

The Microsoft Case

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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.

This speech will exclusively deal with the refusal to supply interoperability information.

The Commission's findings in the 2004 Decision rest on Microsoft's exceptional, super dominant market position on the PC operating system market. Microsoft's market share in this market is between 90 and 95%, and it has enjoyed these high market shares for many years. Microsoft's market position is protected by the applications barrier to entry in the market which derives from the fact that the vast majority of PC applications are written for the Windows PC operating system platform.

The 2004 Decision found that Microsoft abusively leveraged its PC operating system dominance onto the work group server operating system market through withholding essential interoperability information necessary for competing work group server operating systems to "communicate" with the Windows PC and server operating system. The 2004 Decision established that access to the interoperability information was indispensable to compete viably in the work group server operating system market and that Microsoft's refusal risked eliminating competition in the work group server operating system market to the detriment of innovation and consumer choice.

The judgment

On 17 September 2007, the Court of First Instance (Grand Chamber) rendered judgment with regard to Microsoft's application for annulment against the 2004 Decision. The Court upheld the Commission's findings with regard to Microsoft's refusal to supply

* **The views expressed are personal and not necessarily those of the Commission**

interoperability information and the tying of Windows Media Player.¹ The Court's reasoning will be summarised in the following.

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.

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 IPRs or constituted trade secrets.

The Court reiterated well-established case-law² 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 an abuse.*"³ The Court noted that "*the following circumstances, in particular, must be considered to be exceptional:*

1. *in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market;*
2. *in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market;*
3. *in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand."*

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

Indispensability

¹ 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.

² 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.

³ Paragraph 331 of the judgment.

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.

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 viably⁴ and that there were no viable solutions to achieve interoperability other than disclosures⁵ from Microsoft.

Elimination of competition

As regards the impact of Microsoft's refusal to supply on the competitive situation in the work group server operating system market, the Court noted at the outset that the Commission does not have to wait until there is no competition left in the relevant market before acting under Article 82 EC.⁶ The Court also emphasised that because of the significant network effects in place in the concerned market the elimination of competition brought about by Microsoft's behaviour would be difficult to reverse.⁷

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.⁸ The Commission collected a very significant amount of customer evidence showing that it was the artificial "interoperability advantage" that Microsoft reserved for its products 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.*"⁹

New product/consumer welfare

⁴ Paragraph 422 of the judgment.

⁵ Paragraph 435 of the judgment.

⁶ Paragraph 561 of the judgment.

⁷ Paragraph 562 of the judgment.

⁸ Paragraphs 479-620 of the judgment.

⁹ Paragraph 593 of the judgment.

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'.*"¹⁰

The Court confirmed the Commission's analysis that the insufficient degree of interoperability with Windows discouraged Microsoft's competitors from developing and marketing work group server operating systems with innovative features to the prejudice of consumers.¹¹

The Court also confirmed the Commission's analysis that "*consumers consider non-Microsoft work group server operating systems to be better than Windows work group server operating systems on a number of features to which they attach great importance*"¹²

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.¹³

Therefore, the Court agreed with the Commission's findings that Microsoft's refusal to supply interoperability information limited technical development to the prejudice of consumers within the meaning of Article 82 (b) EC.¹⁴

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. The Court noted that the burden of proof lies with the company invoking the objective justification and it is for the Commission to rebut the company's arguments.¹⁵

¹⁰ Paragraph 643 of the judgment.

¹¹ Paragraph 653 of the judgment.

¹² Paragraph 661 of the judgment.

¹³ Paragraph 657 of the judgment.

¹⁴ Paragraph 665 of the judgment.

¹⁵ Paragraph 688 of the judgment.

As already pointed out 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.¹⁶

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.*"¹⁷

The Court also rejected Microsoft's argument that the disclosure of the interoperability information would significantly reduce or eliminate Microsoft's incentives to innovate.¹⁸

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.*"¹⁹

The Court also noted "*that there was ample scope for differentiation and innovation beyond the design of interface specifications. In other words, the same specification can be implemented in numerous different and innovative ways by software designers*"²⁰

Conclusion on the Microsoft case

As evidenced by the quotes from the judgment in the previous section the Microsoft case was very fact-intensive and was based on a great deal of analysis of market conditions, effects on consumers and incentives to innovate. The Commission found that by abusing its dominant position in the PC operating system market Microsoft was able to impose its less per formant technology as *de facto* standard. This in turn led to a lock-in of consumers and a denial of consumer choice.

¹⁶ Paragraph 689 of the judgment.

¹⁷ Paragraph 690 of the judgment.

¹⁸ Paragraph 701 of the judgment.

¹⁹ Paragraph 702 of the judgment.

²⁰ Paragraph 655 of the judgment.

The Commission was very careful to establish that Microsoft's competitors would not be able to duplicate Microsoft's operating system and that the disclosure of the interoperability information would not negatively impact on Microsoft's incentives to innovate in the work group server operating system market. On the other hand the Commission also established that Microsoft's conduct prevented innovation in the work group server market as products which were valued by consumers were prevented from viably competing with Microsoft's products.

Proof that the Commission's analysis with regard to innovation incentives in this case was correct can be found in Microsoft's own actions and statements following the judgment. In February 2008 Microsoft announced that it would make interoperability information, including the information it had to disclose pursuant to the 2004 Decision, available on its web site free of charge.²¹

Simultaneously Microsoft's CEO Steven Ballmer confirmed the benefits of interoperability disclosures "[...] *what we are permitting is more innovation around our products, more interoperability, maybe also more potential for third parties to cannibalize what could have been Microsoft business,*" [...] *"But it is a path we have committed ourselves to because we think it is good for customers and is consistent with our legal obligations."*²²

In view of the specific circumstances of the Microsoft case it is highly misleading to derive from this case, as some commentators have done, that the "floodgates will open after *Microsoft*" and that refusal to supply cases will become the norm rather than the exception in the Commission's enforcement practice.

I am sure that antitrust intervention in refusal to supply cases will remain exceptional as cases will be decided on the basis of rigorous assessment of specific facts and in view of their impact on consumers and innovation.

LESSONS TO BE LEARNED FROM THE MICROSOFT CASE

²¹

See <http://www.microsoft.com/interop/principles/default.aspx>.

²²

Herald Tribune, 3 March 2008.

The importance of interoperability for competition

Interoperability is key to effective competition as it avoids lock-in and consequently allows for consumer choice. We want users to choose which products they want and through those choices, determine which innovative products thrive on the market.

We have no interest in regulating IT markets or in deciding which companies are successful and which are not; we simply wish to ensure that a super-dominant company is not able to do so to its own advantage, and to the detriment of consumers and innovation.

De facto standards imposed on the industry by a dominant company (such as the protocols in the Microsoft case) or agreements between competitors which result in undisclosed technology and inaccessible IPR might have negative effects on competition.

A lack of interoperability with a dominant product can lead to lock-in into a less performant technology due to network effects and high switching costs as the Microsoft case proves.

An effective level playing scenario where competition on the merits develops, enhanced innovation is facilitated and consumers' choice is guaranteed. These are the priorities behind the Commission's enforcement.

Many thanks for your kind invitation.