum necessary to avoid abusive behaviour. Within the EU competition law system, Article 82 EC is of particular relevance in this respect, since the concept of ‘abuse of a dominant position’ contained in that Article may take the form of an abuse of IPR by a dominant undertaking, i.e. the holder of such right. Establishing such an abuse in practice can be extremely difficult. Over the years, the relevant case law has highlighted just how problematic this is. The most notable and the single most high profile case is of course the *Microsoft* case itself; though the case was not exclusively about the use or abuse of IPRs by Microsoft: another part of the *Microsoft* case concerned the question of illegal tying of the Microsoft Media Player to the Windows operating system. This latter part of the case will be discussed in the present article, albeit more briefly than the issue of abuse of IPRs.

## 2. SOME PRELIMINARY REMARKS AND OBSERVATIONS

Before discussing the central question of this article of whether, and if yes, how the *Microsoft* judgment changed the situation in relation to the issue of abuse of IPRs under Article 82 EC, it would be helpful to make a number of preliminary remarks and observations; some of these points might perhaps be considered fairly simple and straightforward but they need to be made.

Firstly, it is the very purpose and the very subject-matter of an IPR, for example a patent, that the holder will enjoy an exclusive right and that it is therefore for the holder – and for him alone – to decide: if, how, when, and under which conditions he wants to exercise his right. Thus, it is for the holder of a patent to decide whether he himself will use the patent to exploit the invention for the purposes of production, or somehow use the invented method or molecule or whatever the patent covers; alternatively he can decide to license the IPR to another party. In the latter situation, the holder of the patent enjoys the right to determine on which economic terms and for how long the licence will be granted.<sup>4</sup> In other words the patent is the property of the holder as is his house.

Secondly, an inventor is entitled to seek to have his invention patented and when this happens he must enjoy the protection of that patent. This right equally applies to dominant undertakings which in principle are just as entitled to exercise patent rights as any other (non-dominant) patent holder. Dominant undertakings are also entitled to invest heavily in obtaining patents through a policy of innovation whilst also, in principle, being entitled to decide not to use a patent and to refuse to license their patent to another party. As long as they stay within the limits of the patent legislation, dominant undertakings are technically on safe ground. The same, of course, applies to copyrights, trade marks and design rights.

However, competition law also applies to holders of IPRs. But competition law is not meant to be used to abolish the very subject-matter of the right(s) created, for example by a patent or a copyright; it should only be used to the extent necessary to avoid an abuse of the right(s) by the holder. The difficult question is, however, when is the use or exercise of IPRs abusive? This is a very delicate question, which during the last 20 years, has probably not become easier to answer, let alone answer in a clear manner; indeed some might even argue that this question is simply unanswerable.

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<sup>4</sup>See Case 402/85, *Basset/SACEM* [1987] ECR 1747.

Under EU competition law, it is long established in case law that dominant undertakings have a special obligation to avoid behaviour which can restrain, distort or hinder competition.<sup>5</sup> However, as stated so eloquently by John Temple Lang,<sup>6</sup> this special obligation simply means that Article 82 EC applies to dominant undertakings. It means that conduct which is perfectly lawful for ordinary (non-dominant) undertakings may be unlawful if it is carried out by a dominant undertaking. If, as recognised by case law, a dominant undertaking is allowed to defend its economic and legal interests, this is not so if the purpose or effect in reality is to damage competition by a disproportionate and unnecessary action.<sup>7</sup>

The difficulty, however, still exists in determining what constitutes abuse of a dominant position by the exercise of IPRs. As mentioned before, the simple fact that an IPR holder refuses to grant a licence is not in itself enough to constitute abusive conduct.<sup>8</sup> There must be other circumstances present for such refusal to be labelled abusive. The same applies to dominant undertakings which have a 'firm' policy of always seeking intellectual property protection for their innovations, even if they do not necessarily desire to exploit the protected innovation whether immediately following the grant of the protection under law or at a later stage.

