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The judgment of the European Court of First Instance in *Microsoft* raises several issues. In the short contribution hereinafter, we will look in particular at the main findings regarding the two abuses (refusals to license and product integration).

I. The Obligation to License Intellectual Property

Under the applicable case law before *Microsoft* (i.e., the *IMS Health* and *Magill* judgments),[1] the refusal by a dominant undertaking to allow access to a product protected by intellectual property rights (IPR) was regarded as abusive only in exceptional circumstances, where three conditions were met:

(i) where the IPR is "indispensable" to exercise an activity in a neighboring market;

(ii) where the refusal is likely to "eliminate all competition" on such market; and

(iii) where the undertaking intends to use its IPR to hinder the production of "new products" that it does not offer and for which there is a potential consumer demand.

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[1] *See* Case T-201/04, Microsoft v. Commission, [2007] 5 C.M.L.R. 846 [hereinafter *Decision*]; Case C-418/01, IMS Health v. NDC Health, [2004] E.C.R. I-5039 [hereinafter *IMS Judgment*]; and Cases T-69/89, 70/89 & 76/89, RTE, ITP & BBC v. Commission, [1995] E.C.R. II-485 [hereinafter *Magill*].

This last condition, the "new product" condition, was justified by the fact that:

> [I]n the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a license prevents the development of the secondary market to the detriment of consumers.[2]

It is essentially with regard to this third condition, the "new product" condition, that the *Microsoft* judgment introduces significant changes to the existing case law.[3]

The Commission adopted its decision in *Microsoft* one month before the *IMS Health* judgment and, subsequently, manifestly had difficulties in justifying its approach in *Microsoft* in light of the Court's reading of the "new product" condition in *IMS*. As stated in the *Microsoft* judgment, the Commission found that "an 'automatic' application of the criteria laid down in *IMS Health*, would be 'problematic' in this case." The Commission therefore maintained before the Court that:

> [I]n order to determine whether such a refusal [to licence] is abusive, it must take into consideration all the particular circumstances surrounding that refusal, which need not necessarily be the same as those identified in *Magill* and *IMS Health*.[4]

Among the "particular circumstances" of the case, the Commission referred more specifically to the fact that the *Microsoft* case differed from the previous cases in so far as:

(i) it raised not only a question of access to an IPR but a question of interoperability;

(ii) Microsoft was "superdominant";

[2] *See IMS Judgment*, *supra* note 1, at para. 48.

[3] Note that there are some indications also in the judgment that the other two conditions may be satisfied with proof of less than "indispensability" and "elimination of competition".

[4] *See Decision*, *supra* note 1, at para. 316.

(iii) Microsoft had in the past given access to the information and has ceased doing so after a while;[5] and

(iv) Microsoft's IPRs were “tenuous”.

In its judgment however, the Court does not refer to any of these circumstances. Interoperability and “superdominance” are only mentioned with reference to the “indispensability” condition but not in relation to the “new product” condition.[6] The Court moreover indicates that it does not matter whether Microsoft relied on IPRs, and whether these were real and innovative.

Rather than distinguishing *Microsoft* from previous cases, the Court chooses to widen the previous case law. Indeed, the Court states that:

> The circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health* […] cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.[7]

It is therefore only necessary according to the Court to assess in each case whether the refusal to license makes it more difficult for competitors to innovate, as this in itself is said to have an impact on competition justifying the applicability of Article 82 EC.

Moreover, the Court does not consider that it is necessary at this stage to assess the negative impact of the obligation to license on the dominant company's own

[5] See the approach in Cases 6/73 & 7/73, ICI & Commercial Solvents v. Commission, [1974] E.C.R. 223.

[6] *See Decision*, *supra* note 1, at para. 283.

[7] *See id.* at para. 647.

incentives to innovate. Contrary to the Commission, which had found that both the impact on innovation by third parties and by the dominant undertaking had to be put in the balance,[8] the Court finds that the impact on the dominant company's incentives to innovate must be assessed merely as a "defence" (i.e., with the burden of proof on the dominant undertaking).[9]

In view of this extremely wide test (i.e. assessing merely the possible negative impact on competition), the Court logically finds that "competitors are placed at a disadvantage by comparison with Microsoft" (emphasis added). One may indeed wonder if this will not always be the case whenever any dominant company refuses to license any IPR, unless such an IPR is entirely useless.

However, with regard to the negative impact of the obligation to license IPRs to third parties on innovation of the dominant company itself, the Court takes a very narrow view and finds that Microsoft has not shown that there is such a negative impact. In particular, it finds that the mere fact that IPRs are at stake does not constitute a valid justification,[10] nor does the fact that the technology is "secret". According to the Court, such secrecy is merely the consequence of a unilateral choice by Microsoft which therefore cannot rely on it. The Court finds also that neither the "great value" of the know-how, nor the innovative and original aspect of the IPR, constitute an objective

[8] *See id.* at para. 783.

[9] *See id.* at paras. 688 et seq.

