

## **COMPARING THE US AND EU MICROSOFT ANTITRUST PROSECUTIONS: HOW LEVEL IS THE PLAYING FIELD?**

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### **Abstract**

The United States and the European Union have spent considerable time and resources pursuing antitrust cases against Microsoft over the past decade. While the antitrust cases began in similar fashions, the US and EU have diverged significantly in responding to Microsoft's business practices. Given the similarity of US and EU antitrust law, it is debatable why the Microsoft antitrust litigation developed differently in each jurisdiction. While the US case generally ended in a settlement that has been criticized as too lenient on Microsoft, the EU case ended in a decision imposing harsh remedial measures and a severe fine. We find plausible explanations for the disparity to include a differing focus between US and EU antitrust policy, various political considerations, and the different issues confronting regulators in each case.

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## 1. Introduction

The United States and the European Union have spent considerable time and resources pursuing antitrust cases against Microsoft over the past decade. Even as the US case effectively concluded, the EU continues to examine Microsoft's compliance with court orders and hear its appeals. The US antitrust probes of Microsoft date to the early 1990's, spanning three presidential administrations and focusing on a wide range of Microsoft's business practices. EU investigations did not begin until the mid-1990's and were more narrowly tailored to issues of server compatibility and Windows Media Player "bundling."<sup>1</sup>

While the antitrust cases began in similar fashions, the US and EU have diverged significantly in responding to Microsoft's business practices. While the US initially dealt with Microsoft's violations harshly (a federal district court judge ordered the breakup of the company into two entities), an appellate decision overturning the breakup eventually led to a settlement with the US government that many critics regarded as too lenient on Microsoft. In contrast, the European Commission ("the Commission") imposed a heavy fine and required Microsoft to change key elements of its operating software and business practices. The Commission continues to monitor Microsoft's compliance with its orders as the European Court of First Instance prepares to rule on Microsoft's appeal.

Given the similarity of US and EU antitrust law, it is debatable why the Microsoft antitrust litigation developed differently in each jurisdiction. Many legal commentators assert that antitrust law in the US focuses on protecting consumers through competition, while the EU emphasizes protecting the competitive process. In addition, disparate political backdrops could have contributed to a more lenient settlement in the US, while the EU faced elevated pressure to weaken Microsoft's market power. Finally, the differing substance of the two antitrust cases could reasonably lead to distinct conclusions in each jurisdiction.

## 2. The United States' Treatment of the Microsoft Antitrust Litigation

When investigations of Microsoft by the US government began in the early 1990's, the company already dominated the market for computer operating systems. The first investigation began in 1990 when the Federal Trade Commission began probing

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<sup>1</sup> "Bundling" refers to the inclusion of other software products, such as Internet Explorer, Microsoft Office, or Windows Media Player with the operating system installation.

whether Microsoft's pricing policies illegally thwarted competition.<sup>2</sup> After the FTC deadlocked on whether to file charges against Microsoft in 1993, the Justice Department announced it would take over the case.<sup>3</sup> In 1994, Microsoft and the Justice Department reached a settlement requiring the company to not bundle products through contracts with computer manufacturers.<sup>4</sup> The settlement was initially rejected by Judge Stanley Sporkin in February of 1995, but the D.C. Court of Appeals reversed Sporkin and removed him from the case.<sup>5</sup> On remand, Judge Thomas Penfield Jackson approved the settlement, ostensibly impeding the company's ability to use restrictive licensing agreements with computer manufacturers and vendors.<sup>6</sup>

While Microsoft's antitrust issues appeared resolved, disputes with the Justice Department arose again after Microsoft began bundling its Internet Explorer web-browser with the Windows 95 operating system. In October of 1997, the Justice Department charged Microsoft with violating the court-approved settlement by leveraging its overriding position in the operating system market in order to dominate the web browser market (at the expense of Netscape's browser).<sup>7</sup> Microsoft claimed it did not breach the consent decree, as the company categorized Internet Explorer as an "operating system upgrade," and therefore the product was not covered by the agreement's provisions on separate products.<sup>8</sup> Judge Jackson issued a preliminary injunction barring Microsoft from bundling Internet Explorer with Windows, but the D.C. Court of Appeals (in a series of rulings) reversed the injunction and also held that the 1995 consent decree did not apply to Microsoft's new operating system, Windows 98.<sup>9</sup>

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<sup>2</sup> *US v. Microsoft Timeline*, WASH. POST, at <http://www.washingtonpost.com/wp-dyn/business/specials/microsofttrial/timeline/> (last visited July 29, 2002).

