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TRIBUNAL DE PRIMEIRA INSTANCIA DAS COMUNIDADES EUROPEAS
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EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÄTT

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Confidential Version

REPORT FOR THE HEARING*

(Competition – Abuse of a dominant position – Client PC operating systems – Work group server operating systems – Refusal by dominant undertaking to provide interoperability information and to allow its use – Streaming media players – Dominant undertaking tying the supply of its Windows Client PC operating system to the acquisition of that software – Remedies – Designation of monitoring trustee – Fine – Determination of the amount – Proportionality)

In Case T-201/04,

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

applicant,

supported by

Association for Competitive Technology, Inc., established in Washington, DC
(United States), represented by L. Ruessmann, lawyer,

DMDsecure.com BV, established in Amsterdam (Netherlands),

MPS Broadband AB, established in Stockholm (Sweden),

Pace Micro Technology plc, established in Shipley (United Kingdom),

Quantel Ltd, established in Newbury (United Kingdom),

Tandberg Television Ltd, established in Southampton (United Kingdom),

represented by J. Bourgeois, lawyer,

Exor AB, established in Uppsala (Sweden), represented by S. Martínez Lage, H.
Brokelmann and R. Allendesalazar Corcho, lawyers,

* Language of the case: English.

Mamut ASA, established in Oslo (Norway),

TeamSystem SpA, established in Pesaro (Italy),

represented by G. Berrisch, lawyer,

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

interveners,

v

Commission of the European Communities, represented by R. B. Wainwright, F. Castillo de la Torre, P. Hellström and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

AudioBanner.com, trading as 'VideoBanner', established in Los Angeles (United States), represented by L. Alvizar, lawyer,

European Committee for Interoperable Systems (ECIS), established in Brussels (Belgium), represented by J. Flynn QC., D. Paemen, N. Dodoo and M. Dolmans, lawyers,

Free Software Foundation Europe eV, established in Hamburg (Germany), represented by C. Piana, lawyer,

Software & Information Industry Association (SIIA), established in Washington, DC, represented by C. Simpson, Solicitor, and J. Flynn QC., D. Paemen, N. Dodoo and M. Dolmans, lawyers,

interveners,

APPLICATION for the annulment of Commission Decision C(2004)900 final of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 - Microsoft) or, in the alternative, the annulment of or the reduction in the fine imposed on the applicant in that decision

Background to the dispute

- 1 Microsoft Corp. ('Microsoft'), a company established in Redmond (United States), designs, develops and markets a wide variety of software products for

different types of computing devices. Those products include client operating systems for personal computers ('PC'), called Windows, work group server operating systems, called Windows Server, and streaming media players, called Windows Media Player. Microsoft also provides support services.

- 2 On 10 December 1998, Sun Microsystems, Inc. ('Sun'), a company established in Palo Alto (United States) which supplies inter alia work group server operating systems, lodged a complaint with the Commission pursuant to Article 3 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).
- 3 In its complaint, Sun criticised Microsoft's refusal to disclose to it the information and technology necessary to allow interoperability of its work group server operating systems with the Windows Client PC operating system.
- 4 On 2 August 2000, the Commission sent Microsoft a first statement of objections. It related essentially to certain issues concerning interoperability between Windows Client PC operating systems and the server operating systems of other suppliers ('client-to-server interoperability').
- 5 Microsoft replied to that first statement of objections on 17 November 2000.
- 6 In the interim, in February 2000, the Commission launched, on its own initiative, an investigation relating, more specifically, to Microsoft's 'Windows 2000' generation of PC and work group server operating systems and to Microsoft's incorporation of its Windows Media Player in its Windows PC operating system.
- 7 That investigation led, on 29 August 2001, to a second statement of objections being sent to Microsoft. In that statement of objections the Commission repeated its previous objections concerning client-to-server interoperability. It also raised a number of issues concerning interoperability between work group servers ('server-to-server interoperability'). Finally, the Commission raised certain issues relating to the integration of the Windows Media Player software in the Windows PC operating system.
- 8 Microsoft replied to the second statement of objections on 16 November 2001.
- 9 Next, the Commission sent requests for information to several clients of Microsoft and to various other market participants and, from April to June 2003, conducted a market investigation.
- 10 On 6 August 2003, the Commission sent Microsoft a third statement of objections designed, according to the Commission, to supplement the two previous statements and to give information as to the remedies which it was intending to order.

- 11 Microsoft replied to that third statement of objections by letter of 17 October 2003 and submitted supplementary observations on 1 December 2003.
- 12 A hearing was held by the Commission on 12, 13 and 14 November 2003.
- 13 On 16 January 2004, the Commission sent Microsoft a letter, to which Microsoft replied on 7 February 2004.
- 14 On 24 March 2004, the Commission adopted a decision relating to a proceeding under Article 82 EC in Case COMP/C-3/37.792 – Microsoft ('the contested decision').

The contested decision

- 15 According to the contested decision, Microsoft infringed Article 82 EC and Article 54 of the Agreement on the European Economic Area ('EEA') by reason of two abuses of a dominant position.
- 16 The Commission first identified three distinct relevant product markets, of a worldwide dimension, and found that Microsoft held a dominant position on two of them. The Commission then found that Microsoft had engaged in two types of abusive conduct. Consequently, it imposed a fine and a number of remedies on Microsoft.

I – The relevant product markets and the relevant geographical market

- 17 The contested decision identifies three distinct relevant product markets, consisting respectively, of client PC operating systems (recitals 324 to 342 of the contested decision), work group server operating systems (recitals 343 to 401 of the contested decision) and streaming media players (recitals 402 to 425 of the contested decision).
- 18 The first product market identified in the contested decision is the client PC operating system market. An operating system is a software product which controls the basic functions of a computer and allows the user to use the computer and to run applications on it (recital 37 of the contested decision). Client PCs are multifunctional computers designed to be used by one person at a time and may be linked to a network (recital 45 of the contested decision).
- 19 As regards the second market, the contested decision defines work group server operating systems as operating systems designed and marketed to deliver, in an integrated manner, 'basic infrastructure services' to a relatively limited number of client PCs connected to a small to medium-sized network (recitals 53 and 345 of the contested decision). The contested decision identifies, more specifically, three sets of services, namely (i) sharing files stored on servers, (ii) sharing printers and (iii) the administration of users and groups of users, that is to say the

administration of how those users and groups of users may access network services (recitals 53 and 345 of the contested decision). This latter set of services consists in particular in ensuring that users can access and use the network resources securely, *inter alia*, by first authenticating users and then checking that they are authorised to perform a given action (recital 54 of the contested decision).

- 20 According to the contested decision, those three sets of services are closely interrelated within work group server operating systems. They may be regarded to a large extent as 'one and the same work group service', but viewed from two different perspectives, namely that of the user (file and print services) and that of the network administrator (group and user administration services) (recital 56 of the contested decision).
- 21 The third market identified in the contested decision is the streaming media players market. Media players are defined as software products capable of reading sound and image content in digital format, i.e. of decoding the corresponding data and translating them into instructions for hardware (for example, loudspeakers or a display) (recital 60 of the contested decision). Those instructions are transmitted to the hardware through the operating system. Streaming media players are capable of reading sound and image content streamed through the internet (recital 63 of the contested decision).
- 22 In the contested decision, the Commission considers (i) that streaming media players are products distinct from client PC operating systems (recitals 404 to 406 and 800 to 813 of the contested decision), (ii) that those media players are not subject to competitive pressure from classical playback devices (such as CD and DVD players) (recitals 407 to 410 of the contested decision), (iii) that only media players with similar functionalities exert competitive constraints on Windows Media Player (recitals 411 to 415 of the contested decision) and (iv) that the presence of supply-side substitutable products is limited (recitals 416 to 424 of the contested decision).
- 23 As regards the relevant geographical market for client PC operating systems, work group server operating systems and streaming media players, the Commission finds in the contested decision that that market is world-wide (recital 427 of the contested decision).

II – Dominant position

- 24 In the contested decision, the Commission finds that Microsoft holds a dominant position on the client PC operating systems market and on the work group server operating systems market (recitals 429 to 472 and 473 to 541 of the contested decision).
- 25 As regards the client PC operating systems market, the Commission relies on the following elements in concluding that Microsoft has held a dominant position on that market since at least 1996:

- Microsoft’s share of that market is over 90% (recitals 430 to 435 of the contested decision);
- There are significant barriers to entry on that market, owing to indirect network effects (recitals 448 to 464 of the contested decision);
- Those indirect network effects are attributable (i) to the fact that consumers appreciate platforms on which they can use a large number of applications and (ii) to the fact that software designers develop applications for the client PC operating systems that are most popular with consumers (recitals 449 to 450 of the contested decision).

26 As regards the work group server operating systems market, the Commission bases its conclusion on the following findings:

- Microsoft’s share of that market is, on a conservative estimate, at least 60% (recitals 473 to 499 of the contested decision);
- The position of Microsoft’s three main competitors on that market is as follows: Novell, with its ‘NetWare’ software, has a market share of 10 to 25%, Linux vendors have a market share of 5 to 15% and UNIX vendors have a market share of 5 to 15% (recitals 503, 507 and 512 of the contested decision);
- The work group server operating system market is characterised by the existence of significant barriers to entry, attributable in particular to network effects and to Microsoft’s withholding of interoperability information (recitals 515 to 525 of the contested decision);
- There are close commercial and technological links between that market and the client PC operating systems market (recitals 526 to 540 of the contested decision).

III – *Abuse of dominant position*

27 In the contested decision, the Commission finds two types of abusive conduct by Microsoft.

A – *Refusal to provide interoperability information and to allow its use*

28 The first type of abusive conduct alleged against Microsoft is its refusal to provide its competitors with interoperability information and to allow its use for the purpose of developing and distributing products competing with Microsoft’s own products on the work group server operating system market, from October 1998 until the date of notification of the contested decision (Article 2(a) of the contested decision). That conduct is described in recitals 546 to 791 of the contested decision.

- 29 For the purposes of the contested decision, '*Interoperability Information*' means 'the complete and accurate specifications for all the *Protocols* implemented in *Windows Work Group Server Operating Systems* and that are used by *Windows Work Group Servers* to deliver file and print services and group and user administration services, including the Windows Domain Controller services, Active Directory services and Group Policy services, to *Windows Work Group Networks*' (Article 1(1) of the contested decision).
- 30 'Protocol' is defined as 'a set of rules of interconnection and interaction between various instances of *Windows Work Group Server Operating Systems* and *Windows Client PC Operating Systems* running on different computers in a *Windows Work Group Network*' (Article 1(2) of the contested decision).
- 31 The Commission emphasises in the contested decision that the refusal at issue does not relate to elements of Microsoft's source code but solely to specifications for the protocols in question, a specification being a detailed description of what is expected from the software in question, in contrast to 'implementations' (also referred to, for purposes of the present Report for the Hearing, as 'realisations'), constituted by the running of the code on the computer (recitals 24 and 569 of the contested decision). The Commission thus states that '[the contested decision] does not contemplate ordering Microsoft to allow copying of Windows by third parties' (recital 572 of the contested decision).
- 32 The Commission also found that the conduct alleged against Microsoft was part of a general pattern of conduct (recitals 573 to 577 of the contested decision), that it involved a disruption of previous higher levels of supply of information (recitals 578 to 584 of the contested decision), that it created a risk that competition might be eliminated on the work group server operating system market (recitals 585 to 692 of the contested decision) and that it had a negative effect on technical development, to the detriment of consumers (recitals 693 to 708 of the contested decision).
- 33 Finally, the Commission rejected Microsoft's arguments that there was objective justification for its refusal (recitals 709 to 778 of the contested decision).

B – Tying of Windows Client PC operating system with Windows Media Player

- 34 The second type of abusive conduct alleged against Microsoft is that, from May 1999 until the date of notification of the contested decision, it made the availability of the Windows Client PC operating system conditional on the simultaneous acquisition of the Windows Media Player software (Article 2(b) of the contested decision). That conduct is described in recitals 792 to 989 of the contested decision.
- 35 The Commission found that Microsoft's conduct satisfied the conditions for a finding that there had been abusive tying for the purposes of Article 82 EC (recitals 794 to 954 of the contested decision). It reiterated, first, that Microsoft

had a dominant position on the market for client PC operating systems (recital 799 of the contested decision). Second, the Commission considered that streaming media players and client PC operating systems are two separate products (recitals 800 to 825 of the contested decision). Third, it stated that Microsoft did not make it possible for consumers to buy Windows without the Windows Media Player software (recitals 826 to 834 of the contested decision). Fourth, the Commission submitted that the tying in question foreclosed competition in the market for media players (recitals 835 to 954 of the contested decision).

- 36 Finally, the Commission rejected Microsoft's arguments that the tying in question resulted in increased efficiencies such as to offset the anti-competitive effects identified in the contested decision (recitals 955 to 970 of the contested decision) and second that Microsoft has no incentive to engage in 'anti-competitive' tying (recitals 971 to 977 of the contested decision).

IV – *Fine and remedies*

- 37 The two abuses identified by the contested decision have been punished by the imposition of a fine amounting to EUR 497 196 304 (Article 3 of the contested decision).
- 38 Moreover, Microsoft was required, under the first paragraph of Article 4 of the contested decision, to bring to an end the abuses referred to in Article 2 in accordance with Articles 5 and 6 of that decision. Microsoft is also required to refrain from any conduct having the same or equivalent object or effect as those abuses (second paragraph of Article 4 of the contested decision).
- 39 By way of remedy for the abusive refusal to supply referred to in Article 2(a) of the contested decision, Article 5 of that decision orders Microsoft to act as follows:

'(a) Microsoft ... shall, within 120 days of the date of notification of [the contested decision], make the *Interoperability Information* available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms, allow the use of the *Interoperability Information* by such undertakings for the purpose of developing and distributing work group server operating system products;

(b) Microsoft ... shall ensure that the *Interoperability Information* made available is kept updated on an ongoing basis and in a *Timely Manner*,

(c) Microsoft ... shall, within 120 days of the date of notification of [the contested decision], set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope and terms of use of the *Interoperability Information*; as regards this evaluation mechanism, Microsoft ... may impose reasonable and non-discriminatory

conditions to ensure that access to the *Interoperability Information* is granted for evaluation purposes only;

...'

40 By way of remedy for the abusive tying referred to in Article 2(b) of the contested decision, Article 6 of that decision orders Microsoft *inter alia* to offer, within 90 days of the date of notification of that decision, a full-functioning version of the Windows Client PC operating system which does not incorporate Windows Media Player, with Microsoft retaining the right to offer a bundle of the Windows Client PC operating system and Windows Media Player.

41 Finally, Article 7 of the contested decision provides:

'Within 30 days of the date of notification of [the contested decision], Microsoft ... shall submit a proposal to the Commission for the establishment of a suitable mechanism assisting the Commission in monitoring Microsoft['s] ... compliance with [the contested decision]. That mechanism shall include a monitoring trustee who shall be independent from Microsoft

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

Proceedings for breach of United States antitrust law

- 42 Concurrently with the investigation conducted by the Commission, Microsoft was the subject of an investigation for breach of United States antitrust law.
- 43 In 1998, the United States of America and 20 Federal States brought proceedings against Microsoft under the Sherman Act. Their complaints related to the measures taken by Microsoft against Netscape's Internet browser 'Netscape Navigator' and Sun Microsystems' Java technologies. The 20 Federal States in question also brought actions against Microsoft for breach of their own antitrust laws.
- 44 After the United States Court of Appeals for the District of Columbia Circuit ('the Court of Appeals'), to which Microsoft had appealed against the judgment delivered on 3 April 2000 by the United States District Court for the District of Columbia ('the District Court'), delivered its judgment on 28 June 2001, Microsoft reached a settlement in November 2001 with the United States Department of Justice and the Attorneys General of nine States ('the United States Settlement'), under which Microsoft entered into two types of commitment.
- 45 First, Microsoft agreed to establish document specifications for the communications protocols used by Windows server operating systems in order to

'interoperate', i.e. render those systems compatible, with Windows Client PC operating systems, and to license those specifications to third parties on defined terms.

46 Second, the United States Settlement provided that Microsoft was to allow original equipment manufacturers ('OEMs') and end consumers to enable or remove access to its middleware products. The Windows Media Player software is one of the products belonging to that category, as defined in the United States Settlement. Those provisions are designed to ensure that middleware suppliers will be able to develop and distribute products which function correctly with Windows.

47 Those terms were approved on 1 November 2002 by the District Court.

48 On 30 June 2004, upon appeal by the State of Massachusetts, the Court of Appeals upheld the District Court's judgment of 1 November 2002.

Procedure

49 By application lodged at the Registry of the Court of First Instance on 7 June 2004, Microsoft brought this action.

50 By separate document lodged with the Registry on 25 June 2004, Microsoft also applied under Article 242 EC for suspension of the operation of Articles 4, 5(a), 5(b), 5(c) and 6(a) of the contested decision.

51 By order of 22 December 2004 in Case T-201/04 R *Microsoft v Commission*, not yet published in the ECR, the President of the Court of First Instance dismissed that application and reserved the costs.

52 By order of 9 March 2005, the President of the Fourth Chamber of the Court of First Instance granted the following associations and companies leave to intervene in the proceedings in support of the form of order sought by Microsoft:

- Association for Competitive Technology, Inc.;
- DMDsecure.com BV, MPS Broadband AB, Pace Micro Technology plc, Quantel Ltd and Tandberg Television Ltd;
- Exor AB;
- TeamSystem SpA and Mamut ASA.; and
- The Computing Technology Industry Association, Inc.

- 53 By the same order, the President of the Fourth Chamber granted the following associations and companies leave to intervene in the proceedings in support of the form of order sought by the Commission:
- AudioBanner.com, trading as ‘VideoBanner’;
 - Free Software Foundation Europe eV;
 - RealNetworks, Inc.; and
 - Software & Information Industry Association (SIIA).
- 54 Microsoft requested, by letters of 13 December 2004, 9 March 2005, 27 June 2005 and 9 August 2005, that certain confidential information contained in the application, the defence, the reply, Microsoft’s observations on the statements in intervention, and the rejoinder be omitted from the documents sent to the interveners. It produced a non-confidential version of those pleadings. The communication of those pleadings to the interveners referred to in paragraphs 52 and 53 above, was restricted to that non-confidential version. Those interveners raised no objection in that regard.
- 55 The interveners referred to in paragraphs 52 and 53 above lodged their statements in intervention within the prescribed periods. The main parties submitted their observations on those statements in intervention on 13 June 2005.
- 56 By order of 28 April 2005 in Case T-201/04 *Microsoft v Commission*, not yet published in the ECR, the President of the Fourth Chamber granted European Committee for Interoperable Systems (ECIS) leave to intervene in the proceedings in support of the form of order sought by the Commission. Since that association’s application to intervene was lodged after the expiry of the period referred to in Article 116(6) of the Rules of Procedure of the Court of First Instance, it was permitted to submit its observations only in the oral procedure, on the basis of the Report for the Hearing to be sent to it.
- 57 By decision of the Court, sitting in plenary session, of 11 May 2005, the case was assigned to the Fourth Chamber, Extended Composition.
- 58 By decision of the Court, sitting in plenary session, of 7 July 2005, the case was assigned to the Grand Chamber and was assigned to a new Judge-Rapporteur.
- 59 By order of the President of the Grand Chamber of 16 January 2006, RealNetworks was removed from the case as intervener in support of the form of order sought by the Commission.

Forms of order sought by the parties

- 60 The applicant, supported by the interveners referred to in paragraph 52 above, claims that the Court should:
- annul the contested decision;
 - in the alternative, annul or substantially reduce the fine;
 - order the Commission to pay the costs.
- 61 The Commission, supported by the interveners referred to in paragraphs 53 and 56 above, contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

Pleas in law and arguments of the parties

- 62 The applicant puts forward a number of pleas in law in support of its action. Some of those pleas seek the annulment of the contested decision and are grouped together around three issues concerning (i) the refusal to provide interoperability information and to allow its use, (ii) the tying of the Windows Client PC operating system with Windows Media Player and (iii) the obligation to appoint an independent monitoring trustee responsible for ensuring that Microsoft complies with the contested decision. The other pleas in law seek the annulment of the fine imposed or a reduction in its amount.

I – Preliminary observations

- 63 As a preliminary point, the Commission criticises the fact that Microsoft submits a number of arguments of a legal nature only in the annexes to its pleadings. It observes in that regard that, according to the case-law, although specific points in the text of the application can be supported and completed by references to specific passages in documents annexed to it, a general reference to other documents cannot compensate for the lack of essential elements of the legal arguments in the application itself, even if those documents are attached to the application. It is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental purpose.
- 64 The Commission also criticises Microsoft for failing to communicate to it or to the Court of First Instance the information on the basis of which the experts' opinions annexed to its pleadings were established. It submits that those annexes should therefore be disregarded.

- 65 Moreover, the Commission claims that Microsoft has raised several new pleas in its reply and that they must be rejected as inadmissible pursuant to Article 48(2) of the Rules of Procedure.
- 66 Finally, the Commission submits that the contested decision is based on a number of findings entailing complex technical and economic assessments. The Commission states that, according to the case-law, examination by the Community judicature of such assessments must necessarily be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers (Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECR I-5469, paragraph 13; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 279, and the judgment of 21 April 2005 in Case T-28/03 *Holcim (Deutschland) v Commission*, not yet published in the ECR, paragraphs 95, 97 and 98).
- 67 Microsoft submits that ‘the relevant passages of ... [its] application do contain the essence of the pleas in law and the arguments relied upon’ and points out that, according to the case-law, specific points in the text of the application can be supported by and completed by references to specific passages in the documents attached (order in Case T-56/92 *Koelman v Commission* [1993] ECR II-1267, paragraph 21).
- 68 Microsoft contends that the other objections that the Commission raises against certain annexes attached to the application are not well founded either. Microsoft asserts that it took a deliberate decision to limit the number of annexes so as not to add to the file, that it is under no obligation to submit every document referred to in the footnotes in its annexes, that the Commission has copies of all documents lodged during the administrative proceedings and that there cannot be any dispute over its right to provide information to its experts.
- 69 Finally, Microsoft submits that the Community judicature does not refrain from conducting searching inquiries into the soundness of the Commission’s decisions, even in complex cases.

II – *The application for annulment of the contested decision*

A – *Refusal to provide interoperability information and to allow its use*

- 70 In connection with this first issue, Microsoft relies on a single plea in law alleging infringement of Article 82 EC. That plea falls into three parts. In the first part, Microsoft claims that the criteria for obliging an undertaking in a dominant position to grant a licence, as set out by the Community judicature, have not been met in the present case. In the second part, Microsoft claims that Sun has not asked it for the technology which the Commission has ordered it to disclose.

Lastly, in the third part, Microsoft contends that the Commission fails to take proper account of the obligations imposed on the Communities by the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property ('TRIPS Agreement').

1. Preliminary observations

a) Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

- 71 Microsoft makes a number of observations on the technical and factual context to the contested decision.
- 72 First, it states that it began to develop a server operating system in the early 1990s, a period in which the server computer market was 'traditionally dominated' by integrated firms, such as IBM and Sun, both of which manufacture expensive servers and supply equally expensive server operating systems that run only on their own servers. Microsoft observes that there are several other work group server operating systems presently on the market, some of which were available before it released its first Windows server operating system in 1992. It cites, more specifically, the following products: Novell's NetWare 6.5, Sun's Solaris, Santa Cruz Operation's UNIXWare 7.1.3 Business Edition), various versions of Linux (including RedHat's Enterprise Linux ES), Apple's Macintosh OS X and IBM's OS/2 Warp Server. Microsoft claims that the Commission does not contend in the contested decision that any of these various products is likely to exit the market in the foreseeable future, and that data on 'usage shares' confirm that those products remain 'viable competitors'.
- 73 Second, Microsoft complains that in the contested decision the Commission makes no reference to the efforts it has made to ensure interoperability of its Windows server operating systems with non-Microsoft server operating systems.
- 74 In that respect, it starts by explaining that, as a relatively new entrant into the server operating system market, its commercial success in that area has depended on its ability to develop products that work well with non-Microsoft server operating systems that are already present on the market. Accordingly, Microsoft designed its Windows server operating systems from the outset to interoperate with non-Microsoft server operating systems. Over time, Microsoft has progressively included support for more standard communications protocols in its server operating systems and invested in the creation of add-on products, such as Windows Services for UNIX and Windows Services for NetWare, which make it easier for customers to use Windows server operating systems along with non-Microsoft operating systems.
- 75 Next, Microsoft refers to the existence of five methods for ensuring interoperability between its Windows server operating systems and those of its competitors.

- 76 (1) Microsoft refers to the possibility of using standard communications protocols such as TCP/IP (Transmission Control Protocol/Internet Protocol) and HTTP (Hyper Text Transfer Protocol). It states that those protocols are not proprietary to any vendor and that it has been a major contributor to their development. It adds that it has added to its Windows server operating systems support for more and more standard communications protocols.
- 77 (2) Microsoft states that it is possible to add a software code to a Windows Client PC or server operating system to permit it to communicate with a non-Microsoft server operating system using communications protocols specific to that server operating system. It claims to facilitate this 'approach' by providing a comprehensive set of system services, accessible to its competitors via published APIs, which they can use to develop the necessary software code, commonly referred to as a 'redirector'.
- 78 (3) Microsoft refers to the further possibility of adding a software code to a non-Microsoft server operating system to permit it to communicate with a Windows Client PC or server operating system using communications protocols specific to Windows operating systems. Microsoft cites, as an example of that 'approach', SAMBA, an open source software product that runs on UNIX or Linux server operating systems and communicates with Windows Client PC operating systems or Windows Work Group operating systems using reverse-engineered versions of Microsoft's communications protocols.
- 79 (4) Microsoft explains that a single server operating system can be used as a 'bridge' between two different sets of communications protocols, for example, between NFS and CIFS/SMB. With just one such 'bridge' in a heterogeneous computing network, it is possible for a large number of Windows Client PC and server operating systems to communicate effectively with an equally large number of non-Microsoft server operating systems without adding software code to any of the products.
- 80 (5) Microsoft refers to the possibility of adding a 'block' of software code to all of the client PC and server operating systems in a network and achieving interoperability by means of communications that take place among those 'blocks' of software code. It states that middleware products such as IBM's MQ Series or application products such as SAP's R/3 use this approach. Thus different server operating systems do not need to communicate with one another directly since the communications occur in middleware products or applications.
- 81 Lastly, Microsoft points to a number of considerations concerning 'levels of interoperability'.
- 82 Microsoft states (1) that 'interoperability occurs along a continuum' and that 'it is not an absolute standard'. Microsoft refers, in that regard, to a report compiled by two IT experts in which they explain the concepts of 'tight' and 'loose' coupling

and why efforts to achieve ‘tight’ coupling among software products from different vendors have failed (Annex A.9.2. to the application). Those reasons are both technical and commercial in nature.

