

## Interview with Deborah Majoras, Deputy Assistant Attorney General, U.S. Department of Justice, Antitrust Division



Deborah Platt Majoras

**Ed. Note:** *Deborah Platt Majoras is the Deputy Assistant Attorney General with lead responsibility for civil enforcement, and under the recent reorganization is supervising Litigation I, II, and III, which includes what was formerly known as the Civil Task Force. Ms. Majoras was the first antitrust official of President George W. Bush's administration to arrive at the Antitrust Division. Her arrival coincided with the GE/Honeywell investigation, giving her just enough time to meet with her counterparts at the European Commission before they denied the deal. Ms. Majoras has also taken the lead supervisory role in the case against Microsoft Corp.*

*Ms. Majoras was interviewed for this article by the editors of The Antitrust Source on January 28, 2002. In this interview, Ms. Majoras discusses, among other topics, the goals of the current administration, the rationale for the Division's reorganization, the Merger Review Initiative, and the Department's approach to high-tech merger investigations.*

*Ms. Majoras comes to the Division from Jones, Day, Reavis and Pogue where, as a partner in the Antitrust and Trade Regulation Section, she was actively involved in criminal and civil antitrust litigation. She arrived at Jones, Day in 1991 after clerking for Judge Stanley S. Harris, United States District Court for the District of Columbia. Ms. Majoras received her J.D. in 1989 from the University of Virginia, where she was a member of the Order of the Coif as well as Articles Editor, Law Review. She earned a Bachelor of Arts, Westminster College summa cum laude in 1985.*

—Richard C. Park

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**ANTITRUST SOURCE:** A reorganization of the Antitrust Division was announced on January 4, 2002. Can you tell us what your responsibilities include now, and how everybody else's responsibilities have been defined in the wake of that announcement?

**MAJORAS:** As you know, when I first arrived I was the only civil deputy for a short period of time and so I dabbled in just about everything. I took the initial month or two to spend some time visiting with the sections, learning more about the Division, and figuring out whether the structure was appropriate for the most effective and efficient antitrust enforcement. When Charles and the other deputies arrived, they did some of the same and we devised a reorganization plan for the Division. That plan culminated in our getting approval from our appropriations committees in Congress to implement this reorganization, which actually is not major, but nonetheless is important. My responsibilities have not changed much under the reorganization. I will now have supervisory responsibility over our new Litigation I section, Litigation II, which remains the same although will be somewhat downsized, and Litigation III which was previously the Civil Task Force. I previously had responsibility for Civil Task Force and Litigation II, so generally speaking my responsibility will stay the same. I will retain supervision over the *Microsoft* case, even though that may end up in a section that I do not otherwise supervise.

**ANTITRUST SOURCE:** What is new Litigation I?

**MAJORAS:** I say “new” because Litigation I previously had been the criminal enforcement section in D.C., which is now going to be referred to as National Criminal Enforcement. Litigation I is being formed out of part of Litigation II and some other commodities and personnel from some other sections. I can’t tell you just yet exactly what commodities it will focus on because we are working on that now, but one of the key changes in the reorganization is that we have eliminated any hard break between merger and non-merger enforcement. So, for example, previously Litigation II only did merger enforcement work and Civil Task Force was actually formed to focus on non-merger investigations. Over time, particularly during the merger wave, Civil Task Force ended up doing a lot of merger work in any event. A very important reason for the change is that we want every section to have a portfolio of products and services, and to have the staff, chief, and assistant chief of those sections be very focused on those areas and be able to engage in what we call community policing—really getting out there in the community, speaking with trade associations, and being known to the leaders of those industries—so that we can have the sort of interaction that makes for very effective antitrust enforcement.

