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COMMISSION DECISION

of 13.12.2011

addressed to:

INTERNATIONAL BUSINESS MACHINES CORPORATION
relating to proceedings under Article 102 of the Treaty on the Functioning of the
European Union and Article 54 of the EEA Agreement

Case COMP/C-3/39692-IBM Maintenance Services

(Text with EEA relevance)

(Only the English text is authentic)

Parts of this text have been edited to ensure that business secrets and other confidential information are not disclosed. Those parts are enclosed in square brackets with an asterisk [*].

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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 Treaty¹, in particular Article 9(1) thereof,

Having regard to the Commission Decision of 23 July 2010 to initiate proceedings in this case,

Having expressed concerns in the Preliminary Assessment of 1 August 2011,

Having given interested third parties the opportunity to submit their observations pursuant to Article 27(4) of Regulation (EC) No 1/2003 on the commitments offered to meet those concerns,

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

Having regard to the final report of the Hearing Officer in this case²,

¹ 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 ("the Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The Treaty 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 Treaty will be used throughout this Decision.

Whereas:

1. SUBJECT MATTER

- (1) This decision is addressed to International Business Machines Corporation ("IBM"). It pertains to IBM's conduct relating to the maintenance of its mainframe hardware and operating system software products³.
- (2) In a Preliminary Assessment of 1 August 2011, the Commission formally expressed preliminary concerns that IBM may have refused to grant adequate access to certain inputs required to provide maintenance services for IBM's mainframe hardware and operating system software, in breach of Article 102 of the Treaty, in particular, Article 102, paragraph (b), and Article 54 of the Agreement on the European Economic Area (the "EEA Agreement")⁴.

2. THE PARTIES

- (3) **IBM** is a multinational computer, technology and services corporation head-quartered in Armonk, North Castle, New York, United States of America (the "United States"). It manufactures and sells computer hardware and software, and offers, *inter alia*, outsourcing services, system integration services, hosting services, and consulting services. In 2010, IBM's turnover was USD 99.87 billion⁵ (EUR 75.33 billion⁶) and its net income was USD 14.83 billion world-wide⁷ (EUR 11.18 billion). In 2009, IBM's revenues from its mainframe business were USD [*] billion⁸ (EUR [*] billion) world-wide and USD [*] billion⁹ (EUR [*] billion) in the European Economic Area ("EEA"). In 2009 its estimated net turnover related to the maintenance services for IBM System z mainframes was USD [*] billion¹⁰ (EUR [*] billion) world-wide and USD [*] billion¹¹ (EUR [*] billion) in the EEA.
- (4) **Third-party maintainers** ("TPMs") are companies not affiliated with or authorised by IBM which offer maintenance services for IBM mainframes and other third-party servers. According to IBM, the following TPMs are active in the maintenance of IBM mainframes in the EEA: ECS Group¹², Azamour Solutions, Techno-Group, Olympic Support CST and COS¹³. IBM estimates that, depending on the country/region and the period concerned, it earns between 70-95% of the potential revenue that could be

² OJ XXX

³ In the following text, a reference to the term "mainframe" refers to both hardware and the operating system software.

⁴ In the following text, a reference to Article 102 of the Treaty should be understood as a reference to both Article 102 of the Treaty and Article 54 of the EEA Agreement.

⁵ See <http://www.ibm.com/annualreport/2010/highlights.shtml>, printed on 4 November 2011.

⁶ The exchange rate used for 2010 is EUR 1 = USD 1.3257. Source: Eurostat.

⁷ See <http://www.ibm.com/annualreport/2009/highlights.shtml>, printed on 4 November 2011.

⁸ IBM's submission of 30 April 2010, reply to question 2, page 4.

⁹ Idem, reply to question 2, page 4.

¹⁰ Idem, reply to question 1.3, page 4.

¹¹ Idem, reply to question 1.3, page 4.

¹² On 28 October 2010, Econocom Group acquired ECS Group.

¹³ IBM's submission of 30 April 2010, reply to question 4, page 5.

earned from maintenance services for IBM System z mainframes¹⁴. Thus, revenue shares of TPMs taken all together are modest compared to IBM's share.

3. PROCEDURAL STEPS UNDER REGULATION (EC) NO 1/2003

- (5) On 23 July 2010, following information received from a TPM regarding IBM's conduct relating to the maintenance services of its mainframe hardware and software products, the Commission opened proceedings with a view to adopting a decision under Chapter III of Regulation (EC) No 1/2003.
- (6) On 1 August 2011, the Commission adopted a Preliminary Assessment as referred to in Article 9(1) of Regulation (EC) No 1/2003 which set out the Commission's preliminary competition concerns. The Commission preliminarily concluded that IBM may have refused to grant access to certain inputs required to provide maintenance services for IBM's mainframes to TPMs. The Preliminary Assessment was notified to IBM on 2 August 2011.
- (7) On 14 September 2011, IBM submitted commitments to the Commission in response to the concerns expressed in the Preliminary Assessment.
- (8) On 20 September 2011, a notice¹⁵ was published in the *Official Journal of the European Union* pursuant to Article 27(4) of Regulation (EC) No 1/2003, summarising the case and the commitments and inviting interested third parties to submit their observations on the commitments within one month following the publication.
- (9) The Commission received seven observations from interested third parties. The Commission informed IBM of these comments. On 24 October 2011, IBM submitted an amended proposal for commitments (dated 21 October 2011).
- (10) On 5 December 2011, the Advisory Committee on Restrictive Practices and Dominant Positions was consulted. On 5 December 2011 the Hearing Officer issued his final report.

