The inadequacy of the European Commission's Remedies for Microsoft's tying practices in the *Microsoft* Cases: Casting doubt on the suitability of the Commission's approach for an Information Technology Economy

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This article examines whether the remedies that the European Commission imposed for Microsoft's tying practices in Microsoft I *and Microsoft* II *were adequate. To this end, the article first identifies the three main objectives that competition law remedies aim to achieve and explains how the imposed remedies fall short of accomplishing these objectives. Then, the question whether categorising Microsoft's practices under the essential facilities doctrine would have made a difference in designing adequate remedies is considered. However, the conclusion reached is that this is rather unlikely, even if the Commission were to succeed in establishing Microsoft's liability under this doctrine. Against this backdrop, the article demonstrates that the Commission's inability to design an appropriate remedy raises doubts about the soundness of the competition claim brought against Microsoft and takes the view that the Commission's position should be revisited in relation to Information Technology Economy.*

I. Introduction

The Microsoft litigation started in the United States but the multinational presence of the software giant led to the initiation of competition investigations in other jurisdictions as well, including Europe. More specifically, the European Commission ('the Commission') opened two investigations into the following practices which were preliminarily considered to amount to abusive tying by

Microsoft in breach of Article 102 of the Treaty of the Functioning of the European Union, namely Microsoft's practice of bundling Windows Media Player ('WMP') with its Windows Operating System ('Windows OS'), hereafter referred to as *Microsoft I*; and Microsoft's practice of bundling Internet Explorer ('IE') with its Windows OS, hereafter referred to as *Microsoft II*.[1] *Microsoft I* and *Microsoft II* are also collectively referred to in this article as the *Microsoft* cases.

Microsoft I started in 1998 and a decision against Microsoft was made by the Commission in 2004, finding that Microsoft's tying of WMP to Windows OS was contrary to Article 102 TFEU. It is should be noted that *Microsoft I* also included claims against Microsoft regarding its refusal to provide interoperability information to its competitors. The focus of this article is on the tying claims only. In addition, the remedial part of the decision included the following: (1) an order for Microsoft to pay a massive fine of €497,196,204; (2) the requirement to disclose interoperability information to a certain standard; (3) the obligation to provide an unbundled version of Windows OS which does not include WMP (unbundled Windows OS); (4) appointment of a Monitoring Trustee on Microsoft's expense to oversee the enforcement of the interoperability and tying part of the remedial order.[2] *Microsoft II* started in 2007 and was concluded by a commitment decision adopted by the Commission in 2009. The decision made the commitments submitted by Microsoft – for the purpose of alleviating the Commission competition concerns relating to the bundling of IE with Windows OS – binding on Microsoft. The second part of this article will provide more background and details of both cases.

This article considers whether the behavioural remedies imposed on Microsoft for its tying practices in the *Microsoft* cases, namely the provision of the unbundled

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[1] Article 102 of the TFEU states 'Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.'
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.' Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML

[2] Case COMP/C-3/37.792 Microsoft - Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf

Windows OS and the commitments, were adequate. For this purpose, part three of this article provides a review of the literature on the objectives of competition law remedies. In light of the objectives defined, part four discusses the adequacy of the remedies imposed. Adequacy is measured in this article according to the following criteria: firstly, whether the remedy effectively ends the infringement and its effect, i.e. whether it restores competition; secondly, whether the remedy improves consumer choice; and thirdly, whether the remedy protects the competitive process – as opposed to protecting competitors only. This article aims to illustrate that the remedies imposed in the *Microsoft* cases are inadequate because they do not fulfil the abovementioned objectives.

Part four also examines the question whether considering Microsoft's practices as a refusal to supply access to an essential facility would aid the design of more appropriate remedies. Accepting Judge Posner's proposition that the availability of an adequate remedy is indicative of the soundness of the competition claim being brought against an undertaking,[3] the intention behind this question is to demonstrate that an adequate remedy seems unachievable even under a different classification of the allegedly abusive conduct. On this basis, the article highlights the merits of the arguments requesting the Commission to revisit its position on the *Microsoft* cases for the sake of developing a coherent competition policy for information technology economy.

This article should not be understood as suggesting that the Commission has not properly established a tying abuse. By contrast, this article supports the view that the traditional competition rules applied should have been adapted to accommodate the requirements of information technology industry as characterised by strong network effects and endogenous market entry. The article also supports the argument that while the categorisation of Microsoft's practices as tying has facilitated the finding of an infringement, considering the practices under the essential facilities doctrine is not likely to do so.[4] Even if liability is established under the essential facilities doctrine, this article aims to cast some doubts on the possibility of designing an adequate remedy without interfering - most probably in a negative manner - with the peculiar competitive structures and processes occurring within the information technology and software markets involved.

II. Background - The EU *Microsoft* cases

[3] Below n 37.

[4] This article does not conclude whether or not liability under the essential facilities doctrine is possible. A full analysis of economic and legal factors is beyond this article and its aims. However, this article looks to the relevant case law on essential facilities and comments from relevant literature to demonstrate that such a finding is unlikely.

Since this study focuses on the Commission's findings and remedies imposed on Microsoft for its tying practices, this section will focus on the tying aspects of the *Microsoft* cases only.

Microsoft I

On December 10, 1998, Sun Microsystems Inc. ('Sun') complained to the European Commission that Microsoft had infringed Article 102 and had abused its dominant position in the market for Client PC Operating Systems following Microsoft's refusal to provide interoperability information which workgroup server operating systems required.[5] Following this complaint, the Commission issued a statement of objections to Microsoft on August 1, 2000 which only focused on the Commission's concerns regarding Microsoft's refusal to supply interoperability information. Meanwhile, in February 2000, the Commission decided to widen the scope of the investigation on its own initiative and included an inquiry into Microsoft's incorporation of a WMP into Windows OS. As such, a second statement of objections was issued on August 30, 2001 which included the Commission's concerns relating to the interoperability information and tying of WMP to Windows OS.[6]

On 24 March 2004 the Commission issued decisions pursuant to Article 7 of Regulation 1/2003.[7] The Commission found Microsoft to be dominant in the working group server market.[8] At the outset of its analysis of Microsoft's tying practices, the Commission sets out the following four cumulative elements required to make a finding of prohibited tying under Article 102 TFEU:

1. the tying and tied goods are two separate products;

[5] The Commission explains the term 'working groups server operating systems' at para 53 of its decision: 'The present case focuses on 'work group server services', which are the basic infrastructure services that are used by office workers in their day-to-day work, namely sharing files stored on servers, sharing printers, and the 'administration' of how users and groups of users can access these services and other services of the network (for example, applications installed on the client PCs or servers). 'Work group server operating systems' are operating systems designed and marketed to deliver these services collectively to relatively small numbers of client PCs linked together in small to medium-sized networks' - Case COMP/C-3/37.792 Microsoft - Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf.

