

The Microsoft Judgment and its Implications for Competition Policy towards Dominant Firms in Europe

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I. INTRODUCTION

Sun Microsystems sent a letter to Microsoft on September 15, 1998. It requested that Microsoft “provide complete information” that would enable Sun’s operating system to interoperate with Windows operating systems. Four months later Sun lodged a complaint with the European Commission,¹ which initiated an investigation. The Commission issued a decision on March 24, 2004² which found that Microsoft had abused its dominant position in client operating systems³ in two ways.⁴ First, the Commission found that since October 1998 Microsoft had unlawfully refused to provide certain computer protocols that would enable competing server operating system vendors to interoperate with Microsoft’s Windows client and server operating systems.⁵ This abuse focused on server operating systems that perform “work group” tasks⁶ and arose out of Sun’s initial complaint. Second, the Commission found that since May 1999 Microsoft had tied Windows Media Player⁷ to Microsoft’s Windows client operating system. This abuse arose out of a self-initiated investigation by the Commission. Microsoft made an application to the European Court of First Instance⁸ for annulment of the Commission Decision. On September 17, 2007 the Luxembourg-based court rejected all of Microsoft’s grounds for annulling the abuse findings.⁹ Microsoft decided not to appeal to the European Court of Justice (the “ECJ”) on October 22, 2007 thereby ending this almost decade-old case.¹⁰

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¹ Also referred to as the “Commission”.

² Also referred to as the “Microsoft Decision”, the “Commission Decision” or the “Decision”.

³ A “client” refers to a computer that an individual uses while a “server” refers to a computer that is used by many people as part of a network.

⁴ Case COMP/C-3/37.792.

⁵ Microsoft Decision, recital 791 and Article 2(a).

⁶ Microsoft Decision, recitals 546-791.

⁷ In the following also referred to as “WMP”.

⁸ In the following referred to as “the CFI” or as “the Court”.

⁹ The CFI annulled a part of the Decision that concerned the appointment of a trustee to administer the protocol licensing program. Case T-201/04, not yet reported in ECR. Also referred to as the “Microsoft Judgment”, the “Court’s judgment”, the “CFI’s judgment” or the “Judgment.”

¹⁰ See <http://www.microsoft.com/Presspass/press/2007/oct07/10-22MSStatement.msp>.

This article assesses the implications of the Microsoft Judgment for European antitrust policies towards dominant firms which, under EC case law, may have market shares of as little as 40 percent.¹¹ In doing so the article makes three principal observations. First, the Microsoft Judgment largely reflects continuity with the CFI's review of appeals involving an abuse of a dominant position. Second, the Microsoft Judgment, as with previous Article 82 EC¹² judgments by the Community Courts,¹³ lacks limiting principles. It thereby places only prosecutorial discretion between common business practices and findings of abuse. Third, the approach the Community Courts have taken to abuse of dominance cases conflicts with their approach to merger clearance reviews and coordinated practices under Article 81 EC.¹⁴ While in these other areas of competition law, the ECJ and the CFI have embraced economic reasoning and have set a high bar for the Commission, in terms of logic and evidence, there has been no sign of development under Article 82 for the last 40 years: the Court's policy continues to follow a form-based approach, based on ideas and concepts derived in a pre-Chicago world.

In Section II we summarize briefly the Commission Decision and the Court's judgment in the Microsoft case and describe some key issues of the two parts of the case, namely the abusive refusal to supply information and the unlawful tying of Windows and WMP. In Section III we provide an analysis of the CFI judgment. First, we show that the CFI's analytical framework largely follows the "ordoliberal" tradition in European competition policy. Ordoliberalism emphasizes the impact of market structure and assumes a clear dividing line between "competition on the merits" and anti-competitive behavior. As a result, the CFI heavily relies on structural presumptions and a form-based analysis rather than an assessment of the effects of the conduct on consumer welfare. Second, we take a closer look at the Court's tests to identify abusive refusal to supply and abusive tying. We observe that the CFI has adopted weaker criteria for compelling property sharing by a dominant firm than the ECJ has in previous judgments and that the CFI declined the Commission's invitation to consider an effects-based analysis of tying. In Section IV we consider the implications after the CFI's Microsoft judgment for European competition policy. While the judgment reflects a certain continuity with the past it came at a time when there has been considerable debate—including within the Commission itself—for a more effects-based analysis of predatory and exclusionary practices. We make some concluding remarks in Section V. This article largely accepts the Commission's evidence in support of its Decision against Microsoft for the sake of argument and focuses mainly on the implications of the CFI's judgment in light of this evidence.

¹¹ In *British Airways v. Commission*, Case T-219/99, [2003] ECR p. II-05917, paragraphs 211 and 225, British Airways was found dominant in the context of Article 82 with a share which had declined from 46% to just under 40% during the period of abuse.. The finding relied heavily, though, on the fact that the rest of the market was very fragmented. Subsequently, in *Wanadoo Interactive*, Case COMP/38.233, the Commission concluded in paragraph 227 that Wanadoo did hold a dominant position, albeit it only had a market share of 39%. The Commission reached this finding both based on the size and strength of Wanadoo's main competitors, who all had markets shares in between 6.5% and 16%.

¹² Article 82 concerns abuse of dominant position. In the following this provision will be referred to as "Article 82 EC" or "Article 82".

The legal framework of the European Union is now the so-called Lisbon Treaty, signed in Lisbon December 17, 2007, which consists of the Treaty establishing the European Union and the Treaty establishing the European Community. The treaty provisions dealing with competition law are located in the Treaty establishing the European Community. Hence, the reference "EC", e.g. Article 82 EC.

¹³ The European Court of Justice (ECJ) and the Court of First Instance (CFI) are together referred to as the "European Community Courts" or "Community Courts". Community refers to the European Community, which was the predecessor to the European Union.

¹⁴ Article 81 concerns anti-competitive agreements and concerted practices. In the following this provision will be referred to as "Article 81 EC" or "Article 81".

II. THE MICROSOFT CASE: OVERVIEW AND KEY ISSUES

A. Overview

1. The Commission Decision

The Microsoft Decision by the European Commission consisted of two separate parts, namely the case regarding the refusal to supply information and the case concerning the tying of WMP and Windows. The common element of the two parts of the Commission's decision was the finding, which Microsoft did not challenge during the investigation or appeal, that Windows was the dominant PC (or "client") operating system with a market share in excess of 90 percent and was the *de facto* standard for client operating systems.¹⁵ Beyond that the two cases were distinct.

a) The Refusal to Supply Case

The refusal to supply case was about computer networks that link client computers used by employees for their daily work with server computers that perform specialized tasks including managing the network. When Sun sent its letter requesting information from Microsoft, most organizations had standardized on Windows for their client computers but were also using several other operating systems for their server computers. Microsoft was a recent entrant into server operating systems. In 1998, Microsoft had an 18 percent share of server operating systems' revenue while Sun, Novell, IBM, and companies that sold Unix-based operating systems had a 41 percent share. The Commission's investigation narrowed its focus to "work group server operating systems" which provide sharing of printing, sharing of files stored on servers, and administration of access to network services.

The Commission considered whether the information requested by Sun which Microsoft was deemed to have refused was needed by rival server operating system vendors to enable their work group server operating systems to interoperate with Microsoft's client computers as well as with Microsoft's work group server operating systems on the same network. The Decision concluded that Microsoft's competitors needed access to "protocols" that provide "set[s] of "rules of interconnection and interaction" between Windows client and work group server operating systems on different computers in a work group network."¹⁶

As a remedy the Commission required Microsoft to license the protocols at a reasonable and non-discriminatory royalty that did not reflect the "strategic value" of the protocols.¹⁷ After the Decision, Microsoft and the Commission engaged in further disputes over Microsoft's compliance with the remedy, including the appropriate license

¹⁵ Microsoft Decision, recital 472.

¹⁶ Microsoft Decision Article 1(2). See also Microsoft Judgment, paragraph 39.

¹⁷ Microsoft Decision recital 999.

rates. Microsoft agreed to license the protocols at three different terms¹⁸ about a month after the CFI rejected its appeal.¹⁹

b) *The Tying Case*

The tying case was about media player software that enables computers to play back audio and video content. The software is based on a format for arranging audio and video signals into digital files and a “codec” that provides for the compression and decompression of the file. Media players were originally developed in the early 1990s and used primarily for playing music using the newly popular CD drives on computers. With the emergence of the commercial internet in the mid 1990s, media player software was developed for distributing media files over the internet from servers used for this purpose and playing these files back on client computers.

Microsoft and Apple included media players with their respective operating systems in the early 1990s. Their software initially provided only local playback of media files. RealNetworks introduced “streaming” media player software in 1995. This software enabled content providers to send audio and video files which started playing on the end-user’s computer much like a radio or television broadcast would. Microsoft, Apple and other companies introduced their own streaming technologies a few years later. As broadband has become faster and more widespread, stream media players have become widely deployed by content providers and consumers to play things such as internet radio, video ads, and short video files such as those on YouTube.com. The Commission Decision focused on media players that provided streaming.²⁰

The Commission’s concerns run as follows: given that Windows was on more than 90 percent of all PCs, the bundling of Windows and Windows Media Player guaranteed Microsoft WMP’s ubiquity in the market.²¹ As other forms of distributing media players, such as downloading, were less efficient, rival media players were not able to achieve the same reach. According to the Commission, this competitive advantage would lead content providers to encode their content primarily in a Microsoft-compatible format and application vendors to write applications primarily for WMP.²² The Commission

¹⁸ “First, ‘open source’ software developers will be able to access and use the interoperability information. Second, the royalties payable for this information will be reduced to a nominal one-off payment of €10 000. Third, the royalties for a worldwide licence including patents will be reduced from 5.95% to 0.4% - less than 7% of the royalty originally claimed. In these agreements between third party developers and Microsoft, Microsoft will guarantee the completeness and accuracy of the information provided. The agreements will be enforceable before the High Court in London, and will provide for effective remedies, including damages, for third party developers in the event that Microsoft breaches those agreements. Effective private enforcement will therefore complement the Commission’s public enforcement powers. These changes mean that open source competitors to Microsoft will be able to provide businesses with competitive, innovative alternatives to Microsoft work group server products, knowing that they are fully interoperable with Microsoft’s Windows desktop operating system. The Commission will now adopt a decision as soon as possible on the pending non-compliance case regarding past unreasonable pricing for the interoperability information, on which the Commission sent a Statement of Objections on 1 March 2007 (see IP/07/269). Microsoft also has ongoing obligations to continue to comply with the Commission’s 2004 Decision: should Microsoft fail to comply with those obligations in the future the Commission can issue a new decision to impose daily penalties”, see IP/07/1567 referred to in the footnote below.

¹⁹ Commission press release of the October 22, 2007, “Antitrust: Commission ensures compliance with 2004 Decision against Microsoft”, IP/07/1567. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1567&format=HTML&aged=0&language=EN&guiLanguage=en>.

