

The Enforcer Tapes

Editor's Note: *Newly confirmed antitrust enforcers Charles James and Timothy Muris addressed the Section of Antitrust Law on two separate occasions this past August, at the Section of Antitrust Law Annual Meeting Luncheon in Chicago, August 7, and at the Section's Post-Annual Leadership Meeting in Colorado Springs, August 9. We obtained permission from the new AAG for Antitrust and FTC Chairman to tape their comments. Their prepared remarks from the Chicago session are available on the DOJ and FTC Web sites, at www.usdoj.gov/atr/public/speeches/8764.htm, and www.ftc.gov/speeches/muris/murisaba.htm.*

We present here as two separate articles the edited version of the Question and Answer portion of the Chicago session, and the full program from the Antitrust Section Post-Annual Meeting in Colorado Springs. We found the enforcers' comments to be an interesting and refreshingly informal window into their early thoughts on assuming the leadership of the U.S. government antitrust agencies.



Timothy J. Muris

Timothy J. Muris was sworn in June 4, 2001, as Chairman of the Federal Trade Commission. Previously, he served at the Commission as Assistant Director of the Planning Office (1974–1976), Director of the Bureau of Consumer Protection (1981–1983), and Director of the Bureau of Competition (1983–1985).

Immediately prior to his appointment, Chairman Muris was a Professor at George Mason University School of Law, where he also acted as interim dean. Chairman Muris worked in the Executive Office of the President, Office of Management and Budget for three years and was Of Counsel with the law firms of Collier, Shannon, Rill & Scott (1992–2000) and Howrey, Simon, Arnold & White (2000–01). He received his bachelor's degree with high honors from San Diego State University and his J.D. from UCLA, where he was associate editor of the Law Review. A member of the American Bar Association's Antitrust Section, Chairman Muris has written widely on antitrust, consumer protection, regulatory, and budget issues.



Charles A. James

Charles A. James was confirmed by the U.S. Senate on June 14, 2001, as the Assistant Attorney General for Antitrust at the Department of Justice. AAG James previously served in the Antitrust Division under the first Bush Administration as a Deputy Assistant Attorney General (1989–1992) and as Acting Assistant Attorney General (1992). He also served in several positions at the FTC, including Assistant to the Director of the Bureau of Competition (1983–85). Mr. James has received the FTC Chairman's Award (1985) and the U.S. DOJ Edmund Randolph Award (1992).

Most recently, Mr. James practiced law at Jones, Day, Reavis & Pogue's Washington, D.C. office, where he chaired the firm's Antitrust and Trade Regulation Practice. His practice concentrated on mergers, acquisitions, and joint ventures, particularly in the telecommunications, health, information technology, and financial service industries.

Mr. James also has participated in a variety of public service and bar association activities, including as a member of the American Bar Association's Section of Antitrust Law. Mr. James earned his law degree from the National Law Center at George Washington University and his bachelor's degree from Wesleyan University. ●

The Enforcer Tapes: Chicago

Question and Answer Session, ABA Section of Antitrust Law Annual Meeting Luncheon, Chicago, IL, August 7, 2001:
Charles James, AAG for Antitrust, U.S. Department of Justice, and Timothy J. Muris, Chairman, Federal Trade Commission

Following remarks by AAG James and Chairman Muris [available at <http://www.usdoj.gov/atr/public/speeches/8764.htm> and <http://www.ftc.gov/speeches/muris/murisaba.htm>] the Messrs. James and Muris took questions from the audience.

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Question: *At one point, the FTC was very active in exploring under Section 5 cases involving signaling and invitations to collude. Will the FTC be active in that area under your leadership?*

Chairman Muris: There currently are a few investigations that present those types of issues. Obviously you have to find the right facts.

Question: *Consumer privacy is an issue of concern to a large number of consumers. What do you see as the Commission's role and the Commission's initiatives in this area?*

Muris: I am spending approximately ten times more on privacy concerns than any other issue because I did not know much about it and the issue is of great concern to many consumers. The Commission will have a very active role, as did the Pitofsky Commission. In terms of resources, we will probably do even more as the issue evolves. I will be making a speech in Cleveland at the beginning of October where I hope to lay out our agenda. [<http://www.ftc.gov/speeches/muris/privisp1002.htm>] I think that my colleagues agree that privacy is important and a proper issue for the Commission.

Question: *What lies ahead for enforcement in terms of vertical mergers and vertical foreclosures?*

James: Obviously, horizontal merger enforcement continues to be the meat and potatoes of the antitrust world. Over the last decade, however, particularly as the technology industries have become so important, we've seen more complementary-type transactions. There certainly is a potential for problems in transactions where you have the ability to exclude or preclude, and, as Tim said, I think my new watchword is going to be "stubborn facts." When the stubborn facts indicate that there are market power issues, such as where someone through a vertical combination (i.e., through merger or other agreement) has the ability to preclude competition, I won't be shy about stepping in. Of course, the countervailing issue is always efficiencies, and we will try to strike the appropriate balance. One of the things that I'm personally troubled by is that there is no stated enforcement policy in this area, and I'm not quite sure that there is a ready solution. Moreover, the court decisions in this area are not particularly clear. Perhaps one of the things that the great think tank over at the Federal Trade Commission could do is devote some

more study to these types of issues.

Question: *With regard to “stubborn facts,” specifically, what type of stubborn facts are you talking about in the vertical area or with respect to invitations to collude? Is one of the stubborn facts going to be looking at what the effects are as opposed to the existence of market power? Where there have been anticompetitive effects, are you going to focus more on the anticompetitive effects on consumers?*

James: I think “stubborn facts” fall into all of those categories, and with respect to vertical enforcement, the effect on consumers still remains the principal issue. “More stubborn” facts speak to whether there is real foreclosure, as opposed to just mere competitive inconvenience. I don’t want us begin to develop an “inconvenient” facilities doctrine or a “desirable” facilities doctrine that guides our enforcement in the vertical area, and so I principally would be looking for real foreclosure. Where that occurs, consumer harm is likely to follow, and our enforcement in this area will be very consistent with our enforcement in the horizontal area.

Question: *Do either one of you foresee any changes in your policies, attitudes, or relationship with the FCC with regard to mergers in the media/telecom/cable area?*

James: We have one great benefit right now, which is that we have a pretty good antitrust lawyer as the head of the FCC who has a very strong respect for the role of the Antitrust Division in reviewing mergers. If the purpose of your question is to persuade us to discuss previous decisions in this area, I’m not going to fall into that trap. The Merger Guidelines are the Merger Guidelines, and it certainly will be my intention to follow them in those industries and to recognize the importance of converging technologies and the efficiency issues that such convergence brings about.

Question: *Are innovation markets a useful concept to antitrust analysis?*

Muris: They certainly can be, and the Commission’s action in the drug area was largely sensible, given the nature of drug innovation and the regulatory process.

Question: *I wonder if either of you would like to comment on the interesting history of the hospital merger cases? It’s hard to figure out what will happen in the future.*

James: Tim, let me take a shot at that, and I would be really interested in your views. One of the interesting facts about the hospital world is that so many of these cases have actually been litigated, as distinguished from the great oral history of antitrust law in so many other markets. If you look at the body of hospital decisions, what you see is a set of decisions that, in most instances, hue very closely to the Merger Guidelines approach to market definition, which is the real cutting issue in many of these cases. It is certainly the case that the Merger Guidelines approach to market definition suggests a certain geographic dimension to hospital cases. Having worked on quite a few of them as a practitioner, I think that courts have determined the market definition issue correctly. The antitrust bar, however, may be a lot more uncomfortable with decisions that seem to take the position that there are some other issues or values—other than pure antitrust market definition—that are at play in hospital mergers, or that community decisions about how to structure health care services as reflected in affidavits from local people ought to trump antitrust analysis. As antitrust lawyers, we all ought to be very uncomfortable with those types of decisions. So, I’m comfortable applying the Merger Guidelines and letting the Merger Guidelines dictate the result. I think that the Guidelines, however, dictate a result in which very few hospital mergers are going to rise to the level of

substantial competitive problems. When they do, we'll take action.

Muris: I think it's true that very few are problematic in a statistical sense. The question is whether there are any that can be successfully challenged. I think the Commission may have some comparative advantage here.

Question: *While I realize this may be a sensitive issue, would each of you comment on the role antitrust should have with respect to the WTO?*

“Over the long haul, there's a fear of antitrust being contaminated by trade. I hope the contamination runs the other way.”

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James: If you look back to the last round of multinational trade talks that led to the creation of the WTO, there was a little noticed chapter that had the word “competition” in it, and so it's not surprising that as people begin to talk about a new round, competition issues will at least be on the table. The extent to which competition issues are on the table, however, likely will be the subject of ongoing discussions. I think that people in the antitrust community, and the law enforcement community in general, have concerns about the potential that issues that are brought within the WTO framework might evolve into WTO disputes, and that's certainly an issue we have to be concerned about. By the same token, the WTO as a multinational organization can have some very positive proselytizing effects in terms of bringing antitrust enforcement to more jurisdictions and imposing a general non-discriminatory, non-trade-based regime of competition law in various countries throughout the world. So, as a new WTO round begins, I certainly would expect competition issues to be on the table.

Muris: I taught trade law for several years. Competition issues are becoming increasingly important in the WTO, whether competition authorities are involved or not. At some stage, and I don't know if this is the round to do it, it would be better to have competition authorities involved and competition issues addressed.

The first steps will be very minimalist ones. Over the long haul, there's a fear of antitrust being contaminated by trade. I hope the contamination runs the other way. Members of the antitrust community, whether they are Democrats or Republicans, believe in markets and they believe in open trade. Obviously, politics and other issues are involved, but I like to think that we can have a positive influence in the trade world.

Question: *One of the tribunals of the WTO has ruled that the 1916 Antidumping Act violates the treaty and thus is void, so it has, in essence, eviscerated an act of Congress. Do either of you have any comment on that ruling?*

James: As far as I am aware, the 1916 Act has never resulted in a successful private prosecution and has never been invoked by the government. So I thought it was very interesting that the Europeans and the Japanese could find this statute and bring it to the WTO's attention. But, as you're probably aware, there is a repeal that's pending, and to the extent that the 1916 Dumping Act is characterized as an international antitrust anti-discrimination statute, it probably deserves repeal. It is certainly the case that under the WTO structure, we have a prescribed remedy for that kind of conduct. Hopefully this is more an academic issue than a practical one.

Question: *Can you give some indication what's being discussed between the FTC and DOJ regarding the best business practices, and what might be done to reduce the appearance and belief that mergers are being dealt with differently at the two agencies?*

James: This initiative is the very good idea of a person who has lots of good ideas—Tim Muris. It is envisioned that we will bring together people from our respective agencies who are the most involved in merger enforcement and iden-

tify best practices in terms of how we conduct interviews, structure information requests, review documents and information, and what sorts of standards we use in assessing substantial compliance. We hope it will have the effect of making our agencies more similar in the approaches that we take. There are differences that are associated with our respective procedures and discovery tools outside of the Hart-Scott-Rodino process, and some differences are always going to occur if you have different people making decisions. But, I think Tim and I are both very committed to making our respective enforcement approaches as similar and consistent as possible.

