



EUROPEAN COMMISSION

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[...]

**Subject: Case COMP/39.784 – Omnis / Microsoft
(Please quote this reference in all correspondence)
Commission Decision rejecting the complaint**

Dear Sir,

1. On 23 December 2009 Omnis Group lodged a complaint with the Commission alleging anti-competitive behaviour on the market for the provision of Enterprise Resource Planning ("ERP") or Enterprise Application Software ("EAS") by Microsoft in violation of Article 101 and/or 102 of the Treaty on the Functioning of the European Union ("TFEU"). By letters of 18 February, 25 February and 6 April 2010, Omnis Group provided additional information and explanations on the above matter. By letters of 5 August, 13 August, 17 August, 20 August, and 26 August 2010, Omnis Group requested an investigation also under Article 106 TFEU.

2. By letter of 13 July 2010, Omnis Group was informed that pursuant to Article 7(1) of the Commission Regulation (EC) No 773/2004¹, after careful examination of the factual and legal elements put forward in its complaint, the Commission took the preliminary view that there was no sufficient degree of interest of the European Union in conducting a further investigation into the alleged infringements ("the Article 7(1) letter").

3. Omnis Group commented on that letter by letters of 5 August, 9 August², 12 August, 13 August, 16 August, 17 August, 20 August, 26 August³ and 27 August 2010. These

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and, respectively, 102 of the TFEU. The two sets of provisions are in substance identical. For the purposes of this Decision references to Articles 81 and 82 of the EC Treaty should be understood as references Articles 101 and 102 of the TFEU when appropriate.

² A corrected version of the letter of 9 August 2010 was sent later the same day.

submissions essentially restate several times the same facts and information already submitted to the Commission before the Article 7(1) letter.

4. By letters of 9 July and 26 August 2010, Omnis Group requested an oral hearing. Pursuant to Article 12 of Commission Regulation (EC) 773/2004, the right to request an oral hearing is limited to those parties to whom the Commission has addressed a statement of objections. Pursuant to Article 6(2) of Commission Regulation (EC) 773/2004 the Commission may afford complainants the possibility to express their views at the oral hearing of the parties to which a statement of objections has been addressed, as in the present case no statement of objections has been issued, Omnis Group's request to express its views at an oral hearing cannot be acceded to. The case-law makes clear that:

"A procedure commenced by the Commission to ensure that the competition rules are observed by undertakings does not constitute adversarial proceedings between a complainant undertaking and the undertaking that is the object of the procedure. Since the two undertakings concerned are not in the same procedural situation, it follows that the complainant cannot invoke the same rights to a fair hearing as those that the other undertaking is recognized as having and under which the latter must be in a position to set out its views on the complaints which may be upheld against it, as well as on the documents on which those complaints are based.

It follows that a complainant undertaking cannot rely on a right to a formal hearing before the Commission has rejected its complaint".⁴

5. By letter of 14 July 2010, Omnis Group requested access to the file or access to the documents included in the file. By letter of 22 July 2010, the Commission services responded to that request informing Omnis Group that the file did not contain accessible documents, which do not contain business secrets or other confidential information, which were not already in Omnis Group's possession or were not publicly available. By letter of 11 August 2010, Omnis Group repeated the request for access to the documents on which the Commission based its provisional assessment, under Article 8(1) of Commission Regulation (EC) 773/2004.

6. The complainant has a right in that context under Article 8(1) of Commission Regulation (EC) 773/2004 to request access only to the documents on which the Commission bases its provisional assessment. The Commission based its provisional assessment on documents which are all in Omnis Group's possession.

7. A market study by the market research company IDC⁵ ("the IDC report") on which the Commission's provisional assessment partly relies was sent to Omnis Group for comments on 9 September 2010. Subsequently, Omnis Group sent its comments on 20 September, 21 September, 22 September and 24 September 2010.

³ There are three separate and different letters of 26 August 2010 by Omnis Group, one commenting on the Commission's Article 7(1) letter, another one waiving confidentiality on that submission and another one requesting an oral hearing.

⁴ See Case T-57/91, *EMC Naloo v Commission*, [1996] ECR II-01019, para 275-276.

⁵ Worldwide Enterprise Applications 2009-2013 Forecast Update and 2008 Vendor Shares, December 2009, IDC #221271, Volume 1.

8. According to Article 7(1) of Commission Regulation (EC) 773/2004, "*Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit*". The extended time-limit for Omnis Group to submit comments on the Article 7(1) letter was 27 August 2010. The deadline for Omnis to comment on the IDC report was 24 September 2010. The Commission took into account all the submissions received before this date. However, out of these submissions, only the submission of 24 September 2010 contains comments on the IDC report. The submissions of 20 September, 21 September and 22 September concern Omnis Group's contacts with OLAF and the alleged intellectual property aspects of the case and do not contain any information that would change the Commission's assessment as outlined in this decision. Moreover, the submission of 24 September 2010 itself contains largely information that does not relate to the IDC report at all.

