ORDER OF THE PRESIDENT OF THE FOURTH CHAMBER OF THE COURT OF FIRST INSTANCE

28 April 2005 *

In Case T-201/04,

Microsoft Corp., established in Redmond, Washington (United States), represented by J.-F. Bellis, lawyer, and I. Forrester QC,

applicant,

supported by

Association for Competitive Technology, Inc., established in Washington, DC (United States), represented by L. Ruessmann, lawyer,

DMDsecure.com BV, established in Amsterdam (Netherlands),

* Language of the case: English.

MPS Broadband AB, established in Stockholm (Sweden),

Pace Micro Technology plc, established in Shipley, West Yorkshire (United Kingdom),

Quantel Ltd, established in Newbury, Berkshire (United Kingdom),

Tandberg Television Ltd, established in Southampton, Hampshire (United Kingdom),

represented by J. Bourgeois, lawyer,

Exor AB, established in Uppsala (Sweden), represented by S. Martínez Lage, H. Brokelmann and R. Allendesalazar Corcho, lawyers,

Mamut ASA, established in Oslo (Norway), and

TeamSystem SpA, established in Pesaro (Italy),

represented by G. Berrisch, lawyer,

The Computing Technology Industry Association, Inc., established in Oakbrook Terrace, Illinois (United States), represented by G. van Gerven and T. Franchoo, lawyers, and B. Kilpatrick, Solicitor,

interveners,

v

Commission of the European Communities, represented by R. Wainwright, F. Castillo de la Torre, P. Hellström and A. Whelan, acting as Agents,

defendant,

supported by

AudioBanner.com, trading as VideoBanner, established in Los Angeles, California (United States), represented by L. Alvizar, lawyer,

Free Software Foundation Europe eV, established in Hamburg (Germany), represented by C. Piana, lawyer,

RealNetworks, Inc., established in Seattle, Washington (United States), represented by A. Winckler, M. Dolmans and T. Graf, lawyers,

Software & Information Industry Association, established in Washington, DC (United States), represented by C. Simpson, Solicitor,

interveners,

APPLICATION for annulment of Commission Decision C(2004) 900 final of 24 March 2004, relating to a proceeding under Article 82 EC (Case COMP/C-3/37.792 — Microsoft), or for reduction of the amount of the fine imposed on the applicant,

THE PRESIDENT OF THE FOURTH CHAMBER
OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Background

1 Microsoft Corp. ('Microsoft') develops and markets computer software, including operating systems for client personal computers ('PCs'), known as Windows, work group server operating systems, known as Windows Server, and streaming media players, known as Windows Media Player.

2 On 10 December 1998, Sun Microsystems, Inc., established in Palo Alto, California (United States), lodged a complaint with the Commission. That complaint related to Microsoft's refusal to supply Sun Microsystems, Inc. with the information necessary to allow interoperability of its work group server operating systems with Windows. The Commission opened an investigation into the matter.

3 In February 2000 the Commission opened a second investigation into Microsoft. The object of that investigation was the integration of Windows Media Player in Windows.

4 The two investigations were subsequently joined under Case No COMP/C-3/37.792.

5 On 24 March 2004, the Commission adopted Decision C(2004) 900 final relating to a proceeding under Article 82 EC in Case COMP/C-3.37.792 — Microsoft ('the Decision').

6 In assessing Microsoft's conduct, the Commission, first, defined three relevant markets. Those markets were the client PC operating system market (recitals 324 to 342 to the Decision), the work group server operating system market (recitals 343 to 401 to the Decision) and the streaming media player market (recitals 402 to 425 to the Decision).

7 Second, the Commission found that each of those markets was worldwide (recital 427 to the Decision).

8 Third, the Commission found that Microsoft held a dominant position on two of those markets, namely the client PC operating system market (recitals 429 to 472 to the Decision) and the work group server operating system market (recitals 473 to 541 to the Decision).

