

What Would a Kerry Administration Antitrust Program Look Like?

William Kolasky

As all readers of *Antitrust Source* know, there is a broad bipartisan consensus as to the important role the antitrust laws play in protecting competition so that free markets can deliver their promise of lower prices and more choices for consumers. In a recent interview for this article, Sarah von der Lippes, Director for Justice Policy for the Kerry-Edwards campaign, when asked what a Kerry Administration antitrust program would look like, responded that Kerry has “a long, strong record of supporting vigorous enforcement of the antitrust laws.” She acknowledged, however, that because of the broad bipartisan consensus in this area, it is unlikely that there would be any major shift in direction from the current Bush Administration.

While Ms. von der Lippes is undoubtedly correct that it is unlikely there would be any major change in direction in antitrust policy in a Kerry Administration, there might well be some differences in emphasis. Many view the second Clinton Administration, under the leadership of Joel Klein and Doug Melamed at the Antitrust Division and Bob Pitofsky and Bill Baer at the FTC, as something of a golden age of antitrust enforcement. The current Bush Administration has done a credible job of enforcing the antitrust laws, but has recently suffered a string of defeats in both merger and nonmerger cases. Whoever is elected, the antitrust agencies will need to focus on what lessons they should take from these defeats. Apart from that, the biggest difference between a Kerry Administration and the current Bush Administration would likely be at the FTC. Over the last three years, under the leadership of Chairman Tim Muris, the FTC has pursued what might be called a “public choice” agenda, with a strong emphasis on governmental and quasi-governmental restraints. We could expect a Kerry Administration to focus more attention on private restraints and exclusionary conduct, as the Clinton Administration did.

With this by way of background, we can examine each of the four major areas of antitrust enforcement to see where else we might see differences.

Cartel Enforcement. The Clinton Administration, under the leadership of Anne Bingaman and Joel Klein, transformed cartel enforcement. During the Reagan and first Bush Administrations, criminal antitrust enforcement focused primarily on domestic, often local, bid-rigging conspiracies in industries like road paving and electrical contracting. Anne Bingaman began the effort to reenergize cartel enforcement by introducing a much-improved corporate leniency program in 1993 and by centralizing responsibility for criminal enforcement in the field offices and one litigation section in Washington, thereby creating a dedicated cadre of experienced cartel prosecutors. These reforms bore fruit under Joel Klein and Gary Spratling with the prosecutions of the global lysine, graphite electrodes, and vitamin cartels. These prosecutions produced record fines and ended conspiracies costing consumers worldwide billions of dollars.

In the current Bush Administration, and especially under the leadership of Hew Pate, the Antitrust Division has continued to make anti-cartel enforcement its number one priority, scoring a number of important successes. While the total fines collected have fallen somewhat since the

■ *William Kolasky is a partner of Wilmer Cutler Pickering Hale and Dorr LLP. He served from September 2001 until December 2002 as Deputy Assistant Attorney General in the Antitrust Division, responsible for international enforcement and policy. He has been a fundraiser for the Kerry campaign, but is not an adviser to it.*

peak year of 1999, the Bush Administration has put even more emphasis on putting cartel perpetrators, both domestic and foreign, in jail. As a result, the average jail sentences for individuals have increased substantially, reaching a high of eighteen months in FY2003.¹ The Division has also continued the effort, begun during the Klein years, of encouraging other jurisdictions to put more emphasis on cartel enforcement and to adopt American-style leniency programs. This effort has been hugely successful. The European Union, which had a long record of tolerating cartels, has become an aggressive enforcer, and even Japan, which not only tolerated but even encouraged cartels, seems to be stepping up its enforcement activities. The Division has also taken steps to strengthen its own enforcement program by supporting legislation increasing the maximum fines and jail sentences for criminal antitrust violations and offering leniency recipients protection from treble damages as an incentive to blow the whistle.

A Kerry Administration would almost certainly continue to make cartel enforcement the Antitrust Division's number one priority, both domestically and internationally. Despite the increased fines and jail sentences, there is every reason to believe that with companies cutting their compliance programs in a misguided effort to reduce costs, cartel activity is still common and that an energetic enforcement program should continue to root out significant cases to prosecute.

Merger Enforcement. One of FTC Commissioner Thomas Leary's many contributions to antitrust scholarship is his review of merger enforcement activity over the last twenty years, showing what he correctly termed "the essential stability" of merger policy over this period.² With one brief exception during the second Reagan Administration, the percentage of merger filings resulting in challenges has remained essentially unchanged over the last two decades.

The second Clinton Administration coincided with the largest merger wave in U.S. history, whereas the current Bush Administration has seen one of the slowest periods of merger activity. The Antitrust Division has nevertheless challenged several high profile mergers, including *United Airlines/US Airways*, *General Dynamics/Newport News*, *EchoStar/DirecTV*, and *Oracle/PeopleSoft*. Parties, however, seem more willing to litigate than in the past. This has led to three consecutive defeats for the two agencies in *Arch Coal/Triton*,³ *Dairy Farmers of America/Southern Belle*,⁴ and, most recently and visibly, *Oracle/PeopleSoft*.⁵ The number of high profile and litigated cases confirms that both agencies have continued to pursue an aggressive merger enforcement program. This, too, could be expected to continue in a Kerry Administration.

Nonmerger Civil Enforcement. As noted above, the area in which we would likely see the greatest difference between a Kerry Administration antitrust program and the current Bush Administration is nonmerger civil enforcement. When Joel Klein became AAG, he set as one of his core strategic objectives re-engaging the courts in the development of antitrust doctrine. This led to a series of significant nonmerger civil enforcement actions, the most notable of which was the Division's action against Microsoft. Probably the most controversial action of the Bush Adminis-

¹ See James M. Griffin, *The Modern Leniency Program After Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program*, Remarks Before the ABA Section of Antitrust Law Annual Meeting (Aug. 12, 2003), available at <http://www.usdoj.gov/atr/public/speeches/201477.htm>.

² Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105 (2002).

³ *FTC v. Arch Coal, Inc.*, Civ. No. 04-0534 (JDB) (Mem. op. D.D.C. Aug. 16, 2004).

⁴ *United States v. Dairy Farmers of Am., Inc.*, 2004 WL 1084551 (E.D. Ky. Apr. 4, 2004).

⁵ *United States v. Oracle Corp.*, 2004 WL 2006847 (N.D. Cal. Sept. 9, 2004).

tration was its settlement of that case after the Division's partial victory in the D.C. Circuit.⁶ Microsoft aside, however, the Antitrust Division has continued to pursue all of the other nonmerger civil cases filed by the Clinton Administration, with mixed success. It won a partial victory in *Visa/Mastercard*,⁷ but lost both the *American Airlines*⁸ and *Dentsply*⁹ cases (the latter is now on appeal). The Division has not, however, initiated any significant new civil nonmerger cases.

The picture is quite different at the FTC which, under Tim Muris's leadership, had a very active nonmerger civil enforcement program, but one largely reflecting its Chairman's public-choice policy agenda. Many of the cases the FTC brought under Chairman Muris's leadership focused on settlements of patent disputes, alleged abuses of standard-setting organizations, and activities arguably protected by the state action or *Noerr* doctrines.¹⁰ All of these reflect the classic Republican view that the most durable restraints are those imposed by government. The FTC also engaged in what some view as a misallocation of its scarce enforcement resources by pursuing an action against an unimportant covenant not to compete in the Three Tenors joint venture between Polygram and Warner.¹¹ The purpose of this action seemed largely to be an effort to resuscitate the *Massachusetts Board of Optometry*¹² framework for a truncated rule of reason analysis, which Chairman Muris helped develop during his previous tenure at the Commission.

One could expect some shift in emphasis in a Kerry Administration toward investigating and prosecuting private restraints of trade and exclusionary conduct, with somewhat less emphasis on governmental restraints. Some antitrust practitioners with Democratic pedigrees (and presumably aspirations) have been privately critical of the current Antitrust Division leadership for not doing more in this area. They have also criticized the Department's amicus brief in *Trinko*¹³ as taking too narrow a view of exclusionary conduct under Section 2. These criticisms do not, however, command a consensus even among supporters of Senator Kerry. Others (including this author) believe the Division has performed a public service by trying to bring greater clarity to this area of the law, in which Professor Einer Elhauge of Harvard has aptly described the existing legal standards found in the case law as "not just vague but vacuous."¹⁴ Some would even criticize the Division for not doing more in this area, which it had an opportunity to do in *LePage's*,¹⁵ but which it ducked by filing an amicus brief that urged the Supreme Court to adopt a "wait and see" approach to the issue of above-cost bundled discounts by dominant firms.¹⁶

⁶ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

⁷ *United States v. VISA U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003).

⁸ *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

⁹ *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387 (D. Del. 2003).

¹⁰ See Joseph J. Simons, Report from the Bureau of Competition, Remarks Before the 51st Annual ABA Antitrust Section Spring Meeting (Apr. 4, 2003), available at <http://www.ftc.gov/speeches/other/030404simonsaba.htm>.

¹¹ *Polygram Holding, Inc.*, FTC Docket No. 9298 (July 24, 2003), available at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>; see William Kolasky & Richard Elliott, *The Federal Trade Commission's Three Tenors Decision: "Qual due fiori a un solo stello,"* ANTITRUST, Spring 2004, at 50.

¹² *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).

¹³ See Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

¹⁴ Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255 (2003).

¹⁵ *3M Co. v. LePage's, Inc.*, 124 S. Ct. 2932 (2004).

¹⁶ See Brief for the United States as Amicus Curiae, *3M Co. v. LePage's, Inc.*, 124 S. Ct. 2432 (2004).

International. We can also expect substantial continuity in the international arena. In her interview, Ms. von der Lippes confirmed that a Kerry Administration would continue the initiative begun by Joel Klein and Doug Melamed near the end of the Clinton Administration, to strengthen international cooperation with other competition authorities around the world. A Kerry Administration would, she said, continue the effort to build the International Competition Network—which was conceived during the Clinton Administration and brought to fruition in the Bush Administration—into an effective tool for promoting both convergence and cooperation among competition authorities worldwide.

Some have criticized the Bush Administration for the tone of its highly vocal criticism of the European Commission for its decision in GE/Honeywell.¹⁷ Others (including this author, who was one of the principal spokesmen for the Bush Administration on this issue) argue that the decision to engage the European Commission in a public debate over the objectives of competition policy served a beneficial purpose in helping to persuade the Commission both to embrace a consumer welfare vision of competition policy and to adopt significant reforms to its processes. These reforms included, most importantly, the appointment of a chief economist with a staff of professional economists to serve as a check on legally trained case handlers who sometimes can become too eager to pursue novel theories, especially in high visibility cases.

A Kerry Administration would likely be no less diligent in defending the prevailing U.S. view that the antitrust laws should be used only to protect competition, not competitors. A Kerry Administration likely would also be equally cognizant of the danger of using the antitrust laws to try to manage competition, rather than simply assuring it can operate free of artificial private restraints and exclusionary conduct. But, as in other areas of foreign policy, a Kerry Administration might seek to deal with foreign competition authorities in a less confrontational—dare one say more “sensitive”—manner than the Bush Administration sometimes has. ●

¹⁷ See William Baer, Former Director, FTC Bureau of Competition, Federal Trade Commission, Remarks at Conference Board Annual Antitrust Program (Mar. 2002) (characterizing the Bush Administration approach as “smash-mouth”).

The Future of U.S. Competition Policy

William E. Kovacic

I sometimes am praised for papers I haven't written. The erroneously aimed plaudits usually are meant for Bill Kolasky, whose name and professional interests resemble my own. I ordinarily would welcome a free ride on Bill's scholarship, but not on his essay, *What Would a Kerry Administration Antitrust Program Look Like*.

Kolasky predicts that "the biggest difference between a Kerry Administration and the current Bush Administration would likely be" at the Federal Trade Commission. For several reasons, his explanation is unsatisfying. First, Kolasky's definition of his forecasting task is unduly narrow. He speaks of the Kerry Administration's "antitrust program" and "antitrust policy," but his essay overwhelmingly addresses litigation-related matters. Except for a comment about U.S. participation in ventures such as the International Competition Network, Kolasky suggests that "antitrust policy" consists only of cases and amicus briefs.

The era of equating antitrust policy with cases is past. The successful government agency today does not engage simply, or even primarily, in "antitrust enforcement." The global trend is to use a broad range of policy instruments to diagnose and address obstacles to competition. Beyond cases, the successful competition agency invests in research, holds hearings and workshops, performs empirical work, publishes studies, and submits advocacy comments to other public authorities.

By his case-centric coverage, Kolasky is silent on the likely content of a Kerry FTC non-litigation competition program. Will the FTC continue to hold hearings and publish studies, in the tradition of Bob Pitofsky and Tim Muris, on subjects such as global competition, health care, or the intersection of competition policy and intellectual property policy? What about the continuation of existing FTC research to assess the effects of past FTC law enforcement decisions? Would a Kerry Administration sustain or expand FTC transparency initiatives, such as explaining decisions not to prosecute and releasing data on variables that influence merger analysis? The omission of non-litigation activities in the forecast overlooks what the FTC and many other competition agencies today understand: coordinated strategies that make full use of litigation and non-litigation tools are essential to successful competition policy.

In reviewing the FTC's antitrust cases, Kolasky states that the Commission under Muris "had a very active nonmerger civil enforcement program but one largely reflecting its Chairman's public choice policy agenda." He adds that "many" FTC cases in the Muris era "focused on settlements of patent disputes, alleged abuses of standard-setting organizations, and activities arguably protected by the state action or *Noerr* doctrines." Kolasky explains that "all" of these matters "reflect the classic Republican view that the most durable restraints are imposed by government." By contrast, he predicts that a Kerry Administration would "focus more attention on private restraints and exclusionary conduct, as the Clinton Administration did." Kolasky gives no data on Muris FTC enforcement matters to show how many FTC cases fell into the "public choice" and non-public

■ **William E. Kovacic**
is the General Counsel
of the Federal Trade
Commission. The views
expressed here are his
own and not necessarily
those of the Federal
Trade Commission or
any of its individual
members.

choice categories, respectively. Nor does he assemble data for the Clinton FTC to compare the Muris and Pitofsky nonmerger programs.

Tim Muris surely treated restraints involving government or “quasi-government” processes as serious transgressions. What was their place in the overall enforcement mix? During the Muris Chairmanship (June 6, 2001 through August 12, 2004), the FTC issued 34 nonmerger competition complaints. By the broadest definition, 12 of the 34 matters fall into Kolasky’s “public choice” category. It is not self evident why one would say that a program in which roughly a third of cases are “public choice” matters “largely reflects” a “public choice policy agenda.” Of the 22 “non-public choice” cases, 18 involved horizontal restraints in the health care sector. These matters—all concerning private restraints—constituted the largest part of the Muris nonmerger enforcement program. Does Kolasky think a Kerry Administration would do otherwise?

The essay’s only comment on the Muris “private” restraint nonmerger program scorns the FTC’s *PolyGram* case (*Three Tenors*). Though the author omits other private restraints matters, such as the FTC health care program, he points out that “some view” the *Three Tenors* case “as a misallocation of [the FTC’s] scarce enforcement resources by pursuing an action against an unimportant covenant not to compete.”

Kolasky’s lament about *Three Tenors* implies that the fact that “some” observers dislike a government case proves, by itself, that the matter is flawed. I suspect that at least some observers—practitioners, newspaper editorial writers, academics—find fault with virtually every government antitrust case and believe such matters waste scarce public funds. It would be strange policy to insist that a government agency forgo a case if it is possible to identify some who oppose the intervention in question.

Kolasky also declares that “the purpose of [the FTC’s *Three Tenors*] action seemed largely to be an effort to resuscitate the *Massachusetts Board of Optometry* framework for a truncated rule of reason analysis, which Chairman Muris helped develop during his previous tenure at the Commission.” Kolasky provides no further explanation for his conclusion about the motivation for the FTC’s case. The best time to identify the “purpose” of the “action” presumably is the original decision to prosecute. Chairman Muris did not participate in the Commission vote in July 2001 to issue the *PolyGram* administrative complaint.¹ It is not apparent how Kolasky confidently can infer that the four voting commissioners initiated the case “largely” (or to any degree) to give Chairman Muris an opportunity to “resuscitate” the *Massachusetts Board* framework.

If we put aside doubts about Kolasky’s assessment of the emphasis, significance, and soundness of the Muris nonmerger enforcement program dealing with private restraints and instead adopt a somewhat moderated version of the Kolasky hypothesis and posit that the Muris litigation agenda had a strong “public choice” emphasis, we must ask: Would a Kerry Administration materially depart from this agenda? Kolasky puts the Pitofsky and Muris eras in watertight compartments, ignores important connections in enforcement across administrations, and overlooks the cumulative nature of FTC policy making.² It is misleading to discuss the evolution of FTC competition policy in the “Muris” era involving patent and standard-setting issues without acknowledging contributions and influences from Pitofsky-era antecedents such as *Summit/Visx*, *Dell Computer*, and *Schering* (which the Commission initiated at the close of Pitofsky’s chairmanship).

¹ The FTC Press Release announcing the *Polygram* complaint appears at <http://www.ftc.gov/opa/2001/07/tenors.htm>.

² For a critique of commentary that slights important elements of continuity across administrations, see William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 467–70 (2004).

Similarly, the Pitofsky FTC's decision in 2000 to start the generic drug study—a project embraced by the Muris FTC and concluded with a formative report in 2002—ought to make one wary of the notion that future administrations would not have an enduring interest in Orange Book listing matters. Perhaps Kolasky thinks that a Kerry Administration would reduce the effort the FTC has given to these and related pharmaceutical matters that implicate the government's regulatory processes and involve billions of dollars in health care costs for consumers. Tim Muris assuredly pursued such measures aggressively, but he built upon enforcement approaches and a base of knowledge that Bob Pitofsky had a key role in developing.

Addressing Kolasky's contention that the Muris "public choice" matters "reflect the classic Republican view that the most durable restraints are those imposed by government," we can look at a recent statement by Ulf Böge, President of Germany's Bundeskartellamt, at the Seoul Competition Forum on April 20, 2004.³ Böge observed that "Economic policy researchers have increasingly come to realize . . . that a large number of these restrictions of competition, if not most, are not caused by private companies at all. It is rather the governments themselves which cause damage to consumers and reduce overall economic welfare due to distortions and restraints of competition resulting from their laws, regulations or concrete administrative practice." He concluded by saying that the "battle against state-imposed restrictions of competition is no less important" than challenges to private restraints "if competition is to develop freely."

Böge's comments underscore a modern development that Kolasky ignores. Foreign competition officials increasingly endorse the philosophy that Kolasky labels "public choice" or "classic Republican"—namely, that competition policy must be no less concerned with attacking public restraints as private restraints. As Tim Muris has pointed out, the United States has tended to lag behind foreign authorities, such as the EC, in putting public restraints high on the competition policy agenda. Against the backdrop of this emerging international norm of competition policy, it would be unremarkable for a Kerry FTC to decide it is appropriate to have a third of its antitrust cases address restraints featuring government or quasi-government involvement.

Beyond his review of the Muris litigation program, Kolasky also comments on government antitrust litigation trends. The Bush Administration, he notes, "recently has suffered a string of defeats in both merger and nonmerger cases." Kolasky advises that "[w]hoever is elected, the antitrust agencies will need to focus on what lessons they should take from these defeats." Since June 2001, the FTC has had two antitrust matters, both merger preliminary injunction actions, decided in federal court. In one case (*Libbey*), the district court granted the preliminary injunction. In the other, more recent case (*Arch Coal*), the court denied the preliminary injunction. The current "string" of FTC federal court antitrust defeats stands at one.

No public agency should regard any litigation defeat with indifference. To ensure superior preparation and utmost attention to sound policy development, an agency must approach each new matter with the view that the agency is only as good as its latest case. The FTC's modern development of a norm of continuing self-assessment and ex post evaluation—one of the institutional trends that escapes Kolasky's attention—provides assurance that the Commission in any presidential administration will examine the causes of any federal court setback carefully. ●

³ Ulf Böge, *State-Imposed Restrictions of Competition and Competition Advocacy*, Seoul Competition Forum (Apr. 20, 2004).

Editor's Note

In this issue, Bill Kolasky, former Deputy Assistant Attorney General in the Antitrust Division during the Bush Administration—and now a Kerry fundraiser—and Bill Kovacic, General Counsel for the Federal Trade Commission under both Tim Muris and Deborah Majoras, reflect upon the past four years and speculate upon what changes could occur under a different presidential administration.

