Neutral citation [2024] CAT 69

Case No: 1570/5/7/22 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

28 November 2024

Before:

JUSTIN TURNER
(Chair)
JOHN DAVIES
PROFESSOR IOANNIS LIANOS

Sitting as a Tribunal in England and Wales

BETWEEN:

JJH ENTERPRISES LIMITED
(TRADING AS VALUELICENSING)

Claimant

\- v -

(1) MICROSOFT CORPORATION
(2) MICROSOFT LIMITED
(3) MICROSOFT IRELAND OPERATIONS LIMITED

Defendants

Heard at Salisbury Square House on 20, 21 and 22 November 2024

JUDGMENT (SUMMARY JUDGMENT)

APPEARANCES

<u>Maya Lester KC</u>, <u>Max Schaefer</u>, <u>Jon Lawrence</u> & <u>Andris Rudzitis</u> (instructed by Charles Fussell & Co LLP) appeared on behalf of the Claimant.

<u>Robert O'Donoghue KC</u>, <u>Nikolaus Grubeck</u>, <u>Jaani Riordan</u> & <u>Kristina Lukacova</u> (instructed by CMS Cameron McKenna Nabarro) appeared on behalf of the Defendants.

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A. INTRODUCTION

1. By application dated 14 December 2023, the Claimant (JJH) applied for summary judgment against certain defences raised by Microsoft in these proceedings.

2. JJH was a vendor of pre-owned licences for Microsoft software products, including *Windows* and *Office*. Perpetual licences may be resold in the UK and EU in accordance with the CJEU's judgment in case C-128/11 *UsedSoft v Oracle* [2012] 3 CMLR 44.

3. From about 2011, the Defendants (hereafter "Microsoft") migrated customers from the use of perpetual licences to its subscription-based service, Microsoft 365. JJH's case is that Microsoft stifled supply of pre-owned licences by, in exchange for discounts to its subscription based service, requiring customers to surrender or retain the perpetual licences they no longer required. JJH contends *inter alia* that:

> "Microsoft agreed to provide certain large customers with discounted Microsoft 365 pricing, subject to their accepting "custom anti-resale terms" (or "CAR Terms")
>
> Microsoft later amended its global licensing terms, which provided for discounted M365 subscriptions (known as "From SA" pricing) to enterprise customers that had migrated from perpetual licences, so as to require them to retain their old perpetual licences in order to keep the From SA discount. This requirement is referred to as the "New From SA Condition".

The terms complained of are referred to collectively as the "Impugned Terms".

4. JJH says that the Impugned Terms amounted to anti-competitive agreements contrary to Article 101 TFEU, and/or that the conduct complained of amounted to Microsoft abusing its dominant positions in the markets for desktop operating systems and office productivity suites, contrary to Article 102 TFEU (and analogous provisions under the Competition Act 1998 and the EEA Agreement). It contends that but for such breaches of competition law, JJH would have been able to resell many more pre-owned licenses for Microsoft software than it did. It claims for damages for lost sales.

5. It is common ground that whether the Impugned terms are contrary to Article 101(1) and/or whether Microsoft's conduct is *prima facie* abusive under Article 102 is a matter for trial. Microsoft denies that the conduct in issue amounted to a campaign to stifle sales of pre-owned licences. Further it contends *inter alia* that its use of CAR Terms was limited, and that it withdrew the New From SA Condition in response to VL's claim.

6. This application arises from what have been referred to as Microsoft's "alternative defences". These are (a) that Article 101(1) does not apply because the relevant agreements fall within the scope of Article 101(3); (b) that if Microsoft's conduct was *prima facie* anti-competitive under Article 102 it may be objectively justified as being proportionate means of achieving legitimate aims and/or (c) that any anticompetitive effects arising from Microsoft's conduct were proportionate to the procompetitive effects. For the purpose of this application the defences under (a) and (c) were treated as being essentially the same and have been referred to as the "efficiencies defence". JJH seeks summary judgment on these alternative defences as having no realistic prospects of success.

B. THE APPROACH TO SUMMARY JUDGMENT

7. Summary judgment under the CAT Rules is approached on the same basis as in the High Court under the CPR. The principles are familiar. It is necessary for the Tribunal to consider whether the relevant defences have a *"realistic"*, as opposed to a *"fanciful"*, prospect of success. The relevant test is set out by Lewison J in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 at paragraph 15:

> i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In

some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

8. A summary judgment procedure is ordinarily unsuitable where the issues raise difficult questions of law in a developing area (see for example *Intel Corp v Via Technologies* [2002] EWCA Civ 1905).

