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The Thirteenth Chime of the Clock

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Few judgments of the European Court of First Instance (CFI) have attracted as much attention or controversy as the decision in *Microsoft Corporation v. European Commission*. One aspect of the case dealt with Microsoft's practice of "bundling" its own Windows Media Player application with its ubiquitous Windows operating system. The Court upheld a Commission decision that found Microsoft liable under Article 82 and, as a remedy, required Microsoft to produce and market an unbundled version of its operating system called "Windows N". But Windows N has failed to sell in the marketplace, and the market position of competing media players has nonetheless grown.

The ineffective remedy calls into question the liability analysis that came before it. This article examines possible alternative remedies for "technological tying" and concludes that no satisfactory remedy was open to the Commission or the Court. A more realistic liability analysis would have been appropriate, and the doctrine of objective justification could have provided a better analytical vehicle for resolving the case. By recognizing that, in the context of the software industry, technological bundling is the paradigm of progress, the Commission and the CFI might have avoided an ineffective and potentially dangerous foray into regulation of software design.

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I. Introduction

In *Microsoft Corporation v. European Commission* (EC *Microsoft*),¹ the Court of First Instance (CFI) upheld the Commission’s remedy for Microsoft’s unlawful bundling of Windows Media Player (WMP) into its operating system—a requirement that Microsoft develop and sell a new product called “Windows N”. This “unbundled” edition is identical to regular Windows products except that, until the user installs additional software, the operating system is unable to display video, play most audio files, handle streaming media from the Internet, or even play an audio CD. Using Windows N, an OEM or perhaps a consumer could download and install a media program to enable functionality of this kind, either from Microsoft or a competitor. This was the remedy devised by the Commission for a tying violation of Article 82 EC (the European prohibition of abuse of dominance) which consisted in Microsoft bundling its WMP application with each copy of its Windows operating system at no additional charge.²

Windows N has been available for purchase since July 2005.³ Although it insisted that such a product be developed, the Commission made no stipulation concerning its price.⁴ Unsurprisingly, Microsoft chose to price the two versions identically. As a result, Edition N (so-named after the Commission rejected all of Microsoft’s own naming proposals⁵) has failed to sell. Having been on the market for more than two years, it accounts for less than five thousandths of one percent of Microsoft’s sales of Windows, with few stores or computer manufacturers choosing to carry the product in the first place, let alone sell it to consumers.⁶ Windows N appears destined to serve a competitive purpose only in the narrowest of product markets—that for antitrust collectibles.

1 Case T-201/04, *Microsoft v. Commission* (not yet reported) (judgment of Sep. 17, 2007) [hereinafter Judgment].

2 Windows Media Player is Microsoft’s own application for handling digital video and audio content.

3 Microsoft began marketing Windows Edition N while EC *Microsoft* was pending before the CFI.

4 The Commission, in its original decision, prohibited Microsoft from offering a discount to customers taking the bundled product, but did not prohibit charging the same price for bundled and unbundled versions. Commission Decision 2007/53/EC of 24 May 2004, Case COMP/C-3/37.792 - Microsoft, 2007 O.J. (L 32) 23, at recital 1013. In its submissions before the Court, the Commission expressly reserved its position on equal pricing (Judgment, *supra* note 1, at 908), but has raised no objections to an even-handed pricing policy since Edition N went on sale in 2005.

5 See Press Release, Microsoft Corporation, Microsoft Statement on European Commission Process (Mar. 28, 2005), available at <http://www.microsoft.com/presspass/press/2005/mar05/03-28EUNameStatementPR.mspx>.

6 See Microsoft Corporation, FACT SHEET: Windows XP N Sales [hereinafter Windows N Fact Sheet], at <http://www.microsoft.com/presspass/legal/european/04-24-06windowsxpnsalesfs.mspx> (last visited Apr. 1, 2008).