- 83 (2) Microsoft points out that, during the administrative procedure, it produced 50 statements from undertakings in all industry sectors, public and private, and from the various Member States at that time. Those undertakings attest in their statements that a high level of interoperability exists between Windows Client PC and server operating systems, on the one hand, and non-Microsoft server operating systems on the other, as a result of using methods already available in the market. Microsoft cites, more specifically, the case of [Robert Bosch GmbH] [Confidential], which stated that it used server computers running Linux and SAMBA to provide work group services to Windows Client PC operating systems. Similarly, Siemens AG stated that it used server computers running NetWare to provide the same services to such operating systems. Microsoft adds that the three surveys conducted by Mercer Management Consulting (‘Mercer’), which it also submitted during the administrative procedure, confirm that enterprise customers do not choose server operating systems based on concerns about interoperability with Windows Client PC and server operating systems.
- 84 (3) Microsoft, referring to recitals 667 to 687 of the contested decision, claims that the Commission recognises there that a number of methods exist to enable interoperability in heterogeneous networks containing non-Microsoft server operating systems and Windows Client PC and server operating systems. Many of these methods were developed without access to the communications protocols covered by the contested decision. In other words, according to Microsoft, ‘[those methods] disprove the assertion that [its] proprietary communications protocols are essential to achieving interoperability’. It adds that two server operating systems can interoperate in the sense of exchanging information with one another or providing services to one another without the need for the two products to be exactly the same. According to Microsoft, the concept of ‘interoperability’ should be distinguished from the concepts of ‘cloning’ or ‘duplication’.
- 85 In its reply, Microsoft claims that the remedy provided for in Article 5 of the contested decision is not consistent with the standard of interoperability which the Commission used in the contested decision to assess alternative means of ensuring interoperability between the operating systems of different suppliers. For the purpose of that assessment, the Commission envisaged interoperability as being the ability of competitors to make their products behave exactly like Windows server operating systems, which would have required far more extensive disclosure of information than that referred to in Article 5 and, in particular, disclosure of information concerning the internal workings of those operating systems (recitals 669 and 679 of the contested decision). Microsoft raises the point that, at the interim measures hearing, the parties granted leave to intervene in support of the form of order sought by the Commission stated, however, that they had no interest in the latter information and that, in its defence, the Commission

made clear that it did not intend that Microsoft's competitors should be able to 'clone' the file and print services and the user and group administration services supplied by Windows server operating systems. Microsoft also states that, for the purpose of complying with the contested decision, it has delivered to the Commission a copy of the specifications of its communications protocols and that those specifications will enable its competitors to copy certain 'features' that it has developed. By way of example, it states that, by having access to the DRS protocol (Directory Replication Services), third parties could be able to reverse engineer other parts of the Windows server operating system that use Active Directory.

- 86 Third, Microsoft relies on the fact that its communication protocols are technologically innovative and are covered by intellectual property rights.
- 87 (1) Microsoft relies on a number of considerations in order to show that its communication protocols are innovative.
- 88 (i) Microsoft gives details about the 'nature of that technology'. It explains that the communications protocols are not mere interfaces but enable computers connected via a network to exchange information to accomplish predefined tasks. They are often developed in connection with the performance of specific tasks by server operating systems and are intimately linked with the way in which those tasks are performed. The grant of communications protocol licences thus necessarily entails providing competitors with information about the internals of the server operating systems with which that communications protocol is used.
- 89 (ii) Microsoft claims that the directory service is a key competitive feature in the work group server operating systems market. It refers, in that context, to the innovative nature of the directory service included in Windows 2000 Server, called Active Directory. Microsoft claims that the Windows server operating systems offer the best distributed directory service, inter alia because of the innovative communications protocols that it has designed.
- 90 (iii) Microsoft refers to a document drawn up by Mr Lees, a software designer, contained in Annex C.4 to the reply, in which he describes the innovative aspects of one of the protocols used by Active Directory (the DRS protocol) which Microsoft is required to supply to its competitors pursuant to the contested decision. In that document, Mr Lees also gives a succinct description of the innovative aspects and the commercial value of the other relevant communication protocols.
- 91 (iv) Microsoft states that it has a large number of engineers and significant financial resources devoted to the task of developing new and improved communications protocols. It submits that requiring it to license specifications for its communications protocols to competitors would deprive it of the benefits of its research and development efforts and would reduce the incentive, both for itself

and its competitors, to invest in the design of new and improved communications protocols. It refers in that respect to Section D of a report attached as Annex A.19 to the application.

- 92 (2) Microsoft raises a number of considerations in support of its argument that its communication protocols are protected by intellectual property rights.
- 93 (i) Microsoft states that its communication protocols are covered by patents or patent applications.
- 94 In that respect, Microsoft maintains, first of all, that the design of new and improved communications protocols is an important aspect of competition in the server operating system market and that the innovative aspects of communication protocols may be patented.
- 95 Next, Microsoft refers to the fact that its communications protocols are protected by patents granted in the United States and in Europe. More specifically, it states that it has obtained more than 30 patents for its communications protocols in the United States and at least three patents for the communications protocols covered by the contested decision in Europe (namely patents ‘EP 0661652’, ‘EP 0438571’ and ‘EP 0669020’). In addition, another twenty patent applications are pending in the United States, as are two in Europe (in its reply, Microsoft states that one of its two applications has since been granted, namely patent ‘EP 1004193’). Moreover, Microsoft is planning to apply for ‘some 130 European patents relating to Windows server operating systems’. It claims that it itself informed the Commission of the existence of patents covering its communication protocols at the hearing in November 2003.
- 96 Lastly, Microsoft, relying on two opinions by Mr Knauer (Annex A.21 to the application and Annex C.6 to the reply), a patent attorney, states that Article 5 of the contested decision imposes the compulsory grant of patent licences. Microsoft adds that, according to recital 1002 of the contested decision, ‘the disclosure order should apply in a prospective manner to future generations of Microsoft’s products’ and concludes from this that the scope of the compulsory grant of licences will expand over time and that the remedy in question applies ‘in perpetuity’. Every European patent that Microsoft obtains for the communications protocols covered by the contested decision would automatically become subject to compulsory licensing.
- 97 Microsoft adds that obliging it to license its communications protocols to competitors has the effect of denying it the right to reserve to itself the exploitation of its inventions for the fixed period of time provided by law, as well as the right freely to determine whether and to whom it wishes to grant a licence.
- 98 (ii) Microsoft relies on the fact that the specifications for the ‘server-to-server’ communications protocols which it must design and disclose to its competitors pursuant to the contested decision are copyrighted. Microsoft claims that requiring

it to design specifications for its communication protocols and license those specifications will have the effect of enabling its competitors to 'clone' the aspects of Windows server operating systems to which those communications protocols relate, namely file and print services and user and group administration services.

- 99 In its reply, Microsoft considers the question of copyright protection from two separate perspectives.
- 100 As a first point, Microsoft refers to 'forced creation and publication'. It claims that it would not have created the specifications in question if it had not been ordered by the contested decision to do so. It adds that, like any copyright holder, it has the exclusive right to authorise the first publication or disclosure of works such as those specifications and submits that, in the present case, it would not have conferred that right on its competitors even if those specifications had existed. It refers, in that regard, to an opinion of Mr Meijboom in Annex C.7 to the reply and to a table entitled 'First Publication Right and Right of Disclosure in the Member States' Copyright Acts' in Annex C.2.2 to the reply.
- 101 As a second point, Microsoft raises the question of the 'adaptation or alteration of copyright works'. It states that it is apparent from Article 4 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) that the author of a computer program has the exclusive right to control the reproduction of that program by any means and in any form, in part or in whole, as well as the translation, adaptation, arrangement and any other alteration of that program and the reproduction of the results thereof. Microsoft claims that, as a result of the contested decision, it is forbidden to assert that exclusive right against those implementing the specifications, regardless of how closely their products will, as an inevitable result, reproduce the detailed 'design' content of Windows server operating systems and of the specifications themselves.
- 102 Microsoft claims that if competitors holding licences use the specifications in question to make their server operating systems interoperate with the portions of Windows server operating systems that provide 'work group' services, they will not create a 'distinct work'. Using those specifications, they could make their product 'talk like' Windows server operating systems only if that product conformed in numerous respects to the detailed design of the computer programs revealed by those specifications. Microsoft adds that licensees will need to follow carefully the instructions in the specifications, conforming to the detailed design of the relevant portions of Windows server operating systems.
- 103 Furthermore, Microsoft claims that the Commission concedes that copyright protection goes beyond mere literal copying. Relying on the wording of Article 4(b) of Directive 91/250, Microsoft adds that prohibited copying includes the translation of a computer program, or part thereof, into a different programming language. It concludes that it cannot seriously be denied that copying the detailed

design that Windows server operating systems use to provide ‘work group’ services constitutes copyright infringement. In support of its arguments, Microsoft refers to an opinion of Mr Prescott QC (Annex C.8 to the reply).

- 104 (iii) Microsoft claims that the communication protocols are valuable trade secrets and that it discloses its client-to-server communication protocols only by means of licensing agreements which provide for an obligation of confidentiality.
- 105 In its reply, Microsoft emphasises that trade secrets are a form of intellectual property and states that their protection is a matter of national law. It claims that the Commission does not dispute that the specifications for communications protocols that Microsoft is required to create are protected as trade secrets.
- 106 The finding contained in recital 36 of the contested decision that specifications for software products are generally not made available to the public by commercial software vendors such as Microsoft confirms, moreover, that those specifications often constitute trade secrets. In addition, in the District Court’s judgment of 1 November 2002, the communications protocols in question are clearly viewed as ‘protected intellectual property’.
- 107 Moreover, Microsoft contends that the Commission appears to support the idea that the harm that an undertaking suffers where it is forced to reveal a trade secret is less grave than that which it suffers where it is ordered to allow infringement of its patents and copyrights. However, that idea is not based on any precedent in Community law.
- 108 Lastly, Microsoft submits that the Commission may not rely on Article 6 of Directive 91/250. That provision does not change national law with respect to the recognition of trade secrets, or ‘the [Commission’s] duty under Community law to respect the industrial property interests of private parties when applying the competition rules’.

b) Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

- 109 As a preliminary point, the Commission recalls the definition given to ‘Interoperability Information’ and ‘Protocols’ by Article 1(1) and (2) of the contested decision. It explains that that decision requires Microsoft to provide ‘technical documentation’, called ‘specifications’, which describes in detail the ‘Protocols’. The Commission stresses that it is important to distinguish this technical documentation from the source code of Microsoft’s products. A competitor which wants to develop a work group server operating system that understands Microsoft’s protocols will have to write source code in its product that enables the protocol specifications to be implemented. In implementing the same protocol specifications, two programmers would not write the same source code and the performance of their programs would be different (recitals 24, 25, 698 and 719 to 722 of the contested decision). From that point of view, the

protocols could be compared to a language in which the syntax and vocabulary are the specifications, inasmuch as the mere fact that two persons learn the syntax and vocabulary of that language does not mean that they will use the language in the same manner.

- 110 The Commission then comments on Microsoft's observations on the technical and factual background to the contested decision.
- 111 The Commission takes the view, first, that Microsoft's description of the factual background is misleading in several respects. In particular, it criticises Microsoft's argument that the fact that there are several other work group server operating systems on the market shows that competition has not been eliminated. The Commission states that most of the costs faced by vendors on the software market are linked to the development of the product and not to the quantities sold. The fact that a competitor continues to offer its product for sale does not therefore mean in itself that that product represents a 'viable competitive constraint'.
- 112 Second, the Commission takes issue with Microsoft's arguments regarding the efforts it has made to ensure interoperability of its Windows server operating systems with non-Microsoft server operating systems.
- 113 The Commission states that Microsoft does not quantify its alleged increasing reliance on industry standards and that recitals 236 to 272, 669 and 670 of the contested decision describe in detail Microsoft's conduct of embracing open industry standards and extending them in a 'proprietary fashion', thereby making reliance on those standards unsuitable for competitors who wish to achieve viable interoperability.
- 114 As regards the products called Windows Services for UNIX and Windows Services for NetWare, the Commission refers to recital 281 of the contested decision and states that they are not solutions allowing interoperability between the new version of UNIX or NetWare and the 'Windows domain architecture'.
- 115 Next, the Commission recalls that, in the contested decision, it already examined the five alternative methods for ensuring interoperability relied on by Microsoft and demonstrated that they do not constitute 'viable substitutes' to the disclosure of the interoperability information at issue. It refers more particularly to recitals 669 and 687 of the contested decision and states that the third method and the 'bridge' referred to by Microsoft depend on the availability of that information, and that the fourth and fifth methods are mere variants of the second and third methods.
- 116 Lastly, the Commission also criticises the considerations put forward by Microsoft in relation to 'levels of interoperability'.
- 117 The Commission maintains (1) that 'tight coupling' and 'loose coupling' are not clearly defined technical terms, especially in the field of operating system

software. It disputes in any event that the ‘tightly coupled interface details’, referred to in the report compiled by two IT experts contained in Annex A.9.2 to the application, are innovative.

- 118 (2) As regards the client statements produced by Microsoft during the administrative procedure, the Commission recalls that they have already been discussed in recitals 357, 358, 440 to 444, 511, 513, 595, 602, 628 and 707 of the contested decision. The Commission observes that those statements, dating back to 2000 and 2001, relate essentially to companies that had to a large extent embraced a Windows standard for their work group network. As regards the statement made by [Robert Bosch] [Confidential], that statement is wrong to the extent that that undertaking (i) has a substantial proportion (20%) of non-Microsoft client PCs, (including ‘growing numbers of Linux workstation operating systems’), (ii) uses LINUX to transfer files between ‘UNIX clients and Windows servers’ and (iii) stated, in reply to two requests for information from the Commission, that it was using its ‘security file/print and email servers on Windows 2000 (50%) and Windows NT4 (50%)’. As regards the statement made by Siemens, the Commission submits that it does not help Microsoft’s case. It points out that Siemens refers not only to NetWare, but also to Banyan Vines, to LINUX, to OS/2, to Solaris and to Windows and makes clear that Siemens is planning ‘to deploy Windows 2000 in its computing environment’, that Siemens ‘is deploying Windows 2000 Server mainly for file and print services’ and that it ‘is also deploying Windows 2000 mainly as a replacement for Windows NT server and NetWare’. Moreover, in response to the Commission’s requests for information, Siemens gave the following information on the servers that are used to provide security, file and print services in its IT network: ‘Security: up to 2,000 Domain controllers running Windows NT or Windows 2000 for authentication’; ‘File and print: up to 3,000 servers running Windows NT or Windows 2000’. As regards the surveys conducted by Mercer, the Commission observes that, in recital 645 of the contested decision, it already stated that those surveys demonstrated precisely the opposite of what Microsoft claims.
- 119 (3) The Commission submits that the arguments advanced by Microsoft by reference to recitals 667 to 687 of the contested decision are representative of the narrow concept of interoperability which Microsoft supports and are inconsistent with Directive 91/250. The Commission does not deny that ‘some interoperability with the Windows domain architecture’ is already possible but points out that the investigation which it conducted led it to the conclusion that the degree of interoperability that can be achieved by competitors through Microsoft’s limited disclosures of information or reverse-engineering is too low to enable them to stay viably in the market. Finally, the Commission emphasises that the contested decision aims to ensure that competitors of Microsoft are able to create products ‘that will function differently, whilst being able to understand the messages conveyed by Microsoft’s relevant products’ and does not seek to ensure that those competitors are able to create exactly the same products as Microsoft’s.

- 120 Furthermore, the Commission claims to have difficulties in understanding Microsoft's argument in relation to the alleged inconsistency between the remedy provided by Article 5 of the contested decision and the standard of interoperability used in that decision to assess alternative means of ensuring interoperability between the operating systems of different suppliers (see paragraph 85 above). The Commission states that, in recitals 669 and 679 of the contested decision, it simply noted that 'the alternatives in question provide a lesser degree of interoperability with Microsoft's dominant products (a lesser ability to access the features of these products), than Microsoft's own offering enjoys'. What is at stake therefore is the degree of interoperability with the Windows environment and not the 'cloning' of Microsoft's products or features thereof. The Commission, referring to recitals 568 to 572, 740 and 749 to 763 of the contested decision, adds that that decision states expressly that it concerns disclosure of interface specifications only. Furthermore, the Commission submits that Microsoft fails to substantiate to the requisite legal standard its claim that, by having access to certain specifications for its communication protocols, third parties could carry out reverse engineering on other parts of the Windows server operating system that use Active Directory.
- 121 Third, the Commission considers Microsoft's claim that its communication protocols are innovative and covered by intellectual property rights.
- 122 (1) It disputes that those communication protocols are innovative.
- 123 (i) In response to Microsoft's assertion that the grant of its communications protocol licences will entail the disclosure of information about the internals of its work group server operating systems, the Commission observes that the contested decision does not intend that competitors of Microsoft should have access to the source code on which those server operating systems are built.
- 124 (ii) The Commission submits that the document drawn up by Mr Lees (Annex C.4 to the reply) does not establish that the secret information at stake includes 'any intrinsically valuable invention'. The Commission refers to two memoranda drafted by its consultant OTR (Annexes D.2 and D.3 to the rejoinder), in which that consultant explains why the ideas and principles underlying those communication protocols are not new. In actual fact, according to the Commission, '[w]hat is probably new and innovative is Microsoft's implementation of these ideas and principles' but this implementation will not be revealed as a result of the contested decision.
- 125 (iii) The Commission contends that Microsoft fails to substantiate its claim that it has a large number of engineers and significant financial resources devoted to the task of developing new and improved communications protocols and does not give any 'quantitative evaluation' thereof. In any event, this does not suffice to demonstrate that the decision entails 'compulsory licensing'. It would still be necessary for Microsoft to establish that, 'in taking advantage of the [contested]

[d]ecision, its competitors would be doing something that, but for Microsoft's authorisation, would infringe an [intellectual property right] held by Microsoft'.

- 126 (2) The Commission comments on Microsoft's argument that its communication protocols are protected by intellectual property rights.
- 127 As a preliminary point, the Commission maintains that, as regards the first part of the single plea in law alleging infringement of Article 82 EC, Microsoft disputes, in its application, only the finding of an abuse consisting in the refusal to provide its competitors with interoperability information and to allow its use. The question to be resolved is therefore whether, at the time when that abuse was committed, the information in question was protected by 'relevant' intellectual property rights and not whether the remedy for that abuse may imply compulsory licensing of intellectual property rights. Most of Microsoft's arguments in support of that part of the plea do not concern that abuse, but the remedy for it.
- 128 (i) As regards the claims made by Microsoft regarding patents, the Commission reiterates, first of all, that nothing in the file shows that the communication protocols in relation to which Microsoft will have to disclose specifications contain innovations. In any event, it has not been established that those innovations have been patented.
- 129 Next, the Commission states that it does not exclude the possibility that, as a result of the remedy provided for in Article 5 of the contested decision, Microsoft might, 'either now or in the future', have to grant patent licences.
- 130 The Commission takes the view, however, that several factors demonstrate that Microsoft's refusal was not justified by considerations related to protection of its patents. Thus, the Commission maintains that it was only at the end of the administrative procedure, a few weeks before the adoption of the contested decision, and at the Commission's insistence, that Microsoft identified one patent (patent EP 0669020), without giving any explanation as to whether implementation of its protocols by another undertaking would necessarily entail exploitation of that patent. The Commission also refers to Samba, an 'open-source' product that implements certain Microsoft communications protocols that the Samba group developers have identified using reverse-engineering techniques. The Commission states, more precisely, that Samba appears to have offered support for SMB 'opportunistic locking' as early as January 1998 (version 1.9.18) and for DFS (Distributed File System) as early as April 2001 (version 2.2.0). As far as the Commission is aware, the Samba group never licensed the patents in question from Microsoft and Microsoft has never argued that the Samba group was infringing these patents. Finally, the Commission notes that patents EP 0661652, EP 0438571 and EP 0669020 were filed before 1996, that is to say, before the release of Windows NT 4.0 Server. According to the Commission, it 'would therefore appear that these three patents had been licensed to AT&T, and through AT&T to Sun and many others, precisely for the purpose of allowing the

implementation of the Windows NT 4.0 protocols in question (in the framework of the "AS/U" program ...). It adds that '[t]his licence grant has survived the termination of Microsoft's disclosure obligation towards AT&T'.

- 131 In that context, the Commission points out that the legality of a measure must be assessed on the basis of the factual and legal circumstances at the time of its adoption, so that, in the present case, account may be taken only of patent EP 0 669 020.
- 132 In addition, the Commission maintains that, insofar as patents constitute subjective exclusive rights, it is for the undertaking claiming that a decision entails a compulsory licence of a patent to demonstrate, during the administrative procedure, that this will be indeed the case. However, Microsoft does not demonstrate that the contested decision entails the compulsory licensing of patents EP 0661652, EP 0438571 and EP 0669020 or, in other words, that a work group server operating system vendor wishing to take advantage of the remedy provided for in Article 5 of the contested decision would have to license one of those patents.
- 133 In that connection, the Commission criticises the opinion of Mr Knauer which is contained in Annex A. 21 to the application. The Commission notes that Mr Knauer had to 'rely on information received from Microsoft in regard to the selection of protocols that fall under Article 5 of the [contested] decision'. Besides the issues which it raises 'from a procedural perspective', that fact also calls in question Mr Knauer's assessment that a competitor implementing the relevant protocols would necessarily infringe Microsoft's patents. According to the Commission, the "methods" covered by the patents at issue may be linked to details that are specific to Microsoft's implementation of the specifications'. The fact that Microsoft's engineers, faced with a specific implementation context, had to implement the specifications by following the patented method does not mean that competitors who face a different implementation context will have to do the same. In addition, it is apparent from a closer examination of Mr Knauer's opinion that it is not obvious that a competitor taking advantage of the implementation of the contested decision would infringe the claims of the three patents at issue. In that respect, the Commission contends, in essence, that that opinion relates to the claims which cover interaction between a PC and a work group server and that those claims are therefore in principle infringed only when a work group server is used in conjunction with a PC. The work group server 'product' as such, when it is not operating with a PC, is not covered by one of those patents. Moreover, when customers use the work group server in conjunction with a licensed Windows PC, they do not infringe the patent claims.
- 134 The Commission asserts that Microsoft's arguments based on patent EP 1004193 are no more relevant. It considers that Mr Knauer's opinion contained in Annex C.6 is not convincing and doubts whether the technology covered by that patent displays novel features.

- 135 As regards Microsoft's argument that it plans to submit 130 [Confidential] European patent applications, the Commission submits that it is speculative, premature and irrelevant for the purposes of assessing the legality of the contested decision. It adds that Microsoft fails to show that any patents which it might be granted will read on the communication protocols referred to in the contested decision.
- 136 (ii) As regards the claims made by Microsoft regarding copyright, the Commission first observes that Microsoft puts forward the argument that the technical documentation that it will have to develop and disclose pursuant to the contested decision is copyrighted. Microsoft does not contend that the contested decision interferes with its copyright over Windows. The Commission also notes that Microsoft does not explain why that decision leads to compulsory licensing of copyright and does not specify which one of the various exclusive rights that copyright law grants to the copyright holder it would have to license.
- 137 Next, the Commission raises a number of issues regarding copyright. It states that the use of information protected by copyright for the purposes of creating a distinct work does not interfere with copyright and that the thirteenth recital in the preamble to Directive 91/250 states that ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright. The Commission adds that there may be specific situations where the legislator considers that copying of a copyright-protected work is necessary in order to obtain the information necessary for creating a distinct work and that this idea underlies Article 6 of Directive 91/250, which constitutes an exception to Article 4 thereof. However, the exception set out in Article 6 of Directive 91/250 and the remedy for the refusal to supply are 'two different matters'. While Article 6 of Directive 91/250 supposes an act incompatible with Article 4 of that directive, namely the 'reproduction' or 'translation' of a computer program by way of 'decompilation', that remedy provides for a mechanism whereby the information necessary in order to achieve interoperability is transmitted in the form of specifications, which precisely avoids 'decompilation'. The Commission adds that '[t]he costs that the competitors will avoid through the [contested] decision are not the research and development costs of building their products, but the costs in material resources and, more importantly, in time, of reverse-engineering the necessary interoperability information'.
- 138 Moreover, without excluding that the specifications could, as such, be covered by copyright, the Commission submits that that does not mean that the use of the information contained in that document, by way of implementation in an operating system, amounts to a violation of copyright. The implementation of a specification is not copying, but leads to a clearly distinct work (recitals 570 and 571 of the contested decision). It states that, contrary to what Microsoft claims, those specifications will not reveal 'the detailed design of the computer programs'.

- 139 Finally, the Commission claims that refusal by Microsoft to disclose the relevant documentation and allow its use 'would not correspond to the essential function of [copyright], in that it would not correspond to the protection of Microsoft's incentives to innovate'. The Commission maintains that Microsoft would never have created the copyrighted work if it had not ordered it do so. It adds that, '[r]efusing to disclose the copyrighted work does not protect the incentive to create the copyrighted work'.
- 140 In its rejoinder, the Commission complains that in its reply Microsoft submitted two new arguments in relation to the question of copyright and asserts that those arguments must be declared inadmissible, pursuant to Article 48(2) of the Rules of Procedure.
- 141 It considers that, in any event, those two arguments cannot be accepted.
- 142 Thus, as regards the alleged 'forced creation', the Commission states that there is no 'right not to produce copyrighted material' in any of the Member States' copyright laws. As regards the exclusive right to authorise the first publication or disclosure of works invoked by Microsoft, the Commission submits that the chart in Annex C.2.2 to the reply cannot be considered adequate justification since it is too imprecise and 'generic' and that Mr Meijboom's opinion in Annex C.7 to the reply is not convincing. On that latter point, the Commission maintains that 'the interpretation that Mr Meijboom outlines is debated and debatable under [Netherlands] law' and that, in any event, there can be no question in the present case of compulsory licensing of the 'exclusive economic right' identified by Mr. Meijboom in paragraph 22 of his opinion since third parties are not going to publish the technical documentation disclosed by Microsoft. The Commission states that, more generally, the contested decision does not permit any third party 'to perform any copyright-relevant act normally reserved to Microsoft'.
- 143 Against that background, the Commission also emphasises that the issue of copyright over the specifications is purely incidental in nature. It explains that central to this case is the requirement on Microsoft to disclose information and to allow its use and that that necessarily entails a document being written.
- 144 As regards the 'adaptation or alteration of copyright works', the Commission claims that the technical documentation which Microsoft must disclose is 'a posteriori documentation of certain aspects of the Windows product' and that it cannot, therefore, be regarded as 'preparatory design material' of a computer program under Article 1(1) of Directive 91/250. It adds that Microsoft's competitors will take from that documentation the 'ideas and principles' conveyed therein and will use them to design software products different from Windows. These ideas and principles, however, are not the fruit of the efforts undertaken to write the technical documentation but were developed first to be used in Windows.

- 145 Still with regard to the question of the 'adaptation or alteration of copyright works', the Commission claims that, in any event, the implementation of the communication protocols at issue is not an act which infringes copyright. It observes that licence beneficiaries will use the ideas and principles conveyed in the technical documentation to build products that use such ideas and principles for the purposes of interoperability, in the same way as they would do had they derived these ideas and principles through lawful reverse-engineering. If the use, by Microsoft's competitors, of the 'ideas and principles' conveyed in the technical documentation disclosed were to be considered a copyright infringement, that would deprive Article 6 of Directive 91/250 of any useful effect.
- 146 The Commission adds that the contested decision does not require Microsoft to provide access to the detailed internal design of Windows server operating systems, since the disclosure is only about interface information and the latter will not be reproduced, arranged or altered, but will be used by third parties to write their own specification-compliant interfaces (recital 1004 of the contested decision).
- 147 Finally, the Commission does not dispute that the translation of a computer program into a different programming language is a restricted act under Directive 91/250. It takes the view that that finding is, however, not relevant in the present case since Microsoft's competitors will not have access to source code written by Microsoft that they could translate into a different programming language. Furthermore, referring in particular to the observations in Annex D.8 to its rejoinder, the Commission calls in question the opinion of Mr Prescott QC contained in Annex C.8 to the reply.
- 148 (iii) As regards trade secrets relied on by Microsoft, the Commission recognises that the information that Microsoft has to disclose pursuant to the contested decision has so far been kept secret from its competitors in the work group server operating system market. On the other hand, the Commission submits that Microsoft's equation between such '[trade] secrets' and intellectual property rights 'created by law' is far from obvious.
- 149 In that respect, the Commission contends, first of all, that case-law on compulsory licensing does not as such apply to trade secrets and that protection of those secrets under national law is normally more limited than that granted for copyright or patents. It claims that trade secret laws, unlike patent and copyright laws, confer no exclusive right on holders of trade secrets and do not enable them to exclude others from using information when it is lawfully obtained.
- 150 The Commission considers that, whilst there may be a presumption of the legitimacy of refusing to license an intellectual property right created by law, by contrast, the legitimacy under competition law of not revealing a 'secret', the existence of which merely results from a unilateral business decision, should be dependent upon the facts of the case, in particular the interests at stake. In the

present case, the secret in question is not valuable because it involves innovation, but because it is in the possession of a dominant undertaking. The Commission repeats that Microsoft has failed to demonstrate that the protocols for which it must disclose specifications 'embody hitherto secret and intrinsically valuable inventions'.

