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

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Abstract

This article puts the judgment of the EC Court of First Instance (CFI) in *Microsoft* in perspective and links it with the ongoing discussion on competition policy and innovation. It also replies to some claims made by Ahlborn and Evans in their piece on the same judgment (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1115867). The first section takes a general look at the judgment, and in particular at how the CFI issued a judgment from which it would be difficult to appeal. It also addresses the allegedly excessive deference of the CFI towards the Commission decision (1). Afterwards, the paper goes into more specific issues concerning the first part on interoperability information (2) and the second part on tying (3). Finally, the judgment is placed in a broader forward-looking perspective (4).

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The judgment of the Court of First Instance (CFI) of the European Communities in *Microsoft* v. *Commission*[1] led to the closing of this 10-year mammoth case.[2] Its sheer size immediately begs the question of whether there are any conclusions, guidance or lessons transcending this complex story.

This article seeks to answer this question, if only in part. It complements and comments upon the companion piece of Ahlborn and Evans, who address the same question.[3] It shows that, while the broad criticism levelled by Ahlborn and Evans might be unjustified, there are a number of more specific points where the CFI opens more issues than it solves with its judgment, in particular as regards the relationship between competition policy and innovation.

The first section takes a general look at the judgment, and in particular at how the CFI issued a judgment from which it would be difficult to appeal.[4] It also addresses the allegedly excessive deference of the CFI towards the Commission decision (1). Afterwards, the paper goes into more specific issues concerning the first part on interoperability information (2) and the second part on tying (3). Finally, the judgment is placed in a broader forward-looking perspective (4).

1. The CFI between the Commission and the European Court of Justice (ECJ)

Institutionally, the CFI finds itself between the Commission and the ECJ. In its judgment it sought to fulfil its review function with respect to the Commission (1.2.) while avoiding exposing itself to criticism from the ECJ on an eventual appeal (1.1.).

1.1. *The eventual appeal to the ECJ*

The CFI judgment in *Microsoft* appears to be designed to avoid any exposure to a reprimand by the ECJ, by minimizing the chances of appeal.[5] The CFI seems to keep itself busy with facts for the larger part of the opinion, or at least to want the reader to perceive the case as a large mass of factual issues thrust upon a relatively simple and straightforward legal framework. Those parts of the judgment which are explicitly

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[1] CFI, 17 September 2007, Case T-201/04, *Microsoft* v. *Commission*, not yet reported [hereinafter referred to as the "Judgment"]. This case was brought under Article 230 EC against Commission Decision 2007/53 of 24 March 2004, Case COMP/C-3/37.792, *Microsoft* [2007] OJ L 32/23 (summary), available in full text at http://ec.europa.eu/comm/competition/index_en.html [hereinafter referred to as the "Decision"]. In addition, this article also refers to the Order of the President of the Court of First Instance of 22 December 2004, Case T-201/04 R, *Microsoft* v. *Commission* [2004] ECR II-4463, dismissing Microsoft's application for interim relief.

[2] With the Commission Decision of 27 February 2008, Case COMP/C-3/37.792, *Microsoft*, available in full text at http://ec.europa.eu/comm/competition/index_en.html. The case had started with a complaint by Sun on 10 December 1998.

[3] C. Ahlborn and D.S. Evans, "The *Microsoft* judgment and its implications for the competition policy towards dominant firms in Europe" {add reference} [hereinafter "Ahlborn and Evans"].

[4] And indeed Microsoft chose not to appeal from the CFI judgment to the European Court of Justice (ECJ).

[5] As illustrated by ECJ, 15 February 2005, Case C-12/03 P, *Commission* v. *Tetra Laval* [2005] ECR I-987, it matters not that the appeal appears unlikely to succeed, since the ECJ can also mark its disagreement with the reasoning of the CFI without necessarily coming to a different conclusion.

presented as issues of law are apparently devoid of any innovation which could trigger further discussion.

So it is with the first part on the supply of interoperability information. The Commission case hinges upon the line of case-law concerning refusal to supply, starting with *Commercial Solvents*,[6] and including – or morphing into – the so-called Essential Facilities Doctrine (EFD), which although never recognized by name is said to be exemplified by a string of major cases, namely *Magill*,[7] *Bronner*[8] and *IMS*.[9] A key element in the latter cases in particular are those conditions or "exceptional circumstances"[10] under which Article 82 EC could trump property rights – over physical or intellectual property – to support an order forcing the holder of such rights to grant access to competitors. Over the years, the ECJ seemed to converge towards a specific list of conditions.[11] In its decision, the Commission was short on the law and surprisingly audacious, staking its entire case on the claim that "there is no persuasiveness to an approach that would advocate the existence of an exhaustive checklist of exceptional circumstances and would have the Commission disregard *a limine* other circumstances of exceptional character that may deserve to be taken into account when assessing a refusal to supply."[12] In its judgment, the CFI carefully avoids the issue, finding that it "follows from... case-law that the following circumstances, *in particular*, must be considered to be exceptional [emphasis added]".[13] The CFI then proceeds to restate those conditions, in a way which carefully follows existing ECJ case-law.[14] The rest of the judgment on the first issue, for all its length, professes to do nothing more than review whether the Commission made out those circumstances on the facts of *Microsoft*. The CFI thereby avoids ruling on the Commission argument about the exhaustiveness of the list drawn from ECJ case-law.

On the second part regarding tying, the CFI went further: not only did it put the case against Microsoft on fairly safe legal terrain, but it actually supplied the legal reasoning which was missing from the Commission decision. If the legal reasoning of the Commission under the first part was audacious, it was skimpy at best under the second one. The Commission pulled out its four conditions for tying to be prohibited under Article 82 EC like a rabbit out of a hat, with no references whatsoever to support its

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[6] ECJ, March 1974, Cases 6 and 7/73, *Istituto Chemioterapico Italiano S.p.A.* v. *Commission* [1974] ECR 223.
[7] ECJ, 6 April 1995, Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE)* v. *Commission* [1995] ECR I-743.
[8] ECJ, 26 November 1998, Case C-7/97, *Bronner* [1998] ECR I-7791.
[9] ECJ, 29 April 2004, Case C-418/01, *IMS Health* [2004] ECR I-5039.
[10] In their case-law, the ECJ and CFI characterize as "exceptional circumstances" the conditions required to jutisfy ordering a dominant firms to provide access to its physical or intellectual property. For the sake of simplicity in drafting, they are referred to here as "conditions".
[11] In *IMS*, *supra*, note 9, while the ECJ did specify that the conditions were cumulative, it did not rule that the list was exhaustive. That case was in any event decided after the Commission decision in *Microsoft.*
[12] Decision at para. 555.
[13] Judgment at para. 332.
[14] Ibid., with the addition of the absence of objective justification at para. 333, the note that the new product condition is found only in intellectual property cases at para. 334 and the two-market construction at para. 335.

assertion.[15] In particular, the Commission did not explain how these conditions related to the two leading cases on tying until then, *Hilti*[16] and *Tetra Pak*.[17] The CFI obliged and constructed the legal reasoning which the Commission should have included in its Decision,[18] thereby also positioning the Decision as a mere application of conditions which had already been outlined in – or at least could be derived from – previous cases.

In the end, the CFI judgment is made to appear light on law and heavy on fact. What is more, the legal discussion is short and seems uncontroversial. In the light of the limited scope of appeals to the ECJ (on points of law only), this reduced greatly the basis for an appeal from that judgment (and the chances that it could be successful). Unfortunately, this also means that the more interesting points in the judgment are hidden – sometimes deep – in what appear to be discussions of fact. The CFI judgment does indeed feature a number of remarkable passages, some of which are picked up in the next sections.

