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Article 82 and the New Economy: Need for Modernisation?

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Some consider the application of Article 82 EC too formalistic and incoherent with the lack of any sound economic basis when applied to traditional markets. This view seems to be even more prevalent when it applies to new economy markets as they present a peculiar set of characteristics, such as economies of scale, network effects, consumer lock-in, and high rates of innovation, which distinguish them. It is possible to identify two divergent approaches: those who concentrate particularly on the dangers of network effects as a reason to justify an aggressive antitrust policy; and those who consider antitrust enforcement as largely unnecessary, because the dynamic characteristic of these industries makes any dominant position temporary as those markets are highly contestable. These two different views seem to constitute an extension of two conflicting perspectives of the ‘neo-structuralist’ and the ‘neo-Schumpeterian’. The former favours aggressive antitrust enforcement when an anti-competitive behaviour is carried out, the latter considers dominance in the new economy markets as temporary and short-lived. Both the European Commission and the EU courts, on one side, and the majority of national competition authorities, on the other side, have focused their attention on the neo-structuralist view. The scope this article is to discuss these two approaches in the light of the EU Commission’s *Microsoft* Decision, trying to conclude that, as long as the application of Article 82 to new economy markets afford market access for all participants without eliminating incentives to innovate or frustrating the dynamism of those markets, there is no reason to modernise it through ‘revolution’, as consumer choice is another important competition policy aim to be achieved.

1. INTRODUCTION

This article attempts to examine the current state of application of Article 82 EC Treaty, as a tool for challenging major corporations’ behaviour in the exercise of their market power. According to some commentators, it seems to remain the great unmodernised legal instrument in the European Competition Law;¹ as a consequence, its application, if considered too formalistic and incoherent with the lack of any sound economic basis, when applied to traditional markets, seems to be even more unsuitable

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¹ See, *inter alia*, B Sher, ‘The Last of the Steam-Powered Trains: Modernising Article 82’ (2004) 25 ECLR 243, and M Furse, ‘On a Darkling Plain: the Confused Alarms of Article 82 EC’ (2004) 25 ECLR 317.

when it applies to new economy markets, as they present a peculiar set of characteristics, such as economies of scale, network effects, consumer lock-in, and high rates of innovation, which distinguish them from traditional markets.

Commentators, however, do not agree on the competition policy implications of these differences, making it possible to identify two divergent approaches: those who concentrate particularly on the dangers of network effects, for example, as a reason to justify an aggressive antitrust policy;² and those who consider antitrust enforcement as largely unnecessary, because the dynamic characteristic of these industries makes any dominant position temporary as those markets are highly contestable.³ These two different approaches specify a more general debate over the role of competition law, consisting of the two conflicting perspectives of the 'neo-Structuralist' and the 'neo-Schumpeterian'.⁴ The former favours aggressive antitrust enforcement when an anti-competitive behaviour is carried out, the latter considers dominance in the new economy markets as temporary and short-lived.

The European Commission and EU Courts, together with the majority of national competition authorities, have focused their attention on the neo-structuralist view. This approach has been criticised, above all, by dominant firms, because it allegedly fails to take into account the negative effect that an aggressive competition law enforcement might have on innovation and, consequently, on consumer welfare, as Microsoft's appeal against the EU Commission's decision is seeking to establish before the Court of First Instance. Nevertheless, the competition authorities so far have adapted competition law analysis to apply to new economy markets, following the traditional structure of analysis under Article 82, that is, market definition, dominance and abuse.

In order to analyse these two different approaches, the landmark *Microsoft* decision will be specifically examined, alongside other relevant case law, as it represents the first time that the Commission has taken on the high-tech sector in such a direct way.⁵

2. THE APPLICATION OF ARTICLE 82 IN NEW ECONOMY MARKETS

The electronic communications sector, which encompasses the converged telecommunications, media, and information technology sectors, is just a part of what is termed the 'New Economy', an expression which also comprises high technology industries such as, *inter alia*, Internet based businesses, and computer software and

² See, for example, D Balto and R Pitofsky, 'Antitrust and high-tech industries: the new challenge' (1998) Fall-Winter, *The Antitrust Bulletin*, 583; and also, R Pitofsky, 'Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property' (2001) 68 *Antitrust Law Journal*, 913.

³ See, for example, MA Cusumano and DB Yoffie, *Competing on Internet Time*, Touchstone, 2000; and DJ Teece and M Coleman, 'The meaning of monopoly: antitrust analysis in high-technology industries' (1998) Fall-Winter, *The Antitrust Bulletin*, 801.

⁴ For an extensive analysis of these two conflicting perspectives applied to new economy markets, see G Monti, 'Article 82 and New Economy Markets', in C Graham and F Smith, *Competition, Regulation and the New Economy*, Hart Publishing, 2004, at pp17-54.

⁵ A previous case against IBM in the early 1980's, also involving interface information for computers, was settled when IBM agreed to certain undertakings, including making its interface information available to competitors.

hardware. The characteristics of these markets include very rapid technological change, the creation and exploitation of intellectual property rights, the need for complementary products to work together, and a high degree of technical complexity. In some markets such as electronic communications ‘network externalities’ or ‘network effects’ are also important features. New Economy industries pose particular problems for competition laws: for example, competition between undertakings is not so much on price as on innovation and the usual ways of defining markets may not work well; in fact, the SSNIP test tries to identify short term demand substitutability by posing a small but significant price rise, but the high technology markets of the new economy are characterized by dynamic competition, where the threat to existing products comes from new products. Concentrating on hypothetical price rises instead of the competitive constraints stemming from product innovation may lead to identifying markets which are too narrow. Therefore, competition may not be in markets but for markets.⁶ Starting from these assumptions, there is much debate about the extent to which ‘general’ competition law can be satisfactorily applied to the new economy.⁷

While some commentators have argued that the application of Article 82 is too formalistic and incoherent with the lack of any sound economic basis when applied to traditional markets,⁸ its application seems to be even more obsolete and inappropriate, as far as new economy markets are concerned. In fact, as mentioned above, these industries present a unique set of characteristics that distinguish them from traditional manufacturing industries, in particular, economies of scale, network effects, consumer lock-in, and high rates of innovation. Consequently, if modernisation of the application of Article 82 is considered as necessary in the traditional manufacturing markets, it is even more crucial where new economy markets are concerned. Furthermore, while for the former what is needed is reform involving an economic effect based analysis, where according to the latter any antitrust authorities’ intervention or enforcement is considered as unnecessary, harmful and futile.⁹ However, there is no agreement between commentators and authorities over modernisation of the application of Article 82, and, in particular, over the implications that the mentioned peculiarities have for competition policy.

⁶ Markets may ‘tip’ towards one firm whose products become the standard, rendering the firm dominant – Microsoft is an obvious example – and competition will be aimed at replacing the dominant firm. A Jones and B Sufrin, *EC Competition Law*, 2nd ed, Oxford University Press, 2004, at p 43.

⁷ See, *inter alia*, C Veljanovski, ‘EC Antitrust in the New Economy: Is the European Commission’s View of the Network Economy Right?’ (2001) 22 ECLR 115; C Ahlborn, DS Evans, and AJ Padilla, ‘Competition Policy in the New Economy: Is European Competition Law up to the Challenge?’ (2001) 22 ECLR 156; and R Lind and P Muysert, ‘Innovation and Competition Policy: Challenges for the New Millennium’ (2003) 24 ECLR 87.

⁸ See, *inter alia*, J Kallaugher and B Sher, ‘Rebates Revisited: Anti-Competitive Effects and Exclusionary Abuse Under Article 82’ (2004) 25 ECLR 263; HG Kamann, and E Bergmann, ‘The Granting of Rebates by Market Dominant Undertakings under Article 82 of the EC Treaty’ (2005) 26 ECLR 83; D Sinclair, ‘Abuse of Dominance at a Crossroads – Potential Effect, Object and Appreciability Under Article 82 EC’ (2004) 25 ECLR 491; and, D Ridyard, ‘Exclusionary Pricing and Price Discrimination Abuses under Article 82 – An Economic Analysis’ (2002) 23 ECLR 286.

⁹ C Ahlborn et al, *op cit* n 7, p 163.

3. TWO DIVERGENT APPROACHES

In broad terms, it is possible to identify two main divergent approaches: those which focus on the dangers of network effects as a reason to justify an aggressive antitrust enforcement; and those focussing on the dynamic characteristic of these industries, which suggests that any dominant position is temporary as markets are contestable, and therefore antitrust enforcement is largely unnecessary. However, these two opposed views seem to reflect a more general debate over the role of competition law. On one hand, the structure – conduct – performance paradigm of the Harvard School, affirms that the structure of the market determines the firm’s conduct and that conduct determines market performance. In particular, certain industry structures lead to certain types of conduct which then lead to certain kinds of economic performance, as for example, highly concentrated industries cause conduct which leads to poor economic performance, such as reduced output and monopoly prices. This conclusion that market structure dictated performance caused a belief that antitrust should be concerned with structural remedies rather than behavioural,¹⁰ thus leading in the 1960s to an extremely interventionist antitrust enforcement policy. On the other hand, the Chicago School, which considers the pursuit of efficiency as the sole goal of antitrust, does not support sentimentality for small business but places trust in the market. In fact, it places considerable belief in the ability of the market to correct and achieve efficiency itself without interference from governments and antitrust laws.¹¹ It is not difficult to see, therefore, how the ‘Neo-Structuralist’ and the ‘Neo-Schumpeterian’ views over the new economy markets are similar to the views informing the more general debate over the role of competition law.¹²

From a neo-structuralist perspective, as mentioned above, there are three characteristics, which are evidence of the likelihood of dominance in new economy markets. First, many products, such as software for computers, are characterised by notable economies of scale.¹³ Whereas this does not lead to dominance unless the high market shares can be held for some time, it is when the other two characteristics of new economy markets are present, network effects and lock-in, that the risk of dominance is most likely, if not inevitable. Secondly, many new economy businesses are characterised by network effects, that is the more people who use a particular service, the more value

¹⁰ The focus of attention was, therefore, on concentrated industries; in particular, Bain considered that most industries were more concentrated than was necessary; that barriers to entry were widespread and very high, so new firms were prevented from entering markets. See, ES Mason, *Economic Concentration and Monopoly Problem*, Harvard University Press, 1957; and JS Bain, *Barriers to New Competition*, Harvard University Press, 1956.