9. Caution is required in granting summary judgment where the application will not dispose of the whole case. See Floyd LJ in TFL *Management Services v Lloyds TSB Bank* [2014], at paragraph 27:

"I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross-examination in any event, or where summary disposal of the single issue may well delay, because of

> appeals, the ultimate trial of the action: see Potter LJ in *Partco Group Ltd v Wragg* [2002] 2 Lloyd's Rep 343, para 27(3) and cases there cited."

10. See also the recent decision in *Getty Images (US) Inc v Stability AI Ltd* [2023] EWHC 30390 (Ch), in which Joanna Smith J said as follows at paragraph 38:

> "On the issue of 'compelling reason', it may be inappropriate to grant summary judgment where similar issues would remain to be determined at a full trial and extensive factual and expert evidence would have to be called, meaning that there would be much less in terms of saving costs and court time than is normal."

C. ISSUES WHICH ARISE ON THIS APPLICATION

11. Key issues which arise on this application are as follows:

(1) **First** whether the case which is being advanced in support of the alternative defences is the case which has been pleaded. Ms Lester KC, who represents JJH, submitted that at all material times, and in the face of repeated requests for clarity, Microsoft's pleading has been inadequate. She also submits that it would be unfair for Microsoft not to be held to its pleading given the ample opportunities it has had for clarification.

(2) **Second** as to whether, as a matter of law, the alternative defences under Article 102 are concerned only with benefits which accrue to customers and consumers and not benefits which might accrue to the dominant undertaking which is engaged in the alleged abuse.

(3) **Third** whether the objective justification relied upon as a defence under Article 102 have a realistic prospect of success and should proceed to trial.

(4) **Fourth** whether the efficiencies defences under Article 101(3) and Article 102 have a realistic prospect of success and should proceed to trial.

12. We observe that most of the argument on this application was directed to the objective justification defence under Article 102, with relatively little attention being given to the efficiencies defences under Article 101(3) or Article 102.

D. WHETHER THE DEFENCE RELIED UPON IN RESISTING THIS APPLICATION IS PLEADED

13. The Defence states:

> 58. Paragraph 57 is denied. Such conduct as the Defendants did engage in was, to the extent the issue even arises, objectively justified.
>
> 58.1 The Terms in Issue (including the New From SA Condition) were necessary and reasonable having regard to any and/or all of the following facts and matters:
>
> (a) The ability to use improved and/or upgraded software products, and their constituent Copyright Works, that was offered to qualifying customers.
>
> (b) The need for the copyright owner to obtain an appropriate remuneration corresponding to the economic value of the Copyright Works in circumstances where access to those works was being offered on a discounted basis to qualifying customers.
>
> (c) The need to safeguard the specific subject matter of the intellectual property concerned, namely the Copyright Works, and the need to ensure compliance by licensees with the requirements for resale of second-hand software licences (including the inherent and/or practical difficulty in ensuring that customers render their own copy of any software installed pursuant to Qualifying Licences unusable at the time of resale).
>
> (d) The cost of the ongoing provision of services to qualifying customers.
>
> 58.2 Further or alternatively, even if (which is denied) there were any, or any appreciable, anti-competitive effects, those anti-competitive effects were outweighed by, and proportionate to, the pro-competitive benefits referred to at paragraphs 25.2 and 31.2 above. Paragraphs 39, 54.2, 56.4, 57 above, and 64.2(a)-64.2(c) below are repeated.

14. Further information was provided on 19 May 2023 pursuant to a request dated 31 March 2023. At paragraph 3 to 6 of the response to Request 1, Microsoft describe the conditions under which resale of computer licences may take place following *UsedSoft GmbH v Oracle International Corp* (C-128/11). It makes reference *inter alia* to the need for the licence fee to have been fully paid, the requirement that the first user destroy its copy of the copyright work, and that the first user is not entitled to subdivide a multiuser licence.

