

The Commission's decision in the Microsoft Internet Explorer case and recent developments in the area of interoperability

Carl-Christian Buhr, Friedrich Wenzel Bulst, Jeanne Foucault, Thomas Kramler (C-3) ⁽¹⁾

1. Commitment decision on the tying of Internet Explorer to Windows

1.1 Introduction

On 16 December 2009, the Commission adopted a commitment decision ('the Decision') pursuant to Article 9 of Regulation 1/2003 against Microsoft Corporation ('Microsoft') ⁽²⁾. With this decision the Commission made binding on Microsoft commitments that it had offered to address the Commission's preliminary concerns regarding potential abuse of its dominant position in the market for client PC operating systems as set out in a statement of objections issued on 14 January 2009. The concerns related to the tying of Microsoft's web browser, Internet Explorer, to its client PC operating system Windows. In order to meet these concerns, Microsoft committed to allow computer manufacturers and users to turn Internet Explorer off and to offer Windows users unbiased choice among different web browsers by means of a browser choice screen.

1.2 The competition concerns raised by the Commission under Article 102 of the TFEU

The case originated from a complaint lodged in December 2007 by Opera Software ASA, a Norwegian web browser manufacturer, which alleged that the tying by Microsoft of its web browser Internet Explorer to its dominant client PC operating system Windows foreclosed the market for web browsers.

1.2.1 Background

The reasoning in the statement of objections followed to a large extent the Commission's 2004 decision against Microsoft ⁽³⁾ as upheld by the General Court (then the Court of First Instance) in 2007 ⁽⁴⁾.

On 24 March 2004, the Commission had adopted a decision pursuant to Article 82 EC (now Article 102 TFEU) concluding inter alia that Microsoft had abused its dominant position on the market for client PC operating systems by tying its media player to its dominant PC operating system Windows ⁽⁵⁾.

1.2.2 Competition concerns raised

In the statement of objections the Commission preliminarily considered that the four criteria establishing a tying abuse contrary to Article 102 of the TFEU were fulfilled by the tying of Internet Explorer to Windows, namely

- (a) the tying and tied goods are two separate products;
- (b) the undertaking concerned is dominant in the tying product market;
- (c) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product;
- (d) the tying is liable to foreclose competition ⁽⁶⁾.

(a) Client PC operating systems are software products that control the basic functions of a computer and enable the user to make use of such a computer and run application software (such as a word processor) on it. Microsoft did not contest that it holds a dominant position on that market. Microsoft holds a worldwide market share of around 90 % in the market for client PC operating systems. Moreover, Microsoft has consistently held that very high market share for the past ten years ⁽⁷⁾.

(b) Web browsers are software applications that allow users to access and interact with web content. The Commission considered that, both for demand-side and supply-side reasons, web browsers and client PC operating systems are separate products.

(c) Before Windows 7 was released, the tying of Internet Explorer to Windows was both technical

⁽¹⁾ The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors

⁽²⁾ The Decision, including Microsoft's commitments, is available at http://ec.europa.eu/competition/antitrust/cases/decisions/39530/final_decision_en.pdf.

⁽³⁾ Commission Decision 2007/53/EC of 24 March 2004, OJ L 32, 6.2.2007.

⁽⁴⁾ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601. See Kramler/Buhr/Wyns, CPN 3/2007, 39.

⁽⁵⁾ See Banasevic/Huby/Pena Castellot/Sitar/Piffaut, CPN 2/2004, 44 for details.

⁽⁶⁾ Case T-201/04 *Microsoft v Commission*, at paragraphs 842, 869 and 1058. See also Communication from the Commission 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', OJ C 45, 24.2.2009, at paragraph 50.

⁽⁷⁾ See Commission Decision 2007/53/EC of 24 March 2004, OJ L 32, 6.2.2007, p. 23, at paragraph 432.

and contractual. PC manufacturers (also called original equipment manufacturers or ‘OEMs’) and end users could not technically de-install Internet Explorer from Windows. Moreover, licence agreements prevented OEMs from selling Windows without Internet Explorer pre-installed.

(d) The Commission preliminarily considered that the tying of Internet Explorer to Windows was liable to foreclose the market for web browsers and that the tying gave Internet Explorer an artificial distribution advantage that other web browsers were unable to match. By tying Internet Explorer to Windows, Microsoft ensured that Internet Explorer was as ubiquitous on PCs world-wide as was Windows. The statement of objections identified two major channels for distributing web browsers. Those two channels are distribution through OEMs and downloading via the internet.

Under Microsoft’s licensing model, OEMs must license Windows with Internet Explorer pre-installed. OEMs may also install an alternative web browser but only in addition to Internet Explorer. The evidence on the Commission’s file showed that OEMs which pre-install Windows hardly ever distribute competing web browsers. Until very recently, none of the top ten OEMs in the US and in the EEA shipped a client PC with Windows with a non-Microsoft web browser pre-installed, in spite of attempts by web browser vendors to obtain such distribution agreements. Such agreements could in any event not offset Internet Explorer’s ubiquity, since third-party web browsers could only be installed *in addition to* Internet Explorer. The reluctance of OEMs to ship two web browsers may also be explained by the additional resources which would be needed to support and test the second web browser. For many OEMs, customer support is a major business cost.

