



EUROPEAN COMMISSION  
Competition DG

## *CASE AT.39530 (Microsoft – Tying)*

(Only the English text is authentic)

### **ANTITRUST PROCEDURE** **Council Regulation (EC) 1/2003**

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Article 23(2)(c) Regulation (EC) 1/2003

Date: 06/03/2013

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Brussels, 6.3.2013  
C(2013) 1210 final

PUBLIC VERSION

**COMMISSION DECISION**

**of 6.3.2013**

**addressed to Microsoft Corporation  
relating to a proceeding on the imposition of a fine pursuant to Article 23(2)(c) of  
Council Regulation (EC) No 1/2003 for failure to comply with a commitment made  
binding by a Commission decision pursuant to Article 9 of Council Regulation (EC) No  
1/2003**

**Case AT.39530 – Microsoft (Tying)**

(Text with EEA relevance)

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**Case AT.39530 – Microsoft (Tying)**

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

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 23(2) thereof,

Having regard to the Commission decision of 16 July 2012 to re-open and initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of 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,<sup>2</sup>

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

Whereas:

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<sup>1</sup> OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union (“TFEU”). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of “Community” by “Union” and “common market” by “internal market”. Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

<sup>2</sup> OJ L 123, 27.4.2004, p. 18.

## 1. THE COMMITMENT DECISION OF 16 DECEMBER 2009

- (1) On 16 December 2009, the Commission adopted a Decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.530 — Microsoft (Tying)) (notified under document C(2009) 10033) (the “Commitment Decision”)<sup>3</sup> pursuant to Article 9(1) of Regulation (EC) No 1/2003, which made binding the Commitments offered by Microsoft Corporation (“Microsoft”) to meet the Commission’s concerns, as set out in a Statement of Objections of 14 January 2009.
- (2) Article 1 of the Commitment Decision made binding the Commitments offered by Microsoft to address the Commission’s preliminary concerns regarding a potential abuse of Microsoft’s dominant position in the market for client personal computer (“PC”) operating systems. The Commission’s preliminary concerns related in particular to the tying of Microsoft’s web browser, Internet Explorer (“IE”), to its dominant client PC operating system, Windows.
- (3) In order to address the Commission’s preliminary concerns, Microsoft committed in particular to offer Windows users an unbiased choice among different web browsers by means of a Choice Screen in Windows XP, Windows Vista, Windows 7 and in Windows client PC operating systems sold after Windows 7.<sup>4</sup> Microsoft committed to display the Choice Screen to Windows users within the European Economic Area (“EEA”) that have IE set as the default web browser.<sup>5</sup>
- (4) According to the Commitments, the Choice Screen consists of an initial page containing basic information about the purpose of the Choice Screen<sup>6</sup> and a second page displaying the twelve most widely-used web browsers that run on Windows 7 based on usage share in the EEA, as measured semi-annually<sup>7</sup>. The Choice Screen must also prominently display the final releases of the five highest ranked web browsers based on usage share in the EEA.<sup>8</sup>
- (5) For Windows 7, the Choice Screen had to be made available from 17 March 2010 (thirteen weeks after the adoption of the Commitment Decision) and had to remain in place until 16 December 2014 (end of the duration of the Commitments).<sup>9</sup>
- (6) Microsoft also committed not to circumvent or attempt to circumvent the Commitments in any way.<sup>10</sup>
- (7) Finally, Microsoft committed to report to the Commission annually on the implementation of the Commitments.<sup>11</sup>

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<sup>3</sup> A summary of that Decision was published in OJ C 36, 13.2.2010, p. 7.

<sup>4</sup> Paragraphs 7 and 9 of the Commitments.

<sup>5</sup> Paragraph 7 of the Commitments.

<sup>6</sup> Paragraph 8 of the Commitments.

<sup>7</sup> Paragraph 11 of the Commitments.

<sup>8</sup> Paragraph 13 of the Commitments.

<sup>9</sup> Paragraph 7 of the Commitments.

<sup>10</sup> Paragraph 18 of the Commitments.

<sup>11</sup> Paragraph 22 of the Commitments.

