THE EUROPEAN MICROSOFT CASE AT THE CROSSROADS OF COMPETITION POLICY AND INNOVATION

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The judgment of the Court of First Instance (CFI) of the European Communities in Microsoft v. Commission1 led to the closing of this 10-year mammoth case.2 Its sheer size immediately raises the question whether there are any conclusions, guidance, or lessons transcending this complex story.

In this article I seek to answer that question, if only in part, as well as to complement and comment upon the companion piece by Christian

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2 The Microsoft case started with a complaint filed by Sun Microsystems on December 10, 1998; although it is not public, the Sun Complaint is mentioned by the Commission in its 2004 Decision. Commission Decision 2004 at 2 (¶ 3). The Microsoft case appeared to close with the Commission Decision of February 27, 2008. Case COMP/C-3/37.792—Microsoft Corp., Comm’n Decision (Feb. 27, 2008) (fixing the final amount of the fine), available at http://ec.europa.eu/competition/antitrust/cases/decisions/37792/decision2008.pdf. However, this 2008 Commission Decision is now pending before the Court of First Instance. Case T-167/08, Microsoft Corp. v. Comm’n, 2008 O.J. (C 171) 41 (announcing the application).
Ahlborn and David Evans, who address the same question. While the broad criticism leveled by Ahlborn and Evans might be unjustified, there are a number of specific points where the CFI opens more issues than it solves with its Judgment, in particular as regards the relationship between competition policy and innovation.


Institutionally, the CFI finds itself between the Commission and the ECJ. In its Judgment it sought to fulfill its function to review the Commission and also sought to avoid exposing itself to criticism from the ECJ on a possible appeal.4

A. THE EVENTUAL APPEAL TO THE ECJ

The CFI Judgment in Microsoft is designed to avoid any exposure to a reprimand by the ECJ, by minimizing the chances of appeal.5 The CFI keeps itself busy with facts for the larger part of the opinion, or strives to convey the impression that the case is a large mass of factual issues thrust upon a relatively simple and straightforward legal framework. Those parts of the Judgment that are explicitly presented as issues of law are seemingly devoid of any innovation that could trigger further discussion.

So it is with the first part on the supply of interoperability information. The Commission case hinges upon the line of case law concerning refusals to supply, starting with Commercial Solvents,6 and including (or morphing into) the so-called essential facilities doctrine, which—although never recognized by name—is said to be exemplified by a string

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3 Christian Ahlborn & David S. Evans, The Microsoft Judgment and its Implications for Competition Policy towards Dominant Firms in Europe, supra this issue, 75 Antitrust L.J. __ (2008) [hereinafter Ahlborn & Evans].
4 Indeed, Microsoft chose not to appeal the CFI Judgment to the ECJ.
5 As illustrated by Tetra Laval, it matters not that the appeal appears unlikely to succeed because the ECJ can also mark its disagreement with the reasoning of the CFI without necessarily coming to a different conclusion. Case C-12/03 P, Comm’n v. Tetra Laval, 2005 E.C.R. I-987, ¶ 39 (Eur. Ct. Justice), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003J0012:EN:HTML.
of major cases, namely *Magill*, *Bronner* and *IMS*. A key element in the latter cases in particular are the elements or “exceptional circumstances” under which Article 82 EC could trump property rights to support an order forcing the holder of property rights to grant access to competitors. Over the years, the ECJ case law seemed to converge towards a specific list of elements. The Commission in its *Decision* was short on the law and surprisingly audacious, staking its entire case on the claim that “there is no persuasiveness to an approach that would advocate the existence of an exhaustive checklist of exceptional circumstances and would have the Commission disregard *a limine* other circumstances of exceptional character that may deserve to be taken into account when assessing a refusal to supply.” The CFI avoids the issue, finding that it “follows from... case-law that the following circumstances, in *particular*, must be considered to be exceptional [emphasis added]”. The CFI then proceeds to restate those elements, in a way that carefully follows existing ECJ case law. The rest of the *Judgment* on the first issue, for all its length, professes to do nothing more than review whether the Commission made out those elements on the facts of *Microsoft*. The CFI thereby avoids ruling on the Commission argument about the exhaustiveness of the list drawn from ECJ case law.

In its discussion of the second part regarding tying, the CFI went further: not only did it place the case against Microsoft in fairly safe legal terrain, but it actually supplied the legal reasoning that was missing from the Commission *Decision*. If the Commission’s legal reasoning in

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10 In their case-law, the ECJ and CFI characterize as “exceptional circumstances” the elements required to justify ordering a dominant firms to provide access to its physical or intellectual property. For the sake of simplicity in drafting, they are referred to here as “elements”.

11 In Case C-418/01, *IMS Health*, 2004 E.C.R. I-5039, while the ECJ did specify that the elements were cumulative, it did not rule that the list was exhaustive. That case was in any event decided after the Commission decision in *Microsoft*.


14 *Id.* ¶ 333 (adding the absence of objective justification); *id.* 334 (noting that the new product element is found only in intellectual property cases); *id.* 335 (noting the two-market construction).

15 *Id.* ¶¶ 859–869.
the first part was audacious, it was skimpy at best in the second one. The Commission pulled the four elements of its test for illegal tying under Article 82 EC with no references to support its assertion. More specifically, the Commission did not explain how these elements related to the two leading cases on tying until then, *Hilti* and *Tetra Pak*. The CFI obliged and constructed the legal reasoning that the Commission should have supplied in its *Decision*, thereby also re-positioning the Commission *Decision* as a mere application of a test that had already been outlined in—or at least could be derived from—previous cases.

In the end, the CFI *Judgment* is made to appear light on law but heavy on fact. What is more, the legal discussion is short and seems uncontroversial. In light of the limited scope of appeals to the ECJ (on points of law only), the basis for an appeal from the *Judgment* (and the chances that it could be successful) are greatly reduced. Unfortunately, by the same token the more interesting points in the *Judgment* are also hidden—sometimes deeply—in what appear to be discussions of fact. The CFI *Judgment* does indeed feature a number of remarkable passages, some of which are discussed below.

**B. THE REVIEW OF THE COMMISSION DECISION**

Ahlborn and Evans argue that the CFI was too deferential to the Commission. They claim that this deferential attitude is typical of Article 82 EC cases, and that it is potentially dangerous because it leaves the Commission (and NCAs and national courts acting as original instances) with too much discretion in the application of Article 82 EC.

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16 *Commission Decision 2004*, supra note 1, ¶ 794. While the Commission does not indicate where the four elements of its test come from, they are remarkably close to the requirements under U.S. law for tying to be illegal under Sherman Act § 1, as they were applied in the U.S. *Microsoft* case. See United States v. Microsoft Corp., 253 F.3d 34, 84 (D.C. Cir. 2001) (taking into account that the D.C. Circuit Court of Appeal added a foreclosure of competition requirement and an efficiency defense when it moved the inquiry under a rule of reason. Id. at 95.).


19 *CFI Decision 2007*, supra note 1, ¶¶ 852–69.
Yet in Microsoft, the CFI extends the “more attentive” approach introduced in Merger Control Regulation (MCR) cases20 to Article 82 EC cases. The CFI adopts the standard set out by the ECJ in Tetra Laval: “The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.”21

As a matter of principle, Microsoft actually opens the door to closer scrutiny of Commission decisions.

Ahlborn and Evans note that the CFI also recalls the general proposition that the Court will only undertake a limited review of complex economic or technical appraisals made by the Commission.22 While this may seem to send a “mixed message”, as the two authors claim, it is important to keep in mind the nature of the proceedings: the CFI does not conduct a review de novo, and accordingly it will not reach its own conclusions on what the “correct” decision would have been. The CFI reviews a Commission decision in an area where the Commission enjoys a measure of discretion, and accordingly the key test is whether the Commission reached its decision without manifest error.

