

THE ANTITRUST MARATHON

Part III: The Monopolization/Abuse Offense: Microsoft as a Case Study

SPENCER WALLER: We have two commentators for this joint panel, then we'll proceed in this fashion, but I think it makes sense to talk in an integrated fashion about the remedy side. Standing between and your lunch is a discussion of to the extent that we have sorted out today the purpose and role of monopolization law on a conceptual level, what it means to be a monopolist and what harms it is we are trying to avoid. We need to get some idea of what it is that monopolists do and that the dominant firms do that cross the legal lines in a different jurisdiction. Most of the discussion has been US and EU centered, and to the extent we can broaden that, we should, from other jurisdictions. We have two brief issues papers.

One that I put together is looking at whether or not we have, or we can, develop a single definition of what it means to unlawfully monopolize or abuse a dominant position. My sense is that we have failed miserably at doing so and that it's probably an impossible task to find the Holy Grail. It just hasn't been done yet. People probably will continue to search, and we should. But at best, we come up with a framework where the Microsoft court has at least given us a way to do it, if not an answer as to exactly what should be done in a particular case. Philip Marsden has done an issue paper where he has taken the Court of First Instance's *Microsoft*¹ ruling and worked through it, looking at the most recent important pronouncement out of the European system, and, again, what we do in the shadow of Microsoft on both sides of the Atlantic.

He has some thoughts about what the court found and what that suggests about the overall standards for an abuse of a dominant

¹ Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 WL 2693858 (Sept. 17 2007).

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position. I'll let Philip talk about in the course of the discussion if he wishes, but I certainly got the sense that the search for a single standard of what it means to abuse a dominant position is probably as illusory in the EU as it has been so far in the US system. I think we all have the responsibility to grapple with what does violate the law and what should violate the law, and I, therefore, didn't specifically pick any one person to get the ball rolling. But I invite everybody to turn their placards up if they wish to speak. I'll go with Ken Davidson. I gave him the option from having to cut him off the last time, and I also wanted to thank all the students for hanging in there. And if there are any questions you have or any comments you want to offer, we would invite your participation as well.

KEN DAVIDSON: Spencer, thank you. I really want to add a footnote to your suggestion that maybe we should have a panel on who gets to decide. Is it the courts, is it the juries? This is not a new question. This question was debated in Congress after *Standard Oil* when they decided they wanted to pass the Federal Trade Commission Act and when they decided to pass Clayton. They had very much in mind the kind of debate that we have today about what is the standard and who should develop it. And what they decided was fairly simple, that they did not trust the courts. They did not think the courts were adequate to litigating all of the issues that I have heard people say repeatedly must be taken into account. We have to look at consumer choice. We have to look at environmental policy. We have to look at a whole series of different issues.

Congress passed the Federal Trade Commission Act and said, we don't think the Supreme Court has shown in *Standard Oil* or the other cases that they can handle these issues. Well, I submit that the Supreme Court and other courts in the United States in the last two or three years have said, we can't make the distinction of what is good behavior and bad behavior. We can't make the distinctions of who is an expert and who is not an expert. We don't trust juries to make this kind of decision. The possibility of false positives is so great, that we simply will not listen to issues. Well, these are not new issues. These are issues that went into the creation of the Federal Trade Commission. We have a specialized commission which has never reached its potential, which stands there like the European Commission and could be used for the kinds of purposes that all of you have suggested have to be brought into antitrust. The courts have walked away. Maybe we need a new institution. That's my thought.

PHILIP MARSDEN: It's a great point to start on, because one of the things I wanted to clarify about the Court of First Instance judgment in *Microsoft* on September 17th is that contrary to a lot of what the earlier commentators have said about it, this was not a full appeal in the sense that I think you understand in the United States. This is something that is much more closely focused on what we call a judicial review standard. The standard in the case was based on the fact that the European Commission is responsible for making complex economic appraisals, and the courts' review is necessarily limited to checking whether the relevant rules on procedure and stated reasons have been complied with, whether the facts have been accurately stated, and whether there has been any manifest error of assessment or a misuse of powers. And even though the judgment is extremely thorough and gets into a range of very deep economic appraisals, the court is saying, we don't think that Microsoft has shown that the European Commission is manifestly wrong or has made a manifest error or appraisal. So in that sense, I just want to point out that this is a very, very well reasoned judgment, but there is that standard there, which is a lower standard, I believe, than a full review on the merits.