## 2. PROCEDURE

- (8) On 17 June 2012, the Commission received information from a developer of web browsers about an alleged irregularity with regard to the roll-out of the Choice Screen with Microsoft's client PC operating system Windows 7 ("Windows 7"). According to this information, the Choice Screen was not being displayed to users on PCs within the EEA running on Windows 7 and purchased in 5 different Member States from well-known retailers during the last week of May 2012, even when users within the EEA had been using the respective PCs for several weeks.<sup>12</sup>
- (9) The Commission informed Microsoft about those allegations in a meeting on 22 June 2012.
- (10) On 4 July 2012, Microsoft acknowledged in writing that the Choice Screen had not been displayed to users within the EEA of PCs sold with Windows 7 Service Pack 1 ("Windows 7 SP 1") pre-installed that had IE set as the default browser ("the affected users").<sup>13</sup>
- (11) On 5 July 2012, the Commission sent a request for information to Microsoft.<sup>14</sup>
- (12) On 12 July 2012, Microsoft again acknowledged in writing that the Choice Screen had not been displayed to the affected users.<sup>15</sup>
- (13) On 14 July 2012, Microsoft replied to the Commission's request for information of 5 July 2012.<sup>16</sup>
- (14) On 16 July 2012, the Commission decided to re-open proceedings in the present case pursuant to Article 9(2) of Regulation (EC) No 1/2003 and to initiate proceedings pursuant to Article 11(6) of that Regulation and Article 2(1) of Commission Regulation (EC) No 773/2004.
- (15) On 28 July 2012, Microsoft informed the Commission that it had distributed the Choice Screen to the affected users.<sup>17</sup>
- (16) On 24 October 2012, the Commission adopted a Statement of Objections.<sup>18</sup>
- (17) Microsoft was granted access to the Commission's file on 6 November 2012.
- (18) Microsoft replied to the Statement of Objections on 2 December 2012.<sup>19</sup>
- (19) On 22 January 2013, the Commission sent a request for information to Microsoft.<sup>20</sup>

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<sup>12</sup> Submission by Google of 17 June 2012.

<sup>13</sup> Microsoft's letter of 4 July 2012.

<sup>14</sup> Commission's request for information of 5 July 2012.

<sup>15</sup> Microsoft's letter 12 July 2012.

<sup>16</sup> Microsoft's reply to the Commission's request for information of 14 July 2012.

<sup>17</sup> Microsoft letter of 28 July 2012.

<sup>18</sup> Commission Statement of Objections of 24 October 2012.

<sup>19</sup> Microsoft's reply to the Statement of Objections.

<sup>20</sup> Commission's request for information of 22 January 2013.

- (20) On 28 January 2013, Microsoft replied to the Commission’s request for information of 22 January 2013.<sup>21</sup>

### 3. FACTS

#### 3.1. Microsoft’s failure to display the Choice Screen to the affected users

- (21) In late 2009, Microsoft put together a team to write the software to implement the Choice Screen.<sup>22</sup> The team created a “detection logic” programming code, that is to say a code that enabled the Windows Update servers to identify users that should receive the Choice Screen Update within the EEA. The team also created an executable software code (“exe”) that was meant to display the Choice Screen on the relevant PCs within the EEA.<sup>23</sup>
- (22) Microsoft began distributing the Choice Screen on 23 February 2010.<sup>24</sup> As part of the Choice Screen implementation, certain electronically stored reminders were created for Windows engineers, informing them of the need to update the relevant programming code when Service Packs and Updates to Windows 7 (such as Windows 7 SP 1) were to be released.<sup>25</sup>
- (23) On 22 February 2011, Microsoft released Windows 7 SP 1.<sup>26</sup> A service pack is, for the most part, a collection of bug fixes and other updates to a particular version of Windows.<sup>27</sup> The bug fixes and other updates are rolled into one package and sent out to existing computers running that particular version of Windows. The service pack is also distributed to computer manufacturers (“Original Equipment Manufacturers” or “OEMs”)<sup>28</sup> which can choose to pre-install Windows 7 SP 1 on PCs they sell to retailers. PCs within the EEA on which OEMs had pre-installed Windows 7 SP 1 started reaching consumers approximately 4 to 12 weeks after the release of Windows 7 SP 1 on 22 February 2011.<sup>29</sup>
- (24) The detection logic code for the Choice Screen Update should have been updated in February 2011 to ensure that the Choice Screen was displayed to all users within the EEA of Windows 7 SP 1 that had IE set as their default browser. However, despite the reminders referred to in paragraph (22), this was not done.<sup>30</sup>
- (25) Microsoft sent regular reports to the Commission on the implementation of the Commitments, as required by paragraph 22 of the Commitments. The report of 16 December 2011<sup>31</sup> stated: “*as previously reported, Microsoft completed distribution of the browser choice Windows Update to the Windows installed base on 15 May*

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<sup>21</sup> Microsoft’s reply to the request for information of 28 January 2013.

<sup>22</sup> Microsoft’s report on the implementation of the Commitment Decision of 18 June 2010, p. 1; see also Corrected Report by Dechert LLP, p. 6 and 7.

<sup>23</sup> Microsoft’s letter of 12 July 2012, p. 2; Microsoft’s reply to the Statement of Objections, p. 6.

<sup>24</sup> Microsoft’s letter of 12 July 2012, p. 2.

<sup>25</sup> Microsoft’s letter of 12 July 2012, p. 2; see also Corrected Report by Dechert LLP, p. 2.

<sup>26</sup> Microsoft’s letter of 12 July 2012, p. 2.

<sup>27</sup> Microsoft’s letter of 12 July 2012, p. 2.

<sup>28</sup> Microsoft’s letter of 12 July 2012, p. 2.