1.2. *The review of the Commission Decision*

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

Yet in *Microsoft*, the CFI extends the "more attentive" approach introduced in Merger Control Regulation (MCR) cases[19] to Article 82 EC cases. The CFI adopts the standard set out by the ECJ in *Tetra Laval*: "The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it."[20] As a matter of principle, *Microsoft* actually heralds closer scrutiny of Commission decisions.

Ahlborn and Evans note that the CFI also recalls the general proposition that the Court will only undertake a limited review of complex economic or technical appraisals made by the Commission under competition law.[21] While this may seem to send a "mixed message", as the two authors claim, it is important to keep in mind the nature of the proceedings: the CFI does not conduct an appeal *de novo*, and accordingly it will not

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[15] Decision at para. 794. While the Commission does not indicate where these four conditions are coming from, they are remarkably close to the requirements under US law for tying to be illegal under *§ 1* of the Sherman Act, as they were applied in the US *Microsoft* case: see *US* v. *Microsoft* 253 F.3d 34 at 84 (D.C. Cir. 2001), taking into account that the DC Court of Appeal added a foreclosure of competition requirement and an efficiency defence when it moved the inquiry under a rule of reason at 95 and ff.
[16] CFI, 12 December 1991, Case T-30/89, *Hilti AG* v. *Commission* [1991] ECR II-1439, upheld by ECJ, 2 March 1994, Case C-53/92, *Hilti AG* v. *Commission* [1994] ECR I-667.
[17] CFI, 6 October 1994, Case T-83/91, *Tetra Pak International* v. *Commission* [1994] ECR II-755, upheld by ECJ, 14 November 1996, Case C-333/94. *Tetra Pak International* v. *Commission* [1996] ECR I-5951.
[18] Judgment at para. 852-869.
[19] As formulated authoritatively by the ECJ in *Tetra Laval*, *supra*, note 5, para. 39.
[20] Judgment at para. 89.
[21] Ibid., para. 87 and 88.

reach its own conclusions on what the "correct" legal assessment was. The CFI is conducting judicial review of a Commission decision in area where the Commission enjoys a measure of discretion, and accordingly the key issue is whether the Commission reached the conclusion it did without manifest errors.

More fundamentally, the degree of deference granted to Commission decisions cannot be measured simply by looking at the success rate of challenges to various types of Commission decisions before the Community courts, as Ahlborn and Evans do. This approach is methodologically flawed for two reasons. Firstly, the dataset is not necessarily representative, comparing as it does cases brought before the ECJ/CFI against MCR or Article 82 decisions. On the one hand, MCR decisions are typically not brought to the CFI unless there is a major concern with the decision. It is well known that despite the efforts of the CFI, firms cannot afford to wait for the outcome of a challenge to a Commission decision. Hence positive decisions with commitments on the part of the notifying parties are rarely challenged by the parties, even if the Commission might have made errors in its assessment.[22] Typically the most controversial negative decisions end up before the CFI.[23] Given the disincentive to litigate it should come as no surprise that when the parties do bring their case to the CFI, they achieve a significant success rate. On the other hand, there is almost no disincentive to challenge negative Article 82 EC decisions, and a larger proportion of them are brought before the Courts. A very rough look at the figures shows that the proportion of reversals to total negative decisions is not so different, at 25% for MCR cases versus 18% for Article 82 cases.[24]

Cases	MCR	Article 82
Negative decisions by the Commission	20	50
Brought before the Community courts	9	28
Commission decision reversed	5[25]	9
% of reversals to total negative decisions	25	18

Secondly and more fundamentally, deference is not related to the rate at which the CFI and ECJ reverse or confirm Commission decisions. This would imply that the Court is

[22] Positive (clearance) decisions have in a number of cases been challenged by disgruntled competitors of the merged entity, with limited success: see CFI, 3 April 2003, Case T-114/02, *BaByliss* v. *Commission* [2003] ECR II-1279 and CFI, 13 July 2006, Case T-464/04, *Impala* v. *Commission* [2006] ECR II-2289. They are left out of the dataset since they do not correspond to the concern for Type I errors which underpins the discussion of deference. If they were included, in any event, the reversal percentage for MCR decisions would only be decreased.

[23] And even then only to make the point, as was the case with GE/Honeywell. The award of damages against the Community in CFI, 11 July 2007, Case T-351/03, *Schneider/Legrand* (not yet reported), however, changes the incentives and could lead to more systematic challenges to MCR decisions.

[24] As of January 2008. The total number of negative decisions under Article 82 EC is based on published cases. Nowadays cases tend to be systematically published, but in the early days of EC competition law some cases went unpublished. The real number of negative Article 82 EC decisions is therefore probably higher, so that the proportion should in fact be somewhat lower, given that none of the unpublished cases were brought to the ECJ or CFI (otherwise they would have been taken into the data set by virtue of the ECJ/CFI judgment).

[25] Counting CFI, 14 December 2005, Case T-210/01, *General Electric* v. *Commission* [2005] ECR II-5575 as a reversal in substance, if not in result.

deferent whenever it fails to quash a Commission decision. However, it is quite possible that the Court, having submitted the Commission decision to thorough scrutiny, would still conclude that the Commission did its work properly and that its decision should stand. In other words, the Court can both leave deference at the door and yet ultimately side with the Commission.[26]

If anything, *Microsoft* marks a new era in Article 82 EC litigation. Never before had the Commission put so much effort and care into a decision, and never before had the CFI looked into every nook and cranny of an Article 82 EC decision the way it did in its judgment. Without wanting to launch a discussion on litigation strategy, the reasons for judgment filed by the CFI show that the Court had to deal with a large number of arguments thrown at it by Microsoft; some were dismissed summarily as "merely semantic"[27] or "purely formal"[28] but the others were considered carefully, as the reasons for judgment show. Save for the management trustee, Microsoft simply failed to convince the CFI that the Commission had made a manifest error in its Decision. But the CFI left no stone unturned.

The CFI judgment might appear deferential in the light of the earlier Order of the President of the CFI on Microsoft's application for interim measures (suspension of the Commission Decision pending review).[29] Indeed that Order had gone against Microsoft, but not for the usual reasons. According to the case-law of the ECJ, interim measures can be granted if the entrant shows (i) a *prima facie* case on the substance and (ii) urgency, i.e. that the balance of inconvenience weighs in favour of the entrant.[30] Typically, when applications for interim measures are turned down, the order turns on the *prima facie* case (first condition). The Order in *Microsoft* was a rare instance where the entrant was found to have made a *prima facie* case; the application was rejected on urgency. In his Order, the President of the CFI indicated that he thought that Microsoft had valid arguments against the Commission Decision on both the interoperability information[31] and the tying[32] issues. Yet none of these arguments carried the day in the actual judgment three years later. The President might have been outvoted in the Grand Chamber.[33] At the same

[26] From a lawyer's perspective, the conflation of the outcome (confirm or quash) with the process (deferential or not) reflects a typical failure of social science research to take judicial processes seriously, focusing instead of outcomes and extraneous factors.
[27] Judgment at para. 850.
[28] Ibid. at para. 773.
[29] Order of 22 December 2004, *supra*, note 1. This is an order on an application by Microsoft for the suspension of the execution of the Commission Decision of March 2004.
[30] Ibid., para. 71, referring to the Rules of Procedure of the Court and to case-law.
[31] Ibid., para. 204 and ff. These *prima facie* valid arguments related among others to whether the Decision fit the set of conditions in the case-law and whether the presence of intellectual property rights made any difference in the outcome, two issues which of course feature prominently in the CFI judgment.
[32] Ibid., para. 394 and ff. These *prima facie* valid arguments related among others to the test used by the Commission to find an abusive tying, to the significance of the integrated Windows design in the legal assessment and to the existence of separate markets for Windows OS and Media Player, here as well issues which feature prominently in the CFI judgment.
[33] As Ahlborn and Evans seem to suggest at p. {27}.

