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Refusing to be dominant – the Microsoft case and its implications

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Contents

SUMMARY	1
PREFACE	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Purpose	5
1.2 Method & material	5
1.3 Delimitation	6
2 THE MICROSOFT CASE	9
2.1 Facts and background	9
2.2 General Court	10
2.2.1 <i>Abusive conduct</i>	10
2.2.2 <i>Indispensability</i>	11
2.2.3 <i>Elimination of competition</i>	11
2.2.4 <i>New product</i>	12
2.2.5 <i>Objective justification</i>	13
2.3 Comments	14
2.3.1 <i>Schools of competition policy</i>	17
2.3.1.1 Harvard	17
2.3.1.2 Chicago	18
2.3.1.3 Post-Chicago	18
2.3.1.4 Ordoliberalism & Microsoft	19
3 MICROSOFT DISCUSSION	23
3.1 The abusive conduct	23
3.2 Indispensability	25
3.3 Elimination of competition	29
3.4 New product	33
3.5 Objective justification	37
3.6 Future implications	39
4 COMMISSION DEVELOPMENT	46
4.1 Commission Discussion Paper 2005	47
4.1.1 <i>Termination of an existing supply relationship</i>	48

4.1.2	<i>Refusal to start supplying an input</i>	49
4.1.3	<i>Refusal to supply information needed for interoperability</i>	50
4.2	Industry comments	50
4.3	Commission 2009 Guidance	57
5	ANALYSIS & CONCLUSION	60
5.1	Microsoft	60
5.1.1	<i>The abusive conduct</i>	60
5.1.2	<i>Indispensability</i>	61
5.1.3	<i>Elimination of competition</i>	62
5.1.4	<i>New product</i>	64
5.1.5	<i>Objective justification</i>	65
5.2	The Commission	66
5.3	Conclusion	69
	BIBLIOGRAPHY	73
	TABLE OF CASES	77

Summary

Refusal to license is one of the main areas of tension between IPRs and Article 102 TFEU, dealing with the problematic but important question of whether it is an abuse for a dominant undertaking to refuse to allow others to use its protected rights. The European Courts have, in a number of cases, decided that the refusal to supply/license may amount to an abuse of a dominant position. The last case in line dealing with this was the Microsoft case. In its judgment from 2007, the GC ruled that Microsoft had abused its dominant position by refusing to supply certain information, protected by IPRs, to a number of requesting companies.

The main purpose of this thesis is to analyse in what way the Microsoft judgment follows established EU jurisprudence on refusal to supply/license as well as to analyse what implications for the future can be deduced from its outcome.

The Microsoft case is the focus of this thesis. The main arguments of the Commission and Microsoft as well as the assessment of the GC are covered and analysed. A large part of the thesis deals with the opinion and view of scholars and debaters on the Microsoft case, presenting and comparing the most relevant parts of their argumentation. Another part deals with the Commission and its Guidance concerning abusive exclusionary conducts by dominant companies, issued in 2009. The main points of the Discussion Paper leading up to the Guidance as well as many contributions of several interested parties received by the Commission are presented and discussed.

This thesis shows that the GC judgment in the Microsoft case has confirmed the case law on refusal to supply/license on certain aspects, it has modified some previously established aspects and on some, it can even be said to have completely departed from case law. This includes the modifying of the wording of recognized criteria as well as interpreting them in such a way as to give them a whole new meaning. This, it is argued, has increased legal uncertainty and made it difficult to envisage possible objective justifications for refusal to license situations. As for the general future implications of the case, it is difficult to give any concrete answers. The legal value of the Commission Guidance is low compared to Court judgments. Therefore, until the GC or the CJEU will get a chance to change direction again, the Microsoft case, even while acknowledging its special character, will be the latest shaping case as regards refusals to supply/license, and companies will need to adhere to its standards as defined by the GC. On the other hand, from a self-assessment perspective, the Commission 2009 Guidance is the only tool, apart from case law, which companies can use. Despite all this, the situation is not optimal from a legal certainty perspective, and many people will await with eagerness for the next case dealing with refusal to supply/license to appear in front of the EU Courts.

Preface

My interest for refusal to supply/license matters emerged during a general course on competition law which I attended right before my work with this thesis started. During that course, we touched upon a couple of the seminal EU cases on the topic, such as Commercial Solvents and Magill, as well as the highly debated Microsoft case. I found the area to be very interesting and, most of all, highly relevant, thus the choice to write my thesis on the subject.

This thesis marks the end of the Master's Programme in European Business Law of the Faculty of Law at Lund University, a programme which I am extremely happy that I chose to enter. Not only have I broadened and deepened my knowledge in several important legal areas during this time, but I have also got to know many great persons from all over the world. It has definitely been a lifetime experience.

I would like to express my gratitude towards my supervisor Henrik Norinder for his guidance and helpful comments during my work with this thesis.

20th of May 2011, Malmö, Sweden

Tomasz Dowejko Jurkowski

Abbreviations

AG	Advocate General
CJEU	Court of Justice of the European Union
CPCOS	Client PC Operating System
GC	Court of First Instance
EU	European Union
GC	General Court
IP	Intellectual Property
IPR	Intellectual Property Right
R&D	Research & Development
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
WGSOS	Work Group Server Operating System

1 Introduction

“The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.”

So reads Article 345 TFEU, giving the impression that intellectual property rights (IPRs), recognised and protected under national law, are respected by the Treaty provisions and, consequently, will not be interfered with by the institutions of the EU. In reality, this is far from the truth.

In order to encourage and reward investment in innovation, the laws of most countries provide for the granting and the protection of IPRs. By this, the IPR holders are granted exclusive rights, allowing them to benefit financially from their protected property. Although the importance of IPRs is on some level indisputable, their interaction with a number of laws of the European Union is complicated as they raise issues not only for competition law but also for the free movement of goods and services and the operation of the single market. The concern with IPRs from a competition law perspective is quite obvious, as the granting of IPRs can in many cases be equated with granting the holder a monopoly position as regards the protected property. This has the effect of making IPR holders, by consequence, “interesting” subjects to scrutinise when dealing with possible abuses of dominant positions, regulated by Article 102 TFEU. It has often been stated that IPR and competition law serve the same goal, namely to create a dynamic environment. From a competition perspective, however, the grant of a monopoly conflicts with the fundamental desire for open, fair and competitive market conditions.¹ In reality, therefore, competition and IPR policies live side by side, not always in an amicable manner, thus creating the need to balance the objectives of the two when problems arise.

One main area of tension between IPRs and Article 102 TFEU, which moves us closer to the topic of this thesis, is whether it is an abuse for a dominant undertaking to refuse to allow others to use its protected rights. Although the freedom of contract, saying that one should be free to deal with whom one chooses, is a fundamental principle of the free market economy, the European Courts and the Commission have seen the need to, in the interest of the competition policy and law of the EU, limit that freedom. In a number of cases, it has thus been decided that the refusal to supply or, when IPRs are involved, the refusal to license may amount to an abuse of a dominant position. Not surprisingly, this limitation put on both the freedom of contract and the exclusive right granted by IPRs has not always been very appreciated by the affected companies. There has also been an intense debate among scholars, legal and economic, on the general, but very problematic, issue of how the goals and objectives of EU

¹ Lidgaard, H.H., *Competition Classics – Materials & Cases on European Competition Law and Practices*, Course material (2011), p. 282-283.

competition policy should, if at all, have an effect on IPRs granted by national legislation.

The last case in line dealing with a refusal to license matter was the massive, and today very famous, Microsoft case. The GC issued its judgment in September 2007, in which it ruled that Microsoft had in fact abused its dominant position by refusing to supply certain information, protected by IPRs, to a number of requesting companies. Microsoft decided not to appeal the ruling of the GC to the final instance of the CJEU. The case has raised many questions and has definitely not silenced the, already intense, debate centred on the conflict between competition policy and IPRs. This turns us to the purpose of this thesis.

1.1 Purpose

Although the area of refusal to supply/license could give rise to several interesting issues, well worthy of constituting the subject matter of a thesis, I will concentrate on the Microsoft case. Even when delimiting the focus of the thesis to the Microsoft case, however, the number of possible questions, capable of forming the sole purpose of a thesis, is vast. My interest for the subject of the refusal to supply/license area arose inter alia when I was confronted both with earlier cases and with the Microsoft case, but also because of my interest in the “clash” between competition policy on the one hand and IPRs on the other. The Microsoft case is interesting in connection to this, not only because of its sheer size, but also because it gives rise to a lot of central questions on many relevant issues, both when put in relation to previous cases on the matter as well as when trying to assess the future consequences of the judgment.

Therefore, the main purpose of this thesis will be to analyse in what way the Microsoft judgment follows established EU jurisprudence on refusal to supply/license as well as to analyse what implications for the future can be deduced from its outcome. In connection to the latter, the view of the Commission also plays a central role.

1.2 Method & material

This thesis will, naturally, be focused around the Microsoft case. I will cover the judgment, pointing out the main arguments of the Commission and Microsoft and, perhaps most importantly, the assessment of the GC. A large part of the thesis will also deal with the opinion and view of scholars and debaters on the Microsoft case, presenting the most relevant parts of their argumentation for the purpose of this thesis. This material has been selected on the basis of its relevance and of the aim to provide a broad and full picture of the most common themes of discussion on the subject.

Another part, constituting a big portion of the thesis, will focus on the Commission. By its issuance of a Discussion Paper in 2005, covering several abusive exclusionary conducts by dominant companies, inter alia refusal to supply/license, the Commission described and proposed a general framework for analysing such cases. The main points of this Discussion Paper will be presented. In connection to this, a large number of contributions of several interested parties, received by the Commission, will also be presented. The Commission received over one hundred contributions and, consequently, a selection has been necessary. This selection has, in the first place, been based on the relevance of the comments for the purpose of this thesis, as some only discussed the refusal to supply part very briefly or not at all. In the second place, a selection has been carried out so as to avoid too much duplication of comments. Instead, the aim has been to present as many different views and opinions as possible. The final Guidance issued by the Commission will be covered by highlighting its main points relating to the area of refusal to supply.

Important to keep in mind as regards the material used in this thesis is that, with issues such as the Microsoft case and the Commission Discussion Paper, there tends to be more negative than positive articles and comments. Complaining scholars and parties probably find more motivation to write and express their opinion than do those who feel satisfied with the status quo. Even though it is impossible to determine whether their opinion actually represents a true picture of the general view on the matter, it is something that perhaps should be kept in mind when reading. Otherwise, it is easy to become biased and influenced by the somewhat one-sided line of reasoning.

1.3 Delimitation

The refusal to supply/license issue has, as already mentioned, lead to intense discussions among different scholars, both on a legal and economic level. The focus of this thesis will, naturally, be on the legal parts of the discussions. However, in many aspects the legal and economic reasoning is very interrelated and, thus, hard to separate. Neither is this advised, as it may be hard to achieve a full and genuine understanding of the subject without taking into consideration both perspectives. Therefore, some economic concepts and line of reasoning will be covered and discussed.

This thesis will be limited to the European Union and its dealings with the matter of refusal to supply/license. This, however, is not to imply that the topic is centred around the EU. Rather, it is a highly debated and discussed issue all over the world, not the least in the US. There is, however, enough to be said about the EU alone on this subject, thus the limitation. Also, there is no shortage on comparative analyses on the matter.

Finally, this thesis is directed towards readers with some knowledge of EU competition law and, more specifically, Article 102 TFEU concerning the

abuse of a dominant position. Also, some familiarity with the refusal to supply/license issue and the key EU cases on this subject is recommended. This requirement is mostly due to practical reasons, since time and space always constitute constraints on the scope of a thesis. In order to save space and devote time to all the interesting aspects of the refusal to supply/license matter, in particular the Microsoft case, some previous knowledge will need to be assumed.

However, in order to provide readers with a good start, before heading on to the main subject of this thesis, what will follow is a brief summary of the main points derived from the most seminal EU cases on the refusal to supply/license matter.

The refusal to supply/license issue usually arises when an undertaking uses its dominant position on one, primary, market in order to eliminate competition on a closely related, secondary, market. In *Commercial Solvents* in 1974, the CJEU stated that an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives, act in such a way as to **eliminate the competition** of those active on the secondary market.² Later, in *United Brands*, it was pointed out that a dominant undertaking cannot refuse to supply if the purpose of such conduct is to **strengthen the dominant position and abuse it**.³

The first refusal to license case, thus involving IPRs, was the *Volvo* case in 1988. The CJEU acknowledged that the exclusive right of the proprietor of a protected design included the right to prevent others from manufacturing and selling or importing products incorporating the design. An obligation imposed upon the proprietor to grant to third parties a license for the supply of products incorporating the design would lead to the proprietor being deprived of the substance of his exclusive right. Therefore, a refusal to grant such a license, the CJEU concluded, could not in itself constitute an abuse of a dominant position. However, at the same time, the CJEU also held that Article 102 TFEU might prohibit the exercise of an exclusive right by the proprietor of an IPR if it involves, on the part of an undertaking holding a dominant position, **certain abusive conduct**.⁴

This was elaborated more upon a couple of years later in the very well-known *Magill* case, in which the CJEU confirmed that the exercise of an exclusive right by the proprietor might, in **exceptional circumstances**, involve abusive conduct. This would be the case when: the dominant undertaking's refusal would **prevent the appearance of a new product**, which the dominant undertaking itself did not offer, and for which there was a potential demand; there was **no justification** for such refusal; and by its

² Joined Cases 6 and 7/73, *Commercial Solvents v Commission*, 6 March 1974, [1974] ECR 223, para 25.

³ Case 27/76, *United Brands v Commission*, 14 February 1978, [1978] ECR 207, para 189.

⁴ Case 238/87, *Volvo v Veng*, 5 October 1988, [1988] ECR 6211, paras 8-9.

conduct, the undertaking reserved to itself the secondary market by **excluding all competition** on that market, since it denied access to the input which was **indispensable** for creating the new product.⁵

In *Ladbroke*, the GC said that a refusal to supply could only be abusive if the concerned product was either **essential** for the exercise of the activity on the secondary market, in that there was **no real or potential substitute**, or was a new product whose introduction might be prevented, despite **specific, constant and regular potential demand** on the part of consumers.⁶ A few years later, in 1998, the CJEU also concluded in *Bronner* that for the refusal to be abusive it must be likely to **eliminate all competition** in the secondary market, incapable of being **objectively justified** as well as **indispensable** to carrying on the business on the secondary market, inasmuch as there is **no actual or potential substitute** in existence. The CJEU added that for access to a product or service to be capable of being regarded as indispensable it would be necessary to establish that it was **not economically viable** to create a second product/service comparable in size/use to the existing one.⁷

Finally, in the *IMS Health* case in 2004, the CJEU interpreted the existing case law as making it clear that, in order for a refusal by an undertaking to give access to an IP-protected product or service **indispensable** for carrying on a particular business to be treated as abusive, it was sufficient that three cumulative conditions were satisfied, namely that the refusal is **preventing the emergence of a new product** for which there is a potential consumer demand, that it is **unjustified** and such as to **exclude all competition** on a secondary market. The CJEU added, however, that in the balancing of the interest in protection of the IPR and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a license prevents the development of the secondary market to the detriment of consumers. Therefore, the CJEU concluded, the refusal by an undertaking in a dominant position to allow access to a product protected by an IPR, where that product is indispensable for operating on a secondary market, may be regarded as abusive only where the undertaking which requested the license does not intend to limit itself essentially to **duplicating** the goods or services already offered on the secondary market by the owner of the IPR, but intends to produce new goods or services **not offered by the owner of the right** and for which there is a potential consumer demand.⁸

⁵ Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, 6 April 1995, [1995] ECR I-743, paras 49-56.

⁶ Case T-504/93, *Tiercé Ladbroke v Commission*, 12 June 1997, [1997] ECR II-923, para 131.

⁷ Case C-7/97, *Oscar Bronner v Commission*, 26 November 1998, [1998] ECR I-7791, paras 41-46.

⁸ Case C-418/01, *IMS Health v NDC Health*, 29 April 2004, [2004] ECR I-5039, paras 38-51.

2 The Microsoft case

The Microsoft case is the latest, and perhaps the most heavily discussed, case concerning refusal to license. In this chapter, I will give a recollection of the facts of the case and the judgement of the GC, as well as some general comments on the case.

2.1 Facts and background

In December 1998, Sun Microsystems Inc. made an application to the Commission for the initiation of proceedings against Microsoft, alleging that it abused its dominant position by reserving to itself information that certain software products for network computing need to interoperate fully with Microsoft's PC operating systems.⁹ In March 2004, the Commission adopted a decision in which it found that Microsoft had infringed Article 102 TFEU.¹⁰

The Commission had identified two separate product markets: the market for client PC operating systems (CPCOS)¹¹ and the market for work group server operating systems (WGSOS)¹². CPCOS were defined as system software products that control the basic functions of a computer and enable the user to make use of such a computer and run applications on it.¹³ WGSOS were defined as operating systems designed to deliver basic infrastructure services to relatively small numbers of client PCs linked together in networks. The Commission also identified three types of services that are closely interrelated in WGSOS: the sharing of files stored on servers, the sharing of printers and the administration of groups and users.¹⁴

The Commission found that Microsoft had been in a dominant position on the CPCOS market since at least 1996 and on the WGSOS market since 2002.¹⁵ According to the Commission, Microsoft's dominance presented extraordinary features in that Windows was not only a dominant product on the relevant market for CPCOS, but it was the *de facto* standard operating system product for client PCs.¹⁶ Furthermore, there were significant entry

⁹ Commission Decision 2007/53/EC of 24 March 2004 (Case Comp/C-3/37.792), *Microsoft*, OJ 2007 L32/33, para 3.

¹⁰ Case T-201/04, *Microsoft Corp v Commission*, 17 September 2007, [2007] ECR II-3601, paras 20-21.

¹¹ Commission Decision, *Microsoft*, supra note 9, paras 324-342.

¹² *Ibid.*, paras 343-401.

¹³ *Ibid.*, para 37.

¹⁴ *Ibid.*, para 53.

¹⁵ *Ibid.*, paras 429-541. As regards the CPCOS market, Microsoft's market shares were over 90%, its market power had enjoyed an enduring stability and continuity and there were significant barriers to entry in the client PC operating system market. As regards the WGSOS market, Microsoft's market share was, at a conservative estimate, at least 60% and the position of its three main competitors was 10-25%, 5-15% and 5-15% respectively.

¹⁶ *Ibid.*, para 472.

barriers on the WGSOS market, owing inter alia to Microsoft's refusal to disclose interoperability information¹⁷ and the close commercial and technological links between the WGSOS and CPCOS markets¹⁸.

The found abuse consisted of Microsoft's refusal to supply its competitors with interoperability information and to authorise the use of that information for the purpose of developing and distributing products competing with Microsoft's own products on the WGSOS market.¹⁹ The Commission concluded that interoperability with the Windows domain architecture was necessary in order for a WGSOS supplier to viably stay on the market.²⁰ There was a serious risk of elimination of competition in the WGSOS market, since Microsoft's market share had increased swiftly and its dominant position continued to be reinforced. Its refusal to supply had the consequence of stifling innovation and diminishing consumers' choices by locking them into a homogenous Microsoft solution. As such, it was in particular inconsistent with Article 102 (b) TFEU.²¹

In June 2004, Microsoft brought an action by application to the GC, claiming that it should annul the Commission's decision.²²

2.2 General Court

The judgment of the GC is very lengthy and detailed and I will therefore confine myself to deal only with the matters of most relevance.

2.2.1 Abusive conduct

Microsoft argued that its refusal could not constitute an abuse within the meaning of Article 102 TFEU because the criteria established in case law, which determine when an undertaking in a dominant position can be required to grant a license to a third party, were not satisfied in this case.²³

The GC concluded that, according to case law, the exercise of the exclusive right by the owner of an IPR might give rise to an abuse of a dominant position only in exceptional circumstances. Case law had identified three circumstances which were to be considered as exceptional: where the refusal relates to a product or service **indispensable** to the exercise of a particular activity on a neighbouring market; where the refusal is of such a kind as to **exclude any effective competition** on that neighbouring market; and where the refusal **prevents the appearance of a new product** for which there is potential consumer demand. Once it was established that such

¹⁷ Ibid., paras 515-525.

¹⁸ Ibid., paras 526-541.

¹⁹ Ibid., paras 546-791.

²⁰ Ibid., paras 779-780.

²¹ Ibid., paras 781-782.

²² Case T-201/04, Microsoft, supra note 10, para 59.

