Commission imposes a penalty payment pursuant to Article 24(2) of Regulation 1/2003 on Microsoft

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1. Introduction
On 12 July 2006 the Commission adopted a decision to levy a penalty payment of EUR 280.5 million on Microsoft for continued non-compliance with the Commission Decision of 24 March 2004 in Case COMP/C-3/37.792, Microsoft (“the 2004 Decision”) (1). This was the first time the Commission had to have recourse to its powers under Article 24 of Regulation 1/2003 in order to compel an undertaking to comply with a prohibition decision.

According to Article 24 of Regulation 1/2003, the Commission may impose daily periodic penalty payments not exceeding 5% of the average daily turnover in order to compel an undertaking to put an end to an infringement of Article 81 or 82 EC, in accordance with a prohibition decision taken pursuant to Article 7 of Regulation 1/2003.

The procedure under Article 24 of Regulation 1/2003 follows the one laid down in the equivalent provision of Regulation 7/62 (Article 6). However, the level of the periodic penalty payments which the Commission may impose on undertakings was increased with Regulation 1/2003 (2).

In line with the case-law on Article 16 of Regulation 17/62, the procedure involves three steps. First, a preliminary decision pursuant to Article 24(1) warning the undertaking that a periodic penalty payment will be levied from a certain date in case of non-compliance by this date. The final decision pursuant to Article 24(2) will fix the definitive amount of the penalty payment to be paid by the undertaking. Between these two events, a Statement of Objections should be sent to the undertaking in order to safeguard its rights of defence (3).

2. The procedure against Microsoft pursuant to Article 24 of Regulation 1/2003

2.1. The 2004 Decision
The 2004 Decision concluded that Microsoft had abused its dominant position in PC operating systems by (i) refusing to provide interoperability information necessary for competitors to be able to effectively compete in the work group server operating system market and (ii) tying its Windows Media Player with the Windows PC operating system. The Commission imposed a EUR 497,196,304 fine on Microsoft and ordered it to bring the above-mentioned infringements of Article 82 EC to an end (Article 4 of the 2004 Decision).

In particular, the Commission ordered Microsoft to supply interoperability information to interested undertakings on reasonable and non-discriminatory terms (“the interoperability remedy”, Article 5 of the 2004 Decision) and to offer a functioning version of its Windows PC operating system which did not incorporate Windows Media Player (“the tying remedy”, Article 6 of the 2004 Decision).

The 2004 Decision also provided for the establishment of a monitoring mechanism, including a monitoring trustee, whose role would be to provide expert advice to the Commission on Microsoft’s compliance with the 2004 Decision. On 28 July 2005, the Commission adopted a decision on the Monitoring Trustee as foreseen in Article 7 of the 2004 Decision (4). This decision sets out the framework under which the Monitoring Trustee works. Subsequently, the Commission invited Microsoft to put forward candidates for the position of Monitoring Trustee. After a selection procedure, on 4 October 2005, on the basis of a shortlist of candidates submitted by Microsoft, the Commission appointed as Monitoring Trustee Professor Neil Barrett, a British computer science expert.

(1) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.
(3) Regulation 17/62 only permitted periodic penalty payments of between 50 and 1000 units of account per day.
2.2. Assessment of Microsoft’s compliance with the 2004 Decision

2.2.1. A first warning: the Article 24(1) Decision

The 2004 Decision granted Microsoft a 120-day deadline to implement the interoperability remedy and a 90-day deadline to implement the tying remedy (9). The obligations imposed by the 2004 Decision were suspended pending the Court of First Instance’s consideration of Microsoft’s request for interim measures. This application for interim measures was dismissed by the President of the Court of First Instance on 22 December 2004 (7).

After the rejection of Microsoft’s application for interim measures, the Commission engaged in discussions with Microsoft about its compliance with the 2004 Decision. As regards the interoperability remedy, Microsoft submitted interoperability information in the form of a technical description (“specification”) of the protocols relevant to communication between Windows PCs and work group servers (the “Technical Documentation”) (8). This Technical Documentation was reviewed in the course of 2005 by the Commission’s technical experts and several third parties (through an evaluation procedure with confidentiality safeguards) as well as by the Monitoring Trustee; these reviews all came to the conclusion that the Technical Documentation failed to provide sufficient information to build competing interoperable work group server operating system products. The Technical Documentation presented by Microsoft therefore fell short of the requirements of the 2004 Decision, namely to provide complete and accurate interoperability information.

In light of the results of the market test and on the basis of the expert opinions on the Technical Documentation, the Commission decided to open proceedings against Microsoft in order to compel it to comply with its obligations stemming from the 2004 Decision. Consequently, on 10 November 2005, the Commission adopted a decision pursuant to Article 24(1) of Regulation 1/2003 (“the Article 24(1) Decision”) (7). By means of this decision, a periodic penalty payment of EUR 2 million per day was imposed on Microsoft as from 15 December 2005 in the event that by that date, it had not complied with Article 5(a) and (c) of the 2004 Decision, i.e. its obligations (i) to supply complete and accurate interoperability information; and (ii) to make that information available on reasonable terms.

