



Aggressive business tactics: are there limits?

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..... Most people don't really care whether Microsoft or the US Department of Justice comes out on top. It's no different to them than a Sunday football game between the Washington Redskins and the Seattle Seahawks. Sure, the outcome matters to the participants and their fans everywhere, but that is quite a provincial concern. Most people are happy to read about the highlights in the paper the next day.

Does the Microsoft-DOJ case matter in any less provincial sense? Is it about anything more than a civil disagreement between the richest firm on the planet and its home government?

The answer is potentially yes. There's a chance that issues of competition in the PC software industry—particularly those that arose in this trial—will influence competitive activities in other fast-moving industries such as the Internet. The Microsoft case doesn't raise a *sui generis* set of issues, as the lawyers would say. (Translation: The legal issues are not unique to just this market.) On the contrary, the case is taking the first steps toward applying old antitrust norms to the fast-moving information economy.

Or to put it simply, this decision will change competitive tactics at many large firms. Like it or not, that's one fallout from this trial.

Look at Judge Jackson's 200-page "Findings of Fact," the document he issued last November. To be sure, there's a risk that these findings will become obsolete, over-

turned, reinterpreted, and otherwise made obsolete by further events. (There is also a risk that this column will be obsolete by the time it's printed.) That said, it's possible to summarize what tactics upset the judge, tactics that I believe will become a benchmark for many commentators in the future.

Before doing this, I must come clean on one thing. Many industry participants have strong opinions about the good and bad features of the findings. Some of these opinions are bought, some are passionate, and some are simply thoughtless. In my own case, my opinions are not bought, they're passionately held, and I hope they don't come across as thoughtless. That said, I am not an extremist in either direction, mostly because I believe strongly in the inevitability of unforeseen consequences. Any evaluation is guesswork at best.

That precaution aside, I do regularly teach MBAs about competitive tactics in the computer industry. If nothing else, this case will change business tactics in this industry. With certainty, I predict that soon every business school professor and consultant will add a few Power Point slides to their lecture on "competitive tactics for large firms."

What will those slides say? Here's my take on it.

Traditional antitrust norms

These norms apply to innovative sectors: the judge's findings signal that all large high-tech firms should expect close

scrutiny from now on. It signals the end of the era in which high tech was the only major US industry in which big firms were so free of antitrust scrutiny.

Judge Jackson put forward behavioral norms for platform providers. He accepted the basic notion that application developers depend on platform providers and are, thus, beholden to them. From there he applied several antitrust norms about how interfirm relations should be conducted when this dependence is great, largely using a standard line of reasoning in antitrust.

For example, seemingly consistent with a narrow reading of this case, Judge Jackson identifies several specific tactics that resulted in the anticompetitive reduction of consumer choice. That is, Microsoft's tactics foreclosed markets to new entrants while bringing no obvious efficiency gains to society. These tactics include using exclusive contracts to restrict a rival's growth, placing unnecessary barriers in front of potential rivals by withholding information, and punishing distributors that carry a rival's product.

The specific tactics are not interesting, but the judge's general approach is. One would have to discard decades of legal precedents of antitrust law not to hold these specific acts as illegal at a firm with market power. In other words, Judge Jackson is close to concluding that Microsoft took actions that are otherwise forbidden to any other monopolist in any other industry.

Few commentators have noticed how remarkable this finding is, especially coming from a Reagan appointee. It is a foot in the door to wider change. It affirms that the basic rules of antitrust law apply to the development of new software. This is a basic legal point that has been unresolved ever since the government ended its botched antitrust trial against IBM almost twenty years ago. More to the point, if those laws apply here, they also apply elsewhere. The same rules apply to the Internet, an obvious conceptual leap that should be getting more attention.

If the wider consequences are still not apparent, think about it from a tactical level. Certain tactics, such as exclusive contracts, would become forbidden for platform providers and firms that acquire positions of dominance. That's a big deal. Many growing Internet firms employ such tactics and will still want to use them when they become big.

Dominant firms

Such firms should not withdraw routine support too often. For example, Microsoft is also accused of making it unnecessarily difficult for another firm to bring something to market, even when it required a small amount of routine effort. Judge Jackson notes that Sun Microsystems and Real Networks have similar complaints.

Courts typically eschew these types of disputes because both sides can usually make a plausible argument in their favor. Resolving them requires some speculation about what is routine and what is not. In this case, that speculation looks like this. On one hand, Sun and Real could not diffuse their innovations without Microsoft's cooperation, and it's in society's interest to let Sun and Real try. On the other hand, such cooperation might be expensive to offer; Sun and Real don't have rights to receive help any time they ask for it.

Once again, a narrow reading is deceptive. Judge Jackson's findings emphasize the restrictions to consumer choice, which resulted from Microsoft's actions and the implausibility of its excuses for these restrictions. If anything, Judge

Jackson is close to using a principle like this: A platform provider must do for everyone what it does for almost anyone.

In court, Microsoft's lawyers offered logical explanations for why the company withheld support in some cases, but Judge Jackson did not find their explanation credible or plausible. (Note the distinction: logical is not the same as plausible). This seems to indicate that a platform provider can avoid suspicion as long as it plays clean elsewhere. But bad behavior on narrow issues, such as those highlighted earlier, leads to a presumption of suspicion on these more ambiguous questions.

A threat to selectively alter a relationship with another firm is a commonly used competitive tactic. Any restraint on a dominant firm's ability to be selective represents a big change.

Twisting arms

This is risky if it freezes out a competitor: Judge Jackson highlighted how Microsoft galvanized its business partners into taking actions. Specifically, he describes how Microsoft did much to kill Netscape, enlisting other firms, distributors, and business partners in the pursuit of this priority, whether the partner liked it or not. The story was well known, so that is not novel.

However, the judge's evaluation of arm-twisting tactics was relatively novel. If anything, it doesn't appear that he cares who wins a fight. However, he does not want dominant incumbents to have an excessive ability to decide when new entrants can bring goods to market, a standard concern of antitrust law once again. Indeed, Judge Jackson was very eloquent on this issue, especially in the last part of his findings. Law students will quote these passages for years.

I'm not as eloquent, but I can briefly explain the issue. In a nutshell, it's one thing when a firm fights head to head with a competitor, but it's very troubling when a platform provider enlists other mercenaries in that fight. This turns a one-on-one case into one against many, potentially with many reluctant conscripts. In many plausi-

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ble situations, this is not in society's interest. Judge Jackson seems to have bought into the view that this is one such situation.

For all his eloquence, the judge did not resolve this issue in a general way. In other words, how do you know when the situation is good or bad? For example, are there clear legal principles for governing the chaotic alliances of the Internet today? If a dominant firm participates in an alliance, when do such alliances turn from permissible to illegal? The basic principle seems to be that it's okay to twist arms for narrow needs other than foreclosure, but if the arm twisting only has defensive purposes, such as foreclosing entry of a rival product, it risks antitrust scrutiny.

That said, many legal insiders think the judge defined this issue too vaguely and it is leading to a legal ruling that may not survive appeal. Higher courts usually require firmer legal guidance than found in a few eloquent words.

More to the point, the competitive issues raised in this case arise for very general reasons. They will arise again with any dominant platform provider in the next decade. By highlighting the most troubling facts and questions, Judge Jackson has begun to define the scope of antitrust law for the fast-moving economy. Are these the right principles and the right norms? This is the debate that needs to take place and which Judge Jackson's decisions open.