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Nowhere for competition outlaws to hide

BY IRWIN STELZER

BILL GATES sure knows how to make news. One week he dominates the press by forging an alliance with Warren Buffett to pool their resources into a philanthropy fund worth more than \$60 billion (£33 billion). As Mr Gates modestly put it, with a bit of luck they might cure most of the world's major diseases.

The next week he makes news with a much smaller sum: the European Union competition authorities fine Microsoft \$357 million for defying a European Commission order to stop abusing its dominant position in the market for operating systems. The fine is in addition to the \$600 million penalty imposed in March 2004. And if Microsoft continues its defiance beyond July 31, it will risk additional fines of more than \$3 million per day.

Even if these fines stand on appeal, they are unlikely to deplete Microsoft's petty cash drawer. But they do serve notice on so-called "dominant firms" that the EU is the new tough cop on the beat. America, the home of tough competition policy, is in the throes of a conservative-led re-examination of its traditional policy of preventing dominant firms from using their power in one market to stifle competition in other, related markets. Which is precisely the practice at which Neelie Kroes, the Competition Commissioner, has taken aim in the case of Microsoft.

Ms Kroes and her colleagues found that Microsoft has used its dominance of the market for operating systems — 95 per cent of the world's PCs run on Windows — to squeeze out software rivals. It ordered Microsoft to make available information on inter-operability, which the company says a staff of some 300 is finally attempting to put in place by the Commission's July 18 deadline.

"No company is above the law," Ms Kroes told the press, in what

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might have come as a surprise to Microsoft. The company had been found guilty of similar practices in the United States but escaped with what proved to be a mere slap on the wrist: the sanctions to which it agreed have been “disappointing”, according to the judge supervising the case.

All of which highlights the new twists and turns that competition policy is taking around the world. Britain led the way in forging a competition policy that takes no prisoners. Well, actually it might, since Gordon Brown insisted that cartel behaviour be criminalised and the new head of the Office of Fair Trading, John Fingleton, is a no-nonsense enforcer who knows the contribution that competition can make to national efficiency and social mobility.

Other countries are taking a similar approach. The Korean authorities are looking into the business practices of Intel, as is Germany’s Federal Cartel Office, in the latter case at the insistence of AMD, an Intel competitor (and client of mine).

But all is often not as it seems. China is drafting a new competition law that, on its surface, seems to align that country with the worldwide trend towards more vigorous scrutiny of pricing and other practices of dominant firms. Critics worry that the law will be used by the authorities to declare the intellectual property rights of foreign companies barriers to entry and effective competition.

That would give the Chinese Government cover for its continuing efforts to violate the property rights of foreign companies, in breach of the agreements it entered into when joining the World Trade Organisation.

In America, an independent commission and the enforcement agencies are separately reviewing the antitrust laws to see if they need “modernisation”. Some conservative economists are of the view that it is senseless to move against dominant firms, for two reasons. First, the speed of technological change makes all dominant positions unsustainable in the long run, and it is better to allow market forces to whittle away market power than to mount expensive litigation.

Secondly, government remedies are often worse than the disease. The long history of court supervision of the American telecoms industry after the breakup of AT&T, it is argued, slowed technological progress and was to no purpose — witness the reconsolidation now taking place in the industry.

Others, myself included, would argue that some of the credit for America’s spectacular economic growth, and its social mobility, is due to the vigour with which competition policy has been enforced; that the breakup of AT&T unleashed an era of unprecedented technological progress by removing the monopolist’s ability to squelch competitors; and that Ms Kroes has it right by insisting that dominant firms be prevented from stifling competition and that penalties for violations be markedly increased.

In connection with these new, drastic penalties, Ms Kroes was at her pithy best: “Don’t break the antitrust rules. If you do, stop it as quickly as possible. And once you’ve stopped, don’t do it again. If companies do not pay attention to these signals, they will pay a very high price.”

So the game has changed for international businesses. It was only recently that their main concern was to avoid the US enforcement agencies. The Department of Justice reports that some 20 non-US citizens have served jail sentences in America for price-fixing, most after voluntarily surrendering to avoid a lifetime of being unable to travel to countries from which they might be extradited. And BP and British Airways executives are nervously watching the progress of Justice Department investigations into possible antitrust violations.

John Shenefield, a partner in the US firm of Morgan Lewis, is a leader of the American antitrust bar. He says: "The Department of Justice is determined to use the new extradition treaty to force British citizens who violate US antitrust laws, but are unwilling to surrender to US authorities, to pay the same price as US citizens, even if the violation occurred in Britain."

So there you have the new rules: no sanctuary for violators of the competition law. If the Brits don't get you, the Americans will. And if the Americans don't get you, Neelie Kroes is in your future.

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