The Price of Unanimity:
The D.C. Circuit's Incoherent Opinion in *Microsoft*

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The D.C. Circuit's long-awaited decision in the *Microsoft* case[1] should disappoint anyone concerned about the integrity of antitrust law. Surprisingly, the opinion was not only "per curiam,"[2] but unanimous.[3] Most per curiam opinions reach an obvious result by straightforward reasoning;[4] this one reaches a controversial result by convoluted reasoning. Indeed, it strains credulity to believe that all members of the court agreed with every portion of this opinion. Maybe the court thought the per curiam strategy would avoid a confusing welter of opinions and thus give its pronouncement greater authority and less likelihood of reversal. If that was its intent, the result is the opposite: the suppressed divisions on the court are manifest in a host of inconsistencies that undermine the opinion's significance and dilute its doctrinal implications. That the members of the court were willing to sign such a document suggests that the court's paramount goal was to reach a particular result, regardless of the collateral damage to antitrust policy.

In spite of this political act, there may yet be a settlement. In the wake of the opinion (and the events of September 11) the Justice Department and Microsoft have agreed to settle the case on terms that impose a number of behavioral restrictions on the firm.[5] Some states, however, are refusing to join the settlement, claiming the terms are inadequate to restore competition. The incoherence of the D.C. Circuit's opinion has undoubtedly contributed to this controversy: even the most vitriolic critics of the settlement can find support in the court's words.

In this essay we highlight some of the opinion's many inconsistencies, focusing on the court's treatment of (1) the role of the "browser market" in proof of anticompetitive effects, and (2) the role of efficiency concerns in evaluating the integration of the browser and the operating system. Although we disagree with many of the court's holdings on their own terms, we save for another day any extended analysis of the court's treatment of specific issues. Here, we critique the court's rulings and statements only on grounds of incoherence or opacity. Moreover, we limit our consideration of inconsistencies to the substantive rulings. The appellate court, of course, also reversed the structural remedy—a breakup of the company—ordered by the district court and, because of Judge Jackson's misconduct, remanded the case to a new judge.[6] We express no view on these actions.

Anticompetitive Effects and the Browser Market

The browser market played a central role in the appeals court's disposition of the claims of monopoly maintenance, attempted monopolization, and tying. The court held (1) that Microsoft monopolized the operating system market mainly by its actions in the browser market; (2) that the government failed to prove attempted monopolization of the browser market because it failed to prove that such a market exists; and (3) that the government must prove an anticompetitive effect in the browser market in order to establish the tying claim. These conclusions are contradictory.

In the first section of the opinion, the D.C. Circuit Court affirmed most of the district court's findings and conclusions in holding that Microsoft illegally maintained its OS monopoly by integrating its browser with the operating system; entering into restrictive agreements

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with Apple and other computer makers, Internet access providers, independent software vendors, and Internet content providers; and interfering with the development of Sun Microsystems' Java programming language. *Microsoft*, 253 F.3d 34, at 58–80. In doing so, the court endorsed the district court's adoption of the government's theory of anticompetitive effect. Under that theory, Microsoft used the various exclusionary practices to prevent the emergence of software platforms—Netscape's browser and Java—that could undermine the Windows monopoly. Because the emerging platforms would allow developers to write software applications that could run regardless of the underlying operating system, they threatened the OS market's "applications barrier to entry"—the strong tendency of users to buy (and developers to write programs for) the operating system for which the most applications are available. *Id.* at 60. The court wrote that the government was not required to prove actual anticompetitive effect or harm to consumers—only that the acts had a reasonable likelihood of preserving Microsoft's OS monopoly. *Id.* at 79.

The court explained how "market share in the browser market affects market power in the operating system market" by observing that

> Microsoft's efforts to gain market share in one market (browsers) served to meet the threat to Microsoft's monopoly in another market (operating systems) by keeping rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows as the platform for software development.

Id. at 60. The critical point to note here is that the anticompetitive effect in the OS market *depends entirely on Microsoft's acquisition of market share in the browser market.* Only if Microsoft achieved a certain usage share could it convince developers to write to Windows application programming interfaces (APIs) rather than to Netscape's (or some other firm's) cross-platform APIs.

