Article 102 and innovation: the journey since Microsoft

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In a climate of increasing global competition, Europe needs to innovate in order to remain prosperous. At the EU level, this objective is reflected in a wide range of policy initiatives, such as those grouped under the banner of the European Commission’s flagship “Europe 2020” programme, billed as the European Union’s “growth strategy for the coming decade”.¹ This has innovation as one of five key objectives, to be achieved by measures such as the “Digital Agenda” and the “Innovation Union”. Amongst the areas affected by this programme is, unsurprisingly, that of intellectual property rights, with proposals for greater EU involvement such as through the creation of a European patent court. Effective protection of intellectual property is accepted to be vital for innovation; providing companies with an incentive to engage in research and development activities.²

It is not, however, only intellectual property laws which encourage innovation. Competition law also has a significant role to play, since companies that compete strongly are probably more inclined to innovate to gain or preserve a lead over their rivals rather than to rely on abusive business practices to harm competitors or deter innovative potential new entrants. At times since the financial crisis in 2008, there have been calls for a more hands-off approach to applying competition rules. In responding to such calls, the Commission has emphasised the positive effect of vigorous competition enforcement on innovation³.

Even with this shared objective, though, the relationship between intellectual property rights and competition policy is not straightforward. There is an obvious potential for conflict between a system that incentivises innovation by conferring monopoly rights, and rules which aim to ensure effective competition between undertakings; in particular, in the EU, Article 102 of the Treaty on the Functioning of the European Union (“TFEU”),⁴ which controls the exercise of market power. There is also no consensus as to which method of stimulating technological development should be preferred where they come into conflict. For some theorists, it is monopoly profits that best incentivise (and fund) innovation, while for others it is companies competing to gain market share by inventing new products that are most likely to drive innovation.⁵

This tension was examined prominently in the Commission’s investigation into Microsoft, perhaps the most high-profile competition case of the past decade. In its March 2004 decision, the Commission rejected Microsoft’s argument that its intellectual property should be protected to preserve its incentives to innovate, and instead ordered the company to disclose information on interoperability so that competing firms could develop new products compatible with its dominant Windows operating system. The decision, together with the judgment of the General Court three years later which upheld its substantive aspects, thus accepted that intervention to ensure effective competition could be a necessary means of encouraging innovation even where it involved limiting the protection of intellectual property rights.

Taking the Microsoft case as its centre point, this paper aims to offer an overview of some of the leading cases in which the Commission and the Court of Justice of the European Union have developed their approach to balancing intellectual property protection and competition policy. First section of the paper traces how the Commission gradually became more willing to apply Article 102 to alleged abuses of dominance based on intellectual property rights, in particular by requiring the disclosure of information protected by such rights where it was required for competitors to market innovative new products. The second section discusses in greater detail the balance struck by the Commission and the General Court in

¹ http://ec.europa.eu/europe2020/index_en.htm
² This is currently seen as the principal justification for intellectual property rights, although moral arguments also exist. See e.g. K. Coates, Competition Law and Regulation of Technology Markets (OUP, 2011), 92-94.
³ For example, Commissioner for competition policy Joaquin Almunia has observed that “competition drives firms to look for a competitive edge and towards innovation. Therefore, [...] what we need today [...] is more, well-regulated competition in the internal market.” (Priming Europe For Growth, speech to the European Competition Forum, 2 February 2012).
⁴ For clarity, the modern numbering is used for the competition articles of the European treaties throughout, even when referring to events prior to its introduction by the Treaty of Lisbon. Likewise, the General Court’s current name is used throughout.
the Microsoft case, and the reasoning that supported this. The final section reviews some significant cases since then, including in relation to interoperability and standards.

I. The Path to Microsoft

The key context in which the interaction between intellectual property rights and Article 102 has been examined by the Commission and Court of Justice has essentially been that of a refusal to supply; rights-holders refusing to license their intellectual property to competitors and those competitors responding with allegations that this refusal constituted an abuse of dominance. Although the general principle that a dominant firm's refusal to supply could constitute an abuse was well established by the mid-1970s, the application of this principle specifically to refusals to license intellectual property came later; subject to conditions which were not wholly clear and which continued to develop up to the Microsoft case.

A. Early cases

Since the refusal to license case law developed out of the more general principles governing refusals to supply, the seminal 1974 Commercial Solvents judgment was the critical early milestone on the path to Microsoft. This established that a dominant undertaking's refusal to supply a competitor on a downstream market could constitute an abuse prohibited by Article 102 where the refusal threatened to eliminate competition on that downstream market, at least where there was a pre-existing supply relationship between the undertakings concerned.6

This ruling, though important, was not immediately applied in the field of intellectual, rather than tangible, property. In particular, the Commission appears to have been reluctant to engage with issues arising out of intellectual property disputes. This can be seen in its response to controversies around the apparent over-reliance on English copyright laws by car manufacturers during the 1970s and early 1980s to restrict the ability of aftermarket suppliers to compete with them in the market for spare parts. At that time, drawings of a technical nature (such as designs of spare parts) attracted copyright protection for the same period as artistic works (life of the author plus 50 years). This “functional” copyright could be infringed by the production of spare parts based not on the technical drawings themselves but on the actual products marketed by the manufacturer, since this was considered indirect copying of the drawings. Manufacturers could therefore exact royalties from, or even refuse to grant licences to, aftermarket competitors. This use of copyright was considered as part of an inquiry by the UK's Monopolies and Mergers Commission into the car parts industry which reported in 1982,7 and was also the subject of protracted national litigation.8

There were also attempts to involve the Commission in these disputes. It received at least two complaints relation to these issues: from Wyatt Interpart in October 19799 and subsequently from Armstrong Patents Co. The former appears not to have led to any action on the part of the Commission, and although the latter is understood to have resulted in the Commission threatening an action against the UK, this was apparently due to concerns on the part of the Internal Market (rather than Competition) Directorate-General relating to the compatibility of the scope of protection afforded with the internal market. The threatened court action was dropped after a ruling by the UK House of Lords created a limited exception to functional copyright covering car (and other) spare parts.10

This tends to suggest a lack of enthusiasm at that

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7 Car Parts: a report on the matter of the existence or the possible existence of a complex monopoly situation in relation to the wholesale supply of motor car parts in the United Kingdom, HC 318, 1981-82.
8 See in particular British Leyland Motor Corporation Ltd & Anor. v Armstrong Patents Co. Ltd & Anor. [1986] A.C. 577, which created an exception to functional copyright protection covering spare parts, either on the basis of the English-law principle of non-derogation from grant, or on the grounds of public policy; and British Leyland Motor Corporation Limited v T.I. Silencers Limited [1981] 2 C.M.L.R. 75, allowing an appeal against a successful application to strike out elements of a defence to an action for infringement of functional copyright based on the free movement and competition provisions of what was then the Treaty of Rome.
9 Reported in The Economist, 8 December 1979, Industrial property rights; Can it be unlawful to go to law? The then-intended complaint was also discussed in an application to stay national infringement proceedings until its determination by the Commission – see British Leyland Motor Corporation Limited & Ors. v Wyatt Interpart Company Limited [1979] 3 C.M.L.R. 79.
10 Designer Protection, Financial Times, 12 November 1987, reporting the Commission's decision to suspend its action following the judgment of the House of Lords (as to which see footnote 9 above).
time for intervening in disputes around copyright licensing, even where, as the Monopolies and Mergers Commission found, there was a real risk of competitive harm; the Commission preferring to leave national authorities to reform the laws in question.

1. **The IBM investigation**

The Commission did, however, take an important early step in this direction with an investigation into IBM. This concerned allegations of bundling and discrimination, but significantly also examined claims that the company had unlawfully refused to disclose information to its competitors, some of which IBM claimed was protected by intellectual property rights.

Briefly, the allegations set out in a Statement of Objections sent to IBM in December 1980 were that IBM held a dominant position in the supply of the operating system and CPU for its System/370 range of computers; and that it had abused this position by bundling memory and certain basic software with its CPUs, by discriminating against software customers using non-IBM CPUs in refusing to provide certain software installation services and, most significantly for present purposes, by refusing to provide other manufacturers in a timely fashion with "interface information", i.e. the technical information needed for their competing products to be used with IBM's System/370.

IBM denied the allegations, but had also earlier assured the Commission that it was making the software installation services concerned available to all software customers and that it was unbundling all software products. This appears to have resulted in a narrowing of the investigation's focus, as, following an oral hearing in February 1982, the Commission sent IBM a statement of the remedies it proposed should be implemented in the event that it made a finding of abuse limited to memory bundling and refusal to supply interface information.

