COMMISSION OF THE EUROPEAN COMMUNITIES

COMMISSION DECISION

of 27/II/2008

fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005)4420 final

Case COMP/C-3/ 34.792 – Microsoft

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

(Text with EEA relevance)

TO BE NOTIFIED TO:

Microsoft Corporation

COMMISSION DECISION

of 2 7 FEV. 2008

fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005)4420 final

(Case COMP/C-3/37.792 Microsoft)

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[1], and in particular Article 24 thereof,

Having regard to the Commission Decision 2007/53/EC of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/C-3/37.792 Microsoft),[2]

Having regard to the Commission Decision of 10 November 2005 imposing a periodic penalty payment pursuant to Article 24(1) of Regulation (EC) No 1/2003 on Microsoft Corporation,[3]

Having regard to the Commission Decision of 12 July 2006 fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005)4420 final and amending that Decision as regards the amount of the periodic penalty payment,[4]

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

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[1] OJ L 1, 4.1.2003, p.1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).
[2] OJ L 32, 6.2.2007, p. 23.
[3] C(2005)4420 final, not yet published.
[4] C(2006)3143 final, not yet published.

and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty,[5]

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

Having regard to the final report of the hearing officer in this case,[6]

Whereas:

1.   INTRODUCTION

(1)   In Commission Decision 2007/53/EC of 24 March 2004 in a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/C-3/37.792-Microsoft) ("the Decision"), addressed to Microsoft Corporation ("Microsoft"), it was found, *inter alia*, that Microsoft had infringed Article 82 of the EC Treaty ("Article 82") and Article 54 of the EEA Agreement by refusing, from October 1998 until the date of the Decision, to disclose certain specified "Interoperability Information" to vendors of work group server operating system products, so that they could develop and distribute such products (Article 2(a) of the Decision).

(2)   Article 5 of the Decision provides:

"As regards the abuse referred to in Article 2(a):

(a) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, make the Interoperability Information available to any undertaking having an interest in developing and distributing work group server operating system products and shall, on reasonable and non-discriminatory terms, allow the use of the Interoperability Information by such undertakings for the purpose of developing and distributing work group server operating system products;

(b) Microsoft Corporation shall ensure that the Interoperability Information made available is kept updated on an ongoing basis and in a Timely Manner;

(c) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, set up an evaluation mechanism that will give interested undertakings a workable possibility of informing themselves about the scope and terms of use of the Interoperability Information; as regards this evaluation mechanism, Microsoft Corporation may impose reasonable and non-discriminatory conditions to ensure that access to the Interoperability Information is granted for evaluation purposes only;

(d) Microsoft Corporation shall, within 60 days of the date of notification of this Decision, communicate to the Commission all the measures that it intends to take under points (a), (b) and (c); that communication shall be sufficiently detailed to enable the Commission to make a preliminarily assessment as to whether the said

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[5]   OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).
[6]   [Not yet published]

measures will ensure effective compliance with the Decision; in particular, Microsoft Corporation shall outline in detail the terms under which it will allow the use of the Interoperability Information;

(e) Microsoft Corporation shall, within 120 days of the date of notification of this Decision, communicate to the Commission all the measures that it has taken under points (a), (b) and (c)."

(3)   The term "Interoperability Information" is defined in Article 1(1) of the Decision as "the complete and accurate specifications for all the Protocols implemented in Windows Work Group Server Operating Systems and that are used by Windows Work Group Servers to deliver file and print services and group and user administration services, including the Windows Domain Controller services, Active Directory services and Group Policy services, to Windows Work Group Networks".[7]

(4)   It is incumbent upon the Commission to examine whether any compliance measures taken by Microsoft are in conformity with Article 5 of the Decision so as to ensure the effectiveness of the Decision.

(5)   According to settled case-law, the operative part of an act is indissociably linked to the statement of reasons for it and when it has to be interpreted account must be taken of the reasons that led to its adoption.[8] In this regard, Recitals 998 to 1010 of the Decision are particularly noteworthy when describing Microsoft's obligations under Article 5 thereof.

(6)   As set out in Recital 1003 of the Decision, the objective of the Decision and in particular Article 5 thereof "is to ensure that Microsoft's competitors can develop products that interoperate with the Windows domain architecture natively supported in the dominant Windows client PC operating system and hence viably compete with Microsoft's work group server operating system". To that end, Recital 1005 of the Decision makes clear that: "Microsoft must not be allowed to render the order to supply ineffective by imposing unreasonable conditions with respect to the access to, or the use of, the information to be disclosed".

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[7]   The term "Windows Work Group Server Operating System" is defined in Article 1(9) of the Decision as "any of the software products marketed by Microsoft Corporation as Windows NT Server 4.0, Windows 2000 Server and Windows Server 2003 Standard Edition, and updates (including, without limitation, security patches), upgrades and successors to the latter, as well as updates and upgrades to such successors". The term "Windows Work Group Server" is defined in Article 1(8) of the Decision as "a computer connected to a network and on which a Windows Work Group Server Operating System is installed". The term "Windows Work Group Network" is defined in Article 1(7) of the Decision as "any group of Windows Client PCs and Windows Work Group Servers linked together via a computer network". The term "Windows Client PC" is defined in Article 1(4) of the Decision as "a PC connected to a network and on which a Windows Client PC Operating System is installed" and the term "Windows Client PC Operating System" is defined in Article 1(5) of the Decision as "any of the software products marketed by Microsoft Corporation as Windows 98, Windows 98 Second Edition, Windows Millennium Edition, Windows NT Workstation 4.0, Windows 2000 Professional, Windows XP Home and Windows XP Professional, and updates (including, without limitation, security patches), upgrades and successors to the latter, as well as updates and upgrades of such successors".

[8]   See Judgment of the Court of First Instance of 17 September 2007, Microsoft v Commission, Case T-201/04, not yet reported, at paragraph 1258.

(7)   Recital 1008 of the Decision states that: "The requirement for the terms imposed by Microsoft to be reasonable […] applies in particular: […] (ii) to any remuneration that Microsoft might charge for supply; such a remuneration should not reflect the 'strategic value' stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market;"

(8)   It is therefore necessary to assess whether any condition imposed by Microsoft and in particular any remuneration charged by Microsoft with respect to the access to, or the use of, the Interoperability Information is reasonable and non-discriminatory, as provided for in Article 5 of the Decision.

(9)   On 10 November 2005, the Commission adopted a decision pursuant to Article 24(1) of Regulation (EC) No 1/2003 (the "Article 24(1) Decision").[9] Article 1 of that Decision provides that:

"Microsoft Corporation shall ensure that, by 15 December 2005, it fully complies with the obligations set out in Article 5(a) and (c) of the Commission Decision (C(2004)900) of 24 March 2004.

In the absence of such compliance, a periodic penalty payment of EUR 2 million per day, calculated from that date, shall be imposed on Microsoft Corporation."

(10)   The Article 24(1) Decision preliminarily identified two aspects of Microsoft's non-compliance with its obligations under Article 5(a) and (c) of the Decision. First, Microsoft has failed to provide complete and accurate technical documentation embodying the Interoperability Information.[10] Second, the remuneration levels charged by Microsoft at that time for access to or use of the Interoperability Information were considered unreasonable.[11]

(11)   On 12 July 2006, the Commission adopted a first decision pursuant to Article 24(2) of Regulation (EC) No 1/2003 (the "first Article 24(2) Decision") fixing the definitive amount of the periodic penalty payment imposed by the 24(1) Decision for the period between 16 December 2005 and 20 June 2006 with respect to the first aspect of non-compliance identified in the Article 24(1) Decision, namely Microsoft's failure to provide complete and accurate technical documentation embodying the Interoperability Information, at EUR 280.5 million.[12]

(12)   As stated in the first Article 24(2) Decision, the Commission retains the possibility of fixing a definitive amount of the periodic penalty payment for the second aspect of non-compliance preliminarily identified in the 24(1) Decision as from 16 December

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[9]   Commission Decision of 10 November 2005 imposing a periodic penalty payment pursuant to Article 24(1) of Regulation (EC) No 1/2003 on Microsoft Corporation (Case COMP/C-3/37.792 Microsoft), C(2005) 4420 final.
[10]   Recital 101 of the Article 24(1) Decision.
[11]   Recitals 162 and 193 of the Article 24(1) Decision.
[12]   Commission Decision of 12 July 2006 fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005)4420 final and amending that Decision as regards the amount of the periodic penalty payment (Case COMP/C-3/37.792 Microsoft), C(2006)3143 final.

2005, should the Commission conclude that Microsoft has failed to charge reasonable remuneration for access to or use of the Interoperability Information.[13]

(13) The first Article 24(2) Decision also amended Article 1 of the Article 24(1) Decision insofar as it increases the periodic penalty payment imposed on Microsoft for non-compliance with its obligations set out in Article 5(a) and (c) of the Decision to EUR 3 million per day as from 1 August 2006.[14]

(14) The present Decision relates exclusively to Microsoft's obligation pursuant to Article 5(a) of the Decision to charge reasonable remuneration for access to or use of the Interoperability Information.

(15) The remainder of this Decision is structured as follows: Section 2 outlines the procedure; Section 3 assesses Microsoft's compliance with its obligation to charge reasonable remuneration for access to or use of the Interoperability Information; Section 4 deals with the fixing of a definitive periodic penalty payment pursuant to Article 24(2) of Regulation (EC) No 1/2003; and Section 5 contains the conclusion.

2.   PROCEDURE

(16) This Sections sets out, in chronological order, the written correspondence that have so far taken place between Microsoft and the Commission as regards Microsoft's obligation pursuant to Article 5(a) of the Decision to charge reasonable remuneration for access to or use of the Interoperability Information. Other important events relating to Microsoft's compliance with the Decision are also referred to, as appropriate. Meetings between the Commission services and Microsoft have also taken place in conjunction with the written correspondence, but they are not all referred to in this Section.

(17) By letter of 27 May 2004,[15] Microsoft submitted a first description of the measures it intended to take in order to comply with Article 5(a) (b) and(c) of the Decision.

(18) On 7 June 2004, Microsoft lodged an application for annulment of the Decision (Case T-201/204) with the Court of First Instance of the European Communities ("Court of First Instance"). On 25 June 2004, Microsoft submitted an application for interim measures with the Court of First Instance, seeking to suspend the operation of the Decision pending the outcome of the proceedings in Case T-201/04.[16]

(19) On 25 June 2004, the Commission decided on its own initiative not to enforce Article 5(a),(b),(c) and (e) and Article 6(a) and (b) of the Decision, pending the outcome of the application for interim measures. That decision not to enforce certain provisions of the Decision did not in any way affect the time limits set out in the Decision, to which Microsoft remained subject.

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[13]   Recital 244 of the first Article 24(2) Decision.
[14]   Article 3 of the first Article 24(2) Decision.
[15]   Letter of 27 May 2004 from the Deputy General Counsel of Microsoft to the Director of Directorate C of DG Competition.
[16]   Case T-201/04 R.

(20)   The Commission responded to Microsoft's letter of 27 May 2004 on 30 July 2004,[17] expressing doubts as to whether the information supplied by Microsoft was indeed detailed enough to comply with Article 5(d) of the Decision. In particular, the Commission asked Microsoft to provide: (i) the technical documentation (specifications) that Microsoft had thus far prepared for the relevant protocols ("the Technical Documentation"); (ii) the terms that it would apply for access to or use of the technical documentation; and (iii) the terms of the evaluation agreement that would govern access by interested third parties to the Technical Documentation for evaluation purposes only. In the absence of any response by Microsoft, the Commission reiterated its request for more detailed information by letter of 15 October 2004.[18]

(21)   Microsoft responded to those letters on 29 October 2004.[19] In its response, Microsoft argued that: "the Decision does not require Microsoft to provide the Commission with the intellectual property licenses and extensive technical documentation requested". Microsoft also stated that in its view, the description of the measures supplied in its letter of 27 May 2004 satisfied Microsoft's obligation under Article 5(d) of the Decision.

(22)   It is to be noted that Microsoft's position in this regard is inconsistent with Article 5(d) of the Decision, which requires it to provide to the Commission sufficiently detailed information, so as: "…to enable the Commission to make a preliminarily assessment as to whether the … measures [envisaged by Microsoft] will ensure effective compliance with the Decision…".

(23)   In any event, Microsoft submitted with its response two draft agreements that it intended to offer as part of a "Work Group Server Protocol Program" ("WSPP"), more specifically "the draft form of licence agreement that Microsoft plan[ned] to use in order to make available the intellectual property in its protocols" ("the 2004 WSPP Development and Distribution Agreement"), and "a draft form of evaluation agreement that Microsoft plan[ned] to use in order to enable prospective licensees to evaluate the protocols we would be making available before entering into a license for such protocols" ("the 2004 WSPP Evaluation Agreement").[20]

(24)   The Commission sent a letter to Microsoft on 8 December 2004,[21] asking Microsoft to supply further explanations and all the necessary supporting documents which would allow the Commission to assess the conformity of the 2004 WSPP Agreements with Microsoft's obligations under Article 5(a) and (c) of the Decision.

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[17]   Letter of 30 July 2004 from the Director of Directorate C of DG Competition to the Deputy General Counsel of Microsoft.
[18]   Letter of 15 October 2004 from the Director of Directorate C of DG Competition to the Deputy General Counsel of Microsoft.
[19]   Letter of 29 October 2004 from the Deputy General Counsel of Microsoft to the Director of Directorate C of DG Competition.
[20]   The 2004 WSPP Evaluation Agreement and the 2004 WSPP Development and Distribution Agreement are referred to together as "the 2004 WSPP Agreements".
[21]   Letter of 8 December 2004 from the Director of Directorate C of DG Competition to the Deputy General Counsel of Microsoft.

(25) On 22 December 2004, the President of the Court of First Instance rejected Microsoft's application for suspension of the Decision in its entirety.[22]

(26) By letter of 17 January 2005, Microsoft submitted to the Commission a report by PriceWaterhouseCoopers ("PwC").[23] That report ("the 2002 PwC Report") was drafted in 2002 in the context of the settlement entered into by Microsoft and the US Department of Justice in November 2001 ("the US settlement").[24] Its focus was on determining "the value of protocol licenses" for the purpose of the US Communications Protocols Licensing Program ("MCPP"),[25] which is described at Recitals 273 to 279 of the Decision. On 18 January 2005, Microsoft provided the Commission with "a memorandum describing the methodology applied to establish royalties for the WSPP licenses" ("the January 2005 Pricing Memorandum").[26]

(27) By e-mail of 26 January 2005,[27] Microsoft submitted new versions of the "WSPP Evaluation Agreement" and the "WSPP Development and Distribution Agreement". Those agreements were slightly modified versions of the 2004 WSPP Agreements.

(28) By letter of 27 January 2005,[28] the Commission sent a request for information to Microsoft under Article 18 of Regulation (EC) No 1/2003, requesting further information in relation, in particular, to the "intrinsically valuable inventions" that Microsoft claimed to be present in the Technical Documentation. Microsoft responded to that request for information by e-mail of 15 February 2005.[29] Microsoft had in the meantime reiterated to the Commission that it believed that it had already fulfilled its obligations pursuant to Article 5(d) of the Decision prior to responding to that request for information.[30]

(29) By letter of 8 February 2005,[31] the Commission sent another request for information to Microsoft under Article 18 of Regulation (EC) No 1/2003, asking it to provide a list of all its protocols licensed royalty-free and to explain the economic rationale behind this.

(30) On 9 February 2005, the Commission addressed a request for information to third parties under Article 18 of Regulation (EC) No 1/2003, asking them *inter alia*

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[22] Order of the President of the Court of First Instance of 22 December 2004, <u>Microsoft v Commission</u>, Case T-201/04 R, [2004] ECR II-4463.

[23] Letter of 17 January 2005 from Microsoft's Director of Competition Law EMEA to the Head of Unit C-3 of DG Competition.

[24] See Recital 18 of the Decision.

[25] Letter of 17 January 2005 from Microsoft's Director of Competition Law EMEA to the Head of Unit C-3 of DG Competition, on page 1.

[26] E-mail of 18 January 2005 from Microsoft's Director of Competition Law EMEA to the Head of Unit C-3 of DG Competition.

[27] E-mail of 26 January 2005 from Microsoft's Director of Competition Law EMEA to the Head of Unit C-3 of DG Competition.

[28] Letter of 27 January 2005 from the Head of Unit C-3 of DG Competition to Microsoft's Director of Competition Law EMEA.

[29] E-mail of 15 February 2005 from Microsoft's Director of Competition Law EMEA to the Head of Unit C-3 of DG Competition. After having being provided with a non-confidential copy of Microsoft's response, IBM submitted comments on 11 March 2005.

[30] E-mail of 7 February 2005 from Microsoft's Director of Competition Law EMEA to Case Officer B.

[31] Letter of 8 February 2005 from Head of Unit C-3 of DG Competition to Microsoft's Director of Competition Law EMEA.

whether, in their view, the remuneration required under the WSPP Development Agreement is reasonable and in line with the requirement that it should not reflect the "strategic value" stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market (Recital 1008 of the Decision).[32]

(31) On 17 March 2005, the Commission expressed a number of concerns to Microsoft regarding its compliance with Article 5 of the Decision.[33] Microsoft responded to that letter on 31 March 2005.[34] In its letter, Microsoft contended that it was "in full compliance with its obligations under the Decision", but was nevertheless prepared to make a number of changes to the WSPP Evaluation Agreement and to the WSPP Development and Distribution Agreement.[35] This included introducing a new scheme to determine the remuneration that third parties would have to pay in order to obtain

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[32] Requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 were sent to Company Y, Free Software Foundation Europe, Company X, IBM, Nokia, Novell, Red Hat, SCO and Sun. The full text of the questions reads as follows: "1. Do you consider that the terms set out in the Evaluation Agreement are consistent with Microsoft's obligations under Article 5 (c) of the Decision, and in particular with the requirement for these terms to be reasonable and non-discriminatory? Please substantiate your answer through precise references to the direct or indirect experience of your organisation with comparable evaluation mechanisms. 2. How do the terms set out in the Evaluation Agreement compare to industry practice with respect to similar types of disclosure of technical information for evaluation purposes? Please substantiate your answer through precise references to the direct or indirect experience of your organisation with comparable evaluation mechanisms. 3. To the extent that your answers to questions 1-2 above do not cover all the information that you believe is necessary for the Commission to assess the consistency of the Evaluation Agreement with the Decision, please provide all other information that you consider relevant in this regard. 4. Do you consider that the terms set out in the WSPP Development Agreement are consistent with Microsoft's obligations under Articles 5 (a) and 5 (b) of the Decision and, in particular, with the requirement for these terms to be reasonable and non-discriminatory? Please substantiate your answer through precise references to the direct or indirect experience of your organisation. 5. Do you consider that the remuneration required under the WSPP Development Agreement is reasonable and in line with the requirement that it should not reflect the "strategic value" stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market (recital 1008 of the Decision)? 6. Do you consider that the provisions of the WSPP Development Agreement (recital 1008 of the Decision) 6.1 create any disincentives for beneficiaries of the Decision to compete with Microsoft; 6.2 unnecessarily restrain the ability of beneficiaries of the Decision to innovate; 6.3 provide sufficient visibility so as to ensure potential beneficiaries that the terms under which they can make use of the disclosed specifications will remain reasonably stable? 7. How do the terms of the WSPP Development Agreement compare to industry practice governing the use of similar types of information (i.e. disclosure of protocol specifications for interoperability purposes)? Please substantiate your answer through precise references to the direct or indirect experience of your organisation in that respect. 8. Do you consider that the WSPP Development Agreement, and in particular section 4.2, is consistent with Microsoft's obligation pursuant to the Decision to disclose the Interoperability Information in a timely manner? In particular, do you consider that the timing of the disclosures as provided for by the WSPP Development Agreement is objectively justified and consistent with the principle that Microsoft should take as a starting point for disclosure the time when it already has a working and sufficiently stable implementation, and that, where relevant, Microsoft should take as a reference the point in time when it makes new products available to potential customers for beta testing purposes? 9. To the extent that your answers to questions 4-8 above do not cover all the information that you believe is necessary for the Commission to assess the consistency of the WSPP Development Agreement with the Decision, please provide all other information that you consider relevant in this regard."

[33] Letter of 17 March 2005 from the Director General of DG Competition to Microsoft's General Counsel.

[34] Letter of 31 March 2005 from Microsoft's Deputy General Counsel to the Director General of DG Competition.

[35] The changes were described in Annex A to the letter of 31 March 2005 from Microsoft's Deputy General Counsel to the Director General of DG Competition.

access to or make use of the Technical Documentation. That new remuneration scheme had been prepared in consultation with PwC, and Microsoft attached a new report by PwC on this point ("the March 2005 PwC report").[36]

(32)   After another meeting with Microsoft's representatives on 13-14 April 2005, the Commission sent to Microsoft draft agreements providing for possible ways to address the preliminary concerns expressed in the letter of 17 March 2005.[37] On 2 May 2005, Microsoft sent a letter to the Commission proposing "a framework for the protocol licensing program under the Decision". That framework consisted of eight "framework principles" according to which Microsoft expressed readiness to structure the agreements.[38] On 9 May 2005, Microsoft sent a revised set of agreements to the Commission, following up on the framework principles identified in the letter of 2 May 2005.[39]

(33)   Following a number of exchanges of views between the Commission services, the Member of the Commission responsible for Competition and Microsoft, Microsoft presented revised versions of the WSPP Agreements on 20 May 2005.[40]

(34)   On 23 May 2005, Microsoft's chief executive officer, Mr. Ballmer, wrote to the Member of the Commission responsible for Competition. In his letter, Mr Ballmer

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[36]   Annex B to the letter of 31 March 2005 from Microsoft's Deputy General Counsel to the Director General of DG Competition.

[37]   Letter of 18 April 2005 from the Director General of DG Competition to the General Counsel of Microsoft.

[38]   The eight framework principles outlined in the letter of 2 May 2005 are as follows. First, "[l]icensees can choose to license the subsets they want among all the protocol technology covered by the Decision". Second, "[l]icensees can choose the level of documentation they wish to receive". Third, "[l]icensees can make a reasonable choice among the intellectual property rights they wish to license". Fourth, "[r]oyalties will be adjusted according to the licensee's choices among protocols, documentation and intellectual property rights, subject to review by the Trustee in accordance with the terms of the Decision". Fifth, "[l]icensees can implement Microsoft's protocol technology in order to develop software that interoperates with Windows servers as well as any other software product that is already compatible with Windows server operating systems". Sixth, "[i]mplementations can be distributed for use with proprietary or open source software. Protocols implemented using Microsoft's trade secret documentation cannot, however, be published in source code form that thereby reveals the specifications to the world". Seventh, "Microsoft will discuss in good faith with prospective licensees how best to craft agreements in accordance with these principles and the terms of the Decision, subject to review by the Trustee". Eighth "[a]ny dispute relating to the meaning of a license agreement will be subject to consultation with the Trustee, and failing agreement, judicial review by the courts. Any dispute relating to the meaning of the Decision will be subject to consultation with the Trustee, and failing agreement, the appropriate review and processes of the European Commission".

[39]   Letter of 9 May 2005 from the Deputy General Counsel of Microsoft to the Head of Unit C-3 of DG Competition. Enclosed with that letter were the following agreements: Microsoft Work Group Server Protocol Program License Agreement (All IP) for Development and Product Distribution (Work Group Server Operating System Software) ("the All IP Agreement"); Microsoft Communications Protocol Program Agreement for Evaluation of Technical Documentation (3-Day) ("the 3-day Evaluation Agreement"); Microsoft Communications Protocol Program Agreement for Evaluation of Technical Documentation (30-Day) ("the 30-day Evaluation Agreement"); Microsoft Work Group Server Protocol Program License Agreement (No Patents) for Development and Product Distribution (Work Group Server Operating System Software) ("the No Patent Agreement"); Microsoft Work Group Server Protocol Program Patent Only License Agreement for Development and Product Distribution ("the Patent Only Agreement"). Hereinafter in this Decision, those agreements are referred to as "the WSPP Agreements".

