



The Stockholm Network Experts' Series on Intellectual Property and Competition

Innovation, Intellectual Property and
Competition- a Legal and Policy Perspective



By Dr Duncan Curley



STOCKHOLM NETWORK

Innovation, intellectual property and competition - A legal and policy perspective

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The Lisbon Strategy renewed

At a summit meeting of the Council of Ministers in Lisbon in 2000, an ambitious programme to make Europe the most competitive and dynamic knowledge-based economy in the world by the year 2010 was announced. Five years elapsed and in the face of slow progress and even calls to abandon the Lisbon Agenda altogether as a failure,¹ the European Commission decided on a new start. The Lisbon strategy was renamed the *Lisbon partnership for growth and employment* and it was revised and refocused, placing greater emphasis on the complementary efforts of the 25 European Union Member States, in addition to those of the Commission.²

In the updated version of the Lisbon strategy, the Commission has maintained its role as the coordinator of policy at the Community level, with its own Community Lisbon Programme as a counterpoint to the various national efforts. One of three main policy measures proposed under the Community Lisbon Programme is *knowledge and innovation for growth*.³

Innovation, IPRs and competition – the policy role of the European Commission

The European Commission has acknowledged that an important part of its policy for encouraging innovation in the EU is a harmonised system of intellectual property rights (IPRs) that can be used effectively to protect new products and technology.⁴ IPRs are of course vital in a knowledge-based economy, because they confer exclusive legal rights that can be used to prevent others from simply copying a technological innovation and free-riding on the back of someone else's research and development efforts.

Professor Michael Blakeney noted in the first paper in this series for the Stockholm Network that IPR policy formulation from the various Directorates-General (DGs) of the European Commission is somewhat disparate.⁵ Responsibility for IPRs lies with a number of DGs, including Internal Market and Services, Trade, Enterprise and a number of others. Professor Blakeney remarked in his paper that, "to the observer there does not seem to be much IP policy co-ordination between these DGs".

¹ 'Bursting the Bubble'; *Wall Street Journal*, 26 January 2005.

² 'Working together for growth and jobs – A new start for the Lisbon Strategy'; Communication from President Barroso to the Spring European Council: COM(2005) 24 of 2 February 2005.

³ 'Common Actions for Growth and Employment: The Community Lisbon Programme'; Communication from the Commission to the Council and the European Parliament: COM(2005) 330 final of 20 July 2005.

⁴ Deputy Director General Stoll, DG Internal Market (European Commission) at *The Pan-European IP Summit*, Brussels, 2 December 2004.

⁵ Available on The Stockholm Network's website at: <http://www.stockholm-network.org/downloads/publications/d41d8cd9-Blakeney%20Paper.pdf>.

IPRs are - broadly - legal monopoly rights that can be used to prevent competition. IPRs may give firms (or *undertakings*, in the terminology of European competition lawyers) the power to price goods and technology above prevailing market rates. A traditional antitrust approach might condemn the exercise of market power - including in some circumstances the exercise of IPRs - that would result in a more monopolistic or oligopolistic market structure. There is therefore a potential for tension between policies aimed at innovation that bolster effective IPR protection and encourage the establishment of powerful market positions and policies aimed at improving price competition between firms.

The policy tension between the need for strong IPRs and the desire for effective price competition and vibrant markets is exacerbated if one adopts the Schumpeterian view that there is a positive relationship between innovation and market power, i.e. that large firms possessing IPRs are best placed to reinvest the monopoly profits that they have earned in risky research and development (R&D) and as such they are the main drivers of technological and innovative progress in society.⁶

As recognised in the Community Lisbon Programme, the development of new and innovative products and services forms a crucial part of the modern competitive process. Companies must innovate rapidly and invest heavily in research in order to maintain their competitive advantage. Innovation assets such as technical know-how, trade secrets, human resources and IPRs are critical for success. The interplay between innovation, IPRs and competition policy is therefore an increasingly important aspect of the business landscape. It is DG Competition that bears the principal responsibility for formulating policy and promoting competition in the EU by means of the European competition rules, as laid down in particular in Articles 81 and 82 of the EU Treaty.⁷

It goes without saying that all companies - small, medium and large undertakings - that are active on European markets need to be able to understand how the competition rules may affect their ability to exercise their IPRs. If there is a risk that the exercise of IPRs may be hampered at some point in the future because of competition rules, this may affect decisions on whether to invest in a particular area of technology.

