

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 December 1986

relating to a proceeding under Article 85 of the EEC Treaty

(IV/31.458 — X/Open Group)

(Only the German, English, French, Italian and Dutch texts are authentic)

(87/69/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas :

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 6 and 8 thereof,

Having regard to the notification made on 19 August 1985 of a set of agreements, including the 'Agreement for X/Open Group' entered into between Compagnie des Machines Bull, France, Digital Equipment Corporation International (Europe), Switzerland, L. M. Ericsson, Sweden, International Computers Ltd, UK, Nixdorf Computer AG, Federal Republic of Germany, Ing. C. Olivetti & C. SpA, Italy, Philips International BV, The Netherlands, Sperry Corporation (now Unisys), USA, and Siemens Aktiengesellschaft, Federal Republic of Germany, and to the subsequent agreement entered into in pursuance thereof between these undertakings and AT&T Information Systems Inc., USA,

Having published a summary of the notification in accordance with Article 19 (3) of Regulation No 17⁽²⁾,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions.

I. THE FACTS

General background

- (1) All computers require an operating system which supplies the operating instructions needed by the computer to carry out its functions. Historically, the concept of computer architecture has caused operating systems software to be tied very closely to the hardware components of the system, with the result that operating systems designed for one architecture could not normally be used on machines of a different architecture. The tasks which the users want their computers to do are carried out by application programs. Application programs are written for use with a particular operating system and can normally only function with that system. The investments of users in application programs are substantial. Users considering the acquisition of a new machine on which their present application programs cannot function do so in the knowledge that such a step may lead to a costly and time-consuming task in rewriting their existing programs or acquiring a range of new application programs. Users have, consequently, tended to be locked into the systems which they have acquired. This has meant a limitation of the choice of users and of the importance of price and quality as parameters in the competition between suppliers of hardware and software.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No C 250, 7. 10. 1986, p. 2.

- (2) However, in recent years, starting with small-scale systems, several extensive hardware-independent operating systems have been developed and marketed for commercial use. For software houses, the development of 'open systems' means that the market for the programs which they write for such a system is not limited to that of users of machines of a particular architecture. For users, the development of 'open systems' means that they can mix and match hardware and software from the different suppliers addressing such systems, and that they can move application programs between machines ('portability') to meet changing requirements as business grows, thereby giving protection of investments in such programs in the future.

The product

- (3) Unix⁽¹⁾ is an operating system which was first developed in the Bell Laboratories of AT&T in about 1970. Several versions have since then been developed and offered by AT&T; the version 'Unix System V' has been offered since 1983. In 1985 AT&T published a 'System V Interface Definition' aimed at providing a standard application interface to the Unix operating system.
- (4) One of the features of the design of Unix is that it offers a high degree of portability and machine independence. This means that an application program written for a Unix operating system can be moved from one machine to another of different make or capacity with little or not modification. This characteristic should enable users to change their hardware without loss of their software investment.
- (5) A number of other companies have developed varieties of Unix, either under a licence from AT&T or loosely based on the principles of Unix, thereby avoiding the need to pay a royalty to AT&T. Only the versions developed by AT&T are offered under the name of Unix. Since there has been little or no standardisation either between the different versions of Unix itself or between any of the Unix-type varieties, the application software written for any one version or variety will not function with any other without modification. In total, there are today 30 to 35 different commercial versions which are used on machines with very different capacities.

The parties and the notification

- (6) On 19 August 1985 several agreements were notified to which the following companies are parties:
- Compagnie des Machines Bull, France,
 - International Computers Limited, UK,
 - Nixdorf Computer AG, Federal Republic of Germany,
 - Ing. C. Olivetti & C., SpA, Italy,
 - Siemens Aktiengesellschaft, Federal Republic of Germany,
 - Philips International BV, The Netherlands.

Since that date, the following companies have also become parties to the agreements:

- LM Ericsson, Sweden,
- Digital Equipment Corporation International (Europe), Switzerland,
- Sperry Corporation, USA (now Unisys).