The court confirmed this dependence again and again in its discussion of particular exclusionary practices, using terms like "market share"[7] and "usage share"[8] in connection with browsers in ways that presupposed the existence of a browser market. For example, it stated that "Microsoft reduced rival browsers' usage share not by improving its own product but, rather, by preventing OEMs[9] from taking actions that could increase rivals' share of usage,"[10] and "a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation." *Id.* at 70. These statements assume that, for there to be a § 2 violation, there must be foreclosure of *some* share of *something*. An antitrust lawyer would be forgiven for assuming that something was a market.

But in the next section of the opinion, we learn that there is no browser market. The government alleged that Microsoft, in addition to monopolization of the OS market, had attempted to monopolize the browser market using many of the same tactics alleged in support of the monopoly maintenance claim, and by its famous offer to "divide" the browser market with Netscape. But the court short-circuited any consideration of this conduct as attempted monopolization, holding that the plaintiff had failed "to prove a dangerous probability of achieving monopoly power in the putative browser market," as required by *Spectrum Sports*.[11] To prove a dangerous probability of success, the plaintiff must "define the relevant market and . . . demonstrate that substantial barriers to entry protect that market." *Microsoft*, 253 F.3d at 81. On the first point, the plaintiff must offer

> a detailed description of the purpose of a browser—what functions may be included and what are not—and an examination of the substitutes that are part of the market and those that are not. . . . The District Court never

> engaged in such an analysis nor entered detailed findings defining what a browser is or what products might constitute substitutes. In the Findings of Fact, the District Court (in a section on whether IE and Windows are separate products) stated only that "a Web browser provides the ability for the end user to select, retrieve, and perceive resources on the Web." . . . Furthermore, in discussing attempted monopolization in its Conclusions of Law, the District Court failed to demonstrate analytical rigor when it employed varying and imprecise references to the "market for browsing technology for Windows," "the browser market," and "platform-level browsing software."

Id. at 81 (citations omitted). The district court's failure was apparently so complete that the court of appeals foreclosed any reconsideration of the issue on remand. The court pointed to:

> plaintiffs' failure to articulate and identify evidence before the District Court as to (1) what constitutes a browser (i.e., what are the technological components of or functionalities provided by a browser) and (2) why certain other products are not reasonable substitutes (e.g., browser shells or viewers for individual internet extensions, such as Real Audio Player or Adobe Acrobat Reader).

Id. at 81–82 (citations omitted). The court went on to rule that, even if the browser market had been properly defined, a reversal would be required because the government had failed to offer any evidence that the browser market was subject to entry barriers, particularly an applications barrier to entry like the one found to protect the OS market. *Id.* at 82–84.

The court's rejection of the district court's finding of the existence of a relevant browser market is strange, given its deference to the district court's delineation of a market for OSs for personal computers with Intel-compatible processors. That definition excluded other platform software, including browsers, because of the special characteristics of OSs, and the lack of reasonable interchangeability within a foreseeable time.[12] *Id.* at 53–54. Although the court of appeals stated that the district court's findings on the browser market "pale by comparison" with its findings on the OS market, it is difficult to see why the record is sufficient to define a market for one and not the other. Moreover, the court's insistence on "analytical rigor" in the definition of a browser market is inconsistent with its deference to other important findings of the district court. And it seems peculiar that the court of appeals would accuse the district court of lack of analytical rigor without even citing, much less discussing, the district court's most relevant findings (in paragraphs 199–201) that there is a market for web browsing functionality.[13]

More important than any of this is the inconsistency between the court of appeals's reversal of the district court's finding that there is a browser market and its affirmance of the holding that Microsoft monopolized the OS market by building its share of the browser market. The lynchpin of the government's theory of anticompetitive effect was the idea that Microsoft prevented the emergence of a platform threat by Netscape and Java by denying Netscape usage share in the *browser market*. Although the court insisted that attempted monopolization requires "an analysis wholly independent of the conclusions and findings on monopoly maintenance," *id.* at 81, the factual bases for the two claims are inseparable. If there is no market for browsers, then the usage share numbers on which the court relied in finding monopolization are meaningless because they fail to account for usage of other reasonable substitutes. And if there is no market for browsers, then the weakening of a single firm would do nothing to reinforce Microsoft's OS monopoly, because there would be countless other platform threats that would remain. If there are no entry barriers in the browser market, particularly if there is no applications barrier to entry attributable to network effects, then the strategy of acquiring greater share in the browser market would be a vain effort—new entrants would quickly take the

place of any firm at whose expense Microsoft had increased its browser usage.