SPENCER WALLER: You're describing something that's akin in United States law to a judicial review of an agency decision where you're looking for abuse of discretion or failure to develop a record supporting an agency's decision.

PETER CARSTENSEN: I want to come back, in a way, I've been thinking about standards, to the point that I made earlier about the difference between the structural focus on monopoly and the conduct focus. First of all, I think, again, focusing on the American law, the great error was to combine those two issues under the label "monopolization." If the courts had separated out conduct and said that's what an attempt to monopolize means, then we've got a certain set of rules for that, and monopolization is when we're looking at the structure of a firm, and we are going to try to terminate or dissipate its market power, that would have, I think, substantially clarified the inquiry where in one case, when you're focusing on structure, and this is what I've always understood in *Alcoa* was, was it substantial, was it durable, were the centripetal, centrifugal forces of the market unable to remedy this, and was there a workable remedy?

Then when I turn to the attempt model, and this is the conduct stuff that we've been talking about so much, I like the court of appeals

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approach in *Microsoft*² of focusing in on the competitive effects of particular conduct. I think the crucial question is really a step four, where on the one hand, a plaintiff may say that justification is pretextual, that is, that there is no justification in terms of efficiency gains from this conduct. But it's the other prong that interests me and raises some interesting things and allows me to pick up a moment on Simon Baker's concerns. That is, as it stands—as I understand step four, the next alternative for the plaintiff is to say, yes, this is a justification, but there is a less restrictive, a less anticompetitive alternative to achieve the same goal, which invites the Court, the agency, the jury, whomever our decision maker is going to be, to second-guess a management. And that's what creates, I think, risks. And contrary to all that I have stood for 40 years as a lawyer and an academic, I want to suggest that that may not be the right standard, given the dynamics of markets, etcetera, and that something similar to what Justice Peckham in the *Trans-Missouri*³ and the *Joint Traffic*⁴ cases, I think, invoke, which is, if there is a business justification, if a reasonable, non-monopolist could have engaged in this conduct, then it should be lawful.

Now, I would say that the trade-off is then I want a much more vigorous review of structure. General Motors finally died 40 years after it should have been executed. I'm told that Kodak is now dead. But there was about 60 years when it was alive, kicking, and causing harm. That is, one needs a more robust willingness to look at where there has been significant market failure with respect to those centripetal and centrifugal forces and intervene and restructure industries so that they have a more competitive structure. If you'd allow me to do that, which none of you will, then I am much more prepared to have a much more hands-off view of conduct, because I think conduct is extremely hard to police and police sensibly in that kind of day-to-day market. But then you've got to do more when market structure fails significantly. And the thing that we've lost sight of, I think, in the American context is we haven't really preserved that structuralist view of the world, and it died its last gasp, actually, in the *Microsoft* case, with a stupid remedy judgment that the court of appeals killed, not inappropriately, I think, but with the

² United States. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

³ United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

⁴ United States v. Joint-Traffic Ass'n 171 U.S. 505 (1898).

generalization that structural remedies are inappropriate. Complete reversal of the *Standard Oil* standard.

STEVE CALKINS: Coming from Detroit, I need to begin by reassuring Peter that General Motors continues to exist, and indeed, until last year, it was the largest seller of cars and trucks in the world, thank God, and providing lots of employment and tax revenue for the great state of Michigan. But your point that you have to decide either to have an aggressive merger policy and a less aggressive dominant firm policy, or vice versa, surely is correct, because you need to address problems here or there. I went back in terms of what's—I guess the topic here is what's the right standard? And the modernization commission has identified the ideal writing, that Section 2 standards should be clear and predictable in application and administrable.

The area of predatory pricing law provides the best example of success in achieving these goals. And that's the view, the consensus view from a very distinguished group in Washington, is that the ideal is predatory pricing. And I would dissent from that. Yes, predatory pricing law is very clear. The answer is the defendant always wins, unless the plaintiff hired Ken Elzinga. It's an easy administrable standard. You just look and see if Ken is here in the witness box, then you know how to rule. But that's not ideal.

