

Microsoft on Trial

Legal and Economic Analysis of a
Transatlantic Antitrust Case

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3. Victa placet mihi causa: the compulsory licensing part of the Microsoft case

Ian S. Forrester QC*

1. INTRODUCTION

On 17 September 2007, the 13 judges of the Grand Chamber of the European Court of First Instance (CFI) rendered judgment in Case T-201/04 *Microsoft v Commission*.¹ A few days before the judgment, a number of the advocate protagonists in the case who, at that moment, had no idea what the CFI would do, gathered at a conference organized under the auspices of the International Bar Association in the European University Institute, Fiesole. The paper which I presented on that occasion set forth the principal themes presented by that portion of the case as to which I had the honour of serving as the advocate of Microsoft. Jean-François Bellis, with whom I argued the case, is addressing the ‘product integration’ part of the case in Chapter 4 (with Tim Kasten).

The Microsoft Decision² involved two alleged abuses. One related to the design of the Windows operating system which drives the great majority of personal computers, and the lawfulness of incorporating additional functionalities therein. The other related to the nature and extent of Microsoft’s duty to reveal details of how its server products interact, notably as regards client-to-server and server-to-server communications. Each alleged infringement in a sense concerned whether Microsoft, as an

* The opinions expressed are wholly personal. The remark in the title is found in Lucan’s literary work *Pharsalia*, adapting a remark made by Marcus Porcius Cato, which may be translated as ‘even though my case was defeated, I found it persuasive’.

¹ [2007] ECR II-3601.

² Commission Decision 2007/53/EC of 24 March 2004 [2007] OJ L32/23 (hereinafter ‘the Decision’). Author’s note: the decision was adopted by the Commission on 24 March 2004, but there was a typographical error three years later when the publication in the Official Journal occurred.

industry leader, was obliged to pursue policies which assisted its competitors. Each involved new theories of infringement. Despite the newness of these theories, the largest fine in antitrust history was imposed. The case has been widely discussed and written about.³

I will address the ‘interoperability’ or ‘compulsory licensing’ part of the case. After considering the fine, I shall describe the continuing controversy over whether Microsoft must license without remuneration and without confidentiality protections. To focus the discussion of a case presenting a large number of separate points, I list in boxes a number of specific questions which were presented to the judges.

2. SOME PRELIMINARY REMARKS

Various factors rendered the case challenging:

- The size, fame, name, prominence and success of Microsoft and Microsoft’s celebrated antitrust encounters in the United States: past battles between Microsoft and its rivals certainly cast a shadow over the EC proceedings. It must have been tempting for commentators to take at face value the proposition that the company had done something controversial or reprehensible.
- A US battle being re-run in Europe: the complainants in Europe were largely US companies which had not prevailed in domestic US litigation. European complainants were largely absent. Not one

³ See e.g. M. Dolmans and T. Graf, ‘Analysis of Tying under Article 82 EC: The European Commission’s Microsoft Decision in Perspective’ (2004) *World Competition* 225; I. Forrester, ‘Article 82: Remedies in Search of Theories?’ (2004) *Fordham Corporate Law Institute* 167; D. Ridyard ‘Compulsory Access under EC Competition Law: A New Doctrine of “Convenient Facilities” and the Case for Price Regulation’ (2004) *European Competition Law Review* 669; D. Geradin, ‘Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court’s Judgment in *Trinko* in the Wake of *Microsoft*, *IMS*, and *Deutsche Telekom*?’ (2005) *Common Market Law Review* 1519; H. Leupold and S. Pautke, ‘*IMS Health vs. Microsoft*: Befindet sich die Kommission bei Kartellrechtlichen Zwangslizenzen (erneut) auf Konfrontationskurs mit dem EuGH?’ (2005) *EWS* 108; T. Körber, ‘Geistiges Eigentum, essential facilities und “Innovationsmissbrauch”: Überlegungen zum *Microsoft*-Fall im Lichte der EuGH-Entscheidung *IMS Health GmbH*’ (2004) *RIW* 881; J. Drexler, ‘Intellectual Property and Antitrust Law: *IMS Health* and *Trinko* – Antitrust Placebo for Consumers Instead of Sound Economics in Refusal-to-Deal Cases’ (2004) *IIC* 788; P. Thyri, ‘Immaterialgüterrechte und Zugang zur wesentlichen Einrichtung: Der Fall *Microsoft* im Licht von *IMS-Health*’ (2005) *WuW* 388.

end-user customer had complained about the alleged infringing acts.

- Establishing what was factually at stake given the complexity of the technology: was the material at stake banal, trivial or significantly creative? Was access to it indispensable to survive or prosper, or a mere convenience or advantage? The legal issues are much easier to understand for lawyers than the technical ones, so it is tempting not to consider the facts and to assume the validity of the proposition that, for example, the company had refused to deliver ‘interoperability information’. For that reason, this chapter begins by recalling the factual context.
- The implementation of ‘distributed’ technologies at stake in a competing operating system depended in important part upon perfect identity of performance across all operating systems in a network. Thus achieving ‘interoperability’ involved endowing competitors’ products with unique characteristics (such as a distributed directory service running on multiple servers simultaneously) they did not otherwise possess.
- Was the duty of the dominant player to empower rivals to supply perfect interoperability, even if this involved identical functionality? Must Microsoft enable what is generally accepted to be ‘interoperability’ between two *different* software systems or must it enable a competitor to create a ‘drop-in’ replacement for the Windows server when it is functioning ‘as one’ with *other* Windows servers in a network to provide a single service?
- The substantial gap between US jurisprudence and the European Commission’s position on single firm conduct both in richness of the law and the substantive rules. Only a few European judicial authorities concern compulsory licensing under Article 82 EC. *Volvo/Veng*,⁴ *Magill*,⁵ and *IMS Health*⁶ were the main authorities;

⁴ Case 238/87 *Volvo v Veng (UK) Ltd* [1988] ECR 6211.

⁵ Commission Decision 89/205/EC of 21 December 1988 (*Magill TV Guide/ITP, BBC and RTE*), [1989] OJ L78/43, upheld by the CFI in Case T-69/89 *Radio Telefis Eireann v Commission* [1991] ECR II-485, upheld on appeal by the ECJ in 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.

⁶ Commission Decision 2002/165/EC of 3 July 2001 (*NDC Health/IMS Health: Interim Measures*) [2002] OJ L59/18, withdrawn by Commission Decision 2003/741/EC of 13 August 2003 (*NDC Health/IMS Health: Interim Measures*) [2003] OJ L268/69; Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECR I-5039.

*Bronner*⁷ and *Commercial Solvents*⁸ were referred to on refusals to deal in general. These EC cases seem to align with US jurisprudence, including the recent *Trinko*⁹ case before the US Supreme Court. Was *IMS Health*, decided just after the Microsoft Decision, the authoritative word, or should it be rewritten? Was interoperability such an important goal that the *IMS Health* criteria on compulsory licensing had to be radically adapted?

- The applicable and not easy principles of patent and copyright and trade secret law applicable to computer software. Could Microsoft's arguments about patents, copyright and trade secrets be dismissed as irrelevant? Were there no intellectual property (IP) constraints on competition law enforcement? For example, was it correct that competition law owed no deference to trade secrets, as these are private interests not conferred by public law? Could the Commission properly defend itself by doubting whether some of Microsoft's patents had been properly granted? What was the effect of the Copyright Directive?¹⁰

The Challenge of the Name 'Microsoft'

Microsoft is a company which has made extraordinary technological and commercial achievements in only 30 years. Its products have great importance for our daily lives at home and at work. A litigation or a controversy involving Microsoft frequently proceeds in a unique manner, with a lot of technology to understand as background and a lot of passion in the foreground. Other IT companies may be very large and may even be dominant, but somehow Microsoft arouses a unique level of concern. Indeed, one intervening party made the assertion that 'de facto Microsoft enjoys a position that resembles more that of a sovereign state than of a market player'. There may well have been a sense that it is necessary to apply special standards to Microsoft because of its wealth and the importance of its influence over computers. The argument is that because Microsoft

⁷ Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG and others* [1998] ECR I-7791.

⁸ Joined Cases 6/73 and 7/73 *Commercial Solvents and others v Commission* [1974] ECR 223.

⁹ *Verizon Communications, Inc. v Law Offices of Curtis Trinko*, 540 U.S. 398 (2004). See also the *Verizon v Trinko* roundtable discussion in (2004) *Global Competition Review* 16.

¹⁰ Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

is 'special', normal rules are ineffective; and that a Microsoft precedent need not trouble other high technology companies, since it will only affect Microsoft.

To this concern, one could respond that Microsoft's activities are neither unregulated nor unsupervised by government agencies. This applies to the scope of IP and copyright protection for software and inventions associated with computers, including provisions to promote reverse-engineering. It applies to public procurement: governments sometimes choose to prescribe that as a policy matter they will procure software only if it meets certain requirements, including interoperability developments. The public sector in most European countries accounts for between 10 and 25 per cent of all software purchases. When governments say what they wish to buy, vendors listen. Government regulation applies in a variety of other ways as well, whether the rules relate to software security, privacy, features for the disabled or the use of local languages.

It is not the case that only novel invocations of Article 82 EC can regulate or constrain the influence of Microsoft. To put it plainly, if the concern of the European Commission was how to control the market power of Microsoft, governments and international organizations have the resources, and use those resources, to do this in a variety of ways.

That policy observation leads to a legal one. Distorting normal legal principles to reach the desired result creates its own subsequent distortions, difficulties and injustices. Article 82 EC is not designed to regulate the market but to remedy abuses of market power. A rule compelling divulgence of secret technology or penalizing the improvement of a richly-featured product cannot be limited to the special situation of Microsoft. The principles adopted in the judgment must be capable of being applied in a predictable and rational manner in other high-technology controversies. We must be able to formulate permanently valid principles by reference to which the Microsoft Decision can convincingly be defended. For competition law to help competition, new cases should challenge clearly identifiable abuses, the blocking of unexploited markets, affirmative hindering of competitive opportunity, demonstrated consumer harm.

It would be foolish to argue that the Commission lacks the power to create new offences or that the holders of IP rights are immune from Article 82 EC. Microsoft argued that the Decision was an attempt to reconfigure how the marketplace works, by handicapping the leading player in two respects. It condemns a company for not offering a product which no rational person would want to buy. It sees the offering of extra functionalities in a richly-featured product not as the delivery of something better, more useful and more enjoyable, but as an unlawful tying by reference to a fear of what other people might do in response to the launch.

And it condemns a company for not saying ‘yes’ to a competitor who asks for a huge amount of disclosure to enable it to use valuable and secret future technology. It is not easy to see what general principles dominant players should extract from the Decision. But without clear principles, enforcement becomes unforeseeable and potentially arbitrary.

The ‘interoperability information’ was not a readily measurable physical specification like a map of a city or a simple encoded number or password. Microsoft’s first duty was not to grant a compulsory licence, but instead to describe in detail, in writing, how some of its server technology works. This required hundreds of people observing how the software functions and recording that in thousands of pages of documentation to be licensed.

The infringement giving rise to the compulsory licensing remedy was that Microsoft did not – but should have – supplied its competitors with this technological insight when it was being developed. This would have allowed them to deploy in their own products a directory service which was otherwise unique to Microsoft and thus technically to emulate how an important part of the Windows server operating system would function once launched. They would at the same time gain access to the Windows server world in which Microsoft might otherwise become dominant.

Such obligatory divulgence of sophisticated technical secrets differentiates this case from all its supposed predecessor cases in European law. The encroachment upon the rightholder’s interests in each of those earlier cases was limited to not being able to impose contractually an exclusion of unwelcome competition.

3. TECHNICAL BACKGROUND

It is necessary to put the alleged infringement in technical context. The PC revolution in the 1980s with which Microsoft in particular is associated has changed within an astonishingly short time the way we work, how we amuse ourselves, and how we communicate with others.

In the early days of the computer industry in the 1960s, mainframe computers were the norm for companies which could afford them. Offered by IBM, Fujitsu, Nixdorf and others, they were powerful and costly, calling for skilled installation, set-up and maintenance. There was little interoperability among mainframes from different vendors. Users commonly went to a single firm for their computing needs. (Antitrust controversies touched the use of peripheral equipment, like printers made by ‘outside’ suppliers, for mainframes.) In the 1970s, Digital Equipment achieved considerable success with a line of less expensive computers (called minicomputers) that

were well-suited to engineering and scientific tasks. There was little or no interoperability between them and mainframes. Computers were still far too expensive to be purchased by consumers or most small businesses.