Based on the former case law of the Community Courts it seemed to be that the biggest difficulties have often concerned the question of whether or not the relevant holder of the IPR in the case at hand was entitled to refuse to grant a license to another party. The case law on this problematic question consists of only a handful of judgments, which were relied upon by the CFI in the *Microsoft* judgment.

### 3. BEFORE THE MICROSOFT JUDGMENT

At least until the judgment in *Microsoft*, it seemed to be the general understanding that relatively strict conditions had to be present in order to find an abuse in case of a refusal by the holder of an IPR to grant a licence of that right to another person. Three particular cases are worth noting here.

In *VOLVO*, which concerned a design right regarding car body parts, the ECJ found that even if the proprietor of such a right is entitled to prevent third parties from manufacturing and selling or importing, without his consent, products incorporating the design in question, such proprietor, if dominant, may commit an abuse, for example by arbitrarily refusing to supply spare parts to independent repairers or by deciding to stop the production of spare parts even though many cars are still in circulation.

In *Magill*,<sup>9</sup> the ECJ, in confirming the judgment of the CFI, stated that 'refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot itself constitute abuse of a dominant position'. The ECJ, however, went on to state that 'the exercise of an exclusive right by a proprietor may, in exceptional circumstances, involve

<sup>5</sup>See e.g. Case 322/81, *Michelin v. Commission* [1983] ECR 3461.

<sup>6</sup>See Temple Lang, 'European competition law and compulsory licensing of intellectual property rights – a comprehensive principle' (2004) 4 *Europarättslig Tidskrift* 558-588.

<sup>7</sup>See Case T-219/99, *British Airways v. Commission* [2003] ECR II-243.

<sup>8</sup>Case 238/87, *Volvo v. Veng* [1988] ECR 6211.

<sup>9</sup>Cited in note 2 above.

abusive conduct'. The ECJ found that such exceptional circumstances were present if the refusal concerned:

- a product the supply of which was indispensable to the production of
- a new product, for which
- there was a potential consumer demand, provided that the refusal was not justified and
- the refusal would eliminate all competition on the secondary market.

In *IMS Health*,<sup>10</sup> the ECJ, referring to *Magill*, found that it followed from previous case law that, in order for the refusal by a dominant undertaking holding a copyright to be abusive, it was sufficient that three cumulative conditions be satisfied, namely, that the refusal prevents the emergence of a new product for which there is a potential consumer demand, that it is unjustified and that it is such as to exclude any competition on a secondary market.

#### 4. THE MICROSOFT JUDGMENT AND ITS IMPLICATIONS

##### (A) REFUSAL TO SUPPLY

As already mentioned, the first part of the Commission's case against Microsoft concerned Microsoft's alleged policy of not being willing to supply interoperability information to its competitors on the market for work group servers costing less than \$20,000. According to the Commission, this policy would eventually have the consequence that Microsoft would obtain a dominant position on the market for work group servers because Microsoft, with its Windows operating system for client PCs, has more than a 90% share of the world-wide market for PC operating systems and because the servers of Microsoft's competitors, without the interoperability information from Microsoft, are not 100% compatible with Windows and therefore cannot interoperate as effectively with Windows as Microsoft servers. According to the Commission, this would lead to a situation where all competition on the market for work group servers risked being eliminated, as Microsoft in 2004 already had more than a 70% share of that market. The refusal to grant licences to interoperability information therefore constituted an abuse of a dominant position. In its decision, the Commission accepted as a working assumption – on which the decision was founded – that Microsoft's interoperability information might be covered to some extent by IPRs.

In its judgment, the CFI proceeded to analyse the case law regarding refusal to supply<sup>11</sup> and concluded that the exercise of an exclusive right may be abusive only in exceptional circumstances and that such exceptional circumstances are present, in particular if:

- (a) the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;
- (b) the refusal is such as to exclude any effective competition on the neighbouring market;
- (c) the refusal prevents the appearance of a new product for which there is a potential demand.

