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ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
22 December 2004 (1)

(Proceedings for interim relief – Article 82 EC)

In Case T-201/04 R,

Microsoft Corporation, established in Redmond, Washington (United States of America), represented by J.-F. Bellis, lawyer, and I.S. Forrester QC,

applicant,

supported by

The Computing Technology Industry Association, Inc., established in Oakbrook Terrace, Illinois (United States of America), represented by G. van Gerven and T. Franchoo, lawyers, and B. Kilpatrick, Solicitor,

Association for Competitive Technology, Inc., established in Washington, DC (United States of America), represented by L. Ruessmann and P. Hecker, lawyers,

TeamSystem SpA, established in Pesaro (Italy),

Mamut ASA, established in Oslo (Norway),

represented by G. Berrisch, lawyer,

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),

Tandberg Television Ltd, established in Southampton, Hampshire (United Kingdom),

represented by J. Bourgeois, lawyer,

Exor AB, established in Uppsala (Sweden), represented by S. Martínez Lage, H. Brokelmann and R. Allendesalazar Corcho, lawyers,

interveners,

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,

supported by

RealNetworks, Inc., established in Seattle, Washington (United States of America), represented by A. Winckler, M. Dolmans and T. Graf, lawyers,

Software & Information Industry Association, established in Washington, DC, represented by C.A. Simpson, Solicitor,

Free Software Foundation Europe eV, established in Hamburg (Germany), represented by C. Piana, lawyer,

interveners,

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

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

The background to the dispute

- 1 Microsoft Corporation ('Microsoft') develops and markets a variety of software products, including, in particular, operating systems for servers and 'client PCs'.
- 2 On 10 December 1998, Sun Microsystems Inc. ('Sun Microsystems'), a company established in California (United States of America) which supplies inter alia server operating systems, lodged a complaint with the Commission. In its complaint, Sun Microsystems criticised Microsoft's refusal to disclose to it the technology necessary to allow interoperability of its work group server operating system with the Windows Client PC operating system. Sun Microsystems claimed that the technology which it requested was necessary to allow it to compete on the work group server operating system market.
- 3 On 2 August 2000, the Commission sent Microsoft a statement of objections. That statement of objections related essentially to certain issues concerning interoperability between Windows Client PC operating systems and the server operating systems of other suppliers ('client-to-server interoperability'). Microsoft replied to that first statement of objections on 17 November 2000.
- 4 On 29 August 2001, the Commission sent Microsoft a second statement of objections, in which it repeated its previous objections concerning client-to-server interoperability. It also raised a number of issues concerning interoperability between work group servers ('server-to-server interoperability'). Finally, the Commission raised certain issues relating to the integration of the Windows Media Player software in the Windows operating system. Notification of this latter objection resulted from an investigation launched in February 2000 at the Commission's initiative. Microsoft replied to the second

statement of objections on 16 November 2001.

- 5 On 6 August 2003, the Commission sent Microsoft a statement of objections designed to supplement the two previous statements of objections. Microsoft replied to this supplementary statement of objections by letters of 17 and 31 October 2003.
- 6 A hearing was held by the Commission on 12, 13 and 14 November 2003. By letter of 1 December 2003, Microsoft lodged written observations on the issues which had been raised during the hearing by the Commission, the complainant and interested third parties. Following a final exchange of correspondence between the Commission and Microsoft, the Commission adopted, on 24 March 2004, a decision relating to a proceeding under Article 82 EC in Case COMP/C-3/37.792 – Microsoft ('the Decision').

The Decision

- 7 According to the Decision, Microsoft infringed Article 82 EC and Article 54 of the Agreement on the European Economic Area ('EEA') by reason of two abuses of a dominant position.
- 8 The Commission first identified three distinct product markets and found that Microsoft had a dominant position on two of them. The Commission then identified two types of abusive conduct by Microsoft on those markets. Consequently, the Commission imposed a fine and a number of remedies on Microsoft.

I – The relevant markets identified in the Decision and Microsoft's dominant position on two of those markets

The relevant markets identified in the Decision

- 9 The first product market identified in the Decision is the client PC operating system market (recitals 324 to 342). An operating system is a software product which controls the basic functions of a computer and allows the user to use the computer and to run applications on it. Client PCs are multifunctional computers designed to be used by one person at a time and may be linked to a network.
- 10 The second product market identified in the Decision is the work group server operating system market (recitals 343 to 401). The Decision defines 'work group services' as the basic network infrastructure services used by office workers in their day-to-day work for three sets of distinct services, namely sharing files stored on servers, sharing printers, and the 'administration' of the manner in which users and groups of users can access network services ('group and user administration') (recital 53). This latter set of services consists in particular in ensuring that users can access and use the network resources securely, by, inter alia, first authenticating users and then checking that they are authorised to perform a given action (recital 54).
- 11 According to the Decision, the three sets of services identified in the preceding paragraph are closely interrelated within server operating systems (recital 56). The Decision adds in that regard that 'work group server operating systems' are operating systems designed and marketed to deliver those three sets of services collectively to a relatively small number of client PCs linked together in a small to medium-sized network (recitals 53 and 345 to 368). The Decision also states that the absence of demand-side substitutable products is confirmed by Microsoft's pricing strategy (recitals 369 to 382) and by the importance of the interoperability of work group server operating systems with client PCs (recitals 383 to 386). Having, moreover, established that the existence of supply-side substitutable products was limited for work group server operating systems (recitals 388 to 400), the Commission concluded that those operating systems form a distinct product market.
- 12 The third market identified in the Decision is the streaming media players market (recitals 402 to 425). A media player is a software product capable of reading sound and image content in digital format, i.e. of decoding the corresponding data and translating them into instructions for hardware (loudspeakers, screen). Streaming media players are capable of reading content 'streamed' over the Internet.

- 13 In the Decision, the Commission found, first, that a streaming media player is a product distinct from an operating system (recitals 404 to 406), second, that such products are under no competitive pressure from non-streaming players (recitals 407 to 410), third, that only media players with similar functionalities exert competitive constraints on Windows Media Player (recitals 411 to 415), and, fourth, essentially, that the presence of supply-side substitutable products is limited (recitals 416 to 424). The Commission concluded from those factors that streaming media players constitute a distinct product market.
- 14 As regards the geographic dimension of the three product markets previously identified, the Commission found that the relevant geographic market was world-wide (recital 427).

Microsoft's dominant position on the client PC operating system market and on the work group server operating system market

- 15 First, on the client PC operating system market, the Commission found that Microsoft has, at least since 1996, held a dominant position by virtue, inter alia, of the fact that it holds market shares in excess of 90% (recitals 430 to 435), and of the very significant barriers to entry attributable to indirect network effects (see, in particular, recitals 448 to 452). The Commission states in the Decision that those indirect network effects are attributable to two factors: (i) the fact that end consumers appreciate platforms on which they can use a large number of applications and (ii) the fact that software designers develop applications for the PC operating systems that are most popular with consumers.
- 16 Second, on the work group server operating system market, the Commission found that, at a conservative estimate, Microsoft's share of that market is at least 60% (recitals 473 to 499).
- 17 The Commission also evaluated the position of Microsoft's three main competitors on that market. First, it found that Novell, with its NetWare software, held a market share of between 10% and 15%. Second, Linux products accounted for a market share of between 5% and 15%. Linux is a 'free' operating system distributed under a GNU General Public Licence ('GNU GPL'). According to recital 87 to the Decision, Linux provides a limited set of core tasks of an operating system but may be combined with other software to form a 'Linux operating system'. Linux is present on the work group server operating system market in association with Samba software, which is also distributed under a 'GNU GPL' licence (recitals 294, 506 and 598). Third, UNIX products, which comprise several operating systems sharing certain common features (recital 42), account for a market share in the order of 5% to 15%.
- 18 The Commission then found that the work group server operating system market is characterised by the existence of numerous barriers to entry (recitals 515 to 525) and by particular links to the client PC operating system market (recitals 526 to 540). The Commission concluded that Microsoft holds a dominant position on the work group server operating system market.

II – Types of abusive conduct identified in the Decision

Refusal identified in the Decision

- 19 The first type of abusive conduct by Microsoft, described at recitals 546 to 791 to the Decision, consists in Microsoft's refusal to provide its competitors with 'interoperability information' and to allow its use for the purpose of developing and distributing products competing with Microsoft's own products on the work group server operating system market from October 1998 until the date of the Decision (Article 2 (a) of the Decision). For the purpose of the Decision, 'interoperability information' means 'the complete and accurate specifications for all the Protocols implemented in Windows Work Group Server Operating Systems and ... used by Windows Work Group Servers to deliver file and print services and group and user administration services, including the Windows Domain Controller services, Active Directory services and Group Policy services, to Windows Work Group Networks' (Article 1(1) of the Decision). 'Protocols' are defined as 'a set of rules of interconnection and interaction between various instances of Windows Work Group Server Operating Systems and Windows Client PC Operating Systems running on different computers in a Windows Work Group Network' (Article 1(2) of the Decision).
- 20 For the purpose of identifying such conduct, the Decision emphasises in particular that the refusal in issue does not relate to elements of Microsoft's source code but solely to specifications for the protocols

in question, a specification being a description of what is expected from the software in question, in contrast to 'implementations' (also referred to, for purposes of the present order, as 'realisations'), constituted by the running of the code on the computer (recitals 24 and 569). The Commission also found that Microsoft's conduct was part of a general pattern of conduct (recitals 573 to 577), that it involved a disruption from previous levels of supply (recitals 578 to 584), that it created a risk that competition might be eliminated (recitals 585 to 692), and that it had a negative effect on technical development, to the prejudice of consumers (recitals 693 to 708). The Commission also rejected Microsoft's arguments that there was objective justification for its refusal (recitals 709 to 778).

Tying identified in the Decision

- 21 The Commission identified a second type of abusive conduct on Microsoft's part, which is described at recitals 792 to 989 to the Decision. According to the Commission, that conduct consisted in the fact that Microsoft made the availability of the Windows Client PC operating system conditional on the simultaneous acquisition of Windows Media Player from May 1999 until the date of the Decision (Article 2(b) of the Decision).
- 22 In that regard, the Commission found that Microsoft's conduct satisfied the conditions for a finding that there had been abusive tying for the purposes of Article 82 EC (recitals 794 to 954). First, according to the Decision, Microsoft has a dominant position on the market for client PC operating systems (recital 799). Second, streaming media players and client PC operating systems are regarded in the Decision as being two separate products (recitals 800 to 825). Third, Microsoft does not make it possible for consumers to buy Windows without Windows Media Player (recitals 826 to 834). Fourth, the tying which the Commission had identified affects competition in the market for media players (recitals 835 to 954).
- 23 In ascertaining whether that fourth condition was satisfied, the Commission pointed out that in classical tying cases the Commission and the Community judicature 'considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product' (recital 841). The Commission, however, considered in the Decision that, as users to a certain extent obtained media players in competition with Windows Media Player through the Internet, sometimes free of charge, there were in the present case good reasons not to assume without further analysis that tying Windows Media Player constituted conduct which by its very nature was liable to foreclose competition (recital 841).
- 24 In the context of that further analysis, the Commission found, first, that the tying in question afforded Windows Media Player ubiquity on client PCs world-wide which could not be affected by alternative distribution channels (recitals 843 to 877), second, that that ubiquity gave content providers an incentive to distribute their content in Windows Media formats and software developers an incentive to develop their products in such a way as to rely on certain functionalities of Windows Media Player (recitals 879 to 896), third, that that ubiquity affected certain related markets (recitals 897 to 899) and, finally, fourth, that the available market studies invariably pointed to a tendency in favour of the use of Windows Media Player and Windows Media formats to the detriment of its main competitors (recitals 900 to 944). From those various considerations, the Commission concluded that there was a reasonable likelihood that the tying in question would lead to a lessening of competition so that the maintenance of an effective competition structure would no longer be ensured in the foreseeable future (recital 984).
- 25 Finally, the Commission rejected Microsoft's arguments, first, that the tying in question resulted in increased efficiencies such as to offset the anti-competitive effects identified by the Commission (recitals 955 to 970) and, second, that it did not provide incentives to restrict competition (recitals 971 to 977).

III – The remedies and fine imposed on Microsoft

- 26 The two abuses which the Commission identified in the Decision were penalised by the imposition of a fine amounting to EUR 497 196 304 (Article 3 of the Decision).
- 27 Moreover, Microsoft was required, under Article 4 of the Decision, to bring to an end the abuses established 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 from any act or conduct having the same or equivalent object or effect.

28 By way of remedy for the abusive refusal identified in the Decision, Article 5 of the Decision orders Microsoft to act as follows:

'(a) Microsoft ... 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 ... shall ensure that the interoperability information made available is kept updated on an ongoing basis and in a timely manner;

(c) Microsoft ... 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 ... may impose reasonable and non-discriminatory conditions to ensure that access to the interoperability information is granted for evaluation purposes only;

...'

29 The 120-day period referred to in Article 5 of the Decision expired on 27 July 2004.

30 By way of remedy for the abusive tying identified in the Decision, Article 6 of the Decision orders as follows:

'(a) Microsoft ... 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 ... retains the right to offer a bundle of the Windows Client PC operating system and Windows Media Player;

...'

31 The 90-day period referred to in Article 6 of the Decision expired on 28 June 2004.

Proceedings for breach of United States antitrust law

32 Concurrently with the investigation conducted by the Commission, Microsoft was the subject of an investigation for breach of United States antitrust legislation.

33 In 1998, the United States of America and 20 Federal States brought proceedings against Microsoft under the Sherman Act. Their complaints related to the measures taken by Microsoft against Netscape's Internet browser 'Netscape Navigator' and Sun Microsystems' Java technologies. The 20 Federal States in question also brought actions against Microsoft for breach of their own antitrust laws.

34 After the United States Court of Appeals for the District of Columbia Circuit ('the Court of Appeals'), to which Microsoft had appealed against the judgment delivered on 3 April 2000 by the United States District Court for the District of Columbia ('the District Court'), delivered its judgment on 28 June 2001, Microsoft reached a settlement in November 2001 with the United States Department of Justice and the Attorneys General of nine States ('the United States Settlement'), under which Microsoft entered into two types of commitment.

35 First, Microsoft agreed to establish document specifications for the communications protocols used by Windows server operating systems in order to 'interoperate', i.e. render those systems compatible, with

Windows Client PC operating systems, and to license those specifications to third parties on defined terms.

- 36 Second, the United States Settlement provided that Microsoft was to allow original equipment manufacturers ('OEMs') and end consumers to enable or remove access to its middleware products. The Windows Media Player software is one of the products belonging to that category, as defined in the United States Settlement. Those provisions are designed to ensure that middleware suppliers will be able to develop and distribute products which function correctly with Windows.
- 37 Those terms were approved on 1 November 2002 by the District Court, which also rejected the remedy proposals made by the nine States which had not accepted the United States Settlement.
- 38 Upon appeal by the State of Massachusetts, the Court of Appeals on 30 June 2004 upheld the District Court's decision.
- 39 In order to give effect to the United States Settlement, the Microsoft Communications Protocol Program ('the MCPP') was put in place in August 2002. According to the documents produced before the Court of First Instance, 17 licensees benefited from the MCPP between August 2002 and July 2004.

Procedure

- 40 By application lodged at the Registry of the Court of First Instance on 7 June 2004, Microsoft brought an action under the fourth paragraph of Article 230 EC for annulment of the Decision or, in the alternative, annulment of or a substantial reduction in the fine.
- 41 By separate document lodged at the Court Registry on 25 June 2004, Microsoft also applied under Article 242 EC for suspension of operation of Articles 4, 5(a) to (c) and 6(a) of the Decision. By that document Microsoft also sought, on the basis of Article 105(2) of the Court's Rules of Procedure, suspension of operation of those provisions pending a decision on the application for interim relief.
- 42 On the same date, the President of the Court of First Instance, in his capacity as judge dealing with the application for interim relief, requested the Commission to state whether it intended to enforce the Decision before an order had been made on the application for interim relief.
- 43 By letter received at the Court Registry on 25 June 2004, the Commission informed the President of its decision not to enforce Articles 5(a) to (c) and 6(a) of the Decision while the application for interim relief was pending.
- 44 By application lodged at the Court Registry on 25 June 2004, Novell Inc. ('Novell'), established in Waltham, Massachusetts (United States of America), represented by C. Thomas, M. Levitt and V. Harris, Solicitors, and A. Müller-Rappard, lawyer, requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.
- 45 By application lodged at the Court Registry on 30 June 2004, RealNetworks Inc. ('RealNetworks') requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.
- 46 By application lodged at the Court Registry on 30 June 2004, Computer & Communications Industry Association ('CCIA'), established in Washington, DC (United States of America), represented by J. Flynn QC, D. Paemen and N. Dodoo, lawyers, requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.
- 47 By application lodged at the Court Registry on 1 July 2004, Software & Information Industry Association ('SIIA') requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.
- 48 By application lodged at the Court Registry on 1 July 2004, The Computing Technology Industry

Association Inc. ('CompTIA') requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.

- 49 By application lodged at the Court Registry on 2 July 2004, The Association for Competitive Technology ('ACT') requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.
- 50 By application lodged at the Court Registry on 5 July 2004, Digimpro Ltd, established in London (United Kingdom), TeamSystem SpA, Mamut ASA and CODA Group Holdings Ltd, established in Chippenham, Wiltshire (United Kingdom), requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.
- 51 By application lodged at the Court Registry on 5 July 2004, DMDsecure.com BV, MPS Broadband AB, Pace Micro Technology plc, Quantel Ltd and Tandberg Television Ltd (hereinafter referred to collectively as 'DMDsecure.com and Others') requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.
- 52 By application lodged at the Court Registry on 8 July 2004, IDE Nätverkskonsulterna AB, established in Stockholm (Sweden), Exor AB, 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), requested leave to intervene in support of the form of order sought by Microsoft in the interim relief proceedings.
- 53 By application lodged on 13 July 2004, Free Software Foundation Europe ('FSF-Europe') requested leave to intervene in support of the form of order sought by the Commission in the interim relief proceedings.
- 54 In accordance with Article 116(1) of the Rules of Procedure, those applications for leave to intervene were served on the applicant and the defendant, which, depending on the case, either submitted their observations within the prescribed periods or did not submit any observations. By letters of 6 and 8 July 2004, Microsoft requested confidential treatment vis-à-vis such parties as should be granted leave to intervene for the data contained in the Decision which the Commission had accepted would not be made public in the version available on its Internet site.
- 55 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.
- 56 By order of 26 July 2004, the President of the Court of First Instance granted leave to intervene to CompTIA, ACT, TeamSystem SpA, Mamut ASA, DMDsecure.com and Others, Exor AB, Novell, RealNetworks, CCIA and SIIA and dismissed the applications for leave to intervene submitted by Digimpro Ltd, CODA Group Holdings Ltd, IDE Nätverkskonsulterna AB, T. Rogerson, P. Setka, D. Tomicic, M. Valasek, R. Rialdi and B. Nati. The President of the Court of First Instance also ordered that the non-confidential version of the procedural documents be forwarded to the interveners and reserved his decision on the merits of the request for confidential treatment.
- 57 On 27 July 2004, the President of the Court of First Instance, in his capacity as judge dealing with the application for interim relief, organised an informal meeting which, in addition to Microsoft and the Commission, the parties granted leave to intervene by the order of the President of the Court of First Instance of 26 July 2004 and also FSF-Europe were invited to attend. At that meeting the President provisionally granted leave to FSF-Europe to intervene in the interim relief proceedings in support of the form of order sought by the Commission and set out for the parties the timetable for the various procedural stages in the present interim relief proceedings.
- 58 By order of 6 September 2004, FSF-Europe was granted leave to intervene in support of the form of order sought by the Commission.
- 59 Each of the parties granted leave to intervene lodged its observations within the periods prescribed.

- 60 In accordance with what had been decided at the informal meeting on 27 July 2004, Microsoft replied on 19 August 2004 to the Commission's observations of 21 July 2004.
- 61 By application lodged on 31 August 2004, Audiobanner.com, trading as VideoBanner ('Videobanner'), established in Los Angeles, California (United States of America), represented by L. Alvisar Ceballos, lawyer, requested leave to intervene in the interim relief proceedings in support of the form of order sought by the Commission. As neither of the two main parties objected to that application for leave to intervene, VideoBanner was provisionally granted leave to intervene and was requested to submit its observations directly at the hearing.
- 62 In reply to Microsoft's observations of 19 August 2004, the Commission lodged fresh observations on 13 September 2004.
- 63 The applicant and the defendant also lodged their written observations on the statements in intervention on 13 September 2004.
- 64 By way of measures of organisation of procedure, the President of the Court of First Instance, in his capacity as judge dealing with the application for interim relief, put written questions to Microsoft, the Commission and a number of the interveners. The replies given to those questions within the periods prescribed were notified to all of the parties.
- 65 All of the parties, including VideoBanner, presented oral argument at a hearing held on 30 September 2004 and 1 October 2004.
- 66 By letter of 8 October 2004, RealNetworks lodged at the Registry a number of additional details which the President had requested it to produce at the hearing. The other parties received notification of that letter and were invited to submit their observations on it.
- 67 By letter of 27 October 2004, Microsoft submitted observations on RealNetwork's letter of 8 October 2004. None of the other parties submitted observations.
- 68 By letters of 10 November and 19 November 2004 respectively, CCIA and Novell informed the Court that they were withdrawing their intervention in the present case. The Commission, Microsoft and the interveners submitted their observations on those withdrawals within the period prescribed.
- 69 Following the withdrawals of CCIA and Novell, an informal meeting was held on 25 November 2004 in the presence of all the parties in order to address certain procedural consequences of those withdrawals. The minutes of that meeting were forwarded to all the parties on 26 November 2004.

Law

- 70 Under the combined provisions of Articles 242 EC and 225(1) EC, the Court of First Instance may, if it considers that the circumstances so require, order that application of a contested act be suspended.
- 71 Article 104(2) of the Rules of Procedure provides that an application for interim relief must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim relief must be dismissed if any one of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK v Commission* [1996] ECR I-4971, paragraph 30). Where appropriate, the judge hearing an application for interim relief must also weigh up the interests involved (order of the President of the Court of Justice in Case C-445/00 R *Austria v Council* [2001] ECR I-1461, paragraph 73).
- 72 In the context of that overall examination, the judge dealing with the application must exercise the broad discretion which he enjoys when determining the manner in which those various conditions are to be examined in the light of the specific circumstances of each case (order of the President of the Court of Justice in Case C-393/96 P(R) *Antonissen v Council and Commission* [1997] ECR I-441, paragraph

28).

- 73 Article 107(1) of the Rules of Procedure states that '[t]he decision on the application shall take the form of a reasoned order'. It has, however, been held that a judge dealing with an application for interim relief cannot be required to reply explicitly to all the points of fact and law raised in the course of the interim proceedings. In particular, it is sufficient that the reasons given by the judge dealing with the application at first instance validly justify his order in the light of the circumstances of the case and enable the Court of Justice to exercise its powers of review (order in *SCK and FNK v Commission*, cited at paragraph 71 above, paragraph 52, and order of the President of the Court of Justice in Case C-159/98 P(R) *Netherlands Antilles v Council* [1998] ECR I-4147, paragraph 70).
- 74 Because the abuses of a dominant position which Microsoft is alleged to have committed are mutually distinct, as may be seen, moreover, from both the structure of the Decision and the way in which Microsoft has marshalled its arguments, the President considers it appropriate to examine separately the arguments developed in support of the application for suspension of operation of Article 5(a) to (c) of the Decision, read with Article 4 of the Decision (the section dealing with the interoperability information issue), and the arguments developed in support of the application for suspension of operation of Article 6(a) of the Decision, also read with Article 4 (the section dealing with the issue of the tying of the Windows operating system and the Windows Media Player software). Before doing so, however, the President will consider the request for confidential treatment, VideoBanner's application for leave to intervene, the effects of the withdrawal of CCIA and Novell, and also whether the applicant complied with certain procedural requirements relating to the written submissions.