**ANTITRUST SOURCE:** Is the idea that the various sections will be organized along industry lines?

**MAJORAS:** Yes, there will be six civil litigating sections. The three I did not mention are Telecommunications and Media, Transportation, Energy and Agriculture, and what we are now calling Networks and Technology, which was previously Computers and Finance. Those sections previously existed, although Telecom was the Telecommunications Task Force, and we have now made it a full-fledged section. By and large, the commodities in these sections will remain the same, with probably some shifting to do some rationalization. Those three sections, with the exception of the computer industry, are what we refer to as the regulated industry sections, and they are under the supervision of Hew Pate, one of my fellow deputies. What we are doing with the other sections now, Litigation I, II, and III, is giving them more focus within their own portfolios. There will always be overlaps among portfolios and new products that emerge that nobody ever would have thought of, but nonetheless, we are trying to give each of the sections true focus.

**ANTITRUST SOURCE:** A lot of expertise was developed at the DOJ to deal with the *Microsoft* case. Assuming the settlement is approved, will these resources be redeployed to other cases involving the same industry? To cases involving single firm conduct?

**MAJORAS:** What we are trying to do in the Division is take expertise, like that we gained in software and other related industries in *Microsoft*, and concentrate it in sections, turning our lawyers loose a bit so that they are not just waiting for the next merger to come in, but are out looking at and studying these industries and determining where we might want to open investigations and ultimately bring cases. Specifically in answer to your question, if you look at the way high-tech industries and products are developing, it’s certainly conceivable that there will be other monopolization cases to look at in the future. And, yes, we have people who have gained vast knowledge in this industry and also in these theories, and it would make great sense to have these people continue to work in this area.

**ANTITRUST SOURCE:** You have described your responsibilities and Hew Pate's. What are the others'?

**MAJORAS:** Bill Kolasky is the international deputy, Michael Katz is the economics deputy, and Jim Griffin, who is not new to the Division, is the deputy for criminal enforcement.

**ANTITRUST SOURCE:** What would you say the differences are in priorities between this administration and the last?

**MAJORAS:** I actually get that question a lot and it is an interesting one. Believe it or not, we really don't assess what we are doing by comparing ourselves to the last administration. We haven't even tried to do it that way. The Antitrust Division has an unbelievably professional and dedicated group of lawyers and economists, and even as there are changes made in the front office, they just keep working and doing what they are doing. That makes good sense because even if one wanted to politicize antitrust enforcement, and I am not suggesting that one should, there is truly a bipartisan mandate for strong antitrust enforcement, so we will be working accordingly.

Now, one change obviously is the type and number of matters that come before the Division. We don't have a merger wave going on right now. In fact, it is quite the opposite. When I recently looked at merger statistics, I saw that for fiscal year 2002, which began in September, HSR filings were down by more than two-thirds over what they were in FY 2001. Some of that is because of the change in thresholds, but nonetheless, there obviously are some changes in the economy that are dictating that as well. Even though we have fewer HSR-reportable mergers to review, that does not mean we can't or won't look at mergers below the threshold. We have already done that once, and we won't hesitate to do it if we see an anticompetitive problem. We are an enforcement agency. If you look at our front office, we come to this as antitrust lawyers, not politicians. As we see it, we are the referees whose agendas are going to be influenced by what is going on out there in the marketplace.

Nonetheless, there is some prioritization; obviously Charles has placed international enforcement and relations with enforcement agencies around the world high on his agenda. You can see that simply by virtue of the fact that he is dedicating one very smart and capable deputy to be the international deputy. There is a lot of work that remains to be done in that area. Obviously, we, as well as the FTC, are placing a high level of emphasis on issues relating to intellectual property, exploring those issues in antitrust terms. As you know, the FTC and DOJ will jointly hold hearings on intellectual property issues and antitrust starting in early February. This is the first time that the Department of Justice has ever hosted such hearings. We think that dialogue and discussion are very important, and you might see us focusing more on intellectual property. Obviously, we care most about horizontal conduct, but we are going to go beyond the typical merger filings, and we are very interested in looking at the various strategic alliances and joint ventures that are being formed in many industries. We will look at these and see whether, in fact, the right kinds of integration and legitimate efficiencies are being achieved, as opposed to just eliminating a competitor and making life easier for a couple of competitors. So I think you will see us being fairly active in that arena.

