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*Milan*, 6 March 2006

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**COMP/C-3/37792 Microsoft, implementation of Commission  
Decision C (2004) Final of 24 March  
Observation on the Supplementary Response to the Statement of  
Objection**

Dear Sirs,

In its Supplementary Response to the Statement of Objection Microsoft refers to communication between Mr. Adolfo Barbera del Rosal to "Carlo Piana of FSFE"<sup>1</sup>.

Microsoft uses the referenced documentation as an example of possible improper techniques used by the Commission to hide essential information from Microsoft. It uses the wording "non-paper" as an indication of something l'intenzionale kept outside the case file in an attempt to obfuscate the communication under an undisclosed taxonomy.

If only Microsoft was diligent enough to cite the phrase in its entirety, it would have easily connected the mentioned document to an issue totally unrelated to the assessment of the Trustee on the completeness of the information provided by Microsoft. The email communication says: "*Mr Lendecke will submit a non pa-*

<sup>1</sup> I would be pleased, for a start, if Microsoft could refer to me as "Counsel for FSFE and the Samba Team", same title it reserves to my learned colleagues.



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*per on the black box issue by Friday, around 5 pm*". From my limited grasp of English and of the working of international bodies, I gather that "non paper" means a document issued for discussion, that does not commit the issuer to an official and final position. This definition seems to fit well here. The document was written in cooperation with Mr. Lendecke and Mr. Tridgell, of the Samba Team. As the wording of the message suggests, the non paper on the black box issue was... a writing on a black box issue.

The "black box issue" was nothing else than a suggestion of Microsoft that disclosure of certain "secret and valuable" information to the general public can be avoided while ensuring that also "open source" programs (more precisely, Free Software programs) could make use of the licensed information. The "black box solution" aims to separating the free software part, whose source code must be disclosed, from a non-free software part. The suggestion is part of Microsoft appeal number T-313/05.

The non paper discussed, from the point of view of a free software developer, why the suggestion of Microsoft was totally unfeasible, so that the Commission could avoid wasting too much of its time, in the event that it had taken this approach as something useful for Free Software operators. This initial feedback was used, as the following language of the email makes clear, to prepare a subsequent Art. 18 Letter "on open source" which was circulated and to which we have timely replied. This reply to said Art. 18 letter was the final and official position of the FSFE and the Samba Team on the "open source" (*rectius*, Free Software) issue. The paper as opposed to the non paper.

Inference is a slippery logical process, especially when it does not take into consideration trivial things as the evidence at hands. We wonder why, instead of forging reckless accusations, Microsoft has not simply checked with us the scope of this communication, in the light of the clear reference to a matter it knew being unrelated to the evaluation process, by having raised it in the first place. *Honi soit qui mal y pense!*

Yours faithfully,

(Avv. Carlo Piana)