

Remedying the Irremediable: The Government's Dilemma in the *Microsoft Case*

Author's Note: *The article below was prepared before the Microsoft case went into mediation and before the settlement that was announced on November 2. At this writing, some states have settled, while others have vowed to continue the case in order to secure more effective relief. As the analysis below demonstrates, those that fight on are right to do so. The deeply flawed remedial conception prefigured in the Justice Department's September 6 press release has, as feared, been embodied in the federal consent. It is now up to a handful of states to salvage what they can from their overwhelming en banc victory.*

Willard K. Tom

The government has been chasing the Microsoft tiger for a very long time—and has finally caught it with a unanimous en banc affirmation of the finding that Microsoft maintained its monopoly power through unlawful acts. Now what is it to do with the beast?

The remedial principle is straightforward enough: the remedy should “unfetter a market from anticompetitive conduct,” . . . “terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.” What does that mean, however, in a monopoly maintenance case, in which it has been found that Microsoft engaged in unjustified conduct to maintain its monopoly, but not necessarily that it obtained that monopoly illegally or even that it would have lost the monopoly but for the illegal conduct?

The last administration's answer was that one should re-create as closely as possible the competitive conditions that would have existed but for the illegal conduct. While one can never know with certainty exactly what that but-for world would have been, it was reasonably certain that, for some significant period of time, there would have been a competitive

struggle between Microsoft and Netscape as alternative nuclei around which other providers of applications and services would coalesce. Both would seek to commoditize the other's space. If Netscape gained the upper hand, multiple operating systems would become available to computer users. If Microsoft gained the upper hand, multiple browsers would become available.

The end result might well be monopoly in one space or the other. But the important thing would be the competitive struggle to become the surviving monopolist, not only because browsers and operating systems would be better and cheaper as a result, *but also because the rest of the computer industry would thrive in the meantime, and would produce innovative applications and services that would gain a strong enough foothold with consumers that they might not even be dislodged by the surviving monopolist.* Indeed, one or more of those applications and services might become the next Netscape—enough of a competitive threat to the surviving monopolist that that survivor, too, would be forced to compete in order to survive into the next generation. In this way, the computer industry would remain competitively vigorous even in the face of strong network effects that would tend to make any single

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space a natural monopoly.

The last administration recognized that it was too late to revive Netscape as a credible threat to Microsoft's operating system monopoly. The closest one could come to a sufficiently dangerous competitive threat was Microsoft's position in applications software, particularly its dominant Office suite. In this conception, Microsoft's shareholders would be allowed to keep both Microsoft's operating system monopoly and its dominance in office applications, and hence the remedy might not be punitive at all, or at least it would be no more punitive than reasonably necessary to restore competitive conditions. But competition would be restored by putting those two dominant positions in separate corporations whose ownership would drift apart over time, so that each would have the same incentive to compete with each other and extend into each others' space that Microsoft and Netscape had prior to the unlawful conduct. As in the competition between Microsoft and Netscape in the but-for world, the point of that remedy was not to assure ultimate, long-term competition in operating systems. The operating system company might win the competitive struggle, and ultimately maintain its monopoly position through lawful means. The point of the remedy was the competitive struggle itself.

That remedy was imperfect, but the government concluded that, like democracy, it was less imperfect than any of the alternatives. But for better or worse, it is now off the table, and one must wonder what will take its place. In that context, the government's press release of September 6 was not an auspicious beginning. That press release, after announcing that the government would not seek a divestiture remedy, stated that the government would seek "relief that would end Microsoft's unlawful conduct, prevent its recurrence and open the operating system market to competition." While that statement has a suitably ringing cadence, a closer look reveals its flaws. The first two claus-

es amount simply to a "go and sin no more." The third clause reads as if the goal is to assure ultimate, long-term competition in operating systems. Not only does that misapprehend the competitive dynamic in the but-for world, but at this point in the evolution of the computer industry, after Microsoft's misconduct, it might well be a hopeless task. (My apologies to Linux fans, but there it is.) The point of the Netscape threat to the operating system monopoly was that Microsoft had to compete with better products and prices, *and in the meantime the rest of the computer industry would be vigorously competitive and innovative.* It is the strangling of that dynamic from which the market must be unfettered, and it is Microsoft's freedom from that dynamic that constitutes the "fruits of its statutory violation."

Thankfully, and one may faintly hope intentionally, the Joint Status Report does not repeat the offending language of the press release. What then is left? If the inter-system competition that Netscape represented is gone, and the government will no longer seek to have competition from Microsoft Office take its place, then our only hope is intra-system competition. In critical spaces that are likely to be platforms for or gateways to other applications or services, Microsoft must be required to offer consumers a choice between its products and those of others. In other words, appropriate conduct relief needs to include a "must-carry" provision that will revive some of the competitive dynamic that Microsoft has cut off, and allow competition to flourish in—and on the other side of—those gateways.

What spaces, and what firms within those spaces? Obviously, to the maximum extent possible, the government wants to avoid picking winners and losers. As to which spaces, one way to deal with that issue is to use Microsoft's inclusion of middleware products in its operating system software as the benchmark for what types of products should be included, as was done in Judge Jackson's orig-

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inal order. One would need to go somewhat further than that order, because the conduct provisions will now have to carry the burden of restoring competition due to past conduct, not simply preventing a recurrence. Hence, the order would need to include a “must carry” for middleware products that Microsoft included in the operating system in the past as well as those which it attempts to include in the future.

As to which companies, probably the best one can do is to use an approval mechanism of the sort commonly used in divestiture orders and used in the AOL-Time Warner order. In keeping with the rule of thumb that three to five strong competitors usually ensure workable competition, one could limit the must-carry obligation to some small number. To ensure that the

strongest competitors are carried, the approving authority—whether the court, the Antitrust Division, or a trustee—could look to objective measures such as number of users and number of sites accessed.

In short, only if the relief addresses the effect of the unlawful conduct on future rounds of competition, and not merely the past, will the government’s decisive en banc victory on liability be anything but a pyrrhic victory. ●

³³United States v. Microsoft Corp., No. 00-5212, slip opinion (D.C. Cir. June 28, 2001) (quoting *Ford Motor Corp. v. United States*, 405 U.S. 562, 577 (1972); *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 250 (1968)).