

**Proposed Talking Points For Contacts With
USG On The EU-Microsoft Trade Secrets Action**

USG Officials to be contacted:

[REDACTED]

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- *I know that Microsoft has met with you about their current appeal of the European Commission's trade secret decision in their case.*
- *The European Commission's trade secrets decision will establish a precedent that could adversely impact the value of trade secrets which are substantial business assets for many U.S. companies, including mine.*
- *This is an important opportunity at a critical time for the U.S. Government to increase its influence on the shaping of competition policy internationally.* As you know, intellectual property rights are under assault in many areas of the world. I worry that the Commission's decision will give added impetus and credibility to those efforts. It's important for the U.S. Government provide strong leadership in this important area at this time.
- *I understand that Microsoft has asked the U.S. government to intervene directly in the trade secrets case, and I wanted you to know that our company supports that request.*

Backgrounder

On March 24, 2004, the European Commission issued a competition decision against Microsoft (the "2004 Decision") in which, among other things, it found that Microsoft had abused a dominant position on the market for "work group" server operating systems by refusing to supply information for other companies to develop competing work group server operating systems that interoperate with Windows. In June 2004, Microsoft filed an application to annul this decision, which is now pending before the European Union's Court of First Instance (the "CFI").

In connection with the implementation of the 2004 Decision, the Commission on June 1, 2005, adopted a separate decision (the "2005 Decision") that prohibits Microsoft from protecting valuable trade secrets that it must license to competitors pursuant to the 2004 Decision. Specifically, the 2005 Decision would allow licensees to distribute the source code of software implementing confidential Microsoft technologies, with the result that the trade secrets embodied in such code would be readily available to the public. In doing so, the Commission's Decision would destroy trade secret protection for this information.

On August 10, Microsoft filed an application (the "2005 Application") in the CFI to annul the 2005 Decision. That application is pending.

The 2005 Application focuses on a single, discrete issue that should be of urgent concern to U.S. companies: whether trade secrets should be protected against disclosure where it is possible to achieve the stated competition law objective in a manner that preserves their integrity. The case also raises broader legal and policy issues that should be of concern to U.S. industry:

- By allowing third parties to disseminate this trade secret information to the public without restriction, the 2005 Decision expropriates valuable property rights without compensation, in violation of both U.S. and European law.
- The 2005 Decision also violates EU law by imposing a remedy that is disproportionate, indeed wholly unnecessary, to the competition law objectives that the Commission claims to advance.
- The Decision is inconsistent with the U.S. antitrust final judgment against Microsoft, which allows the company to protect its trade secrets and thus strikes a balance between promoting competition and promoting innovation—a balance that the 2005 Decision would undermine.
- Finally, the 2005 Decision violates established standards of public international law, which require governments to respect the property rights of aliens and to exercise moderation and restraint in applying their laws extraterritorially, which the Commission here has failed to do.

The CFI will determine how the two cases will advance. Microsoft anticipates that the briefing of the merits of the 2005 Application will proceed during the course of 2006. The deadline for applications to intervene is in early December 2005.