Volume 4 | Number 1 | Spring 2008

Competition Policy International

# *Microsoft*: What Sort of Landmark?

Daniel Beard

Copyright © 2008
Competition Policy International, Inc.

Published in Competition Policy International (print ISSN 1554-0189, online ISSN 1554-6853),
Spring 2008, Vol. 4, No. 1. For articles and more information, visit www.globalcompetitionpolicy.org.

# *Microsoft*: What Sort of Landmark?

*Daniel Beard*

> *"We require from buildings, as from men, two kinds of goodness: first, the doing their practical duty well: then that they be graceful and pleasing in doing it; which last is itself another form of duty."*
>
> —John Ruskin, *The Stones of Venice* (1880)

The *Microsoft* judgment was a big decision in the sense that it is long and concerns an important company. If it can be called a landmark decision, what sort of landmark is it? This article considers whether—at least on the interoperability side of the case—the *Microsoft* judgment can really be seen as important and, in doing so, makes certain observations about the tests applied and problems remaining in relation to refusal to supply cases. The article concludes that, at least on the interoperability side of the case, the decision does not break new ground and leaves unresolved various problems in relation to the relevant legal tests.

The author is a Barrister at Monckton Chambers in London. He acted in the appeal against the Commission's Decision on behalf of interveners in support of Microsoft.

# I. Introduction

Never in the history of European competition law has so much been written by so many about just one case. The *Microsoft* litigation in the Court of First Instance (CFI), which followed the Commission's infringement decision and record fine, turned into a grand battle. Certain of the protagonists seemed to see it as the moment when the soul of European antitrust was at stake. Not just the Battle of Britain but Stalingrad.

Now, as the dust has settled a little, the battalions of lawyers have tucked away their files and the squadrons of economists have flown away for skirmishes elsewhere, it is worth considering the significance of this judgment.

Cases can, broadly speaking, be seen as important for one of two reasons:

(i) they are high profile;

(ii) they are breaking new ground.

Really important cases are often both. Undoubtedly, the European *Microsoft* competition litigation is important for the first reason; that is, it is high profile. It concerns a company which produces things which affect the way the world works; in other words, Microsoft matters. In relation to the second reason, the answer is far less clear.

This article considers whether—at least on the interoperability side of the case—the *Microsoft* judgment can really be seen as "important" for the second reason and, in doing so, makes certain observations about the tests applied and problems remaining in relation to refusal to supply cases.

# II. Background

In its decision of March 24, 2004 (the "Decision"),[1] the Commission found that Microsoft had infringed Article 82 EC in two ways. The first was that Microsoft had abused its dominant position in the personal computer (PC) operating systems (OS) market and the workgroup server (WGS) OS market (encompassing file, print, group, and user administration services) by refusing to supply indispensable interoperability information to Microsoft's competitors. The interoperability information consisted of protocols necessary for communications among servers and between servers and PCs. The Commission found that Microsoft's refusal to supply this information foreclosed competitors from the WGS OS market. The second concerned the tying or bundling of Windows Media Player with Windows OS and is not the subject of this article.

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

The CFI found no manifest error in the Commission's decision on the interoperability issue. It considered that the refusal to supply the relevant interoperability information was an abuse of a dominant position. Microsoft had failed to substantiate its claim that an obligation to provide interoperability information would undermine its incentives to innovate.

## III. The Key Legal Issue: The Refusal to Supply Test

The interoperability case is viewed as having raised a key issue regarding the appropriate boundary between, on the one hand, the proper protection of intellectual property rights (IPRs) and the access to proprietary information and, on the other, the enforcement of competition rules. In particular, it considers the circumstances in which a dominant supplier of software should be required to provide to competitors information that is either secret or protected by IPRs.

In *IMS*[2] (and taking into account previous case law such as *Magill*,[3] *Volvo*,[4] and *Bronner*[5]), the Court restated the cumulative four-part test which had been developed in previous case law for identifying an abusive refusal to supply. The supply refused must:

**(i)** relate to a product or service indispensable to undertaking a particular activity in a neighboring market;

**(ii)** exclude any effective competition in that neighboring market;

**(iii)** prevent the emergence of a new product for which there is potential consumer demand; and

**(iv)** have no objective justification.

As to part **(i)**, the indispensable nature of the interoperability information at issue, the CFI emphasized that the Commission had a broad discretion in making this complex economic assessment. It then went on to examine in some detail the evidence on which the Commission had relied. This included surveys of information technology (IT) executives apparently revealing that full interoperability with Microsoft's server OS was a key purchasing criterion for server operating systems.