[40]   Letter of 20 May 2005 from Microsoft's Director of Competition Law EMEA to the Head of Unit C-3 of DG Competition.

proposed "a range of factors" according to which the monitoring trustee envisaged in Article 7 of the Decision as well Microsoft, licensees and the Commission would assess whether the remuneration required by Microsoft was reasonable and non-discriminatory. Mr Ballmer explained that these factors would be applied by Microsoft to "put [the] protocols into distinct categories", namely "silver, gold, and platinum tiers".

(35) On 23 May 2005, Microsoft also sent by e-mail to the Commission services a "proposed pricing test".[41]

(36) On 27 May 2005, Mr Ballmer sent a further letter to the Member of the Commission responsible for Competition summarising his understanding of the state of the discussions. Referring to the proposed "pricing test", Mr. Ballmer announced that Microsoft would submit further text that "will guide any assessment of the reasonableness of [Microsoft's] protocol price".

(37) On 27 May 2005, Microsoft also submitted revised versions of a "pricing test" that it would introduce in the WSPP Agreements.[42] By letter of 28 May 2005, Microsoft provided further revised versions of the WSPP Agreements.[43]

(38) By letter of 30 May 2005,[44] Microsoft summarised inter alia its position as regards the basis for the calculation of the remuneration. That letter discussed an appropriate test to establish reasonable prices in the WSPP remuneration scheme. The letter also attached a report by PwC on the "Comparability of Standard Setting to the Licensing of Interoperability Information and Intellectual Property Under the Decision".

(39) On 31 May 2005, Microsoft sent a revised version of the WSPP Agreements which granted worldwide development and distribution rights and which included pricing principles ("the WSPP Pricing Principles") to price the Interoperability Information disclosed by Microsoft.[45] Those WSPP Pricing Principles were included in the WSPP Agreements following several discussions and exchanges of written views between the Commission services and Microsoft.[46]

(40) On 9 June 2005, Microsoft sent to the Commission services updated versions of the WSPP Agreements.

(41) On 13 June 2005, the Commission addressed a request for information to third parties under Article 18 of Regulation (EC) No 1/2003, asking them inter alia whether they considered that the WSPP Pricing Principles were adequately reflected in the

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[41] E-mail of 23 May 2005 from Microsoft's Director of Competition Law EMEA to the Head of Unit C-3 of DG Competition.

[42] Letter of 27 May from Microsoft's Director of Competition Law EMEA to the Director General of DG Competition.

[43] Letter of 28 May 2005 from Microsoft's Director of Competition Law EMEA to the Director General of DG Competition.

[44] Letter of 30 May 2005 from Microsoft's Director of Competition Law EMEA to the Director General of DG Competition.

[45] E-mail of 31 May 2005 from Microsoft's Director of Competition Law EMEA to the Director General of DG Competition.

[46] See, for example, e-mail of 30 May 2005 from Microsoft's Director of Competition Law EMEA to the Director General of DG Competition.

remuneration structure and remuneration calculation method laid down in the WSPP Agreements, and in particular in the Scenarios Royalty Table included therein.[47]

(42) On 15 June 2005, the Commission services sent two reports by the Commission's external technical experts, OTR-Group ("OTR"), to Microsoft for comments. The reports concerned the lack of innovative features in the "Directory Replication Service Remote Protocol" ("DRS protocol"), as well as the completeness and accuracy of the Technical Documentation supplied by Microsoft.[48] Microsoft responded to that letter by letter of 8 July 2005.[49]

(43) On 28 July 2005, the Commission, acting pursuant to Article 7(1) of Regulation (EC) No 1/2003 and in accordance with Article 7 of the Decision, adopted a decision relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft), establishing a monitoring mechanism and providing for the appointment of a Monitoring Trustee ("the Trustee Decision).[50] Article 2.7 of the Trustee Decision provides that Microsoft shall submit for the Commission's approval the terms of a proposed Trustee Mandate,[51] which shall have been provisionally agreed by the proposed Trustee. According to the definitions in Article 1 of the Trustee Decision, the Trustee Mandate "sets out all provisions necessary to enable the Trustee to perform its functions […]".

(44) On 26 August 2005, 19 September 2005, 23 September 2005, 8 October 2005 and 13 October 2005, Microsoft provided revised WSPP Agreements.[52] The WSPP

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[47] Requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 were sent to Company Y, Free Software Foundation Europe, Company X, IBM Nokia, Novell, Red Hat and Sun. The full text of the questions reads as follows: "1. Do you consider that the revised terms set out in the Evaluation Agreement (3-day) and in the Evaluation Agreement (30-day) are consistent with Microsoft's obligations under Article 5 (c) of the Decision, and in particular with the requirement for these terms to be reasonable and non-discriminatory? Please substantiate your answer through precise references to the direct or indirect experience of your organisation with comparable evaluation mechanisms. 2. To the extent that your answers to question 1 above do not cover all the information that you believe is necessary for the Commission to assess the compliance of the Evaluation Agreements with the Decision, please provide all other information that you consider relevant in this regard. 3. Do you consider that the revised terms set out in the 'All IP' Agreement, in the SEPP 'no patents' Agreement and in the "Patent only" Agreement are consistent with Microsoft's obligations under Article 5 (a) and 5 (b) of the Decision and, in particular, with the requirement for these terms to be reasonable and non-discriminatory? Please substantiate your answer through precise references to the direct or indirect experience of your organisation. 4. Do you consider that the "pricing principles" agreed by Microsoft are adequately reflected in the royalty structure and royalty calculation method laid down in the 'All IP' Agreement, the 'no patents' Agreement and the 'patent only' Agreement, and in particular in the Scenarios Royalty Table included therein. 5. To the extent that your answers to questions 3 - 4 above do not cover all the information that you believe is necessary for the Commission to assess the compliance of the 'All IP' Agreement, the 'no patents' Agreement and the 'patent only' Agreement with the Decision, please provide all other information that you consider relevant in this regard."

[48] Letter of 15 June 2005 from the Director of Directorate C of DG Competition to Microsoft's Director of Competition Law EMEA.

[49] Letter of 8 July 2005 from Microsoft's Director of Competition Law EMEA to the Director of Directorate C of DG Competition.

[50] C(2005)2988.

[51] The Trustee Mandate is a contract entered into by Microsoft and the Monitoring Trustee.

[52] E-mail of 26 August 2005 from Microsoft's Deputy General Counsel to the Head of Unit C-3 of DG Competition; e-mail of 19 September 2005 from Microsoft's Director of Competition Law EMEA to the Director of Directorate C of DG Competition; letter of 23 September 2005 from Microsoft's Director of Competition Law EMEA to the Director of Directorate C of DG Competition; e-mail of 8

Agreements enclosed with the letter of 13 October included a revised royalty table, with lowered remuneration rates.[53]

(45) In September and October 2005, four companies entered into 3-day Evaluation Agreements with Microsoft.[54] The Commission requested those companies to submit both a detailed description of how the evaluation took place on-site, and an assessment of whether the Technical Documentation examined in the course of the evaluation provided complete and accurate specifications for the protocols covered by the Decision, as well as their views on the value of the technology described in the Technical Documentation.[55]

(46) On 4 October 2005, the Commission appointed Professor Neil Barrett as Monitoring Trustee (the "Trustee") for the purpose of assisting the Commission in monitoring Microsoft's compliance with the Decision.[56]

(47) By letter of 10 November 2005, the Commission approved the Trustee Mandate that had been proposed by Microsoft and agreed by the Trustee, in accordance with Article 2.7 of the Trustee Decision.[57] The Trustee Mandate provides that the Trustee shall refer to the WSPP Pricing Principles "when providing […] opinions on issues regarding the remuneration Microsoft charges". [58] [59]

October 2005 from Microsoft's Director of Competition Law EMEA to the Head of Unit C-3 of DG Competition; letter of 13 October 2005 from Microsoft's Deputy General Counsel to the Head of Unit C-3 of DG Competition.

[53] According to Microsoft's General Counsel's letter of 16 October 2005 to the Director General of DG Competition (on page 2), Microsoft reduced "the royalty of the 'no patent' license for [the Directory & Global Catalog Replication] scenario to 50% of the corresponding 'all I.P' license. In addition, in order to attempt to bring this matter to closure rapidly and maintain simplicity in our licensing program, we have set 'no patent' royalty levels to 50% of the complete levels for all scenarios which include protocols that are not royalty-free the royalty level for the DRS."

[54] Sun, Oracle, Novell, IBM.

[55] Requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 were sent to Sun on 5 September 2005, to Oracle on 22 September 2005, and to IBM and Novell on 4 October 2005. The full text of the questions reads as follows: "1. Please describe in detail how the evaluation took place on-site, and in particular what kind of facilities Microsoft provided and what kind of security measures Microsoft put in place. 2. Do you consider that the Technical Documentation examined by [your company] provides complete and accurate specifications (see Article 1(1) of the Decision) for the protocols covered by the Decision? Please substantiate your answer. 3. After scrutiny of the Technical Documentation do you consider that the royalty levels proposed by Microsoft and set out in the Royalty Table annexed to the WSPP Agreements are in conformity with WSPP Pricing Principles, which are also annexed to the WSPP Agreements, in as far as they: i. enable implementation of the protocols by a licensee in a commercially practicable manner; and ii. reflect value conferred upon a licensee to the exclusion of the strategic value stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market?" Responses were received from Sun on 20 September 2005, from Oracle on 12 October 2005, from Novell on 13 October 2005 and from IBM on 21 October 2005.

[56] Letter of 4 October 2005 from the Member of the Commission responsible for Competition to Microsoft's CEO. Professor Neil Barrett was one of the four candidates proposed by Microsoft for the position of Trustee.

[57] Letter of 10 November 2005 from the Member of the Commission responsible for Competition to Microsoft's CEO.

[58] Section C.1 b)(ii) of the Trustee Mandate.

[59] For the WSPP Pricing Principles, see Recital (111) and following below.

(48) On 21 October 2005, Microsoft submitted a report, dated 20 October 2005, "on innovation and pricing of the Directory & Global Catalog Replication protocol group under the WSPP pricing principles" ("Microsoft's report on the DRS protocol").[60] OTR provided an analysis of that report on 27 October 2005.

(49) On 10 November 2005, the Commission adopted the Article 24(1) Decision.[61]

(50) On 11 November 2005, Microsoft submitted revised Technical Documentation relating to the Directory Replication Service ("DRS") protocol.[62]

(51) On 15 December 2005, Microsoft submitted various reports purporting to justify the remuneration levels charged in the WSPP Agreements.[63] Those reports included a protocol analysis of the innovative features of the DRS protocol, a report by PwC regarding remuneration methodology and application of the WSPP Pricing Principles ("the 15 December 2005 PwC report") and a report on patents and prior art references.

(52) On 7 February 2006, Microsoft submitted supplemental material relating to the innovations in the protocol technology described in the Technical Documentation.[64] Enclosed with that letter was an updated report of the 15 December 2005 PwC report ("the February 2006 PwC Report").

(53) On 7 April 2006, the Commission provided Microsoft with the Trustee's review of the material purporting to justify the remuneration levels charged by Microsoft in the WSPP Agreements submitted on 15 December 2005 ("the Trustee March 2006 Innovations report").[65]

(54) On 4 May 2006, Microsoft submitted its response to the Trustee March 2006 Innovations report and announced its intention to review the pricing tables set up in October 2005 and to provide reports with respect to its claims on the innovations in the disclosed protocol technology.[66]

(55) On 12 July 2006, the Commission adopted the first Article 24(2) Decision.[67]

(56) On 31 July 2006, Microsoft submitted supplemental material on innovation in response to points raised by the Trustee in his March 2006 Innovations report.[68]

(57) On 24 August 2006, Microsoft submitted a new remuneration scheme that also included a Flexible Income Approach.[69] Enclosed with the letter was a report from

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[60] E-mail of 21 October 2005 from Microsoft's General Counsel to the Director General of DG Competition.
[61] See Recital (9).
[62] Letter of 11 November 2005 from Microsoft's Director of Competition Law EMEA to the Head of Unit C-3 of DG Competition.
[63] Letter of 15 December 2005 from Microsoft's General Counsel to the Director General of DG Competition, Annexes 1, 3, 4 and 5.
[64] Letter of 7 February 2006 from Microsoft's General Counsel to the Director General of DG Competition.
[65] Fax of 17 March 2006 from the Trustee to Case Officer A.
[66] Letter of 4 May 2006 from Microsoft's General Counsel to the Director General of DG Competition.
[67] See footnote 12.
[68] Letter of 31 July 2006 from Microsoft's General Counsel to the Director General of DG Competition.

PwC ("the August 2006 PwC report") and another report from Grant Thornton ("the August 2006 Grant Thornton report"). Further revised WSPP Agreements were also attached. The revised WSPP Agreements included a revised royalty table, with lowered remuneration rates.[70]

(58) On 18 October 2006, Microsoft submitted supplemental material on the revision of the WSPP remuneration scheme.[71]

(59) On 20 October 2006, 22 November 2006 and 28 November 2006, Microsoft submitted revised WSPP Agreements.[72]

(60) On 7 November 2006, the Commission requested various third parties to submit their views on the Flexible Income Approach proposed by Microsoft.[73]

(61) In December 2006, three companies entered into 4-day Evaluation Agreements[74] with Microsoft.[75] On 11 December 2006, the Commission requested those companies to submit both a detailed description of how the evaluation took place on-site, and an assessment of whether the Technical Documentation examined in the course of the evaluation provided complete and accurate specifications for the protocols covered by the Decision.[76] On the same date, the Commission requested the three companies

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[69]   Letter of 24 August 2006 from Microsoft's General Counsel to the Director General of DG Competition.

[70]   Microsoft indicated in its letter of 24 August 2006 (on page 1), that it offered "[…] to license a number of individual protocols at a nominal or a flat fee, additional significant discounts of 30% or more over our October 2005 suggested list royalties for all Gold, Silver and Bronze scenarios […]."

[71]   Letter of 18 October 2006 from Microsoft's General Counsel to the Director General of DG Competition.

[72]   Letter of 20 October 2006 from the Deputy General Counsel of Microsoft to the Director of Directorate C of DG Competition; e-mail of 22 November 2006 from Microsoft's Director of Commercial and Regulatory Affairs, EMEA, to Case Officer A; e-mail of 28 November 2006 from Microsoft's Director of Commercial and Regulatory Affairs, EMEA, to Case Officer A, by which Microsoft extended from three to four days the evaluation period of the 3-day Evaluation Agreement.

[73]   Letter of 7 November 2006 from the Head of Unit C-3 of DG Competition to Microsoft's Director of Commercial and Regulatory Affairs, EMEA. Requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 were sent to Novell, Sun Microsystems, Free Software Foundation Europe IBM Europe-Middle East-Africa, Company X, Nokia Corporation, Oracle and Red Hat on 7 November 2006. The full text of the questions reads as follows: "1. Do you consider that the so-called "Flexible Income Approach" proposed by Microsoft is a reasonable method to calculate the WSPP royalties and in line with the requirement that the remunerating charged by Microsoft should not reflect the "strategic value" stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market (recital 1008 of the Decision)? 2. Please comment in particular on the calculation methodology for the "incremental profit margin" and the allocation of 25% of this incremental profit to Microsoft. Please, substantiate your answer by indicating how this methodology compares to industry practice." Responses were received from Novell on 22 November 2006, Sun on 22 November 2006, Free Software Foundation Europe on 28 November 2006, IBM on 28 November 2006, Company X on 29 November 2006, Nokia on 30 November 2006, Oracle on 15 December 2006 and Red Hat on 27 November 2006.

[74]   See footnote 72 *in fine*.

[75]   IBM, Oracle, Sun.

[76]   The full text of the questions of the request for information pursuant to Article 18 of Regulation (EC) No 1/2003 reads as follows: "1. Please describe in detail how the evaluation took place on-site, and in particular what kind of facilities Microsoft provided and what kind of security measures Microsoft put in place. 2. Do you consider that the Technical Documentation provides complete and accurate specifications (see Article 1 (1) of the Decision) for the protocols covered by the Decision? Please

in question to provide their views on the innovation claims made by Microsoft and on the value of the technology disclosed with the Technical Documentation.[77]

(62) On 15 December 2006, the Commission's external technical advisors, TAEUS International Corporation ("TAEUS"), submitted a report on the innovative character of the non-patented technology disclosed with the Technical Documentation with regard to the protocol technology Microsoft claims to be the most innovative ("TAEUS report on innovation").[78]

(63) On 10 January 2007, Microsoft informed the Commission that a fourth company, Quest Software, Inc. ("Quest"), went through an evaluation of the Technical Documentation.[79] On 12 January 2007, the Commission requested Quest to submit both a detailed description of how the evaluation took place on-site, and an assessment of whether the Technical Documentation examined in the course of the evaluation provided complete and accurate specifications for the protocols covered by the Decision.[80] It appears from Quest's response that it did not review the material Microsoft provided to buttress its innovation claims.[81]

(64) On 24 January 2007, the Trustee submitted a memorandum on WSPP comparable technologies ("Trustee memorandum on WSPP comparable technologies").[82]

(65) On 6 February 2007, the Commission requested various third parties to submit their views on the costs that would be incurred in implementing, on the basis of the Technical Documentation, a fully compatible domain controller.[83]

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substantiate your answer." Responses were received from IBM on 18 December 2006, Oracle on 19 December 2006 and Sun on 20 December 2006.

[77] The full text of the questions of the request for information pursuant to Article 18 of Regulation (EC) No 1/2003 reads as follows: "1. After reviewing the innovation claims made by Microsoft do you consider that technologies described in the Technical Documentation are indeed innovative? 2. In case you deem technology described in the Technical Documentation innovative do you consider that the royalty levels proposed by Microsoft and set out in the Royalty Table annexed to the WSPP Agreements for access to these technologies are reasonable and non-discriminatory and in conformity with WSPP Pricing Principles, which are also annexed to the WSPP Agreements, in as far as they are supported by a market valuation of comparable technologies, excluding the strategic value that stems from the dominance of any such technologies?". Responses were received from Sun on 22 December 2006, IBM on 11 January 2007 and Oracle on 13 February 2007.

[78] E-mail of 12 December 2006 from TAEUS's Project Manager to Case Officer A. The report covers the DRS (Directory Replication Service), FRS (File Replication Service) and NAP (Network Access Protection) protocols.

[79] E-mail of 10 January 2007 from Microsoft's Director of Commercial and Regulatory Affairs, EMEA to Case Officer A.

[80] The full text of the questions of the request for information pursuant to Article 18 of Regulation (EC) No 1/2003 reads as follows: "1. Please describe in detail how the evaluation took place on-site, and in particular what kind of facilities Microsoft provided and what kind of security measures Microsoft put in place. 2. Do you consider that the Technical Documentation provides complete and accurate specifications (see Article 1 (1) of the Decision) for the protocols covered by the Decision? Please substantiate your answer and indicate what part of the material made available by Microsoft you have reviewed." The response from Quest was received on 22 January 2007.

[81] Letter of 22 January 2007 from Quest to the Commission.

[82] E-mail of 24 January 2007 from the Trustee team to Case Officer A.

[83] Requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 were sent to IBM, Sun, Quest and Oracle on 6 February 2006. The full text of the questions reads as follows: "Questions 1-5 below seek information on the costs that would be incurred by your company in implementing, on the

(66)   On 12 February 2007, Microsoft submitted revised WSPP Agreements.[84]

(67)   On 19 February 2007, the Trustee submitted a report analysing a hypothetical business plan for development ("Trustee report on the business plan").[85]

(68)   On 22 February 2007, the Trustee submitted a summary review of Microsoft's innovation claims ("Trustee summary review of innovation claims").[86]

(69)   On 27 February 2007, the Trustee submitted the final version of his report on innovations and comparable technologies ("Trustee report on innovations and comparable technologies").[87]

(70)   On 27 February 2007, TAEUS submitted the final version of its report on the costs that would be incurred by a company in implementing, on the basis of the Technical Documentation, a fully compatible domain controller ("TAEUS report on the business plan").[88]

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[84] basis of the WSPP Technical Documentation, a fully compatible domain controller for file and print and user and group administration that is capable of interoperating with the Windows domain architecture natively supported in the dominant Windows client PC operating system ("the fully compatible domain controller"). Please base your answers on the assumption that the fully compatible domain controller: - is to be developed by adding functionality to your company's own UNIX or Linux operating system; - must continue to function in a UNIX or Linux network. (1) Please provide an estimate of the duration of the development of the fully compatible domain controller described above, including the amount of engineer's work (expressed in man/months) and an estimation of the monthly developer cost. (2) Please provide an estimate of the cost of developing the fully compatible domain controller described above, indicating in particular the following costs: (a) The purchase of the WSPP Technical Documentation: evaluation costs, licensing costs. (b) The costs of the development work (other than the salaries of the developers: design development, project planning, software development, integration, testing, etc. (c) The marketing of the new product, i.e. marketing, sales, sales support, training, recruitment. (d) Any other costs that would be incurred for the initial development of the fully compatible domain controller described above. (3) Please indicate whether you would intend to market the fully compatible domain controller described above (a) As a separate SKU: if so, please provide an estimate of the unit selling price. (b) As two complementary SKUs consisting of: (i) your actual company's UNIX or Linux operating system, and (ii) an add-on that is the implementation of the WSPP protocols allowing your actual company's UNIX or Linux operating system to interoperate with the Window domain architecture; in this latter case, please provide an estimate of the unit selling price of the 2nd SKU. (4) Please provide an estimate of the expected sales of the SKU you would intend to market over the next 10 years. (5) Please provide an estimate of the costs (as a percentage of the revenues of the SKU) that would be attributed to the SKU as regards: (a) General and Administrative expenses; (b) Sales and Management expenses; (c) Current R&D costs; (d) Any other costs that would be incurred." Responses were received from IBM on 12 February 2007, Quest on 12 February 2007, Oracle on 14 February 2007 and Sun on 20 February 2007. For the definition of SKU, see footnote 186, last sentence.

[84] Letter of 12 February 2007 from Microsoft's Director of Commercial and Regulatory Affairs, EMEA, to the Head of Unit C-3 of DG Competition.

[85] E-mail of 19 February 2007 from the Trustee to Case Officer A.

[86] E-mail of 22 February 2007 from the a Member of the Trustee team to Case Officer A. The Trustee, subsequently, on 3 March 2007, submitted a slightly revised version of this report to which Microsoft was granted access on 31 May 2007 ("3 March 2007 Trustee report"). A corrected version of the 3 March 2007 Trustee report was submitted by the Trustee on 21 June 2007. As the correction consisted in merely replacing three footnotes by the actually quoted text this version of the report is not addressed separately from the 3 March 2007 Trustee report in this document.

[87] E-mail of 23 February 2007 from the Trustee to Case Officer A.

[88] E-mail of 27 February 2007 from TAEUS's Project Manager to Case Officer A.

(71)   On 28 February 2007, the Trustee, at the Commission's request, further substantiated his review of Microsoft's? innovation claims ("the 28 of February 2007 Trustee analysis").[89]

(72)   In the light of the reports submitted by the Trustee and TAEUS, the Commission came to the preliminary conclusion that Microsoft had not yet complied with its obligation to charge a reasonable remuneration for access to or use of the Interoperability Information pursuant to Article 5(a) of the Decision.

(73)   On 1 March 2007, a Statement of Objections was addressed to Microsoft ("the Statement of Objections"). The Commission also informed Microsoft that it would give Microsoft access to all documents on the case file (excluding business secrets and other confidential information) obtained, produced and/or assembled by the Commission for the purpose of the procedure pursuant to Article 24 of Regulation (EC) No 1/2003, in so far as they had led the Commission to raise its objections. A list of those documents was attached. Finally, the letter of 1 March 2007 informed Microsoft that it was entitled under Article 27(1) of Regulation (EC) No 1/2003, in conjunction with Article 10 of Regulation No 773/2004, to make known in writing to the Commission its views on the objections within five weeks of the date of receipt of that letter.

