COMPETITION AND GLOBAL ANTITRUST LAW CASES AGAINST MICROSOFT

OUTLINE

- Introduction
- Origin of Antitrust
- The Company Microsoft
- The Allegations
- The Defense
- The Verdicts
- Link to Industrial Organization Model

INTRODUCTION

Firms are set out to make profit in their markets of operations and some could go to any length in edging out other competitors for the much-coveted profit. Complex market structures as duopoly require more strategies in surviving the markets as opposed to less complex ones as perfect competition and monopolies.

To ensure continuous fair play in the market and protect consumer choices, the operational activities of these firms have often been scrutinized to whip them back into line should they be erring in their business practices.

As such, just like in any other sphere of life, commercial and trade laws have evolved overtime and continue to be modified to ensure a level playing field in the commerce and industries across trading nations. Prominent among the world largest markets is the United State of America (USA) with big industry players in Technology (Hardware and Software), Automobile, Oil and Gas, Construction etc.

Basically, two schools of thought form the bases upon which antitrust policy is being administered. The **Traditional** school opine that antitrust should promote and not stifle competition, enhance innovations and eschew market concentration. On the other hand, under the antitrust law, **the Chicago** school advocates for allocative efficiency without hampering productive efficiency so as not to reduce consumer satisfaction. “The Chicago school's influence apparent in many of the major antitrust opinions of the last years” (Geier, 2001)

Amongst the top tech companies in the USA is where Microsoft Corporation, a member of the four big tech (inclusive of Amazon, Apple and Meta) operates. Just like any other company that has been subjected to check and balances, Microsoft is not immune to such and has been continually scrutinized overtime to ensure it does not abuse its dominant market power that is over 90% in the technology space.

The whip of the law in USA as managed by the Federal Trade Commission (FTC) and Department of Justice (DOJ) has been the *Sherman Anti-trust Act*, which is used to tame commercial firms that are perceived not to be playing by the rules of Commerce and Trade. For instance, the Sherman Act saw to the split of AT&T into two (Baby Bells and AT&T) in 1982 as result of the case made against the firm in the 1950s and lingered to 1974.

The European Commission (EC), Competition Bureau and Korean Fair-Trade Commission (KFTC) are also administrative bodies that checkmate commercial trade dealings in their respective markets.

ORIGIN OF ANTITRUST LAWS

Antitrust laws are put in place by the government bodies (FTC, DOJ, CB , KFTC etc.) in order to ensure fair competition amongst players in the market. It prohibits creating barriers to entry for prospective investors or firms.

Antitrust laws originate from the ***Sherman Antitrust Act*** of 1890-an Act meant to safeguard Commerce and Trade from illegal restraint and Monopolies, named after the American politician and Congress man John Sherman, whose expertise was in Trade and Commerce. Sherman drafted the law to;

- prevent **concentration of market power** in the hands of large firms to the detriment of smaller enterprises
- prevent practices that **lead to market monopoly**, thus stifling small business and warding off new entrants in to the market.

The Act empowered the Justice Department and the Federal government to institute legal actions against violators of the Act.

In the same vein, the **Clayton Act of 1914** was passed to strengthen the Sherman Act which was heading towards becoming a **"**paper toothed tiger**"**, since the ***rule of reason*** (relied on in the US steel case, did not deem 70% market dominance as a breach of antitrust laws) was used by the court to exonerate US steel in the landmark case of **1912.**

Sensing that the **Sherman Act might lose its relevance**, from the adopted rule of reason, which exonerated US steel, the Federal Trade Commission (FTC) was also created in 1914 to ensure a fair competition in the market and fortify existing laws governing commerce.

Some economic commentators have opined the defender antitrust policy is based on outdated economic theory which is inapplicable in the modern software markets (Shapiro *et al*, 1998)

After about seven decades of operating the Sherman Act in USA, the European Union's (EU) competition law, which is an addition to the existing national law kicked off in 1950. The development of the EU competition law stems from the insistence of the USA government that the operation of cartels must be stopped, which is a precondition for handing off the control of the German coal and steel industry. Consequently, the **Treaty of Paris (1783),** incorporated its **first European antitrust provision** (Article 65 and 66 of the European Coal and Steel Community)

Progression of the antitrust law, saw to its inclusion in the **Treaty of Rome of 1957**, which created the European Economic Community (EEC). This presented a formal ground for the EU competition law which sets out to;

- avert anti-competitive agreement under Article 85
- halt the abuse of a dominant position under Article 86

The EU competition law has overtime extended its scope to state old monopolies and merger control from the initial focus on cartel domination of the European economy.

