The judgment of the Court of First Instance in the Microsoft case

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1. The 2004 Decision

On 24 March 2004, the Commission adopted a decision pursuant to Article 82 EC concluding that Microsoft had abused its dominant position in the PC operating system market by (i) refusing to provide interoperability information necessary for competitors to be able to effectively compete in the work group server operating system market and (ii) tying its Windows Media Player with the Windows PC operating system. The Commission imposed a EUR 497,196,304 fine on Microsoft and ordered it to bring the above-mentioned infringements of Article 82 EC to an end (2). In particular, the Commission ordered Microsoft to provide the interoperability information to interested undertakings and to offer a version of the Windows PC operating system without Windows Media Player.

The main aim of the Commission's 2004 Decision was to ensure that Microsoft does not abuse its de facto monopoly on the PC operating system market to stifle innovation and consumer choice in adjacent markets. The 2004 Decision therefore thoroughly analysed the consequences of Microsoft's behaviour for the concerned markets.

Microsoft filed an application for annulment against the 2004 Decision with the Court of First Instance. Microsoft also sought to stay the implementation of the remedies foreseen in the 2004 Decision through an interim measures application, which the President of the Court of First Instance rejected by order of 22 December 2004 (3). On 17 September 2007, the Court of First Instance (Grand Chamber) rendered judgment with regard to Microsoft's application for annulment (4).

The Court upheld the Commission's findings with regard to Microsoft's refusal to supply interoperability information and the tying of Windows Media Player. The Court, however, annulled Article 7 of the 2004 Decision which foresees the establishment of a monitoring mechanism, including a monitoring trustee, to oversee Microsoft's compliance with the 2004 Decision insofar as Article 7 entails the delegation of powers of investigation to the monitoring trustee and orders Microsoft to bear the costs of the monitoring trustee. The Court's reasoning will be summarised in the following.

2. The Judgment of the Court of First Instance

2.1. The Court of First Instance's analysis of Microsoft's refusal to supply and authorise the use of interoperability information

In its application for annulment with regard to the Commission's findings on the refusal to supply interoperability information, Microsoft relied essentially on the argument that it would illegally be required to grant a licence to its intellectual property rights (5).

Although the 2004 Decision did not take any position as to whether the interoperability information was indeed covered by intellectual property rights, the Court proceeded on the presumption that the interoperability information was covered by intellectual property rights or constituted trade secrets (6).

The Court reiterated well-established case-law (7) according to which *"the refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only in exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such*

(1) Directorate-General for Competition, unit C-3. The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

(2) Commission Decision 2007/53/EC of 24 March 2004 (hereinafter: «the 2004 Decision»). For a more detailed summary of the 2004 Decision see Competition Policy Newsletter No 2, 2004, p. 44-48.

(3) Case T-201/04 R.

(4) Case T-201/04 *Microsoft v Commission* (hereinafter: «the judgment»).

(5) Microsoft also argued that it had not in fact refused to supply the interoperability information and that the 2004 Decision was incompatible with the TRIPS Agreement. Both pleas were rejected by the Court (see paragraphs 713-776 and 777-813 of the judgment).

(6) Paragraph 289 of the judgment.

(7) Case 238/87 Volvo [1988] ECR 6211, Joined Cases C 241/91 P and C 242/91 P RTE and ITP v Commission [1995] ECR I 743 («Magill»), Case C 418/01 IMS Health [2004] ECR I 5039.

an abuse" ([8]). The Court noted that "the following circumstances, in particular, must be considered to be exceptional:

— *in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;*

— *in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market;*

— *in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand"* ([9]).

The Court then went on to analyse whether these exceptional circumstances were present in the Microsoft case.

Indispensability

With regard to the indispensability of the interoperability information, the Court agreed with the Commission that Microsoft was able to impose Windows as the "de facto" standard for work group computing ([10]).

The Court therefore concluded that non-Microsoft work group server operating systems had to be capable of interoperating with Windows PC and server operating systems on an equal footing if they were to be marketed viably on the market ([11]) and that there were no viable solutions to achieve interoperability other than disclosures ([12]) from Microsoft.

Elimination of competition

As regards the elimination of competition emanating from Microsoft's refusal to supply, the Court noted at the outset that *"[...] Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market"* ([13]).

The Court also stressed that *"[...] the Commission had all the more reason to apply Article 82 EC before the elimination of competition on the work group server operating systems market had become a reality because that market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse"* ([14]).