time, it cannot be excluded either that, upon closer examination, the CFI found that the Commission Decision should stand.[34]

2. **Refusal to supply interoperability information**

As indicated above, on the first issue – the refusal by Microsoft to supply interoperability information to its competitors, such as Sun and Novell – the CFI does not really engage with the adventurous legal position staked by the Commission in the Decision. Rather, the CFI proceeds to show how *Microsoft* fits within the set of conditions so far identified in the case-law (up to and including *IMS*, hereinafter the "*IMS* test"), while leaving open the issue whether other conditions might also be relevant in deciding whether to order access to the intellectual property held by a dominant firm. While the CFI might not have gone as far as to indulge into *substitution de motifs* – replacing the Commission reasoning with its own, which it cannot do under Article 230 EC[35] – it nevertheless seriously reshuffles the Commission findings and reasoning to recast them within the *IMS* test. When the Commission decided *Microsoft* in 2004, *IMS* had not yet been issued, and to a certain extent the Commission might be excused for not having followed a judgment which had not yet been pronounced. At the same time, *IMS* merely restated and confirmed the limitative set of conditions which had already been set out in earlier judgments such as *Magill* and *Bronner*. In 2004, the Commission chose to advocate a less restrictive approach, relying on an open-ended set of conditions, including in particular the fact the Microsoft had engaged in a repeated pattern of conduct and had disrupted previous levels of supply.[36] Obviously, if the Commission took this position, by implication it was not quite convinced that its case fulfilled the *IMS* test.[37] Yet the CFI finds that *Microsoft* is in line with that test. As can be expected, the weaknesses which prompted the Commission to advocate a broader set of conditions do surface when the CFI tries to show that the *IMS* test is met. Each condition is now reviewed in turn.

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[34] See also A. Bartosch, "Der Zugang zu einer wesentlichen Einrichtung – eine Zwischenbilanz nach dem Beschluss des EuG-Präsidenten vom 22.12.2004 in der Rechtssache Microsoft" (2005) 51 RIW 241.

[35] ECJ, 27 January 2000, Case C-164/98 P, *DIR International Film* v. *Commission* [2000] ECR I-447 at para. 38 and ff.

[36] It is open to argument whether the Commission might not have been wiser to rely on the "classical" refusal to supply case-law, as exemplified by *Commercial Solvents*, *supra*, note 6, instead of the more recent "essential facilities" line of cases. For a comparison between the two, see P. Larouche, *Competition Law and Regulation in European Telecommunications* (Oxford: Hart, 2000) at 203-211. *Commercial Solvents* involved the disruption of earlier levels of supply and set a much lower threshold for abuse than the "essential facilities" cases where dominant firms were forced to open up access where it had never been granted before. Two reasons might explain why the Commission took the legal position it did in *Microsoft*: (i) the prevalence within the Commission staff of the unified theory of refusal to supply and essential facilities, according to which the whole case-law is part of a coherent whole (as put forward by J. Temple Lang, "Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities" (1994) 18 Fordham LJ 437) and (ii) the worry that *Commercial Solvents*, an older case which smacks of protecting competitors rather than competition, would not survive under contemporary standards for competition law. See also D. Geradin "Limiting the scope of Article 82 EC: What can the EU learn from the U.S. Supreme Court's judgment in *Trinko* in the wake of *Microsoft*, *IMS* and *Deutsche Telekom*?" (2004) 41 CMLRev 1519 at 1535-1536.

[37] For a discussion of how the Commission Decision diverges from the *IMS* test, see R. Pardolesi and A. Renda, "The European Commission's case against Microsoft: Kill Bill?" (2004) 27 World Comp 513 at 549-551 and J. Killick, "*IMS* and *Microsoft* Judged in the Cold Light of *IMS*" (2004) 1:2 Comp L Rev.

2.1. *Indispensability of the property to which access is sought*

As for *indispensability*, the CFI downplays a key issue, namely the degree of interoperability which a dominant firm is bound to provide to its competitors. That issue is dealt with early in the judgment, almost as a preliminary matter.[38] In its argument before both Commission and CFI, Microsoft relied heavily on the definition of interoperability given at Directive 91/250.[39] Echoing the Commission, the CFI finds no inconsistency between the degree of interoperability required in the Decision and the definition of Directive 91/250, and holds in any event that the Directive was ultimately irrelevant when it came to interpreting Article 82 EC.[40] Yet the arguments focus on the wording of the Directive and fail to address squarely the main point, namely the extent of the special responsibility of a dominant firm.

As a starting point, in the computer network of a typical business, a large number of servers interact with the client computers and with each other in what is termed a "domain architecture". In a nutshell, Microsoft's view was that it was sufficient if rival workgroup server operating systems (OS) were able to interoperate with Windows clients (so-called client/server interoperability). In such a case, Microsoft and its rivals would essentially have competed for the whole of the domain architecture, i.e. for all the servers of a given business (or at least all of its workgroup servers). This could be equated with "competition for the market" of each individual business customer,[41] a fairly granular form of competition.

In contrast, the Commission expected Microsoft to ensure what it termed "interoperability with the Windows domain architecture",[42] meaning that it should be possible to run rival workgroup server OS on one workgroup server within a larger Windows domain. In that case, business customers can mesh Windows and rival servers within their domain, and accordingly every single server is open to competition. This could be compared with "competition in the market". Of course, the required degree of interoperability is then much higher: not only must rival workgroup server OS interoperate with Windows clients, they must also be interoperable with the Windows servers found within the rest of the Windows domain.

Both the Commission and the CFI simply assume that the latter option – competition in the market – is preferrable. The CFI endorses the Commission view that the higher degree of interoperability bound with this option "was necessary in order to enable

[38] Judgment at para. 207-245, followed by the discussion of whether the remedy actually matches the substantive analysis of the Commission at para. 246-266.
[39] Directive 91/250 of 14 May 1991 on the legal protection of computer programs [1991] OJ L 122/42, Rec. 10-12 and Art. 6.
[40] Judgment at para. 222-227.
[41] Which could be administered through either public procurement mechanisms (for public sector institutions) or private mechanisms such as bids made on the basis of RFPs.
[42] Decision at para. 176-184.

developers of non-Microsoft work group server operating systems to remain viably on the market".[43]

As economic literature shows, however, the choice between competition for and in the market is not so simple.[44] Among others, it involves trade-offs between various models of innovation. Crisply put, competition for the market might provide stronger incentives for breakthrough innovation, since the whole market is at stake, but it is likely to give the market leader a strong – usually dominant – position. This dominant position is then the prize which competitors want to take away from the market leader in the next period, when further breakthrough innovation reshuffles the market. In contrast, competition in the market places firms are under constant pressure to operate as efficiently as possible and to innovate, even if only incrementally, in order to gain an advantage over competitors within a largely common technological environment. However, the incentives to come up with a massive breakthrough innovation could be reduced, in the absence of the prospect of large innovation rents for the market leader.

In *Microsoft*, regrettably, neither the Commission nor the CFI went squarely into the basic issue of why competition in the market and incremental innovation should be preferred to competition for the market and breakthrough innovation. At most, there are oblique references when the CFI answers Microsoft's argument that the degree of interoperability required by the Commission was erroneous.[45] The CFI seems to consider that, because of Microsoft's 'superdominance'[46] on client OS, the Windows domain architecture has become the *de facto* standard for workgroup servers, as confirmed in the evidence gathered by the Commission (in particular market surveys). On that basis, and without further discussion of the competition policy implications, the CFI confirms the Commission conclusion that interoperability within the Windows domain architecture is indispensable.