[6] European Commission Press Release - IP/01/1232 'Commission initiates additional proceedings against Microsoft' issued on 30 August 2001 available at http://europa.eu/rapid/press-release_IP-01-1232_en.htm?locale=en.

[7] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:l:2003:001:0001:0025:en:PDF.

[8] See n 5, para 471.

2. the undertaking concerned is dominant in the tying product market;
3. the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and
4. tying forecloses competition.[9]

The Commission found that Microsoft's conduct fulfils these four elements and therefore is considered an infringement of Article 102 TFEU.[10] The Commission also found that the justifications provided by Microsoft for tying WMP to Windows OS do not outweigh the negative effects resulting from the tie and, hence, the justifications were not acceptable.[11]

The Commission also explains the theory of harm which underpins and supports the finding of this infringement. The Commission maintains that Microsoft's tying practice is harmful to competition for two main reasons. First, the Commission contends that Microsoft has - through tying WMP with Windows OS – used 'Windows [OS] as a distribution channel to anti-competitively ensure for itself a significant competition advantage in the media player market'. As such – the Commission concludes – 'competitors, due to Microsoft's tying, are *a priori at a* disadvantage irrespective of whether their products are potentially more attractive on the merits'. Additionally, the Commission took the view that this practice will increase entry barriers for content and application developers. This situation is 'sustainable' especially since the media player market is characterised by network effects, which will 'work in favour of a company which has gained a decisive momentum' and 'will amount to entry barriers for potential competitors'.[12] The Commission also took the position that Microsoft's conduct shielded Microsoft's position from potential competition with 'more efficient media player vendors' and distorted competition within 'a market which could be a hotbed for new and exciting products springing forth in a climate of undistorted competition'.[13]

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[9] See n 5, para 794.
[10] See n 5, paras 799 – 954.
[11] See n 5, paras 956 – 970.
[12] On network effects and two-sided markets see Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet and Maxwell Thomson Reuters, 3rd ed, 2010): The market is a 'two-sided market' which occurs 'where there are two distinct customer groups that have inter-related demand and so one or both groups impose a positive externality on the other…Where the value of a platform to each consumer increases, pricing should take this positive externality into account ..Two sided markets can also exhibit 'tipping' primarily if multi-homing is expensive for both sides of the market. This means that one platform will become dominant. This may lead to market power at the platform level, although not necessarily'. (pp 3-042 – 3-045)
[13] See n 5, paras 979 – 981.

Secondly, the Commission maintains that Microsoft tying practice was used to leverage its dominant position into related markets, thus widening the scope of competitive harm. The Commission explains that the 'tying of WMP allows Microsoft to anti-competitively expand its position in adjacent media-related software markets and weaken effective competition to the eventual detriment of consumers'. According to the Commission, such conduct 'also sends signals which deter innovation in any technologies which Microsoft could conceivably take interest in and tie with Windows [OS] in the future (…) thereby weakening both software developers incentives to innovate in similar areas and venture capitalists proclivity to invest in independent software application companies'. As such, the Commission took the view that there is a 'reasonable likelihood' that Microsoft tying practice will lead to lessening of competition and an 'effective competition structure' will not be guaranteed in the foreseeable future.[14] For these reasons, the Commission found that Microsoft has infringed Article 102 TFEU 'by making the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player from May 1999 until the date of [the d]ecision'.[15]

Therefore, the Commission imposed on a Microsoft a behavioural remedy pursuant to Article 7 of Regulation 1/2003 requiring Microsoft to offer – within 90 days from date of notification of the decision - a full-functioning unbundled Windows OS. The Commission did not prohibit Microsoft from offering the bundled Windows Client PC Operating System.[16]

Microsoft II

On 13 November 2007, the Commission received a complaint against Microsoft from the Norwegian software developer Opera Software ASA ('Opera'). Opera complained that Microsoft's tying of IE to Windows OS 'foreclosed competition on the merit within the web browser market' and did not allow Opera's web browser 'to compete on the merits'. The Commission notified Microsoft of its Statement of Objections on January 15, 2009. In response to the objections raised by the Commission, Microsoft submitted commitments on October 7, 2009. Following consultation with third parties, the Commission informed Opera on 23 October 2009 that the proposed commitments are considered 'prima facie capable of meeting the Commission's competition concerns' and that the Commission 'took the preliminary view that there were insufficient grounds for conducting a further investigation into the alleged infringement'. Following the receipt of comments

[14] See n 5, paras 982-984.
[15] See n 5, Article 2(b).
[16] See n 5, Article 6.

from Opera, an amended proposal for commitments was submitted by Microsoft and the final signed version was submitted on 1 December 2009.[17]

By adopting a decision pursuant to Article 9 of Regulation 1/2003,[18] the Commission made the following commitments proposed by Microsoft binding on Microsoft for five years from the date of the decision:[19]

1. Web browser commitments: Microsoft committed to 'make available a mechanism in Windows Client PC Operating Systems within the European Economic Area ('EEA') that enables OEMs and end users to turn Internet Explorer off and on'. [20] This means that by turning IE off, IE's browser frame window and menus 'will not be accessible and will not otherwise launch programmatically'. Additionally, Microsoft will ensure that:
   '(i) [IE] it can only be turned on through user action specifically aimed at turning on Internet Explorer;
   (ii) the user interface cannot be called upon by applications; and
   (iii) no icons, links or shortcuts or any other means will appear within Windows to start a download or installation of Internet Explorer'.[21]

   OEMs will also be free to pre-install and set as default the web browser(s) of their choice on PCs they ship. Microsoft also committed that its PC Productivity applications distributed in the EEA 'shall not include any icons, links or short-cuts or provide any other means to start a download or installation of Internet Explorer' and that Microsoft shall not use Windows Update to offer new versions of Internet Explorer.[22]

2. Commitments with regard to a browser choice screen: The Commission explains that, for those users who have chosen Internet Explorer as their default web browser, a Choice Screen is to be provided by Microsoft to provide such users with 'an opportunity to choose whether and which competing web browser(s) to install in addition to the one(s) they already have in a fair and unbiased way'. The Choice Screen software will be distributed by means of update to all users within the EEA of Windows

[17] Case COMP/C-3/39.530 – Microsoft (tying) – Commission Decision of 16.12.2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_3.pdf, paras 1-16.
[18] See n 7.
[19] See n 17, Article 1.
[20] OEM is an abbreviation of Original Equipment Manufacturers.
[21] See n 17, Commitments Annex.
[22] See n 17, Commitments Annex.

