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## **CURRENT POLICIES AND DEVELOPMENTS IN INTERNATIONAL COMPETITION LAW**

### **UNILATERAL CONDUCT IN GLOBAL HIGH-TECH INDUSTRIES: THE IMPLICATIONS FOR THE FUTURE OF THE MICROSOFT CASE**

#### **THE SERVER TECHNOLOGY ISSUES<sup>1</sup>**

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#### **I. INTRODUCTION**

This seminar is held ten days before the thirteen judges of the Grand Chamber of the European Court of First Instance will render judgment in Case T-201/04, *Microsoft v Commission*. In a better-ordered world, we would be talking after, not before. This paper will 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 dealing with the “product integration” part of the case.

The *Microsoft* Decision 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. The other related to Microsoft’s duty to reveal details of how its products interact, notably as regards client-to-server and server-to-server communications. Each alleged infringement in a sense concerned whether Microsoft, as an 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.<sup>3</sup>

I will address the “interoperability” or “compulsory licensing” part of the case, which is legally very interesting but may be of limited market consequence given Microsoft’s expressed

willingness to license much of the protocol technology at stake on Reasonable And Non-Discriminatory terms. 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 the judgment might decide.

## II. 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. It must have been tempting for commentators to assume that the company must have been guilty of something, or at least to take at face value the proposition that it had "refused" to "supply" "interoperability" "information". The hugeness of the fine probably had a similar effect.
- This was in some ways 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 end-user customer had complained about the alleged infringing acts.
- The Decision chose a market for servers performing only two functions and costing less than \$25,000. Can a "relevant product market" be limited to a handful of features of a multi-feature product, such that the product itself is in the relevant market only when those features are deployed by the end-user?
- 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. For that reason, this paper begins by recalling the factual context at some length.
- Some articles assume that there was a precisely defined non-delivery of indispensable technology necessary for interoperability with Windows networks. To the contrary, there was a plainly exorbitant demand for a vast amount of secret technology, to which the response was an invitation to talk. Separately, 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. So achieving supposed "interoperability" involved endowing competitors' products with unique characteristics – such as a distributed directory service running on multiple services at once -- they did not otherwise possess.
- Just what must be disclosed was not obvious. The precise contours of the technology to be licensed varied significantly at different points over the past four years,. 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 Decision is not enlightening on this pivotal question as to which the Commission's services have expressed themselves in different ways at different times (so much so that Microsoft said that the scope of its duty to license was like a jellyfish, amorphous but painful).

- 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. *Volvo/Veng*,<sup>4</sup> *Magill*,<sup>5</sup> and *IMS*<sup>6</sup> were the main authorities; *Bronner*<sup>7</sup> and *Commercial Solvents*<sup>8</sup> were referred to on refusals to deal in general. These European cases seem to align with US jurisprudence, including the recent *Trinko* case from the US Supreme Court. Was *IMS*, decided just after the Decision in *Microsoft*, the authoritative word, or should it be rewritten? Was interoperability such an important goal that the *IMS* criteria on compulsory licensing had to be radically adapted?
- Is innovation encouraged by allowing the creator of software to keep it secret, revealing external details only as to how connect to it? Or should a creator be forced to share the details of how the technology works internally? Was there a duty on a dominant player to assist its competitors by endowing them with the capacity to make a "drop in" replacement for a Windows Server when performing the two tasks at issue?
- 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, as the Commission argued? Was competition law under no constraints arising from IP rights? For example, are trade secrets and patented technology forfeit to license under the GPL?

For each of those involved the case was an exceptional professional experience. We will shortly hear which if any of our respective arguments found favour with the judges. Nevertheless, it is worth recollecting that "events" have moved faster than the legal process. As I shall mention, the main legal controversies involving Microsoft and its US rivals have now concluded. The scope of technology that Microsoft must make available by licence has been agreed for now (although there remain disputes with the Commission's services about whether royalties can be charged, and if so how much, and whether confidentiality restrictions can be imposed on licensees).

Whatever the ultimate effect on the protagonists in court, this judgment will be of great importance for the legal community, for teachers of law, for high-tech companies and those who advise them.

### ***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 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 colourful assertion that “*de facto Microsoft enjoys a position that resembles more that of a sovereign state than of a market player*”.

There may well be 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 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, I reply 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 EEA countries accounts for between 10 and 25 percent 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 the contested Decision, or other novel invocations of Article 82, 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 organisations have the resources, and use those resources, to do this in a variety of ways.

That is a political observation, or at least a policy one, which leads to a legal one. Distorting normal legal principles to reach the desired result creates its own subsequent distortions, difficulties and injustices. Article 82 is not designed to regulate the market but to remedy abuses of market power. A decision compelling divulgence of secret technology or penalising 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.

Microsoft argued that the Decision was an attempt to reconfigure how the marketplace works, by handicapping the leading player in two respects. Both infringements created by the Decision are irrational, unprecedented. 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. The Decision 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.

Neither offence helps consumers. Neither remedy encourages innovation. It is not easy to see what general principles dominant players should extract from the Decision: possibly to beware of commercial initiatives which may inconvenience competitors.

