



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.7.2005  
**C(2005)2988 final**

**COMMISSION DECISION**

**of 28.07.2005**

**relating to a proceeding under Article 82 of the EC Treaty  
(Case COMP/C-3/37.792 Microsoft)**

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

(Text with EEA relevance)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 82 thereof,

Having regard to 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,<sup>1</sup> and in particular Article 7 (1) thereof,

Having regard to the Commission decision of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty in Case COMP/C-3/37.792 Microsoft (C(2004)900), and in particular Article 7 thereof,

Having regard to the final report of the hearing officer in this case,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

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<sup>1</sup> OJ L1, 04.01.2003, p. 1/25.

## 1. LEGAL FRAMEWORK

1. On 24 March 2004, the Commission addressed to Microsoft Corporation (“Microsoft”) a decision relating to a proceeding under Article 82 of the EC Treaty (“Article 82”), under Case N° COMP/C-3/37.792 (“the Decision”). In the Decision, the Commission found that Microsoft had infringed Article 82 of the EC Treaty and Article 54 of the EEA Agreement by engaging in acts that constituted various abuses of a dominant position. The Commission also imposed a number of measures aimed at bringing to an end in an effective manner the infringement in question.

2. Article 7 of the Decision reads:

“Within 30 days of the date of notification of this Decision, Microsoft Corporation shall submit a proposal to the Commission for the establishment of a suitable mechanism assisting the Commission in monitoring Microsoft Corporation’s compliance with this Decision. That mechanism shall include a monitoring trustee who shall be independent from Microsoft Corporation.

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

3. The need for and the purpose of the monitoring mechanism provided for in Article 7 of the Decision is explained in particular at recitals 1043 and 1044 of the Decision. In order to ensure that the infringement is brought to an end in an effective manner, measures should be taken so that the Commission will be in a position to efficiently oversee Microsoft’s compliance with the Decision. As explained in these recitals, this includes the establishment of a suitable monitoring mechanism including a monitoring trustee assisting the Commission in monitoring Microsoft’s compliance with the Decision.

4. It results from the wording of Article 7 that the Commission will base its decision establishing the monitoring mechanism on Microsoft’s timely proposal if that proposal is suitable. However, the Commission retains the right to assess the suitability of the monitoring mechanism proposed by Microsoft and, if Microsoft’s proposal is not suitable, to impose a suitable mechanism.

5. The Decision, in particular at recitals 1045 to 1048, outlines a number of guiding principles for the establishment and functioning of the suitable monitoring mechanism foreseen by Article 7.

## 2. PROCEDURE

6. By letter of 28 April 2004, Microsoft submitted a first proposal for the establishment of a monitoring mechanism pursuant to the first paragraph of Article 7 of the Decision (“Microsoft’s original proposal”).<sup>2</sup>
7. The Commission services reacted to this first proposal by way of a letter of 19 May 2004,<sup>3</sup> in which a number of concerns were expressed as regards the suitability of the monitoring mechanism proposed in Microsoft’s submission. In the same letter, the Commission services invited Microsoft to further discuss the proposal in a meeting.
8. Microsoft replied by letter of 28 May 2004, agreeing on the principle of a meeting.<sup>4</sup>
9. By letter of 9 June 2004, and in order to help Microsoft to prepare for the upcoming meeting, the Commission services transmitted a working paper to Microsoft, which included suggested amendments to Microsoft’s original proposal.<sup>5</sup>
10. In a subsequent letter of 30 July 2004, the Commission services took notice of the fact that Microsoft had not followed up on the invitation to meet and discuss the modalities of the implementation of the monitoring mechanism.<sup>6</sup> Equally, the Commission services asked Microsoft to provide by 26 August 2004 any comments on the modified version of Microsoft’s original proposal, which was annexed to the above-mentioned letter of 9 June 2004. The Commission services reiterated their willingness to convene a meeting with Microsoft on this point.
11. Microsoft responded on 26 August 2004, stating that, in view of its application for suspension of the Decision,<sup>7</sup> it might be appropriate to defer a meeting on the monitoring trustee until the President of the Court of First Instance decided on its application.<sup>8</sup> Microsoft indicated that it would, however, be happy to make the necessary arrangements for such a meeting if the Commission services saw a need. In an annex to the letter in question, Microsoft presented comments on the modifications to Microsoft’s initial proposal suggested by the Commission services in the working paper of 9 June 2004.
12. This exchange of letters was followed by various attempts on the part of the Commission services to convene a meeting with Microsoft. Such a meeting was finally held on 16 December 2004.
13. In this meeting, Microsoft stated that, in light of the defence that the Commission had in the interim filed in response to Microsoft’s application for annulment of the

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<sup>2</sup> Letter of 28 April 2004 from John Frank, Deputy General Counsel of Microsoft, to Jürgen Mensching, Director, DG Competition.

<sup>3</sup> Letter of 19 May 2004 from Jürgen Mensching to John Frank.

<sup>4</sup> Letter of 28 May 2004 from John Frank to Jürgen Mensching.

