

THE ANTITRUST MARATHON

Part IV: Remedies – How Far and How Much?

SPENCER WALLER: We're going to conclude with our final panel looking at the question of remedies, both public and private. Philip will be our moderator.

PHILIP MARSDEN: We're going to be combining these two, which makes a lot of sense. Anita had kindly prepared with George Addy a paper on Remedies, How Far and How Much, which you had a chance to review. It's a comparative approach to finding what I like to describe as this idea of a precise scalpel rather than a blunt sledgehammer, because in devising remedies or leaving it to the courts to do so, we do have to try to work out how to crack the nut of this difficult question we've been considering all day, the exquisite question of trying to determine between exclusionary and efficient conduct. Andre Fiebig is going to begin with the discussion of the issues coming out of Anita's paper, and then Christopher Leslie will lead us into a discussion of private actions.

ANDRE FIEBIG: Thank you, Philip. I want to start off my saying that that I found Anita's paper quite good and thought-provoking. I would like to pick up on two themes which she and George Addy raised in the paper: divergent remedies and the the costs that are imposed because of divergent remedies. Anita's paper correctly points out that competition authorities and courts may come to not only divergent substantive result, but even where there is agreement on the illegality of the conduct at issue, there is often divergence in the remedies employed. It is therefore appropriate to look at divergence at both of these levels.

I think that this is what makes the *Microsoft* so salient for us: there were two competition law systems which came to the same result on illegality, but differed on the remedies to be put in place. The

underlying facts in the Microsoft case were pretty much the same on both sides of the Atlantic. Using the same product market definition, Microsoft's market share in the United States was close to what it was in Europe. And the practices at issue were pretty much the same. Hence, these similarities have apparently added to the willingness of certain U.S. antitrust experts to criticize the conclusions reached by the European Commission and the Court of First Instance.

But let's leave aside who is right and who is wrong. In my view, there is seldom an objective right and wrong in antitrust cases. But the reality of the matter is that the divergent remedies impose additional costs on firms. Worldwide compliance with a unified remedy would often be much easier for firms. The question then becomes: what do we do about it? Does this mean that we should coordinate remedies on an international scale?

In my view, coordination of remedies may be a laudable objective, but harmonization of remedies an unachievable objective. When reading Anita's paper, my conclusion was that more effort should be placed on making the application of the substantive rules clearer rather than trying to harmonize remedies. I come to that conclusion because I think the appropriateness of remedies is based on an almost an infinite number of factors. Those factors include economic, political and social considerations. For example, and as I mentioned earlier, it is inappropriate to merely ask what effect a particular practice or transaction will have on prices to the consumer. Quite frankly, there may be situations where a higher price or less output is a social benefit. In Europe, for example, the protection of the environment and securing employment enjoy equal status in the EC Treaty as the protection of competition. It is no wonder that there is and will continue to be divergence in the remedies imposed in the United States and in Europe.

PHILIP MARSDEN: Thanks very much. From a comparative perspective one of the things that comes out most obviously in *Microsoft* is where, as you say, the conduct is essentially the same and the remedies are quite different. The arguments that were used in the European case were not focused specifically - as other cases have been in Europe - on the unique nature of Europe: segmented markets, national consumer preferences, state-induced dominance, these sorts of things. Software is very clearly a global product market. So the Commission couldn't use the standard - and quite legitimate - usual European excuses for having stricter regulation. So you've actually

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got to cut to the heart of it, which is, do we have a substantively different approach in Europe on the theory of harm in abuse cases. So one of the questions I want to throw out, and I'll turn it over to Christopher, and then we'll begin the discussion, is what should global firms be doing about this? To which standard should they be conforming their conduct? Should they be conforming their conduct to the strictest standard, the EU standard? And then also, what should other authorities be doing, do they follow, or does it make any sense for them to craft their own remedy for their own market? Does it make any sense for them at all to allow some form of conduct which another larger jurisdiction is going to prohibit?

CHRISTOPHER LESLIE: When Spencer asked me if I would be a commentator on private enforcement, I said yes because it's pretty easy to be a commentator. Read the paper, find what you agree with, what you disagree with. And the expectations are much lower for a commentator than a speaker. So I was sort of horrified two days ago when I found out there wasn't a paper. But I'm still a commentator, so I'd like to maintain that commentator low expectation by starting off with the assertion that private enforcement isn't terribly important in antitrust. I'd now like to comment on that, because I find that assertion to be outrageous. (Laughter)

There are two primary goals for antitrust law and competition law. First, compensation for the victims of antitrust violations and, second, deterrence of future violations, either by that defendant or by other defendants. Private enforcement is critical in achieving these two goals. In the United States within the context of Section 2, this is partly a function of the fact that the government just doesn't bring that much Section 2 litigation because, as Spencer noted, it's focusing so much more on Section 1 price-fixing cartels. With respect to the two specific goals of antitrust law, compensation is much more likely to be achieved through private litigation because you have the actual victims of the antitrust violation suing for, usually, damages to get some sort of compensation for the money they're out from the monopoly overcharge. Private enforcement is the best way to put that money back in their pockets. And private enforcement is also critical, in my mind, to deterrence. Government actions, while important, don't tend to disgorge the illegal monopoly profits. And in classic cases like *American Can*¹ or *Alcoa*, where a Section 2 violation was found, there's no remedy at all. So you got these illegal monopolies,

¹ United States v. Am. Can Co., 230 F. 859 (D. Md. 1916).

and yet even when you have a finding of liability, they're allowed to keep all their monopoly profits that they got up until that point. And that doesn't really create deterrence against future violations. Even in the United States *Microsoft* case, although you have an excellent opinion by the DC circuit, whatever you think of the structural remedy, the fact is, Microsoft got to keep its illegal monopoly profits that it "earned."

