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EUROPEISKA GEMENSKAPERNAS FÖRSTAINSTANSRÄTT

- 293884 -

REPORT FOR THE HEARING*

(Supplement on Interventions)

In Case T-201/04,

Microsoft Corporation, established in Redmond, Washington (United States), represented by J.-F. Bellis, lawyer, and I. S. Forrester, QC,

applicant,

supported by

Association for Competitive Technology, Inc., established in Washington, DC (United States), represented by L. Ruessmann, lawyer,

DMDsecure.com BV, established in Amsterdam (Netherlands),

MPS Broadband AB, established in Stockholm (Sweden),

Pace Micro Technology plc, established in Shipley (United Kingdom),

Quantel Ltd, established in Newbury (United Kingdom),

Tandberg Television Ltd, established in Southampton (United Kingdom),

represented by J. Bourgeois, lawyer,

Exor AB, established in Uppsala (Sweden), represented by S. Martínez Lage, H. Brokelmann and R. Allendesalazar Corcho, lawyers,

Mamut ASA, established in Oslo (Norway),

TeamSystem SpA, established in Pesaro (Italy),

represented by G. Berrisch, lawyer,

The Computing Technology Industry Association, Inc., established in Oakbrook Terrace (United States), represented by G. van Gerven and T. Franchoo, lawyers, and B. Kilpatrick, Solicitor,

* Language of the case : English.

interveners,

v

Commission of the European Communities, represented by R. B. Wainwright, F. Castillo de la Torre, P. Hellström and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

AudioBanner.com, trading as 'VideoBanner', established in Los Angeles (United States), represented by L. Alvizar, lawyer,

Free Software Foundation Europe eV, established in Hamburg (Germany), represented by C. Piana, lawyer,

Software & Information Industry Association (SIIA), established in Washington, DC, represented by C. Simpson, Solicitor, J. Flynn Q. C., D. Paemen , N. Dodoo, and M. Dolmans, lawyers,

European Committee for Interoperable Systems (ECIS), established in Brussels (Belgium), represented by J. Flynn Q. C., D. Paemen, N. Dodoo, and M. Dolmans, lawyers,

interveners,

APPLICATION for the annulment of Commission Decision C(2004) 900 final of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 – Microsoft) or, in the alternative, the annulment of or the reduction in the fine imposed on the applicant in that decision

Introduction

1 This supplementary report for the hearing is limited to additional submissions made by the parties admitted to intervene in support of the principal parties and which are not covered by their confirmation of arguments already summarised in the main report. It includes the observations of the principal parties on those submissions.

2 The interveners supporting Microsoft as set out above are mainly computer industry associations, designers, developers and manufacturers of PC technology,

software vendors, broadband, video service and digital technology for home providers, web page, website and web applications creators.

3 The submissions made by these interveners relate principally to the issues arising out of the infringements found at Article 2 (b) of the contested decision (these are referred to below as the 'WMP issues'). The two associations, ACT and CompTIA make submissions also in relation to infringements found at article 2 (a) of the contested decision (these issues are referred to below as the 'interoperability issues').

4 The interveners supporting Microsoft confirm Microsoft's submissions and add some new points, particularly as regards the arguments put forward by Microsoft on the following issues:

- in the second branch of second plea on Windows Media Player, the Commission ought to have taken into account the efficiencies of Microsoft's business model as one integrated model offering new functionalities for Windows;

- in the first branch of second plea on Windows Media Player, the Commission applied a new, speculative theory without sound legal basis in relation to foreclosure of competition;

- in the third branch of second plea on Windows Media Player, the Commission fails to demonstrate the infringement of Article 82 EC and in particular of its paragraph (d);

- in the first branch of first plea on interoperability, the criteria for compulsory licensing are not satisfied.

5 The interveners supporting the Commission confirm the latter's submissions. SIIA puts forward arguments on both the interoperability and the WMP issues. FSFE makes submissions in relation to the interoperability issues, while VideoBanner's arguments relate to the WMP issues.

Order sought by the interveners

6 The Association for Competitive Technology (hereafter 'ACT') contends that the Court should:

- annul the contested decision; and

- order the Commission to pay the costs.

7 The Computing Technology Industry Association (hereafter 'CompTIA') contends that the Court should:

- annul the contested decision; and

– order the Commission to pay the costs.

8 DMDsecure.com B.V., MPS Broadband AB, Pace Micro Technology plc, Quantel Ltd, Tandberg Television Ltd (hereafter 'DMD a.o.') contend that the Court should:

– annul Articles 2(b), 4, 6(a) and 7 of the contested decision;

– order the Commission to bear the cost of the intervention.

9 Exor AB (hereafter 'Exor') contends that the Court should:

– annul Articles 2, 4, 6(a) and 7 of the contested decision;

– order the Commission to bear the cost of the intervention.

10 Mamut ASA and TeamSystem SpA (hereafter 'M. and T.') contend that the Court should:

– annul the contested decision;

– order the Commission to bear the costs.

11 The Software & Information Industry Association (hereafter 'SIIA') contends that the Court should:

– dismiss the application;

– order Microsoft to pay the costs, including the costs of SIIA.

12 The Free Software Foundation Europe (hereafter 'FSFE') contends that the Court should:

– dismiss the application;

– order Microsoft to pay the costs.

13 AudioBanner.com, trading as 'VideoBanner' (hereafter 'VideoBanner') contends that the Court should:

– dismiss the application;

– order Microsoft to pay the costs of VideoBanner.

Arguments of the interveners and observations of the main parties

1. *Refusal to provide interoperability information and to allow its use*

Arguments of the parties intervening in support of Microsoft

Arguments of ACT

– As to the standard of proof and duty to give reasons

14 ACT first makes some preliminary remarks on the standard of proof. It claims that, in accordance with the case law T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381 and C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, a high standard of proof applies when (i) the analysis involves speculation as to future outcome, (ii) the type of operation involved would not usually be considered problematic, or (iii) the case involves novel economic theories. It argues that the burden of proof on the Commission in the present case is particularly high, as the contested decision 'speculates in relation to future market developments' and 'involves novel and untested theories', both as regards the interoperability and the tying issues. ACT claims that the Commission has not met the required standard of proof because it assumed rather than proved the abuse and relied upon 'unpredicted future developments'.

15 Secondly, as to the duty to give reasons, ACT contends that the Commission has set out neither an 'adequate and clear' nor an 'unequivocal reasoning' in the contested decision, thereby contravening Article 253 EC. It underlines that on the basis of judgments T-38/92 *AWS Benelux v Commission* [1994] ECR II-211 and C-350/88 *Delacre a.o. v Commission* ECR [1990] I-395, the reasons to be given by the Commission should have been particularly detailed in the present case, since Microsoft has consistently denied liability during the administrative procedure and because the decision departs from established precedent.

16 As regards the interoperability issues, ACT (i) contends that indispensability is a necessary condition, (ii) analyses the implications of the contested decision for intellectual property rights and (iii) draws some conclusions and policy implications and finally analyses the TRIPS related arguments.

– Indispensability

17 ACT first argues that in *IMS Health* and *Bronner* the Court has clearly considered indispensability a necessary condition of any finding of abuse in a refusal to supply case irrespective of whether the input in question was physical property, intellectual property, other valuable commercial information or even just the provision of a delivery service.

18 Secondly, it argues that the contested decision applied a lower instead of the correct test for indispensability and failed to provide evidence to prove to the

required standard either that Microsoft has no competitor in the relevant market and that no one could enter the market without provision of the relevant material, or that although there is some present competition, the refusal to supply will cause it to exit the market and that no one else could enter the market without provision of the relevant material.

19 Furthermore, ACT considers that *IMS Health* implies that indispensability entails necessity. Only if the product or service is necessary for an undertaking to be able to compete in a market, will the refusal to supply that product or service eliminate competition in that market. ACT therefore argues that the 'elimination of competition requirement adds little if anything to the indispensability condition' and concludes that the 'risk of elimination of competition', to which the decision refers, dilutes, misapplies and fails to provide sufficient proof for the indispensability condition. ACT considers that this dilution is particularly dubious, since it applies a 'risk' standard to a market, namely that for work group server operating systems, which is extremely narrowly defined and not recognised in the industry.

20 Thirdly, ACT claims that there is an inherent contradiction between the Commission's observations about the market defined and its finding of indispensability and questions how information on interoperability can be indispensable if 40% of the market is in fact served by competitors.

21 ACT further finds that in any case, strong evidence would be required because:

- of the very serious consequences for Microsoft (quasi-criminal sanctions);
- the case concerns a finding of infringement in relation to actions (refusals to deal) which are prima facie lawful and would constitute an exception to the principle that a commercial undertaking, even dominant, is entitled to deal or not deal freely;
- the Commission is making a novel application of the indispensability test which differs from the existing case law in that competitors do continue to operate in the market; and
- the decision makes uncertain predictions about the future, and not just the immediate future.

22 Moreover, ACT contests the new proposition put forward by the Commission in paragraph 100 of the defence to ignore, when deciding whether someone is a competitor, de minimis competitors who have effectively left the market. ACT considers this argument to be inadmissible as introduced only in the defence. As to its substance, it disputes the validity of the argument on the following grounds:

- the de minimis qualification is inadequate and the Commission fails to explain how operators who are selling competing products, and are specifically defined as within the relevant market, can at the same time 'effectively' have left it;

- the concept does not appear in the relevant case law and compelling reasons should have been given for the introduction of such a new proposition;

- in absence of any basis for the definition of the de minimis notion, it would be impossible to understand the Commission's application of the term and, in any event, it would be implausible that all or its greater part of the competitors occupying up to 40 percent of the relevant market be held to be 'de minimis', especially in view of the individual market share figures relied upon by the Commission (10-25%, 5-15% and 5-15%).

23 ACT also contests as unreasonable paragraph 609 of the Defence, where the Commission argues that by taking market share from Netware rather than from Microsoft, Linux is somehow not a competitor of Microsoft. ACT deduces from this that the reference to de minimis competition does not resolve the contradiction in the Commission's analysis, the term being an 'unjustified attempt to dilute the indispensability condition' and/or inapplicable as a matter of fact. It also considers that the concept of 'threat of effective competition', is equally unexplained.

24 ACT disputes the Commission's findings on the gradual elimination of competition and contends that it has given sufficient evidence of the inevitable elimination of competition. It argues that the refusal to supply in question must still cause exit from the market, even if the elimination is gradual. ACT also affirms that the indispensability criterion is not met by a mere risk of elimination of competition.

25 Although no precise date for the elimination of competition may be necessary, ACT asserts that the longer the period until the event relied upon takes place, the more compelling the evidence must be that it will in fact ultimately take place. According to ACT, the Commission has failed to provide the evidence. Moreover, it considers that the Commission has erred in determining the position of Linux, which is in reality a growing competitor of Microsoft. In this regard, ACT finds that the Commission has, in recitals 605 and 606 of the contested decision, misinterpreted the outcome of the Mercer survey, when it finds that Linux would not become a viable competitor in future years because it relied on the opinion given by 20% of the sample but ignored the 75% who had the opposite opinion.