It is not enough to respond that the browser threat was "nascent." *Id.* at 54. The court rejected Microsoft's argument that the government's theory of anticompetitive effect was inconsistent with the district court's exclusion of browsers from the market for Intel-compatible operating systems, stating that "[n]othing in § 2 of the Sherman Act limits its prohibition to actions taken against threats that are already well-developed enough to serve as present substitutes." *Id.* According to the court, then, the browser can be a nascent competitive constraint on an OS monopolist, without actually being in the OS market. Whatever the merits of that proposition, the court's theory of competitive harm in the OS market requires at least that Microsoft and Netscape were competitors in a browser market. We need *some* evidentiary basis for concluding that harm to a firm constitutes harm to competition in a particular case.[14] Even if the law prohibits harm to "nascent" competitors, we at least must have some coherent theory to support the inference of anticompetitive effect from the injury of a particular firm. In *Microsoft*, the entire theory rested on Microsoft's building of usage share in a browser market. If there is a reasoned economic argument why the absence of a browser market does not undermine the theory of monopolization of the OS market, the court failed to provide it.

But it gets worse. In the third section of the opinion, the court of appeals reversed the district court's holding that Microsoft illegally tied the browser to the operating system, requiring that the district court on remand apply a newly minted rule of reason. Most important here, the court insisted that under its rule of reason for tying, any anticompetitive effect from the tie must be in the tied product market—the market for browsers. Both law[15] and economics[16] require the plaintiff in a tying case to define the market for the tied product. Just as "[i]t is impossible to monopolize a market that does not exist,"[17] it is impossible to reduce competition in a market that does not exist. Nevertheless, the court precluded the government on remand from proving that a browser market exists:

> [O]n remand, plaintiffs must show that Microsoft's conduct unreasonably restrained competition. Meeting that burden "involves an inquiry into the actual effect" of Microsoft's conduct on competition in the tied good market, the putative market for browsers. To the extent that certain aspects of tying injury may depend on a careful definition of the tied good market and a showing of barriers to entry other than the tying arrangement itself, plaintiffs would have to establish these points. . . . But plaintiffs were required—and had every incentive—to provide both a definition of the browser market and barriers to entry to that market as part of their § 2 attempted monopolization claim; yet they failed to do so. . . . Accordingly, on remand of the § 1 tying claim, plaintiffs will be precluded from arguing any theory of harm that depends on a precise definition of browsers or barriers to entry (for example, network effects from Internet protocols and extensions embedded in a browser) other than what may be implicit in Microsoft's tying arrangement.[18]

Id. at 95 (citation omitted). So the government must prove harm in the market for browsers, but will be precluded from proving that there is a market for browsers. Reason totters on her throne. No wonder the government chose not to pursue the tying claim on remand.[19]

Bundling the Browser and the Operating System

Almost as confused as the D.C. Circuit's treatment of the role of the browser market in evaluating competitive effects is its treatment of the integration of the browser and the operating system. In June of 1998, a panel of the same court had reversed Judge Jackson's preliminary injunction enforcing a 1995 consent decree by requiring Microsoft to permit OEMs to remove Internet Explorer functionality from Windows

95.[20] The panel majority announced the standard that IE and Windows 95 were "integrated" if Microsoft could offer "facially plausible"[21] evidence that bundling "combines functionalities . . . in a way that offers advantages unavailable if the functionalities are bought separately and combined by the purchaser."[22] It reasoned that because of "the limited competence of courts to evaluate high-tech product designs and the high cost of errors,"[23] a "court's evaluation of a claim of integration must be narrow and deferential"[24] to a firm's design decisions. The court concluded the government had failed to show a probability of success on the merits,[25] because "[o]n the facts before us,"[26] Microsoft had met the criteria for integration, although that conclusion was "subject to reexamination on a more complete record."[27]

Two years later, however, the court of appeals was far less clear in its treatment of integration under Sections 1 and 2 of the Sherman Act. The government alleged that the bundling of the browser and the operating system constituted both monopoly maintenance and illegal tying. In resolving both of these claims the court expressed concerns about efficiency and judicial competence, but the implications of those concerns for doctrine in the two contexts were quite different. Indeed, the standards that emerged from the court's analysis were similar mainly in their opacity.

