

Microsoft set to learn its fate over €497m fine from European Commission



By Helen Higgins Whelan

Tomorrow, the biggest software company in the world finds out whether it has won its appeal against the regulator of the biggest market in the world. The European Court of First Instance will deliver its judgment on the appeal by Microsoft against the decision of the European Commission to fine it more than €497 million. This fine was the biggest in the

history of the European Commission as a competition regulator.

In this role, the European Commission is charged with making sure that companies that have a dominant position in the market do not abuse that position by damaging the interests of consumers and through them, competitors and the venture capitalists that back them. The case is a test of two principles of abuse of dominant position – refusal to supply and tying.

Refusal to supply is a well established anticompetitive practice; one example of which is the Magill decision against RTE. RTE had refused to supply TV schedules to a rival publication, Magill TV Guide. Tying

is more subtle, but potentially more damaging. Most of us are used to tied or bundled offers like season tickets for a football club or pasta sauce with pasta – often the practice benefits consumers by adding value to an offer. In the ‘freezer cabinet case’ taken by Masterfoods against HB, the Court of First Instance noted that a de facto tie of 40% of ice cream outlets was an abuse of dominant position.

But in the case of a very dominant company, tying may be used to sinister effect. Competition regulators measure dominance by a company’s market share: shares as low as 40% have found to be dominant. Microsoft with its roughly 90% market share of the PC operating system market is

often referred to as a ‘superdominant’ company. Case law and decisions by regulators in numerous cases have established the principle that as your dominance increases so does your responsibility to protect a dynamic competitive process.

The Commission claims Microsoft abused its dominance in two ways. First, Microsoft refused to supply vital interface information to competitors such as Sun Microsystems that would ensure that software products could communicate properly with the Windows PC operating system.

Second, the Commission found that “tying” Windows Media Player (WMP) to the Windows operating

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system adversely affected competition in the media players market. The concern for competition authorities is that competitors for the tied product (in this case WMP) will be excluded from the marketplace because their customers who also need the tying product (Windows) will be re-directed away from the alternative suppliers of the tied product. The more users of the tied product that are dependent on the dominant product, the more impact the tying will have. Microsoft's earlier bundling of Internet Explorer with Windows essentially excluded their rival Netscape's internet navigator product was essentially excluded from the market. This led to the first investigation against Microsoft by the

US Department of Justice, their equivalent of the Commission.

This decision is critical for the European Commission as a competition regulator. A number of their high profile decisions have been overturned by the European Courts in recent years. In July, the Court of First Instance ruled for the first time that a company - Schneider Electric SA - must be compensated by the Commission for losses sustained as a result of the wrongful prohibition of Schneider's merger with Legrand.

Ryanair announced on Wednesday that it has lodged an appeal against the Commission's refusal to allow its bid for Aer Lingus. If the Court of First

Instance were to overturn that refusal, the Schneider decision means that Ryanair might have a claim for damages against the Commission.

The CFI has been highly critical of the Commission's assessments in a number of cases including Schneider, Tetra Laval/Sidel and GE/Honeywell, all of which concerned mergers and their potential impact on competition. No competition regulator (particularly the main European watchdog) wants their decisions overturned and a reversal of the decision against Microsoft would be a huge loss in a series of losses.

But what happens if Microsoft loses? In the short term, it is likely they will

appeal the decision of the Court of First Instance to the European Court of Justice. In the longer term, there is danger of more radical action being taken against Microsoft. How often can Microsoft end up in front of competition regulators before one of the regulators decide that the only remedy is structural and do what the US Department of Justice first suggested – break it up.

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