It is clear from *Tetra Pak II* that, once it is shown that the products or services tied together are distinct, a dominant undertaking cannot rely on the words about nature and commercial usage in Article 102(d). 'Commercial usage' may merely have been established by the dominant undertaking itself[613] and the Court stressed the non-exhaustive character of the particular examples listed in the Article, thereby emasculating the conditions in that sub-paragraph. *Hilti* and *Tetra Pak II* were both driven by concerns about the structure of the market, not about the extraction of monopoly profits or the direct protection of consumers. In *Tetra Pak II* the monopoly profit could have been extracted from the tying product (the machines), had Tetra Pak wished.[614]

(ii) Mixed Bundling

Two of the cases and settlements concerning mixed bundling involved Coca-Cola. In *Coca-Cola Italia Undertaking* (1989)[615] the Commission's SO alleged that Coca-Cola's practice of offering discounts to retailers based on a package of cola and non-cola was an abuse. Coca-Cola agreed not to make discounts on cola conditional on the retailers buying non-cola, and the case was settled on that basis. In *Coca-Cola Undertaking* (2005)[616] Coca-Cola agreed, inter alia, to no longer offer a rebate to its customers if the customer agreed to buy other products together with its best-selling products or to reserve shelf space for the entire group of products.

In the aftermarket case, *Digital Undertaking*,[617] Digital, a computer supplier, offered a package of hardware maintenance services and software support services for its systems. The primary product market of computer systems was competitive but the Commission alleged that by offering customers the package in the aftermarket Digital abused its dominant position on the software support market for Digital systems as it made it uneconomic for customers to buy the hardware maintenance from a third party. Competitors in the hardware maintenance market were therefore excluded from servicing Digital systems. The Commission settled the proceedings when Digital undertook, inter alia, to offer hardware maintenance services on a stand-alone basis and to price its package in a way which fell below the list prices of the individual component services only insofar as the reduction reflected the passing on to customers of costs savings or other benefits stemming from the efficient packaging together of the different elements.

(iii) Technical Bundling and the *Microsoft* Case

In 1984 the Commission came to a settlement with IBM[618] after it had alleged that IBM had infringed Article 102 by, inter alia, tying various computer products together.[619]

[613] See V. Korah, 'The Paucity of Economic Analysis in the EEC Decisions on Competition: *Tetra Pak II*' [1993] *CLP* 150; see also Case T-201/04, *Microsoft* [2007] ECR II-3601, para. 940.

[614] See Korah, ibid.

[615] Commission's *XIXth Report on Competition Policy* (1989), para. 50.

[616] [2005] OJ L253/21.

[617] Commission Press Release IP/97/868. Cf. the *Pelikan/Kyocera* case, *XXVth Report on Competition Policy* (1995), part 87: see Chap. 6. See also D. Maldoom, 'The *Kodak* Case: Power in Aftermarkets' [1996] *ECLR* 473; M. Dolmans and V. Pickering, 'The 1997 Digital Undertaking' [1998] *ECLR* 108; P. Andrews, 'Aftermarket Power in the Computer Services Market: The Digital Undertaking' [1998] *ECLR* 176.

[618] See Commission, *XIVth Report on Competition Policy* (1984) paras. 94–95.

[619] This involved not offering central processing units (CPUs) without a capacity of main memory included in the price (memory bundling); and not offering CPUs without the basic software included in the price (software bundling). IBM did not admit it had a dominant position or that it had committed an abuse but nevertheless undertook to offer its CPUs in the EEC either without main memory or with only such capacity as was strictly required for testing. IBM was also alleged to have committed an abuse by failing to disclose interface information, see Section 13.D, p. 521, and by discriminating between users of IBM software, i.e. refusing to supply certain software installation services to users of non-IBM CPUs. In 2010 the Commission examined complaints (from rival software suppliers) that IBM had tied its mainframe hardware with its operating system. The Commission closed the proceedings on 20 September 2011 and the complaints were withdrawn.

In *Microsoft*[620] the Commission returned to the issue of tying in software markets. The Commission adopted a decision finding that Microsoft had abused its dominant position on the client PC operating systems market, where Microsoft's Windows system had over 90 per cent of the market, by supplying Windows to the computer manufacturers (OEMs) with its Windows Media Player (WMP) pre-installed. The Commission's conclusions were based on the finding that the Windows operating system and the WMP were two distinct products and that by bundling them together Microsoft was leveraging its monopoly power on to the media player market where it faced more competition. The Commission held that for tying to infringe Article 102 four elements must be present (see paragraph 794 in the extract from the Commission's decision): two separate products; dominance in the tying market; the customers are given no choice to obtain the tying product alone; and the tying forecloses competition. The Commission held all four conditions were present in this case. In this extract the Commission explains the detrimental effects of Microsoft's practices.

Microsoft, Commission Decision COMP/37.792, 24 March 2004

Commission

(794) Tying prohibited under [Article 102] of the Treaty requires the presence of the following elements: (i) the tying and tied goods are two separate products; (ii) the undertaking concerned is dominant in the tying product market; (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (iv) tying forecloses competition.

. . .

(979) Through tying WMP with Windows, Microsoft uses Windows as a distribution channel to anti-competitively ensure for itself a significant competition advantage in the media player market. Competitors, due to Microsoft's tying, are *a priori* at a disadvantage irrespective of whether their products are potentially more attractive on the merits.