Two types of bundling constituted monopoly maintenance: (1) Microsoft's imposition of license restrictions precluding OEMs from "removing any desktop icons, folders, or 'Start' menu entries," 253 F.3d at 61, and (2) Microsoft's physical integration of the code of the browser and the operating system. *Id.* at 64–67. The issues were closely related: the first addressed Microsoft's *contractual* preclusion of OEMs from removing IE, *id.* at 61; the second addressed Microsoft's *technological* preclusion of OEMs from removing IE. Both were found to be anticompetitive because of their effect on browser usage share.

Interestingly, however, "IE" means different things in the different contexts. In the licensing discussion, the court addressed only Microsoft's failure to allow OEMs to delete "*visible means of user access to IE*."[28] That was anticompetitive because including two browsers would have created consumer confusion and increased support costs. But in the commingling discussion, the court addressed Microsoft's failure to allow OEMs to delete any of *the actual code that constitutes IE*. By mixing IE code with OS-specific code, Microsoft made it harder to delete IE code without harming the underlying OS.

> [H]aving the IE software code as an irremovable part of Windows meant that pre-installing a second browser would "increase an OEM's product testing costs," because an OEM must test and train its support staff to answer calls related to every software product preinstalled on the machine; moreover, pre-installing a browser in addition to IE would to many OEMs be "a questionable use of the scarce and valuable space on a PC's hard drive."

Id. at 64 (quoting the district court). The court affirmed the district court's conclusions that Microsoft's "commingling" of browser code in the same files with OS code and its prevention of removal of IE from Windows (by not providing a "remove" function) were anticompetitive because the actions reduced rival browsers' usage share.[29]

Moreover, the court held that integration of IE and the OS, with the exception of one design feature, lacked any business justification. *Id.* at 66–67. In reaching this conclusion, it affirmed the district court's acceptance of the testimony of two government witnesses—contradicted by Microsoft's witnesses—that the files containing IE code and shared code also contain OS-specific code. *Id.* at 66. The critical point here is that the court gave no special weight to concerns about interfering with Microsoft's design of Windows. It did express an abstract reluctance to interfere with design decisions, *id.*, but did not on that account hold the government to any

higher standard of proof. The issue of integration is to be considered in the context of the defendant's proffered business justifications and the plaintiff's proffered rebuttals as an ordinary issue of fact. Thus allegations of predatory innovation, unlike claims of predatory pricing, are apparently to be viewed with no particular skepticism. Efficiency concerns have no doctrinal implications, even when the court applies what it concedes is an "edentulous" standard of anticompetitive effects.

The court did conclude that Microsoft's design of Windows to override the user's default browser in a few instances—launching IE unexpectedly—was supported by business justifications that the government had failed to rebut. *Id.* at 67. This holding, however, only confuses matters, in two important respects. First, the court's statement of the plaintiff's rebuttal burden here conflicts with its own statement of the burden earlier in the section. In its discussion of integration, the court stated that, if the plaintiff establishes a prima facie case of anticompetitive effect and the defendant responds by offering a procompetitive justification for the conduct, the plaintiff must "not only rebut[] the proffered justification, but also . . . demonstrat[e] that the anticompetitive effect of the challenged action outweighs it." *Id*. Earlier in the monopoly maintenance section, however, the court stated that the plaintiff may prevail *either* by rebutting the justification *or* by showing the anticompetitive effect outweighs it.[30] The inconsistency did not affect the outcome, because on the one issue for which the court found Microsoft had offered a justification, the government failed either to rebut it or show that it was outweighed by the anticompetitive effect. Nevertheless, the court has created the potential for future confusion on this critical point.