Examination of the Windows N remedy provides a valuable perspective for evaluating the entire technological tying aspect of the EC *Microsoft* case. Indeed, the choice of remedy was inextricably tied to the European Commission's definition of the violation it found, so problems with the remedy immediately call into question the liability analysis that preceded it. What benefits can the remedy be said to have achieved, particularly balanced against the cost of such a sharp transatlantic divergence? If the Windows N remedy lacked merit, were better ones realistically available without sacrificing other important considerations? If not, what does this say about the likely public benefits of an aggressive enforcement program against allegedly anticompetitive product design, particularly in fast-moving technology markets?

Examination of the EC *Microsoft* bundling remedy and its potential alternatives leads to the conclusion that technological bundling cases (as opposed to cases against the more overt forms of exclusion forbidden by the U.S. consent decree⁷) stand little chance of accomplishing any public good or of avoiding unintended harm to competition and innovation. This is primarily because of the ambiguous nature of the conduct being condemned, which is at once harmful to rivals and the embodiment of personal computing progress. Global antitrust enforcement, under attack from all corners of the political arena⁸, has important work to do for the benefit of consumers. Its capital would be better spent elsewhere than on a remedy that invites itself to be mocked.

Perhaps we can take comfort from the idea—pressed by supporters of the decision⁹—that the EC *Microsoft* case is just about Microsoft, and will not be applied beyond its facts. But the opinion converted a sui generis legal and political battle into a CFI precedent that purports to state general principles of law. The

7 Microsoft entered into a consent decree with the U.S. Department of Justice (DOJ) that received final judicial approval on November 12, 2002 from district court Judge Colleen Kollar-Kotelly. The decree provides in part that Microsoft shall not require OEM customers (who install Microsoft software onto computers for sale on to end users) to refrain from distributing, installing or using competing software, nor shall Microsoft "entrench" default settings in favor of its own software.

8 See, e.g., EDWIN S. ROCKEFELLER, *THE ANTITRUST RELIGION* 99 (2007); DOMINICK T. ARMENTANO, *ANTITRUST: THE CASE FOR REPEAL* (2007); *Antitrust Concerns Draw Fire*, WALL ST. J., Feb. 8, 2008; *The Future of Futures*, WALL ST. J., Apr. 11, 2007; and *Unity in the European Market, Except When It Comes to Takeovers*, N.Y. TIMES, Mar. 14, 2006.

9 See, e.g., the comments of prominent European lawyer Thomas Vinje, who represented the European Committee on Interoperable Systems in the EC *Microsoft* case, *quoted in Comments about the EU Court Ruling on Microsoft's Appeal of Antitrust Case*, ASSOCIATED PRESS, Sep. 18, 2007 ("No other companies have anything to fear from this decision. [...] I don't think you'll see the Commission going on a rampage here, certainly not against Microsoft or any others.") and *in Armageddon For IT Firms?*, GUARDIAN UNLIMITED, Feb. 29, 2008, available at <http://www.guardian.co.uk/business/2007/sep/19/davidgowoneurope.europe> ("I've been practising in this area for 20 years and I would be very happy to have discussions with anyone who thinks this affects a broad range of companies and isn't limited to Microsoft but I frankly can't see how they can say this. . . If I'm wrong you can have my holiday home and we can discuss dividing it up.").

Commission appears poised to expand the application of product design bundling claims to Microsoft itself.¹⁰ If such claims are applied generally to all market participants that meet the test of dominance, the CFI's bundling opinion may insert regulators into a wide range of technological decisions. This potential is magnified by the possible increase in private European enforcement mechanisms that allow self-interested parties to invoke the opinion in national courts.¹¹

Unless there are judicially administrable remedies for technological tying or anticompetitive product design that serve a realistic chance of benefiting consumers and innovation, this path cannot be in the public interest. No such remedies seem apparent, and EC competition law should not be read to require a liability finding that leads to no beneficial remedy. If this is the state of current law, the Commission should work to fix the law, especially now that it seeks to supplement the enforcement authority of its own public-minded officials by encouraging the pursuit of damage claims by commercial parties.