<sup>3</sup> *Id.*

<sup>4</sup> Richmond, Riva, *Settlement May Not Put End to Woes Affecting Microsoft*, THE WALL ST. J., Nov. 2, 2001, available at [http://www.stern.nyu.edu/networks/quotes/WSJ\\_November\\_2\\_2001.htm](http://www.stern.nyu.edu/networks/quotes/WSJ_November_2_2001.htm).

<sup>5</sup> *United States v. Microsoft Corp.*, 159 F.R.D. 318 (D.D.C. 1995), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995).

<sup>6</sup> *United States v. Microsoft Corp.*, 1995 WL 505998 (D.D.C. 1995).

<sup>7</sup> Richmond, *supra* note 3.

<sup>8</sup> *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998).

<sup>9</sup> *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998); *United States v. Microsoft Corp.*, 1998 WL 236582 (D.C. Cir. 1998).

After the Justice Department failed to obtain enforcement of the consent decree, it filed a broader antitrust suit against Microsoft in May of 1998 along with twenty states. The trial lasted 78 days and led to Judge Jackson's finding in November of 1999 that Microsoft had illegally "tied" its operating system to Internet Explorer, extending its monopoly power in both markets.<sup>10</sup> Judge Jackson highlighted the inability of users or computer manufacturers to remove Internet Explorer completely from the operating system and its prominence as the default browser for most users.<sup>11</sup> After mediation efforts failed, Judge Jackson ruled that Microsoft should be split into two companies, with one entity encompassing the operating system divisions, and the other focusing on application software.<sup>12</sup>

Microsoft immediately appealed the decision and a year later the D.C. Circuit Court of Appeals reversed Judge Jackson's order that the company be split, but upheld many of the findings that the company violated federal antitrust law.<sup>13</sup> Specifically, the court found that Microsoft prohibited computer manufacturers from modifying or removing pre-bundled icons and entries, which prevented the distribution of rival browsers and maintained Internet Explorer's dominant position on the desktop.<sup>14</sup> Microsoft also purposefully linked Internet Explorer with the operating system, preventing its removal even by experienced computer users.<sup>15</sup> In addition, the court found that Microsoft entered into agreements with Internet Access Providers and Independent Software Vendors to promote Internet Explorer exclusively, and also to use Microsoft's Java Virtual Machine<sup>16</sup> instead of Sun Microsystems' Java programming.<sup>17</sup> The court then remanded the case back to a

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<sup>10</sup> *United States v. Microsoft Corp.*, 65 F.Supp.2d 1 (D.D.C. 1999).

<sup>11</sup> *Id.* at 38-40.

<sup>12</sup> *United States v. Microsoft Corp.*, 97 F.Supp.2d 59 (D.D.C. 2000).

<sup>13</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>14</sup> *Id.* at 61, 64.

<sup>15</sup> *Id.* at 65, 67.

<sup>16</sup> At the time, Java was an emerging programming platform developed by Sun Microsystems that emphasized multimedia aspects previously unavailable on the world wide web. The Justice Department charged Microsoft with using a proprietary version of Java which could prevent Sun's Java as implemented in Navigator to become a successful middleware standard. The theory of harm was that Microsoft prevented Java from becoming an alternative platform to run applications which would run on any operating system using Navigator.