¹¹ For an extensive analysis, A Jones and B Sufirin, op cit n 6, at pp 21-23. For the Chicago School, see, H Hovenkamp, ‘Antitrust Policy After Chicago’ (1985) Univ Mich LRev 213; RH Bork, *The Antitrust Paradox: A Policy at War with Itself*, The Free Press, 1978; and RA Posner, *Antitrust Law*, 2nd ed, University of Chicago Press, 2001. For a critical view of the Chicago School, see, *inter alia*, EM Fox and LA Sullivan, ‘Antitrust – Retrospective and Prospective: Where Are We Coming From? Where Are We Going?’ (1987) 62 New York Univ LRev 936.

¹² For an extensive analysis of these two competing perspectives regarding new economy markets, G Monti, op cit n 4.

¹³ See O Shy, *The Economics of Network Industries*, Cambridge University Press, 2001, at p 5.

it has to an individual user.¹⁴ In fact, high technology markets are often characterised by significant demand-side network effects, which lead to a tendency for markets to allow only a single dominant vendor or technology; hence, the more users join a network, the more valuable a network becomes to all users.¹⁵ As an example, a PC that runs on Windows software is more valuable to a consumer the more other consumers use this standard, so software developers will invest more in writing applications for this standard, making it more likely that customers will have the applications they desire, in what is sometimes called a ‘snowball effect’. Therefore, it is the use of common standards that plays a critical role in linking network users, thus triggering network effects.¹⁶ As a consequence, in these markets there will be a convergence to the most popular network standard. Therefore, a proprietary network creates risks of dominance if there is sufficient consumer demand for the services that can be obtained via the network and if other networks are not compatible.¹⁷ Thirdly, while network effects create entry barriers for new competitors and invite more consumers to the dominant network, another characteristic of the markets concerned – consumer lock-in – affects the ability of consumers to look for substitutes. In particular, lock-in occurs when the cost of switching to a new product is higher than the marginal benefits to be gained by the use of the new product. To exemplify, in terms of computer software, a consumer will find it too costly to switch from one brand of software to another because of the need to learn how to use new software and the problem of transferring files from one programme to the next. Only a considerably better product will persuade those who are locked-in to switch. This makes entry more demanding, and locked-in consumers risk exploitation by the dominant firm.¹⁸

From a neo-schumpeterian perspective, it has been argued that the new economy moves on Internet time, and that competitive advantages are temporary and markets contestable. Dominance achieved, even through the creation of a successful network, is always temporary; thus, the dynamism of the new economy can cancel out dominance.¹⁹ According to some commentators, therefore, antitrust enforcers need to be aware of the self-corrective nature of dominance in new economy markets.²⁰ The consequence of such dynamism would have a direct impact on the strategies of firms, because if markets change so quickly then predatory strategies to exclude competitors

¹⁴ See M Katz and C Shapiro, ‘Network Externalities, Competition and Compatibility’ (1985) 75 *American Economic Review* 424.

¹⁵ R Lind and P Muysert, op cit n 7, p 89.

¹⁶ D Rubinfeld and J Hoven, ‘Innovation and Antitrust Enforcement’, in J Ellig (ed), *Dynamic Competition and Public Policy: Technology, Innovation, and Antitrust Issues*, CUP, 2001.

¹⁷ G Monti, op cit n 4, p 19.

¹⁸ *Ibid*, p 22.

¹⁹ The economist Joseph Schumpeter coined the phrase ‘creative destruction’ to express the idea that the pursuit of market power is a creative and dynamic force that ‘incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one’ - hence the labelling of such innovation-based competition as ‘Schumpeterian’. See, JA Schumpeter, *Capitalism, Socialism and Democracy*, Harper & Bros, 1942, pp 81-86. For an extensive analysis of the ‘Schumpeterian rivalry’, see, HA Shelanski and JG Sidak, ‘Antitrust Divestiture in Network Industries’ (2001) 68 *The University of Chicago Law Review* 1, pp 10-15.

²⁰ DJ Teece and M Coleman, op cit n 3.

become much more difficult to plan as their success will be rather uncertain. A related point is that the dynamism of such markets, being caused, in great part, by the possibilities of the winner making profits, will result in a significant decrease in the incentive to innovate deriving from heavy handed regulation, especially for those dominant firms which are required to grant access, in typical refusal to supply or license cases; thus imposing a sort of tax on innovation.²¹ As a consequence, the competition authorities should not attempt to recreate, at any cost, a condition of perfect competition in these markets, as this may not be the most efficient way of promoting consumer welfare.²² To conclude, according to the neo-schumpeterian model, new economy firms with large market shares have little incentive to exploit consumers, because these will quickly find a substitute, and little incentive to damage rivals, because such conduct will be counterproductive. Thus, dominance would be rare in new economy markets, and when present, the role of competition law remedies questioned, as they may be either too late as the market will already have cured itself, or they may give firms less incentive to innovate, reducing consumer welfare.

4. THE COMPETITION AUTHORITIES' APPROACH

The competition authorities, both at European and national level, so far have sided with the neo-structuralists, both in the traditional and in the new economy markets, because competition law seems to be flexible enough to play a role in regulating the latter too. In particular, the authorities have adapted their competition law analysis to apply to new economy markets, following the traditional structure of analysis of Article 82 that is market definition, dominance and abuse. According to some commentators, in fact, notwithstanding the above mentioned neo-schumpeterians' defence, a firm with demand-side economies of scale and high consumer switching costs due to network effects can make market power more durable,²³ thus rendering the authorities' intervention still desirable if not indispensable. To highlight application of the traditional structure of analysis to abuses, such as refusal to licence and tying, in the new economy markets, the Commission decision against Microsoft will be examined in a particular effort to reconcile the past case law to the case at issue.

4.1. The EC Commission application of the traditional structure of analysis of Article 82 in its decision against Microsoft

4.1.1. Definition of the relevant market

The definition of the relevant market focuses upon consumer needs and identifies what products consumers could switch to if the relevant products became more expensive

²¹ The problems arising from refusal to supply and refusal to license IPRs cases, in particular those emerging from some recent decisions by the European Commission, will be dealt with further on in this work.

²² C Ahlborn et al., op cit n 7, p 160.

²³ 'the combination of demand-side scale economies and consumer switching costs may render dominance of a firm in control of an interface standard unusually enduring and give reason for more careful attention to anticompetitive practices'. See Report by the Federal Trade Commission Staff, *Anticipating the 21st Century: 'Competition Policy in the New High-Tech, Global Marketplace'* (May 1996), at ch 9. An extensive analysis of this report is contained in, D Balto and R Pitofsky, op cit n 2, p 585; and R Pitofsky, op cit n 2, p 913.

and if suppliers enter the market with little time delay.²⁴ According to the Commission's Notice on Market Definition, the emphasis is upon demand substitution, using empirical and econometric evidence to identify product markets. Paragraph 7 of the Notice defines the relevant product market as comprising:

'all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the product characteristics, their prices and their intended use'.²⁵

In particular, the Commission often uses the so-called SSNIP test.²⁶ However, this test is not always effective, as the so-called 'cellophane fallacy' shows. This fallacy arises from the fact that the SSNIP test cannot identify whether the current price is already a monopoly price resulting from the exercise of market power. The Commission recognizes this difficulty and states that using the prevailing market price as the base figure from which to hypothesize the 5-10 per cent price rise of the SSNIP test may be inappropriate where that price has been determined in the absence of competition. Therefore, great care will have to be exercised in using this test to determine whether or not an incumbent on a market has a 'dominant position' for the purposes of Article 82. Although the Commission recognizes this problem, it makes no suggestions for dealing with it; the OFT Guideline on market definition, admitting this difficulty, suggests not carrying out the process of market definition in isolation but together with other evidence on market power, because market definition is a tool for assessing whether undertakings possess market power, not an end in itself.²⁷ Notwithstanding this particular 'fallacy' concerning the demand-side substitutability test, this approach, if adopted together with other evidence,²⁸ should not be changed when dealing with new economy markets, as the EC Commission showed in its decision against Microsoft. In fact, following the finding of facts in the US case against the software giant, wherein the relevant product market had been limited to Intel-compatible PC operating systems, thus excluding non-Intel-compatible operating systems as well as other non-computer devices;²⁹ the Commission, in its decision against Microsoft, narrowly defined the relevant markets by limiting them to the client PC operating system market, the work group server operating system market and the media player market.³⁰ The Commission has often adopted a narrow definition of the relevant markets, as happened in *United*

²⁴ G Monti, op cit n 4, p 24.