(980) Microsoft thus interferes with the normal competitive process which would benefit users in terms of quicker cycles of innovation due to unfettered competition on the merits. Tying of WMP increases the content and applications barrier to entry which protects Windows and it will facilitate the erection of such a barrier for WMP. A position of market strength achieved in a market characterised by network effects—such as the media player market—is sustainable, as once the network effects work in favour of a company which has gained a decisive momentum, they will amount to entry barriers for potential competitors . . .

(981) This shields Microsoft from effective competition from potentially more efficient media player vendors which could challenge its position. Microsoft thus reduces the talent and capital invested in innovation of media players, not least its own . . . and anti-competitively raises barriers to market entry. Microsoft's conduct affects a market which could be a hotbed for new and exciting products springing forth in a climate of undistorted competition.

(982) Moreover, tying of WMP allows Microsoft to anti-competitively expand its position in adjacent media-related software markets and weaken effective competition to the eventual detriment of consumers.

It is notable that the Commission took a more 'effects-based' approach in *Microsoft* than it had done in the past, in *Hilti* and *Tetra Pak II*. It did not assume foreclosure of competitors. Instead it said:[621]

There are indeed circumstances relating to the tying of WMP which warrant a closer examination of the effects that tying has on competition in this case. While in classical tying cases, the Commission and the Courts considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a

[620] COMP/37.792, 24 March 2004. The case also concerned a refusal to supply, discussed in Section 13.D, p. 521.

[621] COMP/37.792, *Microsoft* 24 March 2004, para. 841.

separate product with the dominant product, in the case at issue, users can and do to a certain extent obtain third party media players through the internet, sometimes for free. There are therefore indeed good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclosure competition.

It carefully set out the effects of Microsoft's tying practice. First, installing WMP on Windows provided a more efficient distribution system than was available to the competitors and led to the 'ubiquity' of WMP.[622] That meant, secondly, that content providers and software developers increasingly used the WMP format to the detriment of the main competitors and their technologies.[623] That led, thirdly, to network effects which in the end would result in the market 'tipping' to WMP: it is not necessary for a competition authority to wait until the tipping has actually occurred, by which time meaningful intervention would be too late.[624]

Microsoft was fined €497,196,304.[625] More seriously for Microsoft the Commission ordered it to offer the OEMs a version of Windows without the WMP. The OEMs must be able to choose between Windows alone and a 'package' of Windows plus the WMP. If they choose the former they can install a rival media player. Consumers therefore have a choice of media player when they buy their PC. Microsoft is not allowed to offer any technological, commercial, or contractual term or inducement to make the bundled version the more attractive, and the unbundled version of Windows must work as well as the bundled version.

The Commission's decision raised a number of difficult and controversial issues. Among these was how far even dominant suppliers should be free to develop new versions of their products with 'built in' features. Microsoft appealed to the GC.[626]

Meanwhile, in the US the competition authorities charged Microsoft with an illegal tie by bundling its own Internet Explorer browser (IE) with its Windows operating system, but the case was dropped.[627] The DOJ was highly critical of the EU *Microsoft* decision:

Imposing antitrust liability on the basis of product enhancements and imposing 'code removal' remedies may produce unintended consequences. Sound antitrust policy must avoid chilling innovation and competition even by 'dominant' companies. A contrary approach risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it. It is significant that the U.S. district court considered and rejected a similar remedy in the U.S. litigation.

While the imposition of a civil fine is a customary and accepted aspect of EC antitrust enforcement, it is unfortunate that the largest antitrust fine ever levied will now be imposed in a case of unilateral competitive conduct, the most ambiguous and controversial area of antitrust enforcement. For this fine to surpass even the fines levied against members of the most notorious price fixing cartels may send an unfortunate message about the appropriate hierarchy of enforcement priorities.[628]

622 Ibid., paras. 843–878.

623 Ibid., paras. 879–944.

624 Ibid., para. 946.

625 The fine included that for the other abuse investigated, refusal to supply interface information. This was not a case where the Commission refrained from imposing a fine because of the novelty of the case: it said that as regards the tying/bundling abuse it was not applying a new rule but that *Hilti* and *Tetra Pak II* should have been sufficient guidance to Microsoft in making it clear that its conduct infringed Art. 102: 'the software industry is not exempted from the application of competition law' (ibid., para. 1057).

626 Case T-201/04, *Microsoft* [2007] ECR II-3601; there was no further appeal to the CJ.

627 The District Court held that they were two products and that the browser/operating system package constituted a per se illegal tie-in (87 F. Supp.2d 30 (DDC 2000)), but the Court of Appeals sent it back to be tried under a rule of reason analysis (253 F.3d 34 (DCC 2001)). The Court of Appeals was concerned that the bundling of the system and browser served consumer welfare, in that consumers welcome being able to buy a computer with a browser ready installed, rather than having to shop around for one. The US DOJ then withdrew the tying claim, so it was not retried (the States which were also plaintiffs withdrew their claims likewise).

628 Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in its Microsoft Investigation, 24 March 2004, <http://www.justice.gov/archive/atr/public/press_releases/2004/202976.htm>.

In the *Microsoft* appeal the GC, having stated at the outset the limited nature of its judicial function where complex economic and technical appraisals were concerned,[629] stuck closely to its brief of establishing that the Commission had provided adequate reasoning based on factually accurate, reliable, and consistent evidence capable of substantiating its conclusions. It confirmed (in paragraph 859) that the four factors set out in the Commission's decision,[630] i.e. two products, dominance in the tying market, no choice, and foreclosure, were correct.

