



EUROPEAN COMMISSION
Competition

CASE AT.39784 – Omnis/Microsoft

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 7(2) Regulation (EC) 773/2004

Date: 29/01/2016

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EUROPEAN COMMISSION

Brussels, 29.1.2016
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[...]

Subject: Case COMP/C-3/AT.39784 – Omnis/Microsoft
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Sirs,

- (1) I am writing to inform you that the European Commission (the "Commission") has decided to reject your complaint of 9 April 2015 against Microsoft Corp ("Microsoft"), pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.¹

1. PROCEDURAL BACKGROUND

- (2) On 23 December 2009, Omnis lodged a complaint against Microsoft pursuant to Article 5 of Commission Regulation 773/2004 ("the 2009 complaint").
- (3) In the 2009 complaint, Omnis alleged that Microsoft had committed certain infringements of Articles 101, 102 and 106 of the Treaty on the Functioning of the European Union ("TFEU") on the market for Enterprise Application Software, referred to as 'Enterprise Application Software/Enterprise Resource Planning' systems.
- (4) On 1 December 2010 the Commission adopted a decision pursuant to Article 7(2) of Commission Regulation 773/2004 rejecting the 2009 complaint on the grounds that there was an insufficient degree of Union interest in continuing the investigation into the alleged infringements ("the 2010 rejection decision").²
- (5) On 1 February 2011, Omnis brought an action for annulment of the Commission's 2010 rejection decision before the General Court.

¹ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18.

² Commission Decision of 1 December 2010, Case COMP/39.784.

- (6) On 30 May 2013, the General Court dismissed Omnis's action and upheld the 2010 rejection decision in full.³
- (7) On 9 April 2015 Omnis lodged another complaint ("the 2015 complaint"), again alleging that certain of Microsoft's practices infringed Articles 101, 102 and 106 TFEU. Omnis further elaborated on these allegations with its additional submissions of 14 and 21 October 2015.
- (8) By letter of 4 December 2015 Omnis was informed that pursuant to Article 7(1) of Commission Regulation 773/2004, after careful examination of the factual and legal elements put forward in its complaint, the Commission had taken the preliminary view that a further in-depth investigation of the issue, which would require considerable resources, would be disproportionate. Consequently, Omnis was informed that the Commission intended to reject Omnis' complaint pursuant to Article 7(2) of Commission Regulation 773/2004 ("the Article 7(1) letter").
- (9) Omnis responded to the Article 7(1) letter on 29 December 2015.

2. THE 2015 COMPLAINT AND THE ADDITIONAL SUBMISSIONS OF 14 OCTOBER, 21 OCTOBER AND 29 DECEMBER 2015

- (10) The 2015 complaint as well as the additional submissions of 14 October, 21 October and 29 December 2015 are in many respects vague, imprecise and contradictory and do not amount to claims that would be clear and substantiated enough for the Commission to take a position on. Notwithstanding that fact, the Commission has, in its Article 7(1) letter and in this Decision, assessed all elements in the 2015 complaint and the additional submissions of 14 October, 21 October and 29 December 2015 which could potentially amount to allegations of a breach of EU competition law. The examination of this has not led to a different assessment of the facts underlying the complaint. For the reasons set out below, the Commission does not intend to conduct a further investigation into your allegations and therefore rejects your complaint.
- (11) In the 2015 complaint, you make the following twelve allegations:
 - 1. "Microsoft associated with FUJITSU SIEMENS COMPUTERS, The European Aeronautic Defence and Space Company N.V. (EADS), D-CON.NET AG, D-CON.NET GMBH, COMSOFT DIRECT AG, BECHTLE HOLDING SCHWEIZ AG, GESSA, PROFINET, DIM SOFT, SIVECO, ROMANIAN SOFT COMPANY, MEDIST, NET CONSULTING, SMARTTREE and other companies, in order to constitute a criminal organization, thus protected and guaranteed since 2000 by high European officials, Romanian prime ministers, ministers, members of the Romanian Parliament, political parties, officers of the secret services, judicial police officers, businessmen and underworld felons."⁴

³ EU:T:2013:283.

⁴ Page 15 of the 2015 complaint.

