

# Commission of the European Communities v. Microsoft Corporation

EUROPEAN COMMISSION

Decision Relating to a Proceeding under Article 82 of the EC Treaty

Case COMP/C-3/37.792 Microsoft (March 03, 2004)

<http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf>

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**Author's Note:** This is a European version of the Microsoft litigation, wherein the US federal government—and twenty states—sued Microsoft Corporation for violations of state and federal antitrust laws. That case settled, as noted within this decision by the European Commission, which is the executive arm of the European Community (EC). It focused on the “tying” of Microsoft’s web browser, Internet Explorer, to sales of Microsoft’s Windows operating system. This case addresses two antitrust claims against Microsoft: (1) the limited “inter-operability” of Microsoft’s Windows operating system vis-a-vis competitors; and (2) Microsoft’s “tying” (bundling) of its Windows Media Player to sales of its Windows operating system. The resulting fine imposed by the European Commission was 497,196,304 Euro (approximately \$600,000,000.00).

This is the longest case in the course. It is longer than the vast majority of cases in any national forum, weighing in at a hefty 301 pages, and 1080 paragraphs. The original European Commission opinion summarized thousands of pages of supporting materials, to yield a thumbnail sketch of the actual record produced in these proceedings. This case study provides the best snapshot available for future executives, employees, and lawyers who work for a business selling products in more than one country. They must all be generally familiar with: (1) the local anti-competition regime in a growing number of regions of the world; and (2) the balance that these laws strike—between legitimate competition, and preservation of intellectual property rights in the company’s product.

The textbook author’s minor editorial enhancements include the pagination in this edited pdf version of the case; insertion of a hyphen within original case terms related to “inter-operability;” and occasional italics and bolding as indicated. A number of words are spelled differently than in countries such as the US, as is typical of European decisions written in multiple languages.

## **Commission’s Decision:**

### **1 PARTIES TO THE PROCEEDINGS**

#### **1.1 Microsoft Corporation**

(1) Microsoft Corporation (“Microsoft”), a company based in Redmond, state of Washington, USA, manufactures, licenses and supports a wide variety of software products for many computing devices. Its turnover for the fiscal year July 2002 to June 2003 was USD 32,187 million (EUR 30,701 million) on which it earned net profits of USD 3,217 million (EUR 12,607 million). Microsoft employs 55,000 people around the world. Microsoft Europe Middle East & Africa controls its activities in the European Economic Area (EEA). . . . Microsoft is present in all countries within the EEA.

#### **1.2 The complainant: Sun Microsystems, Inc.**

(2) Sun Microsystems Inc. (“Sun”), a company based in Palo Alto, California, USA, provides network computing infrastructure solutions that comprise computer systems (hardware and software), network storage systems (hardware and software), support services and professional and educational services.<sup>8</sup> Its turnover for the fiscal year July 2002 to June 2003

was USD 11,434 million (EUR 10,906 million) on which it suffered a net loss of USD 2,378 million (EUR 2,268 million). Sun employs some 36,100 people around the world. Sun is present in all countries within the EEA.

## 2 CHRONOLOGY OF THE PROCEDURE AND BACKGROUND

### 2.1 The procedure

(3) On 10 December 1998, Sun made an application to the Commission pursuant to Article 3 of Regulation No 17 for the initiation of proceedings against Microsoft (“Sun’s Complaint”). Sun alleged that Microsoft enjoyed a dominant position as a supplier of a certain type of software product called operating systems for personal computers (“PC operating systems”). Sun further contended that Microsoft infringed Article 82 of the Treaty by reserving to itself information that certain software products network computing, called work group server operating systems, need to inter-operate fully with Microsoft’s PC operating systems. According to Sun, the withheld inter-operability information is necessary to viably compete as a work group server operating system supplier.

(4) [**Operating Systems Inter-operability Claim #1**] The case opened pursuant to Sun’s complaint was registered as Case IV/C-3/37.345. After a first investigation of the complaint, the Commission, on 1 August 2000, sent a Statement of Objections (“the first Statement of Objections”) to Microsoft to give Microsoft opportunity to comment on its preliminary findings of facts and law. . . .

(5) [**Windows Media Player “Tying” Claim #2**] In the interim (February 2000), the Commission had launched an investigation into Microsoft’s conduct on its own initiative, under Regulation No 17, which was registered as Case COMP/C-3/37.792. The investigation carried out under that case concerned more specifically Microsoft’s Windows 2000 generation of PC and work group server operating systems and Microsoft’s incorporation of a software product called “Windows Media Player” into its PC operating system products. On 30 August 2001, that investigation resulted in the sending of a second Statement of Objections (“the second Statement of Objections”) to Microsoft.

(8) From April to June 2003, the Commission engaged in a wider market enquiry (“the 2003 market enquiry”). For inter-operability, on the basis of an independent sample of organisations that use PC and work group server operating systems, a first set of requests for information was sent on 16 April 2003 to 75 companies, all based in the EEA. . . .

(9) In parallel, 46 requests for information were sent on 16 April 2003 to companies active in areas relevant to the issues raised by the incorporation of Windows Media Player into Windows (content owners, content providers, software developers and associations of such companies).<sup>19</sup>

(10) In the light of the findings of the market enquiry and how they related to the Commission’s existing objections, a supplementary Statement of Objections (“the supplementary Statement of Objections”) was issued on 6 August 2003 . . . [which] refined and consolidated the legal considerations contained therein. Microsoft replied to the supplementary Statement of Objections on 17 October 2003 and submitted supplementary material on 31 October 2003. These materials contained two surveys (and analysis of those surveys) carried out by Mercer Management Consulting (“Mercer”) on behalf of Microsoft.

### 2.2 Background on antitrust proceedings against Microsoft in the United States

(14) In parallel to the Commission’s investigation, Microsoft has been under antitrust scrutiny in the United States of America. As the corresponding proceedings under US antitrust

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<sup>19</sup> Based both in the EEA and the US.

law (“the US proceedings”) had an impact on Microsoft’s commercial behaviour, it is appropriate to provide some background information on them.

(15) In 1998, the United States and twenty States filed suit under the Sherman Act against Microsoft. The complaint focused on various measures taken by Microsoft vis-à-vis Netscape’s Web browser “Netscape Navigator” and Sun’s “Java technologies.” The plaintiffs identified four distinct violations of the Sherman Act: (i) unlawful exclusive dealing arrangements in violation of Section 1; (ii) unlawful tying of Microsoft’s “Internet Explorer” Web browser to its “Windows 95” and “Windows 98” PC operating systems in violation of Section 1; (iii) unlawful maintenance of a monopoly in the market for PC operating systems in violation of Section 2; and (iv) unlawful attempted monopolisation of the Web browser market in violation of Section 2. The States also brought claims charging Microsoft with violations of various State antitrust laws [similar to this European proceeding arising under Article 82, which governs EEA countries].

(17) The [US] Court of Appeals ruled on Microsoft’s appeal on 28 June 2001. The Court of Appeals: (i) upheld that Microsoft had acted illegally in protecting its monopoly; (ii) reversed the finding that Microsoft had illegally monopolised the Web browser market; (iii) sent back to the lower court for reconsideration the question of whether Microsoft had illegally tied its dominant PC operating system with its Web browser; and (iv) sent back to the lower court for reconsideration the question of an appropriate remedy for Microsoft’s violation.

(18) The United States and Microsoft agreed a settlement on 2 November 2001 (“the US Settlement”). On 6 November 2001, this settlement (in slightly amended form) was also signed by the States of New York, Illinois, North Carolina, Kentucky, Michigan, Ohio, Wisconsin, Louisiana, and Maryland.

