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Autor	Florent Thouvenin
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Urteil des Europäischen Gerichts erster Instanz
(grosse Kammer) vom 17. September 2007, T-201/04**

Florent Thouvenin*

Das vorliegende Urteil des Europäischen Gerichts erster Instanz (EuG) befasst sich mit den Schnittstellen von Urheber- und Kartellrecht: Mit der Koppelung von Windows Media Player und Windows-Betriebssystem und mit der Verweigerung der Offenlegung von Schnittstelleninformationen durch Microsoft. Von besonderem Interesse ist dabei die zweite Thematik. Die vom EuGH in den Entscheidungen "Magill" und "IMS Health" begründete Rechtsprechung zur kartellrechtlichen Beurteilung einer Lizenzverweigerung wird hier erstmals auf die Verweigerung der Offenlegung von Schnittstelleninformationen angewendet. Und dies, obwohl die Frage der Dekompilierung an sich durch eine urheberrechtliche Schranke geregelt ist.

Microsoft hatte sich auf Anfrage eines Konkurrenten geweigert, all jene Informationen offen zu legen, die erforderlich waren, um die nahtlose Kommunikation der Konkurrenzprodukte mit jenen von Microsoft sicherzustellen. Darauf reichte der Konkurrent Beschwerde bei der Europäischen Kommission ein und setzte damit ein umfangreiches erstinstanzliches Verfahren in Gang, das nach nahezu sechs Jahren mit einem Entscheid der Kommission und dem Aussprechen einer Rekordbusse gegen Microsoft endete. Die von Microsoft erhobene Klage auf Aufhebung dieses Entscheids wurde vom EuG in allen wesentlichen Punkten abgewiesen.

Das EuG hat die marktbeherrschende Stellung von Microsoft, wenig überraschend, bejaht und die Weigerung zur Offenlegung von Schnittstelleninformationen als missbräuchliches Verhalten beurteilt. Entscheidend war, dass (1) die Schnittstelleninformationen für das Angebot der Konkurrenten unverzichtbar sind, (2) die Verweigerung der Offenlegung Wettbewerb auf einem Sekundärmarkt ausschliesst, (3) diese Weigerung das Auftreten neuer Produkte verhindert, für die eine potenzielle Nachfrage besteht, und (4) das Verhalten von Microsoft objektiv nicht gerechtfertigt ist.

Ce jugement du Tribunal de première instance des Communautés européennes (TPI) se prononce sur la relation entre le droit d'auteur et le droit des cartels: sur le couplage de Windows Media Player avec le système d'exploitation Windows et sur le refus de Microsoft de divulguer les informations relatives aux interfaces de programmation. La deuxième thématique mérite un intérêt particulier. La jurisprudence de la CJCE relative à l'appréciation juridique du refus de concéder une licence au regard du droit des cartels, élaborée dans les décisions "Magill" et "IMS Health", a été appliquée en l'espèce pour la première fois au refus de divulguer les informations relatives aux interfaces de programmation. Et ce bien que la question de la décompilation soit réglée par une exception au droit d'auteur.

Sur requête d'un concurrent, Microsoft avait refusé de divulguer toutes les informations qui étaient nécessaires pour assurer une communication sans faille entre les produits de la concurrence et ceux de Microsoft. Suite à cela, le concurrent avait déposé une plainte auprès de la Commission européenne, ce qui a débouché sur une

* Dr. iur., Rechtsanwalt, Zürich.

vaste procédure en première instance. Celle-ci s'est terminée après presque six ans par une décision de la commission et la condamnation de Microsoft à une amende record. Le TPI a rejeté sur tous les points essentiels le recours introduit par Microsoft, qui visait l'annulation de cette décision.

Le TPI a confirmé la position dominante de Microsoft, ce qui n'est pas surprenant, et qualifié de comportement abusif le refus de divulguer les informations relatives aux interfaces. Les éléments suivants ont été déterminants: (1) les informations relatives aux interfaces de programmation étaient indispensables pour l'offre des concurrents, (2) le refus de les divulguer excluait la concurrence sur un marché dérivé, (3) ce refus empêchait le développement de nouveaux produits, pour lesquels une demande potentielle existe, et (4) le comportement de Microsoft n'était objectivement pas justifié.

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I. Einleitung

Das Verhältnis von Immaterialgüterrechten und Kartellrecht gehört zu den umstrittensten Fragen des Wettbewerbsrechts. In der Schweiz trifft Art. 3 Abs. 2 KG eine vordergründige Regelung, wonach Wettbewerbswirkungen, die sich ausschliesslich aus der Gesetzgebung über das geistige Eigentum ergeben, nicht unter das Kartellgesetz fallen. Eine Ausnahme hiervon bilden lediglich die Einfuhrbeschränkungen. Die Bedeutung dieser Norm ist mehr als nur unklar - wenn sie denn überhaupt eine hat.

Zum Verhältnis von Urheber- und Kartellrecht hat der EuGH mit den zwei Entscheiden in Sachen "*Magill*" (Urteil des EuGH vom 6. April 1995, Radio Telefís Eireann (RTE) und Independent Television Publications Ltd (ITP) gegen Kommission der Europäischen Gemeinschaften, Rs. C-241/91 P und RS. C-242/91 P) und "*IMS Health*" (Urteil des EuGH vom 29. April 2004, IMS Health GmbH & Co. OHG gegen NDC Health GmbH & Co. KG, Rs. C-418/01) gewisse Leitlinien gesetzt, die aufgrund ihrer inneren Überzeugungskraft - unabhängig von Art. 3 Abs. 2 KG - auch in der Schweiz zu beachten sind.

In "*Magill*" hatte sich der EuGH mit dem von drei Anbietern dominierten Fernsehmarkt von Irland und Nordirland, genauer mit dem Markt für Fernsehprogrammführer, auseinanderzusetzen. In der entscheidungsrelevanten Zeit gab es in Irland und Nordirland keinen umfassenden wöchentlichen Fernsehprogrammführer. Stattdessen liessen die Fernsehanstalten Programmführer veröffentlichen, die ausschliesslich Angaben über die eigenen Programme enthielten und widersetzten sich gleichzeitig - unter Berufung auf den urheberrechtlichen Schutz - der Wiedergabe ihrer Programmvorschauen durch Dritte. Als die Magill TV Guide Ltd versuchte, einen umfassenden, wöchentlichen Fernsehprogrammführer herauszugeben, wurde sie von den drei Fernsehanstalten auf dem Rechtsweg daran gehindert.

Der EuGH bejahte die marktbeherrschende Stellung der Fernsehanstalten, weil diese aufgrund des faktischen Monopols an den Informationen über die Programmvorschauen die Möglichkeit hatten, wirksamen Wettbewerb auf dem Markt für Fernsehwochenzeitschriften zu verhindern. Das Gericht hielt fest, dass das Verhalten eines

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Unternehmens mit marktbeherrschender Stellung, welches Teil der Ausübung eines Urheberrechts ist, nicht allein aufgrund dieser Tatsache der kartellrechtlichen Beurteilung entzogen ist. Zwar gehört das ausschliessliche Recht zur Vervielfältigung zu den Vorrechten des Inhabers von Urheberrechten, weshalb die Verweigerung einer Lizenz als solche keinen Missbrauch einer marktbeherrschenden Stellung darstellt. Nach Auffassung des EuGH kann aber die Ausübung des ausschliesslichen Rechts durch den Inhaber der Urheberrechte unter aussergewöhnlichen Umständen

missbräuchlich sein. Dies ist der Fall, wenn (1) das Verhalten das Auftreten eines neuen Erzeugnisses verhindert, nach dem eine potenzielle Nachfrage der Verbraucher besteht, (2) das Verhalten nicht gerechtfertigt ist und sich (3) die betreffenden Anbieter durch ihr Verhalten einen abgeleiteten Markt vorbehalten, indem sie durch die Verweigerung des Zugangs zu den Grundinformationen jeden Wettbewerb auf diesem Markt ausschliessen.

