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Tying after *Microsoft*: One Step Forward and Two Steps Back?

Kelyn Bacon

In the tying part of the *Microsoft* case, as in the interoperability part of the case, the CFI upheld the Commission's Decision. But it did so on grounds that were confused and inconsistent. For all of the central elements of the case, the CFI appears to have been unable or unwilling to set out a clear statement of principle and apply it properly to the facts. The judgment also sets the CFI in direct conflict with the more economic approach being developed by the Commission in its assessment of Article 82 cases. The only clear signal provided by the CFI in this case is that it will not engage in a reform of Article 82 policy. Fortunately, this does not prevent the Commission from doing so; indeed, the legal uncertainty resulting from this judgment makes clear guidance from the Commission all the more imperative.

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I. Introduction

The second part of the *Microsoft* judgment addresses the integration of Microsoft's media player ("Windows Media Player" or "WMP") with the Windows operating system. WMP had been integrated into Windows since the early 1990s; then in 1999, when Windows 98 Second Edition was released, Microsoft added streaming functionality to WMP, enabling the playback of an audio or video file while it is being downloaded. Microsoft continued to distribute all successive versions of Windows with WMP installed as an integral component of Windows. In its Decision,[1] the Commission considered that the integration of a streaming media player into the Windows operating system constituted an abuse of Microsoft's dominant position in the supply of PC operating systems, by tying two separate products contrary to Article 82 of the EC Treaty. This abuse contributed to the EUR 497 million fine imposed on Microsoft. In addition, the Commission required Microsoft to offer a WMP-less version of Windows, which the Commission later agreed should be called "Windows XP N".

In its appeal to the Court of First Instance (CFI), Microsoft argued that the integration of WMP into Windows simply was not, either conceptually or legally, a tie. Moreover, even if there was (quod non) a tie, the Commission had not sufficiently demonstrated that it had produced any anticompetitive effects by foreclosing competitors. The CFI rejected those arguments and upheld the decision.[2] Microsoft has decided not to appeal the judgment.

This article will discuss the central parts of the Commission's Decision and the CFI's judgment, before analyzing the implications of the judgment from a Community competition policy perspective.

II. The Commission's Decision

Unlike the interoperability part of the Decision, in relation to which the Commission's investigation was initiated following a complaint by Sun Microsystems, the Commission's investigation into WMP was launched on its own initiative.[3] The Commission admitted, however, that the situation did not fit within the model of a "classical tying case".[4] This led to some uncertainty as to the precise legal basis for the Commission's claims. Thus, in its second

1 Commission Decision 2007/53/EC of 24 May 2004, Case COMP/C-3/37.792 — Microsoft, 2007 O.J. (L 32) 23 [hereinafter Decision].

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

3 Judgment, *supra* note 2, at para. 10.

4 Decision, *supra* note 1, at para. 841.

Statement of Objections (SO), the Commission had relied on claims that the integration of WMP infringed Article 82(b) and (d). But in the Decision, the Article 82(b) claim was dropped, and the Commission only nominally pursued a claim based on Article 82(d).[5] Rather, its case was primarily based on a general application of Article 82 and the case law (in particular, the *Hilti* and *Tetra Pak II* cases[6]), from which the Commission derived the following test:

> "Tying prohibited under Article 82 of the Treaty requires the presence of the following elements: (i) the tying and tied goods are two separate products; (ii) the undertaking concerned is dominant in the tying product market; (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (iv) tying forecloses competition."[7]

That test was, the Commission considered, satisfied by the integration of WMP into Windows.

First, according to the Commission, WMP was a separate product from the Windows operating system itself, since media players are available separately on the market. Consumers can and do obtain other media players such as RealPlayer and QuickTime, as well as WMP itself and WMP upgrades, by downloading them from the Internet. The fact that many consumers expect their PC to include a streaming media player does not, the Commission held, make the two an integrated product for the purpose of the tying test.[8]

Since Microsoft had admitted that it was dominant in the supply of PC operating systems, the second condition was also satisfied.[9]

The third condition was also considered to be satisfied since Windows was distributed with WMP pre-installed. Inevitably, therefore, customers did not have a choice to obtain Windows without WMP. The Commission noted that con-

5 The Decision (*id.* at para. 792) articulates this as a basis; but, there was no claim in the decision that the integration of WMP forced Windows customers to accept "supplementary obligations", nor any suggestion that such obligations would have been inconsistent with "commercial usage".

