FACULTY OF LAW
University of Lund

Master of European Affairs programme, Law (LL.M.)

Brendan Michael Greally

The Interface between Intellectual Property Rights and Antitrust law: An Overview of the Microsoft Proceedings in the US and EU.

Master thesis
10 points

Hans-Henrik Lidgard

Spring 2007

Contents

Summary

Some very significant developments in antitrust law have occurred in the last decade. Many have involved a software company that is enabling the creation of this document. Of course, I am referring to the Microsoft Corporation. Both the case, which ended in a settlement agreement in the US, and the case that is under appeal in the EU will have solemn implications for the future of technology, innovation and the free market economy. In this work, I have provided an overview of both cases and analyzed the specific realm of where intellectual property rights and competition law converge.

I first reviewed the situations where a refusal to supply a customer can lead to an infringement of Article 82 EC. Followed by an example of how such a refusal to deal can lead to an antitrust infringement under Article 82's United States counterpart, §2 of the Sherman Act. Further review focuses on situations where exceptional circumstances, combined with a refusal to license, will lead to a compulsory license. The ideas of exceptional circumstances and indispensable material led to a discussion of the essential facility doctrine and its place in EU and US juris prudence. This area was then summarized with the latest cases in both the US and EU that employ an essential facility theory.

The primer on refusals to deal and essential facilities is followed by a thorough breakdown of the Appellate decision of the US antitrust litigation against Microsoft. Their findings of exclusionary and anticompetitive conduct and lack of evidence for attempted monopolization lay the groundwork for the eventual Commission decision. The court's discussion of the appropriate test to determine anticompetitive tying of an integrated product leads to the ruling that it should be analyzed under a rule of reason analysis.

This work then naturally leads into the recent Commission decision issued against Microsoft. An overview of the decision is presented, attempting to reduce the 301-page decision into a concise and easily readable summary. Whether that was successfully accomplished or not, remains to be seen.

The final analysis in this piece focuses on two separate issues. Firstly, a brief comparative analysis is put forth exploring some of the potential considerations for the results of each respective case. Secondly, the recent *IMS* judgment, enumerating conditions which could lead to a compulsory license, is compared to the Commission's decision against Microsoft, which orders Microsoft to share interface information.

Preface

Thank you,

To my family and friends for your love and support.
To all those in Academia who have filled me with understanding and knowledge throughout the years.

Abbreviations

ABA	American Bar Association
API	Application Programming Interface
Article 82 EC	Article 82 of the EC Treaty
CFI	Court of First Instance
DG	Directorate General
ECJ	European Court of Justice
EC	Treaty Consolidated version of the Treaty establishing the European Community, OJ C325, 24.12.2002
EFD	Essential Facility Doctrine
EU	European Union
IAP	Internet Access Providers
IEAK	Ineternet Explorer Access Kit
ICP	Internet Content Provider
IPR	Intellectual Property Right
ISV	Indpendent Software Vendor
Microsoft	Microsoft Corporation
Microsoft	Case COMP/C-3/37.792 *Microsoft*
OEM	Original Equipment Manufacturer
OS	Operating System
Para(s)	Paragraph(s)
PC	Personal Computer
The Decision	The Commission's decision in Case COMP/C 3/37.792 *Microsoft*
US	United States
USSC	United States Supreme Court
Windows	Windows Client PC Operating System
WMP	Windows Media Player

1 Introduction

Both the US and EU competition authorities have spent a significant amount of manpower and resources over the last decade bringing proceedings against Microsoft for various violations of the antitrust laws. In 2000, the US District Courts ruled in favour of splitting Microsoft into two separate companies in an attempt to eliminate their monopoly powers. However, this success was short lived and ended with the appellate court's decision that eventually led to a settlement agreement keeping the company intact. In Europe, the proceedings are still ongoing. On March 24th, 2004, following a five year investigation, the Commission fined Microsoft 497 million Euro for two different violations of Article 82 of the EC Treaty. The Commission found that Microsoft had violated Article 82(b) EC in that they had refused to supply interoperability information to their competitors. The Commission also found a violation of Article 82(d) in that Microsoft had illegally tied the Windows Media Player to their dominant Windows operating system ensuring ubiquitous distribution. Microsoft has appealed this decision and is presently awaiting the decision from the court.

Both of these proceedings involve the clash of two specific legal paradigms. They are cases, which are representative of the ongoing problems with striking a balance between the right to exercise IPRs and the public's entitlement to benefit from a free market. Intellectual property rights lie at the heart of Microsoft's success. This is best illustrated in the testimony of Bill Gates, co-founder of Microsoft, when he states:

> Microsoft is an intellectual property company. We have no factories of any consequence or natural resources. Indeed, we have no physical assets of any kind that are important to the success of the company. Our products instead consist almost entirely of information we create…[1]

Such intellectual property rights may be of utter importance to Microsoft but so is having a competitive and innovative single market within the EU. The following work provides an overview of the Commission's decision against Microsoft and the Appellate decision in the US litigation. Analytical focus is placed on the issues of refusal to license within the framework of the Commission's decision. There is also a brief comparative analysis on reasons for the divergence between the two respective proceedings

1.1 Purpose

The purpose of this Thesis is to provide an overview of the Microsoft proceedings in both the EU and US. These two cases were analyzed to show the juxtaposition of the respective antitrust cases. And when both cases are reviewed side by side the similarities

[1] Direct Tesitimony of Bill Gates, P 124, *New York v. Microsoft Corp,* 224 F.Supp. 2d 76 (D.D.C 2002.).

and differences in the approaches to the cases become more accentuated. The further purpose of this thesis is to hone in on the specific intersection of where IPR and antitrust law converge in light of the Commission's decision in Microsoft and the recent *IMS* judgment.

1.2 Delimitation

I have chosen to limit my thesis in several ways so that I can maintain a sharp focus on one key issue. I have restricted my thesis to a review of the Microsoft litigation in both the US and EU. Due to the plethora of legal issues involved in both cases I have focused on one specific issue in the Commission's decision. I have limited my analysis to the refusal to supply aspects of the Commission's decision. I have also looked at how they relate to the most recent refusal to license case of the ECJ, *IMS*. I will use the IMS case as a guide to see what, if any, its implications will be in a legal analysis for the upcoming Microsoft appeal to the commission's decision.

1.3 Method and Material

In the process of writing this thesis, the traditional method for legal research and analysis was used. The sources of primary law which were used are mainly Article 82 of the EC Treaty and §1 and §2 of the Sherman Act as well as caselaw from both European and US courts. Both the Commission's Decision and the Decision of the United States Court of Appeals for the District of Columbia Circuit in *United States v. Microsoft* were given much attention. Due to the novelty and complex nature of these decisions, directly on point caselaw was rare. Therefore, secondary sources written by various legal scholars and practitioners, such as law review articles and publications were an invaluable source of insight and information.

As can be seen in the bibliography, most of the secondary sources used EC and US Documents, articles and internet sources. In writing this thesis, the only two books used were those of Valentine Korah[2], and Paul Craig and Grainne de Burca[3]. In my opinion, these works represented some of the best available and well renowned works of literature on the subject of EC Competition Law. The main reason that only two books were used is because these decisions were relatively recent and there is not substantial works available. While Korah's book has a brief summary of the decision and issues, these books were mainly used for background knowledge of Competition Law in general.

[2] Valentine Korah, An Introductory Guide to EC Competition Law and Practice, 8th ed., Oxford, Hart, 2004.

[3] Paul Craig and Gráinne de Búrca, EU Law –Text, Cases and Materials, 3rd ed., Oxford, Oxford University Press, 2003.

In my attempt to create a more understandable presentation of the issues, I have attempted to avoid highly technical language from the decisions. However, due to the nature of these cases, certain aspects of technical capabilities and information must be discussed, as they are crucial in the decisions. Where technical terms are used, I have attempted to give definitions and explanations.

1.4 Disposition

The Subsequent chapter of this thesis presents a general overview of the convergence of IPR and competition law in both the US and EU. This is done to present a complete image of the evolution and current status of this area of law. In order to fully grasp the clash that exists between these two respective areas of law, I have provided case overviews, including the most recent caselaw in each respective jurisdiction, so that the reader gains an understanding of the underlying principles at play. The chapter hones in on the idea of "exceptional circumstance" and "indispensability" as well as the "essential facility doctrine" as they are key rationales in the Commission's decision.

In Chapter 3, I provide a thorough breakdown of the Appellate decision in *United States v. Microsoft*. In Chapter 4, I provide an objective summary of the Commission's Microsoft decision. The final Chapter focuses on the interoperability issue in *The Decision* and provides a look at the Commission's decision to order compulsory licensing in light of the recent *IMS* decision. My analysis with respect to the order to share interface information and criticisms are presented. Finally, a brief comparative analysis of the US and EU proceedings is presented, with some theories as to why the cases resulted in such different outcomes.

2 Convergence of Intellectual Property Rights and Antitrust Law

2.1 Introduction

The intersection of intellectual property rights and the need to maintain competition within the common market has produced some interesting case law. In the EU, when push comes to shove, the policy of keeping the market free from anti-competitive abuses tends to outweigh an individual's or a companies right to exercise their respective intellectual property rights. This policy can even lead to the use of compulsory licensing in order to remedy an abusive situation, which hinders competition. In the US, the case law has evolved quite differently. US courts are much less likely to impose compulsory licenses and give great deference to IPRs. Both the EU and US cases have shown situations where a competitor's refusal to deal with another competitor can lead to a breach of competition law. This becomes an even more complex scenario when there is a clash between competition law and IPRs. The courts have attempted to strike a balance between the two legal rights with varying results. The results will be illustrated through cases from both the US and EU.

2.2 Refusal to supply as a breach of Article 82 EC

2.2.1 Commercial Solvents

The ECJ's seminal refusal to deal case is one involving the refusal to supply raw materials to a competitor.[4] In *Commercial Solvents* the ECJ held that under specific circumstances an undertaking in a dominant position could be abusing its position by refusing to supply a former customer. Commercial Solvents was the only supplier of the raw materials necessary to make ethambutol in the EEC.[5] Commercial Solvents had been supplying Zoja with the raw materials to make ethambutol since 1966.[6] In 1970 Zoja cancelled its order with Commercial Solvents but then subsequently tried to resuscitate that order later in the year.[7] Commercial Solvents refused to supply the materials because they had decided that they were also going to manufacture ethambutol.[8] It was this refusal to deal, in order to stifle competition and to increase

[4] Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission, Joined Cases 6/73 & 7/73, 1974 E.C.R. 223, [1974] 1 C.M.L.R. 309.
[5] Id. at para. 24.
[6] Id. at para. 1.
[7] Id. at para. 23.
[8] Id. at para. 24.

revenue by capturing the market for itself, which led to the decision by the European Commission.

