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Article 102 and High Technology Industries: The impact of the European Microsoft and Intel Case

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ABSTRACT

*High technology industries have frequently come under scrutiny by competition authorities, and the computer software and hardware industries are no exception. In the last few years the European Commission (the **Commission**) has imposed record fines on two of the world's largest high technology companies, the Microsoft Corporation (**Microsoft**) and the Intel Corporation (**Intel**), for abuse of their respective dominant positions under Article 82 of the EC Treaty (now Article 102 of the Treaty on the Functioning of the European Union (**Article 102**)).[2] Two separate cases have been brought against Microsoft, one of which started in 1998 and is still ongoing. The Intel case has also taken almost a decade so far, and has yet to reach its final conclusion.*

This article gives an overview of these cases, all three of which are substantively and procedurally complex. The article concludes with some reflections on the impact of these cases on the development of antitrust law and the consequences for future defendants.

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[2] As a result of the Lisbon Treaty there has been a wholesale renumbering of the Articles of the EC Treaty, including of what were previously known as Articles 81 and 82 – renumbered now to Articles 101 and 102. There has been no substantive change, as the original wording has been retained. The *Microsoft* and *Intel* cases were originally brought under Article 82, but for clarity the new numbering will be used in this article.

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I. MICROSOFT V. COMMISSION

The Commission has brought two major cases against Microsoft for infringement of Article 102, the first concerning work group servers and Windows Media Player (**WMP**) – the Sun Microsystems case[3] - and the second relating to Internet Explorer (IE) and file formats – the Opera case.[4]

A. Sun Microsystems – the Work group server and WMP case

(i) Background

Microsoft is active in the supply of a range of software products including and in particular, operating systems. An operating system is a software product that controls the basic functions of a computer and allows the user to run a variety of applications. Microsoft supplies operating systems for client PCs (i.e. individual computers, which may or may not be connected to a network), as well as for work group servers (i.e. operating systems for small- to medium-sized networks of computers that allow delivery of basic network services – sharing of files stored on servers, sharing printers, and administration of network access). In order for a work group server to function, its operating system must be compatible with the operating system of the client PCs connected to the network, as well as with the operating systems of any other networks with which the work group server is integrated.

On 10 December 1998 Sun Microsystems Inc. lodged a complaint against

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3 Case COMP/ 37.792.

4 Case COMP/39.9530.

Microsoft with the Commission, alleging that Microsoft was acting in breach of Article 102. Sun Microsystems was also active in the supply of work group server operating systems. Sun Microsystems complained that Microsoft was refusing to disclose to it the technology necessary to allow interoperability of Sun Microsystems' work group server operating system with the Windows client PC operating system, supplied by Microsoft. Sun Microsystems claimed that without this interoperability information it would be unable to compete on the market for work group server operating systems.

In addition, in February 2000 the Commission launched an investigation into Microsoft's WMP product.[5] WMP is one of several software products capable of reading sound and image content in digital format "streamed" over the internet, i.e. it can decode the corresponding data and translate them into instructions for hardware (for example, loudspeakers or a screen). The Commission's concerns centred on the integration by Microsoft of WMP into its Windows operating system.

The Commission sent Microsoft three Statements of Objections (**SOs**) in which it set out its preliminary view of the case. The First SO, sent on 2 August 2000, raised concerns in relation to interoperability between the Windows client PC operating system and third party work group server operating systems ("client-to-server interoperability").[6] The Second SO, sent on 29 August 2001, expanded the objections of the First SO to include issues of interoperability between third party work group servers and Microsoft's work group servers ("server-to-server interoperability").[7] The Commission also addressed the concerns relating to WMP. The Third SO, issued on 6 August 2003, further supplemented the first two.[8]

More than five years after the initial complaint had been lodged, the Commission adopted a decision on 24 March 2004 (the **Infringement**

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5 IP/00/141, Commission examines the impact of Windows 2000 on competition.

6 IP/00/906, Commission opens proceedings against Microsoft's alleged discriminatory licensing and refusal to supply software information.