The parties to the notified agreements are hereinafter referred to as 'the members'.

- (7) The agreements notified on 19 August 1985 are the following:
- Agreement for X/Open Group, (hereinafter referred to as the 'Group Agreement'),
 - Non-Disclosure Agreement,
 - Arbitration Agreement.

These agreements were all made on 26 June 1985 with retroactive effect as of 30 November 1984.

- (8) In pursuance of a clause in the Group Agreement, the members have also entered into an Information Exchange Agreement with AT&T Information Systems Inc., USA. This agreement became effective as of 27 September 1985. A copy was sent to the Commission on 27 November 1985.

The agreements between the members

- (9) The principal objective of the X/Open Group established by the members is to take advantage of the portability of Unix and thereby to make possible an increase in the volume of applications available on the members' computer systems. This is to be

(1) Unix is a trademark of AT&T Bell Laboratories.

- achieved by the creation of an open industry standard consisting in a stable but evolving common application environment ('CAE') for software based on AT&T's System V Interface Definition.
- (10) The Group will define this software environment by selecting existing interfaces; it has no primary intent of creating new interfaces. The Group will proceed, in due time, to the standardization of selected interfaces by appropriate national and international standards organizations.
- (11) Group decisions are taken by simple majority.
- (12) According to the Group Agreement, the members will consider for membership particularly those applicants who are major manufacturers in the European information technology industry, with their own established expertise concerning Unix operating systems in such industry, and who are committed to the objectives of the Group.
- (13) Interpreting this clause, the members have indicated that in order to ensure the ability of an applicant to dedicate resources to the Group, they expect the information technology revenue of the applicant to be in excess of US \$ 500 million and that the applicant must demonstrate willingness to contribute to standards and guidelines as well as an existing commitment to established standards.
- (14) The members have further indicated that the members are aware that applicants who do not fulfil the criteria may nonetheless have special attributes which will significantly contribute to achievement of Group objectives and that they should therefore be accepted as members.
- (15) A member may resign at any time.
- (16) The Group Agreement will remain in effect (with regard to the subsisting members of the Group) for so long as the Group remains in existence.
- (17) In order to make the Group's discussions most productive the Group Agreement provides for an exchange of technical and market — but not marketing — information between the members. The members have indicated that the technical information will concern the Unix environment and that the market information will concern the European software industry and its requirements, both those of independent software vendors and those of end-users. In respect of the market information, they have further indicated that it may include analysis of the current structure of the relevant market for Unix operating systems. This analysis may cover categorization of the relevant market by reference to the type of operating system (Unix, particular type of Unix or otherwise) or the type of computer hardware. It may also cover predictions as to the future market structure derived from the collation of information from software vendors, retailers, end-user groups.
- (18) Non-disclosure of confidential information is considered to be a vital part of the membership. The Non-Disclosure Agreement provides for the protection of such information from unauthorized use and disclosure.
- (19) A definition of the interfaces currently identified by the Group as components of the CAE is being published in the 'X/Open Portability Guide' which is on sale to the public. An agreement concerning copyright provides for joint ownership of all present and future copyright in this manual.
- (20) The Group will establish and maintain a software catalogue for appropriate software of the members and third-party suppliers, having end-users as target. The members have indicated that third-party software which is competitive to any member's own product(s) will not be excluded from the catalogue.
- (21) The members are not obliged to design their products to conform with any element of the CAE and they are free to offer Unix systems with facilities additional to or enhancing the CAE elements. They are also free to select their suppliers and to carry out their own publicity in respect of products implementing the CAE or elements thereof.
- (22) The Arbitration Agreement lays down the procedure to be followed in case of disputes between the members.
- The agreement between the members and AT&T*
- (23) Under the Information Exchange Agreement, an exchange of certain information between AT&T and the members is contemplated to take place through certain defined committees. According to the agreement such information may include unpublished materials appropriate to the evaluation of AT&T's Unix System V operating system and related software; unpublished strategies for the direction of the parties' System V standardization efforts; and unpublished versions of AT&T's verification suite of programs for System V applications. The object of this exchange is to give the members the necessary forward visibility of future modifications and updates to the System V Interface Definition to enable the members to maintain compatibility between the AT&T System V Interface Definition and the X/Open Portability Guide. It is intended to amend the guide to reflect and

conform to such modifications and updates. In order that the interfaces which AT&T defines can meet market requirements and be adopted by the members, they will provide AT&T with the market and technical information necessary for this purpose. No exchange of marketing information is provided for.