<sup>5</sup> Letter of 9 June 2004 from Jürgen Mensching to John Frank. The letter in question stresses that this “*amended draft implementation document*” did not represent a formal position taken by the Commission but was a working paper intended to serve as a basis for the upcoming discussion.

<sup>6</sup> Letter of 30 July 2004 from Jürgen Mensching to David Heiner, Deputy General Counsel of Microsoft.

<sup>7</sup> Application for suspension of the Commission Decision of 24 March 2004 (COMP/C-3/37.792 Microsoft) lodged with the Court of First Instance on 25 June 2004 (Case T-201/04 R).

<sup>8</sup> Letter of 26 August 2004 from John Frank to Jürgen Mensching.

Decision,<sup>9</sup> it wished to modify its original proposal.<sup>10</sup> Microsoft announced that it would submit a revised draft of its proposal for a monitoring mechanism.

14. In a letter of 17 January 2005 Microsoft provided the revised proposal for a monitoring mechanism announced during the meeting of 16 December 2004.<sup>11</sup>
15. A subsequent meeting took place between the Commission services and Microsoft on 19 January 2005. Following this meeting, by letter of 28 January 2005,<sup>12</sup> Microsoft submitted another revised proposal for a monitoring mechanism.
16. The Commission, on the understanding that this amended version of Microsoft's original proposal ("Microsoft's January proposal") constituted Microsoft's proposal for a monitoring mechanism pursuant to the first paragraph of Article 7 of the Decision, undertook to analyse this proposal accordingly.
17. The Commission's analysis led to the preliminary conclusion that the monitoring mechanism that was proposed by Microsoft was not suitable. This was in particular due to the following reasons.
18. First, Microsoft's January proposal implied that the Trustee would not be able to undertake any task without Microsoft's prior consent. This would have conflicted with several of the principles set out in the above-mentioned recitals 1045-1048 of the Decision and, more generally, would have inhibited the effective monitoring of Microsoft's compliance with the Decision.
19. Second, Microsoft's January proposal suggested that the Trustee would have access only to the source code of "*Microsoft's client and server operating systems*" (Article 3.2 of Microsoft's January proposal), but not to the source code of Windows Media Player. This would have impaired the effective monitoring of Microsoft's compliance with Articles 4 and 6 of the Decision. In particular, these Articles imply the need for the Commission to check whether "*Microsoft hinder[s] the performance of rival media players through selective, inadequate, or untimely disclosures of Windows APIs*" (see recital 1013 (i) of the Decision). As explained at recital 1047 (iii) of the Decision, the Trustee should provide technical advice to the Commission on this specific point (among others). In order to carry out this task effectively, the Trustee needs access to the source code of Windows Media Player.
20. By letter dated 22 March 2005, the Commission invited Microsoft to comment on its analysis that Microsoft's proposal was not suitable and on the Commission's intention to adopt, on the basis of Article 7(1) of Regulation 1/2003 and of the

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<sup>9</sup> Application for annulment of the Commission Decision of 24 March 2004 (COMP/C-3/37.792 Microsoft) lodged with the Court of First Instance on 7 June 2004 (Case T-201/04). In this application for annulment, Microsoft challenges *inter alia* the Commission's power to appoint a monitoring trustee and to impose on Microsoft the obligation to bear the costs of the Trustee.

<sup>10</sup> In this context, Microsoft referred to the Commission's statement that the Trustee would not be delegated "*the powers of investigation and enforcement conferred on the Commission by regulation for the application of Articles 81 EC and 82 EC*" (paragraph 312 of the Commission's defence in Case T-201/04, 29 October 2004).

<sup>11</sup> Letter of 17 January 2005 from Jean-Yves Art, Director of Competition Law of Microsoft to Cecilio Madero Villarejo, Head of Unit C-3, DG Competition.

<sup>12</sup> Letter of 28 January 2005 from Jean-Yves Art to Cecilio Madero Villarejo.

second paragraph of Article 7 of the Decision, a decision imposing a suitable monitoring mechanism. Accordingly, the Commission gave Microsoft an opportunity to comment on the monitoring mechanism that it envisaged to impose by such a decision. In order to safeguard its procedural rights Microsoft was also informed about the possibility to address comments or requests as regards this letter to the Hearing Officer.

21. By letter dated 14 April 2005, Microsoft responded positively to the draft monitoring mechanism envisaged by the Commission and submitted a new proposal for a mechanism. The purpose of Microsoft's submission is to incorporate the monitoring mechanism outlined in the Annex to the Commission's letter of 22 March 2005, subject only to those textual changes necessary to reflect the fact that these provisions have now been proposed by Microsoft ("Microsoft's April proposal").<sup>13</sup>
22. Following the above-described exchange of views with Microsoft, the Commission deems it appropriate to establish the monitoring mechanism provided for in Article 7 of the Decision, in accordance with the substantive terms envisaged in its letter of 22 March and in Microsoft's April proposal. This monitoring mechanism includes the appointment of a monitoring trustee (the "Trustee").