We invite you to review prior issues of the Antitrust Source to glean an overall picture of current antitrust policies in the Bush Administration. Below are links to previous interviews the Antitrust Source conducted with various agency representatives over the past four years.

—MICHAEL BARNETT

J. Bruce McDonald, Deputy Assistant Attorney General for Regulatory Matters, U.S. Department of Justice, May 2004, <http://www.abanet.org/antitrust/source/Jul04-McDonaldIntrvw7=23.pdf>

Susan Creighton, Director, FTC Bureau of Competition, March 2004, <http://www.abanet.org/antitrust/source/march04/creighton.pdf>

William E. Kovacic, General Counsel, Federal Trade Commission, January 2004, <http://www.abanet.org/antitrust/source/jan04/kovacic.pdf>

Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, November 2003, <http://www.abanet.org/antitrust/source/nov03/delrahim.pdf>

Joseph Simons, Director, FTC Bureau of Competition, May 2003, <http://www.abanet.org/antitrust/source/may03/simonsinterview.pdf>

R. Hewitt Pate, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, January, 2003, <http://www.abanet.org/antitrust/source/jan03/pate.pdf>

Deborah Majoras, Deputy Assistant Attorney General, U.S. Department of Justice, Antitrust Division, March 2002, <http://www.abanet.org/antitrust/source/march02/majoras.pdf>

Michael Katz, U.S. DOJ's Chief Antitrust Economist, March 2002, <http://www.abanet.org/antitrust/source/march02/katz.pdf>

The EC Decision Against Microsoft: Windows on the World, Glass Houses, or Through the Looking Glass?

An ABA Section of Antitrust Law Brown Bag Program (June 30, 2004)

MODERATOR**PARTICIPANTS**

Joe Winterscheid
*McDermott Will &
Emery, Washington, DC*



Rick Rule
*Fried Frank,
Washington, DC and
New York, NY*



Steve Houck
*Menaker & Herrman,
New York, NY*



Doug Melamed
*Wilmer Cutler Pickering
Hale & Dorr,
Washington, DC*

JOE WINTERSCHIED: The divisive nature of the Microsoft saga was presaged, perhaps in an apocryphal manner, by the FTC's two-to-two deadlock over whether to issue an administrative complaint—and that back in 1993. Preparing for today's session, I briefly reviewed the history of the case, and it is striking how we tend to forget with the passage of time its storied past. The Department of Justice, of course, revived the investigation, culminating in a hotly contested proposed consent decree in 1994, which was rejected by Judge Sporkin during the course of his Tunney Act review on Valentine's Day 1995. He concluded that the proposed consent decree was not in the public interest because it was too narrow to constitute an effective antitrust remedy. Judge Sporkin, of course, was reversed by the D.C. Circuit in June 1995 and the consent decree was ultimately entered by the district court judge, although not by Judge Sporkin, later that year. And that was only round one.

In 1998, the Department of Justice and twenty states filed a second suit against Microsoft, alleging violations of Sections 1 and 2 of the Sherman Act. Following a lengthy trial and finding of liability on the merits, a second consent decree was entered into in November 2002.¹ This consent decree, ultimately embodied in the final judgment, was also highly contentious, with several states breaking ranks and formally challenging the adequacy of the proposed remedies negotiated by the Department of Justice.

¹ Available at <http://www.usdoj.gov/atr/cases/f200400/200457.htm>.

Round three of the saga was concluded on March 24 of this year, when the European Commission issued its decision against Microsoft following a five-year investigation.² The EC found that Microsoft had abused its dominant position in PC operating systems by refusing to make interoperability information for server operating systems available on a nondiscriminatory basis and tying Windows Media Player to its operating systems. The EC imposed a fine of €497,000,000—about \$600 million—and adopted remedial measures directed at Microsoft's allegedly unlawful conduct. Specifically, as related to interoperability, the Commission required Microsoft to disclose complete and accurate interface documentation, which would allow non-Microsoft Work Group servers to achieve full interoperability with Windows PCs and servers. As regards tying, Microsoft was required within ninety days to offer to PC manufacturers a version of its Windows Client PC operating system without the Media Player. The EC has agreed to stay enforcement of its decision pending Microsoft's interim appeal to the European Court of First Instance.

[T]he Microsoft case has and continues to be a lightning rod in framing many of the core issues involving dominant-firm conduct under Section 2 of the Sherman Act and Article 82 of the EC Treaty

—JOE WINTERSCHIED

In the international context, the *Microsoft* decision is the third in a celebrated series of cases, together with the merger decisions in *Boeing/McDonnell-Douglas* and *GE/Honeywell*, which are cited as exemplifying the divergence in approach and frictions between the U.S. and the European Commission with respect to their antitrust enforcement policies. On the day the EC issued its decision, U.S. Assistant Attorney General Pate issued a statement commenting on the decision, a notable event in its own right and even more notable in its openly critical assessment of the EC's actions. Contrasting the U.S. approach, which he characterized as providing "clear and effective protection for competition and consumers," the DOJ statement noted that the EC has "pursued a different enforcement approach," and went on to observe that, "imposing antitrust liability on the basis of product enhancement and imposing a code-removal remedy may produce unintended consequences. Sound antitrust policy must avoid killing innovation and competition even by dominant companies. A contrary approach risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it. It is significant that the U.S. District Court considered and rejected a similar remedy in U.S. litigation."³ He also commented critically on the size of the fine imposed—the largest antitrust fine ever levied by the EC in a case involving unilateral conduct under Article 82. This statement was followed, of course, by another rather notable event, perhaps the first of its kind: An extemporaneous exchange in the course of the Enforcer Roundtable at the ABA Antitrust Spring Meeting. Those of you who were there will recall a very spirited exchange between AAG Pate and Philip Lowe, the head of DG Comp, on both sides of the issues raised by the EC's decision.

In sum, the *Microsoft* case was and continues to be a lightning rod in framing many of the core issues involving dominant-firm conduct under Section 2 of the Sherman Act and Article 82 of the EC Treaty, including such issues as the dividing line between aggressive competition and exclusionary conduct; striking an appropriate balance between the intellectual property rights, innovation, and antitrust enforcement concerns raised by the actions of firms that hold those IP rights; and, finally, fashioning an appropriate remedy that strikes a proper balance between these potentially conflicting policies. Last, but not least, it is a poster-child for advocates of the need for a com-

² Commission Decision of 24 March 2004 (Case COMP/C-3/37.792 Microsoft), available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf>.

³ Available at http://www.usdoj.gov/atr/public/press_releases/2004/202976.htm.

mon approach to single-firm conduct in cases involving global competitors and competition in fast-evolving markets.

We have a distinguished panel today who will guide us through discussion of these and other issues, focusing on the aspects of the EC decision that contrast with the approach adopted in the United States. Each panelist offers a unique perspective on the Microsoft saga and the different approaches adopted throughout its history. Our first speaker is Rick Rule, a partner resident in Fried Frank's Washington, D.C. and New York offices and head of that firm's antitrust practice. Rick was a key member of the team that negotiated on behalf of Microsoft the settlement with the U.S. Department of Justice and in a number of the state actions as well. Rick served as Bill Baxter's special assistant and later was the youngest person ever to be appointed as Assistant Attorney General in charge of the Antitrust Division. He served in that position with distinction for many years in the Reagan Administration and then in the first Bush Administration.

Our second speaker is Steve Houck, who will be participating from New York by video link. Steve is in the process of moving to the New York City law firm of Menaker & Herrman. From 1995 to 1999 he was the Assistant Attorney General in charge of the Antitrust Bureau of the New York State Attorney General's Office. While chief of the New York State Antitrust Bureau, Steve acted as lead trial counsel in the *Microsoft* case for the twenty state plaintiffs and the District of Columbia, supervising discovery for the states, and had the distinction of deposing Bill Gates on behalf of the states. Before returning to private practice, he also participated in strategic decisions on behalf of the states that filed the separate complaint. He is currently serving as counsel to the California group of states in connection with enforcement matters associated with *Microsoft*.

Our third speaker will be Doug Melamed. Doug is a partner in the Washington, D.C. office of Wilmer Cutler Pickering Hale & Dorr, and is Co-Chair of the firm's Antitrust and Competition Practice Group. He served in the Antitrust Division from October 1996 to January 2001, first as Principal Deputy Assistant Attorney General and then as head of the Division as Acting Assistant Attorney General. He played a leading role in the Justice Department's *Microsoft* case, from conception through the filing of the government's brief in the D.C. Circuit in January 2001.

RICK RULE: I want to begin by just making a disclaimer. As Joe mentioned, I do work for Microsoft and am involved in the U.S. portion of the case, but I haven't been directly involved in the European case. That's not to say that my remarks won't be appropriately partisan, in part because Microsoft is a client, but also because I believe that the company's position is correct. But I don't want you to hold whatever I say against the company. They're not accountable for my remarks today.

You can think of the title to my remarks as, "Microsoft as the regulator's 'wishbone,' caught between diverging antitrust regimes." I think the company can feel, at times, as if it is being pulled apart as opposed to squeezed. A lot of people like to think of Microsoft as a unique entity and that everything that happens to Microsoft really doesn't apply to anybody else. But I think that this case and the different approaches that the U.S. and EC have taken represent a cautionary tale. And I believe that if what is broken, as reflected in this case, is not fixed, it's going to cause a lot of difficulty for a lot of other companies and create problems for the credibility and effectiveness, ultimately, of antitrust enforcement by the multitude of agencies, which continues to grow.

I would like to start with a description of the problems that I see with the EC's decision. I then want to contrast that with what happened in the United States and discuss both the superficial similarities and the fundamental policy differences. Finally I'll discuss what I'll call the bad portents for international antitrust enforcement and make a humble suggestion about how antitrust enforcement agencies might avoid this problem in the future.

Let me start with the EC's decision. I'd like to be able to say it reminds me of "That 70's Show" in terms of where U.S. antitrust policy was in maybe the early 70's, except I have to say that things were never quite that bad here. There are essentially two parts to the decision. The first deals with interoperability; this is the concern that Microsoft uses certain proprietary protocols to allow Windows server operating systems to communicate or interoperate with Windows clients and also with other Windows servers. The second part of the decision deals with what I'll call integration, although the EC termed it tying; this is the integration of the Windows Media Player with streaming capability—and that's an important qualification—into Windows. I don't want to dwell on the divergence of these parts of the decision with existing EC precedent and EC law, although I do believe that the decision is inconsistent with existing EC law and precedent. Rather, what I'd like to do is address the two different parts of the decision based on what appears to me to be a problem in terms of basic antitrust analysis.

First, with respect to the interoperability portion of the decision, the Commission goes about as far as it has ever gone in the direction of compulsory licensing. In the United States, there is some history of compulsory licensing as a remedy and, as I'll explain, there is an element of compulsory licensing in the Microsoft U.S. decree. The difference with the EC's decision is that they found that Microsoft abused its dominant position by failing to license its technology to competitors. And they did so in a way that I think is different from precedent and contrary to good sense.

As with Section 2 in the United States, which requires proof of "monopoly power," a prerequisite to an Article 82 violation (that is, to the prohibition against the abuse of a dominant position) is finding that the party has a "dominant position" (although that concept is somewhat different from, and laxer than, the concept of monopoly power). Unlike Microsoft's position on the desktop, which the courts here found to be a monopoly, it is, objectively speaking, far less clear that Microsoft has a dominant position in the server market. And, indeed, in the three successive statements of objections that the EC filed, they kept redefining the relevant server market in a narrower and narrower—and dare I say gerrymandered—fashion, to come up with a space in which Microsoft has, according to their numbers, something above a 60 percent share. What they ended up doing is defining something called a Work Group Server market, which includes servers that are priced at less than \$25,000 and perform four tasks—basically file and print, network, and administration, that sort of thing.

Ironically, this "market" really bears no relationship to the initial complaint in the case, which was filed by Sun. Under EU law, someone actually has to be refused something for this kind of case to be brought, and it was Sun that claimed it was refused access to certain interface information by Microsoft at the time. But by the time the Commission got around to defining a market in which Microsoft had a dominant share, they ended up with a market in which Sun is not a significant player and which really wasn't the source of Sun's concern. It also turns out that by the time the decision was rendered or shortly thereafter, Sun had actually entered into an agreement with Microsoft to provide all the interface information that it desired. In other words, by the time the EC ruled, there was no refusal to remedy.

So, in effect, the decision relates to a market that is at odds with the initial complaint and deals with competitors who never alleged that Microsoft had refused to deal with them. The problem with this case is that it reflects the malleability of the concept of market definition under EU law. And this suggests that there are a lot of firms out there that could be subject to the same kind of malleable market definitions in which they would be considered dominant firms.

If a company is dominant in an unrealistically narrowly defined market, then under this decision, even if there are competitive alternatives, and even if the competitors have found ways of either

[T]here are a lot of firms out there that could be subject to the same kind of malleable market definitions in which they would be considered dominant firms.

—RICK RULE

duplicating or mimicking the technology at issue so that it's difficult to argue that the technology is indispensable, the EC's decision suggests the dominant company must share its technology. Under the decision, if there are competitors who want your technology, who say that not having the technology puts them at a competitive disadvantage (and I just would point out, technology is pretty worthless unless it gives its owner some competitive advantage), then it would appear that you may have an obligation to license that technology to your competitors in the same market.

One of the other oddities of this case is that the EC's focus changed because the U.S. decree made the initial case moot. Before the EC could rule, as I'll explain, the U.S. case effectively mooted Sun's initial complaint that Windows server operating systems had an advantage because those server OSs had unique access to the proprietary communications protocols necessary to communicate natively with Windows client operating systems. Once the U.S. decree required Microsoft to make its proprietary client-to-server protocols available for licensing, the focus of the EC shifted to requiring Microsoft to license communications protocols that are used by one Microsoft Windows server to communicate with another Windows server. As the case was ultimately decided, it had very little to do with servers interoperating with Windows operating systems on the desktop and much more to do with servers interoperating with other servers.

If somebody asks for a company's technology—apparently, even if they have competing technology—and if the company has a dominant position, then this decision seems to suggest you have to license it to your competitors unless you have a legitimate justification. The opportunity to avoid condemnation by providing a legitimate justification might seem to be a way to reconcile the U.S. and EU approach. However, what the EC will recognize as a legitimate justification is perhaps the biggest divergence from the U.S. As a general matter, the EC's decision holds that it is not an effective or legitimate justification for a firm to argue that it needs to be able to keep its intellectual property to itself in order to retain the competitive edge it provides. Or at least it is not a sufficient justification, unless on balance the benefits to innovation of the firm being able to keep its technology to itself outweighs the benefits of letting that innovation be used by everybody else in the marketplace. The Commission did a balancing exercise and decided that the benefits of the property rights to the creator of the intellectual property—here, Microsoft—were outweighed by the benefits of spreading that technology through the market. Moreover, it is difficult to be optimistic that the EC would ever find that the interests of a single dominant firm wishing to enjoy exclusive IP rights outweigh the interest of the many in sharing in the enjoyment of that technology. More fundamentally, such a notion of balancing, which is at the heart of the EC's decision, is very much at odds with the way the relationship between intellectual property and antitrust has developed in this country.

The problem with using the antitrust laws to deny the fruits of an investment once the technology is successful not only undermines the incentives to make those kind of investments in the first place, but that it also, at least to some extent, undermines the incentives of third parties to do their own innovation. This is particularly true in this case, because third parties know that not only are they going to be entitled to the communications protocols that Microsoft already has developed, but they will also be entitled to any future communications protocols that Microsoft develops. So, why try to "build a better mousetrap" when you're assured of getting whatever Microsoft comes up with? Clearly, that's a bad rule. I also think it creates a lot of uncertainty in terms of how it gets implemented in the real world and how one advises clients.

The second part of the decision involved integration—the integration of Windows Media Player with streaming capability into Windows. The interesting thing about this part of the case is that apparently, even though Microsoft has integrated media functionality into Windows since 1992,

Microsoft's integration became illegal tying only in the late '90s when Microsoft included streaming capability (that is, basically playing media as it comes down from the Web) in the Windows Media Player. The problem here is that this test is much different from anything that's ever been decided in the EU and much different from anything that's ever been decided in the United States. As a practical matter, the test says that if a third party offers functionality on a stand-alone basis, then the dominant firm is guilty of tying when it integrates that functionality into its dominant product and when integration is not indispensable to achieving benefits. (In the U.S. case, it was not integration per se that amounted to tying, but, rather, it was Microsoft's actions making it impossible for OEMs to hide or remove end-user access to functionality integrated into Windows.) If you read the Commission's decision, indispensability is like a "least restrictive alternative"—or a unicorn—in the sense that it's a kind of mythical beast, unlikely ever to be found by an antitrust regulator in the real world. The EC's decision itself makes this clear when one considers the benefits of integration that Microsoft cited—for example, the fact that all other operating system vendors design their products with integrated media functionality, the creation of a coherent platform to which ISVs can write, and the like.

The EC also found "foreclosure" based on indirect network effects. There was no allegation before the EC, like there was in the United States, that Microsoft prevented OEMs from removing access to the Windows Media Player. There were no arguments that Microsoft essentially entered into exclusives with distributors to ship only Windows Media Players. Instead, the EC concluded that, because Windows Media Player is shipped with every version of Windows and so is ubiquitous, over time those who put content on the Web are going to be forced to use Microsoft's media formats. And if they use Microsoft's format, the logic goes, then pretty soon content vendors won't use anybody else's format, and consumers will be forced to use Microsoft's Windows Media Player. The problem with this argument is (1) it's a purely hypothetical concern; (2) it ignores the fact that to some extent there's a platform or network effect that can actually benefit consumers; and (3) it's inconsistent with the facts.

Contrary to this hypothetical train of logic, in the real world it turns out that media players made by third parties tend to get distributed very broadly. For example, Microsoft has pointed out that every OEM with a greater than 2 percent share of worldwide personal-computer sales ships at least one non-Microsoft media player on their system. So it doesn't appear that OEMs are deterred from shipping third-party media players simply because Windows Media Player is on the system. Second, as a result of the U.S. decrees, OEMs and consumers are free to remove end-user access to Windows Media Player on the PCs they ship, and Microsoft even provides the capability to do so with every version of Windows. Third, there are no exclusives in terms of any other channel in distributing Windows Media Player, so all of those other channels are open to third-party media-player vendors. And finally, media players are much smaller—that is, involve less code—than a lot of other types of software that are routinely downloaded over the internet and stored on PCs today. Media players really don't take up much hard disk space. For example, if you download the Real media player or Apple's Quicktime on a machine with a 40 gigabyte hard disk, which is not all that much these days for PCs, it takes up less than one-tenth of one percent of the hard-drive space. Moreover, it takes about the same time to download one of those media players as it takes to download five popular songs off the Internet. Most of the people using media players to deal with content on the Internet—that is, to "stream" content—are used to downloading things. So, whatever may have been the case with Internet browsers (which involve more code) back in the '90s (when PCs had smaller hard-drives), Internet distribution is really not a problem for media players today.

The EC's concern all comes down to the fact that, because Microsoft is the only one that can be assured its media player will be distributed ubiquitously, it may have some competitive advantage. The EC seems to say, "That's unfair and though we can't require that some other media player will be ubiquitously distributed, we can inhibit the ability of Microsoft to distribute Windows Media Player ubiquitously by requiring Microsoft to make available a version of Windows without the code that constitutes Windows Media Player." The bottom line is, this code removal requirement is not just bad for Microsoft, but it also hurts a lot of third parties, namely third-party software developers, OEMs, and consumers. It is reminiscent of the kind of remedies that Bill Baxter once condemned as counterproductive: what he termed "sand in the saddlebags" remedies—they slow the "lead horse" down to be sure, but at a terrible cost to consumers.

When we turn to the similarities and differences between the U.S. and EC approaches, one could argue that they both deal with interoperability and integration; the U.S. decree has both elements in it, and the EC is simply following along and dealing with the same issues. And to some extent that's true. However, I submit that's not a reason to be sanguine about the EC decision; rather, as I'll explain, I think that's the reason that the EC should have stayed its hand.