Once the degree of interoperability required by the Commission is agreed to, the rest of the reasoning concerning indispensability follows.[47]

2.2. *Elimination of competition on the downstream market*

The next condition in the *IMS* test is that the refusal to disclose the information would *eliminate competition on the relevant downstream market*. The CFI confirms the relevant

[43] Judgment at para. 228.
[44] On this point, see the extensive discussion in Pardolesi and Renda, *supra*, note 37 at 524 and ff. Note furthermore that the two are not exclusive of one another: breakthrough innovation can also occur on a market which is otherwise characterized by incremental innovation.
[45] Under the "indispensability" heading of the Judgment at para. 371-422.
[46] The CFI does not use the term 'superdominance', referring instead to the 'extraordinary' nature of Microsoft's dominance.
[47] Contrary to what Ahlborn and Evans claim at {9}, the requirements of indispensability and elimination of competition are not one and the same thing, even if the difference between the two is slight: indispensability refers to whether the facility/information can be duplicated or otherwise replaced (where the threshold for what is economically feasible is set quite high, see *Bronner*, *supra*, note 8), whereas the 'elimination of competition' condition is more economic and involves relevant market definition. See Larouche, *supra*, note 36 at 188-196.

market definition of the Commission and the methods used for the assessment of market shares.[48] It is interesting to note that the CFI finds that, in any event, the case of the Commission does not rest on the correct assessment of the market for workgroup server OS, since the theory of harm put forward by the Commission involves leveraging of Microsoft's uncontested dominance on the client OS market over to the workgroup server OS market.[49] The Commission case is then subjected to a reality test where the CFI reviews the actual determination that the refusal to supply the interoperability information is likely to eliminate competition on the relevant market. The main difficulty is that, despite Microsoft's increasing market share, a number of competitors have managed to remain active on the market, and Linux providers emerged as new competitors during the term covered by the inquiry. In theory, it is conceivable that such a competitive fringe would suffice to keep the market competitive. However, the CFI agrees with the assessment of the Commission, which was relatively well evidenced.

2.3. *Hindrance to the emergence of a new product*

The tensions caused by the reshuffling undertaken by the CFI to fit the case within the *IMS* test are most visible when it comes to the condition that the refusal to supply information must prevent the emergence of a *new product* for which there is demand. That circumstance was developed at the greatest length in *IMS*,[50] which was rendered after the *Microsoft* decision. In *IMS*, as in *Magill*[51] where the new product circumstance was introduced, the facts were reasonably clear: Magill was seeking to bring to the market a new type of TV guide, whereas NDC (the applicant in IMS) seemed to want to replicate IMS' product. Here the case can be construed in many ways: the Commission chose to emphasize the disruption of existing supply relationships with the introduction of Windows 2000,[52] so that competitors were prevented from continuing to offer competing products with innovative features, by way of "follow-on innovation".[53] This might suffice under the general Commission approach whereby the list of conditions is not limited to the *IMS* test: the case would then come closer to the more classical case-law such as *Commercial Solvents* (refusal to supply whereby existing dealings are terminated). The CFI, on the other hand, chose to frame *Microsoft* within the *IMS* test, with its seemingly more exacting "new product" criterion.

The answer of the CFI is to follow the line of reasoning of the Commission, namely to go back to the text of Article 82(b) EC, which presents "limiting production, markets or technical development to the prejudice of consumers" as a type of abuse of a dominant position. The CFI then links the new product condition to the wording of Article 82(b) EC, holding that the "appearance of a new product cannot be the only parameter... prejudice may arise where there is a limitation not only of production or markets, but also

[48] For a criticism of market definition, see Pardolesi and Renda, *supra*, note 37 at 543-547.
[49] Judgment at para. 559. Leveraging claims being complicated and controversial in economic theory, one would have expected the CFI to spend more time on this point.
[50] *Supra*, note 9.
[51] *Supra*, note 7.
[52] Decision at para. 578-584.
[53] Ibid. at para. 693-700.

of technical development".[54] Leaving aside the limited probative value of the illustrative list of Article 82 EC,[55] the CFI is at pains to reconcile this conclusion with *IMS*, where Article 82(b) played no role in the reasoning and the ECJ insisted on the need to show that the applicant "intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand".[56] Thereafter, the CFI finds that the Commission committed no manifest error in its Decision. In essence, once they obtain the interoperability information from Microsoft, competitors have an incentive to introduce workgroup server OS which are differentiated from and provide added value over Windows workgroup server OS.[57] Here as well, much as on the indispensability issue, the Commission and the CFI assume that incremental innovation – such as would typically result from a "competition in the market" or cumulative knowledge model – is at least as valuable as the lumpier breakthrough innovation which would occur under a model of "competition for the market" or non-cumulative knowledge. This assumption is not explicitly discussed anywhere in the Decision or the CFI judgment.

Much has been written already and will still be written on how the CFI stretched the new product circumstance in *Microsoft*.[58] At the same time, as will be seen below, the CFI might have made its life unduly complicated by taking too formalistic a view of what a "new product" should be and entering into a discussion of how technical improvements in product features were also valuable. Nowhere is it written that a "new product" needs to be a completely new offering, entirely distinct from the original one.[59] At first sight, if as set out above it is assumed that smaller-scale incremental innovation is valuable, there is no compelling legal reason why competing workgroup server OS, if they offer innovative features, cannot qualify as new products. The real difficulty is not with the definition, but rather, as seen below, with the adequacy of the new product condition as a proxy.[60]

2.4. *Absence of objective justification*

[54] Judgment at para. 647.
[55] As the CFI itself recalls later in its Judgment when dealing with the tying issue, at para. 859-861.
[56] *IMS*, *supra*, note 9 at para. 49.
[57] It is interesting to note that the reasoning of the CFI is replete with references to the manner in which other providers competed with Microsoft over previous versions on Windows, underlining how the case is easier to frame as a termination of existing supply relationships, as discussed above.
[58] See already Ahlborn and Evans at {11}, referring to C. Ahlborn et al, "The logic and limits of the 'exceptional circumstances' in *Magill* and *IMS Health*" (2005) 28 Fordham Int'l L.J. 1109. See also D. Ridyard, "Compulsory access under EC competition law – A new doctrine of 'convenient facilities' and the case for price regulation" [2004] ECLR 669.
[59] See the interesting discussion in Ahlborn at al., ibid. at 1147 on this point. Their conclusion is entirely apposite: a new product "satisfies potential demand by meeting the needs of consumers in ways that existing products do not". Not even in *Magill*, *supra*, note 7 was it the case: after all, the Magill TV guide contained the exact same schedules (the essential information) as the others, its main novelty consisting in bringing all these schedules in one single guide.
[60] See also F. Lévêque, "Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case" (2005) 28 World Comp 71 at 75 and ff.

Finally, the CFI leaves the door open for Microsoft to prove that its refusal to disclose the interoperability information is *objectively justified*.[61] Before the Commission and the CFI, Microsoft's argument rested on the adverse incentives on innovation which would follow from compulsory disclosure of interoperability information.[62] The CFI dismissed the argument as "vague, general and theoretical",[63] repeating its earlier finding that the remedy did not allow cloning of Microsoft products and – interestingly enough – referring once more to Microsoft's disclosure policy on earlier versions of Windows, which apparently did not affect the innovation incentives.[64]

More fundamentally, *Microsoft* shows the shortcomings of the efficiency defence as envisaged in the 2005 Discussion Paper.[65]

First of all, the very "efficiency" which is at stake in *Microsoft* is not so much an efficiency gain which would result directly from a given course of conduct,[66] but rather a concern for the long-term, dynamic implications of the competitive analysis.[67] As such, it is not so much an 'efficiency defence' as a component of a proper competitive analysis. It cannot easily be dealt with at the tail-end of the inquiry, after the main elements of Article 82 EC – dominance and abuse – have been established, as the Commission proposed in its 2005 Discussion Paper.[68] In *Microsoft*, the Commission had difficulties holding to this artificial separation between the abuse and the efficiency defence. At the end, it did frame its conclusions in terms of balancing: "on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by [the] positive impact [of the disclosure] on the level of innovation of the whole industry".[69] Microsoft seized the opportunity to argue that the Commission was introducing a new test for the application of Article 82 EC, in violation of previous ECJ case-law.[70] The CFI

[61] On the availability of the defence and the burden of proof, the CFI follows the position set out DG Competition in its Discussion Paper on the application of Article 82 EC to exclusionary abuses (December 2005), available at http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf, at para. 77 and ff. On that issue, the Discussion Paper builds on existing case-law.