²³ Ibid., para 312.

circumstances were present, the refusal by the holder of a dominant position to grant a license could infringe Article 102 TFEU unless **objectively justified**.²⁴

2.2.2 Indispensability

Microsoft claimed that the Commission had failed to show that the non-availability of the requested information meant that its competitors could not remain viable on the market, that it had not taken account of the fact that several WGSOS were present on the market and the fact that the desired interoperability could be achieved by other methods.²⁵

The GC stated that a number of factors confirmed the correctness of the Commission's finding that the information was in fact indispensable. Firstly, it was correct to find that one of the essential functions of WGSOS was the administration of client PCs.²⁶ Secondly, the interoperability of WGSOS with CPCOS was even more important in the case of Windows because of its high market shares on the CPCOS market. As Windows was present on virtually all client PCs installed within organisations, non-Windows WGSOS could not continue to be marketed if they were incapable of achieving a high degree of interoperability with Windows.²⁷ Microsoft had not established that the assessment made by the Commission was manifestly incorrect.²⁸

The GC also noted that Microsoft's competitors' market shares fell significantly as Microsoft's share increased, even though some of them had a considerable technological advantage over Microsoft. The fact that competition was eliminated gradually and not immediately did not contradict the argument that the information was indispensable.²⁹ Also, none of the proposed alternative methods of ensuring interoperability made it possible to achieve the high degree of interoperability which the Commission correctly had required in the present case.³⁰

2.2.3 Elimination of competition

Microsoft argued that the Commission ought to have applied a stricter test when assessing the probability of eliminating effective competition. In its decision, the Commission had referred to a mere "risk of elimination" of competition on the market, even though in previous cases the Court had always ascertained whether the refusal was "likely to eliminate all competition".³¹ Microsoft also observed that, six years after the refusal,

²⁴ Ibid., paras 331-333.

²⁵ Ibid., paras 341-345.

²⁶ Ibid., para 384.

²⁷ Ibid., paras 387-388.

²⁸ Ibid., para 391.

²⁹ Ibid., para 428.

³⁰ Ibid., para 435.

³¹ Ibid., para 439.

numerous competitors were present on the WGSOS market and it criticised the Commission's narrow definition of the second product market.³²

The GC stated that the Commission's definition of the secondary market was based on the finding that the identified services constituted an essential feature of WGSOS, and that those systems were primarily designed, marketed, purchased and used to provide those services.³³ It was immaterial that they were capable of performing certain additional tasks.³⁴ The GC also pointed out that the expressions "risk of elimination of competition" and "likely to eliminate competition" are used without distinction by the Community judicature. Furthermore, the Commission is not required to wait until competitors are eliminated from the market before being able to take action under Article 102 TFEU. What matters is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. The fact that certain competitors retain a marginal presence in certain niches on the market cannot suffice as proof of existence of such competition.³⁵

2.2.4 New product

Microsoft claimed that the Commission had failed to identify any new product that its competitors would possibly develop and demonstrate that there was demand for such a product. Microsoft also questioned the Commission's definition of a "new product". The addition of a feature taken from a competitor's own products could hardly be viewed as the creation of a new product, Microsoft argued.³⁶

The GC emphasised that the circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health*, could not be the only parameter which determines whether a refusal to license an IPR is capable of causing prejudice to consumers within the meaning of Article 102 (b) TFEU. As that provision states, such prejudice may arise where there is a limitation of technical development.³⁷ The Commission was correct to observe that an increasing number of consumers were locked into a homogeneous Windows solution at the level of WGSOS. This limitation of choice was all the more damaging to consumers because they consider that non-Microsoft WGSOS are better than Windows WGSOS with respect to a series of important features.³⁸ Furthermore, Microsoft's competitors would not be able to or have any interest in cloning or reproducing its products after gaining access to the requested interoperability information. They would have no other choice, if they wish to take advantage of a competitive advantage over Microsoft and maintain a profitable presence on the market,

³² *Ibid.*, paras 442-443.

³³ *Ibid.*, para 485.

³⁴ *Ibid.*, para 497.

³⁵ *Ibid.*, paras 561-563.

³⁶ *Ibid.*, paras 624-626.

³⁷ *Ibid.*, para 647.

³⁸ *Ibid.*, paras 650-652.

than to differentiate their products from Microsoft's products.³⁹ The GC also pointed out that, according to case law, Article 102 TFEU covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure. In this case, Microsoft had impaired the effective competitive structure on the WGSOS market by acquiring a significant market share on that market.⁴⁰

The GC concluded that the Commission's finding that Microsoft's refusal limits technical development to the prejudice of consumers within the meaning of Article 102 (b) TFEU was not manifestly incorrect.⁴¹

2.2.5 Objective justification

According to Microsoft, its refusal was objectively justified by the IPRs which it held over the information concerned.⁴² The Commission had rejected its arguments, Microsoft argued, on the basis of a legally defective test which marked a radical departure from the tests defined in case law. The Commission had considered that a refusal to supply information protected by IPRs constituted an infringement if the positive impact on the level of innovation in the whole industry outweighed the negative impact of the dominant undertaking's incentives to innovate. Such a "balancing test" would lead to dominant undertakings having less incentive to invest in research and development, because they would have to share the fruits of their efforts with their competitors. IPRs give the holder an incentive to continue to innovate, Microsoft claimed, and also encourage competing undertakings to undertake their own innovative activities in order to avoid being left behind. Also, the Commission provided no guidance for undertakings in dominant positions to assess whether preserving their incentives to innovate could justify a decision to retain their IPs for their own use.⁴³

The GC pointed out that the fact that the requested information was covered by IPRs could not constitute objective justification within the meaning of both *Magill* and *IMS Health*. A refusal to grant a license to a third party could however only be characterised as abusive when it was accompanied by exceptional circumstances such as those established in case law and, which it had been established, were present also in this case.⁴⁴ Furthermore, Microsoft had not sufficiently established that the decision would significantly reduce its incentives to innovate but merely put forward vague, general and theoretical arguments on that point.⁴⁵

³⁹ *Ibid.*, paras 657-658.

⁴⁰ *Ibid.*, para 664.

⁴¹ *Ibid.*, para 665.

⁴² *Ibid.*, para 666.

⁴³ *Ibid.*, paras 669-671.

⁴⁴ *Ibid.*, paras 690-691.

⁴⁵ *Ibid.*, paras 697-698.

The Commission had rejected Microsoft's arguments, the GC maintained, not by balancing the possible negative impact on Microsoft's incentives to innovate against the positive impact on innovation in the industry as a whole, but after refuting Microsoft's arguments relating to the fear that its products might be cloned and establishing that the disclosure of interoperability was widespread in the industry concerned. All in all, Microsoft had not demonstrated the existence of any objective justification for its refusal to disclose the interoperability at issue.⁴⁶

As the exceptional circumstances identified by the CJEU in *Magill* and *IMS Health* were also present in this case, the plea was rejected as wholly unfounded.⁴⁷ The GC chose therefore not to assess the special circumstances which the Commission had found in the present case.

2.3 Comments

The Microsoft case was a massive case, and a very important one for the Commission to win in order not to undermine its authority and its position of power in relation to big, dominant firms across the world. One person who particularly expressed her satisfaction with the GC judgment was Neelie Kroes, at the time the European Commissioner for Competition Policy. During a press conference, held on the same day as the GC judgment was issued, she held a speech especially devoted to the Microsoft case and its final outcome⁴⁸. She welcomed the fact that the GC had upheld the most crucial elements of the Commission's decision, aiming to give consumers more choice in software markets and to maintain incentives for all companies in these markets to innovate to the benefit of consumers. That decision was particularly important because so many people use computers and because 95 % of the world's personal computers run Microsoft's Windows PC operating system. She continued:

*"The Court has confirmed that Microsoft cannot regulate the market by imposing its products and services on people. The Court has confirmed that Microsoft can no longer prevent the market from functioning properly and that computer users are therefore entitled to benefit from choice, more innovative products and more competitive prices...[T]he Court has confirmed the importance of **interoperability** for consumer choice and innovation in high tech industries. If competitors are unable to make their products 'talk to' or work properly with a dominant company's products, they are prevented from bringing new innovative products onto the market, and customers are locked into the products of the existing provider. Consumers want interoperable products, and companies that want to meet consumers' demands should be able to provide them."*

⁴⁶ Ibid., paras 710-711.

⁴⁷ Ibid., para 712.

⁴⁸ SPEECH/07/539 – Neelie Kroes, Introductory remarks on GC ruling on Microsoft's abuse of dominant market position, Press conference, Brussels, 17th September 2007.

Kroes made it clear that consumers have a right to increased choice and innovation, the decreased prices that competition brings about and that competition on this specific market requires interoperability. She labelled the GC ruling as bitter-sweet, because the Court had confirmed the Commission's view that consumers are suffering at the hands of Microsoft. She also pointed out that, since the decision was adopted, Microsoft's share had grown from 40 % to 80 % for work group servers. This, together with the fact that there had been a lot of innovation in high technology markets in recent years, but largely in areas that Microsoft does not control, showed that the Commission was right to take action against Microsoft. She also commented on the future implications of the case:

"You may hear scare stories about the supposed negative consequences of this ruling for other companies and for innovation on the market. The Commission notes that the Court itself has concluded that Microsoft failed to show that the decision would have a significant negative effect on its incentives to innovate. Let me be clear - there is one company that will have to change its illegal behaviour as a result of this ruling: Microsoft. Other companies will benefit from increased opportunities to compete, to the greater good of consumers.

The Commission decision made clear that this was in many ways an exceptional case. Super-dominance like Microsoft's is rare. The Court has confirmed that...

[The case] sends a clear signal that super-dominant companies cannot abuse their position to hurt consumers and dampen innovation by excluding competitors in related markets.

...the Court ruling confirms the clear principles which govern the conduct of such dominant companies, and which are designed to protect the competitive process and hence consumers."

The Microsoft case has, not surprisingly, received a lot of attention all over the world, especially in the US. On the same day as the GC announced its decision and Neelie Kroes held her speech, Thomas O. Barnett, the Assistant Attorney General for the Antitrust Division of the US Department of Justice, issued a statement where he expressed his concern about the possible consequences of the decision:

"We are...concerned that the standard applied to unilateral conduct by the GC, rather than helping consumers, may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition.

In the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors. In the absence of demonstrable consumer harm, all companies, including dominant firms, are encouraged to compete vigorously. U.S. courts recognize the potential benefits to consumers when a company, including a dominant company, makes unilateral business decisions, for

example to add features to its popular products or license its intellectual property to rivals, or to refuse to do so."⁴⁹

This statement did probably not come as a surprise, as it has been widely known that the viewpoint of the US and the EU Courts on this matter has differed for ages. However, the statement also points to one of the most frequent subjects used in discussions on the matter which scholars have long been engaged in, namely the interest of consumers. Many important questions stem from this discussion. What is the optimal balance for overall consumer welfare and what is the best way to provide companies with incentives to innovate (focus on IPRs) and making sure that consumers get what they want in terms of output, price and quality (focus on competition). As we shall see, Barnett is not the only one concerned about the future.

Another person having had a leading part in the Microsoft case, and whose opinion could be worth mentioning, is the former president as well as chief judge of the GC Grand Chamber dealing with the Microsoft case, Bo Vesterdorf. In his own words:

*"It would be unfortunate if the ruling had a negative effect on the incentives to invest."*⁵⁰

If investors would back off, innovation could suffer and in the end, consumers could be the losers. Vesterdorf pointed out that many critics believed that the judgment weakened patent law and the rights of patent holders. He admitted that the GC had significantly enhanced the authority of the Commission beyond rulings in earlier cases, giving it a wide margin of appreciation. As an example, he mentioned the fact that until now the Commission could step in only if a company eliminated "all competition", whereas after the judgment, the Commission would be able to act if a company merely eliminates "effective competition" without actually getting rid of a rival. As Neelie Kroes, Vesterdorf also highlighted the highly unusual characteristic of the case since no other company had Microsoft's power and had acted in a similar way. He also stressed the difficulty of finding the right balance between competition law and patent and copyright law.

Before moving on to the next chapter, where the Microsoft case will be digested in more detail, let us have a brief look on the development of competition policy from a more general and theoretical point of view.

⁴⁹ Press release, *Assistant Attorney General for Antitrust, Thomas O. Barnett, issues statement on European Microsoft Decision*, 17th September, available at http://www.justice.gov/atr/public/press_releases/2007/226070.htm.

⁵⁰ Lawsky, D., *EU Microsoft judge fears decision may hurt investment*, 12th March 2008, Reuters, available at <http://www.reuters.com/article/2008/03/12/us-eu-microsoft-judge-idUSL1254538020080312>.

2.3.1 Schools of competition policy

This thesis will not focus on the economic reasoning behind competition policy or discuss why it is thought that competition will produce the greatest societal benefits and achieve maximum efficiency. This is a subject of its own with several books and articles discussing the topic in depth. Even though this thesis is focused on the legal aspects of the Microsoft case and the refusal to deal/license debate, some economic aspects must however be mentioned. Many authors, debaters and the like who have commented on the Microsoft case devote a part of their analysis to the economic thinking behind the competition policy and approach pursued in this and other cases. In order to understand the reasoning of these authors, some concepts need to be clarified, without necessarily going into a deep discussion. At the same time, they serve to explain in a general manner how the view on competition policy has developed over time in the US and in the EU.

The USA was the first jurisdiction to adopt a modern system of competition law when US Congress passed the Sherman Act in 1890. The law developed in a series of judicial decisions in the beginning half of the 19th century and was influenced by the different experiences of the American economy as it went through the industrial revolution.⁵¹ At the same time, various theories and paradigms started to develop in the area of competition analysis.

2.3.1.1 Harvard

In the 1950s, the Structure-Conduct-Performance (SCP) paradigm was developed by what is called the Harvard School. According to the paradigm, it is the structure of the market that determines a firm's conduct and that conduct in turn determines market performance, such as profitability, efficiency and technical progress.⁵² The advocates of this view believed that there was a direct causal relation between market structure and economic performance, whereby the fewer the firms (higher concentration), the less competitive the industry, with reduced output and monopoly prices.⁵³ In line with this view, competition policy should be concerned with structural remedies rather than behavioural remedies and the focus of attention was, therefore, on concentrated industries. These views coincided with a general trend of US policies which sought to protect small businesses and which were suspicious of business expansion. This led, in the 1960s in the US, to an extremely interventionist antitrust enforcement policy.⁵⁴

One of the main criticisms of the Harvard structural approach was that it ran the risk of discouraging dominant firms from competing aggressively pursuing price-cutting in form of discounts, innovating in product

⁵¹ Jones, A. – Sufrin, B., *EC Competition Law – text, cases, and materials*, Oxford University Press (2004), p. 19-20.

⁵² *Ibid.*, p. 21.

⁵³ Chalmers, D. et al., *European Union Law*, Cambridge University Press (2010), p. 912-913.

⁵⁴ Sufrin & Jones, *supra* note 51, p. 21-22.

development, or pursuing other strategies which may improve consumer welfare.⁵⁵

2.3.1.2 Chicago

In the 1970s, a different set of opinions were developed about how markets worked, known as the Chicago School. One of their main arguments was that, while it is true that a firm with a large market share may be tempted to behave anti-competitively by reducing output and increasing prices, this kind of behaviour will send a signal to other market players that there is unmet demand in the market, and invite the entry of new firms. This new entry will bring prices down and reintroduce the degree of competition necessary to satisfy consumer desires. In other words, unless new entry was hampered, the market would take care of possible inefficiencies itself. As opposed to the Harvard School, the Chicago School also argued that concentrated markets were more efficient because firms would be able to exploit economies of scale. They also believed that law enforcers were more likely to damage the competitive process by their interventions because of their ignorance about how markets worked. The Chicago school placed economics at the centre of its analysis of competition law and put strong confidence in the belief that markets work best without excessive regulation by states or courts.⁵⁶ The fundamental Chicago view was that the pursuit of efficiency, by which was meant allocative efficiency as defined by the market, should be the sole goal of antitrust. The school did not support sentimentality for small business but placed trust in the market. The identity of the winners or losers was irrelevant as long as efficiency was achieved.⁵⁷

The Chicago School has been criticised for relying on unrealistic assumptions, which fail to explain strategic behaviours taking advantage of market imperfections, where firms can make profits without being efficient.⁵⁸ It has been criticized for being static and concentrating too much on long-term effects rather than on short-term effects and of competition as a process, in a dynamic sense.⁵⁹

2.3.1.3 Post-Chicago

Although the Chicago School has been viewed by many as the most influential school of thought in competition policy, its model has lately been contested by the so called post-Chicago theories. Both schools agree that economics is the essence of competition policy and that consumer welfare should be the exclusive goal of competition law. However, they differ in their views concerning the market mechanism and how enforcement should be carried out. While Chicagoans believe that markets tend towards efficiency, that market imperfections are usually temporary, and that judicial intervention should proceed cautiously, post-Chicagoans believe that market

⁵⁵ Gormsen, L.L., *A principled approach to abuse of dominance in European Competition Law*, Cambridge University Press (2010), p. 31.

⁵⁶ Chalmers, *supra* note 53, p. 913.

⁵⁷ Sufrin & Jones, *supra* note 51, p. 22-23.

⁵⁸ Gormsen, *supra* note 55, p. 37.

⁵⁹ Sufrin & Jones, *supra* note 51, p. 29.

failures are not always self-correcting and that firms take advantage of imperfections to produce inefficient results even in competitive markets. They therefore claim that bearing this fact in mind should encourage enforcement authorities to scrutinize a wider variety of conduct than Chicagoans would examine. Proponents of the Chicago School believe that markets themselves create efficient business behaviour and that the judiciary are ill-equipped to identify and measure market imperfections. Advocates of the post-Chicago reasoning, on the other hand, have less trust in markets and more confidence in the ability of judges to distinguish between competitive and anticompetitive conduct.⁶⁰

2.3.1.4 Ordoliberalism & Microsoft

After having briefly touched upon the line of thought introduced by the different US schools, we now turn to Europe.

In the 1930s and 1940s, a group of neo-liberals at Freiburg University in Germany developed ideologies grouped together under the term ordoliberalism.⁶¹ According to ordoliberals, the aim of competition was the protection of individual economic freedom of action. Ordoliberals would prefer a state of inefficiency coupled with freedom rather than a totalitarian, but efficient, state. Ordoliberals argued strongly against the economic power of dominant undertakings, due to their belief that individual freedom was eroded from within by the rise of private economic power. One of the core ideas of ordoliberalism was therefore the deprivation of power.⁶²

According to the ordoliberal view, the primary goal of competition is the individual economic freedom. The state should protect the basic parameters of the system of competition by establishing a legal framework which should include principles to counteract any tendencies that neutralize competition. It should regulate and limit the emergence of private economic power by prohibiting cartels and the growth of single-firm market power and contracts that create unjustified limits on the competitive autonomy of firms. Ordoliberalism did not regard economic liberalism as a self-correcting system but rather believed that the state should intervene to cure market failures. Although good in principle, ordoliberals argue that a free economic market may have many undesirable outcomes.⁶³

Ordoliberals argued that in order for the market to function effectively the state should construe the legal system in such a way that it could maintain conditions of complete competition. Complete competition could be achieved only through competition on both the supply and demand sides of the market. This, in turn, would require that no player on either side was restricted in their freedom to compete. As such, market power was inconsistent with the idea of complete competition, since a firm with too

⁶⁰ Jacobs, M.S., *An essay on the normative foundations of antitrust economics*, 74 North Carolina Law Review 219 (1995-96), p. 222-225.

⁶¹ Gormsen, *supra* note 55, p. 39.

