Summary of Commission Decision
of 12 July 2006
fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005) 4420 final and amending that Decision as regards the amount of the periodic penalty payment
(Case COMP/C-3/37.792 — Microsoft)
(notified under document number C(2006) 3143)
(Only the English text is authentic)

On 12 July 2006, the Commission adopted a decision fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005) 4420 final and amending that Decision as regards the amount of the periodic penalty payment. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 (1), 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 as well as of Decision C(2005) 4420 of 10 November 2005 can be found in the authentic language of the case and in the Commission's working languages at DG COMP's website at:

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 (C(2004) 900) in a proceeding pursuant to Article 82 of the EC Treaty (Case COMP/C-3/37.792) addressed to Microsoft. In this decision (the Decision), the Commission found, inter alia, that Microsoft had infringed Article 82 of the EC Treaty and Article 54 of the Agreement on the European Economic Area by refusing, from October 1998 until the date of the Decision, to disclose certain specified ‘Interoperability Information’ (2) to vendors of work group server operating system products, so that they could develop and distribute interoperable products.

2. Article 5(a) of the operative part of the Decision reads as follows:

‘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’.

3. Microsoft's application for interim measures against the Decision was rejected by order of the President of the Court of First Instance of 22 December 2004 (T-201/04 R).

4. 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 24(1) Decision reads as follows:

(2) 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’. Article 1(2) of the 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’.

6.2.08 C 138/10 Official Journal of the European Union 5.6.2008
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.

1.2. Appointment of the Monitoring Trustee

5. Article 7 of the Decision provides that:

‘Within 30 days of the date of notification of this Decision, Microsoft Corporation shall submit a proposal to the Commission for the establishment of a suitable mechanism assisting the Commission in monitoring Microsoft Corporation’s compliance with this Decision. That mechanism shall include a monitoring trustee who shall be independent from Microsoft.

In case the Commission considers Microsoft Corporation’s proposed monitoring mechanism not suitable it retains the right to impose such a mechanism by way of a decision’.

6. On 28 July 2005, the Commission adopted a decision pursuant to Article 7 of the Decision and Article 7(1) of Regulation (EC) No 1/2003 establishing the monitoring mechanism provided for in Article 7 of the Decision (the Trustee Decision) (1). The Trustee Decision provides, inter alia, for the appointment of a Monitoring Trustee.

7. By letter of 12 August 2005, Microsoft proposed four candidates for the position of Monitoring Trustee. Having interviewed all four candidates, the Commission appointed one of the candidates proposed by Microsoft, Professor Neil Barrett, as Monitoring Trustee (the ‘Trustee’) by letter of 4 October 2005.

1.3. Procedural steps

8. On 21 December 2005, in the light of reports provided by the Trustee on the technical documentation submitted by Microsoft and sought to contain the Interoperability Information, the Commission came to the preliminary conclusion that Microsoft had not yet complied with the obligations set out in Article 5(a) and (c) of the Decision. Accordingly, the Commission issued a Statement of Objections stating that it intended by a decision pursuant to Article 24(2) of Regulation (EC) No 1/2003 to fix the definitive amount of the periodic penalty payment which was imposed on Microsoft by the Article 24(1) Decision for non-compliance with its obligation to make Interoperability Information available to interested undertakings pursuant to Article 5(a) and (c) of the Decision, for the period between 15 December 2005 and the date specified in a decision pursuant to Article 24(2) of Regulation (EC) No 1/2003.

9. After having been granted a time extension, on 15 February 2006 Microsoft replied to the Statement of Objections.

10. On 10 March 2006, the Commission sent Microsoft a letter enclosing further reports from the Trustee and from the Commission’s technical experts on the technical documentation provide by Microsoft and invited the Microsoft to submit comments, which it did on 14 April 2006.

11. On 30 and 31 March 2006 an oral hearing was held in Brussels.

12. On 11 April 2006, Microsoft submitted a revised version of the technical documentation sought to contain the Interoperability Information.

13. On 19 May 2006, the Commission sent Microsoft a letter enclosing new reports on the revised technical documentation submitted in April from the Trustee and from the Commission’s technical experts, and invited the Microsoft to submit comments, which it did on 9 June 2006.

1.4. The company and product concerned

14. Microsoft is a software company based in Redmond, State of Washington, USA. Its turnover for the fiscal year July 2004 to June 2005, which is Microsoft's latest full business year, was USD 39 788 million. Microsoft employs 55 000 people around the world. Microsoft is present in all countries within the EEA.

15. 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

16. 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’.

17. The Commission has assessed Microsoft's compliance with Article 5(a) and (c) of the Decision on the basis of an evaluation of the completeness and accuracy of the December 2005 version of the technical documentation, as well as of the versions of the technical documentation provided by Microsoft up to April 2006. The Commission has been assisted by the Trustee as well as by its own technical experts. The Commission has come to the conclusion that Microsoft, more than two years after the adoption of the Decision, has not yet complied with the disclosure order laid down in that Decision as it has not provided complete and accurate technical documentation containing the Interoperability Information that would allow competitors to develop servers that could interoperate with Microsoft’s dominant PC and work group server operating systems.

2. DEFINITIVE AMOUNT OF THE PERIODIC PENALTY PAYMENT

2.1. Relevant period of non-compliance

18. This decision only concerns the period from 16 December 2005 to 20 June 2006, the date on which the draft decision was sent to the members of the Advisory Committee in accordance with Article 14(3) of Regulation (EC) No 1/2003 ('the relevant period').