More fundamentally, the degree of deference afforded to Commission decisions cannot be measured simply by looking at the success rate of challenges to various types of Commission decisions before the Community courts, as Ahlborn and Evans do. This approach is methodologically flawed for two reasons. First, the dataset is not necessarily representative, comparing as it does challenges brought against MCR decisions with those brought against Article 82 decisions. On the one hand, MCR decisions typically are not brought before the CFI unless there is a major concern. It is well known that, despite the efforts of the CFI, the merging parties typically cannot afford to wait for the outcome of a challenge to a Commission decision. Hence, only the most controversial negative decisions (prohibitions) end up before the CFI.23 Even if the parties think that the Commission might have made errors in its

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21 CFI Decision 2007, supra note 1, ¶ 89.
22 Id. ¶¶ 87–88; Ahlborn & Evans, supra note 3, at [PINCITE].
23 And even then this may be only to make the point, as was the case with GE/Honeywell. The award of damages against the Community in the recent Schneider case, however, changes the incentives and could lead to more systematic challenges to MCR decisions. Case T-351/03, Schneider Electric v. Comm’n, 2007 E.C.R. II-2237 (Ct. First Instance), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0351:EN:HTML.
assessment, positive (clearance) decisions with commitments of the notifying parties are rarely challenged by the parties.\textsuperscript{24} Given the disincentive to litigate, it should come as no surprise that parties who do bring their case before the CFI achieve a significant success rate. On the other hand, there is almost no disincentive against challenging negative Article 82 EC decisions, and a larger proportion of them are brought before the Courts. A very rough look at the figures shows that the proportion of reversals to total negative decisions is not so different, at 25 percent for MCR cases versus 18 percent for Article 82 cases.\textsuperscript{25}

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<th>Cases</th>
<th>MCR</th>
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<td>Negative decisions by the Commission</td>
<td>20</td>
<td>50</td>
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<td>Brought before the Community courts</td>
<td>9</td>
<td>28</td>
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<td>Commission decision reversed</td>
<td>5\textsuperscript{26}</td>
<td>9</td>
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<td>% of reversals to total negative decisions</td>
<td>25</td>
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Second and more fundamentally, deference is not related to the rate at which the CFI and ECJ reverse or confirm Commission decisions. This would imply that the Court is deferent whenever it fails to quash a Commission decision. But it is quite possible that the Court, having submitted the Commission decision to thorough scrutiny, would still conclude that the Commission did its work properly and that its decision

\textsuperscript{24} Positive (clearance) decisions have in a number of cases been challenged by disgruntled competitors of the merged entity, with limited success: see Case T-114/02, BaByliss SA v. Comm’n, 2003 E.C.R. II-1279 (Ct. First Instance), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002A0114:EN:HTML; Case T-464/04, IMPALA v. Comm’n, 2006 E.C.R. II-2289 (Ct. First Instance), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0464:EN:HTML. Such positive decisions are left out of the dataset because they do not correspond to the concern for Type I errors that underpins the discussion of deference. If they were included, in any event, the reversal percentage for MCR decisions would only decrease.

\textsuperscript{25} As of January 2008, as compiled by the author. The total number of negative decisions under Article 82 EC is based on published cases. Nowadays cases tend to be systematically published, but in the early days of EC competition law some cases went unpublished. The actual number of negative Article 82 EC decisions issued by the Commission is, therefore, probably higher if one includes earlier unpublished cases, so that the proportion of cases reversed by the Court would, in fact, be somewhat lower: none of the unpublished Commission decisions were brought before the ECJ or CFI (otherwise they would have been included in the data set by virtue of the ECJ/CFI judgment).

\textsuperscript{26} This total counts the CFI’s GE/Honeywell judgment as a reversal in substance, if not in result. Case T-210/01, Gen. Elec. v. Comm’n, 2005 E.C.R. II-5575 (Ct. First Instance), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0210:EN:HTML.
should stand. In other words, the Court can both leave deference to the side and ultimately confirm the Commission decision.²⁷

If anything, Microsoft marks a new era in Article 82 EC litigation. Never before has the Commission put so much effort and care into a decision, and never before has the CFI looked into every nook and cranny of an Article 82 EC decision the way it did in the Judgment. The reasons for judgment filed by the CFI show that the Court had to deal with a large number of arguments thrown at it by Microsoft. Some of them were dismissed summarily as “purely semantic”²⁸ or “purely formal”²⁹ but others were considered carefully. Save on the issue of the management trustee, Microsoft simply failed to convince the CFI that the Commission had made a manifest error in its Decision. But the CFI left no stone unturned.

The CFI Judgment might appear deferential in light of the earlier Order of the President of the CFI on Microsoft’s application for interim measures (suspension of the Commission Decision pending review).³⁰ Indeed that Order had gone against Microsoft, but not for the usual reasons. According to the case law of the ECJ, interim measures can be granted if the entrant shows (i) a prima facie case on the substance and (ii) urgency, i.e. that the balance of inconvenience weighs in favor of the entrant.³¹ Typically, when applications for interim measures are rejected, the order turns on the prima facie case (first element). The Order in Microsoft was a rare instance where the entrant was found to have made a prima facie case; the application was rejected on urgency. In his Order, the President of the CFI indicated that he thought that Microsoft had valid arguments against the Commission Decision on both the interoperability information³² and the tying³³ issues. Yet none of these argu-

²⁷ From a lawyer’s perspective, the conflation of the outcome (confirm or quash) with the process (deferential or not) reflects a typical failure of social science research to take judicial processes seriously, focusing instead on outcomes and extraneous factors.

²⁸ Commission Decision 2007, supra note 1, ¶ 850.

²⁹ Id. ¶ 773.


³¹ Id. ¶ 71 (referring to the Rules of Procedure of the Court and to case-law).

³² Id. ¶¶ 204–25. These prima facie valid arguments related among others to whether the Decision fit the test outlined in previous case-law and whether the presence of intellectual property rights made any difference in the outcome, two issues which of course feature prominently in the CFI Judgment.

³³ Id. ¶¶ 394–404. These prima facie valid arguments related among others to the test used by the Commission to find an abusive tying, to the significance of the integrated Windows design in the legal assessment and to the existence of separate markets for Windows OS and Media Player, here as well issues which feature prominently in the CFI Judgment.
ments carried the day in the actual Judgment three years later. The President might have been outvoted in the Grand Chamber.34 But it cannot be ruled out that, upon closer examination, the CFI found that the Commission Decision should stand.

II. REFUSAL TO SUPPLY INTEROPERABILITY INFORMATION

On the first issue—the refusal by Microsoft to supply interoperability information to its competitors, such as Sun and Novell—the CFI does not really engage with the daring legal position staked out by the Commission in the Decision. Rather, the CFI proceeds to show how Microsoft fits within the set of elements so far identified in the case law (up to and including IMS, hereinafter the “IMS test”), while leaving open the issue whether other elements might also be relevant in the decision to order access to the intellectual property held by a dominant firm. The elements of the IMS test are:

- the refusal to deal relates to a product or service indispensable to the exercise of a particular activity on a neighboring market;
- the refusal is of such a kind as to exclude any effective competition on that neighboring market;
- the refusal prevents the appearance of a new product for which there is potential consumer demand; and
- the refusal is not objectively justified.35

While the CFI might not have gone as far as to indulge in a substitution de motivis—replacing the Commission’s reasoning with its own, which it cannot do under Article 230 EC36—it nevertheless seriously reshuffles the Commission findings and reasoning to fit them within the IMS test. When the Commission decided Microsoft in 2004, IMS had not yet been issued, and to a certain extent the Commission might be excused for not having followed a judgment that had not yet been pronounced. At the same time, IMS merely restated and confirmed the limitative set of elements established in earlier judgments such as Magill and Bronner. In 2004, the Commission chose to advocate a less restrictive approach, relying on an open-ended set of elements, including in particular the fact that Microsoft had engaged in a repeated pattern of conduct and had

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34 As Ahlborn and Evans seem to suggest. Ahlborn & Evans, supra note 3, at [27].
disrupted previous levels of supply. Obviously, if the Commission took this position, by implication it was not quite convinced that its case met the IMS test. Yet the CFI finds that Microsoft does meet that test. As can be expected, the weaknesses that prompted the Commission to advocate a broader set of elements surface when the CFI tries to show that the IMS test is met.

