FEDERAL TRADE COMMISSION

SECTION 2 HEARINGS

UNDERSTANDING SINGLE-FIRM BEHAVIOR:

REMEDIES

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MS. KURSH: Good morning, everyone. Thank you for joining us.

I'm Gail Kursh. I'm with the Legal Policy Section of the Antitrust Division, and I would like to welcome everyone this morning to the first of three panels on remedies in Section 2 cases.

These panels are part of an ongoing series of public hearings on single-firm conduct.

My co-moderator today is Dan Ducore, the assistant director of the Compliance Division in the FTC's Bureau of Competition.

The Department of Justice and the Federal Trade Commission are jointly sponsoring these hearings to help advance development of the law concerning Section 2 of the Sherman Act.

We began these hearings last June and have covered a wide range of single-firm conduct that may raise antitrust issues, including predatory pricing and predatory bidding, tying, refusals to deal, exclusive dealing, bundled rebates and misleading and deceptive practices, among other topics.

It seems fitting to us as we get toward the end of these hearings that we now address remedies.
However, it would have been just as fitting for us to have addressed remedies at the very outset of these hearings.

While I expect our panelists today may disagree on the effectiveness of past Section 2 remedies and perhaps even have differing views on the appropriate goals of Section 2 remedies, I hope that we can all agree today that crafting appropriate remedies in Section 2 cases is critically important and that consideration of remedies should begin very early in an investigation or litigation.

So on behalf of the division, I want to thank our panelists for participating today and agreeing to share their insights with us.

I will introduce each panelist in more detail before he speaks. But in brief, our speakers in order are Dave Heiner, vice president and deputy general counsel for Microsoft; Robert Crandall, a senior fellow at the Brookings Institute; Per Hellstrom, chief of Unit C-3 of the Directorate General for Competition, the European Commission; and Tad Lipsky, a partner at Latham & Watkins and former Deputy Assistant Attorney General for the Antitrust Division.

I also want to thank my colleagues at the FTC and at the division for organizing these hearings. And
our panel this morning will go as follows. We will ask each of the four panelists to speak for approximately 15 minutes. We will then take a short break.

The panelists will each be given a couple minutes to respond to each other and then we will have a moderated discussion that Dan and I will lead.

We will not be taking any questions from the floor, and we intend to end today at 12 noon, take a lunch break and begin the afternoon session at around 1:30.

Before introducing our first speaker, I will turn things over to Dan and let him make an introduction.

MR. DUCORE: Thanks, Gail. On behalf of the Federal Trade Commission, I also want to thank our panelists for agreeing to share their time and especially their views with us this morning.

Briefly, the remedies issue is obviously from the agency's point of view about more than simply money damages. That is somebody else's issue.

But certainly more so than in an area like merger enforcement, Sherman 2 cases present much more of a one of a kind kind of concern when you are trying to develop the remedy in the sense that you have to be very careful that the particular remedy matches the
particular facts and the particular theory of harm in your case.

I expect today we will hear a lot about the critical thinking that must go into fashioning effective remedies for particular problems. And Gail is certainly correct -- and I have seen this in my own experience -- that you have to be thinking about remedies at the earliest stages of your case and, for an enforcement agency, at the earliest stages of your investigation.

As someone who thinks about remedies pretty much full-time, I'm going to be particularly interested in hearing about both the broad approaches but also about some of the smaller issues, including things such as let's say administrability and the pitfalls and dangers that can face an agency as it maybe starts to go off the cliff and become an industry regulator.

With those introductions, let me get started, with the exception I have to make a couple of logistical announcements.

First, if there is an alarm, please go down the stairway and get out of the building and follow the instructions of people. You will be actually going across the street. Second, the closest restrooms, men's out the door and to the left, women out the door and past the elevators to the left.
And finally, especially for the panelists,
please turn off cell phones, electronic devices,
especially things like Blackberries. They can create
static on the microphones.

With that more mundane information, let me turn
it back to Gail to introduce the first speaker.

MS. KURSH: Thanks, Dan. David Heiner is vice
president and deputy general counsel at Microsoft
Corporation, where he heads up the legal department's
antitrust group.

Since joining Microsoft in 1994, Dave has played
a leading role in Microsoft's response to government
antitrust proceedings in the United States, Europe and
Asia.

He is the author of "Assessing Tying Claims in
the Context of Software Integration: A Suggested
Framework for Applying the Rule of Reason Analysis."

Dave.

MR. HEINER: Thank you, Gail and Dan, for the
invitation to speak here today, which I very much
appreciate.

This is a subject upon which I think it is fair
to say Microsoft has quite a bit of experience, working
largely with many people I see in the room.

At the outset, I thought it might be useful to
briefly recap the remedies to which Microsoft has been subject over the past decade or so.

    In 1994, a consent decree was put in place and a nearly identical European Union undertaking were put in place. These were mostly contractual in nature.

    In 2002, a consent decree and associated litigated final judgment were entered in the Section 2 case against Microsoft.

    The Section 2 case was followed by a number of competitor lawsuits. Hundreds of consumer class actions were filed. Nearly all of these private cases have been settled with payments and some conduct relief as well.

    In March 2004, the European Commission issued its decision against Microsoft. The Commission took a different approach to the issues than did the U.S. court.

    In February 2006, the Korean Fair Trade Commission issued its decision against Microsoft. The KFTC took yet a third approach. The EC and KFTC decisions are on appeal now.

    As you might imagine, all of this generates quite a bit of work within Microsoft and its law department.

    When I joined the company in 1994, I was the first antitrust lawyer at the company. Today I lead a
group of about 30 professionals dedicated full-time to antitrust counseling and compliance.

This group includes software developers and business personnel as well as lawyers and paralegals.

All told, a few hundred people at Microsoft are engaged in compliance work over the past few years.

I would like to begin with a suggestion on the overall approach to fashioning relief.

I would suggest that it's probably better to focus on creating or preserving opportunities for competitors rather than limiting the defendant's ability to deliver consumer value. This is the approach very much taken by the U.S. consent decree.

The Court of Appeals had reversed and remanded the Section 1 tying claim against Microsoft but affirmed Section 2 liability relating to the manner in which Internet Explorer had been integrated into Windows 98.

The decree that resulted did not require that any functionality be removed from Windows. Rather, every provision of the decree is directed at creating or preserving opportunities for competitors, both as a matter of product design and contractually.

The focus is upon ensuring that distribution channels remain open. This is an approach that was strongly approved by the Court of Appeals in 2004.
Today, new Windows PCs come loaded up with software from Microsoft's competitors, such as Google, Yahoo, AOL, Semantec, McAfee and many others.

Under this approach, consumers benefit from the ability to choose either integrated solutions or separate stand-alone software or, as is so often the case, to use both.

The European Commission has taken a different approach. The Commission ordered Microsoft to create new versions of Windows from which media playback functionality had been removed. These are called Windows XPN and Windows Vista N.

They were built following extensive compliance discussions with the European Commission staff. They are available in every European language.

However, not a single PC manufacturer has chosen to license these operating systems. These operating systems sit on the shelf. Costs have been imposed, but there is little apparent benefit for anyone.

I will return to another aspect of this in a moment. For now, I would note only that the U.S. approach seems far more effective at advancing antitrust values.

This focus on creating opportunity tells us something about the proper objectives of antitrust.
remedies.

I would suggest that remedies should be put in place in order to safeguard competitive opportunities but not necessarily to engineer any particular market outcome, such as a reduction in market share. This is for the market to determine once any competitive restraints have been removed.

Indeed, even if engineering market outcomes were thought to be desirable theory, it is hard to see how this could be accomplished in practice in most cases.

By its nature, a remedy will only govern the conduct of the defendant, not other market participants. Everyone else, competitors, developers of complementary products and, most notably, consumers will act according to their self interest.

This is particularly noteworthy in high-tech industries where products often interconnect with each other in different ways.

For example, both the U.S. and EU remedies require Microsoft to make available certain technology called communication protocols to its competitors for use in their products.

About 30 firms have taken licenses to this technology under the U.S. program and one firm to date under the similar European program.
But whether firms choose to take a license and what kinds of products they build with those licenses is, of course, entirely up to them and outside the control of either Microsoft or any antitrust agency. This general point is relevant outside the context of access remedies as well.

Internet Explorer continues to have very high share, although declining. Should this be seen as a shortcoming of the U.S. consent decree? Well, the open source Firefox Web browser now has about 14 percent share, up from zero just a few years ago.

Given the safeguards set up by the consent decree which apply on a worldwide basis, there is no reason why Firefox couldn't have a much higher share if that reflected consumer preferences.

In fact, Firefox's share is about 33 percent in some major European countries, up from 20 percent just a year ago.

This focus on competitive opportunity rather than outcome of market shares is especially important, I think, in government actions.

As the Court of Appeals explained in the Microsoft case, liability can be established with little or no proof of actual market impact from the conduct at
This is what the court termed in the Microsoft case a rather endogenous test for causation. In fact, the District Court found that there was no proof that the success of Internet Explorer had been due to unlawful conduct.

Where there is no proof of market impact in the first place, it would seem especially inappropriate to expect a remedy to bring about a particular market outcome.

This brings me to my third observation. Whatever the proper role of antitrust remedies may be in the abstract, I think, as Gail and Dan said at the outset, it is really quite important that they be fully thought through before liability proceedings are commenced.

This is true for at least two reasons. First and most importantly, if it is hard to devise an appropriate remedy, that may suggest that there is no liability in the first place. At the very least, it may suggest that the liability rules were not sufficiently clear to provide any real guidance or notice to the defendant of what would be termed unlawful later.

Second, absent a clear view on the question of
remedy, it may be difficult or impossible to obtain rapid relief through settlement.

These points are well illustrated I think by Microsoft's experience in dealing with the Windows tying issues through the years.

The addition of new functionality to Windows can present competitive challenges for firms that wish to offer comparable functionality separately.

Antitrust agencies around the world have focused on that over the past 10 years.

At the same time and as the Court of Appeals noted in the Microsoft case, such integration can lead to important benefits for software developers, PC manufacturers, in fact, to the entire PC ecosystem.

That's why functionality has been integrated into new operating system products steadily over the past 20 years or so and why in fact we see integration of functions as quite a common function across many product categories.

So one has the question how should these competing considerations be addressed in a remedy?

In the U.S., the consent decree approach I outlined earlier is now in place. But there were quite a few bumps along the road to getting there, including three rounds of failed settlement talks, one before
Judge Posner in Chicago.

I think it is fair to say at least part of the reason why those settlement talks failed is that there was disagreement among the DOJ and the various states as to what would be a suitable form of relief. Absent a clear view on this, no agreement could be reached, and the eventual remedy was delayed.

The history in Brussels is instructive as well. In early 2004, Microsoft proposed a variety of remedies to address the Commission's concerns regarding the inclusion of media functionality in Windows.

The Commission case team devoted a great deal of effort to defining and exploring those proposals, and Microsoft is grateful for that. Ultimately, however, the Commission determined that a general remedy should be devised that would address all future tying cases.

Given the range of possible fact patterns and the benefits of integration, however, neither the Commission nor Microsoft was able to articulate any such rule that would govern future product design decisions despite prodigious efforts by both sides. As a result, settlement talks failed. The Commission proceeded to impose the logical remedy for a tying case, which was an order to untie. As a result,
PC manufacturers and consumers can now choose to get Windows without media functionality.

As I have said, they have chosen the full-feature version of Windows, as one might expect. So the question becomes should it be unlawful for a firm to fail to create a product for which there is no appreciable consumer demand? Here consideration of remedy may suggest that there was no unlawful tie in the first place.

The same might be said about the package discounting that was at issue in Lepages or the selective discounting and output increases that were at issue in the American Airlines case.

I would like to conclude with two final observations of a practical nature.

First, in Microsoft's experience, it would seem that the legal process is generally best suited to contractual remedies.

Particular cases may call for other forms of relief. But we should recognize that these come with significant challenges for all concerned.

Contracts are good because they are within the purview of lawyers. We understand contracts. We know how to read them.

They are relatively easy to monitor, both for
the defendant and for the enforcement agency, and I would note that essentially no issue of significance has arisen through the years in Microsoft's compliance with the contractual provisions of the U.S. consent decree.

Product design remedies are more difficult. Here considerable technical expertise may be required in order to devise and monitor a remedy.

Ultimately lawyers will remain responsible for making compliance judgments regarding highly technical matters, and this may be hard, even with expert technical help.

In addition, agency lawyers will inevitably find themselves drawn into the details of product design and even the details of making engineering trade-offs which are essential to the product design process.

To deal with these kinds of complexities, the technical committee set up under the U.S. consent decree now has more than 40 full-time employees.

Remedies that require sharing of complex technical information are also quite challenging. Technological complexity can quickly lead, I think it is safe to say, to enforcement complexity.

Protocol licensing, for example, is just one of eight major provisions of the U.S. consent decree, but it takes up the lion's share of the compliance work,
both for Microsoft and for the agencies.

The EU protocol remedy introduces still greater complexity. That is because it seeks to enable fundamentally different computer operating systems with different computer architectures to work together as if they were one.

This is a computer science project, and even the Commission itself has recently said that making this work would require a massive development effort by third parties, and that hasn't happened yet.

The result has been considerable frustration for the Commission and for Microsoft.

This past summer, the Commission imposed fines upon Microsoft of 280 million Euro for failing to complete this project to the satisfaction of the technical advisors set up under that decision.

Pricing is another challenge and likely will be for any access case that involves information goods, such as software.

The protocol technology that Microsoft has developed was developed over the course of about 10 years. It is covered by 35 patents, and many more are pending. It is covered by copyright and trade secret law.

How is this to be valued? The answer is not
entirely obvious given the many ways that software is monetized today and the varying business models that people have.

Microsoft has suggested pricing that is comparable to that which is in place under the U.S. program where many firms have taken licenses. That pricing is backed up by more than a thousand pages of analysis and justification that the Commission requested.

The Commission has taken issue with this pricing, however, and is threatening to impose new fines that could run to additional hundreds of millions of Euros.

My final observation relates to globalization. From Microsoft's perspective and I think it is fair to say from that of other high-tech companies, it is increasingly important that antitrust agencies cooperate closely on remedies and show due respect for principles of international comity.

For sound economic reasons, the Windows operating system is essentially identical all over the world. That uniformity is critical to the role that Windows provides in enabling compatibility between literally thousands of complementary software products and hardware products.
And that is threatened today by the varying approaches taken to the Windows tying issues in the United States, in Europe and Korea, which I haven't had time to go through this morning.

In the compulsory licensing area, I think it is safe to say that the U.S. and foreign countries are taking a different approach to compulsory licensing.

In the age of the Internet, once trade secrets are revealed, they can never be recovered. Absent greater deference to comity principles, we may well find that the legal regime that imposes the most onerous legal requirements de facto prevails on a worldwide basis.

Again, thanks very much, Gail and Dan. I appreciate the opportunity to speak here today.

(Applause.)

MS. KURSH: Thanks, Dave. Robert Crandall will be next.

Robert is a senior fellow in economic studies at the Brookings Institution. He has previously served as acting deputy and assistant director at the Council on Wage and Price Stability.

He has written extensively on antitrust policy, with a particular emphasis on the telecommunications sector and emerging issues in wireless and broadband
Among the antitrust topics on which he has written is the effectiveness or lack thereof, I guess, of relief in government Section 2 cases.

Bob.

MR. CRANDALL: Thank you, Gail. It is a pleasure to be here.

I haven't written that extensively in antitrust. In fact, I spent most of my career looking at regulatory activities that range as far as environmental policy and fuel economy standards and more recently telecommunications regulation, which, of course, is related to competition policy.

I have not spent as much time as my colleagues on this panel have, I'm sure, on the details of antitrust, nor the details of Section 2 remedies.

My purpose today is to provoke, frankly, and for that reason I'm somewhat disappointed we will not have questions in the audience, though I'm not sure how many economists are in the audience anyway.

You see the title of my presentation. I will focus on the AT&T divestiture, not simply because that's the one I know a little bit about, but because some work which I have done and which Clifford Winston and I have done and Ken Elzinga and I have done on Section 2 relief...
using a case-by-case approach to this, which I think is the only way to go about it.

Each one of these cases is sui generis. It is hard to do a more general study. It suggests very little effect it creates on the market, on competition in the market, on output, on prices.

In fact, not because of shameless self-promotion, but because I would like to provoke people to read the articles and maybe prove me wrong, I have listed the articles in this first slide.

But the one case that everybody comes to as the example of success in Section 2 structural relief cases particularly is the AT&T divestiture, which, of course, was negotiated someplace on a ski slope in Utah in 1982 and was executed effective January 1, 1984 after about 10 years of litigation.

Indeed, at first I would have been a supporter of that and perhaps anyone that was wishing to get into a debate with me on this would find things I have said in the past, 20 years ago, that I might have approved. Maybe I was overly seduced by Bill Baxter, who was a very persuasive guy and a very good fellow to boot.

But over time I have come to question whether in fact even the AT&T case can be considered a success in terms of relief from a Section 2 prosecution.
Now, most people in the room would know about this case. We don't have to spend much time on it.

The principal outcome was a divestiture of the Bell operating companies from the rest of AT&T, AT&T keeping the manufacturing and long distance arms and a large share of the research operations.

The near-term result -- and I will show in a second -- is long distance service increased. Long distance service output increased and U.S. long distance rates fell.

I do these slides myself. That's why they look so bad.

But was the increased long distance competition due to vertical divestiture? This is a very different world in 1982.

AT&T accounted for 80, 85 percent of the access lines and almost the same percentage of total telephone subscribers, including wireless.

AT&T's wireless service was not launched until 1983 in Chicago, its cellular service. They had a more mundane wireless service prior to that.

This is the period in which I think it was McKinsey was predicting there would be a demand for no more than one million cell phones in the United States.

At this time, though, we had so-called universal
service pricing, which is really inverse Ramsey pricing, for you economists in the room. I suppose antitrust lawyers may understand the jargon.

This, in fact, invited entry into long distance service. It invited the likes of Bill McGowan of Microwave Communications Incorporated -- he said he changed the name to MCI because he didn't want people to think he was going to fry them -- to enter the long distance service to figure a way to get access to AT&T's service, particularly with very low prices.

Indeed, they battled that out for many years, culminating in a private antitrust action and convincing the Justice Department in '74 to file the Section 2 case.

Once again, the question was was the vertical divestiture which resulted in this case necessary to promote long distance competition? What are the numbers?

Here are the numbers on real interstate long distance rates and AT&T's average share of revenues using the same access on the left-hand side.

And you see that starting in 1984, after the divestiture, AT&T steadily lost market share and long distance rates came down steadily.

This is taken to reflect success of the decree.
Of course, we don't know what the but for would look like. And it may well be that without some action that we wouldn't have had this result. In fact, most other countries had to take action themselves, and they took action only along one dimension of the decree. No other country that I'm aware of has actually required a divestiture of their operating companies from manufacturing or long distance service companies in their country.

Virtually all of them, however, at some time after 1984, as late as 1998 in the EU, required access, equal access to the incumbent local exchange company switches for terminating or originating calls. This obviously is regulated access, and in any regulated access there is going to be an argument about the price. But nobody engaged in vertical divestiture. One could argue that what Offcom is doing in the U.K. today is a very mild version of structural separation with British Telecom. We will see how that works out.

But no other country actually engaged in vertical divestiture.

Now, if you look at what happened to the price of long distance services, comparing the U.S. interstate rate -- the intrastate rates didn't go down as fast
because the states controlled and used their regulatory controls to keep those prices relatively high, the inverse Ramsey pricing continues to stay low.

If you look at the U.S. interstate prices against the average for Canada and wouldn't make much difference which one you use for the EU. I use the three-minute price here, and I think they also publish 10-minute prices in the annual monitoring reports that the EU does on monitoring effects of their regulatory program.

What you see here is prices came down even more rapidly in Canada and the EU, much more quickly subsequent to their liberalization than it did in the United States subsequent to ours.

In fact, equal access to the switches was all that was required. And the FCC in the United States had not done this of its own volition prior to the bringing of the AT&T case in 1974 or prior to the negotiation of the consent decree, the divestiture with the equal access provisions in it in 1982.

Now, in no small part long distance rates in the United States fell because of declining access charges. One of the things -- and you could take this as a measure of the success of the decree. One of the things that the decree did was to expose exactly how
much if you want to call it broadly subsidy was going on between long distance service and other service, local access to the telephone network in the regulatory process at the Federal Communications Commission.

With very high access charges now having to be levied to keep the rates at about the same level, the FCC started the process of rebalancing rates, lowering access charges and putting all those complicated charges that you and I don't understand on the back of our telephone bills, which are in fact designed to try to shield from the public information about what's really going on here.

But it made good policy sense to put these nontraffic-sensitive charges as a fixed charge on your telephone bill and to lower the traffic-sensitive charges of long distance by doing so.

In fact, a great deal, as you can see, of the decline in long distance rates occurred because of the decline in access charges.

My friends who worked on the AT&T case at DOJ and others who have been involved in this process over the years who don't like my presentation will argue with me that this could not have happened but for the case.

In fact, that is one of the benefits of the case, I suppose. We could not have persuaded the FCC to
undertake both equal access and to rebalance rates but for the divestiture.

I suppose that is a benefit. But again, the problem here was not AT&T's monopolization activities, unless you consider their lobbying activities of the FCC as part of it, but, rather, the FCC's seeming incompetence or reluctance to do the right thing to maximize economic welfare for people using the telephone network.

As a mea culpa, I was actually at the FCC advising part-time one of the commissioners, Glen Robinson, who is now professor of administrative law at University of Virginia. So I guess I'm tied up in the complicity in all that.

This is simply saying much the same thing, that in fact what happened was as a result of the divestiture, there was an exposure of the folly of the universal service pricing policy, something which the FCC addressed with great opposition from so-called consumer groups, who claimed that millions of low-income people would fall off the telephone network.

Of course, we know better than that because we know the price elasticity in the demand for access to telephone service is very, very low.

What about the costs of the decree? My own
estimation -- and I haven't seen anyone else attempt to
address this -- was that we lost about $5 billion of
output just in the transition from the old AT&T to the
new AT&T over 1984-85, in that period.

There are some estimates -- now, these were
funded by the Bell companies as attempting to get out of
the decree. There is an estimate by Paul Ruben, a
colleague at Emory, that the process of administering
the line of business restrictions in the decree totaled
about $1.4 billion over time.

Though what happened -- and this goes to Dave's
presentation on trying to provide technological
prescriptions and deal with changes in technology in an
antitrust decree. What happened was that the market
changed rather dramatically.

Something called the Internet came up and the
separation of interstate from local and intrastate
services in the decree became extremely problematic.
Not only that, but the information restriction which
eventually was abolished by the Court of Appeals also
was a problem at a time when obviously information and
transmission switching of signals were melding together.

