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Why Are We So Reluctant to "Execute" Microsoft?

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On June 28, 2001, the D.C. Court of Appeals held that Microsoft has violated the antitrust laws repeatedly, relentlessly, and over a multi-year period. The court ruled eight separate times that Microsoft engaged in conduct that illegally maintained its monopoly in PC operating systems. Despite these strongly worded conclusions concerning Microsoft's liability, the court was extremely cautious when it considered whether to break up the company. It held that divestiture was a "radical" remedy that should be imposed with "great caution."[1]

Why this reluctance to order structural relief? Even people who condemn Microsoft's conduct and admit that it probably will continue to engage in predatory practices shudder at the idea that we should break it up: "Conduct relief of virtually any type, sure. Even a multi-billion dollar fine could be appropriate. But don't even think about structural relief. Don't destroy Microsoft. Only a fool would execute a company that has made so many wonderful products."

The government did not even dare to mention the term "structural relief" when it filed its suit. It merely asked for "such additional permanent relief as is necessary . . . ." Why the omission? Perhaps shrewd government lawyers knew that if they started the proceeding by explicitly admitting that the best way to achieve justice was by doing the unthinkable they would be more likely to lose the case completely. The judge might reason that if the only effective remedy for a violation was the corporate "death penalty," he would instead just let Microsoft off completely. Only after they spent years proving that Microsoft had repeatedly engaged in anticompetitive conduct did the enforcers raise the possibility of structural relief. And, even when they asked for it, they called it only a "reorganization." Tellingly, one of Microsoft's first suggested changes to the government's proposal was that it be renamed a "divestiture."

Why are we afraid even to discuss in a straightforward manner whether we should break up Microsoft? This is probably because of the legal fiction that a corporation is a "person."

This notion is deeply ingrained in the legal profession, the business community, and society at large. Courts have long held that corporations are legal "people" who are entitled to "due process"—in other words, corporations have constitutional rights. Corporations have names (even nicknames—who would want to execute "Ma Bell"?), pay taxes, and are subject to most laws—just like real people. Moreover, a corporation is a very special type of person. In theory a corporation is a person who cannot die; a corporation is an immortal.

The court of appeals might well have reasoned this way, at least subconsciously. In discussing the conditions under which divestiture might be appropriate, it held: "If indeed Microsoft is a unitary company, division might very well require Microsoft to reproduce each of these departments in each new entity . . ."[2] The reference to the company as a possible unitary entity rather than as a convenient grouping of contracts, and the reference to the need for reproduction following a divestiture, could well reflect more than a logical assessment of underlying economics.

In reality, of course, a corporation is not a conscious organic entity. It is just a series of contracts between real people. It is nothing more than formal and informal relationships

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between shareholders, employees, and other flesh-and-blood people, made for a variety of economic purposes. Some are long term. Others, however, are short-term or can be broken by one party at will. These contracts, moreover, are changing continuously.

Although a corporation can be immortal, in fact corporations die every day. Corporations also frequently sell divisions to other companies, spin off divisions to form separate new firms, and divest portions of themselves in the aftermath of mergers. The very concept of a firm as an entity that shapes itself by decisions about doing things internally through a hierarchy or in the marketplace reflects the changeability that is at the heart of corporate existence. The shape of corporations is constantly in flux. Antitrust is just another cause of this flux. A court-ordered divestiture would constitute only a rearrangement of some of Microsoft's contracts, but not the company's literal "execution."

"Because a corporation is just a convenient grouping of contracts, it follows that it should not have the moral rights of a real person."

Because a corporation is just a convenient grouping of contracts, it follows that it should not have the moral rights of a real person. Its shareholders and employees have rights, of course, but these will not necessarily be destroyed just because the corporation is divided into two or more parts. Shareholder value and jobs should not be needlessly reduced, but reasonable people differ as to whether the combined stock value and employment levels of hypothetical post-break up "baby Bills" would be more, or less, than the current total values. Regardless, Microsoft did break the law repeatedly, and it did accrue illegally gotten gains, so we should not be overly upset if its stock value decreases somewhat as a result of the remedy proceeding. Moreover, shareholder value could decrease even more as a result of a tough, protracted conduct-based remedy. Regardless, a possible decrease in shareholder value should not deter us from rationally discussing whether Microsoft should be broken up.