[62] To the extent that, as pictured by the Judgment at para. 689-695, Microsoft would invoke the mere existence of intellectual property rights over the interoperability information as an objective justification in and of itself, the argument would be circular, as the CFI notes. However, Microsoft's argument went further and considered also the *ex ante* effect of forced disclosure on its incentives to innovate in general.

[63] Ibid. at 698.

[64] Ibid. at 700, 702.

[65] See also E. Rousseva, "The Concept of 'Objective Justification' of an Abuse of a Dominant Position: Can It help to Modernise the Analysis under Article 82 EC?" (2006) 2:2 Comp L Rev.

[66] Compare for instance with the efficiencies arising from certain types of vertical restraints in terms of avoiding free-riding and overcoming information asymmetries.

[67] The whole argument centres on incentives to innovate, so that even at the theoretical level (leaving aside the quantification problem), there might never be any efficiency gain, given that innovation is unpredictable. It is all about trying to influence the course of future events in a matter which is thought favourable. In the Discussion Paper, *supra*, note 61 at para. 234-236, the Commission classifies this argument as a defence, without really addressing the issue raised here.

[68] See Dicussion Paper, *supra*, note 61 at para. 77 and ff.

[69] Decision at para. 783.

[70] In principle, this argument appears to run against the interest of Microsoft, given that a balancing test would likely do better justice to its arguments on innovation incentives. However, in the context of the review of an existing Commission decision, any legal argument which would lead to the invalidity of the decision was presumably thought to be worth making.

considered the above passage as a mere slip of the pen by the Commission,[71] yet the CFI is equally at pains to explain how the innovation incentives can be dealt with as a defence, separately from the assessment of the impact of the course of conduct on the market carried out to establish the abuse. Its reasoning on this point is at best contrived.

Operationally, putting the efficiency defence at the tail-end of the analysis places the defendant before a formidable task, as *Microsoft* shows. Once the Commission is satisfied that the defendant holds a dominant position and that its conduct constituted an abuse, i.e. produced anti-competitive effects to the detriment of consumers, it is difficult to see how a defendant could turn the tide by arguing that in the end the course of conduct does create efficiencies which actually benefit consumers. The CFI unwittingly illustrates this point by stating that the Commission had to "consider whether the justification put forward [...], on the basis of the alleged impact on its incentives to innovate, might prevail over [the] exceptional circumstances [of the *IMS* test], including the circumstance that the refusal at issue limited technical development to the prejudice of consumers".[72] This Herculean task is not made easier by the uncertainty concerning the burden of proof.[73] Admittedly, the alternative – a balancing test carried out within the assessment of abuse – also carries its own operational difficulties, including a greater risk of error due to the discretion inherent in any balancing.[74]

2.5. *Conclusion on the refusal to disclose interoperability information*

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

In a perfect world with complete information, refusal to supply cases could be dealt with, in line with the rest of Article 82 EC, as follows.[75] Intervention should occur only if it brings about an increase in overall welfare. For that, in a very simple fashion,

$$\Delta W_1 + \Delta W_2 > 0$$

where ΔW is the variation in welfare brought about by the intervention in period 1 (now) and 2 (in the future), when compared to the baseline scenario (no intervention). As for period 1,

$$\Delta W_1 = \Delta (TV_1 - TC) - C_a$$

[71] Judgment at para. 705 and ff.
[72] Ibid. at para. 709.
[73] On this point, see A. Bouchagiar, "Soft-Wars: the role of the essential facilities doctrine as *jus in bello*" (2007) 8 CRNI 337.
[74] Geradin, *supra*, note 36 at 1539-1543.
[75] These paragraphs build on Larouche, *supra*, note 36 at 196-203.

where *TV* is the total value to consumers of the service, *TC* the total cost of providing them and C_a the cost of decision-making by the authority.[76] *TV* will increase if for instance the intervention removes a deadweight loss or shifts the demand curve through the apparition of new offerings. *TC* depends on the costs of the two parties, the incumbent (defendant) and the entrant seeking access:

$\Delta TC = \Delta C_i + \Delta C_e$

where ΔC_i reflects the increased costs incurred by the incumbent to provide access (including the loss of economies of scale and scope, opportunity costs and the cost of additional facilities) and ΔC_e the reduction in cost for the entrant in not having to duplicate or replicate the input, facility or information to which access is sought.

As for period 2, it is characterized by an expectation of innovation, which changes the value of the service to TV_2,[77] so that

$\Delta W_2 = \Delta E(TV_2 - TC)$

That expectation of innovation is therefore equally affected by the intervention of the authority to compel access to facilities or information.[78] For instance, intervention will modify the incentives to innovate on the part of the incumbent[79] or of the entrant[80] or create a climate where market players wait for signals from the authority before engaging into innovative ventures.

In real life, however, most of these values cannot be quantified. In particular, ΔC_i is hard to ascertain ahead of intervention and ΔW_2 is almost impossible to quantify.[81] The *IMS* test is designed to provide an approximation of the outcome of the first equation above:

- The *indispensability* condition aims to ensure that ΔC_e is negative (cost savings) and high, so that in any event ΔTC will be limited if not negative. Furthermore, if the cost of duplicating or replicating the facility is low, presumably the baseline scenario (without intervention) will involve duplication or replication on the entrant's own motion, so that $\Delta TV_1 = 0$ and intervention is not warranted;
- If the refusal to supply is likely to *eliminate competition* on the downstream market because of the market power of the incumbent, then in all

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

[77] It is assumed for the sake of simplicity that TC is not changed from period 1, since there is no new intervention. Innovation could of course also consist in decreasing costs rather than increasing valuation.

[78] The effect of the intervention of the authority can be felt not only on the relevant market, but also on other markets.

[79] By giving rise to an expectation that rents on future innovation will also be confiscated via compulsory access or disclosure orders.

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

[81] See S. Vezzoso, "The incentives balance test in the EU *Microsoft* case: a pro-innovation 'economics-based' approach" (2006) 27 ECLR 382.

likelihood $\Delta TV_1 > 0$. Moreover, the incentives of the entrant to innovate are negatively affected by the refusal to supply, so that ΔW_2 could be positive.

- The *new product* condition also has a double proxy function. First of all, it also tends to indicate that $\Delta TV_1 > 0$, because consumers would value a new product for which there is pent-up demand. Secondly, if the entrant brings out a new product differing from the product of the incumbent, presumably the latter's incentive to innovate is not too adversely affected,[82] so that again ΔW_2 would tend to be positive.
- If the *efficiency defence* is considered separately as an objective justification and not as part of the elimination of competition condition, and if the arguments relating to incentives to innovate are part of it, then it does provide an indication regarding ΔW_2.

The above shows that the proxies included in the *IMS* test are neither especially precise – they all serve a dual function – nor exhaustive. In particular, they are weak as regards the approximation of ΔW_2.