<sup>29</sup> Microsoft’s letter of 12 July 2012, p. 5.

<sup>30</sup> Microsoft’s letter of 12 July 2012, p. 2.

<sup>31</sup> Microsoft’s report on the implementation of the Commitment Decision of 16 December 2011.

2010. Microsoft continues to deliver the update to new PCs or those that were not previously in use.”<sup>32</sup> Nowhere in the report was it indicated that the Choice Screen had not, or may not have, been displayed to certain users within the EEA of Windows 7 SP that had IE set as their default browser.

### **3.2. Microsoft’s acknowledgement of the failure and its explanations as to why the failure occurred**

- (26) In its letters of 4 and 12 July 2012 and in its reply to the Statement of Objections<sup>33</sup> Microsoft acknowledged that the Choice Screen had not been displayed to the affected users. Microsoft acknowledged in particular that “[...] the Choice Screen was not being delivered to computers running Windows 7 Service Pack 1”.<sup>34</sup> Microsoft stated: “There is no ambiguity in the relevant Commitment language. There is no question as to how to apply that language to the facts. There is no important matter of principle at stake. There is, rather, a clear obligation, fully understood by all the relevant people at Microsoft through the entire chain of management, and an error in executing on our obligation [...]. Due to our error, the browser choice screen was not delivered to new PCs that shipped with Windows 7 SP1 preinstalled by computer manufacturers. [...] Job No. 1 was to ensure we complied with every one of the Commitments. We recognize that we have fallen short of this goal”.<sup>35</sup> Microsoft expressed “regret that this error [had] occurred”.<sup>36</sup>
- (27) When Windows 7 SP 1 was released, changes should have been made to the detection logic programming code to enable Windows Update to detect which users of Windows 7 SP 1 within the EEA had IE set as their default browser.<sup>37</sup> It was, however, not clearly communicated to, nor understood by, all employees involved that those changes to the detection logic would have to be made when Windows 7 SP 1 was to be released.<sup>38</sup> Microsoft stated that this lack of communication was due to human error.<sup>39</sup>
- (28) One “Sustained Engineering” employee (part of the technical team responsible for delivering the Choice Screen after it was initially developed) placed the Choice Screen on a checklist of work items that needed to be considered when Windows 7 SP 1 was released. When Windows 7 SP 1 was being prepared for roll-out, a second employee of the Sustained Engineering team was responsible for the Windows 7 SP 1 roll-out. He worked on the basis of a list of earlier software “fixes” that were to be rolled into Windows 7 SP 1.<sup>40</sup>
- (29) That list erroneously included the Choice Screen as a component of Windows 7 SP 1. The Choice Screen was not, however, a part of Windows 7 SP 1. This error occurred because the list of Windows 7 SP 1’s components was prepared with an automated software tool that extracted the Choice Screen package description from a database

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<sup>32</sup> Microsoft’s report on the implementation of the Commitment Decision of 16 December 2011, p. 2.

<sup>33</sup> Microsoft’s reply to the Statement of Objections, p. 2, 3, 4, 9 and 16.

<sup>34</sup> Microsoft’s letter of 4 July 2012, p. 1.

<sup>35</sup> Microsoft’s letter of 12 July 2012, p. 1 and 2; see also Corrected Report by Dechert LLP, p. 10.

<sup>36</sup> Microsoft’s letter of 4 July 2012, p. 2.

<sup>37</sup> Microsoft’s letter of 12 July 2012, p. 3; see also Corrected Report by Dechert LLP, p. 1 and 2.

<sup>38</sup> Microsoft’s reply to the Statement of Objections, p. 6.

<sup>39</sup> Microsoft’s reply to the Statement of Objections, p. 3.

<sup>40</sup> Microsoft’s letter of 12 July 2012, p. 3; see also Corrected Report by Dechert LLP, p. 26.

of prior Windows 7 software “fixes”. The automated tool worked this way because most “fixes” were rolled into the next service pack that was released. The second “Sustained Engineering” employee concluded (based on his review of the erroneous Windows 7 SP 1 component list) that the Choice Screen was included as part of Windows 7 SP 1, and therefore concluded that no further action was needed to ensure the distribution of the Choice Screen to users of Windows 7 SP 1 within the EEA and its display to users within the EEA that had IE set as their default browser.<sup>41</sup>

- (30) Microsoft has acknowledged that its compliance report sent on 16 December 2011 should have stated that the Choice Screen was not being displayed to the affected users.<sup>42</sup> Furthermore, Microsoft has acknowledged that the report wrongly stated the total number of installations of the Choice Screen for the period from the entry into force of the Commitments until 30 November 2011. The actual number was approximately 471 million, and not 525,214,680 as initially reported.<sup>43</sup>

### **3.3. Microsoft’s reaction after being informed about the failure to display the Choice Screen to the affected users**

