



Model Courts of Justice 2022

U.S. District Court for the District of Columbia Study Guide

WRITTEN BY Umut Erol
ASSISTED BY YAĞMUR ÇİÇEK & EREN YALÇIN
SUPERVISED BY ZEYNEP GÜLER



LETTER OF THE SECRETARY-GENERAL

Most Esteemed Participants,

On behalf of our academic and organization teams, once again I would like to welcome you to the Model Courts of Justice Family as The Secretary-General of the Model Courts of Justice Conference 2022! My name is Zeynep Güler, and I am a junior at Ankara University, Faculty of Law.

For the first time in Model Courts of Justice history, we will hold a competition court this year. I am confident that we made a difficult but satisfactory decision. Our case, Microsoft vs. United States of America, is a landmark case, and for competition enthusiasts, this will be an excellent opportunity to hone their skills. In this case, it will be argued whether Microsoft violated or did not violate the Sherman Act's associated prohibitions concerning monopolization of operating systems and tying agreements with Original Equipment Manufacturers.

Mr Umut Erol wrote the District Court Study Guide with the help of our hardworking Academic Assistants Ms Yağmur Çiçek and Mr Eren Yalçın. As antitrust was a fresh practice in MCJ, I was cautious, but I trusted my team, and the results have been astounding. Mr Umut, with his never-ending questioning mentality, ensured that every tiny detail was working properly, while Ms Yağmur and Mr Eren finished their sections quickly. I applaud them for their tremendous efforts, devotion, and hard work, and I wish them well in the future.

Before attending our court sessions, I strongly advise all participants to read the Study Guide, the Handbook, the Rules of Procedure, and any other documents available on our website. If you have any queries about the conference or the committee, please do not hesitate to contact me at secretarygeneral@modelcj.org.

Sincerely,

Zeynep GÜLER

Secretary-General of Model Courts of Justice 2022



LETTER OF THE UNDER-SECRETARY GENERAL

Esteemed Participants,

My name is Umut Erol and I study at Université Jean Moulin Lyon 3, Faculty of Law as an exchange student. It is my pleasure to serve you as the Under-Secretary General responsible for the United States District Court in the eleventh edition of the Model Courts of Justice.

This year, the United States District Court will deliver its judgment concerning one of the landmark cases in antitrust law: United States of America v. Microsoft Corporation. The case has become a leading case for the courts of the United States of America to indicate the elements of monopoly and tying. The scope of case will be beyond monopoly and tying by including economic market, operating systems, browser wars, and predatory pricing.

I would like to state my sincere gratitude for both academic and organization teams of the Model Courts of Justice 2022. First of all, I would like to thank the Secretary-General, Ms. Zeynep GÜLER for giving me this wonderful opportunity and aiding me to overcome my obstacles through the process. Also, I would like to thank my highly qualified team-mates, the Under-Secretary Generals of the Model Courts of Justice 2022, Mr. Ahmet Semih AKTAŞ, Mr. İbrahim Selçuk YİĞİT, Ms. Hazal AKIN, and Mr. Burak POLAT for their contributions to the eleventh edition of the Model Courts of Justice. Additionally, I would like to indicate my gratitude for the organization team of the conference. Their professionalism has always fascinated me and I cannot even imagine a wonderful conference without their contributions. Finally, I would like to specially thank our talented Assistant-to-Secretary Generals, notably Ms. Yağmur ÇİÇEK and Mr. Eren YALÇIN since they always helped both academically and mentally throughout the process.

Please do not hesitate to contact me if you have any questions.

Umut EROL

Under-Secretary General responsible for the United States District Court



LETTER OF THE ASSISTANT-TO-THE SECRETARY-GENERAL

Dear Participants,

First of all, I would like to welcome you to the eleventh edition of our conference, Model Courts of Justice 22! My name is Yağmur Çiçek, and I am a junior at Ankara University, Faculty of Law. This year, it will be a pleasure to serve you as Assistant to the Secretary-General.

This year, the Model Courts of Justice will go back in time to simulate one of the notable cases in the U.S. District Court for the District of Columbia, which is named Microsoft Corporation v. United States of America. I am delighted to have been involved in the creation of the study guide for this case, which is one of the landmark cases in antitrust law and involves the monopolization of the Operating Systems and tying agreements with the Original Equipment Manufacturers.