²⁵ Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law, OJ 1997, C372/5.

²⁶ The SSNIP test consists of asking whether a Small (5-10 per cent) but Significant Non-transitory Increase in Price of one product (product A) will cause purchasers to purchase another product instead (product B). If it does, then the test indicates that both A and B form part of the same product market. A Jones and B Sufirin, op cit n 6, p 307.

²⁷ Ibid, at pp 57-58.

²⁸ In defining the relevant product markets, the Commission found, alongside the absence of demand-side substitutable products, the existence of limited supply-side substitutable products, as it will be explained below.

²⁹ See *United States v Microsoft Corp*, 84 F. Supp. 2d 9, 14-18 (D.D.C. 1999).

³⁰ See Commission Decision of 24 March 2004 (Case COMP/C-3/37.792 – *Microsoft*), C(2004) 900 final, at recitals 342, 401, and 425.

Brands case and in *Tetra Pak II* case.³¹ In particular, with regard to the two operating system markets above, and therefore to the abuse of leveraging, the product market at issue in the *Microsoft* case was not too dissimilar from the *Tetra Pak II* case, because the server market, in which portions of Microsoft's alleged abuses were committed, was not part of the product relevant market, as servers are deemed not interchangeable with client PC due to higher prices and differing power requirements without the ability to support a broad scope of applications.³²

As far as the two operating system markets are concerned, the absence of demand-side substitutable products was confirmed, on one side, by Microsoft's pricing strategy³³ and, on the other side, by the importance of the interoperability of work group server operating systems with client PCs.³⁴ Therefore, the Commission concluded that those operating systems form two distinct product markets, having established, moreover, that the existence of supply-side substitutable products was limited for work group server operating systems.³⁵ As for the third relevant market investigated, the Commission found that a streaming media player is a different product from an operating system, that it has no competitive pressure from non-streaming players and, finally, that the presence of supply-side substitutable products is essentially limited, thus concluding that streaming media players constitute a distinct product market.³⁶

Finally, as far as the relevant geographic market is concerned, according to Article 82 EC, Microsoft's conduct must have occurred within the common market or a significant part of it. This element was by no means difficult to prove, given Microsoft's dominant presence world-wide; in fact, the Commission found that, 'the relevant geographic market for client PC operating systems, work group server operating systems and media players is world-wide'.³⁷

4.1.2. Measuring dominance

According to a structural approach, dominance may be assumed if a firm has a high market share. Direct proof of dominance would require evidence of monopoly prices

³¹ In the first case, the lack of interchangeability between bananas and other fresh fruits led the ECJ to consider two separate markets. See Case 27/76 *United Brands v Commission* [1978] 1 CMLR 429, at para. 35; and Case C-333/94 P *Tetra Pak International S.A v Commission* [1997] 4 CMLR 662. More specifically, the Commission in its decision against Microsoft, with regard to leveraging, has concluded that '... analogous to the situation in *Tetra Pak II*, the client PC and work group server operating system markets exhibit a number of strong associative links, both commercial and technological'. Commission Decision of 24 March 2004, *ibid*, at recital 534.

³² This lack of interchangeability has also emerged in the US case. *United States v Microsoft Corp.*, 84 F. Supp. 2d 9, 14-18 (D.D.C. 1999), p 14.

³³ For an extensive analysis of Microsoft's pricing strategy, see Commission Decision of 24 March 2004, *op cit* n 30, at recitals 369-382.

³⁴ *Ibid*, at recitals 383-386.

³⁵ *Ibid*, at recitals 388-400.

³⁶ *Ibid*, at recitals 402-425.

³⁷ *Ibid*, at recital 427. Moreover, it has been also confirmed in the Order of the President of the Court of First Instance of 22 December 2004 (Case T-201/04R *Microsoft v Commission* – Proceedings for interim relief – Article 82) at para 14.

maintained over time, but this would be hard to obtain and may not be the way in which dominance manifests itself. Therefore, according to well-established case law, dominance is merely:

‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers’.³⁸

To prove dominance, the competition authorities have to show that the firm is likely to be able to defeat the challenges posed by potential competitors. Dominance, in most cases, is thus based upon the combination of high market shares and high barriers to entry, though other factors may come into play in its assessment.³⁹

Therefore, although the Commission has almost automatically equated high market shares with a finding of dominance,⁴⁰ its approach can be questioned, given the speed of market developments in the new economy. In fact, according to the above mentioned neo-Schumpeterian’s approach, given dominance in these markets is ‘fragile’, the relevance of market shares diminishes considerably. However, it must be recalled that market shares are not the exclusive measure of dominance, but barriers to entry are also as important; as a consequence, this criticism on its own is not tenable.⁴¹ Furthermore, the same criticism seems to be even less effective, as far as Microsoft’s position is concerned. The Commission, in its decision, stated that Microsoft’s share with regard to its client PC operating system market is so high, approximately 90 per cent, together with at least a 60 per cent share on the market for work group server operating system,⁴² that it would not be necessary to proceed any further in the evaluation of other factors.⁴³ Moreover, Microsoft’s dominance in the two markets for operating systems cannot be defined as ‘fragile’ and likely to be leapfrogged by new innovative products, because of the barriers to entry protecting its market share and the consequent ability to leverage its way into other markets. In particular, according to the Commission decision, the very significant barriers to entry are attributable to indirect network effects, which are imputable to two factors: first, the fact that end consumers

³⁸ Case 27/76 *United Brands v Commission*, op cit n 31, at para 65.

³⁹ See Faull and Nikpay (eds), *The EC Law of Competition*, Oxford University Press, 1999, at paras 3.73 – 3.84.

⁴⁰ It is worthwhile to note that the ECJ, in para 41 of *Hoffmann-La Roche* case, declared that: ‘... very large shares are in themselves, and save in exceptional circumstances, evidence of existence of a dominant position’, Case 85/76 *Hoffmann-La Roche v Commission* [1979] 3 CMLR 211, at para. 41; moreover, still the Commission stated that a ‘market share of over 50% is usually sufficient to demonstrate dominance although other factors are examined’, see Notice on the Application of the Competition Rules to Access Agreements in the Telecommunications Sector, OJ 1998, C265/3.

⁴¹ G Monti, op cit n 4, p 32.

⁴² Commission Decision of 24 March 2004, op cit n 30, at recitals 430-435 and 473-499. It is important to note, moreover, that the Commission also evaluated the position of Microsoft’s three main competitors on the work group server operating system market as follows: first, Novell held a market share of between 10 and 15 per cent; second, Linux products accounted for a market share of between 5 and 15 per cent; third, Unix products account for a market share of between 5 and 15 per cent. Order of the President of the Court of First Instance of 22 December 2004, op cit n 37, at para 17.

⁴³ Case 85/76 *Hoffmann-La Roche v Commission*, op cit n 40, at para 48.

appreciate platforms on which they can use a large number of applications and, second, the fact that software designers develop applications for the PC operating systems that are most popular with consumers.⁴⁴ Although it is not a real network where consumers speak to each other, but a virtual network, created by consumer demand; this does not mean that it is less harmful, but, on the contrary, it leads to dominance because an application written for one operating system is not compatible with other systems. Therefore, the Commission concluded that:

‘In the light of Microsoft’s high market shares, the barriers to entry to the market and the links between the client PC operating system market and the work group server operating system market, it is concluded that Microsoft has a dominant position within the meaning of Article 82 of the Treaty in the market for work group server operating systems’.⁴⁵

To conclude, the Commission decision against Microsoft demonstrates that the neo-Schumpeterian approach is very unlikely to be adopted by competition authorities. In fact, it requires excessive faith that time will cure anticompetitive risks and considers the ability to exploit consumers as being the only anticompetitive aspect of dominance. Of course, this perspective contrasts with the modern approach to competition, with principal concern being the unlawful suppression of competitors⁴⁶ and, because this is the main concern, a short-run analysis of the market seems to be more suitable. The fact that dominance might be eroded in a few years time by market forces will not stop antitrust authorities from intervening, if they consider that with some regulation dominance might be eroded more quickly. Moreover, unlike the neo-Schumpeterians, the authorities may also take the view that by preventing a dominant firm from prolonging its dominance, they are promoting innovation. For the above mentioned reasons, therefore, the neo-Schumpeterian perspective is problematic, particularly in two respects: they are difficult to put into practice for the excessive reliance on time; and they are inimical to the type of antitrust culture that exists at present.⁴⁷

⁴⁴ Commission Decision of 24 March 2004, op cit n 30, in particular at recitals 488-452.

⁴⁵ Ibid, at recital 541. In particular the Commission found that the work group server operating system market is characterised, on one side, by the existence of numerous barriers to entry, such as network effects and Microsoft’s behaviour of withholding interoperability information and, on the other side, by particular links to the client PC operating system market. Ibid, at recitals 515-525 and 526-540.

