Computer & Communications
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The Enduring Potency of the *Microsoft* Decision

1. Introduction

There is a robust debate about whether the current U.S. antitrust framework is fit to tackle monopolization and attempted monopolization cases, particularly with respect to large technology companies.

> [Some] question whether the existing antitrust laws can possibly be relevant to today's economy. The Sherman Act was passed in 1890 in response to the nationwide industrial trusts that the railroads had made possible, and the Clayton Act was passed in 1914 and was aimed largely at retailing and wholesaling practices in localized markets. How, then, can these ancient statutes be relevant to a 21st Century, information-based, economy?[1]

That was a leading antitrust enforcer speaking—in 1998. Then, the focus was on AOL, Compaq, *Microsoft*, Netscape, and Sun—the pioneering tech companies of the 1990s. Today, the focus is on Amazon, Facebook, Google, and Apple—the pioneering tech companies of our times. But the question is the same: can antitrust law address monopolization in the information age?

The D.C. Circuit's landmark 2001 decision holding *Microsoft* liable for unlawful monopolization removes any doubt: antitrust law remains an adaptable and potent tool to curb anticompetitive conduct in the information economy. And that holds true in 2020. In the 19 years since the *Microsoft* decision was issued, courts consistently follow it to determine liability in new technology markets, new types of anticompetitive conduct, and issues of first impression.

2. *Microsoft* Affirmed Antitrust's Role in the Information Age

Microsoft built on deep jurisprudence—"a century of case law on monopolization" under the Sherman Act—to affirm competition law's role in the information age.[2] The *Microsoft* court understood that antitrust aims to prevent conduct that "harm[s] the competitive process and thereby harm[s] consumers."[3] On this principled foundation the court laid an enduring framework for analyzing competition claims in the information economy.

In 2001, a seven-judge panel of the D.C. Circuit Court of Appeals issued a unanimous decision that upheld the trial court's finding of unlawful monopolization against *Microsoft*. The D.C. Circuit's 118-page ruling in *Microsoft* painstakingly applied the Sherman Act's prohibition of unlawful monopolization to novel allegations including technologies such as operating systems, internet browsers, and software platforms and applications.

1 Joel Klein, *The Importance Of Antitrust Enforcement In The New Economy* (Jan. 29, 1998), *available at* https://www.justice.gov/atr/speech/importance-antitrust-enforcement-new-economy
2 *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)
3 *Id.*

For nearly the past two decades, *Microsoft* served as a leading appellate decision the foundation of jurisprudence under Section 2 of the Sherman Act and has provided a framework that future courts and enforcers have applied to police anticompetitive conduct in new technologies, markets, and issues.

The key elements of that framework are:

- **Existing exclusionary conduct doctrine can be applied to technology markets.** By upholding the district court's monopolization decision, the *Microsoft* decision made clear that the principles governing exclusionary conduct cases based on "a century of case law on monopolization" can, and should be, applied to technology markets. Accordingly, the established framework that enforcers use to demonstrate anticompetitive conduct remains valid despite the sometimes-fluid market dynamics of technology industries.[4]

- **Established market power analysis applies to dynamic tech markets.** The *Microsoft* court rejected arguments that new rules should be applied for fast-changing technology markets. *Microsoft* claimed that because "software competition is uniquely 'dynamic,'" structural market analyses should not suffice.[5] *Microsoft* urged the court to adopt a new rule: it should require "direct proof" of monopolistic behavior by examining a company's actual behavior. The court declined, holding the existing laws could be applied to dynamic markets.[6] "The structural approach, as applied by the District Court, is [ ] capable of fulfilling its purpose even in a changing market. *Microsoft* cites no case, nor are we aware of one, requiring direct evidence to show monopoly power in any market. We decline to adopt such a rule now."[7]

  In a lengthy preface, the court made clear that the Sherman Act applies fully to fast-moving technology markets. The court noted "the important role in curbing infringements of the antitrust laws in technologically dynamic markets" given that "the Government will continue to have an interest in defining the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not."[8] In *Microsoft* there was "no claim that anticompetitive conduct should be assessed differently in technologically dynamic markets."[9] This remains true regardless of whether the conduct in question has price or non-price effects - indeed, in *Microsoft*, the "anticompetitive effects" identified by the court were based entirely on foreclosure of market access for Netscape and other competitors, not price.[10]

- **Courts can find the requisite showing of harm in technology markets.**[11] In order to demonstrate liability under Section 2, the court relied on the government's factual and economic evidence of the harm caused by *Microsoft's* specific conduct. Such conduct must have "the requisite anticompetitive effect" of actually monopolizing or