26 More generally, ACT contests the conclusion the Commission has drawn from Netware's fall of the market share since Microsoft entered the work group server operating systems market. It argues that this was due to an inability to adapt to evolving user demand and this argument is supported by the fact that during the same period of time the use of Linux has grown despite the fact that Linux too had no access to the protocols. ACT considers that by placing such weight upon

changes in the market share of Novell, the Commission ends up trying to protect a competitor and not competition.

27 To conclude on indispensability, ACT supports Microsoft's argument that there are at least five alternative methods to achieve interoperability and considers that the Commission's rejection of them is 'unsustainable'. It submits that requiring full compatibility of any alternatives with the Windows work group servers is in contradiction with the case law on the question as to whether there are products or services which provide alternative solutions, even if they are less advantageous.

– As to the implications of the contested decision for intellectual property rights

28 ACT considers the contested decision to be contrary to the rules on essential facilities as expressed in the case law. It expresses its concern as to the Commission's failure to follow existing, stable, and appropriate norms when considering the interrelationship between competition law and intellectual property.

– As to the policy implications

29 ACT is concerned that the Commission's 'incoherent and unreasonable' interpretation of the indispensability condition will have a 'serious detrimental effect on innovation and investment' and argues that by introducing legal uncertainty as to compulsory licensing of intellectual property rights, it will have 'a chilling effect when it comes to outside investments and attracting and retaining key employees that rely on the value of equity in their companies at least in part for their compensation'.

– As to the consistency of the interpretation of Article 82 EC with the TRIPS agreement

30 ACT argues that even if there can exist 'exceptional circumstances' other than those outlined in the case law, the Commission did not define any criteria for identifying them. It thereby contravened the principle of legal certainty and failed to respect fundamental Community law principles, including the obligation to interpret Community law whenever possible in a manner that is in conformity with the Community's international obligations, in particular under TRIPS.

31 ACT further contends that the Commission's interpretation of Article 82 EC in the contested decision is inconsistent with the EC's obligations under the TRIPS Agreement in three respects:

- by creating an exception to exclusive rights in copyrighted works not permitted under Article 13 of the TRIPS Agreement. In particular, ACT argues that none of the three cumulative conditions of Article 13 is satisfied in the remedy ordered in Article 5 of the contested decision and that the

Commission, despite having options in compliance with the TRIPS agreement, chose an inconsistent approach;

– by providing a license without the permission of the patent owner in a manner inconsistent with Article 31 of the TRIPS Agreement. In particular, ACT considers that according to Article 31 (a) of the TRIPS Agreement, licenses must be granted only on a case-by-case basis and the Commission's approach which grants 'a blanket compulsory license to a category of inventions not considering individual merits' is therefore in violation of that article;

– by providing either the irreversible loss of trade secrets or a compulsory license of trade secrets 'resulting in their complete destruction', which are not allowed by Section 7 of the TRIPS Agreement.

Arguments of CompTIA

32 CompTIA first emphasises the importance of strong intellectual property protection in the information and communication technologies ('ICT'). Second, it claims that the Commission's analysis in the present case is inconsistent with *IMS Health*, in particular with regard to the test for compulsory licensing, the indispensability and necessity requirement, the new product criterion, the elimination of competition on a secondary market and the presence of an objective justification. Finally, CompTIA argues that the standard proposed by the Commission would have a significantly adverse impact on the ICT industry and consumer welfare, as compulsory licensing would become common practice generating uncertainty and reducing incentives to innovate.

– As to the importance of strong intellectual property protection in ICT and of the adverse impact on the ICT industry and on consumer welfare of the standard proposed by the Commission

33 CompTIA asserts that the Commission fails to consider the huge importance for technology companies and their financial backers of intellectual property protection in the ICT industry, both patents and trade secrets alike. It adds that the right to exclude others from using the intellectual property enables the innovator to recover its investment and is especially important in this industry where many efforts fail and market leaders are displaced in short time.

– As to the inconsistency of the Commission's analysis with *IMS Health*

34 CompTIA supports Microsoft's submission on the first branch of the first plea concerning interoperability to the effect that the Commission's analysis in the present case is inconsistent with *IMS Health* and disputes the presence of the *IMS Health* conditions with five main arguments.

- In the first place, the standard for compulsory licensing used by the Commission fails to comply with the *IMS Health* four part test and, even if Microsoft's protocols would not be considered as intellectual property, with the *Bronner* standard.

- Secondly, the Commission has misstated the legal standard for indispensability, which must be judged on an objective basis. It finds that the Commission's view, that competing vendors of work group server operating systems must achieve a level of interoperability with the Windows client that is as good as that achieved by Microsoft itself, is incompatible with the criteria put forward by the Court in *IMS Health* and *Bronner*. CompTIA estimates that, because a different but viable level of interoperability can be achieved without the disclosure of Microsoft's specifications, no compulsory licence is justified. Moreover, CompTIA claims that no interoperability problems exist because 40% of the work group server market is controlled by non-Microsoft products and that current approaches to interoperability in the marketplace provide satisfactory solutions to its members.

- Thirdly, the Commission has not demonstrated that Microsoft's refusal to provide intellectual property has prevented the emergence of a new product in a secondary market that cannot be commercialised without a license. It argues that this criterion has to be interpreted restrictively when other firms do not wish to offer a genuinely new product but only to 'free ride' upon the innovator's creativity. Further CompTIA submits that in the interest of legal certainty, limitation to intellectual property rights should only be ordered under clear and objective exceptional conditions.

- In the fourth place, the Commission failed to demonstrate that the refusal to supply the technology at issue is 'likely to eliminate all competition in the secondary market' but contents itself with a 'lower standard of risk' instead of 'likelihood of elimination of competition'. CompTIA adds that the test based on likelihood would still permit prior intervention, would be more consistent with a high standard of proof required to override intellectual property in prospective analysis and would provide operators in the market with sufficient legal certainty. CompTIA further disputes the facts on which the Commission bases its assessment, submitting that the evidence that a number of competitors exist (and retain 40% of the market) almost six years after the alleged refusal and the growing success of Linux, indicate that there is not even a risk of exclusion of competition.

- Finally, CompTIA objects to the Commission's new balancing test claiming that it is contrary to the *Bronner* test, where the Court held that the refusal was incapable of being objectively justified and to the *IMS Health* test, where the Court held that the exercise of intellectual property rights is justified notwithstanding adverse effects on competition, save in exceptional cases. CompTIA considers that the information in the present case concerning communication protocols is 'the essence of Microsoft's business' and is subject to protection of copyright, trade secrets and patents. It differs from that at stake in *Magill* and *IMS Health*. In those cases, there was a clear imbalance between the creative effort of the right holder and the economic advantages flowing from the exercise of the right, and that weakened the business justification for the refusal. CompTIA also disputes the Commission's argument to the effect that the software industry requires a different approach, since 'traditional solutions may have to be adapted in sectors where network effects are pervasive' and the Community legislator has placed particular weight on interoperability. CompTIA argues that such an approach would involve an extraordinary inroad on intellectual property protection in Europe and is fundamentally inconsistent with *IMS Health*. It concludes that such a departure from existing case law is not justified merely because there are network effects, since such effects are also present in the transport and the telecom sectors, where no suspension of intellectual property rights has been suggested.

– As to the 'adverse impact on the ICT industry and on consumer welfare' of the standard proposed by the Commission

35 CompTIA rejects the Commission's 'unduly liberal' interpretation of *IMS Health* to the effect that intervention is justified if there is a mere 'risk that competition may be eliminated'. This interpretation suggests that anything which is not a 'mere clone' satisfies the new product test. CompTIA further states that the only threshold criterion retained from *IMS Health* by the Commission is the indispensability test which it considers met if a competitor suffers any degree of competitive disadvantage. CompTIA adds that the Commission failed to analyse the justifications based on incentives to innovate and instead introduces a new balancing test. CompTIA further argues that if this interpretation was correct, it would lead to compulsory licences becoming a recurrent practice rather than 'exceptional circumstances' as identified by the Court.

36 Secondly, CompTIA submits that the Commission's standard would 'have a profoundly negative impact on innovation and investment', because:

– competitors will have an incentive to free-ride on innovations thereby damaging CompTIA's members;

– undertaking innovative R&D will be discouraged particularly because the results will have to be shared with competitors;

– intellectual property rights will become irrelevant, as they will not provide any added protection ;

– companies would be deterred from licensing intellectual property, fearing that they would have to license all related technology in the future.

CompTIA further argues that the Commission fails to distinguish between short and medium-to-long term incentives to innovate. It states that 'compulsory licensing of IP will send the same message to the IT industry that high piracy rates do', reducing IT investment and weakening the overall industry.

37 Thirdly, CompTIA contends that the Commission's standard will have adverse effects on predictability because:

– of the inconsistency of this interpretation with 'the restrictive case-law approach';

– of the fact that the balancing test fails to provide any practical guidance enabling firms to evaluate their conduct and incentive to innovate; and as

– more firms will be found to be dominant due to the narrow market definition in the software industry thus creating significant uncertainty.

Arguments of the parties intervening in support of the Commission

Arguments of SIIA

38 SIIA makes three points. First, it stresses the 'vital importance of interoperability'. Second, it submits that 'the circumstances of the present case justify a finding of abuse under all the case law'. Third, it submits that Microsoft's claims that the contested decision imposes compulsory licensing of intellectual property are unsupported.

– As to the 'vital importance of interoperability'

39 SIIA states that interoperability is a 'cornerstone' of the software industry and drives competition on the merits and innovation in that industry.

40 SIIA explains that consumers demand and expect interoperability. The ability of a computer program to achieve interoperability with quasi-monopoly products such as the Windows desktop operating system is of especially critical significance to them.

41 SIIA also submits that, in normal competitive circumstances, software developers have every incentive to recognize the benefits of interoperability to consumers and to standardize their products on publicly available protocols and to share interoperability information freely. In software markets characterised by monopoly, the normal industry incentives to facilitate interoperability among competitors do not prevail. SIIA further states that, in situations where Microsoft has quasi-monopoly positions, Microsoft has an incentive to leverage those

positions into adjacent markets by various means, including in particular by frustrating competitors' ability to achieve interoperability with its quasi-monopoly products.

42 SIIA points out that it does not seek disclosure of information that will allow a non-Microsoft server operating system to function in all respects like a Windows server operating system. What the contested decision, the industry and consumers require is the disclosure of information that will allow a non-Microsoft work group server operating system to interoperate with Microsoft's quasi-monopoly desktop operating systems and dominant work group server operating systems in the same way as Microsoft's own server operating systems interoperate. This is called 'interoperability', 'plug replaceability' or 'plug compatibility' in the industry.

43 SIIA considers that the 'IBM Undertaking' provides a valuable point of reference for the current case.

44 SIIA also considers that it is appropriate and proportionate that Microsoft should, as a quasi-monopoly undertaking, be required to disclose and to allow the use of the interface specifications necessary for the competitors to achieve the same sort of interoperability with its dominant products as is achieved by its own work group server operating systems products. Otherwise, competition cannot occur on the merits and effective competition in the work group server operating systems market will be extinguished.