Question: *Is there any thought being given to re-evaluating the Intellectual Property Guidelines or are you satisfied with them the way they are?*

Muris: The relationship between intellectual property and antitrust is becoming increasingly important. Former Chairman Pitofsky made a speech in February about how more and more cases are raising the intersection. [<http://www.ftc.gov/speeches/pit1.htm>] Charles and I have discussed this issue. I'm not at any stage of thought about revising the Guidelines, but clearly it will be useful for both of us to step back and think about the relationship between antitrust and intellectual property. ●

The Enforcer Tapes: Colorado

Comments, Questions and Answers, Charles James and Timothy J. Muris, ABA Section of Antitrust Law Post-Annual Meeting, Colorado Springs, August 9, 2001

The following are the edited remarks of Timothy J. Muris, Chairman of the Federal Trade Commission and Charles A. James, Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, at the ABA Section of Antitrust Law Post-Annual Meeting in Colorado, August 9, 2001.

Roxane Busey, Chair of the ABA Section of Antitrust Law, introduced the two top U.S. antitrust enforcers and invited the audience to ask them probing questions after their remarks.

Comments of Chairman Muris

I will briefly discuss two issues and leave most of the time for questions. One is *California Dental (CDA)* and the issue of truncation; the other is the role of economics.

One point that has surprised me in talking to attorneys in the Bureau of Competition is the looming presence of *California Dental*. As I wrote in an article published last year in the *Supreme Court Economic Review*, given the way the case was tried, the Supreme Court's decision is not surprising. I argued that the case transposed to antitrust a longstanding dispute among the members of the Court about professional advertising that had been previously played out in First Amendment cases. Indeed, *CDA* and the 1995 *Florida Bar* decision had many similarities in the judicial lineups and the issues raised.

For antitrust, *CDA* makes a couple of important points. One, it recognizes once and for all what I thought was obvious, but some others did not, namely that the rule of reason involves a continuum, and that there can be truncation in various cases. Second, *CDA* reinforces that evidence is important. When the Commission tried

the case, it used essentially a per se theory. Ironically, there is abundant evidence about the anticompetitive nature of restraints on advertising and, even more ironically, the FTC itself had produced much of the evidence. For whatever reason, however, the complaint counsel did not choose even to use an economist at trial, and the agency ultimately bore the cost of that ill-fated decision.

In the 1980s, we developed a form of analysis that became known as *Massachusetts Board*. The *Massachusetts Board* analysis derived from a brief that we authored with the Solicitor General on the *NCAA* case. We did not use the word "truncation," but we talked about the possibility of applying the rule of reason in that manner.

As did that analysis, *California Dental* tells us that you have to categorize. There are various levels of analysis under the rule of reason, ranging from preemptory—Areeda's "wink of an eye"—to so-called full-blown rule of reason when market definition would be necessary, absent direct evidence of anticompetitive effect. Surprisingly, some people still want to ignore this fundamental issue of categorization. A prob-

lem with *Massachusetts Board* was it did not really tell you how to categorize. It did have a formula, and, predictably, some of the staff at the Federal Trade Commission found it too easy to allow truncation. In practice, *Massachusetts Board* became too much like the old per-se-versus-rule-of-reason categorization.

Although the concept of truncation and a spectrum is more sophisticated than what it replaced, you still cannot avoid this fundamental issue of the necessity of some form of categorization. As I have written in recent articles, truncation ought to be based on experience. As we gain experience with certain practices, we will need less evidence to condemn them. The classic examples, which everyone recognizes, are naked price fixing and market division. There is also sufficient experience in the economic literature on advertising restraints to treat them in a truncated fashion, and it would not surprise me if that issue finds its way into the courts again from the Federal Trade Commission.

On my second issue—the role of economics—I personally think the Chicago/Post-Chicago discussion is very stale. Although I would not use the word crisis yet, there is an increasing distance between industrial organization economics and its applications to antitrust, which may sound paradoxical given all the money that your clients pay for economists. The problem is that modern industrial organization economics has grown more theoretical and less factual.

If someone asked me to describe myself, I would say “new institutional economics,” not “Chicago” or “Post-Chicago.” The old institutional economics lacked theoretical underpinnings. The new institutional economics now has a formal organization that has been headed by Oliver Williamson, Ronald Coase, and Doug North—the last two are Nobel Prize Laureates. Paul Joskow has written an interesting article, to be published in the *Journal of Law, Economics and Organization*, about transaction cost eco-

nomics, which is a prominent part of this approach.

These economists combine theory with a study of real world institutions. The approach is heavily empirical, in contrast to much of recent industrial organization (IO), which is heavy on theory and light on testing. To start to correct the imbalance, I have asked Dennis Carlton to assemble a group of economists who will meet in the fall to discuss research agenda related to antitrust enforcement.

Unilateral effects are particularly revealing of the modern trend in IO, in part because you have economists talking to each other, with the lawyers paying almost no attention other than to the bottom line. Let me give three illustrations of lawyers ignoring this economic approach:

- Judge Hogan did not mention the extensive econometric work in his *Staples* opinion. In fact, he later said he regarded it as a wash.
- *Baby Food* may be an even stronger illustration. There was uncontroverted econometric evidence that the district court judge relied on—although, unfortunately for him, in his opinion he only made passing reference to it. This evidence showed that Heinz and Beech-Nut did not compete; their cross-elasticities were very low. I worked on the case, as some of you know, and I felt that there was other evidence to support that proposition. Although the evidence was uncontroverted—the FTC did not even present a rebuttal witness—it had no impact on the ultimate result.
- The third illustration comes from my personal experience. I have seen thousands of regressions searching for unilateral effects, many involving soft drinks. It is a rare regression that shows both Pepsi and Coke and Diet Pepsi and Diet Coke being strong competitors. One ought to have pause about any regressions that do not show those two propositions.

There are numerous other problems. One is the lack of a good natural experiment—some prod-

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ucts do not allow each other's prices to deviate from each other enough to test the impact of large price changes. Instead, they move closely with each other. One has a problem predicting what would happen with a 5 or 10 percent price change when the underlying data lack significant variability.

Another problem is that some results predict a price change when the variation around the price change includes zero. Most econometricians believe that a result is meaningless if it includes zero within a standard deviation. Finally, the underlying theories are quite restrictive, particularly the so-called Bertrand theory. Some economists state that the models "predict" a price increase. The truth is that many of these models "assume" a price increase.

Comments of Assistant Attorney General James

Last August, Tim, Deb Garza, and I had the occasion to participate in a program at the ABA Annual Meeting on "The Post-Clinton World of Antitrust." As we were sitting there, I never thought for one second that the post-Clinton world would be us. I now find myself in a "be careful what you say" kind of situation.

And then, in late 2000 Ky Ewing (the past Chair of the Section of Antitrust Law) appointed a task force to examine the goals and challenges of antitrust enforcement in the next Administration, and he appointed my former partner, Joe Sims, to head that task force. Joe and I had many discussions about how the antitrust world could be improved. And now I have that Task Force Report pointed at my own head. [<http://www.abanet.org/antitrust/reports2001.html>]

I thought I would take some time this morning to talk about four areas addressed by the Task Force Report. Tim already talked about two. I plan to discuss some of our reactions to these four sets of recommendations, as well as some of the things that the Antitrust Division is trying

to do in response to what was a very thoughtful effort by the Task Force.

One of the first things that the Task Force Report talked about was resources. The fact of the matter is that the legacy of the Bingaman and Klein years is that Congress likes antitrust enforcement and is prepared to support it with resources, provided that we get it from you in the form of Hart-Scott-Rodino filings. But in point of fact, the resource allocations to the agencies—at least to the Department of Justice—are very generous. The markups that are presently pending before the House and Senate provide us with a very good resource base, and hopefully, we will use it wisely.

The report suggests that we need a strong cadre of competent lawyers. One of the things that has happened in the Justice Department is that, by virtue of the very generous salaries many firms are providing to their associates, it is very difficult for us to recruit young lawyers into the antitrust agencies. And then when we do recruit them and they demonstrate any competence at all, you hire them. That leaves us in a situation where we have a constant inflow of young lawyers. We have a group of lawyers who have been there for quite some time, but our real challenge is recruiting and retaining trained, skilled, mid-level attorneys—and everyone knows that any army marches on the strength of its mid-level people.

In that regard, we are devoting a tremendous amount of time to our training efforts. For the very first time, we will have this year a training academy for our new lawyers. We also are encouraging our economists to participate more actively in the training of our lawyers.

One of the other things that we have observed is that the antitrust agencies are so interested in training people in economics and litigation techniques that we have lost a bit of our focus on providing training on some fundamental legal practices—legal research and writing. As a result, we are devoting a fair amount of our time and attention to providing

some basic legal skills training.

I hope that over a period of years at the Antitrust Division we can address our mid-level situation by having attorneys come to us from the private sector for two- and three-year terms. We think we can do a very good job of training your people because we can expose them to more antitrust than the typical law firm is able to, and I think there would be some mutual benefit to such a program. But it remains for us to work out the details of such an initiative.

We are also giving some considerable thought to our litigation capabilities. I asked our Criminal Deputy, Jim Griffin, to look into how much criminal litigation the Antitrust Division actually did over a period of years. Criminal program litigation is a lot more active than on the civil side. As it turns out, over a period of twelve or thirteen years, the Antitrust Division has tried only sixty criminal cases in total. This includes the period of the great school milk and road-building cases, when there was a perception that trials were pretty active.

We have to find ways to improve our litigation capabilities. Generally, I am not favorably disposed to hiring outside lawyers on a routine basis to handle and lead Division cases. However, in some instances we might experiment with hiring people to provide back-office support to our litigation teams.

The Task Force Report also emphasized the significance of international antitrust and multi-jurisdictional enforcement. As you know, your former leader and my former leader, Mr. James Rill, did a tremendous job of making the world aware of the importance of consultation and coordination among the world's competition agencies.

The GE/Honeywell case notwithstanding, we have a very, very positive bilateral relationship with the European Union and Commissioner Monti and Director Schaub. We are cooperating closely on a number of matters, and I hope that won't get lost in all of the fanfare about GE/Honeywell.

One of the things that I hope you have taken recent notice of is that the European Commission has announced changes to its corporate leniency program. We think it moves their program much closer to ours. Jim Griffin and Scott Hammond of our criminal section engaged in very active consultation with the European Commission on this issue, and it is an example of how our bilateral relationship actually improves convergence.

On the multilateral front, for quite some time we have been engaged in an active dialogue about convergence with other members of the international community. We all view convergence as this fond goal that we hope to achieve somewhere down the road. I think it is about time for us to stop talking about convergence and start converging. To that end, working closely with the Federal Trade Commission, the European Union, Canada and other countries that are vitally interested in this issue, we hope to make some progress along those lines.