I – *The request for confidential treatment*

- 75 At the stage of the interim relief proceedings, it is appropriate to grant confidential treatment, vis-à-vis the parties granted leave to intervene, for the data contained in the Decision which the Commission has accepted should not be made public in the version available on its Internet site, since such information is prima facie liable to be regarded as being secret or confidential within the terms of Article 116(2) of the Rules of Procedure.

II – *VideoBanner's application for leave to intervene*

- 76 As noted at paragraph 61 above, VideoBanner lodged an application for leave to intervene in the interim-relief proceedings in support of the form of order sought by the Commission.
- 77 As that application was made in accordance with Article 115(2) of the Rules of Procedure and the main parties have not raised any objections, it must be granted, pursuant to 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 thereof.

III – *The effects of the withdrawal of certain interveners*

- 78 As CCIA and Novell informed the Court that they were withdrawing their intervention in support of the form of order sought by the Commission in the interim relief proceedings, the President of the Court, in his capacity as judge dealing with the application, organised an informal meeting in the presence of all the parties to examine some procedural consequences of their withdrawal.
- 79 As is clear from the minutes of that meeting, the parties agreed, first, that the documents lodged by CCIA and Novell in the interim relief proceedings, including all annexes to their written submissions, and the arguments presented at the hearing should remain part of the file for purposes of the present interim relief proceedings; second, that all the parties should be able to rely on those matters for the purposes of their arguments and the President should be able to rely on them for his appraisal; and, third, that all the parties had had an opportunity to present argument in respect of all material placed on the file in the present case.
- 80 RealNetworks, moreover, submitted in its observations on CCIA's withdrawal that CCIA did not have the power to withdraw in the present case.

81 The President takes the view in this regard that it is not for him to examine RealNetworks' objection in so far as, first, he has no jurisdiction to adjudicate on whether the decisions of the Board of CCIA were taken in accordance with the provisions of its articles and, second, the application to withdraw was submitted by CCIA in accordance with the requirements laid down in the Rules of Procedure of the Court of First Instance.

IV – Compliance with the procedural requirements governing the written documentation

82 The Commission and a number of the parties intervening in support of the form of order which it is seeking have claimed, first, that certain references to documents annexed to Microsoft's main application are inadmissible; second, that certain documents produced by Microsoft in the course of the present proceedings are inadmissible; third, that there is no evidence to support a number of assertions; and, fourth, that the applicant has failed to comply with other procedural requirements.

The references to the main application

83 In its observations of 21 July 2004, the Commission listed the paragraphs of the application for interim relief which contain references to the main application and to the documents annexed to that application but not annexed to the application for interim relief (Annexes A.9, A.9.1, A.9.2., A.11, A.12.1, A.17, A.18, A.19, A.20, A.21, A.22 and A.24). The Commission concludes that Microsoft cannot effectively rely on those documents.

84 In its observations of 13 September 2004, the Commission added that the new references to the main application which Microsoft made in its observations of 19 August 2004, in particular with regard to the agreement of the World Trade Organisation (WTO) on the trade-related aspects of intellectual property rights ('the TRIPS Agreement') must, like the preceding ones, be excluded. To attach the corresponding sections of the main application as an annex (Annex T.9) to the observations does not allow the conclusion to be drawn that the application for interim relief is self-sufficient.

85 It must be borne in mind in this regard that, at the informal meeting held on 27 July 2004 (see paragraph 57 above), the President drew Microsoft's attention to the large number of references to the main application contained in the application for interim relief and questioned the applicant on that point. As recorded in the minutes of that meeting: '[Microsoft] confirmed that its application for interim measures should be seen as self-sufficient and that the multiple references made in its application for interim measures to annexes to the application in the main case could be ignored for the purposes of the interim measures proceedings'.

86 That position is in accordance with Part VII(1) of the Practice Directions (OJ 2002 L 87, p. 48), which provides that an application for interim relief 'must be intelligible in itself, without necessitating reference to the application lodged in the main proceedings'.

87 It follows that the merits of Microsoft's application for interim relief can be assessed only by reference to the elements of fact and law as they emerge from the application for interim relief itself and from the documents annexed to that application and intended to illustrate its content (see, to that effect, the order of the President of the Court of First Instance in Case T-306/01 R *Aden and Others v Council and Commission* [2002] ECR II-2387, paragraph 52). While it cannot be concluded that every assertion based on a document that is not annexed to the application for interim relief must necessarily be excluded from the proceedings, the fact remains that evidence to support such an assertion cannot be regarded as having been adduced if the assertion in question is challenged by the other party to the proceedings or by a party intervening in support of that other party.

88 So far as the reference to Annex T.9 is concerned, it must be borne in mind that, while an application may be supported and supplemented on specific points by references to particular passages in documents which are annexed to it, a general reference to other documents, even if they are annexed to the application for interim relief, cannot make up for the absence of essential elements in that application (order in *Aden and Others v Council and Commission*, paragraph 87 above, paragraph 52). It is necessary to point out in this regard that Part VII(2) of the Practice Directions, which requires that 'the pleas of fact and law on which the main action is based (establishing a prima facie case on the merits in that action)' be stated 'with the utmost concision', cannot, without circumventing that rule, be

construed as permitting the general reference to an annexed document setting out the details of the argument.

- 89 Without prejudice to the documents placed subsequently on the case-file and the oral submissions at the hearing before the President, the decision in the present proceedings will be taken without reference to either the annexes to the main application or Annex T.9.

The production of documents in the course of the proceedings

- 90 In its observations of 13 September 2004, the Commission maintains, first, that the arguments which Microsoft had put forward in its observations of 19 August 2004, in particular those relating to intellectual property rights set out in detail in two separate annexes (Annex T.3, entitled 'Prescott, Opinion', and Annex T.6, entitled 'Galloux, Opinion'), went beyond those set out in the main application. Nor was any explanation provided as to why Annex T.3, a document dated 3 June 2004, was not produced as an annex when the application for interim relief was made.
- 91 The Commission then states that Microsoft annexed to its observations of 19 August 2004 a document which it had annexed to the main application (Annex A.21, which became Annex T.5, Knauer, 'Aspects of Patent Law of the [Decision]', and a document the content of which appears to be similar to that of an annex to the main application (Annex T.8, Evans, Nichols and Padilla 'Economic Evidence on the Foreclosure Issues Raised by the Commission's Refusal to Supply and Tying Claims', similar to Annex A.19).
- 92 In their replies to the written questions put by the Court before their withdrawal, Novell and CCIA stated that certain documents are inadmissible inasmuch as they ought to have been produced along with the application for interim relief, whereas they were produced only subsequently (Annexes T.3, T.5, T.8 and U.2, Campbell-Kelly, 'Commentary on Innovation in Active Directory').
- 93 The President finds that documents T.3, T.5, T.6 and T.8 were annexed to Microsoft's observations of 19 August 2004 and that they are intended to support the content of those observations. Microsoft cannot therefore, in those circumstances, be criticised for having replied in detail to the arguments which the Commission had put forward in its observations of 21 July 2004; little significance attaches in this regard to the fact that the document annexed bears a date prior to that on which the application for interim relief was lodged or that it is identical or comparable to a document annexed to the main application. Likewise, for the same reasons, Microsoft could validly use Annex U.2 as a basis for its observations on the statements in intervention.

The lack of evidence

- 94 The Commission points out that Annex T.5 and Annex T.8 are based on information to which it has not had access (paragraph 4 of Annex T.5 refers to information received from Microsoft, without further specification; in the case of Annex T.8, the reports referred to in paragraph 6 thereof (prepared by Merrill Lynch and Forrester and dealing with server market data) are not attached, as is the case with regard to those referred to in footnote 35 (surveys conducted by Microsoft), footnotes 42 and 43 ('Digital Media Tracker Survey'), footnote 48 ('Analysis of Media Players Installed on PCs') and footnote 50 ('NERA submission')).
- 95 It is sufficient in this regard to point out that it is for the judge dealing with the application for interim relief to determine, as appropriate, whether the assertions based on the above reports and information are lacking in probative value.

The failure to comply with certain other procedural requirements

- 96 The Commission and CCIA, prior to its withdrawal, submit that Microsoft refers in its application for interim relief to Annex R.6 (Carboni, 'Trade Marks Opinion'), without explaining the relevance of the document in question, and that no account should therefore be taken of that annex.
- 97 As already pointed out at paragraph 88 above, the general reference to other documents, even if they

are annexed to the application for interim relief, cannot make up for the absence of the essential elements in that application. In the present case, Annex R.6, to which the application for interim relief refers, is used to support an argument concerning the risk of harm to Microsoft's trade marks, which reads as follows: '[t]he immediate implementation of Article 6(a) of the Decision would also cause serious injury to the valuable Microsoft and Windows trademarks because Microsoft would be required to sell a downgraded product inconsistent with its basic design concept.' In so far as it is sufficiently clear from this phrase that Annex R.6 is intended to illustrate the risk identified, the President considers that that annex should not be excluded from the proceedings.

V – Substance

The interoperability information issue

A – Arguments of the parties

1. Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it seeks

(a) A prima facie case

- 98 Microsoft states that there is a serious dispute between it and the Commission regarding the compulsory licensing of its communications protocols, with the consequence that the requirement that it demonstrate a prima facie case as to the illegality of Article 5(a) to (c) of the Decision is satisfied.
- 99 Microsoft maintains that the four criteria which must be satisfied before an undertaking can be required to license its products, as defined by the Court of Justice in Case 238/87 *Volvo* [1988] ECR 6211, Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-743 ('*Magill*'), C-7/97 *Bronner* [1998] ECR I-7791 and judgment of 29 April 2004 in Case C-418/01 *IMS Health*, not yet reported, are not satisfied in the present case.
- 100 First, the intellectual property that the Decision would require Microsoft to deliver to its competitors is not indispensable for the purposes of carrying on a business as a supplier of work group server operating systems.
- 101 First of all, Microsoft claims that there are five ways of achieving interoperability between operating systems supplied by different vendors, namely: (i) by using standard communications protocols such as TCP/IP (Transmission Control Protocol/Internet Protocol) and HTTP (HyperText Transfer Protocol); (ii) by adding software code to a Windows Client PC or server operating system to permit it to communicate with a non-Microsoft server operating system by using communications protocols specific to that server operating system; (iii) by adding a software code to a non-Microsoft server operating system to permit it to communicate with a Windows Client PC or server operating system using communications protocols specific to Windows operating systems; (iv) by adding a block of software code to all of the client PC and server operating systems in a network in order to achieve interoperability by means of communications between those blocks of software code; and (v) by using a Windows server operating system as a 'bridge' between the Windows Client PC operating system and the non-Windows server operating system.
- 102 Next, Microsoft refers to the absence of customer complaints about the existing degree of interoperability.
- 103 Last, Microsoft refers to the continued presence of several competitors carrying on that business.
- 104 Second, Microsoft's refusal to make its intellectual property available to its competitors has not prevented the emergence of any new product for which there is unsatisfied consumer demand. No evidence of lack of satisfaction has been adduced. Nor has it been established that Microsoft's intellectual property will be used by its competitors to develop new products and not simply to replicate the functionality of existing Microsoft products.

- 105 Third, the fact that Microsoft has retained its technology for its own use has not had the effect of eliminating competition on a secondary market, since, as shown by the steady growth of Linux, there is substantial competition among vendors of work group server operating systems. Six years after Microsoft's alleged refusal to supply its technology, the market is therefore competitive.
- 106 Fourth, the refusal to license its technology to vendors of non-Microsoft server operating systems is objectively justified. Unlike the information protected by the national legislation then at issue which the companies involved had refused to disclose in *Magill* and *IMSHealth*, paragraph 99 above, the information protected in the present case relates to secret and valuable technology. In the present case, in order to arrive at the conclusion that the refusal to communicate information protected by intellectual property rights was not objectively justified and therefore constituted an infringement of Article 82 EC, the Commission applied an imprecise test which represented a marked departure from those recognised in previous case-law. Thus, the Commission itself considered that such a refusal constitutes an infringement of Article 82 EC if, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (recital 783). In addition to the fluid nature of that new test, it is not demonstrated, on the basis of evidence or analysis, that innovation in the sector would be spurred should Microsoft's technology be delivered to its competitors. Microsoft maintains, on the contrary, that a compulsory licence would reduce competition between server operating system vendors.
- 107 Microsoft further claims that Sun Microsystems did not request it to provide the technology which the Commission now orders it to disclose. Moreover, as no licence for the purpose of developing software in the EEA was ever requested by Sun Microsystems, Microsoft maintains that it was under no duty to regard Sun Microsystems' request as susceptible of leading it to adopt a course of conduct that might fall within the scope of Article 82 EC.
- 108 Last, by requiring Microsoft to license protected information, the Commission fails to take proper account of the obligations imposed on the Communities by the TRIPS Agreement (see paragraph 84 above).
- 109 In its observations of 19 August 2004, Microsoft submits that the Commission cannot validly maintain that the Decision does not impose new conduct on it but only has the effect of requiring it to revert to a business policy that it had initially pursued. Microsoft observes, first of all, that the Commission does not suggest that the information referred to in Article 5 of the Decision was supplied in the past. If the Commission was thus referring to the networking technology information licensed to AT&T in 1994 to permit the creation of a product called 'Advanced Server for UNIX' ('AS/U'), then the supply of that information has not been discontinued. The product called 'PC Net Link' developed by Sun Microsystems, to which AT&T licensed AS/U, is still available on the market today. Sun Microsystems still advertises PC Net Link as providing 'native Windows NT network services' – including file and print services and user and group administration services – on the Solaris server operating system. Sun Microsystems also claims that PC Net Link works well with Microsoft's latest Windows Client PC operating systems, including Windows 2000 Professional and Windows XP.
- 110 Nor can Microsoft be required to license its communications protocols in the future because it decided to license networking technology to AT&T in 1994. It was a term of the contract between Microsoft and AT&T, moreover, that their business relationship would not be extended to new technologies.
- 111 Last, Microsoft states that competing vendors of server operating systems are not dependent on the interoperability information whose supply Microsoft is alleged to have interrupted. Novell has never used AS/U and has never expressed the slightest interest in doing so. Novell's NetWare supplies file and print services and user and group administration services to Windows operating systems using Novell's own suite of communications protocols. Linux vendors have no use for AS/U either. Their server operating systems supply file and print services and user and group administration services to Windows operating systems using the Samba open-source software product, which was developed by reverse engineering Microsoft's communications protocols.

(b) Urgency

- 112 Microsoft contends that the immediate enforcement of Article 5(a) to (c) of the Decision would give rise to three types of serious and irreparable harm.

(1) Infringement of intellectual property rights

- 113 The Decision has the effect of requiring Microsoft to license valuable information protected by intellectual property rights. The resulting infringement of intellectual property rights constitutes serious and irreparable harm.

(i) Valuable information

- 114 Microsoft states that the communications protocols constitute a technology owned by Microsoft and used by Windows Client PC and server operating systems to exchange information with other copies of those operating systems, and that they have significant commercial value (report by S. Madnick and B. Meyer, 'Harm caused by forcing Microsoft to disclose all communications protocols used to provide "work group" services', in annex R.2 ('the Madnick & Meyer report')). Its communications protocols are the fruit of many years of very expensive research and development. Significant efforts were expended in designing communications protocols that provide useful functionality and enhance the speed, reliability, security and efficiency of interactions between Windows operating systems.
- 115 The specifications for the communications protocols, which are detailed descriptions of the design and operation of the communications protocols, would allow a competitor in possession of them to use Microsoft's communications protocols in its own server operating system.
- 116 In its observations of 19 August 2004, Microsoft claims that the compulsory licensing of specifications for communications protocols that enable multiple Windows server operating systems to function jointly in providing work group services would have the effect of disclosing a great deal of information about the internal design of Windows operating systems. As the Madnick & Meyer report shows, licensing the communications protocols that enable interaction between a number of Windows server operating systems would reveal extensive information about how the directory in those operating systems, called Active Directory, works.

(ii) Information protected by intellectual property rights

- 117 Microsoft's communications protocols and the specifications describing them are protected by intellectual property rights. In answer to an argument put forward by the Commission in its observations of 21 July 2004, Microsoft states, first, that a distinction must be drawn between protocol design, protocol specifications and protocol implementation and, second, that intellectual property protection is not limited to any one of those three categories.

Copyright protection

- 118 Communications protocols are protected by copyright under the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as last amended on 28 September 1979, and by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42), by virtue of the preamble and Article 1(1). The specifications for those protocols are preparatory design material, which is also protected by copyright (opinion of Mr Prescott, annex T.3, referred to at paragraph 90 above).
- 119 Consequently, Microsoft, like any copyright owner, has the exclusive right to authorise publication of its protected works or to make them available to the public in any other form. The copyright laws of various Member States expressly authorise owners of protected works to determine whether those works will be published or disclosed in any form. The Decision deprives Microsoft of the right to decide in what form, to whom, when and on what conditions it wishes to make the specifications for its communications protocols available, if at all. The Commission cannot therefore recognise that the specifications for Microsoft's communications protocols are protected by copyright and at the same time maintain that the requirement imposed on Microsoft by the Decision to license those specifications does not infringe the very substance of that right.
- 120 The copyright owner also has the exclusive right to authorise the creation of derivative works, under both Article 12 of the Berne Convention and Article 4 of Directive 91/250. That exclusive right to authorise the creation of derivative works is infringed, since the implementation of the specifications for

Microsoft's communications protocols by its competitors would almost certainly be an adaptation, or a translation, of those specifications which would fall within the ambit of copyright and could therefore not be regarded as a work developed independently. Furthermore, even on the assumption that the licensees were capable of implementing certain specifications without infringing Microsoft's copyright, the Decision does not require them to do so, since it requires Microsoft to 'allow the use' of the specifications for its communications protocols without setting a limit to the way in which the licensees will develop their creations. There is therefore no reason to believe that the licensees will confine themselves to developing applications that would not be unlawful, even on the assumption that it were possible to do so.

- 121 Last, Microsoft claims that, in the context of the United States Settlement, all the parties agreed that the specifications for its client-to-server communications protocols were protected by copyright.

Patent protection

- 122 In its application for interim measures, Microsoft states that certain of the communications protocols that the Commission requires it to provide are covered by patents or patent applications and that it intends to file, before June 2005, a large number of patent applications covering various aspects of the Windows Client PC and server operating systems covering the communications protocols referred to in the Decision. The fact that the effects of the Decision are not limited as to time means that future patents would be covered by the compulsory licensing requirement contained in the Decision.
- 123 In its observations of 19 August 2004, Microsoft identifies three existing European patents and two pending European patent applications covering the communications protocols subject to compulsory licensing. According to the opinion of Mr Knauer, annex T.5, referred to at paragraph 91 above, a number of communications protocols used by Windows server operating systems to provide file and print services and user and group administration services are covered by patents, namely (i) the DFS (Distributed File System) protocol, covered by Patent EP 0 661 652 B1; (ii) the SMB Protocol, covered by Patent EP 0 438 571 B1; and (iii) the Distributed Component Object Model Remote protocol, covered by Patent EP 0 669 020 B1. The patent applications relate to the Constraint Delegation and Active Directory Sites protocols.
- 124 In that context, Microsoft states that the Commission does not exclude patented technology from the remedy and requires that Microsoft license all its intellectual property rights relating to communications protocols, including every patent. Its competitors would thus have no reason to attempt to develop applications which did not use the patented methods.

Protection of trade secrets

- 125 Microsoft maintains that the communications protocols are trade secrets which have not been disclosed to third parties, unless they have undertaken to be bound by a contractual confidentiality obligation.
- 126 In answer to the Commission's observations of 21 July 2004 that, first, the legitimacy under competition law of a refusal to reveal a 'secret' whose existence is purely the consequence of a unilateral business decision should be dependent upon the interests at stake and, second, the damage caused to Microsoft by the requirement to reveal its trade secrets is less serious than the damage caused by the requirement that Microsoft allow reproduction of its copyrighted works or infringement of its patents, Microsoft contends that at the moment it can transfer its communications protocols to third parties in exchange for financial consideration and can bring proceedings against those who unlawfully use those protocols (opinions of Mr Prescott and Mr Galloux, annexes T.3 and T.6, referred to at paragraph 90 above) and that, consequently, compulsory licensing will undermine the value of those assets. Nor can it be inferred from the judgment in Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, paragraphs 84 and 139, that the Court of First Instance accepted that secret information in the form of specifications is not protected in the same way as other intellectual property, since the Court was not called upon to determine whether the specifications for cartons were protected trade secrets.

The necessity for the information

- 127 In its observations of 21 July 2004, the Commission asserts that the specifications for Microsoft's

communications protocols constitute 'information necessary to achieve interoperability' within the meaning of Directive 91/250 and that, consequently, the compulsory licensing ordered by the Decision does not provide Microsoft's competitors with anything which they could not obtain by decompiling Windows server operating systems in accordance with the derogation in Article 6 of that directive.

- 128 However, Microsoft contends that that assertion is incorrect, for a number of reasons.
- 129 First, Article 6(2) of Directive 91/250 offers only a limited exception to the exclusive rights of the owner of a protected software program as set out in Article 4 of that directive. In certain well-defined circumstances, a 'legitimate user' is permitted to 'discover' interfaces in a protected software program by 'decompiling' the machine-readable code that exposes those interfaces. Such 'decompilation' is permitted only if the interfaces are indispensable to support functionality in an independently-created software program and have not been made available by the owner of the program. In the present case, apart from the fact that Microsoft states that it has already disclosed the interfaces that third-party software programs need in order to call upon the functionality of Windows server operating systems, the specifications for its communications protocols are not necessary to support functionality in an independently-created work group server operating system. On the contrary, the Decision requires Microsoft to allow competitors to create products providing the same file and print services and user and group administration services as Windows server operating systems provide by developing their own implementations of Microsoft's communications protocols. Thus, Microsoft is required to provide its competitors with valuable commercial information in circumstances in which they would have no right to decompile under Article 6(2) of Directive 91/250.
- 130 Second, Article 6 of Directive 91/250 allows information to be obtained by decompilation, but in paragraph 2 it places three strict limits on the use of that information, including a prohibition on using the information to create a program reproducing the decompiled program. However, the Decision contains no limit in that sense; on the contrary, it authorises licensees to develop applications which infringe Microsoft's copyright in its specifications for its communications protocols.
- 131 Third, the specifications are more valuable than the information that Microsoft's competitors could obtain through legitimate decompilation.