There followed more than two years of informal negotiations between the Commission and IBM, running in parallel with formal proceedings. In late 1983, the scope of the discussions regarding interface information expanded to reflect concerns raised by European computer manufacturers that IBM's conduct was having an adverse effect on the European market for data communication products.¹¹

In early 1984, having rejected a number of remedies proposed by IBM, the Commission informed the company that unless it offered satisfactory undertakings by the end of July, a formal decision finding an infringement would follow. On 1 August, following further negotiations, IBM and the Commission agreed upon the terms of an undertaking.

The terms of this undertaking included a commitment by IBM to disclose sufficient interface information to competitors in the EEC (as it then was) to enable them to attach their own hardware and software products to System/370. This disclosure was to take place in respect of hardware products within four months of their announcement (or their general availability if later) and for software products, as soon as the interface was reasonably stable and no later than general availability. IBM would be permitted to level reasonable and non-discriminatory charges to cover the cost of reproducing and disseminating the information, and, where the information to be disclosed was protected by any legal right (presumably, and also a reasonable and non-discriminatory royalty rate for the supply of proprietary information that was protected by intellectual property rights.

The undertaking also addressed the Commission's objections regarding memory bundling: IBM agreed to sell System/370 CPUs in the EEC with at most the minimum amount of memory necessary to allow for testing.

Because the Commission's investigation ended without the publication of a reasoned decision, this case formally set no legal precedent. There are, however, parallels with the subsequent Microsoft decision: in each case an (allegedly, in the case of IBM) dominant firm was forced to disclose

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¹¹ See the Commission's 1984 Report on Competition Policy at 79.
proprietary information protected at least in part by intellectual property rights to competitors following the application of Article 102. Officials have also suggested that the Commission considered the impact of the case on IBM's incentives to innovate, and describe conclusions that appear similar to those in the Microsoft case:

[The undertaking] not only stimulated competition in that it removed a major obstacle for IBM's competitors to offer innovative System/370 products at an earlier point in time than they could have done in the absence of the [undertaking], if at all, but also because of this reinforced competition it put pressure on IBM to innovate and improve upon its own products.\(^{12}\)

In Microsoft, the Commission and General Court likewise took the view that disclosure of selected information would not reduce the dominant undertaking's incentives to innovate but rather enhance them by increasing the competitive pressures facing it.\(^{13}\)

2. *Volvo v Veng*

The first formal ruling on refusals to license intellectual property came a few years after the IBM investigation concluded. It resulted from a reference to the Court of Justice arising out of English intellectual property litigation in respect of car parts, involving similar issues to those the Commission had earlier declined to investigate further.

The dispute was between the car manufacturer Volvo and an importer of spare parts, Erik Veng (UK) Ltd (“Veng”). Volvo held a registered design right in respect of the front wing body panels of its Series 200 cars; Veng imported the same body panels and marketed them within the United Kingdom. The panels Veng imported were manufactured without Volvo’s authorisation. Volvo issued proceedings before the High Court of England and Wales for infringement of its registered design right. During the course of these proceedings, the following question was referred to the Court of Justice for a preliminary ruling, along with two related points:

*Is it prima facie an abuse of [a] dominant position for a [manufacturer holding registered design rights] to refuse to license others to supply such body panels, even where they are willing to pay a reasonable royalty [...]?*\(^{14}\)

The court therefore had to decide a question similar to that answered by the Commission in the IBM case: should competition concerns force an undertaking to make the results of its innovation available to a competitor?

The court’s answer was that although the mere refusal to grant a licence could not amount to an abuse of a dominant position, since the ability to prevent third parties from manufacturing or importing a protected design constituted the very subject matter of a design right, a refusal could be abusive if certain special circumstances were present:

*the exercise of an exclusive right [...] may be prohibited by Article [102] if it involves [...] certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts even though many cars of that model are still in circulation.*\(^{15}\)

The last of these sets of circumstances is of particular interest, since it could be interpreted as holding that a refusal to license may be an abuse where it prevents the marketing of a product for which there is consumer demand. In the case, the court appears to have had an existing product in mind (spare parts for cars already in circulation), but it was a small step from this to hold that it could also be abusive to prevent the development and marketing of a new product for which there

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\(^{13}\) For a more detailed account of the IBM investigation contrasting it with the Microsoft proceedings, see Vickers, A Tale of Two EC Cases: IBM and Microsoft, Competition Policy International Vol. 4 No. 1 (Spring 2008), which is informed by its author’s access to a copy of IBM’s 960-page defence held in the library of All Souls College, Oxford.

\(^{14}\) Case 238/87 AB Volvo v Erik Veng (UK) Ltd, judgment of 5 October 1988 at paragraph 4.

\(^{15}\) Paragraph 9
would be consumer demand. This step was taken a few years later.

B. The Magill TV Guide case

In 1985, an Irish company, Magill TV Guide Ltd (“Magill”), began to publish a weekly magazine of TV listings for the full range of channels available in the Republic of Ireland and Northern Ireland, which at the time meant services broadcast by the BBC, the Irish state broadcaster RTE and the UK’s ITV and Channel 4 (both of which were broadcast under the remit of the Independent Broadcasting Authority (“IBA”), with programming provided by private contractors), together with various satellite channels. This was a new development, since until then listings were published in two forms: daily listings in newspapers and on teletext services covering all available channels, and weekly guides published by the BBC, RTE and, for ITV and Channel 4, Independent Television Publications Ltd (owned by the companies providing programming broadcast by the IBA). These weekly guides covered only the channels broadcast by the relevant publisher, so consumers had the choice of comprehensive daily or non-comprehensive weekly guides – the Magill TV Guide was to be a new product: a comprehensive weekly guide.

The reason for the absence of a weekly guide was the licensing policy of each of the broadcasters. Under UK and Irish law, television listings were entitled to copyright protection, and the three main broadcasters licensed newspapers and magazines to carry only daily listings (which they provided free of charge). The broadcasters strictly enforced their intellectual property rights against publications exceeding this limit. Thus, when the Magill TV Guide entered into circulation, it was quickly met by applications by the BBC, RTE and ITV for injunctions and, upon these being granted, publication ceased. Magill did, however, submit a complaint to the European Commission in April 1986, alleging that the licensing practices of which it had fallen foul constituted abuses prohibited by Article 102.

The Commission initiated formal proceedings twenty months later and then, in December 1988, adopted a decision upholding Magill’s complaint. The Commission found that each broadcaster held a dominant position in relation to its own advance weekly listings and the TV guides in which those listings were published, since they enjoyed a "factual monopoly" based on the fact that listings information is a by-product of the programme scheduling carried out by each broadcaster, which was also "strengthened into a legal monopoly" by the protection afforded such information by copyright laws. By refusing to license this information for the purposes of a comprehensive weekly TV guide, the broadcasters "prevent[ed] the meeting of a substantial potential demand existing on the market" in order to protect the position of their own weekly TV guides, which faced no competition in the absence of a comprehensive weekly guide, and thus abused their dominant positions. The Commission therefore ordered the broadcasters to disclose advance weekly programme listings on request and on a non-discriminatory basis, with any royalties charged for licences to be reasonable.

RTE and ITP appealed the Commission’s decision to the General Court and then to the Court of Justice, which delivered its verdict in 1995. In upholding the Commission’s decision, the Court specifically confirmed, with reference to Volvo v Veng, that the exercise of a copyright by a dominant undertaking may “in, exceptional circumstances, involve abusive conduct”. The Court of Justice noted that the General Court had correctly identified a number of exceptional circumstances in the case: the lack of any substitute for a weekly comprehensive TV guide in enabling users to plan their leisure activities around the programming they wished to watch, the indispensable nature of the listings information to which the broadcasters held the rights in compiling such a guide, the consequent fact that the

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16 In the UK, a recent case had expressly confirmed this point (BBC and ITP v Time Out Ltd (1984) FSR 64). In the Republic of Ireland, the point was at issue in court proceedings between Magill and the BBC, ITP and RTE at the time the Commission reached its decision in the Magill case, with the Irish High Court subsequently confirming that copyright protection applied to TV listings ([1990] ILRM 534).
19 Paragraph 52
20 Paragraph 53
broadcasters’ refusal to license this information prevented the appearance of a new product for which there was consumer demand;21 the absence of justification for the refusal;22 and the end-result that the refusal reserved the secondary market for weekly TV guides to the broadcasters by excluding all competition.23

The Court of Justice therefore clearly established that Article 102 could override intellectual property rights in exceptional circumstances. But the relationship that the judgment implied between such rights and competition policy was not necessarily an adversarial one. By basing the judgment to a significant extent on the fact that the broadcasters’ exercise of the intellectual property rights prevented the emergence of a new product, the court placed at the heart of its decision the same considerations of innovation that justify intellectual property rights in the first place. Although particular rights were subordinated to competition rules in this case, this was not in pursuit of goals pursued by competition policy only, but of the shared goal of encouraging innovation.