**ANTITRUST SOURCE:** I noticed that you didn't mention monopolization cases. Is that intentional?

**MAJORAS:** No, it is not intentional. I think the fact is that as we look at the way product markets

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**ANTITRUST SOURCE:** How will the intellectual property hearings that you and the FTC are going to conduct affect the Division's enforcement efforts in the area of intellectual property? Are you going to want to assess what you get in those hearings before you begin major enforcement initiatives, or is there no relationship between the two?

**MAJORAS:** The interesting thing about antitrust enforcement and the antitrust bar is that there is almost no chicken and no egg in terms of study and learning and actually bringing cases. So, for example, both the FTC and the Department of Justice have already brought cases and entered into consent decrees in which intellectual property was a very important part of whatever action was taken and needed to be dealt with accordingly. We don't have a master plan for suddenly increasing enforcement of the antitrust laws in industries and products in which intellectual property plays a key role. We want to look at these issues in the hearings very closely, and I think it is fair to say that our learning in these hearings will affect our future enforcement. Obviously, we already have in place IP Guidelines. We are following those principles; we are not making some effort to suddenly throw those out, but, on the other hand, this is a very dynamic and important area. It is an area in which, while IP and antitrust don't have to conflict, it is at least perceived that they do. Courts are heading in different directions on these issues, and we are anxious to have these hearings to get the views of many experienced and smart people in this area and determine then how that should affect our enforcement efforts going forward. Conversely, I think every enforcement action we bring in which IP has prominence can then be used for further study, and we can look and see what has been effective and what hasn't.

**ANTITRUST SOURCE:** Has there been any thought given to whether there will be new IP guidelines issued during this administration?

**MAJORAS:** Hard to say. We did not come in with the view that guidelines are something that we are going to try to do. I won't rule out that any guidelines could be issued during this administration. It is possible that they could be. The thing about guidelines is that they are really only useful if consensus is pretty fairly developed for how enforcement should work. Otherwise they are hardly worth the paper they are printed on. So that is the difficult thing about guidelines. On the one hand, they are really useful for businesses and for antitrust lawyers and economists to be able to evaluate conduct and mergers, which I think has a huge benefit for all of the economy and for society. On the other hand, if businesses and others are actually relying on guidelines that in fact are not consistent with solid economic thinking and case law, then they are probably counter-productive. So it is a tough thing to determine, and there is no point in doing guidelines if we don't think there is something new and useful to say that folks can rely on.

**ANTITRUST SOURCE:** Is the Division looking for opportunities to submit amicus briefs in circuit court cases that present conflicts between intellectual property laws and antitrust laws?

**MAJORAS:** We are looking at important cases in many different areas of antitrust to determine whether filing an amicus brief would be useful to the court and useful for the integrity of future antitrust enforcement, and certainly IP falls in that area. In fact, in many cases we don't even have to be look-

ing, because we are often asked by courts and by others to step into the fray.

**ANTITRUST SOURCE:** Would it be fair to say that, if you found that the Guidelines were not consistent with existing case law or the consensus around them had evaporated to some extent, that the Department would consider changing or updating or even abandoning certain guidelines?

**MAJORAS:** That certainly could be the case, but only if legal and economic consensus counsels that such a serious step is necessary. For example, right now there are some members of the bar and economists who are looking at the Horizontal Merger Guidelines to determine whether their underpinnings are still valid and whether those guidelines are still serving the purpose they are supposed to serve. Now, the fact of the matter is that no one, at least to my knowledge, has come up with anything better yet. So my view on the Horizontal Merger Guidelines is that there is still plenty of economic and legal consensus. Indeed, if you look today at courts and the opinions they are writing, they are looking at our guidelines, determining that they are consistent with past case law, by and large, and basically applying them or their principles. So, I certainly think we are a long way from throwing them out. On the other hand, I do think it is healthy for us to continue to look at how our laws are developing, how relevant economics is developing, and how well the guidelines are working.

**ANTITRUST SOURCE:** If someone were of the opinion that certain guidelines were out of whack with the consensus of the economic or legal community, what is the best way to bring that to the Division's attention?