- 151 Next, the Commission asserts that interoperability information does not deserve the far-reaching degree of protection claimed by Microsoft. In the present case, Directive 91/250 indicates that the interest in the protection of the inventive effort underlying software does not entitle the inventor to hinder the use of interoperability information inherent in that software in order to render it effective. The Commission claims that all the information which Microsoft is required to disclose under the contested decision could in theory be discovered through 'decompilation' pursuant to Article 6 of Directive 91/250, in combination with Article 5 thereof (that is not, however, a commercially viable solution for competitors). The information accessed in this way would be equivalent in its informative content to that of the specifications that Microsoft is required to produce. According to the Commission, insofar as such a way of accessing the relevant information is possible, it is highly unlikely that its secrecy could be protected under trade secret laws or at the very least that its protection could be as far-reaching as Microsoft claims. Finally, the Commission submits that the fact that Article 9 of Directive 91/250 provides that its provisions are without prejudice to other legal provisions concerning, in particular, trade secrets, cannot be interpreted as meaning that those legal provisions can apply as such to interoperability information of the type envisaged in Article 6 of that directive. The Commission explains, in that regard, that 'decompilation' envisaged in that article presupposes the existence of information which is kept secret and that, consequently, if an undertaking were to obtain protection against 'decompilation' by invoking trade secret laws, Article 6 would be meaningless and deprived of useful effect.
- 152 Lastly, the Commission claims that the applicant confuses the concept of 'property' with the concept of 'right'. It observes that the fact that trade secrets can be assigned or transferred does not mean that they constitute 'intellectual property'.
- 153 The Commission concludes from all the foregoing considerations that Microsoft fails to establish that the contested decision will result in compulsory licensing of copyright or patents enforceable in law in the EEA. The contested decision is limited to interfering with Microsoft's ability to keep secret certain interoperability information, for which no evidence has been adduced that it embodies innovations, or deserves particular protection. Moreover, it claims that Microsoft's assertion that compulsory licensing of specifications for its communications protocols would reduce incentives to invest in the creation of new and improved communications protocols is wholly unsupported, and is in

particular not supported by Section D of the report attached as Annex A.19 to the application.

2. The first part, alleging that the criteria for obliging an undertaking in a dominant position to grant a licence, as set out by the Community judicature, have not been met in the present case

(a) Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

- 154 Microsoft claims principally that it is the principles laid down in Case C-418/01 *IMS Health* [2004] ECR I-5039 (*'IMS Health'*) which are applicable in the present case.
- 155 In that connection, Microsoft reiterates, first of all, that its communication protocols are technologically innovative and are covered by intellectual property rights and that the contested decision entails compulsory licensing (see paragraphs 86 to 108 above). Microsoft states that, in Joined cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743 (*'Magill'*) and in *IMS Health*, the Court of Justice devoted great care to determining whether the owners of the non-secret information at issue should be compelled to license it to third parties. Microsoft states that the issue of compulsory licensing should be approached with even greater caution when, as in the present case, the material at stake is secret, innovative, the fruit of extensive R&D and of significant commercial value.
- 156 Next, the applicant rejects the Commission's claim that an 'automatic' application of the criteria set out by the Court in *IMS Health* is 'problematic' (see paragraph 205 below).
- 157 In that connection, first, Microsoft interprets the Commission's argument set out in paragraph 206 below as meaning that the Commission is not required to apply the criteria specified in *IMS Health* when considering a compulsory licence of trade secrets in a case involving so-called 'technological tying'. Microsoft takes the view that that argument should be rejected, since Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, upheld on appeal by the Court of Justice in Case C-333/94 P [1996] ECR I-5951 (*'Tetra Pak II'*), on which the Commission relies, concerned contractual tying and price discrimination, neither of which is at issue here. Microsoft adds that in that case the Court of First Instance did not consider the issue of compulsory licensing. Moreover, the trade secrets referred to in *Tetra Pak II* did not concern detailed technical innovations such as those at issue in the present case.
- 158 Second, Microsoft disputes the Commission's argument that the circumstances of this case can be distinguished from those in *IMS Health*.

- 159 (1) In that connection, Microsoft states that *IMS Health* involved strong network effects. The 1860 brick structure created by *IMS Health* was considered to be an industry standard precisely because of such effects.
- 160 (2) Microsoft considers that the claim by the Commission that it disrupted previous levels of supply is wrong both in fact and in law and fails to take account of the principles set out in Case C-7/97 (*Bronner*) [1998] ECR I-7791 '*Bronner*'. It claims that at no time did it license specifications for its communications protocols to Sun or another competing vendor of server operating systems. Microsoft states that it licensed network technology to AT&T in 1994 to enable the development of a product called 'Advanced Server for UNIX' ('AS/U') and that a number of products based on AS/U were created by leading UNIX vendors, including PC NetLink from Sun. It explains that, although it agreed with AT&T in 2001 not to extend the licensing agreement to include new technology, AS/U (and products based on it) remains available. It submits that the fact that it licensed a given technology in this manner to AT&T more than ten years ago cannot oblige Microsoft to license all related technology, including communications protocols, for the indefinite future.
- 161 (3) Microsoft asserts that the Commission did not rely, in the contested decision, on the argument that it infringed the policy aims set out in Directive 91/250 by 'refusing to allow compatibility'. Microsoft submits that nebulous claims about public policy have no bearing on determining when compulsory licensing is appropriate. Microsoft also claims that that directive does not create any affirmative obligation to disclose information and disputes the Commission's analysis of Article 6 of that directive and in particular the claim that '[it] is only actively providing what could otherwise be obtained under ... Directive [91/250]' (see paragraph 137 above). Microsoft states, in that respect, that legitimate decompilation can occur only in very limited circumstances and that, in any event, Sun would have had difficulty satisfying the relevant criteria laid down in Directive 91/250, especially as it was seeking a 'reference implementation' (working software code) for a product not yet on the market. Microsoft adds that, unlike the contested decision, Article 6(2) lays down strict limits on the use which can be made from information obtained by reverse engineering methods.
- 162 (4) Microsoft submits that the Commission's argument that the remedy in question will not enable its competitors to profit from its innovation efforts (see paragraph 208 below) is 'incapable of rational application'. It asserts that, by gaining knowledge about the specifications, licensees will inevitably discover valuable information about the way Microsoft designs its server operating systems. It complains that the Commission offers no standards for determining when such 'free riding' may occur, or 'what bearing that assessment should have on compulsory licensing decisions'.

- 163 Lastly, Microsoft asserts that none of the four criteria for obliging an undertaking to license intellectual property rights, as set out by the Court of Justice in *IMS Health*, has been fulfilled in the present case.
- 164 In that connection, Microsoft submits, first, that interoperability information is not indispensable for performing the activity of a supplier of work group server operating systems. It submits that the contested decision contains an error of law and an error of fact on that point.
- 165 (1) Microsoft submits that the error of law is the fact that the Commission used an inappropriate, extraordinary and absolute standard in order to determine whether the interoperability information is indispensable. It is apparent from recitals 176 to 184 of the contested decision that the Commission takes the view that non-Microsoft server operating systems must be able to communicate with Windows Client PC and server operating systems in precisely the same way that Windows server operating systems do. Microsoft claims that the case-law does not, however, require that such ‘optimal access’ to the market be granted and that a given technology cannot be classified as indispensable if it is ‘economically viable’ - albeit less convenient - for the dominant undertaking’s competitors to develop and market their products without access to that technology.
- 166 In its reply, Microsoft states that the Commission, in its defence, assesses the standard for indispensability on the basis of the degree of interoperability necessary, in its view, to allow competitors to stay viably in the market. In so doing, the Commission obliges dominant undertakings to safeguard the viability of their competitors. Such an approach was rejected by the Court of Justice in *Bronner*.
- 167 Microsoft also claims in its reply that the concept of interoperability used by the Commission in recitals 666 to 687 of the contested decision supposes ‘virtual identity’ between Windows server operating systems and competitor operating systems. Referring next to recitals 181 to 184 to the contested decision, Microsoft asserts that the Commission justifies its position that a ‘virtually identical’ level of interoperability is required for competitors to stay viably in the market by arguing that access to specifications for Microsoft’s communications protocols might enable them to avoid ‘having users log on twice’. It submits that that justification is inadequate since (i) many vendors already provide ‘single sign on’ solutions, (ii) having to ‘log[...] on twice’ is clearly an ‘alternative solution’ (even if it is less advantageous) and (iii) the remedy at issue goes much further than is necessary to address this problem.
- 168 (2) Microsoft contends that the contested decision is vitiated by an error of law since the Commission failed to take into account that interoperability already exists on the market, as proved by the prevalence of heterogeneous computing networks containing both Windows server operating systems and non-Microsoft server operating systems in undertakings in Europe.

- 169 Microsoft states that, during the administrative procedure, it submitted reports by experts in computer science describing 'the ways in which interoperability could be achieved in computing networks'. It adds that responses to the Commission's requests for information confirm that interoperability among different types of operating systems is common in computing networks in Europe. Microsoft states that 47% of the companies which responded to those requests for information indicated that they used non-Microsoft server operating systems to provide file and print services to Windows Client PC operating systems. Similar evidence exists with regard to user and group administration services. In addition, it is apparent from the three surveys carried out by Mercer that enterprise customers do not feel constrained in their choice of server operating systems by concerns about interoperability.
- 170 Microsoft reiterates that the five methods described in paragraphs 76 to 80 above ensure interoperability between different operating systems. The evidence gathered by the Commission during the administrative procedure establishes that these methods work in practice for Linux as well as other work group server operating systems. Microsoft states that, contrary to what the Commission implies, Linux has not left the market for server operating systems but that, on the contrary, it has continued to increase market share in that area without having had Microsoft's communication protocols. Referring to Sections D and E of a report compiled by three experts (Annex C.11 to the reply), Microsoft adds that Linux products will continue to progress to the detriment of Windows server operating systems. Microsoft further states that Linux is widely acknowledged to be a serious competitor on the market for server operating systems and that the top ten vendors of servers costing less than USD 25 000 offer work group servers running Linux. Microsoft also points out that the vast majority of companies which has responded to Mercer's first survey stated that Windows 2000 Server had increased interoperability rather than reduced it.
- 171 Microsoft criticises the fact that, in recital 281 to the contested decision, the Commission dismissed a number of 'existing interoperability solutions' on the basis that they could also be used to migrate from non-Microsoft server operating systems to Windows server operating systems. In that connection, Microsoft maintains that those solutions enable enterprise customers to use Windows server operating systems with non-Microsoft server operating systems and that migration paths can be used to move in both directions, since an enterprise customer which has moved from a non-Microsoft server operating system to a Windows server operating system can also 'move in the other direction'.
- 172 Microsoft also criticises the Commission for failing to show, in the contested decision, that reverse engineering of its communications protocols is either 'technically or economically infeasible'. The Commission focused on the purported difficulty of reverse engineering all of the thousands of APIs exposed by Windows (recitals 454, 455 and 685 to the contested decision). That issue is, however, irrelevant in the present case. Microsoft asserts that a number of facts

demonstrate that reverse engineering of its communication protocols is possible with the sufficient resources. Microsoft observes, in that respect, that RealNetworks successfully reverse engineered the communications protocols used by Windows server operating systems to deliver content encoded in Windows Media formats to Windows Client PC operating systems. Microsoft adds that it is apparent from recitals 242, 295 and 296 to the contested decision that the Samba group has reverse engineered the communications protocols that are used by Windows NT 4.0 Server to provide file and print services and user and group administration services to Windows Client PC operating systems. In addition, that group is in the process of reverse engineering the communications protocols used by more recent Windows server operating systems to provide those same services. Microsoft submits that the Samba group would not be engaged in such efforts if they were technically or economically infeasible.

- 173 Finally, Microsoft, referring to the settlement which it agreed with Sun in April 2004, observes that, to date, Sun has still not requested from it access to any of the specifications for its protocols that the contested decision deems indispensable [Confidential]. Microsoft also maintains that Novell has never sought Microsoft's protocols and that its NetWare product provides file and print services and user and group administration services to Windows PC operating systems using its own suite of communications protocols. Microsoft adds that Novell never took a licence from AT&T of the AS/U product and that it did not ask for a licence in respect of the specifications for Microsoft's communications protocols when it concluded a settlement with Microsoft on 8 November 2004.
- 174 Second, Microsoft points out that in *IMS Health*, the Court of Justice held that the refusal by an undertaking in a dominant position to allow access to a product protected by an intellectual property right constitutes an infringement of Article 82 EC only where it is established that that refusal prevents the emergence of a new product on a secondary market for which there is unmet consumer demand. Microsoft observes that the Court stated, in paragraph 49 of that judgment, that that refusal may be regarded as abusive only where the undertaking which requested the licence does not intend to limit itself essentially to duplicating the goods or services already offered on the secondary market by the owner of the intellectual property right, but intends to produce new goods or services not offered by the owner of the right and for which there is a potential consumer demand.
- 175 Microsoft submits that, in the present case, it has not been established that its alleged refusal to provide its competitors with interoperability information and to allow its use prevented the emergence of a new product for which consumer demand remained unmet.
- 176 Microsoft asserts that the contested decision does not identify any new product that its competitors would develop using its communications protocols. The Commission claimed merely that its competitors 'could use the disclosures to

make advanced features of their own products'. Microsoft observes that there was moreover not the slightest indication, either in Sun's letter of 15 September 1998 or in Sun's complaint of 10 December 1998, that Sun intended to use the technology in question to create something other than a work group server operating system. In reality, the Commission's objective is that Microsoft's communication protocols be used by other suppliers to create server operating systems which enter into direct competition with its products by merely reproducing their functionalities.

- 177 Microsoft disputes the Commission's assertion that, for a product to be defined as new, it is sufficient that it contains substantial elements resulting from the licensee's own efforts. Microsoft states in that respect that '[the] [a]ddition of a feature taken from a competitor's products can hardly be viewed as the creation of a new product'.
- 178 Moreover, Microsoft submits that the Commission's claim that the alleged refusal has reduced innovation is erroneous (see paragraph 235 below). It refers to Section C of a report drawn up by experts, contained in Annex C.9 to its reply. Microsoft asserts that the contested decision mentions 'follow-on innovation' only in recital 696 and that the finding in that recital that competitors in the past developed innovative products based on 'the license of AS/U from AT&T' is incorrect. Microsoft reiterates that Novell never used AS/U. It recognises that Sun and 'several other vendors that sold servers with their own server operating systems (typically a variant of UNIX)' did obtain such a licence, but states that their sales of work group servers were always modest. In reality, it is the compulsory licensing provided for in the contested decision which is likely to reduce innovation, since Microsoft will have less incentive to develop technology if it is required to make it available to its competitors. In support of that claim, Microsoft refers to Section B of the aforementioned report and to the 'empirical evidence' referred to in Section D of that report.
- 179 Microsoft also disputes that its alleged refusal has an adverse effect on consumers. It states that the Mercer survey relied on by the Commission (see paragraph 239 below) relates to products currently on the market and that it is therefore irrelevant to the question of whether that refusal has prevented the emergence of new products for which there is unmet consumer demand. Moreover, none of the Mercer surveys shows that Microsoft lags behind its competitors.
- 180 Lastly, Microsoft claims that, in the contested decision, the Commission fails to demonstrate that there is any demand for products that might be created using the specifications for its communications protocols.
- 181 Third, Microsoft submits that its alleged refusal is not likely to exclude all competition on a secondary market, i.e. in this case the work group server operating system market.

- 182 In support of that claim, (1) Microsoft raises a number of issues concerning 'the proper legal standard and standard of proof'.
- 183 In that respect, Microsoft points out that, in recital 589 of the contested decision, the Commission merely states that 'Microsoft's refusal puts 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'. Microsoft submits that, by referring to a mere 'risk', the Commission applies a far more permissive standard than that laid down by the case-law, which requires a likelihood, that is a high probability, that effective competition will be eliminated. It asserts that, contrary to what the Commission contends, the words 'risk', 'possibility' and 'likelihood' do not have the same meaning. In cases involving compulsory licensing of intellectual property rights, the Court of Justice has always asked whether the refusal in question was 'likely to eliminate all competition', and has required in that connection 'something close to certainty'.
- 184 Microsoft adds that the reference in the contested decision to Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, and Case 311/84 *CBEM* [1985] ECR 3261 is misplaced. Those cases did not involve a refusal to license intellectual property rights. Moreover, in each of those cases, the prospect of eliminating competition was, in the absence of alternative sources of supply, immediate and real.
- 185 (2) Microsoft contends that the proposition that competition in the work group server operating systems market could be eliminated by its refusal to disclose to its competitors its communication protocols is contradicted by market conditions. In this connection, it reiterates that it is apparent from the file that it is common for undertakings in Europe to have heterogeneous computing environments composed of Windows Client PC and server operating systems and non-Microsoft server operating systems. It is apparent from the three Mercer surveys that enterprise customers make purchasing decisions with regard to server operating systems on the basis of a range of criteria such as reliability, scalability and applications compatibility, and that concerns about interoperability with Windows Client PC operating systems are not a determinative consideration.
- 186 Microsoft also observes that, six years after the alleged refusal occurred, there are still multiple competitors on the work group server operating systems market, namely, in particular, IBM, Novell, RedHat and Sun and several other distributors of Linux. It reiterates that Linux entered the market recently and is experiencing strong growth. It is not disputed that Linux products, either alone or in combination with Samba products or Novell's new Nterprise server software, compete directly with Windows server operating systems in performing a wide range of tasks, including the provision of file and print services and user and group administration services to Windows Client PC operating systems. It observes that International Data Corporation (IDC), which describes itself as the premier global market intelligence and advisory firm in the information

technology and telecommunications industries, predicted that there was no risk of competition being eliminated. It is clear from IDC's projections that Microsoft's share of the work group server operating system market running on servers costing less than USD 25 000 will remain virtually flat over the period from 2003 to 2008, whereas Linux's market share will double over the same period.

- 187 (3) Microsoft criticises the Commission's definition of the market and the manner in which it has assessed its position on the market.
- 188 It submits that the competition is even 'more vigorous' if account is also taken, when defining the work group server operating system market, of tasks other than the provision of file and print services and user and group administration services which Windows server operating systems are able to perform. It submits in that respect that those server operating systems are, to a large extent, used to perform tasks which are not covered by the Commission's definition of the market. Thus the same Windows server operating system falls within the market in question when it is providing file and print services to client PC operating systems and is outside that market when it is providing proxy services or firewall services to those same operating systems.
- 189 Microsoft claims that '[n]o one in the industry uses the term "work group server" in the way the Commission has used it to define [the relevant market]' and that when 'industry observers' occasionally do refer to work group servers, they generally include in that category servers that perform a wide range of tasks, including Web, database and application serving. Furthermore, none of the major server vendors active on the market sells work group servers limited to performing the tasks identified by the Commission. Microsoft adds that there is not the slightest price difference between copies of Windows Server 2003 used to provide work group services and those used to provide other types of services. The Commission's definition of the market is therefore 'artificially narrow'. Microsoft states that, on the server operating systems market generally, it has approximately 30% market share. To substantiate those various claims, Microsoft relies inter alia on two analyses contained in Annexes A.19 and A.23 to the application.
- 190 In its reply, Microsoft contends that the explanations put forward by the Commission in the defence to justify its market definition are erroneous. It maintains, first of all, that vendors do not charge different people different prices for the same server operating system edition depending on how they will use it. Next, it states that server operating systems considered by the Commission to be 'work group server operating systems' are not 'optimised' to provide work group services. It is thus apparent from the IDC data used by the Commission to calculate market shares that, with the sole exception of Novell NetWare, 'these operating systems spend far more time devoted to non-work group tasks than to work group ones'. Finally, it submits that '[t]he cost of modification in many cases would be zero'. By way of example, it states that if Red Hat wished to modify its Red Hat Enterprise Linux AS operating system, which is not covered

by the Commission's market definition, to recreate the Red Hat Enterprise Linux ES operating system, which the Commission considers does belong to the relevant market, Red Hat needs only to disable certain features.

- 191 As regards further the issue of the definition of the relevant market, Microsoft refers also to the experts' opinion in Annex C.12 to its reply.
- 192 Microsoft also criticises the method used by the Commission to calculate market shares, which consists in taking into consideration only the time devoted by server operating systems to performing work group tasks and only sales of server operating systems costing less than USD 25 000. That leads *inter alia* to the absurd result that 'a copy of an operating system is counted as both inside and outside the market, depending on the tasks it is performing at any given time' and it gives 'no relevant information about dominance'.
- 193 Fourth, Microsoft claims that its refusal complained of was objectively justified by the intellectual property rights which it holds over the technology concerned. It observes that it invested significantly in the creation of its communications protocols and that the resulting commercial success of its products is the rightful reward for that investment. The technology in question is the fruit of its own research and development, is secret and of high value, and contains significant innovation. It adds that a firm's desire to prevent competitors from using its technology to compete against it is a generally accepted justification for refusing to make that technology available.
- 194 Microsoft claims that, in the present case, the Commission rejected that justification by applying a new standard which is legally defective and clearly departs from the standards previously recognised by case-law. The Commission took the view that a refusal to make available information protected by intellectual property rights constitutes an infringement of Article 82 EC if, on balance, the positive impact on innovation in the whole industry outweighs the negative impact on the dominant undertaking's incentive to innovate (recital 783 of the contested decision).
- 195 Microsoft submits that that balancing test advocated by the Commission also has the effect that dominant undertakings will have less incentive to invest in research and development because they will have to share the fruits of those efforts with their competitors. It contends that intellectual property rights encourage the holders of such rights to continue innovating, whilst at the same time encouraging competitors to engage in their own innovative activity to avoid 'being left behind'. Microsoft adds that its competitors will no longer have any incentive to create their own technology.
- 196 Against that background, Microsoft disputes the relevance of the Commission's references to the United States Settlement and the settlement agreed with Sun (see paragraph 272 below).

- 197 As regards the United States Settlement, Microsoft points out that it requires it to license communications protocols implemented in Windows Client PC operating systems for the sole purpose of their implementation in server software ('client-to-server' communication protocols). By contrast, the contested decision requires Microsoft to license its 'server-to-server' protocols so they can be implemented in directly competing server operating systems. In addition, whilst the contested decision is open-ended, Microsoft's obligations under the United States settlement are limited to a five-year term. Economically, one retains a greater incentive to continue to develop technology if, after a fixed period of time, one will again be entitled to exclusive use of improvements to that technology.
- 198 As regards the settlement agreed with Sun, Microsoft observes that it provides for reciprocal commitments to share technology and intellectual property rights on negotiated terms for a period limited to six years. By contrast, under the contested decision, licensees cannot be chosen freely by Microsoft and do not grant any reciprocal licence, since the royalties and other licensing terms are subject to regulation by the Commission, and Microsoft's compulsory licensing obligations '[would] extend indefinitely into the future'.
- 199 Microsoft also criticises the amorphous and unpredictable nature of the new test, stating that the Commission provides no guidance for an undertaking in a dominant position such as Microsoft to assess 'whether preserving its incentives to innovate can justify a decision to retain intellectual property for its own use'. In particular, the contested decision offers no guidance as to how that test has been applied in the present case or how it should be implemented in the future. The file and the contested decision contain no explanation about the positive or negative impacts on innovation that might result from compulsory licensing of Microsoft's communications protocols or how those impacts have been assessed and balanced in the present case.
- 200 Fifth, Microsoft notes that, at paragraph 577 of the contested decision, the Commission states that 'Microsoft's refusal to supply Sun is part of a broader conduct of not disclosing interoperability information to work group server operating system vendors'. Microsoft submits that the pattern of conduct thus attributed to it – which amounts to 'applying on a non-discriminatory basis a policy that virtually all technology companies adopt to protect the fruits of their research and development efforts' – cannot constitute an 'exceptional circumstance' that could justify compulsory licensing.
- 201 In the alternative, Microsoft claims that if it were to be considered that no intellectual property right was in issue in this case, the latter should be examined in the light of the criteria set out in *Bronner*.
- 202 Microsoft claims that in that judgment the Court of Justice considered that the refusal by an undertaking holding a dominant position on a given market to supply to its competitors goods or services was abusive only to the extent that (1) those

goods or services are indispensable to a competitor's business, (2) that refusal is likely to eliminate all competition on a secondary market and (3) that refusal cannot be objectively justified. It submits, referring to its observations regarding the criteria set out in *IMS Health*, that none of those conditions has been met in this case.

a) Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

- 203 The main argument put forward by the Commission is that this case cannot be assessed by reference to the criteria laid down by the '*IMS Health* jurisprudence'.
- 204 In support of its argument, the Commission repeats, first of all, that Microsoft fails to establish that the contested decision indeed interferes with the 'specific subject matter of its intellectual property rights'. In other words, it has not been established that Microsoft's refusal was justified by the exercise of its intellectual property rights, or that the contested decision implies compulsory licensing. It submits that that case-law does not apply 'without adaptation' in the case of intellectual property rights other than copyright and, in particular, in the case of trade secrets.
- 205 Next, the Commission claims that, in any event, an 'automatic' application of the criteria set out in *IMS* is problematic for other reasons'.
- 206 In that regard, it submits, first, that the 'standard of exceptional circumstances' provided for by the case-law cannot apply 'as such, and without further qualification' to a refusal to disclose trade secrets that has the effect of 'technologically tying' a separate product with a dominant product. It states that, in *Tetra Pak II*, neither the Court of First Instance nor the Court of Justice referred to the need for the Commission to establish 'exceptional circumstances', as provided for by the case-law at that time for assessing the compatibility of a refusal to license with Article 82 EC.
- 207 Second, the Commission submits that it cannot be considered that *IMS Health* establishes an exhaustive list of 'exceptional circumstances'. It claims that, in that judgment, as in *Magill*, the Court of Justice set out the requirements under which compulsory licensing was possible, taking into account the respective circumstances particular to those cases. In *IMS Health*, the Court in reality merely established a list of criteria, the fulfilment of which was 'sufficient' for the Commission to be able to impose compulsory licensing. In establishing whether the conduct of an undertaking which refuses to supply is abusive, the Commission must analyse all the factors surrounding the refusal in question.
- 208 Third, the Commission sets out the factors distinguishing the circumstances of this case from those in *IMS Health* and which confirm that the refusal by Microsoft of which it complains amounts to an abuse of a dominant position.

