

(400) First, Microsoft acknowledges that bundling Internet Explorer allows Microsoft to reinforce its position in the market of operating systems for client PCs.⁴⁰⁰

(401) Moreover, it may be true that web browsers today are not substitutes for client PC operating systems insofar as no "general purpose" application programs can be written using a web browser's APIs only without an underlying operating system. Microsoft concedes that web browsers - Microsoft gives Internet Explorer as an example but this is equally true for any other web browsers - expose APIs.⁴⁰¹ Due to the development of the Web 2.0 and its applications "in the cloud", more and more widely used programs can be written using a web browser's APIs. The possibility cannot thus be ruled out that there are incentives to expand the available APIs so as to allow the writing of new applications. Second, middleware such as Java in combination with a web browser could in fact develop into a general purpose platform substitute. As such, the web browser can be deemed a necessary component of a platform threat to the client PC operating system.⁴⁰² In this sense, Microsoft has incentives to foreclose third party web browsers through tying.

(402) It should also be highlighted that Microsoft has a clear incentive to maintain a strong position in the market for web browsers for client PC operating systems due to the fact that the web browser is a strategic gateway to a range of related markets, from which revenues can be extracted such as online advertisement. Moreover, applications "in the cloud" tend to replace some applications that constitute the core business of Microsoft, such as personal productivity applications (see paragraphs (83) to (89) and (377)).

⁴⁰⁰ See Microsoft's submission of 5 March 2008, page 30, reply to question 9: "First, additional functionality available to end users increases demand for Windows directly. Second, often the additional functionality also exposes APIs that enrich the functions provided by other parts of the operating system and by third-party applications that run on Windows, thus increasing demand for Windows indirectly."

⁴⁰¹ See Microsoft's submission of 5 March 2008, page 31, reply to question 9: "Internet Explorer functionality provides a well-documented programming platform, relied upon by third party programs as well as many parts of the operating system."

⁴⁰² See Google's submission of 16 December 2008, page 2: "Although internet applications are at an early stage of development, their potential to undo Microsoft's monopolies will increase significantly as they become more and more widely adopted. Provided these internet applications are not made dependent on Windows, users will not longer be concerned with which operating system runs on their computer because they will be able to access and use the same applications equally well with any operating system". See also paragraphs (79) and (80).

4.3.1.3 Conclusion

(403) Article 82 EC must be read in the light of its underlying objective which is to ensure that competition in the internal market is not distorted (see Article 3 (g) of the Treaty).⁴⁰³ In addition,

*"[t]he aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anticompetitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality output or reducing consumer choice."*⁴⁰⁴

(404) To maintain competitive markets so that innovations succeed or fail on the merits is an important objective of the Community competition rules. The manner in which competition unfolds in the market for web browsers is therefore of competitive concern.

(405) Through tying Internet Explorer with Windows, Microsoft uses Windows as a distribution channel to anti-competitively ensure for itself a significant competitive advantage in the market for web browsers. Competitors, due to Microsoft's tying, are *a priori* at a disadvantage irrespective of whether their products are potentially more attractive on the merits.

(406) Microsoft thus interferes with the normal competitive process which would benefit users, particularly in terms of quicker cycles of innovation due to unfettered competition on the merits. Tying of Internet Explorer increases the content and applications barrier to entry which protects Windows and it will facilitate the erection of such a barrier for Internet Explorer. A position of market strength achieved in a market characterised by network effects – such as the web browser market – is sustainable because once the network effects work in favour of a company which has gained a decisive momentum, they will amount to entry barriers for potential competitors (see paragraphs (342) to (347)).

(407) In addition to being liable to reinforce Microsoft's position on the client PC operating system market, its conduct shields Microsoft from effective competition from potentially more efficient web browser vendors which could challenge its position. Microsoft thus reduces the talent and capital invested in

⁴⁰³ Judgment in Case 322/81 *Michelin*, at paragraph 29.

⁴⁰⁴ Draft Guidance on Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertaking, at paragraph 19. See <http://ec.europa.eu/competition/antitrust/art82/guidance.pdf>, printed on 13 January 2008.

innovation of web browsers, not least its own⁴⁰⁵ and anti-competitively raises barriers to market entry. Microsoft's conduct affects a market which could be a hotbed for new and innovative products springing forth in a climate of undistorted competition.