If other proxies can be found, there is no reason not to use them if they improve the quality of the approximation.[83] Seen against that background, the open-ended approach of the Commission is quite sensible. Two other additional conditions, in particular, were invoked by the Commission in its Decision; as shown above, they also surfaced in various places in the CFI reasoning:

- The refusal to disclose interoperability information could be construed as a *disruption of previous levels of disclosure* in earlier versions of Windows.[84] This would imply that ΔC_i cannot be excessive, given the previous disclosure practices. Furthermore, if Microsoft still managed to be innovative despite voluntary disclosures to competitors on the workgroup OS market, then the effect of disclosure on its innovation incentives cannot be so high,[85] meaning that ΔW_2 would remain positive.
- Microsoft holds a "*superdominant*" position on the neighbouring market for client OS,[86] although it is not superdominant on the workgroup server OS market. If the assumptions implicitly underlying the case stand (competition for the market, cumulative knowledge and incremental innovation), then superdominance will not vanish overnight, and therefore Microsoft would still retain significant incentives, despite compulsory disclosure of interoperability information to competitors.

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

[83] See also P. Larouche, "The role of the market in economic regulation" (Inaugural lecture), Tilburg, 2003 for a discussion of how C_a can serve as a proxy for C_i and W_2 under certain circumstances.

[84] Decision at para. 578-584.

[85] As noted in the Judgment at para. 702.

[86] For a critical view on the relevance of super-dominance, see J. Appeldoorn, "He who spareth his rod, hateth his son? Microsoft, superdominance and Article 82 EC" (2005) 26 ECLR 653.

Here as well, the impact of disclosure on the innovation incentives would therefore be limited, meaning that ΔW_2 would remain positive.

The following table sums up the above discussion:

Proxy for:	TV_1	C_i	C_e	W_2
Indispensability	X		X	
Elimination of competition	X			X
New product	X			X
Efficiency defence				X
Previous course of conduct		X		X
Superdominance				X

In sum, as long as the conditions invoked in the reasoning of the competition authority do contribute to approximating the decision which would be taken under perfect information, there is no reason to exclude them. What is more, since the reasoning of the Commission and the CFI implicitly rests on a coherent but untested model of innovation and given that assessing the impact of intervention on innovation is very difficult, the CFI should have recognized the usefulness of taking into account every relevant proxy in the legal test in order to get the best possible picture.

3. **Tying**

Whereas in the first part of the case, the CFI reshuffled the legal reasoning of the Commission, in the second part concerning tying, the CFI followed the line of reasoning of the Commission, after having supplied it with a legal underpinning.[87] Every condition of the tying test is reviewed in turn.[88]

3.1. *Separate products*

On the first condition, namely that the tying product (Windows OS) and the tied product (WMP) are *separate products*, all agree that customer demand is determinative of the issue, but Microsoft and the Commission disagreed on the assessment of customer demand. For the Commission, the mere existence of some customer demand for separate products is sufficient to satisfy this condition. For Microsoft, customer demand for separate products must be significant.[89] In other words, given technical integration (the

[87] *Supra*, notes 15-18 and accompanying text.

[88] On the tying part of the Commission Decision, see also M. Dolmans and T. Graf, "Analysis of Tying under Article 82 EC: The European Commission's Microsoft Decision in Perspective" (2004) 27 World Comp 225, D.S. Evans and J. Padilla, "Tying under Article 82 EC and the Microsoft Decision: A comment on Dolmans and Graf" (2004) 27 World Comp 503, D. Ridyard, "Tying and bundling – Cause for Complaint" (2005) 26 ECLR 316 and J.Y. Art and G. v.S. McCurdy, "The European Commission's media players remedy in its *Microsoft* decision: Compulsory code removal despite the absence of tying or foreclosure" (2004) 25 ECLR 694.

[89] Microsoft insisted in particular on the absence of notable separate demand for Windows OS without WMP, whereas the Commission (followed by the CFI in the Judgment at para. 925-933) put more emphasis on the existence of separate demand for streaming media players. Microsoft's line of argument, while attractive, seems to collapse the separate demand issue with the remedy. It draws strength from the

merging of WMP into a broad "media functionality" for Windows), it must be shown that customer demand for separate products is still significant, or to paraphrase Ahlborn and Evans,[90] that 'choice' is preferred to 'convenience'.

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

3.2. *Impossibility to obtain the tying product without the tied product*

The CFI also confirmed the conclusion of the Commission that consumers are *unable to obtain the tying product without the tied product*. As the CFI explains,[91] this can be construed as a reformulation of the condition found in Article 82(d) EC to the effect that consumers are compelled to accept 'supplementary obligations'. Even though WMP is given away for free,[92] the CFI agrees with the Commission that OEMs – and their consumers – are compelled to take it when they install Windows on their products and cannot uninstall it. However, the CFI fails to properly factor in the impact of the Consent Decree in the US *Microsoft* case.[93] Among other obligations, Microsoft undertook in the Consent Decree to add to Windows what is now the "Set Program Access and Defaults" feature,[94] allowing end-users to choose directly which media player they want to use and effectively to short-circuit the tie between Windows OS and WMP. The CFI considered that the Consent Decree was not adequate, since customers remain compelled to acquire both products together.[95] For OEMs, indeed, it means that any competing media player would be installed in addition to and not instead of WMP, giving rise to additional costs

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uselessness of the remedy ordered in *Microsoft*. Leaving the remedy aside, however, the issue is whether there is separate demand for each product (i.e. without tying), which could take the form of demand for a package where Windows and WMP are sold together but can be untied as required. As the CFI rightly remarks at para. 921, Microsoft's argument could imply that complementary products cannot be separate products.

[90] Ahlborn and Evans at {21}.

[91] Judgment at para. 864.

[92] At least when downloaded from the Internet. Of course the development costs of WMP are covered by other Microsoft revenue streams.

[93] *US* v. *Microsoft*, 231 F.Supp.2d 144 (D.D.C. 2002), modified after remand, *US* v. *Microsoft*, 2006 WL 2882808 (D.D.C. 2006).

[94] Ibid., under III.H. This feature was added via Windows XP Service Pack 1 and is found directly in the Start Menu.

[95] Judgment at para. 974.

for configuration and for sales support.[96] From an end-user perspective, however, it is a matter of which default rule is chosen: the solution following from the Consent Decree amounts to tying by default with the possibility to break the tie, whereas the Commission in its assessment requires the reverse option, namely no tying by default with the possibility to integrate WMP into Windows if desired.

3.3. *Foreclosure of competition*

If the Consent Decree is not construed as giving consumers the choice to avoid the tie between Windows OS and WMP, then at least it should have been reflected in the core of the analysis, namely the *foreclosure of competition*. The CFI here follows the Commission analysis, which focuses on the OEM channel. In essence, tying WMP to Windows OS gives WMP an "unparalleled presence": OEMs have no incentive to present other bundles to their end-users, and the latter cease to use other distribution channels when they see WMP installed *ab initio*.[97]

While attractive in surface, the theory of harm put forward by the Commission and endorsed by the CFI suffers from one major weakness: it was not borne by reality. Since the Commission stated its case in 2001,[98] seven years have gone by and the harm has not materialized. As the Commission noted, Microsoft was able to build market share on the media player market, up to the point where it held close to 50% of the market.[99] However, its market share has been stagnating in the last years, as iTunes established itself and Adobe Flash made inroads due to the popularity of YouTube. Real also managed to retain second place behind WMP. To the informed observer, the media player market seems very competitive still.

