Microsoft on Trial

Legal and Economic Analysis of a Transatlantic Antitrust Case

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

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1. INTRODUCTION

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

The Microsoft Decision[2] involved two alleged abuses. One related to the design of the Windows operating system which drives the great majority of personal computers, and the lawfulness of incorporating additional functionalities therein. The other related to the nature and extent of Microsoft's duty to reveal details of how its server products interact, notably as regards client-to-server and server-to-server communications. Each alleged infringement in a sense concerned whether Microsoft, as an

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

1 [2007] ECR II-3601.

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

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

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

2. SOME PRELIMINARY REMARKS

Various factors rendered the case challenging:

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

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

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

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

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

It would be foolish to argue that the Commission lacks the power to create new o

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

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

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

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

3. TECHNICAL BACKGROUND

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were well-suited to engineering and scienti c 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.

networks in Europe demonstrated, argued Microsoft, that it was readily possible to achieve e cient interoperability between rival server operating systems and Windows client and server operating systems. Microsoft's server technology enjoyed a considerable distribution advantage: the difficulty thoroughly grasping the conflicting factual claims. Yet this technical history is indispensable to an understanding of the controversy. Was interoperability between server and server perfect, or adequate, or poor? Did the extensive evidence of functioning networks using many different brands of software and hardware prove that there was no significant problem, although there might be intermittent, solvable ones? Or was the Commission right to say that Microsoft's rivals could not compete 'viably' unless they were given access to Microsoft's server technology?

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

4. THE REQUEST AND THE COMPLAINT

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

The compulsory licensing part of the Microsoft case

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

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

By the time Microsoft responded to the Second Statement of Objections, it had (in November 2001) entered into a settlement with the US Department of Justice and certain US states of an antitrust lawsuit they had brought in 1998.[14] Microsoft urged the Commission to consider the settlement as a

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[14] That lawsuit focused on Microsoft's inclusion of Web browsing software, called Internet Explorer, in Windows 98. The District Court found that Microsoft

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

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

QUESTION CONCERNING THE RELEVANT MARKET

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

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

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

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

> Microsoft Corporation has infringed Article 82 of the Treaty and Article 54 of the EEA Agreement by:
>
> (a) refusing to supply the Interoperability Information and allow its use for the purpose of developing and distributing work group server operating system products, from October 1998 until the date of this Decision.

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

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

Microsoft appealed, and also filed an application requesting interim measures suspending the remedies pending the Court's judgment on advocate had ever read: a very thorough, clear and fair description of the questions at stake, explaining the case much better than most articles. The Court was evidently well-prepared, re ected in the large number of questions asked by the judges.

5. THE FACTS AND THE LAW

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It was agreed that Microsoft enjoyed a position of dominance as to operating systems for PCs. (‘Super-dominance’, whatever that means, was mentioned as a concept in the CFI proceedings.) At the time of the alleged refusal, Microsoft did not enjoy a dominant position as to operating systems for servers to coordinate networks of PCs. A number of companies supplied servers, including Sun, Novell, IBM and others, and had done so for longer than Microsoft. The Commission also conceded that interoperability between servers of di erent brands did exist[20] but not well enough for Microsoft’s competitors. It claimed that practical interoperability was imperfect, so as to prevent competitors from competing ‘viably’, and Microsoft’s conduct put others at a competitive disadvantage. The degree of interoperability in force was ‘insu cient to enable competitors to viablyarverce dto sket’.ist organizations use different server operating systems for different functions or for different parts of the organization. They worked together.

Microsoft supplied the Commission with about 50 statements from large users of computing power, describing how they resolved the challenge of having a heterogeneous network. The Commission sent out Article 11 EC

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

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

QUESTIONS ABOUT INTEROPERABILITY

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

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

[25] See above.

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

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

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

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

Nevertheless, according to the Decision, Microsoft interrupted supply:

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

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26 Decision, section 5.3.1.1.3.2.
27 Decision, para. 780.

QUESTIONS CONCERNING THE SUPPOSED INTERRUPTION OF SUPPLY

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

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

More specifically, from the summer of 2004, 210 software engineers in three countries at different times were studying over 6.69 million lines of source code (2.39 million for directory, and 4.30 million for file and print) to identify how their communications protocols functioned. Because the task was large and difficult, and because parts of the code go back to the early 1990s, Microsoft recruited retired Microsoft engineers who worked for the company at that time. Team members studied the source code, read the preparatory design material, chased down the engineers who wrote it and clarified why they had done things in a particular way. With that understanding, a description of functionality could be prepared and the pages fitted into a comprehensible whole. Little of the material was already in existence because the software was designed as proprietary code, not intended for the public domain. Accordingly, the kind of 'speci cation' 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 'speci cation'. Microsoft also o encroachment puts in danger all other persons similarly situated. Such enrichment and detriment respectively would not be remedied by royalties.[28] On the other hand, the 'infringer' will rely on the foreclosure of competition due to the invoked right, the lack of research and development involved, the improbable nature of the right, the unreasonable or capricious behaviour of the dominant player, the peripheral impact upon the dominant player contrasted with the victim's vital need, and the very moderate nature of the contemplated compulsion. The challenge for the antitrust enforcer is to identify the relevant circumstances and to decide wisely.

