The Microsoft Antitrust Case: Rejoinder

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Abstract. In this rejoinder, I discuss the inappropriateness of the theory of predation proposed by Prof. Frank Fisher as well as comments by Dr. O’Brien and Prof. O’Toole. I show that Dr. Fisher’s theory of predation is likely to characterize aggressive procompetitive actions as anti-competitive. If adopted, courts will discourage firms from taking socially beneficial aggressive pro-competitive actions.

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1. Introduction

During the period between the writing of my Microsoft Antitrust article in this issue and the writing of this rejoinder, the most significant developments in the case were the filing of the appeal of Microsoft, the filing of the government’s objections, and the open hearing of the case by the Washington DC court of appeals sitting en banc in late February 2001. The questioning of both sides by the judges of the court of appeals was very frank and pointed. Most of the criticism of the appeals judges (as seen by their questions and by the heated dialog with the lawyers of both sides) was aimed towards the plaintiffs. On a number of occasions, the appeals court judges questioned the validity of the district court’s “findings of fact,” calling them conclusions not based on fact.1 The appeals court

* I am not a consultant of the United States Department of Justice, Microsoft, or any of the Attorneys General of the 19 States and the District of Columbia that are suing Microsoft.

1 For example, at the February 27, 2001 morning hearing of the appeals court, judges questioned Jeffrey P. Minear, representing the United States, as follows:

THE COURT: The District Court, like I said, there are some findings that are merely just conclusions and I find no basis for them. So I’m not in that camp that says because the District Court lists something under findings of fact it’s gospel. There has to be a fact in fact.
THE COURT: It has to be supported.
THE COURT: And it has to be supported by something other than the mere statement of the District Court.

In a second example from the same hearing, a judge asks Mr. Minear:

THE COURT: Let me ask you again so that you can help me. This is one of the cases, one of the places for me, where the failure of the findings of fact to point to any record, citations, makes it very, very difficult on appellate review because they are very conclusionary statements here that I tried to trace to determine whether there was any real data to support the observation that there was a market for
also seemed to question the strength of the plaintiffs’ case (i) on the tying allegation, as well as (ii) on attempting to monopolize the browser market allegation.

The appeals court was critical of the procedure that Judge Jackson used in the remedies part of the case, as well as of the necessity and effectiveness of the ordered remedy (breakup). The appeals court also seemed to be very critical of Judge Jackson’s extended interviews with journalists and strongly suggested that if the case is remanded to a lower court (for either a new determination of facts or for determination of remedies or both), it should not go to Judge Jackson. Overall, the court of appeals appeared unlikely to affirm all three parts of the liability decision of the lower court and also unlikely to affirm the breakup remedy.

browserless operating systems. It is certainly not intuitive given that all of the operating systems offer browsers that can be removed or deleted.

But in making your argument that in all the other cases they can be removed and therefore Microsoft is forcing, you’re ignoring Microsoft’s counter-argument which is they don’t integrate as deeply.

But in any event, make that your second answer. Tell me if there is any data to back up . . . I quite frankly . . . I hear my colleagues in the first part of this argument that we’re supposed to defer to factual findings. But when I find factual findings that look very conclusionary and there is no citation to anything, I don’t think my obligation as an appellate court is to defer to them. So what is the data?

For example, at the February 27, 2001 morning hearing of the appeals court, a judge asked David C. Frederick, representing the United States:

THE COURT: Let me ask you a couple of questions about the standard applied by the District Court. The District Court said that the plaintiffs won the case, and for that reason alone have some entitlement to a remedy of their choice. The District Court also said these officials are by reason of office obliged and expected to consider and to act in the public interest. Microsoft is not. Are those appropriate standards for a District Judge to consider in framing a remedy?

For example, at the February 27, 2001 morning hearing of the appeals court, a judge pointed to David C. Frederick, representing the United States:

THE COURT: Stranger still, even after the remedy, Microsoft retains the monopoly. You cited Grinnell, and I think there’s a point in the Supreme Court’s opinion in Grinnell that says the first order of business when there’s been a Section 2 violation is to issue a remedy that will destroy the monopoly power. This remedy doesn’t do that.

In another question in the same hearing, a judge notes the potential problems that a breakup might create and the fact that there was no hearing to discuss them:

THE COURT: No, no, no. The question that’s being raised is whether a company that has not grown through combinations can be perforated along the lines proposed by the government without a hearing into the problems that might create.

For example, at the February 27, 2001 afternoon hearing of the appeals court, a judge asked John G. Roberts, representing the States plaintiffs:

THE COURT: Well, I’m not sure that I see how you can with a straight face ask us if we remand, to send it to the same judge after these comments.