- 209 (1) Thus, the contested decision has the particular feature of concerning a refusal to supply interoperability information in the software industry. The aim of that decision is to enable the development of products that are compatible with Microsoft's, whereas the precedents cited by Microsoft concerned situations where the 'protected product' had to be incorporated into competitors' products for reasons which went beyond ensuring mere compatibility between two independent products. Furthermore, those precedents have not addressed the particular problems raised in sectors where network effects are pervasive.
- 210 The Commission adds that, unlike the economic sector at issue in this case, the economic sectors at stake in those precedents were not 'sectors where the legislator has clearly recognised that compatibility was favourable to society in general'. The Commission notes the importance that the Community legislator has accorded to interoperability, in particular in the framework of Directive 91/250. Referring to recitals 745 to 763 of the contested decision, the Commission submits that Article 6 of that directive constitutes 'an important point of reference' for the balance to be struck between, on the one hand, permitting undertakings to preserve the secrecy of their innovations and, on the other hand, preserving the ability of undertakings to achieve interoperability with existing products. The legislator has recognised that disclosure of information for interoperability purposes was positive for competition and innovation.
- 211 (2) This case involves a supplier in a dominant position which uses its market power in a given market, here the client PC operating system market, to eliminate competition in an adjacent market, namely the work group server operating system market, 'thereby increasing the barriers to entry in its original market and securing an additional monopoly rent'.
- 212 (3) The Commission observes that the present case concerns a supplier in a dominant position which disrupts previous levels of supply (recitals 578 to 584 of the contested decision). Microsoft's initial policy was to disclose and not to withhold interoperability information. That facilitated, in particular, the introduction in the market of its own work group server operating systems and did not at all discourage it from innovating.
- 213 In its rejoinder, the Commission contends that Microsoft's argument that it did not disrupt previous levels of supplies amounts to a new plea in law which must be rejected as inadmissible. It considers that in any event that argument cannot be accepted. In that regard, (i) it states that the agreement between Microsoft and AT&T that allowed AT&T to develop 'AS/U' involved 'disclosure of Microsoft's implementation of the relevant protocols'. Therefore, that agreement included not only the disclosure of the 'type of interoperability information at stake in the [contested] decision' but also additional information. (ii) The Commission submits that the fact that the AS/U technology remains available is irrelevant. Referring to recitals 580 to 583 of the contested decision, it states, in that regard, that the disclosures made 'in the context of AS/U' are now outdated, Microsoft

having modified the relevant protocols in the subsequent versions of Windows. (iii) The Commission submits that Microsoft's claim that the fact that it licensed certain technology to AT&T more than ten years ago cannot oblige Microsoft to license all related technology for the indefinite future is irrelevant in the light of the approach taken in the contested decision. In that decision, the issue of the disruption of previous levels of supply is treated not as an abuse in itself but as one factor when assessing the refusal to supply alleged against Microsoft (recitals 578 et seq. of the contested decision).

- 214 (4) The Commission submits that the remedy provided for in Article 5(a) of the contested decision will have the effect of enhancing product variety on the market. Referring to recitals 709 to 763 of the contested decision, it adds that that remedy will not enable competitors to profit from Microsoft's innovative efforts. Thus, this is not a 'scenario of the kind envisaged as undesirable in previous case-law'.
- 215 As regards Microsoft's argument in the alternative that this case should be examined in the light of the criteria set out in *Bronner*, the Commission submits that it cannot be accepted. It observes that that judgment related to access to a facility that required a significant amount of investment and takes the view that if it were to be established that the information at stake in this case is not protected by intellectual property rights, but consists in purely arbitrary combinations of messages, that judgment would therefore surely not be a 'relevant point of comparison'.
- 216 The argument put forward in the alternative by the Commission is that, in any event, the criteria set out by the Court in *IMS Health* and *Bronner* have been met in the present case.
- 217 It asserts in that regard, first, that Microsoft's disclosure to its competitors of the interoperability information is indispensable for them to continue competing in the market for work group server operating systems.
- 218 (1) As regards its alleged error of law, the Commission contends that Microsoft's claims are based on a misrepresentation of the Commission's position and on confusion between different questions addressed in the contested decision. It explains that the 'indispensability' criterion entails examination of what degree of interoperability is required to remain as a viable competitor in the market and whether the information to which access is refused is the only economically viable source for achieving the degree of interoperability required. In the present case, the indispensability of the interoperability information derives from the importance of interoperability with client PCs for work group server operating systems (recitals 383 to 386 of the contested decision) and Microsoft's quasi-monopolistic position in the client PC operating system market. The Commission observes that it analysed the 'indispensability' criterion, as established by the case-law, at recitals 666 to 686 of the contested decision and that it examined *inter alia* whether there were any alternatives to disclosure of the requested information.

- 219 According to the Commission, Microsoft appears to contend that the mere existence of inefficient interoperability solutions that allow competitors only to achieve de minimis market penetration or to protect de minimis market positions shows that the 'indispensability' criterion has not been met. Such an approach cannot be accepted, since that criterion must be assessed in accordance with the aim of preserving an effective competition structure that benefits consumers. The question is whether the information, the disclosure of which has been refused, is indispensable to carry on business in the market at issue, that is to say, 'as a viable competitive constraint and not as a de minimis player which has effectively left the market for a "niche" position'.
- 220 In its rejoinder, the Commission states that, contrary to what Microsoft suggests, it does not consider that dominant undertakings are under an obligation to look after the interests of their competitors. It explains that it supports the proposition that a dominant undertaking is not entitled to put at risk effective competition on a secondary market by abusively denying its competitors access to an 'input' necessary to their viability. It adds that if no alternative exists to the denied input which could permit rivals to impose an effective competitive constraint on the dominant undertaking in the secondary market, it is obvious that the input in question is indispensable to the maintenance of effective competition.
- 221 Also in its rejoinder, the Commission recognises that there is a spectrum of possible degrees of interoperability between Windows PCs and work group server operating systems. It claims that it did not define a priori interoperability at a certain level but based its conclusions on the clearly unsatisfactory character of alternative methods which had already been tried by Microsoft's competitors and which 'did not permit the level of interoperability required by customers in an economically viable manner'. The Commission disputes that it took account of a 'virtual identity' level of interoperability mentioned by Microsoft to arrive at the finding of abuse in relation to the refusal to supply interoperability information. It claims that the contested decision regards it as indispensable not that Microsoft's competitors be allowed to reproduce the interoperability solutions implemented by Microsoft, but rather that they be enabled to achieve an equivalent degree of interoperability as a result of their own innovative efforts. As regards the findings at recital 183 of the contested decision to which Microsoft refers (see paragraph 167 above), they do not concern the issue of the standard for indispensability.
- 222 (2) As regards the error of fact by which the contested decision is allegedly vitiated, the Commission submits that the evidence adduced by Microsoft is irrelevant in the present case.
- 223 Thus it has not been demonstrated in the two reports by computer scientists that the solutions proposed by them are commercially viable alternatives to disclosure of interoperability information.

- 224 Microsoft's argument based on the responses to the Commission's request for information is irrelevant insofar as 'it means that interoperability with smaller players is enough, or that some interoperability already exists'. The Commission submits that Microsoft fails to take account of the fact its competitors entered the work group server operating system market before Microsoft started distributing such products. The fact that the information at issue is indispensable for them to remain a viable competitive constraint for Microsoft's products brings about a gradual elimination of those competitors. The fact that this elimination has not yet been completed does not show that the indispensability criterion has not been fulfilled, since what counts is whether the information is indispensable to remain as a viable competitor in the market.
- 225 Moreover, the Commission submits that Microsoft's claim that it failed to show in the contested decision that reverse-engineering was technically or economically infeasible is irrelevant. According to the case-law, it is 'economic viability' which is important. The Commission adds that, at recitals 683 to 687 of the contested decision, it examined whether reverse-engineering could constitute an alternative to disclosure of interoperability information and, in particular, considered the case of the Samba group referred to by Microsoft. That group is not a viable competitive constraint to Microsoft at present and is unlikely to become one in the future. The Commission states that that group is a non-profit making group of programmers, 'who are willing to undertake reverse-engineering efforts that might not make economic sense for commercial companies'. The example of RealNetworks referred to by Microsoft is not relevant either, since it relates to media serving technology which is not included in the interoperability information to be disclosed.
- 226 Lastly, as regards the five methods for ensuring interoperability between the operating systems supplied by various distributors referred to by Microsoft, the Commission contends that Microsoft does not rebut the factual findings made in this regard in the contested decision but merely asserts that these methods are 'feasible' and that its products and those of its competitors 'work well together'.
- 227 In that context, the Commission rejects Microsoft's claim that the analysis carried out in the contested decision is contradicted by the alleged growth of Linux on the work group server operating systems market. As a preliminary point, it states that any figure showing the growth of Linux in that market 'will not represent the penetration of the market by a single operator but rather the best efforts of a number of competing vendors who build upon Linux'. The respective market share of those competing vendors is 'minuscule'. The Commission submits that Microsoft fails to establish that vendors of Linux products had become significant players in that market prior to the contested decision or that Linux was forecast to grow at the time of that decision.
- 228 In this respect, the Commission criticises, first of all, the findings in Section D of the report contained in Annex C.11 to the reply, and asserts that:

- the IDC data which were used by the experts to compile that report are imprecise and are inappropriate for assessing market development;
- there is no evidence that the market share of 6.8% that Linux is said to hold on the server market in terms of sales is applicable to the market for work group server operating systems;
- the two examples of entities mentioned by the experts to show that it is possible to use, in relation with Linux, interoperability solutions based on the reverse-engineering technique are not representative since those entities are two out of only three entities, out of a total of more than 100, which responded to the Commission's market enquiry in 2003 that 'made a non-insignificant use of Linux/Samba'; and
- the experts provide no information on how the four other methods for ensuring interoperability between the operating systems supplied by various distributors relied on by Microsoft could have enabled the alleged growth of Linux in the market during the period in which there was found to be an abusive refusal to supply.

229 Next, the Commission criticises the findings contained in Section E of that report. It claims that:

- it has already rebutted, at recitals 605 to 610 of the contested decision, the arguments that Microsoft bases on IDC's projections and the results of Mercer's third survey;
- IDC's projections of Linux's share for the "file/print" and "networking" workloads' are exaggerated;
- the migration of Windows NT to Linux referred to in Merrill Lynch's report of 8 March 2004 (Annex 7 to Annex C.11 to the reply) is likely to be a one-off effect;
- the Yankee Group Report of 25 May 2004 (Annex 9 to Annex C.11 to the reply) relates to servers in general, not to work group servers, and is therefore largely irrelevant to the present case;
- the Forrester Research Report of 27 May 2004 (Annex 10 to Annex C.11 to the reply) does not concern primarily work group server operating systems and contains findings which run counter to Microsoft's arguments.

230 Also in response to Microsoft's claim that the five methods described in paragraphs 76 to 80 above enable interoperability between various operating systems, the Commission refers to recitals 629 and 708 and footnote 857 of the contested decision.

- 231 As regards Microsoft's assertion that neither Sun nor Novell shows interest in access to the interoperability information in question (see paragraph 173 above), the Commission observes, first of all, that it is a new argument, raised for the first time at the stage of the reply. It then claims that that assertion is incorrect. It states that Sun and Microsoft are currently negotiating the terms and conditions of access to that information and that Novell requested Microsoft to provide it with that information but that Microsoft refused. It adds that, at the hearing, the Vice Chairman of Novell stated that Microsoft had refused to communicate interoperability information to Novell and had put pressure on Novell not to use NDS for NT as 'a way to obviate the need for such interoperability information'. The Commission also refers to the content of a letter of 4 February 1999 by the Chairman of Novell to the Executive Vice Chairman of Microsoft (Annex D.7 to the rejoinder).
- 232 The Commission adds that Microsoft put pressure on AT&T not to licence AS/U to Novell. It also notes that the settlement which Microsoft agreed with Novell on 8 November 2004 does not in any way preclude Novell from taking advantage of the remedies provided for in the contested decision and that Novell has criticised the manner in which Microsoft proposes to implement the contested decision.
- 233 Second, the Commission rejects Microsoft's assertion that it has not prevented the emergence of a new product for which consumer demand remained unmet. It notes that it is apparent from paragraph 49 of *IMS Health* that a 'new product' is one which is not confined essentially to duplicating the products already offered on the market by the owner of the intellectual property right. Consequently, it is sufficient that the product in question contains substantial elements resulting from the licensee's own efforts. The Commission takes the view that, in the present case, Microsoft's competitors will not limit themselves to duplicating Microsoft's products and, moreover, will not be able to do so. It claims that they will use the disclosures to continuously market improved products, 'offering added value over their own and Microsoft's previous offerings', instead of being forced out of the market by the refusal in question. It maintains that, contrary to what Microsoft states, no feature of Microsoft's products and, in particular, no portion of its software code will be integrated in other work group server operating systems.
- 234 The Commission submits that, in the contested decision, it did not confine itself to merely discussing the 'new product' criterion as set out in *IMS Health*. It examined that criterion in the light of the prohibition in Article 82, second paragraph, (b), EC of abuses that consist in limiting technical development to the prejudice of consumers.
- 235 Thus, the Commission asserts that it has been particularly careful to check that Microsoft's refusal is a 'refusal to allow follow-on innovation', i.e. the development of new products, and not a mere refusal to allow duplication. It refers, in this regard, to the findings at recitals 693 to 701 – and in particular 696, 698 and 699 – of the contested decision. In response to Microsoft's criticisms of

the findings at recital 696 of the contested decision, the Commission states that Novell, not being a 'UNIX vendor', was not interested in 'UNIX-based implementation[s]' such as AS/U and states that Sun and other UNIX vendors offered innovative products using AS/U to achieve interoperability with Windows. The Commission adds that, in the public statements that it made following its settlement with Sun in April 2004, Microsoft itself presented that settlement as encouraging new products.

- 236 The Commission also states that Microsoft's competitors are carrying out research and development in spite of Microsoft's refusal to supply interoperability information. However, those competitors need to have access to Microsoft's protocols to make it possible for organisations using Windows PCs and work group servers to take advantage of their innovation without incurring an 'interoperability penalty'.
- 237 As regards Section C of the experts' report in Annex C.9 to the reply, to which Microsoft refers, the Commission submits that it is almost entirely beside the point.
- 238 In the same context, the Commission contends that the arguments that Microsoft bases on its own incentives to innovate are not relevant with regard to the consequences of the abuse in question on the incentives of competitors to innovate. It submits that the 'economic literature' cited by the experts in Section B of the aforementioned report states simply that 'compulsory licensing in general, including that permitting simple duplication (e.g. of pharmaceutical products) may have ambiguous or even negative effects on innovation in the long run' and does not take account of the specific facts of this case. The 'empirical evidence' referred to in Section D of that report is irrelevant for assessing the impact of Microsoft's refusal on incentives for competitors to innovate.
- 239 Moreover, the Commission, citing recital 699 of the contested decision, states that it is apparent from one of the surveys conducted by Mercer that, despite the fact that 'Microsoft lags behind its competitors' as regards several characteristics of server operating systems that are important to consumers, they content themselves with Microsoft's products 'because of the interoperability barrier to adopting alternatives'. It refers also to the findings contained at recital 662 of the contested decision.
- 240 The Commission also contends that Microsoft's claim that the 'new product' criterion has not been met in the present case is predicated on a misinterpretation of the case-law.
- 241 In that respect, the Commission submits (1) that that criterion does not imply the need to show in concrete terms that the product of the licensee would attract customers who would not buy products offered by the existing supplier. In *IMS Health* the Court of Justice concentrated its analysis on product differentiation

which could affect customer choices or, in other words, whether there is ‘potential demand’ for the new product. The exact consequences that this differentiation will have on the choices made and, in the longer run, on the emergence of products attracting new customer categories are determined by the market. In its rejoinder, the Commission states that the new products that are envisaged will clearly respond to potential demand and will build upon operating systems currently marketed by Microsoft’s competitors which display features that consumers value, often more highly than the corresponding features in Microsoft’s work group server operating systems. It reiterates that ‘[t]he ability of the existing products to respond to that demand is fatally hampered by lack of access to interoperability information’.

- 242 (2) The Commission submits that the ‘new product’ criterion does not relate solely to output restrictions.
- 243 (3) The Commission submits that Microsoft cannot rely on the fact that the contested decision focuses on the ability of its competitors to adapt ‘existing products’. The question which arises is whether competitors will essentially duplicate existing products developed by the rightholder. It states, in that context, that the products of Microsoft’s competitors will implement the same set of protocols as Windows work group server operating systems but will differ widely in terms of performance, security and functionality.
- 244 (4) The Commission claims that the case-law does not exclude the existence of competition between the copyright owner’s products and the future products of the licensee, as evidenced by the facts in *Magill* and *IMS Health*.
- 245 Third, the Commission states that the refusal in question risks eliminating any effective competition in the secondary market for work group operating systems.
- 246 (1) It claims that the evidence discussed at recitals 585 to 692 of the contested decision clearly shows that that risk ‘has a high likelihood of being realised in the near future’. It states that that ‘elimination of competition’ is to be distinguished from a mere ‘lessening of competition’. Referring to recital 700 of the contested decision, it argues that if Microsoft’s behaviour remains unfettered, there is a serious risk that competitors’ products will be confined to a ‘niche existence’ or will not be viable at all.
- 247 The Commission takes the view that the judgments in *Commercial Solvents v Commission* and *CBEM*, cited above, provide valuable guidance when assessing Microsoft’s behaviour in the light of Article 82 EC, even if they do not concern a refusal to license intellectual property rights. It submits, in that respect, that the terms ‘risk’, ‘possibility’ and ‘likelihood’ used by the Court in its judgments regarding abusive refusals to supply have the same meaning.
- 248 According to the Commission, most of Microsoft’s arguments are predicated on the incorrect premise that it is for the Commission to establish that competition

has already been eliminated or, at the very least, that its elimination is imminent. It asserts that the case-law does not require that prior elimination of competition be demonstrated and that the contested decision aims to establish that competition in the market for work group server operating systems is likely to be eliminated in the future. The Commission recalls that, in footnote 712 of the contested decision, it states that it is demonstrated in that decision that 'the degree of interoperability that can be achieved on the basis of Microsoft's disclosures is insufficient to enable competitors to viably stay in the market'. Microsoft does not adduce evidence that that conclusion is vitiated by a manifest error of appraisal.

- 249 (2) The Commission comments on Microsoft's arguments in relation to market conditions.
- 250 It states, first of all, that 'the risk of elimination of all competition was already present in 1998, as it is present today', the only change being that 'now this elimination of competition is more imminent than it was in 1998'.
- 251 Next, the Commission disputes the conclusions that Microsoft draws from the three Mercer surveys, maintaining that those surveys show that customers choose Windows as a work group server operating system because of Microsoft's 'unfair' interoperability 'advantage', and despite the fact that Windows is lagging behind other products with respect to several product characteristics that customers value.
- 252 With regard to the argument based on Linux's growth, the Commission submits that that it is wholly unsupported and refers to recitals 506 and 632 of the contested decision, where it is clearly demonstrated that 'the past growth of Linux has been de minimis'. It observes that it is apparent from the last two Mercer surveys that Linux has only a very low market share, i.e. in the region of 5%, in the work group server operating system market.
- 253 As regards IDC's projections, the Commission reiterates that they are imperfect (see paragraph 229 above). It adds that it is apparent from IDC's data that Microsoft rapidly acquired a dominant position in the relevant market, that it continues to increase its share of the market and that it is facing an increasingly fragmented fringe of niche players.
- 254 (3) The Commission rejects Microsoft's criticisms of its definition of the work group server operating systems market and its assessment of Microsoft's position in that market.
- 255 It observes that, in arriving at that definition, it first identified a list of core work group services (which 'closely correspond to a specific customer need'), i.e. the key services that are considered by customers when purchasing a work group server operating system. Those services have been identified on the basis of various items of evidence, including responses by customers to the Commission's requests for information (recitals 349 to 352 of the contested decision), the 'statistical correlation' between the use of a given operating system for one of the

core work group services and its use for the others (recital 353 of the contested decision), and the description and pricing of its products by Microsoft (recitals 359 to 382 of the contested decision). The Commission states that although work group server operating systems are able to be used to provide non-work group services, this does not detract from the fact that they are 'optimised' to provide the core work group server services and that the way they provide those services is what is most influential in the decision to purchase them. The fact that work group servers are sometimes used to run an application does not 'temporarily' put them outside the definition of the relevant market, nor does it 'temporarily' put enterprise servers optimised to run enterprise-class applications in that market. In response to Microsoft's argument that its Windows work group server operating systems can be used to provide proxy or firewall services, the Commission, referring to recital 59 of the contested decision, claims that 'edge servers' perform specialised tasks, and not the core work group services. Such 'edge servers' cannot therefore exert a competitive constraint on Microsoft in the market for work group server operating systems. As regards the fact that the same Linux code can form the basis of various types of server operating system products, depending on what kind of 'add-ons' are used on top of it, the Commission takes the view that that is irrelevant in the present case. It observes, in that respect, that that Linux code is also used to provide client PC operating systems, in conjunction inter alia with a 'graphical user interface', but that this does not however mean that those operating systems should be included in the definition of the relevant market.

- 256 In its rejoinder, the Commission submits that the terminology which it chose to designate the relevant market is irrelevant to any enquiry as to whether its definition of that market is correct. In any event, it is clear that the term 'work group server operating system' is used in the industry to designate the 'type of products at stake in the [contested] decision'.
- 257 Also in its rejoinder, the Commission rejects Microsoft's criticisms of the explanations in its defence (see paragraph 190 above).
- 258 It states, first that, contrary to what Microsoft contends, both Microsoft and its competitors 'charge [customers] different prices for the same ... operating system ... depending on how they will use it'. Prices vary according to the number of client PCs which have access to the relevant server. It adds that vendors of server operating systems offer several different editions - at different prices - of systems belonging to the same 'family'. It states that, '[m]ore generally, Windows server operating systems are licensed by Microsoft to customers and there is in principle no reason why Microsoft should not be able to discriminate depending on use'.
- 259 Next, the Commission submits that Microsoft's claim that work group server operating systems 'spend far more time devoted to non-work group tasks than to work group ones' is based on IDC's data which have been processed using an inappropriate method.

- 260 Lastly, the Commission, in response to Microsoft's claim that 'the cost of modification in many cases would be zero', refers to recitals 334 to 341 and 388 to 400 of the contested decision, which demonstrate the absence of supply-side substitutability for client PC operating systems and for work group server operating systems respectively.
- 261 Also in its rejoinder, the Commission states that Microsoft does not dispute that interoperability with PCs – and, more specifically, with Windows PCs – is especially important for the performance of work group tasks by a server operating system. It claims that a refusal by Microsoft to disclose interoperability information that radically reduces the ability of its competitors to meet customer expectations regarding the performance of work group tasks will change the conditions of competition for servers sold for these tasks relative to those intended for the performance of other tasks. According to the Commission, 'this remains true even assuming ... that, for ... Microsoft and [each of] its rivals, the various editions of its server operating systems currently on the market are all equally suited ... for the performance of both work group server tasks and certain other "low-end" tasks (non-mission critical applications such as e-mail, etc.)'. The Commission claims that Microsoft has been able to use its market power on the client PC operating system market to render its rivals' products increasingly unattractive to customers purchasing server operating systems to perform – whether exclusively or not – work group tasks, 'thus permitting Microsoft inexorably to monopolise such sales'. This very fact indicates that conditions of competition are not homogenous for server operating systems marketed, respectively, for the performance of work group and other tasks. The Commission adds that '[a]s for the supply side, it is obvious that, if one accepts for present purposes (1) the demand-side requirements of customers as regards work group services (undisputed by Microsoft) and (2) Microsoft's own hypothesis that the various editions of each vendor's respective server operating systems have identical capacities as regards work group tasks, then the very same distorted market forces which force the exit of Microsoft's competitors from the sale of server operating systems for work group tasks will prevent supply-side substitution through (re)entry on the basis of the "high-end" editions of the same operating system "families"'.
- 262 The Commission also rejects the criticisms that Microsoft levels against the method which it used to assess market shares. It observes, first, that it is not necessary for its assessment that Microsoft should already have acquired a dominant position on the relevant secondary market through the abuses at issue, provided that there is a risk that competition will be eliminated in that market. It then states that that method 'gives a sufficiently reliable picture of the imbalance of forces on the market for work group server operating systems'. Furthermore, it claims that it did not ask about the time allocated to different tasks by a given server but rather considered, as regards the undertakings which participated in its survey and replied to the Mercer II and III surveys, what proportion of the work group tasks was performed by servers from different suppliers. None of these

three surveys indicates that Microsoft holds a market share of less than 60% for any work group task.

- 263 The Commission adds that ‘applying the “filters” identified by Microsoft makes it possible to use [IDC’s] data as a rough proxy for the sale of the editions of various vendors identified as being work group server operating systems’. It states that ‘to the extent that Microsoft’s own exclusionary behaviour has the effect of partitioning sales of server operating systems purchased primarily for work group tasks from those primarily purchased for other tasks, a “workload” filter permits one to form an impression of Microsoft’s relative strength in sales primarily for the former tasks’. In any event, even if only the ‘USD 25 000 filter’ were applied, without distinguishing by workload, the share of Windows is 65% in terms of volume and 61% in terms of revenue (recital 491 of the contested decision). In the absence of any claim that customers are more likely to buy Windows servers costing less than USD 25 000 for tasks other than work group tasks, this already constitutes a strong indicator of Microsoft’s strength on the relevant market.
- 264 (4) The Commission refers to Annexes B.10 and B.11 to the defence, in which it comments on the observations contained in Annexes A.19 and A.23 to the application. It also refers to Annex D.12 to its rejoinder to rebut the arguments set out by Microsoft in Annex C.12 to its reply, while at the same time submitting that that annex is inadmissible.
- 265 Fourth, the Commission submits that Microsoft may not rely on the fact that it holds intellectual property rights over the technology at issue as objective justification for its conduct. It observes that, in *Magill*, where it was beyond doubt that the contested decision imposed on the applicants the compulsory licensing of a copyright, the Court of Justice found that there was no objective justification for the refusal in question. It adds that Microsoft’s argument renders meaningless the test set out by the Court in *IMS Health*.
- 266 The Commission also claims that Microsoft’s arguments in relation to the negative impact that its obligation to disclose interoperability information will have on its incentives to innovate are purely theoretical and wholly unsubstantiated. It emphasises that it is for the undertaking relying on the existence of objective justification, and not for the Commission, to put forward arguments and provide concrete evidence.
- 267 Furthermore, the Commission disputes that it applied a new test in the present case.
- 268 (1) It criticises Microsoft’s claim that an undertaking is justified in refusing to make available its technology to its competitors where it wishes to prevent them from being able to use it to compete against it. That claim could be interpreted as meaning, first, that, even if the first three criteria laid down by the Court in *Magill* and *IMS* have been met, the refusal to license is lawful if competitors want to use

the license to compete against the dominant undertaking. That contention is mistaken. Second, that claim could be interpreted as meaning that the principles laid down by *Magill* do not apply when the intellectual property right in question covers 'technology'. Aside from the fact that Microsoft fails to explain what it means by 'technology' in this context, it is extremely difficult to distinguish between 'technological' intellectual property rights and 'non-technological' intellectual property rights. In addition, it is not certain that the interoperability information at issue constitutes such 'technology', particularly if it represents a mere arbitrary convention without specific innovative value in itself. Finally, '[m]ore fundamentally, accepting that technology is more valuable would prejudice questions regarding societal choices in conferring intellectual property rights, e.g. by assuming that technical creation is more worthy of protection than cultural creation'.

- 269 (2) The Commission points out that, at recital 697 of the contested decision, it stated that, in view of Microsoft's quasi-monopoly position in the client PC operating system market, its competitors do not have any ability to develop viable alternatives to its protocols.
- 270 (3) The Commission observes that Microsoft merely refers to its incentives to innovate in protocol design, without mentioning its other products. Referring to recital 724 of the contested decision, it asserts that this approach is inappropriate.
- 271 (4) The Commission submits that Microsoft glosses over the fact that the information at stake is information that is necessary for interoperability as defined in Directive 91/250. It states that the purpose of Article 6 of that directive is to provide an incentive to manufacturers to make available adequate information to ensure interoperability and to encourage the development of open systems. It repeats that the Community legislature therefore considered the disclosure of interoperability information to be beneficial for innovation. It observes that it is clear from recital 27 in the preamble to Directive 91/250 that the Community legislature also indicated that refusals to supply such information could constitute an abuse of a dominant position.
- 272 (5) The Commission refers to statements made by Microsoft in the course of the administrative procedure and after the adoption of the contested decision. Thus, at the hearing, Microsoft stated, in response to a question asked by the Commission services, that it had not noticed any negative impact of the United States Settlement on its incentives to innovate. Similarly, at a joint press conference with Sun following the settlement agreed with the latter, Microsoft stated that the two companies would continue to compete and innovate and that 'the impact of the settlement will not be less innovation, but more innovation'. The Commission submits that Microsoft's argument that that settlement provides for reciprocal commitments is irrelevant. It observes, in this respect, that when it agreed that settlement, Sun already had a policy of disclosing the relevant protocols to the industry at large.