2. "Microsoft constituted and operated extensive criminal mechanisms of fraud and corruption, by empowering FUJITSU SIEMENS COMPUTERS (FSC) as the unique Microsoft representative, able to receive payments for Microsoft licenses from the Romanian Government, in order to further pay part of the overcharged license services (approximately 50%) in bribes, by the use of international money laundering schemes."⁵
3. "Microsoft and its associates (Siemens, EADS, RSC etc.) bribed for the last 12 years the Romanian Governments and other "beneficiaries" with hundreds of millions of euro, after charging for nonexistent licenses, fictive services and pirated software. Most of the money were embezzled from the EU finances and projects."⁶
4. "The source code of ISIS.NET was stolen by a company (ROMANIAN SOFT COMPANY - RSC), assisted by Microsoft [...] Once the theft discovered and brought to justice, RSC was sustained by the Microsoft Romania founder and Technical Director, in his quality of a technical judicial expert. The thieves claimed the stolen software belonged to Microsoft. Microsoft refused to deny RSC's statements and participative defence, and refused to present the source code of its Navision product for comparison, even after being informed and officially requeste[d] by ORDA, Prosecutors, OLAF and Omnis several times since 2009, hence determining the prosecutors and the Courts of Justice to exonerate them of several very serious proven and evident frauds, and to thus to charges and to accuse Omnis Group (until 2011) of defamation and other illegal acts."⁷ "RSC also sued Omnis for libel, and asked for damages for loss of business with the Ministry of Interior. RSC sued Omnis [...] only after they received Microsoft's unconditional support."⁸
5. Microsoft appointed FSC Austria as its sole representative and proxy in the licensing contract with the Romanian Government. This constitutes an infringement of Articles 101(1)(a), (c), (d), (e), 102(a), (c), (d), and 106(1) and (2) TFEU.⁹
6. "In September 2003, a strategic partnership was signed between the Romanian Government and Microsoft. On 15 March 2004, the Romanian Government and Microsoft signed a contract for Microsoft licenses (for Enterprise Desktop Professional Platform, Windows 2003 - Server, Exchange 2003 - Server, Systems Management Server, SharePoint - Portal Server, Windows SQL 200 Tech, Encarta Library, etc.). Microsoft monopolized the Romanian market for government and educational IT platforms, selling approx. 260.000 licenses for projected payments in excess of 300.000.000 USD during 2004 – 2012. In exchange of the monopoly, Microsoft allowed approximately 50% of the price

⁵ Page 15 of the 2015 complaint.

⁶ Page 15 of the 2015 complaint.

⁷ Pages 15 and 16 of the 2015 complaint.

⁸ Page 27 of the 2015 complaint.

⁹ Page 16 of the 2015 complaint.

of the licenses to be returned as bribes to Government high officials. This would represent an infringement of Art. 106 para. 1, 2 TFEU."¹⁰

7. "In order for the corruption mechanism to function, selected interposed companies were used. [Some of these] companies were owned by the [Romanian] minister of finance [...] who had to approve and countersign all Government payments to Microsoft. This represents infringement of Articles 101(1)(a), (c), (d), (e), 102(a), (c), (d) and 106(1) and (2) TFEU."¹¹
8. "Microsoft partners with an intermediary company in order to plagiarize plagiarise Omnis' superior competitive software and to distribute it via Internet, free of charge, to competent and corrupt authorities, and for money to thousands of users, with the EU's legitimacy given by a grant that they fraud and by the protection of the EU authorities, who discharge them of their duties."¹²
9. "Microsoft comes to support the defence of criminals (ROMANIAN SOFT COMPANY), based on the assertion that the stolen source code belongs to Microsoft. Expertise reports of the Romanian Copyright Office (ORDA) and OLAF investigations prove the assertion wrong. Microsoft refuses to present the source code of Navision for comparison and verification. The action was meant to eliminate Omnis from the ERP/EAS for Windows markets. This represents infringement of Ar. 101 para. 1 (b), (d), Art. 102 para. (b), (c) TFEU."¹³
10. "Undertaking Microsoft – members of the Romanian Government - Fujitsu Siemens Computers to eliminate effective competition. Microsoft empowered FUJITSU SIEMENS COMPUTERS (FSC) as unique Microsoft representative, able to receive payments for Microsoft licenses from the Romanian government and further use part of the money (approximately 50%) to pay the bribes that had to secure the continuity of the contracts. This represents infringement of Art. 101 para. 1 (a), (c), (d), (e), Art. 102 para. (a), (c), (d) and Art. 106 para. 1, 2 TFEU."¹⁴
11. "Undertaking Microsoft – members of the Romanian Government - RSC, MEDIST to eliminate effective competition. As established by ORDA in its technical-scientific expertise report nr. 18/02.03.2011, and as retained by OLAF in the Final Report of the case OF/2010/0068, the technologies integrated by Omnis Group in ISIS.NET were (in 2002 – 2004) more advanced than those integrated by Microsoft in its Navision product. Hence, Microsoft had good reasons to defend the criminals, sending its technical director as judicial expert in support of ROMANIAN SOFT COMPANY. Thus, the company owned by the minister of finance could be cleared of charges, the minister could continue to approve payments for Microsoft (through FSC

¹⁰ Page 16 of the 2015 complaint.

