



LUXEMBOURG

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TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNAL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA

EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI GENERALI TAL-UNJONI EWROPEA
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EUROPEISKA UNIONENS TRIBUNAL

REPORT FOR THE HEARING *

(Competition – Abuse of dominant position – Client PC operating systems – Work group server operating systems – Refusal of the dominant undertaking to supply and authorise the use of interoperability information – Fulfilment of obligations under a decision finding an infringement and imposing behavioural measures – Periodic penalty payment)

In Case T-167/08,

Microsoft Corp., established in Redmond, Washington (United States),
represented by J.-F. Bellis, lawyer, and I. Forrester QC,

applicant,

supported by

The Computing Technology Industry Association, Inc., established in
Oakbrook Terrace, Illinois (United States), represented by G. van Gerven and
T. Franchoo, lawyers,

Association for Competitive Technology, Inc., established in Washington DC
(United States), represented by D. Went and H. Pearson, lawyers,

interveners,

v

European Commission, represented by T. Christoforou, V. Di Bucci, F. Castillo
de la Torre and N. Khan, acting as Agents,

defendant,

supported by

* Language of the case: English.

EN

Free Software Foundation Europe eV, established in Hamburg (Germany), represented by C. Piana and T. Ballarino, lawyers,

Samba Team, established in New York, New York (United States), represented by C. Piana and T. Ballarino, lawyers,

Software & Information Industry Association, established in Washington DC, represented by T. Vinje, D. Dakanalis and A. Tomtsis, lawyers,

European Committee for Interoperable Systems (ECIS), established in Brussels (Belgium), represented by T. Vinje, M. Dolmans, N. Dodoo and A. Ferti, lawyers,

International Business Machines Corp., established in New York, New York (United States), represented by M. Dolmans and T. Graf, lawyers,

Red Hat Inc., established in Wilmington, Delaware (United States), represented by C.-D. Ehlermann, S. Völcker and C. O'Daly, lawyers,

Oracle Corp., established in Delaware (United States), represented by T. Vinje and D. Paemen, lawyers,

interveners,

APPLICATION for the annulment of the Commission Decision of 27 February 2008 setting the definitive amount of the periodic penalty payment imposed on Microsoft Corp. by Decision C(2005) 4420 final (Case COMP/C-3/37.792 – Microsoft) (OJ 2009 C 166, p. 20) and, in the alternative, the cancellation or reduction of the periodic penalty payment imposed on the applicant in that decision,

Legal context

- 1 Under Article 24 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] (OJ 2003 L 1, p. 1):

1. The Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:

- (a) to put an end to an infringement of Article 81 or Article 82 [EC], in accordance with a decision taken pursuant to Article 7;

...

2. Where the undertakings or associations of undertakings have 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. ...'

Background to the dispute

- 2 Microsoft Corp., a company established in Redmond, Washington (United States), designs, develops and markets a wide variety of software products for different kinds of computing devices. Those software products include, in particular, operating systems for client personal computers ('client PCs'), and work group server operating systems.
- 3 On 24 March 2004, the Commission adopted 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; 'the 2004 Decision').
- 4 According to the 2004 Decision, Microsoft infringed Article 82 EC and Article 54 of the Agreement on the European Economic Area (EEA) owing to two abuses of a dominant position, one of which, the only one relevant to the present case, consists in Microsoft's refusal to supply its competitors with 'interoperability information' and to authorise the use of that information for the purpose of developing and distributing products competing with Microsoft's own products on the work group server operating systems market, between October 1998 and the date of notification of the 2004 Decision (Article 2(a) of the 2004 Decision).
- 5 For the purposes of the 2004 Decision, 'interoperability information' is the 'complete and accurate specifications for all the protocols [implemented] in Windows work group server operating systems and ... 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(1) of the 2004 Decision).
- 6 'Windows work group network' is defined as 'any group of Windows client PCs and Windows work group servers linked together via a computer network' (Article 1(7) of the 2004 Decision).
- 7 A 'protocol' is defined 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' (Article 1(2) of the 2004 Decision).

8 In the 2004 Decision, the Commission emphasises that the refusal in question does not relate to Microsoft's 'source code', but only to specifications of the protocols concerned, that is to say, to a detailed description of what the software in question must achieve, in contrast to the implementations, consisting in the implementation of the code on the computer (recitals 24 and 569 of the 2004 Decision). It states, in particular, that it 'does not contemplate ordering Microsoft to allow copying of Windows by third parties' (recital 572 of the 2004 Decision).

9 In respect of the two abuses identified in the 2004 decision, a fine of EUR 497 196 304 was imposed (Article 3 of the 2004 Decision).

10 By way of remedy for the abusive refusal referred to in Article 2(a) of the 2004 Decision, Article 5 of that decision provides as follows:

'(a) Microsoft ... 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;

(b) Microsoft ... shall ensure that the interoperability information made available is kept updated on an ongoing basis and in a timely manner;

(c) Microsoft ... shall, within 120 days of the date of notification of this decision, set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope and terms of use of the interoperability information; as regards this evaluation mechanism, Microsoft ... may impose reasonable and non-discriminatory conditions to ensure that access to the interoperability information is granted for evaluation purposes only;

(d) Microsoft ... shall, within 60 days of the date of notification of this Decision, communicate to the Commission all the measures that it intends to take under points (a), (b) and (c); that communication shall be sufficiently detailed to enable the Commission to make a preliminary assessment as to whether the said measures will ensure effective compliance with the Decision; in particular Microsoft ... shall outline in detail the terms under which it will allow the use of the [i]nteroperability [i]nformation;

...'

11 Article 7 of the 2004 Decision provides:

'Within 30 days of the date of notification of this Decision, Microsoft ... shall submit a proposal to the Commission for the establishment of a suitable

mechanism assisting the Commission in monitoring [Microsoft's] compliance with this Decision. That mechanism shall include a monitoring trustee who shall be independent from Microsoft ...

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

- 12 By application lodged at the Registry of the General Court on 7 June 2004, Microsoft brought an action against the 2004 Decision.
- 13 By separate document lodged at the Court Registry on 25 June 2004, Microsoft lodged an application under Article 242 EC for suspension of operation of Article 4, Article 5(a) to (c) and Article 6(a) of the 2004 Decision.
- 14 By order of 22 December 2004 in Case T-201/04 R *Microsoft v Commission* [2004] ECR II-4463, the President of the Court dismissed that application.
- 15 By Decision C(2005) 2988 final of 28 July 2005, relating to a proceeding under Article 82 [EC] (Case COMP/C-3/37.792 – Microsoft), the Commission imposed the mechanism provided for in Article 7 of the 2004 Decision. On 4 October 2005 the Commission appointed an independent monitoring trustee.
- 16 By decision of 10 November 2005 ('the 2005 Decision'), imposing a periodic penalty payment pursuant to Article 24(1) of Regulation No 1/2003, the Commission considered that the technical documentation prepared by Microsoft up to 20 October 2005 containing the interoperability information was neither accurate nor complete (recital 101 of the 2005 Decision). The Commission also considered that the remuneration rates charged by Microsoft for granting access to and authorising the use of the interoperability information were unreasonable (recitals 161 and 193 of the 2005 Decision). On those grounds, the Commission ordered Microsoft to comply with the obligations imposed by Article 5(a) and (c) of the 2004 Decision within a period ending on 15 December 2005, failing which a periodic penalty payment of EUR 2 million per day would be imposed on it.
- 17 By decision of 12 July 2006 ('the 2006 Decision'), setting 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 2008 C 138, p. 10), the Commission considered that the technical documentation prepared by Microsoft up to 20 June 2006 containing the interoperability information was neither accurate nor complete (recital 232 of the 2006 Decision). The Commission therefore imposed a periodic penalty payment of EUR 280.5 million on Microsoft on the ground that it had not complied with Article 5(a) and (c) of the 2004 Decision during the period from 16 December 2005 to 20 June 2006. Furthermore, the Commission increased the periodic penalty payment which could be imposed pursuant to the 2005 Decision to EUR 3 million per day from 31 July 2006.

