

Commission Vs. Microsoft: "Rights", "Wrongs" and Priorities for Economic Analysis

Prof. Yannis Katsoulacos,
Athens University of Economics
and Business, Member of the
Hellenic Competition
Commission, 1995-2005

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Basic facts

- In March 2004, the European Commission found that Microsoft had abused its dominant position in two ways:
 - By “bundling” its Media Player for digital music and videos with its Windows operating system.
 - By refusing to supply its competitors information about how its Windows products for computer servers interact.

As a result the Commission:

- (i) fined Microsoft a record EUROS 497 million.
- (ii) ordered the company to market a version of Windows without Windows Media Player and
- (iii) forced it to license interoperability technology on “reasonable terms”

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- Decision upheld by Court of First Instance (September 2007)

Assessment : The Commission

- No question as to the dominant position of Microsoft.
- Commission adhered to the fundamental precepts of European case law and improved on previous procedures by utilizing a more economics-based (rule-of-reason) approach.
- Substantive standard: consumers' welfare.
- Decision / remedies will increase consumers' choice and incentives for innovation.
- High positive precedential value of decision

Assessment : The critique (1)

- The Commission's use of economic analysis, procedures and remedies were controversial.
- Specifically the Commission has been criticized for:
 1. Inadequate economic arguments (e.g. with respect to impact on incentives to innovate and to “tipping”)
 2. Using the wrong legal standards in terms of:
 - (i) Implementing the wrong tests
 - (ii) Assigning too little weight to potential efficiencies
 - (iii) Allocating wrongly the Burden of Proof
 - (iv) Assigning inappropriate Standard of Proof (too high for defendant and too low for itself)

Assessment : The critique (2)

3. Setting the wrong precedent, as standards:
 - (i) Are likely to increase decision errors
 - (ii) Will have negative deterrence effects
 - (iii) Will increase legal uncertainty
 - (iv) Have very high implementation costs
4. Inappropriate remedies, as they:
 - (i) Violate proportionality criterion
 - (ii) Contradictory with tests used to establish abuse (in interoperability case)
 - (iii) Involve very imperfect and costly compliance process
 - (iv) Will not result in consumers benefitting (especially in relation to the bundling case)

Assessment : The critique - conclusion

- Although the Commission's very tough regulatory stance may have forced Microsoft to become a more "responsible" company particularly with regard to interoperability, the **net effect** of the decision, will very likely be negative → increasing legal and business uncertainty and harming European consumers and innovation.

Priorities for Economic Analysis

1. Indirect network effects and “tipping”
2. Efficiency effects of tying/bundling
3. Refusal to licence IPRs – Effects of compulsory licensing of technology
4. Optimal legal standards