Now, here is one of the more interesting -- I
mentioned earlier that the estimates, at least one
commercial estimate of what cellular technology was
going to do back in the 1980s was seriously wrong.

At the very time that the AT&T case was brought, the FCC was deciding what to do about the so-called cellular spectrum.

It took about another nine years for them finally to have one of these licenses begin to -- through one of these licenses for service to become available. There was a lengthy hassle over how not only to allocate the spectrum but how to assign it and divvy it up among players.

We know what they did. They decided to have only two licenses -- why is not at all clear -- and to give one of them to the incumbent wireline carrier on the grounds that I suppose that wireless was complementary and not likely to be competitive with wireline service.

Obviously one's perspective on that would change over time.

So it wasn't until 1983 that wireless service began. This is the time when the consent decree was just going into effect, after it had been negotiated. And in the negotiation of the consent decree, the Bell companies were allowed to keep one of the wireless licenses.

In retrospect, wireless became the most serious
competitor for a long period of time. Cable and VOiP may now take its place in the future.

And it was certainly a mistake to do that. But the bigger mistake was only to assign two bands to cellular service.

It wasn't until we ran a huge federal budget deficit and the Congress decided we needed to raise money through spectrum auctions that we began to get more spectrum allocated to, more and more licenses awarded for cellular service.

And, of course, starting about 1995, 1996, the new PCS cellular licenses were bid on and began to operate, and we went from two carriers to six national carriers over a period of time through a contorted process I won't bore you with right now, because the stuff was licensed on a local market by local market basis rather than national basis.

But the important message here is what drove competition starting in the late '90s was wireless, and particularly long distance competition in the '90s, and now I would even argue competition for the local access.

What I show you here is a chart in which the top red line shows what we would have expected interstate terminating switched access minutes to look like given what was happening to prices and GDP, and the dotted
line below, what actually happened to wireline terminating and interstate access.

The gap that opens up there is primarily due to wireless. That is, wireless began to take a very, very large share.

Interestingly enough, this whole thing developed because of the development of these national plans which most of us have called from anywhere to anywhere. They were introduced first by AT&T, still the largest long distance player.

They cannibalized their own business with this, because then ever other cellular company had to follow in the next year. And today, of course, we have not only a proliferation of these plans, but the plans also allow zero per minute calling in nighttime and on weekends.

This number, which goes through 2004, is woefully out of date. I haven't tried to update it.

I would think that a very, very large share, overwhelming majority of all interstate long distance minutes now go over wireless. As I said, this may change with VOiP.

The price of the decree -- and this is one of the problems of any of these decrees -- is it is difficult to get rid of it.
The price for getting rid of it after 10 or 12 years was the 1996 Telecommunications Act which -- and I won't go into in great detail; we don't have time -- is subject to its own folly and led to enormous battles between entrants and particularly MCI and AT&T and the regional Bell companies, led to an unbundling regime which got more and more liberal as more and more of the new entrants failed and ended up with a thing called a uni-platform which means the entrant could use all of the facilities of the Bell companies at discounted rates, 50 to 60 percent off retail, through the so-called unbundling process, a provision which was eventually overturned by the Court of Appeals which said it went too far.

Also, there was a line-sharing provision which is still in existence throughout Europe and most other countries of the world, Japan, Australia, but which also was ruled as an unjustified extension of the unbundling regime by the D.C. Circuit.

In fact, the great savior of folly in U.S. telecommunications was Steven Williams of the U.S. Court of Appeals, now retired or senior status.

What happened in the '96 act, we wasted at least $50 billion of investment. Where the stuff went nobody knows. I can't find it on eBay today.
MCI and AT&T were forced to enter the arms of Verizon and SBC respectively, not because of the ending, the D.C. Circuit opinions. They would have been forced into it anyway because wireless was eating their lunch so rapidly that their revenues were declining by 10 to 15 percent per year.

So, after 12 years of the AT&T decree and nine years after the 1996 act, we reverted back to a vertically integrated telecom sector.

It was not antitrust, although you could argue that antitrust, certainly the equal access provision did generate the nascent competition early on in long distance services.

But we could have gotten there without antitrust had the FCC been on the job or had they realized the benefits of doing this. We led the way with the AT&T decree, and then the rest of the world could follow with their equal access provisions.

Today, the local bottleneck is largely irrelevant. And, in fact, despite the rhetoric surrounding it, the local telephone companies are in deep trouble because they do not have a network which is easily capable of delivering high-speed video on demand and are, therefore, having to spend enormous amounts of money to upgrade their networks to catch the cable
companies who very easily can offer voice telecommunications services.

As a result, what has happened is with the change in the regulatory regime, the incumbent local carriers are now investing enormous sums in their networks, far more, by the way, than the more regulated EU carriers are investing in Europe or, for that matter, more regulated carriers in Australia. Japan still is investing a lot despite a heavily regulated system.

I don't know that I can give you general lessons from all this. I think this is sui generis.

The AT&T decree may have worked in a narrow sense in that it did introduce equal access into long distance.

The cost of the vertical divestiture was extremely high. Was it necessary? I think in retrospect I can say probably not.

But I didn't have the foresight at the time to say that. And it is easy enough to go back and be a Monday morning quarterback.

But I think it is at least too facile to say this is a decree that clearly was a success and one which we ought to follow in other cases, although one wonders what other industry would offer the same opportunities for this type of vertical divestiture and
access.

But perhaps Dave has some ideas on that.

With that, let me just stop and say one of the things that Cliff Winston and I really wanted to provoke is economists looking at the impacts of antitrust decrees, antitrust policy in general, more empirical work.

Our conclusion in our paper wasn't that antitrust is a failure. It was that we have no empirical evidence that it is a success. And that is a serious problem for a policy that's only been in place for 117 years.

So we hope to provoke people into doing research and either proving what we have done so far right or wrong, as the case may be.

I thank you for your attention.

(Applause.)

MS. KURSH: Thank you, Bob.

I would like to now ask Per Hellstrom to come up. Per is chief of the Unit C-3 at the Directorate General for Competition, European Commission.

He is actively involved in the European Commission's case against Microsoft, and we are very grateful to him for traveling across the Atlantic to share his perspectives based on his experiences with
I would like to provide a European perspective to this issue of remedies. I don't really intend to go into detail in any particular case. I certainly don't want this to turn into another hearing on the Microsoft case. I already defended that case once before the court, and we are still awaiting the judgment in that case.

But I could mention that as some of you may be aware, the Commission is currently undertaking a review of its policy under Article 82, which is our provision for single-firm behavior. And in addition to that, we are also reviewing our policy as regards remedies, both under Article 81, cartels, et cetera, and Article 82. And we are preparing some internal guidance in this regard. Just a brief overview of the legal framework in Europe, which may be different than the U.S. framework. We have Article 82 of the treaty, which states that abuse of a dominant position shall be prohibited. Now, this provision has direct effect and it can be relied upon by private parties before national courts, and it is the implementing regulation, Regulation 1/2003, which provides the enforcement powers
to the European Commission to enforce Article 82 and impose remedies.

Remedies are not mentioned in Article 82 itself. In addition to that, we have the case law of the Community Courts which, of course, has dealt with the issue of remedies in some cases, and there is certain decisional practice of the European Commission, the Microsoft decision being one of those.

I believe, therefore, that one must separate the issues of the finding of an abuse and the imposition of a remedy, at least in our legal system.

Having said that, from the point of view of an enforcement authority, I do share the view that it is important to think about remedies early on in an investigation.

But for the purposes of the discussion on remedies, I think also we must assume that we have already a valid finding of an abuse, for example, a refusal to deal, tying, excessive pricing. And certain aspects that could in theory be relevant for the imposition of a remedy, such as the specific character of the market, efficiencies, incentives to innovate, et cetera, may in fact already have been taken into account in the finding of the abuse.

Now, regulation 1/2003, that is the implementing
The context with regard to remedies are Article 7, which gives the power for us to take prohibition decisions and impose mandatory remedies; Article 9, which provides for commitment decisions. That is voluntary remedies where it is up to the parties to propose adequate remedies. There is no finding of an abuse.

And these decisions are only possible where the Commission does not intend to impose a fine.

And then there is also provision for interim measures in cases of urgency in Article 8.

I will focus today only on the first one, Article 7, prohibition decisions, whereby the Commission is entitled, where it finds an infringement of either Article 81 or 82, to require the undertaking concerned to bring such an infringement to end. For this purpose, it may impose on them any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.

Structural remedies can only be imposed either where there is no equally effective behavioral remedy or where any equally effective behavioral remedy would be more burdensome for the undertaking concerned than the
structural remedy.

In other words, two types of remedies are possible, behavioral, structural.

As the wording indicates, the principles of necessity and proportionality applies. And the aim, as stated, is to bring the infringement effectively to an end.

In other words, the Commission has the power to require a company to restore the market conditions absent the infringement and to impose remedies that are necessary to that effect.

But, of course, details of any such measures can only be decided on a case-by-case basis.

In addition to this, Recital 12 of the regulation provides that with regard to structural remedies, "changes in the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking."

Now, if we look at how this framework is applied in practice, I believe that the standard scenario is to have a cease and desist order plus fines.

In our terminology, fines are not really remedies, but cease and desist orders are.
And by cease and desist orders, I mean an order for the company to bring the abusive behavior to an end and refrain from repeating such act and conduct as well as any act or conduct having the same or equivalent object or effect.

This is usually the standard phrase in an Article 82 decision.

But a remedy, as we speak about it here today, is an elaboration, then, sometimes an expansion of a cease and desist order, either prescribing a certain action or prohibiting a certain action, leaving the firm discretion on what precisely to implement.

Now, how to design a remedy. In theory, remedies or commitments should be effective, proportionate/necessary, clear and precise, cost efficient, transparent and consistent.

Of course, in practice, this is quite a challenge.

And as mentioned, evidently there is an inherent link between the nature of the infringement and the remedies available to the Commission, and any assessment of the effectiveness and necessity of the remedy must be based on the facts and circumstances of each individual case.

But here are some possible criterias,
nonexhaustive list on how to assess the effectiveness of a remedy, questions such as does the remedy lower barriers to entry, is it likely to increase consumer welfare, can it be practically implemented, monitored and enforced and how quickly can the remedy restore competition.

One question that has been raised is whether one could foresee a two-step approach with regard to remedies. That is, if the initial remedies imposed are ineffective for one reason or another, could stricter remedies be imposed.

Here there may be a difference in our respective legal frameworks. In Europe, in order for us to impose a new remedy if the initial remedy does not work, we would have to respect the procedural rights of the parties, and we would normally have to issue a so-called statement of objections outlining the reasons why a new remedy is required. And that, of course, is a procedure that we know takes time.

Of course, this is true for the initial remedy. We must provide sufficient notice in a statement of objection of the remedies foreseen. It would be possible to have some options, some alternatives and allow the company concerned to comment on these.

With regard to behavioral remedies, a possible
definition of behavioral remedy, "a behavioral remedy is a measure that obliges the concerned undertaking to act in a certain way or to omit certain anticompetitive conduct."

Compliance with behavioral remedies usually has to be monitored and enforced. One can classify these types of remedies according to the type of infringement, antiforeclosure remedies, anticollusion remedies or antiexploitation remedies.

I will not go into further detail on these now.

Common to most behavioral remedies is that they do not change the incentive of the firms to engage in anticompetitive behavior. As a consequence, compliance has to be monitored to avoid circumvention.

Monitoring raises various questions as to who should monitor and how. Should it be the European Commission, some sector-specific regulator, competitors, customers, trustees, national courts, or could one resort to some arbitration mechanism, and how should all this be organized.

I believe as regards monitoring, the U.S. is probably more advanced in this regard than we are in Europe. And we are currently looking into ways to improve our effectiveness in this regard.

A structural remedy is a measure that
effectively changes the structure of the market by a transfer of property rights regarding tangible or intangible assets, including the transfer of an entire business unit that does not lead to any ongoing relationships between the former and future owner. After its completion, "a structural remedy should not require any further monitoring."

So structural remedies would normally involve the transfer of property rights, some form of divestiture. There should not be any ongoing links. There should be a one-off measure, a clean break, and this remedy should remove incentives and/or the means of a firm to infringe competition law.

It may be necessary to have some sort of behavioral flanking measures. Monitoring and enforcement should only be necessary until divestiture is completed.

That would be an advantage compared to behavioral remedies. However, structural remedies have rarely been used in Europe under Article 82. However, for the future, the Commission would not hesitate to impose structural remedies when necessary and appropriate. In fact, we could even be obliged to do so, although, of course, again it would depend on the circumstances of each case.
I would just like to conclude with a quote from Mr. Charles A. James, the former Assistant Attorney General at DOJ.

He has stated in an article that "an antitrust remedy must stop the offending conduct, prevent its recurrence and restore competition. Preventing recurrence must involve proactive steps to address conduct of similar nature. Restoration requires prospective relief to create lost competition and may involve actions to disadvantage the antitrust offender and/or favor its rivals."

I believe the Commission would fully subscribe to this statement, although I should add that the Assistant Attorney General also emphasized that the relief, however, must have its foundation in the offending conduct.

So in the end, it all comes back to the inherent link between the remedy and the infringement identified. Thank you for your attention.

(Applause.)

MS. KURSH: Thank you, Per.

Tad Lipsky is a partner at Latham & Watkins and a former Deputy Assistant Attorney General at the Antitrust Division.

While at the division, he organized and
supervised preparation of the merger guidelines and the
Antitrust Division's view of the United States versus
IBM, among many important antitrust cases.

His career has spanned virtually every facet of
antitrust law, and he has served in both public and
private practice, both here and abroad.

Welcome, Tad.

MR. LIPSKY: Thanks, Gail and Dan. Your careers
have spanned almost every aspect of antitrust law too.

I must say you have the organization of these
hearings down to an art and science.

It is really a great pleasure to be able to
focus just on the substance and you are taking care of
all the rest.

So congratulations. This has been a fascinating
set of presentations this morning, and, indeed, the
whole record of the hearings has been very interesting.

I enjoyed it very much. I am sure it will end
up being a very signal contribution to a lot of
subjects.

The remedies in some respects is really the
whole debate.

Ultimately every antitrust case comes down to
what is the problem and what do you want to do about it.
If you don't have the answer to the remedy, you really
aren't out of the starting gate.

It is interesting when Bill Baxter came to Washington, he had a specific plan for some things he wanted to address. Actually, the AT&T case was not high on his list.

His list was to begin an amicus program to articulate to the courts in antitrust cases some economic errors and omissions that he thought were endemic in the precedent.

It is interesting we are seeing sort of the final element of that play out just this week with the Legion case.

Just about every landmark of judicial ignorance that Bill had identified has now fallen, when you look at the Monsanto and Associated General Contractors and NCAA versus Board of Regents and Copperweld.

This is really getting down to the last part of that program.

And then he wanted to rewrite what were then the effective merger guidelines, the 1968 sort of Warren court, Lyndon B. Johnson version of merger guidelines.

Finally, the third element on his list was what he had seen -- he wanted to do something about judgments and decrees and the way relief was handled in the division, and that meant not only cleaning out a lot of
old decrees but, believe it or not, when Baxter came to
town in 1981, it was not yet the consistent practice,
although it was beginning to be more consistent to have
sunset provisions in judgment decrees and in consent
decrees entered by the Antitrust Division.

I think both at the Commission and the division
that is now pretty much uniformly the practice.

He abolished the judgment enforcement section
because he thought it was very pernicious to have a
separate judgment enforcement section which discouraged
connecting the theory of remedy to the theory of relief
sought in a case.

Bill had many memorable phrases, but his way of
summing up this problem was to say of the division
litigators, he said "Everybody likes to catch them, but
nobody wants to clean them," by which he meant if you
weren't willing to clean the fish, then you probably
shouldn't be fishing to catch it either.

My presentation is really in two parts. One is
talking about essential facilities and mandatory access,
because that is such a hot part of the remedies debate
in the context certainly of Section 2 cases,
monopolization cases.

But it is really the way of illustrating what I
think is a fundamental point that is sometimes lost in
debating the specifics of particular cases and I think needs to be emphasized.

Perhaps not a Baxterian phrase, but my phrase to capture the issue is no sense pretending.

If your image of the way an industry should work in a modern capitalist competitive economy is that there should be a number of competitors vying for advantage to supply products and services that meet demand, there are some industries where you are not going to have multiple -- by virtue of the cost structure or some other almost element of the technology or the market, you are not going to have multiple competitors.

This is where the essential facility doctrine really starts, from an implicit recognition that if you have something that meets the essential facility definition and it also is something that other competitors cannot practically duplicate -- is I think the phrase from the seminar cases -- what you have is a classic declining cost industry where you simply are not going to be able to structure it and expect optimal results on a competitive basis.

You will have to consider the viability of regulatory alternatives, price limits in the framework of utility regulation or some other kind of public intervention, and that puts you kind of in the space
where you have essentially got a fundamental departure I think from the antitrust vision of the way an industry is supposed to operate and you need to consider whether you can even attack the problem with an antitrust-like remedy, be it vertical divestiture or whatever, or whether you need a regulatory scheme.

And it also means that the costs and benefits of these ways of addressing this problem need to be confronted in an intellectually honest way and that you might conclude that the best thing to do is to do nothing because there are some problems whose remedies are more costly than just suffering the problem.

I also wanted to point out, as long as we are on the subject, there is a flaw in the essential facilities doctrine, and that is that there is an element that says you are not required to provide access if you don't have room in your facility to provide the access.

That is just inconsistent with the fundamental premise of an essential facility. If you are a monopolist, you obviously have the incentive to undersize and not build enough capacity.

So the fact you are actually operating at capacity and don't have room to fit in access by anybody else may actually be a signal that you are engaged in exploiting your monopoly position.
So it shouldn't be a reason -- you can say the essential facilities doctrine is silly because all it does is identify circumstances where you have to replace antitrust with regulation.

But at least if that's your theory, you don't want to say that you are going to ignore the problem if it turns out that the monopolist is in fact a monopolist and doing what he is not supposed to do.

Finally, a point that has been touched on before, the idea of intellectual property and mandatory licensing of intellectual property as a remedy.

If your inability to duplicate is because of a law that says that nobody else has the legal right to make, use or sell some product or do something else, then you have an inherent tension between the reward structure set up by the intellectual property law and the idea of antitrust intervention.

That is another real complicated problem. So if you want to try and access remedy, here are some of the costs and complications.

First of all, we already heard how complicated it is to engage in access pricing. These are all the familiar problems of traditional public utility-style regulation, local distribution monopolies, gas, electricity, what have you.
Another issue that I think tends to be ignored is evasion possibilities. It is very easy to discuss monopoly pricing in your premise for intervention and to slip into an assumption that if you can do something about monopoly pricing, that will enhance the performance of the essential facility that you have.

But, in fact, anybody who has dealt with an insurance company or bought a car or actually bought anything more complicated than a toothpick realizes that there are zillions of dimensions to any commercial transaction. There is credit terms, there is delivery, there is service, repair, do you get a case with that instrument.

If you have monopoly problem, you have to have some way of forcing, compelling the monopolist to go out beyond the area of profit maximization in every dimension, not just price and output but quality and service and innovation and all that other stuff.

So these regulatory problems tend to be severely underestimated.

I have listed some other disadvantages here of access remedies. You sacrifice economies of integration, as is made obvious by some of our decrees over the years, the Paramount decree separating exhibition from production of motion pictures.
You had it in the AT&T case. It comes up from time to time. The institutional problems of enforcement through the consent decree process I think are fairly well recognized.

The Paramount decree, as a matter of fact, being perhaps a good example, because after a course of enforcement over many years, you had a situation where ultimately the Assistant Attorney General had to walk away from a remedy that had been adopted by the decree enforcement staff, which looked to the new folks like authorizing the so-called splits, the exhibition side, buyers cartel.

So arguably you had a decree enforcement staff being co-opted by the industry that they were regulating and coming up with a solution that was seriously anticompetitive.

Finally, here is a huge problem that is very difficult to get a grip on but nevertheless we are confident that it exists, that if you encourage disadvantaged firms, usually a disadvantaged competitor, to believe there is an antitrust remedy in an essential facility-type context, you are encouraging them to come to the agency, to invest their resources in legal maneuvering rather than investing those resources in innovation that would destroy the monopoly. And that's
a bad thing.

Nevertheless, as this slide is headed, once you are in this space where you can't assume that there is a competitive structure that will automatically achieve optimal performance, you have to assess the possibility that some kind of intervention and some kind of access remedy, despite all the costs and burdens that I just enumerated, might actually be better than doing nothing or might be better than applying some other regulatory remedy.

And some of the items that are sometimes relevant to deciding whether you want to dive off that cliff or not, if you are going to establish conditions, prices and conditions of access, is there a regulatory mechanism that is already extant that could take care of that issue.

What most people regard as the seminal essential facilities case -- it is arguable, but let's accept that for right now -- U.S. versus Terminal Railroad, that's where the J. Gould Railroads owned all the bridges and terminals in St. Louis, and they wouldn't let the western railroads use those facilities on equivalent terms.

When the Supreme Court basically found liability or instructed the lower court to find liability for the
Gould coalition's behavior, they sent the matter back to
the District Court and said fashion a decree that lets
the western railroads use these facilities more or less
on the same terms and conditions as the railroads that
are part of the Gould group, "but, by the way, don't
mess around with the ICC's ratemaking authority, you
can't make rates."

So they had the ICC there they thought they
could rely on to solve any specific ratemaking issues.

We have already heard reference to the FCC's
ability to adjust the access charges and in effect work
in cooperation with the federal District Court in the
Bell system decree.

Then you have this fascinating case of Otter
Tail Power, where the Supreme Court in a 4-3 decision,
where the dissent was actually right, but nevertheless,
it was a 4-3 decision where the Supreme Court
essentially said that on remand, the parties would have
to work out an access arrangement.

And in this particular instance, the Federal
Power Commission would have been the logical regulator.
But at that time it did not have the power to regulate
the access terms and conditions that the Supreme Court
was looking to have enforced.

I don't know where that left people practically.
I doubt that that decree did much good. But in any event, since we have gone from the Federal Power Commission to the Federal Energy Regulatory Commission, they do now have the power to order and regulate access.

But, of course, things have been scrambled in that industry by some fairly aggressive deregulation.

There are some cases which are decided more on Section 1 grounds, Gamco and the Associated Press case.

I will not spend any time on them. Basically, it is an organization where they are granting access to a bunch of different competitors.

So if one of them is wrongfully excluded, you can just order access on the same terms and conditions that are available to everybody else. That makes your information and regulation costs a lot lower.

And, finally, the question of dynamic efficiencies, I think that Bob has really touched on this very profound question about whether the AT&T decree really has anything to do with the fact that long distance rates have come down and now we have all of these different forms of communication.