The Court fully confirmed the Commission's definition of the relevant product markets as well as its analysis of market data and the competitive situation ([15]). The Commission collected a very significant amount of customer evidence showing that it was the artificial "interoperability advantage" that Microsoft reserved for its product via the refusal to supply that drove Microsoft's rapid gain of market share and prevented other vendors of work group server operating systems from viably competing on the market.

The Court concluded that *"[...] Microsoft's refusal has the consequence that its competitors' products are confined to marginal positions or even made unprofitable. The fact that there may be marginal competition between operators on the market cannot therefore invalidate the Commission's argument that all effective competition was at risk of being eliminated on that market"* ([16]).

New product/consumer welfare

The Court noted that whether Microsoft's *"[...] conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in 'limiting production, markets or technical developments to the ... prejudice of consumers'"* ([17]).

The Court then went on to state that *"[...] the contested decision rests on the concept that, once the obstacle represented for Microsoft's competitors by the insufficient degree of interoperability with the Windows domain architecture has been removed, those competitors will be able to offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, will be distinguished from those systems with respect to parameters which consumers consider important (see, to that effect, recital 699 to the contested decision)"* ([18]).

In the same vein, the Court emphasised that *"[...] Microsoft's competitors would not be able to clone or reproduce its products solely by having access to the interoperability information covered by the contested decision"* ([19]).

([8]) Paragraph 331 of the judgment.
([9]) Paragraph 332 of the judgment.
([10]) Paragraph 392 of the judgment.
([11]) Paragraph 422 of the judgment.
([12]) Paragraph 435 of the judgment.
([13]) Paragraph 561of the judgment.
([14]) Paragraph 562 of the judgment.
([15]) Paragraphs 479-620 of the judgment.
([16]) Paragraph 593 of the judgment.
([17]) Paragraph 643 of the judgment.
([18]) Paragraph 656 of the judgment.
([19]) Paragraph 657 of the judgment.

Therefore, the Court agreed with the Commission's findings that Microsoft's refusal to supply interoperability information *"limits technical development to the prejudice of consumers within the meaning of Article 82 (b) [...]"* ([20]).

Objective justification

The Court accepted that even when the above mentioned circumstances are present, the company that refused to supply a product could objectively justify its conduct.

As regards the associated burden of proof, the Court noted that *"[...] it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted"* ([21]).

Microsoft's first claimed objective justification for its refusal to supply interoperability information was the fact that the technology concerned was covered by intellectual property rights ([22]).

However, the Court rejected this argument as *"[...] inconsistent with the raison d'être of the exception which that case-law thus recognises in favour of free competition, since if the mere fact of holding intellectual property rights could in itself constitute objective justification for the refusal to grant a licence, the exception established by the case-law could never apply"* ([23]).

The Court also rejected Microsoft's argument that the disclosure of the interoperability information *"will significantly reduce — still less eliminate — Microsoft's incentives to innovate"* ([24]). In particular, the Court pointed out that it was *"[...] normal practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products and Microsoft itself had followed that practice until it was sufficiently established on the work group server operating systems market"* ([25]).

2.2. *The Court of First Instance's analysis of Microsoft's tying of Windows Media Player with the Windows client PC operating system*

The Court confirmed that the presence of the following four factors constitutes abusive tying under Article 82 (d) EC:

— *"first, the tying and tied products are two separate products;*

— *second, the undertaking concerned is dominant in the market for the tying product;*

— *third, the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and*

— *fourth, the practice in question forecloses competition"* ([26]).

Separate products

The Court confirmed the Commission's assessment that *"[...] the distinctness of products for the purpose of an analysis under Article 82 EC has to be assessed by reference to customer demand"* ([27]).

The Court explicitly rejected Microsoft assertion which claimed that as there was no demand for a Windows client PC operating system without a streaming media player, these could not be considered as separate products. The Court pointed out that complementary products can also constitute separate products and referred to the Hilti ([28]) case: *"[I]t may be assumed that there was no demand for a nail gun magazine without nails, since a magazine without nails is useless. However, that did not prevent the Community Courts from concluding that those two products belonged to separate markets"* ([29]).

The Court also pointed to the particular role of Original Equipment Manufactures ("OEMs"), which combine hardware and software from different sources. In this regard, the Court noted that *"[...] OEMs follow consumer demand for a pre-installed media player on the operating system and offer a software package including a streaming media player that works with Windows, the difference being that that player would not necessarily be Windows Media Player"* ([30]).