### 3. THE MONITORING MECHANISM TO BE ESTABLISHED

23. In establishing the monitoring mechanism at issue, this decision has as its purpose to determine the procedure by which the Trustee will be appointed and, if need be, discharged and/or removed; to identify in more detail the functions that the Trustee will fulfil once in place; and to specify certain rights and obligations of Microsoft towards the Trustee and of the Trustee towards Microsoft and third parties.
24. As envisaged in the Decision (recital 1048 (1)), the Trustee should in principle be designated by the Commission from a list of persons submitted by Microsoft except that, if Microsoft fails to submit any suitable Trustee, the Commission will designate a Trustee of its own choosing. This process will be carried out in two steps. Microsoft will first provide at least two names of proposed Trustees. If none of the proposed Trustees is considered suitable by the Commission, Microsoft will make a second proposal of at least two names. If none of the Trustees proposed as part of this second proposal is suitable, the Commission will designate a Trustee of its choosing.
25. In the process leading to the appointment of the Trustee, the Commission must be in a position to verify whether the proposed trustee(s) would be able to fulfil adequately its function. The present decision must therefore provide for the Commission to receive from Microsoft and the proposed Trustees all information necessary for that purpose. This decision also sets out a number of criteria against which the suitability of any proposed Trustee will be assessed by the Commission.
26. The provisions of the mandate under which the Trustee will carry out its functions (the "Trustee Mandate") will have a significant impact on the ability of the Trustee to

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<sup>13</sup> Letter from Horacio Gutierrez, Associate General Counsel of Microsoft, Microsoft Europe, Middle East and Africa, to Neelie Kroes, Member of the Commission responsible for Competition.

fulfil effectively its functions. Therefore, Microsoft will provide, for each proposed Trustee and at the time when it proposes such Trustee, a proposed Trustee Mandate. Such mandate will include a Work Plan, a Confidentiality Agreement concerning the handling by the Trustee of Microsoft's or other parties' confidential information, and a Source Code Licence that the Trustee needs to sign prior to being granted access to Microsoft's source code. The proposed Trustee Mandates will also set out the terms and conditions of the Trustee's remuneration by Microsoft. The Commission will assess the suitability of the proposed Trustee Mandates and if necessary require modifications thereto.

27. In order to ensure that the monitoring mechanism remains effective in the future and to adapt to unexpected changes of circumstances, the Commission must be able to remove, at Microsoft's request or *sua sponte*, the Trustee. The Commission must also be able to discharge the Trustee upon request by the Trustee. Similarly, it must be possible for the Commission to require that changes be made to the Trustee Mandate, in particular in view of the need to ensure the ongoing effective monitoring of Microsoft's compliance against the background of possible changes in circumstances.
28. As outlined in the Decision (recital 1045), the primary responsibility of the Trustee is to issue opinions, upon application by a third party or by the Commission or *sua sponte*, on whether Microsoft has, in a specific instance, failed to comply with the Decision, or on any issue that may be of interest with respect to the effective enforcement of the Decision. This includes, without limitation, providing expert advice to the Commission on whether (i) Microsoft makes the interoperability information defined in Article 1 of the Decision available to other work group server operating system vendors both completely, accurately and in a timely manner, and does not impose any unreasonable or discriminatory restriction to the access to, or use of, such information, as provided for in Article 5(a)-(b) of the Decision; (ii) whether Microsoft allows access to such information for evaluation purposes under reasonable and non-discriminatory terms, as provided in Article 5(c) of the Decision; (iii) whether the unbundled version that Microsoft makes available pursuant to Article 6 of the Decision is a version of Windows that is full-functioning and does not include Windows Media Player; and (iv) that competing media player vendors have sufficient information so that their media player is not put at a disadvantage in interoperating with Microsoft's dominant client PC operating system, compared to Windows Media Player.<sup>14</sup>
29. The Trustee will have to establish and make public a procedure on the cooperation with Microsoft and the Commission with regard to third party complaints. In order to encourage whenever possible the informal resolution of complaints, it is appropriate to ensure that the Trustee may be used as a mediator between complaining third parties and Microsoft, should both parties wish so.
30. As explained at recital 1045 (footnote 1317) of the Decision, the Trustee should not only be reactive, but should play a proactive role in the monitoring of Microsoft's compliance. In particular, when the Trustee has reasons to believe that there may

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<sup>14</sup> See recitals 1046-1047 of the Decision.

have been a failure by Microsoft to comply with the Decision, the Trustee shall immediately notify the Commission in writing, setting forth the relevant details.