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

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

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

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

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

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

The so-called 'interoperability information' was not in the public domain (unlike the material at stake in *Magill* or the alleged industry standard in *IMS Health*); it was future technology when requested in September 1998, and would be launched only in 2000; the specifications derived from the software code were hugely voluminous (thousands of pages of electronic text once written specially); the technology was the fruit of hundreds of person years of development e

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

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

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

IMS Health

In *IMS Health* (as in *Magill*) the Commission was requested to intervene in order to palliate the anti-competitive consequences of the successful invocation of a national IPR. The complainants[36] said there was no possibility for companies wishing to offer pharmaceutical sales data in Germany to employ any convention for ascribing sales data geographically other than the convention used by IMS, the map known as the 1860 brick structure. To supply usable marketing data to customers, that data had to be useful to pharmaceutical customers. There were no substitutes or alternatives to reporting sales along the same geographic lines as the map of postcodes drawn up by IMS. IMS was successfully claiming that use of this format constituted a breach of its copyright. The Commission found that IMS's bringing of copyright infringement actions was an abuse of its dominant position. The Commission considered that the litigation was likely to eliminate all competition, and that the refusal to grant a licence lacked 'objective justification'.[37]

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

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

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

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

(1) The product or service protected by copyright must be *indispensable* for carrying on a particular business. The test is one of an 'equally efficient competitor'. There is no indispensability if there are 'alternative solutions, even if they are less advantageous'. A company wishing to receive a licence must 'intend to offer new goods or services not offered by the owner of the right and for which there is potential consumer demand'.[41]

(2) The refusal must *prevent the emergence of a new product for which there is potential unmet consumer demand*. The requesting party must 'not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the copyright, but intends to produce new goods or services not offered by the owner of the right'. Microsoft asserted that a licensee product replicating the functionality of say, Active Directory, would not be a 'new product' which was being denied to consum-

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structure was originally an open industry standard and argued that IMS was claiming IPRs over that standard for the abusive purpose of excluding competition by preventing its competitors from using the standard. See J. Killick, 'IMS and Microsoft Judged in the Cold Light of *IMS*' (2004) *Competition Law Review* 23, 30, available at www.clasf.org/CompLRev/assets/Vol1Issue2Article2.pdf.

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

39 Case T-184/01 R *IMS Health*.

40 Case C-418/01 *IMS Health.*

41 Case C-418/01 *IMS Health*.

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

(3) The refusal must not *be objectively justified*.

(4) The refusal must be such as to *exclude all competition* on the secondary market.

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

The Advocate General's Opinion and the Court of Justice's judgment in *IMS Health* diverge. Advocate General Tizzano started his analysis[44] from *Commercial Solvents* and *Telemarketing*[45] (which are 'true' refusal-to-deal cases) before going on to the IP cases *Volvo/Veng* and *Magill* (refusals to license), as well as to *Bronner*. The Court of Justice chose to start its analysis[46] property interests.[47] Any encroachment upon it has to be capable of being analysed, justified and defended without embarrassment and without violence to international treaty obligations.

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

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

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

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

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

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

made in *IMS Health*. However, in both *Magill* and *IMS Health*, the courts did not comment on the assertion, although Advocate General Jacobs did in *Bronner*.[50] The *Magill* and *IMS Health*

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

IMS Health

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

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

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

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

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

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

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[55] that Microsoft's specifications are indispensable because no other alternative was available by which Microsoft's competitors could interoperate with servers using the Windows operating system.

The Fourth IMS Health Test

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

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

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

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

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

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

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

IPRs a rmatively ‘created by law’ such as patents. This approach[57] seems to di erentiate between ‘good’ and ‘bad’ IPRs in a manner similar to that adopted by the Court of Justice in its early cases such as *Sirena*[58] and *Cafe Hag I*.[59] Microsoft disagrees: trade secrets constitute valuable property and are an IPR, just like patents and copyright, and are protected under TRIPS.

Indeed, the Commission argues that the rules on compulsory licensing of IPRs should not apply to knowhow licensing, on the grounds that the act of not licensing an IPR a speci cations painfully drawn up by its engineers; and that any implementation of those speci cations 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 di erent from the Microsoft original, even if the functionality were the same. Microsoft replies that this functional replication of how software performs is entirely inconsistent with the goals and terms of the Software Directive.[61]

QUESTIONS ABOUT INTELLECTUAL PROPERTY

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

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

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

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

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

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

Moreover, the application of the test poses numerous questions. It appears difficult enough for the enforcers to ensure a consistent and objective application of such a test. It would be even more difficult for the Court of Justice to question the Commission's findings. Other unanswered

6. FINES

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

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

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)?