<sup>10</sup>Case C-418/01 *IMS Health v. NDC Health* [2004] ECR I-5039.

<sup>11</sup>See paragraphs 320 to 335 of the judgement.

If such circumstances are present, the CFI stated, only an objective justification prevents the refusal from being abusive under Article 82 EC.

The particular analysis produced by the CFI on the issue of refusal to supply – in the form of a refusal to grant an IPR licence – on the part of a dominant undertaking deserves particular attention. Before casting a closer look at that analysis and its implications, it may be worth offering a number of hypothetical scenarios in an effort to illustrate the possible consequences of the case law analysed by the CFI in the judgment.

In the first scenario, a large undertaking (A) producing medicines for humans has invested large amounts of money in the development of a new product against common colds. In this regard, A has invented a new and very effective combination of molecules for which it has been granted patent protection. The new product cures colds very effectively within 8 hours. Within a few months after the introduction of this product on the market, A becomes dominant in all EU Member States on the market for medicines against colds.

If undertaking B then contacts A and asks for a licence to produce the products and sell them within the EU market or on any other market, it clearly follows from the case law that A is perfectly entitled to refuse to grant B a licence.

In the second scenario, B asks for a licence to produce and informs A that, if granted the licence, B will be able to produce a product which will cure colds within 4 hours. Is a refusal to supply by A abusive in these circumstances? The licence is, from a technical point of view, clearly indispensable for B; however the question must be asked whether B's intended product can reasonably be called a new product or whether it is simply a better, more efficient product. B's intended product is certainly a product for which there would be a potential demand and, in addition, the refusal prevents effective competition on the market. It is, however, not a neighbouring market but the same market. Based on the case law – at least until *Microsoft* – it is submitted that the refusal on the part of A is not abusive since the demand simply concerns a more effective variant of A's product. If A's refusal were to be deemed abusive and a licence was therefore to be granted, this would affect the very subject-matter of the patent right.

In the third scenario, a change to the facts is introduced. B now contacts A seeking a licence in order to produce a combination of molecules to be used for a product which is not meant for colds but would be a very effective medicine against liver cancer. A is not active on the market for medicines against cancer; however A still refuses to grant such licence. The question is asked whether such refusal is abusive under Article 82 EC. Probably the answer should be in the positive for a number of reasons: first, the licence is objectively indispensable: A's combination of molecules being necessary for the new combination by the addition of B's particular molecule; secondly, it is a new (another kind of) product compared to A's product; thirdly, there is a clear consumer demand for the new product; and fourthly, we are dealing with a neighbouring market on which A is not active. Had A been active on that market, the situation might be different, for example if A claims that he is himself in the process of trying to develop a product for treatment of various types of cancer. In such a situation, A may have a reasonable objective justification for refusing to grant B a licence.

Having set out these three scenarios, we turn to consider the findings of the CFI in *Microsoft* in regard of the criteria the Court had identified.

#### I. INDISPENSABILITY

The Commission had concluded in its decision that access to the interoperability information was indispensable for the competitors in order for their servers to be able to interoperate seamlessly with the Windows operating system; as seamlessly as if they were Microsoft servers. Microsoft however disagreed and its response to this claim was that the interoperability information was not indispensable for several reasons:

- (a) Since 90 % of the world's personal computers (PCs) work with Windows and Microsoft's servers only cover 70% of the world market, a large number of non-Microsoft servers have to interoperate with Windows on PCs. Microsoft supported this with market data demonstrating that several undertakings had a combination of servers from different producers, all of them working in a Windows environment.
- (b) A number of software products available on the market allow establishing a sufficient degree of interoperability with Windows for non-Microsoft servers.
- (c) Reverse engineering is possible and has been done successfully by some producers of software for servers.