I would like to offer my sincere thanks to the Under-Secretary General Mr. Umut Erol and my esteemed colleague, Assistant to the Secretary-General Mr. Eren Yalçın, with whom I have enjoyed working together on preparing this remarkable case. Furthermore, I would like to express my gratitude to our honorable Secretary-General Ms. Zeynep Güler for her endless support and my dearest friends from the academic team for their great efforts through this academic year. Lastly, I would like to thank Director-General Ms. Başak Göksu and our organization team led by her for greatly handling the organizational matters and making sure everything is running perfectly.

If you have any questions, please do not hesitate to contact me.

Yağmur ÇİÇEK

Assistant to the Secretary-General



LETTER OF THE ASSISTANT-TO-SECRETARY GENERAL

Esteemed Participants,

I am Eren Yalçın, a sophomore student studying in the Business Administration Department at TED University. I welcome you all to the Model Courts of Justice 2022. This year I am serving as an Academic Assistant to the Secretary-General.

My journey with the Model Courts of Justice began last year as an Academic Trainee in the World Trade Organization Committee. Although at the beginning it was a challenge for me to read legal documents as a business administration student, with the help of my fellow teammates, I had fruitful three days and I met with many great people in the conference.

As an Academic Assistant, I was responsible for writing the introduction parts of the study guides of World Trade Organization, International Criminal Tribunal for the Former Yugoslavia. Lastly, we wrote the introduction part of United States District Court for the District of Columbia with dear Academic-Assistant, Yağmur Çiçek. As an academic team, we have come a long way, and worked hard to provide you with an amazing three-day experience. I am sure you will enjoy reading the carefully written study guides.

First, I would like to convey my respects and thanks to my sister Eylül Yalçın, who insisted that I attend the Model Courts of Justice Conference and encouraged me to be in an environment where I could improve myself. Secondly, I would like to thank to our Secretary-General Zeynep Güler for giving me the opportunity to become an Academic-Assistant. I would also like to thank all my friends in the Academic and Organization team who made this journey joyful. Finally, I would like to express my gratitude to all the valuable participants who were here and attended this magnificent conference. I wish you all a wonderful and enjoyable three days that you will never forget.

Eren YALÇIN

Assistant-to-Secretary General



INDEX

I. UNITED STATES DISTRICT COURTS

1. General Informations about the Legal System of the United States of America

- a. Common Law
- b. Federal System of United States of America
- c. Federal Court System

2. Introduction to the U.S. District Courts

- a. United States District Courts
- b. United States Court of Appeals

3. Structure of the U.S. District Courts

4. Jurisdictions of the U.S. District Courts

II. INTRODUCTION TO ANTITRUST LAW

1. Emergence of Antitrust Law

- a. History
- b. Different Points of Views Towards Antitrust
 - i. Doctrine of Laissez-Faire
 - ii. Adam Smith
 - iii. John Stuart Mill
 - iv. Pareto Optimality
 - v. Chicago School

2. Position of the United States of America Regarding Antitrust

- a. Antitrust as an Uprising Trend: 1955-1980
- b. Reagan-Bush Era: 1980-1993
- c. Antitrust under Clinton Administration: 1993-1998

III. KEY CONCEPTS

1. Liberalism

- a. Classical Liberalism
- b. Social Liberalism
- c. Neoliberalism
 - i. Elements of Neoliberalism
 - a. Privatization



- b. Deregulation
- c. Multinational Corporations
- d. Free Trade
- e. Reduction of Public Expenditure

2. Economic Market

- a. Perfect Competition
- b. Monopolistic Competition
- c. Oligopoly
- d. Monopoly
 - i. Types of Monopoly
 - a. Natural Monopoly
 - b. State Monopoly
 - c. Un-Natural Monopoly
 - d. Attempted Monopolization

3. Tying

4. Anticompetitive Conduct

5. Computer

- a. Boot-Up Sequence
- b. Original Equipment Manufacturers (the OEMs)

6. Operating System

- a. Functions of Operating Systems
 - i. Memory Management
 - ii. Device Management
 - iii. Processor Management
 - iv. Security
 - v. Error Detection
 - vi. Coordination between Other Softwares and Users
 - vii. Job Accounting
 - viii. File Management
- b. Different Types of Operating Systems
 - i. Batch Operating System
 - ii. Time Sharing Operating System
 - iii. Distributing Operating System
 - iv. Network Operating System



7. Graphical User Interface (the GUI)

8. Internet Browser

- a. Internet Service Providers (the ISPs)
- b. Internet Content Providers (the ICPs)
- c. Online Service Providers (the OSPs)

IV. CASE BEFORE THE COURT: MONOPOLIZATION OF OPERATING SYSTEM MARKET UNDER THE SHERMAN ACT (UNITED STATES OF AMERICA v. MICROSOFT CORPORATION)