PETER CARSTENSEN: Extorted.

CHRISTOPHER LESLIE: Or, extorted, as Peter suggests. This suggests that the government's not very good at disgorging the ill-gotten gains, and you're never going to have deterrence unless you can disgorge the ill-gotten gains and hopefully actually have some sort of penalty on top of that to make it so other firms will conclude it's not going to be cost beneficial for them to violate the law in the future. For private enforcement, that leaves the question of who can bring antitrust suits, and that's primarily competitors and consumers.

Unfortunately, in the United States, it seems to me that standing doctrine is being constrained in a way that's reducing the viability of private enforcement from both of these sectors. With competitors, you've got this mantra of antitrust protects competition, not competitors. And some courts are misinterpreting that to suggest antitrust doesn't protect competitors at all. There is sometimes a lack of understanding regarding the relationship between the existence of competitors and the process of competition.

Within the context of consumers, why courts are eliminating consumer standing in some important areas of Section 2, like *Walker Process* patent fraud cases², where the majority of courts are denying standing to direct consumers to sue for the overcharges they admittedly paid to an illegal monopolist. And then we've got no private enforcement in the United States or in federal court for indirect consumers, even when those indirect consumers suffer the lion's share of the antitrust injury, and even when they're the most likely plaintiffs to disgorge the ill-gotten gains.

Antitrust standing doctrine needs to be revisited. On the one hand, there is a legitimate fear of nuisance suits and consumers bringing too

² See Christopher R. Leslie, *The Role of Consumers in Walker Process Litigation*, 13 SW. J. L. & TRADE AM. 281 (2007).

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many suits, the people that used to bring frivolous securities fraud litigation bringing frivolous Section 2 litigation, so you need to have some limit on standing. On the other hand, the issue remains: how do you have a meaningful limit to get the proper private enforcement cases to court, while screening out the frivolous cases, and making sure that you get enough of the proper cases litigated so that we can achieve the twin goals of compensation, and deterrence.

KEN DAVIDSON: In over half of my time with the FTC, I worked in the compliance division, which deals with remedy. We dealt with it fairly frequently with the EU, and my experience was that we did not have problems on making compatible remedies. Even when we changed the remedies, the reasons were usually whatever was originally ordered was impossible, and that was a fact which was taken into account by the Europeans and the Americans when the orders needed to be modified. Harmonization as a practical matter on remedies has been the problem.

The second thing I'd like to say concerns Federal Trade Commission orders, but also *Microsoft* and other cases. These decisions have replaced structural remedies with conduct remedies. A merger case, like *Evanston*, has a conduct remedy. This is insane. We have merger cases in which we find the FTC ordered a 40-year supply contract to take care of a competitive problem. This is not antitrust. This is the road to regulation, in capital letters. Fines. I always hear about fines when I go abroad because competition laws in transitional economies are more likely to have adopted the European system of: we're going to do fines, or even in criminal cases. Although there was a very insightful fellow from the KFTC, the Korean Fair Trade Commission, who said more than a few years ago, we can't do criminal cases. It's a loss of face for the people, so we can't even start a case. Well, I think that's a good point. But I think the real problem with fines is that in order to make them effective, how big do they have to be potentially? I mean, for Microsoft, you can't even think in those terms. So I would agree with Christopher Leslie that the appropriate way to go about the process of figuring what somebody should pay ought to be disgorgement. Take away the incentive to misuse market power.

Finally, you may want additional fines. I don't think they matter that much, that the amount of money you're taking away in a disgorgement proceeding is likely to far exceed anything you're going to get in civil or criminal penalties. And our experience in the

US, we had a presentation at AAI last week in which the person who had looked at the numbers said, frankly, we find that the number of cartel cases has gone up, the amount of money has gone up, and the amount of recidivism has gone up. There's something wrong with that picture.

JOSEPH BAUER: I was going to pick up on something that Christopher said. I guess that it was intended to be provocative, but also tongue in cheek: Should there be a role for private enforcement? I think we all would agree the answer has to be yes.

The starting point should be the functions of remedies. First of all, to the extent that a court finds that the firm or firms have engaged in anticompetitive behavior or monopolistic behavior, the courts will attempt to either create or recreate competition. Then, certainly, there is the interest in obtaining compensation for the victims. And, to the extent that compensation, or the fear of having to pay compensation, advances deterrence, it hopefully has an effect on other firms that are contemplating similar behavior.