31. Since it is incumbent upon Microsoft to bear the costs of bringing its infringement to an end in an effective manner, all costs of establishment of the Trustee, including a fair remuneration for the Trustee's activities, should be borne by Microsoft (see recital 1048 (v) of the Decision). Furthermore, in order for the Trustee to have access to the necessary expertise in tackling specific issues, in particular when it was not possible to anticipate *ex ante* the issues in question, the Trustee should, as outlined in recital 1048 (ii) of the Decision, have the possibility to retain advisors to carry out certain precisely defined tasks on its behalf. The costs related to the retention of such advisors should be borne by Microsoft.
32. Notwithstanding the foregoing, the Commission must retain control over any significant deviation from the approved Work Plan and over the appointment and the terms of engagement of any advisors retained by the Trustee. Where appropriate, Microsoft should have the possibility to be heard by the Commission on these topics.
33. As already outlined in recital 1048 (iii) and (iv) of the Decision, the Trustee should be granted sufficient access to Microsoft internal documents, buildings, personnel and the source code of the relevant Microsoft products. Microsoft may, however, refuse to provide such information and/or access, e.g. when it believes it is necessary to protect its legitimate interests. This however does not mean that Microsoft may provide misleading, inaccurate or incomplete information to the Trustee. Furthermore, this should not be construed as limiting the Commission's power to request or require Microsoft to submit information, which the Commission may subsequently share with the Trustee.
34. In view of the fact the Trustee and its advisors may need to handle confidential information, there is a need for this decision to provide that the Trustee will abide by specific clauses in this regard. This applies to confidential documents of any party – not only Microsoft's – that may have been sent to the Trustee or its advisors.

#### 4. LEGAL BASIS

35. The Decision was adopted under Regulation No 17/62 of 6 February 1962 ("Regulation 17/62")<sup>15</sup>. As made clear in the Decision, the legal basis for Article 7 of the Decision is Article 3(1) of Regulation 17/62.
36. On 1 May 2004, Regulation No 1/2003 of 16 December 2002 ("Regulation 1/2003")<sup>16</sup> entered into force, replacing Regulation 17/62. The succeeding provision of Article 3(1) of Regulation 17/62 is Article 7(1) of Regulation 1/2003.

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<sup>15</sup> Regulation No 17/62 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, p. 204/62. Regulation as last amended by Regulation (EC) No 1216/1999 (OJ L148, 15.6.1999, p.5).

<sup>16</sup> Regulation 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.



37. Article 7 of the Decision provides for the establishment of a monitoring mechanism. The present decision establishes the detailed terms of the monitoring mechanism provided for in Article 7 of the Decision. Therefore, the present decision has as its legal basis both Article 7(1) of Regulation 1/2003 and Article 7 of the Decision.
38. The Commission may review the provisions of this decision in order to ensure an effective implementation of the Decision, pursuant to Article 7 of this decision.

HAS ADOPTED THIS DECISION:

*Article 1*  
*Definitions*

For the purpose of this decision, the following definitions shall apply:

- “Advisor”:** any natural or legal person appointed as an advisor by the Trustee in accordance with Article 3.2.c).
- “Confidential Information”:** any business secrets or other commercially sensitive information provided to the Trustee, the Trustee Team or its Advisors by third parties, Microsoft or the Commission, provided that such information is clearly marked as confidential. Confidential Information shall not include information that: (i) is already in the public domain at the time of disclosure; or (ii) subsequently falls within the public domain through no fault of the Trustee, the Trustee Team or its Advisors.
- “Confidentiality Agreement”:** the confidentiality agreement, annexed to the Trustee Mandate, established in accordance with Articles 5.1, which sets out how the Trustee shall handle Confidential Information, and which shall form an integral part of the Trustee Mandate.
- “Decision”:** Commission decision of 24.03.2004 in case COMP/C-3/37.792 Microsoft Europe, C(2004)900
- “Interoperability Information”:** is as defined in Article 1(1) of the Decision.
- “PC Operating System Market”:** is as defined in the Decision
- “Source Code Licence”:** the licence that Microsoft may have to grant to the Trustee as provided for under Article 4.2, which shall form an integral part of the Trustee Mandate.
- “Streaming Media Player”**

<b>Market”:</b>	is as defined in the Decision
<b>“Terms of Engagement”:</b>	the terms upon which an Advisor is engaged by the Trustee in accordance with Article 3.2.c).
<b>“Timely Manner”:</b>	is as defined in Article 1(3) of the Decision.
<b>“Trustee”:</b>	one or more legal and/or natural persons appointed pursuant to Article 2 to carry out the functions set out in Article 3.
<b>“Trustee Mandate”:</b>	the mandate established under the laws, and jurisdiction of the national courts, of a Member State of the European Community (excluding any applicable private international law) and in accordance with Articles 2.7 or 2.8, and 2.9, which sets out all provisions necessary to enable the Trustee to perform its functions under Article 3, and includes: (i) the Work Plan; (ii) the Confidentiality Agreement; (iii) the Source Code Licence.
<b>“Trustee Team”:</b>	the natural person(s) who are assigned to carry out the functions in Article 3, by the Trustee, in accordance with the Trustee Mandate.
<b>“Windows Client PC Operating System”:</b>	is as defined in Article 1(5) of the Decision.
<b>“Windows Media Player”:</b>	is as defined in Article 1(6) of the Decision.
<b>“Windows Work Group Server Operating System”:</b>	is as defined in Article 1(9) of the Decision.
<b>“Work Group Server Operating System Market”:</b>	is as defined in the Decision
<b>“Work Plan”:</b>	the work plan, annexed to the Trustee Mandate, established in accordance with Articles 2.7 or 2.8, and 2.9, which sets out how the Trustee shall perform its functions under Article 3, and which shall form an integral part of the Trustee Mandate.

