*Liyang Hou**

The Essential Facilities Doctrine – What Was Wrong in Microsoft?***

The essential facilities doctrine is designed to oblige dominant undertakings to make available their important facilities, including intellectual property rights, for other undertakings. It requires a delicate balance of, on the one hand, protecting the exclusivity of ownership and on the other hand encouraging other undertakings' incentive to innovate. The balance that was nicely struck in the previous cases nevertheless was abandoned in the Microsoft judgment. In that case, the General Court made two mistakes: First, it wrongly defined the primary market as client PC operating systems that was in no accordance with the request of Sun, i. e. the interoperability information with Windows client PC operating system. This broader market definition made the General Court struggle in justifying the increasing market shares of Linux products through unnecessarily expanding the scope of "eliminating all the competition" from the requesting undertakings to "eliminating all effective competition". Secondly, the General Court improperly interpreted "new products" hindered by a refusal to grant a license as also including products with "technical development". This arbitrary extension encroaches upon the very substance of the system of intellectual property rights.

1 Introduction

The essential facilities doctrine (EFD) is designed to oblige dominant undertakings to supply a product that is necessary to third-party undertakings.[1] Since an obligation to deal is in principle contrary to the two enshrined principles of free competition, i. e. freedom of contract and exclusivity of ownership,[2] its application is always subject to strict requirements. In the EU, it is commonly accepted that the EFD should be assessed under three conditions within the context of Art. 102 of the Treaty on the Functioning of the European Union (Art. 102): (i) the requested product is indispensible to the product to be supplied by the requesting undertaking; (ii) the denial risks

* Dr. jur.; Associate Professor, KoGuan Law School, Shanghai Jiao Tong University, China.

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1 This article will nevertheless not discuss the situation where a dominant undertaking supplies one group of customers while refusing the equivalent request of others. This can be dealt with under the category of discrimination. *See*, *e.g.*, Case C-27/76, *United Brands v. Commission*, [1978] ECR 207; and Case T-301/04, *Clearstream v. Commission*, [2009] ECR II-3155.

2 Alison Jones & Brenda Sufrin, "EU Competition Law: Text, Cases and Materials" 480 *et seq*, (4th ed., Oxford, Oxford 2011).

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eliminating all the competition from the requesting undertaking; and (iii) there are no objective justifications from the requested dominant undertaking.[3] In addition, when the requested product is an intellectual property right (IPR), or, in other words when it is a case of refusing to grant an IPR license, one more condition is included, i. e. that the denial risks hindering the emergence of a new product.[4] These conditions were applied under a delicate balance in cases preceding the *Microsoft* judgment.[5] However, this balance was renounced in the *Microsoft* judgment delivered by the General Court (GC) (previously the Court of First Instance (CFI)). In this case, Microsoft refused the request of its competitors to disclose the interoperability information with its Windows operating systems. The GC made several controversial interpretations on the EFD, which in the end resulted in Microsoft's obligation to supply the interoperability information to its competitors.

Given the controversies in *Microsoft*, this article serves a dual purpose: first, it observes the common practice of the European authorities in the EFD cases prior to *Microsoft*; secondly, and most importantly, it deliberates on the mistakes committed by the GC in *Microsoft* based on those previous cases. In pursuit of these two purposes, the subsequent five parts are dedicated respectively to summarizing the application of fives conditions of the EFD in the pre-*Microsoft* era: (1) the definition of relevant markets; (2) the indispensability test; (3) elimination of competition; (4) prevention of the emergence of a new product; and (5), no objective justifications. The next part compares the analyses in *Microsoft* with those previous cases in order to demonstrate the errors made by the GC. The last part provides some conclusions.

2 *Defining Relevant Markets*

The EFD does not disallow all kinds of refusal to deal, but essentially only prohibits refusal to deal in the form of leveraging of market power. Therefore, in all EFD cases the first step is to define two relevant markets: one containing the primary product, i. e. the product being requested, where the requested undertaking is dominant, and the other comprising the secondary product, i. e. the derivative product that will be supplied by the requesting undertakings on the top of the requested product.[6] Although no literature denies the existence of the two-market feature in EFD cases, most, if not all, try to neglect the difficulty of defining two such relevant markets. Many authors simply refer to the Commission's notice on the definition of the relevant market.[7] However, defining two relevant markets for the purpose of the EFD is considerably different from that in other cases. In the following,

3 Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O. J. C 45/7, para. 81.

4 Joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission*, [1995] ECR I-743, para. 74.

5 Case T-201/04, *Microsoft v. Commission*, [2007] ECR II-3601.

6 *Ibid.*, at para. 335.

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it will be discussed how the two relevant markets (the primary market and the secondary market) should be defined.

2.1 Primary Market

As far as the primary product or the requested product is concerned, EFD cases can be divided into two types. First, the primary product has already been marketed by dominant undertakings for a while, and the refusal to supply nevertheless takes place where those dominant undertakings decide to monopolize the secondary market and thus disrupts all the supply to third parties on the secondary market. Secondly, the primary product has never been supplied to any third-party undertakings and thus always remains part of those dominant undertakings' final products.

In the first type of cases, the definition of relevant markets is not so different from that in non-EFD cases. It is true that the transactions on the primary and secondary markets may not exist at the time of antitrust action. However, competition authorities can determine the product and geographic dimension of the two relevant markets according to past transactions. Furthermore, the requested undertaking cannot deny the existence of such a market since there was a group of long-standing third-party customers, i. e. requesting undertakings. The European courts, based on the previous transactions, was confronted with no difficulty in defining the primary market as containing raw material (aminobutanol) in *Commercial Solvents*,[8] advertising minutes in *Telemarketing*,[9] spare parts for Hugin's cash registers in *Hugin*,[10] and Hilti-compatible cartridge strips in *Hulti*.[11]

However, the definition of relevant markets in the second type of cases is complicated. Since the primary product has never been supplied to a third party, it is always sold in a bundle with the final product. Consequently, an obligation to supply the primary product is similar to unbundling the final product, with the purpose of creating an intermediate product (i.e. the primary product) that never existed. The difficulty can be observed from two perspectives. First, there is no transaction concerning this intermediary product. Due to no evidence of demand and supply-side substitution, the principles to define relevant markets are not easily applicable here. Secondly, it may be argued that competition authorities can always define the primary market according to the denied request. Nevertheless, a problem may arise with regard to the "unbundleability" of the requested product. Since there may be cases where it is commercially or technically complementary to

7 Commission notice on the definition of the relevant market for the purposes of Community competition law, 1997 O. J. C 372.

