

## COMMISSION DECISION

of 27 February 2008

## fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005) 4420 final

(Case COMP/C-3/37.792 — Microsoft)

(notified under document number C(2008) 764 final)

(Only the English text is authentic)

(2009/C 166/08)

On 27 February 2008, the Commission adopted a decision fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005) 4420 final ('the February 2008 Decision'). In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003<sup>(1)</sup>, the Commission herewith publishes the names of the parties and the main content of the decision, including the penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business interests. A non-confidential version of the full text of the decision can be found in the authentic language of the case and in the Commission's working languages at COMP DG's website at

[http://europa.eu.int/comm/competition/index\\_en.html](http://europa.eu.int/comm/competition/index_en.html)

## 1. SUMMARY OF THE CASE

## 1.1. Background of the case

1. On 24 March 2004, the Commission adopted a decision 2007/53/EC in a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/C-3/37.792) addressed to Microsoft Corporation ('Microsoft')<sup>(2)</sup>. In this decision ('the Decision'), the Commission found, inter alia, that Microsoft had infringed Article 82 of the EC Treaty ('Article 82 EC') and Article 54 of the Agreement on the European Economic Area ('Article 54 EEA') by refusing, from October 1998 until the date of the Decision, to disclose certain specified 'Interoperability Information'<sup>(3)</sup> to vendors of work group server operating system products, so that they could develop and distribute interoperable products.
2. Article 5(a) and (c) of the operative part of the Decision reads as follows:

'(a) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, make the Interoperability Information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms, allow the use of the Interoperability Information by

such undertakings for the purpose of developing and distributing work group server operating system products [...]

- (c) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope and terms of use of the Interoperability Information; as regards this evaluation mechanism, Microsoft Corporation may impose reasonable and non-discriminatory conditions to ensure that access to the Interoperability Information is granted for evaluation purposes only.'

## 1.2. Non-compliance with the Decision

3. In view of Microsoft's continuous non-compliance with the Decision after more than one year after the adoption of the Decision, on 10 November 2005, the Commission adopted a decision imposing a periodic penalty payment pursuant to Article 24(1) of Regulation (EC) No 1/2003 on Microsoft ('the Article 24(1) Decision'). Article 1 of the Article 24(1) Decision reads as follows:

'Microsoft Corporation shall ensure that, by 15 December 2005, it fully complies with the obligations set out in Article 5(a) and (c) of Commission Decision (C(2004) 900) of 24 March 2004.

In the absence of such compliance, a periodic penalty payment of EUR 2 million per day, calculated from that date, shall be imposed on Microsoft Corporation.'

<sup>(1)</sup> OJ L 1, 4.1.2003, p. 1.

<sup>(2)</sup> OJ L 32, 6.2.2007, p. 23.

<sup>(3)</sup> The term 'Interoperability Information' is defined in Article 1(1) of the Decision. It means 'the complete and accurate specifications for all the Protocols implemented in Windows Work Group Server Operating Systems and that are used by Windows Work Group Servers to deliver file and print services and group and user administration services, including the Windows Domain Controller services, Active Directory services and Group Policy services, to Windows Work Group Networks'.