I think it is arguable -- I don't have the time or energy to argue it right now. But I think it is arguable that a lot of these innovations might not ever have occurred without the divestiture decree.
AT&T had essentially invented mobile telephony or at least developed it to the point where the FCC was beginning to grant licenses.

A tremendous fraction of the immense communications and data processing research in the United States took place in an AT&T subsidiary known as Bell Labs.

That was brought to an end by the decree. Really I think it may turn out that the strongest case for connecting the AT&T decree to the subsequent explosion in competition in the communication sector is more an institutional question of unbinding parts of the system that were capable of innovating, although I'm not sure even Bill Baxter would have identified that as a specific objective of his.

It is difficult to draw general conclusions from this history of Section 2 remedies, but let me try a few.

The need for speed. It is often remarked how long structural cases take and how the industry and the technology tend to change in a manner that by the time you are done, everything you thought when you started the case is irrelevant.

Well, Exhibit A in that would be United States versus IBM, where it started as a relatively restricted
predatory pricing case, actually, but it soon expanded. It absorbed all these issues about foreign peripherals being attached to the IBM system.

The theory shifted. And, of course, if you look at the specific procedural approach that was taken in the Federal District Court up in New York, where the case was pending, sort of put like an eight- to 10-year bump in the schedule for the trial, more or less guaranteed disaster.

If you want to have some fun, go back and look at the original 1969 IBM complaint. It sounds so antique.

In an effort to make IBM sound like this thundering, huge, unstoppable behemoth, it says its revenues for general purpose computer systems went from 600 million to $3 billion, as if that was something that would scare us. But nowadays, $3 billion would probably not be a 1 percent market share in that particular industry.

U.S. v. Microsoft, I am the mid-Atlantic distributor of Ann Bingaman's success sheet. I really love what she did in the processor license case.

She took it -- I think from the day that the division actually opened the investigation to the day that decree was entered was just about exactly one year.
If you can pick a targeted practice and remedy it on that time schedule, it almost doesn't matter whether it was good or bad, because you look at it on a time schedule where things haven't changed that much and you can actually make a judgment about what you are doing, whether you are doing something that is helpful or the opposite.

If it had taken 13 years, it would have been ridiculous. But this is an approach that provided a lot of flexibility and tended to minimize error costs.

The broader phase of Microsoft that we have heard spoken about mostly this morning it seems to me extended over a much longer time period.

There are a lot of shifts in remedies. You had a change in administration, where certainly the emphasis shifted, and that sort of fits back into the old IBM pattern that you can't -- I believe I heard it said at one point that we were going to go into the liability determination and that phase of Microsoft without any clear idea of what the remedy was going to be.

Of course, there were some fairly notorious developments on that subject, both in the District Court and in the Court of Appeals, the bit about, well, we won World War II, so we get to determine how the Japanese have to behave.
And then U.S. versus Western Electric, which was sort of the middle and the end phase of the AT&T litigation. Back in the 1910s, it was thought that AT&T had a monopoly of long distance which it was using to snuff out competition of local telecommunications.

In the 1950s incarnation of U.S. versus Western Electric, the theory was that AT&T had a monopoly of telecommunications equipment that was being used to monopolize long lines and local.

And then finally in the 1974, the final phase of the case, the theory was that it was the local monopolies that were used to monopolize the other part.

So this is a little bit gratuitous. It is perfectly possible that over that horrendous stretch of time, all three theories might have been true when they were asserted. Yet, I think it is only in the final phase that you have a good match between the theory of liability and the remedy that was proposed.

I think that's what made -- to the extent it worked, I think that's what made the U.S. versus AT&T decree work.

Institutional suitability of different elements of our society, of our political and legal system to manage relief in these large cases, we all know that the legislature can only intervene selectively and to set
broad principles.

It is very difficult when you do that to try to achieve any kind of economic policy coherence. It only happens rarely, for example, in the Airline Deregulation Act, when essentially Congress said forget economic regulation, we are going back to antitrust.

We have sort of the opposite in communications regulation, all kinds of interventions for all kinds of conflicting and indistinct policy purposes.

Administrative regulation itself tends to reflect that policy and coherence that often characterize legislation.

The executive is a little bit more coherent. At least you have the President theoretically in charge of what the Assistant Attorney General does, and the Assistant Attorney General at least in theory is in charge of what the trial staff does.

It tends to be better directed and more coherent, but it is not immune from distractions and from other agendas, as I think is perhaps illustrated by some of the side-winding that has occurred in almost every major Section 2 structural case since World War II.

Finally, the judicial role. Of course, the Federal District Court is very much in command of what
happens in its own courtroom.

Griffin Bell loves to tell the story he was appointed directly to the Fifth Circuit Court of Appeals, and at his investiture the chief judge said "well, Griffin, you made a hell of a mistake, you know up on this court you have to get at least one other guy to agree with you before you can do anything, but in Federal District Court, you are pretty much in command of the courtroom."

I think Judge Green's phase of United States versus AT&T illustrates certainly the best of what can happen when he gets ahold of a good structural Section 2 case, and maybe in the later phases he might also have illustrated perhaps not the worst of what can happen but some of the disadvantages, that even judges are not immune from the kind of bunker mentality that sets in after you have witnessed these two litigants going back and forth and perhaps have some views of your own, based on the evidence, of course, but nevertheless we do have examples.

Judge Wiezanski in United Shoe Machinery Corporation or -- I have forgot the name of the judge in the Paramount decree, and there is also some evidence of that from the New Jersey court, where the same judge had responsibility for administering United States versus
Western Electric for '56 to '82 -- anyway, 26 years.
You can do the subtraction.

In conclusion, if I had to derive a number of
crisp, identifiable principles from our hundred-plus
years of experience in these kinds of cases, to have a
good one, you have to have a legally sound theory for
attacking a monopoly and you have to have a good
economic analysis that convinces you that the legal
theory deserves to be applied.

And for our purposes here today, most
importantly, you have to be able to identify an
effective remedy that can actually be carried out
without imposing so many costs on various parts of the
system that it is not worth the trip.

And if you wanted to identify a good candidate
for a structural case, I think given all of these
difficulties, you need, number one -- this is something
that is only useful for important problems.

The administrative costs and complexities, the
type of focus, long-term focus on these kinds of issues
that is necessary to bring them to successful conclusion
means that you don't mess around with lemon carts even
if they are monopolies.

You are looking for very long-term performance
issues and very big and important industries.
Finally, to return to the point I was trying to make with the initial presentation about access remedies and essential facilities, you have to be intellectually honest about what you are balancing.

You can try some limited remedies. You can look at the possibility of access remedies and more regulatory approaches, either under the rubric of an antitrust case or perhaps you ought to be lobbying a federal agency or a state agency, for that matter, to impose the regulatory alternative, and you also need to ask yourself the question whether given the costs and benefits of all the alternatives, maybe the best thing to do is nothing.

So thank you.

(Applause.)

MS. KURSH: We will take a 10-minute break and then start off with the questions. Thank you.

(RECESS.)

MS. KURSH: Back on the record. Thank you everyone.

The way we are going to proceed for the remainder of our time this morning is I will ask each of our panelists in order, starting with Dave, to take just a few minutes to respond to anything they heard from anyone else.
For example, Dave, if you want to respond to Per or anyone else on the panel, you should feel free. And then we will proceed with our moderated question session.

The way we have done this in the past, for those of you who haven't been here before, is the agency will be putting up on the slide some propositions. These are not necessarily propositions that the agencies are endorsing, but they are just a way for us to begin the questioning as sort of a springboard for the discussion.

So, Dave, why don't we start with you.

MR. HEINER: I hate to disappoint, Gail. But I don't think I have any comments to add to what the others said.

MS. KURSH: All right, fine. Then we will -- go ahead, Bob.

MR. CRANDALL: I'm more loquacious than Dave. A couple things. First, we mentioned this in a conference call. Tad raises the essential facilities doctrine.

The problem with the essential facilities is someone has to set the price. I can't imagine in the modern world anything, other than maybe water utilities or gas utilities, in which it would be a very easy task to set the prices efficiently for access to a network
industry.

The difficulty in figuring out costs, whether they are forward looking or backward looking costs, of dealing with the problem of the real options for not investing when technology is changing, the stranded cost problem, essentially, are just enormous, not to mention the fact that once you begin to have a regulated approach to essential facilities, you then create enormous tensions in modernizing those essential facilities.

Once you have a set of clients using the network of the local telephone companies in the United States or in Europe, then any attempt by the telephone company to change its network technology is going to be opposed by some of those people who are using the current technology.

So you create enormous disincentives, both from the pricing and because of the argument over technology for deploying new technologies.

So it strikes me that there is a very strong presumption against the essential facilities doctrine in technologically progressive industries.

Finally, Tad mentions the fact that there was probably some benefit to breaking up AT&T because they tended to control the technologies through Bell Labs and
everything.

There is something to that. Interestingly enough, a lot of the students of telecom think one of the great tragedies of breaking up AT&T was the destroying of Bell Laboratories.

But at the bottom, this was a regulatory problem. Had the FCC not engaged in activities to foreclose entry, through the licensing spectrum or through its long distance policy, remember the FCC actually fought in court to try to prevent MCI from offering switched long distance service.

The only reason they allowed MCI and the others and in the so-called special access carriers was to get information on what the costs are from another source so they could regulate AT&T a little more efficiently.

So the problem at the bottom was the fact of a regulatory regime which was interested in the long run perpetuation of itself. That's a problem which also could exist as we heard in terms of continuing to supervise decrees and why sunset is a good item on decrees.

MS. KURSH: Thank you.

Per.

MR. HELLOSTROM: Perhaps a brief comment to something that Dave said.
He said that the aim for competition authority should be to create competitive opportunities rather than engineer a particular market outcome.

I just would like to say that I think we fully support that. I think the European Commission does not aim to engineer market outcomes. But, of course, we may disagree on what it actually means to have real competitive opportunities, and there may be some divergence.

MS. KURSH: Actually, if I could follow-up on that a little bit.

Dave, one of the questions I had for you on that point that you made, would you say that's also true in a case where the theory of liability was based on the monopoly resulting from the exclusionary conduct?

MR. HEINER: Well, I think I was mainly focused on the experience Microsoft has had to date, which was a case where there was not an acquisition of monopoly cases.

Is that what your question is going to?

MS. KURSH: Yes.

MR. HEINER: My comment was focused on the monopoly maintenance situation. In that case, it seems appropriate to try to create opportunities but not necessarily go so far as to try to have a particular
1 market outcome in terms of share.

2 MS. KURSH: Thank you.

3 Tad?

4 MR. LIPSKY: Just maybe to respond briefly to

5 Bob's remark.

6 There is no question that the occasions for

7 invocation of the essential facility doctrine are

8 becoming more rare because of a lot of industries like

9 electric power.

10 As I suggested, the public policy focus has been

11 more on maximizing the areas of the industry that can be

12 deregulated or where market-based solutions can be

13 implemented.

14 So we no longer have a regulated utility kind of

15 as our mental model for the way that that industry

16 works. But it shouldn't be excluded that there are

17 areas that would be candidates for the application of

18 that doctrine.

19 Again, I don't argue with the fact that the

20 costs and complexities of administering an access

21 pricing program can be just enormous. That could be a

22 very good reason for just saying "tough, here is an

23 essential facility."

24 And if Congress isn't willing to adopt a

25 tailored regulatory regime to address it, probably we
are going to do more harm than good by attacking it with antitrust remedies.

I think you will actually find at least more than a hint of that style of reasoning in this new line I guess what I would call soft immunity cases in which I would put both Town of Concord versus Boston Edison and also arguably the Trinko case, where you have an antitrust remedy that is sought to be overlaid on a regulatory background and where the court says the standard for immunity for federal antitrust is a very high one.

It is the plain repugnancy standard, which was a term first used in Terminal Railroad, that we are not going to rule, we are going to reject the argument for immunity, but nevertheless, we refuse to recognize the validity of the claim.

That's why I call it kind of soft immunity. It is a legal ruling that the claim will not go forward. But it is not under the traditional rubric of either express or implied immunity from antitrust prosecution.

MS. KURSH: Thanks.

Tad, let me follow up a little bit on that. You had said -- and I think that's what you were addressing right now -- that there may be times when the best thing is to do nothing.
Can you set out what are the guideposts for those situations? What are you looking for? When do you make that determination that the best thing is to do nothing?

MR. LIPSKY: It is very hard to define in the abstract other than to say you have to look at all the costs and benefits in the particular industry.

It is not something that lends itself really to an ideological type of approach.

For example, there was a phase of the AT&T case when, and this was the rationale that the entry of the decree was based on and much of the dialogue or debate in the early implementation of the decree, including decisions made on applications for waiver of the line of business restrictions and so forth.

You used to constantly hear the phrase that the RBOCs had the incentive and ability to fill in the blank, but basically to goldplate, to enter at less than remunerative prices, to do all kinds of things to exclude competitors and so on and so forth and, therefore, these incentives and the ability to restrict competition in the market they proposed to enter either that they be kept out or that it be conditioned.

I think that argument is logically sound. But if all you can say for the arguments is that it is
logically sound, it seems to me you have only taken like
the first step, because you had to worry about things
like if we exclude the RBOCs, what is going to happen to
innovation, what is going to happen to competition in
this line of business, who is going to administer the
restriction, who is going to decide whether a Humvee is
a car if they are applying to enter the car market and
they produce a Humvee.

All those hideous administrative chores are
costly. They encourage strategic behavior. They have
all the costs and also some of the benefits that I have
identified.

It is really the weighing of the costs and
benefits which is the critical step. It is not simply
having a logical argument as to why a remedy of a
certain type ought to address a certain type of
anticompetitive behavior. It is very extremely fact
specific.

MS. KURSH: With that, let's start with our
first proposition, slide number 2. I will read it for
the record.

"Relief should 'terminate the illegal monopoly,
deny to the defendant the fruits of its statutory
violation, and ensure that there remain no practices
likely to result in monopolization in the future.'"
It is a quote from United Shoe Machinery.

First, I will start with the basic question whether everyone on the panel agrees that these are appropriate remedial goals in a Section 2 case.

MR. HEINER: I will comment briefly.

We had occasion to look at this in connection with the Section 2 case against Microsoft, where this particular quote which was brought out.

Our understanding of its meaning was that the "terminate the illegal monopoly" part of that would apply in a monopoly acquisition case as opposed to a monopoly maintenance case.

Understood that way, it seems to make sense.

The next clause, "deny to the defendant the fruits of its statutory violation," I think one has to then look at the causation issue, what were the fruits of the violation.

And if as I was saying during my 15 minutes, if the causation is relatively weak, there may be lesser occasion to try to effect change.

And the last clause seems to be relatively noncontroversial, I would think.

MS. KURSH: Does anyone have a different view or is there a general agreement?

MR. CRANDALL: I think it is incredibly
optimistic that the last clause could be achieved by any
decree, particularly given the difficulty of even
understanding what caused the monopoly to start with.

But in high-tech industries, given the rapid
rate of change, imagine I guess -- we haven't raised --
have you raised MediaPlayer yet?

MR. HEINER: I briefly referenced it.

MR. CRANDALL: The idea that somehow breaking
off MediaPlayer -- that's right, you talked about
selling the one without Realplayer.

The idea that that somehow was necessary to
prevent Steve Jobs from getting into the business of
distributing music seems rather naive now in retrospect.

I think things change so rapidly you can't
possibly satisfy that last clause in a lot of industry.

MS. KURSH: But is it an appropriate goal to be
reaching for that?

MR. CRANDALL: To dream the impossible dream? I
suppose.

MS. KURSH: I will take that.

MR. HEINER: Let me offer two qualifications.
The word "ensure" is obviously a very strong word.
Whether you could really ensure anything in this area is
kind of a question mark, I think.

And as I read the quote -- and it may or may not

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be what the court had intended -- but I would read it as ensure that there remain no practices likely to result in unlawful monopolization.

There may be natural economic forces and there may be someone built a better mousetrap leading to a very high market share. That is something I think we don't try to remedy through antitrust.

MS. KURSH: If you were to tweak the quote somewhat, in a monopoly maintenance case would you agree that determining the unlawful exclusionary conduct would also be an appropriate goal?

MR. HEINER: I would think so.

MS. KURSH: Let me throw out some other possibilities as goals and see what people think about them.

Do we get agreement that punishment is not an appropriate equitable goal for the enforcement agencies in the United States anyway?

MR. HEINER: You will get agreement from Me.

MR. CRANDALL: You mean in a civil sense or a criminal sense?

MS. KURSH: Either one.

MR. CRANDALL: To the extent you invoke as one of the goals of deterrence, I suppose you can justify doing that.
I can't imagine you could do it for Section 2. That is one of the arguments for criminal penalties or treble damages in section 1. Of course, we have no studies that show whether it works, it deters collusion or not.

MS. KURSH: Let me follow up on that for a moment.

You used the word deterrents. Do you think it is an appropriate goal of a Section 2 remedy to try to deter others from engaging in Section 2 violations?

MR. CRANDALL: Once again, I think it is impossible to imagine that it would work. I can't imagine that somebody engaged in some new industry where he gains 80, 90 percent market share is going to be deterred unless there are criminal penalties associated or very large financial penalties associated with a certain market share, which I would hope would never take place.

I can't imagine this is sufficiently certain that it could work as a deterrent in a Section 2 case.

MS. KURSH: Tad, do you have any views on whether punishment or deterrence of others are appropriate goals?

MR. LIPSKY: I don't think punishment is something that comes in to most questions of
monopolizing conduct.

You can imagine episodes that might occur within the context of a Section 2 litigation where other statutes are brought to bear that do properly have punishment and deterrence elements, thinking of things like destruction of evidence or intimidation of witnesses or crimes collateral to any judicial proceeding or government prosecution.

But I think there was a case called Empire Gas which was brought as a criminal Section 2 case where it was probably the only Section 2 claim that also included a federal firearms count.

I wish I could remember the specific circumstances. Probably somebody riding around the Midwest countryside using a 30 ought 6 to shoot at his competitors' propane tanks or something.

AUDIENCE MEMBER: Dynamite.

MR. LIPSKY: Dynamite, thank you. It is so helpful to have Greg here in the audience. He really knows his firearms.

MS. KURSH: I think I heard at least two panelists, maybe more, maybe Dave and Per mention about helping disadvantaged rivals.

What are the views of the panelists on whether that is an appropriate Section 2 remedy, remedial goal?
MR. HELLSTROM: I think I may have mentioned in that I quoted something stated by Mr. Charles A. James.

MS. KURSH: What is your view on it, Per? Do you think that in the EU helping disadvantaged rivals is an appropriate goal in a Section 2 case -- not Section 2.

MR. HELLSTROM: I think if you have a foreclosure abuse that forecloses competition, and that is presumably also some competitors, indeed, a remedy would probably favor some of the rivals in that it would allow if they had been unlawfully foreclosed, allow them to enter or stay in the market, yes. That would be favorable to them.

MR. CRANDALL: To the economist, it sounds a little bit like the infant industries argument. And politically it strikes me as a bad general idea because it risks creating a set of clients from whom you can't disengage because they require the favorable environment in order to survive.

MS. KURSH: Dave, do you see a distinction between opening up the opportunities for rivals and helping disadvantaged rivals?

MR. HEINER: The phrase "helping disadvantaged rivals" could be subject to a range of interpretations, I suppose.
If it means creating opportunities, I think that's exactly what we need to do. One could imagine a fuller interpretation of that phrase that could mean take the assets of the defendant and transfer them to the disadvantaged rival. That would seem to go too far.

I think that phrase which Mr. James used possibly could be subject to being misread.

MS. KURSH: And, Per, if I could ask you to just comment. Do you see the remedial goals different under European law than in the United States in this area?

MR. HELLSTROM: I'm not too familiar with remedial goals in the United States. It is hard for me to comment.

MS. KURSH: Do you see them as different than the ones in this proposition?

MR. HELLSTROM: Clearly, I would agree with Dave that it is not really the purpose to terminate the illegal monopoly insofar as our Article 82 relates to abusive behaviors.

It is more about terminating the abusive behavior and not the dominant position as such.

So I would agree with that statement.

MS. KURSH: If we can go to slide number 3 for a moment.
I will read this quickly. I think someone already commented on it.

"The fruits of a violation must be identified before they may be denied."

Of course, that is from Microsoft.

In essence, that's saying that one -- we talked about earlier one goal is to deny the fruits of a violation to the defendant.

How do you determine what the fruits of a violation are? Does anyone have some thoughts on how you should go about making that determination?

MR. HEINER: That is something that is supposed to come out during liability phase, I would think.

The next sentence from this decision goes on to say what the fruits were in the Microsoft case. And what they said was that Microsoft had inhibited nascent competitive threats.

So the logical remedy the court explained was to remove those inhibitions on a going forward basis, and that's what was done in the consent decree.

MS. KURSH: Tad or Bob, do either one of you have some thoughts about general principles that should be applied when deciding what fruits flow from a particular violation or is it just a very fact-specific determination?
MR. CRANDALL: I don't like the term "fruits."

It strikes me that this suggests that the real issue here is the monopoly profits of the defendant.

I can imagine a situation in which Microsoft had reaped even greater returns from its operating system position, monopoly, and being a perfectly discriminating monopolist, which an economist might say there is no grounds for intervention here because the output is at an optimal level.

This is a battle that has gone on for years. It is not so much that the greedy monopolist earned monopoly profits but rather that profits and outputs are distorted.

I would prefer it to say the effects of a violation must be identified, the effects on prices and output, rather than fruits.

MS. KURSH: Tad?

MR. LIPSKY: We have this system in the United States where you have the government which never seeks damages or relief that will redown to the government's benefit as a purchaser.

So they don't care about fruits in general, except in the most kind of Elysian and abstract sense that any remedial system like antitrust is supposed to work, you did something wrong, you have to pay back.

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Then, of course, we have the fantastic system with these wonderful talk about fruits, subsidies to private action. You have mandatory treble damages and payment of attorney fees and notice pleading and discovery and joint and several liability. It just goes on and on and on so that you have this entire population which stretches 12 stories high from here all the way up to Connecticut Avenue of people working to either get or defend people from having to pay these spectacular sums which are surely in excess of anything that could reasonably be described as fruits of the violation.

It is almost like the system is designed so that we will never seek an intelligent answer to that question. It does have a meaning in the sense that it was referred to in the first part of the previous quote, which is if you have a case where you think the monopoly is attributable to a certain type of behavior, then you have a real problem. Then you have to decide whether to actually have a structural remedy where you break something up.

Beyond that meaning of fruits, I think we have a problem implementing that in our system.

MS. KURSH: All right. Can we turn to slide 5.
Jumping ahead a little bit to keep things moving. We have talked about this a little. Let's get into it in more detail.

A famous quote from Trinko, "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency."

