COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
Case n. T-201/04
MICROSOFT Corp. Vs European Commission
ORDER July, 26 2004

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

26 July 2004 (1)

(Proceedings for interim relief – Intervention)

In Case T-201/04 R,

Microsoft Corp., having its registered offices in Redmond, Washington (United States), represented by J.-F. Bellis, lawyer, and I.S. Forrester QC, applicant,

v

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

APPLICATION for suspension of the application of Articles 4, 5(a), 5(b), 5(c) and 6(a) of Commission Decision C(2004)900 final of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C?3/37.792 – Microsoft),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES, makes the following Order

The contested decision

1 Microsoft Corp. (‘Microsoft’) develops and markets a variety of software products, including operating systems for personal computers and servers.

2 On 24 March 2004 the Commission adopted a decision relating to a proceeding under Article 82 EC in Case COMP/C-3/37.792 – Microsoft (‘the Decision’). According to the Decision, Microsoft had infringed Article 82 EC and Article 54 of the Agreement on the European Economic Area (‘EEA’) by committing two abuses of a dominant position.

3 The first abuse established in the Decision consists in Microsoft’s refusal to supply to its competitors, over the period from October 1998 to the date on which the Decision was adopted, ‘interoperability information’, as defined in Article 1 of the Decision, and to allow the use of such information for the development and

distribution of products in competition with Microsoft's own products on the market for work group server operating systems (Article 2(a) of the Decision).

4 The second established abuse, according to the Decision, lay in the fact that Microsoft had, for the period from May 1999 to the date on which the Decision was adopted, made availability of the Windows client personal computer operating system conditional on the simultaneous acquisition of the Windows Media Player software (Article 2(b) of the Decision).

5 Those two abuses were penalised by the Commission through the imposition of a fine amounting to EUR 497 196 304 (Article 3 of the Decision).

6 Under Article 4 of the Decision, Microsoft is required to bring to an end the infringements referred to in Article 2 in accordance with Articles 5 and 6 of the Decision. Microsoft is also required to refrain from repeating any act or conduct described in Article 2 and to refrain from any act or conduct having the same or equivalent object or effect.

7 By way of remedy for the first infringement, Article 5 of the Decision orders Microsoft to act as follows:

'(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'.

8 The date on which the 120-day period referred to in Article 5 of the Decision expires is 27 July 2004.

9 By way of remedy for the second infringement, Article 6 of the Decision orders as follows:

'(a) Microsoft Corporation shall, within 90 days of the date of notification of this Decision, offer a full-functioning version of the Windows Client PC Operating System which does not incorporate Windows Media Player; Microsoft Corporation retains

the right to offer a bundle of the Windows Client PC Operating System and Windows Media Player; …'.

10 The date on which the 90-day period referred to in Article 6 of the Decision expires is 28 June 2004.

Procedure and arguments of the parties

11 By application lodged with the Registry of the Court of First Instance on 7 June 2004, Microsoft brought an action under the fourth paragraph of Article 230 EC in which it seeks the annulment of the Decision or, in the alternative, the annulment of or substantial reduction in the fine imposed.

12 By separate document lodged with the Registry of the Court of First Instance on 25 June 2004, Microsoft also applied under Article 242 EC for suspension of the operation of Articles 4, 5(a), 5(b), 5(c) and 6(a) of the Decision. By that document Microsoft also seeks, on the basis of Article 105(2) of the Court's Rules of Procedure, suspension of the operation of those provisions until such time as there has been a decision on the application for interim relief.

13 Also on 25 June 2004, the President of the Court of First Instance, acting in his capacity as the judge responsible for dealing with the application for interim relief, requested the Commission to specify whether it intended to proceed with enforcement of the Decision before a ruling has been made on the application for interim relief.

14 By letter received at the Court Registry on 25 June 2004, the Commission informed the President of its decision not to proceed with enforcement of Articles 5(a), 5(b), 5(c) and 6(a) of the Decision pending the outcome of the proceedings for interim relief.

15 By application lodged with the Court Registry on 25 June 2004, Novell Inc. ('Novell'), established in Waltham, Massachussets (United States), represented by C. Thomas, M. Levitt, V. Harris, Solicitors, and A. Müller-Rappard, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission.

16 By application lodged with the Court Registry on 30 June 2004, RealNetworks Inc. ('RealNetworks'), established in Seattle, Washington (United States), represented by A. Winckler, M. Dolmans and T. Graf, lawyers, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission.

17 By application lodged with the Court Registry on 30 June 2004, Computer & Communications Industry Association ('CCIA'), established in Washington, DC (United States), represented by J. Flynn QC and D. Paemen and N. Dodoo, lawyers, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission.

18 By application lodged with the Court Registry on 1 July 2004, Software & Information Industry Association ('SIIA'), established in Washington, DC (United States), represented by C.A. Simpson, Solicitor, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission.

19 By application lodged with the Court Registry on 1 July 2004, The Computing Technology Industry Association Inc. ('CompTIA'), established in Oakbrook Terrace, Illinois (United States), represented by G. Van Gerven and T. Franchoo, lawyers, and B. Kilpatrick, Solicitor, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

20 By application lodged with the Court Registry on 2 July 2004, The Association for Competitive Technology ('ACT'), established in Washington, DC (United States), represented by L. Ruessmann, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

21 By application lodged with the Court Registry on 5 July 2004, Digimpro Ltd, established in London (United Kingdom), TeamSystem SpA, established in Pesaro (Italy), Mamut ASA, established in Oslo (Norway), and CODA Group Holdings Ltd, established in Chippenham, Wiltshire (United Kingdom) (hereinafter referred to collectively as 'Digimpro and Others'), represented by G. Berrisch, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