9 Fourth, the Commission concluded that, by its conduct on those two markets, Microsoft was infringing Article 82 EC. It considered that Microsoft was abusing its dominant position by refusing to supply the interoperability information and to authorise its use for the development and distribution of products competing with its own products on the work group server operating system market during the period October 1998 to the date of notification of the Decision (recitals 546 to 791 to and Article 2(a) of the Decision). The Commission also considered that Microsoft was abusing its dominant position by making the availability of Windows conditional on the simultaneous acquisition of Windows Media Player during the period May 1999 to the date of notification of the Decision (recitals 792 to 989 to and Article 2(b) of the Decision).

10 Fifth, the Commission ordered Microsoft to bring those infringements to an end, to refrain from any conduct having the same or equivalent object or effect and to implement a series of remedies within certain periods (recitals 994 to 1053 to and Articles 4 to 8 of the Decision).

11 Sixth, the Commission imposed a fine of EUR 497 196 304 on Microsoft (recitals 1054 to 1080 to and Article 3 of the Decision).

Procedure

12 By application lodged at the Registry of the Court of First Instance on 7 June 2004, Microsoft brought the present action.

13 By application lodged at the Registry of the Court of First Instance on 17 December 2004, European Committee for Interoperable Systems ('ECIS'), established in Brussels (Belgium), represented by D. Paemen and N. Dodoo, lawyers, applied to intervene in the proceedings in support of the form of order sought by the Commission.

14 The Commission and Microsoft submitted their written observations on that application to intervene by documents lodged at the Registry of the Court of First Instance on 1 and 7 March 2005 respectively.

The application to intervene

Admissibility of the application to intervene

15 Microsoft submits that the application to intervene is inadmissible on the ground that it does not satisfy the procedural conditions laid down in the Rules of Procedure of the Court of First Instance.

16 Under Article 115 of the Rules of Procedure, in order to be admissible, an application to intervene must comply with certain conditions relating to the period within which the application must be made (paragraph 1), its material content (paragraph 2, first subparagraph) and the applicant having proper representation (paragraph 3).

17 In this case the application to intervene satisfies those conditions.

18 Furthermore, under the second subparagraph of Article 115(2) of the Rules of Procedure the admissibility of an application to intervene is conditional upon compliance with the procedural conditions laid down in Articles 43 and 44 of those Rules. Article 44 of the Rules of Procedure provides, in particular, in paragraph 5(b) that where the applicant for leave to intervene is a legal person governed by private law it is to attach to its application proof that the authority granted to its lawyer has been properly conferred on him by someone authorised for the purpose.

19 In the present case, Microsoft submits, essentially, that the decisions to request leave to intervene in the proceedings and to confer authority on D. Paemen and N. Dodoo for that purpose were improperly adopted by the ECIS Executive Committee on 16 December 2004. It acknowledges that the ECIS General Assembly ratified those decisions on 12 January 2005, but submits that ratification took place only after the application to intervene had been submitted and may be invalid in itself.

20 It cannot be precluded that the validity of the decisions adopted by the ECIS Executive Committee on 16 December 2004 should be treated with caution and it cannot therefore be taken as certain that D. Paemen and N. Dodoo held authority properly conferred by someone authorised for that purpose when ECIS lodged its application to intervene on 17 December 2004. However, it must in any event be noted that, by resolution of 12 January 2005, the ECIS General Assembly, 'properly

constituted', declared that it 'unreservedly confirmed' that decision and, 'although not strictly required to do so by the statutes of ECIS or Belgian law, ratif[ied]' it. That declaration leads to the conclusion that the application to intervene satisfies the requirements of Article 44(5)(b) of the Rules of Procedure (see Joined Cases 193/87 and 194/87 *Maurissen and Others* v *Court of Auditors* [1989] ECR 1045, paragraph 33).