The PC Revolution

By 1980, a number of companies (Amstrad, Apple and others) had started offering microcomputers that were the precursors to what are now called PCs. Products such as the Tandy TRS-80, the Apple II (the first to offer the ‘mouse’), the Commodore PET and the Atari 800 ran their own operating systems. As a result, applications programs written for one brand of PC would not run on any other brand. Users could not share information between PCs, nor could they easily transfer their computing skills from one PC to another.

In 1980, IBM announced plans to introduce what it called the ‘personal computer’. The first IBM PC was offered with a choice of three operating systems: CP/M-86 from Digital Research, UCSD-P System and MS-DOS from Microsoft. Over time, MS-DOS became the most popular of the three. A number of companies launched PCs using similar hardware to that of IBM, and using the MS-DOS operating system under licence from Microsoft. Microsoft continually added new functionality to that operating system and its successors.

Microsoft was fortunate to recognize early the potential of a common ‘platform’, a single operating system which could run on many different brands of PCs with the same basic architecture. This stimulated software developers to create applications which could run on any brand of PC.

The user interfaces of Microsoft operating systems provided a consistent means for users to interact with their computers and thus to use their computing skills on different machines. Microsoft made efforts to convince software developers and manufacturers of the merits of Microsoft operating systems as easy-to-use, attractively-priced and flexible. The company encountered extraordinary success in a short time. That success has engendered intense competition and scrutiny during the past 15 years.

The Server Revolution

The PC revolution revealed a remarkably high demand for accessible, convenient, inexpensive, easy-to-use computers which would serve the domestic or professional needs of non-technical people. This in turn created a demand for software which could coordinate networks of PCs in using printers, exchanging documents, filing, authenticating users logging on to a network, authorizing particular users to do particular tasks, storing

data, and many other tasks as technology evolved. The first, primitive, software for these server functionalities, such as LAN Manager, a layer of code developed with IBM as part of the software of the PC, emerged in the late 1980s. By the 1990s these tasks were performed by dedicated 'server computers', commonly called servers. The interoperability half of the Microsoft case related to operating systems for such servers.¹¹ Microsoft launched its basic Windows NT 3.5 server software in 1992, which was then updated in 1997 and completely reconfigured in 2000 as Windows Server 2000. Microsoft concentrated on developing server operating systems which were easy to configure, easy to use and relatively inexpensive. Those who were familiar with the design of Windows for PCs would find the design of the Windows server operating system user-friendly. Windows Server 2000 and its subsequent versions have been very successful.

Server vendors like Sun and IBM already offered mature versions of UNIX server operating systems in 1992, when the first Windows operating system emerged. In addition, Novell had developed NetWare into the leading server operating system for providing 'file and print' services and 'user and group administration' services to millions of PCs running Windows. The rise of open source software for PCs was matched by the arrival of 'Linux' open source server operating systems. These emerged on the market in 1998 and rapidly progressed, such that by 2004 work group servers running Linux accounted for 11 per cent of the market for operating systems on 'work group' servers. This share of a valuable market was attained without special access to any Windows technology.

Although servers usually perform a number of functions, the Decision concentrates only on the server when executing a few specific tasks: 'file and print' and 'user and group administration' or directory services. The Decision called these 'work group services'.

PC operating systems communicate with server operating systems (client-to-server), and server operating systems communicate among

¹¹ The operating system of a computer schedules its execution of tasks and controls the flow of information within the computer and between the computer and peripheral devices. Operating systems perform two other related functions. First, they provide a 'user interface', the means by which a user interacts with his computer. User interfaces for computers have evolved over the last 30 years from punch card readers, to teletype terminals, to character-based user interfaces, to graphical user interfaces. Secondly, operating systems enable users to find and use information contained in various storage devices which can be 'local', such as a CD-ROM drive, or 'remote', such as 'networks' that connect computers in geographically separated offices.

themselves (server-to-server), by means of communications protocols. Communications protocols can be thought of as software techniques used by server operating systems to communicate information across a network. They can be quite routine or very complex.

Microsoft's directory service, given the trade name 'Active Directory', was distinctive or even unique in several respects when launched in 2000. When running Active Directory, individual servers functioned as exact replicas of each other. If a problem arose, each directory server was programmed to make its own decision on how to react without 'consulting' other servers. Thus the system collectively delivered a single outcome. A number of patents covered the technology. Microsoft claimed that its directory service was superior to those of its rivals. Microsoft's server software could scale to 10,000 while rivals could scale to less than 100. It was suggested that the technology involved was not particularly complex, and that the protocols to be divulged were straightforward. These contentions were contested by Microsoft.

A Sun or IBM server not running Active Directory could perform the Active Directory function in a Windows network only if, for directory purposes, it behaved identically to the Windows servers. (There was dispute over whether this capacity to act identically needs duplication of portions of the software, or merely imitation.) Thus, while there was no doubt that divulging the details of how servers performing the Active Directory collectively function would assist a new entrant to penetrate the Windows server world, it was technically necessary to replicate functionality in order to achieve this end.

Reality of Interoperability Across Mixed Networks

Microsoft observed that in many companies, government departments and universities, it is routine to find a wide range of software products from different vendors working together and with Windows. Although a great majority of PC 'clients' run Windows operating systems, they must interact with many other software and hardware products. Client operating systems, server operating systems, applications programs and the associated hardware must all work together. Thus, interoperability was and is a daily reality in business life.

Microsoft also submitted surveys conducted by Mercer Management Consulting, which indicated that businesses do not choose server operating systems based on concerns about interoperability with Windows client and server operating systems. They assume such interoperability exists, and make their choices by reference to ease of set-up, price, ease of maintenance, and the like. The routine existence of 'heterogeneous' computing

networks in Europe demonstrated, argued Microsoft, that it was readily possible to achieve efficient interoperability between rival server operating systems and Windows client and server operating systems. Microsoft's server technology enjoyed a considerable distribution advantage: the Windows format was familiar to any user of a PC running Windows, Windows servers were easy to set up and install, and Active Directory was an important asset. There was no doubt that sharing the techniques of Active Directory with rivals would confer advantage on them if they could make it work reliably.

The Commission acknowledged that 'interoperability is a matter of degree and that various software products in a system 'interoperate' (at least partially) when they are able to exchange information and mutually to use the information which has been exchanged'.¹² Accordingly, it conceded, interoperability occurs along a continuum; it is not an absolute standard. However, it suggested that although rival server operating systems could compete, they could not compete 'vially' unless given access to Microsoft communications protocols.

Microsoft described five or six well-recognized techniques to achieve efficient interoperability between different software products in a network. The Decision recognizes that a number of methods exist to enable interoperability in heterogeneous networks containing non-Microsoft server operating systems and Windows client and server operating systems. Indeed, many of these methods were developed without access to the communications protocols that the Decision would force Microsoft to license to its competitors. The availability of such interoperability solutions further suggested that interoperability was feasible without compulsory licensing.

Microsoft also pointed to the success of Linux servers without access to the protocols. It argued that two server operating systems can interoperate in the sense of exchanging information with one another or providing services to one another without the need for the two products to be exactly the same. It also observed that to make a 'plug replacement' to permit competitors to replicate features of Microsoft's products was an immensely burdensome remedy. By contrast, the Decision identified a rather modest specific inconvenience: the user might, in some configurations, have to 'log on' twice, when accessing multiple networks inside one company (there were solutions to this supposed problem, also).

Understanding these concepts presented formidable difficulties for those involved in the case. Most outside observers have had even greater

¹² Microsoft Decision, recital 33.

difficulty thoroughly grasping the conflicting factual claims. Yet this technical history is indispensable to an understanding of the controversy. Was interoperability between server and server perfect, or adequate, or poor? Did the extensive evidence of functioning networks using many different brands of software and hardware prove that there was no significant problem, although there might be intermittent, solvable ones? Or was the Commission right to say that Microsoft's rivals could not compete 'viably' unless they were given access to Microsoft's server technology?

Even if as to these technological questions the Commission had been right in every detail, that would merely reveal a factual problem in how the market functioned. There remained the legal question of whether the compulsory divulgence was lawful and proportionate.

4. THE REQUEST AND THE COMPLAINT

In September 1998, Sun Microsystems, a supplier of both operating systems for servers and the server hardware itself, requested from Microsoft a reference implementation (access to the source code) of a large part of what would later be launched as Windows Server 2000, as well as access to a large volume of other secret material. Sun's request was for detailed information about how Windows server operating systems functioned. The letter sent by Sun read as follows (my emphasis):¹³

We are writing to you to request that Microsoft provide [Sun] with the complete information required to allow Sun to provide native support for *COM objects* on Solaris.

We also request that Microsoft provide [Sun] with the *complete information* required to allow [Sun] to provide native support for the *complete set of Active Directory technologies* on Solaris.

We believe it is in the industry's best interest that applications written to execute on Solaris be able to seamlessly communicate via COM and/or Active Directory with the Windows operating systems and/or with Windows-based software.

We believe that Microsoft should include a reference implementation and such other information as is necessary to insure, without reverse engineering, that COM objects and the complete set of Active Directory technologies will run in full compatible fashion on Solaris. We think it necessary that such information be provided for the full range of COM objects as well as for the full set of Active Directory technologies currently on the market. We also think it

¹³ Case T-201/04 R *Microsoft Corporation v Commission*, Order of 22 December 2004 [2004] ECR II-4463, para. 4.

necessary that such information be provided in a timely manner and on a continuing basis for COM objects and Active Directory technologies which are to be released to the market in the future.

The material requested collectively represented a considerable portion of the innovation contained in the Windows server operating system then under development. It did not mention communications protocols. Thus, assuming Microsoft's response was a refusal, Microsoft did not refuse to provide communications protocols. (Nor were communications protocols mentioned in Sun's complaint to the Commission.) The Commission says that a request for a licence to Microsoft's communications protocols was 'implicit' in Sun's letter.

Sun's request called for a wider divulgation than the Decision compels. The Commission took the position that it was wise to demand from Microsoft, which was likely to be reluctant, a broad range of material (thus leaving the addressee of an excessive request for help to decide what help is legally obligatory).

Microsoft replied with an invitation to talk face-to-face, and suggested that there were technical alternatives to the disclosures requested. It did not say 'no' to Sun's request but did not say 'yes'. Its response did not mention that its software was protected by IP rights, a fact the Commission regarded as significant (the refusal did not invoke a reason much invoked thereafter) and Microsoft regarded as normal (the material's secrecy and value were obvious).

QUESTIONS CONCERNING THE EXISTENCE OF A REFUSAL TO LICENSE

- Did a refusal to license occur in autumn 1998 following the request to Microsoft?
- What relevance is to be attributed to the fact that Microsoft's response was not an outright refusal, but a proposal to discuss the matter and a reminder of already available means of interoperating?
- Was the request (which demanded wider and different divulgation than the Decision called for as to abuse and as to remedy) adequate to engage any responsibility to reply on the part of Microsoft?
- What is the duty of a dominant company when receiving an overly broad request to supply information or grant access?

Must it assess the request and grant access to what it considers to be required under the law; or may it refuse such requests outright?

- What relevance is to be attributed to the fact that the licensee wished to make a directly competing product (as opposed to a new product in a separate market)?
- What was the relevance of the fact that the technology requested was secret, was still under development, and had not yet been launched commercially?
- Is it relevant that no royalty was proposed by Sun to Microsoft?
- Is it relevant that Microsoft in its response to Sun did not expressly mention the fact that the technology was covered by IP rights?

The Statements of Objections

The Commission issued a First Statement of Objections in August 2000 in which it alleged that Microsoft had abused its dominant position in client operating systems by depriving other server operating system vendors of Microsoft technology they needed to enable their products to interoperate with those client operating systems (client-to-server interoperability).

The Second Statement of Objections in August 2001 reiterated earlier allegations about client-to-server interoperability. It added that Microsoft deprived other server operating system vendors of technology they needed to enable their products to interoperate with the Windows server operating system ('server-to-server interoperability'). (Separately, it asserted for the first time that the design of Windows to include media functionality amounted to a violation of Article 82(b) and (d) EC.)

By the time Microsoft responded to the Second Statement of Objections, it had (in November 2001) entered into a settlement with the US Department of Justice and certain US states of an antitrust lawsuit they had brought in 1998.¹⁴ Microsoft urged the Commission to consider the settlement as a

¹⁴ That lawsuit focused on Microsoft's inclusion of Web browsing software, called Internet Explorer, in Windows 98. The District Court found that Microsoft unlawfully 'tied' Internet Explorer to Windows in violation of sections 1 and 2 of the Sherman Act. The Court of Appeals, however, reversed on the finding on tying under section 1 and limited its objection under section 2 to limited aspects of the manner in which Microsoft had integrated Web browsing functionality

change in factual circumstances. Specifically, with regard to interoperability, Microsoft noted that the settlement (now embodied in a court order) required Microsoft to make available licences to all of the communications protocols that Windows server operating systems use to interoperate with PCs running Windows client operating systems. So client-to-server advantages, if they had ever existed for Microsoft, had been eliminated by the settlement.¹⁵ Extensive discussions between the Commission and Microsoft now began and continued until the taking of the Decision in March 2004.

