

Case T-201/04

Microsoft Corp.

v

Commission of the European Communities

(Competition — Abuse of dominant position — Client PC operating systems — Work group server operating systems — Streaming media players — Decision finding infringements of Article 82 EC — Refusal of the dominant undertaking to supply and authorise the use of interoperability information — Supply by the dominant undertaking of its client PC operating system conditional on the simultaneous acquisition of its media player — Remedies — Appointment of an independent monitoring trustee — Fine — Determination of the amount — Proportionality)

Judgment of the Court of First Instance (Grand Chamber), 17 September 2007 II - 3619

Summary of the Judgment

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2. *Procedure — Application initiating proceedings — Reply — Formal requirements*
(*Statute of the Court of Justice, Art. 21; Rules of Procedure of the Court of First Instance, Art. 44(1)(c)*)

3. *Competition — Dominant position — Abuse — Definition — Obligations on the dominant undertaking*
(*Art. 82 EC*)

4. *Competition — Dominant position — Abuse — Definition — Obligations on the dominant undertaking*
(*Art. 82 EC*)

5. *Competition — Dominant position — Abuse — Refusal to grant a licence for the use of a product covered by intellectual property rights*
(*Art. 82 EC*)

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(*Art. 82 EC; Commission Notice 97/C 372/03*)

9. *Competition — Dominant position — Abuse — Leveraging*
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(*Art. 82 EC*)

11. *Competition — Dominant position — Abuse — Refusal to grant a licence for the use of a product covered by intellectual property rights*
(Art. 82 EC)

12. *Competition — Dominant position — Abuse — Refusal to grant a licence for the use of a product covered by intellectual property rights*
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14. *Competition — Dominant position — Abuse — Refusal to grant a licence for the use of a product covered by intellectual property rights*
(Art. 82 EC)

15. *Competition — Dominant position — Abuse — Tying*
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16. *Competition — Dominant position — Abuse — Tying*
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17. *Competition — Dominant position — Abuse — Tying*
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20. *Actions for annulment — Pleas in law — Not possible to rely on WTO agreements to challenge the lawfulness of a Community act — Exceptions*
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21. *Competition — Administrative procedure — Commission decision finding an infringement — Remedies*
(Art. 82 EC; Council Regulation No 17, Arts 3, 14 and 16)
22. *Competition — Fines — Amount — Determination — Criteria*
(Art. 82 EC)

1. Although as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission is necessarily limited to checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.

However, while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it.

(see paras 87-89, 379, 482, 564)

Likewise, in so far as a Commission decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's.

2. Under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of

the Rules of Procedure of the Court of First Instance, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. According to consistent case-law it is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application.

Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function.

The Court may take into account only those documents annexed to the application which support or supplement matters of fact or of law expressly set out in the body of the procedural documents by the applicant or defendant.

That interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance also applies to the conditions for admissibility of a reply, which according to Article 47(1) of the Rules of Procedure is intended to supplement the application.

(see paras 94, 95, 99, 483)

3. Article 82 EC deals with the conduct of one or more economic operators involving the abuse of a position of economic strength which enables the operator concerned to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors, its customers and, ultimately, consumers.

Furthermore, whilst the finding of a dominant position does not in itself imply any criticism of the undertaking concerned, that undertaking has a spe-

cial responsibility, irrespective of the causes of that position, not to allow its conduct to impair genuine undistorted competition on the common market.

market. Should it be established that the existing degree of interoperability does not enable those developers to remain viably on the market, it follows that the maintenance of effective competition on that market is being hindered.

(see para. 229)

4. In proceedings brought on the basis of Article 82 EC, the Commission may define the concept of 'interoperability' as the capacity for two software products to exchange information and to use that information mutually in order to allow each of those software products to function in all the ways envisaged, without being bound by the definition given by Directive 91/250 on the legal protection of computer programs, from which it does not depart.