The Commission increased the amount of the fine by 50 per cent for heavier ne later. Likewise, if it elects to come forward with settlement proposals, it ought not to risk receiving a bigger ne.

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

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

7. SUBSEQUENT DEVELOPMENTS

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Microsoft has made a series of public announcements con rming or reinforcing its e orts regarding interoperability. In December 2003, Marshall Phelps announced that 'Microsoft is open for business when it comes to IP licensing'.[64] Microsoft thus committed to license its patents to interested

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

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

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

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

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Licensing Program is available at www.microsoft.com/about/legal/intellectualproperty/default.mspx.

[65] See http://www.microsoft.com/presspass/newsroom/winxp/windowsprinciples.mspx.

[66] See http://www.microsoft.com/presspass/newsroom/winxp/windowsprinciples.mspx.

[67] See http://www.microsoft.com/presspass/press/2006/jan06/01-10Macworld2006PR.mspx.

[68] See http://www.microsoft.com/presspass/press/2006/oct06/10-03MSEMCPR.mspx.

[69] See http://www.microsoft.com/presspass/press/2006/nov06/11-02MSNovellPR.mspx.

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

[71] See e.g. the following Press Releases: '*Microsoft announces exchange ActiveSync licensing agreement with Sony Ericsson*,' available at www.microsoft.

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

8. LICENSING CASES AND FOLLOW-UP

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

Concerning interoperability, the Decision called for licensing on reasonable and non-discriminatory terms, such that royalties should 'not re ect 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 con dential the licensed material.

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 con dential the licensed material. An appeal (Case T-313/05) was led on 10 August 2005 against a Decision of the Commission according to which, if the CFI ruled in

[72] *See* www.microsoft.com/presspass/press/2006/nov06/11-14IVA07PR.mspx.

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 con dentiality constraints upon the licensee. Open source software is shared freely among members of the open source community, who must allow its unlimited exploitation. Such terms would permit a licensee to disclose all the details of an implementation of Microsoft's technology, thus placing Microsoft's trade secrets in the public domain.

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

[illegible]

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 di culties of using and accessing the data, to which Microsoft replied, in e ect promising the same process of continual polishing of the documentation as applies under the US (client-to-server) program, and pointing out various errors and misunderstandings. This debate about the completeness and ease of use of the material was overshadowed by a quite separate controversy which arose in October 2005, as to the *scope* of disclosure called for. The debate related to whether Microsoft had to deliver such level of detail as would permit licensees to emulate server-to-server communications 'over the wire' or whether it was to deliver at a more detailed standard, that of drop-in or 'plug replaceability' of the function delivered through the relevant protocol. This was a sensitive topic as it presented the issue of whether a licensee would need to duplicate perfectly certain algorithms (computing formulae) in order to achieve the desired result. Obviously, the wider the scope, the greater the encroachment on Microsoft's interests; the narrower the scope, the less the technological advantage to the licensees.[73] There was an exchange,

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

during which Microsoft noted that these two scopes were obviously different, and stating that it would execute either, so long as the Commission would specify which it was to be. The Commission declined to give such written con rmation, 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 e ort after the Monitoring Trustee's work plan was adopted in April 2006, specifying in detail the format required.

In November 2005, the Commission took a Decision under Article 24 (1) of Regulation 1/2003 threatening the company with a ne for not having complied with its obligations under the March 2004 Decision. The Decision gave Microsoft until 15 December 2005 to remedy the alleged de ciencies. Without studying what was delivered on that date, the Commission moved to the next stage, a Statement of Objections, claiming that the de ciencies identi ed 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 o ered 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 ne of €280,500,000 on Microsoft. That Decision was challenged in Case T-271/06, which was abandoned in 2007 after the judgment of the CFI.

[illegible]

The Decision allowed Microsoft to apply reasonable and non-discriminatory royalties. The Commission has claimed that Microsoft's proposed licensing terms are unsatisfactory in that Microsoft has not proved to the Commission that its licensing terms are reasonable and non-discriminatory. The pricing controversy has given special prominence to a set of 'pricing principles' developed by the Commission and Microsoft. These were intended for use by the Trustee in resolving any dispute that might arise with a prospective licensee about appropriate level of royalties for the speci cation.[74] In the event of dispute, the Trustee could consider four factors:

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

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

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

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

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

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

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

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

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

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

9. CONCLUSION

Compulsory licensing is a particularly hot antitrust topic. There is a clear divergence (noted by Hew Pate, former head of the Antitrust Division, among other commentators) between the liberal or minimalist[77] approach which prevails in the United States, celebrated by the US Supreme Court in *Trinko*,[78] and more recent cases, and the more formalistic or maximalist approach of the European Commission.[79] In the *Microsoft* case, the Commission ordered a company to draw up a detailed description of its own technology for the purpose of delivering to competitors the means of incorporating that technology in their own products.[80] The link between

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

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

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

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

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

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

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

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

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