The European Commission found that Commercial Solvents was in violation of Article 82 EC, in that its refusal to deal raw materials to Zoja was an abuse of their dominant position.[9] On appeal the ECJ upheld the Commission's decision in finding such a refusal to deal an abuse of a dominant position. The Court held that an:

> Undertaking which has a dominant position in the market for raw materials and which, with the object of preserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position…[10]

This is an example of a company in a dominant position that refuses to deal in order to strengthen their position in a down stream market. Their refusal to supply Zoja left them without the raw materials necessary to manufacture the product leaving Commercial Solvents with less competition. Generally an undertaking has no duty to deal with competitors in the market, but under these specific circumstances the Court held that refusing to deal was an abuse of their dominant position.

2.3 Refusal to deal as a breach of §2 of the Sherman Act

2.3.1 Kodak II

In the US a company has no specific duty to supply or work with competitors.[11] However like many rules there are exceptions. The presumption that invoking an IPR is a valid business justification has been rebutted in cases where it is shown to be a pretext.[12] In *Kodak II* the court held that "neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct.[13]

In *Kodak II* several independent service organizations (ISOs) sued Kodak alleging that their policy of not supplying replacement parts to ISOs prevented them from competing on the market claiming that it was a breach of §1 and §2 of the Sherman Act.[14] Kodak had previously supplied the parts but had changed their policy as

---

[9] Id. at para. 3.
[10] Id. at para. 25
[11] Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951) (right to refuse to deal is "neither absolute nor exempt from regulation").
[12] Image Technical Services, Inc. v. Eastman Kodak Co.
125 F.3d 1195 (9th Cir. 1997).
[13] Id. at 1219.
[14] Id. at 1201.

competition had increased.[15] Due to this policy change, ISOs could not obtain the parts in order to compete with Kodak in repairing the machines.[16]

In deciding the case the court found "that the proffered business justification played no part in the decision to act."[17] The court held that the "Kodak's parts manager testified that patents "did not cross [his] mind" at the time Kodak began the parts policy."[18] Finally the court decided that "it is more probable than not that the jury would have found Kodak's presumptively valid business justification rebutted on the grounds of pretext."[19] Even though Kodak held valid patents, only sixty five of the thousands of items which were summarily refused to the ISOs were patented.[20] This fact and the evidence suggesting that invoking the IPRs were just a pretext to protecting their competitive advantage, led the court to find an antitrust violation.

2.4 Exceptional Circumstances

2.4.1 Magill

One of the first cases that hinted at the use of the essential facility doctrine in the realm of intellectual property rights was a case involving the clash of copyright law and competition law. In *Magill* the ECJ dealt with a situation where the owner of a copyright was invoking their IPRs in a way that was detrimental to a downstream market.[21] In this case ITV, RTE and BBC were broadcasting television programming across Ireland and Northern Ireland.[22] They all held copyrights in their program listings and each published their own weekly guide of their programming.[23] Information on their daily programming was issued free of charge to newspapers and periodicals.[24] Magill entered into an agreement with the television stations where they were allowed to print info on all the stations but never more than 48 hours in advance.[25] When Magill was prevented from publishing a weekly listing of the programming they filed a complaint with the European Commission.

The Commission found in favor of Magill and ordered the stations to license the listings to Magill. The CFI upheld the decision. The Court found that by preventing the use of the copyrighted material they were stopping the release of a new

[15] Id.
[16] Id.
[17] Id. at 1219.
[18] Id.
[19] Id. at 1219-20
[20] Id. at 1220.
[21] Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission, Joined Cases C-241/91 P & C-242/91 P, 1995 E.C.R. I-743, [1995] 4 C.M.L.R. 718.
[22] Id. at para. 6.
[23] Id. at para. 8.
[24] Id. at para. 9.
[25] Id.

product that would directly compete with their own guides.[26] The ECJ upheld the decision of the CFI stating "that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct."[27] The court found that the use of one's copyright to prevent a potential competitor from competing on a downstream market amounted to an abuse of a dominant position. This "prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellant did not offer and for which there was a potential consumer demand."[28] It was this conduct that led the court to find a violation of Article 82 (b) EC.

The Court enumerated three major circumstances that aided in the holding. First, the prevention of a new product ever reaching the market for which there was a potential consumer demand. Second, the lack of justification for the refusal to supply in the realm of broadcasting or the business of publishing television viewer guides. Third, the reservation of the secondary market for the television stations for themselves by blocking access to the "basic information which is the raw material indispensable for the compilation of such a guide."[29] The Court never used the exact terms "Essential Facility Doctrine" however the idea of "indispensable" raw material and "exceptional circumstances" run parallel to the doctrine. The use of the EFD in both the US and EU will be expounded upon further in the following sections.

2.5 Essential Facility Doctrine

In certain cases plaintiffs argue that a facility is essential to remain competitive on a market and the refusal of access to this facility is a violation of the antitrust laws. These cases require a specific set of facts that would override the general rule that undertakings have no duty to deal with competitors. In the EU, recent case law has seen the use of the EFD as a rational for issuing a compulsory license remedy to maintain a competitive market.[30] In stark contrast, the US has continued to move away from using the EFD. In fact, recently in *Trinko,* the USSC refused to acknowledge or adopt the doctrine.[31]

It is not entirely clear in light of the ECJ's most recent case law, as to what extent the EFD has been adopted within the area of intellectual property rights.[32] However it is clear that the rational behind the EFD was used in reaching the recent *IMS* decision. There is a similar situation evolving across the Atlantic, where the USSC was dismissive of the EFD in recent case law, and ultimately did not adopt it.[33] However, while it appears that the ECJ is moving closer to embracing the EFD, the USSC is moving away from it.

[26] Supra at fn 18.
[27] Id. at para. 50.
[28] Id. at para. 54.
[29] Id. at paras. 54-56.
[30] See Case C-481/01, IMS Health GmbH & Co. v. NDC Health GmbH & Co. KG (2004).
[31] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP 540 U.S. 398 (2004).
[32] See Supra. fn 27.
[33] Supra. fn 28.

The EFD is used in refusal to deal situations where one party maintains control over a facility that is essential for another party to remain competitive in a relevant market. The EFD has been used by the European Commission in many different areas. It has been addressed in cases dealing with access to airport operations and access to ports as well as rail services. The reasoning of the EFD has worked its way into ECJ case law but has never been explicitly referred to by name. It has been used by many Federal courts but not adopted by the USSC. There is sound logic behind the EFD; however a specific set of circumstances needs to be present for its application to be appropriate.

2.5.1 Origins of the Essential Facility Doctrine

The essential facility doctrine was born out of U.S. juris prudence. The first case involved an agreement between railway companies.[34] This agreement existed amongst several companies.[35] This agreement involved the ability to control a bridge that could be used at the exclusion of railway companies not in on the agreement.[36] The USSC held that not allowing the other companies access to use of the bridge would lead to driving them out of the relevant market which led the Court to require the members of the agreement to share the bridge.[37] A second case, *Associated Press*, involved denial of access to news stories.[38] The Court held that such information was crucial to the market and that competitors could not function without access to that information.[39]

Later cases in the US expanded and refined the reach of the essential facility doctrine. In *Otter Tail Power Co.* the Supreme Court held that in certain situations, forced access to power grids may be necessary to improve competition.[40] In *Aspen Skiing* a situation arose where three ski mountains who had previous dealings with a smaller solo mountain refused to deal with their former business associates. The four ski resorts had previously shared ski passes and tickets but now the three dominant resorts were refusing to deal, much to the detriment of the smaller resort.[41] The Court held that this was anticompetitive in that there was no commercial justification for the refusal to deal and ordered them to work together.[42]

Given that this doctrine is dealt with on a case by case basis and the issues are very fact specific, the case law in the EU has evolved slightly differently than that of the US. In the recent *IMS* case the ECJ used the rational of the EFD in finding for the plaintiffs, whereas in *Trinko* the courts would not apply the doctrine. Case law has evolved which enumerates the requirements necessary to apply the doctrine. The factors

[34] United States v. Terminal Railroad Association, 224 U.S. 383 (1912).
[35] Id.
[36] Id.
[37] Id.
[38] Associated Press v. United States, 326 U.S. 1 (1945).
[39] Id.
[40] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).
[41] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).
[42] Id.

necessary to apply an EFD rational in the EU are laid out in the *IMS* decision. This case will be discussed later in this work. In the US, the courts have established that a plaintiff relying on the EFD must show "(1) control of the essential facility by the monopolist; (2) a competitor's inability…to duplicate the essential facility; (3) the denial of the use of the facility…and (4) the feasibility of providing the facility."[43]

2.6 Recent US caselaw dealing with the Essential Facility Doctrine

2.6.1 Trinko

The most recent US case touching on the EFD was decided in 2005. In *Trinko* the Court looked at whether the EFD should be applied in a case where the dominant telecommunications company was being accused of failing to comply with their duties under the Telecommunications Act of 1996.[44] Under the Act, Verizon was required to share their network with competitors.[45] A local telephone customer, the law firm of Curtis V. Trinko, brought a claim alleging that Verizon was discriminating against AT&T, their service provider.[46] AT&T was a competitive local exchange carrier ("CLEC") who was granted access to the network under the Telecommunications Act.[47] The suit claimed that Verizon "has not afforded CLECs access to the local loop on par with its own access."[48] In essence they were claiming that Verizon was slow to fix network problems for the CLECs, while talking care of their own customers, making it difficult for CLECs to compete on the local market.[49]

The Court held in favor of Verizon. The Court appears to have weakened the EFD through this decision. The Court stated that it "has never recognized such a doctrine" and "finds no need either to recognize it or to repudiate it here."[50] The Court did state that their conclusion would not change even if it considered the "essential facility" doctrine crafted by some lower courts.[51] The indispensable requirement for invoking the doctrine is "unavailability of access to the "essential facility"; where access exists, as it does here by virtue of the 1996 Act, the doctrine serves no purpose."[52] This case illustrates the latest developments of the EFD at the highest court in the US. It does not sound the death knell for the EFD but shows the court's unwillingness to embrace the

[43] MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).
[44] Supra. fn 30
[45] *Trinko* at 402; see also 47 U.S.C. § 251(c) (2000).
[46] Id. at 404.
[47] Id. at 402.
[48] Amended Complaint at P 21, Trinko v. Bell Atlantic Corp., 123 F. Supp. 2d 738 (S.D.N.Y. 2001) (No. 00 Civ. 1910 (SHS) (JCF)), available at 2001 WL 34727769.
[49] Id.
[50] Trinko at 411.
[51] Id.
[52] Id.