⁶² *Ibid.*, p. 43

⁶³ *Ibid.*, p. 43-44

much market power could hinder the performance of its rivals and thus restrict their freedom to compete. Therefore, the conduct of firms with market power had to be limited so that it could not harm its competitors. This was to be done by imposing an obligation on dominant undertakings in order for them to conduct themselves as if they were faced with complete competition. This way, it was presumed, the dominant undertakings would need to perform in order to be profitable, instead of relying on their power to gain advantages over their competitors.⁶⁴

Ordoliberalism has played an important role in the early development of competition law in the European Union and according to some, it still plays a decisive role⁶⁵. Because of all this, the competition policy of the EU has received a lot of criticism, not least from the other side of the Atlantic where the ordoliberal reasoning has been compared to the influential, but outdated, Harvard School line of thought, even though there are signs that the Commission is now heading towards a more economic, effects-based approach also in the area of dominant undertakings⁶⁶. Still, the Commission and the EU judiciary have been criticized for their heavy focus on the competitive structure of the market, taking a form-based rather than effects-based approach to Article 102 TFEU as well as their will to protect single competitors instead of consumers as a whole. Ahlborn & Evans, for example, take a very critical stance and state that, while other areas of EU competition policy have been modernized over the years, the policy under Article 102 TFEU has remained virtually unchanged over the last forty years. According to them, the analytical framework used by the EU Courts for assessing abuses of dominance is based on concepts and ideas heavily influenced by ordoliberalism.⁶⁷ Or, as Devlin and Jacobs put it in one of their articles, “a relatively obscure philosophic approach to competition known as ‘ordoliberalism’ has played a significant role in the development and evolution of EU antitrust jurisprudence”, something that they claim also has an appreciable explanatory power in analyzing the outcome in Microsoft.⁶⁸

⁶⁴ Ibid., p. 45-47

⁶⁵ See e.g. Pera, A., *Changing Views of Competition, Economic Analysis and EC Antitrust Law*, prepared for the 2008 Macerata Lecture on European Policies at the University of Macerata, Italy (2008), p. 26. He there refers to a statement of AG Kokott in her opinion on case C-95/04 P (British Airways) where she stated that “Article 102...is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the *structure of the market* and thus *competition as such (as an institution)*, which has already been weakened by the presence of the dominant undertaking on the market. In this way, consumers are also indirectly protected. Because where competition as such is damaged, disadvantages to consumers are also to be feared”. According to Pera, there is a definitive ordoliberal influence in that statement, in the reference both to competition as an institution, and to the structure of the market. Furthermore, consumers’ interests are viewed as indirectly protected by the protection of competition, and not as the direct objectives of this protection.

⁶⁶ This was one of the purposes with the Guidance Paper issued in 2009, which will be the topic for chapter 4.

⁶⁷ Ahlborn, C. & Evans, D.S., *The Microsoft Judgment and its implication for competition policy towards dominant firms in Europe*, 75 Antitrust L.J. 887 (2008-2009), p. 909-910.

⁶⁸ Devlin, A. & Jacobs, M., *Microsoft’s five fatal flaws*, 2009 Columbia Business Law Review 67 (2009), p. 92. See also Pera, *supra* note 65, p. 34-35, where he suggests that the

According to some, the ordoliberal ideas have also influenced the EU view on IPRs. In the early days of the European Community there was considerable fear of patent monopolies which were perceived as barriers to entry, which by nature were always viewed with suspicion by ordoliberals. According to Korah, the need to encourage investment and innovation had limited influence on competition law until the Commission began to respect economists more in the late 80s. The Community institutions were mostly analyzing cases *ex post*, which meant that by the time an IPR holder exercised its rights, there was no longer any need to ensure that sufficient incentives existed to encourage innovation. The upholding of IPRs by companies was thus viewed as restricting production and raising prices for the concerned products, and the claim that a limitation of IPRs would reduce the incentives to invest and innovate was not accepted.⁶⁹ IPRs, which were dealt by nationally, were also perceived as isolating one member state from another, contrary to the fundamental principle of the single market. The CJEU therefore developed various doctrines to prevent the use of IPRs to partition the market. Korah points out that Article 101 and 102 TFEU have been interpreted so as to satisfy aims such as the integration of the common market, followed by the protection of competitors, especially small and medium-sized firms, from unfair competition. It has not been until recently that the protection of consumers and the economy as a whole also has been widely recognized.⁷⁰

According to Ahlborn & Evans, the GC's analysis in the Microsoft case reflected ordoliberal thinking throughout the whole judgment and appears to be based on its core concepts, such as the clear delineation of "competition on the merits" and "impediment competition", the use of structural presumptions and an overall form-based approach.⁷¹ They claim that the GC defined competition on the merits narrowly as competition that involves the relative quality of the competing products by identifying the "intrinsic merits of the products". Factors that went beyond the intrinsic merits, such as a competitive advantage arising from better interoperability was thus not regarded as competition on the merits. By comparing the intrinsic merits of Microsoft products relative to its competitor's products, the GC concluded that the products of the latter were superior with respect to a series of

Commission and the Courts, in practically all the refusal to deal cases have been mainly guided by the preoccupation to maintain access to the market, even when this was not clearly justified by economic considerations. He therefore points out that a widespread perception exists that the enforcement of Article 102 TFEU continues to be driven by the consideration of structural aspects.

⁶⁹ Korah, V., *The interface between intellectual property and antitrust: the European experience*, 69 *Antitrust L.J.* 801 (2001), p. 803-804.

⁷⁰ *Ibid.*, p. 804.

⁷¹ Ahlborn & Evans, *supra* note 67, p. 911-912. As they explain, p. 910-911, for ordoliberals, "competition on the merits" primarily concerned the competitive variables of price and quality. Their presumption was that this kind of competition could easily be distinguished from anticompetitive behavior ("impediment competition"). According to Ahlborn & Evans, ordoliberals did not seem to have acknowledged the tension between static competition, which limits profits to the benefit of consumers, and dynamic competition in which the prospect of profits encourages innovation and the creation of new products to the benefit of consumers.

features. From this, they argue, the GC inferred that Microsoft's increase in market shares must have been the result of abusive behaviour since it was not based purely on competition on the merits.⁷²

Ahlborn & Evans also claim that one of the fundamental problems with the GC's approach in the Microsoft case, and the ordoliberal analysis in general, is that there is no objectively defined dividing line between competition on the merits and impediment competition. Although the quality of a product is one important variable, it is not clear to them why other factors, such as the efficiency of a competitor's distribution system or the interoperability between its different products, should not be considered as competition on the merits. Also, even if it would be possible to distinguish between legitimate and illegitimate forms of competition on the merits, the assessment of the relative merits of two offerings and the conclusion of abuse simply from an increase in market shares of the supposedly inferior product is subject to a high risk of error.⁷³

Another preliminary remark that is worth making is the fact that the GC judgment on Microsoft was issued after the publication of the DG Competition Discussion Paper on the application of Article 102 TFEU to exclusionary abuses, at a time when the modernization of Article 102 had already been subject to an intensive debate. The GC's ruling had therefore been expected as an important signal as to whether the GC approves of the Commission's approach to modernisation taken in the Discussion Paper. According to Rousseva, the GC gave mixed signals on this matter. On the one hand, she points out, the ruling supports an effects-based analysis and is ready to recognise that dominant firms may have legitimate reasons to refuse to supply other parties. On the other hand, the GC made it clear that conduct that threatens to eliminate effective competition, by depriving competitors of the possibility to exercise competitive pressure on the dominant undertaking, should always be prohibited.⁷⁴

⁷² Ibid., p. 912.

⁷³ Ibid., p. 913.

⁷⁴ Rousseva, E., *Rethinking Exclusionary Abuses in EU Competition Law*, Hart Publishing (2010), p. 100.

3 Microsoft discussion

In this chapter, I will present the views of scholars on this highly debated case. As mentioned earlier, the Microsoft case has been heavily discussed and this discussion has been carried out by scholars and others on several different levels. A number of authors have focused on the legal aspects of the case, relating its outcome to earlier case law concerning refusal to deal/license, discussing possible implications of the case for the future, applauding and/or criticizing the case. Others have focused on the economic aspects of the case, trying to answer the question on what the economic consequences of the Commission's and the Court's chosen direction are in terms of overall consumer welfare in the short and in the long run, companies' incentives to invest etc. In other words, they are keeping the never-ending discussion on what the perfect balance should be between competition policy and IPR policy alive. In this part of the thesis, the focus will be on what scholars have stated as regards the legal aspects and the implications of the Microsoft case. However, some economic aspects tend to mark their presence in those discussions as well.

3.1 The abusive conduct

If one looks at the structure of the Microsoft case and the judgment by the GC, it is apparent that the GC heavily relied on earlier case law. Or, as Nazzini puts it, the GC is at pains to show that it has adopted an orthodox approach based upon existing case law.⁷⁵ It started its analysis of the alleged abuse by referring to previous judgments, in particular Magill and IMS Health, listing the criteria, more known as "exceptional circumstances", which had been established in those cases. However, in its decision, the Commission actually considered three other characteristics which, as it claimed, allowed Microsoft's conduct to be characterized as abusive.⁷⁶ Although it is true that the IMS Health judgment had not yet been issued when the Commission decided on the Microsoft case in 2004, which to a certain extent excuses the Commission for not following it, IMS Health did in fact only restate and confirm the set of elements established in earlier judgments, such as Magill and Bronner. Still, if the Commission took this position, not focusing on the already established criteria in case law, it could

⁷⁵ Nazzini, R., *The Microsoft Case and the Future of Article 82*, 22 Antitrust 59 (2007-2008), p. 60.

⁷⁶ Commission Decision, Microsoft, supra note 9, para 317. The three characteristics mentioned were: the fact that the present case related to interoperability in the software industry, a matter to which the Community legislature attaches particular importance; the fact that Microsoft used its power on the CPCOS market to eliminate competition on the adjacent WGSOS market; and that the conduct in question involves disruption of previous levels of supply.

by implication be assumed that it was not convinced that the Microsoft case actually met the IMS Health test.⁷⁷

What is interesting in that regard is the fact that the GC, when beginning its assessment of the alleged abuse by Microsoft, stated that it is appropriate, first of all, to decide whether the circumstances identified in Magill and IMS Health were also present in this case. However, if it would find that one or more of those circumstances were absent, it would proceed to assess the particular circumstances invoked by the Commission.⁷⁸ Even though, in the end, the GC did not assess these special characteristics considered by the Commission, this statement would suggest that the GC did not want to confine itself only to the circumstances established in previous judgments⁷⁹. Instead, it made it clear that other circumstances than those established in case law could be invoked by the Commission and, possibly, lead to a conclusion that they were evidence of an abusive conduct. Rouseva believes that the GC's answer entirely changes the case law on refusals to license IP rights. Any reading of the "exceptional circumstances" as not being exhaustive deprives them of their main characteristic: exceptionality. An open-ended list of exceptional circumstances in which an abuse can be found, she argues, risks transforming the exception into the rule.⁸⁰

Rouseva also comments on the statement made by the GC that for an abusive to be considered as abusive, it is necessary to distinguish two markets, one market constituted by the product on which the undertaking refusing to supply holds a dominant position and a neighbouring market on which the product is used in the manufacture of another product.⁸¹ This was a clarification of the CJEU's statement on the matter in the IMS Health case, where it had been stated that it was determinative to identify two different stages of production.⁸² According to her, that clarification was important because it affirms the application of the leverage theory as a basis for the analysis of refusals to deal.⁸³

⁷⁷ Larouche, P., *The European Microsoft Case at the Crossroads of Competition Policy and Innovation: Comment on Ahlborn and Evans*, 75 *Antitrust L.J.* 933 (2008-2009), p. 940-941.

⁷⁸ Case T-201/04, *Microsoft*, supra note 10, p. 336.

⁷⁹ Also noted by Rouseva, supra note 74, p. 103, where she points out that the holding that the exceptional conditions established in Magill and IMS Health are not exhaustive is not a novel reading of the case law. Commentators supportive of the idea of a non-exhaustive list of exceptional circumstances argue that such an interpretation had in fact been suggested by the CJEU in the IMS Health case when it stated that the cumulative conditions in the Magill case were "sufficient" for finding of an abuse. From this, in contrast to the common expression "necessary and sufficient", commentators have drawn the conclusion that the conditions in Magill and IMS Health are not exhaustive. This, it has been argued, would also be consistent with the text of Article 102 (b) TFEU which appear to cover a wider range of circumstances.

⁸⁰ Rouseva, supra note 74, p. 103.

⁸¹ *Ibid.*, p. 104.

⁸² Case C-418/01, *IMS Health*, supra note 8, para 45.

⁸³ Rouseva, supra note 74, p. 104.

Nihoul makes a point when he stresses that case law has shown that the European courts define markets narrowly in IP/competition cases. According to him, in each case the definition has been limited to the protected product and, when so defined, IP firms are always found dominant. Dominance as a concept is therefore not reserved to big, important firms but depends instead on the existence of an innovation. With this attitude towards market definition, firms are likely to be found dominant, whatever their size, where they innovate and their innovations are IP-protected.⁸⁴

All in all, the GC starts its assessment of the case in an expected way. However, and this may be worth mentioning already at this stage, when referring to the exceptional circumstances in *IMS Health*, the GC notes in paragraph 330 that one of these was that the refusal was such as to exclude **any competition** on a secondary market. The surprising thing is that two paragraphs later, in paragraph 332, the GC states that it follows from the mentioned case law that one of the circumstances which, in particular, must be considered to be exceptional is that the refusal is of such a kind as to **exclude any effective** competition on the neighbouring market. We have already seen, from the words of chief judge Vesterdorf, that this new wording was a conscious choice made by the GC. Perhaps, however, this change should not have been expressed in a way which could be understood as inferred from earlier case law, as it was done in paragraph 332 of the judgment. We will return to this aspect later in this chapter.

3.2 Indispensability

As we know, the condition of indispensability was mentioned in both *Magill* and *Ladbroke*, but it was elaborated upon the most in *Bronner*. There, the CJEU stated that the service (the primary market) had to be indispensable to carrying on the business on the secondary market, inasmuch as there was no actual or potential substitute for the existing service. In this regard, it had to be established that there were technical, legal or economic obstacles capable of making it impossible, or even unreasonably difficult, for another company to establish, alone or in cooperation with others, its own service on the primary market. It was also necessary to establish that it was not economically viable to create a second service of a comparable size to the existing one.⁸⁵ This was later confirmed by the CJEU in *IMS Health*. In *Microsoft*, the GC affirmed the conclusion made by the Commission that in order to be able to compete viably with Windows WGSOS, competitors' operating systems must be able to interoperate with the Windows domain architecture on an equal footing with those Windows systems.⁸⁶ Microsoft argued that it was not necessary for its competitors' WGSOS to attain the

⁸⁴ Nihoul, P., *The Limitation of Intellectual Property in the Name of Competition*, 32 *Fordham International L.J.* 489 (2008-2009), p. 497.

⁸⁵ Case C-7/97, *Bronner*, *supra* note 7, paras 41-44.

⁸⁶ Case T-201/04, *Microsoft*, *supra* note 10, para 374.

degree of interoperability required by the Commission in order for them to be able to remain viably on the market.⁸⁷ On this point, the GC stressed, before finding that a number of factors did in fact confirm the correctness of the Commission's finding, that the Commission's analysis of that question was based on complex economic assessments and that it was therefore subject to only limited review by the Court.⁸⁸ It subsequently found that Microsoft had not established that the assessment made by the Commission was manifestly incorrect.

Rousseva observes that the GC agreed with the Commission that the alternatives to the requested information mentioned by Microsoft would allow competitors to achieve only a *de minimis* market penetration, which was insufficient to ensure an effective market structure that would allow competitors to exercise the necessary competitive pressure on the dominant undertaking. The GC confirmed in its own words that, in order to be able to compete viably with Windows WGSOS, competitors' operating systems must be able to interoperate with the Windows domain architecture on an equal footing with those Windows systems. Rousseva argues that the requirement that a dominant firm should provide information which would enable competitors to exercise pressure, as the Commission had phrased it, might be an unjust scale for measuring indispensability, and it could even be seen as a deviation from the definition in Bronner. The ability to exercise competitive pressure, she contends, depends also on other factors than indispensability, such as the competitor's own efficiencies. Rousseva supports however the Commission's and the GC's reference to the need to provide competitors with information that would allow them to compete on an equal footing since this better reflects the idea in the Bronner case according to which the criterion is whether an undertaking with the same scale as the incumbent dominant undertaking is capable of reproducing the service in question. Nonetheless, she concludes, it is normally difficult to determine the conditions under which customers must be supplied so that they are put only on an equal footing rather than being "subsidised" by the dominant undertaking, something the GC did not further elaborate upon.⁸⁹

Nazzini refers to the earlier cases where the CJEU had stated that without the indispensable input, it had to be "impossible or, at least, unreasonably difficult" for any undertaking seeking to operate in the market to supply alternative products or services. He claims that the GC in Microsoft appears to have focused on the second part of that test, holding that it would be "unreasonably difficult" for competitors to market their products viably without the required degree of interoperability. At the same time, he is of the opinion that such an interpretation would amount to requiring a lower threshold than the words "unreasonably difficult" would suggest and he asks the question whether such a lower threshold is of general application or may be limited to the specific circumstances of the Microsoft case. He suggests that the lower threshold may have been justified either because

⁸⁷ *Ibid.*, para. 378.

⁸⁸ *Ibid.*, para. 379.

⁸⁹ Rousseva, *supra* note 74, p. 105.

interoperability issues in the software market are different from typical refusal to supply/license cases or because of Microsoft's special position on the concerned market. The first justification would rely on the belief that, in order to compete viably on the market, competitor's WGSOS must be able to interoperate with Windows. The degree of interoperability required would depend on the special characteristics of the concerned products. According to Nazzini, this kind of rule would however be very limited in practice and there was no clear indication that it was the court's intention to establish such a rule. The second justification, Nazzini claims, would limit the judgment to cases concerning undertakings with significant market power, tending towards a monopoly. He refers to the several references made in the judgment and the Commission's decision to the fact that Microsoft's dominant position on the CPCOS market has "extraordinary features" which supports the finding that, as the Windows operating system is present on virtually all client PCs installed within organizations, non-Windows WGSOS cannot continue to be marketed viably if they are incapable of achieving a high degree of interoperability with Windows. On this point Nazzini do stress, however, that that analysis was part of the factual findings of the case and did not constitute an element of the legal test set out by the court.⁹⁰

Hesse seems to agree with Nazzini's view of a lowered threshold as regards the determination of the indispensability criterion. She refers particularly to the view of the GC that interoperability information is indispensable where that information is necessary for a competitor to achieve the same level of interoperability with the dominant firm's products, which it can achieve itself, and where the inability to achieve that level of interoperability has the effect of reinforcing the dominant firm's competitive position in the market. She argues, however, that where the interoperability information is of any competitive significance, it is difficult to imagine a set of circumstances where this standard of indispensability would not be satisfied.⁹¹

Andreangelli observes the similarities of the Commercial Solvents case with Microsoft, in that Microsoft's interruption of the supply of the necessary information to guarantee interoperability had prevented its competitors from developing operative systems that would be able to connect to Microsoft's CPCOS, to the prejudice of technical development and consumer welfare. The demands of "genuine competition" on the secondary WGSOS market would thus justify both the wide interpretation of the concept of interoperability and the finding of indispensability of the concerned information. She points out, however, that it could be argued that these conclusions may not be easy to reconcile with the need to foster the incentive to innovate, even when dealing with dominant undertakings and

⁹⁰ Nazzini, *supra* note 75, p. 60. See also Ahlborn & Evans, *supra* note 67, p. 900-901, who seem to be of the same opinion, that the criterion of indispensability has been weakened by the GC judgment in Microsoft.

⁹¹ Hesse, R.B., *Counseling Clients on Refusal to Supply Issues in the Wake of the EC Microsoft Case*, 22 *Antitrust* 32 (2007-2008), p. 34. See also Case T-201/04, Microsoft, *supra* note 10, paras. 421-422.

their competitors. It is necessary to strike a balance between preserving competition especially as regards the supply of similar auxiliary goods and the safeguarding of innovation through incentives and appropriate financial rewards, enhancing competition for the market⁹². Andreangelli suggests that the Microsoft judgment has tipped the scales in favour of Microsoft's rivals and thus of competition on the market. She specifically questions whether the obligation put on Microsoft to supply its interoperability information, although having short term benefits in that Microsoft's competitors will be able to supply alternative WGSOS, will also lead to appreciable advantages for innovation in the long term. In her view, such a broad obligation may encourage the duplication or imitation of a de facto standard rather than the investment in new technologies which would eventually displace the leading software.⁹³

Andreangelli also seems displeased with the ease by which the GC rejected the, by Microsoft, proposed alternative methods whereby interoperability could be achieved. On this point, she especially points to Bronner where the CJEU had defined the condition of indispensability as the absence of any "actual or potential substitute" for the input controlled by the dominant undertaking. She also cites the words of AG Jacobs in that case, who stated that an obligation to allow access could be justified where the "duplication [of the input would be] impossible or extremely difficult owing to physical, geographical or legal constraints", or the costs associated with it could "deter any prudent undertaking from entering the market". Although the GC was right to attach concern to the overwhelming market power enjoyed by Microsoft and the network effect characterizing the operative system industry, Andreangelli claims that the breadth of the obligation imposed on Microsoft and its potential implications for the incentives to innovate could have justified a closer look at the available alternatives and, with that, a greater adherence to the Bronner concept of indispensability.⁹⁴ The same kind of reasoning has been expressed by Howarth & McMahon. According to them, even though a denial of access to interoperability information may have raised rivals' costs, this does not necessarily make the information indispensable, and in turn subject to an order for disclosure, to competition in the secondary market. Further examination is necessary as a disclosure

⁹² The concept of "competition for the market" reflects the thinking that companies can, mainly by groundbreaking innovations, "transform" the market, taking it to another level, and at the same seize a dominant position on that market and reap the financial benefits of this position until the next market transformation. This concept is often contrasted with the concept of "competition on/in the market", connoting the traditional view of competition on merits such as price, quantity and quality. It has been argued that "competition for the market" is particularly relevant and present in new economy markets, i.e. high-technology markets. Products competing in the new economy, often relying on information technology and often heavily protected by IPRs, tend to produce strong market leaders often achieving the position of de facto industrial standards (<http://business.highbeam.com/420683/article-1G1-90119430/ec-competition-law-and-intellectual-property-rights>).

