

PUBLIC WEB EDITION

of the

Opinion

Presented 16 October 2009

to the

Commission of the European Union

This public web edition is available in the following web page:

http://www.jukkarannila.fi/lausunnot.html#nro_17

Readers of the Opinion are strongly to evaluate critically both Microsoft's proposal of the Commitment and opinions/proposal presented in the Opinion.

Information related the Case No.COMP/C-3/39.530 can be read and downloaded from the following web page:

http://ec.europa.eu/competition/antitrust/cases/index/by_nr_79.html#i39_530

This web page contains Proposed Commitments and annexes to the Proposed Commitments.

Reader(s) of this Opinion are strongly recommended to give their **own opinions** to the following email address:

COMP-GREFFE-ANTITRUST@ec.europa.eu

These opinions provided by the readers must be in the Commission before 7 November 2009.

With Best Regards,

Jukka Rannila

citizen of Finland

signed and delivered electronically

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COMP-GREFFE-ANTITRUST@ec.europa.eu
European Commission
Directorate-General for Competition
Antitrust Registry
B-1049 Bruxelles/Brussel

10 Market notice on 9 October 2009

11
12 OPINION CONCERNING CASE COMP/C-3/39530 – MICROSOFT (TYING)

13
14 This opinion collect some viewpoints based on the Market Test Notice related to antitrust case Case
15 COMP/C-3/39530 – Microsoft (Tying) .

16
17 These opinions do not represent any organisation, and it is an opinion of an concerned citizen in a
18 Member State.

19
20
21 Generally speaking the Proposed Commitment contains many issues, which must be:

- 22 – modified,
- 23 – extended,
- 24 – rewritten,
- 25 – specified more, or
- 26 – deleted.

27
28 In current form the Proposed Commitment can not be a final form of the final Commitment.
29 Moreover, there is some technical details, which are poorly specified.

30
31
32 Annex 1 holds information of copyright, licence and disclaimer.

33
34
35 Best Regards,

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38
39 Jukka Rannila
40 citizen of Finland
41
42 signed and delivered electronically

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43

44 Request for new round of hearings

45

46 It is probable that this invitation for comments will result a large amount of opinions. Since
47 this case is utmost important, I propose a second round of comments, i.e. Market Test, after
48 the second version of the Commitment is ready.

49

50 **Proposal 1:** A new Market Test is needed for the second version of proposed Commitment,
51 after the Commission has consolidated all provided positions/opinions related to the (first)
52 Proposed Commitment in the EU / Antitrust case COMP/39.530.

53

54 General

55

56 I will go through the text of the proposed commitment paragraph by paragraph and by
57 sentence by sentence.

58

59 Paragraph 1

60

61 **Proposal 2:** A web page www.microsoft.com is too general since Microsoft has hundreds of
62 pages in their web site. Therefore it must something like this:

63

www.microsoft.com/ballot_screen

64

65 **Proposal 3:** There should be also separate annexes for describing ballot screen procedure
66 with Windows XP and Windows VISTA operation systems.

67

68 **Proposa 4:** The Commission can request on its own will these separate annexes for
69 describing ballot screen procedure with Windows XP and Windows VISTA operation
70 systems.

71

72 **Proposal 5:** There must be point added to the third sentence in the paragraph (1):

73

74 Microsoft will ensure that if Internet Explorer is turned off, then

75

[...]

76

(iv) Windows operating system will work coherently even though Internet
77 Explorer is turned off, and Microsoft will promptly correct reported defects
78 that are related to turning off Internet Explorer.

79

80 Paragraph 2

81

82 **Opinion 1:** There must be change in written form for OEM terms, where is specifically
83 specified, that an OEM has free choice to pre-install any web browser. Surely there is
84 "Changes" clause, and finally accepted final form of the Commitment can be compared to
85 Force Majeure -situation, and change in terms is possible.

86

87 **Proposal 6:** Therefore every OEM must be given a written notice of change in the terms, i.e.

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88 free choice for pre-installation of web browsers.

89

90 **Proposal 7:** Previously mentioned list of notified OEMs must be delivered to the
91 Commission and updated regularly, i.e. monthly, to the Microsoft web site.

92

93 **Paragraph 3**

94

95 **Proposal 8:** Sentence 1 in paragraph must be following:

96

97 “ Within Microsoft’s PC Productivity Applications, **which are specified in this**
98 **Commitment, and** distributed in the EEA, Microsoft shall not include any icons,
99 links or short-cuts or provide any other means to start a download or installation of a
100 Microsoft web browser.”