EFD. On the other hand, as seen in IMS, the ECJ appears to be quite comfortable with using the reasoning behind the EFD in reaching their decisions.[53]

2.7 Recent ECJ Caselaw dealing with the Essential Facility Doctrine

2.7.1 IMS

The most recent ECJ judgment regarding the use of the EFD is that involving a company that is the one of the largest supplier of data on sales and prescriptions in the world.[54] IMS divided its market into 1860 small areas called bricks, allowing them to issue data to customers without specific identification of individual pharmacy sales.[55] This method became the industry standard.[56] IMS held a monopolistic position in the market until NDC and AzyX entered the market in the early nineties.[57] They were unable to work with customers using their own data and used IMS's data until they were enjoined from doing so.[58] NDC and AzyX needed IMS's data in order to operate on the German market and they were refused a license.[59] The ECJ reaffirmed the exceptional circumstances requirement used in *Magill* but also enumerated three more requirements.[60] The ECJ held that a refusal to license could be found to be an abuse of a dominant position within the meaning of Article 82 EC where the following cumulative conditions are fulfilled:

> 1.) the protected product or services is indispensable to compete in a particular market; 2.) the refusal is "such as to exclude any competition on a secondary market"; 3.) the refusal prevents the emergence of a new product for which there is potential consumer demand; 4.) the refusal is not objectively justified.[61]

The *IMS* case is a powerful example of the reasoning of the essential facility doctrine being used by the ECJ. Although not mentioned by name specifically, it enumerates a method by which those who are denied access to an essential facility may force their competitor to issue a compulsory license, if all the criteria are fulfilled. The essential facility doctrine may not be the most common approach to establish where a refusal to deal can become a breach of Article 82 or force a compulsory license, but there is no doubt that it is an available claim in the EU for those seeking such a remedy. Although neither the US nor EU courts have adopted the EFD, it is obvious that the ECJ would be more likely to apply the doctrine than the USSC. This reasoning and the requirements enumerated by *IMS* will be tested in the upcoming appeal by Microsoft against the

---

[53] See *IMS.*
[54] Id..
[55] Id.
[56] Id.
[57] Id.
[58] Id.
[59] Id.
[60] Id. at paras. 35 and 50.
[61] Id. at para. 52.

Commission's decision. Microsoft's appeal will be analyzed after a thorough breakdown of both the Commission's Decision against Microsoft and Microsoft litigation in the US.

3 The United States v. Microsoft

3.1 Introduction

On May 18, 1998, the United States Department of Justice and many state attorneys-general filed a complaint against Microsoft for violation of the antitrust laws.[62] The complaint claimed that Microsoft were in violation of §1[63] and §2 of the Sherman Act.[64] The two major claims were that Microsoft was in violation of §1 by maintaining their monopoly in the OS market and violated §2 by attempting to create a monopoly in the browser market.[65] The District Court for the District of Columbia issued its decision on the case on April, 3rd 2000.[66] Microsoft appealed to the Court of Appeals for the District of Columbia and the decision was then issued on June 28th, 2001.[67]

3.2 Relevant Market

The Appellate Court upheld the lower court's finding for the relevant market for the §2 claim.[68] The District Court had found that the relevant market was the Intel-compatible PC OS market.[69] Microsoft had a market share of over 95% in the PC OS market.[70] Despite Microsoft's arguments that certain products should have been included in the relevant market definition, the court held that Microsoft had not successfully challenged the court's findings of fact and therefore they upheld the lower court's ruling.[71]

Microsoft had argued that "middleware" products, specifically, Netscape Navigator and Java should have been included in the relevant market.[72] Both Navigator and Java were potential threats to Microsoft's OS monopoly because they exposed application programming interfaces ("APIs") that could allow cross-platform software development.[73] APIs are "routines or protocols that perform certain widely used functions."[74] Windows, as an OS, has APIs that third party software developers may use so that they can use less code to write their software.[75] This is helpful because by using

[62] United States v. Microsoft Corp., No. 98-1232 (D.D.C. 1999).
[63] 15 U.S.C. 1, 2 (2000).
[64] See United States v. Microsoft Corp., No. 98-1232 (D.D.C. 1999).
[65] Id.
[66] United States v. Microsoft, 87 F. Supp. 2d 30 (D.D.C. 2000).
[67] United States v. Microsoft 253 F.3d 34 (D.C. Cir. 2001).
[68] Id. at 51-52.
[69] Id. at 52.
[70] Id. at 54.
[71] Id. at 52.
[72] Id. at 53
[73] Id.
[74] Id.
[75] Id.

the OS APIs to do basic tasks and functions the software developers would not have to write their own code to perform those tasks.[76]

Due to the use of OS-specific APIs, a computer program needs to be altered or "ported" to be capable of running on another OS.[77] Navigator and Java had been creating APIs that were not dependent on the underlying OS.[78] The result of this was that third party software developers would be able to use the common APIs exposed by the Java or Navigator "middleware", regardless of the OS they were ported to.[79] This posed a threat to Microsoft's monopoly over OS software because the Windows OS would cease to be essential to programmers or users because if they wrote a program for middleware it would function on any computer that had the middleware program on it.[80]

Microsoft argued that middleware should have been included in the relevant market because they believed that if these programs were developed successfully then they could compete directly with Windows.[81] The Court disagreed with Microsoft, upholding the lower court's decision stating that middleware was in its early stages of development.[82] The Court went on to say that the middleware had to develop a significant amount of programs in order to over come the "applications barrier to entry."[83] They needed enough programs to lure people and programmers to start using the middleware applications.[84] There also needed to be enough of a market share so that there would be incentives for developers to write programs for it.[85]

3.2.1 Substantial entry costs to the relevant market

The Court upheld the lower court's findings that there were substantial entry costs to the relevant market from the application barrier to entry.[86] The Court indicated that this barrier originates from two areas related to software consumers, stating that "(1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base."[87] Basically, people want OSs that have the highest amount of compatible software and developers want to write software that can be sold to the biggest number of potential consumers. Therefore the entry cost for

[76] Id.
[77] Id.
[78] Id.
[79] Id.
[80] Id.
[81] Id.
[82] Id.
[83] Id.
[84] Id. at 55.
[85] Id. at
[86] Id. at 54-58.
[87] Id. at 55.

penetrating the OS market include, inter alia, the expenses of getting enough software to be made for your OS to lure enough customers and developers to use the new OS.

3.3 Exclusionary or Anticompetitive conduct

The Government had argued that Microsoft's conduct was exclusionary and anticompetitive in several ways.[88] They focused specifically on:

> (1) the way it integrated IE (Internet Explorer) into Windows; (2) its various dealings with various Original Equipment Manufacturers ("OEMs"), Internet Access Providers("IAPs"), Internet Content Providers ("ICPs"), Independent Software Vendors ("ISVs"), and Apple Computer; (3) its efforts to contain and to subvert Java technologies; and (4) its course of conduct as a whole.[89]

3.3.1 Internet Explorer integrated into Windows

In their analysis of Microsoft's behavior in their integration of IE and Windows the court of appeals looked at three particular measures taken by Microsoft.[90] They looked at 1) the way that Microsoft excluded IE from the "Add/Remove Programs' utility;
2) designed Windows so that in certain circumstances it would override the user's choice of a default browser other than IE; 3) and commingled code related to browsing and other code in the same files, so that any attempt to delete the files containing IE would result in the crippling of the OS.[91]

3.3.2 Preclusion of removal of Internet Explorer by Original Equipment Manufacturers and commingling of code

Microsoft's actions in prohibiting manufacturers from removing IE and the commingling of IE and OS code were found to be anticompetitive because it resulted in discouraging OEMs from putting in other browsers.[92] Also, this action served as a deterrent for the OEM's to install other browsers because of the related costs of testing for compatability and the ensuing customer support calls to support a non IE browser.[93]

---

[88] Id. at 58.
[89] Id.
[90] Id. at 64-65.
[91] Id.
[92] Id. at 66.
[93] Id. at 64-65.