⁴⁶ The reasons for this special emphasis on defending competitors, alongside consumer welfare, in the EC competition law, lay on the common market objective of market integration, in fact, since the days of *Consten/Grundig*, EC competition policy has always played an important role in the overriding goal of achieving single market integration. Therefore, the abusive behaviour which most worries, in the EC context, is that exercised against potential competitors, as it has been pointed out in Article 3(1)(g) EC Treaty, where the Community has to guarantee ‘a system ensuring that competition in the internal market is not distorted’; in the same Article 82, where any abuse of a dominant position ‘... shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States’; in Joined Cases 56 & 58/64 *Consten and Grundig v Commission* [1966] ECR 299; and in Case 85/76 *Hoffmann-La Roche v. Commission*, op cit n 40, at para 91. See also the European Commission First Report on Competition Policy, April 1972, at p 15, where the Commission stated that: ‘Restrictions on competition and practices which jeopardize the unity of the Common Market are proceeded against with special vigour’.

⁴⁷ G Monti, op cit n 4, p 36.

4.1.3. Abuse of dominance

The abusive behaviour which most concerns the competition authorities in Europe, also in new economy markets, is that exercised against potential competitors. This concern is not with higher prices but with exclusionary conduct by the dominant firm. Neo-Schumpeterians find it hard to understand why exclusionary tactics, such as protecting dominance, refusal to co-operate with competitors, and extension of dominance to new markets, are a problem, as they argue that as long as these tactics exclude less efficient competitors, consumers do not suffer and more efficient competitors will always be able to enter the market as holders of a new technology. According to some commentators, in relation to Microsoft's conduct, the operating system involved is so good and is available at such a reasonable price that it has become a quasi-standard for all PC users, and is by no means harmful to consumers.⁴⁸ However, the problem appears when this strong market position is used to impose unfair commercial conditions on PC or other software vendors. Therefore, the fact that an industry provides consumers with innovative, quality products at low prices does not mean that the Commission should abstain from intervention, but its intervention in such industries may not be ruled out, because of either the presence of other competition policy goals to be achieved or a broader view of the consumer harm concerned.

As far as other competition policy goals are concerned, the Commission has always paid attention to fairness considerations within the single market, in particular the foreclosure of firms that may enter a market, regardless of whether their possible entry would benefit consumers.⁴⁹ In fact, the Commission's definition of dominant position has evolved from the decision in *Continental Can*,⁵⁰ where it focused on the economists' concept of discretionary power of the monopolist to set prices, towards a more legal concept, expressed in almost all its decisions and ECJ's judgments since *United Brands*, where the concept of 'economic strength ... which enables a firm to impede effective competition'⁵¹ may indicate the ability to foreclose and keep other firms out of the market, instead of necessarily implying power over prices.⁵²

As for the consumer harm concern, notwithstanding Ahlborn's contention that the conflict between consumer welfare, in terms of allocative and productive efficiency, and the other EC competition policy goals, such as fairness considerations, single market integration issues, and promotion of small and medium sized enterprises, is likely to become even greater in the new economy than in the old economy markets;⁵³ it is worthwhile to take into due consideration the fact that consumer harm in the new economy industries may not entirely coincide with the lack of market efficiency in the

⁴⁸ C Ahlborn et al, op cit n 7, p 165.

⁴⁹ See V Korah, *An Introductory Guide to EC Competition Law and Practice*, 7th ed, Hart Publishing, 2000, at pp 81-82.

⁵⁰ See *Continental Can Co Inc* [1972] CMLR D11, at para II.3.

⁵¹ Case 27/76 *United Brands v Commission*, op cit n 31, at para 65.

⁵² V Korah, op cit n 49, at p 82.

⁵³ C Ahlborn et al, op cit n 7, pp 165-166.

form of low prices and innovative quality products, typical of the traditional model of perfect competition, but it could also and foremost involve denying consumer choice, distorting competition, and stifling innovation.⁵⁴ Microsoft has always maintained that it has not inflicted real harm because consumers were not injured, by basing this argument on the assumption that its behaviour has not produced negative effects on prices and output, but, it has allegedly been beneficial for consumers because prices have been kept low. However, any assessment of the anti-competitive impact of a particular behaviour will be incomplete if limited to price and output effects as the impact on consumer choice must also be considered, especially when dealing with new economy markets.⁵⁵ As Professor Fisher pointed out in his opinion during the trial *United States v Microsoft Corp.*, resources are best allocated when consumers express their preferences by selecting among competing alternatives.⁵⁶ Moreover, Thomas B. Leary has described as one of the great principles of the last antitrust millennium that consumers, 'should generally be free to make their own choices about the goods and services that they want to buy'.⁵⁷ The less choice consumers have in a market, the greater the control suppliers are likely to have over price and output; consequently, freedom of choice would be a meaningless right if consumers have no alternatives from which to choose. Therefore, a key-goal of antitrust enforcement is ensuring that anti-competitive conduct does not deprive consumers of a meaningful set of options from which to select goods and services that best meet their needs.⁵⁸

Moreover, the President of the Court of First Instance pointed out the importance of consumer choice in the order against Microsoft's request for interim measures following the Commission's decision. In particular, as far as the media player market abuse is concerned, in dismissing the request for interim measures, the President upheld the Commission's decision, wherein the latter affirmed that:

‘... immediate implementation of the remedy would be unlikely to make a drastic change to Microsoft's position on the media player market but would simply allow a levelling of competition on that market [...]. Only immediate implementation of the remedy could preserve consumer choice and allow consumers to reap the benefits of innovation in digital media services.’⁵⁹

In the next sub-paragraphs, Microsoft's abusive conduct will be considered in more detail, as an example of how effective are the EC Commission's instruments of analysis in assessing both unlawful tying and refusal to supply/licence in new economy markets.

⁵⁴ See, SD Houck, 'Injury to Competition/Consumer in High Tech Cases' (2001) 75 St John's Law Review 593; and DS Evans, 'Dodging the Consumer Harm Inquiry: A Brief Survey of Recent Government Antitrust Cases' (2001) 75 St John's Law Review 545, p 555.

⁵⁵ SD Houck, *ibid*, p 598.

⁵⁶ See Trial Testimony of Franklin M Fisher at 27-28 (Nos. 98-1232; 98-1233) (January 7, 1999), *United States v Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000).

⁵⁷ See TB Leary, 'Freedom as the Core Value of Antitrust in the New Millennium' (2000) 68 Antitrust Law Journal 545.

⁵⁸ See NW Averitt and RH Lande, 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' (1996) 65 Antitrust Law Journal 713.

⁵⁹ Order of the President of the Court of First Instance of 22 December 2004, *op cit* n 37, at para 388.

Tying

Tying involves an open use of market power to win business on a separate market. It is a relatively straightforward concept constituting a sort of prototype of anti-competitive conduct.⁶⁰ Therefore, it is by no means surprising that Article 82(2)(d) specifically lists tying as an example of abusive behaviour.⁶¹ Competition policy is particularly concerned with tying because it involves leverage, which involves an undertaking which is dominant on one market using that position to interfere with competition on another market, strengthening its position there, and creating barriers to entry. Tying can work because the supplier is dominant in the market for the tying product, so the customer has difficulty going elsewhere for it and therefore does not shop around for the tied product.⁶² Therefore, the whole concept of tying presupposes that different products or services are being tied together, whereas if what is supplied consists of one product there cannot be a tie as one cannot tie something to itself. As a consequence, a difficult issue to deal with is whether products or services are components of a single product or service or are in distinct markets, which is a question a question of market definition.

The tendency of the Courts and the Commission has been to separate products and services into different markets and then to condemn the supplier's attempts to ensure that the customer buys them all as a package.⁶³ However, Article 82(2)(d) specifically refers to supplementary obligations which, 'by their nature or according to commercial usage, have no connection with the subject of such contracts' which suggests that ties will be permitted if there is an inherent or customary link between the products.⁶⁴

As some commentators have pointed out,⁶⁵ a difficult conceptual issue with regard to tying is its relation to bundling. The latter is fairly common commercial practice, which can also be undertaken by non-dominant firms, but it is only superficially similar to the former, in that undertakings seek to achieve the same result, that is to drive the customer to acquire two separate products or services. However, there is a fundamental difference, as tying is used to control a second separate market, using the dominant position in the adjacent market as a lever; bundling, in the majority of cases, is a means of increasing the appeal of the product (the bundled product) the second product (the bundling product) is bundled with. Although bundling has the effect or potential of squeezing out companies marketing the bundled product on a stand-alone basis, it should be considered competitive on the merits under Article 82 EC.⁶⁶ However,

⁶⁰ See R Whish, *Competition Law*, 5th edition, Butterworths, 2003, pp 657 et seq.

⁶¹ Article 82(2)(d) specifically lists 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'.

⁶² A Jones and B Sufrin, op cit n 6, at p 452.

⁶³ Two leading cases in this sense are: Case T-30/89 *Hilti v Commission* [1992] 4 CMLR 16; and Case C-333/94P *Tetra Pak International SA v Commission*, op cit n 31.

⁶⁴ A Jones and B Sufrin, op cit n 6, at p 454.

⁶⁵ Inter alia, T Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses' (2005) 42 CMLRev 129, pp 153-4.