(408) Microsoft's tying of Internet Explorer also sends signals which deter innovation in any technologies which Microsoft could conceivably take an interest in and tie with Windows in the future. Microsoft's tying instils actors in the relevant software markets with a sense of precariousness thereby weakening both software developers' incentives to innovate in similar areas and venture capitalists' proclivity to invest in independent software application companies. A start-up intending to enter or raise venture capital in such a market will be forced to test the resilience of its business model against the eventuality of Microsoft deciding to bundle its own version of the product with Windows.⁴⁰⁶

(409) There is therefore a reasonable likelihood that tying Internet Explorer with Windows has led to a lessening of competition so that the maintenance of an effective competition structure is not ensured, to the detriment of consumers. For these reasons, the Commission takes the preliminary position that tying Internet Explorer with Windows violates the prohibition to abuse a dominant position enshrined in Article 82 EC and in particular point (d) of the second paragraph thereof.

4.4 Effect on Trade between Member States and between EEA Contracting Parties

(410) Article 82 EC prohibits any abuse of dominant position within the common market or in a substantial part of it insofar as it may affect trade between Member States. An abuse of a dominant position affects trade between Member States when it is capable of influencing, either directly or indirectly, actually or potentially, the pattern of trade in goods and services between Member States.⁴⁰⁷

(411) As the Court of Justice held in *United Brands*, if the undertaking holding a dominant position established in the common market aims at eliminating competitors also established in the common market, it is immaterial whether this behaviour relates directly to trade between Member States once it has been

⁴⁰⁵ See 2004 Decision, at recital (841) and fn. 1247.

⁴⁰⁶ See 2004 Decision, at recital (983) and fn. 1250.

⁴⁰⁷ See Joined Cases C-215/96 and C-216/96 *Bagnasco v BNP and others*, [1999] ECR I-135, at paragraph 47.

shown that such elimination will have repercussions on the patterns of competition within the common market.⁴⁰⁸

- (412) Microsoft's anti-competitive behaviour weakens effective competition on the markets for web browsers in an appreciable way. Microsoft's tying of Internet Explorer with Windows risks impairing the effective structure of competition in the world-wide market for web browsers for client PC operating systems.⁴⁰⁹
- (413) Therefore, Microsoft's abuses of its dominance have had an appreciable effect upon trade between Member States within the meaning of Article 82 EC. For the same reasons, Microsoft's abuses of its dominance have had an appreciable effect upon trade between the Contracting Parties to the EEA within the meaning of Article 82 EC and Article 54 of the EEA Agreement.

5 REMEDIES AND FINE

5.1 Application of Article 7 of Regulation 1/2003

- (414) Where the Commission finds that there is an infringement of Article 82 EC, it may, in accordance with Article 7 (1) of Council Regulation (EC) No 1/2003⁴¹⁰ ("Regulation 1/2003"), require by decision that the undertaking concerned brings such an infringement to an end. According to Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area⁴¹¹ "*the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply mutatis mutandis*" in respect of the EEA.
- (415) Pursuant to Article 7 (1) of Regulation 1/2003, the Commission may impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. The Commission may hence order an infringing undertaking to "*do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty*". The Commission may require the undertaking concerned

⁴⁰⁸ Case 27/76, *United Brands v Commission* [1978] ECR 207, at paragraph 201.

⁴⁰⁹ See Case 71/74, *Frubo*, [1975] ECR 563, at paragraph 38.

⁴¹⁰ 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).

⁴¹¹ OJ L 305, 30.11.1994, p.6.

to submit to it proposals with a view to bringing the situation into conformity with the requirements of the Treaty.⁴¹²

- (416) The requirement that a remedy has to be effective empowers the Commission to enjoin a dominant company to refrain from adopting any measures having an equivalent effect as the conduct identified as abusive.⁴¹³
- (417) Finally, according to Article 7 (1) of Regulation 1/2003, the remedy must apply in relation to the infringement that has been established and be proportional to the infringement identified.⁴¹⁴

5.1.1 Remedies

5.1.1.1 The Commission's powers

- (418) The Commission does not have any indication that Microsoft has terminated the conduct set out above. The Commission therefore intends to require Microsoft to bring the infringement of Article 82 EC effectively to an end if it has not already done so and to refrain from any conduct which may have the same or similar object or effect. In line with Article 7 (1) of Regulation 1/2003, the Commission may require specific acts from Microsoft in order to effectively end the infringement.