First, if you look at the integration decision, the U.S. court considered all of the arguments that the EC raised and addressed them, particularly at the remedy phase of the litigation, in much more detail and much more exhaustively than the EC.⁴ And the U.S. DOJ and the court concluded that the downside of a code removal remedy would far outweigh any purported benefits, particularly when less draconian, more consumer-friendly remedies were available. The court recognized that code removal would, in fact, hurt third-party ISPs because system services that third-party software developers expect to be in Windows won't be there. The court in the U.S. concluded that such a remedy would dramatically increase the cost to Microsoft, hurt OEMs, and hurt consumers—all the arguments that Microsoft posed to the EC and the EC ignored. In the United States, there was a recognition that integration in and of itself is not bad and, in fact, can be very good. The court of appeals said that if you're going to attack the integration of functionality into platform software, that integration has to be judged under the rule of reason in this country.⁵

What the EC has done is very different from the kind of rule-of-reason analysis the court of appeals proposed or the kind of analysis that the district court conducted on remand. Also, in the United States case, there was a concern that Microsoft was engaged in not just the integration of Internet-browsing functionality into Windows, but was using that integration, in combination with certain contractual restrictions and distributional restraints, to foreclose the market to Netscape and others. In the U.S., the real concern was the fact that Microsoft didn't let OEMs remove end-user access to Internet Explorer. When the United States came up with a remedy, they never attempted to somehow split apart the platform or deprive Microsoft of the ability to distribute platform functionality broadly by integrating it into Windows. Rather, the United States and the court tried to eliminate the restrictions that Microsoft imposed on others like OEMs and ISPs and that foreclosed third parties from competing with Microsoft, while leaving Microsoft with the ability to innovate through integration. That is the concept embodied in the U.S. decree.

Unlike integration, of course, interoperability was really not part of the U.S. case, but instead was a part of the remedy to which Microsoft originally agreed, and which the court subsequently adopted, to address Microsoft's foreclosure of competing browsers from the market. Section III.E

⁴ See *United States v. Microsoft Corp.*, 231 F. Supp. 2d 134 (D.D.C. 2002).

⁵ See *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

of the consent decree requires Microsoft to make available communications protocols that are used in the Windows server operating system to communicate natively with the Windows client operating system. Microsoft has a number of licensees, and has actually expanded the scope of the program beyond what the decree requires. Section III.E was not included in the decree, however, because the government concluded that Microsoft had failed to live up to some obligation it had as a monopolist to license its technology to competitors. Rather, the remedy was designed to create opportunities for other software vendors to develop middleware that would run on non-Microsoft servers and could serve as alternative middleware that would compete with functionality that Microsoft offers in its Windows client operating system. This is a very different rationale from what the EC articulated for its interoperability provision. In the sense of “realpolitik” as contrasted with sound antitrust, one can perhaps argue that because of that “interoperability” remedy in the U.S. decree, the EC had to expand the scope of its case to include media players and to shift its focus towards server-to-server interoperability from client-to-server interoperability in order not to be outdone by the U.S. But that hardly seems to be the way to administer sensible antitrust enforcement. Indeed, I think that this international “one-upmanship” is largely responsible for a very real divergence between the two cases, and I think that what the divergence portends is not at all good.

*It's particularly
egregious for another
national government
to come along and
decide that it wants to
second-guess that first,
and most appropriate,
jurisdiction's decision.*

—RICK RULE

Furthermore, it's important to keep in mind the circumstances surrounding this case, which I think makes the divergence even more troubling. First, we're talking about a U.S. company that supposedly engaged in anticompetitive behavior with respect to other U.S. companies. If you look at the statement of objections and the decision of the EC, the principal purported victims are U.S. companies—Sun, in the case of the interoperability remedy, and Real Networks, in the case of integration. It seems to me that in a situation like that, it makes more sense for the U.S. to address the matter. Second, this is a case where it's not only theoretically sensible for the U.S. to address it, but where the U.S., in fact, went to great lengths to remedy the concerns. The U.S. DOJ engaged in a thorough investigation, and the U.S. courts thoroughly reviewed the facts. Both the U.S. enforcers and courts spent a lot of resources on that effort. Ultimately there was a settlement where some of the plaintiffs signed on and some didn't. That necessitated more litigation, in which a judge extensively scrutinized the record, heard testimony from numerous witnesses, received additional evidence, and came to the conclusion that the remedies in the decree were appropriate.

So you have a situation where the U.S. antitrust enforcement authorities without a doubt closely scrutinized the behavior, made a decision on the appropriate resolution, and then had their decision and ultimate resolution confirmed after an exhaustive review by U.S. courts. It seems to me that in those circumstances, it's particularly egregious for another national government to come along and decide that it wants to second-guess that first, and most appropriate, jurisdiction's decision.

The fundamental problem with the Commission's failure to give deference to the United States goes far beyond Microsoft. Some seem to believe that a conflict only exists when there's a conflict between remedies. That is to say, there's no problem as long as the remedy of the second jurisdiction doesn't frustrate the first jurisdiction's remedy—or there is no conflict so long as Microsoft can simultaneously comply with both remedies. I think this is a far too narrow view of a conflict. The problem with that view is it means that subsequent jurisdictions don't have to give any credence or deference to the first jurisdiction's balancing of interests and conclusion that in a particular case taking a measured, balanced remedial approach is better for consumers than pursuing a remedy to its ultimate and abhorrent conclusion. Ignoring all but direct remedial conflicts

also means that the most aggressive jurisdiction will always be the one that “calls the shots.” To the extent that there is competition among antitrust enforcers, which there is, and particularly when there seems to be a matter that is prominently in the news, I think it is human nature to want to be the one that gets the most credit or the most attention. That leads to a dynamic where, increasingly, we will see jurisdictions try to “one-up” the other, so that the last, most extreme enforcement jurisdiction can take credit for really bringing down a giant and being tougher than all the other jurisdictions.

Finally, it means there’s no repose for a defendant. A company believes it has something litigated and resolved in the one jurisdiction with the strongest connection to the matter, only to wake up and find that another jurisdiction with a more tenuous connection to the case is investigating it for the same matter. Moreover, in Microsoft’s case, the EC is not the end of the line. The Koreans, the Japanese, at times the Israelis, and the Brazilians have all investigated, or are investigating, the same kind of conduct that the United States and the EC have investigated. So you end up with this disgruntled rivals’ world tour traveling from jurisdiction to jurisdiction—if a complainant doesn’t get all that he wants in one place, then he moves on to the other jurisdictions for successive bites at the apple. And if the next or the third or the fourth successive regime wants to have relevance in the matter they have to be even more aggressive than the jurisdictions they follow.

My parting comment is an idea for the future. I think it’s very hard ever to expect, notwithstanding everything I’ve said, that all jurisdictions are going to follow enlightened antitrust policy as articulated by the United States. Frankly, sometimes our policies aren’t all that enlightened. We make mistakes, just like other jurisdictions do. But I think that what various jurisdictions ought to think about as a model, and I will grant you it is by no means perfect, is the kind of clearance process that the Department of Justice and the FTC follow or the model that the Member States of the EU are planning to follow with the European Competition Network. Where one has either a merger or a major global company like Microsoft that’s alleged to have engaged in certain conduct with global effects, then the jurisdiction that has the most expertise, that has the strongest contacts, probably should be the one that is “cleared” to address the issues. In the absence of some unique or special national concern that is not likely to be addressed or cannot be addressed by the first jurisdiction, the other jurisdictions ought to defer to the outcome achieved in the primary jurisdiction. It should be a process like the DOJ and FTC clearance process, where the DOJ may disagree with an FTC decision, but once the FTC is given clearance, that is the agency with the sole and final responsibility to handle the matter.

STEVE HOUCK: My remarks are going to be structured somewhat differently from Rick’s. I’m going to speak to three issues. First, why I think the EU remedy may have greater potential to be effective than the U.S. remedy. Second, some of the procedural and other differences that might account for the different outcomes here and in Europe. Finally, I’ll say a little bit about comity from the perspective of someone who has worked as a state enforcer in the federal system.

First, since I’m representing several states on enforcement matters, I should note that my remarks don’t necessarily represent the views of any of the states I’ve worked with. I have never had much doubt about Microsoft’s liability. By contrast, I have always felt that the question of remedy was a very difficult one with no easy answers. It requires consideration of complex issues of law and economics, and essentially amounts to making an educated guess about the impact of different remedies on Microsoft, its competitors, and others in several markets involving a very complicated technology. Fortunately, I did not have to make these difficult remedies decisions, and have great respect for the officials in the U.S. and EC who grappled with them.

So why do I think that the EU remedy has the potential to be more effective than the remedy here? As you know, many people on this side of the Atlantic, including the states that I represent, felt that the U.S. remedy would be inadequate to redress the conduct that the court of appeals had found to be unlawful. With the benefit of hindsight, almost two years into the regime of the U.S. remedy, it's very difficult to conclude that it has accomplished much. In the *United Shoe* case cited by the D.C. Circuit, the Supreme Court stated that remedies in an antitrust case must do three things: (1) terminate the illegal monopoly; (2) deny to the defendant the fruits of its statutory violation; and (3) insure that there remain no practices likely to result in monopolization in the future.⁶

With respect to the first factor, I don't think the remedy has been successful. It is certainly true that the U.S. case involved claims of monopoly maintenance, not acquisition. It is equally true that the U.S. remedy has not made even the slightest dent in Microsoft's enormous market power, although the courts have concluded that Microsoft engaged in a course of conduct over many years involving a variety of tactics that violated the antitrust laws. Since the conclusion of trial, Microsoft has accomplished the truly incredible feat of increasing its market share in PC operating systems from 92 percent to 95 percent or even higher. In addition, Microsoft has gained a monopoly share of the market for Web browsers, which it did not have at the time of the trial, and it has increased its share in adjacent server markets to which the interoperability portion of the U.S. remedy is directed. The rapidity with which Microsoft increased its market share in the Web browser market is an indication of why the EC is so concerned about what might happen with media players. When we started the trial, Netscape actually had a considerably larger share of that market than Microsoft did. By the time of the trial, it was pretty much even. Now, as I've said, Microsoft's market share is at monopoly levels, in excess of 90 percent.

The U.S. remedy doesn't fare any better on the other two aspects of the *United Shoe* test. It does not even purport, in my view, to rescind the ill-gained fruits of Microsoft's unlawful conduct. Nor does it prohibit the conduct at the core of the case, which the court of appeals found to be illegal, namely intermingling Web browser and operating system software code. In contrast, the EC remedy, which requires Microsoft to offer an unbundled version of Windows, at least endeavors to tackle in a more head-on, direct fashion Microsoft's tactic of intermingling applications and operating-system code. The EC clearly understood that this tactic has been central to Microsoft's dominance, since it not only undermines OEMs' incentives to bundle competing applications with Windows, but in a network market virtually assures that Microsoft will become the owner of de facto industry standards that makes it extremely difficult, if not impossible, for rivals to compete with Microsoft on the merits of their products. The U.S. remedy, which merely requires that icons be hidden but leaves the intermingled code intact, does little to address these root problems caused by Microsoft's integration of code that the court of appeals held to be a violation of Section 2.

Whether the EC remedy realizes its greater potential to be effective depends, I think, on two things. First, if a stay is entered pending the appeal, Microsoft will continue to reap the benefits of its integration strategy to the point where the remedy may have no chance to succeed even if it's reinstated after an appeal, which can take many, many years. The market can very well tip irreparably in the intervening time period. The second is whether OEMs will be given sufficient incentive to purchase an unbundled version of Windows that is priced identically to, but not lower than, the bundled version. There is no doubt that the EC unbundling remedy is considerably stronger medicine than the icon-hiding of the U.S. decree, but whether it will be strong enough to

⁶ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 352 U.S. 521 (1954).

cure the competition problem it seeks to address absent some price differential remains, I think, to be seen.

The second portion of the EC remedy requires Microsoft to disclose information intended to improve the ability of certain rival servers to operate with Windows. As Rick indicated, it's intended to accomplish a somewhat different purpose than the interoperability portion of the U.S. decree. This provision is a direct response to complaints made to the EC by Microsoft's rivals about their difficulty operating with Windows in a heterogeneous environment—i.e., one including non-Windows servers. In the U.S. decree, on the other hand, the interoperability disclosures are an indirect attempt to support rival middleware products as an alternative platform to Windows. As a consequence, the interoperability portion of the EC decree, like the portion of the EC decree related to media players, is considerably more robust than its U.S. counterpart. Microsoft itself predicted that the interoperability provisions of the U.S. decree would lead to greater consumer choices. So the EC has good reason to believe that the additional disclosures it requires will yield even greater benefits.

[T]he EC's position

on the whole is very

much pro-innovation

and protects everyone's

intellectual property

rights

—STEVE HOUCK

Before discussing some of the differences in process that may have contributed to the different results here and in Europe, I want to say a brief word about innovation and intellectual property, two concepts that are at the heart of the case. Microsoft argues that the EC, by requiring it to disclose interoperability information and to unbundle Windows, undermines its intellectual property and hobbles its ability to innovate. I sincerely doubt that's true. In the first place, Microsoft is allowed to charge a reasonable royalty for the interoperability information it's required to disclose in both the U.S. and EC decrees. In the second place, the EC decree permits Microsoft to offer a bundled version of Windows in addition to the one without a media player. But, fundamentally, it seems to me that Microsoft's integration into Windows of a product invented by someone else—Microsoft did not originate either the Web browser or the media player—is only a limited, derivative form of innovation. Because such integration threatens not only to destroy real risk-taking innovators and discourages others from even thinking about innovating in the space they perceive to be dominated by Microsoft, I think the EC's position on the whole is very much pro-innovation and protects everyone's intellectual property rights—Microsoft's as well as its competitors'.

As an American antitrust lawyer, I was struck by the strong similarity in legal theory and analysis between what the EC did and what we would expect to see in an antitrust decision here in this country. This clearly is not a *GE/Honeywell* type of situation. What then accounts for the difference in remedial approaches struck here and in Europe? Let me suggest some possible explanations. First, and this is a very important one, the EC has the enormous advantage of the roadmap provided by the U.S. litigation—the massive trial record in the district court, its extensive findings of fact, and the court of appeals' detailed legal analysis. In addition, the EC could see that the U.S. remedy was having little real world effect. So it's not surprising, I think, that the EC opted to do something a little bit different. Incidentally, while I have criticized the U.S. remedy, it's important to keep in mind when assessing its overall impact not only the direct impact of the remedy itself, but the indirect impacts of the Sun and AOL settlements, the follow-on class actions and, indeed, the EC proceeding itself. Also, I would be remiss if I failed to acknowledge, based on my recent enforcement experience, that the U.S. litigation certainly appears to have chastened Microsoft so that Microsoft now seems much more sincerely committed to competition that is not only tough, but is fair and lawful.

Another possible explanation for the potentially different results here and in Europe is the more administrative nature of the EC process. By training and experience, I am a big fan of the U.S. adversarial system. I'm not at all sure, however, that it's well-suited to deciding remedies in a case

like *Microsoft*, where the trial judge, rather than deciding an issue based on historical facts, like he or she is accustomed to doing, is required to predict the effect of different remedies in shifting, complicated, high-tech markets. My impression is that both of the U.S. District Court judges who sat on the case felt uncomfortable, and understandably so, in dealing with the remedies phase of the case. For example, Judge Jackson sent the case directly to the court of appeals without taking additional testimony on the remedies issue, and Judge Kollar-Kotelly, who had no prior antitrust experience and was confronted with a massive trial record with which she had no familiarity, urged the parties to settle in the national interest. While the EC process may have its drawbacks, it could well be better suited to grappling with remedies issues like those involved here.

Another striking difference in approach between the U.S. and the EC, which may have affected the outcome here, is the more direct involvement of Microsoft's competitors in the EC proceeding. Both the EC and the states have been criticized, and not only in *Microsoft*, for paying too much heed to what competitors say. I personally think that criticism is often misplaced, and is here. After all, Microsoft's anticompetitive conduct was directed at its competitors and they, as much as the consuming public, were its victims. More to the point, Microsoft's competitors are apt to have a deeper understanding than law enforcement officials of the dynamics of their industry and the likely effect of different remedies. I'm not suggesting government officials should accept at face value what Microsoft's, or for that matter any defendant's, rivals say. Like Microsoft, they have an obvious stake in the outcome and their views, like Microsoft's, should be regarded critically. My sense, though, is that the EC has struck a good balance here. We in the U.S. sometimes are so concerned about "protecting competition, not competitors" that we forget that competition operates through competitors. Competitors are a source of potentially valuable information which ought to be considered and not unduly discounted simply because they're rivals of the defendant, and I think that the EC has done a good job of that here.

Another difference in process that may have contributed to the different outcome is that the U.S. decree grew, in large part, out of a mediation, indeed the one encouraged by Judge Kollar-Kotelly. There is no doubt that alternative dispute resolution is a wonderful thing that should be encouraged, but there is a real question whether a mediation, with its often artificial time pressures, is well-suited to obtaining the best public policy results in a subject matter as complex as remedies in this case. In such circumstances, a mediation can magnify the disadvantages in technical expertise and knowledge that government officials have in negotiating with a defendant over the ins and outs of its business.

My final observation about the U.S. and EC proceedings is that the EC team's make-up and outlook have been more consistent throughout the process, at least so far, than that of their U.S. counterparts. The duration of the U.S. litigation and the changes in administration both in Washington and in some of the states led to significant differences in personnel and approaches to the antitrust laws. Realistically, I think most observers would agree that these changes had a significant impact on the course of the remedies proceedings in the U.S. While on the subject, something that's always irritated me are critics who, when they disagree with a state or EC enforcement decision that differs from one made by federal enforcers in Washington, insinuate that the non-Washingtonians must be acting in response to some inappropriate influence emanating from the political process. That type of unfavorable comparison, which unfairly denigrates state and EC officials, is, I submit, much more difficult to sustain after *Microsoft*. And just to be clear, I am confident that all government officials involved in making the difficult remedies decisions here acted on their sincere convictions and best judgment as to what was appropriate on the law and facts of the case.

*Given the lack of
concrete, measurable
results from the U.S.
remedy experience,
it should come as
no surprise that the
EC officials have
done something
different*

—STEVE HOUCK

My final thoughts are concerning comity. As a state antitrust official, I've had considerable experience working with my federal counterparts. There's no question that the exchange of views and information between state and federal officials generally leads to better results. However, differences sometimes exist, and that's not surprising. In complicated cases like *Microsoft*, reasonable minds certainly can differ on a complicated subject like remedies. In fact, as all antitrust practitioners know, differences of opinion often exist within enforcement agencies as well as between them. Certainly, all enforcement agencies involved in the same matter should listen carefully to what their counterparts say. Indeed, where one enforcement agency takes an action that differs from another in a high profile matter like *Microsoft*, it would be well advised to have a convincing explanation not only for the reviewing court, but for the court of public opinion as well. On the other hand, each agency has a sovereign obligation to do what it thinks is right under its laws to protect consumers and competition within its jurisdiction. I don't think it's fair to criticize the EC on *Microsoft* simply because it's done something different from what was done in the U.S. For one thing, the D.C. Circuit did not rule on Massachusetts' appeal from the district court's remedy decision before the EC acted. Moreover, a fair-minded person, even one who doesn't agree with everything the EC has done in its remedial approach, must nevertheless concede that the decision is very impressive. It not only musters facts in great detail but its legal analysis and economic methodology are generally consistent with that employed here. Given the lack of concrete, measurable results from the U.S. remedy experience, it should come as no surprise that the EC officials have done something different, as it is their perfect right to do, to protect consumers and preserve competition in the EU. And just to respond to one of Rick's points, I think it's clear that in this era, in which we're living in a global marketplace, that while a number of these companies may be American in origin, they sell their products worldwide—it's a worldwide market—and what they do affects competition not only here, but in Europe and elsewhere. I am confident, if this case had been brought first in the EC, that U.S. enforcement officials would not necessarily defer to what the EC had done and would do what they perceived to be in the best interest of the public they serve.

DOUG MELAMED: I'm going to talk about two topics. One is the issue of comity: Should the EC have backed off or deferred? The other is the merits of the EC's decision.

Ideally, in my view, there would be no dual or multiple government enforcement involving the same transaction. There wouldn't be between the FTC and the DOJ, between the DOJ and the states, or between DOJ and FERC or DOT; and there certainly would not be multiple reviews internationally. Rick referred to the clearance agreement between FTC and DOJ as a model for a possible solution to the problem of overlapping international enforcement. If that's the best we can do, I guess it's better than nothing, but I think we really need a more substantial set of comity principles.

Dual enforcement is inherently undesirable. Unless one can predict that the first agency is more likely to have a false negative than a false positive, there's no a priori reason to expect that multiple reviews will result in sounder decisions. For every false negative that's corrected by the second review, you're going to have a false positive in a second review undermining a sound decision in the first place. And we can be sure that multiple reviews will result in increased transaction costs, which will deter aggressive conduct and will be in effect a tax on commerce. So it seems to me that, as a theoretical matter, you don't want multiple reviews because they increase transaction costs and business uncertainty with no likely overall increase in the soundness of enforcement decisions.