In requiring, by way of remedy, that an undertaking in a dominant position disclose the interoperability information, the Commission refers to a detailed technical description of certain rules of interconnection and interaction that can be used within the work group networks to deliver work group services. That description does not extend to the way in which the undertaking implements those rules, in particular, to the internal structure or to the source code of its products.

In that context, the Commission may determine the 'degree of interoperability' of software products by reference to what, in its view, is necessary, in the light of Article 82 EC, in order to enable developers of work group server operating systems competing with the dominant developer to remain viably on the

The degree of interoperability thus required by the Commission enables competing operating systems to interoperate with the dominant undertaking's domain architecture on an equal footing in order to be able to compete viably with the latter's operating systems. It does not entail making competitors'

products work in exactly the same way as its own and does not enable its competitors to clone or reproduce its products or certain features of those products.

(see paras 192, 206, 225, 227, 228, 230, 234, 236-238, 241, 259, 374, 375)

most favourable to the accused dominant undertaking. In such a situation, it is therefore necessary to ascertain whether the criteria which determine when an undertaking in a dominant position can be required to grant a licence relating to intellectual property rights are satisfied.

(see paras 283, 284, 290)

5. In a decision penalising the refusal by a dominant undertaking to provide competing undertakings with interoperability information of software products, the Commission may refrain from making a finding on the issue whether the dominant undertaking's communication protocols or the specifications of those protocols are covered by intellectual property rights and assume that the undertaking is able to rely on such rights. Thus the Commission may proceed on the premiss that the refusal to supply interoperability information might not be a mere refusal to supply a product or a service indispensable to the exercise of a specific activity but a refusal to license intellectual property rights. The Commission thus chooses the strictest legal test and therefore the one
6. Although undertakings are, as a rule, free to choose their business partners, in certain circumstances a refusal to supply on the part of a dominant undertaking may constitute an abuse of a dominant position within the meaning of Article 82 EC unless it is objectively justified.

The refusal by an undertaking holding a dominant position to license a third party to use a product covered by an intellectual property right cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC.

It is only in exceptional circumstances that the exercise of the exclusive right by the owner of the intellectual property right may give rise to such an abuse and that, accordingly, it is permissible, in the public interest in maintaining effective competition on the market, to encroach upon the exclusive right of the holder of the intellectual property right by requiring him to grant licences to third parties seeking to enter or remain on that market.

The following circumstances, in particular, must be considered to be exceptional: in the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; in the second place, the refusal is of such a kind as to exclude any effective competition on that neighbouring market; in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand.

Once it is established that such circumstances are present, the refusal by the holder of a dominant position to grant a licence may infringe Article 82 EC unless the refusal is objectively justified.

Finally, in order that a refusal to give access to a product or service indispensable to the exercise of a particular

activity may be considered abusive, it is necessary to distinguish two markets, namely, a market constituted by that product or service and on which the undertaking refusing to supply holds a dominant position and a neighbouring market on which the product or service is used in the manufacture of another product or for the supply of another service. The fact that the indispensable product or service is not marketed separately does not exclude from the outset the possibility of identifying a separate market. It is sufficient that a potential market or even a hypothetical market can be identified. Such is the case where the products or services are indispensable to the conduct of a particular business activity and where there is an actual demand for them on the part of undertakings which seek to carry on that business. It is decisive that two different stages of production are identified and that they are interconnected in that the upstream product is indispensable for supply of the downstream product.

(see paras 319, 331-335, 691, 1336)

7. For the purposes of application of Article 82 EC to the refusal of a dominant undertaking to grant a licence in the market for work group server

operating systems, the 'interoperability information' must be regarded as being 'indispensable', *inter alia* because the interoperability is of significant competitive importance in that market, even if their lack of availability leads to competition being eliminated only gradually and not immediately.

With respect to operating systems, the Commission may correctly find that there is a market for work group server operating systems which is separate from the market for client PC operating systems.