In a typical Article 82 EC decision, the dominance, the abuse and the remedy relate to the same relevant market. In the interoperability half of the Microsoft case, the alleged abuse related to the market for PC operating systems, while the effect and the remedy related to the server market. When the Commission issued a Third Statement of Objections in August 2003, it sharply narrowed the market definition. The Commission said that

into Windows, but not integration of that functionality generally (*United States v Microsoft Corp.*, 253 F.3d 34, 47, 58 (D.C. Cir. 2001)). Noting the risk of 'detracting welfare-enhancing innovation' (at 90), the Court of Appeals remanded the tying claim, instructing the District Court to analyse it under a 'rule of reason' analysis in which the pro-competitive justifications for including Web browsing functionality in Windows were fully considered (at 74). In that regard, the Court of Appeals noted that Windows serves as a 'platform for third-party applications' (at 74). As the Court of Appeals observed, adding new functionality to Windows, such as Web browsing, may benefit not only consumers but also software developers who can draw upon that functionality in creating their own applications (at 90). The Court also noted that using 'the very same lines of code' to perform multiple functions may provide efficiencies (at 87). While not passing on these potential efficiencies in the absence of appropriate fact finding by the District Court, the Court of Appeals concluded that 'integration of new functionality into platform software is a common practice and that wooden application of per se rules in this litigation may cast a cloud over platform innovation in the market for PCs' (at 95).

¹⁵ The settlement was approved by the US District Court for the District of Columbia (*United States v Microsoft Corp.*, 231 F. Supp. 2d 76, 144 (D.D.C. 2002), hereinafter 'US Final Judgment') in November 2002. At the same time, the court rejected additional relief sought by various states at the urging of Microsoft's competitors (*New York v Microsoft Corp.*, 224 F. Supp. 2d 76, 197 n.85 (D.D.C. 2002), noting 'the substantial involvement of Microsoft's competitors' in drafting the requested relief. That relief included provisions similar to those contained in what emerged 16 months later as articles 5(a) and 6(a) of the European Commission's Microsoft Decision (compare *New York v Microsoft Corp.*, 224 F. Supp. 2d at 226–33 with art. 5(a) of the Decision; and compare *New York v Microsoft Corp.*, 224 F. Supp. 2d at 245–55 with art. 6(a) of the Decision). Before rejecting that relief, the court heard testimony, subject to cross-examination, from 34 witnesses in a 32-day trial, including witnesses from Sun, Novell and RealNetworks. In a 324-page opinion, the court found that the relief sought was likely to retard rather than to promote competition and threatened to harm consumers and other industry participants.

the relevant market where the abuse was felt was for ‘work group server operating systems’ running on servers costing less than US\$25,000 (as opposed to the US\$100,000 figure in the Second Statement of Objections) and only when the (multipurpose) server is being used to provide two types of services to Windows client operating systems: ‘file and print’ services and ‘user and group administration’ (that is directory) services.

This narrowing of the relevant market (which Microsoft called gerrymandering, the less-than-honourable drawing of artificial lines to achieve a desired result) was necessary for the Commission’s theory. Microsoft was dominant in the market for PCs and was using this dominance to eliminate all competition on another market, a server market. Now, it was obvious that servers made by Sun and IBM were not at risk of disappearance. So as to exclude them from consideration, the Commission focused on what it called work group servers. This reduced the technologies at stake to file and print (desired by SAMBA, one of Microsoft’s open source rivals) and directory services (desired, among other things, in the Sun complaint). In that market (albeit disregarding the majority of such servers’ functions, and trying to capture them only while performing the two selected functions), for inexpensive and easy-to-use servers, Microsoft was growing fast, as was Linux.

QUESTION CONCERNING THE RELEVANT MARKET

- Was the relevant market correctly defined or had it been ‘gerrymandered’ to create the impression of relevant market effects?

Microsoft’s negotiations with the Commission intensified in the early months of 2004 and ultimately involved face-to-face discussions between Commissioner Mario Monti and Microsoft CEO Steve Ballmer. However, they did not lead to a settlement. Commissioner Monti stated that consumers would be ‘better served with a decision that creates a strong precedent’, and noted that it was ‘essential to have a precedent which will establish clear principles for the future conduct of a company with such a strong dominant position in the market’.¹⁶ Accordingly, on 24 March

¹⁶ Commission Memorandum MEMO/04/70 of 24 March 2004, Microsoft – Questions and Answers on Commission Decision.

2004, the Commission adopted a Decision against Microsoft. In article 2, the Decision provides that:

Microsoft Corporation has infringed Article 82 of the Treaty and Article 54 of the EEA Agreement by:

- (a) refusing to supply the Interoperability Information and allow its use for the purpose of developing and distributing work group server operating system products, from October 1998 until the date of this Decision.

In article 3 of the Decision, the Commission imposed a fine of €497,196,304 (worth, on the date of the CFI judgment about US\$690 million) on Microsoft. In article 4 of the Decision, the Commission ordered Microsoft to bring to an end the infringement by drawing up a description of:

the complete and accurate specifications for all the Protocols implemented in Windows Work Group Server Operating Systems and that are used by Windows Work Group Servers to deliver file and print services and group and user administration services, including the Windows Domain Controller services, Active Directory services and Group Policy services, to Windows Work Group Networks.¹⁷

Microsoft appealed, and also filed an application requesting interim measures suspending the remedies pending the Court's judgment on the merits. This application was dismissed on 22 December 2004 on the ground that Microsoft had failed to show it would suffer serious and irreparable harm if the Decision was implemented immediately.¹⁸ The outcome was largely determined by considerations relevant to interim measures: in particular, the President of the CFI considered that Microsoft could protect itself contractually against the risks of disclosure of its technology pursuant to the Decision. However, the Order contains a number of comments on the merits of the case, as it concluded that Microsoft had shown a *prima facie* case that the Decision might be considered illegal. The President did acknowledge that 'Microsoft's argument is likely to raise one or more important questions of principle which may affect the legality of the Commission's analysis'.¹⁹

In the main action, a hearing took place before the 13 judges of the CFI on 24–28 April 2006. The Report for the Hearing was the best this

¹⁷ Decision, article 1(1).

¹⁸ Case T-201/04 R, *Microsoft Corporation v Commission*, Order of 22 December 2004 [2004] ECR II-4463.

¹⁹ Order of the President, para. 398.

advocate had ever read: a very thorough, clear and fair description of the questions at stake, explaining the case much better than most articles. The Court was evidently well-prepared, reflected in the large number of questions asked by the judges.

5. THE FACTS AND THE LAW

The Debate About Interoperability

It was agreed that Microsoft enjoyed a position of dominance as to operating systems for PCs. ('Super-dominance', whatever that means, was mentioned as a concept in the CFI proceedings.) At the time of the alleged refusal, Microsoft did not enjoy a dominant position as to operating systems for servers to coordinate networks of PCs. A number of companies supplied servers, including Sun, Novell, IBM and others, and had done so for longer than Microsoft. The Commission also conceded that interoperability between servers of different brands did exist²⁰ but not well enough for Microsoft's competitors. It claimed that practical interoperability was imperfect, so as to prevent competitors from competing 'viably', and Microsoft's conduct put others at a competitive disadvantage. The degree of interoperability in force was 'insufficient to enable competitors to viably stay in the market'.²¹

A key topic in the case was obviously the meaning of 'interoperability' necessary to 'compete viably'. Before getting to the legal question of whether the legal criteria for compulsory licensing could be expanded by reference to the important goal of enhancing interoperability, it was necessary to consider the factual question of whether in actual practice existing levels of interoperability were good, adequate but could be improved, or were inadequate to sustain long-term viable competition.

Microsoft demonstrated that in actual practice, heterogeneous networks were common: inside large users of computing resources they were routine, almost universal. Customers may use an IBM directory server with Windows file servers or other servers, or vice versa; or use two separate directory services for separate parts of the business, with the engineering department using UNIX servers and the sales department using Windows servers. Customers who used the new Windows directory service, Active Directory, also used other servers in separate networks from Linux, IBM, Novell and Sun. There were plenty of examples showing how big

²⁰ Decision, para. 690.

²¹ Decision, para. 589 and n. 712.

organizations use different server operating systems for different functions or for different parts of the organization. They worked together.

Microsoft supplied the Commission with about 50 statements from large users of computing power, describing how they resolved the challenge of having a heterogeneous network. The Commission sent out Article 11 EC letters to a number of others. Details came from one European army, a navy, two national police forces, six government agencies, NATO, a large city, three other international organizations and 31 large companies, most of them household names.²² They used a wide variety of hardware and software. So Microsoft argued that interoperability problems of having different servers were solvable, whether the servers perform only 'work group' tasks or perform 20 tasks simultaneously. Problems do arise but are capable of solution. So in the real world every hour of every day in every city in Europe, hundreds of thousands of servers and millions of client PCs interoperate successfully.

Competing suppliers of server operating systems stress in their publicity material how interoperable their products are in a Windows environment. This combination of heterogeneity and interoperability did not emerge by accident but because Microsoft and other companies helped accomplish it. Without interoperability few customers would buy servers or server operating systems.

Alternative solutions to the actual imperfections as to interoperability were rejected by the Decision. It said reverse-engineering of the characteristics of Microsoft operating systems was too slow, that disclosures by Microsoft were not enough, and that customers were worried about interoperability. But there was only one single example given of a concrete problem for users identified in the Decision in paragraph 183, that users *may* have to log on twice when using the services of two networks in their organization. The word 'may' was used, not 'will', because technical solutions exist to remove the need to log on twice.

Microsoft argued that interoperability already exists as customers and as computer scientists understand it. The word 'interoperability' should not be used as an attractive slogan (with which no person of goodwill can disagree) to justify a major antitrust incursion on private property. Microsoft noted the absence of any complaint from customers, and suggested that the possible inconvenience of having to log on twice did not justify imposing the biggest disclosure of technical secrets in competition law history.

²² Among others: Akzo Nobel, Alitalia, Carrefour, the City of Vienna, Nokia, Novo Nordisk A/S, Royal Dutch/Shell Group, the UK Inland Revenue.

There was a subsidiary question presented by the technical characteristics of a key part of the Windows server operating system, namely Active Directory. A distinction was drawn by Microsoft between communications between servers with a view to communicating data back and forth, and communications between multiple servers working as one to provide a single network service, in this case directory or file and print. These communications are of a 'closely-coupled' kind 'within the service boundary' or within a 'bubble' (alternative synonyms used to describe the special nature of the communications between servers running Active Directory). Servers performing the Active Directory function act as a team of identical entities doing a single job collectively such that for the user the group functions in the same way as a traditional mainframe computer operating a single directory. Because each server must act in exactly the same way ('thinks alike', to use a human analogy), whenever the network encounters a problem there is no need to issue instructions, no need to consult; the server which is best placed to act self-selects and addresses the problem. These servers exhibit 'crowd behaviour' in such a manner that only an identically-programmed server can participate in delivering their functionality collectively.

For a server from one vendor to replace seamlessly another vendor's server confronts the physical fact that equivalent functionality and identical logic producing identical behaviours are necessary for certain purposes. The technology which Microsoft must disclose and should allegedly have revealed is intended to enable that functional equivalence. The Decision's effect, though not its primary goal, was to enable a licensee to build a product which accurately imitates the functionality of a Windows server when executing certain key network functions, directory services and file and print services (though not when it is executing any other services). Over the three years since the adoption of the Decision various synonyms have been used for the exact goal of what the licensee should be enabled to create, including 'clone' (which was discarded as confusing), 'drop-in replacement', 'functional equivalent' or 'replacement'.

Participating in this internal functioning of the various servers (within the service boundary or within the 'bubble' in which these complex functions take place) does not involve what the computer world regards as interoperability.²³ In ordinary life, two companies never independently

²³ An analogy can be made to the IBM undertaking from 1984. IBM, which was then a dominant enterprise, agreed to reveal details of the external interfaces of its mainframe computers. The Commission emphasized that it would not reveal the internal secrets of how the mainframe performed its calculations. So a distinction was made between 'inside the service boundary' (the 'internals') and 'the outside', the printers and disk drives (the 'external' equipment).

develop products with identical logic and identical functionality.²⁴ Yet the only way in which the goal of the Decision can be achieved inside the service boundary is if the licensee servers behave identically to the Windows server.

It must have been very difficult for non-technical judges to master these conflicting factual questions via the pleadings. No one could deny that interoperability was an important policy goal. There was little common ground on what sort of interoperability or the supposed lack thereof justified creating radically new competition law offences.