273 Fifth, the Commission comments on Microsoft's argument that the general pattern of conduct attributed to it cannot constitute an 'exceptional circumstance' that could justify compulsory licensing (see paragraph 200 above). It submits, first, that that argument amounts to a new plea in law which must be rejected as inadmissible. It states, next, that it does not contend that the mere fact that a refusal to license an intellectual property right is part of a general pattern of conduct is in itself an 'exceptional circumstance' sufficient to render such a refusal abusive. It simply takes the view that the fact that Sun is not the only competitor to which Microsoft has denied access to the interoperability information is a relevant circumstance when assessing the compatibility of Microsoft's conduct with Article 82 EC.

3. The second part, alleging that Sun did not request from Microsoft the technology which the Commission has ordered it to disclose

a) Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

274 Microsoft claims, first, that Sun did not request from it a licence for the specifications for its communications protocols.

275 In that respect, it submits (1) that Sun's request did not relate to the 'full and complete specifications' for its communications protocols, but to detailed information about the internals of Windows server operating systems, and, more specifically to:

- the software code that implements the already documented set of 'Windows APIs';
- the component technologies in Windows referred to as 'COM' and 'COM+';
- the new directory service in Windows 2000 Server called 'Active Directory';
- the software code that implements the 'Security Service Provider' Interface in Windows; and
- the equivalent of AT&T's 'Advanced Server' for UNIX, updated for Windows 2000.

276 According to Microsoft, none of those technologies is a communications protocol. It cannot therefore be claimed that it refused to provide Sun with the technology that the contested decision alleges it refused to disclose. It adds that the breadth of Sun's request 'could not have put Microsoft on notice that Sun was seeking a licence to Microsoft's communications protocols'. Furthermore, it observes that Sun's complaint of 10 December 1998 does not make any mention of communications protocols.

- 277 Microsoft observes that in its letter of 15 September 1998 Sun requested access to a 'reference implementation and such other information as is necessary to ensure without reverse engineering that COM objects and the complete set of Active Directory technologies will run in fully compatible fashion on [Sun's] Solaris'. It claims that such technology would have enabled Sun to 'mimic' virtually all of the functionality of Windows server operating systems. According to Microsoft, '[a]llowing Sun to copy the innovative features of Windows server operating systems was plainly not in Microsoft's business interest'. It adds that Sun's request was for technology still under development, since Windows 2000 Server and its 'new Active Directory feature' were commercially released only one year later, in December 1999.
- 278 Microsoft adds that, in its request, Sun did not demonstrate that it needed 'anything from Microsoft' to achieve interoperability between its Solaris server operating system and Windows Client PC and server operating systems.
- 279 (2) Microsoft claims that its response to Sun's request was not a 'flat refusal'. In its response, it explained to Sun the different ways of 'achieving interoperability' and offered to open discussions with it '[in order to examine] ways in which the two firms might improve interoperability between their respective products for the benefit of mutual customers'. Referring to recital 565 of the contested decision, it submits that the Commission cannot claim that the technologies at issue were so complex that Sun could not be expected to know what technology it needed from Microsoft. Sun is a highly sophisticated vendor of server operating systems. Microsoft submits that, in any event, its response was entirely appropriate, since the onus was on Sun to clarify its request. Microsoft claims that Sun did not follow up on its offer and made no real effort to discuss with it interoperability issues. The Commission ignores the evidence in the file which shows that Sun actively hindered the progress of discussions by failing to attend a planned meeting with Microsoft. It adds that Sun has had 'contractual' rights since April 2004 to receive the 'equivalent of the protocol specifications' [confidential], but has thus far failed to avail itself of those rights.
- 280 Microsoft disputes that there is a contradiction between its statement that it is uncertain whether it would have refused to license the specifications for its communications protocols 'had Sun or anyone else actually asked it to do so' and the fact that it seeks the annulment of the contested decision. According to Microsoft, there is a vast difference between a 'negotiated cross-licensing agreement with another leading operating system vendor and a duty to supply the entire world with proprietary technology under mandate from the public authority'.
- 281 Lastly, Microsoft observes that the specifications for some of the communications protocols that it is being compelled to make available to its competitors do not exist and that creating such specifications will be a difficult and time consuming task.

282 Second, Microsoft submits that Sun did not request from it a licence for its intellectual property rights in the European Economic Area ('EEA') for use by Sun in developing work group server operating systems in the EEA.

283 It observes, in that respect, that Sun is a U.S. corporation and that Sun's letter of 15 September 1998 was sent from its U.S. headquarters to the headquarters of Microsoft, another U.S. corporation. It claims that, given the absence of any explicit nexus to the EEA and of any mention, in that letter, of the fact that the technology in question was needed to develop and distribute work group server operating systems in the EEA, it had no reason to consider that Sun was seeking a licence in the EEA. It submits that it was therefore in no way obliged to take into account its 'special responsibility' under Article 82 EC when it responded to Sun's request of 15 September 1998.

b) Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

284 First, the Commission submits that Sun's request of 15 September 1998 was sufficiently clear for Microsoft to understand that Sun wished to have access to interoperability information and that some of that information pertained to certain features of Windows work group networks (the 'Active Directory domain architecture') which were indispensable for Sun to compete viably as a work group server operating system vendor.

285 It states that Microsoft misrepresents Sun's request when it claims that it concerned Microsoft's source code, and not interface information, and states that it has already rebutted that claim in the contested decision. It refers, more specifically, to recitals 713 to 722 of the contested decision, where it established that access to interoperability information will not enable Microsoft's competitors to 'clone' or 'mimic' the functionalities of Microsoft's work group server operating system. The Commission recalls that the aim of that request was to make it possible for Sun's products to 'seamlessly communicate' with the Windows environment. It adds that, in its complaint, Sun had made clear that its request related to 'interface information' and that, in responding to that request, Microsoft had made clear that it had understood it as a request for interoperability information.

286 The Commission submits that Microsoft's claim that, in its complaint, Sun makes no reference to 'communication protocols' is irrelevant. The term 'protocol' is used to describe rules of interconnection and interaction between software components in a networking environment. A request for access to information necessary to enable interconnection and interaction with the Windows software and a request for access to protocol specifications are therefore 'one and the same thing'. Microsoft is adopting an overly formalistic approach. In the same vein, Microsoft cannot claim that the request was improper because it concerned

documentation that had not yet been created, as the information in question was available to Microsoft.

- 287 As for the argument that Sun did not demonstrate that it needed 'anything from Microsoft' to achieve interoperability between Solaris and the Windows Client PC and server operating systems, the Commission submits that it must be rejected. It observes that Microsoft knew perfectly well what was needed to achieve interoperability with its products and what information Sun lacked.
- 288 As regards the argument that Sun's request concerned 'technology still under development', the Commission observes that Microsoft made no reference to that in its response of 6 October 1998. It submits that that argument is not, in any event, well founded, since the first beta version of Windows 2000 Server had already been on the market for one year when the contested decision was adopted.
- 289 Furthermore, the Commission contends that Microsoft cannot claim that it did not refuse Sun's request.
- 290 In that connection, (1) it states that Microsoft's claim contradicts its application for annulment of Article 5 of the contested decision, which specifically requires it to disclose interoperability information.
- 291 (2) Referring to recitals 194 to 198 of the contested decision, the Commission asserts that Microsoft explicitly confirmed to it that it refused to give access to specific elements of the interoperability information in question. It adds that it is made clear in recitals 573 to 577 of the contested decision that this refusal is part of a general pattern of conduct. Similarly, during the proceedings on the application for interim measures, Microsoft stated that that refusal was part of its 'business model'.
- 292 (3) The Commission doubts whether Microsoft would have provided Sun with the information requested if Sun had followed up more actively on Microsoft's offer. It refers, in that connection, to certain statements by Microsoft's executives, which appear at recitals 576 and 778 of the contested decision. In any event, Microsoft's response to Sun's request cannot be construed as an offer to engage in discussions about interoperability. Nor do the subsequent communications between Microsoft and Sun point to the existence of a proposal by Microsoft to disclose the information requested by Sun (recital 193 of the contested decision). The Commission adds that Messrs Terranova, representing Sun, and Goldberg, representing Microsoft, met on 25 November 1998. Microsoft does not explain how the fact that Mr Terranova had to cancel another meeting on 8 March 1999 hindered the interoperability discussions between itself and Sun. The Commission observes that the agenda of that meeting, as suggested by Mr Goldberg, contained no reference at all to the relevant technologies such as Active Directory.
- 293 (4) The Commission reiterates that Microsoft's claim that Sun has not yet requested from it access to the specifications for its communications protocols

pursuant to the settlement agreed in April 2004 is incorrect (see paragraph 231 above).

294 Second, the Commission submits that the fact that Sun's request did not specifically refer to the EEA is irrelevant. It states that, as the relevant geographical market is worldwide, the EEA was necessarily covered by that request and that, as Sun lodged a complaint with the Commission a few weeks later, it should have been very clear by then that the EEA was also concerned.

4. The third part, alleging that the Commission fails to take proper account of obligations imposed on the Communities by the TRIPS Agreement

a) Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

295 Microsoft asserts that, by requiring it to license to competitors the copyrighted specifications for its proprietary communications protocols, the contested decision infringes Article 13 of the TRIPS Agreement.

296 It notes that that provision, entitled 'Limitations and exceptions', states:

'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder'.

297 It claims that the compulsory licensing ordered in the present case by the Commission does not meet the cumulative conditions provided for in Article 13 of the TRIPS Agreement.

298 First, Microsoft submits that the compulsory licensing obligation imposed on it goes beyond what is necessary to enable interoperability, and therefore infringes the requirement that intellectual property rights may be subject to limitations or exceptions only in 'special cases'. The express purpose of that obligation is to enable other server operating system vendors to create products that 'mimic' the functionality of Windows server operating systems. Moreover, Microsoft must also make available to its competitors its communications protocols regardless of whether or not they were adversely affected by its allegedly anticompetitive conduct.

299 Second, Microsoft claims that the compulsory licensing obligation imposed on it interferes directly with Microsoft's 'normal exploitation' of its intellectual property rights. It states that, rather than license innovative technologies to third parties, commercial software firms exploit their intellectual property rights by developing and marketing products that implement such technologies. It adds that that obligation will affect its sales since it will enable its competitors to use its communications protocols to create server operating systems that are interchangeable with its own products.

- 300 Third, Microsoft claims that forcing it to license its communications protocols to its competitors unreasonably prejudices its legitimate interests because it is disproportionate to the Commission's stated goal. The new test developed by the Commission would appear to justify compulsory licensing whenever competitors would benefit from access to a dominant firm's intellectual property, regardless of whether such compulsory licensing is necessary to remedy anticompetitive conduct.
- 301 Moreover, Microsoft states that while the TRIPS Agreement may not be directly applicable under Community law, it is necessary to interpret Community law, including Article 82 EC, in conformity with the international agreements entered into by the Community, such as the TRIPS Agreement (*Case C-61/94 Commission v Germany* [1996] ECR I-3989, paragraph 52). It observes, in that context, that, in his Opinion in *Magill*, Advocate General Gulmann considered that the contested decision of the Commission, which ordered undertakings to license their copyright work, violated Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, last amended on 28 September 1979.
- 302 Finally, Microsoft states that the *Magill* and *IMS Health* judgments are consistent with the TRIPS Agreement since they 'did not involve unreasonable prejudice to legitimate interests or conflict with a normal exploitation of the copyright work'.
- b) Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks
- 303 As a preliminary matter, the Commission notes that it is settled case-law that 'having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions' (*Case C-149/96 Portugal v Council* [1999] ECR I-8395, paragraph 47). In addition, "[i]t is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules' (*Portugal v Council*, cited above, paragraph 49). The Commission adds that in *Joined Cases C-300/98 and C-392/98 Dior and Others* [2000] ECR I-11307 the Court also held that 'the provisions of [the TRIPS Agreement], an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law' (paragraph 44). The Commission also contends that the *Commission v Germany* judgment, cited above, which is relied on by Microsoft, is not relevant in the present case since it refers to the interpretation not of a provision of the EC Treaty, but of secondary Community law. In any event, the argument essentially put forward by Microsoft is that the contested decision is illegal because it violates the TRIPS Agreement.

- 304 The Commission claims, first of all, that that third part of the plea is based on the erroneous premise that the contested decision requires Microsoft to license to competitors the copyrighted specifications for its proprietary communications protocols. It adds that the issue of copyright is, at most, 'purely incidental' in this case.
- 305 Next, the Commission claims that Microsoft's contention that the conditions set out in Article 13 of the TRIPS Agreement have not been met in the present case is based on 'erroneous assumptions'. In this connection, it claims that the compulsory licensing which it ordered does not exceed what is necessary to enable interoperability and disputes that it has developed a new test. It also submits that certain other arguments relied on by Microsoft are unintelligible, such as the fact that competitors 'will mimic' the functionality of Windows server operating systems, or irrelevant in the context of this third part of the plea. The Commission concludes that this part of the plea should be rejected as inadmissible, because it does not respect the requirement laid down by case-law that essential matters of law and of fact on which the action is based must be apparent coherently and intelligibly from the application itself (order in Case T-56/92 *Koelman v Commission* [1993] ECR II-1267, paragraph 21).
- 306 Lastly, the Commission repeats that the contested decision fulfils all the criteria set out by the Court in *IMS Health*. It claims that if it were to be considered that the arguments expounded by Microsoft are correct and that the remedy infringes the TRIPS Agreement, the Court of Justice could not have made the findings contained in that judgment. The Commission concludes *a contrario* that the interpretation of Article 82 EC in that judgment and in the contested decision is consistent with that agreement.

B – Tying of Windows Client PC operating system with Windows Media Player

- 307 In connection with this second issue, Microsoft relies on two pleas in law, alleging (i) infringement of Article 82 EC and (ii) breach of the principle of proportionality.
- 308 The plea alleging infringement of Article 82 EC falls into four parts. In the first part, Microsoft claims that the Commission applied a novel and speculative theory which has no legal basis in reaching the conclusion that there is a foreclosure effect. In the second part, it submits that the Commission should have given greater weight to the benefits flowing from Microsoft's operating system 'design concept', which entails the creation of new versions of Windows with added functionality. In the third part, Microsoft claims that the Commission fails to establish the existence of an infringement of Article 82 EC, in particular of subparagraph (d) of the second paragraph of that article. Finally, in the fourth part, it contends that the Commission fails to take properly into account the obligations imposed on the Communities by the TRIPS Agreement.

309 The plea alleging breach of the principle of proportionality concerns the remedy provided for in Article 6 of the contested decision.

1. Preliminary observations

a) Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

310 As a preliminary point, Microsoft makes a number of observations on the factual background to the Commission's claims in relation to the issue of tying.

311 First, Microsoft states that, like any developer of PC operating systems, it must integrate new functionality into successive releases of Windows in order to meet the needs of its customers, i.e. software developers, computer manufacturers and consumers.

312 (1) Microsoft explains the advantages for software developers arising from the fact that it integrates new functionality into Windows. It states, first of all, that using functionality supplied by Windows means that software developers have less functionality in their own products to design, develop and test. That lowers their development costs and reduces the time needed to bring their products on to the market. Next, using that functionality also enables software developers to reduce the overall size of their applications and, consequently, means that those applications can be distributed more easily. Lastly, Microsoft submits that it is a rule of software development that the less software code an application contains, the less likely it is that the application will malfunction and generate support calls.

313 (2) Microsoft cites the advantages that computer manufacturers derive from the addition of functionality to Windows. It states that those manufacturers depend on this addition to create PCs that will appeal to consumers and that will support the creation of interesting new applications, or that may be an alternative to other electronic products, such as DVD players or game consoles. It states that, when selling PCs for home use, computer manufacturers need to provide products that perform a range of basic tasks of interest to consumers, like downloading photographs from a digital camera or playing an audio CD, both through functionality supplied by Windows itself and through third-party applications running on top of Windows. Computer manufacturers also benefit because consumers know that applications written for Windows will run on any new Windows PC, including applications they purchased for use with an older Windows-based PC.

314 (3) As regards consumers, Microsoft states that they expect products to become more functional with each successive version, and therefore expect Windows to improve over time. If it were to stop adding new functionality to Windows, consumers would switch to other client PC operating systems that continue to evolve, such as Linux or the Apple Macintosh. In addition, Microsoft states that new users of PCs, particularly those with little or no technical expertise, want PCs

that are easy to set up and use. Consumers want to know that any Windows application, including ‘those that support the latest in media functionality’, can run on any Windows-based PC they might purchase. They also want the Windows user interface to make use of audio and video so that using the operating system is easier and more enjoyable, and want Windows to include support for basic activities like downloading a song from the Web or posting pictures on the Internet. Lastly, they expect from a PC the ability to connect to the internet and access information of all types on the Web.

- 315 Second, Microsoft describes the specific advantages which flow from the integration of media functionality in Windows.
- 316 (1) It states that media functionality in Windows can be called upon by third-party applications, thus making it easy for software developers to include audio and video content in their products. The ability to play music and video from within an application, rather than relying solely on the display of static text and graphics to relay information, is beneficial to software developers. The uniform presence of media functionality in Windows, which is exposed to software developers through published APIs, has spurred the creation of numerous applications that make use of audio and video content.
- 317 (2) Microsoft submits that media functionality in Windows offers a number of features that computer manufacturers can use in promoting new PCs, thereby increasing their sales. Features like the ability to play audio CDs and video DVDs and to download songs from the Internet are popular with consumers and help increase demand for PCs. Microsoft states that inclusion of such capabilities in Windows does not prevent computer manufacturers from installing on their computers Microsoft’s competitors’ media players such as RealPlayer or QuickTime and making one of them the default handler of particular types of media files. In fact, most computer manufacturers are doing exactly that.
- 318 (3) Microsoft contends that media functionality makes PCs more appealing and easier for consumers to use. By way of example, it states that media functionality in Windows is relied on by the Help system to provide step-by-step instruction, including video demonstrations, on how to use the operating system. It adds that the presence of that functionality in Windows permits users to locate, organise and store digital media files in the same way they are able to work with other types of information. It states, in that context, that a modern operating system like Windows should provide support for all types of information broadly in use by consumers. Lastly, it observes that the contested decision states that Novell added to its NetWare software new networking and directory functionality at a time when that company was the leader on the work group server operating systems market, and that RealNetworks added a wide range of functionality to its RealPlayer product, including video streaming capability, at a time when that product was the leading media player.

- 319 Third, Microsoft claims that it has taken all steps necessary to ensure that the integration of media functionality into the operating systems does not have the effect of driving competing media players out of the market, and that many of these steps have been ‘codified’ in the District Court’s decision of 1 November 2002.
- 320 In support of its arguments, it raises (1) a number of issues in relation to the manner in which it designs Windows.
- 321 (i) Microsoft ensures that the inclusion of media functionality in Windows does not interfere with the functioning of competing media players. It is therefore technically possible — and in fact common — for a Windows-based PC to be running one or more third-party media players in addition to the media functionality in Windows.
- 322 (ii) Third-party media players can be accessed easily from the Windows user interface.
- 323 (iii) Microsoft designs Windows so that third-party media players will automatically supply some of the media functionality that Windows itself is capable of supplying.
- 324 (iv) Through a tool that Microsoft created for that purpose it is possible for computer manufacturers and consumers to configure Windows so that Windows Media Player is not accessible to the end-user.
- 325 (v) Microsoft facilitates the development of applications that compete with the media functionality in Windows by disclosing that functionality through published APIs. Software developers are free to use as much or as little of that functionality as they like. Similarly, Microsoft ensures that the system services in other parts of Windows that are relied on by Windows Media Player are exposed as published APIs. This permits vendors of competing media players to call upon the same functionality in Windows that the operating system’s built-in media functionality calls upon.
- 326 (2) Microsoft claims that, in entering into agreements with firms that distribute Windows, most notably computer manufacturers, it is careful to preserve opportunities for vendors of competing media players to distribute their products.
- 327 In that regard, it states, first of all, that it makes clear that computer manufacturers are free to install whatever software products they like on PCs running Windows, including competing media players.
- 328 It then states that it allows computer manufacturers to present sign-up offers for Internet access as Windows is being started for the first time and through the placement of icons on the Windows ‘Start’ menu and the Windows ‘desktop’. Internet access providers often distribute and promote third-party media players.

- 329 Lastly, Microsoft states that the contracts that it enters into with software developers, content providers or anyone else do not require them to distribute or otherwise promote Windows Media Player either on an exclusive basis or on the basis of a fixed percentage of their total distribution of media software.
- 330 Fourth, Microsoft submits that the integration of media functionality into Windows does not prevent the use of competing media players on Windows or their ‘widespread distribution’. It states that there are various methods for distributing competing media players, namely, inter alia, having computer manufacturers preinstall third-party media players on new PCs; downloading by consumers from the Internet or corporate intranets; having other vendors include third-party media players with their software products; and having content providers or Internet service providers distribute third-party media players to their users. It observes that downloading from the Internet is a particularly effective method of distribution.
- 331 Microsoft states, referring in particular to a study which appears in Annex A.24.1 to the application, that a recent survey demonstrates that in both the United States and Western Europe, major computer manufacturers install competing media players, such as RealPlayer and QuickTime, on their PCs. The Commission’s assertion that computer manufacturers will not install competing media players unless they can remove Windows Media Player is therefore incorrect. It adds that even the market data which appear in the contested decision show that the usage of competing media players continues to grow, sometimes as much as or more than the media functionality in Windows.

b) Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

- 332 First, the Commission raises a number of issues with respect to the ‘nature’ of the tying abuse. It states, first of all, that it is settled case-law that the concept of abuse is an objective concept (Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 91). The ‘effect’ referred to in the case-law does not necessarily relate to the actual effect of the abusive conduct complained of and, for the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 239).
- 333 The Commission then recalls the findings contained at recital 841 of the contested decision. It notes that that recital states that ‘[t]here are indeed circumstances relating to the tying of WMP which warrant a closer examination of the effects that tying has on competition in this case’, and that, in ‘earlier well-known cases’, the foreclosure effect had been demonstrated simply by establishing that the practice in question concerned the bundling of a separate product with the

dominant product. However, in the present case, due to the specific market characteristics, the Commission considered that 'there [were] good reasons not to assume without further analysis that tying [Windows Media Player] constitute[d] conduct which by its very nature [was] liable to foreclose competition'. It states, that, by those assertions, it was not putting forward the view that the conduct in question was not 'as such' abusive but that it was necessary to analyse that conduct 'in its specific market context'.

- 334 The Commission claims to have carried out such an analysis and then to have concluded that 'Microsoft thus [interfered] with the normal competitive process' (recital 980 of the contested decision) and that '[t]here [was] therefore a reasonable likelihood that tying [Windows Media Player] with Windows will lead to a lessening of competition so that the maintenance of an effective competition structure will not be ensured in the foreseeable future' (recital 984 of the contested decision). It submits that, contrary to what Microsoft claims, it did not assert at recital 984 of the contested decision, or anywhere else in that decision, that the abusive conduct in question would lead to the elimination of all third party media players in the foreseeable future. It claims to have demonstrated that Microsoft 'distorts the choices and incentives of market participants through its tying' and submits that such a distortion of the competitive process amounts to a restriction of competition within the meaning of the case-law 'as it is liable to foreclose competition'. It adds that it also analysed the actual foreclosure effects of Microsoft's abusive conduct, based on data regarding the development of the market. Referring to recital 944 of the contested decision, it submits that these data consistently point to a trend in favour of usage of Windows Media Player and Windows Media formats and confirm that there has already been a degree of foreclosure in the market.
- 335 Second, the Commission submits that Microsoft's description of the factual background surrounding the issue of tying is riddled with omissions, inaccuracies and misleading statements or is wholly unsubstantiated. It comments, more specifically, on three points.
- 336 (1) The Commission submits that the sweeping statements made by Microsoft about the need and the benefits of integrating 'new functionality' into client PC operating systems unrelated to Windows Media Player are irrelevant. It also observes that it does not call in question Microsoft's near-monopoly in the client PC operating systems market as such, but the fact that Microsoft seeks to gain dominance in adjacent markets by relying on its market power instead of competing on the intrinsic quality of its products.
- 337 (2) The Commission responds to Microsoft's claim that it has taken steps to ensure that the tying of Windows Media Player does not result in the foreclosure of competing media players and that many of these steps were 'codified' in the District Court's decision of 1 November 2002. It states, in this regard, that the tying abuse identified in the contested decision started in May 1999 and was

ongoing at the time when the defence was lodged. It was only after the District Court's judgment of 28 June 2001 that Microsoft agreed, in November 2001, to enter into the United States Settlement. Microsoft complied with the obligations with regard to the Windows Media Player imposed on it by that settlement by releasing, on 1 August 2002 and 9 September 2002 respectively, the 'Windows 2000 Professional Service Pack 3' and 'Windows XP Service Pack 1' products. It adds that the measures referred to in the District Court's decision of 1 November 2002 are 'clearly insufficient' to remedy the tying abuse identified in the contested decision.

- 338 (3) The Commission, referring to recitals 849 to 877 of the contested decision, claims that the worldwide ubiquity on client PCs that tying confers on Windows Media Player cannot be affected by the alternative distribution channels to which Microsoft refers. Moreover, it submits that account cannot be taken of 'recent survey' data to which Microsoft refers (see paragraph 331 above), since the data collected as part of that survey have not been made available to either the Commission or the Court and there are 'serious methodological flaws' in that survey.
- 339 In any event, certain elements contained in the study in Annex A.24.1 to the application confirm the validity of the Commission's finding that OEM distribution of competing media players cannot offset the ubiquity of the Windows Media Player. The Commission observes, more specifically, that that study is limited (i) to 'major OEMs', even though small PC manufacturers account for a substantial amount of PC sales, and (ii) to PCs sold to home and small office users. The study does not take account of the PCs sold to enterprise customers, even though this category accounts for 47% of total PCs shipped in Europe, 53 % of total PCs shipped in the US and 53% of total PCs shipped worldwide. In other words, even if a competing media player were pre-installed on all of the PCs sold to home and small office users by the OEMs identified in that study, this would concern only a small fraction of total PC sales, while Windows Media Player is automatically pre-installed on at least 95% of PCs worldwide by virtue of the tie. The Commission also observes that the study identifies as media players a number of programs that cannot be compared to full-featured streaming media players, such as such as PowerDVD and WinDVD.
- 340 The Commission disputes that it claimed that OEMs will not install third-party media players unless they can remove Windows Media Player. What it stated, at recital 851 of the contested decision, is that as long as Microsoft ships Windows only together with Windows Media Player and does not allow for code removal, 'OEMs face negative incentives to bundle an additional media player'. There may therefore be some instances of OEMs installing competing media players on their PCs.
- 341 Third, the Commission briefly recalls its findings in the contested decision with regard to tying. It submits that that those findings are based on well-established

legal and economic theories and that the tying abuse displays the features defined by the case-law on tying (recital 794 et seq. of the contested decision).