7 IP/01/1232, Commission initiates additional proceedings against Microsoft.

8 IP/03/1150, Commission gives Microsoft last opportunity to comment before concluding its antitrust probe.

9 Commission Decision 24 March 2004 in Case COMP/C-3/37.792.

Decision) finding that Microsoft had infringed Article 102 EC.[9]

(ii) The Infringement Decision

The Commission found that there were three distinct product markets in issue:

Market 1. Client PC operating systems
Market 2. Work group server operating systems
Market 3. Streaming media players

In relation to the client PC operating system market (Market 1) the Commission found that, at least since 1996, Microsoft had held a dominant position with a market share of over 90%. This dominant position had been protected by significant barriers to entry attributable to indirect network effects. These indirect network effects were caused by two factors: (i) end customers appreciate platforms on which they can use a large number of applications, and (ii) software developers design applications for the PC operating systems that are most popular with customers.

The Commission identified two ways in which Microsoft was leveraging its dominance in Market 1, with the conduct having effects in Markets 2 and 3 respectively:

Refusal to supply – Microsoft was found to have abused its dominant position in Market 1 by refusing to supply Sun Microsystems and other suppliers of server operating systems with the interoperability information needed by these firms in order to compete effectively against Microsoft's work group server operating systems in Market 2. The interoperability information was so vital that Microsoft's refusal risked eliminating competition in Market 2. The Commission found Microsoft to have both short run and long run incentives to foreclose rivals from the work group server market, and this contention was supported by documentary evidence in the form of internal communications within Microsoft. The abusive conduct was found to have taken place from October 1998 to the date of the Infringement Decision and was part of a general pattern of conduct that involved a disruption to previous levels of supply of information with a negative effect on technical development. The Commission rejected

Microsoft's arguments that there was an objective justification for its refusal.

Tying – Microsoft was found to have abused its dominant position in Market 1 by tying WMP with its Windows client PC operating system, such that no version of the Windows client PC operating system was available without WMP. The Commission found that since this mode of distribution to PC users was only available to Microsoft, and was by far the most effective means of distribution, it would allow Microsoft to weaken competition in Market 3. Microsoft's conduct satisfied the four conditions for tying, for the purposes of Article 102 EC:

(i) Microsoft has dominance in the market for the "tying good" (i.e. client PC operating systems),

(ii) The tying good and "tied good" (i.e. streaming media players) are separate products,

(iii) No untied supply is available (it was not possible to get a Windows client PC operating system without WMP), and

(iv) The tying forecloses competition in the market for streaming media players.

The abusive conduct was found to have taken place from May 1999 until the date of the Infringement Decision.

(iii) Remedies

Microsoft was fined almost €500 million (US$600 million) and ordered to remedy the abusive conduct. To address its refusal to supply abuse, Microsoft would be required to disclose to its competitors specifications of protocols used by Windows work group servers on reasonable terms by 27 July 2004. The Infringement Decision also provided for the appointment of a monitoring trustee, nominated by Microsoft, to provide impartial expert advice to the Commission on compliance issues. The trustee was empowered to access Microsoft's documents, premises, employees and source code and to monitor implementation of the remedies. Microsoft was made liable for the costs of the trustee.

To address the tying abuse Microsoft was ordered to offer a version of its

Windows operating system that did not include the WMP by 28 June 2004, and to refrain from using technological, commercial or contractual means that would be equivalent to tying in the future.

(iv) Appeals and non-compliance

Following the initial Infringement Decision in March 2004, Microsoft lodged an appeal (the **Main Appeal**) with the Court of First Instance (the **CFI**) on 7 June 2004.[10] Later that month Microsoft announced that it had also filed for interim measures (the **Interim Request**), requesting that the CFI suspend the remedies ordered by the Commission until the outcome of the Main Appeal, so as to delay the disclosure of information and the release of an unbundled version of Windows until the CFI had ruled on the Infringement Decision.[11]

The Interim Request was dismissed on 22 December 2004.[12] The following year, in November 2005, the Commission took a decision under Article 24(1) of Regulation 1/2003 finding that Microsoft had not complied with the March 2004 Infringement Decision.[13] The Commission issued an SO relating to this alleged continuing non-compliance and, after receiving Microsoft's responses, imposed a penalty of €280.5 million (US$350 million) on Microsoft on 12 July 2006 (the **First Compliance Decision**).[14] On the same date, the Commission decided that, should Microsoft continue to fail to comply, the maximum amount of the penalty would be increased from €2 million per day to €3 million per day with effect from 31 July 2006.

The Main Appeal was not heard until April 2006 when a five-day hearing took place before the CFI. On 17 September 2007, almost a year and a half later, the CFI handed down its judgment upholding the Commission's

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10 OJ C 179 of 10.07.2004 at 18.

11 Statement from Microsoft Corporation on Filing of Request for Suspension of European Commission Remedies http://www.microsoft.com/presspass/press/2004/jun04/06-27eususpensionstatement.mspx.