5.1.1.2 The remedy of the 2004 Decision

- (419) In the 2004 Decision, in order to bring the tying of Windows Media Player to an end, the Commission ordered Microsoft to offer a full-functioning version of the Windows client PC operating system which does not incorporate Windows Media Player. Simultaneously, the Commission allowed Microsoft to also offer a

⁴¹² Judgment in *Commercial Solvents*, at paragraph 45.

⁴¹³ Judgment of the Court of First Instance in *Tetra Pak II*, at paragraph 220. In its Decision in *Tetra Pak II*, the Commission not only considered the contractual tying *Tetra Pak* had engaged in to be abusive and required its termination pursuant to Article 82 EC, but also ordered *Tetra Pak* in Article 3 of the Decision to refrain from adopting measures having equivalent effect as the ones found unlawful. In Article 3, *Tetra Pak* was *inter alia* ordered to "inform any customer purchasing or leasing a machine of the specifications which packaging cartons must meet in order to be used on its machines." (See Decision 92/163/EEC, Article 3(5) and judgment of the Court of First Instance in *Tetra Pak II*, at paragraph 139.)

⁴¹⁴ In *Hilti*, in addition to imposing a fine and requiring that the infringement be brought to an end, the Commission ordered that *Hilti*: "shall refrain from repeating or continuing any of the acts or behaviour specified in Article 1 and shall refrain from adopting any measures having an equivalent effect." (Commission Decision 88/138/EEC in Cases IV/30.787 and 31.488 - *Eurofix-Bauco v Hilti* (OJ L65, 11.3.1998, p.19, Article 3). See also Commission Decision 93/252/EEC in Cases No IV/33.440 *Warner-Lambert/Gillette and Others* and No IV/33.486 *BIC/Gillette and Others* (OJ L116, 12.5.1993, p.21) and Decision in *British Midland* and the judgment in *Commercial Solvents*, at paragraph 45.) See also, for example, judgment in *Commercial Solvents*, at paragraph 45; judgment in Joined cases C-241/91 P and 242/91 P *Magill* [1995] ECR I-743, at paragraph 93.

bundle of the Windows client PC Operating System and Windows Media Player.⁴¹⁵

- (420) The Court of First Instance found that the remedy prescribed in Article 6(a) of the 2004 Decision is an appropriate means of putting an end to the abuse in question and of resolving the competition issues identified, while causing the least possible inconvenience to Microsoft and its business model.⁴¹⁶
- (421) However, the Court of First Instance made this assessment on the basis of the matters of fact and of law existing at the time when the measure was adopted, that is to say the 24 March 2004, and only for the purpose of concluding that the remedy did not breach the principle of proportionality.⁴¹⁷ The Court of First Instance therefore did not take into account whether this remedy had actual effects on the competitive structure of the market and was capable of offsetting the appreciable altering of the balance of competition in favour of Microsoft and to the detriment of the other operators which the Court of First Instance found to result from the tying of Windows Media Player.⁴¹⁸
- (422) During the Court proceedings in Case T-201/04 R, Microsoft itself called the effectiveness of the tying remedy of the 2004 Decision in question. Microsoft stated that:

*"[i]t is difficult to see what benefit a customer [...] could possibly derive from obtaining the Article 6 version of Windows rather than the full-featured version of Windows, as both would be offered at the same price" and "[i]t is difficult to see how a rational end user could ever opt for such a version".*⁴¹⁹

- (423) Sales data released by Microsoft in April 2006 confirm that there has been very limited demand from OEMs, retailers and users for Windows XP N, the version of the Windows client PC operating system which Microsoft introduced in the EEA to comply with Article 6 of the 2004 Decision.
- (424) Microsoft states that in April 2006 Windows XP N sales represented only 0.005% of overall Windows XP sales in Europe, that no PC manufacturers have ordered or preinstalled Windows XP N on PCs and that only 1787 copies of Windows XP N have been sold to retailers and distributors in Europe by

⁴¹⁵ Article 6(a) of the 2004 Decision.