- (31) After being informed about the failure to display the Choice Screen to the affected users, Microsoft took action to correct the problem.
- (32) First, Microsoft developed a “fix” by writing about half a page of programming code for the Choice Screen package for Windows 7 SP 1. Distribution of this software package started on 3 July 2012. The new programming code contains the detection logic that enables Windows Update to detect which users are running Windows 7 SP 1 within the EEA so that the Choice Screen package can be distributed to them.<sup>44</sup>
- (33) The distribution of the Choice Screen package to users of Windows 7 SP 1 within the EEA and its display to users that have had IE set as their default browser started on 3 July 2012 and was essentially completed by 16 July 2012.<sup>45</sup>
- (34) Second, Microsoft retained outside counsel, Dechert LLP (“Dechert”), to conduct an investigation and prepare a report as to the reasons for Microsoft’s failure to display the Choice Screen Update to the affected users. Dechert had full access to Microsoft personnel, emails and the relevant documents. On 30 August 2012, the Commission received Dechert’s report (the “Dechert Report”), which essentially confirmed Microsoft’s statements with regard to the causes of the non-display of the Choice Screen to the affected users and provided additional information on those causes.<sup>46</sup> On 5 September 2012, the Commission received a corrected version of the Dechert Report.<sup>47</sup>

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<sup>41</sup> Microsoft’s letter of 12 July 2012, p. 3.

<sup>42</sup> Microsoft’s reply to the Statement of Objections, p. 8, Microsoft’s letter of 12 July 2012, p. 6; see also Corrected Report by Dechert LLP, p. 22 to 25.

<sup>43</sup> Microsoft’s letter of 12 July 2012, p. 6; see also Corrected Report by Dechert LLP, p. 23.

<sup>44</sup> Microsoft’s letter of 12 July 2012, p. 3.

<sup>45</sup> Microsoft’s reply to the Statement of Objections, p. 9. There may be a small number of affected users, including those that have not turned on their PCs or are outside of the EEA since 3 July 2012 to whom the Choice Screen has not yet been displayed. See Microsoft’s letter of 12 July 2012, p. 4.

<sup>46</sup> Report by Dechert LLP.

<sup>47</sup> Corrected Report by Dechert LLP.

- (35) The Dechert Report found in particular that Microsoft had failed to clearly assign responsibility for the distribution of the Choice Screen to its employees and that there was insufficient monitoring and inadequate communication among Microsoft employees.<sup>48</sup>
- (36) Third, Microsoft has taken steps to address those problems and to prevent a similar failure in the future. It has established a process that assigns clear responsibilities and involves all key stakeholders, namely the Business Divisions, Legal and Corporate Affairs, senior executives. It has also created a new function of Antitrust Compliance Officer.<sup>49</sup>
- (37) Finally, on 12 July 2012, Microsoft expressed a willingness to extend Section 2 of the Commitments for an additional period of 15 months.<sup>50</sup>

#### **4. LEGAL ASSESSMENT**

##### **4.1. Microsoft's failure to comply with Section 2 of the Commitments**

- (38) In the light of the facts set out in Section 4 of this Decision, the Commission concludes that Microsoft has failed to comply with Section 2 of the Commitments by not displaying the Choice Screen to the affected users.
- (39) Microsoft has acknowledged its failure to comply with Section 2 of the Commitments.<sup>51</sup>

##### **4.2. The duration of Microsoft's failure to comply with Section 2 of the Commitments**

- (40) Paragraph 7 of the Commitments states that “[f]or Windows 7, the Choice Screen update will first be made available to users thirteen weeks after adoption of [...] [the Commitment Decision].” Consequently, the Choice Screen had to be displayed from 17 March 2010 (thirteen weeks after adoption of the Commitment Decision) throughout the whole duration of the Commitments for all users within the EEA running Windows 7 with IE set as default browser. As set out in Section 5 of the Commitments, Windows 7 includes “*Service Packs and Updates thereto, or their successors (including Service Packs and Updates thereto)*”.
- (41) On 22 February 2011, Microsoft released Windows 7 SP 1. However, the first PCs on which OEMs pre-installed Windows 7 SP 1 only reached consumers approximately 4 to 12 weeks after the release date of Windows 7 SP 1.<sup>52</sup> As a result, in the specific circumstances of this case, the Commission considers that Microsoft's failure to comply with the Commitments started on 17 May 2011, 12 weeks after the release of Windows 7 SP 1 within the EEA.

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<sup>48</sup> Corrected Report by Dechert LLP, p. 26.

<sup>49</sup> Microsoft's reply to the Statement of Objections, p. 15.

<sup>50</sup> Microsoft's letter of 12 July 2012, p. 6. Microsoft repeated this offer in a letter of 7 September 2012 and in its reply to the Statement of Objections, p. 4 and 17.

<sup>51</sup> Microsoft's letter of 4 July 2012 and Microsoft's letter of 12 July 2012. Microsoft's reply to the Statement of Objections, p. 2, 3, 4, 9 and 16.

<sup>52</sup> Microsoft's letter of 12 July 2012, p. 5.