What was less clear was the exact scope of the precedent. On the one hand, the Court of Justice did not state that each of the factors that the General Court had identified were necessary conditions for an overall finding of exceptional circumstances, and appeared to leave open the possibility of other points being taken into account. On the other hand, Magill could be seen as quite a narrow precedent, since the broadcasters’ refusal to license the TV listings information prevented the emergence of a specific and wholly-new product – a comprehensive weekly TV guide – and one for which there was empirical evidence of consumer demand based on its brief period of publication before the broadcasters obtained injunctions.24 The extent to which more general, abstract arguments about the impact of the exercise of intellectual property rights on innovation might find traction was thus an open question.25 Furthermore, the court also failed to endorse the General Court’s attempt to redefine the essential purpose of copyright as being “…to protect the moral rights in the work and ensure a reward for creative effort while respecting the aims of, in particular, Article [102]”26 (emphasis added), which would perhaps have given much clearer scope for competition considerations to override intellectual property rights.27 Finally, while by the time the Magill case reached the Court of Justice the protection afforded to TV listings under Irish as well as UK law had been confirmed, the intellectual property right at issue was nevertheless one which would not have been available in many other EU Member States,28 raising the question of whether a more widely-recognised right might be treated more generously.

The Magill judgment was considered briefly in Tiercé Ladbroke,29 a case concerning the licensing for broadcast of sound and picture recordings of French horse races. The General Court interpreted two of the elements constituting exceptional circumstances in Magill as alternative rather than cumulative conditions, those relating to indispensability and preventing the emergence of a new product.30 However, the General Court at the same time construed the circumstances in which this last element would be present relatively narrowly: in the court’s view this required “a new product whose introduction might be prevented, despite specific, constant and regular potential demand on the part of consumers”;31 suggesting that references to more abstract possibilities of product development would be insufficient.

A more influential interpretation of the Magill test came in the Oscar Bronner case.32 Although this

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21 Paragraph 54
22 Paragraph 55
23 Paragraph 56
24 Recital 23 of the Commission’s decision, eighth paragraph: “The publication of the Magill TV Guide, albeit brief and of a limited print run, also clearly demonstrates the consumer demand for a comprehensive weekly TV guide in the area concerned.”
25 See Forrester and Czapracka, Compulsory Licensing in European Competition Law: The Power of the Adjective in Anderman and Ezrachi, op. cit., noting at 157 that Magill involved “a rather clear notion of a new product that the company requesting the licence would develop”.
27 See the discussion of the interaction between the two judgments in Kallaugher, op. cit., 126ff.
28 See e.g. Coates, op. cit., paragraph 6.151.
30 A. Ezrachi, Competition Law Enforcement and Refusal to License in Anderman and Ezrachi (eds.), op. cit., 97.
31 Paragraph 131
32 Case C-7/97 Oscar Bronner v Mediaprint, judgment of 26 November 1998.
case concerned access to a newspaper home-delivery system rather than an intellectual property right, the Court of Justice considered whether the undertaking seeking access could successfully rely on Magill in the event that this case-law applied more widely. In concluding that it could not, the court indicated that four cumulative conditions had to be met for "exceptional circumstances" in the sense of that judgment to exist: (i) that the relevant input was indispensable for carrying on the business in question; (ii) that the refusal prevented the appearance of a new product for which there was a potential consumer demand; (iii) the fact that the refusal was not justified by objective conditions; and (iv) that the refusal was likely to exclude all competition in the secondary market.33 In the instant case, the input (access to the delivery system) was not indispensable, since other distribution methods such as post and kiosks existed and in any event a publisher could realistically set up its own home-delivery system.34 This was a narrower view of Magill as a precedent than that in Tiercé Ladbroke, since a refusal could only be abusive if it related to an indispensable input and prevented the marketing of a new product.

C. IMS Health

The last major case considering the interaction between Article 102 and intellectual property rights prior to the General Court's judgment in Microsoft was IMS Health.35 This arose out of a dispute between two companies engaged in the marketing of regional sales data for pharmaceuticals, IMS Health and NDC Health. IMS Health had developed, with some degree of input from its pharmaceutical company customers,36 a "brick" structure for displaying this sales data, whereby the information was broken down geographically into 1860 "bricks", each of which corresponded to a region determined on the basis of factors such as municipal boundaries, population density, transport connections and the locations of pharmacies and doctors' surgeries. NDC Health had acquired a company, Pharma Intranet Information AG ("PII"), set up by a former manager of IMS Health which marketed data on the basis of brick structures very similar to those used by IMS. IMS Health obtained interim injunctions from a German court prohibiting PII and NDC Health from using any brick structure derived from its 1860 brick structure, on the basis that this constituted a database protected under German copyright law. NDC Health then complained to the Commission, alleging the IMS Health had contravened Article 102 by refusing to grant it a licence to use the brick structure. In July 2001, the Commission adopted interim measures requiring IMS Health to grant a licence to use the 1860 brick structure to all its competitors, including NDC Health, having found there to be "exceptional circumstances" because the structure had become the "industry standard", without which it was impossible to compete on the market for German regional sales data.37 This decision was suspended on appeal to the General Court38 and subsequently withdrawn by the Commission. However, the dispute subsequently came before the Court of Justice following a reference from the German court in parallel copyright infringement proceedings brought by IMS Health against NDC Health.

In its judgment, the Court repeated the summary of the conditions for an abusive refusal to license that it had given in the Oscar Bronner case. However, it also significantly diluted the requirement that the refusal to license be likely to exclude all competition in the secondary market, since it held that it was enough to find this in relation to a "potential or even hypothetical market".39

Another noteworthy aspect of IMS Health is that it is not obvious that the case involved a truly new product at all,40 suggesting a dilution of the "new product" requirement. If such doubts are correct,
this would also be of interest in terms of the balance struck between the goals of intellectual property and competition rules. If *Magill* involved competition rules limiting the exercise of specific intellectual property rights at least in pursuit of an overall goal shared with the broader system of intellectual property (that of encouraging innovation), this could not be said of *IMS Health* if it did not involve an innovative product. Instead, the case would be one of enabling another company to enter the market with a similar product in order to drive down prices; an important goal of competition law, but not of intellectual property rights. However, it should be noted that the Court was not actually tasked with deciding whether the “new product” requirement was met in this particular case, and did not do so. It is worth observing that whether or not the product at issue was especially innovative, it was at least fairly clearly described, as in *Magill*.

Thus, prior to *Microsoft*, the possibility for Article 102 to override the exercise of intellectual property rights in certain circumstances was established, and appeared to be increasing in certain important respects; perhaps representing a greater willingness on the part of the EU courts to resolve tensions between intellectual property rights and competition rules in favour of the latter. However, it remained limited in that although such rights might be subordinated to allow the emergence of a (to a greater or lesser extent) “new” product, there apparently had to be a specific product in prospect, rather than vague and abstract possibilities of future innovation.

II. *Microsoft*

Microsoft’s troubled history with competition authorities began in the US rather than the EU. In 1998 the Department of Justice and twenty State attorneys-general brought proceedings against the company alleging unlawful exclusive dealing arrangements, unlawful tying of the Internet Explorer browser to its Windows 95 and 98 operating systems, unlawful maintenance of a monopoly in the PC operating systems market and unlawful attempted monopolisation of the web browser market. The State attorneys-general also brought claims for violations of various State antitrust laws. The judgment at first instance upheld the tying, monopoly maintenance and attempted monopolisation claims and ordered that Microsoft be broken up, but in June 2001 the US Court of Appeals partially reversed the judgment and remanded the questions of tying and remedies to the lower court for reconsideration. However, in November 2001, Microsoft agreed a settlement with the Department of Justice and a number of the States, which was subsequently approved by the court.41

In Europe, the events leading up to the Commission’s decision in *Microsoft* started not long after the Court of Justice’s landmark 1995 *Magill* judgment. In December 1998, Sun Microsystems, Inc. (Sun) filed a complaint with the Commission alleging that Microsoft enjoyed a dominant position in the supply of PC operating systems and had abused this position by refusing to provide Sun with the information necessary to develop server software products that could interoperate with PCs running Microsoft’s Windows operating system. This led the Commission to issue a Statement of Objections against Microsoft at the beginning of August 2000, which focused on the interoperability issues Sun had raised.