¹¹ Page 16 of the 2015 complaint.

¹² Page 17 of the 2015 complaint.

¹³ Page 17 of the 2015 complaint.

¹⁴ Page 17 of the 2015 complaint.

Austria Bucharest branch, with offices located in the same building as ROMANIAN SOFT COMPANY and MEDIST), Omnis Group's ISIS.NET could be considered a lower copy of Microsoft Navision, Microsoft was able to continue promoting and selling its ERP products. Omnis was thus eliminated from the ERP/EAS for Windows markets. This represents infringement of Art. 101 para. 1 (a), (c), (d), (e), Art. 102 para. (a), (c), (d) and Art. 106 para. 1, 2 TFEU."¹⁵

12. "Microsoft was asked to present the source code of Navision for verification and comparison against ISIS.NET source code. Microsoft did not answer the requests (Omnis Group request – 16.10.2009, ORDA requests – 08.03.2010 and 21.10.2010, Prosecution Office of the Sibiu County request – 11.03.2010, OLAF request – 29.07.2013) or refused to present the source code (OLAF request - 05.11.2013). This represents infringement of Art. 101 para. 1 (b), Art. 102 para. (b) TFEU."¹⁶
- (12) In addition, on 14 October 2015, you informed the Commission about a judgment of the "Supreme Court of Justice" in a trial that dealt with allegations of (government) corruption and breaches of public procurement law in relation to "Microsoft-Siemens-EADS".¹⁷ You further stated that Microsoft's conduct has turned Omnis into "dangerous criminals".¹⁸ You also elaborated further on the first, second, third, fourth, fifth, sixth and tenth allegations of the 2015 complaint (see paragraph (11) above).¹⁹
- (13) On 21 October 2015, you provided information about alleged fraud and embezzlement on an EU-wide scale, ranging from Romanian politicians to high-level EU officials²⁰ and about the above mentioned judgment of the "Supreme Court of Justice".²¹ You also elaborated further on the first, second, third, fourth, sixth, seventh and tenth allegations of the 2015 complaint (see paragraph (11) above).²²
- (14) In your response to the Article 7(1) letter of 29 December 2015, you submit further information that partly relates to the first, third, fourth, seventh, eighth, ninth and eleventh allegations of the 2015 complaint (see paragraph (11) above). In addition, you provide further information about fraud and embezzlement on an EU-wide scale.

¹⁵ Page 17 of the 2015 complaint.

¹⁶ Page 18 of the 2015 complaint.

¹⁷ Pages 1-2 of the additional submission of 14 October 2015.

¹⁸ Page 3 of the additional submission of 14 October 2015.

¹⁹ Pages 1-3 of the additional submission of 14 October 2015.

²⁰ Pages 2-7 of the additional submission of 21 October 2015.

²¹ Pages 2, 3, 6, 7 of the additional submission of 21 October 2015.

²² Pages 2, 4, 6-8 of the additional submission of 21 October 2015.

3. ASSESSMENT

3.1. Principles

- (15) The Commission has discretion in its treatment of complaints.²³ In particular, the Commission is entitled to give differing degrees of priority, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints,²⁴ and to refer to the Union interest in order to determine the degree of priority to be applied to the various complaints brought before it. The assessment of the Union interest raised by a complaint depends on the circumstances of each individual case. When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria,²⁵ but the Commission may notably take into consideration whether, on the basis of the information available, it seems likely that further investigations will ultimately result in the finding of an infringement. The Commission may also attach importance to the potential impact of the alleged infringement on the functioning of the internal market.²⁶
- (16) In addition, the Commission may consider the scope of the investigation required. If it emerges that an in-depth investigation would be a complex and time-consuming matter and the likelihood of establishing an infringement appears limited and/or the potential impact of the alleged infringement of the internal market appears limited, this will weigh against further action by the Commission.²⁷ The Commission cannot be compelled to carry out an investigation, where such an investigation would have no purpose other than to seek evidence of the existence or non-existence of an infringement which the Commission is not required to establish.²⁸
- (17) A decision rejecting a complaint prevents a complainant from requiring the reopening of the investigation unless it puts forward significant new evidence. Accordingly, further correspondence on the same alleged infringement by a former complainant cannot be regarded as a new complaint unless significant new evidence is brought to the attention of the Commission.²⁹