9. The Commission has examined in detail Omnis Group's comments on the Article 7(1) letter and its comments on the IDC report. However, this examination has not led to a different assessment of the facts underlying the complaint. Therefore, on the basis of the information in its possession, the Commission considers that there is insufficient degree of European Union interest for conducting a further investigation into the alleged infringements and rejects Omnis Group's complaint pursuant to Article 7(2) of Commission Regulation (EC) 773/2004.

1. THE COMPLAINT

10. Omnis Group alleges that Microsoft infringes Article 101 and/or 102 of the TFEU since 2000⁶ until to date by using various illegal means to foreclose the market for the provision of ERP or EAS software.

11. In the letter of 5 August 2010, Omnis Group contends that the Commission has not addressed the additional submission of 18 February 2010 and limited itself to analyzing only its submission of 23 December 2009. This contention is unfounded. All information submitted by Omnis Group until the adoption of the Article 7(1) letter, including the submission of 18 February 2010, has been analysed and taken into account in this letter for the purposes of the assessment under competition law: First, paragraphs 1 and 3 of the Article 7(1) letter refer to all of Omnis Group's submissions, including that of 18 February 2010, which have been analysed by the Commission. Second, in several instances, the Article 7(1) letter quotes directly from or relies on information submitted in the 18 February 2010 submission, including the documentation enclosed with it⁷.

⁶ Omnis Group submits that "*Today, we can prove that Microsoft and its partners put us on their 'black list' since the year 2000, and thoroughly targeted us for extermination.*" (Submission of 23 December 2009 by Omnis Group, page 13. See also submission of 18 February 2010, page 9.) It is to be noted though that according to Omnis Group's submissions Microsoft announced the acquisition of Navision A/S on 11 July 2002 (Submission of 23 December 2009 by Omnis Group, page 16, para. 14) and entered the Romanian ERP software market with its Navision ERP software only in 2003 (Submission of 23 December 2009 by Omnis Group, page 18, para. 20).

⁷ See footnotes 7, 9 and 10 of the Article 7(1) letter.

12. Omnis Group also alleges the infringement of intellectual property rights⁸, misuse of European funds, violations of public procurement rules and corruption by Microsoft. As mentioned in Mr Hellström's letter of 12 January 2010, the complaint has been forwarded to the unit in charge of public procurement issues in the Commission's Internal Market Directorate General and to the European Anti-Fraud Office ("OLAF") in order to investigate the allegations which do not directly concern competition law. This decision will therefore solely address the competition law concerns raised in the complaint.

13. The submission of 23 December 2009 states that the complaint "*concerns the allegedly illegal tying by Microsoft of its web browser Internet Explorer to its dominant client personal computer (PC) operating system Windows (Windows) to its server operating system, the .NET Framework and its Navision 3.60 and later versions of ERP (Enterprise Resource Planning) business dedicated systems.*"⁹ However, the complaint, including later submissions, does not substantiate these allegations to an extent that would allow to assess even the likelihood of a competition law infringement related to web browsers or the .NET Framework. Therefore, the allegations with regard to web browsers and the .NET Framework have been addressed neither by the Article 7(1) letter nor by this decision. The complainant has also not further raised these arguments after the receipt of the letter, and these allegations are therefore considered to be dropped. Moreover, the tying of Internet Explorer to the Windows client PC operating system was the subject matter of a Commission Decision of 16 December 2009.¹⁰

14. The complaint raises the following competition law concerns which will be further assessed in this decision:

15. First, Omnis Group alleges that Microsoft has abused its dominant position in contravention of Article 102 TFEU by engaging in various anticompetitive practices, including refusal to deal with Omnis Group¹¹, a refusal to supply information to Omnis Group¹², discriminating against Omnis Group¹³, illegal tying¹⁴ and using interposed companies¹⁵ with a

⁸ By letter of 20 September 2010, Omnis Group submitted that contrary to the Commission's assessment in the Article 7(1) letter, "*there is no issue of intellectual property rights regarding case 39.784. It is an issue of abuse of dominant position (...)*". However, the arguments put forward in that letter have not led the Commission to reconsider its position that certain issues in the complaint do not concern competition law, but may concern intellectual property law, and consequently, for the purposes of this decision, the Commission has not examined those issues.

⁹ Submission of 23 December 2009 by Omnis Group, page 3.

¹⁰ Commission Decision of 16 December 2009, Case COMP/C-3/39.530 – *Microsoft (tying)*.

¹¹ Submission of 23 December 2009 by Omnis Group, page 11. See also submission of 18 February 2010, page 35, and submission of 26 August 2010, pages 60-61, paras. 198-200.