The Commission's conclusions were based on the premiss that there were two products, desktop operating systems and media players. Microsoft therefore claimed, first, that it did not supply two distinct products but one integrated one and that therefore it could not commit the abuse of tying or bundling. It argued that it was relevant to ask whether there was consumer demand for the tying product (Windows) without the tied product (WMP). The GC upheld the Commission's decision that there were two products.

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917. First of all, it must be observed that, as the Commission correctly states at recital 803 to the contested decision, the distinctness of products for the purpose of an analysis under Article [102] has to be assessed by reference to customer demand. Furthermore, Microsoft clearly shares that opinion . . .

918. The Commission was also correct to state, at the same recital, that in the absence of independent demand for the allegedly tied product, there can be no question of separate products and no abusive tying.

919. Microsoft's argument that the Commission thus applied the wrong test and that it ought in reality to have ascertained whether what was alleged to be the tying product was regularly offered without the tied product or whether customers 'want[ed] Windows without media functionality' cannot be accepted.

920. In the first place, the Commission's argument finds support in the case-law (see, to that effect, Case C-333/94 P *Tetra Pak II* . . . paragraph 36; Case T-30/89 *Hilti* . . . paragraph 67; and Case T-83/91 *Tetra Pak II* . . . paragraph 82).

921. In the second place, as the Commission correctly observes in its pleadings, Microsoft's argument, based on the concept that there is no demand for a Windows client PC operating system without a streaming media player, amounts to contending that complementary products cannot constitute separate products for the purposes of Article [102], which is contrary to the Community case-law on bundling. To take Hilti, for example, it may be assumed that there was no demand for a nail gun magazine without nails, since a magazine without nails is useless. However, that did not prevent the Community Courts from concluding that those two products belonged to separate markets.

922. In the case of complementary products, such as client PC operating systems and application software, it is quite possible that customers will wish to obtain the products together, but from different sources. For example, the fact that most client PC users want their client PC operating system to come with word-processing software does not transform those separate products into a single product for the purposes of Article [102].

923. Microsoft's argument ignores the particular intermediary role played by OEMs, who combine hardware and software from different sources in order to offer a ready-to-use PC to the end user. As the Commission very correctly observes at recital 809 to the contested decision, if OEMs and consumers were able to obtain Windows without Windows Media Player, that would not mean that they would choose to obtain Windows without a streaming media player. OEMs follow consumer demand for a pre-installed media player on the operating system and offer a software package including a streaming media

[629] Case T-201/04, *Microsoft* [2007] ECR II-3601, paras. 85–89, but see now Chap. 13, Section 8.A.vii, p. 1000.

[630] COMP/37.792, *Microsoft* 24 March 2004, para. 794.

player that works with Windows, the difference being that that player would not necessarily be Windows Media Player.

924. In the third place, and in any event, Microsoft's argument cannot succeed because, as the Commission observes at recital 807 to the contested decision, there exists a demand for client PC operating systems without streaming media players, for example by companies afraid that their staff might use them for non-work-related purposes. That fact is not disputed by Microsoft.

925. Next, the Court finds that a series of factors based on the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also Microsoft's commercial practice demonstrate the existence of separate consumer demand for streaming media players.

926. In the first place, it must be borne in mind that the Windows client PC operating system is system software while Windows Media Player is application software. As the Commission explains at recital 37 to the contested decision, ' "[s]ystem software" controls the hardware of the computer, to which it sends instructions on behalf of "applications" fulfilling a specific user need, such as word processing', and '[o]perating systems are system software products that control the basic functions of a computer and enable the user to make use of such a computer and run application software on it'. More generally, it is clear from the description of those products at recitals 324 to 342 and 402 to 425 to the contested decision that client PC operating systems and streaming media players clearly differ in terms of functionalities.

927. In the second place, there are distributors who develop and supply streaming media players on an autonomous basis, independently of client PC operating systems. Thus, Apple supplies its QuickTime player separately from its client PC operating systems. A further particularly convincing example is that of RealNetworks, Microsoft's main competitor on the streaming media players market, which neither develops nor sells client PC operating systems. It must be pointed out, in that regard, that according to the case-law the fact that there are on the market independent companies specialising in the manufacture and sale of the tied product constitutes serious evidence of the existence of a separate market for that product (see, to that effect, Case C-333/94 P *Tetra Pak II* . . . paragraph 36; Case T-30/89 *Hilti* . . . paragraph 67; and Case T-83/91 *Tetra Pak II* . . . paragraph 82).

928. Likewise, in the third place, Microsoft, as it confirmed in answer to a written question put by the Court, develops and markets versions of Windows Media Player which are designed to work with its competitors' client PC operating systems, namely Apple's Mac OS X and Sun's Solaris. Similarly, RealNetworks' RealPlayer works with, inter alia, the Windows, Mac OS X, Solaris and some UNIX operating systems.

929. In the fourth place, Windows Media Player can be downloaded, independently of the Windows client PC operating system, from Microsoft's Internet site. Likewise, Microsoft releases upgrades of Windows Media Player, independently of releases or upgrades of its Windows client PC operating system.

930. In the fifth place, Microsoft engages in promotions specifically dedicated to Windows Media Player (see recital 810 to the contested decision).

931. In the sixth place, as the Commission pertinently observes at recital 813 to the contested decision, Microsoft offers SDK licences which differ according to whether they relate to the Windows client PC operating system or to Windows Media technologies. There is thus a specific SDK licence for Windows Media Player.

