

Microsoft's transatlantic backwash

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The Court of First Instance's landmark decision, underscoring a European/US competition policy divide, has undoubtedly stirred waves across the North Atlantic. But IRWIN STELZER welcomes a deeper debate

Even critics of the decision of the Court of First Instance in the *Microsoft* case will have to admit that the 248-page judgment by the European Union's second-highest court has one virtue – unintended, but a virtue nevertheless. When the court, led by its then-about-to-retire President, Bo Vesterdorf, ruled in favour of the European Commission on most points, it set off a much-needed discussion of policy questions that in the end will be more important than his decision to have Microsoft part with a fine of €497 million (\$690 million) – ballooned to €2 billion with additional fines and penalties – in payment for abusing its dominant position in the market for desktop operating systems, and to require the company to provide technical information about its Windows operating system to rivals, which it has finally decided to do, rather than appeal the court ruling. Microsoft's decision to comply with the EC order may at last bring this case to an end, but the issues it raises live on.

The first such debate was triggered by an outraged response from no less an authority than the antitrust division of the US Department of Justice. Assistant attorney general Thomas Barnett charged that the ruling might harm consumers by "chilling innovation and discouraging competition". "It is totally unacceptable that a representative of the US administration criticised an independent court of law outside its jurisdiction," shot back EU competition commissioner Neelie Kroes.

They're both wrong. Barnett has every right to give his opinion: he knows a thing or two about

competition policy, and even more about Microsoft. And Kroes has a point: Barnett might criticise, but he should accompany that criticism with explicit recognition of the right of each country to determine the competition policy that best reflects its social and economic values – ie attitudes toward the balance of risk and stability, efficiency and equity, and consumer and producer interests.

And those values differ in America and in the EU, as is best demonstrated by America's greater tolerance of income inequality and the disruptive effects of 20th century economist Joseph Schumpeter's gale of creative destruction, and the EU's insistence on a social safety net that is far less porous than the one with which American citizens live comfortably. Surely, both jurisdictions are entitled to have their own approaches to such an important issue. Americans might tease their European friends for the resulting slower rate of economic growth, and Europeans might respond with scathing comments on the quality of life in harder-working America, but that is no reason to believe that international uniformity is an essential feature of satisfactory policy.

So, too, when it comes to the line taken on marketplace competition. At the moment, the Bush administration's antitrust enforcers see less danger to competition from some of the business tactics used by dominant firms than do Ms Kroes and her enforcement team. Where the EU often sees anti-competitive practices, the US authorities see hard, tough competition. It was not always thus, and probably will not always be. But to insist that the US and the EU have

identical attitudes towards competition policy – that they form a cartel of enforcement authorities – is both unwise and, in any event, futile. Americans think it fine for private parties to file treble damages actions, with the lawyers rewarded if they win, and left to cry in their beer – (albeit more likely mineral water these days) – if they lose. Europeans find that system a form of ambulance chasing that is costly, unseemly and unproductive, and are only reluctantly and slowly moving to allow private parties the sort of role they play in American antitrust cases. *Chacun à son goût*. Americans are unlikely to forfeit the advantages of private enforcement of competition policy, and Europeans are likely to adopt them very slowly indeed, although the move of several US plaintiffs' firms to open offices in London indicates something about the future outlook for this sort of litigation.

The second issue relates to the role of competitor complaints in antitrust cases. Americans often accuse the EU of relying on whingeing competitors, who want to win in the courts what they have lost in the marketplace. Barnett says his job is to protect competition, not competitors. The EU, by contrast, takes the complaints of competitors who allege they are disadvantaged by dominant competitors more seriously, and properly so. After all, it is not at all clear how we can have competition without competitors, actual or potential. Firms that feel they are the victims of abusive behaviour by dominant firms are "quite welcome" to visit with her, says Kroes, who also contends she is "looking to increase the welfare of consumers". She's right: protecting competitors from exclusionary practices is one way to increase consumer welfare.

But, like its US counterpart, in the end the EC relies on its own investigations and economic and legal analyses. Not a bad idea: listen to

competitors, some of whom are inefficient and looking to the law for relief to which they are not entitled, and others of whom have hard evidence from day-to-day jousts in the marketplace that they are the victims of anti-competitive tactics, unrelated to the efficiency of the dominant firm. Then, investigate and analyse. In the case of *Microsoft*, Kroes came to the same conclusion about the firm's practices as did the pre-George Bush Justice Department. It is not new for antitrust authorities to frown on attempts by a firm dominant in one market to extend that dominance by tying, or bundling, some other product with the one in which it holds an overwhelming and incontestable market share.

Then there is the question of analogies. Microsoft is warning many of the companies who sided with the EU and the court that they might be next for the chopping block. And *The Wall Street Journal* warns: "If Europe's judges can humble Microsoft, then no one is immune". Perhaps – if these other firms achieve dominant positions the way Microsoft did, and then abuse their power, as Microsoft was found to have done. And some analysts worry that sauce for the Microsoft goose might become sauce for the Intel gander when the EU decides that latter case, now underway by the EC (in part at the urging of AMD, a client), or for Google some day.

No need to fret: one of the main issues in *Microsoft* – and a troubling one – is the question of how to treat the intellectual property of a firm that has abused its dominant position. The court's decision to support the EC order to Microsoft to make that property available creates both a sense that the product of the company's hard work is being pilfered, to the detriment of its future incentive to innovate, and also places the pricing of access to that property in the hands of regulators, a chore they

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are not especially qualified to perform. I regard this as a difficult issue that will only be resolved when the authorities realise that in fast-changing high-tech industries, they cannot assume an on-going supervisory function of remedies they might order, and can correct many competitive abuses only by structural dissolution that makes it unnecessary for the courts to monitor pricing, product changes and other things they are ill-equipped to handle.

No question of the disposition of intellectual property is raised in *Intel* and many other cases which focus solely on competitive tactics deployed in the market – an area external to the companies, and having nothing to do with the internal creativity and intellectual property of the entities being investigated.

Finally, there is the question of the nature of evidence that competition authorities should consider. The discovery of incriminating emails and memoranda often makes the news, but there is frequently less there than meets the eye; it is difficult to separate the bragging of some executive from operational instructions and intent to commit an anti-competitive act. Authorities – especially those who are sceptical of complaints by competitors – do better to look to customers. Do they feel abused? Do they have examples of being muscled by a dominant firm if they consider buying from a small competitor? Are the prices they pay to a dominant firm

set so as to make it economically infeasible for them to split their orders among more than one firm? Such evidence should be given considerable weight, at least to the extent of providing clues to the direction of further investigations.

But the opposite is not true: the absence of evidence from customers cannot be taken to mean they are being permitted by a dominant supplier freely to consider competitive offerings. There is no witness protection programme for customers of a dominant firm. If they are indeed the victims of such a firm, their greatest fear has to be retaliation – a cut-off of supplies, late deliveries, denial of previously granted discounts and other techniques that would make testifying as dangerous, and perhaps even as commercially lethal, as a decision to finger Tony Soprano.

In this as in other matters, regulatory authorities in different countries might well have different views. Good thing, especially since there are numerous international fora in which these hard-working, dedicated and sincere civil servants gather to exchange views. They have in the past and surely will in the future continue to learn from each other. Meanwhile, large multinational companies will have to learn to live in a world of nation states that are no more uniform in their rules and regulations than in their dress and language. Hard work, but that's why they earn the big bucks. ■