Meanwhile, in February 2000 the Commission had also begun an investigation on its own initiative, targeting Microsoft’s “Windows 2000” generation of PC operating systems. The scope of this investigation was broader than that in response to Sun’s complaint, since it concerned not only interoperability, but also the bundling of Windows Media Player with Microsoft’s PC operating systems.42 This investigation also resulted in a Statement of Objections in August 2001, which joined it to the earlier proceedings.

Following a market enquiry in which it received responses to questions concerning interoperability from more than 100 companies, the Commission

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41 Details of and case citations for these proceedings can be found at recitals 14-20 of the Commission’s decision. At the time of the Commission’s decision, the State of Massachusetts was appealing the court’s decision to approve the settlement, but on 30 June 2004 the US Court of Appeals for the District of Columbia upheld the lower court’s ruling.
42 While significant in its own right, the bundling aspect of the investigation and subsequent appeal is not considered further in this paper.
issued a third Statement of Objections in August 2003. This refined its arguments in relation to the alleged abuses already covered by the previous Statements of Objections rather than broadening the scope of the investigation. The third Statement of Objections also invited Microsoft to consider a provisional package of remedies on the basis of which the case might be settled. In relation to interoperability, the package proposed that Microsoft should disclose the information required to allow competing low-end servers to work with Windows PCs and servers. However, following intensive negotiations which included three days’ discussion with Microsoft's CEO, Commissioner Monti announced on 18 March 2004 that it had not proved possible to agree a settlement. The Commission's decision followed on 24 March.44

The Commission found that Microsoft held a dominant position on the market for PC operating systems, based on long-held high market shares and significant barriers to entry given that the "quasi-totality" of PC applications were written for Windows.45 It had abused this dominant position by refusing to disclose the information needed by other companies to produce work group server operating systems capable of interoperating with Windows PCs and, in particular, by refusing Sun's request to provide such information, in an attempt to leverage its market power to achieve dominance on the work group server operating system market as well.46 The Commission also rejected Microsoft's arguments as to objective justification, which related principally to its incentives to innovate (considered in greater detail below). The Commission therefore imposed remedies which, if less draconian than the order for Microsoft's break-up initially made in the US proceedings, were nevertheless significant. In addition to imposing a fine of €497m, which was then the largest fine imposed on any single undertaking for infringing EU competition rules, the Commission gave Microsoft 120 days in which to make interoperability information available in a timely manner to any undertaking having an interest in developing and distributing work group server operating system products, on reasonable and non-discriminatory terms. It also indicated that it would appoint a monitoring trustee to ensure compliance, to which Microsoft would be required to grant access to its information, documents, premises, employees and source code and the costs of which Microsoft would bear.

The Commission's decision to continue to a formal prohibition rather than settle (as the US Department of Justice had) came in a difficult legal and political context. In legal terms, it arguably pushed at the boundaries of existing precedent (in particular, the interpretation of the Magill conditions in Oscar Bronner and especially the "new product" requirement, as discussed below), against a company with substantial resources to mount vigorous appeal at a time where the Commission had not long ago endured a number of embarrassing reversals before the General Court.47 Politically, the potential for Commission decisions adverse to the interests of major US companies to attract controversy was clear from past cases,48 and Microsoft had engaged in extensive lobbying in support of its position. The following comment by Commissioner Monti, made during an interview with the author at the 2009 International Bar Association Competition Conference in Fiesole, gives a useful indication both of the difficulties the Commission faced and its reasons for continuing:

The most difficult case I had to decide was certainly Microsoft. I am sure that it is Microsoft not just for the technical complexity but because there was a rather dramatic trade off to be made after the long investigation and after the three days intensive final negotiations with the CEO of Microsoft in order to achieve a settlement. That was a very good phase, but I concluded that we needed for the benefit of legal certainty and of

45 Section 5.2 of the decision.
46 Section 5.3 of the decision.
48 Notably Commissioner Monti's decision earlier in his term to prohibit the GE/Honeywell merger, as well as the transatlantic tensions surrounding the Commission's review of Boeing's acquisition of McDonnell Douglas (which was eventually cleared despite expectations to the contrary).
competition enforcement, to have a binding precedent. To me the biggest cost associated with getting to a decision had to do with our transatlantic relationship. It had been such a huge priority of my tenure to build the strength of the transatlantic relationship in antitrust and in years which literally, broadly speaking, the transatlantic relationship blossomed; it would have been terrible to prejudice the future of that transatlantic relationship just on this decision. […] Microsoft was the most difficult case because of what was at stake, politically and systemically.49

As well as the importance of legal certainty cited by Commissioner Monti, two other factors are worth noting in explaining the Commission’s decision not to settle. Firstly, Commissioner Monti enjoyed extensive support both from his fellow Commissioners and from the Member States (despite lobbying by Microsoft on industrial policy grounds), and the Commission’s hand was also strengthened by support from a large number of companies admitted as interested third parties during the course of the investigation.50 Secondly, the Commission’s case is likely to have been reinforced by evidence that came to light during the prior US litigation.

Perhaps unsurprisingly, Microsoft immediately announced its intention to appeal51 and on 7 June 2004 applied for annulment of the Commission’s decision.52 Insofar as the interoperability element of the decision was concerned, the company relied on three main pleas: (i) Sun had not requested the information the Commission ordered Microsoft to disclose; (ii) the Commission had failed to take into account obligations imposed by the TRIPS Agreement; and (iii), most relevantly for present purposes, that the criteria laid down in previous cases for finding a refusal to license to be an abuse were not met.

On 17 September 2007, the General Court delivered a judgment53 upholding the Commission’s decision almost in its entirety. The only elements that the court annulled related to the monitoring trustee: the court found that the relevant legislation did not give the Commission the right to require an undertaking to grant an independent monitoring trustee powers which the Commission could not itself delegate to a third party or to require an undertaking to bear the costs of such a trustee’s appointment.54

A. Microsoft and innovation

Perhaps the most interesting aspect of the Microsoft case is that it provided a major opportunity for the General Court to consider in detail the tension between enforcement of competition law and protection of intellectual property rights as policy tools to encourage innovation. This came about in two ways. Firstly, the court had to consider whether Microsoft’s refusal to provide interoperability information prevented the emergence of a new product, as required by the existing case law on refusals to license intellectual property rights. Secondly, Microsoft argued that in any event its refusal was objectively justified due to the need to protect its incentives to innovate.

As a preliminary point, the extent to which the interoperability information sought by Microsoft’s competitors was actually protected by intellectual property rights was disputed. The Commission’s decision had left this point open,55 but on appeal the Commission argued that much of the information at most constituted trade secrets, which were not entitled to the same protection afforded to intellectual property rights by the refusal to license case law.56 However, the General Court avoided deciding this point by observing that given the Commission had not excluded the possibility that

49 A Discussion with Professor Mario Monti, footnote 13 above, at page 69 of the transcript.
50 A non-exhaustive list of interested third parties is set out at recital 12 of the Commission’s decision. It is believed that IBM was amongst the anonymous third parties.
52 Shortly thereafter, on 25 June 2004, Microsoft also applied for suspension of the elements of the contested decision requiring it to disclose interoperability information. This application was dismissed by the President of the CFI on 22 December 2004 (Case T-201/04 R Microsoft Corporation v Commission).
54 See e.g. footnote 249.
55 See in particular paragraph 280.
the information was covered by patents or copyright, it was appropriate to proceed on the basis that it was covered by such rights or constituted trade secrets that had to be treated as equivalent to such rights, and therefore continued to address these questions.

