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Press and Information

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22 December 2004

Order of the President of the Court of First Instance in Case T-201/04 R

Microsoft Corp. v Commission of the European Communities

THE PRESIDENT OF THE COURT OF FIRST INSTANCE DISMISSES MICROSOFT'S APPLICATION FOR INTERIM MEASURES

The evidence adduced by Microsoft is not sufficient to show that implementation of the remedies imposed by the Commission might cause serious and irreparable damage

On 24 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 distinct types of conduct. It also imposed a fine of more than EUR 497 million on Microsoft.

The first type of conduct found to constitute an infringement consists in Microsoft's refusal to supply certain 'interoperability information' to its competitors and to allow that information to be used in the development and distribution of products competing with its own products on the work group server operating systems market during the period from October 1998 until the date of adoption of the decision. By way of remedy, the Commission ordered Microsoft to disclose to any undertaking wishing to develop and distribute work group server operating systems the 'specifications' for its client-to-server and server-to-server communications protocols. Specifications describe certain characteristics of a program and must therefore be distinguished from the program's 'source code', which designates the software code actually executed by the computer.

The second type of conduct sanctioned by the Commission is the tying of Windows Media Player with the Windows operating system. The Commission found that that practice affected competition on the media players market. By way of remedy, the Commission ordered Microsoft to offer for sale a version of Windows without Windows Media Player. None the less, Microsoft retains the option to market Windows with Windows Media Player.

On 7 June 2004, Microsoft brought an action before the Court of First Instance of the European Communities for annulment of the Commission's decision. On 25 June 2004, Microsoft applied for suspension of operation of the remedies imposed by that decision. Following the lodging of that application, the Commission informed the President of the Court of First Instance that it did not intend to enforce the remedies until he had adjudicated on the application for suspension.

The Commission has confirmed that Microsoft have paid the fine.

After the hearing before the President, which took place on 30 September and 1 October 2004, and at which the main parties and the parties granted leave to intervene in the interim measures proceedings were heard, the Computer & Communications Industry Association (CCIA) and Novell withdrew from the proceedings as interveners in support of the Commission.

By today's order, the President of the Court of First Instance, Bo Vesterdorf, dismisses Microsoft's application for interim measures.

After examining the circumstances of the case, **the President finds that Microsoft has not shown that it might suffer serious and irreparable damage as a result of implementation of the contested decision.**

As regards the refusal to supply the **interoperability** information, the President considers, first of all, that the main action raises a number of questions of principle relating to the conditions on which the Commission is entitled to conclude that a refusal to disclose information constitutes abuse of a dominant position contrary to Article 82 EC. Emphasising that only the court dealing with the substance of the action can resolve those questions, the President of the Court of First Instance concludes that Microsoft's application for annulment is not at first sight unfounded and that **the requirement that the applicant establish a prima facie case** (which entails an assessment of whether the main action is prima facie founded) **is**, consequently, **satisfied.**

However, the President finds that **the requirement relating to urgency is not satisfied**, since **Microsoft has not adduced evidence that disclosure of the information** previously kept secret **would cause serious and irreparable damage.** Following a factual examination of the actual consequences of disclosure as alleged by Microsoft, the President finds, *inter alia,* that disclosure of information previously kept secret does not necessarily entail serious and irreparable damage and that, in the light of the circumstances of the case, such damage has not been demonstrated in the present case. Nor has Microsoft demonstrated: first, that the use by its competitors of the information disclosed would lead to its 'dilution'; second, that the fact that the competing products would remain in the distribution channel after the decision has been annulled would constitute serious and irreparable damage; third, that Microsoft's competitors might 'clone' its products; fourth, that Microsoft would be required to make a fundamental change in its business policy; and fifth, that the decision would cause an irreversible development on the market.

As regards the **tying of Windows and Windows Media Player**, the President considers, first of all, that some of Microsoft's arguments raise complex questions, such as the question of the anti-competitive effect of tying resulting from 'indirect network effects', which fall to be resolved by the Court of First Instance in the main action. The President concludes that the requirement relating to a prima facie case is satisfied and then examines the urgency in ordering the suspension of implementation applied for. On the basis of a factual analysis of the alleged damage, the President finds that **Microsoft has not demonstrated** specifically **that it might suffer serious and irreparable damage** owing to an interference with its business policy or to injury to its reputation.

Microsoft's application for interim measures is therefore dismissed in its entirety.

REMINDER: The Court of First Instance will deliver final judgment on the substance of this case at a later date. An order on interim measures is without prejudice to the outcome of the main action. An appeal, limited to points of law only, may be brought before the President of the Court of Justice of the European Communities against the decision of the President of the Court of First Instance, within two months of its notification.

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