3.3.3 The override of a user's choice of browser

The Appellate Court held that Microsoft was not guilty of anticompetitive conduct for designing Windows to override a user's choice of browser other than IE in certain situations.[94] The court held in favor of Microsoft because they put forth evidence of pro-competitive reasons for such functions.[95] The government in their prosecution had not rebutted this pro-competitive evidence and so the court overturned the ruling on this count.[96]

3.3.4 Microsoft's various dealings with Original Equipment Manufacturers

The way in which Microsoft dealt with the OEMs to prevent the supply of rival browsers is more complex. The license agreements which Microsoft entered into with the OEMs restricted the freedom of OEMs to support or distribute browsers other than IE.[97] They restricted the ability of OEMs to change the desktop appearance of Windows 95 or 98 and prevented them from removing the IE icon or software.[98] They also stopped the OEMs from changing the boot sequence, which is the array of program registrations that appear when a computer is turned on for the first time.[99] The Court did not accept Microsoft's justifications and held that this conduct was anticompetitive.[100]

3.3.5 Copyright asserted as a defense

The lower court had completely disagreed with Microsoft's assertion of their copyright as a defense stating that it "bordered upon the frivolous".[101] Microsoft had claimed that they were merely exercising their rights as valid copyright holders.[102] The Court of Appeals handled the claim by concisely stating that IPRs do not give the holders a right to violate antitrust laws.[103] The court held that they could employ such restrictions if they were used to prevent substantial alterations of their copyrighted materials.[104] The

---

[94] Id. at 67.
[95] Id.
[96] Id.
[97] Id. at 60-61.
[98] Id. at 61.
[99] Id.
[100] Id. at 64.
[101] Id. at 63.
[102] Id, at 62.
[103] Id. at 63.
[104] Id. at 68.

only restriction that was acceptable under this premise was the restriction which prohibited OEMs from automatically installing an alternative interface when the computer first turned on.[105]

3.3.6 Microsoft's attempts to get Internet Access Providers to distribute Internet Explorer

Using several programs, Microsoft launched a large scale effort to encourage IAPs to distribute IE instead of Navigator. Microsoft offered free licenses for IE to IAPs and gave financial rewards for each IE using customer that the IAP signed up.[106] Microsoft also created an IE Access Kit ("IEAK") which permitted IAPs to change and customize the IE interface.[107] These IEAKs were given to IAPs for free.[108] In addition, Microsoft entered into agreements with the IAPs where Microsoft provided access to the IAPs from Windows and in return the IAPs would promote IE exclusively or at least keep Navigator usage or distribution below a certain level.[109] The Appellate Court held in favor of Microsoft stating that there was no antitrust violation for Microsoft's free product offerings or rebate program as long as there was no predatory pricing.[110] The court went on to say that "the rare case of price predation aside, the antitrust laws do not condemn even a monopolist for offering its products at an attractive price, and we therefore have no warrant to condemn Microsoft for offering IE or IEAK free of charge or even at a negative price."[111] In light of these findings the court overturned the lower court's holding as to liability for this conduct.

3.3.7 Microsoft's exclusivity agreements

Another complicated issue is that of anticompetitive aspects of Microsoft's exclusivity agreements. Under §1 and §2 of the Sherman Act a monopolist may be liable for an exclusive deal or arrangement that is anticompetitive.[112] Under §1 or §2 an exclusive contract is prohibited where its "probable effect is to foreclose competition in a substantial share of the line of commerce affected."[113] Through the evolution of caselaw, §1 developed a higher standard for liability than for liability under §2. The lower court had applied a foreclosure standard[114] while the Appellate court used a 40% or 50%

---

105 Id at 63-64.
106 Id. at 67.
107 Id. at 68.
108 Id.
109 Id. at 67-68.
110 Id. at 68.
111 Id.
112 Id. at 45-48.
113 Id. at 69.
114 *Microsoft Trial*, 87 F. Supp. 2d 30, 52 (D.C.C. 2000).

standard in analyzing the exclusivity agreements.[115] The Courts had both agreed that the government had not established a §1 violation but stated that §2 analysis was an independent examination.[116] Under the lower standards for §2 the court upheld the decision that the exclusive deals closed a substantial percentage of the market to competitors and that Microsoft's agreements were anticompetitive.[117]

3.3.8 Microsoft's dealings with Independent Software Vendors, Internet Content Providers, and Apple Computers

It was also alleged that Microsoft's dealings with ISVs, ICPs, and with Apple Computer as distribution channels for IE were anticompetitive.[118] Microsoft wanted to use these avenues to advance IE and stifle Netscape Navigator. Similar to the situation with the OEMs, Microsoft distributed licenses to bundle IE with ICPs and ISVs software or internet content and gave them preferential technical support so that they would work with IE.[119] Microsoft even went as far as to threaten to delay or cancel the release of Microsoft's Mac Office in order to get Apple Computer to cooperate.[120] Both courts held that the deals with the ICPs did not violate the Sherman Act because the government did not establish that the conduct had a substantial effect on Navigator's distribution or usage.[121] On the other hand, the deal made with the ISVs did hinder Netscape's ability to distribute Navigator, and Microsoft had not put forth any procompetitive explanations for their conduct.[122] The Court also ruled that Microsoft's agreement with Apple Computer to exclusively distribute IE in return for Microsoft not pulling the plug on Mac Office was also anticompetitive.[123] This agreement also substantially impaired Netscape's and other's ability to distribute browsers.

3.3.9 Microsoft's conduct towards Java

The government also had alleged anticompetitive conduct in Microsoft's actions towards Java programming. In particular, Microsoft had made a version of Java that worked better with Windows than Sun Microsystem's Java but it was less portable than the Sun's Java.[124] Microsoft then took various measures to get ICPs and software developers to use

---

[115] *Microsoft Appeal*, 253 F.3d at 70.
[116] Id.
[117] Id. at 70-71.
[118] Id. at 71.
[119] Id.
[120] Id. at 73.
[121] Id.
[122] Id. at 71-72.
[123] Id. at 73.
[124] Id. at 74.

their version of Java.[125] Microsoft also pressured Intel not to work with Sun on Java.[126] The Court held that the version of Java that worked better on Windows was not anticompetitive but that their other actions however were.[127] The agreements with the ISVs to promote Microsoft's version of Java and the pressure exerted on Intel were held to be anticompetitive.[128] Stating that the lower court had not shown specific acts of Microsoft that supported a finding that their "course of conduct as a whole" was anticompetitive, the Appellate court overturned the holding.[129]

3.4 Attempted Monopolization

One of the major rulings that the appellate court overturned was the finding of attempted monopolization of the browser market. The claim failed because the government did not properly define the relevant market or establish that the market could be monopolized.[130] The court declared that the government could not rely on the liability established under §2 for Microsoft's conduct on the OS market to find liability in the browser market.[131]

3.5 Tying

The government also tried to establish that Microsoft had illegally tied products under §1 of the Sherman Act.[132] The lower court decision had enumerated the elements of tying stating that:

> "(1) two separate "products" are involved; (2) the defendant affords its customers no choice but to take the tied product in order to obtain the tying product; (3) the arrangement affects a substantial volume of interstate commerce and (4) the defendant has "market power" in the tying product market."[133]

The biggest issue in tying is the determination of what can be considered two separate products, and what may be one product that has a substantially beneficial product or "functionality" integrated in it. The lower court held that the test of whether there were two products or one integrated product has to be analyzed from the consumer's

[125] Id.
[126] Id. at 77.
[127] Id. at 75-76.
[128] Id. at 75-78.
[129] Id. at 78.
[130] Id. at 81.
[131] Id. at 80-81.
[132] Id. at 84.
[133] *Microsoft Trial*, 87 F. Supp. 2d 30, 47 (D.C.C.).

viewpoint.[134] Under this test the relevant question was whether "consumers today perceive operating systems and browsers as separate "products," for which there is separate demand" rather than "abstract or metaphysical assumptions as to the configuration of the "product" and the "market."[135] The crucial aspects of illegal tying of products is the seller's decision to use its market power over the tying product "to force the buyer into a purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."[136]

3.5.1 Per Se or Rule of Reason Analysis

Using this test the lower court held that Microsoft did illegally tie IE with the Windows OS. However, the appellate court disagreed with the lower court's test and held that it should have been analyzed under a rule of reason analysis. The court ruled that the separate products test or consumer demand test used by the lower court was designed to determine whether the tying arrangement was "welfare-enhancing, and unsuited to per se condemnation."[137] The court went on to state:

> If integration has efficiency benefits, these may be ignored by the Jefferson Parish (separate product consumer demand test) proxies. Because one cannot be sure beneficial integration will be protected by other elements of the per se rule, simple applications of that rule's separate-product's test may make consumers worse off.[138]

The appellate court went on to illustrate that the tying of Windows and IE were different from previous tying cases because IE is "physically and technologically integrated with the tying good (Windows)" and that companies in previous tying cases did not maintain that "their tie improved the value of the tying product to users and to makers of complementary products."[139] Through a rule of reason analysis, a company has the opportunity to show that the gain derived from tying outweighs the lack of consumer's choice.[140] In light of this analysis, the appellate court overruled the lower court's standard of per se analysis and went with a balancing test, which could balance the efficiency gains of "bundling" versus the detriment of loss of choice by consumers.

3.6 Aftermath

---

[134] *Microsoft Appeal, 253 F. 3d 34*, 49 (D.C. Cir. 2001).
[135] Id. at 49.
[136] Id. at 50.
[137] Id. at 87.
[138] Id. at 89.
[139] Id. at 90.
[140] Id. at 92.

As has been explained in the previous pages the decision was overruled in part, upheld in part, and remanded in part for further hearing. After this decision was issued, Microsoft reached an agreement with the government settling the case.[141] In this agreement Microsoft, inter alia, agreed not to prohibit OEMs and ISVs from adding competitive software programs, altering the desktop, or installing boot sequences that would divert users away from Microsoft products.[142] The aforementioned issues of the case were not further litigated leaving only time and speculation to further develop them through caselaw.

[141] *United States v. Microsoft*, 231 F. Supp. 2d 144, (D.D.C 2002).
[142] Id. at 171-175.

4 Commission v. Microsoft

4.1 Introduction

On March 24th 2004 the Commission issued a decision finding Microsoft guilty of violating Article 82 of the EC Treaty.[143] The Commission fined Microsoft over 497 million Euros.[144] This is the largest fine ever levied upon a single undertaking in the Commission's history. In the following pages I will try to breakdown the Commission's holding and show how they arrived at this decision. Some of the language can become confusing due to its technical nature and I will attempt to keep technical details to a minimum as much as possible. I will first lay out some of the definitions used by the Commission before delving into the analysis.

4.1.1 Definitions

Operating Systems:

are system software products that control the basic functions of a computer and enable the user to make use of such a computer and run application software on it.[145]

Work Group Servers:

are the basic infrastructure services that are used by office workers in their day-to-day work, namely sharing files stored on servers, sharing printers, and the "administration" of how users and groups of users can access these services and other services of the network (for example, applications installed on client PCs or servers).[146]

Work Group Operating Systems:

are operating systems designed and marketed to deliver these services collectively to relatively small numbers of client PCs linked together in small to medium-sized networks. [147]

Streaming Media Players:

---

[143] Commission of the European Communities, Commission Decision of 24 March 2004 (Case COMP/C-3/37.792 Microsoft), available at http:// europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf
[144] Id. at para. 1076.
[145] Id. at para. 37.
[146] Id. at para. 53.
[147] Id.

media players that are capable of playing content "streamed" (sent to the client PC as a series of small bits) over the internet without waiting for downloading.[148]

4.2 Commission's Allegations

The Commission alleged that Microsoft had abused their dominant position in two ways. Firstly, Microsoft had leveraged their position as a quasi-monopoly in the OS market for PCs into the market for Server OSs, by refusing to supply technical interoperability information to competitors in the server market. [149] This refusal caused competitor's server operating systems to not work optimally along with Windows servers and client OSs.[150] The Commission also alleged that Microsoft was leveraging its quasi-monopoly in the market for OSs for PCs in to the market for streaming media players.[151] This was accomplished by making the WMP software part of the same software necessary to run the OS for PCs.[152] In other words, WMP was integrated into the OS and was almost irremovable.