12 Order dated 22 December 2004 in Case T-201/04 R.

13 Commission Decision dated 10 November 2005 in Case COMP/C-3/37.792.

14 Commission Decision dated 12 July 2006 in Case COMP/C-3/37.792.

15 Judgment dated 17 September 2007 in Case T-201/04.

Infringement Decision.[15] The only modification related to the monitoring trustee. The CFI ruled that the Commission did not have the power to oblige Microsoft to appoint and pay for a trustee empowered to retrieve various prescribed information from Microsoft.

In relation to the refusal to supply interoperability information, the CFI confirmed that a refusal by a dominant firm to license intellectual property does not itself constitute an "abuse" under Article 102. Such conduct may be an abuse if the product or service is indispensable to competing in a different market, but even then, only if the refusal would exclude competition on the neighbouring market, and if the refusal prevents the appearance of new products for which there is potential consumer demand. The CFI ruled that these exceptional circumstances were present in the case of Microsoft, and that there was no objective justification for its conduct.

In relation to the WMP tying abuse, the CFI used a weaker legal test than had been previously applied, stating that it was only necessary to examine whether the tying by its nature had a foreclosure effect, and not necessary to look at the actual effects the bundling had already had on the market. The CFI therefore significantly widened the scope of the tying abuse.

The following month, Microsoft made commitments to comply with the Infringement Decision and withdrew the remaining appeals it had lodged with the CFI, firstly against the First Compliance Decision (the **First Compliance Appeal**), and secondly against aspects of the remedies imposed by the Infringement Decision.[16]

On 27 February 2008 the Commission took a further decision against Microsoft on compliance (the **Second Compliance Decision**).[17] The Commission fined Microsoft €899 million (US$1.1 billion) for non-compliance. The Commission found that, contrary to the Infringement Decision, Microsoft had not provided other work group server suppliers with complete and accurate technical information on reasonable terms to allow

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16 Order dated 27 November 2007 in Case T-313/05 and Order dated 6 December 2007 in Case T-271/06.

17 Commission Decision dated 27 February 2008 in Case COMP/C-3/37.792.

them to compete. In particular, Microsoft was attempting to charge excessive royalties for protocols which it claimed were innovative but which the Commission found were not. The fine related to non-compliance for the period between June 2006 and October 2007, the earlier period having already been covered by the First Compliance Decision.

On 9 May 2008 Microsoft lodged an appeal against the Second Compliance Decision (the **Second Compliance Appeal**).[18] The grounds for appeal were as follows:

- The Commission imposed the penalty payments in order to force Microsoft to apply "reasonable" price terms without first specifying what terms the Commission would consider to be reasonable. Microsoft was therefore unable to avoid the penalty.
- The Commission made a manifest error of assessment and breached its duty to state reasons.
- The Commission did not give weight to the fact that (i) Microsoft's published rates were lower than those which a third party determined were reasonable, and (ii) no prospective licensee had failed to reach an agreement.
- The Commission based its assessment on reports of the monitoring trustee which in turn were based on documents obtained using investigatory powers which the CFI had held to be unlawful.
- The €899 million fine was excessive and disproportionate.

In November 2008 the CFI granted leave to intervene to Computing Technology Industry Association Inc (**CompTIA**) and the Association for Competitive Technology, Inc (**ACT**) on behalf of Microsoft; and to the Software and Information Industry Association (**SIAA**), Free Software Foundation Europe (**FSFE**), Samba Team, Red Hat, Inc. and the European

18 OJ C 171 of 05.07.2008 at 41.

19 Order dated 20 November 2008 in Case T-167/08.

Committee for Interoperable Systems (**ECIS**) – which groups together companies including Adobe, IBM, Nokia and Oracle – on behalf of the Commission.[19] As of May 2010 no further progress had been made on the Second Compliance Appeal. We will have to wait and see how this case pans out before we fully understand the CFI's position in relation to the Commission's power to impose remedies.

B. Opera – the File formats and IE case

(i) Background

Like the Sun Microsystems case, the Opera case also consists of two strands – an alleged refusal to supply abuse and an alleged bundling abuse.

Opera, a Norwegian internet browser company, filed a complaint with the Commission on 13 December 2007 in relation to web coding standards and the bundling of Internet Explorer (IE) into the Windows client PC operating system. The Commission sent Microsoft an SO on 15 January 2009.[20] The SO followed the precedent set in the previous Infringement Decision and the CFI judgment.

