

REPRINTED FROM GLOBAL COMPETITION REVIEW, 25 September 2007

Microsoft lawyers revisit case at BIICL event

25 September 2007

Some of the key lawyers in the long-running *Microsoft* case squared off against one another at an event in London today.

A week after the Court of First Instance's decision to block Microsoft's antitrust appeal, lawyers on both sides of the long-running dispute met again at a conference organised by the British Institute of International and Comparative Law.

Jean-Francois Bellis, of Van Bael & Bellis in Brussels, an adviser to Microsoft, appeared alongside Per Hellstrom, who spearheaded the European Commission's case team. Also on their panel was James Flynn QC of Brick Court Chambers, who had argued on behalf of the Computer and Communication Industry Association, an intervener supporting the commission. They discussed the 'bundling' aspect of the case.

Philip Marsden, chairman of BIICL's competition law forum, asked whether the CFI's ruling was fundamental or not, and also whether DG Comp would now have to monitor Microsoft's product releases. Hellstrom denied that there would be any kind of approval process for the software company's future products. "It is for each and every company to apply with EC law," Hellstrom said. "My case team will not be embedded in [Microsoft's design team]."

One audience member asked whether the CFI's ruling would apply only to "superdominant" companies. "Article 82 applies to dominant companies and market share may be a factor," Hellstrom replied. "Superdominance is a question of fact, not law," added Flynn.

The conference was held at BIICL's headquarters in central London, and saw almost 100 delegates attend – including six members of the UK's Office of Fair Trading. The event allowed lawyers and economists to discuss the likely impact of last week's ruling. Few could agree on its long-term ramifications.

"There is a general consensus that the court's judgment is sound," said Frances Murphy of Mayer Brown Rowe & Maw. "The question, however, is the extent to which it has far-reaching implications for innovation. It is too early to judge, but I don't think it will."

Speaking alongside Murphy during a session on the ramifications of the decision for IP rights, Jean-Yves Art of Microsoft scotched the idea that the case would remain confined to the facts. "National courts do not have discretion," he said. "You can bring a case under this decision and national courts will have to apply the Microsoft judgment."

One lawyer told GCR off the record that the CFI's decision may allow "many more companies to make mischief" in Europe. Meanwhile, the court's treatment of the "interoperability" issue was like "two ships passing in the night", he said, referring to the opposing arguments made in the case by Microsoft and the commission.

The final session of the day – on the ramifications for antitrust policy-featured several other lawyers from the *Microsoft* case, including Thomas Vinje of Clifford Chance LLP, who represented the European Committee on Interoperable Systems, an intervener, and David Hull of Covington & Burling LLP, who advised Microsoft.