UNLESS THERE ARE JUDICIALLY ADMINISTRABLE REMEDIES FOR TECHNOLOGICAL TYING OR ANTICOMPETITIVE PRODUCT DESIGN THAT SERVE A REALISTIC CHANCE OF BENEFITING CONSUMERS AND INNOVATION, THIS PATH CANNOT BE IN THE PUBLIC INTEREST.

II. The Windows N Remedy Examined

Did Windows N benefit consumers? Sales figures indicate that Windows N was not what consumers wanted. It is hard to see how it has advanced their interests. Just as before the decision, consumers consistently choose to install the fully functional version of Microsoft Windows. WMP is present on practically every (non-Apple) PC sold, and consumers retain the option to purchase or download—often for free—alternative media players from other providers. The CFI in fact recognized that the use of multiple competing media players was becoming increasingly common among consumers throughout the period in question.¹²

10 Charles Forelle, *EU Regulators Begin New Microsoft Probes*, WALL ST. J., Jan. 15, 2008.

11 In *Courage v. Crehan*, the European Court of Justice held that individuals who have suffered loss as a result of an infringement of Article 81 or 82 EC Treaty have a private right of action against the infringing party (Case C-453/99, *Courage Ltd. v. Bernhard Crehan*, 2001 E.C.R. I-6297). However, the procedural context of this right (i.e., the detailed rules for bringing the claim) are a matter for the Member States. By no means have the Member States enacted comprehensive or consistent systems for private enforcement of competition law. The Commission has recently adopted a White Paper, accompanied by a more detailed Staff Working Paper, on the facilitation of private damages claims. See European Commission, *Actions for Damages > Documents*, at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html> (last visited Apr. 3, 2008).

12 See Judgment, *supra* note 1, at 1083. Indeed, since the time of the CFI's judgment, Apple's iTunes program has become the fastest-growing media playback application, and Adobe's Flash Player is the leading Internet-streaming software. That is, the whole prediction about market evolution on which

The only difference is that now consumers (including computer manufacturers acting on their behalf) actively choose to take the bundled version. No rational consumer would decide to purchase a less functional product at the same price.¹³ So consumers have ignored Windows N.

What about competitors? If the remedy was intended to restore free competition to the market for media player software, it is hard to see how competitors are better off because Microsoft has been forced to make a minor additional product that no one buys. Consumers still buy Windows with WMP bundled in, and they retain the option of changing or adding to that player if they prefer another. To the extent that competitors were abused by Microsoft before the judgment, they are still abused, and to the extent that they can compete now, they could compete before. Nothing has changed from the point of view of Microsoft's competitors in the market for media players.

What of the intermediaries between Microsoft and consumers? OEMs buy operating systems in the course of assembling a complete product that they then sell to end users. They now have the option of buying Edition N without WMP installed, and may instead install software from one or more of Microsoft's competitors. But OEMs have also made their lack of interest in the Edition N product clear. Just as before the decision, they can, and do, add additional media functionality to the bundled Windows package; but, they have not taken such functionality away.¹⁴

footnote 12 cont'd

the Commission's decision was based has turned out to be wrong. For one stark illustration of iTunes' astonishing market share growth, see WebsiteOptimization.com, iTunes Player Hits a High Note, Passes RealPlayer - US Broadband Penetration Increases to 86.79% Among Active Internet Users - January 2008 Bandwidth Report, at <http://www.websiteoptimization.com/bw/0801/> (last visited Apr. 4, 2008). The ubiquity of the Flash Player is charted in a Millward Brown study, commissioned by Adobe, that reported in December 2007 a 98.8 percent penetration rate. See Adobe Systems Incorporated, Macromedia - Flash and Shockwave Players: NPD Methodology, at http://www.adobe.com/products/player_census/npd/ (last visited Apr. 4, 2008).