8 Jointed Cases C-6-7/73, *Commercial Solvents*, [1974] ECR 223.

9 Case C-311/84, *Centre belge d'études de marché – Télémarketing (CBEM) v. SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, [1985] ECR 3261.

10 Case C-22/78, *Hugin v. Commission*, [1979] ECR 1869.

11 Case C-53/92 P, *Hilti v. Commission*, [1994] ECR I-667.

maintain such a bundle, it is unwise for competition authorities to define the primary market solely based on the denied request.

Regarding the definition of the primary product that has never been marketed separately, the European Court of Justice (ECJ) in *IMS* provided two hints that "it is determinative that two different stages of production may be identified,"[12] and "there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensible".[13] However, the ECJ's statement is still ambiguous. The first sentence implies that competition authorities should focus on the request of those requesting undertakings to see whether the requested product can be unbundled from the final product. However, in a sense, there is nothing that cannot be unbundled. Therefore, the question of unbundleablity in essence turns into how far competition authorities can go. No clear implications can be found within the statement of the ECJ. Moreover, the second sentence requires competition authorities to examine whether the requesting undertaking has an actual demand for the requested product. The purpose of this statement is also uncertain. Does it suggest that the requesting undertaking is obliged to make pre-investment? If so, how sufficient should this pre-investment be? In addition, it is not observed in other cases that the ECJ's method was further clarified either by the European courts or by the European Commission (Commission).

Nevertheless, in two other cases the question of whether the requested product can be unbundled was discussed in detail, though the ECJ's suggested method was not followed. The first case was *FAG*.[14] FAG (Flughafen Frankfurt/Main AG) owned and operated Frankfurt airport, and it reserved to itself all the services within the airport. This case was filed as abusing a dominant position by third parties that were denied access by FAG to airport facilities in order to provide ground-handling services on the ramp[15] in the airport. The ground-handling services on the ramp were always provided by FAG itself and bundled with the provision of airport facilities for the landing and take-off of aircraft. FAG claimed that the two types of services were complementary and should not be provided separately. The Commission however considered that they constituted separate markets for three reasons: (1) from the demand side, the services relating to the provision of facilities for the landing and takeoff of aircraft were distinct from and not inter-

12 Case C-418/01, *IMS v. NDC*, [2004] ECR I-5039, para. 45.

13 *Ibid.*, at para. 44.

14 IV/34.801, *FAG/Flughafen Frankfurt/Main AG*, 1998 O. J. L 72/30.

15 They consisted of the provision and operation of equipment for the embarkation and disembarkation of passengers, transport of passengers between the terminal and the aircraft position and vice versa, crew transport, loading and unloading of baggage, cargo and mail, transport, sorting and transfer of baggage, transport of cargo and mail on the ramp, cabin cleaning, toilet and water services, push-back/towing of aircraft, provision and operation of equipment to carry out the above activities, fuelling of aircraft, and the transport of catering supplies to and from the aircraft. *Ibid.*, at para. 20.

changeable with ramp-handling services – moreover, airport customers were usually charged with two separate bills for the two services, which implied that it was not necessary to purchase the two services from the same supplier; (2) from the supply side, the provision of airport landing and take-off facilities and the provision of ramp-handling services were significantly different and can indeed be provided by different suppliers;[16] and (3) ground-handling services were provided by independent third parties in other airports.[17]

The second case was *Ricoh*.[18] The applicant of this case, Info-Lad, was a manufacturer of toner for photocopiers. It requested Ricoh, a photocopier manufacturer, to supply empty toner cartridges for Ricoh's machines. Since Ricoh only sold filled cartridges and never provided empty ones, the Commission was confronted with the question whether there could be a separate market for Ricoh's empty cartridges. It was concluded that there was no such a separate market for empty cartridges because first there was no consumer demand, and secondly as a matter of fact all manufactures of photocopiers only supplied filled cartridges.

There are two major differences between the two cases. First, in *FAG* the services of providing facilities for the landing and takeoff of aircraft were horizontal to the ramp-handling services. In other words, they were not upstream-downstream services. In comparison, empty cartridges and filled cartridges in *Ricoh* were vertically related: empty cartridges can be considered as an upstream production stage while filled cartridges as a downstream production stage. Secondly, in *FAG* the two services were unbundled in other countries; whereas, in *Ricoh* all manufacturers only sold filled cartridges. The *IMS* court only held that that "it is determinative that two different stages of production may be identified", and did not specify those different stages as only horizontal productions. In addition, there was no evidence that the vertical relationship between empty cartridges and filled cartridges played a pivotal role in the Commission's refuse to define empty cartridges as a separate market in *Ricoh*. Consequently, one of the most likely justifications to explain the difference between the two cases turns out to be the lack of practice in unbundling empty cartridges.

