

Chapter 5: IP Rights In the EU Microsoft Saga

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1. Introduction

Microsoft's Windows story begins in 1980 when IBM first contacted Bill Gates to talk about writing an operating system for IBM's new "personal computer" (PC). First IBM PCs that went on sale in 1981 were available with three different operating systems, but the most popular was PC-DOS, a version of Microsoft's MS-DOS. IBM allowed Microsoft to sell its own version, MS-DOS, for non-IBM platforms. MS-DOS and Windows, a graphical user interface to MS-DOS, quickly spread to PC-compatible computers and gained the leading market position, overtaking Apple's Mac operating system, which was only available on Apple computers. As PC-compatible computers seized the market, Windows became a *de facto* industry standard. Thus, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent since the beginning of 1990s.¹

Microsoft's market position has been special for a number of reasons. First, most computers run on its flagship software product, Windows, and all or nearly all computer users are familiar with Windows. This allows users to switch easily from one computer to another. Second, since the prevailing majority of computers run on Windows, software developers make their software Windows-compatible. This, in turn, reinforces the users'

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¹ See Findings of Fact of 5.11.1999, United States District Court for the District of Columbia, *United States v. Microsoft Corporation*, Civil Action No. 98-1232 and 1232 (TPJ), at paragraph 35 and Commission Decision of 24 March 2004 in Case COMP/C-3/37.792 Microsoft, OJ [2007] L 32/23 (*Microsoft Decision*), at paragraphs 431-432. The Decision was upheld on appeal by the General Court in Case T-201/04, *Microsoft Corp v. Commission (Microsoft Judgment)*, [2007] ECR II-3601.

preference for Windows. It also means that software developers need the information on how to make their products work with Windows and that marketing software for regular computer users would be extremely difficult if that software does not run on Windows. Third, since Windows is included in nearly all new PCs, any new software or function added to Windows will have the natural advantage of already being installed and ready to run when the user first starts its computer.

Windows evolved with personal computers. As the computing power grew and the Internet became ubiquitous, Microsoft innovated and included new functionalities in its operating system. It had to do so to retain its position in a dramatically changing market. A number of Microsoft's competitors were eliminated in the process. This was, for example, the fate of Aldridge, a seller of a disk cache computer programme that addressed an error in Windows' design and was eliminated when the new version of Windows amended the error,² and of bigger companies, such as WordPerfect or Netscape, which were once market leaders.

2. The Background: Windows Competitive Concerns and the U.S. Case

Microsoft's market position, fostered by powerful network effects, led to series of antitrust challenges. The US Department of Justice ("DOJ") brought a case alleging that Microsoft engaged in exclusionary practices to preserve its monopoly in the market for PC operating systems in 1998.³ According to the DOJ, Microsoft developed Internet Explorer ("IE"), integrated it into Windows, created various technological and contractual hurdles that prevented original equipment manufacturers (OEMs) from removing it and limited user's ability to choose Netscape as a default browser. This, in the DOJ's opinion discouraged OEMs from marketing competing Internet browsers and coerced them into favouring IE, thus foreclosing vital distribution channels from

² Microsoft effectively pre-empted Aldridge's market by including a similar programme in its new version of Windows (Windows 95). When Microsoft's operating system detected Aldridge's software, it displayed a series of message alerts, warning that Aldridge's software decreased system performance and advising that it should be removed. Aldridge argued that Windows was an essential facility and that Microsoft's behaviour excluded it from the market. That argument was rejected and the court hearing the case firmly ruled that Microsoft should not be punished for improving its own product since "*antitrust laws do not require a competitor to maintain archaic or outdated technology; even monopolists may improve their products*". See *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 753 (S.D. Tex. 1998).

³ For a comment on the U.S. *Microsoft* case, see, e.g. Herbert Hovenkamp, "The Monopolization Offence", 62 Ohio State LJ 1035 (2001), pp. 1047-1049; David S. Evans, Albert L. Nichols and Richard Schmalensee, "*United States v. Microsoft: Did Consumers Win?*", 1 J Comp. Law & Econ. 497 (2005).

Netscape. The DOJ also asserted that Microsoft developed its own version of Java that was incompatible with Sun's Java and non-Windows platforms, aggressively promoted its version of Java, misled software developers with respect to interoperability with the original Java, and took actions that impeded the distribution of Sun's Java. The DOJ argued that by engaging in these practices Microsoft had maintained a monopoly in the market for PC operating systems and attempted to gain monopoly in the market for Internet browsers in violation of Section 2 of the Sherman Act. In addition, Microsoft was accused of violating Section 1 of the Sherman Act by illegally tying its Internet browser with the Windows operating system. The DOJ theory was that middleware, including Netscape and Java, could eventually serve as a platform on which applications could run without reliance on an operating system.