QUESTIONS ABOUT INTEROPERABILITY

- Is interoperability in and of itself a relevant goal under EC competition law justifying or helping to justify a special duty to deal?
- Is commercially efficient or adequate (but less-than-perfect) interoperability a sufficiently serious problem to justify a compulsory licence? What level of adequacy will exclude the necessity of such a licence?
- What is the significance of the fact that many users of computing power use servers and PCs from competing suppliers, which routinely work together?
- What is the relevance of the fact that for certain complex products, total interoperability can only be achieved by allowing the requesting party to make a functional copy of the dominant company's product?

The Question of Interruption of Previous Supply

We should at this stage remember another debate, about interruption of supply. *Commercial Solvents*²⁵ was the first case where the Commission accused a supplier of abusing its dominant position by cutting off supplies (of a chemical vital to a customer as retaliation for a disagreement).

²⁴ One notable exception is the open source SAMBA project under which a handful of devotees are striving not to create a new server operating system product for sale in the market, but to create an open source and free functional replica or 'clone' of the Windows server operating system for use in Windows networks.

²⁵ See above.

The question arose of whether Microsoft's behaviour fitted into the *Commercial Solvents* pattern.

In the early days, Microsoft licensed server technology to AT&T that was used to create a product called AS/U (Advanced Services for UNIX). Beginning in 1991, Microsoft had agreed to license AT&T with technology for the early networking product called LAN Manager. In 1992, Microsoft also provided AT&T with the corresponding code in Windows NT server. In 1998, Microsoft and AT&T agreed that although AT&T could continue to use the technology and software it had received for NT, Microsoft was not bound to license software and technology relating to future releases of Windows servers. The contract expired in 2000.

A number of products based on AS/U were created by leading UNIX vendors, including Sun Microsystems's PC NetLink. The Commission contended that Microsoft's conduct vis-à-vis Sun involved a disruption of previous levels of supply.²⁶ It is agreed that Microsoft was not supplying communications protocols to Sun before Sun made its request in September 1998. Sun Microsystems and several other vendors which sold servers with their own server operating systems did license AS/U from AT&T. However, their sales of 'work group' servers were modest. There was no evidence that those sales declined after Microsoft and AT&T agreed not to extend their licence agreement to include new technology embodied in Windows Server 2000. Novell never made any use of AS/U, so Microsoft's dealings with AT&T had no effect on Novell. The same of course applies to open source Linux operating systems, which were making strong headway from 1999.

A decision by Microsoft to license software code and technology (then basic) to AT&T in the early 1990s ought not, said Microsoft, to oblige Microsoft to license for the indefinite future. Declining to assume a perpetual obligation to license all new advances and all new generations of technology is not a disruption of supply. It would seem strange if licensing current technology to one person implied a continuing duty to other persons to supply new technology.

Nevertheless, according to the Decision, Microsoft interrupted supply:

Microsoft has diminished the level of disclosures that it makes concerning information necessary to achieve such interoperability. Microsoft has turned down a formal request by Sun concerning such interoperability information.²⁷

²⁶ Decision, section 5.3.1.1.3.2.

²⁷ Decision, para. 780.

QUESTIONS CONCERNING THE SUPPOSED INTERRUPTION OF SUPPLY

- What was the relevance of the fact that during the 1990s Microsoft supplied to AT&T (with rights to sub-license) software code and technology as to the early version of Microsoft's server operating systems?
- Does the making available of technology by licence to one licensee compel subsequent licences to other licensees of subsequent technology?
- Does the sophistication of the later technology, or its coverage by IP rights, affect any duty to supply?
- Does the termination of a contract with a licensee on agreed terms constitute an interruption of supply to sub-licensees of the licensee?

The Remedy

Pursuant to article 4 of the Decision, Microsoft had to prepare 'a complete and accurate specification'. Thus Microsoft must first research; then describe; then divulge to its competitors; then license them to use it and Microsoft's IP rights in the process. In addition, Microsoft must make the specially written description easy enough for a person without deep expertise of Windows to use. This was a first in competition law history anywhere on earth. At stake were the protocols and technology governing client-to-server and server-to-server communications in the sense of interoperability as the word is commonly understood, and server-to-server communications within the service boundaries ('inside' Active Directory).

More specifically, from the summer of 2004, 210 software engineers in three countries at different times were studying over 6.69 million lines of source code (2.39 million for directory, and 4.30 million for file and print) to identify how their communications protocols functioned. Because the task was large and difficult, and because parts of the code go back to the early 1990s, Microsoft recruited retired Microsoft engineers who worked for the company at that time. Team members studied the source code, read the preparatory design material, chased down the engineers who wrote it and clarified why they had done things in a particular way. With that understanding, a description of functionality could be prepared and the pages fitted into a comprehensible whole. Little of the material was already in existence because the software was designed as proprietary code, not

intended for the public domain. Accordingly, the kind of ‘specification’ years later demanded by the Decision had to be written specially. It then had to be tested. Teams in India and China helped at this stage. Some of the tests involved harnessing together hundreds of computers simultaneously to check what had been done. Tens of thousands of working hours were spent on creating this ‘specification’. Microsoft also offered to give expert help to would-be licensees, and to show them the actual source code of Windows. As described below, there have been a number of disagreements over what format was best for the specification, and over the presence of errors. After an immense amount of discussion between the company and the Monitoring Trustee, these are now for the most part concluded.

The Court was shown a sample of the original source code, a combination of text and symbols which is understandable by an engineer and which, when turned mechanically into zeros and ones by a compiler, is the operating system which controls a Windows server. That was the embodiment of the technology: the original text written by Microsoft engineers and adapted over the years to increase functionality, improve performance, make corrections, enable scalability, and so forth.

Armed with the specification, the licensee can make a software product which will be identical in the sense that a server using it will be a functional equivalent, with identical behaviour and identical logic, doing the same thing as the functions being imitated. The licensee’s code will have different zeros and ones to the original Microsoft code. In that limited sense they may differ. But from the customer’s viewpoint they will functionally be the same (and technically for certain purposes they must be identical).

QUESTIONS AS TO THE FACTS

- Was the Commission’s appraisal of the facts as to interoperability vitiated by error?
- Were the abuse identified by the Decision and its remedy, the divulgation, proportionate to the identified interoperability problem?

On the Principle of Divulgation

In any Article 82 EC controversy, the allegedly dominant rightholder will rely on his right to enjoy private property; the skill, money and time invested in creative effort, and the value attributed by society to encouraging innovation and investment via IP rights; and claim that any

encroachment puts in danger all other persons similarly situated. Such enrichment and detriment respectively would not be remedied by royalties.²⁸ On the other hand, the ‘infringer’ will rely on the foreclosure of competition due to the invoked right, the lack of research and development involved, the improbable nature of the right, the unreasonable or capricious behaviour of the dominant player, the peripheral impact upon the dominant player contrasted with the victim’s vital need, and the very moderate nature of the contemplated compulsion. The challenge for the antitrust enforcer is to identify the relevant circumstances and to decide wisely.

Microsoft was accused of having refused to supply ‘interoperability information’ to enable competitors to develop their own technology for making operating systems for server computers performing so-called work group functions.²⁹ Microsoft’s incentive to innovate receded before the need to protect innovation in general, according to the Commission:

²⁸ In *IMS Health* the Commission had argued that IMS’s temporary loss of its IPR would be compensated by reasonable royalties (Case T-184/01 R *IMS Health Inc. v Commission* [2001] ECR II-3193, para. 142). This argument, however, did not impress the Court, which in the following paragraph (para. 143) stressed: [i]t is important initially to recall that the *public interest in respect of property rights in general and of intellectual property rights in particular* is expressly reflected in Articles 30 EC and 295 EC. The mere fact that the applicant has invoked and sought to enforce its copyright in the 1,860 brick structure for economic reasons does not lessen its entitlement to rely upon the exclusive right granted by national law for *the very purpose of rewarding innovation*’ (emphasis added).

²⁹ ‘Microsoft has been enjoying a dominant (quasi-monopoly) position on the client PC operating system market for many years. This position of market strength enables Microsoft to determine to a large extent and independently of its competitors the set of coherent communications rules that will govern the de facto standard for interoperability in work group networks. As such, interoperability with the Windows domain architecture is necessary for a work group server operating system vendor in order to viably stay on the market.’ Decision, para. 779.

‘The data collected by the Commission show that there is a risk of elimination of competition in the work group server operating system market. Microsoft’s market share has increased swiftly. The company has reached a dominant position in the relevant market. This position continues to be reinforced. Technologies that will lead to a further lock-in into Microsoft’s products at the work group server and client PC level are quickly gaining traction in the market. The Commission’s investigation has also produced evidence that establishes a causal link between the market evolution and the interoperability advantage enjoyed by Microsoft. Furthermore, there is no actual or potential substitute to disclosures by Microsoft of interoperability information.’ Decision, para. 781.

Microsoft's refusal to supply has the consequence of stifling innovation in the impacted market and of diminishing consumers' choices by locking them into a homogeneous Microsoft solution. As such, it is in particular inconsistent with the provisions of Article 82(b) of the Treaty.³⁰

Microsoft's view was that, as to client-server communications, Microsoft had eliminated any advantage it enjoyed through making available the communications protocols used by Windows 'client' PCs and Windows servers as part of the US settlement; and that as to server-to-server communications, there was no need for action since in actual practice servers communicated effectively with other servers. The success in a short time of Linux servers without access to the 'refused' technology further demonstrated the lack of the acute problem alleged by the Commission.

The so-called 'interoperability information' was not in the public domain (unlike the material at stake in *Magill* or the alleged industry standard in *IMS Health*); it was future technology when requested in September 1998, and would be launched only in 2000; the specifications derived from the software code were hugely voluminous (thousands of pages of electronic text once written specially); the technology was the fruit of hundreds of person years of development effort; it was covered by a number of patents issued by European and other agencies, whose issuance confirmed the complexity and novelty; it was copyright; and there was neither practical need nor legal obligation to deliver it to a competitor to make a replica incorporating or imitating what Microsoft effort had created. The Commission did not identify any specific new product that might come from the compulsory licence, but it expressed the hope that disclosure would lead to the emergence of new or innovative products. Microsoft observed that if a licensee wanted merely to imitate the Microsoft product, he would be free to do so.

The Commission applied a so-called balancing test, which weighed Microsoft's incentives to innovate against the incentives of the whole industry to innovate were Microsoft required to make its technology available for licence.³¹

³⁰ Decision, para. 782.

³¹ The test used in the Decision entails an ad hoc balancing of the 'general public good' against a dominant undertaking's right to deal with whom it pleases. 'The central function of intellectual property rights is to protect the moral rights in a right-holder's work and ensure a reward for the creative effort. But it is also an essential objective of intellectual property law that creativity should be stimulated for the general public good. A refusal by an undertaking to grant a licence may, under exceptional circumstances, be contrary to the general public good by consti-

a detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft). As such, the need to protect Microsoft's incentives to innovate cannot constitute an objective justification that would offset the exceptional circumstances identified.³²

Commission officials spoke of the likelihood that the degree of innovation in the market would *increase* as a result of the Commission's intervention. Rival server vendors would be able to focus development efforts on innovations in their products, since they would now be able to compete on the merits of these products, without an 'artificial interoperability obstacle'. Rivals which could deploy Active Directory would certainly have an advantage and could focus on other kinds of creativity. Furthermore, as rivals' products improved, this would spur Microsoft's own incentives to innovate, as it would 'no longer be able to simply rely on the artificial interoperability advantage to win in the market'.³³ Microsoft called this a horticultural approach: to stimulate growth, prune the roses – dubious for technology.

The Commission, as noted above, stated that it expected the divulgation of the technology would lead to the emergence of new products, but it identified no specific new products; and there was no limiting principle in the Decision whereby a licensee would be obliged to make a new product. Indeed, there seems to be a tension between the duty to help competitors create a functionally equivalent substitute product and the expression of a hope that 'new' products will emerge. When a dominant company receives a request for help of a technological kind from a competitor, it is at risk of abusing Article 82 EC if its refusal seems likely to damage the public good. Whether it is obliged to license or not will be decided only after the refusal has occurred by comparing its incentives to innovate with others' interests in enjoying the licensed technology.

tuting an abuse of a dominant position with harmful effects on innovation and on consumers.' Decision, para. 711.

'The major objective justification put forward by Microsoft relates to Microsoft's intellectual property over Windows. However, a detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft). As such, the need to protect Microsoft's incentives to innovate cannot constitute an objective justification that would offset the exceptional circumstances identified.' Decision, para. 783.

³² Decision, para. 783.

