

GLOBAL COMPETITION REVIEW

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Kroes slams 'unacceptable' DOJ criticism 20 September 2007 European competition commissioner Neelie Kroes has hit back at criticism from the US Department of Justice over this week's Microsoft ruling.

In a sharply-worded press release, the head of the DOJ's antitrust division, Thomas Barnett, faulted the European Court of First Instance's decision to uphold the commission's €500 million fine.

In particular, Barnett levelled his sights on the court's approach to dominant firm conduct. The ruling "may have the unfortunate consequence of harming consumers by chilling innovation and discouraging competition," he said.

Speaking to reporters in Brussels on Wednesday, Kroes called Barnett's comments "totally unacceptable". "The European Commission does not pass judgment on rulings by US courts, and we expect the same degree of respect from US authorities on rulings by EU courts," she said.

The difference in opinion between Kroes and Barnett has been reflected in animated antitrust discussions online, particularly in the US. However the majority of antitrust specialists seem to agree with Kroes. Barry E Hawk, of Skadden Arps Slate Meagher & Flom LLP, questions the wisdom of Barnett's comments. "Only one purpose is served by a public statement - mollifying US politicians and business interests that this isn't the way the US interprets the law," he says. "If the purpose is to persuade the commission or courts to change its views, I'd say a public statement is the worst way to do that. This forces a response from the commission; it's escalated it. And Kroes' reaction shows that the commission is not going to roll over on its back in the face of public criticism."

Bert Foer, president of competition think-tank, the American Antitrust Institute, says Barnett should contemplate a public apology.

"The implication of his commentary, and of the DOJ's consistent quarrelling with Europe over Microsoft, is that a foreign sovereign has to practice antitrust the way we do," Foer says. "There is room to disagree and criticise, but there is also room for mutual respect."

The Department of Justice and DG Comp have clashed before, most publicly following the commission's controversial decision to block the GE/Honeywell merger in 2001.

J William Rowley QC, chair of the IBA global forum on competition, says pushing the authorities' philosophical differences into the public arena may be counter-productive. "Given the tenderness that unfortunately remains from some earlier trans-Atlantic exchanges, it is surprising that the head of the DOJ, and subsequently Neelie Kroes, spoke as plainly as they did," he says. "The important goal of convergence in this vital area is likely to be served best when there is an absence of rhetoric."

However, Philip Marsden, director of Competition Law Forum at the British Institute of International and Comparative Law, says Barnett will have considered the consequences of his criticism before speaking out. "I think it's a very bold move from the DOJ to comment on a court judgment, but it shows how important it is to have a clear rational theory of consumer harm," he says. "Barnett is meeting Kroes next week in New York, and he could have said something to her privately then, but he obviously he felt it was so important that he wanted to use this route."

However, the public sparring is unlikely to significantly affect the agencies' strong relationship, Marsden predicts. "I wouldn't expect this sort of rift to affect that relationship, but I would expect it to bring into sharp relief where the line is drawn," he says.

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