The US case settled in 2002, when the DOJ and Microsoft agreed on a number of remedies aimed at preserving the contractual and economic freedom of OEMs to distribute and support non-Microsoft middleware products. Microsoft stipulated that it would allow OEMs to enable or to eliminate access to Microsoft middleware products and to designate non-Microsoft middleware to launch instead of the Microsoft applications.⁴ In addition, Microsoft was obliged to disclose all interfaces used by its middleware to operate with other parts of Microsoft operating systems. That obligation was not directly linked to any of the liability findings, but related to the allegations that Microsoft corrupted interfaces to unfairly eliminate rival's applications. It was meant to place middleware suppliers in a position to compete with Microsoft. Though related allegations have not been raised at the trial, Microsoft was also required to license the communications protocols necessary for software located on a computer server to interoperate with Windows.

⁴ *U.S. v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002). The settlement included Windows Media Player (WMP) among the software products in the middleware category.

3. The European Commission's Case: Theory of Competitive Harm and Remedies

The EU case against Microsoft began in 1998, when Sun complained to the Commission about Microsoft's refusal to license information that Sun deemed necessary for its server software to work with Windows. In 2000, the Commission broadened the scope of its investigation to integrating media functionality (WMP) in the new version of Windows released by Microsoft.

The Commission proceeded with its case following the US Settlement, concluding that the adopted remedies were insufficient to address its concerns about Microsoft's conduct.⁵ It found that Microsoft violated Article 102 TFEU by refusing to supply interoperability information necessary for Microsoft's rivals to compete effectively in the workgroup server operating market (interoperability abuse) and by tying WMP with the Windows PC operating system (tying abuse). The Commission fined Microsoft EUR 497 million and imposed conduct remedies that were designed to end the infringements and remedy the competitive harm.

With respect to the interoperability abuse, the Commission's theory was that by refusing to share interoperability information with its rivals, Microsoft preserved privileged connections between Windows and its work group server operating systems to the detriment of its competitors in the work group server operating market. This allowed Microsoft to "leverage" its dominant position in the market for client PC operating systems into the market for workgroup server operating systems, and ultimately, to preserve its monopoly in the market for PC operating systems.⁶ At the time of Sun's request, Windows was well established as the standard operating system on client computers, but Microsoft was a relatively new entrant in the market for operating systems on server computers. There were, in fact, many alternative server operating systems and some organisations used such different systems simultaneously.⁷ It was also possible to

⁵ *Microsoft* Decision, paragraphs 273-79, 703-08.

⁶ *Ibid*, paragraphs 185-279.

⁷ In the Decision, the Commission defined the market narrowly as the market for work group server operating systems, that is the software that enables the sharing of files stored on servers, the sharing of printers, and the administration of how users and groups of users can access these services and other

achieve some level of interoperability between Windows PC operating system and the server software provided by Microsoft's competitors.⁸ Microsoft shared some interoperability information and at the time Sun filed its request it had a number of active licences for Microsoft's interoperability information.

The level of interoperability between non-Microsoft server software and Microsoft's operating system was, however, according to the Commission, lower than that enjoyed by Microsoft's own software. The key issue was thus whether Microsoft shared *sufficient* amount of information with its competitors in the work group server operating market. The Commission believed that the level of interoperability achieved by Microsoft's competitors was insufficient because competing operating systems were not able to interoperate with Windows architecture on an equal footing with Microsoft's work group server operating systems.⁹ To achieve that level of interoperability Microsoft had to disclose certain information on the so-called server/server communication protocols, that is, in effect, the information on how Microsoft's server software worked.¹⁰

The Commission found that Microsoft's refusal to provide interoperability information violated Article 102 TFEU because (a) interoperability information was necessary for competing providers of work group server operating systems to "*viably stay on the market*",¹¹ (b) Microsoft's conduct involved a disruption of previous levels of supply;¹² (c) there was "*a risk of eliminating all competition in the work group server operating system market*";¹³ (d) the refusal to supply had the consequence of preventing innovation in the work group server market and of diminishing consumers' choices by locking them into a homogeneous Microsoft solution;¹⁴ and (e) the refusal was not

services of the network. See *Microsoft* Decision, paragraphs 52-59. In that market, Microsoft had a relatively high market share.

⁸ This was conceded by the Commission. See *Microsoft* Judgment, paragraphs 139 and 219.

⁹ See *Microsoft* Decision, paragraphs 182 and 282 and *Microsoft* Judgment, paragraph 230.

¹⁰ Microsoft was asked to provide to its competitors "interoperability information" defined in Article 1(1) of the *Microsoft* Decision as "*the complete and accurate specifications for all protocols [that are] implemented in Windows work group server operating systems and used by Windows work group servers to deliver file and print services and group and user administration services, including the Windows domain controller services, Active Directory services and Group Policy services, to Windows work group networks*". See also the conclusion on the concept of interoperability information in *Microsoft* Judgment, at paragraph 206.

¹¹ *Ibid*, paragraph 779.

¹² *Ibid*, paragraphs 578-84 and 780.

¹³ *Ibid*, paragraphs 585-692, 781.