In April 2009 the Commission granted "interested third party" status to ECIS.[21] ECIS alleged that Microsoft was refusing to disclose sufficient interoperability information across a range of products, including information relating to its Office suite, a number of its server products, and also in relation to the so-called .NET Framework. In addition ECIS claimed that Microsoft's new file format (Open Office XML), as used in Microsoft Office, was not sufficiently interoperable with competitors' products.

Google, Mozilla, FSFE and PIN-SME joined ECIS in intervening in the case on behalf of the Commission. The Association for Competitive Technology (**ACT**) intervened on behalf of Microsoft.

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20 MEMO/09/15, Commission confirms sending a Statement of Objections to Microsoft on the tying of Internet Explorer to Windows.

21 Support Grows for EU Browser Case against Microsoft, www.ecis.eu/documents/ECISanIntervenorinEUMicrosoftbrowsercaseApril2009.pdf.

(ii) Commitments

The initial prospects did not look good for Microsoft. Commentators speculated that the fine that might be imposed by the Commission could well exceed the record fine levied against Intel in 2009. The Commission stated that the start date of the infringement, if one was found, would be 1996 and the end date would be beyond the 2004 Infringement Decision. This would have led to a large multiplier, which could also have meant that the fine would have hit the statutory ceiling of 10% of global revenues, i.e. over $5 billion.

A closed-door hearing was initially proposed for 3 to 5 June 2009 but Microsoft objected to the dates because an international conference of antitrust officials was to be held over the same dates and the scheduling clash would mean that key decision-makers might be absent from the hearing. The hearing officer deemed Microsoft to have withdrawn its request for an oral hearing and the hearing was not rescheduled.

The remedies in the first Microsoft case were widely criticised as ineffective. In particular, sales of the version of the Windows operating system supplied without WMP were very low. The Commission's concerns in relation to IE mirror those in the WMP case – i.e. that Microsoft has unique access to a distribution system making IE available to 90% of PC users, and that this also encourages software developers to design their products so as to be Windows and IE compatible. Therefore when, in June 2009, Microsoft announced that it would be launching a new Windows operating system without IE, the Commission expressed concern that this proposal would actually offer consumers less, rather than more, choice and would therefore not be an effective remedy.[22]

In July 2009 it was reported that Microsoft had proposed substantial

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22 MEMO/09/272, Commission Statement on Microsoft Internet Explorer Announcement.

23 MEMO/09/352, Commission welcomes new Microsoft proposals on Microsoft Internet Explorer and Interoperability, http://ec.europa.eu/competition/antitrust/cases/decisions/39530/commitments.pdf.

24 2009/C-242/04, Notice published pursuant to Article 27(4) of Council Regulation (EC) No. 1/2003 in Case COMP/C-3/39.530.

remedies to deal with these concerns.[23] Amongst the five-year commitments market tested by the Commission in October 2009, Microsoft offered to supply a version of Windows which would enable original equipment manufacturers (**OEMs**) or consumers to suppress IE.[24] The deadline for comments on Microsoft's commitments was 9 November 2009. On 16 December 2009 the Commission announced that it had adopted a Commitment Decision under Article 9 Regulation 1/2003 accepting Microsoft's commitments and making them legally binding.[25]

Under the commitments, Microsoft has agreed to make available for five years in the European Economic Area a "Choice Screen" enabling users of Windows XP, Windows Vista and Windows 7 to choose which web browsers they want to install in addition to, or instead of, IE. This facility will be available through the Windows automatic update mechanism. The commitments also provide that OEMs will be able to install competing web browsers, set those to default and turn off IE.

If Microsoft were to break its legally binding commitments it would be subject to a fine imposed by the Commission of up to a maximum of 10% of Microsoft's annual turnover. The Commission would not have to prove breach of EU competition rules.[26]

The commitments are to be reviewed by the Commission in two years' time. This review will confirm whether the commitments made by Microsoft have been sufficient to allay the Commission's concerns, and will therefore be followed very closely by other players in high technology industries.

II. INTEL V. COMMISSION[27]

A. Background

In October 2000 Advanced Micro Devices, Inc. (**AMD**) filed a complaint

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25 Commission Decision dated 16 December 2009 in Case COMP/C-3/39.530.

26 Mlex, *EC Statement: Antitrust- Commission Accepts Microsoft Commitments to give users browser choice*, 16 December 2009.