- (24) The confidentiality of the information supplied under this agreement is ensured by a Non-Disclosure Agreement to be entered into with AT&T by each member, the terms of which are annexed to the Information Exchange Agreement.

The members' submissions

- (25) In support of their request for an exemption under Article 85 (3) of the EEC Treaty the members have submitted that the establishment of a common application environment for software to run on Unix operating systems will be an important development in the support of open standards generally since the elements of the CAE will be defined by reference to international standards, whether official or *de facto*. They further argue that their definition and adoption of aspects of Unix operating systems presents to independent software vendors a large and (from a technical viewpoint) cohesive potential market providing the attractions of scale economics necessary to encourage such vendors to design their products so as to conform to such environment. The consumers will therefore benefit because the range of software available will be significantly greater and less restricted by the design of the computer system itself. In the opinion of the members, the promotion of a stable base for application software investment will encourage new investment, development and competition in the information technology market. As the elements of the CAE to be endorsed or adopted by the Group will only be fundamental or low-level elements, the members can build upon them when designing their own competitive products. The members also claim that the agreements mean an increase in their ability to compete with other major information technology companies and that this benefit will be extended to non-members since the elements of the CAE defined and endorsed by the Group will be published and available to all applicants.

Observations from third parties

- (26) Following the publication of the summary of the notification in the *Official Journal of the European Communities*, the Institut der Anwaltschaft

für Büroorganisation und Bürotechnik GmbH, Federal Republic of Germany, has informed the Commission that it supports the application made by the members of the X/Open Group. The company is a subsidiary of the Deutsche Anwaltverein and has been established by this association of German lawyers with the purpose, *inter alia*, of advising on the use of modern technology by law firms. In its submission the company stresses that, seen from the users' side of the market, where German lawyers are involved only cooperation between the manufacturers as set out in the notification can satisfy the need of users for portability.

- (27) No other observations from third parties have been received.

II. LEGAL ASSESSMENT

A. Article 85 (1)

- (28) Article 85 (1) prohibits as incompatible with the common market all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

Agreements between undertakings

- (29) All the above agreements (cf. points 7 and 8) are agreements in the sense of Article 85 (1) and all parties to these agreements (cf. points 6 and 8) are undertakings in the sense of that Article.

Distortion of competition

- (30) It is the objective of the members of the X/Open Group to establish a standard interface to a particular version of Unix. There is no obligation on the members to design their computers so that they can function with the version of Unix in question, and they are not likely to design all their products for use with this operating system. This is because, *inter alia*, to do so would oblige users with substantial investments in application software for use with a proprietary operating system of one of the members to change their computer systems. The members are, however, likely to put a considerable effort into the design and development of computers on which application programs implementing the CAE can function and to design such software themselves.