15. At paragraphs 10 to 12 if the response to Request 1, it was alleged that:

> 10. The Defendants will contend at trial that, irrespective of any restrictions imposed by the Terms in Issue (the existence and/or appreciability of such restrictions being denied for the reasons set out in Microsoft's Defence) the first user of a Microsoft software product which was purchased in any of the aforesaid circumstances would not have had any legal right, under Article 4(2) of the Directive or section 18 of the 1988 Act, to resell their copy of that software because the necessary conditions for exhaustion of the distribution right would not have been met in respect of that copy (see paragraph 36.2(a) of the Defence).
>
> 11. Any such purported resale, contrary to any of the above requirements, would have been an act which the relevant Defendant, as owner of copyright in the Microsoft software product in question, was in principle entitled to restrain. As such, any further sale or other dealings in the relevant software by the Claimant could also have been lawfully restrained had the Claimant attempted to engage in acts restricted by copyright without the Defendants' consent.
>
> 12. As to paragraph 22, details of the Claimant's business are not within the Defendants' knowledge and they are accordingly unable to plead to those matters (see paragraph 24 of the Defence). In any case, it is by no means obvious that "bulk" dealings in second-hand Microsoft software licences would satisfy the applicable conditions for exhaustion of the distribution right or that the Claimant would be able to prove, with respect to individual copies, that those conditions had been satisfied in any or all instances. Further, even where the distribution right is exhausted with respect to a particular copy, that remains subject to the Defendants' right lawfully to impose other restrictions which are necessary to safeguard the subject matter of the First Defendant's intellectual property rights in its software, and to restrain unlicensed dealings in other copyright works (such as documentation, templates, graphics, and fonts) supplied to the first user alongside such software.

16. Thus, it can be seen that compliance with *UsedSoft* principles is put in issue. In response to Requests 3 and 4, Microsoft addressed again the alternative defences.

> 2. If (contrary to that primary case) the Terms in Issue involved a departure from competition on the merits and/or had appreciable anti-competitive effects, the Defendants contend that any such departure and/or effects were objectively justified, in that:
>
> > a. The Terms in Issue were proportionate means of achieving any and all of the legitimate aims pleaded at paragraphs 13.1(d), 32.1(a), 46.3(c)-(d), 51.1, 57.2, 57.3 and 58.1(a)-(d) of the Defence. As set out above in relation to Request 1, **the First Defendant was entitled to restrain (and, for the avoidance of doubt, objectively justified in restraining) the re-sale of its software in circumstances where the conditions for the exhaustion of distribution right were not satisfied and/or in order to safeguard its exclusive rights as copyright owner**; and/or

> b. In any event, any appreciable anti-competitive effects resulting from the Terms in Issue were very limited, and were outweighed by, and proportionate to, the significant pro-competitive benefits secured by the Terms in Issue, as pleaded at paragraph 58.2 of the Defence (referring to the pro-competitive benefits pleaded at paragraphs 25.2 and 31.2 of the Defence).
>
> 3. Whilst a plea of objective justification involves consideration of the necessity for the alleged restriction(s), the undertaking is not required to consider hypothetical and theoretical alternatives. If the application of what appears to be a commercially realistic and less restrictive alternative would lead to a significant loss of efficiencies, the restriction in question is treated as indispensable: see, for example, *Streetmap.EU Limited v Google Inc* [2016] EWHC 253 (Ch). This will be a matter for legal submission in due course.
>
> 4. The relationship between the Terms in Issue and both (i) the legitimate aims referred to at paragraph 58.1(a)-(d) of the Defence and (ii) the pro- competitive benefits referred to paragraphs 25.2 and 31.2 of the Defence will be a matter for evidence in due course. The Claimant does not require further detail at this stage in order to understand the Defendants' case on objective justification.
>
> **(emphasis added)**

17. Taking the Defence and further information together the allegations include that (a) the Impugned terms could be justified objectively because they were "proportionate means of achieving legitimate aims" and/or (b) the Impugned terms provided pro-competitive benefits which outweighed any anti-competitive effects. Further in respect of (a), as can be seen in the emboldened text, Microsoft contends that the legitimate and proportionate aim is restraining the resale of software in circumstances where the *UsedSoft* conditions have not been met. (Similar allegations are made in respect of Article 101(3) at paragraph 65.4 of the Defence and the response to Request 5).

18. There has been some elaboration and clarification of Microsoft's alternative defence on this application. One matter which Microsoft has raised, which is new, is that it is almost certain that it will be pursuing proceedings for copyright infringement against JJH in the Chancery Division following a letter before action sent on 5 November 2024. Microsoft contends that these will probably not be new proceedings but will be the continuation of existing proceedings which were stayed pursuant to a Tomlin order. Microsoft has also suggested that there is a question mark over whether this Tribunal is competent to determine questions of copyright infringement as they arise, hinting at the possibility that

these proceedings may not be able to proceed pending resolution of the infringement proceedings in the High Court.