932. Last, and in the seventh place, in spite of the bundling applied by Microsoft, a not insignificant number of customers continue to acquire media players from Microsoft's competitors, separately from their client PC operating system, which shows that they regard the two products as separate.

933. The foregoing facts demonstrate to the requisite legal standard that the Commission was correct to conclude that client PC operating systems and streaming media players constituted two separate products for the purposes of Article [102].

934. That conclusion is not undermined by Microsoft's other arguments.

935. In the first place, as regards Microsoft's argument that the integration of Windows Media Player in the Windows operating system from May 1999 constitutes a normal and necessary step in the evolution of that system and is in keeping with the constant improvement of its media functionality, it is sufficient to observe that the fact that tying takes the form of the technical integration of one product in another does not have the consequence that, for the purpose of assessing its impact on the market, that integration cannot be qualified as the bundling of two separate products.

936. As Microsoft itself acknowledged in answer to a question put to it by the Court at the hearing, its decision to supply WMP 6 as a functionality integrated in the Windows operating system from May 1999 was not the consequence of a technical constraint. At that time there was nothing to prevent Microsoft from distributing WMP 6 in the same way as it had distributed its previous player, NetShow, which since June 1998 had been included on the Windows 98 installation CD: and none of the four Windows 98 default installations provided for the installation of NetShow, which had to be installed by users if they wished to use it.

937. Furthermore, Microsoft's argument that the integration of Windows Media Player in the Windows operating system was dictated by technical reasons is scarcely credible in the light of the content of certain of its own internal communications. Thus, it follows from Mr Bay's email of 3 January 1999 to Mr Gates (see paragraph 911 above) that the integration of Windows Media Player in Windows was primarily designed to make Windows Media Player more competitive with RealPlayer by presenting it as a constituent part of Windows and not as application software that might be compared with RealPlayer.

938. In the second place, Microsoft cannot claim that the Commission fails to show that media functionality is not linked, by nature or according to commercial usage, to client PC operating systems.

939. First, it follows from the considerations set out at paragraphs 925 to 932 above that client PC operating systems and streaming media players do not, by their nature, constitute indissociable products. While it is true that there is a link between a client PC operating system such as Windows and application software such as Windows Media Player, in the sense that both products are on the same computer from the user's perspective and that a media player will only work when an operating system is present, that does not mean that the two products are not dissociable in economic and commercial terms for the purpose of competition rules.

940. Second, as the Commission rightly observes, it is difficult to speak of commercial usage in an industry that is 95% controlled by Microsoft.

941. Third, Microsoft cannot rely on the fact that vendors of competing client PC operating systems also bundle those systems with a streaming media player. On the one hand, Microsoft has not adduced any evidence that such bundling was already carried out by its competitors at the time when the abusive bundling commenced. On the other hand, moreover, it is clear that the commercial conduct of those competitors, far from invalidating the Commission's argument, corroborates it. As may be seen from recitals 822 and 823 to the contested decision and as the Commission observes in its pleadings, some vendors of non-Microsoft operating systems who supply their operating systems with a media player make the installation of the media player optional, or allow it to be uninstalled, or offer a selection of different media players.

942. Fourth, and in any event, it is settled case-law that even when the tying of two products is consistent with commercial usage or when there is a natural link between the two products in question, it may none the less constitute abuse within the meaning of Article [102], unless it is objectively justified (Case C-333/94 P *Tetra Pak II* . . . paragraph 37).

943. Finally, in the third place, the argument which Microsoft put forward at the hearing, that the unbundled version of Windows which it placed on the market pursuant to the remedy had met with no success, must also be rejected. As already stated at paragraph 260 above, the lawfulness of a Community measure must be assessed on the basis of the matters of fact and of law existing at the time when the measure was adopted. Furthermore, any doubts as to the effectiveness of the remedy ordered by the Commission do not in themselves prove that its finding as to the existence of two separate products is wrong.

944. The Court concludes from all of the foregoing considerations that the Commission was correct to find that client PC operating systems and streaming media players constituted separate products.

The test for determining whether products are distinct for the purposes of Article 102 is thus 'consumer demand' (paragraphs 917–918). One relevant issue was not whether consumers wanted Windows without media functionality but whether they necessarily wanted them from the same source (paragraphs 921–922); a second was the important role of the OEMs (paragraph 923); and a third was that some operating systems users (e.g. kill-joy employers) did not want built-in media players (paragraph 924). The GC also looked at features of the market and at aspects of Microsoft's commercial practice. It noted that operating systems and streaming media players have different functionality (paragraph 926); distributors supply media players separately from any supply of a PC client operating system (paragraph 927); Microsoft distributed versions of the WMP designed to work with its competitors' operating systems (paragraph 928); WMP could be downloaded independently from Microsoft's internet site (paragraph 929); Microsoft engaged in WMP-specific promotion (paragraph 930); Microsoft applied different licensing arrangements to Windows and to WMP (paragraph 931); and some consumers obtained media players from the competitors, separately from their PC operating system (paragraph 932).

Secondly, Microsoft argued that the situation did not fall within Article 102(d) and that the Commission had added a foreclosure element not expressly provided for in Article 102(d).[631] The GC confirmed that the second paragraph of Article 102 is not exhaustive and that the Commission's 'four factors' could be deduced from the very concept of bundling and from the case law.

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850. The Court finds that Microsoft's arguments are purely semantic and cannot be accepted.

