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Jeffrey S. Kingston

Brussels Sprouts

The plaintiffs antitrust bar finds fertile ground in the European Union.

By Erik Cummins

THE EUROPEAN COMMISSION'S HUGE ANTITRUST RULING against Microsoft this spring put Brussels, Belgium, on the map for plaintiffs antitrust lawyers looking for a favorable forum. The commission, the executive arm of the European Union, fined Microsoft approximately \$600 million, ordering it to unbundle its media player from the Windows operating system and to provide some key source code to competitors.

In June Microsoft appealed the commission's orders, but its brief did not criticize the European Union's handling of the investigation.

"Europe is a venue people ought to think about," says Jeffrey S. Kingston, a partner in the San Francisco office of Morgan, Lewis & Bockius, who represented Sun in the E.C. complaint. "We have a large antitrust group in Washington, D.C., and we

want to match that strength in Europe because we're increasingly seeing that antitrust problems exist on a global scale."

The E.C.'s basic attraction for the plaintiffs antitrust bar is Article 82, an E.U. regulation directed at companies that abuse their dominant market positions. The rule lists numerous examples of abuse, including setting unfair prices or trading conditions with competitors, limiting production or markets to prejudice consumers, and applying different conditions to equivalent transactions. Its intent, says Christopher Norall, an antitrust partner at Morrison & Foerster in Brussels, "is that the big animals in the jungle shouldn't step on the little animals—and that isn't the case in the U.S." As a result, Norall says, the European rule makes it easier for the E.C. to hear abuse-of-dominant-position complaints than it is for its counterpart in the United States.

In May the commission acquired new enforcement powers under Regulation 1, granted by E.U. governments and rulings during the past two years. For the first time, regulators will be able to search the personal property of employees at companies suspected of abusing market power or fixing prices, and to seal off corporate offices to prevent the destruction of evidence. The new rule permits everything but mergers to be enforced by regulators of the member states, raising the possibility that antitrust enforcement could be decentralized among the 25 nations in the E.U. Norall says the departure this fall of Mario Monti, the E.U.'s competition commissioner, only adds to the uncertainty for corporations doing business in Europe.

The E.C.'s aggressive posture, however, is also an opportunity for U.S.-based firms. Morgan Lewis recently recruited antitrust partner Gerrit Schohe from White & Case, giving it five antitrust lawyers in Brussels. The 1,200-lawyer firm has antitrust lawyers posted in London and Frankfurt, and it opened a Paris office earlier this year, in part, Kingston says, to handle incoming antitrust cases.

Clifford Chance is also investing heavily in Brussels. Earlier this year it recruited antitrust partner Thomas Vinje and several associates from Morrison & Foerster's Brussels office. New York's Cleary Gottlieb and London's Allen & Overy, Kingston adds, have been in Brussels for years.

The burst of activity comes 20 years after the E.C.'s

landmark ruling in the IBM antitrust case, which held that the computer giant had abused its dominant market position by making it difficult for competitors to work with its operating system and mainframes. But the settlement that followed wasn't nearly as significant, says Antoine Winckler, a Cleary Gottlieb partner in the Brussels office who represented RealNetworks in the Microsoft case. "The level of the fine [in Microsoft] was unprecedented, and the consequences for the industry were pretty groundbreaking," he says. Winckler adds that in the days following the decision, he fielded four calls from clients asking him, "What can we do in Europe?"

Brussels offers a number of clear tactical advantages to plaintiffs attorneys. It is often easier, faster, and less expensive to take an administrative complaint to the E.C. than it is to file suit in the United States. Complainants simply file a memo with the commission, asking it to investigate their claims. The commission does its own, often costly, investigation. And hearings move quickly, lasting days rather than weeks or months. Decisions come within six months to a year.

Speed alone can make Brussels the venue of choice for disputes involving intellectual property, which can lose substantial market value before litigation in U.S. courts is resolved. However, complainants in Brussels lose, at least for now, the potential for huge damage awards. Most lawsuits in the E.U. member states are heard by judges. Class actions and treble damages do not exist. Winckler says that European judges are traditionally more conservative than their U.S. counterparts, and even victorious plaintiffs are likely to collect small awards.

But for companies such as Sun Microsystems that simply want to change a competitor's behavior, why not go to Brussels? The ease and speed—and the language of Article 82—give smaller companies extraordinary leverage. "People say forum-shopping is something evil, something nasty," Kingston says. "Baloney. Where should we go instead? Should you be a man's man and sue Microsoft in Redmond?"

But Kingston also warns against filing E.C. complaints simply to force competitors into negotiations or to block an opponent's marketing practices. The E.C.'s antitrust enforcers, he says, "are going to react harshly if they believe they're being used as a bargaining ploy." **CL**