Is it really necessary to choose between a policy which fosters innovation, strong IPRs and the strengthening of the market power of large companies and a policy that encourages price competition and a level playing field? In this paper, the coherence of EU competition policy with respect to innovation and IPRs will be examined, in the specific context of the European Commission's approach to research and development and technology licensing contracts. We will also look at the case law on the impact of competition rules on the exercise of IPRs and specifically the European Commission's decision in the *Microsoft* case.

An outline of the main EU Treaty competition provisions

European competition law is intended to fulfil two key objectives: First, open, free and fair competition in the common market of Member States. Second, to break down national borders, insofar as they hamper free trade

⁶ *Capitalism, Socialism and Democracy*; J.Schumpeter (1942).

⁷ The Consolidated Treaty Establishing the European Community.

within the Community, with the goal of achieving a single European market for goods and services. These broad objectives are laid down in the European competition rules, specifically Articles 81 and 82. However, beneath these overarching rules, the detailed implementation is subject to the prevailing competition policy choices of the European Commission.

Article 81

Article 81 regulates joint conduct between undertakings. It is primarily aimed at cartels and other anti-competitive behaviour, but it can catch all kinds of agreements between companies, including contractual arrangements that they have made in furtherance of a business deal.

The text of Article 81 is as follows:

- I. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
 - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
 - any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 82

Article 82 is aimed at unilateral conduct by large firms with substantial market shares. It prohibits undertakings with a dominant position on a particular market from conducting themselves in a way that constitutes an abuse of their market power. Where there is only one dominant undertaking on a market with several smaller, fragmented players, the dominant company may behave like a monopolist, for example, in its pricing strategies. Article 82 imposes strictures on the way in which dominant firms may conduct themselves, with the aim of maintaining what little competition exists on a market that is dominated by one main player.

When conducting market investigations under Article 82, the European Commission usually defines the relevant market and then determines whether a company is in fact dominant on that market. It often uses market share as the most important factor in deciding whether an undertaking is dominant and sees large market shares (greater than 50%) as evidence of the existence of dominance. The relevant market consists of all products (and/or services) that are regarded as substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

The text of Article 82 is as follows:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the detriment of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Examples of conduct that have been found to be abusive when carried out by a dominant undertaking include price discrimination between customers, refusals to supply and tying. It should be noted however, that a

dominant undertaking acting abusively may be able to escape liability for a breach of Article 82 if it can show an objective justification for its conduct.

Fostering innovation and preserving incentives to innovate - a closer look at Article 81

If an agreement is caught by Article 81(1) there is an important legal consequence, which is set out in Article 81(2). An agreement (or a term of an agreement) that falls within the embrace of Article 81(1) is automatically void. This could have serious practical implications for the parties to an agreement, because the contract may then be unenforceable. Article 81(1)(b) expressly prohibits agreements between companies that limit or control “*production, markets, technical development or investment*”.

The European Commission has nevertheless recognised that activities such as cooperation in the conduct of innovative research, technology transfer and the licensing of IPRs between firms can assist in the development and exploitation of risky new technologies, thereby enabling more and better products to be brought to market and allowing greater consumer choice. Thus, even if agreements for the carrying out of research and development or the licensing of IPRs are caught by Article 81(1), these agreements often have pro-competitive benefits. The pro-competitive effects can be taken account of by means of Article 81(3), which (if the conditions in Article 81(3) are met) cancels Article 81(1).

In order to avoid firms having to check every contract for the impact of Article 81(1) and the possibility of exemption under Article 81(3), the European Commission has used its power to issue block exemption regulations and guidance notes. These documents allow companies to check their business contracts against prevailing EU policy under the competition rules. Not only are they helpful documents that explain and clarify EU competition policy, but they are also extremely useful from a legal perspective. If a contract complies with the terms set out in a block exemption, it is legal and enforceable and the detailed competition rules often do not need to be considered further. The block exemptions are therefore said to provide a *safe harbour* or a *safety zone* for certain contracts.

We will now examine two block exemptions in order to draw out from them the European Commission’s policies towards innovation and the effect of competition rules. We will look first at the block exemption for research and development agreements: Commission Regulation (EC) No. 2659/2000 (the ‘R&D block exemption’).⁸ We will then examine the block exemption for technology licensing agreements between two parties (including licences of patents, know-how and software copyright). This block exemption is Commission Regulation (EC) No. 772/2004, also known as the Technology Transfer Block Exemption Regulation (for present purposes, the ‘IPR licensing block exemption’).⁹

⁸ The full text of the R&D block exemption is available on DG Competition’s website at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R2659:EN:HTML>.