2.2.2. The Article 24(2) Decision

2.2.2.1. The review of the Technical Documentation

Following the adoption of the Article 24(1) Decision, Microsoft provided revised Technical Documentation which was in turn reviewed by the Commission’s experts, by the Monitoring Trustee and third parties as to its completeness and accuracy. The review undertaken of the different versions of Technical Documentation supplied by Microsoft led to the conclusion that the documentation did not provide complete and accurate interoperability information to interested undertakings as required by the 2004 Decision (10).

In the light of the findings on the state of the Technical Documentation provided to the Commission by Microsoft in response to the Article 24(1) Decision and after having given Microsoft the opportunity to respond to the Commission’s concerns both in writing (11) and in an oral hearing, the Commission concluded that Microsoft had failed to comply with its obligation to supply complete and accurate interoperability information according to Article 5(a) and (c) of the 2004 Decision.

Consequently, on 12 July 2006, the Commission adopted a decision pursuant to Article 24(2) of Regulation 1/2003 fixing the definitive amount of the periodic penalty payment imposed on Microsoft by the Article 24(1) Decision for the period between 16 December 2005 and 20 June 2006 at Euro 280.5 million (“the Article 24(2) Decision”) and to increase the level of the periodic penalty payment imposed by the Article 24(1) Decision in the case of continuing non-compliance after 31 July 2006 to EUR 3 million per day.

2.2.2.2. Relevant period and amount of the penalty payment

Article 24(2) reads: “Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the

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(9) For a more detailed discussion of the Decision, see Competition Policy Newsletter 2004, Number 2.
(7) Order of the President of the Court of First Instance of 22 December 2004 in Case T-201/04 R, Microsoft, not yet reported.
(8) Article 1(2) of the Decision defines a “Protocol” as “a set of rules of interconnection and interaction between various instances of Windows Work Group Server Operating Systems and Windows Client PC Operating Systems running on different computers in a Windows Work Group Network”.
(11) In May 2006, the Monitoring Trustee concluded that “[t]he [March 2006 version of the] Technical Documentation appears still to be fundamentally flawed in its conception and in its level of explanation and detail […]”.
(12) A Statement of Objections and two letters of facts were addressed to Microsoft.
definitive amount of the periodic penalty payment at a figure lower that which would arise under the original decision.”

In the light of this wording the question arises whether the Commission may fix a definitive amount in cases where an undertaking has not yet satisfied its obligations. In the Article 24(2) Decision (recital 238) the Commission takes the position that it may indeed fix a definitive amount in such a case. Otherwise an undertaking could escape from paying periodic penalty payments imposed on it by continuously failing to comply, which would void Article 24 of its useful effect.

The Article 24(2) Decision concerns a period of established non compliance from 16 December 2005 to 20 June 2006, the date on which the draft decision was sent to the members of the Advisory Committee in accordance with Article 14(3) of Regulation 1/2003 (“the relevant period”). The Article 24(2) Decision indicates that the Commission will carry out an assessment of further revisions of the Technical Documentation undertaken by Microsoft, once Microsoft has provided such revised documentation for all protocols. The 24(2) Decision also makes clear that the penalty payment imposed by the Article 24(1) Decision (with an increase as from 1 August 2006, see below) continues to apply after the end of the relevant period.

In order to determine the level of the periodic penalty payment of Euro 2 million per day in its Article 24(1) Decision the Commission took the following factors into account: (i) the extent to which Microsoft's failure to meet its obligations had reduced the effectiveness of the 2004 Decision and (ii) the necessity of imposing a proportionate and sufficient periodic penalty payment to compel compliance by rendering it economically rational for an undertaking to comply instead of reaping the benefits of non-compliance.

The Commission found that Microsoft's continuing failure to comply was likely to further increase the risk of elimination of competition in the workgroup server operation system market identified in the 2004 Decision. The Commission also held that the effectiveness of Articles 5 (a) and (c) of the 2004 Decision was entirely or at least largely eliminated by Microsoft's non-compliance. This fact would have enabled the Commission to fix the definitive amount of the periodic penalty payment for the period between 16 December 2005 and 20 June 2005 on the basis of the full amount of Euro 2 million per day. However, in order to retain the possibility of fixing a definitive amount of the periodic penalty payment also for the second aspect of non-compliance identified in the Article 24(1) Decision, namely the reasonableness of the remuneration charged by Microsoft for the interoperability information, the Commission decided to fix the definitive amount of penalty payment at EUR 280.5 million, which corresponds to a daily penalty payment of EUR 1.5 million for the relevant period.

2.2.2.3. Increase of the periodic penalty payment

Given the urgent need to establish compliance, the Commission considered it appropriate to amend the Article 24(1) Decision and increase the level of the periodic penalty payment to EUR 3 million, with effect from 31 July 2006. Since it is possible that the disclosure order in Articles 5(a) and (c) of the Decision can be entirely or largely deprived of its effectiveness either through a failure by Microsoft to provide complete and accurate interoperability information or by Microsoft requiring an unreasonable remuneration, this amount applies equally to both aspects of Microsoft's non compliance preliminarily identified in the Article 24(1) Decision of 10 November 2005.

3. Conclusion

This case demonstrates the Commission's determination to ensure compliance with its prohibition decisions, if necessary by means of high penalty payments imposed on undertakings, that do not comply with their obligations.