(42) The Commission considers that the failure to comply ended on 16 July 2012 when Microsoft had essentially distributed and displayed the Choice Screen to the affected users.

(43) The Commission therefore concludes that Microsoft's failure to comply lasted from 17 May 2011 until 16 July 2012.

#### **4.3. Number of users affected by Microsoft's failure to comply with Section 2 of the Commitments**

(44) In its Statement of Objections, the Commission estimated, based on Microsoft's own submissions<sup>53</sup> that the number of PCs affected during the period of Microsoft's failure to comply was between 20 million and 32 million. During that same period, around 36 million PCs with Windows 7 SP 1 and around 29.3 million PCs with other versions of Windows were shipped in the EEA.<sup>54</sup>

(45) In its reply to the Statement of Objections, Microsoft accepted that the Choice Screen was not distributed to approximately 30 million PCs running Windows 7 SP 1 within the EEA.<sup>55</sup> However, it argued that a distinction has to be made between non-installations of the Choice Screen on PCs running Windows 7 SP 1 within the EEA and non-displays of the Choice Screen to the affected users.<sup>56</sup> According to Microsoft, approximately 30 million non-installations also include PCs running Windows 7 SP 1 within the EEA on which IE was not set as default browser.<sup>57</sup> Microsoft estimated that the number of users to whom the Choice Screen should have been displayed, but was not, was approximately 15.3 million.<sup>58</sup>

(46) In the light of Microsoft's arguments and in the specific circumstances of this case, the Commission finds that the number of users affected by Microsoft's failure to comply with Section 2 of the Commitments is 15.3 million.

## **5. FINES**

### **5.1. Principles**

(47) Under Article 23(2)(c) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they fail to comply with a commitment made binding by a decision pursuant to Article 9 of Regulation (EC) No 1/2003. Such a fine shall not exceed 10% of the undertaking's total turnover in the preceding business year.

(48) In fixing the amount of the fine, the Commission must have regard to the gravity and to the duration of a failure to comply. The gravity of the failure to comply is to be

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<sup>53</sup> Microsoft's letter of 12 July 2012, p. 4; Microsoft's reply to Question 9 of the Commission's request for information of 14 July 2012, p. 3 and 4.

<sup>54</sup> Microsoft's reply to the Commission's request for information of 22 January 2013, p. 3.

<sup>55</sup> Microsoft's reply to the Statement of Objections, p. 2, 3, 4, 9 and 16.

<sup>56</sup> Microsoft's reply to the Statement of Objections, p. 6.

<sup>57</sup> Paragraph 7 of the Commitments.

<sup>58</sup> Microsoft's reply to the Commission's request of information of 22 January 2013, p. 4.

assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of the fine.<sup>59</sup>

## 5.2. Negligence

- (49) Microsoft has significant resources and extensive technical experience with the development, distribution and maintenance of software products and operating systems for PCs. Moreover, Microsoft has considerable competition law expertise, having been involved in several recent proceedings concerning infringements of competition law.<sup>60</sup>
- (50) Microsoft was aware or, in any event, ought to have been aware that its failure to comply with Section 2 of the Commitments made binding pursuant to Article 9 of Regulation (EC) No 1/2003 could lead to a fine pursuant to Article 23(2)(c) of that Regulation. Microsoft understood, moreover, that a failure to display the Choice Screen to the affected users would constitute a breach of its obligations under Section 2 of the Commitments.<sup>61</sup>
- (51) A series of errors and omissions led to Microsoft's failure to provide the Choice Screen to the affected users.<sup>62</sup> These errors included technical malfunctions as well as communication problems (for instance the lack of clear communication concerning the update of the detection logic).<sup>63</sup>
- (52) Insofar as the Commission is able to determine, it would seem that Microsoft's failure to comply with Section 2 of the Commitments was due to inadvertent technical and human errors. Given its resources and know-how, however, Microsoft should have been able to avoid such errors and should have had better processes in place to ensure that the Choice Screen was correctly displayed to the affected users.<sup>64</sup>
- (53) Microsoft failed to take measures that would have allowed it to detect and remedy the problems with the display of the Choice Screen to the affected users. For instance, no testing plan was built into the system to ensure the display of the Choice

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<sup>59</sup> See by analogy Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and others v Commission* [2004] ECR I-123, paragraph 90.

<sup>60</sup> See (i) Commission Decision 2007/53/EC in Case No COMP/C-3/37.792 – Microsoft, OJ L 32, 6.2.2007, p. 23; (ii) Commission Decision of 10 November 2005 in Case No COMP/C-3/37.792 – Microsoft for failure to comply with its obligation to make Interoperability Information available to interested undertakings pursuant to Article 5(a) and (c) of Commission Decision C (2004) 900 final of 24 March 2004; (iii) Commission Decision 2008/C 138/07 in Case No COMP/C-3/37.792 – Microsoft, OJ C 138, 5.6.2008, p. 10 to 14, fixing the final amount of the daily penalty payment imposed on Microsoft Corporation by Decision C (2005) 4420 final and amending that Decision as regards the amount of the penalty imposed; and (iv) Commission Decision 2009/C 166/08 in Case No COMP/C-3/37.792 – Microsoft, OJ C 166, 18.7.2009, p. 20 to 23, fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005) 4420 final.

