

# FINANCIAL TIMES

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## LEADERS & LETTERS

### Differing antitrust concerns in US and Europe exposed by record €497m fine for Microsoft

*From Mr Donald I. Baker.*

Sir, Robert Levy's article "A welfare state for aggrieved market losers" (March 24) misses some very big points about the relationship between the European Commission's antitrust case against Microsoft and the US Department of Justice case that preceded it. Some of these points may support Mr Levy's "welfare state" thesis, but many do not. First, the DoJ case was about different products and different practices at earlier times. The DoJ case was about browsers and some tactics that Microsoft used to restrict Netscape browsers. The Court of Appeals found some of these practices to be illegal "exclusionary practices" and hence illegal monopolisation under the Sherman Act.

Second, the Commission's case primarily involves work group servers. It charges Microsoft with "deliberately restricting interoperability between Windows personal computers and non-Microsoft work group servers". Such deliberate restriction by a monopolist, if proven, would also violate the Sherman Act prohibitions on monopolisation.

Third, the second part of the Commission's case – involving integration of Media Player into the Windows operating system – may show a real difference with the US and lend some support to Mr Levy's point. It

echoes the "browser wars" in the US DoJ case. Mere integration, without any coercive collateral conduct, would not normally violate US law even when undertaken by a monopolist.

Fourth, the biggest gap between antitrust in the US and in the European Union is exposed by the huge €497m (\$603m) fine levied against Microsoft. This is the largest fine in antitrust history. That it would be levied by the European Commission for conduct that, even if proven, would be treated as civil only and not subject to a fine in the US is breathtaking. If it won such a case, the DoJ would still only be able to obtain forward-looking relief in such a case.

Finally, the huge fine might just reflect some Robin Hood principle based on Microsoft's vast size and profitability. But it also seems to send the message about culpability. Is it possible that the Commission regards Microsoft's alleged misdeeds as worse than those of the clear leader in the biggest cartel that it has ever prosecuted? (Hoffmann-La Roche, fined €462m in 2001 for the vitamins cartel.) Few American antitrust lawyers would concur in treating "abuse of dominance" more stringently than cartels. At the very least, the big fine heavily underscores the Commission's commitment to the principle articulated by Mario Monti, the

competition commissioner: "Dominant companies have a special responsibility to ensure that the way they do business doesn't prevent competition on the merits and does not harm consumers and innovation."

To summarise, the European Commission's concerns about deliberate competitive abuses by dominant companies are legitimate policies even if somewhat different in tone and priority from those of the US agencies today. The Commission is not duplicating DoJ's Microsoft case (which resulted in a finding of liability by the Court of Appeals in Washington). And the administrative system in Brussels, where the Commission acts initially as investigator, judge and jury, means we probably will not know whether the Commission has a strong factual record of abuse until the Court of First Instance in Luxembourg decides Microsoft's appeals from this week's decision. The court could narrow the Commission's case, reduce the fine or completely overrule the decision. Only then – and it will not be soon – will we know if Mr Levy's "welfare state for losers" thesis is more right than wrong.

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