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. Microsoft has never made that argument. The Decision of March 2004 was unlawful, Microsoft argued, because it created new and unforeseeable offences that are not grounded in proper legal principles and because it imposed aberrant remedies which apply in perpetuity.

### **III. TECHNICAL BACKGROUND**

#### ***What makes the interoperability case unusual?***

It is deeply misleading to define the abuse as the non-delivery of “interoperability information” as if this were a readily measurable physical specification or 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 immense detail, in writing, how some of its technology works. This has required hundreds of people working full-time or part-time for years observing how the software functions and recording that in thousands of pages of documentation.

The infringement giving rise to the remedy is that Microsoft did not – but should have – supplied its competitors with this technological insight when it was being developed, to allow them to make a perfect replica of how an important part of the Windows server operating system would function once launched. 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.

#### ***Some technical history***

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, application 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. Microsoft continually added new functionality to the operating system and licensed it to a wide range of computer manufacturers at attractive prices.

Microsoft was fortunate to recognise 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 licensed its operating systems to computer manufacturers to incorporate in the computers they sell, and it 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 law scrutiny during the past fifteen years as Microsoft’s operating system acquired what the Commission called near ubiquity on PCs.

### ***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, authorising 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.<sup>9</sup> 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 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 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, of course, 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 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 unique in several respects when launched in 2000. Individual servers running Active Directory 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. It was not disputed that Microsoft’s server software could scale to 10,000 while rivals could scale to less than a hundred.

Nor was it seriously disputed that the only way in which a Sun or IBM server, not running Active Directory, could perform the Active Directory function in a Windows network would be if it were endowed with the capacity to behave identically to the Windows servers. (There was dispute over whether this capacity to act identically needs duplication of the software, or merely imitation.)

### ***The reality of interoperability across mixed networks***

Microsoft pointed out with a wealth of detail 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.

Microsoft also submitted three surveys conducted by Mercer Management Consulting, which confirmed 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 and is readily possible to achieve efficient interoperability between non-Microsoft server operating systems and Windows client and server operating systems.

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.”<sup>10</sup> Accordingly, it conceded, interoperability occurs along a continuum; it is not an absolute standard. 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-recognised techniques to achieve efficient interoperability between different software products in a network. The Decision recognises 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 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 very limited 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 difficulty to grasp thoroughly these conflicting factual points. 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 “vially” 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 divulgation was lawful and proportionate.

#### **IV. 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 material requested collectively represented much of the innovation contained in the Windows server operating system then under development. None of those technologies was a communications protocol. Thus, assuming Microsoft's response was a refusal, Microsoft did not refuse to provide communications protocols. (Nor were communications protocols mentioned in its complaint to the Commission.) The Commission says that a request for a licence to Microsoft's communications protocols was "implicit" in Sun's letter.

It is agreed that Sun's request called for a much wider divulgence 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 intellectual property (IP) rights, a fact the Commission regards as significant and Microsoft regards as entirely normal (the material was obviously secret and valuable).

***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 divulgence 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 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 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 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 Objection*

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 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) of the Treaty.)

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.<sup>11</sup> Microsoft urged the Commission to consider the settlement as a 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.<sup>12</sup> 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 decision, the dominance, the abuse, and the remedy relate to the same relevant market. In 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 the relevant market where the abuse was felt was for “work group server operating systems” running on servers costing less than \$25,000 (as opposed to the \$100,000 figure in the Second Statement of Objections) and only when the (multi-purpose) 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 (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 focussed 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, which intensified in the early months of 2004, 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".<sup>13</sup> Accordingly, on 24 March 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, in August 2007, 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"*<sup>14</sup>

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.<sup>15</sup> The outcome was largely determined by considerations relevant to interim measures: in particular, the President 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 of the Court of First Instance 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."*<sup>16</sup>

In the main action, a hearing took place before the 13 judges of the European Court of First Instance on 24-28 April 2006. The Court was evidently well-prepared, reflected in the large number of questions asked by the judges. Judgment will be proclaimed in ten days, on 17 September 2007.

## V. 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 Court proceedings.) At the time of the alleged refusal, Microsoft did not enjoy a dominant position as to operating systems for servers. 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 exist<sup>17</sup> but insufficiently for Microsoft’s competitors. It claimed that practical interoperability was imperfect, so as to prevent competitors from competing “viably”. Microsoft’s conduct risked eliminating competition, as it put others at a competitive disadvantage. The degree of interoperability in force was “insufficient to enable competitors to viably stay in the market”.<sup>18</sup>

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 organisations use different server operating systems for different functions or for different parts of the organisation. They worked together.

Microsoft supplied the Commission with nearly 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 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 organisations and thirty-one large companies, most of them household names.<sup>19</sup> 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 twenty 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 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 were 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 organisation. The word “may” was used, not “will”. This is because technical solutions exist to remove the need to log on twice.

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.

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.