> XP, Windows Vista and Windows Client PC Operating Systems, by means of Windows Update.[23]

Although the Article 9 decision does not entail the finding of an infringement of Article 102, the Commission still provisionally concludes that Microsoft's practice fulfils the four elements of abusive tying.[24] Further, the Commission elaborates on the competition concerns relating to Microsoft's conduct. The Commission advocates a theory of harms similar to that adopted in *Microsoft I*. First, the Commission stresses the distributive advantage which Microsoft creates by tying IE to Windows OS. While the Commission acknowledges that downloading bowsers from the internet is an important and inexpensive distribution channel, the Commission observes that there are other costs which prevented the consumers from switching from a pre-installed web browser. These costs included 'searching, choosing and installing such a competing web browser, which can stem from a lack of technical skills, or be related to the user's inertia'. As such, the Commission considered that the foreclosing effect of Microsoft's tying will reach businesses and individual consumers.[25] Secondly, the Commission maintains that because web browsers 'constitute software platforms' for which 'content and application are developed', the dominance of Internet Explorer in the web browser market which is created by Microsoft tying IE to Windows OS (the market for which Microsoft is also dominant) acts as an incentive for content and application developers to develop software for Internet Explorer 'primarily' or 'at least not to develop only for other web browsers'. As a result, the Commission took the preliminary view that Microsoft was leveraging its dominance in the PC Client Operating system market into the neighbouring content and application development market with the result of stifling innovation in web development.[26] Thirdly, the Commission notes the possibility of web browsers becoming the main gateway of interacting with consumers and reducing dependency on operating systems. Therefore, the Commission is concerned that Microsoft 'countered this platform threat from other web browsers' and is reinforcing its dominance in the operating systems market through tying IE to Windows OS.[27]

It is therefore evident from the above paragraphs that the Commissions adopts a similar theory of harm to consumers and the competitive process in both *Microsoft I* and *Microsoft II*:

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[23] See n 17, Commitments Annex.
[24] See n 17, para 35.
[25] See n 17, pp 32-49.
[26] See n 17, pp 55-56.
[27] See n 17, pp 57-58.

1. Due to the coercion which tying entails, anticompetitive effects result from Microsoft's not providing OEMs - and ultimately consumers – with the option of purchasing Windows OS without WMP or IE.
2. Due to network effects by which the information technology markets are characterised, Microsoft is leveraging the dominance it has in the market for operating systems to achieve similar ubiquity in the media player market by tying WMP and IE to Windows OS and using Windows OS as a distribution channel. This has the effect of raising entry barriers to other media player developers and shields WMP and IE from competition on the merits within the market;
3. Further, network effects also enable Microsoft to leverage the dominance it is abusively creating in the media player market to neighbouring related markets by positioning WMP and IE as software platforms for media and web content and applications respectively. Therefore, content and application developers have in incentive to develop content and applications primarily for WMP or internet explorer or at least not exclusively for other media players. As a result, the competitive structure is distorted and innovation in the web and media is stifled.

III. The objectives of antitrust remedies

To properly address the question of the adequacy of the remedies imposed by the Commission for Microsoft's tying practices in the *Microsoft* cases, it is essential to understand the purpose of competition law remedies. In addition, it is also important to look at relevant legislation, cases and literature in order to identify the guiding principles and considerations to be taken into account when designing remedies.

Regulation 1/2003, which gives the Commission the power to impose remedies in the context of its enforcement activities, reveals the first obvious purpose of such remedies, that is, to bring the competition law infringement to an end. Article 7 explicitly explains that for this purpose - and upon finding an infringement of Articles 81 or 82 EC (now Articles 101 or 102 TFEU) - the Commission has the power to impose 'any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end'.[28] In addition to Article 7, Article 9 of Regulation 1/2003 also provides for the possibility for the Commission to issue commitment decisions, whereby commitments alleviating the Commission's competition concerns voluntarily offered by the undertakings that are subject to investigation are made binding on

[28] See n 7.

them.[29] Generally, remedies adopted under Regulation 1/2003 are aimed at ending the infringement and its effects.[30] In this sense, the remedial objective of restoring competition has also an important consumer welfare dimension,[31] to the extent that remedies offer restitution to aggrieved plaintiffs and consumers.[32]

That said, however, remedies should be designed to protect the competitive process and not competitors. In the process of designing a remedy, certain costs and benefits are relevant. The exercise involves a balancing of the costs and benefits of the proposed remedy for the parties, the relevant competition authority, customers and the general public. These include the benefits that consumers and the competitive process within a market will derive from the proposed remedy.[33] It is important to stress that the aim of a remedy is to 'restore' competition and not to 'create' it. Therefore, it is important to ensure that remedial intervention will not

[29] See n 7, Recital 13 Regulation 1/2003 states: 'Where, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement. Commitment decisions are without prejudice to the powers of competition authorities and courts of the Member States to make such a finding and decide upon the case. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine'

[30] Per Hellstrom, Frank Maier-Rigaud and Friedrich Wenzel Bulst, 'Remedies In European Antitrust Law' [2009-2010] 76 Antitrust Law Journal 46 downloaded from http://heinonline.org; Considering the Commission's mandate to bring an infringement of Article 81 or 82 effectively to an end, Hellström, Maier-Rigaud, and Wenzel Bulst observe that this would entail – amongst other things - a cease-and-desist order. However, they interestingly note that the European Court of Justice has ruled in the case of *Ufex* that cessation of anticompetitive conduct did not form a valid basis for rejection of a complaint for lack of Community interest. Instead, it was held that the Commission was required to 'assess whether the anticompetitive effects of the behavior in question still persist'. Hellström, Maier-Rigaud, and Wenzel Bulst suggest that this serves as an indication that the Commission is empowered to also reverse 'ongoing competitive consequences'. See also Case C-1 19/97 *Ufex and others v Commission* [1999] ECR 1-1341.

