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Free Enterprise: European antitrust activism goes a step too far

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Dark clouds are what Microsoft executives see these days when they inspect the Vista outside their Windows. There is the threat of "cloud-computing," a Web-based concept of personal computing that has the promise of largely unchaining PC users from local operating systems. Another threat clouding Microsoft's global outlook is an increasingly assertive antitrust agenda by the European Commission.

This week's record \$1.35 billion fine levied against the software giant was a further signal that the commission will use a September 2007 ruling against Microsoft by the European Court of First Instance to bolster its activist understanding of ensuring competition. It just (in January) opened two new investigations of Microsoft's competitive practices.

The case that led to the fine, bringing the total financial penalties by the EU against the U.S.-based corporation to almost \$2.4 billion, started with a complaint by Sun Microsystems in 1998. Sun, after winning a decision by a U.S. court, which forced Microsoft to make its programs more compatible with Sun's Java applications, went after its competitor under European laws. Six years later, the EU fined Microsoft a then-record \$613 million.

The company also was told to market copies of Windows without the media player and to make available to its competitors patented information about its software at an "adequate" licensing fee.

There is clear evidence that Microsoft has attempted to leverage its near monopoly in the market for operating systems into bolstering its position in other markets. This is illegal under both U.S. and European antitrust laws. Consequently, the firm lost in court on more than one occasion or settled complaints with competitors and/or the government. Payments over the years included \$1.6 billion to Sun Microsystems, \$1.1 billion to the state of California, \$1 billion to Real Networks, \$775 million to IBM, and the list goes on.

This time, though, the European antitrust commissioner seems to have taken it a step too far. The latest penalty resulted from the European bureaucracy's "concerns regarding Microsoft's unreasonable pricing" for licensing its intellectual property to competitors, as it had been ordered to do.

It is ominous enough that economists have shown a tendency for antitrust legislation to be abused by

powerful firms to hurt their competitors rather than to improve the outcomes for consumers. For example, the January probes were instigated by Opera Software ASA and a lobbying group of Microsoft competitors.

However, when regulators get into the business of telling market participants how much they can charge for access to some of their most lucrative trade secrets, then the economic analysis of regulation and antitrust is relegated to only a footnote. Obviously, Microsoft's initial pricing was reasonable enough for some buyers. Free enterprise systems trust the forces of demand and supply to work such matters out. Badgering Microsoft into providing access for a pittance is hardly an efficient solution.

Right now, many of Microsoft's competitors are cheering. They should enjoy their moment in the sun. Soon enough, they may realize that, as in Goethe's "Sorcerer's Apprentice," they may not be able to get rid of the ghosts that they have called. Firms such as Google (plans to buy DoubleClick) and Apple (exclusive iPhone deals and copyright protection) have recently been put on notice in Europe that those gathering antitrust clouds outside Microsoft's Windows may cast a shadow on them, too.

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