So if I can just parse those goals. With respect to creating or recreating competition, presumably, the principal advocate for that will be the government. But, the principal advocates for compensation and deterrence are likely to be private parties. Although, as Ken says, to the extent that fines are a different way of shifting money, maybe not from the defendant to the victims, but from the defendant to the public coffers, that certainly also has deterrent effects.

Peter was talking a little bit about different kinds of remedies, and we can agree that there's no one size fits all, no one shoe that works for everybody's foot. If you look at antitrust history, the majority of relief decreed has been injunctive. And these can be nuanced. Courts often recognize that a breakup might not be the best way to achieve some of the goals that we've talked about, that breakup may not be very good for restoring competition.

One example is the *United Shoe Machinery*³ case, one of the classic monopoly cases from the '50s, where the government was certainly successful there. Incidentally, that's another industry where

³ *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D.Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

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monopoly is fragile. I tried to find out where's USM today? Part of the answer is, with all of the American shoe business having migrated to Brazil or Italy, and I guess now to China, USM has died a sad death. But you couldn't break up USM, because it only had a single factory. Imagine the court entering an order that the east side of the building would be making one kind of shoe machines, and the west side of the building would be making another. That simply didn't make a lot of sense. There were similar arguments in the *Microsoft* case.

Christopher mentioned *Alcoa*. The main reason that divestiture was not ordered was that between the time the action was brought and the time the court decided the case, something else happened. It was called World War II. During World War II, the government had needs for large quantities of aluminum, and so it sponsored, I think it was Kaiser and Reynolds, to build aluminum factories, so the landscape had changed.

The AT&T challenge was a different kind of breakup. It turned out to be consensual, but it was nonetheless a breakup.

Then, when one thinks about some of these cases in terms of compensation for the victims, again the poster child there is the *Hanover Shoe*⁴ case, where after USM was subject to various forms of injunctive relief, it wound up paying at least treble damages, ironically, to the direct purchasers, who we might say were not really the ones who were injured, but that's a whole other story.

I wanted to respond briefly to something that Spencer talked about, and that is the argument that to some observers, the remedies, or the combination of remedies, are perceived as overkill. I don't mean to say that they are, but they may be perceived by some as overkill.

Does the existence of those substantial remedies then indeed dovetail back or circle back into a court's or an administrative agency's determination as to whether there's a violation in the first place? The way that courts misuse standing is one of my *bêtes noires*, or hobby horses.

The courts have vastly overused standing rules and sustained standing challenges because the court didn't like either the

⁴ *Hanover Shoe v. United Shoe Mach. Corp.*, 393 U.S. 901 (1968).

substantive claim, or something that Steve was talking about, the courts are petrified about discovery or letting these things loose on a jury and so on. So rather than deal with the merits of the case, they say, that guy doesn't have standing, or that company doesn't have standing. And that's a very bad way to run a railroad.

JEFFERY CROSS: I would like to comment on Ken's point regarding the *Evanston Hospital* case. I find the decision very baffling in terms of the remedy. You will recall that the FTC allowed Evanston to merge with Highland Park Hospital in the year 2000 and then in the year 2004 brought a retrospective case looking at that merger as to whether it had violated Section 7. The Commission focused on the fact that prices, based on an extensive regression analysis, including ones by Jon Baker on behalf of the defendants, were far higher than they would have been but for the merger. There were also several pages in the decision devoted to the comments of the executives and the consultant to the effect that the only purpose of the merger was to raise prices charged managed care organizations. After doing such a thorough analysis of the anti-competitive effect, and finding that there was one, the Commission ultimately backed off a breakup of the merged hospitals and came up with a conduct remedy.

Such a remedy is contrary to the FTC/DOJ remedy guides that say that the Agencies prefer structural remedies instead of conduct remedies. I challenge anyone that has more insight into this than myself as to how the conduct remedy that was imposed—separate bargaining units at each hospital for the managed care companies—is going to be any kind of legitimate remedy. The only explanation I can think of is that the Commission was perhaps a little nervous about the fact that it had concluded that the relevant market could be defined by the fact that prices were above competitive levels that this was something it felt it was doing that was new, and, therefore, it needed to back off of the remedy of breaking up this merger after the fact. It is a baffling remedy. It is not a Section 2 case, but yet it is close to it in terms of the analysis because it is looking backward unlike the usual Section 7 case which is forward looking.

DAVID BRAUN: When we look at the difference in approach to evaluating the fundamental offense, which then leads to differing views on remedies in places like Europe and the United States, I'm reminded that we really have two antitrust laboratories at work. And it may not be a bad thing at all to have some competition between

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competition systems. And for those laboratories to work, I don't think it is necessarily harmful or unbeneficial, in most instances, either to our learning our knowledge or, in fact to, in most instances, the companies involved. I think one of the things that I've learned, and most of us who have been in both the government and in private practice have learned, is that government agencies and courts move at a snail's pace by comparison to the speed with which private entrepreneurs, even as large as Microsoft, work. And they are usually able, no matter what the remedy is, as long as it's not taking the company away from them, to find a method by which to go after what they're going after, which is earnings for their company.