The International Competition Network (ICN) is something that is discussed in the Task Force's report. The ICN is not to be confused with the Global Competition Forum, the OECD, or any other organization. It is an effort that we are busily working on and conceptualizing with our counterparts in other governments.

To my way of thinking, we do not need another international debating society. We have plenty of excuses to have French food, and probably do not need another one. What we do need is an appropriate forum or network for government-to-government consultations directed at talking constructively about ways in which we can bring about procedural and substantive convergence. My vision for the ICN is that it be a very project-centered, government-to-government kind of enterprise. When I say "project-centered," I mean something that is not attached to a permanent bureaucracy, but is instead an effort that is focused on a group of projects with timetables and deadlines, has reporting responsibility and task lists, and has

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specific work plans for accomplishing those tasks. The enterprise can then develop reports or findings that can be discussed on a multinational basis with a view toward reaching consensus and achieving implementation through bilateral or multilateral kinds of consultations among governments.

It is important that the ICN institute an appropriate mechanism for private input, but I do not think that private input should come at the cost of having private entities support the ICN financially or participate as equal partners with the government effort. We hope that the private sector would have a very important advisory function in the ICN. But we do not want to create a situation that might diminish the credibility of any government-to-government consultations. We do not want to be perceived as something that is advancing a private agenda—as distinguished from a government agenda—and we do not want to be perceived as setting up a new permanent bureaucracy, because we already have quite a few of those.

Turning now to another important area, the Task Force Report notes the “tension between antitrust law and intellectual property.” That tension is not new, and has existed for quite some time. The fact of the matter is that the significance of the tension has grown, and it has grown, in part, because of the scope and range of intellectual property interests that are now being asserted, because of the importance of intellectual property in many of the New Economy industries, and, quite frankly, because of the very aggressive strategies that companies are employing to extend their intellectual property protections.

Both agencies have had cases in this area, but the Federal Trade Commission deserves some particular credit for its work in the pharmaceutical industry. I think both agencies recognize, however, that we need to expand our knowledge base in this area.

Tim and I have had some substantial discussions about how we might improve our

knowledge base and our understanding of the balancing of antitrust and intellectual property interests. I think this will be an area in which the agencies will be very active, perhaps following upon some of the very fine work that the Pitofsky Commission did in terms of forums and hearings, and bringing the Commerce Department and other government agencies, such as the Patent and Trademark Office, into the debate.

I think it is also an area where the agencies can engage in a fair amount of competition advocacy with the PTO, certain international organizations, and other U.S. regulatory agencies that are involved in licensing and permitting regimes. Hopefully, over a period of time, we will make some progress in increasing understanding in this area.

Last but not least, the Task Force Report addresses the merger process situation. The Division has some ideas that have the potential to improve the process. Of course, that depends upon whether the private bar takes us up on this initiative. We also plan to work with the FTC to identify best practices in the area of second requests and other investigative matters, and hope to achieve progress in this area as well.

The report takes on the subject of clearance, and, quite frankly, our efforts in the merger process area are not going to lead to improvements until we fix the clearance situation. If we are fighting about clearance, then we are not using all of the time under the first thirty days of the Hart-Scott-Rodino process as effectively as we can.

Tim and I have had some discussions about this issue since assuming our respective positions, and we were surprised to find a substantial backlog of fairly contentious clearances. I am proud of the fact that Tim and I were able to resolve these outstanding issues quickly, and I think we are now current on clearances.

We have started to review certain areas of our respective commodity allocations that have become fuzzy over time, and will try to reach

some new accommodations that will improve the process. We are counting on our friendship to help us improve the clearance process and on the clearance process not destroying our friendship. If those two things can occur, that will be a victory as well.

Questions and Answers

Question: *Charles, you spoke about your vision of the role of your agency in the Global Competition Initiative (GCI). Some feel a sense of momentum slide with the GCI over the last six months, and it is probably perfectly understandable.*

You raise some questions. One is the issue of no bureaucracy, and we have heard that from a number of places. The question that arises for me out of that is whether the U.S. agencies and/or the European agencies are going to be prepared to devote some resources themselves, because it does occur to me that to move things forward, actual focused effort needs to be put in place.

I guess the other two subsets of my question are: (1) If there is a momentum issue, have you got a sense of the United States's timing on moving this forward? and (2) With respect to private interests having a role, an advisory-but-not-equal role, are you able at this stage to describe a bit what you think the nature of that advisory role might be for private interests?

James: Tim and I went through a momentum-killing process called Senate confirmation, but I think you will see the momentum increasing now that we are both in place. Tim and I have had quite a few discussions with each other and with our counterparts in other agencies over the last several weeks. I cannot say whether the momentum behind the ICN has reached its former pace, but I think it is moving along at a good speed.

Our intention is that the ICN be launched sometime in the Spring of 2002. The agencies

are prepared to devote resources to this effort, but we think that our resources will not be the only ones that will be deployed. As we contemplate a project-oriented kind of process, we think that the project itself has the potential to dictate the types of resources that are required to execute the project. I envision that at the beginning of a ICN period, whether we call that a year or eighteen months or some other period, the governments would set an agenda of projects that they want to have concluded over a period of time.

In framing the project there would be a work plan. The work plan would dictate certain resource commitments and, depending upon the nature of the project, would involve various types of input, including input from the private sector, government agencies, academia, the business community, and perhaps other organizations.

In terms of considering how the projects were framed, I have always thought that it would be useful to have a business advisory group that would consult with the governments. Obviously, the United States is not in a position to dictate such a vision of the ICN, and so we expect to have consultations in connection with a series of upcoming multinational events and to have a proposed structure for the ICN by the end of the year. If that structure is in place, we can move forward towards a launch in the Spring of 2002.

Muris: I agree that GCI is a useful initiative. Charles's vision is highly useful here. After privacy and non-merger case generation, I am spending more time on international activities than anything else. It is extremely important, and I hope we can make progress.

Question: *I have a comment on the remarks about GCI, and then I have a question, primarily for Tim, about the look-see that Dennis Carlton is going to take into the economic foundations of antitrust policy. Believe it or not, the*

two have a common theme, and the common theme is credible expertise.

There has been a lot of discussion in the context of the GCI of whether the GCI would be totally controlled by the government, steered by the government, and whether private participation would be advisory. I think it is a dreadful mistake if this debate about the composition and control of GCI were a debate about government control versus private control. That is not really the issue. The real issue I think is credible expertise.

You find demands for new institutional frameworks in areas where the need for convergence is most prime—for example, in the merger process, which is a problem that has been around for a long time. There are a lot of government-to-government institutions, such as the OECD, that have made stabs at that problem. There are common forum attempts, there are various attempts to harmonize bilateral treaties, and yet the problem persists. What gives rise to demands for a new institution is that occasionally you find hints sneaking through the dialogue, coming out of the existing government institutions, that the message that the lack of convergence imposes very significant burdens on the private sector is still not received.

We are all looking for models for how convergence can be achieved. I think there is consensus that there is a need for convergence. But the models that seem to have worked in the past are not necessarily models based strictly on all-government activity. I think ultimately, because of the nature of merger process review, you have to have statutory reform, regulatory reform. It has to be acceptable to the governments involved. But what gives rise to the basis for government acceptance of a common approach to a complex multi-jurisdictional problem is the application of credible expertise to the problem itself.

It is less a question of government versus private. The question is: what is the best institutional format for getting the best solution?

This relates to the question I have for Tim about the effort to organize some economic thinking about the policy basis for antitrust. This past Monday morning, the ABA Antitrust Section had a session in Chicago involving some very distinguished practitioners, judges, and others. Interestingly, although this group had a fairly broad and deep consensus that antitrust, at least U.S. antitrust, is now about the application of economic analysis to business conduct, one of the major areas of disagreement was what has been the effect of this trend on the economic profession itself. Specifically, the theme was sounded that because antitrust economists are now consultants—they are not litigators, but they are basically at the elbow of the litigators—is the economics profession still available to the antitrust policy world as a source of mutual first-rate objective expertise?

And so the question to you, Tim, is: Have you thought about this issue? Have you thought about how Dennis Carlton is going to organize an effort so that the output, again, appears to be and is the output of people with credible expertise?

Muris: That is an extremely good question. We have asked Dennis to assemble colleagues from the academic world—most of whom also do consulting—to discuss a structured agenda about possible research. I hope, probably more optimistically than I should, that we will have some influence on the academic research agenda, as well as on our own.

Question: I have a question for both of you and it relates to what Tim was talking about—Mass. Board and truncated analysis. In the last administration, we saw a theme that was not only in the horizontal restraints area but also extended to Section 2 analysis. Basically, if there was a restrictive effect of some sort in the activities of a horizontal group or of a monopolist, the initial inquiry was whether there was an efficiency justification of some type that jus-

tified that restrictive effect. If you didn't get over that hurdle, you didn't go on to, for example, market power in the case of horizontal restraints or how much of an exclusionary effect there had been in a Section 2 context. So a tremendous amount of the burden of the analysis was on whether you have the efficiency to justify that level of restraint caused by your conduct. In contrast, certainly in the horizontal restraints area, there is another way of looking at it that says you start with market power, and if there is not a market power issue, then, except for naked restraints, you do not worry about it and nobody has to justify anything.

I would be interested in your views of how you view that relationship between justification and the exclusionary effect in both the Section 2 and horizontal restraint contexts.

James: It is very important to separate out the Section 2 world from the Section 1 world in that respect. One of my partners, Joe Sims, coined the “Can we help you?” school of antitrust enforcement” phrase to talk about situations where agencies looked at a single firm’s situation, looked at the restrictive activities the firm might have engaged in, and then concluded, “If there is not a good economic justification for that, then that must be a Section 2 problem.” I think that, doctrinally, settled law does not permit one to make that intellectual leap and impose a duty on a single firm—regardless of its market power—to help or facilitate the activities of its rivals.

In the Section 1 context, however, I think that is a part of the law that is important. From a government enforcement standpoint, we should not become entangled with cases that do not involve market power and economic harm. I think that the structural framework of the analysis that you described has a lot of support in the case law, and I hope our enforcement activities in the Section 1 area will be very consistent with the case law, and that we will bring relevant cases.

Muris: I agree with what Charles just said. Moreover, it is important to understand where truncation was born. It was in *BMI*, which attempted to avoid rigid categorization. In effect, *BMI* allowed a justification for what many thought was an illegal restraint.

It was predictable—and, indeed, I predicted it when we derived *Mass. Board*—that the staff would try to categorize as much as possible to shift the burden to the parties. Nevertheless, under current law, categorization is inevitable. If we live in a world where you have to categorize, then we should categorize in the most sensible way possible. My impression in reading the “step-wise” discussion is that it did not answer the question of when you truncate. I did not have enough experience with the Justice Department to know whether they were engaged in more burden shifting than was sensible.

