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Implications of the Court of First Instance's  
Microsoft Order

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# Implications of the Court of First Instance's Microsoft Order

Sven Völcker and Cormac O'Daly

## **Abstract**

On 22 December 2004, the President of the European Court of First Instance issued an order rejecting Microsoft's application for a suspension of the remedies imposed by the European Commission in its decision of 24 March 2004, effectively forcing Microsoft to provide interoperability information to rival server operating systems suppliers, and to offer an "unbundled" version of its Windows operating system without the Windows Media Player. The President found that, while Microsoft had established a prima facie case on the merits, it had not proved that it would suffer serious and irreparable harm from immediate implementation of the remedies ordered by the Commission (see CLI 18 January 2005, p.16). Microsoft has since announced that it will not appeal the CFI President's order to the President of the European Court of Justice (Reuters, 24 January 2005). This article first discusses some of the procedural issues highlighted by the President's order, and in particular examines the considerations that may have influenced Microsoft's decision not to appeal. It then explores the potential significance of the President's statements about Microsoft's prima facie case for Microsoft's pending main action for annulment (Case T-201/04).

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# Competition and IP

## Implications of the Court of First Instance's *Microsoft* order

By *Sven B. Völcker and Cormac O'Daly, Wilmer Cutler Pickering Hale and Dorr LLP\**

On 22 December 2004, the President of the European Court of First Instance issued an order rejecting Microsoft's application for a suspension of the remedies imposed by the European Commission in its decision of 24 March 2004, effectively forcing Microsoft to provide interoperability information to rival server operating systems suppliers, and to offer an "unbundled" version of its Windows operating system without the Windows Media Player.

The President found that, while Microsoft had established a *prima facie* case on the merits, it had not proved that it would suffer serious and irreparable harm from immediate implementation of the remedies ordered by the Commission (*see CLI 18 January 2005, p.16*). Microsoft has since announced that it will not appeal the CFI President's order to the President of the European Court of Justice (*Reuters, 24 January 2005*).

This article first discusses some of the procedural issues highlighted by the President's order, and in particular examines the considerations that may have influenced Microsoft's decision not to appeal. It then explores the potential significance of the President's statements about Microsoft's *prima facie* case for Microsoft's pending main action for annulment (*Case T-201/04*).

### Procedural issues

Some observers may have been surprised by Microsoft's decision not to appeal the order, given the company's apparent determination to exhaust all available legal remedies in defending its business practices against regulatory intervention. However, a closer examination of Microsoft's procedural options reveals that an appeal was indeed unlikely to further the company's interests.

Any order by the CFI President in an interim measures case is open to an appeal to the ECJ President on points of law. Recent examples of such appeals in competition cases are *IMS Health* and *AKZO* – both cases in which the Commission and interveners supporting it had asked the President to set aside orders granting a suspension of the Commission's decision in question.

By itself, such an appeal would not have suspended the CFI President's order or the operative part of the Commission's decision. In other words, regardless of whether it decided to appeal, Microsoft would have had to implement the remedies ordered by the Commission, unless it were to make an *ex parte* request to the President of the ECJ asking that he temporarily suspend the operation of the Commission's decision, or the Commission were to agree not to enforce the decision, as it had done while the interim measures case was pending before the CFI.

Immediately after the CFI President's order, Microsoft announced that it would begin implementing the Commission's remedies by creating a website giving information on the licensing of communication protocols, and by completing the testing of a "stripped down" version of Windows and making it available to PC manufacturers on the basis of a timetable agreed with the Commission. It thus appeared somewhat unlikely from the outset that Microsoft would seek to use the appeal procedure in order to avoid prompt compliance with the Commission's remedies.

Rather, any appeal that Microsoft would have chosen to bring would likely have been aimed at removing any parts of the order that it may have considered prejudicial to other future proceedings before the CFI, either the pending main action or any fresh suspension applications that Microsoft might choose to file.

As discussed below, it would appear difficult (and inconsistent with its public pronouncements) for Microsoft to argue that the President's statements on the merits of its case were on balance prejudicial to Microsoft.

Moreover, as a procedural matter, it could be argued that Microsoft would not have had standing to attack isolated statements on the merits of its case, given the President's recognition that Microsoft had established a *prima facie* case overall.

As regards any future applications for suspension, the order itself points out that Microsoft is free to make such an application at any time on the basis of new facts (*para.325*). Conceivably, Microsoft could have sought to protect its position in such future cases by alleging that the CFI order establishes an unduly high standard of proof for the "serious and irreparable harm" that is necessary for a successful suspension case.