With respect to downloading via the internet, the analysis in the statement of objections indicated that that alternative channel — despite its importance for the distribution of web browsers — does not offset the artificial distribution advantage of Internet Explorer resulting from the tying to Windows. For that distribution mode to be successful, vendors of competing browsers must first overcome users’ inertia and persuade them not to limit themselves to the pre-installed Internet Explorer. Downloading a new web browser thus requires an active decision from the user who must be aware of the existence of that alternative product and then search for, choose and install such a competing web browser.

A consumer survey⁽⁸⁾ conducted on behalf of the Commission showed that more than half of Windows users and about two thirds of Windows users having Internet Explorer as their main web browser do not download web browsers from the internet or are reluctant to do so. All Windows users who had never or had only once downloaded a web browser were also asked during the survey why they did not download web browsers or, for those who had downloaded only once, why they did not do so more often. 55 % of those users said there was no need to download web browsers, 31 % did not know how to install or download software, 15 % replied that they considered downloading or installing software as difficult or complicated, 8 % feared security risks and 7 % were not aware that they could download a web browser. The survey confirmed that there is a significant information deficit on the part of consumers. 84 % of Windows users who use Internet Explorer as their primary web browser never use another web browser on their computer because they are unaware of the other options, or because they do not want to or do not know how to download. A business survey conducted on behalf of the Commission shows that the information deficit is not only limited to consumers.

The Commission preliminarily concluded that as a result of the tying, Internet Explorer’s market share remains much higher than that of its competitors although it could not be considered as a superior product compared to its main competitors. In fact, the Commission came to the preliminary conclusion that the tying allowed Microsoft to maintain its market share despite the fact that it did not improve Internet Explorer 6.0 for many years (while Internet Explorer 6.0 was released in 2001, Internet Explorer 7.0 was only released in 2006, and Internet Explorer 8.0 in 2009) and that neither Internet Explorer 7 nor previous versions seem to have been superior to their main competitors, in particular the Firefox web browser.

Internet Explorer’s ubiquity achieved through Windows was also preliminarily found to create network effects in favour of Internet Explorer. Under time and resource constraints, web designers and software developers tend to develop their product for the web browser that gives them the largest potential audience, namely that of Windows users.

In the statement of objections, the Commission also preliminarily concluded that the tying of Internet

⁽⁸⁾ The Commission carried out empirical surveys of the actual web browser usage characteristics of both consumers and enterprises with the help of a professional market research company. The surveys were conducted in parallel in eight Member States, namely Germany, France, the United Kingdom, Italy, Spain, Poland, Romania and Sweden. The sample size was fixed at 1 000 per Member State for consumers and 500 per Member State for enterprises.

Explorer to Windows could reinforce Microsoft's position on the market for client PC operating systems. More and more applications which used to be available only on desktop computers are now available also on the web (such as email, spreadsheets or word processing applications). Many web applications can be accessed through any web browser regardless of the operating system installed on the client PC. Such applications therefore have the potential to decrease computer users' dependency on specific operating systems. In the statement of objections, the Commission concluded that by tying its web browser to its operating systems, Microsoft attempted to counter this threat in view of the fact that Internet Explorer had its own way of interpreting web standards and used technologies such as ActiveX which are only available on Windows. As a result, no application written specifically for Internet Explorer could run on a web browser installed on a non-Microsoft operating system since Internet Explorer is only available for Windows.

1.2.3 The commitments offered by Microsoft

In the autumn of 2009, Microsoft offered commitments in order to address these competition concerns. Under the final version of the commitments made binding by the Decision, Microsoft undertook to make available within the EEA a mechanism in Windows 7 and its successors that enables OEMs and users to turn Internet Explorer off and on. If Internet Explorer is turned off, the browser frame window and menus would not be accessible in any way. OEMs will be free to pre-install any web browser(s) of their choice on PCs they ship and set it as the default web browser. Microsoft undertook not to circumvent the proposed commitments by any means and not to retaliate against OEMs for installing (only) competing web browsers.

Microsoft also committed to distribute, through Windows Update, a choice screen to all users of Windows XP, Windows Vista and Windows 7 in the EEA who have Internet Explorer set as their default web browser (that is to say the web browser which opens when the user e.g. clicks on a link received by email) and are subscribed to Windows Update. This choice screen update must allow an unbiased choice between web browsers. It will consist of an introductory screen explaining in particular what web browsers are. After that, the actual choice screen will appear and display the icons of the twelve most widely-used web browsers based on usage share in the EEA⁽⁹⁾. The five most popular web browsers will be prominently displayed and presented in a random order. Through scrolling sideways users

will find the remaining seven additional web browsers, also presented in a random order. The random order avoids any bias associated with any particular position on the screen. The approach of displaying five web browsers in a prominent manner, and seven more when the user scrolls sideways, was selected in order to strike an appropriate balance between the need to have a workable choice screen that users are likely to make use of and making the choice screen as accessible as possible to web browser vendors while reflecting the market situation. If the choice screen presented too many web browsers, users could be overwhelmed and as a consequence would be more likely not to exercise a choice at all, but rather to dismiss the entire choice screen. The leading five web browsers are by far more widely accepted than the others by the market⁽¹⁰⁾. At the same time, displaying seven additional web browsers gives web browsers with smaller usage share an opportunity to be included on the choice screen, and therefore to raise awareness about their products and gain new users.

