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# Picking Over the CFI Microsoft Judgment of 17 September, 2007

By Dr. Philip Marsden\*

The two abuses alleged by the Commission were confirmed by the Court as meriting a record fine of €497.2 million, since “Microsoft committed a single infringement, namely the application of a strategy consisting in leveraging its dominant position on the client PC operating systems market.”<sup>1</sup>

## Tying

Here the Court found that the Commission had proven that Microsoft tied two separate products (Windows and Media Player); Windows was dominant in the operating system market, thus customers who bought it were ‘coerced’ into taking Media Player as well; this foreclosed competition in the market for media players and was not objectively justifiable.

The Court thus rejected Microsoft’s arguments that, *inter alia*, the products weren’t separate: Windows just had media functionality, so there could be no ‘tie’; and that while there was separate demand for an operating system and for media players, there was no separate demand for an operating system without a media player (the ‘laceless shoes’ argument); customers who bought Windows received Media Player but were not forced to use it and could readily download rival players; such players had thrived during the period of the abuse (the leading media player in the world currently being Flashplayer), and that product improvement was an objectively justifiable strategy for a dominant firm and to disallow it would guarantee consumers degraded products with less functionality.

The Court upheld the Commission’s remedy of requiring that Microsoft create Windows XPN – i.e. a degraded version of Windows without a Media Player, for the European market, and sell

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<sup>1</sup> Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 WL 2693858 (Sept. 17 2007) at ¶ 1327.

it for the same price as Windows XP. The Commission had rejected Microsoft's offer to ship Windows with a CD of competing media players, rather than degrade its own product. Going forward then, Microsoft is free to add new functionality to Windows or Vista, so long as it provides a product without such improvements for European consumers.

## Refusal to Deal

The Court began by giving Microsoft the benefit of the doubt that its interoperability protocols were protected intellectual property, a fact that was hotly disputed by the complainants. As such, the Court stated that Microsoft could only be forced to divulge such information in "exceptional circumstances". Drawing from case law including *Magill* and *IMS Health*, the Court ruled that such exceptional circumstances were satisfied in this case since the information refused was *indispensable* for competitors to develop competing products *and remain viable*; the refusal led to *a risk* that effective competition would be eliminated; the refusal prevented the potential emergence of new or merely *different* products; and there was no objective justification for the refusal.

The Court thus rejected Microsoft's arguments that competitors were currently designing new products without access to the protocols; Commission intervention in IP rights should be based on a clear likelihood - rather than a mere risk - of harm; access to the protocols would allow rivals to clone Microsoft's operating system (essentially, like giving away the recipe for Coke) forced sharing of its proprietary information would reduce its incentives to innovate in the future.

The Court held that "on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft)."<sup>2</sup>

As a result, Microsoft must provide its rivals with access to its protocols. The Monitoring Trustee feels that the protocols involve no innovative value, but were just arbitrarily selected communications protocols, and Microsoft should provide access for free. The CFI, however, found that the Commission could not grant the Trustee the powers it had, and so perhaps some aspects of his work may be questioned.

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<sup>2</sup> Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 WL 2693858 (Sept. 17 2007) at ¶ 706.

There are many things that could – and will – be said about the Microsoft judgment.

Let's just look at some questions:

1. Is tying by dominant firms now a per se offence in Europe? Are all tying cases involving dominant firms essentially essential facilities cases?

2. On refusal, has the 'new product' requirement been diluted to that of showing that a refusal to provide access to information protected by intellectual property rights is preventing the emergence merely of a 'different' product?

3. On refusal, the court has ruled that a complainant need not prove that harm to the competitive structure is likely, but that there is a 'risk' of such harm. Discuss the ramifications for enforcement policy and prioritisation of cases.

4. The Court reminds us in para 664 that direct consumer harm need not be proven. European case law allows a 'precautionary principle' by which the 'risk' of harm to the competitive structure of the market is enough. Nevertheless, competition authorities are increasingly using consumer welfare as the primary ground for their intervention. This is the most high profile competition law case in Europe. What should we make of the fact that not one consumer rights organisation (and there is at least one in every Member State) did not intervene in support of the Commission?

5. In para. 664, the CFI ruled that "In this case, Microsoft impaired the *effective competitive structure* on the work group server operating systems market *by acquiring a significant market share* on that market." Is there a new abuse being created here, of acquiring market share?

6. What is likely to be the next big abuse case? Intel, Rambus, Qualcomm, Google? Do these cases really have anything to do with the CFI judgment in Microsoft apart from the general deference given to the Commission in abuse cases? What other industries and areas are likely candidates for application of the CFI decision's standards on tying and bundling? What if any new opportunities does the CFI decision give for private Article 82 litigation?

7. On the day of the decision I commented in the Times that: "it highlights the fact that divergences remain between Europe and the US when it comes to technology-driven markets. US courts would not accept the theories adopted by the Court of First Instance this morning. This is hardly an ideal regulatory environment for companies in global technology-driven markets. It leads to difficult choices: should dominant companies say yes to a demand for technology from a US rival that has no foundation in US law, but

which might be accepted in Europe?” Will the CFI decision lead international firms to confirm their behaviour in all global markets to the European standard?

8. With respect to compulsory licensing of IP rights, was the CFI merely applying the “exceptional circumstances” test drawn from *Magill* and *IMS*, or was it expanding it? How did the Court find that Microsoft had precluded “any effective competition” when its competitors have a collective market share of approximately 30-40 percent?

9. Did the CFI adopt an speculative “tipping” analysis in finding that the market share trends demonstrated the inability of competitors to remain ‘viable’ without access to Microsoft’s IP or a Commission decision forbidding the bundling of new features? What are we to make of the acknowledgement at para 1055 that “the number of new media players and the extent of the use of multiple media players are continually increasing”?

10. On tying, Ballmer’s offer to Monti was to ship Windows with a CD with all available media players on it. That was rejected. The abuse found, and upheld by the CFI, was shipping Windows with Media Player while not making available a version without Media Player (hence the remedy in Europe, of Windows XPN being offered). Wasn’t the original Ballmer offer better for consumer choice?