⁶⁶ See DS Evans, AJ Padilla, and M Polo, 'Tying in platform software: Reasons for a rule-of-reason standard in European Competition Law' (2002) *World Competition* 509, p 511.

bundling can also be treated as a market structure abuse, and consequently be considered unlawful under specific circumstances; in particular, when bundling has a leveraging effect and is intentionally used to change the way the market functions. As Eilmansberger points out, a type of potentially abusing bundling, having a leveraging effect, comprises, ‘the addition or inclusion of products so as to obtain a head start on markets for secondary products’.⁶⁷ This type of abusive bundling seems to have been effected by Microsoft with its Windows Media Player (WMP);⁶⁸ in fact, the Windows client PC operating system is used as a sort of launch vehicle to disseminate the WMP so widely that Microsoft would receive an immediate advantage, and would be likely to become the dominant player on markets for software written for such audio and video software.⁶⁹ The similarities between these two conducts may have the undesirable effect of assessing a bundling case under the same standard as tying. This is what the Commission seems to have done in Microsoft, in fact, it concluded that:

‘inasmuch as tying risks foreclosing competitors, it is immaterial that consumers are not forced to “purchase” or “use” WMP. As long as consumers “automatically” obtain WMP – even if for free – alternative suppliers are at a competitive disadvantage’.⁷⁰

Nevertheless, this is far from affirming that the Commission was not right to condemn the bundling of the Windows client PC operating system and the Windows Media Player. The only mistake might have been to use the tying standard.⁷¹

The Commission first dealt with the issue of tying in software markets in 1984, when it came to a settlement with IBM after it had alleged that IBM had infringed Article 82 by tying various computer products together. The Commission returned to the issue of tying in software markets when it took action against Microsoft for supplying its WMP as a package with its Windows client PC operating system. According to the Commission, finding the WMP pre-installed, when the purchaser turns on Windows, means that competition from other media players is stifled, as it leads to a vicious circle by which the ubiquity of the WMP causes companies, such as content suppliers and software developers, to develop products geared to the WMP, which thereby becomes even more desirable to consumers. The Commission’s decision is based on foreclosure theory according to which the widespread distribution of media functionality in Windows may, at some point in the future, lead to a situation in which content providers and software developers will encode almost exclusively in Windows Media format. Microsoft’s conduct, therefore, weakens competition on the merits, stifles product innovation, and ultimately reduces consumer choice.⁷² The Commission’s

⁶⁷ T Eilmansberger, *op cit* n 65, p 154.

⁶⁸ See M Dolmans and T Graf, ‘Analysis of tying under Article 82 EC: The European Commission’s Microsoft Decision in perspective’ (2004) *World Competition* 225, p 240.

⁶⁹ For Microsoft’s ubiquity deriving from the tying of WMP, see Commission decision of 24 March 2004, *op cit* n 30, at recitals 843-848.

⁷⁰ *Ibid*, at recital 833.

⁷¹ See DS Evans and AJ Padilla, ‘Tying under Article 82 EC and the Microsoft Decision: A Comment on Dolmans and Graf’ (2005) *World Competition*, forthcoming.

⁷² Commission Decision of 24 March 2004, *op cit* n 30, at recitals 978-984.

‘snowball’ reasoning reflects its legitimate fear that the information technology industries have a greater tendency towards tipping, leading to dominance, than traditional industries. In particular, at recital 470 of its decision, it explained that certain technology markets may have:

‘specific characteristics [...] (for example network effects and the applications barrier to entry) [that] would [...] suggest that there is an increased likelihood of positions of entrenched market power, compared to certain traditional markets’.

Although some commentators have contended that the Commission failed to demonstrate that media player usage is characterised by the existence of strong network effects.⁷³ The Commission sought to demonstrate the existence of ‘indirect network effects’ related to the fact that the presence of Windows Media Player in all the operating systems distributed by Windows gives content providers and applications manufacturers an incentive to design their products on the basis of Windows Media Player.⁷⁴ The Commission relied largely on present or past factual material relating to the incentives for content providers and software developers.⁷⁵ Notwithstanding the fact that this material supports what is, at least in part, a prospective analysis of the risks for competition resulting from the practice at issue. The Commission noted that, for the purpose of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having or likely to have that effect.⁷⁶ The application of this ‘potential effect’ test in the decision is clearly outlined in recitals 841 and 842 of the same decision. In fact, the Commission stated that although in the ‘classical’ tying cases it is enough to show a tie between a dominant and a non-dominant product:

‘There are indeed circumstances relating to the tying of WMP which warrant a closer examination of the effects that tying has on competition in this case ... [such as the fact that] users can and do to a certain extent obtain third party media players through the Internet, sometimes for free. There are therefore indeed good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition.’⁷⁷

Accordingly, in the following recital the Commission stated that:

‘In the following sections, it will be explained why tying in this specific case has the potential to foreclose competition so that the maintenance of an effective competition structure is put at risk.’⁷⁸

⁷³ See, JY Art and GS McCurdy, ‘The European Commission’s Media Player Remedy in its *Microsoft* Decision: Compulsory Code Removal Despite the Absence of Tying or Foreclosure’ (2004) 25 ECLR 694, p 699.

⁷⁴ Commission Decision of 24 March 2004, op cit n 30, at recital 842.

⁷⁵ Ibid, at recitals 879-896.

⁷⁶ Case T-219/99 *British Airways v Commission* [2004] 4 CMLR 1008, at para 293; and Case T-203/01 *Michelin v Commission*, [2004] 4 CMLR 923, at para 239.

⁷⁷ Commission Decision of 24 March 2004, op cit n 30, at recital 841.

⁷⁸ Ibid, at recital 842.

The Commission considered that neither installation agreements with Original Equipment Manufacturers (OEMs)⁷⁹ nor downloading constitute as efficient a distribution channel as OEM pre-installation.⁸⁰ Consequently, it concluded that ‘... alternative distribution channels do not enable media players competing with WMP to match the ubiquitous and guaranteed presence of the pre-installed WMP code on client PCs worldwide.’⁸¹ Furthermore, ‘... in view of the [above mentioned] indirect network effects obtaining in the media player market, the ubiquitous presence of the WMP code provides it with a significant competitive advantage, which is liable to have a harmful effect on the structure of competition in that market.’⁸²

The adoption of this ‘potential effect’ test has been criticised because it focuses on a tendency to exclude, a potential to exclude rather than a likelihood of excluding an efficient competitor. Therefore, this test is set neither on other effective means of competing with Microsoft, nor on the level of gap in efficiency between the distribution routes, nor on failure of any new entry.⁸³

The Commission’s conclusion on the tying issues were based on the premise that there were two markets, one for client PC operating systems, and one for media players. The Commission concluded that: ‘by reason of its specific characteristics and the lack of realistic substitutes, the market for streaming media players constitutes a relevant product market’,⁸⁴ because, according to its findings, first, a streaming media player is a product distinct from an operating system;⁸⁵ secondly, such products are under no competitive pressure from non-streaming players;⁸⁶ thirdly, only media players with similar functionalities exert competitive constraints on WMP;⁸⁷ fourthly, the presence of supply-side-substitutable products is limited.⁸⁸ Microsoft, instead, argued that WMP was not a separate product, because the client PC operating system and the WPM have to be considered as an integrated product, a single product belonging to the same market. According to Microsoft, an operating system is a ‘platform’ which provides a foundation and services for software applications like financial spreadsheets, word processors or email programs. The characters, sounds and images used by those applications are created by the operating system and sent to the PC’s screens or speakers for display. Today, many PCs work with integrated or attached high-quality speakers and screens to enable the sophisticated audio and colour video that the combination of hardware and operating system are capable of delivering.⁸⁹

⁷⁹ Ibid, at recitals 849-857.

⁸⁰ Ibid, at recitals 858-871.

⁸¹ Ibid, at recital 877.

⁸² Ibid, at recital 878.

⁸³ D Sinclair, op cit n 8, p 496.

⁸⁴ As for market definition in the tying issue, Commission Decision of 24 March 2004, op cit n 30, at recitals 402-425.

⁸⁵ Ibid, at recitals 404-406.

⁸⁶ Ibid, at recitals 407-410.

⁸⁷ Ibid, at recitals 411-415.

⁸⁸ Ibid, at recitals 416-424.

⁸⁹ JY Art and GS McCurdy, op cit n 73, at p 695.

Consequently, Microsoft submitted that the Commission's decision ignored the benefits flowing from its business model which entails the integration of new functionality into Windows in response to technological advances and changes in customer demand.⁹⁰ Furthermore, Microsoft, contended that Windows and its media functionality are not two separate products, and that the Commission had failed to demonstrate that the alleged tying and tied products are not connected naturally or by commercial usage. However, it is clear from *Tetra Pak II* that, once it is shown that the products or services tied together are in different markets, a dominant undertaking cannot rely on the concepts 'nature' and 'commercial usage' in Article 82(2)(d), as 'commercial usage' may have been established by the dominant undertaking itself.⁹¹ Moreover, in the same case, the ECJ stressed the non-exhaustive character of the examples listed in Article 82, and that therefore, a tie may constitute an abuse even if there is a natural link or the tied sale is in accordance with commercial usage.