(19) On 1 November 2002, the US District Court handed down a judgment (“the US Judgment”) which (i) essentially adopted the US Settlement; and (ii) rejected the remedy proposals of the nine “non-settling States.”

### 3 THE PRODUCTS CONCERNED BY THE DECISION

#### 3.2 Client PC and work group server operating systems

##### 3.2.1 *The sales channel for computer devices*

###### 3.2.1.1 Bundles of hardware and software

(68) Computers are as a rule assembled by companies called “Original Equipment Manufacturers” (“OEMs”), using a variety of components provided by other manufacturers. This includes the installation of an operating system supplied by a software company (or developed by the OEM), as well as the bundling of several applications that are required by the end-user. “Value-Added Resellers” (“VARs.”) buy already assembled computer devices and re-sell them with additional software and services—including specific configurations of the software or the hardware. The more complex a computer system, the more room there is for such value-added resellers.

###### 3.2.1.2 Operating systems

(69) Some vendors develop the operating system together with the hardware, both operating system and hardware then being fine-tuned to adapt to each other, and distributed together. This is the case for Sun and most UNIX vendors. By contrast, some operating system vendors are pure software companies, such as Microsoft or Novell. They do not assemble computers but license their operating system products to OEMs and to direct customers. Their operating systems target primarily “Intel-compatible” hardware (client PCs or servers).

(70) Operating systems can also be distributed separately from the hardware (that is to say, directly from the software vendor to the customer). Indeed, a customer that runs a given

operating system on his hardware may, over time, want to “upgrade” to the newer versions of the products sold by the same operating system vendor, without necessarily changing his hardware. The customer may also want to switch to a different operating system vendor whose operating system runs on the same hardware. As a rule, operating system vendors make sure that the price of an “upgrade” is lower than the full price of the product, as a means to encourage customers’ loyalty to their products.

(71) Even when there are commercial intermediaries between the operating system supplier and the customer, the *contractual* relationship between that supplier and the customer is usually a direct one. Indeed, the operating system product is copyrighted material and, as such, its use can be subjected to licensing conditions that are transferred across the distribution channel.

### 3.3 Media players

#### 3.3.1 *The digital media industry*

(107) Before turning to Microsoft’s and its competitors’ media players, it is necessary to provide a short overview of the economic factors which characterise supply, competition and consumption patterns in digital media. As the distribution of digital music over the Internet is more developed than the distribution of digital moving images and a distribution pattern has evolved, the examples given will at times in particular refer to music.

##### 3.3.1.1 Content owners are the source of digital content

(108) At the beginning of the digital distribution chain stands content, that is to say, pieces of information or entertainment in the form of sound and images. Content is normally owned by someone and often this content owner will have copyright over the content and can therefore control its reproduction and distribution by for instance licensing others to market a product based on the copyrighted work. By way of illustration, as regards digital music, there are so-called content owners who license musical works from various artists and distribute them or license them for distribution.

##### 3.3.1.2 Content providers aggregate content and make it accessible

(109) When distributing digital music, content owners often license content providers (intermediaries) which aggregate the music and provide a music service directly to end users (for example, Apple, PressPlay, Yahoo). The intermediaries may also provide the IT platform and provide their service to other corporate customers who then sell to end users (for example, OD2).

##### 3.3.1.4 Various channels for distribution of media players to end users exist

#### 3.3.2 *Microsoft’s products*

(121) Microsoft’s media player is called Windows Media Player (“WMP”). Microsoft’s most recent player is Windows Media Player 9 Series (“WMP 9”) and has been available since 7 January 2003 as an upgrade to previous versions of Windows Media Player for download for Windows XP, Windows 98 SE, Windows Me, and Windows 2000. WMP 9 is also available for Macintosh and UNIX computers since the beginning of November 2003. WMP 9 delivers *inter alia* digital audio and video playback both via download and streaming, Internet radio tuner, DVD playback support, an integrated media guide from WindowsMedia.com, audio CD creation, one-click transfer of digital music to portable devices, and personalisation for users.

#### 3.3.3 *Other parties’ products*

##### 3.3.3.1 RealNetworks

(125) RealNetworks is a software company specialised in network-delivered digital media services and the technology that enables digital media creation, distribution and consumption. ...

(126) In 1995, RealNetworks (then called Progressive Networks) was the first major company to commercially implement streaming media (audio) over the Internet in its media player and media server. The RealAudio player compressed sound files and streamed them over the Internet in real time. . . . Microsoft included RealNetworks' RealAudio player as part of Microsoft's Internet Explorer in Windows 95.

(130) In July 2002, RealNetworks announced the launch of its new architecture called Helix and in particular the Helix Universal Server which would support streaming in various file formats, including Windows Media formats. In the absence of a licensing agreement covering Microsoft's server transmission technology, RealNetworks developed Helix by observing and analysing communications "on the wire" between Microsoft clients and servers. Helix does not allow encoding of content in Windows Media formats.

### 3.3.3.2 Apple

(135) Apple developed its media player, called QuickTime Player, in the early 1990s. QuickTime first ran exclusively on Apple's Macintosh computers. In November 1994, Apple released QuickTime 2.0 for Windows, thereby offering developers a cross-platform standard for creating, using and sharing multimedia content between Macintosh and Windows computers. Users could download the Windows version for USD 7.95. The Apple Movie Player application cost an additional USD 14.95.

## 5 ECONOMIC AND LEGAL ASSESSMENT

(316) Under Article 82 of the Treaty, any abuse by one or more undertakings having a dominant position within the common market or in a substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

(317) Under Article 54 of the EEA [European Economic Area] Agreement, any abuse by one or more undertakings of a dominant position within the territory covered by the Agreement or in a substantial part of it is prohibited in so far as it may affect trade between the contracting parties to the Agreement.

(318) Microsoft is an undertaking within the meaning of Article 82 of the Treaty and Article 54 of the EEA Agreement. Its relevant conduct affects the whole of the EEA.

(319) Insofar as Microsoft's conduct affects trade between Member States, Article 82 of the Treaty applies. As regards the effects on competition in Norway, Iceland and Liechtenstein, and the effects on trade between the Community and those countries, as well as between those three countries, Article 54 of the EEA Agreement applies [to these European Free Trade Area or EFTA countries].

(320) Microsoft does not earn more than 33% of its EEA turnover in the EFTA Member States. Therefore, pursuant to Article 56(1)(c) and Article 56(3) of the EEA agreement, the Commission is competent in this case to apply both Article 82 of the Treaty and Article 54 of the EEA Agreement.

### 5.1 The relevant markets

#### 5.1.1.1.1.3 Server operating systems are not substitutable

(331) Most of the operating systems for client PCs and servers are written on the basis of a small number of code bases: the various UNIX code bases, DOS (which was the basis for Windows 95, Windows 98 and Windows Me), Windows NT (which is the basis for Windows 2000 and Windows XP), and Linux. The code base may be the same for a vast range of computers, from client PC to mainframe.

(332) However, differentiated operating system products are developed on each of those code bases, by adding specific layers of software in order to target different user needs according

to the type of computer on which it is to be used. These differences between client PC and server operating systems are visible for each of the code bases referred to at recital [paragraph] (331). Indeed for all these “multi-purpose” operating system code bases that can be used across the whole range of computers, there is already a separate client PC operating system written on this code base and marketed on the client PC operating system market. Commercially therefore, both categories of products are treated separately, and vendors sell client PC and various server operating system products at different prices according to the functionalities that need to be fulfilled.