4. The Article 24(1) Decision preliminarily identified two aspects of Microsoft's non-compliance with its obligations under Article 5(a) and (c) of the 2004 Decision. First, Microsoft had failed to provide complete and accurate technical documentation embodying the interoperability information. Second, the remuneration levels charged by Microsoft at that time for access to or use of the interoperability information were considered unreasonable.
5. Following the adoption of the Article 24(1) Decision Microsoft provided a revised technical description of the protocols relevant to communication between Windows PCs and work group servers (the 'Technical Documentation')<sup>(1)</sup>. The review undertaken of the different versions of Technical Documentation supplied by Microsoft led to the conclusion that the documentation still did not provide complete and accurate interoperability information to interested undertakings as required by the 2004 Decision.
6. On 12 July 2006, the Commission adopted a decision pursuant to Article 24(2) of Regulation (EC) No 1/2003 fixing at EUR 280,5 million the definitive amount of the periodic penalty payment imposed by the Article 24(1) Decision for the period between 16 December 2005 and 20 June 2006 with respect to the first aspect of non-compliance identified in the Article 24(1) Decision, namely Microsoft's failure to provide complete and accurate technical documentation embodying the interoperability information.
7. The decision of 12 July 2006 also amended Article 1 of the Article 24(1) Decision insofar as it increased the periodic penalty payment imposed on Microsoft for non-compliance with its obligations under Article 5(a) and (c) of the 2004 Decision to EUR 3 million per day as from 1 August 2006.
8. While work on the Technical Documentation continued, the Commission addressed the second aspect of non-compliance identified in the Article 24(1) Decision, namely Microsoft's failure to make interoperability information available on reasonable terms.
9. After a Statement of Objections was addressed to Microsoft on 1 March 2007, Microsoft, on 21 May 2007, submitted revised Work Group Server Protocol Program ('WSPP') Agreements governing access to and use of the interoperability information. These agreements included a royalty table with lower rates compared to what had previously been offered. Microsoft stated that it would apply these lower rates with a 'retroactive' date of application from the date of the adoption of the 2004 Decision. Microsoft had at various earlier occasions submitted revised versions of its WSPP remuneration schemes, the first version of which dated back to 29 October 2004, and had lowered the applicable remuneration rates on several occasions.

### 1.3. Procedural steps

10. On 1 March 2007, a Statement of Objections was addressed to Microsoft (the Statement of Objections) outlining the preliminary conclusion that Microsoft had not yet complied with its obligation to make Interoperability Information available on reasonable and non-discriminatory terms.
11. On 23 April 2007 Microsoft submitted its response to the Statement of Objections and declined the possibility to have an oral hearing.
12. On 21 May 2007, Microsoft submitted revised Work Group Server Protocol Program ('WSPP') Agreements governing access to and use of the Interoperability Information. These agreements included a Revised Royalty Table (the 21 May 2007 remuneration scheme). Microsoft stated that it 'will now officially roll out the lower rates' with a retroactive date of application from the date of the adoption of the Decision. Microsoft had at various earlier occasions submitted revised versions of its WSPP remuneration schemes, the first version of which dates back to 29 October 2004, and after discussions lowered the applicable remuneration rates on various occasions. All of these remuneration schemes had to be considered unreasonable under the pricing criteria underlying the Decision as reflected by WSPP Pricing Principles agreed with Microsoft. These principles rely on three criteria to reflect the value of Microsoft's Interoperability Information for its users to the exclusion of the 'strategic value' stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market (i.e., Microsoft's own creation, innovation and comparison with similar technologies).
13. On 24 July 2007, the a Letter of Facts was sent to Microsoft assessing revisions to Microsoft's remuneration scheme introduced after the adoption of the Statement of Objections and invited the undertaking to submit comments, which it did on 31 August 2007.
14. On 22 October 2007 Microsoft introduced a new remuneration scheme for the WSPP Agreements. This new scheme foresees a No Patent Agreement under which access to and use of the interoperability information is permitted for a one-time payment of EUR 10 000. A Patent Agreement providing for a patent licence to those

<sup>(1)</sup> Article 1(2) of the 2004 Decision defines a 'Protocol' as 'a set of rules of interconnection and interaction between various instances of Windows Work Group Server Operating Systems and Windows Client PC Operating Systems running on different computers in a Windows Work Group Network'.

parts of the interoperability information that Microsoft claims to be covered by patents is available either worldwide for royalties of 0,4 % of the licensee's net revenues or for a split price foreseeing royalties of 0,25 % in the EEA and 3,87 % elsewhere in the world. When adopting the decision of 27 February 2008, the Commission considered that the 22 October 2007 remuneration scheme no longer gives rise to objections as to the reasonableness and non-discriminatory nature of the remuneration rates.

