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As Antitrust Case Ends, Microsoft Is Victorious In Defeat

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As antitrust case ends, Microsoft is victorious in defeat

Antitrust case that Microsoft 'lost' finally ends with a whimper, and the company's Windows OS monopoly intact

May 16, 2011 | By Norman Hawker and Robert Lande

The Department of Justice's antitrust case against Microsoft was one of the largest and most carefully watched in history. The courts ruled that Microsoft illegally maintained its monopoly of personal computer operating systems (OS). After years of oversight of a "behavioral remedy," the department's notoriously weak settlement with Microsoft expired Thursday. After the finding of liability and almost a decade of monitoring Microsoft's behavior, the net result has been to leave Microsoft pretty much where it started — with its Windows monopoly intact.

It's easy to forget that Microsoft's illegal conduct regarding Internet Explorer and Java were merely tactics to preserve and extend its Windows monopoly. In 2001, the Court of Appeals for the District of Columbia upheld the lower court's holding that Microsoft broke the law by illegally maintaining its Windows OS monopoly. The court had the following to say on the case's remedy: "The Supreme Court has explained that a remedies decree in an antitrust case must seek to 'unfetter a market from anticompetitive conduct ... terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.'"

The case's final judgment has ended without achieving these goals. Consumers today have no more choice about which operating system will come installed on their PC than when the Court of Appeals outlined these remedial goals. Windows' market share remains well above 80 percent, approximately the same as when the case was brought in 1998.

Nonetheless, the department released a puzzling apologia last week, trumpeting the success of the remedy. It correctly noted that the final judgment "prevented Microsoft from continuing to engage in exclusionary behavior that was harmful to American businesses and consumers [and] protected the development and distribution of middleware — including web browsers, media players and instant messaging software — thereby increasing choices available to consumers." But none of that concerns the core of the case: the illegal maintenance of Microsoft's Windows monopoly. The final judgment failed to terminate the illegal monopoly, failed to deny Microsoft the fruits of its illegal conduct and failed to provide consumers with a meaningful choice among competing PC operating systems.

In stark contrast to the US' failed attempt to end Microsoft's illegal OS monopoly by overseeing the firm's behavior, the European Union appears to have successfully challenged Microsoft's monopoly in the web browser market by requiring Microsoft to unbundle Internet Explorer from Windows and mandating that consumers be given a "browser ballot" that enables them to install whichever browser they choose.

Perhaps the Justice Department's current predilection for behavioral remedies explains its selective reading of history. It noted: "The Microsoft final judgment was unique in creating a technical committee empowered to assist the department [and] the U.S. District Court [in monitoring the terms of the remedy which] ... proved invaluable to the enforcement of the final judgment."

While the Microsoft case's behavioral remedy was in many ways unique when it was implemented, in recent years the department has blessed a large number of controversial mergers, including Live Nation/Ticketmaster, Comcast/NBC Universal, and Google/ITA, subject only to behavioral remedies. And in a huge pending deal, AT&T hopes it will be permitted to purchase T-Mobile subject only to behavioral conditions.

The true lesson of the Microsoft final judgment is that behavioral remedies are very unlikely to work. They often are so technical and complicated they effectively can be evaded by lawyered-up firms operating in the fast-changing realities of a high-tech field. We can only hope the department's statement last week was not laying the groundwork for an approval of the AT&T/T-Mobile merger, subject only to behavioral oversight.

Another lesson: Monopoly power can persist for long periods even in the fast-changing world of high technology. Microsoft has had its Windows monopoly for decades, and there are no signs of competition coming soon. When we listen to Google's claim that its search engine could be rendered obsolete tomorrow by someone working out of their garage, we should remember that Microsoft made the same claim about Windows more than a decade ago.

A final lesson is that illegal actions, including actions in adjacent markets, can help a company maintain a monopoly, not just acquire one. Whether the fear is that Google is extending its monopoly power into adjacent markets through mergers like that with ITA, or that Google is protecting and extending its search monopoly through various tactics, aggressive antitrust enforcement is crucial at all times.

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