A. INDISPENSABILITY OF THE PROPERTY TO WHICH ACCESS IS SOUGHT

In its discussion of indispensability, the first element, the CFI downplays a key issue, namely the degree of interoperability that a dominant firm is bound to provide to its competitors. That issue is dealt with earlier in the Judgment, almost as a preliminary matter. In its argument before both Commission and CFI, Microsoft relied heavily on the definition of interoperability given at Directive 91/250. Echoing the Commission, the CFI finds no inconsistency between the degree of interoperability required in the Decision and the definition of Directive 91/250, and holds that the Directive was ultimately irrelevant for interpreting Article 82 EC. Yet the arguments focus on the wording of the Directive and fail to address squarely the extent of the duty of a dominant firm to enable its competitors to interoperate with its products.
In the computer network of a typical business, a large number of servers interact with the client computers and with each other in what is termed a “domain architecture”. In a nutshell, Microsoft’s view was that it was sufficient if rival workgroup server operating systems (OS) were able to interoperate with Windows clients (so-called client/server interoperability). In such a case, Microsoft and its rivals would essentially compete for the whole of the domain architecture, i.e., for all the servers of a given business (or at least all of its workgroup servers). This could be seen as “competition for the market” of each individual business customer, a fairly granular form of competition.

In contrast, the Commission expected Microsoft to ensure what it termed “interoperability with the Windows domain architecture”, meaning that it should be possible to run rival workgroup server OS on one workgroup server within a larger Windows domain. In that case, business customers can combine (mesh) Windows and rival servers within their domain, and accordingly every single server is subject to competition. This could be compared with “competition in the market”. Of course, the required degree of interoperability is much higher: not only must rival workgroup server OS interoperate with Windows clients, they must also interoperate with the Windows servers found within the rest of the Windows domain.

Both the Commission and the CFI simply assume that the latter alternative is preferable. The CFI endorses the Commission’s view that the higher degree of interoperability in this option “was necessary in order to enable developers of non-Microsoft work group server operating systems to remain viably on the market”.44

As economic literature shows, however, the choice between these two options is not so simple. Among others, it involves trade-offs between various models of innovation. Succinctly put, competition for the market might provide stronger incentives for breakthrough innovation, since the whole market is at stake, but it is likely to give the market leader a strong—usually dominant—position. This dominant position is then the prize that competitors want to take from the market leader in the next period, when further breakthrough innovation reshuffles the

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42 Which could be administered through either public procurement mechanisms (for public sector institutions) or private mechanisms such as bids made on the basis of RFPs.
43 Commission Decision 2004, supra note 1, ¶ 182.
44 CFI Decision 2007, supra note 1, ¶ 228.
45 On this point, see the discussion in Pardolesi & Renda, supra note 38, at 524–525. Note furthermore that the two are not exclusive of one another: breakthrough innovation can also occur in a market which is otherwise characterized by incremental innovation.
market. In contrast, competition in the market places firms under constant pressure to operate as efficiently as possible and to innovate, even if only incrementally, in order to gain an advantage over competitors within a largely common technological environment. The incentives to achieve a massive breakthrough innovation could be reduced, however, in the absence of the prospect of large innovation rents for the market leader.

In Microsoft, regrettably, neither the Commission nor the CFI went into the basic issue of why competition in the market and incremental innovation should be preferred to competition for the market and breakthrough innovation. At most, there are oblique references when the CFI responds to Microsoft’s argument that the degree of interoperability required by the Commission was erroneous. The CFI seems to consider that, because of Microsoft’s “superdominance” on client OS, the Windows domain architecture has become the de facto standard for workgroup servers, as confirmed by the evidence gathered by the Commission (in particular market surveys). On that basis, and without further discussion of the competition policy implications, the CFI confirms the Commission’s conclusion that interoperability within the Windows domain architecture is indispensable.

Once the degree of interoperability required by the Commission is established, the rest of the reasoning concerning indispensability follows.

B. Elimination of Competition in the Downstream Market

The next element in the IMS test is that the refusal to disclose the information would eliminate competition on the relevant downstream market. The CFI confirms the Commission’s relevant market definition and the

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46 Under the “indispensability” heading of the Judgment. CFI Decision 2007, supra note 1, ¶¶ 371–422.

47 The CFI does not use the term “superdominance,” referring instead to the “extraordinary” nature of Microsoft’s dominance or its very high market share. CFI Decision 2007, supra note 1, ¶¶ 387, 940, and 1038.

48 Id. ¶¶ 421–422.

49 Contrary to what Ahlborn and Evans claim, the requirements of indispensability and elimination of competition are not one and the same, even if the difference between the two is slight. Ahlborn & Evans, supra note 3, at [9] (indispensability refers to whether the facility/information can be duplicated or otherwise replaced (where the threshold for what is economically feasible is set quite high). See Case G-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs, 1998 E.C.R. I-7791 (Eur. Ct. Justice); the “elimination of competition” element is more economic and involves relevant market definition. See LAROCHE, supra note 37, at 188–96.
methods used to assess market shares.\textsuperscript{50} Interestingly, the CFI finds that, in any event, the Commission’s case does not rest on the correct assessment of the market for workgroup server OS, since the theory of harm put forward by the Commission involves leveraging of Microsoft’s uncontested dominance on the client OS market on the workgroup server OS market.\textsuperscript{51} The Commission’s case is then subjected to a reality test: the CFI reviews the factual determination that the refusal to supply the interoperability information is likely to eliminate competition on the relevant market. The main difficulty is that, despite Microsoft’s increasing market share, a number of competitors have managed to remain active on the market, and Linux providers emerged as new competitors during the term covered by the inquiry. In theory, it is conceivable that such a competitive fringe would suffice to keep the market competitive. Still the CFI agrees with the assessment of the Commission, which was relatively well evidenced.

\textbf{C. Hindrance to the Emergence of a New Product}

The tensions caused by the efforts of the CFI to fit the case within the IMS test are most visible in the requirement that the refusal to supply information must prevent the emergence of a \textit{new product} for which there is demand. This element was developed at the greatest length in IMS,\textsuperscript{52} which was rendered after the Decision. In IMS, as in Magill\textsuperscript{53} where the new-product element was introduced, the facts were reasonably clear: Magill sought to bring to the market a new type of TV guide, whereas NDC (the applicant in IMS) seemed to want to replicate IMS’ product. Here the case can be construed in many ways: the Commission chose to emphasize the disruption of existing supply relationships with the introduction of Windows 2000,\textsuperscript{54} so that competitors were prevented from continuing to offer competing products with innovative features, by way of “follow-on innovation”.\textsuperscript{55} This might suffice under the general Commission approach whereby the list of elements is not limited to the IMS test: the case would then come closer to the classical case law, such

\textsuperscript{50} For a criticism of market definition, see Pardolesi & Renda, \textit{supra} note 38, at 543–547.