<sup>17</sup> *Microsoft*, 253 F.3d at 71, 76.

different district court judge to determine the appropriate remedy after castigating Judge Jackson for making public comments negatively aimed at Microsoft.<sup>18</sup>

After the case was remanded to Judge Kathleen Kollar-Kotelly, negotiations resumed between Microsoft and the Justice Department, resulting in a settlement agreement in November of 2001. The parties revised the agreement in March of 2002 after criticism from numerous groups, including corporate rivals, antitrust scholars, and state prosecutors.<sup>19</sup> Judge Kollar-Kotelly accepted nearly all of the terms of the Second Revised Proposed Final Judgment, finding that it promoted the public interest.<sup>20</sup>

The terms of the agreement include provisions that Microsoft will not prohibit computer manufacturers and vendors from adding competing software programs, altering the desktop icon and shortcut layout, and installing boot sequences that divert users away from Microsoft products.<sup>21</sup> The agreement also prohibits Microsoft from entering into agreements with Internet Access Providers prohibiting the use of products that compete with Microsoft's Internet Explorer (or any other Microsoft middleware product).<sup>22</sup> Microsoft also cannot discriminate against internet access providers, independent software vendors, and internet content providers who choose to use products that compete with Microsoft software.<sup>23</sup> In order to prevent Microsoft from excluding competitors, the agreement also stipulated that Microsoft disclose to Independent Software Vendors how its operating system interoperated with any of its middleware products, thus allowing competitors to utilize Windows for their own programs.<sup>24</sup> This provision requires Microsoft to disclose certain source code aspects of its products and provide reasonable, non-discriminatory licenses to Independent

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<sup>18</sup> *Id.* at 113-117.

<sup>19</sup> *US v. Microsoft Timeline*, *supra* note 1.

<sup>20</sup> The only provision of the agreement rejected by Judge Kollar-Kotelly involved future jurisdiction for the case, and the judge ordered that it should be modified so that the court could intervene *sua sponte* if the parties did not comply with the agreement. *United States v. Microsoft Corp.*, 231 F.Supp.2d 144, 202 (D.D.C. 2002).

<sup>21</sup> *Id.* at 171-175.

<sup>22</sup> "Middleware" products refer to programs that increase the functionality of the basic operating system, but are not integral to the system itself (Internet Explorer is an example of a middleware product). *Id.* at 183.

<sup>23</sup> *Id.* at 182.

<sup>24</sup> *Id.* at 186-195.

Software Vendors.<sup>25</sup> Finally, the agreement required Microsoft to allow end-users to remove any Microsoft middleware products (including Internet Explorer) using the “Add/Remove Programs utility,” effectively allowing users to “unbundle” Internet Explorer from Windows.<sup>26</sup>

While about half the states initially did not accept the Justice Department’s settlement agreement, eventually all but Massachusetts settled under terms similar to the November 2001 agreement.<sup>27</sup> Massachusetts’ appeal was eventually denied in June of 2004, effectively concluding the US government’s antitrust case against Microsoft.<sup>28</sup> The agreement’s provision requiring Microsoft to provide its technology to rivals (so their programs work better with Windows) has not been as effective as Judge Kollar-Kotelly hoped.<sup>29</sup> Most notably, Microsoft preserved the right to bundle its own software with Windows as long as it can be removed or altered by computer manufacturers or end-users. This permits Microsoft’s programs to function as the “default” software, especially for less sophisticated computer users who do not alter the essential Windows setup. As the settlement agreement expires in 2007, it is unclear as to how Microsoft will function in relation to its competitors without any judicial oversight.

The Department of Justice since the case was settled seemed for years to be content to quietly monitor Microsoft’s efforts at compliance with the 2002 settlements. Then, on January 23, 2006 the Justice Department filed with Judge Kollar-Kotelly its Response to Microsoft’s Supplemental Status Report on its compliance with the final judgments. The Justice Department’s response criticized the company for falling behind in providing documentation and stated that Microsoft “has not detailed the seriousness of the current situation.”<sup>30</sup> It called other aspects of

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<sup>25</sup> *Id.* at 192-193.

<sup>26</sup> *Id.* at 175-176.

<sup>27</sup> Krim, Jonathan, *Microsoft Settlement Upheld*, WASH. POST, July 1, 2004, at E01.

<sup>28</sup> *Id.*

<sup>29</sup> Bridis, Ted, *Microsoft Judge Says Key Part of Deal Not Working*, THE DETROIT NEWS, Jan. 24, 2004, available at <http://www.detnews.com/2004/technology/0401/25/technology-44236.htm>.

<sup>30</sup> Plaintiffs’ Response to Microsoft’s Supplemental Status Report on Microsoft’s Compliance With the Final Judgments, January 23, 2006, at p. 1.