This article is of the opinion that relying upon the existing unbundling experience to decide whether a requested product can constitute a separate market strikes an appropriate balance between respecting input holders' ownership and encouraging competition from third-party undertakings. It remains those requested undertakings' own business strategies to bundle the requested product with their final products since this may be regarded by the requested undertaking as the best solution to recoup its investment. It is thus intrusive for competition authorities to unbundle any production stage as a

16 *Ibid*., at para. 65.
17 *Ibid*., at para. 66.
18 1 Competition Policy Newsletter 35–37 (February 1999).

separate market. If so, competition authorities would substitute themselves with the requested undertaking to draft business plans. Moreover, defining a separate market for the requested product that has never been marketed separately also changes the existing market structure because there was no such intermediary market beforehand. This may result in irreparable regulatory failure, and impair the interests of requested undertakings, as well as their own incentive to innovate. Last but not least, competition law aims to preserve competition on the market, rather than to create competition. Relying upon the existing unbundling practice can thus decrease regulatory risks to the minimum.

Furthermore, the EFD represents not only the most controversial topic in competition law but also an overlap between competition law and sector-specific regulation. When applied under relaxed conditions, the EFD can be used to deal with issues that traditionally fall within the scope of sector-specific regulation. For example, the Commission even went one step further to define a requested product as a separate market even with no existing unbundling practice in competition-law cases for the purpose of sector-specific regulation. This was the case for access services in the electronic communications sector in the 1990s. In the Notice on the application of the competition rules to access agreements in the electronic communications sector, the Commission referred to the possibility to oblige incumbent electronic communications operators to provide their access networks to alternative operators based on the EFD.[19] Apparently, at the very beginning of liberalizing the electronic communications sector there was no practice of unbundling access networks from electronic communications networks and service as a whole. This goes beyond the conclusion made in the previous paragraphs. This extension was criticized by scholars such as Larouche, as being inconsistent with the legitimacy model of the EFD,[20] and was also one of the reasons to adopt the current electronic communication regulatory framework that integrates competition law principles and methodologies into electronic communications regulation.[21] Under the current electronic communications regulatory framework, the Commission is under no pressure to employ its competition law power for liberalization purposes. Furthermore, similar activities can also be observed within the transport market[22] and the energy market[23] where statutory monopolies were pre-

19 Commission Notice on the application of the competition rules to access agreements in the telecommunications sector – frameworks, relevant markets and principles, 1998 O. J. C 265/2.

20 Pierre Larouche, "Competition Law and Regulation in European Telecommunications" 212 *et seq*., (Hart, Oxford 2000).

21 Alexandre de Streel, "The Integration of Competition Law Principles in the New European Regulatory Framework for Electronic Communications", 26 World Competition 489–514 (2003).

22 Case COMP/37.685, *GVG/FS*, 2004 O. J. L 11/17.

23 Case COMP/39.402, *RWE Gas Foreclosure*, (not reported).

viously present. However, they should be considered as a special application of the EFD and has no general impact on other industrial sectors.

2.2 Secondary Market

The secondary market within the EFD cases comprises the final products to be supplied by the requesting undertakings. Since the EFD concerns cases of leverage of market power, there is no need to prove that the requested undertaking enjoys a dominant position on the secondary market, as established in *Tetra Pak II*.[24] Nevertheless, it may be disputed whether the final product to be supplied by the requesting undertakings can constitute a separate market on its own merits. This question was raised in *Commercial Solvents* where the Commission defined ethambutol as constituting the secondary market. The requested undertaking nevertheless argued that there was no such a separate market for ethambutol because it was a part of a larger market for anti-tuberculosis drugs. The ECJ held that it was not necessary for the derivative market to constitute a self-contained market so long as it can be differentiated from the primary product.[25] It is clear here that the ECJ only required the requesting undertaking to produce a derivative product that was distinct from the primary product possessed by the requested undertaking. There was no further requirement that the requesting undertaking must produce something different from all the products supplied by the requested undertaking. However, it should be noted that *Commercial Solvents* was a case of refusing to supply tangible facilities. When the refusal to deal involves an IPR, another condition is added: the secondary product of the requesting undertaking must be a new product and thus not falling into the product range of the requested undertaking. Although the new product should be different from what are currently offered by the requesting undertaking, it does not necessarily constitute a self-contained market in pursuit of the principle established in *Commercial Solvents*. In other words, it is not necessary for the new product to be a breakthrough innovation in an absolute sense.

3 The Indispensability Test

After having appropriately delineated the primary and secondary markets, and having identified that the requested undertaking enjoys a dominant position on the primary market, competition authorities should examine whether the conditions to analyze the EFD are fulfilled. The first condition requires an assessment of the relationship between the primary product and the secondary product; more specifically, whether the primary product is indispensible to the secondary product.

24 Case C-333/94 P, *Tetra Pak International SA v. Commission*, [1996] ECR I-05951, para. 30.

25 *Commercial Solvents*, *supra* note 8, at para. 22.

According to the case law related to the EFD, the indispensability test entails two elements. First, the primary product should be objectively necessary for the requesting undertaking to carry out their activities on the secondary market. Normally the analysis for this element involves less difficulty. Common knowledge about the industrial sector concerned is normally sufficient to allow competition authorities to determine whether the primary product is necessary. This can be observed from many cases, such as the raw material versus the finished products in *Commercial Solvents*;[26] TV advertising minutes versus telemarketing in *Telemarketing*;[27] spare parts versus maintenance and repair services in *Hugin*;[28] airport facilities versus ramp-handling in *FAG*;[29] railway faculties versus international passenger service in *GVG*;[30] the copyright over TV programs versus TV magazine publishing weekly TV guides in *Magill*;[31] and the copyright on "1860 brick structure" versus services analyzing pharmaceutical sales information based on the "1860 brick structure" in *IMS*.[32] Furthermore, it is also not difficult to find that the primary product is not necessary for the secondary product. For example, in *Ladbroke*, the applicant, a Belgian company making books on betting horse races abroad, requested the Pari Mutuel group to grant the right to broadcast horse races in France.[33] It is obvious that broadcasting horse races is not necessary, though perhaps helpful, for Ladbroke to carry out its gambling services.