¹² Submission of 23 December 2009 by Omnis Group, page 11. See also submission of 18 February 2010, page 35, and submission of 26 August 2010, pages 60-61, paras. 198-200.

¹³ Submission of 23 December 2009 by Omnis Group, page 7. See also submission of 18 February 2010, page 11.

¹⁴ Submission of 18 February 2010 by Omnis Group, page 96. See also submission of 26 August 2010, paras. 17, 117, 121.

¹⁵ Submission of 23 December 2009 by Omnis Group, pages 5, 11, 19. See also submission of 18 February 2010, pages 35, 99-101, and submission of 26 August 2010, paras. 209-217.

view to foreclose the market for the provision of ERP or EAS software in general¹⁶ and to eliminate competition by Omnis Group in particular¹⁷.

16. Second, Omnis Group also alleges that Microsoft has entered into an illegal strategic partnership in contravention of Articles 101 and 106 TFEU with the Romanian Government¹⁸ which conferred an illegal monopoly on Microsoft in Romania and that such agreements amount to an illegal cartel¹⁹ or "cartel-type" behaviour.²⁰

17. Omnis Group has summarised the alleged competition law infringements as "*the presence and performance of Microsoft Corporation (sic) the market of Enterprise Resource Planning solutions, the monopoly obtained on this market with the support of the Romanian Government, actions taken by Microsoft and its distribution partners in eliminating competition.*"²¹

2. ASSESSMENT

18. According to settled case-law of the Courts of the European Union, the Commission is not required to conduct an investigation into each complaint it receives but its only obligation is to examine the factual and legal particulars brought to its notice by the complainant.²² The Courts of the European Union have also recognized that the Commission has discretion in its treatment of complaints.²³ In particular, the Commission is entitled to give differing degrees of priority and to refer to the interest of the European Union in order to determine the degree of priority to be applied to the various complaints brought before it.²⁴

19. In assessing the interest of the European Union as regards the continuation of the investigation of a case, the Commission may in particular balance (i) the significance of the alleged infringement in view of the functioning of the internal market, (ii) the probability of establishing the existence of the infringement and (iii) the scope of the investigation that would be required.²⁵

¹⁶ Submission of 26 August 2010 by Omnis Group, para. 48.

¹⁷ Submission of 23 December 2009 by Omnis Group, pages 29-30.

¹⁸ Submission of 23 December 2009 by Omnis Group, page 11. See also submission of 18 February 2010, pages 17-21 and 54-57.

¹⁹ Letter of 16 August 2010 by Omnis Group, page 3.

²⁰ Submission of 26 August 2010 by Omnis Group, paragraph 27. See also submission of 18 February 2010, page 99. See also submission of 26 August 2010, pages 12-15.

²¹ Submission of 26 August 2010 by Omnis Group, para. 3, and submission of 12 August 2010, page 3.

²² Case T-24/90, *Automec v Commission*, [1992] ECR II-2223, para. 76. Case T-432/05, *EMC Development AB v Commission*, not yet reported, para 59.

²³ Case C-119/97 P, *Ufex v Commission*, [1999] ECR I-1341, para. 88; Case T-193/02, *Laurent Piau v Commission*, [2005] ECR II-209, paras. 44 and 80.

²⁴ *Automec, supra*, paras. 77 and 85.

²⁵ *Automec, supra*, para. 86.

20. As regards the complaint, the Commission considers that further investigation of Microsoft's alleged anti-competitive behaviour on the market for the provision of ERP or EAS software would be disproportionate in light of the limited impact that this conduct has / is likely to have on the functioning of the internal market as well as the limited likelihood of establishing proof of an infringement of Articles 101, 102 or 106 TFEU.

2.1. Relevant Product Market

21. Omnis Group contends that the relevant product market is the market for ERP software, including *"both the individual onsite installations (on customers' networks) and the online (web) access to selected functionalities (under the concept Software-as-a-Service). The main functionalities of ERP solutions include Inventory & Material Management, Sales and Distribution Management, Supplier and Purchase Management, Human Resource Management, Finance Resource Management, Manufacturing, Maintenance, Transport Management, Executive Decision Support, etc. The intended use of these solutions is to provide the means to operate and administrate the activities of any economic enterprise."*²⁶ According to the submission of 23 December 2009 *"Omnis Group (O.G.) (...) is an efficient competitor that does not have the benefits of a dominant position, and it is able to compete against the pricing conduct of Microsoft – the dominant company – in the market of ERP (Enterprise Resource Planning) systems."*²⁷

22. In the *Oracle/PeopleSoft* merger decision, the Commission considered that ERP could be a possible submarket within the EAS market.²⁸ EAS supports major business functions needed to manage a business effectively at a corporate or branch level (such as managing corporate finances, automating the sales and marketing functions of a company, or managing the resources involved in corporate projects).²⁹

