Commission Imposes €899 Million Penalty on Microsoft for Non-Compliance with Remedies

On 27 February 2008, the European Commission (the “Commission”) issued a decision imposing a penalty payment of €899 million on Microsoft Corporation (“Microsoft”) for its failure to comply with obligations imposed on it by the Commission in its March 2004 decision. Microsoft was required to disclose certain information regarding interoperability between its Windows operating system and competing systems. The Commission found that Microsoft charged unreasonable prices for access to interface documentation for work group servers, in breach of Article 82 EC.

The Commission’s 2004 Decision

The Commission began its investigation into Microsoft in December 1998 following complaints that Microsoft refused to supply interface information necessary for competitors to develop server products that could operate with Microsoft’s Windows PC operating system. After a five year investigation, the Commission concluded Microsoft’s refusal to provide interface information between its Windows PCs and non-Microsoft work group server operating systems was part of a broader strategy to deliberately restrict interoperability and exclude competitors from the work group server market.

In addition, the Commission considered that by tying Microsoft’s Windows Media Player to its ubiquitous Windows 2000 PC operating system, Microsoft effectively foreclosed the market for media player software (software that enables music and video content to be played back over the internet). This artificially reduced competitors’ incentives to develop competing software as their products would face a disadvantage unrelated to price or quality.

The Commission decided that Microsoft’s conduct enabled it to acquire a dominant position in the market for work group server operating systems (over 95% of all personal computers worldwide use Microsoft operating systems) and that its practices constituted abuse of Article 82. In addition to imposing a fine of €497 million on Microsoft (the highest imposed on an individual company for breach of EC competition rules at the time), the Commission ordered Microsoft to take the following steps:

> Disclose to competitors, on reasonable and non-discriminatory terms, interfaces required for non-Microsoft work group servers to achieve full interoperability with Windows PCs and server. Microsoft was entitled to reasonable remuneration to the extent that such information might be protected by intellectual property; and

> Offer a version of its Windows operating system without Windows Media Player to PC manufacturers or end users.

Microsoft appealed the Commission decision to the Court of First Instance (“CFI”) on 8 June 2004 and also subsequently applied for interim measures to have the remedies imposed by the Commission suspended. The
interim application was dismissed by the CFI: the remedies therefore became effective as of 22 December 2004. In addition, the Commission’s 2004 decision was upheld by the CFI on 17 September 2007.

In light of its obligations, Microsoft released an unbundled version of Windows (i.e. not including Windows media player). However, lengthy discussions ensued regarding the suitability of the interoperability information that Microsoft was proposing to provide. The Commission announced in November 2005 that Microsoft had not fulfilled its obligation to provide ‘complete and accurate’ information and Microsoft was given until 15 December 2005 to do so. The Commission issued a statement of objections on 22 December 2005 setting out its concerns and announced, in July 2006, its intention to impose penalty payments totalling €280.5 million on Microsoft (namely €1.5 million per day for the period 16 December 2005 to 20 June 2006).

Although Microsoft furnished the Commission with additional documentation, on 1 March 2007 the Commission announced it had sent Microsoft a further statement of objections alleging that Microsoft had not provided interoperability information on ‘reasonable and non-discriminatory terms’. The Commission’s latest decision, as announced on 27 February, confirms this position.

**Latest Findings on Microsoft Pricing**

Microsoft provides two separate types of licensing arrangements to companies that require interoperability information: (i) a licence allowing licensees to use protocols that together comprise interoperability information, but without taking a licence for patents which Microsoft claims to be necessary (the “information licence”) and (ii) a patent licence that combines this first licence with a licence for the patents in question (the “patent licence”).

Microsoft initially demanded a royalty of 3.87% of a licensee’s product revenues for a patent licence and of 2.98% under the information licence. On 21 May 2007, Microsoft reduced the royalty rates to 0.7% and 0.5% respectively as regards EEA revenues, while leaving worldwide rates unchanged. These new rates remained in place until 22 October 2007, when Microsoft changed its terms to provide a licence giving access to the interoperability information for a flat fee of €10,000 and an optional patent licence for a reduced royalty of 0.4% of the licensee’s product revenues.