([20]) Paragraph 665 of the judgment.
([21]) Paragraph 688 of the judgment.
([22]) Paragraph 689 of the judgment.
([23]) Paragraph 690 of the judgment.
([24]) Paragraph 701of the judgment.
([25]) Paragraph 702 of the judgment.
([26]) Paragraph 862 of the judgment.
([27]) Paragraph 917 of the judgment.
([28]) Case T 30/89 Hilti v Commission [1991] ECR II 1439, upheld in Case C 53/92 P Hilti v Commission [1994] ECR I 667.
([29]) Paragraph 921 of the judgment.
([30]) Paragraph 923 of the judgment.

The Court also emphasised that the tying of Windows Media Player was not the consequence of technical constraint but a strategic choice by Microsoft ([31]) *"designed to make Windows Media Player more competitive with RealPlayer by presenting it as a constituent part of Windows and not as application software that might be compared with RealPlayer"* ([32]).

The Court therefore found that the Commission was correct to find that client PC operating systems and streaming media players constituted separate products.

Coercion

In this regard, the Court noted *"that it cannot be disputed that [...] consumers are unable to acquire the Windows client PC operating system without simultaneously acquiring Windows Media Player, which means[...] that the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations must be considered to be satisfied"* ([33]).

The Court also specified that *"[...] in most cases that coercion is applied primarily to OEMs, and is then passed on to consumers. OEMs, who assemble client PCs, install on those PCs a client PC operating system provided by a software producer or developed by themselves. OEMs who wish to install a Windows operating system on the client PCs which they assemble must obtain a licence from Microsoft in order to do so. Under Microsoft's licensing system, it is not possible to obtain a licence on the Windows operating system without Windows Media Player"* ([34]).

Foreclosure

On the foreclosure of competition through Microsoft's tying of Windows Media Player, the Court found *"[...] that the fact that from May 1999 Microsoft offered OEMs, for pre-installation on client PCs, only the version of Windows bundled with Windows Media Player had the inevitable consequence of affecting relations on the market between Microsoft, OEMs and suppliers of third-party media players by appreciably altering the balance of competition in favour of Microsoft and to the detriment of the other operators"* ([35]).

The Court also noted that *"[...] the release of the bundled version of Windows and Windows Media Player as the only version of the Windows operating system capable of being pre-installed by OEMs on new client PCs had the direct and immediate consequence of depriving OEMs of the possibility previously open to them of assembling the products which they deemed most attractive for consumers and, more particularly, of preventing them from choosing one of Windows Media Player's competitors as the only media player. On this last point, it must be borne in mind that at the time RealPlayer had a significant commercial advantage as market leader. As Microsoft itself acknowledges, it was only in 1999 that it succeeded in developing a streaming media player that performed well enough, given that its previous player, NetShow, 'was unpopular with customers because it did not work very well' (recital 819 to the contested decision). It must also be borne in mind that between August 1995 and July 1998 it was RealNetworks' products — first RealAudio Player, then RealPlayer — that were distributed with Windows. There is therefore good reason to conclude that if Microsoft had not adopted the impugned conduct competition between RealPlayer and Windows Media Player would have been decided on the basis of the intrinsic merits of the two products"* ([36]).

The Court put significant emphasis on the distribution advantage that Microsoft achieved through its tying: *"[...] it is clear that owing to the bundling, Windows Media Player enjoyed an unparalleled presence on client PCs throughout the world, because it thereby automatically achieved a level of market penetration corresponding to that of the Windows client PC operating system and did so without having to compete on the merits with competing products"* ([37]).

The Court concluded that the Commission had demonstrated to the requisite legal standard that the bundling of Windows and Windows Media Player from May 1999 inevitably had significant consequences for the structure of competition. *"That practice allowed Microsoft to obtain an unparalleled advantage with respect to the distribution of its product and to ensure the ubiquity of Windows Media Player on client PCs throughout the world, thus providing a disincentive for users to make use of third-party media players and for OEMs to pre-install such players on client PCs"* ([38]).

The Court therefore held that the Commission's findings in this first stage of its foreclosure reasoning were in themselves sufficient to establish that the fourth constituent element of abusive tying, namely foreclosure, was present in this case.

Furthermore, the Court also confirmed the Commission's findings concerning the additional anti-competitive effects of the bundling:

([31]) Paragraph 936 of the judgment.
([32]) Paragraph 937 of the judgment.
([33]) Paragraph 961 of the judgment.
([34]) Paragraph 962 of the judgment.
([35]) Paragraph 1034 of the judgment.
([36]) Paragraph 1046 of the judgment.
([37]) Paragraph 1038 of the judgment.
([38]) Paragraph 1054 of the judgment.