101

102 **Paragraph 4**

103

104 **Proposal 9:** Similarly to free choice to pre-install any web browser, there must be a
105 covenant provided by Microsoft not sue when developing, using, distributing, promoting or
106 supporting software that competes with Microsoft web browsers.

107

108 **Proposal 10:** This written notice to the OEMs must be given at the same time as notice of
109 free choice of pre-installation.

110

111 **Paragraph 6**

112

113 **Opinion 2:** This paragraph considers **direct** OEM licences, which are different from
114 previously mentioned free pre-installation and free using, distributing, promoting or
115 supporting of web browsers.

116

117 **Proposal 11:** Therefore there must be one sentence more:

118

119 “Microsoft shall not terminate a direct OEM licence based on OEMs
120 (licensees) usage of competing web browser related to Internet Explorer or
121 other Microsoft’s web browser(s).”

122

123 **Paragraph 7**

124

125 **Opinion 3:** The five months roll-out in this paragraph is totally vague.

126

127 **Proposal 12:** After sentence “If Microsoft encounters objective unexpected technical
128 difficulties which mean that it is unable to complete the full roll-out within 5 months,
129 Microsoft will before the end of this period submit a reasoned request for an extension to the
130 Commission.” **there must be following sentences:**

131

132 “Commission can nominate technology-oriented experts to determine the

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133 reasoned request and technical obstacles related to five (5) months time, aka
134 grace period. These technology-oriented experts must be given a access to
135 technical development environment of Microsoft in order to determine the
136 validity of reasoned request. If there is user manuals, development manuals,
137 introductory software, test suites or defect information, Microsoft will
138 provide public, complete and concise list and free access of this information
139 to the nominated technology-oriented experts.
140 Commission can order monthly payments for Microsoft after this grace
141 period, if there is non-compliance after this five months grace period.
142 Commission can determine amount of these monthly fines based on severity
143 of the possible non-compliance after grace period.”
144

145 Opinion 4: Based on the previous non-compliance of Microsoft, it can be reasoned that this
146 five (5) months delay can be extended indefinitely, if there is not some monetary measures
147 to prevent non-compliance in this respect.
148

149 Paragraph 8

150
151 **Proposal 13**: One sentence must be added:

152
153 “The Ballot Screen update will include an initial page that provides basic
154 information concerning the purpose of the Ballot Screen. **This initial page**
155 **must be on the default language of the operating system.**”
156

157 **Proposal 14**: An average user might not understand how to test active internet connection,
158 even though it seems easy. Therefore one sentence must be deleted and a new sentence must be
159 added:

160
161 ~~This page will include a notice that prominently reminds the user to ensure~~
162 ~~an active internet connection before proceeding to the browser selection~~
163 ~~page.~~

164 This initial page contains a button that will test internet connections by
165 sending a PING ¹ messages to vendor-managed download servers of the
166 predetermined browsers, and if there are internet connection problems, there
167 will be a notification of these problems and there is a possibility to cancel the
168 installation process of web browsers.
169

170 **Proposal 15**: Term “ClickOnce” is not defined, and it must be defined in the final form of
171 the accepted Commitment.
172

173 Paragraph 9

174
175 Opinion 5: There is not any mention about **manual update** in this paragraph.
176

1 <http://en.wikipedia.org/wiki/PING>

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177 **Proposal 16:** With manual update there must be a possibility to install web browser through
178 Ballot Screen.

179
180 **Proposal 17:** It should be possible to add the wanted web browser(s) to all computers by the
181 administrative personnel, not just removing Ballot Screen.

182
183 **Paragraph 11**

184
185 Opinion 6: “semi-annually” is too vague in the sentence 1.

186
187 **Proposal 18:** “semi-annually” in the sentence 1 must be replaced by “monthly”.

188
189 Opinion 7: “source commonly agreed” is too vague in the sentence 1.

190
191 **Proposal 19:** There must be a specific source mentioned for calculating browser popularity
192 in the final form of the Commitment. **This source of calculating browser popularity must**
193 **be independent of Microsoft and Microsoft's subsidiaries.**

194
195 **Paragraph 13**

196
197 Opinion 8: “semi-annually” is too vague in the sentence 3.

198
199 **Proposal 20:** “semi-annually” in the sentence 3 must be replaced by “monthly”.