45 In addition, SIIA points out that the contested decision does not require the disclosure of Microsoft's source code for the software with which interoperability is required and that the protocol specifications which must be disclosed do not explain to the reader how to write such code.

46 Finally, SIIA relies on Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42).

– As to the allegation that 'the circumstances of the present case justify a finding of abuse under all the case law'

47 First of all, SIIA contends that all circumstances previously found to justify a finding that a refusal to supply or license is abusive are present in this case.

48 In that context, SIIA states that Microsoft has completely failed to demonstrate that its intellectual property rights will be affected by the contested decision. It submits that even if the remedy provided for in Article 5 of the contested decision does involve an impact on Microsoft's intellectual property, all the circumstances previously taken into account in the Community Courts' case-law in deciding whether a refusal to license is abusive are found in the present case and are demonstrated in the contested decision. Moreover, all the circumstances held in

the case-law to justify the finding of an abusive refusal to supply in cases not involving mandatory licences of intellectual property have also been met.

49 SIIA then examines the relevant case-law and identifies the circumstances the Community courts have found to justify finding refusals to supply to be abusive. It examines specifically the judgments in the following cases : Case 6/73 *Istituto Chemioterapico Italiano and Commercial Solvents v Commission* [1974] ECR 223, Case 311/84 CBEM v CLT and IPB (*'Telemarketing'*) [1985] ECR 3261, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* (*'Magill'*) [1995] ECR I-743, Case T-504/93 *Tiercé Ladbroke v Commission* [1997] ECR II-923, Case C-7/97 *Bronner v Mediaprint* (*'Bronner'*) [1998] ECR I-7791 and Case C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* (*'IMS Health'*) [2004] ECR I-5039.

50 SIIA submits that the above-mentioned circumstances are all present in this case. It explains that:

– the refusal by Microsoft of which the Commission complains concerns an 'input';

– the parties requesting the interoperability information are active on a separate market, i.e. that for work group server operating systems;

– the interoperability information is 'essential' or 'indispensable';

– the refusal prevents or hinders innovation;

– the refusal is such as to exclude all competition on a relevant market; and

– the refusal is unjustified.

51 As regards the allegation that the interoperability information is 'essential' or 'indispensable', SIIA asserts inter alia that Microsoft incorrectly characterizes the way interoperability is understood in the industry and that there are no alternatives to the interoperability information that Microsoft withholds.

52 As regards the allegation that the refusal in question prevents or hinders innovation, SIIA states that the remedy will increase competitors' research and development incentives and substantially improve the appeal of their products. In turn, faced with more effective competition, Microsoft will itself have incentives to invest more in research and development.

53 In that context, SIIA further states that the products Microsoft is preventing from emerging through its refusal meet the criteria laid down in the judgment in *IMS Health*. It points out that the vendors of work group server operating systems would implement the interoperability information to offer products that are not substitutable for the products on the market on which Microsoft exerts its refusal,

i.e. the market for PC operating systems. Disclosure of the interoperability information will allow these vendors to offer 'new and innovative products with enhanced functional capabilities while remaining interoperable'. Most importantly, the products Microsoft is preventing from emerging are interoperable products and there is 'unmet consumer demand for interoperable work group servers'. Finally, SIIA states that the 'new products' will not duplicate Microsoft's functionality.

54 With respect to the exclusion of competition, SIIA submits that Microsoft's allegations have no support in law or in fact. It observes that the Community courts do not require evidence of elimination of 'all' competition and that it is sufficient to show that there is a real likelihood that effective competition would be eliminated in the relevant market unless the abuse were brought to an end. SIIA further states that Microsoft's reliance on the development of Linux does not contradict the contested decision's findings on the elimination of effective competition. It stresses that Linux is an operating system not a single firm and that, therefore, Linux's market share in the work group server operating system market is an aggregate of the market shares of various relatively small software firms such as Red Hat and Novell who offer work group server products that are built on top of the open-source Linux operating system. Finally, SIIA disputes the IDC data used by Microsoft and observes that any growth in Linux share is at the expense of NetWare and UNIX, not Windows.

55 Secondly, SIIA claims that the Court of First Instance should consider the entirety of the exceptional circumstances found in this case and should not limit itself to the circumstances found exceptional in *IMS Health*. According to SIIA, there is no single exclusive list of circumstances that must be found in a mandatory licence case and the existence of exceptional circumstances is to be assessed in the specific context of the facts of each case.

56 SIIA also stresses that there are important differences between the present case and *Magill*, *Bronner* and *IMS Health*. In that regard, it points out that:

- in both *Magill* and *IMS Health*, the conduct at issue was a refusal by the incumbents to grant a licence of an intellectual property right, whose existence and infringement had been explicitly established in national court proceedings;

- in neither *Magill* nor *IMS Health* had any of the parties ever licensed the copyright to anyone else for production of the product the complainant wished to offer to the market;

- the material at issue in *Magill* and *IMS Health* effectively constituted the essence of the product sought to be offered by competitors.

57 Thirdly, SIIA lists the additional 'exceptional circumstances' present in the current case which justify a finding of abuse. These circumstances are the following:

- Microsoft has an unusual quasi-monoply position on the market from which it leverages its dominance; this dominance has been long-lasting and is characterised by extremely high market shares;

- the markets involved are related by strong and unavoidable technological links existing between PC operating systems and work group server operating systems, by virtue of the computer networks in which they are used which require them to work closely together;

- disclosing interoperability information is standard industry practice;

- Microsoft previously made available the same type of interoperability information the contested decision requires it to disclose (disruption of previous levels of supply);

- Microsoft's selective refusals to supply have become part of a pattern of conduct;

- Microsoft's behaviour not only allows it to capture a neighbouring market, but also helps it to protect its 'desktop monopoly';

- the European Union has through adoption of Directive 91/250 recognised the fundamental importance of interoperability and the disclosure of interoperability information in the software sphere;

- Microsoft's refusal diminishes incentives to innovate on the part both of Microsoft and its competitors;

- Microsoft's conduct already has led to exceptional harm to competition: Microsoft has rapidly acquired a dominant position in the work group server operating system market with around 70% of the market;

- Microsoft invokes no legitimate objective justification for its decision to cease supplying the type of information it provided in the past, and no objective justification for its refusal to disclose the interoperability information; and

- Microsoft's behaviour has adversely affected consumers.

– As to the allegation that Microsoft's claims that the contested decision imposes compulsory licensing of intellectual property are unsupported

58 First, SIIA contends that no infringement of Microsoft's intellectual property rights is likely to occur as a result of the contested decision.

59 In that respect, SIIA maintains that Microsoft has not established that a compulsory patent licence would be imposed as a result of the contested decision. It observes inter alia that the patents claimed by Microsoft are not infringed when Microsoft's competitors develop (or users use) implementations using the interoperability information to communicate with Windows client or server operating systems or other licensed operating systems.

60 SIIA also maintains that Microsoft has not established that the contested decision has the effect of imposing a compulsory copyright licence. Microsoft is only required to provide specifications that describe the ideas, principles and methods underlying the protocols used for interoperation with Windows. Only those ideas, principles and methods will be implemented (at considerable effort and expense) by competitors in their programs in order for them to achieve interoperability with Microsoft's client PC operating systems. By their nature, protocol specifications are expressed in a completely different way from the implementations of those ideas, principles and methods in computer program code.

61 Secondly, SIIA states that trade secrets are not comparable to intellectual property rights such as copyrights and patents.

Arguments of FSFE

62 FSFE expresses views on the following topics: (1) the actual value of the technology concerned; (2) the history of personal computing; (3) the existence of a sufficient level of competition in the secondary market and risk of disappearance; (4) the indispensability of the measure to restore competition; (5) the unprecedented competitive advantage enjoyed by Microsoft because of multiple combined network effects; and (6) the real incentive to innovate.

– As to the actual value of the technology concerned

63 FSFE submits that the technology that Microsoft refuses to divulge to its competitors is neither new nor innovative and is based on 'existing standards which Microsoft embraced and extended'. It states that the remedy provided for in Article 5 of the contested decision 'must be used to produce an independent implementation of protocols and interfaces, not to use programming code or internal arcane of Microsoft' and that the 'resulting work will not be a porting of Microsoft code to other platforms'.

64 FSFE then describes the main components of 'Microsoft's technology'.

65 FSFE first examines the protocol known as 'CIFS'. That protocol, originally known as 'SMB' (Server Message Block), was not invented by Microsoft but was integrated into the Windows operating system. Microsoft was 'active in the public documentation' of the same protocol until the release of Windows 2000.

66 Secondly, FSFE submits that Windows implements the Open Group's 'DCE/RPC' (Distributed Computing Environment/Remote Procedure Call) standard protocol. That protocol is completely documented on the Open Group Web site. On the other hand, the extensions to DCE/RPC that Microsoft created to modify the latter protocol when used to create secure and encrypted connections between its own products are not published. Knowledge of these changes is essential to create secure and interoperable work group server products.

67 Thirdly, FSFE refers to the 'DCE/RPC IDL (Interface Definition Language)' protocol descriptions.

68 Fourthly, it explains that the Kerberos version 5 security protocol used by Microsoft was originally developed by the Massachusetts Institute of Technology (MIT). Microsoft added a 'proprietary and unnecessary' change to one of the core data requests, which it has not yet completely documented.

69 Fifthly, FSFE refers to the 'LDAP' directory access protocol and states that Microsoft extended the authentication mechanisms of that protocol with several proprietary extensions. It further states that '[b]efore gaining its position in the work group server market Microsoft did make efforts to document some of these early changes'. In other words, whereas Microsoft promoted openness and interoperability when it was not in a dominant position, it made 'closed and proprietary changes' once it had achieved significant market shares. According to FSFE, Microsoft completely failed to provide evidence that those small changes brought to the standard protocols and 'whose disclosure is the goal of [Article] 5 of the [contested] decision' have sound and legitimate technical reasons.

– As to the history of personal computing

70 FSFE submits that Microsoft's allegation that 'consumers [...] have benefited from Microsoft's provision of progressively better operating systems at attractive prices' is contradicted by the 'history of the personal computing'. In that context, FSFE emphasises the importance of IBM's decision 'to make the PC an open platform'. It comments on the creation and the evolution of the 'DOS' (Disk Operating System) and refers in particular to 'QDOS' (Quick and Dirty Operating System), 'PC DOS', 'MS DOS' and 'DR-DOS'. FSFE further submits that 'Microsoft Windows was nothing technically innovative too' and that vertical integration does not necessarily provide more innovation than an 'open approach'.

– As to the existence of a sufficient level of competition in the secondary market and risk of disappearance

71 FSFE indicates that GNU/Linux has been widely adopted in the 'medium to large server segment of the software computer market'. On the other hand, the work group server operating systems market, as defined by the Commission, is overwhelmingly dominated by Windows even though GNU/Linux is sold much more cheaply than Windows.