22 By application lodged with the Court Registry on 5 July 2004, DMDsecure.com BV, established in Amsterdam (Netherlands), MPS Broadband AB, established in Stockholm (Sweden), Pace Micro Technology plc, established in Shipley, West Yorkshire (United Kingdom), Quantel Ltd, established in Newbury, Berkshire (United Kingdom), and Tandberg Television Ltd, established in Southampton, Hampshire (United Kingdom) (hereinafter referred to collectively as 'DMDsecure.com and Others'), represented by J. Bourgeois, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

23 By application lodged with the Court Registry on 8 July 2004, IDE Nätverkskonsulterna AB, established in Stockholm, Exor AB, established in Uppsala (Sweden), T. Rogerson, residing in Harpenden, Hertfordshire (United Kingdom), P. Setka, residing in Sobeslav (Czech Republic), D. Tomicic, residing in Nuremberg (Germany), M. Valasek, residing in Karlovy Vary (Czech Republic), R. Rialdi, residing in Genoa (Italy), and B. Nati, residing in Paris (France) (hereinafter referred to collectively as 'IDE Nätverkskonsulterna and Others'), represented by S. Martínez Lage and H. Brokelmann, lawyers, requested leave to intervene in the interim relief proceedings in support of the form of order sought by Microsoft.

24 In accordance with Article 116(1) of the Rules of Procedure, those applications for leave to intervene were served on the applicant and defendant.

25 By letter of 6 July 2004, received on the same date at the Court Registry, Microsoft informed the Court that it had no objections to the application by RealNetworks for leave to intervene. By letter of 7 July 2004, received on the same date at the Court Registry, Microsoft submitted observations on the application by Novell for leave to intervene. Microsoft did not lodge observations within the prescribed period on the other applications for leave to intervene.

26 In regard to all of the parties which might be granted leave to intervene, Microsoft, by letters of 6 July and 8 July 2004, requested confidential treatment of the data contained in the Decision which the Commission had accepted would not be made public in the version available on its internet site.

27 By letters of 6 July 2004, received at the Court Registry on 7 July 2004, the Commission informed the Court that it had no objections in regard to the applications for leave to intervene lodged respectively by Novell, RealNetworks, CCIA and SIIA, and stated that it was not seeking any confidential treatment. By contrast, the Commission took the view that the application by CompTIA for leave to intervene ought to be rejected.

28 By letter of 13 July 2004, received at the Court Registry on the same date, the Commission informed the Court that it had no objections to the application by ACT for leave to intervene and that it was not seeking any confidential treatment.

29 By letter of 13 July 2004, and subsequently by letters of 14 July 2004, on the other hand, the Commission submitted observations on the applications for leave to intervene that had been submitted respectively by Digimpro and Others, DMDsecure.com and Others, and by IDE Nätverkskonsulterna and Others.

30 The Commission submitted its written observations on the application for interim relief on 21 July 2004. Those observations were notified to Microsoft on the same date.

The applications for leave to intervene

31 Under the second paragraph of Article 40 of the Statute of the Court of Justice, which is applicable to the Court of First Instance by virtue of the first paragraph of Article 53 of that Statute, the right of an individual to intervene is subject to the condition that that individual is in a position to establish an interest in the result of the case in question.

32 An interest in the result of a case must be understood as being a direct and present interest in the granting of the form of order sought by the party whom the prospective intervener wishes to support (order of the President of the Court of Justice in Case C-186/02 P Ramondín and Ramondín Cápsulas v Commission [2003] ECR I-2415, paragraph 7). To that end, it is necessary, in order to grant leave to intervene, to determine that the prospective intervener is directly affected by the contested measure and that his interest in the result of the case is established (order of the President of

the Court of Justice in Joined Cases C-151/97 P(I) and C-157/97 P(I) National Power and PowerGen [1997] ECR I-3491, paragraph 53).

33 When the application for leave to intervene is made in proceedings for interim measures, the interest in the result of the case must be understood as being an interest in the result of the interim proceedings (see, to that effect, the order of the President in Case T-65/98 R Van den Bergh Foods v Commission [1998] ECR II-2641, paragraphs 26 and 27). In the same way as the result of the main proceedings, the result of the interim relief proceedings may adversely affect the interests of third parties or be favourable to them. It follows that, in interim relief proceedings, the interests of the parties seeking leave to intervene must be appraised in the light of the consequences which granting the interim relief sought or rejecting that request may have on those parties' economic or legal position.

34 It is necessary to point out that the direct and present nature of the interest in the result of interim relief proceedings must be appraised having regard to the specific nature of such proceedings. In interim relief proceedings, the interest invoked by the intervener is, if appropriate, taken into account in the balancing of interests (see, in that regard, the order of the President of the Court of Justice in Case C-329/99 P(R) Pfizer Animal Health v Council [1999] ECR I-8343). It is even possible that the balancing of the interests involved will prove to be decisive once the judge with responsibility for granting interim relief has formed the view, in his analysis of the request before him, that the conditions relating to a prima facie case and urgency are satisfied. The notion of an interest in the result of a case should therefore be given a broad interpretation by the judge responsible for granting interim relief in order to ensure that the appraisal of the various interests in issue is not prejudiced.

35 In any event, the appraisal by the judge responsible for granting interim relief of the interest in the result of the case before him cannot affect the appraisal by the Court when dealing with an application for leave to intervene in the main proceedings.

36 The applications for leave to intervene brought by associations of undertakings and those brought on an individual basis, including those brought by companies, shall now be examined in turn.