Microsoft claimed that, as a consequence of these possibilities, access to the interoperability information could not be deemed to be indispensable since it is technically possible and 'economically viable' for its competitors to develop and market their products without such access.

In its answer to these arguments the Commission argued that:

- (a) Microsoft's market share for work group servers had grown to more than 70% in very few years and would continue to do so because of the difficulties users of non-Microsoft servers encounter with the interoperability with Windows. In other words, Microsoft's market share would continue to grow because of the better interoperability it could offer with servers.
- (b) None of the available software products permit the servers of the competitors to obtain the same degree of interoperability as Microsoft servers; as a consequence, Microsoft's competitors are left at a competitive disadvantage.
- (c) Reverse engineering is possible but takes years to accomplish and is far too costly for Microsoft's competitors.

Put in a different way, the Commission's view was that without access to the interoperability information, it would not be economically viable for competitors to continue to try to compete with Microsoft.

The CFI rejected the arguments presented by Microsoft by relying, in substance, on two premises: first, that the indispensability criteria is not a technical, objective criteria but must be based on an appreciation of ‘economic viability’; and secondly, an appreciation of economic viability presupposes an analysis of a complex economic character, which under the case law is subject only to limited review by the Court.

This approach seems to differ from the situations dealt with in earlier case law. In *VOLVO, Magill* and *IMS Health*, and indeed in the earlier case of *Commercial Solvents v. Commission*,<sup>12</sup> there was *no* actual or potential substitute to the product or service to which access was demanded by the third party and refused by the dominant undertaking. In other words, in those cases, access was technically and objectively indispensable. Without access, there was no way at all for other undertakings to stay on or enter the market in the first place. This is obviously different from the situation in *Oscar Bronner v. MediaPrint*,<sup>13</sup> where the ECJ found that access to the newspaper distribution network of MediaPrint, to which access was demanded, was not indispensable to the competitor Oscar Bronner since nothing prevented the latter from establishing their own alternative network, even though it could be costly. The ECJ therefore found no abuse of dominance in the case.

With the CFI’s acceptance of the Commission’s approach in *Microsoft*, the concept of indispensability has now been broadened to also cover ‘economic indispensability’, which in future cases leaves the Commission with the possibility of applying its traditional wide margin of appreciation to the question of whether or not access to a licence of an IPR is ‘economically indispensable’. This probably makes it easier to find a refusal on the part of a dominant undertaking abusive and may leave such an undertaking – when it is the holder of an IPR – with less legal certainty as to and under which circumstances it will have to grant a licence in order to avoid being caught by the net of Article 82 EC. Furthermore, the control of the Commission’s assessment of economic viability is limited in scope because of the margin of appreciation accorded to the Commission. From a criterion based on objective, almost physical indispensability – as we also know it from the concept of ‘essential facilities’ – it has been broadened to include an economic assessment.

## II. ELIMINATION OF COMPETITION ON A NEIGHBOURING MARKET

It is beyond the scope of this article to spend much time on this part of the CFI’s judgment, which mainly dealt with the right product market definition and the development of this market up until the Commission decision – that is, this part of the case mainly dealt with facts and evidence.

In brief, the CFI agreed with the Commission in all respects, mainly on the basis of the limited control it enjoys because of the margin of appreciation left to the Commission when assessing complex economic situations such as the competitive situation of a market. It is, however, worth mentioning that the Court, while repeating that its control was of a limited character in view of the complex economic assessment involved in defining the correct product market and assessing the future market developments, put in a clear caveat at paragraph 482 of the judgment. The Court stressed that ‘... this [however] does not

<sup>12</sup>Joined Cases 6/73 and 7/73, *Commercial Solvents v. Commission* [1974] ECR 233.