Microsoft's mode of compliance "particularly troubling."<sup>31</sup> Perhaps Microsoft's antitrust troubles on the Western shore of the Atlantic are not yet fully resolved.

### 3. The European Union's Treatment of the Microsoft Antitrust Litigation

The European Union's investigations of Microsoft did not commence until October of 1997, four years after the US Justice Department opened its probe.<sup>32</sup> The probe by EU investigators originated after Sun Microsystems complained to regulators that Microsoft withheld key technical information that Sun needed for its computer servers to communicate with Windows-based PCs.<sup>33</sup> The Commission sent Microsoft a formal request for information based on complaints from Microsoft's competitors in February of 2000. At first, the EU Commission's investigation focused solely on the server interoperability issue, and in August of 2000 it issued its first Statement of Objections to Microsoft.<sup>34</sup> This Statement focused on Microsoft's discriminatory treatment of certain developers when providing licensing information for interfacing PCs running Windows with non-Windows servers.<sup>35</sup> The Commission alleged that Microsoft violated Articles 82(b) and 82(c) of the EC Treaty, which prohibit "limiting production, markets or technical development to the prejudice of consumers" and "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage," respectively.<sup>36</sup>

After gathering additional information, the Commission issued its second Statement of Objections on August 30, 2001. This Statement amplified the antitrust charges, as it alleged that Microsoft had utilized an abusive licensing policy towards users in order to leverage its market power from PC operating systems to the workgroup

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<sup>31</sup> *Id.* at p. 2.

<sup>32</sup> *US v. Microsoft Timeline*, *supra*, note 1.

<sup>33</sup> Kanter, James, et al., *Microsoft Must Implement Antitrust Sanctions Now - Top European Court Orders Immediate Compliance With Regulator's Ruling*, *THE WALL ST. J. EUR.*, Dec. 23, 2004, at A1.

<sup>34</sup> In the EU, the Commission functions as both an investigator/prosecutor and an adjudicator/decision-maker during the various phases of an antitrust investigation. A "statement of objections" is a formal step in European antitrust investigations, signaling the opening of a formal investigation.

<sup>35</sup> Press Release IP/00/906, European Commission, Aug. 3, 2000.

<sup>36</sup> TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C 325) (2002) [hereinafter EC TREATY] *available at* [http://europa.eu.int/comm/competition/legislation/treaties/ec/art82\\_en.html](http://europa.eu.int/comm/competition/legislation/treaties/ec/art82_en.html).

server market.<sup>37</sup> The Commission also expanded its investigation to include charges that Microsoft illegally bundled Windows Media Player into the Windows operating system.<sup>38</sup>

The third Statement of Objections was not issued until two years later, and it incorporated new factual evidence and proposed possible remedies to address Microsoft's conduct.<sup>39</sup> This Statement incorporated a market survey by the Commission that found customers were dissuaded from choosing Microsoft's competitors for server needs due to interoperability considerations.<sup>40</sup> The survey also found that the "tying" of Windows Media Player artificially skewed the market in Microsoft's favor, thus harming competition.<sup>41</sup> In response to the server interoperability problem, the Commission proposed that Microsoft reveal necessary interface information in order to facilitate full interoperability between low-end servers and Windows PCs and servers. The Statement also proposed that Microsoft either agree to untie Windows Media Player from Windows or offer competing media players with the Windows operating system.<sup>42</sup>

When the Commission and Microsoft were unable to agree on a settlement concerning remedies, the Commission issued its decision in March of 2004, which concluded that Microsoft had violated Article 82 of the EC Treaty by illegally leveraging its dominance of the PC operating system market into the work group server and media player markets.<sup>43</sup> The Commission's decision encompassed 302 pages and comprehensively lays out Microsoft's abuses and counter-arguments to Microsoft's objections.<sup>44</sup> In response to these abuses, the Commission gave Microsoft 120 days to disclose the necessary protocols so that its competitors' servers could

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<sup>37</sup> Press Release IP/01/1232, European Commission, Aug. 30, 2001.

<sup>38</sup> *Id.*

<sup>39</sup> Press Release IP/03/1150, European Commission, Aug. 6, 2003.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Commission decision of 24 March 2004, Case COMP/C-3/37.792 Microsoft, recital 546.