4. PRELIMINARY ASSESSMENT

4.1. The products and service concerned

4.1.1. Mainframe computers

- (11) Mainframes are large, powerful corporate servers often used to process high volumes of information at very high speed¹⁶. IBM mainframes have been produced since 1964.

¹⁴ Idem, reply to question 5, page 6.

¹⁵ OJ L 275, 20.09.2011, page 8-9.

¹⁶ A corporate server is a computer running programmes that collectively serve the needs of a company, rather than a single user. In contrast to entry level servers, large corporate servers offer a significantly higher degree of system availability and fault tolerance and are used for more specific mission-critical applications (see Commission Decision in Case No M.2609 – *HP/Compaq*, OJ C 39, 13.02.2002, page

IBM System z is IBM's current line of mainframes and has comprised different product families: IBM's z800, z900, z890, z990, z9, z10, and zEnterprise mainframes. IBM currently sells the z10 (EC and BC) and zEnterprise (z196 and z114) mainframes.

- (12) Mainframes are characterised by high reliability, availability, serviceability ("RAS") and scalability:
- (a) Reliability refers to the extremely low failure rates of mainframes and their ability to correct data corruption when it occurs without interrupting operations.
 - (b) Availability refers to the time that a computer system is actually operational. Mainframes are designed to have no or minimal down-time.
 - (c) Serviceability refers to the various methods of diagnosing faults when problems arise. Mainframes can automatically call for support when a system fault arises, thereby avoiding or limiting disruption of any service.
 - (d) Scalability is the ability to increase capacity via expansion such as the addition of another Central Processing Unit ("CPU"). Mainframes can be adjusted to provide capacity according to the customer's requirements¹⁷.

4.1.2. Mainframe maintenance services

- (13) The maintenance of mainframes, like many other servers, is particularly important. Due to their high reliability, availability and serviceability, mainframes are commonly used to run mission-critical business processes. In order to ensure business continuity, expeditious maintenance is therefore essential¹⁸.
- (14) Maintenance services for mainframes are offered both by IBM and by TPMs. Mainframe users can also self-maintain their IBM mainframes¹⁹. During the first year after the purchase of an IBM mainframe, maintenance services are provided by IBM under warranty. Within the EEA, the current IBM warranty scheme provides for the accessibility of spare parts 24 hours a day and 7 days a week, and targets a same-day response²⁰. After the first year, IBM offers its customers maintenance contracts. Under an IBM maintenance contract, customers pay a fixed fee that covers any necessary

23, recitals (19) and (21)). Examples of computers which may provide different large corporate server functionalities are Unix servers, Linux servers and mainframes.

¹⁷ This is achieved either by physically adding parts and/or by activating parts through a portion of License Internal Code ("LIC"), known as the LIC configuration control ("LICCC") record. Parts that are activated at the purchased capacity configuration through a LICCC record are referred to as LICCC-enabled parts (see recitals (16) and (17)).

¹⁸ There are two principal dimensions to the maintenance of mainframes. First, maintenance comprises the repair of mainframes that are not functioning properly. This includes the repair of parts of mainframes that are out of order and the replacement of defective or broken parts. Second, maintenance includes the performing of routine actions designed to keep the mainframe system in working order (scheduled maintenance) and to prevent failures from arising (preventive maintenance).

¹⁹ Broken parts can be replaced on the customer's hardware by IBM, by a TPM or by the customer itself ("self-maintainers").

²⁰ IBM's submission of 30 April 2010, reply to question 7, page 7.

repairs during the term of the maintenance contract, including both the cost of labour and of any spare parts needed to carry out the repairs²¹. Under IBM's maintenance contract, customers may also opt for an enhanced level of maintenance service, in particular in relation to the availability of spare parts and the response time.

4.1.3. *Inputs required to provide maintenance services for IBM mainframes*

- (15) The provision of maintenance services requires, amongst other inputs, spare parts, Machine Code Updates and operating system software updates. As explained in recitals (27) and (28), IBM is the sole source of supply of certain proprietary inputs used for maintenance services of IBM mainframe hardware and operating system software. In recitals (16) and (17), the Commission first identifies the spare parts at issue and then refers to two types of relevant proprietary updates (recitals (18) and (19)).
- (16) First, various spare parts are necessary to provide maintenance services. Some of these spare parts, such as License Internal Code configuration control ("LICCC") parts, are vital to the functioning of IBM mainframes and may also cost significant amounts of money.
- (17) LICCC-enabled parts constitute such a category of spare parts. LICCC-enabled parts include, *inter alia*, Processor Parts, such as Processor Books, which contain processors, memory and other components. On certain mainframe models, single chip modules ("SCMs") are used instead of Processor Books²². Other LICCC-enabled parts include Memory Cards, Escon Channel Cards and ISC Daughter Cards²³. For certain LICCC-enabled parts, the LICCC record must be updated upon replacement. Only IBM can provide LICCC record updates.
- (18) Second, companies providing maintenance services for IBM mainframes also need access to Machine Code Updates (referred to as "Engineering Changes" or "HIPER fixes"²⁴). These updates can be important in order to resolve known defects or safety issues so as to ensure preventive hardware maintenance. In addition, TPMs need to have access to the correct level of Engineering Changes to be applied to a specific mainframe (such as the version of machine code to be installed)²⁵. IBM communicates the release or availability of Machine Code Updates through a public database (the so-called "ECA library"). A mainframe user wishing to install a Machine Code Update can order (or authorise a TPM to order on its behalf) from IBM a System Update Level ("SUL") DVD, which contains all Machine Code Updates released by IBM for the relevant mainframe up to the date of issuance of the SUL DVD.