1. **New product**

In deciding whether the conditions laid down in Magill and the case law that followed were met, a crucial question was whether Microsoft’s refusal to disclose interoperability information could be said to prevent the emergence of a “new product”. Microsoft argued that the Commission had failed to identify any such product, merely claiming that its competitors “could use the disclosures to [develop] the advanced features of their own products”, and that there was in fact no evidence that Sun would use the information to develop anything other than a work group server operating system. The Commission replied that a new product is:

*a product which does not limit itself essentially to duplicating the products already offered on the market by the owner of the copyright. It is sufficient, therefore, that the product concerned contains substantial elements that result from the licensee’s own efforts.*

According to the Commission, since the interoperability information would not allow Microsoft’s competitors simply to clone its products and they would have to offer added value in order to compete, any products developed using the disclosed information would meet this more inclusive definition of a “new product”. More fundamentally, though, the Commission also argued that it had assessed Microsoft’s refusal not only against the “new product” criterion, but also against the text of Article 102 itself; noting that Article 102(b) prohibited abuses that limit technical development.

The court thus made clear that the abusiveness or otherwise of a refusal to license could be analysed directly in terms of its impact on innovation, without the formal constraint of the “new product” criterion.

2. **Objective justification**

During the administrative proceedings leading up to the Commission’s decision, Microsoft argued that its refusal to provide interoperability information to Sun was objectively justified by the intellectual property rights it held over that information and the need to protect these in order to preserve its incentives to innovate:

*The objective justification for Microsoft’s refusal to disclose its intellectual property rights is self-evident: those rights are meant to protect the outcome of billions of dollars of R&D investments in software features, functions and technologies. This is the essence of intellectual property right protection. Disclosure would negate that protection and eliminate future incentives to invest in the creation of more intellectual property.*

The Commission’s response was threefold. Firstly,
it argued that it had been established that Microsoft's refusal hindered technological development by restricting the ability of competitors to innovate, and any negative impact on Microsoft's incentives had to be set against this:

> It has been established [...] that Microsoft's refusal to supply risks eliminating competition in the relevant market [...] that this is due to the fact that the refused input is indispensable to carry on business in that market and that Microsoft's refusal has a negative impact on technical development to the prejudice of consumers. In view of these exceptional circumstances, Microsoft's refusal cannot be objectively justified merely by the fact it constitutes a refusal to license intellectual property. It is therefore necessary to assess whether Microsoft's arguments regarding its incentives to innovate outweigh these exceptional circumstances.63

Secondly, and more importantly, the Commission found that requiring Microsoft to license its intellectual property would not undermine its incentives to innovate in the first place, but actually enhance them overall. The Commission noted that Microsoft's incentives to innovate had to be considered in the context of a counterfactual situation in which Microsoft had eliminated all effective competition in the work group server operating system market. In such a situation, the Commission's view was that Microsoft would have little incentive to innovate:

> Microsoft's research and development efforts are indeed spurred by the innovative steps its competitors take in the work group server operating system market. Were such competitors to disappear, this would diminish Microsoft's incentives to innovate. By contrast, were Microsoft to supply Sun and other work group server operating systems with the interoperability information at stake in this case, the competitive landscape would liven up [...] such competitive pressure would increase Microsoft's own incentives to innovate.64

Thus, not only would innovation by market participants overall be enhanced, but so too would innovation by Microsoft itself: even were the incentive to innovate provided by intellectual property rights undermined, this would be more than compensated for by competition-based incentives. The Commission thus made explicit the view implicit in previous decisions, that competition can be a better tool to encourage innovation than the protection of intellectual property rights.

The final element of the Commission's response was that disclosing information to competitors did not necessarily undermine the value of that information. The Commission noted that voluntary disclosure of interoperability information was normal industry practice and had the potential to provide a significant competitive advantage by allowing the company's technology to become a standard.65

On appeal, the General Court upheld the Commission's assessment. The court began by recalling that Microsoft bore the burden of proving the objective justification on which it wished to rely,66 and then held that the company had failed to do so:

> The Court finds that [...] Microsoft, which bore the initial burden of proof [...] 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.

Microsoft merely put forward vague, general and theoretical arguments on that point [...] without specifying the technologies or products to which it thus referred.67
The court also endorsed the argument of the Commission that the industry practice of disclosing interoperability information indicated a lack of any negative impact on incentives to innovate.68

B. Legal significance

In upholding the Commission’s decision, the General Court broadened in several respects what had been understood to be the circumstances in which a refusal to license intellectual property rights would be considered abusive.

Most notably, the General Court made clear that it was not a necessary condition that the refusal to license prevented the emergence of a new product, which had previously been understood by some commentators as a significant limiting factor.69

Whereas in Magill and IMS Health, it was possible to describe in reasonably concrete terms a product the emergence of which the refusal prevented (a comprehensive TV guide and data in a brick structure respectively), in Microsoft the court upheld a decision that it found to be based on the expectation that competitors would produce products “distinguished from [Windows] systems with respect to parameters which consumers consider important”.70 Microsoft thus marked a shift “from a rather clear notion of a new product that the company requesting the licence would develop to a rather abstract notion of preventing technological development”.71 A criterion which, though in accordance with the text of Article 102(b), lacks obvious boundaries.72

The General Court also broadened two of the other conditions laid down in Magill. The requirement that the input be objectively indispensable was, as Vesterdorf notes, diluted into one of economic indispensability: although competitors might technically have been able to access the market notwithstanding Microsoft’s refusal, it would not have been economically viable for them to do so.73 The requirement for elimination of all competition in the secondary market, already diluted in IMS Health, was further weakened in that, as Ezrachi observes, the court held that it was not “necessary to demonstrate that all competition on the market would be eliminated” but merely that the refusal “is liable to, or is likely to, eliminate all effective competition”. 74

III. The Journey Since Microsoft

The General Court’s judgment in Microsoft was a significant and high-profile success for the Commission, with the substance of its decision entirely upheld. From a legal standpoint, the judgment continued to broaden the circumstances in which a refusal to license would be considered an abuse. It might therefore have seemed reasonable to suppose that the judgment would mark a shift to increasingly vigorous application of Article 102 by the Commission in innovative sectors, making use of the enforcement impetus provided. The then-current Commissioner for competition policy Neelie Kroes herself greeted the judgment at a press conference with the observation that the General Court had upheld a decision that “set an important precedent in terms of the obligations of dominant companies to allow competition, in particular in high tech industries.”75

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68 Paragraph 702.
70 Paragraph 656.
71 Forrester and Czarnecka, op. cit., 157.
72 Howarth and McMahon observe that “if abuse under Article [102] is defined as the prevention of “technical development” surely any refusal to licence which is not mere reproduction or cloning will fulfil this criterion” and, furthermore, that since the General Court held that recipients of the interoperability information could not compete profitably by simply cloning Microsoft’s products (although why they could not compete on price was not obvious), it followed that any product developed on the basis of the information would necessarily constitute “technical development”. See Howarth and McMahon. Windows has performed an Illegal Operation: The Court of First Instance's Judgment in Microsoft v Commission (2008) 29 ECLR 117. On the other hand, it does not necessarily follow from the fact that the anticipated harmful effects of a refusal to license on innovation are not precisely delineated that no such effects are likely. Dolmans, O’Donoghue and Loewenthal note that Microsoft could be said to involve a more serious risk to innovation than cases such as Magill involving a specific product, since what was at issue was the potential suppression of all innovation and development in innovative ways (Article 82 EC and Intellectual Property: the State of the Law Pending the Judgment in Microsoft v Commission, Competition Policy International Volume 3 No. 1, Spring 2007, 133).
74 Ezrachi, op. cit., p. 99 (emphasis added).
75 SPEECH/07/539, Introductory remarks on CFI ruling on Microsoft’s abuse of dominant market position, 17 September 2007.
There were, however, also grounds for caution in this respect. Firstly, Microsoft involved a range of special circumstances arguably limiting its value as a precedent for wide-ranging intervention by the Commission. Microsoft's market power was such that it held what the Commission termed a position of “superdominance”; a term lacking clear legal content but suggesting that undertakings with lower market shares and protected by weaker barriers to entry might attract less intrusive treatment. This point was emphasised by Commissioner Kroes following the General Court’s judgment, who responded to what she termed “scare stories” about the consequences of the ruling for other companies with the observation that “The Commission decision made clear that this was in many ways an exceptional case. Super-dominance like Microsoft’s is rare.”76 Furthermore, as the Commission itself argued before the General Court, Microsoft’s refusal to provide interoperability information was in a disruption of an existing supply relationship, since it had disclosed such information routinely in the past, until its own entry into the server market.77

Secondly, the extent to which Microsoft actually amounted to a substantive broadening of the conditions for a refusal to license to be found abusive has been questioned. On its face, the fact that the Commission’s decision was upheld despite not identifying any particular product the development of which Microsoft’s refusal prevented appeared a considerable relaxation of the conditions laid down in Magill. But, it has been argued that in the specific context of the case, the fact that the Commission was imprecise as to the innovation Microsoft’s behaviour would stifle does not make its claim that innovation would be suppressed an unreasonable one: “It does not take an enormous leap of the imagination to consider that third parties might develop products which work differently from Microsoft’s but which need to interoperate with the core Windows OS. The fact that the Court does not specifically identify such products does not mean it is reaching an implausible or indeed especially tendentious conclusion”. Indeed, if the extent to which innovation must be threatened for a finding of abuse has been diluted, the earlier IMS Health case may be a better example than Microsoft.78

The remainder of this paper now reviews the principal cases since Microsoft in which the Commission has attempted to apply Article 102 in relation to intellectual property rights. While the Commission’s level of activity perhaps supports a more cautious view of the enforcement impetus provided by Microsoft, it has continued to engage with this issue in a number of fields.