<sup>44</sup> Microsoft particularly raised strong objections regarding its intellectual property rights, arguing that the required disclosures would provide a disincentive for Microsoft to innovate in the future. The Commission rejected these arguments, but did note that a refusal to license can constitute an abuse only in exceptional circumstances, which it found in this case. Commission decision, recitals 546-558 and 709-735.

achieve full interoperability with Windows PCs and servers.<sup>45</sup> This licensing disclosure requirement also applied to all future versions of the relevant software in order to keep low-end server suppliers current in the market. The Commission also required Microsoft to offer a version of its operating system without Windows Media Player to computer manufacturers, while still allowing Microsoft to offer the bundled version as well.<sup>46</sup> Finally, Microsoft was fined €497.2 million for its violations of EU antitrust law.<sup>47</sup>

Soon after the Commission's decision, Microsoft appealed to the Court of First Instance, requesting interim measures suspending the decision pending the appeal. The court rejected this interim appeal, however, and allowed the Commission's orders to move forward in December of 2004.<sup>48</sup> Microsoft's appeal on the merits of the case to the Court of First Instance before a 13-judge panel tentatively has been set for April 24-28, 2006.

Currently, it is questionable whether the remedies ordered by the Commission will rectify Microsoft's abuses. While the Commission continues to monitor whether Microsoft has complied with the ruling, competitors have expressed frustration at obtaining proper licensing information from Microsoft.<sup>49</sup> In addition, few computer manufacturers and vendors have purchased Microsoft's Windows XP N, a version of Windows XP unbundled from Windows Media Player.<sup>50</sup> The failure of Windows XP N to generate any interest has effectively undercut the Commission's decision, as vendors and consumers prefer the fully bundled product.

But Microsoft still must find a way to comply with the Commission's March 2004 decision. One of the remedies imposed by the decision was for Microsoft to disclose complete and accurate interface documentation which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and

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<sup>45</sup> Commission decision, recital 1080.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Krim, Jonathan, *E.U. Orders Microsoft To Modify Windows*, WASH. POST, Dec. 23, 2004, at A01.

<sup>49</sup> Marson, Ingrid, *Microsoft's Antitrust Concessions are 'Pointless'*, ZDNET UK, Jul. 13, 2005, at <http://news.zdnet.co.uk/business/legal/0,39020651,39209007,00.htm>.

<sup>50</sup> Associated Press, *Windows Minus Media Player Not Big Seller*, USA TODAY, Jun. 23, 2005, at [http://www.usatoday.com/money/industries/technology/2005-06-22-windowsXPN\\_x.htm?csp=34](http://www.usatoday.com/money/industries/technology/2005-06-22-windowsXPN_x.htm?csp=34).

servers. The European Commission has issued a statement of objections against Microsoft for its failure to comply with certain of its obligations under the Commission decision. The statement of objections indicates that the Commission's preliminary view, supported by two reports from the monitoring trustee, is that Microsoft has not yet provided complete and accurate specifications for this interoperability information. Following a market test of Microsoft's proposals on interoperability, the Commission issued a decision on November 10, 2005, pursuant to Article 24(1) of Regulation 1/2003. This decision warned that should Microsoft not comply with the requirements of the March 2004 decision by December 15, 2005, with respect to its obligation to: (i) supply complete and accurate interoperability information; and (ii) make that information available on reasonable terms, it would face a daily fine of up to €2 million.<sup>51</sup> Since the Article 24(1) decision, Microsoft revised the interoperability information that it is obligated to disclose. However, the Commission took the preliminary view that this information was incomplete and inaccurate.<sup>52</sup> Microsoft was given five weeks to respond to the statement of objections and has the right to an oral hearing. However, on Monday, January 23, the Commission gave Microsoft an extension until February 15 to respond to the Article 24(1) decision.<sup>53</sup> Then, in a surprising move, Microsoft announced on January 25, 2006, that it would license a portion of its source code in an effort to resolve questions of the company's technical compliance with the Commission's 2004 decision. However, a Commission spokesman said the next day that offering access to the source code would not necessarily resolve the problem of compliance. Finally, the Article 24(1) decision further stated that Microsoft's royalty levels were not reasonable, an issue that is currently being assessed by the Commission based on additional information submitted by Microsoft. Thus, it would hardly seem that Microsoft's troubles in Europe are nearing an end.