The Commission’s assessment of the reasonableness of Microsoft’s royalty rates focused on whether the underlying protocols involve innovation, and, where this was the case, on what is charged for comparable technologies. The Commission concluded that a very large part of the unpatented interoperability information lacked innovation, and that, in comparison with the pricing of similar interoperability technology (including other technology made available by Microsoft itself), the royalties demanded prior to 22 October 2007 were unreasonable.

The Commission concluded that, prior to 22 October 2007, Microsoft had failed to comply with its obligation in the 2004 decision to provide interoperability information under the information licence on reasonable terms (the latest Commission decision does not cover royalties for patent licences).

The new decision thus relates to non-compliance from 21 June 2006 (i.e. the date from which the July 2006 penalty period decision ceased to apply) to 21 October 2007. While the Commission’s 2004 decision imposed an obligation to make interoperability information available, it did not set out the terms on which this was to be provided: the Commission stated at the time that it could not assess the reasonableness of the royalties charged by Microsoft until technical interoperability information was complete and accurate.

The Commission has decided that by virtue of its “prohibitive” royalty rates for the provision of indispensable interoperability information, Microsoft effectively made its offer to provide the information meaningless. It concludes that as a result Microsoft continued to stifle innovation and to gain an advantage from the abuse it was required to bring to an end in the 2004 decision.
The Commission has imposed a penalty payment of €899 million under Article 24 of Regulation 1/2003. The Commission has not provided any detail of how this fine has been calculated, but merely states that, given the effects and duration of the non-compliance, the fine is "proportionate and necessary".

**Comment**

After the Commission announced on 22 October 2007 that Microsoft had secured compliance with the 2004 decision, Microsoft confirmed it would not appeal the CFI’s decision and that it would withdraw two outstanding appeals (relating respectively to the scope of the interoperability remedy with regards to open source licences and to the original €280.5 million fine for non-compliance). It follows that the total amount Microsoft has been fined by the Commission, in respect of the relevant practices in the EEA, is now €1.67 billion.

Competition Commissioner Neelie Kroes has commented on Microsoft’s conduct, stating that Microsoft is the first company in fifty years of EU competition policy that the Commission has had to fine for failure to comply with an antitrust decision. She added that she hoped the latest Commission decision would close "a dark chapter in Microsoft’s record of non-compliance" and that "the principles confirmed by the Court of First Instance ruling of September 2007 will govern Microsoft’s future conduct".

**Sources:**

*Commission Press Releases*

IP/08/318, 27.02.08
IP/04/382, 24.03.04
MEMO/07/359, 17.09.07
IP/07/269, 01.03.07
IP/07/1567, 22.10.07
IP/06/979, 12.07.06
**Merger Control**

**Notifications**

1. **Radeberger / Getränke Essmann / Phoenix** – Proposed acquisition by the German company Radeberger Gruppe Holding GmbH of Getränke Essmann GmbH and Phoenix Vertriebs- und Beteiligungsgeellschaft, also both German entities. Radeberger is active in the production and distribution of beer and non-alcoholic drinks; Essmann distributes beverages at the wholesale level; and Phoenix is the owner of a beer licence (in respect of beer distributed by Essmann) (OJ C 50/38, 23.02.08).

2. **Nokia / Navteq** – Proposed acquisition of the US entity NAVTEQ Corporation by Nokia, Inc., a US undertaking forming part of the Finnish group Nokia Corporation. NAVTEQ supplies digital map data and Nokia provides equipment, solutions and services for communications networks (OJ C 52/26, 26.02.08).

3. **Marel / SFS** – Proposed acquisition by the Icelandic company Marel Foods Systems hf. (Marel) of the Dutch undertaking Stork Food Systems (SFS). Marel is active in the development, manufacture, sale and servicing of machinery and systems used for primary processing of fish and poultry, as well as the further processing of fish, red meat and poultry. SFS develops, manufactures, sells and services machinery and systems used for primary processing of poultry, as well as the further processing of fish, red meat and poultry (OJ C 52/27, 26.02.08).

4. **3M / AERO** – Proposed acquisition by 3M Company of Aero Holding Corporation, both US undertakings. 3M is a diversified technology company active on a worldwide basis in six major business areas: industrial and transportation; electronic and communications; health care; consumer and office; display and graphics; safety, security and protection services. AERO is a manufacturer and supplier of personal protection equipment and specialty components (OJ C 55/15, 28.02.07).