13 The loss of functionality is in fact two-fold. Windows Edition N not only lacks a media player application that can be run as a standalone application to enjoy DVDs, music, and video, but it also lacks the platform functionality that integrates the WMP code into other applications and Internet resources. The operation of these other programs, designed to utilize the media resources of a "fully-functional" Windows environment, is accordingly impaired until the user downloads the media player and restores the missing code. Microsoft raised this argument before the Court (Judgment, *supra* note 1, at 1109-22). The Court rejected it, stating that the functionality offered to software developers and Internet site creators "cannot suffice to offset" the anticompetitive harm caused (Judgment, *supra* note 1, at 1151-52, 1158).

14 See, e.g., Windows N Fact Sheet, *supra* note 6 ("virtually no demand from PC manufacturers. . . Original equipment manufacturers (OEMs) stated clearly that they were not interested in installing and selling computers with a less than fully functional version of Windows XP"). See also Ingrid Marson, *Still 'no demand' for media-player-free Windows*, CNET News, Nov. 18, 2005, at

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The Windows N remedy does not look much better in theory than it does in practice. In order to prove a violation of Article 82, the Commission is required to show:

- (a) market dominance;
- (b) an exclusionary or an exploitative abuse by the dominant firm; and
- (c) that the behavior is not objectively justified as a proportionate measure toward a legitimate purpose.¹⁵

The Commission applied its own four-factor test—a test now approved by the Court—for product tying, as if product tying were a special and unique type of antitrust violation with its own independent rationale. The Commission’s test required that, for a violation to be found, there be:

- (a) two separate products;
- (b) an undertaking dominant in the market for one product;
- (c) no choice for the consumer to obtain that product without also obtaining something else; and
- (d) foreclosure of competition.

Finally, an objective-justification test would be applied.

Under EC law, tying can be a violation of Article 82 due to either an exploitative or an exclusionary abuse.¹⁶ The Commission’s test creates a hybrid inquiry that is partly about exploitation and partly about exclusion. This mix and match analysis is reflected in the remedy. An exploitative abuse could result from requiring consumers to purchase a tied product (or to assume “supplementary obligations” as described in Article 82(d)¹⁷). An exclusionary abuse could be

footnote 14 cont'd

http://www.news.com/Still-no-demand-for-media-player-free-Windows/2100-1016_3-5960750.html (last visited Apr. 1, 2008) (noting the “continuing reluctance of PC vendors to sell Windows XP N”); and Paul Meller, *Microsoft Opens Appeal In Europe*, N.Y. TIMES, Apr. 25, 2006 (“To date, not one order for XP edition N has been placed by PC manufacturers, Mr. [Jean-François] Bellis [of Van Bael and Bellis and Microsoft’s lead lawyer] said, and 1,787 have been ordered by computer stores across Europe in the nine months since it went on sale.”).

15 See Case C-85/76, *Hoffman-LaRoche & Co. AG v. Commission*, 1979 E.C.R. 461, at 91; Case C-27/76, *United Brands Company & United Brands Continental BV v. Commission*, 1978 E.C.R. 207, at 249-50 (exploitative abuses); and Case T-30/89, *Hilti AG v. European Commission*, 1991 E.C.R. II-1439 (“[The defendant corporation’s] behaviour cannot therefore be described as being motivated solely by a concern to ensure the safety and reliability of its [products]”). See generally I. VAN BAEL & J.-F. BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* 903-05 & 907-08 (2005).

16 Van Bael & Bellis (2005), *id.* at 904.

17 See, e.g., *Napier Brown/British Sugar*, 1988 O.J. (L 284) 41, at recital 71.

shown if competitors are foreclosed because abuse of dominance ensures that the purchase or use of competitors' products does not occur.¹⁸ The third prong of the Commission's test requires that the consumer be given "no choice" in obtaining the tying product without the tied one. This is a test for exploitation, used to protect a consumer from being stuck with a "supplementary obligation" that he does not want.