As Charles said, we should distinguish the Section 2 case with a monopolist from the Section 1 context. I hope we are sensitive to that issue and that we advance the law in the next few years.

Question: *In the Section 2 context, a particular high point of this theory was Jonathan Baker’s article of a couple of years ago, saying it was just a mode of monopolization analysis—if a monopolist does something that is restrictive, it essentially has to be justified. Do you agree with that in general or is there some threshold quantum of restrictiveness that has to be applied before even a monopolist has to justify what it is doing?*

Muris: Yes. I have written that I disagreed with that approach. Evidence of harm to consumers is necessary, although it need not be quantitative or direct. If a monopolist is going to use an exclusive, however, I am sure that you will counsel it to have good arguments on its behalf. Moreover, post-*Microsoft*, we are not going to find e-mails, at least if you are counseling them, like we found in that case.

Question: *I would like to take the two halves of what you started with, Tim, and sort of show how they meet in relation to what was just said, which is this: When he was on the First Circuit, then-Judge Breyer said, "Economics informs antitrust law, but it is still law." It has to be a system that guides economic actors and we need predictability and we sometimes need simple rules. Yet those of us who have been in the enforcement agencies know that sometimes enforcement decisions are based on exceedingly complex economic models and analyses; they are rarely based on things that actors could predict ex ante.*

To what extent do you think it is appropriate for antitrust enforcement agencies to base their enforcement decisions on different rules than the law provides? A specific example of this might be the truncation issue, where one might say is it perfectly appropriate for an enforcement agency to have its views on how it can properly apply economic analysis, even if the legal standards that a court would apply in a different system in an enforcement process might be very different?

Muris: Again, this is an extremely good and complicated question. To begin to answer, let me raise two points. Charles spoke directly to the first, namely that resource allocation is an important issue, and the government ought to bring cases that will have an impact. Of course, there can be a case when you think the statement of the law itself is important beyond the facts of the case. The second point involves the courts. With mergers, for example, we rarely go to court, and the FTC, in particular, has been extraordinarily difficult to beat in court, outside of hospital mergers.

I am personally uncomfortable with pushing hard on theories that do not have a firm foundation in the law. I also think that the law has a firm foundation in solid economics. Pushed to the extreme, this reasoning could become circular. Particularly in the application of a specific

ic case, people can disagree about how the economics comes out.

James: I think the very first level of inquiry that we go through in the Antitrust Division is whether there is economic harm. Fortunately, in most instances involving true economic harm there is a legal doctrine that will allow us to challenge things. Like Tim, I am very uncomfortable with the view that there are theories that you can pursue for enforcement decision-making purposes that are distinct from the frameworks that exist in the law. I think when you hear that argument, you usually do not hear it before the case is brought. Rather, you hear the case and the whining about why the case was lost. Hopefully, we are not going to do very much whining at the Department while I am there.

Question: *Tim, you have outlined the differences between these two schools of thought on economic thinking and your perspective on each of them. Do you plan to shift the focus of economic analysis at the FTC in the direction of the so-called "institutional economics" that you seem to favor while the research is being undertaken by Dennis's group? And, as a follow-up to that, what are the implications of that, and what kind of economic analysis do you want to see parties presenting to the Commission; what are the types of analysis that perhaps have not been presented recently or are not being presented that you think are more meaningful?*

Muris: Dennis's group is not going to conduct research for us. There are lots of topics for which research would be useful, however. As I mentioned, we will take a hard look at the unilateral effects area, at a minimum to try to make it more relevant. For example, we are considering cases where mergers were approved; where we have models premerger with predictions of what would happen. Such retrospective studies are very useful, and many minds have been changed based on retrospective studies.

I am surprised that more people do not use trade associations to present relevant evidence to us outside of the context of individual cases. There are many, many empirical questions for which better evidence would improve the way we do business. With many trade associations, of course, the members might not agree enough to present evidence on a general issue. ●

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

■ **Willard K. Tom** is a partner at Morgan, Lewis & Bockius LLP, and has written and lectured frequently on antitrust in high technology industries. Recently he has been representing Catavault, a software firm in online identity and authentication, with an interest in vigorous competition in computer industry platforms and gateways.

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-

"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."

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)).

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Foreword



It is my pleasure to introduce the first issue of the *Antitrust Source*, the exciting, new online publication of the ABA Section of Antitrust Law. This publication complements the other Antitrust Section publications provided as a benefit of Section membership, the *Antitrust Law Journal* and *Antitrust*, the magazine. In addition to providing another resource of informative materials of interest to antitrust practitioners and scholars, this publication aspires to utilize its online capability to the fullest by providing very timely materials, direct links to cited materials and events, and opportunities for interaction between Section members and the editorial staff.

Many thanks to the *Antitrust Source's* Editor, Chris Hockett, and its Editorial Board, Mike Barnett, Rita Sinkfield Belin, Kevin O'Connor, Bill Page, Richard Park, and John Woodbury, for their dedication, diligence and enthusiasm in designing and launching this new online publication and to Kathy Fenton, the Section's Publications Officer, and Tina Miller, the *Antitrust Source's* Executive Editor, for their vision, creativity and hard work in developing this project and recognizing its potential. ●

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2001–02

Why Are We So Reluctant To “Execute” Microsoft?

Robert H. Lande

On June 28, 2001, the D.C. Court of Appeals held that Microsoft has violated the antitrust laws repeatedly, relentlessly, and over a multi-year period. The court ruled eight separate times that Microsoft engaged in conduct that illegally maintained its monopoly in PC operating systems. Despite these strongly worded conclusions concerning Microsoft's liability, the court was extremely cautious when it considered whether to break up the company. It held that divestiture was a “radical” remedy that should be imposed with “great caution.”¹

Why this reluctance to order structural relief? Even people who condemn Microsoft's conduct and admit that it probably will continue to engage in predatory practices shudder at the idea that we should break it up: “Conduct relief of virtually any type, sure. Even a multi-billion dollar fine could be appropriate. But don't even think about structural relief. Don't destroy Microsoft. Only a fool would execute a company that has made so many wonderful products.”

The government did not even dare to mention the term “structural relief” when it filed its suit. It merely asked for “such additional permanent relief as is necessary” Why the omission? Perhaps shrewd government lawyers knew that if they started the proceeding by explicitly admitting that the best way to achieve justice was by doing the unthinkable they would be more likely to lose the case completely. The judge might reason that if the only effective remedy for a violation was the corporate “death penalty,” he would instead just let Microsoft off completely. Only after they spent years proving that Microsoft had repeatedly engaged in anti-competitive conduct did the enforcers raise the

possibility of structural relief. And, even when they asked for it, they called it only a “reorganization.” Tellingly, one of Microsoft's first suggested changes to the government's proposal was that it be renamed a “divestiture.”

Why are we afraid even to discuss in a straightforward manner whether we should break up Microsoft? This is probably because of the legal fiction that a corporation is a “person.”

This notion is deeply ingrained in the legal profession, the business community, and society at large. Courts have long held that corporations are legal “people” who are entitled to “due process”—in other words, corporations have constitutional rights. Corporations have names (even nicknames—who would want to execute “Ma Bell”?), pay taxes, and are subject to most laws—just like real people. Moreover, a corporation is a very special type of person. In theory a corporation is a person who cannot die; a corporation is an immortal.

The court of appeals might well have reasoned this way, at least subconsciously. In discussing the conditions under which divestiture might be appropriate, it held: “If indeed Microsoft is a unitary company, division might very well require Microsoft to reproduce each of these departments in each new entity”² The reference to the company as a possible unitary entity rather than as a convenient grouping of contracts, and the reference to the need for reproduction following a divestiture, could well reflect more than a logical assessment of underlying economics.

In reality, of course, a corporation is not a conscious organic entity. It is just a series of contracts between real people. It is nothing more than formal and informal relationships

■ **Robert H. Lande** is

Venable Professor of Law, University of Baltimore School of Law, and Senior Research Scholar, American Antitrust Institute.

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between shareholders, employees, and other flesh-and-blood people, made for a variety of economic purposes. Some are long term. Others, however, are short-term or can be broken by one party at will. These contracts, moreover, are changing continuously.

Although a corporation can be immortal, in fact corporations die every day. Corporations also frequently sell divisions to other companies, spin off divisions to form separate new firms, and divest portions of themselves in the aftermath of mergers. The very concept of a firm as an entity that shapes itself by decisions about doing things internally through a hierarchy or in the marketplace reflects the changeability that is at the heart of corporate existence. The shape of corporations is constantly in flux. Antitrust is just another cause of this flux. A court-ordered divestiture would constitute only a rearrangement of some of Microsoft's contracts, but not the company's literal "execution."

Because a corporation is just a convenient grouping of contracts, it follows that it should not have the moral rights of a real person. Its shareholders and employees have rights, of course, but these will not necessarily be destroyed just because the corporation is divided into two or more parts. Shareholder value and jobs should not be needlessly reduced, but reasonable people differ as to whether the combined stock value and employment levels of hypothetical post-break up "baby Bills" would be more, or less, than the current total values. Regardless, Microsoft did break the law repeatedly, and it did accrue illegally gotten gains, so we should not be overly upset if its stock value decreases somewhat as a result of the remedy proceeding. Moreover, shareholder value could decrease even more as a result of a tough, protracted conduct-based remedy. Regardless, a possible decrease in shareholder value should not deter us from rationally discussing whether Microsoft should be broken up.

The divestiture issue is far more fundamental and emotion-laden than that of shareholder

value. No responsible member of our society would execute a flesh-and-blood person without certainty "beyond a reasonable doubt" that they had engaged in a horrible crime like murder (and many do not believe in capital punishment even under these circumstances). It is likely that many or most of us subconsciously apply these requirements to the Microsoft case: we believe that it is only appropriate to break up Microsoft if we are virtually certain that it committed a crime as horrible as murder. And, of course, even though Microsoft was convicted of eight separate antitrust violations, it did not murder any real people and its crimes are not as clear-cut as murder. Therefore, we reason, they do not deserve to be executed.

We have to remind ourselves that *United States v. Microsoft* is just a civil trial where the government is, rightly, required to prove its case only under a "more likely than not" standard. The antitrust laws forbid certain types of economic activity, and were in large part designed to give companies an incentive to behave in the manner that is best for consumer welfare. The remedy for an antitrust violation is supposed to determine which arrangement of contracts and contractual rights is best for society. Microsoft has, of course, committed an antitrust violation. If it is "more likely than not" that the best way to achieve the goals of the remedy is through divestiture, the court should order divestiture. If conduct remedies are more likely to be optimal, the court should proceed in that direction. These are simply economic alternatives that should be weighed against one another rationally.

