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Albert A. Foer and Robert H. Lande

The future of computers, software applications, and the Internet will in many ways determine the future of the world's economy. This week's Microsoft decision in Brussels reminds us that U.S. high tech companies can do business in the rest of the world only if they abide by the same rules as other foreign companies. The European competition authorities were rightly concerned that Microsoft might gain control over aspects of the world's future technological progress and flow of information in ways never imagined by previous generations. As a pundit remarked, "Microsoft is not your father's Oldsmobile."

The European Commission ("EC") held that Microsoft violated European competition laws. As happened during the Boeing and General Electric cases, we are already experiencing a gusher of government, editorial and political outrage in the U.S. Unfortunately, the Bush Administration and some members of Congress appear to be reacting with more emotion than diplomacy.

DOJ patronizingly lectured the EC, saying, "Sound antitrust policy must avoid chilling innovation and competition even by 'dominant' companies." Under the EC's decree, however, Microsoft is free to innovate in virtually every way. But Microsoft will have to fight the media player war through innovation, not by the monopoly leveraging of a possibly inferior product onto reluctant consumers. The decree will give Microsoft more, not less, incentive to innovate. And, of course, the main effect of the decree is intended to be that other firms also will be able to innovate and bring their product to market. (Few rational investors would invest in a company whose new products could be imitated by Microsoft, bundled into its monopoly operating system, and then sold by Microsoft only as a package.)

DOJ also criticized the \$613 million fine as excessive. Yet, it only amounts to roughly 1% of Microsoft's reported cash on hand, less than 2% of its worldwide annual sales, and was much less than Microsoft paid in only one of the many private suits that it settled. The \$613 million is only an indication that the European trustbusters are serious. In fact, a much larger fine would be needed to affect Microsoft's behavior.

Some members of Congress were even further off the mark. Sen. Trent Lott, R-Miss., called the decision "intolerable," and Sen. Patty Murray, D-Wash., called the ruling "yet another example of Europe's consistent harassment of American industry and policies that support our economic growth."

Perhaps the administration is defensive because their own Microsoft settlement has been predictably ineffectual. The June 2001 Microsoft appellate decision quoted the Supreme Court for the holding that the purpose of the remedy was to "unfetter a market from anticompetitive conduct," to "terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future..." Today Microsoft still has the same 95% of the OS market, the monopoly it was held to have illegally maintained using a dozen different types of predatory tactics. Moreover, Microsoft's anticompetitive conduct mostly involved the browser market, of which Microsoft had less than 60% at the time the record closed in the U.S. case. Now Microsoft's share of this market has reached monopoly proportions - it easily exceeds 90%.

Are the negative complaints justified?

The EC's antitrust case against Microsoft resulted from legitimate concerns over a wide array of anticompetitive conduct that directly and substantially affects the European market. The EC engaged in five years of careful and meticulous investigation before reaching its decision. The remedies that the EC ordered are necessary, modest, and fair.

It should be stressed that the EC antitrust case against Microsoft involves different conduct and different markets from the antitrust case filed by the U.S. Department of Justice and a group of States. In the US case, the Court found that Microsoft illegally maintained its monopoly in the PC operating systems market by engaging in a dozen different types of illegal acts, most of which involved Internet browsers and java technology.

By contrast, the EC case involved an attempt by Microsoft to take over the market for workgroup server operating systems (the software that makes computer networks operate) by deliberately restricting servers made by other companies from working well with the 95% of PCs that use a Microsoft operating system. The EU case also involved an attempt by Microsoft to take over the market for media players by tying the Windows media player to the Windows operating system. (The U.S. Court of Appeals had remanded the U.S. tying claim, which was not further pursued, but expressly held that similar "commingling" of software by Microsoft violated U.S. antitrust law.)

Moreover, the remedy imposed in the U.S. case has done little or nothing to loosen Microsoft's monopolistic hold over the PC operating system market, or to prevent it from taking over the browser market. By contrast, the EC decided that Microsoft must offer a PC operating system without Windows media player and must reveal, for "reasonable remuneration," enough information so that non-Microsoft servers can interoperate with PCs on an "equal footing" with Microsoft's own servers. If this remedy is not put on hold pending the forthcoming appeal, there is no guarantee that it will succeed, but at least it stands an excellent chance of opening up the media player and server markets to true competition. The Europeans have no favored child in this fight - their interest is in opening up the affected markets to competition so that the resulting increased innovation will benefit all consumers in the form of better choices and lower prices. It is ironic that the firms whose innovative efforts Microsoft anticompetitively suppressed were mostly American. The main purpose of the EC's remedy is to enhance their ability to innovate, which will benefit both European and American consumers.

Ignore the jingoism and the claims that European antitrusters don't understand modern economics. Be skeptical of declarations that their competition policy regime favors European companies or picks on American companies. Focus instead on Microsoft's conduct that these respected, experienced professionals found after five years of study to be anticompetitive and what, in that light, it will take to restore and protect competition in the future. It is time to give the Europeans their due as professional protectors of competition.

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