Diese Rechtsauffassung hat der EuGH im Urteil "*IMS Health*" bestätigt, dem der folgende Sachverhalt zugrunde lag: Die IMS Health (nachfolgend: IMS) erstellte für Pharmaunternehmen nach Bausteinstrukturen formatierte Berichte über den regionalen Absatz von Arzneimitteln in Deutschland. Jeder Baustein entsprach dabei einem bestimmten, geografisch definierten Gebiet. Als sich diese Bausteinstrukturen bereits zum Standard entwickelt hatten, begann die NDC Health (nachfolgend: NDC) ebenfalls nach Bausteinstrukturen formatierte Marktberichte über den regionalen Absatz von Arzneimitteln in Deutschland zu vertreiben. Zunächst hatte NDC noch versucht, andere Bausteinstrukturen zu verwenden, ging dann aber wegen des Zögerns der an die Bausteinstrukturen der IMS gewöhnten Kunden dazu über, Strukturen zu verwenden, die jenen der IMS sehr ähnlich waren. Auf Antrag von IMS und mit der Begründung, die Bausteinstrukturen seien dem Urheberrechtsschutz zugängliche Datenbankwerke, wurde NDC gerichtlich verboten, von den Bausteinstrukturen der IMS abgeleitete Strukturen zu verwenden. Im Rahmen eines Vorabentscheidungsverfahrens wurde der EuGH mit der Frage befasst, ob die Weigerung von IMS, NDC eine Lizenz zur Nutzung der Bausteinstruktur zu erteilen, ein missbräuchliches Verhalten eines marktbeherrschenden Unternehmens sei. Dies hat der EuGH in Anwendung der in "*Magill*" entwickelten Kriterien bejaht.

Im vorliegenden Urteil des EuG in Sachen "*Microsoft*" hatte das Gericht im Wesentlichen zwei Verhaltensweisen zu beurteilen, nämlich einerseits die Koppelung des Windows Media Players an das Windows-Betriebssystem und andererseits die Weigerung von Microsoft, den Konkurrenten Schnittstelleninformationen offen zu legen und so die nahtlose Kommunikation der Konkurrenzprodukte mit Windows-Produkten zu ermöglichen. Von besonderem Interesse ist die zweite Thematik. Bemerkenswert ist hier zunächst, dass das EuG die vom EuGH in "*Magill*" und "*IMS Health*" entwickelten Kriterien erstmals auf die Verweigerung der Offenlegung von Schnittstelleninformationen angewendet und diese Weigerung als missbräuchliches Verhalten eines marktbeherrschenden Unternehmens beurteilt hat. Als bedeutende Weiterentwicklung der Rechtslage zu werten ist sodann, dass Microsoft verpflichtet wurde, Konkurrenten die zur Herstellung von Interoperabilität erforderlichen Schnittstelleninformationen offen zu legen. Und dies, obwohl die Schranke von Art. 6 Computer-RL (Richtlinie 91/250/EWG des Rates vom 14. Mai 1991 über den Rechtsschutz von

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Computerprogrammen) die Beschaffung der für die Herstellung von Interoperabilität erforderlichen Informationen durch Dritte an sich ausdrücklich regelt. Damit ist jedenfalls klargestellt, dass die kartellrechtliche Beurteilung auch vor den - bisweilen gar eng gefassten - Schranken des Urheberrechts nicht Halt macht.

II. Sachverhalt und Prozessuales

Im September 1998 forderte Sun Microsystems, ein Anbieter von Servern und Serverbetriebssystemen, Microsoft dazu auf, alle Informationen offen zu legen, die benötigt werden, um die nahtlose Kommunikation der eigenen Produkte mit dem Windows-Betriebssystem und mit auf Windows basierender Software sicher zu stellen. Microsoft antwortete darauf, dass alle erforderlichen Informationen bereits über das "Microsoft Developer Network" (MSDN) veröffentlicht und zugänglich seien und weitere Informationen auch an der von Microsoft organisierten "Professional Developers Conference" erhältlich seien. Darauf reichte Sun Microsystems Beschwerde bei der Europäischen Kommission ein und brachte dadurch ein umfangreiches Verfahren ins Rollen, das mehrere Jahre dauerte.

Mit Entscheidung vom 24. Mai 2004 hielt die Kommission fest, dass Microsoft in zweifacher Hinsicht gegen Art. 82 EG-Vertrag und Art. 54 EWR-Vertrag verstossen habe: Erstens durch die Verweigerung der Offenlegung von Schnittstelleninformationen und ihrer Nutzung zum Zweck der Entwicklung und Vermarktung von Arbeitsgruppenservern und zweitens durch die Bindung des Erwerbs des Windows-Betriebssystems an den gleichzeitigen Erwerb des Windows Media Players. Beides hat die Europäische Kommission als missbräuchliche Verhaltensweise eines marktbeherrschenden Unternehmens beurteilt, und Microsoft wurde angewiesen, die verweigerten Informationen offen zu legen und eine voll funktionsfähige Version des Windows-Betriebssystems anzubieten, in welcher der Windows Media Player nicht enthalten ist. Zudem wurde Microsoft zu einer Busse von 497 Millionen Euro verurteilt.

Am 7. Juni 2004 klagte Microsoft beim Europäischen Gericht erster Instanz (EuG) auf Aufhebung des Entscheides der Kommission und Herabsetzung der Busse. Mit dem vorliegenden, inzwischen rechtskräftigen und gegen 200 Seiten dicken Urteil vom 17. September 2007 hat das EuG den Entscheid der Kommission in allen wesentlichen Punkten bestätigt. Von besonderem Interesse sind dabei die Erwägungen zur Offenlegung der Schnittstelleninformationen, in welchen die vom EuGH in den Entscheiden Magill und IMS Health begründete Rechtsprechung weitergeführt und konkretisiert wird. Diese Erwägungen werden nachfolgend auszugsweise wiedergegeben. Da alle Erwägungen durchnummeriert sind, wird auf das Streichen ganzer Erwägungen nicht ausdrücklich hingewiesen; dasselbe gilt für die zahlreichen Verweise auf die Fundstellen in der Entscheidung der Kommission und die Querverweise innerhalb des Urteils. Der Volltext des Entscheides ist unter <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0201:EN:HTML> abrufbar.

III. Aus den Erwägungen

a) Introduction

(102) It may be useful first in this place to give a general outline of the positions taken by the main parties on the issue of the refusal to supply and authorise the use of interoperability information.