¹⁴ *Ibid*, paragraphs 693-708, 782.

objectively justified because on balance “*on balance, the possible negative impact of an order to supply on Microsoft’s incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft)*”.¹⁵ It specifically rejected the proposition that there is an “*exhaustive checklist of exceptional circumstances*” making a refusal to license abusive.¹⁶ As a remedy, Microsoft was ordered to license proprietary information concerning the communications protocols by which Microsoft’s server operating systems communicate with one another.

Leveraging was also the theory behind the tying abuse.¹⁷ The Commission reasoned that tying affords Microsoft’s WMP unmatched ubiquity, which cannot be matched by using alternative methods of distribution such as free downloads. The Decision ordered Microsoft to provide a version of Windows without WMP.¹⁸

4. The Law: Compulsory Licensing and IP Rights

Microsoft is the latest of a series of cases defining the limits of antitrust in the presence of intellectual property rights. Antitrust intervention in such cases is known as “compulsory licensing”, thus taking its name from the remedy that is usually ordered following the finding of an infringement. The infringement is usually the abuse of dominance and the main concern behind antitrust intervention is the prevention of the leveraging of market power from one market into another market through the reliance on IP rights.

The EU Courts and the Commission have struggled to define the circumstances that would warrant compulsory licensing since the 1988 *Volvo* case.¹⁹ *Volvo*, relying on its IP rights, prevented repairers from using cheaper spare parts manufactured without its permission. The national court before which the IP infringement case was pending asked

¹⁵ *Ibid*, paragraphs 709-78 and 783.

¹⁶ *Microsoft* Decision, paragraph 555. See Robert O’Donoghue and Jorge Atilano Padilla, *The Law and Economics of Article 82 EC* (Hart: Oxford/Portland, 2006), p. 431, who speak of the Commission’s legal analysis in *Microsoft* as “*something of a hybrid*”.

¹⁷ *Microsoft* Decision, paragraph 968.

¹⁸ *Ibid*, Article 6.

¹⁹ Case 238/87, *Volvo AB v. Erik Veng (U.K.) Ltd. (Volvo Judgment)*, [1988] ECR 6211. For an analysis of the case law on compulsory licensing see, e.g., Katarzyna A. Czapracka, *Intellectual Property and the Limits of Antitrust* (Edward Elgar: Cheltenham, 2009), pp. 45-52.

the Court of Justice whether Volvo's refusal to license a third party willing to pay a reasonable royalty to market its spare parts could amount to an abuse of dominance. In response, the Court stressed that the right to exclude was the "*substance of the exclusive right*", and that a refusal to grant a licence cannot in itself constitute an abuse of a dominant position.²⁰ This does not mean that IP rights are immune from EU competition law or that a refusal to license would always be legal. The Court continued that certain abusive conduct might make a refusal to license a violation of the EU competition rules. The Court did not elaborate more generally on the circumstances that could make a refusal to license abusive, but provided a few examples of such conduct. These included an arbitrary refusal to license, setting prices for spare parts at an unfair level and a "*decision no longer to produce spare parts for a particular model even though many cars of that model remain in circulation*".²¹ None of these circumstances was present in the *Volvo* case.

Magill,²² the first case where the Commission and the EU Courts found that the circumstances warranted granting a compulsory licence, soon followed. In that case, three Irish TV stations were forced to allow the publication of copyrighted TV listings by third parties. The case was triggered when Magill, a small publisher, infringed the TV stations' copyrights by publishing a weekly TV guide covering the programs of all TV channels available at that time in Ireland. Magill's TV guide was the first such guide on the market, as each TV station had published a separate weekly TV guide and prevented third parties from publishing weekly TV listings. The Commission decided that by precluding the publication of the comprehensive weekly TV guide, the TV stations violated Article 102 TFEU. This decision was upheld by the General Court and, on appeal, by the Court of Justice. The Court of Justice reasoned that the TV stations were "*the only source of information on program scheduling which is the indispensable raw material for compiling a weekly television guide*".²³ It held that the refusal to license was abusive because it (a) prevented the appearance of a new product, which the TV stations did not offer and for which there was a potential consumer demand; (b) there was no justification

²⁰ *Volvo* Judgment, paragraph 8.

²¹ *Volvo* Judgment, paragraph 9.

²² Case T-69/89, *RTE v. Commission*, [1991] ECR II-485, upheld on appeal by the Court of Justice in Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission*, [1995] ECR I-743.

²³ Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v. Commission*, [1995] ECR I-743, paragraph 53.

for the refusal; and (c) by refusing to license Magill and other such companies, the TV stations reserved for themselves the secondary market of weekly television guides by excluding all competition from the market.²⁴ The Court upheld the remedy imposed on the TV stations by the Commission: a compulsory license with the right to charge reasonable and non-discriminatory royalties.