The Korean Fair-Trade Commission (KFTC) in Article 1 Act sought "to promote fair and free competition; to encourage thereby creative business activities; to protect consumers; and to strive for balanced development of the national economy, by preventing business entities from abusing their market-dominant positions and any excessive concentration of economic power and by regulating illegal cartel conduct and unfair trade practices." (cnet, 2005)

Like the antitrust commissions in other countries, the Competition Bureau (The Bureau) in Canada oversees trade regulations. However, Canada has distinct itself as one of the first countries, via the supreme court ruling that favoured indirect purchasers, who are given privilege to file suit on antitrust infractions. Noteworthy is the CAD$517 million landmark suit of *Pro-Sys Consultant Ltd. and Neil Godfrey Vs. Microsoft Corporation and Microsoft Canada* co filed in 2004.

THE COMPANY MICROSOFT

The firm Microsoft was formed in **1975**, by Bill Gates and Paul G. Allen from Seattle, USA. They converted the Beginners All-Purpose Symbolic Instruction Code (BASIC) programming Language used on the large Mainframe computer for use on the smaller personal desktop computer. Following this progress, the boyhood duo formed a company and derived its name from the words *microcomputer* and *software* to coin the name "Microsoft".

Series of breakthroughs followed, and the company continues to flourish. Notable amongst this is the International Business Machine (IBM) contract of 1980, that saw Microsoft produce operating systems for the IBM PCs. The Microsoft-Disk Operating System (MS-DOS) was produced for IBM in 1981 and other Personal Computer (PC) manufacturers followed suit by licensing MS-DOS as their Operating System (OS).

In the early 1990's Microsoft has sold more than 100 million copies of the MS-DOS and displaced other market competitors including IBM/OS2. Microsoft entrenched it dominance in the operating system market with the introduction of the Windows Operating System-a Graphical

Use Interface (GUI) later in 1990. Subsequent Versions of the Windows such as 3.0, Windows'95 has recorded millions of monthly sales and increased market share of over 90%.

Microsoft's production of software also extends to local networks, internet servers, gaming, PC office applications (MS-word, Access, Power point, Outlook, Office etc.) internet service (MSN, Web TV), programing languages (Java, Visual Basic) as well as hardware component like keyboards and Mouse.

The success story continues till date for Microsoft with series of deals brokered with other business partners in the technology space. The big four global tech companies to which Microsoft belong have impacted not only the business world but households and their lifestyle.

THE ALLEGATIONS

Premise on the myriad of technological milestones attained by Microsoft over the years and the resultant dominance of market share and near monopoly power, other competitors have often complained about Microsoft business antics and dealings in attaining this dominance.

Companies such as Netscape, Sony, Sun Microsystems, RealNetworks amongst other aggrieved ones have sought the intervention of the FTC and DOJ in USA as well as the European Commission (EC) in Euro area to checkmate Microsoft. These complaints, spur both government bodies to investigate allegations and act as appropriate.

Specifically, Sun Microsystems and Real networks filed their complaints with the EC in 1998 and 2003 respectively, while the trio of Netscape, Sony and Sun Microsystems made their petitions to FTC and DOJ in the USA.

The Antitrust Division of the DOJ, as headed by Anne Bingaman in 1993, did not prosecute Microsoft because of its large market share as peddled by some analysts rather it sought to ascertain if Microsoft had used its market power in the operating system market to stifle innovation and competition (Economides, 2001)

The numerous global allegations of unfair competition levied against Microsoft, the potential breach of the Antitrust Acts in their country of operation as well as the result of the cases forms the discussion of this paper.

- **Charges of Monopoly**

Following a complaint by **Netscape** that Microsoft made it difficult to install its software on the PC, the USA government sued Microsoft in 1998 in Civil *Action No. 98-1232(TPJ) and No.98-1233(TPJ)* on the grounds of trying to monopolize the PC market and making it difficult for users to uninstall Microsoft internet Explorer on the PC.

Similarly, in 1998, American Software company-**Sun Microsystems** complained to the European Commission (EC) that Microsoft broke European Union Antitrust rules by practicing discriminatory licensing and failing to supply vital information on its Windows Operating System. Implying that, Microsoft extended its dominance in the PC OS market to the server OS market. Thus, constituting itself as a monopoly by limiting consumer choices.