...  
5.1.1.1.3 Conclusion

(342) By reason of its specific characteristics and the lack of realistic substitutes, the [first] market [of two to be analyzed in this proceeding] for operating systems for client PCs constitutes a relevant product market for the purposes of this Decision.

5.1.1.2 Work group server operating systems

(343) A second relevant market identified by the Commission is that for work group server operating systems.

...  
5.1.1.2.1.4 Importance of inter-operability with the client PCs

(383) As work group server services are intimately linked to the usage of client PCs in an organisation and are delivered to client PC users as an inter-related, distributed service, they are sometimes referred to as the “*standard desktop service*.” As such, they require a very good level of inter-operability with the client PCs in the organisation.

...  
5.1.1.2.3 Conclusion

(401) By reason of its specific characteristics and the lack of realistic substitutes, the market for work group server operating systems constitutes a relevant product market.

5.1.1.3 Streaming media players [the second of Sun’s two basic claims]

(402) Media players are client-side software applications, the core functionality of which is to decode, decompress and play (and further allow to process) digital audio and video files downloaded or streamed over the Internet (and other networks). Media players are also capable of playing back audio and video files stored on physical carriers such as CDs and DVDs. As with other application software, a media player consists of a Graphical User Interface and the underlying technology, that is to say, the software code, which enables multimedia playback functionality. The following sections will first examine whether a media player is a product distinct from an operating system [e.g., whether a tire is distinct from a car]; demand side and supply side substitution will then be addressed.

(403) In the framework of this Decision, the market for streaming media players is not examined as a market where Microsoft might occupy a dominant position at the date of adoption of this Decision, but as a reference market in which to locate the products and vendors that are foreclosed by Microsoft’s tying of WMP.

5.1.1.3.1 A streaming media player is a product distinct from an operating system

...  
(404) Microsoft contends that “*it is inappropriate to consider multimedia playback functionality to be a product separate from an operating system.*” This contention is based on the fact that no client PC would be shipped without substantial multimedia functionality, including the capability to play audio and video content streamed over the Internet.

(405) However, as will be shown below . . . media players are products distinct from operating systems. This is *inter alia* demonstrated by the existence of stand-alone media player

software that can be installed on PCs and by the existence of software vendors specialised in supplying media player products (such as Real Networks). The fact that customers expect to be able to play media content on their computer does not imply that the operating system should include the media player. For instance, consumers value finding a word processor already installed on their computer (and OEM often ship their client PCs with such a programme preinstalled). To the Commission's knowledge, Microsoft has however not contested that word processors and operating systems belong to separate relevant product markets.

(406) Microsoft's contention that media players are not separate from operating systems must therefore be rejected.

#### 5.1.1.3.4 Conclusion

(425) By reason of its specific characteristics and the lack of realistic substitutes, the market for streaming media players constitutes a relevant product market.

#### 5.1.2 The relevant geographic market

(427) The relevant geographic market for client PC operating systems, work group server operating systems and media players is world-wide. The objective conditions for competition are essentially the same across the world. PCs and servers are manufactured by a large number of companies that operate on a world-wide scale such as IBM, Compaq, or Dell. In order to sell computers with the operating system (and a media player) already installed, such manufacturers obtain the necessary licences from the software manufacturers. Generally, a single world-wide licence agreement is entered into between the computer manufacturer and the software manufacturer. The computers are then sold on a world-wide scale. Neither import restrictions, transport costs or technical requirements constitute significant limitations. Language-specific demand characteristics regarding the relevant software exist but, in so far as the supply-side is concerned, do not constitute an obstacle for swift supply on a global basis in accordance with language-related preferences. The entire world can therefore be regarded as the relevant geographic market.

### 5.2 Dominant position

(428) A dominant position under Article 82 of the Treaty has been defined by the Court of Justice of the European Communities as *„a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.”*

#### 5.2.1 Client PC operating systems

(429) In its response to the supplementary Statement of Objections, Microsoft acknowledged that it held *“a dominant position in the supply of operating systems that run on personal computers (“PCs”).”* The following recitals will show that Microsoft holds a dominant position which exhibits extraordinary features since it controls the quasi-standard of the relevant market in question, and has done so for some time. Microsoft's dominance relies on very high market shares and significant barriers to entry.

##### 5.2.1.1 Market shares

(430) Third party estimates of market shares and the evidence gathered during the investigation highlight the extraordinary position of Microsoft in the market.

(431) In 2000, Microsoft's market share in terms of *new client PC operating system licences* was, according to IDC<sup>549</sup> WIWD>. 92.1% when measured by unit shipments and 92.8% measured by revenues. In 2001, this figure had risen to 93.2% when measured by unit shipments and 95.4% by revenues. In 2002, it had further risen to 93.8% when measured by unit shipments and 96.1% by revenues. Microsoft is forecast to maintain these 90%+ market shares in the coming years. If operating systems for Intel-compatible PCs excluding the Macintosh operating system are looked at, Microsoft holds an even greater share of the market.

(432) Moreover, Microsoft's extremely high market shares have not come about recently. In 1996, Microsoft had a market share of 76.4%, and since 1997 has held market shares of consistently over 80%, and of over 90% since 2000.

(433) In terms of *installed base* (which reflects *inter alia* past sales), IDC's evaluation is that Windows (all versions) has grown from 84.6% to 92.8% between 2000 and 2002. The results of the Commission's 2003 market enquiry are in line with these figures. The responses received during the Commission's 2003 market enquiry cover a total amount of approximately 1.2 million to 1.3 million client PCs. More than 1.15 million (more than 87%) of them run Windows (all versions).

(434) Microsoft's share of the market thus only allows for fringe competition. The main alternative to Microsoft's client PC operating system product would be Apple's Mac OS, assuming that it is included in the relevant market. In 2002, this client PC operating system held a market share of 2.9% when measured in unit shipments and 2.2% when measured in revenue.

(435) Very large market shares, of over 50%, are considered in themselves, and but for exceptional circumstances, evidence of the existence of a dominant position. Market shares between 70% and 80% have been held to warrant such a presumption of dominance. Microsoft, with its market shares of over 90%, occupies almost the whole market, it therefore approaches a position of complete monopoly, and can be said to hold an overwhelmingly dominant position.

(445) Out of the approximately 1.2 to 1.3 million client PCs covered by the Commission's 2003 market enquiry, more than 530,000 (more than 40%) of those client PCs were already running Windows 2000 Professional or Windows XP Professional. In addition, for more than 80% of all client PCs, the respondents have already migrated or already taken the decision to migrate to Windows 2000 Professional or Windows XP Professional.

#### 5.2.1.3 Barriers to entry

(448) The nature of the barriers to entry in the client PC operating system market serves to reinforce the conclusion that Microsoft holds a dominant position in this market. These barriers to entry derive from the network effects in the market.

(449) The regular daily use of a client PC involves running applications on it. The overall utility that a consumer derives from a client PC operating system therefore depends on the applications he can use on it and that he expects to be able to use on it in the future. Conversely, Independent Software Vendors ("ISVs") write applications to the client PC operating systems that are most popular among users. In other words, the more popular an operating system is, the more applications will be written to it and the more applications are written to an operating system, the more popular it will be among users.

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<sup>549</sup> International Data Corporation describes itself as "*the premier global market intelligence and advisory firm in the information technology and telecommunications industries.*" See [http://www.idc.com/en\\_US/st/aboutIDC.jhtml;jsessionid=RDV3XQCQ0RP24CTFA4FCFFAKMUDY](http://www.idc.com/en_US/st/aboutIDC.jhtml;jsessionid=RDV3XQCQ0RP24CTFA4FCFFAKMUDY)

...