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

Assuming that the intuitive two-class end-user model set out above is accurate, the tech-savvy users will try to avoid the tie and will look for the best media player(s) available.[100] For these users, media players compete on performance. Conversely, the mainstream users will stick with WMP for the sake of convenience, but they are certainly not impervious to performance. They are making a trade-off: more convenience in return for

[96] Decision at para. 851-852.
[97] Judgment at 1038-1058.
[98] With its second statement of objections, issued on 30 August 2001: Decision at para. 5.
[99] The figures here come from K.J. O'Brien, "As Europe Debated, Microsoft Took Market Share" New York Times (17 September 2007). See also Decision at para. 905 ff.
[100] The tying of WMP to Windows OS does not prevent other media players from being used, it just makes WMP more ubiquitous, as the CFI notes in the Judgment at para. 1049.

less choice. Should WMP be a significantly worse product than its competitors, however, the cost savings in not having to bother with shopping around for a media player would be defeated by the loss of utility in using a sub-standard product. Presumably, mainstream users could then be convinced to take the steps to move to a competing media player. Mainstream users can be kept informed on quality by freeriding on the experience of tech-savvy users, which is relayed to them via media outlets. As long as the tech-savvy user segment is competitive, therefore, Microsoft is under pressure to keep WMP close to the best-of-breed, in order to avoid that the mainstream users would desert it. Mainstream users receive a product of reasonably good quality while not having to incur selection costs. The mainstream user segment could therefore work efficiently, even if it were dominated by one producer. This model has worked on the browser market, after the Consent Decree, where Microsoft Internet Explorer is kept in check by Firefox, Opera, Safari and others. Under this line of analysis, integration delivers its benefits to the mainstream users who value it, while the tech-savvy users obtain the best product that they are seeking. The main role for competition authorities is to keep the tech-savvy segment open, which the US authorities did with the Consent Decree by ensuring that the tying can be defeated or reversed. The remedy advocated by the Commission in *Microsoft*, in contrast, is of limited use, if any.

In strict legal terms, the CFI was not bound to take into account how the market evolved after the Commission Decision. It is conducting judicial review, in order to control whether the Commission Decision was legal when it was taken, and not whether it turned out to have been correct in retrospect.[101] At the same time, given the high stakes in *Microsoft* and the skill of the CFI, it is surprising that the CFI would not somehow allow its reasoning to be influenced by how reality did unfold, at least as far as the interplay between the EC and US remedies was concerned.

On a positive note, the CFI supports the decision of the Commission to treat the foreclosure of competition as a separate condition which must be investigated on its own.[102] Microsoft opportunistically argued that this marked a departure from previous case-law, where the very tying was deemed to have a foreclosure effect by nature.[103] The CFI rejects that argument, although unfortunately it stops just shy of ruling that foreclosure of competition must always be established separately.[104]

3.4. *Absence of objective justification*

Finally, much like on the interoperability issue, the discussion of the efficiency defence brought forward by Microsoft as an *objective justification* for the tying illustrates the

[101] Ibid. at para. 963 and 260.
[102] Ibid. at para. 867-868, 1031-1035.
[103] Of course, as a general proposition, Microsoft – like any other defendant in an Article 82 EC case – is served by an autonomous foreclosure requirement, but as noted, *supra*, note 71, this argument is brought forward in a litigation context.
[104] On this point, Ahlborn and Evans' criticism of the CFI at {14-15} is unduly harsh. The CFI does take a step in the right direction, and *provided* that one agrees with the Commission's focus on the OEM distribution channel (which neither Ahlborn and Evans nor this author do), the part of the Commission case which the CFI considers sufficient does indeed support a finding of foreclosure.

weakness of the Commission approach to efficiencies under Article 82 EC. Putting efficiencies at the tail-end of the examination makes the defence practically pointless. Indeed the CFI promptly sides with the Commission in rejecting Microsoft's arguments, mostly because the Commission remedy does not forbid the bundled Windows and therefore does not take away the efficiencies arising from the integration of WMP into Windows.

3.5. *Conclusion on tying*

In the end, even though the substantive analysis of the Commission on tying is generally sound, one is left wondering why the Commission chose to pursue the tying case further after the US Consent Decree entered into force in 2002. On a proper assessment of the competitive situation, the Consent Decree addressed the concerns which arose from tying, by ensuring that end-users could still break the tie and switch to other products. If the Consent Decree was not an adequate remedy because it was limited in duration, the Commission could have adopted it and made it permanent.[105] Instead, the Commission chose to narrow its focus to the OEM channel and insisted on the creation of a Windows version without WMP (Windows XP N). That product was doomed from the start, being placed on the market alongside the bundled version and sold for the same price.

Indeed, in light of the preceding discussion, the tying case cannot be just about Windows OS and WMP and competition on the market for media players. To a large extent, the Consent Decree addressed these issues. The Commission case is also about who gets to makes fundamental decisions such as the bundling decision.[106] The Commission is concerned generally with the control of innovation paths and intended *Microsoft* to break new ground in this respect.[107] When dealing with foreclosure of competition, the Commission analyzed how Microsoft could use the position of WMP on the media player market to create network effects in favour of its proprietary encoding formats.[108] This could then eventually spill over to other markets (distribution of content over other devices than computers, digital rights management (DRM) systems, etc.).[109] The CFI

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[105] As discussed in P. Larouche, "Legal issues concerning remedies in network industries", in D. Geradin, ed., *Remedies in network industries: EC competition law vs. sector-specific regulation* (Antwerp: Intersentia, 2004) 21 at 39-41, however, experience shows that competition and regulatory authorities, once they have invested in an investigation, will not readily conclude that the actions of another authority have already addressed the issues which arise from the investigation.

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

[107] That concern is also present in the first part of the case dealing with interoperability information, but in a more subdued fashion: see Judgment at para. 392.

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

[109] Decision at para. 879-897.

endorsed that analysis, but it considered that it was not essential for the case.[110] When Microsoft argued that these network effects actually made the tying of Windows OS and WMP efficient by providing content providers and software developers with an ubiquitous integrated platform, the Commission answered that: "an undistorted competition process constitutes a value in itself as it generates efficiencies and creates a climate conducive to innovation (innovation being, in markets such as the software market, a key competition parameter)".[111] The CFI went even further, holding that:[112]

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

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

4. Conclusion and outlook

In *Microsoft*, the CFI tells us the story of a large, successful and innovative firm by all accounts, that could not however resist the temptation to exploit the opportunities created along the innovation path to take extra jabs at the competition. At the same time, the second part of *Microsoft* contains another narrative as well, that of the Commission as policy entrepreneur that could not resist the temptation to intervene either, even as its concerns had been by and large addressed. The CFI failed to pick up that second story.

On interoperability, the case is presented by the CFI as a mere application of the *IMS* test. Whether other conditions exist besides those of the *IMS* test will have to be settled on another day. The CFI gives undue significance and autonomy to the *IMS* test, which ultimately is but a set of proxies.[113] As a matter of law, it ignores other equally useful proxies which the Commission had put forward in its Decision, namely the previous course of dealings and the superdominant position of Microsoft.

On tying, the test used by the Commission is found to be in line with the existing case-law (*Hilti* and *Tetra Pak II*), but here as well, the CFI avoids to rule on the thornier issue of whether foreclosure must be proven separately as an autonomous condition of the tying test. That will also have to wait for another case. Perhaps the biggest disappointment in the whole case is that the CFI does not seem willing or able to rein in the Commission when, after a reasonably sound case in substance, it ignored the effect of

[110] Judgment at para. 1060-1077.
[111] Decision at para. 969.
[112] Judgment at para. 1152-1153.
[113] In my view, in contrast to Ahlborn and Evans, the sanctification of the *IMS* test is a greater concern that any loosening of the set of exceptional circumstances.

the Consent Decree and went on to order an outlandish remedy, the creation of Windows XP N.

Not only is the CFI judgment in *Microsoft* long and difficult to digest in its entirety, but it is structured in such a way that the "official" legal discussion is limited in scope and relatively uncontroversial. Accordingly, its precedential value could remain limited. This would turn *Microsoft* into a very complex but ultimately unique case, contrary to what the Commission intended at the time it took its decision.[114] In that sense, while the Commission won its case in front of the CFI, it did not obtain the resounding endorsement it was hoping for. The CFI did not settle the law, and the issues raised in *Microsoft* will end up before the CFI again.