6 Case C-53/92 P, Hilti v. Commission, 1994 E.C.R. I-667 and Case C-333/94 P, Tetra Pak v. Commission, 1996 E.C.R. I-5951.

7 Decision, *supra* note 1, at para. 794.

8 *Id.* at paras. 800-13.

9 *Id.* at 429 & 799.

sumers were not forced either to "purchase" or to "use" WMP, but regarded this as irrelevant.[10]

Finally, the Commission set out a detailed theory of foreclosure, based on the ubiquity of WMP on PCs worldwide as a result of its integration with the Windows operating system.[11] It claimed that distributors of other media players could not replicate this ubiquity by concluding installation agreements with original equipment manufacturers (OEMs), by offering their media players for download on the internet, or by bundling media players with other software. That in turn would be likely to encourage software developers and content providers to give priority to WMP over other media players, which would create network effects leading to the foreclosure of Microsoft's competitors and the creation of barriers to entry for new products.

On that basis, the Commission concluded that Microsoft had infringed Article 82 by the integration of WMP with Windows.

III. The CFI's Judgment

The Court upheld the Commission's case on the tying of WMP. Starting with the tying test itself, the judgment endorsed the four-stage test proposed by the Commission, with two qualifications. The first was the addition of the condition that there must be no objective justification for the conduct in question.[12] The second was a reformulation of the Commission's customer choice test (no choice to obtain the tying product without the tied product) as an orthodox test requiring the imposition of "supplementary obligations" or coercion within Article 82(d),[13] a claim that the Commission had conspicuously eschewed in its Decision.

Applying that test to the facts of the case, the Court confirmed that WMP was to be regarded as a separate product from the Windows operating system, essentially for the reasons given by the Commission in its Decision.[14] The judgment went on to find that the pre-installation of WMP could be regarded as both coercion and the imposition of "supplementary obligations", on the basis that consumers were unable to acquire the Windows operating system without simultaneously acquiring WMP, and that it was not technically possible to uninstall WMP.[15]

10 *Id.* at paras. 826-34.

11 *Id.* at paras. 835 *et seq.*

12 Judgment, *supra* note 2, at para. 869.

13 *Id.* at paras. 864-65.

14 *Id.* at paras. 912-44.

15 *Id.* at paras. 960-75.

On the issue of foreclosure, the Court confirmed that while neither Article 82 as a whole nor Article 82(d) specifically made any reference to a requirement to demonstrate the anticompetitive effect of bundling, "the fact remains that, in principle, conduct will be regarded as abusive only if it is capable of restricting competition."[16] The Commission was therefore correct to examine in detail the extent to which the integration of WMP did foreclose competitors. In its application of that test, however, the Court again went considerably further than the Decision. It was sufficient, the Court concluded, that the Commission demonstrated that the ubiquity of WMP resulting from its distribution with Windows could not be counterbalanced by other methods of distributing media players. That allowed Microsoft to obtain "an unparalleled advantage with respect to the distribution of its product and to ensure the ubiquity of Windows Media Player on client PCs throughout the world."[17] In turn, that provided a disincentive for users to make use of third-party media players and for OEMs to pre-install such players on client PCs. This, the Court said, "inevitably had significant consequences for the structure of competition."[18] Nevertheless, the judgment went on to endorse the other elements of the Commission's analysis of foreclosure in any event, concluding that the Commission had sufficient grounds to state that there was a "reasonable likelihood that tying Windows and Windows Media Player would lead to a lessening of competition so that the maintenance of an effective competitive structure would not be ensured in the foreseeable future."[19] This conclusion was not, according to the CFI, invalidated by the fact that, several years after the beginning of the abuse, a number of third-party media players were still present on the market.[20] Nor were the anticompetitive effects of the tying objectively justified by the beneficial effects of the uniform presence of media functionality in Windows, such as the provision of a stable platform for software developers and web designers.[21]

IV. Analysis

The analysis that follows considers in turn each of the central planks of the Court's judgment on tying: the separate products test, the coercion test, and the foreclosure requirement. It will show that, on each of these issues, the approach

16 *Id.* at para. 867.