What that's about is the courts responded to a not—I hate to say this, not an affection for juries, but a fear of jurors, for a fear about massive discovery, for a fear about private litigation. For all this, they recoiled. They were persuaded they're terrible risks of false positives. And you really get the message that we don't think that we can, as a court system, make hard decisions. We can't make carefully tuned judgments, and we need to err on the side of the defendant, especially in predatory pricing cases, but now we see more and more in area after area after area of competition law.

And you do occasionally get people sort of echoing Ken Davidson's point and say, my golly, maybe the answer really is that the courts are not up to the job. And once you turn to something like a Federal Trade Commission, which has the unique advantage that a violation does not create a follow-on right of action and a violation can be established under Section 5 without proving a violation under Section 1 or Section 2, so a private party can't come along, and it may well be that there are areas where the Commission ought to identify

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practices that it's prepared to go in and condemn. And that's easy to say, and it sounds nice, and the problem only is that the Commission really has never done a great job of accepting that assignment. And when people talk about interesting or informative guidance from the courts, Spencer talks about the *Microsoft* case, which was not a Federal Trade Commission decision. Some people like some of the concepts they find back in *Aspen Skiing*⁵, which was not a Federal Trade Commission decision. It happens that we have a system of law development that has used the courts. Maybe it's not going to work. I'm not prepared to give up quite yet.

STEVE SHADOWEN: I just want to emphasize how wide the gulf is between, for example, the predatory pricing standard and the standard set forth in the *Microsoft en banc* decision by the DC Circuit. One of the things that is sometimes overlooked is that the *Microsoft* Court applied the rule of reason balancing test to product design changes (what defendants like to call "technological innovation"). For example, the Court applied the balancing test to Microsoft's design of the add/remove function in its software. The private plaintiff's bar is now using the *Microsoft* approach to challenge pharmaceutical manufacturers' strategy of making minor, non-improving (or even degrading) changes in their products in order to impair generic competition.⁶ We have recently brought a case in the District of Columbia challenging what the defendant says is a technological innovation and what we say was simply a change in the product design to keep generics from getting FDA approval.⁷

PHILIP MARSDEN: I think quite a lot of European lawyers and economists read the Court of Appeals decision in *Microsoft* in the US with a lot of interest and favored it. They favored the rule of reason analysis, and I think they were probably hoping for something like that kind of analysis from the Court of First Instance, in the *Microsoft* case in Europe. It was a decision of the full Grand Chamber, 13 judges, and they spent an awful long time on it. I don't believe their judgment comes through as rule of reason analysis. It follows much

⁵ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

⁶ See *Abbott Labs. v. Teva Pharm. USA, Inc.*, 432 F. Supp.2d 408 (D. Del. 2006); see generally H. Hovenkamp, et al., *IP AND ANTITRUST*, at § 12.5 at 12-45 – 12-48 (Supp. 2007); Guy Amoresano, *Branded Drug Reformulation: The Next Brand vs. Generic Antitrust Battleground*, 62 *FOOD & DRUG L.J.* 249 (2007).

⁷ See *Rite Aid Corp., et al. v. AstraZeneca Pharms. L.P., et al.* No. 06-CV-2089 RWR (D.D.C.).

more the traditional type of analysis of how they traditionally find dominance in Europe. In this case though the court makes some fundamental policy statements, they say. 'We have found dominance to the extent of ubiquity, and we in Europe choose quality over ubiquity.' And the judges made several findings of fact, such as that Microsoft products were not as good as potential products that were coming out to market and that Microsoft's ubiquity was preventing the dissemination and development of these products. And the thing that I was concerned about was that I saw no attempt by the court to devise limiting principles. They did have an opportunity at one point to say whether this case was limited only to Microsoft or a super dominant firm. And they specifically did not say that, so their statements pertain to the law on abuse of dominance generally. And then you see the commentators saying this is going to apply to companies with a 40 percent market share since that is the threshold of dominance in Europe. But nobody would say that companies with a 40 percent market share have ubiquity, so those findings at least can't be generally applicable. So I think that ubiquity is the only 'limiting' principle in this case, and they should have gone further and developed something more helpful in terms of guidance with respect to the dividing line between an efficient distribution system and exclusionary practices. Just grateful for reactions.