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, if not its primary goal, was thus 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.<sup>20</sup> In ordinary life, two companies never independently develop products with identical logic and identical functionality.<sup>21</sup> 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 reasonable or effective (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 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*<sup>22</sup> 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). 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.<sup>23</sup> 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 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.”<sup>24</sup>*

### ***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; and 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 stated that it would comply with any instructions it receives. It has 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 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 zeroes 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 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.<sup>25</sup> On the other hand, the “infringer” will rely on the foreclosure of competition due to the invoked right, the lack of R&D 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.<sup>26</sup> Microsoft’s incentive to innovate receded before the need to protect innovation in general, according to the Commission:

*“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.”<sup>27</sup>*

Microsoft’s view was that as to client-server communications, Microsoft had eliminated any advantage it enjoyed through making available the communication 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*); it was future technology when requested in September 1998, and would be launched only in 2000; eventually 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 license, but it expressed the hope that disclosure would lead to the emergence of new or innovative products. It had to agree that a mere imitation could be the fruit.

The Commission applied a so-called balancing test, which weighs Microsoft’s incentives to innovate against the incentives of the whole industry to innovate were Microsoft required to make its technology available for license.<sup>28</sup>

*“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.”<sup>29</sup>*

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.” 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.”<sup>30</sup> 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 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.

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 wise and lawful, and was it appropriately carried out?
- 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 encourages the licensor to be more creative?

#### ***IP rights and the IMS criteria***

The interrelationship between intellectual property rights and competition law has been a recurrent theme for antitrust enforcers, practitioners and academics in recent years.<sup>31</sup> 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.<sup>32</sup>

The purpose of intellectual property 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 intellectual property rights cannot, as a matter of principle, constitute an abuse.

## 1. Introduction

2004 saw two remarkable events, almost simultaneously. In April 2004 the European Court of Justice rendered a judgment in *IMS* which seemed to prescribe fresh and up-dated judicial criteria for compulsory licensing. In March 2004, the Commission's Decision in *Microsoft* imposed a compulsory licence of a description of part of Microsoft's software code in the operating system for its servers. We do not know whether the *Microsoft* Decision betokens a completely new regime, or whether it is an error to be judicially remedied, or whether it will conclude in some other exceptional manner.

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

## 2. The *IMS* judgment

In *IMS* (as in *Magill*) the Commission was requested to intervene in order to palliate the anticompetitive consequences of the successful invocation of a national IP right. The complainants<sup>33</sup> 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, which was successfully claiming constituted a breach of its copyright. The Commission found that IMS' 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 license lacked "objective justification".<sup>34</sup>

As in *Magill*, the Commission's Decision in *IMS* 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".<sup>35</sup> As in *Magill*, the Commission's Decision in *IMS* was suspended, by the President of the Court of First Instance.<sup>36</sup> National litigation in Germany culminated in a preliminary reference ruling of the Court of Justice on April 29, 2004, which constitutes the most authoritative pronouncement of the European judicature to this date on compulsory licensing of intellectual property rights.<sup>37</sup>

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 license must "*intend to offer new goods or services not offered by the owner of the right and for which there is potential consumer demand*".<sup>38</sup>
2. The refusal prevents 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 asserts that a licensee product replicating the functionality of say, Active Directory would not be a “new product” and for which there is a potential consumer demand”*

3. The refusal is not objectively justified
4. The refusal is such as to exclude all competition on the secondary market

These conditions are cumulative.<sup>39</sup> One may assume (like members of the European Court) that they are likely to be interpreted restrictively and applied with much caution.<sup>40</sup>

The Advocate General’s Opinion and the Court’s judgment in *IMS* diverge. Advocate General Tizzano started his analysis from *Commercial Solvents* and *Télémarketing*<sup>41</sup> (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*.<sup>42</sup> The Court chose to start its analysis<sup>43</sup> directly from *Volvo/Veng* and *Magill*. This implies that the encroachment on IP rights by compulsory licensing is to be examined separately from the general refusal to deal cases.

### *3. The nature of the licensed material and the rights covering it*

Before considering the *IMS* tests, there are two preliminary questions. Do different IP rights “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 does not confer immunity from the competition rules upon holders of IP rights: it may be said to confirm the proposition that Community policies must be pursued giving proper respect to private property interests.<sup>44</sup> 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* 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 licenses in *Magill* and *IMS* 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.<sup>45</sup> The doubts over the *IMS* 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” IP rights 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* and *Microsoft*, I can voice a personal opinion which is that the nature of the material and its public or secret status is relevant; that compulsory licenses are more likely in the case of “thin” rights such as those at stake in *Volvo/Veng*, *Magill* and *IMS*; 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.<sup>46</sup> Similar arguments were made in *IMS*. However, in both *Magill* and *IMS* the Courts did not comment on the assertion, although Advocate General Jacobs did in *Bronner*.<sup>47</sup> The *Magill* and *IMS* 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, will be 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.”*<sup>48</sup>

It is not by accident that the first compulsory licence under Article 82 (*Magill*) was imposed in a case involving no secrecy, no research, a disputed copyright, and consumer prejudice; nor that the second case, *IMS*, also involved a modest level of innovation. In cases like *Ladbroke* and *Bronner*, the complainant lost, and deservedly. The European Court’s judgment in *IMS* 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” IP rights. 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* tests could suffice to decide the *Microsoft* case. There are two tests which could equally be regarded as of prime relevance in the case. One involves the blocking of an innovation to the detriment of customers, and the other is the blocking of all competition.