⁹³ Andreangelli, A., *Interoperability as an "Essential Facility" in the Microsoft Case – Encouraging Competition or Stifling Innovation?*, E.L. Rev. 34(4) (2009), p. 596-597.

⁹⁴ *Ibid.*, p. 597-598.

order may reinforce a homogeneous network rather than encouraging innovation and competition within and between heterogeneous networks.⁹⁵

Howarth & McMahon note that the current definition of the indispensability criterion is particularly problematic in network markets. They refer *inter alia* to the referral made by the GC in Microsoft to a specific part of the IMS Health case, where the CJEU held it to be decisive that two different stages of production were identified and that they were interconnected in that the upstream product was indispensable for supply of the downstream product. According to Howarth & McMahon, this interpretation expands the focus beyond a “market” to any input which is indispensable for another stage of production, which potentially encompasses access to any gateway or standard which is by definition indispensable to the production of certain products or services, not just those defined within a market. In high technology markets, characterized by network effects, consumers derive utility from the number of other consumers who choose the same product. The presence of network effects means that markets often “tip” to the supplier who controls a popular and well-functioning standard, resulting in it obtaining a dominant position. These markets, Howarth & McMahon argue, are therefore characterised by firms with large market shares or by monopolies, as one supplier tends to dominate the market. Further, they ask, if monopoly and dominance are so common in these high technology markets, is there any sense in imposing onerous duties on the monopolists, especially if they are liable to be displaced by further innovative technology? Should technological superiority be determined by the courts or by consumers in the market? Howarth & McMahon conclude on this point that the growth in Microsoft's market share could for example be explained by network effects, superior efficiency and/or consumer preference for a homogenous system, rather than abuse. If the answers to these questions are speculative, it may have been more beneficial for the court to decline intervention for fear of “false positives” where pro-competitive behaviour is incorrectly and inefficiently prohibited.⁹⁶

3.3 Elimination of competition

The criterion concerning elimination of competition goes all the way back to Commercial Solvents and has been repeated ever since as one of the exceptional circumstances. However, the final wording of the courts as regards this specific condition has varied. In Commercial Solvent, it was stated that a dominant undertaking cannot **act in a way as to eliminate the competition** of those active on the secondary market. In Télémarketing, this was expressed in the terms of a **possibility of eliminating all competition** from another undertaking. In Volvo, one of the exceptional characteristics

⁹⁵ Howarth, D. & McMahon, K., “*Windows has Performed an Illegal Operation*”: *The Court of First Instance’s Judgment in Microsoft v Commission*, E.C.L.R. 29(2) (2008), p. 121.

⁹⁶ *Ibid.*, p. 120-122.

was held to occur when, by its conduct, the dominant undertaking reserved to itself the secondary market by **excluding all competition** on that market. Subsequently, in *Magill*, both the GC and the CJEU stated that the broadcasting undertakings were using their copyright to **exclude all competition** from the derivative market of weekly television guides. In *Bronner*, the CJEU confirmed that the refusal had to be **likely to eliminate all competition** in the daily newspaper market (secondary market). Finally, in *IMS Health*, although referring *inter alia* to the *Bronner* case, the CJEU phrased this criterion as meaning that the refusal is such as to reserve to the owner of the IPR the secondary market by **eliminating all competition** on that market. Of course, these small differences, it can be argued, have no importance as regards the true understanding of the criterion. Microsoft argued otherwise and I would agree. As we read earlier, the chief judge in the Microsoft case was also aware of the change in the wording of this criterion which the GC established.

In its decision, the Commission considered whether the refusal gave rise to a risk of the elimination of competition on the WGSOS market. Microsoft contended that that criterion was not sufficiently strict, since according to case law on the exercise of IPRs, the Commission must demonstrate that the refusal to license an IPR to a third party is “likely to eliminate all competition”, meaning that there should be a “high probability” of such a result to occur.⁹⁷ The GC rejected this argument, stating that the expressions “risk of” and “likely to” are used without distinction by the Community judicature to reflect the same idea, namely that Article 102 TFEU does not apply only from the time when there is no more, or practically no more, competition on the market. Also, since the objective of Article 102 TFEU is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market, the Commission is not required to wait until competitors are eliminated from the market. What matters is instead that the refusal is liable to, or is likely to, eliminate all effective competition on the market. The fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to demonstrate the existence of such competition. The GC concluded that in this case the Commission had all the more reason to apply Article 102 TFEU before the elimination of competition on the WGSOS market had become a reality, since that market was characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse.⁹⁸

Rousseva observes that in *Microsoft* the GC, for the first time in its jurisprudence, expressly referred to the theory of leverage. As the GC had pointed out, the abusive conduct had its origin in the dominant position on the first product market. As Rousseva points out, it follows that the fulfilment of the condition for elimination of competition in the secondary market does not require that the dominant undertaking on the primary

⁹⁷ Case T-201/04, *Microsoft*, *supra* note 10, para 560.

⁹⁸ Case T-201/04, *Microsoft*, *supra* note 10, paras 561-563.

market is also dominant on the secondary market.⁹⁹ As she also notes, however, the GC was unwilling to discuss how much of the secondary market should be conquered by the quasi-monopolist in the primary market. From the ruling, she concludes that the conditions of the leverage theory would probably be satisfied if an undertaking has a very strong dominant position upstream and is already present downstream, even if it is not dominant. One interesting point she makes is that the GC ruling in Microsoft did not provide a solution to the situation where a quasi-monopolist on the primary market does not yet have presence on the secondary market, as for example was the case in Commercial Solvents.¹⁰⁰

Rousseva also commented the adding by the GC of the word “effective” to the condition. According to her, the formulation raises the question: what is the difference between “effective competition” and the competition that remains when there is a dominant company on the market? If a dominant undertaking on the primary market also has a dominant position on the secondary market, according to Rousseva it could be said that there is no longer effective competition on the secondary market because the mere fact of dominance already means dependence and the absence of effective competition.¹⁰¹ However, she continues, by suggesting that there is no need to establish dominance on the secondary market according to the leverage theory for finding an abuse, the GC’s ruling suggests that the elimination of effective competition is a looser standard than the residual competition in the case of presence of a dominant position on the secondary market.¹⁰²

Rousseva actually goes all the way to claim that the condition relating to elimination of competition is devoid of practical meaning if applied alongside the condition for indispensability. She argues that, if a product offered by a monopolist is found to be indispensable for competition in another market, it goes without saying that the refusal to give access to such a product eliminates the competition. On this point she notes that, in Microsoft, the Commission and the GC assessed the degree of indispensability by establishing how much interoperability information was indispensable for competitors to be able to exercise pressure on the dominant undertaking, in other words how much information was indispensable for effective competition on the secondary market. Based on this, Rousseva claims that the condition of elimination of competition is simply another description of the indispensability criterion. A situation in which the indispensability condition is satisfied, but the condition of

⁹⁹ Rousseva, *supra* note 74, p. 106.

¹⁰⁰ *Ibid.*, p. 107.

¹⁰¹ *Ibid.*, p. 108.

¹⁰² *Ibid.*, p. 108. See also Nazzini, *supra* note 75, p. 60, who understands the new definition as meaning that the refusal must have the likely effect of marginalizing competitors and preventing them from exercising any effective competitive pressure on the dominant undertaking. According to Nazzini, this is a step forward compared to the condition of the elimination of competition on the part of the undertaking requesting access in refusal to supply cases, but it is also a modification of the seemingly more stringent test of elimination of all competition in refusal to license cases.

elimination of competition on the secondary market is not, is inconceivable. This means that one of the two conditions is redundant.¹⁰³

Ahlborn & Evans observe that in *Microsoft*, the GC had to decide whether the Commission had made a manifest error in predicting that Microsoft's refusal to supply would eliminate competition in the WGSOS market, which required a prediction that competition would be eliminated. The prediction was largely based on the fact that Microsoft's market share had been rising and its competitors' falling. According to Ahlborn & Evans, the GC's approach softened both the indispensability and elimination of competition standard. As they note, refusal to grant access to an input no longer has to be an absolute bar to participating in the market for the input to be indispensable and for elimination of effective competition to be likely. Property may be indispensable even if there are companies who remain viable in niches of the market. Establishing indispensability, they conclude, may also be based on predictions about the effects of lack of access to the input on competition over time.¹⁰⁴

Devlin & Jacobs also discussed the new definition chosen by the GC, believing that this seemingly harmless alteration will likely create several problems. This small change in language, Devlin & Jacobs argue, creates and conceals a far more expansive and potentially intrusive test than the one used in earlier case law. The earlier standard, focused on any competition, would permit a broad range of exclusive behaviour, even if the refusal put rivals at a disadvantage. As long as the refusal was not severe enough to entirely foreclose rivals from access to the market, it would be lawful. In contrast, with effective competition, depending on its definition, the GC's standard could forbid refusals to supply that do no more than hinder rivals' ability to compete on an equal ground. Devlin & Jacobs argue that under such a rule, the more valuable the concerned IPR, the greater risk it runs to be mandatory disclosed. Any non-substitutable technology protected by IPRs would be subject to mandatory access. According to them, the GC's decision to rewrite the condition can have very serious consequences.¹⁰⁵

Devlin & Jacobs claim that when dealing with the criterion of elimination of competition, the GC used an ordoliberal view of welfare which conflicts with an economic-based approach. According to them, the GC seemed to believe that improved consumer welfare would only be possible by additional consumer choice, a view whose implications would open up many pieces of IP to the sharing obligation imposed on Microsoft. Devlin & Jacobs point out that the main elements of consumer welfare, as defined economically, are output, price, and quality. They note that in the world of the new economy, where IP drives innovation, there may exist a strong tension between the provision of choice and the promotion of improved technology. According to Devlin & Jacobs, it is only by granting the inventor of a qualitatively superior standard an exclusive right, and thereby

¹⁰³ Ibid., p. 122. See on this point also Ahlborn & Evans, *supra* note 67, p. 899.

¹⁰⁴ Ahlborn & Evans, *supra* note 67, p. 901.

¹⁰⁵ Devlin & Jacobs, *supra* note 68, p. 96-97.

by consequence denying consumers a wider choice, that a desirable incentive structure can be maintained. By ignoring this, they conclude, the GC has sown the seeds for extraordinarily broad rights of access to IP, the very purpose of which is to deny choice.¹⁰⁶

Howarth & McMahon maintain that the question for competition law should be whether a situation, such as that in Microsoft, when the dominant undertaking gains a competitive advantage on the secondary market is indeed an example of abusive conduct, when it is possible that this advantage is perhaps attributed to the direct and indirect network effects on the market. Howarth & McMahon point to the fact that both the Commission and the GC relied on consumer surveys, showing that consumers preferred a number of features offered by Microsoft's competitors' products. They argue, however, that, even if consumers did prefer those features, it is not certain that they would be developed after access to the relevant information had been granted and offered by Microsoft's competitors at a competitive price which consumers would demand. As they state:

“Mandating disclosure on the speculative claim that these features will be developed or preferred may actually discourage innovation and...development of a [new] system.”

Howarth & McMahon claim that the Commission's approach was based on the assumption that consumers were affected indirectly because Microsoft's behaviour was impairing the effective competitive structure in the market. While admitting that structure can clearly affect outcomes, Howarth & McMahon conclude that a focus on this issue alone without a closer examination of the impact of conduct on consumer welfare (and efficiency) is problematic in network environments and in competition law more generally.¹⁰⁷

3.4 New product

The new product criterion was first established in Magill where one of the exceptional circumstances mentioned was that the dominant undertaking's refusal would prevent the appearance of a new product, which the dominant undertaking did not itself offer, and for which there was a potential demand. This was later confirmed by the CJEU in IMS Health, together with an important clarification, namely that when IPRs were involved, a refusal would only be abusive where the requesting undertaking does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the IPR, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.

¹⁰⁶ Ibid., p. 98-99.

¹⁰⁷ Howarth & McMahon, *supra* note 95, p. 122-123.

In *Microsoft*, the GC seems to have seen a need to further qualify the definition of this criterion established by case law, when stating that the circumstance as regards the appearance of a new product envisaged in *Magill* and *IMS Health* could not be the only parameter which determines whether a refusal to license an IPR is capable of causing prejudice to consumers within the meaning of Article 102 (b) TFEU. According to that provision, prejudice to consumers may arise where there is a limitation of technical development. In the present case, an increasing number of consumers were locked into Microsoft at the level of WGSOS, which was all the more damaging since it had been established that consumers considered non-Microsoft WGSOS better than Microsoft WGSOS as regards certain features. The GC also pointed out that Article 102 TFEU also covers practices which indirectly prejudice consumers by impairing an effective competitive structure, as confirmed by case law. In this case, Microsoft had impaired the competitive structure on the WGSOS market by acquiring a significant market share on it.

Rousseva argues that the criterion relating to the prevention of the appearance of a new product has been offered a new understanding by the GC. According to this understanding, the new product is no longer required to have concrete features or satisfy previously unmet consumer demand.¹⁰⁸ She further contends that the new interpretation of the meaning of “new product” probably makes sense in view of the facts of the case. Taking into consideration Microsoft’s quasi-monopolistic position on the CPCOS market and its stable position on the WGSOS market, any further discouragement of competitors’ attempts to compete would likely cut off the possibility for development of the market by non-Microsoft products. It also seemed obvious that consumers were locked into Windows and she also acknowledges the fact that Article 102 (b) TFEU also prohibits the prevention of the technical development in general. However, perhaps most importantly, she views the interpretation of the GC in this case as *de facto* equating the “new product” condition with the condition of elimination of competition. The question of whether a limitation of the technical development of the industry to the detriment of consumers will be the consequence of the refusal is very close to the question of whether it is likely that all effective competition will be eliminated. Rousseva concludes by questioning whether the new product criterion is an adequate element of the abuse test in all circumstances.¹⁰⁹

Larouche claims that the GC was at pains to reconcile its reasoning with *IMS Health*, where Article 102 (b) played no role at all and the CJEU insisted on the need to show that the undertaking requesting the license intends to produce new goods not offered by the owner of the right and for

¹⁰⁸ Rousseva, *supra* note 74, p. 109. As a reminder, in the GC’s view, competitors would not have a interest in cloning Microsoft’s products because they would have no other choice, if they wished to take advantage of a competitive advantage over Microsoft and maintain a profitable presence on the market, than to differentiate their products from Microsoft’s products with respect to certain parameters and certain features.

¹⁰⁹ *Ibid.*, p. 110.

which there is a potential consumer demand. At the same time, he notes that the GC entered into an unnecessarily complicated discussion about how technical improvements in product features can also qualify as a new product. According to Larouche, it is not written anywhere that a new product needs to be a completely new offering, entirely distinct from the original one. If it is assumed that smaller-scale innovation is valuable, there is no compelling legal reason why competing WGSOS, if they offer innovative features, cannot qualify as new products.¹¹⁰

Hesse also gives her view on the new interpretation by the GC of the new product criterion, which she thinks expands the standard outlined in Magill and IMS Health in a significant way. In those cases, she argues, it was required to show a foreclosure of an entirely new product to satisfy the new production criterion. With the decision in Microsoft, it is now sufficient to show that the technical development, by which the GC presumably meant some form of innovation or improvement of an existing product, had been impaired. She concludes that it remains to be seen whether the factual circumstances in Microsoft are likely to be replicated in another case.¹¹¹

Moldén appears to take a critical stance as regards the GC's reasoning. In his view, in order for the new product criterion to have any practical significance, it should be interpreted as representing some additional requirement compared to the "limiting production, markets or technical development to the prejudice of consumers" as stipulated by Article 102 (b) TFEU. He notes that it seems as if the competing WGSOS are on the same product market as Microsoft's and it is clear that they offer some, at least slightly, different features. But, he asks, are these somewhat different features so significant that the competing WGSOS could be characterized as new products? No such analysis was found in the Microsoft judgment. Instead, Moldén argues, the GC seems to have taken a short-cut by stating that the new product criterion is fulfilled because Microsoft's conduct limits technical development and asserting that, by doing so, it applies the earlier Magill and IMS Health case law. Moldén makes clear that he would have preferred if the GC admitted that it was reversing earlier case law by skipping or substantially modifying the new product criterion. According to him, it is now misleading to talk about a "new product criterion", when it would be more appropriate to use the expression "new or improved product criterion".¹¹² Moldén sees the Microsoft judgment as representing a significant legal novelty as regards the EU judiciary's legal assessment of IPRs under EU competition law. If the Magill and IMS Health case law was

¹¹⁰ Larouche, *supra* note 77, p. 945.

¹¹¹ Hesse, *supra* note 91, p. 34. The factual circumstances which Hesse believes constituted the primary drivers behind the GC's conclusion supporting the Commission's finding were: evidence that the lack of interoperability caused by the refusal to supply was locking consumers into a "homogeneous Windows solution"; evidence that consumers were prejudiced by the lack of interoperability because they otherwise would have preferred non-Windows work group servers; and evidence that the refusal to supply had discouraged innovation among Microsoft's competitors.

¹¹² Moldén, R., *Mandatory Supply of Interoperability Information: The Microsoft Judgment*, *European Business Organization Law Review* 9 (2008), p. 328-329.

the only thing on which Microsoft could have based its self-assessment of the compatibility of its conduct with Article 102 TFEU, according to Moldén, it would have been reasonable for Microsoft to conclude that it could continue to compete aggressively and disregard any special responsibility of a dominant firm based on, inter alia, the fact that the refusal would not prevent the appearance of a new product.¹¹³

Subramanian points out that it is not clear what exactly will constitute “technical development”, since the GC did not specify what new products were likely to emerge due to the supply of the interoperability information. She observes a paradox in that the GC found Microsoft’s arguments, that its innovation would be hampered, vague, general and theoretical, when its own lack of clarity as regards its definition of what constitutes technical development in order to be assessed as a new product was as vague and general. Instead of distinguishing Microsoft from previous cases, she concludes, the GC chose to widen the case law.¹¹⁴

Andreangelli believes that the widening of the scope of the new product criterion was due to the GC’s concern with the network effects which automatically gave Microsoft a competitive advantage. She contends, however, that the concept of “new product” adopted by the GC could perhaps have unpredictable adverse effects on the dynamics of innovation driven markets, as it could privilege “follow-on” innovation to the detriment of investment in “brand new” technological progress.¹¹⁵

According to Ahlborn & Evans, the GC’s interpretation of the new product criterion lowered the threshold considerably compared to Magill and IMS Health. It shifted the delicate balance, they argue, which competition policy makers have long recognized, between dynamic competition, which relies on the prospect of future profits from the exercise of market power to stimulate investment and innovation, and static competition, which limits the exercise of market power in favour of competition “on the market”.¹¹⁶

Howarth & McMahon question the arguments used by the GC in this part of the judgment, inter alia that the lack of interoperability information had the effect of limiting consumer choice and that Microsoft’s artificial advantage placed competitors at a disadvantage by comparison with Microsoft. They ask the question whether consumer detriment should be equated with disadvantage to competitors. According to them, the decline in market shares of the competitors on the WGSOS could be attributed to a number of sources other than the refusal to supply interoperability information, such as the superior efficiency of Microsoft’s products or consumer preference for a homogenous market solution. Howarth & McMahon continue and ask, concluding that the GC did not elaborate on the issue, the following:

¹¹³ Ibid., p. 329-330.

¹¹⁴ Subramanian, S., *The Microsoft decision: a setback to IP rights in Europe?*, J.I.P.L.P. 5(4) (2010), ‘New’ product – section.

¹¹⁵ Andreangelli, supra note 93, p. 598-599.

¹¹⁶ Ahlborn & Evans, supra note 67, p. 915.

