Let's play monopoly

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Many people in the computing industry worry about nuances in antitrust policy, though no one will ever admit it. More precisely, no one recognizes that antitrust issues in computing go by another name.

Label it "the Microsoft problem." It's defined in statements like "Microsoft sure crosses the line sometimes," or "I just got out of a meeting with someone from Microsoft; where do they get the gall to do that stuff?"

Outside a 15-mile radius of Redmond, Washington, Microsoft's every strategic move does not elicit cheers. Many people in the computer industry seem to dislike doing business with Microsoft. Indeed, they seem to wish Bill Gates would take early retirement and play board games for the rest of his life. As far as I can tell, this wish reflects more than just jealousy about the size of his treasure chest.

Well, let's not exaggerate too much. A small minority grudgingly admire Microsoft and the savvy of their staff. These admirers are not especially vocal, because they value the respect of their friends who feel otherwise. Only in a newspaper's financial section do Microsoft fans come out of the closet. Microsoft's stockholders love their company.

Is the Microsoft problem really an antitrust problem by another name? If so, it's important to resolve; antitrust is a topic of concern not only for lawyers, economists, and policy wonks. The sooner everyone understands this, the sooner discussions might advance beyond the pejorative.

Consider the key issues. Did Microsoft artificially acquire a monopoly or behave like a monopolist? Because Microsoft and other high-tech firms take extraordinary risks in a rapidly changing marketplace, should they face different antitrust standards than high-tech firms in other industries, such as chemicals, oil, or steel?

It is not a foregone conclusion that Microsoft has violated antitrust law. To be sure, I've heard the stories about its overly aggressive executives and behaviors that may border on the unethical. Yet, Dupont, Standard Oil, and US Steel (not to mention IBM), previous high-tech firms that have faced antitrust scrutiny, were much worse sinners in their day. Only Standard Oil got nailed.

This is a roundabout way of introducing a fascinating study now posted on the Federal Trade Commission Web pages. Last year, a team of FTC staffers wrote a report titled "Anticipating the 21st Century: Competition Policy in the New High-Tech Global Marketplace."

Why is the report interesting? First, it says much about the thinking of the brain trust inside the FTC. It is especially intriguing for what it signals about future federal policy for the Microsoft problem.

First, the facts

The FTC reviews every merger in the United States, making recommendations to the Justice Department about whether a merger artificially creates a monopoly. The FTC also investigates the frequently occurring joint ventures, stock deals, and licensing arrangements if they seem to enhance the kind of cooperation that artificially eliminates competition.

The inside scoop is simple enough to state. During the Reagan era, virtually every merger passed GO in this Monopoly game. Then, the Bush White House developed a more active FTC than Reagan's. Clinton's is more active than Bush's, but still tame in comparison to the FTC of the 1960s.

Anyway, in the last eight years, many of the most confusing cases have centered on high-tech companies. This is not just because electronics companies grow rapidly and merge often. All high-tech firms do this, even those in

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biotechnology, transportation, and a few other industries with aggressive R&D. High-tech firms also experiment with new, innovative contractual forms, just the sort of thing that raises the attention of the FTC.

In addition, these companies hire expensive lawyers, the sort who play legal chess better than the average lawyer. Instead of caving in to government regulators, these lawyers give the FTC a good play. This is not a game of Trivial Pursuit. Billions of dollars ride on the outcome.

So, the FTC decided to see if it could formulate a sensible policy framework for high-tech companies. For example, should antitrust policy for software differ from antitrust policy for, say, agricultural machinery? Are joint ventures in semiconductors less deserving of scrutiny than joint ventures in automobiles? Due to the marketplace risk, do Silicon Valley high-tech firms merit lighter legal standards than, say, the advertising firms of Madison Avenue?

In a refreshing show of openness, the FTC held hearings before writing the report, soliciting a broad swath of opinions from outside the FTC. These hearings involved over 200 witnesses, many of whom are the leading thinkers, consultants, and hackers in the business of making antitrust policy.

What did the FTC investigate?

Many ideas in the report had circulated in research and legal conferences during the last 10 years. Just because the report's ideas are not novel does not mean they are not useful, however. The report summarizes and synthesizes. It is a political document, to be sure, so in a few places it soft-pedals where it ought to have been blunt. Yet, that is a small flaw in comparison with the huge value of putting all this well-written material in one place.

Most computer industry folk will probably want to read Chapter 9. It is a thinly disguised discussion of the Microsoft problem.

Be forewarned that Chapter 9 takes work to read. For example, it never names its protagonist. It doesn't for a variety of legal and intellectual reasons, but primarily because antitrust policies should not be tailored specifically to one company and one set of circumstances in one time period.

As it turns out, there is no simple legal principle to use in high tech. "Monopoly" is simply hard to define; and, once found, it's not easy to remedy. There is no simple get-out-of-jail-free card.

Two major questions shape Chapter 9. Should the FTC reformulate antitrust principles for dominant firms in the computer industry? Does the presence of technically complex networks necessitate a special application of antitrust principles?

Computing always has a place for some firm's designs to serve as a focal point, to coordinate component development into a single system. Also, it is not uncommon for one firm to get a technological lead that no other firm can realistically match. Put these tendencies together, and virtually every segment of the industry has a dominant firm.

American antitrust policymakers have always had a difficult time formulating policy for dominant firms. On one hand, there is a presumption in antitrust law that no single firm should ever be too powerful. (What defines too powerful? That's a judgment call.) On the other hand, antitrust law should not be in the business of punishing firms for being more efficient than every other firm, nor for being lucky. Yet, firms often get large by learning to be efficient or taking advantage of a serendipitous roll of the dice in their R&D labs.

In addition, in industries selling multicomponent products, such as computing, sellers need to coordinate their technical standards ahead of sales. Most buyers don't want to waste their time learning about the guts of every computer.

US antitrust policy makers have a difficult time formulating policy for this type of coordinative activity. It can involve explicit cooperation among erstwhile competitors. Standards could become (and have become in some instances) excuses for reducing competition and erecting artificial monopolies.

However, buyers benefit from the simplification of technically complex products. So too do many sellers, particularly when the standards development lays out a sensible map for future product design.

Put these two difficult policy problems together, and we get the Microsoft problem in a nutshell. This dominant firm openly uses its powerful position to shape standards across a technically complex system. A dominant firm's position inherently holds the potential for either benefits or distortions. Whether or not the benefits outweigh the distortions, however, is a tough call (or at least not obvious to the FTC).

The dominant firms' decisions inevitably produce winners and losers, sowing resentment. Someone somewhere will accuse the dominant firm of misusing its position and power. Judgment calls will always be made in an adversarial atmosphere.

What comes next?

We won't resolve these policy questions quickly or easily. They're not likely to be settled before the FTC grapples with yet another lawsuit involving Microsoft. That said, the FTC staff was wise to raise the general issues now. They have anticipated inevitable future monopoly issues. This report should be a reference for years to come.

Perhaps in my lifetime, the FTC will develop a sensible antitrust framework for our industry—then again, maybe not. Take a look at the FTC's Web page (www.ftc.gov) and decide for yourself. I, for one, am glad to see the FTC trying to come up with a framework. FTC commissioners have a tough job, and often do not have a clue how to go about it.

Though it is no guarantee of useful action or inaction, thoughtful government policy has a much smaller chance of doing severe damage.

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