EU COMPETITION LAW POLICY VERSUS INTELLECTUAL PROPERTY RIGHTS: A STUDY OF THE *MICROSOFT* CASE

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...there is probably a greater global consensus on the desirability of competition and free markets today than at any time in the history of human economic behaviour.[1]

***Summary**: The constant tension between intellectual property rights and competition policy has recently culminated in the Microsoft case. This article examines the tests applied by the European Commission and CFI in finding Microsoft's behaviour tantamount to the abuse of dominant position – are those tests precise and easily applicable, do they result in legal certainty, and do they only result in more competition in the short term, while having far-reaching consequences on the exercise of IPRs? In particular, this article examines the requirements of indispensability and new product in the part of the case concerning the interoperability issue, but also analyses the Commission's assessment of the two separate products element of the test applied in the part of the judgement concerning tying. Finally, the article stresses the need to establish new or redefine the present tests in judging whether the behaviour of a dominant undertaking amounts to the abuse of dominant position.*

1. Introduction

Competition – a game in which some competitors win, and some lose; a game that can have far-reaching consequences, whether economic, social, environmental, or other. Competition allows competitors to use all permitted means to prevail in the constant process of rivalry. Victory means more wealth for the winner(s) and a greater share of the market.

One of the means of competing is innovation, a process as innate to mankind as competition itself.

EU competition law policy goes hand in hand with the creation of the single European market, by facilitating its creation and preventing it from

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[1] Richard Whish, *Competition Law* (6th edn OUP, Oxford 2009) 18.

being hindered by the behaviour of undertakings holding a dominant position. The role of competition is expressly stated in art 101 para 1 (ex art 81 EC) and art 102 para 1 (ex art 82 EC) of the Treaty on the Functioning of the European Union[2] (hereinafter: TFEU).

On the other hand, protection of intellectual property can be found in all national legislations and constitutional traditions of the Member States and is also recognised in the Charter of Fundamental Rights of the European Union[3] of 7 December 2000, as adapted in Strasbourg on 12 December 2007, giving the Charter the same legal value as the Treaties (TFEU and TEU[4]) as of the date of entry into force of the Treaty of Lisbon (1 December 2009).[5] Art 17 of the Charter recognises the right to property, a value common to all Member States, and in the second paragraph it states in particular that intellectual property shall be protected. However, intellectual property rights in the EU arise from the different legal systems of Member States, and this causes problems in terms of achieving the goal of single market integration. Nevertheless, harmonisation in the field of intellectual property rights (copyrights, trademarks, patents, etc), by virtue of EU legislation and the European Court of Justice case law (now the Court of Justice of the European Union), is reducing barriers to the functioning of the single internal market.

In this paper, the author will examine only one intellectual property right - copyright – more precisely, copyright for a computer program, in relation to the existence and exercise of that right by a dominant undertaking on the market. In its early cases, the ECJ accepted that the provisions of the Treaties on competition law, namely arts 101 and 102, could be invoked to prevent the *exercise* of intellectual property rights (hereinafter: IPR) but only when that *exercise* amounted to behaviour prohibited by those articles.[6] The author will show that the criteria for imposing limitations on the exercise of IPR by holders are not precise enough, or possibly not even appropriate, leading to legal uncertainty, and having far-reaching consequences on the exercise of IPR and the system of intellectual property in general. Although there are a certain number of cases dealing with limitations of the exercise of IPR, the author will mainly discuss the *Microsoft* case before the European Commission and the Court of First Instance, which has recently raised much controversy.

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2 Consolidated version of 30 March 2010 OJ C83/47.

3 18 December 2000 OJ C364/8; 30 March 2010 OJ C 83/389.

4 Treaty on European Union, Consolidated version of 30 March 2010 OJ C83/13.

5 Art 6 TEU.

6 See Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299; [1966] CMLR 418; Case 24/67 *Parke, Davis v Centrafarm* [1968] ECR 55.

2. Theoretical background

2.1. Intellectual property

Intellectual property is often referred to as new products of human intellectual endeavour. Intellectual property contributes to human (public) knowledge, so there is strong public interest in intellectual creations being disclosed to the public. In order to encourage the disclosure of intellectual creations, intellectual property rights have been granted to inventors (creators) and the IPR system established.[7] Intellectual property rights do not only represent incentives for the disclosure of creations, but also for further innovation. Thus, IPRs reconcile private (moral and economic) and public (economic and social) interests – the interests of the individual in retaining his investment and being rewarded for his effort, and the interests of society in economic, technological and/or cultural development.

Intellectual property rights are negative rights – they give their holders exclusive rights to use and to exclude everyone else from using their creations. Although this exclusive right (IPR) does not (necessarily) give its holder a monopoly on power, the *exercise* of IPR, by its nature, can create barriers to free trade. This is confirmed by TFEU in art 36 (ex art 30 EC), in which it is stated that quantitative restrictions between Member States shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of (among other things) protection of industrial and commercial property. Although this provision may seem to contradict art 345 TFEU (ex art 295 EC) which lays down that the Treaties shall in no way prejudice the rules in Member States governing the system of property ownership, this is not the case. In fact, ECJ (now CJEU) case law has offered an explanation by differentiating between the *existence* and the *exercise* of IPR.[8] The *existence* of IPR may not be incompatible with the provisions of the TFEU on free movement of goods, although the *exercise* of the IPR may be.

In this sense, the *exercise* of IPRs may come into conflict with the provisions of TFEU setting up rules on competition. As already mentioned, competition law helps to create and maintain a free internal market, while intellectual property may create barriers to entry to the market or lead to a dominant position on the part of a right-holder. Nevertheless, competition and IPR do not appear to be fundamentally in conflict.

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[7] IPR systems have been established at the national level. For the purposes of the internal market, IPR systems of the Member States are being harmonised, and even one IPR has been created at the Community level, namely the Community trademark.

[8] See, for example, Joined Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299; Case C-78/70 *Deutsche Grammophon GmbH v Metro SB Grossmarkte GmbH & Co* [1971] ECR 487.

Rather, they are directed towards the same goals: consumer welfare and research and development. To this end, what is required is a balance that seeks to ensure sufficient rewards for the innovator to disclose his invention, while at the same time preserving the competitive, open internal market, providing the best quality products at the lowest prices.[9]

2.2. Abuse of dominant position

Exercising IPR by a dominant undertaking can sometimes amount to an abuse of dominant position. There is no comprehensive definition of 'abuse of dominant position', although the TFEU, in its rather broad wording, lists in art 102 examples of such abuse, which even so does not constitute an exhaustive list of abusive conduct. Nevertheless, art 102 TFEU does not prohibit dominant undertakings from being able to compete 'on merit' nor is it in itself illegal for an undertaking to be in a dominant position.