17 *Id.* at para. 1054.

18 *Id.*

19 *Id.* at para. 1089.

20 *Id.*

21 *Id.* at para. 1151.

adopted by the Court is problematic and calls into question the rigor of its review of controversial decisions of the Commission.

A. THE SEPARATE PRODUCTS TEST

At a semantic level it is clear that unless products are separate, they cannot be "tied" to one another. This in itself, however, does not give any guidance as to when products should be regarded as "separate" for the purposes of assessing tying under Article 82. This question was one on which Microsoft and the Commission were fundamentally divided. It is disappointing that the Court addressed at length the factual matters in favor of the Commission's conclusion, without giving any principled answer to the prior question of why the Commission was, as a matter of law, correct in its test.

IT IS DISAPPOINTING THAT THE COURT ADDRESSED AT LENGTH THE FACTUAL MATTERS IN FAVOR OF THE COMMISSION'S CONCLUSION, WITHOUT GIVING ANY PRINCIPLED ANSWER TO THE PRIOR QUESTION OF WHY THE COMMISSION WAS, AS A MATTER OF LAW, CORRECT IN ITS TEST.

Both Microsoft and the Commission were in agreement that the distinctness of products for the purpose of a tying analysis under Article 82 EC had to be assessed by reference to customer demand. The parties disagreed, however, as to what was the relevant customer demand. The Commission took the position that the relevant question was the existence of independent demand for the tied product, in this case WMP or media players in general. By contrast, Microsoft argued that the relevant question in this case was rather whether there was demand for operating systems to be offered without media functionality. Put another way, Microsoft's proposed test was whether there was demand for the products to be "untied".

In order to determine which of the two interpretations is correct, it is necessary to consider the underlying rationale of the separate products test. That rationale has never been discussed in the tying cases which have come before the European Court. It has however, been considered by the U.S. courts, most pertinently in the *Microsoft III* judgment of the U.S. Court of Appeals for the DC Circuit.[22] There, the Court recognized that not all ties are detrimental, and that customers could benefit from tying (e.g., through lower distribution and transaction costs). The Court cited the integration of mathematical co-processors and memory into micro-processors chips, and the inclusion of spell checkers in word processors as examples from the computer industry.

Given that tying may have potentially positive as well as negative effects, the consumer demand test, in the judgment of the DC Circuit Court, is a "rough proxy for whether a tying arrangement may, on balance, be welfare enhancing" (i.e., whether the customer benefits from tying outweigh the customer restrictions):

22 United States v. Microsoft Corp., 253 F.3d 34, 346 (D.C. Cir 2001) [hereinafter *Microsoft III*].

> "In the abstract, of course, there is always direct separate demand for products: assuming choice is available at zero cost, consumers will prefer it to no choice. Only when the efficiencies from bundling are dominated by the benefits to choice for enough consumers, however, will we actually observe consumers making independent purchases. In other words, perceptible separate demand is inversely proportional to net efficiencies."[23]

This proxy is intuitively convincing. If, due to efficiencies, two components can be offered either at a lower price (e.g., as a result of economies of scale) or at better quality (e.g., due to integration), and the restrictions on customer choice are not severe (e.g., because bundling does not prevent the use of alternative components), then one would expect all, or almost all, consumers to buy the components as a bundle rather than separately. By contrast, if the efficiencies from bundling are limited and choice is valued highly, then a significant number of consumers can be expected to buy the components individually. This rationale indicates that the critical question is whether consumers only demand the alleged tying product as a bundle, or whether there is material separate demand for the components.

THE CRITICAL QUESTION IS WHETHER CONSUMERS ONLY DEMAND THE ALLEGED TYING PRODUCT AS A BUNDLE, OR WHETHER THERE IS MATERIAL SEPARATE DEMAND FOR THE COMPONENTS.