851. It is appropriate to recall the way in which the Commission structures its argument relating to bundling in the contested decision.

852. At recital 794 to the contested decision, the Commission states that tying prohibited under Article [102] requires the presence of the four factors set out at paragraph 842 above.

853. Next, it examines Microsoft's conduct in the light of those four factors (recitals 799 to 954 to the contested decision).

854. So, the Commission first observes that Microsoft has a dominant position on the client PC operating systems market (recital 799 to the contested decision). The Court notes that Microsoft does not dispute that fact.

855. Second, the Commission says that streaming media players and client PC operating systems are two separate products (recitals 800 to 825 to the contested decision).

856. Third, the Commission states that Microsoft does not give customers the choice of obtaining Windows without Windows Media Player (recitals 826 to 834 to the contested decision).

857. Fourth, the Commission claims that the tying of Windows Media Player forecloses competition in the media players market (recitals 835 to 954 to the contested decision). It observes, in particular, that in classical tying cases both it and the Community Courts 'considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product' (recital 841 to the contested decision). The Commission states, however, that in the present case there are good reasons not to assume without further analysis that tying Windows Media Player constitutes conduct which by its very nature is liable to foreclose competition (ibid.). The Commission considers, in essence, that 'tying [Windows Media Player] with the dominant Windows makes [Windows Media Player] the platform of choice for complementary content and applications which in turn [creates a risk of] foreclosing competition in the market for media players' (recital 842 to the contested decision). Furthermore, '[t]his has

[631] Case T-201/04, *Microsoft* [2007] ECR II-3601, paras. 845–847.

spillover effects on competition in related products such as media encoding and management software (often server-side), but also in client PC operating systems for which media players compatible with quality content are an important application' (ibid.).

858. Last, the Commission examines the basis on which Microsoft relies in its attempt to demonstrate that the abusive conduct imputed to it is objectively justified (recitals 955 to 970 to the contested decision).

859. The Court considers that the Commission's analysis of the constituent elements of bundling is correct and that it is consistent both with Article [102] and with the case-law. The Commission was correct to rely on the factors set out at recital 794 to the contested decision and on the fact that the tying was without objective justification in deciding whether Microsoft's conduct constituted abusive tying. Those factors can be deduced both from the very concept of bundling and from the case-law (see, in particular, Case T-30/89 *Hilti v Commission* . . . upheld in Case C-53/92 P *Hilti v Commission* . . . (both cases being referred to below as 'Hilti') and judgments of the [General Court] and the Court of Justice in *Tetra Pak II*, paragraph 293 above).

860. It must be borne in mind that the list of abusive practices set out in the second paragraph of Article [102] is not exhaustive and that the practices mentioned there are merely examples of abuse of a dominant position (see, to that effect, Case C-333/94 P *Tetra Pak II*, paragraph 293 above, paragraph 37). It is settled case-law that the list of practices contained in that provision is not an exhaustive enumeration of the abuses of a dominant position prohibited by the EC Treaty (Case 6/72 *Europemballage and Continental Can v Commission* . . . paragraph 26, and *Compagnie maritime belge transports and Others v Commission*, paragraph 229 above, paragraph 112).

861. It follows that bundling by an undertaking in a dominant position may also infringe Article [102] where it does not correspond to the example given in Article [102(d)]. Accordingly, in order to establish the existence of abusive bundling, the Commission was correct to rely in the contested decision on Article [102] in its entirety and not exclusively on Article [102 (d)].

862. In any event, the Court holds that the constituent elements of abusive tying identified by the Commission at recital 794 to the contested decision coincide effectively with the conditions laid down in Article[102 (d)].

863. The Court thus rejects Microsoft's argument that in the present case the Commission applied conditions which differ, from two perspectives, from those laid down in Article [102(d)].

864. In the first place, when the Commission states that it is necessary to examine whether the dominant undertaking 'does not give customers a choice to obtain the tying product without the tied product', it is merely expressing in different words the concept that bundling assumes that consumers are compelled, directly or indirectly, to accept 'supplementary obligations', such as those referred to in Article [102(d)].

865. In the present case, as the Court will explain in greater detail at paragraphs 962 and 965 below, that coercion is mainly applied first of all to OEMs, who then pass it on to the end user. The end user is directly exposed to that coercion in the less frequent situation in which, rather than deal through an OEM, he acquires a Windows client PC operating system directly from a retailer.

866. In the second place, it cannot be claimed that the Commission introduced a new condition relating to the foreclosure of competitors from the market in order to establish the existence of abusive bundling within the meaning of Article [102(d)].

867. In that regard, the Court observes that, while it is true that neither that provision nor, more generally, Article [102] as a whole contains any reference to the anti-competitive effect of bundling, the fact remains that, in principle, conduct will be regarded as abusive only if it is capable of restricting competition (see, to that effect, Case T-203/01 *Michelin v Commission* . . . ('Michelin II'), paragraph 237).

868. Furthermore, as will be made explicit at paragraphs 1031 to 1058 below, the applicant cannot claim that the Commission relied on a new and highly speculative theory to reach the conclusion that a foreclosure effect exists in the present case. As indicated at recital 841 to the contested decision, the Commission considered that, in light of the specific circumstances of the present case, it could not merely assume, as it normally does in cases of abusive tying, that the tying of a specific product and a dominant

product has by its nature a foreclosure effect. The Commission therefore examined more closely the actual effects which the bundling had already had on the streaming media player market and also the way in which that market was likely to evolve.