The applications brought by associations of undertakings

37 According to settled case-law, intervention is permissible by representative associations whose object is to protect their members in cases raising questions of principle that are liable to affect those members (orders in National Power and PowerGen, cited above in paragraph 32, paragraph 66, and in Case C-151/98 P Pharos v Commission [1998] ECR I-5441, paragraph 6; orders in Case T-13/99 R Pfizer Animal Health v Council [1999] ECR II-1961, paragraph 15, and in Case T-53/01 R Poste Italiane v Commission [2001] ECR II-1479, paragraph 51). More particularly, an association may be granted leave to intervene in a case if it represents an appreciable number of undertakings active in the sector concerned, if its objects include that of protecting its members' interests, if the case may raise questions of

principle affecting the functioning of the sector concerned, and if the interests of its members may therefore be affected to an appreciable extent by the forthcoming judgment or order (see, to that effect, the order in Case T-87/92 Kruidvat v Commission [1993] ECR II-1375, paragraph 14).

38 Moreover, the adoption of a broad interpretation of the right of associations to intervene is intended to facilitate assessment of the context of such cases while avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure (order in National Power and PowerGen, cited above in paragraph 32, paragraph 66).

39 It is in the light of the conditions and considerations thus set out that the question whether CCIA, SIIA, CompTIA and ACT should be granted leave to intervene falls to be examined.

The application submitted by CCIA

40 CCIA is an association which groups together undertakings operating within the information technology and telecommunications sectors. CCIA is seeking leave to intervene in support of the form of order sought by the Commission. It states in this regard that it has legal personality, that its objects and activities include representation of its members and defence of their interests, that it represents an appreciable number of undertakings active in the relevant sectors and that the present case raises questions of principle that are liable to affect its members.

41 CCIA states that its members are affected in numerous ways by the main action and by the present interim relief proceedings. It points out, in particular, that a number of its members manufacture operating systems for work group servers and that certain others produce software that is in competition with the Windows Media Player. More generally, some members of CCIA are active on markets on which Microsoft applies strategies of tied sales and refusal to sell that are similar to those in issue in the Decision. Finally, virtually all of the members of CCIA are significant users of work group server operating systems and are for that reason detrimentally affected by Microsoft's conduct. CCIA also submits that its members will be affected not only by the result of the main action but also by the timeframe in which the case will be settled, inasmuch as the abuses identified in the Decision have already had serious effects on the market.

42 CCIA adds, in conclusion, that it played an active role during the administrative procedure which resulted in the adoption of the Decision.

43 The Commission has stated that it does not have any objections to the application submitted by CCIA. Microsoft, for its part, did not lodge any observations.

44 The President of the Court finds that the application by CCIA for leave to intervene must be granted.

45 First, CCIA has stated, without being contradicted on this point by the applicant or the defendant institution, that it represents the interests of undertakings operating within the information technology sector, including major undertakings that are in direct competition with Microsoft on some of the markets concerned by the Decision. CCIA must for that reason be regarded as being sufficiently representative of undertakings that are active within the sector concerned.

46 Second, according to Article 2A of CCIA's Articles of Incorporation, its purpose is, inter alia, to promote the interests of the computer and communications industries, and to promote the interests of its members. Article I, Section 2, of CCIA's Bylaws indicates, moreover, that one of its objectives is to educate government and the general public on the importance of 'full, fair and open competition' within those industries. Article I, Section 2, of CCIA's Bylaws also provides that CCIA may take 'such … action of … [a] legal nature as may be appropriate to carry out these objectives'. CCIA must therefore be regarded as having among its purposes that of safeguarding the interests of its members.

47 Third, the present case raises, among others, the question as to the circumstances in which a software producer in a dominant position may be required to provide third parties with information covered by intellectual property rights in order to allow interoperability of the products of those third parties with the products of that producer. The present case also raises the question as to the circumstances in which it may be contrary to Article 82 EC for a producer of software or computer hardware in a dominant position to incorporate new products or new functionalities within an existing product. The position which the President, acting as the judge responsible for granting interim relief, may take on those two questions of principle is liable to have a bearing on the conditions under which undertakings in the information technology sector operate.

48 Fourth, as the members of CCIA are active within the sector concerned, their interests are liable to be affected by the position taken by the judge dealing with the application for interim relief.

49 Furthermore, CCIA took part in the administrative procedure which resulted in the adoption of the Decision.

50 CCIA must therefore be granted leave to intervene in the present interim relief proceedings.

The application submitted by SIIA

51 SIIA is an association of software developers comprising more than 600 members. It requests leave to intervene in support of the form of order sought by the Commission.

52 SIIA submits that it was granted leave to intervene in its own name during the administrative procedure, in the same way as Time Warner Inc., Novell and

RealNetworks, which are three of its members. SIIA points out further that the Court's decision in the main proceedings in the present case will impact on its members' prospects of competing with Microsoft and that, moreover, the commercial viability of some of those members will be jeopardised if the remedies provided for in the Decision are not enforced. SIIA points out, in conclusion, that maintaining the Decision will allow its members to allocate additional resources to research and development.

53 The Commission has declared that it has no objections to the application made by SIIA. Microsoft did not submit observations.

54 The President of the Court takes the view that the application by SIIA for leave to intervene must be granted.

55 First, SIIA states, without being contradicted by Microsoft or the Commission, that it is the principal association of software developers, with more than 600 members operating world-wide. SIIA may therefore be regarded as representing a significant number of undertakings within the information technology sector.

56 Second, Article II of SIIA's Bylaws states that it is a 'trade group formed to represent the common business and public policy interests of the computer software and digital content industries'. Article II also provides that SIIA has the capacity to engage in 'all lawful activities' in furtherance of those purposes. SIIA may therefore be regarded, at this stage, as having among its purposes that of protecting the interests of its members.

57 Third, for the reasons set out in paragraph 47 above, the position which the President, acting as the judge responsible for granting interim relief, may take on the questions of principle raised by the present case is liable to have a bearing on the conditions under which undertakings in the information technology sector operate.

58 Fourth, SIIA has submitted, without being contradicted by Microsoft or the Commission, that it represents undertakings, in particular software designers, that are in competition with Microsoft on the markets in issue in the Decision. In those circumstances, the interests of SIIA's members are liable to be affected by the position taken by the judge responsible for granting interim relief.