21 ECIS therefore has locus standi to apply to intervene in the proceedings.

The merits of the application to intervene

Arguments of the applicant for leave to intervene and of the parties

22 ECIS submits that it satisfies the conditions determining the right to intervene recognised to representative associations and that it must therefore be granted leave to intervene in the proceedings in support of the form of order sought by the Commission.

23 Microsoft disputes that claim. It is not convinced that ECIS is a representative association, that it therefore satisfies all the conditions determining the right to intervene recognised to representative associations and that it may therefore be granted leave to intervene.

24 The Commission submits that ECIS may be granted leave to intervene.

Findings of the President

25 The second paragraph of Article 40 of the Statute of the Court of Justice, which, pursuant to the first paragraph of Article 53 thereof, is applicable to the procedure before the Court of First Instance, provides that any person establishing an interest in the result of a case other than a case between Member States, between institutions of the Communities or between Member States and institutions of the Communities is entitled to intervene in cases.

26 Such an interest is established by a representative association whose object is to protect its members and which applies to intervene in a case raising questions of principle liable to affect those members. That broad interpretation of the right to intervene is intended to facilitate assessment of the context of cases while avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure (orders of the President of the Court of Justice in Joined Cases C-151/97 P(I) and C-157/97 P(I) *National Power and PowerGen* v *British Coal and Commission* [1997] ECR I-3491, paragraph 66, and in Case C-151/98 P *Pharos* v *Commission* [1998] ECR I-5441, paragraph 6; and order of the President of the Fourth Chamber of the Court of First Instance of 9 March 2005 in Case T-201/04 *Microsoft* v *Commission* [2005], not published in the ECR, paragraph 31).

27 In the present case, ECIS presents itself as a representative association of undertakings operating in the information technologies sector. The representative list of its members and the list in the minutes of its General Assembly of 12 January 2005 confirm that, although the members of ECIS are limited in number and although not all of them are active in the information technologies sector, a number of them carry out significant activities in that sector. ECIS can therefore be regarded as a representative association.

28 Next, ECIS states that its object is, inter alia, the promotion and defence of the intangible and tangible interests of its members. Article 4 of its statutes confirms that that is so. ECIS must therefore be regarded as having the object of protecting its members.

29 Last, certain of the questions raised by the case may be regarded as questions of principle concerning the information technologies sector and the judgment determining the merits of the case is therefore liable to affect the members of ECIS who operate in that sector.

30 It follows from the foregoing that ECIS has established an interest in the result of the case.

31 ECIS must therefore be granted leave to intervene in the case in support of the form of order sought by the Commission.

The procedural rights of the intervener

Arguments of the parties

32 ECIS seeks leave to participate in the written procedure. It submits that the provisions on intervention (Articles 115 and 116 of the Rules of Procedure) allow the Court to grant that application. In any event, such a solution is justified by the existence of unforeseeable circumstances or force majeure (second paragraph of Article 45 of the Statute of the Court of Justice), or at the very least of exceptional circumstances. On that point, ECIS relies on the fact that Computer & Communications Industry Association ('CCIA'), some of whose members are also members of ECIS, withdrew on 10 November 2004 the application to intervene in support of the form of order sought by the Commission which it had submitted on 23 June 2004.

33 Microsoft disputes that application. It contends that Articles 115 and 116 of the Rules of Procedure do not allow the Court to grant the application. Furthermore, ECIS has not established either the existence of unforeseeable circumstances or force majeure, or the existence of exceptional circumstances of such a kind as to justify a derogation from those provisions.

34 The Commission submits that if an intervener such as ECIS may be authorised to participate in the written procedure, it must only be allowed to do so in exceptional circumstances, and that the withdrawal of CCIA in the present case could be an exceptional circumstance.

Findings of the President

35 Article 115(1) of the Rules of Procedure provides that the application to intervene must be made within six weeks of the publication in the *Official Journal of the European Union* of the notice of initiation of the action or, failing that, before the decision to open the oral procedure.