- 18 By two applications lodged at the Court Registry on 10 August 2005 and 2 October 2006, Microsoft contested the 2005 and 2006 Decisions respectively.
- 19 By judgment of 17 September 2007 (Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601) the General Court annulled Article 7 of the 2004 Decision and dismissed the remainder of the application. The first point in the operative part of the judgment in *Microsoft v Commission* reads as follows:
- ‘1. Annuls Article 7 of Commission Decision 2007/53/EC of 24 March 2004 relating to a proceeding pursuant to Article 82 [EC] and Article 54 of the EEA Agreement against Microsoft ... (Case COMP/C-3/37.792 – Microsoft), in so far as:
- it orders Microsoft to submit a proposal for the establishment of a mechanism which is to include 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;
 - it requires that the proposal for the establishment of that mechanism provide that all the costs associated with the appointment of the monitoring trustee, including his remuneration, be borne by Microsoft;
 - it reserves to the Commission the right to impose by way of decision a mechanism such as that referred to in the first and second indents above.’
- 20 By two letters lodged at the Court Registry on 24 October 2007, Microsoft applied to discontinue the actions it had brought against the 2005 and 2006 Decisions (see paragraph 18 above).

The contested decision

- 21 By decision 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; ‘the contested decision’), the Commission imposed on Microsoft a periodic penalty payment of EUR 899 million on the ground that it had not complied with the obligations imposed by Article 5(a) of the 2004 Decision during the period from 21 June 2006 to 21 October 2007.
- 22 It is apparent from recital 14 of the contested decision that the decision relates exclusively to the obligation imposed on Microsoft under Article 5(a) of the 2004 Decision, according to which Microsoft is required to grant access to and

authorise the use of the interoperability information on reasonable and non-discriminatory terms.

Work Group Server Protocol Program

- 23 It is apparent from recitals 21 to 23 of the contested decision that, by letter of 29 October 2004, Microsoft submitted to the Commission two draft agreements that it intended to offer to its competitors as part of a 'Work Group Server Protocol Program'. These were the draft form of agreement for licensing the intellectual property rights in the protocols in question, and a draft form of agreement enabling prospective licensees to evaluate the protocols which would be licensed.
- 24 By letter of 20 May 2005, in the course of continuous exchanges with the Commission, Microsoft submitted a group of five kinds of agreement, namely:
- Microsoft Work Group Server Protocol Program License Agreement (All IP) for Development and Product Distribution (Work Group Server Operating System Software);
 - Microsoft Communications Protocol Program Agreement for Evaluation of Technical Documentation (3-Day);
 - Microsoft Communications Protocol Program Agreement for Evaluation of Technical Documentation (30-Day);
 - Microsoft Work Group Server Protocol Program License Agreement (No Patents) for Development and Product Distribution (Work Group Server Operating System Software);
 - Microsoft Work Group Server Protocol Program Patent Only License Agreement for Development and Product Distribution ('the WSPP agreements') (recitals 32 and 33 of the contested decision).
- 25 It is apparent from recitals 33, 37, 39, 40, 44, 57, 59, 66, 92 and 103 of the contested decision that, in the course of the continued exchanges with the Commission, Microsoft submitted, between 20 May 2005 and 21 May 2007, thirteen successive revised versions of the WSPP agreements containing remuneration schemes. One remuneration scheme, submitted on 22 October 2007, provided for the conclusion of a 'No Patent' agreement under which access to and use of the technical documentation embodying the Interoperability Information is permitted for a one-time payment of EUR 10 000. Furthermore, a licensing agreement for the patented technologies is also available against remuneration calculated on the basis of the licensee's net revenues (recital 102 of the contested decision).
- 26 According to recital 39 of the contested decision, the version of the WSPP agreements submitted by Microsoft to the Commission on 31 May 2005 also

contained principles for pricing the interoperability information ('the WSPP Pricing Principles'), which were drawn up following discussions between the two parties. The WSPP Pricing Principles were to guide the monitoring trustee when providing opinions, but also when called upon by a licensee to decide whether or not the remuneration rate is reasonable, a decision that can ultimately be enforced in the High Court of Justice (England and Wales) (recitals 47 and 113 of the contested decision).

Statement of Objections

- 27 On 1 March 2007, the Commission sent a Statement of Objections to Microsoft (recital 73 of the contested decision).
- 28 By letter of 2 March 2007, Microsoft asked the Commission for the exact remuneration rates that Microsoft must set in order to be in compliance with the obligations arising under the 2004 Decision. By letter of 8 March 2007, the Commission replied that it was not for the Commission to prescribe the exact remuneration rates but to ensure that any remuneration rate set by Microsoft is reasonable and non-discriminatory in accordance with Article 5(a) of the 2004 Decision (recital 75 of the contested decision).
- 29 By letter of 23 April 2007, Microsoft responded to the Statement of Objections. On 24 July 2007, the Commission sent a 'Letter of Facts' to Microsoft, in order to give Microsoft the opportunity to comment on the evidence gathered by the Commission after the adoption of the Statement of Objections. Microsoft submitted its observations on 31 August 2007 (recitals 82, 98 and 99 of the contested decision).

Assessment of compliance with the obligations imposed by Article 5(a) of the 2004 Decision

Criteria for assessing the reasonableness of the remuneration rates charged by Microsoft

- 30 The Commission points out, in recital 105 of the contested decision, that, according to recital 1003 of the 2004 Decision, any remuneration charged for access to or use of the interoperability information must allow its users to compete viably with Microsoft's work group server operating system. Moreover, according to recital 1008(ii) of the 2004 Decision, such remuneration should not reflect the strategic value stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market.
- 31 Under those circumstances, a condition imposed by Microsoft and having the potential effect of limiting access to use of the interoperability information will be reasonable within the meaning of Article 5(a) of the 2004 decision only if it is necessary and proportionate to lawful interests of Microsoft which it is designed to protect. In order that the condition may be objectively justified, any

remuneration charged by Microsoft must therefore reflect only the possible intrinsic value of the information in question, and exclude the strategic value which simply stems from the opportunity it affords to interoperate with Microsoft's client PC operating systems. It is for Microsoft to establish that this is the case (recitals 106 and 107 of the contested decision).

- 32 The Commission considers that the WSPP Pricing Principles (see paragraph 26 above) are in accordance with the objectives expressed in recitals 1003 and 1008(ii) of the 2004 decision. Those principles provide that the remuneration scheme must enable the users of the interoperability information to compete viably with Microsoft. They also provide that, in order to assess whether the interoperability information reflects an intrinsic value, that is to say, that it does not consist in the strategic value described in paragraph 30 above, it is necessary:
- to examine whether the protocols concerned are Microsoft's own creations;
 - to examine whether those creations constitute innovation, and
 - to take into account a market valuation of comparable technologies, excluding the strategic value that stems from the dominant position of any such technologies (recitals 117 and 118 of the contested decision).
- 33 The Commission also states, in recitals 119 and 158 of the contested decision, that it will apply the criteria set out in the previous paragraph in order to assess whether the remuneration rates charged by Microsoft are reasonable.
- 34 Moreover, the Commission points out that its assessment will be made, for the period up to 21 October 2007, by reference to the version of the WSPP agreements submitted on 21 May 2007 (see paragraph 25 above). Since the remuneration scheme included in that version of the WSPP agreements provides for lower remuneration rates than those provided for in the previous versions, the Commission's findings will apply *a fortiori* to those previous versions, according to recital 103 of the contested decision.
- 35 The first criterion is not satisfied if Microsoft uses protocols which it takes from the public domain (recital 129 of the contested decision).
- 36 As regards the second criterion, that Microsoft's creations must be innovative, the Commission points out that if the technologies in question are not novel, in the sense that they already form part of the state of the art, or are obvious to persons skilled in the art, Microsoft is not entitled to remuneration. The Commission considers that the criteria of novelty and non-obviousness are appropriate, since they are settled concepts in the area of intellectual property (recitals 130 and 138 of the contested decision). In that context, minor incremental changes or minor improvements which would only represent a negligible value to the recipients of the interoperability information cannot be described as innovative for the purposes of enforcing the 2004 Decision (recital 144 of the contested decision).