³³ Former Commission official Jürgen Mensching, speaking at the Fourth Sweet & Maxwell Annual Competition Law Review Conference, 22 October 2004.

It seems difficult to create an infringement based upon an *ex post facto* appraisal of whether a licence would enhance innovation. On this basis, there is *always* the chance that opening up the treasure chest of technology might lead to advantage for society. But that is a very speculative justification for a huge encroachment on the interests of the rightholder.

CONCERNING THE DECISION TO COMPEL DIVULGATION

- Was it correct to dismiss as insignificant the emergence and rise of Linux when analysing the effective market?
- Was the new balancing test economically wise and legally sound, and was it appropriately performed?
- Is it relevant that the Decision did not identify any specific new product that would emerge through the divulgation?
- Is the Decision right to find that a compulsory licence will encourage the licensor to be more creative?

Intellectual Property Rights and the IMS Health Criteria

The interrelationship between intellectual property rights (IPRs) and competition law has been a recurrent theme for antitrust enforcers, practitioners and academics in recent years.³⁴ The standard theory is that, generally, the two are not in conflict, but that they converge in the pursuit of the same objective, the creation of a competitive market led by technological innovation for the benefit of consumers.³⁵

³⁴ For example, the Joint Hearings of the DOJ and the FTC: 'Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy' (2002), see www.ftc.gov/opp/intellect/index.htm; FTC Report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (October 2003), available at www.ftc.gov/opp/intellect/index.htm; and the Comments received by the European Commission in relation to the Draft new block exemption regulation and draft guidelines on the application of Article 81 to technology transfer agreements, available at europa.eu.int/comm/competition/antitrust/technology_transfer_2/.

³⁵ See e.g. L. Peepkorn, 'IP Licences and Competition Rules: Striking the Right Balance' (2003) *World Competition* 527, 528. Judging by the US example, this has not always been the case; see e.g. W. Bowman, *Patent and Antitrust Law: Legal and Economic Appraisal* (Chicago and London: Chicago University Press, 1973).

The purpose of IP protection is to provide all firms with incentives to innovate, including the ability to use their innovations to their own competitive advantage and prevent competitors from misappropriating the benefits of their investments in research and development. The mere invocation by a dominant company of IPRs cannot, as a matter of principle, constitute an abuse.

Introduction

2004 saw two remarkable events, almost simultaneously. In April 2004, the European Court of Justice rendered a judgment in *IMS Health* which seemed to prescribe fresh and updated judicial criteria for compulsory licensing. In March 2004, the Commission's Decision in the Microsoft case imposed a compulsory licence of a description of part of Microsoft's software code in the operating system for its servers.

If the *IMS Health* judgment had been pronounced in February 2004, the Commission Decision in the Microsoft case must necessarily have been different. Is the Microsoft Decision the first word of a new compulsory licensing era, so that the *IMS Health* test must be adapted immediately after it was adopted?

The *IMS Health* judgment

In *IMS Health* (as in *Magill*) the Commission was requested to intervene in order to palliate the anti-competitive consequences of the successful invocation of a national IPR. The complainants³⁶ said there was no possibility for companies wishing to offer pharmaceutical sales data in Germany to employ any convention for ascribing sales data geographically other than the convention used by IMS, the map known as the 1860 brick structure. To supply usable marketing data to customers, that data had to be useful to pharmaceutical customers. There were no substitutes or alternatives to reporting sales along the same geographic lines as the map of postcodes drawn up by IMS. IMS was successfully claiming that use of this format constituted a breach of its copyright. The Commission found that IMS's bringing of copyright infringement actions was an abuse of its dominant position. The Commission considered that the litigation was likely to eliminate all competition, and that the refusal to grant a licence lacked 'objective justification'.³⁷

³⁶ The author represented the complainant NDC in the interim measures proceedings; and represented the Commission in *Magill* before the CFI and the ECJ.

³⁷ The Commission did not base its attack on the possibility that IMS had hijacked an industry standard. I share the view of my colleague, James Killick, that the Commission could have looked at the case from the basis that the brick

As in *Magill*, the Commission's Decision in *IMS Health* was criticized on intellectual property grounds, since it was thought contrary to 'well-established legal principles' and because it risked to 'discourage investment in intellectual property'.³⁸ As in *Magill*, the Commission's Decision in *IMS Health* was suspended by the President of the CFI.³⁹ National litigation in Germany culminated in a preliminary reference ruling of the Court of Justice on 29 April 2004, which constitutes the most authoritative pronouncement of the European judicature to this date on compulsory licensing of IPRs.⁴⁰

The ruling of the Court of Justice, drawing from *Magill* and *Bronner*, stated or recapitulated the four conditions under which a dominant undertaking may be ordered to license its intellectual property rights:

- (1) The product or service protected by copyright must be *indispensable* for carrying on a particular business. The test is one of an 'equally efficient competitor'. There is no indispensability if there are 'alternative solutions, even if they are less advantageous'. A company wishing to receive a licence must 'intend to offer new goods or services not offered by the owner of the right and for which there is potential consumer demand'.⁴¹
- (2) The refusal must *prevent the emergence of a new product for which there is potential unmet consumer demand*. The requesting party must 'not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right'. Microsoft asserted that a licensee product replicating the functionality of say, Active Directory, would not be a 'new product' which was being denied to consum-

structure was originally an open industry standard and argued that IMS was claiming IPRs over that standard for the abusive purpose of excluding competition by preventing its competitors from using the standard. See J. Killick, 'IMS and Microsoft Judged in the Cold Light of *IMS*' (2004) *Competition Law Review* 23, 30, available at www.clasf.org/CompLRev/assets/Vol11Issue2Article2.pdf.

³⁸ See e.g. J. Temple Lang, 'European Community Competition Policy: How Far Does it Benefit Consumers?' (2004) *Boletín Latinoamericano de competencia* (February), 128, 129, available at europa.eu.int/comm/competition/international/others. See also J. Temple Lang, 'Anticompetitive Non-Pricing Abuses under European and National Antitrust Law' (2003) *Fordham Corp. L Inst.* 303.

³⁹ Case T-184/01 R *IMS Health*.

⁴⁰ Case C-418/01 *IMS Health*.

⁴¹ Case C-418/01 *IMS Health*.

ers, and would merely offer the same functionality albeit under a different name.

- (3) The refusal must not *be objectively justified*.
- (4) The refusal must be such as to *exclude all competition* on the secondary market.

These conditions are cumulative.⁴² One may assume (like members of the Court of Justice) that they are likely to be interpreted restrictively and applied with much caution.⁴³

The Advocate General's Opinion and the Court of Justice's judgment in *IMS Health* diverge. Advocate General Tizzano started his analysis⁴⁴ from *Commercial Solvents* and *Télémarketing*⁴⁵ (which are 'true' refusal-to-deal cases) before going on to the IP cases *Volvo/Veng* and *Magill* (refusals to license), as well as to *Bronner*. The Court of Justice chose to start its analysis⁴⁶ directly from *Volvo/Veng* and *Magill*. This implies that the encroachment on IPRs by compulsory licensing is to be examined separately from the general refusal-to-deal cases.

Nature of the licensed material and the rights covering it

Before considering the *IMS Health* tests, there are two preliminary questions. Do different IPRs 'deserve' different levels of respect when compulsory licensing is under consideration? Can the nature of the *material* to be licensed affect the outcome?

Article 295 EC does not confer immunity from the competition rules upon holders of IPRs: it may be said to confirm the proposition that Community policies must be pursued giving proper respect to private

⁴² See Advocate General Poirares Maduro's Opinion of 14 July 2004 in Case C-109/03 *KPN Telecom BV v Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA)* [2004] ECR I-1127, para. 35.

⁴³ As acknowledged by Advocate General Poirares Maduro, '*a duty under Article 82 EC for a dominant undertaking to aid its competitors should not be assumed too lightly and refusal to supply a competitor is not automatically considered abusive just because the inputs in question are necessary to compete on a secondary market. A balance should be kept between the interest in preserving or creating free competition in a particular market and the interest in not deterring investment and innovation by demanding that the fruits of commercial success be shared with competitors*', *KPN Telecom BV*, para. 39.

⁴⁴ Advocate General Tizzano's Opinion, paras. 48, 49 in Case C-418/01 *IMS Health*.

⁴⁵ Case 311/84 *Télémarketing v CLT and IPB* [1985] ECR 3261.

⁴⁶ Case C-418/01 *IMS Health*, para. 34 *et seq.*

property interests.⁴⁷ Any encroachment upon it has to be capable of being analysed, justified and defended without embarrassment and without violence to international treaty obligations.

Volvo/Veng, *Magill* and *IMS Health* concerned rights whose subject-matter was rather ‘thin’ and not covered by secrecy (design of a spare part, copyright over a public list of forthcoming TV programmes, or the map of 1,860 districts following German postal code boundaries). I have described the compulsory licences in *Magill* and *IMS Health* as capable of being regarded as very rare correctives for the consequences of invoking rights upon such subject matters in a manner which foreclosed competition.⁴⁸ The doubts over the *IMS Health* and *Magill* judgments, which involved debated (even doubtful) rights to control the use of non-secret information, should confirm that the tests there deployed are minima. In other words, it is arguable that ‘mainstream’ IPRs in innovation-driven industries should be subject to more demanding criteria and proof before compulsory licensing can be contemplated.

There is little conclusive authority. Having been involved in *Magill*, *IMS Health* and the *Microsoft* case, I can voice a personal opinion which is that the nature of the material and its public or secret status is relevant; that compulsory licences are more likely in the case of ‘thin’ rights such as those at stake in *Volvo/Veng*, *Magill* and *IMS Health*; and that rights existing under patent or under copyright or trade secret law are equally worthy of protection, respect and deference in the eyes of competition law.

Must competition law treat certain categories of human effort and the law which protects that effort more deferentially than other categories? In *Magill*, the Commission argued that the fact that ‘programme listings are not in themselves secret, innovative or related to research’ was relevant to its decision to condemn the refusal to license.⁴⁹ Similar arguments were

⁴⁷ As well as Article 295, Article 30 EC refers to ‘the protection of industrial and commercial property’.

⁴⁸ See I. Forrester, ‘EC Competition Law as a Limitation on the Use of IP Rights in Europe: Is there a Reason to Panic?’ in C.D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2003: What is an Abuse of a Dominant Position?* (Oxford: Hart Publishing, 2006), pp. 503–21, available at [www.iue.it/RSCAS/Research/Competition/2003\(papers\).shtml](http://www.iue.it/RSCAS/Research/Competition/2003(papers).shtml); I. Forrester, ‘Compulsory Licensing in Europe: A Rare Cure to Aberrant National Intellectual Property’, presentation at the Department of Justice/Federal Trade Commission Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy: Comparative Law Topics, 22 May 2002, Washington, DC, available at www.ftc.gov/opp/intellect/020522forrester.pdf.

⁴⁹ See Case T-69/89 *Radio Telefis Eireann v Commission* [1991] ECR II-485, para. 46.

made in *IMS Health*. However, in both *Magill* and *IMS Health*, the courts did not comment on the assertion, although Advocate General Jacobs did in *Bronner*.⁵⁰ The *Magill* and *IMS Health* material was public domain material protected by a debated (or ‘thin’) right: the status of what some call ‘five star’ material (secret, future technology, the fruit of ongoing research, manifestly very complex) protected by ‘five star’ legal rights (patents, copyright and trade secrets), as opposed to ‘two star’ material protected by ‘two star’ rights, was examined in the *Microsoft* case.

The President of the CFI noted the question in his Order of 22 December 2004, but decided that it had to be resolved in the main action. He did say, however, that:

the hitherto secret specifications for the communications protocols which the Decision requires Microsoft to draw up and disclose are clearly fundamentally different from the information at issue in *Magill* and *IMS Health*. In those cases the information at issue was widely known in the sector: the television programme listings were sent free of charge to newspapers every week and the map of Germany was in reality an industry standard for the presentation of sales figures. However, the question whether, and if so to what extent, a distinction must be drawn according to whether the information is known or secret is even less amenable to determination at this stage because account must be taken more generally of parameters such as 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.⁵¹

It is not by accident that the first compulsory licence under Article 82 EC (*Magill*) was imposed in a case involving no secrecy, no research, a disputed copyright and consumer prejudice; nor that the second case, *IMS Health*, also involved a modest level of innovation. In cases like *Ladbroke* and *Bronner*, the complainant lost, and deservedly. The Court of Justice’s judgment in *IMS Health* offers a set of four criteria which make sense in a large number of different circumstances. They seem capable of being applied to ‘five star’ innovation protected by ‘five star’ IPRs. Applying them will give rise to difficulty in particular circumstances, but they are rational. They may not be the last word, but they are well crafted and are capable of being reconciled with the protection of innovation. The *IMS Health* tests could have sufficed to decide the *Microsoft* case. There are two tests which could equally be regarded as of prime relevance in the case.