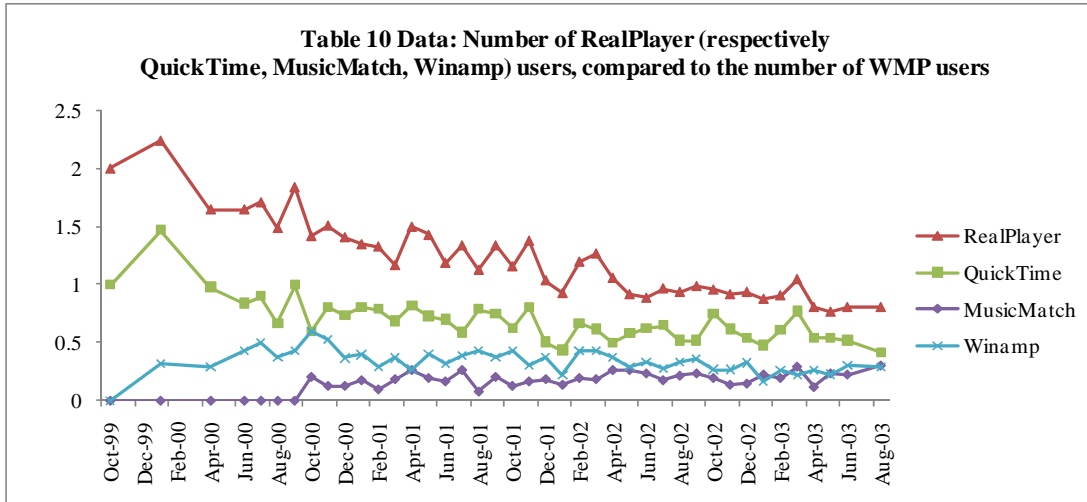
²⁰ Microsoft Decision recital 425.

²¹ *ibid*, recital 833.

²² *ibid*, recitals 879-881.

concluded that the strong network effects would ultimately tip the market in favor of Microsoft.²³

Table 10 in the Decision shows the shares of the use of streaming media players over time based on the data relied upon by the Commission.²⁴



In light of this analysis, the Commission found that Microsoft had abused its dominant position in the client operating system by making its client operating system available only with its media player since May 1999. The Commission did not object to Microsoft making Windows available with Windows Media Player. It did object to Microsoft making Windows available with Windows Media Player without also making available Windows without Windows Media Player.

Prior to the Decision, Microsoft and the Commission had been in discussions about a “must carry” solution, whereby Microsoft would include rival media players in its operating system. Ultimately, Microsoft and the Commission did not reach a settlement. In the Decision, the Commission ordered Microsoft to make available a version of Windows that did not include Windows Media Player.²⁵ It prohibited Microsoft from charging more for the unbundled version of Windows than for the bundled version but did not require Microsoft to charge less for the unbundled than for the bundled version.²⁶ Subsequent to the Commission’s Decision, Microsoft made the unbundled version available, called “Windows N” based on an agreement with the Commission. Microsoft continues to offer a full version of Windows which includes media player features.

2. *The Judgment of the Court of First Instance*

Microsoft filed an application to annul the Decision on June 7, 2004 and the Microsoft case was heard by the Grand Chamber of the CFI which consisted of 13

²³ *ibid*, recital 897.

²⁴ Note that these shares are not the shares for all media players, only the shares for those five media players in the Commission’s table.

²⁵ Microsoft Decision Article 6(b).

²⁶ *ibid*, recital 1013(iii).

judges.²⁷ The CFI held a five-day hearing on April 24-28, 2006 and delivered its judgment on September 17, 2007.

Early in its judgment the CFI notes the scope of its review.²⁸ According to the case law of the Community Courts the review of complex economic appraisals made by the Commission is necessarily limited to “whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of power.” Technical appraisals are also subject to “limited review” and the Courts “cannot substitute their own assessment of matters of fact for the Commission’s.”²⁹ The Court makes a brief reference to the standard of review in merger cases set out in the *Commission v. Tetra Laval* case where it annulled a Commission decision to block a merger based in part on a critical review of the economic evidence: “The Community Courts must ... determine whether [the Commission] 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.”³⁰ Throughout the judgment the CFI principally rejects Microsoft’s criticisms of the Commission’s analysis because Microsoft has not demonstrated that the analysis is in “manifest error.”³¹ We return to the standard of proof and the level of judicial review in Article 82 cases before the CFI.³²

On refusal to supply, the CFI side-stepped two issues which had been highly contentious in the Commission’s Microsoft investigation: first, the question of whether Microsoft’s protocols were protected by copyright, patent, and trade secrets rights as the software company asserted or whether the protocols were just a key subject to no intellectual property rights as the Commission asserted. Here the Court assumed *arguendo* that Microsoft had intellectual property rights.³³ Second, as to the scope of any obligation to license, the Court did not address whether any of the additional circumstances identified by the Commission were exceptional.³⁴ Instead, the CFI examined whether the Commission had shown that the four-prong *IMS/Magill* test was met.³⁵ The CFI concluded that even if Microsoft’s protocols were protected by intellectual property Microsoft had not shown that the Commission manifestly erred³⁶ in finding that the three

²⁷ Under CFI practice the case was assigned to a “Judge Rapporteur” who was responsible for drafting a preliminary report to the Chamber containing his recommendations as to the final judgment. The President of the CFI appoints a Judge Rapporteur when the President has first set the Chamber that will deal with a particular case. This procedure is set out in the CFI’s procedural rules, see Article 13 (concerning normal cases) and Article 14 (concerning “difficult” cases). The judge Rapporteur in Microsoft’s appeal at the CFI was John Cooke (See http://www.infoworld.com/article/05/07/11/HNnewjudge_1.html?WEB%20SERVERS). Judgments are reached by consensus among the judges and there are no dissenting opinions. Most cases before the CFI are heard by five judges in one of several chambers. The judges deliberate their final judgment based on the report by the Judge Rapporteur. The CFI has the ability to decide to have cases heard by the Grand Chamber and did so in this matter. This case was decided by the Grand Chamber presided by the President of the CFI.

²⁸ Microsoft Judgment, paragraphs 85-90.

²⁹ *ibid*, paragraph 88.

³⁰ *ibid*, paragraphs 89 and 482, with reference to Case C-12/03 P, *Commission v. Tetra Laval*, [2005] ECR-I-987, paragraph 39.

³¹ *ibid*, paragraphs 87, 357, 380-381, 391, 421, 457, 526, 530, 534, 557, 618, 649, 665, 683, and 1108.

³² See Section III. C below.

³³ *ibid*, paragraph 284.

³⁴ *ibid*, paragraph 336. The CFI indicates that it would consider the additional circumstances “Only if it finds that one or more of those circumstances [as identified in *Magill* and *IMS Health* – see Section B. below] are absent will the Court proceed to assess the particular circumstances invoked by the Commission.”

³⁵ *ibid*, paragraphs 369-436 (the CFI’s finding with regard to indispensability), paragraphs 479-620 (the CFI’s findings with regard to elimination of competition), paragraphs 643-665 (the CFI’s findings with regard to new product), and paragraphs 688-711 (the CFI’s findings with regard to objective justifications).

³⁶ *ibid*, paragraph 649.

exceptional circumstances were met and Microsoft's refusal was not objectively justified.³⁷

On the tying case, the CFI rejected Microsoft's assertions that the Commission had not applied the correct legal standard.³⁸ It then proceeded to consider Microsoft's annulment application in light of the case law on tying following the ECJ's 1994 *Hilti* judgment³⁹ and the 1996 *Tetra-Pak II* judgment.⁴⁰ It concluded that Windows and Windows Media Player were separate products principally because media players were marketed separately, and that end-users were necessarily coerced into using Windows Media Player because they were not offered Windows without WMP.⁴¹ The Court concluded that the bundling of WMP with Windows gave Microsoft a competitive advantage which prevented competition between Microsoft's WMP and RealPlayer to take place on the basis of the intrinsic merits of the two products.⁴²

B. The Refusal to Supply "Interoperability" Information

1. The Status Quo Ante

The European Community Courts have considered refusal in a number of cases.⁴³ Three cases in particular have shaped European Competition policy in this area. *Magill*⁴⁴ concerned three television broadcasters that made their television listings available separately in their own magazines and to daily newspapers that published the listings together. The TV listings were protected by copyright in the UK and Ireland. The complainant, Magill, wanted to create a weekly comprehensive television guide from their listings. The ECJ concluded that the British Broadcasting Company (BBC), Radio Telefis Eireann (RTE), and Independent Television Publications Ltd (ITP) had abused their dominant position for listing information by refusing to license that information to Magill. The finding of an abuse was based on a number of "exceptional circumstances". The listing information was indispensable to Magill, as without it Magill would not be able to publish a TV-guide covering all channels. That conduct "thus prevented the appearance of a new product, a comprehensive guide to television programmes which the appellants did

³⁷ *ibid*, paragraph 712.

³⁸ *ibid*, paragraph 859.

³⁹ See *Hilti AG v. Commission*, Case C-53/92 P, ECR [1994] I-00667. See also the CFI's judgment *Hilti v. Commission*, Case T-30/89, [1991] ECR II-01439, and the Commission's decision in *Eurofix-Bauco/Hilti*, Case IV/30787, OJ [1988] L 65/19.

⁴⁰ See *Tetra Pak International SA v Commission*, Case T-83/91, [1994] ECR II-00755, confirmed by *Tetra Pak International SA v Commission*, Case C-333/94, [1996] Referred to in Microsoft Judgment paragraph 859.

⁴¹ Microsoft Judgment, paragraphs 856, 945-949, 960-975 and 1148-1150.

⁴² *ibid*, paragraphs 971, 1034, and 1040.

⁴³ See e.g. *Magill, RTE and ITP v Commission*, Joined Cases C-241/91 P and C-242/91 P, [1995] ECR I-743, *Bronner*, Case C-7/97, [1998] ECR I-07791, *IMS Health*, Case C-418/01, [2004] ECR I-05039, *Eurofix-Bauco/Hilti*, Case IV/30787, OJ [1988] L 65/19, *Hilti v. Commission*, Case T-30/89, [1991] ECR II-01439, *Hilti AG v. Commission*, Case C-53/92 P, ECR [1994] I-00667, *Commercial Solvents, (ICI & CSC v. Commission)*, Joined cases 6 and 7-73, [1974] ECR 00223, *European Sugar Industry*, Case No. IV / 26 918, OJ [1973] L140/17, *Napier Brown - British Sugar*, Case No. IV/30.178, OJ [1988] L284/41, *United brands company and United brands continental v. Commission*, Case 27/76, [1978] ECR 000207, *Benzine en Petroleum*, Case 77/77, [1978] ECR 01513, *British Telecommunications*, Case No. IV/29877, OJ [1982] L360/36, *British Leyland v. Commission*, Case 226/84, [1986] ECR 03263, *Boosey & Hawkes*, Case No. IV/32.279, OJ [1987] L286/36, *London European/SABENA*, Case No. IV/32.318, OJ [1988] L317/47, *Sea Containers v. Stena Sealink*, Case No. IV/34.689, OJ [1994] L15/8, *DPAG Cross border mail, (British Post / Deutsche Post)*, Case No. COMP/36.915, OJ [2001] L331/40, *Clearstream*, Case No. COMP/38.096, *ITT Promedia v. Commission*, Case T-111/96, [1998] ECR II-02937, *Volvo v. Veng*, Case 238/87, [1988] ECR 6211, *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v. Régie nationale des usines Renault*, Case 53/87, [1988] ECR 6039, and *Höfner v. Macrotron*, Case C-41/90, [1991] ECR I-01979.