(74)   On 1 March 2007, Microsoft's CEO sent a letter to the Member of the Commission responsible for Competition asking for Microsoft's and the Commission's teams to meet with the Trustee before the Commission issued the Statement of Objections.[90]

(75)   On 2 March 2007, Microsoft asked for the exact remuneration rates that Microsoft must set for the Interoperability Information in order to be in compliance with the Decision.[91] The Commission replied to that letter on 8 March 2007 recalling that it is not for the Commission to prescribe the precise remuneration rates for Microsoft's own protocol technology and that the Commission's obligation is, however, to ensure that any remuneration rate set by Microsoft at its own discretion is reasonable and non-discriminatory in accordance with Article 5(a) of the 2004 Decision.[92]

(76)   On 2 March 2007, Microsoft requested access to the case file,[93] which it was granted on 5 March 2007, at the Commission's premises.

(77)   On 8 March 2007, Microsoft informed the Commission that Quest had signed a licence under the WSPP.[94]

(78)   On 9 March 2007, Microsoft requested a time extension to respond to the Statement of Objections.[95] On 15 March 2007, the Commission's hearing officer granted an extension to respond to the Statement of Objections until 23 April 2007.[96]

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[89]   E-mail of 28 February 2007 from a member of the Trustee team to Case Officer A.

[90]   Letter of 1 March 2007 from Microsoft's CEO to the Member of the Commission responsible for Competition.

[91]   Letter of 2 March 2007 from Microsoft's General Counsel to the Director General of DG Competition.

[92]   Letter of 8 March 2007 from the Director General of DG Competition to Microsoft's General Counsel.

[93]   E-mail of 2 March 2007 from Microsoft's legal counsel to the Head of Unit C-3 of DG Competition.

[94]   Letter of 8 March 2007 from Microsoft's Director of Commercial and Regulatory Affairs, EMEA, to the Head of Unit C-3 of DG Competition.

(79)   On 15 March 2007, the Commission sent a formal request for information to Quest on the recently signed WSSP licence.[97]

(80)   On 27 March 2007, the Commission transmitted a copy of the Statement of Objections to the parties admitted as interested third parties in the procedure leading to the adoption of the Decision.[98]

(81)   On 13 April 2007, Microsoft "[proposed] to reduce the royalty rate for the entire set of protocols covered by the Decision (with all associated intellectual property rights) to 1%" for distribution within the EEA.[99]

(82)   On 23 April 2007, Microsoft submitted its response to the Statement of Objections (the "Response to the Statement of Objections").[100] In the same letter, Microsoft informed the Commission that it declined the possibility to have an oral hearing.

(83)   On 25 April 2007, the Commission transmitted a copy of the Response to the Statement of Objections to the parties admitted as interested third parties in the procedure leading to the adoption of the Decision.[101]

(84)   On 27 April 2007, Microsoft submitted a corrigendum to its Response to the Statement of Objections.[102]

(85)   On 9 May 2007, Microsoft requested further access to the case file.[103]

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[95]   Letter of 9 March 2007 from Microsoft's legal counsel to the Commission's hearing officer.

[96]   Letter of 15 March 2007 from the Commission's hearing officer to Microsoft's legal counsel.

[97]   Letter of 15 March 2007 from the Head of Unit C-3 of DG Competition. The full text of the questions of the request for information pursuant to Article 18 of Regulation (EC) No 1/2003 reads as follows: "1. Please provide a copy of the licence agreement and any side agreements you have entered into with Microsoft in the framework of the WSPP. 2. Please provide a list of the licensed scenarios and the WSPP protocols you intend to use. 3. Please provide a description of the product you intend to develop on the basis of the WSPP Technical Documentation? Please indicate which enterprises are the "target" customers for this product. 4. Please provide an estimate of the cost and time of development, as well as of the price of the product you intend to develop." Quest responded to the request for information on 21 March 2007.

[98]   Letters of 23 March 2007 from the Director of Directorate C of DG Competition to the following third parties: Association for Competitive Technology (ACT); Computer and Communication Industry Association (CCIA); Computing Technology Industry Association (CompTIA); European Committee for Interoperable Systems (ECIS); Free Software Foundation Europe (FSFE); IBM; Novell; Oracle; Red Hat; Software and Information Industry Association (SIIA) and Sun. Comments on the Statement of Objections were received from Novell, on 13 April 2007, and from ACT and CompTIA, on 23 April 2007.

[99]   Letter of 13 April 2007 from Microsoft's General Counsel to the Director General of DG Competition. The geographical scope of the Microsoft's offer for the EEA includes Switzerland.

[100]   Letter of 23 April 2007 from Microsoft's legal counsel to the Director of Directorate C of DG Competition.

[101]   Letters of 24 April 2007 from the Director of Directorate C of DG Competition to the following third parties: Association for Competitive Technology (ACT); Computer and Communication Industry Association (CCIA); Computing Technology Industry Association (CompTIA); European Committee for Interoperable Systems (ECIS); Free Software Foundation Europe (FSFE); IBM; Novell; Oracle; Red Hat; Software and Information Industry Association (SIIA) and Sun. Comments on the Response to the Statement of Objections were received from ECIS, FSFE, Novell and from Red Hat on 8 May 2007.

[102]   Letter of 27 April 2007 from Microsoft's legal counsel to the Director of Directorate C of DG Competition.

[103]   Letter of 9 May 2007 from Microsoft's legal counsel to the Head of Unit C-3 of DG Competition.

(86) On 11 May 2007, TAEUS submitted a report on Microsoft's experts' report enclosed with the Response to the Statement of Objections ("the 9 May 2007 TAEUS report").[104]

(87) On 11 May 2007, the Trustee submitted a report on Microsoft's experts' report enclosed with the Response to the Statement of Objections ("the 11 May 2007 Trustee report").[105]

(88) On 11 May 2007, the Trustee and his Advisors submitted a report on Microsoft's experts' report enclosed with the Response to the Statement of Objections ("the 11 May 2007 Trustee Advisor report").[106]

(89) On 14 May 2007, the Commission transmitted to Microsoft a copy of the 11 May 2007 TAEUS report and of the 11 May 2007 Trustee and Trustee Advisor reports, as well as copies of all comments submitted by third parties on the Statement of Objections and on the Response to the Statement of Objections.[107]

(90) On 16 May 2007, Microsoft requested further access to the case file.[108]

(91) On 19 May 2007, Microsoft sent updated information on third parties having taken a WSPP licence.[109]

(92) On 21 May 2007, Microsoft submitted revised WSPP Agreements which included a Revised Royalty Table ("the 21 May 2007 remuneration scheme").[110] Microsoft stated that it "will now officially roll out the lower rates" with a retroactive date of application from the date of the adoption of the Decision.[111]

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[104] E-mail of 11 May 2007 from TAEUS to Case Officer A. The full title of the report is Response to Task Nr. 07-03, Prepared for the European Commission, Project #07-EC001-000035, May 9, 2007.

[105] E-mail of 11 May 2007 from the Trustee to Case Officer A. The full title of the report is Trustee Response: Finkelstein Technical Assessment of 19th April 2007 COMP/C-3/37.792 Microsoft.

[106] E-mail of 11 May 2007 from the Trustee to Case Officer A. The full title of the report is "Monitoring Trustee Advisor Report. With regard to EU Case 37792, Review of "Technical Assessment: European Commission Statement of Objections 1st March 2007" by Professor Anthony Finkelstein (with Professor Jeff Magee, Professor Jeff Kramer, Professor Wolfgang Emmerich and Dr. Holger Schwichtenberg)". An adapting date field caused this document to be accidentally dated 14 May 2007 (and named "Monitoring Trustee Advisor Report 14 05 2007.pdf") when it was transmitted to Microsoft.

[107] Letter of 14 May 2007 from the Head of Unit C-3 of DG Competition to Microsoft's Director of Commercial and Regulatory Affairs, EMEA.

[108] Letter of 16 May 2007 from Microsoft's legal counsel to the Director of Directorate C of DG Competition.

[109] E-mail of 19 May 2007 from Microsoft's Deputy General Counsel to the Head of Unit C-3 of DG Competition.

[110] E-mail of 21 May 2007 from Microsoft's Deputy General Counsel to the Head of Unit C-3 of DG Competition. The Revised Royalty Table is based on a reduction of the remuneration rate for the entire set of protocols available under the All IP Agreement to 1% of the licensees net revenues. Other remuneration rates are modified accordingly. A rate of 0.5% of the recipient's net revenues is charged for all the WSPP protocols under the WSPP No Patent Agreement and a rate of 0.7% of the recipient's net revenues is charged for all the patent licences covering the WSPP protocols under the WSPP Patent Only Agreement.

[111] Letter of 21 May 2007 from Microsoft's General Counsel to the Director General of DG Competition, on page 1.

(93) On 21 May 2007, the Commission sent formal requests for information to Xandros Incorporated, ONStor and Juniper Networks regarding their recently signed WSSP licences.[112]

(94) On 23 May 2007, the Commission granted Microsoft further access to the case file.[113]

(95) On 1 June 2007, Microsoft submitted a supplemental response to the Statement of Objections.[114] On 8 June 2007, Microsoft submitted a further technical assessment.[115]

(96) On 11 June 2007, the Commission sent a formal request for information to Microsoft requesting copies of all the agreements concluded with Xandros within the framework of a collaboration agreement announced on 4 June 2007.[116]

(97) On 9 July 2007, the Trustee submitted a response to Microsoft's reply to the Trustee summary review of innovation claims of 22 February 2007 ("the 8 July 2007 Trustee report").[117]

(98) On 24 July 2007, the Commission sent a Letter of Facts ("the Letter of Facts") to Microsoft. This letter gives Microsoft the opportunity to comment on the Commission's assessment of the 21 May 2007 remuneration scheme and of other evidence which was gathered by the Commission after the adoption of the Statement of Objections, notably reports of the Trustee and the Commission's experts, TAEUS, as well as responses to requests for information to WSPP licensees. Microsoft was given access to the case file with regard to the documents filed after the adoption of Statement of Objections.[118]

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[112] Requests were sent to Xandros Incorporated, ONStor and Juniper Networks on 21 May 2007. The full text of the questions reads as follows: "1. Please provide a copy of the licence agreement and any side agreements you have entered into with Microsoft in the framework of the WSPP. 2. Please provide a list of the licensed scenarios and the WSPP protocols you intend to use. 3. Please provide a description of the product you intend to develop on the basis of the WSPP Technical Documentation? Please indicate which enterprises are the "target" customers for this product. 4. Please provide your current estimate of the cost and time of development, as well as of the price of the product you intend to develop." Juniper Networks, Xandros and ONStor responded to the request for information on 30 May, 5 June and 6 June 2007, respectively.

[113] Letter of 23 May 2007 from the Head of Unit C-3 of DG Competition to Microsoft's legal counsel.

[114] Letter of 1 June 2007 from Microsoft's legal counsel to the Director of Directorate C of DG Competition.

[115] Letter of 8 June 2007 from Microsoft's legal counsel to the Director of Directorate C of DG Competition. This further technical assessment comments on the Trustee's summary review of Microsoft's innovation claims dated 3 March 2007 (see footnote 86).

[116] Letter of 11 June 2007 from the Head of Unit C-3 of DG Competition to Microsoft's Director of Commercial and Regulatory Affairs, EMEA. Microsoft submitted its response by letter of 15 June 2007 from Microsoft's Director of Commercial and Regulatory Affairs, EMEA, to the Head of Unit C-3 of DG Competition.

[117] E-mail of 9 July 2007 from the Trustee to Case Officer D. The full title of the report is "Monitoring Trustee Advisor Report. Reply to Microsoft Response to the Statement of Objections (SO) Case 37792".

[118] Letter of 24 July 2007 from the Director of Directorate C of DG Competition to Microsoft's General Counsel.

(99) On 31 August 2007, Microsoft submitted its response to the Letter of Facts (the "Response to the Letter of Facts").[119]

(100) On 17 September 2007, the Court of First Instance partially annulled Article 7 of the Decision but dismissed the remainder of Microsoft's application for annulment.[120]

(101) On 2 October 2007, the Commission requested Microsoft to provide all documents and information Microsoft has provided to the Trustee or his advisory team, independently of the Commission, from the date of the appointment of the Trustee.[121] Microsoft responded to that request by letters of 31 October 2007 and 9 November 2007.

(102) On 22 October 2007, following discussions with the Commission Microsoft introduced a new remuneration scheme for the WSPP licences ("the 22 October 2007 remuneration scheme"). That new scheme provides for a No Patent Agreement under which access to and use of the technical documentation embodying the Interoperability Information is permitted for a one-time payment of EUR 10 000. A Patent Agreement providing for a patent licence to those parts of the Interoperability Information that Microsoft claims to be covered by patents is available either worldwide for royalties of 0.4% of the licensee's net revenues or for a split price providing for royalties of 0.25% in the EEA and 3.87% elsewhere in the world.

(103) For the purpose of analysing compliance with Article 5(a) of the Decision before 22 October 2007, it is assumed that Microsoft has provided the necessary information pursuant to Article 5(d). This assumption is without prejudice to any final assessment that the Commission may make in that respect, and to any course of action it may decide to undertake. For the sake of clarity, the revised WSPP Agreements, as sent by Microsoft on 21 May 2007, together with the WSPP remuneration scheme applied therein constitute the basis of the Commission's assessment of Microsoft's compliance with Article 5(a) of the Decision prior to 22 October 2007. As outlined in this Section, Microsoft has at various earlier occasions revised the WSPP remuneration scheme and lowered the applicable remuneration rates.[122] However, as the 21 May 2007 WSPP remuneration scheme provides for lower remuneration rates than previous versions of the WSPP Agreements, the following Section assessment applies, *a fortiori*, also to the remuneration schemes of those previous versions.

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[119] Letter of 31 August 2007 from Microsoft's legal counsel to the Director of Directorate C of DG Competition.

[120] Judgment of the Court of First Instance of 17 September 2007, Microsoft v Commission, Case T-201/04, not yet reported.

[121] Request for information pursuant to Article 18 of Regulation (EC) No 1/2003, of 2 October 2007.

[122] See letter of 24 August 2006 from Microsoft's General Counsel to the Director General of DG Competition, on page 2 in which Microsoft contends that: "[…] Microsoft has reduced the suggested list royalties for all WSPP tasks and scenarios by at least 30% below their October 2005 levels."

3. **COMPLIANCE WITH ARTICLE 5(A) OF THE DECISION: THE AVAILABILITY OF THE INTEROPERABILITY INFORMATION ON REASONABLE TERMS**

3.1. **Framework for the assessment of the remuneration**

(104) Pursuant to Article 5(a) of the Decision the remuneration charged by Microsoft for access to or use of the Interoperability Information must be reasonable.

(105) It follows from Recitals 1003 and 1008(ii) of the Decision that any remuneration charged by Microsoft for access to or use of the Interoperability Information must allow its recipients to "viably compete with Microsoft's work group server operating system"[123] and that "such a remuneration should not reflect the 'strategic value' stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market."[124]

(106) As noted in Recital 7 of the Article 24(1) Decision, in case Microsoft imposes conditions for access to or use of the Interoperability Information which have the potential effect of: (i) limiting the ability of, or providing disincentives to interested undertakings in providing competing work group server operating system products that interoperate with the Windows domain architecture; and/or (ii) preventing such products from becoming a viable competitive constraint to Microsoft's products, such conditions can only be considered as reasonable under the Decision if they constitute a proportionate measure aimed at protecting Microsoft's legitimate interests. In such a case, it is therefore incumbent upon Microsoft to identify the legitimate interests it intends to protect by means of a certain condition imposed on interested undertakings, and to explain how the imposed condition is both necessary and proportional having regard to such legitimate interests, and thus objectively justified. Therefore, when assessing the reasonableness of conditions imposed by Microsoft, a balance must be struck between any such legitimate interests and the public interest in ensuring the effectiveness of the Decision and thereby maintaining effective competition. Any interest claimed by Microsoft as requiring protection as well as any justification brought forward by Microsoft as to the necessity and proportionality of a condition in question must be considered in the light of Microsoft's special responsibility as a dominant undertaking. This is a responsibility that weighs particularly on Microsoft, since that undertaking enjoys an overwhelmingly dominant position, as noted in Recital 435 of the Decision and confirmed by the Court of First Instance.[125]

(107) In order for it to be reasonable, any remuneration charged by Microsoft for access to or use of the Interoperability Information should be justified by showing that it allows competitors to viably compete with Microsoft's work group server operating system and that it represents a fair compensation for the value of the technology that is transferred by Microsoft to recipients of the Interoperability Information beyond the mere ability to interoperate, namely excluding the "strategic value" stemming from Microsoft's market power in the client PC and work group server operating system markets.

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[123]   See Recital 1003 of the Decision.
[124]   See Recital 1008 (ii) of the Decision.
[125]   See Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraph 387.

(108) The Court of First Instance has pointed out that the Interoperability Information which is indispensable to viably compete with Microsoft in the work group server operating system market is necessarily of great value to the competitors who wish to have access to it.[126]

(109) However, Microsoft should not be able to further benefit from its illegal refusal to disclose the Interoperability Information by charging remuneration that merely reflects the fact that, as the Court of First Instance found, Microsoft was able to impose the Windows domain architecture as the *de facto* standard for work group computing[127], irrespective of the actual value of the technology it was ordered to disclose pursuant to Article 5 of the Decision. The Court of First Instance also rejected Microsoft's claim that disclosure of the Interoperability Information covered by intellectual property rights would eliminate future incentives to innovate, without taking into account any revenue that Microsoft could draw from such a disclosure.[128] It also observed that it is normal practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products and that Microsoft itself had followed that practice until it was sufficiently established on the work group server operating systems market.[129] The Commission considers that these findings apply *a fortiori* when the information at stake is not covered by intellectual property rights.

(110) Microsoft recognises that its WSPP remuneration scheme must be commercially practicable for interested undertakings and that Microsoft should not be remunerated for the strategic value stemming from its market power in the client PC operating system market or in the work group server operating system market. As shown in sub-Section 3.1.1.1. Microsoft has agreed to price the Interoperability Information in conformity with the WSPP Pricing Principles[130] that reflect this rationale.

3.1.1. *The WSSP Pricing Principles*

3.1.1.1. The genesis of the WSSP Pricing Principles

(111) As outlined in Recital (39), the WSPP Pricing Principles were agreed upon in May 2005 following several discussions[131] and exchanges of written views between the Commission services and Microsoft.

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[126] See Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraph 694.

[127] See Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraph 392.

[128] See Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraphs 696-701.

[129] See Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraph 702.

[130] See Recitals (111) and following of this decision.

[131] In a press statement of 1 March 2007 entitled "Microsoft Statement on European Commission Action on Protocol Pricing", on page 8, Microsoft's General Counsel confirmed that "[…] every word of [the WSPP Pricing Principles] was negotiated and, in many instances, I personally negotiated the words with senior people at the EC."

(112) In its Response to the Statement of Objections,[132] Microsoft confirms that the WSPP Pricing Principles emerged from a range of factors, listed in a letter of 23 May 2005 from Microsoft's CEO to the Member of the Commission responsible for Competition, which in Microsoft's view the Trustee (as well as Microsoft, licensees and the Commission) should draw upon in applying standard valuation techniques.[133] According to Microsoft those factors were presented "in an effort to reach some sort of common ground" on the assessment of the reasonableness of Microsoft's remuneration.[134]

(113) In May 2005, Microsoft included the WSPP Pricing Principles in the WSPP Agreements. In those agreements Microsoft warrants that it applied the WSPP Pricing Principles in good faith in establishing the "Licensed Protocol pricing".[135] According to the WSPP Agreements that warranty can ultimately be enforced in the High Court of England and Wales.[136]

(114) The WSPP Pricing Principles were also annexed to Microsoft's proposal of a Trustee Mandate[137] submitted to the Commission for approval pursuant to Article 2.7 of the Trustee Decision. The Trustee Mandate was approved by the Commission on 10 November 2005.[138]

(115) Following the establishment of the WSPP Pricing Principles in May 2005, Microsoft confirmed on various occasions that it is applying the WSPP Pricing Principles and seeking conformity with them in setting the remuneration rates for access to or use of the Interoperability Information.[139]

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[132]   Microsoft's Response to the Statement of Objections, at paragraph 230.
[133]   Letter of 23 May 2005 from Microsoft's CEO to the Member of the Commission responsible for Competition, on page 3.
[134]   Microsoft's Response to the Statement of Objections, at paragraph 230.
[135]   See, for example, the warranty in section 7.5 of the WSPP No Patent Agreement of 21 May 2007.
[136]   Section 7.7 of the WSPP No Patent Agreement of 21 May 2007 stipulates that the licensee in relation to this warranty is entitled: "[…] (i) to raise with the Trustee its good faith belief that the licensed protocol pricing contained in Exhibit B is not in accordance with the WSPP Pricing Principles after reasonable efforts to resolve such issue with Microsoft, and (ii) if the Trustee finds that such pricing is not in accordance with the WSPP Pricing Principles, to (A) have this agreement amended and (B) receive a refund (if applicable) of royalties already paid under this agreement, both in accordance with the Trustee's finding; and (c) if necessary, seek to enforce the foregoing (a) and (b) in the court referenced in section 11.7." (emphasis added). Section 11.7 of the WSPP No Patent Agreement of 21 May 2007 refers to the Chancery Division of the High Court of England and Wales in London as competent jurisdiction. The other WSPP Agreements (All IP and Patent only) of 21 May 2007 contain the same provisions. The WSPP Patent only Agreement of 22 October 2007 contains similar provision on section 5.3.1. The WSPP Evaluation Agreements (section 9) provides for a "Fast Track Dispute Resolution" on prices between Microsoft and potential licensees with the involvement of the Trustee.
[137]   E-mail of 13 October 2005 from Microsoft's Director of Competition Law EMEA to the Director of Directorate C of DG Competition.
[138]   Letter of 10 November 2005 from the Member of the Commission responsible for Competition to Microsoft's CEO.
[139]   See letter of 3 October 2005 from Microsoft's General Counsel to the Director General of DG Competition, on page 2: […] We have endeavoured, in good faith, to establish royalty levels that conform to the agreed Pricing Principles."; letter of 11 October 2005 from Microsoft's General Counsel to the Director General of DG Competition, on page 2: "[…] I want to confirm that we are committed to and are in fact applying the pricing principles established with the Commission in June. We recognize that prices need to reflect the factors contained in those principles, and these factors include a focus on the innovativeness of our protocol technology."; letter of 4 May 2006 from Microsoft's General Counsel

3.1.1.2. The content of the WSPP Pricing Principles

(116) The WSPP Pricing Principles make clear that "the remuneration proposed and/or established by Microsoft is appropriate if it: (i) enables implementation of the protocols by a licensee in a commercially practicable manner; and (ii) reflects value conferred upon a licensee to the exclusion of the strategic value stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market".[140]

(117) The WSPP Pricing Principles go on to state that the assessment of what reflects such value conferred upon a licensee to the exclusion of strategic value should in particular take into account:

"- whether the protocols described in the specifications are Microsoft's own creations (as opposed to Microsoft's implementation of a publicly available standard, such as IETF RFCs, W3C standards or other comparables);

- whether these creations by Microsoft constitute innovation;

- and a market valuation of technologies deemed comparable, excluding the strategic value that stems from the dominance of any such technologies".

(118) The Commission considers that the WSPP Pricing Principles properly reflect the rationale of the Decision as expressed in Recitals 1003 and 1008(ii), namely that the WSPP remuneration scheme should allow interested third parties who implement the

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[140]
to the Director General of DG Competition, on page 3: "As you'll recall, Microsoft previously agreed to submit its royalties to scrutiny under the Pricing Principles under patent standards, e.g., novelty and non-obviousness/inventive step."

