

# Court of First Instance: Microsoft vs European Commission

**IRIS 2007-9:1/4**

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On September 17, the Court of First Instance (CFI) issued its judgment in the antitrust case of Microsoft Corporation vs Commission of the European Communities.

The CFI essentially confirmed the Commission's 2004 Decision (see IRIS 2004-5: 4), in which it found that Microsoft had abused a dominant position (1) in the market for Workgroup Server Operating Systems, by refusing to supply interoperability information to competitors, and (2) in the market for Client PC Operating Systems, by tying the Windows operating system with Windows Media Player functionality. However, it annulled article 7 of that Decision, which provided for an independent trustee to monitor compliance with the Decision.

The first abuse concerned a refusal to supply interoperability information for Microsoft's Workgroup Server Operating Systems to its competitor Sun and others. This is widely regarded as the most important aspect of the ruling, as it affects the circumstances under which a dominant firm may be required to share intellectual property with competitors. Due to the refusal to supply interoperability information, and because interoperability with the dominant Microsoft-standard was a key feature for workgroup server products, Sun was unable to create competing products and risked being eliminated from that market. Consequently, innovation was impeded to the prejudice of consumers. Furthermore, there was no objective justification for the refusal. The court confirmed the applicability of the four-factor test developed by the Court of Justice (ECJ) in the cases of Magill and IMS Health, although it interpreted one of these factors - namely, the requirement that it can be shown that the emergence of a new product can be prevented - more broadly than in previous case law. Thus, the CFI upheld the Commission's order to have Microsoft supply the interoperability information to its competitors.

The second abuse of a dominant position related to the tying of Windows Media Player functionality with the Windows Operating System. The Commission had found, and the CFI confirmed this, that the operating system and the media player constituted two different products and that the tying product (the operating system) was not offered without the tied product (the media player). The combination risked eliminating competition, with Windows Media Player

eventually emerging as the only platform for digital content. This could give Microsoft significant control over digital content distribution in general. Thus, the Commission's order to have Microsoft offer a version of Windows without Media Player, named Windows XPn, was upheld.

Microsoft can claim only a minor victory in this case. Article 7 of the original Decision required Microsoft to submit a proposal for an independent monitoring trustee who should have access to Microsoft's documents, employees, premises and source code independently of the Commission. The trustee's duties entailed more than a mere obligation to report on Microsoft's behaviour. The CFI held that, as the authority responsible for compliance with the Communities' competition laws, the Commission could not delegate these powers to an independent third party. Moreover, it could not order Microsoft to bear the costs of the trustee.

Although the CFI's ruling may still be appealed before the Communities' highest court, the Court of Justice, it is nonetheless regarded as a landmark judgment. For one, the CFI's extensive analysis of the facts of this case is final and will not be reviewed by the Court of Justice. Moreover, whereas Microsoft had originally indicated its intention to appeal any negative ruling by the CFI, their language was more nuanced about this point in a press conference following the CFI's ruling.

***Judgment of the Court of First Instance, T-201/04, Microsoft Corp. v. Commission of the European Communities, 17 September 2007***

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