[31] Ioannis Lianos, 'The availability of Appropriate Remedies A Limit to Competition Law Liability Under Article 102 TFEU? The Mischiefs of Discretionary Remedialism In Competition Law', in Federico Etro and Ioannis Kokkoris (eds), *Competition Law and the Enforcement of Article 102* (OUP 2010)

[32] See n 31; Lianos states: 'Remedies seek generally to restore 'the plaintiff's rightful position, that is, to the position that the plaintiff would have occupied if the defendant had never violated the law…[or] to restore the defendants to the defendant's rightful position, that is, the position that the defendant would have occupied absent the violation'. Lianos notes that his study 'builds on the assumption that consumers should be at the center of the attention of competition law enforcers' at both the liability and remedy phases of a decision

[33] These can take the form of 'increased competition (with better choice and lower prices)' and 'longer-term disincentives'; see Pierre Larouche, 'Legal Issues Concerning Remedies In Network Industries' [2004] available at http://papers.ssrn.com/soL3/papers.cfm?abstract_id=832025.

harm lawful competition within a market.[34] Further, remedial intervention of the court or competition authority should be at the level that allows 'self-correcting forces' within a relevant market to 'restart'.[35] Therefore, remedies which prevent competition on the merits do not preserve the competitive process and should not be imposed, even if a dominant firm's smaller rivals find it harder to compete.

Even a remedy which does not prevent competition on the merits can affect the dominant firm's incentives to innovate and compete, if a remedy 'directly limits the degree of permissible marketplace success or effectively punishes success through the imposition of additional remedies'.[36] Since remedies are aimed at training dominant firms with regards to acceptable conduct when competing on the merits, such remedies should not have the effect of altering a dominant firm's incentive to engage in competitive process.[37] Therefore, it seems logical and fair that the process of 'natural selection' should be allowed to take its course within a given market. This will result in the survival of the fittest market players and inevitably competition forces will eliminate the weak competitors who are unable to keep up with innovation and competitive pricing within a given market.[38]

Additionally, an agreement on the importance of the existence of a close nexus between the finding of an infringement and the remedy designed to effectively end it can be found in the rulings of the European Courts and the literature relating to remedies.[39] Considering the aim of restoring competition which entails ending the infringement and any effect(s) on a relevant market, this nexus seems to require that remedies are designed to cure the consumer harm which underpins the finding of an infringement in a given case.[40] Therefore, the process of designing an adequate remedy requires ascertaining the type of violation and the resulting harm to consumers and competition.[41] In this regard, it has also been argued that in certain cases going beyond the traditional approach of mirroring the abuse may be warranted and might be necessary to ensure the effectiveness of remedies.[42]

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[34] John Lopatka and William Page, 'Designing a Microsoft Remedy That Serves Consumers' [2000-2001] 9 George Mason Law Review 691.
[35] See n 31.
[36] Werden, G., 'Remedies For Exclusionary Conduct Should Protect And Preserve The Competitive Process' [2009-2010] 76 Antitrust L.J. 65 downloaded from http://heinonline.org
[37] Barnett, T. 'Section 2 Remedies: What To Do After Catching The Tiger By The Tail' [2009-2010] 76 Antitrust L.J. 31 downloaded from http://heinonline.org
[38] See n 37
[39] Economides, N. and Lianos, I. 'A Critical Appraisal of Remedies in the E.U. Microsoft Cases' [2010] 2 Colombia Business Law Review 346
[40] See n 31 and 39
[41] See n 39
[42] See n 30

Nevertheless, a clear disagreement between the scholars can be observed on the question to what extent this connection should affect liability issues and findings of an infringement. On the one hand, some scholars have stressed the importance of thinking of an appropriate remedy at the outset because crafting effective remedies is not an easy process and a bad remedy may cause more harm than inaction. Further, this thinking process may yield the conclusion that competitive harm does not exist and – using Judge Posner's words – it may thus indicate the 'soundness of antitrust claim'.[43] In addition, splitting the question of liability from the remedy design will not result in a consistent theory of competition law remedies.[44] On the other hand, while other scholars submit to the benefits of early consideration of remedies, they stress that the question of finding an infringement and designing a remedy should remain strictly separated and the first should not be dependent on the latter. Further, supporters of this view maintain that - in the process of finding an infringement - competition authorities should not shy away from making such finding and 'must not succumb to an 'if you can't fix it easily, it ain't broke' fallacy' when faced with cases where the required remedial action is not clear from the outset.[45] Nonetheless, the arguments for early contemplation of remedies are much more convincing especially in light of the possible negative effects which remedies may have on innovation incentives of market players and their willingness to engage in lawful competitive behaviour.

IV. Analysis of the *Microsoft* remedies

To assess the adequacy of the remedies imposed by the Commission for Microsoft's tying practices in the *Microsoft* cases, it is important to assess them in light of the defined objectives. With this in mind, the purpose of this part of the article is to evaluate whether the behavioural remedies imposed by the Commission in relation to Microsoft's tying practices in *Microsoft I* and *Microsoft II* have fulfilled the objectives set out in the introduction.

The requirement of bringing an infringement to an end is straightforward. However, the restorative function of a remedy and the requirement of undoing the anticompetitive effects on the market entail ensuring two additional requirements, which shall also be considered. Firstly, the existence of an appropriate 'fit' between the remedy and the theory of harm adopted by the Commission;[46] and secondly, that the remedy is capable of altering the incentives of the market players in the market in such way that competitive market structure be restored.

[43] See n 37
[44] See n 31.
[45] See n 30.
[46] As described by Lianos (n 31 above).