Appendix 1 of the WSPP Agreements. The full text of the WSPP Pricing Principles reads as follows: "Microsoft believes that, with the licensing program it has established pursuant to Article 5 of the 2004 Decision and the additional flexibility it is prepared to offer, it will be able to reach an appropriate license with any undertaking that has a good-faith interest in taking a license in accordance with the Decision. However, in the event that Microsoft and a potential licensee are unable to achieve agreement on pricing after good faith efforts, Microsoft is willing to submit the matter for review by a Trustee to be appointed by the Commission pursuant to its 2004 Decision. In addressing the matter in question, the Trustee shall utilize the following framework for determining appropriate pricing:
The remuneration proposed and/or established by Microsoft is appropriate if it:
i. enables implementation of the protocols by a licensee in a commercially practicable manner;
ii. and reflects value conferred upon a licensee to the exclusion of the strategic value stemming from Microsoft's market power in the client PC operating system market or in the work group server operating system market.
The Trustee should recognize that the effectiveness of the 2004 Decision in accordance with Article 82 may be hampered if royalties are excessive. In this regard, the Trustee should consider as a cap on the appropriate royalty level the likely non-strategic incremental income to the licensee that will result from implementation of the specifications.
With regard to part (ii), the Trustee shall consider, in particular:
- whether the protocols described in the specifications are Microsoft's own creations (as opposed to Microsoft's implementation of a publicly available standard, such as IETF RFCs, W3C standards or other comparables);
- whether these creations by Microsoft constitute innovation;
- and, a market valuation of technologies deemed comparable, excluding the strategic value that stems from the dominance of any such technologies.
The Trustee may consider other factors that he or she deems appropriate and which are consistent with the 2004 Decision, as confirmed by the Commission, drawing upon standard valuation technique."

Interoperability Information to viably compete with Microsoft's work group server operating system[141], and that Microsoft should not be compensated for the strategic value of the Interoperability Information that stems from Microsoft's market power in the PC operating system market or in the work group server operating system market.[142] In order for Microsoft's WSPP remuneration scheme to be considered reasonable both conditions must be met.

(119) The WSPP Pricing Principles, to which Microsoft has agreed and on which Microsoft asserts to have based its WSPP remuneration schemes, may therefore serve as a point of reference for the assessment of the reasonableness of the prices charged by Microsoft under Article 5(a) of the Decision.

(120) For the purposes of this Decision, it will therefore be assessed whether Microsoft has priced the Interoperability Information in a reasonable manner so that the remuneration charged represents a fair compensation for the value of the technology that is transferred by Microsoft to recipients of the Interoperability Information and allows them to viably compete with Microsoft's work group server operating system by drawing on the criteria mentioned in the WSPP Pricing Principles.

(121) In its Response to the Statement of Objections Microsoft contests that the Commission can rely on the WSPP Pricing Principles in an enforcement procedure pursuant to Article 24 of Regulation (EC) No 1/2003 in order to assess the reasonableness of Microsoft's WSPP remuneration scheme.[143] Microsoft asserts that the "WSPP Pricing Principles were designed as a dispute resolution mechanism that would come into play only in the event Microsoft and a prospective licensee were unable to reach agreement on appropriate royalties".[144]

(122) As outlined in Recitals (113) and (114), the WSPP Agreements provide that the WSPP Pricing Principles serve as a framework for settling disputes between Microsoft and potential or actual licensees with the help of the Trustee. The WSPP Agreements, however, also allow for court enforcement of the Trustee's findings on the basis of the WSPP Pricing Principles with regard the appropriateness of Microsoft's pricing. This invalidates Microsoft's argument that the WSPP Pricing Principles "are not mandatory preconditions for Microsoft's ability to charge positive royalties for its protocol specifications".[145]

(123) In addition, Microsoft in making the argument that the Commission cannot rely on the WSPP Pricing Principles in the assessment of Microsoft's WSPP remuneration scheme, disregards the main functions of the Trustee.

(124) Pursuant to Article 7 of the Decision, the Trustee shall assist the Commission in monitoring Microsoft's compliance with the Decision. In that context, it must be noted that Article 7 of the Decision was annulled by the Court of First Instance insofar as it provided for conferring investigatory powers to the Trustee and the Court of First Instance ordered Microsoft to bear all the costs of the appointment of

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[141]   Recital 1003 of the Decision.
[142]   Recital 1008(ii) of the Decision.
[143]   Microsoft's Response to the Statement of Objections, at paragraph 234.
[144]   Microsoft's Response to the Statement of Objections, at paragraph 233.
[145]   Microsoft's Response to the Statement of Objections, at paragraph 234.

the Trustee, including his remuneration.[146] That annulment does, however, not affect the appointment of the Trustee and the provisions of the Trustee Decision and the Trustee Mandate as regards the tasks the Trustee has to perform at the Commission's request.

(125) The Trustee Decision provides in Article 3.1 (b) that "[…] the Trustee shall, if required by the Commission […] provide ad hoc opinions to the Commission on issues pertaining to whether […] the terms under which Microsoft makes the Interoperability Information available and allows its use for the purpose of developing and distributing work group server operating system products are reasonable and non-discriminatory […]". The Trustee Mandate, which has been approved by the Commission and signed by both Microsoft and the Trustee, specifies that: "[…] when providing such opinions on issues regarding the remuneration Microsoft charges, the Trustee shall refer to the WSPP Pricing Principles […]".[147]

(126) Under the Trustee Mandate the Trustee is therefore under an obligation to refer to the WSPP Pricing Principles whenever he addresses an opinion pertaining to the remuneration Microsoft charges for access to and use of the Interoperability Information to the Commission.

(127) In order to ensure Microsoft's compliance with the Decision, the Commission must be able to take enforcement measures with regard to Microsoft's compliance with the Decision at any appropriate moment and to draw upon opinions of the Trustee based on the WSPP Pricing Principles on issues regarding the remuneration Microsoft charges.

(128) It follows from this sub-Section and the previous sub-Section that the Commission is entitled to refer to the WSPP Pricing Principles for the assessment of the reasonableness of the prices charged by Microsoft under Article 5(a) of the Decision.

3.1.1.3. The interpretation of the WSPP Pricing Principles

First criterion: the protocols described in the Technical Documentation are Microsoft's own creation

(129) The first criterion in the WSPP Pricing Principles to assess whether Microsoft's remuneration rates are reasonable, is that the protocols described in the Technical Documentation are Microsoft's own creation. If, for example, Microsoft simply uses protocols that it takes from the public domain, the only information that it provides pursuant to the Decision is which of the protocols available in the public domain it is actually using. Microsoft should not be entitled to charge any price for that information.

Second criterion: the protocols described in the Technical Documentation must be innovative

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[146] Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraphs 1230 to 1279.

[147] Section C.1 b)(ii) of the Trustee Mandate.

(130) The second criterion in the WSPP Pricing Principles to assess whether Microsoft's remuneration rates are reasonable, is whether Microsoft's protocols are innovative. If the protocol technology currently used by Microsoft, although different from protocol technology available in the public domain, is not novel, in the sense that it already forms part of the state of the art, or is obvious to persons skilled in the art (namely if there is no innovation in the Interoperability Information), Microsoft should not be entitled to charge for such protocol technology. Microsoft itself explicitly acknowledges this, when it states that "if the DRS protocol consisted solely or mainly of […] mundane material, it would be appropriate to offer it royalty-free or nearly so."[148] [149]

(131) The assessment of Microsoft's protocol technology on the basis of its novelty and non-obviousness should ensure that Microsoft can only be remunerated for valuable technology transferred to the recipients of the Interoperability Information to which those recipients would not have had access without Microsoft's disclosures.[150]

(132) Insofar as Microsoft puts forward already granted, effective patents that allegedly read on the protocol technology disclosed with the Technical Documentation, it is assumed, for the purpose of this Decision, and in line with the judgment of the Court of First Instance[151], that the fact that a patent has been granted and has not been found invalid creates a presumption that the protocol technology covered by this patent is innovative.[152]

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[148] Letter of 20 October 2005 from Microsoft's General Counsel to the Director General of DG Competition, on page 3.

[149] Microsoft asserts that the reasonableness of the prices of non-patented protocol technology should be based on its innovative character at the time of the invention (first implementation) by Microsoft. This approach is, however, flawed in the present context. As recalled in Recital (116), in order for it to be reasonable, any remuneration should be justified by showing that it represents a fair compensation for the value of the technology that is transferred by Microsoft to recipients of the Interoperability Information. If, at the moment the protocol technology is transferred by Microsoft to recipients in accordance with the Decision, the protocol technology in question is no longer innovative, this finding should be reflected in the remuneration Microsoft is entitled to charge. In any event, the Commission notes that Microsoft's innovation claims have also been assessed in relation to the time of the invention (first implementation) by Microsoft.

[150] Microsoft has acknowledged that "novelty and non-obviousness" is a workable standard to assess innovation – this is referred to in a letter of 4 May 2006 from Microsoft's General Counsel to the Director General of DG Competition, on page 3: "As you'll recall, Microsoft previously agreed to submit its royalties to scrutiny under the Pricing Principles under patent standards, e.g., novelty and non-obviousness/inventive step." This letter contains the following footnote: "As before, our response is without prejudice to legal conclusions and duties as to who bears the burden of proof in an Article 24 proceeding or the proper interpretation of the Pricing Principles established in June 2005. Those Principles speak for themselves, and to the extent they may apply we're neither asserting nor agreeing to any additional or different interpretations of them in providing this information. In that regard, our response is also without prejudice to legal conclusions as to whether the Pricing Principles -- which are a mechanism in the WSPP license for resolving disputed royalty rates with licensees and are not a part of the 2004 Decision -- can form a basis for an Article 24 proceeding and statement of objections regarding Microsoft's compliance with the Decision." This footnote cannot be read as qualifying Microsoft's position quoted above in this footnote which, in addition and as emphasised by Microsoft, also is merely recalling a position adopted earlier by Microsoft.

[151] Judgment of the Court of First Instance of 17 September 2007, Microsoft v Commission, Case T-201/04, not yet reported, at paragraph 695.

[152] This is, however, without prejudice to the validity of the patents and to whether the protocol technology in question is actually described in the Technical Documentation.

(133) In its Response to the Statement of Objections Microsoft contests the definition of innovation that the Commission uses for the purpose of assessing the innovativeness of the protocol technology described in the Technical Documentation.[153] In particular, Microsoft contends that "[t]he Commission's narrow definition of innovation finds no support in law or economics"[154] because there is no requirement either in the Decision or in the WSPP Pricing Principles to show that "innovations in [Microsoft's] WSSP protocols meet a patentability standard".[155] Microsoft further asserts that trade secrets "can be extremely valuable even if they do not meet the test for patentability".[156] According to Microsoft, the Commission "seems to be operating on the [wrong] assumption that any technology with value will be the subject of a patent application".[157] To support its argument that the Commission's standard for innovation is unreasonable, Microsoft submitted an expert opinion ("the LECG Report").[158]

(134) Microsoft does not question that, under the agreed WSPP Pricing Principles, protocol technology described in the Technical Documentation must be innovative, and that the value of the protocol technology must go beyond the mere value of enabling interoperability with Microsoft's products, if a remuneration is to be charged by Microsoft. Microsoft confirmed, by letter of its General Counsel to the Director General of DG Competition, that it has "[…] committed that: […] Any individual protocol that is not innovative will be available for a nominal fee."[159]

(135) The WSPP Pricing Principles acknowledge that "the effectiveness of the Decision in accordance with Article 82 may be hampered if royalties are excessive." It is the Commission's obligation to ensure that Microsoft puts an end to the abuse of its dominant position and thereby stops distorting competition in the work group server operating system market by rendering the order to supply ineffective, in particular by imposing unreasonable remuneration rates on undertakings having an interest in developing and distributing work group server operating system products.[160]

(136) It is in this specific context of enforcing the Decision that the term "innovation" as used in the WSPP Pricing Principles should be interpreted.

(137) In order to ensure that Microsoft is only remunerated for valuable technology transferred to the recipients of the Interoperability Information, these recipients should not be charged for protocol technology that is already publicly available or that only provides technical solutions which are obvious to persons skilled in the art,

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153 Microsoft's Response to the Statement of Objections, at paragraphs 193-197.
154 Title of section VI.C.1. of Microsoft's Response to the Statement of Objections.
155 Title of section VI.C.1.a. of Microsoft's Response to the Statement of Objections
156 Microsoft's Response to the Statement of Objections, at paragraph 197.
157 Microsoft's Response to the Statement of Objections, at paragraph 196.
158 Gambardella, A., Layne-Farrar, A., Lerner, Josh, Assessing innovation: an economic analysis of licensing intellectual property, 23 April 2007, Annex C to Microsoft's Response to the Statement of Objections.
159 Letter of 4 May 2006 from Microsoft's General Counsel to the Director General of DG Competition, on page 4.
160 See Recital 1005 of the Decision.

but which have been kept secret by Microsoft to preserve its artificial interoperability advantage.[161]

(138) For the purposes of this Decision, it is therefore maintained that innovation can be shown by demonstrating that the protocol technology does not already form part of the state of the art (i.e. novel), nor is it obvious to persons skilled in the art (i.e. non-obvious). The Commission does not use the novelty and the non-obviousness criteria in the context of an assessment of the patentability of the protocol technology in question, but rather as a reasonable proxy to assess the innovation in that technology. This also represents an operational proxy in so far as novelty and non-obviousness are settled concepts in the area of intellectual property. The Commission is also not assuming that technology that is not patented is devoid of commercial value.[162] However, in the context of these proceedings, because of the indispensability of the Interoperability Information, its commercial value is not an adequate yardstick to determine a reasonable remuneration for it. Any protocol technology which would fall short of meeting the novelty and non-obviousness criteria would only represent, in these proceedings, a negligible value to the recipients of the Interoperability Information.

Third criterion: the remuneration rates for the protocols described in the Technical Documentation are in line with a market valuation of comparable technologies

(139) The third criterion in the WSPP Pricing Principles to assess whether Microsoft's remuneration rates are reasonable is whether they are in line with a market valuation of technologies deemed comparable to the protocol technology described in the Technical Documentation.

3.1.1.4. The application of the WSPP Pricing Principles

(140) In its Response to the Statement of Objections Microsoft criticises the application of the WSPP Pricing Principles by the Trustee, the Commission's experts TAEUS and finally the Commission in two ways.

(141) First, Microsoft asserts that the Commission misinterprets the terms "novel" and "non-obvious" when assessing innovation in Microsoft's protocol technology. In particular, Microsoft contends that the Commission did not take into account incremental improvements made in Microsoft's protocol technology and the fact that novel combinations of otherwise obvious technologies may also be innovative.[163] Second, Microsoft criticises the too granular approach the Commission has allegedly taken in analysing the innovation in Microsoft's protocol technology.[164]

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[161] See Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraph 653.

[162] Microsoft's Response to the Statement of Objections, at paragraph 197.

[163] Microsoft's Response to the Statement of Objections, at paragraph 199, see also LECG Report, at section 2.

[164] Microsoft's Response to the Statement of Objections, at paragraphs 203 - 205.

(142) In order to support its argument that also "modest incremental innovations are worthy of licensing"[165] and should therefore have been taken into account by the Commission, Microsoft refers to academic research on the general economic benefits of incremental innovations[166] and to Commission Communications on innovation policy.[167]

(143) This broad definition of "innovation", which emanates from a macroeconomic context, cannot be carried over literally to the specific context of the present enforcement proceedings.

(144) The need to put an end to ongoing distortions of competition by Microsoft through unjustified remuneration rates, which do not represent a fair compensation for the value of the technology that is transferred by Microsoft to recipients of the Interoperability Information, is a key factor in the assessment of Microsoft's WSPP remuneration scheme. The Commission therefore considers that in the specific context of enforcing the Decision the term "innovation" in the WSPP Pricing Principles, and in general in the context of the assessment of the reasonableness of the royalties in the present Decision should be interpreted in such a way as to exclude minor incremental changes or minor improvements which would only represent a negligible value to the recipients of the Interoperability Information.

(145) In addition, Microsoft argues that novel combinations of otherwise obvious technologies may also be innovative and that the Commission did not take this into account when assessing the innovation in Microsoft's protocol technology.[168]

(146) With regard to that argument, it should be pointed out that not every combination of technologies can be considered innovative but only those combinations which were not "obvious to try" by a person skilled in the art.[169] This applies to any combination, regardless of whether the individual technologies are innovative or not.[170]

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[165]   See LECG Report, at paragraph 33.

[166]   LECG Report, at paragraphs 30 to 36.

[167]   Communication from the Commission of 13 September 2006 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions: "Putting knowledge into practice: A broad-based innovation strategy for the EU", COM (2006) 502 final, at page 4. Microsoft also refers to a Communication from the Commission of 11 March 2003 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions: "Innovation policy: updating the Union's approach in the context of the Lisbon strategy", COM (2003) 112 final, at pages 5 to 6.

[168]   Microsoft's Response to the Statement of Objections, at paragraph 205; LECG Report, at paragraph 36.

[169]   See with regard to patentable combination inventions the case law of the Boards of Appeal of the European Patent Office (T 388/89, T 717/90, T 869/96) as summarized in European Patent Office, Case Law of the Boards of Appeal of the European Patent Office, Fourth Edition, 2002, on page 120: "When assessing inventive step in a combination invention the decisive criterion is not whether individual elements of the combination were known and obvious from prior art, but whether the state of the art would lead a skilled person to this particular overall combination of (possibly already known) features."

[170]   Microsoft's repeated assertion, for example in the "Reply to Arguments regarding Microsoft's Distributed COM (DCOM) Protocol", annexed to the "Response to the Letter of Facts", on page 6, that from the innovativeness of one technology used in combination with others it could be inferred that the combination itself constitutes further innovation, must be rejected. Even if all constituent parts of a combination are innovative, it does not follow automatically that combining these parts would not have been obvious to try for a person skilled in the art.

(147) As outlined in Recitals (169) to (219) the evidence on the Commission's case file leads to the conclusion that the combinations of protocol technologies, which Microsoft claims to be innovative, are indeed not the product of innovation but of ordinary skill and common sense.

(148) The Commission has, supported by the Trustee and its experts TAEUS, assessed Microsoft's claims of innovative combinations of its protocol technology.[171]

(149) The Trustee affirms that where combinations of elements were indeed presented by Microsoft in its Innovation Reports they were found not to be innovative.[172] TAEUS in applying the "obvious to try" test[173] reaches the same conclusions in its assessment of the combinations of the technologies claimed innovative by Microsoft.[174]

(150) The Trustee's and TAEUS's assessments are actually corroborated by the statements of Microsoft's expert, Professor Finkelstein, on the innovation in Microsoft's protocol technology. Professor Finkelstein states: "In seeking to achieve a challenging set of design goals it is often, indeed generally, unwise to innovate at every level. Experienced engineers achieve their aims by considered combination of reuse of existing solutions, skilled application of 'design patterns' and piecemeal improvements of known approaches […]. Only when it cannot be avoided will an experienced engineer resort to deploying wholly novel technology. […] This approach precisely characterises Microsoft's approach and good software engineering practice."[175]

(151) Professor Finkelstein, on behalf of Microsoft, therefore confirms the Commission's assessment that Microsoft in order to meet its product design goals largely relies on combinations of existing solutions and slight improvements to known approaches, which are dictated by ordinary engineering skills and common sense, rather than on innovative protocol technology.[176]

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[171]　The Trustee remarks in this respect: "Unfortunately, the Microsoft Innovation Reports made this as an unsubstantiated assertion, offering no justification for why any particular combination of a subset of the claimed innovative technical features should be considered innovative when those features themselves were judged otherwise. Had such a claim been presented and its innovative characteristics explained, that claim could have been judged. It wasn't presented and so it could not be judged. Consistently throughout the process of performing the innovation assessment, the Trustee raised with Microsoft this issue of the un-argued assertions presented in the Innovation Reports." (14 May 2007 Trustee report, on pages 8 to 9). The Commission pointed to this lack of substantiation on Microsoft's part in paragraph 21 of the Letter of Facts.

[172]　Trustee report of 11 May 2007, on page 11 and 8 July Trustee report.

[173]　As outlined in TAEUS report of 9 May 2007, on pages 6 and 7, TAEUS applied the following methodology in assessing Microsoft's claims and in particular the claims presented by Professor Finkelstein in his report of 19 April 2007: "We determine whether such a combination was obvious based primarily upon one factor: whether the result was different from what would be expected. We consider a combination obvious if it involves merely arranging a number of known elements with each performing the same function it has been known to perform in the past, and the overall result is no greater than would be expected from the combination."

[174]　TAEUS report of 9 May 2007, on page 7: "In this report TAEUS analyzes combinations of Microsoft's claimed innovations. None of these combinations appears to show novelty or non-obviousness."

[175]　Professor Finkelstein report of 19 April 2007, at paragraphs 18 and 19.

[176]　Professor Finkelstein reiterates this point at paragraph 27 of the Professor Finkelstein report of 19 April 2007 where he states: "[Microsoft] innovated, naturally enough, within the framework of their

(152) As regards the alleged design innovation resulting from the combination of Microsoft's protocol technology Professor Finkelstein claims that this design innovation leads to improvements in availability, performance, consistency and efficiency of Microsoft's server operating system.[177]

(153) That assertion merits two observations. First, Professor Finkelstein does not point out whether and how this alleged combinative design innovation, which was not claimed by Microsoft in its Innovation Reports[178], is actually documented in the Technical Documentation to be provided to licensees and whether therefore this allegedly innovative technology is actually transferred to recipients of the Technical Documentation.

(154) Second, Professor Finkelstein fails to indicate, as compared to which technology, the combination of Microsoft's protocol technology provides improvements in terms of availability, performance, consistency and efficiency. Without reference to such a comparator, Professor Finkelstein's statements remain unverifiable assertions which cannot form the basis of an assessment of the reasonableness of Microsoft's WSPP remuneration scheme.

(155) Microsoft also criticises the too granular approach the Commission has allegedly taken in analysing the innovation in Microsoft's protocol technology. However, Microsoft fails to show that the assessment of the protocol technology not at the protocol level, but at a less granular level, for example, by looking at combinations of protocol technologies, would lead to a different result in the Commission's assessment that very significant parts of Microsoft's protocol technology are not innovative. The Commission's assessment of such innovation claims, where they have been brought forward by Microsoft, points to the contrary.

(156) For example, the Commission's assessment is supported by the 9 May 2007 TAEUS report with regard to File Replication Service (FRS) and Directory Replication Service (DRS) for which Professor Finkelstein, on behalf of Microsoft, claims design innovation resulting from the combination of protocol technology[179]. In that report TAEUS concludes that: "Based on Microsoft's documentation, it appears that each of these claimed innovations is used in a fashion that was previously known. The results from combining these elements appear to fit closely with what would be expected. These appear to be obvious combinations producing obvious results."[180] The other

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architecture […] The innovations were largely, but not exclusively, relatively conservative as they aimed at robust operation. In combination the innovations result in improved server operating systems."

[177] See Professor Finkelstein report of 19 April 2007, with regard the File Replication Service (FRS) at paragraph 43, 50 and 63 where Professor Finkelstein states: "A major part of this innovation is the combination of suitable mechanism to achieve the overall goals of availability and performance", with regard to Directory Replication Service (DRS) see paragraph 143: "The techniques and algorithms that DRSR employs are carefully chosen to work in concert in order to achieve the overall goals of improving availability, performance and reliability of an Active Directory Service deployment through replication and to do so as efficiently as possible."

[178] See Trustee report of 11 May 2007, on page 17.
[179] See Prof. Finkelstein report of 19 April 2007, at chapters VIII and IX.
[180] TAEUS report of 9 May 2007, on page 34.

instances of innovation claims concerning combinations of protocol technologies are assessed in the Annex.[181]

(157) Microsoft's criticism as to the application of the WSPP Pricing Principles by the Trustee, the Commission's experts TAEUS and the Commission is therefore unfounded.

3.1.1.5. Conclusion

(158) It follows from Section 3.1.1. that any remuneration requested by Microsoft for making Interoperability Information available which is not in compliance with the pricing criteria underlying the Decision, as reflected in the WSPP Pricing Principles, must be considered not objectively justified and thus unreasonable.