⁴¹⁶ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, at paragraph 1223.

⁴¹⁷ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, at paragraphs 943 and 1149 to 1228, particularly 1223.

⁴¹⁸ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, at paragraph 1034.

⁴¹⁹ Case T-201/04 R *Microsoft v Commission* [2004] ECR II-4463, at paragraph 424.

comparison to 35.5 million copies of the bundled version of Windows XP that were sold in Europe during the same nine-month period.⁴²⁰

- (425) The Commission has no reason to doubt these figures nor are there any indications that the demand for the version of Windows without the Media Player has increased since 2006.
- (426) In view of these figures and with hindsight, the Commission considers that the untying remedy imposed by the 2004 Decision was not effective enough to restore competition in the market for streaming media players, namely because it allowed Microsoft to continue offering a tied version of Windows and did not provide sufficient incentives for OEMs and users to opt for the untied version.
- (427) In view of the experience with the tying remedy of the 2004 Decision, the Commission therefore intends to impose a different, more effective, but nevertheless proportionate remedy in this case.

5.1.1.3 Technical scope of the envisaged remedies

- (428) At this stage, the Commission intends to impose remedies that enable users and OEMs to make an unbiased choice between Internet Explorer and competing third party web browsers.
- (429) To this end, users of the Windows client PC operating system should be prompted with a "ballot screen" which would be programmed by Microsoft and could be customized by OEMs and which would give users an objective opportunity to choose which competing web browser(s) instead of, or in addition to, Internet Explorer they want to install and which one they want to have as default. Users could install one or more of the web browsers offered through the "ballot screen". The Commission may, in particular, order Microsoft to offer web browsers through the ballot screen, or to foresee in its contractual relationships with OEMs that they should do so.
- (430) Microsoft can also be ordered to provide the technical means to disable Internet Explorer to OEMs and users.
- (431) In this regard, removing the Internet Explorer icon is not sufficient since the code is still present on the computer and is not "disabled". A practical way to disable Internet Explorer is thus to "lock" part of the code of Internet Explorer. The aim is to remove what the users consider as the main functionality of the web browser

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See <http://www.microsoft.com/presspass/legal/european/04-24-06windowsxpnsalesfs.msp>, printed on 7 November 2008.

with a minimal impact on third-party applications that currently rely on Internet Explorer APIs.

- (432) "Locking" Internet Explorer code should be done with the goal of having a minimal impact on third-party products. However, if third parties need to rely on some parts of the locked code, Microsoft could distribute the desired components only to developers, and developers could then redistribute these components only with a programme that depends on them.
- (433) For that remedy to be effective, the Commission also intends to order Microsoft to disclose in a complete, accurate and timely manner all the Windows APIs on which Internet Explorer relies, so that non-Microsoft web browser suppliers are not at a competitive disadvantage compared to Microsoft when designing a web browser that will run on top of Windows. Microsoft can be forbidden to hinder the performance of rival web browsers through selective, inadequate, or untimely disclosures of Windows APIs.
- (434) The Commission also intends to order Microsoft to refrain from any act or conduct having the same or equivalent object or effect. In this context, Microsoft must refrain from using any technological or contractual mechanisms with the aim of presenting Internet Explorer to the user as the "preferred" web browser or from any equivalent preferential treatment of Internet Explorer in the Windows client PC operating system or in the relationships between Microsoft and third parties concerning that system.
- (435) The Commission also intends to forbid Microsoft to retaliate against any OEM or other third party for developing, using, distributing, promoting or supporting any software product that competes with Internet Explorer, in particular by altering Microsoft's commercial relations with that OEM or third party, or by withholding any monetary payment, discount or the provision of preferential licensing terms, technical, marketing, and sales support, enabling programs, product information, information about future plans, developer support, hardware or software certification or approval, or permission to display trademarks, icons or logos or any other preferential treatment.
- (436) These remedies would be designed to do away with the distribution advantage enjoyed by Internet Explorer. With such a remedy, independent software vendors (ISVs) could thus expect to find APIs of non-Microsoft web browsers on the Windows PCs and so a level playing field would be ensured.