Moreover, the facts in the *Microsoft* case suggest that the corporation would be relatively simple to break up. Microsoft essentially consists of teams of immensely talented programmers and a substantial body of intellectual property rights. All a court would have to do would be to rule that certain of these people and some of this intellectual property now should be housed in particular buildings and be part of company A,

"Because a corporation is just a convenient grouping of contracts, it follows that it should not have the moral rights of a real person."

while others should be part of company B. This situation is very much unlike that of *United States v. United Shoe Machinery Corp.*³ In that celebrated case the court had to break up a monopoly that made all of its shoe machines in one factory. Compared to that situation, in *Microsoft* a structural solution is simple.

Further, meaningful conduct relief would be likely to result in court oversight of many of Microsoft's activities for years to come. It certainly is possible to craft a tough package of effective conduct remedies that will not hamper the company's ability to innovate.⁴ Yet, this package is necessarily complex, lengthy, regulatory in nature, and susceptible to being evaded.⁵ Even the settlement agreed to by the Department of Justice, nine states, and Microsoft on November 6, 2001—which only amounts to a slap on the wrist for Microsoft—will last for five years, with possibly a two-year extension.⁶ By contrast, structural relief would in most ways be simpler, quicker, and less burdensome. It also is likely to be more effective and much more difficult to evade.

Reasonable people certainly can differ as to whether the best, most pro-consumer, most pro-innovation results in the *Microsoft* case are likely to arise from a conduct-based remedy, from dividing it into several corporations, or through a combination of methods. Divestiture, however, should not only be a last resort. It should be a viable option that is considered logically on its legal, administrative and economic merits, without the influence of subconscious anthropomorphizing. It certainly should not be thought of in moral terms and avoided at all costs lest we engage in the reprehensible act of “killing” someone. It is in no respect the corporate equivalent of the death penalty.

On Sept. 6, 2001, the federal and state enforcers pursuing the case announced they would not ask the court to break up Microsoft. On November 6, the Department of Justice, nine states, and Microsoft agreed to a Revised Proposed Final Judgment that settled the case

through a series of conduct remedies.

However, many believe that Microsoft has had a history of “interpreting” past court orders in a manner that made them ineffective. Many simply do not trust Microsoft to live up to either the letter or the spirit of the Stipulation. Many fully expect Microsoft to delay and circumvent this remedy.

The parties' agreement provides that if Microsoft violates the agreement, “the plaintiffs may apply to the Court for a one-time extension of this Final Judgment of up to two years, together with such other relief as the Court may deem appropriate.”⁷ Assuming that Microsoft does violate this Stipulation, the enforcers and the court should reevaluate whether to impose a structural remedy. They should do so using logic instead of emotion. They should decide upon the most appropriate relief considering each option on its legal, economic, and administrative merits, without anthropomorphizing. In light of Microsoft's evasions they will have to reconsider the best way to make sure that this lawbreaker is deprived of the fruits of its illegal conduct, that competition is restored to the affected market, and that Microsoft is prevented from engaging in similar conduct. The best way to do all of this is the most straightforward one. The court should break up Microsoft. ●

¹ *United States v. Microsoft*, No. 00-5212, at 61 (D.C. Cir. June 28, 2001).

² *Id.* at 105.

³ 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

⁴ See *Conduct Remedies in the Microsoft Monopolization Litigation*, Paper Presented at AAI Press Briefing at the National Press Club (Oct. 5, 2001), available at <http://www.antitrustinstitute.org>. The American Antitrust Institute presented a white paper which called for ten tough conduct remedies to be imposed in the *Microsoft* case.

⁵ *Id.*

⁶ See Revised Proposed Final Judgment (Nov. 6, 2001).

⁷ *Id.* at V(B) (emphasis added).

The Price of Unanimity: The D.C. Circuit's Incoherent Opinion in *Microsoft*

John E. Lopatka & William H. Page

The D.C. Circuit's long-awaited decision in the *Microsoft* case¹ should disappoint anyone concerned about the integrity of antitrust law. Surprisingly, the opinion was not only "per curiam,"² but unanimous.³ Most per curiam opinions reach an obvious result by straightforward reasoning;⁴ this one reaches a controversial result by convoluted reasoning. Indeed, it strains credulity to believe that all members of the court agreed with every portion of this opinion. Maybe the court thought the per curiam strategy would avoid a confusing welter of opinions and thus give its pronouncement greater authority and less likelihood of reversal. If that was its intent, the result is the opposite: the suppressed divisions on the court are manifest in a host of inconsistencies that undermine the opinion's significance and dilute its doctrinal implications. That the members of the court were willing to sign such a document suggests that the court's paramount goal was to reach a particular result, regardless of the collateral damage to antitrust policy.

In spite of this political act, there may yet be a settlement. In the wake of the opinion (and the events of September 11) the Justice Department and Microsoft have agreed to settle the case on terms that impose a number of behavioral restrictions on the firm.⁵ Some states, however, are refusing to join the settlement, claiming the terms are inadequate to restore competition. The incoherence of the D.C. Circuit's opinion has undoubtedly contributed to this controversy: even the most vitriolic critics of the settlement can find support in the court's words.

In this essay we highlight some of the opinion's many inconsistencies, focusing on the

court's treatment of (1) the role of the "browser market" in proof of anticompetitive effects, and (2) the role of efficiency concerns in evaluating the integration of the browser and the operating system. Although we disagree with many of the court's holdings on their own terms, we save for another day any extended analysis of the court's treatment of specific issues. Here, we critique the court's rulings and statements only on grounds of incoherence or opacity. Moreover, we limit our consideration of inconsistencies to the substantive rulings. The appellate court, of course, also reversed the structural remedy—a breakup of the company—ordered by the district court and, because of Judge Jackson's misconduct, remanded the case to a new judge.⁶ We express no view on these actions.

Anticompetitive Effects and the Browser Market

The browser market played a central role in the appeals court's disposition of the claims of monopoly maintenance, attempted monopolization, and tying. The court held (1) that Microsoft monopolized the operating system market mainly by its actions in the browser market; (2) that the government failed to prove attempted monopolization of the browser market because it failed to prove that such a market exists; and (3) that the government must prove an anticompetitive effect in the browser market in order to establish the tying claim. These conclusions are contradictory.

In the first section of the opinion, the D.C. Circuit Court affirmed most of the district court's findings and conclusions in holding that Microsoft illegally maintained its OS monopoly by integrating its browser with the operating system; entering into restrictive agreements

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John E. Lopatka is
Alumni Professor of
Law at the University
of South Carolina
School of Law.
William H. Page is
Marshall M. Criser
Eminent Scholar at the
University of Florida
Levin College of Law.

with Apple and other computer makers, Internet access providers, independent software vendors, and Internet content providers; and interfering with the development of Sun Microsystems' Java programming language. *Microsoft*, 253 F.3d 34, at 58–80. In doing so, the court endorsed the district court's adoption of the government's theory of anticompetitive effect. Under that theory, Microsoft used the various exclusionary practices to prevent the emergence of software platforms—Netscape's browser and Java—that could undermine the Windows monopoly. Because the emerging platforms would allow developers to write software applications that could run regardless of the underlying operating system, they threatened the OS market's "applications barrier to entry"—the strong tendency of users to buy (and developers to write programs for) the operating system for which the most applications are available. *Id.* at 60. The court wrote that the government was not required to prove actual anticompetitive effect or harm to consumers—only that the acts had a reasonable likelihood of preserving Microsoft's OS monopoly. *Id.* at 79.

The court explained how "market share in the browser market affects market power in the operating system market" by observing that

Microsoft's efforts to gain market share in one market (browsers) served to meet the threat to Microsoft's monopoly in another market (operating systems) by keeping rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows as the platform for software development.

Id. at 60. The critical point to note here is that the anticompetitive effect in the OS market *depends entirely on Microsoft's acquisition of market share in the browser market*. Only if Microsoft achieved a certain usage share could it convince developers to write to Windows application programming interfaces (APIs) rather than to Netscape's (or some other firm's) cross-platform APIs.

The court confirmed this dependence again and again in its discussion of particular exclusionary practices, using terms like "market share"⁷ and "usage share"⁸ in connection with browsers in ways that presupposed the existence of a browser market. For example, it stated that "Microsoft reduced rival browsers' usage share not by improving its own product but, rather, by preventing OEMs⁹ from taking actions that could increase rivals' share of usage,"¹⁰ and "a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation." *Id.* at 70. These statements assume that, for there to be a § 2 violation, there must be foreclosure of *some* share of *something*. An antitrust lawyer would be forgiven for assuming that something was a market.

But in the next section of the opinion, we learn that there is no browser market. The government alleged that Microsoft, in addition to monopolization of the OS market, had attempted to monopolize the browser market using many of the same tactics alleged in support of the monopoly maintenance claim, and by its famous offer to "divide" the browser market with Netscape. But the court short-circuited any consideration of this conduct as attempted monopolization, holding that the plaintiff had failed "to prove a dangerous probability of achieving monopoly power in the putative browser market," as required by *Spectrum Sports*.¹¹ To prove a dangerous probability of success, the plaintiff must "define the relevant market and . . . demonstrate that substantial barriers to entry protect that market." *Microsoft*, 253 F.3d at 81. On the first point, the plaintiff must offer

a detailed description of the purpose of a browser—what functions may be included and what are not—and an examination of the substitutes that are part of the market and those that are not. . . . The District Court never

engaged in such an analysis nor entered detailed findings defining what a browser is or what products might constitute substitutes. In the Findings of Fact, the District Court (in a section on whether IE and Windows are separate products) stated only that “a Web browser provides the ability for the end user to select, retrieve, and perceive resources on the Web.” . . . Furthermore, in discussing attempted monopolization in its Conclusions of Law, the District Court failed to demonstrate analytical rigor when it employed varying and imprecise references to the “market for browsing technology for Windows,” “the browser market,” and “platform-level browsing software.”

Id. at 81 (citations omitted). The district court’s failure was apparently so complete that the court of appeals foreclosed any reconsideration of the issue on remand. The court pointed to:

plaintiffs’ failure to articulate and identify evidence before the District Court as to (1) what constitutes a browser (i.e., what are the technological components of or functionalities provided by a browser) and (2) why certain other products are not reasonable substitutes (e.g., browser shells or viewers for individual internet extensions, such as Real Audio Player or Adobe Acrobat Reader).

Id. at 81–82 (citations omitted). The court went on to rule that, even if the browser market had been properly defined, a reversal would be required because the government had failed to offer any evidence that the browser market was subject to entry barriers, particularly an applications barrier to entry like the one found to protect the OS market. *Id.* at 82–84.