3.1.2. The WSPP Agreement remuneration schemes

3.1.2.1. General framework

(159) The WSPP Agreements, prior to 22 October 2007, contained a Royalty Table (Appendix 1, Table A-1) which specifies the remuneration Microsoft charged for either the provision of the relevant Technical Documentation under the No Patent Agreement, or the licensing of the relevant patents under the Patent Only Agreement, or both under the All IP Agreement. According to the WSPP Agreements, the WSPP Protocols[182] were grouped, and could be provided in four ways, as follows:

   (i)   by having access to the Technical Documentation;

   (ii) by getting a licence for the relevant patents for all WSPP Protocols or for a specific task;[183]

   (iii) by choosing a specific scenario within a task;[184] or

   (iv) by opting for the provision of Interface Definition Language ("IDL") files only.[185]

(160) The remuneration set out in the Royalty Table corresponded to the different agreements (All IP, No Patent, Patent Only, IDL Only) and the tasks, scenarios or IDL files which the recipient chooses. As regards the level of remuneration for the tasks, scenarios or IDL files, Microsoft distinguished four price categories: Gold, Silver, Bronze and the royalty-free categories. The remuneration to be paid under those categories was either based on the recipient's net revenue (which meant in this context the revenues derived from the sales of the products in which the protocols were implemented and from the service revenues of the products in question)[186]

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[181]   In the Annex, innovation claims concerning combinations of protocol technologies can be identified by their description in the column "Description of the technology" which explicitly refers to the fact that what is claimed as innovative is a combination of different technologies.

[182]   WSPP Protocols means the protocols that are covered by the WSSP Agreement.

[183]   The available tasks are: File/Print, User and Group Administration and General Networking.

[184]   Microsoft lists 20 different scenarios that may be licensed individually.

[185]   On 22 November 2006, Microsoft has provided an "IDL Only" license.

[186]   Net revenue was defined as follows in section 2.3 of Exhibit B of the All IP Agreement of 21 May 2007: "'Net Revenues'" means, for each Licensee SKU, except as specified in (i) or (ii) below in this

generated by products implementing the WSPP Protocols, or corresponded to a fixed amount in USD per server.[187] Microsoft applied to each of the tasks, scenarios or IDL files chosen by recipients where the remuneration rates are in the form of a percentage, a minimum and maximum remuneration in the form of a fixed amount of dollars per server. For ease of reference, the Royalty Table A-2 (for EEA distribution), as provided by Microsoft in the WSPP Agreements of 21 May 2007, is shown below.[188]

Task	Scenario	Price (% or per server)				Minimum (per server)				Maximum (per server)				Category
		All IP	Patent Only No. of patents covered	Trade Secret Only	IDL Only	All IP	Patent Only	Trade Secret Only	IDL Only	All IP	Patent Only	Trade Secret Only	IDL Only	
I. File/ Print	CIFS	$0												RF
	Base File Services	$1.00	$0.60 4(4) US 1(1)EU	$0.50	$0.50	$1.00	$0.60	$0.50	$0.50	$1.00	$0.60v	$0.50	$0.50	Bronze
	DFS (Distributed File System) + FRS (File Replication Service	0.4%	0.3% 4(2) US 1(1) EU	0.25%	0.25%	$2.50	$1.60	$1.30	$0.90	$49.20	$32.00	$24.60	$17.20	Silver

section: (a) all revenues actually recognized by Licensee or any of its Affiliates in the normal course of business from (1) the sale, lease, licensing or other grant of rights (including without limitation subscriptions or user such user based connection fees) in units of the Licensee SKU (including without limitation all of its components, such as but without limitation its hardware and software components), and (2) any installation, support, maintenance, or similar agreements for services that are contractually required in connection with the sale, lease, licensing or other grant of rights (including without limitation subscriptions or user based connection fees) in such Licensee SKU units, including in each such case the fair market value of any non-monetary consideration; less (b) any Qualifying Credits. Revenues associated with Evaluation Versions […] will not be calculated as part of Net Revenue. In no event will Net Revenue for an Embedded Product be less than the cost of goods sold (as determined using generally accepted accounting practices) for such Embedded Product." SKU was defined in section 1.19 of the All IP Agreement of 21 May 2007 as "[…] a stock keeping unit maintained in the ordinary course of the Licensee's business and used for purposes of accounting and/or tracking Distribution in connection with this Agreement."

[187] For 20 protocols Microsoft applied a one-time flat fee remuneration between USD 5 000 and USD 100 000. See Table A 1 of the All IP Agreement of 21 May 2007. The following assessment of the reasonableness of Microsoft's remuneration rates also applies to these one-time flat fees.

[188] The royalty rates for distribution outside the EEA remained unchanged between the adoption of the Statement of Objections and 22 October 2007. For example, as regards the combined file, print, user administration and networking tasks, these rates varied from 5.95% of the recipient's net revenues (for a licence to those patents which allegedly read on the technology necessary to interoperate with Windows Client PCs and Windows work group server operating systems as well as access to and the right to use the Technical Documentation), to 3.80% of the recipient's net revenues (for a licence to those patents which, according to Microsoft's claims, read on the technology necessary to interoperate), 2.98% of the recipient's net revenues (for a licence that allowed recipients to develop work group server operating system products on the basis of the Technical Documentation) and 2.08% of the recipient's net revenues (for a licence to those patents which allegedly read on the IDL files as well as access to and the right to use the Technical Documentation of these IDL files)

Task	Scenario	Price (% or per server)				Minimum (per server)				Maximum (per server)				Category
		All IP	Patent Only No. of patents covered	Trade Secret Only	IDL Only	All IP	Patent Only	Trade Secret Only	IDL Only	All IP	Patent Only	Trade Secret Only	IDL Only	
	Print RPC	$1.00	$0.60 2(2) US (1) EU	$0.50	$0.50	$1.00	$0.60	$0.50	$0.50	$1.00	$0.60	$0.50	$0.50	Bronze
	Internet Print	$1.00	$0.60 1 US	$0.50	N/A	$1.00	$0.60	$0.50	N/A	$1.00	$0.60	$0.50	N/A	Bronze
	Advanced File Services	0.5%	0.4% (8) US (4) EU	0.25%	0.25%	$4.00	$2.60	$2.00	$1.40	$84.40	$54.90	$42.40	$29.60	Gold
	All File/Print Protocol Groups	0.7%	0.4% 11(16) US 2(7) EU	0.3%	0.25%	$4.50	$2.90	$2.30	$1.60	$104.70	$67.40	$51.90	$36.30	Silver
II. UGA	Base Authentication & Authorization	$3.00	$2.00 3(8) US (3) EU	$1.50	$1.00	$3.00	$2.00	$1.50	$1.00	$3.00	$2.00	$1.50	$1.00	Bronze
	Domain Services Interaction	$3.00	$2.00 3 US	$1.50	$1.00	$3.00	$2.00	$1.50	$1.00	$3.00	$2.00	$1.50	$1.00	Bronze
	Multi-Factor Authentication & Certificate Services	0.25%	0.25% 1 US	0.25%	0.25%	$1.00	$0.70	$0.50	$0.50	$15.00	$9.80	$7.50	$5.30	Silver
	Group Policy	0.25%	0.25% 2 US	0.25%	N/A	$1.00	$0.70	$0.50	N/A	$15.00	$9.80	$7.50	N/A	Silver
	Systems and Systems Health Management	0.25%	0.25% 1(4) US (3) EU	0.25%	0.25%	$1.00	$0.70	$0.50	$0.50	$15.00	$9.80	$7.50	$5.30	Silver
	Directory & Global Catalog Replication	0.8%	0.6% 8(4) US 1 EU	0.5%	0.3%	$6.50	$4.20	$3.30	$2.30	$96.30	$62.60	$48.20	$33.70	Gold
	Kerberos Group Member-ship Protocols	$0	1 US											RF
	Window Remote Registry Services	$0	(2) US											RF
	Windows Event Logging	$0	1 US (1) EU											RF
	Network Time Services	$0												RF
	Network Connection Mgmt	$0												RF

Task	Scenario	Price (% or per server)				Minimum (per server)				Maximum (per server)				Category
		All IP	Patent Only No. of patents covered	Trade Secret Only	IDL Only	All IP	Patent Only	Trade Secret Only	IDL Only	All IP	Patent Only	Trade Secret Only	IDL Only	
	MSDN protocols	$0												RF
	Remote Procedure Calls	$0	1 US											RF
	Network Access Protection	0.5%	0.3% (5) US (1) EU	0.25%	0.25%	$4.00	$2.60	$2.00	$1.40	$59.30	$38.50	$29.60	$20.70	Gold
	Windows Security Health Validator	0.5%	0.3%	0.25%	0.25%	$4.00	$2.60	$2.00	$1.40	$59.30	$38.50	$29.60	$20.70	Gold
	NAP for DHCP	0.5%	0.3%	0.25%	0.25%	$4.00	$2.60	$2.00	$1.40	$59.30	$38.50	$29.60	$20.70	Silver
	All UG&A Protocol Groups	0.9%	0.7% 21(23) US 1(8) EU	0.6%	0.4%	$7.50	$4.90	$3.80	$2.60	$111.10	$72.20	$55.60	$39.00	Gold
III. Networking Transport		$0.50	$0.50 9(10) US 1(4) EU	$0.50	$0.50	$0.50	$0.50	$0.50	$0.50	$0.50	$0.50	$0.50	$0.50	Bronze
	Combined File Print, U&GA and Networking	1.0%	0.7%	0.5%	0.4%	$6.00	$3.90	$3.00	$2.10	$111.10	$72.20	$55.60	$39.00	Gold

3.1.2.2. No Patent Agreement

(161) Under the No Patent Agreement, Microsoft allowed recipients to develop work group server operating system products on the basis of the Technical Documentation and to distribute these products worldwide.[189] As shown in Royalty Table A-2 (for EEA distribution), for documentation of the WSPP protocols associated with the File/Print task, a remuneration rate of 0.3% of the recipient's net revenues was charged, whilst for documentation of the WSPP protocols associated with the User and Group Administration task, a rate of 0.6% of the recipient's net revenues was charged. A rate of 0.5% of the recipient's net revenues was charged for all the WSPP protocols. The Directory and Global Catalogue Replication scenario was categorised as "gold", and had a rate of 0.5% of the recipient's net revenues. The minimum rate for the documentation of the WSPP protocols was USD 3 per server, whereas the maximum rate was USD 55.60 per server.

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[189]   See the "licence grant" in section 2.1 and the definition of "Licensed Server Implementation" in section 2.2 of the No Patent Agreement of 21 May 2007.

3.1.2.3. Patent Only Agreement

(162) Under the Patent Only Agreement, Microsoft provided a licence to those patents which, according to Microsoft's claims, read on the technology necessary to interoperate with Windows Client PCs and Windows work group server operating systems.[190] As shown in Royalty Table A-2 (for EEA distribution), for the patent licence covering the protocols associated with the File/Print task, a remuneration rate of 0.4% of the recipient's net revenues was charged, whilst for the patent licence covering the protocols associated with the User and Group Administration task, a rate of 0.7% of the recipient's net revenues was charged. A rate of 0.7% of the recipient's net revenues was charged for all the patent licences covering the WSPP protocols. The Directory and Global Catalogue Replication scenario had a remuneration rate of 0.6% of the recipient's net revenues. The minimum rate for all the WSPP protocols was USD 3.90 per server, whereas the maximum rate was USD 72.20 per server.

3.1.2.4. All IP Agreement

(163) Under the All IP Agreement, Microsoft provided a licence to those patents which allegedly read on the technology necessary to interoperate with Windows Client PCs and Windows work group server operating systems as well as access to and the right to use the Technical Documentation.[191] As shown in Royalty Table A-2 (for EEA distribution), for the WSPP protocols associated with the File/Print task, a rate of 0.7% of the recipient's net revenues was charged, whilst for the WSPP protocols associated with the User and Group Administration task, a rate of 0.9% of the recipient's net revenues was charged. A rate of 1% of the recipient's net revenues was charged for all the WSPP protocols. The Directory and Global Catalogue Replication scenario had a remuneration rate of 0.8% of the recipient's net revenues. The minimum rate for all the WSPP protocols was USD 6 per server, whereas the maximum rate was USD 111.10 per server.

3.1.2.5. IDL Only Agreement

(164) Under the IDL Only Agreement, Microsoft provided a licence to those patents which allegedly read on the IDL files as well as access to and the right to use the Technical Documentation on these IDL files.[192] As shown in Royalty Table A-2 (for EEA distribution), for the IDL files of the WSPP protocols associated with the File/Print task, a rate of 0.25% of the recipient's net revenues was charged, whilst for the WSPP protocols associated with the User and Group Administration task, a rate of 0.4% of the recipient's net revenues was charged. A rate of 0.4% of the recipient's net revenues was charged for all the WSPP protocols. The Directory and Global Catalogue Replication scenario had a remuneration rate of 0.3% of the recipient's net revenues. The minimum rate for all the WSPP protocols was USD 2.10 per server, whereas the maximum rate was USD 39 per server.

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[190] See the "licence grant" in section 2.1 of the Patent Only Agreement of 21 May 2007.
[191] See the "licence grant" in section 2.1 of the All IP Agreement of 21 May 2007.
[192] See the "licence grant" in section 2.1 of the IDL Only Agreement of 21 May 2007.

3.1.3. *The No Patent Agreement prior to 22 October 2007 was inconsistent with the pricing criteria underlying the Decision*

(165) As outlined in Section 3.1.1.2, in order for Microsoft to be able to charge a non-nominal remuneration for Interoperability Information, Microsoft's protocol technology must be Microsoft's own creation, it must be innovative and the remuneration must be in line with a market valuation for comparable technologies.

(166) For the purposes of this Decision, it is necessary to assess whether the remuneration schemes involving patent licences that Microsoft made available were reasonably priced, namely whether the remuneration rates in the Patent Only Agreement as well as for the patent licences of the All IP and IDL only Agreements were reasonable. The Commission will focus on Microsoft's obligation pursuant to Article 5(a) of the Decision, namely to make non-patented Interoperability Information available for a reasonable remuneration.

(167) The following sub-Sections therefore examine, in line with the WSPP Pricing Principles, whether there is innovation in the non-patented technology described in the Technical Documentation which Microsoft makes available through the No Patent Agreement.

3.1.3.1. Assessment of the innovative character of the non-patented WSPP Protocols

Introduction

(168) The No Patent Agreement of 21 May 2007 allowed recipients to develop work group server operating system products on the basis of the Technical Documentation, but without granting a licence to the patents which allegedly read on the technology necessary to interoperate with Windows client PC and Windows work group server operating systems. Microsoft argues that large parts of the non-patented protocol technology described in the Technical Documentation are innovative. These claims are examined in the remainder of this Section.

General Assessment of Microsoft's innovation claims

(169) On 31 July and 24 August 2006, Microsoft provided innovation reports purporting to furnish evidence on the innovative character of the protocol technology described in the Technical Documentation. In a letter dated 31 July 2006, Microsoft asserts that: "of the 62 communication protocols currently included in the complete set of WSPP scenarios, 32 are covered by patented innovations and we believe are therefore by definition innovative, in addition to any non-patented innovations described in detail in our reports. Another 19 are covered by non-patented innovations described in detail in our reports. From our investigations, it appears that 11 of the current 62 WSPP protocols – standing alone – do not constitute innovation under the Commission's definition of innovation."[193] The total number of protocol technologies which contain non-patented innovations according to Microsoft's claims amounts to 173.

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[193]   Letter of 31 July 2006 from Microsoft's General Counsel to the Director General of DG Competition, on page 3.

(170) To substantiate each of its innovation claims with regard to non-patented protocol technology, Microsoft uses the following methodology:

"1. Identification of whether the technology was developed by or on behalf of Microsoft, and the date it was first developed

2. A description of the problem the technology was developed to resolve in whole or in part and the OS version in which it was first introduced

3. A description of alternative prior art technologies considered in the determination that the MS-developed technology is a new and non-obvious innovation

4. Identification of where in the revised technical documentation the innovation is revealed"[194]

(171) At the Commission's request, the Trustee reviewed Microsoft's innovation claims concerning the non-patented protocol technology.[195] The Commission's experts TAEUS also reviewed the innovation reports provided by Microsoft for two gold scenarios and one silver scenario.[196] Both the Trustee and TAEUS followed the same methodology as the one used by Microsoft (See recital (170)) to examine the innovation claims.

(172) In the Response to the Statement of Objections, Microsoft seeks to counter both the Trustee's and TAEUS's analysis. At the Commission's request, the Trustee and his advisors as well as TAEUS have reviewed the arguments put forward by Microsoft in that Response. In view of those arguments, both the Trustee and TAEUS maintain that their reports are based on sound methodology and that their conclusions are valid.[197]

(173) With regard to Microsoft's innovation claims, the Trustee concludes: "Little of the material provided by Microsoft in the WSPP technical documentation for the protocols was in practice found to be innovative and therefore due a positive royalty."[198]

(174) TAEUS has independently come to the same conclusion with regard to three scenarios[199] that were in the gold and silver pricing categories: "TAEUS has examined 21 technologies for NAP, FRS and DRS protocols that Microsoft claimed were innovative, but were not patented. […] [T]hese technologies were not novel when first implemented by Microsoft and are not novel today. […] The claims by

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[194] Letter of 31 July 2006 from Microsoft's General Counsel to the Director General of DG Competition, on page 2.
[195] Trustee report on innovations and comparable technologies.
[196] TAEUS's report on innovation.
[197] See the 9 May 2007 TAEUS report, on page 40, and the 11 May 2007 Trustee report, on page 20 as well as the 8 July 2007 Trustee Report. The Commission's assessment in this Decision is additionally based on Microsoft's Reply to the Letter of Facts and on the technical reports annexed to it.
[198] Trustee report on innovations and comparable technologies, on pages 14 and 15.
[199] Out of the 20 different scenarios listed Microsoft that may be licensed individually.

Microsoft as to the innovation of their technologies as discussed in this report are not relevant. The technologies outlined in this document are therefore not innovative."[200]

(175) On the basis of the Trustee and TAEUS reports and its own assessment of the relevant facts, of these reports as well as of Microsoft's submissions, the Commission found that, of a total of 173 non-patented innovation claims: (i) for 166 innovation claims put forward by Microsoft there is prior art or the innovation claims do not fulfil the non-obviousness test; and (ii) 7 innovation claims have been found meritorious.[201] The Commission's findings are summarised in the Annex to this Decision.

(176) Third parties also provided additional feedback on Microsoft's innovation claims regarding the non-patented technology.

(177) Sun, for example, notes that: "[n]one of the innovation claims made by Microsoft that [Sun] was able under conditions of the Evaluation to examine were meritorious. As a result, it is inappropriate for Microsoft to demand a royalty with respect to these claims. Although the Evaluation process did not permit Sun to examine in depth all of the innovation reports, it would be expected based upon the materials that were evaluated that the remainder of the materials would similarly possess only strategic value for interoperability rather than genuine innovation."[202]

(178) IBM came to the same conclusion: "[b]ecause of the extremely limited time available, IBM's reviewers were only able to review a sample of the 'innovation' information provided. Within that sample, IBM has found no evidence of any genuine innovation, Rather, the 'innovation' claims that IBM has reviewed are highly dubious for a variety of reasons […].", "IBM's review has not identified any Microsoft technology that could be described as innovative as is further described below."[203]

(179) Before carrying out a more detailed analysis with regard to the innovation claims relating to the Directory & Global Catalogue Replication scenario and the FRS scenario, it is necessary to address a number of general arguments put forward by Microsoft in its Response to the Statement of Objections.

(180) First, Microsoft reiterates that "the reports [from the Trustee and TAEUS] are based on a bottom-up rather than top-down analysis of the WSPP protocols that ignores a great deal of innovation at the task and scenario protocol level as opposed to the protocol level."[204] This argument has already been addressed and rejected in Recitals (155), (156) and (156).

(181) In addition, the Trustee indicates that Microsoft did not present any claim stating that there was innovation in the combination of protocols to satisfy higher-level design

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[200] TAEUS's report on innovation, on page 32.
[201] These seven innovation claims relate to the technology features "Referral Management (DFSCS)", "Domain Relative Tracking (DLTP)", "File Location Tracking Machine (DLTP)", "File Staging (FRS)", "Secure Communication Channel Negotiation (IPSEC)", "Efficient Denial of Service Attack Resistance (IPSEC)" and "Establishing Virtual In and Out Channels (RHTTP)".
[202] Sun's response to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 of 12 December 2006, on page 9.
[203] IBM's response to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 of 11 January 2007, on page 4.
[204] Microsoft's Response to the Statement of Objections, on page 73.

goals and that such inexistent claims "could not therefore be judged at all."[205] The Trustee also states that although the WSPP Pricing Principles refer to protocol technology[206] nothing prevented Microsoft from formulating its innovation claims on any level it wanted to claim innovation for.[207] Similarly, TAEUS indicates that they "did not divide Microsoft's claimed innovations to show that each piece lacked innovation. Rather, TAEUS treated each claimed innovation as a whole, and compared it as a whole to other technology."[208] Therefore, Microsoft's criticism based on the inappropriate level of analysis in the Trustee and TAEUS reports is not justified.

(182) Second, Microsoft alleges that some of the prior art references identified by the Trustee and TAEUS "have no bearing whatsoever on the innovation under consideration".[209] That allegation seems to result from the fact that Professor Finkelstein, on the one hand, claims that the Trustee should have looked at the "overall model, that is the combination of innovations" presented in Microsoft's Task Scheduler Innovation Report[210] but, on the other hand, criticises the Trustee for referring to "Academic Documents on Scheduling Theory"[211] because these do not deal with the individual innovations claimed by Microsoft. It thus adds nothing to the substance of the previous allegation (that innovation claims have not been accessed on an appropriate level) and must equally be rejected.

(183) Third, Microsoft alleges that some of the prior art references identified by the Trustee and TAEUS are subsequent to Microsoft's innovation.[212] TAEUS addresses the example for such alleged non-prior art references indicated by Microsoft: "Professor Finkelstein attempts to dismiss the design of the Lustre file system based on the notion that it was not actually implemented until 2002, after the date of Microsoft's claimed innovation. If he could show that this portion of the Lustre design was changed to coincide with Microsoft's design after Microsoft's claimed innovation, this would be relevant – but he fails to do so. […] [A]ll available literature seems to indicate that this portion of the Lustre system was implemented as it was designed – i.e., following the design that predates Microsoft's claimed innovation."[213] It must be

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[205] 11 May 2007 Trustee report, on pages 10 and 11. ECIS concurs: "In a few areas, Microsoft has identified the 'contents' of a combination it asserts is innovative. However, beyond the identification of the elements of the combination, it has not set out why combining these elements produces something that by reason of the combination has inherent or substantial value", ECIS comments on Microsoft's Response to the Statement of Objections, on page 43.

[206] See 11 May 2007 Trustee report, on page 2.

[207] This appears to have been obvious to Microsoft when it created the innovation reports. For example, in Microsoft's Innovation Report on Windows Remote Registry, dated 31/06/2006, on page 26, Microsoft explicitly claims that the "combination of innovations found in Microsoft's WinReg protocol provides additional benefits and innovations that extend beyond the individual innovations discussed above".

[208] 9 May 2007 TAEUS report, on page 6.

[209] Microsoft's Response to the Statement of Objections, on page 73.

[210] This is one of the reports in which Microsoft claims innovations for the protocols to be licenced. This particular "Innovation Report Task Scheduler" is dated 21 August 2006 and superseded an earlier version dated 31 July 2006.

[211] Finkelstein Technical Assessment of 19 April 2007 (Annex D to Microsoft's Response to the Statement of Objections), at paragraphs 34 and 35.

[212] See Microsoft's to the Statement of Objections, on page 73. See also Finkelstein Technical Assessment of 19 April 2007, at paragraphs 33 to 36.

[213] 9 May 2007 TAEUS report, on page 11. Another example is given on page 39 as regards a reference to a documentation of the "FileUtils" software that Prof. Finkelstein also had questioned.

concluded that Microsoft's attempt to discount the reports by the Trustee and TAEUS as partly imprecise and thus untrustworthy is unfounded.