**MAJORAS:** There are several ways. Publishing papers and participating in seminars can be very helpful to start the dialogue. We, at the agencies, can invite some of that dialogue ourselves, both formally through hearings and more informally. At a point when issues and positions have crystallized to a fair degree, hearings can be an important way to get a variety of viewpoints and get them out publicly so that all who are interested can participate and take a look. I know that before the joint venture guidelines were promulgated, there were hearings and various viewpoints were presented.

**ANTITRUST SOURCE:** Charles James embarked on his job confessing some frustration with DOJ as a merger lawyer, and that was the inspiration for some of the aspects of the Merger Review Initiative. Can you tell us where the Initiative stands now?

**MAJORAS:** The Merger Review Initiative has been implemented. Now, we have not had much experience with the Initiative. Once again, we simply haven't had a critical mass of mergers to try it out on. Basically, what we are working to achieve is more aggressive investigation during the first thirty-day period, including early consultations with the parties to try and get on the same page. Then, if a second request needs to be issued, we are using what we have learned in the first thirty days to narrow it. Going forward from there, we want to put into place regular consultations between the parties and the Division—up to and including written letter agreements between the Division and the parties' lawyers that set forth steps on timing—some steps that hopefully can manage burden, but won't put any of us in a bad position going forward if in fact we end up in litigation. The key to this is to have a two-way street. We have had some initial success with it. By that I mean we have had some investigations that I think were conducted more efficiently and productively than they would have been had we not set the staff loose to really use judgment and get

the investigation narrowed and not worry about all the issues right up front. I have heard some very positive feedback from our staff and from economists and lawyers on the other side about a couple of investigations. So, again I think it has promise. I have also had one or two mergers in which staff lawyers have come to me and said, "Gee, I don't think this worked as well." In one matter, the parties were really jerking us around and trying to make it one-sided so that we were giving a lot to reduce burden but not getting much in return. Lawyers can certainly play it that way, but it will not be very effective on either side. And, in addition, our staff knows that if they work with particular lawyers and these things don't work out, they don't necessarily have to offer such an agreement or such measures in the future.

**ANTITRUST SOURCE:** In the instances where you feel it has worked well, have the mergers been allowed to occur or have they been stopped?

**MAJORAS:** The only examples that I am thinking of have been allowed to proceed.

**ANTITRUST SOURCE:** With conditions that were identified or without?

**MAJORAS:** The ones I am thinking of now were without. Second requests were issued and an investigation was conducted. There was very good dialogue between the parties and the Division, and ultimately we determined that an enforcement action was not appropriate.

**ANTITRUST SOURCE:** In some of its manifestations, the process calls for people to stipulate to geographic and product markets. If a case like that is later litigated, will the participants be stuck with those stipulations?

**MAJORAS:** It depends on the situation. First of all, the most important thing to remember about the Initiative is that it is intended to be flexible. The investigation plans and any timing and other arrangements with the parties are suppose to be tailored to exactly what is needed in a particular matter. Part of the reason for this is it seemed that there were too many instances in which, for example, the same model second request was being used over and over again, even when certain types of inquiries were not appropriate to the investigation and they may have been negotiated out eventually. So we really want these plans to be tailored. It will not always be the case that parties will be asked to stipulate to a particular market. Suppose you have a matter in which, as is often the case, it is fairly clear that the market will be the United States. But the real issue is going to be how the product market is defined. For purposes of trying to arrive at the right answer, whether an enforcement action ought to be taken, why bother dealing with issues of geographic market during the investigatory period? We can stipulate during the investigation that the geographic market is the United States. Now, suppose we focus primarily on the product issues and then we get to the point where we say we intend to bring a case. We understand that we don't entirely agree on the geographic market and that parties might want to fight the action on every single ground, so we can dissolve that stipulation, and make sure that nobody is hurt by it by agreeing that each side will be entitled to proper discovery on that issue. In fact, you can imagine the scenario, which I think has already happened and has been successful, in which we take a very close look at a product market or other issue and ultimately determine that on that key issue, it is not appropriate for us to bring an enforcement action. Then we haven't all wasted a lot of time preparing our litigation issues.