We have had some discussion about this already, but I think it is worth a little more.

In Trinko, the Court specifically was addressing refusals to deal.

Tad, I would start with you. What if any refusals to deal do you believe are irremediable?

MR. LIPSKY: Well, I don't think any refusal to deal is irremediable.

The question is whether it is irremediable at a tolerable cost. I think that's what I was trying to suggest.

If Judge Green had not had the FCC to fall back on for the implementation of the access charge element of the MFJ remedy, I think he might well have concluded that it was an impossible task, that as meritorious as the division's case was, it was simply not an acceptable
judicial function for him to be involved in.

I wonder if he could have just said in the Tunney Act proceeding this is a violation of Article 3, courts don't do this.

It is almost what is suggested in this quotation from Trinko, and I suppose that in the right case, he probably would have been upheld in that.

MS. KURSH: Are there other types of cases, let's say predatory pricing or other types of refusal to deal cases where you think the cost of a remedy are going to be so high or so difficult to effectively monitor and enforce that the agency should not be bringing the cases?

Anyone want to comment on that?


MS. KURSH: Do you think that even if the cost of a conduct decree is very high that there is value in bringing the case with a simple "sin no more" kind of judgment, the violation is enjoined?

MR. LIPSKY: If there ever is a good predatory pricing case brought, I think that would be a good example.

The IBM case started that way. It started essentially as a predatory pricing case involving a
Model 90 and very advanced for them, very advanced computers that control data -- they were beating IBM to the prestige customers like the MIT Labs and Lawrence Berkeley and so forth.

So there was a valid predatory pricing claim that could have been discussed back in 1969.

Unfortunately, things worked out so that that aspect of the case was obscure.

But there would be an occasion to say all right, let's have a big fine, let's have a big kind of remedial punishment for engaging in blatant predatory pricing behavior.

MS. KURSH: But for -- I'm sorry. Let me just follow up on that.

In a government case, what do you see as the appropriate relief in a predatory pricing case that you believe should be brought?

MR. LIPSKY: I think arguably you could just have some kind of fine or penalty. I'm not suggesting that the remedy in a predatory pricing case would be price regulation.

I think especially in a market like that, which was extraordinarily dynamic and remains dynamic, I wouldn't attempt to impose any kind of forward-looking remedy.
MS. KURSH: Dave?

MR. HEINER: I would just say generally I think that a sin no more remedy, once the sin is identified, will likely be more efficacious and easier to administer than remedies in the form of thou shall do something.

Whenever you have a defendant creating something new or doing something they haven't done before, I think we are getting into more challenging areas and certainly have seen that in various Microsoft remedies, I think.

MS. KURSH: If oversight, control, regulation is unworkable or extremely costly, should that be a basis for a structural remedy? Anyone? Any takers?

MR. CRANDALL: Not necessarily. It may well be that -- as an economist, when I talk about cost, I'm talking about the effect on output, not just the administrative cost of carrying out the decree.

It may well be that the structural remedy creates more economic cost than doing nothing.

So ruling out a behavioral decree and then looking at a structural decree is okay, but that doesn't mean to say necessarily you go with a structural decree.

MR. HEINER: It may well be also, I think, as I was suggesting earlier, if it is so costly to administer an access remedy, that may reflect in part the fact that perhaps the underlying objective is too ambitious or
there shouldn't really be liability in the first place.

MS. KURSH: I wanted to follow-up. Do people agree with that, if there does not seem to be an appropriate effective remedy, that suggests that maybe there was not underlying liability to begin with?

Per, do you have a view on that?

MR. HELLSTROM: I have my doubts on that approach. I think that puts the cart before the horse in a sense.

I think one should carefully analyze the behavior and try to establish whether there is an abuse.

As we said, there are various alternative remedies. A simple cease and desist order could be an appropriate remedy, together with a fine.

So I'm not sure if indeed there are such situations.

MR. LIPSKY: I hesitate to make any absolute statement about that. The theory is the theory and the remedy is the remedy. You can imagine good theories and bad remedies and vice versa.

MR. HEINER: My statement was not absolute either. It was a maybe kind of statement.

Just to elaborate on it a little, the central antitrust issue involving Microsoft over the past 10 years or so has been this question of building features...
into Windows and this second question involving interoperability that has become quite prominent recently.

I have really been struck by this tying issue, as we have gone around the world literally talking to enforcement agencies about it, that the agencies may have a clear view on liability, but we don't seem to get to a remedy that will be deemed satisfactory.

Again, this is why we really couldn't settle the European Union case. The Commission had taken the view, not unreasonably, that a settlement really ought to address the issue on a going-forward basis for years to come. It should not just address MediaPlayer functionality.

So Commissioner Monti was looking for something that we could really generalize. And, frankly, there was nothing we could come up with.

It seems to me that the reason for that was that anything you would propose, the remedy was worse than the perceived harm. You would lose the benefits of integration over time.

It is those benefits that also lead us back to thinking, gee, should there be liability in the first place.

And then we have the remedy which didn't come
out of the settlement but was imposed and further drives on the point that there shouldn't be any liability. We will hear from the European court on that and see how it comes out.

MS. KURSH: Do any of the panelists have a view on what is appropriate equitable relief in a product design case?

Are there limitations? Is there a template that we should be following? No? Okay.

MR. CRANDALL: I don't know how you can generalize that.

MR. DUCORE: I would like to follow up a little on this point about irremediability, if there is such a word.

And maybe I will be provocative here. Maybe I should give the disclaimer that I should have given before, that whatever I say are my own views and not the views of the Commission or commissioner.

But from the perspective of an enforcement agency, does anybody on the panel think, especially in the context of the U.S. system, where you can have follow-on private litigation -- that's all about money generally.

Is there a value in an agency, enforcement agency taking on perhaps a difficult, complex situation
and establishing the point that what took place was a Sherman 2 violation or a Section 5 violation and even if it is not able to fashion a specific, effective going forward conduct remedy, set the stage for the victims of that conduct then coming forward with follow-on litigation to get the damages that, after all, the agency generally doesn't seek on its own?

MR. CRANDALL: I will offer a view on that.

I don't see the antitrust laws as being designed to redistribute income.

The way you put it, you avoided one large class of people, namely, the trial attorneys who are going to benefit from that.

I don't see that there is an overwhelming social benefit from doing that, and there have to be better ways to redistribute income than doing it that way.

MR. LIPSKY: Given all of the incentives for private litigation that exist under the U.S. system, I would say that what you are proposing is kind of dangerous, because it used to be that you have a criminal case and there would or wouldn't be a trial and there would be a plea, and sort of word would get out, and at some point the private litigation, the class actions would follow.

Nowadays, all you need is a press release saying
that some agency somewhere in the world is investigating some industry, and, kaboom, you have an MDL, even where the press release says it is the European Commission investigating, not even the United States that is investigating.

Given this -- it just happens -- there used to be just the criminal cases and then it went to all the horizontal cases. Now it is even vertical cases, like Dentsply.

You immediately get follow-on class actions the minute something comes to light. The same with U.S. Tobacco.

The whole litigation bar is sitting out there like the Strategic Air Command on hairtrigger alert.

I think the necessity for the agencies to go forward and establish liability, as you have described, I think that's in many ways a dangerous approach.

Now, it is another thing to say should the agencies be articulating and focusing on competition problems. Absolutely. Usually, at least for the major Section 2 cases, all of these cases arise in kind of a broader policy context.

The AT&T case are years of debate about what to do about this or that part of telecom, and there is a White House Office of Telecommunications policy that was
involved and the FCC was involved.

And the Division and the Commission should be
gloriously involved in those kinds of debates. And they
have investigative tools that are appropriate for
situations like that.

But on the narrow proposition if there is no
hope of an efficacious remedy should the agencies
nevertheless go forward and prosecute just to get the
determination on the record that this was bad, somehow
that rubs me very much the wrong way.

MR. DUCORE: What about to establish the points
of that so it might be easier to challenge the next
conduct that's similar earlier in the process, maybe at
a point where you could more easily follow up on an
efficacious remedy?

MR. CRANDALL: If? I don't understand.

MR. DUCORE: In other words, take on a hard
case, hoping to be able to design a good remedy but not
steering away from the case I will say simply because
you are not sure you can develop the remedy but
nevertheless if you establish liability, then setting
the stage so that if the next industry comes along and
does the same thing, you are better positioned perhaps
to challenge it more quickly and stop it before it
reaches a point where it is irremediable.
MR. LIPSKY: I guess you could defend the United States versus Robert Crandall on that case. But it is not the same Bob Crandall. It is the former chairman of American Airlines.

I think it is a good point in the context of legal theory. U.S. versus Crandall is sort of the perfect illustration of something that was conduct that was debatably within the attempt defense. I think it was brought as a civil case primarily for that reason.

It did have the result that the agency wanted, which was to establish that this kind of inchoate offer to collude would work as an attempt case where the parties could collectively exercise monopoly power.

Of course, inchoate collusion, invitations to collude has since become kind of an active prong of antitrust under other statutes as well. I think it served the intended purpose.

I think well-advised business people are told that inchoate forms of collusion, offers to collude, even though they may not meet the standards of Section 1 of the Sherman Act, are nevertheless very bad ideas.

In the Section 2 area, in the monopolization conduct area, though, I wonder if there isn't enough difference industry to industry and form of conduct to form of conduct.
It might be a relatively rare case where you actually want to accomplish or where there is any objective in trying to accomplish the plausibility. Offering natural gas and gas water heaters as a bundle might be more or less desirable in ways that offering a computer operating system and a Windows-compatible Internet browser are not. It could go either way.

So I think you query what you really accomplish in trying to establish a standard, given that a lot of these cases occur in very dynamic industries.

MS. KURSH: Tad, on a somewhat different point, I have a question for you.

In Aspen Skiing, the District Court had ordered the parties to offer jointly a four-area coupon book, as you might recall, similar to the one that Ski Co was offering at another resort.

Do you have any view on whether this aspect of the remedy in Aspen Skiing helped or hurt consumers and when if ever forcing the only two competitors in a market to collaborate is good for consumer welfare?

MR. LIPSKY: Well, Aspen is a funny little case, because the market power issue was stipulated the wrong way.

But if you can force yourself to imagine that
the four ski slopes in Aspen, Colorado had a monopoly
anything, maybe you can picture a world in which all the
ski slopes in North America are owned by two companies,
and one owns 75 percent of them and the other owns 25
percent of them. So in the average ski resort, you
would have a situation like Aspen.

You could respectively argue that this is more
like the U.S. versus Associated Press or Gamco Warehouse
kind of situation.

Here is an efficient arrangement. The terms and
conditions have been set historically by the parties for
ordinary profit-maximizing reasons. And you could order
them to collaborate if you thought that the conduct
was -- that the larger competitor's conduct in cutting
off cooperation with the smaller competitor was an
attempt to maintain this monopoly.

There is a leak in that theory, though, and that
is in order to get its refusal to cooperate with I
forget which ski company was the evil monopolist and
which one was the gallant David challenging Goliath.

But the problem was the David ski company said
we will give you a voucher, we will give our customers a
voucher redeemable at the local bank in cash.

It was actually more remunerative for the
monopolist to accept that voucher than to allow people
to use their credit cards, because they didn't even have
to pay the merchant fee, the clearance fee associated
with use of the credit card.

To me, as I say, if you can force yourself to
believe that it was a monopoly case, I think the whole
case could have been solved simply by enjoining that
act, that the defendant should have been required when a
customer of the other ski company came up and said
"here, I will give you this cash, this face value cash
cost-free voucher for your tickets," the defendant could
have been required to accept that and that would have
solved the whole problem.

Now, I think maybe the issue you were trying to
get at is the one lurking below the surface of
cooperation between competitors.

Of course, that is a huge problem and it is
alluded to in Trinko, of course. But Aspen Skiing
actually is a little bit different because of the
externality, the joint product of allowing customers to
use all the competitors.

That is actually a product that had independent
utility to customers in Aspen Skiing, which would not be
true.

You wouldn't buy a form of long distance service
just because it allowed you to make a call on MCI and on
AT&T. That would make no sense.

It is in the AT&T-type situation, where there is no utility in the use of multiple competitors, that you have the much greater danger and no apparent benefit of the forced collaboration.

MS. KURSH: In a refusal to deal with a rival situation, how does the court, the agency establish the terms in which the rivals have to deal?

MR. LIPSKY: That's, of course, what most of my remarks were devoted to, what a terrible dilemma that is.

The presence of a regulatory agency helps, query whether a court can ever do it absent the Associated Press/Gamco Warehouse kind of situation.

MR. CRANDALL: I would demur on that.

My discussion of this with the regulatory agency in many cases can't come close to getting it right. The fact they have more resources to throw at it doesn't suggest they will get the prices right.

It may be something for courts to avoid. It doesn't suggest a regulatory solution necessarily.

MR. LIPSKY: Bob, do you allow the intellectual possibility that there could be a case where as imperfect as the regulatory solution might be, with all the costs and benefits considered, it might be better to
regulate rather than if your alternative is to do nothing?

MR. CRANDALL: I suggest something like water distribution or gas distribution, something where the technology is extremely simple and not changing very much. That's a possibility.

Once you get beyond that, I think it is problematic.

MS. KURSH: Thank you very much.

Dan, do you have something?

MR. DUCORE: One question to try to wrap that up.

The FTC and DOJ have slightly different functions. We are not always in front of a judge.

I guess the question for a panel is whether they see a value in whether you call it an investigation or administrative litigation that leads to some report that identifies the issue and sort of tees it up that a court-type remedy doesn't seem workable here, Congress should step in and deal with it in some way?

MR. CRANDALL: You are suggesting just an investigation, an inquiry, but not necessarily litigation?

MR. DUCORE: If the concern is that we are not equipped to write a decree or order, that it goes...
forward and specifically modulates conduct and there
isn't an existing regulatory agency that we think would
be well equipped but at least flag it for consideration.

MR. CRANDALL: I think it is perfectly
appropriate for the FTC or the DOJ to be doing analyses
of these things.

The question is do they bring cases. Earlier
you were suggesting you might bring a case even though
you don't have an appropriate remedy and it's just a
learning experience so that you are better prepared next
time.

I think Dave might be concerned that you spent
10 years on Microsoft trying to learn how to do it
better the next time.

MR. DUCORE: What I was getting at is if all you
can get -- my earlier point I don't think I made it as
clear.

If you could only have what is called a
sin-no-more remedy, you did this, this was unlawful,
don't do that again, that obviously may set up private
actions, but it also sets the precedent so we have told
you not to do this again, if the next guy comes along
and maybe he is doing it, maybe we could get a judge to
tell him stop earlier in the process.

It is not that you couldn't have a remedy. It
is that the remedy would simply be you shouldn't do that anymore.

MS. KURSH: All right. On that note, I would ask everyone to join me in thanking our panelists for their insight.

We will see everyone this afternoon at 1:30. We pick up on remedies and some other interesting topics to get into.

Thank you. 12:00 p.m.

(Whereupon, at 12:00 p.m., the hearing was recessed, to be reconvened at 1:30 p.m. this same day.)
MR. ELIASBERG: Welcome to the second remedies panel, part of the ongoing series of hearings on single-firm conduct.

I'm Ed Eliasberg. I'm a lawyer with the legal policy section of the Antitrust Division. My co-moderator today is Dan Ducore, the assistant director of the compliance division in the FTC's Bureau of Competition.

The Department of Justice and Antitrust Division and Federal Trade Commission are jointly sponsoring these hearings to help advance the development of the law concerning Section 2 of the Sherman Act.

Transcripts and other materials from the prior sessions are available on the DOJ and FTC Websites.

These are the next to last set of hearings. We will be holding a wrap-up in the coming months and ask that you check the Division's and FTC Website pages for more information about it.

Today's session concerns remedies in actions brought under Section 2.

Accepted wisdom seems to be that effectively remedying violations of Section 2 can be a challenge. Our panelists may have differing views on how well remedies in past Section 2 matters have furthered the
purposes of the antitrust laws.

The discussion session in this panel will have
particular emphasis on structural and conduct remedies
in Section 2 matters.

Also on our panel is a representative from the
European Commission to share his perspectives based on
emerging remedies under European law.

On behalf of the Division, I thank our panelists
for participating today and sharing their views with us.

I will introduce each in more detail before he
speaks. But in brief, our speakers in the amended order
of appearance are the following.

Andy Joskow is a senior vice president and
director of NERA Economic Consulting.

Dietrich Kleemann is head of the task force on
ex post assessment of merger decisions, Directorate
General for Competition, European Commission.

We are scheduled to have also Franklin Fisher,
who is the Jane Berkowitz Carlton and Dennis William
Carlton professor of microeconomics at the Massachusetts
Institute of Technology, and hopefully he will be able
to join us in a few minutes.

Then John Thorne, who is senior vice president
and deputy general counsel at Verizon Communications.

And Richard Epstein, the James Parker Hall
distinguished service professor of law at the University of Chicago Law School.

Thanks to my colleagues at the FTC and the division for organizing this hearing.

The organization of the panel is as follows. We will have three panelists speak for approximately 15 minutes each. Then we will take a short break. The final two panelists will speak.

Each panelist will have a couple minutes to respond to the other presentations, and then there will be a moderated discussion led by Dan and me.

In that time period also, David Heiner, who was on the panel this morning who is, I believe, deputy general counsel of Microsoft, has graciously agreed to join us and maybe will also be participating, if he likes, in the moderated discussion.

We will not be taking any questions from the floor, and we plan to end at 4:30.

Before introducing our first speaker, I would like to turn things over to my co-moderator, Dan Ducore.

MR. DUCORE: On behalf of the Federal Trade Commission, I want to thank our panelists for graciously volunteering their time and their views today to help assess remedies for single-firm antitrust violation cases. I was going to say Sherman 2, but we do it under
Section 5 of the FTC Act.

As I think it became pretty clear in this morning's session, I will say Sherman 2 violations are sometimes hardest to make out.

I think it is probably equally true that once you have made them out, figuring out the best way to remedy those problems is at least equally hard.

And unlike some other areas in merger enforcement and certainly horizontal agreements enforcement, Sherman 2 single-firm conduct violations are of necessity, particularly fact intensive when it comes to designing remedies, both in terms of what the theory of the harm is and how the industry operates.

As someone whose office has to deal with remedies for all kinds of antitrust cases every day, I'm going to be particularly interested in hearing about broad approaches as well as some of the more detailed issues having to do with administrability and, as part of that, what do you do if it is not clear that a remedy, a workable remedy doesn't do more harm than good.

We talked a little bit about that this morning. This afternoon we are going to focus a little more on the difference between the conduct remedy approach and the structural approach.
So with that, we are about to start, except I have to make a couple of logistical announcements.

One is in case of an emergency and if an alarm goes off, walk, do not run, to the exit and do not take the elevator but take the stairs down stairs and walk across the street, and there will be obviously people directing you to where to go. I suspect that won't be an event this afternoon.

Also, the restrooms, if anybody in the audience needs them, are out the hall to the left, the men's room to the immediate left, the women's room past the elevators to the left.

Finally, please turn off all electronic devices, especially cell phones, Blackberries and other hand-held devices which in particular can create static if they are operating near the microphones.

So without any further ado, and I don't know if you are going to restructure the order again.

MR. ELIASBERG: We have the good fortune that Dr. Franklin Fisher has been able to join us now. Welcome, Frank.

Frank, I will sort of leave it to you. If you need a moment to catch your breath, we can have Andy go first.

DR. FISHER: I can go first.
MR. ELIASBERG: I appreciate you going back to the bullpen, Andy.

DR. FISHER: Of course, you understand that I am tempted to talk about the effects of deregulation on the behavior of airlines. Perhaps not.

MR. ELIASBERG: Franklin Fisher is the Jane Berkowitz Carlton and Dennis William Carlton professor of microeconomics at the Massachusetts Institute of Technology, Emeritus, where he has taught for 44 years. He has served as director of CRA International since 1967 and is a director of the National Bureau of Economic Research.


Frank, let me assure you we are delighted to have you here today.

DR. FISHER: Thank you. I am delighted to be here, although somewhat more stressed than I thought I was going to be.

All right. Well, the question of how to design remedies in Section 2 cases isn't easy.

Unlike prospective mergers which can be blocked or price fixing cases or collusion cases where actions can be enjoined, single-firm monopoly cases even when
won tend to founder on remedy issues.

Structural relief can be and often is seen as too drastic, and injunctive relief can simply turn into an effort to prohibit actions already in the past and already obsolete or can require continuing and perhaps continual judicial supervision.

Too often in the past antitrust authorities have failed adequately to consider the problem of remedies. And I'm delighted to see an actual hearing is taking place on this subject.

With those encouraging remarks, I have two parts to this talk.

I want first to discuss what I think the desirable objectives are that a Section 2 remedy or maybe any remedy should be, and then I want to exemplify some of this by talking about the Microsoft case and suggested remedies in it.

I was the principal economic witness for the Division in that case. And I'm going to talk about these two things.

Here are the five things that I think one ought to try to achieve, and it will turn out that some of them are impossible to achieve and you can't achieve some of them without making some of the others difficult.
And while I don't think it is a whole mess, I do think it is a very complicated issue.

The first one is one ought to want to restore competition. That ought to be a primary objective. One ought to want to undo the anticompetitive effects of the violation.

That may not be possible. Indeed, it may not be clear what would have happened in the absence of the violation. That's particularly true in innovative industries.

Second, the punishment as it were ought to fit the crime. I realize these are civil cases, but you know what I mean. One wants to fit the remedy to the violation.

It is natural to require that the remedy be reasonably consonant with the liability findings. In particular, it is natural to require that the remedy be such that had it been in place at the time, the violations would not have occurred.

But while that requirement is as the law is developed as I understand it, that requirement may satisfy the standard for consent decree hearings under the Tunney Act, it is not guaranteed to satisfy the important objective of restoring competition.

I will exemplify that when we talk about the
Microsoft case.

A broader remedy that prohibits violations, not merely those found liable but similar to those to be liable, may still not work.

This is likely to happen if the defendant used the anticompetitive actions to ward off a threat to its monopoly power at a crucial moment, with similar threats unlikely to arise again or perhaps ever.

Next one would like to disgorge monopoly profits. The violator shouldn't be permitted to profit from the violation. Otherwise, there won't be any disincentives for it or others to repeat such violations.

But, of course, fines are unusual in Section 2 cases. On the other hand, fines may not be necessary. The treble damage provision of the Clayton Act certainly encourages private suits, and the loss of such a suit can result in considerably more than the disgorgement of monopoly profits.

I really don't like that answer. I can't tell from your faces whether you like it or not, but I don't. Treble damages also encourage -- here, by the way -- I don't know if you have been given my text. If you have, in the text there is a really Freudian error. The text I recently discovered says "treble damages also
encourage reasonably basic private suits" --the word
"basic" should be "baseless" -- "sometimes suits that
follow a federal investigation, even though that
investigation doesn't result in an actual case and
finding of liability."