19. On this application we do not attach weight to the fact that a copyright action may be pursued in the Chancery Division. Leaving aside the opportunistic timing of this announcement, the position is that those proceedings have not yet been launched, nor has there yet been an application to set aside any stay embodied in a Tomlin Order. As to whether this Tribunal has competence to determine questions of copyright infringement we have two preliminary observations. First, it is not clear to us that the determination of whether it was proportionate to introduce the Impugned Terms to meet a concern that some or part of JJH's trade was in breach of copyright, should involve a retrospective audit of copyright infringement in the courts: if this a material defence then the relevant consideration would seem to be the reasonableness of the fear of copyright infringement and the proportionality of the Impugned Terms at the time they were introduced. Second, we see no reason why this Tribunal should not be competent to decide such matters insofar as they form part of the alternative defences under Articles 101 and 102. Although Mr O'Donoghue KC, for Microsoft, has raised this question of jurisdiction we have not yet heard proper argument and do not express a concluded view.

20. The heart of JJH's criticism in relation to the pleadings is that the case being presented by Microsoft in response to this application is new and unpleaded: that case being *"that it was appropriate and necessary to have a term preventing all resale of second hand licences, both lawful and unlawful, in order to deal with rife infringements"*. We do not accept this submission. It is correct that such matters are not found in the Defence; and it is also correct that the threat of copyright infringement proceedings and the suggestion that all JJH's sales may be infringing is unpleaded; but the core of the alternative defence, that the First Defendant was entitled to employ the Impugned Terms to restrain the re-sale of its software in circumstances where the conditions for the exhaustion of distribution right were not satisfied, was set out in the further information served on 19 May 2023.

E. THE LAW

21. Article 101

1. The following shall be prohibited as incompatible with the internal 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 internal 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.

(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 102

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal 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 prejudice 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.

22. Whereas Article 101(3) defines circumstances in which Article 101(1) does not apply, Article 102 contains no express exceptions. Mr O'Donoghue made the submission that whereas one can identify, in texts and judgments, references to *defences* under Article 102 it is necessary to keep in mind that abuse under Article 102 requires a holistic assessment. He submits, that the Tribunal therefore needs to be cautious about attempts to isolate objective justification from the overall assessment of abuse, *a fortiori* where the defence raises questions of proportionality. We agree with this submission.

23. We were referred by JJH to *Hilti AG v Commission* [1991] ECR II-1439 in which the court was concerned with a finding that Hilti had abused its dominant position on the market for cartridge strips and nails compatible for use with its own branded nail gun by seeking to exclude independent producers of nails. Hilti argued objective justification complaining that the independent producer's nails were dangerous to consumers. The court, in rejecting the case of objective justification, held from paragraph 118 that:

> 118. As the Commission has established there are laws in the United Kingdom attaching penalties to the sale of dangerous products and to the use of misleading claims as to the characteristics of any product. There are also authorities vested with powers to enforce those laws. In those circumstances it is clearly not the task of an undertaking in a dominant position to take steps on

> its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or at least as inferior in quality to its own products.
>
> 119. It must further be held in this connection that the effectiveness of the Community rules on competition would be jeopardised if the interpretation by an undertaking of the laws of the various member States regarding product liability were to take precedence over those rules. Hilti's argument based on its alleged duty of care cannot therefore be upheld.

24. JJH cite this case to support a proposition that stifling supply is not a legitimate alternative to pursuing a proper legal remedy. It contends, by analogy, that a defence based upon infringement of copyright could not be an objective justification for the abuse in this case and that the appropriate remedy is to pursue a case for copyright infringement.

25. An important proposition of law relied upon by JJH in support of this application is that the alternative defences to Article 102 are bound to fail because the defence of objective justification <u>may only take account of those benefits which accrue to customers and consumers</u> and not benefits which accrue to a dominant undertaking engaged in the alleged abuse. If JJH is right about this then the case that justification of these measures is to protect the Microsoft's commercial interest in its copyright may not be soundly based.

26. Matters became somewhat untidy during argument on this topic in relation to the various subcategories of Article 102 defences: in particular as to which exist in law and which had been pleaded. Without reliving that untidiness, it is apparent that there have been different approaches to objective justification in the authorities. JJH addressed us only briefly, in writing and in oral submissions, on its central proposition that benefits must accrue to consumers and not just the dominant undertaking.