72 FSFE also submits that GNU/Linux does not pose a competitive threat to Microsoft.

– As to the indispensability of the measure to restore competition

73 FSFE criticises the five alternative methods for ensuring interoperability relied on by Microsoft. It submits that '[t]echnically, all these [methods] describe correct scenarios' but 'have a fundamental omission: authentication'. It further states that most of the server-to-server protocols which Microsoft regards as valuable trade secrets revolve around authentication. FSFE claims that Microsoft has 'tightly coupled' its desktop operating systems with its own authentication servers and that 'it is simply impossible to separate the authentication server task from the other purposes a Microsoft work group server performs such as file and print'. It adds that '[i]f the desktop operating system of choice is Windows, this dictates the use of a Microsoft authentication server implementation'.

74 FSFE acknowledges that the use of standard communications protocols such as TCP/IP and HTTP makes it possible to achieve interoperability. However, that interoperability extends only to the functionality which Microsoft chooses (and authentication tasks are deliberately left out of the services which Microsoft implements).

75 As to the possibility of adding a software code to a Windows Client PC or server operating system, FSFE submits that this method encounters the same problem as the first above-mentioned method as the APIs necessary to do authentication are deliberately left out of the 'comprehensive set of system services' referred to by Microsoft.

76 FSFE refers to the further possibility of using 'native' Windows protocols by 'network analysis', as Samba does. Samba is however unable to be a 'Backup Domain Controller for a Windows Primary Domain Controller', and vice versa.

77 Finally, FSFE states that the possibility of using a single server operating system as a 'bridge' between two different sets of communications protocols, for example, between NFS and CIFS/SMB is a 'very bad example'. With respect the approach used by middleware products such as IBM's MQ Series or application products such as SAP's R/3, FSFE submits that Microsoft explicitly leaves out the question of authenticating native Windows users.

– As to the unprecedented competitive advantage enjoyed by Microsoft because of multiple combined network effects

78 FSFE explains the 'hardware problems' encountered by GNU/Linux, the 'software network effects' as well as the 'difficulties which are specific of the market defined by the [contested] decision'.

– As to the real incentive to innovate

79 FSFE rejects Microsoft's proposition that the contested decision, in requiring it to waive its intellectual property rights, will diminish or annul its incentives to innovate.

Observations of Microsoft

80 Microsoft puts forward three main arguments. First, it states that Article 5 of the contested decision requires a compulsory licence of its intellectual property rights on a worldwide basis. Second, it submits that the contested decision fails to satisfy any of the four 'essential criteria' set out in *IMS Health*. Third, Microsoft states that the contested decision cannot be justified by the other 'exceptional circumstances' relied on by SIIA.

As to the compulsory licensing

81 According to Microsoft, it can no longer be disputed that EU and US patent rights are subject to a compulsory license as a result of Article 5 of the contested decision. That decision also encroaches upon Microsoft's copyrights in the specifications that it is obliged to draw up, both in Europe and in the rest of the world. Finally, there will be 'global ramifications for Microsoft's trade secrets'.

82 With respect to the patents, Microsoft submits that recent developments make it very clear that the contested decision requires 'substantial patent licensing'. It explains that, for the first time in European competition law history, the Commission has obliged a company to grant licences relating to intellectual property rights (including US intellectual property rights) for the development of products on a worldwide basis. Besides the 30 EU or US patents (which have been granted or are pending) relating to 18 of the 52 protocols covered by the contested decision, Microsoft is under a continuous obligation to make new protocols and future patents available to its competitors. The number of patents at issue confirms that technological innovation was involved in the creation of Microsoft's 'protocol technology'.

83 With regard to trade secrets, Microsoft emphasises that these are 'commercial property rights'.

84 As to the copyright, Microsoft rejects SIIA's argument that the contested decision does not require Microsoft to disclose source code, but only specifications for protocol technology, and that none of those specifications will or can be reproduced in the competitors' program code. It emphasises the considerable value of specifications in the computer industry. In view of the significant skill and effort that have gone into producing Microsoft's protocol technology and associated specifications, there can be no doubt that the latter are the subject matter of copyright. Microsoft further states that copyright protection is not

limited to exact reproduction in the same medium, but covers also adaptation in another medium.

85 Finally, Microsoft submits that even if no intellectual property rights were at issue in the present case, the 'obligation to deal with competitors' imposed by the contested decision would still be unlawful. It refers, in that regard, to *Bronner*.

As to the criteria set out in *IMS Health*

86 Microsoft alleges that none of the four criteria set out in *IMS Health* is met in the present case.

87 First, as regards the 'indispensability' criterion, Microsoft states that there is a 'huge gap' between marketplace reality and the contention in the contested decision that access to Microsoft's protocol technology is indispensable to competition on the market for work group server operating systems. It claims that neither the Commission, SIIA nor FSFE have demonstrated that competitors cannot provide 'work group services' to Windows Client PC and server operating systems without having access to Microsoft's protocol technology.

88 Microsoft relies again on the 'emergence' of the Linux server operating systems after the alleged abuse started and on the strong growth Linux is experiencing on the market for such products. It observes that Linux benefits from a 'strong support' of important companies such as Dell, Hewlett-Packard, IBM, Novell and Sun.

89 Microsoft also observes that SIIA's experts concede that there are various ways of achieving interoperability without having access to the technology at issue and that FSFE confirms that a server 'running Samba' can provide file and print services within a Windows domain.

90 Microsoft further states that there is a high level of interoperability in the IT sector. It claims that there exists a sixth alternative method for ensuring interoperability, which uses web services protocols and 'has become common recently as a result of industry cooperation led by Microsoft and IBM'.

91 With regard further to the question of the 'indispensability' and referring to the findings contained at recital 183 of the contested decision, Microsoft claims that there are different ways to allow users of Windows Client PC operating systems to benefit from services offered by non-Microsoft server operating systems without having to log-on twice. It refers inter alia to a product called 'Centrify', which enables users to have a single user ID and password giving them access to services in heterogeneous environments composed of Windows, Linux and UNIX server operating systems.

92 Microsoft also observes that Windows 2000 Server is in fact more interoperable than its predecessor (Windows NT Server). For example, unlike Windows NT

Server, Windows 2000 Server supports the Kerberos standard for authentication as well as the directory access protocol called LDAP.

93 As regards 'plug replaceability', Microsoft states that Article 5 of the contested decision does not require 'perfect compatibility' and that the Commission did not adopt such a 'standard' in its pleadings. It adds that requiring perfect compatibility would go far beyond the 'indispensability' criterion set out in *Bronner* and *IMS Health*. Microsoft also explains that its competitors on the market for work group server operating systems do not need Active Directory. Indeed, non-Microsoft server operating systems have their own directory services which can provide work group services to Windows Client PC and server operating systems. In addition, competing server operating systems providing file and print services can obtain directory services from Active Directory via standard protocols, such as LDAP. Thus, 'competitors are not excluded technically or commercially from the domain by virtue of the customer choosing to use Active Directory' and there is no need to create 'plug replacements' of Windows server operating systems when other methods are already available for achieving interoperability. Finally, Microsoft submits that SIIA and its experts confuse 'plug replaceability', i.e. complete substitutability, with 'interoperability'. It points out that 'plug replaceability goes well beyond industry norms, customer desires and expectations and the legal definition of interoperability'.

94 Microsoft submits that the definition of 'interoperability' contained in Directive 91/250 is 'the subject of considerable debate'.

95 Secondly, with regard to the 'new product' criterion, Microsoft asserts that the contested decision does not state that 'any specific new product would emerge following the compulsory licence' but merely hopes that some innovation might occur. It rejects SIIA's allegation that competitors will use Microsoft's protocol technology to create a server operating system which would be a 'plug replacement' for a Windows server operating system, considering that developing a 'plug replacement' for an existing product can hardly be viewed as the creation of a new product.

96 Thirdly, Microsoft repeats that its alleged refusal is not likely to exclude all competition. It indicates that, six years after that alleged refusal, 'competitors remain significant, holding 30-40% of even the Commission's wrongly defined work group server operating system market'. It adds that market data show that there was no jump in the annual growth rate of its market share either after the alleged refusal to supply information to Sun in 1998 or following the release of Windows 2000 Server in late 1999. Microsoft criticises the fact that SIIA fails to mention that Microsoft's share of the work group server operating systems market has not materially increased since 2001. SIIA also fails to mention that IDC predicts that Microsoft's share will remain stable until 2008. Microsoft adds that, even though Linux entered the work group server operating systems market, it is widely accepted that it is a serious competitor of Microsoft on that market. It also

states that it has only a 30% market share on the market for 'server operating systems generally'.

97 Fourthly, Microsoft reiterates that the technology it has been ordered to license, 'for the sole purpose of enabling its competitors to produce products that compete with Windows server operating systems', is protected by several kinds of intellectual property rights. It rejects SIIA's allegation that disclosure of the specifications will not reveal 'anything of substance about the way Windows server operating systems work'. It claims that 'the design of communication protocols that multiple Windows server operating systems use to provide work group services on a distributed basis is intimately linked to the design of the overall product'. Microsoft rejects FSFE's allegation that Microsoft's protocol technology for basic file services is essentially limited to the CIFS protocol, an early version of which is in the public domain. In that regard, it claims that the FRS protocol which it has developed to provide file services on a distributed basis in very large networks has innovative aspects and required substantial investments in terms of design and development efforts. The FRS protocol was developed because there was no standard protocol that could be used to provide the functionalities that Microsoft's customers required.

98 Microsoft also reiterates that Sun's request was 'excessively broad'. It adds that the latter wanted to have access to 'Microsoft's forthcoming innovations', i.e. a version of Active Directory that would run on Solaris, and not to information necessary to achieve interoperability between Solaris and an existing Windows server operating system.

As to the other 'exceptional circumstances'

99 First, Microsoft claims that it is the principles laid down in *IMS Health* which are applicable in the present case.

100 Secondly, Microsoft states that the arguments put forward by SIIA in support of its proposition that other 'exceptional circumstances' justify the contested decision are inadmissible as the Court is not entitled to carry out a new assessment of 'grounds upon which a valid decision might have been based'.

101 In any event, none of the factors relied on by SIIA justifies the compulsory licensing of Microsoft's protocol technology.

102 In that regard, Microsoft submits that the fact that it holds a high market share on the market for Client PC operating system does not amount to an 'exceptional circumstance'.

103 Microsoft further submits that the contested decision is not based on the allegations of technological tying or leveraging relied on by SIIA or on a theory of 'defensive monopoly leveraging'. It rejects the assertions of SIIA and FSFE that it made minor and unnecessary changes to standard protocols in order to prevent

competitors from interoperating with Windows Client PC and server operating systems and that it 'frequently … chang[es] its protocols at will'. Instead, Microsoft continues to support industry standard protocols such as LDAP and Kerberos.

