

The applicant claims that the Court should:

- annul the decision of the appointing authority rejecting his request;
- order the Commission to pay the costs.

Pleas in law and main arguments

This action was brought by the applicant as a result of the fact that, on 1 April 2003, he submitted a request to the Commission in the following terms: (a) if a medical report drawn up by Dr M.P. Simonnet on the occasion of the medical check up which the Commission required him to undergo on 20 June 2002 exists, to have a certified copy thereof sent to him or to a doctor designated by him and, in the latter case, that he should be informed thereof in writing; (b) if the medical report does not exist, to be informed of that fact in writing; (c) if there is any reason to deny the requests at (a) and (b) above, to be informed thereof in writing.

Following the implied rejection of the request, the applicant brought the present action.

In support of his arguments, the applicant puts forward the following pleas in law:

Breach of the law inasmuch as the official is entitled to have access to all data relating to him drawn up by agents of the defendant in the course of their duties and in their possession, and thus including the medical report.

Breach of the applicant's right to health, in particular to his physical and mental health and of the institution's duty to have regard for his welfare.

Breach of the obligation to provide reasons for decisions, as provided for in Article 25 of the Staff Regulations.

Breach of the duty to have regard to the welfare of officials, inasmuch as the defendant had not the slightest regard for the interest of the applicant to have access to the medical report, or at least for such a report to be transmitted to a doctor of his choice, in particular in light of the fact that it is impossible to discern what interest of the service the defendant sought to protect, quod non, by its rejection of the request and of the complaint.

Action brought on 17 May 2004 by Daniel Van der Spree against Commission of the European Communities

(Case T-182/04)

(2004/C 179/35)

(Language of the case: French)

An action against the Commission of the European Communities was brought before the Court of First Instance of the

European Communities on 17 May 2004 by Daniel Van der Spree, residing at Overijse (Belgium), represented by S. Orlandi, A. Coolen, J.-N. Louis and E. Marchal, lawyers, with an address for service in Luxembourg.

The applicant claims that the Court should:

- Annul the decision establishing finally the applicant's career development review covering the period from 1 July 2001 to 31 December 2002;
- Order the defendant to pay the costs.

Pleas in law and main arguments:

In support of his action, the applicant pleads, first, breach of Articles 26 and 43 of the Staff Regulations and of the special measures applicable to the 2001-2002 transitional appraisal exercise. The applicant also pleads breach of the duty to state reasons, inconsistency between the comments and the marks awarded and manifest error of assessment. The applicant relies, further, on infringement of the rights of the defence in that the decision was based on an internal audit report of which the applicant was not given notice and on alleged appraisal criteria of which, the applicant submits, he was not informed.

Action brought on 7 June 2004 by Microsoft Corporation against the Commission of the European Communities

(Case T-201/04)

(2004/C 179/36)

(Language of the case: English)

An action against the Commission of the European Communities was brought before the Court of First Instance of the European Communities on 7 June 2004 by Microsoft Corporation, Washington (USA), represented by I. S. Forrester, QC, and J.-F. Bellis, lawyer.

The applicant claims that the Court should:

- annul the Commission Decision of 24 March 2004, or, in the alternative, annul or substantially reduce the fine imposed;
- order the Commission to bear the costs.

Pleas in law and main arguments:

The applicant contests the decision of the Commission which found two abuses of a dominant position by the applicant and imposed a fine of EUR 497,196,304 on the applicant. In the decision, the Commission found that the applicant has refused to supply 'Interoperability Information' and allow its use for the purpose of developing and distributing work group server operating system products. Secondly, the Commission found that the applicant made the availability of the 'Windows Client PC Operating System' conditional on the simultaneous acquisition of Windows Media Player.

Firstly, the applicant claims in support of its application that the Commission erred in finding that the applicant infringed Article 82 EC by refusing to supply communications protocols to competitors and to allow the use of that proprietary technology in competing work group server operating systems.

According to the applicant, the conditions required by the European Courts before a dominant undertaking is obliged to license its intellectual property rights are not met in the present case. According to the applicant, the technology which it is ordered to license is not indispensable to achieve interoperability with Microsoft PC operating systems, the alleged refusal to supply the technology did not prevent the emergence of new products on a secondary market and, finally, did not have the effect of excluding all competition on a secondary market.

Furthermore, the applicant claims that the contested decision wrongly denied that the applicant could rely on its intellectual property rights as an objective justification for its alleged refusal to supply the technology and instead advanced a new and legally defective balancing test invoking public interest in disclosure.

The applicant also submits that no licence for the purpose of developing software in the EEA was ever requested and that the applicant was under no duty to regard Sun's request as giving rise to any special responsibility under Article 82 EC.

Additionally, the applicant claims that the Commission failed to take into account the obligations imposed on the European Communities by the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property (TRIPS) when applying Article 82 to the facts of this case.

Secondly, the applicant invokes that the Commission erred in determining that the applicant infringed Article 82 EC by making the availability of its PC operating systems conditional on the simultaneous acquisition of media functionality referred to as Windows Media Player.

According to the applicant, the contested decision is based on a speculative foreclosure theory according to which the widespread distribution of media functionality in Windows may, at some undetermined point in the future, lead to a situation in which content providers and software developers will encode almost exclusively in Windows Media formats. The applicant submits that this theory is inconsistent with the Commission Decision regarding the AOL/Time Warner concentration⁽¹⁾ as well as with the evidence on file showing that content providers continue to encode in multiple formats.

The applicant also submits that the contested decision ignores the benefits flowing from the applicant's business model, which entails the integration of new functionality into Windows in response to technological advances and changes in customer demand.

Also, according to the applicant, the contested decision fails to meet the conditions required to establish a violation of Article 82 EC, and in particular point (d) thereof. The applicant submits that Windows and its media functionality are not two separate products. The applicant claims furthermore that the contested decision fails to demonstrate that the alleged tying and tied products are not connected naturally or by commercial usage. In addition, the applicant submits that the contested decision fails to take into account the obligation imposed on the European Communities by TRIPS when applying Article 82 EC to the facts of the case and that the remedy imposed is disproportionate.

Thirdly, the applicant submits that the requirement that the applicant appoints and remunerate a trustee to monitor its compliance with the decision, and receive and investigate complaints, is unlawful as being *ultra vires*. The applicant states that the powers delegated to the trustee are investigatory and enforcement powers normally belonging to the Commission which cannot be delegated.

Finally, the applicant submits that there is no basis for imposing any fine on the applicant in light of the legal novelty of the finding of abuse. The applicant also claims that the amount of the fine is plainly excessive.

⁽¹⁾ 2001/718/EC: Commission Decision of 11 October 2000 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.1845 - AOL/Time Warner) (OJ 2001 L 268, p. 28).