So I kind of like the idea that we have some of the competing systems. I don't find it particularly harmful. And do I see, as I think some others have mentioned, that we have some overincentives on the private side of this country that need to be remedied, and we have some severe underincentives, perhaps, in Europe, but which Europeans seem to be entirely content with. And I don't think we, at least I, as an American, ought to be overly encouraging them to go away. It is not necessarily the right way for them and not necessarily for us. I would prefer to see treble damages detrebled. I would prefer to see some stronger incentives in cases where there has been a proven offense. I think of the situation that we had recently and that is repeating itself. As soon as an investigation is opened in Europe and announced publicly, regardless of whether there's an investigation or any evidence of an offense in the United States, there are several private treble damage class-actions filed in Philadelphia or New York or someplace else. And that is a disincentive, I think, for all of us, because it's a waste of time and a waste of money. It helps to enrich lawyers, make judges busy, but in many instances, it's an abuse of the system.

STEVE CALKINS: These are generally hard questions. It used to be a civil world in the US where the government got an injunction and then the privates would come along, you'd get money. And, indeed, ironically, in Evanston, I'm told that the real penalty may be delivered by privates with some private cases looking for damages from the *Evanston Hospital* thing. And that system has got some problems with it. For instance, when the government can only have an injunction kind of remedy, the government sort of doesn't like that and sometimes it wants to go off and punish it a little bit. And in terms of *Evanston*, I mean, that's when I think where they said it's illegal. We need to do something.

We're afraid of tampering with their integration, and so we're going to create a totally absurd order, and because we don't know how to write it, we'll ask the defendants to write it and feel good about ourselves. At least we've done something to them, and that's too bad. It would have been better if you're going to decide that it was illegal, but we don't have a good remedy to put a big fine on them, then leave them alone to go on their way. And the fact the government can't do that has problems. The follow-on has problems because we have this treble damage sort of image out there which tends to drive the law in another way, and so that's problematic.

Now the situation's been changed because at least at the criminal level, the federal penalties have become dramatically higher, just been skyrocketing over the last couple of decades, and so we have very large federal penalties, maybe not enough, but certainly very different than when our system was created. So also the Federal Trade Commission has finally decided that it can get disgorgement in an antitrust case. It's scared about doing so, it doesn't do it very often, but it's decided that it's held that it has the power, it hasn't yet found that rejected, and so at least in theory, the Federal Trade Commission can go out there and get disgorgement of all these ill-gotten gains. And so now, unfortunately, we are left with the question of what is the right way to do this? Should we be having more disgorgement by a Federal Trade Commission going out to the people, if you will, and less follow-on litigation from private parties? Or should the Federal Trade Commission get more disgorgement, the follow-ons get less? Should we have more money going to the treasury in terms of criminal fines and less follow-on or not? Of course, if we knew the right number, all this would be easy. We don't. And so people on the more enforcement side tend to say more is better, and those on the less enforcement side say you ought to do less. But at some point, we have to think about what's the right way to do this. And each of the different approaches has different cost and benefits. It creates different incentives. And with the way that the world has changed so dramatically, it's time that we started thinking about what is the right way to proceed.

CARLOS ORCI: I had two objectives when I decided to come to Chicago: the first one was to finish the Marathon, and the second one was to learn more about the topics we are discussing today. In Mexico, antitrust law is not as developed as in many other countries such as the United States, and we therefore look to other

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jurisdictions, principally the, European Community and the United States, for suggestions as to how to adopt the concepts used in such jurisdictions to the civil law system used in Mexico. One of the remedies established in the Mexican Competition Law to determine the amount of the fine to be imposed upon agents engaging in illegal conduct is to increase the penalty in the event that the company repeats the antitrust behavior. In this case, the company may be fined up to 10 percent of the company's annual sales—not only its profits—obtained in the previous year or 10 percent of the value of the assets of the company, whichever is higher. I consider that this method of calculating fines could be used as a basis for allocating a fair and sufficient fine in the case of the *Microsoft*.

ANITA BANICEVIC: One point that I want to throw out there for discussion is to whether deterrence should, in fact, be the ultimate goal in unilateral conduct cases, or should it be restoring competition? The reason I bring that up is that I think that we all agree that it's often difficult to tell the difference between aggressive and healthy competition and the line between aggressive competition and anticompetitive conduct is really quite fact specific. As a result, there is a significant risk, in my view, that overdeterrence could easily occur in abuse of dominance cases. Furthermore, does the goal of deterrence give the regulators the excuse to issue enormous fines under the guise of deterrence, when ultimately the impact of such fines is, perhaps, chilling competition. And then the last comment I want to raise on this point is how the goal of deterrence can be reconciled with the dicta in *Trinko*, which refers to the right to earn monopoly profits and charge monopoly prices.

SPENCER WALLER: Thank you. I want to be a little specific. We have an array of sanctions in the US and elsewhere, and we kind of critique them all. One is, you could prosecute monopolization criminally, the way we do cartels, and we have the ability to levy a fine, but we don't do that. We haven't done it in the United States since the late '60s, and almost everybody thinks it's a pretty bad idea, absent extraordinary, extraordinary conduct that would be probably criminal under some other statute such as arson or something of that, if you really were blowing up your competitors. I did a little research, and I can't find the criminal complaint that is purely Section 2 after about 1967 or '68. I don't recall the exact dates. So we don't do criminal sanctions prosecutions and, therefore, under our US system, give up the right to seek criminal fines. And we all mostly agree that that's fine.

