



Press and Information

General Court of the European Union
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Judgment in Case T-167/08
Microsoft Corp. v Commission

The General Court essentially upholds the Commission's decision imposing a periodic penalty payment on Microsoft for failing to allow its competitors access to interoperability information on reasonable terms

However, the Court has reduced the amount of the periodic penalty payment from €899 million to €860 million to take account of the fact that the Commission had permitted Microsoft to apply, until 17 September 2007, restrictions concerning the distribution of 'open source' products

On 24 March 2004, the Commission adopted a decision¹ finding that Microsoft had abused its dominant position by engaging in two separate types of conduct and it therefore imposed a fine of more than €497 million on Microsoft.

The first type of conduct found to constitute an abuse – the only one relevant in this case – consisted in Microsoft's refusal to make available to its competitors, between October 1998 and 24 March 2004, certain '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 systems market. By way of remedy, the Commission had required Microsoft to grant access to that information and to allow the use of it on reasonable and non-discriminatory terms. In order to assist the Commission in monitoring Microsoft's compliance with the decision, provision had been made for the appointment of a monitoring trustee, whose remuneration was to be borne by Microsoft, with 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.

Following adoption of the 2004 decision, the Commission and Microsoft entered into a dialogue with a view to establishing a mechanism for making the interoperability information available. Considering that Microsoft had failed to provide a complete and accurate version of the interoperability information within the period set by the 2004 decision and that the remuneration rates sought by Microsoft for granting access to the information were unreasonable, the Commission adopted a number of decisions imposing periodic penalty payments on it.

By a decision of 12 July 2006², the Commission imposed a periodic penalty payment of €280.5 million, considering that Microsoft had failed to comply with the 2004 decision during the period from 16 December 2005 to 20 June 2006.

In its judgment of 17 September 2007³, the General Court essentially upheld the 2004 decision. However, the Court partially annulled the article in the decision relating to the monitoring trustee.

By decision of 27 February 2008⁴, a fresh periodic penalty payment amounting to €899 million was imposed on Microsoft for the period from 21 June 2006 to 21 October 2007, on the ground that the

¹ Decision 2007/53/EC relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft Corp. (Case COMP/C-3/37.792 – Microsoft) (OJ 2007 L 32, p. 23).

² Decision C(2006) 3143 final (Case COMP/C-3/37.792 – Microsoft) (OJ 2008 C 138, p.10).

³ Case [T-201/04 Microsoft v Commission](#); see also Press Release [63/07](#).

⁴ Decision C(2008) 764 final of 27 February 2008 fixing the definitive amount of the periodic penalty payment imposed on [Microsoft] by Decision C(2005) 4420 final (Case COMP/C-3/37.792 – Microsoft) (OJ 2009 C 166, p. 20).

remuneration rates proposed by Microsoft for granting access to the interoperability information were unreasonable.

Microsoft has brought an action before the General Court for annulment of that decision or, in the alternative, for cancellation or reduction of the periodic penalty payment.

In its judgment of today, **the Court essentially upholds the Commission's decision and rejects all the arguments put forward by Microsoft in support of annulment.**

The Court considers, first, that, taking account of the pricing principles drawn up by Microsoft and the Commission, Microsoft was in a position to assess whether the remuneration rates it was seeking up to 21 October 2007 for granting access to the interoperability information were reasonable for the purposes of the 2004 decision.

Second, the Court holds that the criterion relating to the innovative character of the technologies in question – which was used by the Commission in the assessment of the reasonableness of Microsoft's remuneration rates – gives an indication of whether those rates reflect the intrinsic value of a technology rather than its strategic value, namely the value stemming from the mere ability to interoperate with Microsoft's operating systems.

In that regard, third, the Commission is entitled to assess those technologies' innovative character by reference to its constituent elements, namely novelty and inventive step, Microsoft in any event not having argued that the inventiveness of the technologies at issue cannot be assessed in a context other than that of a patent grant. The effect, in the context of this case, of assessing the innovative character of the technologies covered by the contested decision by reference to novelty and inventive step is not to extinguish generally the value of intellectual property rights, trade secrets or other confidential information, let alone make innovative character a precondition for a product or information to be covered by such a right or to constitute a trade secret in general. The sole purpose of such an assessment is to preclude, as required by the 2004 decision, any remuneration received by Microsoft from reflecting the strategic value of the interoperability information.

Furthermore, the Court considers that Microsoft has failed to invalidate the Commission's assessment that 166 of the 173 technologies relating to the interoperability information were not innovative.

However, the Court **considers it necessary to alter the amount of the periodic penalty payment in order to take account of a letter from the Commission of 1 June 2005.** In that letter, the Commission accepted that Microsoft could restrict distribution of products developed by its 'open source' competitors on the basis of non-patented and non-inventive interoperability information until delivery of the Court's judgment in Case T-201/04, that is to say, until 17 September 2007. Even though the contested decision was based on the unreasonable nature of the remuneration rates proposed by Microsoft and not on the refusal to allow access to the interoperability information, the Commission's acceptance, in the light of the pending case, that Microsoft could apply, for a certain period, a practice that might entail the preservation of a situation which the 2004 decision was intended to bring to an end, could be taken into account in determining the gravity of the conduct found to be unlawful and, therefore, the amount of the periodic penalty payment.

In that connection, having regard to the material in the documents before it, the Court considers that the possibility afforded by the letter of 1 June 2005 was relevant only to a marginal part of the effects produced by the conduct found to be unlawful; **the amount of the periodic penalty payment imposed on Microsoft must therefore be fixed at €360 million.**

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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