“If the market share of the non-Microsoft work group server software continues to decline after disclosure, will this be attributed to consumer irrationality for rejecting the vastly superior features of the non-Microsoft products or the imperfect disclosure of information?”¹¹⁷

3.5 Objective justification

From case law we know that the mere fact of holding IPRs cannot in itself constitute objective justification for the refusal to grant a license. In the case at hand, Microsoft expressed its discontent with the balancing test adopted by the Commission, where it had considered that a refusal to supply information protected by IPRs would constitute an infringement if the positive impact on the level of innovation in the whole industry outweighed the negative impact of the dominant undertaking’s incentives to innovate. This would, according to Microsoft, lead to dominant undertakings having less incentive to invest in research and development, because they would have to share the fruits of their efforts with their competitors. IPRs give the holder an incentive to continue to innovate and they also encourage competing undertakings to undertake their own innovative activities in order to avoid being left behind. According to the GC, however, Microsoft had only put forward vague, general and theoretical arguments on the point that disclosure of the interoperability information would have a significant negative impact on its incentives to innovate, without specifying the technologies or products to which it thus referred.

Larouche observes the convenience which the defendant, in this case the Commission, is offered by putting the efficiency defence at the end of the analysis. Once the Commission has shown that the defendant holds a dominant position and that its conduct constituted an abuse, i.e. produced anticompetitive effects to the detriment of consumers, he concludes that it is difficult to see how the other party could turn things around by arguing that its conduct does create efficiencies that benefit consumers.¹¹⁸

Spulber also notes the difficult task which Microsoft was confronted with since, as the GC pointed out, in order to prove its case Microsoft would have had to specify the technologies or products to which it referred when it stated that the disclosure would have a negative impact on its incentives to innovate. Spulber argues that innovation, by its very nature, involves as yet unknown technologies and products. By requiring a company to show that disclosing IP-protected information would reduce its incentive to innovate, the GC imposed the impossible requirement of identifying what future inventions would not occur.¹¹⁹

¹¹⁷ Howarth & McMahon, *supra* note 95, p. 123-124.

¹¹⁸ Larouche, *supra* note 77, p. 948.

¹¹⁹ Spulber, D.F., *Competition Policy and the Incentive to Innovate: The Dynamic Effects of Microsoft v. Commission*, 25 *Yale Journal on Regulation* 247 (2008), p. 261.

Forrester discusses what a dominant undertaking possibly could invoke as objective justifications, and he mentions heavy R&D expenditures and the limited period of available patent protection as examples. He also refers to AG Jacobs in *Bronner* who reviewed US case law and pointed out three categories of objective justification: technical, commercial and efficiencies. Forrester also asks a number of practical questions: What if a dominant player receives a very broad request, can it confidently say no or must it negotiate a more reasonable question? Would there be an abuse if the dominant company would refuse to accept the broad request, but the Commission would later find that a slightly narrower request should have been consented on?¹²⁰

Nazzini observes that the GC accepted that a negative impact on the incentives to innovate may be an objective justification, but it avoided to recognize that this must involve a balancing of anti-competitive and pro-competitive effects and a trade-off between ex post market power and ex ante incentives to innovate. Nazzini concludes that the GC limited its analysis to what was strictly necessary to its findings, instead of conducting a clear analysis of previous case law, and that this lack of clarity is something which is clearly signifying the state of uncertainty that plagues the law relating to Article 102 TFEU.¹²¹

Subramanian is also of the opinion that there is not much that a dominant undertaking can use as objective justification once the indispensability of a product has been established. According to her, the GC ruling fails to acknowledge that a firm's most valuable assets are precisely the ones which tend to be disruptive of competitors' attempts to remain viably on the market. She concludes that the GC missed a valuable opportunity to consolidate previous case law and further develop clarity on the confrontation between IP and competition law.¹²²

According to Howarth & McMahon, Microsoft's incentive to innovate is what is protected by the grant of the IPR and it should therefore not have the burden of establishing this again as an objective justification by a requirement to identify specific technologies or products it hopes to develop. They argue that the appropriate test for the abuse of an IPR is an assessment of whether the right is no longer being exercised according to its essential function but is being used to achieve an anti-competitive purpose.¹²³

Devlin & Jacobs stress that there is a crucial distinction between traditional and new economy industries, and that monopoly inventors may be particularly important to the economic growth of the latter. In their opinion,

¹²⁰ Forrester, I.S., *Regulating Intellectual Property via Competition?...*, European Competition Law Annual 2005: The Interaction between Competition Law and Intellectual Property Law, Hart Publishing, p. 22.

¹²¹ Nazzini, supra note 75, p. 61.

¹²² Subramanian, supra note 114, Objective justification – section.

¹²³ Howarth & McMahon, supra note 95, p. 124.

the test applied by the GC lacks any sensitivity whatsoever as regards the trade-off between the long and the short term. They continue by arguing that, even if the EU Courts generally place primacy on the immediate welfare of consumers, and sees the danger of long term harm to innovation with scepticism, there should be a mechanism dealing with cases where the opposite scenario is obviously true. This mechanism should involve a balancing act, rather than an a priori assumption. As an example, they point to high-risk, capital intensive technology markets, where the risk of diluting intellectual property is considerably greater than on other markets. Devlin & Jacobs also find it hard to imagine how anyone could prove that its incentives to innovate would weaken if it would be placed under an obligation to grant access. They further state that the GC's treatment means that adverse incentive effects are eliminated as an objective justification. Given the importance of maintaining proper incentive structures in the new economy, Europe's decision to discard any consideration of them is highly ill-advised, they conclude.¹²⁴

Andreangelli suggests that the GC should have analysed more closely the impact of the obligation to disclose the interoperability information on Microsoft's incentives to innovate. She points to cases in other areas of competition law, especially the British Airways judgment, where the CJEU held that the legality of a rebate scheme should be scrutinised in its economic and legal context and focus on its actual impact on competition and consumers. The GC in Microsoft, instead of dismissing Microsoft's arguments as vague, should therefore have conducted an analysis of the implication of the obligation put on it for its incentives to innovate. This, Andreangelli continues, should be the practice in every similar case in order to determine whether imposing a duty to license for the purpose of boosting competition would benefit future technical development and thereby increase consumer welfare. She points out that, as long as the GC's approach is focused on the short term impact on the patterns of the industry as a whole, there seem to be little room for assessment of any impact on the incentive to invest and innovate of the dominant undertaking. Andreangelli concludes that the Microsoft case confronted the GC with the problems arising from trying to apply existing standards developed for traditional industries to conduct in highly innovative markets. The outcome demonstrated that the existing case law conditions might not be entirely applicable to highly competitive markets, where not only the short term impact is important to consider but also the long term effects on the concerned companies' incentives to invest in research and development.¹²⁵

3.6 Future implications

What will the implications of the Microsoft judgment be for future cases and the general state of law in the EU as regards refusal to supply/license matters? Will its outcomes be applicable only to undertakings with a,

¹²⁴ Devlin & Jacobs, *supra* note 68, p. 105-106.

¹²⁵ Andreangelli, *supra* note 93, p. 599-603.

similar to Microsoft, super-dominant position on the market or only affect markets with significant network effects? It is difficult to give any definitive answer to these questions. Although time will surely tell, there will definitely not be a lack of suggestions, predictions and horror stories about what the future has in store for those undertakings having the nerve to refuse their competitors access to their most valuable IP-protected assets.

Larouche claims that the legal discussion in the GC judgment is limited in scope and relatively uncontroversial. Because of this, Microsoft could turn into a complex but ultimately unique case and, thus, its precedential value would be limited. Even though the Commission won the case before the GC, it did not receive the support it had hoped for and the issues raised in Microsoft will most definitely show up before the GC once more. Larouche further notes that both the Commission and the GC seem to prefer competition in the market and incremental innovation over competition for the market and breakthrough innovation. Perhaps, he speculates, this is linked with Microsoft's superdominance on the CPCOS market, in which case the issue will remain open in subsequent cases where the concerned undertaking is not super-dominant.¹²⁶ Also, the balance between the assessment of the abuse and the efficiency defence is hard to follow, and in practice it makes the efficiency defence a hopeless exercise, especially as its place is at the end of the analysis. Larouche also comments on the criticism made by Ahlborn & Evans that the Microsoft case follows an ordoliberal approach, a view he believes is exaggerated. Instead, he sees the Microsoft case as a significant improvement in the quality of competition analysis clearly heading towards an effects-based approach. According to him, the Commission carefully set out how Microsoft's conduct harmed competition and, as a consequence, consumers, although the GC could have supported this more strongly in its ruling.¹²⁷ As Larouche claims, Microsoft rests on an obvious preference for incremental over breakthrough innovation, at least when superdominance is involved. The Commission thus intervened to protect the competitive process not for the sake of keeping competitors in business, but rather to ensure that incentives remain for competitors to the super-dominant firm to try to innovate.¹²⁸

Marsden points out that the Microsoft case highlights the divergences that remain between Europe and the US when it comes to technology-driven markets, as the US courts would not accept the theories adopted by the GC. This leads to a troublesome regulatory environment for companies in global technology markets and to difficult choices for dominant companies. According to Marsden, the case also makes clear that Europe remains more likely to oblige a company to hand over its IP to a rival than is the US. The GC's ruling dilutes the exceptional circumstances in that it is no longer a question of whether the IP is indispensable to carry on business on the secondary market. Instead, a dominant company must act in such a way as to maintain sufficient viable competitors on the market. As Marsden puts it,

¹²⁶ Larouche, *supra* note 77, p. 959-960.

¹²⁷ *Ibid.*, p. 962.

¹²⁸ *Ibid.*, p. 963.

the Commission is saying that the leading player must handicap itself to enable others to have a chance of winning. He also stresses that the Commission must now decide whether Microsoft is case-specific or if it can be used in a general application against all dominant companies' future conduct. The wider question of the judgment will also be whether it will lead to more innovation in Europe.¹²⁹

Forrester stresses that the law must be sufficiently predictable for companies to plan their affairs and that the Microsoft judgment shows that new techniques are necessary to deal with the challenge of the new technology and the special features of software. However, legal principles applied to one dominant player must be capable of being applied in the future to other dominant players. He then presents a number of questions to which an answer will have to be given in the future application of the present standard, a standard which is difficult to apply and difficult to foresee. Some of the questions he asks are:

“How should the dominant holder of an important technological advantage reply to a broadly-formulated request for access to the technology from a competitor who wishes to use that technology to build a competing product? ...

If the request for technical assistance is too broad, is there a duty to deliver something narrower?

Must the dominant player under the balancing test compare its own interests and incentives to innovate with those of society as a whole? ”¹³⁰

Drexl discusses the difficult area of how competition policy and intervention is, and should be, used when dealing with IPRs. He notes on this point that in principle, IPRs only exclude competition by imitation but enhance competition by substitution¹³¹. The exclusion of imitation allows the IPR holder to charge a premium price for its protected product. At the same time, it creates additional incentives for competitors to bring better products on the market. This system of dynamic competition, he points out however, may not be feasible on all markets, for example where network effects and the emergence of a technological standard create high entry barriers, where a refusal to license may harm follow-on innovation. According to Drexl, the GC judgment in Microsoft is very much characterized by an approach of balancing the incentives to innovate of both Microsoft and its competitors. This was facilitated by the fact that it was possible to make an ex post assessment of Microsoft's conduct on its competitors' incentives to innovate. As regards Microsoft's own incentives, however, the GC had to rely on predictions. Here, Drexl concludes, the GC dealt with the problem by putting the burden of proof for the yet unknown

¹²⁹ Marsden, P., *Legal analysis: gloomy prospects for European innovation*, 17 September 2007, Times Online, available at <http://business.timesonline.co.uk/tol/business/law/article2476178.ece>.

¹³⁰ Forrester, *supra* note 120, p. 25.

¹³¹ This could be compared with the concepts mentioned earlier of "competition in the market" (imitation) and "competition for the market" (substitution).

effects on future innovation on the undertaking that wanted to justify the refusal at issue.¹³²

Nazzini questions whether the Microsoft judgment will have any implication for the Commission's review of its Article 102 TFEU policy. He notes that in the judgment, the focus is mainly on the form of the conduct and its effects on competitors rather than on consumer welfare.¹³³

Devlin & Jacobs are not holding back their discontent with the Microsoft judgment. To them it marks a worrying shift in Europe's jurisprudential thinking, placing short-term consumer welfare at the expense of long-term innovation. According to them, a general reduction in IP scope, duration or exclusivity, as a consequence of the Microsoft judgment, will most certainly have a negative effect on innovation in at least some settings. This, they claim, is especially worrisome as the duty imposed by the GC will apply only to those inventions generating the greatest value and return and, thus, the most valuable to society. Competitors will rarely, if ever, demand access to technologies for which substitutes already exist. Consequently, by the Microsoft judgment, EU competition law seeks to dilute the most valuable IPRs, reducing the incentive to invent the most important technologies. Devlin & Jacobs conclude that whether the chosen path by the EU judiciary will improve or worsen consumer welfare is a matter which cannot yet, or perhaps never can, be resolved. Policymakers are forced to choose between either the short or the long term. Devlin & Jacobs argue, however, that because of the inadequacies underlying the Microsoft ruling, its precedential value should be narrowly construed in the future.¹³⁴ As they summarise the Microsoft judgment:

*“Ultimately, the decision rests on the implicit assumption that any harm to incentives that might flow from subjecting Microsoft to a duty to share is outweighed by the short-run boon to consumers. But, this assumption is both unproven and unprovable. It represents either a guess about relative benefits, a political bias in favour of the short term, or scepticism about the relationship between incentives and innovation.”*¹³⁵

Moldén believes that the Commission's decision in Microsoft is a good example of a more economic approach in many aspects. However, at the same times he notes that the GC's judgment could be viewed as being less economic than the Commission's decision. As an example, he points to the fact that the Commission actually suggested other circumstances indicating abusive conduct on behalf of Microsoft, whereas the GC chose to apply the conditions set out in earlier case law instead. He also thinks that a more elaborate test involving the balancing of Microsoft's incentives to innovate

¹³² Drexler, J., *Real Knowledge is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases*, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-15 (2009), p. 25-26.

¹³³ Nazzini, *supra* note 75, p. 63-64.

¹³⁴ Devlin & Jacobs, *supra* note 68, p. 71-75.

¹³⁵ *Ibid.*, p. 91.

against the competitors' incentives to innovate, which was absent in the GC's judgment, would have amounted to a more advanced economic approach. Moldén also notes that the GC's judgment contains several parts upholding a traditional ordoliberal approach to competition law. He refers on this point to the part of the GC's judgment where it states that it is settled case law that Article 102 TFEU covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure, and where it concludes that Microsoft impaired the effective competitive structure on the WGSOS market by acquiring a significant market share on that market. However, Moldén believes that the GC's judgment was motivated on ordoliberal grounds since Microsoft's conduct would be likely to eliminate competition not only from less efficient competitors but also from more efficient producers of WGSOS. The Microsoft case, he concludes, is therefore not only about leveraging market power from one market to another, but also about promoting competition on the merits as opposed to competition based on artificial advantages inherent to a dominant position.¹³⁶

Hesse believes that the GC's holding relating to when interoperability information is indispensable has to be viewed in the context of a presumably general scepticism on the part of the Commission and the GC concerning the innovative value of the IPRs asserted by Microsoft. It will be interesting to see how the Commission and the GC will apply the standard in cases where there is less scepticism about the concerned IPRs. Another aspect left to be decided is how much less effective the dominant firm's competitors must be for a liability of granting access to occur. Hesse also stresses that it is important to resist the temptation to view Microsoft as an unusual case, incapable of having precedential value for other undertakings. As she sees it, there is little in the GC judgment to suggest that its conclusions were limited to the specific facts of the case, and the substantive violations for which Microsoft was found liable were not of such an unusual nature that the significance of the outcome can be disregarded in the future.¹³⁷

According to Andreangelli, the Microsoft case could be interpreted as reflecting a clash between two opposing views of competition and innovation. One is based on the idea of competition for the market, with the emergence and the temporary monopoly position of a superior product. The other is based on competition in the market, where competition and innovation is seen as the outcome of a process in which all competing suppliers should be allowed to participate and that the leading supplier should allow its competitors to share the benefits of the investment required to produce the "industry standard". Andreangelli points out that the idea of competition in the market may have chilling effects on future investments in the development of new technologies, especially in industries where competition is driven by innovations, and thus reduce or eliminate the drive to compete for the best product to emerge as the leading standard. She concludes that the central question is then how to reward the efforts of

¹³⁶ Moldén, *supra* note 112, p. 331-334.

¹³⁷ Hesse, *supra* note 91, p. 34-36.

technological development of the leading supplier while avoiding the possibility of a leading product becoming so deep-rooted as to prevent the emergence of a more efficient alternative output.¹³⁸

Howarth & McMahon are of the opinion that if a duty to deal is to remain part of Article 102 TFEU liability, there needs to be greater clarity in the formulation of general standards on the assessment of abusive conduct, especially when IPRs are involved. They state that perhaps the Microsoft judgment could be explained on public policy ground rather than on the anti-competitive effects of the refusal. As an example, they point to the fact that the Commission argued that the refusal to supply interoperability information was special because of the importance of compatibility and connectivity in the software industry where network effects are present, later acknowledged also by the GC. If this was in fact the case, they conclude, it should have been made more explicit, rather than trying to assess it according to established case law criteria.¹³⁹

According to Ahlborn & Evans, the GC's judgment in Microsoft reduces the presumption that a dominant firm can freely choose its own trading partners. First, the GC confirmed that a refusal could be evaluated taking into considerations other aspects than those established in case law as exceptional circumstances. Second, the GC replaced the new product criterion with the more general concept of limiting technical development. Third, the GC nullified the indispensability criterion by redefining the elimination of all competition criterion, adopting an elastic "effective competition" concept instead. As they see it, the GC's approach in Microsoft moves the refusal to share property from a weak per se lawful rule, as had been the basis in previous judgments by the CJEU, towards a rule of reason analysis.¹⁴⁰ Ahlborn & Evans point out that there had been some hope that the GC would use the Microsoft judgment to move its Article 102 TFEU jurisprudence towards a more economic-based analysis, as it had already done in other areas of EU competition law. Instead, they claim, the GC emphasised its adherence to the traditional, ordoliberal, form-based approach. They do acknowledge that the Microsoft judgment could be argued to apply only to superdominant firms or firms benefiting from substantive network effects. Still, even though those aspects were mentioned by the GC, the legal direction of the judgment was not tied to those concepts. The GC's loosening of the established case law standards, they believe, was not based on the presence of a monopoly market share or of network effects. Ahlborn & Evans conclude by stating that no matter what precedential value can be placed on the Microsoft judgment at this point in time, the GC's ruling will be quoted until either the GC or the CJEU changes course. The Commission, and parties with matters before the Commission, will therefore need to respect the Microsoft judgment regardless of the specific circumstances of the issue at hand.¹⁴¹

¹³⁸ Andreangelli, *supra* note 93, p. 594.

¹³⁹ Howarth & McMahon, *supra* note 95, p. 124-125.

¹⁴⁰ Ahlborn & Evans, *supra* note 67, p. 903.

¹⁴¹ *Ibid.*, p. 927-928.

According to Subramanian, it is worrying if the reasoning in the judgment will be applied to regular refusal to license cases, since abuse of a dominant position can then be found more easily, affecting both innovation and consumer welfare. She believes that the case has widened the scope of Article 102 TFEU to the point that a refusal to license by a dominant firm will be held abusive even if it results only in preventing competitors from producing identical or similar products. The negative effects on innovation that will stem from this judgment could have been limited if the GC had emphasised that the circumstances relating to Microsoft were exceptional. Nowhere in the judgment could this be found, Subramanian argues. Instead, the case gives the appearance that the EU is stealthily expanding the scope of Article 102 TFEU to ensure that competition policy retains priority in Europe at the expense of the rights granted by IP law. As she sees it, IP rights are already restrained by their duration and scope, reflecting the trade-off between the exclusion of competition and promotion of innovation. The non-harmonisation of IP laws in the EU has led to those rights being faced with opposition from the Commission rather than playing a complementary, supportive role to competition policy with a view to promoting innovation. Subramanian also thinks that it is debatable if the deficiencies of the IP system can, or should, be remedied by using competition rules. She observes on this point that there is unfortunately no EU institution equivalent to DG Comp to protect IP rights in the EU. Accepting a hierarchy in which one area of law can trump another will affect the balance that is most likely to create an optimal environment for innovation. Subramanian concludes that although abuse of IPRs must be restricted, this cannot be done by consistently diluting the value of IPRs which have traditionally been used for the promotion of innovation. As she puts it in her own words:

“Though it is necessary to check abusive conduct of super-dominant firms in the market, it is worth noting that bulldozing a forest to capture the rare predator can lead to other creatures being trampled on the way.”¹⁴²

Even though many possible negative consequences have been highlighted in this part of the thesis, perhaps it would be proper to conclude the chapter by giving some positive light on the future, quoting, once more, the Assistant Attorney General for the Antitrust Division of the US Department of Justice, Thomas Barnett:

“The Justice Department looks forward to continuing its wide-ranging and positive relationship with the EC on antitrust matters, including matters affected by today's decision. This cooperation is particularly important given the global nature of many markets, including in the high technology sector. The Justice Department will work with the EC to develop sound antitrust enforcement policies that benefit consumers on both sides of the Atlantic.”¹⁴³

So, in the end, maybe the future will not be that bad after all?