3. The Microsoft saga

In 1998, Sun Microsystems Inc, an undertaking based in Paolo Alto, California, USA, lodged a complaint with the European Commission stating that Microsoft, holding a dominant position as a supplier of PC operating systems, had refused to disclose to Sun and to others who provided server operating systems sufficient interface information necessary to create work group operating systems that would operate fully with Microsoft's PC operating systems.[10]

Five years later, the European Commission found that Microsoft had abused its dominant position by refusing to supply interoperability information and allow its use for the purpose of developing and distributing work group server operating system products. The European Commission also found that Microsoft had abused its dominant position by making the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player (tying). Microsoft

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[9] On the relationship between IP and competition law, see for example: Mark A Lemley, 'A New Balance Between IP and Antitrust' (2007) 13 (2) Southwestern Journal of Law and Trade in Americas 237-256; Estelle Derclaye, 'Abuses of Dominant Position and Intellectual Property Rights: A Suggestion to Reconcile the Community Courts Case Law' (2003) 26 World Competition, 685-705; John Temple Lang, 'Compulsory Licensing of Intellectual Property in European Community Antitrust Law' (May 2002) <http://www.ftc.gov/opp/intellect/020522langdoc.pdf> accessed on 10 August 2010.

[10] More specifically, the case concerned Microsoft's 'Windows 2000' generation of PC and work group server operating systems.

was fined €497,196,304, a sum which eventually grew to €1.396 billion due to Microsoft's failure to comply with the Commission's decision. In the first part of this article, the author will discuss the refusal to supply the interoperability information, while in the second part the author will turn to the tying issue in the *Microsoft* case.

3.1. Refusal to supply interoperability information

In the *Microsoft* case[11] concerning interoperability issues, the European Commission found that Microsoft held the dominant position in two markets: PC operating systems and work group operating systems. The Commission found that the reason for Microsoft's refusal to release interoperability information was in order to provide leverage for the dominant position it held on the operating system market and the work group server market. In fact, on the client PC operating systems market, Microsoft's share of the market in 2000 was more than 90%.[12]

In brief, *PC operating systems*[13] are system software that control the basic functions of computers and enable users to use such computers and run application software on them. However, this case focused on 'work group server services', which are the basic infrastructure services used by office workers in their day-to-day work, namely sharing files stored on servers, sharing printers, and the 'administration' of how users and groups of users can access these services and other services of the network.[14] *Work group server operating systems* are operating systems designed and marketed to deliver these services collectively to relatively small numbers of client PCs linked together in small to medium-sized networks.[15] In addition, work group operating systems can be used to run applications.

In the European Union, a computer program is protected by copyright,[16] giving its holder exclusive rights, such as the right to reproduction, adaptation and distribution of a computer program. Therefore, anyone who wants to use a computer program must have the authorisation of the right-holder. However, art 6 of the Software Directive allows for the decompilation of a computer program (i.e. reverse-engineering) without needing the authorisation of the right-holder, if the reproduction

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11 Case COMP/C-3/37.792 *Microsoft* [2005] 4 CMLR 965.

12 *Microsoft* (n 11) recital 431.

13 *Microsoft* (n 11) recital 39: '... the operating system is often described as 'platform software'...or 'platform'...

14 *Microsoft* (n 11) recital 53.

15 *Microsoft* (n 11).

16 Art 1 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) [2009] OJ L111, 5.5.2009, 16-22 (hereinafter: the Software Directive).

of the code and translation of its form are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, if certain conditions are met.[17]

According to the Commission, refusing to supply competitors with information that would enable them to develop competing programs for workgroup servers compatible with the Windows platform (ie interoperability information) amounted to an abuse of dominant position. The Commission found that Microsoft had actually been disclosing the interoperability information to the providers of work group servers until it issued the Windows 2000 version. The Commission held that:

> Non-dominant players in the work group server operating system market have incentives to provide their competitors with interoperability information, since the existence of interoperable and complementary software products enhances the value of their own products in the eyes of users. […] It must also be pointed out that Microsoft itself acted in accordance with this logic when its position in the work group server operating system market was still marginal. Microsoft even disclosed source code in order to promote its programming models and communication standards.[18]

Over the years, the Windows platform became a *de facto* standard, which made it onerous for competitors to compete with Microsoft without the necessary interoperability information.[19] This situation pushed Microsoft's competitors (like Sun, Novell and IBM) to the margins of the market, which reduced their incentives to innovate and at the same time set up barriers to entry to the market. The Commission assessed that server-to-server interoperability was indispensable input for Microsoft's competitors to compete in the work group server operating system market[20] and concluded that Microsoft's behaviour had impaired the effective competitive structure in the market.[21] Furthermore, since Microsoft's behaviour led to the marginalisation of its competitors and the erection of barriers to entry to the operating systems market, the Commission's opinion was that consumers had been deprived of choice.[22]

The Commission followed the ECJ's conclusion in previous case law that there was no obligation on the part of a dominant undertaking to

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17 Software Directive (n 16). See points (a), (b) and (c) of art 6(1).

18 *Microsoft* (n 11) recitals 732 & 734.

19 *Microsoft* (n 11) recital 637: '…interoperability with the Windows environment has played a key role in driving the uptake of Microsoft's work group server operating systems'.

20 *Microsoft* (n 11) recital 692.

21 *Microsoft* (n 11) recital 704.