MS. ANITA BANICEVIC: My comment is not necessarily a reaction to Philip's point, but to provide a bit more perspective regarding where Canada is at on this same issue. I think we're pulled in two directions. We were just involved in a loyalty rebate case that went to the Federal Court of Appeal, and the Canadian Commissioner of Competition put forward a number of arguments that are consistent with the EU approach to loyalty programs by dominant firms. The Commissioner's arguments essentially, were that when a loyalty program is offered by a dominant firm, it's problematic. Her written arguments cited the approach in *Michelin*, as well as a number of other cases in the EU. And we, on behalf of the defense, put forward arguments that were more in line with the rule of reason approach and said, look at the US, and look what they've considered in similar cases. In the end, as a result of the Court of Appeal's decision, we ended up somewhere lost in the middle of this debate, and in my opinion, no further off. The Court of Appeal declined to really wade into the appropriate approach with respect to loyalty programs and one of the primary points of guidance offered by the Court was that for the purpose of determining whether a particular course of conduct

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is “anti-competitive”, the approach that should be taken is focused on whether there is any intended negative effect upon a competitor.

Now, in Canada, there are two elements to the abuse of dominance legislation. First, you have to consider whether or not something is an anticompetitive act because it’s part of our legislation, so that’s the first hurdle. But in my view, the Court of Appeal has potentially set the bar too low such that anything that’s an act of competition that’s directed towards a competitor could potentially meet the definition of an “anti-competitive act.” So, for example, dropping your prices could meet the Court of Appeal’s definition of anti-competitive act – which is an intended negative effect that is exclusionary, predatory, or disciplinary towards a competitor. I should mention that in prior Canadian abuse cases, it was accepted that one needs to look at effects on competition (and not just a competitor) in order to determine whether something was an anticompetitive act.

Where we ended up as a result of this case is that the effect on competition doesn’t matter for the purposes of determining whether something is anti-competitive. The Court of Appeal determined that an act may be found to be anticompetitive, but then one might find that it does not meet the second arm of our abuse of dominance legislation which is to consider whether the impugned act has the effect of substantially lessening or preventing competition in a relevant market.

So, in my view, the dichotomy between EU and the US has had an impact in Canada, where we’re sort of at a loss as to which approach to follow. In my view, we have ended up following neither approach, really, leaving the state of our abuse of dominance law a bit more of a mess. But we’ll see where we end up. The case that I am referring to is going to be redetermined by the Canadian Competition Tribunal in February 2008. It will be interesting to see whether or not the Court of Appeal’s standards will actually make a difference in the outcome of the redetermination.

ADRIAN MAJUMDAR: The difference in starting points in the EU versus in the States is important to understanding the different views expressed here. Following *Michelin II*, the standard for finding abuse is a practice that is “capable of harm”, which is a pretty low standard. It’s not even “likely” or “very likely”, it’s just “capable of harm”. So when people talk about the risk of false positives in Europe, we’re already starting from a much lower standard relative to the US. And

also bear in mind that the dominant position, to the extent that one can appropriately focus on market shares, could start at 40 percent. Whereas, I guess, it would be a higher starting point here. And if you're talking about low price abuses, again, as I understand it, in the US it's much harder to penalize predatory or other exclusionary pricing than in Europe. In sum, if you're starting point in Europe is that a 40 percent market share combined with a certain form of behavior that's capable of harming competition can be an abuse, then that's a very different starting point to what you have here in the States. I guess we'll have more discussions about risks of false positives; I would imagine that the risk must be different here compared to Europe as a result of the different starting thresholds for intervention.