- (31) The members are all companies of a considerable size in the computer industry and they are all established or active throughout the Community. It is true that they have varying strength in the markets for different categories of computers and that their market positions vary from Member State to Member State. However, together they represent a substantial opportunity for software houses offering their products for use in the common market because application programs which implement the CAE can run on a wide range of machines offered by the members. Software houses should therefore be very interested in designing application programs which implement the group's definitions. This, in turn, may also make other hardware manufacturers interested in implementing them.
- (32) The definitions which the group adopts are made publicly available. In this respect the definitions constitute an open industry standard. However, non-members as opposed to members cannot influence the results of the work of the group and do not get the know-how and technical understanding relating to these results which the members are likely to acquire. Moreover, non-members cannot implement the standard before it has been made publicly available whereas the members are in a position prior to implement the interfaces which the Group defines because of earlier knowledge of the final definitions and, possibly, of the direction in which the work is going. In an industry where lead time can be a factor of considerable importance, membership of the group may thus confer an appreciable competitive advantage on the members *vis-à-vis* their hardware and software competitors. Considering the wider importance which is likely to be attached to the standard, this advantage in lead time directly affects the market entry possibilities of non-members. The advantage in question is different in nature from the competitive advantage which the participants in a research and development project naturally hope to get over their competitors by offering a new product on the market; they hope that their new product will result in a demand from users but their competitors are not prevented from developing a competing product whereas in the present case non-members wanting to implement the standard cannot do so before the standard becomes publicly available and, therefore, are placed in a situation of dependence as to the members' definitions and the publication thereof.
- (33) If the Group was open to any company willing to commit itself to the objectives of the Group no such company would be prevented from competing with the members of the Group on an equal basis.
- (34) According to the Group Agreement, the members decide upon applications for membership. Applications from major manufacturers in the European information technology industry with Unix expertise and a commitment to the objectives of the Group will particularly be considered (cf. points 11 and 12). It appears that competing companies with a commitment to the objectives of the Group but which are not 'major manufacturers' with a revenue from information technology in excess of US \$ 500 million (cf. point 13) are likely to be excluded from membership. Also companies fulfilling the criteria may, however, be excluded from membership as a result of the fact that a majority approval is required (cf. point 11). The members, consequently, have available to them a power to exclude applicants who fulfil the stipulated criteria for membership. In addition, since the Group 'particularly' will consider companies fulfilling the said conditions for membership, it also appears that companies not fulfilling the criteria but which 'have special attributes which will significantly contribute to achievement of Group objectives' (cf. point 14), may nevertheless be admitted to the Group. Apart from excluding competing companies from membership the conditions for membership also leave the way open for possible discriminatory treatment of applications.
- (35) In the circumstances of the case, an appreciable distortion of competition within the meaning of Article 85 (1) may result from future decisions of the Group on interfaces in combination with decisions on admission of new members to the Group.
- (36) The exchange of information between the members (cf. point 17) and between the members and AT&T (cf. point 23) concerns technical information with regard to the Unix environment and market information in respect of the requirements of users. The particular aim of the Group, that is, to create an open industry standard, cannot be achieved without an exchange of technical information between the members and with AT&T, and this technical information cannot be viewed and assessed by the parties in isolation from the structure and the requirements of the market. It is therefore natural that an exchange of such information is provided for.
- (37) The members are competitors in the supply of machines on which application programs implementing the CAE can function. They are also competitors of AT&T, although programs implementing the CAE may not function with the

version of Unix used by AT&T without certain modifications. However, neither the Group Agreement nor the agreement between the members and AT&T provide for any exchange of information with respect to prices, customers, market positions, production plans or other sensitive market information concerning the products of the parties. The Group Agreement only provides for an exchange of information necessary for the members to establish the CAE. As to the agreement with AT&T, it only provides for an exchange of information necessary to give the members the necessary forward visibility of future modifications and updates to the System V Interface Definition to enable them to maintain compatibility between the AT&T System V Interface Definition and the X/Open Portability Guide.

- (38) The exchange of information does not restrict the parties in their freedom to determine their market behaviour independently. In the context of the present case, there is no reason to assume that the exchange of information will go further than provided in the agreements nor that it will result in concerted behaviour by the parties. As far as the exchange of market information in particular is concerned it may be noted that, in the absence of more far-reaching cooperation between the parties, joint market research to collect information and ascertain facts and market conditions does not in itself affect competition. Neither is competition between the members affected by the joint establishment of structural analyses. Insofar as the members design their products to conform to the CAE, an exchange of information of the kind provided for may actually help increase competition between the members and between the members and AT&T. In the absence of any such exchange of information the users might not be released from their dependence on a single supplier. On the basis of the information at hand it may therefore be concluded that the clauses concerning the exchange of information do not have the object or effect of restricting competition in the sense of Article 85 (1).