In some circumstances, it is irrelevant whether the separate demand test is phrased in terms of the demand for the two products to be "untied", or simply framed in terms of the demand for the alleged tied product, since both questions lead to the same outcome. This is the case in a tie between consumables and primary products, and explains why the CFI in *Hilti* identified nail guns and nails as separate products on the basis that "there have been independent producers ... making nails intended for use in nail guns"[24]; hence, that there was an independent demand for the tied product, nails. If there is demand for nails produced by independent producers, it follows inexorably that there is also demand more generally for the two products to be "untied".

But the facts of the present case demonstrate that, in some cases, the two questions may have different answers. The particular characteristics of media players are that:

23 *Id*. at 383-84.

24 Case T-30/89, Hilti v. Commission, 1991 E.C.R. II-1439, at para. 67.

(a) they are typically made available for free;

(b) they are relatively easy to download;

(c) they require a minimal amount of memory on a PC; and

(d) they are imperfect substitutes both in terms of features as well as formats.

As a result of these features, many customers have installed and use more than one media player. This in turn means that while there is undoubtedly separate demand for media players themselves, that demand would still exist even if most or all customers wanted WMP to be bundled with Windows. In such a case, the separate products test only corresponds with its economic rationale (as a proxy for the net welfare effect of the arrangement) only if it is asked whether there is customer demand for the "untied" product. The Commission's version of the test, focusing only on the demand for the tied product, carries the risk of producing what scientists call a "false positive".

The CFI's analysis of the separate products test did not, in this author's view, deal adequately with these problems. The Court's starting point was the assertion that the Commission's test was supported by the *Tetra Pak* and *Hilti* cases.[25] But that begs the question, since the CFI did not address the central issue of whether those cases (which both involved ties of consumables) had comparable features to the present case.

The CFI's second argument was that Microsoft's argument "amounts to contending that complementary products cannot constitute separate products for the purposes of Article 82 EC, which is contrary to the Community case-law on bundling." In support, the Court commented that in *Hilti* it could be assumed that there was no demand for a nail gun magazine without nails, since a magazine without nails is useless, but that this did not prevent the European Court there from concluding that the two products belonged to separate markets.[26]

> THE QUESTION OF WHETHER THERE IS DEMAND FOR A SPECIFIC PRODUCT TO BE MADE AVAILABLE IN "UNTIED" FORM DOES *NOT* LEAD TO THE RESULT THAT TWO COMPLEMENTARY PRODUCTS ARE INEVITABLY TO BE REGARDED AS A SINGLE PRODUCT.

Unfortunately this too misses the point. The question of whether there is demand for a specific product to be made available in "untied" form does *not* lead to the result that two complementary products are inevitably to be regarded as a single product. That is illustrated by the *Hilti* example given by the CFI itself; in that case, while users obviously

25 Judgment, *supra* note 2, at para. 920.

26 *Id.* at para. 921.

needed to obtain both cartridge strips and nails to use together in their nail guns, there was a demand for cartridge strips to be sold without the corresponding nails (i.e., for the two products to be "untied"). Thus, although the products were complementary, they were clearly separate products.[27] It cannot, however, be assumed that the same is true of Windows and WMP. Ultimately, it should have been a matter of evidence demonstrating the demand for Windows and WMP to be distributed separately rather than together. No such evidence was provided, since the Commission did not regard this as a relevant question.[28]

The Court's third and final argument on the test was a claim that in any event there was demand for client PC operating systems to be provided without streaming media players, for example by companies afraid that their staff might use them for non-work-related purposes, which the Court claimed was not disputed by Microsoft.[29] This is a surprisingly uncritical acceptance of a single-sentence assertion by the Commission in the Decision,[30] which Microsoft did *not* accept; on the contrary, it pointed out in its pleadings that the claim was simply conjecture on the part of the Commission, unsupported by any evidence whatsoever.

The comments of the Court represent little more than a recitation of the arguments of the Commission, with little or no critical analysis. They suggest that the Court was unable or unwilling to articulate a coherent rationale for its approach. That is unfortunate, and Microsoft (and other undertakings in a similar position) would be justified in expecting better. In an industry where product integration is the norm, and where there is increasing consumer demand for multifunctional equipment, the Court's judgment sets an uncertain precedent for undertakings seeking to satisfy that demand.