In relation to **(ii)**, the exclusion of any competition in the WGS OS market, the CFI noted that it was not the elimination of a particular competitor which

2 Case C-418/01, IMS Health v. NDC Health, 2004 E.C.R. I-5039 [hereinafter *IMS*].

3 RTE, ITP & BBC v. Commission, 1995 E.C.R. II-485 [hereinafter *Magill*].

4 Case 238/87, AB Volvo v. Erik Veng (U.K.) Ltd., 1988 E.C.R. 6211 [hereinafter *Volvo*].

5 It is noted that this case did not, of course, concern IPRs or trade secrets; rather, it merely the question of access to an existing national delivery service. Case C-7/97, Oscar Bronner GmbH & Co KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KG, 1998 E.C.R. I-7791.

was important, but the elimination of competition. It stated that the Commission need not, however, wait for the actual elimination of competitors before taking action; rather, the risk of elimination was sufficient. Furthermore, it held that the continuing marginal presence of competitors in certain market niches did not preclude a finding that competition was being excluded.

On **(iii)**, the new product requirement, the CFI took Article 82(b) ("limitation of technical development") to mean that the "new product" concept extends to innovative new product features that consumers want. The CFI highlighted the specific factual context, in particular: the nature of interoperation; surveys perceived to show that but for interoperability problems customers believed that rivals' server OS products were better than Microsoft's; rivals having introduced innovative and popular features at a time when interoperability information had been available; and rivals having incentive to develop products that were differentiated and innovative beyond the design of interface specifications.

Finally on **(iv)**, objective justification, the CFI gave fairly short shrift to Microsoft's arguments. It found that Microsoft did not meet its burden to prove specifically how its incentives might be affected, particularly given that disclosure of interoperability information is common in the software industry. The CFI did not engage in a broader analysis of whether the disincentives placed on companies to develop valuable secret information if they can be later ordered to disclose it, more generally outweigh the industry-wide innovation benefits of a compulsory license.

Thus, the CFI analysis might be seen as a straightforward application of the *IMS* principles. In its Decision, the Commission went out of its way to state that the "exceptional circumstances" in which mandatory provision of sensitive information should be made were not exhausted by the four *IMS* principles and that, furthermore, in the case of Microsoft, additional features meant that the circumstances were exceptional. The Court did not consider it necessary to consider these matters as explicit components in the legal test. The legal test applied was that derived directly from a well-known line of case law without further analysis, criticism, or material qualification. On this key issue of the relevant legal test, therefore, *Microsoft* does not appear to be an "important" judgment: it does not break new ground.

ON THIS KEY ISSUE OF THE RELEVANT LEGAL TEST, THEREFORE, *MICROSOFT* DOES NOT APPEAR TO BE AN "IMPORTANT" JUDGMENT: IT DOES NOT BREAK NEW GROUND.

Furthermore, as pointed out by Frederic Jenny,[6] the approach of the CFI in stressing the "manifest error of assessment" test in its analysis might reinforce the suggestion that the Court is going to be particularly slow to overturn Commission assess-

6 Frederic Jenny, *The CFI Decision in* Microsoft*: Why the European Commission's guidelines on abuse of dominance are necessary and possible*, 1(2) GCP MAGAZINE (Jan-08).

ments in complex economic or technical cases. This should not, however, come as any great surprise and may have some important lessons for those bringing such appeals in the future—less is more. Appeals need a clear and simple "narrative" to be able to succeed otherwise they become bogged down in complexity and make then easier to reject.

## A. BREAKING NEW GROUND: THE APPLICATION OF THE "NEW PRODUCT" TEST?

It has been suggested that, in fact, contrary to appearances of merely following *IMS*, in at least one respect, the CFI did break new ground in *Microsoft*: limb (iii) of the *IMS* test—the new product test—has been liberalized or expanded. In other words, post-*Microsoft*, it will be easier to argue that a product a competitor offers or intends to offer is "new" and thus requires provision of the relevant necessary input held by the dominant rival.

Undoubtedly, the Court's approach is somewhat general in form.[7] It sees the test met by the potential existence of new products if interoperability were available rather than needing to point to specific novelties which are being held back. To that extent, the analysis might be seen as more liberal. But a better reading is that, in fact, nothing novel is happening to the new product test.

First, it must be remembered that we are talking about interoperability information for sophisticated computer systems. It does not take an enormous leap of the imagination to consider that third parties might develop products which work differently from Microsoft's but which need to interoperate with the core Windows OS. The fact that the Court does not specifically identify such products does not mean it is reaching an implausible or indeed especially tendentious conclusion. Perhaps, at most, the analysis might have been clearer.

Second, it is important to remember how little novelty was assumed to be required in relation to the pharmaceutical data collection system referred to as the "brick structure" in *IMS* itself. It was never suggested in any judgment that the rival product was some sort of quantum leap forward in terms of pharmaceutical data collection and analysis. Indeed, it might be more difficult to see quite why novelty (or potential novelty) was identified in that case rather than in *Microsoft*.