104 Microsoft denies that work group server operating systems are characterized by network effects. It also denies that it interrupted the supply of technology. It recalls, in that regard, that it entered into a licence agreement with AT&T in 1994, which expired in 2001. However, the technology disclosed under that agreement and the products developed on the basis of that technology are still available. Microsoft observes that the technology in question is very different from the advanced technology on which Windows 2000 Server was based when it was released.

105 According to Microsoft, the fact that Directive 91/250 recognises the importance of interoperability does not constitute an 'exceptional circumstance'. Nor the alleged absence of objective justification for Microsoft's refusal to license technology to Sun amounts to such a circumstance.

106 Finally, Microsoft denies that its behaviour has adversely affected consumers. It points out that there is no evidence in the file to suggest that a customer was not able to use non-Microsoft server operating systems owing to interoperability problems.

Observations of the Commission

107 First, the Commission examines the question of the risk of elimination of competition.

108 It claims that the assertion by ACT that the application of the 'risk of elimination of competition test' dilutes the 'indispensability condition' is manifestly erroneous. It recalls that the Court has held that 'for the purposes of establishing an infringement of Article 82 EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect' (Case T-219/99 *British Airways v Commission* [2003] ECR II-5917, paragraph 293). The Court also held that 'where an undertaking in a dominant position actually puts into operation a practice generating the effect of ousting its competitors, the fact that the hoped-for result is not achieved is not sufficient to prevent a finding of abuse of a dominant position within the meaning of Article 82 EC' (paragraph 297).

109 The Commission observes that ACT acknowledges that interoperability is a matter of degree. It then submits that the degree of interoperability required by the contested decision cannot be dissociated from the aim of the latter, namely to preserve effective competition. According to the Commission, the disclosure

ordered by the contested decision does not go beyond what is indispensable to enable competitors to stay viably in the market and thus to counter the risk of elimination of effective competition in the work group server operating systems market caused by Microsoft's refusal to supply.

110 The Commission alleges that the market shares indicated by ACT are incorrect and that the latter's theories are based on the erroneous view that the survival of some competitors is enough to refute a finding of abuse, even if they do not constitute a viable competitive constraint. The Commission adds that, contrary to the assertions of ACT, the case law does not require it to prove the elimination of all competition.

111 Secondly, the Commission denies that the contested decision will have a negative impact on the 'ICT industry and consumer welfare' or on innovation and investment, as claimed by CompTIA and ACT. In that regard, the Commission refers to recitals 723 to 729 of the contested decision and states that Microsoft has not adduced evidence that, as a result of the contested decision, it will be forced to significantly adapt its investment policy. The Commission further states that the views of CompTIA are not shared by the software industry in general, and not even by all of its members.

112 Thirdly, as regards the arguments made by ACT in relation to the TRIPS Agreement, the Commission refers to the submissions contained in its Defence and in its Rejoinder. It adds that the pleas based on Article 31 and Section 7 of the TRIPS Agreement are inadmissible as they have not been raised by Microsoft. In any event, ACT is not entitled to rely on those provisions. The Commission further states that the argument based on Article 31 of the TRIPS Agreement is unfounded and trade secret protection is not absolute.

2. *Tying of the Windows Client PC operating system with Windows Media Player*

Arguments of the parties intervening in support of Microsoft

Arguments of ACT

113 ACT makes five main arguments on the tying issues. It examines the legal test applied in the contested decision focusing on the separate product analysis, the customer choice requirement, and the 'prediction of foreclosure'.

– As to the legal basis of the test

114 ACT submits that, although the Commission purports to base its legal test on Article 82 EC and in particular on Article 82 (d) EC, its legal test is based on neither and instead applies a different four-stage test. ACT finds that whichever of these tests is considered, the test is defective in analysis and reasoning and that the Commission therefore has not satisfied the requirement to give reasons.

115 ACT first claims that if the Commission's case was that Article 82(d) EC is infringed, it should have shown that the integration of Windows Media Player with the Windows operating system makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature and commercial usage, have no connection with the subject. In contrast, the Commission misinterprets Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 by relying on it to claim that 'it is not necessary to show a supplementary obligation'. In fact, the Court in that case held explicitly that the rebate scheme involved such an obligation. ACT further states that the Commission does not even claim that the second criterion, namely that the alleged we should be reflected in normal commercial usage, is satisfied. In recital 961 it effectively admits that the sales in the present case are in accordance with commercial usage.

116 Second, ACT argues that the Commission is 'forced to fall back on a more general application of Article 82 EC'. However, it considers that this is impermissible since no such theory is set out in any of the three statements of objections which refer only to Article 82 (b) and (d) EC. ACT further claims that the Commission's position is also unfounded in substance, *Hilti* and *Tetra Pak II* being inapplicable as there is no forced purchase or de facto exclusive supply obligation and it failed to give sufficient weight to Microsoft's justification for bundling Windows Media Player.

117 Third, ACT maintains that a new four-stage test was created 'to replace a crucial requirement in the existing case law which could not be satisfied' and precisely because the Commission could not show the infringement of Article 82 or 82(d) EC. According to ACT, this test should have been accompanied by careful reasoning since:

– it was not set out in either the second or third statement of objections;

– it is doubtful on which legal basis it relies;

– it is in any event inconsistent with both legal basis concerning in particular consumer choice;

– it does not mention the established criterion of objective justification;

– the practical effect of the Commission's approach and of the remedy is absurd and ineffective on competition as there is no demand for a version of Windows without Windows Media Player.

– As to the separate product analysis

118 ACT supports Microsoft's position that the relevant question concerning consumer demand is whether there is demand for the alleged tying product without the tied product. In particular, it puts forward three sets of submissions.

119 First, ACT considers that the Commission's interpretation of the consumer demand test cannot be reconciled with the rationale of the 'separate products' test. It argues that unlike previous cases where it was apparent that products were separated and tied, in the present case the underlying policy rationale must be examined. It points to the views of the US courts as useful in this regard. According to ACT, they show that tying may have potentially positive as well as negative effects which have to be weighed. If, due to efficiencies, two components can be offered either at a lower price or at better quality and the restrictions on customer choice are not severe, then one would expect all consumers to buy the components as a bundle rather than separately.

120 ACT further indicates that the Community courts have until now considered ties only when applied to consumable products, where it is irrelevant whether the consumer demand test is phrased in terms of the tied or tying product. In this case, according to ACT the situation is different because of the particular characteristics of media players, which are available for free and are only imperfect substitutes in terms of features and formats. If there are genuine and significant benefits of buying the bundle which outweigh the possible restriction of customer choice, the demand will be mainly for the bundled product. ACT adds that this would be the case even if there is also separate demand for additional media players. It further argues that the Commission's conclusion that customers prefer the unbundled product is erroneous and prohibits beneficial forms of integration and innovation. ACT finally considers that it would in any event not be appropriate to correct deficiencies of the Commission's consumer demand test under the objective justification criterion, as the difficult burden of proof to demonstrate that the efficiencies from tying outweigh the restrictions of customer choice would be placed on the dominant firm. Second, it would be an impossible burden. The Commission's analysis in fact suggests that a firm can rely on an objective justification only to the extent that it can be shown that (i) the tie is indispensable and (ii) a hypothetical tie with the alleged tied product of a third party would not lead to comparable consumer benefits.

121 Second, ACT alleges that under the Commission's approach, the prohibition of the alleged abusive tying does not remedy the alleged anticompetitive damage. It further states that in absence of any distinct, real demand for the unbundled product, there is no causal link between the alleged abusive behaviour and that damage and unbundling does not redress the supposed competition problem.

122 Third, ACT contends that under a correct interpretation of the consumer demand test, the Commission would have concluded that there is no separate product and that Microsoft's integration of Windows Media Player into Windows is not abusive. ACT emphasises that the Commission has failed to provide any evidence that third party vendors would offer sufficient financial incentives to induce OEMs to sell Windows without Windows Media Player. It further argues that the absence of any separate demand for the operating system is confirmed by the behaviour of the competitive (non-dominant) fringe such as Apple, Linux and Sun

which include media players with their operating systems, which shows that bundling leads to consumer benefits. It is also clear, according to ACT, that the various efficiencies of having a pre-installed media player clearly outweigh any hypothetical restrictions and that such restrictions do not exist in the eyes of the consumers.

– As to the customer choice requirement

123 ACT points out that the customer choice requirement has been similarly defined in both US and EC jurisdictions. A simple assertion that a customer is forced to accept the tied product is, according to ACT, not sufficient to show the connection between the tie and the competitive damage alleged; it must rather be shown that the tie deprives the customer of the option of using another supplier. ACT concludes that, had the Commission applied the correct test, it would have found that in the present case there is neither a restriction of consumers' freedom of choice to install, purchase and/or use third party media players, nor any exclusive supplying or forced purchase or use of Windows Media Player.

– As to foreclosure

124 ACT argues that the Commission should have at the very least demonstrated that foreclosure will 'in all likelihood' occur as a result of Microsoft's conduct. In fact, it gives no more than speculative assertions that there is a 'reasonable likelihood' that tying Windows Media Player with Windows will lead to a lessening of competition.

125 Secondly, ACT contends that even if the Commission would have proved such a likelihood of foreclosure, 'such a case would not be substantiated by the scope of its conclusions on the key issue of indirect network effects'. The key element of the Commission's case is its 'finding as to the likelihood of content providers and software developers to do what it says they will do, namely to converge on the Windows Media Player platform'. According to ACT, the Commission would be required to demonstrate not simply that incentives exist, in abstracto, for an undertaking to engage in the predicted conduct, but whether, in all the circumstances, sufficient incentives exist to substantiate a claim that the conduct will 'in all likelihood' occur. ACT further argues that in contrast, the contested decision neither contains such analysis, nor any consideration of the cost-benefit balance of supporting multiple media player formats. ACT therefore concludes that the Commission's case on indirect network effects must be doomed to failure, because the Commission did not (i) quantify the costs of supporting additional formats (ii) identify and quantify the economic benefits of supporting additional formats and (iii) evaluate on the basis of those calculations whether it would make economic sense to offer content in formats other than Windows Media Player.

– As to the allegation that the media player case is a failed and re-labelled essential facility case

126 ACT first alleges that the striking similarities between the media player case and *Bronner* make it obvious that the Commission's claim against the integration of Windows and Windows Media Player raises in essence an issue as to whether Windows is an essential distribution facility for streaming media players. According to ACT, this would be evidenced by the alternative remedy proposed in the third statement of objections, 'to carry other media players in Windows and not just Windows Media Player'. ACT therefore argues that the 'media player case is a failed and re-labelled essential facility case'.

127 Second, ACT contends that the *Bronner* test is not satisfied in the present case because Windows is 'patently not indispensable as a distribution channel for media players', competitors having other options available. It concludes that the Commission only penalises Microsoft for success on merits.

