DO DOMINANT COMPANIES NEED FORTUNE TELLERS OR LAWYERS?

A few comments on the new Microsoft Decision of February 2008

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Commission Decision of February 2008 imposing the highest Commission fine ever and "*closing a dark chapter in Microsoft's record of non-compliance*" (*dixit* N. Kroes)

BUT 3 QUESTIONS:

I. WHAT ARE "FRAND" CONDITIONS ?
   1) Notoriously difficult concept
   2) Difficulties particularly for IPR licenses
   3) Approach *in casu*
   4) What is the value of input from competitors?
   5) How appropriate is the requirement for "innovativeness"?

II. IS IT LEGITIMATE TO IMPOSE A FINE FOR NOT "DIVINING" WHAT ROYALTY MIGHT BE ACCEPTABLE TO THE COMMISSION?

III. THE RIGHT TO A JUDGE – (Does Article 24 of Regulation 1/2003 allow the Commission to force a company under threat of daily penalties to give away irreversibly valuable know-how at any condition the Commission may decide to dictate by itself?)

I. WHAT ARE « *FRAND* » CONDITIONS?

A. FRAND CONDITIONS: NOTORIOUSLY DIFFICULT CONCEPT

- Generally the task of regulatory authorities
- See eg. US Supreme Court in Trinko
- Commission itself reluctant here to say what proper price is

B. FRAND CONDITIONS: PARTICULARLY DIFFICULT FOR IPRs

- See eg. Mr Justice Laddie (*Hewlett Packard case*, [2005] ETMR 1301 at 1037): Intellectual Property Rights enable "*their owners to charge a higher price. That is not an abuse. It is an inherent feature of such rights. Without it, the whole economic justification for Intellectual Property Rights would disappear*".

C FRAND CONDITIONS: APPROACH IN CASU

- Article 5 of 2004 decision only speaks of "*reasonable and non-discriminatory conditions*". *Quid*?

- According to ECC press release
  - Microsoft demanded initially 3,87 % (patent license) and 2,98 % (information license). Is this unreasonable?
  - Then went down in May 2007 to 0,7 % (patent license) and 0,5 % (information license). Is this unreasonable?
  - Then went down in October 2007 to 0,4 % (patent license) and 10 000 € (information). According to the Commission: this is reasonable!
- But what is a "*reasonable*" fee is not an exact science!
  - You can try to "*compare*" with other licenses (both Microsoft and ECC did that)
  - You can try to "*reconstruct*" the value (PWC vs Trustee) but what is an adequate margin, etc. ?
- The fact that some licensees accepted the royalties proposed by Microsoft is apparently not good enough.
- Nor is the fact that royalties are apparently below even the US MCPP scheme.

D. ***FRAND CONDITIONS: Value of input from competitors?***

- Competitors said proposals were "*outrageous*", "*crippling*", etc., but how far should the Commission rely on self-serving ideas of competitors on adequate royalty?
- Should prices be fixed in accordance with the intrinsic value of what is being licensed or to ensure profitability of competitors?
- How far does a dominant company have to rely on financial consideration of rivals (which are –and should be– unknown to it)?
- Is competition law designed to protect competition or competitors?

E. FRAND CONDITIONS: AS TO REQUIREMENT OF "INNOVATIVENESS"

- [Commission press releases]: Microsoft can only charge where there is "*substantial innovation*"
- But what is "*innovative*"?
- And how shall the Commission judge that?
- And where does this requirement come from? It does not exist in case-law, nor in previous administrative practice, and sits uneasily with the whole concept of business secrets.
- Are "*non-innovative*" trade secrets necessarily "*strategic*", and must henceforth be made available free of charge by any dominant company?

II. IS IT LEGITIMATE TO IMPOSE A FINE FOR NOT « DIVINING » WHAT ROYALTY MIGHT BE ACCEPTABLE TO THE COMMISSION?

- Article 5 of the Decision is silent on what a "*reasonable*" fee means - But sets up a procedure (Microsoft to make proposals in 60 days, Commission to decide in 120 days).
- No decision taken *in casu* by the Commission.
- Contrary to previous cases (*Commercial Solvents*, *Hugin*, *Magill*, *IMS*, …).
- AG Warner in *Commercial Solvents* considers it is "*unfair to a person to make an order against him to do something positive without specifying in the order what he must do in order to comply with it*".
- Even unfairer if fines are then a function of the length of time it takes for the Commission to decide!

III. THE RIGHT TO A JUDGE

- Should the Commission not take first a clear and precise decision – susceptible to judicial review– of what would have been its interpretation of Article 5? (See AG Warner hereabove)

- Is it acceptable to put pressure on Microsoft to make proposals for lower and lower rates, to sign pricing principles going much further than the law and arguably than the 2004 decision itself, without any judicial review, under threat of (huge) daily penalties (3m €/day)?

- Does the fact that the 2004 decision was not suspended by the CFI allow now the Commission to impose irreversible behavioural remedies such as the disclosure of business secrets *at any condition it now deems fit*?

- This all puts more than ever in question the Commission's triple role as investigator, prosecutor and judge.

CONCLUSION

- A worrying precedent – that could apply in theory to any "*dominant company*".
- A big future for a new profession in anti-trust law: the fortune tellers!
- Will read the decision with interest – and hope that my fears are misplaced!