The problem, however, is that we're nowhere near a system internationally in which we can expect one nation to back off in favor of another. The U.S., I agree with Steve, surely would not have backed off if some foreign vitamin producer, for example, had engaged in anticompetitive conduct that had a substantial effect on U.S. commerce. We don't even have that level of trust among agencies in the United States, where we have purportedly the same laws, because we have multiple agencies reviewing the same transactions, sometimes simultaneously. So I think deference is only an aspiration. Hopefully, dialogue, experience, and maturity in the world economies will bring agencies together and we can get to that point, but we're not close to that now.

The issue of deference raised by the *Microsoft* proceedings is thus a different and more modest one. In two respects, the EC had a responsibility to give a lot of weight to what the U.S. did and what the U.S. thought. First, as both Rick and Steve pointed out, the U.S. had studied this industry extensively, knew a lot about it, had fashioned certain remedies, and had passed up opportunities for other remedies. The EC should have consulted the U.S. and treated its views as something between a substantial amicus brief and maybe an expert report. I suspect that happened. That surely is something we should expect of the international competition agencies.

Second, the EC should have taken the U.S. remedy as an attribute of the market and should have regarded it as part of the regulatory background to be taken into account in determining both whether there was a need for the EC to intervene and what appropriate intervention might be. The EC should have asked, among other things, whether the U.S. remedy reduced the risk of competitive harm from the conduct at issue in the EC case or increased the cost of an additional remedy. Both the Supreme Court's decision in *Trinko* and then-Judge Breyer's decision in *Town of Concord* make clear that that would be expected under U.S. antitrust law.⁷

Beyond that, however, I don't think the EC had a responsibility to back off. The U.S. case did not raise the issues with which the EC was concerned. It did not raise an issue of interface disclosure or of interconnection between the operating system and complements. The remedy touched upon that, but the liability case did not. And there was no product-bundling case brought in the United States. Although all eight judges found that Microsoft's commingling of files had no proven justification and was anticompetitive, the U.S. did not challenge bundling as an element of its liability case. Its so-called tying claims were contractual in nature and had to do with restrictions on OEMs' efforts to remove the browser.

So, the only basis for backing off or deferring here would have been because of the U.S. remedy, and I don't think that provides much reason for deference. First of all, there is, in any antitrust case, a potentially wide range of equitable remedies, from very narrow ones that simply put an end to the illegal conduct, to very broad ones that conceptualize expansively the nature of the wrongdoing and prohibit any conduct of that type. One could have imagined in the U.S. case, for example, a remedy that conceptualized the wrongdoing as efforts to use desktop-operating-system market power to disadvantage complements. The U.S. remedy did not do that, probably for good reason. It did not, in other words, purport to occupy the field.

Moreover, it's just a remedy in the United States. Neither a consent decree nor even a litigated remedy establishes substantive antitrust rules. The remedy would not preclude a private lawsuit or a subsequent lawsuit by a previously non-litigating state because it does not change the substantive antitrust standard. It is simply a remedy for the proven claims of the plaintiffs in that case.

Dual enforcement is
inherently undesirable
... [but] we're
nowhere near a
system internationally
in which we can expect
one nation to back off
in favor of another.

—DOUG MELAMED

⁷ See *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990).

That is true in the U.S., where the underlying law in the original case is the same as that applicable to the later cases. And it is especially true where the underlying laws differ. As a substantive matter, EC law is not displaced by a U.S. remedy. So I think it was appropriate for the EC, mindful of the facts and the expertise of the United States, to proceed to apply its law, hopefully sound law, to the conduct that it was interested in.

Let me now turn to the substance of the EC decision. First, I don't know the facts; all I know is what I have read in the decision. So I can't argue about facts that aren't apparent from the decision. I think we should all have a certain skepticism about the EC's fact-finding. The EC is getting a lot better than it used to be, but it does not have the discovery tools or the fact-vetting tools, the hearing-type tools, that we're accustomed to in the U.S. Another caveat: I'm going to assume the EC got it right on market definition and determination of dominant position. There's nothing on the face of the opinion that leads me to think that's wrong. The decision is very fact-intensive. Rick alluded to facts I don't know about that may or may not cast doubt on the EC's conclusions, but I'm just going to assume those questions away.

I'm going to focus, then, only on the following question: Is the conduct that the EC found, and on which it based its finding of abuse of dominant position, the kind of conduct that would violate U.S. law or sound antitrust standards? My answer in a nutshell is this: I don't know. It might. There's nothing, in my view, on the face of the EC's decision or in principle that suggests that the EC got it wrong or that the conduct was not anticompetitive. It's the kind of conduct that could violate antitrust law. But we can't tell for sure because of the way the EC articulated its decision. It did not precisely address the issues that I think need to be addressed. In some respects, the EC opinion reflected a concern with matters that I think should not be given the weight the EC has historically tended to give them: concern about preserving a level playing-field and a tendency sometimes to give the back of the hand to efficiency. On the face of the decision, however, I don't think there's anything plainly unsound about the theories on which the EC relied.

Before I talk about the EC opinion, let me discuss what I understand to be the EC's legal standard. We're dealing here with exclusionary conduct, conduct that disadvantages non-consenting rivals of the defendant. In the U.S., exclusionary conduct has been much more difficult for antitrust law than collusive conduct because exclusionary conduct almost always involves a potential trade-off between benefits to the defendant and harms to rivals and thus raises the question of how antitrust should balance those competing factors.

It seems to me that in a broad sense, to oversimplify, there are three possible ways antitrust can deal with this problem. It could say that whenever the defendant can show any benefit from the conduct, it's home free. Microsoft made an argument along these lines in the U.S. case. That's not the law, and wisely so, because almost all exclusionary conduct has that property or potentially has that property. Tie-ins, for example, always have the benefit of transaction cost-savings and one-stop shopping. Surely that should not be the end of the tying analysis.

At the other extreme, antitrust law could focus on the consequences of the conduct in the market. It could ask, for example, whether the conduct created or is likely to create market power that might impose a cost to society that exceeds the benefits of the conduct. There are aspects of the EC decision and EC history, as I understand it, that suggest that that's what the EC was doing. There is some rhetoric in U.S. opinions that suggests that as well, but I don't think there are many holdings to the effect. The problem with that approach, of course, is that it could condemn building a better mousetrap. You can imagine an invention, for example, that gives a little bit of benefit to consumers and to economic welfare, but enables the defendant to gain a great deal of market power in the long run. And yet, our law would not condemn such an invention both because

there are likely to be too many false positives if the law were trying to weigh the long-run costs of market power costs against efficiencies and because, in the real world, actors, uncertain about how their conduct will be assessed in hindsight, would be afraid to be the kind of aggressive competitors the antitrust laws are intended to encourage.

Instead, U.S. antitrust law—wisely, in my view—takes a middle course. It asks a narrower question than what is the welfare implication of the defendant's conduct. It asks instead whether the defendant's conduct is competition on the merits. While the meaning of that term is not entirely clear, I think it comes down in most cases to the question, is this sensible business conduct that is profitable for the defendant without regard to its tendency to exclude rivals and thus facilitate supracompetitive recoupment? If the defendant is losing money—or sacrificing profits—in search of recoupment, then it's probably doing something anticompetitive, and vice versa. That is the principle on which the U.S. based its *Microsoft* case. And it is the principle embraced in *Trinko*, *Aspen Skiing*, and lots of other U.S. cases.⁸

So to me, the question is whether the conduct condemned by the EC in its *Microsoft* decision is anticompetitive in this sense. The EC defined abuse of dominance as having four attributes. They are ambiguous, but they could be construed to be consistent with sound antitrust principles. First, the EC says that abuse of dominance must be an objective concept related to behavior. In other words, liability does not turn on subjective intent or motive. Second, it involves conduct by a dominant firm that “influences the structure of the market.” This sounds like a market power screen. Third, it has “the effect of hindering competition in the market.” This sounds like *Brown Shoe* and other cases that require injury to competition in the market as a whole, rather than simply injury to an individual rival.⁹ So far, so good.

It's the fourth element that worries me: The conduct must be “different from that which conditions normal competition.” That could mean different from competition on the merits—some peculiar anticompetitive contrivance that would meet our so-called sacrifice or competition-on-the-merits test. But it could also mean that firms that are engaged in new and innovative forms of conduct are at a real disadvantage because their conduct does not look “normal.”

As the prior speakers have pointed out, the EC's decision had two components: the interconnection issue with the servers, and the bundling of the Media Player. I am more troubled by the bundling part of the decision than the interconnection part.

Subject to the caveats I mentioned earlier about not knowing the facts beyond what is stated in the decision, the interconnection part looks like it might be right. First of all, a firm with a monopoly position, as Microsoft was found to have in desktop operating systems, can violate U.S. antitrust law if it refuses to interconnect effectively with a rival provider of complements. That is what the *AT&T* case was all about.¹⁰ The hard question, of course, is whether the particular lack of comparably effective interconnection involves a profit sacrifice or rather promotes efficiency. Even monopolists have an incentive to let a thousand complements bloom because doing so increases the value of their monopoly product, so why would a monopolist disadvantage a complement? Why would Microsoft disadvantage Sun servers, for example? Well, it may be that Microsoft has no anticompetitive reason; because complements increase the value of the desk-

⁸ See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁹ See *United States v. Brown Shoe Co.*, 370 U.S. 294 (1962).

¹⁰ *United States v. AT&T Corp.*, 524 F. Supp. 1336 (D.D.C. 1981).

top, we might expect there to be a good efficiency story. The EC, however, found, plausibly to my eyes, that there were anticompetitive reasons why Microsoft would have wanted to disadvantage complementers in the server space. There were profit opportunities there that Microsoft could not realize simply through its desktop operating system and, in a way analogous to the government's theory in the U.S. case, Microsoft could build entry barriers to protect its desktop operating system monopoly by acquiring a dominant position in servers and thereby requiring two-level entry that would make it harder for rivals to attack its desktop operating monopoly. So I think it's perfectly plausible that Microsoft had anticompetitive incentives and was not refusing to interoperate for efficiency reasons. The EC noted other factors consistent with this conclusion, including that Microsoft had changed its practices with respect to interface disclosure over time when rivalry became important and that other operating-system firms, without plausible anticompetitive incentives, did not engage in similar conduct.

What the interconnection issue comes down to in large part is, as Rick said, the issue of intellectual property and incentives for innovation. The idea is that you don't want to make a successful firm give up the fruits of its labor or share them with its rivals because doing so reduces its incentive to invest in the first place and, under some circumstances, could reduce rivals' incentives to innovate as well.

This does not appear to be a compelling defense for Microsoft in this case. While I cannot be sure from the EC's decision, it looks to me as though Microsoft is being asked to share only interconnection know-how and software—not enough of its property, in other words, to enable rivals to clone a product and thus to diminish the value of Microsoft's innovations. So the IP or incentive risks here seem quite insubstantial. By contrast, the benefits of disclosing the information are better interoperability and thus more competition in servers. This could be a sound antitrust case.

I worry, though, about two aspects of it. First, as Rick pointed out, the EC noted that the U.S. decree required Microsoft to disclose its client-to-server "communication protocols" but said that that does not completely solve the problem because there are server-to-server and client-to-client protocols as well. It's not inconceivable that there is an antitrust story here about server-to-server protocols by themselves, but that it is a more complicated and more difficult story than the client-server story. It is probably very hard for Sun to sell the server if it cannot connect effectively with the desktop. But it is not clear why Sun cannot sell a whole constellation of servers, instead of having to connect with Microsoft servers. There might be an installed-base network effects story, but no such story was articulated by the EC. On the other hand, elsewhere in the opinion, the EC did talk about the need for rivals to know more than mere interfaces, to know the internal plumbing needed by the software operating system, in order effectively to interconnect and interoperate with the desktop operating system. So it's not clear that the EC was relying entirely on a server-to-server story in concluding that its remedy was needed, in addition to the U.S. decree, in order to prevent Microsoft from using its market power to injure server competition.

My second concern is that the EC did not expressly analyze the issue in terms of the costs and benefits to Microsoft—that is, by asking whether it would have made sense for Microsoft to refuse to license the interfaces to the server operating system vendors but for the prospect of supra-competitive recoupment. Frankly, though, few U.S. courts ask that question explicitly and rigorously, so we are often left to infer whether that is what's going on from less precise articulations of the facts.

Let me turn to the bundling issue. Here, too, I think that the EC might have gotten it right. But it's not clear. On the surface, this is an ordinary tying case. Two products, Media Player and a monopoly desktop operating system, are tied together, and Microsoft appears to be on the verge

of gaining market power in the tied-product market, the streaming market. But at every step in the case here, there are questions that I don't know the answers to.

In determining whether there were two products, the EC noted the D.C. Circuit's concern that the separate demand test for determining two products can be a backward-looking test, but it dismissed that concern with the observation that there are separate demands even four years after tying began. That's a pretty good answer. I wish, though, that the EC had articulated the better answer, which is that, if the test is whether there appeared *ex ante* to be sufficient demand that it would have been efficient and profitable for the defendant to provide an unbundled alternative in addition to the bundled alternative, then the separate demand test does not, at least in theory, have the problem that worried the D.C. Circuit. If the test is phrased that way—which is what I think the Supreme Court intended in *Jefferson Parish*¹¹—it is open to the innovator to show that it has a different kind of product and that it would be too costly to unravel it and try to satisfy what it reasonably predicts will soon be insubstantial demand. Microsoft might have prevailed if the question had been put that way.

I think the problem

here—to invert a

metaphor—is that the

EC got caught up in

the forest and lost

sight of the trees.

—DOUG MELAMED

I think the problem here—to invert a metaphor—is that the EC got caught up in the forest and lost sight of the trees. It should have asked what would the costs to Microsoft have been of offering an unbundled alternative? Were those costs sufficiently modest in comparison to the apparent predicted demand for the unbundled alternative that it would have been efficient for them to do so and efficient for the EC to require them to do so? The EC didn't ask that question. The EC notes a lot of evidence that beats around the question and suggests the answer might be yes, but I wish that they—and the U.S. courts—would be more rigorous in asking such questions so we could have more confidence that they're getting the right results.

Two other aspects of the separate-products issue warrant brief comment. The EC emphasized also on the two-product question that other operating-system vendors did not make their own media players, but rather provided media players offered by others. I don't understand the logic of that. That's a make-or-buy decision. An original-equipment spark-plug doesn't become a separate product if GM buys it from a vendor rather than making it in-house. On the other hand, Microsoft's argument that the users wanted some kind of media player with the operating system does not prove that they are only one product. *Jefferson Parish*, after all, dealt with tying of surgery to anesthesia services. I don't think there was a large demand for surgery without any type of anesthesia. The issue was whether there was demand for an alternative to the defendant's particular version of anesthesia.

Much of the EC's decision regarding injury to competition in the tied product market struck me as pretty good. The EC identified costs imposed on users who take the bundle because, once they have the Microsoft Media Player, they have increased support costs, testing costs, confusion, and the like if they try to substitute another media player. Rick disputes that as a matter of fact, but on the face of the opinion it seems plausible to me. Microsoft disputed similar concerns about browsers in the U.S. case, but all eight judges were persuaded that those were real costs.

The EC pointed out that Microsoft's share of users increased from 18 percent in 1999 to about twice that in 2002. That suggests a trend toward market power in the media space. That's not enough to show injury to competition. I disagree with Steve about that because just saying that the other guy is successful doesn't prove that he's successful on account of the allegedly anti-competitive conduct. But the EC also noted that Microsoft did not do well in the reviews of the

¹¹ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

products. I think there were eighteen reviewers, only two of which rated Microsoft best. If Microsoft is thought to have a mediocre product and yet its market share is rapidly increasing, one might suspect that it's getting there by something other than competition on the merits.

One possibility, however, is that Microsoft is gaining share because it has efficiencies in distribution. This is where I part company with the EC. The EC found injury to competition because bundling creates ubiquitous distribution for the Microsoft Windows Media Player. But that's an efficiency. That's just a benefit Microsoft is able to confer on consumers because of its economy of scope. So, too, with the network effects that were identified by the EC as a form of injury to competition. Here, I agree with Rick. In these two respects, complaining about ubiquitous distribution and network effects, I think the EC was portraying an old bad habit: a concern about preserving rivalry rather than focusing on efficiency. That's not a crazy instinct because, in the long run, rivalry brings us the benefits of competition. But if you believe, as I do, that we can't predict the long-run conditions of rivalry very well, it seems to me it's not a very sound basis for antitrust decision making.

JOE WINTERSCHIED: I'd like to double back and give each panelist an opportunity to give a brief reply.

RICK RULE: I didn't defend the U.S. decree, but I'm prepared to. First of all, as some people always fail to acknowledge, the violation that Microsoft was found to have committed was monopoly maintenance. If you look at the entire case, there was no claim that Microsoft had achieved its position on the desktop illegally. It had achieved it legitimately. So, it would not have been an appropriate remedy to essentially try somehow to deprive Microsoft of its position on the desktop. With respect to Web browsing, one part of the court of appeals' decision was the fact that the government never actually proved that there was such a market. I think as a practical matter, there is likely to be functionality that ultimately migrates down into the operating system as a platform service—I think that's arguably what happened with Web browsing, so it's not surprising that functionality became, as a matter of economics and practicality, an integral part of Windows.

With respect to media players, however, and the decree addressed it, my point is that I think the DOJ remedy, in fact, resolved any concerns that anyone should have. The government and the court actually looked at media players, took evidence on it. The fact is, it's very hard to say that integrating the media playback into the operating system inherently forecloses the ability of a third party like Real from marketing an application that does the same thing, just better. In fact, again, the statistics that all the major OEMs ship at least one other third-party media player suggests that rivals are not being foreclosed. Moreover, the difference between the facts at the time of the DOJ case and the EU case is the existence of the DOJ decree, which allows OEMs to remove end-user access to the Windows Media Player, so that only the plumbing is there. Basically, if OEMs or end-users want to put Real Network's or any other media player on a machine and provide access only to that media player, Windows now enables them to do that. I think that's why, even though Microsoft has done well, it has done well solely because of the ubiquity point that Doug made, as well as the quality of its media player.

That brings me to Doug's point with respect to tying. I guess I'm a little surprised that Doug would say, "Gee, it's a different case because it involved bundling and that wasn't the U.S. case." I've always presumed the reason that wasn't the U.S. case is because the U.S. understood that integration of new functionality in a technological product like an operating system should not in itself be attacked. The reason the government attacked the various contractual and distribution-

al restrictions is due to the fact, I thought, that they believed those restrictions, not bundling per se, were the source of the exclusion.

After the decrees removed the provisions found to be exclusionary, the only thing that's in the EU's case is the very fact of integration. To me, when you're talking about platform software, the entire history of which is integration of functionality into the platform—and this is true not just in desktop operating systems, but it's true in every type of platform software—functionality tends to gravitate into the platform and become a platform service when it is functionality used broadly by ISVs and designed to basically bring together other kinds of hardware. You see it gravitate towards the platform. That's beneficial and, if it gets ubiquitously distributed, that may give it an advantage in the platform, but it is not necessarily a foreclosure. To the extent you're concerned about it, you're concerned about an efficiency, as Doug mentioned.

Let me then move to the comments on interoperability and respond to Steve. I agree that interoperability was not part of the U.S. case. One can argue, for that reason, that maybe the U.S. should have deferred to the EU and allowed them to proceed against the interoperability issue and not put it in the consent decree. The U.S. government and the states decided otherwise and insisted that the interop provision be in the decree. But the notion that simply because Microsoft is able to charge RAND terms for the intellectual property that it's required to license somehow removes all concern about undermining innovation strikes me as very odd. It's pretty much a statement that there's nothing wrong with compulsory licensing, so why don't we just make everybody license? Because if it's not going to be a problem, aren't we better off with licensing and, if it's a valuable patent, let's just have a compulsory license and not worry about innovation. The reason that is wrong is it's very difficult for a patent holder to extract maximum value if compelled to license. At times the way one maximizes return is not by licensing but by incorporating the technology in a product and gaining a comparative advantage. The patent holder may not be able to obtain optimal licensing terms because of the transaction costs and other difficulties in a way to capture all of the rents. I think Steve would know this, given some of the difficulties that have arisen even in the DOJ decree. Once the government gets into the question of pricing and setting licensing terms, it becomes very administrative, there are a lot of costs involved, and the notion that compulsory licensing somehow approximates the market return of the intellectual property is just not borne out in the real world.