(see paras 484, 485, 531)

(see paras 381, 428)

8. As stated in the Commission Notice on the definition of the relevant market for the purposes of Community competition law, '[a] relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. That means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

9. Where, in the context of proceedings relating to the application of Article 82 EC, the Commission takes issue with an undertaking for having used, by leveraging, its quasi-monopoly on a product market to influence a second product market, the abusive conduct alleged against the undertaking has its origin in its dominant position on the first product market. Thus, even if the Commission were wrongly to have considered that the undertaking was in a dominant position on the second product market, that could not of itself suffice to support a finding that the Commission was wrong to conclude that there had been an abuse of a dominant position.

(see para. 559)

10. For the purposes of application of Article 82 EC, the expressions 'risk of elimination of competition' and 'likely to eliminate competition' are used without distinction by the Community judicature to reflect the same idea, namely that Article 82 EC does not apply only from the time when there is no more, or practically no more, competition on the market. If the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC, that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market.

In the case of a refusal by a dominant undertaking to grant a licence on the work group server operating systems market, the Commission has all the more reason to apply Article 82 EC before the elimination of competition has become a reality because that market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse.

It is not necessary to demonstrate that all competition on the market would be

eliminated. What matters, for the purpose of establishing an infringement of Article 82 EC, is that the refusal at issue is liable to, or is likely to, eliminate all effective competition on the market. It must be made clear that the fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition.

(see paras 561-563, 593)

11. The fact that the dominant undertaking's conduct prevents the appearance of a new product on the market falls to be considered under Article 82(b) EC, which prohibits abusive practices which consist in 'limiting production, markets or technical developments to the ... prejudice of consumers'.

The circumstance relating to the appearance of a new product cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers within the

meaning of Article 82(b) EC. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.

arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.

Article 82 EC covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure.

The mere fact that a product is covered by intellectual property rights cannot constitute objective justification to refuse to grant a licence. If the mere fact of holding intellectual property rights could in itself constitute objective justification for such a refusal, the exception established by the case-law could never apply.

(see paras 643, 647, 664)

It is for the dominant undertaking which maintains that the granting of access to third parties to technology covered by intellectual property rights would have a significant negative impact on its incentives to innovate to support it with arguments and evidence.

12. Although the burden of proof of the existence of the circumstances that constitute an infringement of Article 82 EC is borne by the Commission, it is for the dominant undertaking concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with arguments and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the

(see paras 688-690, 697, 1144)

13. The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those

agreements. That principle of consistent interpretation applies only where an international agreement prevails over the provision of Community law concerned. Since an international agreement, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), does not prevail over primary Community law, that principle does not apply where, as here, the provision which falls to be interpreted is Article 82 EC.

Moreover, in a situation where the Commission is required to apply Article 82 EC to the factual and legal circumstances of a particular case and in which it must be presumed, in the absence of proof to the contrary, that the conclusions which it reached in that regard are the only ones that it could validly adopt, the Commission is not, strictly speaking, required to make a choice between several possible constructions of a text of Community law.

(see paras 797-799)

distribute work group server operating systems and to allow them to use that information 'subject to the application of reasonable and non-discriminatory conditions', there is nothing to prevent the undertaking from giving access to that information through a licence if the information relates to a technology covered by a patent or by another form of intellectual property right.

The fact that there is a requirement that the conditions to which any licences are subject be reasonable and non-discriminatory does not mean that the dominant undertaking must impose the same conditions on every undertaking seeking such licences. It is not precluded that the conditions may be adapted to the specific situation of each of those undertakings and vary, for example, according to the extent of the information to which they seek access or the type of products in which they intend to implement the information.

(see paras 808, 810, 811)

14. Where the Commission is penalising infringement of Article 82 EC and orders an undertaking in a dominant position to disclose 'interoperability information' to undertakings wishing to develop and
15. In order to determine whether the conduct of the dominant undertaking constitutes abusive tying, the Commission is entitled to base its finding on the

following factors: first, the tying and tied products are two separate products; second, the undertaking concerned is dominant in the market for the tying product; third, the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and fourth, the practice in question forecloses competition. The Commission also takes into account the fact that the tying is not objectively justified.

bundling, the Commission is entitled to rely on Article 82 EC in its entirety and not exclusively on Article 82(d) EC.