⁴⁴ See *RTE and ITP v. Commission*, Joined Cases C-241/91 P and C-242/91 P, [1995] ECR I-743.

not offer and for which there was a potential consumer demand.”⁴⁵ Furthermore, by refusing to supply the essential information, the BBC, RTE, and ITP “reserved to themselves the secondary market of weekly television guides by excluding all competition on that market.”⁴⁶ Finally, “there was no objective justification for such refusal.”⁴⁷

In the subsequent *Bronner* case,⁴⁸ the ECJ clarified the scope of its Magill judgment. While *Bronner* did not concern the licensing of intellectual property (but rather the case of a newspaper distribution system), the case is nevertheless of prime importance due to the seminal opinion of Advocate General Jacobs,⁴⁹ which provides an overall framework for refusal to deal cases and specifically addresses the specific issue of intellectual property. In this case, the ECJ was asked to determine the circumstances under which a newspaper group (Mediaprint), with a significant share of the market for daily newspapers, would have joint access to its home-delivery network to a rival newspaper company (Oskar Bronner). The ECJ concluded that an obligation to joint access would only arise if the product in question was indispensable to compete in a market, in as much as there was no actual or potential substitute for that product. The ECJ emphasized that for there to be an abusive refusal, the dominant undertaking’s refusal must be “likely to eliminate all competition on the part of the undertaking seeking access.”⁵⁰ In this case the ECJ did not find that Mediaprint’s service was indispensable in order for Bronner to be able to carry on its business, as there were other means of distribution available.⁵¹ Nor did the ECJ find there to be any technical, legal or economic barriers making it impossible to establish a separate distribution network

The third case decided by the ECJ was *IMS Health*.⁵² *IMS Health* involved a company that collected and disseminated data on pharmaceutical sales in Germany. *IMS Health* had developed a data analysis structure for pharmaceutical sales in Germany, the so-called “1860 brick structure”, dividing Germany into 1860 sales regions. *IMS Health* claimed copyright protection for this structure which was in part based on the German postcode areas. According to the Commission, the 1860 brick structure had become a *de facto* industry standard for pharmaceutical data presentation in Germany. *IMS Health* refused rival NDC use of the 1860 brick structure. The ECJ⁵³ enunciated the four-pronged test developed in *IMS Health*⁵⁴ and clarified *Bronner*.

Under Article 82 EC the Community Courts generally presume that a dominant firm has committed an abuse if the challenged practice has a particular form such as we will see in the case of tying below. That is, certain practices are essentially *per se*

⁴⁵ *ibid*, paragraph 54.

⁴⁶ *ibid*, paragraph 56.

⁴⁷ *ibid*, paragraph 57.

⁴⁸ *Bronner*, Case C-7/97, [1998] ECR I-07791.

⁴⁹ An Advocate General is appointed for the specific case by the First Advocate General once the written procedure is over and the oral procedure begins. The appointed Advocate General is together with the appointed Judge-Rapporteur responsible for monitoring the progress of the case they are assigned to. The cases at the Court are argued by the parties at a public hearing, before the bench and the Advocate General. Some weeks later the Advocate General delivers his/ her opinion before the Court at a public hearing. The Advocate General’s opinion is a detailed analysis of the legal aspects of the case including an independent suggestion to the Court of the response the Advocate General would recommend. When deciding on the case the bench will take the opinion of the Advocate General into account. See http://curia.europa.eu/en/instit/presentationfr/index_savoirplus.htm.

⁵⁰ *Bronner*, paragraph 38.

⁵¹ *ibid*, paragraph 42.

⁵² See Case C-418/01, [2004] ECR I-05039.

⁵³ In response to the request for a preliminary ruling by a German court.

⁵⁴ *IMS Health* judgment, paragraph 38.

unlawful when conducted by a firm in a dominant position.⁵⁵ Refusal to supply is the exception. The case law presumes that a dominant firm can refuse to supply actual or potential traditional practices and that doing so is an abuse only in “exceptional circumstances.”⁵⁶ *Magill*, *Bronner* and *IMS* make it clear that a necessary condition for requiring a company to share its property is that the property “itself be indispensable to carrying on that person’s business, inasmuch as there is no actual or potential substitute in existence.”⁵⁷ The sufficient conditions depend on whether the property at issue is intellectual or not: the elimination of competition, the suppression of a new product, and the lack of objective justification are, together with indispensability, sufficient conditions for a refusal abuse involving intellectual property; the elimination of a new product has not been required outside of intellectual property.⁵⁸ As other observers have pointed out the requirement that property be indispensable to compete and the requirement that lack of access to the property will eliminate competition on the market appear to be simply two different ways of saying the same thing.⁵⁹

The Microsoft Judgment embraces the *Bronner/Magill/IMS* test. However, it weakens the presumption that dominant firms can choose their trading partners relative to previous ECJ judgments in several significant ways.⁶⁰

2. *Indispensability and the Elimination of Competition*

The previous cases involved situations in which firms claimed that they could not enter a market without access to property held by dominant firms. *Magill*, for example, could not offer a weekly television guide without access to the listings of the television stations that broadcast in Ireland.⁶¹ While one could question whether there was a separate market for weekly television guides, once one accepts that market, it follows that *Magill* could not compete in that market without access to the broadcasters’ listings. The listings were indispensable for making a weekly guide available and without them no competition would take place on that market. Moreover, while again one could debate market definition, it is apparent that failure to make the listings available would prevent

⁵⁵ Technically, a “per se” offense does not exist under Article 82 as it is open to the dominant firm to raise the defence of objective justification. However, given that objective justifications had no practical relevance in Article 82 proceedings, the use of the notion “per se” offense seems justified.

⁵⁶ See David S. Evans, “Economics and the Design of Competition Law,” forthcoming as a chapter in “*Issues in Competition Law and Policy*”, (W. Dale Collins, ed.).

⁵⁷ See *Bronner*, paragraph 41. See also in the *IMS Health* judgment, paragraph 38, the ECJ states that “it is clear from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.” See furthermore *Magill*, paragraph 56, in which the ECJ held that “the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market (see the judgment in *Commercial Solvents v. Commission*, paragraph 25) since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.”

⁵⁸ Microsoft Judgment, paragraph 334. The elimination of a new product has not been mentioned outside of the intellectual property cases.

⁵⁹ See e.g. Robert O’Donoghue and A. Jorge Padilla, “The Law and Economics of Article 82”, Hart Publishing, 2006, pp. 440-442. See also Christian Ahlborn, David Bailey and Helen Crossley, “An Antitrust Analysis of Tying: Position Paper”, GCLC Research Papers on Article 82 EC, July 2005.

⁶⁰ Microsoft Judgment, paragraph 316.

⁶¹ NDC made the same claim regarding the data collection structure developed by IMS Health for Germany.

the emergence of a weekly television guide which would have been a new product in Ireland at the time.⁶²

Microsoft's rivals were in a different situation than *Magill* when Sun sent its letter in 1998.⁶³ They had a 60 percent share of the work group server operating system market at that time and a 27 percent share at the time of the Decision. Vendors that relied on the Linux open source operating system had entered the market after Sun's letter and had a 5-15 percent share of the work group server operating system market in 2003 according to the Decision.⁶⁴

The CFI found that the "elimination of competition" prong was met based on two considerations. The first was directional. Even though competition had not been eliminated it found that the Commission was right to act when it found that a practice would eliminate competition in the future.⁶⁵ The second was definitional. The Commission needed to establish the elimination of "effective competition." The CFI observed that "the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition."⁶⁶

Both considerations require the exercise of considerably more judgment than was necessary in *Magill*. The CFI had to decide whether the Commission had made a manifest error in predicting that Microsoft's refusal to supply would eliminate competition in the work group server market. That approach required a prediction that competition would be eliminated. That prediction was largely based on the fact that Microsoft's market share had been rising and its competitors' falling. This approach also required a finding that it would be the lack of access to the protocols that would be the cause of that elimination. That finding was largely based on statements by survey respondents that interoperability with Microsoft's operating systems was an important factor for them.⁶⁷ The CFI also had to decide whether the Commission had made a manifest error in concluding that certain forms of competition were not effective. The Commission had dismissed Linux on the grounds that it had a small share in the year before the Decision and that as open source software it was provided by multiple vendors. The CFI agreed.⁶⁸

The CFI's approach effectively softens the indispensability standard which is the flip side of the elimination of competition. Access to property does not have to be an absolute bar for participating in the market. Property may be indispensable even if there is a competitive fringe of firms that are viable in niches of the market. Establishing indispensability may be based on predictions about the effect of lack of access over time.

Bo Vesterdorf, the former President of the CFI and member of the Grand Chamber that entered the Microsoft Judgment, acknowledged in a March 2008 speech that the judgment weakened the indispensability and elimination of competition prongs of Community Law. According to an article in Reuters: "Vesterdorf said that many critics believe the decision weakened patent law and the rights of patent holders to do as they

⁶² Subsequently, in *IMS Health*, the ECJ left much ambiguity on how much differentiation one needs to meet this test. Consider television guides. Suppose *Magill* had wanted to supply the BBC's television listings which the BBC presented in its own magazine in a different format—a guide with a different color, better paper, or bundled with different content. It is not clear which of any of those differences together or combined would qualify as a new product.

⁶³ Microsoft Judgment, paragraph 3.

⁶⁴ Microsoft Decision recital 507, and Microsoft Judgment, paragraph 33.

⁶⁵ *ibid*, paragraph 561.

⁶⁶ *ibid*, paragraph 563.

⁶⁷ *ibid*, paragraphs 409.

⁶⁸ *ibid*, paragraphs 433, and 583-594.

wished with their intellectual property. There was no doubt that the CFI had significantly enhanced the authority of the European Commission beyond its rulings in earlier cases, he said, giving it “a wide margin of appreciation.” For example, until now the Commission could step in only if a company eliminated all competition, he said. With the decision, the Commission can act if a company merely eliminates “effective competition” without actually getting rid of a rival.”⁶⁹

3. *The “New Product” Test*

The CFI found that the “new product” prong was satisfied as well.⁷⁰ However, its analysis departs significantly from the previous cases. First, it rejected the “new product” prong as a sufficient condition for a refusal to supply abuse.