<sup>61</sup> Microsoft's letter of 12 July 2012, p. 1 and 2. See also corrected Dechert Report, p. 1, 10 and 26. See also Microsoft's reply to the Statement of Objections, p. 14 and 15.

<sup>62</sup> Corrected Report by Dechert LLP, p. 3.

<sup>63</sup> Corrected Report by Dechert LLP, p. 3. See also Microsoft's reply to the Statement of Objections, p. 2 and 9.

<sup>64</sup> Microsoft's letter of 12 July 2012, p. 3, 5 and 6; see also Corrected Report by Dechert LLP, p. 26 and 27, Microsoft's reply to the Statement of Objections, p. 16.

Screen after the initial roll-out of Windows 7 SP 1.<sup>65</sup> In addition, several incidents that occurred during the relevant time period could have given Microsoft employees indications about the failure to display the Choice Screen to the affected users. These included *inter alia* customer complaints about Choice Screen delivery problems which did not lead to sufficient questioning by Microsoft employees.<sup>66</sup>

(54) The Commission therefore considers that Microsoft acted negligently.

### 5.3. Gravity

(55) In its assessment of the gravity of Microsoft's failure to comply with Section 2 of the Commitments, the Commission takes into account the serious nature of the breach of Union law and the facts as described and assessed in Sections 3 and 4 of this Decision.

(56) First, regardless of the specific circumstances of the case, a failure to comply with a commitment decision is, in principle, a serious breach of Union law.<sup>67</sup> Recital 13 of Regulation (EC) No 1/2003 states that “[w]here, in the course of proceedings which might lead to an agreement or practice being prohibited, undertakings offer the Commission commitments such as to meet its concerns, the Commission should be able to adopt decisions which make those commitments binding on the undertakings concerned. Commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement.”

(57) The Union legislature thus wanted to ensure that the competition rules laid down in the TFEU are applied effectively, by means of the adoption of decisions making commitments, proposed by the parties and considered appropriate by the Commission, binding in order to provide a more rapid solution to the competition problems identified by the Commission, instead of proceeding by making a formal finding of an infringement.<sup>68</sup>

(58) The Commission therefore regards the infringement committed by Microsoft as a serious one, in that it undermines the effectiveness of the mechanism provided for in Article 9 of Regulation (EC) No 1/2003.

(59) Second, Microsoft's failure to comply with Section 2 of the Commitments goes to the core of the Commission's competition concerns and of Microsoft's obligations under the Commitment Decision. The Commitment Decision addressed concerns about the tying by Microsoft of its web browser, IE, to its client PC operating system, Windows.<sup>69</sup> The Commission was concerned that this practice was liable to foreclose the market for web browsers and give IE an artificial distribution advantage.<sup>70</sup> To address these concerns, Microsoft proposed a set of commitments of

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<sup>65</sup> Corrected Report by Dechert LLP, p. 27. See also Microsoft's reply to the Statement of Objections, p. 14.

<sup>66</sup> Corrected Report by Dechert LLP, p. 3.

<sup>67</sup> See by analogy Case T-141/08 *E.ON Energie AG v Commission* [2010] ECR II-5761, paragraph 279.

<sup>68</sup> Case C-441/07 P *Commission v Alrosa Company Ltd* [2010] ECR I-5949, paragraph 35.

<sup>69</sup> Recital 1 of the Commitment Decision.

<sup>70</sup> Recital 39 of the Commitment Decision.

which the Choice Screen was a key element.<sup>71</sup> Without the Choice Screen, the Commitments would not have been appropriate to address the competition concerns identified by the Commission.<sup>72</sup> It was in large part because the distribution of the Choice Screen through Windows Updates requires minimum user activity for the Choice Screen to reach the user that the Commission concluded that the Commitments were suitable for providing rival web browsers with an effective opportunity to compete on the merits with IE.<sup>73</sup>