200
201 Opinion 9: In the final sentence of the paragraph 13 the term “reasonable period of time”
202 must be replaced with a specific time period the final form of the Commitment, e.g. a
203 month.

204
205 **Proposal 21:** In the final sentence of the paragraph 13 there is missing points. The procedure
206 for dispute resolution should be following:

- 207 – a dispute is recognised
208 – the disputed issue is informed to the Commission
209 – Microsoft and vendor try to resolve the dispute
210 – Microsoft and vendor resolve the issue
211 – written resolution of the dispute is informed to the Commission
212 – IF Microsoft and vendor cannot resolve the dispute, then Microsoft
213 must submit the matter to the Commission for determination

214
215 **Paragraph 15**

216
217 Opinion 10: The referenced “Timely Manner” is vaguely defined in the chapter 5. This issue
218 will be discussed later on.

219
220 **Proposal 22:** In the final sentence of the paragraph 13 “may not charge” must be changed
221 **“must not charge”.**

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222
223 **Proposal 23:** There must be a new sentence in the end of the paragraph 15.

224
225 “Microsoft will provide a way give feedback about API defects. These API defects
226 must be listed in the page committed to API defects. The status of API defects must
227 be informed in the same page.”

228
229 Opinion 11: This is not hard task, since a single web page can comply previous sentence.

230
231 **Paragraph 17**

232
233 Opinion 12: This paragraph implies passive behaviour by Microsoft, and it is not acceptable.

234
235 **Proposal 24:** There must be new sentences in the end of the paragraph 17:
236 “When there is changes and updates in the Windows Update online service,
237 Microsoft will invite browser vendors mentioned in the paragraph 13 to test changes
238 and updates in the Windows Update online service. If there is defects found by
239 browser vendors mentioned in the paragraph 13 in the updates in the Windows
240 Update online service, Microsoft will promptly to start correcting these defects.”

241
242 **Paragraph 18**

243
244 Opinion 13: There is not mentioning about the renewal of the Commitment, if the web
245 browser market is still dominated by one web browser provider, in this case Microsoft.

246
247 **Proposal 25:** There must be new sentences in the end of the paragraph 19:
248 “
249 The term of this Commitment can be renewed after 5 years of the adoption of this
250 Commitment. Commission can on its own will monitor web browser market, and can
251 have on its own will have Market Review of the web browser market. If Commission
252 can reasonably proof, that web browser market is still abusively dominated by one
253 Microsoft web browser in the fifth year of this Commitment, Commission can on its
254 own will ask a new Market Test during the fifth year of this Commitment. Based on
255 the Market Test, Commission and Microsoft can agree on the new Commitment after
256 this Commitment, and the negotiations for the new Commitment can happen in the
257 fifth year of this Commitment.
258 “

259
260 **Amendment 1 / Paragraph 20**

261
262 **Proposal 26:** I propose following paragraph 20 to be added.
263
264 “
265 (20) The twelve (12) web browser vendors mentioned in the paragraph 13 can
266 provide yearly reports in January to the Commission about the competitive

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267 situation in the web browser market during this Commitment. There reports
268 can be provided by individual web browser vendors or by collective effort of
269 web browser vendors. Commission can evaluate these reports, when
270 reviewing effectiveness of this Commitment.
271 Commission can on its own will have Market Reviews, i.e. the Commission
272 can have a public consultation for Customers of the Microsoft's Relevant
273 Software Products, Competitors of the Microsoft's Relevant Software
274 Products, Competition Authorities in the Member States, Standard Setting
275 Organisations, Information and Communication Technology Experts
276 Associations and to the general public.
277 The Commission can use these Market Reviews, when reviewing
278 effectiveness of this Commitment.
279 ”

280

Amendment 2 / Paragraph 21

281

282

283

Proposal 27: I propose following paragraph 21 to be added.

284

285

286

287

288

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290

291

292

“(21) There will be new internet standards presented during time period of this
Commitment. According to annex 4(b) to Marrakesh Agreement Establishing the
World Trade Organization there can be standards and technical specification. If there
is Government Procurement in some country based on technical specifications (WTO
definition) concerning web standards in a procurement, bidding Microsoft's web
browser version will comply with these technical specifications mandated in specific
procurements.”

293

294

Opinion 14: Here is following background for the proposed paragraph 21

295

296

297

Agreement on Government Procurement ² as annex 4(b) to Marrakesh Agreement
Establishing the World Trade Organization (WTO).