Second, for purposes of remand in the case, this holding greatly complicates the task of determining exactly what Microsoft must allow OEMs to remove. Apparently, Microsoft must allow deletion of all of the means of "readily accessing" IE, but it need not allow deletion of IE technologies necessary to launch IE where an override of the default browser was shown to be justified. But the condemnation of commingling code, combined with the court's holding that unjustified use of disk space is anticompetitive, would seem to suggest that any code specific to IE, apart from what is necessary for the default overrides, must be capable of being removed. None of this has yet been specified.[31]

More important, the court's treatment of integration in the monopoly maintenance section is inconsistent with its treatment of the same issue in the tying section. In the latter context, the court of appeals held that the district court applied an incorrect standard in evaluating the legality of Microsoft's tying of the browser to the OS. *Id.* at 84–97. The district court had refused to apply the standard for tying that the court of appeals announced in the 1998 consent decree case, instead applying a version of the per se rule drawn from the Supreme Court's decision in *Jefferson Parish*.[32] The court of appeals reversed, but not (as one might expect) because Judge Jackson had dodged its 1998 standard. Indeed, the en banc court of appeals itself distinguished the panel's 1998 standard, somewhat disingenuously, as limited to the consent decree context.[33] Instead, the court held that an unspecified "rule of reason" inquiry was necessary because of the special efficiency concerns associated with the integration of functionality in platform software. *Id.* at 89–95.

The court recognized that there are potential harms to consumer choice from combining applications with the operating system and preventing their removal. But Microsoft had asserted important efficiencies that, according to the court, the conventional test did not allow to be considered adequately. Although the requirement that there be two products for there to be a tie (even under the per se rule) is a proxy for an efficiency analysis, according to the court it is too crude a test to address the efficiencies

adequately. Consequently, the court remanded for consideration under a rule of reason, which "more freely permits consideration of the benefits of bundling in software markets, particularly those for OSs, and a balancing of these benefits against the costs to consumers whose ability to make direct price/quality tradeoffs in the tied market may have been impaired." *Id.* at 94. The court emphasized that in the tying inquiry the plaintiff must establish an anticompetitive effect in the market for the *tied* product—browsers.[34]

First of all, we note the absurdity of a tying rule created specifically to address "technological integration of added functionality into software that serves as a platform for third-party applications." *Id.* at 84. The move is particularly suspect because it is unnecessary, even if we grant that platform competition has unique aspects. There is ample precedent for considering procompetitive justifications under current tying law.[35]

More important, however, the court's invocation of efficiency as the basis for its concoction of a special test for platform tying is inconsistent with its indifference to efficiency in the context of monopoly maintenance. The court asserted that a new test for tying is necessary to allow adequate consideration of productive efficiency and thus to avoid deterring beneficial integration. But the same efficiency concerns apply with equal force in the monopoly maintenance context. The court gave lip service to a concern about interfering in design decisions in that context. But, far from creating any special test, it simply affirmed the district court's conclusory findings that Microsoft's commingling code and prevention of removal of IE were anticompetitive and lacked any procompetitive justification. In the process, it addressed none of the concerns about efficiency that it found so compelling in the tying section.

Another puzzle is worth noting. The court declared that, if the plaintiffs pursue a tying claim on remand, the district court "must also consider" a theory not addressed in its analysis of monopoly maintenance, something called "price bundling." *Id.* at 96. Describing the "core concern" in tying law, the court explained that competition on the merits of the tied product "is foreclosed when the tying product either is sold only in a bundle with the tied product or, though offered separately, is sold at a *bundled price*, so that the buyer pays the same price whether he takes the tied product or not."[36] The court here appears to divide the universe of tying arrangements sensibly into two groups, one in which a buyer is forced to purchase two products because of contractual or physical constraints, and one in which the buyer is permitted to purchase the tying product alone but has no economic incentive to do so because the price is no lower than the price charged for the package of products.[37] One would assume that the latter sort of tie is what the court calls "price bundling."

But the government did not allege "price bundling" in this sense, because Microsoft did not offer a version of Windows without IE. In the court's typology, the government's case alleged only the first kind of tying arrangement—one created by contractual or physical binding. Why, then, would the district court need to consider price bundling? The court of appeals required the district court to compare Microsoft's charge for Windows and IE together with the amount that "its charge *would have been* for Windows alone." *Id.* at 96 (emphasis added). But under the court's typology a *hypothetical* price of Windows without IE (however that might be determined) is irrelevant to price bundling, which occurs when the tying product is *in fact* offered separately, but at a price that represents no discount from the price of the bundle.