5.1.1.4 Geographical scope

- (437) As established in paragraph (176), markets for web browsers for client PCs and operating systems for client PCs are global. More specifically, the impact of tying of Internet Explorer on content providers and software developers is worldwide due to the global nature of the internet. It can therefore not be excluded that a remedy which is to make good the negative effects of the tying of Internet Explorer on the competitive structure within the EEA will have to be applied globally.⁴²¹

5.1.1.5 The envisaged remedies are proportionate

- (438) The remedies will not hinder Microsoft's ability to market its web browser nor will they restrain its behaviour other than doing away with the artificial competitive advantage brought about by the tying of Internet Explorer. In particular, the remedies will not prevent Microsoft from offering its web browser but rather will enable competition on the merits between Microsoft's web browser and third-party products.
- (439) The remedies will also enhance users' choices. Many consumers are likely to purchase a bundle including a PC, a client PC operating system, and a web browser from an OEM. However under the remedies, the final configuration as regards the web browser will not be *de facto* imposed by Microsoft but determined by competing OEMs which, as the Court of First Instance pointed out, act as intermediaries for users,⁴²² or by the user himself. Under the remedies, the user benefit which derives from obtaining a bundle of an operating system and a web browser will therefore not be eliminated whilst the users' ability to freely choose a web browser will be restored since the user will be offered the opportunity to choose the web browser he wishes to use.
- (440) The remedies will therefore restore effective competition between different web browsers both on OEM and user level without extensively interfering either with Microsoft's product design or its distribution practices.

5.1.1.5.1 Interdependencies between Windows and Internet Explorer

- (441) Microsoft's argument relying on essential and irreversible interdependencies ~~between Windows and Internet Explorer~~ cannot be accepted as an objective justification for tying. The existence of such interdependencies is the result of a deliberate choice by Microsoft in its design of the tie.

⁴²¹ See Judgement in *Commercial Solvents*, at paragraph 33.
⁴²² Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, at paragraph 904.

- (442) Microsoft states that removing the Internet Explorer code would undermine the integrity of the operating system.⁴²³ According to Microsoft, the code bases of Windows and Internet Explorer contain interdependencies in the sense that Windows makes calls to Internet Explorer APIs or dynamically linked libraries for some functionalities.⁴²⁴
- (443) Even if this were the case, this argument is irrelevant as regards the remedies described in paragraphs (428) to (436) since only part of the code of Internet Explorer such as the user interface would have to be disabled/"locked". The dynamically linked library providing the user interface does not contain core functionality of Internet Explorer such as parsing and analysing HTML. It is thus likely that the interdependencies between Windows and the user interface of Internet Explorer would not prevent Microsoft from providing an operating system product that works seamlessly even if the said Internet Explorer code were disabled.
- (444) According to Microsoft, if the Commission ordered the removal of more Internet Explorer related code then users could, for instance, not use the Windows Help function which is based on HTML, and for which the user interface is Internet Explorer. However, it must be recalled that Microsoft started to switch to the current format for help files, namely compiled HTML, from Windows 98 onwards. Before, it used a format called the WinHelp format that Microsoft currently supports even in Windows Vista. There seems to be little technical reason to prefer compiled HTML to another format to store and display help files. Microsoft's argument that the locking of the actual code of Internet Explorer would prevent users from using Windows help files must thus be rejected.
- (445) In any event, it is technically possible for Microsoft to have Windows handle the limited absence of web browsing capabilities caused by disabling part of the code that constitutes Internet Explorer (and the resulting effect on any interdependencies) in a way that does not lead to the breakdown of operating system functionality.⁴²⁵

⁴²³ See Microsoft's submission of 5 March 2008, page 30, reply to question 9. As regards several components that have been integrated over time into Windows, Microsoft also contends that "*Excluding any of these features from Windows would impair or degrade the usability of Windows in that Windows would no longer perform the function provided by these features.*"

⁴²⁴ See Microsoft's submission of 5 March 2008, page 31, reply to question 9: "*Internet Explorer functionality provides a well-documented programming platform, relied upon by third-party programs as well as many parts of the operating system.*"

⁴²⁵ See TAEUS report, Task Nr 08-01, 08-EC001-000125, prepared for the European Commission, 29 July 2008 (sent on 30 July 2008), page 10.

