

Microsoft Waging IP Fight In Antitrust Battle With EC

Tuesday, March 28, 2006 --- Microsoft will get the opportunity to argue before European regulators this week in an effort to stave off a hefty daily fine in what has become a highly-contentious and drawn out antitrust battle with the European Commission.

“Microsoft respects the Commission’s authority and will continue to work hard to meet any and all demands. While we are ready to meet all their requirements, the Commission needs to be clear and consistent what those requirements are,” said a company spokesperson.

At a closed-door hearing in front of European officials later this week, the software company will get a chance to rebut charges that it has not provided enough technical information that would help its competitors create software to interface with Windows servers.

European officials had fined Microsoft €497 million back in March 2004 for violating antitrust laws, ruling that the company had to offer a version of Windows in Europe without certain audio-visual software, and provide a set of protocols to rivals in order to design programs.

The ensuing antitrust brawl has become consumed by Microsoft's intellectual property concerns and European regulators' vigorous antitrust efforts.

An attorney who is involved with the current Microsoft antitrust litigation, but declined to be identified due to the sensitive nature of the case, indicated that the case had yet to be resolved partly because the EC was not being consistent in its disclosure requirements.

“The Commission said what’s wrong, but not what would be right,” the attorney said.

Microsoft and European authorities have been at odds for years over how best the software company should reveal detailed technical data to its rivals in accordance with the 2004 ruling, while at the same time not revealing sensitive information the company argues is legally protected.

A spokesperson for the EC declined to comment on the matter.

Last year, both parties agreed to appoint an independent trustee to help settle the matter, an independent U.K. computer scientist named Neil Barret, who studied the issue and concluded that the protocols Microsoft had provided up until that point were “totally unusable” because of vague instructions.

Microsoft has since offered competitors access to its Windows server source code, and most recently offered unlimited technical support to its rivals—overtures that have been greeted with a certain degree of skepticism from European officials and rival developers.

The current impasse, the attorney observed, reflects how challenging it can be for European antitrust officials—who perhaps aren't as versed in complex technical matters—to adequately gauge the right amount of information the company should properly disclose regarding interoperability issues.

The attorney also maintained that the EC's disclosure standards have successively changed since Microsoft was first asked to provide information to its rivals—a factor that has complicated the negotiations over how much the company should reveal and how much the company feels it should be penalized.

“The goalposts have shifted,” the attorney observed.

Thomas Vinje, an attorney with the law firm Clifford Chance LLP who is also representing a group of rival software makers in a complaint against Microsoft, said that the software company believes the actions of the Commission are undermining its valuable intellectual property in order to prevent it from innovating.

“In my view, the case is not about this at all. Instead, it's about requiring Microsoft to compete on the merits by requiring it to provide interface specifications to competitors so they can achieve interoperability with Microsoft's dominant products on a level playing field,” Vinje stressed.

David Bradshaw, an analyst with the telecom and software consulting firm Ovum, said that one of the reasons a resolution in the case has been so elusive is because both parties are waging different battles on the same ground.

“Microsoft sees this in a completely different light than the EU,” he said, noting that the information European regulators want the software giant to disclose is probably regarded as quite “commercially sensitive” by the company.

Bradshaw thought that whether or not Microsoft had been sincere in its efforts to comply with the 2004 European ruling was extremely hard to assess.

The analyst said it was difficult for Microsoft to completely dispel the suspicion that it is not genuinely cooperating with European antitrust officials because it so thoroughly dominates that desktop market.

Nicholas Economides, a professor at the Stern School of Business at New York University, suspected that Microsoft had taken a number of steps to

make information available to its competitors and questioned whether the European court had a sufficient amount of expertise to deal with the complex technical details of the case.

“Trying to achieve a 100% level of interoperability probably isn’t feasible,” he said, referring to the EC’s demands that Microsoft be more forthcoming as it discloses information about interfacing matters.

Economides argued that rather than one side fighting to preserve its intellectual property, and the other side fighting to apply its antitrust laws, the case should be thought of in terms of whether or not the laws being invoked in the case are properly suited to settle the matter.

“The real issue is the extent to which antitrust law can determine issues of interoperability,” the professor observed.

Next month the Microsoft will put forth arguments in a broader appeal to Europe’s second-highest court, The Court of First Instance, as it attempts to have the landmark 2004 ruling annulled—a ruling that could ultimately result in a €2 million daily fine for Microsoft should European trust-busters emerge victorious in the dispute.

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