

Bill Gates, the Prince

The Muddled Microsoft Case and Stone-Age Antitrust Laws

The recent settlement of the major antitrust case against Microsoft ostensibly marks the conclusion of those regrettable and costly proceedings—and hopefully also the end of the drama, at times quite bizarre, that pervaded the litigation.

The case pertained to the way Microsoft threw its weight around, using its dominance as the maker of the Windows operating system against other software companies. Most notably, Microsoft packaged its Internet browser within Windows. Critics claimed that the browser bundling gave Microsoft's browser an illegal advantage over other Internet browsers; Microsoft argued that tucking the browser into Windows made sense for users.

As the case crawled through the courts, the software industry zipped along, eventually making central parts of the case largely moot. One of Microsoft's chief opponents, Netscape, saw its share of the browser market dwindle to almost nothing before it was purchased by America

Online, another Microsoft competitor. AOL expanded into a giant, then deflated. The "dot-com bubble" burst, stocks fell, Internet companies disappeared—and throughout the tumult, the Microsoft case plodded along in a legal system oblivious to the rapidly changing times.

Meanwhile, the case itself took some strange turns. First, some old e-mails came back to haunt Bill Gates in the courtroom. Then it was revealed that one Microsoft competitor, Oracle, hired investigators to snoop through the trash of various pro-Microsoft organizations. Later, one of the judges involved in the case made such egregiously inappropriate and biased comments to the press—Judge Jackson compared Microsoft's executives to drug dealers and murderers, and questioned the intelligence of the company's lawyers—that his decision to break up the company was overturned. With so little substance and so much at stake, and with ambitious competitors and posturing politicians constantly taking potshots at the company, the

Microsoft case became precisely the sort of circus that characterized economic and political life in the 1990s.

But all this is drawing to an end. In early November 2002, Microsoft reached a settlement with the Justice Department and nine states, bringing *U.S. v. Microsoft* to a close. The settlement imposed minor restrictions on the company but included none of the far harsher remedies that had been proposed, like breaking the company into two or three parts.

With the help of a special committee of technical advisors, U.S. District Judge Colleen Kollar-Kotelly will be watching and enforcing the settlement for five years, with a possible extension of two more years if Microsoft engages in “a pattern of willful and systemic violation.” The judge ended the executive summary of her decision with this note of caution: “The Court will hold Microsoft’s directors, particularly those who testified before this Court, responsible for implementing each provision of this remedial decree. Let it not be said of Microsoft that ‘a prince never lacks legitimate reasons to break his promise,’ for this Court will exercise its full panoply of powers to ensure that the letter and spirit of this remedial decree are carried out.”

It has been suggested—or is it obvious?—that the judge’s warning, with its out-of-context quotation from Machiavelli’s *Prince*, is directed specifically at Bill Gates. With its own new corporate compliance committee in place, Microsoft has rushed to assure investors that it won’t again run afoul of the feds.

But several outstanding suits against Microsoft will keep it in the legal news. As of this writing, at least two of the states involved in the antitrust litigation, Massachusetts and West Virginia, have decided to appeal the settlement. The

European Commission also has an unresolved antitrust case against Microsoft; it is unclear whether the direction of that case, which relates to server software, will be affected by the U.S. settlement. And a few other private lawsuits against the company, filed by competitors like Sun Microsystems, are still alive and kicking in a federal court in Baltimore.

Charles James, who was until recently the U.S. Assistant Attorney General in charge of antitrust, told the American Bar Association that he fears that the Microsoft case is a “portent of what future antitrust can be: a major Washington power grab like a major piece of legislation or a lobbying campaign.” Indeed, so long as the government doesn’t update its antiquated antitrust policies for the modern age, companies will continue to use them tactically against one another.

Still, none of the remaining lawsuits against Microsoft is as serious as the federal case that has been settled, and none of them is likely to involve penalties as severe as some that were proposed during *U.S. v. Microsoft*. All that talk about splitting up the company into “Baby Bills” is passé. Now Microsoft—the company that once used the tagline “Where do you want to go today?”—has to decide in what direction it wants to go. Some critics think that Microsoft and its flagship Windows product are about to lapse into irrelevance as portable computing devices become more popular. Others say that Microsoft is in danger of becoming much too powerful. (According to the Computer and Communications Industry Association, an anti-Microsoft organization, “Microsoft is poised to monopolize the Internet itself.”) Microsoft CEO Steve Ballmer recently said he wants to make sure that his company is successful and respected “not just today, but really over

the next 50 years.” The direction his company chooses in the post-lawsuit era will decide whether Microsoft will be around that long.