Furthermore, **RealNetworks** complained to the USA administrative bodies that Microsoft was restricting consumer choices by illegally compelling users to utilize its windows media player. This complaint also formed the basis for the EU's suit against Microsoft with the accusation that the EU's antitrust law was violated.

Again, in **Pro-Sys Consultant Ltd. and Neil Godfrey** Vs. Microsoft Corporation and Microsoft Canada co, the plaintiffs also alleged that Microsoft began to monopolize the PC OS as well as word processors and spreadsheet markets towards the end of 1980s. Plaintiffs claimed the resultant monopolies enabled Microsoft to surcharge on Canadian software consumers. This CAD$517 million class action covered period from December 1998-March 2010.

In addition, KFTC fined Microsoft to the tune of 33 billion Won ($32million USD) in December 2005, on the allegation of violating Korea's Monopoly Regulation and Fair-Trade Act by bundling the Windows Server OS with the Windows Media Service. Also, the Instant Messaging (IM) and Media Player (MP) was also bundled into Windows operating system, thus fending off competition, which constitutes unfair trade practices and an abuse of Microsoft's dominant market position according to Korea's antitrust laws. In specific terms, the commission asserted that the conduct "raised entry barriers" to the markets these products play in, leading to the "restriction of market competition and obstruction of consumer welfare,"
Corroborating KFTC's allegation is the complaint lodged by Daum Communication, a Korean top web portal operator in 2001, as regards Microsoft bundling of IM and MP into its Windows. As such, Datum instituted a suit in South Korea in 2004.

The case against Microsoft by Sun Microsystem in 1998 bothers on *interoperability***.** Interoperability is the ability of a PC to communicate with a server through links or network interfaces. As such, for Windows Operating System to work with non-Microsoft server software in achieving cloud computing, "interface information - technical information and even limited parts of the software source code of the Windows PC OS - must be known." Premise on the non-

availability of this, Sun Microsystem complained that Microsoft extended its dominance in the Personal Computer (PC) OS market to the server OS market.

Again, against the backdrop of complaint made by Netscape, the US government, via its DOJ, sued Microsoft in 1998 for trying to Monopolize the PC market. Allegedly, Microsoft made it difficult to install competing software on the PC and, the internet explorer could not be uninstalled by users, thus, constituting a Monopoly.

- **Breach of Contractual Agreements**

The breach of contracts allegation is another legal battle that Microsoft has faced over the years, due to suits initiated against it by its business partners and competitors.
Prominent amongst the cases is ***Sun Microsystems vs Microsoft*** in the infamous Java suit of 1997, in which the defendant was accused of manipulating Sun's Java application to work differently and maybe better on Windows computer.
Hence, implying that Microsoft had taken other course of actions to enhance its already established monopoly advantage, which is deemed illegal under section 2 of the Sherman Act. However, Microsoft insisted that it was only being innovative in finding better ways to make Java work effectively on windows.

In addition, in ***Media Right Technologies Inc. (MRT) vs Microsoft***, in April 2013, the plaintiff claimed that Microsoft replicated its electronic file content protection after interaction between both parties and thus, used information gathered from MRT to build its Protected Media Pathway (PMP) software in 2005 after its refusal to accept Microsoft offer of $50million for a 51% stake in MRT in 2004.

The case against MICROSOFT by Sun Microsystem in 1998 bothers on ***interoperability.*** That is, the ability of Windows Operating System to work with non-Microsoft server software in achieving cloud computing. That is, Microsoft extended its dominance in the Personal Computer (PC) Operating System market to the server operating system market.

THE DEFENSE

In the Netscape case, Microsoft filed an appeal and as part of its defense, referred to an e-mail received from Netscape's Chairman (James Clark) on December. 29, stating in parts, "you might take an equity position in Netscape" Clark stated. The email evidence is in response to the government's accusation that Microsoft illegally offered to divide the internet browser market with Netscape. During the federal antitrust trial and on the 3rd day of proceedings, Microsoft used the email defense, indicating that its approach was a reaction to Netscape's offer.

In the KFTC suit, Microsoft objected that the combination of IM and media player functionality in windows has enhance value offered to both consumers and developers that write programs

running on windows. Specifically, Microsoft claims that “Competition in these technologies in Korea has been, and remains, vibrant with many new Korean companies successfully offering digital media and IM choices for Korean consumers,"

In reaction to the RealNetworks’s case upon filing of defense by Microsoft, its former spokesperson, Stacy Drake, responded that “the digital media marketplace is characterized by intense competition and a continual stream of new technology and innovations and companies entering the market each week. “This is a case where a leading firm (RealNetworks) is seeking to use antitrust laws to protect and increase its market share and to limit the competition it must face.”