(452) The degree of ubiquity that Windows has attained on client PCs has been described at recitals (431) and (433). The quasi-totality of commercial applications written for client PCs are therefore written to Windows as a platform.

(453) Although in theory possible, it would be extremely difficult, time-consuming, risky and expensive to develop an alternative client PC operating system, with *a priori* no application able to run on it, because users are very unlikely to buy an operating system without a wide range of applications already available, tested and used by other people. Therefore, for a new operating system product to enter the client PC operating system market, it would be necessary that such a product is either able to support a critical mass of existing Windows-dependent applications, or a comparable critical mass of applications already written for the new platform.

(453) Although in theory possible, it would be extremely difficult, time-consuming, risky and expensive to develop an alternative client PC operating system, with *a priori* no application able to run on it, because users are very unlikely to buy an operating system without a wide range of applications already available, tested and used by other people. Therefore, for a new operating system product to enter the client PC operating system market, it would be necessary that such a product is either able to support a critical mass of existing Windows-dependent applications, or a comparable critical mass of applications already written for the new platform.

...

(458) In essence, the dynamic between the Windows client PC operating system and the large body of applications that is written to it is self-reinforcing. In other words, applications developers have a compelling economic incentive to continue writing applications for the dominant client PC operating system platform (that is to say, Windows) because they know that the potential market will be larger.

...

(464) Microsoft's financial performance is consistent with its near-monopoly position in the client PC operating system market. In 2002, . . . Microsoft incurred costs of USD 1,994 million and received revenues of USD10,394 million, resulting in an operating income of USD 8,400 million. This means that for its client PC operating system product, Microsoft operated on a profit margin of approximately 81%. This is high by any measure.

#### 5.2.1.5 Conclusion

(471) In the light of Microsoft's very high market shares, and the high barriers to entry in the market, the Commission finds that Microsoft has a dominant position within the meaning of Article 82 of the Treaty on the market for operating systems for client PCs. . . .

(472) Microsoft has been dominant in this relevant market since at least 1996. Its market share was already at a high level prior to that date and has consistently grown since then. Microsoft's dominance has therefore been strong and durable. Microsoft's dominance presents extraordinary features in that Windows (in its successive forms) is not only a dominant product on the relevant market for client PC operating systems, but it is the *de facto* standard operating system product for client PCs.

#### 5.2.2.2.3 Conclusion

...

(514) The Commission has examined a variety of data in order to measure Microsoft's market share. These comprise various sets of IDC figures, figures from the Commission's 2003 market enquiry, and the results of Mercer's two 2003 surveys. All these data sets confirm that Microsoft holds by far the leading market share—in every measure, it has a share of at least 50%, and for most measures, its figures are in the 60-75% range. Such market shares are consistent with a presumption of dominance in the work group server operating system market according to the case-law outlined in paragraph (435). This conclusion is corroborated by evidence (again from both the IDC figures and the Commission's 2003 market enquiry) that Microsoft's main

rival, NetWare, is in a weak position, and that other operating systems, such as Linux and UNIX, have a limited presence in the market.

### 5.2.2.3 Barriers to entry

...

(520) This means that the easier it is to find technicians skilled in using a given work group server operating system, the more customers are inclined to purchase that work group server operating system. In turn, however, the more popular a work group server operating system is among customers, the easier it is for technicians (and the more willing are technicians) to acquire skills related to that product. This mechanism can be formalised from an economic perspective in terms of network effects.

(521) The following quote by one of the IT executives (from a “*Spanish Services Firm*”) asked by Mercer as part of Survey I constitutes a good illustration that specifically mentions work group server operating system products (Novell): “*We used to have a lot of Novell. Two years ago, we started to switch. The new technical staff that we were hiring were more expert on [Windows] NT [...] We have one Novell server left for printing. That will be replaced by a Windows 2000 server.*”

...

(524) Finally, Microsoft’s behaviour in the market of withholding inter-operability information (as outlined in Section 5.3.1) also builds an additional (artificial) barrier to entry in the market. As has been outlined in Section 5.1.1.2.1.4, there is a strong need for client PC operating systems and work group server operating systems to inter-operate. Therefore, if a work group server operating system vendor encounters obstacles to inter-operability, these will act a barrier to entry in the market.

(525) In conclusion, the work group server operating system market exhibits barriers to entry (including Microsoft’s behaviour of withholding inter-operability information). Given the importance of these barriers to entry, it is unrealistic to envisage potential competitors profitably entering the market.

## 5.3 Abuses

(542) The fact that an undertaking holds a dominant position is not in itself contrary to the competition rules. However, an undertaking enjoying a dominant position is under a special responsibility not to engage in conduct that may distort competition.

(543) The Court of Justice defined the concept of abuse under Article 82 of the Treaty in the following terms:

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.<sup>656</sup>

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<sup>656</sup> Judgment of the Court of 13 February 1979 in Case 85/76, Hoffmann-La Roche [1979] ECR 461, at paragraph 91.

...

(545) In the following, Microsoft's behaviour will be assessed pursuant to Article 82 of the Treaty. The behaviour assessed can be grouped in the following two categories: Microsoft's **refusal to supply inter-operability information** (Section 5.3.1) and **Microsoft's tying of WMP with Windows** (Section 5.3.2) [bolding added].

### 5.3.1 Refusal to supply

(546) In the following recitals (recitals (547) to (791)), it will be established that Microsoft is abusing its dominant position by refusing to supply Sun and other undertakings with the specifications for the protocols used by Windows work group servers in order to provide file, print and group and user administration services to Windows work group networks, and allow these undertakings to implement such specifications for the purpose of developing and distributing inter-operable work group server operating system products. As outlined above, it cannot be excluded that ordering Microsoft to disclose such specifications and allow such use of them by third parties restricts the exercise of Microsoft's intellectual property rights.

(547) Although [business] undertakings are, as a rule, free to choose their business partners, under certain circumstances a refusal to supply by a dominant undertaking may constitute an abuse of dominance pursuant to Article 82 of the Treaty, unless it is objectively justified. This may also be the case for a refusal to license intellectual property rights.

...

(557) *Volvo* is another case in point for further circumstances having been mentioned as relevant by the Court of Justice in relation to a refusal to supply.<sup>673</sup> In *Volvo*, independent repairers wanted to make spare body parts for Volvo cars. Volvo held a registered design and was not prepared to grant a licence for a royalty. The Court stipulated that in itself, a refusal to license does not amount to abusive behaviour. . . . Nevertheless, it added that the exercise of a holder's exclusive right might be prohibited by Article 82 of the Treaty if it involves "*certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation.*"

...

(571) Not only is it therefore possible to provide interface specifications without giving access to all implementation details, but it has been outlined above that it is common practice in the industry to do so, in particular when open inter-operability standards are set. In this respect, it is also noteworthy that, under the US Communications Protocols Licensing Program, licensees are not granted access to Microsoft's *source code*, but to *specifications* of the relevant protocols.

(572) In conclusion, Microsoft's refusal to supply as at issue in this Decision is a refusal to disclose specifications and allow their use for the development of compatible products. The present Decision does not contemplate ordering Microsoft to allow copying of Windows by third parties.

...

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<sup>673</sup> Judgment of the Court of Justice of 5 October 1988 in Case 238/87, *Volvo v Veng* [1988] ECR 6211.