- 342 Thus, (1) Microsoft holds a dominant position – and is even ‘super dominant’ – in the client PC operating system market.
- 343 (2) Streaming media players, by reason of their specific characteristics and in the light of the lack of substitutes, constitute a distinct product market, separate from the client PC operating systems market (recitals 402 to 425, and 800 to 813 of the contested decision). The Court of Justice and the Court of First Instance have rejected the argument that two products constitute one integrated product (Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, confirmed by the judgment in Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, and Case T-83/91 *Tetra Pak v Commission* [1996] ECR II-755, confirmed by the judgment in Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951). Both courts pointed out that the existence of independent manufacturers which specialised in the manufacture of the tied product indicated that there was separate consumer demand and hence a distinct market for the tied product.
- 344 (3) The Commission submits that it is undisputed that Microsoft does not offer customers the possibility of acquiring Windows without Windows Media Player. It explains that OEMs are normally the direct ‘addressees’ of the coercion, ‘passing’ it on to the end-users. By virtue of Microsoft’s licensing model, OEMs must license Windows with Windows Media Player pre-installed. OEMs can install a competing media player on a Windows PC only in addition to Windows Media Player.
- 345 (4) The Commission claims that the tying in question is liable to foreclose competition. It explains that it is apparent from recitals 843 to 877 of the contested decision that that tying afforded Windows Media Player ubiquity on client PCs worldwide which could not be affected by alternative distribution channels. That ubiquity gave content providers an incentive to distribute their content in Windows Media formats and software developers an incentive to develop their products in such a way as to rely on certain functionalities of Windows Media Player (recitals 879 to 896 of the contested decision). Consumers will in turn prefer using Windows Media Player, since a wider array of complementary software and content will be available for that product. The Commission claims that Microsoft’s tying reinforces and distorts these ‘network effects’ to its advantage. It adds that the available market studies invariably pointed to a tendency in favour of the use of Windows Media Player and Windows Media formats to the detriment of its main competitors (recitals 900 to 944). According to Microsoft itself, other media players are however rated higher in terms of quality by users (recitals 948 to 951 of the contested decision).

346 The Commission states that, to find that there has been an abusive tying, the case-law does not require proof that competition has already been foreclosed. Nor is the Commission required to show that all competition risks being eliminated.

347 (5) The Commission submits that Microsoft fails to establish that the conduct alleged against it is based on objective justification. It rejected Microsoft's arguments that the tying in question resulted in increased efficiencies such as to offset the anti-competitive effects identified in the contested decision (recitals 955 to 970 of the contested decision). As regards, more specifically, the alleged distribution efficiencies, it considers that the arguments put forward by Microsoft are based on confusion between 'the benefits to consumers of having a media player pre-installed along with the client PC operating system, and Microsoft selecting the media player for consumers'. The Commission adds that it was found, at recitals 962 to 969 of the contested decision, that Microsoft does not put forward any increase in technical efficiencies for which the 'integration' of Windows Media Player in Windows would be a precondition. It asserts, lastly, that, by the tying in question, Microsoft shields itself from effective competition from potentially more efficient media player vendors, which could challenge its position. Microsoft thus reduces the talent and capital invested in innovation in respect of media players, and diminishes its own incentives to innovate in that area.

2. The first plea, alleging infringement of Article 82 EC

a) The first part, alleging that Commission applied a novel and speculative theory which has no legal basis in order to conclude that there is a foreclosure effect

Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

348 Microsoft asserts that, in the contested decision, the Commission applied a new test for tying in arriving at the conclusion that the integration of media functionality into the Windows operating system constituted an abuse under Article 82 EC. As stated at recital 841 of the contested decision, in classical tying cases, the Commission and the Community judicature consider the foreclosure effects for competing vendors to be demonstrated by the bundling of a separate product with the dominant product. In Microsoft's submission, it follows from the same recital to the contested decision, first, that the present case is not a 'classical tying case' and, second, that 'users can ... obtain third party media players through the Internet, sometimes free [of charge]'. The Commission therefore accepts that '[t]here are ... good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition' (recital 841 of the contested decision).

349 The Commission none the less concludes that there is a foreclosure effect in this case and bases that conclusion on a theory that the widespread distribution of

media functionality in Windows will compel content providers to encode their content in Windows Media formats, which will, in turn, eventually drive all competing media players out of the market and then, indirectly, oblige consumers to use only Windows multimedia functionality (recitals 836 and 842 of the contested decision).

- 350 Microsoft asserts that the Commission's new theory is based on the existence of 'indirect network effects'. Referring to recital 842 of the contested decision, it explains, in that regard, that the Commission submits that competition may be foreclosed at some unidentified point in the future, if, as a result of the widespread distribution of media functionality in Windows, applications manufacturers and content providers will have an incentive to design their products solely on the basis of Windows Media Player.
- 351 Microsoft submits that that theory is highly speculative because it infers the existence of anticompetitive effects exclusively from a prediction about the future conduct of third parties over which Microsoft has no control, namely software developers and content providers. It repeats that it has taken many steps to ensure that the integration of media functionality in Windows does not directly restrict the choice available to consumers and third parties. Microsoft rejects the Commission's argument that the fact that it has demonstrated foreclosure where it is normally presumed does not mean that it has applied a novel legal theory. The Commission's approach in this case has nothing in common with the approach adopted in any previous case relating to Article 82 EC.
- 352 In that context, Microsoft observes that it is settled case-law that the concept of abuse under Article 82 EC is an objective concept. It criticises the fact that, in the present case, an abuse was found to exist only 'because of the predicted future effects of a course of conduct that is not as such abusive'.
- 353 Microsoft also submits that the 'prospective analysis' carried out by the Commission in the present case is similar to that which it carries out under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, as rectified, OJ 1990 L 257, p. 13, and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1)). Although such an analysis is inherent in the 'ex ante nature' of the review which the Commission carries out under that regulation, that is not the case where the Commission applies Article 82 EC. The Commission's powers under that article are 'ex post in nature'.
- 354 Microsoft also contends that the Commission's position is inconsistent with the conclusions reached by the Commission in the AOL/TimeWarner decision (Commission Decision 2001/718/EC of 11 October 2000 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.1845 – AOL/Time Warner), OJ 2001 L 268, p. 28). In that decision, the Commission, far from referring to 'indirect network effects',

emphasises the importance of decisions made by content providers in determining the popularity of media players and acknowledges the ease with which media players can be distributed, especially via downloading from the Internet, and the fact that there is no obstacle to using several media players on any given PC. The Commission also found in that decision that ‘Winamp ... would shortly become the most popular player in the world’.

- 355 Moreover, Microsoft claims that the foreclosure theory adopted by the Commission in the present case fails to take account of a number of relevant factors and is based on predictions which are contradicted by the facts. It states that the burden of proof on the Commission is particularly high where it is carrying out a prospective analysis.
- 356 Thus, Microsoft submits, first, that the Commission has ‘ignored the factors that lead content providers to use formats other than Windows Media format’. It asserts that there is no basis for believing that content providers view the breadth of distribution of media software associated with a particular format as the decisive criterion in choosing the formats in which they will encode their content. In reality, factors other than the ‘ubiquity’ of a particular media player influence content providers in their choice of a given format for encoding their content. In that respect, Microsoft criticises the Commission for limiting itself, in the request for information which it sent to content providers, to asking them whether the ‘reach’ of a media player was a significant factor in the decision to write to a given format. The Commission failed to ask whether they were influenced by other factors.
- 357 Microsoft criticises the Commission’s assertion that content providers face additional costs in making content available in more than one format. It claims that the Commission should have adduced evidence that the costs of providing an additional format outweigh the resulting benefits. In fact, the Commission collected - but ignored - evidence that the costs of making content available in a given media format are a trivial portion of overall costs. Referring to recital 894 of the contested decision, Microsoft adds that ‘encoding in a second media technology costs only 50% as much to support as the first’. It concludes from this that there are scale economies in offering multiple media formats and that a second format will be offered even if it is significantly less popular among end users.
- 358 Microsoft also observes that even content providers which rely on only one format have not chosen Windows Media, long after the start of the claimed abuse. Thus, Apple decided not to use Windows media technology either for its iPod or its iTunes music store. In addition, software developers indicated to the Commission that on average they were using ‘two of the three major sets of APIs (Windows, Real or Quicktime)’.

- 359 In its reply, Microsoft, referring to a note by Professor Seabright, which appears in Annex C.16, claims that media players would be susceptible to 'tipping' only if (i) the use of multiple media players results in significant costs for users or content providers and (ii) media players are perceived as homogenous with respect to their intrinsic characteristics and the content that can be accessed by such media players. Neither condition is satisfied in this instance.
- 360 Second, Microsoft claims that the prediction at recital 984 of the contested decision that 'tipping' in favour of Windows Media format will occur in the 'foreseeable future' is inconsistent with the facts and the evidence in the file. Those facts and that evidence demonstrate that content providers continue to use multiple formats, that third party media players, far from having disappeared from the market, are flourishing and that consumers are not forced to use Windows Media Player.
- 361 (1) It is apparent from the responses to the Commission's requests for information that ten of the twelve content providers which encoded their content in Windows Media formats also encoded their content in other formats. Content providers continue to use formats developed by Apple, RealNetworks and other vendors. A survey of the 1000 Web sites most visited by U.S Internet users during the period 2001 to 2004 found that the number of sites 'with any media content' rose by 47%, while the number using RealNetworks' formats rose by 59% and the number using QuickTime formats rose by 79%.
- 362 (2) OEMs continue to offer multiple media players on PCs that they sell. The number of third-party media players installed on home and small office computer models sold by the main OEMs in May 2004 averaged 4.3 on U.S. models and 2.4 on European models.
- 363 (3) The average number of media players people use each month has increased from 1.5 per person at the end of 1999 to 2.1 in 2004.
- 364 In that context, Microsoft submits that the Commission cannot rely on the fact that the number of users of Windows Media Player is increasing. What matters, according to Microsoft, is whether the number of users of other formats is sufficient to make it worthwhile for content providers to encode content in those formats.
- 365 Also in that context, Microsoft disputes the merits of the analogy that the Commission draws with Netscape Navigator, observing that, whereas any Web browser can access the vast array of Web pages on the Internet, media content encoded in a particular format can be played only in a media player that supports that format. Thus, in order to be able to play the full range of available media content, consumers are required to obtain and use more than one media player.
- 366 Lastly, Microsoft submits that the theory developed by the Commission appears to be lacking in objectivity. It is apparent from the contested decision that the

foreclosure theory applies only where the media functionality bundled with Windows is that developed by Microsoft. Notably, that theory was not found to apply between 1995 and 1998, when RealNetworks' streaming media player was included in Windows.

Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

367 The Commission expresses its surprise, first of all, that Microsoft criticises it for having departed from the 'normal presumption of harm to competition applied in tying cases in the past', and for having gone to additional lengths in discussing the actual foreclosure effect of tying on competition in the media player market. The fact that it has demonstrated a foreclosure effect where it is normally presumed does not mean that it has applied a novel legal theory.

368 Next, the Commission draws attention to its findings with regard to foreclosure in the contested decision. More specifically, it draws attention to the following points:

- the tying in question afforded Windows Media Player ubiquity on client PCs worldwide and no other distribution mechanism or combination of distribution mechanisms attains 'this universal distribution' (recital 844 of the contested decision);
- users who find Windows Media Player pre-installed on their client PCs are less likely to use alternative media players as they already have an application which delivers media streaming and playback functionality (recital 845 of the contested decision);
- Microsoft itself advertises the advantages of OEM pre-installation of software for PC users and recognises, as regards Windows Media technologies, that, '[t]o the extent Microsoft offers consumers certain functionality in its operating systems, it is quite true that they may choose to use what Microsoft offers instead of licensing third-party software products that deliver similar functionality' (recital 846 of the contested decision);
- content providers and software developers look to installation and usage shares of media players when they decide, taking into account their limited resources, for which technology they should develop their complementary software (recital 879 of the contested decision);
- Microsoft itself stresses the importance of the 'interdependency between player usage and availability of content and applications' (recital 879 of the contested decision);
- content providers and software developers have a strong incentive to develop their solutions on the basis of Windows Media technology, since

this gives their products a possible reach which is equal to Microsoft's share of the client PC operating systems market, that is to say, above 90% worldwide (recital 880 of the contested decision);

- once media content is encoded in the proprietary Windows Media formats, it can normally be played back only by Windows Media Player; '[i]n the absence of format and codec interoperability, the compatibility of content and applications with a specific media player helps to drive popularity of the media player which, in turn, drives uptake of the underlying media technology, including supported codecs, formats (including DRM ...) and media server software' (recital 881 of the contested decision);
- by tying Windows Media Player to Windows, Microsoft thus creates a 'positive feedback loop' (recital 882 of the contested decision).

369 The Commission submits that its finding that the tying in question risks foreclosing competition in the market is not speculative but is based on a factual assessment of the specific characteristics of this market and the incentives of content providers and software developers. It submits that it is apparent from the judgment in *Case T-65/98 Van den Bergh Foods v Commission* [2003] ECR II-4653 that it is not improper to take account of the likely reactions and choices of third parties, inter alia competitors or customers, faced with unilateral action by a dominant firm, in assessing whether such action is likely to lead to foreclosure. In the present case, it is beyond dispute that Microsoft does not give customers the possibility of acquiring Windows without Windows Media Player. Furthermore, the tying in question has a direct influence on the incentives of third parties, and thus interferes with their free choice (recitals 845, 851, 870, 883, 884 and 895 of the contested decision).

370 Referring to recitals 879 to 896 of the contested decision, the Commission observes, in this respect, that it has undertaken a detailed analysis of the impact of Microsoft's behaviour, inter alia by sending extensive questionnaires to a range of content providers, software developers and content owners.

371 The responses to those questionnaires lead to the following findings:

- all content providers that responded to the questionnaires indicated that making content available for more than one technology generated additional costs (recital 884 of the contested decision);
- those same content providers considered that a technology's reach and the presence of media client software on PCs were significant factors in deciding which technology to support (recital 886 of the contested decision);
- some of those content providers even stated that reach was the 'single most important factor' (recital 889 of the contested decision);

- as long as usage of competing media players is significant, the trade-off of supporting additional formats may be positive for content providers (recital 890 of the contested decision);
- software developers provided responses along the same lines as those of content providers (recitals 893 to 896 of the contested decision);
- thus, when asked whether the additional costs of ‘multiple format support’ are in the future likely to influence companies’ decisions on whether to develop applications for technologies other than Windows Media, 12 out of 13 software developers stated that this was the case (recital 890 of the contested decision);
- by tying Windows Media Player to Windows, Microsoft can assure content providers and software developers that end-users will be able to play back their content, that is to say, that they will be able to reach a wide audience; the ubiquity of the Windows Media Player on Windows PCs therefore secures Microsoft a competitive advantage unrelated to the merits of its product (recital 891 of the contested decision).

372 In its rejoinder, the Commission states that Microsoft has already engaged in certain exclusionary conduct, the likely effects of which on market conditions are readily discernible. It claims to have adduced evidence that Microsoft’s conduct has already altered the conditions of competition.

373 As regards Microsoft’s reference to the *AOL v Time Warner* decision (see paragraph 354 above), the Commission observes that that decision was adopted on the basis of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, as rectified, OJ 1990 L 257, p. 13, and as amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1) and that it must be considered in the specific context in which it was adopted. In any event, the *AOL v Time Warner* decision supports the point of view put forward by the Commission in the contested decision since it confirms, first, ‘the content/format/usage relationship as a key competitive parameter in media player competition that needs to be protected against abusive distortions’ and, second, that player software falls within a market which is distinct from the market for operating systems.

374 Moreover, the Commission rejects Microsoft’s claim that the ‘theory’ adopted by the Commission in the present case fails to take account of a number of relevant factors and is based on predictions which are contradicted by the facts.

375 First, it disputes that it ‘ignor[ed] factors that lead content providers to write to non-Windows Media formats’. It asserts that, in the requests for information which it sent to content providers, it did not raise only the question of the ‘reach’ of a media player and that it never indicated in the contested decision that that ‘reach’ was the only relevant factor. It found only that that ‘reach’ was an

important and significant factor. In any event, Microsoft recognises that content providers take into account that factor when selecting the encoding format of their products and therefore implicitly recognises that the 'unmatched ubiquity achieved through Microsoft's tie distorts that selection process'.

- 376 The Commission also claims that it is apparent from the questions that it put to content providers and software developers that they do balance and give more weight to the costs of multi-technology support than to its benefits. It observes that Microsoft itself stated that 'to encode streaming content for delivery in multiple formats [was] expensive and time-consuming for content providers' (recital 883 of the contested decision). In addition, the responses to the Commission's market enquiry showed that making content available for more than one technology generated additional costs (recital 844 of the contested decision). Even if the cost of multi-technology support is not the sole factor determining whether or not content providers use encoding in multiple formats, it is clearly one significant element that they consider. The Commission disputes that it collected evidence in its market enquiry showing that the costs of making content available in a given media format were only a trivial portion of overall costs. On the contrary, it is apparent from the information which it received that content preparation costs are significant.
- 377 Moreover, the Commission disputes the merits of the findings in Professor Seabright's note contained in Annex C.16 to the reply. It observes, first of all, that the contested decision does show that downloading cannot offset the ubiquity that Windows Media Player gains through the tie in question and that this ubiquity distorts the incentives of content providers. Next, it reiterates that its finding of abuse of a dominant position does not rely on a finding of complete elimination of competition or 'tipping' of the market. Lastly, it asserts that Professor Seabright (i) does not substantiate his claim set out in paragraph 359 above, (ii) ignores various material aspects of the present case, such as 'the distortions caused to network effects by monopoly leveraging', and (iii) does not demonstrate that the conditions he claims are necessary for tipping have not been fulfilled. The Commission also refers to the observations in Annex D.15 to its reply.
- 378 Second, the Commission rejects Microsoft's claim that the foreclosure analysis undertaken in the contested decision is contradicted by the facts.
- 379 It reiterates, first of all, that Microsoft misrepresents recital 984 of the contested decision, as that recital does not refer to 'tipping' of the market but merely states that Microsoft's tying is liable to affect negatively the structure of competition in the media player market.
- 380 Next, the Commission submits that the market data that it included in the contested decision consistently point to a trend in favour of usage of Windows Media Player and Windows Media formats to the detriment of the main competing media players (recitals 906 to 942 of the contested decision). Those data show

that, until the second quarter of 1999, RealPlayer was leading the market, with almost twice as many users as Windows Media Player and QuickTime (recital 906 of the contested decision). By contrast, from the second quarter of 1999 to the second quarter of 2002, the total number of users of Windows Media Player increased by about 39 million additional users, roughly equal to RealNetworks' and Apple's combined increase in users (recital 907 of the contested decision). More recent data from Nielsen/NetRatings show that Windows Media Player has attained a distinct lead over both RealPlayer (over 50% more unique users) and QuickTime (three times as many unique users) and that this lead increased in the period from October 2002 to January 2004 (recital 922 of the contested decision). The trend described above is similar to that displayed by the web browser market, which was the subject of the US anti-trust proceedings.

- 381 The Commission claims that Microsoft does not contest these market data, but presents new data, some of which even post-date the adoption of the contested decision, and, consequently, could not have been taken into account.
- 382 Lastly, the Commission claims that, in any event, analysis of more recent figures confirms the finding of foreclosure made in the contested decision.
- 383 Thus, (i) as regards the data relating to content providers put forward by Microsoft (see paragraph 361 above), the Commission states that Microsoft fails to substantiate them and presents them in a misleading manner. It observes that it is clear that during the period 2001-2004, the number of Web sites with 'any' media content rose so that it is not surprising if there were more Web sites which offered non-Windows Media formats. It states that Microsoft fails to mention that Web sites supporting Windows Media formats rose by 141% in the same period. Furthermore, Microsoft gives no indication of the actual quantity of content in non-Windows media formats offered by the Web sites in question or the actual usage of the content in those media formats.
- 384 (ii) As regards the data relating to the average number of media players pre-installed on PCs by OEMs, the Commission asserts that these are inconclusive (see paragraphs 338 and 339 above). In any event, it is apparent from the evidence put forward by Microsoft that more than 70% of PCs sold in Europe and more than 80% of PCs shipped worldwide will typically have only one single media player pre-installed and that, as a result of the tie in question, this will always be Windows Media Player. The Commission adds that, to the extent that OEMs pre-install competing media players on PCs, any such pre-installation is 'overshadowed' by the fact that Windows Media Player is automatically found on 95% of all PCs shipped worldwide. Lastly, it submits that the study to which Microsoft refers is in particular 'vitiating' in the light of the fact that it takes account of competing streaming media players that have been pre-installed as a result of 'legacy deals' (contracts about to expire) that have not been renewed and software products that do not qualify as streaming media players.

385 (iii) The Commission claims that there is a clear trend in favour of Windows Media Player (and Windows Media format) usage. The Nielsen/NetRatings US media player usage data establish that by March 2005, Windows Media Player's usage share had risen to above 80%, RealPlayer's usage share had fallen to below 40%, and QuickTime's usage share had fallen to just over 10%. Recent data from Nielsen/Netratings also show that Windows Media Player's share of exclusive users has steadily increased, with 53 to 55% of users using Windows Media Player exclusively at present, compared to 10 to 13 % for RealPlayer and 3 to 4 % for QuickTime Player.

386 In response to Microsoft's claim that the foreclosure theory is lacking in objectivity as it was not found to apply when RealNetworks' media player was included in Windows (see paragraph 366 above), the Commission observes that it cannot be precluded from pursuing a given infringement of Community competition law on the basis that it did not pursue another possible infringement (recital 818 of the contested decision).

b) The second part, alleging that the Commission should have given greater weight to the benefits flowing from Microsoft's 'business model', which entails the integration of new functionality into Windows over time

Arguments of the applicant and the parties granted leave to intervene in support of the form order which it seeks

387 As a preliminary point, Microsoft asserts that the integration of new functionality into operating systems in response to technological advances and changes in consumer demand is a core element of competition in the operating system business and has served the industry well for more than 20 years. It submits that the integration of 'streaming capability' into Windows is one aspect of its 'successful business model' and has contributed to the increasing use of digital media. It takes the view that the Commission committed a manifest error of assessment by not sufficiently considering the real benefits flowing from the integration of new functionality into Windows. It claims that the assertion contained at recital 970 of the contested decision, that 'Microsoft has not submitted adequate evidence to the effect that tying [Windows Media Player] is objectively justified by pro-competitive effects which would outweigh the distortion of competition caused by it' is clearly inconsistent with the evidence in the file.

388 Microsoft puts forward three arguments in support of that second part of the plea.

389 First, it claims that the integration of media functionality into Windows is indispensable to providing the benefits of a 'stable and well-defined platform'.

390 Such integration is essential to allow software developers and Web site creators to make efficient use of the Windows platform. By calling upon Windows media functionality, they can easily include audio and video content in their products.

Consequently, they do not need to design and develop the complex software code required to play such content and can focus on improving the unique aspects of their products that differentiate them from competing products.

- 391 Microsoft disputes the Commission's assertion at recital 1031 of the contested decision that it does not matter whether the media functionality bundled with Windows is provided by Microsoft or a third party, because it is possible to redistribute the software code that supplies that functionality or to rely on functionality supplied by third-party media players. It submits that software developers are not interested in distributing components of the underlying operating system or dealing with the complexities created when different permutations and combinations of those components are present on different brands of PCs. Nor are they interested in a situation where each software developer is required to come up with its own method of providing the same basic functionality, especially when differing approaches may not work well together. Rather than having a common platform that provides a reliable set of system services, software developers would face the need to determine what functionality is present on the particular version of Windows installed on a customer's PC and then to supplement that functionality as necessary. That would make applications larger and more complex, thus making those applications more expensive to develop, test and support.
- 392 Microsoft adds that adding components to Windows on a piecemeal basis risks creating conflicts among differing versions of those components that would cause Windows or the application being installed to malfunction.
- 393 It also submits that, for applications that are already in use, there is no ready mechanism to ensure distribution of the components of Windows on which those applications rely to obtain media functionality. Those applications will no longer function correctly on a version of Windows without Windows Media Player.
- 394 Microsoft states that competing media players cannot replace the media functionality in Windows in the case of applications designed to call upon that functionality in Windows because such functionality is not 'fungible'. It recognises that third party media players such as Apple's QuickTime may perform some of the same tasks for users that the media functionality in Windows performs, but claims that such products may not expose their functionality to other software products through published APIs and that, if they do, those APIs will be very different from the media-related APIs exposed by Windows. Thus, an application designed to call upon the media functionality in Windows cannot call upon similar functionality provided by a competing media player without being substantially revised.
- 395 In its reply, Microsoft disputes the Commission's assertion that competing media players are capable of substituting Windows Media Player in respect of much of its functionality. In this regard, it asserts, first of all, that the Commission offers

no evidence that any third party will decide to offer 'substitute functionality for all the media functionality integrated into Windows'. It then states that, to the extent that competing media players make their functionality available through published interfaces that can be used by third party applications, those interfaces will be different from the interfaces in Windows. It infers from this that other parts of Windows and applications designed to call upon the media functionality in Windows will not work properly without substantial modification. Lastly, Microsoft reiterates that it was clearly shown during the interim measure proceedings that applications and Web sites which rely on functionality in Windows will not work properly if that functionality is removed.

- 396 Microsoft also claims that vendors of third-party media players have different business objectives from those of an operating system vendor such as Microsoft. Thus, RealNetworks is seeking to maximise use of its media players to promote the sale of related products and services. In contrast, Microsoft is seeking to make Windows the most capable platform for developing applications, including those that contain audio and video content. As a result, those two firms treat software developers differently.
- 397 Lastly, Microsoft claims that the absence of media functionality in certain copies of Windows will be similarly damaging for Web site developers that rely on the media functionality in Windows to play audio and video content. It claims that if they were no longer able to count on the uniform presence of media functionality in Windows, those Web site developers would have to incorporate in their products mechanisms for detecting the presence of the requisite media functionality and, if it were missing, for downloading the necessary software code to the user's PC.
- 398 In its reply, Microsoft claims that the Commission's assertion that the benefit flowing from the integration of uniform media functionality cannot amount to a valid justification under Community law is incorrect both in law and fact. The Commission cannot, when applying Article 82 EC, simply ignore the benefits that flow from the conduct said to constitute an abuse. Moreover, the Commission erred by asserting that any 'standardisation' that results in the present case would not be the outcome of a competitive process. On that point, Microsoft states that if third parties were to standardise on the media functionality in Windows, this will only be because they will have decided for themselves that such standardisation was 'the most efficient course of action'.
- 399 Second, Microsoft submits that the integration of Windows Media functionality is indispensable to achieving 'other benefits'.
- 400 It explains, in this respect, that Windows consists of a large number of specialized blocks of software code that perform specific tasks. To avoid duplicating the same functionality in every one of these blocks, particular blocks of software code - the 'components' - call upon one another to perform specific tasks. A single

component can therefore be used to fulfil several functions. For example, a component that streams audio content can be used both for the ‘Help system’ in Windows and for the text-to-voice narration feature that makes Windows more accessible to the visually impaired. Since this software design methodology, referred to as ‘componentisation’, is based on the cross-dependencies of components, the removal of one component will cause many other components to malfunction. Thus, numerous other features of Windows XP, including the ‘Help system’, would cease to function if media functionality were removed from the operating system. Furthermore, in light of the cross-dependencies of the components, Microsoft cannot design other parts of Windows to rely on media functionality unless it can be certain that that functionality will be present on every PC running Windows. Computer manufacturers are not therefore free to remove Windows components, in particular those that supply media functionality.

- 401 Microsoft adds that ‘componentisation’ provides benefits in terms of improving the performance of operating systems from two points of view. First, individual components are not responsible for supplying disparate types of functionality. Second, having specialised components provide functionality to one another consumes fewer system resources than having multiple components provide overlapping functionality. Microsoft claims that ‘the benefits cannot be realized with regard to media functionality in Windows if it must be made optionally removable, as the [contested] decision would require’.
- 402 In its reply, Microsoft disputes the Commission’s assertion that it never claimed that the integration of Windows Media Player with Windows produced increased ‘technical efficiencies’. It claims that it explained in detail why it was ‘technically efficient to include media functionality in Windows that is available to be called upon by other parts of the operating system as well as by applications running on top of the operating system’. In its defence, the Commission fails to take account of the benefits described in the application. Microsoft adds that the fact that many software developers freely choose to rely on the media functionality in Windows is itself evidence that ‘uniform integration’ of such functionality generates increased technical efficiencies. Lastly, it claims to have demonstrated during the administrative procedure that Windows operates ‘faster’ when media functionality is integrated.
- 403 Third, Microsoft examines the effects that the remedy provided for in Article 6 of the contested decision will have on the above-mentioned benefits.
- 404 It recalls, first of all, that Windows is designed, developed and tested as an integrated whole, and that there are large numbers of cross-dependencies among various components of the operating system. It repeats that taking components out of Windows will degrade the operating system, especially when those components are used to provide basic services, such as the ability to play audio and visual content.