Microsoft, in its defense to the allegations brought against it by RealNetworks before the European Commission, claimed that comprehensive information about Windows operating system was availed to software developers, inclusive of RealNetworks as well as providing procedures to Original Equipment Manufacturers (OEMs) and final consumers to set up their systems so that any other media players like RealNetworks are seen.

In Sun microsystems vs Microsoft, the defendant did not admit to any wrong doings and appealed this in February 2003. As part of Microsoft’s defense, the company filed counter claims alleging that Sun microsystems violated an agreement reached with respect to Java by both firms in 2001. It claimed that the settlement put paid to the previous legal dispute that dates to 1997 on the Java saga.

THE VERDICT

The judge-Thomas P. Jackson, in the Netscape case against Microsoft ruled that Microsoft violated multiple sections of the Sherman Antitrust Act. He ordered that Microsoft should be split into two parts (operating systems and other software) as it constitutes an innovation threat to the software industry and stifles competition. Microsoft appealed via a suit and the earlier ruling to split the company was struck out. The case led to calls to break up big techs such as Amazon.

The resultant ruling forced Microsoft to make 3rd party software compatible with windows as well as submitting to years of govt. oversight. The case also led to creating a thriving environment for other entrants such as Apple, Google etc.

In the European Commission’s antitrust suit due to Sun Microsystem’s complaint, Microsoft was fined $613 million and was ordered to make available within 90days, windows operating system devoid of windows media player to European Market. Microsoft proposed to appeal the fine and install other non-Windows OS over a 3-year period, which will be around 1 billion installation for users. However, in July 2004, Microsoft paid the full fine amount, which was kept in an escrow account pending the outcome of its appeal on the fine.

In addition, Sun Microsystem initiated another suit against Microsoft as relating to its Java software manipulation. In the $35million dollar suit, the plaintiff alleged that Microsoft sought to

extend Java software by making it work differently and presumably better on Windows computer. “The wrong advert by Microsoft that its product were Java compatible broke the Universality of Java, argued Sun.” Consequently, the licensing agreement signed with Microsoft was terminated and the software giant fined $20million while also ordered to stop using the phrase “Java Compatible” on its product.

In the 2005 settlement as relating to antitrust allegations by RealNetworks, Microsoft is to give cash and other benefits valued at $761m. Specifically, $301million in cash, 18 months support for real's product development and marketing activities. In return, Real will also support MSN search about firms will promote the use of Windows Media tech with Rhapsody to Go.

Furthermore, as relating to KFTC’s verdict, the Commission ruled that Microsoft had contravened South Korea's Monopoly Regulation and Fair-Trade Act by lumping Windows Media Player and Windows Messenger with Windows. KFTC’s ruling stressed Microsoft's huge gain in market share once both media player and instant messaging software were bundled with Windows. Also, the verdict revealed that Microsoft's market share gain translated into a large market share drop for competing software. South Korea took the verdict a step ahead of the duo of United States and the EU.
Silverthorn, 2006, noted that in addition to the fine, the Korea Fair Trade Commission ordered Microsoft to market two versions of Windows. The first version would be stripped of Windows Media Player and Windows Messenger within 180 days, while the second version would include both software applications, but would also direct users to Web pages where they could download competing software.

In Canada, the supreme court of British Columbia acknowledged that the parties (Pro-sys vs Microsoft) have achieved a settlement in principle which is not covert. However, the supreme court held that “until the parties file their materials for the notice of settlement approval hearing, the parties shall keep all of the terms of this settlement agreement confidential and shall not disclose them without the prior consent of defence counsel and class counsel, as the case may be, except as required to establish the distribution process and as required by law” .
The verdict provided for a settlement claims procedure for class members and school claimants to make demands for compensation from Microsoft either in the form of consumer cash payments or the redemption of volume licensee vouchers.
Microsoft is obliged to make or fund the consumer cash payments and the redemption of vouchers on a continuous basis as well as the administration expenses, class counsel fees and the costs of notice. however, the court put a ceiling on the value of vouchers identified, the consumer cash payments, and class counsel fees payments by Microsoft, which must not exceed CAD$517,331,500.