- 37 The Commission adds in that regard that, insofar as Microsoft puts forward patents reading on protocol technologies disclosed with the technical documentation, it assumes, provisionally and for the purposes of the contested decision, that those technologies are innovative (recital 132 of the contested decision).
- 38 With regard to the third criterion set out in paragraph 32 above, the Commission states that it is designed to verify that the remuneration rates charged by Microsoft are in line with a market valuation of comparable technologies (recital 139 of the contested decision).

Assessment of the reasonableness of the remuneration rates charged by Microsoft
– General framework

- 39 In recitals 159 to 164 of the contested decision, the Commission summarises the general framework of the remuneration scheme proposed by Microsoft.
- 40 In that regard, the Commission states that Microsoft proposes various types of access to the interoperability information within the framework of the WSPP agreements. Thus, Microsoft offers access to protocols relating to five scenarios within the File/Print task, to sixteen scenarios within the User and Group Administration task and to the General Networking task.
- 41 Four types of agreement give access to interoperability information.
- 42 First, the ‘No Patent’ agreement allows the recipients of interoperability information to develop and distribute work group server operating systems on the basis of the technical documentation.
- 43 Secondly, under the ‘Patent Only’ agreement, Microsoft provides a licence to those patents which, according to Microsoft, read on the technology necessary to interoperate with Windows Client PCs and Windows work group server operating systems.
- 44 Thirdly, under the ‘All IP’ agreement, Microsoft provides a licence to those patents which, according to Microsoft, read on the technology necessary to interoperate with Windows Client PCs and Windows work group server operating systems as well as access to and the right to use the technical documentation.
- 45 Fourthly, under the ‘Interface Definition Language Only’ agreement, Microsoft provides a licence to those patents which allegedly read on the Interface Definition Language files as well as access to and the right to use the technical documentation on these files.
- 46 For most of the scenarios, Microsoft charges remuneration rates based on the type of agreement chosen and applies a minimum and maximum amount for those

rates. Remuneration rates are also provided for in respect of the scenarios as grouped in a task and in respect of the scenarios within the three tasks identified in paragraph 40 above as a whole. The remuneration charged is expressed either as a percentage of the licensee's net revenue derived from the sale of products implementing the protocols in question, or as a fixed amount per server sold.

47 It is apparent from recitals 166, 167 and 297 of the contested decision that the Commission focuses on the reasonableness of the remuneration rates charged by Microsoft for the non-patented technology included in the technical documentation and made available through the 'No Patent' agreement.

– The innovative character of the protocols described in the technical documentation to which Microsoft provides access under the 'No Patent' agreement

48 According to recital 169 of the contested decision, Microsoft claims, in two reports submitted to the Commission on 31 July and 24 August 2006 respectively, that a total of 173 protocols contain non-patented innovations.

49 To substantiate its appraisal, Microsoft (a) verified that the technology in question was developed by or on behalf of Microsoft, (b) described the problem resolved by that technology, (c) described prior art technologies taken into account in order to determine that the protocol in question is innovative, and (d) identified the location of those innovations in the revised technical documentation.

50 At the Commission's request, the monitoring trustee reviewed Microsoft's claims concerning the non-patented technology following the methodology described in paragraph 49 above. The Commission made the same request to TAEUS, a specialist company, in respect of the scenarios 'File Replication Service', 'Directory Replication Service' and 'Network Access Protection'. The reports of TAEUS and of the monitoring trustee were submitted to the Commission on 15 December 2006 and 27 February 2007 respectively (recitals 62, 69 and 171 of the contested decision).

51 The monitoring trustee reached the conclusion that little of the material provided by Microsoft in the technical documentation is innovative and therefore justifies remuneration. Moreover, TAEUS concluded that none of the 21 technologies incorporated in the three scenarios which it examined is innovative (recitals 171 to 174 of the contested decision). Those conclusions were not altered following Microsoft's response to the Statement of Objections, which gave rise to two reports by the monitoring trustee and one from TAEUS, according to footnote 197 of the contested decision.

52 For its part, the Commission concluded that, of the 173 protocol technologies which Microsoft claims are innovative, for 166 either there is prior art or they are obvious to persons skilled in the art, while 7 are innovative (recitals 175 and 219 of the contested decision).

- 53 The 173 technologies in question are set out in a table annexed to the contested decision, containing a summary description of each technology and, for most of the technologies, information regarding the date of their creation, the resulting benefits according to Microsoft, a reference to the file submitted by Microsoft, a summary assessment, a reference to prior art and a reference to the sources which, according to the Commission, substantiate the assessment made, and also information regarding prior art. The sources in question consist in two reports by the monitoring trustee dated 3 March and 8 July 2007 and observations made on 8 May 2007 by the European Committee for Interoperable Systems ('ECIS') on Microsoft's response to the Statement of Objections.
- 54 In recitals 187 to 218 of the contested decision, the Commission set out its analysis of the innovative character of eight protocol technologies in the 'Directory & Global Catalog Replication' scenario, which forms part of the User and Group Administration task, and of eleven protocol technologies in the 'File Replication Service', which forms part of the File/Print task. With the exception of the arguments relating to the 'File Staging' technology, Microsoft's claims that those technologies are innovative were rejected by the Commission (recital 219 of the contested decision).

– Market valuation of comparable technologies

- 55 In recitals 220 to 279 of the contested decision, the Commission set out its assessment concerning a market valuation of technologies comparable to the non-patented technologies disclosed under the 'No Patent' agreement. According to that assessment, comparable technologies are offered remuneration-free by Microsoft and by other undertakings, so that the market valuation shows that the remuneration rates charged by Microsoft are unreasonable.

Periodic penalty payment

- 56 The Commission states, in recitals 285 and 298 of the contested decision, that the decision relates exclusively to the period from 21 June 2006 to 21 October 2007, since the scheme adopted by Microsoft on 22 October 2007 (see paragraph 25 above) did not give rise to objections as to the reasonableness of the remuneration rates which it contains. Accordingly, the Commission fixed the definitive amount of the periodic penalty payment at EUR 899 million for that period (recitals 299 and 300 of the contested decision).

Procedure and forms of order sought by the parties

- 57 By application lodged at the Registry of the General Court on 9 May 2008, Microsoft brought the present action.

