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EUROPE SHOULD LEARN FROM RECENT U.S. COURT RULING IN *MICROSOFT*

by
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Europe should take a lesson from the U.S. Court of Appeals' affirmance of the Microsoft Consent Decree. *Massachusetts v. Microsoft Corporation* (D.C. Cir., June 30, 2004). The U.S. case, initiated as a "surgical strike" in 1998 simply to unbundle the company's web browser from its ubiquitous operating system, has just passed its sixth year in the courthouse, and it is fair to say that never in the history of jurisprudence has one business been subjected to such an exhaustive judicial review of the propriety of its practices.

The Court of Appeals decision was meticulous, over eighty pages long, approving the Consent Decree which had all but resolved the Justice Department's and nine States' case against Microsoft. The decision surveys the Tunney Act, a 1974 law (recently amended) requiring judicial review and approval of consent decrees. The District Court had followed the Tunney Act procedures with a vengeance, and approved the Decree only after extended hearings, briefs, and some 32,000 public comments. Nine of the dissenting States then secured a separate judgment that largely mimicked the Decree. Massachusetts alone persevered, basically insisting that Microsoft completely redesign its Windows product by somehow extricating its browser code, a draconian proposal never even contemplated in the original complaint.

Europe should learn from this, and should listen to the U.S. Justice Department's position that the Consent Decree is the appropriate resolution of the cases. The latest European case, instigated by a competitor rather than by a consumer, would force elimination of Windows' media components, which have been part of the product, with later refinements, virtually since its inception. A media player today is considered an automatic component by consumers, just as the browser was in earlier days. Even as far back (in Internet time) as 1998, the U.S. Court of Appeals held that browsers and operating systems were one product, not two, for purposes of tie-in claims under earlier consent decree which had resolved the 1994 DOJ and European Commission cases against the company. Again, three years later, the court directed that any tie-in claim should be tested by the "Rule of Reason," with a balancing of competitive benefits against competitive restraints. This hurdle prompted the Justice Department to immediately drop that part of the case, which had started the whole process in the first place.

In the barely dozen years that the Internet has existed as we now know it, Microsoft has redefined the way that business and personal affairs are conducted worldwide. As that revolution continues, consumers insist on more and better alternatives imbedded in their core system. Antitrust laws should reward the innovation that creates those alternatives, not the competitors who prefer the courthouse to the marketplace. The European Commission should pause and reflect on this case, and whether it is really in their constituents' best interests to carry on a process that seems determined to protect competitors at the expense of competition.

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