B. THE COERCION TEST

Having established that two products are properly to be regarded as separate, the central objection to a tie is that customers are coerced into purchasing the sec-

27 One can think of many similar examples: wine and wineglasses or a chocolate fountain and chocolate, to cite a few close to the heart of this author.

28 It follows that the CFI's comments that customers might wish to obtain the products together, but from different sources, were also pure speculation (Judgment, *supra* note 2, at paras. 922-23). Had the Commission asked the right question, it might conceivably have found that end users and OEMs wish to obtain Windows unbundled from WMP, in order that a different media player can be pre-installed (though this seems unlikely, given the negligible sales of Windows XP N). On the other hand, it might have found that the preponderant demand was for the products to be bundled, since it saves everyone the bother of installing WMP, which most users would end up downloading anyway. The point is, however, that the decision simply did not reach a conclusion on this issue one way or the other.

29 Judgment, *supra* note 2, at para. 924.

30 *See* Decision, *supra* note 1, at para. 807 & n. 936 which simply cites in support the fact that "Organisations routinely choose the applications they want installed on their desktops."

ond product from the dominant supplier of the first product, when they would prefer to obtain the second product elsewhere (or in some cases not at all). In the *Hilti* case, the producers of nail guns attempted to force users to purchase only their own branded nails and cartridges for use in the guns. In *Tetra Pak II*, the purchases of filling machines were not able to obtain supplies of packaging from any source other than Tetra Pak. In both cases, therefore, the tie was prohibited because of the coercion of the customers, forcing them to buy from Hilti and Tetra Pak certain consumables that they would or might have wanted to source from a competing supplier.

That objection is reflected in the U.S. tying standard applied in *Microsoft III*, referred to previously, which requires that "the defendant affords consumers no choice but to purchase the tied product from it."[31] This test is thus explicitly based on the notion of a forced purchase, and is central to the U.S. interpretation of the tying test. As the U.S. Supreme Court said in the seminal case of *Jefferson Parish*:

> "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer did not want at all, or might have preferred to purchase elsewhere on different terms."[32]

In a similar vein, the U.S. Supreme Court in the earlier case of *Northern Pacific Railway* had defined a tying arrangement as:

> "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[33]

According to the Court, such arrangements:

31 *Microsoft III*, *supra* note 22, at 381.

32 Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2 (1984).

33 Northern Pac. R. Co. v. United States, 356 U.S. 1, 518 (1958)

> "deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products."[34]

The reasoning of the U.S. Court in these cases is consistent with the judgments in *Hilti* and *Tetra Pak*, the key feature being that the forced purchase of the product from the dominant undertaking deprives the customer of the choice to purchase elsewhere from a competing supplier.

By contrast, the Commission's different test of whether the dominant undertaking "does not give customers a choice to obtain the tying product without the tied product" (a definition subsequently repeated in the Commission's Article 82 discussion paper[35]) was entirely anodyne, containing no requirement of either a forced purchase or coercion of any sort. This test would be satisfied, for example, if WMP did not come pre-installed as part of Windows, but was simply provided with Windows in every case for the customer to install if desired.[36]

The CFI evidently recognized the problems with this approach, and noticeably did not apply the Commission's test. Instead, in its view, the test was indeed one of coercion or the imposition of supplementary obligations within the meaning of Article 82(d).[37] Therefore prima facie, its judgment realigns the tying test with the U.S. jurisprudence and the European Court's earlier case law and is consistent with the basic rationale of a tying prohibition.

The Court's application of this test to the facts of the case is, however, more questionable. As noted above, the CFI's ruling was that the test was satisfied by the fact that consumers buying a Windows operating system automatically obtained WMP, taken together with the fact that WMP could not technically be

34 *Id.*

35 The Commission's Article 82 discussion paper asserts: "Typically tying involves the dominant undertaking by contract depriving its customers of the choice to obtain the tying product without the tied product." *See* EUROPEAN COMMISSION, DG COMPETITION DISCUSSION PAPER ON THE APPLICATION OF ARTICLE 82 OF THE TREATY TO EXCLUSIONARY ABUSES (Dec. 2005) [hereinafter Article 82 discussion paper], at para. 182, *available at* http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf.