*Article 2*  
*Appointment of the Trustee*

- 2.1 A Trustee shall be appointed by the Commission, in accordance with Articles 2.2 to 2.6, to carry out the functions set forth in Article 3, in accordance with a Trustee Mandate approved by the Commission pursuant to Articles 2.7, or adopted by the Commission pursuant to Article 2.8, as modified pursuant to Article 2.9. The Trustee's appointment shall take effect from the date where the Commission approves or designates the Trustee, unless otherwise specified by the Commission.
- 2.2 The Trustee shall possess the necessary qualifications, professional expertise, resources and availability required to carry out its mandate effectively. The Trustee shall be independent of Microsoft and shall neither have nor become exposed to a conflict of interest that could impair its ability to carry out its mandate impartially. The Trustee shall be remunerated in a way that does not compromise its independence and ability to fulfil its mandate effectively and impartially. In particular, the remuneration of the Trustee shall include pre-paid fees in sufficient amount to allow the Trustee to fulfil its mandate effectively. The Trustee shall be ready, willing and able to abide by the terms of this decision. Without limitation to the generality of the foregoing, neither the Trustee nor any member of the Trustee Team shall (absent the prior written agreement of the Commission):
- a) have been employed in any capacity by Microsoft, or any competitor of Microsoft in the PC Operating System Market, the Work Group Server Operating System Market or the Streaming Media Player Market, within the past year, nor shall it be so employed during its term as Trustee or for as long as it is a member of the Trustee Team;
  - b) have been retained in any capacity by Microsoft within the past year, nor shall it be so retained during its term as Trustee or as a member of the Trustee Team;
  - c) have been retained as a consulting or testifying expert by Microsoft, any party intervening in the Commission's proceedings in Cases IV/C-3/37.345 or COMP/C-3/37.792 or any subsequent action, or in any other action adverse to or on behalf of Microsoft, nor shall it be so retained during its term as Trustee or as a member of the Trustee Team; or
  - d) perform any other work for Microsoft, or any competitor of Microsoft in the PC Operating System Market, the Work Group Server Operating System Market or the Streaming Media Player Market, for one year after its discharge or removal as Trustee or its leaving the Trustee Team.

- 2.3 Within fifteen (15) days of the date of notification of this decision, Microsoft shall submit to the Commission for approval two or more proposed Trustees. The proposal shall contain sufficient information for the Commission to verify that each proposed Trustee fulfils the requirements set out in Article 2.2. A non-confidential version shall be submitted to allow the Commission to carry out a market test if it deems it necessary. Without limitation to the generality of the foregoing, the proposal shall include the following information from the proposed Trustees (business secrets may be provided under separate cover, directly to the Commission):
- a) a full *curriculum vitae*, or equivalent, detailing the qualifications and professional expertise of the Trustee and each member of the Trustee Team;
  - b) a full description of the role that would be undertaken by each member of the Trustee Team;
  - c) a proposed Work Plan;
  - d) a statement disclosing any work undertaken by the Trustee or any member of the Trustee Team either for Microsoft or for a competitor of Microsoft in the past three years, including the fees earned;
  - e) a statement disclosing the global earnings of the proposed Trustees, in the past three years, including annual profit and loss accounts, and balance sheets, or equivalent;
  - f) a statement certifying that the proposed Trustee is neither subject to, nor will become exposed to, any conflict of interest within the meaning of Article 2.2;
  - g) a statement certifying that the proposed Trustee is aware of the terms of this decision and is ready, willing and able to abide by them;
  - h) a full description of the resources available to the Trustee to handle Confidential Information in accordance with the obligations set out in Article 5; and
  - i) an estimate of the amount of time that the Trustee and each member of the Trustee Team would work in a year, as well as a complete breakdown of the fees payable for each member of the Trustee Team.
- 2.4 The Commission shall reject the proposed Trustees if they are not able to fulfil the functions set forth in Article 3 effectively; or do not meet the requirements in Article 2.2. Otherwise, the Commission shall approve the proposed Trustees. The Commission may attach conditions to its approval. If only one proposed Trustee is approved, Microsoft shall sign with the approved Trustee a Trustee Mandate, in accordance with Article 2.7. If more than one proposed Trustee is approved, Microsoft shall sign such a Trustee Mandate with any one of the approved Trustees.
- 2.5 If the Commission rejects all of the proposed Trustees, Microsoft shall submit at least two more proposed Trustees within fifteen (15) days of notification of the rejection by the Commission of its previous nominees, in accordance with the requirements set forth in Article 2.3. The provisions of Article 2.4 shall apply to the new proposals submitted by Microsoft.
- 2.6 If all of Microsoft's further proposed Trustees pursuant to Article 2.5 are rejected by the Commission, the Commission shall offer Microsoft fifteen (15) days to submit

comments on one or more proposed Trustees of its own choosing, having regard to the requirements of Article 2.2 and the functions of the Trustee under Article 3. Thereafter, the Commission shall designate a Trustee. Microsoft shall sign with the designated Trustee a Trustee Mandate, in accordance with Article 2.8.