Secondly, there should be no economically viable substitutes on the primary market.[34] This point was first brought forward in *Commercial Solvents*. The requested undertaking claimed that there were actually possible substitutes on the primary market. However, the ECJ pointed out that those substitutes were either in an experimental stage or only resulted into a modest production that could only satisfy self-needs.[35] Consequently, it was held that those substitutes were only of minor importance, and it was not possible for the requesting undertakings to "have recourse on an industrial scale to methods of manufacture of (the requested product) based on the use of different raw materials".[36] It is clear here the ECJ did not aim to find a monopolized primary market in an absolute sense, but only referred to no effective substitutes. This argument can also be found in *Telemarketing*. The requested undertaking was a broadcasting company, and was granted an

26 *Ibid*.
27 *Telemarketing*, *supra* note 9.
28 *Hugin*, *supra* note 10.
29 *FAG*, *supra* note 14.
30 *GVG/FS*, *supra* note 22.
31 *Magill*, *supra* note 4.
32 *IMS*, *supra* note 12.
33 Case T-504/93, *Tiercé Ladbroke SA v. Commission*, [1997] ECR II-923.
34 *Magill*, supra note 4, at paras. 52–53; and Case C-7/97, *Oscar Bronner v. Mediaprint*, [1998] ECR I-7791, at paras. 44–45.
35 *Commercial Solvents, supra* note 8, at para. 15.
36 *Ibid*., at para. 16.

exclusive right to run a French-speaking TV station in Belgium. As a matter of fact, there were also other French-speaking TV channels from France broadcasting in Belgium. However, since those stations were aimed only rarely or not at all at the Belgium public, they were not considered as effective substitutes.[37]

This point was further developed in *Bronner* where the ECJ maintained that indispensability should be established not only by the fact that there were no effective substitutes on the primary market,[38] but also by the fact that there were no technical, legal or even economic obstacles to make it impossible, or even unreasonably difficult, for the requesting undertaking to produce a substitute, either alone or in cooperation with others on the secondary market.[39] It should be noted that the possibility of creating a potential substitute referred not to the possibility of a small company, but to a hypothetical company with a comparable size to the requested undertaking.[40] Consequently, the ECJ implies that the EFD is not designed for the convenience of undertakings to free ride dominant undertakings, but only for the necessity of survival on the secondary market in situations where there are no effective substitutes.

This article applauds the ECJ for its development in *Bronner*. As mentioned in the preceding section, the EFD concerns an area where competition law and sector-specific regulation overlap. When the conditions of the EFD are loosely applied, competition law can be stretched to invade the territory of sector-specific regulation. Therefore, a difficult question is to which extent competition law must limit itself in the application of the EFD. When obliging an undertaking to supply a product that it does not intend to sell to others, competition law should not go beyond the situation where (i) it is objectively necessary for the secondary product to rely on the primary product; and (ii) there are no substitutes, either actual or potential, on the relevant market. It is reasonable that dominant undertakings are under no obligation to provide any of their products to third parties. An obligation to deal should limit its application to what are indispensible for the production of the requesting undertakings. Moreover, no actual or potential substitutes on the relevant market suggest that the requested undertaking enjoys at least a super-dominant position on the primary market, and most importantly this strong position will not easily disappear in a short term by itself. This strongly justifies the intervention of competition law, and at the same time significantly lowers the risk of regulatory failure.

37 *Telemarketing*, *supra* note 9, at para. 6.
38 *Bronner*, *supra* note 8, at para. 43.
39 *Ibid.*, at para. 44.
40 *Ibid.*, at paras. 45–46.

4 Elimination of Competition

The second condition states that the refusal to supply risks eliminating all the competition on the requesting undertakings. European courts maintain this condition as separated from the first condition that the requested product is indispensible to the derivative product to be produced by the requesting undertaking. However, it is in practice impossible to distinguish the two conditions. As supported by some scholars,[41] the risk of eliminating all competition is an inevitable consequence of the indispensability of the requested product to the derivative product.

As a matter of fact, European courts have never carried out specific analysis to examine whether the refusal to deal resulted in a possibility of eliminating all competition on the secondary market. In *Commercial Solvents*, the ECJ only referred to the fact that the sales of the derivative product from the requesting undertaking stopped after the disruptive supply of the requested product.[42] In *Telemarketing*, it was apparent that the requesting undertaking could not continue to provide its telemarketing service without acquiring broadcasting minutes from the requested undertaking that was a legal monopoly on the TV broadcasting market.[43] The same can also be observed in the EFD cases involving IPRs such as in *Magill* and *IMS*, where the provision of the secondary product must necessarily infringe the requested undertaking's copyrights on the primary markets.

Furthermore, the indispensability test requires that there are no effective substitutes on the primary market. Once this condition has been fulfilled, it is reasonable to imagine that the requesting undertakings cannot acquire the necessary inputs for their production on the secondary market. It hence goes without any doubt that their surviving possibility on the secondary market diminishes.

All in all, the second condition of "eliminating all the competition on the part of the requesting undertakings" indeed becomes a consequence of the indispensability test.

5 Prevention of the Emergence of a New Product

There is always a dispute over whether the EFD should apply to IPRs. A major reason for such a debate lies in the fact that the purpose of IPRs is to grant a monopoly that is nevertheless balanced with a limited time period. A discussion of whether it is appropriate to apply the EFD to IPRs goes beyond the scope of this article. Nevertheless, as already mentioned, European courts did not neglect the significance of such a temporary monopoly with respect to innovation. Therefore, a new condition is included in the EFD

41 Net Le, "What does 'capable of eliminating all competition' mean?", 26 European Competition Law Review 6–10 (2005).

42 *Commercial Solvents*, *supra* note 8, at para. 25.