⁵⁰ Case C-7/97 *Oscar Bronner*.

⁵¹ Case T-201/04 R *Microsoft Corporation v Commission*, Order of 22 December 2004, para. 207.

One involves the blocking of an innovation to the detriment of customers, and the other is the blocking of all competition. Following the judgment of the CFI the criteria for compulsory licensing have been sharply relaxed.

The *IMS Health* tests

The First of the IMS Health Tests: New Product Denied to Customers

The Magill TV Guide was a product Irish consumers desired. It was something new. Those who were involved in Magill will recollect the interest shown by the CFI in the physical demonstration of the new product: dozens of multichannel guides in other Member States, and none in Ireland after the extinction of the Magill TV Guide.

One of the challenges in establishing a compulsory licensing regime is to avoid an arbitrary standard-less test. Every IPR is likely to be used to prevent competition, by preventing the replication of copyright material, the manufacture of a patented object or the exploitation of a trade secret. It is pointless to say that such a refusal is anti-competitive, since blocking competition is one of the entitlements conferred by the right. In *Magill*, the result made obviously good sense: it was foolish (to the ordinary consumer) that advertising schedules of forthcoming television programmes could not be reproduced as Magill proposed. But what was the limiting principle? What was the distinguishing feature by which the BBC could be challenged, without creating gross uncertainty for other rightholders? The Court of Justice's answer was: a new product for which there was unmet consumer demand. The three broadcasters were using their Irish copyright to prevent the replication of their works to launch a new kind of publication which consumers demanded but were not getting. There was consumer harm.

The new product test will be an easy way of filtering out meritless complaints about refusals to license. It also makes logical sense. Any IPR involves some blocking of product differentiation. Making a blue version of a red product would not satisfy the test. According to *IMS Health*, essentially 'duplicating the goods or services already offered on the secondary market by the owner of the copyright' is not sufficient.⁵²

Making a completely new product which consumers want would satisfy the test. Duplication with some differentiation ('mine would be better') will not on its own suffice. It will often be debatable whether the 'infringing' product is really new or merely incrementally superior. Whether a much better product is new will be a common subject of discussion. What is new may need verification of the facts, as in the case of *IMS Health* where the

⁵² Case C-418/01 *IMS Health*, para. 49.

German courts were given the task of investigating the question of whether the ‘infringing’ party was indeed offering something different to IMS.

In the Microsoft case, the test is said to be satisfied by the possible emergence of unspecified products. Now, whenever technology is released via licences, products will *probably* emerge that were not previously on the market. But is this really enough to satisfy the ‘new product’ test? Is it necessary for the test to be satisfied that the ‘new’ products can be identified before the licence? No specific new product had been identified by the Commission; and of course, the licences which Microsoft grants do not limit the licensee’s freedom to make a non-innovative product.

Moreover, Microsoft is not denying any product to consumers, unlike the broadcasters in *Magill*. It is offering server operating systems which are in its eyes superior to others. It is preventing other companies from duplicating such functionalities, not from creating alternatives which are superior or cheaper, or otherwise different. Microsoft denies that endowing its competitors with the capacity to make a directory service which is of identical functionality to its own directory service will lead to the making of a new product for which there is unmet consumer demand.

The Second IMS Health Test

On the next condition, elimination of competition, the Court of Justice’s test in *IMS Health* (29 April 2004) speaks of ‘elimination of all competition’.⁵³ By contrast, the test in the *Microsoft* case (24 March 2004), is the ‘risk of elimination of competition’, a test based on probabilities. The contested behaviour did not eliminate all competition. It hindered, so said the Commission, viable competition.

According to the Commission, ‘the degree of interoperability that can be achieved on the basis of Microsoft’s disclosures is insufficient to enable competitors to viably stay in the market’.⁵⁴ Thus, the goal of the Decision is delivering a ‘sufficient’ degree of supply of interoperability, and thus, by implication, a ‘sufficient’ degree of competition. Microsoft argued that absolute elimination is the legal test, and that if Novell and Linux server operating systems never used the controversial communications technology, that test was not and could not be satisfied.

The Third IMS Health Test

As to indispensability, courts must ask whether the protected IPRs are indeed indispensable for competitors to carry on their business activities.

⁵³ Case C-418/01 *IMS Health*, para. 52.

⁵⁴ Decision, para. 589, n. 712.

Bronner (not an IP case) and *Ladbroke* indicate that access is not indispensable if a dominant undertaking's competitors can develop and market their products without access, even if it would be more convenient for them to have it. The existence of several types of server operating system confirmed that competing products existed without having had access to the technology at issue, one of them (Linux) having emerged during the period of the alleged abuse.

Particular debate concerned whether the technology was meant to assist the competing servers more perfectly to communicate with Microsoft servers or to act in a network of Microsoft servers which necessarily involves replicating how a Microsoft server acts. The Decision states⁵⁵ that Microsoft's specifications are indispensable because no other alternative was available by which Microsoft's competitors could interoperate with servers using the Windows operating system.

The Fourth IMS Health Test

The fourth condition was objective justification. Any dominant company would say it is objectively justified in not disclosing its intellectual property to a major competitor wishing to help to displace the dominant player's products. There may be cases where the refusal would indeed block all competition, where a licence is indispensable and where a new product would be made by the licensee. The rightholder might reasonably refer to the heavy research and development expenditure, the limited period of available patent protection, and to the firm's own view of the best way of exploiting its own invention. (Advocate General Jacobs in *Bronner* reviews US case law and points out three categories of objective justification: technical, commercial and efficiencies.)⁵⁶

⁵⁵ Decision, para. 669: 'As regards the use of open industry standards implemented in Windows, interoperability within a Windows work group network largely depends on specifications that are proprietary or are extended versions of standard protocols. Therefore, open industry standards fall short of *enabling competitors to achieve the same degree of interoperability with the Windows domain architecture as Windows work group server operating systems do*. Since all major work group server operating system vendors already support most of the open industry standards supported in Windows, it can be concluded that this degree of interoperability proves to be insufficient for them to viably compete in the market. Therefore, reliance on open industry standards cannot be considered to be at present a realistic substitute to disclosures by Microsoft'. (Emphasis added.)

⁵⁶ See Advocate General's Opinion in Case C-7/97 *Oscar Bronner*, para. 47:

The US essential facilities doctrine has developed to require a company with monopoly power to contract with a competitor where five conditions are met. First, an essential facility is controlled by a monopolist. A facility will be regarded

QUESTIONS ABOUT COMPULSORY LICENSING

- Are the *IMS Health* tests the relevant ones? Can they be supplemented?
- Is the investment of money and time by the dominant company in creating the material to be licensed a relevant factor? If so, does one look at the investment in the relevant product, or more widely to the investments in other products (failure and successes) on which the licensor worked?
- Is it relevant that the request was made to enable the licensee to make a directly competing product?
- Is there a difference in the legal test depending on whether the information is covered by IPRs or not?
- If interoperability is a policy goal of such importance that enhancing interoperability has become a new criterion for compelling a licence, do the other *IMS Health* tests such as total elimination of competition and new product for which there is unmet consumer demand still apply?

Different intellectual property rights

The Commission has advanced novel theories about trade secret law, which are of wider interest. It argued in the Microsoft case that antitrust owes little deference to trade secrets, as the reasons and motives for keeping the material secret should be considered first. The Commission has expressed the view that trade secrets should therefore be treated differently from

as essential when access to it is indispensable in order to compete on the market with the company that controls it. The following have for example been held to be essential facilities: railroad bridges serving the town of St Louis; a local telecommunications network; a local electricity network. Secondly, a competitor is unable practically or reasonably to duplicate the essential facility. It is not sufficient that duplication would be difficult or expensive, but absolute impossibility is not required. Thirdly, the use of the facility is denied to a competitor. That condition would appear to include the refusal to contract on reasonable terms. Fourthly, it is feasible for the facility to be provided. Fifthly, there is no legitimate business reason for refusing access to the facility. A company in a dominant position which controls an essential facility can justify the refusal to enter a contract for legitimate technical or commercial reasons. It may also be possible to justify a refusal to contract on grounds of efficiency. (References omitted.)

IPRs affirmatively ‘created by law’ such as patents. This approach⁵⁷ seems to differentiate between ‘good’ and ‘bad’ IPRs in a manner similar to that adopted by the Court of Justice in its early cases such as *Sirena*⁵⁸ and *Café Hag I*.⁵⁹ Microsoft disagrees: trade secrets constitute valuable property and are an IPR, just like patents and copyright, and are protected under TRIPS.

Indeed, the Commission argues that the rules on compulsory licensing of IPRs should not apply to knowhow licensing, on the grounds that the act of not licensing an IPR affirmatively created by IP law is fundamentally different to that of ‘not revealing’ a ‘secret’, the existence of which merely results from a unilateral business decision. So one question to be settled is whether competition law may more readily compel a licence in a case involving trade secrets than in a case involving other IP interests.

Even though the Commission doubts the existence of IPRs relevant to the controversy, it has still ordered Microsoft to license the IP:

The order to supply is therefore not limited to disclosing specifications but also encompasses authorising the implementation of such specifications in work group server operating system products . . . to the extent that this Decision might require Microsoft to refrain from fully enforcing any of its intellectual property rights, this would be justified by the need to put an end to the abuse.⁶⁰

Microsoft stated that many patents cover the technology. The Commission’s response was that the patents may have been wrongly granted or that it may be possible for a licensee to engineer around the software inventions over which Microsoft held patent protection. Microsoft responded that there was no reason for a licensee to seek an alternative means of exploiting the licence, and that it was not for the Commission to second-guess the decisions of national or European patent authorities. Subsequently, the Commission has suggested that all or nearly all of the licensed material should be licensed royalty-free on a worldwide basis. Royalties might be demanded only for ‘innovative’ technology, but not for innovation in the commonly understood sense. This topic is addressed further below.

Microsoft notes it has copyright in the source code and in the

⁵⁷ See R. Milgrim, ‘Commission Proposed Capital Punishment – by Definition – for Trade Secrets, a Uniquely Valuable IP Right’ (2006) *Journal of Patent and Trademark Office Society* 911.

⁵⁸ Case 40/70 *Sirena S.r.l. v Eda S.r.l. and others* [1971] ECR 69.

⁵⁹ Case 192/73 *Van Zuylen frères v Hag AG* [1974] ECR 731.

⁶⁰ Decision, paras 1003, 1004.

specifications painfully drawn up by its engineers; and that any implementation of those specifications must infringe its copyright interests. The Commission denies any encroachment of copyright. It says that Microsoft must deliver a specially written, detailed description of the functionality implemented by its own source code, rather than licensing the source code as such: so the source code of the licensee's program would be different from the Microsoft original, even if the functionality were the same. Microsoft replies that this functional replication of how software performs is entirely inconsistent with the goals and terms of the Software Directive.⁶¹

QUESTIONS ABOUT INTELLECTUAL PROPERTY

- What relevance is to be attributed to the fact that the information requested was subject to IPRs?
- Is any distinction to be made between these various rights? Does it matter if a licensor possesses patents, or copyright or trade secret rights, or believes it does, over the material requested?
- Should any distinction be made between the different types of IPRs (patents, copyright, trademark and know how)?
- Is knowhow and the law which protects it eligible only for a lesser degree of respect than other rights in the face of antitrust concerns?
- Did the Decision lawfully reconcile the long-term incentives to innovate (given by IPRs) with the shorter-term incentives of competition law?
- May the Commission defend a compulsory patent licence by doubting the validity of the issued patents?

Need for legal certainty

Establishing constraints on compulsory licensing creates legal certainty for market operators, at the cost of limiting the enforcer's freedom to condemn. Any *ex post* regime based on condemnation, such as the prohibition of abuses, needs predictability to be lawful. While legal uncertainty

⁶¹ Council Directive 91/250/EC on the legal protection of computer programs [1991] OJ L211/42.

is, indeed, inherent in antitrust,⁶² stability in enforcement patterns is necessary for business's growth and prosperity. Business needs reasonably clear guidance. A 'standardless' test risks being applied in an arbitrary manner.

Everyone would agree that duties to license should be imposed only in the rarest cases, the categories of which should be defined. Predictable rules should always be the basis for a legal regime based on condemnation. Legal principles applied to one dominant player should be capable of being applied in the future to other dominant players.

If the Decision were well-founded in condemning Microsoft's behaviour, considerable practical difficulties would arise for future addressees of requests to license. Consider the situation of the dominant holder of an important technological advantage who receives a broadly-formulated request for access to the technology from a competitor who wishes to use that technology to build a competing product. The rightholder will normally prefer not to grant such a licence, but will surely not wish to risk being condemned and heavily fined for abuse of a dominant position. If the request for technical assistance is very broad, is there really a duty to deliver as opposed to a duty to discuss what is appropriate? The dominant player should not be obliged to identify what lesser disclosure might satisfy its legal duty.