4.3 Dominant Position over the Operating Systems market

In order to find a violation of Article 82 EC the Commission had to first establish that Microsoft held a dominant position in the OS market for client PCs. The Commission used various methods for calculations and they all led to the finding that Microsoft had at least a 90% market share.[153] The Commission found that in 2000 Microsoft's market share for new client PC OSs was 92.1% when measured by units shipped and 92.8% when measured by revenues.[154] These figures increased the following year to 93.2% (units shipped) and 95.4% (revenues), and continued upwards in 2002 with 93.8% (units shipped) and 96.1% (revenues).[155] These figures present an almost irrefutable case that Microsoft is in a dominant position. In contrast, the nearest alternative to Microsoft's client PC OS would be Apple's Mac OS, with a market share of 2.9% (units shipped) and 2.2% (revenues) which pales in comparison.[156]

[148] Id. at para. 63
[149] Id. at paras. 779-784.
[150] Id.
[151] Id. at paras. 877-878.
[152] Id.
[153] Id. at paras. 431-435.
[154] Id. at para. 431.
[155] Id.
[156] Id.

4.3.1.1 Barriers to entry: Network effects

The Commission held that barriers to entry in the client PC OS market helped reinforce Microsoft's dominant position in the market.[157] The fact that over 90% of the market was using the windows OS led more people to want to use it so that their computers could communicate well with more people.[158] This is what is known as a "network effect". The classic example is that of a telephone: the more people that have a phone the more valuable the device becomes. There are also indirect network effects that can create a barrier to entry into the market which can be seen in the way that Independent Software Vendors focus on products that will work with Windows.[159] The Commission stated that "the more popular an operating system is, the more applications will be written to it and the more applications are written to an operating system, the more popular it will be among users."[160]

It is these barriers that helped insulate Microsoft from competitors allowing them to act independent of other companies. The Commission held that it would be extremely difficult, risky, expensive and very likely unsuccessful for a competitor to attempt to enter into the client PC OS market due to the fact that consumers would not purchase a OS "without a wide range of applications already available, tested and used by other people."[161] This kind of indirect network effect has also been called the "applications barrier to entry", as was touched upon previously in my analysis of the litigation against Microsoft in the US.[162] Another barrier to entry also exists if it is cost prohibitive to change to new systems.[163] This can occur because companies may have to spend more money on new equipment or learn how to use a new system.[164] This is known as "switching" or "learning costs."[165]

The Commission concluded that in light of Microsoft's extremely high market shares and the high barriers to entry, Microsoft was in a dominant position under Article 82 EC for client PC OSs.[166] The Commission went further and held that not only did Microsoft have a dominant product on the market for client PC OSs but Windows represented the "de facto standard operating system product for client PCs."[167]

---

[157] Id. at para. 448.
[158] Id. at para. 438.
[159] Id. at para. 448.
[160] Id. at para. 449.
[161] Id. at para. 453.
[162] Id. at para. 459.
[163] Roberto Pardolesi and Andrea Renda, *The European Commission's case against Microsoft: Kill Bill,* 27 World Competition Law and Economics Review 513, pp. 521-535 (2004).
[164] Id.
[165] Id.
[166] Id. at para. 471.
[167] Id. at para. 472.

4.3.1.2 Overwhelmingly Dominant Position

The Commission found that not only was Microsoft in a dominant position but that they were in an "overwhelming dominant position."[168] Microsoft admitted in their response to the supplementary Statement of Objections that "it held a dominant position in the supply of operating systems that run on personal computers ("PCs")."[169] The Commission seemed to be trying to stress just how dominant Microsoft was when it stated that "Microsoft, with its market shares of over 90%, occupies almost the whole market-it therefore approaches a position of complete monopoly, and can be said to hold an overwhelmingly dominant position."[170] In using such powerful language the Commission cited to the previous opinion of Advocate General Fennelly in the *Compagnie Maritime Belge* decision from 2000.[171] In this opinion "Advocate General Fennelly talked of a concept of "superdominance" and highlighted the "particularly onerous special obligation" affecting an undertaking which enjoys a position of "overwhelming dominance verging on monopoly.""[172]

The Commission also found that Microsoft was dominant over the market for OSs for servers.[173] Using different methods of calculation the Commission determined that the market share for work group servers was conservatively estimated to be at least 60%.[174] They also found that since applications were capable of being run on work group servers, the indirect network effect of applications barriers to entry were also present.[175] The Commission also held that there were other network effects that acted as a barrier to entry, such as the way that it was much easier to find skilled technicians for the work group server OS because it was the market leader.[176] The Commission firmly established Microsoft's dominance and then went on to explain how they abused this position.

4.4 Refusal to supply interface Information to competitors selling servers

[168] Id. at para. 435.
[169] Id. at para. 429.
[170] Id. at para. 435.
[171] Joined Cases C-395/96 P & C-396/96 P, Compagnie Maritime Belge and others v. Commission (Cewal) [2000] ECR I-1365, opinion of Advocate General Fennelly
[172] *The Decision* at para. 435 (citing Joined Cases C-395/96 P & C-396/96 P, Compagnie Maritime Belge and others v. Commission (Cewal) [2000] ECR I-1365, opinion of Advocate General Fennelly, at paragraph 137.)
[173] *The Decision* at para. 541.
[174] Id. at para. 499.
[175] Id. at para. 516.
[176] Id. at para. 520.

The Commission also accused Microsoft of abusing their dominant position by refusing to supply interoperability information to their competitors. They accused Microsoft of augmenting their dominant position over the client PC OS market to the adjoining market in OSs for servers.[177] The Commission held that refusing to supply the information necessary to design competitive programs for work group servers which were compatible with Windows was an abuse.[178] They claimed that it risked eliminating competition in the server market, suppressing innovation and seriously reducing the consumers' choice by locking them in.[179] Much to the advantage of Microsoft, the withholding of this information shut out competitors from being capable of designing work group servers that were fully compatible with Windows.

The decision also reviewed several cases on refusal to supply including *Commercial Solvents, Magill, Tierce Ladbrokes, Bronner,* and *Volvo.*[180] These cases were used to establish that a refusal to supply can in exceptional circumstances amount to an abuse under Article 82. In the commission's reading of *Magill* they held that "there is no persuasiveness to an approach that would advocate the existence of an exhaustive checklist of exceptional circumstances."[181] This belief that the exceptional circumstances were not exhaustive runs counter to the ECJ's holding in *IMS* which was issued less than a month after the Commission's decision. This will be discussed further in this work. The Commission interpreted the ECJ's caselaw to mean that the totality of the circumstances in a refusal to deal case needs to be analyzed in reaching a decision on whether there was an abuse.[182]

4.4.1 Exceptional Circumstances

In order to establish that refusing to supply the interoperability information was an abuse, the Commission had to show that this situation was one with exceptional circumstances that necessitated intervention. The Commission found that several factors, when added together, created the necessary exceptional circumstances.[183] They held that Microsoft's refusal to supply Sun Microsystems was part of larger pattern of behavior in which they refused to supply sellers of work group servers with the necessary information needed for interoperability.[184] The Commission also raised the issue of refusing to supply after having previously supplied information necessary.[185] This disruption of previous levels of supply could very well turn out to be a key issue. This cutting off of information

[177] Id. at paras. 779-781, 1065.
[178] Id. at paras. 779-784.
[179] Id. at paras. 585-589, 781, See also, F. Leveque, "Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case," (2005) 28 World Competition Law and Economics Review 71.
[180] Id. at paras. 548-559.
[181] Id at para. 555.
[182] Id.
[183] Id. at paras. 573-577.
[184] Id.
[185] Id. at paras. 578-84.

appears to be an attempt to bring the case under the reasoning of other cases where undertakings had refused to supply current customers.[186]

4.4.2 Risk of elimination of competition

The Commission analyzed Microsoft's behavior with two key elements in mind.[187] The first was Microsoft's market strength on the client PC OS market.[188] The second was that they considered the interoperability with the client PC OS to be of significant competitive importance in the work group server OS market.[189] The Commission held that Microsoft's behavior cultivated a high risk that competition in the supply of work group servers could be eliminated.[190] They also held that not supplying the interoperability information led to the limiting of technical development to the prejudice of the consumer, which is in direct conflict with Article 82(b) EC.[191] It was held that because of the lack of interoperability information consumers were locked into Windows for work group server OSs, prohibiting consumers from benefiting from any competitor's innovations.[192] This also led to a situation where competitors could not break into the market with their innovations leading them to give up on developing new merchandise.[193] The Commission was weary of Microsoft's potential success at eliminating other competitors out of the market for work group servers, stating that if Microsoft was successful it would have a significant effect on innovation.[194] The rational was that if Microsoft was the only innovator on the market, then they would be the only company producing new products, and therefore would not have competition at their heels to spur new development, and innovation would grind to a halt.

Before Microsoft gained a significant market share in the work group server OS market there was an exchange of interoperability information.[195] Because they did not have any substantial shares in the market it was to Microsoft's advantage to have their client PC OSs work well with their competitor's non-Microsoft work group server OSs. This all changed when Microsoft began to gain significant market share in the server market.[196] Now, there was no need to get "in" with other competitors and, starting with Windows 2000, that Microsoft started to hold back interoperability information that it had once openly supplied to competitors.[197] This is when the market continued to shift in Microsoft's favor and other competitors market shares continued to slide.[198] The

---

[186] See *Commercial Solvents.*.
[187] Id. at para. 586.
[188] Id.
[189] Id.
[190] Id. at paras. 585-562.
[191] Id. at para. 693.
[192] Id. at para. 694.
[193] Id.
[194] Id. at para. 725.
[195] Id. at para. 587.
[196] Id.
[197] Id.
[198] Id. at paras. 590-597. See also Leveque at pp.82-85.