59 Furthermore, SIIA participated in the administrative procedure which resulted in the adoption of the Decision.

60 SIIA must therefore be granted leave to intervene in the present interim relief proceedings.

The application made by CompTIA

61 CompTIA is an association of undertakings active within the area of information and communications technology. CompTIA seeks leave to intervene in support of the form of order sought by Microsoft.

62 CompTIA submits that it satisfies the conditions governing leave to intervene that have been laid down in the case-law (order in Kruidvat v Commission, cited above in paragraph 37; order of the President of the Court of 30 October 2003 in Joined Cases T-125/03 R and T-253/03 R Akzo Nobel Chemicals and Akcros Chemicals v Commission [2003] ECR II-0000, paragraph 4).

63 First, CompTIA claims to be the world's largest information and telecommunications technology trade association, with more than 16 000 members in 89 countries.

64 Second, CompTIA is, by reason of its Bylaws, charged with safeguarding the interests of its members and is authorised to intervene in the present proceedings inasmuch as the issues raised therein directly affect its members.

65 Third, the Decision raises fundamental questions that affect the entire information technology sector.

66 CompTIA does not, in the Commission's view, have a sufficient interest in the result of the case. The Commission notes in this regard that the Bylaws of CompTIA do not include the protection of its members' interests or their representation. Moreover, the antitrust policy statement which CompTIA has annexed to its application is no more than a draft common position which does not recommend or in any way authorise CompTIA to adopt measures designed to protect that position. In addition, the admission of CompTIA as an amicus curiæ before some American courts is irrelevant in the present context. Finally, the admission of CompTIA as an interested party during the administrative procedure is not, as such, determinant, since the applicable criterion for leave to submit observations during the administrative procedure is not necessarily identical to that defined in the second paragraph of Article 40 of the Statute of the Court of Justice.

67 Microsoft did not submit observations on the application by CompTIA.

68 On 13 July 2004 the President of the Court of First Instance called on CompTIA to specify, inter alia, the provisions of its Bylaws on which it was relying for its submission that its purpose was to protect the interests of its members.

69 By letter of 16 July 2004, CompTIA stated that it was relying, for that purpose, on Articles II and XI of its Bylaws, on the antitrust policy statement adopted by its board of directors, and on Section 2 of its Certificate of Incorporation. CompTIA also emphasised its past interventions with the American judicial authorities. On 21 July 2004 the Commission submitted observations in which it expressed the view that CompTIA could, at best, be described as having as its purpose the promotion of its members' interests, but not their representation and defence. The Community Courts,

it claims, have already turned down applications for leave to intervene made by associations which are simply responsible for promoting the collective interests of their members (order of the President of the Third Chamber of the Court of 25 June 1999 in Case T-13/99 Pfizer Animal Health v Commission, not published in the ECR, paragraph 28).

70 The President of the Court takes the view that the application by CompTIA for leave to intervene must be granted.

71 First, CompTIA has stated, without being contradicted by Microsoft or the Commission, that it represents more than 16 000 members in more than 80 countries, 200 of whom, moreover, have their headquarters in Europe. Those members are involved at all levels of the information technology industry and include software designers, manufacturers of computer hardware, application service providers, distributors, retailers and resellers. CompTIA can thus be regarded as representing a significant number of undertakings active within the information technology sector.

72 Second, with regard to the purpose of CompTIA, Section 2 of its Certificate of Incorporation states that its purpose is to engage in 'any lawful transaction or activity … for which corporations may be formed under the Revised Nonstock Corporation Act of the State of Connecticut, as amended'. Section 2 also provides that, 'without limiting the foregoing', CompTIA is formed 'to promote and encourage the highest standards of professional and business competence and ethics among its members and within the information technology industry as a whole'. Article II of its Bylaws recapitulates those various purposes and further states that, in order to achieve those goals, CompTIA 'shall endeavor to … establish a programme for conveying the collective views of its members to the information technology industry, governmental agencies and the public'. CompTIA also points out that it has intervened before the American judicial authorities and in the administrative procedure before the Commission with a view to complying with the antitrust policy statement adopted by its Board of Directors. In light of those facts, CompTIA can be regarded as having, among its purposes, that of protecting the interests of its members.

73 Third, for the reasons set out in paragraph 47 above, the position which the President, acting as the judge responsible for granting interim relief, may take on the questions of principle raised by this case is liable to have a bearing on the conditions under which undertakings in the information technology sector operate.

74 Fourth, CompTIA represents numerous undertakings active on the markets concerned, including software designers, whose interests are liable to be affected by the position taken by the judge dealing with the application for interim relief.

75 Furthermore, CompTIA participated in the administrative procedure leading to adoption of the Decision.

76 The application by CompTIA for leave to intervene in the present interim relief proceedings must for those reasons be granted.

The application submitted by ACT

77 ACT is a trade association representing just below 3 000 undertakings active in the development of software, system integration, information technology consultancy and training and e-commerce. ACT requests leave to intervene in support of the form of order sought by Microsoft.

78 ACT considers that it satisfies the conditions governing the granting to associations of leave to intervene, as set out in the case-law (order in Kruidvat v Commission, cited above in paragraph 37). ACT first points out that it was admitted to participate in the administrative procedure which led to the adoption of the Decision. It submits further that the action brought by Microsoft raises questions of principle which could have consequences for the entire information technology sector and, more particularly, for the activities of its members. ACT claims that it has a particular interest in convergence in and stability of the legal treatment of platform software in the United States and the European Union.

79 The members of ACT also have significant activities within the EEA and would be detrimentally affected in the event of the main action failing or of immediate implementation of the Decision. Such implementation would diminish the value of their intellectual property right portfolios and would precipitate a fall in investments in those companies which are active within the information technology sector. Disclosure of the communications protocols of the Windows system would also constitute a precedent liable to lead to increased instability within server operating systems and risks of malfunction. The remedy requiring the Windows system to be marketed without the Windows Media Player software would, for its part, deprive ACT's members of the possibility of having recourse to certain application programming interfaces (API) and would, moreover, discourage production and maintenance of a secure platform.

