

V

*(Announcements)*PROCEDURES RELATING TO THE IMPLEMENTATION OF COMPETITION
POLICY

EUROPEAN COMMISSION

**Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Case
COMP/C-3/39.692/IBM — Maintenance services****(Text with EEA relevance)**

(2011/C 275/10)

1. INTRODUCTION

- (1) According to Article 9 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty ⁽¹⁾, the Commission may decide — in cases where it intends to adopt a decision requiring that an infringement is brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment — to make those commitments binding on the undertakings. Such a decision may be adopted for a specified period and shall conclude that there are no longer grounds for action by the Commission. According to Article 27(4) of the same Regulation, the Commission shall publish a concise summary of the case and the main content of the commitments. Interested parties may submit their observations within the time limit fixed by the Commission.

2. SUMMARY OF THE CASE

- (2) On 1 August 2011, the Commission adopted a preliminary assessment pursuant to Article 9(1) of Regulation (EC) No 1/2003 concerning alleged infringements of International Business Machines Corporation ('IBM') on the maintenance markets for IBM mainframes.
- (3) According to the preliminary assessment, IBM may hold a dominant position on the market for certain inputs necessarily required for the maintenance of IBM mainframe hardware and software. The preliminary assessment expressed the concern that IBM may have abused its dominant position in breach of Article 102 of the TFEU and Article 54 of the EEA Agreement by imposing unreasonable supply conditions for these inputs on its competitors in the maintenance market. Those competitors are existing customers of IBM. The

Commission's preliminary assessment is that IBM's practices may amount to a constructive refusal to supply of these inputs.

- (4) The preliminary assessment does not seek to examine the possible market for the supply of multi-vendor maintenance services to customers owning various different server platforms, including IBM mainframes and, in particular, does not purport to assess the competitive situation between IBM and other server manufacturers in the supply of maintenance services to customers with different server platforms.

3. THE MAIN CONTENT OF THE OFFERED COMMITMENTS

- (5) IBM does not agree with the Commission's preliminary assessment. It has nevertheless offered commitments pursuant to Article 9 of Regulation (EC) No 1/2003, to meet the Commission's competition concerns. The key elements of the commitments can be summarised as follows:
- (6) IBM commits to ensure the expeditious availability of certain spare parts and technical information to third party maintainers (TPMs) under reasonable and non-discriminatory terms and conditions. To this end, IBM commits to enter into a framework contract with any TPM interested in providing maintenance services for IBM System z servers in the European Economic Area (EEA).
- (7) The framework contract shall be based on reasonable terms and conditions and contain, inter alia, an obligation on IBM to: (i) supply TPMs in an expeditious manner with critical parts without any obligation on TPMs to return the

⁽¹⁾ OJ C 115, 9.5.2008, p. 47.

- defective part; (ii) maintain the same prices for critical parts to TPMs as IBM offers to self-maintainers, for present and future mainframes models; (iii) make technical information (including machine code updates) available to TPMs in an expeditious manner.
- (8) The framework contract shall also include the possibility for TPMs to enforce IBM's obligations in the event of any dispute relating to the agreement. The framework contract will provide for specific performance and contractual penalties in case of IBM's late delivery of critical spare parts and technical information.
- (9) In order to facilitate dealings with TPMs, IBM will create the position of an EU-wide TPM relationship manager.
- (10) The commitments apply to all IBM System z machine models and types that have not been withdrawn from service by IBM and will have five years duration, starting from the date of adoption of the Commission's decision pursuant to Article 9 of the Regulation (EC) No 1/2003. IBM commits to submit to the Commission a yearly report on the implementation of the commitments.
- (11) The commitments are published in full in English on the website of the Directorate-General for Competition at: http://ec.europa.eu/competition/index_en.html
- (12) The Commission intends, subject to market testing, to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring the commitments summarised above and published on the Internet, on the website of the Directorate-General for Competition, to be binding. If there are substantial changes to the commitments, a new market test will be launched.
- (13) In accordance with Article 27(4) of Regulation (EC) No 1/2003, the Commission invites interested third parties to submit their observations on the proposed commitments. Comments should, as far as possible, be substantiated with detailed reasoning, containing the necessary facts on which comments are based and, if a problem is identified, a proposal for a solution of the identified problem.
- (14) All observations must reach the Commission not later than one month following the date of this publication. Interested third parties are also asked to submit a non-confidential version of their comments, in which commercial secrets and other confidential passages are deleted and are replaced as required by a non-confidential summary or by the words 'commercial secrets' or 'confidential'. Legitimated requests will be respected.
- (15) Observations can be sent to the Commission under reference number COMP/C-3/39.692/IBM — Maintenance services, either by e-mail (COMP-GREFFE-ANTITRUST@ec.europa.eu), by fax (+32 22950128) or by post, to the following address:

4. INVITATION TO MAKE COMMENTS

- (12) The Commission intends, subject to market testing, to adopt a decision under Article 9(1) of Regulation (EC) No 1/2003 declaring the commitments summarised above and published on the Internet, on the website of

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Directorate-General for Competition
Antitrust Registry
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