STEVE CALKINS: Just to pick up on Philip's point, and actually now Adrian, in terms of the difference in this nation and Europe of, relatively, what we would think of as small firms being concerned about all this or Simon's lament about this firm wanted to have low prices and it was afraid. In the US, we both have these very clear pro-defendant standards, and, as Adrian suggested, a much higher level of power needed or market share needed before you become concerned. During the dominant firms hearing, Ron Stern for General Electric spoke up and said, look, counseling in the world of monopolization in the US simply is not hard. It's very rare that there are any concerns. He said that, quote, most successful firms simply do not meet the monopoly power test under US law. It's just not a hard thing to give advice. The answer is you don't need to worry about this in the vast majority of circumstances. And it's really a very different situation than you have in Europe. How can one explain this? I think the only way you can explain it is by the different systems of law enforcement.

Here, going back where I was before, because of private litigation, the courts have been driven to create very clear pro-defendant standards and to insist on very clear proof of high market shares and power. In Europe, where you have more trust in government, more trust in enforcers, you hope that the government will be wise and restrained, you can have standards that when applied can result in much greater enforcement. And, of course, one of the interesting wrinkles will be what happens if private enforcement becomes a reality in Europe? Will you have to change and become more like us?

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SPENCER WALLER: You know, Steve, you've alluded to one of my great fears in the world, which is, I know a lot of reasonable people have said our substantive rules have been driven by remedies. We'll get to the guts of that after lunch. My real fear is, we'll end up in a world where we have extremely loose standards, coupled with the diminution of private enforcement. We'll get rid of it or further curtail it and still have the same general pro-defendant rules, even in a world where there's less private enforcement. And then my counterfear is that Europe may be ending up with the opposite world, where they have much more restrictive rules for the behavior of the defendants and a growing system of private enforcement. So we both could end up with the worst of all possible worlds, just in opposite directions.

SIMON BAKER: Just to Steve Calkin's point about having all-knowing omniscient governments which we trust and love, we could take it because the discussion that these are very sophisticated so on, and they make great decisions when they do. One of the trends that I've seen, certainly in the UK, and I think more generally, it's self-assessment, however, where they are pushing stuff off and they're saying, we're not going to opine on this. There is case law, there is guidance. You decide whether you're dominant. You decide if this is a problem. So even if we can trust them to make their decisions when they do, but there's this whole trend about pushing it back onto firms, their advises and having to read the tea leaves from what's gone before. And that's where the problem—I think that's the heart of the problem that I see. If we were getting after the event, wise decision making and sensible remedies applied for a no-fault basis that would be fine. It's when we have to second-guess and the businesses are having to second-guess, that's where these issues really, you know –

STEVE CALKINS: Can't these expensive lawyers in Europe tell their clients when the government will care and when the government won't care?

SIMON BAKER: No, they can't. Because the standard is, as Adrian was saying, so very low. You can have 35 percent on one measure or a 15 percent on another. For the reasons you said about cellophane fallacy, we find it very hard to say, well the market is clearly this or clearly that. So there are some plausible states of the world where you might have 35 or 42 percent, but we're not sure, and here's a discount scheme which looks a bit like *Michelin*, so on a precautionary basis, you should not go ahead. And you'll struggle to

get guidance from the regulatory authorities. They'll say, well, self-assess. And this is where we—and it's not the isolated—you know, Ron Stern's point. This is firms that almost on an intuitive level, you would say this firm can't be, you know, seriously a problem. And there are lots of firms with 35, 40, 45 percent on certain market definitions, which is great for business but problematic.

ANDRE FIEBIG: I would take issue with the statement or inference that it is easy in the United State to advise dominant firms. Let's start with the threshold issue of whether the firm has sufficient market power in the first place. Defining market, despite being a necessary step in the process, is inherently imprecise. I merely have to refer to the recent *Whole Foods*⁸ case in which the D.C. District Court denied the application of the Federal Trade Commission to enjoin the merger of Whole Foods and Wild Oats. In that case, you had relatively clear evidence on the anti-competitive purpose of the merger. And yet, the court disagreed with the relevant market definition advanced by the Federal Trade Commission. Ambiguity and uncertainty are inherent characteristics of an antitrust practice. So it is not always fair to claim that firms know when they are engaging in monopolistic practice or abusing their dominant position. Even in the Microsoft case it was not entirely clear. Reasonable minds could differ on the issues. Moreover, in many instances, cases are decided by juries. This adds to the uncertainty. Hence, whether a particular commercial practice is permissible is often a difficult determination.