The competitive harm alleged by the Commission, however, was exclusionary, not exploitative. The theory was that Microsoft had ensured that each consumer was already equipped with WMP, reducing consumers' need to look at the range of players and decide which best suited their needs.¹⁹ This was said to have resulted in the exclusion of other media player manufacturers.²⁰ Having applied a hybrid test that sits between the two types of Article 82 abuse in finding a violation, the Commission concluded that the introduction of "customer choice" would address the violation found.

A mismatched liability inquiry thus produced an ineffective remedy. The Commission's remedy—giving customers a choice about whether or not to accept WMP by marketing a version without it—was meaningless as far as Microsoft's alleged exclusion was concerned. The issue was that customers could (and did) get WMP so much more easily than competing products, not that they had to use the program. The CFI ended up endorsing a remedy aimed at a non-existent harm.²¹

So what can be said for Windows N? To be sure, it did not impose price regulation or otherwise intrude on Microsoft's business model, which the CFI rightly celebrated.²² The condemnation of Microsoft's bundling may be pleasing to those who simply dislike Microsoft and enjoy seeing it condemned and put to expense. The result may likewise please observers of a populist or anti-American bent. Conversely and perversely, the seeming futility of the remedy will bring glee to the hearts of those who do not believe in the value of antitrust enforcement generally, or Article 82 enforcement in particular. But none of these observations is a worthy reaction to the CFI decision. It is wrong to say that the Court's or Commission's decisions were based on nationality or politics (indeed,

18 See, e.g., Case C-53/92P, Hilti AG v. European Commission, 1994 E.C.R. I-667.

19 See Judgment, *supra* note 1, at 1041-42.

20 *Id.* at 1090.

21 The CFI completes the circle of confusion by stating that "the Commission's sole intention is to make it possible for consumers to obtain Windows without Windows Media Player" (*id.* at 1225). Its earlier findings about harm to competing media player companies have, by this stage of the long judgment, apparently fallen by the wayside altogether.

22 *Id.* at 1223.

many of the complainants were U.S. companies). Rather, the decision reflects a good-faith conviction that Article 82 technology tying enforcement can work as a practical matter to protect competition and promote innovation in markets adjacent to that in which an undertaking has lawfully achieved a dominant position. That is the proposition that merits discussion.

III. Possible Alternative Remedies

Can the enterprise of technological tying enforcement be defended on the ground that, although this particular remedy was flawed, better ones might be available? That does not appear to be the case. Assuming that the bundling of WMP with Windows constituted an unlawful product tie (on the ground that Microsoft's dominance on the market for operating systems enabled it to bundle its own media software with each copy of Windows, and so obtain an unfair advantage in the media-player market), three alternative remedies might have been pursued.

THE DECISION REFLECTS A GOOD-FAITH CONVICTION THAT ARTICLE 82 TECHNOLOGY TYING ENFORCEMENT CAN WORK AS A PRACTICAL MATTER TO PROTECT COMPETITION AND PROMOTE INNOVATION IN MARKETS ADJACENT TO THAT IN WHICH AN UNDERTAKING HAS LAWFULLY ACHIEVED A DOMINANT POSITION. THAT IS THE PROPOSITION THAT MERITS DISCUSSION.

A. HARD UNBUNDLING

One remedy could have required that Microsoft stop selling WMP as a bundle with Windows altogether, on the ground that offering the bundle at all constituted unfair leverage of its unquestioned dominance in the operating system market and so automatically excluded other media player competitors. A strong variant of this remedy might include a breakup of Microsoft into operating system and application companies.²³

Imposing a remedy like this, however, would have defied the logic of many of the most significant developments in the computer industry since its inception. Advances in computing have always been, in great measure, about making one thing—one device, one operating system, one application—perform several different functions. The path from abacus to handheld is a story of increasingly integrated functionality: convenience and efficiency remain the goals of innovation.

