Grand designs, new Vistas and diplomacy by other means

Dr Jonathan Fitchen
Department of Law and Criminology, University of Wales, Aberystwyth
Email: jcf@aber.ac.uk

Abstract

The development and marketing of computer software by market leaders such as Microsoft has a latent potential to 'lock-out' competitors and thus raises regulatory concerns for antitrust and competition law authorities. Within Europe the announcement of 'Vista' generated complaints from competitors, and other interested parties, to the competition directorate of the European Commission. The complaints alleged that aspects of Vista seemed to be likely to breach Article 82 EC (abuse of a dominant position). Despite representations by the Commission to Microsoft, and consequential adjustments to Vista, there are still claims that "Vista" will extend Microsoft's dominance of the internet by threatening the de facto replacement of the HTML standard with Microsoft's own internet publication language, XAML, which is 'optimised' to function most efficiently on Microsoft based platforms.

This paper will question the suitability of European Competition law to function as an indirect means of regulating the inter-compatibility of Vista and other forms of proprietary software. It will be suggested that far from assisting such regulation, European competition law currently obstructs the regulation of software inter-compatibility. The following 'obstructions' will be addressed:-

- The necessary due process of law is far too slow when set against the comparatively short life-span of software.
- The ex post facto nature of competition law places it at the 'wrong end' of any such intended regulatory process.
- Competitors may choose to 'compete' by exploiting the flaws in the current system to either: a) secure 'a free ride'; or b) to stifle true technical innovation.

A different approach will be proposed which would prefer the exemption of the software sector from the scope of EC Competition Law in return for compliance with EU established common standards of inter-compatibility.