²¹ IBM's submission of 18 May 2010, reply to question 14 g, page 9.

²² The current IBM z196 and z10 EC mainframes contain one to four Processor Books that can be activated according to the needs of the customer (see recital (12)(d) above). In z10 BC and z114 servers, SCMs are used instead of Processor Books. Processor Books and SCMs, also known as Processor Parts, contain several processors, some of which can be inactivated. See IBM's submission of 18 May 2010, reply to question 14.c, page 5.

²³ ISC Daughter cards and Escon Channel Cards are used to control the number of ports open for communication with the processor.

²⁴ HIPER fixes are Machine Code Updates necessary to address high impact or pervasive problems.

²⁵ ECS's submission of 4 December 2009, response to question 1, section 1.2.1.1, page 4.

- (19) Third, in order to provide maintenance services, TPMs also need access to operating system software updates, such as Programme Temporary Fixes ("PTFs"), which are code updates designed to resolve known software problems²⁶. IBM is the sole source of supply of these software updates for which it claims intellectual property protection.

4.2. Relevant markets

4.2.1. Product market

- (20) Different product markets may be identified in this case. There is a primary market for large corporate servers, on which IBM sells its mainframes. In addition, two relevant aftermarkets which are adjacent to the primary market for large corporate servers might also be considered. A first possible adjacent product market is the market for those inputs required for the maintenance of IBM mainframes which only IBM can supply. A second possible adjacent product market is the provision of IBM mainframe hardware and operating system software maintenance services. IBM inputs required for maintenance of IBM mainframes are a necessary input in a downstream market for maintenance services.
- (21) Whether the aftermarkets for IBM's inputs and maintenance services for mainframes constitute separate product markets or are part of a single market for "systems", mainly depends on the likely reaction of customers to moderate price increases in the aftermarkets²⁷.
- (22) If secondary products such as spare parts or operating system software updates for different brands are incompatible or not substitutable, and a moderate increase in the aftermarket prices does not affect customers' choices in the primary market (for instance because of high switching costs, "lock-in" effects or relative unimportance of prices in secondary markets), then there could be a separate market for the primary good and brand-specific aftermarkets.
- (23) According to the case-law of the Court of Justice, an aftermarket consisting of the secondary products (or services) of only one brand of a primary product, such as IBM mainframes, would appear to be a relevant product market if: (a) switching to secondary products of other producers is not possible; and (b) there are high switching costs in the market for the primary product²⁸. According to the Commission's Preliminary Assessment, these conditions seem to be fulfilled in this case.
- (24) On the basis of the initial findings of the investigation and without having reached a definitive view, the Commission concluded in the Preliminary Assessment that relevant product aftermarkets might be identified for inputs needed in order to

²⁶ IBM's submission of 25 October 2010, reply to question 7, page 2. See also http://searchdomino.techtarget.com/sDefinition/0..sid4_gci214488.00.html, printed on 20 October 2010.

²⁷ See XXVth Report on Competition Policy, COM(96)126 final, paragraphs 86, 87 on the Pelikan/Kiocera decision and Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (OJ C 372, 9.12.1997, paragraph 56). See also Case T-427/08 *CEAHR v Commission*, judgment of 15 December 2010, not yet reported, paragraphs 80, 96, 102 and 105.

²⁸ See Case T-427/08 *CEAHR v Commission*, judgment of 15 December 2010, not yet reported, paragraphs 79-80, 84 and following.

provide maintenance services to IBM mainframes which cannot be sourced outside IBM and for hardware and operating system software maintenance services for IBM mainframes.

4.2.2. *Geographic market*

- (25) IBM's policy regarding the supply, pricing, and the distribution of inputs is implemented across the EEA. Thus, any restrictive conduct resulting from this policy applies to the whole EEA. The Commission therefore preliminarily concluded that the geographic scope of the relevant markets for inputs should be defined as at least EEA-wide²⁹.

4.3. **Dominance**

- (26) Without having reached a definitive view, the Commission preliminarily concluded that IBM appeared to be dominant within the meaning of Article 102 of the Treaty in a market for certain inputs required for the maintenance of IBM mainframe hardware and operating system software, as IBM is the exclusive supplier of inputs which are required for maintenance services.