- (60) Third, 15.3 million users were affected by Microsoft's breach of Section 2 of the Commitments. Microsoft has asserted that there have been "approximately 160 million successful installations" of the Choice Screen Update during the period of the failure to comply with Section 2 of the Commitments.<sup>74</sup> However, the Commission considers that, even when viewed in that context, the number of users affected, and the scope of Microsoft's breach of Section 2 of the Commitments, is significant.
- (61) Fourth, in its Reply to the Statement of Objections, Microsoft argues that the Commission should take into account the fact that its failure to comply had a limited actual impact on the market: the usage share of IE has been steadily declining, even during the period of the failure to comply with Section 2 of the Commitments.<sup>75</sup>
- (62) The Commission cannot subscribe to that argument. Irrespective of its market impact, Microsoft's failure to comply runs counter to one of the basic principles of the mechanism provided for in Article 9 of Regulation (EC) No 1/2003, namely that it allows a more rapid solution to the competition problems identified by the Commission instead of the adoption of a decision requiring that an infringement be brought to an end. The Union legislature has confirmed the importance of this mechanism by providing in Article 23(2)(c) of Regulation (EC) No 1/2003 that a fine for breach of a commitment shall not exceed 10% of that undertaking's worldwide turnover in the preceding business year.
- (63) In addition, while the impact on the market may render a failure to comply with a commitment more serious, the alleged absence of such an impact in the present case cannot detract from the seriousness of Microsoft's failure to comply.<sup>76</sup>

#### **5.4. Duration**

- (64) The duration of Microsoft's failure to comply with Section 2 of the Commitments is 14 months.
- (65) When setting the amount of the fine, the Commission takes into account that 14 months is a significant part of the overall duration of Section 2 of the Commitments (4 years and 39 weeks).

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<sup>71</sup> Recital 60 of the Commitment Decision.

<sup>72</sup> Recitals 97 and 103 of the Commitment Decision.

<sup>73</sup> Recital 104 of the Commitment Decision.

<sup>74</sup> Microsoft's reply to the Statement of Objections, p. 4.

<sup>75</sup> Microsoft's reply to the Statement of Objections, p. 11 to 14.

<sup>76</sup> See by analogy Case T-332/09 *Electrabel v Commission*, judgment of 12 December 2012, paragraph 247.

## 5.5. Mitigating circumstances

- (66) Microsoft has acknowledged in writing its failure to comply with Section 2 of the Commitments immediately after the Commission made it aware of the fact that the Choice Screen was not being rolled out properly. Microsoft's prompt admission and description of the circumstances of the failure to comply has allowed the Commission to investigate the matter efficiently. Moreover, Microsoft has deployed resources to conduct a thorough investigation as to the reasons for the failure to comply with Section 2 of the Commitments (see paragraph (34)) and it has cooperated with the Commission by providing, in a timely manner, the relevant information relating to its failure to comply with Section 2 of the Commitments. The Commission takes these elements into account as a mitigating circumstance.
- (67) Microsoft has argued that the Commission should take into account a number of additional elements as mitigating circumstances.
- (68) First, Microsoft claims that the Commission should take into account the fact that its failure to comply was the result of negligence.
- (69) The Commission considers that the fact that a failure to comply has been committed negligently does not, in competition law terms, render that failure to comply less serious.<sup>77</sup> Moreover, Microsoft's conduct does not constitute an excusable error,<sup>78</sup> in view of: (i) its significant resources; (ii) its extensive technical experience with the development, distribution and maintenance of software products and operating systems for PCs; (iii) its considerable competition law expertise; (iv) the fact that it ought to have been aware that its failure to display the Choice Screen to the affected users would constitute a breach of Section 2 of the Commitments; and (v) its reporting obligations on compliance with the Commitments.
- (70) Second, Microsoft argues that the Commission should take into account its quick identification and remedying of the error leading to the failure to comply with Section 2 of the Commitments.<sup>79</sup>
- (71) The Commission considers that, in line with the case-law, such a factor can lead to a reduction only in altogether exceptional circumstances.<sup>80</sup> In the case at hand, such exceptional circumstances are not present. Microsoft was under an obligation to comply with Section 2 of the Commitments throughout the period of its failure to comply. After it was informed about the failure to comply with the Commitments, Microsoft was required to take swift action to identify and remedy the failure. The fact that Microsoft did so is not an exceptional circumstance but merely Microsoft's obligation pursuant to Section 2 of the Commitments. If Microsoft had not acted swiftly to remedy its failure to comply, the Commission could have, pursuant to Article 24(1)(c) of Regulation (EC) No 1/2003, imposed periodic penalty payments on Microsoft in order to compel it to comply.

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<sup>77</sup> See by analogy Case C-137/95 P *SPO and Others v Commission* [1996] ECR I-1611, paragraph 55; Case T-271/03 *Deutsche Telekom AG v Commission* [2008] ECR II-477, paragraph 279; Case T-332/09 *Electrabel v Commission*, judgment of 12 December 2012, paragraph 237.

<sup>78</sup> See by analogy Case T-332/09 *Electrabel v Commission*, judgment of 12 December 2012, paragraphs 275 and 281.

<sup>79</sup> Microsoft's reply to the Statement of Objections, p. 17.

<sup>80</sup> Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-2917, paragraph 228.

