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The *Microsoft* Compliance Case

Eric Barbier de La Serre – GCLC, 26 September 2012

2 main topics

1. Substantive pricing principles applicable to the disclosure of non-patented information

2. Nexus between the imprecise nature of competition rules and the Commission's ability to impose a fine

General Court confirms guiding principle already present in 2004 Decision

- Microsoft's refusal to supply was an abuse (paragraphs 139-140)
- Therefore, "[a]*ny remedial measure* […] *had to exclude the possibility for Microsoft to make earnings comparable to the benefits that it derived from abusing its dominant position*" (paragraph 141)
  - ➔ **Remedy should not amount to a pricing abuse**
  - ➔ **But here goes beyond: no benefits comparable to those of sanctioned abuse** (even if pricing is not abusive in itself)

- "[A]*llowing Microsoft to charge remuneration rates reflecting the value resulting from the mere ability to interoperate with Microsoft's operating systems – in other words the strategic value stemming from Microsoft's power* […] *– would in effect allow it to transform the benefits of the abuse into remuneration for the grant of licences*" (paragraph 142)
  - ➔ **Principle: no price reflecting market power**
  - ➔ **Why, since the abuse was not the holding of a dominant position?**

General Court confirms guiding principle already present in 2004 Decision (cont.)

- *"Recognition of such a right would by definition run counter to the objective stated in Recital 1003 to the 2004 decision, which is to allow viable competition with Microsoft's work group server operating system, since Microsoft would be in a position to charge all potential competitors prohibitive rates of remuneration"* (paragraph 142)

  - ➔ **Principle: price reflecting market power is "prohibitive"**

  - ➔ **Why, since is not *per se* exclusionary nor exploitative?**

General Court approves pricing principles in 2008 Decision

- **Confirms the 3 rules in 2008 Decision**:
  - "*responds* […] *to the need to assess whether Microsoft's remuneration rates are* ***reasonable*** *for the purpose of recital 1008(ii) and Article 5(a) of the 2004 decision*" (paragraph 145)

- **Specifically confirms Rule No 2 in 2008 Decision: the technologies must be innovative**
  - "*The* ***intrinsic value*** *of products such as those at issue in fact* ***lies in their innovative character***" (paragraph 143)
  - The Commission may define: (i) novelty as meaning "*not forming part of the state of the art*" and (ii) non-obviousness as meaning "*not obvious to a person skilled in the art*" (paragraphs 147 *et seq*.)

    ➔**Applies IP principles to non-patented information** (is a proxy to assess innovation and therefore non-strategic value)

General Court approves pricing principles in 2008 Decision (cont.)

- **Specifically confirms Rule No 3 in 2008 Decision**
  - "*whilst all strategic value of the technologies in question* […] *must be excluded, a* ***market valuation*** *of comparable technologies* […] *is also required* […]. *Such is the type of approach by which it is possible to assess the value which the interoperability information would have* ***in the absence of any dominant operator***" (paragraph 144)

    ➔ **"Reasonable" price is price without dominant position**

Isn't the remedy broader than necessary to correct the abuse?

- The proper counterfactual: is it (i) the price without the abuse or (ii) the price without the dominant position?
- Since the abuse was a refusal to supply, isn't the proper test that the price should not:
  - amount to constructive refusal to supply
  - be otherwise exclusionary
  - be excessive (*United Brands*)?
- In other words: since dominant positions are not prohibited, why impose the competitive price (i.e., the price without any dominant position)?