43 *Telemarketing*, *supra* note 9, at paras. 26–27.

analysis when IRPs are involved, which is that the refusal to grant a license must be able to prevent the emergence of a new product.[44]

This condition first appeared in *Magill*.[45] However, two questions were left unanswered in that judgment. First, it did not clarify whether this condition is additional or alternative to the indispensability test. This uncertainty led to the fault interpretation in the subsequently case *Ladbroke* that

[t]he refusal to supply the applicant could not fall within the prohibition laid down by Article 86 (now Art. 102) unless it concerned a product or service which was *either* essential for the exercise of the activity in question, in that there was no real or potential substitute, *or* was a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers.[46] [emphasis added]

The "either-or" phase implies that the *Ladbroke* court considered that the prevention of the emergence of a new product was alternative to the indispensability test. This interpretation was even taken on by the Commission in its *IMS* decision where the it stated that "there is no requirement for a refusal to supply to prevent the emergence of a new product in order to be abusive".[47] This fault interpretation was corrected subsequently by the ECJ in *IMS*. The court articulated that the prevention of the emergence of a new product for which there was potential consumer demand was one of the cumulative conditions alongside with the indispensability test, eliminating all the competition and no objective justifications.[48]

The second question left in *Magill* was whether the new product, or the derivative product, should be different from that supplied by the requested undertaking. This point was not touched upon by *Ladbroke*, but was finally answered in *IMS* where the ECJ firmly maintained that a refusal to license an indispensible IPR was abusive only where the undertaking which requested the license did not intend to limit itself essentially to duplicate the goods or services already offered on the secondary market by the owner of IPRs, but to produce new goods or services not offered by the owner of IPRs for which there was potential consumer demand.[49] In addition, as already pointed out in the second part of this article, it is not necessary for the new product to constitute a self-contained product. In other words, it is possible that the new product falls into a broader market definition so long as it is not provided by the requested undertaking.

44 This additional condition is nevertheless question by other authors as unreasonable. *See*, *e.g.*, Andreas Heinemann, "Compulsory Licences and Product Integration in European Competition Law – Assessment of the European Commission's *Microsoft* Decision", 36 IIC 63–82 (2005.)

45 *Magill*, *supra* note 4, at para. 54.

46 *Ladbroke*, *supra* note 33, at para. 131.

47 Case COMP D3/38.044, *NDC Health/IMS Health*, (not reported), para. 180.

48 *IMS*, *supra* note 12, at para. 38.

49 *Ibid*., at para. 49

6 No Objective Justification

Since a refusal to supply is governed by Art. 102, the requested undertaking is allowed to justify its refusal. Nevertheless, it should be noted that an obligation to deal is already an exception to the general principle of freedom to contract and exclusivity of ownership. The justification to decline such an obligation is nothing less than an exception to another exception. It is thus understandable that not many requested undertakings will succeed in this job because the previous analyses already take into account the requested undertaking's interests. European courts have only hinted that possible justifications may include capacity limits in supply,[50] technical or commercial requirements that make the supply impossible,[51] and protecting consumers' interests from being seriously or irreparably damaged.[52] However, as a matter of fact, only few requested undertakings could convince the European courts or the Commission at this stage.

7 Microsoft

The GC's 2007 *Microsoft* judgment concerned two abusive activities of Microsoft: (i) refusing to provide third-party producers of workgroup server operating systems with the interoperability information with Windows client PC operating systems; and (ii) tying windows media player to its client PC operating systems for the purpose of excluding other media players. The second behavior is not relevant to this article. The first abuse was filed by Sun to the Commission as Microsoft refused to disclose the information and technology necessary to allow its workgroup server operating system to interoperate with the Windows client PC operating system. After investigation, the Commission decided that Microsoft infringed Art. 102 by refusing to supply interoperability information.[53] Later, the Commission decision was appealed to the GC, and the GC dismissed the application.[54] Microsoft initiated no further action with the ECJ afterwards and the case came to an end. In this judgment the GC ignored the delicate balance struck in the previous cases from several aspects. This lack of attention stirred fierce debate in academic circles. In the following, this article aims to make its contribution to this debate by examining two mistakes committed by the GC: the first is related to the problematic definition of the primary market; and the second concerns the arbitrary extension of the "new product" to also cover products with "technical development".

50 *Commercial Solvents*, *supra* note 8, at para. 28; and Case C-77/77, *BP v. Commission*, [1978] ECR 1513.

51 *Telemarketing*, *supra* note 9, at para. 26.

52 Case T-184/01 R, *IMS v. Commission*, [2001] ECR II-3193, para. 148.

53 Case COMP/C-3/37.792, *Microsoft*, (not reported).

54 *Microsoft*, *supra* note 5.

7.1 Relevant Markets

As far as the definition of relevant product markets are concerned, the GC, in accordance with the previous cases, defined two relevant markets. The primary market comprised of client PC operating systems and a secondary market containing workgroup server operating systems.[55] As a piece of common knowledge, Microsoft enjoyed a quasi-monopoly position on the primary market. Moreover, it was also found to hold a dominant position on the secondary market.

Nevertheless, the manner to define the primary market in *Microsoft* is considerably different from that in other EFD cases, and remains the first mistake made by the GC. In the previous cases that supported requesting undertakings, the primary markets were always defined strictly based on the request of those requesting undertakings. Where the requested products have never been marketed separately from the final products provided by the requested undertakings, the authorities had to investigate whether the requested product can actually be unbundled and thus tailored the definition of the primary market to the needs of those requesting undertakings.[56] This analysis involves a deliberation on the question of whether it is more complementary to maintain the bundle than to break it. In all those, cases both the European courts and the Commission always carried out their analyses by investigating in the first place whether the requested product could constitute a separate market. For example, in *Bronner* the ECJ examined whether the home-delivery service could be considered as a product market, though it finally left the answer to the national court.[57] In *FAG*, the Commission concluded that it was reasonable to separate the ground-handling service on the ramp from the whole products.[58] In those IPR-related EFD cases, the problem of unbundling is less important because the second product must be a new product in comparison with the requested IPR. For instance, in *Magill* the primary product was the weekly TV program information provided by TV stations, while the secondary product was a comprehensive weekly TV guide;[59] in *Ladbroke* the primary market was the transmission of sound and pictures of French horse races and the secondary product was the horse-race gambling service;[60] and in *IMS* the primary product was the copyright held by IMS on its "1860 brick structure" whereas the derivative product was the presentation of regional sales data.[61]

55 *Microsoft Decision*, *supra* note 53, at paras. 342 and 401.