\textsuperscript{51} \textit{CFI Decision 2007}, \textit{supra} note 1, ¶ 559. Leveraging claims being complicated and controversial in economic theory, one would have expected the CFI to spend more time on this point.

\textsuperscript{52} Case C-418/01, IMS \textsc{Healt}h \textsc{GmbH} \& \textsc{Co. OHG} \, v. \, NDC \textsc{Healt}h \textsc{GmbH} \& \textsc{Co. KG}, 2004 E.C.R. I-5039 (Eur. Ct. Justice).


\textsuperscript{54} \textit{Commission Decision 2004}, \textit{supra} note 1, ¶¶ 578–84.

\textsuperscript{55} \textit{Id.} ¶¶ 693–700.
as Commercial Solvents (refusal to supply whereby existing dealings are terminated). The CFI, on the other hand, chose to frame Microsoft within the IMS test, with its seemingly more exacting “new product” element.

Nevertheless, the CFI follows the Commission’s line of reasoning by going back to the text of Article 82(b) EC, which presents “limiting production, markets or technical development to the prejudice of consumers” as a type of abuse of a dominant position. The CFI then links the new product element to the wording of Article 82(b) EC, holding that the “appearance of a new product . . . cannot be the only parameter . . . prejudice may arise where there is a limitation not only of production or markets, but also of technical development”. Leaving aside the limited probative value of the illustrative list of Article 82 EC, the CFI is at pains to reconcile its reasoning with IMS, where Article 82(b) played no role and the ECJ insisted on the need to show that the applicant “intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand”. The CFI goes on to find that the Commission committed no manifest error in its Decision. In essence, once they obtain the interoperability information from Microsoft, competitors have an incentive to introduce workgroup server OS that are differentiated from and provide added value over Windows workgroup server OS. Here as well, much as on the indispensability issue, the Commission and the CFI assume that incremental innovation – such as would typically result from a “competition in the market” or cumulative knowledge model – is at least as valuable as the lumpier breakthrough innovation that would occur under a model of “competition for the market” or non-cumulative knowledge. This assumption is not explicitly discussed anywhere in the Decision or the Judgment.

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57 CFI Decision 2007, supra note 1, ¶ 647.
58 As the CFI itself recalls later in its Judgment when dealing with the tying issue. Id. ¶¶ 859–61.
60 It is interesting to note that the reasoning of the CFI is replete with references to the manner in which other providers competed with Microsoft over previous versions on Windows, underlining how the case is easier to frame as a termination of existing supply relationships, as discussed above.
Much has been written already and more will be written on how the CFI stretched the new-product element in Microsoft. At the same time, as will be seen below, the CFI might have made its life unnecessarily complicated by taking too formalistic a view of what a “new product” should be and by entering into a discussion about how technical improvements in product features can also qualify. Nowhere is it written that a “new product” needs to be a completely new offering, entirely distinct from the original one. If, as set out above, it is assumed that smaller-scale incremental innovation is valuable, there is no compelling legal reason why competing workgroup server OS, if they offer innovative features, cannot qualify as “new products”. The real difficulty is not with the definition, but rather, as explained below, with the adequacy of the new product element as a proxy.

D. Absence of Objective Justification

As the last element of the IMS test, Microsoft had the opportunity to prove that its refusal to disclose the interoperability information is objectively justified. Before the Commission and the CFI, Microsoft’s argument rested on the adverse incentives on innovation that would follow from compulsory disclosure of interoperability information. The CFI dismissed the argument as “vague, general and theoretical”, repeating

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62 See the interesting discussion in Ahlborn at al., on this point. Their conclusion is entirely apposite: a new product “satisfies potential demand by meeting the needs of consumers in ways that existing products do not”. Ahlborn et al., The Logic and Limits, supra note 61, at 1147. Not even in Magill was it the case: after all, the Magill TV guide contained the exact same schedules (the essential information) as the others, its main novelty consisting in bringing all these schedules in one single guide. Joined Cases C-241 & C-242/91 P, Radio Telefis Eireann & Indep. Television Publ’ns Ltd. v. Comm’n, 1995 E.C.R. I-743 (Eur. Ct. Justice) (Magill).

63 See also François Lévêque, Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case, 28 WORLD COMPETITION 71, 75–78 (2005).


65 As pictured by the Judgment, to the extent that Microsoft would invoke the mere existence of intellectual property rights over the interoperability information as an objective justification in and of itself, the argument would be circular. CFI Decision 2007, supra note 1, ¶¶ 689–95. However, Microsoft’s argument went further and considered also the ex ante effect of forced disclosure on its incentives to innovate in general.

66 Id. ¶ 698.
its earlier finding that the remedy did not allow cloning of Microsoft products and—interestingly enough—referring once more to Microsoft’s disclosure policy on earlier versions of Windows, which apparently did not affect the innovation incentives. More fundamentally, Microsoft demonstrates the shortcomings of the efficiency defense as envisioned in the 2005 Discussion Paper.

The very “efficiency” that is at stake in Microsoft is not an efficiency defense—i.e., an efficiency gain that would result directly from a given course of conduct—but rather a concern for the long-term, dynamic implications of the competitive analysis. It cannot easily be dealt with at the tail-end of the inquiry, after the main elements of Article 82 EC—dominance and abuse—have been established, as the Commission proposed in its 2005 Discussion Paper. In Microsoft, the Commission found it difficult to hold to this artificial separation between the abuse and the efficiency defense. In the end, the Commission framed its conclusions in terms of balancing: “on balance, the possible negative impact of an order to supply on Microsoft’s incentives to innovate is outweighed by [the] positive impact [of the disclosure] on the level of innovation of the whole industry”. Microsoft seized the opportunity to argue that the Commission was introducing a new test for the application of Article 82 EC, in violation of previous ECJ case law. The CFI considered the above passage as a mere slip of the pen by the Commission, yet the CFI is equally at pains to explain how the innovation incentives can be dealt with as a defense, separately from the assessment of the impact of the

67 Id. ¶¶ 700, 702.
69 Compare for instance with the efficiencies arising from certain types of vertical restraints in terms of avoiding free-riding and overcoming information asymmetries.
70 The whole argument centers on incentives to innovate, so that even at the theoretical level (leaving aside the quantification problem), there might never be any efficiency gain, given that innovation is unpredictable. It is all about trying to influence the course of future events in a matter which is thought favorable. In the DG Competition Discussion Paper, the Commission classifies this argument as a defense, without really addressing the issue raised here. European Comm’n, DG Competition, Discussion Paper, supra note 64, ¶¶ 254–56.
71 See id. ¶¶ 77–92.
72 Commission Decision 2004, supra note 1, ¶ 783.
73 In principle, this argument appears to run against the interest of Microsoft, given that a balancing test would likely do better justice to its arguments on innovation incentives. However, in the context of the review of an existing Commission decision, any legal argument which would lead to the invalidity of the decision was presumably thought to be worth making.
74 CFI Decision 2007, supra note 1, ¶¶ 705–10.
course of conduct on the market carried out to establish the abuse. Its reasoning on this point is at best contrived.

Operationally, putting the efficiency defense at the end of the analysis presents the defendant with a formidable task, as Microsoft shows. Once the Commission is satisfied that the defendant holds a dominant position and that its conduct constituted an abuse, i.e., produced anticompetitive effects to the detriment of consumers, it is difficult to see how a defendant could turn the tide by arguing that in the end the course of conduct does create efficiencies that benefit consumers. The CFI unwittingly illustrates this point by stating that the Commission had to “consider whether the justification put forward [. . .], on the basis of the alleged impact on its incentives to innovate, might prevail over [the] exceptional circumstances [of the IMS test], including the circumstance that the refusal at issue limited technical development to the prejudice of consumers”.