869. In light of the foregoing, the Court considers that the question of the bundling must be assessed by reference to the four conditions set out at recital 794 to the contested decision (see paragraph 842 above) and to the condition relating to the absence of objective justification.

870. The second condition set out at recital 794 to the contested decision must be considered to be met, because it is common ground that Microsoft has a dominant position on the market for what is alleged to be the tying product, namely client PC operating systems. The arguments which Microsoft puts forward in relation to the first three parts of the first plea (see paragraph 839 above) will be examined in conjunction with the four other conditions which must be satisfied to substantiate the finding of abusive tying. In carrying out that examination, the Court will proceed as follows. First, it will examine the condition relating to the existence of two separate products in the light of the arguments advanced by Microsoft on the second and third parts of the plea. Second, it will examine the condition to the effect that the conclusion of contracts is made subject to supplementary obligations, in the light of the arguments which Microsoft puts forward in support of the third part of the plea. Third, the Court will analyse the condition relating to the restriction of competition on the market in the light of the submissions made by Microsoft in connection with the first part of the plea. Fourth, it will examine the objective justifications on which the applicant relies, taking into account the arguments which it puts forward in connection with the second part of the plea.

Thirdly, Microsoft said that there was no restriction of *actual* (rather than *hypothetical*) customer choice. It argued that there was no 'coercion' or supplementary obligation involved. Consumers did not pay more for the WMP functionality of Windows. They did not have to use it. They could install and use third party media players. The GC held all of this irrelevant. It was not necessarily true that the WMP was free just because there was no separate charge for it and, anyway, it was not required that consumers had to pay a certain price for the tied product.[632] Nor did Article 102(d), as could be seen from *Hilti*, demand that the consumers had to use the tied product.[633] Although both OEMs and consumers *could* install and/or use other media players, they had little incentive to do so.[634] This last point was vital for the issue of foreclosure.

Fourthly, Microsoft claimed that the Commission had failed to prove that the integration of WMP with Windows involved foreclosure of competition. It argued that the Commission, recognising that it was not dealing with a 'classical tying case', had applied a 'highly speculative theory, relying on a prospective analysis of the possible reactions of third parties, in order to reach the conclusion that the tying at issue was likely to foreclose competition'.[635] The GC rejected this too.

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1046. Thus, the release of the bundled version of Windows and Windows Media Player as the only version of the Windows operating system capable of being pre-installed by OEMs on new client PCs had the direct and immediate consequence of depriving OEMs of the possibility previously open to

[632] Ibid., paras. 968–969.

[633] Ibid., para. 970.

[634] Ibid., para. 971.

[635] Ibid., para. 1032.

them of assembling the products which they deemed most attractive for consumers and, more particularly, of preventing them from choosing one of Windows Media Player's competitors as the only media player. On this last point, it must be borne in mind that at the time RealPlayer had a significant commercial advantage as market leader. As Microsoft itself acknowledges, it was only in 1999 that it succeeded in developing a streaming media player that performed well enough, given that its previous player, NetShow, 'was unpopular with customers because it did not work very well' (recital 819 to the contested decision). It must also be borne in mind that between August 1995 and July 1998 it was RealNetworks' products—first RealAudio Player, then RealPlayer—that were distributed with Windows. There is therefore good reason to conclude that if Microsoft had not adopted the impugned conduct competition between RealPlayer and Windows Media Player would have been decided on the basis of the intrinsic merits of the two products.

...

1052. As the Commission asserts at recital 870 to the contested decision, while downloading is in itself a technically inexpensive way of distributing media players, vendors must deploy major resources to 'overcome end-users' inertia and persuade them to ignore the pre-installation of [Windows Media Player]'.

1053. Second, Microsoft has put forward no argument capable of calling in question the Commission's finding that the other methods of distributing streaming media players mentioned in the contested decision, namely bundling the media player with other software or Internet access services, and retail sale, are only a 'second-best solution and [do] not rival the efficiency and effectiveness of distributing software pre-installed on [Windows] PCs' (recitals 872 to 876 to the contested decision).

1054. It follows from the foregoing that in the analysis set out at recitals 843 to 878 to the contested decision, which is the first stage of its reasoning, the Commission demonstrated to the requisite legal standard that the bundling of Windows and Windows Media Player from May 1999 inevitably had significant consequences for the structure of competition. That practice allowed Microsoft to obtain an unparalleled advantage with respect to the distribution of its product and to ensure the ubiquity of Windows Media Player on client PCs throughout the world, thus providing a disincentive for users to make use of third-party media players and for OEMs to pre-install such players on client PCs.

1055. Admittedly, as Microsoft contends, a number of OEMs continue to add third-party media players to the packages which they offer to their customers. It is also common ground that the number of media players and the extent of the use of multiple players are continually increasing. However, those factors do not invalidate the Commission's conclusion that the impugned conduct was likely to weaken competition within the meaning of the case-law. Since May 1999 vendors of third-party media players have no longer been able to compete through OEMs to have their own products placed instead of Windows Media Player as the only media player on the client PCs assembled and sold by OEMs.

1056. It should further be noted that the merits of the findings made above are borne out by data examined by the Commission in the third stage of its reasoning. More particularly, as will be explained at paragraphs 1080 to 1084 below, the data mentioned at recitals 905 to 926 to the contested decision show a clear tendency in favour of using Windows Media Player to the detriment of competing media players.