22 *Microsoft* (n 11) recital 706.

supply or grant a licence, except under exceptional circumstances. In its decision, the Commission considered several judgments on refusal to supply, namely *Commercial Solvents, Télémarketing, Tiercé Ladbroke,*[23] but mainly on *Magill*[24] and *Bronner*,[25] and the test(s)[26] set up by the ECJ in those cases: (i) supply of input is indispensable for continuing business[27] (or in the Magill case – refusal prevents the appearance of a new product for which there was potential consumer demand); (ii) refusal is likely to eliminate all the competition; and (iii) refusal is not objectively justified. However, in *Microsoft*, the Commission based its decision not only on these exceptional circumstances, but it also found other exceptional circumstances that led to the conclusion that Microsoft's behaviour amounted to the abuse of dominant position.[28]

In response, Microsoft claimed that the information requested by Sun did not concern interfaces and therefore its request did not relate to interoperability; that it had already made certain disclosures that would facilitate interoperability between competing work group server operating systems and the Windows environment; that the needed information could have been obtained by way of reverse-engineering; that the Commission lacked evidence that Microsoft's actions had harmed consumers; that refusal to supply was objectively justified due to intellectual property rights over the information requested; that Sun required a degree of interoperability that was too high and went beyond the 'full interoperability' that would be contemplated by the Software Directive and finally, that it had no incentive to foreclose competitors.[29]

The Commission rejected all the arguments and held that all requirements to establish the abuse of dominant position had been met. The Commission's finding of abuse was upheld on appeal to the Court of First Instance[30] (hereinafter: CFI) in *Microsoft vs Commission.*[31]

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[23] Joined Cases 6 & 7-73 *Commercial Solvents and Others v Commission* [1974] ECR 223; Case 311/84 *Télémarketing v CLT and IPB* [1985] ECR 3261; Case T-504/93 *Tiercé Ladbroke v Commission* [1997] ECR II-923.

[24] Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743.

[25] Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint* [1998] ECR I-7791.

[26] Those tests are similar but slightly different, see *Magill* paras 52-56, and *Bronner* para 41.

[27] The supply is indispensable - meaning that there is no realistic actual or potential substitute; see *Bronner* (n 25) para 41.

[28] Generally about other circumstances, see also recital 557; Microsoft's refusal to supply limits technical development to the prejudice of consumers (recital 701); the specifics of a particular industry (recital 470); disclosure of interoperability information is not exceptional in the industry (recital 730); leveraging strategy (recitals 769-778), etc.

[29] *Microsoft* (n 11) recitals 208, 292, 702, 709, 731, 730, 764.

[30] Now the General Court, after the Lisbon Treaty came into force.

[31] Case T-201/04 [2007] ECR II-000.

In its judgment, the CFI also analysed the relevant case law, particularly *Magill*, *Bronner* and *IMS Health*,[32] a case that was decided by the ECJ shortly after the Commission brought the decision in the *Microsoft* case. The CFI repeated that the mere refusal by a dominant undertaking to license a product covered by IPR could not in itself constitute abuse of dominant position. However, only in exceptional circumstances would the exercise of an exclusive right by the owner of the intellectual property right give rise to such an abuse.[33] The Court indicated the following circumstances, in particular,[34] which must be considered to be exceptional: (i) refusal relates to products or services indispensable to the exercise of a particular activity on a neighbouring market; (ii) refusal is of such a kind as to exclude any effective competition on that neighbouring market; (iii) refusal prevents the appearance of a new product for which there is potential consumer demand.[35] Of course, if these circumstances are met, the behaviour (refusal to supply) may constitute an infringement of art 82 EC (now art 102 TFEU), unless it is objectively justified.

At this point, it should be noted that neither the Commission nor the CFI drew any conclusions as to whether Microsoft's interoperability information was indeed protected by IPR or not; the Commission, as well as the CFI, only assumed that it was. Therefore, they applied the test for the refusal to supply to third parties a licence relating to intellectual property rights, which they claimed was the most favourable to Microsoft, and concluded that the strict criteria against which such a refusal may be found to constitute an abuse of a dominant position within the meaning of art 82 EC (now 102 TFEU) were anyway satisfied in the present case.

3.1.1. Analysis of the test applied

Concerning the **indispensability** requirement, the author will not hypothesise as to whether the requested information was indispensable for Sun to create work group server operating systems that would work with the Windows environment; for the purpose of this article, it will be assumed that it was. It should merely be pointed out that the Commission and the CFI regarded the indispensability requirement as closely connected with economic viability.[36] Vesterdorf, the President of the

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32 Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-05039.

33 Case T-201/04 (n 31) para 331.

34 Indicating that these circumstances did not represent an exhaustive list of circumstances.

35 Case T-201/04 (n 31) para 332.

36 Case T-201/04 (n 31) para 352: 'The indispensability criterion entails an examination of the degree of interoperability necessary to remain as a viable competitor on the market and of whether the withheld information is the only economically viable source for achieving that degree of interoperability.'

Grand Chamber in the CFI's *Microsoft* case, indicates in his article[37] that, with this broadened notion of indispensability, the Commission would be able to apply a wide margin of appreciation to the question of whether or not access to a licence of an IPR is 'economically indispensable'.

> This probably makes it easier to find a refusal on the part of a dominant undertaking abusive and may leave such an undertaking – when it is the holder of an IPR – with less legal certainty as and under which circumstances it will have to grant a licence in order to avoid being caught by the net of Article 82 EC. [...] From a criterion based on objective, almost physical indispensability – as we also know it from the concept of 'essential facilities' – it has been broadened to include an economic assessment.[38]

'Economically viable' obviously means that a competitor must not be pushed to the margins of the market; otherwise it would not put competitive pressure on a dominant undertaking. However, the term 'economical viability' is very broad and can lead to the danger of protecting competitors rather than competition as such. If an economic assessment is included in deciding whether or not input is indispensable - whether the refusal to supply is abusive - then at least some parameters as to what would amount to 'economic viability' are indispensable. However, even with parameters, an economic assessment would have to be carried out on a case-by-case basis, and every time an undertaking required from the dominant undertaking the alleged indispensable input (concerning its IPR), the dominant undertaking would have to perform the economic analysis. The author believes this would be too heavy a burden for the IPR holders with a dominant position on the market. Therefore, this requirement, especially broadened after the CFI decision, would hardly function in practice and the situation after this decision would create great legal uncertainty. However, the question of economic viability in relation to the indispensability requirement leads us to the second requirement of the test applied.

As the Court stated, refusal is abusive if it is of such a kind as to exclude any **effective competition**. The question is what is meant by the notion of 'effective competition'? How many undertakings/competitors must be on the market in order to have effective competition? Are two enough? Three? More? Although there is no (uniform) explanation, in theory or practice, of what effective competition is, it can be agreed that a quasi monopoly situation on the market would not usually represent a state of effective competition. For example, Vesterdorf indicates that

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37 Bo Vesterdorf, 'Article 82 EC: Where do we stand after the Microsoft judgement?' (25 June 2008) 7 http://www.icc.qmul.ac.uk/GAR/Vesterdorf.pdf accessed 10 August 2010.