⁹ The full text of the IPR licensing block exemption is available on DG Competition’s website at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_123/l_12320040427en00110017.pdf.

The R&D block exemption

Innovation can be a risky and expensive business. In certain areas of technology, this risk may be too great for one firm to bear on its own. One way of ameliorating the risk is to share the research and development costs with another company. The R&D block exemption acknowledges that research and development agreements do not generally give rise to competition concerns because such cooperation often gives rise to new, technologically superior products thereby enhancing technical progress and overall consumer welfare.

One may ask why research and development agreements should be the subject of regulatory concerns at all, given the basic premise that competition is rarely affected by such arrangements. The answer is that although coordination of research efforts by two firms may not have an immediate effect on a market for products, it may nevertheless have an effect on future competition, if, as a result of their joint arrangement, one of the partners decides either to abandon its own future investments in a particular technological area or to refrain from competing as vigorously as it might have done, had it not been for the agreement. The way that this is dealt with in the R&D block exemption is by black-listing any contractual provision that restricts the freedom of one of the parties from carrying out its own research and development in an unconnected field¹⁰. In such circumstances, the R&D block exemption is not available.

This is reflective of a well-established competition policy imperative of the European Commission, which is to preserve a competitive market structure by ensuring that research and development agreements and other contracts do not restrict the number of players investing in a particular technological area such as might lead to an over-concentration of existing research efforts and a deleterious overall effect on dynamic competition based on innovation.¹¹

The IPR licensing block exemption

Another area in which the European Commission has sought to promulgate a pro-innovation policy under Article 81 is IPR licensing and technology transfer, with the IPR licensing block exemption.¹² Licensing deals are often done so that companies can benefit from synergies arising out of their respective technological expertise. Licensing is also an effective way of disseminating technology, leading to innovation and ultimately new and better products for consumers.

The IPR licensing block exemption provides a broad exemption from Article 81(1) for many types of licensing contracts that are entered into by two parties. However, there are certain conditions that must be met. In order for an agreement to come within the block exemption's safe harbour, the contracting parties' market shares must be below certain percentage thresholds. Assessment of the parties' market shares may involve

¹⁰ Article 5(1)(a) of the R&D block exemption.

¹¹ *High Technology Industries, Private Restraints on Innovation, and EU Antitrust Law: The European Approach to Market Analysis of R&D Competition*; J.Kairo and M.Paulweber, RTKom 1/2001 13 and 2/2001 68.

¹² *Intellectual Property Licences and Technology Transfer*; D.Curley, Chandos Publishing (Oxford) Limited (2004).

defining the relevant market and analysing economic data. Two economic markets must be examined: the market for the products which are to be made pursuant to the IPR licence agreement and the market for the granting of IPR licences for technology. Undertakings with more than a 30% individual share of a relevant product market or a relevant technology market are unable to take advantage of the block exemption. If two undertakings are competitors on either a relevant product market or a relevant technology market, their combined market share must be less than 20% in order to come within the block exemption.

These market share thresholds are another indication of the European Commission's policy of endeavouring to preserve competition in innovation, by seeking to maintain the capacity for technological development to be conducted in a number of firms, rather than allowing technology (and IPRs) to become concentrated in the hands of a few.

Critics have pointed out that the market-based assessments called for in the IPR licensing block exemption can be quite complex.¹³ There may for example be insufficient data for the calculation of market shares in certain technology licensing situations. In addition, a static, market share-based analysis may give an inaccurate picture of a firm's market power in fast-moving sectors of the economy undergoing rapid technological change. Yet there can be no doubt that the Commission intended its policy towards IPR licensing to have positive effects on innovation, even if the block exemption is difficult to apply in practice.

A closer look at Article 82: ownership of IPRs and market dominance

Mere ownership of an IPR is not sufficient to establish a dominant position, for the purposes of Article 82. This is because the relevant market will often consist not just of products covered by a particular patent or copyright. It is quite often the case that other products may compete on a market with a product that is protected by IPRs. Broadly, market dominance on the part of an IPR owner will only arise if there are no or only a few non-infringing substitute products available for consumers to buy.¹⁴ Cases under Article 82 involving IPRs are therefore quite rare and almost always controversial.