(184) Fourth, Microsoft alleges that in cases in which no prior art references have been found, the reports of the Trustee and TAEUS still consider the protocol technology to have been "obvious for a person skilled in the art" and thus not innovative which for Microsoft amounts to unfair and inappropriate "dismissive treatment of the many innovations in the WSPP protocols".[214] According to the Trustee, "the assessment that something was 'obvious' was used in contexts where long-established principles of computer science were applied by Microsoft to entirely appropriate problems. In many places, the assessment of something as obvious was almost forced on the Advisory team". He goes on to give examples of such obvious obviousness: "Microsoft claimed as innovative deleting a row from a database" or "storing information in memory".[215] TAEUS pointed out that they in fact had "described only one of Microsoft's claimed innovations as obvious" and that this "was based primarily upon the fact that the description lacked sufficient detail to provide specific instances of prior art".[216] Based on the foregoing, the arguments Microsoft provides for its claim that unfair and inappropriate use has been made of the obviousness criterion are unfounded.

(185) In conclusion, Microsoft's general criticism of the Trustee and TAEUS reports must be rejected as unfounded and misleading.

(186) In Recitals (187) to (218), a more detailed analysis with regard to the innovation claims related to the Directory & Global Catalogue Replication scenario and the File Replication Service (FRS) scenario is provided. Those two scenarios, which were listed in the gold pricing category of the No Patent Agreement of 21 May 2007 and hence were deemed by Microsoft to be amongst the most innovative and valuable protocol technologies provided under the WSSP Agreements, are particularly relevant for the provision of work group server operating system services. The remuneration charged for DRS represented 100% and for FRS 50% of the remuneration due for licensees licensing *all* scenarios.

Directory & Global Catalogue Replication scenario

(187) According to the WSPP Innovation Map[217], the Directory & Global Catalogue Replication scenario involves two protocols: the Directory Replication Service Remote Protocols (DRSR) and the SMTP Replication Protocol Extensions. Microsoft claims non-patented innovations only for the Directory Replication Service Remote Protocol.

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[214]   Microsoft's Response to the Statement of Objections, at paragraph 214.

[215]   11 May 2007 Trustee report, on page 7. The Trustee provides several other similar examples.

[216]   9 May 2007 TAEUS report, on page 9. The report goes on to stress that "in this report, based on Professor Finkelstein's further explanation of that claimed innovation, TAEUS points out specific prior art to that claimed innovation. Therefore, even that one instance of describing a claimed innovation as obvious has been eliminated in favour of having shown concrete prior art to each and every one of Microsoft's claimed innovations".

[217]   The WSPP Innovation Map was enclosed, as part of its innovation reports, with Microsoft's letter of 31 July 2006 from Microsoft's General Counsel to the Director General of DG Competition. The WSPP Innovation Map links the documents of the Technical Documentation to the protocols and the scenarios they are related to.

(188) In the part of Microsoft's innovation report concerning the DRSR protocol, Microsoft mentions 17 technologies that it considers to be innovative. Amongst those 17 technologies, 8 are not covered by patents, namely (i) automated topology modelling, (ii) simultaneous domain rename, (iii) replication convergence despite server failure, (iv) KCC monitoring for automated topology management – ISTG latency monitoring, (v) efficient renaming replication through the use of GUID identification, (vi) management of the addition, removal and rejoining of partitions, (vii) behaviour versioning and (viii) global catalogue search. Each of those claims is discussed in Recitals (189) to (202).

(189) First, concerning the automated topology modelling, Microsoft claims that this technology "promotes processing efficiency by using the least-cost communication path between servers."[218] It states that "old techniques of topology generation required the manual creation of the topology by a network administer. The manual generation of the topology was often less efficient and potentially more error-prone. Microsoft's DRSR protocol addresses these shortcomings by providing an automated topology modelling."[219]

(190) However, automated creation of topology was already well-known at the time Microsoft implemented it in the DRSR protocol in 1999. The principle of automated creation of topology had already been mentioned for the xFS topology and the Ficus system.[220] The Trustee states that "least-cost topologies have been known for some time in fixed and mobile telecommunications, and in large computer networks. The approach to generating a least cost topology using a minimum spanning tree was described as early as 1996 by Mathew B. Doar. The minimum spanning tree is one of the best studied optimization problems in computer science. A variety of algorithms are available. Microsoft has chosen to use Kruskal's algorithm, known to be suitable at the time of release of Windows 2000."[221] Microsoft's topology modelling cannot therefore be considered as novel.[222]

(191) Second, concerning the simultaneous domain rename, this technology aims at addressing problems of rename failures. Microsoft asserts that it promotes stability by coordinating domain renames[223] of forests[224] that ensure adoption across the forest

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[218] Microsoft's DRSR protocol innovation report, on page 21.
[219] Microsoft's DRSR protocol innovation report, on page 22.
[220] See TAEUS report on innovation, on page 22. Ficus is a replicated filing system developed in the late 1980s at the University of California Los Angeles. (See Heidemann, John S., Page, Thomas W., Guy, Richard G., Popek, Gerald J., Replication Ficus Distributed File Systems, Proceedings of the Workshop on Management of Replicated Data, November 1990, on pages 20-25, available at http://www.isi.edu/~johnh/PAPERS/Popek90a.pdf, printed on 26 January 2007)
[221] Trustee summary review of innovation claims, on page 10.
[222] This is despite the fact that according to Professor Finkelstein "the comparison to prior art in replicated file systems is not relevant as the characteristics of directory services are as different from file systems as libraries are from phone books", Finkelstein Technical Assessment of 19 April 2007 (Annex D to Microsoft's Response to the Statement of Objections), at paragraph 84. Both contain an assembly of objects with similar characteristics, though. As the task at hand is the replication of these objects over several sites (servers, or libraries and phone books in the analogy), it is "not true that the two are entirely unrelated or that well-known technology in one area becomes innovative when applied to the other", TAEUS, 11 May 2007 TAEUS report, on page 17.
[223] Microsoft refers to domain rename in the following terms: "The way to change the hierarchical structure of an existing domain tree is to rename the domains." Understanding How Domain Rename Works, Microsoft Corporation, April 2003, on page 5, available at

and describes it as follows: "A tool is used to create the script that describes the enterprise rename, and the generated script is then replicated throughout the systems. […] A triggering mechanism then allows for simultaneous execution of the name change across all of the domain controllers. The replication of the script before the execution of the rename provides enough time to complete replication regardless of possible server failures. Then upon the trigger, all servers are renamed without the problem of the rename being backed out."[225]

(192) That claimed innovation essentially consists in carrying out the domain renaming in two phases. As pointed out by TAEUS[226], this was already a known technique when Microsoft implemented it in 1999 and has been used in the EAN Directory Service.[227] Moreover, the application of systematic changes to a target server via distribution of a script to be executed on the target server is available and has been used in relational database management systems, such as Microsoft's SQL Server or Oracle for years. As a "directory service is a database; rather a specialized database, but a database nonetheless" there is no innovativeness in Microsoft's approach to the domain renaming.[228]

(193) Third, Microsoft claims that its "replication convergence despite server failure" is innovative because it "promotes fault tolerance, time and resource efficiency, changeability, and stability by not allowing a failed server to cause a 'break' in convergence".[229] Microsoft states that "prior global-scale replication systems could experience interruptions and 'breaks' in convergence if a server failed"[230] and claims that its protocol ensures that replications are completed even if a server fails: "Microsoft's DRSR protocol provides a Knowledge Consistency Checker (KCC) that constructs a circular path of all the intra-site servers in a ring fashion, such that if one node breaks, the domain controllers on each side of the broken node may still connect and this allow for continual replication. The KCC thus allows for 'routing around' domain controllers from which replication cannot be accomplished. The KCC also detects and routes around failed domain controllers acting as Intersite bridgehead servers."[231]

(194) The Trustee and TAEUS concur in concluding that this technology is similar to the implementation in the context of the Ficus system (which dates from 1992).[232] Professor Finkelstein's contention that "Ficus just maintains one ring where the nodes

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http://download.microsoft.com/download/9/6/5/965e6899-e086-4b3e-8ed6-516ea07ea225/Domain-Rename-Intro.doc, printed on 7 February 2007. For the meaning of "Windows domain" and "tree", see Recitals 146 and 151 of the Decision, respectively.

[224] Referring to a new (at the time) feature of Windows 2000, the Decision indicated that Windows 2000 domains can be organised in a hierarchical way, with "trees" of Windows 2000 domains linked to one another by automatic trust relationships. "Several trees can then be linked by trust relationships in a 'forest'", see recital 151 of the Decision.

[225] Microsoft's DRSR protocol innovation report, on page 36.

[226] TAEUS's report on innovation, on pages 22 and 23.

[227] EAN Directory Services is a implementation of X.500, a set of ISO and CCITT recommendations for a distributed directory service based on the specifications of the Open Systems Interconnection (OSI).

[228] 11 May 2007 TAEUS report, on pages 17 and 18.

[229] Microsoft's DRSR protocol innovation report, on page 45.

[230] Microsoft's DRSR protocol innovation report, on page 46.

[231] Microsoft's DRSR protocol innovation report, on page 46.

[232] See TAEUS report on innovation, on pages 23 and 24.

are the file servers while the Microsoft DRSR Innovation Report clearly points out that rings are maintained at a much finer granularity, namely for each naming context contained in the directory"[233] is apparently based on a misunderstanding. As TAEUS points out, "[i]n DRSR, each server contains a number of naming contexts, and a ring is formed of servers containing a specific naming context. In Ficus, each server contains a number of Volumes, and a ring is formed of the servers containing a specific Volume. Both use one or more rings, one ring per naming context/Volume. Only the names have changed – the systems themselves are the same"[234]. This kind of replication convergence has also been mentioned in earlier papers, for example in a paper on Bayou, as mentioned in the Trustee summary review of innovation claims on page 14.[235] In conclusion from the exchanged arguments, this technology cannot be considered novel.

(195) Fourthly, concerning the KCC[236] monitoring for automated topology management, Microsoft describes this claimed innovation as follows: "the DRSR protocol provides for automated topology management through monitoring of latency of the Intersite Topology Generator (ISTG), by configuring and adjusting the connections between servers, or domain controllers, and enabling automatic replication throughout the network. […] The KCC uses replication latency monitoring to detect whether the Intersite Topology Generator (ISTG) is operating properly or requires replacement to ensure proper replication."[237]

(196) This technology is described by TAEUS as "a fairly simple implementation of server failover; i.e., a role assigned to a server, and, when and if a monitor detects that the assigned server is not [sic] longer carrying out the responsibilities of that role, the role is assigned to a different server. Such failover of a server is a relatively widely implemented capability."[238] The Trustee reaches a similar conclusion: "the most relevant prior art is Border Gateway Protocol RFC 1771".[239] If the innovation is claimed to lie in a method of making sure there is no single point of failure during

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[233]   Finkelstein Technical Assessment of 19 April 2007 (Annex D to Microsoft's Response to the Statement of Objections), at paragraph 100.

[234]   9 May 2007 TAEUS report, on pages 18 and 19.

[235]   See Karin Petersen, Mike Spreitzer, Douglas Terry, Marvin Theimer, Bayou: Replicated Database Services for World-wide Applications. 7th ACM SIGOPS European Workshop (EUROSIGOPS-96), and LDAP V3 Replication Requirements, Internet Draft 19 February 1999. Microsoft's expert Professor Finkelstein finds the comparison of DRSR with Bayou "inappropriate as the domain in which replication is used in Bayou is fundamentally different from that of DRSR." As the Trustee's Advisors point out "[t]his is not a valid argument to make. Innovation does not occur the first time a particular kind of application uses a given algorithm to solve a problem that the algorithm was designed to solve", Monitoring Trustee Advisor Report of 11 May 2007 (Review of Technical Assessment by Prof. Finkelstein and others), on page 6.

[236]   KCC stands for Knowledge Consistency Checker. Microsoft's TechNet refers to KCC as "a built-in process that runs on all domain controllers and generates replication topology for the Active Directory forest. The KCC creates separate replication topologies depending on whether replication is occurring within a site (intrasite) or between sites (intersite). The KCC also dynamically adjusts the topology to accommodate new domain controllers, domain controllers moved to and from sites, changing costs and schedules, and domain controllers that are temporarily unavailable." (http://technet2.microsoft.com/WindowsServer/en/library/1038d210-c07c-4cde-ad08-a4079b9a8ff01033.mspx?mfr=true, printed on 7 February 2007).

[237]   Microsoft's DRSR protocol innovation report, on page 49.

[238]   TAEUS report on innovation, on page 25.

[239]   Trustee summary review of innovation claims, on page 14 of Part 1.

failover rather than in the failover mechanism itself, as Professor Finkelstein appears to do[240], additional prior art can be referenced. TAEUS mentions the "CHORUS/MiX system [that] had a relatively general-purpose distributed failover manager (FOM). This does not carry out the fail-over itself, but (much like Microsoft's ISTG monitor) monitors the failover mechanism and takes actions to correct problems when/if they occur. Specifically, the FOM distributes management of failover so there is not a single point of failure that allows the failover mechanism itself to fail – precisely the intent of Microsoft's ISTG latency monitoring."[241] This technology cannot therefore be considered as non-obvious to a person skilled in the art.

(197) The fifth claimed innovation in the DRS protocol concerns what Microsoft calls the efficient renaming replication through the use of GUID identification. Essentially, this consists in giving each server an identifier (called GUID for Globally Unique Identifier) different from the server name that will stay the same for the whole server life, independent of possible changes in server names.[242] Professor Finkelstein goes so far as to claim as innovative that Microsoft's GUIDs are globally unique.[243] Firstly, this is not even claimed by Microsoft, as the Trustee points out.[244] Secondly this claim is both false, because it is quite possible that two identical GUID exist at the same time, and irrelevant because for a computer system at hand it does not matter if identical GUIDs exist in a different system.[245]

(198) As pointed out by TAEUS[246], Microsoft's use of system-wide unique identifiers is similar to the ones used in the Coda[247] or Bayou[248] systems, for example, in which each server is given a unique identifier. It cannot therefore be considered novel. Sun also indicates that: "[t]his method is not new to Microsoft. Sun is aware of the use of this practice dating at least to Apollo computer and the DCE Open Computing Group."[249]

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[240]   See Finkelstein Technical Assessment of 19 April 2007 (Annex D to Microsoft's Response to the Statement of Objections), at paragraph 106.

[241]   11 May 2007 TAEUS report, on page 20. For CHORUS/MiX see Kittur/Armand/ Steel/Lipkis, Fault Toleance in a Distributed CHORUS/MiX system.

[242]   Microsoft explains on pages 50 and 51 of its DRSR protocol innovation report: "the DRSR protocol solves the problems associated with servers identified by 'names' by using the innovative identification of servers by a globally unique identifier (GUID). By identifying servers by GUID instead of by Name, the servers can still be contacted even during a rename."

[243]   See Finkelstein Technical Assessment of 19 April 2007 (Annex D to Microsoft's Response to the Statement of Objections), at paragraph 112.

[244]   See Monitoring Trustee Advisor Report of 11May 2007 (Review of Technical Assessment by Prof. Finkelstein and others), at paragraph 7.

[245]   See 11 May 2007 TAEUS report, on page 21.

[246]   See TAEUS report on innovation, on page 26.

[247]   Coda is a network file system developed at Carnegie Mellon University since the late 1980s.

[248]   Bayou was a project at the Xerox Palo Alto Research Center (PARC) from July 1993 until December 1997. The Bayou webpage indicates that the Bayou system "was designed to support collaboration among users who cannot be or choose not to be continuously connected." (http://www2.parc.com/csl/projects/bayou/, printed on 20 February 2007).

[249]   Sun's response to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 of 11 December 2006, on page 6. Sun further notes that "[b]oth of these items of prior art date to the early 1980's. Apollo's NCA operating system and DCE both used fixed IDs paired with IDs that might be changed, which is what Microsoft claims".

(199) Sixthly, Microsoft also claims that the DRSR protocol contains innovation in its way of managing the addition, removal and rejoining of partitions.[250] The claim is summarised by the Trustee as follows: "this claim describes the creation of LDAP referrals by a domain controller with a global catalog for all domains in the forest that it maintains."[251] However, both TAEUS and the Trustee find that there is nothing in the description of the claim that allows concluding that the technology was indeed innovative. Sun indicates that: "[t]hese concepts are not unique to Microsoft. LDAP provides for the partitioning of directory records and further for administrator choice as to which partitions will be replicated. Partition records reflect administrator choices on replication."[252] As LDAP is a lightweight version of the X.500 standard and the technique claimed as innovative by Microsoft is present in the 1993 version of this standard, the existence of prior art is evident.[253]

(200) The seventh claimed innovation concerns behaviour versioning. Microsoft asserts that this promotes changeability by allowing different versions of software to function on different servers. Microsoft describes this claimed innovation as follows: "Old techniques of update administration would prevent functionality between servers executing different software versions. Thus, all servers would need to execute the same software to collaborate. The network running different versions of software at different servers does not necessarily operate properly until all software updates are completed. Microsoft's DRSR protocol addresses these shortcomings by the use of a behaviour vector approach to enable global network upgrading of versions to the Active Directory. The behaviour supports a 'feature list' as opposed to a 'hierarchy' approach'."[254]

(201) According to TAEUS, this is similar to the Processor ID feature implemented in Intel and AMD processors and has even been previously published for other areas of Windows.[255] It cannot therefore be considered novel, and, according to the Trustee, the technology is not even properly described in the Technical Documentation.[256] Sun indicates that: "[t]his claim relates solely to a problem of Microsoft's creation in the architecture of its legacy systems and its tying the behavior of its directory service to the operating system of which it is a part."[257]

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[250] Directory partitions are used to store and copy different types of data. Directory partitions contain domain, configuration, schema, and application data (see http://technet2.microsoft.com/WindowsServer/f/?en/library/048ecec8-7398-43ca-9a41-ebcec47c6a8d1033.mspx, printed on 20 February 2007).

[251] Trustee summary review of innovation claims, on page 15 of Part 1.

[252] Sun's response to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 of 11 December 2006, on page 5.

[253] 9 May 2007 TAEUS report, on page 22.

[254] Microsoft's DRSR protocol innovation report, on page 104.

[255] TAEUS's report on innovation, on page 28 and 9 May 2007 TAEUS report, on pages 23 and 24.

[256] Trustee summary review of innovation claims, on page 18 of Part 1: "The DRSR specification shows an example of a query but nothing else. […] The claim therefore does not actually map on the DRSR specification in a usable manner." Professor Finkelstein's assertion that the Trustee had agreed that the technique constitutes innovation (see Finkelstein Technical Assessment of 19 April 2007 (Annex D to Microsoft's Response to the Statement of Objections), at paragraph 132) is incorrect as is underlined by the Monitoring Trustee Advisor Report of 15 May 2007 (Review of Technical Assessment by Prof. Finkelstein and others), on page 8.

[257] Sun's response to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 of 11 December 2006, on page 8. Sun further notes that: "[O]ther directory services run on top of an operating

(202) Finally, the last claimed innovation with regard to the Directory Replication Service Remote protocol concerns the Global Catalogue search.[258] Microsoft explained that the use of the Global Catalogue allows a single-point search for information that resides across domains and therefore promotes changeability by allowing querying of distributed data.[259]

(203) However, that claim of novelty is unwarranted, since this has already been used, for example in LDAP. TAEUS states that: "Many LDAP servers support subordinate references as well. […] the OSDF DEC [dating from 1993] system also allows a number of directory services to provide the data for a single directory information tree."[260]

(204) In conclusion, the Commission considers that Microsoft's claims concerning innovation in the non-patented protocol technology disclosed in the Technical Documentation of the Directory & Global Catalogue Replication scenario are not valid.

File Replication Service scenario

(205) As regards the File Replication Service scenario, the WSPP Innovation Map indicates that it includes only the File Replication Service FRS protocol ("the FRS protocol"). Microsoft claims non-patented innovations for this protocol.

(206) In the part of the innovation report concerning the FRS protocol, Microsoft mentions five technologies that it considers to be innovative in that protocol, namely (i) multi-master replication, (ii) customized replication by data type, (iii) replication pre-

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[258] system and thus do not have to account for the particular version of operating system that they are installed upon. This claim thus relates solely to interoperation with Active Directory and has strategic value only" (ibid).

[258] The Decision explains in Recital 151 that " […] domain controllers can be set up as 'global catalogue servers', which means that in addition to the information on the resources available in the domain that it controls, the domain controller will store a 'summary' of all the resources available in the forest ('the Global Catalogue data'). Such Global Catalogue data are kept updated through various protocols."

[259] As explained by Microsoft on page 115 of its DRSR protocol innovation report: "Locating information in a distributed directory requires searching each server for the information. Each server is addressed and then asked for the required information. The searching process can become time-consuming if the network is large and distributed over several distant locations. Old techniques would query each server. The searches were difficult to obtain accurate search results when searching across domains/partitions. In addition, completing more difficult searches, such as recursive group expansion searches across domains, could lead to continually expanding searches and were not possible in previous systems. Microsoft's Global Catalog innovation addresses these shortcomings by the use of the Global Catalog (GC) which allows a single-point search for information that resides across domains. The GC is innovative in its functionality of creating **a unified view of all naming contexts** (NC) in a distributed partitioned directory to enable efficient distributed querying." Interestingly, Professor Finkelstein, in his subsequent technical assessment of the 1 March Statement of Objections characterises the claimed innovation differently, stating that the "global catalogue contains **replicas of all naming contexts** used in the distributed system", Finkelstein Technical Assessment of 19 April 2007 (Annex D to Microsoft's Response to the Statement of Objections), at paragraph 136 (emphasis added in both citations). As TAEUS point out, the result of this would not be "efficient distributed querying" (as initially claimed innovative by Microsoft), "but querying that is no longer distributed", 9 May 2007 TAEUS report, on page 25. Whether Microsoft or its expert Professor Finkelstein are right in this aspect does not affect the overall conclusion on this claimed innovation.

[260] TAEUS report on innovation, on page 29.

processing, (iv) customized replication scheduling, and (v) MoveIn and MoveOut flags. Two innovation claims for the two first technologies (multi-master replication and customized replication by data type) are allegedly covered by patents, but these patents do not cover four other innovation claims in relation to these two technologies. As regards the three other technologies (replication pre-processing, customized replication scheduling and MoveIn and MoveOut flags), Microsoft indicates that they are not covered by patents, but it asserts that they are nevertheless innovative. Only the non-patented innovation claims are discussed in Recitals (207) to (218).

(207) Firstly, concerning multi-master replication, Microsoft asserts that two innovation claims in relation to this technology are not covered by patents, namely the conflict detection and resolution and the use of GUIDs. As regards the first technology, conflict detection and resolution, Microsoft describes it as follows: "other conflict resolution rules may be applied according to the data, the attributes of the file, and/or the desires of the administrators. These comparison rules guarantee that independent decisions by each node are the same. Regardless of the particular comparison test used to resolve conflicts, each and every system must select the same winning file to manage collisions."[261] The Commission, having examined the Trustee's and TAEUS reports, considers the technology to be obvious for a person skilled in the art, as it just consists of the decision that all of the interconnected computer systems follow the same arbitrary rules. TAEUS has pointed to this in its report: "As [Microsoft's innovation report] makes clear, the rules themselves are arbitrary. The important point is that all of the interconnected systems follow the same arbitrary rules. Although Microsoft's disclosure discusses the possibility of using such criteria as file size or version number, it appears that the primary rule they actually implement for files is that the most recent file overwrites any previous file. Again, this rule for files is neither new nor innovative."[262]

(208) As for the use of GUIDs, Microsoft states that it "promotes resource efficiency and data accuracy by enabling the accurate tracking of a file or folders among multiple servers."[263] TAEUS explains in its report that, at the time of its implementation by Microsoft in 1999, other systems, such the Andrew File System or DCE, already used similar technology.[264] The Trustee also confirms that the method is "common to version control systems and encryption techniques."[265]

(209) Microsoft's expert Professor Finkelstein complains that the Commission has not taken into account a combination of conflict detection and resolution and GUIDs.[266] As Microsoft has not provided an explanation as to the way in which the combination of these two well-known techniques, which are present in one form or other in most distributed file systems, is novel, there is no reason to consider the techniques innovative.