- (27) In particular, as the manufacturer of IBM mainframes hardware and operating systems, IBM is the only supplier of the following key inputs for hardware maintenance:

- (a) Only IBM can issue LICCC records which are needed to install certain LICCC-enabled parts³⁰.
- (b) Only IBM can provide Machine Code Updates, such as the correct level of Engineering Changes, which should be applied to an IBM mainframe to keep it in running order. IBM is the only reliable source of comprehensive, up-to-date information concerning the release and availability of these updates. IBM is the sole source for the publishing of the ECA Library, the database containing this information, and the supply of Machine Code Updates necessary for preventive maintenance.

- (28) Furthermore, IBM is the only supplier of key inputs for operating system software-related maintenance, such as PTFs. Only IBM can provide these PTFs.

- (29) In addition, the IBM key inputs described in recitals (27) and (28) are specific to IBM mainframes and are not interchangeable with inputs for other computers³¹.

- (30) Moreover, entry into the market for the inputs required for maintenance of IBM mainframes would necessitate substantial investment and access to IBM's technology for which IBM claims intellectual property protection. Therefore, without IBM's

²⁹ Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (OJ C 372, 9.12.1997, paragraph 8).

³⁰ See IBM's submission of 18 May 2010, reply to questions 10, page 2, 14.b, page 4, 14 c. page, 6. In contrast to prior generations of IBM zSeries servers, for IBM's most recent generations (the z10 and z196 servers), a LICCC record update is only needed for the installation of one processor part (i.e. the processor book in slot 1) (IBM's submission of 31 August 2011, page 12).

³¹ See Case 22/78 *Hugin Kassaregister v Commission* [1979] ECR 1869, paragraph 7.

agreement, no competitor is likely to become an alternative source of the inputs required for maintenance of IBM mainframes.

4.4. Practices raising concerns

- (31) The concerns expressed in the Preliminary Assessment relate to IBM's dealings with undertakings providing maintenance services for IBM mainframes³². The Commission took the preliminary view that IBM imposed unreasonable supply conditions with regard to certain inputs required for the maintenance of IBM mainframes on its competitors in the maintenance market, thus putting them at a competitive disadvantage³³. The Commission noted that IBM already had existing supply arrangements with competitors.
- (32) The Commission preliminarily concluded that the cumulative effect of the following features of IBM's behaviour with respect to the supply of essential inputs might amount to a constructive refusal to supply that could raise concerns under Article 102 of the Treaty³⁴. The following recitals summarise the Commission's Preliminary Assessment in this regard, all of which remains provisional and would need further analysis before any definitive findings could be made.
- (33) First, IBM has restricted access to IBM spare parts for TPMs by comparison with IBM's treatment of its own customers and IBM's past treatment of TPMs. Before November 2002, access to IBM's spare parts was available to TPMs 24 hours a day and 7 days a week. After November 2002, however, access for TPMs became restricted to Monday to Friday from 9:00 to 12:30 and from 13:30 to 17:30 (bank holidays excluded)³⁵.
- (34) Second, new stand-alone Processor Books and SCMs could only be bought from IBM and could not be stocked by TPMs, since they were subject to an exchange-only policy³⁶. The defective spare part had to be returned to IBM within 48 hours of the spare part being delivered. Before October 2009, if TPMs failed to meet the deadline or in case of non-return, a much higher non-exchange price was applied to the part. After October 2009, in case of a non-return, a non-exchange price was charged while in case of a late return a 3% daily fee applied³⁷. Depending on the series, model and configuration of the mainframe, the non-exchange price could be up to 4139 % higher than the exchange price³⁸.

³² The Preliminary Assessment did not seek to examine the possible market for the supply of multi-vendor maintenance services to customers owning various different server platforms, including IBM mainframes. In particular, it did not purport to assess the competitive situation between IBM and other server manufacturers in the supply of maintenance services to customers with different server platforms.

³³ In *Tetra Pak II*, the Court of Justice highlighted that the fact that a dominant company's abusive conduct has adverse effects on a market distinct from the dominated one does not detract from the applicability of Article 102 TFEU (see Case C-333/94 P *Tetra Pak v Commission* ("Tetra Pak II") [1996] ECR I-5951, paragraph 25).

³⁴ Actual refusal of essential inputs by the dominant undertaking is not necessary for an abuse. Case T-301/04 *Clearstream* [2009] ECR II-3155, demonstrates that excessive delay in providing a good or service can amount to an abusive refusal to supply (see paragraph 151).

³⁵ IBM's submission of 18 May 2010, annex 11.1, page 1 and annexes 18.1.a, 18.1.b, 18.1.c.

³⁶ *Idem*, reply to question 15, page 13.

³⁷ *Idem*.

³⁸ IBM's submission of 18 May 2010, reply to question 15.b, pages 14-15.