We've also moved away from structural remedies, and that becomes more debatable. But, obviously, if we think the problem is an enduring structural monopoly, we should probably do something about it, but absent the fortuitous events of *Alcoa* where the government actually built the plants and then sold them at a discount to Kaiser and Reynolds. So nothing had to be divested from Alcoa, but competition could be created anew because of the public property that was being divested after the war, that's exceptional. And AT&T is exceptional in the sense that it was consensual. So, it's been awhile since we have simply forced a recalcitrant defendant to divest anything outside of the merger area.

Fines by themselves are likely to not be enough, or to be sort of random and not well correlated to either deterrence or compensation. And frequently, behavioral injunctions are simply too complicated. Well, where does that leave us? What other tools do we have, other than the crisp and clean, occasional structural remedy when it's easy and nobody really gets hurt too bad.

Let me suggest two things. They don't cover all cases, but they cover some cases. One is, I've spent a lot of time thinking about the right to access and open access regimes, which we frequently call the Essential Facilities Doctrine in antitrust. It's not the only way we think about it. I'm convinced in a world where most of the important industries have an intellectual property component or a technology component or an internet component, that access is the most important issue going forward relating to monopoly power in most of our systems.

Microsoft is an example. It was all about access, as was *Trinko* and a bunch of other cases. And I think we need remedies that are about access. If we look at what Microsoft, what happened in Europe, I think, ironically, what Microsoft proposed as a remedy for the media players was probably better access than what the Commission insisted on and what the court upheld. If the idea is we don't want to let Microsoft use its bottleneck through its operating system to deny downstream diversity and choice and consumer welfare and all the different senses, then, gee, I think it's a lot better to at least have Microsoft hand out its competitors a disk, especially if that's what they're willing to do, rather than just have them sell an unbundled version of what they're selling bundled and then leaving consumers

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having to figure out how to get access on their own. So on the record, I just said something nice about Microsoft.

The second half of the EU case was about access of a different sort. And both sides agreed that access was the issue, they just disagreed factually whether Microsoft was providing it or not, and the Commission found not enough, and the Court upheld that. We'll see where it goes. But I think one aspect of this is to focus on access and devise intelligent, functional remedies that provides that access, yes, even if it does involve resurrecting things like the essential facilities doctrine, but also using non-antitrust, non-traditional regulatory and other tools to provide that kind of access.

The second thing is I think we need to move to a better system of public/private partnerships to enforce competition law, and I think it's absolutely critical in the abuse of dominance and monopolization area. I think we have to move away from public agencies trying to monopolize the enforcement of competition law, particularly in this area of power. There is often a role for private enforcement, not always. And again, Microsoft is a peculiar example, because it's not clear they were overcharging for anything. At least some of the things that they were held to do unlawfully in the DC circuit opinion don't involve an apparent overcharge, and a private party who seeks to prove that is starting at ground zero, doesn't have much to rely on from the government case.

Now, because we don't have the power to fine, maybe we want to have more cases go to a verdict. Maybe we need setting up where there is an where there isn't overcharges and having the government cases then be the vehicle to set up private liability actions to then find where the overcharges are. Maybe disgorgement is a powerful tool that we ought to figure out how to use beyond just the very limited Federal Trade Commission context, or maybe, when there are government consent decrees, we ought to spend a little more time on the disgorgement or compensation aspects of whatever it is the defendant would then have to do to make consumers right, either at the direct purchaser level and/or at the indirect purchaser level. So I can see a lot of creative and interesting things.

I'm troubled by when the agencies have centralized the bulk of the enforcement activity in this area and then further use their power to kind of shut private parties out of the process in different ways. I'd like to see a much more constructive partnership. And that's the only

model that I would offer to the EU and other jurisdictions. And I agree with David, I'm not offering the specifics of the US model or any other specific suggestion, but this idea that it needs to be a seamless web to have the best array of governmental enforcement and private enforcement options, damages and access kinds of things.

BERT FOER: I want to make four points, and I'm going to come back in my last point to what Spencer was saying. The first point is that in the US, remedy has been the tail on the dog. It has not been wagging the dog. It's something that gets thought of at the last minute with the least resources, although the FTC made some efforts to change that, which I think is very positive. One result, or one manifestation is this: think of the treatise on antitrust remedies that you go to when you're researching the law or economics of remedy. There is none, right? Why not? And isn't it time that a real effort be made to go through antitrust cases, figure out what the remedies were, put them into some patterns, and also attempt to evaluate what has worked and what hasn't worked, such that there is a body of systematic knowledge? I don't think it exists, but such a project might be very helpful in moving toward the future of remedies. Of course, that involves more than just monopoly. But it is a place to start from.

And that gets to a point that is made very often, which is that we need more studies of what has worked, what hasn't worked, evaluation of decisions that were made or decisions that were not made. That is a resource problem. Everybody agrees that we need more of this but it is comparable to everybody talking about the weather and nobody doing anything about it.

