

EU Versus U.S. Antitrust Policies

By **Juan Delgado** | Wednesday, October 10, 2007

The recent decision of the European Antitrust Court on Microsoft renewed the already heated debate on the different approaches to antitrust policies in the United States and in Europe. The categorical claim "We Americans protect competition, while Europeans protect competitors" has come back onto the scene. Juan Delgado explores whether this statement is more than misleading, smooth-sounding propaganda.

Antitrust policy aims to increase economic welfare by creating a level playing field. No transatlantic discrepancies up to here. In both the United States and Europe, this is the guiding principle of competition policies. But just how do you best protect consumers' welfare? It is here that we are entering controversial territory.

Do Americans protect competition? U.S. antitrust policy entails proving that the actions of a firm with monopoly power have an anticompetitive effect before punishing its behavior.

Who's being protected?

Europe, in contrast, has traditionally followed a simplistic "check list" approach: Companies with monopoly power cannot engage in certain practices — because they are *presumed* to have an anticompetitive effect. In the United States, such an effect has to be established.

One would be tempted to admit that the U.S. reasoning is the right one: If there is no harm, there is no need for punishment. However, the real problem is to define the harm. What is the burden of proof required to prove that an action has an anticompetitive effect?

Anticompetitive practices do not always have immediate effects — and therefore, in most cases, their impact is difficult to evaluate. Consumers might be deprived of new products and lower prices — if competition is reduced as a result of anticompetitive behavior by a dominant firm. How do we evaluate this?

The American Airlines example

The United States has set the burden of proof very high — and suffers from static analysis. A court recently rejected a predatory pricing case against American Airlines because the Department of Justice was unable to show that the airline would be able to recover current losses in the future.

This decision closed the door to future cases of predatory pricing: Proving that a dominant firm sells below its costs is not sufficient evidence of anticompetitive behavior.

Finding the right balance

In Europe, the case would have had a different outcome. The company would be unfairly damaging competition — irrespective of its future plans.

What is the right balance? Probably somewhere in the middle. Antitrust laws should be enforced when there are reasonable and founded risks that competition will be harmed without necessarily providing evidence of such harm.

Europe has not yet got there. The United States has gone too far in requiring

evidence of such harm. Waiting until such evidence exists — if this evidence can ever be collected — might be too late — and the damage might be irreversible.

Do politics matter?

Increasing the role of sophisticated economic analysis and moving towards a more effect-based system should help Europe increase the effectiveness of its antitrust policies — as has happened in the past in the United States. Pushing up the thresholds of proof in the present (long before it may actually manifest itself in the market) helps dominant firms — but not necessarily competition and consumers.

Europe introduced antitrust provisions with its founding act, the Treaty of Rome. But to be sure, back in 1957, competition policy was not high on the agenda of European integration.

From irrelevant to relevant

At the time, this was essentially an irrelevant issue. If anything, strong, and perhaps dominantly, positioned companies were desired in the aftermath of World War II.

Accordingly, for decades cartels were tolerated, if not supported, in Europe. But the principles were there. It was only missing a stronger commitment to enforcement. In the last two decades, the European Commission has firmly pushed forward this commitment to make competition policy one of its trademark issues on the global stage.

Keeping it apolitical

The otherwise often criticized lack of political profile and determination on the part of the European Commission in this case is a strength. A non-politicized European Commission has been able to lead the implementation of a non-partisan, time-consistent competition policy across Europe irrespective of the political leanings of governments in each country.

This has also legitimized EU rulings when national governments have occasionally attempted to support their domestic industries.

The politicized United States

In contrast, politics do matter in the United States. The heads of the regulatory bodies are politically appointed — and their budgets are decided by the U.S. Congress.

The activism of antitrust policies during the Clinton Administration has been replaced by a laxer approach during the Bush years, which started out with an agreement to settle the Microsoft case.

In contrast, the determination of Italy's Mario Monti — the former top EU competition official — has been inherited and continued by his successor, the Dutch Neelie Kroes.

The EU's September 2007 Microsoft court ruling is an example of how regulations can have impacts beyond national borders. If Microsoft from now on has to disclose its software protocols in Europe, it is likely that the rest of the world will follow suit.

Europe, the global regulator?

Europe is emerging as the global regulator. This is not necessarily because of the merits of European regulation — but simply because of the inaction of the United States. This inaction might be deliberate, that is, based on the belief that no regulation is the best way to regulate.

However, this has proved not always to be the case. In many policy areas, such as climate change or health insurance, the United States is evolving from none to some regulation, correcting its initial inaction.

Competition for anti-competition

Even from a European perspective, the emergence of a dominant regulator with no countervailing power is not good news for consumers. Consumers would clearly benefit from constructive competition between regulators to protect their interests better.

The regulatory laggard role adopted by the United States does not help nourish such competition.

Opponents to the Microsoft ruling claimed that Europe is closed for business to those companies that aim to be market leaders. This argument falls flat on its face, though. A true market leader does not need to foreclose the market in order to retain that status.

Innovative products and competitive prices reinforce the position of a market leader. Competition boosts the incentives of a market leader. Consumers should not be afraid of market leaders where markets are open to be contested. Such markets are open for consumers and businesses that want to meet consumers.

Will such markets be more likely to exist in the United States or Europe?