(see paras 842, 843, 852, 859-861, 1151, 1152)

16. The distinctness of products for the purpose of an analysis under Article 82 EC has to be assessed by reference to customer demand. In the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abusive tying.

Such justification may not be inferred from the advantages arising from the fact that tying ensures a uniform presence of the product on the market. Such a result cannot be allowed to be imposed unilaterally by an undertaking in a dominant position by means of tying.

Complementary products can constitute separate products for the purposes of Article 82 EC.

The fact that there are on the market independent companies specialising in the manufacture and sale of the tied product constitutes serious evidence of the existence of a separate market for that product.

Since the list of abusive practices set out in the second paragraph of Article 82 EC is not exhaustive, bundling by an undertaking in a dominant position may also infringe Article 82 EC where it does not correspond to the example given in Article 82(d) EC. Accordingly, in order to establish the existence of abusive

The fact that tying takes the form of the technical integration of one product in

another does not have the consequence that, for the purpose of assessing its impact on the market, that integration cannot be qualified as the bundling of two separate products.

Moreover, even when the tying of two products is consistent with commercial usage or when there is a natural link between the two products in question, it may none the less constitute abuse within the meaning of Article 82 EC, unless it is objectively justified.

Client PC operating systems, on the one hand, and streaming media players, on the other hand, constitute two separate products for the purposes of Article 82 EC, in the light of the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also the dominant undertaking's commercial practice on the market for client PC operating systems.

(see paras 917, 918, 921, 922, 925, 927, 933, 935, 942, 1341)

17. It does not follow from either Article 82(d) EC or the case-law that consumers must necessarily pay a certain price for the tied product in order for it to be concluded that they are subject to supplementary obligations within the meaning of that provision.

Moreover, neither Article 82(d) EC nor the case-law on bundling requires that consumers must be forced to use the tied product or prevented from using the same product supplied by a competitor of the dominant undertaking in order for the condition that the conclusion of contracts is made subject to acceptance of supplementary obligations to be capable of being regarded as satisfied.

(see paras 969, 970)

18. While it is true that neither Article 82(d) EC nor, more generally, Article 82 EC contains any reference to the anti-competitive effect of bundling, the fact remains that, in principle, conduct will

be regarded as abusive only if it is capable of restricting competition.

For the purposes of applying Article 82 EC to bundling, although the Commission may examine the actual effects which tying has had on the market and the way in which that market is likely to evolve, rather than merely considering — as it normally does in cases of abusive tying — that the tying has by its nature a foreclosure effect, does not mean that it adopted a new legal theory.

The fact that an undertaking in a dominant position in the market for client PC operating systems bundles the streaming media player with the client PC operating system — the operating system pre-installed on the great majority of client PCs sold throughout the world — without the possibility of removing that media player from the operating system, allows the media player to benefit from the ubiquity of that operating system on client PCs, which cannot be counterbalanced by the other methods of distributing media players. Thus, owing to the bundling, the media player enjoys an unparalleled presence on client PCs throughout the world, because it thereby allows that media player automatically to achieve a

level of market penetration corresponding to that of the dominant undertaking's client PC operating system, without having to compete on the merits with competing products. Such a tied sale is moreover capable of having an appreciable impact on content providers and software designers, since the market for streaming media players is characterised by significant indirect network effects.

(see paras 867, 1035, 1036, 1038, 1058, 1060, 1061)

19. Article 82 EC is intended to prohibit a dominant undertaking from strengthening its position by recourse to means other than those based on competition on the merits.