Serious and irreparable damage

- 132 Microsoft maintains, in the second place, that the disclosure of information protected by intellectual property rights would cause serious and irreparable harm.
- 133 By allowing Microsoft's competitors to use the communications protocols in order to provide server operating systems capable of replacing those supplied by Microsoft, Article 5(a) of the Decision deprives Microsoft of the competitive advantages which it has acquired through research and development. Intellectual property rights imply the right to choose whether or not to use the protected property and the way in which to use it. It has already been held that compulsory licensing undermines the 'fundamental rationale' of intellectual property, which 'affords the creator of inventive and original works the exclusive right to exploit such works' (order of the President of the Court of First Instance of 26 October 2001 in Case T-184/01 R *IMSHealth v Commission* [2001] ECR II-3193, paragraph 125). For that reason, the Court of First Instance has recognised that to require an undertaking to license its intellectual property, even on a 'purely temporary' basis, risks causing 'serious and irreparable damage' even when the information concerned is already in the public domain (*ibid.*, paragraph 127).
- 134 The irreversible nature of the delivery of intellectual property is particularly obvious in the case of trade secrets. In the present case, the intellectual property relates to Microsoft's insights into the ways of accomplishing certain tasks that server operating systems need to perform, whether by themselves or in collaboration with client PC and server operating systems. Disclosure of those insights reveals knowledge that can never be erased from the memory of the recipients.
- 135 The compulsory licensing of copyrighted information also has irreversible effects on competition. By studying the specifications for copyrighted communications protocols, Microsoft's competitors will be able to obtain detailed knowledge of the inner workings of its operating systems and to use that knowledge in their own products. It will be impossible to determine subsequently that that knowledge is

not being used by Microsoft's competitors.

- 136 The compulsory licensing of patents also causes irreparable harm. Admittedly, following annulment of the Decision, Microsoft would be able to bring proceedings against third parties in order to prevent them from using the patented technology, but it would be a particularly complicated and inefficient exercise to attempt to ascertain whether or not Microsoft's technology was still being used, and products created in the meantime and incorporating Microsoft's inventions would probably remain in distribution channels and in the hands of customers.
- 137 Although the Decision allows Microsoft to license its intellectual property on 'reasonable and non-discriminatory terms', which presumably implies payment of a royalty, the damage to its intellectual property rights would not be cured by the receipt of such a royalty (see, to that effect, the order in *IMS Health v Commission*, paragraph 133 above, paragraph 125).

(2) Interference with Microsoft's business freedom

- 138 Microsoft refers to the orders of the President of the Court of First Instance in Case T-41/96 R *Bayer v Commission* [1996] ECR II-381, paragraph 54, and *IMS Health v Commission*, paragraph 133 above (paragraph 130) and maintains that, as in the cases in which those orders were made, its ability to determine freely the crucial elements of its business policy would be compromised by the implementation of the Decision.

(i) Freedom to communicate information

- 139 In the present case, it is not Microsoft's business policy to offer a general licence for its communications protocols. The licensing of its client-to-server protocols was agreed in the United States Settlement, but that settlement does not cover the licensing of its server-to-server communications protocols. By requiring Microsoft to deliver the specifications for its server-to-server communications protocols, most of which have never been drawn up, the Decision forces Microsoft to become a purveyor of technology to its competitors in the server operating system sector.
- 140 Microsoft then explains the differences between, on the one hand, the United States Settlement and the agreement with Sun Microsystems and, on the other hand, the Decision.
- 141 The United States Settlement provides for the licensing of client-to-server communications protocols for the sole purpose of ensuring interoperability with Windows client PC operating systems, unlike the Decision, which requires the licensing of the same protocols for use in work group server operating systems which provide file and print services and user and group administration services to any Windows Client PC or server operating system.
- 142 The settlement concluded with Sun Microsystems – the only complainant before the Commission – in April 2004 comprises a series of reciprocal agreements whereby the parties agreed to collaborate in product development and to conclude cross-licences, including licences covering the types of communications protocols concerned by the Decision. Microsoft emphasises that the cross-licences make provision for consideration in the form of access to Sun Microsystems' intellectual property and provide Sun Microsystems with an incentive to respect Microsoft's intellectual property in its licensed technology. The reciprocal nature of those agreements provides Microsoft with the consideration specifically lacking in the compulsory licensing ordered by the Decision.

(ii) Freedom to develop products

- 143 Microsoft maintains that implementation of the Decision would deprive it of its capacity to develop its products. The compulsory licensing of its communications protocols would definitively compromise its freedom to decide how to develop its products. The future improvement of those protocols and, ultimately, Microsoft's capacity to innovate would be affected, as the Madnick & Meyer report shows. Once third-party products begin to depend on the design features of a Windows server operating system rather than calling upon its functionality through published interfaces, Microsoft's capacity to change those design features with the aim of improving the product will be reduced. The Commission's assertions to the contrary in its observations of 21 July 2004 ignore commercial reality. It is already an

engineering challenge for Microsoft, in the context of successive releases of new Windows server operating systems, to maintain backward compatibility with the thousands of published interfaces used by third-party software programs. The task of adding new functionalities and improving the performance, security and reliability of existing functionality would be made considerably more difficult if third-party software programs were calling upon Windows functionality using what were formerly confidential protocols (Madnick & Meyer reports, annexes R.2 and T.7).

(iii) The need to 'harden' the protocols

- 144 Private protocols are not designed to be used in unknown third-party software products. Consequently, the disclosure of a large number of private communications protocols might lead to malfunctions, crashes and security risks. Microsoft would then have to devote part of its resources to 'hardening' the protocols against inadvertent and malicious use, which often requires the addition of protective code or substantial additional testing before products using the communications protocols can be released. In that regard, the Decision irreversibly affects Microsoft's freedom to develop its products in whatever way it deems appropriate.
- 145 In its observations of 19 August 2004, Microsoft further states that providing competitors with specifications for communications protocols that were never intended for any purpose other than communicating between Windows server operating systems would expose customers to technical vulnerabilities. It refers on that point to the Madnick & Meyer reports, annexes R.2 and T.7. Such protocols make numerous assumptions about the internal workings of the server operating systems that jointly provide work group services. Consequently, they do not have the protective mechanisms which they would have if they had been designed to communicate with third-party software products. While it would be possible for Microsoft to 'harden' the implementations of its communications protocols in the future, there are millions of Windows server operating systems in customer networks using the protocols in their current state. It is not feasible to retrofit those products to protect them against improper use of the communications protocols, because adding the necessary protective mechanisms would require extensive changes to products already in use. Although the Commission decides what it refers to as 'security through obscurity' (annex S.2), customers would be unhappy to learn that disclosures ordered by the Commission made existing Windows server operating systems vulnerable to malfunction (Madnick & Meyer report, annex T.7). The protocols are complicated and the chances of a mistake in implementing them in another work group server operating system are high. Such a mistake could lead to significant data loss and data corruption, with concomitant harm to Microsoft and its customers. Needless to say, customers take data loss and corruption seriously and Microsoft would suffer serious harm, in particular to its reputation, if the existing base of Windows server operating systems were placed at risk by the incorrect use of Microsoft's communications protocols. The Commission suggests that 'any harm would be reversible ... once the Decision is annulled'. However, annulment could not restore lost or corrupted data, nor would it restore Microsoft's good name.

(3) Irreversible change in market conditions

- 146 Microsoft maintains that compulsory licensing would irremediably change prevailing market conditions to its disadvantage. It is apparent that the Commission sought to bring about that change: recital 695 to the Decision states that '[i]f Microsoft's competitors had access to the interoperability information that Microsoft refuses to supply, they could use the disclosures to make the advanced features of their own products available in the framework of the web of interoperability relationships that underpin the Windows domain architecture'.
- 147 In order to demonstrate the irreversible change that will occur on the market, Microsoft claims that examination of the detailed specifications for communications protocols which it owns, made possible by compulsory licensing, will reveal to competitors important aspects of the design of Windows server operating systems. As explained in the Madnick & Meyer report, the specifications for formerly private communications protocols would be particularly likely to reveal information about the internal design of operating systems because those protocols are often dependent on their specific implementation in software code. The use of such communications protocols by third parties would therefore entail specifying many details, although those details remain implicit when the protocols are used privately by different copies of the same operating system running on different servers.
- 148 The large-scale disclosure of such information would enable Microsoft's competitors to reproduce in

their server operating systems a range of functionality that Microsoft has developed through its own research and development efforts. The resulting damage to Microsoft would extend beyond the scope of the compulsory disclosure, beyond the work group server operating system market and indeed beyond the geographic scope of a compulsory licence.

(c) The balance of interests

- 149 Microsoft maintains, first, that the Communities' interest in imposing an effective remedy does not require the immediate implementation of Article 5(a) to (c) of the Decision.
- 150 First of all, as the purpose of Article 82 EC is 'to safeguard the interests of consumers, rather than to protect the position of particular competitors' (order in *IMS Health v Commission*, paragraph 133 above, paragraph 145), significant weight should be given to the absence of harm to consumers. In the present case, customers benefit from various interoperability solutions. Thus, in five years of proceedings before the Commission, not a single undertaking stated that it wanted to choose a non-Windows server operating system but was forced by interoperability concerns to choose a Windows server operating system.
- 151 Next, the implementation of the remedy provided for in Article 5 of the Decision is unnecessary, since Microsoft's competitors have no urgent need for access to its communications protocols. Furthermore, in Microsoft's submission, the Commission itself does not claim that competition between vendors of work group server operating systems would disappear in the short term should Article 5 of the Decision be suspended.
- 152 On that point, Microsoft claims that its competitors' products are competitive at present and provides various studies and projections concerning Linux, UNIX and Novell in support of that contention.
- 153 Microsoft further submits that the Commission has not established a link between the remedy provided for in Article 5 of the Decision and any request formulated by suppliers of work group server operating systems. Neither Sun Microsystems, Novell nor Free Software Foundation/Samba have asked Microsoft to licence its communications protocols.
- 154 The advantage which those competitors may derive from being able to discover how Microsoft has addressed certain issues in the design of server operating systems cannot prevail over Microsoft's legitimate interest in protecting its own technology. When the interests are weighed up, the public interest in maintaining effective competition must clearly take precedence over the interests of Microsoft's competitors alone.
- 155 The risk that competing server operating systems suppliers might exit the market should the effects of Article 5 of the Decision be suspended does not exist. Microsoft's competitors have been licensing their server operating systems to enterprise customers for many years without providing access to the specifications for the communications protocols that the Decision would require Microsoft to deliver to them. In support of its analysis, Microsoft provides various data relating to certain of its competitors on the market in question.
- 156 Last, Microsoft contends that it cannot be maintained that the implementation of the Decision is urgent, since the administrative procedure, during which the Commission's assessment of the situation constantly changed, lasted five years.
- 157 Second, in the exercise consisting in balancing the interests, account should be taken of the Communities' obligations under international treaties, including the TRIPS Agreement, and also of the merits of the main action. On that last aspect, Microsoft submits, in reliance on the order of the President of the Court of Justice of 11 April 2002 in Case C-481/01 P(R) *NDC Health v IMS Health and Commission* [2002] ECR I-3401, that the merits of its main action must be taken into account in the balancing of interests. In the present case, it is particularly clear that the Commission has not established that the criteria laid down in the case-law (judgment in *IMS Health*, paragraph 99 above) which permit an undertaking in a dominant position to be compelled to grant licences to its competitors were satisfied.

- 158 Third, and last, Microsoft states that since the adoption of the Decision Sun Microsystems has reached an agreement with Microsoft which addresses all the concerns underlying its complaint to the Commission. There is therefore no immediate need to implement the Decision while the main action is pending.
- 159 ACT claims that unless the remedy is suspended it will produce serious and irreparable effects owing to the damage to the strength and value of its members' intellectual property rights in the EEA.
- 160 More specifically, ACT maintains, first, that the immediate applicability of the remedy would constitute a groundbreaking precedent in the compulsory licensing of intellectual property rights which would quickly and substantially reduce the value of the intellectual property rights owned by its members. In that regard, ACT claims that the Commission has interpreted and applied Article 82 EC in a way that is inconsistent with the Community's obligations under Articles 13, 31 and 39 of the TRIPS Agreement.
- 161 ACT maintains, second, that disclosure of the communications protocols which have thus far been the exclusive property of Microsoft would result in the instability of Windows Client PC and server operating systems, which would immediately cause significant harm for its members.
- 162 CompTIA submits that, in so far as it requires Microsoft to supply its intellectual property to any undertaking present on the servers market, the remedy provided for in Article 5 of the Decision will reduce the level of protection for the entire information technology and communications industry, give rise to legal uncertainty and have the immediate effect of reducing investment in the technology sector and therefore the general level of economic activity.
- 163 CompTIA further contends that the serious and irreparable damage which that remedy will cause to the entire sector, and also to the members of CompTIA, exceeds any possible adverse effect which the lack of immediate disclosure could have on the public interest or the interest of third parties. In that context, CompTIA states that no evidence has been brought to its attention of an interoperability problem on the servers market, even though it plays a greater role than any other trade association in certifying the qualifications of technology industry workers in the servers sector.

2. Arguments of the Commission and the parties granted leave to intervene in support of the form of order which it seeks

- 164 The Commission contends, by way of preliminary submission, that the application for suspension of implementation of Article 5(a) to (c) of the Decision relies to a large extent on the assessment of the impact which the Decision is supposed to have on the exercise of Microsoft's 'intellectual property rights'; it makes a number of introductory observations in that regard. In its observations of 13 September 2004, the Commission states that even on the assumption that Microsoft has expressly shown that the Decision would force it to license its intellectual property rights, the Commission's argument would remain just as valid. FSF-Europe supports the Commission's argument.

(a) Preliminary observations

- 165 First of all, the Commission states that Article 5(a) to (c) of the Decision requires Microsoft to provide technical documentation, called 'specifications', which describes in detail the 'protocols' referred to in Article 1(1) of the Decision. However, it is important to distinguish that technical documentation from the source code of Microsoft's products. A competitor wishing to write a server operating system that understands Microsoft's protocols will have to write code in its product that implements the specifications. Two programmers implementing the same protocol specifications will not write the same source code and the performances of their programmes will be different (recitals 24, 25, 698 and 719 to 722). From that aspect, the protocols may be compared with a language whose syntax and vocabulary are the specifications, since the mere fact that two persons learn the syntax and the vocabulary of the same language does not mean that they will use it in the same way.
- 166 Next, against that background, the Commission examines the various intellectual property rights on which Microsoft relies.

(1) Copyright

- 167 As regards, first, copyright, the Commission maintains that Microsoft's contentions are inaccurate, if not misleading. Microsoft wrongly gives the impression that the use of interoperability information in order to make interoperability effective normally constitutes breach of copyright. Microsoft is also wrong to state that copyright protection extends to the communications protocols and to rely on copyright in the 'specifications' to support its contention that the use of the knowledge contained in those specifications constitutes breach of copyright.
- 168 Although the Commission does not rule out the possibility that those specifications may, as such, be covered by copyright, it maintains that that does not mean that the use of the information contained in that document, in the form of implementation in an operating system, constitutes a breach of copyright, since, as the Decision states, implementation of a specification does not constitute copying, but leads to a clearly distinct work (recitals 25, 570 et seq. and 719 et seq.)
- 169 In its observations of 13 September 2004, the Commission maintains, essentially, that implementation of the communications protocols does not constitute a form of exploitation prohibited by copyright.
- 170 From the many comments made by the Commission on Microsoft's observations of 19 August 2004, it is appropriate to mention the answers made more specifically to five categories of arguments.
- 171 First, the Commission states that Microsoft relied for the first time in its observations of 19 August 2004 on a right of 'disclosure' (paragraph 119 above). The Commission observes that Article 6bis of the Berne Convention, which sets out the 'moral rights' of the copyright owner, does not mention that right and that, accordingly, an obstacle to the exercise of that alleged right cannot be contrary to the 'normal exploitation of the computer program' as defined in Article 6(3) of Directive 91/250, since that provision provides that that exploitation must be interpreted 'in accordance with the provisions of the Berne Convention'. At most, the right of disclosure is a 'moral right' which cannot be licensed. Furthermore, reliance on a right of disclosure is difficult to reconcile with the fact that Microsoft's products are on the market, that persons are able to observe, study or test them and, under certain circumstances, to decompile them. Last, Microsoft's reasons for refusing disclosure of the information concerned are purely economic and therefore have nothing to do with the rationale of the right in question.
- 172 Second, the Commission disputes that the technical documentation which will have to be disclosed can be regarded as a 'computer program' protected by Directive 91/250, on the ground that it constitutes 'preparatory design material' for a computer program (paragraph 118 above). The information in question is not composed ex ante as an internal aid to the creation of Microsoft's programs but written ex post for the sole purpose of disclosing only limited information to Microsoft's competitors.
- 173 In response to Microsoft's assertion, based on Article 4 of Directive 91/250, that implementation of the protocols in question would 'almost certainly' be an adaptation or translation of the specifications covered by Microsoft's copyright (paragraph 120 above), the Commission states that the applicant fails to substantiate that assertion. The text of Directive 91/250 and its legislative history lead to the conclusion that writing interfacing software on the basis of interface specifications is not normally covered by Article 4 of that directive. Article 6 of Directive 91/250 is based on the premiss that the use of interoperability information, extracted by decompilation – which is 'exempted' – in order to 'achieve the interoperability of an independently created computer program with other programs' is not an act in breach of copyright, unless the information is 'used for the development, production or marketing of a computer program substantially similar in its expression' to the decompiled program. If Microsoft were correct, Article 6 of Directive 91/250 could never be invoked to build compatible products, since the creation of those products would be an 'act which infringes copyright' and therefore prohibited by Article 6(2)(c).
- 174 Third, the Commission refutes the restrictive interpretation by Mr Prescott (Annex T.3) of Article 1(2) of Directive 91/250, which provides that '[i]deas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright'. Mr Prescott's argument that the whole, or the structure, of the 'ideas' in question is protected by copyright where they form a 'substantial part of the protected work' is flawed because, first, it is not consistent with Article 1(2) and Article 6 of Directive 91/250 and, second, the judgments of the English courts on which he bases his analysis have nothing to do with the present case.
- 175 Fourth, as regards Microsoft's arguments, referred to at paragraph 120 above, which suggest, first of

all, that the remedy would lead to a particular 'temptation', as it were, for Microsoft's competitors to develop implementations which infringed its copyright and, next, that the Decision makes no provision for any safeguard against such 'temptation', the Commission states that the remedy does not require disclosure of the source code and that, consequently, the prohibition in Article 6(2) of Directive 91/250 on using the information obtained by decompilation 'for the development, production or marketing of a computer program substantially similar in its expression' is not applicable.

- 176 Fifth, the Commission maintains that, contrary to Microsoft's contention (paragraph 129 above), Microsoft has not disclosed the interfaces that third-party software programs need to call upon the functionality of Windows server operating systems. The interfaces to which Microsoft refers are 'application programming interfaces' ('APIs') which allow applications running on a Windows server operating system to use the services of that server operating system, whereas the interfaces at issue in the present case are those through which a Windows work group server delivers its services to Windows work group networks (recital 210).

(2) Patents

- 177 As regards patents, the Commission notes at the outset that during the administrative procedure Microsoft mentioned only one patent application, whereas during the judicial procedure it refers to three European patents and two pending patent applications. Microsoft has not produced the documentation from which it might be determined whether a licence in respect of one or more of those patents would be indispensable for a person implementing the relevant protocols.
- 178 In its observations of 13 September 2004, the Commission states that before the adoption of the Decision Microsoft mentioned the existence of only one patent, on 20 January 2004, whereas the three European patents referred to in the document setting out Mr Knauer's opinion (Annex T.5; paragraph 91 above) were granted before the end of 2001 and the two European patent applications were, according to that document, filed before the end of 2002. As regards the content of Mr Knauer's opinion, the Commission observes that Mr Knauer had to 'rely on information received from Microsoft in regard to the selection of protocols that fall under Article 5 of the Decision'. Neither is it obvious to the Commission that a competitor of Microsoft taking advantage of the implementation of the Decision will be infringing some of the claims in those patents. The doubts expressed as to whether a developer of server software using the relevant protocols in order to communicate with Windows clients would infringe the claims in question are confirmed by Microsoft's behaviour towards Samba, an 'open source' product which implements certain Microsoft communications protocols that the Samba group developers have identified using reverse-engineering techniques. Samba appears to have incorporated SMB's 'opportunistic locking' as early as January 1998 (version 1.9.18) and Dfs as early as April 2001 (version 2.2.0). So far as the Commission is aware, the Samba group has never licensed the patents in question from Microsoft and Microsoft has never claimed that its patents were being infringed by the Samba group. The Commission observes that the three patents in question were all granted before the end of 2001 and that, in view of the technical description which they propose, they appear to relate to the NT 4.0 generation of Microsoft's products, which predates Windows 2000.

- 179 The relationship between Microsoft's patent claims and the Decision therefore remains unclear.
- 180 The Commission concludes on that point that Microsoft has not proved that any of its patents would be infringed should Article 5(a) to (c) of the Decision be implemented.

(3) Trade secrets

- 181 The Commission maintains that the parallel which Microsoft draws between trade secrets and intellectual property rights is not self-evident. It refers to the Tetra Pak II case (Commission Decision 92/163/EEC of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 – Tetra Pak) (OJ 1992 L 72, p. 1)), which culminated in the judgment in *TetraPak v Commission*, paragraph 126 above (paragraphs 84 and 139).
- 182 While there may be a presumption of legitimacy in respect of a refusal to license an intellectual property right created by law, the legitimacy in competition law of a refusal to disclose a secret the existence of which depends purely on a unilateral business decision should depend on the facts of the

case and, in particular, on the interests at stake. In the present case, Directive 91/250 shows that the interest in the protection of the inventive effort underlying the software does not entitle the inventor to hinder the use of interoperability information inherent in that software for the purpose of achieving interoperability.

- 183 The Commission acknowledges that Directive 91/250 does not require the inventor to disclose the information on his own initiative. However, from the aspect of any trade secret that Microsoft may have, disclosing interoperability information for the purpose of achieving interoperability is not comparable to licensing a competitor to copy a work protected by intellectual property rights legislation. That assertion is supported by the technical relevance of such disclosure, by the practices existing in the software industry and by Microsoft's own behaviour when it entered the market.
- 184 In its observations of 13 September 2004, the Commission rejects the idea that the protocols reflect important innovation, since the truth of that assertion has not been established by Microsoft either in its application, or in its subsequent observations, or in annex T.3. The Commission also regards as unfounded the argument that the remedy would have the effect of 'transferring' the innovation in question to Microsoft's competitors, since, first, disclosure of the information would not entail a transfer of the essential value of the Windows operating system and, second, under Article 82 EC an undertaking in a dominant position may be ordered to license an essential element of one of its products, as demonstrated by *Magill* and *IMSHealth*, paragraph 99 above.
- 185 FSF-Europe submits, in essence, that the information which the Decision requires Microsoft to disclose has little value in terms of innovation and contains a number of incompatibilities deliberately introduced in pre-existing written protocols. Microsoft's approach consists in adopting pre-existing protocols and then altering them with the aim of preventing or prohibiting interoperability. It has acted in that way in regard to several work group server protocols, disclosure of which the Samba group sought in order to create a compatible product, namely the CIFS, DCE/RPC (Distributed Computing Environment/Remote Procedure Call), DCE/RCP IDL ('Interface Definition Language'), Kerberos 5 et LDAP (Active Directory) protocols.