1057. It follows from information communicated by Microsoft itself during the administrative procedure and referred to at recitals 948 to 951 to the contested decision that the significant growth in the use of Windows Media Player has not come about because that player is of better quality than competing players or because those media players, and particularly RealPlayer, have certain defects.

1058. In the light of all the foregoing considerations, the Court concludes that the Commission's findings in the first stage of its reasoning are in themselves sufficient to establish that the fourth constituent element of abusive bundling is present in this case. Those findings are not based on any new or speculative theory, but on the nature of the impugned conduct, on the conditions of the market and on the essential features of the relevant products. They are based on accurate, reliable and consistent evidence which Microsoft, by merely contending that it is pure conjecture, has not succeeded in showing to be incorrect.

1059. It follows from the foregoing that it is not necessary to examine the arguments which Microsoft puts forward against the findings made by the Commission in the other two stages of its reasoning. None the less, the Court considers that it should examine them briefly.

1060. In the second stage of its reasoning, the Commission seeks to establish that the ubiquity of Windows Media Player as a result of its bundling with Windows is capable of having an appreciable impact on content providers and software designers.

1061. The Commission's theory is based on the fact that the market for streaming media players is characterised by significant indirect network effects or, to use the expression employed by Mr Gates, on the existence of a 'positive feedback loop' (recital 882 to the contested decision). That expression describes the phenomenon where, the greater the number of users of a given software platform, the more there will be invested in developing products compatible with that platform, which, in turn reinforces the popularity of that platform with users.

1062. The Court considers that the Commission was correct to find that such a phenomenon existed in the present case and to find that it was on the basis of the percentages of installation and use of media players that content providers and software developers chose the technology for which they would develop their own products (recital 879 to the contested decision). The Commission correctly stated, first, that those operators tended primarily to use Windows Media Player as that allowed them to reach the very large majority of client PC users in the world and, second, that the transmission of content and applications compatible with a given media player was in itself a significant competitive factor, since it increased the popularity of that media player, and, in turn, favoured the use of the underlying media technology, including codecs, formats (including DRM) and server software (recitals 880 and 881 to the contested decision).

...

1078. In the third stage of its reasoning, the Commission examines the evolution of the market in light of market surveys carried out by Media Metrix, Synovate and Nielsen/NetRatings and concludes that the data in those surveys 'consistently point to a trend in favour of usage of [Windows Media Player] and Windows Media formats to the detriment of the main competing media players (and media player technologies)' (recital 944 to the contested decision).

1079. The Court finds that the conclusion referred to in the preceding paragraph is correct.

...

1088. It follows from the foregoing considerations that the final conclusion which the Commission sets out at recitals 978 to 984 to the contested decision concerning the anti-competitive effects of the bundling is well founded. The Commission is correct to make the following findings:

- Microsoft uses Windows as a distribution channel to ensure for itself a significant competitive advantage on the media players market (recital 979 to the contested decision);
- because of the bundling, Microsoft's competitors are a priori at a disadvantage even if their products are inherently better than Windows Media Player (ibid.);
- Microsoft interferes with the normal competitive process which would benefit users by ensuring quicker cycles of innovation as a consequence of unfettered competition on the merits (recital 980 to the contested decision);
- the bundling increases the content and applications barriers to entry, which protect Windows, and facilitates the erection of such barriers for Windows Media Player (ibid.);
- Microsoft shields itself from effective competition from vendors of potentially more efficient media players who could challenge its position, and thus reduces the talent and capital invested in innovation of media players (recital 981 to the contested decision);

- by means of the bundling, Microsoft may expand its position in adjacent media-related software markets and weaken effective competition, to the detriment of consumers (recital 982 to the contested decision);
- by means of the bundling, Microsoft sends signals which deter innovation in any technologies in which it might conceivably take an interest and which it might tie with Windows in the future (recital 983 to the contested decision).

1089. The Commission therefore had ground to state, at recital 984 to the contested decision, that there was a reasonable likelihood that tying Windows and Windows Media Player would lead to a lessening of competition so that the maintenance of an effective competition structure would not be ensured in the foreseeable future. It must be made clear that the Commission did not state that the tying would lead to the elimination of all competition on the market for streaming media players. Microsoft's argument that, several years after the beginning of the abuse at issue, a number of third-party media players are still present on the market therefore does not invalidate the Commission's argument.

1090. It follows from all of the foregoing considerations that Microsoft has put forward no argument capable of vitiating the merits of the findings made by the Commission in the contested decision concerning the condition relating to the foreclosure of competition. The Court must therefore conclude that the Commission has demonstrated to the requisite legal standard that the condition was satisfied in the present case.

The section on foreclosure is the most interesting part of the judgment.[636] The GC concerned itself with the threat to the structure of competition. In paragraph 1034 it talked of 'appreciably altering the balance of competition in favour of Microsoft', and in paragraph 1054 it deduced from the *first stage of the Commission's reasoning*, i.e. just its findings as to the ubiquity of WMP, that the Commission had demonstrated to the requisite legal standard that the bundling 'inevitably had significant consequences for the structure of competition'.[637] It was assumed that this advantage led to foreclosure.[638] The GC thought it unnecessary to examine the further stages of the Commission's reasoning, i.e. the impact on the software developers and the evolution of the market,[639] although it did so for the sake of completeness. The emphasis of the judgment is on the market structure, on the fact that the ubiquity of WMP gave it an advantage unrelated to its 'intrinsic merits'[640] (which means its qualities rather than its advantages in distribution).[641]