- (35) Third, IBM is the only provider of LICCC records which are needed to install certain LICCC-enabled parts and of certain technical information such as Machine Code Updates and PTFs. Timely access to this information is critical for TPMs³⁹.
- (36) The established case-law of the Court of Justice shows that the refusal by an undertaking occupying a dominant position on the market of a given product to meet the orders of a previously supplied customer may constitute an abuse of that dominant position under Article 102 of the Treaty where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor⁴⁰.
- (37) The Court of Justice recently held that the conditions to be met under the *Bronner* line of case-law⁴¹ do not necessarily apply when assessing the nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser⁴².
- (38) However, the Commission's preliminary view is that it would, in any case, be able to show that the inputs at issue here are indispensable in order to provide maintenance services for IBM mainframes. As explained in recitals (27) and (28), a number of inputs required to provide maintenance service to IBM mainframes (such as certain LICCC-enabled parts, Machine Code updates and operating system PTFs) cannot be sourced outside IBM and are subject to specific sourcing conditions. Since there can be no viable substitute for these essential inputs, the Commission took the preliminary view that these inputs may be indispensable to compete effectively with IBM on the relevant downstream market for maintenance services for IBM mainframes.
- (39) On the issue of whether IBM's conduct is liable to eliminate a trading partner as a competitor (see recital (36) above), the Commission came to the preliminary conclusion that the cumulative effect of IBM's behaviour has the potential to lead to the exclusion of the few existing rival firms⁴³ that compete with IBM on the downstream market for IBM maintenance services⁴⁴. Thus, the Commission's preliminary conclusion was that IBM's behaviour may limit markets to the prejudice of consumers pursuant to Article 102, paragraph (b) of the Treaty.

³⁹ ECS's submission of 11 December 2009, reply to question 1, paragraph 1.2.1.3.

⁴⁰ See Joined Cases C-468/06 to 478/06 *Sot. Lélos kai Sia EE and Others v GlaxoSmithKline AVEE Farmakeftikon Proïonton* [2008] ECR I-7139, paragraphs 34 and 49 (citing Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223, paragraph 25, and Case 27/76 *United Brands and United Brands Continental v Commission* [1978] ECR 207, paragraph 183).

⁴¹ Case C-7/97 *Bronner* [1998] ECR I-7791, paragraphs 41-46.

⁴² Case C-52/09 *TeliaSonera Sverige*, judgment of 17 February 2011, not yet reported, paragraph 55. See, in a similar vein, Case T-65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653, paragraph 161, as well as paragraphs 170 and 171, and Case C-552/03 P *Unilever Bestfoods Ltd v Commission* [2006] ECR I-9091, paragraphs 113 and 137.

⁴³ ECS's submission of 11 December 2009, reply to question 14. See Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223, paragraph 25.

⁴⁴ See Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraph 561: "[...] if the Commission were required to wait until competitors were eliminated from the market, or until their elimination was sufficiently imminent, before being able to take action under Article 82 EC [now art. 102 TFEU], that would clearly run counter to the objective of that provision, which is to maintain undistorted competition in the common market and, in particular, to safeguard the competition that still exists on the relevant market". See also Case T-301/04 *Clearstream* [2009] ECR II-3155, paragraph 148.

- (40) IBM argues that the practices at issue are justified by legitimate commercial considerations and thus would be objectively justified. In particular, in its response to the Preliminary Assessment, IBM claimed intellectual property right protection with regard to some inputs required to provide maintenance service to IBM mainframes⁴⁵. In view of the commitments submitted by IBM to address the Commission's competition concerns (see recitals (43) to (50)), the Commission did not need to further investigate this point, including by carrying out an in-depth analysis of the veracity of IBM's claims. However in the Commission's preliminary view these considerations may be insufficient to justify the conduct at issue. In particular with regard to the claimed intellectual property right protection, and even assuming that IBM could show that its intellectual property rights cover the inputs at issue, it nevertheless must be noted that, according to the case-law, the exercise of an exclusive intellectual property right may not justify the arbitrary refusal to supply spare parts to independent repairers⁴⁶.
- (41) By letter of 8 December 2010, IBM informed the Commission that it had taken steps to modify the conditions under which it made LICCC-enabled spare parts and updates for System z servers available to TPMs⁴⁷. According to IBM, its new practice was effective since July 2010. However, regardless of whether these practices were implemented or not, in view of their unilateral character, IBM's declarations cannot be enforced by TPMs. For these reasons, and without prejudice to the issue of whether the substance of the unilateral declarations outlined in the letter of 8 December 2010 would in any case be sufficient to meet the Commission's competition concerns, the preliminary assessment of the Commission was that IBM's unilateral declarations cannot obviate the need for formal commitments.

4.5. Effect on trade between Member States

- (42) IBM's inputs are supplied by IBM across the EEA and worldwide. Moreover, the practices raising preliminary concerns may affect various TPMs, some of which are active in different Member States. For this reason, the Commission's preliminary conclusion was that the practices raising preliminary concerns may have repercussions on the pattern of competition within the internal market and could affect the market structure.

5. PROPOSED COMMITMENTS

- (43) IBM disagrees with the Commission's Preliminary Assessment. In particular, IBM contests the preliminary findings with regard to the relevant markets and dominance. IBM further claims that it has addressed any possible competition concerns raised by its practices in July 2010 (see recital (41)). IBM has nevertheless offered commitments pursuant to Article 9(1) of Regulation (EC) No 1/2003 to address the Commission's competition concerns ("the Commitments"). The key elements of the Commitments offered voluntarily by IBM on 14 September 2011 are as follows:

⁴⁵ IBM's submission of 31 August 2011, pages 14 and 15.