### ***The first of the IMS 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 the *Magill* case will recollect the interest shown by the Court of First Instance in the physical demonstration of the new product: dozens of multi-channel 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 IP right is likely to be used to prevent competition, by preventing the

replication of copyright material, or 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 ECJ'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 IP right involves some blocking of product differentiation. Making a blue version of a red product would not satisfy the test. According to *IMS*, essentially “*duplicating the goods or services already offered on the secondary market by the owner of the copyright*” is not sufficient.<sup>49</sup>

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* where the German courts were given the task of investigating the question of whether the “infringing” party was indeed offering something different to *IMS*.

In *Microsoft*, 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 test***

On the next condition, elimination of competition, the Court's test in *IMS* (29 April 2004) speaks of “*elimination of all competition*”.<sup>50</sup> By contrast, the test in *Microsoft* (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*".<sup>51</sup> 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 test***

As to indispensability, courts must ask whether the protected intellectual property rights are indeed indispensable for competitors to carry on their business activities. *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 states<sup>52</sup> 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 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 R&D expenditure, the limited period of available patent protection, 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 there three categories of objective justification: technical, commercial and efficiencies.<sup>53</sup>)

### ***Questions about compulsory licensing***

- Are the *IMS* 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?
- It is 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 IP rights 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* tests such as total elimination of competition and new product for which there is unmet consumer demand still apply?

### ***Different IP rights***

The Commission has advanced novel theories about trade secret law, which are of wider interest. It says that antitrust owes little deference to trade secrets. The Commission has contended that mere secrecy is not enough for competition law to grant respect to the rightholder's interests, since the reasons and motives for keeping the material secret should be first considered. The Commission has expressed the view that trade secrets should therefore be treated differently from IP rights affirmatively "created by law" such as patents. This approach<sup>54</sup> seems to differentiate between "good" and "bad" intellectual property rights in a manner similar to that adopted by the ECJ in its early cases like *Sirena*<sup>55</sup> and *Café Hag F*<sup>56</sup>. Microsoft disagrees: trade secrets constitute valuable property and are an IP right, just like patents and copyright, and are protected under TRIPS.

Indeed, the Commission argues that the rules on compulsory licensing of intellectual property rights should not apply to know-how licensing, on the grounds that the act of not licensing an intellectual property right 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 IP rights 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."*<sup>57</sup>

*"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."*<sup>58</sup>

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 under "LICENSING TERMS AND FOLLOW UP".

Microsoft notes it has copyright in the source code and in the 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 perfectly inconsistent with the goals and terms of the Software Directive.

### *Questions about IP*

- What relevance is to be attributed to the fact that the information requested was subject to IP rights?
- 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 IP rights (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 IP rights) 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 is, indeed, inherent in antitrust.<sup>59</sup> 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.

Considerable practical difficulties are presented if the Decision validly condemned Microsoft's behaviour. 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 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.<sup>60</sup>

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

## VI. FINES

I have now described the principal points which were debated as to the merits of the interoperability half of the case. It is worth adding some thoughts on the fine of EUR 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.

### *The 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*) suggest that in March 2004 the only judicial authority upholding a compulsory licence was *Magill*. The alleged abuse in the *Microsoft* Decision 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 the *Magill* and the *Microsoft* Decision 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? 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.

Or, alternatively, the Commission set the fine knowing that each of the legal theories by which the fine was justified was novel, creative and improbable, but hoping that the guilt of Microsoft would be demonstrated by a huge fine for not divulging its technology.

#### ***Legal precedents on how to set the fine in case of an antitrust novelty***

Fines in a regime of law are imposed for recognised 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).

#### ***The arithmetic by which the fine was calculated***

The starting amount was €165,732,101. The Decision proceeds 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 \$25,000" the fine is based on "all servers". The Commission does 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 describes 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 fifteen 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. Indeed, that the fine was a means to justify the finding of the abuse, not a calibrated sanction to punish an abuse. In the absence of a better explanation from the Commission rooted in practice or precedent, one has the impression that the Commission thought that imposing a record fine would help suggest there had been a record abuse.

### ***Questions about the fine***

- |   |
|---|
| <ul style="list-style-type: none"> <li>• Was the imposition of any fine lawful?</li> <li>• Were the infringements novel?</li> </ul> |
|---|

- 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?

## **VII. WHAT COMES AFTER THE JUDGMENT?**

A number of questions of fundamental legal importance were presented by the interoperability case. The judgment's guidance on these questions will be of great importance for the legal community. But for the computer community it is likely to be yesterday's battle, as I will now explain.