298

299

Article VI: Technical Specifications

300

301

302

303

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1. Technical specifications laying down the characteristics of the products or services
to be procured, such as quality, performance, safety and dimensions, symbols,
terminology, packaging, marking and labelling, or the processes and methods for
their production and requirements relating to conformity assessment procedures
prescribed by procuring entities, shall not be prepared, adopted or applied with a
view to, or with the effect of, creating unnecessary obstacles to international trade.

307

308

2. Technical specifications prescribed by procuring entities shall, where appropriate:

309

310

(a) be in terms of performance rather than design or descriptive characteristics; and
(b) be based on international standards, where such exist; otherwise, on national

² http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm

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311 technical regulations(footnote 3), recognized national standards (footnote 4), or
312 building codes.

313
314 (footnote original) 3 For the purpose of this Agreement, a technical regulation
315 is a document which lays down characteristics of a product or a service or
316 their related processes and production methods, including the applicable
317 administrative provisions, with which compliance is mandatory. It may also
318 include or deal exclusively with terminology, symbols, packaging, marking or
319 labelling requirements as they apply to a product, service, process or
320 production method.

321
322 (footnote original) 4 For the purpose of this Agreement, a standard is a
323 document approved by a recognized body, that provides, for common and
324 repeated use, rules, guidelines or characteristics for products or services or
325 related processes and production methods, with which compliance is not
326 mandatory. It may also include or deal exclusively with terminology,
327 symbols, packaging, marking or labelling requirements as they apply to a
328 product, service, process or production method.

329
330 3. There shall be no requirement or reference to a particular trademark or trade name,
331 patent, design or type, specific origin, producer or supplier, unless there is no
332 sufficiently precise or intelligible way of describing the procurement requirements
333 and provided that words such as "or equivalent" are included in the tender
334 documentation.

335
336 4. Entities shall not seek or accept, in a manner which would have the effect of
337 precluding competition, advice which may be used in the preparation of
338 specifications for a specific procurement from a firm that may have a commercial
339 interest in the procurement.

340
341 **Amendment 3 / Paragraph 22-24**

342
343 **Proposal 28:** I propose following paragraphs to be added.

344
345 “(22) There will be new internet standards (both “de jure” and “de facto”) presented
346 during time period of this Commitment.”

347
348 “(23) Microsoft will comply with a new web standard (“de jure”), if three (3) largest
349 or over six (6) web browser providers mentioned in the paragraph 13 are committed
350 to a specific web standard (“de jure”). Standard setting organisation (SDO) is
351 specified in Article VI: Technical Specifications of the Agreement on Government
352 Procurement ³ as annex 4(b) to Marrakesh Agreement Establishing the World Trade
353 Organization.”

354

3 http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm

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355 “(24) In “de facto” standards there can be Market Review by the Commission. If
356 there is a “de facto” standard hindering the competition, the Commission can start
357 antitrust proceedings with provider of that “de facto” competition hindering web
358 standard. If competition hindering “de facto” web standard is provided by Microsoft,
359 Commission and Microsoft shall start immediately negotiations to alleviate the
360 hindered competition during this Commitment. In market review the Commission
361 can review if complying with “de facto” standard is reasonable and feasible to the
362 web browser providers mentioned in the paragraph 13.”

364 “(25) Conformity of the standards is important for all browsers in the market.
365 Microsoft will assure that Internet Explorer conforms with “de jure” and “de facto”
366 standards. If other browser vendors, consumers or other companies can prove that
367 Internet Explorer does not conform to these standards, Commission and Microsoft
368 will negotiate about solving conformity problems, and they will determine timetable
369 for achieving conformity. Commission can nominate technology-oriented experts to
370 determine conformance of Internet Explorer. If Microsoft does not comply with
371 accepted timetable, Commission can order monthly fines for Microsoft.”

373 Opinion 15: Based on Microsoft’s previous non-conformity to public standards, there must
374 be safety measures to ensure that Microsoft really conforms to standards.

376 SIDENOTE.

377 In WTO case EC - Bananas III (DS27) it was concluded that General
378 Agreement on Trade in Services Articles II and XVI prohibits de facto
379 discrimination as well as de jure discrimination, the Appellate Body noted
380 that in past practice, GATT Article I applied to de facto discrimination. Also
381 in case Canada – Autos (DS 139 and 142) it was concluded that article I:1
382 covers de facto discrimination as well as de jure discrimination.