56 Some authors even criticize that the Commission may place excessive focus on the request of requesting undertakings in order to enforce the obligation to deal. *See*, Michael D. Diathesopoulos, "The Relation between Essential Facilities Doctrine and Market Definition" (2010), available at SSRN: http://ssrn.com/abstract=1732147 (last visited 16 December 2011).

57 *Bronner*, *supra* note 34, at paras. 32–35.

58 *FAG*, *supra* note 14, at paras. 64–68.

59 Case T-69/89, *RTE v. Commission*, [1991] ECR II-485, para. 62.

60 *Ladbroke*, *supra* note 33, at paras. 81–87.

On the other hand, a market definition that is defined broader than the refused request is usually a sign that the requesting undertaking cannot acquire the primary product. An example can be observed in *Ricoh*.[62]

Coming back to the *Microsoft* judgment, what was requested by Sun was interoperability information with the Windows client PC operating system.[63] However, the primary product was defined by the GC as client PC operating systems. This broader market definition did not cause trouble for the GC to find Microsoft's dominant position on the primary market, which was different from *Ricoh* where the Commission could not confirm that Ricoh had a dominant position on the market for consumables for all photocopy machines after refusing to define a narrower primary market for consumables specifically for Ricoh's machines.[64] However, this market definition results in a gap in the GC's reasoning for the subsequent analyses. By defining a broader primary market the GC neglected the analysis on whether interoperability information could be, as a matter of fact, unbundled from the Windows client PC operating system. As discussed earlier, the issue regarding unbundleablity serves the first balance in dealing with EFD cases since an obligation to deal cannot be imposed on a product that is better to be bundled to the final product. Furthermore, this article notices no difficulty confronted by the GC to define the primary product as the interoperability information. The second part of this article observes that the definition of the primary market is usually based on unbundling practices on the relevant market. As shown in the judgment, during most of the 1990s, Microsoft actually granted a license relating to the disclosure of portions of the Windows source code (versions before Windows 2000) to AT&T, which developed a product capable of enabling interpretability with Windows products. AT&T then licensed its product to other companies, including Sun.[65] This may be considered as an unbundling practice and was relied upon by the GC to define the primary market as the market for the required interoperability information with the Windows client PC operating system.

This broader market definition furthermore led to two consequences. First, the primary market, which should have been tailored to the needs of the requested undertaking, i. e. the interoperability information for the Windows client PC operating system in this case, was not defined due to the broader market definition. The reason may be the difficulty in defining a proper level of interoperability. However, the Commission, in order to implement the judgment, must specify that information in any case. A lack of definition of the level of interoperability in the prohibition decision put the Commission in an awkward position in the implementing stage, where it had to adopt a long list of implementing decisions. This has never been observed in other

61 *IMS*, *supra* note 12, at para. 23.
62 *Ricoh*, supra note 18.
63 *Microsoft*, *supra* note 5, at para. 2.
64 *Ricoh*, *supra* note 18.
65 *Microsoft*, *supra* note 5, at para. 429.

cases. Secondly and most importantly, this broader market definition inevitably included operators active on the secondary market that did not necessarily need the interoperability information with the Windows client PC operating system. The inclusion of those operators made the GC struggle in carrying out its analysis on the subsequent conditions for the EFD analysis, in particular the indispensability test and elimination of all competition on the part of requesting undertakings. To make matters worse, this was the very reason why the GC was obliged to extend the application of those two conditions, which will be elaborated in following two sections.

7.2 The Indispensability Test

In the previous cases, the indispensability test sought for effective substitutes on the primary market. In *Microsoft*, since the primary product was defined as client PC operating systems, the GC should have looked for substitutes for the Windows client PC operating system. However, what was requested by Sun was not a client PC operating system, but the interoperability information with the Windows client PC operating system. Therefore, when analyzing the indispensability test, the GC had to change the subject matter for its substitute-seeking analysis to the interoperability information, which made the analysis of the indispensability test inconsistent with the definition of the relevant markets.

Furthermore, the devastating effect of the broader market definition did not end here. The interoperability information with the Windows client PC operating system was a matter of degree.[66] Different providers of workgroup server operating systems need various degrees of interoperability. Without adding the required level of interoperability into the definition of the primary market, the GC apparently included all providers into its analysis. Indeed, Microsoft was a quasi-monopoly on the market for client PC operating systems and imposed a de facto standard for workgroup computing. Thus, most providers of workgroup service operating systems required a high level of interoperability with Windows products. Moreover, it was impractical to obtain the interoperability information via other methods due to technical and time limits. This can be observed by the fact that Microsoft, though claiming that there were five alternative methods to achieve interoperability with the Windows client PC operating system,[67] did not deny that none of those methods or solutions made it possible to achieve the high degree of interoperability required by the Commission.[68] Therefore, it may be established that the interoperability information with the Windows client PC operating system was in general essential for those undertakings.