¹⁴² Subramanian, supra note 114, The decision in retrospect – section.

¹⁴³ Supra note 49.

4 Commission development

Having digested the Microsoft case thoroughly, we now turn our focus to the Commission. As mentioned earlier, the Commission has been criticised when it comes to the way it has been dealing with matters falling under Article 102 TFEU. Among other things, it has been suggested that, while the approach used in Article 101 TFEU and merger proceedings has been modernised, the approach used in Article 102 TFEU matters is still very form-based, not backed up by modern economic thinking, thus still resembling very much the outdated ordoliberal reasoning.

As a way of facing this criticism, in 2005 the Commission decided to reflect on and review its policy as regards Article 102 TFEU matters as well as clarifying the way it would enforce that policy. The broad lines of that reflection were set out by Neelie Kroes in a speech in September 2005¹⁴⁴. The subject of the speech was, as she said, how to improve enforcement of Europe's ban on abuse of monopoly power. She stressed that it was not the intention of the Commission to propose a radical shift in the policy, but to:

“[D]evelop and explain theories of harm on the basis of a sound economic assessment for the most frequent types of abusive behaviour to make it easier to understand our policy, not only as stated in policy papers but also in individual decisions based on Article 82.”

She went on pointing out that in the view of the Commission, the objective of Article 102 TFEU is the protection of competition on the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. She was aware that it had often been suggested that, unlike Section 2 of the Sherman Act¹⁴⁵, Article 102 TFEU is concerned with “fairness” and, as a consequence, not focused primarily on consumer welfare. On this, she pointed out that according to her own philosophy it is first competition, and not competitors, that should be protected. Second, the aim is ultimately to avoid consumer harm. As long as competition ultimately benefits consumers, it does not matter if it hurts competitors on the way. Since the main and ultimate objective of Article 102 TFEU is to protect consumers, protection of an undistorted competitive process on the market is necessary. She continued:

“We need to take into account not only short term harm, but also medium and long term harm arising from the exclusion of competitors. I am well aware of the difficulty associated with predicting medium or long term harm ... We cannot just wash our hands of responsibility and say that competition law cannot or should not protect the consumer against negative medium to long term effects, just because it is difficult to assess.”

¹⁴⁴ SPEECH/05/537 – Neelie Kroes, Preliminary Thoughts on Policy Review of Article 82, Speech at the Fordham Corporate Law Institute, New York, 23rd September 2005.

¹⁴⁵ The corresponding article to Article 102 TFEU in the US.

She also commented on whether there should be an “efficiency defense” under Article 102 TFEU. On this, she confirmed that, even though Article 102 TFEU does not expressly admit such a possibility, the Commission must find a way to include efficiencies in the analysis. For reasons of consistency, the analytical framework for reviewing efficiencies under Article 102 TFEU should not differ much from those used under Article 101 TFEU and the Merger Regulation. Neelie Kroes concluded:

“What I have summarized today is our search for sensible ‘rules’ that would enable us to reach preliminary conclusions about when conduct may exclude competition, yet at the same time allow companies to know when they are on safe ground. Such an approach would have the advantage of being based on solid economic thinking while at the same time giving clear indications to companies and maintaining workable enforcement rules.”

4.1 Commission Discussion Paper 2005

Following a press release in December 2005, the Commission published a Staff Discussion Paper on the application of Article 102 TFEU to exclusionary abuses, describing a general framework for analysing abusive exclusionary conduct by a dominant company. By the issuance, the Commission invited all interested parties to submit comments on the Discussion Paper before March 2006. Important to note is that the Discussion Paper was issued after the Commission had announced its Microsoft decision (April 2004) as well as after the GC ruling in IMS Health had been delivered (April 2004).

The Discussion Paper covers many different exclusionary conducts. One chapter is devoted to “refusal to supply”, which will be our focus. Worth noting is that in the introductory part of the paper, it is inter alia stated that with regard to exclusionary abuses, the objective of Article 102 TFEU is the protection of competition on the market as means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Effective competition brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. In applying Article 102 TFEU, it is maintained, the Commission will adopt an approach which is based on the likely effects on the market.¹⁴⁶

The Discussion Paper and the approach it proposes is, not surprisingly, very much based on conclusions drawn from the case law of the EU judicature, with several referrals to earlier judgments. The Paper begins the chapter on refusals to supply by asserting that, although dominant undertakings are generally entitled to determine whom to supply and to decide not to continue supplying certain trading partners, a refusal to supply may still be classified as an exclusionary abuse. As the dominant company prevents access to an input, the requesting undertaking is either driven out of the

¹⁴⁶ DG Competition Discussion Paper on the application of Article 82 of the Treaty to exclusionary abuses, Brussels, 19th December 2005, para 4.

market, marginalised or prevented from entering the market. In order for the refusal to be abusive, it must, however, have a likely anticompetitive effect on the market which is detrimental to consumer welfare.¹⁴⁷

After making clear the distinction between primary (upstream) and secondary (downstream) market, the Discussion Paper points out that the main purpose of forcing companies to supply is to improve the competitive situation in the downstream market. In connection to this, the Paper also observes the effect, both positive and negative, which this could have on innovation. It is acknowledged that the fear of having to supply might lead companies not to invest in the first place or to invest less. On the other hand, it is also acknowledged that access to an input may lead to increased investment by other firms in follow-on research and development. It is concluded that account has to be taken of both the effect of having more short-term competition and the possible long-term effects on investment incentives.¹⁴⁸

The Paper then goes ahead and presents the proposed method of assessment. It does this by distinguishing three different situations: the termination of an existing supply relationship; the refusal to start supplying an input; and the refusal to supply information needed for interoperability.

4.1.1 Termination of an existing supply relationship

According to the Paper, in order to find a termination of an existing supply relationship abusive, the following four conditions normally have to be fulfilled: (i) the behaviour can be characterised as termination; (ii) the refusing undertaking is dominant; (iii) the refusal is likely to have a negative effect on competition; (iv) the refusal is not justified objectively or by efficiencies.¹⁴⁹

The most relevant conditions for the purpose of our discussion are naturally the latter two. On the third condition, the Paper notes that for it to be fulfilled, a complete elimination of competition is not necessary. The extent to which the termination of one customer has an impact on the level of competition depends on the pre-existing competition on the downstream market. However, and this is important to point out, if the input owner is itself active in the downstream market and terminates supplies to one of its few competitors, it will normally be presumed that there is a negative effect on competition on the downstream market.¹⁵⁰ As a possible defence, the Paper points to an example where the dominant company is terminating supplies because it wants to integrate downstream. In such a situation, the

¹⁴⁷ Ibid., paras 207 & 210.

¹⁴⁸ Ibid., para 213.

¹⁴⁹ Ibid., para 218.

¹⁵⁰ Ibid., para 222.

dominant company has to show that consumers are better off if the supply relationship is terminated.¹⁵¹

4.1.2 Refusal to start supplying an input

In order for a refusal to start supplying an input to be found abusive, five conditions normally have to be fulfilled: (i) the behaviour can be characterised as a refusal to supply; (ii) the refusing undertaking is dominant; (iii) the input is indispensable; (iv) the refusal is likely to have a negative effect on competition; (v) the refusal is not objectively justified.¹⁵²

We will focus on conditions three to five. The concept of indispensability means that without the concerned input, companies cannot manufacture their products or provide their usual service levels. When real or potential substitutes exist in the market, the input of the dominant company is not indispensable.¹⁵³ Worth noting is that the Paper points out that in the case of IPRs, it must not be possible for competitors to turn to any workable alternative technology or to “invent around” the IPR. Such a requirement, it continues, would likely to be met where the technology has become the standard or where interoperability with the rightholder’s IPR-protected product is necessary for a company to enter or remain on the market.¹⁵⁴

The discussion around the fourth condition is identical to the third condition in the preceding section. As far as possible defences are concerned, the Paper makes clear that in order to maintain incentives to invest and innovate, a dominant firm must not be unduly restricted in the exploitation of valuable results of a previous investment. A dominant undertaking should therefore normally be free to seek sufficient compensation for its successful projects. The question on whether there will be an abuse will depend on the specific circumstances of the case. The Paper notes that, as regards IPRs, it is more likely that an abuse will be found if it is likely that the investment leading up to the IPR would have been made even knowing that a duty to supply would be imposed. The Paper concludes that the Commission will take account of the respective values that are at stake, including the possible positive effects on incentives to follow-on investment from allowing access.¹⁵⁵

The Paper devotes an extra section to the refusal to license IPRs, noting that in those cases an additional condition may have to be met. Referring to the Volvo case, the Paper confirms that imposing on the holder of an IPR the obligation to grant a license to third parties would lead to the holder of the IPR being deprived of the substance of the exclusive right.¹⁵⁶ Again referring to Volvo, as well as Magill and IMS Health, the Paper observes in

¹⁵¹ Ibid., para 224.

¹⁵² Ibid., para 224.

¹⁵³ Ibid., para 228.

¹⁵⁴ Ibid., para 230.

¹⁵⁵ Ibid., para 236.

¹⁵⁶ Ibid., para 238.

paragraph 239 that only under exceptional circumstances can the refusal to license an IPR be considered an abuse. This could for example be the case when all the five conditions described are all fulfilled in addition to that the refusal prevents the development of the secondary market, to the detriment of consumers. This, however, the Paper stresses, may only be the case if the requesting undertaking intends to produce new goods or services not offered by the IPR owner and for which there is potential consumer demand.¹⁵⁷ Also, the Paper concludes in paragraph 240:

“A refusal to license an IPR protected technology which is indispensable as a basis for follow-on innovation by competitors may be abusive even if the license is not sought to directly incorporate the technology in clearly identifiable goods and services. The refusal of licensing an IPR protected technology should not impair consumers’ ability to benefit from innovation brought about by the dominant undertaking’s competitors.”¹⁵⁸

4.1.3 Refusal to supply information needed for interoperability

According to the Paper, a special case arises when an undertaking refuses to supply information, necessary for interoperability between two markets, in order to extend its dominance from one market to another. Even though there is no general obligation for dominant companies to ensure interoperability, that could be an abuse of a dominant position.¹⁵⁹ Also, the Paper concludes, it may not be appropriate to apply to such refusals to supply information the same high standards for intervention as those described in the previous sections.¹⁶⁰

4.2 Industry comments

The Commission received over one hundred contributions from various parties. Some of these are more relevant than others for the purpose of this thesis. Several commented the refusal to supply part of the Discussion Paper very briefly, while others devoted a lot of space on that matter alone. I will limit myself to mention only some of these, especially those that most significantly touch upon the issues discussed in this thesis. For the sake of saving space and avoiding repetition, paragraphs 239 and 240 of the Discussion Paper, which will be referred to below, have been covered above in the end of section 4.1.2.

Linklaters strongly support the idea that forced sharing should only be ordered in exceptional circumstances. On this point they agree with the opinion of AG Jacobs in Bronner that intervention is only justified where

¹⁵⁷ Ibid., para 239.

¹⁵⁸ Ibid., para 240.

¹⁵⁹ Ibid., para 241.

¹⁶⁰ Ibid., para 242.

the refusal would confer upon the dominant undertaking a genuine stranglehold on the secondary market. They also agree with the Paper that for any refusal to supply to be abusive, the market effect of it must be detrimental to consumer welfare.¹⁶¹ At the same time, they are concerned by certain statements in the Discussion Paper, which fail to distinguish between short-term benefits to competitors and the medium to long-term incentives to innovate.¹⁶² Linklaters observe that the Discussion Paper correctly admits that the requesting party must have the intention to offer new goods, not offered by the rightholder, for which there is potential consumer demand. However, it is pointed out, the Paper lacks any specification of what kind of novelty is required. For example, it is unclear whether new products include variations of the products already offered by the dominant company.¹⁶³

Assonime also note that the question on how the novelty requirement should be interpreted is a crucial issue. They argue that the obligation to license IPRs must remain an exception and that, therefore, the novelty criterion and the potential benefit for consumers relating from the obligation to license should not be interpreted loosely.¹⁶⁴

FBD argue that only refusals to supply which lead to a substantial reduction of competition should be capable of being an abuse, and not those that merely have a negative effect on competition. FBD also note a contradiction in the Discussion Paper on the part concerning IPRs. They note that the Paper recognises that an obligation to grant an IP license would deprive the rightholder of the substance of the exclusive right and therefore can only be considered abusive under exceptional circumstances. This, they claim, is at odds with other statements, especially in paragraph 240 where it is stated that an abuse may occur even if the license is not sought to directly incorporate the technology in clearly identifiable new goods or services. This approach, according to FBD, seriously interferes with patent protection and incentives to innovate. FBD also argue that the efficiency defence should prevail whenever the refusal to deal is indispensable to the initial investment, without any regard to the fact whether the indispensable input had been made with knowledge about a future possible duty to supply.¹⁶⁵

ICC note that it is not clear whether the conditions, listed in the Paper, for finding an abuse are necessary or simply sufficient, by the wording that they “normally” must be fulfilled. If this wording is meant to make it possible for the Commission to identify other criteria on a case-by-case basis, legal certainty would be significantly undermined.¹⁶⁶ ICC also observe that no guidance is provided on how “new” a product needs to be in order to fulfil the criterion of prevention of the appearance of a new product. In ICC’s view, the Commission should clearly specify that it must be a new kind of

¹⁶¹ Linklaters, global law firm, p. 19.

¹⁶² *Ibid.*, p. 20.

¹⁶³ *Ibid.*, p. 22.

¹⁶⁴ Associazione fra le Società italiane per azioni, p. 21.

¹⁶⁵ Freshfields Bruckhaus Deringer, global law firm, p. 14-15.

¹⁶⁶ International Chamber of Commerce, p. 25.

product that must expand the market rather than steal sales. The new product should thus satisfy consumer demand that is not satisfied by existing products. ICC also note that, even though the CJEU in IMS Health spoke of an elimination of competition, the Paper states that a refusal is abusive if it is likely to have negative effect on competition. ICC express its concern that the proposed approach may carry the risk of reducing the incentives to invest and innovate in the long term. As an example, they point to paragraph 240. This paragraph, they fear, will create a possibility for inefficient competitors to free-ride on investments and risks taken by a dominant undertaking. This may deter companies from investing and innovating in the first place, which will potentially lead to a big negative impact on consumers in the long term.¹⁶⁷

USCIB are concerned that the effect of the proposed approach could be to require dominant firms to share every technological advance made to improve production processes, even absent an existing market for such technology or without any leveraging on behalf of the dominant undertaking. This, they stress, would be particularly troubling in an innovation market, where technological advances are the primary competitive advantage. As regards IPRs, USCIB point out that the purpose of IP law is to provide businesses an incentive to invest in research and development and that IPRs are thus of essential importance to promoting consumer welfare. Adopting rules and standards, they argue, that create uncertainty as to when a company may need to license its IP will have a negative effect on investment in research and development. As many others, they also note that there is no definition of what constitutes “new goods or services”, which leaves open the possibility of an overly broad definition.¹⁶⁸

AFEP stress that the autonomy of the policy governing the protection of IPRs must be safeguarded, as it is in the common interest and pursues an aim as legitimate as competition policy. As they see it, with the approach proposed by the Paper:

“The risk is that [the] result and motivation of innovation will be increasingly hindered, at the risk of pulling the plug on the driving force behind the growth of European companies, and therefore their competitiveness.”¹⁶⁹

IBA stress how important it is that the Commission encourages investment and innovation and that it is very clear about what is and is not an abuse, and they point to a number of aspects of the Discussion Paper where more clarity is desired. First, the condition that a refusal to license IPRs could be considered to be abusive when it prevents the development of the market for which the license is an indispensable input, is too vague and needs to be clarified. It should be specified that a new product must be a “new kind of product” and not a slight variation. As they see it, a new product should significantly grow demand by attracting new customers, instead of just

¹⁶⁷ Ibid., p. 28-29.

¹⁶⁸ United States Council for International Business, p. 26-28.

¹⁶⁹ Association Française des Entreprises Privées, p. 6-7.

stealing shares from existing products. Second, as many others, IBA are concerned with the statement in paragraph 240. The statement in that paragraph, they believe, seems to create a “speculative” right to insist on the use of rivals’ inputs, even if the requesting firm has no specific intention to make a “new product”. It goes too far and would discourage investment and innovation.¹⁷⁰

Ashurst is of the opinion that it should be clarified in the Discussion Paper that a product or service will only be “new” if it is in a different product market. This view, they claim, is supported by the fact that it is mentioned that there should be a “potential consumer demand” that is not satisfied by the current products offered. Also, Ashurst claim that the statement in paragraph 240 is unclear and at odds with current case law. If a competitor intends to use a licensed IPR in order to offer goods or services that are not new, then he basically intends to replicate the product already offered. The “new product” rule established by case law expressly prevents this.¹⁷¹

AmCham EU note that the Discussion Paper does not attempt in any significant manner to modernise the current treatment and method of analysis of refusals to supply but that it rather seeks to summarise the jurisprudence of the EU courts. AmCham EU, therefore, are of the opinion that this part of the Discussion Paper would benefit from further reflections on how an economic and effects-based approach could be implemented.¹⁷² They also point out the lack of definition of what a “new” product or service is and suggest that this should be clarified, for example by stating expressly that the new product or service should meet consumer demand that is not satisfied by existing products or services. AmCham EU also note that the statement in paragraph 240 of the Discussion Paper is contradicting the new product criterion. It introduces uncertainty and goes beyond the existing case law. Finally, AmCham EU urge the Commission to clearly signal that competition authorities and courts should be very reluctant to interfere in IP licenses and it also urge the Commission not to, in relation to IPRs, adopt such an open-ended approach that it is at odds with the need to encourage greater efforts in R&D and innovation in the EU.¹⁷³

RBB Economics state that the approach set out by the Discussion Paper falls short of the objective of establishing a proper effects-based assessment. Such an assessment would have required the Commission to identify a welfare loss on behalf of consumers and assess the extent to which this is outweighed by efficiencies. As a worrying example, RBB point to the statement that the conduct is likely to be abusive when the investments that have led to the existence of the indispensable input would have been made even if the investor had known that it would have a duty to supply. RBB point out that it is hard to see how the Commission would be able to assess such a case and to demonstrate that the investment would have been made

¹⁷⁰ International Bar Association, p. 29-30.

¹⁷¹ Ashurst, international law firm, p. 35-36.

¹⁷² American Chamber of Commerce to the European Union, p. 32.

¹⁷³ *Ibid.*, p. 35-36.

under different circumstances. The Commission, it is urged, must be very careful of substituting its own *ex post* judgment for the *ex ante* decisions of private firms. As another example is mentioned the similar situation, but with IPRs, where the Discussion Paper adds that in its assessment the Commission will take account of the values at stake, including the positive incentives on follow-on investments. It is hard, RBB argue, to see how such an exercise could be anything but speculative. Predicting follow-on investments and comparing the benefits that consumers would derive, *vis-à-vis* the long-term negative impact on investment is at best hard to assess. According to RBB, it is hard to see how an assessment subject to such a high degree of uncertainty could justify the imposition of compulsory licensing.¹⁷⁴ RBB conclude by stating that the Discussion Paper does not appear to provide much comfort in terms of reducing uncertainty for firms committing risky investments. It is also unclear what weight would be put on, by the Commission, on the current gains and the future losses deriving from reduced investment incentives. This, RBB stress, is important as the wrong balance between short-term and long-term gains for consumers might ultimately end up protecting competitors rather than competition.¹⁷⁵

EFPIA, representing the pharmaceutical industry, are concerned about the lack of clarity in the Discussion Paper. For example, they refer to the sentence that refusal to license IPRs “might prevent the development of the market for which the license is an indispensable input to the detriment of the consumer”. They note that “might” is a very low threshold and is in practice likely to operate as a catch all. Also, it is not specified on what market the development must be on. As an example, they ask whether the refusal to license IPRs to generic companies, who will thus not be able to manufacture a competing product, is abusive. EFPIA are also concerned about paragraph 240 in the Discussion Paper. Would a generic product be considered follow-on innovation? Is combination therapy follow-on innovation?¹⁷⁶

ACT is of the opinion that by including paragraph 240, the Discussion Paper attempts to do away entirely with the requirement in the IMS Health case that the requesting undertaking intends to offer “new product or services”. The provision given in paragraph 240 broadens, and makes it impossible to identify, the scenarios in which a dominant company could be required to grant a license. It would be extremely difficult, they argue, for the Commission to assess the circumstances in which a known IPR is “indispensable” as a basis for a follow-on innovation, which is by its very nature unknown. ACT thus concludes that paragraph 240 should be deleted, since it threatens to undermine the value of IPRs, serves to compromise incentives to innovate, goes against the jurisprudence of the CJEU and creates an environment of legal uncertainty.¹⁷⁷

¹⁷⁴ RBB Economics, advisors on economic aspects of competition law, p. 52-53.