27. JJH referred to the Commission "*Guidance on enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*" (2009/C 45/02) of 24 February 2009, (the Guidelines). The Guidelines state:

> **D. Objective necessity and efficiencies**
>
> 28. In the enforcement of Article 82, the Commission will also examine claims put forward by a dominant undertaking that its conduct is justified (1). A

dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anti- competitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking.

29. The question of whether conduct is objectively necessary and proportionate **must be determined on the basis of factors external to the dominant undertaking**. Exclusionary conduct may, for example, be considered objectively necessary for health or safety reasons related to the nature of the product in question. However, proof of whether conduct of this kind is objectively necessary must take into account that it is normally the task of public authorities to set and enforce public health and safety standards. It is not the task of a dominant undertaking to take steps on its own initiative to exclude products which it regards, rightly or wrongly, as dangerous or inferior to its own product (2).

(emphasis added)

28. JJH also made reference to the decision of this Tribunal in *Genzyme Limited v Office of Fair Trading* [2004] CAT 4. It was held at [538]:

We observe first that Genzyme's arguments on objective justification relate partly to various claimed benefits of its pricing policy which ultimately accrue to Genzyme. However, in our view the concept of "objective justification" does not fall to be applied in terms of benefits which accrue to the dominant undertaking, but in terms of the general interest, and particularly the interests of customers and consumers which the Chapter II prohibition is intended to protect.

29. The Guidelines and this decision are supportive of JJH's position. The relevant parts of the Guidelines remain in force for the time being, however, there are, in circulation from the Commission, further Draft Guidelines which it is anticipated will replace them. These appear to assume a different position. They state:

GENERAL PRINCIPLES APPLICABLE TO THE ASSESSMENT OF OBJECTIVE JUSTIFICATIONS

167. Conduct that is liable to be abusive may escape the prohibition of Article 102 TFEU where the dominant undertaking can demonstrate to the requisite standard that such conduct is objectively justified. To be objectively justified, the conduct must be objectively necessary (so-called "objective necessity defence") or produce efficiencies that counterbalance, or even outweigh, the negative effect of the conduct on competition (so-called "efficiency defence").

168. An objective necessity defence must be based on evidence that the behaviour of the dominant undertaking was objectively necessary to achieve a certain aim. **The objective necessity may stem from legitimate commercial considerations, for example, the protection of the dominant undertaking**

> **against unfair competition**, or the placing of orders by the customer that are out of the ordinary or if the customer's conduct is inconsistent with fair trade practices. It may also stem from technical justifications, for example linked to maintaining or improving the performance of the dominant undertaking's product. While the arguments supporting an objective necessity defence may also relate, for instance, to public health, safety or other public interest considerations, the Union Courts have confirmed that it is not the dominant undertaking's task to take steps on its own initiative to eliminate products which, rightly or wrongly, it regards as dangerous or as inferior in quality to its own products, nor more generally to enforce other undertakings' compliance with the law. An objective necessity defence will be accepted only if the actual or potential exclusionary effects resulting from the conduct are proportionate to the alleged necessary aim. The proportionality condition is not met where the same aim could be achieved through means that are less restrictive of competition.
>
> **(emphasis added)**

30. The emboldened sentence footnotes (footnotes not shown) *Google and Alphabet v Commission* T-612/17, paragraph 552. This states.

> 551. It is apparent from settled case law that it is open to a dominant undertaking to provide justification for behaviour that is liable to be caught by the prohibition under art.102 TFEU by establishing either that its conduct is objectively necessary from a technical or commercial point of view, or that the exclusionary effect produced may be counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers (see, to that effect, *Post Danmark* (C-209/10) at [40] and [41] and the case law cited).
>
> 552 The objective necessity may stem from legitimate commercial considerations, for example to protect against unfair competition or to take account of negotiations with customers (see, to that effect, judgments of 14 February 1978, *United Brands Co v Commission of the European Communities* (27/76) EU:C:1978:22; [1978] 1 C.M.L.R. 429 at [184]–[187], and of 9 November 1983, Nederlandsche Banden-Industrie-*Michelin NV v Commission of the European Communities* (322/81) EU:C:1983:313; [1985] 1 C.M.L.R. 282 at [90]), but equally from technical justifications, for example linked to maintaining product or service performance or to improving performance (see, to that effect, *Microsoft* at [1146] and [1159]).

31. JJH has not addressed us on this passage nor sought to address the cases cited therein. Nor has it sought to explain why these apparent contradictions in the case law, and between the Guidelines and Draft Guidelines, do not show that this is a developing area of law and consequently not suitable for summary judgment.