- 405 Next, it claims that if the contested decision were applied as precedent against future integration by Microsoft, it would quickly become impossible to design, develop and test the Windows operating system. For every block of software code that had to be made optionally removable, Microsoft would face an exponential increase in the amount of work required. Thus, for example, if the Commission decided to apply to 'a second block of software code' the same principles as those established in the contested decision, Microsoft would be required to offer four different versions of Windows.
- 406 Microsoft claims that that 'fragmentation' would make it impossible to know whether any given copy of the operating systems contained functionality on which software developers, manufacturers of peripherals or users wished to rely. It would lead to there being one, or even multiple versions of Windows per computer manufacturer, each offering a different set of functionality. Over time, making functionalities of Windows optionally removable would reduce the choice of consumers as they would be tied to particular brands of PCs running idiosyncratic versions of Windows with no assurance that applications, such as graphics programs, would work on other versions of Windows. That uncertainty would also make it much more difficult to mix and match different brands of PCs in a single computing network.
- 407 According to Microsoft, the only way to avoid such 'fragmentation' would be to 'freeze' Windows in its current state, with Microsoft no longer improving its operating system in response to improvements in hardware and software technology or changes in consumer demand.

Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

- 408 As a preliminary point, the Commission observes that, during the administrative procedure, Microsoft did not argue that the integration of Windows Media Player with Windows resulted in any increased technical efficiencies. In addition, the Commission expresses its surprise that a company with a 'super-dominant' position should justify tying on the basis that that practice constitutes 'a core element of competition' in its monopoly market.
- 409 Next, the Commission examines the three arguments put forward by Microsoft in support of this second part of the plea.
- 410 First, referring to recital 963 et seq. of the contested decision, the Commission observes that it already found that Microsoft had failed to supply evidence that the tying in question was indispensable for the alleged pro-competitive effects to be realised.
- 411 The Commission explains that media players in general exhibit both application and platform software characteristics and that, although they are based on the client PC operating system, other applications may build on them. It states that

media players offer their platform services irrespective of whether they are tied to a PC operating system or not and states, by way of example, that at present software developers and content providers still develop products that are based on RealPlayer's platform. The tying in question is not therefore indispensable for offering platform services to software developers. In support of that last claim, the Commission also states that software developers can and do write to Windows Media Player 9, which was released separately from any operating system upgrade and was not therefore pre-installed on Windows.

- 412 The Commission takes the view that the benefit that the tying in question offers for software developers and content providers consists in enabling them to avoid the 'efforts of competition', which cannot amount to a valid justification under Community competition law. Software developers and content providers that base their products on the Windows Media Player platform do not, as a result of the tying of that player with the 'ubiquity' of the Windows operating system 'monopoly', need to convince users to install that player. By contrast, software developers and content providers that design applications based on the platform of third-party media players typically provide for means to incite users to install on their computers the relevant media player, for example, by including internet links for downloading it.
- 413 The Commission adds that the tying in question raises the costs borne by vendors of competing media players and their third party software developers in convincing users to install their media players, because 'competitors need to overcome the disincentives generated by the automatic presence of Windows Media Player to install a different media player product, but with essentially similar characteristics (learning, support, and storage costs are examples of such disincentives)'.
- 414 The Commission also takes the view that Microsoft's 'uniform platform' argument amounts to a claim that it should be allowed to extend the 'Windows monopoly' by tying other software products to Windows, simply because those products also offer platform capabilities to third-party developers. It observes that Microsoft basically argues that integration of Windows Media Player leads to de facto standardisation, and that this provides benefits to third parties, since they know that that player will always be present in Windows. Although standardisation may be beneficial when it emanates from decisions of standards bodies or is the outcome of a competitive process in a market, it should not be imposed unilaterally by a dominant company through tying (recital 969 of the contested decision).
- 415 Moreover, the Commission asserts that even if software code is not completely 'fungible' (see paragraph 394 above), it remains true that competing media players are substitutes for Windows Media Player in respect of a large part of its functionality. As regards other functionality, competing media player vendors may choose not to implement it at present because they know that this

functionality is available in Windows Media Player. This does not however exclude that they could develop this functionality immediately following the implementation of the remedy provided for in Article 6 of the contested decision in order to take advantage of the unbundled version of Windows and to meet the demand of software developers. The fact that vendors of third-party media players have different business objectives from those of an operating system vendor such as Microsoft does not alter the fact that those media players can be a substitute for Windows Media Player.

- 416 In its rejoinder, the Commission states that it has never claimed that third-party media players are 'complete substitutes' for the media functionality in Windows. In the contested decision, the Commission merely explained that third-party media players running on top of an unbundled version of Windows version could largely 'replace features' of Windows Media Player. It observes that streaming media players will compete with one another on the basis of a number of parameters, such as the quality of streaming, the method of organising content and the format in which the stream is provided.
- 417 Finally, the Commission submits that Microsoft's claim that such applications will malfunction on a version of Windows without Windows Media Player (see paragraphs 393 and 404 above) is false and unsubstantiated. It states that many applications already include the 'Windows Media redistributable code', and will therefore function perfectly on that version of Windows. It adds that professional web sites normally incorporate mechanisms that automatically detect the absence of components needed to run the web page and fetch 'necessary components for download' (recital 1037 of the contested decision). It refers in this regard to the example referred to at recital 1038 of the contested decision. In its rejoinder, it also states that developers that base their products on Windows Media Player have in any case a variety of ways to deal with the possibility that a PC user has not already installed that media player.
- 418 Second, the Commission rejects Microsoft's arguments based on 'componentisation'.
- 419 It claims, first of all, that those arguments are 'entirely abstract'. Thus, Microsoft refers to 'media functionality' in general, whereas the contested decision does not require it to remove all media files in Windows, but only the ones which constitute Windows Media Player. Thus, basic media functionality is unaffected (recitals 1019 and 1020 of the contested decision).
- 420 Next, the Commission submits that the files which constitute Windows Media Player and which must be removed pursuant to the contested decision have been clearly identified by Microsoft. It refers in this regard to a letter of 13 September 2004 sent to it by Mr Heiner of Microsoft, and submits that Microsoft cannot claim that it is not 'technically feasible' to design an 'unbundled' version of Windows.

- 421 Moreover, the Commission asserts that it is incorrect to state that the contested decision requires the media functionality to be ‘optionally removable’ (see paragraph 401 above). The contested decision requires Microsoft to develop and offer a version of Windows which is not bundled with Windows Media Player, ensuring that that version is full-functioning and of good quality, but does not prevent it from continuing to offer a version of Windows bundled with Windows Media Player ‘in line with its current software design methodology’.
- 422 Lastly, the Commission observes that Microsoft only offers one single example of ‘cross-dependency of components’, namely the ‘Help system’ in Windows XP. It asserts that to the extent that that system relies on audio or video, it relies on media infrastructure that will remain in the version of Windows which is not bundled with Windows Media Player and therefore works well, irrespective of the presence of that media player, as demonstrated by a ‘test report’ submitted by RealNetworks in the interim proceedings. Microsoft’s assertion that numerous other features of Windows XP will cease to function if media functionality is removed from the operating system is unsubstantiated. In particular, the report attached as Annex A.18 to the application contains only ‘vague general assertions’.
- 423 The Commission adds that it examined in detail, at recitals 1026 to 1042 of the contested decision, the issue of the alleged interdependencies between Windows and Windows Media Player. It recalls that it found that it was obvious that if that media player were removed from Windows, certain functionalities that it normally delivers would not be available (recital 1033 of the contested decision). However, this does not mean that the operating system will not work properly or that the product will be ‘degraded’.
- 424 The Commission further adds that the existence of Windows XP Embedded shows that it is technically possible for Windows to function in the absence of multimedia capabilities caused by code removal in a way that does not lead to the breakdown of operating system functionality (recitals 1028 to 1030 of the contested decision). Windows XP Embedded can be configured in such a way as not to include Windows Media Player without this harming the integrity of the non-Windows Media Player related operating system functionality. As stated at recital 1029 of the contested decision, ‘[that suggests] that Windows is designed to deal gracefully with interdependencies, that is to say, without undermining the functioning of the ‘rest’ (in Microsoft’s view) of the operating system’. This was in fact demonstrated by RealNetworks during the administrative hearing.
- 425 In its rejoinder, the Commission adds that Microsoft’s claim that Windows operates ‘faster’ when media functionality is integrated has never been supported by any evidence.

- 426 Third, the Commission submits that Microsoft's arguments concerning the future effects of the remedy provided for in Article 6 of the contested decision are hypothetical, speculative and irrelevant.
- 427 Thus, the Commission submits that it is incorrect to state that the contested decision requires Microsoft to offer two different versions of Windows. Under the contested decision, Microsoft is required to offer a version of Windows without Windows Media Player and retains the right to continue to offer the 'bundled' version of Windows. It also observes that Microsoft already markets a number of different versions of its client PC operating system, which are not all interchangeable between each other, such as Windows 98, Windows 2000, Windows Millennium Edition, Windows NT and Windows XP. Those various versions of Windows do not support the same applications.
- 428 The Commission also rejects Microsoft's claim that it would have to 'freeze' Windows in its current state. It repeats that Microsoft has not demonstrated that the tying of Windows Media Player with Windows resulted in any increased technical efficiencies and submits that the remedy in question fully preserves Microsoft's incentives to innovate both in the media player market and the client PC operating system market and enables consumers to exercise their choice based on the merits of products. In reality, it is the tying in question that deters innovation, in particular in the media player market (recital 981 of the contested decision). Moreover, that practice deters investments in any technology in which Microsoft could conceivably take an interest (recital 983 of the contested decision).

c) The third part, alleging that the Commission fails to establish the existence of an infringement of Article 82 EC, in particular of subparagraph (d) of the second paragraph of that article

Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

- 429 Microsoft submits that the Commission fails to establish the existence of an infringement of Article 82(d) EC.
- 430 First, the Commission fails to demonstrate that Microsoft makes the grant of licences to its Windows operating system conditional on the acceptance of supplementary obligations.
- 431 In support of that claim, Microsoft submits (1) that the contested decision fails to establish that Windows and its media functionality belong to two separate product markets.
- 432 It claims that that media functionality is 'a long-standing feature of the Windows operating system'. In Windows, the software code that permits users to play audio and visual content is no different from code that permits users to access other

types of information, such as text or graphics. Moreover, other parts of Windows as well as third-party applications running on top of that operating system rely on that same software code.

- 433 Microsoft criticises the fact that in the contested decision the Commission examines only whether the alleged ‘tied’ product, namely, media functionality, is available separately from the alleged ‘tying’ product, namely the client PC operating system. The appropriate question is in actual fact whether the latter product is regularly offered without the alleged tied product. There is no material demand on the part of consumers for a PC operating system without media functionality, and therefore no operator markets such a PC operating system.
- 434 It submits that the Commission punishes dominant undertakings which improve their products by integrating new features when it requires that those features must be capable of being removed whenever a third-party undertaking markets a standalone product that provides the same or similar functionality. It observes that Windows contains many features that can be augmented or replaced by standalone products that provide the same or similar functionality. It cites the example of the file system in Windows.
- 435 Microsoft adds that the position adopted by the Commission is even less tenable given that the alleged abuse was triggered not by the integration of media functionality into Windows – which dates back to 1992 and has since been constantly improved – but from the improvement that it made to that functionality in 1999 when it added its own streaming capability to that functionality. In other words, the Commission calls in question the presence of media functionality in Windows only to the extent that it enables audio and video content found on the Internet to be played before it has been fully downloaded.
- 436 Microsoft also claims that all other significant PC operating systems, *inter alia* Mac OS, Linux, OS/2, and Solaris, include media functionality with the ability to play content ‘streamed’ over the Internet. Its competitors have all taken the view that including such functionality in client PC operating systems is a good business practice that meets consumer demand. That demonstrates that streaming capability is a ‘natural feature’ of a client PC operating system, not a separate product. In that context, Microsoft emphasises that ‘a product should be defined primarily in terms of customer expectations and demands’. The Commission seems to concede that customers do, in fact, want operating systems with media functionality (recital 824 of the contested decision).
- 437 Microsoft adds that the contested decision expressly recognises, at recital 1013, that it would not have committed an abuse if it had offered, at the same price, in 1999, two versions of Windows, namely one with Windows Media Player and one without. There is no evidence, however, that there would have been demand for a version of Windows that contained, at the same price, fewer features. This lack of demand also shows that ‘Windows with media functionality’ is a single product.

- 438 Moreover, Microsoft claims that the Commission cannot rely on the judgments in *Tetra Pak II* and the judgments in *Hilti v Commission*, cited above, to justify its argument that Windows and its media functionality belong to two separate product markets. In this respect, it observes, first of all, that those two cases involved consumable products that were used with durable equipment over the lifetime of that equipment and which were 'physically separate' from one another. It submits that in those cases, unlike here, there was evidence that there was demand for the tying product without the tied product. It then observes that in this case the Commission has never identified a customer wishing to obtain the alleged tying product without the alleged tied product.
- 439 Lastly, Microsoft criticises certain arguments put forward by the Commission in its defence in order to show that Windows constitutes a separate product from Windows Media Player: (i) It maintains that the U.S. courts have never concluded that Windows Media Player is in a market separate from the Windows operating system. (ii) It submits that the fact that it releases versions of Windows Media Player separate from Windows does not provide evidence of demand for Windows without Windows Media Player. Moreover, those versions of Windows Media Player are, in fact, mere updates to the existing media functionality in Windows. (iii) Microsoft claims that the Commission's assertion that the files that constitute Windows Media Player are easily identifiable is irrelevant. That assertion is in any event not true. (iv) The Commission fails to provide an adequate response to Microsoft's argument that its competitors engage in the same behaviour.
- 440 (2) Microsoft claims that the question of 'supplementary obligations' within the meaning of Article 82(d) EC does not arise in the present case.
- 441 In support of that claim, it submits, first of all, that consumers are not required to pay extra for the media functionality in Windows. It states that that functionality is a feature of Windows and is included in the overall price of the operating system. Unlike in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 and the judgments in *Hilti v Commission*, cited above ('*Hilti*'), consumers do not face any financial disincentive imposed by Microsoft if they use competing products.
- 442 Microsoft then observes that consumers are not required to use Windows Media Player. They can even use the 'Set Program Access & Defaults' feature of Windows that Microsoft created pursuant to the District Court's decision of 1 November 2002 to remove all end user access to the media functionality in Windows and to set a competing media player as the default handler of various media file types.
- 443 Finally, Microsoft claims that, unlike in *Hilti* and *Tetra Pak II*, consumers are not prevented from installing and using third-party media players instead of, or in addition to, the media functionality in Windows. It observes that, at recital 860 of the contested decision, the Commission moreover states that consumers on average use 1.7 media players each month and that that figure is increasing.

- 444 In its reply, Microsoft adds that it is the Commission's argument that deprives Article EC 82 of its useful effect. If that argument were to be accepted, it would result in the elimination of 'coercion' as a requirement for a tying abuse, contrary to sound economic principles.
- 445 Second, Microsoft asserts that the Commission has not demonstrated that the media functionality is not connected naturally or by commercial usage with client PC operating systems.
- 446 Microsoft claims that the integration of media functionality was a 'natural step' in the evolution of those operating systems, as demonstrated by the fact that all vendors of such operating systems include such functionality in their products. It repeats that it is always seeking to improve Windows in response to technological advances and changes in consumer demand and states that, over time, Windows and other client PC operating systems have evolved to support a wider and wider range of file types. For software developers and consumers, there is no fundamental difference between files that contain text or graphics and those that contain audio or video. In fact, there is an expectation that a modern operating system will support both kinds of files.
- 447 Microsoft asserts that operating systems and media functionality have become 'strongly connected' by commercial usage. It states, in this respect, that it included media functionality in Windows in 1992 and then constantly improved it. It explains that the streaming capability that it added in 1999 'was just one of many capabilities [that it] added to keep pace with rapid changes in technology' and repeats that other operating system vendors, and particularly Apple, have also included media functionality in their products.
- 448 Lastly, Microsoft takes the view that the Commission may not rely in the present case on the statement of the Court of Justice, at paragraph 37 of its judgment in *Tetra Pak II*, that, even where tied sales of two products are in accordance with commercial usage, such sales may still constitute abuse within the meaning of Article 82 EC unless they are objectively justified. In the present case, the fact that the alleged tied product is available separately does not refute the fact that that product and the alleged tying product are connected naturally or by commercial usage. In the present case, unlike in *Tetra Pak II*, suppliers of third-party media players are not displaced by the presence of media functionality in Windows.
- 449 In its reply, Microsoft adds that the Commission's argument that undertakings in a dominant position may be deprived of the right to adopt a course of conduct which would be unobjectionable if adopted by undertakings that are not dominant, and that it is not permissible to refer to industry practice in certain circumstances, is irrelevant to the issue of whether the Commission has established that the requirements laid down in Article 82(d) EC have been satisfied.

Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

- 450 First, the Commission examines Microsoft's claim that it has not been demonstrated that Microsoft makes the grant of licences to its Windows operating system conditional on the acceptance of supplementary obligations.
- 451 (1) The Commission rejects the assertion that the contested decision does not establish that Windows and its 'media functionality' belong to two separate markets.
- 452 As a preliminary point the Commission observes that the reasoning put forward by Microsoft is based on a 'diffuse notion of "media functionality"'. It states that what Microsoft calls 'media functionality' is not one general, indivisible block of code. In practice, Microsoft itself differentiates between underlying media infrastructure of the operating system, which acts as a platform for media applications and provides basic system services to the rest of the operating system, and the media player application that runs on top of the operating system, and which decodes, decompresses and plays digital audio and video files downloaded or streamed over the Internet. It states that the contested decision is concerned with Microsoft's tying of the streaming media application Windows Media Player, and not with the underlying media infrastructure.
- 453 Referring to recital 802 of the contested decision, the Commission submits that the Community judicature has held that the existence of independent manufacturers specialising in the manufacture of the tied product indicates a separate consumer demand and therefore a separate market for the tied product (judgments in *Tetra Pak II* and *Hilti*). It contends that the distinction that Microsoft draws between this case and the *Tetra Pak II* and *Hilti* cases, on the basis that they involved consumable products that were 'physically separate' from the equipment with which they were used, is unconvincing. The judgments in *Tetra Pak II* and *Hilti* cannot be interpreted as meaning that the application of Article 82 EC should be limited to the tying of consumable products. The Commission also submits that Microsoft's claim that, in those cases, there was evidence that there was demand for the tying product without the tied product is incorrect.
- 454 The Commission rejects Microsoft's assertion that it should rather have assessed whether there was demand for the tying products without the tied product. That assertion amounts to a claim that complementary products cannot constitute separate products for the purposes of the application of Article 82 EC, which conflicts with established Community case-law. The Commission recalls that, in the *Hilti* judgment, the Court of First Instance held that the products in question, namely nail gun cartridges and nails, were separate as they could be supplied by different sources. According to the Commission, that is also the case with PC operating systems and media players. It adds that the U.S. courts rejected similar

arguments which Microsoft submitted before them and have consistently held that there is a separate market for Intel-compatible client PC operating systems, and excluded so-called 'middleware products' (which includes Windows Media Player) from that market.

- 455 The Commission also asserts that Microsoft's commercial practice of developing and distributing versions of Windows Media Player for the operating systems of Apple's Mac and Sun's Solaris, and even for non-PC platforms (such as TV set-top boxes), further indicates that PC operating systems and media players are not just parts of the same product (recital 805 of the contested decision). Similarly, it observes that Microsoft releases upgrades of Windows Media Player, distinct from Windows operating system releases or upgrades, engages in promotion specifically dedicated to that media player, and applies different 'SDK' licensing agreements to Windows and Windows Media Technologies (recitals 805 and 813 of the contested decision).
- 456 Moreover, the Commission asserts that particular emphasis must be placed on the specific role played by OEMs, which, in their relations with software vendors, can be seen to be acting as 'purchasing agents' for end-users (recitals 68 and 119 of the contested decision). OEMs provide users with an 'out-of-the-box' experience by combining PC hardware, a PC operating system, and software applications to meet consumer demand. The Commission states that the vast majority (75%) of Microsoft's client PC operating systems business is generated through OEMs. It observes that the fact that consumers may wish to have a media player pre-installed on their computer does not imply that Microsoft must tie its own media player with its PC operating system. In response to such demand from consumers, OEMs could add a media player with the PCs they sell, just as they offer consumers the possibility of including other software applications in them.
- 457 The Commission submits that Microsoft's argument that there is no demand for Windows without a media player ignores the specific role that OEMs fulfil. It adds that Microsoft has not submitted any evidence showing that OEMs 'could not also provide the same media player functions without the need for Microsoft to tie its own media player application to Windows'.
- 458 The Commission adds that the evidence at its disposal shows that not all users of operating systems necessarily want those systems to be equipped with a streaming media player (recital 807 of the contested decision) and that, 'to the extent that they do, their demand for streaming media players is distinct from the demand for operating systems'.
- 459 Moreover, the Commission submits that Microsoft's statement that the alleged abuse was triggered by an improvement which it made to its media functionality in 1999 is misleading. Referring to recital 814 et seq. of the contested decision, it explains that it took issue with Microsoft's conduct 'at a juncture where tying became more harmful than it had previously been' and that it cannot be claimed

that it considers the bundling of previous media players to be lawful under Article 82 EC.

- 460 As regards Microsoft's argument that other operating systems vendors are behaving in exactly the same manner (see paragraph 436), the Commission observes that that ignores the fact that the impact of tying practices differs according to whether they emanate from a dominant or a non-dominant company. It states that the potential degree of foreclosure stemming from tying depends on the market share of the tying product. It also states that certain operating system vendors, such as Sun and Linux, do not bundle their operating system with their own media player, but with a media player offered by independent suppliers, and that do they do not link the media player concerned to their operating system by making its removal impossible (recitals 822 and 823 of the contested decision).
- 461 Lastly, the Commission disputes that it recognised, at recital 1013 of the contested decision or anywhere else in that decision, that Microsoft would not have committed an abuse if it had offered, at the same price, in 1999, two versions of Windows, namely one with Windows Media Player and one without. It states that if Microsoft were now to decide to sell the 'unbundled' version of Windows at the same price as the 'bundled' version, it would examine that policy taking into account the present market conditions and Microsoft's obligation to refrain from any measures having an equivalent effect to tying, and, if necessary, issue a new decision pursuant to Article 82 EC.
- 462 (2) The Commission submits that the arguments that Microsoft puts forward in support of its proposition that the question of 'supplementary obligations' within the meaning of Article 82(d) EC does not arise in the present case have already been rejected at recitals 826 to 834, 960 and 961 of the contested decision. Those arguments find no support in the case-law and deprive Article 82 EC of its useful effect. It states that coercion arises if a dominant company denies customers the realistic choice of buying the tying product without the tied product.
- 463 The Commission observes that, when referring to the concept of 'supplementary obligations', Article 82(d) EC does not include a reference to 'payment'. By its reasoning, Microsoft suggests that there can be no harm to competition under Article 82 EC where a dominant company charges a uniform price for two products, rather than two separate prices, or imposes a product on customers without charging a price. In so doing, Microsoft conflates coercion and harm to competition.
- 464 The Commission adds that the wording of Article 82 EC does not suggest that customers must necessarily be forced to use the tied product, or be prevented from using third-party substitutes for the tied product. By contrast, it regards as clearly relevant the question whether or not customers or suppliers of complementary software and content are likely to use the bundled product at the expense of competing non-bundled products.

- 465 In response to Microsoft's claim that consumers on average use 1.7 media players each month, the Commission observes that they cannot replace Windows Media Player with another media player on their PC, but can only add a second media player to that PC. Thus, that figure cannot detract from the fact that Windows Media Player is always pre-installed on Windows PCs.
- 466 Lastly, the Commission observes that given that Microsoft sold Windows only together with Windows Media Player and charged a 'single uniform price' for this bundle, it cannot seriously be claimed that customers were not forced to purchase Windows Media Player at the same time as Windows.
- 467 Second, the Commission considers Microsoft's claim that it has not been demonstrated that the media functionality is not connected naturally or by commercial usage with client PC operating systems.
- 468 In this regard, referring to recital 961 of the contested decision, the Commission states that undertakings in a dominant position may be deprived of the right to adopt a course of conduct which would be unobjectionable if adopted by undertakings that are not dominant. It observes that the Court of Justice stated in its judgment in *Tetra Pak II* that, even where tied sales of two products are in accordance with commercial usage, such sales may still constitute abuse within the meaning of Article 82 EC unless they are objectively justified. It states that it is 'tautological' to refer to commercial usage or practice in an industry that is 95% controlled by Microsoft and maintains that it is settled case-law that reference to industry practice in a market where competition is already restricted by the very presence of a dominant company is not admissible.
- 469 Furthermore, the Commission rejects Microsoft's assertion that suppliers of third-party media players are not displaced from the market by the presence of media functionality in Windows. That assertion ignores the fact that Microsoft has a virtual monopoly in the PC operating system market and that tying of Windows Media Player to the Windows Client PC operating system forecloses competition in the media player market.

d) The fourth part, alleging that the Commission fails to take proper account of the obligations imposed on the Communities by the TRIPS Agreement

Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

- 470 Microsoft claims that the contested decision forces it to develop a version of its Windows operating system from which 'nearly all' media functionality has been removed, and to offer this 'degraded product' under the Microsoft and Windows trademarks, to consumers in Europe. In so doing, the contested decision violates rights of which the European Communities are legally bound to protect under the TRIPS Agreement.

- 471 First, Microsoft claims that the contested decision interferes with its trademark rights in a manner prohibited by Articles 17 and 20 of the TRIPS Agreement. That decision deprives it of its ability to control the quality of goods sold under its trademarks, without regard to the interests of Microsoft or of third parties and despite the availability of other equally effective but less intrusive alternatives.
- 472 In that context, Microsoft raises, first of all, general considerations in relation to trademark rights. It observes that the TRIPS Agreement requires WTO members to grant trademark owners certain exclusive rights. It adds that Community law 'recognises the quality function of trademarks', stating that, according to Article 12(2)(b) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), a registered trade mark shall be liable to revocation if, in consequence of the use made of it by the proprietor of the trade mark or with his consent in respect of the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services. It also states that both in Europe and internationally, well-known trademarks are afforded greater protection than other marks.
- 473 Next, Microsoft draws attention to the content of Articles 17 and 20 of the TRIPS Agreement. According to Article 17 of that agreement, the exceptions to the rights conferred by a trademark must be limited and must take account of the legitimate interests of the owner of the trademark and of third parties. Article 20 of the TRIPS Agreement provides that the use of a trademark is not to be unjustifiably encumbered by special requirements, such as use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.
- 474 Moreover, Microsoft claims that, by requiring it to offer for license a version of Windows from which media functionality has been removed, the Commission obliges it to place its 'most valuable' trademarks on a product it did not design and that it knows will not work in the ways Microsoft intended it to work. In addition, confusion is likely to arise between that version of Windows and the one containing media functionality. Microsoft also submits that the contested decision interferes with its right to control the quality of the products to which the mark is affixed and that more than 40 features of Windows and certain popular applications written by Microsoft and by other software developers will not work when the media functionality has been removed. It adds that certain Web sites that rely on the software code that the contested decision requires to be removed will not function properly.
- 475 According to Microsoft, these 'incursions' are not 'limited' exceptions for the purposes of Article 17 of the TRIPS Agreement. Moreover, the contested decision fails to take account of the legitimate interests of the owner of the trademark and third parties. The obligation on Microsoft to place its 'Windows' and 'Microsoft' marks on inferior products over which it is not able to exercise design control is in

direct opposition to the interests of consumers, of third party software developers, and of Microsoft itself.

