

Final report of the hearing officer in Case COMP/C-3/37.792 — Microsoft

(pursuant to Article 15 of Commission Decision (2001/462/EC, ECSC) of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings — OJ L 162, 19.6.2001, p. 21)

(2007/C 26/04)

The draft decision in this case gives rise to the following observations:

The proceedings and the Statements of Objections

On 10 December 1998, Sun Microsystems Inc ('Sun') lodged a complaint under Article 82 against Microsoft Corporation ('Microsoft') pursuant to Article 3 of Council Regulation No 17/62 ⁽¹⁾, alleging that Microsoft had wrongfully withheld interface information required for interoperability which would ultimately allow Microsoft to extend its dominance in PC operating systems into the closely related market for work group server operating system software. The case opened pursuant to Sun's complaint was registered as Case IV/C-3/37.345.

On 1 August 2000 the Commission sent the first Statement of Objections (SO) to Microsoft in accordance with Article 2 of Regulation No 2842/89 ⁽²⁾. Microsoft replied on 17 November 2000.

In February 2000, the Commission launched an own-initiative investigation into the issue of whether Microsoft had illegally tied its Media Player product to its dominant Windows operating system, which was registered as Case COMP/C-3/37.792.

A second Statement of Objections, which was sent to Microsoft on 30 August 2001, joined the relevant findings set out in the first Statement of Objections to the procedure followed under Case COMP/C-3/37.792. It concerned the issues of interoperability and the incorporation of Windows Media Player in Windows. Microsoft replied on 16 November 2001. They waived their right to an oral hearing.

A third Statement of Objections was received by Microsoft on 6 August 2003. This supplementary Statement of Objections did not cover abusive practices different from those set out in the first and the second Statement of Objections and clarified that its new elements had to be read and understood in the context of the first two Statements of Objections. In particular, it incorporated the findings of a subsequent market enquiry and explained in further detail the remedies envisaged by the Commission.

Microsoft's reply to the Statement of Objections

Microsoft were initially given 8 weeks to reply to the third Statement of Objections, that is until 1 October 2003. They were granted access to the Commission's file on 7 and 8 August 2003. This was the fourth time that Microsoft had been granted access. On 7 September 2003, Microsoft requested an extension of 60 days to the time limit to reply to the Statement of Objections, until 4 December 2003. I considered such a long extension was not merited. However, taking account in particular of the holiday period, I granted an extension of the deadline until 17 October 2003. On 17 October 2003, Microsoft duly replied to the third Statement of Objections.

Microsoft asked to be allowed to submit additional material in the form of survey information and analysis by the economic consultant firms Mercer and NERA. Microsoft was permitted to submit the additional material by 31 October 2003, under condition that it provided the Commission with the underlying raw data of the survey before filing its economic submission. Microsoft complied with this condition and duly submitted the Mercer and NERA reports on 31 October.

⁽¹⁾ Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EC Treaty (OJ L 13, 21.2.1962, p. 204)

⁽²⁾ Regulation No 2842/89/EEC of the Commission of 22 December 1998 on the hearing of parties in certain proceedings under Article 85 and 86 of the EC Treaty (OJ L 354, 30.12.1998, pp. 18-21).

The participation of third parties in the proceeding; mutual transmission of information

As a formal complainant, Sun was provided with a non-confidential version of the Statements of Objections.

In addition to Sun, a large number of other third parties actively participated in the procedure and were granted the status of interested third parties.

The third parties were provided with the non-confidential version of all three Statements of Objections and Microsoft's replies. Their written submissions were sent to Microsoft for comment. In view of the mutual transmission of all main documents between parties and third parties, the case has been hallmarked by a high degree of transparency as between the various parties concerned.

By letter of 4 November 2003, Microsoft requested me to rule that a paper and two reports by the complainant and a third party, which the Commission had forwarded to Microsoft on 3 November, should not be submitted or referred to at the oral Hearing. I did not grant this request on the basis that the reports related to the case at issue, but I informed participants at the hearing that Microsoft had not yet had sufficient opportunity to comment formally on these documents.

The oral hearing

In its written response to the third Statement of Objections, Microsoft requested an oral hearing.

The oral hearing took place on 12, 13 and 14 November 2003. In addition to Microsoft, the complainant and eight interested third parties attended. In order to provide Microsoft with ample opportunity to develop their arguments orally, the first one and a half days were reserved for their presentation. The complainant and the interested third parties were given between 30 minutes and two hours each to submit their observations. Finally, Microsoft took advantage of the opportunity to comment on third parties' observations at the oral hearing and also subsequently in writing.

During the oral hearing, a third party (RealNetworks) intended to refute Microsoft's assertion that Microsoft's Windows operating system did not work properly without the functionalities of Windows Media Player. Its presentation gave rise to a difference of opinion as to whether RealNetworks had removed the binary code of the Windows Media Player application entirely from Windows. In order to examine the accuracy of RealNetworks' presentation, the Commission invited Microsoft and RealNetworks to its premises in Brussels. On 23 January 2004 RealNetworks repeated its presentation on a laptop in the presence of representatives of the Commission and Microsoft. Microsoft was provided with this computer for further verification and commented on 6 February 2004.

The Commission's letter of 16 January 2004

On 16 January 2004, Microsoft was granted further access to the file. On the same day, the Commission sent a letter to Microsoft. Its purpose was to avoid misunderstandings as to the conclusions the Commission would draw with respect to a number of documents and evidence from the oral hearing which had been placed on the file. To this aim, the documents and evidence as well as the respective conclusions drawn by the Commission were listed in an annex attached to the letter. Furthermore, in reaction to Microsoft's response to the third Statement of Objections, the Commission's letter of 16 January 2004 pointed to the correct interpretation of the objections raised in the field of interoperability. Microsoft was afforded the opportunity to comment on both aspects of this letter until 30 January 2004.

By letters of 24 and 27 January, Microsoft took the view that the letter of 16 January 2004 contained a number of new elements and that it might, therefore, constitute a new and unacknowledged Statement of Objections. Microsoft also requested an indication as to which paragraphs in the Statement of Objections the conclusions in the annex to the Commission's letter of 16 January related and asked for an extension of the time to reply until 13 February 2004. Microsoft was provided with the requested indications on 27 January 2003. By letters of 30 January and 5 February I extended the deadline for Microsoft to comment until 8 February 2004.

Microsoft submitted their comments on the annex of the Commission's letter of 16 January on 7 February 2004. They stated that the letter of 16 January contained new objections. Furthermore, Microsoft requested confirmation that their comments would be taken into account.

By letters of 30 January and 20 February 2004 I took the view that the Commission's letter of 16 January 2004 had unmistakably been designed to ensure Microsoft's correct understanding of the objections raised in the field of interoperability as well as of the conclusions that the Commission might draw with respect to certain documents in the file. Therefore, I did not share Microsoft's opinion that this letter constituted an unacknowledged new Statement of Objections. However, in my letter of 20 February, I confirmed that the substance of Microsoft's response would of course be taken into account by the Commission.

In the course of the proceeding, some of the objections raised in the second Statement of Objections have been dropped, namely those referred to as technological leveraging, discriminatory licensing and abusive licensing policy.

In the light of the above, I consider that the right to be heard of Microsoft and of the third parties has been respected in the present case.

Brussels, 18 March 2004

Karen WILLIAMS