- (72) Third, Microsoft claims that the Commission should take into account that it has taken a number of internal measures to avoid similar errors and failures to comply in the future.<sup>81</sup>
- (73) The Commission considers that while the internal measures taken by Microsoft in order to prevent any repetition after the failure to comply had come to an end are important, they do not alter Microsoft's failure to comply with Section 2 of the Commitments in the past.<sup>82</sup> These measures thus place no duty on the Commission to reduce the fine. Moreover, it is impossible to determine the effectiveness of the internal measures taken by Microsoft to prevent future non-compliance.<sup>83</sup>
- (74) Fourth, Microsoft argues that the Commission should take into account when setting the fine that this is the first case in which an undertaking is fined because of failure to comply with a commitment.<sup>84</sup>
- (75) In view of the clear wording of Article 23(2)(c) of Regulation (EC) No 1/2003 and of the Commitments themselves, as acknowledged by Microsoft (see recital 25 of this Decision), the Commission considers that Microsoft was aware or ought to have been aware of its obligations under the Commitment Decision and that failure to comply with the Commitments was unlawful and could give rise to a fine. The Commission will therefore not take into account that this is the first case in which an undertaking is fined because of failure to comply with a commitment.
- (76) Fifth, Microsoft has proposed to extend the duration of Section 2 of the Commitments by an additional 15 months. This, however, does not diminish the gravity of Microsoft's failure to comply with Section 2 of the Commitments. Microsoft's offer is only forward-looking to address a potential competition concern that, as a result of Microsoft's past failure to comply with Section 2 of the Commitments, may not be fully addressed by the Commitments. It cannot alter the fact that, during the period between 17 May 2011 and 16 July 2012, Microsoft did not display the Choice Screen to the affected users, in breach of Section 2 of the Commitments.

## 5.6. Deterrence

- (77) A fine for failure to comply with a commitment made binding by a decision pursuant to Article 9 of Regulation (EC) No 1/2003 must have a deterrent effect. Undertakings should not consider that it would be advantageous to breach a commitment made binding by a decision pursuant to Article 9 of Regulation (EC) No 1/2003.<sup>85</sup>
- (78) In order to ensure that the fine has a deterrent effect, the size of the undertaking concerned has to be taken into account.<sup>86</sup> The Commission therefore takes into account the fact that Microsoft's turnover in the fiscal year July 2011 to June 2012,

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<sup>81</sup> Microsoft's reply to the Statement of Objections, p. 14 to 17.

<sup>82</sup> See by analogy Case T-15/02 *BASF v Commission* [2006] ECR II-497, paragraph 266.

<sup>83</sup> See by analogy Case T-73/04 *Carbone-Lorraine v Commission* [2008] ECR II-2661, paragraph 144 and Case T-38/07 *Shell Petroleum and Others v Commission*, judgment of 13 July 2011, paragraph 96.

<sup>84</sup> Microsoft's reply to the Statement of Objections, p. 17.

<sup>85</sup> See by analogy Case T-141/08 *E.ON Energie AG v Commission* [2010] ECR II-5761, paragraph 288.

<sup>86</sup> Joined cases 100 to 103/80 *SA Musique Diffusion française v Commission* [1983] ECR 1825, paragraph 121; Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 111.

Microsoft's last full business year, was USD 73,723 million<sup>87</sup> (EUR 55,088 million).<sup>88</sup>

- (79) In the light of all the factors set out above, the fine is set at EUR 561 000 000, corresponding to 1.02% of Microsoft's turnover,

HAS ADOPTED THIS DECISION:

#### *Article 1*

Microsoft Corporation has failed to comply from 17 May 2011 until 16 July 2012 with Commission Decision of 16 December 2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.530 — Microsoft (Tying), notified under document C (2009) 10033).

#### *Article 2*

For the failure to comply referred to in Article 1, a fine of EUR 561 000 000 is imposed on Microsoft Corporation.

The fine shall be paid in euro within three months of the date of the notification of this Decision to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT

1–2, Place de Metz

L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI / COMP/39.530

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where the undertaking referred to in Article 1 lodges an appeal, it shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.

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<sup>87</sup> Microsoft's data for the US fiscal year ending June 30, 2012, source: Microsoft's Form K 10 report to the SEC for the fiscal year ended June 30, 2012, available under <http://www.microsoft.com/investor/SEC/default.aspx>, p. 44, downloaded and printed on 10 August 2012.

<sup>88</sup> The exchange rate used for the year July 1, 2011 – June 30, 2012 is EUR 1 = USD 1.338275. This is the average of the quarterly exchange rates for this period available under [http://epp.eurostat.ec.europa.eu/portal/page/portal/exchange\\_rates/data/database](http://epp.eurostat.ec.europa.eu/portal/page/portal/exchange_rates/data/database), downloaded and printed on 10 August 2012.

*Article 3*

Microsoft Corporation shall immediately bring to an end the failure to comply referred to in Article 1 in so far as it has not already done so.

Microsoft Corporation shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

*Article 4*

This Decision is addressed to Microsoft Corporation, One Microsoft Way, Redmond, WA 98052-6399, USA.

This Decision shall be enforceable pursuant to the first paragraph of Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 6.3.2013

*For the Commission*

*Joaquín ALMUNIA  
Vice-President*