Questions

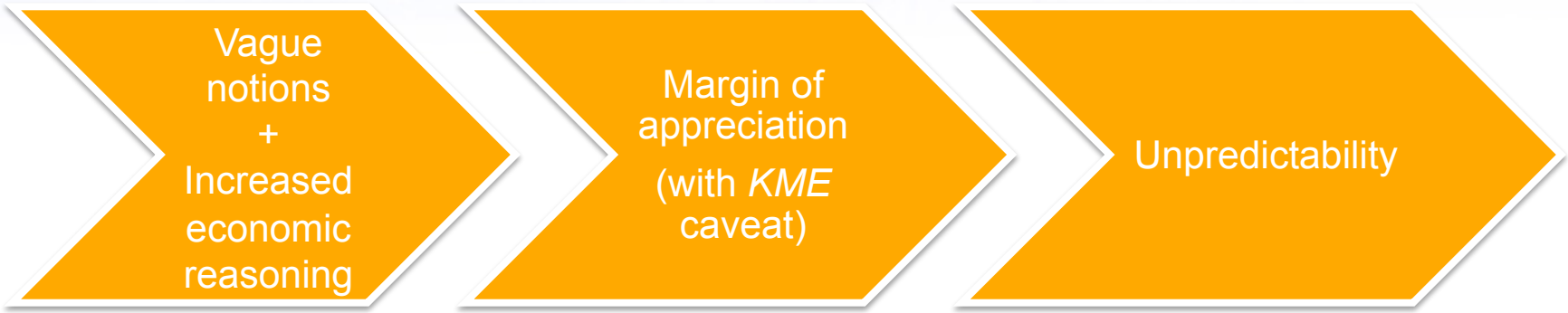
- **May be explained by Microsoft's overwhelming dominance?**
  - ➔ It may have played a role: See Recital 109 of 2008 Decision referring to paragraph 392 of 2004 judgment: due to the **ubiquity** of Windows on client PCs, Microsoft could impose the Windows domain architecture as the '***de facto* standard** for work group computing'
  - ➔ But still goes beyond remedying the abuse?
- **Or is it a broadening of the case law on excessive pricing?**
  - ➔ There is no indication in the judgment that the General Court intended to make such a sweeping finding
- May be explained by another element:
  - ➔ Principles were **negotiated in part** between Microsoft and Commission ➔ lead to compliant prices, but may not be the only ones
  - ➔ But "no-leverage-on-market-power" finding is a basic premise of the 2004 Decision and was approved by the General Court

- In any case, principles are difficult to extrapolate to cases where there is no previous finding of abuse (paragraphs 139-140), in particular where the issue is whether the pricing itself (and not the remedy to an abuse) is abusive

- Example of:
  - FRAND cases (assuming FRAND principles apply): also concern technology that becomes a standard, but does not presuppose previous abuse (if no ambush)
  - Excessive prices: extrapolation likely not possible

Legal certainty and right to impose a fine

- Question: may the Commission impose fines when the provision defining the offense is vague and general?



- What about:
  - principle of legality (Article 49 Charter and Article 7 ECHR)?
  - chilling effect?
  - shooting in the dark?

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The General Court's reasoning:

- Microsoft's argument: "reasonable" is not precise enough
- The General Court:

  "*the use of imprecise legal concepts in making rules, breach of which entails the civil, administrative or even criminal liability of the person who contravenes them, does not mean that it is impossible to impose the remedial measures provided for by law, provided that the individual concerned is in a position, on the basis of the wording of the relevant provision and, if need be, with the help of the interpretation of it given by the courts, to know which acts or omissions will make him liable*" (paragraph 84)

- In this case:
  - It was up to Microsoft to make proposal (and not to Commission to set prices) (paragraph 95)
  - Commission and Microsoft negotiated pricing principles that are sufficient to specify legal course of conduct (paragraphs 85-86)

The Court partially begged the question

- "*the use of imprecise legal concepts within a provision does not prevent liability being established as against a person who contravenes it. As the Commission points out, if it were otherwise, an infringement of Article 101 or 102 TFEU – which are themselves drawn up using imprecise legal concepts, such as distortion of competition or 'abuse' of a dominant position – could not give rise to a fine without the prior adoption of a decision establishing the infringement*."
- Is not convincing: amounts to saying "infringement is punishable because otherwise may not be punished"
- What are the limits?
  - A renewed role for: (i) intent and (ii) likelihood of anticompetitive effects?
  - Assume that duration can only start from issuing of SO (*Visa*)?