38 Vesterdorf (n 37) 7.

effective competition would mean competition which might represent a real constraint or a real competitive challenge to the dominant undertaking.[39] Further, Dolmans, O'Donoghue and Loewenthal consider effective competition to be:

> a meaningful process of competition whereby firms have an effective opportunity to compete on the merits on the basis of price, quality, and innovation. [...] Competitors that are marginalized in dynamic markets and that are unable – or deprived of further incentives – to engage in viable competitive innovation are effectively the same as no competition in those areas.[40]

On the other hand, Bishop and Walker define effective competition in relation to the outcome that the market produces:

> What matters therefore are the outcomes for consumers that competition in a particular market delivers - not the particular form that the competition process takes. Whether a market is characterized by effective competition or not therefore depends on the outcomes it produces.[41]

Therefore, it is questionable whether this requirement for the exclusion of effective competition is justified to limit intellectual property rights (exclusive rights) acquired by law at all: if IPR can be limited only in exceptional circumstances, how can a compulsory licensing obligation be imposed on a dominant undertaking, limiting its IPR, if the notion of effective competition, as an exceptional circumstance, has not been defined?

However, the requirement that perhaps raises the most controversy and will be dealt with in more detail in this article is the '**new product**' requirement. This requirement is particularly interesting, especially from the point of view of intellectual property law.[42] What is actually meant by a new product? The term 'new product' resembles the term 'novel' or 'novelty' in patent law.[43] Thus, if we use patent law terminology, a

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[39] Vesterdorf (n 37) 8.

[40] Maurits Dolmans, Robert O'Donoghue and Paul-John Loewenthal, 'Article 82 EC and Intellectual Property: The State of the Law Pending the Judgement in Microsoft v Commission' (2007) 3 (1) Competition Policy International 130.

[41] Simon Bishop and Mike Walker, *The Economics of EC Competition Law* (2nd edn Sweet & Maxwell, London 2002) para 2.10.

[42] In cases involving an IPR, the Courts (CFI and/or ECJ) employed the new product test while assessing whether a refusal to supply amounted to an abuse of dominant position. In that respect, see *Magill* and *IMS Health* (n 24 and 32).

[43] Art 52 (1) of the European Patent Convention (a revised version of EPC entered into force on 13 December 2007): 'European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step [emphasis added]. See also Article 27 (1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

new product would be a product that does not form part of the state of the art,[44] ie that did not exist before (or at least was not revealed to the public). Thus, would this mean that a new product is a product that includes at least one new technical feature which distinguishes it from the state of the art? Is there a quality scale for such a technical feature or would it suffice for a new product to have merely a new feature, which would not make it differ significantly from an already existing product, in other words, not substantially change the product itself, or its usage? Would this be enough to force the right-holder to license their intellectual property right? Would this amount to an exceptional circumstance? The Court analysed this further and added that this requirement did not refer only to a new product but also to a technical development.[45] Nevertheless, all the above could also be applied to technical development. So, what would amount to technical development? Would it entail the normal progress of technology, an obvious advancement from the point of view of a person skilled in the art (ie an expert)? Or would it demand an inventive step, ie a technical development not so obvious to a person skilled in the art, as under patent law? If the new product test was assessed according to patent law, it would be questionable whether the Commission (or the NCAs) or the Court were skilled to judge it from the point of view of patent law. One may argue that the new product requirement should not be appraised according to such strict criteria, that less demanding criteria should be applied for compulsory licensing, meaning that the new product requirement does not have to be 'a new patent' requirement. Regardless of whether this presumption is true or false, the new product test as it exists and is applied at the moment is not precise, leaving a very wide margin of discretion that leads to a great deal of legal uncertainty for dominant undertakings who are IPR holders. Therefore, at least some guidelines are needed for the assessment of what constitutes a new product or technical development. Of course, the test would need to be different, depending on the kind of industry involved, or the kind of intellectual property right involved in a particular case. Since this case dealt with software, perhaps the new product (or technical development) requirement should have been assessed from the point of view of copyright law (since computer programs are at last protected by copyright).

Therefore, if we analyse the concept of a new product or a technical development (in this particular case) through copyright law, for a product to be new or considered as containing a technical development, it must only be original in the sense that the product (ie a computer program)

[44] European Patent Convention (n 43) art 54 (1).

[45] Case T-201/04 (n 31) para 647.

is the author's own intellectual creation.[46] But what about the level of originality, if it exists? In Recital 8 of the Software Directive it is explicitly stated that in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied.[47] This would mean that a new product should not be appraised from the point of view of quality, but rather as someone's intellectual creation. In that sense, it seems that the notion of a new product is a fairly broad one and leaves a certain margin for interpretation, especially in a sophisticated industry like the software industry. It would also seem that, in this specific case, a new product would be any product which did not represent literally a copy of Microsoft's operating system. The European Commission stated that 'cloning' Microsoft's operating systems could be considered only if Sun were allowed access to Microsoft's source code, not just the duplication of functionalities.[48] Thus, one may conclude that a new product (a new computer program) does not need to offer anything new to the state of the art in the sense of its functionalities; it suffices that its author develops a computer program (with the same technical features) independently, without using the source code of another computer program developed by other(s). Even though the term 'new product' is additionally defined with the rider 'for which there is potential consumer demand', this is a sweeping phrase. In fact, the question is whether it is the role of the European Commission or the CFI to decide for which product there is potential consumer demand and for which there is none. In *Magill* or *IMS Health* it was quite easy to perceive that there was potential consumer demand for the products in question. However, this is not always so clear. In fact, from what we have noted so far, it may be concluded that the requirement for a new product or a technical development, from the point of view of copyright law, is relatively easy to fulfil. This would mean that the circumstance was not so exceptional, which in the end might result in (unjustifiably) coercing the right-holder to license their intellectual property right easily and often. Thus, an exclusive right to exclude others from using the creation protected by intellectual property right(s) would no longer be exclusive. This broad, vague requirement of a new product or technical development might therefore undermine the concept and even the ratio of intellectual property rights. Lévêque notes that neither the economic, nor the legal definition of newness helps to determine whether the refusal to license is abusive to the detriment of consumers, and adds that the

[46] Software Directive (n 16) art 1 (3).

[47] See more on the notion of originality of a computer program and its different interpretations: Alain Strowel & Estelle Derclaye, *Droit d'auteur et numérique: logiciels, bases de données, multimédia* (Bruylant, Brussels 2001) 185-191.