Particularly in large class action suits, this
results in a kind of legalized privacy, with the mere
certification of a class enough to produce settlement by
defendants greatly at risk.

That's mainly a problem I think for Section 1
cases. But the whole issue of treble damages is too
complex to simply assume that they should continue and
will result efficiently in the disgorgement of monopoly
profits.

One possible answer would be to require the
defendants to compensate those that were injured (back
to the federal case) as well as paying something above
that, since otherwise they or others may be tempted to
take advantage of these situations, and in return the
compensated victims should give up their rights to sue
for treble damages.

D, I'm quite fond of this one, but it is
difficult. Make the remedy self-enforcing. If
possible, one wants the remedy to serve for itself.

You want a situation to be created in which
market forces prevent the recurrence of the same or similar violations, as opposed to injunctive relief. That kind of remedy ideally doesn't require continued and long judicial supervision and continued wrangling and litigation that can go with that. Ordinarily, of course, this is going to require some sort of structural remedy. That isn't easy to do. In the first place, courts are traditionally reluctant to grant structural relief, which usually means divestment or breakup. In the second place, crafting one is not easy and may sometimes be impossible. Too often in the past the antitrust authorities -- let me say for the moment I will talk about something in the quite distant past. You don't have to worry, guys. You weren't around. I was. The antitrust authority has simply assumed that a somewhat arbitrary divestment is what is called for. That may have gone hand in hand with the naive belief that monopoly power equals large market share, so that simply breaking up the defendant would be sufficient without the relationship of the breakup to the violation.

That was certainly true of the great fiasco of the IBM case. I, by the way, was the principal witness
for IBM in the IBM case.

The government's remedy proposal never reached
the court but was discussed at deposition by an
economist whom I will courteously not name.

He proposed breaking up IBM into four successor
companies, each of which would have one and only one
tape plant or disk plant. No consideration was given to
whether computer companies with only one such plant were
likely to be viable.

The focus was exclusively on reducing IBM's
supposedly very large market share, which was measured
by the government in truly peculiar ways, having nothing
to do with market power.

Structural remedies need to be better thought
through than that.

I'm sorry. I can't stop myself from telling the
following story:

That witness never testified at trial. It came
out at his deposition.

And there was a truly peculiar set of things in
the deposition, which began with the witness being
instructed not to answer the questions of how many
successor companies he proposed to have. And the
grounds for that -- first, I quote the lawyer in
question -- "I won't tell you."
Upon being told that that was not cognizable under the Federal Rules, he offered to tell if the room would be cleared of people not connected with the case.

IBM's lawyer said "I don't see anybody in the room not connected with the case." And the lawyer for the Justice Department observed that my son and the son of the late John McGowan, who both of us were working on the case, were present he said "the boys."

So they sent the boys out of the room. And now the lawyer was willing to give the grounds.

He said "I'm not going to let him tell because it might upset the stock market."

Well, there was some discussion as to whether that came under the Federal Rules, and decided to let the answer go on, provided the room was still further cleared of everybody not totally essential.

Nicholas Katzenbach, then general counsel for IBM, asked if it was okay if he stayed. The lawyer said yes, but I couldn't.

I said I was going to go out and join my 12-year-old son, who was no doubt calling his broker at that very moment.

The witness then testified about the tape plants and the disk plants. But the number was sealed and referred to as X in the transcript.
The motion to unseal, like many things in the IBM case, remained undecided. That was in 1974. The case ended in 1982 with that motion still undecided by Judge Edelstein.

That number was four to anybody with any sense who can count the number of tape plants and disk plants that IBM had, and it was also four to anybody who was with that same witness at a cocktail party a couple weeks later and heard him say it was four.

Believe me, the IBM case was full of things like this, some much worse.

Anyway, I could not talk about remedies without getting to that. It lives with me still.

The last thing is I think, as I already said, one ought to try to avoid remedies that require prolonged and complicated judicial oversight.

That's likely to be true of complicated injunctive relief, and it is particularly burdensome if the injunction is to hold for long periods of time in a changing industry.

Now I want to talk about Microsoft.

One of the things about Microsoft is almost none of the remedies proposed were without flaws, maybe none of them without.

I have to talk first a little bit about the
underlying economics and what is called the
"applications barrier to entry", and then I have to talk
about the violation.
This won't take very long, and then the conduct
remedies all the problems and the structural problems,
ultimately some problems.
Here is the story on the underlying economics.
How long have I got? I will speak slower.
First place, this is the way things stood in the
business in the late 1990s and to some extent still
stand, I think.
Applications written for one operating system
generally don't run on others. It is expensive to port
them. You have to start all over to port them to
another operating system.
Secondly, software application writing has large
economies of scale. The costs are all up front, big
costs. They are the costs of writing the program,
debugging the program, writing the manuals that go with
it. Putting out extra copies of the program costs
essentially zero.
As a result, application writers prefer to write
for operating systems which have many users so they can
spread the fixed costs over a large number of customers.
On the other hand, not surprisingly, computer
users prefer operating systems that have a large number of applications.

As a result, an operating system that becomes relatively popular for whatever reason attracts more applications. These attract additional users, which in turn attract even more -- well, this is badly written. It should say which in turn attract even more applications, which in turn attract even more users and so on.

Eventually that operating system attains monopoly power as other operating systems find it difficult or expensive to attract application writers. This is the so-called applications barrier to entry.

Microsoft was the beneficiary of this, starting at least with Windows 95 and continuing onward. And if Microsoft had simply been content with this relatively natural phenomenon, there would not have been an antitrust case and there certainly wouldn't have been a successful antitrust case.

But Microsoft was not content with this. It sought to destroy or contain two innovations, Netscape's browser and Sun Microsystem's Java, that threatened to weaken or remove the applications barrier to entry.

I'm not going to discuss exactly how those would have worked, but I will -- that's relatively available.
elsewhere.

There is -- I can't resist it -- government Exhibit 39. By the way, you mustn't think that I retain in my memory after whatever it is, eight years, what is in every single exhibit in the case. This happens to be my favorite.

Government Exhibit 39 is an e-mail that says you should care about the browser even more than does Bill Gates, because if we lose the browser, we lose basically everything, and goes on about the operating systems will turn into a commodity and so on.

Microsoft basically was found to have violated the antitrust laws by its actions in those two dimensions.

This was a great victory for the government. But the events leading to the remedy, in my opinion, eventually turned that victory into another fiasco.

What remedies were suggested and what were the problems with them? Well, with perhaps one exception which wasn't exactly considered seriously by the government, I believe, every suggested remedy had important defects in terms of the objectives that I listed above.

I begin with the conduct remedies.

There is the one in the ultimate settlement.
This is a remedy -- basically it is a conduct remedy that matched the violation. It did that and might deter similar conduct.

It didn't restore competition, and it may have left Microsoft secure in having destroyed two really important threats.

Well, there is an issue here. That would satisfy and did satisfy Tunney Act proceeding. But this wasn't an ordinary a Tunney Act proceeding.

This wasn't a proceeding before liability. This was a proceeding after liability had been decided, appealed, affirmed, certiorari had been denied, and the case came back again with a remand on remedy.

By the way, I didn't have much to do with the remedies which is why I'm criticizing them. I was retained briefly by the Antitrust Division after the remand on remedy, but there was no serious work involved in that.

The remedy that eventually emerged might have been appropriate for a pretrial consent decree, but it wasn't appropriate after liability was finally decided. It gave up the fruits of victory.

It is entirely possible -- one doesn't know -- that if you think about it, Microsoft may have succeeded in destroying the threats to the applications barrier to
entry at the golden moment in which they were there.
And trying to put the toothpaste back in the tube
afterwards doesn't work.

Another remedy that was a conduct remedy
suggested was allowing other operating systems to use
the application programming interface of Windows; that
is, give the other makers of other operating systems
enough information so that programs written for Windows
would run on their operating system. They could design
their operating systems that way.

Well, that would certainly have been effective
if it had succeeded. It would, however, have
required -- it might have gone too far, in fact.

It would have required prolonged and complicated
judicial oversight. Anybody who has ever been involved
in writing a complicated software program -- and believe
me, I know at the moment from bitter experience and the
programs I'm involved with are nothing like as
complicated as operating systems -- knows that even with
the best will in the world, if you try to make the
program available to other programmers or teach them how
to do things with it, it is very hard.

And there wouldn't have been the best will in
the world, and there would have been for a very long
time continued wrangling over whose fault it was that
this wasn't succeeding. And that would have required continued judicial oversight.

Now I come to structural remedies. The first is the one one might most naturally think of. It was called the Baby Bills for reasons that should be apparent.

It was one in which there would have been three successor companies made out of Microsoft. Each one of them would have had the right to Windows.

There were a number of objections to this, some of them valid, some of them not quite so impressive.

The first one was; Would successor companies have kept their versions of Windows compatible with the installed base of programs? There was a lot of talk about that.

I think the answer was of course they would, because they would have had a big incentive to attract the people with the installed base of program.

The second one sounds funny but isn't, the question of who would get Bill Gates, who may not have been an asset in the trial, believe me, but he was certainly an asset to the company and would still be. And you can't divide him up, so to speak.

The one that wasn't typically mentioned but I think ought to be bothersome is the following.
Eventually the phenomenon that I talked about in the underlying economics would take over again, and one or the other of these companies would get ahead, the snowball effect would take over, the application remedy would occur and the thing would be restored.

Of course, each of these companies would be owned by the original Microsoft shareholders, so that in some sense anyway the monopoly profits it would have earned later would accrue back to the owners of the violator.

The remedy proposed by the Antitrust Division was to break up Microsoft into two successor companies, one with the operating systems and the other with the applications, particularly Microsoft Office, in the belief or the hope that the applications company would have a big incentive to encourage competition and operating systems.

Maybe that would have worked. It is somewhat roundabout, and it is not obvious that if it worked, it would have been self-enforcing.

Not obvious that it would have worked, and I don't find it particularly attractive. It never got, so to speak, much past the starting block.

The remedy that I think is attractive, although also has problems, is the one proposed by Herbert
Hovenkamp, but so far as I know, not apparently
seriously discussed in the higher reaches of the Justice
Department.

This was the following. Pick a number, N. You
have to study what the number N should be. Then require
Microsoft to auction off N licenses to Windows together
with the requisite know-how. Do nothing further.

This is simple. And it improves competition.

No breakup is required. If the ultimate monopoly gains
do not necessarily occur, the ultimate gains don't
necessarily principally accrue to the original Microsoft
shareholders, which is attractive, as opposed to the
Baby Bill remedy.

This seems to me to be a model of remedy design,
despite its possible flaws. And I wish it had been more
seriously discussed.

But Microsoft, like other cases, is a case in
which it was not obvious that there is any really,
really good remedy.

I happen to hate the one that eventually arose
in the settlement, but other people made that.

Thank you.

(Applause.)

MR. ELIASBERG: Thank you, Frank.

Dietrich Kleemann is head of the task force on
ex post assessment of merger decisions, Directorate General for Competition, European Commission.

Dietrich, welcome.

Can we just check with the panelists, double-check to be sure the Blackberries are off. Thank you.

MR. KLEEMANN: Frankly spoken, at first I think I'm not the best place to speak to you here today in this hearing because of our more than 16 years since the beginning of your merger work, I was a member of the merger task force and today a proud member and followed the European Commission.

However, I think that there are quite significant similarities between remedies under merger regulation and remedies that would be called abuse cases under Article 82 of what you would call attempt to monopolize.

But let me just take a short look at our experience in the remedies.

Since we started, we have had more than 3000 final decisions in European merger control, but out of them, only 19 prohibitions and maybe 28 restores in the second phase.

That is what you would call a second request, more or less, which is normally like a prohibition.
decision.

On the other hand, we had 140 clearance decisions with remedies in the first place and 79 decisions with remedies in phase two. And frequently these decisions were not only related to the remedy but to the whole package.

So I think one can say that around 8 percent of all our cases we intervened by way of remedies, and the question is now can the antitrust practice use a benefit from this rich experience in merger control.

I said there are similarities. However, there are also differences between the remedies in merger control and antitrust.

First of all, from a more formal point of view, our remedies are based on commitments proposed by the parties.

The remedies in abuse cases are imposed by the authority on the parties. However, I would say this is a more formal difference because of costs.

In a merger case the Commission would always negotiate remedies with the merging parties and give guidance and indicate what would be necessary to clear a case at the end for the parties to have any incentive to follow this guidance in order to avoid the prohibition decision.
I think more important is the difference between behavioral and structural remedies.

As my colleague, Per Hellstrom, certainly outlined this morning, for cases under violation 1 of 2003, behavioral remedies are the rule and structural remedies are only the exception.

I think we will come back to this point later in the discussion certainly.

By contrast, in merger control, because it deals with structural competition problems, not just behavior of a party, the most adequate remedies are normally structural ones. That meets the classical divestiture.

Although I must admit the borderline between structural remedies and behavioral remedies is not always clear. It is only clear if I limit the structural remedy. There are many other instances where you could say it has behavioral elements but also structural elements.

However, having said this, in appropriate cases, we accept also typical behavioral remedies. This is the case that divestiture, for instance, is not feasible or would not be meaningful. However, to prohibit blankly the case would not be proportionate.

And there we have two groups in particular. To one are those I would call the access remedies. I will
go through this later on. The other group which also
plays a significant role are changes to long-term
exclusive contracts.

However, as I said, we have structural remedies.
Here you see an overview from our so-called remedy
studies carried out on 96 cases between '96 and 2000.
And you see around 60 percent of remedies were
divestitures. The others were sometimes cutting links
between competitors by exiting a joint venture was even
17 percent.

Long-term exclusive licenses which are sometimes
replacing classical divestitures because they were
partially related to what they call -- they have limited
competition.

You can't divest forever a brand because there
would then -- there would be more companies in different
countries.

So we intend to exercise and that, I must say,
wasn't always very successful. Not surprisingly, the
most successful remedy was to find in the right place
the transfer of a stand-alone business, where you didn't
have to make a package, a remedy to cut off all
services. It was a clear-cut business which was sold.

I emphasize the importance of access remedies in
merger.
They are maybe related to the access to infrastructure, for instance, to a network, platforms, the telecommunications sector and so on, to technology, which implies the licensing of intellectual property sometimes and access to what I would call essential inputs.

This talks about, for instance, in the media sector, the content, TV content and so on or, for instance, in the electricity sector, we had the case where we organized auctions to open up the market to give excess electricity in a situation where we had a merger structure.

The main purpose was always either to avoid foreclosure effect, maybe resulting from vertical links, where we had to get control of our essential upstream facilities, such as a decoder base, for instance, and so on.

And the second purpose which went way off with the first one together was to lower barriers to entry so as to outbalance the loss of competition but open up the market to new competitors.

A crucial issue, however, with these kind of remedies, much more than was with structural remedies, is the way how you implement it.

First of all, sometimes nearly part of the
problem is how to determine from the outset the terms of
access, price to be paid, for instance, the general
conditions.

It has taken one to lead a very strong and
mandatory, which is very often not feasible for the
Commission itself. You wouldn't set up otherwise a task
force for 10 years for an individual case.

So we need there to rely on trustees, sometimes
in a very official way on regulators, which help us to
monitor these remedies.

And the last one is the best one, a kind of
safeguard by the market when you impose a rapid
evaluation procedure, a fast resolution period.

And just not to run out of time, I will give you
at the end maybe a practical example which was the case,
Newscorp Telepiu, a case of pay TV in Italy where one of
two TV players controlled by Newscorp acquired Telepiu,
the by far leading pay TV player in Italy.

The case led virtually to a monopoly. On the
other hand, we were confronted with a scenario where
although this was not a failing company case, there was
quite a high likelihood that the second player would
accept the market over time, and that would mean we
would have had a monopoly in any event.

So on balance, it was better for the consumer
and better for the market to have some kind of a regulator place a number of far reaching commitments which were all designed to facilitate new entry into this pay TV market so to have at least a chance that in the future in the evolving market there won't be this problem.

We see typically a set of remedies which are here combined but are used separately. The first was limiting exclusivity for TV rights so to make them available for newcomers.

There we had a commitment getting the output rights for early termination for existing, limiting on, the other hand, distribution of future output use or football rights to two, prospectively three years, and limiting the exclusivity to the DTHI, their viewers, so as to enable user companies pay for the other TV spot.

It was such as the upcoming ADSL such that the DVD or such as the cable network, which are not very much involved in Italy, get a chance to get premier content on their transmission means.

The second one will also enable them further to have immediately the necessary anchor channels you need for a successful pay TV.

So Telepiu had to grant access to third parties to its premier content, the premium sport channels and...
the premium Hollywood TV channels.

Of course, this raised the question how to calculate the price. We did that at a fixed rate and so-called retail market basis.

That means looking at the retail price of Telepiu and deducting the costs of that on the basis of a wholesaler. It means the costs added on some other factors like benchmarking were similar to situations in other countries.

As a counterpart, they had to grant access to third parties to their technical platform, the condition, the related services, which would enable a new entrant to access the old channels now on DTH, because without access to the similar decoder base of Telepiu, this would not have been possible.

There was a classic element that said if you had to divest this DTT business, the two channels, in this evolving market, in particular in Italy, all this was subject to a detailed dispute resolution arrangement, and here in particular the most sensitive parts were taken over by the Italian media and telecom regulator, the so-called Ajicom, which was committed to apply his own word in dispute settlements to this specific case, and in fact did it very successfully.

I think two years ago in the decision they
reduced the price for the wholesale offer for premium content by around 40 percent.

Having said this, this is a typical example, but also you have a very limited number of cases where you have this complex set of remedies which we thought were the appropriate solution in this specific situation.

You may notice that many of the features in this case or general features of merger committees could also play a major role in antitrust abuse cases.

But on balance, I would say antitrust can benefit from our experience in merger control, certainly as the implementation is concerned, all the technical stuff with trustees and so on.

But I think also in certain instances in terms of the substantive solution.

Thanks.

(Applause.)

MR. ELIASBERG: Thank you, Dietrich.

Our last speaker before the break is Andrew Joskow.

Andrew is senior vice president and director of NERA's Washington, D.C. office.

Dr. Joskow is a former deputy assistant attorney general for economics at the Antitrust Division and also a senior staff economist on the President's Council of
Economic Advisors and a member of the joint FTC/DOJ task force on efficiencies that drafted the efficiency sections of the 1992 horizontal guidelines.

Andy, welcome.

DR. JOSKOW: Thanks for inviting me.

It is very nice to see some old Department of Justice colleagues here. Thanks for coming.

When I was listening to Professor Fisher talk about the IBM case, it became clear to me that these cases just infect people's beings over time.

The expert that Professor Fisher was talking about was a professor at the school where I went to undergraduate college. And as an alumnus -- I will keep you guessing -- as an alumnus, I met him a number of years later, and it was clear to me that he never recovered.

So in that vein, what I want to talk about today is this issue of structure versus conduct.

What I want to do is take it from the point of view of merger remedies, which is a somewhat settled area, and try to talk a little bit about the principles that make us say structure, yes in mergers. Behavioral, no. But in Section 2, maybe less yes, structural, maybe more yes, conduct.

And as I said, it is quite well developed and
the Antitrust Division has a merger policy guide, and it kind of lays out things quite simply.

But when we start talking about Section 2, we just see a whole host of issues where there are lots of possibilities, but each possibility seems to create problems.

We talk about divestiture or breakup, all kinds of organizational design problems. If you make a mistake, you can't go back.

Exclusive dealing contracts, you can prohibit them, but there are lots of ways or often ways to recreate those contracts in other ways.

You can prohibit the tie in a tying case, but you risk the loss of certain integration efficiencies in certain cases.

Predatory pricing, I don't know what to do in that case. I will talk about that a little bit later. You have all kinds of various cease and desist orders, some of which could be beneficial, but at the same time you risk them being anticompetitive or outside the violation being discussed.

So mergers, there is a single goal. The remedy isn't trying to make competition better than it was before the merger, just trying to restore competition.

The structure seems to strongly prefer a way to
do that, a structural remedy, usually through divesting
assets or an existing business, and all that with the
hope of preserving any efficiencies inherently in the
merger.

    Quoting from the guideline, "restoring
competition is the only appropriate goal with respect to
crafting a merger."

    It is interesting that these guidelines are
written almost in the negative in the sense they talk
about why conduct remedies would be bad, less why
structure would be good.

    Why are conduct remedies bad in a merger case?
    Well, there is the direct cost of just monitoring a
conduct remedy through the life of a consent decree.
That should be "cost," not "coast."

    Indirect costs of evading the spirit of a
decree. For example, you could say you have to have a
price cap, but there are lots of ways of undermining a
particular price cap, and, of course, that doesn't
necessarily get to all -- prices don't necessarily get
to all the aspects you want to preserve in a competitive
market.

    If you constrain pro-competitive behavior, for
example, prohibiting price discrimination could
eliminate the possibility for efficient pricing in some
cases and just generally constrain the ability of the
merger, of a firm to flex its muscles in the market.

    It seems clear that structure is the way to go.
And mergers are about changing structure, and what you
want to get out of competition is lower prices, improved
quality, more innovation.

    And the way to get that is to maintain rivalry
within the market, and that means separating assets.

    If you went the other way, as I said, price
protection as an example, that really undermines the
multiple -- it doesn't preserve the multiple dimensions
of competition that we were talking about.

    This is the benefit of the Hart-Scott-Rodino
Act. It allows assets to be divested before they are
scrambled so you don't have to deal with this problem of
where do we put Bill Gates and these assets. Everything
is already separate.

    Now, there is a preference in these situations
to divest an existing business entity.

    That is something that Dietrich mentioned in one
of his examples. And that begins to get to the issue
of, well, what is it we are trying to do, once you have
found a violation in a merger, what is the but-for world
that you are looking for?

    Are you trying to get the Herfindahl back to
1800 if you went from 1800 to now? Well, not necessarily because once you get to the remedy phase, you are really looking to make sure you created an entity that will allow competition to be restored.

That may mean taking more than just bringing the merger back to 1800. We need to have sufficient assets in order to make sure the firm has the incentive to compete.

In a sense, there has been a market test in a merger case because the business is already designed. You have a sense of what assets are necessary in order to compete in the premerger world.

Even so, after all that, being kind of the general way to go, the FTC studied these things back in 1999, and they found kind of a mixed bag in the success of structural remedy.

So even in a merger case, you really need to be careful. One of the things that actually came out of that study was the increased preference for an ongoing business that already existed as a form of public remedy.

So what about in the Section 2 case? The conduct arises from the existence of monopoly power. So the thought would be, well, you want to change the firm's structure so that it doesn't have the ability or
incentive to restrain competition in the future.