For context, it should be noted that this comes alongside significant activity in relation to high-technology industries generally, which can also have important implications for innovation. The Commission’s most high-profile Article 102 investigation is currently that into Google, which concerns the ranking of search results and the terms of advertising agreements rather than intellectual property rights, but where smaller, specialised competitors are harmed by a dominant firm’s behaviour, as the complainants allege, this too has the potential to reduce innovation.79

A. Interoperability since Microsoft

Following the General Court’s judgment, there was some suggestion that a relatively large number of investigations would follow in which the Commission would apply the precedent that had been set to interoperability issues involving other products.80 This did not occur, presumably because the Commission was not confronted with cases with sufficiently similar facts to those in Microsoft.

1. Enforcing the Microsoft decision

In order for Article 102 to be an effective tool to prevent the abuse of intellectual property rights harming innovation, especially in fast moving, high-technology sectors, decisions taken under it need to be enforced promptly. The Microsoft case

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76 Ibid.
80 See e.g. Microsoft Suffers Stinging Defeat, Financial Times, 18 September 2007, anticipating interoperability-focused investigations in relation to other Microsoft products and possibly those of Apple.
illustrates the potential difficulties of this, since it resulted in an extended dispute between the company and the Commission as to what exactly constituted compliance with the Commission’s order to supply complete and accurate interoperability information on reasonable and non-discriminatory terms.

After its application for the suspension of the Commission's decision was rejected, Microsoft engaged in discussions with the Commission as to the scope of the interoperability information to be disclosed and, in June 2005, the Commission announced that the company had made proposals relating to the implementation of this remedy. However, market-testing and advice from the monitoring trustee indicated that, even after revisions by Microsoft, the information remained incomplete and inaccurate. On 22 December 2005, therefore, the Commission issued a statement of objections, and on 12 July 2006 it adopted a decision imposing a fine of €280.5m (€1.5m per day for the relevant period of non-compliance).

The focus then shifted to the terms on which Microsoft made interoperability information available. In a Statement of Objections announced on 1 March 2007, the Commission accused Microsoft of charging unreasonable prices for the information, in particular because it contained no significant innovation. Microsoft then made further concessions which led the Commission to announce on 22 October 2007 that Microsoft had agreed to take the steps necessary to ensure compliance with the interoperability remedy that it had imposed. However, the Commission also indicated that it would still adopt a decision punishing Microsoft for its past non-compliance in relation to pricing, and did so the following February, fining the company €899m. This decision was largely upheld by the General Court in June 2012, although the fine was reduced slightly to €860m.

Thus, while the Commission eventually succeeded both in bringing to an end Microsoft's abusive conduct and in penalising it, it took more than three years to do so; three years during which, as Commissioner Kroes acknowledged, Microsoft had continued to be able to use its intellectual property rights to “stifle innovation”. The explanation for this lies at least in part in the fact that the Commission’s March 2004 decision did not contain a clear and comprehensive set of measures ready for Microsoft to implement. Instead, detailed negotiations had to take place following the decision, with evident scope for disagreement as to what exactly constituted compliance. In this respect, it is worth noting that the Commission has now significantly tightened the procedural framework for remedies. Firstly, under Commissioner Kroes, the Commission began to insist that a remedies package should be considered in advance and included as part of any settlement negotiation. Secondly, at the same time as negotiations with Microsoft were underway, the Commission implemented the commitments process under Article 9 of Regulation 1/2003, providing more clearly defined parameters for companies wishing to negotiate a settlement. The effect of these reforms can arguably be seen in the outcomes of two subsequent investigations.

2. **Microsoft’s public interoperability undertaking**

In January 2008, shortly after it had finally succeeded in forcing Microsoft to comply with its 2004 decision, the Commission announced that it had opened up two new fronts against the company. One investigation took up a complaint by the browser developer Opera that Microsoft was unlawfully tying its Internet Explorer browser to Windows, while the other related to allegations by the European Committee for Interoperable Systems that Microsoft was failing to disclose interoperability information across a broad range of products including its Office suite, several server

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81 IP/05/7673, Commission to market test new proposals from Microsoft on interoperability, 6 June 2005.
82 IP/07/269, Commission warns Microsoft of further penalties over unreasonable pricing as interoperability information lacks significant innovation, 1 March 2007.
84 Case T-167/08 Microsoft Corporation v European Commission, judgment of 27 June 2012.
86 The Article 9 procedure became available on 1 May 2004, and the Commission subsequently published guidance on its policy towards accepting commitments – see MEMO/04/217, Commitment decisions: frequently asked questions and answers, 17 September 2004.
products and the NET framework. In relation to Office, a particular concern was whether Microsoft's new Office Open XML file format was sufficiently interoperable with competitors' products.87

The stage was thus set for another confrontation between the Commission and Microsoft. However, perhaps as a result of the General Court's judgment,88 Microsoft instead offered a public undertaking that remedied the Commission's interoperability concerns without a statement of objections being issued.89 Microsoft undertook to make available to third parties the information required to allow their software products to interoperate with the products in relation to which concerns had been raised in the same way as Microsoft's own products, on the basis of a template licence agreement. Interestingly, in what has been described as a "novel approach in EU competition law", Microsoft would also offer a warranty agreement guaranteeing the completeness and accuracy of the interoperability information disclosed; enabling private enforcement in the courts or arbitration proceedings90 to supplement the threat of renewed enforcement action by the Commission.

3. Complaints against IBM

IBM also attracted significant attention in relation to interoperability in the years following the General Court's judgment. Between late 2007 and 2011, the company faced a series of complaints made to the Commission concerning business practices allegedly aimed at restricting the use of IBM hardware with non-IBM software and vice-versa.

The first of these complaints was made by Platform Solutions, Inc. ("PSI") in October 2007. In 1999 PSI was formed in order to develop a mainframe computer to compete with those produced by IBM, which had become by far the largest of very few vendors continuing to develop and support mainframes, by using industry-standard technology such as Windows and Linux operating systems and Intel processors to deliver lower prices. At the same time, PSI's mainframes would employ an emulator apparently allowing them in principle to run with IBM's operating system if required.91 despite the use of processors which would not normally be compatible. PSI requested that IBM provide certain information and licences necessary for it to develop computers with this capability, but IBM allegedly refused, and subsequently brought US proceedings against PSI alleging patent and copyright infringement and misappropriation of trade secrets.92 PSI counterclaimed on the basis that IBM's refusal to license was an abuse of its dominant position, and also filed a complaint with the European Commission.

PSI's complaint did not result in a formal investigation, presumably in large part because in July 2008 IBM agreed to acquire PSI, with each party dropping its claims against the other; a transaction described by a number of commentators in terms of IBM buying its way out of trouble.93 While the Commission retains discretion to open an investigation even where a complaint has been withdrawn, investigating without the complainant's support and assistance is likely to prove difficult. There was also no competition scrutiny of IBM's position on the mainframe market from a merger...
control perspective, since the transaction did not exceed the thresholds for mandatory review under either US or EU legislation.

