



June 21, 2007

The Vista Problem: Can Microsoft Fend Off Another Legal Onslaught?

Will Microsoft's concessions over Vista's desktop search default be enough to forestall additional investigation into the company's practices? Whether Google is mollified may not be the point on which the answer to that question turns. The European Union and some U.S. states' attorneys general may just be getting started with fresh challenges for the software giant.

By Erika Morphy
E-Commerce Times
Part of the ECT News Network
06/21/07 3:12 PM PT



Earlier this month, it looked for a while as though there might be another wave of multi-jurisdictional investigations against Microsoft (Nasdaq: MSFT) Latest News about Microsoft reminiscent of the antitrust saga that began in 1998. Google (Nasdaq: GOOG) Latest News about Google had been complaining -- first behind the scenes, then publicly -- about the lack of access for third-party search engines in Microsoft's latest operating system, Vista.

Antitrust authorities on the state level were starting to sniff around. On Wednesday, though, Microsoft announced it would make changes to Vista that would satisfy Google's concerns.

Under the new agreement, Vista users can choose whether to stick with the built-in tool provided by the Vista OEM (original equipment manufacturer) or use another company's product as the default for desktop search.

Microsoft insisted from the beginning that Vista allowed users to use whatever search platform they wanted. However, the tweaks the company just introduced make that choice easier to implement.

For instance, the user-selected default desktop search will now appear on prime desktop real estate. It will show up whenever Windows launches a new top-level window to provide search results and appear on the Start menu.

Also, vendors will be able to register their desktop search programs for this default, as ISVs (independent software vendors) are able to register third-party Web browsers and media players as the default in Windows.

Is It Enough?

Will Microsoft's concessions be enough to forestall additional investigation into the company's practices? Earlier this month, following the leak of a Department of Justice memo that outlined Google's concerns, it appeared quite likely that more than a few state attorneys general were going to look into whether Microsoft had violated its consent decree.

The DoJ memo also urged state AGs not to investigate Microsoft, suggesting the claims were baseless. That prompted a separate mini-scandal, as speculation arose over the appearance of unusually close ties between Microsoft and the Bush administration.

Political considerations aside, there are several factors that state, U.S. and European agencies

responsible for enforcing anticompetition laws will consider when deciding whether to initiate new investigations or continue ongoing investigations now that Microsoft has announced plans to change Vista, said Jeffrey C. Johnson, a partner with Pryor Cashman who specializes in the transactional aspects of technology and intellectual property exploitation.

"First and foremost will be exactly what changes are made," he told the E-Commerce Times. "Of most importance will be whether these agencies perceive Microsoft as being entirely cooperative -- or alternatively evasive -- in its efforts."

For example, if the Federal Trade Commission or U.S. Attorney's Office is happy with Microsoft's cooperation, it is less likely that New York's attorney general will initiate his own investigation.

"Similarly, if agencies believe Microsoft is cooperating to the best of its ability and is satisfied that Microsoft's changes to the Vista operating system address existing concerns, that may deter these agencies from delving further into the issue," Johnson said.

Microsoft dealt with earlier complaints that it had violated its consent decree by accommodating changes, noted Ruth Dowling, a partner and cochair of the antitrust practice group with Edwards Angell Palmer & Dodge.

"Since 2002, there have been any number of licensing issues and other third-party product issues against Microsoft," she told the E-Commerce Times. "What has happened is that Microsoft made the necessary structural changes."

As a result, she said, the company has been perceived in the marketplace to be responsive to these kinds of issues.

What About Google?

Google's reaction will also weigh in the decision, Pryor Cashman's Johnson said. "If Google says that Microsoft has satisfactorily addressed its concerns, that will carry some significant weight with enforcement agencies to whom Google's complaints were first addressed."

While Microsoft's efforts may be enough to deter U.S. federal agencies and some states, they may fall short in the long run. "Generally, I think Microsoft is seen with a much more skeptical eye in Europe, and there are some states that share that skepticism. Accordingly, while Microsoft's efforts may be enough to assuage some investigatory bodies, those efforts are unlikely to be the last word in this case."

BECKERMAN
PUBLIC RELATIONS