The Court of Justice's final and most complete pronouncement on the circumstances making a refusal to license illegal was the *IMS Health* judgment,²⁵ delivered weeks after the Commission decided the *Microsoft* case.²⁶ IMS, a company engaged in tracking sales of pharmaceutical products, worked together with its clients to devise a "brick structure", a geographical division of Germany largely corresponding to the postcodes. The brick structure had become a *de facto* industry standard and IMS's rivals found it impossible to market the pharmaceutical data other than by using structures similar to that created by IMS. To prevent them from doing so, IMS brought proceedings before a German court alleging a copyright infringement. The court found that the brick structure was protected as a database under German copyright law, but referred to the Court of Justice a question whether IMS's refusal to license the copyright violated Article 102 TFEU. The EU Court began its reasoning by stating that bar for "*exceptional circumstances*" a refusal to license is presumptively legal, even if it is the act of a dominant company.²⁷ Relying on *Magill*, the Court held that a refusal to license by a dominant company is abusive if four cumulative conditions are met: (a) the protected product or service is indispensable to compete in a particular market; (b) the refusal to provide it is "*such as to exclude any competition on a secondary market*"; (c) the company which requested the licence intends to offer new products or services not offered by the right holder and for which

²⁴ *Ibid*, paragraphs 54-56.

²⁵ Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG (IMS Health Judgment)*, [2004] ECR I-5039.

²⁶ On the *IMS Health* case and on its bearing on *Microsoft*, see generally Ian S. Forrester, "Article 82: Remedies in Search of Theories?", in: Hawk (Ed.), *International Antitrust Law and Policy 2004, Annual Proceedings of the Fordham Corporate Law Institute* (Juris Publishing: New York, 2005), p. 177 *et seq.*; *idem*, "Regulating Intellectual Property via Competition? Or Regulating Competition via Intellectual Property? Competition and Intellectual Property: Ten Years on, the Debate still Flourishes", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2005: The Interaction between Competition Law and Intellectual Property Law* (Hart: Oxford/Portland, 2007), pp. 74-89.

²⁷ *IMS Health Judgment*, paragraphs 34-35.

there is potential consumer demand; and (d) the refusal is not justified by any “*objective considerations*”.²⁸

Citing its earlier ruling in the *Bronner* case,²⁹ the Court clarified that the indispensability criterion should be interpreted narrowly. It is met only if a competitor as efficient as the dominant company could not duplicate the requested service or product.³⁰ The participation of the pharmaceutical industry and its dependency on the brick structure was relevant for the assessment of indispensability.³¹ The *IMS Health* Court also specified that the “new product condition” is satisfied when the company which requested the license “*does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the IP right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand*”.³² The Court reasoned that the refusal to grant the licence must prevent “*the development of the secondary market to the detriment of consumers*”,³³ but did not comment on the degree to which the new product must be different from the product offered by the IP holder and whether the two products could be substitutable.

5. The *Microsoft* Judgment

The General Court largely rejected Microsoft’s application for annulment of the Commission’s Decision. It confirmed that Microsoft violated Article 102 TFEU by refusing to provide interoperability information and by tying WMP and its Windows operating system. It also upheld the remedies, confirming that Microsoft had to make available the interoperability information sufficient to allow a competing operating

²⁸ *Ibid*, paragraphs 37-38.

²⁹ Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH* (*Bronner* Judgment), [1998] ECR I-7791.

³⁰ *IMS Health* Judgment, paragraph 28.

³¹ *Ibid*, paragraph 29.

³² *Ibid*, paragraph 49.

³³ *Ibid*, paragraph 48.

system to interoperate with Windows on an equal footing with Microsoft's own work group server operating system.³⁴

A significant point in the dispute between the Commission and Microsoft was whether Microsoft's communication protocols were covered by IP rights and whether the Commission's decision involved compulsory licensing. This was crucial because the case was decided a few weeks before the Court of Justice delivered its *IMS Health* ruling and, as evident from the discussion above, the Commission took a significantly different approach to the assessment of a refusal to license than that adopted in *IMS Health*. The Commission's point of departure was that *IMS Health* did not apply because Microsoft's communication protocols were not innovative enough to be patentable and the implementation of its Decision would not amount to a compulsory licence. The Commission conceded that the interoperability information could be protected under trade secret laws, but argued that trade secrets did not deserve the same level of protection as other forms of IP and that the EU case law on compulsory licensing of IP rights did not apply to trade secrets.³⁵ It then argued that the "automatic" application of the *IMS Health* criteria would not be appropriate in the *Microsoft* case and that other "particular circumstances" had to be considered in the assessment of a refusal to license under Article 102 TFEU.³⁶

The General Court, perhaps unfortunately, did not rule on any of these matters, stating that it was not necessary since the Commission did not establish in its Decision whether the interoperability information was covered by IP rights and instead adopted the presumption that such rights existed. The Court proceeded on the assumption that the protocols in question were covered by IP rights or constituted trade secrets and that trade secrets should be treated as IP rights.³⁷

The Court based its assessment of Microsoft's refusal to provide interoperability information on the Court of Justice's *IMS Health* test. It held that a refusal to license is

³⁴ *Microsoft* Judgment, paragraphs 207-266. The General Court annulled the Decision's provisions relating to the monitoring trustee, reasoning that in appointing the trustee, with his own powers of investigation and capable of being called upon to act by third parties, the Commission had exceeded its authority to confer power on a third party. See *ibid*, paragraphs 1251-1279.

