

Exhibit 1
to
Reply Declaration of James G. Gilliland,
Jr. In Support of Apple Inc.'s Motion to
Dismiss Psystar's Counterclaims



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.4.2004
C(2004)900 final

COMMISSION DECISION

of 24.03.2004

**relating to a proceeding under Article 82 of the EC Treaty
(Case COMP/C-3/37.792 Microsoft)**

(ONLY THE ENGLISH TEXT IS AUTHENTIC)

(Text with EEA relevance)

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*which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.*⁵⁴⁵

- (427) The relevant geographic market for client PC operating systems, work group server operating systems and media players is world-wide. The objective conditions for competition are essentially the same across the world. PCs and servers are manufactured by a large number of companies that operate on a world-wide scale such as IBM, Compaq, or Dell. In order to sell computers with the operating system (and a media player) already installed, such manufacturers obtain the necessary licences from the software manufacturers. Generally, a single world-wide licence agreement is entered into between the computer manufacturer and the software manufacturer. The computers are then sold on a world-wide scale. Neither import restrictions, transport costs or technical requirements constitute significant limitations. Language-specific demand characteristics regarding the relevant software exist but, in so far as the supply-side is concerned, do not constitute an obstacle for swift supply on a global basis in accordance with language-related preferences. The entire world can therefore be regarded as the relevant geographic market.

5.2 Dominant position

- (428) A dominant position under Article 82 of the Treaty has been defined by the Court of Justice of the European Communities as *“a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers”*.⁵⁴⁶

5.2.1 Client PC operating systems

- (429) In its response to the supplementary Statement of Objections, Microsoft acknowledged that it held *“a dominant position in the supply of operating systems that run on personal computers (‘PCs’)”*.⁵⁴⁷ The following recitals will show that Microsoft holds a dominant position which exhibits extraordinary features since it controls the quasi-standard of the relevant market in question, and has done so for some time. Microsoft's dominance relies on very high market shares and significant barriers to entry.

⁵⁴⁵ Commission notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997, p.5)

⁵⁴⁶ See judgment in Case 27/76 United Brands v Commission [1978] E.C.R. 207, at paragraph 65.

⁵⁴⁷ Microsoft's submission of 17 October 2003, on page 1.

5.2.1.1 Market shares

- (430) Third party estimates of market shares and the evidence gathered during the investigation highlight the extraordinary position of Microsoft in the market.
- (431) In 2000, Microsoft's market share⁵⁴⁸ in terms of *new client PC operating system licences* was, according to IDC,⁵⁴⁹ 92.1% when measured by unit shipments and 92.8% measured by revenues.⁵⁵⁰ In 2001, this figure had risen to 93.2% when measured by unit shipments and 95.4% by revenues.⁵⁵¹ In 2002, it had further risen to 93.8% when measured by unit shipments and 96.1% by revenues.⁵⁵² Microsoft is forecast to maintain these 90%+ market shares in the coming years.⁵⁵³ If operating systems for Intel-compatible PCs excluding the Macintosh operating system are looked at (see recital (326) above), Microsoft holds an even greater share of the market.
- (432) Moreover, Microsoft's extremely high market shares have not come about recently. In 1996, Microsoft had a market share of 76.4%, and since 1997 has held market shares of consistently over 80%,⁵⁵⁴ and of over 90% since 2000.⁵⁵⁵
- (433) In terms of *installed base* (which reflects *inter alia* past sales), IDC's evaluation is that Windows (all versions) has grown from 84.6% to 92.8% between 2000 and 2002.⁵⁵⁶ The results of the Commission's 2003 market enquiry are in line with these figures. The responses received during the Commission's 2003 market enquiry

⁵⁴⁸ In the client PC operating system market, market share data measured in units shipped may to some extent be more informative than revenue-based figures. Indeed, end-users typically desire one copy of an operating system per client PC. Moreover, the client PC operating system market is one characterised by network effects, so that being able to attract a wide number of users is a key competitive advantage for a client PC operating system product. "To the extent that a firm's share is greater using the dollar sales measure, this indicates that the firm's products are positioned towards the high end of the market. Since users typically desire a single copy of software per computer, unit sales tend to be a better measure of (market) share than dollar sales." See Michael Katz and Carl Shapiro, *Antitrust in Software Markets*, September 1998, page 14 (at: <http://faculty.haas.berkeley.edu/shapiro>).

⁵⁴⁹ International Data Corporation describes itself as "the premier global market intelligence and advisory firm in the information technology and telecommunications industries". See http://www.idc.com/en_US/st/aboutIDC.jhtml;jsessionid=RDV3XOCQ0RP24CTFA4FCFFAKMUDYWIWD.