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

19. Article 24(2) of Regulation (EC) No 1/2003 provides that, 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. The Commission must also have the power to fix a definitive amount for a given period of time in a case where an undertaking has not yet satisfied, by the end of such period, the obligation which the periodic penalty payment was intended to enforce. Otherwise, an undertaking could escape from paying periodic penalty payments imposed on it by continuously failing to comply, which would void Article 24 of its useful effect.

20. In the Article 24(1) Decision, the Commission imposed a periodic penalty payment of EUR 2 million per day. In doing so, the Commission took into account the necessity of imposing a sufficiently high periodic penalty payment to ensure Microsoft’s compliance with the Decision and the extent to which Microsoft’s failure to meet its obligations under Article 5(a) and (c) of the Decision had reduced the effectiveness of the remedy. While the Statement of Objections, related exclusively to one aspect of Microsoft’s non-compliance, namely its failure to provide complete and accurate technical documentation that embodies the Interoperability Information, it made clear that the level of the periodic penalty payment should reflect the extent to which this aspect of Microsoft’s non-compliance had reduced the effectiveness of the remedy.
21. In this respect, regard must be had to the fact that the continuing failure by Microsoft to comply with the Decision and to bring its very serious breach of Article 82 of the Treaty and of Article 54 of the EEA Agreement to an end (1) (2) is liable to further increase the risk of elimination of effective competition in the work group server operating system market identified in the Decision (3). It is necessary to set periodic penalty payments at a level which reinforces the incentive to comply with a decision taken pursuant Article 7 of Regulation (EC) No 1/2003 by rendering it economically rational for the undertaking concerned to comply with such a decision rather than to reap the benefits of non-compliance. Similarly, the Commission must take into account the necessity of setting periodic penalty payments which are proportionate and sufficient to compel compliance from an undertaking such as Microsoft, with its very substantial size and financial resources.

22. The Commission concluded that throughout the relevant period the technical documentation was incomplete and inaccurate to such an extent that it was not a suitable basis for an interested undertaking to start developing work group server operating systems which interoperate with Microsoft's products, as envisaged by the Decision. Therefore, it is established that during the relevant period, the effectiveness of Article 5(a) and (c) of the Decision was entirely or at least largely eliminated, irrespective of whether or not the remuneration charged by Microsoft was reasonable with regard to the information provided. In view of this, the Commission would be fully entitled to fix the definitive amount of the periodic penalty payment for the sole aspect of non compliance established by this decision on the basis of EUR 2 million per day throughout the relevant period.

23. However, it is possible that the Commission will also conclude that Microsoft has failed to comply with Article 5(a) and (c) of the Decision as regards the reasonableness of the remuneration charged after 15 December 2005 for information provided. At this stage, for the purposes of effective enforcement, it is therefore necessary to retain the possibility of fixing a definitive amount for this aspect of non-compliance from the date fixed in the Article 24(1) Decision.

24. The definitive amount of the periodic penalty payment in respect of Microsoft's failure to comply with the obligations regarding the provision of complete and accurate technical documentation embodying the Interoperability Information pursuant to Article 5(a) and (c) of the Decision, was therefore calculated on the basis of an amount of EUR 1.5 million per day throughout the relevant period.

2.3. Conclusion

25. The definitive amount of the periodic penalty payment imposed on Microsoft, pursuant to Article 24(2) of Regulation (EC) No 1/2003, for failing to comply with the obligations regarding the provision of complete and accurate technical documentation embodying the Interoperability Information laid down in Article 5(a) and (c) of the Decision was fixed at EUR 280.5 million for the period from 16 December 2003 to 20 June 2006 inclusive.

3. INCREASE OF THE PERIODIC PENALTY PAYMENTS

26. Microsoft's delay in complying with its obligations under the Decision is liable to further increase the risk of elimination of effective competition on the market for work group server operating systems, where, at the time of the Decision, Microsoft had already achieved a dominant position and was likely to eliminate all competition (recital 1070 of the Decision). Market data indicate that Microsoft's market share continues to grow steadily. Since the market for work group server operating systems is characterised by high barriers to entry (recitals 515 to 525 of the Decision), due among other things to indirect network effects that reinforce each other (see recital 653 of the Decision), this deterioration in the market structure risks becoming irreversible. As such, ensuring Microsoft's compliance is now a matter of even greater urgency than before.

(1) See recitals 1068-1074 of the Decision.
(2) See in this regard also the Judgment in Joined Cases 46/87 and 227/88, Hoechst [1989] ECR 2859, at paragraph 64, where the Court refers to the ‘obligation imposed upon all persons subject to Community law to acknowledge that measures adopted by the institutions are fully effective so long as they have not been declared invalid by the Court and to recognize their enforceability unless the Court has decided to suspend the operation of the said measures […]’.
(3) See recitals 590 to 692 of the Decision.
27. Following the Article 24(1) Decision, which imposed a periodic penalty payment of EUR 2 million per day, Microsoft has not taken the necessary measures for at least seven months. In the light of the urgent need to establish the level of the periodic penalty payment is increased to EUR 3 million, with effect from 31 July 2006. Since it is possible that the disclosure order in Article 5(a) and (c) of the Decision can be entirely or largely deprived of its effectiveness either through Microsoft’s failure to provide complete and accurate technical documentation embodying the Interoperability Information or by Microsoft requiring an unreasonable remuneration, this amount should apply equally to both aspects of Microsoft’s non-compliance preliminarily identified in the Article 24(1) Decision. Consequently, if Microsoft does not comply with its obligations by 31 July 2006, the Commission may decide to fix definitively the full amount of this increased periodic penalty payment for any subsequent relevant period of non-compliance in respect of either aspect of Microsoft’s non-compliance, taken in isolation, or for both, taken together.