## B. (SADLY) NOT BREAKING NEW GROUND: INDISPENSABILITY/ELIMINATION OF COMPETITION TESTS

In *Philosophical Investigations*,[8] Wittgenstein points out that in order to verify the truth of a headline you do not go out and buy multiple copies of the same newspaper. It is an obvious fallacy that simple repetition strengthens the reasons for

7 *See, e.g.*, Judgment, *supra* note 1, at §656.

8 L. Wittgenstein, Philosophical Investigations (1972).

accepting the truth of a proposition. The application of the *IMS* test by the Court shows signs of this problem.

Indispensability (*IMS* limb (i)) and elimination of competition (limb (ii)) really amount to the same thing. The question raised in the case law about whether competition will be eliminated in the secondary market will invariably involve the consideration of the same issues as arise in relation to the assessment of the indispensability condition. In other words, if a product or service is indispensable for competing in a market, then the refusal to supply that product or service results in the exclusion of competition in that market. As then-Advocate General Maduro in *KPN* stated: "At the outset, in order for a refusal to supply to be caught by Article 82 EC, the existence of a dominant position that enables the dominant undertaking to prevent competition on a secondary market must be established."[9] AG Maduro recognized that it is difficult to see what the "elimination of competition" requirement adds to the indispensability condition.

Although this analysis may seem obvious, it is material in assessing the approach of the Court (and the Commission) in the *Microsoft* case for two reasons. First, in any legal test, asking the same question twice is dangerous—it is confusing and it can mean that evidence is not properly or coherently tested in the round and that the relevant tests can be fudged. Indeed, in this case, the question effectively gets asked three times. The initial "factual and technical assessment" by the Court considers precisely the same issues in testing what constitutes viable competition. Thus, by its factual outline which sets out what it considers the Commission rightly found to amount to a threshold of "viable competition", the Court effectively reaches its conclusions on the key elements of the legal tests before it comes to consider them explicitly. Of course, the application of a legal test to a particular case depends on findings of fact. But it might be said that, in practice, the interoperability case was settled by the section of the judgment where the assessment of what was required in order to be part of the "blue bubble" of interoperating servers (and the need to be in the "blue bubble") was made.[10]

Second, while repeating the question is bad enough, getting it wrong is worse. Here we do have a problem and it relates to the question about whether there needs to be a risk or a likelihood of elimination of competition. The Court focuses on the question of the "risk" of elimination of competition. In doing so, it may be seen as unjustifiably diluting the impact of the indispensability condition.

Obviously the Court was aware of concerns of this sort and considered that there was too much unnecessary semantic discussion about the relevant legal tests in the submissions it has received. It made clear that when referring to "risk", the Court meant that competition need not have been actually eliminated at the time

9 Opinion of Advocate General Poiares Maduro, Case C-109/03, KPN Telecom BV v. OPTA, 2004 E.C.R. I-11273 (Jul. 14, 2004), at para. 50.

10 Judgment, *supra* note 1, at 25.

of the decision. That is fine so far as it goes; but, it is no answer to the problem. Even if it is the case that the elimination of competition can, as a matter of law, occur gradually in order to discharge the indispensability condition, the refusal to supply in question must still be the cause of the exit from the market. When the decision maker or the appeals court talk about beliefs or expectations about the future, there can be no absolute certainty and thus "a high likelihood" of the elimination of competition might be sufficient proof of indispensability.

However, the Commission and, in turn, the Court do not reach a conclusion that there is such a high likelihood that competition will end because instead they uses the notion of "risk of elimination of competition". The indispensability condition is not merely that there is a "risk" of elimination of competition, but that it must at least involve sufficient proof of likelihood. As one sharp Microsoft lawyer put it: there is a world of difference in being told that there is a risk you could catch bird flu and a high likelihood you could catch bird flu. This is not merely a semantic distinction.

More generally it reflects a flaw—or, at least a lack of clarity—in the way the *IMS* test itself is framed and it is perhaps unfortunate that in the course of this grand litigation some further light could not be shone on the issue.

The approach adopted could be criticized as a straightforward legal error; specifically, that the wrong test was applied. Certainly it will be difficult in future cases to judge precisely what indispensability really means when the threshold is effectively qualified by reason of the operation of the second limb of the *IMS* test. More generally it reflects a flaw—or, at least a lack of clarity—in the way the *IMS* test itself is framed and it is perhaps unfortunate that in the course of this grand litigation some further light could not be shone on the issue.

## IV. Burden and Standard of Proof

Arguments about burden and standard of proof are often seen as merely the modern legal equivalent of medieval theologians arguing about the number of angels that might fit on the head of pin. They are generally abstruse arguments with little practical impact in civil litigation. However, in the circumstances of the *Microsoft* case, the analysis may deserve a little more attention.