²³ Case C-119/97 P *Ufex v Commission*, EU:C:1999:116, paragraph 88; Case T-193/02 *Laurent Piau v Commission*, EU:T:2005:22, paragraphs 44 and 80.

²⁴ OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, pp. 25-27.

²⁵ Case C-56/12 P *EFIM v Commission*, EU:C:2013:575, paragraph 85.

²⁶ Case T-74/11 *Omnis Group v Commission*, EU:T:2013:283, paragraph 80.

²⁷ Case T-306/05 *Scippacercola and Terezakis v Commission*, EU:T:2008:9, paragraph 133.

²⁸ Case T-320/07 *Jones and Others v Commission*, EU:T:2011:686, paragraph 115. It is also inherent to the complaint procedure that the burden of proof regarding the existence of an alleged infringement is borne by the complainant. See Case C-56/12 P *EFIM v Commission*, EU:C:2013:575, paragraph 72.

²⁹ Case T-241/97 *Stork Amsterdam v Commission*, EU:T:2000:41, paragraphs 80-82; Point 78 of the Notice on the handling of complaints.

3.2. Application in the present case

- (18) The first, second, third, fourth (in part), eighth, ninth (in part) and eleventh allegations of the 2015 complaint (see paragraph (11) above), as supplemented by your additional submissions of 14 October, 21 October and 29 December 2015, relate to possible breaches of national or international criminal law, and not of the Union competition rules.
- (19) The fourth allegation (in part) of the 2015 complaint (see paragraph (11) above), as supplemented by your additional submissions of 14 October, 21 October and 29 December 2015, relates to a possible breach of national libel law, and not of the Union competition rules.
- (20) The sixth allegation of the 2015 complaint (see paragraph (11) above), as supplemented by your additional submissions of 14 and 21 October 2015, relates to a possible breach of public procurement law, and not of the Union competition rules.³⁰
- (21) The ninth (in part) and twelfth allegations of the 2015 complaint (see paragraph (11) above), as supplemented by your additional submission of 29 December 2015, relate to a possible breach of intellectual property law, and not of the Union competition rules.³¹
- (22) In so far as your additional submissions of 14 October, 21 October and 29 December 2015 contain information that does not relate to the allegations made in the 2015 complaint, that information relates to possible breaches of national criminal law, international criminal law or intellectual property law, and not of the Union competition rules.
- (23) This Decision will, therefore, solely address the fifth, seventh and tenth allegations of the 2015 complaint, as supplemented by your additional submissions of 14 October, 21 October and 29 December 2015. Where certain allegations substantially overlap, they will be dealt with together.

3.2.1. *The fifth and tenth allegations: Microsoft's appointment of FSC as its sole representative and proxy*

- (24) The Commission is of the view that the likelihood of finding an infringement of Articles 101, 102 or 106 TFEU is limited in relation to your fifth and tenth allegations, which are substantially the same.
- (25) First, the 2015 complaint fails to state on which market the alleged conduct is occurring.
- (26) Second, even assuming, as the title of the 2015 complaint suggests, that Microsoft's alleged conduct takes place on an EU-wide market for Enterprise Resource Planning/Enterprise Application Suite ("ERP/EAS") systems for Windows platforms, there is no indication: (i) of the existence of any agreement between at least two

³⁰ Case T-74/11 *Omnis Group v Commission*, EU:T:2013:283, paragraph 101.

