U.S.News & WORLD REPORT

Why the EU's Microsoft Fine Is Self-Defeating

Penalizing Microsoft with a hefty fine is disturbing on several levels

By: Dalibor Rohac - March 11, 2013

European Commissioner for Competition Joaquin Almunia speaks during a media conference at EU headquarters in Brussels on Wednesday, March 6, 2013.

Dalibor Rohac is a policy analyst at the Center for Global Liberty and Prosperity at Cato Institute in Washington D.C.

After a long hiatus, the European Commission is once again fining Microsoft. This time, a €561 million penalty was imposed on the software giant for an alleged violation of a prior agreement with the regulators, which required that Windows users be offered an explicit choice between Microsoft Internet Explorer and alternative Web browsers.

Since 2009 when the agreement was made, Explorer's market share has fallen below 30 percent. "Had no idea they were still making a browser," an anonymous Twitter denizen joked after this week's decision had been taken. Some observers thus see the Commission's decision as a strategic move in its ongoing negotiations with Google, demonstrating that EU competition regulators still have teeth.

Whatever the regulators' motives, the decision to penalize Microsoft with a hefty fine for what the company claims is a technical glitch is disturbing on several levels. Most fundamentally, the fact that market share of Explorer has been on decline for years is illustrative of the fact that traditional approaches to competition policy do not work well in the 21st century—particularly not in the area of software and information and communication technologies. Explorer is no longer seen as a leading product by consumers, who are switching away from it—regardless of whether they are offered an explicit "choice screen" as required by the European Commission.

Markets for information and communication technologies, including software and online platforms, have become incredibly dynamic—more so than any other industry in human history. The innovation cycle in this area is so rapid that companies are able to sustain their technological lead for ever-shorter periods of time—making lock-in with a particular technology standard an increasingly irrelevant problem.

Furthermore, the entry into the software and online business is practically costless—certainly in comparison with industries like energy or transport, which require enormous fixed costs and which have therefore been the traditional focus of competition policy.

Software and Internet giants have come and gone. These days, very few young people have vivid recollections of Word Perfect or Netscape Navigator—once the dominant word processor and web browser, respectively—or sites like Geocities or Altavista. It follows that static measures of market power, used by European regulators, are misleading and will underrate the actual degree of competition existing in the market. Worse yet, policy interventions in this dynamic economic environment are likely to backfire.

In a paper published in 2008, during the heyday of the European Commission's crusade against Microsoft, regulatory economists Bob Hahn and Peter Passell wrote that these cases were, "at best, a way to keep lawyers well remunerated and, more likely, a significant barrier to productive change."

One wonders whether the most recent decision by the Commission means that European regulators are planning to 'get tough' again on seemingly dominant firms in the area of information and communication technologies. If so, Europeans should worry. Scholars see policy uncertainty as a major obstacle on the way to economic recovery. Note that, although European competition law is very detailed, no transparent criteria have been offered to set the actual amount of the fine. If more companies in Europe risk finding themselves in violation of competition statutes and facing unspecified penalties, they will almost certainly consider moving their business elsewhere.

Using tools of competition policy to penalize technological leaders during—or even after—the brief periods when they enjoy market leadership damages the emergence and diffusion of new technologies on the continent. Competition policy thus amplifies the effect of Europe's privacy and hate speech laws, which are much stricter than on the other side of the Atlantic.

In 2000, European leaders promised to turn the continent into "the most competitive and dynamic knowledge-based economy in the world." What might have sounded once like an ambitious policy goal sounds today like a bad joke. But it does not have to be—the continent's troubles are completely self-inflicted. But if European policymakers decide to continue in their present course, there is even less hope that a new Microsoft will be started in a garage in Munich or Lyon.