The Community Courts have made it clear that the burden of proof rests on the Commission to establish to the "requisite legal standard" the facts and matters that it relies on to establish a breach of Article 81 or 82.[11] The requirements

11 Case C-185/95, P Baustahlgewebe GmbH v. Commission, 1998 E.C.R. 1-8417, at para. 58:

> where there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements found by it and to

*footnote 11 cont'd on next page*

of that standard have been variously expressed to encompass an obligation on the part of the Commission to produce "sufficiently precise and coherent proof"[12] or "a firm, precise and consistent body of evidence,"[13] and to show that it was "in possession of sufficient evidence to establish that the information on which it based itself was correct and that its assessments were well founded."[14]

Although the *Microsoft* case did not involve the application of Article 81, it concerned Article 82 which manifests a similar character of a quasi-criminal provision[15] (as the size of the fine in the case confirmed). Accordingly, a defendant merits the same protection that the Community Courts have accorded to the defendant in Article 81 cases. In that context, it is notable that then-Advocate General Vesterdorf stated that: "Considerable importance must be attached to the fact that competition cases of this kind [cartels] are in reality of a penal nature, which naturally suggests that a high standard of proof is required."[16]

Furthermore, as a matter of general principle, it should not be open to dispute that the more remote or speculative the proposition to be established, the more convincing the evidence that is required to establish it. This point was elegantly made by Lord Hoffman in the English case of *SSHD v. Rehman*,[17] a case cited by then-CFI President Vesterdorf in an article discussing the standard of proof in

*footnote 11 cont'd*

> adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.

*See also* Case T-41/96, Bayer AG v. Commission, 2000 E.C.R. II-3383, at para. 77.

12 Cases 29/83 & 30/83, Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v. Commission, 1984 E.C.R. 1679, at paras. 16-20. The ECJ applied the same "requisite legal standard" in Rheinzink to the application of Article 82 in Case C-53/92 P, Hilti AG v. Commission, 1994 E.C.R. I-667.

13 Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 & C-125/85 to C-129/85, Ahlström et al. v. Commission, 1993 E.C.R. I-1307, at paras. 70-127.

14 Case T-30/89, Hilti AG v. Commission, 1991 E.C.R. II-1439, at para. 44.

15 President Vesterdorf drew no distinction between Articles 81 and 82 in a recent article discussing the standard of proof in merger cases and characterised them both as provisions that involved severe penalties of a quasi-criminal nature. *See* B. Vesterdorf, *Standard of proof in merger cases: reflections in the light of recent case law of the Community Courts*, 1 Euro. Competition J. (Mar. 2005), at 27.

16 Case T-1/89, Rhone Poulenc v. Commission, 1991 E.C.R. II-86. It is also noted that in the ECJ's ruling in *Montecatini*, there was a presumption of innocence in antitrust proceedings given "the nature of the infringements [of Article 81(1)] in question and the nature and degree of severity of the ensuing penalties." *See* Case C-235/92 P, Montecatini v. Commission, 1999 E.C.R. 1-4539, at para. 176. In Case C-199/92 P, Hüls v. Commission, 1999 E.C.R. I-4287, at para. 149, the Court specifically stated that the presumption of innocence is a "fundamental right" under Community law. The Court went on to say that the presumption of innocence applies in particular to competition law proceedings where fines or periodic penalty payments can be imposed (*id.* at para. 150).

17 Secretary of State of Home Department v. Rehman, 2003 1 A.C. 153, 194 [hereinafter *Rehman*].

merger cases.[18] Lord Hoffman stated that, although the applicable standard of proof would be the same (the balance of probability), "it would need more convincing evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian."[19]

The Community Courts' jurisprudence in the application of the competition rules generally, and Article 82 specifically, recognizes this requirement. It is established that the quality and strength of evidence that the Commission needs to adduce to establish an infringement of Article 82 depends on both the nature of the alleged abuse and the particular circumstances of the case. Specifically, the burden on the Commission is particularly high where (as in both aspects of the *Microsoft* case) the Commission must prove the abuse and, in seeking to do so, relies on predicted future developments rather than past or present actions or events.

First, regarding the nature of the abuse, particularly careful analysis is required in cases where it cannot be assumed that the conduct complained of results in anti-competitive effects. Thus, then-Advocate General Jacobs stated in *Bronner*[20] that:

> "[T]he justification in terms of competition policy for interfering with a dominant undertaking's freedom to contract often requires a careful balancing of conflicting considerations. In the long term it is generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business. For example, if access to a production, purchasing or distribution facility were allowed too easily there would be no incentive for a competitor to develop competing facilities. Thus while competition was increased in the short term it would be reduced in the long term. Moreover, the incentive for a dominant undertaking to invest in efficient facilities would be reduced if its competitors were, upon request, able to share the benefits. **Thus the mere fact that by retaining a facility for its own use a dominant undertaking retains an advantage over a competitor cannot justify requiring access to it** . . ." (emphasis added)[21]

18 *See* Vesterdorf (2005), *supra* note 15, at 23.