### ***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.*"<sup>61</sup> Microsoft thus committed to license its patents to interested parties in a commercially reasonable manner under terms standard in the industry. Numerous licensing programmes 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 license, 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.*"<sup>62</sup> 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.<sup>63</sup>

There are over 50 examples of active interoperability collaboration in which Microsoft has engaged recently, including collaboration with Microsoft's direct competitors. These include:

- **The Interop Vendor Alliance (IVA).** The IVA is a global industry group of software and hardware vendors that works together to enhance the way that diverse products interoperate with Microsoft's operating systems and applications. The group 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. The IVA's activities include interoperability testing, sharing of relevant technical information, and communicating about interoperability solutions to customers.<sup>64</sup>
- **Apple.** In January 2006, Microsoft and Apple announced a new agreement whereby Microsoft will continue developing and selling its Office suite for Macintosh and incorporate XML compatibility to facilitate interoperability between Microsoft Office

suites on various platforms. The five-year agreement also ensured Microsoft support for versions of Office for Macintosh that will run natively on new Intel-based Macintosh systems. Microsoft is developing “universal binary” versions of Office that will run quickly and efficiently on both Intel and PowerPC platforms.<sup>65</sup>

- **EMC.** In October 2006, Microsoft and EMC Corporation announced an alliance to enhance interoperability between EMC’s Documentum enterprise content management (ECM) platform and Microsoft products. As part of the alliance, EMC and Microsoft have focused on the interoperability of the Documentum platform and Microsoft Office SharePoint Server 2007, the 2007 Microsoft Office system, and SQL Server.<sup>66</sup>

- **Novell.** In November 2006, Microsoft and Novell announced the signing of a set of agreements to enable greater interoperability between the two companies’ products, notably Windows and SUSE Linux. The two companies agreed to establish a joint research facility, with initial efforts focusing on virtualization, server management through Web services, and document format compatibility.<sup>67</sup>

- **Oracle.** In May 2004, Microsoft and Oracle agreed on Oracle’s participation in the Microsoft Visual Studio Industry Partner (VSIP) programme. The VSIP programme is designed to help software vendors ensure interoperability between their software and Visual Studio .NET. The agreement was designed to facilitate tighter integration for developers between the Oracle Database and Microsoft Visual Studio .NET. For example, in July 2005, Oracle released a plug-in for Visual Studio .Net 2003 that allows developers using the Microsoft software development tools to build applications for Oracle’s 10g database.

- **Sun.** In April 2004, Microsoft and Sun Microsystems entered into a broad technology collaboration arrangement aimed at enabling their products to work better together.<sup>68</sup> Among other efforts, the companies have worked to ensure greater information sharing between the companies’ desktop and server products. Microsoft and Sun have worked jointly to improve Microsoft .NET and Java/J2EE interoperability. The companies have also developed specifications to enable single sign-on and authentication across Microsoft and Sun products.<sup>69</sup>

- **Symbian.** In March 2005, Microsoft licensed its ActiveSync protocol to Symbian for use in Symbian OS, an operating system for mobile phones that competes with the Windows Mobile Smartphone OS. This protocol provides connectivity between devices running non-Microsoft OS software and Microsoft’s Exchange Server. Microsoft has also licensed ActiveSync to others for use with non-Microsoft OS software, such as palmOne (palmOne’s proprietary OS) and Motorola (Linux-based OS).<sup>70</sup>

## **VIII. LICENSING CASES & 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. On the interoperability side, such precision has been lacking.

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 Court rules in 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 is being challenged on a variety of grounds, including public international law, on the ground that the Commission lacks jurisdiction to destroy valuable intellectual property created in a third country and principally exploited there.

### ***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 lesser the technological advantage to the licensees.<sup>71</sup> There was an exchange, 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 Trustee's work plan was adopted in April 2006, specifying in detail the format required.

In November 2005, the Commission took an Article 24(1) Decision threatening the company with a fine for having not complied with its obligations under the March 2004 Decision. The Decision gave Microsoft till 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 EUR 280,500,000 on Microsoft. That Decision is challenged in Case T-271/06.

### *Price controversies*

The Decision allowed Microsoft to apply reasonable and non-discriminatory terms. The Commission has claimed that Microsoft's proposed licensing terms are unsatisfactory in that Microsoft has not proven 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.<sup>72</sup> 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 are being used as an absolute over-arching 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 been 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 \$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 proven the point to their satisfaction, and that accordingly only a few pieces of the specification merited any compensation at all.<sup>73</sup> 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% 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 has taken the view that the proposed maximum royalty rate of 5% 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% of the licensee's selling price for whatever product the licensee made based upon the licensed technology.<sup>74</sup>

The Commission rather than trying to prove Microsoft's terms are unreasonable, claims that Microsoft has not proved to the Commission's satisfaction certain key points (the comparable

transactions are comparable, the innovations are innovative). The Commission in effect attempts to reverse the burden of proof by arguing that Microsoft has a burden under the 2004 Decision to prove to the Commission that its prices are in fact “reasonable”.

The company disagrees 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 penalised, 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 EUR 500,000 per day, then EUR 2,000,000 per day during 40 days ending 30 July 2006, then EUR 3,000,000 per day from July 31, 2006 to date. By the time this conference occurs in September 2007, the threatened penalty would total something like EUR 1,250 billion.

The company is thus threatened with the largest penalty in world competition law history for proposing as a basis for commercial negotiations a royalty rate which is higher than the public authority deems appropriate.

