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CASE NOTE:

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by

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As someone who has spent a considerable portion of the last five years working on issues involving Microsoft's conduct and the competition laws, I read with interest the commentary that followed the issuance of the Court of First Instance's decision on September 17. Much of the focus of the commentary was on the significance of the decision with respect to the state of "convergence" of U.S. and European Community ("Community") competition law relating to unilateral conduct of "dominant" firms. While convergence, or the lack thereof, is obviously a major issue, the decision is also important because of what it reflects about regulatory and judicial views in Europe and the United States on issues at the intersection of intellectual property and competition law. These issues have broader implications than just the *Microsoft* case.

But first a small point; the standard of review applied by the CFI may have been a significant driver of the outcome. In paragraph 87 of the decision, the CFI states that its review of the "complex economic appraisals" is "necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers." Similarly, in paragraph 88 of the decision, the CFI notes that "complex technical appraisals … are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own

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assessment of matters of fact for the Commission's."[1] The CFI thus rejected Microsoft's invitation to perform a "searching inquiry into the soundness of the Commission's decision" (paragraph 86), opting instead to apply a standard of review akin to an "abuse of discretion" standard in the United States. Regardless of what one thinks of the merits of Microsoft's appeal to the CFI, application of this standard perhaps doomed it from the start.

Nonetheless, the somewhat cursory attention that the CFI gave to Microsoft's arguments regarding the compulsory licensing of its intellectual property does raise significant issues. The decision reflects a willingness to impose compulsory licensing on firms that have been found to have abused their dominance, provided that "exceptional circumstances" are present and the refusal was not objectively justified.[2] Further, the CFI confirmed that under Community law the existence of an intellectual property right could not, in and of itself, constitute an "objective justification" for a dominant firm's refusal to supply.[3]

The CFI's treatment of Microsoft's intellectual property arguments raises the question of whether the competition laws are, in effect, being used to reform the IP laws (patent laws in particular) and whether they are an appropriate vehicle for doing so. Judges in antitrust cases and policymakers in the United States in recent years have been extremely reluctant to use the competition laws to weaken IP rights, unless there was

[1] In paragraph 89, the CFI describes the review that it is entitled to make as establishing whether "the evidence put forward is factually accurate, reliable and consistent, … contains all the relevant data that must be taken into consideration in appraising a complex situation …. [and] is capable of substantiating the conclusions drawn from it."
[2] There is some puzzling language at paragraphs 316-17 and 336 of the decision, which appears to open the door for the imposition of compulsory licensing even where any one or more of the "exceptional circumstances" outlined in the opinion is not present. It remains to be seen how the holding reflected in these paragraphs will be applied in other cases.
[3] Decision, paragraph 690.

clear evidence that the IP was procured by fraud. This tendency reflects, at least in part, a discomfort with the use of the competition laws as a vehicle to "un-do" what the patent laws have done.[4] The CFI's decision suggests that Europe is at a different place on the continuum on these issues.

The CFI's treatment of the "objective justification" prong of the test it sets forth for refusals to supply further crystallizes this divergence because it does not appear to leave much room for a dominant firm to establish that a refusal to supply is objectively justified once it has been determined that the information is "indispensable."[5] Here, the CFI appears to adopt the Commission's formulation of the relevant question as "whether the information that Microsoft refuses to disclose is indispensable to any competitor seeking to carry on business on the relevant market 'as a viable competitive constraint and not as a *de minimis* player who has effectively left the market to a "niche" position.'"[6] It is hard to imagine a circumstance in which a dominant firm could justify its refusal to license its intellectual property to a competitor under this standard, except in those unlikely situations where a competitor has initiated a complaint with the Commission over a refusal to license IP that is of minimal competitive value. But such a standard is potentially at odds with one of the fundamental features of an intellectual property right—the ability to exclude.

So what does the decision mean? One could argue, as people often do, that Microsoft is a case unto itself and that the decision thus does not mean much for anyone

[4] This is not to say that there is no room in the United States for questioning whether a particular exercise of an intellectual property right runs afoul of the Sherman Act. It is clear that there are limits.
[5] The other two "exceptional circumstances" outline by the CFI appear to flow directly from the indispensability factor. *See* Decision, paragraph 565 (noting that the Commission in its contested decision analyzed the indispensability and elimination of competition factors together).
[6] Decision, paragraph 355.

else. As someone who counsels firms subject to the Commission's jurisdiction, however, I think drawing this conclusion would be a mistake. Going forward, companies with high market shares will need to consider the principles advocated by the Commission and adopted by the CFI. In particular, the decision highlights differences between U.S. and European law relating to the treatment of intellectual property in the context of refusals to deal, and those differences are important. And, much as the Court of Appeals decision in *U.S. v. Microsoft* did for government prosecutors in the United States, the decision also makes clear that the Commission is capable of taking on a substantial adversary and persevering to a victory. That lesson alone deserves our attention.