23. In the *SAP/Business Objects* merger decision, the Commission also considered a possible sub-division of the EAS market into (i) Enterprise Resource Planning (ERP); (ii) Customer Relationship Management (CRM); (iii) Supply Chain Management (SCM); (iv) Supplier Relationship Management (SRM); (v) Product Lifecycle Management (PLM); and (vi) Business Analytics (BA).³⁰ In the *Oracle/PeopleSoft* merger decision, the Commission considered that Financial Management Systems (FMS) and Human Resources (HR) together constitute Enterprise Resource Planning (ERP).³¹

24. The Commission considers that for the purposes of this decision, it can be left open whether the conduct Omnis Group complains about takes place in the market for the provision of EAS or the ERP software submarket as Microsoft does not appear to have significant

²⁶ Submission of 18 February 2010 by Omnis Group, Documentation, pages 36-37.

²⁷ Submission of 23 December 2009 by Omnis Group, page 3.

²⁸ Commission Decision of 26 October 2004, Case COMP/M.3216 – *Oracle/PeopleSoft*, paras. 10-15 and 27.

²⁹ Commission Decision of 26 October 2004, Case COMP/M.3216 – *Oracle/PeopleSoft*, para. 8. See also Commission Decision of 21 January 2010, Case COMP/M.5529 – *Oracle/Sun Microsystems*, para. 24; Commission Decision of 20 July 2010 in Case COMP/5904 – *SAP/Sybase*, para. 18.

³⁰ Commission Decision of 22 October 2007, Case COMP/M.3216 – *SAP/BusinessObjects*.

³¹ Commission Decision of 26.10.2004, Case COMP/M.3216 – *Oracle/PeopleSoft*, para. 9.

market shares on either of these markets and therefore the assessment of the case will not change regardless of whether the relevant market is that of EAS or ERP software.

25. Following the Article 7(1) letter, Omnis Group suggested that the relevant product market should be "[t]he market for EAS/ERP software for Microsoft Windows 'infrastructure software' (operating systems for client personal computers 'client PCs', operating systems for work group servers and SQL relational database management servers 'RDBS') for Intel-compatible computers."³² Omnis Group sustained this market definition also in its submission of 24 September 2010³³. Considering that the major ERP or EAS software run on multiple operating systems, this market definition does *prima facie* not appear relevant: from a customer perspective, switching from an ERP or EAS software running on Windows to the same ERP or EAS software running on another operating system should be relatively easy. Moreover, even if the relevant product market were defined as "[t]he market for EAS/ERP software for Microsoft Windows 'infrastructure'" as suggested by Omnis Group, the assessment made in this decision would not materially change. According to IDC, in 2008, [45-50]% of EAS ran on Windows.³⁴ Even if only EAS software running on Windows are looked at, Microsoft's market share would still be around [5-10]% of the worldwide EAS market by revenue³⁵, and its market share of the worldwide ERP market would be below [5-10]% (assuming that [45-50]% of ERP software run on Windows)³⁶, which would not change the assessment relating to dominance.

2.2. Relevant Geographic Market

26. The Commission considers that while it can be left open whether the market is European Economic Area (EEA) or worldwide, the characteristics of the product market would suggest that it is likely to be a worldwide market. This is because EAS or ERP software providers, irrespective of their location, supply the same products to clients on a worldwide basis. While an EAS or ERP software may be individualised at the request of the company buying it, this does not change the fact that it remains the same product. The fact that there is no transportation cost involved in the delivery of the software supports a worldwide market definition. Omnis Group does not contest this geographic market definition.³⁷

³² Letter of 17 August 2010 from Omnis Group, page 1.

³³ Submission of 24 September 2010 by Omnis Group, page 1.

³⁴ Worldwide Enterprise Applications 2009-2013 Forecast Update and 2008 Vendor Shares, December 2009, IDC #221271, Volume 1, Tab: Markets. Table 2 – Worldwide Enterprise Applications Revenue by Region and Operating Environment, 2008-2013 (\$M).

³⁵ See below paragraph 28. Since Navision only runs on Windows, its [0-5]% market share of the EAS software market represents $[0-5]\% / [45-50]\% = [5-10]\%$ of the EAS software running on Windows.

³⁶ See below paragraph 27. Since Navision only runs on Windows, its 4% market share of the ERP software market represents $4\% / [45-50]\% = [5-10]\%$ of the ERP software running on Windows.

³⁷ Letter of 17 August 2010 from Omnis Group, page 5.