The computer and technology trade press makes a conspicuous virtue of technological integration. As one analyst puts it: “[T]he endgame is that users should

²³ As many know, district court Judge Thomas Penfield Jackson imposed a breakup remedy in the DOJ case. EC Competition Commissioner Neelie Kroes also hinted at such a remedy at the 2007 Spring ABA Antitrust Section meetings.

end up with more integrated functionality at a lower price.”²⁴ Whether companies are building multiple functions into email management software,²⁵ integrating baseband and radio frequency capacity into a single chip in cellular telephone manufacture,²⁶ or designing competitive wireless network technology,²⁷ integration is a key ambition and a driving objective.

Accessibility is also a priority. Graphical user interfaces become cleaner, simpler, and more helpful with time, and the effort and understanding that machines demand of the average user diminishes with each step. To task consumers of an operating system with finding and downloading separate applications in order to access central functions is counter to both innovation trends and common sense.

To promote such a remedy as applicable outside the unique circumstances of *Microsoft* would chill activity that has been seen previously as laudable technological innovation. As soon as any dominant company added an additional level of functionality to its product, that function would have to be “spun-off” (i.e., unbundled and set up as a separate program) to avoid allegations of leveraging its dominant position to the unlawful disadvantage of competitors in the market for the new function. Customers would be required to purchase, and companies required to package and market, an array of separate, narrowly functional individual programs in order to assemble anything as useful as a standard PC.²⁸ No one really wants a world in which this happens except owners of companies producing unbundled accessories.²⁹

24 Matt Hines, *IT Security and Management on Collision Course*, INFOWORLD DAILY NEWS, Oct. 18, 2007 (quoting Neil McDonald, technology analyst).

25 See, generally, Robert F. Smallwood, *The Fast-Moving Email Management Market*, KM WORLD, May 2007, at 12.

26 See, generally, Gregory Quirk, *IC Keeps Phone Costs Ultralow*, ELECTRONIC ENGINEERING TIMES, Dec. 4, 2006, at S72.

27 Joni Morse, *Wi-Fi Deployments Stretch Across Cities, Countries, Corporations*, RCR WIRELESS NEWS, Feb. 27, 2006, at 12 (“In order to be successful, branch and retail WLAN solution must deliver . . . wide-ranging integrated functionality for security and voice. . .”).

28 This is particularly true given the Court’s loose, demand-based definition of what constitutes a “separate product”. See Judgment, *supra* note 1, at 917-44.

29 As the U.S. Court of Appeals for the DC Circuit noted in *United States v. Microsoft Corporation*, 253 F.3d 34, 88 (D.C. Cir. 2001) [hereinafter *Microsoft III*]:

[I]f there were no efficiencies from a tie (including economizing on consumer transaction costs such as the time and effort involved in choice), we would expect distinct consumer demand for each individual component of every good. In a competitive market with zero transaction costs, the computers on which this opinion was written would only be sold piecemeal—keyboard, monitor, mouse, central processing unit, disk drive, and memory all sold in separate transactions and likely by different manufacturers.

B. MUST-CARRY

The Court might have required that Microsoft bundle its competitors' products into the Windows operating system along with its own. Just as WMP received a free ride onto new computers, so could the applications made by everyone else. What if, as part of the Windows installation process, customers could select which media player they want to install from a menu of options?

The problem with this remedy lies in its administration. Every media player would clamor to be included in the menu on the Windows installation CD. There would be no obvious way for Microsoft or a court to decide whose claim should be granted and whose should be denied. At a minimum, this remedy would generate ongoing controversy and burden. Microsoft could justly complain that its own product would suffer damage to its reputation from the inevitable consumer complaints generated by this more cumbersome installation procedure, or by the potentially inferior products customers might choose to install.