    But what does that mean? You want the remedy to be tied to the violation, as Professor Fisher said.
    
    But how far do you want to go? This is something maybe we can talk about in discussion.
    
    What is the but-for market structure? If Microsoft had an 80 percent market share and whatever it did violating Section 2 brought it to a 90 percent market share, does that mean we just want to bring it back to 80 percent or do we say that's not enough, it will just happen again and you want the Baby Bills?
    
    Exactly where do we want to go?
    
    I think the difficulty in going very far is because the structural remedy is very difficult because firms just aren't divided up this way.
    
    In the case of a horizontal divestiture, it is not necessarily neatly divided in that way.
    
    What are the necessary assets, what are the necessary intellectual property, what are the necessary employees to create a going concern and have these separated entities?
    
    It seems that the risk of failure in a situation is quite great, that you just don't create the right firm. The market essentially unravels and goes back to the way it was.
And I think this is why we really don't see this very much, this type of remedy, the horizontal divestiture.

We have to go back to 1911 for the Standard Oil case and the American Tobacco case to see that. It was rejected later in the United Shoe case. And I think the horizontal, "let's turn Microsoft into three," was fairly quickly rejected early on.

What about vertical divestitures? Does that work?

There you would think that the lines within a firm may be clearer. You have the input part of the firm, the output part of the firm. You can see how changing the vertical relationship between two companies might change the incentives for foreclosure.

So this is what happened in AT&T. We had a form of a vertical divestiture. But even there, when we had structural relief, we had it seemed like limitless ongoing needs to monitor the lines of business the Bell operating companies were in.

There were connecting issues simply because there had to be an ongoing relationship between the two companies, not just two companies, but the long distance companies and the operating companies.

In Microsoft, again, maybe it would have been
easier to split along operating system lines and application system lines.

But I sort of agree that even if there weren't huge loss of efficiencies, it is not clear to me that this indirect type of divestiture would have led to the ultimate entry of a competing operating system company. It seemed highly theoretical.

Again, it could have -- because of the network effects, it could have easily unraveled and gotten the market right back to where it was.

There is just no practical experience really in having a world of competing operating systems. It seems like quite a leap to think "well, we can just do it."

So in thinking about structure, it seems that in mergers, the benefits are pretty high to having some type of structural or divestiture remedy, whereas, the costs are pretty low. They often can be accomplished without forgoing efficiencies.

When you have to forgo a lot of efficiencies, the case for divestiture might be weaker, but in general I think it is pretty strong.

In Section 2 cases, on the other hand, it seems like the costs are pretty high. You don't really have much experience in competition in the particular market, and it is not clear that the competitive process would
necessarily be enhanced if the market just reverted back
to monopoly.

It would be difficult to determine how far to go
with structure if your goal is really just to try to
apportion how much of the monopoly was gained as a
result of the anticompetitive conduct.

The efficiency losses could be pretty
substantial.

Still, most likely you will require ongoing
monitoring anyway, particularly in the vertical case and
possibly even in the horizontal case.

So what about behavioral remedies in Section 2?
Well, like any behavioral remedy, there is ongoing
monitoring.

Evasion clearly can be a problem. But it seems
to me that in certain cases, exclusive dealing, tying,
bundled discounts, they can be prohibited fairly broadly
within consent decrees.

And they do get at this issue of, well, what is
the incremental effect of the anticompetitive conduct.
Because it focuses on the effect on facilitating entry,
and even if there is some loss of efficiency to the
dominant firm, it seems like that loss in many cases is
worthwhile in order to in a sense help rivals and
improve and facilitate entry.
Dentsply is a particular example of a pretty simple remedy, not attempting to break up Dentsply. That leaves us with attempted monopolization, which seems to me to fall outside of both of these cases, structural versus conduct.

Is there an irremediable violation? That question has been asked. This one has bothered me for a long time.

It seems that whenever anyone thinks of prohibiting lower end prices, that seems anticompetitive, expanding output, that seems anticompetitive, limiting the magnitude of price cuts, that seems also anticompetitive.

Breaking up the airline doesn't seem to be the way to go if you think about the American Airlines case because there are strong network effects. There aren't many hub airports with two hub carriers.

So, again, that seems really not the way to go. Maybe fines are a remedy, although in the American Airlines case, you really didn't have recoupment.

I'm not sure if this would be a disgorgement or some kind of fine for deterrence.

Is guess that leaves open the question if you don't have a remedy, is there a case.

The agencies have the obligation to enforce the
antitrust laws, but they certainly have an interest in
deterring what they think to be anticompetitive
predatory pricing.

But it seems to me that this may be a situation
where there is no clear structural or conduct remedy
that one could put forward in any kind of very
broad-based fix, such as thou shalt not violate Section
2, or something like that.

It just seems like it doesn't really get at the
specific conduct and it is just adding a criminal
contempt portion to one's obligations under the Sherman
Act.

So just in summary, it seems that in mergers,
the structural remedies and the basis for those remedies
seem pretty clear.

In Section 2 cases, I think the case is weaker.
That's not to say never, but I think that the historical
experience has been limited, which would probably limit
one's desire to go in that direction.

So I think in the case of Section 2, I think it
is more likely desirable to focus on some form of
conduct remedy.

Thank you.

(Applause.)

MR. ELIASBERG: Thank you, Andy.
Why don't we take a 10-minute break and come back for the last two speakers. Thank you.

(Recess.)

MR. ELIASBERG: Welcome back.

Our first speaker will be John Thorne, who is senior vice president and deputy general counsel at Verizon, where he works on antitrust trade regulation, merger review and strategic initiatives. He is coauthor of several academic treatises, including "Federal Communication Law and Federal Broadband Law."

John, welcome.

MR. THORNE: Thank you very much. I don't have any slides. So you can relax your eyes a little bit.

The first thing I want to say is I did read in preparation for this session Richard Epstein's new book on consent decrees, and I cannot praise it enough. It is a wonderful concise summary of an awful lot of history, and I found it very useful in preparation here.

I recommend it to the Commission. I wanted to offer my own gift to the people studying this topic, partly because this is a book that was written in 1992. It has been revised and it is way out of date. You can't find it anyplace.

But it has a full history of the AT&T breakup.
When we rewrote the treatise, even though this is longer, there is hardly anything in here about Judge Green anymore.

Dan, I want to give you those as a present.

MR. ELIASBERG: Thank you, John. We greatly appreciate it. But Richard's book was only 144 pages.

MR. THORNE: I'm serious. You may actually find those are useful as references. Put it in the library.

MR. ELIASBERG: Thank you very much.

MR. THORNE: My experience and the reason I'm the token business person on this panel is I worked on the AT&T breakup remedy from 1983 to 1996.

I also worked on several antitrust consent decrees along the way, for example, most recently the Verizon-MCI merger decree, which is still pending before Judge Emmett Sullivan in the D.C. Court.

I wrote some books about the experience. There is an awful lot to say about the AT&T breakup decree, and I'm attempting to tell you interesting stories about it.

The first story I will tell is it was actually the third of three government cases that resulted in consent decrees against the AT&T company.

In fact, the second one, the one that resulted
in a consent decree the year I was born, 1956, it is interesting. If we have time, maybe if we have questions, I want to come back to it.

I know a current question relating to my friend Qualcomm or Microsoft or others is should we take all of their intellectual property and let other people have it at either free or at discounted nondiscriminatory terms.

That question was answered and implemented in a consent decree in 1956 against the Bell system.

There is some interesting history there. The one decree I was going to focus on for a couple minutes is this 1982 AT&T breakup decree implemented in 1984.

It was agreed to by the parties and approved in 1982. A lot of litigation preceded that. I could talk about that. I won't.

Starting in 1982, that was not -- when you think of settlement, consent decree, that's the end of the case, done. The lawyers go home, the parties now start complying.

That was actually the beginning of more litigation than had preceded the decree. There were 7,782 briefs filed with Judge Green, plus an additional large number.

I didn't actually count them. I can get the numbers if you guys want the number, a large number of
briefs, hundreds if not thousands of briefs filed with the Department of Justice, which had its own shadow docket.

In fact, every week, if you went to the DOJ offices, they had an updated table of what was pending at DOJ, the motions docket on the purple table.

Judge Green issued countless orders. There was a criminal trial and a conviction of NYNEX for criminally violating the decree's provisions. It was overturned in the D.C. Circuit.

Besides that appeal, there were 15 other consolidated groups of appeals in the D.C. Circuit. There were about a half a dozen certiorari issues.

The '82 decree itself was summarily affirmed in the Supreme Court, over a dissent by three justices. It was written by then Justice Rehnquist, who wasn't the chief at that point.

He was concerned that Judge Green was embarking on a nonjudicial function. He did not want to inadvertently create a judicial branch, the common carrier bureau of the FCC, and he was worried that might ensue. He recognized that was a bad thing.

If you go over to the D.C. court's new annex where they built that sort of circular structure right next to the old Barrett Prettyman Courthouse building,
you will see a series of exhibits.

I contributed one of the exhibits. It is about Judge Green and the legacy he left, because in fact he did create something like the FCC's common carrier bureau.

He and the 1982 decree were put out of business with the 1996 act of Congress called the Telecommunications Act of 1996.

Now, there is an interesting debate. I don't -- I will just give you my view of it quickly, an interesting debate on whether the AT&T decree did any substantive good at all in terms of competition.

People who say it did a lot of good claim that the decree brought down long distance prices by 70 percent and gave us colored telephones.

Both of those statements are not true. Long distance prices did come down very substantially, but more than 100 percent of the price decrease is attributable to a different phenomenon that was going on over at the FCC, a reduction of access charges. Major costs for long distance prices came down almost as much as the access prices came.

The colored telephones, the plethora of new devices, that is something the FCC accomplished before. They came up with a plug and play rule. You have a plug
in the side of your wall, and you start mixing and
matching telephones.

That was not a benefit of the decree. There was
a different effect from the breakup, and that is that
the breakup disbursed the power of a single firm.

A very powerful single firm was broken up into
eight or 10 or 11 entities. It was AT&T, which was the
long distance manufacturing arm initially, seven
regional local telephone companies.

They had a jointly owned separate services
company, Bellcorp, and there was Cincinnati Bell and
Southern New England Telephone, which had been partially
owned by AT&T.

The diversity of behaviors of the different
firms you would have expected. If you sliced up one
thing and sent the pieces off on their own, the
diversity was largely stifled by line of business
restrictions that attached to seven of the firms.

Judge Green had said in approving the decree
that we the public would not tolerate a king over the
means of our political processes or economic processes,
in his view much better to have local warlords.

That's what we got. Some of the efficiencies of
a larger firm were sacrificed. Many of those
efficiencies have been recreated since, re achieved since
the divestiture happened.

But the topic here is not what is the applicable structure of telecommunications markets. The question is what did we learn about remedies, both structural and conduct remedies.

The AT&T decree involved both kinds of remedies.

Both the structural and the conduct aspects of the AT&T decree derived from a belief held by Bill Baxter -- maybe there's some in the room who worked with him -- the belief that vertical integration by a regulated monopoly firm is a bad thing.

So the solution was in part structural, take apart the vertically integrated pieces, separate things that are competitive from the regulated monopoly businesses.

And there was a regulatory component. Let's forbid the reintegration of the new vertical, things that will sprout, let's quarantine the regulated monopoly.

The structural remedy was very painful, it was expensive. It changed an awful lot of things.

It made an opportunity for me personally. So I'm grateful for that. And it is a credit to Judge Green that he was able to pull it off. He was an expert administrator and he got it done.
The conduct regulation is what created the 8,000 briefs filed afterward.

The basic idea was almost everything was prohibited and it required Judge Green repeatedly and the Justice Department even more so to keep answering these two kinds of questions, what is allowed, what is okay and, on the other hand, can we have an exception, please.

So, for example, I can't do this justice -- the books do it justice -- but March 22, 1985, Judge Green issued this order from his court, "Pacific Bell" -- that was one of the telecoms in California, now it is AT&T -- "is permitted to provide telephone service to Mrs. Mary Campbell who lives in the Plymouth exchange in the Stockton, California LATA via the Placerville central office in the Sacramento, California LATA."

September 10, 1991, June Green ordered, "Wisconsin Bell may provide interLATA cross-boundary foreign exchange service to Ms. Vicky Mallard and Mr. Ricky Schultz."

There is a category of behaviors or services called information services. Green ruled it was okay to provide time and weather announcements as a public service and separately a kind of wireless service that had been prevalent, paging services -- nobody in this
room uses paging services anymore, but people used to
carry pagers to be summoned.

Green said it was okay for the local telephone
companies to provide paging services, provide time,
provide paging, but not okay to provide the time over a
paging signal to your wristwatch. He ruled that was not
okay.

The telephone companies were forbidden from
manufacturing customer telephone equipment or network
telephone equipment.

And the question came up what if it breaks, can
you fix it, is repair a permitted or prohibited
manufacturing function.

Judge Green answered the detailed question "what
does it mean to manufacture." And Bell Atlantic -- I
was there at the time -- filed a brief which we called a
certificate of compliance, which was our way of trying
to get an answer to a further question.

We were going to tell them how we are going to
comply with his definition of manufacture. We said we
understood we could continue providing advice, not
repair, but advice to manufacturers to help fix product
defects.

Judge Green issued an order saying I refuse, the
court refused to clarify the point.
Instead, he declared some of what we were proposing may be forbidden and it would be subject to enforcement proceedings.

That's 1988. Judge Green directed us to seek guidance from the Department of Justice. The Justice Department refused to provide guidance because it has neither the obligation nor the resources to do so.

But later the Justice Department told a different Bell company it could engage in some repair functions.

We took that as a good sign. DOJ asked Judge Green to confirm the DOJ interpretation because, quote, "the decree's manufacturing prohibition is ambiguous with respect to repairs."

Judge Green refused to consider the DOJ request.

Three years later, it was my son's birthday, I remember this. It was July 10. All of the telephone networks in suburban Maryland and Northern Virginia and Washington, D.C. went out.

There was a problem with signaling machinery that was generating a bunch of garbage messages. All the networks went down.

Bell Atlantic thought they had people who knew how to fix this. They flew to Texas to Alcatel here are our ideas for how to solve the problem.
I called up whoever was on duty at DOJ that day. I think it was Connie Robinson. She may have been on holiday or something. Don Russell had to take the call.

I said, "Don, we want to send people to try to fix the phone." I don't remember if I called or not; the phones weren't working.

I got a message through to DOJ, "we will try to help repair this, is that okay with you?" They said "well, we don't know."

They had an emergency motion in front of Judge Green, asked can we go help try to fix the telephone networks that had been out for several days.

Green agreed and immediately authorized it and wrote "repair and fixing and troubleshooting and so on are things that are normally done, that are appropriately done. I don't think can by any stretch of the imagination can they be regarded as either the manufacture or design of the equipment."

Wireless service is now a big business. There are now more wireless phones. Everybody has one, just in case you get summoned for something.

1983, that was not the case. 1983 AT&T is in the middle of the divestiture negotiations. We signed the decree in '82 implementing it and drawing these boundaries around what are the permitted calling areas.
They were drawn with respect to the land facilities, the 99.9 percent of what the local Bell companies had.

AT&T went to DOJ and said, wait a minute, these wireless phones won't fit neatly in the land boundaries, moving customers don't respect the geography the same way, the networks will have different scales.

And DOJ said, wait a minute, of course wireless is confined to the LATA boundaries, just like the land services are.

This was probably, in contract terms, a mistake of law, a mistake of fact. There had been no meeting of the minds on how to treat wireless.

We went to Judge Green, and Green ruled wireless would be confined. So for 13 years, every time we wanted to expand a wireless service area, we had to go back to Judge Green to get it preapproved.

The long distance prohibition, very easy in concept, a difference between local and long distance calls.

Left to answer were things like can you switch a long distance call. It is not carrying a long distance call but can the local switches switch a call, can they provide directory assistance or operator service, is it okay to put out a local pay phone that is capable of use
for long distance calls.

These were all big issues and briefed extensively.

Small number of lessons from this experience. One -- and you will hear this more from Richard, I expect, or certainly read it in his book -- is a lesson that humility is much to be preferred than exuberance, enthusiasm of ambitious remediers.

Richard's subtitle, "less is more," that is absolutely right.

When markets and technologies are changing, nobody, not even the very good staff of the Justice Department, is accurately able to predict how that will end up.

We have examples of what seemed like very reasonable predictions on which much was staked that all came to nothing.

I suggest as a very positive concrete idea the Antitrust Division manual on remedies, which goes through lots of boilerplate. It ought to be added something about considering the limits of your knowledge for predicting the future.

There is an obvious connection between the quality and the sureness, the certainty of your substance and how good the remedy is going to be.
Section 2 is a harder thing to figure out, whether you actually have a violation. It translates immediately into the difficulty of coming up with a good remedy.

Bill Baxter, God bless him, wanted to forbid all vertical integration by a regulated monopoly. It was premised in a kind of regulation that was going out of style then.

That remedy ignored the other technologies that were looming, wireless and Internet. It resulted in a freeze of things as they existed in 1982, so simple things like telephone service or complex things like whether there were vertical deficiencies or vertical problems.

In one important respect, the Bell decree was very, very bad. Probably the worst thing about it was it reached out and covered markets that had not been the subject of the litigation.

There was a category of activities that had been part of a bill in Congress that hadn't passed called information services.

The government, thinking it is a competitive business, just like long distance or equipment manufacturing, said let's prohibit any involvement with overly regulated monopolies in information services.
That had effects that ranged from tiny to significant.

On the tiny side, useful services like voice mail were delayed by my estimate about four years. It turns out that voice mail, if you don't answer the phone and someone takes a message, that's something a local telephone company can provide for you more efficiently than any external service provider.

Four years of delay getting that. More significant effects were wireless business which was not litigated or really meant to be covered by the decree. I think that was crippled compared to Europe.

We were delayed compared to Europe in deployment of wireless services as a result of the restrictions on wireless.

I personally think, not to go through this in detail, that our development of the Internet was delayed by about a decade by these restrictions.

We had the second string building the Internet instead of the people that had more of the core assets needed to do a good job of it.

It is important before I sign off here to compliment Judge Green, give him and the staff of DOJ the highest compliments that are possible.

Judge Green had -- I have anecdotes about Judge Green being a great administrator before he got the job...
and when he got the job.

But he could not keep up with the pace of regulation that this decree produced. That means it can't be done by anybody. I have statistics on that. But that's gilding the lily.

One last point, then. I think there is a strong connection from the certainty of your substance to how the remedy is going to work.

But there is an opposite effect as well. There is sort of a feedback from problems of remedy to substance.

You see this reflected in the recent Trinko decision, where Justice Scalia writes, "Effective remediation of violations of regulatory sharing requirements ordinarily require continuing supervision of a highly detailed degree. We think Professor Oleto got it right that no court should impose a duty to deal, a substantive requirement that it can't explain or adequately and reasonably supervise."

If a problem is irremediable by antitrust law, we shouldn't have that as a problem, or, in my terms, you shouldn't be setting yourself up to find violations you can't fix. It is better to cut the law off.

This comes up probably most vividly in the current debates over whether discounted bundles should
be Section 2 problems. Microsoft offers you a
discounted bundle of multiple products, should that be a
violation.

And if you can't fix that, then the answer
probably is it shouldn't be a violation. I will stop
there.

(Applause.)

MR. ELIASBERG: Thank you, John.

Richard Epstein is the James Parker Hall
distinguished service professor of law, faculty director
of curriculum and director, law and economics program,
University of Chicago Law School, where he has taught
since 1972.

He has also been the Peter and Kirstin Senior
Fellow at the Hoover Institution since 2000.

He served as editor of the Journal of Law and

Richard has written on a wide range of legal and
interdisciplinary subjects, including the recent book on
antitrust called "Consent Decrees and Practice" that
John just mentioned.

Richard, welcome.

MR. EPSTEIN: Thank you.

You see that John and I have very different
styles. And in fact, if I had talked to John before I
wrote the stuff on the AT&T decree, it would have been a much longer book because I would have had to go through all of these situations.

Let me see if I can talk a little bit about this, and I'm going to I think start with a point that John ended on, which is the relationship between your confidence in the substantive law and your ability to design remedies on the other.

Before I actually came back to look at antitrust laws in some detail, I had sort of forgotten there was a Section 2 and always thought the only thing a sensible antitrust law could do was to try to regulate horizontal behavior by controlling such cases as cartels and divisions of markets, and then as the more difficult task to figure out what should happen with respect to mergers.

The reason why the first task is relatively easy and the second task is more moderately difficult is in the first case, you are generally but not always confident that the efficiency gains are very small from horizontal collusive arrangements but the restrictive practices are large.

Then as you start going over to the merger areas, you are never quite sure what the relative magnitudes are going to be. So you have a lot of
problems to worry about.

Now, when you come to Section 2, after I figured out what this was all about, you realize that there the worm may have completely turned and that virtually every practice which is going to be attacked under Section 2 will be the kind of practice which will have some substantial efficiency gain.

So you will have to go into a question of whether or not its restrictive component is going to be large enough so as to justify losing that particular gain in question.

If your basic intuition is that the magnitudes are going to be roughly of equal proportion at best and you know that the administrative solutions are going to be far more difficult than in the other areas, there is a part of me -- it is not the part of me which I actually believe in 100 percent -- which says maybe we should call the whole thing off and the way in which we solve the problem of remedies under Section 2 is to get rid of liability under Section 2 of the Sherman Act so you don't have anything to worry about at all.

I have become reluctantly persuaded that there are a number of cases in which the strategies of foreclosure by contract and otherwise may have some modicum of success.
I guess I backed off that provision and I now believe an ideal operation of either the FTC or the FCC or the DOJ might be able to bring some positive good to this area, even though I think to some extent it is a long shot.

In doing this, I should say that I have worked both with Microsoft, although not on the antitrust case here but on other matters, and certainly I worked with John Thorne with respect to the various things having to do with the implementation of the 1996 Act.

And indeed, I think I gave him the single worst advice he ever received in the history of mankind when I told him that the statute was actually drafted, this '96 Act, in an intelligent fashion.

The lesson I learned from that is it wasn't the statute is so difficult. It is one of the things you worry about is the constant drift between a statute which seems to have a game plan that is moderately coherent and administrative implementation and interpretation of it, which can easily run awry.

So the whole question of drift within administrative agencies is to me one of the single biggest problems you have with legislative reform.

Where you start off, the various questions, and how it is that you manage to keep the relative balance
on the remedial side direct to the administrative issue
to the judicial enforcement is to me a very major
problem.

In dealing with this, what I did -- and this was
an inspired thing that Microsoft asked me to do -- is
write a history of some of the consent decrees that
actually emerged from the various sorts of litigation
under Section 2.

The first case was a Section 1 case which I
talked about, which had to do with the meatpackers case.

