



Global Competition Law Centre

***The recent €899 million fine imposed
on MS: substantive and procedural
issues***

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Recap on timeline/events (1)

- March 2004: Infringement decision giving 120 days to comply with *interoperability information* obligation, and €497m fine for past violations
- June 2004: Implementation suspended pending interim measures application
- December 2004: Interim measures refused by CFI
- December 2005: Commission decision setting €2m per day penalty for non-compliance with 2004 infringement decision
- July 2006: Commission decision imposing periodic penalty of €280.5m for incomplete/inaccurate Technical Documentation from December 2005 until 20 June 2006 (“**First Article 24(2) Decision**”)

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Recap on timeline/events (2)

- Post-July 2006: Commission focus shifts to Microsoft (MS) *pricing of access to interoperability information*
- March 2007: SO sent to MS
- April 2007: MS response but no oral hearing
- February 2008: Commission imposes a second periodic penalty of €899m for unreasonable pricing of access to interoperability information from date of First Article 24(2) Decision until 22 October 2007 (“**Second Article 24(2) Decision**”)

Substantive issues

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Commission guiding principles

- Royalty should not reflect the “***strategic value***” stemming from MS’s dominance in the PC OS or WG OS markets, i.e., fruit of forbidden tree
- Protocols should reflect MS ***innovation*** and not be public domain or obvious
- Royalty should be in line with ***market valuation*** for technologies deemed comparable to the innovations identified

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MS's licensing proposals

- Broadly, two sorts of licenses offered:
 - “No patent agreement:” providing access to secret, but not patented, information concerning the protocols that comprise the interoperability information
 - “All IP Agreement:” same as above plus patents (allegedly) read on the technology necessary to interoperate with Windows Client PC and WG server OS

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MS's royalty proposals

➤ Initially:

- For No Patent Agreement, either 2.25%-4.25% of recipient's net revenues or minimum/maximum royalty of \$25/\$475 per server (depending on scope of Protocols sought);
- For All-IP Agreement, either 4.5%-8.5% of licensee's net revenues or minimum/maximum royalty of \$50/\$950 per server (depending on scope of Protocols sought)

➤ Commission response:

- Recipients said proposals were "*outrageous*" "*crippling*" etc.
- Maximum royalty exceeded MS's own sale price for WG Server OS
- % royalty always exceeded minimum royalty

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Commission Assessment

- Assessment of No Patent royalty proposals:
 - Protocols (WSPP & DRS) had little or no innovative character
 - Access to interface information did not imply disclosing MS implementation of same
 - PwC report commissioned by MS dismissed because (1) it *assumed* innovation; and (2) share of recipient revenue required proof of innovation
- Assessment of All-IP royalty proposals:
 - Commission prepared to assume that existence of patents = innovative character
 - Comparable licensing of protocols (in standard setting context) was royalty-free
 - Two PwC comparators not in point because they concerned licensing of source code

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Outcome

- 21 May 2007: MS reduced royalty following issuance of SO to 0.7% for All-IP agreement and 0.5% for No Patent agreement
- 22 October 2007:
 - MS offered access to interoperability information for €10,000 flat fee
 - All-IP license reduced to 0.4% of licensee product revenues
- Royalties from date of First Article 24(2) decision (21 June 2006) until 22 October 2007 considered unreasonable

Procedural issues

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Procedural highlights (1)

- First time Commission has had to enforce compliance with Article 81/82 decision
- Tough line on enforcement procedure consistent with recent Commission stance in, e.g., EON
- Aggregate fine staggering, but daily amount of €3m = c. 3.5% of daily turnover (compared to 5% maximum amount)

Procedural highlights (2)

- Unclear to what extent Commission has merely taken technical advice from OTR or whether it has effectively sub-contracted its decision making, contrary to CFI ruling
- On the one hand, fine seems very harsh given that there are no previous decisions on the terms of compulsory access.
- Prior cases where periodic penalties were considered usually only required a resumption of existing supply terms so compliance was easy (*Commercial Solvents*)
- On the other hand, Commission position was reasonably clear from late 2005 so hints of obstruction by defendant

Key learning

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Conclusions

- Commission to be admired for tenacity
- But 10 years to get a remedy in a compulsory dealing case a salutary lesson
- Still very unclear what terms of access might be in refusal to deal cases
- Market comparators arguably not in point for unique assets: valuable IPRs should get fair compensation (ECPR?)
- Fine is enormous, but MS given some benefit of doubt by excluding period pre-21 June 2006
- MS arguably had “option” of reducing fine by agreeing to royalty at an early stage and then challenging decision before CFI
- Possible damages actions?
- Limited implications for other cases other than Commission will take actual/apparent obstruction seriously

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