- 2.7 Microsoft shall, at the same time when it submits the proposed Trustees pursuant to Article 2.3, , submit for the Commission's approval the terms of a proposed Trustee Mandate, which shall have been provisionally agreed by the proposed Trustees. The proposed Trustee Mandates shall include all provisions necessary to ensure that the Trustee will perform its functions under Article 3 effectively. The Commission may require such modifications to the proposed Trustee Mandate as necessary to ensure that the Trustee will perform its functions under Article 3 effectively. Within seven (7) days of the Commission's approval, Microsoft and the Trustee shall sign the Trustee Mandate. An original counterpart of the signed Trustee Mandate shall be submitted to the Commission within seven (7) days of signature.
- 2.8 In cases where, acting pursuant to Article 2.6, the Commission designates a Trustee of its choosing, Microsoft shall enter into negotiations with the Trustee to establish the terms of the Trustee Mandate. Microsoft may submit the proposed Trustee Mandate, which shall have been provisionally agreed by the designated Trustee, within twenty-one (21) days of the designation of the Trustee by the Commission. The proposed Trustee Mandate shall include all provisions necessary to ensure that the Trustee will perform its functions under Article 3 effectively. The Commission may require such modifications to the proposed Trustee Mandate as necessary to ensure that the Trustee will perform its functions under Article 3 effectively. In case Microsoft and the designated Trustee fail to agree on a proposed Trustee Mandate within the time allotted, the Commission may specify the terms for such a Trustee Mandate, after having heard the designated Trustee and Microsoft. Within seven (7) days of the date where the Commission approves or specifies the Trustee Mandate, Microsoft and the designated Trustee shall sign the Trustee Mandate approved or specified by the Commission. An original counterpart of the signed Trustee Mandate shall be submitted to the Commission within seven (7) days of signature.
- 2.9 After Microsoft and the Trustee have signed the Trustee Mandate pursuant to Article 2.7 or Article 2.8, the Commission may, after having heard Microsoft and the Trustee, require such modifications to the Trustee Mandate as necessary for the Trustee to perform its functions under Article 3 effectively.

*Article 3*  
*Functions of the Trustee*

- 3.1 The Trustee shall monitor Microsoft's compliance with the Decision. Without limitation to the generality of the foregoing, the Trustee shall, if required by the Commission:
  - a) provide a confidential report to the Commission on its activities under this decision every three (3) months or at any other frequency that the Commission may otherwise determine, starting from the date of its appointment by the Commission, or any other date that the Commission may otherwise determine. Regardless of when reports are due, when the Trustee has reasons to believe that there may have been a failure by Microsoft to comply with the Decision, the

Trustee shall immediately notify the Commission in writing, setting forth the relevant details. Equally, the Commission may at any moment request the Trustee to submit a report on a specific issue pertaining to Microsoft's compliance with the Decision;

- b) provide ad hoc opinions to the Commission on issues pertaining to whether:
  - i. the Interoperability Information that Microsoft is required to make available under Article 5(a) of the Decision is made available completely and accurately;
  - ii. the terms under which Microsoft makes the Interoperability Information available and allows its use for the purpose of developing and distributing work group server operating system products are reasonable and non-discriminatory;
  - iii. Microsoft has refused access to the Interoperability Information or denied the ability to use it, to any undertaking having an interest in developing and distributing work group server operating system products, for the purpose of developing and distributing such products;
  - iv. the Interoperability Information made available pursuant to Article 5(a) of the Decision is kept updated on an ongoing basis and in a Timely Manner;
  - v. the conditions that Microsoft imposes as regards the evaluation mechanism provided for under Article 5(c) of the Decision are reasonable and non-discriminatory;
  - vi. Microsoft offers a full-functioning version of the Windows Client PC Operating System ("the unbundled version of the Windows Client PC Operating System") which does not incorporate Windows Media Player;
  - vii. the unbundled version of the Windows Client PC Operating System is less performing than any version of the Windows Client PC Operating System incorporating Windows Media Player that Microsoft would continue to offer, regard being had to the fact that media functionality included in Windows Media Player would, by definition, not be part of the unbundled version of the Windows Client PC Operating System;
  - viii. Microsoft hinders the performance of rival media players through selective, inadequate, or untimely disclosures of interfaces through which Windows Media Player interoperates with any version of the Windows Client PC Operating System.
- c) advise the Commission on whether substantiated complaints by third parties about Microsoft's compliance with Articles 4 to 6 of the Decision are well-founded from a technical point of view;
- d) address reasoned opinions to the Commission on Microsoft's compliance with Articles 4 to 6 of the Decision, upon receipt of a substantiated complaint by a third party or on its own initiative; and

- e) address reasoned opinions to the Commission on any issue that the Commission may deem to be of interest with respect to the effective enforcement of the Decision.