2.3. Allegations of infringements of Article 102 TFEU

2.3.1. Microsoft's position on the relevant market(s)

27. The Commission notes that available market information confirms Microsoft's small market share during the period relevant to the complaint. AMR Research states in a report from 2007 that Microsoft's market share by application revenue was 3% of the worldwide ERP market in 2006, with a growth rate similar to that of its competitors.³⁸ Omnis Group refers to AMR Research's subsequent 2008 ERP Report which indicates that Microsoft's worldwide market share was 4% by revenue in 2007.³⁹

28. Similar figures are reported by Gartner who indicates that Microsoft had a [0-5]% worldwide market share of the ERP market in 2007 and qualified Microsoft's Dynamic Navision⁴⁰ software as a "niche player".⁴¹ According to IDC, in 2008, Microsoft had a [0-5]% share of the worldwide EAS market by revenue, following SAP ([10-15]%), Oracle ([5-10]%), and Siemens ([0-5]%).⁴²

29. Market information confirms that there is vigorous competition on the EAS and ERP software markets. IDC reports that in 2008, there were a total of [150-200] companies active in the EAS market worldwide, with [10-30] companies above 1% market share by revenue and a total of [20-40] companies above 0.5% market share by revenue.⁴³ The high number of active firms and their relatively small market shares also suggests that entry barriers are low. In the *SAP/Sybase* merger case, the Commission also observed that there were several important players on the market, none of them being dominant.⁴⁴

³⁸ The ERP Market Sizing Report 2006-2011, 2007, by AMR Research, page 5. http://www.sap.com/solutions/business-suite/erp/pdf/AMR_ERP_Market_Sizing_2006-2011.pdf,

³⁹ Letter of 13 August 2010 by Omnis Group, footnote 1, referring to <http://www.microsoft.com/presspass/itanalyst/docs/08-01-08AMRResearch.PDF>, "Awakening a Sleeping Giant: Inside Microsoft Business Solutions' ERP Strategy" by AMR Research, August 2008, page 1.

⁴⁰ Navision is the ERP software marketed by Microsoft in Romania. Microsoft entered the Romanian ERP market in May 2003, with Navision 3.60.

⁴¹ "Magic Quadrant for Midmarket and Tier 2-Oriented ERP for Product-Centric Companies", by Gartner, June 2009. See at <http://www.gartner.com/technology/media-products/reprints/microsoft/vol4/article12/article12.html>. According to Gartner's definition "ERP systems' functionality normally covers the following areas: finance and accounting (general ledger [G/L], accounts payable and accounts receivable), sales or customer order management, operations management, purchasing, and human resource management."

⁴² Worldwide Enterprise Applications 2009-2013 Forecast Update and 2008 Vendor Shares, December 2009, IDC #221271, Volume 1, Tab: Markets. Table 1 – Worldwide Enterprise Applications Licence, Maintenance, and Subscription, Revenue by Vendor, 2006-2008. IDC defines the market as Enterprise Applications Market, including "[...]". (Worldwide Enterprise Applications 2009-2013 Forecast Update and 2008 Vendor Shares, December 2009, IDC #221271, Volume 1, Tab: Markets, page 53.) The definition of ERP as used by the Commission appears to correspond to the ERM market as defined by IDC.

⁴³ Worldwide Enterprise Applications 2009-2013 Forecast Update and 2008 Vendor Shares, December 2009, IDC #221271, Volume 1, Tab: Markets. Table 1 – Worldwide Enterprise Applications Licence, Maintenance, and Subscription, Revenue by Vendor, 2006-2008.

⁴⁴ Commission Decision of 20 July 2010 in Case No. COMP/M.5904 – *SAP/Sybase*.

30. Omnis Group does not in fact contest that available information shows that Microsoft has a low market share on the relevant market(s). Rather, Omnis Group claims that Microsoft is reporting incorrect sales figures to market research companies and Microsoft's market share both in Romania and other European countries already exceeds 40%.⁴⁵ Omnis Group alleges that the figures provided by Microsoft to market research companies are flawed and underestimate Microsoft's market share. In this regard, Omnis Group states that *"Microsoft does not inform correctly on their ERP sales. Contracts to sell partially or integrally ERP functionality are signed either with their Ireland Offices or with their Corporate headquarters, depending on Microsoft's interest to cover up their advancement to market domination. Their resellers are unknown and some are used just for committing piracy on other companies. Microsoft does not have only 3% of the ERP market. We tried to find out more on the subject but found out that Microsoft is very secretive about its ERP expansion and their successful growth, Microsoft does not take pride anymore in their dominance, they carefully conceal it."*⁴⁶