- (39) The Non-Disclosure Agreement is just a natural legal safeguard and the Arbitration Agreement only lays down the procedure to be followed in case of conflict. Neither of these agreements have the object or effect of restricting competition in the sense of Article 85 (1).

Trade between Member States

- (40) The members intend to market the products which implement the Group definitions in all Member States of the European Community. The Group

Agreement can therefore directly influence the flow of goods manufactured by the members and indirectly the flow of goods manufactured by non-members and competing with the goods of the members. Trade between Member States may thus be affected to an appreciable extent.

Conclusion

- (41) Consequently, the Group Agreement fulfils the conditions in Article 85 (1) of the EEC Treaty as it relates to the criteria for membership and the requirement of majority decisions concerning admission of new members.

B. Article 85 (3)

Overall balance of advantages and disadvantages

- (42) In the present case the Commission considers that the advantages involved in the creation of an open industry standard (in particular the intended creation of a wider availability of software and greater flexibility offered to users to change between hardware and software from different sources) easily outweigh the distortions of competition entailed in the rules governing membership which are indispensable to the attainment of the objectives of the Group Agreement. In fact, the competitive advantages conferred on members by their ability to restrict access to the Group and the distortions of competition this entails, are reduced by the Group's professed aim of making available as widely and quickly as possible the results of the cooperation. This same aim also increases the objective advantages the cooperation will promote. The Commission considers that the willingness of the Group to make available the results as quickly as possible is an essential element in its decision to grant an exemption.

The detailed reasons for the conclusion that Article 85 (3) is applicable are set out below.

Promotion of technical progress

- (43) The Group Agreement contributes to promoting technical progress by establishing a common application environment for software to run on Unix operating systems. As a result of this, open industry standard application programs may be developed by independent software houses, and possibly by the members, which might not otherwise have been developed because, in the absence of the agreement, the markets to be addressed would not

have offered sufficient commercial prospects to make it worthwhile to begin the design work. It is the professed aim of the Group to make available as widely and quickly as possible the results of the cooperation. Consequently, hardware manufacturers and software houses which are not members will have available the information necessary to permit them to produce compatible products with a minimum of delay.

Consumer's benefit

- (44) As a result of the agreement consumers are likely to be offered a wider choice of application programs doing either the same job or doing jobs for which no program, in the absence of the agreement, would have been available. The agreement means, moreover, that the programs which will be developed will be considerably less restricted by the architecture of the computers. The main investment by users being in software, users are generally not willing to acquire a new machine on which their existing software cannot run. This has tended to make users dependent upon the manufacturers of their systems. As the Group is defining a common application environment, the Group Agreement means, therefore, that users will obtain greater scope for mixing hardware and software from different suppliers and replacing their hardware without having also to replace their software. This represents a major advantage for users compared with the present situation (cf. point 26).

Indispensability

- (45) The aims of the Group could not be achieved if any company willing to commit itself to the Group objectives had a right to become a member. This would create practical and logistical difficulties for the management of the work and possibly prevent appropriate proposals being passed. The way in which access to the Group is limited is indispensable to the attainment of the positive objectives of the Group. According to the Group Agreement, it is required that the members be major manufacturers in the European information technology industry with Unix experience. Only such companies can normally be expected to be able to provide resources of all kinds appropriate to the support of the Group's activities. It is, moreover, required that new members be approved by a majority vote. This enables a majority of the members to prevent admission of companies which might have an adverse effect on the cooperation and the achieve-

ment of the objectives of the Group. The members are the best to ascertain and weigh the advantages and disadvantages of admitting a new member for the efficiency of the work of the Group. The practical difficulties of bringing together representatives of the members with authority to commit their companies without endless discussions increase considerably with the number of members. The requirement of a majority vote also gives the members a further possibility of limiting the number of members to a manageable size. The fact that the members are in a position to admit applicants who do not fulfil the general criteria means, on the other hand, that it is possible to admit companies which are not major manufacturers but which may be able to make a substantial contribution to the work of the Group. Because qualitative as well as quantitative judgements may be called for in order to ensure that the work of the Group will not be hindered by new members, some discretionary power of admission is necessary.