“The circumstances relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health* ...cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.... It was on that last hypothesis that the Commission based its finding in the contested decision.”⁷¹

The CFI then examined, in the new product portion of its analysis, whether the Commission was in manifest error in concluding that Microsoft’s refusal limited the ability of its rivals to compete and altered consumer choice. With regard to new products it agreed with the Commission that Microsoft’s rivals had incentives to differentiate their products. However, it did not insist on any specific evidence of what these products might be nor did the Commission offer any. In the end, the CFI concluded that the new product prong was satisfied because “the Commission’s finding to the effect that Microsoft’s refusal limits technical development to the prejudice of consumers within the meaning of Article 82(b) EC is not manifestly incorrect.”⁷²

4. *The CFI Test for Refusal to Supply*

The *Bronner/Magill/IMS* test is a weak *per se* lawful rule for refusal to supply by dominant firms. A refusal is considered lawful but for exceptional circumstances.⁷³ The test screens out most requests for compulsory sharing of property. The CFI’s *Microsoft* test makes that screen more porous and reduces the presumption that a dominant firm can freely choose its own trading partners. First, the CFI admits the possibility that a refusal should be evaluated based on an elastic set of “exceptional circumstances” and not the ones identified most recently in the ECJ’s judgment in *IMS Health*.⁷⁴ Second, the CFI effectively replaces the new product prong of the exceptional circumstances test with one

⁶⁹ David Lawsky, “EU Microsoft judge fears decision may hurt investment,” Reuters, March 12, 2008. See <http://www.reuters.com/article/reutersEdge/idUSL1254538020080312?pageNumber=1&virtualBrandChannel=0&sp=true>.

⁷⁰ *ibid*, paragraph 665.

⁷¹ *ibid*, paragraphs 647-648.

⁷² *ibid*, paragraph 665.

⁷³ For a discussion of weak and strong *per se* tests see David S. Evans, “Economics and the Design of Competition Law,” forthcoming as a chapter in “*Issues in Competition Law and Policy*”, (W. Dale Collins, ed.), as also referred to in note 60.

⁷⁴ Microsoft Judgment, paragraphs 316, 319, 321-332, and 336.

that is based on the general concept of limiting technical development.⁷⁵ Third, the CFI nullifies the indispensability prong of the test, which provides the foundational necessary condition for an abuse, by adopting an elimination of competition test which is based on the prediction of future market behavior and which adopts an elastic “effective competition” concept.⁷⁶ As we will see below, the CFI has taken the ECJ’s jurisprudence on refusal to share property in a decidedly ordoliberal direction.

C. *The Tying of Windows Media Player to Windows*

1. *The Status Quo Ante*

The European Courts have considered tying by dominant firms⁷⁷ in a number of cases.⁷⁸ The two most prominent Article 82 cases are the *Hilti* case⁷⁹ and the *Tetra Pak II* case.⁸⁰ Both cases concerned the tying of primary products and consumables. In *Hilti*, the Commission held that Hilti had abused its dominant position in the market for certain fastening systems used in the construction industry by restricting its supply of cartridge strips to certain distributors and end-users based on whether or not these customers also purchased the complement nails from Hilti. In *Tetra Pak II* the Commission found that Tetra Pak had abused its dominant position in the market for (anti)septic packaging machines by tying purchase and use of Tetra Pak cartons exclusively supplied by Tetra Pak to the purchase of Tetra Pak packaging machines. In both cases, the European Courts upheld the Commission’s decision.

In the past, tying was subject to a *per se* prohibition under EC law, triggered by a finding of: (i) dominance in the market of the tying product; (ii) the establishment of the tying product and the tied product as two separate products; and (iii) an element of coercion towards these customers.⁸¹ Foreclosure of competition was considered but generally presumed.⁸² In the *British Sugar* case,⁸³ the Commission had made clear that a significant effect on the tied market was not a prerequisite for a finding of abuse to ensure the criteria are satisfied. In principle, a dominant firm can raise the defense of objective

⁷⁵ *ibid*, paragraph 665.

⁷⁶ *ibid*, paragraphs 369-436.

⁷⁷ Tying may also be regarded as a restrictive practice under Article 81, see Commission Guidelines on Vertical Restraints, OJ [2000] C-291/1.

⁷⁸ See e.g. *GEMA I*, Case No. IV/26.760, OJ [1971] L134/15, *European Sugar Industry*, Case No. IV/26 918, OJ [1973] L140/ 17, *Michelin I*, (*Bandengroothandel Frieschebrug BV/ NV Nederlandsche Banden-Industrie Michelin*), Case No. IV/29.491, OJ [1981] L353/33, *Michelin v. Commission*, Case 322/81, [1983] ECR 3461, OJ L143/1, *Napier Brown - British Sugar*, Case No IV/30.178, OJ [1988] L284/ 41, *Hilti v. Commission*, Case T-30/89, *Hilti AG v. Commission*, Case C-53/92 P, ECR [1994] I-00667, [1991] ECR II-01439, *London European/ SABENA*, Case No. IV/32.318, OJ [1988] L317/47, *Tetra Pak International SA v Commission*, Case T-83/91, [1994] ECR II-00755, confirmed by *Tetra Pak International SA v Commission*, Case C-333/94, [1996] ECR I-05951, *FAG - Flughafen Frankfurt/Main AG*, Case No. IV/34.801, OJ [1998] L173/32, *De Post-La Poste*, Case No. COMP/37.859, OJ [2002] L61/32, *Coca Cola*, OJ [2005] L253/21, *IRI/ Nielsen*, XXVth Report on Competition Policy (1996), paragraph 64, *Centre belge d’études de Marché - télémarketing (CBEM) SA v. Compagnie Luxembourgeoise de télédiffusion SA, Information publicité benelux SA*, Case 311/84, [1985] ECR 3261, and *IBM*, OJ [1984] L118/24. See also Christian Ahlborn, David Bailey and Helen Crossley, “An Antitrust Analysis of Tying: Position Paper”, GCLC Research Papers on Article 82 EC, July 2005.

⁷⁹ *Eurofix-Bauco/Hilti*, Case IV/30.787, OJ [1988] L 65/19.

⁸⁰ *Tetra Pak II*, Case IV/31.043, OJ [1992] L 72/1, recitals 116-120.

⁸¹ See *Hilti*, (*Hilti AG v. Commission*), Case T-30/89, [1994] ECR I-00667, the ECJ dismissed the appeal in Case C-53/92, [1994] ECR I-00667. See also Microsoft Decision, recital 794.

⁸² See e.g. *Hilti*.

⁸³ See footnote 82.

justification. For example, *Hilti* argued, unsuccessfully, that the tying of its nails and nail cartridges was justified on the grounds of health and safety.⁸⁴ In practice, the defense of objective justification has played no role in deciding the outcome of the cases.

Prior to the *Microsoft* case, EC law on tying did not look unlike US law as developed in *Jefferson Parish*.⁸⁵ However, while the framework of analysis in the US has been reinterpreted to accommodate a shift in policies moving from *per se* illegality towards a modified *per se* rule,⁸⁶ EC law on tying has been largely static and immune to influence from economic thought. Tying under EC law therefore seems to be closer to a strong *per se* rule of illegality: a dominant firm commits an abuse if it requires consumers to take another product as a condition of taking its dominant product and is commercially successful.

In light of previous case law, the Commission's finding of abusive tying, based on the four-pronged test, might seem uncontroversial. Microsoft conceded that Windows was dominant in the client operating system market. There was no dispute that consumers could only get Windows with Windows Media Player included after May 1999. All that was left was whether Windows and Windows Media Player were separate products. Two aspects of the tying case, however, stood in the way of a simple application of the form-based approach: (i) Microsoft disputed that Windows and Windows Media Player were separate products; and (ii) in the Microsoft case, the Commission itself had embraced a rule of reason approach to tying rather than following the form-based approach in its Decision on the basis that many media players could be downloaded for free and therefore foreclosure could not be presumed. Microsoft challenged the Commission's finding of foreclosure.⁸⁷

The Court endorsed the Commission's finding of abuse and reaffirmed that no effects-based analysis was required even though the Commission thought it should be.⁸⁸

2. *The Separate-Product Test and the But-For World*

Microsoft and the Commission disagreed on the test for determining whether there was a tie between two separate products. The Decision asserted that it was sufficient to show that there was independent demand for the tied product.⁸⁹ The fact that media players including Windows Media Player were made available separately therefore showed that Windows and Windows Media Player were two separate products. Microsoft argued that it was necessary to assess whether there was significant demand for the unbundled version of the tying product. It did not dispute that media players were separate products. But it claimed that operating systems generally came with media players and that consumers did not want operating systems that lacked media player features. Thus Windows was a single product and not a bundle of two separate products.⁹⁰

⁸⁴ *ibid.*, paragraphs 115-119.

⁸⁵ *Jefferson Parish Hospital District No 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed. 2d 2 (1984).

⁸⁶ In certain circumstances, US policy has even openly shifted towards a rule of reason approach.

⁸⁷ Microsoft Judgment, paragraph 839.

⁸⁸ *ibid.*, paragraphs 1089-90.

⁸⁹ Microsoft Decision recital 804.

⁹⁰ To see the difference in positions suppose that there are two features A and B, which can be combined in various ways. The Commission claimed that A and B were separate products because B was sold separately. Microsoft claimed that AB was a single product because that was no significant demand for A. Therefore it claimed that the two products at issue were AB and B.

The CFI found that the Commission's position was supported by *Hilti* and *Tetra Pak II*.⁹¹ It rejected Microsoft's position because it "amounts to contending that complementary products cannot constitute separate products for the purposes of Article 82 EC..."⁹² It pointed to *Hilti* where "it may be assumed that there was no demand for a nail gun magazine without nails"⁹³ and observed that consumers might want to obtain their PC operating systems and applications together but from different sources.

3. *Foreclosure and the Rule of Reason*

As mentioned above, the Commission had deviated in the tying part of its Decision from the form-based approach established by previous case law. It emphasized in its press releases that it had taken a "rule of reason" approach to tying.⁹⁴ It had recognized that there were several features of media players that made it inappropriate to infer that tying would foreclose competition. In particular media players were readily available through downloads and often for free.⁹⁵

The Commission therefore engaged in an extensive analysis, taking up a large part of the tying part of the Decision, of whether Microsoft's tying had foreclosed competition in the market for media players. In its assessment of foreclosure, the Commission followed a three step analysis: First, it compared WMP's distribution system, i.e. Windows, with alternative distribution systems of rival media players and concluded that rival media players could not achieve the same level of market penetration. Second, it considered the effect which this advantage had on other market participants and came to the conclusion that WMP's ubiquity through Windows made it less likely for users to use alternative players and for OEMs to install other media players and ultimately led content providers to encode content primarily in WMP compatible formats and software developers to write applications primarily for WMP. At the third stage, the Commission then assessed whether the market developments pointed towards a trend in favor of WMP.⁹⁶

The Court flatly rejected the Commission's invitation to move from a *per se* rule of illegality towards a rule of reason which would assess any actual or likely harm to consumers. It concluded that:

"the Commission's findings in the first stage of its reasoning are in themselves sufficient to establish that [foreclosure of competition as a] constituent element of abusive bundling is present in this case."⁹⁷

In other words, in order to satisfy the "foreclosure of competition" element of the tying abuse, it is sufficient to demonstrate the existence of an advantage from tying over rivals which do not have opportunity to bundle. The impact of such an advantage on competition and consumer welfare will then be presumed and need not be established.