(b) A prima facie case

- 186 The Commission rejects at the outset Microsoft's assertions that the present case is merely about its relationship with Sun Microsystems and that Sun Microsystems did not request the information which the Decision orders Microsoft to disclose.
- 187 Next, the Commission recalls that it stated in its preliminary observations that no copyright owned by Microsoft would prevent the interoperability information from being used for the purpose of achieving interoperability (paragraphs 167 and 168 above). None the less, it comments on the four criteria laid down in the case-law in respect of compulsory licences and assumes, for the sake of argument, first, that some intellectual property right issues may be at stake and, second, that no other criterion is relevant to a finding of exceptional circumstances, although in the Commission's view the second assumption is contradicted by the wording of the *IMSHealth* judgment, paragraph 99 above (paragraph 38).
- 188 As regards, first, the indispensability of the information alleged to be covered by intellectual property rights, the Commission contends that Microsoft's claims that there are 'many other ways of achieving interoperability' have already been refuted in the Decision (recitals 666 to 687).
- 189 Second, the Commission rejects Microsoft's claim that it has not prevented the emergence of any new product for which there was unsatisfied consumer demand.
- 190 It follows from paragraph 49 of the judgment in *IMSHealth*, paragraph 99 above, that a 'new product' is a product which is not limited 'essentially to duplicating' the products already offered on the market by the owner of the copyright. It is sufficient, therefore, that the product in question contains substantial elements contributed by the licensee's own efforts. Accordingly, it is not precluded that the products of the owner of the copyright should compete with the future products of the licensee, as shown by the facts of the cases determined by the Community judicature (Case T-69/89 *RTE v Commission* [1991] ECR II-485, paragraph 73; *Magill*, paragraph 53; and *IMSHealth*, paragraph 99 above). Furthermore,

the 'new product' criterion does not imply an obligation to provide concrete proof that the licensee's product would attract customers who would not buy the products offered by the existing supplier. Any other interpretation would render the case-law largely meaningless, since owners of intellectual property rights normally have excellent reasons for granting licences to operators who intend to manufacture goods which do not compete with their own goods. A situation of that type therefore does not normally lead to a refusal to supply. In *IMSHealth*, paragraph 99 above, the Court of Justice concentrated on product differentiation which could affect consumer choices, or, in other words, on whether there is 'potential demand' for the new product. The precise consequences which that differentiation will have for the choices made and, in the longer term, for the emergence of products attracting new customer categories, will be determined by the market.

- 191 In the present case, the implementation of the protocols can take very different forms (recitals 24, 25 and 698), which provides sufficient scope for product differentiation, and there are significant possibilities for product differentiation which could enhance competition but which at present are neutralised by Microsoft's conduct.
- 192 Third, as regards the elimination of competition on a secondary market, the Commission states that it thoroughly analysed in the Decision the developments on the relevant market and the importance of interoperability for those developments (recitals 590 to 692) and, in particular, the alleged 'steady growth of Linux' (recitals 598 to 610). In the application for interim relief, Microsoft does not claim that there has been any error in that regard. Microsoft incorrectly assumes that, where competition is eliminated gradually, a 'cease and desist order' on the basis of Article 82 EC could be made only when there would no longer be any point in making such an order, because the market had irreversibly turned into a monopoly, whereas in reality it is sufficient that the refusal to license be 'likely' to exclude competition (*Bronner*, paragraph 99 above, paragraph 40, and *IMSHealth*, paragraph 99 above, paragraphs 37 and 38).
- 193 Fourth, Microsoft does not mention any specific objective justification for its conduct, apart from making a general reference to 'its intellectual property rights', which has already been refuted in the Decision (recitals 709 to 763).
- 194 The Decision therefore shows, and Microsoft has not seriously disputed, that Microsoft's conduct satisfied the requirements laid down in the case-law.
- 195 Last, as regards the incompatibility of the Decision with the TRIPS Agreement, the Commission refers to the findings set out at recitals 1052 and 1053 to the Decision.

(c) Urgency

- 196 The Commission submits that Microsoft has not shown that it would suffer serious and irreparable damage should implementation of the Decision not be suspended. The interveners SIIA and FSF-Europe support the Commission's argument.

(d) The balance of interests

- 197 The Commission contends that the balance of interests tilts in favour of immediate implementation of Article 5(a) to (c) of the Decision and therefore claims that the application should be dismissed. The interveners SIIA and FSF-Europe support the Commission's arguments.

B – Findings of the President

1. A prima facie case

- 198 In support of its claim that the prima facie case requirement is satisfied, Microsoft essentially maintains, first, that the conditions on which a refusal to supply information protected by intellectual property rights constitutes an abuse of a dominant position prohibited by Article 82 EC are not satisfied in the present case; second, that Sun Microsystems has not requested the information which the Decision orders the applicant to supply and that its request did not relate to the development of software in the

EEA; and, third, that the Commission has failed to fulfil the obligations imposed on the Community by the TRIPS Agreement.

- 199 In the light of the arguments developed by Microsoft in the context of the interim relief proceedings, the second and third sets of arguments cannot be regarded as sufficiently serious to constitute a *prima facie* case.
- 200 The arguments relating to Sun Microsystems' request were refuted in detail in the Decision (recitals 199 to 207, 564 and 565) and Microsoft has not shown *prima facie* that the Commission erred in defining the scope of Sun Microsystems' request. Likewise, the argument that Sun Microsystems' request did not relate to software development 'in the EEA' cannot succeed, since that request was couched in general terms and since the EEA is necessarily a part of the relevant worldwide market, as clearly demonstrated at recitals 185 et seq. and 427 to the Decision.
- 201 The plea alleging failure to take account of the TRIPS Agreement has not been expanded in such a way that the President can make a proper ruling on it. Microsoft has merely claimed in its application for interim relief that, 'in imposing a mandatory licence on Microsoft, the Commission [did] not properly take into account the obligations imposed on the European Communities by [the TRIPS Agreement]'. Furthermore, the reference to the arguments expounded in annex T.9 has not been found to be consistent with the applicable procedural rules (see paragraph 88 above).
- 202 The President will therefore confine himself to examining the single plea alleging infringement of Article 82 EC, it being noted that in the context of the present application Microsoft does not deny that it holds a dominant position on the client PC operating system market and on the work group server operating system market. It is therefore contesting only the allegedly abusive nature of its refusal to disclose the interoperability information and to authorise its use by its competitors.
- 203 It should be recalled at the outset that recitals 546 to 791 to the Decision are devoted to an examination of the abusive nature of the refusal to supply the interoperability information. The Commission states there that it must analyse the whole of the circumstances particular to each case before being able to conclude that there are exceptional circumstances characterising an abusive refusal (recitals 546 to 559). In the present case, the Commission considered that the exceptional circumstances consisted in the fact that the refusal to supply the interoperability information was directed against Sun Microsystems, formed part of a general pattern of conduct and entailed a reduction in the level of disclosure of information (recitals 560 to 584), that it risked eliminating competition (recitals 585 to 692) and that it had a negative effect on technical development, to the prejudice of consumers (recitals 693 to 708). In the light of those 'exceptional circumstances', the Commission found that Microsoft's arguments did not amount to sufficient objective justification for the refusal to disclose the interoperability information, whether in terms of incentives for Microsoft to innovate (recitals 709 to 763) or of its having no interest in restricting competition (recitals 764 to 778).
- 204 In the present case, the *prima facie* case requirement must be considered to be satisfied, regard being had to the questions of principle raised by the case and to the fact that certain pleas and arguments require a thorough examination. In substance, it must be ascertained whether the circumstances taken into account by the Commission are correct in fact and capable in law of founding the conclusion that there are exceptional circumstances which justify ordering the applicant to disclose valuable information protected by intellectual property rights.
- 205 The questions of principle relate to the conditions on which the Commission is justified in concluding that a refusal to disclose information constitutes an abuse of a dominant position prohibited by Article 82 EC.
- 206 First, this case raises the question whether the conditions laid down by the Court in *IMSHealth*, paragraph 99 above, are necessary or merely sufficient. The Commission contends in the Decision that the existence of exceptional circumstances must be assessed on a case-by-case basis and that it cannot therefore be excluded, without a thorough examination of each case, that a refusal may be abusive, even though the conditions hitherto laid down by the Community judicature are not satisfied. Microsoft, on the contrary, maintains in its application that a refusal to supply can be found to be abusive only where the conditions laid down by the Community judicature are satisfied. Clearly, that question cannot

be resolved at the interim relief stage. It should be pointed out, however, that the Court of Justice has held, in the words of paragraph 38 of the judgment in *IMSHealth*, that 'it is sufficient', in order for 'the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive', 'that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and [that it is] likely to exclude all competition on a secondary market'.

- 207 Second, this case raises the question whether, where the exercise of an intellectual property right is in issue, the nature of the protected information must be taken into account. Microsoft contends that the Decision compels it to supply competitors with technology that is secret and valuable and which, consequently, is intrinsically different from the information at issue in *Magill* and *IMSHealth*, paragraph 99 above. Thus, the requirements to be satisfied in order for a refusal to disclose information to constitute an abuse of a dominant position are all the stricter because the information is valuable. The Commission, on the other hand, maintains that the Community judicature has never taken the 'value' of an intellectual property right into consideration. On that point, the President finds that the hitherto secret specifications for the communications protocols which the Decision requires Microsoft to draw up and disclose are clearly fundamentally different from the information at issue in *Magill* and *IMSHealth*, paragraph 99 above. In those cases the information at issue was widely known in the sector: the television programme listings were sent free of charge to newspapers every week and the map of Germany was in reality an industry standard for the presentation of sales figures. However, the question whether, and if so to what extent, a distinction must be drawn according to whether the information is known or secret is even less amenable to determination at this stage because account must be taken more generally of parameters such as the value of the underlying investment, the value of the information concerned for the organisation of the dominant undertaking and the value transferred to competitors in the event of disclosure.
- 208 This case also raises the question whether the requirements laid down by the Court of Justice in its judgment in *IMSHealth*, paragraph 99 above, are satisfied in the present case. The Commission does not dispute the relevance of that judgment, which, essentially, consolidates the position thus far expressed by the Community judicature as regards the circumstances in which a refusal to license intellectual property rights constitutes an abuse.
- 209 The dispute between the parties relates to the indispensability of the information in issue, the barrier to the emergence of a new product for which there is claimed to be an unsatisfied demand, the risk of eliminating competition on the secondary market and the objectively justified nature of the refusal. While it is for the Court dealing with the substance of the case to resolve the disputes in respect of each of those requirements, the President none the less considers it necessary to identify the sources of the dispute between the parties which he deems sufficiently serious to constitute a prima facie case. In that regard, the accent will be placed on two specific aspects.
- 210 As regards, first, the indispensability of the interoperability information, it should be observed that that question is dealt with at recitals 666 to 687 to the Decision.
- 211 On that point, Microsoft refers to a number of methods allowing sufficient interoperability between the operating systems of different suppliers.
- 212 That argument emphasises the disagreement between the parties as regards the level of interoperability required. As stated at recitals 743 to 763 to the Decision, the information which must be provided in accordance with the remedy is the 'information necessary to achieve ... interoperability' within the meaning of Article 6 of Directive 91/250, on decompilation. Microsoft maintains that the decompilation provided for in Article 6 of Directive 91/250 is permitted only where the interfaces are indispensable to ensure the functionality of an independently-created software program and that in the present case the specifications for its communications protocols are not necessary to ensure the functionality of an independently-created work group server operating system. Microsoft concludes that the information which it has refused to communicate cannot be regarded as interoperability information.
- 213 The preamble to Directive 91/250 defines interoperability as 'the ability to exchange information and mutually to use the information which has been exchanged'. At the 27th recital, that directive states that its provisions are without prejudice to the application of the competition rules under Article 82 EC

'if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive'. However, the question whether, in the present case, the information requested from Microsoft is actually necessary for interoperability, as defined in Directive 91/250, requires a thorough examination of the elements of fact in the light of the applicable legislation, which only the Court dealing with the substance of the case can undertake.

- 214 As regards, second, the objectively justified nature of the refusal, Microsoft contends that it was permissible for it to rely on its intellectual property rights and to refuse to license its technology to third-party operating systems providers. In answer to a written question put by the President, Microsoft also claimed that the information requested by Sun Microsystems related to technology under development.
- 215 In order to understand the scope of Microsoft's argument, the President questioned Microsoft at the hearing. It emerged that it cannot be excluded, in Microsoft's submission, that the refusal may be objectively justified by the intellectual property rights which Microsoft holds in the information requested by Sun Microsystems or, in other words, that the justification for the refusal lies in the need not to disclose information because it is legally protected and is valuable.
- 216 That argument may be understood as meaning that Microsoft was entitled to refuse to disclose legally-protected information irrespective of whether or not there were exceptional circumstances.
- 217 Thus, on the one hand, Microsoft's argument means that, in the absence of duly-established exceptional circumstances, the exercise of the prerogatives recognised to the holder of intellectual property rights cannot give rise to abusive conduct within the meaning of Article 82 EC. As that argument is very closely linked to the question whether the Commission has demonstrated that 'exceptional circumstances' existed in the present case, it cannot be examined separately from that question (see paragraph 206 above).
- 218 On the other hand, Microsoft's argument also means that, even if exceptional circumstances had been established by the Commission, its refusal to communicate the information in question was justified by the need to protect the valuable information covered by the intellectual property rights.
- 219 That argument, which was developed by Microsoft during the administrative procedure, as shown at recital 709 to the Decision, was rejected by the Commission in the Decision (recitals 710 to 712), which concluded on that point that, in regard to the exceptional circumstances, 'Microsoft's refusal cannot be objectively justified merely by the fact that it constitutes a refusal to license intellectual property' (recital 712). The Commission then examined the other arguments which Microsoft put forward in order to demonstrate that the refusal to disclose the information in issue could be justified by the need to protect its incentive to innovate. The Commission, after rejecting Microsoft's arguments relating to its concerns about the 'cloning' of its products (recitals 713 to 729), concluded that it could not, explaining that disclosure of interoperability information is a widespread practice in the industry concerned (recitals 730 to 735) and pointing out that the undertaking given to the Commission by IBM in 1984 was not substantially different from what Microsoft was ordered to do in the Decision (recitals 736 to 742), and that its approach is consistent with Directive 91/250.
- 220 The fact none the less remains that Microsoft's argument, understood as seeking to challenge the legality of the Commission's assessment in relation to the absence of objective justification for the refusal, cannot be rejected outright as unfounded, in the light of the specific circumstances of the case.
- 221 On that point, the intellectual property rights on which Microsoft relies have not been declared valid by a national court and for that reason the present situation may be distinguished from those in *Magill* and *IMSHealth*, paragraph 99 above. However, the Commission did not exclude the existence of intellectual property rights and in any event took them into account when considering whether the refusal was justified.
- 222 The central issue is therefore whether the Commission was entitled to conclude that the need to protect the purported value of the information alleged to be covered by intellectual property rights was not sufficient to support the conclusion that the refusal to communicate that information was objectively justified.

223 The Commission's approach consisted in ascertaining whether, in spite of the exceptional circumstances identified, the considerations put forward by Microsoft precluded the adoption of a remedy. That is apparent, in particular, from recital 783 to the Decision, which states:

'The major objective justification put forward by Microsoft relates to Microsoft's intellectual property [in] Windows. However, a detailed examination of the scope of the disclosure at stake leads to the conclusion that, on balance, the possible negative impact of an order to supply on Microsoft's incentives to innovate is outweighed by its positive impact on the level of innovation of the whole industry (including Microsoft). As such, the need to protect Microsoft's incentives to innovate cannot constitute an objective justification that would offset the exceptional circumstances identified ...'.

224 However, it is for the Court dealing with the substance of the case to ascertain whether a manifest error was made in the evaluation of the interests involved, in particular in connection with the protection of the intellectual property rights relied on and the requirements of free competition enshrined in the EC Treaty.

225 Accordingly, the President considers that the arguments which Microsoft puts forward concerning the issues raised in the present case cannot, in the interim-relief proceedings, be regarded as prima facie unfounded. The prima facie case requirement is therefore satisfied.

2. Urgency

226 For the purposes of determining whether the implementation of Article 5(a) to (c) must be suspended as a matter of urgency, it is necessary to make a number of preliminary observations.

(a) Preliminary observations

227 The preliminary observations concern, first, the subject-matter of the remedy and, second, the extent of the alleged damage.

228 As regards the subject-matter of the remedy, it should be recalled that, in the words of Article 5(a) of the Decision, Microsoft is to disclose the 'interoperability information' 'to any undertaking having an interest in developing and distributing work group server operating system products' and, on 'reasonable and non-discriminatory terms', allow it to be used by those undertakings for the purpose of 'developing and distributing work group server operating system products'. As thus formulated, the remedy seeks to require Microsoft to disclose what the Commission criticises it for having wrongfully refused to supply (see also Article 2(a) of the Decision and recital 998 thereto).

229 Furthermore, as is apparent from recitals 999 and 1004 to the Decision, Microsoft is not required by the remedy in question to disclose source codes, nor does Microsoft dispute that point in the present interim-relief proceedings.

230 According to Article 1(1) of the Decision, the information which Microsoft is ordered to disclose is 'the complete and accurate specifications for all the protocols implemented in Windows Work Group Server Operating Systems and ... used by Windows Work Group Servers to deliver file and print services and group and user administration services, including the Windows Domain Controller services, Active Directory services and Group Policy services, to Windows Work Group Networks'. Recital 999 to the Decision states that '[t]his includes both direct interconnection and interaction between a Windows work group server and a Windows Client PC, as well as interconnection and interaction between a Windows work group server and a Windows Client PC that is indirect and passes through another Windows work group server'.

231 The objective pursued by the Commission is, according to the Decision, 'to ensure that Microsoft's competitors can develop products [compatible] with the Windows domain architecture [originally] supported in the dominant Windows Client PC operating system and hence viably compete with Microsoft's work group server operating system' (recital 1003; see also recitals 181 to 184).

232 Last, the parties agree that the authorisation to use the specifications, provided for in Article 5(a) of the

Decision, means that the specifications, which describe in detail what is expected of a software product, can be implemented by Microsoft's competitors. However, the parties are not agreed as to the time necessary to implement the specifications, i.e. to write them in code.

- 233 As regards the extent of the alleged damage, it should be recalled that the Decision requires Microsoft to disclose the specifications for its client-to-server and server-to-server protocols.
- 234 In its application for interim relief, Microsoft emphasised the difference between the Decision and the United States Settlement, stating that the United States Settlement authorised a licensee to use Microsoft client-to-server communications protocols only in order to ensure interoperability with the Windows Client PC operating systems, whereas the Decision requires Microsoft to license those protocols for use in work group server operating systems which provide file and print services and user and group administration services to any Windows Client PC or server operating system. The difference between the United States Settlement and the Decision was described by the Commission at recitals 688 to 691.
- 235 In answer to a written question put by the President, Microsoft explained that, as regards client-to-server protocols, the United States Settlement and the Decision are similar in that both compel Microsoft to develop specifications describing certain of its protocols, to provide those specifications to competitors and to allow competitors to use the specifications in order to implement, in their products, protocols that Microsoft has created to be used in its Windows operating systems.
- 236 At the hearing, Microsoft claimed that the United States licence programme will last until November 2009 and that the licences granted cover the whole world. It concluded that the immediate implementation of the obligation to disclose the specifications for the client-to-server protocols is unnecessary, since the United States Settlement makes it possible to achieve the same result by the date on which the Court of First Instance adjudicates on the merits of the case.
- 237 In that regard, the President observes that a decision is immediately enforceable and that suspension of its operation can be ordered only in the circumstances prescribed in the EC Treaty, in the Statute of the Court of Justice and in the Rules of Procedure of the Court of First Instance. Accordingly, the immediately enforceable nature of a decision is not in any way dependent on the necessity for its implementation.
- 238 None the less, account will be taken of the foregoing elements in the context of the examination of the urgency in ordering suspension of the obligation to disclose the specifications for the client-to-server protocols.
- 239 That argument developed by Microsoft at the hearing makes it necessary to undertake a separate examination of the condition relating to urgency according to whether the Decision requires Microsoft to disclose the specifications for the server-to-server communications protocols and the specifications for the client-to-server communications protocols.

(b) The serious and irreparable damage caused by the obligation to disclose the specifications for the server-to-server protocols

- 240 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures (order of the President of the Court of Justice in Case 310/85 R *Deufile v Commission* [1986] ECR 537, paragraph 15; order of the President of the Court of First Instance in Case T-13/99 R *PfizerAnimalHealth v Council* [1999] ECR II-1961, paragraph 134). It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind (order of the President of the Court of Justice in Case C-356/90 R *Belgium v Commission* [1991] ECR I-2423, paragraph 23; and orders of the President of the Court of First Instance in Case T-44/98 R II *EmesaSugar v Commission* [1999] ECR II-1427, paragraph 128, and Case T-151/01 R *DualesSystemDeutschland v Commission* [2001] ECR II-3295, paragraph 187).
- 241 The alleged damage must be certain or at least established with sufficient probability, while the applicant is required to prove the facts forming the basis of the supposed damage (order of the Court of

Justice in Case C-280/93 R *Germany v Council* [1993] ECR I-3667; and order of the President of the Court of Justice in Case C-335/99 P(R) *HFBandOthers v Commission* [1999] ECR I-8705, paragraph 67).

242 In the present case, Microsoft claims that implementation of the Decision would harm its intellectual property rights and also its commercial freedom and capacity to develop its products. It also maintains that implementation of the Decision will irreversibly alter market conditions.

243 Each of those three heads of damage will be examined separately.

(1) The alleged infringement of intellectual property rights

244 Microsoft maintains that implementation of the Decision will require it to license to its competitors valuable information protected by intellectual property rights.

245 It is therefore necessary to examine whether Microsoft has established specifically how the effects of the Decision are serious and irreparable. To that end, it is appropriate to separate the question whether disclosure of the interoperability information constitutes in itself serious and irreparable damage for Microsoft and the question whether the use of that information by Microsoft's competitors will give rise to serious and irreparable consequences.

(i) Disclosure of the interoperability information

246 The information that Microsoft is ordered to disclose is alleged to be protected by intellectual property rights and to be valuable. In the light of Microsoft's arguments, it is appropriate to assess in turn whether, first, the infringement of the exclusive prerogatives of the holder of an intellectual property right and, second, the obligation to disclose information constitute serious and irreparable damage.

247 First, Microsoft claims that, by requiring it to grant licences to its competitors, the Decision breaches its intellectual property rights in the information that it is required to disclose.

248 Without its being necessary in the present case to adopt a position on the existence of intellectual property rights or, consequently, on the question whether implementation of the Decision would effectively compel Microsoft to grant licences affecting its copyright or its patents, it is clear that should such rights be at stake the fact of requiring an undertaking to issue licences affecting its intellectual property rights would constitute in itself a substantial breach of the exclusive prerogatives which the undertaking derives from those rights.

249 The fact remains that that breach is the necessary consequence of the principle established in *IMSHealth*, paragraph 99 above, since the examination carried out by the Community judicature consists specifically in weighing up, on the one hand, the protection conferred by an intellectual property right on its holder and, on the other, the requirements of free competition laid down in the EC Treaty. Thus, where the Commission considers, when faced with exceptional circumstances, that the requirements of free competition require it to order an undertaking in a dominant position to grant a licence affecting its intellectual property rights, there is necessarily a breach of the prerogatives of the owner of those rights. In the present case, on the assumption that the specifications for the communications protocols, once drawn up, are protected by copyright, the very fact of ordering Microsoft to make its specifications available to competing undertakings constitutes a breach of the exclusive rights conferred on the author. Likewise, on the assumption that some of the protocols are protected by patents and that their use proves to be indispensable for the undertakings referred to in Article 5 of the Decision, the very fact that Microsoft is unable to use its patents as it intends constitutes a breach of the prerogatives conferred on the inventor.