I think what it points out is the difficulty and the problem with the profit-sacrifice standard as a standard for judging conduct of monopolies or dominant firms. While theoretically it makes sense to distinguish subjectively when a monopolist is acting appropriately and inappropriately, it suffers the flaw of moving directly from the theoretical and assuming that you can develop operational rules based on that theory directly. And I think it's a standard that is prone to a lot of false positives. I think the *Microsoft* case and the decision of Judge Jackson is Exhibit 1 in that regard, because there was a failure to comprehend the benefits of integrating functionality into an operating system, why ISVs rely on that integration, and what the harm is if you basically try to remove that code, the harm to ISVs, the harm to consumers, the harm to OEMs.¹² I find it troubling that there are still very, very smart people like Doug who don't quite grasp that, and who think that Microsoft just put this functionality in Windows for no obvious profit motive because Microsoft didn't increase the price of Windows. Therefore, they conclude that the integration must have been designed to just exclude competitors. I think that's why the profit sacrifice test, as I have said on

¹² See *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (findings of fact) and 87 F. Supp. 2d 30 (conclusions of law).

numerous occasions and will continue to say to people like Doug, is just a bad test. I think the balancing, four step test that the court of appeals used is far better than a sort of profit sacrifice test which, again, the D.C. Circuit very explicitly rejected in that case.

STEVE HOUCK: Like Doug, I read the EC decision as very consistent with U.S. law. Some people criticize the EC decision because they think it wasn't respectful of intellectual property rights and the U.S. decision. I don't think that's true. Microsoft did, in fact, assert intellectual property defenses in the U.S. case, which were summarily dismissed by both the district court and the court of appeals. The reason for that, of course, is that intellectual property used to commit an antitrust violation is subject to compulsory licensing, divestiture, and other appropriate regulation. Finally, there is a lot of controversy in this country about what the broader ramifications are of the *Trinko* case, but the one thing that is clear, what's taught from *Aspen Skiing*, is that a company with market power cannot change its course of dealings with its rivals in an anticompetitive fashion without a procompetitive justification. I think the EC decision fits very squarely within that doctrine and I call your attention to recitals 584 through 589 where the EC explains how it was in Microsoft's interest for a while to facilitate interoperability with rival servers, and then recites how Microsoft changed its course of conduct.

DOUG MELAMED: I don't disagree that there might be a lot of benefits from integration. It is a fact question. I don't assume that integration is always a good thing or a bad thing. All eight judges who looked at the government's case found, and on rehearing reiterated, that there were no benefits shown from the commingling of browser files with the operating system, which was an important part of the U.S. tying case. That's a fact question. If Microsoft, which knows how it designed its system, can't come up with an explanation, I don't know why, as a matter of law, we should deem there to be efficiencies and have a legal test that doesn't allow courts to grapple with that question.

JOE WINTERSCHIED: To follow up on the appropriateness of deference, the effectiveness of the remedies imposed in the U.S. is hardly a clear-cut proposition if one looks back to the controversy surrounding the first consent, the ensuing contempt proceedings, and considerable debate as to the effectiveness of the second consent. Looking at that record, why should the EU necessarily defer? The U.S. has not necessarily been exemplary in terms of its being a model for the effectiveness of the remedy. At least it's not yet been proven on this most recent round.

RICK RULE: I always think one could argue that the best way to look at it is on specific anecdotes. For various reasons, not that it's made Microsoft very happy or that it hasn't caused a lot of pain and angst and cost to the company to have the decree, but I think that the decree is a good resolution to the case for everybody concerned. The issue to me is, if the jurisdiction that makes the most sense to look at a particular conduct draws certain conclusions and, as the United States and the states did in good faith here, reaches certain balances, it seems to me that in the interests of world commerce and repose and ultimately the credibility of antitrust enforcement, other jurisdictions should defer to the first jurisdiction unless they have specific interests in their own country that could not or were not explicitly addressed by the first jurisdiction. Now I agree, it may be a pipe dream.

DOUG MELAMED: Critics say that all the equitable remedies thus far have failed with Microsoft. It's possible that what they mean is that Microsoft is nevertheless becoming dominant in these mar-

kets. That could be for reasons unrelated to anticompetitive conduct. So it's a little bit glib to say the remedies failed. But even if they have failed, I think the most important inference is that equitable remedies in these kinds of cases are extremely difficult because, if they're going to be successful, they're probably going to be very costly and burdensome. And if we want to err, as I think DOJ did, and maybe wisely, to make sure that the cure is not worse than the disease, then we are often not going to have much of a cure. So one lesson we might draw is that the EC should have brought a case in order to impose its civil fine remedy because that, at least, has the prospect of being an effective deterrent on a going forward basis without the efficiency costs of a conduct remedy. The lesson might be, not that we need a more far-reaching conduct remedy, but that we need to rethink the whole idea of civil remedies. ●

A Brief Look at Recess Appointments

James O'Connell

On the morning of August 16, Federal Trade Commission (FTC) Chairman Tim Muris relinquished his position to return to academia and private practice. That same Monday morning, Jones Day partner and former Deputy Assistant Attorney General Deborah Majoras arrived at the FTC to take Muris's place as both Federal Trade Commissioner and Chair. Two weeks later, on August 31, Commissioner Mozelle Thompson left the FTC after nearly seven years of service. He was replaced on September 3 by Jonathan Leibowitz, a lobbyist for the Motion Picture Association of America and a former Senate Judiciary Committee staffer.

Although Majoras and Leibowitz were nominated several months ago by President George W. Bush, those nominations have not yet cleared the U.S. Senate. Instead, President Bush placed Majoras and Leibowitz on the FTC by exercising his power to appoint senior government officials during Senate recesses. With two of the five members of the FTC now serving as "recess" appointees—one of them the new Chair—many in the antitrust bar have been turning to their old constitutional law case books to figure out exactly what recess appointments are. In this article I will attempt to shed some light on the practice.

The Majoras and Leibowitz Nominations

Nominees to the FTC must generally be confirmed by the Senate before being appointed. However, Commissioners Majoras and Leibowitz did not assume their new duties with the blessings of that body, due largely to the parliamentary maneuvers of Senator Ron Wyden (D-OR).

Senator Wyden, a longstanding critic of the FTC's handling of mergers in the petroleum industry, has blamed this year's spike in gasoline prices, in part, on what he has described as the agency's lax oversight. Leibowitz, a Democrat, and Majoras, a Republican, were nominated by President George W. Bush on April 8 and May 11, 2004, respectively. In early summer Senator Wyden said he intended to place a "hold" on both nominations until his concerns about the lack of intense civil antitrust oversight by the FTC were addressed to his satisfaction. Under Senate rules, such a move would have prevented the Senate from debating the nominations once they had cleared the Senate Commerce Committee, which has oversight responsibility for the FTC.

The nominations did not even get that far. Committee Chairman John McCain (R-AZ), who had intended to hold a vote on the nominations early on the morning of July 22, before the Senate broke for its annual August recess, agreed to postpone the committee vote for a few hours as a courtesy to Senator Wyden, who had asked for additional discussion and debate time. When Chairman McCain brought the nominations up for a vote later that day, Senator Wyden invoked the Senate's rarely used "2-hour rule," which can force an end to a committee meeting that has lasted longer than two hours when the Senate is in session. An angry Senator McCain gavelled the committee meeting to a close, and the Senate departed the capital with the Majoras and Leibowitz nominations still on the table.

■ **James O'Connell** is Counsel to the Assistant Attorney General at the Antitrust Division of the U.S. Department of Justice. The views and opinions expressed herein are solely those of the author and do not represent the official position or policies of the U.S. Department of Justice.

Article II of the Constitution authorizes the president to appoint “officers of the United States” with the “Advice and Consent of the Senate,” but it also confers power to the president to fill vacant government posts when the Senate is in recess. The Senate’s inaction left the door open for President Bush to fill the two FTC slots—and eighteen other vacant government positions—by making such “recess appointments.” Although very closely watched by members of the antitrust bar, neither the Majoras/Leibowitz nomination saga nor their respective recess appointments garnered the same degree of press and public interest as similar battles over judicial nominations, such as President Bush’s recess appointment in January 2004 of Charles Pickering to the Fifth Circuit Court of Appeals. However, the power exercised by the president in both situations is the same, and because all recess appointments bypass the Senate’s cherished advice and consent process, so is the potential for controversy.

A Brief History Lesson

The nation’s federal judges, ambassadors, and senior government officials—including Federal Trade Commissioners—may be nominated by the president, but technically they are appointed jointly by the president and the Senate.¹ While the extent of the Senate’s “advice and consent” role is often the subject of heated debate, the question of whether the Framers intended the Senate to play some role in the appointment of judges and senior government officials is not.

However, there is more to Article II than the “Advice and Consent” clause. The next clause states that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”² What did the Framers have in mind when they committed those words to parchment? Neither the records of the Constitutional Convention nor other sources, such as *The Federalist Papers*, provide much guidance—although the latter do note that the clause “authorize[s] the president, Singly, to make temporary appointments” when “it might be necessary for the public service to fill [vacancies that might happen during the Senate’s recess] without delay,” and that it should be considered a “supplement” to the Appointments Clause.³

This absence of either discussion or debate arguably supports the view that the recess appointment power was intended to be a simple solution to a practical problem, and a power to be exercised only when necessary. The thinking may simply have been that the president should not have to put up with vacancies at the highest levels of government while waiting for the Senate to assemble and consider nominees. Such a rationale may not make much sense in the early 21st century—when the Senate is in session on and off throughout the year, rapid transportation is readily available, and communication instantaneous—but the clause no doubt appeared far more practical in the late 18th century.

When the Constitution was drafted, short legislative sessions and long recesses were expected to be the norm, and even journeys of limited distance were significant undertakings. The early Senate was routinely in recess for most of the year, and its brief sessions were sometimes delayed because travel conditions made it difficult for enough Senators to arrive in the capital to assem-

¹ U.S. CONST. Art. II, § 2, cl. 2 (The president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court and all other officers of the United States . . .”).

² U.S. CONST. Art. II, § 2, cl. 3.

³ See *Staebler v. Carter*, 464 F. Supp. 585, 596–97 (D.D.C. 1979) (discussing THE FEDERALIST No. 67, at 455 (Alexander Hamilton) (Wesleyan ed. 1961)).

ble a quorum. Although travel conditions improved throughout the 19th century, the country—and the distances that Senators had to travel—continued to expand. Until the early 20th century, moreover, Congress was in recess for about half of every year.

Today, of course, Congress meets for longer periods throughout the year, with shorter recesses, so regardless of the Framers' original intent it would be difficult to argue that presidents make recess appointments primarily because of scheduling concerns, or in emergencies.⁴ However, neither the use of the power for political rather than practical reasons, nor the controversy such appointments can cause, is new. A good example of the latter can be found near the start of the republic.

President George Washington, who made a total of nine judicial recess appointments during his two terms,⁵ caused a political firestorm with his recess appointment of John Rutledge to the Supreme Court. In 1795, when Chief Justice John Jay resigned to become governor of New York, Washington appointed former Associate Justice John Rutledge to fill the vacancy during a Senate recess. The hot political issue of the day was Jay's Treaty of 1794 with Great Britain, which resolved disagreements that had festered since the signing of the Treaty of Paris in 1783. Although the treaty was immensely unpopular with the public, it was ratified by the Senate in June 1795 with the support of the Washington Administration, shortly before the Rutledge recess appointment. Several weeks later, Rutledge gave a speech in which he stated that he would rather see President Washington dead than see him sign the recently ratified treaty. The Washington Administration maintained Rutledge's appointment in the face of the resulting uproar, but the new Chief Justice's views were too much for the Senate, which rejected his permanent appointment in December 1795.

Although recess appointees are rarely so controversial, presidents often use the power to install temporarily nominees who are unable to win Senate approval. For example, a president may fill a vacancy with a recess appointee in order to delay a confirmation vote until after an election, when the nominee will have the advantage of facing a potentially altered political landscape as an incumbent. This may have been the thinking behind President Eisenhower's appointments of Justices William Brennan in October 1956 and Potter Stewart in October 1958. Although a riskier strategy politically for both president and nominee, presidents may also use the recess appointment power to install those who enjoy the support of a majority of the Senate but whose nominations cannot be brought to the floor for a vote because of the parliamentary maneuvers of the opposition. Such maneuvers can run the gamut from large scale filibusters, as in the case of the Pickering nomination, or single-Senator tactics, such as those employed by Senator Wyden to block the Majoras and Leibowitz nominations.

⁴ See, e.g., *Staebler*, 464 F. Supp. at 597 (“[T]here is nothing to suggest that the Recess Appointment Clause was designed as some sort of extraordinary and lesser method of appointment, to be used only in cases of extreme necessity.”).

⁵ SUART BUCK, ET AL., THE FEDERALIST SOCIETY, JUDICIAL RECESS APPOINTMENTS: A SURVEY OF THE ARGUMENTS 8–9 (Jan. 2004) [hereinafter *FS Survey*], available at <http://www.fed-soc.org/pdf/recapp.pdf>. Both the *FS Survey* and a report by the Congressional Research Service, *infra* note 13, provide excellent overviews of the practice and history of judicial recess appointments, including topics not discussed here, such as the potential conflict between the recess appointments clause and section 1 of Article III, as well as the interesting question of whether salaries may be paid to recess appointees. See, e.g., *FS Survey, supra*, at 4–6 (potential Article II/Article III conflict) and 11–12 (payment).

The Recess Appointments Clause

Whatever the Framers' original intent, the recess appointment power today is considered a reasonable and constitutional tool that enables the president to counter undemocratic Senate intransigence or inaction. Or, it has been twisted by unreasonable presidents into a scurrilous means of circumventing the democratic process and the constitutionally appointed advice and consent powers of the Senate. It depends on whom you ask, and when you ask them.

But aside from political considerations, are there limits to the president's recess appointment power? For example, are vacant positions always "Vacancies"; when is a recess "the Recess"; and what exactly does it mean for a vacancy to "happen"? As some law school professors are inclined to say: Let's take a moment to unpack the clause.

"The President shall have the Power to fill up all Vacancies . . ." The last word of that excerpt has occasionally caused problems. What, exactly, is a "vacancy" under the recess appointments clause? If a judge with life tenure resigns or dies while in office, the position becomes a vacancy. Similarly, if a holder of a term position on a regulatory board or commission resigns before or upon the end of a term, the position moves into the "vacancy" column. Those are easy. What if despite the expiration of an incumbent's term the incumbent has not—or will not—go gently into that good night? Must the office be empty, the desk drawers cleared out, the pictures with the powerful taken off the walls, and the farewell cake consumed before the position is truly a "vacancy"? The answer, as perhaps should be expected, is "maybe."

The answer is "maybe" because the statutory language that creates a term position often includes a "hold-over" provision that permits or even requires the outgoing office-holder to remain in the post upon the expiration of a term until a replacement arrives. For example, the Federal Trade Commission Act states that "upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified."⁶

The question of whether a position is truly "vacant" if it remains occupied under a hold-over provision has not been resolved definitively by the courts,⁷ although presidents have long interpreted hold-over provisions as not conflicting with their recess appointment power, and Congress has never objected to the practice.⁸ The limited case law suggests that a president cannot use the recess appointment power to fill a term position if the incumbent's term has not expired, or if the incumbent remains in office pursuant to a mandatory holdover provision, unless the incumbent resigns or is removed.

Why might this be relevant? Majoras was appointed to a position that had been vacated by her predecessor before his term had expired—albeit shortly before she was sworn in. However, it is worth noting that the FTC Act's hold-over provision is mandatory, and that it contains the "appoint-

⁶ 15 U.S.C. § 41(1). The Securities Exchange Act of 1934 is similar. *See* 15 U.S.C. § 78d(a) ("Each [SEC] commissioner shall hold office for a term of five years and until his successor is appointed and has qualified.").

⁷ *Compare* *Wilkinson v. Legal Servs. Corp.*, 865 F. Supp. 891, 906 (D.D.C. 1994), *rev'd on other grounds*, 80 F.3d 535 (D.C. Cir. 1996) ("expiration of a statutory term of office, therefore, does not create a 'vacancy' that requires application of the Recess Appointments Clause" if relevant hold-over provision requires departing official to remain until replaced), *and* *Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), *vacated in part as moot*, 1994 WL 163761 (D.C. Cir. 1994) (no vacancy on U.S. Postal Service Board of Governors if holdover provision, which permits a Governor to continue to serve for up to one year after expiration of his term until "his successor has qualified," applies), *with* *Staebler*, 464 F. Supp. 585 (FEC vacancy occurs upon expiration of a Commissioner's term, not when the Commissioner loses the right to remain in office pursuant to Federal Campaign Act's hold-over provision by virtue of the appointment and confirmation of a successor).

⁸ *See* *Staebler*, 464 F. Supp. at 594.

ed and qualified” language that some courts have equated with a requirement that the replacement be confirmed by the Senate.⁹

“that may happen during the Recess of the Senate . . .” Two distinct questions: What exactly does it mean for a vacancy to “happen during [a] Recess,” and when is a recess “the Recess”?

The first question is potentially the more difficult of the two. One could interpret the words “that may happen during the Recess . . .” to reach only vacancies that “happen to occur” during a recess. Under such a reading, the president could only use the recess appointment power to fill positions that become vacant while the Senate is in recess. However, while such a narrow interpretation may be reasonable on its face—especially when one remembers that the early Senate was in recess far more often than it was in session, and that vacancies were therefore far more likely to occur during recesses—it has been rejected by attorneys general since at least 1823, when Attorney General William Wirt advised President Monroe that it should be

perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission.¹⁰

Subsequent attorneys general have agreed with AG Wirt’s opinion in a variety of situations.¹¹

When the Constitution was written—when horse-drawn coaches and mule-pulled barges were state of the art—a president may have had to wait a long time for a quorum of senators to assemble to consider nominations. It seems inconceivable that the Framers would have intended the president’s recess appointment power to apply to vacancies that come about one day into a lengthy Senate recess, but not to those that occur one day prior to the start of the recess. Instead, the consensus view is that the provision applies to all vacancies that “happen to exist” during a Senate recess, i.e., to those that either (a) come about while the Senate is in recess, or (b) existed prior to the recess and were not filled before the Senate left town. This interpretation has been widely accepted by the courts.¹²

On to the second question: Does any break in the Senate’s legislative calendar qualify as “the Recess of the Senate” sufficient to trigger the president’s recess appointment power? Over two centuries of tradition and precedent suggest that the answer is “not quite.”

⁹ Compare *Wilkinson*, 865 F. Supp. at 900 (“The plain meaning of [‘appointed and qualified’] is that [the outgoing Director] remains . . . until the new Director has been ‘appointed’ by the President and ‘qualified,’ i.e., confirmed by the Senate.”), and *Mackie*, 827 F. Supp. at 58 (equating “successor has qualified” with “nominated by the President and confirmed by the Senate”), with *Swan v. Clinton*, 100 F.3d 973, 986 (D.C. Cir. 1996) (taken together, “appointed and qualified” may mean “appointed and confirmed,” but “a more natural reading of ‘qualified’ on its own would have it mean that the requirements for assuming office have been fulfilled, which could be either by nomination with Senate confirmation or by recess appointment.”), and *Nippon Steel Corp. v. United States Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1376–81 (C.I.T. 2002) (“appointed and qualified” means either appointed by the President and confirmed by the Senate, or appointed by the President pursuant to the recess appointments clause).

¹⁰ 1 Op. Att’y Gen. 631, 633 (1823).

¹¹ See, e.g., 12 Op. Att’y Gen. 449 (1868) (vacancy occurring during a Senate session but recess appointment to fill it made during a later recess); 41 Op. Att’y Gen. 80 (1960) (same). See also 2 Op. Att’y Gen. 525 (1832) (vacancy occurring during a recess and Senate failing to confirm regular non-recess nomination before next recess); 19 Op. Att’y Gen. 261 (1889) (same).

¹² See, e.g., *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985) (narrow interpretation “would lead to the absurd result that all offices vacant on the day the Senate recesses would have to remain vacant at least until the Senate reconvenes”); *United States v. Allocco*, 305 F.2d 704, 710 (2d Cir. 1962) (“happen” means “‘happen to exist’ because only that definition recognizes the continuing nature of the state of vacancy, and accords with the true purpose of the recess power provision”).