⁹¹ *ibid*, paragraph 920.

⁹² *ibid*, paragraph 921.

⁹³ Microsoft Judgment, paragraph 921.

⁹⁴ Commission press release of March 24, 2004, "Commission concludes on Microsoft investigation, imposes conduct remedies and a fine", IP/04/382. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/382&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁹⁵ Microsoft Decision, e.g. recitals 804, 841, 858-859, 968, and 1037.

⁹⁶ *ibid*, recitals 843-878, 919, 937, 944, and 946.

⁹⁷ Microsoft Judgment, paragraph 1058.

Indeed it can be argued that the Court goes one step further when it states:

“Admittedly, as Microsoft contends, a number of OEMs continue to add third party players to the packages which they offer their customers. It is also common ground that the number of media players and the extent of the use of multiple players are continually increasing. However, those factors do not invalidate the Commission’s conclusion that the impugned conduct was likely to weaken competition within the meaning of the case. Since May 1999 vendors of third-party media players have no longer been able to compete through OEMs to have their own products placed instead of Windows Media Player as the only media player on the client PCs assembled and sold by OEMs.”⁹⁸

This suggests that the existence of an advantage resulting from tying (being the only firm to be able to have their media player installed as the only media player) does not only allow a presumption of harm but actually makes this presumption irrebuttable; in other words, no matter how much evidence the dominant firm may be able to present to show that competition is alive and well, it will not escape a finding of abuse - after all, competition could have been even greater in the absence of the impugned behavior. This logic is in line with that applied in the *BA/Virgin* case⁹⁹ where the Commission came to a finding that there was an abusive pricing practice during a period in which the dominant firm’s market share fell from 45 percent to under 40 percent, as without the pricing practices, the market share of the dominant firm might have fallen even further.

4. The CFI Test for Tying

In many respects, the Court followed a very traditional, ordoliberal analysis in the Windows Media Player part of the judgment. The four-pronged test is broadly in line with earlier cases, such as *Tetra Pak II* and *Hilti* and indeed both cases are referred to in the judgment in numerous places.¹⁰⁰

Two points, however, stick out in the Court’s tying analysis, as we will explain in further detail in the following section. First, while the Court’s interpretation of the separate product test purports to be based on *Hilti*, the Microsoft Judgment actually leads to a widening of the scope of abusive tying and blurring of the dividing line between tying cases and refusal to supply cases. Second, the Court rejected the opportunity provided by the Commission’s effects-based analysis, to move EC policy on tying away from *per se* offense to a rule of reason approach.

⁹⁸ *ibid*, paragraph 1055.

⁹⁹ *Virgin/British Airways*, Case IV/D-2/34.780, O.J [2000] L30/1.

¹⁰⁰ *ibid*, *Tetra Pak II* is referred to in paragraphs 293, 859-860, 892, 897, 901, 910, 920, 927, 942, 953, 1339, and 1354, and *Hilti* is referred to in paragraphs 859, 892, 901, 920-921, 927, 951, 953, 970, 1339, and 1354.

III. THE CFI JUDGMENT: A CONSUMER WELFARE ANALYSIS

A. *The Court's Analytical Framework in Abuse of Dominance Cases*

1. *Ordoliberalism and the Future of Article 82*

The Microsoft appeal was considered over a period of intensive debate about the future direction of the control of dominant firms in Europe. This debate was in part triggered by a discussion paper which DG Competition circulated at the end of 2005. The Commission put off deciding what if any guidance it may give on the direction of Article 82 until after the Microsoft Judgment.¹⁰¹

While other areas of EC competition policy had been “modernized” over the years (notably EC merger control and the control of restrictive agreements under Article 81), the policy under Article 82 has remained virtually unchanged over the last 40 years. The Court’s analytic framework is based on concepts and ideas which predate the Chicago and post-Chicago developments in antitrust thinking. These concepts and ideas have been heavily influenced and shaped by ordoliberalism, developed in Germany between the 1930s and 1950s. Ordoliberalism saw itself as a “third way” between the centrally planned economy and the unregulated market advocated by laissez-faire liberalism.

For ordoliberalism, competition in the market economy was fragile and needed to be preserved through a strong and active competition policy. The aim of competition policy was to keep markets de-concentrated to ensure that no firm had market power. Markets in which no firms had market power would automatically guarantee “complete competition”. Ordoliberalism was hostile towards dominant firms: to the extent that they could not be broken up, ordoliberalism envisaged an “as if” regulation, whereby dominant firms would be forced to behave as if they were subject to complete competition.

For ordoliberals, “competition on the merits” primarily concerned the competitive parameters of price and quality. Competition on the merits could generally easily be distinguished from anti-competitive behavior (“hindrance competition”) which for ordoliberals included price discrimination, loyalty rebates and exclusive arrangements. Ordoliberals with their strong emphasis on price competition do not seem to have acknowledged the tensions between static and dynamic competition.

The impact of ordoliberal concepts and ideas on the European Community Courts case law under Article 82 is obvious and includes:

- *the low threshold of dominance*: under EC competition, the control of dominance kicks in at a very low threshold and focuses strongly on market shares. As noted earlier, market shares around 40 percent have been held to be sufficient for a finding of dominance.¹⁰²
- *a form-based approach towards unilateral behavior*: the view that conduct could on its face be clearly categorized into “good behavior” (competition on the merits) and “bad behavior” without redeeming features (impediment competition), such as price discrimination and loyalty rebates, led to a form-based *per se* approach which is reflected in Article 82 decisions and

¹⁰¹ The Commission is still considering which is the best way to move forward with the review. See <http://ec.europa.eu/comm/competition/antitrust/art82/index.html>.

¹⁰² See for example *BA/Virgin*, see footnote 106.

judgments until today, for example in *Michelin II* and *British Airways v. Commission*.¹⁰³ The Court has repeatedly taken the view that it is sufficient for an abuse that the conduct “tends to restrict competition”, i.e. “is capable of having, or likely to have, such an effect”.¹⁰⁴

- *structural presumptions*: the close link between market structure and competition on which ordoliberalism is based has found its way into numerous structural presumptions, including structural presumptions of dominance (a firm is presumed to be dominant when it has a market share in excess of 50 percent) as well as structural presumptions of consumer harm (in *BA/Virgin*, the presumption was made that a greater loss of market share by the dominant firms would lead to greater consumer welfare).¹⁰⁵

2. *Ordoliberalism at the core of the Microsoft judgment*

The Court’s analysis reflects ordoliberal thinking throughout the judgment and is based on its core concepts, such as the clear delineation of competition on the merits and impediment competition, the use of structural presumption and an overall form-based approach.

a) *Competition on the merits*

The Court’s assessment distinguishes between factors which are legitimate in the competitive process (“competition on the merits”) and those that are not.

For the Court, competition on the merits is in particular the respective quality of the competing products or, in the Court’s words, “the intrinsic merits of the [competing] products.”¹⁰⁶ Other factors, by contrast, such as a competitive advantage in the distribution system (in the context of the WMP case) or better interoperability (in the context of the Interoperability case) were not regarded as competition on the merits:

“[I]t is clear that owing to the bundling, Windows Media Player enjoyed an unparalleled presence on client PCs throughout the world, because it thereby automatically achieved a level of penetration corresponding to that of the Windows client PC operating system *and did so without having to compete on the merits with competing products.*”¹⁰⁷

Having defined competition on the merits primarily as the relative quality of the products, the Court then assesses the evidence of the quality of Microsoft products (i.e. Windows Server in the interoperability case and WMP in the media player case) relative to rival products and concludes in both cases that Microsoft’s products were inferior:

- In the interoperability case, the Court argues that the limitation on devices were found to be especially important because survey respondents “consider

¹⁰³ *Michelin v. Commission*, Case T-203/01, and, *British Airways v. Commission*, Case T-219/99, appeal pending before the European Court of Justice, Case C-95/04.

¹⁰⁴ See e.g. *Microsoft v. Commission*, Order of the President of the Court of First Instance of 22 December 2004, Case T 201/04 R, paragraph 400, referring to, *Michelin v. Commission*, Case T-203/01, paragraph 239, and, *British Airways plc v. Commission*, Case T-219/99, paragraph 293, and *British Airways plc v. Commission*, Case C-95/04 P, paragraph 30.

¹⁰⁵ *Virgin/British Airways*, Case IV/D-2/34.780, O.J [2000] L30/1, at paragraph 107.

¹⁰⁶ Microsoft Decision recital 1046.

¹⁰⁷ Emphasis added.

that non-Microsoft work group server operating systems are better than Windows work group server operating systems with respect to a series of features.”¹⁰⁸

- In the media player case, according to the Court, “Microsoft itself acknowledges it was only in 1999 that it succeeded in developing a streaming media player that performed well enough, given that its previous player, NetShow, ‘was unpopular with customers because it did not work very well’.”¹⁰⁹

From this evidence, the Court draws the inference that on the basis of competition on the merits, Microsoft could not have been as successful as it was and that therefore the increase in market shares must be the result of abusive behavior.

There are two fundamental problems with the Court’s approach and the ordoliberal approach more generally. First, and most importantly, there is no obvious dividing line between “competition on the merits” and “hindrance competition”. The quality of a product is one important competitive parameter but it is not clear why other factors, such as the price, the quality of after sales service or the efficiency of a competitor’s distribution system (or quality of interaction of various products) should not be regarded as competition on the merits.

Second, (even assuming that legitimate and illegitimate competitive parameters can clearly be distinguished) the assessment of the relative merits of two offerings and any inference of abuse from an increase in market shares of the allegedly inferior product, is subject to a high risk of error. The Court’s assessment provides a good illustration. It does not take into account factors which businesses would consider when deciding which work group server operating system to purchase, most importantly the total cost of ownership, including the initial purchase price (despite the higher quality of BMW’s products, Volkswagen’s high market share need not be the result of abusive market practice).

b) Form-based Analysis and Structural Presumptions

The Court follows the ordoliberal form-based approach and relies heavily on structural presumptions. This can be seen most clearly in the tying part of the judgment.