Though it was a Section 1 case, all the mistakes
came in Section 2 guise. What I mean by that is you had
there a situation in which there was evident collusion
among the packers with respect to the distribution of
their goods, but the remedies decided to impose on each
of the companies restrictions on what they could do
unilaterally in those markets in which they had no
monopoly to begin with.

Essentially what happened when the thing was
subject to litigation is Justice Cardozo was a good
common lawyer and said "you make a bed of nails by
contract with the Justice Department, you expect to be
stung and burned every time you try to roll over on this
bed of nails, and I'm not going to let you out of it."

So you have this weird situation where the
government continues, in many cases for 30 or 40 years, to insist upon the enforcement of provisions that are in the contract without making any independent evaluation of why it is that they have the slightest bit of good they can confer on anybody.

The first lesson one learns about consent decrees is that shorter is better, 40 years is too long, open-ended is simply inexcusable. Once you get over three or five years out, it is almost sure you are going to be making a mistake.

What you want to do is to recognize that Shakespeare was right when he said that brevity is the soul of wit. You don't want these things to run on.

The explanation was given the movement of companies and technologies are almost always unanticipated.

The packers case and Swift and Company actually had its final litigation in the 1960s and had to do with an acquisition of the Greyhound Bus Company.

So you can see that the continuity across these cases was in fact something which simply could not be sustained.

As you start to move on -- I will not talk about all the cases. But let me talk about one which I think is perhaps the poster child of inept management with
respect to unilateral practices, although, again, it is not quite a unilateral practice case, and that has to do with the United Shoe Machinery case.

This is a transaction which began with the merger of United Shoe in 1899. To the extent it is a merger case, of course it is not a pure unilateral practices case.

The logic behind this merger was in fact one of immense economic advantage in that shoe making was an extremely complicated process and that you had separate companies, each of whom owned patents which controlled separate stages in the processes.

And if you tried to negotiate piecemeal transactions amongst them, what you did is you ran into a classic version of the double, triple, quadruple marginalization problem.

When you all the companies, essentially what you did is you created a patent pool which allowed somebody to smoothly price the entire process from soup to nuts.

What was interesting is that the antitrust sophistication circa 1910 was probably greater than the antitrust sophistication circa 1960 on this matter, and the Supreme Court let this thing go, understanding exactly what was happening, even though it would not have used language like "double marginalization" or any
of the terms we use today.

    What happened is after the merger took place, the government just would not let go. This was part of Woodrow Wilson's exuberant progressivement.

    What you then do is you try to attack various kinds of contractual restrictions that are imposed upon the various lessees of United Shoe Machinery's equipment, most of which had some degree of exclusivity associated with them.

    To take a simple kind of provision, if it turns you want to use one of our particular machines, you have to use all of our particular machines, and you have to use them for certain periods of length.

    All these clauses, at least if you take the view of the modern law, essentially engage in the sin known as foreclosure, which means by virtue of the fact that you now control something at one stage of the market, you will preclude competition from taking place at something either upstream or downstream from the thing that you control.

    The lesson I think one has to learn from this is extremely important, and it actually carries over I think very well to the Microsoft cases.

    What happens is the government managed after some great deliberation to win these cases, and all of
these offending clauses in the first round of litigation were removed.

So now the question is what's going to happen in the marketplace. And the answer in this particular case was absolutely nothing.

It turned out that there may have been a 2 percent or a 5 percent difference, but that there were huge efficiency advantages associated with being able to get all of your equipment from a single supplier such that if any part of the stream went down, you would know whom to turn to for repair, and that vertical integration was prized by customers, who did not love the thought of trying to mix and match 27 different pieces from 14 different companies, knowing that the interconnections would never be quite right and having each company say that the other fellow had done it wrong.

If it is a 15 percent monopoly premium you are paying for piece of mind, it is money well spent in the eyes of many people.

What happens is that the clauses themselves turned out to have very little value with respect to the way in which United Shoe continued to operate its business.

There is a very important lesson to be learned
from this, which is if you keep the clauses in place and
start to fight over them, all of a sudden somebody will
actually believe you know something about the way in
which your business runs, and by making such a big deal
of it as a defendant, all you do is you create the
impression that they have greater causal efficacy than
in fact they do in the marketplace.

So I have a piece of free advice to all clients
of mine or nonclients of mine, which is that any time
somebody wants to attack one of your contractual
provisions on the grounds that it creates market power,
exclusion foreclosure, whatever it is, you just
surrender, pull the damn thing out and let business go
on exactly the same way as it did before.

Here I think I disagree a little bit with Frank
Fisher with respect to the question about how potent
were the various exclusionary provisions Microsoft that
had with respect to the kind of things that go on his
desktop and so forth.

I thought Microsoft made a horrific set of
mistakes in terms of the way in which it handled the
early stages of the litigation, by hanging on to these
clauses as if everything depended upon them.

When in fact once they were removed, it turned
out that the modifications that were made with respect
to Microsoft Explorer probably had much more to do with
the decline of Netscape than any kind of contractual
provisions that you have.

So what you say in effect is this. If you keep
the contractual injunction in place in these sorts of
situations, everybody is now going to impute high
restrictive, low efficiency value with respect to the
particular practice in question, and you won't have a
laboratory experiment which will allow you to sort these
things out.

If my intuitions about end-to-end services are
correct -- and I think those intuitions are right as
much in the United Shoe case as they are in the
Microsoft case and vice versa -- what you want to do is
pull the plug on the restriction and then simply rely on
the efficiency with respect to the products that you
want.

As it turns out, I think in this world, monopoly
is not necessarily an ideal situation, but it is
certainly one which is not necessarily less preferable
than other situations in which you have coordination
problems to replace it.

To use the very fancy language some people use
today, when you start having to put together equipment
from multiple players, it is kind of like a self-imposed
anticommons problem. You have this guy here, that guy there, everybody is getting in everybody else's way.

    And it may well be that empirically the commons problem, taking everything from a single supplier, even if it is able to expand its control by virtue of the network it has, is a better solution for you than anything else.

    So now, having said all this, how do we start to think about these questions of design?

    I will not take too much more time because I think the discussion is important. But I want to say a couple things about John Thorne's remarks.

    It is not that I disagree with him, but strangely enough, I don't think that John actually talked about the single worst features associated with the decree which were the original structural choices that were made with respect to.

    If you go back, the FCC was not the world's most nimble agency in the '60s and '70. But by the mid-1970s, after the MCI case and so forth, it did begin to tinker with the prospect that the way in which you try to handle the common carrier system as a common carrier issue was to mandate various kinds of interconnections between the central system and anybody else who wanted to get on.
What happened is if you had kind of a trunk line, other people could hook on and start to add their service. And the theory would be that the function of the legal system would be to make sure that any rival competitor could reach any customer on the AT&T system, and if you could start on the AT&T system, you could reach anybody from a rival competitor.

Of course, if you had two rival competitors in different places, then you would have to be able to go from rival A through AT&T, if need be, back to rival B.

So that what happens is that the way in which you expanded competition under these things is to mandate intersection.

The question is how do you do it. If I understand the situation correctly, what you simply do is ensure compatibility, just as you would in the Microsoft case, and you don't worry very much about pricing issues.

The brute fact of the matter is early on if you were tiny in the AT&T system as B, you are getting a subsidy by virtue of the interconnection.

What is nice about this subsidy is that it shrinks with time, because as you become larger now, it turns out access to your customers by the main carrier is more valuable than it was to begin with, and after a
while you get yourself into a nice equilibrium.

In my view, if they had done that first in the 1982 decree and if they had basically blown up all of the unbundled network pricing elements associated with the 1996 Act, you would have been able to see a fairly coherent expansion of what has happened.

The thing that I wanted to stress about this is when you are talking about these network industries, of which I think both the computing and I think the telecommunications industries qualify -- but United Shoe does not -- what you want to do in effect is to make sure that interconnections can be obtained at the lowest possible cost and to do nothing else thereafter.

It is not that you are going to get yourself into a perfect solution.

But I think if there is anything that I learned from the AT&T decree is this constant, mindless, numbing rhetoric about how it is when you force people to sell things to other people at prices that administrators will now determine, incorrectly as a matter of force and effect, that we have somehow removed ourselves closer to a competitive system.

The truth about the matter is John I think was right when he alluded to the fact that the rate cap system was a pretty sensible way in which to run that
business, because what rate caps essentially did is you didn't try to use cost-plus pricing, but you took into account the fact that generally speaking, there are always going to be greater efficiencies in telecom.

So if you just lower in real terms the rates by 2 or 3 percent a year and do nothing else, they will get a little monopoly profits, you will get a lot of administrative savings, and there will be a huge amount of administration underneath the kind of caps that take place.

So that kind of mix on remedies is I think exactly what you are after.

Here is the way in which I start to think about Section 2 in a word, is that I think basically damages are not particularly important one way or another when you are bringing these government suits, which is why they have not been brought.

I think the invalidation of certain kinds of contractual provisions is certainly appropriate and relatively easy to implement, and my advice to both firms is that you basically pull them out of the agreement so that you don't have to fight that battle under adverse terms.

And most of the structural remedies are a case of too much at too high a cost. And in general, I can
think of no cases that succeeded on this.

I would guess that it was in the trillions of
dollars over the last 25 years that we could attribute
to bad remedial design in telecommunications, a really
very big and substantial number.

United Shoe was a small little case. But
remember, when they finally got frustrated at the
inability to make the contractual restrictions change
the behaviors in markets, they broke up the firm, and it
sort of went belly up.

I think one has to remember that. I'm a lawyer.

I don't start with existence theorems about how the
government can improve things by picking the optimal
choice.

I'm a guy who believes that you start with a
breach and realize it is substantial, and unless you can
find a clean kill, the best thing to do is to stay your
hand.

Thank you.

(Appplause.)

MR. ELIASBERG: Thank you, Richard.

Before we get into the moderated discussion, why
don't we go down the panel here and see if any of the
speakers would like to take a moment or two to comment
on what the other speakers have said.
So with the request that it just be a minute or two, Franklin, let me start with you. Any thoughts?

DR. FISHER: Yes. I can't resist it.

MR. ELIASBERG: Try to speak into the microphone, please, for the court reporter.

DR. FISHER: Sure.

I can't resist it. I think the dictum that every practice under Section 2 has large efficiency gains is wrong.

I think it is correct -- that every practice under Section 2 is likely to be defended as having large efficiency gains is not the same thing.

MR. ELIASBERG: Okay.

Dietrich, anything?

MR. KLEEMANN: Maybe to John's remark about the remedies, actual remedies.

I remember you said maybe in a Section 2 cases, behavior, yes. However, it is not too clear.

I want to add something which is I would say any intervention of the state in terms of structural remedies is an intervention into the right of property.

If you see a merger case, there the parties, they change themselves, the market such so you can say if they do this in an anticompetitive way, it might not so much be covered by their right of property to do
this, and you can't intervene against such operation.

By contrast, in that case, nobody changes the market structure in the same sense. Simply they use a given market structure to achieve some anticompetitive goals.

And for me, it is not so obvious that you can intervene in such a situation easily into the property rights of a party which is always some kind of action as if you would an expropriation.

On the other hand, you can say commercial property is certainly not to be used in an absolutely free way.

It is subject to some fundamental applications. And these fundamental applications certainly include the respect of the basic rules for market economy.

And if you heard these basic rules in a very clear, blatant way, it might be justified to intervene into the property rights. But I repeat it probably is in legal terms as opposed to merger control a last resort.

Therefore, the hurdle is much higher.

MR. ELIASBERG: Thank you.

Andy, any thoughts?

DR. JOSKOW: Just one thing. I think there is some consensus about what we are saying with regard to
structure versus conduct.

What I hear what I think is happening is what we are saying about remedies is actually tying it back to what one might say about what is a real good liability case.

If we are saying that, well, you can probably make something out of cases where we can limit or remove certain contractual provisions, at least to foreclosure and reductions of competition, in some cases I think we are in the types of legitimate cases we may be talking about.

I think that is important too.

MR. ELIASBERG: Thank you.

John, any thoughts?

MR. THORNE: Can I ask a question instead of making a comment?

MR. ELIASBERG: Well, you may ask, yes.

MR. THORNE: This is a question for Dietrich. In your remarks, you talked about access remedies as being one of the primary ways you resolve mergers.

Then the first issue you listed under the topic of access grants is setting the terms for the access grants, price and other terms.

I wondered, you have a large body of mergers
where you have insisted on access grants. How do you
deal with the effect of that requirement on investment,
investment either by the firm where the requirement is
placed, which might want to invest less in stuff it has
to give away on regulated terms or incentives of the
demanders for access who might not build as much of
their own stuff if they can borrow it for free from
others?

MR. KLEEMANN: First of all, I think I have to
say access remedies are the most important behavior
remedies, certainly not in general the most important,
which are still clear-cut remedies such as divestiture.

However, there are situations, in particular in
industries where you have essential facilities and where
there is the high risk of foreclosure combining
essential facilities vertically with players where you
have to find a way out.

It is certainly true an eternal argument of all
incumbents in the possession of platforms or networks
that if you interfere with their strategies, you stifle
any kind of new investment.

Take only the current debate in Germany or in
Europe about the demands of the German Telecom to get
for their super quick DSL network, fiber network, an
exception from the generally regulated rule. Otherwise,
as I said, they would not invest.

In my view, this can, however, not be an excuse
to do something, to simply accept that one guy is going
to foreclose a market at the outset with all the severe
consequences for the future development.

Having said this, if you go to impose such an
access remedy, you have, however, to be fair.

I just mentioned in my short statement our
solution in the Telepiu case, where we started with the
certain bases, a price which is feasible, including a
certain margin for them and also some benchmarking with
other similar situations, other markets.

I think this is a realistic approach, and I
don't think that Telepiu's investment over the last
three or five years has been harmed by this.

Having said this, of course you should do all
this in a careful way and not going to impose easily
without carefully examination of this kind of
commitment.

But to confuse and generally to renounce this
kind of commitment, even in blunt cases of market
foreclosure, I would say would be a general kind of
resignation in this area.

And I saw in some statements if you are caught,
if it is communicated as it is, and I found this kind of
resignation, in particular, given the importance of these kind of markets that have these remedies is not acceptable.

MR. ELIASBERG: Richard, do you have a comment?

MR. EPSTEIN: I have a couple comments. One, I think with respect to the whole problem about Section 2, I think there are some of these practices which are inefficient. I think they have small efficiency gains and small inefficiencies.

One of the things that is most striking about many of these contractual restrictions is they did a little foreclosure and they did a little good. And getting rid of the provisions didn't change things very much.

One of the things you always worry about when people knock down contractual terms is if you leave freedom of price, so whatever you couldn't get in the contract term you may well get in the price term.

So it is not at all clear you made some major sort of social advancement with respect to these things.

With respect to what was just said about the European approach on the remedy side, it is probably something more that David can speak to than I.

But the striking differences between the EU remedies with respect to the Microsoft and the American
remedies are very dramatic. What happens is there are
two dangers here, and I think he has only alluded to
one.

The first danger is, of course, that monopoly
foreclosure will take place.

The other danger is while subsidization through
expropriation of the transactions, where you no price
term associated with them for the divestiture of
intellectual property or patents of some kind or another
or prices that are well below the cost and, in fact, one
of the problems about John's industry which I think
shows this is if you go back to the history of telereg
pricing, what those guys managed to dream up in the FCC
was they gave you a very small rate and said they would
be depreciating it on you.

Since they gave you a small rate base, they gave
you a very low rate of return. The standard history of
regulated industries on pricing is if you give people a
large rate base, taking very little risk and they get a
smaller rate of return, and if give them a higher rate,
what they did under telereg was to give them a small
base and a low rate, which had really very after adverse
consequences.

The Supreme Court, they would not attack this as
either a statutory construction matter nor in the end as

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a takings and regulatory kind of takings issue.

MR. ELIASBERG: Thank you, Richard.

Why don't we go to the moderated discussion.

And with this we will not only have our panelists, but David Heiner has graciously agreed to also participate.

Let's take a look first at slide 4.

And I will go ahead and just read this into the record.

"Finding the right remedy for antitrust violations is never easy, and we have never been particularly good at it."

And that comes from Herbert Hovenkamp's "The Antitrust Enterprise."

Would I be correct in assuming that there is no disagreement with that among any of the panelists?

MR. EPSTEIN: Actually, there is some. One of the reasons why there is some disagreement is I think Herbert got the remedies wrong.

He was really very harsh on the Microsoft remedy. I think, for example, he wildly overrated the technical efficiency of the OS 2 system and created the error that I think constantly happens, which is to assume whenever there is a restricted practice which we have now struck down, it was that practice rather than the inherent merits of the product which led to the
loss.

I thought of all the Microsoft exhibits I read, the one that was really devastating on that point was the one prepared by Kevin Murphy which went through the question of why it was all the other systems had failed, given very powerful and detailed explanations based on structure architecture and design.

Yes, I think we aren't particularly good at it.

It is not the case that the author of the quote is necessarily immune from the criticism.

MR. HEINER: I could pick up on that a little bit and specifically comment on the remedy that Professor Fisher pointed out that Professor Hovenkamp proposed in the Microsoft case.

First off, I would agree with the quote and I would agree with the thrust of Professor Fisher's presentation that remedies are certainly hard in Section 2 cases.

I have personally found that to be the case with respect to the Microsoft issues that I have been dealing with for many years.

My sense of the situation is that to some extent it may be that remedies are so hard in Section 2 cases because quite often the underlying structure is in fact efficient and perhaps even the conduct is efficient as
to which there has been liability determined.

But when you get to the remedy phase, you maybe begin to have second thoughts about some of that.

That is sorted of pointed up by Professor Fisher's application about the applications barrier to entry in the Microsoft case.

The applications barrier to entry is a reflection of natural economic forces, as the professor said.

It reflects the value of compatibility to consumers. They want to get a PC that is the same as other PCs, it runs the same applications.

Many of the remedies that were proposed through the years went to try to attack the applications barrier to entry and thereby break compatibility.

People turned away from those remedies quite properly because they didn't want to give up that benefit. I think that was very much the case with the remedy number 5 that we saw from Professor Hovenkamp.

The idea there was that Microsoft should be obliged to conduct an auction of the Windows source code, the crown jewels of the company essentially, to end licensees who would then go out and offer Windows in competition with one another.

What would have happened in that case is that
the value of Windows and the price would have essentially tended toward zero.

Any time you have two or three or more firms with the exact same information good with a zero marginal cost, they will tend to compete the cost down to zero.

The effect would have been quite dramatic in terms of taking away the value of what is really one of the most valuable products of all time.

The three firms, to try to break out of that, would have sought to differentiate their products.

They would have competed with one another to add different features and thereby break compatibility. That would not have been maintained, and customers would have lost the benefit of that.

That I think is why the Division did not go down that path. But I do think it illustrates the broader point about many times the remedies may point up that the existing situation is efficient.

MR. ELIASBERG: Frank, did you want to make a comment on that?

DR. FISHER: Well, I don't agree with that.

MR. HEINER: I know.

DR. FISHER: I agree that the successor firms under that remedy would try to differentiate themselves
and try to improve their products in various ways.

All of them would have a great big incentive of remaining compatible with the existing stock of programs. I think it is unlikely they would try to differentiate themselves in ways that would break compatibility.

MR. EPSTEIN: I think the difficulty with that logic is the only way they could avoid breaking down compatibility is to meet with one another.

What you would have is a contract combination in restraint of trade. It would have to take place because the gains, as Frank says, from coordination are so great.

But it can only take place underneath some sort of government supervision to make sure that while those folks are sitting in the room to figure out compatible features they don't manage to figure themselves out on compatible prices.

In addition to that, as everybody is trying to develop products to make sure that they can make the compatibility, everybody has to slow down with respect to what they are doing to make sure the compatibilities will survive.

My own view about it is so long as you allow for some degree of competition on top of the operating
system that was designed under the Kollar-Kotelly
decree, that's all that you can expect.

I will say this, since he was my former student.
When Doug Ginsberg actually evaluated this particular
portion in the state case which Hovenkamp helped to
author, he did not give a Chevron deference kind of
answer which said we don't know what is going on there,
when are not smart enough to figure all this out, if she
thinking it is right, we are just going to let it fly.

He said well done. This was in fact very much
considered on the part of the Justice Department.
Frank's position lost. And frankly, well done.

DR. FISHER: Frank doesn't agree with that
either.

MR. EPSTEIN: I'm stunned to hear.

DR. FISHER: The compatibility I was talking
about -- we may be using the term a little bit
differently -- was remaining compatible so that any
program that ran on Windows at the time that this
occurred would continue to run on the operating systems
as they developed at the other company.

I was not referring to a situation in which they
had to remain compatible with each other other than
that.

MR. EPSTEIN: I did misunderstand you.
But having that understanding, it seems to me that software designers who were now going to have to be compatible with foreign-compatible systems are going to have incentives that are less than ideal.

This is a case in which the monopoly platform has an advantage and it is shown by virtue of the fact that you can design something for a market where you will get 10X as opposed to 2.5.

That's why it is that Macintosh, although it is finally moving up there, is always essentially first we do the Microsoft system and two years later you come out with it.

What is the difference in the number of programs for one system as opposed to the other?

MR. HEINER: It is large.

MR. EPSTEIN: 10, six, whatever it is.

That's one of the things you start to give up in this game. There are no free lunches here.

DR. FISHER: It is true, and I thought I said so, that it is probable that eventually anyway the natural effects will take over and one of these things will become very large again.

That's perfectly true. That's a defect. You can't prevent that.

MR. EPSTEIN: So the frictions aren't worth
running.

MR. HEINER: Let's turn to that different point, which is the natural tendency of the market to move on in high-tech industries.

It is kind of interesting to see now in 2007, is there a huge excitement when Microsoft comes out with Windows Vista, the latest version, are people running to get Vista to run Vista applications?

And the answer unfortunately for Microsoft seems to be not as much as we might like.

Where is the excitement today in terms of applications? It is all Internet-based services. So it is the YouTubes of the world and My Space and Friendster and Flicker and Yahoo and Google and all that. That runs across any browser on any operating system.

Here is another case where technology does move on, market forces tend to take care of themselves. I don't know what will come in 2010 and 2012.

Microsoft will be offering its own Internet-based services increasingly in the years to come.

But it does feel like already the discussion we had in the late '90s is moving on.

MR. ELIASBERG: With that in mind, looking back again at the statement by Hovenkamp and putting aside...
that people who live in glass houses should not throw
stones, Richard's point, I would ask particularly of
Frank and Richard, any Section 2 cases come to mind,
government Section 2 cases where the remedy was right,
where the agency got the remedy right?

MR. EPSTEIN: Microsoft.

MR. ELIASBERG: Frank?

DR. FISHER: None. I'm not suggesting it was an
easy task either.

MR. ELIASBERG: Not one case?