80 The Commission has stated that it has no objections to the application submitted by ACT. Microsoft did not submit any observations within the prescribed period.

81 The President of the Court takes the view that the application by ACT for leave to intervene must be granted.

82 First, ACT has stated, without being contradicted by Microsoft or the Commission, that it is a trade association representing almost 3 000 undertakings active in the development of software, system integration, information technology consultancy and training and e-commerce. ACT also states that its members are established world-wide, including within the EEA, and that they include various sizes of undertakings. ACT can for those reasons be regarded as representing a significant number of undertakings within the information technology sector.

83 Second, according to Article II(D) of its Bylaws, one of ACT's purposes is to 'seek protection of [its members'] rights and privileges'. Article II(F) of ACT's

Bylaws states that a further purpose is to 'enhance competition in and among the technology industries and to protect technology products, companies and industries from undue regulation or intervention that would undermine free and open competition by and among such products, companies and industries'. ACT's purposes thus include, in particular, that of protecting its members' interests.

84 Third, for the reasons set out in paragraph 47 above, the position which the President, acting as the judge responsible for granting interim relief, may take on the questions of principle raised by the present case is liable to have a bearing on the conditions under which undertakings in the information technology sector operate.

85 Fourth, ACT includes undertakings specialising in software design, whose interests are liable to be affected by the position taken by the judge dealing with the application for interim relief.

86 Furthermore, ACT participated in the administrative procedure that resulted in the adoption of the Decision.

87 ACT must for those reasons be granted leave to intervene in the present interim relief proceedings.

The applications brought on an individual basis

The application brought by Novell

88 Novell and its subsidiaries are active in a variety of software markets. Novell has been active in the area of computer networking ever since it developed and marketed the NetWare software in 1983. In support of its application for leave to intervene in support of the form of order sought by the Commission, Novell argues that its interest in the result of the interim relief proceedings follows on from several factors. First, its participation in the administrative procedure which led to the adoption of the Decision was very active from the outset and allowed it to influence the Commission's assessment of the relevant factual and legal issues. Second, as Microsoft's main competitor on the market in work group server operating systems, Novell has been affected by Microsoft's refusal to supply interoperability information. Novell's competitive position weakened rapidly in consequence, as the Commission has confirmed in the Decision (recitals 590, 593 and 594 of the Decision). Third, in concluding that Microsoft's refusal to provide interoperability information formed part of a general pattern of conduct on Microsoft's part, the Commission based itself on, inter alia, the treatment of requests for interoperability information submitted by Novell (recital 573 of the Decision). Fourth, Novell expects to benefit from the remedies ordered in Article 5 of the Decision, inasmuch as it is an 'undertaking having an interest in developing and distributing work group server operating system products' within the meaning of that article.

89 While the Commission has not raised any objections to the application for leave made by Novell, Microsoft has submitted several observations. It first submits that,

according to recital 573 of the Decision, Novell did not request Microsoft to forward to it its communications protocols but simply asked to be able to replace a directory in the Windows operating system with a directory from the NetWare system. Next, Microsoft submits that Novell did not seek to obtain a licence relating to the client-to-server communications protocols, in accordance with the settlement concluded between the American authorities and Microsoft. Microsoft accordingly asks whether, as Novell argues, it can be fairly stated that Novell is a 'direct beneficiary' of the remedy imposed by the Commission. The urgency in having access to Microsoft's technology is belied by the interoperability of the NetWare server operating systems with the Windows client operating systems and by the fact that no application has been made for a licence in regard to Microsoft's communications protocols.

90 The President of the Court takes the view that Novell must be granted leave to intervene in support of the form of order sought by the Commission.

91 To the extent to which the Decision finds that Microsoft abused its dominant position by refusing to provide interoperability information and to authorise the use of such information for the development and distribution of products in competition with its own on the market in work group server operating systems, it must be held that Novell, as an undertaking in competition with Microsoft, does have an interest in the immediate cessation of the abuse which has been confirmed. It must be pointed out in this regard that the Decision states that Microsoft's share of the market in work group server operating systems 'has grown since it entered the market, and continues to grow to such an extent that its main competitor in the market, Novell, has gone from a leading position to being a relatively minor player in the space of just a few years' (recital 590) and that '[the] data collected by the Commission show that there is a risk of elimination of competition in the work group server operating system market' (recital 781).

92 Furthermore, Novell played a very active role in the administrative procedure before the Commission. As is clear from the Decision, the observations which Novell submitted in its capacity as an interested third party within the meaning of Article 19(2) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), were taken into proper account by the Commission.

93 Finally, Novell has a direct interest in dismissal of the request for suspension of the application of Article 5 of the Decision inasmuch as it is an undertaking which comes within the scope of that provision.

The application submitted by RealNetworks

94 In its application for leave to intervene in support of the form of order sought by the Commission, RealNetworks points out that it operates on the markets affected by Microsoft's conduct in tying the sale of the Windows Media Player software to that of the Windows operating system for personal computers and that, as an interested third party, it played an active role in the administrative procedure before the Commission.

95 Neither Microsoft nor the Commission has raised any objections to RealNetworks' application for leave to intervene.

96 RealNetworks develops and supplies specialised software for network-delivered digital multimedia services and the technology that makes possible the creation, distribution and consumption of digital multimedia content. Having regard to the factors raised by RealNetworks in support of its application for leave to intervene, the established nature of which is evident from the Decision (in particular, recitals 112 to 118, 125 to 134, 812, 855 and 856), the President of the Court takes the view that RealNetworks has demonstrated a sufficient interest in dismissal of the application for interim relief.