The Commission had undertaken a detailed effects-based analysis in the WMP section of the decision, concluding in three steps: (i) that Windows provided Microsoft with a more efficient distribution system for WMP than was available to its rivals; (ii) that this advantage led content providers and application providers increasingly to adopt the WMP format; and (iii) which in turn, due to strong network effects, ultimately leads the market to tip towards Microsoft’s WMP.¹¹⁰

The Court rejects the effects-based analysis of the Commission and concludes that “the Commission’s findings in the first stage of its reasoning are in themselves sufficient to establish that [the element of foreclosure of competition] is present in this case.”¹¹¹ In other words, according to the Court, it is sufficient to establish that tying places rivals at a

¹⁰⁸ Microsoft Judgment, paragraph 652, with a reference to recital 819 to the contested Decision.

¹⁰⁹ *ibid*, paragraph 1046.

¹¹⁰ *ibid*, recitals 843-878, 944 and 946.

¹¹¹ Microsoft Judgment, paragraph 1058.

disadvantage and therefore distorts the market structure. In the Court's view, this disadvantage was clearly established as "no third party media player could achieve [Microsoft's] penetration without having the advantage in terms of distribution that Windows Media Player enjoys as a result of Microsoft's use of its Windows client PC operating system."¹¹² Likewise, Microsoft has an advantage over its rivals if the computer manufacturer or the end-user obtains Windows with a media player already included.¹¹³

The Court also points out that evidence of continued competition in the market does not invalidate the conclusion of foreclosure of competition:

"Admittedly, as Microsoft contends, a number of OEMs continue to add third party media players to the packages which they offer to their customers. It is also common ground that the number of media players and the extent of the use of multiple players are continually increasing. However, those factors do not invalidate the Commission's conclusion that the impugned conduct was likely to weaken competition within the meaning of the case law."¹¹⁴

The Court's analysis of the refusal to supply abuse is more difficult to characterize. Unlike all other Article 82 categories of abuses, the Community Courts had in the past defined abusive refusal to deal or license very restrictively. The approach in refusal to supply was an island of consumer welfare analysis in a sea of otherwise form-based ordoliberalism.

In the refusal-to-supply portion of the case the CFI seems to have taken a step back from the ECJ. The ECJ added the new-product test for refusal to license intellectual property on top of the already stringent indispensability and elimination of competition tests for physical property. This test would seem to require evidence that the conduct would not just eliminate competition, and whatever benefits that may come from that, but also eliminate a new product that consumers would not be able to get otherwise. The CFI replaced this with its "limits technical development" test which would seem to apply for almost any refusal to license intellectual property.¹¹⁵

The shift by the Microsoft Judgment represents a noticeable shift in refusal to supply cases from a weak *per se* legality analysis towards a more ordoliberal approach that can also be seen from the increasing use of structural presumptions. Thus, the CFI observes:

"While it is true that on the date of adoption of the contested decision those competitors were still present on the market, the fact remains that their market share fell significantly as Microsoft's share increased rapidly, notwithstanding the fact that some of them, particularly Novell, had a considerable technological advantage over Microsoft."¹¹⁶

The evidence in support of a causal link consists of the fact that the shares declined and survey evidence that Microsoft's rivals scored more highly than Microsoft on certain dimensions. Thus the emphasis is on the refusal to supply placing rivals at a competitive disadvantage and thereby distorting the market share.

¹¹² Microsoft Judgment, paragraph 1039.

¹¹³ *ibid*, paragraphs 1041, 1043 and 1048.

¹¹⁴ *ibid*, paragraph 1055.

¹¹⁵ *ibid*, paragraph 665.

¹¹⁶ *ibid*, paragraph 428.

Furthermore, the Court explicitly rejects the need to establish any (actual or likely) harm to consumer welfare:

“[I]t is settled case law that Article 82 covers not only practices which may prejudice consumers directly, but also those which indirectly prejudice them by impairing an effective competitive structure (...). In this case, Microsoft impaired the effective competitive structure on the work group server operating systems by acquiring a significant market share on that market.”¹¹⁷

c) *Shift from Dynamic to Static Competition*

The Court’s interpretation of the “new product” test means to lower the threshold noticeably compared to *Magill*, in other words, it shifts the balance between (*ex ante*) dynamic competition (through increased incentives to innovate) and (*ex post*) static competition (through price competition) in favor of the latter. At a time of increasing importance of innovation, such a shift is hard to justify.¹¹⁸

3. *The Court’s Ordoliberal Approach is Inconsistent with Modern Economic Theory and Evidence (as well as Other Aspects of EC Competition Policy)*

The ordoliberal approach adopted in the Microsoft case (and indeed in previous cases such as *Michelin II* and *BA/Virgin*) is incompatible with modern economic theory and evidence and in particular raises three fundamental problems:

First, many of the underlying assumptions of ordoliberal competition policy such as the belief that there is a clear causal relationship between market structure and degree of competition (also known under the name of structure-conduct-performance paradigm) have failed the test of time.

Second, the resulting broad *per se* prohibition for behavior such as tying is inconsistent with the “prior belief” of economics that such behavior is generally welfare enhancing and only rarely anti-competitive.

Third, as we will explain in further detail in the following section, the Court’s form based approach makes it prone to adopting unsound criteria to define unlawful behavior...

B. *Defining Abusive Behavior: The CFI’s ”Separate Product” Test in the Tying Part of the Microsoft Judgment*

The Microsoft Judgment does not only raise questions regarding the overall framework of its analysis but also about specific criteria applied to define abusive behavior. One criterion in particular deserves a closer look: the separate product test in the tying part of the Microsoft Judgment. As mentioned in the previous section, one of the key legal issues of the tying case concerned the interpretation and scope of the ”separate product” test, which is the second element of the four-pronged test used by the Commission to identify abusive tying.

¹¹⁷ *ibid*, paragraph 664.

¹¹⁸ Recognizing this concern, in a speech given on March 12, 2008, Bo Vesterdorf, the former President of the CFI and a member of the Grand Chamber at the time of the Microsoft Judgment, noted that, “It would be unfortunate if it had a negative effect on the incentives to invest.” See Microsoft Judgment paragraph 561.

Were the Commission and the Court correct in drawing the conclusion that Windows and WMP were separate products on the basis of the (uncontested) fact that consumers obtained media players separately and independently from operating systems (i.e. that media players were separate products)? Or was Microsoft correct in that the Commission should have established that there was significant consumer demand (either from OEMs or end-users) for operating systems which came without media players?

The two different interpretations of the separate product test are more than a semantic quibble. While in many instances (such as primary products and consumables) both versions of the separate product tests will lead to the same result, in a range of cases, the outcome will be fundamentally different as it will depend on different factual issues. To assess the relative merits of both versions of the separate product test, it is worth looking at (a) their underlying rationale and (b) the circumstances where they lead to different outcomes.

a) *Rationale of the Separate Product Test*

The rationale for Microsoft's interpretation of the separate product test has been provided by the US Court of Appeals in *Microsoft III*.¹¹⁹

A starting point of the US Court of Appeals was that tying may have harmful (as well as beneficial) effects: on the one hand, a tie "[impairs] a buyer's freedom to select the best bargain",¹²⁰ on the other hand customers benefit from efficiencies, such as lower distribution costs. The US Court of Appeals saw the separate demand test as a "rough proxy for whether a tying arrangement may, on balance, be welfare enhancing",¹²¹ i.e. whether the customer benefits from tying outweigh the customer restrictions:

"In the abstract, of course, there is always direct separate demand for products: assuming choice is available at zero cost consumers will prefer it to no choice. Only when the efficiencies from bundling are dominated by the benefits of choice for enough customers, however, will we actually observe consumers making independent purchases. In other words, perceptible separate demand is inversely proportional to net efficiencies."¹²²

In the context of the Microsoft case, this proxy means: if customers had the choice between operating systems which came bundled with media players and "naked" operating systems, i.e. operating systems without a media player (and then obtain the media player separately), would there be significant demand (either by OEMs or by end-users) for the "naked" operating system. If the answer is yes, then this is an indication that the harm of restricting choice outweighs the efficiency benefits of tying (for a significant portion of overall demand); if (given the choice between the full and naked version of Windows) no customer wants the naked version, then this suggest that tying overall has a positive net effect on consumer welfare, in other words, convenience beats choice.¹²³

¹¹⁹ US v. Microsoft Corp., 253 F.3d 34 (D.C.Cir. 2001).

¹²⁰ Microsoft Judgment, paragraphs 47-51.

¹²¹ US v. Microsoft Corp., 253 F.3d 34 (D.C.Cir. 2001).

¹²² *ibid.*

¹²³ The answer to this question is of course crucially dependent on the relative price of the two version of Windows. If the price difference between the two versions is sufficiently large, then one can always expect demand for Windows N. The correct price difference between the full and naked version of Windows is dependent on the price for the standalone tied product. As WMP and other media player are made available for free, the Commission was correct in not imposing a price difference for the two versions of Windows.

The Court does not provide a detailed discussion about the relative merits of the two versions of the test. It, however, puts forward two arguments for rejecting Microsoft's interpretation and embracing the Commission's interpretation:

First, the Court states that "the Commission's argument finds support in the case law" and cites *Tetra Pak II* and *Hilti*.¹²⁴ While the wording of these cases may indeed be interpreted as support for the Commission, the problem with this argument is that in both cases, Microsoft's and the Commission's interpretations would have led to the same result (namely that the primary product and the consumables were separate products). In other words, the issue of which of the two versions of the separate product test is correct did not arise.

Second, the Court claims that "the concept that there is no demand for a Windows client PC operating system without the streaming media player, amounts to contending that complementary products cannot constitute separate products for the purposes of Article 82, which is contrary to the Community case law on bundling".¹²⁵ To take *Hilti*, for example, it may be assumed that there is no demand for a nail gun magazine without nails since a magazine without nails is useless. This claim reveals a misunderstanding of Microsoft's version of the separate product test. The test is not whether there is demand for the tying product (operating systems, nail guns) if the complementary product (media players, nails) did not exist. The test is whether if given the choice, most customers would want to buy two products as a bundle or whether a significant share of customers would want to make separate purchase decisions for the two products.

b) Scope of the EU Separate Product Test

The mere fact that the Court has not expressed a coherent rationale for the Commission's version of the separate product test does not necessarily mean that that version is problematic. It is therefore worth assessing whether the Commission's version of the separate product test leads to meaningful results in circumstances in which the version of the separate product test proposed by Microsoft is not satisfied, i.e. in circumstances where there is no demand for the naked version of Windows.

In these circumstances, the Commission's version of the separate product test runs into three interrelated problems:

First, there is no longer any causal link required between the "impugned conduct" and any foreclosure in the market. If, at the outset, Microsoft had made available Windows N in addition to the full version of Windows, then by definition (having assumed that Microsoft's interpretation of the separate product test is not satisfied) all customers would have opted for the full version of Windows and the effect in the market is the same as if Microsoft had only offered the full version of Windows.

Second, in such a situation, the test of "coercion" (the third element in establishing abusive tying) is either never satisfied or loses any meaning: customers are "forced" to purchase a full version of Windows which they would have bought in any event (or "prevented" from buying Windows N, which they would not have wanted had they been given the choice).