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(103) According to the contested decision, Microsoft abused its dominant position on the client PC operating systems market by refusing, first, to supply Sun and other competitors with the specifications for protocols implemented in Windows work group server operating systems and used by the servers running those systems to deliver file and print services and group and user administration services to Windows work group networks and, second, to allow those various undertakings to use those specifications in order to develop and market work group server operating systems.

(104) The Commission contends that the information to which Microsoft refuses access is interoperability information within the meaning of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42). It claims, in particular, that that directive envisages interoperability between two software products as being the ability for them to exchange information and mutually to use that information in order to allow each of those software products to operate in all the ways contemplated. The Commission maintains that the concept of interoperability which Microsoft advocates is inaccurate.

(105) The Commission finds, on the basis of a series of factual and technical factors, that "the proper functioning of a Windows work group network relies on an architecture of client/server and server/server interconnections and interactions, which ensures a transparent access to the core work group server services (for Windows 2000/Windows 2003, this "Windows domain architecture" can be termed an "Active Directory domain architecture")" and that "the common ability to be part of that

architecture is an element of compatibility between Windows client PCs and Windows work group servers". The Commission describes that compatibility in terms of "interoperability with the Windows domain architecture" and maintains that such interoperability is "necessary for a work group server operating system vendor in order to viably stay on the market".

(106) The Commission further contends that in order that Microsoft's competitors can develop work group server operating systems capable of achieving such a degree of interoperability when the servers on which they are installed are added to a Windows work group, it is essential that they have access to information relating to interoperability with the Windows domain architecture. It maintains, in particular, that none of the five methods described by Microsoft of ensuring interoperability between operating systems supplied by different vendors constitutes a sufficient substitute for the disclosure of that information.

(107) Last, the Commission asserts that, according to the case-law, while undertakings are, as a rule, free to choose their business partners, under certain circumstances a refusal to supply by an undertaking in a dominant position may constitute an abuse of a dominant position within the meaning of Article 82 EC. It maintains that the present case presents a number of "exceptional circumstances" which show that Microsoft's refusal to supply was an abuse, even on the strictest hypothesis - and therefore the one most favourable to Microsoft - that the refusal is regarded as a refusal to supply to third parties a licence relating to intellectual property rights. The Commission maintains that it is entitled to take account of "exceptional circumstances" other than those identified by the Court of Justice in Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* (1995) ECR I-743 ("*Magill*") and approved by the Court of Justice Case C-418/01 *IMS Health* (2004) ECR I-5039, but that in any event those exceptional circumstances are present in this case.

(108) Microsoft has argued since the beginning of the administrative procedure that the concept of interoperability employed by the Commission in the present case is not consistent with the concept of "full interoperability" envisaged by Directive 91/250 and that it does not correspond to the way in which undertakings organise their computer networks in practice. It claims, in particular, that "full interoperability is available to a developer of server operating systems when all the functionality of his program can be accessed from a Windows client operating system". Microsoft thus adopts what the Commission describes as a "one-way" definition, whereas the Commission relies on a "two-way relationship".

(109) In Microsoft's submission, the full interoperability referred to above may be achieved through the disclosure of interface information which it already provides, notably by its "MSDN" product or the conferences which it organises for "Professional Developers" or through certain other methods available on the market.

(110) Microsoft claims that the Commission's concept of interoperability means, on the other hand, that its competitors' operating systems must function in every respect as a Windows server operating system. That situation could be achieved only if those competitors were allowed to "clone" its products, or some of their features, and if information on the internal mechanisms of its products were communicated to those competitors.

(111) Microsoft maintains that a requirement that it disclose such information would amount to an interference with the free exercise of its intellectual property rights and with its incentive to innovate.

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(112) Last, Microsoft submits that the present case must be appraised in the light of *Magill* and *IMS Health* since the refusal must be analysed as a refusal to grant third parties a licence relating to intellectual property rights and because, accordingly, the contested decision implies compulsory licensing. It maintains, however, that none of the criteria which in its submission were exhaustively accepted by the Court of Justice

in those judgments is satisfied in the present case. Microsoft concludes that the refusal at issue cannot be characterised as abusive and that the Commission cannot therefore order it to disclose the interoperability information. In the alternative, Microsoft relies on Case C-7/97 *Bronner* (1998) ECR I-7791 and submits that the criteria laid down in that judgment are not satisfied in the present case either.

(113) In the second place, it is appropriate to describe the way in which Microsoft structures its argument in the first part of the plea and the way in which the Court will examine that argument.

(114) Thus, before developing its actual reasoning, Microsoft puts forward a number of considerations concerning interoperability, which may be summarised as follows. First, it claims that there are five methods of achieving interoperability between Windows client PC and server operating systems and competing server operating systems. Second, it criticises the degree of interoperability required by the Commission in the present case (and claims, in essence, that the Commission's real intention is to allow Microsoft's competitors to "clone" its own products or certain of their features) and also the scope of the remedy prescribed in (...) the contested decision.

(115) In addition to those various considerations, Microsoft puts forward a series of arguments in order to demonstrate that the communication protocols which it is required to disclose to its competitors pursuant to the contested decision are technologically innovative and that those protocols, or their specifications, are covered by intellectual property rights.

(116) Microsoft's actual reasoning in the first part of this plea may be set out as follows:

-- the present case must be appraised in the light of the various circumstances recognised by the Court of Justice in *Magill* and approved in *IMS Health*;

-- the circumstances in which a refusal by an undertaking in a dominant position to grant third parties a licence covering intellectual property rights may be characterised as abusive are, first, where the product or service concerned is indispensable for carrying on a particular business; second, where the refusal is liable to exclude all competition on a secondary market; third, where the refusal prevents the emergence of a new product for which there is potential consumer demand; and, fourth, where the refusal is not objectively justified;

-- none of those four circumstances is present in this case;

-- as a subsidiary point, the criteria applicable are those recognised by the Court of Justice in *Bronner* which correspond to the first, second and fourth circumstances referred to above and identified in *Magill* and *IMS Health*;

-- nor, accordingly, is any of the three *Bronner* criteria satisfied in the present case.

(117) The Court will begin by examining Microsoft's allegations concerning the varying degrees of interoperability and the scope of the remedy prescribed in the contested decision. The applicant's arguments relating to the existence of five methods of achieving interoperability between its operating systems and its competitors' systems will be analysed when the Court examines what is claimed to be the indispensable nature of the interoperability information. The Court will then deal with Microsoft's arguments concerning the intellectual property rights which in its submission cover its communication protocols or the specifications for those protocols. Finally, the Court will appraise the actual reasoning which Microsoft develops in the first part of the plea and determine, first, the circumstances by reference to which Microsoft's impugned conduct must be analysed and, second, whether those circumstances are present in this case.

b) The varying degrees of interoperability and the scope of the remedy prescribed in the contested decision

c) The assertion that Microsoft's communication protocols are protected by intellectual property rights

(283) Although the parties devoted lengthy argument, both in their written pleadings and at the hearing, to the question of the intellectual property rights which cover Microsoft's communication protocols or the specifications of those protocols, the Court considers that there is no need to decide that question in order to resolve the present case.