To conclude, it cannot be ignored that the reasons behind the Commission's decision against Microsoft are inspired by the fact that EC law on tying is driven by concerns about the structure of the market, rather than the extraction of monopoly profits or the 'classical' protection of consumers. The Commission and the Courts have consistently been concerned with the ability of smaller firms to compete. This is a matter of policy, which has been summed up in paragraph 36 of *Tetra Pak II* judgment, where the ECJ stated:

'any independent producer is quite free, as far as Community competition law in concerned, to manufacture consumables intended for use in equipment manufactured by others'.⁹²

In other words, independent producers are free to manufacture and Community competition law will positively help them to do so by constraining the conduct of dominant undertakings for whose equipment they wish to provide products or services. This appears to be a policy concerned less about efficiency and free competition and more about the protection of small firms and competitors.⁹³

Refusal to supply/license

According to the EC Commission's Decision, the other type of abusive conduct consisted in Microsoft's refusal to provide its competitors with 'interoperability information' and to allow its use for the purpose of developing and distributing products competing with Microsoft's own products on the work group server operating system market. The Commission considered that the refusal to supply limits technical development to the prejudice of consumers, and that an increasing number of consumers find themselves locked into a homogeneous Windows solution at the level

⁹⁰ See Case T-201/04, Action brought on 7 June 2004 by Microsoft Corporations against the Commission of the European Communities, OJ 2004, C179/18.

⁹¹ See V Korah, 'The Paucity of Economic Analysis in the EEC Decision on Competition: Tetra Pak II' [1993] *Current Legal Problems* 150.

⁹² See Case C-333/94P *Tetra Pak International SA v Commission*, op cit n 31, at para 36.

⁹³ A Jones & B Sufirin, op cit n 6, at p 462.

of work group server operating systems, due to the lack of interoperability that competing work group server operating system products can achieve with the Windows domain architecture. This impairs the ability of such customers to benefit from innovative work group server operating system features brought to the market by Microsoft's competitors. In addition, this limits the prospect for such competitors to successfully market their innovation and thereby discourages them from developing new products.⁹⁴

The Commission, furthermore, in order to rule out the possibility of violating Microsoft's intellectual property rights, specified that it was not seeking the disclosure of Microsoft's source code, but the disclosure of a full specification of the protocols used by Windows work group servers to deliver work group server services to Windows work group networks, and to allow the use of that specification to build interoperable products.⁹⁵ Microsoft's attempt to justify its actions as a proper exercise of its intellectual property rights clashed with the emphasis placed on the special responsibility of dominant firms in dealing with competitors; abuse which damages the common market is given greater concern than interference with property rights. Microsoft reacted to the European Commission's decision by bringing an action brought before the Court of First Instance on 7 June 2004.⁹⁶ Microsoft claimed that the Commission erred in finding that the applicant infringed Article 82 EC by refusing to supply communications protocols to competitors and to allow the use of that proprietary technology in competing work group server operating systems. According to Microsoft's defence, the conditions required by the European Courts before a dominant undertaking is obliged to license its intellectual property rights were not met in the present case, as the technology which it was ordered to license is not indispensable to achieve interoperability with Microsoft PC operating systems, the alleged refusal to supply the technology did not prevent the emergence of new products on a secondary market and, finally, it did not have the effect of excluding all competition on a secondary market.

In the cases where the IP in question has no close substitutes, ownership of this intangible may confer on the holder of these rights either a position of dominance in the market for such intellectual creations, or strengthen a position of dominance which it holds in a downstream market. The availability of IPRs in the hands of a dominant firm may enable it to erect barriers to entry – by enforcing the exclusive rights conferred on it by the law and refusing to license these rights to others – where the IP is an indispensable input to market participation. Therefore, the more indispensable the input which is protected by IPRs, the greater the necessity to obtain a licence to utilise it before a competitor can enter a downstream market which utilises that input, and the

⁹⁴ Commission Decision of 24 March 2004, *op cit* n 30, at recitals 693-708.

⁹⁵ In this context, it is important to briefly mention the distinction between interface specifications and implementation. In particular, 'a specification is a description of what the software product must achieve, whereas the implementation relates to the actual code that will run on the computer', therefore, an interface specification describes what an implementation must achieve, not how it achieves it. *Ibid*, at recitals 24 and 569.

⁹⁶ *Op cit* n 90.

stronger the ability of the rights-holder occupying a dominant position to exclude its competitors from the downstream market.⁹⁷

Before dealing with the analysis of these issues outlined above and, in particular, if they are met, it is important to briefly review the European Court case-law. In fact, the conditions or circumstances when a refusal to license an Intellectual Property Right (IPR) amounts to an abuse are obscure, as rulings by the European Court of Justice (ECJ) and the Court of First Instance (CFI) on the application of Article 82 to IPRs are difficult to reconcile. The ECJ, in its recent judgment on *IMS Health* case delivered on 29 April 2004,⁹⁸ provided an excellent illustration of the problem, regarding under which circumstances the holder of an IPR abuses its dominant position under Article 82. Although refusals to deal with a competitor are not expressly prohibited under Article 82, the ECJ has since the 1970s included them within the scope of that article,⁹⁹ by identifying at least two types of refusals to deal: refusals to supply, which seem to be connected to tangible property, and refusals to license, connected to intellectual property. There are some landmark cases in which the ECJ and the CFI have elaborated the conditions or circumstances in which an IPR holder may be required, *ex* Article 82, to grant a license to its competitors.

In *Renault*¹⁰⁰ and *Volvo*¹⁰¹, the court did not set out circumstances in which a refusal to license is abusive, but merely gave non-exhaustive examples of abusive conduct which may result from the exercise of an IPR,¹⁰² thus only setting the scene for the more detailed ruling in *Magill*.¹⁰³ This constituted the first case in which the Court addressed in detail the conditions under which a refusal to license will be abusive in 'exceptional circumstances'.¹⁰⁴ These are: 1) the prevention of the appearance of a new product which the IPR holder did not offer and for which there was a potential consumer demand; 2) the refusal is not justified and/or; 3) the IPR holder reserves to himself a secondary market by excluding all competition on that market.¹⁰⁵

In *Ladbroke*, the CFI refined one of the conditions in *Magill*, in fact, it added a new alternative condition: a refusal to license will infringe Article 82 if it concerns a product

⁹⁷ See B Ong, 'Building Brick Barricades and other Barriers to Entry: Abusing a Dominant Position by Refusing to License Intellectual Property Rights' (2005) 26 ECLR 215, p 218.

⁹⁸ See Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] 4 CMLR 1543.

⁹⁹ See Cases C-6 and 7/73 *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corporation v Commission* [1974] 1 CMLR 309.

¹⁰⁰ See Case C-53/87 *Consorzio Italiano Della Componentistica di Ricambio per Autoveicoli & Maxicar v Régie Nazionale des Usines Renault* [1990] 4 CMLR 265, at para 9.

¹⁰¹ See Case C-238/87 *AB Volvo v. Erik Veng (UK) Ltd* [1989] 4 CMLR 122, at para 15.

¹⁰² In order to amount to an abuse of dominance, the ECJ required the refusal to license to be accompanied by 'certain abusive conduct', such as arbitrary refusal to supply original spare parts to independent repairers, fixing prices of spare parts at unfair levels, and discontinuing production of spare parts for car models that were still in circulation. *Ibid.*, at para 9.

¹⁰³ See Case T-69/89 *Radio Telefis Eireann v Commission* [1991] 4 CMLR 586; Case T-76/89 *ITP v Commission* [1991] ECR II-575; Cases C-241/91P and C-242/91P *Radio Telefis Eireann (RTE) & Independent Television Publications Ltd (ITP) v Commission* [1995] 4 CMLR 718.

¹⁰⁴ *Ibid.*, at para 50.

¹⁰⁵ *Ibid.*, at paras 53-56.

or service which is essential, or indispensable, for the exercise of the activity in question, in that there was no real or potential substitute.¹⁰⁶

Finally, the Court in *Bronner* set out a tripartite test which combines the second and third conditions from *Magill* and the new one added by the CFI in *Ladbroke*: 1) the refusal of the service comprised in the home delivery must be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service; 2) such refusal cannot be objectively justified; 3) the service in itself must be indispensable to carrying on that person's business, in as much as there is no actual or potential substitute in existence for that home delivery scheme.¹⁰⁷ The conditions set out in these cases differ, and moreover, there is uncertainty as regards whether the conditions in *Magill* should be applied in a cumulative or alternative way. Some commentators¹⁰⁸ consider that the case law can be reconciled, on the basis that the ECJ does not consider it self-evident that the same conditions should apply to cases involving refusals to license (involving intellectual property) and refusals to supply (involving other types of property, mainly tangible). It could be argued, therefore, that the *Bronner* judgment clarifies the distinction between cases involving refusals to supply and refusals to license. In the first set of situations, only the tripartite test set out in *Bronner* applies whereas in the second set, only the cumulative conditions of *Magill* apply.

This solution appears to have been recently adopted by the ECJ in its judgment on *IMS* case delivered on 29 April 2004, wherein it listed the same conditions or 'exceptional circumstances', under which a refusal to license is abusive, set out in *Magill*. In particular, 1) the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the copyright owner and for which there is a potential consumer demand; 2) the refusal is not justified by objective considerations; 3) the refusal is such as to reserve to the copyright owner the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market.¹⁰⁹ Therefore, the 'new product' condition, confirmed in *IMS*, suggests that the ECJ will apply a more demanding test to cases where the essential facility in question is a product or service protected by IPRs.¹¹⁰ Another important consequence is that the circumstances under which a refusal to license will be abusive are cumulative,¹¹¹ and therefore will be rarely fulfilled. In the light of this interpretation, *IMS*'s refusal might

¹⁰⁶ See Case T-504/93 *Tiercé Ladbroke S.A v Commission* [1997] 5 CMLR 309, at para. 131.