27 Case COMP/37.990.

with the Commission against Intel for offering allegedly abusive rebates and imposing exclusivity provisions in relation to x86 Central Processing Units (**CPUs**) – the computer chips that make up the main hardware component of a computer. Five years later, the Commission and national competition authorities raided Intel's offices across Europe. In 2006 AMD and the Federation of German Consumer Organisations (*Verbraucherzentrale Bundesverband*, VZBV) filed complaints with the German competition authority (*Bundeskartellamt*), which were subsequently passed to the Commission. The Commission sent Intel an SO in July 2007,[28] and raided Intel's premises again in February 2008. After an oral hearing in March 2008, a second SO was sent to Intel in July 2008.[29]

B. The Decision

In May 2009 the Commission imposed a record fine on Intel of €1.06 billion (US$1.3 billion),[30] or 4.15% of Intel's worldwide turnover in 2008, for abuse of its dominant position; the largest fine ever levied on one firm. The abuse was found to have taken place between 2002 and 2007, during which Intel held at least 70% of the market for x86 CPUs.[31]

Applying its new guidelines on exclusionary abuses,[32] the Commission found that Intel had foreclosed the market by:

1. Offering illegal royalty rebates

Intel offered significant rebates, which were wholly or partially hidden, to OEMs that bought all or substantially all of their x86 CPU requirements from Intel. Intel also made direct payments to a major retailer on the condition that it stocked only computers with Intel x86 CPUs. It is important to note that the Commission did not hold that rebates are illegal

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28 MEMO/07/314, Commission confirms sending Statement of Objections to Intel.

29 MEMO/08/517, Commission confirms supplementary Statement of Objections sent to Intel.

30 MEMO/09/235 Commission imposes fine of 1.06 billion Euros on Intel for abuse of dominant position; orders Intel to cease illegal practices - questions and answers.

31 Commission Decision dated 13 May 2009 in Case COMP/C-3/37.990.

32 Guidance on the Commission's enforcement priorities in applying Article 102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (C(2009) 864).

in themselves; the Commission accepts that rebates are an inherent part of doing business and can be beneficial to the consumer. The Commission did however find that the conditions attached to the rebates/payments offered by Intel excluded AMD from the market, impeded innovation and prevented customers (and ultimately consumers) from choosing rival products.

2. Payments to manufacturers

Intel also made payments to OEMs which were unrelated to the purchase of Intel products, to delay or cancel the launch of AMD-based products and/or to put restrictions on the distribution of specific AMD-based products. The Commission concluded that these payments had the effect of preventing competing products, for which there was a consumer demand, from being introduced to the market.

Intel lodged its appeal against the fine in July 2009, claiming that the Commission committed several legal errors.[33] Intel claimed that the Commission misinterpreted and ignored certain evidence when constructing its case, and failed to meet the required standard of proof. In particular, Intel believes that the Commission failed to conduct any analysis of the foreclosure effects of the rebates in Europe, and also incorrectly applied the "as efficient competitor" test which formed part of its analysis.

In November 2009 the EU Ombudsman, a watchdog that monitors EU institutions, criticised the Commission's handling of the case, in particular the failure of the Commission in taking a proper note of the meeting with the computer-maker Dell, which formed part of its investigation.[34] The Commission has however stood-by its interview procedure in the face of the Ombudsman's criticism, claiming that informal interviews, such as those that occurred with Dell, were valuable as part of the investigative procedure. It is worth noting, however, the Ombudsman did not find that the Commission had infringed Intel's rights of defence.

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33 OJ C 301 of 22.11.2008 at 60.

34 Decision of the European Ombudsman closing its enquiry into complaint 1935/2008/FOR against the European Commission, http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark#hl0.

III. CONCLUSIONS

Although the cases discussed above are still in progress, it is not too early to reflect on their impact, not least because more than a decade has passed since the first Microsoft case was launched. This in itself demonstrates a key problem with antitrust enforcement in high technology industries – by the time the cases have reached their conclusion the marketplace has moved quickly beyond the problems dealt with in the case, and some of the competitors involved may have fallen by the wayside in the meantime.

Further, the fate of Microsoft, subject to a second investigation just as the first was finally drawing to a close, should be noted by other companies as an indication that allowing the relationship with the Commission to sour may lead to a string of antitrust cases. The support the Commission had from the CFI in the Microsoft case will also be useful to the Commission as a bargaining tool against any future infringers contemplating bringing an appeal against a Commission decision.