#### 5.3.1.1.3 Additional circumstances to consider

##### 5.3.1.1.3.1 Microsoft's refusal to Sun is part of a general pattern of conduct

(573) As outlined above, Microsoft has acknowledged that it does not intend to disclose the information requested by Sun to Sun or to any other work group server operating system vendor. Moreover, many competitors to Microsoft in the work group server operating system market have confirmed that they do not obtain sufficient interoperability information from Microsoft and feel that this puts them at a strong competitive disadvantage *vis-à-vis* Microsoft. Some of them (Novell, Samba) have argued that Microsoft refused to provide information that they had requested or failed to answer their requests.

...

(584) In conclusion, by not disclosing the new interface specifications that organise the Windows 2000 domain while it previously disclosed part of the corresponding interface specifications for the Windows NT domain, Microsoft disrupts previous levels of supply.

#### 5.3.1.2 Risk of elimination of competition

...

(586) In this case, Microsoft's behaviour as regards disclosures of interface information must be analysed against the backdrop of two key elements, which have been outlined above. First, Microsoft enjoys a position of extraordinary market strength on the client PC operating system market. Second, inter-operability with the client PC operating system is of significant competitive importance in the market for workgroup server operating systems.

(587) A historic look at the work group server operating system market shows that Microsoft entered this market relatively recently. UNIX vendors and Novell were the first developers with significant activity and success in this area. Customers had started to build work group networks that contained non-Microsoft work group servers and Microsoft's competitors had a distinct technological lead. The value that their products brought to the network also augmented the client PC operating systems' value in the customers' eyes and therefore Microsoft—as long as it did not have a credible work group server operating system alternative—had incentives to have its client PC operating system inter-operate with non-Microsoft work group server operating systems. While entering the work group server operating system market, pledging support for already established technologies was important in gaining a foothold and the confidence of the customers.

(588) Once Microsoft's work group server operating system gained acceptance in the market, however, Microsoft's incentives changed and holding back access to information relating to inter-operability with the Windows environment started to make sense. With Windows 2000, Microsoft then engaged in a strategy of diminishing previous levels of supply of inter-operability information. This disruption of previous levels of supply concerns elements that pertain to the core tasks that are expected from work group server operating systems, and in particular to the provision of group and user administration services.

(589) In the following recitals (recitals (590) to (692)), it will be established that Microsoft's refusal puts Microsoft's competitors at a strong competitive disadvantage in the work group server operating system market, to an extent where there is a risk of elimination of competition.

...

(611) Microsoft's success in the market is also reflected in its own financial results. Microsoft's annual report for the fiscal year ended 30 June 2003 shows that Microsoft's Server and Tools category revenue grew 16% to USD 7,140 million and its

profits grew 20% to USD 2,457 million over the 2002 fiscal year. This represents a profit margin of 49.1%. A significant portion of these sales comes from the standard version of its Windows server operating system product, that is to say, the work group server operating system product.

...  
5.3.1.2.1.5 Uptake of alternatives to Windows

...  
(632) As regards NetWare and Samba/Linux, the relevant evolution has been described above. It is worth recalling that, out of more than 100 responses, Microsoft was only able to refer to one instance of migration from Windows to NetWare and two instances of migration from Windows to Linux for work group server tasks.

...  
5.3.1.2.2 Inter-operability is the key factor driving the uptake of Microsoft's work group server operating systems.

(637) Various sources of evidentiary material such as Microsoft's own marketing documents, reports by industry analysts and customer evidence show that inter-operability with the Windows environment has played a key role in driving the uptake of Microsoft's work group server operating systems.

5.3.1.2.2.1 Microsoft's commercial behaviour

(638) In its commercial behaviour, Microsoft has consistently used the integration with Windows client PCs as a key marketing argument for selling its work group server operating system product.

...  
(641) Similarly, a study conducted by Andersen Consulting in 1999 echoes Microsoft's statement concerning the additional value that Windows 2000 Professional provides when it is used with Windows 2000 Server: "Many of the benefits of migration to Windows 2000 Professional relate to the way in which the client works with the server. These benefits will not be seen if the organization is not planning to migrate to Windows 2000 Server as well as to Windows 2000 Professional."

5.3.1.2.2.2 Customer evidence

5.3.1.2.2.2.1 Role of inter-operability-related considerations

(642) In its 2003 market enquiry, the Commission asked customers about the role of inter-operability with the Windows environment in their purchasing decisions concerning work group server operating systems.

...  
(653) The fact that customers are worried about NetWare's "*long term vendor support and development and platform*" is . . . a risk of elimination of competition in the work group server operating system market due to inter-operability issues; in fact it is a logical consequence of these inter-operability issues. The elimination of competition, in turn, informs the choices of network administrators, who devote less time in getting trained on NetWare's products. In other words, the *available skill-sets and cost/availability of support (in-house or external)* are diminishing for NetWare.

...  
(657) The responses to these surveys confirm that inter-operability with the client PC is important to customers, and that barriers to entry exist in the relevant market for work group server operating systems.

...  
5.3.1.2.5 Conclusion

(692) It follows from the foregoing considerations that Microsoft's behaviour risks eliminating competition in the work group server operating system market, due to the indispensability of the input that it refuses to supply to its competitors.

#### 5.3.1.3 Impact on technical development and consumer welfare

##### 5.3.1.3.1 Microsoft's refusal to supply limits technical development to the prejudice of consumers.

(693) Article 82(b) of the Treaty provides that abuse as prohibited by that Article may consist in limiting technical development to the prejudice of consumers.

(694) Due to the lack of inter-operability that competing work group server operating system products can achieve with the Windows domain architecture, an increasing number of consumers are locked into a homogeneous Windows solution at the level of work group server operating systems. This impairs the ability of such customers to benefit from innovative work group server operating system features brought to the market by Microsoft's competitors. In addition, this limits the prospect for such competitors to successfully market their innovation and thereby discourages them from developing new products.

(695) If Microsoft's competitors had access to the inter-operability information that Microsoft refuses to supply, they could use the disclosures to make the advanced features of their own products available in the framework of the web of inter-operability relationships that underpin the Windows domain architecture.

...

##### 5.3.1.3.2 Alleged lack of evidence of harm to consumers

(702) Microsoft states that there is a "*lack of evidence that Microsoft's actions have harmed consumers.*" In contrast, the evidence submitted by Microsoft (Microsoft customer statements, Mercer's surveys) would conclusively prove that customers are satisfied with the degree of inter-operability that they are able to achieve.

...

(704) Furthermore, it is established case-law that Article 82 of the Treaty "*covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure as envisaged by Article 3(f) of the Treaty.*" In this respect, it is noteworthy that Microsoft's refusal to supply has already enabled it to gain a dominant position in the market for work group server operating systems. As such, Microsoft's behaviour is impairing the effective competitive structure in the market.

(705) Microsoft's apparent assumption is that the only results compatible with the Commission's objections would be that customers report on interoperability-related *problems* in the daily management of their IT networks. Such an assumption is inappropriate. It is the developers of complementary software which has to inter-operate with Microsoft's software who depend on the interface information. Customers will not always exactly know what is disclosed by Microsoft to other work group operating system vendors and what is not. It is only indirectly that customers factor into their purchase decisions the results of Microsoft rivals' best-efforts to achieve inter-operability with Microsoft's dominant products.<sup>852</sup> It is at this moment that the exclusionary effect of

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<sup>852</sup> In particular, Mercer's statement that "*applications-level, not operating system-level inter-operability tops the list of key inter-operability issues*" for IT executives must be read against the fact that the in-house development work carried out by a typical IT department is as a rule focused on application-level, not operating system-level software. As such, it is more in conjunction with application-level inter-operability than in conjunction with operating

Microsoft's refusal to supply sets in, in that these products appear, in the eyes of customers, less attractive than Microsoft's software.