On the choice screen users can choose to obtain more information about each web browser and/or to trigger a direct download of web browsers. The choice screen should thus create the conditions for users to make an informed choice between the web browsers presented. Users not wishing to make a choice may simply close the choice screen or postpone their choice. In order to reflect market developments, the list of the web browsers to be included on the choice screen will be updated every six months subject to a procedure set out in detail in the commitments text. The commitment text also specifies the design and implementation details of the choice screen. Entities running larger internal networks will have the possibility to determine whether the choice screen is displayed on each individual PC.

The term of the commitments is five years. Microsoft committed to regularly report to the Commission on the implementation of the commitments. It also committed to make adjustments to the choice screen within the scope of these commitments at the Commission's request and where proportionate and necessary in order to ensure the effective implementation of the commitments. Furthermore, in addition and without prejudice to the general provision of Article 9(2) of Regulation 1/2003, Microsoft or the Commission may request a review

⁽⁹⁾ The choice screen will also be accessible at www.browser-choice.eu.

⁽¹⁰⁾ According to NetApplications, in October 2009, the fifth web browser by usage share in Europe, namely Google Chrome, had a usage share of 3.8 %, while the sum of the usage shares of all other less widely used web browsers came to 0.45 % (when excluding Netscape, which is no longer supported and would therefore not be included on the choice screen).

of these commitments two years or later after the adoption of the Decision where either (i) the market circumstances have fundamentally changed or (ii) the choice screen has manifestly failed to provide consumers with an effective choice among browsers in a reasonable way. Microsoft will not unreasonably withhold its cooperation with such a review. This review mechanism is an important safeguard should the remedy need to be adjusted.

1.2.4 The commitments meet the competition concerns

The Commission took the view that these commitments meet its concerns with respect to the tying of Internet Explorer to Windows. The distribution of the choice screen through Windows Update requires minimum user activity for the choice screen to reach more than 100 million European users of Windows and does not necessitate the involvement of third parties in distributing competing web browsers, which could in and of itself jeopardise the effectiveness of the measure. Furthermore, OEMs will in future be able to freely choose between competing offerings as regards the web browsers to be installed on the PCs which they ship. The commitments are therefore suitable for providing rival web browsers with an effective opportunity to compete on the merits with Internet Explorer and for enhancing competition on the web browser market by removing Microsoft's artificial distribution advantage stemming from the tying of Internet Explorer to Windows and by informing users about available web browser choices.

Enhanced competition in the web browser market resulting from the implementation of the commitments would also substantially weaken the network effects currently favouring Internet Explorer. More competition should also lead to more widespread use of web browsers which run on multiple operating system platforms. This would in turn contribute to weakening the network effects in favour of Windows, the only operating system on which Internet Explorer runs.

2. Interoperability

Following discussions with the Commission, Microsoft published on 16 December 2009 an interoperability undertaking⁽¹¹⁾, in which it committed to disclose a large amount of interoperability information free of charge on its website. This information should improve interoperability between third party products and several Microsoft products, including Windows, Windows Server, Office, Exchange, and SharePoint. Pursuant to the undertaking Microsoft must ensure that the information is complete and accurate and must provide a warranty to that effect. Access to and use of the information will be subject to no more than a nominal upfront fee and licensing terms which are compatible with open source licences. The warranty agreements which Microsoft offers as part of the undertaking provide for private enforcement including a fast-track dispute resolution mechanism and a right to liquidated damages in case the warranties are breached. Microsoft's informal interoperability undertaking thus relies on some elements familiar from the post-judgment implementation of the disclosure remedy imposed by the Commission's 2004 Microsoft decision. As pointed out by Commissioner Kroes⁽¹²⁾ this is a very welcome initiative by Microsoft as enhanced interoperability is crucial for competition in the software industry. The Commission will now carefully monitor the impact of Microsoft's undertaking on the market and take its findings into account in its assessment of the pending antitrust investigation regarding interoperability⁽¹³⁾.

3. Conclusion

The commitments proposed by Microsoft, and made binding by the Decision, address the competition concerns preliminarily identified by the Commission effectively and in a timely manner. The swift solution achieved in this case is capable of having an immediate impact on competition in a very important technology market to the benefit of consumer choice and innovation.

⁽¹¹⁾ Available at <http://www.microsoft.com/Presspass/press/2009/dec09/12-16Statement.mspx>.

⁽¹²⁾ See Neelie Kroes, European Commissioner for Competition Policy, 'Your Internet, Your Choice': Microsoft web browsers decision, Opening remarks at press conference, Brussels, 16 December 2009, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/582>

⁽¹³⁾ In December 2007 proceedings were opened in relation to a complaint by the European Committee for Interoperable Systems (ECIS); see <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/19>