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[261] Microsoft's FRS protocol innovation report, on page 18.
[262] TAEUS's report on innovation on page 9.
[263] Microsoft's FRS protocol innovation report, on page 20.
[264] TAEUS's report on innovation, on page 11.
[265] Trustee summary review of innovation claims, on page 28 of Part 1.
[266] Finkelstein Technical Assessment of 19 April 2007 (Annex D to Microsoft's Response to the Statement of Objections), at paragraph 47.

(210) Secondly, as regards the customized replication by data type, Microsoft claims that it "promotes resource efficiency and adaptability by allowing changes to topology types without creating new communication needs."[267] A considerable part of this technology is covered by patents. Microsoft claims that non-patented technology contributes to this benefit, for example, Sysvol replication with the Active Directory topology, and should therefore be regarded as innovative. However, as explained by TAEUS[268], this had already been described and implemented in the Ficus system in 1992. Therefore, TAEUS concludes that: "Microsoft's use of a self-healing ring topology within a site and point-to-point connection between sites for replication of SYSVOL files is not novel today, and was not novel when first implemented by Microsoft."[269] It must also be stressed that patented technology can have no role in this particular assessment and its interdependencies with the non-patented technology under discussion must therefore not be taken into consideration.

(211) Third, Microsoft asserts that its replication pre-processing encompasses six non-patented innovative technologies called version vector join, version vector rejoin, aging cache, customized polling, deterministic compression.[270]

(212) Version vector join and version vector rejoin essentially relate to the same technology.[271] These concepts had already been used prior to their implementation by Microsoft as is described by TAEUS: "Version Vectors have been used in similar fashions in a number of other systems as well, including the Locus, Coda and Ficus distributed file systems. The Ficus reference, in particular, points to the superiority of time stamps over the simple version numbers used by Microsoft."[272] The Trustee also points to "Popek J et al UCLA: Replication in Ficus Distributed File Systems"[273] as relevant prior art.

(213) TAEUS holds that the "capability [of aging cache] is also common to most file replication services."[274] The Trustee describes that it was "broadly used and obvious, common in low level communication protocols and terminal emulations at least."[275]

(214) As regards the customized polling, it is a simplified technique when compared to the publicly available Lace's algorithm, as explained by TAEUS: "it does appear that Lace's algorithm may be somewhat more sophisticated. Microsoft adjust the polling interval only rather suddenly, not gradually as described in the Lace description."[276] Deterministic compression consists in compressing the data only if this would have an effective result and to flag if such a compression has happened. It must be stressed

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[267] Microsoft's FRS protocol innovation report, on page 23.
[268] TAEUS's report on innovation, on page 12.
[269] TAEUS's report on innovation, on page 13.
[270] The "file staging" technology is accepted to be innovative.
[271] As pointed out by TAEUS on page 14 of its innovation report: "the Version Vector Rejoin is simply a different application of the Version Vector Join process. […] the comments made about the Version Vector Join process apply equally to the Version Vector Rejoin process. Microsoft's implementation of Version Vectors and the Version Vector Rejoin process is not novel today and was not novel when Microsoft first implemented it".
[272] TAEUS' s report on innovation, on page 14.
[273] Trustee summary review of innovation claims, on page 2 of Part 1.
[274] TAEUS's report on innovation, on page 15.
[275] Trustee summary review of innovation claims, on page 31 of Part 1.
[276] TAEUS's report on innovation, on page 17.

that a certain number of programs also compress data depending on the effectiveness of the algorithm result. This is the case for "pzip" or even "info-zip" which have been in development since 1990. TAEUS also concludes that "Microsoft's deterministic compression is not novel today and was not novel at the time it was first implemented by Microsoft."[277]

(215) Fourth, as regards customized replication scheduling, Microsoft asserts that two aspects of this non-patented technology are innovative: the scheduled replication and the forced replication. Microsoft describes the scheduled replication as follows: "the FRS protocol provides for a selectable replication schedule. To execute a replication on a schedule, FRS allows for setting the times that the replication should occur within either the NTFRS Replica Set Object or the NTDS Connection Object. The replication would then occur according to the schedule."[278] and the forced replication as follows: "the FRS protocol provides for a selectable replication type that forces immediate replication of data. To execute an immediate replication, FRS allows a replication to be forced using the NtFrsApi_Rpc_ForceReplication method. The forced replication executes regardless of any scheduled replication. Thus, changes can be made immediately to all members of the replica."[279] The same results could be achieved with the "rsync"[280] software in conjunction with a standard tool like the "cron" command under UNIX at the time of their implementation by Microsoft.[281] The simple idea of scheduling something or doing something at once, i.e. delaying execution of a command to a specified later point in time or forcing immediate execution, can hardly be called innovative, regardless of what it is that is or is not scheduled.

(216) Fifth, Microsoft asserts that its MoveIn and MoveOut flags "deliver resource efficiency by minimizing the number of change orders that are needed to replicate large file moves."[282] In this context, according to Microsoft, "the flags represent that the change order was generated as part of a subdirectory move in or move out. In other words, the change order applies to numerous files involved in a mass move of files due to a restructuring of the folder or file hierarchy."[283]

(217) However, the Trustee notes that: "these are the standard scheduling criteria used within the art across a broad range of applications. There is nothing novel or innovative about using these methods to initiate replication in FRS: it would have been delinquent not to do so."[284] In addition, most of the competing systems (LINUX, UNIX) have in fact implemented other, possibly better ways to handle the problems and the solution developed by Microsoft appears to be obvious for a person skilled in the art. For example, TAEUS states that: "allowing movement of entire directories under UNIX-like operating systems has been supported (e.g. by the mv

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[277]   TAEUS's report on innovation, on page 18.
[278]   Microsoft's FRS protocol innovation report, on page 59.
[279]   Microsoft's FRS protocol innovation report, on page 57.
[280]   The "rsync" algorithm is an algorithm for updating a file on one machine so that it becomes identical to a file on another machine (see http://rsync.samba.org/tech_report/, printed on 20 February 2007).
[281]   TAEUS's report on innovation, on page 19.
[282]   Microsoft's FRS protocol innovation report, on page 62.
[283]   Microsoft's FRS protocol innovation report, on page 63.
[284]   Trustee summary review of innovation claims, on page 33 of Part 1.

command) for some time."[285] The Trustee comes to the same conclusion: "the performance of similar operations on either files or directories is common place. There is nothing novel or innovative about using these methods to minimise the number of Change Orders needed to operate on directory structured data sets"[286].

(218) In conclusion, the Commission considers that Microsoft's claims concerning innovation in the protocol technology disclosed in the Technical Documentation of the File Replication Service scenario with the single exception of the "file staging" technology are not valid.

Conclusion

(219) In Recitals (169) to (218) and in the Annex to this Decision the conclusions as to the innovativeness of Microsoft's non-patented protocol technology disclosed with the Technical Documentation are set out. In the absence of convincing evidence as to the innovative features of 166 out of 173 protocol technologies disclosed with the Technical Documentation the Commission considers that Microsoft's claim that the non-patented protocol technologies disclosed with the Technical Documentation are innovative is in essence unfounded.

3.1.3.2. Assessment of the prices of comparable technologies

Introduction

(220) As has been outlined in Section 3.1.3.1. the non-patented protocol technology which Microsoft discloses with the Technical Documentation was, with the exception of seven instances, found to be non-innovative. In accordance with the WSPP Pricing Principles and with Microsoft's own commitment to prospective WSPP licensees[287] the remuneration rates Microsoft charged until 22 October 2007 for non-innovative Interoperability Information disclosed through the No Patent Agreement are therefore not objectively justified.

(221) Additional evidence that the remuneration rates that Microsoft charged for the non-patented Interoperability Information is not objectively justified is provided by a market valuation of comparable technologies which is provided for in the WSPP Pricing Principles as one of the criteria to assess the reasonableness of Microsoft's remuneration scheme.

Market evaluation of comparable technology

– Comparable protocol technology is provided royalty-free

(222) Recitals (224) to (238) provide an outline of the pricing of protocol technology comparable to the WSPP protocols, that is to say of protocol technology that is used

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285   TAEUS report on innovation, on page 20.
286   Trustee summary review of innovation claims, on page 34 of Part 1.
287   See letter of 4 May 2006 from Microsoft's General Counsel to the Director General of DG Competition, on page 4: "[…] we have committed that: […] Any individual protocol that is not innovative will be available for a nominal fee."

to deliver file and print services or group and user administration services or similar protocol technologies.

– Comparable protocol technology is provided royalty-free by Microsoft

(223) First, it should be stressed that Microsoft has provided similar technical documentation of protocols royalty-free in the past and still provides similar technical documentation of protocols royalty-free today. In some cases, this extends to patented technologies.

(224) For example, Microsoft, together with other software companies, developed the Web Services Security (WS-Security) specification. This was submitted to the Organization for the Advancement of Structured Information Standards ("OASIS") and provides a royalty-free licence that includes rights to its applicable patents.[288]

(225) Other examples of protocol technology made available by Microsoft on a royalty-free basis can be found in Microsoft's response to a request for information, in which Microsoft lists a number of protocols documentation of which is available royalty-free either on MSDN ("Microsoft Developers Network")[289] or from a standard-setting body to which it was submitted by Microsoft.[290]

(226) As regards the protocol specifications that Microsoft makes available royalty-free on MSDN, Microsoft indicates that they are made available under such terms on the grounds that the protocols in question are "historical or legacy connectivity protocols or relatively minor extensions to published protocols".[291]

(227) As regards the protocols submitted to standard-setting bodies, Microsoft explains that this submission was made because it "felt it would be beneficial to make these protocols available through a standard-setting body".[292]

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[288] See section 2.2 of the Royalty Free Web Services Security Specification Licence Agreement. The text of the licence is available at http://download.microsoft.com/download/8/e/5/8e59dce6-2b27-4fc3-bd00-0531c5514ae3/WSS_License-Agreement.pdf, printed on 28 February 2007.

[289] Collaboration Data Object for Windows 2000, Protocol Library, HyperTerminal Protocols, Internet Protocol Security Protocols, Protocol for Address Space Traversal, Remote X/Open Directory Services Remote Protocol, Serial Bus Protocol 2, Simple Network Time Protocol Extensions, Simple Service Discovery Protocol Extensions, Universal Plug and Play Internet Gateway Device, VT-UTF8 and VT100+ Protocols. (See the list of protocols enclosed with Microsoft's response of 15 February 2005 to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003).

[290] Sockets Direct Protocol, RVP, Presence and Instant Messaging Protocol, Generating KDC Referrals to locate Kerberos realms, Teredo: Tunneling IPv6 over UDP through NATs, Negotiation of NAT-Traversal in the IKE Protocol (MS/SafeNet/FSecure/Cisco), UDP Encapsulation of IPsec ESP Packets (F-Secure/MS/Cisco/Nortel), RDMA Protocol Specification. (See the list of protocols enclosed with Microsoft's response of 15 February 2005 to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003).

[291] Microsoft's response of 15 February 2005 to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003, on page 6.

[292] On the "Teredo" protocol "Microsoft felt that standardization of Teredo (a major enabling technology facilitating broader multi-vendor adoption of peer to peer communications technologies) will be an important factor for adoption by ISPs and also in being able to have a stable IPv6 address prefix dedicated by IANA to the Teredo service." See Microsoft's response of 15 February 2005 to an information request, on page 6. On the RDMA Protocol Specification, "Microsoft felt it would benefit all to work for the multi-vendor adoption of the wire protocol, as a basis for all industry participants to

(228) Another example of protocols made available by Microsoft on a royalty-free basis is the CIFS 1.0 ("Common Internet File System") protocol to request file and print services from server systems over a network. As outlined in Recitals 237 to 240 of the Decision, in 1997, Microsoft made the specifications for the CIFS 1.0 protocol available royalty-free through the IETF[293]. Updated CIFS specifications are now available from Microsoft under a royalty-free licence, which, according to Microsoft, has been introduced to address concerns of the Commission ("Royalty-free CIFS Technical Reference Licence Agreement").[294] [295]

(229) On 12 September 2006, Microsoft published its "Open Specification Promise"[296] which is *de facto* a royalty-free licence covering a number of specifications of protocols, which include protocol specifications whose goal is to achieve interoperability.[297] The Trustee confirmed that the "Web Service Specifications" disclosed under the "Microsoft Open Specification Promise" are indeed comparable to the WSPP protocols as regards their objective and nature.[298]

(230) Microsoft explains the "Open Specification Promise" in the following terms: "No one needs to sign anything or even reference anything. Anyone is free to implement the specification(s), as they wish and do not need to make any mention of or reference to Microsoft. Anyone can use or implement these specification(s) with their technology, code, solution, etc. You must agree to the terms in order to benefit from the promise;

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provide value through IP protected application binary compatibility and network manageability in their products." See Microsoft's response of 15 February 2005 to a request for information, on page 6.

[293] IETF stands for Internet Engineering Task Force**.**

[294] The licence agreement is available at http://msdn2.microsoft.com/en-us/library/aa302199.aspx, printed on 25 January 2007.

[295] In a response of 15 February 2005 to an information request, Microsoft states the following: "In order to provide clarity regarding rights to the use of this protocol (for which some documentation had been previously published in approximately 1997), and in response to concerns expressed by the European Commission in its first Statement of Objections, Microsoft made public an express royalty-free license along with restated technical documentation." Contrary to PwC's assertion, see February 2006 PwC report, on page 60. The fact that Microsoft offered the CIFS licence only after the Commission had issued a Statement of Objections does not disqualify it as a comparable. The Statement of Objections of 1 August 2000 did not state that Microsoft has allow the use of its technology royalty-free but on fair, reasonable and non-discriminatory terms (see paragraph 369). However, Microsoft chose to offer a royalty-free licence.

[296] By means of the "Open Specification Promise" Microsoft irrevocably promises not to assert any Microsoft Necessary Claims against undertakings for making, using, selling, offering for sale, importing or distributing any implementation to the extent it conforms to a Covered Specification. "Necessary Claims" are those claims of Microsoft-owned or Microsoft-controlled patents that are necessary to implement only the required portions of the Covered Specification that are described in detail and not merely referenced in such Specification (see http://www.microsoft.com/interop/osp/default.mspx, printed on 7 February 2007).

[297] Microsoft describes the Web services specifications which are disclosed under the "Open Specification Promise" as follows: "Web services specifications compose together to provide interoperable protocols for Security, Reliable Messaging, and Transactions in loosely coupled systems.", see http://msdn2.microsoft.com/en-us/library/ms951274.aspx, printed on 8 November 2007.

[298] See Trustee report on innovations and comparable technologies, pages 10 and 11:"Arguably, even the Microsoft 'Web Services' collection of specifications is equally directly comparable, being set of documents offered with the objective of enhancing interoperability through the provision of specifications for the network services supporting access to and control over information within the broader Internet."

however, you do not need to sign a license agreement, or otherwise communicate your agreement to Microsoft."[299]

– Comparable protocol technology is provided royalty-free by other companies

(231) Not only Microsoft but also other companies have made comparable protocol specifications available royalty-free including, in some cases, patented technologies.

(232) The specifications of the NFS ("Network File System") protocol, originally designed by Sun, which provides transparent remote access to shared files across a network, are freely available on the internet.[300] As regards the NFS version 4 specifications, Sun has entered into an agreement with IETF and the Internet Society to offer "a cost-free, perpetual, non-exclusive, worldwide right and license […] under any Sun patent rights that are essential to practice the Specification".[301]

(233) The LDAP ("Lightweight Directory Access Protocol") protocol, which is partly supported by Active Directory[302], is an IETF standard licensed royalty-free.

(234) The Kerberos security protocol, that was originally developed by the Massachusetts Institute of Technology (MIT) and of which Microsoft implements an extended version,[303] is also an IETF standard licensed royalty-free.[304]

(235) Other comparable protocol specifications for the file and print tasks are also provided royalty-free. Examples are the LPR ("Line Printer Daemon Protocol")[305] or the CUPS ("Common Unix Printing System").[306]

(236) The Trustee's analysis supports the Commission's findings with regard to comparable technologies: "the technologies comparable to those offered by Microsoft are primarily those presented as specifications for interoperability; and these are observed to come mainly from the efforts of what might broadly be termed the 'standards-setting' arena – encompassing such technologies as CORBA, JAVA, DCE, and those described in various IETF/RFCs – and from some more precise offerings such as the MIT Kerberos suite and the SUN NFS and NIS solutions.

Their objective and nature are both directly comparable, and the specified technologies are broadly comparable – being networked services providing various network access schemes for files, printing and the remote control and application of administration and security services.

These several technologies have direct correspondence to the technologies described in the Microsoft offering – for example, in the arena of directory services (NIS),

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[299] See Frequently Asked Questions on the "Open Specification Promise", see http://www.microsoft.com/interop/osp/default.mspx, printed on 8 November 2007.

[300] See http://www.freesoft.org/CIE/RFC/1813/index.htm, printed on 28 February 2007.

[301] See An Agreement Between the Internet Society, the IETF, and Sun Microsystems, Inc. in the matter of NFS V.4 Protocols, of May 1998 (http://www.ietf.org/rfc/rfc2339.txt, printed on 7 February 2007).

[302] Recital 243 of the Decision.

[303] Recital 251 of the Decision.

[304] Recital 153 of the Decision.

[305] See http://www.ietf.org/rfc/rfc1179.txt, printed on 28 February 2007.

[306] See http://www.cups.org, printed on 28 February 2007.

distributed file systems (NFS), and distributed authentication (Kerberos) – and although available as implemented technologies are also available as specifications from which competing, interoperable solutions can be independently developed."[307]

(237) In his report on innovation and comparables, the Trustee lists specific comparables and matches them to Microsoft's innovative protocol technology.[308]

Microsoft's arguments

(238) Microsoft asserts that its experts PwC have assessed the reasonableness of its remuneration rates based upon licences of comparable technologies and with comparable terms using a so-called "Market Approach".[309]

(239) Section VII.A of the August 2006 PwC report details how PwC uses the Market Approach to identify potentially comparable licences to the WSPP Agreements. Based on a variety of database search methods, PwC initially identifies potentially comparable transactions. It then carries out what it calls an "economic qualification" of these transactions, which reduces the number of potentially comparable transactions. According to PwC this "economic qualification" qualifies as potentially comparable only those transactions with a running royalty rate, which are a technology licence between unrelated parties, free of other considerations that obscure the actual royalty rate and executed outside of litigation.[310]

(240) In applying the Market Approach PwC has disqualified licences issued in the context of a standard-setting process. Such a disqualification is inappropriate for the reasons set out in Recitals (264) to (273).

(241) After the "economic qualification", PwC then carries out a "technical qualification" on the remaining transactions to screen out those transactions which cover technology not comparable with Microsoft's protocol technology. This leaves PwC with 11 transactions allegedly comparable to the WSPP Agreements. Of these, PwC identifies two IBM licences[311] as best comparables for user and group administration, one MCPP licence, which PwC recognises not to be comparable for user and group

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[307]   Trustee report on innovation and comparables, on pages 10 and 11.
[308]   Trustee report on innovation and comparables, on page 12.
[309]   According to PwC "the Market Approach relies on the comparison of the financial performance or transaction price of sufficiently similar companies or assets to the valued asset. This approach can provide empirical evidence of value through a comparison of past occurrences in similar companies or other market prices. The value derived from these similar assets can then be adjusted to approximate the subject asset, with varying degrees of precision. For an intellectual property license valuation, where the goal is to determine an appropriate royalty rate, this approach generally considers the royalty rates of comparable licence transactions", August 2006 PwC Report, on page 32.
[310]   As explained by PwC on page 41 of its August 2006 report: "In order to be economically comparable the license needed to provide a running royalty rate and be: 1) a technology license (as opposed to a product license or distribution agreement, for example); 2) between unrelated parties; 3) free of other considerations that obscure the actual royalty rate (e.g. as part of a merger, joint venture or cross license or related to significant non-royalty benefits); and 4) executed outside of litigation (i.e. not a damages award or settlement)."
[311]   See August 2006 PwC report, on page 45 and 46 (IBM-CrossComm and IBM-Level 8).

administration but nevertheless relevant[312], and two other MCPP licences as most directly comparable with the WSPP in the file and print area.[313]

– The MCPP licences

(242) As outlined in Recitals 14 et seq. of the Decision a protocol disclosure programme has been set up in the United States following a settlement between the United States and Microsoft of 2 November 2001.[314] This settlement has been endorsed by the US District Court for the District of Columbia on 1 November 2002 ("Final Judgment").[315] According to the Final Judgment, Microsoft "[…] shall make available for use by third parties, for the sole purpose of interoperating or communicating with a Windows Operating System Product, on reasonable and non-discriminatory terms […], any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court, (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (i.e., without the addition of software code to the client operating system product) with a Microsoft server operating system product."[316]

(243) In order to comply with these obligations under the Final Judgment, Microsoft has set up the MCPP, under which Microsoft discloses the relevant communications protocols.

(244) The Commission considers it inappropriate to present as comparables under a market evaluation licences that were made available under a settlement between the US government and Microsoft for the following reasons.[317]

(245) In its Response to the Statement of Objections Microsoft tries to portray the MCCP licences that PwC identified as comparable as "concrete evidence from the marketplace that Microsoft's proposed royalty rates are reasonable".[318]

(246) Microsoft also stresses that the MCCP licence agreements were the product of arm's-length negotiations with prospective licensees.[319] However, the royalty rates applied in the three MCPP licences to which PwC refers as comparables do not differ from the 4 % of net revenue royalty rate of the standard MCCP agreement which Microsoft has elaborated in cooperation with the US government.[320]

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[312]   See August 2006 PwC report, on page 47 (Microsoft-Network Appliance server-to-server licence).
[313]   See August 2006 PwC report, on pages 51 (Microsoft-Network Appliance) and 52 (Microsoft-Hitachi).
[314]   See Recital 18 of the Decision.
[315]   United States District Court for the District of Columbia, Memorandum Opinion with Findings of Fact and Final Judgment of 1 November 2002 in re State of New York et al. v. Microsoft Corporation, Civil Action No. 98-1233 (CKK); Memorandum Opinion with Findings of Fact and Final Judgment of 1 November 2002 in re United States of America v. Microsoft Corporation, Civil Action No. 98-1233 (CKK). See also Recital 19 of the Decision.
[316]   Section III.E of the Final Judgment.
[317]   On the US settlement, see Recitals 14 to 20 of the Decision.
[318]   Microsoft's Response to the Statement of Objections, at paragraph 105.
[319]   Microsoft's Response to the Statement of Objections, at paragraph 105.
[320]   See   http://www.microsoft.com/about/legal/intellectualproperty/protocols/PricingOverview.mspx, printed on 8 November 2007.

(247) Microsoft's assertions are in contrast to the Joint Status Reports regularly filed with the US District Court for the District of Columbia by Microsoft and the plaintiffs in the US Microsoft case, namely the US Department of Justice and several States (together, "the Plaintiffs") on Microsoft's compliance with the Final Judgment which bear witness that the MCCP licence agreements and in particular the applicable royalty rates were indeed elaborated under close scrutiny of the Plaintiffs.[321]

(248) It is not for the Commission to decide on whether the royalty rates of the MCCP licence agreements which have apparently been agreed upon between the Plaintiffs and Microsoft can be considered reasonable in the context of the Final Judgment. The Commission, however, rejects Microsoft's attempt to present the MCPP licences as market evidence in a market evaluation.

(249) As set out in Recitals (275) to (279), this assessment is not altered by the fact that two companies have actually entered into MCPP licences which PwC deems comparable.

– The other allegedly comparable licences

(250) For the following reasons the other licences presented by PwC as comparables are not appropriate benchmarks.

(251) As PwC indicates[322], IBM licensed to CrossComm not only documentation for Advanced Peer-to-Peer Networking but also a patent licence and the right to use IBM's source code and to incorporate IBM's object code directly in CrossComm's products.