This Herculean task is not made easier by the uncertainty concerning the burden of proof. Admittedly, the alternative—a balancing test carried out within the assessment of abuse—also carries its own operational difficulties, including a greater risk of error due to the discretion inherent in any balancing.

E. Conclusion on the Refusal To Disclose Interoperability Information

In the end, with respect to the refusal to disclose interoperability information, Microsoft must be seen as another round in the long struggle of EC law to find a suitable analytical framework to deal with refusals to supply (and more broadly with cases where longer-term considerations relating to dynamic efficiency and innovation are present). Part of that struggle involves ending the separate life of the infamous essential facility doctrine and basing the analysis on sound principles consistent with the rest of Article 82 EC. In Microsoft, the CFI shies away from the Commission’s open-ended approach, but perhaps tries too hard to hold on to the orthodox IMS test. After all, the IMS test is only a set of proxies.

In a perfect world with complete information, refusal-to-supply cases could be dealt with, as follows, in line with the rest of Article 82 EC. Intervention should occur only if it brings about an increase in overall

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75 Id. ¶ 709.
77 Geradin, supra note 37, at 1539–43.
78 These paragraphs build on LAROCHE, supra note 37, at 196–203.
welfare. For that, in a very simple fashion, \( \nabla W_1 + \nabla W_2 > 0 \), where \( \nabla W \) is the variation in welfare brought about by the intervention in period 1 (now) and 2 (in the future), when compared to the baseline scenario (no intervention). As for period 1, \( \nabla W_1 = \nabla (TV_1 - TC - Ca) \), where \( TV \) is the total value to consumers of the service, \( TC \) the total cost of providing them and \( Ca \) the cost of decision-making by the authority.\(^{79}\) \( TV \) will increase if, for instance, the intervention removes a deadweight loss or shifts the demand curve through the emergence of new offerings. \( TC \) depends on the costs to the two parties, the incumbent (defendant) and the entrant seeking access: \( \nabla TC = \nabla Ci + \nabla Ce \), where \( \nabla Ci \) reflects the increased costs incurred by the incumbent to provide access (including the loss of economies of scale and scope, opportunity costs and the cost of additional facilities) and \( \nabla Ce \) the reduction in cost for the entrant in not having to duplicate or replicate the input, facility or information to which access is sought.

Period 2 is characterized by an expectation of innovation, which changes the value of the service to \( TV_2 \),\(^{80}\) so that \( \nabla W_2 = \nabla E (TV_2 - TC) \). That expectation of innovation is therefore equally affected by the intervention of the authority to compel access to facilities or information.\(^{81}\) For instance, intervention will modify the incentives to innovate on the part of the incumbent\(^{82}\) or of the entrant\(^{83}\) or create a climate where market players wait for signals from the authority before engaging in innovative ventures.

In real life, however, most of these values cannot be quantified. In particular, \( \nabla Ci \) is hard to ascertain before intervention and \( \nabla W_2 \) is almost impossible to quantify.\(^{84}\) The IMS test is designed to provide proxies for the outcome of the first equation above:

\(^{79}\) This includes the cost of making a decision (i.e., determining whether access should be granted, where or over which information, and at what cost) and enforcing it. The cost of continuing to enforce the decision in subsequent periods (litigation, reporting, etc.) is ignored for the sake of simplicity.

\(^{80}\) It is assumed for the sake of simplicity that \( TC \) is not changed from period 1, since there is no new intervention. Innovation could of course also consist in decreasing costs rather than increasing valuation.

\(^{81}\) The effect of the intervention of the authority can be felt not only on the relevant market, but also on other markets.

\(^{82}\) By giving rise to an expectation that rents on future innovation will also be confiscated via compulsory access or disclosure orders.

\(^{83}\) By giving a greater incentive to innovate in the knowledge that access to information or facilities in the hands of dominant players will be enforced. At the same time, small entrants must also fear that, if successful, their own innovation rents could be confiscated in turn.


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The indispensability element aims to ensure that $\nabla C_e$ is negative (cost savings) and high, so that in any event $\nabla TC$ will be limited if not negative. Furthermore, if the cost of duplicating or replicating the facility is low, presumably the baseline scenario (without intervention) will involve duplication or replication on the entrant’s own initiative, so that $\nabla T V_1 = 0$ and intervention is not warranted;

- If the refusal to supply is likely to eliminate competition on the downstream market because of the market power of the incumbent, then in all likelihood $\nabla T V_1 > 0$. Moreover, the incentives of the entrant to innovate are negatively affected by the refusal to supply, so that $\nabla W_2$ could be positive.

- The new product element also has a double proxy function. First, it also tends to indicate that $\nabla T V_1 > 0$, because consumers would value a new product for which there is pent-up demand. Second, if the entrant introduces a new product differing from the product of the incumbent, presumably the latter’s incentive to innovate is not significantly adversely affected, so that again $\nabla W_2$ would tend to be positive.

- If the efficiency defense is considered separately as an objective justification and not as part of the elimination of the competition element, and if the arguments relating to incentives to innovate are part of the defense, then it does provide an indication regarding $\nabla W_2$.

The above shows that the proxies included in the IMS test are neither especially precise—they all serve a dual function—nor exhaustive. In particular, they are weak as regards the approximation of $\nabla W_2$.

If other proxies can be found, there is no reason not to use them if they improve the quality of the approximation. Read in this light, the Commission’s open-ended approach is quite sensible. Two additional elements were invoked by the Commission in its Decision; as shown above, they also appeared in various places in the CFI reasoning:

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85 The entrant expands the market and increases the innovation rent, albeit not at the same rate as if the incumbent itself would have supplied the new product. At the same time, the entrant can also undermine the incumbent’s incentives by engaging in vertical differentiation with a new product of a lower quality.

86 See also Pierre Larouche, The Role of the Market in Economic Regulation, Inaugural Lecture, Conference Towards a Horizontal Approach to Economic Regulation, Tilburg Univ. (Nov. 14, 2003 (discussing how $C_e$ can serve as a proxy for $C_i$ and $W_2$ under certain circumstances).
The refusal to disclose interoperability information could be construed as a *disruption of previous levels of disclosure* in earlier versions of Windows.87 This approach would imply that $\nabla C_i$ cannot be excessive, given the previous disclosure practices. Furthermore, if Microsoft still managed to be innovative despite voluntary disclosures to competitors on the workgroup OS market, then the effect of disclosure on its innovation incentives cannot be so high,88 meaning that $\nabla W_2$ would remain positive.

Microsoft holds a so-called *superdominant* position on the neighboring market for client OS,89 although it is not superdominant on the workgroup server OS market. Microsoft’s market power is therefore unlikely to disappear rapidly, despite compulsory disclosure of interoperability information to competitors. Microsoft would then still retain significant incentives to innovate (as compared to a situation where the intervention would deprive an incumbent of any possibility to retain market power through innovation). Here as well, the impact of disclosure on the innovation incentives would therefore be limited, meaning that $\nabla W_2$ would remain positive.

