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Identifying and Remedying Exclusionary Conduct: *Microsoft*, the DOJ Section 2 Report, and the New Administration

William H. Page[1]

The Department of Justice's Section 2 Report[2] ("Report") considered in great detail how courts should best go about identifying exclusionary conduct and how they should best remedy that kind of conduct once they found it. Even though the new Assistant Attorney General has now withdrawn the Report as an official statement of Antitrust Division policy, the questions the Report addressed remain for the new administration. In this essay, I will comment on two subsidiary but nonetheless critical subjects that the DOJ addressed in the Report: general (as opposed to practice-specific) standards of exclusion and affirmative-obligation (as opposed to prohibitory) remedies. In both instances, my observations will draw on the experience of *United States v. Microsoft*; the DOJ's last and still pending monopolization case.

I. GENERAL STANDARDS OF EXCLUSION

The Report offered two recommendations under the heading of "General Standards for Exclusionary Conduct." First, the Report endorsed the framework of the D.C. Circuit's 2001 *Microsoft* decision for allocating and shifting burdens of producing evidence that alleged conduct is anticompetitive. Second, after canvassing various general standards of anticompetitive effect, the Report settled on the "disproportionality test," under which "conduct that potentially has both procompetitive and anticompetitive effects is anticompetitive under section 2 if its likely anticompetitive harms substantially outweigh its likely procompetitive benefits." I will try to shed light on the recommendations by reexamining how the D.C. Circuit applied its burden-shifting approach to identify anticompetitive effects in *Microsoft*. In doing so, I draw on

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[2] U.S. DEPARTMENT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (SEPT. 2008) ("Section 2 Report").

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the *Microsoft* book which I wrote with John Lopatka of Penn State.[3] I argue that the burden shifting framework had little practical significance in *Microsoft* itself, because the initial determination of anticompetitive effect was all but decisive. On that issue, the court applied something like the disproportionality standard, but failed to require adequate proof of anticompetitive effects.

Under the D.C. Circuit's burden-shifting approach, the plaintiff is first required to show that the defendant's conduct harmed not only competitors but the "competitive *process* and [therefore] consumers." If the plaintiff carries this burden, the defendant must respond with a pro-competitive justification for the conduct, that is, "a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal." If the defendant produces a justification, the plaintiff is required either to refute it or to prove that the anticompetitive harm outweighs any benefit.

The DOJ's Report argues that this burden-shifting approach can save litigation costs by allowing summary judgment or dismissal on the pleadings. In *Microsoft* itself, however, the test only structured the appellate court's analysis of voluminous evidence of competitive and efficiency effects that both sides had offered at the trial. As applied by the court of appeals, the first step in the analysis—determining whether a practice was prima facie anticompetitive—did the heavy lifting. The court reversed eight of the district court's holdings that Microsoft had monopolized by particular acts. Of these eight reversals, seven were because the conduct was not anticompetitive. Those determinations, of course, ended the analysis of those practices in Microsoft's favor, because the government had failed to carry its initial burden.

Where the government did carry its burden, however, the court's determination that an alleged practice was anticompetitive was almost as decisive the other way. Only once did Microsoft successfully rebut a showing of anticompetitive effect by offering an efficiency justification. In that instance, Microsoft was able to offer technical and functional reasons for its design of Windows to launch Internet Explorer to perform the Windows Help and Update functions, even if the user had designated a rival product as the default browser. The government failed to refute the justification or to show they were less weighty than the anticompetitive effect.

Thus, despite its surface complexity, the D.C. Circuit's system of shifting burdens really only required an initial showing of anticompetitive effect and an opportunity for rebuttal. Moreover, the ruling on the initial showing was almost always decisive one way or the other. Thus, the court's standard of anticompetitive effect was crucial to the outcome of the case. The court asked whether the practice at issue harmed the "process of competition" and not simply rivals. In applying this standard, the court appeared to

[3] WILLIAM PAGE & JOHN LOPATKA, THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE (2007).

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be guided by something like the disproportionality standard endorsed by the DOJ Report. The D.C. Circuit found that practices that provided obvious benefits to consumers—lower prices or better products—were not anticompetitive, even though the practices harmed rivals and seemed to be unprofitable to Microsoft.

For example, the court upheld Microsoft's practice of giving Internet Explorer away free to Internet Access Providers, because, "the rare case of price predation aside, the antitrust laws do not condemn even a monopolist for offering its product at an attractive price." Similarly, the court held that Microsoft did not monopolize by creating an incompatible, Windows-specific Java Virtual Machine ("JVM"), because the new product was a bit faster than Sun's JVM. These decisions implicitly (and correctly) rejected other possible general standards of exclusion.