⁴⁶ Case 238/87 *AB Volvo v Erik Veng* [1988] ECR 6211, paragraph 9.

⁴⁷ IBM's submission of 8 December 2010. IBM claims that LICCC-enabled parts (including the important processor parts) are now available on a continual basis and that the 48-hours exchange-only policy has been terminated. IBM further claims to have improved the availability of updates to TPMs.

- (44) IBM commits to maintain the expeditious availability of LICCC-enabled parts and Machine Code Updates to TPMs active in the EEA under commercially reasonable and non-discriminatory terms and conditions for repair purposes. To this end, IBM commits to enter into a contract with any TPM interested in providing maintenance services for IBM System z servers in the EEA.
- (45) The contract is to be based on reasonable terms and conditions and contain, among others, an obligation on IBM to: (i) supply TPMs in an expeditious manner with LICCC-enabled parts (and any LICCC record updates required to install such parts) without any obligation on TPMs to return the defective part; and (ii) make Machine Code Updates available to TPMs in an expeditious manner.
- (46) In addition, IBM unilaterally proposed to maintain a fixed price for two specific Processor Parts for repair purposes and to maintain the same prices for other LICCC enabled-parts for TPMs and self-maintaining customers.
- (47) The contract is to include the possibility for TPMs to enforce IBM's obligations in the event of any dispute relating to the agreement. The contract is to also provide for specific performance and contractual penalties in case of IBM's late delivery of LICCC-enabled parts (and/or the LICCC record updates required to install such parts) or Machine Code Updates.
- (48) In an annex to the Commitments, IBM also submits a number of standard contract clauses detailing how the obligations undertaken by virtue of this Decision will be implemented. These standard contract clauses are part of IBM's Commitments. These standard clauses constitute minimum requirements for the contracts that IBM commits to sign with TPMs. IBM remains free to negotiate with TPMs any other terms and conditions which might be required, provided that these are commercially reasonable and non-discriminatory.
- (49) In order to facilitate dealings with TPMs, IBM undertakes to create the position of an EU-wide TPM Relationship Manager, acting as a contact point for TPMs. In particular, the TPM Relationship Manager will be responsible for assisting TPMs in resolving any concerns regarding, inter alia, the availability of LICCC-enabled parts.
- (50) The Commitments apply to all IBM System z machine models and types that have not been withdrawn from service by IBM. The Commitments will have a duration of five years, starting from the date of the adoption of this Decision. IBM commits not to circumvent or attempt to circumvent the Commitments and to submit to the Commission a yearly report on their implementation.

6. THE COMMISSION NOTICE PURSUANT TO ARTICLE 27(4) OF REGULATION (EC) No 1/2003

- (51) In response to the publication on 20 September 2011 of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003 (the "market test"), the Commission received seven responses from interested third parties, including from two major TPMs.

6.1. Responses from interested third parties and Revised Commitments

- (52) A number of comments and suggested amendments to the Commitments were received during the market test. The main issues raised by the respondents are summarised below in recitals (53) to (73). In reaction to the comments, IBM submitted an amended version of the commitments on 24 October 2011 (the "Revised Commitments") and provided further explanations of its current business practices.
- (53) The comments submitted by third parties can be grouped into three categories.
- (54) A first set of comments concerns the inputs required to provide maintenance services (such as LICCC records needed to install certain LICCC-enabled parts, Machine Code Updates and software updates). A second category of comments focuses on the standard contract clauses annexed to the Commitments. Finally, a third category of comments pertains to IBM's pricing policy.
- (55) First, concerns were expressed about the definition of "LICCC-Enabled Replacements Parts" provided for in the Commitments in so much as it appeared to be limited to existing, rather than all existing and future, LICCC-enabled parts. In response to this comment, the Revised Commitments provide for an amendment to the definition of "LICCC-Enabled Replacement Parts" which makes clear that successors to the currently available parts are not excluded.
- (56) One respondent also indicated that the Commitments did not allow TPMs to buy LICCC-enabled parts and the respective LICCC records for stock and training purposes. In view of IBM's commitment to deliver spare parts in an expeditious manner and due to the fact that, as a rule, there is ample advance warning before processor parts and other LICCC-enabled parts break down, the Commission considers that the unavailability of these spare parts and codes for stock purposes does not raise competition concerns⁴⁸. Furthermore, IBM explained that the unavailability of these spare parts and codes for training purposes should not raise concerns, since the maintenance service does not involve the opening or repair of Processor Parts, but merely the replacement of defective Processor Parts⁴⁹. The Commission considers that IBM's reasoning is persuasive in particular in view of IBM's statement that its own maintenance personnel does not open up and repair defective Processor Parts, but merely replaces defective parts with well-functioning parts⁵⁰.
- (57) Concerns were also raised that LICCC records (including those needed for Processor Parts) could not be purchased within the EEA on a stand-alone basis. In response to this concern IBM clarified that LICCC records can be requested in the EEA, for maintenance purposes, without ordering a part⁵¹.
- (58) As regards Machine Code Updates, two respondents submitted that the content of the ECA Library, the public database used by IBM to announce the release of new

⁴⁸ IBM's submission of 31 August 2011, page 12.