(see para. 1070)

20. Given their nature and structure, agreements of the World Trade Organisation

(WTO) are not in principle among the rules in the light of which the Community judicature is to review the legality of measures adopted by the Community institutions. It is only where the Community has intended to implement a particular obligation assumed under the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Community judicature must review the legality of the Community measure in question in the light of the WTO rules.

21. When the Commission finds in a decision that an undertaking has infringed Article 82 EC, that undertaking is required to take, without delay, all the measures necessary to comply with that provision, even in the absence of specific measures prescribed by the Commission in that decision. Where remedies are provided for in the decision, the undertaking concerned is required to implement them — and to assume all the costs associated with their implementation —, failing which it exposes itself to liability for periodic penalty payments imposed pursuant to Article 16 of Regulation No 17.

There is nothing in the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to prevent the competition authorities of the members of the WTO from imposing remedies which limit or regulate the exploitation of intellectual property rights held by an undertaking in a dominant position where that undertaking exercises those rights in an anti-competitive manner. Thus, it follows expressly from Article 40(2) of the TRIPS Agreement that the members of the WTO are entitled to regulate the abusive use of such rights in order to avoid effects which harm competition.

The Commission it is not entitled to delegate to a third party the powers of investigation and enforcement conferred on it by Regulation No 17. On the other hand, it is entitled to monitor the implementation by the undertaking concerned of the remedies ordered in an infringement decision and to ensure that the other measures necessary to put an end to the anti-competitive effects of the infringement are fully implemented without delay. For those purposes, it is entitled to use the powers of investigation provided for in Article 14 of Regulation No 17 and, where necessary, to use an external expert in order, *inter alia*, to resolve technical issues.

(see paras 801, 802, 1189, 1190, 1192)

Moreover, where the Commission decides to obtain the assistance of an external expert it may communicate to that expert any information and documents which it may have obtained in the exercise of its powers of investigation under Article 14 of Regulation No 17.

By establishing a monitoring mechanism involving the appointment of an independent monitoring trustee required to act on his own initiative and upon application by third parties, whose role is not limited to putting questions to the undertaking concerned and reporting the answers to the Commission, who has access to information, documents, premises and employees and also to the source code of its relevant products, without limit in time, the Commission goes far beyond the situation in which it retains its own external expert to provide advice when it investigates the implementation of remedies.

There is no provision of Regulation No 17 that authorises the Commission to require an undertaking to bear the costs which the Commission incurs as a result of monitoring the implementation of remedies.

It is for the Commission, in its capacity as authority responsible for applying the

Community competition rules, to pursue the implementation of infringement decisions in an independent, objective and impartial manner. It would be incompatible with its responsibility in that regard for the effective implementation of Community law to depend on or be influenced by the willingness or the capacity of the addressee of the decision to bear such costs.

Moreover, the Commission does not have unlimited discretion when formulating remedies to be imposed on undertakings for the purpose of putting an end to an infringement. In the context of the application of Article 3 of Regulation No 17, the principle of proportionality requires that the burdens imposed on undertakings in order to bring an infringement to an end do not exceed what is appropriate and necessary to attain the objective sought, namely re-establishment of compliance with the rules infringed.

(see paras 1256, 1264-1266, 1268-1270, 1274-1276)

22. In the case of an undertaking which has been found to have committed two abuses of a dominant position, the Commission may, in order to assess the

gravity of the infringement for the purposes of determining the amount of the fine, take account of the fact that those two abuses form part of a leveraging strategy whereby the dominant position on one product market is used to extend that dominant position to other adjacent markets.

In such a case, the Commission may take a single starting point for the fine for the two abuses, without having to explain what that amount represented or how it was apportioned between the two types of abuse.

The obligation to state reasons does not require the Commission to indicate in its decision the figures relating to the method of calculating the fines.

The Commission may apply a weighting to that amount to ensure that the fine was sufficiently deterrent and to reflect the dominant undertaking's significant economic capacity. In that regard, the possibility cannot be precluded that the undertaking might commit the same type of infringement in future with other products.

(see paras 1344, 1352, 1360, 1361, 1363)