Commission held that the client PC OSs of Microsoft's competitors was marginalized in the server market and this bolstered Microsoft's dominant position over the Client PC OS market.[199] The Commission was concerned that the less there was compatibility between windows and non-Windows servers the more it served to shore up Microsoft's strong market shares in the client PC OS market.[200]

4.5 Microsoft's Justification

Microsoft proffered what they believed was an objective justification for refusing to supply the interoperability information to their competitors. They avowed that:

> The objective justification for Microsoft's refusal to disclose its intellectual property rights is self-evident: those rights are meant to protect the outcome of billions of dollars of R&D investments in software features, functions and technologies. This is the essence of intellectual property right protection. Disclosure would negate that protection and eliminate future incentives to invest in the creation of more intellectual property.[201]

The Commission did not accept this justification as "self evident"[202] and went on to explain why it was unacceptable, focusing in on moral rights. The Commission refuted Microsoft's justification and explained that:

> The central function of intellectual property rights is to protect the moral rights in a right-holder's work and ensure a reward for the creative effort. But it is also an essential objective of intellectual property law that creativity should be stimulated for the general public good. A refusal by an undertaking to grant a licence may, under exceptional circumstances, be contrary to the general public good by constituting an abuse of a dominant position with harmful effects on innovation and on consumers.[203]

The Commission obviously believed that this was one of those exceptional circumstances that warranted intervention for the general public good by finding that this refusal to supply would hurt innovation contrary to the function of IPRs.

---

[199] Id. at para. 769.
[200] Id.
[201] Id. at para. 709 (quoting NERA Report attached to Microsoft's submission of 17 October 2003, at para. 53).
[202] Id. at para. 710.
[203] Id at para. 711.

4.6 Tying as an Abuse of a Dominant Position

As previously defined in an earlier section, a streaming media player is one which can play movies or music while continuously downloading data so that the viewer or listener does not have to wait. In determining the relevant market the Commission held that it was the market for streaming media players that was relevant, excluding other non-streaming media players as well as devices such as CD and DVD players.[204] The Commission determined that Microsoft had been tying the WMP to Windows since 1999.[205] This was a violation of Article 82(b) of the treaty.[206] The Commission went on to enumerate the four requirements needed to establish abusive tying stating that:

> (i) the tying and tied goods are two separate products; (ii) the undertaking concerned is dominant in the tying product market; (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (iv) tying forecloses competition.

The following sections of this work will show how the Commission established these four elements and found that Microsoft had illegally tied WMP to Windows.

4.6.1 Distinct Products

In order to establish that Windows and WMP were two distinct products the Commission used a consumer demand analysis. If the Commission could establish that there was separate demand for the two products then the element of separate products would be fulfilled. Microsoft argued that WMP was an integral part of Windows.[207] The Commission referenced both the *Hilti* and *Tetra Pak II* cases to demonstrate that, because independent manufacturers also produced the tied product, not integrated with a OS, there was a separate consumer demand and hence a distinct market.[208] The Commission also found that there was a not insignificant amount of consumers that choose to acquire media players that were not integrated into OSs.[209] Microsoft made the case that relatively few people would purchase Windows without WMP, however this was refuted by the Commission because Microsoft failed to acknowledge that there was other media

[204] Id. at paras. 407-425.
[205] Id. at paras. 978-984.
[206] Id.
[207] Id. at para. 800.
[208] Id. at para. 802 (citing Judgment of the Court of Justice in Tetra Pak II, at paragraph 36 and Judgment of the Court of First Instance of 12 December 1991, Hilti, Case T-30/89, [1991] ECR p. II-1439, at paragraphs 66 and 67).
[209] Id. at para. 808.

players on the market, and that if consumers were given a choice, it would not necessarily be WMP that they select.[210]

4.6.2 Overwhelmingly Dominant Position in Tying Market

Another element necessary to establish a tying violation under Article 82 EC is that the undertaking must be in a dominant position in the tying market. As previously mentioned, not only did the Commission find that Microsoft was in a dominant position in the client PC OS market but they were in an overwhelmingly dominant position.[211] They also had established that there were high barriers to entry due to the network effects, the indirect effect of application barriers to entry and the high costs of switching products.[212] It was clearly established by the Commission and even admitted by Microsoft themselves that they were in a dominant position in the market.[213]

4.6.3 Consumers Deprived of Choice

Because the software for WMP was integrated and written into Windows, you received a WMP whether you wanted or needed one whenever you purchased Windows. This was another element needed to establish a tying violation, the undertaking not giving the customer a choice to obtain the tying product without the tied product. Through the licensing model that Microsoft held with its OEMs, OEMs were required to offer Windows with the WMP pre-installed.[214] If OEMs or other consumers wanted to add another media player they could do so but they could not uninstall the WMP due to the way that it was integrated into other parts of the OS.[215] Microsoft argued that under Article 82 (d) there was a requirement that the customer be subject to a supplemental obligation and that since WMP was offered at no additional charge there was no such obligation.[216] The Commission rejected this approach holding that customers need not have to pay for the tied product in that giving it to the end users had a foreclosing effect on competition.[217] They held that as long as the end user automatically receives WMP then this creates a disadvantage for the competitors.[218]

[210] Id. at paras. 808-809.
[211] Id. at para. 435.
[212] Id. at paras. 448-471.
[213] Id. at para. 429.
[214] Id. at para. 827.
[215] Id. at para. 829.
[216] Id. at para. 830.
[217] Id. at paras. 832-832.
[218] Id.

4.6.4 Foreclosure of Competitors

The final element of tying that the Commission addressed was that of the foreclosure of competitors from the market. The Commission cited ECJ caselaw and held that it is abusive for a dominant undertaking to directly or indirectly tie products since this deprives consumers of free choice as well as blocks other producers from the market.[219] The Commission held that Article 82 EC had to been interpreted in the light of its objectives which are to ensure that competition within the internal market is not distorted.[220] It is through this interpretation that the Commission found that Article 82 EC prohibits conduct, which indirectly ties consumers, which produce similar exclusionary effects of direct tying.[221]

In determining whether there was a foreclosing effect the Commission noted that because Microsoft's shares in the client PC OS market were over 90%, the tying of WMP enabled them to obtain unmatched ubiquity on the client PC OS market.[222] Due to the tying of the two, WMP would be as ubiquitous on the market as Windows.[223] To put this in perspective, of the 121 million client PC OSs shipped in 2002, 114 million contained WMP pre-installed.[224] The Commission found that since users already had WMP on their computers they would be less likely to get another one.[225] They also held that OEMs would be less likely to add another media player as it would be cost prohibitive.[226]

The Commission held that Microsoft, through the tying of WMP to Windows, had placed competitors at a competitive disadvantage.[227] They found that Microsoft had interfered with the normal competitive process because the tying increased the application barriers to entry thereby protecting Windows and facilitating a barrier for WMP.[228] They went on to state that this shielded Microsoft from the competition of other innovative media players which could challenge the status quo, thereby reducing the flow of research and development of media players, hurting innovation in general.[229] It was found that this created a situation where there was a general deterrent effect on innovation for any technologies where Microsoft could tie with Windows in the future.[230]

[219] Id. at para. 835 (citing Judgment of the Court of 13 February 1979, Hoffmann-La Roche, Case 85/76, [1979] ECR p. 461, at paras. 98, 90 and 111).
[220] Id. at para. 836 (citing Article 3(g) of the Treaty).
[221] Id. (citing Judgment of 13 February 1979, Hoffmann-La Roche, Case 85/76, [1979] ECR p. 461, at para. 41).
[222] Id. at para. 843.
[223] Id. at para. 844.
[224] Id. at para. 843.
[225] Id. at para. 845.
[226] Id. at paras. 851-857.
[227] Id. at para. 979.
[228] Id. at para. 980.
[229] Id. at para. 981.
[230] Id. at para. 983.

4.7 Remedies for Infringement

4.7.1 Fines

After a thorough consideration of the case the Commission issued the largest fine ever imposed on a single firm. They fined Microsoft EUR 497,196,304 ($672,482,134.86[231]) for what was considered a long and "very serious infringement of Article 82 of the Treaty."[232] The fine had been issued to create a deterrent effect and then doubled due to Microsoft's substantial fiscal resources.[233]

4.7.2 Obligation to supply Interface Information for Servers

In order to remedy the refusal to supply situation the Commission held that Microsoft would be compelled to release the interoperability information.[234] Microsoft was ordered to release the interface information to their competitors in the work group server market on reasonable and non-discriminatory terms.[235] In responding to Microsoft's claimed objective justification the Commission held that:

> on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft).[236]

Microsoft was not required to turn over source code, but was required to provide the protocols necessary so that competitors in the work group servers market could design compatible servers.[237] The Commission decided that due to the fact that source could was not obliged to be turned over Microsoft's concerns over cloning were unfounded.[238] They also concluded that this would not adversely affect Microsoft's incentives to innovate merely because they were ordered to supply the interface information.[239] Microsoft were also required to appoint a monitoring trustee to ensure that they complied with the Commission's decision and also bear the cost of the trustee.[240] This obligation

[231] Present day converted value, converted on May 12th, 2007 at http://www.xe.com/ucc/.
[232] Id. at paras. 1074-1080.
[233] Id. at para. 1076.
[234] Id. at paras. 998-1009.
[235] Id.
[236] Id. at para. 783.
[237] Id. at paras. 999-1000.
[238] Id. at paras. 713-722.
[239] Id. at para. 729.
[240] Id. at paras. 1043-1048.

to supply interface information will continue as long as Microsoft is using them and up to the time when they cease to provide on line self help support for the product on their website.[241]

4.7.3 Tying Remedy

The Commission held that Microsoft would be required to offer a version of Windows for client PCs that did not have a WMP.[242] This was applicable to Windows which were licensed to end users and to OEMs that were for sale within the EEA.[243] This did not however preclude Microsoft from offering a version of Windows that contained a bundle with Windows and WMP.[244] Among other measures Microsoft was ordered to refrain from punishing OEMs who offered the untied version of Windows or from hindering the performance of other media players.[245] Microsoft was given 90 days to remedy the tying; an amount of time that the Commission considered to be sufficient to prevent the market from tipping in favor of the WMP on account of the previously mentioned network effects.[246]

[241] Id. at paras. 1000-1002.
[242] Id. at para. 1011.
[243] Id.
[244] Id.
[245] Id. at para. 1013.
[246] Id. at paras. 1016-1017.