The following table summarizes the above:

<table>
<thead>
<tr>
<th>Proxy for:</th>
<th>$TV_j$</th>
<th>$C_i$</th>
<th>$C_e$</th>
<th>$W_2$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indispensability</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Elimination of competition</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>New product</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Efficiency defense</td>
<td></td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Previous course of conduct</td>
<td></td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Superdominance</td>
<td></td>
<td></td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

As long as any elements invoked in the reasoning of the competition authority do contribute to approximating the decision that would be taken under perfect information, there is no reason to exclude them. What is more, since the reasoning of the Commission and the CFI implicitly rests on a coherent but untested model of innovation and given

88 See CFI Decision 2007, supra note 1, ¶702 (discussing how Microsoft’s previous disclosure of information allowed operators to make products more attractive and noting that there was no claim that this had any negative impact).
89 See generally Jochen Appeldoorn, *He Who Spareth His Rod, Hateth His Son?* Microsoft, Superdominance and Article 82 EC, 26 EUR. COMPETITION L.R. 653 (2005) (critiquing the current view on the relevance of superdominance).
that assessing the impact of intervention on innovation is very difficult, the CFI should have recognized the usefulness of taking into account every relevant proxy in the legal test in order to obtain the best possible picture.

III. TYING

In the first part of the case, the CFI reshuffled the Commission’s legal reasoning. In the second part concerning tying, the CFI followed the Commission’s line of reasoning, after having supplied it with a legal underpinning. The CFI endorsed the following elements for a tying claim:

- the tying and tied products are two separate products;
- the defendant is dominant on the market for the tying product;
- the defendant does not give consumers a choice to obtain the tying product without the tied product;
- the tying forecloses competition;
- the defendant cannot put forward any objective justification for its conduct.

A. SEPARATE PRODUCTS

On the first element, namely that the tying product (Windows OS) and the tied product (WMP) are separate products, all agree that customer demand is determinative of the issue, but Microsoft and the Commission disagreed on the assessment of customer demand. For the Commission, the mere existence of some customer demand for separate products is sufficient to satisfy this element. For Microsoft, customer de-
mand for separate products must be significant. In other words, given technical integration (the merging of WMP into a broad “media functionality” for Windows), it must be shown that customer demand for separate products is still significant, or to paraphrase Ahlborn and Evans, that “choice” is preferred to “convenience”.

Quite possibly, both the Commission and Microsoft could be right about consumer demand. In all likelihood, two classes of consumers can be distinguished among end-users. First, more tech-savvy consumers want the best available media player for their requirements, and are able and willing to undertake whatever operations might be necessary (including downloading a program, installing it and configuring Windows) to obtain and use that media player. These consumers prefer choice over convenience. Second, mainstream consumers have neither the skills nor the will to play with the software on their computer; they expect their computer system to be able to handle media files and will be satisfied with whichever media player or “media functionality” handles that task. They prefer convenience over choice. Without making an empirical claim, it is probably fair to say that the former class of consumers represents a non-negligible minority. If that intuition is correct, then there is demand for the products separately from each other and the CFI rightly sided with the Commission.

B. IMPOSSIBILITY OF OBTAINING THE TYING PRODUCT WITHOUT THE TIED PRODUCT

The CFI also confirmed the conclusion of the Commission that consumers are unable to obtain the tying product without the tied product. As the CFI explains, this can be construed as a reformulation of the clause found in Article 82(d) EC to the effect that consumers are compelled to accept ‘supplementary obligations’. Even though WMP is given away for free, the CFI agrees with the Commission that OEMs – and their con-

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93 Microsoft insisted, in particular, on the absence of notable separate demand for Windows OS without WMP, whereas the Commission and the CFI put more emphasis on the existence of separate demand for streaming media players. See id. ¶ 925–53. Microsoft’s line of argument, while attractive, seems to collapse the separate demand issue with the remedy. It draws strength from the uselessness of the remedy ordered in Microsoft. Leaving the remedy aside, however, the issue is whether there is separate demand for each product (i.e., without tying) which could take the form of demand for a package where Windows and WMP are sold together but can be untied as required. As the CFI rightly remarks, Microsoft’s argument could imply that complementary products cannot be separate products. See id. ¶ 921.

94 Ahlborn & Evans, supra note 3, at [24].

95 CFI Decision 2007, supra note 1, ¶ 864.

96 WMP is given away free, at least when downloaded from the Internet. Of course, the development costs of WMP are covered by other Microsoft revenue streams.
consumers – are compelled to accept it when they install Windows on their products and cannot uninstall it. But the CFI fails to properly factor in the impact of the Consent Decree in the U.S. Microsoft case. Among other obligations, Microsoft undertook in the Consent Decree to add to Windows what is now the “Set Program Access and Defaults” feature, allowing end-users to choose directly which media player they want to use and effectively severing the tie between Windows OS and WMP. The CFI considered that the Consent Decree was not adequate, since customers remain compelled to acquire both products together. For OEMs, indeed, it means that any competing media player would be installed in addition to and not instead of WMP, giving rise to additional costs for configuration and for sales support. From an end-user perspective, however, it is a matter of choosing a default rule: the solution in the Consent Decree amounts to tying by default with the possibility to break the tie, whereas the Commission in its assessment requires the reverse option, namely no tying by default with the possibility to integrate WMP into Windows if desired.

C. FORECLOSURE OF COMPETITION

If the Consent Decree is not construed as giving consumers the choice to avoid the tie between Windows OS and WMP, then at least it should have been considered in the core of the analysis, namely the discussion of foreclosure of competition. The CFI here follows the Commission’s analysis, which focuses on the OEM channel. In essence, tying WMP to Windows OS gives WMP an “unparalleled presence”: OEMs have no incentive to present other bundles to their end-users, and the latter cease to use other distribution channels when they see WMP installed ab initio.

While attractive on the surface, the theory of harm put forward by the Commission and endorsed by the CFI suffers from one major weakness: it was not borne out by reality. Since the Commission stated its case in 2001, seven years have gone by and the harm has not materialized. As the Commission noted, Microsoft was able to build market share on the  

98 United States v. Microsoft Corp., 2006 WL 2882808 (D.D.C. 2006), at *4 (under III.H). This feature was added via Windows XP Service Pack 1 and is found directly in the Start Menu.  
99 CFI Decision 2007, supra note 1, ¶ 974.  
101 CFI Decision 2007, supra note 1, ¶¶ 1038–58.  
media player market, up to the point where it held close to 50% of the market.\textsuperscript{103} Its market share has been stagnating in the recent years, however, as iTunes established itself and Adobe Flash made inroads due to the popularity of YouTube. Real also managed to retain second place behind WMP. To the informed observer, the media player market seems very competitive still.

It is not clear why the Commission’s fears did not materialize. On the one hand, the Commission might have made the wrong assumptions about the significance of the OEM channel, the behavior of users or the level of innovation in the market. On the other hand, the Consent Decree might have removed the threat of harm by strengthening end-user choice and control. The remedy imposed by the Commission in Microsoft, however, has had little effect: Windows XP N has been a commercial failure. Certainly, if the theory of harm of the Commission turned out to have been correct, the Commission remedy alone could not have prevented harm from occurring in the absence of the Consent Decree.