<sup>13</sup>Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] ECR I-7791.

prevent the Community judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of sustaining the conclusions drawn from it'. The Court referred in that regard to the judgment of the ECJ in *Tetra Laval*.<sup>14</sup>

Nonetheless, the CFI's findings in this part of the judgment contain an important clarification regarding the criterion for elimination of competition. The Court declared that it is not necessary that *all* competition on the market would be eliminated; what is necessary is that the refusal is likely to eliminate all *effective competition*.<sup>15</sup> In *IMS Health* as well as in *Magill*, it was stressed that the conduct was abusive as it would lead to elimination of all competition on the secondary market. After *Microsoft*, it is elimination of all *effective competition*, namely competition which might present a real constraint or a real competitive challenge to the dominant undertaking. This shift from elimination of all to elimination of effective competition appears to have at the same time rendered the conditions for finding an infringement of Article 82 EC less strict by loosening the conditions for finding an abuse in these situations. To most people this shift is probably well-founded, as what is necessary is that there is room for some effective and not just some, however toothless, competition.

### III. NEW PRODUCT

On this point, the judgment of the CFI represents another development of the case law, which will be welcomed by competition authorities themselves but presumably less by the proponents of strong protection of IPRs. In illustrating this point, it would be helpful to briefly consider the arguments of the parties in the case.

The Commission claimed that the refusal to supply the interoperability information to Microsoft's competitors prevented new products from entering the market, thereby causing prejudice to the consumers or at least preventing technical development on the market. If competitors cannot access the interoperability information, they cannot produce servers which can effectively compete with the Microsoft servers. If, on the other hand, they were able to obtain the information, they would not just be able to duplicate Microsoft servers, which would in any event not make them a better choice than Microsoft servers, but they might introduce servers to the market with added-on extra capabilities that would make them potentially more attractive to consumers than Microsoft servers and thereby create competition and further development.

Against this, Microsoft argued that it followed from the Commission's case that, for the competitors' servers to be able to match Microsoft servers as regards interoperability, the former would necessarily have to be a complete duplicate of the Microsoft servers as regards work group services; otherwise the competing servers could not be put into a group of Microsoft work group servers and function seamlessly within such a group. Put differently, competing servers would have to be 'clones' as regards the core services offered by work group servers. Therefore they would not constitute a new product but just another parallel product bearing another name.

<sup>14</sup>Case C-12/03 P, *Commission v. Tetra Laval* [2005] ECR I-987.

<sup>15</sup>See paragraph 563 of the judgement.



Having examined the application of the new product criterion in the case law, the CFI dealt with this criterion – which in earlier case law had been seen as an important limitation on the finding of abuse – by stating at paragraph 647 of the judgement:

'The circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health*... cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.'

Simply put: in order to find an abusive refusal to grant a licence, it is no longer a *conditio sine qua non* that the refusal prevents the emergence of a new product in a strict sense: also the prevention of technical development may be abusive. This is, according to some views, a development which may have significant consequences for IPRs holders.<sup>16</sup> Going back to the scenarios mentioned above regarding the medicine against colds, it might mean, in the second scenario, that B would be entitled to obtain a licence from A, the patent holder simply because its product was claimed to be better and therefore could be claimed to be a technical development for which there is a potential demand. However the question arises whether this case law would also mean that, if dominant on the market, A would be obliged to grant a licence every time another person claims that, if given a licence, its product will be a technical development for which there is potential demand. It may be supposed that proponents of strong protection of IPRs hope that this is not the case. Since the conditions under which a refusal to license a product must remain *exceptional*, this definition or broadening of the, 'new product' criterion must, like any other exception, be interpreted restrictively.

#### IV. OBJECTIVE JUSTIFICATION

It follows from the earlier case law and as was confirmed by the CFI in its judgement, if the other criteria for finding abuse are fulfilled, a dominant undertaking may still avoid such a finding if it can present an objective, convincing justification for the conduct in question.