³⁵ *Ibid*, paragraphs 267-282.

³⁶ *Ibid*, paragraph 316.

³⁷ *Ibid*, paragraphs 283-289.

anticompetitive “*only in exceptional circumstances*”,³⁸ which occur “in particular” when the conditions coined in the *IMS Health* case are satisfied, namely that: (a) the refusal relates to a product that is indispensable to the exercise of a particular activity in a neighbouring market; (b) the refusal “*is of such kind as to exclude any effective competition on that neighbouring market*”; (c) the refusal prevents the appearance of a new product for which there is potential consumer demand.³⁹ If these conditions are met, the refusal by the holder to grant a licence may infringe Article 102 TFEU, unless it is objectively justified, which is for the dominant company to prove.⁴⁰ From the above it is evident that the General Court built upon the *IMS Health* ruling and did not address the more controversial legal theories advocated by the Commission. It left thus open the question how other circumstances may influence the assessment of a refusal to deal under Article 102 TFEU.⁴¹

However, although the Court did not at first sight adopt an open-ended approach to the catalogue of “exceptional circumstances” making a refusal to deal illegal, it developed and re-interpreted a number of important points of law. In so doing, it significantly relaxed the *IMS Health* test and lowered the threshold for antitrust intervention. While *IMS Health* had confirmed the limiting principles established in earlier ECJ rulings, including *Magill* and *Bronner*, the General Court effectively embraced a more pro-active approach to applying Article 102 TFEU to refusals to deal.

Thus, under *Bronner* and *IMS Health*, the requested product or service is indispensable if there is no actual or potential substitute for that product, which implies that “it is not economically viable” to create alternative products or services on a scale comparable to that of the company which controls the existing product or service.⁴² The *Bronner* Court specifically stressed that the requirement of indispensability is not

³⁸ *Ibid*, paragraph 331.

³⁹ *Ibid*, paragraph 332.

⁴⁰ *Ibid*, paragraph 333.

⁴¹ The Court held that there would only be the need to assess the other circumstances listed by the Commission, if it found that Microsoft’s refusal to license was not abusive under the *IMS Health* criteria (*ibid*, paragraphs 336 and 711). See further Knut Werner Lange, “Europäisches Kartellrecht und geistiges Eigentum – Der Fall *Microsoft*”, in: Lange, Klippel & Ohly (Eds.), *Geistiges Eigentum und Wettbewerb* (Mohr Siebeck: Tübingen, 2009), pp. 140-141.

⁴² *Bronner* Judgment, paragraphs 43-46; *IMS Health* Judgment, paragraph 28. The *Bronner* Court clarified that this would be typically the case if there are “*technical, legal or even economic obstacles capable of making it impossible, or [...] unreasonably difficult*” to replicate the product or service (*ibid*, paragraph 44; see also *IMS Health* Judgment, paragraph 28).

satisfied when such alternative products or services are “less advantageous” than those controlled by the dominant company.⁴³ As mentioned above, in *Microsoft*, there were alternative means to achieve interoperability. Microsoft’s competitors used these means to compete on the work group server operating market following Microsoft’s refusal to provide the interoperability information.⁴⁴ Yet, the General Court found that the indispensability criterion was satisfied. It embraced the Commission’s reasoning that the interoperability information was indispensable because competing products had to interoperate with Windows domain architecture on an equal footing with Microsoft’s systems in order to *compete viably* on the market.⁴⁵

The Court also held that it was not required to show that the refusal eliminates *all* competition in the secondary market.⁴⁶ The issue here was of the degree and the evidence necessary to show that all competition on the secondary market is eliminated. Microsoft argued that a refusal is abusive only if it is “likely to eliminate all competition”⁴⁷ and that the prospect of eliminating competition must be “immediate and strong”.⁴⁸ The General Court rejected this argument and agreed with the Commission that it is sufficient that the refusal creates a risk of elimination of all *effective* competition. The fact that the competitors retain “*a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition*”.⁴⁹ The evidence of the rapid growth of Microsoft’s shares in the market for work group server operating systems coinciding with declining shares and interoperability problems experienced by Microsoft’s rivals supported the Commission’s findings that the refusal to license created a risk of eliminating all effective competition in the relevant market.⁵⁰

The General Court went even further in its interpretation of the new product criterion.⁵¹ It affirmed the Commission’s position that a refusal to license may be abusive

⁴³ *Bronner* Judgment, paragraph 41.

⁴⁴ *Microsoft* Judgment, paragraphs 342-350.

⁴⁵ *Ibid*, paragraphs 230, 248-250.

