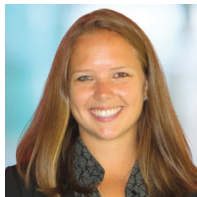
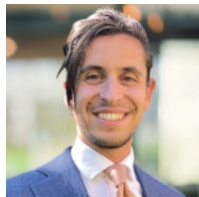

Webinar Recap: The Microsoft Case and Today's Big Tech Wars: A Peek into the Past to See the Future?

by Katrina Messina and Igor Cerasa; Analysis Group, Inc.

ABA Antitrust Law Section (October 21, 2024)



Katrina Messina



Igor Cerasa

Introduction

The United States Court of Appeals for the District of Columbia Circuit's opinion in *United States v. Microsoft Corporation* is one of the most significant antitrust decisions of the past decades.¹ The 2001 ruling has influenced numerous district court litigations and continues to affect the outcomes of antitrust disputes.

On May 20, 2024, the American Bar Association's (ABA) Thought Leadership in Antitrust Law & Academia Taskforce, along with the ABA's Civil Practice and Procedure Committee, the Media and Technology Committee, and the Federal Civil Enforcement Committee, sponsored a webinar titled "The Microsoft Case and Today's Big Tech Wars: A Peek into the Past to See the Future?" The webinar looked back at *Microsoft* in the light of today's antitrust enforcement and provided insights on how this landmark decision has influenced the latest antitrust cases filed against "Big Tech."

The webinar was moderated by John Taladay (Co-Chair of Antitrust Practice at Baker Botts LLP), who was joined by an impressive panel, which included Rima Jamil Alaily (Corporate Vice President and Deputy General Counsel of the Competition Law Group at Microsoft), Adam Cella (Chief Counsel for the House Judiciary Committee's Subcommittee on the Administrative State, Regulatory Reform, and Antitrust), Andrew

Gavil (Professor at Howard University School of Law), and Carl Shapiro (Professor at University of California, Berkeley). The discussion revolved around three main topics: the relevance of *Microsoft* at the time of the decision, the key principles established by the DC Circuit Court's opinion, and how those principles might apply to current cases and shape the approach to future enforcement and litigation.

Summary of the Microsoft Case

Mr. Taladay kicked off the conversation with a summary of the Microsoft Case, which focused on Microsoft's efforts to displace Netscape Navigator, a popular internet browser at the time, and replace it with its own browser, Internet Explorer. The U.S. Department of Justice's (DOJ) Antitrust Division, joined by several states, charged Microsoft with four separate violations of the Sherman Act: (i) a claim of exclusive dealing; (ii) a tying claim; (iii) a claim of attempted monopolization of the internet browser market; and (iv) a claim of monopolization of the PC operating system market. The District Court initially upheld three of the four claims.² As part of the remedy, the District Court ordered splitting Microsoft in two pieces, an operating system company and an application company. On appeal, the DC Circuit Court relied on a structural approach rather than requiring direct evidence of monopoly power; thus, the Circuit Court found that Microsoft had monopolized the market for Intel-compatible PC operating systems because of its high market share and the existence of high barriers to entry. Based on that analysis, the DC Circuit Court upheld the claim that Microsoft was monopolizing the PC operating system market in violation of Section 2 of the Sherman Act and asked the District Court to reconsider the remedy. Before the District Court could rule on any new remedies, Microsoft and the DOJ reached an agreement and signed a consent decree.

After Mr. Taladay's introduction, Professor Gavil provided context about the legal landscape at the time of the Microsoft case. He noted that competition authorities had been scrutinizing Microsoft since 1990 and that technological changes were happening along with political and legal changes. He added that several other important antitrust cases were being pursued at this time.³ *Microsoft*, he continued, fell between two periods of prominent Supreme Court rulings in antitrust: the decisions in the *Aspen*, *Kodak*, and *Brooke Group* cases in the early 1990s, and *Trinko*, decided in 2004.⁴

The Relevance of *Microsoft* in the Past

Professor Gavil next discussed how *Microsoft* immediately became important legal precedent across U.S. courts, cited heavily in cases that allege violations of Section 2 of the Sherman Act. Other cases, he added, have since relied on *Microsoft*'s foreclosure theory and the burden shifting framework to establish monopolization.

Mr. Cella then analyzed the relevance of *Microsoft* in the political and regulatory context, noting that during the Reagan administration—several years before *Microsoft* was decided—the approach to antitrust enforcement had changed significantly.⁵ In his view, *Microsoft* represented an important milestone for two reasons: first, it demonstrated that antitrust enforcement could still be used against some of the largest companies in the world, even after the post-1980s shift in enforcement; and second, it showed that a consumer-focused approach to address antitrust laws could be effective against technology companies in innovative markets.