– As to the allegation that the Commission's test would deter innovation

128 ACT argues that the contested decision has the 'clear effect of stifling innovation' and discouraging companies from improving their products by adding new features. Apart from the deficiencies of the Commission's tying test, ACT argues that a detailed dynamic analysis of the technological benefits of integrating Client PC operating systems and media players instead of an 'overall static approach is required for assessing dynamic competition in high tech industries'. Finally, ACT underlines that the proposed remedy will also generate significant uncertainty and impact on innovation in the IT industry. Taking media functionality out of the Windows Client PC Operating System, for instance, strongly disadvantages ACT members who have long relied on its presence.

Arguments of DMD a.o.

129 DMD a.o. make four sets of submissions. First, they insist that the Commission has misapplied Article 82(d) EC by holding that there are two separate products and that consumers are coerced into purchasing (or using) Windows Media functionality with Windows. They argue that 'integrating media functionality within an operating system is consistent with commercial usage'. Second, DMD a.o. submit that the Commission should have demonstrated that the alleged tying has effects that run counter to the objective of Article 82 EC. Third, DMD a.o. state that the decision's new foreclosure theory engenders legal uncertainty. Finally, they argue that the integration of media functionality into Windows is objectively justified.

– As to the misapplication by the Commission of Article 82(d) EC

130 DMD a.o. first submit that the Commission has misapplied the first condition of Article 82(d) EC by holding that there are two separate products. They assert that

by failing to examine whether there is demand for the product without the tied component, the Commission draws the incorrect conclusion from *Tetra Pak II* and *Hilti* that when there are specialised independent manufacturers, there is a separate consumer demand and a distinct market for the tied product.

131 DMD a.o. on the contrary argue that in commercial usage, Windows with media functionality included is one single product. They consider this to be demonstrated by the fact that all commercially significant PC client operating systems include a media player without separate charge, that it is technically and economically efficient to include it and that there is no demand of the product with the media functionality removed.

132 Secondly, DMD a.o. consider that consumers (OEMs and end users) are neither coerced into purchasing or using Windows Media functionality with Windows nor from using other third-party media player in addition or instead and that 'integrating media functionality within an operating system is consistent with commercial usage'. They consider that the Commission's view that it is not necessary to examine whether there is such a constraint leads to the unacceptable conclusion of not having to establish coercion in Article 82(d) EC.

– As to the failure to demonstrate that the alleged tying has effects that run counter Article 82 CE

133 DMD a.o. first argue that, after admitting that this is not a 'classical' tying case and that it does not, without further analysis of its likely effects, foreclose competition (recital 841 of the contested decision), the Commission fails to establish foreclosure. They assert that integrating media functionality does not foreclose third party media players and has zero marginal costs. They further submit that the Commission's tipping theory is contradicted by historical facts, because foreclosure has not happened over the last twelve years; multimedia has not declined nor do software developers write mainly for Windows media functionality. On the basis of DMD a.o.'s experience, encoding can be done and is done in other formats and major media players continue to achieve wide-spread distribution.

134 DMD a.o. further state that Commission's ubiquity argument is rebutted by the fact that 'the number of Windows Media Player users has risen relatively to the number for other players' as a result of competition on the merits. They explain that Windows Media Player is preferred because of its superior technical qualities and since it is more committed to developing improved media functionality and content protection component developing a robust digital rights management system that content providers trust. Ubiquity does not equal to market success in this industry as is shown by the failure of other functionalities integrated into Windows to achieve popularity such as Windows Photo Studio or Microsoft Movie Maker.

135 Secondly, DMD a.o. submit that the Commission has not met the required standard of proof, which should, as in *Tetra Laval*, be especially high because the Commission applied a prospective analysis.

136 Thirdly, DMD a.o. claim that the Commission fails to incorporate a sufficiently reasoned analysis of consumer interests and has not shown that the conduct harms consumers as opposed to competitors. DMD a.o. are, in contrast, convinced that consumers benefit from greater choice and savings involved by the media functionality integration. Further, they submit that the Commission failed to take into account recent trends showing that:

– video and audio entertainment is now recognised as a critical application and further expansion of multimedia capabilities is expected;

– traditionally end-users were provided applications by different companies and via independent network infrastructures;

– the cost of network infrastructure has been a major issue leading to the significant market convergence of TV, telephony and Internet services; and

– PCs evolved to become a multimedia device with convergence in functionalities.

– As to the allegation that the decision's new foreclosure theory engenders legal uncertainty

137 DMD a.o. consider that the decision's new foreclosure theory creates legal uncertainly. They explain that if Windows does not as at present offer a consistent platform benefiting all communities in the PC environment, there would be direct harm to the interveners. This would be particularly the case with regard to the current DMD project of conceiving an alternative to peer to peer networks and to Pace's Windows CE NET-based set-top box including Windows Media Player. Pace makes business decisions based on technology roadmaps and is programmed to take into account how existing technologies will develop.

– As to the objective justification of the integration of media functionality into Windows

138 DMD a.o. submit that even assuming the media functionality would be regarded as separate from Windows, this integration would still respond to Windows designed concept and would therefore be objectively justified. DMD a.o. expect to have to bear, as a result of the removal of the media functionality, costs which might force them into bankruptcy as they would not be able to adapt their products to the new market situation. These costs relate to being compelled to write off investments made, downsize their business plan, risks of malfunctioning, loss on return on research and investments and drop in the number of their customers

DMD a.o. therefore ask for the annulment of articles 2(b), 4 and 6 (a) and 7 of the contested decision.

Arguments of Exor

139 Exor makes four sets of submissions. First, it argues that the Commission failed to take proper account of the positive effects of the integration of new functionality in Windows. Secondly, it asserts that the condition as to separate products and the existence of coercion for finding that there is tying under Article 82(d) EC are not met. Thirdly, Exor points out that the Commission's new foreclosure theory is unfounded in fact and in law.

– As to the argument that the Commission failed to take proper account of the positive effects of the integration of new functionality in Windows

140 Exor supports Microsoft's second branch of first plea on Windows Media Player to the effect that the Commission should have taken into account the efficiencies of Microsoft's business model of one integrated platform offering new functionalities for Windows. It argues that the integration of media functionality in Windows and the uniformity, consistency and stability of the platform has positive effects for the software industry as a whole and in particular for web site designers and software developers who write applications for the Windows platform. Benefits include the possibility for other components of Windows to call on this functionality, so that a single block of code is employed for multiple purposes within the same operating system.

141 Exor considers that if Microsoft was compelled to create a new version of Windows without media functionality, Exor would face problems of costs in developing new web sites for the full version of Windows and related to malfunctioning which could damage its reputation. Furthermore, Exor would experience a loss of business because the malfunctioning and the associated costs would deter Exor's customers from including media functionality.

142 In particular, Exor first argues that:

– if it chose not to adjust existing web sites and develop new ones exclusively for the full version of Windows, it would 'have to bear any additional support costs as a result of an increase of support calls by users of the A6 version of Windows who would be unable to properly access media content on such web sites';

– if it chose to include in such web sites new software code capable of identifying the user's operating system as an A6 version of Windows, it would have to 'inform the user that content published on the web site cannot be accessed, and instruct him how to install the required Windows Media functionality if he so wished' and would have to bear the cost of developing, installing and testing such code;

– if it chose to either replicate the required Windows Media functionality or redistribute it as part of its web site, it would also have to incur substantial development and/or testing costs which would finally increase the price of its products and possibly reduce customer demand for Exor's web design services.

143 Secondly, Exor asserts that the malfunctioning of such web sites will damage its reputation on the market, to the extent that in the eyes of customers – web site owners – such malfunctioning is likely to be attributed to the designer of the web site.

144 Finally, it considers that such malfunctioning and the associated costs could deter its customers from including multimedia content in their web sites in the first place, which would result in a loss of business for Exor.

– As to the argument that the conditions concerning separate products and coercion for finding that there is tying under Article 82(d) EC are not met

145 Exor first argues that the separate product condition for finding that there is tying under Article 82(d) EC is not met. It considers that the Commission should have found that there is no separate demand for media players as stand alone products instead of analysing whether there was customer demand for a particular functionality separately from the alleged tying product. Exor considers that such an approach prevents innovation, since any improvement of the software product through the integration of a new functionality would then be regarded as tying simply because such functionality was offered on a standalone basis before the product improvement. Instead, Exor considers that integrating media functionality is in accordance with commercial usage. Secondly, it supports Microsoft's argument that there is no coercion, neither at OEM nor at end user level.

– As to the argument that the Commission's new foreclosure theory is unfounded in fact and in law

146 Exor supports Microsoft's first branch of the first plea concerning Windows Media Player in that Article 82 EC requires that the abusive conduct in question has, as such, exclusionary (and/or exploitative) effects on the market. It asserts that the objective concept of abuse requires that any exclusionary effects derive directly or, at least, indirectly, from the alleged tying practice of the dominant undertaking and not 'merely from the speculative (subjective) behaviour of third parties on which Microsoft has no control'.

147 Exor further argues that as the Commission admits, this case is not a classical tying case and is to be distinguished from previous case law, because here there is neither coercion (i.e. *Hilti*, *Tetra Pak II*), nor the possibility of foreclosure (i.e. Cases T-203/01 *Michelin v Commission*, [2003] ECR II-4071 and T-219/99 *British Airways v Commission* [2003] ECR II-5917) nor an exclusivity obligation (Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653).

148 Furthermore, Exor considers that, even if the new prospective theory were held admissible in law, quod non, the Commission's foreclosure theory is unfounded in fact. According to Exor, the Commission has in any even not met the required high legal standard of proof, as set out in *Tetra Laval* by demonstrating on the basis of available market data that conduct, apparently commenced five years earlier in 1999, has actually had exclusionary effects for third party media players.

149 It further argues that the Commission has not demonstrated that consumers want the product without media functionality, that OEMs are willing to sell it and that demand would provide incentives to rely on third party technology. Exor concludes from the above that if foreclosure occurred, it would have done so regardless of whether Microsoft offered the A6 version of Windows.

Arguments of M. and T.

150 M. and T. make four submissions. First, the Commission's decision should be rejected or subject to a high standard of proof because of its remarkable departure from established precedent. M. and T. dispute the Commission's deductions from *Hilti* and *Tetra Pak* and support Microsoft's arguments that there are relevant differences in this case (no extra costs, only benefits for consumers, no constraint to use it, no supplementary obligation, other media players can be installed even as default a.s.o.). M. and T. therefore consider that the Commission's decision departs so radically from the established ingredients of a tying violation, especially by applying a prospective analysis instead of the ex-post analysis always applied in previous cases, that it should be rejected as a matter of law.

151 In the alternative, M. and T. submit that if the novel theory is to be accepted, it should at least be subjected to a high standard of proof and made subject to careful review because of its novelty and reliance on predictions of future events. They argue that the reasoning in *Tetra Laval*, that a prospective analysis must be carried out with great care, applies to the present case.

152 Secondly, the Commission applied the wrong test with regard to the separate product requirement and committed a manifest error of assessment on why operating systems contain media player functionality. M. and T. argue that the Commission applied the wrong test with respect to the separate product requirement because the fact that media players are 'sold' separately from Windows operating systems and that there is demand for such media players does not prove that there is any material demand for the Windows operating systems without Windows Media Player.