SPENCER WALLER: Well, Andre, assuming you don't have problems with definition, and assuming you have an admittedly dominant firm, what, in general, is it that you say to them when they say, what can we do and what can't we do?

ANDRE FIEBIG: You mean once you know they're dominant?

SPENCER WALLER: Yes.

ANDRE FIEBIG: But that is my point. The illegality of particular conduct is often dependent upon market power and hence market definition. If you assume market power, then the task is much easier. But in the real world, it is extremely difficult to know whether a firm enjoys sufficient market power.

⁸ Fed. Trade Comm'n v. Whole Foods Mkt., Inc., 502 F.Supp.2d 1 (D.C. Dist. Aug. 16, 2007).

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SIMON BAKER: It's a hypothetical.

SPENCER WALLER: Well, Microsoft knows.

ANDRE FIEBIG: I am not convinced that was the case.

SPENCER WALLER: They know now.

ANDRE FIEBIG: Perhaps. But even that conclusion may change in the near future.

SPENCER WALLER: Once you either resolve or assume the ambiguities, what is it that you tell a firm, if you are dominant, comma, you may do X or you can't do X? And I guess that's my question is, is there a single standard? Should it be, well, if you could do it when you had 15 percent, it's okay. Now you have 75 percent, what do you tell them? Out of a worst-case scenario, assuming somebody finds you are dominant or a monopoly power, what can you do and what can't you do?

ANDRE FIEBIG: Well, I think that is a somewhat easier question than the threshold question of market power.

SPENCER WALLER: What do you tell them?

ANDRE FIEBIG: Well, it depends on the particular conduct at issue and many other factors. If it were so easy, there would probably be a lot fewer cases and a lot more unemployed lawyers.

PHILIP MARSDEN: First, *Microsoft* tying, and then I'd like to talk about *BA*. With respect to guidance, what the commission and what the courts clearly told Microsoft is that you're more than welcome to continue innovating and adding applications to your operating system, please continue to do so. And also, don't think you have to come into the Commission in advance and check with us to see if a particular new application is all right. However, you do have to make sure that if you do bundle any application with your operating system in the future, you have to provide, for the European market, another product that does not have that bundle of new applications as well. That's very clear.

So as long as there is a 'less Improved', or 'degraded' product, available on European market, then it shouldn't be an abuse for Microsoft to innovate. With that said, I understand that Microsoft is probably into the Commission's offices almost daily trying to negotiate with them about what applications they are or are not allowed to bundle, and the extent of such product integration. But the clear position of the law is that you are able to continue innovating, just make sure that the European consumers have a different less innovative product to choose from as well.

Now, from the *BA* case, when Virgin Atlantic made its complaint against British Airways with respect to the step discounts and fidelity rebates to travel agents, let's remember that complaint in the US court was summarily dismissed for not showing any antitrust injury. But in Europe, the complaint was accepted by the Commission, a several million Euro fine was levied, and this was affirmed by the European Court of Justice. The explanation from the European Court of Justice last spring was that we're not protecting competition as a 'process', we're protecting competition as an 'institution'. The judgment had a lot more than might be structuralist sort of language than might be expected even with competition as a process type theory.

The immediate reaction from the Office of Fair Trading in the UK, - which had been critical of the theory of harm espoused by the Commission - was to close all of the cases it had from complaints against BA from any other rival relating to such discounts. It was a real sort of poke in the eye of the European Court. So it was really quite a moment in England to see this happening. Some practitioners were completely split, because the OFT was also releasing a paper on private actions, which was essentially saying, if you can't come to us to get any joy, use the courts. But if you go to the courts, what case law are they obliged to use? European Court of the Justice in *BA*. So they're clearly transferring the cases to the courts, and if you're going to see increasing litigation in the UK, as you definitely are, it's going to be under European case law. So just in terms of balancing the use of the administrative agency versus the courts, I think it's going to be quite a shift there in the next few years. I don't think that is going to help the development of coherent and convergent policy throughout Europe though; quite the opposite.