250 None the less, to take the view that a breach of the exclusive prerogatives of the holder of the right constitutes in itself, and irrespective of the circumstances particular to each case, serious and irreparable damage, would mean that the urgency requirement is always satisfied when the measure which the Court is requested to suspend is of the type envisaged in *IMSHealth*, paragraph 99 above.

- 251 It is therefore necessary, in such circumstances, to examine whether, in the light of the elements of the case, the fact that intellectual property rights will be affected until a decision has been given on the merits of the case is likely to cause, over and above the simple breach of the exclusive prerogatives of the holder of the rights in question, serious and irreparable damage (see, to that effect, order of the President of the Court of Justice in Joined Cases 76, 77 and 91/89 R *RTE and Others v Commission* [1989] ECR 1141, paragraph 18; and order in *IMS Health v Commission*, paragraph 133 above, paragraphs 126 to 131).
- 252 Second, Microsoft maintains that the cause of the damage lies in the fact that the subject-matter of the disclosure is secret and valuable information.
- 253 In that regard, it is an indisputable fact that, once acquired, knowledge of information previously kept secret – whether because it is the subject of an intellectual property right or because it constitutes a trade secret – may be retained. Should the Decision be annulled, its annulment would not delete the knowledge of that information from memories and compensation would be very difficult as the value of the transfer of knowledge would be difficult to quantify. However, Microsoft does not explain what irreparable damage might be caused to it by the simple fact that third parties had knowledge of data disclosed by it, as opposed to the developments resulting from the use of that knowledge.
- 254 Next, the disclosure of information previously kept secret does not necessarily mean that serious damage will occur.
- 255 In the present case, however, Microsoft claims essentially that the interoperability information has a specific value. That value relates, first of all, to the fact that the communications protocols are the fruit of substantial and costly efforts and also to the fact that their commercial applications are significant. Microsoft further claims that drawing up the specifications is also onerous.
- 256 The President considers that, in the light of the material in the case-file, proof of the serious nature of that damage has not been adduced. In particular, the vague allegation that Microsoft's communications protocols have 'cost tens of millions of [United States] dollars', even if it were well founded, is not supported by any evidence. Account must also be taken of the fact that such costs will be offset in part by the royalties that Microsoft will be able to demand for the use of its protocols under the licences granted in implementation of the Decision.
- 257 In any event, the financial damage alleged in the preceding paragraph cannot be regarded as serious, owing to the financial power of Microsoft, whose turnover for the United States fiscal year July 2002 to July 2003 was, according to recital 1 to the Decision, EUR 30 701 million (see, to that effect, order of the President of the Court of Justice in Cases C-51/90 R and C-59/90 R *Comos-Tank and Others v Commission* [1990] ECR I-2167, paragraph 26).
- 258 Microsoft further maintains that the value of the information in issue consists in the fact that the specifications for the server-to-server communications protocols contain a significant amount of information on the functioning of the 'Active Directory' in the Windows operating systems. Its server-to-server communications protocols are not simple interfaces unconnected to the underlying implementation of the functionalities accessible via those interfaces. Consequently, communication of the protocols to competitors would amount to transferring to them a significant quantity of information on the way in which those functionalities are supplied (annex R.2; annex T.7; annex U.1, Madnick & Meyer, 'Response to CCIA annex by Ronald Alepin and to the submission by [FSF-Europe]'; and annex U.2).
- 259 The President notes, first, that Microsoft maintains in its written submissions that it would be required to disclose information on the internal structure or the innovative aspects of its products but notes further that the specific examples relate exclusively to the replication protocols in Active Directory and, second, that that assertion is based on the analyses by Dr Madnick and Dr Meyer, on the one hand, and by Mr Campbell Kelly, on the other.
- 260 In that regard, the President considers that Microsoft's allegations cannot be regarded as proven to the requisite legal standard.

- 261 Microsoft's assertion that the information that it would be required to disclose will reveal the mode of functioning of its products is illustrated by the sole example of Active Directory, defined in the Decision as the directory service included in Windows 2000 Server (recital 149). In its observations on the statements in intervention, Microsoft again emphasised that 'the specifications will teach competitors a great deal about how important components of Windows server operating systems, such as Active Directory, work'. At the hearing, the question put by the President as to whether the specifications would reveal elements relating to components of Windows server operating systems other than Active Directory did not meet with a clear and convincing answer either. On that point, one of Microsoft's expert witnesses stated that he 'believed' that the rules governing the management of the directory would also be revealed.
- 262 The claims made by Microsoft's experts and the examples relating to Active Directory on which they relied are based on analyses (see paragraph 116 above) which were strongly criticised by the Commission and the parties intervening in its support. Those parties challenged the assumptions made in those analyses and, in particular, the assumption that the protocols used to deliver communications between two copies of the same operating system and also the replication method are 'tightly coupled'. The objections raised by the Commission – based on documents submitted by experts (annex S.2 and annex U.1, 'Report by OTR', dated 10 September 2004) –, by FSF-Europe and, before they withdrew from the proceedings, by CCIA and Novell, relate essentially to the vague and conjectural nature of the demonstration in the Madnick & Meyer report and to the fact that that report contains theories which are contrary to Microsoft's practices. In annex 3 to CCIA's statement in intervention, Mr Alepin maintains that correctly-written protocol specifications reveal little or nothing about the internal structure, algorithms and other innovative aspects of the operating systems.
- 263 Faced with such objections and in the absence of other more precise material produced by Microsoft, it is not possible to take as established the allegations that the specifications will reveal more than is necessary to ensure the interoperability sought by the Commission.
- 264 Likewise, as the Commission stated in an answer to a written question, Microsoft's assertion that the single compression algorithm used by Active Directory would have to be disclosed under the remedy imposed by the Decision cannot be verified in the absence of sufficient objective evidence for that purpose.
- 265 In that regard, the President considers that Microsoft had the possibility and the right to submit a technical file to the Commission, and to the Commission alone, in which it would have been able to comment on the degree of precision of the specifications and the risks of revealing information necessarily covering more than just the interoperability sought by the Commission. However, Microsoft refrained from doing so during the administrative procedure. Likewise, after the adoption of the Decision, Microsoft could have explained the reasons why efficient security measures to overcome that difficulty could not be envisaged. In particular, the Commission stated at the hearing that it had requested Microsoft on 30 July 2004 to communicate its specifications for examination, but that they were never sent; and Microsoft does not dispute that assertion.
- (ii) The use of the interoperability information
- 266 Microsoft claims that, once the interoperability information is disclosed, the use to which it will be put will be the cause of a number of types of serious and irreparable damage.
- The alleged dilution of the information
- 267 Microsoft contends that the information disclosed will be able to be used by its competitors, that it may be placed in the public domain and that there will be no means of checking whether it is being used following annulment of the Decision.
- 268 That argument ignores the possibility of providing for contractual safeguards concerning the confidentiality and use of the information pending the decision of the Court in the main action, such clauses being standard practice in the sector. Confidentiality clauses, together where necessary with penalty clauses, can be inserted in the licence agreements concluded with the undertakings having an interest in developing and distributing products competing with Microsoft's products, within the

meaning of Article 5(a) of the Decision.

- 269 On that point, the Commission has indicated that Microsoft could require reasonable contractual safeguards for the disclosure, so that the information disclosed to competitors will no longer be able to be used should the Decision be annulled. The licence agreements concluded within the framework of the MCPP and technology transfer agreements constitute reference elements.
- 270 In that context, it should be noted that Microsoft itself stated in its application for interim measures that the disclosure of trade secrets to its contractual partners was subject to compliance by them with an obligation to maintain confidentiality (see paragraph 125 above).
- 271 Furthermore, Microsoft undertook, under the agreement with Sun Microsystems, to communicate the specifications for its server-to-server communications protocols. However, it has offered no explanation of why contractual safeguards identical to the ones in that agreement would not ensure that the information disclosed in implementation of the Decision was not made public. As stated at recital 211 to the Decision, moreover, '[i]n the course of the 1990s, Microsoft entered into a licence with AT&T relating to the disclosure of portions of the Windows source code'. Microsoft has not explained why it would not be able to use the same contractual safeguards as those that must have been included in that agreement with AT&T when disclosing the specifications referred to in Article 5 of the Decision.
- 272 The possibility of appropriate safeguards also provides an answer to Microsoft's fear that the knowledge disclosed will spread to the point of entering the public domain. Apart from the fact that the conclusion of licences does not in any way mean that the data in question will, from a legal point of view, be in the public domain, at least as regards intellectual property rights, the damage alleged by Microsoft assumes that the other parties will fail to honour their contractual undertakings, which cannot be presumed (see, to that effect, order of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel v Commission* [1998] ECR II-2769, paragraph 41).
- 273 As regards the allegation that it will be impossible to ascertain whether the information is being used after the Decision has been annulled, Microsoft asserts that it is simplistic to believe that the use of its specifications for the communications protocols will be immediately detectable should the Decision be annulled, owing to the maintenance of interoperability of third-party work group server operating systems and Windows server operating systems. However, in its observations on the statements in intervention, Microsoft stated that 'without having access to the source code of third-party products' it could not know to what extent those third parties were using the knowledge which they obtained through their access to the specifications for Microsoft's communications protocols. It follows from that argument that Microsoft considers it possible to determine to what extent competitors are using the knowledge which they have obtained from the specifications for the communications protocols by having access, should the Decision be annulled, to the source code of their products. The possibility that an independent expert – appointed by common agreement between the contracting parties or, failing that, by the Commission – should access the source code of the products of Microsoft's competitors in order to check whether that knowledge was being used can perfectly well be provided for in the licensing agreements to be concluded with the undertakings referred to in Article 5 of the Decision. It is also open to Microsoft, moreover, to include in those licensing agreements penalty clauses which, in the event that the Decision is annulled, would prevent its competitors from marketing products containing the interoperability information. Such contractual stipulations in relation to the procedures for checking the products and the penalties incurred for breach of the undertaking given not to use the information following the annulment of the Decision must be considered to be sufficient to avoid irreparable damage.
- 274 For the sake of completeness, it should be observed that the appraisal in the preceding paragraph is supported by the fact that at the hearing Novell stated that it was prepared to allow access to the source code of its products, should the Decision be annulled, for the purpose of verifying that it was not using the interoperability information. Microsoft did not answer that point.

The argument that the products will remain in the distribution channels

- 275 Microsoft maintains that the Decision will cause permanent damage to its intellectual property rights – more specifically to its right to exploit its patents – since, if the Decision is annulled, products incorporating its technology will remain in the distribution channels and in the hands of its customers.

- 276 The President considers that Microsoft has not established that those circumstances constituted serious and irreparable damage.
- 277 First, it is not known when competing products implementing the specifications will be placed on the market. In that regard, it is common ground that the undertakings which receive the information will first have to implement the specifications and then have to place their products on the market. At the hearing, Microsoft's representative stated that the specifications for the communications protocols would be ready within three to four weeks.
- 278 The total period between the date of receiving the specifications and the date of placing the products on the market was put at several years by the Commission in the Decision (recitals 719 to 721 to the Decision). In its observations, the Commission referred to a 'letter from Sun [Microsystems] to the Commission dated 20 July 2004', paragraph 3 of which states, with reference to the specifications for server-to-server protocols:
- 'Employing a team of up to [a substantial number of] engineers it took [longer than one] years for Sun [Microsystems] to complete the development effort to deliver a market-ready version of AS/U based upon materials received from AT&T. For the reasons explained below, Sun [Microsystems] would expect that more time would be required to introduce a similarly complex from technical specifications supplied pursuant to the "Technical Collaboration Agreement" with Microsoft dated April 2004.'
- 279 Furthermore, in the pleadings which it submitted before withdrawing from the proceedings, CCIA maintains that 'even if the information were disclosed tomorrow (and assuming that it was complete and correct), it is clear that it would take several years (at least two) before one of Microsoft's competitors could place a product using that information on the market', that assertion being based on annex CCIA.R.3, in which Mr Alepin considers that it is entirely unrealistic to expect that any fully interoperable product would be commercially available in two years' time (paragraph 84). SIIA and, before withdrawing, Novell developed the same argument in their written submissions.
- 280 When invited to comment in writing on that information relating to the estimate of the time necessary to implement its own specifications, Microsoft stated essentially that the time necessary to implement a specification depends largely on the resources allocated to that effort. At the hearing, Microsoft stated that a product could be placed on the market in less than three months, but without providing sufficient detail or evidence to support that claim or making it possible to ascertain whether it is well founded. That claim cannot therefore be upheld.
- 281 It follows from the foregoing, without prejudice to the fact that it will take some time for Microsoft's competitors to sell the versions of their products compatible with Windows work group server operating systems, that there is no reason to believe that those compatible products will be marketed in the short term. Consequently, the effect of which Microsoft complains would in any event take concrete form only for a limited period between the date on which the products concerned are placed on the market and the date on which judgment is delivered in the main proceedings.
- 282 Second, any damage arising from the fact that products implementing the specifications for Microsoft's protocols will remain in the distribution channels cannot be regarded as irreversible, since an effect of that nature is inevitably limited in time, either because the products will eventually be sold and installed within the undertakings which have acquired them (see paragraph 283 below) or because the unsold products will become technologically obsolete.
- 283 Third, Microsoft correctly maintains that, even if the Decision should be annulled, the competing products will remain installed within the undertakings which have acquired them. None the less, that fact cannot be regarded as the cause of serious and irreparable damage, since, first, Microsoft has not shown how the presence of those products in customers' networks would appreciably harm its future activities and, second, it is likely that the commercial value of those products, which will have satisfied customer demand before judgment is given on the merits of the case, will fall rapidly if the Decision is annulled by the Court of First Instance.
- 284 On that last point, should the Decision be annulled, Microsoft would be able to prevent competing operating systems from being compatible with the new versions of the Windows operating systems by

altering its server-to-server communications protocols and thereby significantly and rapidly reducing the value of the competing products. The fact that it is technically possible to affect interoperability between the Windows environment and the competing work group server operating systems installed in undertakings – which is likely to enable Microsoft to derive an exclusive benefit from subsequent improvements – was confirmed at the hearing and Microsoft raised no objection on that point.

- 285 Even on the assumption that Microsoft were to decide not to alter its communications protocols should the Decision be annulled, the fact that competing work group server operating systems remain within networks will not be likely to cause it irreparable damage either. At the hearing, Microsoft stated that, should the Decision be annulled, it would be technically possible to sever interoperability with competing work group server operating systems, but that it would be inconceivable from a commercial point of view not to ensure backward compatibility between old and new systems. However, although the maintenance of that compatibility allows competing operating systems to interoperate in a network with the new version of the Windows operating systems, that does not alter the fact that the former systems are less technologically advanced than the latter systems and that, from a commercial viewpoint, they would rapidly become obsolete. In that regard, it must be borne in mind that, should the Decision be annulled by the Court of First Instance, Microsoft's competitors would no longer be able to use the interoperability information referred to in Article 5 of the Decision (see paragraph 273 above) and that, consequently, backward compatibility would be ensured only for the work group server operating systems marketed by those competitors before the date of annulment.

The alleged 'cloning' of the products

- 286 Microsoft maintains that the information in question will be able to be used to clone its products. Once its competitors have acquired detailed knowledge of the internal operating modes of its operating systems by studying the copyrighted specifications for its communications protocols, they will be able to use them for their own products. It would be difficult, indeed impossible, for Microsoft and for the judicial authorities to determine whether Microsoft's competitors were using that knowledge when designing their own server operating systems.
- 287 In that regard, it should be borne in mind that the premiss of that reasoning, namely that it will be possible to obtain information going far beyond just the interoperability information, has not been held to be established (see paragraphs 260 to 265 above).
- 288 Furthermore, Microsoft's allegation is based on a reading of Article 5 of the Decision that does not take account of the grounds on which it is based. The direction in Article 5 that Microsoft must allow the use of its specifications for its protocols 'for the purpose of developing and distributing work group server operating system products' must be read in the light of recitals 1003 and 1004 to the Decision. Recital 1003 states that '[t]he objective of this Decision is to ensure that Microsoft's competitors can develop products that interoperate with the Windows domain architecture natively supported in the dominant Windows Client PC operating system and hence viably compete with Microsoft's work group server operating system'. Recital 1004 states that 'as regards the subsequent use of the specifications, the specifications should also not be reproduced, adapted, arranged or altered, but should be used by third parties to write their own specification-compliant interfaces'.
- 289 It follows that Article 5 of the Decision must be understood as meaning that the use of the protocols is permitted only for the purposes of interoperability and that, consequently, their use for other purposes is not allowed. The Commission expressly confirmed that interpretation at the hearing and emphasised that compliance with that limitation will be capable of being verified by Microsoft's 'monitoring trustee who shall be independent from [it]' referred to in Article 7 of the Decision.

(2) The alleged interference with commercial freedom

- 290 Microsoft maintains that its freedom to determine the essential elements of its business policy will be compromised owing to the implementation of the Decision: the Decision would require it to disclose information to its competitors, deprive it of its capacity to develop its products and force it to 'harden' its protocols.
- 291 In that regard, it should be pointed out that, in principle, any decision taken under Article 82 EC and

requiring a dominant undertaking to bring an abuse to an end necessarily entails a change in its business policy. The obligation imposed on an undertaking to alter its conduct cannot therefore be regarded as constituting serious and irreparable damage in itself, short of considering that the urgency requirement is always satisfied when the decision whose suspension is sought orders the addressee to bring abusive conduct to an end.

- 292 Where an applicant invokes an interference with its business freedom to demonstrate that the interim measure applied for must be ordered as a matter of urgency, it must adduce evidence either that implementation of the contested measure will oblige it to alter certain essential elements of its business policy and that, even after judgment in its favour has been given in the main proceedings, the effects of the implementation of that measure will prevent it from resuming its initial business policy, or that those effects will cause it serious and irreparable damage of another kind, it being borne in mind that it is in the light of the circumstances of each case that the alleged damage must be assessed.
- 293 Thus, in the orders in *Bayer v Commission*, paragraph 138 above, and *IMSHealth v Commission*, paragraph 133 above, on which Microsoft relies, the judge dealing with the application assessed the consequences of the interference with the undertakings' freedom to define their business policies in the light of the effects of the implementation of the measure.
- 294 In the order in *Bayer v Commission*, paragraph 138 above, the judge dealing with the application actually emphasised that '[i]n this case, if the applicant's argument were to be accepted by the Court as well founded, immediate implementation of the provision in question would risk depriving the applicant of its independence in defining certain crucial elements in its business policy' (paragraph 54). He further held that '[a] situation of that kind is particularly likely to cause serious damage to the applicant in the context of the pharmaceutical industry, which is distinctive in that prices and methods of reimbursement are fixed or controlled by national health services, thereby giving rise to large disparities in the prices for a single medicine in the various Member States' (paragraph 55). As the sectoral regulation of prices had been regarded as a factor limiting the undertakings' scope for business freedom, the judge concluded that a further interference with an already-restricted business freedom constituted serious damage. The change in Bayer's business policy was therefore regarded as sufficient to characterise the urgency only in the light of the specific features of that case.
- 295 In the order in *IMSHealth v Commission*, paragraph 133 above, the judge dealing with the application for interim measures considered that the urgency requirement was satisfied because there were serious grounds for believing that many of the 'market developments' to which immediate execution of the decision was likely to give rise would be very difficult, if not impossible, to reverse should the application in the main action be upheld (paragraph 129). The 'real risk of serious and irreparable damage to the applicant's interests' (paragraph 127) identified in that case therefore relates to the serious and irreversible nature of the market developments. The considerations relating to the interference with the freedom which undertakings enjoy when defining their business policy (paragraphs 130 and 131) were taken into account solely for the purposes of supporting the conclusion at which the judge dealing with the matter had already arrived in relation to urgency, as may be seen from the fact that there is no analysis of the serious and irreparable nature of the interference.
- 296 It is appropriate therefore to examine whether Microsoft has demonstrated that, regard being had to the circumstances of the case, the interference with its business freedom is the cause of serious and irreparable damage.
- (i) The alleged fundamental change in business policy
- 297 The fundamental change in business policy which the Decision would impose on Microsoft is contradicted by certain material in the file.
- 298 First of all, both the United States Settlement and the Decision require Microsoft to disclose the specifications for its communications protocols. Admittedly, the United States Settlement does not require Microsoft to disclose the specifications for its server-to-server communications protocols, but it does require it to license all the protocols implemented in a Windows Client PC operating system for the purposes of interoperability with a Windows server operating system. The President finds, in the light of the evidence before him and having regard to the fact that the Decision is in keeping with the disclosure policy already implemented by Microsoft under the United States Settlement, that the

differences existing in terms of business policy between that settlement and the Decision cannot be regarded as being fundamental. It must be noted, in that context, that it is not disputed that one of the protocols licensed under the MCPP is a communications protocol used not only for client-to-server communications but also for server-to-server communications. On that last point, it follows, in particular, from recital 179 to the Decision that '[s]ervers in a network can sometimes use the same protocols as client PCs in order to communicate with other servers. For instance, in a Windows domain, Microsoft Kerberos is used for authentication both between a Windows client PC and a Windows group server and among Windows work group servers'. Furthermore, the alleged interference with Microsoft's business policy is not irremediable, since annulment of the Decision, like the end of the MCPP due to take place to take place in 2009, would allow Microsoft not to license its communications protocols any more, should that be its choice.

299 Next, it is apparent from the case-file that Microsoft's management declared that they wished to pursue a policy of actively promoting licences in respect of the protocols covered by the United States Settlement and of affirming the intention to offer usage rights on a wider basis than required by that settlement. The following is taken from a Microsoft press release dated 1 August 2003 (annex N.12):

'Microsoft also announced that it is generally willing to provide even broader usage rights for the company's protocol technology than is required by the final judgment in the antitrust case or is reflected in standard MCPP licence agreements. Microsoft has already voluntarily granted usage rights to a number of licensees under the MCPP that exceed the requirements of the final judgment, and Microsoft encourages other developers who may be interested in licensing the company's protocol technology to discuss their technical requirements with Microsoft's protocol licensing team.'

300 Last, the agreement concluded between Microsoft and Sun Microsystems provides for disclosure of the server-to-server communications protocols covered by the Decision. In so far as that agreement provides for communication of the protocols which the Decision specifically requires Microsoft to disclose, Microsoft cannot validly claim that the implementation of the Decision would oblige it fundamentally to modify its business policy.

301 In light of the foregoing considerations, the President cannot take it as established that the Decision will cause a sufficiently significant change to Microsoft's business policy.

302 That conclusion is supported by the fact that the Commission stated at the hearing, in answer to a question put by the President, that in the course of the negotiations with the Commission during the administrative procedure, Microsoft was prepared to disclose more interoperability information than that referred to in the Decision. While insisting on the specific nature of each negotiation, which was the result of mutual concessions, Microsoft did not contradict the Commission's argument on that point.

(ii) The alleged difficulty in improving the protocols

303 Microsoft states that implementation of the Decision will have the effect of restricting the flexibility which it needs to improve the protocols concerned on a regular basis, thus reducing its capacity to innovate (annexes R.2 and T.7).

304 In that regard, it should be recalled that Article 5(a) to (c) of the Decision requires Microsoft to communicate the specifications for its protocols to its competitors, but leaves Microsoft free to design its protocols as it sees fit. The improvement of the protocols therefore remains a decision which it is for Microsoft to take in accordance with the expected consequences of such a decision. Microsoft has failed to establish that a decision to improve the protocols during the interim period – until the Court has delivered judgment in the main action – would have practical consequences of such magnitude as to constitute a real obstacle to innovation.

