

COMMISSION DECISION

of 4.3.2009

on the deletion of Article 7 of Decision 2007/53/EC relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation and repealing Decision C(2005)2988 final

(Case COMP/37.792 – Microsoft)

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, and in particular Article 7(1) thereof,

Having regard to Commission Decision 2007/53/EC of 24 March 2004 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation (Case COMP/37.792 Microsoft),² and in particular Article 7 thereof,

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

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

¹ OJ L 1, 4.1.2003, p. 1.

² OJ L 32, 6.2.2007, p. 23.

Whereas:

- (1) In Decision 2007/53/EC, the Commission found that Microsoft Corporation ("Microsoft") had infringed Article 82 of the Treaty and Article 54 of the EEA Agreement by engaging in acts that constituted various abuses of a dominant position. As a result, it imposed a fine and a number of remedies aimed at bringing to an end in an effective manner the infringement in question.
- (2) Article 7 of Decision 2007/53/EC provides for the establishment of a suitable mechanism to assist the Commission in monitoring Microsoft's compliance with that Decision, including a monitoring trustee who is independent from Microsoft.
- (3) Commission Decision C(2005)2988 final of 28 July 2005 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/37.792 Microsoft) establishes a monitoring mechanism including the appointment of a monitoring trustee.
- (4) On 7 June 2004, Microsoft lodged an application for the annulment of the Decision 2007/53/EC with the Court of First Instance of the European Communities.
- (5) The judgment of the Court of First Instance of 17 September 2007 in Case T-201/04,³ partially annulled Article 7 of Decision 2007/53/EC and dismissed the remainder of Microsoft's application for annulment.
- (6) In paragraph 1 of the operative part of that judgment, the Court of First Instance annuls Article 7 of Decision 2007/53/EC in so far as:
 - "– it orders Microsoft to submit a proposal for the establishment of a mechanism which is to include a monitoring trustee with the power to have access, independently of the Commission, to Microsoft's assistance, information, documents, premises and employees and to the source code of the relevant Microsoft products;
 - it requires that the proposal for the establishment of that mechanism provide that all the costs associated with the appointment of the monitoring trustee, including his remuneration, be borne by Microsoft; and
 - it reserves to the Commission the right to impose by way of decision a mechanism such as that referred to in the first and second indents above".
- (7) The Court of First Instance held that: "[...] by establishing a monitoring mechanism involving the appointment of an independent monitoring trustee as referred to in Article 7 of the contested decision, and charged with the functions set out, in particular, at recital 1048(iii) and (iv) to that decision, the Commission went far beyond the situation in which it retains its own external expert to provide advice when it investigates the implementation of the remedies prescribed in Articles 4, 5 and 6 of the contested decision."⁴

³ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601.

⁴ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraph 1268.

- (8) Furthermore, the Court of First Instance held that: "[...]The second subparagraph of Article 7 of the contested decision is [...] without legal basis, particularly in so far as it entails the delegation to the monitoring trustee of powers of investigation which the Commission alone can exercise pursuant to Regulation No 17."^{5 6}
- (9) As regards the bearing of the costs associated with the appointment of the monitoring trustee the Court of First Instance found that: "There is no provision of Regulation No 17 that authorises the Commission to require an undertaking to bear the costs which the Commission incurs as a result of monitoring the implementation of remedies."⁷
- (10) In view of that judgment and pursuant to Article 233 of the Treaty, the Commission reimburses Microsoft for all the costs associated with the appointment of the monitoring trustee, including his remuneration borne by Microsoft.
- (11) In addition, from the date of the judgment in Case T-201/04, any work performed by monitoring trustee under the monitoring mechanism has been funded by the Commission through the general budget of the European Communities and that expenditure has been incurred in accordance with Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities ('the Financial Regulation')⁸.
- (12) The Commission has now gained more than a year of experience with the new methods of funding the monitoring mechanism as provided for in Decision 2007/53/EC.
- (13) It should be noted that the monitoring mechanism as established by Decision C(2005)2988 comprises a monitoring trustee and a sufficient number of staff together with the necessary technical equipment for monitoring Microsoft's compliance with Decision 2007/53/EC.
- (14) In view of the legal obligations as regards the procurement of monitoring services imposed by the Financial Regulation, it has to be concluded that the monitoring mechanism, as established by Decision C(2005)2988, is no longer appropriate for the purpose of monitoring Microsoft's compliance with Decision 2007/53/EC.
- (15) In addition, a similar quality of technical advice as that provided by the monitoring trustee is available through external technical experts, by means of contracts concluded from time to time in accordance with the Financial Regulation.

⁵ At the time of the adoption of Decision 2007/53/EC, Regulation No 17/62 (OJ P 13, 21.2.1962, p. 204) was still in force, whereas Regulation (EC) No 1/2003, which replaced it, became applicable on 1 May 2004.

⁶ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraph 1271.

⁷ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, paragraph 1274.

⁸ OJ L 248, 16.9.2002, p. 1.

- (16) Accordingly, the Commission has decided to rely in future, to the extent necessary, on external technical experts to assist it in monitoring Microsoft's compliance with Decision 2007/53/EC.
- (17) Accordingly, Article 7 of Decision 2007/53/EC should be deleted and Decision C(2005)2988 final should be repealed,

HAS ADOPTED THIS DECISION:

Article 1

Article 7 of Decision 2007/53/EC is deleted.

Article 2

Decision C(2005)2988 final is repealed.

Article 3

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

Done at Brussels, 4.3.2009

For the Commission
Neelie KROES
Member of the Commission