¹⁰⁷ Though the *Bronner* case does not deal with an IPR, it is relevant to this analysis for two reasons: first, the Court, to reach its decision in *Bronner* relied upon the above mentioned cases; second, it has heavily relied on that ruling to decide the *IMS* case. As for the tripartite test, see Case C-7/97 *Oscar Bronner GmbH & Co Kg v Mediaprint* [1999] 4 CMLR 122, at para 41.

¹⁰⁸ See, for example, E Derclaye, 'Abuse of a Dominant Position and Intellectual Property Rights: A Suggestion to Reconcile the Community Courts' Case Law', in C Graham and F Smith, *Competition, Regulation and the New Economy*, Hart Publishing, 2004, pp 55-75.

¹⁰⁹ Case C-418/01 *IMS Health Inc v NDC Health Corp*, op cit n 98, at para 52.

¹¹⁰ See D Geradin, 'Limiting the Scope of Article 82 EC: What can the EU learn from the US Supreme Court's Judgment in *Trinko* in the wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?' (2004) 41 CMLRev 1519, p 1527.

¹¹¹ Case C-418/01 *IMS Health Inc v NDC Health Corp*, op cit n 98, at paras 37-38.

not be considered as abusive by the national court and it may not ultimately be forced to grant a license,¹¹² notwithstanding the President of the CFI's suggestion that the facts of *Magill* are different from those of *IMS*.¹¹³ However, attempts to give additional precision on some aspects of the *Magill* test are also important for analysis of Microsoft's alleged abuse. Among them, the 'new product' requirement seems to be the more controversial, and while insisting on the importance of this condition, the ECJ failed to specify precisely what is to be understood by 'new product'. The Court stated that the refusal by a dominant firm to allow access to a product protected by a copyright may be regarded as an abuse:

'only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand'.¹¹⁴

While it appears that a new product is a product that does not duplicate the existing product, yet is somehow different and for which there is a potential consumer demand, it is not clear how 'different' a product should be from the product already sold on the secondary market to be considered as 'new'. The Court chose to refer to a soft concept such as 'new' rather than to a well-established and clearly defined competition law concept, such as the notion of substitution.¹¹⁵ The Court considers it as sufficient that the new product presents some novel features while remaining substitutable with the existing product, thereby implying a much lower threshold for the application of Article 82 to refusal to license cases. Some commentators have considered such an interpretation as being designed not to prevent harm to competition, but to ensure that a dominant firm's competitors gain access to the inputs they need to compete on a level playing field with the dominant firm, and that instead of protecting competition, this new interpretation protects competitors.¹¹⁶

Microsoft, in its request for interim relief, maintained that the criteria which must be satisfied before an undertaking can be required to license its products, as defined in the European Courts' extensive case law, are not satisfied in the present case.¹¹⁷ Before dealing with the criteria laid down in the case law in respect of compulsory licences, the Commission established that Microsoft effectively refused to disclose interoperability information and allow their use for the development of compatible work group servers by its competitors.¹¹⁸ Furthermore, among the additional circumstances to be taken into

¹¹² See, E Derclaye, 'The *IMS Health* decision and the reconciliation of copyright and competition law' (2004) 29 EL Rev 687, p 696.

¹¹³ See the Order of the President of the Court of First Instance of 10 August 2001 (Case T-184/01R *IMS Health Inc v Commission* – Proceedings for interim relief – Article 82) at para 24.

¹¹⁴ Case C-418/01 *IMS Health Inc v NDC Health Corp*, op cit n 98, at para 49.

¹¹⁵ D Geradin, op cit n 110, at p 1531.

¹¹⁶ *Ibid*, at p 1532.

¹¹⁷ Order of the President of the Court of First Instance of 22 December 2004, op cit n 37, at para 99.

¹¹⁸ Commission Decision of 24 March 2004, op cit n 30, at recitals 560-584.

consideration, the Commission argued that Microsoft's conduct involves a disruption of previous levels of supply of interoperability information. In particular, the Commission explained that:

‘a historic look at the work group server operating system market shows that Microsoft entered this market relatively recently. [...] Microsoft - as long as it did not have a credible work group server operating system alternative – had incentives to have its client PC operating system interoperate with non-Microsoft work group server operating systems. [...] Once Microsoft's work group server gained acceptance in the market, [...], Microsoft's incentives changed [...]. With Windows 2000, Microsoft then engaged in a strategy of diminishing previous levels of supply of interoperability information.’¹¹⁹

Disrupting previous levels of supply is one of the most obvious forms of predation, which if it were to be tolerated would place any firm buying an essential input from a potential competitor at the mercy of this firm, as affirmed since *Commercial Solvents*.¹²⁰ As far as this particular aspect is concerned, it is interesting to note that even the most conservative Justice of the US Supreme Court in *Trinko* case,¹²¹ in distinguishing it from the judgment in *Aspen Skiing*,¹²² seems to believe that a disruption of previous levels of supply should give a cause of action under Section 2 of the Sherman Act. In order to show that this disruption of prior levels of supply of interoperability creates a risk of elimination of competition on the work group server market, the Commission argued that while Microsoft's market share for work group server operating system products has quickly increased over the last few years, its competitors' market shares have consistently declined.¹²³ Consequently, the Commission rejected the arguments raised by Microsoft to deny that the lack of interoperability disclosures would eliminate competition on the market and that, if so, these disclosures are not necessary as there would be several categories of substitutes for them, and determined that interoperability disclosures are essential to Microsoft's competitors on the work group server market and Microsoft's refusal to provide them creates risks of elimination of competition on that market.¹²⁴

¹¹⁹ Ibid, at recitals 587-588.

¹²⁰ Cases C-6 & 7/73 *Istituto Chemioterapico Italiano SpA & Commercial Solvents Corporation v Commission*, op cit n 99.

¹²¹ *Verizon Communications Inc v Law Offices of Curtis v Trinko, LLP*, 540 U.S. 682, (2004).

¹²² *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, (1985). Judge Scalia, in *Trinko* case, held that while in *Aspen Skiing* there was a monopolist's unilateral termination of a voluntary course of dealing, suggesting a willingness to forsake short-term profits to achieve an anti-competitive end; Verizon did not voluntarily engage in a course of dealing with its rivals, and that, while in *Aspen Skiing* the defendant refused to provide to its competitor a product that it already sold at retail, the services allegedly withheld in *Trinko* were not otherwise marketed or available to the public.

¹²³ See Commission Decision of 24 March 2004, op cit n 30, at recitals 590-612.

¹²⁴ Ibid, at recitals 666-692. In particular, ‘Microsoft puts forward three broad categories of “substitutes” for disclosure by Microsoft. These are: the use of open industry standards supported in Windows; the distribution of client-side software on the client PC; and the reverse-engineering of Microsoft's products in order to gain access to the necessary interoperability information’ (recital 667). Moreover, while Microsoft argues that the communications protocol licensing program that it created pursuant to the US Final Judgment allows any vendor of server operating systems to license any or all of the communications protocols that Windows server operating systems use to communicate with Windows client operating systems, thus

The Commission, in establishing that Microsoft's refusal to supply a product protected by an IPR amounts to an abuse of a dominant position contrary to Article 82 EC, has addressed the conditions imposed by the ECJ in *Magill* and *IMS*. As a preliminary observation, however, it is important to note that the analysis of the ECJ in *IMS* on the 'likelihood of excluding all competition' seems to be only a tautological restatement of the first condition in *Magill* test, that access to a facility is indispensable for a competitor to enter the secondary market.¹²⁵ Moreover, 'elimination of all competition' and 'indispensability' do not need to be absolute. In fact, if the Court has to wait until all competition is actually eliminated, the harm to consumers and industry would be irreparable. Due to the lock-in of consumers with the incumbent's product, it would be difficult to find a potential competitor for the incumbent.¹²⁶ Furthermore, in view of the tendency of some high tech markets to 'tip', failure to provide access to interoperability information today will condemn the server software market to near certain monopolisation by Microsoft in the foreseeable future.¹²⁷ Therefore, absolute indispensability does not seem to be required. It is necessary to show only the inability practically or reasonably for any firm in the market to effectively duplicate the element and compete in the downstream market.¹²⁸

As far as the 'new product' requirement is concerned, the Commission rejected Microsoft's claim that it has not prevented the emergence of any new product for which there was unsatisfied consumer demand. In fact, as mentioned above, from paragraph 49 of the judgment in *IMS Health* case, it follows that a 'new product' is a product which is not limited 'essentially to duplicating' the products already offered on the market by the owner of the copyright. It is sufficient, therefore, that the product in question contains substantial elements contributed by the licensee's own efforts. Accordingly, it is not precluded that the products of the owner of the copyright should compete with the future products of the licensee, as shown by Community's case law.¹²⁹ Furthermore, the 'new product' criterion does not imply an obligation to provide concrete proof that the licensee's product would attract customers who would not buy the products offered by the existing supplier. In the present case, the

concluding that there is no client-to-server interoperability issue; the Commission counter-argues that Microsoft's argument is based on an inadequate distinction between 'client-to-server interoperability' and 'server-to-server interoperability', as in Windows work group networks, client-to-server and server-to-server interoperability are tightly linked to one another (recitals 688-689 and 177-182).