Indeed whether *Microsoft* will have a larger impact – as Ahlborn and Evans fear[115] – depends on the extent to which, in subsequent cases, various key points hidden in the discussion of the reasoning of the Commission are extricated from their context and turned into general legal propositions. In the part on interoperability information, for one, the Commission and the CFI implicitly prefer competition in the market and incremental innovation over competition for the market and breakthrough innovation, as reflected in the discussion of the indispensability and new product circumstances. Unfortunately, this choice remains implicit; perhaps it is linked with the super-dominance of Microsoft, as some passages would seem to indicate, in which case the issue will remain open in subsequent cases where the defendant is not super-dominant. In the part on tying, both the Commission and the CFI briefly glimpse into the links between competition policy, innovation and standardization, raising more questions than they answer. Here as well, the discussion takes place against the background of super-dominance, so that it might be confined to the facts of *Microsoft*.

So far, the main impact of *Microsoft* is psychological. After a string of defeats,[116] the Commission managed to win what was perhaps its most important case ever, the one on which it had staked its credibility. Its confidence boosted, the Commission is now moving ahead with a number of Article 82 EC cases in high-tech industries, against firms such as Intel,[117] Rambus,[118] Apple[119] or Qualcomm.[120] Two new cases have also been

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[114] See among others the statements made by then Commissioner Monti on the eve of the decision: "Commissioner Monti's statement on Microsoft", Press Release IP/04/365 (18 March 2004), available on europa.eu/rapid. The Commissioner was hoping for "a strong precedent" to "establish clear principles for the future conduct of a company with such a strong dominant position in the market".

[115] Ahlborn and Evans at {27} and ff.

[116] In merger control cases, the Commission lost the infamous "2002 trilogy": CFI, 6 June 2002, Case T-342/99, *Airtours* v. *Commission* [2002] ECR II-2585; 22 October 2002, Case T-310/01, *Schneider Electric* v. *Commission* [2002] ECR II-4071; 25 October 2002, Case T-5/02, *Tetra Laval* v. *Commission* [2002] ECR II-4381 (confirmed by ECJ, *supra*, note 5). It also lost for all intents and purposes in *General Electric*, *supra*, note 25.

[117] "Commission confirms sending of statement of objections to Intel", MEMO/07/314 (27 July 2007). Intel is suspected of abusive conduct designed to exclude its rival AMD from the market.

[118] "Commission confirms sending a statement of objections to Rambus", MEMO/07/330 (23 August 2007). Rambus is suspected of 'patent ambush' in the Dynamic Random Access Memory (DRAM) market.

[119] "Commission confirms sending a statement of objections against alleged territorial restrictions in on-line music sales to major record companies and Apple", MEMO/07/126 (3 April 2007). This case concerns the

opened against Microsoft.[121] At the same time, the Commission does not have additional resources, so it cannot handle so many such cases at once.[122] On the international scene, *Microsoft* has been criticized as yet another instance of excessive interventionism by the European Commission, but at the same time in certain quarters the Commission has also been applauded as the only major competition authority which actually dares to tackle difficult cases and large defendants.[123] Happily or not, *Microsoft* could herald a passing of the torch to the European Commission as the leading competition policy enforcer, at least in the high-tech sector.

At the policy level, *Microsoft* lays out bare the shortcomings of the approach proposed by the Commission in the Discussion Paper[124] for the inclusion of an efficiency defence in Article 82 EC analysis. In both parts of the case, the split between the assessment of abuse (in particular of the anti-competitive effect of the allegedly abusive conduct) and the efficiency defence is hard to follow at a conceptual level, and in practice it makes the efficiency defence a hopeless exercise, coming as it does at the tail-end of the analysis.

Ahlborn and Evans consider that *Microsoft* follows an outdated ordoliberal approach.[125] Such sweeping criticism is exaggerated. Contrary to what Ahlborn and Evans claim, *Microsoft* marks a significant improvement in the quality of the competition analysis, away from the hallmarks of ordoliberalism – a form-based approach, the special responsibility of the dominant firm[126] – and towards a more effects-based approach. In both parts of the case, the Commission carefully set out how the conduct of Microsoft in its view harmed competition and ultimately consumers; as set out above, the CFI could have endorsed this evolution more strongly.

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restrictions imposed on iTunes users (via credit card controls) preventing them from purchasing in iTunes stores outside the Member State where their credit card was issued, leading to differentials in price and choice between Member States. Contrary to the other cases mentioned here, this case is based on Article 81 EC, relying as it does on the distribution agreements between Apple and major record companies. It was settled when Apple agreed to equalize iTunes prices: "Commission welcomes Apple's announcement to equalise prices for music downloads from iTunes in Europe", IP/08/22 (9 January 2008). Apple has also been involved in competition litigation at Member State level, concerning the restrictions on playing iTunes tracks on other MP3 players than the iPod (France and the Netherlands, complaint rejected) or the exclusive distribution agreements for the iPhone (Germany, interim measures against Apple refused on appeal).

[120] "Commission initiates formal proceedings against Qualcomm", MEMO/07/389 (1 October 2007). Qualcomm allegedly breached Article 82 EC when licensing its intellectual property on exploitative terms.

[121] "Commission initiates formal investigations against Microsoft in two cases of suspected abuse of dominant market position", MEMO/08/19 (14 January 2008). These revisit the two issues in *Microsoft*, albeit on new markets, namely the release of interoperability information regarding Microsoft Office and the tying of Internet Explorer to Windows so as to defeat open standards. These two new cases have allegedly caused Microsoft to espouse a different approach and issue its Interoperability Principles on 21 February 2008: http://www.microsoft.com/interop/principles/default.mspx.

[122] All the more since the CFI did quash the Commission Decision as far as the use of the monitoring trustee was concerned (Judgment at para. 1261 and ff.),, implying that more Commission resources will need to be dedicated to the implementation of decisions than was the case in *Microsoft.*

[123] The latter is not entirely accurate, since the US Department of Justice did succeed at least in part in its case against Microsoft: *United States* v. *Microsoft*, 253 F.3d 34 (D.C.Cir.2001) (en banc).

[124] *Supra*, note 61.

[125] Ahlborn and Evans at {17-20}.

[126] The notion of special responsibility is only mentioned once in the reasoning of the CFI (at para. 229), in a quite inconsequential manner.

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

If anything, what Ahlborn and Evans criticize as the use of form-based analysis and structural presumptions, allegedly leading to a shift in emphasis on static competition, could be more constructively interpreted as a divergence of views on dynamic effeciencies and innovation. Ahlborn and Evans take a somewhat offhand view: as long as firms – including larger ones – are incentivized, innovation will ensue and bring about measurable static benefits in the form of efficiencies (better interoperability, integration of media functionality, etc.). Dynamic aspects, since they cannot be measured, are better left alone. The Commission and the CFI take a different and equally coherent view, but unfortunately they leave it unarticulated. As indicated above, *Microsoft* rests on an implicit preference for incremental over breakthrough innovation – at least when superdominance is involved – and a concern for the control over innovation paths. The Commission intervenes to protect the competitive process not for the sake of keeping competitors in business, but rather in order to ensure that innovation continues to be generated outside of the superdominant firm (or at least that incentives remain for competitors to try to innovate). By the same token, consumer preferences – the decisive factor in rewarding innovation — are expressed directly through the competitive process as opposed to the unilateral decision of a firm based on its perception of these preferences.

It is by no means clear that the view of the Commission and the CFI is preferrable; it has its advantages and disadvantages, which need to be further researched and which will hopefully be better understood and explained in future cases. However, that view cannot be summarily branded with the 'stigma' of ordoliberalism.