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**ANTITRUST SOURCE:** The idea would be that such a stipulation in a pre-merger context would not be cited for or against any party in a litigation?

**MAJORAS:** No, and that can be made clear. Again, if everybody agrees that the stipulation should govern in litigation, it can. If that initial letter agreement says we are stipulating to geographic market now during the investigation and for litigation purposes, then, sure, we would cite it. If it is just for the purposes of the investigation, then, no, we wouldn't cite it.

**ANTITRUST SOURCE:** What about the Clearance Procedure Agreement? Can you tell us what its status is and what its fate is likely to be?

**MAJORAS:** Well, its status is on hold for the moment. Unfortunately, it has been sidetracked for all of the wrong reasons. Indeed, I think it is fair to say the factors that underlie any opposition to it underscore the very reasons why we need it. Maybe I haven't been in Washington long enough, but I am still optimistic that because this is "good government" and it needs to be done, ultimately it will be done. The Department is very supportive of doing it. It has just been put on hold for a bit while we have some discussion with a few members of Congress.

**ANTITRUST SOURCE:** In the interim, will the FTC and the Division be abiding by the proposed terms of the agreement?

**MAJORAS:** In the interim, we are resolving clearance in the way that we always have, based on the experience of the agencies in the particular product or service. There are several things in the agreement, including timing agreements for getting clearance decided faster, and other really important things. Those, of course, have not been highlighted in the press because they are not controversial enough. The controversial part is the allocation of responsibilities, and what is interesting about a lot of the pushback on the allocation is that it is just simply puts into an agreement what we already do. For example, when pharmaceutical matters come up, everybody knows that the FTC generally gets those. When telecom matters come up, everyone knows the DOJ generally gets those. The controversy that has surrounded the proposed agreement is curious, but I am hoping that with education we will overcome it.

**ANTITRUST SOURCE:** Does the way that this has unfolded create the possibility of making the clearance procedure more contentious, at least in the near future?

**MAJORAS:** I hope not. I think the fact of the matter is nobody involved in either agency who steps back from this process can say that we should do anything but get matters cleared quickly and get on with our investigations. That is the only "good government" way to do it. Tim Muris and Charles and folks who work for them, including me, are very committed to trying to improve the process. The fact is the clearance process works very well in a high percentage of cases; it is just that in a number of high profile and other matters there has been contentiousness, given the convergence of various industries. I am afraid the number of those has grown, and there were some matters sitting in clearance for quite some time when we got here, and we resolved to try to do something about it. Again, I am optimistic that this agreement will work out and if it doesn't, I am equally optimistic that we will work to do the right thing, albeit in a different way.

**ANTITRUST SOURCE:** Are you approaching mergers in the high-tech field any differently?

**MAJORAS:** When I have talked about this before, I was asked whether there ought to be separate guidelines for high-tech mergers. What I had said then, and what I will say to you, is that we are still using the Horizontal Merger Guidelines in assessing mergers, no matter what type of industry they may be in. If those Guidelines are used the way they are supposed to be used, which is flexibly and engaging in the right kind of fact-based analysis, then the sort of factors that distinguish high-tech-type markets from others will be taken into account in the Horizontal Guidelines merger analysis, as they should be. And so while I recognize that may not be the most satisfying of answers to some, what it means is we will take into account the characteristics in the particular marketplace. There is no special formula for doing high tech any differently than we do others.

**ANTITRUST SOURCE:** There has been a lot of commentary that high-tech markets are evolving so quickly that antitrust enforcers have a difficult time keeping up with them and having the remedies they are seeking continue to be relevant. What is your philosophy about that concern and how do you propose to deal with it in terms of your enforcement efforts, both merger and non-merger?