384 **Amendment 4 / Paragraph 26**

386 Opinion 16: Microsoft is having a passive attitude of informing all interested parties in this
387 proposed commitment.

389 Proposal 29: I propose following paragraph to be added.

391 “(26) Microsoft shall provide public web pages related to the Ballot Screen. It shall
392 be possible to all interested persons and all legal entities to sign into the information
393 mailing lists informing about the Ballot Screen and to RSS feeds informing about
394 Ballot Screen. Microsoft will promptly inform all relevant changes in the the Ballot
395 Screen procedures to these information lists and to Microsoft’s web page.

397 **Amendment 5 / Paragraph 27**

399 Opinion 17: Microsoft is not proposing that how Volume Licensing Customers are going to

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400 be served during this proposed Commitment.

401

402 **Proposal 30:** I propose following.

403

404 Microsoft and Commission can negotiate how Volume Licensing Customers are
405 served during the final Commitment.

406 Volume Licensing Customers need option, where they can enforce usage of certain
407 versions of web browsers in their organisations based on the policy in their
408 organisations.

409 Microsoft shall provide constructive proposal how to serve Volume Licensing
410 Customers for the next version of the proposed Commitment.

411

412 Opinion 18: When there is a second Market Test, Microsoft's constructive proposals for
413 serving Volume Licensing Customers can be better evaluated.

414

415 **Definition "Timely Manner"**

416

417 **Proposal 31:** This should contain definition of "alpha" version and clearer explanation
418 between "alpha" and "beta" versions.

419

420 **Proposal 32:** There is not mentioning, that how long period "beta testing" is. Is there some
421 standard "beta testing period" for Microsoft's products in the "beta testing phase"? This
422 should be defined better!

423

424 **Definition "Windows Client PC Operating System"**

425

426 **Proposal 33:** This should information about Windows VISTA and about Windows XP and
427 their successors.

428

429 **MISSING Definition "API"**

430

431 **Proposal 34:** The term "API" must be defined.

432

433 **MISSING Definition "ClickOne"**

434

435 **Proposal 35:** The term "ClickOnce" must be defined.

436

437 **ANNEX A of the proposed Commitment**

438

439 Opinion 19: The term "Turn Windows features on or off" is totally vague.

440

441 **Proposal 36:** "Turn Internet Explorer on or off" should be a separate option right in the
442 Control Panel, not hidden deeply to "Turn Windows features on or off" menu.

443

444 Opinion 20: An average user might not understand how to test active internet connection,

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445 even though it seems easy. Therefore one sentence must be deleted and a new sentence must be
446 added:

447

448 **Proposal 37:** This initial page contains a button that will test internet connections by
449 sending a PING messages to vendor-managed download servers of the predetermined
450 browsers, and if there are internet connection problems, there will be a notification of these
451 problems and there is a possibility to cancel the installation process.

452

453 Opinion 21: There should be clear “HELP” link, that would open clear explanation of the
454 following phases.

455

456 **ANNEX B of the proposed Commitment**

457

458 **Proposal 38:** In the bottom of the Ballot Screen there should link “Technical Information”,
459 which would give clear technical information about all presented browsers for technically-
460 oriented persons.

461

462

463

464 **ANNEX 1 of this Opinion**

465

466 Annex 1 holds information of copyright, licence and disclaimer.

467

468

469 **SIGNATURE**

470

471

472 Jukka Rannila

473 citizen of Finland

474

475 signed and delivered electronically

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476

ANNEX 1

477 DISCLAIMER

478

479 Legal disclaimer:

480

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482 entity I am member either by law or voluntarily. This opinion paper is only intended to trigger thinking and it
483 is not legal advice. This opinion paper does not apply to any past, current or future legal entity. This opinion
484 paper will not cover any of the future changes in this fast-developing area. Any actions made based on this
485 opinion is solely responsibility of respective actor making those actions.

486

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488

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492

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494 extreme-left or moderate-left. They are only opinions of an individual whose overall thinking might or might
495 not contain elements of different sources. These opinions do not reflect past, current or future political
496 situation in the Finnish, European or worldwide politics.

497

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499

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501

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511

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515

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517

518 The English explanation is in the following web page:

519

520 <http://creativecommons.org/licenses/by-nd-nc/1.0/fi/deed.en>

521

4 Based on the Finnish three-party system there is phenomenon called extreme-centre in Finland.