Shortly after this agreement was reached, however, another complainant stepped forward, T3 Technologies, Inc. (“T3”). Since 2000, T3 had sold a range of small mainframes called “tServers” developed specifically for smaller-sized users for which IBM mainframes were unsuitable, which employed an emulator developed by Fundamental Software to run IBM software. The system made use of a patent which IBM licensed to Fundamental Software, and IBM received royalty payments for each tServer sold, as well as licensing software to the end-user. IBM would often finance the customer’s purchase through its financial services division.94 However, in 2006, T3 launched more capable “Liberty” mainframes using PSI’s technology, which T3 viewed as competing with much of IBM’s mid-sized product line.95 Shortly thereafter, IBM terminated its relationship with T3, revoked the patent licence agreement with Fundamental Software, sued T3 for patent infringement, and announced that it would no longer sell its operating systems and middleware to customers using hardware produced by other companies.96 T3 initially responded by intervening in support of PSI in the latter’s US litigation against IBM, but in August 2008 announced that, following the purchase of PSI by IBM, it would submit its own complaint to the Commission. The complaint would accuse IBM of preventing sales of competing mainframe hardware by tying sales of mainframe hardware to mainframe software and by withholding intellectual property licences, with the result that T3 had been forced to lay off three-quarters of its workforce and seek external financing while IBM became the sole option for mainframes in the EU and worldwide.97

T3’s complaint was filed in January 2009. In March 2010, a similar complaint was submitted by the French open-source software company TurboHercules SAS, inviting the Commission to order IBM to cease tying its mainframe operating system with IBM hardware and to license its interfaces and protocols on fair and reasonable terms. In July 2010 the Commission received a further complaint, this time from Neon Enterprise Software LLC (“Neon”), a US-based developer and distributor of software for IBM mainframes. That month, the Commission opened formal proceedings against IBM, investigating the complaints of tying and separate concerns relating to mainframe maintenance services raised on the Commission’s own initiative.

However, following an in-depth investigation, the Commission announced in September 2011 that it was closing proceedings in respect of the tying aspects of its investigation. This followed the withdrawal of all three companies’ complaints. T3 had withdrawn its complaint in May 2011, at the same time as it dropped its appeal in the US proceedings against IBM (in which IBM had earlier obtained summary judgment in its favour). Neon also agreed to withdraw its complaint, according to a filing with the US Securities and Exchange Commission by IBM, while TurboHercules confirmed at the beginning of August that it was no longer pursuing its complaint, citing business reasons.98 The Commission continued to pursue its own-initiative investigation into IBM’s provision of mainframe maintenance services, and this was subsequently resolved on the basis of a formal commitments decision.99

4. Recent developments

In March of this year, the Commission announced an investigation into the US software company The MathWorks, Inc., which develops software products used in academia and engineering to design and simulate control systems. This followed a complaint by the Texas-based technology company National Instruments100 that MathWorks had refused to provide it with software licenses and

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94 See Jeff Gould/Peerstone Research, IBM says 99.8% of mainframe market not enough, we want it all, 12 August 2008, available at http://theopenenterprise.org/analysis/ibm-says-998-of-mainframe-market-not-enough-we-want-it-all.html
96 Gould, op. cit.
97 T3 press release, above.
98 Mlex EC mulls future of IBM antitrust probe as complaints end, 2 August 2011.
100 Mlex, "National Instruments emerges as EC complainant in MathWorks probe", 6 March 2012.
accompanying interoperability information for its two main products MATLAB and Simulink, thereby preventing it from lawfully reverse-engineering in order to achieve interoperability with those products.101

Commissioner Almunia has used the initiation of this investigation as an opportunity to emphasise that “software interoperability [...] remains central to our enforcement practice.”102 It will therefore be interesting to see how far the Commission takes the investigation, and whether any similar investigations follow. However, some caution may be appropriate in the light of recent remarks by Director-General Italianer, which, while not excluding such action, appear to be more receptive to the possibility that finding a refusal to license interoperability information to be abusive may prejudice incentives to innovate than the Commission was in its Microsoft decision:

The Commission [...] believes that competition intervention requires careful consideration where the application of the prohibition of the abuse of dominant position would lead to the imposition of an obligation to supply on the dominant undertaking. The existence of such an obligation to supply – even for fair remuneration – may undermine undertakings’ incentives to invest and innovate and, thereby, possibly harm consumers. Also, competitors may be tempted to free ride on investments made by the dominant undertaking. Neither of these consequences would, in the long run, be in the interests of consumers. Nevertheless, the impact of mandated access on incentives to innovate has to be looked at carefully against the factual background of the individual case.103

5. Interoperability beyond Article 102

As well as its enforcement activities, the Commission’s legislative programme appears to include measures addressing interoperability issues, forming part of the broader innovation agenda touched upon at the beginning of this paper. In late March of this year, the Commission’s Directorate General for the Information Society (under the direction of former Competition Commissioner Kroes) published a questionnaire seeking views on the need for “measures leading significant market players to license interoperability information not covered by standards”. The consultation closed on 20 June and the Commission indicated that it was likely to publish a draft Communication or Directive by the end of this year.

Interoperability concerns can of course also arise in the merger control context. Perhaps the most notable recent example of this was the Commission’s review of the acquisition of the computer security software company McAfee by Intel, which was approved subject to commitments in January 2011. The central concern of the Commission was that Intel would have an incentive to limit the extent to which Intel hardware would work with security solutions competing with those marketed by McAfee, and vice-versa. The transaction was cleared only on the basis of commitments by Intel not to engage in such behaviour and to disclose to competitors the information needed for their products to use the functionality of Intel hardware in the same way as McAfee products.104

B. Competition and standards-setting

Alongside its continued activities in relation to interoperability, the Commission has been increasingly involved with the application of Article 102 to issues around standards. This has arguably constituted something of a shift away from more traditional horizontal concerns around the potential for collusion during the standards-setting process aimed at excluding

101 IP12/208, Commission opens proceedings against MathWorks, 1 March 2012. As indicated by the press release, the Software Directive’s protection of reverse-engineering lawfully-acquired software for interoperability purposes is also a significant aspect of the case.
102 Higher Duty for Competition Enforcers, speech to the International Bar Association’s Antitrust Conference in Madrid, 15 June 2012.
103 Innovation and competition policy in the IT sector: the European perspective, Conference on Innovation, Competition Policy and Online Service Providers, Beijing, 26 June 2012.
104 Case M5984 Intel/McAfee, decision of 26 January 2011.
competitors, although such issues received continued attention in the Commission’s updated Horizontal Guidelines published in December 2010.

In broad terms, issues under Article 102 in relation to standards have arisen as a result of two forms of conduct. Firstly, where a patent is not disclosed during the standards-setting process, subsequent attempts to mount a “patent ambush” will contravene Article 102. Secondly, the Commission may investigate undertakings which apparently fail to honour commitments made to standards-setting bodies in their licensing practices.

1. **Patent ambush – the Rambus case**

In August 2007, the Commission confirmed that it had sent a statement of objections to Rambus Inc., a US-based company involved in developing and licensing (but not manufacturing) chip connection technologies for computers and other electronics, accusing it of abusing a dominant position by attempting to claim royalties for the use of its patents from manufacturers of dynamic random access memory (“DRAM”) chips.

DRAM chips had been standardised by an industry-wide body, JEDEC, and by 2008 various successive JEDEC standards covered more than 96% of DRAM sales. Between 1991 and 1996, Rambus had participated in the development of these standards as a member of JEDEC. However, the Commission had formed the preliminary view that Rambus had abused this participation to effect a “patent ambush”. The Commission alleged that, contrary to JEDEC rules requiring all members to disclose issued and pending patents relating to standards under development, Rambus had failed to disclose the existence of patents on the basis of which it subsequently attempted to claim royalties. Furthermore, it had used information gained from its participation in JEDEC to tailor its patent applications to cover JEDEC standard-compliant DRAM chips. In the Commission's view, this had allowed Rambus to claim royalties which it otherwise could not have, since JEDEC policy was to develop standards free from patent claims or, at a minimum, to obtain assurances from rights-holders that licences would be available on satisfactory terms. Had Rambus disclosed the existence of its patents, evidence gathered by the Commission suggested that JEDEC DRAM standards would have incorporated alternative, patent-free technologies. Instead, according to the Commission Rambus' non-disclosure meant that it was subsequently in a position to charge higher royalties in respect of standards into which the industry was locked.

The Commission concluded on a preliminary basis that Rambus’ attempts to exact royalties was abusive in the specific circumstances of the case, including its intentional breach of JEDEC policy and of the underlying duty of good faith in the context of standard setting, which resulted in the frustration of other participants’ legitimate expectations. The Commission also noted that Rambus’ alleged conduct undermined confidence in the standard-setting process, which in the sector concerned was “a precondition to technical development and the development of the market in general to the benefit of consumers”.