3.2 In carrying out its functions under Article 3.1, the Trustee may:

- a) on reasonable notice to Microsoft, request:
  - i. to interview any Microsoft personnel (who may have counsel present);
  - ii. to inspect and copy any document in the possession, custody or control of Microsoft personnel;
  - iii. to obtain reasonable access to any systems or equipment to which Microsoft personnel have access;
  - iv. to obtain access to, and inspect, any physical facility, building or other premises to which Microsoft personnel have access;
  - v. access to available office space, telephone, and other office support facilities at any Microsoft facility identified by the Trustee;
  - vi. access to the source code of Microsoft's Windows Client PC Operating System, Windows Media Player, Windows Work Group Server Operating System, subject to the terms of the Confidentiality Agreement and the Source Code Licence as approved by the Commission and agreed to by the Trustee, the Trustee Team and, if relevant, Advisors who may have access to the said source code; and
  - vii. to be provided with a workable possibility to study, interrogate and interact with such source code for as long as required to carry out its functions under Article 3.1;
- b) have access to any compilation of documents, data or any other information that Microsoft or any third party is requested or required to submit to the Commission for the purpose of monitoring Microsoft's compliance with the Decision, if deemed necessary by the Commission; and
- c) appoint, at the cost and expense of Microsoft, one or more Advisors, provided that such Advisors fulfil the requirements of Article 2.2, and their appointment is necessary for the performance of one or more of the Trustee functions in Article 3.1. The appointment of such Advisors and their Terms of Engagement shall be subject to prior consultation of Microsoft and the Commission's approval. Microsoft shall have fifteen (15) days to comment on the proposed Advisors and their Terms of Engagement from the date on which it is consulted. The compensation of any Advisor by the Trustee shall be based on reasonable and customary terms commensurate with the individual's experience and responsibilities.

3.3 The Trustee shall establish and make public, in a manner acceptable to the Commission, a procedure for third parties to submit complaints regarding Microsoft's alleged failure to comply with any of its obligations under Articles 4 to 6 of the Decision. The Trustee shall promptly forward the confidential version of any such complaint to the

Commission, together with a summary of its preliminary conclusions and recommendations regarding the merits of the complaint and possible ways to resolve it. To encourage, whenever possible, the informal resolution of such complaints, the non-confidential version of any such complaints shall be forwarded to Microsoft. Microsoft shall have thirty (30) days following receipt of a complaint to submit comments on that complaint to the Commission, including reports on measures it has taken, without prejudice to its position on the merits thereof. If the Commission deems it appropriate, it may instruct the Trustee to advise it, pursuant to Articles 3.1.c), d) and e), on the substance of the complaint. The Trustee shall preserve the anonymity of any third party complainant from Microsoft, where it deems it appropriate to do so, upon request of the Commission, or the third party, or in its discretion.

- 3.4 If requested by Microsoft and the third party complainant, the Trustee may mediate between the parties, based on terms of reference concerning the conduct of the mediation and on a fee-sharing arrangement in relation to the costs of such mediation mutually agreed to by the parties, with a view to reaching a settlement of the complaint on terms acceptable to both parties, subject to the Commission's approval. All confidential submissions made to the Trustee by either party in the course of the mediation, whether in writing or orally, as well as any confidential findings or recommendations made by the Trustee, whether in writing or orally, shall be made available to the Commission upon request. The Trustee may communicate with third parties and Microsoft about how the complaint might be resolved, provided that no Confidential Information obtained from Microsoft or the third party concerned is disclosed without their prior written agreement.

*Article 4*  
*Rights and Obligations of Microsoft*

- 4.1 Microsoft may comply with any request made by the Trustee pursuant to Article 3.2.a) in its sole discretion, subject only to the obligations entered into by Microsoft in the Trustee Mandate. Should Microsoft fail to comply voluntarily and promptly with a request made by the Trustee pursuant to Article 3.2.a), the Commission may revert to its powers of investigation and enforcement provided for under Council Regulation (EC) No 1/2003 and its Implementing Regulation (EC) No 773/2004. In doing so, the Commission may request the Trustee's presence and/or may share any information gathered using its powers of investigation with the Trustee.
- 4.2 Microsoft shall grant a Source Code Licence to the Trustee, providing it with all rights necessary to carry out its functions under Article 3.2.a) vii effectively.
- 4.3 Microsoft shall pay the reasonable fees and expenses of the Trustee, incurred in the performance of its functions under Article 3, on such terms and conditions as set out in the Trustee Mandate.
- 4.4 Microsoft shall indemnify the Trustee, the Trustee Team, and Advisors and hold them harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with the performance of the Trustee's functions under Article 3, except to the extent that such liabilities, losses, damages, claims, or expenses result from wilful default, recklessness, gross negligence, or bad faith by the Trustee, the Trustee Team, or Advisors. Notwithstanding the foregoing, the Trustee, the Trustee Team and Advisors



shall be ordinarily liable for any damage caused to Microsoft, third parties or the Commission from the disclosure of Confidential Information due to their breach of the Confidentiality Agreement or Article 5.7.