1. The *Microsoft I* remedy for tying WMP to Windows OS

In terms of bringing the infringement to an end, the Commission has adopted the traditional approach of mirroring the abuse by ordering Microsoft to provide a fully-functioning Windows that does not include WMP. It is important to note that following the CFI's decision, supporters of the decision expected a high demand for the unbundled Windows OS.[47] However, those predictions proved too optimistic and inaccurate given the reality of the market conditions and consumer behaviour following the implementation of the remedy. The predicted demand of OEMs or end-users for the unbundled Windows OS offered by Microsoft in compliance with the remedy was very low.[48] Additionally, the WMP format did not dominate the media player and neighbouring markets of content and application development, as was expected. Further, powerful competitors did not appear in the market for media players.[49] It is thus evident that the remedy failed to make changes in the competitive structure of the market for media players. As several scholars including First,[50] Heiner,[51] and Economides and Lianos[52] observed, the remedy did not go beyond breaking the tie and making the choice of buying the Windows OS without WMP available to OEMS and consumers. As such, it appears that this remedy did not maximize consumer choice in the best possible manner. To the contrary, the lack of demand for the unbundled Windows OS demonstrates the existence of consumer demand for the existing version of Windows OS version.[53]

It is also questionable whether the remedy effectively restores the competitive process since it falls short of altering the incentives of Microsoft or OEMs or creates the desired competition restraints on Microsoft.[54] The failure of the remedy

[47] Ian Ayres and Barry Nalebuff, 'Going Soft on Microsoft? The EU's Antitrust Case and Remedy' [2005] 2 The Economists' Voice, Article 4. Ayres and Nalebuff - who were amongst the earliest commentators on the Commission's decisions in 2005 – predicted that OEMs and consumers would buy the unbundled Windows OS because it would be 'just as good or in some eyes better'. Ayres and Nalebuff maintained that the unbundled Windows OS would appeal to OEMs if rival media players provide the OEMs with 'financial incentives…to establish their player as a default option. This benefit will also be passed down to end users in form of lower hardware costs'.

[48] See references in n 31, 33,50, 51.

[49] Nicholas Economides and Ioannis Lianos, 'The Elusive Antitrust Standard on Bundling in Europe and in the United States in the Aftermath of the Microsoft Cases' (2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1078932.

[50] Harry First, 'Strong Spine, Weak Underbelly: The CFI Microsoft Decision' (Law and Economics Research Paper Series Working Paper No. 08-14, New York University Centre of Law, Economics, and Organization, 2008) available at http://ssrn.com/abstract=1020850

[51] David Heiner, 'Single-Firm Conduct Remedies: Perspectives From The Defense' [2007-2008] 75 Antitrust Law Journal 871.

[52] See n 31.

[53] See n 49.

[54] See n 50 .

may also be attributable to the logical lack of a demand for a degraded product which should have been considered from the outset. It is also crucial that when products are imposed as part of a remedial action, the demand for the product should be properly evidenced.[55] The absence of a price differential between the Windows OS and the unbundled Windows OS version was a contributing factor to the lack of demand for the unbundled product and the limited effects this remedy had on consumer choice patterns and Microsoft's market share in the windows media player market.[56] It is therefore suggested that the remedy proposed by Microsoft was more likely to be effective in this respect.[57]

Most importantly however, the inadequacy of the remedy is rooted in the clear disconnect between the theory of harm underpinning the case and the remedy.[58] In this regard, it must be noted that the Commission stressed the distributional advantage Microsoft gained by utilizing the ubiquity of Windows OS to gain similar ubiquity and strengthen its presence in the market for media players. It is true that Microsoft's distributional advantage was vital to the findings of anticompetitive foreclosure in the Commission's decision. However, this simple and traditional approach of merely mirroring the infringement seems to suggest that the Commission did not consider how these anticompetitive effects will be undone by the remedy imposed. There is much merit in the argument that the effects of the theory of harm advocated by the Commission which was based on competitors being disadvantaged because of distributional advantage of Microsoft could not be undone by designing a remedy that merely mirrors the tying abuse.

On this basis, it has been argued that when designing effective remedies the approach of mirroring the abuse may not be sufficient. Instead, the appropriate starting point for remedy designing should be the anticompetitive effects of the behaviour subject to enforcement action. Applying this to the *Microsoft* case, it is proposed that considering the anticompetitive effects of a tying abuse should have been the starting point when designing possible remedies to be put in place in order to 'neutralise' them. These anticompetitive effects include imposing price differentials on tied bundles, imposition of must-carry obligations, and active marketing support. While it is only natural that the choice of remedy will vary

[55] William Page, 'Mandatory Contracting Remedies in the American and European Microsoft Cases' [2008-2009] 75 Antitrust Law Journal 787.

[57] Spencer Weber Waller, 'The Past, Present and Future Of Monopolization Remedies' [2009-2010] 76 Antitrust Law Journal 11.

[58] See n 39. Further in the article cited in n 33 of this article, Lianos explains that while the unbundling remedy fits with the liability theory of tying, there still exists a disconnect between the unbundling remedy and the theory of harm based on distributional advantage which was used to make a finding of tying claim.

from one infringement to the other, it is stressed that the suitability of the remedy should be assessed predominantly on whether or not it is capable of undoing the anticompetitive effects.[59] This designing method seems to be more capable of producing remedies that fit more appropriately with the theory of harm and - as consequence – have a greater restorative effect on distorted competition within the relevant market.

2. The *Microsoft II* remedy for tying IE to Windows OS

Although the theory of harm adopted by the Commission in *Microsoft II* matched the theory of harm in *Microsoft I*, the remedies imposed by the Commission were quite different. The fact that similar facts and issues call for different remedies is a striking indication that the remedies in *Microsoft I* fell short of what was required for them to be effective and thus needed to be redesigned. Following the issuance of the Statement of Objections, the Commission published a press release responding to Microsoft's announcement that it will offer an unbundled Windows OS without IE within the EEA. The Commission confirmed that it 'would not require Microsoft to provide Windows to end-users without a browser' and that it had considered in the Statement of Objections a 'ballot screen' remedy which would 'allow consumers to choose from different web browsers presented to them through a 'ballot screen' in Windows'. The Commission also commented that the unbundled version would mean that Microsoft is providing less to consumers in terms of consumer choice.[60]

The Commission's choice not to replicate the remedy imposed in *Microsoft I* is in itself a testimony of the inadequacy of the remedies imposed on Microsoft for its tying practices in *Microsoft I*. Furthermore, the Commission's press release implies that the ballot screen remedy is more suited to address any limitations to consumer choice and the concerns relating to anticompetitive foreclosure of rival media players caused by Microsoft's tying of Internet Explorer to Window OS. From a consumer choice perspective, it is correct to say that the remedy imposed will empower consumers by making numerous choices available to them. Equally, it may be argued that the ballot screen remedy is 'tilted' against Microsoft and in favour of non- Microsoft commercial browser vendors, since Microsoft will be the only internet browser developer obliged to provide a ballot screen displaying rival browsers even when consumers have chosen it as the default browser. In addition, in the event that a non-Microsoft commercial browser vendor is able to reach an arrangement with an OEM, whereby its browser would be set as the default, the

[59] See n 30.