19 For those not familiar with the parks of London, the proposition that a lioness had been seen in Regents Park is not completely outlandish; London zoo sits inside the northern perimeter of the park.

20 Opinion of Advocate General Jacobs, *Bronner*, *supra* note 5 (May 28, 1998), at para. 58.

21 *Id.* at paras. 57-62.

In this respect, the relevant test to be applied in the *Microsoft* case must be clearly distinguished from the evidential test formulated in *British Airways plc v. Commission*,[22] where the CFI ruled that it was not necessary to demonstrate that the abuse had a "concrete effect on the markets concerned"; but, that it was sufficient to show that it "tends to restrict competition ... or is capable of having, or likely to have, such an effect." These observations related to consideration of the effect of an abuse after the elements of the abuse had been found.[23]

Second, it is important to distinguish between those cases that are concerned with a present distortion of competition and those that are concerned with a future loss of competition. Article 82 cases typically fall into the first category since the prohibition addresses an undertaking's past behavior. In such cases, therefore, the loss of competition can normally be assessed by reference to observed trends on the market. The *Microsoft* case, however, was different. The Commission's Decision relied not on proof of past or present foreclosure of competition, but on an assertion that Microsoft's conduct would at some unascertained point in the future result in the foreclosure of its competitors.[24] As such, it was a case where the finding of competitive harm required an appraisal of the likelihood that the market would evolve in the way predicted by the Commission.

This type of analysis is most commonly found in the context of merger control. It is in that context, therefore, that the evidential issues have been most extensively considered by the Community Courts, which have provided detailed guidance on what is required for the Commission to be able to prohibit a merger (e.g., *Airtours*,[25] *Schneider*,[26] and *Tetra Laval*[27]). That guidance might seem applicable to cases under Article 82 that rely on a forward-looking assessment of competitive impact. Indeed, given the quasi-criminal nature of the penalties imposed for breach of Article 82, the need to adhere to strict evidential standards

22 Case T-219/99, British Airways plc v. Commission, 2003 E.C.R. II-nyr (judgment of Dec. 17, 2003), at para. 293.

23 The ingredients of the abuse, in particular that rival undertakings were unable to attain a level of revenue sufficient to overcome any exclusionary effect of BA's scheme and whether the scheme was economically justified, were found at paragraphs 270 to 292 of the judgment (*id.*).

24 Commission Decision 2007/53/EC of 24 May 2004, Case COMP/C-3/37.792 — Microsoft, 2007 O.J. (L 32) 23 [hereinafter Decision]. *See, e.g.*, paragraphs 589 (and n. 712), 692 & 992.

25 Case T-342/99, Airtours plc v. Commission, 2002 E.C.R. II-2585 [hereinafter *Airtours*].

26 Regarding the Commission's Article 8(3) prohibition, *see* Case T-310/01, Schneider Electric SA v. Commission, 2002 E.C.R. II-4071; regarding the Commission's Article 8(4) divestiture decision, *see* Case T-77/02 Schneider Electric SA v. Commission, 2002 E.C.R. II-4519.

27 Case T-5/02, Tetra Laval BV v. Commission, 2002 E.C.R. II-4381 [hereinafter *Tetra Laval* (CFI)] and Case C-12/03P, Tetra Laval BV v. Commission, 2005 E.C.R. I-987 [hereinafter *Tetra Laval* (ECJ)].

is even stronger. The test applied in that series of cases was summarized by then-President Vesterdorf in an article:

> "The Commission, under the judicial control of the Courts, would have to decide that it was **satisfied at a high degree** whether the concentration would be **likely to result in significant anti competitive effects** and would have to prove that its conclusion was based on a body of **solid, cogent and convincing evidence** and not vitiated by any errors of fact, law or manifest errors of appreciation . . .
>
> . . .
>
> [The standard required] would appear to be something more than a pure balance of probabilities standard, but most certainly something less than a criminal standard . . . " (emphasis added)[28]

There are cogent reasons for doubting whether the notion of a standard of proof is especially relevant in cases assessing future likelihoods.[29] However, the Community Courts have also made it clear that, in certain situations, there will be a particularly strong requirement on the Commission as to the level of evidence necessary to satisfy the "requisite legal standard", and the Community Courts' review of the Commission will be correspondingly thorough. In particular, these situations have been identified where:

- an analysis particularly involves speculation as to future outcomes;[30]
- the relevant type of merger would not usually be considered problematic;[31] or

28 *See* Vesterdorf (2005), *supra* note 15, at 31.