**MAJORAS:** Our view is that antitrust enforcement can keep up with rapidly changing markets. While speed may be essential, speed has often been essential in all kinds of markets throughout the history of antitrust enforcement. So our view is that, yes, the antitrust enforcement mechanisms that we have in place are adequate to keep up with evolving technology markets. Now, it is true that as enforcement and litigation proceed over time, markets can change and so evidence and, potentially, remedies have to be studied very carefully to determine whether they are still relevant to what is really going on in the market place. That is key. But it certainly can be done, and the alternative is some form of regulation in these industries. For example, I hear a lot of people say that because of the nature of networks in high-tech industries, antitrust enforcement may not be adequate because we can't enforce quickly enough before the market gets "tipped" to one particular player and that once this occurs the player will have taken the market and there will be little the Division can do to fix it. We are aware of those tendencies in certain markets, and we account for that. We also have to remember that the carrot that is held out there in all industries is that a company could be so good that it gets to be the only one, and we don't want to squelch the R&D and the hard work that is spawned when a company wants to be the primary provider of any particular service or product. So we have to be careful about that, and I don't believe that regulation would work as well in that regard because regulation wouldn't keep up any faster than case-by-case enforcement, and it has some down side. It can chill innovation and chill enthusiasm for companies, and I still think that our system of taking cases as they come, by investigation, and ultimately by bringing cases, is the better way to continue.

**ANTITRUST SOURCE:** To what extent do you think DOJ should share its analysis with parties to a merger so that the other side can offer a rebuttal prior to litigation getting started?

**MAJORAS:** In general, our thinking should be shared. I think the element of surprise is overrated. Those who are defending themselves need to understand where we are headed. It means that we can structure an investigation that is tailored to what it is we are really thinking and have the parties behaving cooperatively so that we can actually get the work done more efficiently and effectively. And frankly, as a lawyer, I want to know what the defense is. Having said that, it is kind of hard to

demand full antitrust analysis two weeks after you file your HSR. The level of discussion, and our ability to be able to lay cards on the table, is obviously going to be influenced by how quickly we are getting the materials and how much time we have had to analyze them. The dialogue, however, will not be effective if the parties will not engage.

**ANTITRUST SOURCE:** In terms of your philosophy that the government ought to share its current thinking with merging parties, what are you doing to transmit that message down the line to staff that are actually on the front lines dealing with the parties' counsel?

**MAJORAS:** First, we rolled out our Merger Process Initiative to our staff and discussed our willingness to be open as one of the points that is important to us, but not because we want to be nice to parties. That's not it. It's because, again, we think the investigation would be far more effective if we have a dialogue. In addition, at the deputy level, we are getting involved in investigations fairly early. So we are working together with our staff in terms of the extent of dialogue with the parties, including dialogue between economists. I think sometimes, some folks were worried that might give away too much, too early. But if they have someone in the front office agreeing this is worth doing, then that gives some reassurance and makes people more comfortable about doing it. So those are a couple of the ways in which we are communicating it.

**ANTITRUST SOURCE:** You have in the past suggested that there has been too much reliance on unilateral effects theories and that not enough attention has been given to coordinated interaction type of affects. Can you discuss why that is true and give some examples?

**MAJORAS:** I think that is a bit of an overstatement of what I had said previously. As you know, David Scheffman at the FTC and some others have been raising questions about whether unilateral effects analysis is being used almost exclusively now, and whether coordinated interaction possibilities are essentially being ignored. I think it is absolutely an issue worth exploring. If you look at the cases that are being brought, almost all of them are being brought under unilateral effects theories. So that's interesting. And one could say the reason for that is because all the cases that are being brought today involve differentiated products, and coordinated interaction would just be impossible. That might be true. Once we do the concentration analysis, if we find high levels of concentration, the competitive effects analysis must be a separate step. In other words, we can't just assume that because HHIs are high, there must be an anticompetitive effect. I want to make sure that we are being disciplined in that analysis.

**ANTITRUST SOURCE:** How do you think the Division ought to weigh the benefits of econometric or simulation analyses of merger against the cost to the parties of supplying the Division with that kind of data to support the modeling?