305 Next, the argument that the flexibility with which it will be able to improve the protocols concerned will be affected by the constraint, imposed by commercial reality, of having to ensure backward compatibility with competitors' products based on its protocols cannot be accepted in view of certain evidence in the case-file.

306 First, it should be recalled that, historically, Microsoft did not consider itself bound by such an obligation

when it decided to render Novell's NDS for NT inoperative (recitals 298 to 301 and 686 to the Decision).

- 307 Second, Microsoft in any event ensures backward compatibility with the previous versions of its own products. There is no evidence in the file on which to believe that, in ensuring such compatibility, it is not also capable of ensuring backward compatibility with all compatible implementations. Microsoft has stated that it ensured backward compatibility with a range of products, emphasising that '[i]t [was] already an engineering challenge for Microsoft, in the context of successive releases of new Windows server operating systems, to maintain backward compatibility with the thousands of published interfaces used by third-party software programs for Microsoft'.
- 308 Third, the increased complexity represented by the development of compatible work group server operating systems has not been evaluated. In any event, the extra effort must be regarded as limited during the interim period owing to what will probably be the small number of compatible products placed on the market and bought by customers before the merits of the case have been determined by the Court. On that point, it should be noted that a new Microsoft operating system, known as 'Longhorn', will, according to Microsoft, be ready for 2006 and that, as the parties intervening in support of the Commission stated, the effect of the announcement of its launch will be likely to influence customer purchases to the detriment of competing work group server operating systems.
- 309 Fourth, the United States Settlement, which operates to the advantage of not only manufacturers of work group server operating systems, within the meaning of the Decision, but also virtually all manufacturers of server operating systems, ought to have had a negative impact of the same kind as that on which Microsoft relies in these interim relief proceedings. However, there is nothing in the parties' written submissions to indicate that implementation of the Decision might affect Microsoft's flexibility to change its protocols to a greater extent than that resulting from the undertakings agreed by Microsoft in the context of the United States Settlement. On that point, it follows from one of Microsoft's answers to the written questions that, in certain circumstances, the United States Settlement allows Microsoft to choose to use innovations in client-to-server protocols to increase the appeal of the Windows operating systems, without making that technology available to its competitors. It adds:

'In particular, if Microsoft develops new client-to-server protocols that are not included in its Windows client operating system, but are installed separately, then Microsoft need not make such protocols available to competitors. For example, Microsoft could develop innovative protocols in connection with a new version of its Windows server operating system. When a network using that Windows server operating system was set up, customers would be asked to install the client software implementing these protocols on their personal computers. (This is the method traditionally followed by Novell.)'

- 310 That statement confirms that Microsoft intends to improve its products and that the constraints leading to a lack of flexibility as regards the possibility of improving them effectively are not such as to prevent that improvement. It matters little whether the improvements are made available by deliberate intention or under a legal constraint.
- 311 Fifth, the agreement with Sun Microsystems, which covers the protocols concerned by the Decision, tends to show that the impact on Microsoft's capacity to alter its protocols is not irreversible.

(iii) The alleged need to 'harden' the protocols

- 312 Microsoft states that it would have to 'harden' the protocols in order to avoid 'possible malfunctions, crashes and security risks' as a result of 'inadvertent and malicious use'.
- 313 On the assumption that the 'possible malfunctions, crashes and security risks' were proven, the President finds that Microsoft is merely invoking the damage resulting from the efforts which it claims would be necessary to prevent such a possibility from becoming a reality, without stating how that damage would be serious and irreparable. In particular, it does not show that the 'hardening' of the protocols would have to be maintained should the Decision be annulled or that it would be the cause of another type of damage. Furthermore, as the Commission contends, the recipients of the interoperability information would have strong incentives to render their products secure and stable and to prevent their 'inadvertent use' and would have no interest in 'malicious' use. On the contrary, as the

Commission further submits, the undertakings benefiting from the disclosure will have a manifest interest in avoiding random damage, by testing their implementations against Microsoft's and ensuring that their products do not cause data loss or corruption with their customers. Those tests will naturally extend to all Windows products with which the competitor concerned intends to establish interoperability. In all probability, therefore, there will be no need for Microsoft to adapt retroactively products previously installed.

- 314 Just as in relation to the alleged interference with its ability to design its products freely, Microsoft has not established that the risks referred to in the preceding paragraph materialised as a result of the implementation of the United States Settlement. Last, although Samba or AS/U implement a number of protocols which had initially been designed as 'private' protocols, to use Microsoft's terminology, Microsoft does not put forward any example of 'unexpected' data capable of causing data loss or data corruption being transmitted to Windows.
- 315 The alleged constraints on Microsoft's capacity to develop its products are already inherent in the settlement concluded with Sun Microsystems, which includes the protocols of relevance in the context of the Decision. Even on the assumption that it exists, the resulting damage therefore has no connection with the remedy and Microsoft has not established that the suspension of implementation which it seeks would appreciably alter its current position.
- 316 Last, precise technical conditions could also be agreed by contract, as provided for in the context of the United States Settlement. In answer to a question put by the President, Microsoft stated that the United States Settlement allows it to make disclosure of security-related protocols conditional upon certain terms designed to minimise the risk that those protocols would be used maliciously to compromise computer security. Thus, the fear connected with malicious use of the information in issue or inadequate implementation testing could be dispelled by the possibility of requesting the Commission to authorise Microsoft to refuse to supply the information in such a situation.

(3) The alleged irreversible development of market conditions

- 317 Microsoft maintains that mandatory licensing will irremediably alter to its detriment the conditions prevailing on the market, because examination of the detailed specifications for the communications protocols in issue will reveal to its competitors important aspects of the design of the Windows server operating systems. The large-scale disclosure of such information would allow competitors to reproduce in their server operating systems a series of functionalities that Microsoft has developed through its own research and development efforts.
- 318 The factual premiss on which Microsoft bases its analysis has not been regarded by the President as proven to the requisite legal standard (see paragraphs 260 to 265 above). Nor has Microsoft adduced evidence of the development of the market which it maintains would follow from the alleged problem, even though the Commission challenged that point in its observations in defence. Microsoft's argument cannot therefore be accepted.
- 319 In any event, even on the assumption that Microsoft's argument may be understood as meaning that disclosure of the interoperability information will alter market conditions in such a way that it would lose market share and, should the Decision be annulled, would no longer be able to regain the market share lost, the President finds that Microsoft has adduced no factual evidence to support that argument. In particular, it has not demonstrated that there would be obstacles preventing it from regaining a significant part of the share which it could have lost as a result of the remedy (see, to that effect, order of the President of the Court of Justice in Case C-471/00 P(R) *Commission v CambridgeHealthcareSupplies* [2001] ECR I-2865, paragraph 111; and order of the President of the Court of First Instance of 16 January 2004 in Case T-369/03 R *ArizonaChemicalandOthers v Commission*, not yet reported, paragraphs 82 to 84).

(c) The serious and irreparable damage caused by the obligation to disclose the specifications for the client-to-server protocols

- 320 It follows from all of the foregoing considerations that, as regards the obligation to disclose the specifications for the server-to-server communications protocols, the various heads of damage alleged

by Microsoft were not held to satisfy the urgency requirement.

- 321 As Microsoft has put forward no additional argument on which a different conclusion might be reached as regards the effects of the disclosure of the client-to-server communications protocols, the President is necessarily led to conclude that Microsoft has not shown that the urgency requirement was satisfied in relation to the second part of the obligation to disclose. In that regard, it should be borne in mind that, as the Commission correctly explained in the Decision, client-server interoperability and server-server interoperability are two indissociable components of interoperability within a computer system consisting of a number of client PCs running Windows and a number of work group servers running Windows, all linked together in a network (recitals 144 to 184 and 689).
- 322 In any event, it must be taken into account that Microsoft insisted at the hearing that there was no need to require it to disclose the specifications for the client-to-server protocols, since those protocols can be obtained until 2009 under the MCPP. That argument can only be taken to mean that the disclosure of those specifications ordered by the Decision cannot be the cause of serious and irreparable damage to Microsoft.
- 323 The application for interim measures must therefore also be dismissed for lack of urgency in so far as it seeks suspension of implementation of the obligation to disclose the specifications for the client-to-server protocols and to authorise their use by Microsoft's competitors.
- 324 In the light of all of the foregoing, as the urgency requirement is not satisfied, the application for suspension of implementation of Article 5(a) to (c) must be dismissed without there being any need to balance the various interests involved.
- 325 It is important to make clear that, under Article 109 of the Rules of Procedure, rejection of an application for an interim measure does not bar the party who made it from making a further application on the basis of new facts. In the present case, it cannot be ruled out that a continuing disagreement as to details of the means of implementation of the Decision may be regarded as a 'new fact'. More specifically, in view of the references in the foregoing assessment to the contractual conditions that justify the conclusion that the urgency requirement is not satisfied (see paragraphs 268, 273, 285 and 316 above), the refusal to include such safeguard clauses in the licence agreements to be concluded with the undertakings referred to in Article 5 of the Decision might be regarded as a change in circumstances susceptible of calling in question certain of the grounds on which the present order is based.

The tying issue

A – Arguments of the parties

1. Arguments of Microsoft and the parties granted leave to intervene in support of the form of order which it is seeking

(a) A prima facie case

- 326 Microsoft maintains that it presented arguments in its application for annulment which prima facie provide grounds for annulment of the provisions of the Decision as concerns the alleged tying abuse.
- 327 In the Decision, the Commission claims that the incorporation by Microsoft of an improved multimedia functionality in Windows constitutes an abuse within the meaning of Article 82 EC, 'in particular' within the meaning of subparagraph (d) of the second paragraph of that article, and also in application of a new criterion in respect of tied sales derived from Article 82 EC. As stated at recital 841 to the Decision, in classical tying cases, the Commission and the Courts consider the foreclosure effects for competing vendors to be demonstrated by the bundling of a separate product. In Microsoft's submission, it follows from the same recital to the Decision, first, that the present case is not a 'classical tying case' and, second, that 'users can ... obtain third party media players through the Internet, sometimes free [of charge]'. The Commission therefore accepts that '[t]here are ... good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition' (recital 841).

- 328 The Commission none the less concludes that there is a foreclosure effect in this case and bases that conclusion on a highly speculative theory, according to which the ubiquitous distribution of media functionality in Windows will compel content providers to encode their content almost exclusively in Windows Media formats, which will, in turn, eventually drive all competing media players out of the market and then, indirectly, oblige consumers to use only Windows multimedia functionality (recitals 836 and 842 to the Decision). Microsoft claims that there is, for the purposes of the case-law, 'a serious dispute regarding the correctness of the fundamental legal conclusion underpinning' the Commission's allegations concerning the design and integration of Windows Media Player (order in *IMS Health v Commission*, paragraph 133 above, paragraph 106). Microsoft also submits that it has satisfied the requirement that the finding of infringement on which Article 6(a) of the Decision is based be shown to be prima facie unlawful.
- 329 First, the Commission's speculative theory concerning foreclosure from the market has no basis. The Decision does not reflect market realities, particularly in so far as, first, users of Windows-based client PCs find it easy to use different media players with different formats and, second, content providers use multiple formats on a daily basis. The Commission's finding is also contrary to the very different theory applied in the AOL/Time Warner decision (Commission Decision 2001/718/EC of 11 October 2000 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M.1845 – AOL/Time Warner) OJ 2001 L 268, p. 28). Furthermore, the Commission concludes in the Decision that the foreclosure theory applies only where the media functionality of Windows is developed by Microsoft, although that theory was not found to apply between 1995 and 1998, when RealNetworks' media player was 'bundled' with Windows.
- 330 In its observations of 19 August 2004, Microsoft further states that the Commission wholly ignores the fact that the main Web sites continue to present media content in two or more formats, the fact that the number of formats on popular Web sites with media content has increased and is now approximately three and, last, the fact that in the spring of 2004 almost 80% of Web sites presented content in RealNetworks format.
- 331 The Commission also fails to take account of recent market developments, in particular the exponential growth in devices other than client PCs, such as Apple's iPod, which reads media content in formats different from Windows, or the future generation of mobile telephones, which will include media players. Microsoft maintains that content suppliers who wish to reach the widest possible audience will continue to use multiple formats, in order to reach, on the one hand, users of devices other than client PCs which are not capable of reading contents in Windows Media format and, on the other, consumers who use third-party media players on their client PCs rather than the Windows Media functionality.
- 332 Second, the benefits flowing from Microsoft's operating system 'design concept', which entails the creation of new versions of Windows with added functionality, are substantial and should have been given more weight by the Commission.
- 333 Third, the Commission fails to establish the existence of an infringement of Article 82 EC, in particular of subparagraph (d) of the second paragraph of that article. In particular, the Decision does not establish that Windows and its media functionality belong to two distinct product markets. The Commission incorrectly considers only whether the alleged tied product is available separately from the alleged 'dominant' product, whereas the appropriate question is whether the latter product is regularly offered without the alleged tied product. Nor does the question of a supplementary obligation arise in the present case, since consumers (i) are not required to pay extra for the media functionality in Windows, (ii) are not required to use the media functionality in Windows and (iii) are not prevented by Microsoft from using third-party media players instead of or in addition to the media functionality in Windows. Nor has the Commission demonstrated that the media functionality is not connected naturally or by commercial usage with client PC operating systems. Indeed, other operating systems include media functionality and Microsoft has been integrating constantly-improving media functionality into Windows since 1992.
- 334 Fourth, the Commission failed in the present case to take sufficiently into account the obligations imposed on the European Community by the TRIPS Agreement.
- 335 Fifth, the remedy is disproportionate.

336 CompTIA and Exor support Microsoft's position as regards a prima facie case. They contend that Microsoft has demonstrated that Articles 4 and 6(a) of the Decision are prima facie unlawful.

(b) Urgency

337 Microsoft maintains that the immediate implementation of Article 6(a) of the Decision will cause two types of serious and irreparable harm, resulting, first, from the abandonment of the fundamental design concept underlying its Windows operating system and, second, from injury effect to its reputation.

(1) The harm which Microsoft alleges will follow from the abandonment of the fundamental design concept underlying the Windows operating system

338 Microsoft maintains that the fundamental design concept underlying its Windows operating system constitutes the basis of the Windows business model. Microsoft's business model has the goal of designing a common platform for the development and running of applications, no matter what hardware is used by the consumer.

339 The immediate enforcement of Article 6(a) of the Decision would compel Microsoft to abandon that concept and thus cause it serious and irreparable harm. By requiring it to offer a version of Windows from which the software code corresponding to what the Commission identifies as 'Windows Media Player' has been removed, Article 6(a) of the Decision prohibits Microsoft from designing its operating system in such a way as to include new or improved media functionality on a uniform basis. It also deprives software developers, content providers, OEMs and consumers of the benefits they currently derive from the Windows platform.

340 Microsoft recalls that, according to the case-law, serious and irreparable damage is caused when a party is required to implement immediately a Commission decision which would entail structural changes or prevent it from determining essential aspects of its commercial policy (order in *RTE and Others v Commission*, paragraph 251 above; order of the President of the Court of Justice of 13 June 1989 in Case C-56/89 R *Publishers Association v Commission* [1989] ECR 1693; orders of the President of the Court of First Instance of 16 July 1992 in Case T-29/92 R *SPO and Others v Commission* [1992] ECR II-2161; in Joined Cases T-7/93 R and T-9/93 R *Langnese-Iglo and Schöller Lebensmittel v Commission* [1993] ECR II-131; of 10 March 1995 in Case T-395/94 R *Atlantic Container Line and Others v Commission* [1995] ECR II-595; in *Bayer v Commission*, paragraph 138 above; of 7 July 1998 in Case T-65/98 R *Van den Bergh Foods v Commission* [1998] ECR II-2641; and in *IMS Health v Commission*, paragraph 133 above). Should the Decision be implemented immediately, the benefits flowing from uniformity of the Windows platform would be irreversibly lost, resulting in serious and irreparable harm to Microsoft.

341 Nor, in Microsoft's submission, would that harm be repaired by the annulment of the Decision. Microsoft's engineers would have to assume that at least some copies of Windows distributed in the EEA will not have the media functionality. Since those downgraded versions of Windows could not be taken back from users should the Decision subsequently be annulled, Microsoft's engineers would have to take into account the fact that two versions would be in existence for many years, as would third parties who depend on the stability and consistency of the Windows platform, which would increase their costs and continuously reduce the appeal of Windows. Those planning difficulties would be compounded by the conditions laid down in Article 4 of the Decision.

(2) Harm to Microsoft's reputation

342 Microsoft contends that the distribution of the version of Windows required by Article 6(a) of the Decision ('the Article 6 version') would cause serious and irreparable harm to its reputation as a developer of quality software products.

343 First, the Article 6 version would not contain the media functionality normally made available to applications running on Windows. Consequently, many applications would not work with that version of the operating system, even though it would be called 'Windows'. That malfunction would undermine the central value of Windows and would also have the effect that Microsoft and the OEMs and software developers would be required to resolve problems created by the Decision and to provide the necessary

support to dissatisfied customers in the interim. Resolving the many foreseeable and potentially unforeseeable problems would be extremely difficult, costly and harmful to Microsoft's reputation.

- 344 In its observations of 19 August 2004, Microsoft disputes the Commission's assertion that Microsoft could maintain 'basic media functionality' in the Article 6 version. The Commission fails to explain what it means by 'basic media functionality' and its assertion could be correct only if it were referring to the ability to generate certain sounds or display static pictures on the screen. In any event, the Article 6 version would remove all ability to play audio or video files, in particular from compact discs or digital versatile discs (DVDs) or from documents in standard formats such as MP3 downloaded from the Internet on to the hard disk of a client PC. In Microsoft's submission, a consumer will regard a client PC operating system which is incapable, in 2004, of performing such common tasks as seriously downgraded.
- 345 Nor does the Commission dispute the non-exhaustive list of all the Windows functionalities that would no longer work properly in the Article 6 version.
- 346 Second, the problems caused by the Article 6 version would not be resolved by the installation of third-party media players. Microsoft claims that such products are not substitutes for the media functionality in Windows, since they do not provide the same APIs, which leads to certain failures in third-party applications and Web sites that rely on Windows media functionality.
- 347 Third, Microsoft would suffer equivalent, or even greater, harm since other parts of Windows that rely on its media functionality would no longer work correctly in the Article 6 version, in particular as regards the 'My Music' folder and the transfer of MP3 files to a large range of portable digital music players.
- 348 It follows from the non-exhaustive list of defects caused by the Article 6 version, first, that only some of those defects could be remedied by installing a third-party media player and, second, that the defects resolved would vary depending on which media reader was installed.
- 349 In its observations of 19 August 2004, Microsoft disputes the Commission's argument that third-party media players installed on new client PCs by OEMs can replace the Windows media functionalities. That assertion, which is apparently based on the supposition that the software code which supplies media functionality is perfectly substitutable, is technically incorrect. The Commission does not mention any third-party media player offering full media functionality which is not in the Article 6 version. Microsoft does not dispute that a part of Windows media functionality could be restored by installing certain media players. None the less, a part of the media functionality of the operating system would still be corrupted. Media player manufacturers are not in the business of curing Windows media functionality defects. Where appropriate, the extent to which the installation of a third-party media player will be capable of restoring a part of media functionality in the Article 6 version will in any event vary greatly depending on the media player installed.
- 350 Microsoft explains that, in so far as third-party media players make their functionality available by means of published interfaces, those interfaces are different from the interfaces used by the applications to call upon media functionality in Windows. Consequently, the different variations of platform software use different interfaces to present similar types of functionality. The other parts of Windows and the applications designed to call up media functionality in Windows cannot suddenly obtain that functionality of a media player of a third-party undertaking. At the very least, it would be necessary to alter Windows or a Windows application to enable third-party media players to use alternative interfaces. Those changes would probably be substantial and would have to be made for each of the media players. The advantages of a uniform platform would therefore be lost, even if third-party media players were capable of providing all the media functionality not in the Article 6 version.
- 351 Fourth, the immediate implementation of Article 6(a) of the Decision would cause serious and irreparable harm to the Microsoft and Windows trade marks, because Microsoft would be required to sell a downgraded product inconsistent with its basic design concept. Microsoft's reputation as a supplier of quality software would be damaged if it were forced to place its name on a downgraded product that did not provide the media functionality that consumers expect from a modern operating system.

- 352 Fifth, Microsoft states that it could not prevent damage to its reputation by issuing notices informing consumers about the nature of the Article 6 version, since it would be unable to carry out all the tests necessary to draw up a complete list of the applications which would not work properly with the Article 6 version. In practice, it is likely that many consumers will be unable to understand the consequences of the absence of media technology in the Article 6 version.
- 353 Sixth, the immediate implementation of Article 6(a) of the Decision would cause serious harm to Microsoft's copyright in Windows. Microsoft would be required to adapt its work by removing the parts of the software code which provide the media functionality that in Microsoft's judgment should be included in a modern operating system and the absence of which renders the product defective. That damage to Microsoft's copyright would be irreparable, since, once the adaptation was marketed, there would be no way of taking the downgraded versions of Windows out of circulation.
- 354 In its observations of 19 August 2004, Microsoft disputes a number of the Commission's arguments relating to its trade marks and its reputation. In particular, it disputes the Commission's claim that the 'impression' that Windows operating systems 'always guarantee the presence of [Microsoft's] basic design concept' is 'factually incorrect', the Commission noting in that regard that Microsoft already produces a number of different versions of Windows. Microsoft submits that the existence of the products mentioned by the Commission has no impact on the serious and irreparable damage which it has demonstrated. Windows CE and Windows XP Embedded are not client PC operating systems. The other versions of Windows XP identified by the Commission, namely Professional, Home, Media Center Edition and Tablet PC Edition, all expose the same common core of interfaces, the 'Win32 APIs'. These are the interfaces that software developers have used to write Windows applications since the release of Windows NT 3.5 and Windows 95, and thus all versions of Windows XP will run the existing stock of Windows applications. In its observations on the statements in intervention, Microsoft also uses the same argument to counter RealNetwork's assertion that the Windows platform is already fragmented.
- 355 The important thing for Microsoft and end users is that the latest version of Windows designed for use as a general-purpose operating system, Windows XP, in all its versions, will run any Windows application designed over the last 10 years. That would not be possible in the case of the Article 6 version, even though that version will be seen by consumers as a general-purpose client PC operating system.
- 356 Last, also in its observations of 19 August 2004, Microsoft further claims that the Commission appears to share its view that the harm invoked is irreparable, since, in the Commission's words, the 'unbundled versions of Windows cannot be taken back from users'. The Commission none the less contends that the residual damage would not be irreversible, because 'Microsoft would be able to use the Internet in order to distribute [Windows Media Player] to any customer that has acquired an [Article 6 version]'. That hypothetical possibility is factually incorrect. It ignores users of the Article 6 version who are not connected to the Internet. Furthermore, Microsoft does not download and install software code on users' client PCs without their prior consent. The Article 6 versions would remain in the hands of consumers for a long time, and perhaps even indefinitely. Microsoft adds that even if the Commission is correct to consider that some users would prefer the Article 6 version, it must also conclude that there are users who would not give permission for Microsoft to restore media functionality in their operating systems.
- 357 Microsoft's position on the existence of serious and irreparable damage is supported by Exor. Exor contends that the damage sustained would not depend on either the decisions of third parties, i.e. decisions by consumers to buy the Article 6 version, or a 'lack of diligence' on the part of Microsoft. The Article 6 version would inevitably be a downgraded product, since the removal of one of the components of the Windows operating system would cause malfunctions in other components which rely on the missing code in order to provide media functionalities. Even if it were technically possible to redesign Windows completely in order to eliminate those interdependencies, the efficiencies stemming from such interdependencies would be completely lost. The Decision requires Microsoft to develop a completely different version of Windows. Consequently, the mere ex post installation of media functionality would not be sufficient, since the components which had been modified in order not to call upon the media functionality would no longer be capable of doing so afterwards.