¹²⁵ See N Le, 'What Does "Capable of Eliminating all Competition" Mean?' (2005) 26 ECLR 6.

¹²⁶ *Ibid*, at p 7.

¹²⁷ It is worth noting that some commentators have criticised this more open-ended Commission's approach, defining it as a 'convenient facilities doctrine', because it reserves the right to consider the costs and benefits of mandating access, given the facts surrounding the case. See D Ridyard, 'Compulsory Access Under EC Competition Law – A New Doctrine of "Convenient Facilities" and the Case for Price Regulation' (2004) 25 ECLR 669.

¹²⁸ Advocate General Jacobs in *Bronner* case, referring to US case law, notes that 'absolute indispensability' is not required. Case C-7/97 *Oscar Bronner GmbH & Co Kg v Mediaprint*, op cit n 107, at paras 47-66. As for the US case law, it is worth noting that the Supreme Court, in the above mentioned *Trinko* case, narrowing the interpretation in *Aspen Skiing*, held that 'a necessary requirement for invoking the "essential facilities doctrine" is the unavailability of access to the "facility". Where access exists [albeit in a disadvantageous way], the doctrine serves no purpose'.

¹²⁹ See Case T-69/89 *RTE v Commission*, op cit n 103, at para 73; *Magill*, op cit n 103, at para 53.

implementation of the protocols can take very different forms, which provides sufficient scope for product differentiation, and there are significant possibilities for product differentiation which could enhance competition but which at present are neutralised by Microsoft's conduct.¹³⁰ However, the Commission's decision contains limited reference to the impact of the refusal on the ability of Microsoft's competitors to develop new products, thus perpetrating that vague definition of the new product requirement given by the ECJ in *IMS Health*. In fact, the Commission stated only that:

'Due to the lack of interoperability [...], an increasing number of consumers are locked into a homogeneous Windows solution at the level of the work group server operating system. This impairs the ability of such customers to benefit from innovative work group server operating system features brought to the market by Microsoft's competitors. In addition, this limits the prospect for such competitors to successfully market their innovation and thereby discourages them from developing new products'

...

'In a longer-term perspective, if Microsoft's strategy is successful, new products other than Microsoft's work group server operating systems will be confined to niche existences or not be viable at all. There will be little scope for innovation – except possibly for innovation coming from Microsoft.'¹³¹

As for the objective justification criterion, Microsoft does not mention any specific objective justification for its conduct, apart from making a general reference to its 'intellectual property rights', which the Commission refuted in its Decision.¹³² According to the President of the Court of First Instance, therefore, the Commission Decision demonstrated, and Microsoft has not seriously disputed, that Microsoft's conduct satisfied the requirements laid down in the case law.¹³³

Some controversial final remarks

To conclude the analysis of the Commission's Decision against Microsoft, and in particular its alleged abuse of refusing to supply important interoperability information, it is worthwhile to focus on two particular controversial issues: the 'new product' test and the impact of mandatory access on incentives to invest.

As far as the new product issue is concerned, the Commission simply suggested that Microsoft's refusal to disclose interoperability information will prevent its competitors from developing unspecified future products, which, according to Microsoft, does not meet the new product test designed in *Magill* and further refined in *IMS*, though only in the former it was possible to identify the specific new product. However, a possible solution to the alleged partial failure to meet this requirement, might be represented by the attempt either from the Commission or the CFI, in upholding the Commission's

¹³⁰ Order of the President of the Court of First Instance of 22 December 2004, op cit n 37, at paras 190-191.

¹³¹ Commission Decision of 24 March 2004, op cit n 30, at recitals 694 and 700.

¹³² Order of the President of the Court of First Instance of 22 December 2004, op cit n 37, at para 193.

¹³³ *Ibid*, at para 194.

decision in the main proceedings, to show that Microsoft's competitors' group servers are different from Microsoft's products, for instance because they offer new functionalities.¹³⁴

As for the impact of mandatory access on incentives to invest, some economists suggests the need to balance the *ex post* allocative efficiency gains, which can be realised by mandating access, with the *ex ante* dynamic efficiency gains, which can be protected by refusing access. The Commission and the ECJ have traditionally focused on increased 'allocative efficiency'. However, this tension between *ex ante* and *ex post* efficiency is even more acute when the facility to be supplied is protected by IPRs. This tension, in fact, is at the core of the *Microsoft* case. To respond to this argument, the Commission engaged in a balancing process between Microsoft's interests in protecting its investments in IPRs and the benefits (in terms of innovation) that would be derived from mandating Microsoft to give access to the information requested by its competitors,¹³⁵ and concluded that:

'the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft).'¹³⁶

5. CONCLUSION

As has been emphasised throughout this article, the Article 82 case law on the establishment of dominance is often criticized for defining markets arbitrarily and too narrowly lacking sophisticated economic analysis and overestimating undertakings' market power. The internal review of Article 82 which the Commission began in 2003 will examine the way in which market power is assessed and at the role that market shares, and the presumptions accorded to certain levels of market share, play in that assessment. Article 82 is the major area of competition law not hitherto subjected to 'modernisation'.¹³⁷

One of the most critical arguments about the identification of dominance concerns time-scale. It appears that the Commission looks at a shorter time-scale reference period than many economists would advocate. Dominance denotes power over time, but the question is how much time? On one hand, economists point out the

¹³⁴ D Geradin, op cit n 110, at pp 1538-1539.

¹³⁵ Ibid, at p 1542.

¹³⁶ Commission Decision of 24 March 2004, op cit n 30, at recital 783. The recital then concludes that 'As such the need to protect Microsoft's incentives to innovate cannot constitute an objective justification that would offset the exceptional circumstances identified'.

¹³⁷ In the course of reviewing its policy on the abuse of dominant position under Article 82, DG Competition, and, in particular, the Chief Economist of DG Comp, commissioned a report from the Economic Advisory Group for Competition Policy (EAGCP), an independent discussion forum on competition policy matters between academics, whose main purpose is to support DG Comp in improving the economic reasoning in competition policy analysis. The EAGCP has presented its report on 21 July 2005. In particular, it argues in favour of an economic-based approach to Article 82, in a way similar to the reform of Article 81 and merger control. It supports an effect-based rather than a form-based approach to competition policy. See Report by the Economic Advisory Group for Competition Policy ("EAGCP") on 'An economic approach to Article 82', downloadable from: http://europa.eu.int/comm/competition/publications/studies/eagcp_july_21_05.

importance of recognizing ‘dynamic competition’ and the fact that temporary market power is in some industries, such as technologically innovative ones, inevitable. On the other hand, competition policy needs to ensure that entry into the market remains open, thus eliminating all those impediments which prevent it. The Commission tends to act against undertakings which are in a position to act anti-competitively and to the detriment of consumers now and in the medium term, although they may well be subject to competition from new entrants in the longer term. However, the view that all markets will eventually become competitive is only a hopeful presumption; for this reason, antitrust intervention is concerned with ensuring that this occurs sooner rather than later or too late. Moreover, a perverse effect of a longer-run analysis would be waiting until all competition is actually eliminated, thus generating an irreparable harm to consumers and industry alike.

This does not mean ruling out the scope for an increased and useful role of economic analysis in the application of Article 82 EC, as it seems to have been pointed out by the Commission in its decision against Microsoft’s alleged tying. In the assessment of this conduct, the Commission did not seem to adopt its decision (using the exact wording of the Economic Advisory Group for Competition Policy ‘EAGCP’), ‘... on the basis of the form that a particular business practice takes’ (‘per se’) but, rather, ‘... on the assessment of the anti-competitive effects generated by business behaviour’ (‘rule of reason’).¹³⁸ However, it cannot be denied that Article 81 cases and merger cases need a more economic-based analysis and a higher degree of speculation from the authorities on market future effects, as compared to Article 82 cases.

To conclude, therefore, it is submitted as long as the application of Article 82 to new economy markets afford market access for all participants without eliminating incentives to innovate or frustrating the dynamism of those markets, there is no reason to radically modernise it, given the importance of consumer choice as a significant competition policy aim to be achieved.

¹³⁸ See, in particular, recitals 841-842 of the Decision against Microsoft, where the Commission stated that, although in the ‘classical’ tying cases it is enough to show a tie between a dominant and a non-dominant product, ‘There are indeed circumstances relating to the tying of WMP which warrant a closer examination of the effects that tying has on competition in this case... [such as the fact that] users can and do to a certain extent obtain third party media players through the Internet, sometimes for free. There are therefore indeed good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclose competition’. In the following recitals, the Commission considered that neither installation agreements with Original Equipment Manufacturers (OEMs) nor downloading constitute as efficient a distribution channel as OEM pre-installation. Consequently, it concluded that ‘... alternative distribution channels do not enable media players competing with WMP to match the ubiquitous and guaranteed presence of the pre-installed WMP code on client PCs worldwide.’ Furthermore, it is worth noting that the ‘EAGCP’, in distinguishing between an economics-based and a form-based approach to the application of Article 82, affirmed that: ‘An economics-based approach to the application of Article 82 implies that the assessment of each specific case will not be undertaken on the basis of the form that a particular business practice takes but rather will be based on the assessment of the anti-competitive effects generated by business behaviour’. See Report by the Economic Advisory Group for Competition Policy (‘EAGCP’) on ‘An economic approach to Article 82’, *ibid*, at p 3.