Assuming that the intuitive two-class end-user model set out above is accurate, the tech-savvy users will try to avoid the tie and will look for the best media player(s) available.\textsuperscript{104} For these users, media players compete on performance. Conversely, the mainstream users will stick with WMP for the sake of convenience, but they are certainly not indifferent to performance. They are making a trade-off: more convenience in return for less choice. Should WMP be significantly worse than competing products, however, the cost savings in not having to bother with shopping around for a media player would be defeated by the loss of utility in using a sub-standard product. Presumably, mainstream users could then be convinced to take the steps to move to a competing media player. Mainstream users can be kept informed on quality by free riding on the experience of tech-savvy users, which is relayed to them via media outlets. As long as the tech-savvy user segment is competitive, therefore, Microsoft is under pressure to keep WMP close to the best-of-breed, in order to avoid the desertion of mainstream users. Mainstream users receive a product of reasonably good quality without having to incur selec-


\textsuperscript{104} The tying of WMP to Windows OS does not prevent other media players from being used, it just makes WMP more ubiquitous, as the CFI notes in the Judgment. CFI Decision 2007, supra note 1, ¶ 1049.
tion costs. The mainstream user segment could therefore work efficiently, even if it were dominated by one producer. This model has worked on the browser market after the Consent Decree, where Microsoft Internet Explorer is kept in check by Firefox, Opera, Safari and others. Under this line of analysis, integration delivers its benefits to the mainstream users who value it, while the tech-savvy users obtain the best product that they are seeking. The main role for competition authorities is to keep the tech-savvy segment open, which the U.S. authorities did with the Consent Decree by ensuring that the tying can be defeated or reversed. The remedy advocated by the Commission in Microsoft, in contrast, is of limited use, if any.

In strict legal terms, the CFI was not bound to take into account how the market evolved after the Commission Decision. It reviews whether the Commission Decision was legal when it was taken, and not whether it turned out to have been correct in retrospect. At the same time, given the high stakes in Microsoft and the skill of the CFI, it is surprising that the CFI would not somehow allow its reasoning to be influenced by the subsequent course of events, at least as far as the interplay between the EC and U.S. remedies was concerned.

On a positive note, the CFI supports the Commission’s choice to treat the foreclosure of competition as an autonomous element of the tying test, to be investigated separately. Microsoft opportunistically argued that this approach marked a departure from previous case law, under which the tying was deemed to have a foreclosure effect by nature. The CFI rejects that argument, although unfortunately it stops just shy of ruling that foreclosure of competition must always be established separately.

D. ABSENCE OF OBJECTIVE JUSTIFICATION

Finally, as on the interoperability issue, the discussion of the efficiency defense brought forward by Microsoft as an objective justification for the tie, illustrates the weakness of the Commission approach to efficiencies

105 Id. ¶ 260.
106 Id. ¶¶ 867–68, 1031–35.
107 Of course, as a general proposition, Microsoft—like any other defendant in an Article 82 EC case—is served by an autonomous foreclosure requirement, but as noted above, this argument is brought forward in a litigation context. See supra note 74 and accompanying text. [CONFIRM THAT THIS IS CORRECT SUPRA LOCATION]
108 On this point, the Ahlborn and Evans criticism of the CFI is unduly harsh. See Ahlborn & Evans, supra note 3, at [15-16]. The CFI does take a step in the right direction, and provided that one agrees with the Commission’s focus on the OEM distribution channel (which neither Ahlborn and Evans nor this author do), the part of the Commission case which the CFI considers sufficient does indeed support a finding of foreclosure.
under Article 82 EC. Putting efficiencies at the tail-end of the examination makes the defense practically pointless. Indeed the CFI promptly sides with the Commission in rejecting Microsoft’s arguments, mostly because the Commission remedy does not forbid the bundled Windows and therefore does not take away the efficiencies arising from the integration of WMP into Windows.

E. Conclusion on Tying

Even though the substantive analysis of the Commission on tying is generally sound, in the end one is left wondering why the Commission chose to pursue the tying case further after the U.S. Consent Decree entered into force in 2002. On a proper assessment of the competitive situation, the Consent Decree addressed the concerns that arose from tying, by ensuring that end-users could still break the tie and switch to other products. If the Consent Decree was not an adequate remedy because it was limited in duration, the Commission could have adopted it and made it permanent. Instead, the Commission chose to narrow its focus to the OEM channel and insisted on the creation of a Windows version without WMP (Windows XP N). That product was doomed from the start, being placed on the market alongside the bundled version and sold for the same price.

Indeed, in light of the preceding discussion, the tying case is not just about Windows OS and WMP and competition on the market for media players. To a large extent, the Consent Decree addressed these issues. The Commission case is also about who has the last word on fundamental decisions such as the bundling of two products. The Commission is concerned generally with the control of innovation paths and intended Microsoft to break new ground in this respect. When dealing with foreclosure of competition, the Commission analyzed how Microsoft could use the position of WMP on the media player market to create network

109 However, experience shows that competition and regulatory authorities, once they have invested in an investigation, will not readily conclude that the actions of another authority have already addressed the issues which arise from the investigation. See Pierre Larouche, Legal Issues Concerning Remedies in Network Industries, in Remedies in Network Industries: EC Competition Law vs. Sector-Specific Regulation 21, 39–41 (Damien Geradin ed., 2004).

110 The IT industry has always been very critical of Microsoft’s single-handed decisions as to which features or applications would be integrated into Windows because these decisions often terminated or shrunk entire lines of business. Of course, this can be an efficient outcome, but the issue remains whether Microsoft is best qualified to make that decision.

111 That concern is also present in the first part of the case dealing with interoperability information, but in a more subdued fashion. See CFI Decision 2007, supra note 1, ¶ 392.
effects in favor of its proprietary encoding formats.\textsuperscript{112} The market power gained could eventually extend into other markets (distribution of content over devices other than computers, digital rights management systems, etc.).\textsuperscript{113} The CFI endorsed the Commission’s analysis, but did not consider it essential to the case.\textsuperscript{114} When Microsoft argued that these network effects actually made the tying of Windows OS and WMP efficient by providing content providers and software developers with an ubiquitous integrated platform, the Commission answered that “an undistorted competition process constitutes a value in itself as it generates efficiencies and creates a climate conducive to innovation (innovation being, in markets such as the software market, a key competition parameter)”\textsuperscript{115} The CFI went even further, holding that:\textsuperscript{116}

Although, generally, standardisation may effectively present certain advantages, it cannot be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying. . . [I]t cannot be ruled out that third parties will not want the de facto standardisation advocated by Microsoft but will prefer it if different platforms continue to compete, on the ground that that will stimulate innovation between the various platforms.

Here again, neither the Commission nor the CFI takes its reasoning to the end. If unilateral standardization by a dominant player is not acceptable, then what is the preferred option? The CFI states that competition between platforms might also be desirable for some, without more. Microsoft calls for further research on the link between competition policy, innovation policy, and standardization.

IV. CONCLUSION AND OUTLOOK

In Microsoft, the CFI tells us the story of a large, successful, and innovative firm that could not resist the temptation to exploit the opportunities created along the innovation path to take extra jabs at the competition. At the same time, the second part of Microsoft contains an-

\textsuperscript{112} The reasoning of the Commission assumes that the dissemination of content will take place along the lines of a broadcasting model, where a small number of large content providers and software developers decide for the larger group of passive users. In such a situation, it might indeed pay off to stick to proprietary standards for encoding. However, so far content dissemination on the Internet is also largely done via non-broadcasting models, in particular via decentralized peer-to-peer. In such a case, a proprietary approach to encoding might be unsuccessful, given the large number of smaller content providers.

\textsuperscript{113} Commission Decision 2004, supra note 1, ¶¶ 879–97.

\textsuperscript{114} CFI Decision 2007, supra note 1, ¶¶ 1060–77.

\textsuperscript{115} Commission Decision 2004, supra note 1, ¶ 969.

\textsuperscript{116} CFI Decision 2007, supra note 1, ¶¶ 1152–53.
other narrative: that of the Commission as policy entrepreneur who could not resist the temptation to intervene, even after its concerns had been by and large addressed. The CFI failed to see that second story.

On interoperability, the case is presented by the CFI as a mere application of the IMS test. Whether other elements exist besides those of the IMS test will have to be settled another day. The CFI gives undue weight and autonomy to the IMS test, which is only a set of proxies.117 As a matter of law, it ignores other equally useful proxies that the Commission had put forward in its Decision, namely the previous course of dealings and the superdominant position of Microsoft.