4 *Id.* at 56.
5 *Id.* at 51.
6 *Id.*
7 *Id.* at 57.
8 *See United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001). But the court did note, "We fear that these efficiencies are common in technologically dynamic markets where product development is especially unlikely to follow an easily foreseen linear pattern." *Id.* at 94.
9 Id. at 51.
10 *See United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001). But the court did note, "We fear that these efficiencies are common in technologically dynamic markets where product development is especially unlikely to follow an easily foreseen linear pattern." *Id.* at 94.
11 *Id.* at 84.

creating a dangerous probability of monopolizing a properly specified relevant market.[12] Because of the diversity of potential business practices, the court held, such proof is a "particularly fact-intensive inquiry."[13] While inferences of harm from one market cannot be transferred to another, liability can be found where each of the elements of the alleged offense are separately proven for each relevant market.[14]

- **The Rule of Reason can demonstrate Section 2 liability for technology companies.** The court determined that *Microsoft's* conduct violated Section 2 under the "Rule of Reason" analysis. The rule of reason is a flexible and rigorous yardstick for assessing Section 2 liability, which balances the conduct's harms and benefits to determine its "actual effect" on consumer and competition overall.[15] The court emphasized that conduct that may concern rivals, in the wider context, constitute technological innovation that benefits consumers. The court correctly determined that *per se* presumptions are inappropriate for reviewing "the legality of tying arrangements involving platform software products" or product design in technology markets where "the economic consequences of network effects and technological dynamism act to offset one another."[16] While the court unequivocally condemned *Microsoft* for taking steps that harmed rivals when those steps had "no procompetitive justification," the court made clear that actual pro-consumer innovation should be protected—even if rivals are allegedly harmed—since "firms routinely innovate in the hope of appealing to consumers," which is "all the more true in a market . . . in which the product itself is rapidly changing."[17]

- **The "causation" standard can be met in technology markets.** Noting the consensus view that "[t]he plaintiff has the burden of pleading, introducing evidence, and presumably proving by a preponderance of the evidence that reprehensible behavior has *contributed significantly* to the ... maintenance of the monopoly,"[18] the court found that this causation standard was met by *Microsoft's* conduct. Under this standard, liability should attach only to behavior that could be said to have made "a significant contribution to . . . maintaining monopoly power,"[19] with the benefit of the doubt going to the defendant to avoid needlessly deterring innovation.

- **The test for monopolization can be met in technology markets.** The court determined that *Microsoft's* conduct met this test. Plaintiffs must independently satisfy each of the elements of the test for monopolization. That test requires that the defendant: (1) possesses monopoly power in a relevant market; (2) acquired or maintained that power by unlawful means rather than by competition on the merits; and (3) engaged in conduct that harmed consumer welfare.[20] Significantly, given the DOJ's focus on so-called "hot documents" at trial, the court also cautioned that "in considering whether the monopolist's conduct on balance harms competition and is therefore

[12] *Id.* at 58 (citing as sufficient the "effect of significantly reducing usage of rivals' products and hence protecting [*Microsoft's*] own operating system monopoly").
[13] *Id.* at 84.
[14] *Id.*. at 58-59
[15] *Id.* at 80.
[16] *Id.* at 81
[17] *Id.* at 65.
[18] *Id.* at 79, citing 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 650c, at 69 (1996).
[19] *Id.*
[20] *Id.* at 50, 80. *See also id.* at 59 ("If the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.").

condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it."[21] However, the court found liability despite these precautionary rules, holding that the effect of *Microsoft's* conduct was to "protec[t] *Microsoft's* monopoly from the competition," and that *Microsoft* failed to "specify or substantiate" any potential procompetitive justifications for its conduct.[22]

- **Anticompetitive effect is measured by consumer harm.** "To be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice." The court noted that "plaintiff successfully establishes a prima facie case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct."[23] If the monopolist's procompetitive justification stands unrebutted, "then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."[24] In other words, the *Microsoft* court's analysis properly recognizes efficiency as a central focus of the antitrust statutes, and instructs judges to balance efficiencies against anticompetitive harms in determining whether the statute has been violated.[25] The court also made clear that efficiency claims should be carefully scrutinized, and in practice determined that certain *Microsoft* efficiency claims did not excuse the anticompetitive effects of its conduct.[26] On the other hand, the court noted that if firms without market power are engaged in the same alleged behavior as the accused monopolist, then it is highly likely that the behavior is efficient rather than anticompetitive regardless of its effect on rivals.[27]

3. The *Microsoft* Analytical Framework Has Been Widely Followed

The *Microsoft* analytical framework has proven repeatedly that it is well-suited to protect consumers as well as the ability of firms to innovate to improve their products. Over the past two decades, U.S. antitrust enforcers have successfully used *Microsoft* to prosecute anticompetitive conduct in a wide variety of dynamic industries, many of which did not exist and were not anticipated at the time the decision was written. Federal and state agencies have viewed *Microsoft* as an essential enforcement tool, particularly in cases that involve rapidly changing technologies or novel forms of competitive harm. The *Microsoft* case is ideally suited to antitrust enforcement in the digital economy, and overturning the well-established, pro-consumer framework that it established risks greatly curtailing innovation and investment in crucial sectors of the U.S. economy.