## **IX. CONCLUSION**

Compulsory licensing is a particularly hot antitrust topic at the moment. There is a clear divergence (noted by Hew Pate, former head of the Antitrust Division, among other commentators) between the liberal or minimalist<sup>75</sup> approach which prevails in the US, celebrated by the Supreme Court in *Trinko*<sup>76</sup> and more recent cases, and the more formalistic or maximalist approach of the Commission.<sup>77</sup> In *Microsoft*, the Commission ordered a company to draw up a detailed description of its own technology for the sole purpose of delivering to competitors the means of incorporating that technology in their own products.<sup>78</sup> The link between the compelled conduct and the infringing act was rather distant. The compelled conduct had great political and industrial symbolism.

Of course, every Article 82 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 balancings of public and private advantage.

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.

If the European Commission's Decision in *Microsoft* is judicially held to be good law, then European law would be sharply at odds with US law. Major legal discrepancies between friendly jurisdictions commonly drift back to alignment after a while, in which case *Microsoft* would be a second *Sirena*,<sup>79</sup> an eccentricity born of over-enthusiasm.

<sup>1</sup> Provisional text. Subject to revision.

<sup>2</sup> Queen's Counsel at the Scots Bar, Visiting Professor, University of Glasgow; White & Case, Brussels. The opinions expressed are wholly personal.

<sup>3</sup> See e.g. M. Dolmans and T. Graf, "Analysis of Tying Under Article 82 EC: The European Commission's Microsoft Decision in Perspective", 27 *World Competition* 225 (2004); I. Forrester, "Article 82: Remedies in Search of Theories?", 2004 *Fordham Corp.L.Inst.* 167 (B. Hawk, Ed. 2005); D. Ridyard "Compulsory Access Under EC Competition Law - A New Doctrine of 'Convenient Facilities' and the Case for Price Regulation", 25 *ECLR* 669 (2004); 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*?", 41 *CMLR* 1519 (2005); Leupold and Pautke, "*IMS Health vs. Microsoft*: Befindet sich die Kommission bei Kartellrechtlichen Zwangslizenzen (erneut) auf Konfrontationskurs mit dem EuGH?", 16 *EWS* 108 (2005); Körber, "Geistiges Eigentum, essential facilities und 'Innovationsmissbrauch': Überlegungen zum *Microsoft*-Fall im Lichte der EuGH-Entscheidung *IMS Health GmbH*", 50 *RIW* 881 (2004); Drexl, "Intellectual Property and Antitrust Law – *IMS Health* and *Trinko* – Antitrust Placebo for Consumers instead of Sound Economics in Refusal-to-Deal Cases", 35 *IIC* 788 (2004); Thyri, "Immaterialgüterrechte und Zugang zur wesentlichen Einrichtung: Der Fall *Microsoft* im Licht von *IMS-Health*", 55 *WuW* 388 (2005).

<sup>4</sup> Case 238/87, *Volvo (UK) Ltd. v. Veng AB*, [1988] ECR 6211.

<sup>5</sup> Commission Decision 89/205/EEC of 21 December 1988 (*Magill TV Guide/ITP, BBC and RTE*), OJ [1989] L 78/43, 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 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.

<sup>6</sup> Commission Decision 2002/165/EC of 3 July 2001 (*NDC Health/IMS Health: Interim Measures*), OJ [2002] L 59/18, withdrawn by Commission Decision 2003/741/EC of 13 August 2003 (*NDC Health/IMS Health: Interim Measures*), OJ [2003] L 268/69; Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Judgment of 29 April 2004, [2004] ECR I-5039.

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

<sup>8</sup> Cases 6/73 and 7/73, *Commercial Solvents and Others v. Commission*, [1974] ECR 223.

<sup>9</sup> 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. Second, 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.

<sup>10</sup> Decision, paragraph 33.

<sup>11</sup> 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 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 "detering welfare-enhancing innovation", *id.* at 90,

the Court of Appeals remanded the tying claim, instructing the District Court to analyze it under a “rule of reason” analysis in which the pro-competitive justifications for including Web browsing functionality in Windows were fully considered. *Id.* at 74. In that regard, the Court of Appeals noted that Windows serves as a “platform for third-party applications”. *Id.* 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. *Id.* at 90. The Court also noted that using “the very same lines of code” to perform multiple functions may provide efficiencies. *Id.* 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”. *Id.* at 95.

<sup>12</sup> The settlement was approved by the United States District Court for the District of Columbia (*United States v Microsoft Corp.*, 231 F. Supp. 2d 76, 144 (D.D.C. 2002); the “U.S. 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 Decision 5 (compare *New York v. Microsoft Corp.*, 224 F. Supp. 2d at 226-33 with Section 5(a) of the Decision; and compare *New York v. Microsoft Corp.*, 224 F. Supp. 2d at 245-55 with Section 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.

<sup>13</sup> Commission Memorandum MEMO/04/70 of 24 March 2004 “Microsoft — Questions and Answers on Commission Decision”.

<sup>14</sup> Decision, Article 1, (1).

<sup>15</sup> Case T-201/04 R, *Microsoft Corporation v. Commission*, Order of 22 December 2004, [2004] ECR II-4463..