[10] *See id.* at para. 690.

justification in itself.[11] Clearly, these very general findings of the Court raise doubts with regard to the possibility for any dominant undertaking to use this defense in the future.

More generally, one may wonder whether the obligation for a dominant undertaking to provide its technologies and IPRs to competitors whenever they constitute an advantage will not simply encourage competitors to free-ride on dominant companies' innovation instead of doing their own research. From that perspective, it is unclear that innovation and ultimately consumers will benefit from this case law. Indeed, it will be easy for plaintiffs henceforth to argue that any IPR or technology of a dominant company should be licensed to it as it is at a "competitive disadvantage" without it.

II. Product Integration

In relation to product integration, the Court endorses the classical five-part test[12] requiring:

(i) the existence of two separate products;

(ii) dominance on the tying product market;

(iii) a refusal to supply the tying product without the tied product;

(iv) "foreclosure" of competitors on the tied product market;[13] and

(v) the absence of any objective justification for the tie.

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[11] *See id.* at paras. 694 & 695.

[12] *See id.* at para. 859.

[13] The judgment underlines that tying must not be regarded as a per se infringement and requires a close examination of the actual foreclosure effects on the market. Note however that the actual wording of para. 868 is not absolutely clear in this regard.

It should further be noted that the Court makes no distinction between contractual or economic tying and tying in the form of product integration[14] (even though the latter presents more obvious efficiencies than the former).

With regard to (i) the separate products condition, dominant companies will find little mileage in the judgment to justify product integration. Indeed, the Court considers that the distinctness of products has to be assessed by reference to customer demand (i.e., that there is "tying" if two products are sold together although there is independent demand for each of them) which seems to be an unduly wide test. Also, the fact that, pursuant to the remedy imposed by the Commission, the unbundled version of Windows placed on the market had met with no success is considered irrelevant. In other words, Microsoft has to sell its products separately even where there is no demand for the individual parts on their own. Finally, the fact that the burdening operating systems with a media player is practiced by Microsoft competitors and is a commercial usage is found irrelevant.

With regard to the condition of "leveraging", the Court also applies a relatively low threshold. Thus, the fact that in compliance with the settlement in the United States, the manufacturers and users of PCs with Microsoft's operating system installed can easily remove Windows Media Player (WMP) and replace it with another media player is found irrelevant because customers continue to acquire both products together.

Finally, with regard to (iv) the "foreclosure" condition, the Court satisfies itself with the finding that Microsoft had gained an "advantage" through the product

[14] *See Decision*, *supra* note 1, at para. 935.

integration.[15] However, it seems to us that as soon as the tying product is dominant, there is bound to be some "advantage" in product integration. In other words, tying would become very close to a per se abuse.[16]

More specifically, although the Court acknowledges the existence of downloading[17] and "that the number of media players and the extent of the use of multiple players are continually increasing,"[18] it does not consider that it eliminates WMP's "advantage". In the same manner, the figures given in the Commission decision showing a competitive market where all competitors increased their sales[19] have not been taken into consideration. For the Court, there is an "advantage" even in the absence of evidence regarding an actual or potential foreclosure. Interestingly, the Court does not refer to the extensive developments on "indirect network effects" as found in the Commission's decision.

III. Conclusions: Quo vadis?

In conclusion, the Court appears to take a rather broad approach in applying the "traditional" criteria of abuse laid down in *Hoffmann-La-Roche*[20] and confirmed by the Commission's Discussion Paper on the application of Article 82[21] (i.e., (i) "foreclosure

[15] *See id.*, *inter alia* at paras. 1039, 1042, 1047, 1054 & 1088.

[16] In this regard, it is interesting to note that the English expression "foreclosure" is translated throughout the judgment into French, the language in which the judgment was deliberated, by "restriction de concurrence".

[17] *See Decision*, *supra* note 1, at para. 1050.

[18] *See id.* at para. 1055.

[19] *See id.* at para. 907.

[20] Case 85/76, Hoffmann-La-Roche v. Commission, [1979] E.C.R. 461, at para. 91.

[21] EUROPEAN COMMISSION, DG COMPETITION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (2005), *available at* http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

effects" and (ii) not justified by "competition on the merits"). With regard to alleged "foreclosure", a mere "disadvantage" caused to competitors is found sufficient. With regard to "competition on the merits", it is no longer regarded by the Court as an element of the abuse, but rather as a "defence". If competitors suffer a "disadvantage", then "it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence."[22]

In other words, any efficiency of a dominant player—if it has an impact on competition (as it is bound to have)—creates in itself a "presumption of culpability" and it is for the dominant company then to rebut it.

As to the individual abuses, the Court broadens significantly the *Magill* and *IMS Health* case law in replacing the "new product" test by a "negative impact on competitors' incentives to innovate" test. Similarly, the Court brings de facto tying one step closer to being a per se abuse in recognizing that a mere "advantage" for the company resulting from its dominance in the market is sufficient to regard the practice as abusive.

[22] *See Decision*, *supra* note 1, at paras. 688, 697 & 1144.