[48] *Microsoft* (n 11) recitals 713-728.

new product condition is difficult to apply, since newness is a continuous rather than a discrete variable.[49]

3.1.2. Consumer harm

As already mentioned, the existence of intellectual property is important in order to encourage invention and the contribution of such inventions to human knowledge. If authors/inventors have an incentive to innovate and reveal their innovation to the public, society will advance. Thus, innovation enhances consumer welfare. If innovation is stifled, prosperity will not increase, and this will be to the detriment of consumers. In that respect, it is highly important to apply well-founded and credible tests in order to find refusal to license IPR as abusive behaviour in the sense of art 102 TFEU.

In this case, the Commission considered that Microsoft's refusal to supply the relevant information was of limited technical developmental importance, to the prejudice of consumers within the meaning of art 82(b) EC (now art 102(b) TFEU).[50] Firstly, because of the lack of interoperability of competing work group server operating system products with the Windows environment, an increasing number of consumers were locked into a homogeneous Windows solution at the level of work group server operating systems. Secondly, Microsoft's refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features. In conclusion, consumers had been deprived of choice, which the Commission (and the CFI) equated with consumer harm.[51] Microsoft argued that the Commission had not proved any harm had been done to consumers, but this was rejected by the Commission; the inability to choose constituted in itself consumer harm – the inability to benefit from innovative products brought to the market by competitors. The Commission did not show any evidence as to how consumers might have suffered from the alleged loss, ie the lack of choice. Of course, it can be agreed that a lack of choice is not beneficial to consumers. Lévêque points out that:

> The value lost by consumers for the improved product not being on the market is the key variable. [...] From an economic perspective what is important is not whether some consumers would like the

[49] François Lévêque, 'Innovation, Leveraging and Essential Facilities: Interoperability Licensing in the EU Microsoft Case',(March 2005) Cerna <http://www.cerna.ensmp.fr/Documents/Innovation,_leveraging_and_essential_facilities:_Interoperability_licensing_in_the_EU_Microsoft_case.pdf> accessed 10 August 2010. Lévêque does not consider the product to be the relevant level of analysis; rather, he considers the analysis of incentive effects (incentives to innovate) to test whether the market will be limited to the prejudice of consumers to be more relevant.

[50] *Microsoft* (n 11) recital 693 and onwards.

[51] *Microsoft* (n 11) recital 694; Case T-201/04 (n 31) paras 649 – 653.

> improvement being made but what is their willingness to pay for and whether it outweighs the costs of improvement.[52] [53]

Moreover, when the Commission stated that in the case in question Microsoft caused consumer harm, was the Commission referring to average or specialised consumers (IT experts)? It would be interesting to read the Commission's or the Court's findings in this respect, since one must admit that the needs and therefore the alleged loss of these two categories of consumers are not the same.

Furthermore, when we talk of the reasons for restraining someone's (exclusive) rights acquired by law and the conditions under which it is justifiable to restrain those rights, the reasons must be sound and the conditions strict and known in advance. As shown above, the test applied leaves a great deal of room for manoeuvre which *eo ipso* leads to legal uncertainty. An undertaking in a dominant position cannot be sure when it will be obliged to license its intellectual property, which may diminish its incentive to innovate. In addition, an undertaking may decide not to invest in innovation if it will be forced to license the product/result of its investments, because of the high possibility of other undertakings (competitors) getting a free ride. The absence of further innovation also represents prejudice towards consumers. However, in the present case, the Commission came to the conclusion that a detailed examination of the scope of the disclosure at stake led to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate was outweighed by its positive impact on the level of innovation in the whole industry (including Microsoft).[54] Spulber disagrees by stating that competition policy that promotes competition for its own sake need not result in greater innovation, and emphasises that:

> Policies that place asymmetric burdens on firms that have larger market shares will reduce the incentive to innovate for both large and small firms. Deterrence of innovation may cause firms to seek other avenues of competition, from high-priced branding strategies to bargain-basement pricing strategies. At risk are the potential benefits of new products, new technologies, and new transaction methods. Consumers are harmed when competition policy diminishes the incentive to innovate. […] By reducing IP protections, *Microsoft v. Commission* reduced the incentive to innovate both for successful firms and for their competitors.[55]

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[52] Lévêque (n 49) 8.

[53] As already mentioned above, a new product, if regarded from the copyright law point of view, does not need to involve improvement(s), it just needs to be original in the sense of art 1 (3) of the Software Directive.

[54] *Microsoft* (n 11) recital 783.

[55] Daniel F Spulber, 'Competition Policy and the Incentive to Innovate: The Dynamic Effects of Microsoft v. Commission' (2008) 25 (2) Yale Journal on Regulation 247-301, 300, 301.

Finally, it should be noted that in its decision, the Commission highlighted the essential objective of IPR, by stating in recital 711 that:

> The central function of intellectual property rights is to protect the moral rights in a right-holder's work and ensure a reward for the creative effort. But it is also an essential objective of intellectual property law that creativity should be stimulated for the general public good. A refusal by an undertaking to grant a licence may, under exceptional circumstances, be contrary to the general public good by constituting an abuse of a dominant position with harmful effects on innovation and on consumers.

The Commission ordered Microsoft to make interoperability information available on reasonable and non-discriminatory terms, to allow the use of the interoperability information and to keep the information updated.[56] Thus, in the end, Microsoft had to license its interoperability information in order to stimulate creativity and foster the general public good. However, whether this decision will generate general public good or only protect competitors in the short term, the future will tell.

3.2. Tying

Besides the refusal to supply interoperability information, the Commission found that Microsoft had also abused its dominant position by tying its Windows Media Player to its PC operating system, ie by selling its PC operating system with a streaming media player[57] already built in (pre-installed).

Tying is the practice whereby the supplier of one product, the tying product, requires a buyer to buy a second product too, the tied product.[58] Art 102(d) TFEU lists tying as an example of abuse, 'making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.' Tying is a common business strategy, because it is a way of reducing costs, improving quality, and reducing price inefficiency, but it is also a strategy to foreclose markets, exclude competitors from the market or push them to the margins, or conceal prices. There has been little case law on tying,

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[56] *Microsoft* (n 11) art 5(a)(b).

[57] *Microsoft* (n 11) recital 401,'Media players are client-side software applications, the core functionality of which is to decode, decompress and play (and further allow to process) digital audio and video files downloaded or streamed over the Internet (and other networks). Media players are also capable of playing back audio and video files stored on physical carriers such as CDs and DVDs. As with other application software, a media player consists of a Graphical User Interface and the underlying technology, that is to say, the software code, which enables multimedia playback functionality.'