- 58 By document lodged at the Court Registry on 16 August 2008, Free Software Foundation Europe ('FSFE') and Samba Team sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.
- 59 By documents lodged at the Court Registry on 19 August 2008, the Software & Information Industry Association ('SIIA') and ECIS sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.
- 60 By document lodged at the Court Registry on 25 August 2008, International Business Machines Corp. ('IBM') and Red Hat Inc. sought leave to intervene in the present proceedings in support of the Commission.
- 61 By document lodged at the Court Registry on 26 August 2008, Oracle Corp. sought leave to intervene in these proceedings in support of the Commission.
- 62 By documents lodged at the Court Registry on 25 and 26 August 2008 respectively, the Computing Technology Industry Association, Inc. ('CompTIA') and the Association for Competitive Technology, Inc. ('ACT') sought leave to intervene in the present proceedings in support of Microsoft.
- 63 By order of 20 November 2008, the President of the Seventh Chamber of the General Court (former composition) granted those applications.
- 64 The interveners submitted their statements in intervention and the other parties submitted their observations thereon within the prescribed periods.
- 65 By way of measures of organisation of procedure, the Commission was requested to produce certain documents and other information.
- 66 Microsoft claims that the Court should:
- annul the contested decision;
 - in the alternative, cancel or reduce the amount of the periodic penalty payment;
 - order the Commission and the parties intervening in its support to pay the costs.
- 67 The Commission contends that the Court should;
- dismiss the application;
 - order Microsoft to pay the costs.
- 68 SIIA, ECIS, IBM, Red Hat and Oracle contend that the Court should:

- dismiss the application;
- order Microsoft to pay the costs of their interventions.

69 CompTIA claims that the Court should:

- annul the contested decision;
- order the Commission to pay the costs of its intervention.

70 ACT claims that the Court should:

- annul the contested decision;
- in the alternative, cancel or reduce the amount of the periodic penalty payment imposed on Microsoft;
- order the Commission to pay the costs of its intervention.

Pleas in law and arguments of the parties

71 The pleas put forward by Microsoft allege, first, that it was unlawful to impose a periodic penalty payment before Microsoft's obligations under Article 5 of the 2004 Decision had been made specific; second, that the Commission erred in law by concluding that the remuneration rates relating to the 'No Patent' agreement were unreasonable; third, that an error was committed in relation to the criteria applied to assess the innovative character of the technologies disclosed in the 'No Patent' agreement; fourth, that the use of the reports of the monitoring trustee was unlawful; fifth, that the rights of the defence have been infringed and, sixth, that there is no legal basis for the imposition of a periodic penalty payment and that the amount thereof is excessive and disproportionate.

72 Moreover, Microsoft claims that the contested decision is invalidated by a failure to state reasons in respect of a series of matters.

The first plea, alleging that it was unlawful to impose a periodic penalty payment before Microsoft's obligations under Article 5(a) of the 2004 Decision had been made specific

Arguments of Microsoft and of the parties intervening in its support

73 In support of its first plea, Microsoft raises a set of four complaints.

74 First, the Commission infringed its obligation to specify positively what Microsoft must do in order to comply with Article 5(a) of the 2004 Decision. It is apparent from the Commission's decision-making practice that it could have specified, in

the 2004 Decision, the remuneration rates to which Microsoft is entitled. The expression 'reasonable rates' includes rates of various levels. This view does not amount to a challenge of the legality of the 2004 Decision, nor does it deny that it is possible to implement provisions which include indefinite legal concepts, but it does challenge the right to impose a periodic penalty payment for infringement of the aforementioned provision before specifying the obligations which arise under it.

- 75 With a view to specifying those obligations before requiring Microsoft to comply with them, the Commission established the procedure laid down in Article 5(d) of the 2004 Decision. However, as the Commission stated in the Statements of Objections sent to Microsoft in August 2000 and August 2003, and as is apparent from recital 995 of the 2004 Decision, if the measures proposed by Microsoft were unsatisfactory, the Commission would impose the measures necessary by means of a decision. However, the Commission has consistently refused to specify what it meant by 'reasonable remuneration rates', even though the responsibilities which it assumed under Article 5 of the 2004 Decision require it to impose on Microsoft positively specified conditions by means of a decision. Since the WSPP Pricing Principles give only general guidelines which do not lead to an exact figure, they cannot be considered sufficient. The claims relating to the absence of intrinsic value and to the common practice of providing interoperability information free of charge have no factual basis and are discredited by the conclusion of licensing agreements in accordance with Microsoft's remuneration scheme.
- 76 Secondly, Microsoft claims that such conduct constitutes an infringement of Article 24 of Regulation No 1/2003, since the imposition of a periodic penalty payment designed to compel a person to adopt a certain course of action presupposes that the obligations of the person in question have been exhaustively defined; otherwise, the imposition of the periodic penalty payment infringes fundamental rights. In the present case, the Commission, which was not entitled to initiate the procedure under Article 24 of Regulation No 1/2003 if it did not know exactly what Microsoft had to do to comply with the 2004 Decision, could have relied on the monitoring trustee to specify Microsoft's obligations to the required degree.
- 77 Thirdly, Microsoft, supported by CompTIA, states that, by imposing a periodic penalty payment before specifying Microsoft's obligations to the required degree, the Commission infringed the principle of good administration. In that regard, CompTIA maintains that the Commission's action is characterised by a lack of transparency, objectivity and fairness, while the periodic penalty payment imposed is arbitrary and disproportionate in the light of the circumstances of the case. According to CompTIA, the Commission's conduct is a source of risk and uncertainty which discourages innovation to the detriment of the consumer.

- 78 Fourthly and finally, Microsoft claims that, by refusing to adopt a decision which was open to judicial review and to specify the obligations arising under Article 5(a) of the 2004 Decision in respect of remuneration rates, the Commission compelled Microsoft to comply with its requests to lower the remuneration rates for all the WSPP agreements, without, however, being able to bring proceedings concerning the legality of the requests in question. Thus, Microsoft has been deprived of its right to effective legal protection against the assessments, always ‘preliminary’, made by the Commission. Furthermore, even if Microsoft had refused to review its proposals or had brought an action for damages or an action for failure to act, those actions would not have led to a Commission decision defining a reasonable remuneration rate.
- 79 Since Microsoft has repeatedly raised these arguments during the administrative procedure without receiving any response, even in the contested decision, the latter is also invalidated by a failure to state reasons.
- 80 ACT maintains that Microsoft implemented the most appropriate methods to define its obligations under Article 5(a) of the 2004 Decision, whereas the Commission merely rejected the corresponding research results without even giving the clarifications which Microsoft needed in order to comply with the obligations in question. Moreover, the Commission requested information only from the undertakings which supported its position.

Arguments of the Commission and of the parties intervening in its support

- 81 The Commission draws attention, first of all, to the agreement it reached with Microsoft in May 2005 concerning the WSPP Pricing Principles (see paragraph 25 above). Furthermore, by letter of 17 March 2005, the Commission informed Microsoft of its position, according to which the possibility that Microsoft could charge a non-nominal remuneration was subject to the condition that the interoperability information was innovative, while a letter dated 18 April 2005 contains a similar opinion, which was reiterated in a letter from Microsoft of 4 May 2006. The 2005 Decision states the same notion in recital 105, while the condition relating to the market valuation (see paragraph 32 above) is illustrated in recital 106 of that decision. Microsoft’s reactions following the judgment in *Microsoft v Commission*, paragraph 19 above, show that it was able to identify within a short time the measures which it had to take in order to comply with the obligations arising under the 2004 Decision.
- 82 Next, the Commission, supported by IBM, adds that Microsoft cannot, at this stage, plead an alleged lack of precision of the 2004 Decision regarding the definition of its obligations or the lack of a legal basis for that definition, and that, even if it were acknowledged that the Commission could have specified those obligations further at the time, it was not required to do so. Moreover, the fact that certain provisions contain indefinite legal concepts does not mean that penalties for infringing the obligations arising under them cannot be imposed without prior

specification of the obligations in question. It is necessary to distinguish between an indefinite legal concept and an insufficiently precise provision. Thus, an obligation is clearly defined if the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts or other authorities, to know which acts or omissions will make him liable. This is the position in the present case, since Microsoft's obligation to achieve a certain result clearly stems from the 2004 Decision and from the guidance provided by the Commission subsequently.

