LICENSING AGREEMENTS (INTERNET): THE MICROSOFT CASE

Subject: Licensing agreements
Distribution agreements
Comfort letters

Industry: Internet service providers; computer software

Parties: Microsoft
Various Internet service providers

Source: Commission Statement IP/99/317, dated 10 May, 1999

(Note. Microsoft's licensing agreements with Internet service providers have been approved by the Commission, following amendments to the agreements designed to prevent the market from being foreclosed in Microsoft's favour. The Commission is at pains to point out that, in approving the licences, it is not prejudging the question whether Microsoft's general behaviour is or is not an abuse of a dominant position; that the issues in this licensing case are not the same as those raised in the case at present before the US courts; and that approval of the licences could be reviewed if there is any change in the "legal or factual situation".)

The notified agreements, as amended

The Commission has approved Microsoft's licensing agreements with Internet Service Providers (1SPs) by means of a comfort letter. Microsoft formally notified these agreements to the Commission in February 1998. In the notified version, Microsoft has removed all the provisions which could be contrary to European competition rules. Mr Karel Van Miert, the Commissioner responsible for competition policy, has therefore written to Microsoft raising no objection to these agreements and declaring them compatible with the common market and the EC Treaty. This clearance covers only the agreements between Microsoft and the ISPs; the Commission has not ruled on the overall behaviour of Microsoft, in particular concerning a possible abuse of a dominant position.

On 27 February 1998, Microsoft, the computer software manufacturer, formally notified to the Commission, pursuant to Article 4 of Council Regulation No 17, a set of agreements made with some European ISPs for the licensing and distribution of its Internet Explorer products. An ISP is a company that maintains a permanent connection to the Internet and enables its subscribers to connect to the Internet via a telephone link to the ISP. The ISPs may also provide its subscribers with World Wide Web (WWW) pages.

Microsoft's formal notification of its agreements followed an inquiry launched by the Commission's Directorate-General for Competition (DG IV) into a previous version of the agreements. During this inquiry, DG IV advised Microsoft to re-examine the agreements in the light of European Union (EU) competition rules to ensure that they did not contain restrictions that might have the effect of illegally foreclosing the market for Internet browser software

from Microsoft's competitors and of illegally promoting the use of Microsoft's proprietary technology on the Internet.

Microsoft subsequently amended its agreements and notified the revised agreements to the Commission. The two main changes are, first, that the ISPs' failure to attain minimum distribution volumes or percentages of Internet Explorer browser technology will no longer result in termination of their agreements; and, secondly, that ISPs are now allowed to promote and advertise competing browser software. Considering that Microsoft has removed the said clauses and that the notified agreements no longer infringe EU competition rules, the Commission has cleared the agreements by way of an administrative letter (so-called comfort letter) pursuant to Article 81(1) [previously Article 85(1)] of the EC Treaty.

Under the approved agreements, Microsoft promotes the ISPs by including them in a list of available services pre-installed on new Personal Computers which use Microsoft's proprietary Windows operating system. Microsoft also licences its Internet Explorer software to ISPs who make it available to their subscribers. In return the ISP pays Microsoft a fee for every subscriber gained via this feature and promotes Internet Explorer products. Under the agreements, ISPs can further be granted a license to customise Microsoft's Internet Explorer software in accordance with specific instructions and use the Internet Explorer logo in conjunction with its use and distribution of the licensed software. (Further details of the notification of the Microsoft Internet Explorer Licensing Agreements were published in the Official Journal of the European Communities on 9 June 1998.)

The comfort letter covers only the agreements between Microsoft and ISPs. The Commission has not therefore given any ruling on the global behaviour of Microsoft concerning a possible abuse of dominant position. In particular, this case is quite different in scope and substance from the court case currently pending in the US. However, the Commission could reopen its investigation into Microsoft's ISP agreements if there were any future change in the factual or legal situation affecting any essential aspect of these agreements that warranted a further inquiry.

Background

- March 1997: DO IV opens first investigation into the agreements between Microsoft and European ISPs.

- February 98: Revision of Microsoft's software licensing agreements with ISPs. Microsoft removes the clauses imposing on the ISPs minimum distribution volumes and exclusive promotion of the Internet Explorer products. Microsoft formally notifies the new version of the agreements to the European Commission.

- June 98: Commission publishes a description of Microsoft's ISP agreements as revised in the Official Journal of the European Communities.)

- May 99: DG IV issues comfort letter clearing the notified agreements. □