...

#### 5.3.1.4 Justification put forward by Microsoft

##### 5.3.1.4.1 Protection of Microsoft's incentives to innovate

(709) Microsoft argues that its refusal is objectively justified due to the intellectual property rights that it holds over the information requested by Sun. In this respect, Microsoft states:

The objective justification for Microsoft's refusal to disclose its intellectual property rights is self-evident: those rights are meant to protect the outcome of billions of dollars of R&D investments in software features, functions and technologies. This is the essence of intellectual property right protection. Disclosure would negate that protection and eliminate future incentives to invest in the creation of more intellectual property.

(710) However, the fact that Sun's request may constitute a request that Microsoft license certain intellectual property rights to Sun cannot as such constitute a "self evident" objective justification for Microsoft's refusal to supply.

(711) The central function of intellectual property rights is to protect the moral rights in a right-holder's work and ensure a reward for the creative effort. But it is also an essential objective of intellectual property law that creativity should be stimulated for the general public good. A refusal by an undertaking to grant a licence may, under exceptional circumstances, be contrary to the general public good by constituting an abuse of a dominant position with harmful effects on innovation and on consumers.

(712) It has been established above in Section 5.3.1.2 that Microsoft's refusal to supply risks eliminating competition in the relevant market for work group server operating systems, that this is due to the fact that the refused input is indispensable to carry on business in that market and that Microsoft's refusal has a negative impact on technical development to the prejudice of consumers. In view of these exceptional circumstances, Microsoft's refusal cannot be objectively justified merely by the fact that it constitutes a refusal to license intellectual property. It is therefore necessary to assess whether Microsoft's arguments regarding its incentives to innovate outweigh these exceptional circumstances.

...

#### 5.3.1.5 Conclusion on refusal to supply

(779) Microsoft has been enjoying a dominant (quasi-monopoly) position on the client PC operating system market for many years. This position of market strength enables Microsoft to determine to a large extent and independently of its competitors the set of coherent communications rules that will govern the *de facto* standard for inter-operability in work group networks. As such, inter-operability with the Windows domain architecture is necessary for a work group server operating system vendor in order to viably stay on the market.

(780) Microsoft has diminished the level of disclosures that it makes concerning information necessary to achieve such inter-operability. Microsoft has turned down a formal request by Sun concerning such inter-operability information.

(781) The data collected by the Commission show that there is a risk of elimination of competition in the work group server operating system market. Microsoft's market share has

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system-inter-operability that IT executives are likely to be confronted with technical issues that their IT department needs to solve.

increased swiftly. The company has reached a dominant position in the relevant market. This position continues to be reinforced. . . .

(782) Microsoft's refusal to supply has the consequence of stifling innovation in the impacted market and of diminishing consumers' choices by locking them into a homogeneous Microsoft solution. As such, it is in particular inconsistent with the provisions of Article 82(b) of the Treaty.

(784) In conclusion, Microsoft's refusal to supply inter-operability information violates Article 82 of the Treaty.

### 5.3.2 *Tying of Windows Media Player with Windows*

(792) In the following recitals (recitals (793) to (993)), it will be established that Microsoft infringes Article 82 of the Treaty, in particular paragraph (d) thereof, by tying Windows Media Player ("WMP") with the Windows PC operating system. Article 82(d) provides that abuse as prohibited by that Article may consist in making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(793) The Commission considers that Microsoft started to tie its streaming media player with Windows 98 Second Edition in May 1999. Whatever bundling Microsoft may have engaged in previously, with Windows 98 Second Edition, Microsoft tied for the first time the product that it offered in the relevant market for streaming media players. It will further be shown that since May 1999, Microsoft has persisted in the abusive behaviour by tying WMP with subsequent versions of Windows.

5.3.2.1 Microsoft's conduct fulfils the constituent elements of a tying abuse under Article 82 of the Treaty.

(794) Tying prohibited under Article 82 of the Treaty requires the presence of the following elements: (i) the tying and tied goods are two separate products; (ii) the undertaking concerned is dominant in the tying product market; (iii) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; and (iv) tying forecloses competition.

(795) It will be established . . . that Microsoft's conduct fulfils the constituent elements of tying. Furthermore, it will be shown . . . that Microsoft's arguments to justify the tying of WMP do not prevail over the anti-competitive effects of tying.

(796) In discussing the individual elements of tying, the impact of the US Judgment and Microsoft's implementation of it will be examined. This is all the more important as Microsoft argues that the US Settlement (and the US Judgment) has had the practical effect of "unbundling" WMP and Windows. Microsoft states that it started implementing the US Settlement on 16 December 2001. Accordingly, OEMs would be free to install and promote other non-Microsoft media players. They could ship client PCs free from visible means of access to WMP and hence with RealPlayer or another media player pre-installed as the default player. Microsoft argues that any additional antitrust remedy on the Commission's part would therefore be unnecessary.

(797) As outlined above,<sup>923</sup> the US proceedings focused on Microsoft's anti-competitive conduct of protecting its dominant client PC operating system from competitive threats posed by Netscape's Navigator and Sun's Java. Furthermore, the plaintiffs dropped their tying charge. . . . As a consequence, after the [US] Court of Appeals' ruling, the District Court had no opportunity to consider whether Microsoft's conduct violated the prohibition of tying under § 1 of the Sherman Act.

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<sup>923</sup> See above, at recital (14) *et seq.*

(798) Consequently, the US Judgment does not purport to include a remedy for tying. In particular, the US Judgment does not provide for removal of WMP code from the PC operating system (and neither does Microsoft's altered business conduct). Under the US Judgment, Microsoft need only provide a means enabling OEMs and end-users to hide the icon and entries representing the WMP application on the computer screen. The WMP code is still present on top of each Windows operating system Microsoft ships.

...

(803) The distinctness of products for the purposes of an analysis under Article 82 therefore has to be assessed with a view to consumer demand. If there is no independent demand for an allegedly "tied" product, then the products at issue are not distinct and a tying charge will be to no avail.

(804) The fact that the market provides media players separately is evidence for separate consumer demand for media players, distinguishable from the demand for client PC operating systems. There is, therefore, a separate market for these products. There are vendors who develop and supply media players on a stand-alone basis, separate from PC operating systems. Media players are often offered for download from the respective vendors' Web-sites. Microsoft itself states that "*there are a dozen of media players, of which RealNetworks, RealPlayer and Apple's QuickTime are only two of the most prominent.*"

(805) Microsoft's own practice to develop and distribute versions of WMP for Apple's Mac operating systems and Sun's Solaris client operating system further indicates that operating systems and media players are not just parts of the same product. . . .

(806) While Microsoft's tying and desktop ubiquity give it a substantial distribution advantage in this market, the fact that a not insignificant number of consumers choose to obtain media players separately from their operating system shows that informed consumers recognise them as separate products. Microsoft continuously stresses the number of consumers who use RealPlayer, a media player that clearly is separate from any operating system. RealNetworks does not develop and sell operating systems.

...

(824) If anything, the argument that other operating system vendors offer media players together with the operating system shows that customers predominantly want their client PCs to provide multimedia capabilities. Microsoft's conclusion, however, that the operating system and a media player therefore constitute one single product is not valid. For illustration, if Microsoft provided a third party's media player with Windows, rather than its own—or OEMs provided such a bundle—consumers' demand for multimedia capabilities would be equally met. However, logically, this does not mean that this third party media player would be or would become a part of the Microsoft Windows operating system.