The application submitted by Digimpro and Others

97 Digimpro and Others have requested leave to intervene in support of the form of order whereby Microsoft seeks suspension of application of the provisions of the Decision which require Microsoft to offer a version of its Windows operating system for personal computers which does not incorporate the Windows Media Player software or the code governing its functionality. Each of those applicants considers that it has a direct and present interest in the suspension of application of Articles 2, 4, first paragraph, and 6 of the Decision in so far as immediate implementation of those provisions would cause them serious and irreparable damage.

98 The applicants for leave to intervene manufacture or develop software and applications which function under the Windows operating system and, as such, they state that they are dependent, directly or indirectly, on the functionality of the Windows Media Player software tied to that operating system.

99 First, certain of the applicants have developed and marketed, or are developing at present, products which function with the Windows Media Player software of the Windows operating system for personal computers. The Decision would thus have the effect of forcing them to modify their products in such a way as to include in them a functionality designed to detect whether the operating system installed in the computers of their customers contains the Windows Media Player software and, if not, to indicate to them the steps which must be followed in order to install the Windows Media Player software. In the alternative, they could modify their products by copying in them the code of the Windows Media Player software. Interventions of this kind would, however, be costly in terms of time and money.

100 Second, they submit that a number of them would have to provide update software to customers using present or previous versions of their products in so far as those customers may find themselves having to use their products on a computer equipped with a Windows operating system which lacks the Windows media player software. Providing a corrective measure of this kind would involve significant cost and give rise to many practical difficulties.

101 Third, the separation of the Windows Media Player software from the Windows operating system for personal computers could upset the operation of the applicants' products, even if a customer had himself installed the Windows Media Player software on his personal computer. The search for solutions to defective functionality of this kind would involve the applicants in additional expense.

102 Fourth, the applicants fear that the Decision represents the first step in the fragmentation of the Windows operating system for personal computers and for that reason it gives rise to great commercial uncertainty.

103 Fifth, the applicants contend that the improvements which Microsoft has introduced into its Windows operating system enable them to improve their own products or to offer new products. These derived improvements would no longer be possible if Microsoft were to be prevented from developing its own operating system.

104 Microsoft did not submit observations within the prescribed period.

105 The Commission, for its part, has expressed grave reservations as to the interest which Digimpro and Others may have in intervening. The Commission submits that the interest of the applicants, which appear to belong to the broad category of independent software sellers, is not direct, present or certain.

106 The Commission expresses the view, first, that the arguments relating to future disputes or to the future development of the Windows operating system cannot be regarded as establishing such an interest in the result of the case.

107 The Commission also takes the view that the arguments relied on in the application for leave to intervene demonstrate at most that the independent sellers are encouraged to develop applications which feature the Windows Media Player software because they know that this software is incorporated in the Windows operating system and that those purchasing that system therefore automatically have it at their disposal. However, the Commission argues, the Decision does not oblige the applicants to modify their products. The Decision has the effect of allowing consumers to choose the version of the operating system which incorporates, or does not incorporate, the Windows Media Player software, a choice linked to the merit of the product on offer and not to the mere fact that it is coupled to the Windows operating system. Sellers of software ought therefore to adapt themselves to consumer choice and organise their activities accordingly. It will always be possible for them to design products exclusively for the Windows Media Player software and subsequently persuade consumers, on the basis of the merits of their products and services, to opt for the version of the Windows operating system which incorporates the Windows Media Player software. There is therefore no reason to believe that the applicants will incur costs or suffer harm as a direct result of the Decision. As any costs which they may have to bear will depend on decisions to be taken in the future, the applicants' interest in the result of the case cannot be regarded as sufficient (order of the Court in Case T-18/97 Atlantic Container Line and Others v Commission [1998] ECR II-589, paragraph 14). So far as concerns the applicants' assertion that their products might

no longer be able to function correctly, this, the Commission argues, reveals the hypothetical nature of an interest in the result of the case in this regard.

108 With more specific regard to the interests claimed by each of the applicants, the Commission submits that Digimpro Ltd is not, at present, active on any market, that the damage relied on by TeamSystem SpA is liable to materialise only in so far as consumers decide to use the version of the Windows operating system which does not feature the Windows Media Player software – a situation that may already possibly obtain – and that Mamut ASA invokes problems of compatibility between its products and those of Microsoft that are scarcely credible in view of the close relations existing between those two companies. As for CODA Group Holdings Ltd's interest in the result of the case, this is neither certain nor direct as its products are not based directly on the Windows Media Player software of the Windows operating system.

109 The Commission adds that to accept the applicants' arguments would be tantamount to having to admit virtually all software designers world-wide.

110 The President of the Court finds that implementation of the Decision would have the effect of requiring Microsoft to offer for sale two versions of its operating system for personal computers, the first without the Windows Media Player software and the second incorporating that software. As a result of that new situation, software designers would no longer be entitled to assume that all computers fitted with the Windows operating system will contain multimedia application programming interfaces (API). The resulting adaptation of their products and assumption of responsibility for the additional technology which this might involve may give rise to significant extra costs for the designers concerned; conversely, failure to adapt their products to the new market situation resulting from implementation of the Decision might prevent them from winning over customers in line with expectations.

111 Regard being had to those factors, the view must be taken that marketing of the Windows operating system for personal computers which does not incorporate the Windows Media Player software risks having a significant effect on the activity of the software designers concerned and that their interest in having implementation of the Decision suspended is consequently established. The matters set out in their application justify the conclusion that TeamSystem SpA and Mamut ASA must be granted leave to intervene in support of the form of order which Microsoft is seeking in the proceedings for interim relief.