36 Article 116(2) of the Rules of Procedure provides that if an application to intervene made within the six-week period is granted, the intervener is to receive a copy of every document served on the parties.

37 Article 116(4) of the Rules of Procedure provides that, in the cases referred to in Article 116(2) of the Rules of Procedure, the President is to prescribe a period within which the intervener may submit a statement in intervention containing the form of order sought by the intervener in support of or opposing, in whole or in part, the form of order sought by one of the parties, its pleas in law and arguments and also, where appropriate, the nature of any evidence offered.

38 Article 116(6) of the Rules of Procedure provides that, where the application to intervene is made after the expiry of the six-week period referred to above, the intervener may, on the basis of the Report for the Hearing communicated to him, submit his observations during the oral procedure.

39 It is apparent upon reading those provisions together that the procedural rights of the intervener differ according to whether he submitted his application to intervene before the expiry of the six-week period beginning with the publication in the *Official Journal of the European Union* of the notice of initiation of the action, or after the expiry of that period but before the decision to open the oral procedure.

40 Where the intervener submitted his application before the expiry of that period, he is entitled to participate in both the written procedure and the oral procedure. In that capacity, he must receive a copy of the documents and may submit a statement in intervention containing the form of order which he seeks in support of or opposing, in whole or in part, the form of order sought by one of the main parties, his pleas in law and arguments and also, where appropriate, the nature of any evidence offered.

41 On the other hand, where the intervener submitted his application after the expiry of that period, he is only entitled to participate in the oral procedure, provided he submitted his application to the Court of First Instance before the opening of that procedure. In that capacity, he must receive a copy of the Report for the Hearing and may submit his observations on the basis of that report during the oral procedure.

42 As those provisions are mandatory (order of the Court of First Instance of 30 May 2002 in Case T-52/00 *Coe Clerici Logistics* v *Commission* [2002] ECR II-2553, paragraphs 24 and 31), they are not within the discretion of either the parties or even the Court.

43 In the present case, the notice of the initiation of the action was published on 10 July 2004 (OJ 2004 C 179, p. 18). ECIS's application to intervene was lodged at the Registry of the Court of First Instance on 17 December 2004. Clearly, therefore, it was submitted after the expiry of the six-week period provided for in Article 115(1) of the Rules of Procedure, plus the period of 10 days on account of distance provided for in Article 102(2) of the Rules of Procedure.

44 Accordingly, ECIS can claim only the procedural rights provided for in Article 116 (6) of the Rules of Procedure.

45 ECIS maintains, however, that CCIA's withdrawal constitutes unforeseeable circumstances or force majeure.

46 The second paragraph of Article 45 of the Statute of the Court of Justice provides that no right is to be prejudiced in consequence of the expiry of a time-limit if the party concerned proves the existence of unforeseeable circumstances or of force majeure.

47 The provisions on procedural time-limits are of strict application, which serves the requirements of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (judgment in Case 209/83 *Ferriera Valsabbia* v *Commission* [1984] ECR 3089, paragraph 14, and order of the Court of Justice of 18 January 2005 in Case C-325/03 P [2005], ECR I-403, paragraph 16).

48 The second paragraph of Article 45 of the Statute of the Court of Justice, which derogates from that principle and must therefore be interpreted strictly, applies to the mandatory procedural time-limits the expiry of which entails the loss of the right

previously open to a natural or legal person to initiate an action (judgment in Joined Cases 25/65 and 26/65 *Simet and Feram* v *High Authority* [1967] ECR 33, 43) or to submit an application to intervene (order of the President of the First Chamber of the Court of First Instance of 22 March 1994 in Joined Cases T-244/93 and T-486/93 *TWD Textilwerke Degendorf* v *Commission*, not published in the ECR, paragraphs 18 to 20).

