



European Commission

# Competition

## CASE T-167/08

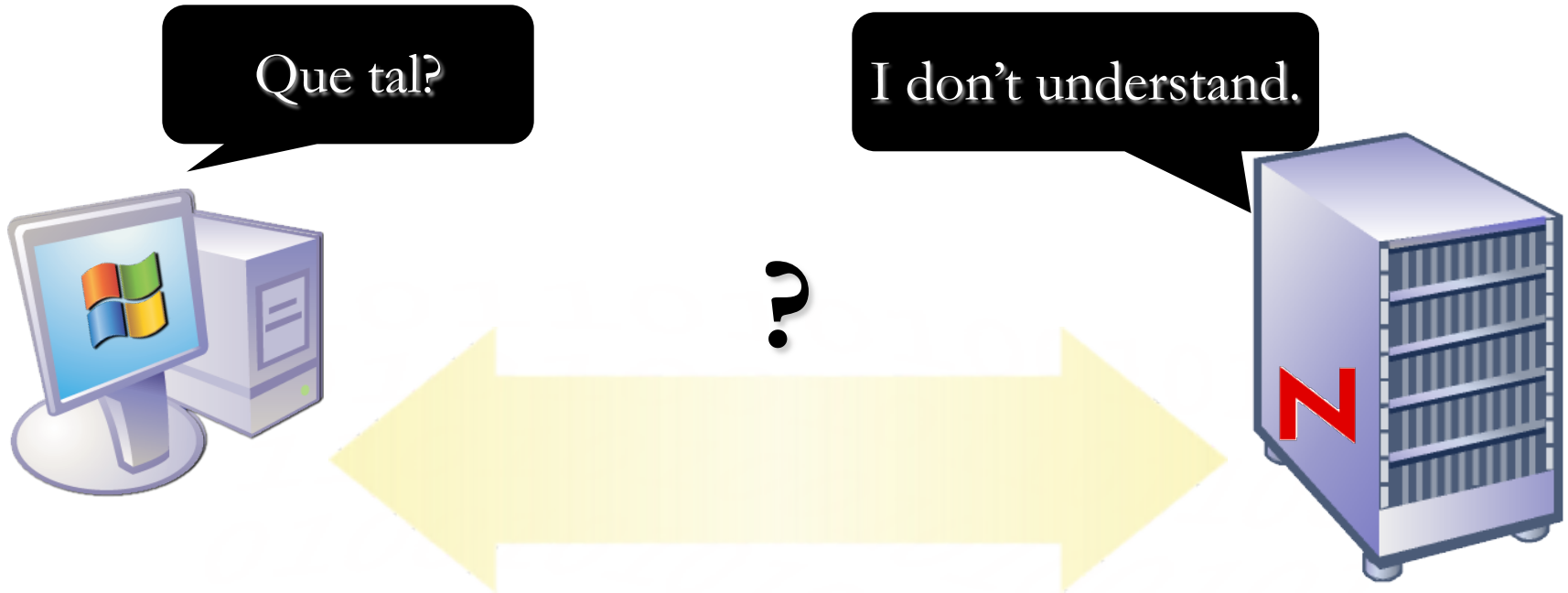
# Microsoft v Commission

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(The views expressed are not necessarily those of the European Commission)



## The 2004 Microsoft decision





## 2007 Microsoft Judgment

- *“As the Windows operating system is thus present on **virtually all client PCs installed** within organisations, non-Windows work group server operating systems cannot continue to be marketed if they are incapable of achieving a high degree of interoperability with Windows.”* (GC, para. 388)
- Microsoft imposed its less performant technology as **de facto** standard. (GC, para. 392).



## 2007 Microsoft Judgment

*“Microsoft itself expressly acknowledges in its written submissions ... [that] its competitors will **not** be in a position to develop products which are ‘clones’ or reproductions of Windows work group server operating systems by having access to the interoperability information at which the contested decision is aimed.” (GC, para. 241)*

*“Microsoft ... did **not** sufficiently establish that if it were required to disclose the interoperability information that would have a **significant negative impact on its incentives to innovate.**” (GC, paras. 697-698)*



## 2004 Microsoft decision

- Article 5 (a): "*Microsoft shall, make complete and accurate Interoperability Information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on **reasonable and non-discriminatory** terms, allow the use of the Interoperability Information by such undertakings for the purpose of developing and distributing work group server operating system.*"



## 2004 Microsoft decision

- *Recital 1003: “Any remuneration charged for access to, or use of, the interoperability information had to allow its users to **compete viably** with Microsoft’s work group server operating system.*
- *Recital 1008 (ii): “ (...) any remuneration **should not reflect the 'strategic value' stemming from Microsoft’s market power** in the client PC operating system market or in the work group server operating system market.”*



## Follow-up compliance cases

- Penalty Payment Decision of 12 July 2006
  - Incomplete and inaccurate Interoperability Information
  - EUR 280.5 million
- Penalty Payment Decision of 27 February 2008
  - Unreasonable Pricing of the Interoperability Information
  - EUR 899 million



## WSPP Pricing Principles

- Agreed with Microsoft in May 2005 to concretize application of the 2004 decision.
- Microsoft has committed to apply WSPP Pricing Principles in WSPP licence agreements.