32. In the circumstances we do not consider it would be appropriate to decide, at this stage, that the commercial considerations of the dominant undertaking are not relevant when assessing the proportionality of objective justification. We

consider we are not in a position to conclude and that as a matter of law we are only entitled to take account of those benefits which accrue to customers and consumers.

33. As to the correct interpretation of Article 101(3) and the scope of an efficiencies defence under Article 102 we have been referred to *Sainsbury v Mastercard* [2018] EWCA Civ 1536 at [76]:

> [76] As we have already mentioned, it is common ground that in order to establish exemption under art 101(3) four cumulative conditions have to be satisfied as set out in the Guidelines, only the first three of which were engaged in this case:
>
> (1) The agreement must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress;
>
> (2) Consumers must receive a fair share of the resulting benefits;
>
> (3) The restrictions must be indispensable to the attainment of these objectives.
>
> We will refer to these three conditions, as did Popplewell J, as 'the benefits requirement', 'the fair share requirement' and 'the indispensability requirement', respectively.

F. ASSESSMENT OF THE SUMMARY JUDGMENT APPLICATION

34. We have already dealt with the First and Second issues. We have dismissed JJH's argument that Microsoft's defence to this application is insufficiently pleaded, and we having refused to determine the point of law, that only benefits which accrue to customers and consumers are relevant. These matters were central to JJH's application for summary judgment.

35. As to the reliance on *Hilti* and the suggestion that stifling supply is not a legitimate alternative to pursuing a proper legal remedy for copyright infringement, we do not consider the law or facts are clear enough to rule in JJH's favour on a summary judgment application. This is a question which will require further legal argument in the light of the facts once they have been established.

36. A further point developed by JJH is the submission that there is an apparent inconsistency in Microsoft's position. JJH point out that on the one hand

Microsoft contends, in its principal defence, that the Impugned terms had little effect and were not enforced; and yet on the other hand when it comes to the alternative defences it contends that these terms were necessary to protect its commercial interests. JJH says these positions cannot be reconciled. Microsoft's response to this is to say the alternative defences are contingent on it being wrong in its primary defence that there is no distortion of the market. That might be its position but JJH is correct that it *is* difficult to reconcile these alternative cases. This tension may be something which will weigh in the Tribunal's mind at trial, but the inconsistency, insofar as it is not explainable, cannot, of itself, determine this application for summary judgment.

37. The question which will arise at trial, in the context of objective justification, is whether Microsoft's concerns, about copyright infringement arising from a failure of JJH to show it has complied with the *UsedSoft* requirements, provide an objective justification for the Impugned Terms. We are in no position today, on the evidence before us, to concluded that there is no reasonable prospect of Microsoft succeeding on this point. This point should be decided when the Tribunal is in possession of the relevant facts.

38. In refusing this application we also attach weight to our opinion that the assessment of abuse under Article 102 is a holistic assessment and that, when considering the question of proportionality, it is not satisfactory to look at the alternative defences in isolation. We further have regard to the fact that summary judgment on this defence will not resolve this dispute and that we therefore see this as a case where the caution advised by Floyd LJ in *TFL Management Services v Lloyds TSB Bank* is appropriate.

39. As to the provisions of Article 103(1) and the procompetitive benefits to which reference is made in paragraph 58.2 of the Defence, we see the arguments being advanced by Microsoft as poorly developed at this stage. In particular it is unclear how the commercial interests which may provide the objective justification are "pro-competitive" and/or "promote technical or economic progress" and/or why consumers receive "a fair share of the resulting benefits". The argument advanced by Microsoft appears to be that society in general benefits from ensuring copyright is not infringed. It also suggests that a relevant

benefit might be the discounts it has offered customers. Although these arguments are poorly developed and appear challenging, we have heard insufficient argument to draw any conclusions in respect of these efficiency defences. Given that we have concluded the objective justification defence should proceed to trial we are cautious in giving summary judgment on the narrow issue of the efficiency defences.

40. Finally, we observe that although we have concluded that Microsoft's case is sufficiently pleaded to resist this application for summary judgment this should not be interpreted as this Tribunal ruling that the pleadings are suitable for trial or that further requests for clarification of Microsoft's case are not appropriate. We make no findings in respect of these matters.

41. Accordingly, for the foregoing reasons, this application is dismissed. This judgment is unanimous.

Justin Turner KC Chair	John Davies	Ioannis Lianos

Charles Dhanowa O.B.E., K.C. (*Hon*) Registrar	Date: 28 November 2024