³¹ Case T-74/11 *Omnis Group v Commission*, EU:T:2013:283, paragraph 74.

undertakings within the meaning of Article 101 TFEU;³² (ii) of the existence of a dominant position within the meaning of Article 102 TFEU;³³ or (iii) that FSC is a public undertaking or an undertaking to which Romania has granted special or exclusive rights within the meaning of Article 106 TFEU.³⁴

- (27) Third, even if there were an agreement between at least two undertakings, this would not in itself require the Commission to pursue an investigation. For an agreement to be caught by the prohibition contained in Article 101(1) TFEU, it must also be capable of having as its object or effect the restriction of competition to an appreciable extent.³⁵ You have, however, not put forward any evidence to demonstrate that this would be the case.
- (28) Fourth, the existence of a dominant position would not in itself require the Commission to pursue an investigation. A finding that an undertaking has such a dominant position is not in itself a ground of criticism of the undertaking concerned. It is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market.³⁶
- (29) Fifth, Article 102 TFEU can apply in certain circumstances to conduct by a dominant undertaking on markets other than the dominated markets that has effects either on the dominated markets or on the non-dominated markets themselves.³⁷ You have, however, not put forward any evidence to demonstrate that this would be the case, in particular how Microsoft's appointment of FSC would affect Microsoft's competitors or trading partners.
- (30) In view of the limited likelihood of establishing the existence of an infringement, the Commission takes the view that a further in-depth investigation of this issue, which would require considerable resources, would be disproportionate.

3.2.2. The seventh allegation: the use of interposed companies, some owned by the Romanian Minister of Finance

- (31) The Commission is of the view that the likelihood of finding an infringement of Articles 101, 102 or 106 TFEU is limited in relation to your seventh allegation.
- (32) First, the 2015 complaint fails to state on which market the alleged conduct is occurring.

³² Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer*, EU:C:2004:2, paragraphs 100-102.

³³ Case C-52/09 *TeliaSonera Sverige*, EU:C:2011:83, paragraph 23.

³⁴ Case 56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, p. 249.

³⁵ Case T-74/11 *Omnis Group v Commission*, EU:T:2013:283, paragraph 61.

³⁶ Case T-74/11 *Omnis Group v Commission*, EU:T:2013:283, paragraph 61.

³⁷ Case C-52/09 *TeliaSonera Sverige*, EU:C:2011:83, paragraphs 84-86.

- (33) Second, there is no indication: (i) of the existence of any agreement between at least two undertakings within the meaning of Article 101 TFEU;³⁸ (ii) of the existence of dominance within the meaning of Article 102 TFEU;³⁹ or (iii) that any of the interposed companies, including those allegedly owned by the Romanian Minister of Finance, is either a public undertaking or an undertaking to which Romania has granted special or exclusive rights within the meaning of Article 106 TFEU.⁴⁰
- (34) Third, even if there were an agreement between at least two undertakings, this would not in itself require the Commission to pursue an investigation. For an agreement to be caught by the prohibition contained in Article 101(1) TFEU, it must also be capable of having as its object or effect the restriction of competition to an appreciable extent.⁴¹ You have, however, not put forward any evidence to demonstrate that this would be the case.
- (35) Fourth, the existence of a dominant position would not in itself require the Commission to pursue an investigation. A finding that an undertaking has such a dominant position is not in itself a ground of criticism of the undertaking concerned. It is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market.⁴²
- (36) Fifth, Article 102 TFEU can apply in certain circumstances to conduct by a dominant undertaking on markets other than the dominated markets that has effects either on the dominated markets or on the non-dominated markets themselves.⁴³ You have, however, not put forward any evidence to demonstrate that this would be the case, in particular how the use of interposed companies would affect Microsoft's competitors or trading partners.
- (37) In view of the limited likelihood of establishing the existence of an infringement, the Commission takes the view that a further in-depth investigation of this issue, which would require considerable resources, would be disproportionate.

4. CONCLUSION

- (38) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements and consequently rejects the 2015 complaint pursuant to Article 7(2) of Regulation No. 773/2004.

³⁸ Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer*, EU:C:2004:2, paragraphs 100-102.

³⁹ Case C-52/09 *TeliaSonera Sverige*, EU:C:2011:83, paragraph 23.

⁴⁰ Case C-553/12 P *Commission v DEI*, EU:C:2014:2083, paragraph 56.

⁴¹ Case T-74/11 *Omnis Group v Commission*, EU:T:2013:283, paragraph 61.

⁴² Case T-74/11 *Omnis Group v Commission*, EU:T:2013:283, paragraph 61.

⁴³ Case C-52/09 *TeliaSonera Sverige*, EU:C:2011:83, paragraphs 84-86.

5. Procedure

5.1. Recourse against this Decision

- (39) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

- (40) The Commission reserves the right to send a copy of this Decision to Microsoft. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.⁴⁴ If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform the responsible case handler [...]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to Microsoft.
- (41) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

Margrethe VESTAGER
Member of the Commission

⁴⁴ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.