¹⁷⁵ *Ibid.*, p. 53.

¹⁷⁶ European Federation of Pharmaceutical Industries and Associations, p. 31-32.

¹⁷⁷ The Association for Competitive Technology, p. 10-11.

Van Bael & Bellis are also concerned with paragraph 240. They claim that the CJEU for a good reason established that a refusal to license would only be abusive if the license was to be used to produce clearly identifiable goods or services, not offered by the dominant firm and for which there is a potential consumer demand. That condition ensures that a compulsory license will only be granted when the license is truly necessary. If the goods or services to be produced using the compulsory license were not identified, it would not be possible to assess whether the license is, in fact, necessary or indispensable. Creating a right to a compulsory license, they conclude, in order to allow follow-on innovation has the effect of denying the right holder the very substance of its exclusive IPRs.¹⁷⁸

Not all comments are negative. The American Antitrust Institute welcome the wording of the Discussion Paper that a refusal to license IPRs that prevent the development of the market for which the license is an indispensable input may constitute an abuse. This, they claim, may prevent a hold-up problem or the exclusionary abuse of an industrial standard encumbered by IPRs.¹⁷⁹

CCIA point to the fact that when interfaces are protected by IPRs, they are particularly susceptible to use for anticompetitive purposes. CCIA therefore, unlike the majority of the contributions, fully support the conclusion in paragraph 240 that refusal to license technology that is indispensable for follow-on competition is often abusive. Unlike books or novels, they continue, computer applications function only in conjunction with hardware and other software. When a company exercises proprietary control over the interface specifications implemented by its products, that company can determine which products made by other firms may interoperate with its software or hardware. Also, should that company have a dominant position in a particular market, it could use its control over interoperability to expand its position into adjacent markets. Such control, CCIA contend, poses substantial risks to consumer welfare. In their own words:

“Consumers would not receive the benefit of innovative products introduced by new entrants. In the absence of competition during the effective lifespan of the product, the first developer would have little incentive to develop more innovative and less costly products...Prohibiting competitors from accessing the de facto standard interface specifications would lock users into a particular operating system, software platform, or network software environment, and would inhibit the transfer of data between users with different computing environments. An appropriate antitrust framework should account for these considerations when analyzing refusals to license.”¹⁸⁰

CompTia are worried about the uncertainty which the Discussion Paper introduces in the refusal to supply section, especially with regard to IPRs. This uncertainty, they contend, as to when a company may be required to

¹⁷⁸ Van Bael & Bellis, international law firm, p. 11-12.

¹⁷⁹ The American Antitrust Institute, p. 12-13.

¹⁸⁰ Computer and Communications Industry Association, p. 17-18.

license its IPRs will have a chilling effect on innovation, in particular in dynamic markets where firms invest large sunk costs in research and development and take on high risk. According to CompTia, the Discussion Paper fails to increase the much necessary legal certainty in this area of law. As regards the contradiction, noted by other contributors, of the new product criterion with paragraph 240, CompTia suggest that it should be clarified that an IPR holder is not required to create new competition in its own market, and that compulsory licensing may only be required when the refusal to license prevents the appearance of a new product in a secondary market where the dominant firm is not present. Otherwise, a license to competitors in a market in which the dominant undertaking is already active, would represent a serious encroachment on the very essence of its right.¹⁸¹ CompTia also argue that there is no apparent economic, legal or practical reason why a refusal to supply interoperability information should be analysed differently than any other refusal to supply IPRs. A refusal to supply should be deemed abusive only if it illegally forecloses competition and, they maintain, there is no reason to think that interoperability information poses any unique issue in this regard.¹⁸²

TaylorWessing believe that the Commission's analysis of refusal to supply where IPRs are involved has far reaching implications. They wonder why the Commission considers that it is equipped to make complex assessments of "the values at stake, including the possible positive effects on incentives to follow-on investment from allowing access". As they state in their contribution:

*"Once the Commission starts to analyse the adequacy and significance of investments behind innovations leading to IPRs it is embarking on a dangerous and slippery slope that will cause great uncertainty and will chill innovation. The Commission would do well to remember that IPRs have a clear purpose. If it believes that certain types of copyright ought not, as a matter of policy, to be granted then it is open to amend the underlying IP legislation. The Commission must resist the temptation to tinker with IP rights, including the rules on trade secrets, through the application of competition policy."*¹⁸³

Crecedi point out that IPRs are exclusive rights and would be eroded if the owner of a patent, trademark, design or copyright was obliged to grant licenses to its competitors, simply because consumers prefer the protected product to such an extent that the right holder has become dominant.¹⁸⁴

CBI argue that, at a time when the EU needs to enhance its competitiveness, companies need to be encouraged to invest and should not have to face the risk of losing the benefits of their investment. They refer to AG Jacobs' opinion in Bronner where he stated that "in the long-term it is generally pro-competitive and in the interests of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its

¹⁸¹ The Computing Technology Industry Association, p. 26-27.

¹⁸² Ibid., p. 28.

¹⁸³ Taylor Wessing, international law firm, p. 7-8.

¹⁸⁴ Centre de Recherches sur le Commerce et l'Economie Numérique, p. 64.

business...If access were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short-term it would be reduced in the long-term”¹⁸⁵.

4.3 Commission 2009 Guidance

The final Guidance on the Commission’s enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings was released in February 2009, thus long after the GC gave its ruling in the Microsoft case (September 2007). The Guidance clearly differs on several points from the wording of the Discussion Paper. At the same time, it introduces some new concepts and explanations.

As in the Discussion Paper, the Guidance clarifies from the start that it is the Commission’s view that any undertaking should have the right to choose its trading partners and to dispose freely of its property, and that intervention on competition law grounds in refusal to supply matters requires careful consideration. The Guidance thus acknowledges that an obligation to supply may undermine undertakings’ incentives to invest and innovate and, thereby, possibly harm consumers. Competitors may also be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. This, it is recognised, would in the long run be contrary to the interest of consumers.¹⁸⁶

Referring to IMS Health, the Guidance notes that the Commission does not regard it as necessary for the refused product to have been already traded. It is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified.¹⁸⁷ It then goes on and lists three circumstances which, if present, will make the refusal to supply/license case an enforcement priority. The three circumstances are: the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market; the refusal is likely to lead to the elimination of effective competition on the downstream market; and the refusal is likely to lead to consumer harm.¹⁸⁸ These three circumstances are then discussed in more detail.

As for the objective necessity of the input, this does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market. Instead, it is maintained, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter, in the long term, the negative consequences of the refusal. The Commission will make an

¹⁸⁵ Confederation of British Industry, UK business lobbying organisation, p. 16-17.

¹⁸⁶ Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), para 75.

¹⁸⁷ *Ibid.*, para 79.

¹⁸⁸ *Ibid.*, para 81.

assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future, whereby the notion of duplication is meant the creation of an alternative source of efficient supply that is capable of allowing competitors to exert a competitive constraint on the dominant undertaking in the downstream market.¹⁸⁹ Also, it is pointed out, the termination of an existing supply arrangement is more likely to be found abusive than a *de novo* refusal to supply. In those cases, it would be up to the dominant company to demonstrate why circumstances have changed in such a way that the continuation of its existing supply relationship would not be beneficial.¹⁹⁰

If the objective necessity requirements, as mentioned in the preceding paragraph, are fulfilled, the Commission considers that a dominant undertaking's refusal to supply is generally liable to eliminate, immediately or over time, effective competition in the downstream market. It is further clarified that the likelihood of effective competition being eliminated is generally greater the higher the market share of the dominant undertaking in the downstream market, the less capacity-constrained it is relative to its competitors, the closer the substitutability between the dominant undertaking's output and that of its competitors, the greater the proportion of competitors in the downstream market that are affected as well as the more likely it is that the demand that could be served by the foreclosed competitors would be diverted away from them to the advantage of the dominant undertaking.¹⁹¹

By the third circumstance, the Guidance introduces a completely new condition, consumer harm. It is stated that, in examining the likely impact of a refusal to supply on consumer welfare, the Commission will examine whether, for consumers, the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply.¹⁹² Commission harm, it is explained, may for example arise where the competitors that the dominant undertaking forecloses are, as a result of the refusal, prevented from bringing innovative goods or services to market and/or where follow-on innovation is likely to be hampered. The Guidance points out that this may particularly be the case if the requesting undertaking does not intend to limit itself essentially to duplicating the goods or services already offered by the dominant undertaking on the downstream market, but intends to produce new or improved goods or services for which there is a potential consumer demand or is likely to contribute to technical development.¹⁹³

Finally, one section is devoted to justifications. The Guidance claims that the Commission will consider arguments by the dominant undertaking that a refusal is necessary to allow it to earn an adequate return on the investment

¹⁸⁹ Ibid., para 83.

¹⁹⁰ Ibid., para 84.

¹⁹¹ Ibid., para 85.

¹⁹² Ibid., para 86.

¹⁹³ Ibid., para 87.

required to develop its input business, thus generating incentives to continue to invest in the future. Claims by the dominant undertaking that its own innovation will be negatively affected by the obligation to supply or by the structural changes in the market conditions which the obligation will bring about, including the development of follow-on innovation by competitors, will also be considered.¹⁹⁴ It falls, however, on the dominant undertaking to demonstrate any negative impact which an obligation to supply is likely to have on its own level of innovation. Also, if the dominant firm has previously supplied the input, this could be relevant for the assessment of any claim that the refusal to supply is justified on efficiency grounds.¹⁹⁵

In the Guidance there is also a general section on objective justifications, applying to all exclusionary abuses. There it is stated that a dominant undertaking may seek to justify its conduct either by demonstrating that its conduct is objectively necessary or that it produces substantial efficiencies which outweigh any anticompetitive effects on consumers. The Commission will assess whether the conduct in question is indispensable and proportionate to the goal pursued by the dominant undertaking.¹⁹⁶ Another justification may also be based on the ground of efficiencies that are sufficient to guarantee that no net harm to consumers is likely to arise. For this justification to be possible, the dominant undertaking must normally demonstrate that the efficiencies are likely to be realized as a result of the conduct, the conduct is indispensable to the realization of those efficiencies, the likely efficiencies outweigh any likely negative effects on competition and consumer welfare in the affected markets, and that the conduct does not eliminate effective competition by removing all or most existing sources of actual or potential competition.¹⁹⁷ As it is stated in the Guidance:

“Rivalry between undertakings is an essential driver of economic efficiency, including dynamic efficiencies in the form of innovation. In its absence the dominant undertaking will lack adequate incentives to continue to create and pass on efficiency gains. Where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains.”¹⁹⁸

After the dominant undertaking has provided all the necessary evidence to demonstrate that the conduct concerned is objectively justified, it falls on the Commission to make the assessment of whether the conduct concerned is not objectively necessary and, by weighing apparent anti-competitive effects against any advanced and substantiated efficiencies, is likely to result in consumer harm.¹⁹⁹

¹⁹⁴ Ibid., para 89.

¹⁹⁵ Ibid., para 90.

¹⁹⁶ Ibid., para 28.

¹⁹⁷ Ibid., para 30.

¹⁹⁸ Ibid., para 30.

¹⁹⁹ Ibid., para 31.

5 Analysis & Conclusion

In this chapter, I will present my own views on the Microsoft case and some of the issues present in the refusal to supply/license discussion. I will also briefly reflect on the Commission 2009 Guidance and the Discussion Paper leading up to the Guidance. Finally, based on the covered material in the previous chapters as well as the analysis in this chapter, I will attempt to make a conclusion, trying to answer the questions as stated in the purpose part of this thesis.

5.1 Microsoft

The Microsoft case was a massive one. Because of its size and the controversial topic it concerned, i.e. refusal to license and the never-ending discussion of the conflict between competition policy and IPRs, it is not very surprising that it has received a lot of attention all over the world. The questions which the case deals with are still very relevant and important, although the principle question was raised already in *Commercial Solvents* as regards refusal to supply and in *Volvo* as regards refusal to license. Even though subsequent case law developed and clarified the matter, with seminal judgments such as *Magill*, *Bronner* and *IMS Health*, apparently some question marks remained. In 2004, the Commission thus found that Microsoft had abused its dominant position by refusing to supply interoperability information to its competitors on the WGSOS market.

5.1.1 The abusive conduct

As already pointed out in 3.3.3, while the Commission had identified three characteristics which it believed proved that Microsoft's conduct was indeed abusive, the GC chose not to consider these. Instead, it decided to assess the Microsoft case in light of the already established, by case law, circumstances. However, the GC also pointed out that if it would find that one or more of those circumstances were absent, it would proceed to assess the case specific circumstances identified by the Commission. Rouseva argued that this stance of the GC entirely changes the case law, as any reading of the "exceptional circumstances" as not being exhaustive deprives them of their main characteristic: exceptionality. I myself do not necessarily agree with this view. In *Magill*, the CJEU referred to *Volvo* concluding that the exercise of an exclusive right by a proprietor may, in exceptional circumstances, involve abusive conduct. Later, in *IMS Health*, the CJEU confirmed that, according to case law, it was sufficient that three cumulative conditions, in addition to the indispensability criterion, were satisfied to find an abuse of a dominant position. In my view, none of these statements by the CJEU confirm that the mentioned circumstances are exhaustive. What Rouseva suggests is, basically, that once a set of conditions have been listed by the CJEU and later confirmed by the same in subsequent cases,

these conditions should achieve the status of being exhaustive. From a legal certainty perspective, perhaps this would be reasonable. From a more general perspective, however, I do not see why such reasoning would be preferable. In my opinion, by the GC's decision to leave open the possibility to assess the other circumstances mentioned by the Commission, it acknowledged the need to balance case-specific pro- and anti-competitive aspects against each other, thus applying a form of "rule-of-reason" approach to refusal to supply cases. Of course, it can be argued whether the Commission or the EU Courts have the necessary qualifications to assess all relevant aspects and make a sensible decision based on specific facts of different cases. On the other hand, relying solely on a set of circumstances established and confirmed several years ago, concerning specific industries and particular undertakings, does not guarantee a sensible and intelligent outcome of a case in another situation, in another industry with other undertakings either. Whatever the optimal way to go would be, I am not of the opinion that the GC departed from established case law on this point, by leaving open its possibility to assess other relevant aspects in order to potentially establish an abuse.

5.1.2 Indispensability

Looking at the facts of the case and the situation as it was at the time of the Commission decision, was the interoperability information which Microsoft refused to supply indeed indispensable? It was clear that other WGSOS were present on the market, although not interoperable with Microsoft's CPCOS Windows, and there existed other methods of achieving interoperability. Could, or perhaps more importantly, should such a situation warrant the Commission to define the concerned information as indispensable, later confirmed by the GC? In Bronner, Oscar Bronner claimed it was not economically viable for it to create a second home-delivering system due to its small amount of subscribers. The CJEU concluded however that there were other methods of distribution, although not as convenient, which were used by other publishers. It was also obvious in Bronner that other magazines than those published by Mediaprint, the dominant firm, were present on the market. What would this reasoning of the CJEU suggest as regards the Microsoft case? In Microsoft it was clear that other WGSOS did exist on the market. Microsoft also claimed that there were other methods of achieving interoperability. Basically, the answer of the GC was that the Commission had been right in concluding that non-Windows WGSOS could not continue to be marketed if they were incapable of achieving a high degree of interoperability with Windows and none of the proposed alternative methods of ensuring interoperability made it possible to achieve the high degree of interoperability which the Commission correctly had required in the present case.

I would argue that, in a way, at the time of the Commission's decision, the Microsoft case was very similar to the Bronner case. The outcome was however completely different. In both cases, there were other companies present on the secondary market (the WGSOS and magazine markets) and

in both cases, the competitors on the secondary market did not have access to the product/service on the primary market. In Bronner, Mediaprint was not required to grant access to its home-delivery system, whereas in Microsoft, it was ordered to supply interested parties with the concerned interoperability information. Of course, I also realize that it can easily be argued that the cases present several dissimilarities and that they are very different in nature. In Bronner, there were no obvious signs of publishers, competitors to Mediaprint on the secondary magazine market, losing ground because of them not having access to Mediaprint's home-delivery system. In Microsoft, the market shares of Microsoft's competitors fell significantly as its own share increased. Also, because of its extremely high market share on the CPCOS market, the viability of its competitors on the secondary WGSOS market was even more dependent on interoperability with Microsoft's CPCOS. These aspects, which the Commission inter alia based its argument on, are indeed very relevant.

Neelie Kroes pointed out in her speech that Microsoft's share increased from 40 % to 80 % during the three-year period between the decision of the Commission and the judgment of the Court and that this proved that the Commission had been right to act in the first place. The question is at what point, in the process of competition, the Commission should be warranted to act in the way it did in Microsoft. Of course this is an open question and it is hard to give a firm, well-grounded, answer. I think it would depend inter alia on the specific industry, what products are involved, what the substitutes are and how the market has evolved in the past, aspects that the Commission obviously took into account. The Microsoft situation was very special and it is perhaps not very strange that the Commission did choose to act at the time it did. The question then arises whether the GC accepted the Commission's assessment too easily. As Andreangelli and Howarth & McMahon suggested, perhaps the GC should have further examined the available alternatives proposed by Microsoft, especially taking into consideration the breadth of the obligations put on Microsoft and the potential implications for its incentives to innovate.

5.1.3 Elimination of competition

Much of the arguments presented in the preceding part regarding the criterion of indispensability could be repeated here, as the two criteria are closely interconnected. It is obvious that the GC has changed the definition of the criterion in a substantial manner. Case law has presented a number of definitions, the most strict being **elimination of all competition** and the most loose/lenient being a **likely elimination of all competition**. In Microsoft, the GC chose the lenient version and made it even more lenient by adding that it would be enough for the Commission to show a **likely elimination of all effective competition**. As we have seen, this was a conscious move. The question is, was it a wise move? Once again, as in the case of indispensability, the problem circles around the question on when the Commission should have the permission to act. Is a growing market share on behalf of the dominant undertaking and, consequently, a

diminishing market share on behalf of its competitors enough to conclude that elimination of all competition, even all *effective* competition, is likely to occur? Both the Commission and the GC would probably answer this in the negative, as would I. As the GC and the Commission did point out, the concerned market in Microsoft was special in that it was characterized by significant network effects. We also know from earlier discussions that the quasi-monopoly position of Microsoft on the CPCOS had been referred to several times both in the Commission's decision and in the GC judgment. All these factors, combined, was probably what inclined the GC to take the view that, in this case, the Commission had all the reason to conclude that there was a risk that competition on the WGSOS would be eliminated.

One could also argue that the adding of the word *effective* is perhaps not that decisive in practice. As I see it, it is the word "likely" which is relaxing the original expression of the criterion the most, not the word "effective". And, as we know, the word "likely" was introduced already in Bronner, and the closely related word "possibility" even earlier in *Télémarketing*²⁰⁰. On the other hand, when redefining the criterion, the GC also specifically pointed out that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to demonstrate the existence of such competition. Even though this statement related in a way quite obviously to the specific facts of the case, it could probably be given a wider, more general, interpretation. At the same time of adding the word "effective", the GC probably wanted to specify what this meant in more practical terms. Based on this conclusion, the obvious question is whether that argument is convincing.