The court’s rejection of the district court’s finding of the existence of a relevant browser market is strange, given its deference to the district court’s delineation of a market for OSs for personal computers with Intel-compatible processors. That definition excluded other platform software, including browsers, because of the special characteristics of OSs, and the lack of reasonable interchangeability within a fore-

seeable time.¹² *Id.* at 53–54. Although the court of appeals stated that the district court’s findings on the browser market “pale by comparison” with its findings on the OS market, it is difficult to see why the record is sufficient to define a market for one and not the other. Moreover, the court’s insistence on “analytical rigor” in the definition of a browser market is inconsistent with its deference to other important findings of the district court. And it seems peculiar that the court of appeals would accuse the district court of lack of analytical rigor without even citing, much less discussing, the district court’s most relevant findings (in paragraphs 199–201) that there is a market for web browsing functionality.¹³

More important than any of this is the inconsistency between the court of appeals’s reversal of the district court’s finding that there is a browser market and its affirmance of the holding that Microsoft monopolized the OS market by building its share of the browser market. The lynchpin of the government’s theory of anti-competitive effect was the idea that Microsoft prevented the emergence of a platform threat by Netscape and Java by denying Netscape usage share in the *browser market*. Although the court insisted that attempted monopolization requires “an analysis wholly independent of the conclusions and findings on monopoly maintenance,” *id.* at 81, the factual bases for the two claims are inseparable. If there is no market for browsers, then the usage share numbers on which the court relied in finding monopolization are meaningless because they fail to account for usage of other reasonable substitutes. And if there is no market for browsers, then the weakening of a single firm would do nothing to reinforce Microsoft’s OS monopoly, because there would be countless other platform threats that would remain. If there are no entry barriers in the browser market, particularly if there is no applications barrier to entry attributable to network effects, then the strategy of acquiring greater share in the browser market would be a vain effort—new entrants would quickly take the

place of any firm at whose expense Microsoft had increased its browser usage.

It is not enough to respond that the browser threat was “nascent.” *Id.* at 54. The court rejected Microsoft’s argument that the government’s theory of anticompetitive effect was inconsistent with the district court’s exclusion of browsers from the market for Intel-compatible operating systems, stating that “[n]othing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes.” *Id.* According to the court, then, the browser can be a nascent competitive constraint on an OS monopolist, without actually being in the OS market. Whatever the merits of that proposition, the court’s theory of competitive harm in the OS market requires at least that Microsoft and Netscape were competitors in a browser market. We need *some* evidentiary basis for concluding that harm to a firm constitutes harm to competition in a particular case.¹⁴ Even if the law prohibits harm to “nascent” competitors, we at least must have some coherent theory to support the inference of anticompetitive effect from the injury of a particular firm. In *Microsoft*, the entire theory rested on Microsoft’s building of usage share in a browser market. If there is a reasoned economic argument why the absence of a browser market does not undermine the theory of monopolization of the OS market, the court failed to provide it.

But it gets worse. In the third section of the opinion, the court of appeals reversed the district court’s holding that Microsoft illegally tied the browser to the operating system, requiring that the district court on remand apply a newly minted rule of reason. Most important here, the court insisted that under its rule of reason for tying, any anticompetitive effect from the tie must be in the tied product market—the market for browsers. Both law¹⁵ and economics¹⁶ require the plaintiff in a tying case to define the market for the tied product. Just as “[i]t is

impossible to monopolize a market that does not exist,”¹⁷ it is impossible to reduce competition in a market that does not exist. Nevertheless, the court precluded the government on remand from proving that a browser market exists:

[O]n remand, plaintiffs must show that Microsoft’s conduct unreasonably restrained competition. Meeting that burden “involves an inquiry into the actual effect” of Microsoft’s conduct on competition in the tied good market, the putative market for browsers. To the extent that certain aspects of tying injury may depend on a careful definition of the tied good market and a showing of barriers to entry other than the tying arrangement itself, plaintiffs would have to establish these points. . . . But plaintiffs were required—and had every incentive—to provide both a definition of the browser market and barriers to entry to that market as part of their § 2 attempted monopolization claim; yet they failed to do so. . . . Accordingly, on remand of the § 1 tying claim, plaintiffs will be precluded from arguing any theory of harm that depends on a precise definition of browsers or barriers to entry (for example, network effects from Internet protocols and extensions embedded in a browser) other than what may be implicit in Microsoft’s tying arrangement.¹⁸

Id. at 95 (citation omitted). So the government must prove harm in the market for browsers, but will be precluded from proving that there is a market for browsers. Reason totters on her throne. No wonder the government chose not to pursue the tying claim on remand.¹⁹

Bundling the Browser and the Operating System

Almost as confused as the D.C. Circuit’s treatment of the role of the browser market in evaluating competitive effects is its treatment of the integration of the browser and the operating system. In June of 1998, a panel of the same court had reversed Judge Jackson’s preliminary injunction enforcing a 1995 consent decree by requiring Microsoft to permit OEMs to remove Internet Explorer functionality from Windows

95.²⁰ The panel majority announced the standard that IE and Windows 95 were “integrated” if Microsoft could offer “facially plausible”²¹ evidence that bundling “combines functionalities . . . in a way that offers advantages unavailable if the functionalities are bought separately and combined by the purchaser.”²² It reasoned that because of “the limited competence of courts to evaluate high-tech product designs and the high cost of errors,”²³ a “court’s evaluation of a claim of integration must be narrow and deferential”²⁴ to a firm’s design decisions. The court concluded the government had failed to show a probability of success on the merits,²⁵ because “[o]n the facts before us,”²⁶ Microsoft had met the criteria for integration, although that conclusion was “subject to reexamination on a more complete record.”²⁷

Two years later, however, the court of appeals was far less clear in its treatment of integration under Sections 1 and 2 of the Sherman Act. The government alleged that the bundling of the browser and the operating system constituted both monopoly maintenance and illegal tying. In resolving both of these claims the court expressed concerns about efficiency and judicial competence, but the implications of those concerns for doctrine in the two contexts were quite different. Indeed, the standards that emerged from the court’s analysis were similar mainly in their opacity.

Two types of bundling constituted monopoly maintenance: (1) Microsoft’s imposition of license restrictions precluding OEMs from “removing any desktop icons, folders, or ‘Start’ menu entries,” 253 F.3d at 61, and (2) Microsoft’s physical integration of the code of the browser and the operating system. *Id.* at 64–67. The issues were closely related: the first addressed Microsoft’s *contractual* preclusion of OEMs from removing IE, *id.* at 61; the second addressed Microsoft’s *technological* preclusion of OEMs from removing IE. Both were found to be anti-competitive because of their effect on browser usage share.

Interestingly, however, “IE” means different things in the different contexts. In the licensing discussion, the court addressed only Microsoft’s failure to allow OEMs to delete “*visible means of user access to IE.*”²⁸ That was anticompetitive because including two browsers would have created consumer confusion and increased support costs. But in the commingling discussion, the court addressed Microsoft’s failure to allow OEMs to delete any of *the actual code that constitutes IE.* By mixing IE code with OS-specific code, Microsoft made it harder to delete IE code without harming the underlying OS.

[H]aving the IE software code as an irremovable part of Windows meant that pre-installing a second browser would “increase an OEM’s product testing costs,” because an OEM must test and train its support staff to answer calls related to every software product preinstalled on the machine; moreover, pre-installing a browser in addition to IE would to many OEMs be “a questionable use of the scarce and valuable space on a PC’s hard drive.”

Id. at 64 (quoting the district court). The court affirmed the district court’s conclusions that Microsoft’s “commingling” of browser code in the same files with OS code and its prevention of removal of IE from Windows (by not providing a “remove” function) were anticompetitive because the actions reduced rival browsers’ usage share.²⁹

Moreover, the court held that integration of IE and the OS, with the exception of one design feature, lacked any business justification. *Id.* at 66–67. In reaching this conclusion, it affirmed the district court’s acceptance of the testimony of two government witnesses—contradicted by Microsoft’s witnesses—that the files containing IE code and shared code also contain OS-specific code. *Id.* at 66. The critical point here is that the court gave no special weight to concerns about interfering with Microsoft’s design of Windows. It did express an abstract reluctance to interfere with design decisions, *id.*, but did not on that account hold the government to any

higher standard of proof. The issue of integration is to be considered in the context of the defendant's proffered business justifications and the plaintiff's proffered rebuttals as an ordinary issue of fact. Thus allegations of predatory innovation, unlike claims of predatory pricing, are apparently to be viewed with no particular skepticism. Efficiency concerns have no doctrinal implications, even when the court applies what it concedes is an "edentulous" standard of anti-competitive effects.

The court did conclude that Microsoft's design of Windows to override the user's default browser in a few instances—launching IE unexpectedly—was supported by business justifications that the government had failed to rebut. *Id.* at 67. This holding, however, only confuses matters, in two important respects. First, the court's statement of the plaintiff's rebuttal burden here conflicts with its own statement of the burden earlier in the section. In its discussion of integration, the court stated that, if the plaintiff establishes a prima facie case of anticompetitive effect and the defendant responds by offering a procompetitive justification for the conduct, the plaintiff must "not only rebut[] the proffered justification, but also . . . demonstrat[e] that the anticompetitive effect of the challenged action outweighs it." *Id.* Earlier in the monopoly maintenance section, however, the court stated that the plaintiff may prevail *either* by rebutting the justification *or* by showing the anticompetitive effect outweighs it.³⁰ The inconsistency did not affect the outcome, because on the one issue for which the court found Microsoft had offered a justification, the government failed either to rebut it or show that it was outweighed by the anticompetitive effect. Nevertheless, the court has created the potential for future confusion on this critical point.

Second, for purposes of remand in the case, this holding greatly complicates the task of determining exactly what Microsoft must allow OEMs to remove. Apparently, Microsoft must allow deletion of all of the means of "readily

accessing" IE, but it need not allow deletion of IE technologies necessary to launch IE where an override of the default browser was shown to be justified. But the condemnation of commingling code, combined with the court's holding that unjustified use of disk space is anticompetitive, would seem to suggest that any code specific to IE, apart from what is necessary for the default overrides, must be capable of being removed. None of this has yet been specified.³¹

More important, the court's treatment of integration in the monopoly maintenance section is inconsistent with its treatment of the same issue in the tying section. In the latter context, the court of appeals held that the district court applied an incorrect standard in evaluating the legality of Microsoft's tying of the browser to the OS. *Id.* at 84–97. The district court had refused to apply the standard for tying that the court of appeals announced in the 1998 consent decree case, instead applying a version of the per se rule drawn from the Supreme Court's decision in *Jefferson Parish*.³² The court of appeals reversed, but not (as one might expect) because Judge Jackson had dodged its 1998 standard. Indeed, the en banc court of appeals itself distinguished the panel's 1998 standard, somewhat disingenuously, as limited to the consent decree context.³³ Instead, the court held that an unspecified "rule of reason" inquiry was necessary because of the special efficiency concerns associated with the integration of functionality in platform software. *Id.* at 89–95.

