THE WALL STREET JOURNAL EUROPE - September 27, 2006

Microsoft's Precrimes

By Alberto Mingiardi

Quarrels between the European Commission and Microsoft seem to be the daily bread in Brussels. In the beginning there was Mario Monti, who as EU antitrust chief in 2004 fined Microsoft a record €497 million for a series of violations, including its "bundling" of Media Player with its Windows operating system. Mr. Monti's successor, Neelie Kroes, didn't trade the iron fist for a velvet glove: Earlier this year she fined the software giant another €280.5 million for not having complied with the Commission's orders. It is worth noting that the latter fine came even though the original case is still under judicial review.

Above and beyond this fumus persecutionis, another dispute that's coming out into the open between Ms. Kroes and Microsoft entails possibly significant consequences for the very essence of competition regulation, which is at risk of becoming antitrust policing.

Since March, the Commission has expressed concerns about Vista, the new version of Windows, ready to be released in a few months but waiting for an informal greenlight from Brussels. Ms. Kroes has said that she expects Microsoft to apply "the general principle" of the Commission's
2004 ruling to future Windows versions.

This claim is based on the assumption that the original ruling can be a source of legal restraint far above its original scope. Leaving aside its merits or shortcomings, the Monti decision on Media Player orders Microsoft only to "refrain from using any technological, commercial, contractual or any other means which would have the equivalent effect of tying [Media Player] to Windows."

Ms. Kroes's objections do not seem to take into account the general trend in information technology to marry previously independent functions. Among others, Google is showing this to be the way forward by integrating plenty of formerly independent functions -- from daily planners to spreadsheets -- into its email service, and by piling up ever more functions into its search engine. Dictating business strategies should not be a regulator's job.

Furthermore, from a mere procedural point of view, the situation today is not comparable to the one that led to Mr. Monti's original ruling.
Though first developed in 1998, Microsoft's Media Player was integrated in Windows XP in 2001. This led to complaints by the then major supplier of analogous software, RealNetworks, on both the sides of the Atlantic.
RealNetworks won the game in Europe, and Mr. Monti forced Microsoft to release a version of XP without Media Player.

Real's complaints in Europe and the U.S. also led to a business agreement that the two companies signed in October 2005. One of the peace treaty's key points concerns Vista: The new program will redirect users to a Web site to download the Real software needed to play Real media files. The Media Player dispute really seems to be over for the litigants -- if not for the regulator.

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The case of Vista is unprecedented in another way as well. The Commission is threatening Microsoft not to violate the "spirit" of an older decision -- i.e., not to bundle too many new features with its new operating system. In a subtle way, this time it is the regulator that is casting the first stone.

As Brussels ponders a revamping of its monopoly policies, there is a demand among experts for the Commission to focus more on consumer welfare per se than on the form that a particular business practice takes (e.g., exclusive deals or bundling). However, forms cannot be bypassed.

Vista is not the same program that the EU has already ruled about -- and this is not merely a matter of "forms." The new operating system's alleged future dominance is merely a prediction, albeit a reasonable one based on the history of previous iterations of Windows. Still, there can be no evidence of the size of Vista's market share until it is released and sold.

What's more, the Commission already has shown little success in predicting the future when it comes to Microsoft. Two years on, it seems clear that Mr. Monti's concerns about Media Player's becoming dominant in its market segment were greatly exaggerated. In spite of its integration within Windows, Media Player had to face aggressive competition, and there is no sign that RealAudio or Apple's iTunes could not grow their market shares because they were not bundled with Windows (iTunes is of course bundled in Apple's Mac OS). In fact, the opposite has proven true: A recent Nielsen/NetRatings survey found that Apple's iTunes Web site and software reach 14% of Internet users world-wide -- up 241% in just one year. What's more, the market demand for the Media Player-less version of Windows XL was so minimal as to be an embarrassment for Mr. Monti, who had cited consumer choices as one reason for ruling against Microsoft in 2004.

Ms. Kroes's apparent desire to apply the old Monti ruling to an as-yet-unreleased Vista raises an obvious question. As far as antitrust cases, the Commission is already prosecutor, judge and jury. Shall its powers expand over the boundaries of time, too?

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In "Minority Report," a 1956 Philip K. Dick short story made famous by a Steven Spielberg film a few years ago, murders are prevented before they happen thanks to three mutants who foresee the future. The system initially works, but quickly collapses as a former policeman proved it incompatible with justice and the rule of law.

Neelie Kroes has said it would be desirable for the newer Windows "to avoid the problems we are facing now." In a nutshell, this is the cornerstone of a new approach to competition policy: a doctrine of harm pre-emption, so to speak. Whether such a doctrine is to be applied to cases other than Microsoft's remains to be seen.

But "Minority Report" reminds us of a simple, stubborn fact: You cannot be "guilty" of any crime before you have commited it and been accused, much less proven, of having committed it. This is a basic tenant of legal certainty as we know it. Why should it not continue to apply to competition policy?

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