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Press and Information

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Judgment of the Court of First Instance in Case T-201/04

Microsoft Corp. v Commission of the European Communities

THE COURT OF FIRST INSTANCE ESSENTIALLY UPHOLDS THE COMMISSION'S DECISION FINDING THAT MICROSOFT ABUSED ITS DOMINANT POSITION

However, the Court has annulled certain parts of the decision relating to the appointment of a monitoring trustee, which have no legal basis in Community law

On 23 March 2004 the European Commission adopted a decision finding that Microsoft had infringed Article 82 of the EC Treaty by abusing its dominant position by engaging in two separate types of conduct. The Commission also imposed a fine of more than EUR 497 million on Microsoft.

The first type of conduct found to constitute an abuse consisted in Microsoft's refusal to supply its competitors with 'interoperability information' and to authorise them to use that information to develop and distribute products competing with its own products on the work group server operating system market, between October 1998 and the date of adoption of the decision. By way of remedy, the Commission required Microsoft to disclose the 'specifications' of its client/server and server/server communication protocols to any undertaking wishing to develop and distribute work group server operating systems.

The second type of conduct to which the Commission took exception was the tying of Windows Media Player with the Windows PC operating system. The Commission considered that that practice affected competition on the media player market. By way of remedy, the Commission required Microsoft to offer for sale a version of Windows without Windows Media Player.

In order to assist the Commission in monitoring Microsoft's compliance with the decision, the decision provided for a monitoring trustee to be appointed by the Commission from a list of persons drawn up by Microsoft. The monitoring trustee's primary responsibility would be to issue opinions, upon application by a third party or by the Commission, or on his own motion, on whether Microsoft was complying with the decision and on any issue that might be of interest with respect to the enforcement of the decision. He was to have access to Microsoft's assistance, information, documents, premises and employees and to the source code of the relevant Microsoft products. All the costs associated with the monitoring trustee, including his remuneration, were to be borne by Microsoft.

On 7 June 2004 Microsoft brought an action before the Court of First Instance for annulment of the decision or for annulment or a substantial reduction of the fine imposed on it.

The refusal to supply the interoperability information

First, the Court confirms that the necessary degree of interoperability required by the Commission is well founded and that there is no inconsistency between that degree of interoperability and the remedy imposed by the Commission.

The Court then observes that the Commission defined interoperability information as a detailed technical description of certain rules of interconnection and interaction that can be used within Windows work group networks to deliver work group services. The Court notes that the Commission emphasised that Microsoft's abusive refusal to supply concerned only the specifications of certain protocols and not the source code and that it was not its intention to order Microsoft to disclose its source code to its competitors.

The Court also considers that the aim pursued by the Commission is to remove the obstacle for Microsoft's competitors represented by the insufficient degree of interoperability with the Windows domain architecture, in order to enable those competitors to offer work group server operating systems differing from Microsoft's on important parameters. In that connection, the Court rejects Microsoft's claims that the degree of interoperability required by the Commission is intended in reality to enable competing work group server operating systems to function in every respect like a Windows system and, accordingly, to enable Microsoft's competitors to clone or reproduce its products.

As to the question of the intellectual property rights covering the communication protocols or the specifications, the Court considers that there is no need to adjudicate on that question in order to determine the case. It observes that in adopting the decision the Commission proceeded on the presumption that Microsoft could rely on such rights or, in other words, it considered that it was possible that the refusal at issue was a refusal to grant a licence to a third parties, thus opting for the solution which, according to the case-law, was the most favourable to Microsoft.

As regards the refusal to supply the interoperability information, the Court recalls that, according to the case-law, although undertakings are, as a rule, free to choose their business partners, in certain circumstances a refusal to supply on the part of a dominant undertaking may constitute an abuse of a dominant position. Before a refusal by the holder of an intellectual property right to license a third party to use a product can be characterised as an abuse of a dominant position, three conditions must be satisfied: the refusal must relate to a product or service indispensable to the exercise of an activity on a neighbouring market; the refusal must be of such a kind as to exclude any effective competition on that market; and the refusal must prevent the appearance of a new product for which there is potential consumer demand. Provided that such circumstances are satisfied, the refusal to grant a licence may constitute an abuse of a dominant position unless it is objectively justified.

In the present case, **the Court finds that the Commission did not err in considering that those conditions were indeed satisfied.**

The Court considers that the Commission was correct to conclude that the work group server operating systems of Microsoft's competitors must be able to interoperate with Windows domain architecture on an equal footing with Windows operating systems if they are to be capable of being marketed viably.

The absence of such interoperability has the effect of reinforcing Microsoft's competitive position on the market and creates a risk that competition will be eliminated.

The Court observes that the circumstance relating to the appearance of a new product must be assessed under Article 82(b) of the Treaty. It considers that the Commission's finding that Microsoft's refusal limits technical development to the prejudice of consumers within the meaning of that provision is not manifestly incorrect.