The court recognized that there are potential harms to consumer choice from combining applications with the operating system and preventing their removal. But Microsoft had asserted important efficiencies that, according to the court, the conventional test did not allow to be considered adequately. Although the requirement that there be two products for there to be a tie (even under the per se rule) is a proxy for an efficiency analysis, according to the court it is too crude a test to address the efficiencies

adequately. Consequently, the court remanded for consideration under a rule of reason, which “more freely permits consideration of the benefits of bundling in software markets, particularly those for OSs, and a balancing of these benefits against the costs to consumers whose ability to make direct price/quality tradeoffs in the tied market may have been impaired.” *Id.* at 94. The court emphasized that in the tying inquiry the plaintiff must establish an anticompetitive effect in the market for the *tied* product—browsers.³⁴

First of all, we note the absurdity of a tying rule created specifically to address “technological integration of added functionality into software that serves as a platform for third-party applications.” *Id.* at 84. The move is particularly suspect because it is unnecessary, even if we grant that platform competition has unique aspects. There is ample precedent for considering procompetitive justifications under current tying law.³⁵

More important, however, the court’s invocation of efficiency as the basis for its concoction of a special test for platform tying is inconsistent with its indifference to efficiency in the context of monopoly maintenance. The court asserted that a new test for tying is necessary to allow adequate consideration of productive efficiency and thus to avoid deterring beneficial integration. But the same efficiency concerns apply with equal force in the monopoly maintenance context. The court gave lip service to a concern about interfering in design decisions in that context. But, far from creating any special test, it simply affirmed the district court’s conclusory findings that Microsoft’s commingling code and prevention of removal of IE were anticompetitive and lacked any procompetitive justification. In the process, it addressed none of the concerns about efficiency that it found so compelling in the tying section.

Another puzzle is worth noting. The court declared that, if the plaintiffs pursue a tying claim on remand, the district court “must also

consider” a theory not addressed in its analysis of monopoly maintenance, something called “price bundling.” *Id.* at 96. Describing the “core concern” in tying law, the court explained that competition on the merits of the tied product “is foreclosed when the tying product either is sold only in a bundle with the tied product or, though offered separately, is sold at a *bundled price*, so that the buyer pays the same price whether he takes the tied product or not.”³⁶ The court here appears to divide the universe of tying arrangements sensibly into two groups, one in which a buyer is forced to purchase two products because of contractual or physical constraints, and one in which the buyer is permitted to purchase the tying product alone but has no economic incentive to do so because the price is no lower than the price charged for the package of products.³⁷ One would assume that the latter sort of tie is what the court calls “price bundling.”

But the government did not allege “price bundling” in this sense, because Microsoft did not offer a version of Windows without IE. In the court’s typology, the government’s case alleged only the first kind of tying arrangement—one created by contractual or physical binding. Why, then, would the district court need to consider price bundling? The court of appeals required the district court to compare Microsoft’s charge for Windows and IE together with the amount that “its charge *would have been* for Windows alone.” *Id.* at 96 (emphasis added). But under the court’s typology a *hypothetical* price of Windows without IE (however that might be determined) is irrelevant to price bundling, which occurs when the tying product is *in fact* offered separately, but at a price that represents no discount from the price of the bundle.

Apparently, the court is employing a different (but unstated) definition of price bundling from the one it had suggested earlier in its opinion. The price bundling claim the court would have the lower court resolve is whether Microsoft charged a price *increment* for IE in Windows.³⁸

If Microsoft charged no higher price for the combination of Windows and IE than it would have charged for Windows without IE, then Microsoft did not engage in price bundling. Under this definition, price bundling is charging a higher price for the package of tying and tied products than for the (hypothetical) tying product alone. In other words, if Microsoft gave IE away for free—a question on which the court finds conflicting record evidence, *id.*—it did not price bundle. One might think that if a seller gave away a valuable product it would face condemnation for predatory pricing. But the court sidesteps this implication by noting “there is no claim of price predation.” *Id.* (emphasis added).

Thus, apparently Microsoft may have committed a tying offense by charging more for the combination of IE and Windows than it would have charged for Windows alone. Why such a practice should be given a name, much less the misleading term “price bundling,” is obscure. Perhaps the court meant to say that contractual or physical tying is okay if the seller charges no increment in price for the tied good, because the practice does not harm consumers. Thus, if and only if the seller charges a

price increment will the seller have to prove that it has procompetitive justifications for the contractual or physical tie.³⁹ But this interpretation of the court’s analysis conflicts with its conclusion in the monopoly maintenance section that OEMs incurred a cost in pre-installing a second browser because of customer confusion and that end-users incurred an opportunity cost in installing a second browser by wasting space on their hard drives. If these effects are taken seriously, tying could be anticompetitive despite a zero price increment.

Conclusion

The D.C. Circuit’s bizarre disposition of the *Microsoft* case is a missed opportunity. One would have hoped that a court with such expertise in antitrust and regulatory matters would have produced a majority analysis (with perhaps an insightful concurrence and a trenchant dissent) that pointed the way for antitrust law in the information age. Instead, we are left with an inscrutable per curiam opinion that gives us only a result and confusion. The most important monopolization case of the information age deserved better. ●

¹ United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

² In this context, per curiam means “not attributed to any one member of the court.” A Dictionary of Modern Legal Usage 125 (2d ed. 1995), quoted in R. Perry Sentell, Jr., *The Peculiarity of Per Curiam: The Georgia Supreme Court*, 52 MERCER L. REV. 1, 2 (2000).

³ Some controversial opinions are decided per curiam, but with numerous partial concurrences and dissents. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976). Whatever else may be said for that use of the per curiam device, it does not submerge the divisions on the court.

⁴ One study of the Supreme Court’s per curiam practice concluded that per curiam opinions, among other functions, “decide less controversial cases in a cost-effective manner; provide prompt direction to lower courts to follow recent decisions; rapidly answer obvious legal questions that, nonetheless, represent important issues; and extend major decisions incrementally.” Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29, 38 (1992).

⁵ Proposed Final Judgment, United States v. Microsoft Corp.,

No. 98-1232 (CKK) (filed Nov. 2, 2001) <http://www.usdoj.gov/atr/cases/f9400/9462.htm>; Stephen Labaton & Steve Lohr, *One-Third of States Remain Opposed to Microsoft Settlement Deal*, N.Y. TIMES, Nov. 6, 2001, <http://www.nytimes.com/2001/11/06/business/06CND-SOFT.html>.

⁶ The court disqualified the judge “retroactive only to the date he entered the order breaking up Microsoft,” *Microsoft*, 253 F.3d at 111. Even though the court found “fair room for argument that the District Court’s factfindings should be vacated *in toto*,” *id.* at 119, it declined to set aside the entire decision because there was no evidence of actual bias. Microsoft challenged the consistency of this ruling with the appellate court’s decision to affirm the trial court’s findings on the merits, *Petition for Writ of Certiorari, United States v. Microsoft Corp.*, No. 1-236 (U.S. filed Aug. 7, 2001), <http://www.microsoft.com/presspass/trial/appeals/08-07petition.asp>, but the Supreme Court denied certiorari.

⁷ See, e.g., *Microsoft*, 253 F.3d at 60 (“The reason market share in the browser market affects market power in the operating system market is complex, and warrants some explanation.”); *id.* (“Microsoft’s efforts to gain market share in one market (browsers)

served to meet the threat to Microsoft's monopoly in another market (operating systems)"); *id.* at 69 ("Following *Tampa Electric*, courts considering antitrust challenges to exclusive contracts have taken care to identify the share of the market foreclosed."); *id.* at 72 ("Microsoft's exclusive deals with the ISVs had a substantial effect in further foreclosing rival browsers from the market.")

⁸ *Id.* at 60 ("The restrictions Microsoft places upon Original Equipment Manufacturers are of particular importance in determining browser usage share"); *id.* at 62 ("Microsoft reduced rival browsers' usage share not by improving its own product but, rather, by preventing OEMs from taking actions that could increase rivals' share of usage."); *id.* at 65 ("Because Microsoft's [commingling code], through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products and hence protecting its own operating system monopoly, it is anticompetitive."); *id.* ("Because the [default] override [of users' choice of browsers] reduces rivals' usage share and protects Microsoft's monopoly, it too is anticompetitive."); *id.* at 67 ("Plaintiffs plainly made out a prima facie case of harm to competition in the operating system market by demonstrating that Microsoft's [commingling code] increased its browser usage share and thus protected its operating system monopoly from a middle-ware threat."); *id.* at 71 ("By ensuring that the 'majority' of all IAP subscribers are offered IE either as the default browser or as the only browser, Microsoft's deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly."); *id.* at 73-74 ("Because Microsoft's exclusive contract with Apple has a substantial effect in restricting distribution of rival browsers, and because (as we have described several times above) reducing usage share of rival browsers serves to protect Microsoft's monopoly, its deal with Apple must be regarded as anticompetitive.")

⁹ OEM stands for "original equipment manufacturer," industry jargon for a company that assembles, brands, and sells computers.

¹⁰ *Id.* at 63. The court did not explain why the relevant measure of the browser market is *usage*, rather than *installation*. The court's analysis focused on the reluctance of OEMs to install a rival browser. See, e.g., *id.* at 61. But we put this point aside.

¹¹ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

¹² See also *Microsoft*, 253 F.3d at 79-80.

¹³ *United States v. Microsoft Corp.*, 65 F. Supp. 2d 1, 49-50 (D.D.C. 1999).

¹⁴ Economic harm is typically not anticompetitive if the injured firm is not a competitor of the defendant. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138 (1998); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1355-56 (Fed. Cir. 1999). In theory, a firm could be on the verge of entering its first market yet represent such an unusual and promising competitive force that its foreclosure would work a cognizable injury to competition. But this theory would not apply here, because Netscape was indeed supplying a product commercially and the methods used to exclude it related to the distribution of that product.

¹⁵ *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 519

(3d Cir. 1998) ("Before we can determine whether there was harm to competition in the tied market, that market must be defined."); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993) (holding that plaintiff failed to establish a threat to competition in "the most narrowly defined tied product market"); *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 493 (3d Cir. 1992) (finding that plaintiff improperly defined the tied product market too narrowly).

¹⁶ Edmund H. Mantell, *Antinomies in Antitrust Law: Tying and Vertical Integration*, 7 J.L. & COMMERCE 23, 58 (1987): "Thus, in order to determine what fraction of the aggregate market for the tied product has been 'foreclosed' to other sellers of that product, one must define the scope of that market. This requirement of market definition, considered purely as a question of economics, constitutes essentially the same requirement of market definition as in a Section 2 monopolization case. The issues which arise are the same, and the depth of the economic analyses are essentially the same."

¹⁷ *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 480 (7th Cir. 1988).

¹⁸ The court's reference to "the tying arrangement itself" apparently as implicit evidence of a browser market and entry barriers is obscure. It is reminiscent of the proposition that a tying arrangement itself may prove market power in the tying product market. See *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958). That proposition has since been repudiated. See *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977).

¹⁹ Joint Status Report, at 2, *United States v. Microsoft Corp.*, No. 98-1232 (CKK) (filed Sept. 20, 2001), <http://www.usdoj.gov/atr/cases/f9000/9085.htm>.

²⁰ *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998), *rev'd* 980 F. Supp. 537, 541 (D.D.C. 1997). The preliminary injunction barred Microsoft from "forcing OEMs to accept and preinstall the software code" of IE 3. *Id.* at 940.