#### 1.4. The company and product concerned

15. Microsoft is a software company based in Redmond, state of Washington, USA. Microsoft's turnover for the fiscal year July 2006 to June 2007 was USD 51 120 million. Microsoft employs 78 500 people around the world. Microsoft is present in all countries within the EEA.
16. The products concerned by the present procedure are the 'Windows Work Group Server Operating Systems' as defined in Article 1(9) of the Decision.

#### 1.5. The nature of the non-compliance

17. As set out in recital 1003 of the Decision, the objective of the Decision 'is to ensure that Microsoft's competitors can develop products that interoperate with the Windows domain architecture natively supported in the dominant Windows client PC operating system and hence viably compete with Microsoft's work group server operating system'.
18. As set out in recital 1008 of the Decision, the 'requirement for the terms imposed by Microsoft to be reasonable and non-discriminatory applies in particular [...] (ii) to any remuneration that Microsoft might charge for supply; such a remuneration should not reflect the "strategic value" stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market'.
19. The February 2008 Decision assesses Microsoft's compliance with Article 5(a) of the Decision on the basis of an evaluation of the revised WSPP Agreements as sent by Microsoft on 21 May 2007 together with the WSPP remuneration scheme applied therein. As this remuneration scheme provides for lower remuneration rates than previous versions of the WSPP Agreements, the assessment applies, *a fortiori*, also to the remuneration schemes of these previous versions. Under the scheme a rate of 0,5 % of the recipient's net revenues is charged for all the WSPP protocols under the WSPP No Patent Agreement and a rate of 0,7 % of the recipient's net revenues is charged for all the patent licences covering the WSPP protocols under the WSPP Patent Only Agreement.

20. The February 2008 Decision focuses on Microsoft's obligation pursuant to Article 5(a) of the 2004 Decision to make *non-patented* Interoperability Information available for a reasonable remuneration.
21. In the February 2008 Decision the Commission outlines that the WSPP Pricing Principles properly reflect the rationale of the 2004 Decision as expressed in its Recitals 1003 and 1008(ii). The decision of 27 February 2008 concludes that in the absence of convincing evidence as to the innovative character of almost all of Microsoft's non-patented protocol technologies disclosed with the technical documentation of the Interoperability Information and in view of the market valuation of comparable technologies (cf. the summary of the WSPP pricing principles in paragraph 12 above), Microsoft's remuneration schemes prior to 22 October 2007 must be considered unreasonable under Article 5(a) of the Decision. This assessment is backed by reports of the Monitoring Trustee as well as by external technical experts, TAEUS.

## 2. DEFINITIVE AMOUNT OF THE PERIODIC PENALTY PAYMENT

### 2.1. Relevant period of non-compliance

22. This February 2008 Decision concerns the period from 21 June 2006 to 21 October 2007 ('the relevant period').

### 2.2. Definitive amount of the periodic penalty payment for the relevant period

23. The decision of 27 February 2008 fixes the definitive amount of the periodic penalty payment imposed on Microsoft at EUR 899 million for the relevant period.
24. According to Article 24(2) of Regulation (EC) No 1/2003, where the undertaking concerned has satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision.
25. When calculating the definitive amount of the periodic penalty payment, *inter alia*, the following considerations were taken into account:
  - the persistent non-compliance regarding reasonable and non-discriminatory remuneration for a period of more than fifteen months,
  - the further increase of the risk of elimination of effective competition in the work group server operating system market identified in the 2004 Decision,
  - Microsoft's ability of reaping the benefits of non-compliance,

- the necessity of setting periodic penalty payments which are proportionate and sufficient to deter non-compliance,
- the fact that substantially lower rates applied as from 21 May 2007,
- the fact that the February 2008 Decision is limited to *non-patented* Interoperability Information.

### 2.3. Conclusion

26. For the period between 21 June 2006 and 21 October 2007, the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Commission Decision C(2005) 4420 final of 10 November 2005 for failure to comply with its obligation to make Interoperability Information available to interested undertakings on reasonable and non-discriminatory terms pursuant to Article 5(a) of Commission Decision is fixed at EUR 899 million in the February 2008 Decision.