⁴⁹ IBM's submission of 15 October 2011.

⁵⁰ Idem.

⁵¹ IBM's submission of 24 October 2011.

Machine Code Updates, has deteriorated over time. They contend that the current level of updates of the ECA Library would not allow TPMs to have full information concerning all Machine Code Updates available both for new and older IBM mainframes.

- (59) In light of these comments, IBM clarified that, before the entry into force of the Revised Commitments, the ECA Library will contain all existing Machine Code Updates released for any relevant IBM machines covered by the Revised Commitments. IBM further confirmed that it will not stop using the ECA Library as the means of informing TPMs of the release of new Machine Code Updates during the validity of the Revised Commitments⁵².
- (60) One respondent also indicated that the Commitments were unclear with respect to whether SUL DVDs contained all necessary Machine Code Updates or just those Machine Code Updates published since the previous SUL DVD was issued. In particular, the respondent expressed concern that certain mainframes might not have been fully updated for several years, which means that if each SUL DVD only contains the latest updates for a certain mainframe, the SUL DVD would not be compatible with the customer's system at its existing update level.
- (61) The Revised Commitments make clear that each SUL DVD contains all Machine Code Updates released for the relevant machine type up to the SUL DVD's date of issuance.
- (62) With regard to software updates, two respondents contended that the Commitments did not properly address the supply of inputs required to provide software maintenance services. In particular, one respondent argued that the Commitments do not provide for the expeditious access for TPMs to PTFs (see recital (19)).
- (63) IBM already clarified in its response to the Preliminary Assessment that it makes such PTFs available to operating system licensees (and to TPMs acting on their behalf) within the same approximate timeframe as they are made available to IBM's own maintenance organisation⁵³. In particular, PTFs are immediately accessible by logging onto the so-called Shopz database. This database is available to all System z operating system licensees in the same way (based on the licensee's customer number), regardless of whether they are self-maintainers or make use of TPMs. IBM further confirmed that TPMs acting on an operating system licensee's behalf have direct on-line access to IBM's proprietary PTFs in the same way as operating system licensees. With the licensee's IBM log-in details (namely, the licensee's IBM customer number and its IBM ID/Password), TPMs can directly access PTFs through the Shopz database for the benefit of such licensee or, if the licensee has subscribed to it, through a paid service (IBM ServiceLink)⁵⁴.
- (64) Second, the following comments were received concerning the standard contract clauses annexed to the Commitments.

⁵² Idem.

⁵³ IBM's submission of 31 August 2011, page 14.

⁵⁴ IBM's submission of 24 October 2011.

- (65) One respondent suggested that IBM's right to require written confirmation from TPMs that the TPM is authorized by the rightful possessor to repair the specific mainframe for which the part is being requested and that such part will be used by the TPM to repair that mainframe, should be assessed on an objective basis. In the Revised Commitments, IBM adapted the wording of the relevant standard contract clause in line with the comments received such that written confirmations would only be required if there was an "*objective*" reason to doubt the accuracy of the information provided in connection with an order or if the order otherwise appears abnormal.
- (66) The justification for IBM's right to audit TPMs was called into question by one respondent, particularly since, under the standard contract clauses annexed to the Commitments, TPMs are already required to provide detailed information in the standing order forms.
- (67) IBM confirmed that it only audits TPMs after they have obtained the relevant part or update in question⁵⁵.
- (68) The necessity for TPMs to obtain signed, written authorisation in hard copy form from an authorised representative of their client to order and use License Internal Codes ("LIC") was also questioned by one respondent.
- (69) IBM clarified that it does not insist on receiving a signed, written authorisation in hard copy from the Machine Code Licensee at the time of the TPM's order. This might, however be required for subsequent auditing purposes⁵⁶.
- (70) With respect to recitals (65) to (69) above, the Commission considers that IBM's right to audit TPMs and a TPM's obligation to obtain a written authorisation from their clients to order and use LIC have no impact on the time-frame within which IBM provides the input and therefore do not undermine the effectiveness of the Revised Commitments.
- (71) Third, most respondents contend that the fixed prices unilaterally proposed by IBM for two specific Processor Parts were not reasonable. In light of these comments, IBM deleted in the Revised Commitments references to: (i) the fixed prices for Processor Parts and (ii) the obligation to maintain the same prices for LICCC-enabled parts for both TPMs and self-maintaining customers.
- (72) A number of other comments have also been received concerning the pricing and discount policy applied by IBM to its mainframe customers. The Commission considers that these objections go beyond the competition concerns identified in the Preliminary Assessment which only relate to a possible constructive refusal to supply and not to IBM's pricing policy as such.
- (73) Whilst the Commission for the purposes of the Preliminary Assessment and this Decision did not assess the general reasonableness or fairness of IBM's prices for LICCC-enabled parts and Machine Code Updates, the Commission recalls that IBM commits to maintain the expeditious availability of these inputs to TPMs under

⁵⁵ IBM's submission of 15 October 2011.

⁵⁶ Idem.

commercially reasonable and non-discriminatory terms and conditions for repair purposes and not to circumvent or attempt to circumvent this commitment.