Presidents have long made recess appointments during both “inter-session” (between sessions of a single Congress, or between individual Congresses) and “intra-session” (during a single session of Congress) recesses, although the latter have occasionally been questioned. Intra-session recesses were themselves rare prior to the mid-19th century, when shorter congressional sessions perhaps made them less necessary (and the difficulties of travel perhaps made them less practical). In 1867 Congress broke with this tradition and scheduled two intra-session recesses that lasted from March 30 to July 3, and from July 20 to November 21, during which President Andrew Johnson made fourteen recess appointments. Although eleven other presidents have made nearly three hundred intra-session recess appointments since then, only two—one each by Presidents Warren Harding and Calvin Coolidge—were made prior to the 1940s.¹³ Indeed, in 1901 Attorney General Philander C. Knox—the architect of the *Northern Securities*¹⁴ case (and the subject of a portrait that hangs prominently in the Antitrust Division’s main conference room)—advised President Theodore Roosevelt that an intra-session holiday adjournment was merely a temporary suspension of business and not “the Recess” contemplated by the recess appointments clause.¹⁵

Although Knox’s view was rejected by later attorneys general,¹⁶ the argument that intra-session recess appointments are unconstitutional is still made from time to time. For example, it is a central argument in the amicus brief that Senator Edward Kennedy (D-MA) has filed in support of a challenge to the constitutionality of President Bush’s February 2004 intra-session recess appointment of William Pryor to the Eleventh Circuit Court of Appeals. However, the few courts that have been called upon to examine the question have consistently upheld the legitimacy of intra-session recess appointments.¹⁷

If an intra-session recess is just as good as an inter-session recess, how long must either be for the appropriate exercise of the recess appointment power? Or, to put it another way, how short is too short?

Never one for moving gently when moving aggressively would do just as well, President Theodore Roosevelt once made appointments during an inter-session recess that lasted less than a day. As in so many other areas, however, whether Roosevelt’s actions would be considered aggressive today depends upon whom you ask. The modern consensus is that recesses that are longer than thirty days—such as the August 2004 recess during which both Majoras and Leibowitz were appointed—are clearly sufficient. However, President Bush appointed William Pryor to the Eleventh Circuit during an eleven-day intra-session recess in February 2004, and former Presidents Bush and Clinton filled vacancies during similarly brief recesses (twelve days in the case of former President Bush, ten days for former President Clinton). It is also worth noting that although no president has made a recess appointment during a recess that was shorter than

¹³ CONGRESSIONAL RESEARCH SERVICE, RECESS APPOINTMENTS: FREQUENTLY ASKED QUESTIONS 4 & n.7 (Sept. 10, 2002) [hereinafter *CRS Report*], available at <http://www.senate.gov/reference/resources/pdf/RS21308.pdf>.

¹⁴ *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

¹⁵ See *FS Survey*, *supra* note 5, at 8–9.

¹⁶ See *id.* at 9 (discussing AG Harry Daugherty’s advice to President Harding, 33 Op. Att’y Gen. 20 (1921) (“The question . . . ‘is whether in a practical sense the Senate is in session so that its advice and consent can be obtained.’”)).

¹⁷ See *Nippon Steel Corp. v. United States Int’l Trade Comm’n*, 239 F. Supp. 2d 1367, 1374 n.13 (C.I.T. 2002) (“The Court is aware that the making of appointments during an intrasession recess is not without controversy. The long history of the practice (since at least 1867) without serious objection by the Senate, however, demonstrates the legitimacy of these appointments.”); *Gould v. United States*, 19 Ct. Cl. 593, 595 (Ct. Cl. 1884) (“We have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned [during an intra-session recesses] could be and was legally filled by appointment of the President alone [pursuant to the recess appointments clause].”).

ten days in over twenty years,¹⁸ the Department of Justice has expressed the opinion that an eighteen-day recess is sufficient,¹⁹ and that any recess longer than three days might be of sufficient duration to trigger the recess appointment power.²⁰

“by granting Commissions which shall expire at the End of their next Session.” The precise meaning of the phrase “End of their [the Senate’s] next Session” is not defined within the recess appointment provision. However, it has long been accepted that a recess appointment made by the President during the first session of a Congress, or between the first and second sessions of a Congress, lasts until the end of that Congress’ second session. Recess appointments made during the second session of a Congress, or between Congresses, expire at the end of the first session of the next Congress. In all such cases, recess appointments terminate when the Senate adjourns *sine die*.²¹ Alternatively, of course, a recess appointment is terminated if and when someone—either the recess appointee or someone else—is nominated by the president, confirmed by the Senate, and formally appointed to fill the position.

For example, the Majoras recess appointment was made during a Senate recess that occurred during the second session of the 108th Congress. Therefore, Chairman Majoras’s “Commission” will expire (a) at the end of the first session of the 109th Congress, in late 2005, (b) when she is re-nominated by the president and confirmed by the Senate, or (c) when someone else is nominated by the president for the position and confirmed by the Senate, whichever comes first. Commissioner Leibowitz, who was appointed during the same recess, faces an identical clock.

Conclusion

The practice of filling vacancies by executive fiat during Senate recesses is often controversial. The degree of controversy, and the political price paid by both president and appointee, are a function of the office that is being filled, the level of Senate support for the appointee, and the reasons behind the failure of the original nomination to clear the Senate. For example, although the recent recess appointments to the FTC may have displeased Senator Wyden, by far the loudest protests result from judicial recess appointments that are made in the face of multi-Senator filibusters—which, perhaps not coincidentally, are increasingly rare. Controversial though it may sometimes be, the president’s power under Article II to fill vacancies during Senate recesses is unquestionably constitutional, and its use for both practical and political reasons is as old as the republic itself. ●

¹⁸ See *CRS Report*, *supra* note 13, at 4.

¹⁹ See *FS Survey*, *supra* note 5, at 10 (citing *Recess Appointments During an Intrasession Recess*, 16 Op. OLC 15 (Jan. 14, 1992) (noting appointments that were made by Presidents Reagan and Coolidge during eighteen- and fifteen-day intrasession recesses, respectively)).

²⁰ See *CRS Report*, *supra* note 13, at 3 (citing *Mackie v. Clinton*, Civil Action 93-0032-LFO (July 2, 1993)).

²¹ See *Recess Appointments*, 41 Op. Att’y Gen. 463 (1960) (noting that the commissions of officers appointed during a Senate recess “will continue until the end of that session of the Senate which follows the final adjournment *sine die* of the second session of the 86th Congress”); *Authority of the Attorney General to Make Successive Designations of Interim United States Marshals*, 17 Op. O.L.C. 1 n.3 (Jan. 19, 1993) (the “next Session” language in the Recess Appointments Clause refers to “the adjournment *sine die* of the session of the Senate for the first session of Congress that begins after the designation was made”); *Recess Appointments Issues*, 6 Op. O.L.C. 585, 586–87 (Oct. 25, 1982) (“a recess appointment made during an intrasession recess expires upon the adjournment *sine die* of the session of Congress which follows the adjournment *sine die* of the session during which the intrasession recess occurs.”). See also *CRS Report*, *supra* note 13, at 2.

Perspectives on *Empagran*

Editor's Note: On July 23, 2004, shortly after the Supreme Court decided *Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004), the Sherman Act Section 1 and Sherman Act Section 2 Committees of the ABA Section of Antitrust Law sponsored a Brown Bag luncheon to analyze the Court's decision. Because of the importance of the case and the complexity of the decision, we are publishing the edited presentations of several of the commentators in this issue of The Antitrust Source. The commentators are: Edward Swaine, Associate Professor of Legal Studies, the Wharton School, and Associate Professor of Law, University of Pennsylvania Law School; Thomas C. Goldstein; Goldstein & Howe P.C., Counsel for Respondents; and Jonathan S. Franklin, Hogan & Hartson L.L.P., Counsel for Amicus Curiae the Business Roundtable in Support of Petitioners.

—ANNE RODGERS

EDWARD SWAINE: The *Empagran* case was a private suit brought by foreign (and, originally, domestic) purchasers of bulk vitamins who claimed that U.S. and foreign vitamin manufacturers and distributors engaged in a price-fixing conspiracy that resulted in higher prices for U.S. and foreign purchasers. As is often the case, there was a government action in the background. One of the co-conspirators sought amnesty and cooperated with the U.S. Department of Justice; that investigation ultimately resulted in plea agreements with twelve corporate defendants and thirteen individual defendants and fines of nearly a billion dollars. Equally substantial fines were imposed overseas, where the matter came before antitrust authorities in the European Union, Canada, Australia, and Korea. U.S. purchasers subsequently began private actions and the settlements reportedly exceeded \$2 billion.

Proceedings in *Empagran* itself were framed by several key circumstances—some factual in nature, and one potentially more artificial—relating to geography. The plaintiffs that remained in the suit were all foreign firms. Their transactions took place outside the United States, and their injuries were suffered abroad. To be sure, the price fixing involved was thought to have significant effects both within and outside the United States. But the D.C. Circuit and the Supreme Court each assumed that these effects were independent of one another—that is, that the same conduct led to higher U.S. prices and independently led to higher fixed prices outside the United States—although the plaintiffs offered to show a closer relationship.

Thus framed, the case touched on an unresolved issue involving the Foreign Trade Antitrust Improvements Act (FTAIA). The FTAIA provides generally that the Sherman Act does not apply to conduct involving “trade or commerce . . . with foreign nations.” But there is an exception: The Sherman Act *does* apply if conduct has a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce and such effect “gives rise to a claim” under the Sherman Act. The D.C. Circuit and the Supreme Court grappled with the specific question of whether the plaintiffs’ claim must stem from the selfsame U.S. effects, or whether it is enough that some other claims do so, such that “a [U.S. effects-based] claim” enables jurisdiction over independent foreign injury claims. The circuits had split on this question. The Fifth Circuit had held that a foreign injury independent of U.S. effects was not actionable (that is, the U.S. effect had to be the basis for the

claimed injury). The Second Circuit had held that independent foreign injury was actionable. In the decision on review in *Empagran*, the D.C. Circuit weighed in, holding that independent foreign injury was actionable at least so long as the predicate U.S. effects were sufficient to give rise to a private U.S. claim (that is, not simply a governmental enforcement action). The D.C. Circuit based its decision on the language of the FTAIA, its legislative history, and the view that the Sherman Act's purposes would be advanced by permitting a greater recovery.

On review this past Term, the Supreme Court held that the D.C. Circuit was incorrect. The Court held initially that the FTAIA exclusion applied not only to export trade but also to transactions within, between, and among other nations. More significantly, the Court held that, by virtue of the FTAIA, the Sherman Act does not apply to independent foreign injury. Its reasoning was perhaps more surprising than its conclusion. First, it held that ambiguous statutes should be construed so as to avoid unreasonable interference with the sovereign authority of other nations; Congress might have anticipated some impact of U.S. antitrust laws on foreign sovereigns, the Court supposed, but it was presumptively unreasonable to apply U.S. law to claims based on foreign conduct causing independent foreign harm. In the Court's view, it was insufficient to answer that foreign antitrust laws prohibited similar conduct, particularly since nations differ about appropriate remedies. The Court also rejected as too complex any case-by-case approach to assessing the impact of jurisdiction on international comity.

Second, the Court took the view, based on the language of the FTAIA and its legislative history, that Congress did not want to expand the Sherman Act's scope with respect to foreign commerce. In this connection, it reviewed pre-1982 judicial precedents and held that they failed clearly to establish any right to relief to private plaintiffs under comparable conditions. The Court also rejected the plaintiffs' textual arguments that the FTAIA speaks generally in terms of "conduct"—and does not, consequently, support distinctions based on particular transactions, nor on the type of plaintiff—and that the FTAIA demanded only that conduct's domestic effect give rise to "a claim," not to "the plaintiff's claim." Even if the plaintiffs might have shown the more natural reading of the statute, the Court added, the basic intent of Congress was otherwise, and policy considerations—like the need to encourage defendants to seek government amnesty—at least mitigated the argument in favor of enhancing private deterrence.

The Court concluded by remanding for further proceedings, noting that the plaintiffs offered to show that higher price effects in the U.S. were in fact necessary to maintain international price fixing. Subsequently, the D.C. Circuit ordered briefing on the question of whether this alternate theory had been preserved and whether there was in fact sufficient linkage between the domestic and the foreign effects.

Although my primary purpose here is to provide a brief background on the controversy in *Empagran*, let me also offer briefly three reasons for why I think the Court's opinion, regardless of whether its basic result is right, was poorly done. First, it endorsed—without explanation—an approach to international comity that was facially inconsistent with the majority opinion in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), and even with this Term's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004). Second, it eschewed a focus on statutory language for a rather non-conventional (to the modern ear, at least) attention to congressional intent and legislative history—but without coming to grips with the detailed arguments presented by both sides on those questions.

Third, it failed to resolve any but the most extreme and easiest instances of foreign claims—that is, those claims that are completely estranged from U.S. effects, on which it is easiest to reach a view—and licensed a standardless inquiry into the relationship between antitrust markets. This will

*I think the Court's
opinion, regardless of
whether its basic result
is right, was poorly
done.*

—EDWARD SWAINE

likely bedevil the lower courts and, more significantly, defeat the objectives the Court identified: namely, reassuring foreign nations that their sovereign interests (in *reducing* antitrust enforcement, at least) will be respected, and clarifying for wrongdoers their potential liability (by *reducing* that potential liability, as it happens) and thus facilitating the Justice Department's amnesty program. When lower courts must decide, according to their own lights, whether there is a sufficient link in any given case, in any given set of markets, between foreign and domestic claims, any enhanced certainty is purely a fortuity. For these reasons, among others, *Empagran* will likely have far less impact, for better or for worse, than will the recently enacted Antitrust Criminal Penalty Enhancement and Reform Act, which increased the Justice Department's leverage against potential defendants. It may be regretted, however, that the Court's analysis provides little room for taking such developments into account, and does so little to ensure the proper balance between U.S. and foreign antitrust efforts.

THOMAS C. GOLDSTEIN: I argued the case on behalf of the plaintiffs.

I will give my bottom-line sense of what I think is up with the case and where the courts will go. I'll then talk briefly about procedure, and then get into slightly more detail about what it is that I think the Supreme Court was trying to do and what it accomplished.

The bottom line is that the case has good things for a defendant and good things for some plaintiffs. I think it did good things for defendants in that there is now a categorical rule that eliminates the least tenable cases under the FTAIA and the Sherman Act: the ones that describe no relationship between injuries in the United States and the foreign injury. That is to say, those cases allege that there was an international conspiracy and then that's good enough to bring claims that arise overseas in the United States.

That kind of case is now completely out of the question; and I think there were cases pending that had allegations like that. As I'll discuss in a second, I think that's how the Supreme Court conceived of the Fifth Circuit *Den Norske* decision. See *Den Norske Stats Oljeselskap As v. HerreMac Vof*, 241 F.3d 420 (2001), *cert. denied*, 534 U.S. 1127 (2002). I don't think anybody seriously thought those claims could be brought. "Anybody" is an overstatement, but I think, based on some doctrines that I'll discuss, that the *Empagran* lawyers certainly never thought that it was sufficient that you simply had the international conspiracy.

And I also said that I think that there are things in the *Empagran* ruling favorable to plaintiffs. I think it's a little too early to tell exactly how pro-plaintiff the ultimate rule will be. But I would certainly say that this decision is favorable to the *Empagran* plaintiffs. "Favorable" is a loose term—that is not to say that we won. We recognize that we didn't, we didn't ask for a judgment, and we're actually paying the defendants' costs in the Supreme Court. We recognize that the word "reverse" has certain negative connotations for the prevailing party. But for reasons that I'll describe—including the fact that we conceded it in both our brief and in oral argument—the rule that the Supreme Court adopted was right. We sincerely believe that our claim fits within the set of cases that the Supreme Court—or the D.C. Circuit—will say are okay.

I said that I would talk about where the case goes from here. There is a briefing order in the D.C. Circuit. We see the case proceeding in three parts. The first is the threshold question that's raised by a sentence in the defendant's reply brief and then a sentence in Justice Breyer's unanimous opinion for the Court: whether or not we've preserved the question of whether we have a claim in which our injury overseas is interrelated with the injury that occurred in the United States. The D.C. Circuit's briefing order goes to the procedural question. Those are relatively short briefs that are due relatively soon.

The second thing that I think will happen is that the D.C. Circuit will conclude that we have preserved that claim. Maybe not, but I think there are an awful lot of arguments that say we have. Then the court will turn to the question of what degree of relationship is required. It is concerned, I think, with whether or not they should decide that question, or whether the district court should decide that question in the first instance. I think our view will be, although we haven't come to a firm conclusion, that the D.C. Circuit ought to decide the question of law. Is it "but for" causation? Is it something else? How intrinsic does the injury to the United States have to be for it to be said that it gave rise to the injury overseas?

Third, once that standard is set (which won't determine if anybody wins or loses), the district court will likely decide as a matter of fact whether or not we satisfy the standards that the court of appeals sets. That is all a prelude to some other things that will happen in the case. No doubt, the defendants will move to dismiss, assuming we get over all that—on forum non conveniens grounds, on personal jurisdiction grounds, and then on the merits—although we think the guilty pleas are a good sign that we'll win the merits.

Now, what did the Supreme Court think it was doing? I personally agree, as a matter of literary criticism, with those who think that the opinion is really kind of weird. But if we look behind it at what it is the Supreme Court thought it was doing, it thought it was resolving a circuit split between the Fifth Circuit's *Den Norske* decision and the D.C. Circuit's ruling that "a claim" meant "any person's claim."

You can look at the *Den Norske* decision in a variety of different ways. I should say I represented the plaintiffs in the Supreme Court in *Den Norske*, along with Seth Waxman, unsuccessfully seeking certiorari in that case. There were heavy-lift barges around the world and you don't send a heavy-lift barge from the Gulf of Mexico to the Arabian Peninsula. They sort of stay where they are. They weigh as much as Washington, D.C.; they are stuck there. The Fifth Circuit emphasized that the injury to people in the Gulf of Mexico—that is to say, within the United States—didn't have much to do with the injury that happened to people in Europe. There was an international conspiracy but not an interrelated market.

I believe that the Supreme Court thought that the D.C. Circuit's decision that any person—a characterization of the phrase "a claim"—injured overseas could bring a claim so long as somebody was hurt here was in conflict with the Fifth Circuit's decision, and resolving that conflict is all that the Supreme Court believed it was doing. In that scenario, the Court said that the Fifth Circuit had it right, and what it characterized as the D.C. Circuit's decision was wrong. So the Supreme Court conceived of our case as people in Ecuador or Panama, for example, free riding on the claims of people injured in the United States. So somebody was hurt by this international price-fixing conspiracy by purchasing bulk vitamins in Maryland and that was sufficient for somebody in Ecuador to sue. The Supreme Court said, when you have a complete failure to have a relationship between the U.S. and abroad to support injury, you can't bring such a claim. That's perfectly sensible. Even though, interestingly, Justice Breyer thought that perhaps the D.C. Circuit had "the more natural reading," because either reading was plausible, the defendants' was the better one.

The interesting thing about the case, and why I think it ultimately accomplishes very little (except that, for reasons I'll describe at the end, it may be regarded as pro-plaintiff), is that everybody agreed on the outcome in the scenario that the Supreme Court described. At oral argument, we affirmatively agreed that those claims were not cognizable, indeed to the point of saying that if that's all that the Supreme Court read the D.C. Circuit to hold, that we would lose and the case would be remanded.

*I personally agree,
as a matter of literary
criticism, with those
who think that the
opinion is really kind
of weird.*

—THOMAS C. GOLDSTEIN

Our position was that those claims should be resolved in two ways that the Supreme Court did not adopt. We had said that those claims should be knocked out in ways that wouldn't require reversing the D.C. Circuit's judgment. The first one I still think is right—and that is, those people have antitrust standing. We said antitrust standing means that your claim has to be one that furthers the interest of the United States, and if somebody is hurt in Ecuador and doesn't have anything to do with what's going on here it's impossible to say, except in the most strained way, that allowing such a claim would further the interest of U.S. consumers.

Or we said, second, that following *Hartford Fire* you would knock those claims out on comity grounds. We had read *Hartford Fire* (because it says so, so it wasn't that much of a stretch), that you decide the scope of the statute and then you decide later whether or not comity kicks out some of those cases. That was the fight between Justice Souter and Justice Scalia in *Hartford Fire*. The Supreme Court didn't go for that in *Empagran*. It said no, we're going to read the statute to preclude those claims in the first instance. So this obviously was not that big a concern of ours that this class of cases would be knocked out, because we thought that they inevitably would be knocked out on other grounds.

Now to close, this opinion will be favorable at least to these plaintiffs, and that's true I think for four reasons. The first is I think there is a strong negative inference—particularly to the D.C. Circuit panel that has already ruled for us once—when Justice Breyer says 1, 2, 3, 4, 5, 6, 7 times (and four of the times are in italics) that they're only reaching the question whether or not there is a claim when the injury overseas is completely unrelated to the injury of the United States. The negative pregnant is the suggestion that there is a claim when the facts are otherwise.