[58] Whish (n 1) 18.

and in that sense, the *Microsoft* case represents a huge step forward in dealing with this type of abuse. In the two leading cases from previous case law, *Hilti*[59] and *Tetra Pak II*,[60] the Commission, the CFI (now General Court) and the ECJ (now the Court of Justice of the European Union) decided that tying was illegal *per se* for undertakings holding a dominant position on the tying product market. In *Hilti*, the Commission held that *Hilti* had abused its dominant position on the market for equipment for inserting fastenings used in the construction industries by requiring purchasers of its nail gun to acquire cartridges (protected by IPR) and nails. The Commission concluded that *Hilti* tried to leverage its dominance from one product market to another two product markets (consumables). In *Tetra Pak II*, the Commission held that Tetra Pak had abused its dominant position on the market for (non-)aseptic machines by tying the supply of those machines to the supply of Tetra Pak cartons which the machines filled.

In the *Microsoft* case, Microsoft was selling its PC operating system with its Media Player pre-installed,[61] denying customers the opportunity of buying the Microsoft PC operating system without Windows Media Player (WMP). The Commission applied the test, set out in previous case law, under which the tying arrangement is contrary to art 82 EC (now 102 TFEU): (i) the tying and tied goods are two separate products; (ii) the undertaking concerned is dominant on the tying product market; (iii) the undertaking concerned does not give customers the choice of obtaining the tying product without the tied product; and (iv) tying forecloses competition.[62]

As for the first requirement, the Commission decided that WMP and Windows represented two distinct products, since there was an independent consumer demand for the tied product (WMP). As evidence, the Commission accepted the fact that the market provided media players separately, that there were vendors developing and supplying media players on a stand-alone basis, separate from PC operating systems, and that Microsoft itself sold versions of its WMP separately from its OS, for example to Apple Mac operating systems and to the Sun Solaris client operating system, and finally, that Microsoft had carried out promotional activity specially dedicated to WMP. The Commission rejected Microsoft's argument that WMP was an integral part of Windows, ie that there was only one integrated product.

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[59] Case T-30/89 *Hilti AG v EC Commission* [1991] ECR II-1439; and C-53/92 P *Hilti AG v EC Commission* [1994] ECR I-667.

[60] Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755; Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951.

[61] *Microsoft* (n 11) recital 310: 'Windows Media Player is installed on the computer as a non-removable component of Windows.'

[62] *Microsoft* (n 11) recital 794.

Further, the Commission found that Microsoft had a dominant position on the PC operating system market and that it tried to leverage its dominant position onto the streaming media player market by distributing Windows (the tying product) only with WMP (the tied product), without providing the means for removing WMP.[63] Therefore, according to the Commission, the second requirement was also satisfied.

Third, the Commission ascertained that original equipment manufacturers (OEM) were forced, by virtue of Microsoft's licensing model, to license Windows only with WMP pre-installed. If an OEM wished to install another media player, this could only be done by installing an additional media player alongside WMP rather than instead of WMP. Microsoft argued that WMP was distributed with Windows at no extra charge and that users were not obliged to use it; on the contrary, they were free to use any other media player, most of which were available free of charge. The Commission rejected this argument by stating that it was immaterial that consumers were not forced to purchase or use WMP - as long as consumers automatically obtained WMP (even if free of charge), the alternative suppliers were at a competitive disadvantage.[64]

Lastly, concerning the foreclosure of competition on the market for media players, the Commission went one step further. According to previous case law, it was enough to establish the existence of the first three elements, while the foreclosure element was (almost) presumed. The same was true of objective justification – it could be raised but it would not have much influence on the outcome of the case:

> Tying under EC law therefore seems to be closer to a strong *per se* rule of illegality: a dominant firm commits an abuse if it requires from consumers to take another product as a condition of taking its dominant product and is commercially successful at tying the products.[65]

This represents the form-based approach to tying. In the *Microsoft* case, the Commission moved from the form-based approach to an effects-based approach by examining in detail the effects that tying had on competition, since it admitted that there were some pro-competitive elements in the impugned tying.[66]

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[63] *Microsoft* (n 11) recital 799.

[64] *Microsoft* (n 11) recitals 826-834.

[65] Christian Ahlborn and David Evans, 'The Microsoft Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe' (2009) 75 (3) Antitrust Law Journal 887-932 <http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=39753559&site=ehost-live> accessed 10 August 2010.

[66] *Microsoft* (n 11) recital 841.

Despite certain pro-competitive elements in the tying in question (the media player provided free of charge; users can and do to a certain extent obtain third party media players through the Internet, sometimes also free of charge), the Commission ascertained that the maintenance of an effective competition structure in the media player market was put at risk. Because of the ubiquity of the Windows platform, and therefore the ubiquity of WMP, the content and application providers choose to make their products compatible with the most popular (distributed) media player, thus stifling competition among producers of streaming media players (the network effects[67] of ubiquity). The Commission was of the opinion that tying would entail foreclosure of competition, due to the fact that complementary content and applications were liable to be developed primarily for WMP.[68] Furthermore, the Commission decided that no other distribution mechanism or combination of distribution mechanisms had attained this level of universal distribution (not even by downloading from the Internet). The Commission concluded:

> There is therefore a reasonable likelihood that tying WMP with Windows will lead to a lessening of competition so that the maintenance of an effective competition structure will not be ensured in the foreseeable future. For these reasons, tying WMP with Windows violates the prohibition to abuse a dominant position enshrined in Article 82 of the Treaty and in particular point (d) of the second paragraph thereof.[69]

Finally, the Commission ordered Microsoft to offer, beside the bundled version of Windows, a fully-functioning version of the Windows Client PC Operating System which did not incorporate WMP.[70] However, Microsoft would not be obliged to offer the unbundled version of Windows (Windows N) at a lower price.

The Commission's finding of abuse in this respect was upheld on appeal to the CFI. The Court emphasised that the four above-mentioned conditions for establishing whether tying was abusive coincided effectively with the conditions laid down in art 82(d) EC (now art 102(d) TFEU). In addition, the Court found the Commission had not erred in examining in more detail the possible foreclosure effects of Microsoft's practice.[71]

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[67] Network effects arise where the value of a product increases with the number of customers who use the same product, but also with an increase in the number and variety of complementary products. This is a very common occurrence on the telecommunications and software markets.

[68] *Microsoft* (n 11) recital 863.

[69] *Microsoft* (n 11) recital 984.