#### 5.3.2.1.2.3 Conclusion

(825) It follows from the foregoing that client PC operating systems and media players are distinct products for the purposes of Community competition law. As products distinct from client PC operating systems, media players are susceptible to be tied within the meaning of Article 82 [and this a second category of antitrust violation].

#### 5.3.2.1.3 Microsoft does not give customers a choice to obtain Windows without Windows Media Player

(826) The third element of illegal tying pursuant to Article 82 of the Treaty is that customers are not given the choice of acquiring the tying product without the tied product. The dominant undertaking renders the availability of the dominant (tying) product conditional on the customer's simultaneous acquisition of the tied product.

...

(833) In particular, it will be shown that inasmuch as tying risks foreclosing competitors, it is immaterial that consumers are not forced to “purchase” or “use” WMP. As long as consumers “automatically” obtain WMP—even if for free—alternative suppliers are at a competitive disadvantage. This is because no other media player vendor can guarantee content and software developers similar platform ubiquity. Content providers and software developers who know that WMP is present on all Windows client PCs (more than 90% of the market) will provide Microsoft with a competitive advantage by developing content and applications primarily to WMP. These arguments are developed in greater length and supported by evidence in the following section on foreclosure of competition.

(834) It follows from the above considerations that Microsoft’s does not afford customers a choice as to whether to acquire the tying product without the tied product, which is the third constituent element of tying pursuant to Article 82 of the Treaty.

#### 5.3.2.1.4 Microsoft’s tying of Windows Media Player forecloses competition in the market for media players

(835) The fourth element of tying contrary to Article 82 of the Treaty is that tying has a harmful effect on competition. The Court of Justice has stated that it constitutes an abuse when an undertaking in a dominant position directly or indirectly ties its customer by a supply obligation since this deprives the customer of the ability to choose freely his sources of supply and denies other producers access to the market.

##### 5.3.2.1.4.1 Tying Windows Media Player affords Microsoft unmatched ubiquity on client PCs worldwide

(843) In 2002, 121 million client PC operating systems were shipped. 114 million of them had Windows pre-installed. In percentage terms, Microsoft holds a market share of 93.8%. In the period from October 2001 to March 2003, 207 million PCs were shipped worldwide. 196 million had Windows pre-installed.

(844) Through tying WMP with Windows, Microsoft ensures that WMP is as ubiquitous on PCs worldwide as Windows is. No other distribution mechanism or combination of distribution mechanisms attains this universal distribution. Microsoft obviously controls this mode of distribution and (no longer) affords competing media player vendors access to it.

(845) Users who find WMP pre-installed on their client PCs are indeed in general less likely to use alternative media players as they already have an application which delivers media streaming and playback functionality.

(851) In any event, as long as Microsoft ships Windows only together with WMP and does not allow for code removal, OEMs face negative incentives to bundle an additional media player that uses up hard-drive capacity and offers essentially similar functionality because users in turn are unlikely to pay a higher price for such a bundle. . . .

(857) In conclusion, tying WMP creates disincentives for OEMs to ship third party (streaming) media players pre-installed on their PCs.

##### 5.3.2.1.4.1.2 Downloading cannot offset Windows Media Player’s ubiquity

(869) Moreover, users may expect a media player provided “out-of-the-box” together with the hardware to yield better results than a product they need to self-install. Another obstacle to downloading is that Windows generates an error message if a user tries to access content that WMP does not support. In such circumstances an unsophisticated user may feel insecure about downloading a media player. Last but not least, it must be recalled that in many corporations, employees are prevented from downloading software as downloads increase complexity for IT administrators who would need to manage disparate desktops.

...  
5.3.2.1.4.1.4 Conclusion

(877) From the above, it follows that alternative distribution channels do not enable media players competing with WMP to match the ubiquitous and guaranteed presence of the pre-installed WMP code on client PCs worldwide.

...  
5.3.2.1.4.2 Effect on content providers and software developers

...  
(890) Three major content owners state that the intermediaries they deal with in order to distribute digital content increasingly become Microsoft-oriented. In a statement supplied by Microsoft, [confidential] states that “*we felt it would be confusing for consumers if we offered them at the same time digital downloads in multiple different formats.*”

...  
(895) Software developers who write applications relying on a media player will have incentives to write foremost to WMP (assuming approximate equivalence of media players in terms of functionality) as WMP is tied to the client PC operating system that is installed on the large majority of PCs that are manufactured.

...  
**5.4 Effect on Trade between Member States and between EEA Contracting Parties**

(990) Article 82 of the Treaty prohibits any abuse of dominant position within the common market or in a substantial part of it insofar as it may affect trade between Member States. An abuse of a dominant position affects trade between Member States when it is capable of influencing, either directly or indirectly, actually or potentially, the pattern of trade in goods and services between Member States.

...  
(992) Microsoft’s anti-competitive behaviour weakens effective competition on the markets for work group server operating systems and media players in an appreciable way. Microsoft’s refusal to supply interface information brings about a risk of elimination of competition on the world-wide market for work group server operating systems. Microsoft’s tying of WMP with Windows risks impairing the effective structure of competition in the world-wide market for media players.

(993) Therefore, over the period considered, Microsoft’s abuses of its dominance have had an appreciable effect upon trade between Member States within the meaning of Article 82 of the Treaty. For the same reasons, Microsoft’s abuses of its dominance have had an appreciable effect upon trade between the Contracting Parties to the EEA within the meaning of Article 82 of the EC Treaty and Article 54 of the EEA Agreement.

## 6 REMEDIES AND FINES

### 6.1 Article 3 of Regulation 17

(994) Where the Commission finds that there is an infringement of Article 82, it may, in accordance with Article 3 of Regulation 17, require by decision that the undertaking concerned brings such an infringement to an end.

...  
6.1.1 *Remedy concerning refusal to supply*

(998) The natural remedy to Microsoft’s abusive refusal to supply is an order to supply what has been refused.

6.1.1.1 Order to disclose inter-operability information for the development of inter-operable products

(999) Microsoft should be ordered to disclose complete and accurate specifications for the protocols used by Windows work group servers in order to provide file, print and group and user administration services to Windows work group networks.

(1004) As outlined above in Section 5.3.1.1.2, this Decision does not contemplate compulsory disclosure of Windows source code as this is not necessary to achieve the development of inter-operable products. The disclosure order should concerns [sic] the interface specifications only.

### 6.1.2 *Remedy concerning tying*

#### 6.1.2.1 Scope

(1011) Under this Decision, Microsoft will have to offer a version of Windows for client PCs which does not include Windows Media Player. The remedy applies to Windows licensed directly to end users (home users via retail and corporate customers) and licensed to OEMs for sale in the EEA. Microsoft will retain the possibility to also offer to OEMs and end users a bundle of Windows and WMP.

### 6.1.3 *Monitoring Mechanism*

(1044) The effective monitoring of Microsoft's compliance with this Decision will therefore have to be ensured by establishing a suitable monitoring regime including a monitoring trustee. Microsoft will have to submit a proposal to that effect. Guiding principles for Microsoft in this respect are outlined in the following.

(1045) The primary responsibility of the Monitoring Trustee should be to issue opinions, upon application by a third party or by the Commission or *sua sponte*, on whether Microsoft has, in a specific instance, failed to comply with this Decision, or on any issue that may be of interest with respect to the effective enforcement of this Decision.

### 6.1.4 *Consistency of the remedies with the Community's international obligations*

(1051) Second, Microsoft argues that to order the removal of WMP code would violate the Community's obligations under the World Trade Organisation Agreement on Technical Barriers to Trade.