<sup>16</sup> Order of the President, Paragraph 398.

<sup>17</sup> Decision, paragraph 690.

<sup>18</sup> Decision, paragraphs 692, 589 and 712.

<sup>19</sup> Among others: Akzo Nobel, Alitalia, Carrefour, the City of Vienna, Nokia, Novo Nordisk A/S, Royal Dutch/Shell Group, UK Inland Revenue.

<sup>20</sup> 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).

<sup>21</sup> 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.

<sup>22</sup> *Supra.*

<sup>23</sup> Decision, section 5.3.1.1.3.2.

<sup>24</sup> Decision, paragraph 780.

<sup>25</sup> In *IMS* the Commission had argued that IMS’s temporary loss of its IP right 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 for property rights in general and for 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].

<sup>26</sup> “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

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*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.” (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.” (781)*

<sup>27</sup> Decision, paragraphs 779 to 782.

<sup>28</sup> 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 constituting an abuse of a dominant position with harmful effects on innovation and on consumers.” (Microsoft Decision, *op. cit.*, 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.” (Microsoft Decision, *op. cit.*, para. 783.)*

<sup>29</sup> Decision, para. 783.

<sup>30</sup> Former Commission official Jürgen Mensching, speaking at the Fourth Sweet & Maxwell Annual Competition Law Review Conference, 22 October 2004.

<sup>31</sup> 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 <http://www.ftc.gov/opp/intellect/index.htm>; the FTC Report “To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy” (October 2003), available at <http://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: [http://europa.eu.int/comm/competition/antitrust/technology\\_transfer\\_2/](http://europa.eu.int/comm/competition/antitrust/technology_transfer_2/).

<sup>32</sup> See, for example, L. Peepkorn, “IP Licences and Competition Rules: Striking the Right Balance”, 26 *World Competition* 527 (2003), p. 528. Judging by the US example, this has not always been the case; see, for example, Ward S. Bowman, *Patent and Antitrust Law. Legal and Economic Appraisal* (1973).

<sup>33</sup> The author represented the complainant NDC in the interim measures proceedings; and represented the Commission in *Magill* before the CFI and the ECJ.

<sup>34</sup> 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 structure was originally an open industry standard and argued that IMS was claiming IP rights over that standard for the abusive purpose of excluding competition by preventing its competitors from using the standard. See Killick, “IMS and Microsoft Judged in the Cold Light of IMS”, 1(2) *CompLRev.* 23 (2004), p. 30, available at: <http://www.clasf.org/CompLRev/assets/Vol1Issue2Article2.pdf>.

<sup>35</sup> See e.g. Temple Lang, “European Community Competition Policy – How Far Does It Benefit Consumers?”, 18 *Boletín Latinoamericano de competencia* 128 (February 2004), available at <http://europa.eu.int/comm/competition/international/others>, p. 129. See also Temple Lang, “Anticompetitive Non-Pricing Abuses under European and National Antitrust Law”, in 2003 *Fordham Corp. L. Inst. (B. Hawk, Ed; 2004)*, pp. 303 -308.

<sup>36</sup> Case T-184/01 R, *IMS Health, op.cit.*

<sup>37</sup> Case C-418/01, *IMS Health, op.cit.*

<sup>38</sup> *Ibid.*

<sup>39</sup> See Advocate General Poiares 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.

<sup>40</sup> As acknowledged by Advocate General Poiares 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.", *ibid.*, para. 39.

<sup>41</sup> Case 311/84, *Télémarketing v. CLT and IPB*, [1985] ECR 3261.

<sup>42</sup> Paras. 48, 49 *et seq.* of AG Tizzano's Opinion.

<sup>43</sup> *IMS, op.cit.*, para. 34 *et seq.*

<sup>44</sup> As well as Article 295, Article 30 refers to "the protection of industrial and commercial property".

<sup>45</sup> See I. Forrester, "EC Competition Law as a Limitation on The Use of IP Rights in Europe: Is There a Reason to Panic?", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2003: What Is an Abuse of a Dominant Position?* (Oxford/Portland, 2006), pp.503-521, available at [http://www.iue.it/RSCAS/Research/Competition/2003\(papers\).shmtl](http://www.iue.it/RSCAS/Research/Competition/2003(papers).shmtl); *idem*, "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, Washington, D.C., May 22, 2002, available at <http://www.ftc.gov/opp/intellect/020522forrester.pdf>.

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

<sup>47</sup> Case C-7/97, *Oscar Bronner, op.cit.*

<sup>48</sup> Case T-201/04 R, *Microsoft Corp. v. Commission*, Order of 22 December 2004, *op.cit.*, para. 207.

<sup>49</sup> *IMS, op.cit.*, para. 49.

<sup>50</sup> *IMS, op.cit.*, para. 52.

<sup>51</sup> Microsoft Decision, *op.cit.*, para. 589, footnote 712.