Microsoft argued that its behaviour was objectively justified.[642] It defended its 'business model' as having benefits for software developers, OEMs, and consumers. The GC answered that some of the benefits could be achieved without integration and the fact that software developers and site creators were convenienced by knowing that WMP was present on nearly all client PCs in the world was

[636] For comment on this see, e.g., C. Ahlborn and D. S. Evans, 'The *Microsoft* Judgment and its Implications for Competition Policy Towards Dominant Firms in Europe' (2008–2009) 75 *Antitrust LJ* 887; Rousseva, n. 269, 252–255; L. Lovdahl Gormsen, 'Why the European Commission's Enforcement Priorities on Article 82 EC Should be Withdrawn' [2010] *ECLR* 45, 48; D. Howarth and K. McMahon, '"Windows has Performed an Illegal Operation": The Court of First Instance's Judgment in *Microsoft v Commission*' [2008] *ECLR* 117.

[637] The point at para. 1055 where the GC in effect speculates that an increase in the use of the competitors' products might have been greater in the absence of the impugned conduct recalls the finding about the rise in Virgin's market share in *British Airways*: see Section 11.F.c, p. 454 ff.

[638] Case T-201/04, *Microsoft* [2007] ECR II-3601, para. 1058.

[639] Ibid., para. 1059.

[640] Ibid., para. 1046.

[641] Ahlborn and Evans, n. 636, 887.

[642] At this point in the judgment the GC clarified where the burden of proof lies when objective justification is raised. See Section 5.E, p. 374.

exactly why the integration led to foreclosure.[643] The GC dismissed the claim that the removal of WMP from Windows would lead to a degradation of the latter.[644] Above all the GC stressed that the Commission had not ordered Microsoft to cease supplying Windows with WMP, but only to also supply Windows without it.

The Commission's remedy in *Microsoft*, the supply of an alternative 'naked' version of Windows without WMP installed, was not a success. OEMs had no interest in such a product.[645] It would have been different had the Commission ordered Microsoft *not* to supply Windows with WMP.

In 2009 the Commission sent an SO to Microsoft saying that Microsoft might have infringed Article 102 by tying its Internet Explorer (IE) browser to Windows in that Windows was only supplied with IE ready installed.[646] The matter was concluded with a commitments decision whereby Microsoft undertook to provide users of Windows PCs who have IE set as a default web browser with a browser 'Choice Screen' and to allow OEMs to choose which browser to install.[647] The 'Choice Screen' was made operational on 1 March 2010. The commitments decision meant that the Commission did not have to produce a fully reasoned decision and the possibility of the technical tying issue being re-examined in the GC did not arise. However, on 6 March 2013 the Commission fined Microsoft €561 million for failing to comply with its commitments.[648]

(iv) The *Google/Android* Investigation

In April 2015 the Commission opened proceedings against Google in respect of its Android mobile operating system.[649] The Commission is concerned with allegations concerning the tying or bundling of certain Google applications and services with the Android system 'to the detriment of consumers and developers of innovative services and products'.[650] Android is an open-source system which is distributed for free and the allegations relate to the installing by OEMs of Google's core apps and the Google Mobile Services suite.[651]

[643] Case T-201/04, *Microsoft* [2007] ECR II-3601, para. 1151.

[644] Ibid., paras. 1164–1166.

[645] The GC said that the lawfulness of the Commission decision had to be judged at the time of its adoption. The fact that the remedy had not worked was irrelevant and could not be taken into account by the GC looking at the separate product issue with hindsight (para. 943). According to Ahlborn and Evans, n. 636 (who acted for or on behalf of Microsoft), between the date of the naked Windows being made available and the date of the oral hearing in the case no OEM in the world chose to install it. Retailers bought 11,787 copies of the naked Windows XP, less than 0.005% of those sold in Europe.

[646] MEMO/09/15. The tying of Windows and IE was the subject of the DOJ proceedings in the US discussed in the text at n. 627, p. 482.

[647] IP/09/1941, [2010] OJ C36/7. In a speech on 21 October 2009 in Brussels, 'Competition and Consumers in the 21st Century', SPEECH/09/486, available at <http://europa.eu/rapid/press-release_SPEECH-09-486_en.htm>, Neelie Kroes said, 'In IT we have stopped dominant companies abusing their position to restrict consumer choice. No matter how big those infringers are—we have consistently said that no company is above the law. Our message to these companies is: You can't run away or spend your way around Europe's rules. Speaking of this—promising news on Microsoft, don't you think? In the New Year we hope that hundreds of millions of consumers in Europe will get a choice of which web browser to use on their computers.'

[648] IP/13/2013. The Commission found that Microsoft failed to roll out the browser choice screen with its Windows 7 Service Pack 1 from May 2011 to July 2012, so that 15 million Windows users in the EU did not see the choice screen during that period.

[649] COMP/40.009, *Google (Android)*, IP/15/4780.

[650] MEMO/15/4782; IP/16/1492; MEMO/16/1484. See further <http://chillingcompetition.com/2013/09/05/some-thoughts-on-the-new-anti-google-android-complaint-post-13/>; <http://chillingcompetition.com/2013/09/09/some-thoughts-on-the-new-anti-google-android-complaint-post-33-bundling-allegations/>; and <http://chillingcompetition.com/2013/09/16/android-google-and-bundling-some-follow-up-thoughts/>.

[651] The initial problem is whether Google is dominant in respect of Android.