The *Microsoft* case has supported major antitrust enforcement efforts in key high-technology industries. Recent decisions have continued to rely on *Microsoft's* proposition that the dynamic nature of technology markets is not a free pass for conduct that harms competition.

[21] *Id.* At 59

[22] *Id.* at 66.

[23] *Id.*

[24] *Id.*

[25] *See id.* at 59 ("Fourth, if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit."). *See also id.* at 95 ("Of the harms left, plaintiffs must show that *Microsoft's* conduct was, on balance, anticompetitive. *Microsoft* may of course offer procompetitive justifications, and it is plaintiffs' burden to show that the anticompetitive effect of the conduct outweighs its benefit.").

[26] *Id.* at 77.

[27] *Id.* at 93.

a) *Surescripts (2020)*

In January, the District of Columbia relied on *Microsoft* to deny a motion to dismiss Sherman Act monopoly maintenance allegations. In *FTC v. Surescripts*, the FTC alleged that an e-prescription provider maintained its monopoly through anticompetitive conduct. The allegations focused on an exclusive loyalty-based pricing policy under which loyal pharmacies (i.e., those who worked only with Surescripts) would be charged less for Surescripts' services.[28] Surescripts claimed that this policy could not be actionable unless the low prices were deemed predatory. Citing *Microsoft*, however, the court disagreed. The court recalled that *Microsoft's* exclusive dealing contracts with internet access providers "'clearly ha[d] a significant effect in preserving its monopoly; they help[ed] keep usage of [*Microsoft's* competitor] below the critical level necessary for [it] or any other rival to pose a real threat to *Microsoft's* monopoly.' Like the behavior at issue in *Microsoft*, Surescripts's alleged practice of charging loyal pharmacies [] less . . . do not need to constitute predatory pricing for Surescripts's exclusionary practices to constitute unlawful maintenance of a monopoly."[29]

The court also cited *Microsoft* in rejecting Surescripts' formalist argument that there was no exclusionary conduct because its exclusive contracts were short-term and terminable. Noting that the inquiry is "fact intensive," the court emphasized the importance of the evidence and facts regarding the practical effect of the exclusive contracts.[30] Because the FTC alleged that the "exclusive terms, when combined with the nature of the two relevant markets and Surescripts's dominant monopoly position, had the effect of foreclosing large parts of both markets and harming competition," the motion survived dismissal.[31] The district court's decision in *Surescripts* is a prime example of the centrality of a rigorous review of the facts under the *Microsoft* framework.

b) *Bazaarvoice (2014)*

Microsoft was also cited to support a court's finding of antitrust violations in a merger case. In *United States v. Bazaarvoice*, the Northern District of California found that a leading ecommerce online review platform provider violated the Clayton Act when it acquired its primary competitor. The court acknowledged "the debate over the proper role of antitrust law in rapidly changing high-tech markets."[32] But, citing *Microsoft*, the court concluded: "It is not the Court's role to weigh in on this debate. The Court's mission is to assess the alleged antitrust violations presented, irrespective of the dynamism of the market at issue."[33] Because *Bazaarvoice* "did not present evidence that the evolving nature of the market itself precludes the merger's likely anticompetitive effects," the Clayton Act was violated.[34] The court ultimately ordered *Bazaarvoice* to divest the acquisition.

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[28] *Fed. Trade Comm'n v. Surescripts, LLC*, No. CV 19-1080 (JDB), 2020 WL 264147 (D.D.C. Jan. 17, 2020)
[29] *Id.* at *7 (citing *Microsoft*, 253 F. 3d at 70-71).
[30] *Id.* at *9.
[31] *Id.*
[32] *United States v. Bazaarvoice, Inc.*, No. 13-CV-00133-WHO, 2014 WL 203966, at *76 (N.D. Cal. Jan. 8, 2014).
[33] *Id.*
[34] *Id.*

b) Actavis (2015) – State Level Enforcement

The Second Circuit relied on *Microsoft* to uphold the district court's finding of a Sherman Act violation. In *New York ex rel. Schneiderman v. Actavis plc*, New York alleged that a monopolist pharmaceutical company engaged in exclusionary conduct when it withdrew a version of a drug whose patent was set to expire and substituted it for a newer and different version, to impede generic competition. In this "issue of first impression for the circuit courts," the Second Circuit followed *Microsoft's* rule of reason analysis, calling it a "helpful framework for determining when a product change violates § 2."[35] The court acknowledged *Microsoft's* "general rule" that "courts are properly very skeptical about claims that competition has been harmed by a dominant firm's product design changes" because "[p]roduct innovation generally benefits consumers."[36] But after analyzing the facts under the *Microsoft* framework, the Court held that the conduct was anticompetitive. "Because Defendants' forced switch 'through something other than competition on the merits[ ] has the effect of significantly reducing usage of rivals' products and hence protecting its own . . . monopoly, it is anticompetitive."[37]