[70] *Microsoft* (n 11) art 6 of the Decision.

[71] Case T-201/04 (n 31) paras 1036-1090. Although the Court emphasised in para 1035 that '...the fact that the Commission examined the actual effects which the bundling had

3.2.1. *Analysis of the test applied*

3.2.1.1. *The separate product test*

Microsoft argued that Windows and WMP constituted one integrated product and that there was no consumer demand for the PC operating system without WMP. The Court admitted that the IT and communications industry was an industry in constant and rapid evolution, so that what initially appeared to be separate products might subsequently be regarded as forming a single product, both from the technological aspect and from the aspect of competition rules.[72] However, the Court added that it was by reference to the factual and technical situation that existed at the time when, according to the Commission, the impugned conduct had become harmful, ie the period after May 1999, that the Court must assess whether the Commission was correct in finding that streaming media players and client PC operating systems constituted two separate products.[73]

At this point, it must be noted that the Commission, according to the Court, correctly examined this criterion in relation to (separate) consumer demand. Interestingly enough, the Commission indicated that the fact that a not insignificant number of consumers chose to obtain media players separately from their operating system showed that *informed consumers* recognised them as separate products.[74] The Court, although it confirmed the Commission's finding about two separate products, did not use the term 'informed consumers', nor did it differentiate users according to their IT skills. Furthermore, the Commission also took into account (recital 866) '*sophisticated* users' when explaining the differences in the burden of downloading a media player of different users. Microsoft also used in its argumentation the distinction between users in arguing that '*home users who know little about computers*' favour buying systems that can be plugged in and run with a minimum of effort.[75] The Commission did not discuss this distinction any further; it used the term 'consumers' throughout the whole decision, and only in recital 806 did it use the term 'informed consumers'. The Commission did not define the

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already had on the market and the way in which that market was likely to evolve, rather than merely considering – as it normally does in cases of abusive tying – that the tying has by its nature a foreclosure effect, does not mean that it adopted a new legal theory.' Can it be understood that the Court's opinion was that, despite the Commission's detailed analysis of the actual effects of tying on the market, it was and still is sufficient to find a tying conduct – which has by its nature (automatically) a foreclosure effect? Ahlborn and Evans (see n 65) are of the opinion that it is so, while Larouche disagrees (see n 78).

[72] Case T-201/04 (n 31) para 913.

[73] Case T-201/04 (n 31) para 914.

[74] *Microsoft* (n 11) *recital* 806.

[75] *Microsoft* (n 11) recital 846.

term 'informed user', but it could be concluded that *an informed consumer* would know more about computers than *a consumer*.[76] From this, it may be speculated (in the absence of empirical evidence) that from the point of view of users less skilled in IT, the operating system (Windows) and WMP could have been viewed as a single product even at that time, May 1999 and onwards (as the Court referred to that period). Contrary to 'uninformed users' or 'unsophisticated users' or 'home users who know little about computers', informed (or sophisticated) users might see them, as the Commission stated, as two separate products. Did the Commission take the higher level criterion to establish whether Windows and WMP represented one or two products? If so, why did it not continue to base its findings and conclusion at that level? If the Commission had continued to base its findings according to *informed consumers,* it would have taken into account that *informed consumers* could easily obtain (eg download) other streaming media players and that they could easily see the difference in quality between various players such as WMP and RealPlayer, QuickTime, etc, so that there would be no risk of market foreclosure. What did Commission mean by the term 'informed consumer'? How informed would a person need to be to be included in that category? Why did the Commission assess such a crucial element in this test only according to the abilities of *informed* consumers? Why did the Commission not assess this element in terms of how an average consumer perceived it, as in trademark law?[77] It might be that by even at that time (May 1999), by taking into account average consumers, the Commission could have reached a different conclusion about the first element of the test – the product(s) element.[78]

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[76] Since the Commission did not define the notion of 'sophisticated consumer' either, it is questionable whether this category of consumer represents another (third) category of consumers or the same category as the 'informed consumer'.

[77] In trademark law, the institute of an average consumer is used as a criterion for assessing the distinctiveness of the proposed/used trade mark (sign). According to case law, the notion of average consumers means, in English, '... consumers who are reasonably well informed and reasonably observant and circumspect'; however, it is important to observe that in French this definition does not use the words 'well informed' but: '<u>normalement informé</u> [emphasis added] et raisonnablement attentif et avisé'; and in German, 'eines <u>durchschnittlich informierten</u> [emphasis added], aufmerksamen und verständigen Durchschnittsverbrauchers'.. See cases: C-210/96 *Gut Springenheide and Tusky / Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657 para 31; C-53/01 *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd* [2002] ECR I-05475 para 63; Joined cases C-53/01 *Linde and others v Deutsches Patent- und Markenamt* [2003] ECR I-03161 para 41.

[78] Pierre Larouche also distinguishes two classes of consumers: more tech-savvy consumers and mainstream consumers, the former wanting the best available media player for their requirements, and being able and willing to undertake whatever operations might be necessary (including downloading a program, installing it, and configuring Windows) to obtain and use that media player, and the latter who, having neither the skills nor the will to play with the software on their computer, 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. Larouche estimates (emphasising that this estimation does not involve

The question is whether the Commission should in similar cases take as a starting point for the assessment of two separate products the average consumer rather than a skilled one. There seem to be some logical arguments in favour of such a conclusion and one of them is legal certainty. Even though this test (with average consumers taken into account) might not have yielded a different result in this particular case (although this does not seem to be the case), it may well be that in some other cases this requirement might turn out to be important, leading to a different outcome.

In this case, Microsoft argued that it was necessary to assess whether there was a meaningful consumer demand for the unbundled version of the tying product (for client operating systems without multimedia functionality).[79] As already mentioned, the Commission assessed whether there was an independent demand for an allegedly 'tied' product[80] and concluded that such a demand indeed existed. The CFI upheld the Commission's finding in this respect and stated that:,

> as the Commission correctly observes in its pleadings, Microsoft's argument, based on the concept that there is no demand for a Windows client PC operating system without a streaming media player, amounts to contending that complementary products cannot constitute separate products for the purposes of Article 82 EC, which is contrary to the Community case-law on bundling. To take *Hilti*, for example, it may be assumed that there was no demand for a nail gun magazine without nails, since a magazine without nails is useless.[81]

Alhorn and Evans lay down that:

> this claim reveals a misunderstanding of Microsoft's version of the separate product test. The test is not whether there is demand for the tying product (operating systems, nail guns) if the complementary product (media players, nails) does not exist. The test is whether, if given the choice, most customers would want to buy two products as a bundle from the same manufacturer, or whether a significant

making an empirical claim) 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.' Pierre Larouche 'The European Microsoft Case at the Crossroads of Competition Policy and Innovation: Comment on Ahlborn and Evans' (2009) 75 (3) Antitrust Law Journal 933-963 <http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=39753560&site=ehost-live> accessed 10 August 2010.