The divestiture issue is far more fundamental and emotion-laden than that of shareholder value. No responsible member of our society would execute a flesh-and-blood person without certainty "beyond a reasonable doubt" that they had engaged in a horrible crime like murder (and many do not believe in capital punishment even under these circumstances). It is likely that many or most of us subconsciously apply these requirements to the Microsoft case: we believe that it is only appropriate to break up Microsoft if we are virtually certain that it committed a crime as horrible as murder. And, of course, even though Microsoft was convicted of eight separate antitrust violations, it did not murder any real people and its crimes are not as clear-cut as murder. Therefore, we reason, they do not deserve to be executed.

We have to remind ourselves that *United States v. Microsoft* is just a civil trial where the government is, rightly, required to prove its case only under a "more likely than not" standard. The antitrust laws forbid certain types of economic activity, and were in large part designed to give companies an incentive to behave in the manner that is best for consumer welfare. The remedy for an antitrust violation is supposed to determine which arrangement of contracts and contractual rights is best for society. Microsoft has, of course, committed an antitrust violation. If it is "more likely than not" that the best way to achieve the goals of the remedy is through divestiture, the court should order divestiture. If conduct remedies are more likely to be optimal, the court should proceed in that direction. These are simply economic alternatives that should be weighed against one another rationally.

Moreover, the facts in the *Microsoft* case suggest that the corporation would be relatively simple to break up. Microsoft essentially consists of teams of immensely talented programmers and a substantial body of intellectual property rights. All a court would have to do would be to rule that certain of these people and some of this intellectual property now should be housed in particular buildings and be part of company A,

while others should be part of company B. This situation is very much unlike that of *United States v. United Shoe Machinery Corp.*[3] In that celebrated case the court had to break up a monopoly that made all of its shoe machines in one factory. Compared to that situation, in *Microsoft* a structural solution is simple.

Further, meaningful conduct relief would be likely to result in court oversight of many of Microsoft's activities for years to come. It certainly is possible to craft a tough package of effective conduct remedies that will not hamper the company's ability to innovate.[4] Yet, this package is necessarily complex, lengthy, regulatory in nature, and susceptible to being evaded.[5] Even the settlement agreed to by the Department of Justice, nine states, and Microsoft on November 6, 2001—which only amounts to a slap on the wrist for Microsoft—will last for five years, with possibly a two-year extension.[6] By contrast, structural relief would in most ways be simpler, quicker, and less burdensome. It also is likely to be more effective and much more difficult to evade.

Reasonable people certainly can differ as to whether the best, most pro-consumer, most pro-innovation results in the *Microsoft* case are likely to arise from a conduct-based remedy, from dividing it into several corporations, or through a combination of methods. Divestiture, however, should not only be a last resort. It should be a viable option that is considered logically on its legal, administrative and economic merits, without the influence of subconscious anthropomorphizing. It certainly should not be thought of in moral terms and avoided at all costs lest we engage in the reprehensible act of "killing" someone. It is in no respect the corporate equivalent of the death penalty.

On Sept. 6, 2001, the federal and state enforcers pursuing the case announced they would not ask the court to break up Microsoft. On November 6, the Department of Justice, nine states, and Microsoft agreed to a Revised Proposed Final Judgment that settled the case through a series of conduct remedies.

However, many believe that Microsoft has had a history of "interpreting" past court orders in a manner that made them ineffective. Many simply do not trust Microsoft to live up to either the letter or the spirit of the Stipulation. Many fully expect Microsoft to delay and circumvent this remedy.

The parties' agreement provides that if Microsoft violates the agreement, "the plaintiffs may apply to the Court for a one-time extension of this Final Judgment of up to two years, *together with such other relief as the Court may deem appropriate*."[7] Assuming that Microsoft does violate this Stipulation, the enforcers and the court should reevaluate whether to impose a structural remedy. They should do so using logic instead of emotion. They should decide upon the most appropriate relief considering each option on its legal, economic, and administrative merits, without anthropomorphizing. In light of Microsoft's evasions they will have to reconsider the best way to make sure that this lawbreaker is deprived of the fruits of its illegal conduct, that competition is restored to the affected market, and that Microsoft is prevented from engaging in similar conduct. The best way to do all of this is the most straightforward one. The court should break up Microsoft. ●

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[1] United States v. Microsoft, No. 00-5212, at 61 (D.C. Cir. June 28, 2001).

[2] *Id.* at 105.

[3] 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[4] *See* Conduct Remedies in the Microsoft Monopolization Litigation, Paper Presented at AAI Press Briefing at the National Press Club (Oct. 5, 2001), *available at* http://www.antitrustinstitute.org. The American Antitrust Institute presented a white paper which called for ten tough conduct remedies to be imposed in the *Microsoft* case.

[5] *Id.*

[6] *See* Revised Proposed Final Judgment (Nov. 6, 2001).

[7] *Id.* at V(B) (emphasis added).