(284) The arguments which Microsoft derives from the alleged intellectual property rights cannot, as such, affect the lawfulness of the contested decision. The Commission did not take a position on the merits of those arguments but adopted the decision on the assumption that Microsoft was able to rely on such rights in the present case. In other words, it proceeded on the

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premiss that, so far as it relates to the interoperability information, the conduct at issue in the present case 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, and thus chose the strictest legal test and therefore the one most favourable to Microsoft. The Commission did not therefore decide whether or not Microsoft's impugned conduct constituted a refusal to grant a licence or whether or not the remedy prescribed in the contested decision entailed compulsory licensing.

(289) It follows from the foregoing considerations that the appraisal of the merits of the first part of the plea must proceed on the presumption that the protocols in question, or the specifications of those protocols, are covered by intellectual property rights or constitute trade secrets and that those secrets must be treated as equivalent to intellectual property rights.

(290) The central issue to be resolved in this part of the plea therefore is whether, as the Commission claims and Microsoft denies, the conditions on which an undertaking in a dominant position may be required to grant a licence covering its intellectual property rights are satisfied in the present case.

d) The specific arguments invoked in support of the first part of the plea

(i) The circumstances by reference to which the abusive conduct must be analysed

(312) It must be borne in mind that Microsoft's argument is that its refusal to supply interoperability information cannot constitute an abuse of a dominant position within the meaning of Article 82 EC because, first, the information is protected by intellectual property rights (or constitutes trade secrets) and, second, the criteria established in the case-law which determine when an undertaking in a dominant position can be required to grant a licence to a third party are not satisfied in this case.

(313) It must also be borne in mind that the Commission contends that there is no need to decide whether Microsoft's conduct constitutes a refusal to license intellectual property rights to a third party, or whether trade secrets merit the same degree of protection as intellectual property rights, since the strict criteria against which such a refusal may be found to constitute an abuse of a dominant position within the meaning of Article 82 EC are in any event satisfied in the present case.

(314) While Microsoft and the Commission are thus agreed that the refusal at issue may be assessed under Article 82 EC on the assumption that it constitutes a refusal to license intellectual property rights, they disagree as to the criteria established in the case-law that are applicable in such a situation.

(315) Thus, Microsoft relies, primarily, on the criteria laid down in *Magill* and *IMS Health* and, in the alternative, on those laid down in *Bronner*.

(316) The Commission, on the other hand, contends that an "automatic" application of the criteria laid down in *IMS Health* would be "problematic" in this case. It maintains that, in order to determine whether such a refusal is abusive, it must take into

consideration all the particular circumstances surrounding that refusal, which need not necessarily be the same as those identified in *Magill* and *IMS Health*. Thus it explains in the contested decision, that "the case-law of the European Courts (...) suggests that the Commission must analyse the entirety of the circumstances surrounding a specific instance of a refusal to supply and must take its decision (on the basis of) the results of such a comprehensive examination".

(317) At the hearing, the Commission, questioned on this issue by the Court, confirmed that it had considered in the contested decision that Microsoft's conduct presented three characteristics which allowed it to be characterised as abusive. The first consists in the fact that the information which Microsoft refuses to disclose to its competitors relates to interoperability in the software industry, a matter to which the Community legislature attaches particular importance. The second characteristic lies in the fact that Microsoft uses its extraordinary power on the client PC operating systems market to eliminate competition on the adjacent work group server operating systems market. The third characteristic is that the conduct in question involves disruption of previous levels of supply.

(318) The Commission contends that in any event the criteria recognised by the Court of Justice in *Magill* and *IMS Health* are also satisfied in this case.

(319) In response to those various arguments, the Court observes that, as the Commission rightly states in the contested decision, 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.

(320) The Court of Justice thus considered that a company in a dominant position on the market in raw materials which, with the aim of reserving such raw materials for the purpose of manufacturing its own derivatives, refused to supply a customer which was itself a manufacturer of those derivatives, and was

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therefore likely to eliminate all competition on the part of that customer, abused its dominant position within the meaning of Article 82 EC (Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* (1974) ECR 223; see, concerning a refusal to supply a service, Case 311/84 *CBEM* (1985) ECR 3261).

(321) In Case 238/87 *Volvo* (1988) ECR 6211, the Court of Justice, on a reference for a preliminary ruling under Article 234 EC, was asked whether the refusal by a car manufacturer which was the proprietor of a design right covering car body panels to license third parties to supply products incorporating the protected design must be considered to be an abuse of a dominant position within the meaning of Article 82 EC. In its judgment, the Court of Justice emphasised that the right of a proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without his consent, products incorporating the design constitutes the very subject-matter of his exclusive right. The Court of Justice concluded (paragraph 8) that "an obligation imposed upon the proprietor of a protected design to grant to third parties, even in return for a reasonable royalty, a licence for the supply of products incorporating the design would lead to the proprietor thereof being deprived of the substance of his exclusive right, and that a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position". The Court of Justice added, however, that "the exercise of an exclusive right by the proprietor of a registered design in respect of car body panels (might) be prohibited by Article (82 EC) if it involve(d), on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model (were) still in circulation, provided that such conduct (was) liable to affect trade between Member States" (paragraph 9).

(322) In *Magill* the Court of Justice, on appeal, had also been called upon to adjudicate on the question of the refusal by a dominant undertaking to license a third party to use an intellectual property right. That case concerned a decision in which the Commission had found that three television companies had abused their dominant position on the market represented by their respective weekly programme listings and the market for the television guides in which those listings were published by relying on their copyright in those listings to prevent third parties from publishing complete weekly guides to the programmes broadcast by the various different television channels. The Commission had therefore ordered those television companies to supply their advance weekly programme listings to each other and to supply them to third parties on request and on a non-discriminatory basis and to permit reproduction of those listings by those third parties. The Commission had also stipulated that any royalties requested by the television companies, should they choose to grant reproduction licences, should be reasonable.

(323) In *Magill* (paragraph 49), the Court of Justice, referring to *Volvo*, stated that "the exclusive right of reproduction form(ed) part of the author's rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot itself constitute abuse of a dominant position". Still with reference to *Volvo* the Court of Justice explained, however, that "the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct" (paragraph 50).

(324) The Court of Justice considered that the following circumstances were relevant for the purpose of establishing that the conduct of the television companies in question was abusive. In the first place, their refusal concerned a product (the television channels' weekly programme listings) the supply of which was indispensable to the exercise of the activity in question (the publication of a complete weekly television guide) (paragraph 53). In the second place, the refusal prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the television companies in question did not offer and for which there was a potential consumer demand, which constituted an abuse under Article 82(b) EC (paragraph 54). In the third place, the refusal was not justified (paragraph 55). Finally, in fourth place, the television companies, by their conduct, had reserved to themselves a secondary market, the market for weekly television guides, by excluding all competition on that market (paragraph 56).

(325) In *Bronner*, the Court of Justice, on a reference for a preliminary ruling under Article 234 EC, had been requested to rule on whether the refusal by a press group holding a very large share of the daily newspaper market in Austria, and operating the only nationwide newspaper home-delivery scheme in Austria, to allow the publisher of a rival newspaper to have access to that scheme for appropriate remuneration, or to allow that publisher to purchase certain complementary services from the group, constituted an abuse of a dominant position contrary to Article 82 EC.