Competition not eliminated

- (46) The members will offer the products which they develop and which will implement the Group's definitions in competition with each other and in competition with similar products which are developed and offered by third parties. The Group Agreement does not, therefore, afford the possibility of eliminating competition in respect of a substantial part of such products.

Conclusion

- (47) All conditions for the application of Article 85 (3) are thus fulfilled.

C. Articles 6 and 8 of Regulation No 17

- (48) Whenever the Commission takes a decision pursuant to Article 85 (3) of the Treaty it shall, pursuant to Article 6 (1) of Regulation No 17, specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification.
- (49) Pursuant to Article 8 (1) of Regulation No 17 a decision in application of Article 85 (3) of the Treaty shall be issued for a specified period and conditions and obligations may be attached thereto.
- (50) The Group Agreement was notified on 19 August 1985. It was entered into with retroactive effect as of 30 November 1984 for an indefinite period (cf. point 16).

- (51) The period until 30 November 1990 should give the members sufficient time to decide upon the definitions to be adopted. Such period will, furthermore, enable the Commission to reassess the cooperation between the members and its impact on non-members within a reasonable period of time. It is therefore appropriate to grant an exemption from 19 August 1985 to 30 November 1990.
- (52) Although the conditions for membership are indispensable they may be applied in an unreasonable manner. In order to ensure that the conditions for the application of Article 85 (3) are fulfilled in the above period it is, therefore, necessary that the Group submits an annual report to the Commission on cases where applications for membership have been refused and that it immediately informs the Commission of any changes in the membership,

HAS ADOPTED THIS DECISION :

Article 1

Pursuant to Article 85 (3) of the EEC Treaty, the provisions of Article 85 (1) are hereby declared inapplicable from 19 August 1985 to 30 November 1990 to the 'Agreement for X/Open Group' entered into by the parties referred to in Article 5, (1) to (9), hereinafter called 'the members'.

Article 2

The following obligations are attached to this Decision :

- (a) The members shall ensure that the Commission is informed immediately of any changes in the membership of the X/Open Group.
- (b) The members shall ensure that the Commission receives an annual report on any case where an application for membership of the X/Open Group has been refused in the period covered by the report. The first such report shall be submitted no later than 30 November 1987 and the subsequent reports no later than 30 November of the following years.

Article 3

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the EEC Treaty in respect of the Non-Disclosure Agreement and the Arbitration Agreement entered into by the members.

Article 4

On the basis of the facts in its possession, the Commission has no grounds for action under Article 85 (1) of the

EEC Treaty in respect of the Information Exchange Agreement entered into by the parties referred to in Article 5, (1) to (10).

Article 5

This Decision is addressed to :

1. Compagnie des Machines Bull,
121, avenue de Malakoff,
F-75116 Paris,
2. Digital Equipment Corporation International
(Europe),
12, avenue des Morgines,
case postale 510,
CH-1213 Petit-Lancy 1, Geneva,
3. Telefonaktiebolaget L.M. Ericsson,
S-126 25 Stockholm,
4. International Computers Limited,
ICL House,
Putney,
GB-London SW15 1SW
5. Nixdorf Computer AG,
Fürstenallee 7,
D-4790 Paderborn,
6. Ing. C. Olivetti & C., SpA,
Via G. Jervis 77,
I-10015 Ivrea,
7. Philips International BV,
PO Box 218,
Groenewoudseweg 1,
NL-5600 MD Eindhoven,
8. Siemens Aktiengesellschaft,
Wittelsbacherplatz 2,
D-8000 München 2,
9. Unisys Corporation,
Mail Station B307M,
PO Box 500,
Blue Bell,
USA-PA 19424,
10. AT&T Information Systems,
100 Southgate Parkway,
Morris Township 07960,
Morristown,
New Jersey,
USA.

Done at Brussels, 15 December 1986.

For the Commission
Peter SUTHERLAND
Member of the Commission