Microsoft argued before the CFI that it relied, as a justification for its conduct, solely on the fact that the technology concerned was valuable and covered by the concept of IPRs. In its judgment however, the CFI found that the simple fact that the information requested was covered by the concept of IPRs cannot constitute an objective justification for a refusal if the other conditions are fulfilled; otherwise the *raison d'être* of the exception would be rendered meaningless since the exception would then never apply.<sup>17</sup>

Finding that Microsoft had only presented 'vague, general and theoretical' arguments and had thus not lifted its burden of proof for this allegation, the CFI also rejected Microsoft's arguments to the effect that, if it were to be obliged to grant a licence, this would eliminate future incentives to invest in the creation of more IPRs. However, having already rejected

<sup>16</sup>See for a strict approach to this criteria, Temple Lang, note 6 above, at, p. 577.

<sup>17</sup>See paragraph 690 of the judgement.

Microsoft's arguments concerning incentives to invest, the Court nevertheless examined this aspect somewhat more closely at paragraphs 702 to 710, first by making the point that the disclosures made under the settlement in the USA had not had any negative impact on Microsoft's incentive to invest and secondly by accepting the conclusion of the Commission in its decision to the effect that the need to protect Microsoft's incentives to invest cannot outweigh the exceptional circumstances of the case and cannot therefore constitute an objective justification.

In other words, a balancing of the interests at stake must be made and the burden of proof as to the negative impact on incentives to invest rests on the dominant undertaking.

The Court further stated that the mere fact that the technology was secret and of great value to the licensees and contained important innovations could not constitute an objective justification, since it was Microsoft's own unilateral decision to keep the information secret and the information was valuable to the competitors precisely because it was indispensable. Furthermore, there is no reason why secret information should be more protected than technology that is necessarily made public by a patent registration.

The Court, however, because of the pleadings of the parties, did not have the opportunity to clarify what might constitute an objective justification for refusal to grant a licence of an IPR. As mentioned above, by referring to a few case scenarios, an objective justification might perhaps be that the dominant undertaking itself is just starting to rely on the IPR concerned to develop a new product of the type that the applicant for a licence is claiming he would introduce on the secondary market and for which there is potential demand. Another objective justification might be that the IPR concerned is the only and fundamental basis for its production and that, if a licence were to be given to create competition *vis-à-vis* the dominant undertaking – because it follows from the judgment that the product need not be a new one but just a technical development – that might deprive the undertaking of its very economic basis.

Reflecting on this particular part of the judgment, it would seem that it has expanded the case law on four important fronts: the first is regarding the indispensability criterion, which now in addition to objective indispensability also covers 'economic viability', thereby allowing the authorities – in this case the Commission – a wide margin of appreciation; secondly, that the new product criterion no longer covers only new products in strict terms but also a technical development of an existing product; thirdly, elimination of competition means elimination of all *effective* competition and not all competition; finally, the value of the IPR or the degree of innovation involved or the negative effect on incentives to invest does not – at least easily – count as objective justification for a refusal by the dominant undertaking to grant a licence of its IPR(s).

#### (B) TYING

As was noted above, the second part of the Commission's finding of abuse on the part of Microsoft concerned the alleged illegal tying of the Windows Media Player to the Windows

software packet. In other words, customers could not buy Windows without also getting the Media Player which was integrated into Windows and which could not be uninstalled by buyers. This practice was started at the end of 1998/beginning of 1999; prior to that, Microsoft sold Windows with media players produced by other producers or by itself as an option.

The Commission found that this new business model constituted abusive tying or bundling of two separate and different products which had as its effect to restrain considerably competition from producers of other media players, since practically any buyer of a new PC would automatically get Microsoft's media player with Windows: buyers would not need another media player or at least only few of them would go looking for other media players. In other words, the market for other media players had become much smaller and might completely disappear. This in turn would have another effect, namely that writers of content for media players would focus on writing programmes that are compatible with the Windows Media player because of the much greater market they could access. This would diminish the demand for other media players because of the more limited volume of content written for them.