(c) The balance of interests

358 Microsoft contends that the balance of the interests at stake tilts heavily in favour of suspending implementation of Article 6(a) of the Decision. It submits (i) that the immediate implementation of Article 6(a) of the Decision is unnecessary, (ii) that that implementation would cause serious harm to it and to others and (iii) that the balance of interests ought to take the Commission's obligations under international treaties into account.

(1) The lack of necessity for the immediate implementation of Article 6(a) of the Decision

359 First of all, Microsoft contends that the Commission's interest in imposing an effective remedy does not require immediate implementation of Article 6(a) of the Decision. The remedy imposed is expressly designed to deprive Microsoft of what the Commission alleges to be a decisive competitive advantage of the media functionality in Windows, namely the fact that it enjoys widespread distribution because it is integrated into the leading operating system for client PCs. In Microsoft's submission, a number of facts show that the Commission's concern about the widespread distribution of media functionality in Windows is unjustified.

360 First, the integration of media functionality in Windows does not prevent consumers from running one or more third-party media players on Windows, but actually facilitates the development of those media players since many of them rely to a certain extent on that functionality.

361 Second, vendors of third-party media players are free to distribute their products widely, in particular by means of agreements with OEMs or by downloading over the Internet.

362 Third, under the United States Settlement, vendors of third-party media players are free to reach exclusive agreements with OEMs whereby the media functionality in their product is the only one offered to the end user.

363 Fourth, third-party media players can design their products in such a way that they can read files in Windows Media formats.

364 Fifth, the Commission itself has emphasised the ease with which consumers can download media players on their PCs. Furthermore, the Commission attributed no significance to the widespread distribution of media functionality in Windows when assessing the probability that, as a result of the AOL/Time Warner concentration, AOL's media player would shortly become the most popular player in the world (see paragraph 329 above)

365 Next, Microsoft contends that the Commission's position and the remedy imposed are based on excessively speculative reasoning, according to which the widespread distribution of media functionality in Windows will in future compel content providers to use Windows formats exclusively, which will drive all third-party media players out of the market. There is no evidence to support the Commission's speculation that any delay in implementing Article 6(a) of the Decision would 'tip' the scales in favour of Windows Media Player, which would drive out all competition.

366 Thus, first, the integration of media functionality into Windows has not prevented the emergence of third-party media players, as demonstrated by the example of iTunes. Microsoft also produces data which show that, between April 2003 and April 2004, although the use of Windows Media Player increased, both RealPlayer and QuickTime maintained the numbers of users.

367 Nor, second, is there the slightest evidence that content providers are 'inclining' towards Windows Media formats.

368 Third, the facts contradict the theory that removal of the Windows Media Player code is necessary because OEMs are not prepared to pre-install third-party media players if they are not allowed to distribute Windows without media functionality (recital 851 to the Decision).

369 Fourth, in its observations of 21 July 2004, the Commission maintains for the first time that 'even a 5% exclusive share of PCs with a third-party media player will provide incentives to software developers to also write applications for this media player'. That theory is incorrect, it confirms that the Commission's

objective is to fragment Windows and it is at odds with the Commission's objective of increasing consumer choice.

- 370 Fifth, in its observations of 19 August 2004, Microsoft disputes the Commission's assertion that immediate implementation of the remedy is necessary to 'make consumer choice possible'.
- 371 Sixth, also in its observations of 19 August 2004, Microsoft states that third-party media players continue to be distributed in huge numbers and that large amounts of content continue to be encoded in non-Microsoft formats.
- 372 Seventh, in its observations on the statements in intervention, Microsoft further states that the implementation of the remedy provided for in Article 6(a) of the Decision in the 'end user' segment and the 'OEM' channel will not resolve any of the concerns underlying the Decision. In the first place, it is difficult to see what benefits an 'end user' could derive from an Article 6 version rather than a complete version of Windows, since both would be offered at the same price. In the second place, the Commission has not investigated the extent to which OEMs would be prepared to enter into exclusivity agreements for the client PCs which they distribute in the EEA.

(2) The damage resulting from the immediate implementation of Article 6(a) of the Decision

- 373 Microsoft maintains that the damage that would result from the immediate implementation of Article 6 (a) of the Decision is real and significant, since implementation would not allow Microsoft to continue its long-standing and successful business model, as it has shown, it submits, in its arguments in respect of urgency. Furthermore, Microsoft, supported more broadly on that point by CompTIA, ACT, Mamut and TeamSystem, DMDSecure.com and Others and Exor, claims that account should be taken of the interests of software developers and website creators whose activities depend on a uniform Windows platform.
- 374 First, applications conceived on the premiss of Windows media functionality would not function properly on the Article 6 version.
- 375 Second, immediate implementation of Article 6(a) of the Decision would affect applications and websites currently under development and those which will be developed in the future, and that serious and irreparable damage could not be avoided by the installation of third-party media players.
- 376 Third, in its observations of 19 August 2004, Microsoft disputes the Commission's arguments, first, that software developers who develop applications that rely on Windows functionality may 'avail themselves' of the 'possibility "to redistribute the player as part of their application and from their [Internet] site"' and, second, that '[i]t is commonplace in the software industry for software developers to write their applications to accommodate the eventuality of dealing in an intelligent way with the possible absence of a media player (update)', so that 'any costs related to such adaptations of applications ... are likely to be insignificant, or at least not exceed those normally incurred whenever Microsoft provides a new version (or update) of Windows'. In practice, in Microsoft's submission, the process of restoring media functionality in the Article 6 version would be just as complicated and onerous for others as for Microsoft.
- 377 Fourth, Microsoft states that in considering the various interests at stake in the present case, it is important to bear in mind the significance attributed in the proceedings before the District Court which upheld the United States Settlement to the interests of software developers and to the disadvantages resulting from the fragmentation of Windows.

(3) The Community's obligations under the TRIPS Agreement

- 378 Last, Microsoft requests the Court to consider the obligations imposed on the Community by the TRIPS Agreement.

2. Arguments of the Commission and the parties granted leave to intervene in support of the form of order sought by it

(a) A prima facie case

- 379 The Commission, supported on this point by CCIA before it withdrew from the proceedings, contends that Microsoft's case is prima facie unfounded and must be rejected.
- 380 The Commission maintains that its findings with regard to tying are based on well-established legal and economic theories and that the tying abuse is consistent with the case-law on tying (recital 794 et seq. to the Decision). Microsoft does not put forward any increase in technical efficiencies for which the 'integration' of Windows media player in Windows would be a precondition (recitals 962 to 969 to the Decision).
- 381 Thus, first, as regards the existence of a foreclosure effect, the Commission fails to see at the outset how a difference from certain earlier cases to which Microsoft refers supports its claim that a new theory was applied in the present case. The fact that foreclosure is demonstrated where it is normally presumed does not mean that a new legal theory is being applied. The Commission accepts that the Decision, unlike those adopted in certain earlier cases (Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, upheld by the Court of Justice in Case C-53/92 P *Hilti v Commission* [1994] ECR I-667, and *Tetra Pak v Commission*, paragraph 126 above, upheld by the Court of Justice in Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951), does not conclude that there was foreclosure from the market per se (recital 841 et seq.), but takes into account the specific circumstances of the case, i.e. the fact that media players may be downloaded, sometimes free of charge, over the Internet.
- 382 However, the evidence in the present case shows, first of all, that no other media player manufacturer can equal the ubiquity of Windows Media Player which results from its being tied with Windows and, moreover, that that situation is liable to have a significant effect on developers of complementary software and content. The reduction, by tying, of the applications and content available for other manufacturers' media players is ultimately harmful to consumers as it reduces innovation in those products, irrespective of their intrinsic merits. Microsoft has put forward no objective justification for that practice.
- 383 Furthermore, Microsoft's claim that the Commission's findings of foreclosure are based on speculation is wrong in fact and in law. Recitals 879 to 896 to the Decision provide a clear description of the impact of tying on content providers and independent software developers. It follows from the Decision that Windows Media Player usage is increasing while, according to Microsoft itself, other media players are rated higher in terms of quality by users (recitals 948 to 951). Nor does the case-law require that the Commission demonstrate that all third-party media players have been eliminated from the market (judgments of 30 September 2003 in Case T-203/01 *Michelin v Commission*, not yet reported, paragraph 239; of 23 October 2003 in Case T-65/95 *Van den Bergh Foods v Commission*, not yet reported, paragraphs 149 and 160; and of 17 December 2003 in Case T-219/99 *British Airways v Commission*, not yet reported, paragraph 293).
- 384 Second, as regards the existence of distinct products, the Commission claims that the Court of Justice and the Court of First Instance have held that the existence of independent manufacturers specialising in the manufacture of the tied product already indicates a separate consumer demand and therefore a separate market for the tied product. That approach is also consistent with United States case-law.
- 385 Third, the arguments whereby Microsoft seeks to demonstrate that no coercion was exercised on consumers have already been rejected in the Decision.
- 386 Last, the Commission rejects the arguments put forward by Microsoft in respect of its two other pleas. First, as regards Microsoft's reference to the Community's obligations under the TRIPS Agreement, the Commission refers to its arguments relating to the remedy provided for in Article 5(a) of the Decision (see paragraph 195 above). Second, the Commission submits that the remedy provided for in Article 6 (a) of the Decision is proportionate, since Microsoft retains the right to offer a bundled version of Windows with Windows Media Player and since, even if some customers should choose the Article 6 version, they would still have the opportunity to complement that product with Windows Media Player, should they so desire.

(b) Urgency

387 The Commission, supported on this point by RealNetworks and SIIA, and also by CCIA before it withdrew from the proceedings, maintains that Microsoft has not demonstrated the existence of serious and irreparable damage that would be caused to it by the immediate implementation of the Decision.

(c) The balance of interests

388 The Commission maintains that the balance of interests tilts towards rejecting Microsoft's request, in particular as regards the public interest in maintaining, at least, effective competition. The media player market is approaching the stage at which it may be starting to tip. The Commission is supported on this point by RealNetworks and SIIA. The Commission adds in that regard that immediate implementation of the remedy would be unlikely to make a drastic change to Microsoft's position on the media player market but would simply allow a levelling of competition on that market and thus enable the status quo to be maintained as regards the structure of that market. Only immediate implementation of the remedy could preserve consumer choice and allow consumers to reap the benefits of innovation in digital media services.

389 As regards the risk of damage to third parties, the Commission disputes the arguments based on possible claims from certain software developers, certain web site developers and certain content providers. The Commission also plays down the risk that damage might be caused indirectly to the computer sector in general.

B – Findings of the President

1. A prima facie case

390 In the words of Article 2(b) of the Decision, Microsoft is stated to have infringed Article 82 EC by 'making the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player from May 1999 until the date of [the] Decision'. In order to provide a remedy for that situation, Article 4 of the Decision requires Microsoft to bring that infringement to an end in accordance with Article 6 of the Decision. Article 6(a) of the Decision orders Microsoft to market 'a full-functioning version of the Windows Client PC Operating System which does not incorporate Windows Media Player'. The Decision states, however, that 'Microsoft ... retains the right to offer a bundle of the Windows Client PC Operating System and Windows Media Player'.

391 In support of its claim that the prima facie case requirement is satisfied, Microsoft relies on a series of arguments made up essentially of five parts. It maintains, first, that the Commission applied in the Decision a speculative theory without any basis; second, that the Commission should have given greater weight to the advantages flowing from the Windows operating system design concept; third, that the decision fails to establish an infringement of Article 82 EC; fourth, that the Decision does not take sufficiently into account the obligations imposed on the Community by the TRIPS Agreement; and, fifth, that the remedy imposed by the Decision is disproportionate.

392 In the light of the arguments submitted by Microsoft in the interim measures proceedings, the fourth and fifth parts of its arguments cannot be considered sufficiently serious to constitute a prima facie case.

393 The part relating to the disproportionate nature of the remedy was presented in an excessively succinct manner by Microsoft in its application. Microsoft merely stated in that regard that 'the remedy imposed by the Decision [was] disproportionate'. It fails to explain, in particular, how the allegedly disproportionate character of the measure imposed by Article 6(a) of the Decision should be established by the Court. As regards the part relating to failure to observe the TRIPS Agreement, it was not developed sufficiently to enable the President to arrive at an informed decision. First, Microsoft merely stated in its application for interim measures that 'the Decision [did] not take sufficiently into account the obligations imposed on the European Communities by [the TRIPS Agreement]'. Second, the reference to the argument developed in annex T.9 was not held to be consistent with the applicable procedural rules (see paragraph 88 above).

394 The President considers, however, that Microsoft's other arguments raise complex issues which it is for the Court of First Instance to resolve in the main action and that those arguments cannot be regarded

in the interim measures proceedings as prima facie unfounded.

- 395 First, this case raises a complex issue concerning the first part of Microsoft's argument, whereby Microsoft alleges in substance that the Commission unlawfully applied a new theory on tying.
- 396 By that argument, Microsoft essentially criticises the Commission for having concluded that the media player market would 'tip' in Microsoft's favour without making any attempt to reconcile that theory with the realities of the market. Microsoft relies in particular, first, on the fact that it is easy for users of Windows-based client PCs to access different media players using different formats and, second, on the fact that content providers make use of different formats. In that regard, Microsoft claims that the Decision relies on pure supposition.
- 397 In the Decision, in order to arrive at the conclusion that the bundling of Windows Media Player with Windows constituted tying prohibited by Article 82 EC, first, the Commission considered that Microsoft held a dominant position on the client PC operating systems market (recital 799), which Microsoft does not dispute. Second, the Commission considered that streaming media players and client PC operating systems were distinct products (recitals 800 to 825). Third, the Commission considered that Microsoft did not allow its customers to obtain Windows without Windows Media Player (recitals 826 to 834). Fourth, the Commission examined the existence of foreclosure effects on the market. In that regard, it follows from recital 841 to the Decision that the Commission gave the following answer to Microsoft's arguments that the practice condemned by the Commission had no such effects: '[t]here are indeed circumstances relating to the tying of [Windows Media Player] which warrant a closer examination of the effects that tying has on competition in this case. While in classical tying cases, the Commission and the Courts considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product, in the case at issue, users can and do to a certain extent obtain third party media players through the Internet, sometimes ... free [of charge]. There are therefore indeed good reasons not to assume without further analysis that tying [Windows Media Player] constitutes conduct which by its very nature is liable to foreclose competition'. Consequently, in the light of the characteristics of the market in question, the Commission recognised that the present case presented specific features from the viewpoint of its previous practice and of what it considered to reflect the principles established in the Community case-law on tying.
- 398 For that reason, Microsoft's argument is likely to raise one or more important questions of principle which may affect the legality of the Commission's analysis. In that regard, it has consistently been held that 'abuse' is an objective concept referring to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (Case 85/76 *Hoffmann-La Roche v Commission*, [1979] ECR 461, paragraph 91; and Case T-228/97 *Irish Sugar v Commission* [1999] ECR II-2969, paragraph 111).
- 399 In the present case, the Commission considered, essentially, that the anti-competitive effect of the tying was the result of 'indirect network effects'. Those effects related to the fact that the presence of Windows Media Player in all the operating systems distributed by Windows gives content providers and applications manufacturers an incentive to design their products on the basis of Windows Media Player (recital 842). For the purpose of demonstrating that fact, the Commission relied largely on present or past factual material relating to the incentives for content providers and software developers (recitals 879 to 896). None the less, as may be seen in particular from recitals 842 and 984 to the Decision, that material supports what is at least in part a prospective analysis of the risks for competition resulting from the impugned practice.
- 400 Admittedly, as the Commission has noted, for the purpose of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having or likely to have that effect (*Michelin v Commission*, paragraph 383 above, paragraph 239, and *British Airways v Commission*, paragraph 383 above, paragraph 293). The present case none the less raises the complex question whether, and if so on what conditions, the Commission may rely on the probability that the market will 'tip' as a ground for imposing a sanction in respect of tying practised by a dominant

undertaking where that conduct is not by nature likely to restrict competition, should that be the case.

- 401 Second, an important question arises in connection with the examination of Microsoft's argument that the Commission should have given greater weight to the positive effects of the Windows operating system 'design concept'. That argument might lead the Court of First Instance, in the main action, to consider on what conditions the existence of objective justification may permit the conclusion that a tying practice having anti-competitive effects is not prohibited by Article 82 EC. Prima facie, the resolution of that intricate question requires an examination of whether any positive effects associated with the increasing standardisation of certain products may constitute objective justification or whether, as the Commission contends, the positive effects of standardisation may be accepted only when they result from the operation of the competitive process or from decisions taken by standardisation bodies.
- 402 Third, over and above the questions of principle raised by the examination of these two parts, Microsoft disputes the scope of the factual premisses on which the Commission's analysis is based. It maintains, in particular, in relation to the first part of its argument, that the Commission's analysis relating to the existence of 'indirect network effects' is contradicted by the fact that content providers continue to have recourse to different formats. In that regard, it must be stated that the Commission has not disputed that that was the case, at least to a certain extent. It is for the Court of First Instance to rule, in the main action, on those factual questions and on the consequences, if any, to be drawn from them in regard to the validity of the Commission's analysis.
- 403 Fourth, Microsoft's argument that 'Windows and its media functionality' do not constitute two distinct products for the purposes of the application of Article 82 EC in regard to tying cannot, in the interim measures proceedings, be considered prima facie unfounded, regard being had in particular to the fact that for many years Microsoft and other manufacturers have integrated certain media functionalities in their client PC operating systems.
- 404 The first three parts of Microsoft's arguments therefore raise important questions, particularly in regard to the complex economic assessments which they entail both in law and in fact. The President considers that Microsoft's arguments cannot be regarded in the interim measures proceedings as prima facie unfounded, so that the prima facie case requirement is satisfied.

2. Urgency

- 405 Microsoft maintains that implementation of Article 6(a) of the Decision will irreversibly affect the value of the Windows platform, which would cause it to sustain two kinds of serious and irreparable damage. Those two kinds of damage must be assessed separately.
- (a) The alleged damage to the Windows operating system 'basic design concept'
- 406 Article 6(a) of the Decision requires Microsoft to design and place on the market a product which it does not currently market and which it states to be incompatible with a fundamental element of its business policy. More particularly, Microsoft maintains that Article 6(a) of the Decision causes damage to the Windows operating system 'basic design concept'. In substance, Microsoft thus invokes an interference with its commercial freedom.
- 407 In that regard, it is apparent from the case-file that Microsoft has for many years marketed an operating system which it regards as offering users common functionalities, which have been gradually expanded and which since 1992 have included, inter alia, certain media functionalities. It is also sufficiently clear from the case-file that Microsoft endeavours to ensure, at least generally, that the most recent version of its general-purpose Windows operating system will run applications designed for its earlier versions.
- 408 In this context, it should be emphasised that implementation of the Decision would require Microsoft to market an operating system without certain media functionalities which in its view form an integral part of that operating system. The Decision therefore interferes with Microsoft's commercial freedom. Furthermore, certain applications designed to function on the whole package consisting of Windows and Windows Media Player might not function satisfactorily in the Article 6 version, at least if that version should remain without a media player.

- 409 In that regard, the President recalls that, with regard to the principle of freedom to exercise business activities, which, according to the consistent case-law of the Court of Justice (Case 44/79 *Hauer* [1979] ECR 3727, paragraphs 31 to 33, and judgment of 9 September 2004 in Joined Cases C-184/02 and C-223/02 *Spain and Finland v Parliament and Council*, not yet reported, paragraph 51), forms part of the general principles of Community law, the undertakings active on the territory of the Community are free, in principle, to choose the commercial policy which they deem appropriate. That means, in particular, that it is in principle for each undertaking to decide freely on the nature and properties of the products which it intends to place on the market. However, it cannot be considered that an interference with an undertaking's business policy always constitutes serious and irreparable damage to that undertaking for the purposes of an application for interim measures. It is thus in the light of the circumstances of each case that the serious and irreparable nature of an interference with an undertaking's commercial freedom must be assessed (see paragraph 292 above).
- 410 In the circumstances of the present case it must be accepted that the interference with Microsoft's commercial freedom, when considered as such and independently of its actual effects on the market, cannot be regarded as irreparable. Putting aside any consequences that the Decision may have on the market during the period before the possible annulment of the Decision, if it is annulled, it is not apparent that, if Microsoft is successful in the main proceedings, it would be unable to apply its 'basic design concept' again to all the products which it markets following annulment of the Decision. Consequently, in that situation, even on the assumption that Microsoft did demonstrate that the interference with its commercial freedom in itself constitutes serious damage, that damage would not appear to be irreparable.
- 411 It is none the less appropriate to examine whether, in the light of its actual consequences on the market during the period up to the judgment in the main proceedings, the interference with Microsoft's commercial freedom is likely to cause serious and irreparable damage to that undertaking. In that regard, it is necessary to take into account the consequences which might result for Microsoft, first, from being required to design the Article 6 version, second, from placing that version on the market and, third, from the possibility that it may be bought by Microsoft's customers.
- 412 First, Microsoft maintained at the hearing that even if the Article 6 version should not be bought in significant quantities, there would be damage to its 'design', particularly in the light of the 'futile exercise' that the design of the Article 6 version would constitute.
- 413 In so far as Microsoft thereby refers to the need to design the Article 6 version, it has not provided sufficient details of the disadvantage which would result from that obligation. For the sake of completeness, there is also every reason to think that the damage thereby suffered by Microsoft would essentially consist of development costs. In the absence of proof to the contrary, such damage would constitute financial damage, which, otherwise than in exceptional circumstances which are not present in this case, does not constitute irreparable damage (order of the President of the Court of Justice in Case C-213/91 R *Abertal and Others v Commission* [1991] ECR I-5109, paragraph 24; and order of the President of the Court of First Instance in Case T-53/01 R *Italian Post v Commission* [2001] ECR II-1479, paragraph 119).
- 414 Second, in so far as Microsoft's argument must be understood as meaning that it would suffer damage from the mere fact that it would be required to place the Article 6 version on the market, and irrespective of whether that version would actually be purchased, it has not provided sufficient details of the nature, the seriousness and the irreparability nature of those alleged disadvantages. In so far as Microsoft's argument must be understood to mean that it would suffer damage to its reputation, it will be examined together with the second head of damage on which it relies (see paragraphs 442 to 475 below).
- 415 At the hearing, Microsoft none the less further submitted that, even if there should be no demand for the Article 6 version, there would be uncertainty for third parties, in particular content providers. Content providers would not know the number of Article 6 versions delivered. That, in Microsoft's submission, would reduce the appeal of Windows.
- 416 In that regard, it must be borne in mind that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures (see the case-law cited at paragraph 240 above).