The must-carry approach was in fact one of the options discussed for settlement of the case, but rejected by the Commission.³⁰ As a settlement on agreed terms between Microsoft and the Commission, this might have been a workable compromise. But as a precedent for all dominant technology firms, it would be alarming. As a judicially imposed remedy, it would be unworkable. Judicially imposed forced dealing on this scale seems unlikely to succeed.³¹

C. PRICE REGULATION

A third option would be to do with conviction what the actual remedy did half-heartedly:

- (i) require the marketing of the unbundled product;
- (ii) permit the marketing of the bundle; and
- (iii) ensure that there is a meaningful price gap between the two.

Consumers could choose a more expensive product with WMP included, or a cheaper one without. The difficulty with such an arrangement is that it runs counter to the whole notion of competition law as principled enforcement rather than price regulation. Setting prices is not a task that either the Commission or CFI is well-suited to perform. And, it seems bizarrely artificial given that WMP is also available to download for free, as are competing media playback or Internet-streaming products like the Apple iTunes store and Adobe Flash Player.

30 *Europe Takes On Windows*, N.Y. TIMES, Mar. 20, 2004.

31 Forced dealing may in fact be a practical result of the decisions, that is developers of successful secondary products may find it easier to demand that dominant companies buy them rather than compete with them and risk antitrust complaints.

Moreover, even if this solution could work for a single accessory, a serious attempt to apply it over time would lead to an impractical array of mixed or mismatched options that consumers are unlikely to desire.³²

This review of the options suggests that there is no serious bundling remedy that would be workable on the facts of *EC Microsoft* without doing violence to other important values or creating an administrative nightmare. Certainly the remedy imposed by the Commission fixed nothing and did not help consumers, though it no doubt did a little harm to Microsoft. Yet the CFI concluded that Microsoft acted unlawfully. Was this finding of a violation with no apparently workable remedy correct as a legal or policy result? As a matter of policy, at least, it would be desirable to “begin with the end in mind”.³³ That is, without good confidence that an available remedy will work in practice, government intervention should not be undertaken in the first place.

IV. A More Modest Proposal

How should the facts in *EC Microsoft* be reviewed for abuse of dominance? It is clear that WMP was competing with other media players. It is also clear that WMP had an advantage with respect to its competitors in that market because it came ready-installed as part of every copy of Windows. As a result, consumers were more likely to use WMP in place of a competing product simply because they already had the Microsoft product, rather than because it was better or more efficient. This is true even though it would have been relatively easy to download or purchase any number of competing media players.

The problem with holding this to be abusive is that Microsoft, in bundling its media player, was doing exactly what software companies are supposed to do: develop their products to do more things. It cannot make sense to assign antitrust authorities the task of weighing the merits of competing technologies to determine whether product development is “abusive” if the best remedy that can result looks like Windows N or its alternatives.

Why go down this path? Article 82 recognizes the possibility that a prima facie abuse of dominance may be objectively justified by reference to a pro-competitive purpose. There can be few pro-competitive purposes clearer or more compelling than the legitimate development and innovation of software products in line with industrial practice. This objective-justification test provides an appro-

32 From this point, Microsoft might fairly argue that more serious imposition of the vision underlying Windows N would lead to a hodgepodge of different versions of Windows, destroying Microsoft’s business model of providing a uniform Windows product as a platform for other applications. That is, perhaps only Windows N’s market failure allowed the court fairly to say Windows N was minimally intrusive on Microsoft’s business model.

33 See STEPHEN R. COVEY, *SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE* 95 (1989).

appropriate ground on which the CFI might have recognized the special nature of the software industry and declined to interfere with Microsoft's product development.³⁴ Instead, the CFI found itself approving a remedy without a clear objective in sight, leading it to demand that Microsoft market a product it did not want to sell to consumers who did not want to buy it. Predictably, this was all to no discernible effect on competition.

