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The London Disputes Newsletter

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Trouble working together? The Commission Wants to Know

The European Commission has launched a public consultation on access to interoperability information, with the aim to ensure that new IT devices, applications, data repositories and services interact seamlessly anywhere. This initiative could have significant consequences for the IT sector in Europe.

The European Commission (the Commission) (Directorate General (or DG) for the Information Society) has launched a public consultation on the access to interoperability information. The Commission is looking at how to encourage the licensing of interoperability information not covered by standards. The survey is available [here](#).

This survey is part of DG Information Society's 'Digital Agenda for Europe'. The second pillar of the Digital Agenda is focused on ensuring that new IT devices, applications, data repositories and services interact seamlessly. Improved standard-setting procedures and increased interoperability have been identified as fundamental to this objective.

Focus and Content

The stated purpose of the survey, which is in the form of a questionnaire is to obtain 'input from stakeholders and interested parties on the needs, barriers and opportunities for measures leading significant market players to license interoperability information not covered by standards'. Interoperability refers to the ability of different services and products (hardware or software products in the context of this consultation) to communicate with each other and to work together. Information required to enable interoperability (i.e. interoperability information) is often considered to be valuable intellectual property protected by copyright, trade secrets and patents.

The survey is anonymous and has separate questions for each of three classes of respondents, namely: (i) users of digital products or services; (ii) potential users, such as system integrators, in-house developers or developers of complementary products or services; and (iii) owners of interoperability information.

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Users are asked about the extent to which products or services present interoperability limitations, i.e. whether users have faced difficulties when moving between products and whether their choices have been constrained as a result. The Commission is interested in experiences as diverse as the exchange of documents between different word processors to access to internet content on different platforms.

Potential users and owners of interoperability information are asked about barriers to accessing the information. This includes intellectual property rights ("IPRs"), ease of licensing, transaction costs in negotiating the license and licensing fees. The Commission also asks whether a 'model contract' for interoperability would be acceptable and reduce costs and whether guidelines to assess and agree the value of interoperability information would facilitate license negotiations. The use of Licenses of Right where available (such as in the UK) and FRAND (fair and reasonable and non discriminatory) access terms is also queried.

Legislative and Enforcement Context

The consultation may have significant consequences for competition enforcement in the IT sector in Europe.

For example, the Commission (DG Competition) found in 2004 that Microsoft's refusal to supply interface information between Windows software and non-Microsoft work group server operating systems excluded competitors from the market for work group server operating systems. The *Microsoft* case occupied the Commission for over a decade and demonstrates the complexity that can arise when trying to resolve issues of 'lock in' to a particular technology retrospectively.

More recently, both the *Cisco/Tandberg* merger (March 2010) and the *Intel/McAfee* merger (January 2011) were cleared following commitments to make interoperability information available. In *Cisco/Tandberg* the merging parties were required to divest a protocol developed by Cisco for its videoconference solutions to ensure the interoperability of the merged entity's products with those of its competitors. In *Intel/McAfee*, the parties committed to provide competitors of McAfee with information to use functionalities of chipsets and CPUs in the same way as used by McAfee. At the beginning of March 2012 the Commission opened an investigation into whether the software firm MathWorks had abused a dominant position by refusing to provide end-user software licenses and interoperability information to its competitors.

It therefore appears that the Commission is looking to avoid the difficult antitrust enforcement issues faced in the *Microsoft* case by creating models so that, in the absence of standards, interoperability information does not result in 'lock in' to a particular technology. It has tested out some of these concepts in agreeing interoperability commitments in merger control cases and it now appears to want to test these more widely using the consultation process.

The specific outcome of this consultation remains unclear. It may result in a Communication, providing guidelines on licensing interoperability information, or it may be used in the development of a directive. The consultation will close on 20 June 2012. Current and potential users and owners of interoperability information are encouraged to participate as this initiative may have significant consequences for the IT sector in Europe.

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