This leads to one of my favorite points that one day I'll try and do something about: developing the role of prediction in antitrust. All antitrust is mostly about prediction, but nowhere is this more true than when we deal with remedies. What will happen if we do X, or what will happen if we don't do X, and what will happen if we do X as compared to Y and so forth? We don't put resources into the science of prediction. Clearly, it's not a very precise science, but corporations pay a lot of money for forecasters, demographers, planners, and futures researchers. There are systematic techniques and methodologies that are used. Some work, some don't work, some may be applicable in different circumstances to antitrust. I think we need to study what methods of prediction might help us with the remedy phase.

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And my final point is about the potential for creativity in settlements and cy pres distributions that can affect the competitive situation in a monopoly base.

Moving closer to what Spencer may be getting at, the State of Utah brought a case against two medical waste disposal companies. The two leading companies were in this state. They made a decision to swap assets. One would stay in this state, one would operate in an adjacent state, then you would have two states where there was no competition in either. Obtaining a conviction wouldn't have been hard, so the State was able to negotiate a strong settlement. But the company that had left the state was unwilling to come back into the state.

So now what do you do to create some competition where there had been? One of the things the state did was to force the settling company to put up some money, and they distributed that money in several ways—one was a very intelligent distribution. They funded the creation of a tool kit by the AAI, which laid out the nature of the medical waste management industry, showing the legal and economic aspects that are of antitrust relevance, and providing strategies that can be used by all the states and the federal government to protect competition in this industry.

But I want to call attention to a different aspect of the settlement. The Utah antitrust authorities gave money out from the settlement fund directly to potential competitors of the remaining monopolist, and the idea was to build these companies up so they could compete more effectively. This particular effort at industrial policy didn't work. It didn't work because—the beneficiary companies couldn't get the proper zoning in order to create the necessary competing facilities. Nonetheless, it's an interesting idea. It does raise questions about what we would call industrial policy. And, of course, that's almost as bad a word as “populist,” which Spencer may have earned for himself earlier today. I mean, in this field, to be called a populist or to be engaged in industrial planning is absolutely a death sentence. But we need to think outside of the box.

Take the *Evanston* case. Suppose the FTC had said, well, it's too late to break up the merged hospital company, but the two hospitals that merged made all this extra money out of an illegal merger. Let's take that money and put it into the creation, maybe not of a whole

hospital, which perhaps would have been too expensive, but some sort of a facility that would have provided competition for at least some of the departments of the hospital. There are creative approaches to be examined in antitrust remedies. It's a lot like bankruptcy, where there are opportunities for very creative remedies if people are willing to try. And, for a variety of reasons including the conservative bias against government being able to operate in the public interest, I don't think there's been enough effort to think and act creatively in this field.

PHILIP MARSDEN: I think that's right. In Europe, they're looking quite hard at some of the work that the FTC has been doing on looking back at whether intervention worked and to what extent it happened to benefit consumer welfare. And the OFT was engaged in a study on that. And the European Commission did that with respect to its merger remedies. And, of course, the whole purpose of this is to work out how better to estimate what their future intervention may be. With respect to predictive abilities, I do have to wonder how much predictive ability the European Commission has when you look at the tying remedies in Europe in *Microsoft*, I think making sure that the unbundled product, with less bells and whistles on it, was going to be sold at the same price. You don't need to be able to have a degree in predictive science or whatever to work out what is going to happen then.

BERT FOER: It's not that nobody told them.

CHRISTOPHER LESLIE: David advocated detrebling damages. I just didn't want there to be a transcript that didn't have a defense of trebling. Two responses: The first is that trebled damages do not necessarily play a significant role in antitrust class action litigation. The bogeyman of trebled damages is most often brought up in the context of class-action litigation. The whole class gets together, and with all the damages aggregated and trebled, that it's going to decimate the poor legal monopolist. But antitrust class-action litigation almost inevitably settles. Those settlements have to be approved by the federal judge, but the benchmark for approving the settlements in Section 2 class-action cases is single damages, not treble damages. So the settlements in these cases are invariably a fraction of single damages, often as low as 5, 10, 20 percent of single damages. So even though you've got class-actions and a possibility of treble damages, these class-action litigations are not disgorging the ill-gotten gains.

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Second, independently of that, trebling is defensible because disgorgement – in the form of single damages – alone isn't enough. Disgorgement is necessary, but it's not sufficient. If the penalty for robbing a bank is the robber has to give the money back, then people will rob banks, because as long as there's a minor probability that they'll get away with it, robbing banks is a net positive thing to do: if they're caught, they give the money back, and if they're not caught, they get to keep it. We need to have trebling in order to compensate for the fact that at least some Section 2 violations aren't going to be caught. Some of them are self-concealing, like Walker Process patent fraud cases, and some of them just don't make it through because of these tightened standing requirements that eliminate some legitimate suits. So it seems to me that trebling is important to ensure disgorgement and to also make it more likely that firms considering illegal monopolization will determine that it's not going to be cost beneficial for them.

