Commission closes probe into IBM’s licensing terms for speech recognition engines

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In June 2002, the European Commission decided to close an investigation triggered by a complaint from UK voice recognition software company, AllVoice Computing plc, against IBM Corp., after the latter agreed to modify its licensing terms.

AllVoice Computing plc (‘AllVoice’), a British firm that develops and sells voice recognition software, filed a complaint against International Business Machines Corporation (‘IBM’) alleging that IBM had a dominant position on the market for the licensing of general-purpose dictation speech recognition engines and was abusing that position in a number of ways, particularly through unfair licensing terms.

Voice recognition software is a technology which enables a computer to recognise spoken words and transcribe them into a written text. The technology includes a dictation speech recognition engine (‘the engine’) and a speech application program (‘the application program’) which together form a speech recognition end product (‘the end product’).

Both IBM and AllVoice sell end products, but AllVoice only makes application programs, meaning that it needs a licence for a speech recognition engine. Besides IBM, other suppliers of speech recognition engines included until recently Dragon, and Lernout & Hauspie, which filed for bankruptcy at the end of 2001.

Following a careful analysis of the complaint, in a warning letter of June 2001, the Commission’s services expressed concerns to IBM that it may be dominant on the engine licensing market and therefore some of its licensing terms might be abusive within the meaning of Article 82 of the EC Treaty.

The Commission’s concerns were based on the fact that IBM retained the right to terminate the speech recognition licence if AllVoice were to initiate proceedings against IBM or any of its customers for infringement of AllVoice’s speech recognition patents (‘the termination for challenge clause’). IBM also imposed on AllVoice a requirement to add value to the licensed technology at least equivalent to the value of that licensed technology (‘the value-add provision’), with the possible consequence that such a requirement might result in retail price maintenance.

The effect of the termination for challenge clause, which was included only in the contract offered to AllVoice, appeared to be that as long as AllVoice wished to sell a product that required the relevant licence for IBM speech recognition technology, it would be unable to take action to prevent IBM from infringing any of AllVoice’s speech recognition patents, whether or not they were linked to the licensed technology.

In its reply, IBM maintained that it was not dominant on the relevant product market and that, in any event, these clauses were not anti-competitive. However, following negotiations between the Commission and IBM, IBM proposed to modify the relevant clauses.

IBM has now limited the termination for challenge clause to challenges to the licensed technology. Thus, after modification, the termination is limited to the situation where AllVoice challenges IBM’s engine, i.e., the ‘licensed program’, as offered by IBM and/or its customers on the basis that it infringes AllVoice’s products. This is in fact a more narrowly tailored clause than the Technology Transfer Block Exemption Regulation (‘TTBE’) (1) (2) would allow.

The TTBE block-exempts a termination clause based on challenges on any ground, e.g., on the ground that the licensed technology is invalid, has

(2) Article 2.1(15) TTBE exempts: ‘[a] reservation by the licensor of the right to terminate the agreement if the licensee contests the secret or substantial nature of the licensed know-how or challenges the validity of licensed patents within the common market belonging to the licensor or undertakings connected with him’.
expired and/or infringes third parties’ patents and/or the licensee’s. The revised termination for challenge clause would allow termination of the contract only if AllVoice were to allege an infringement of its own intellectual property: AllVoice could nevertheless challenge IBM’s intellectual property on any other ground without fearing termination of its contract. It is not abusive that IBM can terminate AllVoice’s contract if AllVoice tries to use its IP rights against IBM’s licensed technology. Otherwise AllVoice could potentially, by using its IP rights, prevent IBM or any of IBM’s licensees from using IBM’s own technology while AllVoice maintains the right to use IBM’s own technology itself.

According to IBM, the purpose of the value-add provision is not to set prices but to ensure that the application program meets a certain quality and that it adds ‘usefulness’ to the end package. IBM however agreed to express the value-add provision without using the term ‘value’, to avoid the risk of ‘value’ being interpreted as cost and/or price. Instead, the clause now refers to functionality, product differentiation, creation of new marketing opportunities, or integration in other products.

The modified clauses do not infringe the EC’s competition rules, and there would appear to be no ongoing anti-competitive effects.

In its complaint, AllVoice also made a wide range of allegations about IBM’s past behaviour. In relation to these alleged abuses of a dominant position in the past, the Commission has rejected the complaint on the grounds that there is a lack of Community interest and furthermore, that there is at present no infringement of the EC’s competition rules. The Commission’s limited resources should be concentrated on those practices that have the most significant impact on the market and on consumers. As a result of IBM’s modifications and a settlement between the parties for the past, AllVoice has withdrawn its complaint following the Commission’s rejection letter.