112 By contrast, in light of the argument developed in the application for leave to intervene, it cannot be concluded that Digimpro Ltd has established that it has a present interest in the result of the interim proceedings. As is clear from its application, the main product of that company is not yet on the market, and the company states, without indicating a precise timetable for its launch, that this product 'will be' software that permits users to interact with stored audio information and that it 'will operate' as an accessory to Windows Media Player.

113 In light of the information provided in the application for leave to intervene, the application must also be rejected in so far as it has been submitted by CODA Group Holdings Ltd. The risk that uncoupling the Windows Media Player software from the Windows operating system may affect the proper functioning of some of its applications cannot be regarded as being sufficient to establish that this company has an interest in intervening, as it is clear from the request for leave to intervene that those applications are already being delivered to its customers on several platforms other than the Windows platform, such as IBM AS/400 and Unix, and that the products which it designs do not rely directly on the Windows Media Player code in the Windows operating system.

114 The application for leave to intervene must accordingly be granted in so far as it has been submitted by TeamSystem SpA and Mamut ASA but must be rejected in so far as it has been submitted by Digimpro Ltd and CODA Group Holdings Ltd.

The application submitted by DMDsecure.com and Others

115 DMDsecure.com and Others, which are companies operating in the areas of media, entertainment and telecommunications, seek leave to intervene in support of the form of order sought by Microsoft. DMDsecure.com markets content protection and digital rights management server-side systems, components and solutions. MPS Broadband distributes Internet Protocol-based international broadband TV-contents. Pace Micro Technology is primarily active in the area of digital set-top television technology. Quantel provides computer hardware products within the television and cinema sectors. Finally, Tandberg TV markets video products and systems live and on demand across a variety of networks.

116 They claim that they have a direct and specific interest in having implementation of the Decision suspended inasmuch as their activities could be directly and substantially affected by the result of the interim relief proceedings and of the main proceedings (order in Kruidvat v Commission, cited above in paragraph 37, paragraph 10). The obligation imposed on Microsoft to develop and offer a version of its operating system which does not feature the Windows Media Player software concerns the applicants to the extent to which their products operate with that software. They would as a consequence be obliged to modify their products in such a way as to enable them to be used with other software. A modification of this kind would be costly, technically complex and would have repercussions on the services provided in conjunction with the products in question.

117 While Microsoft did not lodge observations on the application for leave to intervene within the prescribed period, the Commission has expressed serious doubts as to the applicants' interest in intervening.

118 The Commission's view is that the applicants have failed to demonstrate a direct, present and certain interest in the result of the interim relief proceedings. The applicants' arguments, it submits, indicate their natural inclination to favour a single technology and make it clear that their decision to base themselves on the Windows

Media Player software stems from the fact that they know that this software is tied to the Windows operating system and is thus automatically acquired by consumers.

119 Contrary to what the applicants contend, the Decision, in the Commission's view, does not in any case oblige them to modify their products. The Decision simply allows consumers to choose to acquire the version which does, or does not, incorporate the Windows Media Player, a choice which has to do with the merit of the product on offer and not with the fact that it is tied to the Windows operating system. The companies, in particular those which base themselves on the omnipresence of the Windows Media Player software, ought therefore to adapt to consumer choice and arrange their activities accordingly. It will always be possible for those companies to base themselves exclusively on the Windows Media Player software and subsequently persuade consumers, on the basis of the merits of their products and services, to opt for the version of the Windows operating system which does incorporate the Windows Media Player software. There is thus no reason to believe that the applicants will incur costs or suffer harm as a direct result of the Decision. As any costs which they may have to bear would depend on decisions which they, other companies and their customers might take in the future, the applicants' interest in the result of the case cannot be regarded as sufficient (order in Atlantic Container Line and Others, cited above in paragraph 107, paragraph 14).

120 The Commission adds that to grant the applicants leave to intervene would, given that they belong to a heterogenous group of companies, give rise to an obligation to admit virtually all software designers world-wide.

121 The President of the Court takes the view, in light of the matters which they have set out in their application for leave to intervene, that DMDsecure.com and Others have a direct and present interest in suspension of implementation of the Decision in so far as the technologies which they use are at present designed to operate to a large extent with the platform of the Windows operating system that incorporates the Windows Media Player software. If the Decision is implemented, there is a risk that their activities could be significantly affected, not only by making it necessary for them to adapt to such changed circumstances by modifying the technologies used but also obliging them initially to bear the costs of such modification.

122 DMDsecure.com and Others must for those reasons be granted leave to intervene in support of the form of order sought by Microsoft.

The application submitted by IDE Nätverkskonsulterna and Others

123 IDE Nätverkskonsulterna and Others request leave to intervene in support of the form of order sought by Microsoft. They provide, within the information technology sector, services such as the installation, integration and migration of data and systems, support and outsourcing, web design and software development. Their services are dependent on the technology developed by Microsoft. The applicants' in-depth knowledge of the products developed by Microsoft has been recognised by Microsoft,

which has awarded them the title of 'Microsoft Most Valuable Professionals'. IDE Nätverkskonsulterna and Exor AB alone have not received that title.

124 Relying on the case-law of the Court of Justice (order in Joined Cases 16/62 and 17/62 Confédération nationale des producteurs de fruits et légumes and Others v Council [1962] ECR 471), IDE Nätverkskonsulterna and Others take the view that, as implementation of the Decision would impact significantly on their legal and/or economic situation, they have a direct and present interest in the suspension of Articles 4 and 6(a) of that Decision requested by Microsoft.

125 The applicants argue that the negative effects of the remedy of untying the Windows Media Player software from the Windows operating system will vary according to the activities in which they engage.

126 First, some of the applicants are responsible for installation of the operating systems and application software in personal computers, integration services for, inter alia, various applications, and support services such as the provision of periodic software updates. So far as they are concerned, the existence of two versions of the Windows operating system would give rise to additional costs associated with the need to adapt services according to the customer's version of the Windows operating system and to ensure the proper functioning of the version which does not feature the Windows Media Player software.