¹²⁴ Microsoft Judgment, paragraph 920.

¹²⁵ *ibid*, paragraph 921.

Finally, a tying abuse in these circumstances raises the problem that the obvious remedy (offering the component in addition to the bundle) has no effect on the market for the reasons outlined above. In other words, no one would buy Windows without WMP (this is in fact what happened in the Microsoft case, as explained further below).

The Court sidesteps these three fundamental problems by contrasting in its foreclosure analysis the actual world with Microsoft's impugned conduct with a counterfactual where Microsoft no longer offers a full version of Windows (or alternatively assumes that Microsoft's version of the separate product test is satisfied). To demonstrate this point, let us look at the Court's reasoning with respect to foreclosure:

- (i) through bundling with Windows, "Windows Media Player enjoyed an unparalleled presence on client PCs"; no third party media player could achieve such a level of market penetration;¹²⁶
- (ii) users who find WMP pre-installed on their PC are less likely to use alternative media players and the bundling provides a disincentive for OEMs to ship third party media players on their PCs;¹²⁷
- (iii) Microsoft developed streaming media only in 1999 and its previous player had been "unpopular";¹²⁸ and
- (iv) there is therefore good reason to conclude that if Microsoft had not adopted the impugned conduct, competition between RealPlayer and Windows Media Player would have been decided on the basis of the intrinsic merits of the two products.¹²⁹

The chain of logic of the Court would clearly hold, if in a world without impugned conduct, Microsoft would only make available Windows N and WMP separately. In this case WMP loses its distribution advantage, the incentives of end-users and OEMs would remain unaffected and WMP would compete on the "intrinsic merits of the two products." But as the Court itself points out,¹³⁰ the Commission does not object to the bundling of WMP and Windows, merely to the fact that Windows is not also made available without WMP. Indeed the Court's overall assessment is based on the counterfactual that Microsoft offers both a full version of Windows and Windows N.¹³¹

In a counterfactual world where Microsoft offers both a full version of Windows and Windows N, the chain of events as set out by the Court is by no means obvious or conclusive: through the full version of Windows, WMP would continue to enjoy ubiquity, end-users' and OEMs' incentives would continue to be affected and RealPlayer would continue to face the same disadvantages, unless the Court could show that a significant number of OEMs or end-users, if given the choice, would opt for Windows N, thereby destroying the ubiquity advantage of WMP.

Unfortunately, having rejected the correct version of the separate product test, the Court does not address this critical issue anywhere in its judgment. It would seem apparent as a matter of economic logic that there would not have been significant demand

¹²⁶ *ibid.*, paragraphs 1038 and 1039.

¹²⁷ *ibid.*, paragraph 1041.

¹²⁸ *ibid.*, paragraph 1046.

¹²⁹ *ibid.*, paragraphs 1040 and 1046-1047.

¹³⁰ *ibid.*, paragraph 1150.

¹³¹ *ibid.*, paragraphs 1148 to 1150.

for the unbundled version of Windows after May 1999 when the claimed abuse began.¹³² It is common experience that media players are widely available for free.¹³³ It was therefore not surprising that when it came to the remedy the Commission did not insist that Microsoft charge a lower price for the version of Windows without a media player than for the version with a media player. Such a price difference could not be sustainable so long as Microsoft like other vendors continued to make Windows Media Player available separately for free. Computer manufacturers and end-users could have purchased the lower priced version and installed Windows Media Player at no cost. Microsoft in fact offered Windows and Windows N at the same price. Not surprisingly during the period between offering Windows N and the time of the hearing, no computer manufacturer in the world chose to install Windows N on any of their computers. Retailers bought 1,787 copies which amounted to less than 0.005 percent of the copies of all sales of Windows XP sold at retail in Europe; no information is available on how many of those copies were bought by or installed by consumers.^{134 135} In theory, one could make the argument that in 1999 there might have been demand for Windows N which due to Microsoft's behavior has evaporated in the meantime.

C. Scope of Judicial Review and Standard and Burden of Proof

More than 50 years after the coming into force of the EC competition law regime, neither the scope of judicial review nor the burden and standard of proof in competition law was entirely clear. The Microsoft Judgment has helped to clarify some issues and has obscured others.

1. Scope of Judicial Review

At the outset of its judgment¹³⁶ the CFI sets out the extent of its judicial review. In doing so, it sends a mixed message: on the one hand, it highlights that the Court's "review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of power."¹³⁷ On the other hand the CFI makes clear that the standard which it has applied in merger cases is, at least in principle, also applicable in Article 82 cases:

¹³² The Commission claimed that some companies wanted Windows without media players to prevent their employees from using media players at work. Microsoft Decision, recital 807. The CFI pointed to this as evidence that there was demand for the unbundled product. Microsoft Judgment, paragraph 924. However, it is hard to see how this evidence could support a tying abuse since rival media player vendors could not be foreclosed from customers that do not want media players at all. In any event computer manufacturers have not chosen to meet this claimed demand by offering Windows N.

¹³³ The Commission would only go so far as admitting that media players were sometimes available for free. Media players have long been distributed at no cost. In fact RealNetworks' 1997 10-K stated, "From its inception, the Company has strategically chosen to offer its RealPlayer software to individual users free of charge to promote the widespread adoption of its client software and speed the acceptance of Internet multimedia." In 2001, when RealNetworks's CEO Rob Glaser was asked "What's the best move you've made," he responded, "Probably making the RealPlayer free."

¹³⁴ Presentation of Jean-Francois Bellis to the CFI on behalf of Microsoft. These findings went undisputed at the five-day oral hearing.

¹³⁵ See Microsoft Judgment, paragraph 943 where the CFI dismisses this evidence on the grounds that that it can only consider evidence at the time the Decision was adopted and that doubts considering the effectiveness of a remedy do not provide that the separate product finding is wrong.

¹³⁶ *ibid*, paragraphs 85-90.

¹³⁷ *ibid*, paragraph 87.

“While the Community Courts recognize that the Commission has a margin of appreciation in economic or technical matters that does not mean that they must decline to review the Commission’s interpretation of economic or technical data. 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.”¹³⁸

In practice the extent of judicial review by the CFI has differed widely depending on the circumstances with emphasis sometimes on the former, sometimes on the latter statement.

The CFI’s restraint may be in part explained by a binary approach: if the Commission is seen to have generally done a diligent job, the Court is likely to exercise restraint; in cases where that is not the case, the Court has at times reviewed the Commission’s decision in great detail. In the *Microsoft* case, the Court clearly believed that the Commission had gone to great lengths to provide factual support for its case as the emphasis is clearly on the limited review in complex circumstances. Time and again the Court refers to the manifest error standard in rejecting Microsoft’s claims.¹³⁹

At the same time, the Microsoft Judgment confirms a trend which has been so long standing that it almost has become a law itself: the Commission always wins Article 82 on appeal as far as points of substance are concerned. During the last 20 years, the Commission has not lost a single Article 82 case on substance, while the failure rate of the Commission on points of resistance was in the region of 25%.

Table: Challenges of Commission’s Decisions in Merger and Article 82 Cases¹⁴⁰

Cases	Merger Cases	Article 82 Cases
Cases challenged before the CFI	31 (100%)	15 (100%)
Successful challenges on substantive points		
- full	<u>5 (16%)</u>	0 (0%)
- partial	<u>3 (10%)</u>	1 (7%) ¹⁴¹
- total	<u>8 (26%)</u>	1 (7%)
Successful challenges to procedural points		
- full	4 (13%)	4 (27%)
- partial	1 (3%)	1 (7%)
- total	<u>5 (16%)</u>	5 (33%)

These figures are consistent with those presented by Damien Neven. He found that the Commission won 98 percent of Article 82 cases but only 75 percent of Article 81 cases and 58 percent of merger control matters. Neven states that:

¹³⁸ *ibid.*, paragraph 89.

¹³⁹ *ibid.*, paragraphs 381, 391, 421, 526, 530, 534, 557, 618, 649 and 665.

¹⁴⁰ The merger cases reviewed are the cases in which the Commission has found that the merger in question did constitute a merger under the EC Merger Regulation and which have subsequently been challenged. The Article 82 cases reviewed are the cases where the Commission found that Article 82 had been infringed and where these decisions were subsequently been challenged. Only decisions made since 1990; i.e. since the current merger regime came into force; have been reviewed.

¹⁴¹ See *Irish Sugar v. Commission*, Case T-228/97.

“The Commission’s record with respect to Article 82 is striking in absolute terms but also relative to the other provisions. The difference can possibly be related to the nature of the evidence brought forward in these procedures: [...] Article 82 has remained focused on form, whereas the Merger regulation and increasingly Article 81 (at least with respect to vertical agreements) are focusing on effects, which involves the development of economic theories and evidence. Such differences in success rates are consistent with the view that the scope for disagreements is greater when economic theory and evidence is important. [...]”¹⁴²

The clear difference in outcome may indeed be partly explained by the form-based approach under Article 82 which makes it easier for the Commission to win on substance. It raises, however, the question why it is that in Article 82 cases, where the rules are more form-based and economic theory and evidence less relevant, the analysis is nevertheless so complex that “the Court’s review is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether facts have been accurately stated and whether there has been any manifest error of assessment or misuse of power”. While in merger cases, where the rules are effects-based and economic theory and evidence matter more, the Court has shown far fewer inhibitions to intervene. Part of the answer to this question may be found in the Court’s greater willingness to presume that mergers are more benign than the activities of dominant firms.

Whatever the origins of the Court’s restraint in judicial oversight of the Article 82 cases, post Microsoft Judgment, the Commission has currently virtually boundless discretion in shaping policy with respect to dominant firms.

2. *Burden and Standard of Proof*

The Court clarifies the burden of proof in Article 82 cases and in particular answers the question where the burden lay to balance any efficiencies and harm to competition:

“[A]lthough the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.”¹⁴³

When it comes to the standard of proof, however, the Court adds to the existing confusion. Microsoft had argued that the Commission, by referring to the “risk of eliminating competition “had failed to meet the requisite standard, namely the “likelihood of elimination of competition.” The Court dismisses Microsoft’s claim:

¹⁴² “There is otherwise no clear benchmark to evaluate the absolute level of the success rate with respect to the Merger Regulation and Article 81; given the deference that the Court gives to the Commission’s analysis [...], one would expect the Commission to prevail in most ‘marginal cases’. Hence the success rate of the Commission in (infra-marginal) cases in which the parties believe that the Commission’s analysis was biased possibly as a result of a systematic problem is likely to be lower than [the 98 percent, 75 percent and 58 percent respectively]. Seen in this light, a success rate around 60 % may not impress, but this remains highly judgmental,” Damien J. Neven, “Competition Economics and Antitrust in Europe”, 2006., pp 761-762.

¹⁴³ Microsoft Judgment, paragraph 688.