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<sup>51</sup> The Commission may then, after consulting the Advisory Committee of Member State Competition Authorities, issue a decision pursuant to Article 24(2) of Regulation 1/2003 imposing a fine on Microsoft for every day between December 15, 2005, and the date of that decision. The Commission then may take other steps to continue the daily fine until Microsoft complies with the decision.

<sup>52</sup> Commission Press Release IP/05/1695.

<sup>53</sup> Interestingly, on that same day the Department of Justice filed critical comments with the US District Court overseeing the US Microsoft settlement. The Commission and Department of Justice have conceded that they are in regular contact with respect to Microsoft. Reuters:  
<http://go.reuters.com/newsArticle.jhtml?type=technologyNews&storyID=10956196&src=rs/technologyNews>.

#### **4. Reasons for the Disparate Treatment of Microsoft by US and EU Regulators**

While no definitive answer exists for why the Microsoft antitrust litigation resulted in such different outcomes, a number of theories help explain the contrasting results. Plausible explanations for the disparity include a differing focus between US and EU antitrust policy, various political considerations, and the different issues confronting regulators in each case. Of course, Microsoft may succeed in its appeal of the EU case, potentially resulting in similar conclusions for each jurisdiction's investigation of the company.

Although US antitrust law contains substantial parallels to its EU counterpart, the enforcement of these laws often differs in the two jurisdictions. EU antitrust law largely derives from Articles 81 and 82 of the EC Treaty. Article 81 prohibits cartels and "concerted practices" that distort competition, such as price fixing, production limits, and dividing market share.<sup>54</sup> Article 82 prohibits dominant businesses from using their market share to leverage other markets, engaging in predatory pricing, excessive pricing, price discrimination and some forms of resale price maintenance, or generally abusing their market position.<sup>55</sup> These Articles roughly comport with Sections 1 and 2 of the Sherman Act, respectively.<sup>56</sup> While these provisions appear similar, most commentators acknowledge that US antitrust law aims to promote competition, while EU law attempts to protect competitors.<sup>57</sup>

This differing emphasis may help to explain why Microsoft was treated more harshly in the EU than in the US. Some disagreement exists as to whether Microsoft's bundling practices ultimately harm consumers at all (Microsoft often argues that its integration efforts make Windows easier to operate for inexperienced users). There is little question, however, that Microsoft's bundling practices severely harm its competitors, as placing their software on Windows machines becomes difficult, especially when default Microsoft software already exists to address needed functions. The experiences of Sun Microsystems, Netscape, and RealPlayer have all shown how Microsoft can squeeze its competitors via bundling. Therefore, if the EU

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<sup>54</sup> EC TREATY art. 81.

<sup>55</sup> EC TREATY art. 82.

<sup>56</sup> Bumgardner, Larry, *Antitrust Law in the European Union*, GRAZIADIO BUS. REPORT, Vol. 8, No. 3, (2005).

<sup>57</sup> *Id.*; See also Disney, Helen, *A More Subtle Anti-trust Regime for Europe*, FIN. TIMES (LONDON), Oct. 13, 2004, at 21.

focuses on protecting competitors, its harsh treatment of Microsoft makes perfect sense in order to try and buoy competitors in the media player and work group server markets.<sup>58</sup>

Political considerations may have also played a major role in the disparate treatment of Microsoft by US and EU regulators. When the antitrust action began, the Clinton administration's Justice Department exhibited a hostile attitude toward Microsoft's practices (as evidenced by its requests to split the company and impose heavy sanctions). When the Bush administration (and its decidedly more pro-business political views) took over the case in 2001, some speculated that the administration would move toward a settlement in the case.<sup>59</sup> While key administration and Justice Department officials deny any political pressure existed to settle on terms favorable for Microsoft, many critics (including states that initially refused to settle and software trade groups) decried the settlement as a politically motivated cave-in to big business interests.<sup>60</sup> An interesting although highly speculative theory could also be posited that if a government uses a total welfare test instead of a consumer welfare standard, and negative effects on consumers outside the jurisdiction are disregarded while monopoly profits accruing to a domestic company count for the total welfare test, a government could be inclined to take a favorable view on abuses where the negative effects are felt elsewhere. This is similar to the reasoning for legalizing export cartels, for example under the Webb-Pomerene Act.<sup>61</sup> Finally, the political considerations of the 9/11 attacks also played a role, as Judge Kollar-Kotelly specifically cited the economic consequences of the attack as an imperative reason for pushing towards a settlement.<sup>62</sup>