127 Second, the applicants which provide web design services use the technology developed by Microsoft. In order for the audiovisual content of the internet sites which they install to be accessible to those using a computer which does not have the Windows Media Player software, the applicants will be obliged to incur development and support costs.

128 Third, the applicants which provide training services in regard to Microsoft products will have to adapt their training programmes to the users' profile.

129 Finally, a number of the applicants provide software development services, for which they use the media functionality of the Windows Media Player. By reason of the Decision, their activities will be limited to those customers who have opted for the Windows operating system equipped with the Windows Media Player software or, for customers who have not made such a choice, those activities will oblige them to modify the content of their products.

130 Microsoft did not submit observations on the application for leave to intervene within the prescribed period.

131 For its part, the Commission has expressed serious doubts as to the applicants' interest in intervening. As the Commission's arguments are similar to those which it set out in response to the application made by DMDsecure.com and Others, reference is made to paragraphs 118 to 120 above.

132 The President of the Court takes the view that the application by IDE Nätverkskonsulterna AB cannot be upheld.

133 So far as that company is concerned, immediate enforcement of the Decision might indeed force it to adapt the services which it offers to its customers, that is to say, consulting and outsourcing services. The uncoupling of the Windows Media Player software and the Windows operating system may thus lead it to take account of that development and to adapt its services accordingly. However, adaptation of the services in question could not be classified as a direct consequence of implementation of the Decision but would have to be regarded as being dependent primarily on the choice made by customers to opt for a Windows operating system not featuring the Windows Media Player software and to demand services resulting from that choice. On the basis of the information provided in the application for leave to intervene, that company's interest thus cannot be regarded as being direct and present within the meaning of the case-law cited above.

134 By contrast, the Exor company must be granted leave to intervene in support of the form of order sought by Microsoft. It is clear from the application for leave to intervene that Exor designs web sites and develops applications at a significant level, as its customers include the largest Swedish recruitment agency after the Swedish public employment agency, and that the technologies which it uses in developing such web sites are at present designed to function exclusively with the platform of the Windows operating system which incorporates the Windows Media Player software. If the Decision is implemented, there will therefore be a risk that its activities could be significantly affected, not only in making it necessary for it to adapt to this change in circumstances through modification of the technologies used but also in forcing the company initially to bear the costs of that modification. Its direct and present interest must consequently be regarded as having been sufficiently demonstrated at this stage.

135 With regard to the remaining applicants, their interest in the result of the interim relief proceedings cannot, on the basis of the information contained in the application, be regarded as having been sufficiently established.

136 As the claims made in the application for leave to intervene have not been proved, it is not possible to conclude that the activities engaged in by those applicants would be affected in a sufficiently significant way if the application for interim relief were to be dismissed. With more particular regard to Mr Rogerson, Mr Tomicic, Mr Valasek and Mr Nati, the portion of their activities that involves software development is not at all specified in their application.

137 It must also be added that adaptation of the computer support services (Mr Rogerson, Mr Setka and Mr Tomicic), computer training services (Mr Setka) and consulting services (Mr Tomicic) cannot be considered a direct consequence of implementation of the Decision but must be regarded as being dependent primarily on the choice made by customers to opt for a Windows operating system that does not incorporate the Windows Media Player software and to demand services resulting from that choice (see paragraph 133 above).

138 With regard to the interest alleged by Mr Rialdi, this cannot be treated as being direct, as dismissal of the application for interim relief is likely to affect him only in so far as he participates in the results of the company in which he is a member of the board and vice-president of its advanced technology division.

139 In the light of the foregoing, the application for leave to intervene by IDE Nätverkskonsulterna and Others must be granted in so far as it was submitted by Exor AB but must be rejected in so far as it was submitted by the other applicants.

The application for confidential treatment

140 Microsoft has requested that the confidential version of the Decision should not be disclosed to the applicants for leave to intervene.

141 As the interventions are to be allowed under the conditions laid down in Article 116(2) of the Court's Rules of Procedure, transmission of the procedural documents served on the parties must, at this stage, be limited to the non-confidential version produced by Microsoft. A decision as to whether the application for confidential treatment is well founded shall, if necessary, be taken at a later stage in the light of any objections which may be submitted on that issue.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE orders:

1. Computer & Communications Industry Association is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the defendant.

2. Software & Information Industry Association is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the defendant.

3. The Computing Technology Industry Association Inc. is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.

4. The Association for Competitive Technology is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.

5. Novell Inc. is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the defendant.

6. RealNetworks Inc. is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the defendant.

7. TeamSystem SpA and Mamut ASA are granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.

8. The application submitted by Digimpro Ltd and by CODA Group Holdings Ltd in Case T-201/04 R in support of the form of order sought by the applicant is dismissed.

9. DMDsecure.com BV, MPS Broadband AB, Pace Micro Technology plc, Quantel Ltd and Tandberg Television Ltd are granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.

10. The application submitted by IDE Nätverkskonsulterna AB, by Mr T. Rogerson, by Mr P. Setka, by Mr D. Tomicic, by Mr M. Valasek, by Mr R. Rialdi and by Mr B. Nati in Case T-201/04 R in support of the form of order sought by the applicant is dismissed.

11. Exor AB is granted leave to intervene in Case T-201/04 R in support of the form of order sought by the applicant.

12. The Registrar shall transmit to the intervening parties the non-confidential version of the procedural documents.

13. A period shall be fixed for the intervening parties to submit observations on the application for confidential treatment. The decision on whether that application is well founded is reserved.

14. A period shall be fixed for the intervening parties to submit a statement in intervention, without prejudice to the possibility of supplementing it later, should the need arise, in the light of a decision as to whether the application for confidential treatment is well founded.

Luxembourg, 26 July 2004.

Registrar H. Jung

President B. Vesterdorf

1 – Language of the case: English.