[79] *Microsoft* (n 11) recital 1024.

[80] *Microsoft* (n 11) recital 803.

[81] *Hilti AG v EC Commission* (n 59) para 921.

share of customers would want to make separate purchase decisions for the two products.[82]

3.2.1.2. *Foreclosure of competition*

Notwithstanding the conclusion of the existence of two separate products – the question still remains as to whether tying would have foreclosed the competition. Now, six years after the Commission's decision that Microsoft should also offer Windows without WMP (called Windows N), the reality is that the demand for Windows N is insignificant[83] and that competitive streaming media players still exist - like Real Player, Adobe Flash Player, QuickTime, VLC Media Player, Winamp, etc. Therefore, the Commission's conclusion that there was a reasonable likelihood that tying WMP with Windows would lead to a lessening of competition, so that inability to maintain an effective competition structure in the foreseeable future did not happen. Here again, the same question may be raised as in the previous argument on the interoperability issue: how many undertakings/competitors must be on the market in order to have effective competition or, in other words, what is effective competition? One can assume that eventually the number of media players will lessen and that only the best media players will survive – this is the possible outcome of competition on the relevant market, but having three or more media players on the market (as today) does not represent evidence that competition is not effective, nor that it has shrunk, with the risk of the market being foreclosed eventually.

Microsoft, the copyright holder of Windows, decided to upgrade its product with a media player. This was its right within the law – to exploit its creation. The Commission and the CFI restrained its right because of the dominant position it held on the PC operating system market. However, the reasons for limiting the exercise of intellectual property rights (even of a dominant undertaking) must be justified by some higher, common value(s), and the conditions (criteria) for limiting IPR must be explicit and known in advance. If not, intellectual property would not enjoy protection accorded by the law. Nor would the right-holder know how to behave – there would be no legal certainty. If a dominant undertaking cannot further develop (technologically integrate) its own product because it holds a significant market share (or, in this case, a quasi monopoly), this would mean that a new, special category of intellectual property rights exists for dominant undertakings. One must admit that tying may (and often does) serve as a tool for market expansion, preserving the monopolist's market power, or for competition with rivals.

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[82] Ahlborn and Evans (n 65).

[83] Apparently, about 2,000 copies have been sold.

Nevertheless, tying can also be used as a means of quality improvement, cost reduction or reducing price inefficiency. The greatest concern from the competition law point of view is when the tying is done by a dominant undertaking, and European case law in that respect views it almost as illegal *per se*.[84] Schmidt states that 'the commercial practice of tying, when analysed from an economic point of view, can have pro-competitive efficiencies, and thus should ideally be viewed as prohibited only when it has significant anti-competitive effect'.[85] This means that an effects-based approach, like the one used by the Commission in this case, is essential.

Bearing all the above in mind, the facts are the following: the Commission found the impugned tying as abusive conduct leading to foreclosure of the market, yet the market, six years later, has not been foreclosed. Thus, the media player market has not been foreclosed, although the exercise of Microsoft's intellectual property rights concerning Windows and WMP has been limited.

4. Conclusion

The Microsoft saga shows that is not easy to strike the right balance between intellectual property rights and competition law. It took six years for the Commission to render a decision, because it was engaged in detailed analyses of Microsoft's behaviour and its impact on the competition.

The creation of a work that can be or is protected by intellectual property right(s) requires an enormous amount of work, knowledge and other financial and/or technical resources. There are two different sets of interests; those of the creator to be adequately rewarded for his creative work and investments, and those of the public, to be able to benefit from the creation/invention.

On the other hand, the free market and undistorted competition are also common values recognised by the Treaties, legislation and case law. As with intellectual property, competition law also aims at constant innovation, consumer welfare and development. It ensures that competition on the merits is present and continues to be present on the market.

When intellectual property rights, as a fundamental right, becomes an obstacle to other common values, such as free competition and other market freedoms, its holder may be limited in exercising that fundamen-

[84] See *Hilti* and *Tetra Pak II* (n 59 & 60).

[85] Hedvig Schmidt, *Competition Law, Innovation and Antitrust: An Analysis of Tying and Technological Integration* (Edward Elgar, Cheltenham, UK, 2009) 25. Schmidt proposes a new three-step test, ie a new regulatory model to analyse tying, see pages 249-251, and in more detail pages 179-249.

tal right. However, this limitation must be restricted and applied only in completely justified situations. Nevertheless, the conditions under which the limitation of the exercise of intellectual property rights is justified must be precise, excluding any room for discretion, and must be known in advance.

In the *Microsoft* case, the Commission was concerned that Microsoft used its intellectual property to leverage its dominant position in the PC operating system market onto the adjacent work group server operating systems market, and that it also tried to expand its dominance on the media player market. In order to establish whether Microsoft's behaviour amounted to abusive conduct, the Commission applied certain tests set out by previous case law. In this article, the author has tried to show that certain elements of those tests contain vague terms which may result in the tests being too easily fulfilled, so that conduct might be (wrongly) considered as abusive. In the case of the refusal to supply interoperability information, the requirement of a new product of technical development seems to be particularly problematic; it may be that this 'exceptional circumstance' is too easy to accomplish, which means it is no longer an exception. In the tying part of the case, the assessment of the separate product element seems not to have been applied correctly. The author argues that the Commission should, in her view, always have in mind *average* consumer demand.

If the proposed tests are too easy to accomplish, the exercise of intellectual property is put at risk, and the ratio of the existence of IPR is endangered. In addition, the legal uncertainty thus provoked can reduce incentives to invest, and this automatically lessens the general public good, and may even encourage the free-ride phenomenon.

Therefore, there is an indispensable and urgent need to establish new, or redefine present tests or other rules in competition law, to encourage innovation and foster consumer welfare, while at the same time achieving a balance between exercising intellectual property rights as fundamental rights and ensuring a free competitive market. Alternatively, the concept of the duration of intellectual property rights must change in a way that retains enough rewards for their holders and maintains incentives to innovate, while not creating barriers to the freedom of competition.