29 Quoting Lord Hoffmann in *Rehman, supra* note 17, at 194:

> I agree with the Court of Appeal that the whole concept of a standard of proof is not particularly helpful in a case such as the present. In an criminal or civil trial in which the issue is whether a given event happened, it is sensible to say that one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of future risk. This depends upon an evaluation of the evidence of the appellant's conduct against a broad range of facts with which they may interact. The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof.

30 *Tetra Laval* (ECJ), *supra* note 27, at paras. 39 (last sentence) & 42.

31 *Tetra Laval* (ECJ), *supra* note 27, at para. 44 & *Tetra Laval* (CFI), *supra* note 27, at para. 155.

- the case involves novel economic theories.

Thus, the CFI in *Tetra Laval* stated that in light of the fact that "the anticipated dominant position would emerge only after a certain lapse of time", the Commission analysis needed to be "particularly plausible".[32] This was upheld by the ECJ which commented:

> "[N]ot only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusion drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect."[33]

Similarly, the CFI in *Airtours* noted that:

> "[T]he prospective analysis which the Commission has to carry out in its review of concentrations involving collective dominance calls for close examination in particular of the circumstances which, in each individual case, are relevant for assessing the effects of the concentration on competition in the reference market . . . where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon them to produce **convincing evidence** thereof." (emphasis added)[34]

Notwithstanding these lines of authority and the good reasons why a high level of scrutiny might be appropriate with regards to the interoperability part, the Commission's Decision alleged that the interoperability information was indispensable for competing in the market for workgroup servers, but did not allege that as a result there is no competition in the market. After having found

32 *Tetra Laval* (CFI), *supra* note 27, at para. 162.

33 *Tetra Laval* (ECJ), *supra* note 27.

34 *Airtours*, *supra* note 25, at para. 63.

that up to 40 percent of the market is provided for by competitors, the Commission speculated that without access to this information there would be a gradual elimination of this competitive fringe.

The Court was content with this analysis. It was happy with the manner in which the Commission had dealt with the various pieces of evidence and that the relevant burden had been discharged to the relevant standard. There was no manifest error of assessment even after the Court had considered the evidential foundation at some length. There is, however, an absence of recognition as to why particularly compelling evidence might be required to meet the relevant thresholds and, moreover, why the evidence provided was in fact particularly compelling.

THE DETAILED ANALYSIS, AT LEAST ON OCCASION, CASTS DOUBT ON WHETHER THE HIGH STANDARD OF PROOF IS REALLY MET.

Indeed, the detailed analysis, at least on occasion, casts doubt on whether the high standard of proof is really met. For example, can it be right to say that in a WGS OS market, as defined by the Commission, if Linux is taking market share from Novell but less from Microsoft, then it is likely to be eliminated from the market even though Linux's share is shown to be growing?[35] If seventy managers who use mixed systems are surveyed, and 53 say they want to use more Linux, can it really be dismissed as being irrelevant to the question of whether Linux will inevitably exit the market?[36]

The analysis of the evidence by the Court is of some concern here both for the lack of clarity about the standard of proof being applied and the actual treatment of some parts of the evidence. The matter is of greater importance, however, given the overlapping concern between the relevant burden and standard and the nature of the substantive test being applied. As discussed earlier, at the very least, limbs **(i)** and **(ii)** of the *IMS* test lack clarity or, more exactly, it is unclear what each adds to the other. That lack of clarity can further affect the approach that the Court may bring to bear in analyzing the evidence before it and exercising its review function. As is evident from the earlier analysis, it was important for the Court to apply a rigorous approach to its assessment of whether the Commission had adduced sufficient evidence to support its decision.

## V. Post-Decision Evidence

It does not appear that the Court relied on any post-Decision evidence submitted to it (although not entirely clear from the manner in which the CFI frames its judgment that it entirely ignored post-Decision evidence). However, one

35 Judgment, *supra* note 1, at §603.

36 *Id.* at §§597-600.

point which may arise for further consideration in future cases—particularly in refusal to supply cases where abuse is identified as having already occurred on the basis of a prediction as to the future effect on competition—is the extent to which post-decision evidence might be admitted for consideration. The principal barrier to such material being admitted and considered by the Court is the general rule repeatedly stated by the Community Courts that the legality of a Commission's Decision falls to be assessed on the basis of the elements of fact and law existing at the time when the measure was adopted.

