EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 11 February 2004
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OPINION OF THE LEGAL SERVICE*

NOTE TO MR LOWE
DIRECTOR GENERAL FOR COMPETITION

Subject: Case No COMP/C-3/37.792 - Microsoft

Ref.: note D215 Mr Lowe dated 15 January 2004

The Legal Service can give a favourable opinion to the draft decision in the above case, for the purpose of submitting the draft to the Advisory Committee (version received via e-mail dated 10 February 2004 at 08h02).

However, due to time-constraints the draft has not yet been scrutinized to the necessary extent and the Legal Service therefore reserves its position, in particular with regard to the following issues that require further reflection and clarification.

Remedies

The section on remedies should in an initial paragraph clearly set out the approach on what is decided in the present decision, and what may be decided in future (implementing) decisions. We understand that, with regard to the refusal to supply abuse, the idea is *not* to make any positive order (disclosure or licensing) in this first decision, but rather request Microsoft to submit proposals/information, and then make the necessary orders in one or several subsequent decisions.[1] However, at present there is an inconsistency between the recitals and the corresponding articles of the operative part.[2]

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[1] Such an approach would seem feasible, but may raise certain procedural issues with regard to the subsequent decisions.

[2] Cf. e.g. paras 1046 (Microsoft is ordered...") and 1053 ("there *is* a disclosure order") which is not reflected in any article.

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With regard to the tying remedy, it is noted that Microsoft retains the right to continue this practice, as long as it also offers an unbundled version of Windows. This raises certain points concerning the drafting of this section.[3]

As to the fine, the reasoning should be further elaborated, in particular with regard to the finding that the infringement must be considered *very serious*. Under the Guidelines on Fines abuses of a dominant position are normally characterised as *serious*, but can in cases of "clearcut abuses...by...a virtual monopoly" be considered *very serious*. The Guidelines do not purport to be exhaustive, and we could find that other abuses are in fact equally very serious. However, this must be appropriately reasoned. With regard to the nature of the infringement one could *inter alia* emphasize the strategic importance of the markets that Microsoft seeks to dominate through its leveraging practices.

As regards the operative part, the description of the abuse in Article 1(1) is inconsistent with the description in paragraph 564. In article 2(2) the reference to the infringement should be "Article 1(2). The wording of Articles 2(d) and 2(2) regarding time extensions could be streamlined and shortened.

Intellectual property rights

Copyright

The fundamental concern as regards compatibility between the decision and Directive 91/250/EEC on the legal protection of computer programs (the Directive) is the possibility that the reasoning on which the decision is based contradicts the Commissions interpretation of the Directive in the absence of case-law. Therefore, a general reserve must be made as it is necessary to examine the entire decision to ensure that the statements as to scope of protection and the legal use of certain information are appropriate to the facts of the case.

As regards disclosure, Article 1 of the Directive sets out the object of protection (computer programs), whereas Article 4 sets out the exclusive right of the rightholder as follows:

> *Article 4 Restricted Acts*
> *Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize:*
> *(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the rightholder;*
> *(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;*
> *(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.*

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[3] Cf. e.g. para 1068 requesting Microsoft to refrain from measures having equivalent effect to tying and para 1089(e) not to tie WMP to e.g. Office (considering that Microsoft may continue to tie WMP to Windows). The emphasis should rather be to prevent Microsoft from frustrating the unbundled offer.

The act of disclosure of information with regard to computer programs is not mentioned among the exclusive rights. It could be argued that if any potential use of any disclosed interface information would imply an act covered by Article 4, the act of disclosure is equally covered by the exclusive right. However, such reasoning is not convincing. Furthermore, the evidence submitted by DG Comp (Mr. Virsing's statement) seems to support to a reasonable extent that this is not the case.

In other words, the mere disclosure by the right holder without reproduction, adaptation etc. is not covered by the exclusive right as defined by the Directive and the possible use of the disclosed information cannot be said in all circumstances to amount to a restricted act as defined in Article 4.

However, the draft decision imposes an obligation on Microsoft to "prepare a technical documentation through which it will make available the information in an organised manner and format useful to skilled engineers". It is rather dubious why this particular act could not constitute a reproduction. Alternatively, one could simply ask for the disclosure of the information in question and leave it to Microsoft to "disclose in a manner useful to skilled engineers". It is reasonable to assume that Microsoft would choose itself to extract the information in question in a separate document.

As regards the use by third-parties, it is manifestly not clear what the aim of the decision is. Article 2(1)(c) mentions "Microsoft shall establish a mechanism through which potential beneficiaries of the disclosure will have the possibility to review [..] for the sole purpose of evaluating it for potential licence". It is not clear whether identified information the use of which would not be covered by any IP rights would also be subject to a licence. Furthermore, the use of the term "licence" assumes that the disclosed information cannot *ever* be used without a licence.

At this stage, it is only possible to agree to a general orientation according to which it cannot be excluded that certain use of other information amounts to reproduction of copyright protected material which cannot be used without the authorisation of the right holder. In other words, if the intention is equally to ensure the possible use by third-parties it is necessary to explore if and to what extent a compulsory licence of copyright would need to be imposed.

Trade secrets
The section on trade secrets is unclear and merits further reflection. In general, trade secrets protection involves being able to prevent others from revealing one's secrets, not having a right to refuse to communicate them oneself.

Patents
At present, the draft decision only requires Microsoft to submit to the Commission a detailed list of any relevant patents and patent applications in the EEA, and propose the terms for licensing. Any compulsory licensing order would follow in a subsequent decision. Such a decision would have to contain adequate reasoning as to why each compulsory license is necessary. The information supplied by Microsoft (and possible comments by interested parties) could provide some basis for this.

In paragraphs 1052 and 1068 the wording "Microsoft will submit to the Commission a detailed list of patents granted in the EEA reading on the information to be disclosed..." is unclear.

Richard Wainwright

Frank Benyon

c.c.: MM. Mensching, Madero, Paulis, Competition Hearing Officer