49 In so far as the second paragraph of Article 45 of the Statute of the Court of Justice also applies to the six-week period provided for in Article 115(1) of the Rules of Procedure, the expiry of which entails not the loss of the right to submit an application to intervene but, as in this case, the limitation of the procedural rights conferred on the intervener, it is settled case-law that it is only in wholly exceptional circumstances, of unforeseeable circumstances or of force majeure, that that article permits any derogation from the provisions on procedural time-limits (judgment in *Ferriera Valsabbia* v *Commission*, cited above, paragraph 14, and order in *Zuazaga Meabe* v *OHIM*, cited above, paragraph 16).

50 The concepts of unforeseeable circumstances and force majeure contain an objective element relating to abnormal circumstances unconnected with the person concerned and a subjective element involving the obligation, on his part, to guard against the consequences of the abnormal event by taking appropriate steps and, in particular, by paying close attention to the course of the procedure and demonstrating diligence (judgment in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 32, and order in *Zuazaga Meabe* v *OHIM*, cited above, paragraph 25).

51 In the present case, CCIA's withdrawal may perhaps constitute an event unconnected with ECIS, although, as the latter acknowledges, the two representative associations have members in common.

52 However, it is not an abnormal event. Any intervener is always entitled to withdraw his intervention, just as any applicant is always entitled to discontinue his action, in accordance with Article 99 of the Rules of Procedure. The withdrawal of an intervener therefore does not in itself assume an abnormal nature. Nor, in the present case, does any of the factual elements relied on by ECIS permit CCIA's withdrawal to be described as abnormal. In particular, where a person such as CCIA participates, as an interested third party, in any administrative procedure in order to convince the Commission that there has been an infringement of the competition rules, where the Commission adopts a decision to that effect, where the author of the infringement seeks annulment of that decision and where the person in question intervenes in the dispute in order to assert his interest, it cannot be considered abnormal that he should ultimately decide to change his strategy, to settle his dispute with the applicant by extrajudicial means and, should he consider it appropriate, against payment of financial consideration.

53 Last, ECIS does not show, and, moreover, does not seriously seek to show, that it discharged its obligation to forearm itself against the consequences of that event by taking appropriate steps.

54 Accordingly, ECIS has not established the existence of unforeseeable circumstances or of force majeure.

55 ECIS contends, last, that CCIA's withdrawal constitutes an exceptional circumstance.

56 Even on the assumption that certain exceptional circumstances permit an intervener who has submitted his application to intervene after the expiry of the six-week period provided for in Article 115(1) of the Rules of Procedure to benefit from a

procedural right other than those conferred on him by Article 116(6) of the Rules of Procedure, it must be recalled that the factual elements invoked by ECIS do not permit CCIA's withdrawal to be considered either abnormal or exceptional.

57 It follows from the foregoing that ECIS's rights will be those provided for in Article 116(6) of the Rules of Procedure.

58 In so far as ECIS's application to participate in the written procedure should be interpreted, not as claiming a right, but as manifesting its availability to respond to a measure of organisation of procedure whereby the Court might wish to invite it to make written submissions pursuant to Article 64(3)(b) of the Rules of Procedure, it must be observed that it will be for the Fourth Chamber of the Court of First Instance, when the time comes, to contemplate the need for such a measure.

Costs

59 Article 87(1) of the Rules of Procedure provides that a decision as to costs is to be given in the final judgment or in the order which closes the proceedings.

60 At this stage of the proceedings, costs must therefore be reserved.

On those grounds,

THE PRESIDENT OF THE FOURTH CHAMBER
OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **European Committee for Interoperable Systems is granted leave to intervene in Case T-201/04 in support of the form of order sought by the Commission.**

2. **European Committee for Interoperable Systems will be able to present its observations at the oral procedure, on the basis of the Report for the Hearing, which will be communicated to it.**

3. **Costs are reserved.**

Luxembourg, 28 April 2005.

H. Jung — Registrar

H. Legal — President of the Fourth Chamber