A survey of the cases

The tension between IPRs, incentives to innovate and competition law is thrown into sharp relief in cases where a dominant undertaking refuses to grant a licence of its IPR and the remedy sought under Article 82 is a compulsory licence. The notion that a firm may be forced to grant a licence of valuable IPRs to a competing entity by virtue of competition law potentially takes away the basic rationale for obtaining the exclusive rights in the first place.

The compulsory licensing of IPRs as a remedy for an abuse of dominant position under Article 82 began to develop in the European case law in the late 1980s when the European Court of Justice considered the case of

¹³ *The New EC Technology Transfer Block Exemption Regulation*; P.Treacy and T.Heide, EIPR (2004) 414.

¹⁴ *The Relevant Market in Intellectual Property Antitrust: An Economist's Overview*; S.Addanki and K.Anderson, Practising Law Institute/Patents, Copyrights, Trademarks and Literary Property (1995) 414-577.

Volvo v Veng.¹⁵ Volvo had alleged that the importation and sale in the UK by Veng of front wing components for Volvo cars infringed Volvo's UK registered design. Veng alleged that Volvo was abusing its dominant position on the market for spare parts by refusing to grant Veng a licence of its IPRs to permit Veng to sell the components lawfully. The European Court held that any obligation imposed by competition law on the owner of an IPR to grant a licence would take away the very substance of the exclusive monopoly right.

The conclusion that was drawn from this case was that if a dominant company owns IPRs which enable it to prevent competitors from producing directly competing products, it was not an abuse under Article 82 for it to refuse to grant licences. Dominant undertakings would only commit an abuse of a dominant position within the meaning of Article 82 by refusing to licence their IPRs if they did something more than merely exercise those rights to prevent the monopoly given to them from being infringed.

The first case in which IPRs were actually the subject of a compulsory licence order came in 1995 with the European Court of Justice's *Magill* decision.¹⁶ Mr. Magill was a businessman in Ireland who wanted to publish a composite television programme guide for Irish viewers. Until that point, Irish TV viewers had had to buy separate guides for each TV channel. The result was that Irish broadcasters sued Mr. Magill for infringement of copyright in the list of TV programmes contained in their individual guides. On appeal, the European Court confirmed that the refusal of the broadcasters to license Mr. Magill infringed Article 82. In particular, it was held that the exercise of an exclusive right such as copyright may in *exceptional circumstances* infringe Article 82. The *exceptional circumstances* in this case included the fact that the refusal to license Mr. Magill prevented the launch of a new product for which there was proven consumer demand.

The decision in *Magill* was followed by the *IMS Health* case.¹⁷ *IMS Health* arose as a result of a referral to the European Court of Justice from a court in Germany. The issue was whether, in the circumstances of the case, an abuse had been committed when a dominant undertaking (IMS Health) had refused a licence to its weaker competitor (NDC) to use a database in which copyright subsisted, despite an offer to pay valuable consideration for the licence. The information contained in the database consisted of regional sales data on pharmaceuticals, organised in a database according to what was called 'brick' structure. NDC had previously attempted to enter the market in Germany for the sale of similar data and services, with a database structure that was derived from IMS' brick structure. IMS had sued NDC for copyright infringement and had sought an interim injunction. NDC asked IMS to grant it a copyright licence to use IMS' brick structure, in exchange for payment, but IMS refused.

The European Court of Justice stated that in order for the refusal of a copyright owner to give access to a product or service that was indispensable for carrying on a particular business to be abusive under Article 82, it was sufficient that three cumulative conditions were satisfied:

¹⁵ [1989] CMLR 122.

¹⁶ *RTE and ITP v Commission* [1995] ECR I-743.

¹⁷ Case C-481/01.

- the refusal was preventing the emergence of a new product for which there was a potential consumer demand;
- the refusal to licence by the copyright owner was not justified by objective considerations;
- the refusal was such as to exclude any competition on a secondary market.

It is not clear whether this is a different test from *Magill's* “*exceptional circumstances*” or whether this is simply an expanded reiteration of the same principle stated in *Magill*.