5. **AXA / CDC / Portefeuille Accor** – Proposed acquisition by AXA Real Estate Investment Managers France, controlled by Group AXA (France) and Caisse des Dépots et Consignations (CDC). The business activities AXA are financial protection and real estate management, CDC is involved in insurances, real estate, capital investment and services, Accor Global is involved in the hotel and tourism business and Portefeuille Accor is involved in property management of hotels in France and Switzerland (OJ C 55/15, 28.02.07).

6. **Simplified procedure cases**
   - **Scholz / TTC / GMPL / JV** (OJ C 54/43, 27.02.08).

**Phase I Clearances**

7. **Unconditional clearances**
   - **Permira / Arysta** (IP/08/301, 25.02.08).
   - **Acer / Packard Bell** (IP/08/325, 28.02.08).

8. **Unconditional clearances: simplified procedure**
   - **Arcelor / OFZ** (MEX/08/0226, 26.02.08).
   - **INEOS / BP VAM & EtAc Business** (MEX/08/0226, 26.02.08).
9. Clearance with undertakings

> **Rexel / Hagemayer** – The Commission cleared the proposed acquisition of the Dutch company Hagemeyer’s subsidiaries in several EEA countries and in Russia by Rexel of France. Both companies are mainly active in the wholesale distribution of electrical products and installation material, the wholesale of heating, ventilation and air-conditioning products and – in some Member States – household products and consumer electronics. The proposed transaction gave rise to competition concerns in Ireland as it would have strengthened the current leading position of Rexel in a very fragmented market where competitors would not have had the size and the geographic coverage to exercise a competitive constraint on the merged entity. Accordingly, the parties agreed to divest the entire wholesale distribution of electrical products of Hagemeyer in Ireland, thus addressing the Commission's concerns (IP/08/292, 22.02.08).

**Antitrust**

10. **Commission confirms sending Statement of Objections (SO) to Alcan** – On 22 February 2008, the Commission confirmed it has sent a SO to Alcan, the world’s largest aluminium producer following its acquisition by Rio Tinto in 2007. The SO outlines the Commission’s preliminary view that Alcan has abused its dominant position in breach of Article 82 EC by tying its dominant aluminium smelting technology with handling equipment sold by Alcan’s wholly-owned subsidiary, ECL. The Commission considers that this contractual tie, if proven, might significantly harm Alcan’s customers and ultimately end-users of aluminium, through reduction in innovation and likely negative impact on the aluminium prices. Alcan has eight weeks to respond to the SO (MEMO/08/111, 22.02.08).

11. **Commission welcomes proposals from E.ON for structural remedies** – The Commission has welcomed structural remedies offered by E.ON to settle ongoing antitrust cases in the electricity sector. E.ON proposes to commit to sell its electricity transmission system network to an operator which would have no interest in the electricity generation and/or supply businesses and to commit to divest 4800MW of generation capacity to competitors. The Commission intends to market test E.ON’s proposals. If the Commission decides (under Article 9 of Regulation 1/2003) to make the commitments legally binding, the Commission will not pursue the antitrust cases (MEMO/08/132, 28.02.08).

**State Aid**

12. **Commission closes investigation into Flemish public service broadcaster VRT** – The Commission has closed its investigation under EC Treaty state aid rules into the financing regime for VRT, the public service broadcaster in the Flemish community of Belgium in light of formal commitments by the Belgian authorities to amend the current regime. The modifications will clarify inter alia the definition and entrustment of the public service remit and introduce mechanisms to ensure the proportionality of the public funding. The Commission has concluded that these commitments would be suitable to ensure compliance with EU state aid rules. Belgium now has twelve months to implement the commitments (IP/08/316, 27.02.08).
13. **Third Postal Directive published** – Directive 2008/06, which amends Directive 97/67 with regard to the full accomplishment of the internal market of Community postal services has been published in the Official Journal. The Directive provides for all postal services in the EU to be opened to competition by 31 December 2010. This will be done by the removal of the current reserved areas. Some member states (those who joined the EU in 2004 or which are very small) have the option to extend this deadline by a further two years. The Directive also contains provisions relating to the maintenance of a universal service, methods for financing the universal service, the granting of access to networks and the powers and role of independent national regulatory authorities (OJ L 52/3, 27.02.08).