36 To take another example familiar to readers of British weekend newspapers, the inclusion with the newspaper of a free CD or DVD would also, on this definition, be regarded conceptually as a "tie".

37 *See*, in particular, Judgment, *supra* note 2, at paras. 961-63 & 975.

uninstalled. Both of these points are correct as a matter of fact. But for the CFI to draw from those facts the conclusion that customers were in some way coerced or required to accept supplementary obligations, in circumstances where the pre-installation of WMP constituted neither a forced purchase,[38] nor a forced use of the product, and did not prevent OEMs or end users from installing and using other media players in preference, is a triumph of form over substance. The Court's true assessment of the situation is betrayed by its comment, in the same part of the judgment, that "OEMs are deterred from pre-installing a second streaming media player on client PCs and … consumers have an incentive to use Windows Media Player at the expense of competing media players."[39] The integration of WMP might well have acted as an OEM "deterrent" or a consumer "incentive", but neither effect should be regarded as coercion or the imposition of supplementary obligations.

THE INTEGRATION OF WMP MIGHT WELL HAVE ACTED AS AN OEM "DETERRENT" OR A CONSUMER "INCENTIVE", BUT NEITHER EFFECT SHOULD BE REGARDED AS COERCION OR THE IMPOSITION OF SUPPLEMENTARY OBLIGATIONS.

It is difficult to avoid the conclusion that on this issue at least the CFI was (to invert the usual idiom) "willing to strike, but afraid to wound." The Court apparently wished to set a precedent underlining that the tie of two products is only to be regarded as abusive where the "supplementary obligations" condition of Article 82(d) is satisfied; at the same time, however, it seems to have been very careful not to overturn the decision on this point.

C. FORECLOSURE

In light of the increasing discussion, including within the Commission itself, as to the application of a more rigorous economic approach to the interpretation of Article 82,[40] it is encouraging that the Court has reiterated that conduct will only be regarded as abusive where it is capable of restricting competition, and appears to have endorsed the Commission's application of a foreclosure test which takes account of the "actual effects" that the conduct has had on the market.[41]

As with the coercion test, however, the difficulties lie in the Court's application of the test on the facts, for which the Court appears to have relied very heavily on a structural standard. It was sufficient, the CFI thought, that the

38 The suggestion (*id.* at para 968) that the price of WMP is included in the total price of the Windows operating system ignores the fact that the competitive price of WMP is zero, since both WMP and competing media players are widely available to download for free.

39 Judgment, *supra* note 2, at para. 971.

40 In particular in the context of the Article 82 discussion paper, *supra* note 35.

41 Judgment, *supra* note 2, at paras. 867-68.

Commission demonstrated that the integration of WMP "inevitably had significant consequences for the structure of competition," by allowing WMP to benefit from the ubiquity of Windows on PCs throughout the world.[42] According to the CFI, it was not necessary to go further and show that this did in fact result in the elimination or restriction of competition, as the Commission had done in its examination of the network effects said to result from Microsoft's conduct.

The CFI thus seems to be saying that the use by Microsoft of a particularly effective distribution system for its media player in itself constituted foreclosure, whether or not the evidence showed an overall reduction of competition on the media player market (e.g., by a reduction in the number of media players available or a trend towards exclusive use of WMP). Indeed, the Court expressly commented that it was common ground that the number of media players and the extent of the use of multiple players are continually increasing. But this did not, in the Court's view, demonstrate the absence of foreclosure.[43]

The Court's judgment on this issue gives rise to a number of questions. First, the ruling is at odds not only with the methodology of the Commission in its original decision, but also the approach adopted by the Commission in its Article 82 discussion paper. In the latter, the Commission emphasizes that the *Hoffmann-La Roche* definition of exclusionary abuse within Article 82 requires a "likely market distorting foreclosure effect" to be established. It goes on to say that:

> "By foreclosure is meant that actual or potential competitors are completely or partially denied profitable access to a market. ... Foreclosure is said to be market distorting if it likely hinders the maintenance of the degree of competition still existing in the market or the growth of that competition and thus have as a likely effect that prices will increase or remain at a supra-competitive level."[44]

Whatever Microsoft's criticisms of the Commission's own foreclosure assessment, it is clear that that assessment was designed to satisfy a test of foreclosure akin to the test articulated in the discussion paper. The judgment of the CFI, however, does not even purport to follow this approach. It is unclear where this leaves the Commission's Article 82 policy reform proposals, for which the eco-

42 *Id.* at para. 1054.

43 *Id.* at para. 1055.

44 Article 82 discussion paper, *supra* note 35, at para. 58.

nomic analysis of foreclosure proposed in the discussion paper was a central tenet. The legal formalism of the CFI's approach in this case in respect of Article 82 is also inconsistent with the European Court's own emphasis on a more economic approach to the assessment of anticompetitive effects in the fields of Article 81 and merger control,[45] prompting the question of why Article 82 should be treated differently.

From a purely practical perspective, the CFI's judgment is also likely to create real problems for dominant undertakings. Many such undertakings will benefit from particular advantages which may make their products or services particularly attractive to, or more likely to be used by, consumers. That in itself should not imply foreclosure. Rather, the real question should be whether the use (or abuse) of those advantages leads in concrete terms to a lessening of competition on the market. For those advising undertakings in this situation following *Microsoft*, there is no longer merely the (already difficult) question of considering whether their competitive conduct falls the right side of the line; rather, there is a real question of what the line even looks like.

V. Concluding Remarks

Some critics of the *Microsoft* judgment have pointed in mitigation to the unusual facts of the case and the constitution of the Court delivering the judgment. Not many dominant undertakings, it is said, enjoy the ubiquity of the Windows operating system and the competitive advantages that entails. Moreover, it is pointed out, one cannot expect ground-breaking judgments from a Grand Chamber of 13 judges from very different legal traditions. In this author's view, neither of these factors is a good excuse. The size, strength, and market power of an undertaking are all relevant factors in the economic assessment of an alleged infringement of Article 82; however, they should not lead to the adoption of a different or lower threshold for the establishment of such an infringement. And if the Grand Chamber of the CFI is unable to deliver a coherent and principled judgment in an important case, serious doubts must be raised as to the usefulness of such a constitution.

> THE *MICROSOFT* RULING SHOULD BE SEEN FOR WHAT IT IS: A CLEAR SIGNAL THAT THE CFI IS ITSELF UNWILLING TO ACT AS A CATALYST FOR THE REFORM OF ARTICLE 82 POLICY.

The *Microsoft* ruling should therefore be seen, unexcused, for what it is: a clear signal that the CFI is itself unwilling to act as a catalyst for the reform of Article 82 policy. But that does not prevent reform from taking place, as it is doing,

45 *See, e.g.,* Case T-342/99, Airtours plc v. Commission, 2002 E.C.R. II-2585; Case C-12/03 P, Commission v. Tetra Laval, 2005 E.C.R. I-987; Case T-210/01, General Electric Company v. Commission, 2005 E.C.R. II-5575; Case T-328/03, O2 (Germany) v. Commission, 2006 E.C.R. II-1231; Case T-168/01, GlaxoSmithKline v. Commission (not yet reported) (judgment of Sep. 27, 2006).

through the Commission's own development of its policy in the prosecution of Article 82 cases. In that respect, there is as yet no sign that this judgment (or the equally controversial judgment of the ECJ in *British Airways* earlier last year[46]) has dissuaded the Commission from an economic analysis in its investigation of ongoing Article 82 cases. In fact, if anything, the *Microsoft* judgment demonstrates the need for an ongoing debate as to the direction of the Commission's enforcement policy in this area. It is to be hoped that the legal uncertainty resulting from the ruling will at least serve to reinvigorate that reform process.

46 Case C-95/04 P, British Airways v. Commission (not yet reported) (judgment of Mar. 15, 2007).