- 83 Supported by SIIA, ECIS, IBM and Oracle, the Commission points out that recitals 1003 and 1008(ii) of the 2004 Decision (see paragraph 30 above) clearly state the conditions which any remuneration must satisfy, so that, in view of the fact that the interoperability information is commonly provided free of charge, Microsoft must have been aware that it was impossible to charge a remuneration for the information in the 'No Patent' agreement. Those conditions were the subject-matter of extensive discussions leading to the WSPP Pricing Principles, which establish criteria which are specific and in accordance with the usual practice of the industry, including Microsoft, enabling the latter, the monitoring trustee and the High Court of Justice (England & Wales) (see paragraph 26 above) to assess the reasonableness of a given rate of remuneration. The Commission, which did not even have access to the complete information before the second half of 2006, is therefore not required to impose, by means of a further decision, the remuneration rates which it considers reasonable before it can impose a periodic penalty payment on Microsoft for failing to fulfil its obligations under Article 5(a) of the 2004 Decision, since such an obligation moreover does not arise under Article 5(d) thereof (see paragraph 10 above). Under the principle of proportionality, any measure of a behavioural nature must be appropriate and necessary to preserve Microsoft's freedom to choose among the many possible solutions open to it to comply with the applicable competition rules.
- 84 The Commission denies that the case-law invoked by Microsoft regarding the principle of good administration supports Microsoft's argument in that regard. Furthermore, even if Microsoft made an honest effort to fulfil its obligation to achieve a certain result deriving from the 2004 Decision, that does not compensate for the fact that that effort was fruitless. CompTIA and ACT were indeed heard during the administrative procedure, although the contested decision is based principally on the reports of the monitoring trustee and of TAEUS, so it cannot be acknowledged that the Commission endorsed in a biased fashion the assessment of companies which had an interest in a specific outcome.
- 85 Finally, it was Microsoft which chose to enter into lengthy exchanges with the Commission regarding the remuneration rates to be applied and, if it considered that the institution's conduct was unlawful, it could have brought an action for damages or an action for failure to act, if appropriate with an application for interim relief. Its right to effective judicial protection was therefore not compromised.

The second plea, alleging that the Commission erred in law by concluding that the remuneration rates relating to the 'No Patent' agreement were unreasonable

Arguments of Microsoft and of the parties intervening in its support

- 86 Having regard to the indefinite character of the concept of reasonable remuneration and to the Commission's refusal to specify Microsoft's obligations, Microsoft agreed to create a mechanism for negotiating remuneration rates with potential licensees and to submit to arbitration by the monitoring trustee. Furthermore, at the Commission's request, Microsoft fixed remuneration rates at even lower levels than those suggested by PricewaterhouseCoopers, a world-renowned firm of experts, based on the evaluation of technologies reasonably considered to be comparable and in accordance with universally accepted methods. However, as is widely known, even those rates serve only as a point of departure in negotiations with potential licensees, and the matter may be referred to the monitoring trustee in the event of disagreement, in order to define a reasonable rate pursuant to the WSPP Pricing Principles. Even if the Commission does not agree with the assessment of the external specialists appointed by Microsoft in good faith and with the aim of complying with the 2004 Decision, it cannot be accepted that Microsoft applied unreasonable, let alone discriminatory, remuneration rates, since none of its licensees considered it appropriate to refer the matter to the monitoring trustee, even during the negotiations, although Microsoft's position was weakened because of the threat of a very high periodic penalty payment. In any event, the implementation of that dispute resolution mechanism with Microsoft's agreement ensures that any remuneration eventually paid would be reasonable because it would be in accordance with the WSPP Pricing Principles applied by the monitoring trustee.
- 87 Under those circumstances, it must be concluded that the reason why certain undertakings did not even negotiate with Microsoft or refer the matter to the monitoring trustee is not that the remuneration rates proposed by Microsoft were unreasonable, but that they did not believe the argument alleging that the protocols in question were not innovative.
- 88 Microsoft also rejects the arguments that the undertakings which concluded licensing agreements paid for the strategic value of the technologies in question and are not Microsoft's competitors as materially inaccurate.
- 89 The fact that the agreements concluded with Microsoft concern the 'All IP' agreement is irrelevant, since it cannot be inferred from that that the remuneration rates proposed for the 'No Patent' agreement were unreasonable and because the technical documentation is exactly the same in both cases.
- 90 Since Microsoft repeatedly raised these arguments during the administrative procedure without receiving any response, including in the contested decision, the latter is also vitiated by a failure to state reasons.

- 91 Faced with the Commission's refusal to specify the remuneration rates which it considered reasonable, Microsoft also undertook to apply retroactively to the date of adoption of the 2004 Decision whatever rates would ultimately be defined as reasonable as a result of the exchanges with the Commission, so that potential licensees would be certain that in the end they would have to pay only a reasonable price. The Commission's claim regarding the dissuasive effect of remuneration rates which are only proposed, and not 'applied' by Microsoft, is only a supposition which is unsupported by evidence.
- 92 If the Commission accorded so much importance to the opportunity for potential licensees to calculate the licence costs accurately, it should have adopted a decision specifying the reasonable maximum rate instead of imposing an arbitration mechanism.
- 93 Supported by CompTIA, Microsoft maintains that the product of arm's length negotiations is the most reliable indicator of the reasonable character of a given remuneration rate. Already, four undertakings have concluded, of their own free will, agreements for access to the interoperability information even at a price higher than that regarded by the Commission as unreasonable, a fact which cannot be ignored in favour of theoretical and abstract evaluation constructions. Furthermore, according to CompTIA, it is impossible to know at the negotiation stage whether the undertaking in question intended to develop technologies to compete with those of Microsoft and that this matter is in any event irrelevant to the purpose of the 2004 decision.
- 94 Microsoft adds that the 2004 Decision does not preclude it from charging remuneration rates which are a proportion of the revenue of the licensees nor does it require Microsoft to adapt to the business model of each of its potential licensees.
- 95 Finally, the Commission ignored the fact that, in spite of its name, the 'No Patent' agreement gives interested parties the right to benefit from Microsoft's patented innovations. If the Commission considers that Microsoft's pledge not to assert rights under the corresponding patents does not have the desired effect, it should state so clearly in these proceedings.

Arguments of the Commission and of the parties intervening in its support

- 96 According to the Commission, the question of whether Microsoft could believe in good faith that it was complying with the 2004 Decision is irrelevant for the purposes of the present proceedings. Furthermore, given Microsoft's competitive position, the results of its negotiations with potential licensees are not consistent with the objectives protected by the 2004 Decision. Supported by IBM, the Commission states that the possibility to negotiate remuneration rates and the existence of an arbitration mechanism only after the conclusion of the licensing agreement do not fulfil the obligation to achieve a certain result established by the

2004 Decision, which Microsoft must fulfil irrespective of any negotiation. This is so *a fortiori* because Microsoft has for a long time refused to provide access to the interoperability information and because the remuneration rates cannot depend on the negotiating weight of each potential licensee since they must be defined before the conclusion of any agreement owing to the amounts involved.