⁴⁶ See on this question James Killick, “*IMS and Microsoft* Judged in the Cold Light of *IMS*”, 1 *Comp. L. Rev.* 23 (2004), pp. 38-39.

⁴⁷ *Microsoft* Judgment, paragraph 439.

⁴⁸ *Ibid*, paragraph 440.

⁴⁹ *Ibid*, paragraphs 563-564.

⁵⁰ *Ibid*, paragraphs 567-571 and 580.

⁵¹ See Bo Vesterdorf, “Article 82 EC: Where Do we Stand after the *Microsoft* Judgement?”, 1 *Global Antitrust Review* 1 (2008), pp. 9-10.

not only if it prevents the marketing of a new product, but also when it limits “technical development”.⁵² It was not necessary to identify any particular product that the refusal prevented from coming into being.⁵³ The Court held that Microsoft’s refusal to license limited technical development because it created an “*artificial interoperability advantage*”, which, together with Microsoft’s market position, discouraged the development of competing server operating systems.⁵⁴ In fact, the Court noted, the consumers considered that non-Microsoft work group server operating systems were better than Windows work group server operating systems with respect to a series of features to which they attached great importance. As a result, “*the limitation thus placed on consumer choice [was] all the more damaging to consumers*”.⁵⁵

Once the Court had decided that the above three conditions were fulfilled, it was not surprising that it ruled against Microsoft also on the issue of objective justification. Indeed, the possibility of offering an objective justification for otherwise exclusionary conduct, serves as little reassurance for a dominant company.⁵⁶ The Court rejected the proposition that the existence of an IP right⁵⁷ or the innovative or original character of the protected subject-matter can be, in itself, a sufficient justification for a refusal to license,⁵⁸ but offered little guidance as to what is a sufficient “objective justification”.⁵⁹ A dominant company can refuse to share its IP that is indispensable for its competitors to compete “effectively” on a neighbouring market only if it can prove that it would have “*a significant negative impact*” on its incentives to innovate and that that impact outweighs the exceptional circumstances.⁶⁰ Neither the fact that the technology concerned is secret and valuable, nor the fact that it contains important innovations justifies a refusal to license.⁶¹ A dominant company has to furnish specific evidence that a compulsory license

⁵² *Microsoft* Judgment, paragraphs 647-649 (internal citations omitted).

⁵³ *Ibid*, paragraph 647.

⁵⁴ *Ibid*, paragraph 653.

⁵⁵ *Ibid*, paragraph 652.

⁵⁶ See generally, Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Oxford/Portland, 2010).

⁵⁷ *Microsoft* Judgment, paragraph 690.

⁵⁸ *Ibid*, paragraph 693.

⁵⁹ *Ibid*, paragraphs 704-710.

⁶⁰ *Ibid*, paragraph 697.

⁶¹ *Ibid*, paragraphs 692-695.

would affect its incentives to innovate in relation to identified technologies or products.⁶² The Court found that Microsoft did not provide such evidence and that compulsory licensing would not adversely affect Microsoft's incentives to innovate. It reasoned that the compulsory license would not allow competitors to clone Microsoft's products, that sharing interoperability information is a standard practice in the software industry, and that the obligation to share interoperability information imposed on Microsoft in the U.S. settlement did not adversely affected Microsoft's incentives to develop its operating systems.⁶³

In consequence, the Court rejected the application for annulment and upheld the Commission's decision with regard to the interoperability side of the abuse.⁶⁴

6. Judging *Microsoft* with the Benefit of Time Passed

Compulsory licensing classically entails a balancing between short-term and long-term benefits.⁶⁵ The rule is that by enabling the competitors of the dominant company, based on the compulsory access to the latter's protected material, to build competing products, there are benefits to consumers because of more competition that is expected to drive prices down. However, there are also long-term losses for consumer welfare, since companies are less likely to compete "for the market" (allocative efficiency) or innovate (dynamic efficiency) if they know that the fruit of success will be their demise due to antitrust intervention.⁶⁶

Microsoft did not appeal the General Court's judgment, so the latter currently represents the latest precedent in the EU law on compulsory licensing. The principle

⁶² *Ibid*, paragraph 698.

⁶³ *Ibid*, paragraphs 699-703. The comparison with the U.S. settlement is not fully justified, taken that the obligations imposed on Microsoft in the U.S. were much narrower (they were considered insufficient to address the Commission's concerns). For example, under the U.S. settlement, Microsoft was required to license communications protocols implemented in Windows client operating systems only for implementation in a licensee's server software and Microsoft was under no obligation to license the protocols for implementation in competing client operating systems. Furthermore, unlike in the U.S., the Commission effectively questioned Microsoft's right to charge royalties and to preserve the secrecy of its interoperability information.

⁶⁴ For further discussion of the recent developments following the Microsoft case, with particular reference to the tying part, see also Chapter 1 by Etro and Kokkoris in this Volume.