Note: See A. Emanuelson, Standardisation agreements in the context of the new horizontal guidelines, E.C.L.R. 2012 33(2) 69, noting the “traditional concern of the risk that firms would collectively exclude competitors in some manner under the guise of establishing otherwise beneficial standards”. Killick notes the possibility that IMS Health could also have been analysed in terms of standards, since the 1860-brick structure had been developed with the assistance of its customers (although as noted earlier, the extent of this assistance was in dispute between IMS and NDC), but the Commission did not do so. See further J. Killick, IMS and Microsoft judged in the Cold Light of IMS (2004) 1 Competition L. Rev. 23.

106 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011) OJ C11/01 (replacing the 2001 Guidelines on the applicability of Article 81 of the EC Treaty to horizontal co-operation agreements (2001) OJ C3/02, which also contained a chapter on standardisation agreements). The risk of issues arising under Article 102 in relation to standards-essential patents can of course be mitigated by the use of Article 101 to introduce safeguards into standards-setting processes As Emanuelson notes, this is a significant aspect of the updated Guidelines. An earlier example of this was the Commission’s 2004-2005 investigation into the European Telecommunications Standardisation Institute’s (“ETSI”) rules, which resulted in ETSI adopting amendments proposed by the Commission to guard against the risk of patent ambush. See IP/05/1665, Commission welcomes changes in ETSI IPR rules to prevent “patent ambush”, 12 December 2005.

107 The Statement of Objections followed a complaint made jointly against Rambus by Infineon Technologies AG and Hynix Semiconductor Inc. in December 2002. Infineon withdrew its complaint in April 2005. The US Federal Trade Commission had been investigating Rambus since 2002 and in February 2007 made an order imposing remedies including maximum royalty rates, however, this was subsequently overturned on appeal, and the case was dropped in May 2009.


109 Recitals 35-47.

110 Recital 28.

111 Recital 29.
The case was subsequently resolved on the basis of commitments offered by Rambus, which the Commission accepted, following revisions in light of market-testing, and made binding by a decision in December 2009. In summary, Rambus agreed to offer for a five-year period a bundled licence covering all patents relating to the standards in question, with royalties waived altogether in respect of the standards adopted during the period in which the company was suspected of having concealed its patents, and capped in respect of subsequent JEDEC standards.

2. Breach of commitments to standards-setting organisations

In Rambus, one of the Commission's concerns was that the company's concealment of its patents had allowed it to avoid giving commitments to JEDEC as to the terms on which it would license its patents if adopted as part of DRAM standards. Where a rights-holder has made commitments to a standards-setting organisation, the Commission will also investigate if it suspects that the company has failed to comply with those commitments.

The first key occasion on which the Commission analysed such a situation from the perspective of Article 102 was its investigation into Qualcomm, a company holding intellectual property rights in relation to two mobile telephony standards, CDMA and WCDMA. In October 2007, the Commission announced that it had formally initiated proceedings, which followed a complaint made in 2005 by six mobile phone and chipset manufacturers (Ericsson, Nokia, Texas Instruments, Broadcom, NEC and Panasonic) that the terms on which Qualcomm was licensing its patents relating to the WCDMA standard were not fair, reasonable and non-discriminatory (“FRAND”), contrary to commitments made during the standardisation process. The Commission noted that the complaints linked the charging of non-FRAND royalties not only to higher handset prices but also to the restriction of innovation by slowing the development of the 3G standard and prejudicing the adoption of a future 4G standard.113

In November 2009, after a lengthy investigation, the Commission closed its proceedings against Qualcomm, on the basis that the case was no longer an enforcement priority following the decisions of all six complainants to withdraw their complaints.114 The Commission emphasised its continued commitment to pursue “illegal behaviour by dominant companies in key innovative sectors like telecoms and IT”, but at the same time struck a cautionary note, observing that “any antitrust enforcer has to be careful about overturning commercial agreements”.115 The Commission is understood still to be considering a separate complaint brought against Qualcomm by Icera Inc.116

Around the time that the Commission closed its investigation into Qualcomm, it also announced a resolution to another case in which compliance with FRAND commitments relating to mobile telephony standards were at issue. In 2007, the German non-practising entity IPCom had acquired a patent portfolio from Bosch which included patents essential to the GSM and UMTS standards. Bosch had participated in the process that set these standards as a member of the European Telecommunications Standards Institute, had declared certain of its patents essential to these standards and had committed to grant irrevocable licences for such patents on FRAND terms. There was initially doubt as to whether IPCom would consider itself bound to continue this licensing policy, but following discussions with the Commission, IPCom made a public declaration that it would do so. In welcoming IPCom’s declaration, the Commission noted that the pro-competitive economic effects of standards-setting would be placed at risk if the commitments made as part of the process did not survive transfer.117

112 Emanuelson, op. cit. at 70.
113 MEMO/07/389, Commission initiates formal proceedings against Qualcomm, 1 October 2007.
114 Nokia and Broadcom withdrew their respective complaints in July 2008 and April 2009, as part of wider agreements settling patent litigation against Qualcomm.
116 According to an update filed by Qualcomm with the SEC, in January 2012 the company provided additional documents and information requested by the Commission.
Although neither investigation resulted in a formal decision, the IPCom and Qualcomm proceedings influenced the section of the Commission’s updated Horizontal Guidelines dealing with standards-setting agreements, which have been a particularly important aspect of the Commission’s competition policy given the lack of “hard law” in this area. It has been observed that the complexity of the issues raised meant that the Commission’s primary policy goal in updating the Guidelines was “to give incentives to standards-setting organisations to front-load competition and transparency in the standard-setting process with the aim of minimising the risk of potential competition problems further down the road”. In more concrete terms, the Guidelines set out various criteria to be considered in assessing whether licensing terms are fair and reasonable, and also emphasise that rights-holders giving FRAND commitments must be required to ensure that any transferee is itself bound by those commitments.

The intersection between Article 102 and standards is currently receiving prominent consideration as part of the wide-ranging patent disputes between several of the world’s major technology companies, in particular in relation to smartphones and tablet computers. The Commission is investigating a number of complaints concerning licensing behaviour and related litigation, and has also announced that as part of this it intends to take measures to clarify the criteria that licensing terms should meet in order to comply with FRAND obligations.

Finally, standards-related issues have also been considered in merger control proceedings. The acquisition by Google of Motorola Mobility Holdings, Inc. (“MMI”) raised the question of whether the merged undertaking would be likely to abuse market power conferred by MMI’s patents essential to the 3G and LTE telecommunications standards. The Commission examined this point in detail before concluding that this was not likely to be the case, placing some reliance on letters Google had sent to a range of standards-setting bodies making what the company termed “irrevocable” and “legally binding” commitments to license the standards essential patents received from MMI on FRAND terms (underscoring the importance the Commission attaches to FRAND licensing obligations surviving the transfer of the relevant patents; as seen in the IPCom case)."  

IV. Conclusion

Up to the Microsoft judgment, the Commission’s approach to balancing the competing imperatives of intellectual property rights and Article 102 developed in a relatively clear direction, towards a broader application of Article 102. The apparent initial hesitance to intervene in national intellectual property disputes in the 1970s and early 1980s began to fall away, with the Magill, Tiercé Ladbroke and IMS Health cases developing and expanding the possibility that intellectual property rights might be overridden where their exercise threatened not to encourage technical development but instead to stifle new products. The Microsoft case then continued this trend, and at the time seemed to signpost further similar interventions, even if there is room to debate the precise extent to which it broadened the conditions for compulsory licensing relative to IMS Health.

Looking back now, though, it seems possible that Microsoft may remain the high-water mark for antitrust intervention in the field of intellectual property rights for some time. Despite its success in that case, the Commission’s preference since then appears to have been to settle investigations into the use of intellectual property rights, whether informally, as with Microsoft’s interoperability undertaking and IPCom’s agreement to honour Bosch’s FRAND obligations, or on the basis of formal commitments, as in the Rambus case.

The Commission’s conduct of its ongoing investigation into Google seems to support this...
impression. Faced with complaints that a dominant technology firm is, amongst other things, using its market power to allegedly harm smaller, specialised competitors to the benefit of its own services, the Commission is attempting to reach a settlement. From a long list of complaints, the Commission has chosen a small number of concerns to be tackled separately and engaged in extensive negotiations with the company. This may reflect the complexity of the issues involved in a field where the legal position is not altogether clear. More significantly, it presumably reflects an awareness that in a fast-moving industry a prompt negotiated settlement may do more to prevent lasting distortion of the competitive structure of the market than even a tough, formal decision which may take many years to reach, defend and enforce.