- (74) IBM has itself confirmed that it will not use pricing to circumvent the Revised Commitments⁵⁷. Certainly, pricing of the relevant inputs by IBM at levels which would amount to a constructive refusal to supply would constitute a circumvention of the Revised Commitments.

6.2. Conclusions

- (75) Overall, the observations received did not lead the Commission to identify any new competition concerns and contained no points such as to make the Commission reconsider the concerns it expressed in the Preliminary Assessment.
- (76) In view of the results of the market test, the Commission considers that, the Revised Commitments, together with the clarifications provided by IBM concerning the supply conditions of PTFs and LICCC records, are sufficient to meet the competition concerns expressed in the Preliminary Assessment.

7. PROPORTIONALITY OF THE REVISED COMMITMENTS

- (77) According to settled case-law, the principle of proportionality requires that the measures adopted by European institutions must be suitable and not exceed what is appropriate and necessary for attaining the objective pursued⁵⁸. Where there is a choice between several appropriate measures, recourse must be had to the one that is least onerous and the disadvantages caused must not be disproportionate to the aims pursued. For the assessment of the proportionality of commitments submitted within the framework of Article 9 of Regulation (EC) No 1/2003, the Commission takes into account that the commitments are not imposed by the Commission for an established infringement under Article 7(1) of Regulation 1/2003 but are voluntarily proposed by the undertaking seeking to bring the proceedings to an end without a formal decision on the existence of an infringement⁵⁹.
- (78) The Commission takes the view that the Revised Commitments in their final form are sufficient and necessary to address the competition concerns identified in the Preliminary Assessment without being excessive. As the competition concerns arise from the fact that IBM may have refused to grant adequate access to certain inputs required to provide maintenance services for IBM mainframes, the Commission considers that the Revised Commitments are proportionate as they address these concerns guaranteeing the expeditious availability to TPMs, under commercially reasonable and non-discriminatory terms, of relevant spare parts and technical information essential for IBM mainframe maintenance by TPMs.

⁵⁷ IBM's submissions of 1 July 2011 and 10 November 2011.

⁵⁸ Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, paragraph 144, and Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, paragraph 201.

⁵⁹ Case C-441/07 *Commission v Alrosa Company Ltd*, judgment of 29 June 2010, not yet reported, paragraphs 40-41.

- (79) In the Commission's preliminary view, IBM might have put TPMs active in the maintenance of IBM mainframes at a competitive disadvantage by imposing unreasonable supply conditions for certain essential inputs and with a view to limiting current and future competition in the market for IBM mainframe maintenance.
- (80) The fact that IBM commits to provide expeditious availability of certain inputs essential to provide maintenance services to IBM mainframes, under commercially reasonable and non-discriminatory terms and conditions, addresses these concerns in an adequate and proportionate manner.
- (81) The Revised Commitments will be binding on IBM for a total period of 5 years. This duration is necessary and proportionate as it takes into account the technological evolution in this industry.

8. CONCLUSION

- (82) By adopting a decision pursuant to Article 9(1) of Regulation (EC) No 1/2003, the Commission makes commitments, offered by the undertaking concerned to meet the Commission's concerns expressed in its Preliminary Assessment, binding upon it. Recital (13) of the Preamble to the Regulation (EC) No 1/2003 states that such a decision should not conclude whether or not there has been or still is an infringement. The Commission's assessment of whether the commitments offered are sufficient to meet its concerns is founded on its Preliminary Assessment, representing the preliminary view of the Commission based on the underlying investigation and analysis and the observations received from third parties following the publication of a notice pursuant to Article 27(4) of Regulation (EC) No 1/2003.
- (83) In the light of the commitments offered, the Commission considers that there are no longer grounds for action and, without prejudice to Article 9(2) of Regulation (EC) No 1/2003, the proceedings in this case should therefore be brought to an end.
- (84) The Commission retains full discretion to investigate and open proceedings under Article 102 of the Treaty as regards practices that are not the subject matter of this Decision. In particular, this Decision is without prejudice to an examination of possible abusive conduct by IBM on the market for the maintenance of IBM's mainframe hardware and software products, other than constructive refusal to supply TPMs as described herein.

HAS ADOPTED THIS DECISION:

Article 1

The Commitments in the Annex shall be binding on International Business Machines Corporation (IBM) for a period of five years from the date of adoption of this Decision.

Article 2

It is hereby concluded that there are no longer grounds for action in this case.

Article 3

This Decision is addressed to:

International Business Machines Corporation

1 New Orchard Road,

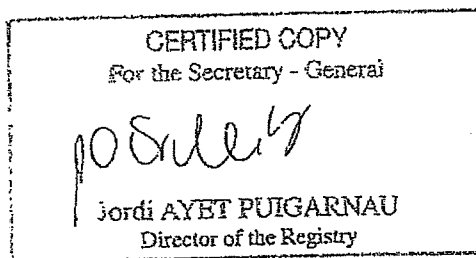
Armonk,

New York 10504

United States of America

Done at Brussels, 13.12.2011

For the Commission
Joaquín ALMUNIA
Vice-President



ANNEX
THE COMMITMENTS