[60] European Commission Press Release – Memo/09/272 'Antitrust: Commission statement on Microsoft Internet Explorer announcement' issued on 12 June 2009 available at http://europa.eu/rapid/press-release_MEMO-09-272_en.htm?locale=fr.

browser – unlike Internet Explorer – will not be removed via a ballot screen.[61] Therefore, there is a strong suggestion that this remedy is not – as it should be – aimed at protecting the competitive process. Instead, it seems to go further and to be protecting competitors.

The remedy has also been criticized for several practical implementation problems. Equal treatment of third parties is a valid concern: how does the remedy propose to provide equal treatment to the third parties in order to restore competition? Unequal treatment risks the occurrence of the undesirable result of protecting competitors instead of the competitive process. Further, disputes in this area may lead to the court or competition authority exercising its power to resolve them thereby leading to excessive intervention in the market.[62] To ensure equal treatment, it is imperative that the plaintiffs are not the only beneficiaries of the remedy. It is recommended that all third parties are given fair and non-discriminatory access; however this is highly impractical especially in the case of Microsoft where many program developers exist. Therefore, it has been suggested that since choosing the beneficiaries is inevitable, then the strongest competitors should be the chosen beneficiaries.[63] Nevertheless, it is doubtful whether this suggestion would restore undistorted competition as required or simply perpetuate the issue. The process of choosing the beneficiaries of a must-carry remedy almost transforms this remedy to a form of regulation and does not preserve the competitive process.[64]

Reasonable concerns regarding the possible negative effects this remedy may have on competition within a relevant market or industry have also been voiced. Instead of remedying innovation concerns such as those raised by the Commission in the Microsoft cases, it appears that such remedy reinforces them. The remedy may potentially reduce competitiveness within a market when dominant firms are forced to share the benefits of their investments and rivals are 'relieved' from investing in their own assets.[65] Further, it is accepted that the existence of more than one technological standard – as opposed to competitors using a single standard - is in many cases beneficial to consumers. Competitors' incentives to research and develop other standards are weakened by a remedy which ensures access to an existing dominant standard.[66] On this basis, it is safe to say that the remedy imposed in *Microsoft II* may alter the incentives of market players, albeit towards the wrong direction.

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[61] See n 49.
[62] Microsoft US case cited in Economides and Lianos (n 49).
[63] See n 30.
[64] See n 30.
[65] See n 37.
[66] See n 36,

Notwithstanding the arguable merits of the remedies imposed in *Microsoft II* in terms of consumer choice and rebalancing of the distributional advantage within the media player market, the fact remains that the remedy did not achieve the main requirement of Article 7 and 9 of Regulation 1/2003, that is, ending the infringement. Strictly speaking, the technological tie has not been undone. This observation could be seen to contradict the criticisms made in the assessment of the remedies in *Microsoft I*. However, this is not the case. In order for a remedy to be adequate, it should correspond to both the behaviour and the theory of harm advocated by the Commission. In both the *Microsoft* cases, the remedy corresponds to only one of these elements. While the remedy in *Microsoft I* provided a 'conceptual link' between the conduct (tying) and the remedy (unbundling of tied products) it did not properly fit the theory of harm based on Microsoft's distributional advantage and consumer loss and does not serve the restorative purpose of remedies. [67] The remedy in *Microsoft II* is a better fit for the theory of harm but does not conceptually fit with a tying abuse. Therefore, it has been argued – with due scepticism – that the Commission in *Microsoft II* relies on the 'quasi per-se illegality' of the tying abuse to make a finding of liability but then adopts a remedy which matches an essential facilities case.

Choosing such a convenient categorisation for the purpose of establishing an abuse is liable to pave the way for strategic litigation whereby competitors could bring claims under forms of abusive behaviour which are less onerous to prove and achieve remedies such as those imposed in the *Microsoft* cases.[68] Such purposes – strategic litigation – do not conform to any of the objectives of competition law enforcement and remedies discussed in the previous chapter and would definitely be detrimental to the competitive process within a market. This problem can be resolved by adopting an effects-based approach to Article 102 and moving away from strict categorization of Microsoft's behaviour as a tying case. On this basis, proponents of this view put forward a convincing argument that when a remedy which is fit for an essential facilities case is ordered by a competition authority, a corresponding essential facilities case should be brought by the competition authority and not a tying case.[69]

V. Are the *Microsoft* remedies adequate under the essential facilities doctrine?

As discussed earlier, the theory of harm advocated by the Commission was mainly based on the distributional advantage Microsoft's WMP and IE enjoyed because of Microsoft's dominance in the operating systems market. As a result, this narrative

[67] As described by Economides and Lianos (see n 39).
[68] See n 31.
[69] See n 49.

implies that the use of Windows OS as a distribution system for WMP and IE was the main reason for the potential harm to consumers and the competitive process. It would therefore be reasonable to consider Windows OS as a distribution system owned by the dominant firm and consider WMP and IE as products delivered via this distributions system.[70]

Furthermore, the criticism of the remedies imposed by the Commission also guides one's thinking in the direction of assessing Microsoft's practices under the essential facilities doctrine. As mentioned above, evidencing the rivals' need for products which are to be included in a mandatory dealing remedy is an essential exercise which needs to be undertaken by the courts or competition authorities before imposing mandatory dealing remedies.[71] Commenting on the must-carry remedy, Economides and Lianos argue that a must carry remedy should only be imposed if the followings requirements are fulfilled: '(1) there are substantial distributional advantages of the dominant firm in the sense that access to the dominant firm's input is indispensable in order to viably stay on the market, and (2) there is substantial consumer loss arising from the lack of distribution through the dominant firm'.[72] These requirements are similar to those established in the European case law for imposing access to essential facilities.