**MAJORAS:** I understand that data gathering, particularly to get it in the form that can be useful to econometricians, can be burdensome. I've been on the other side; I've done it. However, sometimes, it is not that burdensome and so it is a knee jerk reaction for a lot parties to come in and immediately say that providing data is just too burdensome and they can't do it. We end up doing this dance for three or four months and eventually we get it anyway. What is terribly troubling is when, at the end of doing this dance, we find out that the parties' economists have had data they have been working with all along. Some of the game playing that goes on with respect to sharing analyses is just

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absolutely unhelpful. Having said all that, my view in general is that when we conduct an investigation, we should always weigh the burdens on the parties and the costs versus the likelihood that it will provide anything useful to us in trying to determine the competitive implications of a particular deal. So if, for example, we had a situation in which documents and interviews were revealing that, despite high concentration levels, we really ought not be worried about the competitive implications of a particular deal, deciding anyway to go forward and make the parties work really, really hard to give us data in a particular form and so forth just in case econometrically we might be able to make the case, I would say is not a balancing that I would do. Now part of that is because I don't believe we should be bringing cases based solely on econometrics when the empirical evidence is not there to support the econometric simulation or theory. So in those cases, I think it is more likely to be a waste of time. On the other hand, particularly in the area of consumer products, obviously econometric studies have been shown to be useful in merger review.

**ANTITRUST SOURCE:** Does the DOJ approach the issue of up-front buyers differently from the FTC? If a buyer is put forward for the DOJ to consider will you accept the buyer's view about whether it thinks the divested assets are good enough to enable them to compete effectively?

**MAJORAS:** I don't know exactly how the FTC is currently approaching it. I know in the past there was at least a perception in the bar that the FTC was demanding up-front buyers, and I believe there was some of that. And so in that respect, yes, I would say the Antitrust Division has differed. Up-front buyers have not been, and are not today, a requirement. They can be useful, though, and are something that we would consider in terms of whether we would accept a buyer's assessment that, "I am buying these assets, so clearly I think that this bundle is strong enough to compete." Will we take that at face value? No, though obviously that is an important indicator for us. It's important to let the market speak whenever we can and that is one way in which the market can speak. On the other hand, we still have to take a close look at the buyer's plans and incentives. Just because it is a sophisticated buyer with financial resources doesn't mean that it will necessarily use those assets in a way that is important to the marketplace, which is changing as a result of a merger. So, we look at the whole deal that the up-front buyer has cut. Are there advantages that the buyer is getting other than particular assets that would make this buyer really want to do this deal, whether or not these assets ever succeed or not? Will this vertically integrate the buyer, so that now the buyer will only be using the assets in a captive fashion? These are all things that we would look at, but we are flexible in the analysis of assessing buyers, whether upfront or not.

**ANTITRUST SOURCE:** Talking about enforcement emphasis, do you think there will be an increased likelihood or increased emphasis on litigating mergers at the DOJ? You said earlier that with the slackening pace of merger activity that there weren't as many mergers to focus on. Is the result of that going to be more focus on the ones that there are or a more intense focus on non-merger activity?

**MAJORAS:** That is an interesting question. I haven't been at the Division during a merger wave, so I don't know whether there were certain mergers that were not subject to enforcement actions because, for example, they weren't "low hanging fruit" compared to some of the other mergers that we were seeing. Obviously, it is always our job to balance our resources and so forth so it is conceivable that that could happen. It is also the case that this will give us an opportunity to focus more on non-merger conduct investigations. This time is also enabling us to get our house in order in terms

of our reorganization and getting the various sections focused on doing merger and non-merger investigations within their bundles of responsibility. We will litigate when we believe that an enforcement action is appropriate.

**ANTITRUST SOURCE:** Do you think that DOJ is going to get into the business of challenging mergers after they have closed?

**MAJORAS:** That is hard to say in the abstract. We definitely have third parties who come to us and complain about mergers even after they have closed—sometimes well after they have closed. Obviously, our obligations as antitrust enforcers don't stop at the conclusion of the HSR process. So, it's entirely conceivable that we could bring cases like that. But, we are not out looking for them just for the sake of bringing them as a warning. I think that, in fact, for efficiency and competition reasons, all of us have benefited greatly from an enforcement action that appropriately stops a transaction from going forward, rather than trying to undo it after the fact. That's the whole basis for HSR. So, we should endeavor to cast the net out widely enough, so that we can get the anti-competitive mergers before they get through. Having said that, what we do in HSR review and other merger review is necessarily predictive in nature and that means it's imperfect. Just because companies are actually permitted to merge doesn't mean that there will never be an investigation of the merger going forward.