31. Furthermore, Omnis Group contests the veracity of the figures reported by IDC for 2008 stating that *"The Commission mentioned: IDC reports that in 2008, there were a total of [150-200] companies active in the EAS market worldwide..."* It would be useful to know how many of those companies are active in the ERPW market and how many of them became actually Navision resellers, in the last four years. (...) *The Microsoft 3% market share on the EAS market, unchanged for the last years according to AMR report, and Microsoft appearing not to be able and willing to influence the market – which seems to sustain vigorous competition because of the large number of players – may be a misleading view of the EAS and EASW markets."*⁴⁷ Omnis Group quotes from Wikipedia that *"Dynamics NAV⁴⁸ has approximately 65,000 companies running the solution with over 1.3 million end user licenses. Approximately 13,000 of those companies are in the US. It was the first and only mid-market ERP application to break one-million end user licenses."*⁴⁹

32. In the comments on the IDC report, Omnis Group maintains its position that the data presented therein is *"intentionally diluted"*⁵⁰, *"falsely induce the wrong conclusions regarding the ERP markets and Microsoft's performance on the ERP for Windows markets"*⁵¹, *"Microsoft exerts the kind of influence on the consulting companies (...) that it allows it to decide which of the ERP developers are to be promoted and which are to be boycotted"*⁵² and that *"any information regarding Microsoft should also be taken into consideration with great*

⁴⁵ Letter of 25 February 2010 by Omnis Group, page 1. See also submission of 24 September 2010, pages 1-2 and 16.

⁴⁶ Letter of 25 February 2010 by Omnis Group.

⁴⁷ Submission of 26 August 2010 by Omnis Group, paragraph 163.

⁴⁸ Microsoft's Navision ERP software has later been renamed to Dynamics NAV.

⁴⁹ Submission of 26 August 2010 by Omnis Group, footnote 150 referring to <http://en.wikipedia.org/wiki/Navision>.

⁵⁰ Submission of 24 September 2010 by Omnis Group, page 1.

⁵¹ Submission of 24 September 2010 by Omnis Group, page 2.

⁵² Submission of 24 September 2010 by Omnis Group, page 16.

caution"⁵³. Furthermore, the fact that according to the IDC report Microsoft has good opportunities to grow in the EAS market in the future, in particular by acquisitions, does not change the current competitive landscape which is essentially characterised by several strong companies that exert competitive constraint on each other and many smaller ones.

33. The 2008 AMR ERP Report which Omnis Group also refers to in its letter of 13 August 2010 confirms the overall market share IDC accords to Microsoft. While that AMR report estimates that in 2007, Microsoft had 4% market share on the worldwide ERP market, IDC estimates that in 2008, Microsoft had [0-5]% market share in the worldwide EAS market. While these two reports refer to the ERP and EAS markets respectively, and market research companies may use slightly different definitions for these markets, it does not change the conclusion that Microsoft does not appear to have a dominant position on either of these markets.

34. The Commission's analysis in 2004 of the *Oracle/PeopleSoft* merger concluded that there was vigorous competition in the EAS submarkets.⁵⁴ The decision found that "*Oracle, PeopleSoft and SAP are the main players*" on the markets for high-function ERP for large and complex enterprises, and other vendors such as Lawson, Intenia, IFS, QAD and Microsoft also occasionally win bids.⁵⁵ In its analysis of the *SAP/Business Object* merger in 2007, the Commission considered that "[T]he EAS market, as well as EAS sub markets are characterised by the presence of several internationally active competitors among which Oracle (including Hyperion), Cognos Inc., Microsoft, SAS all represent credible alternatives to customers."⁵⁶ In the *SAP/Sybase* merger decision in July 2010, the Commission also depicted the EAS market as one where several players exert competitive constraints on each other.⁵⁷

35. In conclusion concerning the veracity of the data reported by market research companies, the Commission has no reason to cast doubt on the accuracy of the figures provided by Microsoft to those companies and their subsequent findings as they concur with the Commission's own assessment in relevant merger decisions.

36. In view of the above, it *prima facie* seems that competition on the EAS and ERP software markets is vigorous and that Microsoft is not one of the leading players. It therefore appears unlikely that Microsoft would be in a dominant position on the relevant market(s).

2.3.2. *Alleged infringements*

37. As mentioned in the Article 7(1) letter, Omnis Group alleges that Microsoft has abused its dominant position on the market for the provision of EAS or ERP software by engaging in

⁵³ Submission of 24 September 2010 by Omnis Group, page 17.

⁵⁴ Commission Decision of 26.10.2004, Case COMP/M.3216 – *Oracle/PeopleSoft*.

⁵⁵ Commission Decision of 26.10.2004, Case COMP/M.3216 – *Oracle/PeopleSoft*, paras. 9 and 23. In that case, the Commission defined the relevant market as high-function FMS and HR software, FMS and HR together constituting the ERP market.

⁵⁶ Commission Decision of 27.11.2007, Case COMP/M.4944 – *SAP/Business Objects*, para. 22.