- (446) While, in general, it is accurate that web browsing functionality cannot be called upon when it is not present on a client PC operating system, most of the other web browser vendors implement such functionality independently from the operating system.
- (447) There is no evidence that users could not enjoy similar functionality to that provided by Internet Explorer through a bundle of Windows and a third party web browser.
- (448) It should be noted that a US Court of Appeals in a related (but not identical) context took issue with Microsoft's commingling of web browser code with Windows to prevent OEMs and consumers from removing such web browser code from a Windows PC under the legal doctrine of monopoly maintenance. The Court of First Instance found that Microsoft had not proffered a justification for code-commingling, and concluded that Microsoft's conduct "*reduces rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system*" in an anticompetitive manner.⁴²⁶

5.1.1.5.2 Interdependencies between Internet Explorer and third party applications

- (449) According to Microsoft, content providers would be harmed by code removal as they might take advantage of some features of Internet Explorer as regards the way their content will be displayed. For example, some websites that are specifically designed for Internet Explorer since it is the most widely used web browser today cannot be rendered correctly with some other web browsers whose market share is much smaller. According to Microsoft, code removal – or disabling/"locking" – would also injure software developers who write applications that rely on Internet Explorer.
- (450) It should first be noted that even if this were true, it would not mitigate any finding of abuse of a dominant position by Microsoft pursuant to Article 82 EC. It is Microsoft's own product design choice which would have brought that situation about.
- (451) In any case, the amount of code that would be locked by Microsoft could be limited to what the user considers as being the web browser, such as the user interface. ~~Most of the code would thus still be available for third-party~~

⁴²⁶ Judgment of 28 June 2001, United States Court of Appeals for the District of Columbia Circuit, *United States v Microsoft*, No. 00-5212, on page 39.

applications to rely on. The implications of the remedy on third-party software would thus be limited.

- (452) Beyond the fact that the locking of the code can be done with a minimal impact on third-party products, the presence of Internet Explorer on a client PC operating system is not a precondition for content providers and software developers to rely on Internet Explorer's functionalities. Indeed, Microsoft's web browser can be downloaded free of charge from Microsoft's website. Moreover, if some applications need part of the code that has been disabled with Internet Explorer, Microsoft could distribute this very part of the code to developers who could then redistribute it with the program relying on it.
- (453) As regards the impact of disabling/"locking" a part of the code on content providers, it is not an unusual situation that content providers implement solutions which detect which web browser the user is currently employing, and that they foresee the necessary steps in case the presentation of their content requires a particular web browser. In their submissions to the Commission, major web portals explained that they support a list of web browsers, which means that their pages in any event check which web browser is used. Most of them already deploy web browser-specific code, in order to take advantage of a given web browser's feature or to fix bugs.⁴²⁷

5.1.1.5.3 Conclusion

- (454) Considering the long-standing abuse (from 1996 to this day), the implementation of the envisaged remedies should be intended to restore a level-playing field and enable genuine consumer choice between Internet Explorer and third-party web browsers. The remedy detailed at paragraphs (428) to (436) meets both these objectives by removing the artificial competitive advantage that the tying of Internet Explorer to Windows affords to Microsoft and by enabling the user to choose his/her web browser.
- (455) On the other hand, it has been underlined that the remedies would have a minimal impact on the functioning of the Windows client PC operating system as currently shipped by Microsoft, since only a minimum amount of code, namely the user facing aspects of Internet Explorer would have to be disabled. The impact on content providers and software developers would therefore also be limited. Furthermore, in case they wanted to make use of Internet Explorer's specific features, they could require the user to download Microsoft's web

⁴²⁷ See section 4.3.1.1.4.1.3.2.

browser from the internet, or they could be provided by Microsoft with parts of the necessary code that they could redistribute with their product.

- (456) In conclusion, the envisaged remedies appear to be proportionate since they provide corrective measures to remedy the abuse without impairing Microsoft's ability to make available its web browser on a level playing field with its competitors, with a minimal impact on third-parties.