5 Analysis

5.1 Introduction

Despite the Commission's belief that the negative impact from forcing Microsoft to provide interoperability information to their competitors, is out weighed by the positive effects on innovation as whole, I belief that the opposite is true. The Commission appears to have lowered the bar for cases in which an IPR can be overridden in exceptional circumstances and a compulsory license issued. The Commission seems to have created a test based on the general public good creating serious issues of legal uncertainty.[247] The Decision also veers away from caselaw, the tests that were enumerated in *Magill* and reaffirmed in *IMS*, and are reinterpreted employing a "totality of the circumstances test." The Commission does not turn entirely away from ECJ juris prudence in that it seems to be making a point to show that Microsoft had ended some prior dealings with competitors. This would bring the case under the seminal refusal to supply case of *Commercial Solvents*, however the instant case is far more complex than a simple refusal to supply situation.

5.2 A brief analysis of why the US and EU cases have diverged

Over the past decade both the US and EU have spent much time and effort launching antitrust cases against Microsoft. The US case has effectively been neutralized by the settlement agreement it reached with the government and the respective states. Many have been critical, feeling that Microsoft was let off with a slap on the wrist. The case in Europe began around five years after the US litigation and the case is still hotly debated. In contrast to the US situation many critics, myself included, feel that the Commission has been overly harsh in their treatment of Microsoft's business practices. The US and EU antitrust laws are somewhat similar. This begs the question of why one case has settled while the other is awaiting appeal. Theories range from differing focuses of antitrust policy to political considerations.[248]

5.2.1 Differing Policy Considerations

[247] James Killick, *IMS and Microsoft Judged in the cold light of IMS*, Vol. 1 Issue 2, December, 2004. p. 45.

[248] John P. Jennings, *Comparing the US and EU Microsoft Antitrust Prosecutions: How level is the playing field?* , Erasmus Law and Economics Review 2, no. 1 (March 2006), p 81.

US antitrust law is derived from §1 and §2 of the Sherman Act.[249] EU competition law is based in Article 81 and 82 of the EC Treaty. Even though these two respective competition law provisions are somewhat similar, "most commentators acknowledge that the US antitrust law aims to promote competition, while EU law attempts to protect competitors."[250] These differing approaches to antitrust law may present an explanation as to why the cases have had such divergent results. In the US case the appellate court refused to accept the lower courts per se analysis and remanded it for further review under the rule of reason. This was due to the disagreement as to whether such a bundling was ultimately harmful to the consumer. The rule of reason balancing test would allow for an examination as to whether such integration hurt or helped a consumer.

What does not need to be too closely scrutinized is whether bundling has a negative effect on competitors. The practice of bundling severely hurts Microsoft's competitors in that getting their software on computers with Windows is extremely hard when something that already performs similar functions has already been placed on the computer through bundling. This is illustrated through the effects that such bundling has had on Sun Microsystem, Netscape, and Real Player. If protection of competitors is their focus it can be seen in their attempt to bolster competitors in the media player and work group server markets. The EU officially takes the position that it "regulates competition as a means of enhancing consumer welfare, and not to protect competitors from dominant firms' genuine competition."[251] Even if they are protecting competitors if can be said that, the protection of those competitors helps them enter into a market and in the end the benefits trickle down to the consumers.

5.2.2 Political Considerations

Something that is somewhat harder to pin down is the different political considerations that may weigh on the treatment of the Antitrust actions. The antitrust litigation started in the US while Democrat Bill Clinton was in office. The Clinton administration's Justice Department took a very hard line against the business practices of Microsoft. This is clear from their seeking to split Microsoft into separate companies and punish them with severe sanctions. However, the Republican Bush administration took over in 2001 bringing with them their pro business inclinations.

There is no way to easily measure such a nebulous thing as political pressure, but actions speak louder then words. Political pundits and critics alike have criticized the settlement as giving in to big business.[252] The Justice Department (under Clinton) went from seeking to split up one of the most successful US companies in the world to working out an agreement which has been criticized as too lenient. That is quite a turnaround from one administration to the next. One other political consideration is worth discussing. In promoting a settlement agreement to the parties, Judge Kollar-

[249] 15 U.S.C. §1, 2 (2000).
[250] Jennings, p81.
[251] Jennings, fn 58, p82
[252] Jenna Green, *Policing Microsoft and its Market*, Legal Times, July 7, 2003.

Kotelly referenced the economic ramifications of the September 11th attacks on the US as a crucial reason for encouraging the parties to settle the dispute.[253] Although there is no way of actually ascertaining how much of a role this may have played, it certainly could have been a factor when you consider the effect the attacks had on the US economy.

The political considerations may have had an opposite effect within the EU leading to a decision with more stringent sanctions. The Competition Commissioner in place during the Microsoft proceedings was Mario Monti. As the top antitrust official in the EU, had a reputation for zealous enforcement of the competition laws much to the chagrin of the European business community.[254] Monti did not hide his intentions in dealing with the Microsoft decision stating in a press release that the case would be seen through to its conclusion ending in benefits to "innovation and customers alike."[255] Monti's antitrust leanings were demonstrated when he helped put an end to the GE/Honeywell merger, notwithstanding the US objections that it would not harm competition.[256] The harsher penalties and lack of settlement seem to correspond well with the EU competition authorities' zeal, just as the settlement in the US comports well with a pro-business Republican administration.

5.2.3 Different Substantive Issues

One less intriguing explanation for the divergent results between the two Microsoft proceedings could be the fact that there were dissimilar facts and issues to the respective cases. The Commission Decision dealt with Microsoft's efforts to leverage itself into the adjacent work group server market and the tying of WMP to Windows. Whereas the US prosecutions dealt with the bundling of IE and the restrictive conduct of Microsoft that sought to prevent the altering of Microsoft's middleware programs. Even though both cases dealt with bundling, the authorities emphasized different issues. The US case focused on the exclusionary agreements that Microsoft entered into with OEMs to protect IE, while the EU case focused more on the tying of WMP to Windows. These differing issues along with the political and policy considerations could all have been factors is that led to the divergent results.

5.3 The Decision in light of IMS

The *IMS* judgement represents the latest ECJ case dealing with the clash of competition law and IPRs. The judgment was issued a little over a month after the Commission issued their expansive decision on Microsoft. If we were to apply the legal standards enumerated in *IMS* to the Microsoft case, the Commission's case would not hold up. In

[253] Green, supra.
[254] Larry Bumgardner, *Antitrust Law in the European Union*, Gradziadio Bus. Report, Vol. 8, No. 3, (2005).
[255] Press Release IP/03/1150, European Commission, Aug. 6, 2003.
[256] Green, supra note 251.

the following sections, I will compare the facts of both cases and see just where the Decision stands in light of the legal standards laid out by the ECJ.

5.3.1 The IMS test

The ECJ found four cumulative conditions under which a dominant undertaking could be ordered to license their IPRs.[257] For the readers convenience I will reprint them below:

> 1.) the protected product or services is indispensable to compete in a particular market; 2.) the refusal is "such as to exclude any competition on a secondary market"; 3.) the refusal prevents the emergence of a new product for which there is potential consumer demand; 4.) the refusal is not objectively justified

The ECJ was not fully clear as to whether these factors were necessary or merely sufficient to find that a refusal to license is an abuse under Article 82 EC.[258] The way in which the court interprets whether these criteria are merely sufficient or required will play a pivotal role in the way they approach the Microsoft decision.[259]

The Microsoft decision and the *IMS* judgment have some common characteristics. In both cases, there are rivals that claim that a dominant company's refusal to license information, which is protected by intellectual property laws, affects competition in a related market, violating Article 82 EC.[260] In both cases, the dominant firm responds claiming that IPRs are essential for innovation.[261] Similarly, both harmed competitors claim that the IPR at stake is indispensable because customers face staggering obstacles in switching to an alternative.[262] In both cases the Commission ordered compulsory licensing of the IP that the defendant's were seeking to withhold.[263]

5.3.2 Indispensability

The first condition is that the product or service protected must be indispensable for carrying on a particular business. The question raised is whether the interoperability information that Microsoft is being ordered to share with competitors is indispensable for them to compete in the work group server market. The Commission relies on an essential

---

[257] *IMS*. at para. 37-38.
[258] Katararzyna A. Czapracka, *Where Antitrust Ends and IP Begins-On the Roots of the Transatlantic Clashes*, 9 Yale Journal of Law & Technology 44, (2007).
[259] Id.
[260] Donna Gitter, *Strong Medicine for Competition Ills: The Judgment of the European Court of Justice in the IMS Health Action and Its implications for the Microsoft Corporation.* 15 Duke J. Comp. & Int'l L. 153, 188, (2004)
[261] Id.
[262] Id.
[263] Id.

facility theory without making a strong case that the information is actually essential. There are various producers of work group server OSs across Europe.[264] When you look at the market, you can see that the interoperability information is clearly not indispensable. It would make life much easier for the competitors but that is not sufficient to establish indispensability according to previous caselaw.[265] In determining indispensability, caselaw suggests that the court should look at whether there are "alternative solutions, even if they are less advantageous."[266] In the Microsoft decision, there are alternatives but they are deemed not economically viable, thus too disadvantageous. The Commission further weakens the concept of indispensability by summarily rejecting Microsoft's arguments that competitors can reverse engineer. The fact that it is available for reverse engineering shows that it is not entirely inaccessible to competitors despite the unpredictable nature of attempting such reverse engineering. The Commission seems to be seeking to high a level of interoperability, which it considers necessary for a competitive market. Different server OSs interoperate perfectly well, just not at the optimal "native" level of interoperability that the Commission ordered to be made accessible. A major criticism of a lower standard for compulsory access to a dominant company's resources is exemplified in the way that it could stifle innovation.[267] This access may have short-term benefits for competition but in the long run could serve to reduce competition in that it would chill innovation and R&D from dominant firms.[268]

5.3.3 New Product

Another condition laid out in *IMS* is that this refusal to license is abusive when an undertaking reserves the secondary market to itself preventing a new product from being released. The Commission in reaching their decision does not broach this issue. There is no discussion as to any specific products that are being withheld from a secondary market. This may be because none of the competitors showed that they would be able to create new, different products as a result of being granted access to the interoperability information. In `fact, they would be offering the same products offered by Microsoft and directly competing with them. The Commission focuses more on the fact that the refusal to supply restricts technical development to the prejudice of consumers.[269] In *Magill* there was an identifiable product being withheld from the secondary market for which there was an unmet consumer demand, whereas in the Microsoft decision there is just technical developments. The closest the Commission ever gets is to state that the interoperability information could be used to bring innovative features to the server OS.[270] This is not a new product, just an improvement on their own products.[271] A

[264] Ian S. Forrester, *Article 82: Remedies in search of Theories?* 28 Fordham Int'l L.J. 919, 945, (2005).
[265] See Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-Und Zeitschriftenverlag GmbH & Others, [1998] E.C.R. I-7791
[266] *IMS* at para. 28.
[267] Killick, at 41.
[268] Id.
[269] Id. at 43.
[270] Id.
[271] Id.

serious drawback to this approach is that in dealing with IPRs most of the time competitors would be capable of using your rights to improve their products.