I'd like to quickly segue that back to Spencer's point on disgorgement alone isn't enough. It seems to me we need to take a multi-prong approach. And when you find a Section 2 violation, then you need to come in with all remedies swinging. You need to disgorge, you need to penalize in order to make it so people will be deterred from violating antitrust laws in the future, and then you need to find a way to fix the market within the context of that particular market, whether it's a structural or conduct remedy. But it seems to me that if each one of these remedies alone is insufficient, then that's a really good reason where we should come in with all of the arrows in our quiver and try to use them as a multi-prong remedy.

PETER CARSTENSEN: Thank you. I want to quickly go back over this structure and conduct remedy stuff with a couple of observations. First *Alcoa*. Let's not forget that we did get a remedy there. The Mellons had to give up their ownership of the Aluminum Company of Canada, which has emerged as a competitor over time. *AT&T*, I think, is one of the best structural cases that I can think of in terms of freeing up technology. Think of the dramatic changes, things that were in Bell Labs that got loose once AT&T was broken up. Now they're reconstructing it to lock in the present technology. But these two observations—and Bert's talking about alternative ways to deal with the path dependency that we were on, because that had been one of my observations when I looked at some of these arguments about the harm of antitrust in the past is that antitrust remedies need to

combine with some major change in technology or other context for there to be a significant change in the marketplace.⁵

We had a case a little like Bert's that I don't know the outcome of, but the *Marshfield Clinic*⁶ private damage case, the money was used to subsidize competing doctors to come into the Marshfield Clinic monopoly area and begin to build a practice. But that suggests—and I'll pick up a little bit on Simon's concerns with how his clients were being told not to cut prices—that if the focus of remedy is on the dynamics of the market and changing the path dependency that we're on, then things that force up the price in the short run of the dominant firm that allow competitors to reestablish themselves in the market may make a good deal of sense from a remedy perspective if what you're trying to do is to restore a competition that has been lost for some exogenous or endogenous reason.

On the other hand, if you really think, as I think Scalia does, that monopoly is inevitable, then all you do is screw the consumer, because nothing is really going to change when you do this. But then you may—you do get into regulatory models. That is, no, I don't want you treating consumers differently. I want you to market your ridiculous operating system this way rather than that way. So it becomes much more purely regulatory, and I think, falls out of competition policy.

STEVE CALKINS: Very quickly. I was reminded by Bert's comment about Utah, about just how hard all this stuff is. In my case, the Federal Trade Commission sued the Detroit Auto Dealers, which had conspired to remain closed on Saturday. They more or less won the case. They got an order which required a variety of things. And those things happened, and years later, the dealers remained closed on Saturday. They'd been doing it for a long time, and they just continued doing it, and the Federal Trade Commission couldn't do a whit of good. And it is so terribly hard. You know, Microsoft loses a case involving Netscape Navigator long after Netscape Navigator is gone, for all practical purposes.

In Europe, none of you seem to think that the Media Player option is going to make a whit of difference, and that doesn't seem surprising

⁵ Peter C. Carstensen, *How to Assess the Impact of Antitrust on the American Economy: Examining History or Tehorizing*, 74 IOWA L. REV. 175 (1989).

⁶ *Roxema v. Marshfield Clinic*, 977 F. Supp. 1362 (W.D.Wis. 1997).

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to anybody. It's very hard to do much good when you have any kind of a remedy that's coming along after the fact.

So what do you take away from that? One is that you need aggressive merger enforcement to prevent the establishment of monopolies. You need to try to do what you can to make sure that entry is easy in various parts of the economy so that monopolies don't get established. But where you do have monopolies, you really ought to act fast. If you can identify in a case of *Conwood* that people are going around ripping out racks and things and you can get in there and stop it quickly before someone has too much power, that's a whole lot better than trying to come along and bribe somebody to enter the market years later. So speed is one lesson. And then another, to go back to where we started this morning, is clarity. Where you can really be certain you know what's illegal, you can act more quickly, counselors can counsel against it. And when people do it, it can be sufficiently, morally contemptible that when Christopher wants to come in with this I hurt him both guns and arrows blazing and flying, well, there will be some kind of support for doing that, and so it's all part of one big picture.

KEN DAVIDSON: I think we have gotten more imaginative along the lines that Spencer mentioned in things like access remedy. But I think further that fundamentally we have not had enough study of remedy and what it's worth and what it's not. I would say most of the regulatory remedies, access remedies in particular that have been tried at the Federal Trade Commission have not worked. We didn't know enough about them. We didn't know enough about remedy. There is no book on remedy. And I think it's very important for us to get, in a general way, the word out as what works and what does not work and why they don't work. I know in my own case, I have worked on a whole bunch of remedies with total failures, and they were total failures because we didn't understand enough about the industry when we designed the remedy. Well, maybe that's too bad, or maybe it's too late. In some cases, it's too late and you can't do anything the way you're trying to do it.

But the one point that is most important, I think, is to line up these remedies, look at the remedies, look at where they failed. We can learn from that. I'm afraid that our one experience with doing that, the divestiture study, both in the EU and the one that we did at the FTC, was a substantial learning experience, and it has resulted in ever-more complicated remedies. That is probably not a good result,

because the more complicated remedies deny what competition law is supposed to be fostering, namely markets and interplay of market action. You have to be looking towards something that is going to reestablish competition, and without looking to see what the effect has been, we're not going to know.