The earliest formulation of this argument was found in an article written by Microsoft's lawyers Jean-Yves Art and Gregory McCurdy in 2004.[73] Art and McCurdy argue that Microsoft's behaviour should be considered under the essential facilities doctrine as a refusal to provide distribution services to rival media players. Due to the emphasis the Commission has placed on the distributional advantage Microsoft has because of its dominance in the market for operating systems, this article suggests that Microsoft's behaviour should be considered under the essential facilities doctrine. Therefore, an assessment of whether or not Microsoft allows its competitors in the media player or internet browser markets access to its distribution system, that is, Windows OS, is required. This suggestion is put forward with the aim of exploring whether - in the event that liability under the essential facilities doctrine is established - imposing a must-carry remedy would be adequate.

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[70] See Ioannis Lianos, 'Categorical Thinking in Competition Law and the 'Effects-based' Approach in Article 82 EC' in Ariel Ezrachi (ed), *Article 82 EC – Reflections on its recent evolution* (Hart Publishing 2009), pp 19-49.
[71] See n 55.
[72] See n 49.
[73] Jean-Yves Art and Gregory McCurdy, 'The European Commission's media player remedy in its Microsoft decision: compulsory code removal despite the absence of tying or foreclosure' (2004) 25 European Competition Law Review 694.

The obvious result of categorising and analysing Microsoft's practices under the essential facilities doctrine will be to relieve the concerns of conceptual incoherence between the theory of the case (liability stage), the theory of harm and the remedy. In addition, in terms of consumer choice and restoration of competition, the merits and criticisms of the remedy mentioned above in the *Microsoft II* discussion will also be relevant in the event of such a categorisation. More importantly though, this categorisation will not lead to a remedy being imposed if the requirements set out by the European Courts for imposing access to an essential facility is not fulfilled and no finding of abusive refusal to supply access is made. A full analysis of the indispensability and competitive structure of the media player and internet browser markets is beyond this article. However, the main case law relating to essential facilities and some of the literature relating to information technology markets and network effects will be examined to consider the main focus of the adequacy of possible remedies under the essential facilities doctrine.

The case of *Oscar Bronner* summarises the elements required for establishing a case of refusal of access under the essential facilities doctrine. First, the refusal of access to the essential facility 'must be likely to eliminate all competition' in the relevant market. Secondly, the access should be indispensable. Thirdly, the refusal of access is not objectively justified.[74] The opinion of Advocate General ('AG') Jacobs clarifies the requirement of indispensability. The AG explains that when considering whether access is indispensable to competitors the extent of the handicap refusal of access causes to competitors should be assessed and whether this handicap is temporary or permanent. Therefore, it is necessary to ascertain whether the refusal 'make[s] the competitor's activities impossible or permanently, seriously, and unavoidably uneconomic'. Further, AG Jacobs stated that a single competitor claiming a particular vulnerability will not satisfy the indispensability criteria.[75] Concurring with the Advocate General, the Court also held that a competitor arguing that developing an alternative facility of its own is not 'economically viable' will not satisfy the requirement of indispensability.[76]

In light of those requirements, it is doubtful whether the Commission would have been successful in establishing the liability standard for a claim under the essential facilities doctrine in the *Microsoft* cases. First of all, the Commission recognizes that there are alternative distribution channels for media players but argues that Microsoft has a distributional advantage which is strengthened by network effects. Such an argument is insufficient according to *Oscar Bronner* and distribution

[74] Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] ECR I-7791.
[75] Ibid, Opinion of Advocate General.
[76] See n 74.

through Windows OS is not indispensable to rival medial players. Second, it is unlikely that 'all competition' will be eliminated if access – in form of a must carry remedy imposed on Microsoft – is denied to Microsoft's rivals on the media player and internet browser markets. It is interesting to note that the Commission describes the issue in *Microsoft I* as a 'structural problem'. However it is the structure of this market itself which leads to the conclusion that the Commission overestimated Microsoft's distributional advantage.[77] It is also apparent that the Commission has given certain assumptions relating to role of OEMs channels, consumer behaviour patterns, and market innovation undue emphasis and significance.[78] It is also important to bear in mind that entry to the software market is 'endogenous' and when entry is characterised as such all firms lose the ability to act independently of consumers and competitors and competitive forces.[79] Therefore, it appears that the elimination of all competition in the media player or internet browser market is highly unlikely. Further, it is also noteworthy that the network effects and particularities of software industry - which the Commission relies on to establish the likelihood of the potential harm of Microsoft's tying practices to consumers and the markets competitive structure – have actually been used by several scholars to negate Microsoft's liability when considering Microsoft's behaviour under the essential facilities doctrine. This is because in a 'New Economy' such as the software industry research and development costs are high and the marginal cost of production is becoming less relevant. In addition, network effects are also a predominant feature of the New Economy. For these reason, the application of traditional competition law analysis to competition issues in the' New Economy' seems obsolete.[80] As such, considering the inherent characteristics of the software market, it appears that the occurrence of 'tipping' toward a certain platform within the software market should not be considered a sub-optimal competitive state which warrants intervention because the characteristics of the software industry mentioned above makes it unlikely that the

[77] See n 49; Economides and Lianos explain the media player market setup is characterised by the following: 'the lack of friction in the distribution of all media players, the zero price, the quick download and installation, the ability of the consumer to designate default media player, and the fact that many media players each play many formats'. They take that view that as a result of this structure or 'setup'. As a result, they take the view that it is most likely that the 'potential loss to consumers from a skewed distribution of the market share in the media players market will be small' and that the Microsoft's distributional advantage was overestimated by the Commission.

[78] Pierre Larouche, 'The European Microsoft Case at the Crossroads of Competition Policy and Innovation' (2008) available at http://ssrn.com/abstarct=1140165.

[79] Federico Etro, 'Endogenous Market Structures and Antitrust Policy' (2009) available at http://www.intertic.org/Policy%20Papers/JLaw&Econ.pdf.