153 M. and T. further submit that the Commission committed a manifest error in its assessment why all operating systems contain media player functionality. They argue that demand, not Microsoft, is the reason why all operating systems have opted for integrating media functionality into all modern PC operating systems. They claim that even if competing media players exposed and documented the

same number and range of APIs as Windows (which they do not), the APIs would be different. In order for software to run on an entirely different API set, M. and T. and all Independent Software Vendors (ISVs) would effectively have to create a new version of their software for that API set.

154 Thirdly, there is no evidence of foreclosure. M. and T. argue that after all those years since 1999, the Commission has still presented no evidence of foreclosure and asserts that this conclusion is weak and wrong.

– As to the failure to consider properly the benefits of integrating Windows Media Player into Windows

155 M. and T. first consider that the Commission failed properly to consider the benefits of integrating Windows Media Player into Windows by not taking into consideration the importance for ISVs of the Windows Client PC operating system as a stable platform providing media functionality. With regard to the reason why all operating systems have media functionality, they argue that Windows operating system as a stable platform is the very basis for the success of the interveners and thousands of other European software companies that develop software products to run on PCs with Windows operating system. Secondly, M. and T. claim that a PC operating system is not a static product but serves users and software developers and must constantly change in order to keep up with customer demand and technological progress. Thirdly, they assert that media functionality is an integral part of any modern PC operating system because consumers today expect a PC to play and view media content and many ISVs make use of the media capabilities of modern PCs. Furthermore, they state that integrating Windows Media Player into Windows allows them to 'concentrate on what they are good at, writing business software that runs on … Windows …, without having to spend valuable resources on making their media applications run on PCs that mayor may not have Windows Media Player or any of the other media players installed'.

156 M. and T. further argue that a software that was developed for Windows 98 and that required Windows media functionality will not run on a Windows version without media functionality unless some of the code that Microsoft was forced to remove as a result of the contested decision has been added. The foreseeable consequences would be:

– uncertainty and inexperience with the new version;

– M. and T. would have to develop technical solutions to address this issue bearing the costs, estimated to be 50 000 – 250 000 euro for Mamut and 50 000 for TeamSystem, to ensure that their programmes run on all PCs, irrespective of which version of Windows is installed;

– problems, which did not exist since DOS was the predominant system, would be reintroduced.

157 M. and T. further stress that:

- any technical solutions would not be trivial as demonstrated by the prolonged discussions between Microsoft and the Commission;

- the Commission ignores the importance of testing, accounting for 90% for a typical application programme, M. and T. can not run the risk that their applications do not function on their customers' PCs;

- the Commission's suggestion to inform customers about system requirements would only work with respect to customers buying PC and Windows at the same time they purchase the software from M. and T.

158 M. and T. secondly claim that Commission refused to consider Microsoft's evidence that integrating media functionality into Windows provided important benefits by allowing software developers to rely upon the dependable presence of the requisite Windows Media Player API's in writing their software. The Commission claimed that it discounted these benefits because Microsoft failed to supply evidence that tying of Windows Media Player is indispensable for the alleged pro-competitive effects to come into effect (recital 963 of the contested decision). M. and T. argue that since Microsoft had proved that there were pro-competitive benefits, by not showing that one or more alternatives were available to achieve the benefits without the alleged harm, the Commission committed a manifest error.

159 M. and T. further dispute the Commission's argument that ubiquity prevents other media players from flourishing. They submit that there is evidence of the success of other competing media players during the last six years since Windows Media Player with streaming capability was added to Windows. Moreover, M. and T. assert that all ISVs that write their applications to any media player benefit from the integration of Windows Media Player into Windows, because other media players only function if they reinstall part of the code that allegedly involved unlawful tying. M. and T. therefore consider the Commission's reasoning to be inconsistent and illogical, by arguing on the one hand that ordering Microsoft to offer a version of Windows without Windows Media Player is necessary to ensure undistorted competition among media players and on the other, by arguing that the code removal order does not have an appreciable effect on ISVs and other content providers, because they could very easily and with little effort redistribute Windows Media Player. M. and T. submit that Commission should be found to have erred as a matter of law for refusing to consider evidence of pro-competitive benefits, because its reasoning is defective and because it is vitiated by a manifest error of appraisal.

Arguments of CompTIA

160 CompTIA stresses that the Commission has failed to meet the legal standards for a tying case, in particular it failed to show that:

– the alleged tying and tied products are not connected naturally or by commercial usage as demonstrated by the fact that all vendors of such operating systems include media functionality in their products;

– there are two separate products, the relevant question being whether there is meaningful demand for the tying product without the tied product not whether the allegedly tied product is available separately and there is no such demand;

– there are 'supplementary obligations' and consumer coercion because consumers are not required to pay extra for the media functionality in Windows, they are not required to use it and are not restricted from using third-party media players;

– its speculative foreclosure theory is consistent with the objective and ex-post nature of the concept of abuse, especially since in almost six years, content providers continue to offer content in non-Microsoft formats and third party media players are flourishing;

– it has taken proper account of the substantial efficiencies generated by the single, unified stable and consistent Windows platform, including Windows Media Player.

161 Secondly, CompTIA considers that the test advanced by the Commission is unsuited to cases of technological integration and would punish companies for integrating new functionality into their existing products thus stifling innovation. In particular it notes that the Commission:

– through such an interpretation of the separate product test, ignores the efficiency benefits of integration and punishes dominant undertakings for improving their products through integration by requiring new features to be made removable whenever a third party markets a stand-alone product that provides the same or similar functionality;

– devalues the copyright on which a dominant undertaking is entitled to rely by ordering the forced sale of a copyright protected product;

– fails to focus on the critical issue of whether consumer choice has in fact been restricted and does not show consumer coercion thus protecting competitors rather than consumer welfare;

– is prepared to intervene on the basis of speculative prospective theories of harm, even without market evidence support and where the alleged foreclosure results from choices freely made by third parties. It adds that the fact that third party media players are widely available highlights the futility of intervening in rapidly moving technology industries unless there is clear evidence of harm to consumer welfare;

- is disinclined to engage in a detailed appraisal of the pro-competitive effects of technological integration and failed to show that an alternative exists to achieve the same benefits because currently no such alternative exists;
- by ordering the remedy, will cause substantial uncertainty and stifle growth and innovation in the ICT industry, affecting also CompTIA's members. CompTIA indicates that since software providers cannot predict in advance where incorporating new functionality will be deemed to constitute an illegal tie, they will be discouraged to invest and innovate.

Arguments of the parties intervening in support of the Commission

Arguments of SIIA

162 SIIA makes four sets of submissions. First, it states that Microsoft's conduct satisfies the conditions for a finding that there has been abusive tying for the purposes of Article 82 EC. Secondly, it submits that the tying in question forecloses competition. Thirdly, SIIA states that Microsoft is not entitled to argue that Windows and Windows Media Player form a single 'uniform platform'. Fourthly, it states that the remedy provided for in Article 6 of the contested decision is proportionate.

– As to the elements of a tying abuse

163 First, SIIA states that Microsoft is 'overwhelmingly dominant' in the tying product market.

164 Secondly, SIIA submits that Windows and Windows Media Player are separate products. This is demonstrated by Microsoft's own commercial practices and, more specifically, by the fact that Microsoft already markets a componentised version of Windows, namely 'XP Embedded', which allows the end-user to 'pick and choose' individual components of Windows XP such as Windows Media Player. SIIA also observes that the latest version of Windows Media Player, Windows Media 9 Series, like its predecessors, can be downloaded from Microsoft's website separately from the operating system. Moreover, Microsoft itself relies on distinct branding and marketing for Windows Media Player and develops and distributes versions of Windows Media Player for Apple's Macintosh operating system.

165 SIIA considers that Microsoft's proposition that the appropriate question is whether the tying product is regularly offered without the tied product has no support in law. In addition, that proposition totally ignores the role played by PC OEMs.

166 Thirdly, SIIA rejects Microsoft's argument that its provision of a 'uniform platform' incorporating different kinds of functionality (including Windows Media Player) into the operating system is standard industry practice.

167 Fourthly, SIIA rejects Microsoft's claim that the Commission has failed to demonstrate coercion in this case. It considers that coercion stems from the fact that purchasers have no choice of whether or not to opt for Windows Media Player when they purchase Windows, whether they are OEMs or end-users. It observes inter alia that the 'price' of Windows Media Player is included in the overall price of the Windows operating system. Therefore, OEMs are faced not only with contractual and technical coercion, but also with financial coercion. SIIA also states that Microsoft's proposition that tying is not abusive if the end-user is not forced to use the 'tied' product finds no support either in the wording of Article 82 (d) EC or in the case-law. Finally, SIIA submits that none of the three articles by economists on which Microsoft relies identifies payment of a separate price or use of the 'tied' product as preconditions for establishing a tying abuse.

– As to the foreclosure of competition

168 SIIA submits, first, that there is a general presumption under EC law that as soon as there are sufficient indications of foreclosure, tying by a dominant firm will necessarily lead to foreclosure unless there are objective justifications for the conduct put forward and substantiated by the dominant firm. In other words, the Commission is only required to consider whether there is a risk of foreclosure occurring and whether there are any 'benefits' to consumers which may constitute 'objective justifications' for the tying behaviour.

169 Secondly, SIIA maintains that, in any event, the contested decision demonstrates that foreclosure is occurring in this case.

170 In that regard, SIIA denies that the Commission's theory of foreclosure is speculative. It adds that that theory meets the standard of proof required in proving violations of Article 82 EC. The Commission has diligently shown that there is a serious risk of elimination of competition in the market for media players as a result of Microsoft's illegal tying.

171 SIIA explains that the evidence presented by the Commission shows that foreclosure was already under way when the contested decision was issued. It refers to certain data included in Annex S. 7 to its statement in intervention. SIIA further states that the contested decision establishes the causal link between Microsoft's behaviour and the foreclosure of competition. Any perceived lack of independent demand for the 'tying' product without the 'tied' product results from Microsoft's tying over the last five years. The ubiquity and network effects are a clear and proximate cause of the risk of foreclosure, and the evidence that RealPlayer was consistently rated better than Windows Media Player confirms that the foreclosure is not caused by any lack of quality or functionality. SIIA adds that alternative distribution methods are unable to match Microsoft's method of distributing Windows Media player with the ubiquitous Windows operating system. Finally, SIIA submits that content providers and independent software

vendors are increasingly encoding content solely in the Windows Media Player format.

– As to the argument that Windows and Windows Media Player form a single 'uniform platform'

172 SIIA considers that Microsoft is not entitled to argue that Windows and Windows Media Player form a single 'uniform platform'. It comments on four of the points raised by Microsoft on this topic.