The conversation next turned to Ms. Alaily, who described the practical implications that the lawsuit had on Microsoft, most notably through the consent decree. She observed that the consent decree provided the industry with the guarantee that Microsoft's platform would remain open and that competition could flourish. While the consent decree ultimately expired in 2011, she added, Microsoft's behavior continued to be shaped by roughly 200 private lawsuits filed across the United States and Canada, some of which did not resolve until 2018, and by orders and settlements that remain in place today in the European Union. Ultimately, she concluded, Microsoft learned important lessons from this case, including the importance of taking responsibility for the impact of technology on business practices; listening to critiques from partners and customers; and developing a more open, customer-focused and principled approach.

Finally, Professor Shapiro contributed his view on how *Microsoft* impacted innovation, both in the monopolized market for PC operating systems and the ecosystem for internet browsers more broadly.⁶ The Court recognized that Microsoft's operating system had a 95 percent market share in a market with high barriers to entry, making it hard for other operating systems to succeed in the market because of a "chicken and egg problem" posed by network effects.⁷ Professor Shapiro pointed out that Microsoft's market share remains very high. He expressed the view that the remedies set forth in the consent decree were not effective in helping other operating systems overcome Microsoft's network effects and thus did not restore competition in the PC operating system market. As to the broader market for internet browsers, Professor Shapiro added that whether any of the remedies enabled more innovation is an ongoing debate.

Key Principles

Mr. Taladay then moved the discussion to the key economic and legal principles contained in *Microsoft*.

Professor Gavil began with legal principles, discussing the influential "burden shifting framework," which can be traced back to the landmark decision in *Alcoa*, that was applied in *Microsoft*.⁸ Professor Gavil described that in this multi-step framework, the court first evaluates whether the defendant has monopoly power. If monopoly power is established, then the court considers the evidence of exclusionary conduct that has an anticompetitive effect. If an anticompetitive effect is established, the

burden shifts to defendants to provide pro-competitive justifications. If evidence of pro-competitive benefits is shown, the court must then weigh the harms and benefits, for example by looking at whether less restrictive behaviors are available (i.e., can the same benefit be delivered in a way that does not restrict competition). Despite its popularity, Professor Gavil noted that there is some criticism of the idea that monopoly power and exclusionary conduct can be separately evaluated in every case, particularly because in many contexts, they are interdependent.

Mr. Cella added that the burden shifting framework provides a clear way for judges to write opinions, while allowing companies to better analyze their conduct when it comes to potentially anticompetitive behaviors. Mr. Cella also discussed different approaches to demonstrating monopoly power. He noted that in *Microsoft*, the Court considered both circumstantial evidence of monopoly power (e.g., high market share) and more direct measures of monopoly power (e.g., effect on consumers), which overlapped with the analysis of conduct. Importantly, according to Mr. Cella, the Court's opinion in *Microsoft* did not rest on market share alone, but also considered the existence of barriers to entry (e.g., due to network effects). He also noted that structural presumptions, like the analysis of market shares in monopolization cases or HHI presumptions in merger law, are powerful tools for enforcers to use across a variety of antitrust cases.⁹

Professor Shapiro discussed how the Court in *Microsoft* addressed the government's burden of causation. He noted that the Court relied heavily on Microsoft's own documents showing that Netscape posed a threat to Microsoft's monopoly even though it was not an operating system and was not part of the relevant market. The Circuit Court subsequently acknowledged that neither plaintiff nor the District Court could confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct. It nevertheless concluded that the factual evidence provided in the case was sufficient to satisfy the government's burden of causation. Professor Shapiro cautioned, however, that while the weaker standard applied by the Court was sufficient to establish liability, it proved to be insufficient to determine adequate remedies to Microsoft's conduct.

Mr. Taladay then transitioned the discussion to the issue of market definition, noting that the Court rejected Microsoft's argument that mobile handsets represented an additional competitive challenge to PC operating systems. Ms. Alaily observed that the market was indeed narrowly defined, adding that in today's digital landscape, mobile operating systems have outstripped PC operating systems, and because of that competition, Windows is no longer dominant. In response, Mr. Taladay remarked how a recent complaint against Apple uses a narrow approach to market definition, with the government alleging that lower and higher end smartphones do not compete and therefore belong to different markets.

Next, Professor Shapiro shared his observations on the economic principles contained in *Microsoft*. This was the first case, he argued, where a court analyzed network effects as a barrier to entry and established the mechanism of harm in the

context of network economics. Professor Gavil added that the Court discussed the issue of switching costs for consumers as another barrier to entry. Professor Shapiro also noted that the Court recognized that the case was not about prices but about innovation.

The discussion next shifted to the “consumer welfare standard,” as applied in *Microsoft*. Mr. Cella and Ms. Alaily described how *Microsoft* demonstrates the flexibility of the consumer welfare standard in dealing with technology industries, where price is often not an issue because the product is free, as was the case with Internet Explorer at the time. They agreed that in *Microsoft*, the consumer welfare standard was broadly applied, by considering harms in innovation in a rapidly developing market.

Legacy for Future Cases

The discussion then turned to analyzing *Microsoft*’s legacy, and whether it will remain a significant precedent for districts courts addressing current and future cases against technology companies.