The cases in which the Community Courts have referred to the general principle that where a measure (whether a decision or legislative provision) is under challenge, it must be assessed on the basis of the facts and information available at the time of its adoption, are distinguishable from the *Microsoft*-type situation. In the *Microsoft* decision, the finding of abuse of dominance which has occurred depends on predictions as to future events (i.e., foreclosure or elimination of competition). Certain cases have involved discussion of what the Commission expected would happen after the measure under challenge was introduced, but these have primarily been cases concerning legislative provisions (e.g., *Schroeder*[37] and *Crispoltoni*[38]). There is clearly a material difference between, on the one hand, adopting a set of rules based on past experience and expectations as to the future and, on the other, reaching a specific infringement decision which is predicated on certain matters coming to pass. Many of the other cases concern attempts to adduce new material in circumstances where it had been previously requested (e.g., *GAARM*[39]) or there was a notification procedure under which such material should have been provided (e.g., the state aid cases such as *Belgium v. Commission*,[40] *British Airways and British Midland v. Commission*,[41] and *ESF Elbe v. Commission*[42]). It is clear that where a notification process is in existence, allowing post-decision evidence would wholly undermine that process.

It is notable, however, that even in some of these cases certain consideration of post-decision evidence appears to have been permitted. It appears that post-decision evidence has been admitted and referred to as corroboration in annulment applications even in cases not involving predictive findings (e.g., *Schroeder*,

37 Case 40/72, Schroeder v. Germany, 1973 E.C.R. 125.

38 Cases C-133, 300 & 362/93, Crispoltoni v. FAT, 1994 E.C.R. I-4863.

39 Case 289/83, GAARM v. Commission, 1984 E.C.R. 4295.

40 Case 234/84, Belgium v. Commission, 1986 E.C.R. 2263.

41 Cases T-371 & 394/94, British Airways et al. and British Midland v. Commission, 1998 E.C.R. II-2405 [hereinafter *BA and British Midland*].

42 Case T-6/99, ESF Elbe-Stahlwerke v. Commission, 2001 E.C.R. II-1523.

*Crispoltoni*, and *BA and British Midland*). In particular, it is noted that in *British Midland*, the CFI stated: "As the Court of Justice accepted in *Bremer Vulkan* ... such factors occurring after the date on which the contested decision was adopted may be taken into consideration as illustrating the obligation to state reasons devolving on the Commission."[43] There is no reason why the *Bremer Vulkan* principle should not extend more generally to other heads of challenge apart from reasons challenges. In fact, in *BP v. Commission*,[44] the Commission itself submitted "developments subsequent to the contested decision may be taken into account, at least in order to show that the Commission did not commit a manifest error of assessment ..." In addition, there has been at least one instance where the Court itself has asked for expert evidence which considered post-decision facts and market developments because it was considered it might be helpful in analyzing the decision in question (e.g., *Ahlstrom v. Commission*[45]).

Why should this be of importance here? Given the length of time it takes for the judicial process to grind through, a natural experiment is occurring which may assess the veracity of the initial assumptions made. Was it really the case that at the time of the oral hearing, the best available evidence would suggest that an elimination of competition on the WGS OS market really was occurring as predicted?

It must be recognized, of course, that given the review function of the CFI in appeal cases, there must be care to not impugn the Commission for lacking the benefit of hindsight. It must also be recognized that the admissibility of post-decision evidence can pose a difficult problem in relation to the proper application of review test since there is no decision in respect of that material which can be subject to challenge and review. Nonetheless, to pretend that the real-world outcome must not impinge on the assessment of whether the Commission could (or should) have reached its conclusions as it did when it took its decisions risks maintaining a legal fiction at the expense of an economically rational assessment within the structure of competition law. If competition law is there to ensure that markets operate more effectively, then refusing to consider the real outcome means that courts have to be blind to the best information indicating whether (or not) markets are working. Furthermore, the range of circumstances for which such evidence might be

If competition law is there to ensure that markets operate more effectively, then refusing to consider the real outcome means that courts have to be blind to the best information indicating whether (or not) markets are working.

43 *BA and British Midland*, *supra* note 41, at §275.

44 Case T-11/95, BP Chemicals Limited v. Commission of the European Communities, 1998 E.C.R. II-03235.

45 Case C-98/85 et al., Ahlstrom v. Commission, 1993 E.C.R. I-01307.

admitted need not be unduly wide. After all, this was a case where a finding of previous abuse was based on predictions, not actual events that had occurred.

## VI. Did the Commission "Over-Prove" Its Case?

As noted in the previous section, the Court did not find it necessary to go beyond *IMS* to consider the additional factors which the Commission maintained rendered the non-supply an abuse. As at least one person has observed, the consequence of the CFI judgment is that the Commission, in effect, "over-proved" its case. That is perhaps true; however, it may be that the factors to which the Commission referred—factors which pertained to the circumstances of *Microsoft* and, in particular, the history of dealing with inoperability information—fed into the Court's approach more generally.