The decision in *IMS Health* thus offers little practical guidance in determining whether Article 82 and *Magill* compulsory licensing would apply when a competitor seeks to bring to market not just a new product (as in *Magill*) but a different product that infringes the IPRs of a dominant undertaking. Whatever the legal position (which will only be clarified after a further ruling from the European Court of Justice), it appears that the European Commission is of the view that Article 82 has a broad application, so that the remedy of compulsory licensing is not limited only to *Magill*-type circumstances in which the market for a *new* product is being suppressed by reason of a refusal to licence.¹⁸

The Microsoft decision

A summary of the facts of the case

With a decision that was made public in March 2004¹⁹, the European Commission concluded a five year investigation into alleged anti-competitive activity by the US software giant Microsoft Inc. The Commission had been considering two alleged abuses of a dominant position. The first abuse was a refusal by Microsoft to supply interoperability information to its competitors in order to allow them to offer their own work group server operating systems, which enable (for example) ‘file and print’ services to be shared by a group of personal computers (PCs). The second abuse was the tying by Microsoft of its Windows Media Player to its Windows operating system. For the purposes of this examination, only the work group server aspect of the decision will be considered,²⁰ although both aspects are presently on appeal to the Court of First Instance of the European Communities.²¹

The Commission based its finding of dominance under Article 82 on Microsoft’s large market share of new PC operating system licences, which it said had been over 90% since 2000. This was, according to the Commission, approaching a position of complete monopoly. Given the prevalence of the Microsoft Windows

¹⁸ ‘Balancing intellectual property rights and competition law in a dynamic, knowledge-based European economy’; D.Curley in *The Intellectual Property Debate*; M.Pugatch (ed.), Edward Elgar (2006).

¹⁹ Case COMP/C-3/37.792 Microsoft.

²⁰ For a summary of the Media Player aspects of the decision, see McDermott Will & Emery’s *International News* publication (Spring 2005) at <http://www.mwe.com/info/news/int-spring05.pdf#page=14>.

²¹ In 2004, Microsoft applied to the President of the Court of First Instance to suspend the compulsory disclosure remedy pending its appeal on the merits, but this request was turned down in December 2004 (see Commission Press Release MEMO/04/305 dated 22 December 2004).

operating system on the PCs of many work group networks, Microsoft had an in-built advantage over its competitors in the market for work group server operating systems, in that it was in the best position to engineer the most efficient software to interact with the ubiquitous Windows operating system installed on most PCs. The Commission said that Microsoft had used its position of near monopoly on the market for PC operating systems to leverage its position on the market for work group server operating systems, where its market share was conservatively estimated to be at least 60%. The main rival to Microsoft's operating system, NetWare (sold by Novell), was in a weak market position and other operating systems, such as Linux and UNIX, had only a limited presence on the market.

One of Microsoft's competitors, Sun Microsystems, Inc. had initiated the Commission's investigation by writing to Microsoft with a request that it be provided with specifications that would enable it to produce a competing work group server operating system product. Microsoft had refused Sun's request on the grounds that the interoperability information constituted valuable intellectual property, which was protected by copyright, trade secret laws and patents.

In its decision, the Commission characterised Microsoft's refusal to supply this information as an abuse under Article 82. Microsoft was ordered to pay a record fine and to disclose complete and accurate specifications of the protocols necessary for Microsoft's competitors' work server operating system products to be able to interface properly with Windows-operated PCs. The intended effect of this disclosure order was to lessen the market dominance of Microsoft's products. By allowing Microsoft's competitors access to the interoperability information, the Commission said that others would be incentivised to enter the market for work group server operating systems, although it offered no concrete evidence to this effect from the other market players.

Incentives to innovate and their effect on future competition

Microsoft argued that its conduct in refusing to supply interoperability information to Sun was objectively justifiable, because if it was forced to license out interface information, this would take away its own incentives to continue with further innovation in work group server operating systems. Microsoft has maintained that an order that forces it to allow others to use the interface information amounts to a compulsory licence of its IPRs, arguing that such a remedy has only ever before been imposed in exceptional circumstances (such as those in *Magill*). During the appeal hearing before the Court of Instance on 26 April 2006, Microsoft accused the European Commission of "the biggest encroachment on intellectual property in European competition law history" and likened the Commission's ruling to "opening the vaults of a bank" and handing out money to passers-by.²²

The Commission noted in its decision that the specifications requested might constitute information that was *prima facie* protectable by Microsoft as trade secrets. The Commission also acknowledged that if it ordered Microsoft to disclose these specifications to its competitors (such as Sun) for the purpose of allowing them to

²² 'Microsoft attacks Brussels in court', *Financial Times*, 27 April 2006; 'Computer gains', *The Lawyer*, 15 May 2006.

produce rival work group server operating systems, this might constitute compulsory licensing of Microsoft's IPRs. Nevertheless, the Commission said that the *Magill* case provided the necessary justification for a compulsory licence in this case. There were exceptional circumstances that warranted a compulsory licence, specifically, Microsoft's overwhelming dominance in the market for PC operating systems, the indispensability of the interface information to Microsoft's competitors and the risk of elimination of competition in the work group server market if the remedy was not imposed.