Microsoft's main arguments against the finding of abuse by the Commission were that:

- (a) there were not two separate products but just one which over time had been developed into one integrated product; Microsoft explained in that regard that there was no demand for Windows without a media player;
- (b) Windows with the media player did not cost more than without the media player;
- (c) furthermore, any buyer of a Windows PC can download free of charge as many other media players as they want and nobody is forced to use Windows Media Player; anybody can use any other media player on their Windows PC. There was thus no foreclosure of competition; and
- (d) as it was an advantage to users and writers of content to have one broadly used stable and well defined platform becoming so to speak an industry standard there was an objective justification for the integration of the media player into Windows.

On its part, the CFI felt that all of these arguments should be dismissed by stating the following:

First, the Commission was right to claim that there were two different products. Indeed, Microsoft itself had earlier sold the products separately and still did so for a particular version of Windows. There were other producers out there selling the media players separately, which demonstrated the existence of a distinct demand for media players. Referring to the *Hilti* judgment,<sup>18</sup> the CFI further stated that the fact that there was no demand for Windows without media player did not prevent it from concluding that those two products belonged to separate markets. Added to this was the fact that it was not a case of logical technical development and of technical necessity to integrate the two products into one.

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<sup>18</sup>Case C-53/92 P, *Hilti v. Commission* [1994] ECR I-667, upholding the CFI judgment in Case T-30/89, *Hilti v. Commission* [1991] ECR II-1439.

Secondly, even if Microsoft did not charge a separate price for its media player, it could not be inferred that the media player was provided free of charge, because it was evident from the facts of the file that the price was included in the total price for Windows. The Court added that, in any event, it does not follow from Article 82(d) EC or the case law on bundling that consumers must necessarily pay a certain price for the tied product for it to be illegal bundling.

Thirdly, whilst it is true that certain other media players can be downloaded free of charge, this is not as simple as it is said. The Commission had presented facts to demonstrate that a not unimportant part of attempts to download simply failed and that probably a considerable number of private users of PCs were either unaware of that option or simply would not even want to try other media players, as they already had one at their disposal. The Court further confirmed the point of view that, as Windows Media Player is found on almost all PCs, this would necessarily lead content writers to concentrate on writing for that format, which in turn would lead to less content for the format of other competitors and, as a consequence, less demand for their media players, thereby leading to foreclosure.

Finally, the fact that the tying enables software developers and Internet site creators to be sure that Windows Media player is present on virtually all client PCs in the world is precisely one of the main reasons why the Commission correctly took the view that the bundling led to the foreclosure of competing media players; that anticompetitive effect cannot be offset by the claimed advantages for software writers. Furthermore, the Court stated that, although standardisation may effectively present certain advantages, it could not be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying.

It seems that the main worry that was expressed, following the delivery of the judgement, about its tying section is linked to the consequence of the Court's finding of two separate products and its dismissal of the claim that the integration of Media Player into Windows represented a logical technical development of the 'Windows' product. These arguments have been based on the assumption that no buyer of a client PC would want a PC which was unable to receive streaming sound and pictures. That is because, today as well as even in 1999, a large majority of websites incorporate sound and moving pictures which, in order to be used without cumbersome downloading, presupposes a working streaming media player installed on the PC. Thus, instead of customers having to buy separately the media player of their choice and having it installed afterwards, it is being argued that it is more logical that the media player is integrated in the PC package that the customers buy.

As long as buying the 'package' does not prevent manufacturers of PCs from selling a PC package that contains one or more other media players and as long as buyers of client PCs are free to add further media players to their PC, it might be argued that there is some truth in this line of argument, depending however on the exact competitive conditions present on the market. As it appears from the judgment, the Court found the conditions of the market to be such that that type of arguments could not be followed.

However, as long as the dominant undertaking limits itself to improving the quality of its products – and therefore enhance their competitiveness – and as long as it does not use action – without any value to their own products or productivity – simply and only to interfere with the competitors’ development opportunities on the market, a technical development or improvement of their products is to the advantage of competition and thus to the advantage of consumers.