However, there were still some providers on the derivative market that did not need the level of interoperability required by the Commission. This in

66 *Ibid*., at para. 158
67 *Ibid*., at para. 346.
68 *Ibid*., at para. 435.

particular concerned Linux products. Without directly acquiring the interoperability information from Microsoft, Linux products on the secondary market nevertheless managed to continue increasing their market shares.[69] It was true that Linux products were mainly used for tasks such as Web serving, firewall serving and for mission-critical applications,[70] and hence could not offer a full-fledged set of services covering the sharing of files stored on servers, the sharing of printers and the administration of groups and users.[71] This nevertheless explained why Linux products required less interoperability information. Most importantly, it exposed the defect of not defining the primary market as the required interoperability information. Since not every piece of information related to interoperability was necessary to Linux products, the indispensability between the primary and secondary products in *Microsoft* was not solidly established. Even the GC could not give a reasonable explanation why without the interoperability information Linux providers could still increase their market shares. The GC only stated that "the growth of Linux products on the workgroup server operating systems market was only modest".[72] Had the primary product been defined as the interoperability information with the Windows client PC operating system at the level specified by the Commission, those Linux products should have been excluded from the analysis of the indispensability test, and thus the GC's analysis would be more tenable.

7.3 Elimination of All Competition

In the previous cases the analysis of elimination of all competition overlapped the indispensability test. Since there are no other effective substitutes on the primary markets, the requesting undertakings cannot carry out their activities on the secondary market. However, it is striking in *Microsoft* that the GC replaced the concept of "eliminating all the competition" with "eliminating all effective competition".[73] Based on such a change, the GC accepted limited presence of fringe competitors, in this case, Linux producers. In the following paragraphs, it will be analyzed that such a change is unnecessary and the reason is still the problematic definition of the primary market.

The very controversy in *Microsoft* was that when the Commission decision was adopted there were still a large number of competitors active on the secondary market where Microsoft only had around a 60% market share.[74] Microsoft's competitors seemed not to be eliminated in a short term. Such a market situation was not really consistent with the risk of eliminating all competition. This may be the reason why the GC extended the scope of this

69 *Ibid*., at para. 432.
70 *Microsoft Decision*, *supra* note 53, at para. 598.
71 *Microsoft*, *supra* note 5, at para. 26.
72 *Ibid*., at para. 432.
73 *Ibid*., at para. 563.
74 *Ibid*., at para. 33.

condition from eliminating all competition to eliminating all effective competition. Therefore, the following paragraphs focus on the question whether those competitors can actually be excluded from the secondary market due to the refusal to grant a license.

First, those competitors can be divided into two groups: (i) competitors that demand a high level of interoperability with Windows products, for example Sun; and (ii) competitors that only need a low level of interoperability, such as Linux producers. For the first group of competitors, as appropriately pointed out by the GC, their presence was largely due to the fact that many consumers were still using older versions of Windows products and the interoperability problem mainly came out when Microsoft released its Windows 2000 product line.[75] It is foreseeable that those competitors would gradually lose their market shares on the derivative market to Microsoft with more and more consumers updating to Windows 2000 products or even newer versions. Consequently, it can indeed be concluded that this condition, even according to the standard established in the previous cases, was fulfilled in relation to the first group of competitors.

However, as far as the second group of competitors is concerned, Linux producers, as mentioned above, continued to increase their market shares. There was no evidence that they would be excluded from the secondary market very soon, even without the interoperability information. The GC did not deny this point, but referred to some forecasts that Linux products would not become effective competition.[76] However, the underlying reason for the success of Linux products, though "modest" as described by the GC, was due to the fact that the level of interoperability required by the Commission was not indispensible to their production. Therefore, the refusal to license did not eliminate their competition.

Accordingly, the extension to eliminating all effective competition can only find its added value with regard to providers that did not need the level of interoperability desired by the Commission, and most importantly was not relevant to the request of the applicant in this case, i. e. Sun. Had the primary product been defined as the interoperability information, the fringe competition from Linux products should have been excluded immediately. Furthermore, it was also not necessary for the GC to expand the scope of this condition. In addition, once the primary market had been defined appropriately, it would have been not necessary for the GC to refer to the fast growing speed of Microsoft on the secondary market in order to prove that effective competition had been gradually weakened.[77] This gives a confusing impression that a dominant undertaking may be punished simply because of its extraordinary success.

75 *Ibid*., at para. 429.
76 *Ibid*., at para. 567.
77 *Ibid*., at paras. 569–573.

7.4 Preventing the Emergence of a New Product

In the previous cases, a refusal to grant an IPR license may be considered abusive only when it prevents the development of the secondary market to the detriment of consumers. This is for the purpose of balancing the interest and economic freedom of IPR owners against the interest in protecting free competition from other undertakings. Thus, the requesting undertakings, after acquiring such a license, should not limit themselves essentially to duplicating products already offered by the owner of an IPR, but to supplying new products that are currently not offered by that owner and for which there is potential consumer demand.[78]

Turning back to *Microsoft*, it is quite likely that the requested undertaking, Sun, after obtaining the interoperability information, would still supply a workgroup server operating system similar to Microsoft's own product. Based on the analyses in the previous cases, this condition cannot be satisfied. Nevertheless, the *Microsoft* judgment changed completely such an interpretation. Thereby the GC held that

[t]he 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 (now Art. 102). As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.[79]

If it can still be argued that the extension of *Microsoft* regarding the indispensability test and eliminating all competition only contains minor mistakes that did not invalidate the GC's whole conclusion, the extension related to the condition of preventing the emergence of a new product cannot be forgiven. The interpretation in the previous cases struck a proportionate balance between protecting the IPR owners' interest and encouraging other undertakings' incentive to innovate.[80] The purpose of IPRs is to allow their owners to enjoy monopoly for a limited time period in order to fully exploit their IPRs. It is probably not reasonable to protect the IPR owner's interest when other undertakings would like to develop a product based on that IPR that is on the one hand not provided by the IPR owner and on the other hand is refused to license. Under such a circumstance competition law is justified to intervene. However, this balance is broken in *Microsoft*. The GC interpreted the new product not only in the sense of a new market but also a product with technical development. Consequently, different from the previous cases that only protected requesting undertakings' interest in creating a new market, *Microsoft* also cherishes differentiation on the derivative market. This makes the EFD principle encroach into the very substance of the

78 *IMS*, *supra* note 12, at paras. 48–49.

