European Commission assumes role of global technology watchdog

The recent European Court of First Instance decision in the *Microsoft* case may turn out to have major implications for all IP owners operating in the technology sector

As is always the case with such things, it will probably take a while for the full implications of the European Court of First Instance's (CFI) decision in the *Microsoft* case to sink in fully. However, the delight on the faces of officials from the European Commission Competition Directorate General and the back-slapping outside the court indicated that they believed a major victory had been secured. The frowns on the faces of Microsoft's representatives and their very limited post-decision comment told a similar story. And who can argue with such reactions?

In its judgment, handed down on 17th September, the CFI upheld the Commission's 2004 decision to fine Microsoft Euros 497 million, a sum that had been levied after an inquiry found that the company had abused a dominant position by tying Windows Media Player with the Windows PC operating system and refusing to provide interoperability information to rivals. And the court then went further. It confirmed that the company should immediately comply with a Commission order to ensure its products can operate with other computer systems by sharing interoperability information with competitors; while, in addition, it was ordered to produce a version of the Windows operating system which does not include Media Player software. That the court found the Commission's decision to appoint a trustee to monitor Microsoft's ongoing compliance with the original decision was not permissible under European law would have been scant consolation for the company. If it had been a football match, the final score would have read something like 6-1. In other words, it was a slaughter.

Compulsory licensing confirmed

In its decision, the CFI seemed to confirm that the possibility of compulsory licensing of intellectual property rights is now something to which companies with strong market share in Europe are going to have to face up. While the court stated that compulsory licensing would not be automatic, it did confirm that would be possible if the rights in question relate to: "A product or service indispensable to the exercise of an activity on a neighbouring market; the refusal [to license those rights] must be of such a kind as to exclude any effective competition on that market; and the refusal must prevent the appearance of a new product for which there is potential consumer demand." As Brad Smith, Microsoft's general counsel, pointed out in a press conference, it is not just his company that enjoys large market share in Europe – the likes of Apple, Google and IBM are also dominant players and could also fall foul of the Competition DG at some time in the future.

On the other side of the Atlantic, meanwhile, a "concerned" Thomas Barnett spoke of the decision "chilling innovation and discouraging competition". In pointed language, Barnett, who is head of the antitrust division at the US Department of Justice, said: "In the United States, the antitrust laws are enforced to protect consumers by protecting competition, not competitors." Well, that's as may be, but following the CFI judgment it is the European Commission which has emerged as the global watchdog of the technology industry. Europe is a hugely important market and so any of the big players planning a strategy is going to have to consider carefully what the Commission will think before it puts that strategy in place. If Brussels does not like the way a company is using its IP rights to create or protect a powerful position in a marketplace, the Competition DG has been given the green light to open up an investigation, impose substantial financial penalties if it finds wrong doing and order companies to make their rights available to others. And competitors can petition for these investigations to begin.

Microsoft felt that its position as a rights holder would protect it from the Commission's attentions. But the CFI has made clear that this is not the case. Given Microsoft's immensely strong position, it would be unwise to draw too many conclusions about where this leaves other IP owners, but they could not be blamed if they were worried. Europe says it wants to be an IP powerhouse; Europe says that it encourages innovation; Europe says that it wants to be the world's leading knowledge economy. But has anyone told the Competition DG?

The European Commission has always claimed to speak with one voice on IP. Clearly, it believes that there is no contradiction between advocating stronger IP rights through mechanisms such as the European Patent Litigation Agreement and the Community patent, while at the same time stating that those companies which use such rights to develop powerful positions in their markets will have to share them with their competitors if the Commission decides they should.

Second-guessing the EPO

But while there is now much greater clarity with regard to the competition/IP nexus in Europe, several unresolved issues remain. Perhaps the most important is the extent to which the Commission is able to second-guess the European Patent Office in deciding whether products are innovative enough to justify the royalty rates a licensor demands of licensees.

In March this year, the Commission issued a statement of objection relating to Microsoft's compliance with the original 2004 decision. As part of this, the Commission argued that the royalty rates Microsoft was charging its competitors for access to interoperability protocols required under the 2004 decision were too high; this on the grounds that the protocols were not innovative enough – despite the fact that some of them were covered by patents granted by the EPO. In effect, if such claims are allowed to stand, it creates a situation in which an unelected, non-judicial body has the right to decide that the patents a company owns are not worth the paper they are written on; and

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