(326) In its judgment (paragraph 38), the Court of Justice first of all observed that although in *Commercial Solvents v Commission* and

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CBEM it had held that the refusal by an undertaking holding a dominant position on a given market to supply an undertaking with which it was in competition on a neighbouring market with raw materials and services respectively, which were indispensable to carrying on the rival's business, constituted an abuse, it had done so to the extent that the conduct in question was likely to eliminate all competition on the part of that undertaking.

(327) Next, the Court of Justice stated (paragraph 39) that at paragraphs 49 and 50 of *Magill* it had held that the refusal by the owner of an intellectual property right to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position, but that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve an abuse.

(328) Last, the Court recited the exceptional circumstances which it had established in *Magill* and stated (paragraph 41): "(E)ven if that case-law on the exercise of an intellectual property right were applicable to the exercise of any property right whatever, it would still be necessary, for (that) judgment to be effectively relied upon in order to plead the existence of an abuse within the meaning of Article (82 EC) in a situation such as that which forms the subject-matter of the (...) question, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme."

(329) In *IMS Health* the Court of Justice again ruled on the conditions in which a refusal by an undertaking holding a dominant position to grant to a third party a licence to use a product protected by an intellectual property right might constitute abusive conduct within the meaning of Article 82 EC.

(330) The Court of Justice first of all confirmed (paragraph 34), with reference to *Volvo* and *Magill* that, according to settled case-law, the exclusive right of reproduction formed part of the rights of the owner of an intellectual property right, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of that position. The Court of Justice also observed (paragraph 35) that it was clear from that case-law that exercise of an exclusive right by the owner might, in exceptional circumstances, involve abusive conduct. Next, after reciting the exceptional circumstances found to exist in *Magill*, the Court held (paragraph 38) that it followed from that case-law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it was sufficient that three cumulative conditions be satisfied, namely, that that refusal prevents the emergence of a new product for which there is a potential consumer demand, that it is unjustified and that it is such as to exclude any competition on a secondary market.

(331) It follows from the case-law cited above that 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.

(332) It also follows from that case-law that 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.

(333) 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.

(334) The Court notes that the circumstance that the refusal prevents the appearance of a new product for which there is potential consumer demand is found only in the case-law on the exercise of an intellectual property right.

(335) Finally, it is appropriate to add that, 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 (see, to that effect,

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IMS Health, paragraph 43). Thus, the Court of Justice held, at paragraph 44 of *IMS Health*, that it was sufficient that a potential market or even a hypothetical market could be identified and that such was the case where the products or services were indispensable to the conduct of a particular business activity and where there was an actual demand for them on the part of undertakings which sought to carry on that business. The Court of Justice concluded at the following paragraph of the judgment that it was decisive that two different stages of production were identified and that they were interconnected in that the upstream product was indispensable for supply of the downstream product.

(336) In the light of the foregoing factors, the Court considers that it is appropriate, first of all, to decide whether the circumstances identified in *Magill* and *IMS Health* as described above are also present in this case. Only if it finds that one or more of those circumstances are absent will the Court proceed to assess the particular circumstances invoked by the Commission.

(ii) The indispensable nature of the interoperability information

(369) As already pointed out, the Commission adopted a two-stage approach in determining whether the information at issue was indispensable, in that, first of all, it considered what degree of interoperability with the Windows domain architecture non-Microsoft work group server operating systems must achieve in order for its competitors to be able to remain viably on the market and, second, it appraised whether the interoperability that Microsoft refused to disclose was indispensable to the attainment of that degree of interoperability.

(370) Microsoft claims that that reasoning is incorrect in law and in fact.

-- The alleged error of law

(371) Microsoft's arguments concerning the Commission's supposed error of law relate to the first stage of its reasoning.

(372) Microsoft takes issue first of all with the degree of interoperability required by the Commission in the present case: it contends, in substance, that the Commission's position effectively requires that its competitors' work group server operating systems be able to communicate with Windows client PC and server operating systems in exactly the same way as Windows server operating systems do. The applicant reiterates that that degree of interoperability implies virtual identity between its systems and its competitors' systems.

(373) Those assertions must be rejected.

(374) The Court has already defined the degree of interoperability which the Commission required in the contested decision. The Court observed, in particular, that the Commission had concluded that, in order to be able to compete viably with Windows work group server operating systems, competitors' operating systems must be able to interoperate with the Windows domain architecture on an equal footing with those Windows systems. The Court has held that interoperability, as thus envisaged by the Commission, had two indissociable components, client/server interoperability and server/server interoperability and that it implied in particular that a server running a non-Microsoft work group server operating system could act as domain controller within a Windows domain using Active Directory and, consequently, would be able to participate in the multimaster replication mechanism with the other domain controllers.

(375) The Court has also already found that, contrary to Microsoft's contention, by requiring such a degree of interoperability, the Commission did not intend that non-Microsoft work group server operating systems should function in every respect as a Windows work group server operating system and, accordingly, that the applicant's competitors could develop work group server operating systems that were identical, or even "virtually identical", to the applicant's.

(421) It follows from all of the foregoing considerations that Microsoft has not established that the Commission made a manifest error when it considered that non-Microsoft work group server operating systems must be capable of interoperating with the Windows domain architecture on an equal footing with Windows work group server operating systems if they were to be marketed viably on the market.

(422) The Court also concludes from those considerations that the absence of such interoperability with the Windows domain architecture has the effect of reinforcing Microsoft's competitive position on the work group server operating systems market, particularly because it induces consumers to use its work group server operating system in preference to its competitors', although its competitors' operating systems offer features to which consumers attach great importance.

-- The alleged error of fact

(423) The arguments which Microsoft derives from the Commission's alleged error of fact are of two types.

(424) In the first place, Microsoft claims that the Commission's case is contradicted, first, by the fact that several work group server operating systems are present on the market and by the heterogeneous nature of computer networks within undertakings in Europe and, second, by the fact that, even though they do not have access to the interoperability information at issue, distributors

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of Linux products have recently entered the market and have consistently gained market share.

(425) The Court considers that the first of those arguments is not sufficient to call in question the validity of the Commission's argument.

(432) (As to the second argument), account must be taken of the fact that the growth of Linux products on the work group server operating systems market was only modest during the years immediately preceding the adoption of the contested decision. When those Linux products were used in conjunction with Samba software (developed with the use of reverse engineering) they could attain a certain degree of interoperability with Windows operating systems. However, that degree of interoperability was significantly reduced following the launch of the Windows 2000 generation. Thus, in October 2003 - that is to say, several months after Microsoft had already begun to market the Windows 2003 server operating system, which had succeeded the Windows 2000 server system - the degree of interoperability that Linux products had managed to achieve enabled them to act only as member servers within a domain using Active Directory.

(433) Finally, the projected growth of Linux products on the work group server operating systems market is lower than Microsoft claims and will come about to the detriment not of Microsoft's systems but, in particular, of Novell's systems and the systems of distributors of UNIX products.

(434) In the second place, Microsoft claims that the Commission failed to take account of the fact that several methods other than the disclosure of the information at issue ensure sufficient interoperability between different suppliers' operating systems.

(435) On that point, it is sufficient to observe that Microsoft itself has recognised, both in its written pleadings and in answer to a question put to it at the hearing, that none of its recommended methods or solutions made it possible to achieve the high degree of interoperability which the Commission correctly required in the present case.

(436) It follows from all of the foregoing considerations that Microsoft has not demonstrated that the circumstance that the interoperability information was indispensable was not present in this case.