MS. ANITA BANICEVIC: Simon picked up most of my comments. However, I want to address the question that was raised regarding

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how do you know when an enforcement agency's going to care about a certain course of conduct. In my opinion, our abuse of dominance legislation is also prone to being used for strategic complaints by competitors. And that's a factor that makes it difficult to advise clients as to whether an enforcement agency is going to view a particular course of conduct as problematic. In my view, the relevant question is not whether the Competition Bureau will care, but will your competitors care? Will they care enough to go to the bureau? And that, to me, is a concern. In addition, another factor which sometimes arises, and this may be a cynical view, is whether or not the enforcement agency feels any pressure to bring a case of a particular nature. A particularly cynical view that has been expressed in Canada is that the Bureau may have been interested in bringing a loyalty rebate case in Canada, given what was going on in the EU and the US. So, overall whether an enforcement agency will take enforcement action in respect of a particular course of conduct will often depend upon a number of factors which are beyond the control of counsel.

MAURICE STUCKE: One thing in the CFI's opinion that surprised me was the lack of complaints by consumers, as well as the Court's reliance on the third Mercer⁹ survey to show that Microsoft's product was inferior to that of its rivals. Although the Court placed great weight on this one survey, it did not seem from the opinion at least, that customers were forced to take the Microsoft product, and if consumers had their druthers they would have opted for the other systems.¹⁰ When I was with the Antitrust Division, one of our

⁹ See, e.g., Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 WL 2693858 (Sept. 17 2007) at ¶¶ 407-412, 635, 652, 661.

¹⁰ See, e.g., Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 WL 2693858 (Sept. 17 2007) at ¶ 662 (stating “[n]ext, Microsoft cannot rely on the fact that consumers never claimed at any time during the administrative procedure that they had been forced to adopt a Windows work group server operating system as a consequence of its refusal to disclose interoperability information to its competitors. In that connection, it is sufficient to point out that Microsoft does not dispute the Commission's findings at recitals 705 and 706 to the contested decision. Thus, at recital 705 to the contested decision, the Commission observes that it is developers of complementary software required to interoperate with Microsoft's systems who ‘depend on the interface information’ and that ‘[c]ustomers will not always exactly know what is disclosed by Microsoft to other work group operating system vendors and what is not’. At recital 706 to the contested decision, the Commission states ‘[w]hen confronted with a “choice” between putting up with interoperability problems that render their business processes cumbersome, inefficient and costly, and embracing a homogeneous Windows solution for their

mantras was “Are consumers concerned, and, if so, what are their concerns?” The consumers’ concerns do not appear in the Court’s opinion. It also struck me that with respect to media players the Court, at times, took a paternalistic tone, namely, consumers do not care because they have Microsoft’s Windows Media Player, and thus will not inquire about alternative media players¹¹ Was there consumer concern or was it basically the complaints of competitors?

PHILIP MARSDEN: That’s one of the questions I put at the head of my paper. And people responded privately and said, you know, it doesn’t really matter whether or not consumers have intervened on the side of the Commission or not. That doesn’t happen much in the US, with the exception of Bert Foer, maybe. I still think it’s a valid point to make, though, because *Microsoft* was the most high-profile competition case in Europe, absolutely. And the main allegation of harm was consumer harm, based on indirectly reduced choice. And the reason why I threw that question about why wasn’t there more sort of consumer noise is that consumers are, of course, diffuse and not very well organized in Europe as well. However, at the same time, I was conducting the study with DG SANCO, which is the consumer body at the European Commission, which was a study of how 14 of the national consumer NGOs were liaising with their national competition authorities and with the Commission. And I said to them, let’s pick some products that you would like to do a case study on, based on existing cases. And we gave them a list. And one of them was the *Microsoft* case, and they didn’t choose that. They chose petrol, generic medicines, and downloadable music. I said, you know, this is a great opportunity for you to educate yourselves about the market and to explain to your members what the *Microsoft* case is

work group network, customers will tend to opt for the latter proposition’ and that ‘[o]nce they have standardised on Windows, they are unlikely to report interoperability problems between their client PCs and the work group servers’.”).

