

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

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

In 1998, the Department of Justice and twenty states filed a second suit against Microsoft, alleging violations of Sections 1 and 2 of the Sherman Act. Following a lengthy trial and finding of liability on the merits, a second consent decree was entered into in November 2002.<sup>1</sup> This consent decree, ultimately embodied in the final judgment, was also highly contentious, with several states breaking ranks and formally challenging the adequacy of the proposed remedies negotiated by the Department of Justice.

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

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

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

—JOE WINTERSCHIED

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

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

<sup>3</sup> Available at [http://www.usdoj.gov/atr/public/press\\_releases/2004/202976.htm](http://www.usdoj.gov/atr/public/press_releases/2004/202976.htm).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

—RICK RULE

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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—STEVE HOUCK

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

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

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

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

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

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

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

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—STEVE HOUCK

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

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

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

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

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

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

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

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

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

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

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—DOUG MELAMED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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—DOUG MELAMED

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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