- 4.5 Without prejudice to Article 4.1, any information supplied by Microsoft in whatever form in response to a request made by the Trustee pursuant to Article 3.2.a) shall be complete and accurate and shall not be misleading.

*Article 5*  
*Obligations of the Trustee*

- 5.1 The Trustee shall sign a Confidentiality Agreement which shall provide that:
- a) Confidential Information obtained in the course of performing its functions under Article 3 may not be disclosed to anyone other than the Commission, or the Trustee and the Commission in the case of Advisors. Disclosure to the Commission shall only be made as provided for in this decision, in the Trustee Mandate or upon the Commission's prior written request;
  - b) any Confidential Information obtained by the Trustee, the Trustee Team and Advisors in the performance of their functions under Article 3 shall be kept by them in the strictest confidence and shall be used solely for the purpose of performing their functions under Article 3;
  - c) adequate safeguards are established and adhered to by the Trustee, the Trustee Team and Advisors, to take delivery of, track the dissemination of, monitor the use of, protect against the disclosure of and determine the safe disposal of Confidential Information. Such safeguards shall be effective to protect the Confidential Information, but shall not be such as to prevent the Trustee, the Trustee Team and Advisors from effectively fulfilling their functions under Article 3.
- 5.2 The Trustee, the Trustee Team and Advisors shall not make any public statements relating to their activities under Article 3.
- 5.3 The Trustee shall procure that the Trustee Team and Advisors sign confidentiality undertakings warranting their knowledge of and compliance with the principles outlined in the Confidentiality Agreement and Article 5.2.
- 5.4 Prior to submitting its final confidential report under Article 3.1.a), the Trustee shall submit a draft of the same for the Commission's comment and shall take account of those comments. Following submission of the final confidential report, the Trustee may be required to prepare a non-confidential version of the report for the case file. All other communication between the Trustee and the Commission shall form part of the Commission's internal documents.
- 5.5 The Trustee shall only carry out the tasks specified in the Trustee Mandate or other tasks that it has been expressly instructed to carry out by the Commission. The Trustee shall account in detail for its fees and expenses incurred in carrying out the tasks specified in the Work Plan or otherwise expressly instructed by the Commission. The Trustee shall submit its detailed account of fees and expenses to the Commission for its approval prior to submitting it to Microsoft. The Commission shall hear Microsoft regarding the

reasonableness of each item of fees and expenses before approving them. In case Microsoft wishes to submit comments with regard to the fees and expenses of the Trustee, it has to do so by reference to individual items of fees and expenses.

- 5.6 The Trustee is required to be pro-active in its monitoring of Microsoft's compliance with the Decision, but shall not undertake any significant work not covered by the Work Plan unless it has received express written instructions from the Commission. Where the Trustee is required to exercise its own initiative, it shall discuss the work involved with the Commission and obtain its prior approval before undertaking any significant work.
- 5.7 The Trustee shall abide by the obligation of non-disclosure imposed in Article 28(2) of Council Regulation (EC) No 1/2003 with regard to any information acquired from the Commission.

#### *Article 6*

##### *Discharge or Removal of the Trustee*

- 6.1 The Trustee shall cease to perform its functions under this decision only after it has either been discharged or removed by the Commission.
- 6.2 The Trustee may by a reasoned request showing good cause ask the Commission to discharge it from its mandate under this decision.
- 6.3 The Commission may, after having heard the Trustee and Microsoft, remove the Trustee if the Trustee no longer fulfils the requirements of Article 2.2 or is unable to carry out its functions under Article 3 effectively, or for any other good cause.
- 6.4 Microsoft may by a reasoned request ask the Commission to remove the Trustee if the Trustee no longer fulfils the requirements of Article 2.2 or is unable to carry out its functions under Article 3 effectively, or for any other good cause. The Commission, after having heard the Trustee, may either reject Microsoft's request or remove the Trustee.
- 6.5 The Commission may require the Trustee to continue in its function until a new Trustee has been appointed under the procedure specified in Article 2 and has received an appropriate hand-over allowing it to replace the Trustee in carrying out its functions under this decision effectively.

#### *Article 7*

##### *Review Clause*

The Commission may on its own initiative or upon a duly substantiated request by Microsoft waive, modify or terminate, in whole or in part, this decision (including, without prejudice to the generality of the foregoing, any provisions establishing deadlines):

- a) where there has been a material change of circumstances or for any other good cause;
- b) where any of the provisions in this decision proves incompatible with, or insufficient for, the effective implementation of the Decision; or

- c) where Microsoft systematically fails to co-operate with the Trustee or fails to comply with any of its obligations under this decision.

*Article 8*  
*Addressee, Enforceability*

This Decision is addressed to Microsoft Corporation, One Microsoft Way, Redmond, WA 98052, United States.

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 28.07.2005

*For the Commission*

*Neelie KROES*  
*Member of the Commission*