⁶⁵ See generally Arianna Andreangeli, "Interoperability as an 'Essential Facility' in the *Microsoft* Case – Encouraging Competition or Stifling Innovation?", 34 EL Rev. 584 (2009).

⁶⁶ See also the case note by Arianna Andreangeli, 45 CML Rev. 863 (2008), p. 881.

established in the *Microsoft* ruling seems to be that a dominant company may be under a duty to license an IP right not only when its refusal to deal prevents the emergence of a new product in a strict sense but also the technical development of an existing product and follow-on innovation in general. It is noteworthy that the General Court preferred this test to the Commission's balance of innovation incentives.

With the benefit of hindsight, we make below some observations on the real relevance of the *Microsoft* litigation for IP rights and the law on compulsory licensing.

A first observation is that one may argue that what really lay behind *Microsoft* is not so much a balancing of incentives to innovate for Microsoft and its competitors, or, as the General Court put it, a loss in terms of technical development because of a blockage to possible follow-on innovation by Microsoft's competitors. Instead, it could be argued that what really mattered for the Commission and the General Court was, apart from innovation and dynamic efficiency, more competition and allocative efficiency. Indeed, some authors explain in this way even the pre-*Microsoft* case law on compulsory licensing and criticise it for not spelling out clearly the real reasons behind antitrust intervention.⁶⁷ According to these authors, the *IMS Health* line of case law is formalistic; instead of focusing on economic reasoning, the EU Courts have opted for a normative balancing test between the interest in protecting the intellectual property right and the economic freedom of its owner on the one hand, and the interest in protecting free competition on the other hand. A more economic approach would have been to say that there may exist market conditions, particularly when there are external market failures, such as standardisation or network effects, where the exclusion of competition by itself is a sufficient parameter to allow antitrust intervention at the expense of the protection of an intellectual property right.⁶⁸

⁶⁷ See, in particular, Josef Drexl, "Intellectual Property and Antitrust Law – *IMS Health* and *Trinko* – Antitrust Placebo for Consumers instead of Sound Economics in Refusal-to-Deal Cases", 35 *International Review of Industrial Property and Copyright Law* 788 (2004).

⁶⁸ *Idem*, p. 800 *et seq.* Compare also the views of Andreas Heinemann, "Compulsory Licences and Product Integration in European Competition Law – Assessment of the European Commission's *Microsoft* Decision", 36 *International Review of Industrial Property and Copyright Law* 63 (2005), p. 72 *et seq.* and again of Josef Drexl, "Abuse of Dominance in Licensing and Refusal to License: A 'More Economic Approach' to Competition by Imitation and to Competition by Substitution", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2005: The Interaction between Competition Law and Intellectual Property Law* (Hart: Oxford/Portland, 2007), p. 662.

Without agreeing or disagreeing with these theories, we believe that this is probably how the General Court and the European Commission saw *Microsoft*. In our view, it was probably Microsoft's long-lasting resilience in the client PC operating system market that prompted the Commission to focus more on the short term results of the conduct. The Commission's Decision was more explicit here and specifically referred to Microsoft's incentives to leverage its market power from the client PC operating system market into the work group server operating system market.⁶⁹ Indeed, within the hundreds of paragraphs and pages of the General Court's judgment, we can identify why the Commission was particularly worried here:

*“Second, the Commission invokes the fact that the present issue involves a supplier in a dominant position which uses its market power on a particular market, in this case the client PC operating systems market, to eliminate competition on a neighbouring market, namely the work group server operating systems market, ‘thereby increasing the barriers to entry in its original market and securing an additional monopoly rent’. That situation reinforces the harm to consumers that results from the restriction of the development of new products.”*⁷⁰

This was already described in some detail in the Decision:

“In this case, it cannot be excluded that in the future there will be companies challenging Microsoft's dominant position in the client PC operating system market. By having achieved a dominant position in the work group server operating system market, Microsoft secures a strategic input important for undertakings wanting to compete in the client PC operating system market, namely interoperability with the Windows work group servers. Indeed, a future competitor in the client PC operating system market will need to provide products interoperable with Microsoft's dominant work group server operating system. As such, by strengthening its dominant position in the work group server operating

⁶⁹ See Microsoft Decision, paragraph 770: “[s]oftware markets are subject to ‘shifts of paradigms’, of which the evolution from the original centralised computing approach to the modern approach of distributed computing, where processing power is distributed between servers and ‘fat clients’, constitutes a good example. An evolution that would lead the IT industry back to a more server-centric (and ‘thin client’) approach could in the long term threaten to strip Microsoft's overwhelming dominance on the client PC operating system market of its competitive importance.”

⁷⁰ *Microsoft Judgment*, paragraph 306.

*system market, Microsoft effectively reinforces the barriers to entry in the client PC operating system market.”*⁷¹

In other words, it is the degree of lack of competition and the resilient existence of the monopoly that was more disturbing for the Commission than anything else.⁷² This is certainly a statement of intellectual clarity and honesty.