⁵⁷ Commission Decision of 20 July 2010 in Case COMP/5904 – *SAP/Sybase*.

various anticompetitive practices, including refusal to deal with Omnis Group⁵⁸, refusal to supply information to Omnis Group⁵⁹, discriminating against Omnis Group⁶⁰, illegal tying⁶¹ and using interposed companies⁶² with a view to foreclose the market(s) in general⁶³ and to eliminate competition by Omnis Group in particular.⁶⁴

38. However, in view of Microsoft's low market shares on the relevant market(s) the likelihood of establishing an abuse of 102 TFEU is very limited.

2.4. Allegations of infringements of Article 101 and 106 TFEU

2.4.1. Exclusive dealing and using interposed companies

39. Omnis Group alleges that Microsoft used its distribution partners in Romania to exclude Omnis Group from the market.⁶⁵

40. Omnis Group also contends that *"Microsoft used interposed companies (Romsys, Infoworld⁶⁶) in order to eliminate Omnis Group and its ISIS.NET system out of the e-Health Consortium."*⁶⁷ In this regard, Omnis Group states that *"in 2007, Microsoft eliminated Omnis Group and its ERP software, ISIS.NET from the RNT [Romanian National Traumatology Network] consortium, defining another project (National Critical Medicine Network Portal) and including ROMSYS as ERP supplier."*⁶⁸ (the 'RNT case') In support of this allegation, Omnis Group refers to documentation annexed to the submission of 18 February 2010 entitled "The RNT case". However, that 66-page document does not contain any indication of a

⁵⁸ Submission of 23 December 2009 by Omnis Group, page 11. See also submission of 18 February 2010 by Omnis Group, page 35, and submission of 26 August 2010, pages 60-61, paragraphs 198-200.

⁵⁹ Submission of 23 December 2009 by Omnis Group, page 11. See also submission of 18 February 2010, page 35, and submission of 26 August 2010, pages 60-61, paragraphs 198-200.

⁶⁰ Submission of 23 December 2009 by Omnis Group, page 7. See also submission of 18 February 2010, page 11.

⁶¹ Submission of 23 December 2009 by Omnis Group, page 7. See also submission of 18 February 2010, page 11, and submission of 26 August 2010, paras. 17, 117, 121.

⁶² Submission of 23 December 2009 by Omnis Group, pages 5, 11, 19. See also submission of 18 February 2010, pages 35, 99-101, and submission of 26 August 2010, paragraphs 209 – 217.

⁶³ Submission of 26 August 2010 by Omnis Group, para. 48.

⁶⁴ Submission of 23 December 2009 by Omnis Group, pages 29-30.

⁶⁵ Submission of 23 December 2009 by Omnis Group, page 5. *"Microsoft used interposed companies in order to eliminate Omnis Group and its ERP flagship product ISIS.NET out of the market and to replace it with its own Navision product"*.

⁶⁶ Romsys and Infoworld were/are distributors of Microsoft's Navision ERP software. Submission of 23 December 2009 by Omnis Group, pages 8 and 11.

⁶⁷ Submission of 23 December 2009 by Omnis Group, pages 11 and 19, para. 29.

⁶⁸ Submission of 18 February 2010 by Omnis Group, pages 100-101.

likelihood that Microsoft would have entered into an agreement in contravention of Article 101 TFEU in order to exclude Omnis Group from the consortium.

41. Omnis Group further alleges that Microsoft has convinced past Omnis Group clients, the Romanian National Council of Small and Medium Private Enterprises (CNIPMMR)⁶⁹ and Baneasa Investments (BISA)⁷⁰, to give up their collaboration with Omnis Group. Omnis Group submits that *"The BISA case is about Microsoft using interposed "ghost" companies in order to eliminate competition."*⁷¹ Omnis Group also contends that *"Microsoft engaged in anti-competitive practices together with SMARTREE, to direct potential customers to a preferred supplier (SMARTREE) of SaaS [Software As A Service] in HR field. Microsoft and SMARTREE conspired to reduce competition unduly in the respective market (software for HR management is a submarket of ERP/EAS software)"*⁷² However, the documentation submitted in this regard⁷³ does not contain any information that would indicate the likely existence of an agreement or concerted practice in contravention of Article 101 TFEU.

2.4.2. Strategic partnership with the Romanian Government

42. Omnis Group alleges that Microsoft and the Romanian Government have entered into a strategic partnership following which the Romanian Government has conferred an illegal monopoly on Microsoft and that by the same act, Microsoft and the Romanian Government entered into a *"cartel"*⁷⁴ or *"cartel-type arrangement"*⁷⁵.