The above cases clearly demonstrated a movement towards large fines for antitrust breaches – Microsoft's fine of almost €500 million (US$600 million) under the Infringement Decision was the highest fine ever to be imposed on an individual company as of 2004, a dubious title now held by Intel. The revised fining guidelines[35] give the Commission the power to impose very large fines and it has not shied away from using such power. The Commission has made clear that it wants to send a strong message that it takes abuse of dominance seriously and this area of antitrust law is a key enforcement priority. The Commission is trying to reinforce its position as a progressive and activist enforcer, something that has not changed with the rotation of power within the Commission towards the end of 2009.

There has been much criticism of the mounting levels of fines imposed by the Commission, in Article 102 cases and also in cartel cases. Some

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35 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).

36 *See e.g.*, D. Slater et al., , *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, GLOBAL COMPETITION LAW CENTRE WORKING PAPERS SERIES, GCLC WORKING PAPER 04/08, http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf.

perspective is of course needed – the €500 million (US$600 million) fine imposed on Microsoft in the Sun Microsystems case can be compared to the €50 billion of cash on Microsoft's balance sheet at the time of the decision. However, the growth in the fine amounts imposed by the Commission over the last few years has been almost exponential. Some have argued that such penalties are contrary to the principles of due process.[36] The argument goes that the fines have been so high that they can now be deemed criminal in nature. If that is the case then the concern is that the administrative procedures that make up an antitrust investigation would not meet the standards of a criminal investigation. Further, the dual role of the Commission as investigator and adjudicator becomes even more perverse, and may even violate Article 6(1) of the European Convention on Human Rights (the **ECHR**).[37]

There are naturally two sides to this story. The other side concerns adequate punishment of offenders, successful deterrence through administrative penalties, and some concept of proportionality that takes into account the level of damage caused by competition law infringements.[38] From this point of view the Commission's latest spate of penalties have not been "too high", rather the fines levied in the preceding decades have been "too low".[39] The legal basis of the fines has not changed and the fines are no more criminal than they ever were. It is still relatively rare for the Commission's fine to reach the 10% turnover cap, the express purpose of which is to limit the penalties to a proportionate amount.[40] Finally, the Community courts

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37 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, UKTS 71 (1953).

38 Wouter P.J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights*, 33(1) WORLD COMPETITION (2010).

39 *See* Philip Lowe, *Cartels, Fines and Due Process*, GCP ONLINE, Release Two (2002).

40 *See e.g.* Joined Cases C189/02 *Dansk Rørindustri A/S and others v Commission*, [2005] ECR I5425, ¶ 281: "*That [10%] limit is therefore one which is uniformly applicable to all undertakings and arrived at according to the size of each of them and seeks to ensure that the fines are not excessive or disproportionate.*"

41 *See e.g.* the recent judgment in Case T54/03 *Lafarge v Commission*, ¶ 35 (not yet published); *also see* Joined Cases 209/78 et al. *Heintz van Landewyck and others v Commission*, [1980] ECR 3125, ¶ 81.

have repeatedly ruled that the Commission is not a "tribunal" under Community law and therefore its dual role does not violate the ECHR.[41]

Putting aside the remarkable fines, the Intel and Microsoft cases also raised issues of the nature of the Commission's investigation. The Intel case in particular gives an example of the extensive powers of investigation that the Commission is prepared to use in abuse of dominance cases. The Commission highlighted that Intel went to great lengths to conceal the existence of the anti-competitive conditions attached to its rebates and payments, ensuring that they were not evident on the face of the agreements. However, the Commission relied on emails and other contemporaneous evidence, gathered from the dawn raids of Intel's offices and through responses to information requests, to establish the illegal conditions.

Microsoft argued that the proposed disclosure remedies in the work group server and WMP case would limit its incentives to innovate. It may turn out however that the increase in interoperability actually enhances Microsoft's incentives to innovate, as it tries to ensure that its work group servers are better than the competition. If this increase in innovation manifests itself then it may have an impact on remedies in future high technology cases.

In other respects the Microsoft case does have some unique features, i.e. Microsoft's "super-dominance", which may prove a distinguishing factor in terms of the cases' substantive precedential value. However, the CFI's judgment in the work group server and WMP case may prove to have significantly lowered the threshold for an obligation to license IP rights as well as having widened the scope of abusive tying. The CFI was at pains to point out the "special responsibility" to the market which dominant undertakings have. Whatever the distinguishing features, the Intel and Microsoft cases will clearly be used as a guide and a benchmark for Article 102 cases in high technology industries in the future.