(252) The scope of the IBM-CrossComm licence is therefore substantially different from the No Patent Agreement as it covers patents and allows direct use of the licensor's code in the licensee's products whilst the No Patent Agreement only gives access to a specification which has to be implemented by the licensee, i.e. code that can run on a computer has to be developed and programmed by the licensee according to the Technical Documentation.[323] The IBM-CrossComm licence stipulates that the running royalties to be paid by CrossComm to IBM are due specifically in view of the continuing right to use IBM's object code in CrossComm's products.[324]

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[321] See Joint Status Report on Microsoft's Compliance with the Final Judgments, dated 3 July 2003, Section II.A.5: "In addition, at Plaintiffs' insistence, Microsoft is undertaking changes to the MCPP's royalty structure and rates, which will result in further changes to the licensing terms. Discussions on this issue have been occurring over the past several weeks and, although progress has been made, Plaintiffs remain concerned about the royalty structure and rates proposed by Microsoft."

[322] 24 August 2006 PWC Report, on page 45.

[323] The Trustee estimates that such an implementation of the Technical Documentation provided by Microsoft will take three years and require 300 engineers. See Trustee report on the business plan, on page 2.

[324] Section 3.1.2 of the IBM-CrossComm licence reads: "As consideration for a continuing right to use OBJECT Code in PRODUCTS and other material from LICENSED WORKS, CrossComm shall pay, for each unit of Product delivered to a CrossComm customer (including internal customers), the applicable royalty as set forth in Schedule A." The explicit terms of the licence agreement are therefore in stark contradiction with PwC's assertion that the object code would have been nearly valueless for CrossComm, 24 August 2006 PWC Report, on page 48.

(253) The same argument applies to the IBM-Level 8 licence. This licence not only provides documentation but also the right to use IBM's source code and to integrate IBM's object code directly in Level 8 products.[325]

(254) PwC asserts, on behalf of Microsoft, that the value of the right to use source code in the IBM licences referred to in Recital (253) is minimal because the source code has to be adapted ("ported") to a different operating system platform by the licensee. In addition, the WSPP Agreements provide for a so called "source code reference licence", that is to say a licence that allows to study the Microsoft source code but not the use of it.[326]

(255) In that respect it should, first, to be pointed out that Microsoft is not under an obligation pursuant to the Decision to offer a source code reference licence.[327] Second, Microsoft incorrectly downplays the significant difference between a right to use source code directly in a licensee's product, even if it has to be ported, and a right to use protocol specifications. As the Trustee has pointed out, the development efforts necessary for porting source code to a different operating system platform and for the implementation of a specification, even if supported by a source code reference licence[328], are not comparable.[329] Porting source code is less demanding than implementing a specification.

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[325] See section 4.1 of the licence: "IBM hereby grants to Level 8 a world-wide, non-exclusive licence to execute, display and perform the LICENSED CODE only when it is integrated in PRODUCT CODE. […]" As most of the code provided under this licence (which provides for royalties rates of 10 to 11%) is only object code and not source code (see section 1 of the licence) PwC's contention that the object code provided with this licence has to be considered nearly valueless (see 24 August 2006 PWC Report, on page 48) is contrasted by the licensing terms.

[326] 23 April 2007 PWC Report, at paragraphs 57 and 58.

[327] See Recital 999 of the Decision.

[328] As pointed out in Recitals 205 to 208 of the Commission Decision of 12 July 2006 (C(2006) 3143 final) the source code reference licence is of limited usefulness for WSPP licensees as it does not relieve them from the burden of establishing by means of the specifications which information is essential for interoperability as this cannot be inferred from the source code.

[329] See Trustee memorandum on WSPP comparable technologies, on the third page (not numbered): "In the provision of source code, the development exercise has already been undertaken by the licensor. At a minimum, the licensee need only compile the program if it was developed to run on an identical platform [internal footnote omitted]. If it was developed to run on a different platform, then the licensee would need to make some changes to the program to reflect the different nature of the platform: for example, one operating system might require a file to be opened using one particular form of command whereas a different operating system might use a variation in the corresponding command. These alterations are termed 'Porting' of the program, and in a well-written source code are well isolated and relatively easily discovered, with the main body of the program remaining unaltered. In a less well-written program, these changes might be scattered throughout the source code – but they seldom necessitate the wholesale rewriting of the program in any other than the most extreme case.

By contrast, in the provision of a specification a substantial body of work must be undertaken to obtain a program reflecting that specification. From the specification, it is necessary to determine the program requirements (optional and mandatory), to produce a program design, to produce and implement a project plan for the programming team, and to carry out the program development. Such exercises require substantially greater teams working over much longer periods of time at correspondingly higher levels of expenditure – and, it might be remarked, carrying greater levels of risk of failure.

A porting exercise might be measured in man-months or even man-days; an implementation exercise in man-years.

(256) It is therefore inappropriate to regard licences which include the right to use object code and source code as comparable to a licence which gives access to protocol specifications. Such licences are hence not helpful in reaching conclusions about which remuneration rate would have been reasonable.

(257) PwC has also performed an analysis of comparables at scenario levels and has identified the following other licences as comparables for specific scenarios: the IBM-TurboWorx licence for the networking transport scenario[330], and the Sprague & Mutineer – Wave Systems and Radius – Augment licences for the base authentication and authorization scenario[331], the domain service interaction scenario[332], the multi factor authentication and certificate services scenario.[333]

(258) As regards the IBM-TurboWorx licence, it includes the right to use IBM's source code in TurboWorx's products which actually appears to be the main purpose of this licence.[334] Therefore the observations made and conclusions drawn in Recital (256) are also pertinent with regard to this licence.

(259) According to PwC the Sprague & Mutineer – Wave Systems licence is a patent licence[335] and therefore not comparable to the No Patent Agreement. As regards the Radius – Augment licence, PwC was unable to specify the nature of the licensed material.[336] In view of this lack of crucial information that licence cannot be taken into account as a comparable to the No Patent Agreement.

(260) It therefore must be concluded that the licences examined by PwC are in fact not technically and economically comparable to the disclosures made under the No Patent Agreement which renders a market evaluation of the remuneration rates on the basis of these licences unsound.

> – Remuneration charged in the context of standard-setting is comparable

(261) Many of the protocol specifications mentioned in the preceding Section are provided in the context of standard-setting organisations ("SSOs"). It is indeed the case that the focus of SSOs, particularly in high-tech industries, is to promote specifications that will allow all players in the market to interoperate with each other's products.

(262) Microsoft argues that licences granted in the context of standard-setting bodies are not proper comparables "because they confer significant non-royalty benefits that Microsoft will not receive under the WSPP"[337]. First, according to Microsoft companies that licence intellectual property within the context of standard setting

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On that basis, it is not unreasonable to deduce that source code should be more expensive – and, arguably, considerably more expensive – than a corresponding specification."

[330] 24 August 2006 PWC Report, on page 132.
[331] 24 August 2006 PWC Report, on page 85.
[332] 24 August 2006 PWC Report, on page 94.
[333] PwC only considers the Sprague & Mutineer – Wave Systems licence comparable, see 24 August 2006 PWC Report, on page 102.
[334] The licence's preamble stipulates:"Licensee wishes to obtain a license to the source code for the TSpaces software for incorporation into its product offerings and distribution as object code therein."
[335] Exhibit II.8 of the 24 August 2006 PWC Report.
[336] Exhibit II.10 of the 24 August 2006 PWC Report.
[337] Microsoft's Response to the Statement of Objections, at paragraph 121.

bodies benefit from cross licences with other participants in the standardisation process. Second, they benefit from an enhanced competitive position for their products. Third, they benefit from services offered by the bodies established by the standardisation process, in particular certification services. Finally, Microsoft argues that royalty-free licensing can be a means to broaden the market of a company. By agreeing to licence for free a technology which is adjacent to its core product, the company generates more sales for its core activities without giving away intellectual property directly linked to its main products.[338]

(263) According to Microsoft' experts LECG, all those elements are not present in the context of WSPP licensing, which makes it impossible to consider royalty-free licences granted in the context of SSOs as meaningful comparables.[339]

(264) In response to Microsoft's arguments it must be pointed out that the Commission does not contend that the existence of comparable royalty-free licences within the context of SSOs necessarily implies that all of Microsoft's protocol technology, irrespective of its innovative character, should be made available royalty-free. In this respect, it must be noted that SSOs generally rely on holders of essential intellectual property rights agreeing to license such intellectual property and trade secrets at reasonable and non-discriminatory rates as opposed to royalty-free licensing.

(265) However, the Commission rejects Microsoft's general contention that licences granted within the context of SSOs, including the ones that are granted royalty-free, cannot be regarded as not being comparable to WSPP licences.

(266) In this respect, the arguments put forward by Microsoft and its experts LECG suffer from a fundamental flaw in that they start from the assumption that the comparability of licences should be examined in view of Microsoft's present competitive position and the way it handles its business today. That disregards the very purpose of the Decision which is to put an end to distortions of competition resulting from Microsoft's illegal refusal to disclose Interoperability Information.

(267) As already recalled in Recital (109), the Court of First Instance found that due to its refusal to disclose Interoperability Information Microsoft was able to impose the Windows domain architecture as the *de facto* standard for work group computing.[340]

(268) In the light of today's competitive situation as described by the Court of First Instance there is no incentive for Microsoft to submit protocol specifications regarding work group computing to an SSO in order to improve its competitive position. That is, however, not the appropriate yardstick to establish whether licences submitted to SSOs are comparable to the WSPP Agreements. The appropriate yardstick should be how Microsoft would or other industry players do act if their protocol technologies were or are not the *de facto* industry standard. Microsoft's experts PwC confirm this assessment.[341]

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[338]   LECG Report, at paragraphs 11 to 18.
[339]   LECG Report, at paragraph 18.
[340]   See Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraph 392.
[341]   At page 24 of its February 2006 report, PwC points out that the proper counterfactual is what Microsoft could charge if it was not dominant: "strategic value is […] the difference between the rate that a

(269) In that respect the Court of First Instance found that: "[…] it is normal practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products and Microsoft itself had followed that practice until it was sufficiently established on the work group server operating systems market. Such disclosure allows the operators concerned to make their own products more attractive and therefore more valuable."[342]

(270) As witnessed by the examples given in this sub-Section such interoperability related disclosures are very often made to SSOs. Incidentally, recent announcements by Microsoft such as the "Microsoft Open Specification Promise" bear witness that Microsoft follows the same logic of promoting interoperability in areas where it has not yet achieved a strong market position.[343]

(271) Finally it should be noted that Article 5 of the Decision does not prevent Microsoft from submitting its WSPP Protocols to an SSO, thereby possibly reaping alleged "non-royalty benefits" in the form of cross licences or services provided by the SSOs referred to by Microsoft.

Conclusion

(272) In conclusion, comparable protocol technology to the WSPP Protocols is provided royalty-free. The fact that some of these protocols are provided in the context of standard-setting bodies does not mean that these protocols should be disregarded as comparables, as Microsoft contends, especially given that the main aim of SSOs in this area is to promote interoperability, which is precisely the stated aim of the Decision.

– The fact that MCPP and WSPP licences have been concluded does not provide evidence for reasonable remuneration

(273) Microsoft asserts that "[…] the best indicator of what is reasonable in relation to royalty rates is the results of arm's length negotiations between a licensor and prospective licensees who have a genuine interest in making use of the technology at issue."[344]

(274) Microsoft argues that the fact that companies have entered into MCPP and WSPP licence agreements constitutes conclusive evidence that the agreed licence rates are appropriate.[345]

(275) The Commission does not deny that the outcome of arm's length negotiations between companies with similar negotiation power can give indications as to the reasonableness of the agreed royalties. However, an arm's length negotiation is

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dominant firm can charge and the rate a non-dominant firm can charge. The lack of this strategic value does not imply that the royalty rate is zero. An appropriate comparison is to a market that has sizeable firms, but which all fall well short of the Commission's threshold for 'market dominance'."

[342] See Judgment of the Court of First Instance of 17 September 2007, Microsoft v Commission, Case T-201/04, not yet reported, at paragraph 702.
[343] See also Recital 734 of the Decision which recalls that Microsoft promoted interoperability in the work group server market when its position was still marginal.
[344] Microsoft's Response to the Statement of Objections, at paragraph 95.
[345] Microsoft's Response to the Letter of Facts, at paragraph 31.

predicated on the fact that the negotiating parties are on equal footing. The negotiation power of Microsoft is far from equal to the one of prospective licences under the MCPP and the WSPP.

(276) The Court of First Instance confirmed the Commission's findings that the Interoperability Information is indispensable for competitor's to viably market work group server operating systems.[346] The Court of First Instance also confirmed that without access to the Interoperability Information competitors' products are confined to marginal positions or even made unprofitable.[347]

(277) In the negotiations that Microsoft envisaged with prospective licensees, these licensees were therefore faced with the choice of either accepting royalty rates proposed by Microsoft which according to the Commission's assessment do not reflect a fair compensation for the transferred protocol technology or to be marginalised in the work group server operating system market.

(278) The fact that MCPP and WSPP licences have been entered into prior to 22 October 2007 does therefore not necessarily indicate that Microsoft's pricing scheme was reasonable. A large number of other considerations might have played a role in the licensee's decision to enter into an agreement with Microsoft. For example, a licensee may still be better off taking a licence at unreasonable prices if the alternative is that it risks losing market share due to Microsoft's interoperability advantage. In addition, a company's customers may demand interoperability with Windows even though they might not be prepared to pay more for the thus enhanced product.

(279) Therefore, Microsoft's argument about the evidentiary value of the actual licences that Microsoft has entered into under the MCPP and WSPP for the reasonableness of its pricing prior to 22 October 2007 is unfounded.

3.2. Conclusion

(280) In conclusion, in the absence of convincing evidence as to the innovative character of almost all of Microsoft's non-patented protocol technologies disclosed with the Technical Documentation and in view of the market valuation of comparable technologies Microsoft's remuneration scheme for the No Patent Agreement prior to 22 October 2007 must be considered unreasonable under Article 5(a) of the Decision.

4. DEFINITIVE AMOUNT OF THE PERIODIC PENALTY PAYMENT

4.1. Relevant period of non-compliance

(281) Article 5(a) of the Decision, in conjunction with Article 1(1) thereof, require Microsoft to make Interoperability Information available to any undertaking having an interest in developing and distributing work group server operating system products *on reasonable and non-discriminatory terms.*

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[346] See Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraph 421.

[347] See Judgment of the Court of First Instance of 17 September 2007, <u>Microsoft v Commission</u>, Case T-201/04, not yet reported, at paragraph 593.

(282) For the purpose of this Decision, the Commission has assessed Microsoft's compliance with Article 5(a) of the Decision on the basis of an evaluation of the WSPP remuneration schemes prior to 22 October 2007, the day on which Microsoft established compliance with the Decision, as regards its obligations under Article 5(a) of the Decision to make Interoperability Information available to any undertaking having an interest in developing and distributing work group server operating system products *on reasonable and non-discriminatory terms.*

(283) For the reasons outlined in Section 3.1.3, Microsoft has failed to ensure that it complied with the obligation set out in Article 5(a) of the Decision to charge a reasonable remuneration for access to or use of the Interoperability Information prior to 22 October 2007.

(284) The first Article 24(2) Decision fixed a definitive amount of the periodic penalty payment with regard to Microsoft's non-compliance with its obligations to provide complete and accurate technical documentation embodying the Interoperability Information for the period between 16 December 2005 and 20 June 2006.

(285) While the first Article 24(2) Decision did not address Microsoft's non-compliance for its obligation to make the Interoperability Information available *on reasonable and non-discriminatory terms* and while the Commission retained the possibility of fixing a definitive amount for this aspect of non-compliance starting from 16 December 2005 in that decision,[348] the Commission considers it appropriate to fix a definitive amount for this aspect of non-compliance only for the period beginning on 21 June 2006. This Decision therefore only concerns the period from 21 June 2006 to 21 October 2007 ("the relevant period").

4.2. Definitive amount of the periodic penalty payment for the relevant period

(286) The 24(1) Decision of 11 November 2005 provides for a maximum amount of the periodic penalty payment of EUR 2 million per day with respect to both aspects of non-compliance identified therein.

(287) The decision of 12 July 2006 amends Article 1 of the 24(1) Decision insofar as it increases the periodic penalty payment imposed on Microsoft for non-compliance with its obligations under Article 5(a) and (c) of the Decision to EUR 3 million per day as from 1 August 2006. According to recital 248 of this decision this amount applies to both aspects of non-compliance preliminary identified in the Article 24(1) Decision.

(288) According to Article 24(2) of Regulation (EC) No 1/2003, where the undertaking concerned has satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision.

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[348] See Recital 244 of the first Article 24(2) Decision.

(289) Microsoft's turnover for the fiscal year July 2006 to June 2007, which is Microsoft's latest full business year, was USD 51,120 million.[349] Microsoft's average daily turnover was therefore USD 140.05 million (EUR 107.3 million)[350]. According to Article 24(1) of Regulation (EC) No 1/2003, the maximum periodic penalty payment that may be imposed by the Commission pursuant to that article cannot exceed 5% of that amount, that is to say USD 7.00 million (EUR 5.37 million).

(290) When calculating the definitive amount of the periodic penalty payment the following considerations must be taken into account:

(291) Since the adoption of the first Article 24(2) Decision Microsoft has persistently failed to comply with its obligations regarding reasonable and non-discriminatory remuneration for a period of more than fifteen months despite the Commission's repeated calls for full compliance.

(292) Even after the Statement of Objections was issued on 1 March 2007, which set out the Commission's concerns in detail, Microsoft did not comply but adopted its 21 May 2007 remuneration scheme which yet again contained unreasonable terms.

(293) In this regard, respect must be had to the fact that the continuous failure by Microsoft to comply with the Decision and to bring its breach of Article 82 of the Treaty and of Article 54 of the EEA Agreement to an end prior to 22 October 2007[351] [352] was liable to further increase the risk of elimination of effective competition in the work group server operating system market identified in the Decision[353] which was confirmed by the Court of First Instance on this point.[354] Therefore, it is necessary to set penalty payments for the relevant period at a level which takes into account that Microsoft was

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[349] Microsoft's data for the US fiscal year ending June 30, 2007 from http://www.microsoft.com/msft/reports/ar07/staticversion/10k_fr_not_17.html, printed on 25 October 2007.

[350] The exchange rate used for the year July 1, 2006-June 30, 2007 is EUR 1 = USD 1.3050. This is the average of the average daily exchange rates for this period. Source: Calculations based on data available on http://sdw.ecb.europa.eu/quickview.do?SERIES_KEY=120.EXR.D.USD.EUR.SP00.A.

[351] See recitals 1068 to 1074 of the Decision.

[352] See in this regard also the Judgment in Joined Cases 46/87 and 227/88, Hoechst [1989] ECR 2859, at paragraph 64, where the Court refers to the "obligation imposed upon all persons subject to Community law to acknowledge that measures adopted by the institutions are fully effective so long as they have not been declared invalid by the Court and to recognize their enforceability unless the Court has decided to suspend the operation of the said measures […]."

[353] See recitals 590 to 692 of the Decision. The Evidence on the Commission's file shows that, prior to 22 October 2007, no competitor of Microsoft in the workgroup server operating systems market has entered into a WSPP licence agreement in order to develop and bring to market a competing work group server operating system. The companies who have entered into WSPP licence agreements have only done so to develop products which do not directly compete with Microsoft's work group server operating system products. See response to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 by Quest, on page 3; Response to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 by ONStor, on page 1; Response to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 by Juniper Networks, on pages 1-2 and 24; Response to a request for information pursuant to Article 18 of Regulation (EC) No 1/2003 by Xandros, on pages 1-2.

[354] See Judgment of the Court of First Instance of 17 September 2007, Microsoft v Commission, Case T-201/04, not yet reported, at paragraph 620.

able to reap the benefits[355] of non-compliance for a total of two years and 10 months.[356]

(294) Similarly, the Commission must take into account the necessity of setting periodic penalty payments which are proportionate and sufficient to deter an undertaking such as Microsoft, with its very substantial size and financial resources,[357] and other undertakings from not complying with a decision pursuant to Article 7 of Regulation (EC) No 1/2003.

(295) The procedure pursuant to Article 24 of Regulation (EC) No 1/2003 aims at compelling undertakings to comply with their obligations. As long as compliance is not achieved, mere fruitless efforts to comply need not be taken into account. This decision establishes that Microsoft did not comply with its obligation to make Interoperability Information available to interested undertakings on reasonable and non-discriminatory terms pursuant to Article 5(a) of the Decision from 21 June 2006 to 21 October 2007. Microsoft's announcement to make the 21 May 2007 scheme available retroactively cannot be taken into account. Unreasonable remuneration levels charged or announced by Microsoft in the past are likely to have dissuaded interested undertakings from taking licences and this dissuasive effect cannot be remedied by a retroactive lowering of those levels. Microsoft could therefore not make up for previous non-compliance by retroactively applying a new remuneration scheme.

(296) The Commission does, however, take into account that substantially lower rates applied as from 21 May 2007.

(297) Regard must also be had to the fact that, as outlined in Section 4.1., the scope of this decision is limited to assessing the reasonableness of Microsoft's remuneration schemes for non-patented Interoperability Information. This decision does not assess whether the remuneration rates requested by Microsoft for patent licences prior to 22 October 2007 were reasonable and does therefore not establish non-compliance in this respect.

(298) The Commission considers at this stage that the 22 October 2007 remuneration scheme applied by Microsoft does not give rise to objections as to the reasonableness and non-discriminatory nature of the remuneration rates charged for access to or use of the non-patented Interoperability Information.

(299) In view of the foregoing considerations it is appropriate to fix the definitive amount of the periodic penalty payment imposed on Microsoft, pursuant to Article 24(2) of

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[355]   Microsoft generated a turnover of USD 4,579 million in the work group server operating system market in 2005 of which it held a market share of 74%. The total market size in 2005 was USD 6,100 million. Microsoft further increased its share of that market in 2006 and 2007.

[356]   It should be recalled that Microsoft's application for interim measures was rejected on the 22 December 2004 by Order of the President of the Court of First Instance of 22 December 2004 in Case T-201/04 R [2004] ECR II-4463.

[357]   At the time of the Decision, Microsoft was the largest company in the world by market capitalisation. According to the same measure Microsoft has held a consistently high ranking in the list of the world's largest companies by market capitalisation. Microsoft's resources are significant. According to Microsoft' publication (http://www.microsoft.com/msft/reports/ar07/staticversion/10k_fr_not_17.html, printed on 25 October 2007) net income for the fiscal year 2007 was $18,524 million (up from $16,472 in 2006).

Regulation (EC) No 1/2003, for failing to comply with the obligations regarding the reasonable and non-discriminatory remuneration for making the technical documentation embodying the Interoperability Information available laid down in Article 5(a) of the Decision at EUR 899 million for the period from 21 June 2006 to 21 October 2007.

5. CONCLUSION

(300) In light of the considerations set out above, it is appropriate to fix the definitive amount of the periodic penalty payment imposed on Microsoft, pursuant to Article 24(2) of Regulation (EC) No 1/2003, for failing to comply with the obligations regarding the reasonable and non-discriminatory remuneration for making the technical documentation embodying the Interoperability Information available laid down in Article 5(a) of the Decision at EUR 899 million for the period from 21 June 2006 to 21 October 2007.

HAS ADOPTED THIS DECISION:

Article 1

For the period between 21 June 2006 and 21 October 2007, the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Commission Decision C(2005)4420 final of 10 November 2005 for failure to comply with its obligation to make Interoperability Information available to interested undertakings on reasonable and non-discriminatory terms pursuant to Article 5(a) of Commission Decision 2007/53/EC of 24 March 2004 is fixed at EUR 899 million.

Article 2

The definitive amount of the periodic penalty payment specified in Article 1 shall be paid, within 3 months of the date of notification of this Decision, into the following bank account held in the name of the European Commission:

Citibank, N.A., Citigroup Centre

Canada Square, Canary Wharf, UK-London E14 5LB

(Code IBAN:GB43CITI18500811850415)

(Code SWIFT: CITIGB2L)

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

Article 3

This Decision is enforceable pursuant to Article 256 of the EC Treaty.

Article 4

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

Done at Brussels, **2 7 FEV. 2008**

For the Commission
Neelie KROES
Member of the Commission