However, such an argument would also appear very difficult to make. The Court of Justice has in past cases emphasised the considerable degree of discretion that the CFI President enjoys in interim measures cases, in particular when making assessments as to the serious and irreparable nature of any damage (*para.72, citing Antonissen v Council and Commission at para.28*).

The order's findings on this issue are highly fact-specific and do not contain many statements of a more general nature that would appear to be particularly good targets for an appeal on points of law. Indeed, confirmation of the CFI President's approach by the Court of Justice could have detracted from Microsoft's chances of success in any future applications for interim measures.

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### Implications for the main case

Given that the CFI President ultimately denied the urgency of Microsoft's application for suspension, it is intriguing that he nevertheless engaged in a fairly detailed examination of whether Microsoft had proved a *prima facie* case in challenging the legality of the Commission's decision.

It is, of course, tempting to speculate whether one can divine anything about the outcome of the main case from the President's statements on the merits of Microsoft's claims. Indeed, Microsoft's public statements indicate that it took a fair degree of comfort from the order in this respect.

However, before engaging in such speculation, some words of caution are in order. First, it should be recalled that the threshold for finding a *prima facie* case is fairly low. Where the order finds that Microsoft has succeeded in presenting a *prima facie* case, it uses wording such as "[...] the *prima facie* case requirement must be considered to be satisfied, regard being had to the questions of principle raised by the case and to the fact that certain pleas and arguments require a thorough investigation" (*para.204*).

Second, while the President's statements on the quality of Microsoft's *prima facie* case will clearly be taken into account by the chamber deciding the case, they are not in any sense binding on the chamber. A systematic review of the CFI's case law would surely uncover many instances in which the CFI rejected applications for annulment that had been found to present a *prima facie* case at the interim measures stage. The President himself is not a member of the chamber deciding the main case, and it would be futile to speculate whether the order reflects some kind of informal consensus about the merits of the case within the chamber – one could just as well speculate that the order is designed to influence discussions within the Court that have not yet produced any consensus.

With these caveats in mind, the order's statements on the merits of Microsoft's case nevertheless make for interesting reading, both as regards the licensing of interoperability information and the tying of the Windows Media Player.

### Interoperability information issue

Turning first to the interoperability aspect of the Commission's decision, Microsoft had advanced three principal arguments. First, its refusal to supply information protected by IP rights did not satisfy the necessary conditions for an infringement of article 82 EC. Second, Sun Microsystems had not asked for the information that the Commission's decision orders Microsoft to supply, and Sun's request did not in any event relate to the development of software in the EEA. Third, the Commission had infringed the TRIPs Agreement by ordering disclosure of the relevant information.

The order first dismisses the second and third arguments as not disclosing a *prima facie* case. It states – as if incontrovertibly – that the Commission's decision established that Sun had in fact asked for the relevant information and that there had been no misunderstanding about the scope of Sun's request.

The order also rejects the TRIPs argument because Microsoft had not expanded on it sufficiently for a ruling to be made, and its general reference to documents annexed to its pleading was impermissible under the CFI's procedural rules (*paras.88, 201*).

While the unceremonious disposal of these arguments in the interim measures case may not, as a legal matter, bar Microsoft from attempting to rely on them in the main case, one would nevertheless assume that the President meant to send it a fairly clear signal to focus its litigation on potentially more promising grounds for annulment. Indeed, the assertion that Sun never asked for the information seems somewhat pointless given that Microsoft had refused to provide it during many years of contentious administrative and court proceedings.

As regards the TRIPs arguments, the Commission had already considered and rejected them in its decision (*Decision, paras.1052-3*).

More interesting are the President's statements concerning Microsoft's *prima facie* case with respect to the abusive nature of its refusal to license information that may be protected by IP rights. These statements have a certain Solomonic quality in that they would appear to give both Microsoft and the Commission encouragement.

In particular, Judge Vesterdorf pays more than a passing regard to Microsoft's argument that, in a case such as this, the "nature" of the protected IP rights or their intrinsic "value" must be taken into account. He recognises the secret nature of the interoperability specifications as "fundamentally different" from the information disclosed in *IMS* or *Magill*, describing this latter information as "widely known" (*para.207*).

The Commission had argued that the "value" of the information in question was irrelevant in deciding whether a compulsory licence should be enforced. According to the President, "account must be taken more generally of the value of the underlying investment, the value of the information concerned for the organisation of the dominant undertaking, and the value transferred to competitors in the event of disclosure." It will be interesting to see whether the chamber will accept this as a framework for its analysis when considering the main case.