5.3.4 Risk of Elimination of Competition in a Downstream Market

In *IMS* the court held that along with the indispensability for carrying on a particular business, the refusal must be likely to exclude all competition in the downstream market. The Commission departs from this concept using a watered down version of this criteria. In the Commission's decision they found Microsoft's behaviour to be abusive because it "puts Microsoft's competitors at a strong competitive disadvantage and produces "a risk of eliminating all competition" in the downstream market.[272] It would prove very difficult to establish such a risk of elimination of all competition on a market for where Microsoft has a 60% market share and the competitors have a market share between 5-10%.[273] This being the case, it becomes clear why the Commission went with an approach that focused on the competitive disadvantages created and the possible risks, rather than the actual elimination of competition on the downstream market.

5.3.5 Objective Justification

This criterion of lack of an objective justification is the most troubling of all four. There is no caselaw or Commission decision that provides guidelines for what would be an objective justification for refusing to license. In the Commission's decision, they balance the effects of the order to supply information on Microsoft's incentives to innovate against the positive effects of such an order on the innovation that will be stimulated in the whole industry.[274] This balancing test does not derive from any ECJ cases or from any previous Commission decisions. Because of the extreme difficulty of applying such a balancing test before an issue arises, this will greatly diminish legal certainty, a fundamental principle of EC law.[275] There is no guidance given on how to weigh these factors. This lack of legal certainty is even more daunting when you consider the large fines companies may be subject to if they miscalculate the balancing test. Rules that would subject companies to compulsory licensing, loss of R&D investments, and significant fines should at least have some guideposts for which they could aim. The uncertainty of what would be an acceptable justification leads to uncertainty in where companies should place their efforts to innovate.

---

272 *The Decision* at para. 589.

273 See *Czapracka* p. 18 of Westlaw pdf printout, (Publication page references were not available for this document at the time of the writing of this thesis.)

274 *The Decision* at para. 783.

275 Killick at 44.

5.4 Concluding Remarks

The Commission's analysis in *The Decision* takes a different view of compulsory licensing in refusal to license cases than those taken by the ECJ in *IMS.* The Commission lowers the threshold for when a refusal to supply an "indispensable" or "essential facility" is an abuse under Article 82 EC. They use a watered down version of the criteria provided in *Magill* and *IMS.* Their approach is one that not only uses a lower standard than the caselaw suggests but also attempts to create new law.

The parameters laid out by the commission could lead to over-enforcement of compulsory licensing. They could also be detrimental to incentives to spend on R&D as the uncertainty of compulsory licensing would serve to chill investment.

The ball is now clearly in the CFI's court and myself and many concerned innovators are eagerly awaiting the courts ruling. With respect to how I think they will or should rule, I am clearly critical of the decision and feel that the Commission was overly harsh in fining such a large sum for something that was not clearly a violation of the law. I also believe that their watering down of the legal standards provided for through caselaw and their inventive new balancing test to promote innovation does more harm than good. They may help competition in the short term but could have serious effects on innovation and development in the long run. It could lead to companies having to factor in the chance that they will be compelled to share their IPRs before investing or even companies reducing their investments on innovation in the chance that they could free ride from a dominant firm.

In issuing their decision hopefully, the court will clarify what the limiting principles actually are. I believe that the courts will eventually overrule the Commission's decision but not in its entirety. They will also reduce the large fine, as it was not explicitly clear that there was a competition law violation when Microsoft was behaving as it did.

Bibliography

Books

Craig, Paul,
de Búrca, Gráinne — *EU Law –Text, Cases and Materials*, 3rd ed., Oxford, Oxford University Press, 2003.

Korah, Valentine — *An Introductory Guide to EC Competition Law and Practice*, 8th ed., Oxford, Hart, 2004.

Articles

Brennan, Tim, — *The Legacy of U.S. v. Microsoft.* Regulation, Winter 2003, p26.

Czapracka, Katarzyna, A. — *Where Antitrust Ends and IP Begins – On the Roots of the Transatlantic Clashes*, 9 Yale Journal of Law and Technology 44, (2007).

Forrester, Ian S., — *Article 82:Remedies in search of Theories?* 28 Fordham Int'l L.J. 919, 945, (2005).

Fox, Eleanor, — *Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The US/EU Divide.* 2006 Utah L. Rev. 725.

Gitter, Donna, — *Strong Medicine for Competition Ills: The Judgment of the European Court of Justice in the IMS Health Action and Its implications for the Microsoft Corporation.* 15 Duke J. Comp. & Int'l L. 153, 188, (2004).

Green, Jenna, — *Policing Microsoft and its Market,* Legal Times, July 7, 2003.

Jennings, John P., — *Comparing the US and EU Microsoft Antitrust Prosecutions: How level is the Playing Field?,* Erasmus Law and Economics Review 2, no. 1 (March 2006) p.71-85.

Killick, James, — *IMS and Microsoft Judged in the cold light of IMS,* Volume 1 Issue 2, December, 2004.

Leveque, F. “*Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case,”* 28 World Competition Law and Economics Review 71 (2005).

Pardolesi, Roberto, Renda, Andrea, *The European Commission’s case against Microsoft: Kill Bill,* 27 World Competition Law and Economics Review 513, (2004).

Turney, James, *Defining the Limits of the EU Essential Facility Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation.* Norhwestern Journal of Technology and Intellectual Property Law Volume 3, Number 2 (Spring 2005)

Stratakis, Alexandros, *Comparative Analysis of the US and EU Approach and Enforcement of the Essential Facility Doctrine,* European Competition Law Reveiw 2006, 27(8), 434-442.

Internet Sources

American Bar Association (2004), The *EC Decision Against Microsoft: Windows on the World, Glass Houses, or Through the Looking Glass?,* September 2004, http://www.abanet.org/antitrust/at-source/04/09/Sep04MSBB.pdf last visited 12 May 2007.

http://www.xe.com/ucc/, used to convert Euros into U.S. Dollars, last visited 12 May 2007.

Reckon Open, *Microsoft: The EC Abuse of Dominance Case,* http://www.reckon.co.uk/open/Microsoft:_the_EC_abuse_of_dominance_case last visited 12 May 2007.

Statement by U.S. Assistant Attorney General for Antitrust R. Hewitt Pate, 24 March 2004, http://www.usdoj.gov/atr/public/press_releases/2004/202976.htm last visited 12 May 2007.

EC Legislation

Consolidated version of the Treaty establishing the European Community, OJ C 325, 24.12.2002.

Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 EC, OJ L 1, 04.01.2003.

COMP/C-3/37.792 Microsoft.

US Legislation

47 U.S.C. § 251(c) (2000).

15 U.S.C. §1, 2 (2000)

EC Documents

Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law OJ C 372, 9.12.1997.

Commission Press Release of August 6 2003, IP/03/1150.

Commission Press Release of 24 March 2004, MEMO/04/70, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/04/70&format=HTML&aged=1&language=EN&guiLanguage=en last visited 12 May 2007.

DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, December 2005, http://ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf Last visited 12 May 2007.

Court Documents

United States v. Microsoft Corp., No. 98-1232 (D.D.C. 1999).

Amended Complaint, Trinko v. Bell Atlantic Corp., 123 F. Supp. 2d 738 (S.D.N.Y. 2001) (No. 00 Civ. 1910 (SHS) (JCF)), available at 2001 WL 34727769.

Table of Cases

EC Caselaw

Joined Cases 6/73 & 7/73, Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v. Commission, 1974 E.C.R. 223

Case 85/76, Hoffman-La Roche and Co. AG v. Commission [1979] ECR 461

Case 322/81, Nederlandsche Banden-Industrie Michelin NV v. Commission [1983] ECR 3461

Case C-62/86, Akzo Chemie BV v. Commission [1991] ECR I-3359

Joined Cases C-241/91 P & C-242/91 P, Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission, [1995] E.C.R. I-743

Case: C-53/92P, Hilti AG v. Commission [1994] ECR I-667

Case C-333/94P, Tetra Pak International SA v. EC Commission [1996] ECR I-5951

Case C-7/97, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-Und Zeitschriftenverlag GmbH & Others, [1998] E.C.R. I-7791.

Joined cases C-215/96 and C.216/96 Bagnasco v. BNP and others, [1999] ECR, I-135

Case 395/96P, Compagnie Maritime Belge Transports SA v. Commission [2000] ECR I-1365

Case C-481/01, IMS Health GmbH & Co. v. NDC Health GmbH & Co. KG [2004].

US Caselaw

United States v. Terminal Railroad Association, 224 U.S. 383 (1912).

Associated Press v. United States, 326 U.S. 1 (1945).

Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951).

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9^{th} Cir. 1997).

United States v. Microsoft, 87 F. Supp. 2d 30 (D.D.C. 2000).

United States v. Microsoft 253 F.3d 34 (D.C. Cir. 2001).

United States v. Microsoft, 231 F. Supp. 2d 144, (D.D.C 2002).

New York v. Microsoft Corp, 224 F.Supp. 2d 76 (D.D.C 2002.).

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP 540 U.S. 398 (2004).