- 97 Supported by FSFE and Samba Team, the Commission maintains that the retroactive application of the remuneration rates does not compensate for the dissuasive effect on potential licensees of the unreasonable prices applied up to 22 October 2007. SIIA, IBM and Oracle add, in that regard, that the absence of intrinsic value in the interoperability information combined with the exorbitant remuneration rates left no room for negotiation, which was not even publicly acknowledged as a possibility by Microsoft. The fact that Microsoft acted in accordance with the conclusions of an expert report drawn up by external experts (see paragraph 86 above) is irrelevant, since the 2004 Decision and the WSPP Pricing Principles provide precise and objective assessment criteria. In any event, the Commission, supported by IBM, points out that the report in question contains no analysis of the innovative character of the technologies at issue, and that its analysis of the evaluation of comparable technologies has already been rejected in the 2005 Decision and in the Statement of Objections of 1 March 2007.
- 98 The conclusion of certain licensing agreements invoked by Microsoft does not establish the reasonableness of the remuneration rates charged by Microsoft for the ‘No Patent’ agreement because, first, the interoperability information is indispensable, second, the agreements in question are ‘All IP’ agreements and, third, the licensees are not competitors of Microsoft.
- 99 In that regard, FSFE, Samba Team, SIIA and IBM express doubts as to whether the agreements concluded by Microsoft are representative, owing to the fact that its respective licensees enjoy special advantages as developers of software which does not compete with but complements Microsoft’s software, thus benefiting from the strategic value of the interoperability information.
- 100 Supported by IBM, the Commission points out that the contested decision does not have the effect of undermining the value of Microsoft’s patented technologies, since the purpose of the ‘No Patent’ agreement is not to grant a licence to use such technologies and Microsoft’s unilateral pledge not to assert rights under it was not given until 24 October 2007. FSFE, Samba Team, IBM and Red Hat claim that the remuneration rates charged by Microsoft and the pledge in question discriminate against ‘open source’ developers.
- 101 Finally, recitals 122 to 127 and 273 to 278 of the contested decision provide a reply to Microsoft’s arguments, so that the complaint alleging failure to state reasons is unfounded.

The third plea, alleging an error in relation to the criteria applied to assess the innovative character of the technologies disclosed in the 'No Patent' agreement

Arguments of Microsoft and of the parties intervening in its support

- 102 Microsoft reiterates that the Commission ignored the value of the patented innovations described in the 'No Patent' agreement and adds that the application of a patentability standard for assessing the innovative character of non-patented technologies constitutes a manifest error of assessment. In addition, the contested decision does not state the reasons on which it is based.
- 103 This plea is not 'ineffectual', since Microsoft has not conceded that the Commission's analysis of the third criterion of the WSPP Pricing Principles is correct. That analysis is based on an erroneous perception of the meaning of 'innovation', a fact which is bound to affect the choice of technologies regarded as comparable. CompTIA points out that the technologies chosen by the Commission as comparable are part of a different business model from that implemented by Microsoft, so the Commission's market valuation is invalidated.
- 104 The view that Microsoft is entitled to receive remuneration only for novel and non-obvious technologies within the meaning of patent law finds no support in the 2004 Decision or the WSPP Pricing Principles or in the law in general. Microsoft has not conceded that the application of those criteria, by that institution and by the monitoring trustee, was appropriate in this case. Supported by CompTIA and ACT, Microsoft points out that trade secrets may disclose an important value, due mainly to the fixed development costs, irrespective of whether they are also patentable or already patented, since the undertaking concerned must be free to adopt a policy in that regard. Contrary to what IBM maintains, the functionality of the 'File Replication Service' protocol is of crucial importance, hence the fact that one of its aspects is patented in the United States. The Commission does not explain how the patentability standard it applied is designed specifically to exclude the strategic value of Microsoft's technologies in accordance with recital 1008(ii) of the 2004 Decision. According to ACT, only an assessment of the value of the interoperability information in the absence of any dominant operator would have made it possible to evaluate, in the light of the 2004 Decision, the rates proposed by Microsoft.
- 105 Supported by ACT, Microsoft claims that the Commission applied the criteria of novelty and non-obviousness too restrictively and therefore in a manner contrary even to patent law. Thus, contrary to the rules of assessment established by the Commission in other areas, it is only truly pioneering inventions, totally different from prior art, which may be described as novel in the present context. However, the existence of prior art references relating to concepts more-or-less similar to those implemented by Microsoft does not amount to the collective obviousness of the technologies covered by the contested decision which, moreover, Microsoft's competitors have been unable to develop, as CompTIA and ACT confirm.

According to CompTIA, it is the market and not the Commission which must determine the best technology. The Commission goes so far as to deny, in its defence, that the criterion of novelty as applied in intellectual property law is appropriate, so that it is not clear to Microsoft what criterion was finally implemented in the contested decision.

- 106 Furthermore, the granular approach adopted in the contested decision excludes from the concept of innovation any non-obvious combination of known elements. However, it is apparent from the case-law of the Boards of Appeal of the European Patent Office that the relevant question is not whether a skilled person could have implemented such a combination but whether he actually would have done so in expectation of an improvement. Observing that the Commission has conceded that some of the technologies concerned by the contested decision are innovative, ACT maintains that the technology must be described as innovative as a whole, where it consists in a combination of new and non-obvious elements and non-patentable elements. There is nothing to show that the Commission actually examined Microsoft's technological combinations as such.
- 107 Microsoft submitted, during the administrative proceedings, several reports showing the truth of its claims relating to the novelty and non-obviousness of the non-patented inventions contained in the technical documentation, which the Commission rejected. There is therefore no need to increase the burden of documentation submitted to the General Court, since the relevant question is whether the Commission's approach is consistent with the 2004 Decision.
- 108 The contested decision is also vitiated by a failure to state reasons, since it contains no response to the analysis contained in a report drawn up by a professor and barrister, a former member of the Board of Appeal of the European Patent Office, who set out in detail the errors committed by the Commission in patent law and confirms the truth of Microsoft's claims. It is also apparent from that report that the Commission and the monitoring trustee considered the patentability of the technologies taking account of the state of the art in 2007 and not at the time Microsoft would have applied for the grant of a patent, thus taking account of technologies which appeared after the first implementation of the crucial technologies by Microsoft. According to this logic, no undertaking could demonstrate that its technology is novel and non-obvious, while there would be arbitrary discrimination between the various technologies depending on whether or not Microsoft chose to apply for a patent. Moreover, the contested decision contains only vague references with no specific comparisons between the claims of those technologies and those of the prior art technologies.
- 109 Irrespective of specific examples, the fundamental errors identified by Microsoft vitiate the whole of the Commission's analysis, so that the General Court must find that the contested decision is unlawful, as part of the full review which it is called upon to make. In any event, the existence of innovation at less granular levels is apparent from the fact that, in the contested decision, the Commission

altered its appraisal and considered that Microsoft is entitled to charge a remuneration for the licences granted under agreements other than the 'No Patent' agreement. However, the technical documentation is exactly the same in all the WSPP agreements.

- 110 ACT adds that the Commission's approach encourages the transfer of valuable technologies at abnormally low prices, prevents investment in research by horizontally devaluing intellectual property rights and disproportionately favours the 'open source' model to the detriment of innovative SMEs.