Moreover, the application of the test poses numerous questions. It appears difficult enough for the enforcers to ensure a consistent and objective application of such a test. It would be even more difficult for the Court of Justice to question the Commission's findings. Other unanswered questions remain. Do judges and competition authorities have the right background for setting the appropriate terms of access? Since the owner refuses to license, someone else would have to assess and set the amount of compensation. This could be anything between the licensing cost and the opportunity cost of licensing (i.e. the income taken away by the additional rightholder). This is difficult enough for a regulator and, as noted by others, very difficult indeed for a general enforcer.⁶³

⁶² See R. Hawk and N. Denaeyer, 'The Development of Articles 81 and 82 EC Treaty: Legal Certainty' in C.-D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford: Hart Publishing, 2001), pp.130, 137, 140.

⁶³ See also V. Korah, 'Refusals to License Contrary to Article 82 EC – IMS – When are the Circumstances Special?' Fordham IP Conference Papers (2005).

QUESTIONS ABOUT ISSUES OF GENERAL PRINCIPLE

- Was Microsoft correct to say that the Commission Decision was intended to change how the market operates rather than to condemn recognizably infringing conduct?
- Are the criteria established by the Decision adequately clear and capable of being applied in future cases?

6. FINES

I have now described the principal points which were debated as to the merits of the interoperability half of the case. I add some thoughts on the fine of €497,196,304. The imposition of the largest fine in history presented an obvious financial concern even for a company which is prosperous. It also presented a moral element: Microsoft was accused not just of a technical offence but a wilful breach of the law. Although the huge fine is almost always referred to in press accounts of the case, the fine and its amount received only a few paragraphs in the Commission Decision.

Supposed Absence of Novelty of the Infringements

Paragraph 1057 of the Decision states:

The Commission is not applying any new rule of law; . . . this case is based on a constant practice . . . expressed and developed in previous cases . . . in the absence of the application of any novel concept of competition law . . . Microsoft should have known it was acting unlawfully.

The relevant legal precedents on the interoperability side of the case (*Volvo/Veng*, *Magill*, *Ladbroke*, *Bronner* and *IMS Health*) suggest that in March 2004 the only judicial authority upholding a compulsory licence was *Magill*. The alleged abuse in the *Microsoft* case was not hindering exports; it was not a cartel; it was not blocking parallel trade; it was no hard-core infringement. It was failing to draw up a detailed and lengthy description of secret technology not yet on the market, information necessary to ensure that Microsoft's Active Directory technology could work perfectly on competitors' products. The core of the alleged infringement was not agreeing to an obviously unreasonable request. Microsoft argued

that if the Commission truly believed its assertions in the Decision at paragraph 1057 about the relevant law, that *Magill* and the *Microsoft* case were completely consistent, then the relevant law was manifestly misunderstood by the Commission. Who could imagine that failure to create a detailed description of an immense quantity of secret future technology for a competitor could constitute an infringement of Article 82 EC? Who would have thought that in September 1998 there was a duty to say 'yes' to such a request by reference to a completely new set of exceptional circumstances? The same surprise could be voiced, with equal force, as to the suggestion that it was an obviously unlawful tie to bring out a more richly configured product while not leaving on the market the unimproved version of that product. Microsoft said that if the Commission were really of that opinion, then the Commission had completely misunderstood the applicable precedents.

Legal Precedents on How to Set the Fine in Case of an Antitrust Novelty

Fines in a regime of law are imposed for recognized offences. Penalties should not be visited on those who had at least good grounds to trust their conduct was lawful. Competition law is not a static science. Sometimes the boundaries of offensive conduct are well defined. Going over the boundary if detected is likely to attract a fine, even a severe fine, as in the case of cartel agreements.

Sometimes the boundary is not clear. When a new line is drawn, the penalty is either non-existent or modest. In past cases where the Commission has elected to establish a new offence, it has commonly imposed a symbolic fine or even no fine. In *Magill* no fines were imposed even though the three broadcasters had acted simultaneously and identically to put out of business the *Magill* TV Guide, and even though in that case there was clear customer harm (for example, Irish television addicts had to buy three magazines instead of one).

Arithmetic by which the Fine was Calculated

The starting amount was €165,732,101. The Decision proceeded from the proposition that Microsoft engaged in a very serious infringement. The very serious designation has historically been confined to conduct that is plainly an infringement of the competition rules, such as hard-core price fixing or explicit market allocation schemes, conduct especially repugnant to Europe's competition culture, conduct worthy of an exemplary fine.

The Commission set the initial amount of the fine at 7.5 per cent of Microsoft's combined EEA turnover for client PC operating systems and

server operating systems. After having laid such stress on the relevant market being 'operating systems for work group servers costing less than US\$25,000' the fine is based on 'all servers'. The Commission did not explain why it took into account Microsoft's turnover for its Windows 2000 Server Standard Edition when the alleged abuse related to work group server operating systems. Most income was earned from servers acting outside the alleged relevant market. Did the Commission depart from its own market definition?

Increase for Deterrence

Then there was a doubling of the initial amount, justified by Microsoft's significant economic capacity and the need to ensure a sufficient deterrent effect. It was not clear what it is that Microsoft should be deterred from doing. Was it disallowing access to new technology (Active Directory) or was it adding new technology (Windows Media Player with streaming capacity)?

Increase for Long Duration

The Commission increased the amount of the fine by 50 per cent for what it described as the long duration of the infringements. It says Microsoft made two acts of supposed procedural misconduct: 'systematically requesting significant extensions to the deadlines granted' and 'using part of the limited resources of the Commission in settlement discussions during the procedure'. The proceedings indeed lasted five years. The Commission can reject any request for an unreasonable extension of time to reply to a Statement of Objections and it did so during the proceedings. The theories of the Commission went through several cycles in the Statements of Objections in August 2000, August 2001 and August 2003. It seems severe that the length of the Commission's reflections on the case justified imposing additional financial penalties.

In March 2004, after 15 months of settlement negotiations, the Commissioner announced the need for 'a precedent which will establish clear principles for . . . future conduct'. At that moment he praised the company which had looked for a creative solution: 'I would like to stress the constructive and cooperative spirit displayed by Microsoft in the last few weeks. I also want to acknowledge the high degree of professionalism of the members of the Microsoft team at all levels.' Microsoft's reward for manifesting that constructiveness and cooperativeness was an increased fine. If a company asks for better conditions for the exercise of its right to be heard and is granted more time, the company ought not to pay a

heavier fine later. Likewise, if it elects to come forward with settlement proposals, it ought not to risk receiving a bigger fine.

One must suspect that the Decision to impose any fine upon Microsoft was coloured by what people would think. The biggest fine in history might reinforce the impression of guilt and distract from the implications of the creation of the new abuse theories. If this were true, the fine served to justify the finding of the abuse, rather than as a calibrated sanction to punish an abuse.

QUESTIONS ABOUT THE FINE

- Was the imposition of any fine lawful?
- Were the infringements novel?
- Was the Commission entitled to increase the fine because Microsoft had sought and obtained extensions of time to reply to its Statements of Objections?
- Was the Commission entitled to increase the fine because Microsoft had engaged in settlement negotiations?

7. SUBSEQUENT DEVELOPMENTS

Agreements to Enhance Interoperability Between Microsoft and Competitors

Microsoft has made a series of public announcements confirming or reinforcing its efforts regarding interoperability. In December 2003, Marshall Phelps announced that ‘Microsoft is open for business when it comes to IP licensing’.⁶⁴ Microsoft thus committed to license its patents to interested

⁶⁴ On 3 December 2003, Microsoft Deputy General Counsel Marshall Phelps announced an updated intellectual property policy aimed at ‘convey[ing] that Microsoft is open for business when it comes to IP licensing’. See Q&A: Microsoft Unveils New Policy on Intellectual Property: Microsoft Deputy General Counsel Marshall Phelps explains how today’s announcement of an updated intellectual property policy will boost access to innovation across the IT industry’, www.microsoft.com/presspass/features/2003/dec03/12-03ExpandIPQA.msp. Microsoft’s IP Licensing Program includes programs for licensing source code for Microsoft Windows, Microsoft Office and other software, hundreds of Microsoft-designed communications protocols, the Office XML schemas and file formats, and Microsoft’s diverse IP portfolio. More information about Microsoft’s IP

parties in a commercially reasonable manner under terms standard in the industry. Numerous licensing programmes are listed on Microsoft's website (including the 2001 United States Consent Decree). If a company wants to use existing protocol documentation outside the scope of the current licence, Microsoft states that it is prepared to discuss licensing terms. Microsoft has also stated that it is open to requests from any bona fide company for documentation and licensing terms for protocols that are not currently documented or offered for licence. Respect for Microsoft's intellectual property will be a condition of any such licence.

In July 2006 Microsoft announced the 'Windows Principles: Twelve Tenets to Promote Competition'.⁶⁵ Under the Principles, Microsoft commits to make available, on commercially reasonable terms, all of the communications protocols that it has built into Windows and that are used to facilitate communication with Windows Server. A parallel initiative is the notion of 'Interoperability by design', another aspect of Microsoft's interoperability strategy reflected in its development efforts.⁶⁶

At least 50 examples can be noted of active interoperability collaboration in which Microsoft has engaged recently, including collaboration with Microsoft's direct competitors. Agreements were reached with Apple,⁶⁷ EMC,⁶⁸ Novell,⁶⁹ Sun,⁷⁰ Oracle and Symbian,⁷¹ and also with the Interop Vendor Alliance (IVA), a global industry group of software and hardware

Licensing Program is available at www.microsoft.com/about/legal/intellectual-property/default.aspx.

⁶⁵ See <http://www.microsoft.com/presspass/newsroom/winxp/windowsprinciples.aspx>.

⁶⁶ See <http://www.microsoft.com/presspass/newsroom/winxp/windowsprinciples.aspx>.

⁶⁷ See <http://www.microsoft.com/presspass/press/2006/jan06/01-10Macworld2006PR.aspx>.

⁶⁸ See <http://www.microsoft.com/presspass/press/2006/oct06/10-03MSEMCPR.aspx>.

⁶⁹ See <http://www.microsoft.com/presspass/press/2006/nov06/11-02MSNovellPR.aspx>.

⁷⁰ See Web Single Sign-On Metadata Exchange Protocol, available at developers.sun.com/techtopics/identity/interop/web_sso_mex_may2005.pdf.

⁷¹ See e.g. the following Press Releases: 'Microsoft announces exchange ActiveSync licensing agreement with Sony Ericsson,' available at www.microsoft.com/presspass/press/2006/feb06/02-06SonyExchangePR.aspx?pf=true; 'Microsoft and Motorola form strategic alliance to extend unified communications to mobile devices', www.microsoft.com/presspass/press/2006/jun06/06-25UCGMotorolaPR.aspx?pf=true; and 'palmOne licenses Microsoft exchange server Synchronization Protocol for integration with next-generation Treo Smartphones', www.microsoft.com/presspass/press/2004/oct04/10-05PalmOnePR.aspx?pf=true.

vendors that works together to enhance the way that diverse products interoperate with Microsoft's operating systems and applications. The IVA was founded in November 2006 by Microsoft and includes members like BEA Systems, Citrix, NEC, Novell, Siemens, Sun Microsystems and more than a dozen others. Its activities include interoperability testing, sharing of relevant technical information, and communicating about interoperability solutions to customers.⁷²

8. LICENSING CASES AND FOLLOW-UP

The reaching of these various understandings and initiatives has not eliminated interoperability controversies arising from the Commission Decision of March 2004. In order to put in perspective the history I am about to tell regarding the implementation of the remedy on the interoperability half of the case, we may usefully recall the 'tying' half of the case. There Microsoft received a succession of precise instructions concerning what files should be removed to create the reduced version of Windows, what the product should be called and even how it should be packaged. The launch of the new product Windows XP-N was therefore accomplished smoothly because the Commission's instructions implementing the remedy were precise and detailed.

Concerning interoperability, the Decision called for licensing on reasonable and non-discriminatory terms, such that royalties should 'not reflect the "strategic value" stemming from Microsoft's market power'. Just after Christmas 2004, upon the rejection of its application for interim measures, Microsoft activated a website giving access to the licence terms governing access to the technology.

There have been serious controversies about how the material should be compiled and presented; whether royalties could be charged; and whether licensees could be obliged to keep confidential the licensed material.