(iii) Elimination of competition

(479) The Court will examine in the following order the four categories of arguments which Microsoft puts forward in support of its contention that the circumstance relating to the elimination of competition is not present in this case: first, the definition of the relevant product market; second, the method used to calculate market shares; third, the applicable criterion; and, fourth, the assessment of the market data and the competitive situation.

-- The definition of the relevant product market

(480) Microsoft's arguments in respect of the definition of the relevant product market concern the second of the three markets identified by the Commission in the contested decision, namely, the work group server operating systems market. The Commission describes those systems as being designed and marketed to deliver collectively file and print sharing services and group and user services to a relatively small number of client PCs linked together in a small or medium-sized network.

(481) Microsoft contends, in effect, that the Commission defined that second market too restrictively by including only server operating systems used to supply the services mentioned in the preceding paragraph, namely what are known as "work group" services. Microsoft's objective in challenging the Commission's definition of the market is essentially to establish that the evolution of the market is different from that described in the contested decision and does not represent the elimination of all competition.

(482) The Court notes at the outset that in so far as the definition of the product market involves complex economic assessments on the part of the Commission, it is subject to only limited review by the Community judicature (see, to that effect, Case T-342/99 *Airtours v Commission* (2002) ECR II-2585, paragraph 26). However, this does not prevent the Community judicature from examining the Commission's assessment of economic data. It is required to decide whether the Commission based its assessment on accurate, reliable and coherent evidence which 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, to that effect, *Commission v Tetra Laval*, paragraph 39).

(484) In arriving at the contested definition of the product market, the Commission took into account the demand-side substitutability and the supply-side substitutability of the products. It must be borne in mind that, as stated in the Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), point 7, "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". As indicated at point 20 of that notice, moreover, supply-side substitutability may also be taken into account when defining

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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.

(485) The Court would point out straight away that the definition of the second market is not based on the idea that there is a separate category of server operating systems exclusively implementing file and print services and user and group administration services. Quite to the contrary, at a number of points in the contested decision the Commission expressly acknowledges that work group server operating systems may also be used to carry out other tasks, and, in particular, may run "non-mission critical" applications. In the contested decision, the Commission states that "non-mission critical" applications are those whose failure "would impact the activity of some users (but) would not impact the overall activity of the organisation". In that regard, the Commission refers, more specifically, to the running of internal email services. As will be explained in greater detail below, the Commission's definition is based in fact on the finding that the capacity of work group server operating systems to supply collectively file and print services and also user and group administration services constitutes, without prejudice to the other tasks which they are capable of performing, an essential feature of those systems, and that those systems are primarily designed, marketed, purchased and used to provide those services.

(486) As regards, in the first place, demand-side substitutability, the Commission concludes that "there are no products that (...) exercise sufficient competitive pressure on work group server operating systems such that they should be included in the same relevant product market".

(526) It follows from the foregoing considerations that Microsoft has not established that the Commission's finding that there are no products that, from the demand-side perspective, exercise sufficient competitive pressure on work group server operating systems to justify their inclusion in the same relevant product market was manifestly incorrect.

(527) In the second place, the question of supply-side substitutability is analysed by the Commission in the contested decision.

(528) The Commission considers that "other operating system vendors, including in particular vendors of server operating systems, would not be able to switch their production and distribution assets to work group server operating systems without incurring significant additional costs and risks and within a time framework sufficiently short so as to consider that supply-side considerations are relevant in this case". More specifically, the Commission rejects the argument developed by Microsoft in its response of 16 November 2001 to the second statement of objections, that there is a "virtually instantaneous supply-side substitution", in that it is sufficient to "disable" the "more complex functionalities" in higher-end server operating systems in order to obtain a product comparable to a work group server operating system.

(529) It is clear to the Court that, in the body of its pleadings, Microsoft puts forward no specific argument capable of calling in question the analysis carried out by the Commission in the recitals to the contested decision referred to above. In the reply, it merely makes the general assertion that "the cost of modification in many cases would be zero" and "in the other cases (...) would be negligible", without even indicating whether it thereby intends to contest the Commission's finding that there was no supply-side substitutability.

(530) In those circumstances, the Court finds that Microsoft has not established that the Commission manifestly erred when it concluded that there was no supply-side substitutability in this case.

(531) The Court concludes from the foregoing that the Commission was correct to define the second product market as the work group server operating systems market.

-- The method used in calculating market shares

(533) Microsoft takes issue with the Commission for having used an inappropriate method to calculate the market shares of the various operators on the second product market. It maintains, in particular, that that method provides no "relevant information about dominance".

(557) The Court concludes that Microsoft has not demonstrated that the method which the Commission used when calculating market shares is vitiated by a manifest error of assessment or, consequently, that the estimates of market shares given in the contested decision must be considered manifestly incorrect.

(558) Nor did the Commission base its finding that Microsoft held a dominant position on the work group server operating systems market solely on its market shares on that market. It also took into account the fact that there were barriers to entry to that market, owing in particular to the presence of network effects and obstacles to interoperability, and also the close commercial and technological links between that market and the client PC operating systems market.

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(559) Last, as regards the abusive refusal to supply, it must be borne in mind that in the contested decision the Commission takes issue with Microsoft for having used, by leveraging, its quasi-monopoly on the client PC operating systems market to influence the work group server operating systems market. In other words, Microsoft's abusive conduct has its origin in its dominant position on the first product market. Even if the Commission were wrongly to have considered that Microsoft was in a dominant position on the second market that could not therefore of itself suffice to support a finding that the Commission was wrong to conclude that there had been an abuse of a dominant position by Microsoft.

-- The applicable criterion

(560) In the contested decision, the Commission considered whether the refusal at issue gave rise to a "risk" of the elimination of competition on the work group server operating systems market. Microsoft contends that that criterion is not sufficiently strict, since according to the case-law on the exercise of an intellectual property right the Commission must demonstrate that the refusal to license an intellectual property right to a third party is "likely to eliminate all competition", or, in other words, that there is a "high probability" that the conduct in question will have such a result.

(561) The Court finds that Microsoft's complaint is purely one of terminology and is wholly irrelevant. 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.

(562) In this case, the Commission had all the more reason to apply Article 82 EC before the elimination of competition on the work group server operating systems market had become a reality because that market is characterised by significant network effects and because the elimination of competition would therefore be difficult to reverse.

(563) Nor is it 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.

-- The assessment of the market data and the competitive situation

(565) In the contested decision, the Commission analyses together the circumstance that interoperability is indispensable and the fact that the refusal is likely to eliminate competition. Its analysis has four parts. In the first place, the Commission examines the

evolution of the work group server operating systems market. In the second place, it establishes that interoperability is a factor which plays a determining role in the use of Windows work group server operating systems. In the third place, it states that there are no substitutes for disclosure by Microsoft of the interoperability information. In the fourth place, it makes a number of observations about the CPLC.

(566) The arguments which Microsoft puts forward in support of the present complaint relate essentially to the first part of the Commission's analysis. Microsoft claims, in effect, that the market data contradict the Commission's argument that competition on the work group server operating systems market is at risk of being eliminated as a consequence of the refusal at issue.