Taking account of the value of the underlying investment appears, at first glance, to be consistent with the very rationale of limiting compulsory licences to exceptional circumstances, but the investment may be of a questionable nature if it is primarily the result of tweaking interoperability standards to make them proprietary. The "value of the information to the organisation" and the "value transferred to competitors in the event of disclosure" seem even more problematic as criteria for the abusive nature of a refusal to license, as the "value" in question may be proportionate to the exclusionary effects of non-disclosure.

But there are also statements in this section of the order that must be encouraging for the Commission and the parties intervening on its behalf. The Commission had emphasised in the *Microsoft* decision that, in its view, the Community courts' case law, in particular *Magill*, did not imply that there is "an exhaustive checklist of exceptional circumstances" justifying imposition of a compulsory licence on dominant intellectual property holders.

Before the CFI, Microsoft had argued the contrary, *i.e.* that the conditions set out in *Magill* and more recently in *IMS Health* are "necessary" for any finding that a refusal to license IP rights is abusive, rather than simply "sufficient" for such a finding.

This legal question is important to the extent that there may be doubts as to whether the *Magill/IMS Health* criteria are satisfied in the present case. If the CFI finds that those criteria are not “necessary” for a finding of an article 82 EC infringement, the Commission can rely, for example, on Microsoft’s previous dealings with workgroup server operating systems sellers – a factor that distinguishes the *Microsoft* case from *Magill* and *IMS Health* (see *CLI June 2004*, at p.17).

President Vesterdorf states that the issue of “necessary” versus “sufficient” “clearly [...] cannot be resolved at the interim relief stage” (para.206). However, in the next sentence he adds an *obiter dictum* pointing out that the ECJ actually uses the term “sufficient conditions” in its *IMS Health* judgment. Given the obvious significance of the question, one can only assume that the President is intending to signal that Microsoft should not place too much stock in the argument that *Magill* and *IMS Health* are the last word on possible situations in which a refusal to license IP rights can be abusive.

### Requirement to unbundle the Windows Media Player

Moving to the arguments relating to the obligation to produce an unbundled version of Windows PC operating systems, the President again begins by dismissing two of Microsoft’s weaker arguments, *i.e.* that the Commission’s decision infringes the TRIPs Agreement (see above) and that the remedies imposed are disproportionate. With respect to both arguments, the President complains that Microsoft had presented them “in an excessively succinct manner” (para.393).

In dealing with Microsoft’s other arguments, the President again makes some comments that may be viewed as encouraging by Microsoft, whereas others point more in the Commission’s direction.

The President finds that Microsoft’s arguments raise several complex questions that cannot be regarded as *prima facie* unfounded in interim measures proceedings, *i.e.* the allegations that

- by relying on “indirect network effects” resulting from incentives for content providers and application programmers, the Commission unlawfully applied a novel theory on tying
- the Commission should have given greater weight to the purported positive effects of the Windows “design concept”
- the Commission did not adduce sufficient evidence for its indirect networks theory
- the Commission wrongly concluded that PC operating systems and media players constitute distinct products

The President thus accepts, by and large, the way in which Microsoft has framed the issues before the CFI, in particular its claim that the reliance on “indirect network effects” was not (yet) a well-established concept under article 82 EC.

However, the President also acknowledges the Community courts’ case law (in particular *Michelin II* and *British Airways*), according to which it is sufficient for a finding of an abuse under article 82 that the abusive conduct “tends to restrict competition or, in other words, that the conduct is capable of having or likely to have such an effect.” These judgments thus state that proof of actual anticompetitive effects is not required.

President Vesterdorf is not suggesting any departure from this case law. Indeed, he acknowledges the possibility that Microsoft’s bundling of the Windows operating system with its media player may “by nature [be] likely to restrict competition” within the meaning of *Michelin II* and *British Airways*. If the CFI finds this to be the case, any discussion about the actual significance of indirect network effects would become moot.

### Conclusion

Microsoft’s decision not to appeal President Vesterdorf’s order highlights the *de facto* finality of any decisions made by the Court of First Instance for plaintiffs in interim measures cases, in particular on the issue of serious and irreparable harm.

On substance, the order contains some interesting statements that should help to frame and focus the discussion before the CFI in the main case. However, it would be wrong to assume that the order contains any clear indications of how the CFI will decide the main case.

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