ANDRE FIEBIG: I just wanted to perhaps ask Christopher and maybe Peter, whether they would impose the same remedies had *Microsoft*, the first time the practices were questioned, complied with the European Commission's remedies? In other words, do you give any credit to Microsoft for the inherent ambiguity of competition laws? In other words, is there any justice in saying, well, did Microsoft say I didn't know that it was illegal? What if at the time they said, gee, I'm sorry? We didn't know it was illegal. We'll do whatever you say.

CHRISTOPHER LESLIE: I guess I'd fight the premise. I find that a little disingenuous. You're suggesting that Microsoft didn't know that lying about making polluted Java and then growing polluted Java as part of its strategy, of lying to software developers to focus them on Microsoft's version of Java that was not compatible with other versions. To suggest Microsoft didn't know that was wrong, I just can't buy that premise.

ANDRE FIEBIG: But it happens all the time, I mean, even by non-dominant. To get to be dominant, you have to do that.

CHRISTOPHER LESLIE: Yeah, bad acts happen all the time by firms. When they say that they're shocked, *shocked*, that their bad act might violate the law, I'm just not willing to say, oh, okay, lower the fine for you. I think that regardless of when you come in with *Microsoft* that you have to have some attempts to calculate what the illegal profits they gained were and to disgorge them. And I disagree with Spencer. I think there were illegal overcharges. It's not your traditional – a calculation where you observe the competitive market price and then watch the price go up. Illegal overcharges exist because, but for Microsoft's anticompetitive acts, you would have had an emergence of competing operating systems that would have driven the market price down. It's really hard to calculate with any precision, but given the violation, that must have happened that there was an overcharge going on. I think you employ the economist to come in and come up with some estimate of what their illegal profits were, and I think you have that as the minimum to disgorge, and then

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you have to have something more than that to compensate for the fact that there wasn't 100 percent probability of them being found liable and getting that disgorgement. And after you disgorge all the ill-gotten gains and put in a penalty, then you find a way to go forward with the structural remedy like the EU did.

ANDRE FIEBIG: But do you give them a credit for the clarity or lack of clarity of the legal norm?

CHRISTOPHER LESLIE: At its core, *Microsoft* is not an unclear case. I'm baffled when people think that this is the cutting edge of antitrust. This was a garden-variety antitrust violation that just happened to take place in a high-tech market. But there wasn't anything new and innovative, and no brand-new antitrust law was created in this case. It was just the application of bread-and-butter antitrust principles in a high-tech industry. So, no, I don't give a whole lot of credit when Microsoft says "we didn't realize that trying to dry up every possible distribution network for our competitors and then lying to our own customers, the people that we're dependent on, we didn't realize that getting a monopoly through those acts was wrong." I'm just not willing to give any credit for that.

PETER CARSTENSEN: You're a Mac user, aren't you? Imagine not Microsoft, but another monopolist who engages in some practices that, when we take a look at them, think about them and have some sophisticated analysis, we then say these really have much more of a foreclosure effect on competition than that ought to have. Hence, we tell the monopolist henceforth don't do it. That's where to keep the market open would make a lot of difference to me. How early do we seek a remedy, and what kind of remedies other than just stop doing it, would be important. How much of other sanctions would I want to have? A monopolist engaged only in innocat conduct, now revealed to be anticompetitive has yet, I think, to actually walk the face of the earth. But when, as, and if that happens, then I think we really do have to think about how draconian we want to be with our remedies when we really discover a practice we always thought was a good one and it turns out to be a bad one.

SPENCER WALLER: Well, I thank you for a great day. I just want to close with a couple of comments. I guess I want to do like the McLaughlin Group does with John McLaughlin who usually saves the zinger for the end. But when we're thinking about remedies, I just want you to go away with a really interesting thought that we don't

have time to talk about it today. But Andre asked a what-if question about Microsoft. I'll ask another what-if question. What if once it became clear that they had durable market power over operating systems, and what if once it became clear they engaged in conduct that was illegal under one or more of the jurisdiction laws, what if the remedy was the forced licensing or auction of the source code for Windows? What would the world like look that we live in today? And with that, I thank you, and I look forward to seeing you at other Institute events and carrying on this conversation in London in April. We have been discussing a series of questions we've been dealing with since the beginning of competition law, and we'll be dealing with them for quite some time. Philip, as our host of the next leg of the marathon, gets the final word.

PHILIP MARSDEN: Thank you very much for a great day. I welcome you all to come to London on April 11th next year for exactly the same format and with some lawyers and economists from the UK and from the continent, I hope. One of the things we've been talking about all day, of course, is apt for running analogies, which is, you know, are those dominant firms, or Microsoft, are they doing something other than pulling ahead of their rivals in the race through their own ingenuity, or are they, indeed, excluding their rivals from the race? I know there are various views on that around the table, and there certainly are in London. The marathon discussion is certainly not over.

Thank you, Spencer for hosting this first stage in the Marathon. Thank you to the court reporters and to the students for helping us, and thank you all.