(567) In the first part of its analysis, the Commission began by examining the evolution of the market shares of Microsoft and its competitors on the second product market. It established, essentially, that Microsoft's market share had experienced rapid and significant growth and that it continued to increase to the detriment of Novell in particular. The Commission then noted that the market share of UNIX vendors was weak. Last, it considered that Linux products had only a very small presence on the market, that they had made no headway on the market during the years immediately preceding the adoption of the contested decision and that certain forecasts concerning their future growth were not capable of calling in question its finding that effective competition would be eliminated on the market.

(568) The Court considers that those different findings are confirmed by the evidence in the file and that they are not called in question by Microsoft's arguments.

(618) It follows from all of the foregoing that the Commission did not make a manifest error of assessment when it concluded that the evolution of the market revealed a risk that competition would be eliminated on the work group server operating systems market.

(619) The Commission had even more reason to conclude that

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there was a risk that competition would be eliminated on that market because the market has certain features which are likely to discourage organisations which have already taken up Windows for their work group servers from migrating to competing operating systems in the future. Thus, as the Commission correctly states in the contested decision, it follows from certain results of the third Mercer survey that the fact of having an "established record as proven technology" is seen as a significant factor by the large majority of IT executives questioned. At the time of the adoption of the contested decision, Microsoft, at a conservative estimate, held a market share of at least 60% on the work group server operating systems market. Likewise, certain results of that survey also establish that the factor "available skill-sets and cost/availability of support (in-house or external)" is important for the majority of the IT executives questioned. As the Commission quite correctly states in the contested decision, "(that) means that the easier it is to find technicians skilled in using a given work group server operating system, the more customers are inclined to purchase that work group server operating system" and, "in turn, however, the more popular a work group server operating system is among customers, the easier it is for technicians (and the more willing are technicians) to acquire skills related to that product". Microsoft's very high market share on the work group server operating system market has the consequence that a very large number of technicians possess skills which are specific to Windows operating systems.

(620) The Court therefore concludes that the circumstance that the refusal at issue entailed the risk of elimination of competition is present in this case.

(iv) The new product

(643) It must be emphasised that the fact that the applicant'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".

(644) Thus, in *Magill* the Court of Justice held that the refusal by the broadcasting companies concerned had to be characterised as abusive within the meaning of that provision because it prevented the appearance of a new product which the broadcasting companies did not offer and for which there was a potential consumer demand.

(645) It is apparent from the decision at issue in that case that the Commission had, more specifically, considered that by their refusal, the broadcasting companies limited production or markets to the prejudice of consumers. The Commission had found that that refusal prevented publishers from producing and publishing a weekly television guide for consumers in Ireland and Northern Ireland, a type of guide not then available on that geographic market. Although each of the broadcasting companies concerned published a weekly television guide, each guide was devoted to that particular broadcaster's own programmes. In finding an abuse of a dominant position by those broadcasting companies, the Commission had emphasised the harm which the absence of a general weekly television guide on the market in Ireland and in Northern Ireland caused to consumers, who, if they wished to know what programmes were being offered in the coming week, had no alternative to buying the weekly guides of each channel and themselves extracting the relevant information in order to make comparisons.

(646) In *IMS Health* the Court of Justice, when assessing the circumstance relating to the appearance of a new product, also placed that circumstance in the context of the damage to the interests of consumers. Thus, at paragraph 48 of that judgment, the Court emphasised, with reference to the Opinion of Advocate General Tizzano in that case ((2004) ECR I-5042), that that circumstance related to the consideration that, in the balancing of the interest in protection of the intellectual property right and the economic freedom of its owner against the interest in protection of free competition, the latter can prevail only where refusal to grant a licence prevents the development of the secondary market, to the detriment of consumers.

(647) The circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health*, 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.

(648) It was on that last hypothesis that the Commission based its finding in the contested decision. Thus, the Commission considered that Microsoft's refusal to supply the relevant information limited technical development to the prejudice of consumers within the meaning of Article 82(b) EC and it rejected Microsoft's assertion that it had not been demonstrated that its refusal caused prejudice to consumers.

(649) The Court finds that the Commission's findings at the recitals referred to in the preceding paragraph are not manifestly incorrect.

(650) Thus, in the first place, the Commission was correct to observe, that "(owing) to the lack of

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interoperability that competing work group server operating system products can achieve with the Windows domain architecture, an increasing number of consumers are locked into a homogeneous Windows solution at the level of work group server operating systems".

(651) It must be borne in mind that it has already been stated that Microsoft's refusal prevented its competitors from developing work group server operating systems capable of attaining a sufficient degree of interoperability with the Windows domain architecture, with the consequence that consumers' purchasing decisions in respect of work group server operating systems were channelled towards Microsoft's products. The Court has also already observed that it was apparent from a number of documents in the file that the technologies of the Windows 2000 range, in particular Active Directory, were increasingly being taken up by organisations. As interoperability problems arise more acutely with work group server operating systems in that range of products than with those of the preceding generation, the increasing uptake of those systems merely reinforces the "lock-in" effect referred to in the preceding paragraph.

(652) The limitation thus placed on consumer choice is all the more damaging to consumers because, as already observed, they consider that non-Microsoft work group server operating systems are better than Windows work group server operating systems with respect to a series of features to which they attach great importance, such as "reliability/availability of the (...) system" and "security included with the server operating system".

(653) In the second place, the Commission was correct to consider that the artificial advantage in terms of interoperability that Microsoft retained by its refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features, to the prejudice, notably, of consumers. That refusal has the consequence that those competitors are placed at a disadvantage by comparison with Microsoft so far as the merits of their products are concerned, particularly with regard to parameters such as security, reliability, ease of use or operating performance speed.

(654) The Commission's finding that "if Microsoft's competitors had access to the interoperability information that Microsoft refuses to supply, they could use the disclosures to make the advanced features of their own products available in the framework of the web of interoperability relationships that underpin the Windows domain architecture" is corroborated by the conduct which those competitors had adopted in the past, when they had access to certain information concerning Microsoft's products. (...).

(656) Thus, the contested decision rests on the concept that, once the obstacle represented for Microsoft's competitors by the insufficient degree of interoperability with the Windows domain architecture has been removed, those competitors will be able to offer work group server operating systems which, far from merely reproducing the Windows systems already on the market, will be distinguished from those systems with respect to parameters which consumers consider important.

(657) It must be borne in mind, in that regard, that Microsoft's competitors would not be able to clone or reproduce its products solely by having access to the interoperability information covered by the contested decision. Apart from the fact that Microsoft itself acknowledges in its pleadings that the remedy prescribed in the contested decision would not allow such a result to be achieved, it is appropriate to repeat that the information at issue does not extend to implementation details or to other features of Microsoft's source code. The Court also notes that the protocols whose specifications Microsoft is required to disclose in application of the contested decision represent only a minimum part of the entire set of protocols implemented in Windows work group server operating systems.

(658) Nor would Microsoft's competitors have any interest in merely reproducing Windows work group server operating systems. Once they are able to use the information communicated to them to develop systems that are sufficiently interoperable with the Windows domain architecture, they will have no other choice, if they wish to take advantage of a competitive advantage over Microsoft and maintain a profitable presence on the market, than to differentiate their products from Microsoft's products with respect to certain parameters and certain features. It must be borne in mind that, as the Commission explains in the contested decision, the implementation of

specifications is a difficult task which requires significant investment in money and time.