Controversies about Confidentiality

I begin with the debate which is easiest to comprehend. The question is whether Microsoft would be following reasonable and non-discriminatory terms if it were to compel its licensees to keep confidential the licensed material. An appeal (Case T-313/05) was filed on 10 August 2005 against a Decision of the Commission according to which, if the CFI ruled in

⁷² See www.microsoft.com/presspass/press/2006/nov06/11-14IVA07PR.msp.

favour of the Commission in the main case (Case T-201/04), Microsoft would immediately be required to permit its licensed technology to be disseminated on an 'open source' basis: that means without being allowed to impose confidentiality constraints upon the licensee. Open source software is shared freely among members of the open source community, who must allow its unlimited exploitation. Such terms would permit a licensee to disclose all the details of an implementation of Microsoft's technology, thus placing Microsoft's trade secrets in the public domain.

The Commission's Decision was being challenged on a variety of grounds, including public international law, on the ground that the Commission lacked jurisdiction to destroy valuable intellectual property created in a third country and principally exploited there. The case was abandoned in the autumn of 2007.

Controversies about Scope and Adequacy

As noted above, after the President's Order of 22 December 2004 rejecting Microsoft's request for suspension, Microsoft activated a website revealing its licence terms and announcing the availability for inspection of the documentation. In June 2005, the Commission sent to Microsoft a technical report about difficulties of using and accessing the data, to which Microsoft replied, in effect promising the same process of continual polishing of the documentation as applies under the US (client-to-server) program, and pointing out various errors and misunderstandings. This debate about the completeness and ease of use of the material was overshadowed by a quite separate controversy which arose in October 2005, as to the *scope* of disclosure called for. The debate related to whether Microsoft had to deliver such level of detail as would permit licensees to emulate server-to-server communications 'over the wire' or whether it was to deliver at a more detailed standard, that of drop-in or 'plug replaceability' of the function delivered through the relevant protocol. This was a sensitive topic as it presented the issue of whether a licensee would need to duplicate perfectly certain algorithms (computing formulae) in order to achieve the desired result. Obviously, the wider the scope, the greater the encroachment on Microsoft's interests; the narrower the scope, the less the technological advantage to the licensees.⁷³ There was an exchange,

⁷³ This matter had arisen even during the hearing on interim measures, when it was suggested that only the narrower scope of disclosure would be necessary. There was no explicit clarification during the hearing of the main action in April 2006.

during which Microsoft noted that these two scopes were obviously different, and stating that it would execute either, so long as the Commission would specify which it was to be. The Commission declined to give such written confirmation, but Microsoft recorded in writing its understanding of the oral discussions with the Commission, and stated that it would supply the broader scope, including where necessary algorithms and other internal details so as to enable drop-in replaceability of a Windows server by a licensee's server. Microsoft submitted further documentation in November 2005, and continued to deliver ever more detailed documentation more or less continuously thereafter for about seven months, with a particular burst of effort after the Monitoring Trustee's work plan was adopted in April 2006, specifying in detail the format required.

In November 2005, the Commission took a Decision under Article 24 (1) of Regulation 1/2003 threatening the company with a fine for not having complied with its obligations under the March 2004 Decision. The Decision gave Microsoft until 15 December 2005 to remedy the alleged deficiencies. Without studying what was delivered on that date, the Commission moved to the next stage, a Statement of Objections, claiming that the deficiencies identified had not been remedied.

By contrast, Microsoft's independent experts stated that what Microsoft had produced in December 2005 was 'complete and accurate'. Microsoft stated that it would do whatever was explicitly required of it, and as an aid to licensees offered them further help in using the technology, as well as a sight of its source code.

In April 2006, the Trustee and Microsoft's engineers agreed on a detailed work plan in the format favoured by the Trustee. By 18 July 2006, Microsoft had executed the documentation (thousands of electronic pages long) in that format and was praised for having done a good job. Nevertheless, on 12 July 2006, the Commission imposed a fine of €280,500,000 on Microsoft. That Decision was challenged in Case T-271/06, which was abandoned in 2007 after the judgment of the CFI.

Price Controversies

The Decision allowed Microsoft to apply reasonable and non-discriminatory royalties. The Commission has claimed that Microsoft's proposed licensing terms are unsatisfactory in that Microsoft has not proved to the Commission that its licensing terms are reasonable and non-discriminatory. The pricing controversy has given special prominence to a set of 'pricing principles' developed by the Commission and Microsoft. These were intended for use by the Trustee in resolving any dispute that might arise with a prospective licensee about appropriate level of royalties

for the specification.⁷⁴ In the event of dispute, the Trustee could consider four factors:

- whether the protocols represent Microsoft's own creation;
- whether the creations by Microsoft constitute innovation;
- a market valuation of comparable technologies; and
- other factors that he deems appropriate.

The pricing principles were intended to guide the Trustee in the event of a specific dispute about what would be a reasonable royalty. No such dispute has arisen. Some ten licensees have agreed on the royalties they will pay without recourse to dispute resolution procedures. However, the principles were being used as an overarching standard against which to judge the royalty rates put up for negotiation by the company.

Even though there have not been any disputes with actual licensees about royalty rates, the principles have given rise to a number of points of debate with the Commission. For example, the Commission holds that it need consider market comparators only if the technology has been found to be innovative in the sense that it is superior to all other technologies on the market. In addition, it has been argued that no royalty should be paid for technology which solved problems particular to Microsoft software as opposed to problems of general applicability.

Further, the Commission has argued that the price should be set at a level which permits viable competition between the licensee and Microsoft. On this theory, since the licensees by the Commission's estimation could need as long as two years to implement the specification by building their own software and might have to spend well over US\$100 million in the process, the price of the licence should, it is argued, be set low enough to make that effort worthwhile. It seems curious that although the Commission is claiming that the technology lacks any innovation and is rather trivial, it also claims that Microsoft must take into account in its pricing the very substantial efforts and costs of competitors to implement the technology.

There was sharp debate over the level of innovation reflected in the licensed technology. The company said it had dozens of granted or pending patents which read on the licensed technology. The Commission's experts, TAEUS, and the Trustee concluded that Microsoft had not proved the point to their satisfaction, and that accordingly only a few pieces of the

⁷⁴ The WSSP Pricing Principles are available from the Microsoft website at www.microsoft.com/downloads/details.aspx?FamilyId=5A9CACB3-E823-4522-967C-A6EE3CD3995D&displaylang=en.

specification merited any compensation at all.⁷⁵ Indeed, the Commission's current position is that the technology should be made available free of charge or for a nominal fee, on a worldwide basis. According to the Trustee 'all of the described features were considered either to have been Microsoft implementations of prior developments by others, or to have been anticipated by prior developments and to be immediately obvious minor extensions to that prior work'. PricewaterhouseCoopers supplied evidence to the effect that the royalty rates proposed by Microsoft were at least 30 per cent below market norms for similar technology. Microsoft recalled that the proposed royalty programmes could be negotiated to meet the individual requirements of the licensee, and that it was 'open for business' in dealing with prospective licensees; and that it had concluded licences with several companies. The Commission nonetheless took the view that the proposed maximum royalty rate of 5 per cent was not 'reasonable' since, according to the Commission, there was no 'significant innovation' in the licensed material. The Commission contends that it is entitled to examine the question of innovation because the Decision forbids the exploitation by Microsoft of the 'strategic' value of the technology. Thus, the asserted infringing conduct consisted of proposing as a basis for negotiation a royalty rate of 5 per cent of the licensee's selling price for whatever product the licensee made based upon the licensed technology.⁷⁶

The Commission, rather than trying to prove Microsoft's terms are unreasonable, claimed that Microsoft had not proved to the Commission's satisfaction certain key points (the comparable transactions are comparable, the innovations are innovative). The Commission in effect argued

⁷⁵ On 1 March 2007, the Commission issued a Press Release (IP/07/269) 'Competition: Commission warns Microsoft of further penalties over unreasonable pricing as interoperability information lacks significant innovation'.

⁷⁶ In August 2006 Microsoft submitted a proposal on licensing terms for the protocol specifications after several discussions, stating that Microsoft was 'willing to entertain any reasonable price offer from any potential licensee, and that we are willing to be flexible to meet any unique business needs of potential licensees'. See Microsoft Statement on European Commission Action on Protocol Pricing, available at www.microsoft.com/presspass/press/2007/mar07/03-01PricingProtocolPR.msp. The licensing arrangement may simplistically be outlined as follows. The four options are (i) a licence for all intellectual property rights in the WSPP protocols and the protocol specifications ('All IP'); (ii) a licence limited to Microsoft's patents on the WSPP protocols ('Patent Only'); (iii) a licence limited to Microsoft's trade secrets disclosed in the protocol specifications ('Trade Secret Only'); and (iv) a licence limited to the IDL files ('IDL Only'). Microsoft further divided the protocols into Gold, Silver and Bronze price categories based on the degree of innovation. (A fourth category includes protocols, not necessarily innovative, for which there will be no royalty.)

that Microsoft has a burden under the 2004 Decision to prove to the Commission that its prices are ‘reasonable’.

The company disagreed with these factual conclusions, pointing to the amount of time and effort deployed in creating the technology whose characteristics must be divulged in the licensed specification. However, the company said it was willing to charge lower royalties so as to avoid being penalized, and accordingly asked what lower figures would be acceptable and not unreasonable or excessive. The Commission was unwilling to prescribe a figure, on the grounds that it is not a price regulator.

On 1 March 2007 the Commission issued a Statement of Objections pursuant to Article 24 of Regulation 1/2003, threatening a daily penalty, backdated to 16 December 2005, in an amount which was initially €500,000 per day, then €2,000,000 per day during 40 days ending on 30 July 2006, then €3,000,000 per day after 31 July 2006. On 27 February 2008, the Commission imposed a fine of €899,000,000. That fine is under appeal in Case T-167/08.

The company was thus subjected to the largest penalty in world competition law history for proposing as a basis for commercial negotiations a royalty rate higher than the public authority deemed appropriate.

9. CONCLUSION

Compulsory licensing is a particularly hot antitrust topic. There is a clear divergence (noted by Hew Pate, former head of the Antitrust Division, among other commentators) between the liberal or minimalist⁷⁷ approach which prevails in the United States, celebrated by the US Supreme Court in *Trinko*,⁷⁸ and more recent cases, and the more formalistic or maximalist approach of the European Commission.⁷⁹ In the *Microsoft* case, the Commission ordered a company to draw up a detailed description of its own technology for the purpose of delivering to competitors the means of incorporating that technology in their own products.⁸⁰ The link between

⁷⁷ W. Kolasky, General Counsel of the FTC, speaking in Brussels at a conference on The Article 82 EC Abuse Concept, 30 September 2004, referred approvingly to the ‘modesty’ of the US authorities in their approach of antitrust enforcement, as opposed to the European Commission’s policy.

⁷⁸ *Verizon Communications, Inc. v Law Offices of Curtis Trinko*.

⁷⁹ I. Forrester, ‘Article 82: Remedies in Search of Theories?’ (2004) *Fordham Corp. L Inst.* 167.

⁸⁰ S. Scotchmer, ‘Standing on the Shoulders of Giants: Cumulative Research and the Patent Law’ (1991) *Journal of Economic Perspectives* 29.

the compelled conduct and the infringing act was rather distant. The compelled conduct had great political and industrial symbolism.

Of course, every Article 82 EC case is likely to create new ground, and perfectly compelling precedents are rare. In a democratic society, the law must be sufficiently predictable for individuals to plan their affairs. This is especially true in the case of laws which condemn or which inflict punishment. The balancing test involves comparing the dominant player's own interests and incentives to innovate with those of society as a whole. There are formidable challenges in being subject to a standard which is difficult to apply and difficult to foresee. There are not less significant challenges for judicial review of decisions based upon policy choices and broad balancing of public and private advantage. The judgment was the subject of intense media interest, rumour and speculation. It was exceptionally long and to some extent case-specific. Unfortunately, the judgment has not definitively clarified the limits of the possible duty of a dominant player to grant a licence.

The judgment of the CFI was not appealed, so that there is now a clear discrepancy between the standards prescribed in *IMS Health* by the Court of Justice and those prescribed by the CFI in the *Microsoft* case. We will see the law better once more judicial authority exists, via challenges to refusals by competition agencies to order a licence, challenges to the ordering of a licence by competition agencies, and references to the European Court. In ten years' time, I predict that there will be a doctrine in Europe broadly parallel to that in the United States.

European law on compulsory licensing is today sharply at odds with US law. Major legal discrepancies between friendly jurisdictions commonly drift back to alignment after a while, in which case the *Microsoft* case would be a second *Sirena*,⁸¹ an eccentricity born of overenthusiasm.

⁸¹ Case 40/70 *Sirena S.r.l. v Eda S.r.l. and others* [1971] ECR 69.