Apart from the instances in which Microsoft offered an obviously better product or a lower price, however, the court of appeals held that practices that *tended* to harm Netscape and Sun were prima facie harmful to competition. For example, the court condemned practices—like Microsoft's exclusive contracts with software developers—that the court found tended to reduce Netscape's browser "usage share," even though the government did not quantify any such effect and even though the government failed to prove that a browser market even existed. The court similarly condemned Microsoft's efforts to "trick" software developers into writing programs in Microsoft's Windows-specific version Java rather than in Sun's cross-platform version, even though there was no proof that any developers actually fell for the ploy.

In instances like these, the burden shifted to Microsoft to produce a pro-competitive justification, which it was unable to do to the court's satisfaction. Equally important, the court did not require the government to prove that these actions that tended to harm Netscape and Java really did anything to maintain Microsoft's monopoly. It was enough, at least for purposes of liability, that Netscape's browser and Sun's Java technologies posed a "nascent" threat to evolve into a rival platform that might erode the applications barrier to entry that protected Microsoft in the market for operating systems.

Microsoft thus raises some difficult questions about what a disproportionality standard means in a burden-shifting framework. First, it seems that certain types of pro-competitive benefits trump any anticompetitive effects, regardless of their proportions. The court correctly held that practices that obviously benefit consumers are legal regardless of the harm they inflict on rivals. That holding seems to preclude liability even in cases where the harm to rivals might exceed the benefit to consumers—for example, where a new product or lower (non-predatory) price drives all competitors from the field and leaves the innovator with a monopoly. In such an instance, one might argue that the gains to dynamic competition exceed any static losses, but any such

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reading should be made explicit in the standard.

Second, *Microsoft* shows that there is a danger, where consumer benefits are not sufficiently obvious, that courts will confuse harm to rivals with harm to competition. The disproportionality standard should be read in such cases to require plaintiffs to offer solid evidence and theory to support claims of anticompetitive effect, particularly where the alleged effect is predicted to occur at some indefinite point in the future.

II. AFFIRMATIVE OBLIGATION REMEDIES

The Report discussed in general terms the costs and benefits of various remedies for monopolization. It favored "prohibitory" remedies, but held open the possibility of "additional relief," including "affirmative-obligation remedies." The Report specifically mentioned the protocol-licensing requirement of the *Microsoft* final judgments (§ III.E, entered in November 2002) as an example of a challenging and controversial affirmative-obligation remedy. In this note, I will comment on the protocol-licensing program and its implementation. In doing so, I draw on my previous work with Jeff Childers.[4]

Section III.E requires Microsoft to "make available" to software developers the communications protocols that Windows client operating systems use to interoperate "natively" with Microsoft's server operating systems in corporate networks or on the Internet. The short-term goal of the provision is to allow developers to write applications for non-Microsoft server operating systems that can interoperate as easily with Windows client computers as can software written for Microsoft's server operating systems. The long-term goal is to preserve, in the network context, the "middleware threat" to the Windows monopoly. The idea is that middleware applications running on non-Microsoft servers might become a rival platform that could erode the "applications barrier to entry" as Netscape and Java had threatened to do.

Judge Kollar-Kotelly placed special emphasis on this provision as the "most forward-looking" one in the final judgments. It was, she believed, necessary to assure that the other provisions do not become "prematurely obsolete" as computing moves to corporate networks and the Internet. In practice, however, the provision has done little to advance the goals of the decree. Equally important, as I explain below, its implementation (by two sets of plaintiffs, with the aid of a Technical Committee and technical consultant) has been Kafkaesque. In 2006, when problems of implementation reached a crisis, the parties agreed to extend § III.E for 2 years beyond its scheduled

[4] *See especially*, William Page & Jeff Childers, Software Development as an Antitrust Remedy: Lessons from the Enforcement of the Microsoft Communications Protocol Licensing Requirement, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090642#, and William Page & Jeff Childers, Measuring Compliance with Compulsory Licensing Remedies in the American Microsoft Case, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1149862.

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expiration in November 2007. In January 2008, Judge Kollar-Kotelly held that the delays in implementation of § III.E required extension of the other provisions of the judgment for the same time. Just last month, at the plaintiffs' insistence, Microsoft consented to an extension of the final judgments for an additional 18 months beyond November 2009 and an optional extension of § III.E for 18 months beyond that.