²¹ 147 F.3d at 950.

²² *Id.* at 948. The court continued that the bundle "must be different from what the purchaser could create from the separate products on his own" and the combined form must "be better in some respect. . . . The concept of integration should exclude a case where the manufacturer has done nothing more than to metaphorically 'bolt' two products together." *Id.* at 949.

²³ *Id.* at 950 n.13.

²⁴ *Id.* at 949-50.

²⁵ *Id.* at 953.

²⁶ *Id.* at 950, 952.

²⁷ *Id.* at 952.

²⁸ 253 F.3d at 61. The court confirmed this interpretation by stating "because an OEM's altering the appearance of the desktop or promoting programs in the boot sequence *does not affect the code already in the product*, the practice does not self-evidently affect either the 'stability' or the 'consistency' of the platform." *Id.* at 63-64.

²⁹ *Id.* at 65 (“Because Microsoft’s conduct, through something other than competition on the merits, has the effect of significantly reducing usage of rivals’ products and hence protecting its own operating system monopoly, it is anticompetitive.”). *See also id.* at 66 (asserting that “commingling deters OEMs from pre-installing rival browsers, thereby reducing the rivals’ usage share and, hence, developers’ interest in rivals’ APIs as an alternative to the API set exposed by Microsoft’s operating system”).

³⁰ “If the monopolist asserts a procompetitive justification . . . then the burden shifts back to the plaintiff to rebut that claim. . . . [I]f the monopolist’s procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.” *Id.* at 59. Thus, if the plaintiff rebuts the procompetitive justification, the finding of anticompetitive effect stands, and the plaintiff prevails; only if the plaintiff *fails* to rebut the procompetitive justification must it prove that the anticompetitive harm outweighs the procompetitive benefit.

³¹ The proposed consent decree, *see supra* note 5, addresses these issues in § III (H). To oversimplify greatly, the proposed decree would require Microsoft to allow end users and OEMs (1) to block access to Microsoft middleware products by removing icons, shortcuts, etc., and (2) to designate non-Microsoft middleware products as defaults. But the decree would allow Microsoft to override the defaults in defined circumstances. The decree apparently does not require Microsoft to allow the deletion of any actual code of a middleware product.

³² *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 47–51 (D.D.C. 2000) (applying *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984)).

³³ *Microsoft*, 253 F.3d at 92. The panel had explicitly stated that the rule it announced was “consistent with tying law.” *Microsoft*, 147 F.3d at 950. The en banc court said that “[t]o the extent that the [panel] decision completely disclaimed judicial capacity to evalu-

ate ‘high-tech product design,’ . . . it cannot be said to conform to prevailing antitrust doctrine (as opposed to resolution of the decree-interpretation issue then before us).” *Microsoft*, 253 F.3d at 92. It is hard to see how the court’s institutional competence to evaluate product design is dependent upon the legal theory under which the design is challenged.

³⁴ *Id.* at 95 (proving a reduction in competition “involves an inquiry into the actual effect of Microsoft’s conduct on competition in the tied good market, . . . the putative market for browsers”) (internal citations and quotation omitted).

³⁵ *See, e.g.*, *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 815 n.2 (6th Cir. 1997) (following the *Areeda* treatise in interpreting *Kodak* as “provid[ing] for an inquiry into whether the defendant’s [tying] conduct has procompetitive effects”).

³⁶ *Microsoft*, 253 F.3d at 87 (emphasis added). The court continued, “In both cases, a consumer buying the tying product becomes entitled to the tied product; he will therefore likely be unwilling to buy a competitor’s version of the tied product even if, making his own price/quality assessment, that is what he would prefer.” *Id.*

³⁷ The latter would be the limiting case of an economic tying arrangement. In theory, a seller could offer a discount for the tying product alone, but such a small one that a buyer would generally find purchase of the tied product from an alternative seller to be uneconomic.

³⁸ The court implies that Microsoft engaged in “price bundling” if “there is a positive price increment in Windows associated with IE. . . .” *Id.*

³⁹ *See Microsoft, id.* at 96 (“If there is a positive price increment in Windows associated with IE (we know there is no claim of price predation), plaintiffs must demonstrate that the anticompetitive effects of Microsoft’s price bundling outweigh any procompetitive justifications the company provides for it.”).

Paper Trail: Working Papers and Recent Scholarship

Before a paper reaches the public in its “final” version, it goes through many iterations as a draft or as a working paper. Much of this writing is available pre-publication on the authors’ or universities’ web sites, or on specialized web sites that collect this scholarship. Many of these papers, even when published, may not come to the notice of practitioners and others through the usual literature channels.

This department will track current working papers or recently published articles on issues of interest to antitrust practitioners and enforcers. When we find a paper of particular interest, we will summarize its contents in a short paragraph.

We welcome readers’ suggestions of papers you have found to be particularly useful or insightful. Contact Bill Page, page@law.ufl.edu.

Papers and Summaries

**Charles J. Romeo and Andrew R. Dick,
“The Effect of Format Changes and Ownership
Consolidation on Radio Station Outcomes,”
Economic Analysis Group Discussion Paper
(EAG 01-5) (May 24, 2001).**

In many proposed mergers that might raise unilateral competitive effects concerns in a differentiated market, the merging parties rely in part on the claim that product repositioning by other firms in the market would rob the merged firm of any non-trivial incentive to raise price. In particular, radio stations are differentiated by format to attract a particular demographic. When reviewing proposed mergers of radio stations, the Antitrust Division has evaluated the advertising price effects of the mergers within a particular format (e.g., news/talk, top-40, classic rock) offered in a geographic area. In cases in which Division viewed the post-merger share (and the delta) of the merging parties in a particular format as raising antitrust concerns, the merging parties frequently contended that format repositioning by rival stations would substantially reduce such concerns. Romeo and Dick analyze an extensive cross-section and time-series of format changes and find that format changes by large radio groups occur only when stations are performing poorly (suggesting that small advertising price changes are not likely to induce repositioning) and that the changes are often to formats that attract the same demographic. Romeo and Dick conclude that format repositioning may only be a weak constraint on the post-merger exercise of market power.

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Carl Shapiro, “Antitrust Limits to Patent Settlements” (May 1, 2001),

<http://www.haas.berkeley.edu/~shapiro/>

See <http://www.ssrn.com>

Shapiro addresses the issue of how antitrust principles should be applied in the context of settlements of intellectual property disputes. He applies a standard of consumer benefit to evaluate settlements in a variety of stylized market environments and settlement types (including payments by the patent holder to the challenger for delayed entry).

Josh Lerner, “Did Microsoft Deter Software Innovation?” (May 2001)

<http://www.people.hbs.edu/jlerner/>

See <http://www.ssrn.com>

Analyzing a database of indicia of innovative activity between 1990 and 2000, Lerner tentatively concludes that Microsoft did not deter innovation in software.

Randal C. Picker, “Pursuing a Remedy in Microsoft: The Declining Need for Centralized Coordination in a Networked World” (forthcoming in *J. Inst'l & Theoretical Econ.*)

<http://www.law.uchicago.edu/Lawecon/index.html>

See <http://www.ssrn.com>

Picker argues that any Microsoft remedy should take account of the increasingly easy sharing of software over “the network” rather than by incorporation into the operating system. He suggests that the remedy should emphasize removing Microsoft’s ability to use its dominant position in the operating system market distort this method of software distribution. One dramatic suggestion is to require Microsoft for two years to distribute only a stripped-down version of Windows, but to allow it to distribute middleware by other means, such as downloads from its web site.

Ian Gale and Daniel P. O’Brien, “The Antitrust Implications of Capacity Reallocation by a Dominant Firm,” *J. Indus. Econ.* XLIX (No. 2) (June 2001).

In many industries in which some resource is in apparently inelastic supply, such as landing slots at major airports and spectrum licenses in communications, a firm’s acquisition of additional capacity from other firms frequently results in a reallocation of that capacity from one market to another. After providing a brief (but useful) review of previous papers which generally conclude that the capacity reallocation will be excessive from the standpoint of social welfare, Gale and O’Brien develop a dominant firm model that relaxes some of the assumptions of these previous papers to evaluate the effects of

the dominant firm’s acquisition of additional capacity from the fringe. They conclude that the capacity reallocation will be inadequate rather than excessive in social welfare terms. Gale and O’Brien then apply the model to a Justice Department-challenged deal between Motorola and Nextel that resulted in the two firms controlling a large fraction of the spectrum available for radio dispatch services and a type of cellular service. While the Justice Department feared that the deal would result in too much capacity being allocated from the dispatch-type service to the cellular service, the authors conclude that at least part of the resulting Consent Decree had the effect of deterring socially optimal capacity shifts. ●

HOTLinks

Hot Links, a source list for antitrust lawyers and economists.

[Neither The Antitrust Source nor its sponsor, the ABA Section of Antitrust Law, necessarily endorses the sites listed below or any of the content within them.]

■ **From the American Bar Association:** <http://www.abanet.org/antitrust/>

Contains abstracts and tables of contents for the Antitrust Law Journal and Antitrust magazine; links to antitrust-related Web sites; Membership services, committee activities and publications; meeting information and new publications order forms.

■ **From the US DOJ Antitrust Division:** <http://www.usdoj.gov/atr/contact/otheratr.htm>

Not just their home page, but they actually have a comprehensive set of links to a lot of competition agencies around the globe.

■ **From the Federal Trade Commission:** <http://www.ftc.gov/ftc/antitrust.htm>

Links to who's who in the Bureau of Competition, their mission, public schedules, and documents.

■ **From FindLaw:** <http://www.findlaw.com/01topics/01antitrust/index.html>

A great source for finding other AT law firms, consultants, summaries of law, cases, discussion groups, and more.

Antitrust Policy

■ <http://www.antitrust.org/>

A pretty broad range of editors, including economists and lawyers in government, private practice, and academia. Interesting articles. More economics, and news.

■ **From Cornell Law:** <http://www.law.cornell.edu/topics/antitrust.html>

Links to the statutes that bind us and the latest decisions that guide us... as well as information on antitrust generally. Includes links to federal and state enforcement and decisions as well.

■ **From the American Antitrust Institute:** <http://www.antitrustinstitute.org/>

Information on the latest antitrust issues, links to cases, people in antitrust.

■ **From Ripon College:** <http://www.ripon.edu/faculty/bowenj/antitrust/INTRO.htm>

Excerpts from the Supreme Court's debates on antitrust cases up to about 1993.

International Antitrust

- **From the United Nations:** <http://www.unctad.org/en/subsites/cpolicy/index.htm>

Thorough set of links to international competition authorities.

- **From the EU:** <http://europa.eu.int/comm/competition/antitrust/oj/>

- http://europa.eu.int/comm/competition/index_en.html

A calendar of events of interest to Competition lawyers from the EU.

- <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-home-71-3-no-no-no,FF.html>