Consequently, in so far as the uncertainty on which Microsoft relies may cause damage to third parties, it cannot be taken into account under the head of urgency (see, to that effect, order of the President of the Court of Justice in Case 112/88 *Crete Citron Producers Association v Commission* [1988] ECR 2597, paragraph 20). However, it is appropriate to examine Microsoft's arguments that the uncertainty created among third parties would, conversely, reduce the appeal of its platform.

- 417 First of all, Microsoft provides neither details nor evidence on which it might be possible to assess the precise nature, the existence, the seriousness and the irreparable nature of the reduction in the appeal of Windows that would be caused by that alleged uncertainty. On the assumption in particular that the reduced appeal on which Microsoft relies means that certain third parties relying on 'the stability of Windows' might decide, on account of the marketing of the Article 6 version, that they would no longer design their products for that platform, Microsoft does not adduce sufficient evidence to demonstrate that such a choice might be made by those operators in significant proportions.
- 418 On that point, the President observes for the sake of completeness that none of the parties which have intervened in support of the form of order sought by Microsoft has maintained that, owing to the implementation of Article 6(a) of the Decision, it might cease to design its products for the Windows platform. Those parties stated that the implementation of Article 6(a) of the Decision was likely to cause them damage, since, in particular, it would mean that they would have to choose whether or not to adapt to the uncertainty created on the market. On the other hand, first, the possibility that they may choose not to adapt their products to the Article 6 version remains very largely hypothetical at this stage. Second, even on the assumption that the probability that those operators will not adapt their products to the Article 6 version were proved to the requisite legal standard, that, as the Commission emphasises, would not prove that they would however cease to design their products for the version of Windows including Windows Media Player. In fact, none of the interveners in support of the form of order sought by Microsoft maintained that, on account of the Decision, it might be led to design its products for a different operating system. Accordingly, it has not been shown that the reduction in the appeal of Windows, even vis-à-vis those interveners alone, could be significant for Microsoft in practice.
- 419 Last, at no point has Microsoft specifically demonstrated that the uncertainty as to the uniformity of the Windows platform would reduce its appeal for final consumers or its customers.
- 420 Third, it is appropriate to examine the consequences for Microsoft of the possibility that the Article 6 version would be purchased in significant quantities.
- 421 In that regard, it should be stated, by way of preliminary observation, that the remedy referred to in Article 4 and Article 6(a) of the Decision is intended to put an end to the infringement found by the Commission and does not prejudice future developments on the market. As the Commission noted at the hearing, the remedy does not preclude the possibility that Windows Media Player, regard being had to its own merits and as a result of competition which, in the Commission's submission, would be restored, will continue in practice always to be bought with Microsoft's operating system.
- 422 In addition, Microsoft expresses serious doubts as to the probability that the Article 6 version will sell in significant quantities.
- 423 In that regard, it follows from recitals 69 and 70 to the Decision that client PC operating systems are marketed essentially through two distribution channels: first, distribution to final consumers and, second, distribution to OEMs, who assemble client PCs and generally install an operating system.
- 424 As regards distribution to end users, Microsoft indicated in its observations on the statements in intervention, that, '[i]t is difficult to see what benefit a customer in that channel 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'. In the same observations, Microsoft states that '[i]t is difficult to see how a rational end user could ever opt for such a version'.
- 425 As regards OEMs, moreover, Microsoft states that 'it is conceivable that a third party media player vendor might seek to induce an OEM, by payment of compensation, to license the Article 6 version of Windows and bundle it, on an exclusive basis, with its media player'. However, Microsoft then criticises the Commission for having failed to analyse the extent to which OEMs would be prepared to enter into

such agreements. It states that '[t]he fact that OEMs currently install multiple media players and that no media player vendor appears to have paid OEMs to remove visible access to Windows Media Player ... suggests that media player vendors are not sufficiently interested in exclusive arrangements to pay for the Article 6 version of Windows'. Furthermore, at the hearing, although it continued to envisage the possibility that some of its competitors might enter into exclusivity agreements with OEMs, Microsoft repeated its doubts as to the potentially significant nature of sales of the Article 6 version.

- 426 It is thus clear that Microsoft seriously doubts that the Article 6 version will sell in significant quantities.
- 427 It is settled case-law that it is for the party applying for the interim measure to prove that it cannot wait for the outcome of the main proceedings without suffering serious and irreparable damage (see the case-law cited at paragraph 240 above). In that context, it is sufficient, particularly where the occurrence of the damage depends on the occurrence of a series of factors, that damage be foreseeable with a sufficient degree of probability (order in *Germany v Council*, paragraph 241 above, paragraphs 22 and 34, and order in *HFB and Others v Commission*, paragraph 241 above, paragraph 67). However, the applicant is still required to prove the facts forming the basis of its claim that serious and irreparable damage is likely (order in *HFB and Others v Commission*, paragraph 241 above, paragraph 67).
- 428 In the present case, as Microsoft has failed to adduce sufficient evidence on which to take the opposite course, it is not for the judge dealing with the application for interim measures to prejudge the effect which the remedy imposed by Article 6(a) of the Decision will have on the market. It must therefore be held that, as Microsoft itself seems to agree, the possibility that sales of the Article 6 version may reach significant levels remains, at this stage and on the basis of the evidence before the President, very largely hypothetical.
- 429 The premiss on which the damage alleged by Microsoft is based in such a situation cannot therefore be regarded as demonstrated.
- 430 In any event, even on the assumption that Microsoft has demonstrated to the requisite legal standard the probability that the Article 6 version will sell in significant quantities, it should be noted that, as the Commission maintains, Microsoft does not rely in the present case on an irreversible development of the market as a result of those sales. Should the Decision be annulled, Microsoft would be able to resume marketing the single version of Windows with Windows Media Player and therefore apply, again and exclusively, what it regards as the 'basic design concept' of the Windows operating system. It has not been shown that there would be any obstacles capable of preventing Microsoft from regaining the position which it held on the market before the implementation of the remedy.
- 431 Those factors notwithstanding, Microsoft maintains that it would suffer serious and irreparable damage, for two distinct reasons.
- 432 In the first place, it claims that 'the benefits flowing from uniformity of the Windows platform would be irreversibly lost'. Furthermore, the damage caused would not be made good by the annulment of the Decision, since 'Microsoft's engineers would have to assume that at least some copies of Windows distributed in the EEA will not have the media functionality', which would require that they 'take into account that two versions would be in existence for many years'.
- 433 However, Microsoft does not state in sufficient detail how the obligation imposed on its engineers would affect or render impossible the resumption of its 'basic architectural design' should the Decision be annulled. Thus, Microsoft does not explain first of all how, following the annulment of the Decision, it would be prevented from again distributing solely the version of Windows with Windows Media Player.
- 434 Microsoft next appears to take the view that the damage which it invokes would not be unlimited in time, since it would be encountered 'for many years'.
- 435 Furthermore, Microsoft does not adduce evidence on which it would be possible to evaluate to the requisite legal standard the damage resulting from the additional efforts that its designers would have to make in order to take account of the existence of two versions. In the absence of detailed information in that regard, there is every reason to believe that those efforts would take the form of

additional costs and, consequently, of financial damage, which, otherwise than in exceptional circumstances which are not present in this case, does not constitute irreparable damage (orders in *Abertal and Others v Commission*, paragraph 413 above, paragraph 24, and *Italian Post v Commission*, paragraph 413 above, paragraph 119).

- 436 Nor does Microsoft demonstrate how it would be impossible, or at least irreparably and seriously damaging, for it, in the event that Article 4 and Article 6(a) of the Decision were annulled, to ignore the existence of copies of the Article 6 version that would already have been marketed.
- 437 The first head of damage invoked by Microsoft cannot therefore substantiate the prospect of serious and irreparable damage.
- 438 In the second place, Microsoft contends that 'third parties that depend on the stability and consistency of the Windows platform' would also have to take account of the fact that two versions would be in existence for many years, 'which would increase their costs and reduce the appeal of Windows on an ongoing basis'.
- 439 In that regard, it is appropriate to reiterate, in this context, the observations set out at paragraphs 421 to 428 above. It has not been demonstrated that there is a sufficiently significant risk in practice, even if the Article 6 version should sell in significant quantities, that the operators who currently design their products for Windows would cease to do so or that consumers, customers or other operators who in Microsoft's view rely on the stability of Windows might reduce their purchases or their use of Windows.
- 440 Last, as regards the two heads of damage invoked by Microsoft, in addition to the conclusion already drawn at paragraph 430 above, the President considers in any event that the Commission has put forward convincing evidence to show that, following the annulment of the Decision, Microsoft would be able to use certain mechanisms, in particular an update of its operating system, in order to distribute Windows Media Player and, consequently, to restore at least to a very large extent the tying of Windows Media Player with its operating system. Microsoft and the parties intervening in its support have not contradicted those assertions in sufficient detail to exclude the strong probability that Microsoft may distribute Windows Media Player in proportions quite sufficient to avoid the serious damage which it invokes.
- 441 It must therefore be concluded that Microsoft has not demonstrated that implementation of Article 6(a) of the Decision would cause it serious and irreparable damage owing to the interference with its 'basic design concept' or, more generally, owing to an interference with its commercial freedom.

(b) The alleged damage to Microsoft's reputation

- 442 Microsoft maintains that implementation of Article 6(a) of the Decision will damage its reputation as a 'developer of quality software products', owing essentially to the malfunctions which it claims will affect the Article 6 version.
- 443 In the present case, the damage alleged by Microsoft relies largely on the premiss that the Article 6 version of Windows will affect the functioning of applications and websites that call upon certain functionalities of Windows Media Player and also on certain parts of the Windows operating system itself.
- 444 It is therefore first of all necessary to assess the extent to which the problems to which Microsoft refers exist and, if so, whether they could easily be avoided.
- 445 In that regard, it should be noted at the outset that, in answer to the questions put by the President, the Commission stated that in its view a product having the characteristics referred to by Microsoft – i.e. a product which would not allow the operating system to call upon the functionalities mentioned by Microsoft as missing – would constitute a 'full-functioning' version of Windows, within the meaning of Article 6(a) of the Decision, provided that those functionalities are indeed the ones normally provided by Windows Media Player.

- 446 It is then appropriate to examine separately, first, the problems which, in Microsoft's submission, would affect the functioning of the Windows operating system and, second, those which it claims would affect the functioning of certain applications and certain websites.
- 447 As regards, first, the problems which, in Microsoft's submission, would affect the functioning of the Windows operating system, RealNetworks has designed and produced a series of tests to show that they can be resolved by installing a third-party media player. Microsoft does not dispute that that is the case for some of the problems referred to, but none the less maintains that unresolved problems would persist and that the extent to which they could be cured would depend on the media player installed.
- 448 In the light of the evidence adduced by the parties, the President considers that it has not been shown that third-party media players could guarantee in all circumstances full replacement of the functionalities identified by Microsoft. The replacement of those functionalities depends closely on the technical possibilities of the media player installed. On the other hand, the installation of such a media player could enable those various functionalities to be replaced to a reasonably large extent.
- 449 As regards, second, the problems concerning the use of certain applications and certain websites, in the light of the evidence adduced by the parties intervening in support of the form of order sought by the Commission, it should also be noted that the functionalities concerned may to a large extent be replaced by the installation of third-party media players. Furthermore, even if there were a cost involved for them, there would be a strong incentive for website and applications designers who currently rely on Windows Media Player to encourage users to download the software or to distribute it themselves under the licences normally granted by Microsoft for that purpose.
- 450 The factors mentioned in the three preceding paragraphs substantially reduce the probability that the problems to which Microsoft refers may be detected by final consumers.
- 451 In its observations on the statements in intervention and at the hearing, Microsoft did admittedly maintain that the alleged problems could be resolved, in the tests carried out by RealNetworks, only if certain Windows Media Player codes are installed. That point was not formally contradicted by the Commission or by RealNetworks in the case of the problems relating to the functioning of certain applications and certain websites. RealNetworks none the less stated that the installation of the codes had been effected by the applications themselves, or, in the case of the websites, by means of a downloading device available on those sites. The parties therefore agree in part on Microsoft's argument. None the less, that argument still has no bearing on the assessment of the urgency in ordering the requested suspension of implementation. It is immaterial in the present case that certain of the problems alleged by Microsoft can be cured only if certain Windows Media Player codes, or even, where appropriate, all the Windows Media Player codes, are installed, by the actual application concerned or via the website itself, if installation of those codes can effectively resolve a sufficient part of the problems alleged by Microsoft.
- 452 Also irrelevant is Microsoft's argument that the differentiated reinstallation of certain Windows Media Player codes would cause security or stability problems to the Article 6 version. Microsoft has not adduced evidence to show that the possible installation of old Windows Media Player codes might cause instability in the operating system or that other problems of that type might be encountered. Last, in so far as Microsoft means that the addition of distinct codes on various copies of the Article 6 versions calls in question the uniformity of its platform, it adds nothing to the argument relating to the interference with its 'basic design concept', which has already been rejected above (see paragraphs 406 to 441 above).
- 453 It has therefore not been demonstrated that the problems invoked by Microsoft could not be avoided, at least to a large extent.
- 454 In the second place, and in any event, in so far as certain of the problems alleged by Microsoft remain, it must be held that Microsoft has not adduced before the President evidence demonstrating to the requisite legal standard that end consumers or, more generally, its customers would associate any absence or malfunction of those functionalities with an unforeseen malfunction of Microsoft's product rather than with the normal consequences of the absence of a media player and, more specifically, of Windows Media Player. Even on the assumption that all the problems mentioned by Microsoft exist and cannot be avoided, Microsoft has not proved that it would be unable to warn its customers of the

objective characteristics of the Article 6 version and thus induce them to make choices in full knowledge of the facts, or that it would be prohibited by the Decision from doing so.

- 455 In that regard, Microsoft has indeed maintained that it would not be possible for it to carry out the tests which would enable it to identify all the defects in the Article 6 version and, in particular, all the applications that would not function on that version. However, it has not adduced any evidence permitting an assessment of the impossibility of carrying out those tests for the problems which it claims would be caused to its operating system. As regards, next, the tests necessary to evaluate the proper functioning of certain applications and certain websites, Microsoft has not shown how the mere fact that its customers are aware that Windows Media Player is not present in the Article 6 version is not sufficient to inform them of the possibility that certain applications and certain websites which rely on the functionalities of Windows Media Player may not function properly.
- 456 More generally, it should be emphasised that the Commission has expressly stated that in its view Microsoft is entitled to inform its customers that Windows Media Player is absent from the Article 6 version. Microsoft has not demonstrated that that knowledge alone would not be sufficient for its customers to understand the consequences which their choice may have for the availability of certain media functionalities.
- 457 As regards the direct distribution of its products to final consumers, although Microsoft maintains that few of them understand the way in which Windows applications call upon media functionality, it adduces no evidence to support its allegations and which would permit an assessment of the real extent of consumers' ignorance.
- 458 As regards the distribution to OEMs, there is every reason to think that they are particularly discriminating purchasers and that they are therefore able to make choices in a particularly informed way. If, consequently, the Article 6 version displays the incurable problems to which Microsoft refers, then, in the absence of proof to the contrary, there is every reason to think either that that version will quite simply not be bought by those OEMs or that they will buy it with full knowledge of the facts and therefore without any damage to Microsoft.
- 459 In those circumstances, it has not been shown that the fact that a customer of Microsoft, of whatever type, chooses the Article 6 version and encounters the problems to which Microsoft refers would be capable of injuring Microsoft's reputation.
- 460 In the third place, even on the assumption that it has been demonstrated to the requisite legal standard, first, that none of the problems alleged by Microsoft could be avoided and, second, that customers and consumers could not make an informed choice, Microsoft has not adduced evidence permitting an assessment of the real seriousness of those defects and, in particular, the extent to which they might have specific effects on its reputation with the various operators in the sector.
- 461 Microsoft does not adduce any evidence to demonstrate that the defects which it identifies would be likely to have a substantial effect on the perception of final consumers and OEMs. In particular, it adduces no evidence relating to the way in which those operators perceive the functionalities which it describes in its application as defective. In that regard, Microsoft on a number of occasions mentions the 'My Music' folder, which provides a detailed view of the files recorded on the hard disk of a client PC and, more particular, of certain digital media contents. Microsoft claims that the Article 6 version would not allow such a detailed view, with or without a third-party media player. None the less, it adduces no evidence which would permit the President to evaluate the probability that that problem is perceived sufficiently readily by final consumers. Nor does Microsoft demonstrate that that problem, on the assumption that it is readily perceived, would be likely to have a significant effect on its reputation. Accordingly, in the absence of sufficient evidence of the actual importance of the functionalities in question for final consumers and of their expectations, the President is unable to evaluate the real consequences of the problems for its reputation which Microsoft invokes.
- 462 Microsoft has also failed to prove that the implementation of Article 4 and Article 6(a) of the Decision would have significant effects on its reputation with economic operators other than its customers and, in particular, on its reputation with website designers and software developers. In that regard, it is significant that none of the parties intervening in support of Microsoft has indicated that its own perception of Microsoft might be altered or that it might no longer design its products with a view to

their being used with Microsoft's products.

- 463 In the fourth place, it is not apparent that Windows Media Player would not be readily available and could not be easily installed in the Article 6 version. Consequently, even on the assumption that certain consumers or customers should not make an informed choice and therefore prove to be somewhat dissatisfied, Microsoft has not demonstrated how that situation could not readily be resolved if the persons concerned were informed that they could subsequently obtain Windows Media Player.
- 464 In the fifth place, and still on the assumption that the alleged defects should be proved to the requisite legal standard and be incurable, the seriousness of the adverse effect on Microsoft's reputation would to a large extent depend on the actual distribution of the Article 6 version. It is appropriate to repeat, in that context, the finding already made (see paragraphs 421 to 428 above) that, on the one hand, in the absence of sufficient evidence, it is not for the judge hearing the application for interim measures to prejudge the effects of the remedy on the market and, on the other hand, Microsoft itself expresses doubts as to the extent of sales of the Article 6 version and does not claim that there is a risk of an irreversible development on the market.
- 465 In the sixth place, even on the assumption that, in spite of all of the foregoing, Microsoft has demonstrated to the requisite legal standard that there is a risk of serious harm to its reputation, it has not demonstrated that there are any structural or legal obstacles preventing it from implementing the publicity measures which would allow it to restore its reputation.
- 466 Microsoft has therefore not succeeded in demonstrating that implementation of Article 4 and Article 6 (a) of the Decision is likely to cause serious and irreparable damage to its reputation.
- 467 However, Microsoft invokes the existence of damage to its reputation from two further and more specific aspects, namely damage to its trade marks and breach of its copyright.

(1) The alleged damage to Microsoft's trade marks

- 468 As regards, first, the damage to Microsoft's trade marks, in so far as it is supposed to cause damage to its reputation, or be the result of that damage, owing in particular to the poor quality of the Article 6 version, that argument must be rejected on the grounds already stated at paragraphs 454 to 459 above. Microsoft has not demonstrated, in particular, that the alleged defects, even on the assumption that they exist, would have a negative and significant effect on the perception of final consumers. The argument developed in the 'Trade Marks Opinion' (annex R.6) attached to Microsoft's application must therefore be rejected.
- 469 Furthermore, in so far as Microsoft's argument means that its Windows trade mark would no longer guarantee the presence of its 'basic concept', the President recalls that the essential function of the trade mark is to guarantee the identity of the origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or service from others which have another origin. For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the EC Treaty seeks to establish, it must offer a guarantee that all the goods or services bearing it have been produced under the control of a single undertaking which is responsible for their quality (see, in particular, judgment of 29 April 2004 in Case C-371/02 *Björnekulla Fruktindustrier*, not yet reported, paragraph 20). In so far as the trade mark makes it possible to guarantee the presence of certain objective characteristics of a product, as Microsoft appears to contend, the President does not in any event have evidence allowing him to assess with sufficient precision, beyond the perception which Microsoft has of its 'basic concept' and its trade mark, the way in which that trade mark is actually perceived by customers on the relevant market. That is the case, in particular, of the evidence which permits an assessment, from the customers' point of view, of the objective characteristics which might be associated with it and, where appropriate, the real gravity of a variation in those characteristics.
- 470 In any event, since, first, should Article 6(a) of the Decision be annulled, Microsoft would again be able to market solely the version of Windows with Windows Media Player and, second, Microsoft has not demonstrated that it would be impossible for it to implement appropriate publicity measures, where necessary, it has not demonstrated that the alleged damage to its trade mark, on the assumption that

it is established and serious, would be irreparable.

(2) The alleged breach of Microsoft's copyright

- 471 As regards, last, the alleged breach of Microsoft's copyright, it must be stated by way of preliminary observation that Microsoft has not indicated how breach of its copyright could be linked to the damage to its reputation which it alleges.
- 472 Furthermore, Microsoft's argument on that point is very succinct and particularly vague. In that context, it does not refer to any specific rules to the effect that the fact that it itself adapts its work – albeit under compulsion – would constitute a breach of its copyright.
- 473 Moreover, the mere fact that a Commission decision may to a certain extent affect intellectual property rights is, in the absence of further explanation, insufficient to support the conclusion that there is serious and irreparable damage, at least independently of the actual effects of that breach. In the present case, the only actual effects alleged by Microsoft are those which have been previously described and rejected as not sufficient to constitute serious and irreparable damage (paragraphs 411 to 466 above).
- 474 Last, in so far as Microsoft indicates that the circulation of copies of the Article 6 version, i.e. of a mandatory adaptation of its work, would cause it non-pecuniary damage, that damage, in the absence of proof to the contrary, would be neither serious nor irreparable. That is *a fortiori* the case when, as already found above (paragraphs 422 to 429 above), it is not demonstrated that the Article 6 version might be distributed in significant quantities or that the subsequent distribution of Windows Media Player would not to a very large extent provide a remedy for the distribution of the Article 6 version.
- 475 Microsoft has therefore failed to demonstrate that implementation of Article 6(a) of the Decision would be likely to cause it serious and irreparable damage by reason of damage to its reputation.
- 476 Consequently, Microsoft has not shown that the implementation of Article 6(a) of the Decision was likely to cause it serious and irreparable damage. Consequently, without there being any need to balance the interests at stake, the application for suspension of operation of Article 6(a) must be dismissed.
- 477 As regards the application for suspension of Article 4 of the Decision (paragraph 27 above), it cannot be upheld. First, the first subparagraph of that article refers to Articles 5 and 6 of the Decision. The lack of urgency in ordering suspension of operation of Articles 5 and 6 therefore necessarily entails dismissal of the application for suspension of operation of that reference provision. Second, in so far as the application for interim measures seeks suspension of operation of the second subparagraph of Article 4 of the Decision, it is sufficient to state that Microsoft has not developed sufficient argument to support that form of order and that, in any event, at this stage the effects of the prohibition referred to in that article remain purely hypothetical.
- 478 The application must therefore be dismissed in its entirety.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

- 1. The request for confidential treatment submitted by Microsoft Corporation is granted at the interim measures stage;**
- 2. Audiobanner.com, trading as VideoBanner, is granted leave to intervene in support of the form of order sought by the Commission in the interim measures proceedings;**

3. **The Computer & Communications Industry Association is removed from the case as intervener in support of the form of order sought by the Commission in the interim measures proceedings;**
4. **Novell Inc. is removed from the case as intervener in support of the form of order sought by the Commission in the interim measures proceedings;**
5. **The application for interim measures is dismissed;**
6. **Costs are reserved.**

Luxembourg, 22 December 2004.

H. Jung

B. Vesterdor

Registrar

President

1 – Language of the case: English.

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