[80] Federico Etro, 'Competition Policy For The New Economy' in Katsoulacos (ed), *Abuse of Dominance* (Athens University Press, Athens 2007) pp 46-83 available at http://www.intertic.org/Policy%20Papers/CRESSE.pdf.

successful platform will remain in that position for very long. Competition concerns may be justified when the successful platform withstands the natural destructive cycle within the software industry.[81]

Applying this to the *Microsoft* cases, three main arguments seem to convincingly dismiss any claims that elimination of all competition may result from Microsoft's behaviour. Firstly, developing a player is not hard and this is evidenced by the existence of 31 different players. Secondly, Microsoft cannot eliminate all rival formats because 'sophisticated consumers' such as record labels, artists, and hardware manufacturers promote alternative formats to prevent such an outcome. Thirdly, the ubiquity of Microsoft's format is a far-fetched proposition in light of Microsoft's inability to stop competition from competing developers such as Amazon and Apple.[82] Further, the information infrastructure which is being developed as part of the current global economy is increasing and competitors such as Apple (specifically iTunes) and Google books have appeared.[83] Additionally, competitors such as Apple also engage in technological tying similar to that condemned in the *Microsoft* cases.[84] As such, it is evident that the Commission's decision fails to address the impact of applying the competition rules formulated for 'traditional market' to a software industry characterised by those features. More importantly, the Commission does not properly consider the short-term 'quasi-cyclical' manner in which market leaders in the software industry tend to appear and disappear.[85]

So, how should the competitive concerns raised by the Commission have been remedied? The answer seems to be in Weber Waller's suggestion to consider 'doing nothing'.[86] Four persuading reasons for refraining from intervention are advanced and it appears that they may be justifiably applied to the *Microsoft* cases. Firstly, according to the Schumpeterian theory of 'waves of creative destruction', it is only a matter of time before the 'next big thing' erodes the existing monopoly. Secondly, if it is likely that flawed conclusions will be arrived at or that an adequate remedy is unavailable or it likely that the market will respond to such

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[81] See n 12.
[82] Malcolm Coate and Jeffrey Fischer, 'Microsoft's Market Realities: A Letter Commenting on 'Going Soft on Microsoft? The EU's Antitrust Case and Remedy' by Ian Ayres and Barry Nalebuff' (2005) 2 The Economists' Voice, Article 10.
[83] See n 57.
[84] See n 39.
[85] Arianna Andreangeli, 'European Union: Spotlight on the IT Industry: The Microsoft Case – Protecting Rivalry on Innovative Markets … but at What Price for Their Future?' in Barry Rodger (ed), *Landmark Cases in Competition Law. Around the World in Fourteen Stories* (International Competition Law Series, Volume 53, Kluwer Law International 2013).
[86] See n 57.

behaviour, then inaction is a better strategy. Thirdly, market conditions are prone to change over the course of litigation which may render the case groundless as was the case with IBM litigation in the US. Fourthly, the relief should sometimes 'come from outside the legal system'.[87] It is therefore justifiable to suggest that the Commission should have adopted a more effects-based approach in its analysis of Microsoft's tying practices instead of proclaiming their incompatibility with European Competition law.

Because the Commission decided to shy away from an effects-based approach, the approach adopted in the *Microsoft* cases was seen by some critics as entailing potential adverse long-term effects on innovation and competition.[88] This approach also did not achieve much in terms of competition policy development. The Commission's intervention was considered unwarranted because – given the characteristics of the software market – most of its competition concerns were unfounded.[89] The Commission was also criticized for avoiding the provision of evidence of actual or potential consumer harm in the *Microsoft* cases. Adopting such an approach in innovation-related cases such as the Microsoft cases may result in creating a standard of liability which is easily met without resorting to evidential effects-based analysis of consumer harm. Such an approach is likely to harm the competition in such markets as well as the development of competition law policy going forward.[90] In light of the foregoing discussion it is plausible to suggest that the inadequacy of outcomes of the remedies imposed in the *Microsoft* cases should lead the relevant courts and competition authorities to recognise that Microsoft's tying practices were not unlawful.[91] It is also reasonable to call for the development of a revised competition law analysis suited for digital economies, instead of relying on traditional competition law analysis which are based on 'conventional economic models of monopoly and oligopoly market structures'.[92]

VI. Conclusion

[87] See n 57.
[88] See n 85.
[89] See n 78; Larouche takes the view that following the US Consent Decree the Commission should not have pursued the tying case. Larouche also maintains that the *Microsoft* cases 'raised more questions than it has answered'. Larouche goes as far as describing the Commission as a 'policy entrepreneur that could not resist to intervene even as its concerns had been largely addressed.
[90] Drexl, J. 'Real Knowledge Is To Know The Extent Of One's Own Ignorance: On The Consumer Harm Approach In Innovation-Related Competition Cases' [2008-2009] 76 Antitrust L.J. 677 downloaded from http://heinonline.org
[91] See n 55
[92] McKenzi, R. and Lee, D. 'How Digital Economies Revises antitrust thinking' [2001] 46 Antitrust Bull. 253 downloaded from http://heinonline.org

In light of the foregoing discussion, the remedies imposed in the *Microsoft* tying cases are inadequate. In *Microsoft I*, the unbundled Windows OS provides less to consumers and does not address the alleged theory of harm put forward by the Commission in its decision. As such, there is no 'fit' between the theory of harm and the remedy. In *Microsoft II*, the must-carry remedy arguably addresses some of the alleged harm. Nevertheless, it still risks jeopardising the competitive process in favour of protecting competitors who failed to gain substantial market shares even after Microsoft complied with the remedies. Further, the conceptual mismatch between the tying infringement and the access-resembling must-carry remedy puts at risk the rational development of competition law theory. As explained in the article, the essential facilities doctrine provides the closest fit between the theory of the case, the underpinning theory of harm and the must-carry remedy imposed. Yet, the outcome of this consideration was that under the essential facilities doctrine the standard of liability will most likely not be met and the appropriate course of action in *Microsoft* cases would have been to refrain from finding liability and imposing any remedies.

Therefore, it is fair to conclude that the inadequacy of the remedies imposed by the Commission is rooted in the incorrect categorisation of the abuse as a tying abuse and the misguided application of a conventional competition policy unsuited for fairly new markets, such as the software industry. It seems that Judge Posner is correct: the unavailability of adequate remedies is indicative of an unsound competition claim brought against Microsoft. The unsoundness of the *Microsoft* cases does not lie in the fact that the tying claim has been improperly made by the Commission. It rather lies in the unsound categorisation of the claim as such. In this regard, the shift in the Commission's position regarding the remedies imposed in *Microsoft I* and *Microsoft II* is clear evidence of a realisation – on the Commission's part – of some of the shortcomings of its remedy design. However, the fact that *Microsoft II* was still pursued as a tying case shows that the Commission did not go as far as to recognise that its repeated failure to desperately devise an adequate remedy should have led it to revisit its approach in the software industry and the emerging information economy generally. The Commission should not continue to re-design remedies in vain. At the end of the day, the Commission cannot fix what is not broken.