Political motivations in the EU may have played a reverse role, driving regulators to seek harsher sanctions. The former Competition Commissioner, Mario Monti, was the chief antitrust official in the EU and had a reputation for zealous

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<sup>58</sup> This is solely the author's analysis. The EU officially asserts that it regulates competition as a means of enhancing consumer welfare, and not to protect competitors from dominant firms' genuine competition. *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses*, p. 17; available at <http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf>.

<sup>59</sup> Guinto, Joseph, *Will Bush's New Antitrust Chief Usher in New, Less Intrusive Era?*, INVESTORS BUSINESS DAILY, May 4, 2001, available at [http://www.stern.nyu.edu/networks/quotes/IBD\\_May\\_4\\_2001.html](http://www.stern.nyu.edu/networks/quotes/IBD_May_4_2001.html).

<sup>60</sup> Green, Jenna, *Policing Microsoft and its Market*, LEGAL TIMES, July 7, 2003.

<sup>61</sup> 15 U.S.C. 61- 65.

<sup>62</sup> Green, *supra*.

enforcement of antitrust laws, earning him the fear and enmity of the business world.<sup>63</sup> Mr. Monti served from 1999 until late 2004, and oversaw a great deal of the Microsoft antitrust litigation. He stated publicly in 2003 that the case would press on to its conclusion, with its final outcome resulting in benefits to “innovation and consumers alike.”<sup>64</sup> In addition, Mr. Monti had shown his antitrust sentiments when he helped to bar the proposed GE/Honeywell merger, despite US complaints that the merger would not harm competition.<sup>65</sup> The harsher penalties imposed by the Commission match the political trends of EU antitrust regulators, just as the pro-business stance of US regulators coincides with their more relaxed settlement requirements. While it is impossible to detect with any certainty how political factors influenced the cases, the contrasting results match the two governments’ differing approaches to business regulation.

Finally, the differing outcomes of the Microsoft litigation potentially resulted from the different facts and issues confronting regulators. As discussed above, the US case chiefly concerned Microsoft’s bundling of Internet Explorer and preventing computer manufacturers from altering Microsoft’s middleware programs. In contrast, EU regulators only confronted problems caused by Microsoft’s attempts to leverage itself into the work group server market and the bundling of Windows Media Player. While the bundling issues seem similar, the US case emphasized the exclusionary contracts Microsoft used to require computer manufacturers to keep its middleware prominently featured (and that users could not remove the program from the operating system). The EU, on the other hand, generally focused on the bundling itself. Thus, while these cases both involve the terms “Microsoft” and “antitrust,” they deal with somewhat different issues. This factor, combined with the other issues above, could easily explain the differing results reached by US and EU regulators.

## 5. Conclusion

Antitrust regulators in both the United States and European Union fought protracted battles with Microsoft that resulted in two starkly different outcomes. As these approaches are slowly implemented, regulators in both jurisdictions hope that the provisions lead to more competitiveness, innovation, and benefits for consumers. The emphasis in the US on manufacturer and consumer choice could easily lead to

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<sup>63</sup> Bumgardner, *supra* note 51.

<sup>64</sup> Press Release IP/03/1150, European Commission, Aug. 6, 2003.

<sup>65</sup> Green, *supra* note 54.

continued Microsoft dominance in various computer software markets, assuming the company produces high quality programs in the future. The EU approach of promoting the positions of Microsoft's competitors may weaken the corporate giant there, but early signs indicate that Microsoft will remain dominant across the Atlantic as well. Given the tremendous size of this litigation, the future fallout of the decisions could influence antitrust law long into the future.

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