In its Decision, the Commission referred to the fact that the refusal to supply did not relate simply to questions of the supply or licensing or IPRs, but to a specific type of valuable information: interoperability information. Interoperability information is specifically designed to enable interoperability (hence the name). Preventing interoperation with other products is generally not economically desirable unless you are trying to leverage market power. It also stressed that Microsoft had an exceptionally high market share and cited the term "superdominance", a term that has been bandied around in competition knitting-circle discussions particularly since *CEWAL*.[46] No one quite knows what it means; but, it sounds really bad. In addition, the Commission was keen to emphasize what it considered the tenuous nature of the IPRs relied on by Microsoft. Finally, it emphasized that in the past Microsoft had given access to interoperability information, and now had ceased to do so.

None of these points were explicitly relied on by the Court. There was, for example, no reference to "superdominance". The distinction between IPRs and other valuable secret commercial information was specifically stated not to be important to the assessment. It is doubtful, however, that these factual issues were really as insignificant as has been suggested. At the very least they provide color and background. They provide the court with a greater degree of confidence in applying precedent (i.e., the prior case law in *IMS*, *Magill*, *Volvo*, and *Bronner*) which, almost all recognize, has flaws.

It is a perennial danger to assume that competition cases can be won simply by sufficiently coherent economic analysis being provided. While good economists (and lawyers), of course, structure their analysis around the available facts, there

46 Advocate General Fennelly talked of a concept of "superdominance" and highlighted the particularly onerous special obligation affecting an undertaking which enjoys a position of overwhelming dominance verging on monopoly. *See* Opinion of Advocate General Fennelly, Joined Cases C-395/96 P & C-396/96 P, Compagnie Maritime Belge and others ("CEWAL") v. Commission, 2000 E.C.R. I-1365, at para. 137 (citing the Commission's Decision, *supra* note 24, at §435, n. 560).

is a temptation to undervalue the impact that a bit of forensic dirt can still have. As one experienced practitioner put it after an extensive discussion of the nature of consumer welfare and its importance in Article 82 analysis, sometimes the "Sniff" test is as important as the SSNIP test.

## VII. Consequences

If it is the case that the judgment is driven by particular facts more than it explicitly recognizes and the legal analysis is far from groundbreaking—and indeed, it may be criticized, then are there any significant consequences that result from the CFI's *Microsoft* judgment? The answer is "yes".

WHILE THE COMMISSION MAY SEEK TO EXPLICATE ITS APPLICATION WITH REVISED GUIDELINES ON ARTICLE 82, THE *IMS* STRUCTURE REMAINS THE BASIS FOR ANALYSIS. WITH THAT COMES AN INEVITABLE UNCERTAINTY AS TO WHEN DOMINANT UNDERTAKINGS WILL BE REQUIRED TO SUPPLY IPRS AND OTHER SENSITIVE INFORMATION.

First, the case law is stuck with the *IMS* test for the moment. While the Commission may seek to explicate its application with revised guidelines on Article 82, the *IMS* structure remains the basis for analysis. With that comes an inevitable uncertainty as to when dominant undertakings will be required to supply IPRs and other sensitive information.

Second, the judgment is talismanic. Its impact is likely to be political in the sense that it is likely to inform the Commission's approach to enforcing Article 82. While there may be claims that, post-judgment, the exercise of its operational discretion is simply "business as usual", it is only necessary to contemplate for a moment the counterfactual of the Commission having lost to see that such an account would ring hollow. The case took on a significance for the Commission that far outweighed the value of the legal precedent; in essence, it enforced competition law against one of the world's largest undertakings—however deep your pockets, you are not out of reach of EC competition law. It also gave it some confidence to act in non-commodity markets.

It is doubtful that we would have seen the range of computing, software, and Internet-related inquiries being pursued with such vigor if *Microsoft* had gone the other way. Nonetheless, if, despite its size and public profile, the *Microsoft* decision does not develop or clarify the case law to any significant degree, it leaves much scope to fight any other infringement decisions.

## VIII. Conclusions

The Commission's *Microsoft* Decision and the CFI judgment upholding it have been said to be a landmark in EC competition law. If so, what sort of landmark is it? Certainly, it exhibits less of the clean-lined functionality and elegance of the London Eye and more of the ill conceived grandness of the Millennium Dome.[47] Whether the architectural blueprint is sketched in the Commission's guidelines or in future case law, the refusal to supply edifice still needs work. ◥

47 Both the London Eye and the Dome were constructed to celebrate the Millennium. The London Eye is the large Ferris wheel on the South Bank of the Thames which enables visitors to get spectacular views over London. The Millennium Dome was constructed in Greenwich in East London and was widely perceived as an extravagant white elephant whose exhibits were ill thought out. After lying empty for some time it has been turned into a large private arena and exhibition space. It recently hosted an extended run of the Spice Girls reunion tour.