"The Commission is correct to make the following findings:

- *Microsoft uses Windows as a distribution channel to ensure for itself a significant competitive advantage on the media players market (recital 979 to the contested decision);*
- *because of the bundling, Microsoft's competitors are a priori at a disadvantage even if their products are inherently better than Windows Media Player (ibid.);*
- *Microsoft interferes with the normal competitive process which would benefit users by ensuring quicker cycles of innovation as a consequence of unfettered competition on the merits (recital 980 to the contested decision);*
- *the bundling increases the content and applications barriers to entry, which protect Windows, and facilitates the erection of such barriers for Windows Media Player (ibid.);*
- *Microsoft shields itself from effective competition from vendors of potentially more efficient media players who could challenge its position, and thus reduces the talent and capital invested in innovation of media players (recital 981 to the contested decision);*
- *by means of the bundling, Microsoft may expand its position in adjacent media-related software markets and weaken effective competition, to the detriment of consumers (recital 982 to the contested decision);*
- *by means of the bundling, Microsoft sends signals which deter innovation in any technologies in which it might conceivably take an interest and which it might tie with Windows in the future (recital 983 to the contested decision"* ([39]).

Objective justification

The Court confirmed that there was no objective justification for Microsoft's bundling. It rejected all of Microsoft arguments in this respect ([40]). Notably, as regards Microsoft's assertion that the integration of Windows Media Player in Windows and the marketing of Windows in that form alone led to the de facto standardisation of the Windows Media Player platform, which would have beneficial effects on the market, the Court held that *"[...] Although, generally, standardization may effectively present certain advantages, it cannot be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying"* ([41]).

([39]) Paragraph 1088 of the judgment.
([40]) Paragraphs 1144-1167 of the judgment.
([41]) Paragraph 1152 of the judgment.

2.3. *The Court of First Instance's analysis of the monitoring mechanism*

With regard to the powers of a monitoring trustee, the Court held that *"[...] the Commission has no authority, in the exercise of its powers under Article 3 of Regulation No 17, to compel Microsoft to grant to an independent monitoring trustee powers which the Commission is not itself authorised to confer on a third party"* ([42]).

Secondly, the Court held that *"There is no provision of Regulation No 17 that authorises the Commission to require an undertaking to bear the costs which the Commission incurs as a result of monitoring the implementation of remedies"* ([43]).

The Court therefore annulled Article 7 of the Decision insofar orders Microsoft to submit a proposal for the establishment of a mechanism which is to include a monitoring trustee with investigatory powers and foresees that all the costs associated with the appointment of the monitoring trustee, including his remuneration, be borne by Microsoft.

2.4. *Fines*

The Court confirmed the amount of fine that had been imposed, confirming, among other aspects, that the two abuses were held to be very serious infringements of Article 82 EC.

3. Conclusion

It is evident from the judgment that the Court's findings are based both on a long line of consistent case-law, but also on the specific facts of the case, not least the circumstances relating to Microsoft's near monopoly position on the client PC operating system market ([44]).

([42]) Paragraph 1271 of the judgment.
([43]) Paragraph 1274 of the judgment.
([44]) See paragraph 387 of the judgment: *"Microsoft's dominant position on the client PC operating systems market exhibits, as the Commission states at recitals 429 and 472 to the contested decision, 'extraordinary features', since, notably, its market shares on that market are more than 90% (recitals 430 to 435 to the contested decision) and since Windows represents the 'quasi-standard' for those operating systems.»; Paragraph 392 of the judgment: «In that regard, the Court finds first, that, in light of the very narrow technological and privileged links that Microsoft has established between its Windows client PC and work group server operating systems, and of the fact that Windows is present on virtually all client PCs installed within organisations, the Commission was correct to find, at recital 697 to the contested decision, that Microsoft was able to impose the Windows domain architecture as the 'de facto standard for work group computing'"*; see also paragraph 1152 of the judgment as cited above.

In this regard, the Court made clear that Microsoft might be able to engage in similar types of abuses in other areas, noting that: *"Since Microsoft is very likely to maintain its dominant position on the client PC operating systems market, at least over the coming years, it cannot be precluded that it will have other opportunities to use leveraging vis-à-vis other adjacent markets. Furthermore, Microsoft had already faced proceedings in the United States for a practice similar to the abusive tying at issue, namely the tying of its Internet Explorer browser and its Windows client PC operating system, and the possibility cannot be precluded that it might commit the same type of infringement in future with other application software"* ([45]).

The judgment will serve as a precedent for the Commission to ensure that Microsoft does not abusively extend its de facto PC operating system monopoly into other markets without constraint so that innovation and consumer choice will suffer.

([45]) Paragraph 1363 of the judgment.