A second observation is that there is a clear difference between the Commission’s Decision and the General Court’s Judgment: the Commission’s approach was intellectually more honest than the judgment and the latter was certainly more formalistic than the former.⁷³ The Commission’s Decision took into account in this balancing not just the Microsoft’s investment incentives, which may suffer as a result of forced dealing, but also those of Microsoft’s rivals. In so doing, the Commission was putting emphasis on stimulating innovation by increased competition. In fact, the Commission took the view that compulsory licensing and increased competition will encourage innovation by Microsoft’s rivals and will also increase Microsoft’s own incentives to innovate. So more competition in the market for operating systems will not only lead to lower consumer prices in the short term, but also to more innovation and greater consumer choice in longer term.

It has been argued that this “incentives balance test” is entirely in line with the basic philosophy of the recent “more economic approach”.⁷⁴ Unfortunately, the General Court was hesitant to review the Commission’s test, found it unnecessary to examine the Decision’s other exceptional circumstances and opted for a more conventional and formalistic solution or, as Eleanor Fox puts it, a “safe approach”,⁷⁵ preferring to review the case only on the basis of the *IMS Health* criteria. This appeared at the time to

⁷¹ *Microsoft* Decision, paragraph 769. This is a point not missed by John Vickers, “Some Economics of Abuse of Dominance”, Paper delivered at the conference on “Fifty years of the Treaty: Assessment and Perspectives of Competition Policy in Europe” at IESE Business School (Barcelona, 19-20 November 2007), p. 25.

⁷² See, in this direction, Pierre Larouche, “The European *Microsoft* Case at the Crossroads of Competition Policy and Innovation”, Tilburg Law and Economics Center (TILEC) Discussion Paper No. 2008-021, p. 8.

⁷³ See the criticism of François Levêque, “La décision du TPICE contre Microsoft : où est passée l’économie?”, 14/2008 *Revue Lamy de la Concurrence* 22.

⁷⁴ See François Lévêque, “Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU *Microsoft* Case”, 28 *World Competition* 71 (2005), p. 76 *et seq.*; Claudia Schmidt and Wolfgang Kerber, “*Microsoft*, Refusal to License Intellectual Property Rights, and the Incentives Balance Test of the EU Commission”, available at SSRN: <http://ssrn.com/abstract=1297939>, p. 2.

⁷⁵ Eleanor M. Fox, “*Microsoft* (EC) and Duty to Deal: Exceptionality and the Transatlantic Divide”, 4 *Competition Policy International* 25 (2008), p. 29.

represent a victory for Microsoft, in the sense that the Court agreed with it that the law applicable to its case was only the compulsory licensing line of cases, notwithstanding the Commission's insistence that there were no intellectual property rights at stake. However, the Court's judgment, interprets "surprisingly elastically",⁷⁶ the *IMS Health* criteria and lowers the threshold with regard to the conditions of indispensability⁷⁷ and "new product",⁷⁸ which are essentially the "gate-keepers" of compulsory licensing.⁷⁹

A third observation is that the balancing between incentives to innovate, ultimately makes *Microsoft* above all a case about the burden and standard of proof. Essentially, if in a compulsory licensing case one must balance the incentives to innovate of a dominant firm against those of its competitors, the result will very much depend upon who must prove what and which degree of certainty is necessary. Thus, caution must be exercised when taking into account the investment incentives of the dominant undertaking's competitors so as not inadvertently to tip the balance in favour of antitrust intervention. A dominant company's incentives to invest and innovate may be tangible, since dominance may be to a great extent the result of such investment and innovation, whereas there may be no certainty and concreteness as to the innovation of its competitors.⁸⁰ An antitrust authority should therefore try to prove to a satisfactory legal standard that the latter's incentives to invest and innovate are concrete and should not content itself with a mere assumption that those rivals will invest and innovate. Likewise, an antitrust authority should be more protective of the dominant firm's incentives to innovate when that firm has not fallen into inertia ("monopolist's quiet life") but is a constant innovator.

⁷⁶ See John Vickers, "Competition Policy and Property Rights", University of Oxford, Department of Economics, Discussion Paper Series, No. 436, May 2009, p. 22.

⁷⁷ See, in this direction, Renato Nazzini, "The *Microsoft* Case and the Future of Article 82 EC", 22(2) *Antitrust* 59 (2008), p. 60.

⁷⁸ Compare David Howarth and Kathryn McMahon, "'Windows has Performed an Illegal Operation': The Court of First Instance's Judgment in *Microsoft v. Commission*", 29 ECLR 117 (2008), p. 123: "If abuse under Art.82 is defined as the prevention of 'technical development' surely every refusal to license which is not mere reproduction or cloning will fulfil this criterion".

⁷⁹ See Brenda Sufrin, "The *IMS* Case", 3 Comp. LJ 19 (2004), p. 30.

⁸⁰ Of course, when this is not the case, for example when a dominant company has merely been granted exclusive rights by means of state regulation, there should be less immunity from antitrust intervention.