Professor Gavil observed that it will be interesting to see how parties will distinguish *Microsoft* from current and future cases, as this will affect its relevance as a precedent. For example, he noted that different circuits might have different approaches and that the government has been moving away from the DC Circuit and filing more complaints in front of the Third Circuit, including in the recent case the DOJ filed against Apple. He concluded that this may be an attempt to differentiate other cases from *Microsoft* by getting away from the DC Circuit approach.

Ms. Alaily noted that it will be difficult to predict whether courts will rely on the *Microsoft* framework in the future, because the industry is very different today than it was two decades ago. She added that in *Microsoft*, the government was able to put together a very powerful overarching narrative and there is no guarantee that future plaintiffs will be able to put forward as effective a narrative.

Next, Professor Shapiro commented on whether Courts can rely on the precedent set by *Microsoft* where the Court adjudicated based on the rule of reason because of the novelty of the claims rather than under the *per se* rule. He opined that none of *Microsoft*’s practices were found illegal *per se*, hence there is little chance that monopolization matters in the technology industry will soon be evaluated under the *per se* rule based on that precedent. In *Microsoft*, the Court carefully investigated the impact of each specific conduct on competition, and he believes courts will continue to do so for matters in the technology industry.

The conversation then transitioned to the topic of the remedies put in place in *Microsoft* through the consent decree and what can be learned from them.

Mr. Cella remarked that the *Microsoft* consent decree required *Microsoft* to disclose certain information used for interoperability and to have uniform licensing terms, creating opportunities for software developers to innovate and compete. However, he

argued, the general lesson is that remedies are not perfect, especially in rapidly evolving industries like the technology industry, and that changes in businesses' conduct coming from antitrust rulings have generally been smaller than what people hoped or expected.

Ms. Alaily asserted that some provisions of the consent decree did have long-lasting and unexpected consequences. For example, the consent decree imposed a technical committee put in place to oversee Microsoft's compliance. Over the ten years of its existence, the committee received and processed complaints from competitors concerned about how the consent decree was being implemented, which had a disciplining effect that may have been broader than what the consent decree imagined.

Professor Gavil argued that not enough cases have reached the remedy stage for one to be able to draw final conclusions on what challenges are faced in terms of determining effective remedies. He noted that it is important to differentiate between monopoly acquisition as opposed to monopoly maintenance cases, as quantifying the incremental power acquired by monopolists from anticompetitive conduct in maintenance cases, such as *Microsoft*, may be difficult. Professor Shapiro further noted that the DC Court has been very clear that the goal of remedies is to restore lost competition, and that existing monopolies cannot be broken up in maintenance cases. As a result, he concluded that antitrust remedies are often unlikely to have major impacts on businesses and the government should question what difference winning a specific case will make and whether it is worth investing the resources when first pursuing a case.

Conclusions

To conclude the discussion, each panelist was asked for a closing thought.

Mr. Cella observed that antitrust is very fact specific, as was seen in *Microsoft*, and some claims will always have more merit than others. Ultimately, he concluded, courts will have to follow the burden shifting framework set forth in *Microsoft* and, if necessary, require a set of limited remedies with uncertain outcome.

Ms. Alaily remarked that competition authorities have a tough job ahead of them, and they will want to have as many tools at their disposal as possible, including the legal and economic principles that came out of the *Microsoft* case, as they continue to build on the past.

Professor Gavil observed that it has become very difficult for plaintiffs and the government to satisfy the burden they face in antitrust cases. He noted the possibility that the U.S. could reform antitrust laws to follow the European approach more closely, where new regulation has been implemented to overcome the limits of a traditional case-by-case enforcement approach.

Finally, Professor Shapiro emphasized that *Microsoft* was an important win for the government, and the Court's opinion was well-reasoned and relied on sound economics. At the same time, he concluded, it was an extraordinary case, unlikely to be replicated in the future, because Microsoft had very strong market power and the facts were extremely favorable to the government.

Endnotes

- 1 United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
- 2 The DC District Court dismissed the exclusive dealing claim. See *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000); *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000).
- 3 Among the relevant cases being litigated at the time, Professor Gavil cited the Intel case (*In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404 (D. Del. 2007)), the American Airlines predatory pricing case (*United States v. AMR Corp.*, 335 F.3d 1109 (2003)), and the Dentsply case (*United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005)).
- 4 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *Verizon Commc'ns, Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 US 398 (2003).
- 5 Scholars have argued that, during the Reagan administration, antitrust enforcement programs were more lenient. See, e.g., William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 *Antitrust L.J.* 377, 384–389 (2003), and the references cited therein.
- 6 The Court found that the market for “licensing of all Intel-compatible PC operating systems world-wide” was a relevant market in this case. (See *United States v. Microsoft Corp.*, Court's Findings of Facts at 18.)
- 7 *United States v. Microsoft Corp.*, 253 F.3d 34, 55 (D.C. Cir. 2001).
- 8 *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).
- 9 The Herfindahl-Hirschman Index (HHI) is a common measure of market concentration, and it is often used as an indicator of the amount of competition in a specific market.

All content ©2024 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.