173 First, SIIA recalls that the contested decision does not prevent consumers being offered 'out-of-the-box' PCs that include media functionality. It also recalls that the contested decision requires the 'unbundled' version of Windows to be equally performing in terms of operating system functionality as the 'bundled' version. SIIA adds that software developers, website developers and content providers will not be disadvantaged by the offering of a version of Windows without Windows Media Player. These developers and content providers are quite used to working in an environment where operating systems are heterogeneous. In that respect, SIIA observes that Microsoft currently markets numerous versions of the Windows operating system and that these versions can vary substantially from one version to the next as to the functionality (including the media player) they offer. Finally, SIIA submits that there are no technical efficiencies justifying tying Windows and Windows Media Player.

174 Secondly, SIIA rejects Microsoft's allegation that there are disadvantages to removing Windows Media Player from the Windows operating system. It explains that tests conducted on several occasions on an 'unbundled' version of Windows show that the latter version functions quite normally without Windows Media Player pre-installed. SIIA also states that third-party media players are able to perform all the functions of Windows Media Player. It further states that media players are differentiated products, over which consumers have different preferences.

175 Thirdly, SIIA considers that the argument that, were Microsoft required to offer Windows Media Player and Windows separately, this will 'fragment' the 'uniform platform' that it currently offers cannot be accepted. SIIA observes that no fewer than five versions of the Windows operating system have been released in the last five years alone, and that each one includes different features and APIs. In addition, Microsoft's practice is to deliver functionality and interfaces via separately installable packages. Thus, according to SIIA, 'fragmentation' of the Windows operating system is already a reality in the marketplace today, and can only be attributed to Microsoft's own business method.

176 Fourthly, SIIA states that the contested decision does not violate Microsoft's intellectual property rights. It explains that the contested decision does not prejudice Microsoft's trademark rights, as it does not permit third parties to make

use of the trademarks. Moreover, no risk of confusion can be expected to occur in the labelling of the versions of Windows with and without Windows Media Player pre-installed, as the issue of labelling has already been resolved to the satisfaction of both Microsoft and the Commission. In any event, trademark rights do not permit the right holder to use the trademark to achieve anticompetitive objectives. SIIA further states that the contested decision does not permit third parties to distribute Microsoft's products without its consent and that, therefore, no violation of copyright could occur.

– As to the proportionality of the remedy provided for in Article 6 of the contested decision

177 In SIIA's view, Microsoft cannot claim that the United States Settlement establishes an 'equally effective but less intrusive' remedy than the one provided for in Article 6 of the contested decision. SIIA recalls that, as a result of the United States Settlement, new versions of Windows XP include a software mechanism known as 'Set Program Access and Defaults', which allows OEMs and users to effectively remove end-user access to certain Windows features, including Windows Media Player. According to SIIA that does not ensure that Windows Media Player is removed from the Windows operating system. As the Windows Media Player code remains on the Windows operating system, Windows Media Player will continue to benefit from the ubiquitous Windows platform; and OEMs will continue relying on the presence of Windows Media Player on the desktop and will not be 'incentivised' to incur the cost of installing alternative media players. Accordingly, content providers and applications developers will continue to target primarily Windows formats, whether the icon is hidden or not.

Arguments of VideoBanner

178 First, VideoBanner states that the tying of Windows Media Player with Windows has a negative impact on 'investment in third-party technology'. Numerous venture capital companies informed it that they would not invest in its 'cutting-edge audio and video technologies' if those technologies compete with Windows Media Player 'because of the real or perceived impossibility of overcoming [Windows Media Player's] ubiquity'. The pre-installation and ubiquity of Windows Media Player discourage venture capital companies from investing in new audio and video technologies even if those technologies are superior to Windows Media Player. VideoBanner further states that since 1998, when Microsoft began tying Windows Media Player with Windows, there has been virtually no major investment in competing media desktop technologies and not a single new major competitor has appeared in the streaming media sector.

179 Secondly, VideoBanner submits that, by cutting off the ability of small companies to raise investment capital, the tying in question 'destabilizes' start-up companies and their ability to introduce 'emerging' technologies on the market. In addition,

that tying gives Microsoft 'the ability to impose its proprietary formats upon the streaming industry independent of the merits of these formats or the decisions of standards bodies'.

180 Thirdly, VideoBanner states that Microsoft cannot claim that tying the Windows Client PC operating system with Windows Media Player has benefits for consumers. As an example, VideoBanner indicates that, by avoiding competition on the merits, the tying in question enables Microsoft 'to exempt itself from the need to make its Windows Media Player secure before it is pre-installed, as apposed to afterwards'. It submits that '[t]here have been a number of significant security holes in Windows Media Player' and that competition on the merits would give alternative streaming media companies an opportunity to compete against Windows Media Player on issues such as 'relative security'. VideoBanner adds that to compel Microsoft to offer an unbundled version of Windows would benefit consumers 'by creating a competition of price, quality, features and security' among the various media player vendors.

181 Fourthly, VideoBanner claims that the 'guaranteed ubiquity' of Windows Media Player enables Microsoft 'to leverage its installed base of Windows Media Players in order to provide media servers'.

182 Fifthly, VideoBanner states that the ubiquity of Windows Media player creates impediments that discourage innovation among media software developers. It further submits that the tying enables Microsoft to determine 'which audio and video formats live and die'.

Observations of Microsoft

183 Microsoft claims, first of all, that the interveners supporting the Commission do not convincingly rebut Microsoft's proposition that 'the uniform integration of functionality into Windows platform gives rise to a number of significant benefits'. SIIA's allegation that Microsoft does not really integrate technology in Windows on a uniform basis contradicts the Commission's argument that it is the uniformity of the integration of media functionality in Windows that generates incentives for third parties to rely exclusively on that technology. While it is correct that Microsoft improves existing functionalities over time, the core functionalities remain the same across all versions of Windows.

184 Secondly, Microsoft claims that the contested decision fails to establish that Windows and its media functionality belong to two separate product markets.

185 In that regard, Microsoft submits that, contrary to the assertions of SIIA, the proper legal test is whether there is separate demand for the 'tying' product without the 'tied' product. It considers that it is obvious that no rational customer would be interested in a product with less functionality offered at the same price as a full-featured product. It adds that SIIA cannot rely on the judgments in *Tetra Pak II* and in *Hilti* to justify its argument that Windows and its media functionality

belong to two separate product markets. Microsoft rejects SIIA's allegation that there are some Client PC operating systems that do not integrate media functionality.

186 Next, Microsoft states that, contrary to the assertions of SIIA, its commercial conduct is consistent with the fact that Windows and the media functionality at issue do not constitute separate products. It rejects SIIA's arguments summarized in paragraph 164 above, claiming inter alia that it offers different licensing terms and conditions for many parts of the Windows operating system and that the way in which it labels files in Windows XP or categorises them in Windows XP Embedded is irrelevant.

187 Thirdly, Microsoft reiterates that the Commission failed to establish that there is any coercion in the present case. It claims inter alia that the media functionality in Windows is available for free and that the Commission allows it to charge the same price for both versions of Windows presumably because it cannot be denied that 'the competitive price for media players is zero'.

188 Fourthly, Microsoft reiterates that the foreclosure theory adopted by the Commission in the present case is erroneous.

189 It explains that the contested decision is based on an inherently speculative theory that infers the existence of anti-competitive effects exclusively from predictions about the future conduct of third parties and that the Commission applies thus a test which is not objective in nature.

190 Microsoft also submits that a particularly high 'burden of proof' should apply in the present case and that the Commission failed to provide sufficient evidence to support its predictions about future market developments. It criticises the fact that SIIA produces new evidence in that respect.

191 More particularly, Microsoft states that the Commission's prediction that content providers will increasingly rely exclusively on Windows Media formats is unsupported. The interveners supporting the Commission do not provide evidence that the additional costs of encoding in multiple formats will deter content providers from doing so.

192 Microsoft further states that OEMs continue to pre-install multiple third party media players on the computers they sell. It denies that consumers are prevented from using third party media players, observing inter alia that neither RealPlayer nor QuickTime have been losing users and that the average number of media players that consumers use each month has increased from 1.5 per person at the end of 1999 to 2.1 per person in 2004.

193 Finally, Microsoft claims that the interveners supporting the Commission do not provide evidence to show that there is demand (either from end-users or from OEMs) for a version of Windows without Windows Media Player. It mentions

inter alia that OEMs compete vigorously to offer the most capable PCs and are therefore 'more likely to want to offer PCs with multiple media players, as opposed to a single media player'. It also states that VideoBanner does not claim to have any interest in entering into exclusive distribution agreements with OEMs.

194 Fifthly, Microsoft claims that the contested decision fails to establish that the media functionality is not connected naturally or by commercial usage with Client PC operating systems.

Observations of the Commission

195 First, the Commission denies that it has not met the proper standard of proof. It considers that the interveners supporting Microsoft are not entitled to rely on the judgments in *Tetra Laval.*

196 Secondly, the Commission claims that the reasoning of those interveners seems to be based on the view that third-party media players are merely some sort of complement to Windows Media Player. Yet the evidence shows that third-party media players that are based on independent technologies, such as RealPlayer or QuickTime, are not mere complements to Windows Media Player, but directly compete with the latter. The Commission adds that data reveal that the large majority of users use only one media player.

197 The Commission observes that the interveners supporting Microsoft ignore that the latter has never given the market the possibility of choosing between a 'bundled' and an 'unbundled' version of Windows and thus of evaluating the respective merits of the two offers.

198 The Commission further states that the reasoning of those interveners is based on the mistaken assumption that Microsoft has been explicitly allowed to charge the same price for the 'bundled' and 'unbundled' versions of Windows. It adds that 'customers pay for Windows Media Player through the price of Windows'. In any event, what matters is not the cost of acquiring one media player, but the disincentives to acquire alternative media players that result from the fact that Microsoft imposes Windows Media Player.

199 Thirdly, the Commission submits that '[b]y refusing to give customers a choice between a version of Windows with and without Windows Media Player, Microsoft imposes itself on operating system customers as a source of supply for streaming media players'. The fact that customers can, in theory, can acquire other media players in addition to Windows Media Player does not alter the fact that Microsoft restricts the ability of operating system customers to freely choose their source of supply of streaming media players.

200 Fourthly, as regards the foreclosure of competition condition, the Commission states that Exor misrepresents the implications of the *Van den Bergh Foods v Commission* case. It further states that, contrary to DMD a.o.'s contention, the

contested decision clearly emphasises that hiding end-user access does not address the concerns identified by the Commission. The Commission rejects ACT's assertion that the present case amounts to a 're-labelled essential facilities case'. It stresses, in that respect, that Microsoft is not required to provide its streaming media player competitors with access to any facilities. Microsoft is only required to allow customers to choose between its bundled and unbundled products.

201 Fifthly, the Commission rejects the contention of the interveners supporting Microsoft that tying Windows Media Player with Windows generates benefits. It claims inter alia that '[t]o the extent that the interveners make an attempt to explain the benefit of Microsoft's tying, their attempts merely serve to confirm the anti-competitive nature of Microsoft's tie'.

202 Finally, the Commission considers that the assertion of ACT and CompTIA that the contested decision lacks sufficient reasoning is unfounded.

J. D. Cooke
Judge-Rapporteur