Second, I think that this decision strips away the best hypotheticals of the defendants and the government, which argued quite forcefully and persuasively to the Supreme Court that the D.C. Circuit's reading—if taken to its furthest consequence—would mean that somebody who was just hurt in Ecuador could sue here despite the fact that there was no relationship. That argument really did bring on the parade of horrors. The Supreme Court stripped away the parade of horrors.

Third, I think that the now-narrowed scope of the Sherman Act heightens our argument for deterrence. It doesn't undercut it. That is to say, the D.C. Circuit, relying on *Pfizer*, talked about the need to allow claims of persons injured overseas to proceed in order to fully combat illegal cartels. Now when we are going to talk about our claims on remand, this is where there is a direct relationship between the injury here and the injury abroad. That really does emphasize how it is that these foreign claims do enhance deterrence of cartels and therefore protect U.S. consumers.

I would say finally that I think this is going to be resolved by the D.C. Circuit. I think the Supreme Court is going to be loath to step back into this in the short term. You know it's highly possible that a direct sort of conflict would arise again soon. I just find it unlikely. What has to happen on remand is a fairly loosey-goosey kind of case-by-case look at what kind of relationship is required, and it's difficult to characterize that as a direct conflict as a matter of law. So I do think that the Supreme Court is unlikely to do anything in the very short term.

JONATHAN S. FRANKLIN: Among the panel members, I am in some ways the odd person out. While I did prepare an amicus brief in the *Empagran* case together with my colleagues Jan McDavid, Jeff Blattner, and Will Johnson, I was not litigating the case in the trenches. In addition, I'm not an antitrust lawyer, and I don't pretend to be one. Like Tom Goldstein, I'm an appellate lawyer, which means that I handle pretty much any case that comes in the door in any area of law. Just by comparison, some of my recent Supreme Court cases have involved the ownership of submerged lands in Alaska, the Clean Air Act, the Foreign Sovereign Immunities Act, Megan's Laws, and the

constitutionality of ballot labels imposed on candidates. But not being an expert on an area of law has never stopped me from speaking before, and it won't here either. My goal today is to try to focus briefly on the bigger picture and to speak from the perspective of where I see this case fitting in—or maybe not fitting in—with some of the other cases of this Term in the Supreme Court.

My colleagues and I prepared an amicus brief in *Empagran* on behalf of the Business Roundtable, which is a well-known and prestigious association of major companies and their chief executives. But while I did represent the Roundtable in the case, I'm speaking here solely for myself and not my client or my firm. Nevertheless, I will try to give a perspective on why the Business Roundtable got involved in this case, how they saw the case, and where I see the case going in the future. The first reason the Roundtable got involved in *Empagran* was that the case was viewed as important to the business community in general. One of the perspectives I often have urged on the Supreme Court—sometimes successfully, sometimes not—is that the business community values certainty in legal applications, perhaps sometimes even above correct results. And in this case, the D.C. Circuit's decision was viewed as both incorrect and also as spawning a degree of uncertainty that was seen as intolerable by the business community. In addition, the Roundtable was actually involved in the legislative process that led to the FTAIA and believed strongly that there was a clearly discernible intent of Congress, even though the legislative language may have turned out to be somewhat inscrutable. And that intent—which I'm glad to say was picked up by the Supreme Court in its opinion—was that Congress above all was concerned about narrowing the scope of U.S. antitrust jurisdiction, not expanding it. The business community in general viewed the D.C. Circuit's decision as contrary to that intent because it worked an expansion of antitrust jurisdiction, rather than a narrowing, as Congress had intended. The "I" in the statute's acronym is for "improvements," and the D.C. Circuit's decision was not viewed as an improvement by the business community. I'm happy to say that the Supreme Court did bring a certain degree of certainty to the statute by making clear that the D.C. Circuit's rationale was incorrect: one cannot simply point to some hypothetical plaintiff somewhere in the United States and say that the existence of that hypothetical plaintiff, in combination with an international conspiracy, means that persons injured in wholly foreign transactions are able to sue in the United States.

The Court also made clear that there is a cooperative international antitrust enforcement regime and that expanding the scope of U.S. jurisdiction to areas that are deemed to be the province of foreign governments will disrupt that process. Businesses in particular are vitally interested in knowing which legal regimes are governing their conduct and in not having potentially inconsistent regimes governing them in foreign countries.

I would also like to touch briefly on where I think this case fits—or doesn't fit—into the Court's Term. This was an interesting Term in one respect because of the large number, relative to other Terms, of cases that involved international issues, particularly the extent to which U.S. laws might apply in places other than the United States. In addition to this case, there was the *Intel* case, which also involved antitrust issues—specifically, the question of whether U.S. proceedings could be invoked to assist plaintiffs who were prosecuting an action in Europe. But there were also other international cases that came up at the same time. The Guantanamo Bay case, as well, was ultimately about whether U.S. courts are going to have the authority to intervene in a place that was at least asserted to be outside the United States. There was also the *Sosa* case, involving the Alien Tort Statute, which was a very important case considering whether international human rights cases can be brought by foreign nationals in this country. And there was also the *Altmann* case, in which I was also involved in an amicus capacity. That case involved the Foreign Sovereign Immunities Act and a Holocaust-era claim brought against the country of Austria by a woman who

*The Empagran case
actually ended up being
an outlier in the sense
that in all of the other
cases that I mentioned
the Supreme Court
essentially came down
on the side of saying
that U.S. jurisdiction
could extend more
broadly than some had
hoped it would.*

—JONATHAN S. FRANKLIN

asserted that she was unable to bring her claim in Austria and decided instead to sue Austria here in the United States. The *Empagran* case actually ended up being an outlier in the sense that in all of the other cases that I mentioned the Supreme Court essentially came down on the side of saying that U.S. jurisdiction could extend more broadly than some had hoped it would. In *Sosa*, the Court announced a very narrow and limited holding—that only certain kinds of claims could be brought—but the Court did open the door to some extent to claims brought under the Alien Tort Statute involving events occurring entirely abroad.

Increasingly in my practice, which spans a number of areas, I have seen instances of foreigners coming to the United States to sue because our courts, unlike probably any other courts in the world, are viewed as open to anybody who wants to roll their dice and try their luck. I'm not sure whether that's a great thing for our country, but the trend spans many different areas of law. The trend does not just involve antitrust law, as in *Empagran*, but also encompasses the Alien Tort Statute and Foreign Sovereign Immunities Act cases, and other areas as well. I have been seeing more and more foreign plaintiffs coming into the courts here. I don't know whether this can be viewed as the United States exporting its legal system or importing plaintiffs, but it is certainly an international trade issue that has not been recognized very much.

One possible way to explain the different result in *Empagran*—other than the obvious point that each case involved different statutes and constitutional provisions—is that the Court was concerned in *Empagran* that it would be stepping on the toes of foreign enforcement authorities to some extent if it expanded jurisdiction in the way the plaintiffs had suggested, whereas in the other cases there at least arguably was no ability for the foreign jurisdiction to assert itself over the claims in question. The Court therefore might have felt that there was a need to assert U.S. authority in those cases. I frankly think *Intel* is somewhat inconsistent with *Empagran*, and the fact that Justice Breyer dissented in *Intel* and wrote the majority in *Empagran* is some support for that proposition.

Finally, I'd like to touch briefly on the remand issue. I am not involved in the remand proceedings at this point, but whatever is meant by the remand, the Supreme Court could not have intended for the exception—to the extent there is an exception—to swallow the rule. If it is simply enough to assert that an international conspiracy is at work involving a market that is viewed as a global market—if that is enough to bring the U.S. jurisdiction back into play—then I think much of what the Supreme Court said in its opinion in *Empagran* would have been for naught. And again from the business perspective, companies do not relish the idea of some sort of a wide-ranging factual inquiry that needs to be undertaken in every case before you even get to the point of knowing whether there is U.S. jurisdiction. That was one of the problems with the way the D.C. Circuit resolved the case in the first place, and it certainly ought not to be brought back into the case on remand through this issue of causation.

However the remand is to be conducted, it ought to be conducted in accordance with the basic principles the Supreme Court laid out. And in that regard, it is important that wherever the bar is set on remand, it should be set sufficiently high so it could not be surmounted simply by making conclusory statements or producing some sort of generalized evidence that there is a worldwide market and a worldwide conspiracy. That holding, if it were adopted on remand, would threaten to have the exception swallow the rule. The Supreme Court did not decide that jurisdiction exists simply because someone can allege, or even show facts demonstrating or indicating, that a worldwide conspiracy might fail were it not for the U.S. component of it. Such a holding comes very close to—if not precisely duplicates—the argument that all one needs is a worldwide market, given the size of the U.S. market in many of these instances. I don't think the Supreme Court

focused on this issue because it wasn't briefed to the Court. And because the Supreme Court is generally somewhat cautious, the Court probably wanted to make clear that while it was deciding one issue it was not necessarily expressing a view on the other. But I do think that the remand ought to keep in mind the basic intent of the statute as set forth by the Court in *Empagran*, which was to narrow the scope of U.S. antitrust jurisdiction.

Furthermore, the fact that other countries may have different remedies for antitrust violations is no reason to expand U.S. jurisdiction. The Supreme Court, at least in my reading of the opinion, has rejected that notion. The Court said, in essence, that it knew that different countries are going to do things in different ways. The Court felt that this situation is not a problem but is, in fact, something we want to encourage. The basic thrust of the Supreme Court's analysis was that this international comity is threatened by expanding the scope of U.S. jurisdiction to circumstances involving parties who were injured abroad. Any future proceedings under the statute should also be conducted with that basic principle in mind. ●

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: In this edition we note two books—one by antitrust lawyers and one by antitrust economists—that discuss practical issues that arise in antitrust litigation, and one paper by Katz and Shelanski—on the role of innovation in formulating merger policy.

Send suggestions for papers or books to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE/JOHN R. WOODBURY

Book Notes

Winning Antitrust Strategies: Leading Attorneys on Mastering the Laws that Regulate, Promote, and Protect Competition (Aspatore Books, 2004)

This book collects eleven short articles, all by experienced antitrust practitioners, commenting on trends in contemporary antitrust law and on the characteristics of a successful antitrust practitioner. The pieces contain some useful generalizations about antitrust counseling and advocacy. But, because most of them are personal reflections on an entire field rather than essays on specific issues, they offer mainly impressions and conclusions, many of which are self-evident, rather than arguments or original research. Because the authors appear to have been given the same charge, they tend to cover much of the same ground. Most of the authors, for example, summarize the coverage of the antitrust laws. Many of the authors identify the same contemporary trends, such the importance of economic analysis, the internationalization of antitrust enforcement, and the rise of antitrust litigation in state courts. And many of them make the same observations about good practice, emphasizing that a lawyer should understand clients' business goals, stress to clients the importance of antitrust compliance, simplify the presentation of antitrust cases, and be forthright in dealings with enforcement officials. The book may be of some interest to new antitrust practitioners or to business executives.

Economics of Antitrust: New Issues, Questions, and Insights (Lawrence Wu, ed., NERA Economic Consulting 2004)

This book is an all-NERA effort: fourteen articles written by NERA economists, edited by one of those economists, and published by NERA itself. The articles initially appeared in the NERA newsletter, *Antitrust Insights*. All of the articles are short (about ten pages each, with a few endnotes) and discuss specific economic and statistical issues that arise in antitrust litigation or regulation. Half of the articles deal with issues in merger cases, and half deal with issues involving other practices, including predatory pricing, price discrimination, tying, and exclusionary contracts. The editor provides a preface, index, and useful abstracts for each of the articles.

The discussions are all in readable prose, and include no equations or diagrams, other than a few tables. Yet I would not call them strictly nontechnical, because they do deal with some advanced and topical issues. For example, Sumanth Addanki distinguishes the “residual” elasticity of demand implicit in the Lerner Index of monopoly power, and “Marshallian” elasticity of demand. The former

measure takes account of anticipated price responses of other firms; the latter assumes that prices of other products are held constant. When an econometric study estimates the Marshallian demand elasticity, which is appropriate for measuring substitution between products in market definition, it is likely to differ from the residual elasticity figure. If the study is used in litigation, this disparity will probably provoke questions for an expert on cross examination.

Most of the other essays likewise focus on the interaction of economic analyses with legal or regulatory requirements. Because many of the essays grow out of practical applications of economic theory and statistical methods in actual studies used in litigation, they will be interesting to economists who study antitrust issues. And, because of their topicality and accessibility, they will also be useful to economically informed antitrust practitioners and students.

—WHP

Paper Summary

Michael L. Katz and Howard A. Shelanski, *Merger Policy and Innovation: Must Enforcement Change to Account for Technological Change?* NBER Working Paper 10710 (August 2004), www.nber.org/papers/w10710 (fee to download)

The role of innovation in antitrust generally, and merger analysis specifically, has been the focus of numerous academic papers. This has been a discussion shaped by the insights of Joseph Schumpeter and his “gale of creative destruction” wrought by monopolist-pretenders seeking to dethrone an incumbent monopolist, by F.M. Scherer’s views that the optimal amount of innovation requires an industry structure that is more oligopoly than competition or monopoly, and by the litigation surrounding Microsoft.

Against that backdrop, the Katz/Shelanski paper focuses on two seemingly different questions for merger policy. How should merger policy be informed if in fact some particular market is characterized by rapid innovation? Will a particular merger that, e.g., creates a more dominant firm, reduce or increase the incentives to innovate?

With respect to evaluating the antitrust impact of innovation on the competitive effects of any particular merger, the paper focuses on market-definition issues. Should the current products of the merging firms really be the focus of the merger evaluation or should the agencies seek to identify future product market competition? Are current shares a useful predictor of post-merger market performance? To be sure, there is nothing novel about these questions, but the paper highlights both the empirical and conceptual issues that such an approach raises, including the fact that it invariably takes us into the murky area of (ultimately) identifying future product rivals, i.e., assessing potential competition. Perhaps most interestingly, the paper notes that a presumption that an innovation-based forward-looking analysis invariably broadens the market is incorrect. As a result of innovation, products that are in one market today may be in distinct markets in the future (think of the competition between the telegraph and the telephone when telephony was in its nascent stages).

In turning to the discussion of the impact of competition on innovation incentives, the paper begins in the same way it did in addressing the first question—how to identify future market boundaries and potential competition. It’s not hard for a reader to reach the conclusion that the answers to the two questions posed by the authors are so interrelated—the extent of market innovation on competition depends on the incentives of the incumbent firms to innovate—that it makes

one wonder whether the authors were too facile in their innovation-competition/competition-innovation dichotomy. In fact, the paper is likely accurate in distinguishing between exogenous and endogenous technical change. For example, innovations in computer technology revolutionized the banking industry and may shape our views on bank mergers. But those innovations were not generated by the banking industry. Nonetheless, that distinction is not always clear in the paper.

That issue aside, the paper reviews what we know about the role of market structure on innovation (and the important role that IP protection plays in evaluating a merger's effects on innovation incentives), although the cited paper by Cohen and Levin is far more comprehensive. Those who have any familiarity with this issue will not be surprised by the authors' conclusion: We have very little to say generally about the market structure/innovation nexus. Depending on the precise market model and the degree of IP protection, product market structures most conducive to innovation can range from monopoly to more robust competition.

Perhaps (in my view) the death-knell for any recommendation that the agencies evaluate the effect of a merger on the change in the innovation incentives of the combined firm is the paper's suggestion that these should be considered efficiencies. It is difficult enough to provide evidence on variable cost savings that the agencies will find verifiable. The difficulty of providing verifiable evidence of the merger's impact on innovation incentives is certainly orders of magnitude larger than providing cost-savings estimates. And this discussion seems far too focused on the impact of the merger on the combined firm's incentives to innovate rather than the impact on the total post-merger "production" of innovation by the market.

The most disappointing aspect of the paper is that it devotes so little space to the question posed in the title—whether merger enforcement should be more sensitive to innovation concerns—other than saying "yes," with a few tips. But interestingly, the authors do question the two-year horizon of the Merger Guidelines, arguing that by discounting the future so heavily, merger policy will inevitably result in underestimating the market importance of revolutionary changes wrought by innovation. The paper argues that the correct approach "would be to estimate probability distributions for alternative potential outcomes and then use the probabilities as weights in projecting an expected net present value of a merger's effects on consumer welfare." And I thought that demonstrating verifiable cost savings was difficult! It is a pity that the authors did not focus more of the paper on the costs and benefits of the two-year horizon, and propose meaningful rules or guidelines on when the two-year horizon should be relaxed (or made more restrictive).

All told, there is little that is novel in this paper. However, it does provide a useful and accessible overview of the important issues that arise in merger matters where innovation is a significant consideration. ●

—JRW

Response to Grimes and Kwoka

Mary Coleman and Joseph J. Simons

Warren Grimes' and John Kwoka's article, *A Study in Merger Enforcement Transparency: The FTC's Ocean Cruise Decision and the Presumption Governing High Concentration Mergers* (Grimes & Kwoka),¹ observes that the antitrust agencies should strive for transparency. As the record reveals, the Federal Trade Commission agrees with this principle, though with perhaps a more realistic view of the amount of transparency that is logistically practicable and legally possible.² But it seems to us that the article is less a "study" of transparency than yet another effort by the authors—objectors to the proposed cruise mergers³—to bite the apple that eluded them during the actual investigation and argue about the merits of the cruise line decision. While much, if not all, of what they say has been extensively dealt with in publicly available materials provided by the Commission and its staff,⁴ we briefly address a few points.

The Guidelines' Presumption Is Rebuttable

Grimes & Kwoka assert that "the Commission did not offer a well-reasoned ground and factual basis" sufficient to overcome the Merger Guidelines' rebuttable presumption of anticompetitive effects. The statement appears to rest fundamentally on the authors' repeated conclusion that whatever evidence the Commission cited was not "enough" to rebut the Guidelines' presumption. Given the array of empirical and qualitative evidence that has been described in various public

¹ ANTITRUST SOURCE, May 2003, available at <http://www.abanet.org/antitrust/source/may03/metstudy.pdf>.

² AmeriSource Health Corp./Bergen Brunswig Corp. See, e.g., Statement of the Federal Trade Commission (Aug. 24, 2001), available at <http://www.ftc.gov/os/2001/08/amerisourcestatement.pdf>; Statement of the Federal Trade Commission, Phillips Petroleum/Tosco Corp. (Sept. 17, 2001), available at <http://www.ftc.gov/os/2001/09/phillipstoscostmt.htm>; Press Release, Investigation of Kroger/Raley's Transaction Closed (Nov. 13, 2002), available at <http://www.ftc.gov/opa/2002/11/krogerraley.htm>; Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corp./P&O Princess Cruises plc (Oct. 4, 2002), available at <http://www.ftc.gov/os/2002/10/cruisestatement.htm>; Statement of the Commission, Sunoco Inc./Coastal Eagle Point Oil Co. (Dec. 29, 2003), available at <http://www.ftc.gov/os/caselist/0310139/031229stmt0310139.pdf>; Statement of the Federal Trade Commission, Caremark Rx, Inc./AdvancePCS (Feb. 11, 2004), available at <http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf>; Statement of the Federal Trade Commission, RJ Reynolds Tobacco Holdings, Inc./British American Tobacco, p.l.c. (June 22, 2004), available at <http://www.ftc.gov/os/2004/06/040622batrjrstmt.pdf>; Statement of Chairman Timothy J. Muris, Genzyme Corp./Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004), available at <http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf>; DOJ and FTC Merger Challenges Data, Fiscal Years 1999–2003 (Dec. 18, 2003), available at <http://www.ftc.gov/opa/2003/12/mergereffects.htm>; FTC Horizontal Merger Investigation Data, Fiscal Years 1996–2003 (Feb. 2, 2004), available at <http://www.ftc.gov/opa/2004/02/horizmerger.htm>.

³ Professor Grimes chaired, and Dr. Kwoka was a member, of a committee formed by the American Antitrust Institute (AAI) to review the cruise mergers. The AAI opposed both mergers, making public comments to that effect on its Web site and to the FTC. See Grimes, Hawker, Kwoka, Lande & Moss, *The FTC's Cruise Lines Decisions: Three Cheers for Transparency* (Nov. 18, 2002), available at <http://www.antitrustinstitute.org/recent2/217.cfm>.