Arguments of the Commission and of the parties intervening in its support

- 111 Supported by SIIA and by Oracle, the Commission submits that this plea is ineffectual, since the operative part of the contested decision rests not only upon the assessment of the innovative character of the technologies in question but also on the result of the market valuation of comparable technologies. However, Microsoft has not challenged the finding in paragraph 55 above, and merely to reject it at the reply stage does not satisfy the conditions of Article 44(1)(c) or of Article 48(2) of the Rules of Procedure of the General Court. Furthermore, as is apparent from recitals 165, 220, 221 and 280 of the contested decision, the analysis of the innovative character is separate from the analysis of the market valuation. Under those circumstances, according to SIIA, even if the Commission's analysis of the innovative character of the technologies in question is wrong, Microsoft still should have demonstrated that the technologies chosen as comparable are less innovative than those concerned by the contested decision.
- 112 For the sake of completeness, the Commission points out that the information in question concerns only interoperability with Microsoft's dominant products and that Microsoft agreed that non-innovative information should be available at no charge. Accordingly, as SIIA, IBM and Oracle confirm, although the Commission used two concepts of patent law to assess the innovative character of the technologies at issue in accordance with the WSPP Pricing Principles, it did not intend to examine their patentability, since, moreover, such an exercise would require an assessment of their industrial applicability and technical character. Furthermore, according to the Commission, IBM and Oracle, the innovative character is to be assessed by reference to the moment a third party obtains access to the technology in question, covered up to that moment by the trade secrets policy applied by Microsoft to the marketing of its products. In any event, the Commission also made an assessment by reference to the moment that each technology was first implemented by Microsoft. Supported by Oracle, the Commission states that Microsoft has not explained what type of 'less granular' approach would have made it possible to establish that the combinations of technologies examined by the Commission are, contrary to the Commission's findings, innovative.

- 113 Accordingly, the fact that, even in the absence of innovative character, trade secrets are protected at national level and may have significant value is irrelevant, since the assessment made in the present case seeks only to exclude the strategic value deriving from Microsoft's position on the Clients PC market. Furthermore, the Commission does not support the premiss that every valuable technology should be patented.
- 114 Thus, the assessment of the novelty and non-obviousness of 173 technologies which Microsoft has claimed is an appropriate approach, the sole purpose of which is to consider whether Microsoft was charging a remuneration for granting access to technologies whose value is based only on the fact that they allow interoperability with Microsoft products, thus imposing an 'interoperability tax'. To the same end, the Commission carried out the market valuation concerning the marketing of comparable technologies, including by Microsoft, the results of which have not been challenged. It follows that the claims made by ACT alleging discrimination between two business models and a horizontal devaluation of intellectual property rights are unfounded. The Commission adds that the evaluation of intellectual property is not made on the basis of its development cost, since such cost is not a reliable indicator of its value, as is acknowledged by the external experts appointed by Microsoft.
- 115 ECIS, IBM and Oracle maintain that, even where it is the result of combinations, the technology to which Microsoft provides access, such as, according to IBM, the 'File Replication Service', is part of the prior art and has no intrinsic value. In fact, adds ECIS, Microsoft has made minor amendments without added value to public communication protocols, with the sole aim of preventing interoperability with the products developed by its competitors.
- 116 According to the Commission and IBM, Microsoft only makes general assertions about the allegedly restrictive application of the criteria of novelty and non-obviousness without substantiating them with concrete examples taken from the Commission's assessments, or indicating how a less restrictive application would have led to a different result. The same is true of the report produced by Microsoft (see paragraph 108 above).
- 117 Red Hat reiterates that even the terms applicable at 22 October 2007 discriminate against 'open source' developers, so that Microsoft should adopt a version of the agreements involving patents which is compatible with the 'GNU General Public Licence', in order to restore effective competition to the market.
- 118 The Commission maintains that it has not excluded any non-pioneering technological improvement, but only insignificant improvements which have no value for Microsoft's potential licensees. In that regard, recitals 148 to 157 of the contested decision give an adequate reply to Microsoft's arguments.

- 119 The claim made by the parties intervening in support of Microsoft relating to the technologies which Microsoft's competitors have not developed is based on a confusion between the concepts of implementations and specifications.
- 120 Finally the reasoning in the contested decision is clear and allows the General Court to carry out its review, so that the complaint alleging a failure to state reasons is unfounded.

The fourth plea, alleging that the use of the monitoring trustee's reports was unlawful

Microsoft's arguments

- 121 According to Microsoft, the annulment of Article 7 of the 2004 Decision by the judgment in *Microsoft v Commission*, paragraph 19 above, renders unlawful all the actions that the monitoring trustee has taken, such as requesting and receiving documents and other materials directly from Microsoft, and preparing reports based on those documents and materials. In the present case, the Commission based the contested decision entirely on the reports drawn up by the monitoring trustee, who obtained evidence under an illegal delegation of powers. Therefore, the Commission failed to take all the measures necessary to comply with the judgment in *Microsoft v Commission*, paragraph 19 above.
- 122 Irrespective of whether the monitoring trustee made use of the powers which had been unlawfully delegated to him, the decision of 28 July 2005 (see paragraph 15 above) is without question based on the delegation censured by the General Court, so that the Commission was not entitled to base the contested decision on those reports.
- 123 Under those circumstances, the questions of whether Microsoft was required to accede to the monitoring trustee's requests and whether the Commission lawfully obtained access to the information at issue through the monitoring trustee or through Microsoft are irrelevant, since the monitoring trustee acted within the framework of the powers delegated to him by the Commission.
- 124 Finally, since, as is also apparent from the annex to the contested decision, TAEUS did not carry out the same tasks as the monitoring trustee, its intervention is irrelevant in this context.

Arguments of the Commission and of the parties intervening in its support

- 125 Supported by ECIS, the Commission contends that, according to Article 4(1) of the decision of 28 July 2005 (see paragraph 15 above), Microsoft had no obligation to comply with the monitoring trustee's requests. The monitoring trustee's mandate contains a similar clause in point D.1. The Commission therefore did not delegate the powers censured by the judgment in *Microsoft v*

Commission and, accordingly, the decision of 28 July 2005 is unaffected by the operative part of that judgment.

- 126 Moreover, the monitoring trustee did not make requests to Microsoft pursuant to Article 3(2) of the decision of 28 July 2005 nor did he use, for the purposes of preparing his reports, the source code obtained from Microsoft.
- 127 In any event, even if the monitoring trustee had obtained information directly from Microsoft, a mere reference to his reports does not render the contested decision unlawful since the Commission obtained the information in question lawfully.
- 128 Moreover, the Commission asked Microsoft, pursuant to Article 18(2) of Regulation No 1/2003, to provide it with any documents which it had supplied directly to the monitoring trustee, thus rectifying any possible illegality.
- 129 Finally, the Commission points out that the contested decision is also based on the reports by TAEUS, which relate to the technologies which Microsoft claimed to be the most innovative and which were not based on the monitoring trustee's reports (see paragraph 50 above).

The fifth plea, alleging an infringement of the rights of the defence

Microsoft's arguments

- 130 Microsoft claims that, because the Statement of Objections was sent on 1 March 2007, that is to say, seven months before the end of the period taken into account by the Commission for determining non-compliance with Article 5 of the 2004 Decision (22 October 2007), Microsoft was prevented from expressing its views on all the matters raised against it. Both the Statement of Objections and the Letter of Facts contained only preliminary assessments within the meaning of Article 5(d) of the 2004 Decision and did not afford Microsoft the opportunity to comment on all the issues forming the basis of the imposition of the periodic penalty payment, the purpose of which is different from that of a fine. Accordingly, Microsoft was unable to comment on the limitation of the subject-matter of the contested decision, which focused on compliance with Article 5(a) of the 2004 Decision in respect only of the 'No Patent' agreement and which shows that the Commission acknowledged the innovative character of three additional technologies in relation to the view expressed in the Statement of Objections. These factors are crucial in the light of Article 24(2) of Regulation No 1/2003. Furthermore, Microsoft did not have the opportunity to claim that the compliance of its conduct with the obligations imposed by the 2005 Decision should have led to a significant reduction in the amount of the periodic penalty payment, or to comment on the length of the period established by the Commission. Finally, Microsoft was denied the opportunity to point out certain errors of fact committed by the Commission such as calculating the periodic

penalty payment up to 22 October 2007, although Microsoft submitted a proposal considered to be reasonable on 9 October 2007.