(659) Last, Microsoft's argument that it will have less incentive to develop a given technology if it is required to make that technology available to its competitors is of no relevance to the examination of the circumstance relating to the new product, where the issue to be decided is the impact of the refusal to supply on the incentive for Microsoft's competitors to innovate and not on Microsoft's incentives to innovate. That is an issue which will be decided when the Court examines the circumstance relating to the absence of objective justification.

(660) In the third place, the Commission is also correct to reject as unfounded Microsoft's assertion

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during the administrative procedure that it was not demonstrated that its refusal caused prejudice to consumers.

(661) First of all, as has already been observed, the results of the third Mercer survey show that, contrary to Microsoft's contention, consumers consider non-Microsoft work group server operating systems to be better than Windows work group server operating systems on a number of features to which they attach great importance.

(662) Next, Microsoft cannot rely on the fact that consumers never claimed at any time during the administrative procedure that they had been forced to adopt a Windows work group server operating system as a consequence of its refusal to disclose interoperability information to its competitors. In that connection, it is sufficient to point out that Microsoft does not dispute the Commission's findings in the contested decision. Thus, the Commission observes that it is developers of complementary software required to interoperate with Microsoft's systems who "depend on the interface information" and that "customers will not always exactly know what is disclosed by Microsoft to other work group operating system vendors and what is not". In the contested decision, the Commission states "when confronted with a 'choice' between putting up with interoperability problems that render their business processes cumbersome, inefficient and costly, and embracing a homogeneous Windows solution for their work group network, customers will tend to opt for the latter proposition" and that "once they have standardised on Windows, they are unlikely to report interoperability problems between their client PCs and the work group servers".

(663) Furthermore, Microsoft's own statements concerning the disclosures made under the United States settlement show that those disclosures had the consequence of offering greater choice to consumers.

(664) Last, it must be borne in mind that it is settled case-law that 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 (*Case 85/76 Hoffmann-La Roche v Commission* (1979) ECR 461, paragraph 125, and *Irish Sugar v Commission*, paragraph 232). In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.

(665) The Court concludes from all of the foregoing considerations that the Commission's finding to the effect that Microsoft's refusal limits technical development to the prejudice of consumers within the meaning of Article 82(b) EC is not manifestly incorrect. The Court therefore finds that the circumstance relating to the appearance of a new product is present in this case.

(v) The absence of objective justification

(688) The Court notes, as a preliminary point, that 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 arguments and evidence relied on by the undertaking cannot prevail and, accordingly, that the justification put forward cannot be accepted.

(689) In the present case, as the Commission found in the contested decision and as Microsoft expressly confirmed in the application, Microsoft relied as justification for its conduct solely on the fact that the technology concerned was covered by intellectual property rights. It made clear that if it were required to grant third parties access to that technology, that "would (...) eliminate future incentives to invest in the creation of more intellectual property". In the reply, the applicant also relied on that fact that the technology was secret and valuable and that it contained important innovations.

(690) The Court considers that, even on the assumption that it is correct, the fact that the communication protocols covered by the contested decision, or the specifications for those protocols, are covered by intellectual property rights cannot constitute objective justification within the meaning of *Magill* and *IMS Health*. Microsoft's argument is inconsistent with the *raison d'être* of the exception which that case-law thus recognises in favour of free competition, since if the mere fact of holding intellectual property rights could in itself constitute objective justification for the refusal to grant a licence, the exception established by the case-law could never apply. In other words, a refusal to license an intellectual property right could never be considered to constitute an infringement of Article 82 EC even though in *Magill* and *IMS Health* the Court of Justice specifically stated the contrary.

(691) It must be borne in mind that, as stated above, the Community judicature considers that the fact that the holder of an intellectual property right can exploit that right solely for his own benefit constitutes the very substance of his exclusive right. Accordingly, a simple refusal,

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even on the part of an undertaking in a dominant position, to grant a licence to a third party cannot in itself constitute an abuse of a dominant position within the meaning of Article 82 EC. It is only when it is accompanied by exceptional circumstances such as those hitherto envisaged in the case-law that such a refusal can be characterised as abusive 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. It must be borne in mind that it has been established above that such exceptional circumstances were present in this case.

(692) The argument which Microsoft puts forward in the reply, namely that the technology concerned is secret and of great value to the licensees and contains important innovations, cannot succeed either.

(693) First, the fact that the technology concerned is secret is the consequence of a unilateral business decision on Microsoft's part. Furthermore, Microsoft cannot rely on the argument that the interoperability information is secret as a ground for not being required to disclose it unless the exceptional circumstances identified by the Court of Justice in *Magill* and *IMS Health* are present, and at the same time justify its refusal by what it alleges to be the secret nature of the information. Last, there is no reason why secret technology should enjoy a higher level of protection than, for example, technology which has necessarily been disclosed to the public by its inventor in a patent-application procedure.

(694) Second, from the moment at which it is established that - as in this case - the interoperability information is indispensable, that information is necessarily of great value to the competitors who wish to have access to it.

(695) Third, it is inherent in the fact that the undertaking concerned holds an intellectual property right that the subject-matter of that right is innovative or original. There can be no patent without an invention and no copyright without an original work.

(696) The Court further observes that in the contested decision the Commission did not simply reject Microsoft's assertion that the fact that the technology concerned was covered by intellectual property rights justified its refusal to disclose the relevant information. The Commission also examined the applicant's argument that if it were required to give third parties access to that technology there would be a negative impact on its incentives to innovate.

(701) It follows that it has not been demonstrated that the disclosure of the information to which that remedy relates will significantly reduce - still less eliminate - Microsoft's incentives to innovate.

(702) In that context, the Court observes that, as the Commission correctly finds in the contested decision, it is normal practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products and Microsoft itself had followed that practice until it was sufficiently established on the work group server operating systems market. Such disclosure allows the operators concerned to make their own products more attractive and therefore more valuable. In fact, none of the parties has claimed in the present case that such disclosure had had any negative impact on those operators' incentives to innovate.

(709) In other words, in accordance with the principles laid down in the case-law, the Commission, after establishing that the exceptional circumstances identified by the Court of Justice in *Magill* and *IMS Health* were present in this case, then proceeded to consider whether the justification put forward by Microsoft, on the basis of the alleged impact on its incentives to innovate, might prevail over those exceptional circumstances, including the circumstance that the refusal at issue limited technical development to the prejudice of consumers within the meaning of Article 82(b) EC.

(710) The Commission came to a negative conclusion but not by balancing the negative impact which the imposition of a requirement to supply the information at issue might have on Microsoft's incentives to innovate against the positive impact of that obligation on innovation in the industry as a whole, but after refuting Microsoft's arguments relating to the fear that its products might be cloned, establishing that the disclosure of interoperability was widespread in the industry concerned and showing that IBM's commitment to the Commission in 1984 was not substantially different from what Microsoft was ordered to do in the contested decision and that its approach was consistent with Directive 91/250.

(711) It follows from all of the foregoing considerations that Microsoft has not demonstrated the existence of any objective justification for its refusal to disclose the interoperability at issue.

(712) As the exceptional circumstances identified by the Court of Justice in *Magill* and *IMS Health* were also present in this case, the first part of the plea must be rejected as wholly unfounded.