Microsoft made this argument before the Court, although it is not prominently treated in the judgment and the Court does not address it distinctly. The judgment records Microsoft's submissions that "[c]onsumers expect that Windows will be continually improved" and that:

"[T]he main justification for its conduct is that the integration of new functionality into operating systems in response to technological advances and changes in consumer demand is a core element of competition in the operating system business and has served the industry well for more than 20 years."³⁵

That is exactly the point. Integrated functionality is the central feature of the industry in which Microsoft operates. If this feature of the market is not capable of constituting an objective justification for its integration of a media player, it is hard to see what might be.³⁶

A better approach in the face of the remedial problem in this area would be for the CFI to recognize the objective justification unless it is clear that *no* inno-

34 In doing so, they would have aligned the EC treatment of this issue with that of the U.S. courts in the American counterpart of this case. In *Microsoft III*, the DC Circuit replaced a rule of per se illegality in software bundling cases with a more flexible and fact-sensitive "rule of reason" analysis that weighed competitive harm against gained efficiencies. See *United States v. Microsoft Corp.*, 87 F.Supp.2d 30 (D.D.C. 2000, *rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001)). The clarity with which the DC Circuit indicated the difficulty of showing that adding product features would constitute an antitrust "tying" violation led the DOJ to drop its tying claim.

35 Judgment, *supra* note 1, at paras. 1106 & 1108.

36 There was a complicating factor in the analysis—evidence that senior executives at Microsoft had their eye on more than just improving Windows. In particular, the Court refers to an email between Microsoft executives indicating a plan to attack the position of the media company, RealNetworks, on the media player market by harnessing the power of the entire Windows brand (*id.* at paras. 911 & 937). That looks like an *intentional* exclusionary abuse of dominance. Still, in every case of healthy software development, there will be an awareness and hope that competitors will suffer from the success of the integrated product. Intent evidence of this type would appear to preclude the requisite showing of legitimate purpose required to make out an objective justification defense in EC law. See, e.g., *supra* note 15.

vation or improvement was accomplished by the product design under attack.³⁷ Only in the rare case where this is clear will a competition agency have much

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confidence that its intervention will produce positive effects. Otherwise, the decision will inevitably be made on the basis of competing expert technical testimony, consumer satisfaction surveys, and the like. An ex post analysis based on such amorphous criteria cannot provide useful guidance for businesses engaged in real-world competition. As an academic matter, this less-ambitious approach to technology product design claims would leave the possibility that the value of the innovation might be outweighed by the harm of exclusion. The

problem is that answering this question in the real world is not a task for which competition law officials and judges are well-suited.³⁸ Assigning them this task cannot make sense if practical remedies are lacking.

V. Conclusion

Is the EC *Microsoft* bundling decision really so bad? Certainly the Commission and the opinion should be celebrated for avoiding hands-on price regulation. Perhaps the case will be limited to Microsoft Corporation alone as its proponents have suggested. For all the controversy, we are unlikely to see—for several years at least—another undertaking in Microsoft’s unique position, let alone one subject to the same kind of transatlantic litigation. In retrospect, the story of Edition N will speak for itself. In that way, Edition N may still contribute to the debate and sound development of competition law, if not to the welfare of software users. It can best do so by telling the Commission and the CFI that the potentially mischievous doctrine of technological tying by product design should be carefully circumscribed. ▼

37 Employing a test such as this would be consistent with the test for exclusionary conduct advocated by the DOJ in a number of cases including *Microsoft III*—asking whether the practice at issue makes economic sense but for the exclusion of competition. While the application of such a test is not without difficulty, it would put the analysis of exclusionary conduct on a more predictable, realistic, and objective footing than the open-ended evaluation of technical merits and consumer preference risked by the analysis in EC *Microsoft*.

38 See, e.g., Judgment, *supra* note 1, at paras. 1050, 1078, 1080, 1084, *et seq.*, where the Court finds itself choosing among, and drawing legal distinctions from, competing consumer surveys and market statistics.