“The expressions ‘risk of elimination of competition’ and ‘likely to eliminate competition’ are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.”¹⁴⁴

The Court fails to distinguish clearly between the issue whether the harm to competition needs to be established or whether the Commission is able to intervene in anticipation of harm to competition and the standard of proof. The Court also fails to acknowledge that “risk” and “likelihood” are fundamentally different thresholds.

IV. IMPLICATIONS OF THE MICROSOFT JUDGMENT FOR ARTICLE 82

A. The Judgment of the Decade?

The Microsoft Judgment had been touted as the judgment of the decade and there had been some hope that the judgment might provide a boost for the Article 82 reform process.

The Microsoft Judgment followed the traditional ordoliberal analysis. This should not have come as a surprise. If the CFI were interested in a radical policy shift towards an effects-based, consumer welfare interest, the Microsoft case was not opportune.

The Commission had more so than any other case staked its reputation on the case. And rightly or wrongly the Commission had accused Microsoft of challenging its authority by not abiding by the remedy. The CFI would have risked damage to the Commission as an institution if it annulled the Decision. At the same time the Commission was seen as having done a diligent job. It had spent five years on the case, issued three statements of objection, and issued a dense 301 page Decision. The Community Courts have generally shown great deference to the Commission in Article 82 cases and have supported the Commission in far less diligent decisions. Furthermore, it was unlikely that radical or innovative thinking would have emerged from a consensus of the 13 judges that made up the Grand Chamber. Finally, the CFI could point to a number of special circumstances about Microsoft. As it repeatedly observes through the judgment Microsoft Windows is ubiquitous.¹⁴⁵ Indeed, the Commission has pointed to the exceptional nature of the case, as it is directed to an instance of super-dominance which is rarely observed.¹⁴⁶

These factors will eventually be forgotten, though, just as all of the idiosyncratic circumstances that lead to precedents fade away. One might argue that the Microsoft judgment only applies to “super-dominant” firms or ones that have “network effects” that could propel them quickly to market dominance or whose products are “ubiquitous” and important for commerce. These features are mentioned for sure by the CFI. But the legal direction of the judgment is not tied to those concepts. The CFI’s loosening of the

¹⁴⁴ *ibid*, paragraph 561.

¹⁴⁵ Microsoft Judgment, paragraphs 979, 980, 982, 983, 987, and 1069.

¹⁴⁶ Microsoft Decision, recital 435, footnote 560.

Bronner/Magill/IMS standards including the treatment of new products and the risk of elimination of competition were not predicated on a firm having a monopoly market share or network effects. Nor were its application of the separate products test or its conclusion that foreclosure could be inferred entirely from the nature of the impugned conduct. The ordoliberal threads that run through the judgment were not predicated on anything peculiar to Microsoft. The ECJ will not have the opportunity to affirm any of these points since Microsoft declined to appeal. But the Grand Chamber of the CFI has spoken and its views will be quoted back until either the CFI or the ECJ changes course. The Commission, and complainants, will therefore heed it.

B. Open Floodgates?

One therefore has to confront the implications of a case which arguably has significantly lowered the threshold for an obligation to license IP rights and may also have widened the scope of abusive tying. At the very least, the Microsoft case has confirmed the broad, sweeping *per se* prohibition and the reluctance of the Court to engage in a detailed judicial review in Article 82.

Previous Article 82 cases with equally sweeping *per se* prohibitions, such as *Michelin II*, have not brought the European economy to its knees. Will the impact of the Microsoft Judgment be equally limited? The lack of impact has generally been attributed to the restrictive enforcement (in terms of numbers of cases brought rather than substantive tests): the large majority of dominant firms may be in breach of the Article 82 pricing rules, but the chance of an investigation being opened is similar to that of lightning striking or being caught exceeding the 55 MPH speed limit on US highways. Additionally, despite the wide ranging prohibitions that could be supported by the CFI judgment the Commission will use its prosecutorial discretion to apply implicit rules which are stricter than those approved by the Courts.

This view of the world may be overly optimistic for the following reasons:

First, due to the success of complainants in high profile cases in the EU and the increasingly hostile environment for dominant firms, the Commission is becoming the regulator of choice for many global cases, such as *Sun* and *AMD* against *Intel*, and *Micron* and *Hynix* against *Rambus*. We do not comment on the merits of these investigations but merely highlight the incentives to choose the forum with the highest enforcement thresholds.

Second, the Commission obtains considerable help from complainants who have incentives to provide it with extensive resources. Therefore, the Commission's resources are less capacity constrained than they may seem. Complainants also have the ability to sue the Commission for failing to pursue a legitimate complaint. Third, the European Court has followed the ordoliberal approach in *Michelin II* and *BA/Virgin* in the last five years and shown great deference to the Commission in these cases. The Microsoft Judgment is an exclamation point on that jurisprudence. It has increased the Commission's bargaining power and will give firms an increased incentive to agree to commitments with the Commission rather than pursuing an appeal.

Finally, the Commission is increasingly losing its position as gate-keeper to Article 82 cases as a result of a greater number of abuse of dominance cases being heard before national courts. This has two potential effects: it further increases the capacity of Article 82 disruption; furthermore, national courts are more likely to apply the CFI's judgments

literally and safeguards of the Commission's stricter enforcement priority criteria will be eroded. The attempt to strengthen the role of private litigation in the EU is likely to magnify these effects.

C. EU on Collision Course with US

The current line of abuse cases seems to have set the EU institutions on a direct collision course with the US regulators. Not only are US courts and European Community Courts at opposite ends of the spectrum in terms of economic sophistication (contrast the tying analysis of the US Court of Appeals in *Microsoft III* with that of the CFI in the EU Microsoft case), more importantly, they are at opposite ends of the enforcement spectrum: for example, it is hard to reconcile *Trinko*¹⁴⁷ with the interoperability part of the EU Microsoft case. As the EU becomes increasingly the global forum of choice for abuse of dominance cases, more and more US companies will find themselves under investigation by the Commission (Qualcomm, Intel and Apple are currently all in the dock) for behavior which in their home jurisdiction is not only permitted but often regarded as pro-competitive.

D. The Impact of the Microsoft Judgment on Modernization

The Directorate General for Competition of the European Commission has been considering the reform of its approach to Article 82 investigations for several years. In December 2005, it issued a draft discussion paper which proposed tests for abuse that went in the direction of the competitive effects approach.¹⁴⁸ An advisory group of academic economists also issued a paper that recommended that the Commission adopt the rule of reason approach based on a detailed analysis of competitive effects.¹⁴⁹

The impact of the Microsoft Judgment on the Commission's plans for modernization of the rules of dominant firms is not clear-cut. On the one hand the Commission may be tempted to shelve the reform proposals now that the Court has recently endorsed *per se* rules in three of the four broad areas of abuse of dominance (predatory pricing, rebates/discounts and tying) and has expanded the scope of the rules in the fourth area (refusal to supply).

On the other hand, the underlying policy reasons for reform are as pertinent as ever (if not more so, and after the Microsoft Judgment). The policy regarding dominant firms is an anachronism of the early years of EC competition law, at odds with modern economic thinking. It is inconsistent with the remainder of EC competition policy, in terms of policy goals and policy approach. The current approach under Article 82 fails because it relies upon broad sweeping prohibitions, which capture many efficient business practices, without either a proper assessment of competitive harm or the counterbalance of

¹⁴⁷ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP (02-682) 540 U.S. 398 (2004) 305 F.3d 89.

¹⁴⁸ "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses", Brussels December 2005. See <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>. See also O'Donoghue and Padilla, "The Law and Economics of Article 82", Hart Publishing, 2006. See furthermore Ahlborn, Denicolò, Geradin, and Padilla, "DG Comp's Discussion Paper on Article 82: Implications of the Proposed Framework and Antitrust Rules for Dynamically Competitive Industries", 31 March, 2006. See <http://ec.europa.eu/comm/competition/antitrust/art82/057.pdf>.

¹⁴⁹ Report by the EAGCP, "An economic approach to Article 82", July 2005. See http://ec.europa.eu/comm/competition/publications/studies/eagcp_july_21_05.pdf.

a well-developed theory of objective justification. As a result, the law has become more unpredictable.

The Commission may feel that a more sophisticated exercise of their prosecutorial discretion will provide a satisfactory cure for these ills. Commissioner Kroes was at pains to stress that she was committed to a “stable, fair and restrained” regulatory environment. Welcome though that is, regrettably, it does not provide a sufficient substitute for a clearly-stated and well-founded policy for Article 82. The increasing role of national competition authorities and courts with parallel powers under either Article 82 itself or their national analogues makes a fundamental reform of Article 82 absolutely necessary.

E. The Stability of the Status Quo

The status quo of EU policy towards dominant firms is not tenable in the long run. There is now considerable tension between the EU approach towards merger and restrictive agreement, which follows, more and more, a consumer welfare approach and the EU approach towards dominant firms. Effects which would be regarded as welfare enhancing in a merger control context could be regarded as problematic under Article 82. This level of schizophrenia is difficult to maintain in the long run.

Secondly, the Court currently grants almost unlimited discretion to the European Commission. This discretion is the result of a very wide scope of prohibition (which captures behavior which is not only welfare enhancing but also frequently practiced) coupled with a very limited judicial review. In this sense, the situation is comparable with EU merger control at the end of the 1990s, where the Court had supported the Commission invariably for almost a decade. The lack of perceived judicial review led to a certain hubris of the EU Commission’s Merger Task Force¹⁵⁰ and ultimately its dissolution after three crushing defeats in front of the Court in 2002. There is a risk that the Commission will similarly overreact in Article 82.

Finally, the increasing number of cases before national authorities and national courts will ultimately force the Courts to adopt a more rationale Article 82 policy. However, the transition from the current status quo to an acceptable solution may be long and painful.

V. CONCLUSION

The Court of First Instance has been a driving force for the modernization of competition policy in the European Community. The Directorate General for Competition has dramatically improved the rigor of its analysis since its stunning defeats in 2002 and has steadily increased its use of modern economics in its investigations. The Microsoft case provided an important opportunity for the CFI to reshape Article 82 EC or to at least signal that it was supportive of moving from form-based to effects-based analysis. Doing so would not necessarily have required the CFI to annul the Decision.¹⁵¹ That could have consisted simply of agreeing that the detailed analysis of the effects of foreclosure which the Commission had presented was in fact a necessary element of establishing an Article

¹⁵⁰ The different sector directorates of DG Competition each now have a designated “merger task force.” Together and individually they are referred to as the “Merger Task Force” or “MTF.”

¹⁵¹ For example the CFI affirmed the Commission’s decision to block the GE-Honeywell merger while rejecting virtually all of the speculative economic theories that were behind the Commission’s reasoning.

82 abuse. The CFI judgment on Microsoft was a step back not only from the CFI's modernization efforts but from the Commission's efforts as well. Time will tell whether the CFI judgment is a bump in the road or a road block towards the modernization of European competition policy.