I will not go into a discussion on what the possible implications of this approach may have for innovation, especially in high-technology market characterised by substantial network effects, as that is not the purpose of this thesis. Still, it seems obvious to me that this new definition of the criterion of elimination of competition tends to favour competitors instead of consumers. For example, why is so unlikely that one of the small niche-companies would in a near future develop a completely revolutionary product on the WGSOS market or, better yet, transform the WGSOS market to a whole different level? By Microsoft's refusal to supply the interoperability information, its competitors would be forced to come up with something revolutionizing in order to steal market shares from Microsoft. Perhaps simultaneously they would need to do something extraordinary on the CPCOS in order to incline Windows customers to use their WGSOS as well. By the GC decision, one could argue that the incentives for Microsoft's competitors to look into the possibility of doing something of that sort seem to have been diluted. The question is whether this will benefit consumers in the long term? To me, this move by the GC could be seen as sacrificing the CPCOS market in order to keep competition on the WGSOS market alive. Perhaps this is not a big problem on the CPCOS/WGSOS markets, taking into consideration the extreme position of

²⁰⁰ Case 311/84, *CBEM v CLT and IPB*, 3 October 1985, [1985] ECR 3261, para 26.

Microsoft on the CPCOS market and thus the small likelihood of someone ever challenging that position in a substantial manner. What could be more troublesome and worrying is if this new definition of the elimination of competition will be applied more generally to other industries. That could hamper or even eliminate innovation in certain primary markets just in order to create or maintain innovation in secondary, derivative, markets. I am not sure if this would be beneficial for consumer welfare in the long term. Another question which remains to be answered by the judicature is what the market share of the dominant undertaking needs to be both on the primary market and, perhaps more importantly, on the secondary market in order for the Commission to be allowed to make the assumption that an elimination of all effective competition is likely to occur. At present, there is high legal uncertainty surrounding this specific question.

One interesting point made by Rousseva, which I very much agree with, is the fact that, in practice, the elimination of all effective competition criteria is not very useful when applied alongside the condition of indispensability. If a certain input is indispensable in order for a business to remain viable on a secondary market, it goes without much saying that the refusal to supply this indispensable input will eventually, if not immediately, have the effect of eliminating all effective competition on the secondary market. With this in mind, it can definitely be argued that the adding by the GC of the word effective to the criterion has made it devoid of all practical meaning.

5.1.4 New product

As for the new product criterion, it could be argued that the GC clearly did not see how the facts of the case could lead to a conclusion that the appearance of a new product, which Microsoft did not itself offer, and for which there was a potential demand had indeed been prevented. Since the GC obviously wanted the Microsoft case to fulfil all the established exceptional circumstances, thus leaving out the need to assess the case-specific characteristics which the Commission had identified, it was forced to interpret the criterion of preventing the appearance of a new product in a substantially different way than that presumably envisaged by the CJEU in both Magill and IMS Health. The GC therefore concluded that this criterion could also be interpreted as meaning that a refusal to license can be abusive when there is a limitation of technical development, referring to the wording of Article 102 (b) TFEU. The GC claimed that the Commission's findings as regards this were not manifestly incorrect. Inter alia, the GC pointed out that the Commission was correct to observe that an increasing number of consumers were locked into a homogenous Windows solution. However, is that aspect really relevant to the criterion of preventing the appearance of a new product? Microsoft did not prevent its competitors to create new products on the WGSOS market. As a matter of fact, there were several different WGSOS present on the market. Yes, perhaps they were only confined to small niches on the market, but still, they were present and, obviously, a number of suppliers could remain viable on that niche market. Did Microsoft prevent the appearance of a new product? Did it even limit

technical development? I do not know the correct answer to that question. On the one hand, I would argue that Microsoft did nothing of the sort. If consumers chose its products on the WGSOS market because of its extreme dominance on the CPCOS market, the problem is not a limited number of products on the WGSOS market but rather the very close connection between the WGSOS and the CPCOS market and the network effects inherent in these markets. I am not so sure that the reason why the market share of Microsoft's WGSOS increased was mainly due to the lack of interoperability information on behalf of its competitors. On the other hand, I would agree that Microsoft's quasi-monopolistic position on the CPCOS market in a way limited the chances for other WGSOS suppliers to develop a new product capable of competing with Microsoft on the WGSOS market. However, I am not sure that the obligation put on Microsoft to provide access to the interoperability information will change this, since Microsoft's strong position on the CPCOS will remain and since CPCOS and WGSOS work together very closely. This was also pointed out by Howarth and McMahon, who asked the somewhat provocative question whether a continuing decline in market shares of non-Microsoft work group server software after a disclosure on behalf of Microsoft would be explained by consumer irrationality for rejecting superior features of non-Microsoft products or the imperfect disclosure of information.

It is obvious that the GC offered a completely new understanding of the new product criterion, pointed out by almost everyone commenting the case. Rouseva even argued that the new definition put forward by the GC equated that criterion with the one concerning elimination of competition. As she stated, the question of whether it is likely that all effective competition will be eliminated is very close to the question whether the consequence of a refusal will be a limitation of the technical development of the industry to the detriment of consumers. Even though I would not perhaps make as far reaching assumptions as Rouseva on this matter, she does have a point. I would, however, probably agree more with Moldén that in order for the new product criterion to have any practical significance, it should be interpreted as representing some additional requirement compared to the very broad wording of Article 102 (b) TFEU. That part of the article always applies and should thus not be treated as an exceptional circumstance in refusal to supply cases. Even though I agree that it could, and should, be used when assessing cases under Article 102 TFEU, I think it was unwise of the GC to make it seem as it interpreted the new product criterion as meaning just that, instead of admitting, as Moldén also argued, that it was reversing case law and substantially modifying the criterion. Again, it is possible that this was due to the will of the GC to reconcile its reasoning with earlier judgments, not departing from the criteria settled by case law.

5.1.5 Objective justification

It is hard, at the present time, to imagine what kind of objective justification for a refusal to supply/license would be accepted by the EU judicature,

when it has been established that a product or service on a primary market is indispensable for another company to remain viable on a secondary market, when it is likely that the refusal to supply/license will eliminate all effective competition on that secondary market and, finally, when it has been concluded that the refusal is limiting technical development. These are the criteria originally established by earlier case law, substantially redefined or reinterpreted by the GC in *Microsoft*, which, when found to be present, must be justified in order for the dominant undertaking to escape the obligation to provide access to the concerned product or service. I honestly do not know what, taking into consideration previous case law and especially the GC judgment, could qualify as an objective justification. To me it is obvious that IPR holders are the ones who should have the most reasons to and the biggest chances of being able to refuse someone access to their protected property, be it a product or a service. The Commission and the EU Court's, however, seem very eager to break this presumption into pieces.

The reason why an undertaking gets an IPR in the first place is because of its willingness to invest in research and development. In practice, therefore, the only reasonable argument that an IPR holder can use as a possible justification is the negative impact that a disclosure will have on its incentives to innovate. As Spulber notes, however, innovation involves as yet unknown technologies and products. In order to be granted an IPR, one has to make something new, something not present at the moment. At the same time, according to the GC, *Microsoft* put forward vague, general and theoretical arguments on the point that disclosure would have a significant negative impact on its incentives to innovate, without specifying the technologies or products to which it thus referred. In practice, this creates an impossible requirement on dominant undertakings trying to justify the refusal to supply/license their IP-protected property. As a consequence, the way in which a dominant undertaking can objectively justify its refusal is at the present time coupled with great uncertainty.

5.2 The Commission

The Discussion Paper was meant to be a first step towards a more economic and effects-based approach to Article 102 TFEU matters. On the one hand, one could welcome the fact that the Commission decided to clarify its approach and perhaps get rid of the negative ordoliberal features it had been accused of promoting. In the introductory part of the Paper, it pointed out that the objective of Article 102 TFEU is the protection of competition on the market as means of enhancing consumer welfare and of ensuring an efficient allocation of resources. So far, so good. The question is whether the purpose of the Paper, as envisaged by Neelie Kroes, to make it easier to understand the Commission's policy, was indeed accomplished by the subsequent sections of the Discussion Paper, especially the refusal to supply section. The Paper confirmed that in order for a refusal to be abusive, it must have a likely anticompetitive effect on the market which is detrimental to consumer welfare. Also, the Paper observed that when assessing refusal

to supply matters, account has to be taken of both the effect of having more short-term competition and the possible long-term effects on investment incentives. Both these statements seem quite appropriate to make in order to stress a shift towards a more effects-based approach of assessment.

Then, however, the Paper presented the more specific proposed method of assessment. The Paper's definition of the elimination of competition criterion is not very surprising taken into consideration the Commission's view on the matter in Microsoft. The same could be said about the indispensability criterion. However, when discussing possible defences, the Paper stated that, as regards IPRs, it is more likely that an abuse will be found if it is likely that the investment leading up to the IPR would have been made even knowing that a duty to supply would be imposed. Also, apparently the Commission will take account of the respective values that are at stake, including the possible positive effects on incentives to follow-on investment from allowing access. In my view, by this statement, the Paper would practically eliminate every chance of success for a dominant undertaking to justify a refusal because of its negative impact on incentives to innovate. If a company knows that its investment leading up to an IPR may in the future be put under a duty to supply, it has two choices. Either, it decides not to invest, obviously to the detriment of consumers. Or, it decides to invest, with the consequence that a future refusal will likely be found abusive, thus being deprived of the substance the exclusive right. To me, this kind of legal environment would surely chill the incentives to invest and to innovate and I do not see how this would benefit consumers in the long term.

The Paper also established an additional criterion to be fulfilled when dealing with refusal to license IPRs cases, namely that the refusal prevents the development of the secondary market, to the detriment of consumers. This, however, the Paper stressed, may only be the case if the requesting undertaking intends to produce new goods or services not offered by the IPR owner and for which there is potential consumer demand. This was clearly in line with both Magill and IMS Health. However, in the next paragraph, paragraph 240, the Paper made clear that when an IPR protected technology is indispensable for follow-on innovation by competitors, a refusal may be abusive even if the license is not sought to directly incorporate the technology in clearly identifiable goods and services. This additional paragraph, it could be argued, turns the preceding paragraph, and with that the established CJEU case law in Magill and IMS Health, completely upside down. It is an apparent contradiction which was also observed by many of the comments from contributing parties. Many of them noticed a lack of guidance on how new a product needs to be in order to fulfil the new product criterion. Some requested the Commission to specify that it must be a new kind of product that must expand the market rather than steal sales from the dominant undertaking. In my opinion, paragraph 240 departs from the established case law which, at least to me, seems to interpret a new product as something not offered by the dominant undertaking and thus, in a way, creating a new market, or at least

broadening the existing market. If the goods for which the license is sought cannot be identified, how will the Commission determine whether the input for them is in fact indispensable? In order for an input to be indispensable for something, that something has to be identified.

As for the final Guidance, issued by the Commission in February 2009, it is definitely more neutral than the Discussion Paper on several points, perhaps as a consequence of all the negative comments it got from the contributing parties. Also, the Commission purposely waited for the GC to issue its judgment in Microsoft before it would release the Guidance. Even so, the assessment method it sets out departs in a way from the one established in case law. In the Guidance, the Commission lists three circumstances which, if present, will make the refusal to supply/license case an enforcement priority.

The first one is the indispensability criterion. An input is defined as indispensable when there is no substitute on which competitors could rely so as to counter, in the long-term, the negative consequences of the refusal. The Commission will make an assessment of whether competitors can effectively duplicate the input produced by the dominant undertaking in the foreseeable future. This criterion seems to provide the Commission with substantial powers of making assessments which in reality will more probably amount to assumptions or predictions. This regards both the question on whether there are actual or potential substitutes which can be used to counter the negative consequences of the refusal in the long term as well as the assessment of whether competitors can effectively duplicate the required input. It is difficult to assess exactly how the Commission will make this evaluation.

If the criterion of indispensability is fulfilled, the Commission considers that a dominant undertaking's refusal to supply is generally liable to eliminate effective competition in the downstream market, thus fulfilling the second criterion. This wording seems to indicate that the Commission agrees with a number of scholars who suggested that the elimination of effective competition was in a way identical to the indispensability criterion. Because of this, one wonders what the practical need of having this as a separate criterion really is. The Commission is probably one of few who know the answer.

By the third circumstance, the Guidance introduces the new criterion of consumer harm. The Commission will examine whether, for consumers, the likely negative consequences of the refusal to supply in the relevant market outweigh over time the negative consequences of imposing an obligation to supply. Commission harm may arise where the foreclosed competitors are, as a result of the refusal, prevented from bringing innovative goods to market, likely to contribute to technical development, and/or where follow-on innovation is likely to be hampered. The new product criterion has been transformed to the more general consumer harm criterion. This is clearly an effect of the GC judgment in Microsoft, which the Commission waited for

before issuing its Guidance. Paragraph 240 from the Discussion Paper has been deleted, or rather modified, as it now is expressed that consumer harm may arise when follow-on innovation is likely to be hampered. It is difficult to assess whether this is an effect of an actual change in the view of the Commission compared to the one presented in the Discussion Paper, or whether this is just a slight modification in order not to warm up the already heated debate.

It is obvious that the Commission does not want to rely on the criteria and their definitions as established by the CJEU in *Magill*, *Bronner* and *IMS Health*, or even, perhaps more surprisingly, by the GC in *Microsoft*. Perhaps it viewed those definitions as constraints on its possible scope of action. Since one of the purposes with the Guidance was to reflect a more economic and effects-based approach towards Article 102 TFEU matters, maybe the definitions in the Guidance make more sense. With an effects-based approach follows that the Commission should be able to assess different situations in a case-by-case manner, making qualified assessments of pros and cons of the concerned conduct. Therefore, the Commission may have wanted to define the criteria it will use in its assessment in a more general, open-ended manner. Of course, this could at the same time raise concerns about legal certainty, but often that is the price one has to pay in order to adopt a more flexible legal framework and approach.

Naturally, the legal value of the Guidance can be discussed, as it is not binding on the EU courts. Still, it is the only thing, apart from case law, which we have seen can change abruptly at any time, that companies have to cling on to when attempting to make a self-assessment of their conducts.

5.3 Conclusion

It is now time to try to make a conclusion and answer the initially established questions, forming the purpose of this thesis. So, first, in what way does the *Microsoft* judgment follow established EU jurisprudence on refusal to supply/license?

As we have seen, the *Microsoft* case was a special case. Still, the GC decided to assess it according to the established criteria in previous judgments of the CJEU. On a general level, it can be said that the *Microsoft* case has confirmed the case law on refusal to supply/license on certain aspects, it has most certainly modified some aspects and perhaps it can even be said to have completely departed from case law on some.

As it decided to follow the criteria established in *Magill* and *IMS Health* by the CJEU, the GC also pointed out that if it would find that one or more of those circumstances were absent, it would proceed to assess the case specific circumstances identified by the Commission. Some would argue that this, not viewing the exceptional circumstances as exhaustive, clearly departs from case law. I would be more inclined, however, to view it as a

slight modification of case law, since it has never been confirmed that the established criteria are in fact exhaustive.

As for the indispensability criterion, the GC concluded that the Commission had been right in concluding that non-Windows WGSOS could not continue to be marketed if they were incapable of achieving a high degree of interoperability with Windows and none of the proposed alternative methods of ensuring interoperability made it possible to achieve the high degree of interoperability which the Commission correctly had required in the present case. Therefore, the interoperability information was indeed indispensable. In a way, the GC clearly tried to make the facts of the Microsoft case fit with the Bronner test of indispensability. Even though other WGSOS were present on the market as well as other methods of achieving interoperability, because of Microsoft's extremely high share on the CPCOS market and its increasing share on the WGSOS market, it was concluded that the viability of its competitors on the WGSOS market was dependent on interoperability with Microsoft's CPCOS. I would say that the GC followed Bronner but only half way. In my opinion, the GC should have further examined the available alternatives proposed by Microsoft, especially taking into consideration the breadth of the obligations put on Microsoft and the potential implications for its incentives to innovate, before making its final conclusion on this aspect.

It is obvious that the GC departed from case law when adding the word "effective" to the already established condition of elimination of all competition. This was a conscious move. However, as I have already mentioned, perhaps the word "effective" is not very decisive in practice. Instead, as I see it, it is the word "likely" which is relaxing the original expression of the criterion the most. The word "likely" was introduced already in Bronner, and the closely related word "possibility" even earlier in *Télémarketing*. Therefore, whether the GC's new definition of the criterion in practice makes a departure from established case law need not be as evident as one may think.

As for the new product criterion, here the GC made its biggest movement away from the case law definition. The GC concluded that this criterion could also be interpreted as meaning that a refusal to license can be abusive when there is a limitation of technical development, referring to the wording of Article 102 (b) TFEU. As has already been discussed, this broadens the new product criterion substantially and makes it highly appropriate to ask whether it is still relevant to talk about a new product criterion as such. As we have seen, in its Guidance the Commission adopted the criterion of consumer harm instead.

Finally, we have the objective justification part. On this aspect, it is difficult to assess whether the GC followed previous case law or not, since there has not been a lot of objective justifications presented in earlier judgments, except for the circumstances in *Bronner* and *Ladbroke*, which were not applicable in *Microsoft*. However, since Microsoft did not succeed with its

justification, the GC's judgment could be viewed as following case law at least from that perspective.

Finally, what implications for the future can be deduced from the outcome of the Microsoft case as well as the Commission Guidance?

Sceptics would probably claim that the amount of question marks and the general uncertainty over refusal to supply/license issues has increased after the GC ruling in Microsoft. Others would argue that Microsoft was a one of a kind case, having little, or no, precedential value as regards the principle question of when a dominant undertaking is abusing its position by refusing to supply/license. Scholars are showing their appreciation of or discontent with the judgment, often discussing the case in context of an overall, principle, discussion concerning the conflict between competition policy and IPRs, trying to suggest what the optimal balance would be for consumer welfare in the long term. Some tend to favour the idea of effective competition at the expense of IPRs, believing that effective competition generates new products, lower prices and better quality, thus viewing competition as the main driver behind consumer welfare. Others prefer to think that IPRs are what provide incentives to create better products at lower prices and with better quality, seeing competition as a natural consequence of the granting and protection of IPRs. This is surely not a two-state setting with only two determinative views. Rather, it should be seen as an elastic range with different sets of beliefs as regards the optimal balance between competition policy and IPRs. It could also be visualised as a scale which sometimes tips over in favour of either competition policy or IPRs. A lot of the views tend to group in the middle of the scale, making it even harder to make choices. When an authority or court finally makes a choice, placing the weight too far from the middle of the scale, the debate awakens. With a large amount of proponents, in both the legal and the economic sphere, on both sides of the spectrum, with a lack of obvious evidence as to what balance maximises consumer welfare, it is self-evident that the tension will remain and a heated debate will never be far away. As in many other areas of law, the question boils down to where to draw the line.

I think that the GC ruling in Microsoft will have visible implications. Although the Commission released its Guidance after the Microsoft case, its legal value is low compared to that of the judgments of the EU Courts. It is, however, interesting to see that the Commission does clearly not see itself strictly bound to previous judgments, but instead attempts to create the basis for a sound economic and effects-based approach as regards refusal to supply cases. It remains to be seen if it will succeed in this. Therefore, until the GC or the CJEU will get a chance to change direction again, the Microsoft case will be the latest shaping case as regards refusals to supply/license. Companies will therefore adhere to its principles and the set standards as defined by the GC. Some companies may think that the Microsoft case was concerned with a company so special as to make the precedential value of the case small or irrelevant. I am myself not so sure about this. Although the super-dominance of Microsoft and the

characteristic network effects inherent in the relevant markets were mentioned frequently by the Commission and the GC, the legal assessment of the necessary criteria and the conclusions made in connection to those were not all dependent on the two characteristic aspects only. I therefore think that the Microsoft case does have precedential value, at least until the next dominant undertaking refusing to supply will end up in a European Court.

However, from a legal certainty perspective, the situation is not optimal. When is it likely that elimination of effective competition will occur, what exactly is a new product, and is it really possible to justify a refusal to supply/license once all the defined criteria have been established to be present in a given situation? These are questions which will remain unanswered until the next case will appear before the GC or the CJEU, something bound to happen in the near future and which at least some of us will wait for impatiently. A completely different question is what kind of consequences the Microsoft case and the future state of law on refusal to supply/license will have for overall consumer welfare in the long term. Luckily, I can leave that thorny question for someone else to answer.

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AmCham EU, American Chamber of Commerce to the European Union

AFEP, Association Française des Entreprises Privées

Assonime, Associazione fra le Società italiane per azioni

Ashurst

CRECEDI, Centre de Recherches sur le Commerce et l’Economie Numérique

CCIC, Computer and Communications Industry Association

CBI, Confederation of British Industry

EFPIA, European Federation of Pharmaceutical Industries and Associations

FBD, Freshfields Bruckhaus Deringer

IBA, International Bar Association

ICC, International Chamber of Commerce

Linklaters

RBB Economics

ACT, The Association for Competitive Technology

AAI, The American Antitrust Institute

CompTIA, The Computing Technology Industry Association

Taylor Wessing

United States Council for International Business

Van Bael & Bellis

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