#### 5. REFLECTIONS

The judgment of the CFI in *Microsoft* offers an appropriate opportunity for one to reflect on the application of Article 82 EC in cases concerning refusal by dominant undertakings to license their IPRs. Given the difficulties in striking the right balance between IPRs and competition law and the importance of any change in this balance it is understandable why some observers have expressed surprise and some scepticism about the judgment. Striking a balance between IPRs and competition law is indeed an extremely difficult exercise that will rarely meet everybody’s expectations. Some fear that, with this judgment, the scope of protection afforded to IPRs has been weakened considerably and that the already somewhat shaky legal certainty that IPRs holders had before *Microsoft* has been rendered even more shaky after *Microsoft*. But this is one side of the story only and one must admit that the views on this issue can vary significantly depending on the degree of competition enforcement that is deemed acceptable at a given moment within a given jurisdiction.

According to some views, with this judgment, the weaponry of competition authorities in general and the European Commission in particular has been reinforced. Indispensability is no longer objective; it is no longer physical indispensability only: it now covers ‘indispensability to operate in an economically viable way’, a criterion which leaves a rather wide margin of appreciation to the authorities, subject only to limited control by the judiciary. The new product criterion now also covers technical development, a criterion which is perhaps of a complex technical character and therefore also leaves the authorities a margin of appreciation subject to limited control by the judiciary. The secondary market criterion now also covers a secondary market where the dominant undertaking is active and it must accept to grant licences to competitors of an IPR on an upstream market to allow the competitors to compete more effectively using a product representing a technical development of the dominant undertaking’s product on the downstream market.

As to the objective justification, this was dealt with by the CFI rejecting arguments concerning disincentives to invest as well as the value of the investments made (and therefore of the IPR concerned), and by indicating that, on balance, the anticompetitive effects of the conduct outweighed that type of considerations. This of course means that it was so in the case itself and not necessarily in all other cases of this type.

There can be relatively broad agreement that the judgment may have far reaching consequences. On the one hand, the European Commission and the national competition authorities of Member States will now have support for a more powerful intervention *vis-à-vis* dominant undertakings, which may be good for competition. On the other hand, the judgment may have what some might call negative consequences for holders of IPRs, which perhaps might deter investments that otherwise would be made and in turn have negative consequences for competition, in particular if innovation were to be discouraged to the detriment of consumers. As was pointed out at the beginning, even dominant undertakings should be allowed to invest in patents and other IPRs, because even when these investments may incidentally limit the possibilities open to competitors, it normally benefits the consumers in the long run.

Regarding the tying part in the judgment, it is probably the case that less people are worried about the consequences of the judgment, even though, also in this respect, it is necessary to bear in mind that the risks entailed in overstretching the concept of tying can become a serious constraint for what otherwise would be valuable development and innovation to the benefit of consumers. As Advocate General Francis Jacobs once put it, competition law is not there to protect competitors but competition and the consumers.

In applying Article 82 EC with the rather vague notion of abuse and in view of the fact that intervention under the Article normally has as a consequence the need for dominant undertakings to modify their future business practices, the competition authorities need to exercise particular caution and choose their cases with great care in order to avoid running the risk of adopting in reality anticompetitive decisions.

## 6. CONCLUSION

The *Microsoft* judgment presents a number of developments or evolutions of the case law. Some of them may be far reaching and some seem to have given rise to concern. Others seem to raise less concern, but, as regards the future, it should not be forgotten that this judgment rules upon a very special and particular set of factual circumstances regarding an undertaking with an immense worldwide market power. The judgment must always be read and understood in its context. From a purely academic point of view, it may be regretted that the judgment was not brought on appeal before the ECJ so Europe's highest Court could have its final say in the case. However, sooner or later, either through a direct action or through a reference for a preliminary ruling under Article 234 EC, the ECJ may find the occasion to examine and decide on the delicate balance that must be struck between IPRs and competition law.