43. In this regard, Omnis Group contends that *"Microsoft accomplished a strategic partnership with the Romanian Government and a commercial contract in order to sell and verify ALL software implementations for all State controlled institutions and programs (health, education, administration, defence, etc.) and to have exclusive rights over litigations regarding third party claims of any kind. Both contracts contravene with the Art. 82 of the Treaty."*⁷⁶ As regards the relevant markets concerned, Omnis Group submits that *"Microsoft is the IT&C "Strategic Partner" of the Romanian Government"*.⁷⁷ Omnis Group also submits that the partnership was concluded in September 2003 and *"on March 15 2004, the Romanian Government and Microsoft signed a contract for Microsoft licenses (for Enterprise Desktop Professional Platform, Windows 2003 – Server, Exchange 2003 – Server, Systems*

⁶⁹ Submission of 26 August 2010 by Omnis Group, paragraphs 209 – 216.

⁷⁰ Submission of 18 February 2010 by Omnis Group, pages 99-100, and supporting document "The BISA case". See also submission of 26 August 2010 by Omnis Group, paragraph 217.

⁷¹ Submission of 18 February 2010 by Omnis Group, page 35.

⁷² Submission of 26 August 2010 by Omnis Group, paragraph 205. See also submission of 18 February 2010 by Omnis Group, page 94.

⁷³ Submission of 18 February 2010 by Omnis Group, File "Smartree case".

⁷⁴ Letter of 16 August 2010 by Omnis Group, page 3.

⁷⁵ Submission of 26 August 2010 by Omnis Group, paragraph 27.

⁷⁶ Submission of 23 December 2009 by Omnis Group, page 11. See also submission of 18 February 2010, pages 17-21 and 54-57.

⁷⁷ Submission of 12 August 2010 by Omnis Group, page 3.

*Management Server, SharePoint – Portal Server, Windows SQL 200 Tech, Encarta Library, etc.)*⁷⁸ Further, Omnis Group submits that such contract was renewed in 2009 until 2012.⁷⁹

44. The Commission notes that the contracts submitted by the complainant to substantiate the above allegations appear to be publications in the Romanian Official Journal of the procurement contracts for software licenses by the Romanian Government. Thus the question of whether such contracts have been correctly awarded to Microsoft in the relevant market and not to other competitors like Omnis is subject to the rules on public procurement. It is to be recalled that the assessment of whether the Romanian Government has complied with EU procurement legislation does not constitute the subject matter of this decision.

45. The allegations that these mere procurement contracts would instate a monopoly of Microsoft in the relevant market or a cartel between the Romanian Government and Microsoft remain unsubstantiated by any reference to concrete provisions of these contracts and/or their anticompetitive implementation on the relevant market. It is therefore highly unlikely that an infringement of Articles 101 and Art 106 TFEU could be established on the basis of the information provided by the complainant.

2.5. *Limited likelihood of establishing proof of infringements*

46. With respect to allegations of infringements of the Article 102 TFEU, the Commission's view is that it would not be able to show that Microsoft is dominant on the relevant market(s). Therefore on the basis of the available information, the likelihood of establishing an infringement of Article 102 TFEU is very low.

47. With respect to the allegation of infringements of Articles 101 and 106 TFEU, the Commission's view is that the information submitted does not constitute sufficient evidence that competition law has been infringed or the allegations do not concern competition law. Therefore, on the basis of the available information, the likelihood of establishing an infringement of Articles 101 or 106 TFEU is very low.

3. CONCLUSION

48. In view of the above considerations, the Commission has come to the conclusion that the information contained in the submissions made by the complainant in response to its Article 7(1) letter and commenting on the IDC report, have not led to a different assessment of the complaint and maintains that there is no sufficient degree of European Union interest for conducting further investigation into the alleged infringements and consequently rejects the complaint on the basis of Article 7(2) of Commission Regulation (EC) No 773/2004.

49. Nevertheless, Omnis Group's attention is drawn to the fact that according to settled case-law, Articles 101 and 102 TFEU produce direct effects in the relations between individuals and confer rights which, in particular the national courts must safeguard.⁸⁰ It should

⁷⁸ Submission of 18 February 2010 by Omnis Group, pages 30, 60-64 and 99. See also submission of 26 August 2010, pages 12-15.

⁷⁹ Submission of 18 February 2010 by Omnis Group, pages 65-69.

⁸⁰ Case 127/73, *BRT/SABAM*, [1974] ECR 51, para 16; Case C-453/99, *Courage*, [2001] ECR I-6297, para 23.

also be emphasized in this regard that the competition authorities in the Member States and the national courts have, according to Articles 3, 5 and 6 of Regulation (EC) No 1/2003, applicable since 1 May 2004, the power and the obligation to apply Articles 101 and 102 TFEU in their entirety. Therefore, this decision is without prejudice to other legal and judicial avenues Omnis Group may have recourse to.

4. PROCEDURE

50. An action challenging this Decision may be brought before the General Court of the European Union in accordance with Article 263 TFEU.

For the Commission,

Joaquín Almunia
Vice-President