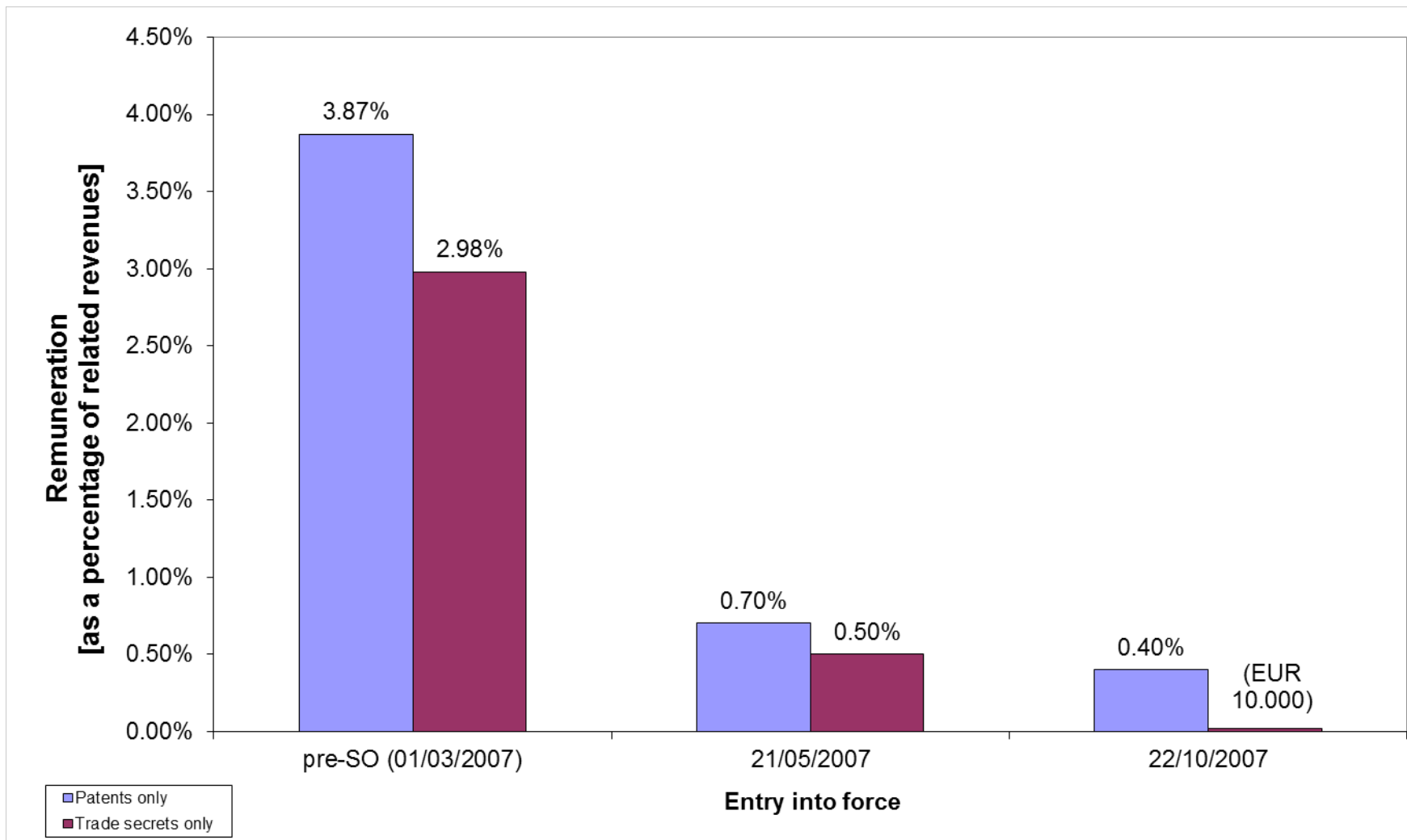
## WSPP Pricing Principles

Three criteria in order to exclude strategic value:

- Protocol technology is Microsoft's own creation.
- Protocol technology is innovative.
- A market valuation of comparable technologies.



# Competition





## February 2008 decision

- 166 out of 173 of the non-patented protocol technologies are not innovative (i.e. not novel or obvious).
- Comparable protocol technology is provided royalty free by Microsoft and its competitors.



## Judgment in T-167/08

### Procedural issues

- Fine and periodic penalty payment serve same purpose: deterrence and prevent repetition or continuation of infringement (GC, para. 94).
- No need to specify rates before imposing penalty payment (GC, para. 91).
- Trustee can be used but like an expert (GC, paras. 170-178).
- SO (and Art 24(2)decision ?) before compliance is achieved (GC para.187).



## Judgment in T-167/08

### Substantive issues

- FRAND is a range, it is not for the Commission to determine rate within the range as long as compatible with Article 102 TFEU (GC, para. 95).
- Intrinsic value (innovative character) versus strategic value (value of interoperability with dominant product) (GC, para. 143).



## FRAND issues

- Horizontal Guidelines, para 289: compare ex-ante to ex post value of standardised technology
  - determine intrinsic value of technology v. strategic value.
- Competition authorities to set the outer boundaries.
  - remuneration must be reasonable in relation to the economic value provided (C-403/08, FAPL, para 109).



## Impact of the compliance cases ?

- 2008 Interoperability Principles:  
*"For its part, Microsoft recognizes the important responsibilities that it bears by virtue of the mission-critical use of its products by customers worldwide on a daily basis. Certain Microsoft [...] have become so central to operational continuity of customers' businesses that interoperability and data portability solutions are more valued than ever."*
- Microsoft posted the Interoperability Information free of charge on its web site.
- 2011: Microsoft contributes source code to Samba, the file server software that enables Linux servers to share files with Windows PCs.



## Conclusion

- Penalty payments useful instrument under Regulation 1/2003 to enforce compliance. Should be included in Art. 7 decisions.
- Limits of FRAND determination under EU competition law.