## 6.2 **Article 15 (2) of Regulation 17–Fines**

(1054) Under Article 15(2) of Regulation 17, the Commission may, by decision, impose fines upon undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 82 of the Treaty and/or Article 54 of the EEA Agreement. Such fines can be a sum from EUR 1,000 to EUR 1,000,000 or a sum in excess thereof, but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement.

(1055) In fixing the amount of the fine, the Commission must have regard to the gravity and duration of the infringement. In addition, the fine imposed should reflect any aggravating or attenuating circumstances.

### 6.2.1 *The basic amount of the fine*

(1059) The basic amount of the fine is determined according to the gravity and duration of the infringement.

#### 6.2.1.1 Gravity

(1060) In its assessment of the gravity, the Commission takes into account the nature of the infringement, the actual impact on the market (where this can be measured) and the size of the relevant geographic market.

#### 6.2.1.1.1 Nature of the infringement

(1061) Refusal to supply and tying by undertakings in a dominant position have already been ruled against on several occasions by the Court of Justice.<sup>1329</sup>

(1062) It has been established in this Decision that Microsoft holds a dominant position in the client PC operating system market with a market share that is currently well above 90%. The client PC operating system market, as well as the two other markets relevant to this case are characterised by strong direct and/or indirect network effects.

(1063) . . . Microsoft has conducted a leveraging strategy which constitutes *two separate abuses*.

...

#### 6.2.1.1.4 Conclusion on gravity

(1074) On the basis of the above, it is apparent that the behaviour of Microsoft involves abuses of a dominant position that are particularly anti-competitive in their nature, and which have a significant impact on markets of strategic importance in the IT sector. In addition, Microsoft's behaviour affects the entire EEA. In view of these factors, it must be concluded that Microsoft has committed a very serious infringement of Article 82 of the Treaty and Article 54 of the EEA Agreement, for which the likely fine is above EUR 20 million.

(1075) The initial amount of the fine to be imposed on Microsoft to reflect the gravity of the infringement should be, in light of the above circumstances, EUR 165,732,101.

(1076) When calculating the initial amount of the fine, account should be taken of the necessity of setting the fine at a level that ensures that it has a sufficient deterrent effect. In order to do so, it is necessary to determine whether any *upward adjustment* of the initial amount is necessary [italics added]. Given Microsoft's significant economic capacity,<sup>1342</sup> in order to ensure a sufficient deterrent effect on Microsoft, the initial amount should be adjusted upwards by a factor of 2 to EUR 331,464,203.

...

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## □ Notes & Questions

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<sup>1329</sup> See above at recital (1057). See also Commission Decision 2002/180/EC in Case Comp/C-1/37.859-De Post- La Poste). OJ L 61, 2.3.2002, p. 32.

<sup>1342</sup> Microsoft is currently the largest company in the world by market capitalisation. . . .According to the same measure, Microsoft has held a consistently high ranking in the list of the world's largest companies by market capitalisation, being the largest in 2000, the fifth largest in 2001, and the second largest in 2002. . . .Microsoft's resources and profits are also significant. Microsoft's Securities and Exchange Commission filing for the US fiscal year July 2002-June 2003 reveals that it possessed a cash (and short-term investment) reserve of USD 49,048 million on June 30, 2003. As regards profits, this Securities and Exchange Commission filing indicates that in US fiscal year July 2002-June 2003, Microsoft earned profits of USD 13,217 million on revenues of USD 32,187 million (profit margin of 41%). For the Windows PC client PC operating system product during this period ("Client" product segment), Microsoft earned profits of USD 8,400 million on revenues of USD 10,394 million (profit margin of 81%).

1. Article 82 governs product sales in countries within the European Economic Area (EEA). Consider the following passages in this case: (a) Microsoft is headquartered in Redmond, Washington, as noted in the European Commission's first paragraph; (b) per paragraph 9, requests for information were sent to EEA countries *and* the US; (c) paragraph 427 provides that the "relevant geographic market for client PC operating systems, work group server operating systems and media players is world-wide." Is Microsoft being required to answer for its conduct "worldwide?" Does the EC have the right to prosecute this matter at its seat in Brussels?

2. One is in a dominant position when either: (a) revenues or percentage sales are more than half of the market share, or (b) one has the largest percentage of all competitors in the relevant market. Is Microsoft's European/world economic position contrary to the competition rules?

3. As a result of this decision, Microsoft must share inter-operability information, and now deal with businesses that can choose whether to bundle Windows Media Player into their product sales. Does this decision mean that Microsoft is no longer free to choose its business partners?

4. Paragraph 711 states that the "central function of intellectual property (IP) rights is to protect the moral rights in a right-holder's work and ensure a reward for the creative effort." This decision requires Microsoft to yield inter-operability information—and therefore trade secrets, which the case does not mention—which Microsoft created with multi-millions of dollars of research and development cost. Is there a tension between IP rights and the Community's application of its Article 82 antitrust statute. Is this fair to Microsoft? Is it good for business?

5. Paragraph 702, et seq., contains Microsoft's argument that there is no evidence that its actions have harmed consumers. If you are living in Europe—and either using your own computer, or going to an Internet café—has Microsoft harmed you?

6. What is "tying?" What business product was tied to another, for purposes of the European Commission's analysis in this case? How does it harm a consumer of Microsoft products?

7. Does the Commission's authorization for Microsoft to allow its OEMs to bundle its product defeat the purpose of this decision? If Microsoft can contract with them to do so, then what does the Commission's mean by requiring Microsoft to "unbundle" its media player from its operating system?

8. To whom should the money damages be paid: plaintiff Sun? All of Microsoft's competitors in: (a) Europe?; (b) the world?; and (c) in what relative percentages? Should a portion be paid to individual users? To the European Commission? Should the actual damages, and the upward adjustment (similar to punitive damages, because of its "deterrent effect") be treated differently, in terms of who gets what?

9. *Appeal*: Microsoft sought judicial review of this European Commission decision in the Court of First Instance of the European Communities on 7 June 2004. Microsoft therein contended that the Court should annul the Commission Decision of 24 March 2004; or, in the alternative, substantially reduce the fine imposed—and order the Commission to bear the costs of all proceedings, should Microsoft ultimately prevail.

Per the predictable basis for alleged error, Microsoft's pleading in this related action claimed that the Commission misapplied Article 82 of the EC treaty as follows: (a) the technology which it was ordered to license was *not* indispensable to achieve inter-operability with Microsoft's PC operating systems; (b) its refusal to supply the technology did *not* prevent the emergence of new products on a secondary market—or have the effect of excluding all competition in the relevant market; (c) the Commission failed to take into account the obligations imposed on the European Communities by the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property (TRIPS) [text §13.2]; and (d) the Commission erred by determining that Microsoft infringed Article 82 by making the availability of its PC operating systems conditional on the simultaneous acquisition of media functionality referred to as

Windows Media Player. Microsoft's most intriguing basis for Commission error was that: "the contested decision ignores the benefits flowing from the applicant's business model, which entails the integration of new functionality into Windows in response to technological advances and changes in customer demand." Action brought on 7 June 2004 by Microsoft Corporation against the Commission of the European Communities, (Case T-201/04), Official Journal of the European Union, p. C 179/18-19 (July 7, 2004).

10. Sun corporation is a "Silicon Valley" California business. To learn more about Sun's decision to sue in Europe—rather than at the Washington state headquarters of Microsoft—see E. Cummins, Brussels Sprouts: The Plaintiffs Antitrust Bar Finds Fertile Ground the European Union, 25 Calif. Lawyer 28 (Aug. 2004).