When you said no, you mean no to Microsoft or no
case at all?

DR. FISHER: I don't agree with it for
Microsoft, and I cannot think of any case in which it
has been really very well done.

That is partly because -- three reasons why.

One, I'm probably not familiar as I sit here with all
the cases. I think that is probably true.

Two, it is a very difficult problem.

Three, until fairly recently, my impression is
if you go back historically that the record of the
amount of thought put into this in Section 2 cases is
rather poor.

MR. ELIASBERG: Okay.

MR. THORNE: Let me amplify the number of
Section 2 cases that might have come out correctly.

The Seventh Circuit decision written by Judge Cudahee in MCI versus AT&T drew a distinction.

They articulated a broad essential facilities doctrine that probably does not exist in American law.

They drew a distinction between kinds of circuits that AT&T was voluntarily selling to others. When MCI came up to the windows and said "can I have some of those too, please," AT&T said "no."

That was a violation. So that piece of it was decided by the court as a violation. And the remedy was you must provide to MCI what you voluntarily sell to others on the same terms.

There was another piece where MCI came to the window and said I haven't built my long distance lines to San Francisco, will you give me big chunks of your long distance network, and Judge Cudahee said no, we are not going to give that to you. That's an asset. If you want to compete for it, you have to build yourself.

His decision and the remedy which is if you are voluntarily offering something, don't discriminate against rivals, that was a pretty simple one and I think correct.

MR. EPSTEIN: That fits with my program, which is nondiscrimination is another way of saying
interchange which is something you mandate.

It is kind of a common carrier remedy. The reason you do it through the antitrust situation as opposed to the FCC is since they voluntarily priced it so you didn't have to have a ratemaking hearing going on in order to deal with that issue.

So that you got the real advantages of essentially both halves.

MR. THORNE: If you are worried about investment deterents, when a firm voluntarily sets the terms, you don't worry about it and you say do for others what you do for others.

MR. EPSTEIN: To me that has always been the pattern and the great mistake in the 1996 act which was amplified by the administrative rules was the horrific pricing with respect to the unbundled network elements.

That was done through legislation and then through pricing at the administrative level.

The basic position I would take and it applies to the Microsoft remedy in Europe is transferring assets, no, facilitating interconnections, yes, where you would like to be.

MR. ELIASBERG: Andy?

DR. JOSKOW: I'm not sure zero is the right answer on the government's effectiveness.
I don't know effectiveness, but on what were appropriate remedies.

I mentioned the Dentsply case which was about false teeth. That was a Section 2 case. It seems to me certainly the exclusive dealing contracts were the place to look in that case because the jury is still out on what happened.

Visa and MasterCard, which is really a Section 1 case but like a Section 2 case, if there is a finding of liability, the rule about allowing banks to issue cards, presumably American Express cards, seemed to be where to look.

You can argue about whether those contracts were efficient, and the argument had been strong they should have won the case. Once there is liability, it seems like those remedies are the place to look.

That is consistent with what we have been saying in these kind of very stark contractual cases. If there is anyplace where there was a remedy, it would be in those cases.

MR. EPSTEIN: Visa is a client. What can I tell you?

I didn't work on this case. The Walmart case which talked about the illegal tie-in between the various debit and credit cards as opposed to the pin
debit, this is another illustration.

There is $3 billion paid out. They removed the restrictions, and eight people decided to abandon the thing, or a number like that. You can check with the Visa people.

The change in actual on-the-ground behavior by virtue of removal of the tie was nonexistent. Keeping this tie is yet another version of a suicide pact that many large corporations do. They overestimate the value of the restraint to their business.

If you are sitting there and you have a bunch of customers, a thousand coming in, even only 5 percent of them use whatever you think to be the elicit tying thing. You don't want to chase away 5 percent of your business.

Dennis Carlton gave his most sophisticated testimony and great class action stuff. In the end, it is like as Rick Blaine said, it is not worth a hill of beans in this crazy world.

DR. FISHER: Just one thing about that.

I am in fact the Jane Berkowitz Carlton and Dennis Carlton --

MR. EPSTEIN: Dennis is an old and dear friend.

DR. FISHER: He is an old and dear friend of mine too. He may in fact have given a great deal of
fine testimony, but it was only at the class action
side.

The guy who gave the testimony in the Walmart
suit generally was me.

MR. EPSTEIN: I stand corrected. I thought you
guys did a terrific job of lawyering.

It is interesting, this is another point which
we didn't talk too much about.

Essentially network industries tend to be
two-sided industries, and they don't have any unique
pricing equilibrium.

Trying to drive everybody down to marginal costs
gives you all the same problems that you had with the
marginal cost controversy and the bridge which Viccerey
talked about in the 1940s.

These are very hard things to work out. That
was just another case in which the tie-in arguments were
very eloquent but the actual change occurred after the
lawsuit was finished.

MR. ELIASBERG: Perhaps hold that thought.

Before we go on, did you have any questions,
Dan?

With that respect, why don't we have slide
number 8.

The slide reads "Conduct remedies are more
effective than structural remedies in Section 2 cases."

Dietrich, I will let you off the hook on this one because we understand from you and Per that indeed under your regulation, 2001 regulation, there is a presumption in favor of civil remedies.

So you sort of have it mandated to you. But I would like to start out with getting the reaction of the other panelists.

Yes or no, is it more accurate or not that conduct remedies are more effective than structural remedies in Section 2?

MR. EPSTEIN: It is an ambiguous question. Certainly they are if effective means does it make as great or a smaller change. It makes a much greater change to use a structural remedy than a conduct remedy.

But if effectiveness means do you get more social surplus from the remedy, which is more Draconian, I think, in most cases, the answer is not.

So what you want is a remedy which is less intrusive because it does modest harm and almost no bad, as opposed to one which is like to create harm because it is effected with the wrong sign attached to it.

MR. ELIASBERG: In your thinking, usually conduct remedies will do less harm?
MR. EPSTEIN: And a little bit of good. My basic schtick on that is usually the underlying business doesn't change that much.

That's not an argument for keeping it. In my book, I advocated unilateral surrender, which I said that rather than even get yourself into trouble and having all these learned economists, why would you want to invite trouble from Dennis? What you do is pull the damn thing out, and it turns out you keep 90 percent of your business.

MR. ELIASBERG: On that score, Frank, given the chair that you hold and also the positions that I understood you to be making in your presentation, what are your views on this, particularly with respect to what you said about Microsoft?

DR. FISHER: I agree with the first half of what Richard said. I'm not sure about the second half.

Conduct remedies are easier to get. They are easier -- they are not as likely to do serious harm. I agree with that.

They can be awfully difficult to supervise effectively.

The part I don't necessarily agree with is they basically have no effect.

I think structural -- there are not a whole lot
of cases with really big structural remedies, and I think rightly so.

MR. ELIASBERG: Anybody else?

MR. KLEEMANN: One problem in this respect.

If we are talking about behavioral remedies and structural remedies, it seems that there is a clear distinction between those in practice.

There are remedies which are just at the fall line. Just to give you an example, we had the case where we had a monopolist in France for energy who bought up a large German competitor and they would remove a potential competitor.

We had to look at the situation. The structural remedies, we cannot force EDF to sell four or five French nuclear power plants. Therefore, we had to see for a different way to open up the French market and to create the market.

As a rule of thumb, to have a market, you need an ability of one sort of the nature of customers.

And, therefore, we asked EDF to auction on a regular basis 6000 megawatt capacity in so-called virtual power plants.

At least for five years it is going on. This facilitated significantly the creation of the market in France in terms of protecting this.
You would see the first sign since we are able because we asked them to behave in a certain way, you would define as access to energy, gasoline comes through too.

But we couldn't change the sector of the market completely. I would be cautious to put too much emphasis on difference too.

MR. THORNE: I agree with Richard that the question is ambiguous and it depends on what kind of conduct you are prohibiting or requiring.

The dimension on which remedies get really bad is the time dimension. It is not like wine that gets better if you save it.

Conduct remedies you enforce over long periods of time. Structural remedies, you do them and then the market and the firms, they get on with life.

Bad things that are part of a structural remedy get cured in the market adjusting. Conduct remedies can skew things over a long period and have much more harmful effects.

MR. ELIASBERG: If you have a structural remedy, you would be saying it is important not to have something where there is a conduct remedy preventable, for example, like a line of business.

MR. THORNE: Bill Baxter had a very good idea
when he came to the Antitrust Division. There were all
these -- he had a program of let's root them out and
vacate them.

They way outlived their lifetime. Anything that
takes very long to happen is probably a bad idea.

DR. JOSKOW: This reads like an empirical
question. The problem is under the second clause,
structural remedies, we really don't have many examples
to look at.

I do agree with the instinct that people have
with regard to substantial costs and through structural
remedies.

The conduct remedies, on the other hand, you
can't think of conduct remedies that don't require the
kind of line of business intervention. You can think of
conduct remedies that are structural in the sense that
you are in or out.

So in that sense, in those cases they could be
effective.

MR. EPSTEIN: I would draw a distinction on the
conduct remedies. I think things like the early decrees
from United Shoe. It says these foreclosure clauses
will never be used again in a lease, and they lasted for
30, 50 years.

I think when the conduct remedies start to say
you have to provide a mix of services at certain kinds of prices --

MR. THORNE: Let's license all patents at reasonable royalties.

MR. EPSTEIN: Which is in many of these decrees, which is a suicide pact.

There is a pretty good empirical reason to believe if you take compulsory licenses, ideally if you had to only issue compulsory licenses, you couldn't practice the patent, you would want the income stream to equal exactly on net what you would get if you practiced the patent before, and that would leave you indifferent.

The theory would be if the government paid a lump sum, you get the marginal cost at the back end.

I'm not aware of any instance associated with any compulsory licensing scheme where that condition has been met. Almost invariably what happens is the licenses come very cheap in many industries or in certain industries like the copyright stuff, the radio cases, things where they have different reasons, many of the licenses, the increases are so high they drive half the stations out of business.

This is a situation where in some industries you are systematically low and others you are systematically high. So you don't want to be systematically in that
MR. DUCORE: To what extent do people think that the efficacy of a conduct remedy would vary or would depend on the kind of violation, for example, an exclusive dealing violation versus a predation violation?

MR. EPSTEIN: In exclusive dealing, you could prohibit the foreclosure clauses. The ASCAP decree, the first time out of the box they said you cannot license one of these things where you have to take it for the whole time of the station as opposed to the amount of time that's being dedicated to music.

Over the next 70 years of that decree, nobody ever argued about that provision.

I think with the exclusionary, you have some fairly good fixes.

But in predation, I wouldn't know what it is. Do not sell it below cost in an industry where cost declines at 22 percent a year this year and 42 percent next year?

It is so incoherent to me it seems to me what you have done in the name of a conduct remedy what you have done is you have a ratemaking procedure done through some sort of special master.

MR. DUCORE: We have broken up the slide. The
next slide would be structural remedy.

I think we can talk about whichever slide is up there. My next question is along the lines of similar to what kind of conduct violation.

Does it make a difference in your views, in your thinking about a structural versus a conduct remedy whether the violation itself is a monopoly acquisition violation versus a monopoly maintenance violation?

MR. EPSTEIN: By conduct? I know what it means. You are not talking about mergers in the acquisition side?

MR. DUCORE: No. But if the conduct led to the monopoly that didn't exist previously, does that make more of a case for a structural remedy?

MR. EPSTEIN: I can't think of any reason. Can you? I think most of us -- we are willing to surrender on both cases.

DR. JOSKOW: You still have to think about in the business sense what the market would have looked like.

I don't think we have any idea. That puts aside the practical issues we discussed with regard to structural remedy.

MR. DUCORE: Does it make a difference whether in the trial, assuming there has been a trial, that
there is no evidence -- that the evidence shows that there was no necessarily efficiency basis for the monopoly, the monopoly was caused by the conduct? Does that reduce your concern about fixing a structure?

MR. EPSTEIN: I think somebody, Frank or somebody mentioned reversability is an extremely important consideration in these things.

In fast-moving technological industries, you can't reverse the 2006 in 2007. Given the pace in which these cases run, you are typically talking years' delay.

I think the effort to try and get yourself back to the old situation and sort of engineer forward from that to where you would have been in the absence of is just hopeless.

DR. FISHER: I agree with that. I don't want you to think I'm totally negative.

MR. EPSTEIN: We agree on 85 percent.

DR. FISHER: Yes, but it is not the same 85 percent.

MR. EPSTEIN: It has to be.

DR. JOSKOW: The same 60 percent.

DR. FISHER: Anyhow, I agree with all of that.

The pure way the question was posed supposes that the monopoly is solely the fruit of conduct that has no efficiency consequences. And presumably you
could take that to mean that if you prohibited the
close, the monopoly would cease to exist.

I think that's very rare. But if that is true,
that would be the case with prohibiting conduct.

The question I think may presuppose that
reversability is possible.

MR. ELIASBERG: I want to be sure I understand.

For example, in United Shoe, to take a case that
is a little more neutral to everyone, the situation may
well be that the contracts involved added to monopoly
power, added to a larger market share. But absent it,
there would still be, if you will, a monopoly.

So is everyone saying the same thing, that is to
say, that in a situation like that, a structural remedy
would be inappropriate?

MR. EPSTEIN: It would create the vertical
difficulties that the merger managed to overcome.

Remember that was a situation where you had guys
lining patents up. The last thing you want to do is
destroy the efficiencies.

So you got rid of the clauses, and it turned out
it made relatively little difference. And then the
government had another breakup, and that made a lot of
difference and didn't help anybody.

By that time, foreign competition was real in
the United States. And now the major American competitor is no longer.

I have to go in two minutes to catch a plane.

Can I make one little kind of observation?

On the intellectual property stuff --

MR. ELIASBERG: Which was the next slide.

MR. EPSTEIN: It is property. There is some Supreme Court or Court of Claims case that somehow the takings clause doesn't protect issued patents out there which I think is most dangerous stuff.

The systematic attack on intellectual property is often misguided. If it is not, you reform the intellectual property law, change fair use. The last thing you want to do is either bolster or weaken a patent in the context of an antitrust dispute.

That's why I don't like the EU approach with respect to Microsoft. In its original version, it said all trade secrets shall go into the public domain.

It is not only in Europe. It is worldwide. The last decree was awfully generous in allowing the competitors to take the stuff from Microsoft and use it to build rival networks.

I know you have gone ape over the case. It can't be because you think it is the same as the American decree.
MR. HEINER: I touched on this a little bit this morning before you got here.

MR. EPSTEIN: You did go ape.

MR. HEINER: The proposition -- I think you might as well put up the next slide on IP. The proposition was --

MR. ELIASBERG: Slide 9.

MR. HEINER: -- should IP be treated the same as other kinds of property.

What we are concerned about now under the European approach is will IP be treated as property at all.

That's the fundamental question, because this is a case where we have a few dozen patents at issue and a decision or a statement of objections recently by the Commission that seems to suggest, although it is hard to tell, that maybe those patents aren't worth much at all and that the trade secrets are really not to be valued at all and the same for the copyright, for that matter.

So for us, the first line of defense is just should IP be treated as property, period.

MR. EPSTEIN: Thank you all. I have to run to catch a plane.

MR. ELIASBERG: Let me sort of ask a follow-up question that repeats a bit what David and Richard were
going into.

In a Section 2 case, when should compulsory licensing be considered? No takers on this?

DR. FISHER: I will give it a try. I'm doing this on my feet. I'm sitting down.

One could imagine a case in which a patent has been grossly misused and misused in such a way as to preserve a monopoly.

One way to get around that is to say, okay, let's stop the misuse. Another way to get around it is possibly the only way to reverse that might be to have compulsory licensing.

That's the best I can do with it. I'm not really certain.

MR. ELIASBERG: I am going to put you on the spot, Andy, in your position with NERA.

Sometimes you have to quickly make an assessment and a statement. What are your views on that?

DR. JOSKOW: I agree with Frank.

MR. THORNE: There was an actual experiment run in the 1956 Bell decree which required at that point the premier American research facility, Bell Labs, to license on reasonable terms all its patents and, secondarily, not to practice them itself except to the extent they were used in providing accounting for a
telephone service.

So the AT&T company was not allowed to sell computers to people even though they invented them, lasers or transistors or any of the gear they naturally would have done if they used their own patents.

They could license them. I don't know if that was good or bad. It was a very large experiment run on a very large generator of IP.

MR. ELIASBERG: Let me ask you, John, if you know, in that decree, was the compulsory licensing royalty-free or not?

MR. THORNE: To a small number of favored providers, they were royalty free. For most people who would want to use the patents, they were on reasonable terms.

I think in the almost 30 years that that decree was in effect, I think there were maybe two disputes brought to a magistrate in the District Court. Otherwise, they appear to have been without dispute and they were cheap and nondiscriminatory.

MR. ELIASBERG: Sort of a follow-up question for anybody on the panel. And Dietrich, I'm also looking toward you on this one.

When is it appropriate to have a royalty-free license in a Section 2 case? Not just compulsory but
royalty-free.

MR. KLEEMANN: If I can take a position, it is with respect to the merger practice. It is not an issue there so much.

The issue for us is a merger, for instance, where one company takes over assets to which essential patents relate, and essential patents are those which cannot be circumvented by producing a certain product.

That means if a competitor gets these kind of essential patents, there is a high risk that he could exclude all his competitors as a consequence, and there either we would have a case at all and there are cases where we had this danger and the merger was abandoned afterwards. Or we would at least ask in large instances on the fee to spend basis, which is by the way in many industries the standard.

In particular, if you have the standard-setting bodies, they are all working on the lease rent terms. That would be the type of case for us.

MR. ELIASBERG: It is usually not -- Frank, Andy and John, anyone care to address this?

DR. FISHER: The only merit I can see in a royalty-free licensing as opposed to compulsory licensing at reasonable royalties is it prevents argument about what the reasonable royalties are.
Apart from that, it seems to me that there isn't any case for that. That seems to be simply an expropriation of intellectual property.

I'm unable to think of a situation in which that's the only way to remedy the problem.

MR. ELIASBERG: Okay. Andy or John?

DR. JOSKOW: It does seem like one can always think about that in a competitive market, but for the monopoly, there was some competitive prices, competitive royalty that one can imagine is out there so that it is hard to imagine that one would want to therefore impose zero royalties.

Even in the merger cases, when there is licensing required, what is required is paid up licenses with no ongoing royalties often. But it has to do with more of the ongoing interaction between the two firms.

But even in cases like that, you want some kind of compensation for the product.

MR. THORNE: As a believer in the principle that you learn something about whether there is a violation from whether there's a remedy, I can't imagine a violation that requires that as a remedy.

MR. DUCORE: Again, a consensus that a zero royalty is never appropriate.

MR. THORNE: The consensus is nobody can think...
of a violation where that would be the right remedy.

MR. DUCORE: Is it sort of a philosophical concern that there must be value to the intellectual property or is it a concern that we haven't come across a fact pattern that demonstrates that but for the illegal conduct, the intellectual property holder would have had nothing of value to hold out to customers?

DR. FISHER: Had that been the case, it was pretty farfetched. What is happening is there would have been competing patents.

But the defendant has managed somehow to make competing patents unprofitable or to absorb or it bought up all the competing patents as we established the monopoly and, therefore, has been able to charge a high price for the patents.

The monopoly offense, the effect is to acquire the patent monopoly.

Arguably you could say it would be worth very little if they had done that. I can't think of an actual case.

DR. JOSKOW: The patents competed in the market, right?

DR. FISHER: They didn't because every time somebody filed for a patent, these guys came along and bought it up.
I don't know of any case like that.

MR. DUCORE: What about a situation where, assuming the facts exist to show this, you could show that but for the violation, technology would have gone along in a direction that didn't infringe patents?

In other words, you have some kind of failure to disclose and lock in and things of that nature, so that by the time -- it was a fact issue clearly.

But the thrust of the violation is that the technology practitioners would not have locked themselves into this technology and then had liability to the patentholders.

DR. FISHER: I'm not going to say anymore.

DR. JOSKOW: We think we know what case you are talking about.

MR. ELIASBERG: There are no comments on that one. Actually, I would -- can we have slide 6, please. This is a quote from Microsoft 3. "Relief should be tailored to fit the wrong creating the occasion for the remedy."

I think all of you have talked or made allusions to the different types of, different kinds of Section 2 violations.

I just wanted to go back to this. Vis-a-vis conduct versus structure, this whole
notion of conduct versus structure, not to repeat what
people have said about the virtue of conduct in general
or the virtue of structure in general or all that, but
thinking of the frequent types or classifications of
Section 2 conduct, predatory pricing, predatory business
bidding, refusal to deal, bundled discounts, are there
any where it seems cry out for a conduct decree or any
that seems to on the other hand cry out for an approach
where structural relief would be more appropriate?

DR. FISHER: Can I comment on the quote?

MR. ELIASBERG: Yes.

DR. FISHER: That is one of the appropriate
objectives of if you want a remedy to satisfy. I would
be happier if it had said relief should be tailored to
fit the consequences of the wrong creating the occasion
for the remedy.

I don't think it is enough -- this is putting
the genie back in the bottle again. I don't think it is
enough to say we are going to tailor something that if
1947 ever comes around again, this wouldn't happen.

If you could figure it out, what you want to do
is restore competition. That doesn't necessarily go
with this.

MR. ELIASBERG: Anything else?

DR. JOSKOW: What is the wrong? Is it the
monopoly or is it the conduct?

It seems like it is hard to determine how much of a monopoly is because of the behavior. So it seems that this is really talking about the incremental effects of the behavior. If that's what it is talking about.

DR. FISHER: I think it assumes Judge Ginsburg -- I don't think that's what he meant. I agree that's what he ought to have meant.

MR. THORNE: One difference you haven't focused on is the difference between relief that is ordered after an adjudication of a violation versus a consent decree, which is a little bit like a plea bargain, where the defendant is facing breaking up into eight or nine or 10 or 12 pieces.

Instead, I will accept the other conditions that you want and then the sentence reads as relief should not go beyond addressing the violations that were being proved in the case that got started prior to the settlement as opposed to you have a willing defendant and you have thought of a lot of other good things the defendant could do to improve the markets and you would like to impose a lot of those things too and the defendant seems willing to agree to them.

MR. KLEEMANN: Maybe I would subscribe totally
to this merger control. Everything is about to avoid the risk of anticompetitive interpretation and not about the consequence.

    It is a risk situation. I wonder whether this could be typical in abuse cases where you are not creating the structural change but with a certain behavior which has consequences.

    MR. ELIASBERG: Well, I think we have run out of time. And I would request that the audience join me in a round of applause thanking our panel.

    (Applause.)

    (Whereupon, at 4:30 p.m., the hearing was concluded.)
CERTIFICATION OF REPORTER

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: APRIL 2, 2007

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BRENDA SMONSKEY