¹¹ See, e.g., Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 WL 2693858 (Sept. 17 2007) at ¶ 1041 (stating “[u]sers who find [Windows Media Player] pre-installed on their client PCs are indeed in general less likely to use alternative media players as they already have an application which delivers media streaming and playback functionality’. The Court therefore considers that, in the absence of the bundling, consumers wishing to have a streaming media player would be induced to choose one from among those available on the market.”); Case T-201/04, *Microsoft Corp. v. Comm’n*, 2007 WL 2693858 (Sept. 17 2007) at ¶ 1053 (stating that “while downloading is in itself a technically inexpensive way of distributing media players, vendors must deploy major resources to ‘overcome end-users’ inertia and persuade them to ignore the pre-installation of [Windows Media Player]”).

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about. And they just didn't want to be involved. They just said it was just an obvious anticonsumer practice. And I thought, well, in that case, you should be intervening or speaking up or something. But they weren't going to do that, nor could they explain to me why bundling and charging for access to protocols was anticonsumer. So, no, there was no movement from the consumer NGO side to intervene. And equally, there was no reaching out from the Commission to consumer NGOs. So the *Microsoft* case is definitely a competitor-driven complaint and I don't mean that pejoratively: most abuse cases are. I mean, the competitors are mainly five large American software companies, and that's a fact. They can be called a federation or whatever it is, but they're definitely companies, not consumers. So it's just something that very much puzzled me, that there wasn't more consumer body involvement. And reaching out from the Commission down to the consumers in a way and saying come on in. Bring in some surveys, bring in some complaints, maybe they're just not organized. Maybe that will change as litigation increases.

JEFFERY CROSS: I want to respond to Spencer's question, because I think that's the nub of the issue—at least in the US. Assuming clear dominance, although in the US it would be phrased “monopoly,” and you have defined the market properly, and have the market shares to assume monopoly, the real question has been: What can the defendant do and what it cannot do. The reason I think that is true in the US, is that we don't condemn monopoly itself because of the fear of hurting innovation and application of business acumen. What we condemn is the improper attaining of monopoly or improper maintaining of monopoly.

Of course, the question becomes what is improper. It's easy at one end of continuum, when the defendant is cutting crab lines and beating up crew members of competitor's boats, which is the *Dooley v. Crab Boat Owners* case.¹² As you walk down the continuum, where do you end up? I always liked the tension between the *Alcoa* case and the *DuPont* Titanium Dioxide case. In *Alcoa*, if I remember correctly, Alcoa was building new plants to meet competition, and Judge Learned Hand concluded that such conduct was over the line. In the *DuPont*¹³ case, DuPont was building new plants, highly

¹² *Dooley v. Crab Boat Owners Ass'n*, 2004-1 Trade Cas. (CCH) P74,421.

¹³ *In re E.I. du Pont de Nemours* (T: O₂), 96 F.T.C. 653 (1980).

efficient plants to meet demand, but that was considered to be acceptable. So I think the answer to your question necessarily is moving towards the kind of burden shifting approach that you outline in your paper, and I think that's not a bad one. If the defendant comes up with a plausible pro-competitive justification for the conduct, plausible from the perspective of advancing consumer welfare and efficiencies, etcetera, etcetera, then the burden goes to the plaintiff to show that the overall effect is an anti-competitive effect versus a pro-competitive effect, all of which are very susceptible to a jury analysis, both of what's plausible and not plausible.

I also want to comment on something that Peter said in terms of the least restrictive means test, in the context of burden shifting and the defense of the plausible pro-competitive justification. The conduct may advance consumer welfare, but in reality, it's more than you need to accomplish the same means. And is that just second-guessing management? I think of Judge Taft's analysis of least restrictive meaning in *Addyston Pipe*, which was whether conduct that goes beyond what is necessary, at least for the portion that goes beyond what is necessary, is that really anti-competitive. I think the foregoing fits nicely into a burden-shifting framework with once you come forward with a plausible pro-competitive justification for your conduct, I'm not blowing up the trucks, but I'm trying to compete as a monopolist and to innovate. Then the plaintiff suggests, well, it's more than you need. And then you ultimately get to the test of what's the ultimate anti-competitive effect in the market place.