LINK TO INDUSTRIAL ORGANIZATION MODEL

Asides, Microsoft dominance in the software market, which has made it a near monopoly, it does engage in several deals with other market participants and players in the technology space.
As it relates to industrial organization theory, Microsoft has engaged in vertical integration- whereby two or more firms engaged in different line of production merge to boost productivity, efficiency and ultimately profitability. Example of these ongoing Microsoft-Activision Blizzard gaming deal, Intuit-Microsoft deal etc.

In 1994, Microsoft made another attempt and proposed a $2 billion acquisition of interests, in Intuit inc. Intuit owned Quicken, the leading personal financial software package. Microsoft's also had Money that performed most functions as Quicken. Carl *et al*, 1999, revealed that the government viewed Quicken and Money as competing in a market for personal finance check book software. In that market, Quicken was the leading product with a 69% share, followed by Microsoft money with a 22% market share.

The antitrust division noted the comments made by Intuit chairman in the September 1994 memorandum to his board about the proposed acquisition interest from "Godzilla"-Intuits code name for Microsoft. "Our combination gives financial institutions one clear option, eliminating a bloody share war and speeding adoption. That, in turn enriches the term of trade we can negotiate with financial institutions. Premise on this and other evidence, the DOJ described Microsoft and Intuits as significant competitors, thus, indicating the proposed acquisition would eradicate competition between the duo, which consumers had hitherto benefited via quality and innovative products at low prices.
The antitrust division rejected Microsoft proposed remedy in which some of its Money assets would have been transferred to Novell ink. The DOJ held that Novell would not be an effective competitor as Microsoft was with money. Also, DOJ did not share Microsoft's sentiment that market entry was easy, and that competition from banks (e.g online banking) would checkmate the pricing of Quicken. Owing to the concerns and objections raised by the DOJ, the parties halted the transaction in July 1995.

REFRENCES

Butts, C. (2009). The Microsoft Case 10 Years Later: Antitrust and New Leading New Economy Firms. *Nw. J. Tech. & Intell. Prop.*, *8*, 275.

Economides, N. (2001). The Microsoft antitrust case: rejoinder. *Journal of Industry, Competition and Trade*, *1*, 71-79.

Gavil, A. I., & First, H. (2014). *The Microsoft antitrust cases: competition policy for the twenty-first century*. MIT Press.

Geier, M. (2001). United States v. Microsoft Corp. *Berk. Tech. LJ*, *16*, 297.

Katz, M. L., & Shapiro, C. (1999). Antitrust in software markets. *Competition, innovation and the Microsoft monopoly: Antitrust in the digital marketplace*, *29*.

Page, A. C. (1994). Microsoft: A Case Study in International Competitiveness, High Technology, and the Future of Antitrust Law. *Fed. Comm. LJ*, *47*, 99.

Schmalensee, R. (1982). Antitrust and the new industrial economics. *The American Economic Review*, *72*(2), 24-28.

Silverthorn, D. J. (2006). Microsoft Tying Consumers' Hands-The Windows Vista Problem and the South Korean Solution. *Mich. Telecomm. & Tech. L. Rev.*, *13*, 617.

url:eweek.com/it-management/microsoft-files-defense-in-real-networks-case/
url:elaw.klri.re.kr/eng_mobile/viewer.do?hseq=41658&type=sogan&key=38
url:casetext.com/case/sun-microsystems-inc-v-microsoft-corp-3
url:pinsentmasons.com/out-law/news/sun-presses-ahead-with-antitrust-lawsuit-against-microsoft
url:applecon.com/case-studies/pro%E2%80%91sys-consultants-ltd-v-microsoft-corporation/
url:cnet.com/tech/tech-industry/south-korea-fines-microsoft-32-million/
url:cnet.com/tech/tech-industry/microsoft-daum-reach-settlement
url:ec.europa.eu/commission/presscorner/detail/en/IP_00_906
url:justice.gov/atr/us-v-microsoft-courts-findings-fact
url:stern.nyu.edu/networks/Microsoft_Antitrust.final.pdf.
url:.jstor.org/stable/pdf/

url:justice.gov/atr/us-v-microsoft-courts-findings-fact
url:computerworld.com/article/2564087/european-commission-fines-microsoft--613m-in-antitrust-case.html
url:news.microsoft.com/2005/10/11/microsoft-and-realnetworks-resolve-antitrust-case-and-announce-digital-music-and-games-partnership/