<sup>52</sup> Microsoft Decision, *op.cit.*, 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]

<sup>53</sup> See Advocate General's Opinion, *Bronner, op.cit.*, at 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.<sup>(42)</sup> First, an essential facility is controlled by a monopolist. A facility will be regarded 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;<sup>(43)</sup> a local telecommunications network;<sup>(44)</sup> a local electricity network<sup>(45)</sup> 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.<sup>(46)</sup> Thirdly, the use of the facility is denied to a competitor. That condition would appear to include the refusal to contract on reasonable terms.<sup>(47)</sup> 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

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*legitimate technical or commercial reasons.*<sup>(48)</sup> *It may also be possible to justify a refusal to contract on grounds of efficiency.*<sup>(49)</sup> [References omitted]

<sup>54</sup> See R. Milgrim, “Commission Proposed Capital Punishment – By Definition – For Trade Secrets, A Uniquely Valuable IP Right”, in: *Journal of Patent and Trademark Office Society*, November 2006, vol 88, No 11, p 911.

<sup>55</sup> Case 40/70, *Sirena S.r.l. v. Eda S.r.l. and others* [1971] ECR 69.

<sup>56</sup> Case 192/73, *Van Zuylen frères v. Hag AG*, [1974] ECR 731.

<sup>57</sup> Decision, paragraph 1003.

<sup>58</sup> Decision, paragraph 1004.

<sup>59</sup> See Hawk and Denaeijer, “The Development of Articles 81 and 82 EC Treaty: Legal Certainty”, in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), pp. 130, 137, 140.

<sup>60</sup> See also “Refusals to license contrary to Article 82 EC – IMS – When are the circumstances special?”, V. Korah, 2005 Fordham IP Conference papers.

<sup>61</sup> 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*, <http://www.microsoft.com/presspass/features/2003/dec03/12-03ExpandIPQA.mspix>. 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 intellectual property portfolio. More information about Microsoft’s IP Licensing Program is available at <http://www.microsoft.com/about/legal/intellectualproperty/default.mspix>.

<sup>62</sup> See <http://www.microsoft.com/presspass/newsroom/winxp/windowsprinciples.mspix>.

<sup>63</sup> See <http://www.microsoft.com/presspass/newsroom/winxp/windowsprinciples.mspix>.

<sup>64</sup> See <http://www.microsoft.com/presspass/press/2006/nov06/11-14IVA07PR.mspix>

<sup>65</sup> See <http://www.microsoft.com/presspass/press/2006/jan06/01-10Macworld2006PR.mspix>.

<sup>66</sup> See <http://www.microsoft.com/presspass/press/2006/oct06/10-03MSEMCPR.mspix>.

<sup>67</sup> See <http://www.microsoft.com/presspass/press/2006/nov06/11-02MSNovellPR.mspix>.

<sup>68</sup> See <http://www.microsoft.com/presspass/press/2004/apr04/04-02SunAgreementPR.mspix>.

<sup>69</sup> See “Web Single Sign-On Metadata Exchange Protocol,” at

[http://developers.sun.com/techtopics/identity/interop/web\\_sso\\_mex\\_may2005.pdf](http://developers.sun.com/techtopics/identity/interop/web_sso_mex_may2005.pdf).

<sup>70</sup> See, e.g., the following press releases: *Microsoft Announces Exchange ActiveSync Licensing Agreement With Sony Ericsson* available at <http://www.microsoft.com/presspass/press/2006/feb06/02-06SonyExchangePR.mspix?pf=true>; *Microsoft and Motorola Form Strategic Alliance to Extend Unified Communications to Mobile Devices*, <http://www.microsoft.com/presspass/press/2006/jun06/06-25UCGMotorolaPR.mspix?pf=true>; and *palmOne Licenses Microsoft Exchange Server Synchronization Protocol for Integration With Next-Generation Treo Smartphones*, <http://www.microsoft.com/presspass/press/2004/oct04/10-05PalmOnePR.mspix?pf=true>.

<sup>71</sup> 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.

<sup>72</sup> The WSSP Pricing Principles are available at the Microsoft website

<http://www.microsoft.com/downloads/details.aspx?FamilyId=5A9CACB3-E823-4522-967C-A6EE3CD3995D&displaylang=en>.

<sup>73</sup> 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”.

<sup>74</sup> 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 : <http://www.microsoft.com/presspass/press/2007/mar07/03-01PricingProtocolPR.mspix>. 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

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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 include protocols, not necessarily innovative, for which there will be no royalty.)

<sup>75</sup> 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.

<sup>76</sup> *Verizon Communications, Inc. v. Law Offices of Curtis Trinko*, 124 S.Ct. 872 (2004). See also the *Verizon v. Trinko* roundtable discussion in 7(2) *Global Competition Review* 16 (2004).

<sup>77</sup> I. Forrester, “Article 82: Remedies in Search of Theories?”, 2004 *Fordham Corp.L.Inst.* 167 (B. Hawk, Ed. 2005).

<sup>78</sup> S. Scotchmer, “Standing on the Shoulders of Giants: Cumulative Research and the Patent Law”, *Journal of Economic Perspectives*, Vol. 5 (1991), p. 29.

<sup>79</sup> Case 40/70, *Sirena S.r.l. v. Eda S.r.l. and others* [1971] ECR 69.