**ANTITRUST SOURCE:** Can I ask you some questions about *Microsoft*?

**MAJORAS:** I will answer them or not answer them, depending upon what they are.

**ANTITRUST SOURCE:** Does the fact that the states split into two groups, one supporting the settlement and one not supporting the settlement, bode any changes in the way that the DOJ and states will work together in the future?

**MAJORAS:** Well, I hope not. I will say a couple of things. First of all, whenever you represent a party in a joint plaintiff or joint defense relationship, there is always the possibility that at some point interests may diverge and parties go their separate ways. The same was certainly true when I was on the joint defense side. So that by itself is absolutely fine and appropriate as we go forward. The only thing that I am taking a very close look at, however, is when we were working on the *Microsoft* case with the states, we were told that our high level of openness and cooperation with the states was unprecedented. The fact that we were constantly sitting down with them all the way up to the level of Charles, and talking through theories and possible remedies, is something that was unprecedented. We thought that that was absolutely the way to do it. It is fine for the other states, having heard all of that, to go their own separate ways. But, I think it is not fine to then have heaped on us, because of all the lobbying going on, that we somehow shut them out of the process. That is just flat out wrong. Any state that wanted to participate in our thinking and in the process was invited to do so; some just chose not to. Also, some of the public criticism of us lobbed by some of the states that didn't settle, I think, is just unproductive and, of course, it makes it harder to think that you always want to be so open with your co-party if you believe not only that they might go their separate ways, which is fine, but once doing that and knowing what you are thinking that they might then tell the world that you are doing something wrong. That is a little bit trickier. But having said all that, we have had great relationships over the years, and there are good reasons why that should continue,

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including economies and not subjecting parties to dual and different enforcement. There are great reasons to work closely together and we have plans to do that, but obviously the *Microsoft* experience gives us some things we need to talk about going forward.

**ANTITRUST SOURCE:** Is there any thinking being given to how the states and the Division might get back on the same page in terms of coordinating their enforcement activities in general?

**MAJORAS:** Yes, we are working on it.

**ANTITRUST SOURCE:** With the perspective you have gained from a year on the DOJ side of the table, is there any advice for private practitioners that you wish you been given when you were on that side?

**MAJORAS:** This is actually something that I was taught, but has been absolutely confirmed now that I'm on this side of the table. That is, defending your matter or your conduct by just sitting back and not offering anything affirmatively but just waiting for us to present our views and then criticizing those views without giving any alternative, is generally not very effective. It is absolutely your right to do it because we bear the burden, and we will bear the burden when we bring a case. But, it's not very helpful, particularly in the merger context, where we are being told over and over again "we need you to hurry up, we need to get this done." Investigations in which the dialogue is rich are much more efficient and effective, and very often result in no enforcement action. The gamesmanship that goes on generally doesn't get you very far except to prolong the thing. You might say "well, it really doesn't prolong the thing because I won't give you more time." But, the fact is, that we often do get more time. Nobody wants to have a lawsuit filed, so we generally get more time. Now we have reminded our staff that time is of the essence for the parties. Having said that, we do have some complicated things to investigate. So I have yet to see a situation in which the parties' gamesmanship has been helpful to them in the end. Conversely, I have seen many many cases in which professional, serious dialogue going back and forth has resulted in a very positive result on both sides.

The second thing I would say relates to third parties coming in to talk to us. We welcome those discussions with third parties. It is important that third parties be willing to come in and let us know what's going on in their market. It's very helpful and very important to us in our mission. But, two things should be kept in mind. First, keep your complaints to antitrust complaints, because otherwise you just sound like you are whining about having to compete. Second, remember that we are looking after the public interest, not just your own interest, and while there may be some overlap, they don't necessarily coincide. Third-parties need to remember that we are not bringing cases simply on their behalf. ●