79 *Microsoft*, *supra* note 5, at para. 647.

80 Kung-Chung Liu, "Rationalising the Regime of Compulsory Patent Licensing by the Essential Facilities Doctrine", 39 IIC 757–774 (2008).

IPR rules, i. e. IPR owners' willingness to exploit their rights solely for their own benefits.

Furthermore, the concept of "technical development" is very vague. This may cause difficulties in some cases. Suppose A holds patent X, and based on X it introduces a medicine that can cure flu in eight hours. In the first scenario, B would like to acquire X to produce an effective medicine for cancer. Within both the previous cases and *Microsoft*, it is very likely that A would be forced to grant such a license to B. In the second scenario, B desires to obtain this patent in order to also produce a medicine that nevertheless can cure flu in two hours. This seems to deliver technical development, and thus according to *Microsoft*, A might possibly be obliged to license to X. However, a complicated issue would be raised in the third scenario where B intends to produce a medicine that can cure flu in seven hours.[81] It is unclear in this case whether the GC's interpretation can lead to the conclusion that A should also license to X. Assuming that the answer is yes, IPR holders are put in a dangerous position since in the future they may be forced to license their IPRs even if the requesting undertakings only intend to produce similar products with minor modification in competition with them.

Some authors claim that when making such an extension the GC takes into account a specific feature of the software sector, namely that incremental innovation is as important as lumpier breakthrough innovations.[82] However, this may lead to a sector-specific competition law, and is against the general understanding that competition law serves as an industry-wide regulation. This article is hence of the opinion that the extension goes far beyond the original purpose of the EFD.

7.5 No Objective Justification

The previous cases prove that once the other conditions have been fulfilled it is very difficult for the requested undertaking to justify their refusal to deal. Regarding this point, *Microsoft* did not make any difference. The GC first declined Microsoft's claim that the technology concerned was covered by the IPR, and thus the refusal was reasonable.[83] Consistent with the previous cases, the analysis of the other conditions already takes into account the special features of IPRs, and accordingly the protection granted by IPRs cannot be regarded as a justification at this stage. Nevertheless, it is interesting to notice that the GC also rejected Microsoft's argument that an obligation to license would impair its incentive to innovate. The GC's reasons were mainly two fold. First, Microsoft merely put forward vague, general and

81 Bo Vesterdorf, "Article 82 EC: Where do we stand after the Microsoft judgement?", 1 Global Antitrust Review 1–14 (2008).

82 Pierre Larouche, "The European *Microsoft* case at the crossroads of competition policy and innovation" (2008), available at: http://ssrn.com/abstract=1140165 (last visited 16 December 2011).

83 *Microsoft*, *supra* note 5, at paras. 690–691.

theoretical arguments on this point.[84] Secondly, it was normal practice for operators to disclose to third parties the interoperability information with their products and such disclosure can allow those operators to make their own products more attractive and therefore more valuable.[85] However, it remains the IPR owners' decisions to decide how to deal with their properties. By referring to the normal practice, the GC intruded into the IPR holders' business strategies.

8 Conclusions

Since the EFD represents an exception to the free will of ownership, its application must be subject to strict restrictions. Regarding this point, the case law in the pre-*Microsoft* era strikes a delicate balance of, on the one hand, protecting the exclusivity of ownership, and on the other hand incentives to innovate from other undertakings. This can be first observed from the definition of the primary market where the European authorities focus on the demand of the requesting undertakings to assess whether the requested product can be unbundled from the final product supplied by the requested dominant undertakings. Once the primary and secondary markets have been defined, the European authorities subsequently seek for effective substitutes on the primary market in order to establish the indispensability of the primary product to the secondary product. This indispensability test is implemented in such a strict way that the subsequent analysis of eliminating all competition from the requesting undertakings becomes a natural consequence. At the final step, the requested dominant undertaking is allowed to justify its refusal, though in practice they seldom succeed at this stage.

Where a refusal to deal involves an IPR, a more delicate balance is reached by adding a new condition to the above analyses. This condition is that the refusal to grant a license should risk of hindering the introduction of a new product. In pre-*Microsoft* era, this new product is required to be able to constitute a new market where the requested dominant undertaking is not active. This requirement on the one hand gives due respect to the will of IPR holders to exploit their rights fully to their own benefit, and on the other hand encourage other undertakings to bring innovation in addition to the products provided by the requested dominant undertaking. This limits the harm to IPR holders and the market to the minimum.

However, the *Microsoft* judgment brings down all those appropriate balances. The GC first made a technical mistake in defining the primary market without accordance with the need of the requesting undertaking. While the requesting undertaking demands interoperability information with the Windows client PC operating system, the primary market is defined as client PC operating systems. This broader market definition is firstly not consistent with the subject matter of the subsequent indispensability test, and secondly

84 *Ibid*., at para. 698.
85 *Ibid*., at para. 702.

includes competitors, in particular those providing Linux products, that depend to a lesser extent on the interoperability information required by the Commission. The consequence is that the GC struggles in justifying in its analysis on the increasing market share of Linux products even without the interoperability information provided by Microsoft by expanding the condition of "eliminating all the competition" to "eliminating all effective competition". This extension would not have been necessary if the primary product had been defined as the interoperability information with the Windows client PC operating system.

The second mistake committed by the GC is related to the new condition for IPR-related EFD cases. While the previous cases establish a proportionate balance by requiring that the secondary product must constitute a new market, *Microsoft* acknowledges that products with technical development can also satisfy this condition. An obligation to grant a license under such circumstances may force IPR holders to support their direct competitors with their exclusive IPRs. This in essence encroaches upon the very substance of the IPR system, which creates a temporary legal monopoly over an IPR. The *Microsoft* judgment nevertheless gives an impression that an IPR holder has to change their monopolized IPR into "open source" simply because of their exceptional achievements.