On tying, the test used by the Commission is found to be in line with the existing case-law (Hilti and Tetra Pak II), but here as well, the CFI avoids ruling on the thornier issue whether foreclosure must be proven separately as an autonomous element of the tying test. That question will also have to await another case. Perhaps the biggest disappointment in the whole case is that the CFI does not seem willing or able to rein in the Commission when, after a reasonably sound case in substance, it ignored the effect of the Consent Decree and went on to order an outlandish remedy, the creation of Windows XP N.

Not only is the CFI Judgment in Microsoft long and difficult to digest, it is also structured in such a way that the “official” legal discussion is limited in scope and relatively uncontroversial. Accordingly, its precedential value could remain limited. Microsoft could turn into a very complex but ultimately unique case, contrary to what the Commission intended at the time it took the Decision.118 In that sense, while the Commission won the case before the CFI, it did not obtain the resounding endorsement it had hoped for. The CFI did not settle the law, and the issues raised in Microsoft will end up before the CFI again.

Indeed whether Microsoft will have a larger impact—as Ahlborn and Evans fear119—depends on the extent to which, in subsequent cases, various key points hidden in the discussion of the reasoning of the Commission are extricated from their context and turned into general legal propositions. In the part on interoperability information, the Commis-

117 In my view, in contrast to Ahlborn and Evans, the sanctification of the IMS test is a greater concern than any loosening of the elements of that test (the “exceptional circumstances”).


119 Ahlborn & Evans, supra note 3, at [30-31].
sion and the CFI seem to prefer competition in the market and incremental innovation over competition for the market and breakthrough innovation as reflected in the discussion of the indispensability and new product circumstances. Unfortunately, this choice remains implicit; perhaps it is linked with the superdominance of Microsoft, as some passages would seem to indicate; in which case the issue will remain open in subsequent cases where the defendant is not superdominant. In the part on tying, both the Commission and the CFI offer brief glimpses into the links between competition policy, innovation and standardization, raising more questions than they answer. Here as well, the discussion takes place against the background of superdominance so that it might be confined to the facts of Microsoft.

So far, the main impact of Microsoft is psychological. After a string of defeats, the Commission managed to win what was perhaps its most important case ever, the one on which it had staked its credibility. Its confidence boosted, the Commission is now moving ahead with a number of Article 82 EC cases in high-tech industries, against firms such as

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Intel, Rambus, Apple or Qualcomm. Two new cases have also been opened against Microsoft. At the same time, the Commission did not obtain additional resources, and it cannot handle so many such cases at once. On the international scene, Microsoft has been criticized as yet another instance of excessive interventionism by the European Commission, but the Commission has also been applauded as the only

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123 Press Release, European Comm’n, European Commission Confirms Sending a Statement of Objections Against Alleged Territorial Restrictions in On-line Music Sales to Major Record Companies and Apple (Apr. 3, 2007), available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/126&format=HTML&aged=0&language=EN&guiLanguage=en. This case concerns the restrictions imposed on iTunes users (via credit card controls) preventing them from making purchases in stores outside the Member State where their credit card was issued. This practice leads to differentials in price and choice between Member States. Contrary to the other cases mentioned here, this case is based on Article 81 EC, relying as it does on the distribution agreements between Apple and major record companies. The case was settled when Apple agreed to equalize iTunes prices. See Press Release, European Comm’n, European Commission Welcomes Apple’s Announcement to Equalise Prices for Music Downloads from iTunes in Europe (Jan. 9, 2008), available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/22.

Apple has also been involved in competition litigation at the Member State level concerning the restrictions on playing iTunes tracks on MP3 players other than the iPod (France and the Netherlands, complaint rejected) and the exclusive distribution agreements for the iPhone (Germany; interim measures against Apple refused on appeal).


126 The CFI did quash the Commission Decision as far as the use of the monitoring trustee was concerned. See CFI Decision 2007, supra note 1, ¶¶ 1261–1279 (implying that more Commission resources will need to be dedicated to the implementation of decisions than was the case in Microsoft). This latter assertion is not entirely fair because the US Department of Justice did succeed at least in part in its case against Microsoft. See generally United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).
major competition authority that actually dares to tackle difficult cases and large defendants.127 Happily or not, Microsoft could herald a passing of the torch to the European Commission as the leading competition policy enforcer, at least in the high-tech sector.

At the policy level, Microsoft lays bare the shortcomings of the approach proposed by the Commission in the Discussion Paper128 for the inclusion of an efficiency defense in Article 82 EC analysis. In both parts of the case, the split between the assessment of abuse (in particular of the anticompetitive effect of the allegedly abusive conduct) and the efficiency defense is hard to follow at a conceptual level, and in practice it makes the efficiency defense a hopeless exercise, coming as it does at the tail-end of the analysis.

Ahlborn and Evans consider that Microsoft follows an outdated ordoliberal approach.129 Such sweeping criticism is exaggerated. Contrary to what Ahlborn and Evans claim, Microsoft marks a significant improvement in the quality of the competition analysis, away from the hallmarks of ordoliberalism—that is, a form-based approach and the special responsibility of the dominant firm130—and towards an effects-based approach. In both parts of the case, the Commission carefully sets out how the conduct of Microsoft in its view harmed competition and ultimately consumers; the CFI could have endorsed this evolution more strongly.

The evidence of ordoliberalism brought forward by Ahlborn and Evans is not convincing. For one, while the CFI lapses into “competition on the merits” language at times, by and large the improvements in interoperability in Windows 2000 and the efficiencies arising from bundling Windows OS and WMP are recognized as legitimate achievements of which Microsoft is not to be deprived. It is the additional steps of refusing to disclose interoperability information or not enabling customers to separate Windows OS from WMP that give rise to problems.

If anything, what Ahlborn and Evans criticize as the use of form-based analysis and structural presumptions, allegedly leading to a shift in emphasis on static competition, could be more constructively interpreted as a divergence of views on dynamic efficiencies and innovation. Ahlborn and Evans take a somewhat offhand approach: as long as firms—

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127 The latter assertion is not entirely fair because the U.S. Department of Justice did succeed, at least in part, in its case against Microsoft. See generally id.
128 See European Comm’n, DG Competition, Discussion Paper, supra note 64.
129 Ahlborn & Evans, supra note 3, at [18-22].
130 The notion of special responsibility is only mentioned once in the reasoning of the CFI, in a quite inconsequential manner. CFI Decision 2007, supra note 1, ¶ 229.
including larger ones—are incentivized, innovation will ensue and bring about measurable static benefits in the form of efficiencies (better interoperability, integration of media functionality, etc.). Dynamic aspects, since they cannot be measured, are better left alone. The Commission and the CFI take a different but equally coherent view; unfortunately they leave it unarticulated. As indicated above, Microsoft rests on an implicit preference for incremental over breakthrough innovation—at least when superdominance is involved—and a concern with control over innovation paths. The Commission intervenes to protect the competitive process not for the sake of keeping competitors in business, but rather in order to ensure that innovation continues to be generated outside of the superdominant firm (or at least that incentives remain for competitors to try to innovate). By the same token, consumer preferences—the decisive factor in rewarding innovation—are expressed directly through the competitive process as opposed to the unilateral decision of a firm based on its perception of these preferences.

It is by no means clear that the Commission’s and CFI’s view is preferable; it has its advantages and disadvantages, which need to be further researched and which one hopes will be better understood and explained in future cases. The Commission’s and CFI’s view cannot, however, be branded summarily with the ‘stigma’ of ordoliberalism.