Apparently, the court is employing a different (but unstated) definition of price bundling from the one it had suggested earlier in its opinion. The price bundling claim the court would have the lower court resolve is whether Microsoft charged a price *increment* for IE in Windows.[38]

If Microsoft charged no higher price for the combination of Windows and IE than it would have charged for Windows without IE, then Microsoft did not engage in price bundling. Under this definition, price bundling is charging a higher price for the package of tying and tied products than for the (hypothetical) tying product alone. In other words, if Microsoft gave IE away for free—a question on which the court finds conflicting record evidence, *id.*—it did not price bundle. One might think that if a seller gave away a valuable product it would face condemnation for predatory pricing. But the court sidesteps this implication by noting "there is no *claim* of price predation." *Id.* (emphasis added).

Thus, apparently Microsoft may have committed a tying offense by charging more for the combination of IE and Windows than it would have charged for Windows alone. Why such a practice should be given a name, much less the misleading term "price bundling," is obscure. Perhaps the court meant to say that contractual or physical tying is okay if the seller charges no increment in price for the tied good, because the practice does not harm consumers. Thus, if and only if the seller charges a price increment will the seller have to prove that it has procompetitive justifications for the contractual or physical tie.[39] But this interpretation of the court's analysis conflicts with its conclusion in the monopoly maintenance section that OEMs incurred a cost in pre-installing a second browser because of customer confusion and that end-users incurred an opportunity cost in installing a second browser by wasting space on their hard drives. If these effects are taken seriously, tying could be anticompetitive despite a zero price increment.

Conclusion

The D.C. Circuit's bizarre disposition of the *Microsoft* case is a missed opportunity. One would have hoped that a court with such expertise in antitrust and regulatory matters would have produced a majority analysis (with perhaps an insightful concurrence and a trenchant dissent) that pointed the way for antitrust law in the information age. Instead, we are left with an inscrutable per curiam opinion that gives us only a result and confusion. The most important monopolization case of the information age deserved better. ●

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

[2] In this context, per curiam means "not attributed to any one member of the court." A Dictionary of Modern Legal Usage 125 (2d ed. 1995), *quoted in* R. Perry Sentell, Jr., *The Peculiarity of Per Curiam: The Georgia Supreme Court*, 52 Mercer L. Rev. 1, 2 (2000).

[3] Some controversial opinions are decided per curiam, but with numerous partial concurrences and dissents. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976). Whatever else may be said for that use of the per curiam device, it does not submerge the divisions on the court.

[4] One study of the Supreme Court's per curiam practice concluded that per curiam opinions, among other functions, "decide less controversial cases in a cost-effective manner; provide prompt direction to lower courts to follow recent decisions; rapidly answer obvious legal questions that, nonetheless, represent important issues; and extend major decisions incrementally." Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 Judicature 29, 38 (1992).

[5] Proposed Final Judgment, United States v. Microsoft Corp., No. 98-1232 (CKK) (filed Nov. 2, 2001) http://www.usdoj.gov/atr/cases/f9400/9462.htm; Stephen Labaton & Steve Lohr, *One-Third of States Remain Opposed to Microsoft Settlement Deal*, N.Y. Times, Nov. 6, 2001, http://www.nytimes.com/2001/11/06/business/06CND-SOFT.html.

[6] The court disqualified the judge "retroactive only to the date he entered the order breaking up Microsoft," *Microsoft*, 253 F.3d at 111. Even though the court found "fair room for argument that the District Court's factfindings should be vacated *in toto*," *id.* at 119, it declined to set aside the entire decision because there was no evidence of actual bias. Microsoft challenged the consistency of this ruling with the appellate court's decision to affirm the trial court's findings on the merits, Petition for Writ of Certiorari, United States v. Microsoft Corp., No. 1-236 (U.S. filed Aug. 7, 2001), http://www.microsoft.com/presspass/trial/appeals/08-07petition.asp, but the Supreme Court denied certiorari.