Section 2 remedies should aim to restore competitive conditions that would have existed but for illegal conduct. They should not try to achieve a competitive ideal or supervise market outcomes. Injunctions should normally be limited to preventing recurrence of proven wrongs. Regulatory decrees should be avoided, because, as the Supreme Court said in *Trinko*, courts are ill-suited "to act as central planners, identifying the proper price, quantity, and other terms of dealing." Compulsory dealing (or affirmative-obligation) remedies are usually only appropriate where the defendant terminates a profitable course of dealing for no good reason.

The *Microsoft* final judgments generally reflect these principles. Most of its provisions respond more or less directly to the liability holdings in the case that were affirmed by the DC Circuit in 2001—for example, prohibiting retaliation against computer manufacturers for promoting rival middleware; requiring uniform licensing terms; and giving computer manufacturers flexibility to remove visible means of access to Microsoft middleware products and install rivals' products.

The protocol licensing provision, however, departs from these principles in several ways. First, it does not address a proven violation. There was no allegation that Microsoft exploited control over its interfaces to exclude rivals; indeed, the case held that making a product incompatible was usually legal. The idea for disclosure of interfaces was raised during settlement negotiations after the trial on liability. There was not even clear evidence that § III.E was needed for interoperability, which competitors could achieve in various other ways.

Second, the provision involves detailed regulation of both price and quantity, raising complex technical issues that required a new bureaucracy in the form of the Technical Committee to implement. Finally, it imposes a duty of dealing, even though Microsoft had never licensed (or even documented) the protocols before.

As these red flags warned, the protocol licensing program has been a nightmare to implement. Microsoft has agreed to suspend royalties on its intellectual property, and has provided essentially unlimited tech support to its licensees. Nevertheless, the plaintiffs have consistently challenged the quality of the documentation that Microsoft has produced. The TC has tested this documentation by developing "prototype implementations" of them and reporting the problems its engineers encountered as bugs or "technical documentation issues" ("TDIs"), which Microsoft has tried to resolve.

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Over the years, despite multiple sets of specifications and a complete rewrite of the documentation, the TC has continued to generate thousands of new TDIs. In January 2008, Judge Kollar-Kotelly extended the judgments because of Microsoft's failure to produce "certifiably complete accurate and usable documentation." Although she recognized that Microsoft responded cooperatively to the plaintiffs' concerns, and had committed enormous resources to the project, she held it had not done so early enough. Microsoft had, she found, failed to resolve the TDIs and to produce additional requested documentation illustrating the use of the protocols in "complex" scenarios. The plaintiffs have justified the recent additional multi-year extensions on the same grounds.

Jeff Childers and I have argued that the problems of enforcement of this provision of the judgment have less to do with Microsoft's failure to commit adequate resources than with the intractability (and pointlessness) of the task and the unrealistic standard of compliance. Even assuming that a forward-looking, affirmative-obligation provision is warranted in this case, the plaintiffs and the court have applied an impractical standard of perfection with no meaningful time limit. Not surprisingly, dozens of engineers tasked with finding "issues" in over 25,000 pages of technical documentation have done so.

In their most recent Report in April 2009, the plaintiffs suggest that, even though Microsoft's documentation of the protocols will probably be "substantially complete" by the end of this year,

> there will still be thousands of TDIs that need to be identified and ultimately resolved. The TC and its staff will also still have months of work to perform before they can be satisfied to a reasonable degree of certainty that the documents are of a sufficient quality (i.e., sufficiently complete, accurate, and usable) that Plaintiffs can have confidence that allowing the Final Judgments to expire is appropriate.

Thus, we face years more of this process without any discernable end-point, even though Microsoft has stated without contradiction that it is aware of no actual or potential licensee that can't use the protocols because of flaws in the documentation. Licensees may find flaws, but they can work around them, with the help of Microsoft's tech support.

We suggest that the appropriate standard of compliance should be to ask: How would a competitive firm achieve § III.E's goal of interoperability? That competitive firm would not apply a standard of perfection with no time limit. It would set out to find the practical needs of its actual and potential licensees, especially which features they want and are willing to pay for; it would establish a development program and testing mechanisms to meet those needs; and, most important, it would impose a firm ship date. Flaws in the documentation would be acceptable so long as they could be addressed in a

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reasonable maintenance program. Under these standards, Microsoft's documentation and support effort are more than sufficient.

Ironically, in the European *Microsoft* case the monitoring trustee has reached essentially this result. He has concluded that "the interoperability information made available by Microsoft . . . appears to be complete and accurate [in] that a software development project can be based on it." Therefore "Microsoft is now complying with its obligations under the 2004 Decision" so long as it responds to technical issues raised by licensees. One hopes that the new administration will adopt a similar approach to § III.E. Failing that, perhaps the hard lessons of the *Microsoft* judgments will help shape future judgments and their implementation.

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