⁴ Joseph J. Simons, *Merger Enforcement at the FTC* (Oct. 24, 2002), available at <http://www.ftc.gov/speeches/other/021024mergenforcement.htm>; *Cruise Investigation: Empirical Evidence & Financial Investigation* (Nov. 2002), available at <http://www.ftc.gov/be/hilites/ftcbeababrownbag.pdf>; Mary Coleman, David Meyer & David Scheffman, *Empirical Analyses of Potential Competitive Effects of a Horizontal Merger: The FTC's Cruise Ships Mergers Investigation* (2003), available at <http://www.ftc.gov/be/riocruise0703.pdf>.

■
Mary Coleman and Joseph J. Simons were, respectively, Deputy Director, Bureau of Economics, and Director, Bureau of Competition, during the FTC's investigation into the Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc transactions.

materials—many available prior to the Grimes & Kwoka article—explaining why the Commission majority and a unanimous staff believed that the presumption was rebutted, one wonders what evidence the authors would ever find to be “enough.”⁵ The authors’ real argument seems to be that the presumption should be conclusive without regard to the evidence concerning the likelihood of a competitive effect. But the Commission (and mainstream antitrust jurisprudence) long ago progressed beyond any such simplistic and formalistic approach to merger analysis. For example, the Pitofsky Commission closed without challenge its investigations of at least seven mergers (not including health care cases) with concentration indices and market shares of the merging parties equal to or higher than those of the merging parties in the cruise matters.⁶

In his response to this article, Warren Grimes suggests that we and the Commission place no weight on the rebuttable presumption and that in a merger with high concentration and a significant increase in concentration, it should be the proponents of the merger who need to provide credible information as to why there are not likely to be competitive effects from the merger. However, this is exactly what the parties did in this case. They provided the Commission with extensive data and other information that demonstrated conclusively that neither coordinated interaction nor unilateral effects were likely. In fact, the extensive and disaggregated data provided to the Commission showed that such effects were highly unlikely, and that if the presumption was not rebutted in this case, the presumption would effectively be irrebuttable. In a closing statement, one would expect the Commission to explain either why it did not find that a rebuttable presumption existed or if it did, why the Commission found that the evidence rebutted the presumption. That is what the majority’s statement did in this matter.

The Evidence Showed that Neither Unilateral or Coordinated Theories nor “Strategic Behavior” Justified Enforcement Action

Having denied that the Commission offered grounds for rebutting the presumption, Grimes and Kwoka spend much of the rest of their article attempting to refute the grounds that were in fact provided. Largely ignoring the facts and analyses involved in the Commission’s decision, they instead discuss a number of superficial critiques, mostly by proposing theories of anticompetitive harm without discussion of proof or evidence related to these theories. Their critiques can be loosely grouped around what they describe as “three possible theories of anticompetitive effects from the cruise mergers:” unilateral effects, coordinated effects, and so-called “strategic behavior.” A few words suffice for each.

Unilateral Theories. Grimes & Kwoka’s primary concern about unilateral effects derives from their belief—contrary to the evidence before the Commission—that the cruise industry’s products are sufficiently differentiated from each other that one or both mergers (they are not clear which) would combine sufficiently close competitors to allow the merged firm to increase prices. Rather than provide evidence to support this asserted differentiation, they posit a contradiction between two points made by the Commission: (1) that the cruise companies each compete on so many levels and with so many products that no two are particularly close substitutes for each other; and (2) the cruise industry’s products are too highly differentiated to permit effective coordination.

⁵ In his reply to this article, Warren Grimes states that the analyses done by the Commission appear to have been based on “aggregate” data. We find this claim to be curious because the analyses described in the various materials listed in note 4 above clearly focus on analyses conducted at a very disaggregated level, frequently comparing information across individual sailings.

⁶ Simons, *supra* note 4.

No contradiction, however, exists. The Commission's two points are essentially the same. Each cruise line offers so many different products, overlapping with each other cruise line at so many different levels, that the cruise lines are *neither* "uniquely close substitutes" *nor* capable of coordination on price.⁷ Given the high demand elasticities and low critical loss facing each cruise line, the lack of uniquely high diversion between individual cruise lines, and the complexity revealed by the actual transaction prices, the Commission majority concluded that unilateral theories were not supported.⁸

Coordinated Theories and "Strategic Conduct." Grimes & Kwoka assert that the Commission has not provided convincing evidence explaining why neither of the proposed mergers would be likely to result in coordinated effects. They offer little by way of countervailing analysis to support this view, except to reiterate their opinion that, given the high concentration, the proposed mergers must somehow enhance the likelihood of coordination. The Commission, however, focused on whether the evidence supported the likelihood of a competitive harm rather than simply focusing on the level and change in concentration. The fundamental point of the Commission's analysis was that the evidence, particularly the empirical analyses, showed no mechanism by which either merger would alter the industry dynamics to offset the powerful economic forces already making the industry highly competitive and coordination difficult.⁹

This conclusion was true not only for prices and amenities, but also for capacity, where (once again) Grimes & Kwoka's belief that they caught the Commission in a contradiction rests instead on a misunderstanding of the Commission's conclusion. The Commission found that the substantial capacity changes required to "move the price needle" in the face of high elasticities would likely render any such strategy by the merged entity (with or without the other major cruise lines) unprofitable, even if other competitors made no response whatsoever.¹⁰ Such large capacity movements out of North America—expensive in themselves—would necessarily require capacity movements to much smaller markets (because all the other markets are markedly smaller), which would cause prices in those markets to drop more than any rise in price in North America. And because the major players were already quite active in the other markets, the loss of profits outside of North America would likely swamp any profits from raising price inside. Further, there is no reason to believe that other competitors would sit idly by in the unlikely event that anticompetitive redeployment was attempted and price raised. Thus, a theory of coordinated capacity reduction was untenable.

⁷ Professor Grimes continues to assert in his reply that there is a contradiction in the Commission's finding. We are still puzzled by his confusion. There is clearly substantial overlap in the type of products offered by the cruise lines, making unilateral effects less likely. However, the products sold by each cruise line are extremely varied and thus coordination is made more difficult because there are multiple dimensions over which coordination would have to occur.

⁸ A more detailed discussion of the unilateral effects analysis is provided in Coleman et al., *supra* note 4. Grimes & Kwoka's speculation that Alaska might offer a unique venue for unilateral capacity effects (predicated on their assumption that the two dissenting Commissioners' concern must rest on "uncontroverted" evidence, although whatever evidence there may have been plainly failed to convince the Commission majority or any part of the Commission staff), merits only the response that the Commission's statement addressed every theory for which there was credible evidence or plausible basis for concern.

⁹ That cruise lines try to monitor some of each others' prices may shed some light on whom they view as competitors but is in no way sufficient to show that price coordination is likely or even possible.

¹⁰ In their quest for inconsistencies, Grimes & Kwoka do not appreciate the difference between building or reconfiguring ships or announcing plans to do either of those—none of which requires that contracts be breached—and canceling committed contractual ship orders. That the Commission found the former to be easier than the latter is hardly surprising, let alone an example of "Goldilocks" economics.

Grimes & Kwoka devote several paragraphs of their article to a discussion of yield management. We note that “whether yield management aids or hinders coordination” is not, as Grimes & Kwoka assert, a “policy” question. It is a factual question to be answered by the evidence in each investigation.¹¹ In this investigation, the extensive economic analyses and evidence showed—among other things—that application of the cruise lines’ yield management systems resulted in substantial nonsystematic, unpredictable, and largely unobservable variation in prices, precluding effective price coordination both in the industry as currently constituted and in the post-merger world. Further, Grimes & Kwoka’s derisive description of yield management as a “sophisticated tool of price discrimination,” under which the prices charged consumers are higher than “competitive levels,” ignores the reality that the use of yield management and similar pricing systems is ubiquitous in many industries involving perishable products, including the travel industry. The fact that an industry uses such a system, by itself, cannot be the basis for concluding that current pricing is or is not competitive. Mere price differences in this or any other industry are not conclusive evidence of supracompetitive pricing.¹²

Finally, Grimes & Kwoka turn to their “strategic conduct” theory, under which one or the other merger would, they suggest, somehow enhance the incentives for and abilities of the merged firm or firms to engage in allegedly anticompetitive conduct, such as signing exclusive or “favorable” agreements with some of the nation’s thousands of travel agents, or “influencing regulators,” or “employ[ing] computer reservation systems to gain advantages over rivals.” None of these activities is necessarily (or even likely to be) anticompetitive, and may well be procompetitive. For instance, exclusive or “favorable” agreements with distributors are (as antitrust scholarship has long recognized) likely to be procompetitive. More importantly, in this investigation, there was no credible evidence that either merger enhanced the risk of any sort of “strategic conduct,”¹³ and if such conduct were to be realized and produce anticompetitive effects, it could be challenged later, separate and apart from the merger. There was no reason to interfere with either proposed merger due to speculative concerns about possible conduct that might or might not occur, and might or might not be anticompetitive.

Conclusion

Though in part a recognition of the Commission’s efforts to improve transparency, much of Grimes & Kwoka’s “Transparency” article is a critique of the Commission’s decision not to challenge the cruise mergers. We believe that the Commission’s conclusions are fully supported by the extensive evidence and analysis cited by the Commission and elsewhere. And we welcome the Commission’s decision to explain its thinking publicly, thereby contributing to our understanding of the analytical framework used in merger review. ●

¹¹ Professor Grimes in his response argues that yield management “should” make target price coordination easier. It is possible that yield management could make coordination easier but that does not mean that the actual way in which yield management is employed in this industry does make coordination easier or that it makes it likely. This possibility was considered in depth in the Commission investigation and the evidence did not support that the use of yield management in this industry made coordination likely.

¹² In this regard, we suggest a review of the important treatment of this issue in the recent *Symposium on Competitive Price Discrimination*, 70 ANTITRUST L.J. 593 (2003).

¹³ Thus, as with the rest of the Commission’s analysis, we considered not only if there were a possible theory of competitive harm but whether the evidence supported the theory. In his response, Professor Grimes seems to indicate that theory is enough.

Reply to Coleman and Simons

Warren S. Grimes

Mary Coleman and Joseph Simons have written a spirited response to John Kwoka's and my article on the FTC's decision to close its investigation of the cruise mergers.¹ This exchange could not have occurred without the published opinions of the three member Commission majority and the two dissenting commissioners. In our article, we lauded the FTC's efforts to provide transparency to a decision to close an investigation. Full transparency to any agency decision is unattainable and probably undesirable.² It may well be, however, that the debate reflected in this exchange might have been narrowed and refined with fuller disclosure.

I address here, as Coleman and Simons do in their response, the role of the Merger Guidelines' presumption of anticompetitive effects that attaches when a merger would substantially increase concentration in an already concentrated industry. We indicated, and Coleman and Simons agree, that the presumption is rebuttable. Our difference of view appears to center on how the presumption operates or, indeed, whether it operates at all.³

Our view is that the presumption operates only when the staff or opponents of a merger offer a credible theory of anticompetitive effects that is consistent with available evidence. This approach reflects the practice at the antitrust agencies well before the Muris Commission. We also believe, however, that once a credible theory has been presented, the burden should be on the proponents of the merger to explain why anticompetitive effects are unlikely. As the premerger HHI level and postmerger increase in HHI become larger, the burden on proponents of the merger should be heavier.

The Commission majority, after conceding that the presumption was "interest-provoking," appeared to ignore it, placing the burden of persuasion on merger opponents to provide evidence of likely anticompetitive effects. In their response, Coleman and Simons assert that the merging parties met their burden of rebutting the presumption by providing "extensive data and other information." Of course, effective rebuttal is measured by relevant and persuasive evidence, not by its sheer volume. In the face of genuine concern about specific anticompetitive effects, Coleman and Simons track the Commission majority in responding with sweeping pronouncements about indus-

¹ Warren Grimes & John Kwoka, *A Study in Merger Enforcement Transparency: The FTC's Ocean Cruise Decision and the Presumption Governing High Concentration Mergers*, ANTITRUST SOURCE, May 2003, available at <http://www.abanet.org/antitrust/source/may03/metstudy.pdf>.

² For more expansive treatment of the transparency issue as it applies to merger enforcement, see Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 BUFFALO L. REV. 937 (2003), and the responsive comments from Robert Pitofsky, Peter C. Carstensen, and John M. Nannes.

³ Coleman and Simons suggest that our article grew out of a desire to reargue positions that the American Antitrust Institute took in opposing the cruise mergers (both of us were members of a Committee that developed the AAI's position). Our earlier involvement in the case was fully disclosed and should be no more disqualifying than Coleman's and Simons' understandable interest in defending positions that they may have advocated before the divided Commission. Neither we, nor they, had any financial interest in the outcome of the case.

try conditions and arguments that there was insufficient evidence or analysis in support of the concerns. This approach appears to give little, if any, weight to the presumption.

In justifying the closure of the investigation, Coleman and Simons find comfort in the Pitofsky Commission's closure without challenge of at least seven merger investigations despite asserted comparable or higher concentration and concentration increase levels. With the virtual complete lack of transparency that accompanied such closures in the past, little can be said about their relevance as precedents. As the Commission majority itself said in its Cruise Merger statement, merger enforcement is case specific.

Should the burden be on opponents of a high concentration merger to demonstrate with specific evidence that the merger is likely to produce anticompetitive effects? We find this view troubling because it ignores venerable economic learning and theory that underlies *Philadelphia National Bank*⁴ and four iterations of horizontal merger guidelines. Even when the risk of anticompetitive effects is at its highest, the burden would be placed on the Commission and its staff, or on outside opponents of the merger, to produce information (which only the merging parties may possess) to demonstrate in conclusive fashion that anticompetitive effects are likely.

Given our view of how the presumption should operate, our point is not that the Commission majority's decision was incorrect. Rather, it is our view that credible theories of anticompetitive conduct were not adequately addressed or refuted in the Commission majority's statement. We could not know then, and do not know now, the full extent of the evidence available to the Commission and its staff. Of course, the Commission itself may have failed to gather critical evidence if, in conducting the investigation, it gave insufficient weight to a credible theory of anticompetitive effects. The burden, however, should be on the parties to the merger who are most likely able to provide dispositive evidence in the face of structural circumstances that suggest a high risk of anticompetitive effects.

Both the Commission majority, and Coleman and Simons in their response, give weight to aggregate analysis of overall conditions in the cruise line industry.⁵ For example, they stress the "high demand elasticities" that exist in cruise lines, a condition that might appear to lessen the risk of anticompetitive effects. But this aggregate analysis says nothing about whether conditions of high demand exist in this industry. That such high demand conditions do exist is a given because, as described below, the yield management systems that cruise lines employ are specifically designed to take advantage of high demand conditions. Shouldn't the Commission have examined sample niche markets or areas of overlap to determine whether anticompetitive effects were possible? Had they ruled out such effects in areas in which the potential for rent seeking was highest, they could have comfortably and convincingly closed this investigation.

In rejecting both unilateral effects theories and coordinated effects theories, we criticized what appeared to be the Commission's decision to highlight overlap (in rejecting unilateral effects theories) but then highlight the lack of overlap (in rejecting coordinated effects theories). Hence, our view that the Commission was engaging in Goldilocks economics: seeking elusive middle ground

⁴ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

⁵ This criticism is not based on the lack of detailed data provided to the Commission (see Coleman & Simons, n.5), but on the way in which the Commission majority and Coleman and Simons employ this data to draw sweeping conclusions about industry conditions (high demand elasticity, low critical loss, and complexity in pricing) as a basis for dismissing any and all potential anticompetitive effects. Some of these industry conditions, such as pricing complexity, are inapplicable or less applicable to certain anticompetitive effects (e.g., coordination in the pricing of on-board amenities). Why didn't the Commission majority use the wealth of individual data to address these special areas of concern?

(“not too hot, hot too cold, just the right temperature”) in its treatment of these issues. We stand by this criticism. For example, Coleman and Simon stress “the complexity revealed by actual transaction prices” and the lack of cruise line offerings that are “uniquely close substitutes.” These conclusions—apparently based on aggregate data analysis—might make coordinated effects less likely but would appear to make unilateral effects more likely.

With respect to coordinated effects, Simons and Coleman say that we offer “little by way of countervailing analysis” beyond our reliance on the presumption that large mergers in concentrated industries are suspect. Our view is that the presumption should be particularly forceful in the area of coordinated effects. Merger policy is prophylactic, and offers federal agencies a “last chance” to thwart an industry structure that would be conducive to oligopolistic rent seeking. Tacit parallel conduct among oligopolists is just as harmful to consumers and competition as cartel conduct, probably cannot be reached by the Sherman Act, and should be addressed in a careful prophylactic merger review.⁶

With respect to computerized yield management programs, we challenged the Commission majority’s supposition that the complexity in pricing reflected by these programs meant that coordination was less likely. Coleman and Simons claim that these programs led to “substantial non-systematic, unpredictable, and largely unobservable variation in prices, precluding effective price coordination.” The conclusion, again apparently based on aggregate analysis, seems transparently overdrawn. The computer programs that are used to adjust prices have the same purpose for all firms in this industry. For example, yield management programs would vary price based on how full the ship is and how near the date of sailing is. In conditions of high demand, the response of the yield management program is anything but nonsystematic and unpredictable: prices will go up, and rival firms might well seek to set comparable prices for particular trips that closely parallel one another. That parallel sailings may be rare is a valid point, but cruise lines will also know that high demand exists at certain seasonal points and that many customers will look at alternative destinations, giving the firms an opportunity to set prices in tacit coordination during such high demand periods. The use of sophisticated yield management programs should make such targeted tacit coordination easier, not more difficult.⁷

Coleman and Simons chide us for describing yield management as a “sophisticated tool of price discrimination” that may allow the setting of prices above competitive levels. That there is sophisticated price discrimination in the sale of cruises, hotel rooms, and air travel is beyond dispute. But Coleman and Simons apparently believe that the ubiquity of these practices demonstrates that they are consistent with competition.⁸ The issue faced by the Commission, however, is not the lawfulness of price discrimination in general or in its particular application in cruise lines, but whether to proscribe a merger that, by increasing the likelihood of coordinated practices, might enhance the discrimination and produce higher prices for cruise passengers.

⁶ Coleman and Simons offer no response to our point that coordination of the availability of amenities becomes more likely in a more concentrated industry. With fewer rivals, it becomes easier for firms to tacitly follow a practice of refusing to pay refunds or forcing passengers to pay extra for on-board amenities. The issue is consequential—we cited an industry expert who indicated that on-board charges generate up to one-fifth of the cruise lines’ total revenues.

⁷ Yield management programs have not been a bar to tacit parallel pricing among airlines, and appear to facilitate such conduct.

⁸ We join Coleman and Simons in commending the Symposium on Competitive Price Discrimination, 70 ANTITRUST L.J. 593 (2003). The Symposium presents a variety of views on price discrimination, but surprisingly, none of the participants even mentioned the wealth transfer loss to consumers caused by price discrimination. This omission is substantial since the avoidance of wealth transfer loss is embraced by many scholars as a central goal of antitrust law. For that perspective, see LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 2.5 (2000).

Finally, Coleman and Simons challenge our concern that the cruise mergers might enhance opportunities for anticompetitive strategic conduct. Here again, our point is not to finally decide whether the likelihood of strategic conduct was or was not enhanced by the merger, but merely to observe that serious concerns along this line, raised in the dissenting opinion, were not addressed by the Commission majority. That powerful market players may engage in strategic conduct to raise rivals' costs is hardly a novel theory. As we pointed out, it is well grounded in the literature and recognized in the jurisprudence of the Commission (in cases such as *Time Warner*).

Coleman and Simons response is to suggest that conduct, such as making favorable or exclusive agreements with travel agents or influencing regulators to limit rival's access to land facilities, is unlikely to be anticompetitive and may well be procompetitive. Readers should judge for themselves whether this conclusory statement is persuasive in light of the substantial theoretical literature and case law addressing conduct to raise rivals' costs. Coleman and Simons also argue, however, that "there was no credible evidence that either merger enhanced the risk of any sort of 'strategic conduct.'" This statement highlights the striking difference between our application of, and their apparent disregard for, the presumption against large mergers in highly concentrated industries. We believe that, once a credible theory of anticompetitive effects has been advanced, the presumption operates to place the burden of proof on proponents of the merger. Coleman and Simons apparently embrace a view that the presumption has no effect: the burden remains on opponents of the merger to come up with evidence that the merger will have anticompetitive effects. The disregard of the presumption is apparently of less concern because, the response suggests, should anticompetitive effects occur, they "could be challenged later separate and apart from the merger." This last point suggests a de-emphasis on the prophylactic role of merger enforcement and a confidence in the ability of antitrust enforcers to ferret out and prosecute post merger abuses. If this confidence is well-placed, perhaps we no longer need a merger enforcement policy. ●