[7] *See, e.g., Microsoft*, 253 F.3d at 60 ("The reason market share in the browser market affects market power in the operating system market is complex, and warrants some explanation."); *id.* ("Microsoft's efforts to gain market share in one market (browsers)

served to meet the threat to Microsoft's monopoly in another market (operating systems)"); *id.* at 69 ("Following *Tampa Electric*, courts considering antitrust challenges to exclusive contracts have taken care to identify the share of the market foreclosed."); *id.* at 72 ("Microsoft's exclusive deals with the ISVs had a substantial effect in further foreclosing rival browsers from the market.")

[8] *Id.* at 60 ("The restrictions Microsoft places upon Original Equipment Manufacturers are of particular importance in determining browser usage share"); *id.* at 62 ("Microsoft reduced rival browsers' usage share not by improving its own product but, rather, by preventing OEMs from taking actions that could increase rivals' share of usage."); *id.* at 65 ("Because Microsoft's [commingling code], through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products and hence protecting its own operating system monopoly, it is anticompetitive."); *id.* ("Because the [default] override [of users' choice of browsers] reduces rivals' usage share and protects Microsoft's monopoly, it too is anticompetitive."); *id.* at 67 ("Plaintiffs plainly made out a prima facie case of harm to competition in the operating system market by demonstrating that Microsoft's [commingling code] increased its browser usage share and thus protected its operating system monopoly from a middleware threat."); *id.* at 71 ("By ensuring that the 'majority' of all IAP subscribers are offered IE either as the default browser or as the only browser, Microsoft's deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly."); *id.* at 73–74 ("Because Microsoft's exclusive contract with Apple has a substantial effect in restricting distribution of rival browsers, and because (as we have described several times above) reducing usage share of rival browsers serves to protect Microsoft's monopoly, its deal with Apple must be regarded as anticompetitive.").

[9] OEM stands for "original equipment manufacturer," industry jargon for a company that assembles, brands, and sells computers.

[10] *Id.* at 63. The court did not explain why the relevant measure of the browser market is *usage*, rather than *installation*. The court's analysis focused on the reluctance of OEMs to install a rival browser. *See, e.g., id.* at 61. But we put this point aside.

[11] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[12] *See also Microsoft*, 253 F.3d at 79–80.

[13] United States v. Microsoft Corp., 65 F. Supp. 2d 1, 49–50 (D.D.C. 1999).

[14] Economic harm is typically not anticompetitive if the injured firm is not a competitor of the defendant. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 138 (1998); Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1355–56 (Fed. Cir. 1999). In theory, a firm could be on the verge of entering its first market yet represent such an unusual and promising competitive force that its foreclosure would work a cognizable injury to competition. But this theory would not apply here, because Netscape was indeed supplying a product commercially and the methods used to exclude it related to the distribution of that product.

[15] Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 519 (3d Cir. 1998) ("Before we can determine whether there was harm to competition in the tied market, that market must be defined."); Virtual Maintenance, Inc. v. Prime Computer, Inc., 11 F.3d 660 (6th Cir. 1993) (holding that plaintiff failed to establish a threat to competition in "the most narrowly defined tied product market"); Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 493 (3d Cir. 1992) (finding that plaintiff improperly defined the tied product market too narrowly).

[16] Edmund H. Mantell, *Antinomies in Antitrust Law: Tying and Vertical Integration*, 7 J.L. & Commerce 23, 58 (1987): "Thus, in order to determine what fraction of the aggregate market for the tied product has been 'foreclosed' to other sellers of that product, one must define the scope of that market. This requirement of market definition, considered purely as a question of economics, constitutes essentially the same requirement of market definition as in a Section 2 monopolization case. The issues which arise are the same, and the depth of the economic analyses are essentially the same."

[17] Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 480 (7th Cir. 1988).

[18] The court's reference to "the tying arrangement itself" apparently as implicit evidence of a browser market and entry barriers is obscure. It is reminiscent of the proposition that a tying arrangement itself may prove market power in the tying product market. *See* Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958). That proposition has since been repudiated. *See* United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610 (1977).

[19] Joint Status Report, at 2, United States v. Microsoft Corp., No. 98-1232 (CKK) (filed Sept. 20, 2001), http://www.usdoj.gov/atr/cases/f9000/9085.htm.