⁵⁵⁰ IDC, *Worldwide Client and Server Operating Environments Forecast, 2002-2007*

⁵⁵¹ IDC, *Worldwide Client and Server Operating Environments Forecast, 2002-2007*

⁵⁵² IDC, *Worldwide Client and Server Operating Environments Forecast, 2002-2007*

⁵⁵³ IDC, *Worldwide Client and Server Operating Environments Forecast, 2002-2007*

⁵⁵⁴ See first Statement of Objections, at paragraph 246.

⁵⁵⁵ Microsoft's enduring high market shares were also highlighted by the US District Court for the District of Columbia. Referring to operating systems for Intel-compatible PCs, it held that: "[e]very year for the last decade, Microsoft's share of the market for Intel-compatible PC operating systems has stood above ninety percent. For the last couple of years the figure has been at least ninety-five percent, and analysts project that the share will climb even higher over the next few years". See Findings of Fact of 5.11.1999, United States District Court for the District of Columbia, *United States v Microsoft Corporation*, Civil Action No. 98-1232 and 1232 (TPJ), at paragraph 35.

⁵⁵⁶ IDC, *Worldwide Client and Server Operating Environments Forecast, 2002-2007*, on page 17.

cover a total amount of approximately 1.2 million to 1.3 million client PCs. More than 1.15 million (more than 87%) of them run Windows (all versions).

- (434) Microsoft's share of the market thus only allows for fringe competition. The main alternative to Microsoft's client PC operating system product would be Apple's Mac OS, assuming that it is included in the relevant market. In 2002, this client PC operating system held a market share of 2.9% when measured in unit shipments and 2.2% when measured in revenue.⁵⁵⁷ Table 5 summarises Microsoft's market shares and those of its competitors since 2000 in the client PC operating system market:

Table 5: Client PC operating system market shares since 2000 (%)

Operating system	2000		2001		2002	
	Units	Revenues	Units	Revenues	Units	Revenues
Windows	92.1	92.8	93.2	95.4	93.8	96.1
Apple (Mac OS)	3.9	3.3	3.1	2.4	2.9	2.2
Linux	1.7	0.5	2.3	0.4	2.8	0.4
Others	2.4	3.3	1.3	1.8	0.5	1.4
Total	100.0	100.0	100.0	100.0	100.0	100.0

Source: IDC, *Worldwide Client and Server Operating Environments Forecast, 2002-2007*

- (435) Very large market shares, of over 50%, are considered in themselves, and but for exceptional circumstances, evidence of the existence of a dominant position.⁵⁵⁸ Market shares between 70% and 80% have been held to warrant such a presumption of dominance.⁵⁵⁹ Microsoft, with its market shares of over 90%, occupies almost the whole market – it therefore approaches a position of complete monopoly, and can be said to hold an overwhelmingly dominant position.⁵⁶⁰

5.2.1.2 Continuity of Microsoft's market power

- (436) As has been highlighted at recital (432), Microsoft has held very high market shares in the client PC operating system market for many years. As such, Microsoft has enjoyed an enduring stability and continuity to its market power. However, prior to its acceptance that it held a dominant position in the market (see recital (429) above) Microsoft had argued that since the Commission's allegations related to Windows 2000 Professional, and since this version of Microsoft's client PC operating system

⁵⁵⁷ IDC, *Worldwide Client and Server Operating Environments Forecast, 2002-2007*

⁵⁵⁸ See Judgment of the Court of Justice in Case C-62/86 *Akzo v Commission* [1991] E.C.R. I-3359, at paragraph 60 and Judgment of the Court of First Instance in Case T-228/97, *Irish Sugar v Commission* [1999] E.C.R. page II-2969, at paragraph 70.

⁵⁵⁹ Judgment of the Court of First Instance in Case T-30/89, *Hilti v Commission* [1991] E.C.R. p. II-1439, at paragraph 89, confirmed by the Court of Justice in Case-53/92 P, [1994] E.C.R. I-667.

⁵⁶⁰ Advocate General Fennelly talked of a concept of "superdominance" and highlighted the "particularly onerous special obligation" affecting an undertaking which enjoys a position of "overwhelming dominance verging on monopoly" in his opinion in Joined Cases C-395/96 P & C-396/96 P, *Compagnie Maritime Belge and others v. Commission* ("Cewal") [2000] ECR I-1365, opinion of Advocate General Fennelly, at paragraph 137.