5.2 Application of Article 23 of Regulation 1/2003

- (457) Under Article 23(2) of Regulation 1/2003, the Commission may, by decision, impose fines upon undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 82 EC and/or Article 54 of the EEA Agreement. Such fines shall not exceed 10% of the turnover in the preceding business year of the undertaking(s) participating in the infringement.
- (458) The Commission intends to impose a fine on Microsoft for illegally tying Internet Explorer with its dominant client PC operating system.
- (459) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation No 1/2003, regard shall be had both to the gravity and to the duration of the infringement. In setting the fine to be imposed, the Commission will refer to the principles laid down in its Fining Guidelines.⁴²⁸
- (460) In assessing the gravity of the infringement, the Commission will have regard to a number of factors, such as the nature of the infringement, Microsoft's market share and the geographic scope. In its assessment of the gravity in the present case, the Commission will take into account, inter alia the facts as described and assessed above, and in particular the circumstances that:
- The tying by Microsoft is by its nature a very harmful violation as it extends the ubiquity of its client PC operating system to its web browser thereby foreclosing other web browsers. The tying also has important effects on the delivery of content over the internet, a very important commercial sector at present. Content providers and software developers focus on Internet Explorer and Microsoft's proprietary technologies because they know that Internet Explorer is pre-installed on every Windows PC.

⁴²⁸ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.9.2006, p.2.

- By tying Internet Explorer to Windows, due the network effects, Microsoft increases the content and applications barriers to entry, which protect Windows.⁴²⁹ Because Internet Explorer is the least standards-compliant of the main web browsers, content and applications specifically designed for Microsoft's web browser create a lock-in of both individual and business users into Internet Explorer and therefore into Windows.
 - Microsoft has a very substantial market shares around 90% in the client PC operating system market.
 - The markets for client PC operating systems and for web browsers are at least EEA wide in scope.
- (461) In accordance with point 13 of the Fining Guidelines, in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. In the present tying case, the Commission considers that the value of sales to which the infringement directly or indirectly relates must be understood as referring to the sales of both the tying and the tied product. This applies *a fortiori* if one takes into consideration that Microsoft's strategy has been to use its dominant position on the client PC operating system market in order to foreclose the web browser market and that Microsoft's behaviour also reinforced its position on the operating system market.
- (462) The Commission also draws Microsoft's attention to paragraph 25 of the Fining Guidelines according to which an additional amount may be imposed for the purpose of establishing the basic amount.
- (463) Under the Fining Guidelines, the basic amount may be increased where the Commission finds that there are aggravating circumstances or decreased the Commission finds that there are mitigating circumstances.
- (464) In particular, the Commission draws Microsoft's attention to paragraph 28 of the Fining Guidelines: where an undertaking continues or repeats the same or a similar infringement after the Commission has made a finding that the undertaking infringed Article 81 or 82 EC the basic amount will be increased by up to 100 % for each such infringement established.

⁴²⁹ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, at paragraph 1088.

- (465) In the 2004 Decision, the Commission found that Microsoft had tied Windows Media Player to its Windows client PC operating system in contravention of Article 82 EC.
- (466) The Commission considers that for the purposes of applying paragraph 28 of the Fining Guidelines the tying Internet Explorer to Windows constitutes a similar infringement to the tying Windows Media Player to Windows which was found to be illegal in the 2004 Decision. The Commission therefore intends to increase the basic amount accordingly.
- (467) The Commission proposes to set the fine at a level sufficient to ensure deterrence. In particular, the Commission draws Microsoft's attention to paragraph 30 of the Fining Guidelines.
- (468) As regards the duration of the abuse, it has been established in paragraphs (240) to (245) that the tying started in December 1995. For the purposes of the present Statement of Objections, the Commission considers the illegal conduct to have started in 1996. The conduct is still ongoing.

6 CONCLUSION

- (469) In light of the considerations set out above, the Commission intends by a decision to:
- establish that Microsoft has infringed Article 82 EC and/or Article 54 of the EEA Agreement by the conduct outlined in this Statement of Objections,
 - impose the remedies described in this Statement of Objections on Microsoft pursuant to Article 7 of Regulation 1/2003,
 - impose a fine on Microsoft pursuant to Article 23(2)(a) of Regulation 1/2003.

Done at Brussels, 14.1.2009.

For the Commission

Neelie KROES

Member of the Commission