These successful enforcement actions underscore that *Microsoft's economics-based* framework remains a potent blueprint for antitrust cases, whether dealing with fast-changing technology markets or issues of first impression. Just as importantly, the *Microsoft* framework reinforces the role of innovation in the competitive process and the need to consider the benefits that innovation brings to consumers. The *Microsoft* court observed that "[r]apid technological change leads to markets in which firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product enhancements."[38] The court's due concern for the powerful pro-consumer effects of innovation competition is evident in its careful consideration of efficiencies.

Antitrust Enforcers Have Repeatedly Endorsed the *Microsoft* Framework

Senior FTC officials across the political spectrum have endorsed the *Microsoft* framework. In 2006, then-FTC Chair Deborah Platt Majoras noted that *Microsoft* "incorporates principles for which there is wide consensus" to create a "sensible 'weighted' balancing approach."[39] Majoras observed that the *Microsoft* court "did not attempt to substitute ex post facto its judgment for that of business judgments that were made ex ante."[40] This ensured that consumers would be protected from anticompetitive conduct while avoiding chilling incentives to innovate that would arise from the prospect of an *ex post* analysis with the benefit of hindsight.[41] Majoras praised the *Microsoft* court's painstaking analysis of the facts, "taking care to ensure not to chill procompetitive behavior."[42]

35 787 F. 3d 638, 652 (2d Cir. 2015).
36 *Id.* (citing *Microsoft*, 253 F.3d at 65).
37 *Id.* at 658.
38 *Microsoft*, 253 F.3d at 49-50.
39 Deborah Platt Majoras, Chairman, Federal Trade Commission, *The Consumer Reigns: Using Section 2 to Ensure a "Competitive Kingdom"* (June 20, 2006), *available at* https://www.justice.gov/atr/deborah-platt-majoras-remarks.
40 *Id.*
41 *Id.*
42 *Id.*

In 2015, then-Assistant Attorney General Bill Baer observed that rooting antitrust analysis in an evidence-based consideration of consumer welfare, as in *Microsoft*, remains critical for enforcers seeking to achieve victory in the courts.[43] And in a 2018 address, Assistant Attorney General Makan Delrahim held up *Microsoft* as an example that "antitrust law has responded to new and innovative products and markets to protect against novel threats to the competitive process."[44]

Conclusion

The *Microsoft* framework is as appropriate and potent as ever. Its sound approach to Sherman Act analysis continues to be effectively applied by enforcers and courts at every level to new technologies and issues of first impression. Accordingly, there is "no [] need to make substantive changes to the primary federal antitrust laws."[45] Doing so risks long-term harm to consumers by disrupting reliance on an evidence-based and economically sound antitrust framework.

About CCIA

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[43] Bill Baer, *Remarks at the Chatham House Annual Antitrust Conference* (June 18, 2015). Baer emphasized that the *Microsoft* case illustrates that tying antitrust analysis closely to the facts and to well understood and broadly accepted economic principles insulates it from political pressure, expressing confidence that:

> . . . the department's recent enforcement decisions demonstrate that it will not be swayed by public opinion, professional pundits or political influence. *And, where we are able to demonstrate that the facts and law are on our side, the courts will support our law enforcement challenges. The department's landmark monopolization suit against Microsoft illustrates this.* Even in the somewhat unsettled legal area of dominant firm conduct, *seven judges of the D.C. Circuit Court of Appeals issued a unanimous decision that upheld the key liability determinations against Microsoft for maintaining its monopoly in the operating systems market.* (emphasis added)

[44] Makan Delrahim, *Don't Stop Believin': Antitrust Enforcement in the Digital Era* (April 19, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university-chicagos

[45] Deb Majoras, *Statement of Deborah Platt Majoras, Chairman, Federal Trade Commission, Before the Antitrust Modernization Commission* (Mar. 21, 2016), *available at* https://www.ftc.gov/sites/default/files/documents/advisory_opinions/statement-chairman-majoras-antitrust-modernization-commission/060321antitrustmodernization.pdf.