[20] United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998), *rev'g* 980 F. Supp. 537, 541 (D.D.C. 1997). The preliminary injunction barred Microsoft from "forcing OEMs to accept and preinstall the software code" of IE 3. *Id.* at 940.

[21] 147 F.3d at 950.

[22] *Id.* at 948. The court continued that the bundle "must be different from what the purchaser could create from the separate products on his own" and the combined form must "be better in some respect. . . . The concept of integration should exclude a case where the manufacturer has done nothing more than to metaphorically 'bolt' two products together." *Id.* at 949.

[23] *Id.* at 950 n.13.

[24] *Id.* at 949–50.

[25] *Id.* at 953.

[26] *Id.* at 950, 952.

[27] *Id.* at 952.

[28] 253 F.3d at 61. The court confirmed this interpretation by stating "because an OEM's altering the appearance of the desktop or promoting programs in the boot sequence *does not affect the code already in the product*, the practice does not self-evidently affect either the 'stability' or the 'consistency' of the platform." *Id.* at 63–64.

[29] *Id.* at 65 ("Because Microsoft's conduct, through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products and hence protecting its own operating system monopoly, it is anticompetitive."). *See also id.* at 66 (asserting that "commingling deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system").

[30] "If the monopolist asserts a procompetitive justification . . . then the burden shifts back to the plaintiff to rebut that claim. . . . *[I]f the monopolist's procompetitive justification stands unrebutted,* then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id.* at 59. Thus, if the plaintiff rebuts the procompetitive justification, the finding of anticompetitive effect stands, and the plaintiff prevails; only if the plaintiff *fails* to rebut the procompetitive justification must it prove that the anticompetitive harm outweighs the procompetitive benefit.

[31] The proposed consent decree, *see supra* note 5, addresses these issues in § III (H). To oversimplify greatly, the proposed decree would require Microsoft to allow end users and OEMs (1) to block access to Microsoft middleware products by removing icons, shortcuts, etc., and (2) to designate non-Microsoft middleware products as defaults. But the decree would allow Microsoft to override the defaults in defined circumstances. The decree apparently does not require Microsoft to allow the deletion of any actual code of a middleware product.

[32] United States v. Microsoft Corp., 87 F. Supp. 2d 30, 47–51 (D.D.C. 2000) (applying Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)).

[33] *Microsoft*, 253 F.3d at 92. The panel had explicitly stated that the rule it announced was "consistent with tying law." *Microsoft*, 147 F.3d at 950. The en banc court said that "[t]o the extent that the [panel] decision completely disclaimed judicial capacity to evaluate 'high-tech product design,' . . . it cannot be said to conform to prevailing antitrust doctrine (as opposed to resolution of the decree-interpretation issue then before us)." *Microsoft*, 253 F.3d at 92. It is hard to see how the court's institutional competence to evaluate product design is dependent upon the legal theory under which the design is challenged.

[34] *Id.* at 95 (proving a reduction in competition "involves an inquiry into the actual effect of Microsoft's conduct on competition in the tied good market, . . . the putative market for browsers") (internal citations and quotation omitted).

[35] *See, e.g.*, PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 815 n.2 (6th Cir. 1997) (following the Areeda treatise in interpreting Kodak as "provid[ing] for an inquiry into whether the defendant's [tying] conduct has procompetitive effects").

[36] *Microsoft*, 253 F.3d at 87 (emphasis added). The court continued, "In both cases, a consumer buying the tying product becomes entitled to the tied product; he will therefore likely be unwilling to buy a competitor's version of the tied product even if, making his own price/quality assessment, that is what he would prefer." *Id.*

[37] The latter would be the limiting case of an economic tying arrangement. In theory, a seller could offer a discount for the tying product alone, but such a small one that a buyer would generally find purchase of the tied product from an alternative seller to be uneconomic.

[38] The court implies that Microsoft engaged in "price bundling" if "there is a positive price increment in Windows associated with IE. . . ." *Id.*

[39] *See Microsoft, id.* at 96 ("If there is a positive price increment in Windows associated with IE (we know there is no claim of price predation), plaintiffs must demonstrate that the anticompetitive effects of Microsoft's price bundling outweigh any procompetitive justifications the company provides for it.").