

# Herald



# Tribune

Europe vs. Microsoft ■ Francois-Henri Briard

## A costly and suspect offensive

PARIS

**I**n March 2004, after a five-year investigation of Microsoft, the European Commission issued a drastic ruling with far-reaching implications.

According to the eminent experts and civil servants of Brussels, Microsoft had abused its dominant market position in violation of the EC Treaty.

The complaint was twofold: Microsoft restricted interoperability between the Windows operating system and groups of non-Microsoft servers, and Microsoft illegally tied Windows Media Player to the Windows operating system.

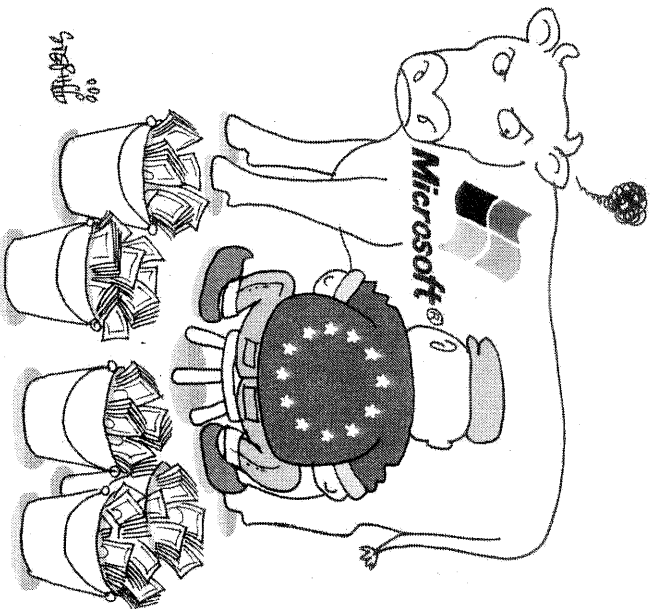
The company did what was necessary under the law: It paid a fine of almost one half-billion Euros; agreed to license key technologies (communications protocols) on reasonable and non-discriminatory terms and priced them 30 percent lower than comparable technologies on the market; provided extensive technical documentation to its marketplace rivals; and marketed in Europe a version of Windows XP (and now Windows Vista) without the Windows Media Player.

In spite of this enormous effort, EC Competition Commissioner Neelie Kroes recently declared that Microsoft was in non-compliance with the EC's sanctions. She virtually ignored Microsoft's explanation of its licensing program and, on March 1, issued an official "Statement of Objections" against Microsoft.

According to this statement, Microsoft's communications protocol technologies contain no significant innovation and therefore the company's proposed licensing prices remain unreasonable.

Such a provocative assertion raises several serious legal and policy issues. Foremost, Microsoft's communications protocols are protected by a number of patents, themselves obtained through a lengthy and costly process under the jurisdiction of authorities in Europe and the United States.

Indeed, Microsoft accepted the EC principle that



licensing prices would take into consideration the level of innovation in the protocols, understanding that those protocols had been deemed innovative by patent authorities on both sides of the Atlantic.

Even to seasoned European legal observers, it is a mystery by what authority the European Competition Commission can declare that these same protocols are without significant innovation.

Is the Commission now the global arbiter of intellectual property and the free market? Which Europe does the EC serve: the Europe of marketplace competition or the Europe of bureaucracy and regulation?

The economic and legal principles that form the foundation of free market competition are the same

in Europe and the United States, yet the EC has taken a very different approach to regulation.

In the United States, a fruitful dialogue between Microsoft and the government produced a legitimate and reasonable result that enables Microsoft's rivals to access Windows technologies. As a result, numerous companies have taken out licenses that provide this access while also upholding the value of Microsoft's intellectual property.

In Brussels, by contrast, heavy artillery and unilateralism dominate: first a fine of €497.2 million in 2004; another fine of €280.5 million in 2006; a new Statement of Objections before Microsoft had the opportunity to bring its licensing program to the marketplace; legal summons; formal notices; a threat of new fines retroactive to December 2005 for €3 million per day — more than one billion euros per year!

Could we be seeing an attempt by the EC to shake down a successful American company in order to create freely available public property out of valuable proprietary technology?

The central question is, who finally will pay the costs of such overreaching regulation? Microsoft of course is now paying the direct costs. But ultimately all purchasers of software around the world will pay. Regulation that drives up business costs will ultimately be reflected in the price of products.

To date, neither the European economy nor European consumers have benefited from the EC's overreaching approach toward Microsoft. Europe needs more competition, innovation and commercial freedom, not further bureaucracy and regulation.

The only remaining hope is that the European Court of First Instance will issue a ruling that forces the EC to adopt a reasonable course of action. The EC should take no further action against Microsoft until the court speaks.

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