Last, the Court rejects Microsoft's arguments to the effect that the refusal is objectively justified because the technology concerned is covered by intellectual property rights. The Court notes that such justification would render ineffective the principles established in the case-law which are referred to above. The Court further considers that Microsoft has failed to show that if it were required to disclose the interoperability information that would have a significant negative effect on its incentives to innovate.

The Court therefore upholds the part of the decision concerning interoperability.

The bundling of the Windows client PC operating system and Windows Media Player

By way of preliminary observation, the Court considers that the factors on which the Commission based its conclusion that there was abusive tying are correct and consistent with Community law. It observes that those factors are as follows: first, the undertaking concerned must have a dominant position on the market for the tying product; second, the tying product and the tied product must be two separate products; third, consumers must not have a choice to obtain the tying product without the tied product; and, fourth, the practice must foreclose competition.

In respect of each of those factors, the Court considers that the Commission's decision is well founded.

First, the Court observes that it is not disputed that Microsoft had a dominant position on the client PC operating systems market.

Second, the Court, noting that the question as to whether products are distinct must be assessed by reference to consumer demand, finds that a number of factors based on the nature and the technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and also Microsoft's commercial business practice, demonstrate the existence of separate consumer demand for media players. In that regard, the Court notes, inter alia, that the Windows operating system is system software, whereas Windows Media Player is application software; that there are independent companies, like RealNetworks, who design and supply competing products independently of operating systems; that Microsoft develops and markets Windows Media Player for other operating systems; that Windows Media Player can be downloaded independently of the Windows operating system; and that, in spite of the bundling, a not insignificant number of consumers continue to acquire competing media players separately.

Third, the Court observes that it is beyond dispute that, in consequence of the tying, consumers are unable to acquire the Windows operating system without simultaneously acquiring Windows Media Player. In that regard, the Court considers that neither the fact that Microsoft does not charge a separate price for Windows Media Player, nor the fact that consumers are not obliged to use that media player, is relevant for the purposes of the examination of that factor.

Fourth, the Court finds that the Commission clearly demonstrated in the contested decision that the fact that Microsoft offered OEMs only the version of Windows bundled with Windows Media Player had the inevitable consequence of affecting relations on the market between Microsoft, OEMs and suppliers of third-party media players by appreciably altering the balance of competition in favour of Microsoft and to the detriment of the other operators. The Court considers that that practice enabled Microsoft to obtain an unparalleled advantage with respect to distribution of its product and to ensure the ubiquity of Windows Media Player on client PCs

throughout the world, thus providing a disincentive for users to use third-party media players and for OEMs to pre-install such media players on client PCs. The Court concludes that the Commission was correct to find that there was a significant risk that the tying would lead to a weakening of competition in such a way that the maintenance of an effective competitive structure would not be ensured in the near future.

Last, the Court finds that Microsoft has not demonstrated the existence of objective justification for the bundling and that the remedy imposed by the Commission is proportionate. On that point, the Court makes clear that Microsoft retains the right to continue to offer the version of Windows bundled with Windows Media Player and that it is required only to make it possible for consumers to obtain the operating system without that media player, a measure which does not mean any change in Microsoft's current technical practice other than the development of that version of Windows.

The Court therefore upholds the part of the decision concerning the bundling of Windows Media Player.

The monitoring trustee

The Court observes that if the Commission decides to seek the assistance of an external expert, it may communicate to him all the information and documents which it has obtained in the exercise of its powers. However, it considers that by establishing the mechanism of a monitoring trustee, with his own powers of investigation and capable of being called upon to act by third parties, the Commission went far beyond the situation in which it appoints its own expert to advise it during an investigation.

The Court criticises, in particular, the obligation imposed on Microsoft to allow the monitoring trustee, independently of the Commission, access to its information, documents, premises and employees and also to the source code of its relevant products. It observes that no limit in time is envisaged for the continuing intervention of the trustee.

The Court finds that the Commission has no authority to compel Microsoft to grant to a monitoring trustee powers which the Commission itself is not authorised to confer on a third party.

Last, the Court considers that the Commission exceeds its powers in so far as it makes Microsoft responsible for all the costs associated with the monitoring trustee. There is no provision of Community law that authorises the Commission to require an undertaking to bear the costs which the Commission itself incurs as a result of monitoring the implementation of remedies.

The Court therefore annuls the decision in so far as it orders Microsoft to submit a proposal for the appointment of a monitoring trustee with the power to have access, independently of the Commission, to Microsoft's assistance, information, documents, premises and employees and to the source code of the relevant Microsoft products and in so far as it provides that all the costs associated with that monitoring trustee be borne by Microsoft.

The fine

The Court finds that the Commission did not err in assessing the gravity and duration of the infringement and did not err in setting the amount of the fine. Since the abuse of a dominant position is confirmed by the Court, the amount of the fine remains unchanged at EUR 497 million.

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

Unofficial document for media use, not binding on the Court of First Instance.

Languages available: EN, FR

The full text of the judgment may be found on the Court's internet site

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04>

The Judgment will be on the internet site at 10.00hrs.

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*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",
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