- 131 In this way, the Commission also undermined the role of the Advisory Committee on cartels and dominant positions, which it is supposed to consult, pursuant to Article 14 of Regulation No 1/2003.

The Commission's arguments

- 132 The Commission states that, as is apparent from the case-law, it is not required to wait until the end of an infringement in order to adopt a Statement of Objections; otherwise, it would no longer be able to adopt decisions under Articles 7 and 8 of Regulation No 1/2003 ordering undertakings to put an end to infringements or adopting interim measures. Those considerations apply *a fortiori* in the case of periodic penalty payments, which are also designed to inform the undertaking concerned of the Commission's position and to encourage it to comply with a prior decision finding an infringement. Moreover, given the preliminary nature of the Statement of Objections, nothing prevents the Commission from using new evidence, provided that it affords the undertakings concerned the opportunity to make known their views in that respect, or the undertakings in question from submitting exculpatory evidence to the Commission.
- 133 In the present case, by means of the communication of the Statement of Objections and the Letter of Facts, Microsoft had the opportunity to comment orally and in writing on the Commission's assessment of its remuneration schemes proposed up to 21 May 2007 and on the maximum amount of the periodic penalty payment which might be imposed. The Commission is not required to seek Microsoft's opinion regarding the dropping of objections against it or to give more information than it did regarding the amount of the periodic penalty payment.
- 134 The Commission adds that only the publication of the scheme submitted by Microsoft on 10 October 2007 could mark the end of the period of non-compliance. Since it was published on 22 October 2007, the contested decision is not vitiated by an error in that regard.
- 135 Finally, the Commission points out that Microsoft's observations were indeed forwarded to the Advisory Committee on cartels and dominant positions.

The sixth plea, alleging that there is no legal basis for the imposition of a periodic penalty payment and that the payment is excessive and disproportionate

Arguments of Microsoft and of the parties intervening in its support

- 136 Microsoft states, first, that the Commission was not entitled to impose a fine on it without having first defined precisely the conduct which Microsoft had to adopt in order to comply with the 2004 Decision. Furthermore, Microsoft cannot be

required to comply with Article 5(a) of that decision before the procedure described in Article 5(d) has ended.

- 137 Second, in the contested decision the Commission found only that Microsoft failed to comply with regard to the remuneration rates relating to the 'No Patent' agreement and proposed as starting points for negotiation. However, it is nonsensical to give priority to one WSPP agreement, although they were all regarded as covering information indispensable to Microsoft's competitors.
- 138 Third, it is apparent from the 2006 Decision that the Commission apportioned 75% of the maximum periodic penalty payment to Microsoft's obligation to submit an accurate and complete version of the interoperability information and 25% to the obligation to propose reasonable and non-discriminatory remuneration rates. However, by imposing in the present case approximately 60% of the maximum periodic penalty payment for infringement of the first part of the second of the aforementioned obligations, the Commission inexplicably departed from its original weighting and thus infringed the principle of the protection of legitimate expectations. Furthermore, the Commission did not explain the methodology for calculating the daily penalty or the principles according to which it calculated reductions; therefore the contested decision is vitiated by a failure to state reasons in that regard. It is also apparent that, in fact, the Commission did not apply a consistent weighting of the various forms of non-compliance according to their importance.
- 139 Fourth, Microsoft points out that, of the 488 days covered by the periodic penalty payment, 306 were devoted to the Commission's assessment of Microsoft's proposals, which called in question its opinion that the measures which Microsoft had to take were obvious and shows that the periodic penalty payment imposed was unfair.
- 140 Fifth, supported by ACT, Microsoft reiterates that, in view of the Commission's refusal to assist it substantially by indicating the appropriate level of the remuneration rates, it adopted all the measures available to it in order to comply with the 2004 Decision.
- 141 Sixth, the periodic penalty payment is 40 times as much as the remuneration which Microsoft would have charged if all its competitors had concluded 'No Patent' agreements at rates considered unreasonable by the Commission, and it far exceeds all the fines recently imposed for infringement of the competition rules.
- 142 Seventh, the Commission failed to take into account the fact that Microsoft finally complied with the 2004 Decision and, on those grounds, to reduce the amount of the periodic penalty payment, in accordance with Article 24(2) of Regulation No 1/2003.
- 143 Finally, eighth, Microsoft reiterates that the period of non-compliance ended on 9 October 2007 (see paragraph 130 above).

Arguments of the Commission and of the parties intervening in its support

- 144 As regards the arguments relating to Article 5(d) of the 2004 Decision, the Commission, supported by SIIA, reiterates that that provision does not require it to specify Microsoft's obligations further in order to be able to impose a periodic penalty payment on the company and points out that it provides a period of 60 days within which Microsoft had to provide the information in question. Furthermore, Microsoft's efforts or willingness to fulfil its obligations are irrelevant in the light of the possibility of imposing a periodic penalty payment for a period of non-compliance which began approximately two years after the adoption of the 2004 Decision.
- 145 With regard to the calculation of the periodic penalty payment, the Commission states that, for the 488 days covered by the contested decision, the periodic penalty payment could have amounted to EUR 1.423 billion. However, since, first, the scheme adopted by Microsoft on 22 October 2007 did not give rise to objections as to the reasonableness of the remuneration rates which it contains, second, that Microsoft applied substantially lower rates from 21 May 2007 and, third, that the contested decision concerns only the 'No Patent' agreement, the periodic penalty payment imposed represented approximately 63% of the maximum periodic penalty payment. However, the reduction also covers the period before 21 May 2007, but does not have to spread over the entire period concerned. The periodic penalty payment is calculated at EUR 2 million per day for the period between 21 June 2006 and 20 May 2007 and at EUR 1.5 million per day for the period between 21 May 2007 and 21 October 2007. According to settled case-law, Article 253 EC does not require the figures relating to the method of calculating fines to be indicated in the Commission's decision, and the same rule applies in the context of periodic penalty payments. Under those circumstances, recitals 281 to 299 of the contested decision provide adequate reasoning in that regard.
- 146 Supported by SIIA, the Commission adds that, contrary to what Microsoft suggests, the 'No Patent' agreement is crucial for Microsoft's main competitors, who do not wish to obtain a licence covering Microsoft's patented technologies. Accordingly, the Commission observes that, as is apparent from recital 248 of the 2006 Decision, non-compliance with the obligation to make the interoperability information available on reasonable and non-discriminatory terms hampers the effectiveness of the 2004 Decision in the same way as the refusal to provide an accurate and complete version of that information. Microsoft's arguments based on a mandatory weighting of the different elements of non-compliance and, consequently, infringement of its legitimate expectations, are therefore unfounded.
- 147 Since Microsoft was required to comply with the 2004 Decision and could end the infringement of its own free will at any time, it cannot complain that during part of the period of non-compliance the Commission examined the proposals made by Microsoft in that connection.

- 148 With regard to the proportionality of the periodic penalty payment, the Commission, supported by SIIA, denies that the remuneration which Microsoft would have received is an appropriate assessment criterion and adds that Microsoft's delaying tactics have enabled it to make very significant gains in view of the development of its market share relating to the products in question. In the light of Microsoft's reasons for further delaying compliance with the 2004 Decision, its financial situation, the very serious nature of the infringement it has committed and the maximum amount of the periodic penalty payment which could lawfully have been imposed on it, it must be concluded that the periodic penalty payment finally imposed is proportionate.
- 149 Finally, the Commission maintains that it correctly exercised the power of assessment conferred on it by Article 24(2) of Regulation No 1/2003 by applying a reduction of 37% for the reasons set out in paragraph 145 above.

Nicholas Forwood
Judge-Rapporteur

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