One of the weaknesses in the Commission's decision was that it did not find that Microsoft was suppressing a new product (as required by *Magill*) by refusing to supply the interoperability information. The fact was that there were other work group server operating systems already available from other vendors, such as NetWare and Linux, even though their respective market shares were small. Microsoft has latched on to this omission and has criticised the decision for not specifying an unmet consumer demand that would justify a disclosure order of the kind made by the Commission.

In coming to its decision, the Commission focussed instead on the effect of Microsoft's refusal to supply interoperability information on the overall level of innovation in the industry. The Commission alleged that the effect of Microsoft's refusal to supply the requisite information would be to force the market to migrate towards an industry standard for work group server operating systems based on Windows, thereby discouraging other companies from coming up with innovative solutions of their own and limiting technical development to the prejudice of consumers.²³ In short, the Commission argued that Microsoft's refusal to supply interoperability information would adversely affect the incentives of others to innovate and so prevent the emergence of new products in the future. The Commission concluded that by ordering disclosure, there would be an overall positive effect on incentives to innovate in the rest of the industry, as well as on Microsoft.²⁴ To the European Commission, these considerations outweighed the potential negative impact of a compulsory licence on Microsoft's own incentives to innovate.

Conclusions

The Commission has recognised the importance of IPRs as providing a means for reward for investment in risky technologies. In its guidance notes on the application of competition rules to the licensing of IPRs and technology under Article 81, the Commission says.²⁵

"In the assessment of licence agreements under Article 81 it must be kept in mind that the creation of intellectual property rights often entails substantial investment and that it is often a risky endeavour. In order not to reduce dynamic competition and to maintain the incentive to innovate, the innovator must not be unduly restricted in the exploitation of intellectual property rights that turn out to be valuable".

²³ See the text of Article 82, sub-paragraph (b).

²⁴ Paragraph 783 of the decision.

²⁵ Paragraph 8 of the European Commission's Guidelines on the application of Article 81 of the EC treaty to technology transfer agreements (see http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/c_101/c_10120040427en00020042.pdf).

Consistent with the need for antitrust agencies to act with caution in fast-moving, innovative markets so as not to perturb the ordinary functioning of the competitive process, the Commission has adopted a relatively light regulatory touch under Article 81, with a *laissez faire* attitude towards research and development and IPR licensing agreements. This policy also has the advantage of transparency via the medium of the block exemptions and the Commission's guidance notes.

The Commission's policy under Article 81 and its "hands off" approach to agreements that facilitate innovation and new products and services may be contrasted with the disclosure order in the Article 82 *Microsoft* case. In *Microsoft*, the Commission has adopted a potentially far-reaching disclosure remedy on the basis of a prediction about incentives to innovate in the software industry that it *hopes* will cause others to enter the market for work group server operating systems.

Leaving aside the obvious practical difficulties associated with the implementation of such a remedy,²⁶ there is a danger that such a measure (if applied more generally) would have the effect of deterring companies from innovating, if the benefits of their efforts are ultimately to be removed by competition law. The test employed by the European Commission in its *Microsoft* decision could mean that a dominant firm may be forced to license its IPRs to competing entities which intend to offer a product which will *directly* take market share away from the dominant company.

In conclusion, legal issues concerning the interplay of innovation, IPRs and competition are likely to occur with increasing frequency in today's knowledge-based economy. The need for consistent and coherent policies has never been greater. The European Commission needs to work harder at communicating a clear and transparent message on all of these issues. Until then, companies and their advisers will be uncertain as to the possibility of regulatory intervention. Such legal uncertainty has no place in the EU if it is to succeed in creating fast-moving, dynamic markets with new products and innovative technologies, as envisaged in the revised Lisbon strategy.

²⁶ Microsoft and the European Commission continue to dispute whether Microsoft has implemented the European Commission's remedy in accordance with the terms of the March 2004 decision. Microsoft believes that it has complied (see for example <http://www.microsoft.com/about/legal/eudecision/>) but on 12 July 2006 the Commission imposed a penalty payment of €280.5 million on Microsoft for continued non-compliance.