- 476 Lastly, Microsoft submits that the contested decision infringes Article 20 of the TRIPS Agreement because, despite the availability of other equally effective alternatives, it forces Microsoft to encumber the 'Windows' trademark in a manner that reduces its function as an indicator of source and quality, thereby leading to consumer confusion and harming the 'goodwill' associated with the mark.
- 477 Second, Microsoft claims that the contested decision compromises its exclusive rights to authorise adaptations, arrangements and other alterations of its works, to authorise the reproduction of its works, in any manner or form, and to distribute copies of Windows to the public. That decision forces it to create an adaptation of Windows that is not of Microsoft's own design and represents a substantial alteration of its copyrighted work, and obliges it to offer copies of this 'compelled adaptation of its copyrighted work' for licence and for use by licensees.
- 478 Microsoft asserts that compulsory licensing of copyrighted material is permissible under the TRIPS Agreement only under the conditions provided for in Article 13 thereof, which have not been satisfied in the present case. It states, first of all, that the contested decision appears to apply not to a special case, but to 'all cases in which dominant undertakings improve their products by adding functionality to them, provided that someone else offers the same or similar functionality separately'. Next, it repeats that its practice is to improve its product by adding new functionality to it over time, as technology advances and consumer and other demand changes. Forcing it to grant a licence for such additional functionality on a standalone basis is clearly inconsistent with the normal exploitation of its work. Lastly, it claims that the contested decision unreasonably prejudices its legitimate interests by requiring it to create a version of Windows which includes large amounts of copyrighted material but does not represent the 'integrated whole' that it created.
- 479 Microsoft adds that the Commission could have ordered a remedy that was equally effective, but less prejudicial to its interests, than that provided for in Article 6 of the contested decision. By way of example, it refers to the fact that, in its decision of 1 November 2002, the District Court promotes the development and marketing of third-party media players through a variety of mechanisms, including by allowing computer manufacturers to remove end user access to the media functionality in Windows.

Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

- 480 As its principal argument, the Commission again submits that the legality of the contested decision cannot be reviewed in the light of the TRIPS Agreement (see paragraph 303 above).
- 481 In the alternative, it submits that the arguments put forward by Microsoft in support of that fourth part of the plea are entirely without foundation.
- 482 First, the Commission submits that Microsoft's arguments in relation to its trademarks are difficult to understand. It states that Microsoft does not make clear whether the alleged violation of the TRIPS Agreement relates to the finding of a tying abuse in the contested decision or to the remedy for that abuse.
- 483 Next, the Commission recalls that under Article 16(1) of the TRIPS Agreement the owner of a registered trademark has the exclusive right to prevent third parties from unauthorised use of identical or similar signs. However, Microsoft fails to explain how its right to prevent the unauthorised use of its trademarks by third parties may be affected by the contested decision. Nor does it explain to what extent the use of its trademarks may, by virtue of the contested decision, be unjustifiably encumbered by special requirements within the meaning of Article 20 of the TRIPS Agreement. In this regard, the Commission states that the contested decision does not prescribe any special requirements but rather requires Microsoft to use the same trademarks for both versions of Windows.
- 484 According to the Commission, the exclusive right granted by trademark, as referred to in Article 16 of the TRIPS Agreement, is thus preserved, as well as the function of the trademark as a guarantee of origin. In that context, the Commission rejects Microsoft's argument based on the trademarks having a 'quality function', stating that trademarks inform consumers that the goods or services concerned will have whatever qualities they happen to associate with the indications of origin borne by them, and that trademark law does not provide a guarantee of particular qualities of products.
- 485 The Commission also claims that the remedy provided for in Article 6 of the contested decision does not prejudice Microsoft's right to control the quality of the products to which the trademark is affixed, because Microsoft would still retain 'total control of the quality of its own products'. Moreover, it states that it has already rebutted the argument that the version of Windows which is not bundled with Windows Media Player will be a 'degraded' product. As to the risk of confusion relied on by Microsoft (see paragraph 474 above), the Commission asserts that that risk does not relate to products of third parties and that it can in any event be avoided with adequate information and labelling. It also rejects the argument that a higher level of protection is granted to well-known trademarks,

observing that that refers only to unauthorised use of the same or similar signs by third parties.

- 486 Lastly, the Commission contends that even assuming that the contested decision prejudices Microsoft's trademark rights, the derogating provision contained in Article 17 of the TRIPS Agreement, read in conjunction with Articles 8(2) and 40(2) of that agreement would allow the bringing to an end of the competition law infringement identified in the contested decision.
- 487 Second, the Commission rejects the arguments that Microsoft bases on its copyright.
- 488 It claims that the exclusive rights of Microsoft under Article 9(1) of the TRIPS Agreement, read in conjunction with Article 11 of the Berne Convention, and Article 9(1) of that convention, are not affected by the contested decision, as it does not authorise any third parties to adapt or reproduce Microsoft's copyrighted works.
- 489 Moreover, the Commission submits that Microsoft cannot rely on the 'integrity right', a moral right conferred by copyright, as the subject matter of this 'integrity right', as defined by Article 6 *bis* of the Berne Convention, has little to do with this case and is not covered by the TRIPS Agreement.
- 490 The Commission submits that the arguments that Microsoft bases on Article 13 of the TRIPS Agreement cannot be accepted. The contested decision deals with a 'special case' within the meaning of that article, inasmuch as it applies to 'instances of tying which would constitute an abuse of a dominant position'. It further contends that Microsoft will derive revenues from the sale of the version of Windows which is not bundled with Windows Media Player. Microsoft's objection that it does not wish to exploit the 'work in question' is linked to the idea that moral rights are affected, and has nothing to do with the normal economic exploitation of copyright. There is no 'right not to produce copyrighted works', and moral rights cannot be subject to 'economic exploitation' within the meaning of Article 13 of the TRIPS Agreement.
- 491 The Commission adds that, even assuming that the contested decision prejudices Microsoft's trademark rights under the TRIPS Agreement, the derogating provision contained in Article 13 of that agreement, read in conjunction with Articles 8(2) and 40(2) thereof, would allow the bringing to an end of the competition law infringement identified in the contested decision.
- 492 Lastly, as regards Microsoft's contention that the Commission could have ordered other remedies in the present case, such as those prescribed by the District Court in its decision of 1 November 2002, the Commission refers to the recitals set out in paragraph 502 below.

3. The second plea, alleging infringement of the principle of proportionality

a) Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

493 Microsoft submits that the remedy provided for in Article 6(a) of the contested decision infringes the principle of proportionality from three points of view.

494 First, the remedy fails to take account of the legitimate interest of software developers and Web site creators in 'preserving Windows as a stable and consistent platform'. It will therefore harm those third parties in Europe whose existing products rely on the media functionality in Windows.

495 Second, that remedy prejudices Microsoft's moral rights by requiring it to mutilate its Windows operating systems and to licence that 'mutilated' version of its product to third parties. In particular, it ignores Microsoft's right to object to changes in the work or to the deformation, mutilation and other impairment thereof.

496 Third, Microsoft submits that that remedy is 'internally inconsistent' and that it is therefore impossible for it to comply with it because it requires it to remove important functionality from Windows while nevertheless ensuring that the 'degraded' version of Windows is not 'less performing' than its full version. Removing Windows Media Player from Windows inevitably degrades the operating system which had been designed by Microsoft and results in the creation of a version of Windows which is 'less performing' than the Microsoft operating system.

b) Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

497 As a preliminary point, the Commission notes that even if the Court of First Instance were to conclude that the remedy provided for in Article 6(a) of the contested decision is disproportionate, this could at the most lead only to the annulment of that remedy.

498 The Commission submits, first of all, that that remedy is proportionate, in particular as Microsoft retains the right to offer a bundled version of Windows with Windows Media Player (recitals 1022 to 1025 of the contested decision). It also observes that the remedy in question does not hinder Microsoft's ability to market its media player and to continue to offer it separately for downloading.

499 Next, the Commission disputes that it is impossible to identify the code of Windows Media Player or to comply with that remedy, and states that Microsoft itself acknowledges that it has already developed an unbundled version of Windows ready for release on the market (see paragraph 420 above). It refers, in addition, to recitals 1018 to 1021 of the contested decision.

- 500 Moreover, the Commission submits that Microsoft has not provided any evidence to show that the remedy provided for in Article 6(a) of the contested decision causes injury to third parties or degradation of the operating system. As regards that latter point, it points out that recital 1012 of the contested decision states that ‘the unbundled version of Windows [Media Player] must in particular not be less performing than the version of Windows which comes bundled with [Windows Media Player], regard being had to [Windows Media Player]’s functionality which, by definition, will not be part of the unbundled version of Windows’.
- 501 With regard to the alleged prejudice to Microsoft’s ‘moral rights’, the Commission contends that Microsoft is not ‘normally considered as the rightholder of moral rights in Europe’. The tying remedy does not prevent the authors of the work from claiming ‘paternity’, and does not involve any disclosure of the code. As to the ‘integrity right’, it is not at issue in this case (see paragraph 489 above).
- 502 Finally, the Commission submits that the remedies prescribed by the District Court’s judgment of 1 November 2002 are insufficient to remedy the tying abuse identified in the contested decision. That judgment does not prescribe a remedy for tying. It does not oblige Microsoft to remove the Windows Media Player code from the client PC operating system, but only to provide a means enabling OEMs and end-users to hide the icon and entries representing the Windows Media Player application on the computer screen. Moreover, Microsoft has designed this ‘hiding’ mechanism in such a way that Windows Media Player can be ‘reactivated’ and override the default set-up choices of users. The District Court’s judgment of 1 November 2002 does not therefore affect the ubiquitous presence of Windows Media Player code on PCs, and hence the incentives of software developers and content providers to ‘focus on Windows Media Player as the platform technology for their complementary offerings’.

C – The independent monitoring trustee

1. Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks
- 503 Microsoft claims that its obligation under Article 7 of the contested decision to appoint an independent monitoring trustee to assist the Commission in ensuring that Microsoft complies with that decision is unlawful on two grounds: (i) the Commission has no authority to delegate to a private person the enforcement powers conferred on it by Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and (ii) the Commission has no authority to impose on Microsoft the obligation to bear the costs of monitoring its compliance with the contested decision, including remuneration of the independent monitoring trustee.

504 First, Microsoft asserts that it is clear from paragraphs 1043 to 1048 of the contested decision that the powers delegated to the independent monitoring trustee in the present case are enforcement powers which normally belong to the Commission. While the primary responsibility of that trustee is to issue opinions on Microsoft's compliance with the contested decision, he also has, to that end, the power to investigate the actions taken by Microsoft to comply with that decision. Microsoft observes that footnote 1317 of the contested decision states that '[t]he Monitoring Trustee should not only be reactive, but should play a proactive role in the monitoring of Microsoft's compliance'. The contested decision therefore seeks to establish an independent source of investigatory and enforcement action.

505 However, investigatory and enforcement powers in relation to Articles 81 and 82 EC are conferred exclusively on the Commission or national competition authorities by Articles 11 and 14 of Regulation No 17 and by Articles 18 to 21 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1) and neither regulation authorises the Commission to delegate its powers to third parties, or, in particular, to private persons.

506 Furthermore, by delegating those powers to a private person, the Commission deprives Microsoft of guarantees conferred on undertakings by case-law to safeguard their rights of defence.

507 In its reply, Microsoft states that it has no objection to an independent monitoring trustee advising the Commission on technical questions.

508 Second, Microsoft observes that Article 7 of the contested decision, read in conjunction with paragraph 1048(v) thereof, requires it to bear 'all costs of establishment of the Monitoring Trustee, including a fair remuneration for the Monitoring Trustee's activities'. However, in competition cases, the Commission cannot impose pecuniary charges other than fines and periodic penalty payments.

2. Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

509 The Commission principally claims that the arguments put forward by Microsoft in the context of this third issue are inadmissible, as they are premature, speculative and insufficient to bring about the annulment of Article 7 of the contested decision. It recalls that that article requires Microsoft to submit a proposal for the establishment of a monitoring mechanism, while reserving to the Commission the right to impose such a mechanism by way of a decision should it deem Microsoft's proposal unsuitable. It states that recitals 1044 to 1048 of the contested decision outline the guiding principles which should be taken into account by Microsoft in preparing such a proposal, but that most of those principles are not imposed on Microsoft by Article 7 of the contested decision. In

particular, that article does not specify either the independent monitoring trustee's precise functions or his 'source' of remuneration. Microsoft is therefore free to suggest a narrower scope of action for the trustee than that envisaged in the contested decision, and different remuneration arrangements. The Commission would then be free to reject those suggestions and impose a differently worded mandate by decision. Such a decision would not be simply confirmatory of the contested act and would be a challengeable act.

- 510 In the alternative, the Commission contends that the arguments relied on by Microsoft in the context of this third issue are not well founded.
- 511 First, the Commission submits that it is not clear from recitals 1044 to 1048 of the contested decision that it has delegated to a private person the powers of investigation and enforcement conferred on it by regulation for the application of Articles 81 and 82 EC. (1) It observes that Microsoft offers no reason whatsoever for 'enlarging its argument to include a delegation of enforcement powers'. (2) It claims that, as regards information-gathering, the contested decision merely provides for a 'consensual mechanism' which would permit swift resolution of a number of the technical issues that are likely to arise regarding the implementation of the remedies. It recognises that recital 1048 and footnote 1317 of the contested decision envisage that the independent monitoring trustee can address questions to Microsoft, and have access to documents and to the source code of the relevant products but claims that nothing prevents Microsoft from specifying in its proposal for the mandate that it could decline to answer such questions or to grant access to the information requested. In response to such refusal, the Commission would reflect on whether it would be justifiable to act pursuant to Chapter V of Regulation No 1/2003, and would therefore retain its entire discretion regarding the use of its powers of investigation.
- 512 Second, the Commission claims that the remuneration at issue clearly does not enter into the category of penalties provided for in Regulation No 17 and Regulation No 1/2003. It claims that if Article 7 of the contested decision were to be understood as imposing an obligation as regards the remuneration of the independent monitoring trustee, that obligation would be based on Article 3 of Regulation No 17, which empowers the Commission to require undertakings to bring an infringement to an end. It explains that a decision taken on the basis of that article may also include an order to do certain acts or provide certain advantages which have been wrongfully withheld, as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty, and that it involves certain costs for the addressee thereof. The Commission observes in this regard that in the present case, as stated at recital 1044 of the contested decision, the implementation of the remedies requires effective monitoring of Microsoft's compliance with its obligations under the contested decision.

III – *The application for annulment of the fine or a reduction in its amount*

A – *Arguments of Microsoft*

- 513 As its principal argument, Microsoft, referring to the pleas previously put forward, submits that it has not infringed Article 82 EC and submits that Article 3 of the contested decision must accordingly be annulled.
- 514 In the alternative, Microsoft claims that the fine imposed on it is excessive and disproportionate and must therefore be annulled or substantially reduced.
- 515 Microsoft claims, first, that imposing a fine on it is not justified, as the infringements alleged against it result from 'novel theories of law'. In support of that contention, it relies on certain excerpts from press releases published by the Commission relating to competition cases (Commission Press Releases of 20 April 2001, IP/01/584; and of 2 June 2004, IP/04/705) and the practice of not imposing fines in cases involving novel or complex issues. It also observes that in other cases the Commission has imposed only a symbolic fine on undertakings having regard to the fact that they could not easily have inferred from its previous decisions that their conduct amounted to an infringement of competition rules.
- 516 Microsoft submits that the principles applied by the Commission in the present case represent a significant departure from those laid down by well established case-law, and that they are the product of 'substantial modification of the Commission's theories as the case progressed over the last five years'.
- 517 Thus, as regards the abusive conduct consisting in its alleged refusal to provide its competitors with interoperability information and to allow its use, Microsoft claims that the Commission has never identified precisely the information in question. It repeats, moreover, that it was not put on notice that Sun's request related to a licence of Microsoft's intellectual property rights in the EEA for use in the development of server operating system software in the EEA. Lastly, it asserts that the Commission's position is novel inasmuch as it requires valuable intellectual property rights to be licensed in order to facilitate the development of products that compete directly against Windows server operating systems.
- 518 As regards the abusive conduct consisting in the allegation that it made the availability of the Windows Client PC operating system conditional on the simultaneous acquisition of the Windows Media Player software, Microsoft observes, first of all, that the Commission's tying theory was not even mentioned in the first statement of objections. It states, next, that this is the first time that the Commission has held that improving a product by integrating 'improved' functionality in it, in this case media functionality containing streaming capability, without simultaneously offering a version of that product at the same price without such functionality, could amount to an infringement of Article 82 EC.

- 519 Second, Microsoft claims that the amount of the fine imposed on it is excessive. It puts forward three arguments in support of that assertion.
- 520 (1) It submits that the basic amount of the fine is unjustified. It submits, first of all, that the contested decision does not explain how the Commission determined the basic amount of the fine. Next, it disputes the merits of the Commission's assertion that it has committed a 'very serious' infringement. In that regard, it observes that it took the Commission more than five years to arrive at the conclusion that what it did was wrong, and even longer to decide which remedies were appropriate. It adds that it had no way of foreseeing that its conduct could be said to infringe the competition rules, much less that its conduct could be said to be a 'very serious' infringement. Lastly, Microsoft claims that setting the starting amount, for gravity, of the fine at EUR 165 732 101 (recital 1075 of the contested decision) is arbitrary and lacks adequate reasoning.
- 521 In its reply, Microsoft rejects the Commission's allegation that the abuses concerned had a significant impact on the relevant markets. In fact, '[n]either alleged abuse has been linked by the Commission to any negative impact in the market or any deterioration in the competitive position of third parties'. Microsoft adds that the Commission's finding that the infringement found must be characterised as 'very serious' is based on 'an inaccurate summary of the findings of abuse and on speculation'.
- 522 Also in its reply, Microsoft claims that the Commission did not limit itself to taking into account 'the products which were concerned by the infringements' when setting the starting amount, for gravity, used in calculating the basic amount of the fine. The Commission took into account Microsoft's turnover for server operating systems in general. However, under a quarter of Microsoft's revenues from those systems can be attributed to the work group server operating systems market as defined by the Commission.
- 523 (2) Microsoft submits that the Commission was not justified in doubling the starting amount, for gravity, used in calculating the basic amount of the fine by relying on its 'significant economic capacity' and the need to ensure a sufficient deterrent effect. It states that the Commission does not accuse it of being unwilling to comply with the law and that, on the contrary, Mr Monti, the Commissioner then responsible for competition, commended its efforts to reach an amicable settlement in the present case and the professionalism of the members of its team. Microsoft adds that the 'deterrence principle' should apply only where the infringer has a diversified product portfolio and must be deterred from creating in a different product line the infringement that the Commission found in the product line at issue. That is not the case with Microsoft. Lastly, it claims that that starting amount is based on its worldwide turnover and profits and that the same data are used to justify its upward adjustment for the purposes of deterrence (footnote 1342 of the contested decision), which gives rise to 'double counting'. The other factors mentioned in footnote 1342 of the contested decision do not

justify doubling the starting amount used in calculating the basic amount of the fine.

- 524 In its reply, Microsoft adds that the Commission cannot rely on the need to deter other undertakings from committing similar infringements in order to justify a multiplier being applied to the starting amount, for gravity, used in calculating the basic amount of the fine. That multiplier can be applied only when the infringement is 'clearly illegal', has been repeated on prior occasions and may be expected to be repeated by other undertakings in the future. As for the likelihood of Microsoft itself repeating the same or a similar infringement, the Commission cites no evidence that Microsoft 'will not comply with the applicable rules of EC law once their meaning is clear'.
- 525 (3) Microsoft claims that the increase of 50% of the amount in respect of gravity in order to take account of the duration of the infringement is excessive. It criticises, first of all, the fact that the Commission took no account of the action taken by Microsoft to address the issues raised by the Commission in their discussions and in the statements of objections, or of the commitments which it entered into in the framework of the United States Settlement. Next, Microsoft complains that the Commission failed to take account of the length of the administrative procedure. It submits that it cannot be criticised for trying to reach a settlement with the Commission. It adds that it could not have brought the alleged abuses to an end at an earlier stage as 'the Commission's theories changed so much over six years'.

B – Arguments of the Commission

- 526 The Commission submits that Microsoft's main argument must be rejected as it has failed to establish that the Commission erroneously found that there had been an infringement of Article 82 EC in the present case.
- 527 The Commission also rejects the argument in the alternative put forward by Microsoft.
- 528 In this respect, it submits, first, that the fine imposed on Microsoft is justified.
- 529 (1) It repeats that it has not applied any new rule of law in the present case (recital 1057 of the contested decision).
- 530 (2) As regards the abusive conduct consisting in the refusal to provide interoperability information and to allow its use, the Commission claims that it has taken into account 'the possibility that [intellectual property rights] are involved'. Consequently, building on judgments such as *Magill*, it has devoted a large part of the contested decision to showing that there were exceptional circumstances under which a refusal to license intellectual property rights could be an abuse of a dominant position. It adds that, as the recitals in the preamble to Directive 91/250 indicate specifically that the withholding of interoperability

information can constitute an abuse of a dominant position, Microsoft cannot seriously contend that it could not be aware that it was infringing Article 82 EC. In its rejoinder, the Commission rejects Microsoft's contention that it could not have predicted the Commission's legal analysis of the refusal in question. It observes that in the first statement of objections, it analysed Microsoft's behaviour in the light of the same case-law on 'refusal to supply' as is relied upon by the contested decision. It adds that, in response to that statement of objections, Microsoft took the view that the undertaking given by IBM in 1984 was a relevant point of comparison.

- 531 Moreover, the Commission observes that it has already rebutted Microsoft's arguments in relation to the scope of Sun's request and has already stated that the case-law does not exclude the existence of competition between the copyright owner's products and the future products of the licensee. In its rejoinder, it adds that it had identified at the time of the first statement of objections 'a certain amount of information that was wrongfully withheld by Microsoft' and repeats that Microsoft was fully aware of the fact that it was refusing to grant its competitors access to the interoperability information referred to in the contested decision.
- 532 (3) As regards the tying abuse, the Commission recognises that this case may differ from previous cases on tying in that, in the contested decision, it conducted an assessment of the actual effects of that illegal behaviour. It submits however that it is not because the Commission has demonstrated foreclosure, which is normally presumed in tying cases, that it must be accused of developing 'a novel legal theory'. In its rejoinder, it emphasises that its findings are based on well-established legal and economic principles.
- 533 (4) The Commission submits that it is perfectly possible for an undertaking like Microsoft, which has significant legal and economic resources at its disposal, to predict that its behaviour was liable to be characterised as abusive. It states that the Community judicature has consistently rejected the argument that there is no justification for imposing a fine on an undertaking where the latter could not be aware that it was infringing competition rules. Lastly, Microsoft cannot rely on the fact that the Commission did not impose a fine on an undertaking in another case in order to escape a penalty itself.
- 534 Second, the Commission submits that the fine imposed on Microsoft is not excessive. It observes that the fine represents 1.62% of Microsoft's worldwide turnover in the business year ending on 30 June 2003 and that it is therefore below the 10% limit provided for in Article 15(2) of Regulation No 17.
- 535 (1) The Commission asserts that the basic amount of the fine is justified.
- 536 It observes, first of all, that, when fixing the amount of the fine, it has a margin of discretion and that it is not required to apply specific mathematical formulae. It

also observes that it is not obliged, by virtue of the requirement to state reasons, to indicate in its decision the figures relating to the method of calculating the fines and that it cannot, by mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment.

- 537 Next, the Commission asserts that, in accordance with the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, the ‘Guidelines’), it assessed the gravity of the infringement taking into account its nature, its impact on the market, and the size of the relevant geographic market. It observes that Microsoft’s arguments concern only the first of those three criteria. As regards the criterion relating to the impact on the market, the Commission states that it was analysed at recitals 1069 to 1072 of the contested decision.
- 538 Moreover, the Commission observes that the basic amount of the fine related to two different abuses. It claims that, as those abuses concerned the whole of the EEA and had a significant impact on the relevant markets, it was also entitled to take into account the turnover in products which were the subject of the restrictive practice as a proxy for measuring the harm to competition (Case T-230/00 *Daesang and Sewon Europe v Commission* [2003] ECR II-2733, paragraph 52).
- 539 Lastly, the Commission claims that it fixed the starting amount used in calculating the basic amount of the fine by relying not on Microsoft’s worldwide turnover, but on its turnover in the EEA in PC and work group server operating systems and that the basic amount bears a relationship to that turnover, as it represents 7.5% thereof. It concludes from this that Microsoft’s claim that it used a double counting method (see paragraph 523 above) is unfounded. In response to Microsoft’s contention that it took into account turnover on server operating systems in general, it states that it relied on the figures supplied to it by Microsoft following a request for information relating to work group server operating systems.
- 540 (2) The Commission claims that it was justified in applying a multiplier of 2 to the starting amount, for gravity, used in calculating the basic amount of the fine. The Commission observes in this respect that that starting amount represented less than 1% of Microsoft’s turnover for the last business year, which would not have made the fine sufficiently deterrent. It explains that it fixed that multiplier taking into account the fact that large undertakings generally have greater resources which means that they are more aware of the requirements and consequences of competition law than smaller firms. It adds that the Court of First Instance accepted that it was entitled to apply a multiplier in order to ensure that the fine had deterrent effect (Case T-31/99 *ABB Asea Brown Boveri v Commission* [2004] ECR II-1881, paragraph 165, and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon v Commission* [2004] ECR II-1181, paragraphs 239 to 243).

- 541 The Commission also observes that it is clear from the case-law that the aim of deterrence, which it is entitled to pursue when setting fines, is to ensure that undertakings comply with the competition rules laid down in the Treaty when conducting their business within the Community or the EEA (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midlands Ingredients v Commission* [2003] ECR II-2597, paragraphs 110 and 111). It follows that the deterrent effect of a fine imposed for infringement of the Community competition rules cannot be assessed by reference solely to the particular situation of the undertaking sanctioned. It is necessary not only to deter the same undertaking from repeating the same infringement or from engaging in other infringements of the competition rules, but also to deter other undertakings 'of similar size and resources' from committing comparable infringements. It asserts that, contrary to what Microsoft claims, there is no precedent to the effect that 'deterrence is only relevant for manifest infringements'. The Commission adds that the multiplier used in the present case (2) is lower than that which it generally uses (2.5).
- 542 Moreover, the Commission states that it did not claim that Microsoft obstructed its investigation and that it did not find make a finding of aggravating circumstances in respect of Microsoft.
- 543 (3) The Commission disputes that the increase of 50% that it applied, on account of the length of the infringement, to the amount determined for gravity is excessive. It claims that it followed the standard practice of applying, for infringements of a long duration, a 10% increase per year of participation in the infringement.
- 544 It takes the view that Microsoft cannot rely on the action that it took to address the issues identified by the Commission or in the framework of the United States Settlement, since that action is irrelevant for calculating the duration of the infringement. It claims that, at recitals 241, 242 and 270 to 279 of the contested decision, it discussed at length the 'value' of that action and reached the conclusion that the infringement had not been terminated. In addition, it refers to paragraph 278 of Case T-203/01 *Michelin v Commission* [2003] ECR II-4071.
- 545 Finally, as regards the argument based on the length of the administrative procedure, the Commission observes, first of all, that Microsoft does not claim that that length was excessive. It submits, next, that the length was objectively justified by the complexity of the case and the need to ensure the rights of defence of Microsoft. Moreover, Microsoft has significantly contributed to any possible delay, first, 'by systematically requesting significant extensions to the deadlines granted, and second, by using part of the limited resources of the Commission in

settlement discussions'. In addition, Microsoft could have decided to terminate the infringement before the contested decision was adopted, thereby reducing its duration. It observes that the fact that an undertaking continues an infringement knowing that it is the subject of an investigation can be an aggravating circumstance.

J. D. Cooke
Judge-Rapporteur