1. Overview

- a. Microsoft Corporation
- b. Operating Systems of Microsoft
- c. Positions of Microsoft over the Related Markets
 - i. Operating System Market
 - ii. Internet Browser Market
- d. Actors Threatening the Dominance of Microsoft
 - i. Intel
 - ii. World Wide Web
 - iii. Netscape
 - iv. Java
- e. Emergence of Internet Explorer
 - i. Internet Explorer
 - a. Tying of the Microsoft Internet Explorer Software to the Windows 95
 - b. Agreements with Internet Service Providers and Online Services
 - c. Customization of PC Boot-Up Sequence and PC Screens
 - d. Tying of the Microsoft Internet Explorer Software to the Windows 98

2. Timeline of the Case

- a. 1995 Consent Decree



- b. The Period Following the Issuance of 1995 Consent Decree

3. Claims of the Parties

- a. Claims of the United States of America
- b. Claims of the Microsoft Corporation

4. Established Agenda

V. APPLICABLE LAW

1. Sherman Act

- a. Section 1: Trusts, etc., in restraint of trade illegal; penalty
- b. Section 2: Monopolizing trade a felony; penalty

2. Clayton Act

- a. Section 3: Trust in Territories or District of Columbia illegal; combination a felony

3. Robinson-Patman Act

- a. Section 13(a): Discrimination in price, services, or facilities
- b. Section 13a: Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties

VI. CASE LAW

- 1. Standard Oil**
- 2. Kodak**
- 3. AT&T**
- 4. Jefferson Parish**

VII. CONCLUSION

VIII. BIBLIOGRAPHY

- 1. Books**
- 2. Articles**
- 3. Websites**
- 4. Cases, Codes, and Rules**



I. UNITED STATES DISTRICT COURTS

United States District Courts are indispensable components of the legal system of the United States of America (the USA).

1. General Information about Legal System of the United States

In the United States, common law has been adopted as a legal system, and this system consists of unwritten laws based on legal rules established by the courts. The common law system is recognized by the United States and a few other countries and it is effective in determining the rules and resources to be used in dispute resolution.¹

a. Common-Law

The common law system is used in these countries such as England, Australia, and Canada, as well as the United States. In general, common law is not codified and lacks a comprehensive collection of legal rules and statutes. This system is mostly based on statutes, which are scattered, legislative decisions, and judicial rulings in similar situations. These rulings are documented in case-law collections over time, and judges decide whether or not they should be applied. As a result, judges play a significant role in shaping both American and English law.²

One of the most crucial differences between the common law system and that which has remained since its origin is the lack of separation between public and private law; it is stated that the legal system developed without this distinction when England had a feudal state structure. Furthermore, in the United States, the doctrine of strict separation of powers does not apply in practice. The formation of a system known as 'checks and balances' is a rejection of

¹ The Common Law and Civil Law Traditions (*Law.berkeley.edu*, 2022) <<https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf>> accessed 16 February 2022.

² Vivienne O'Connor, 'Common Law And Civil Law Traditions' [2012] SSRN Electronic Journal p.1(3)



certain separations of powers. In the courts, there is no dual system, and the border between public and private law is becoming more blurred.³

The origins and development of common law as a legal system can be traced back to England, where the feudal system and its occurrences shaped the social, economic, and political history of the country, as well as the foundation of its law. One of the characteristics of this feudal system was that disputes were resolved locally, with each region acting independently of the others. Thereafter, the king argued that the existing legal system was unsuitable for establishing a central power, and a new legal system needed to be created. Following the court decisions, general norms to be applied across the country were established, and a new system was formed to ensure uniformity in the legal order.⁴

The parties are bound by the decisions made under this system as well as similar disputes that may arise in the future, and the emergence and settlement of new cases enrich the rules of the system by implementing new ones. The creation of precedent doctrines provides stability and consistency in terms of reaching the same decisions on the same problems. The judges are the mainstays of this system since their decisions are essential to the rules of law in this system.⁵

b. Federal System of United States of America

In the United States, there is a federal system in place, and the country is divided into federated states. They have total autonomy inside themselves, with their own system of laws and rules. In international affairs, however, these federated states come together and act as a single body. As a result, this structure has formed the judicial system of the country, leading to various legal rules in each state.⁶

c. Federal Court System

³ John Henry Merryman, 'The Public Law-Private Law Distinction in European and American Law' (1968) 17 J Pub L 3 p.6-11

⁴ Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1967) 15 Am J Comp L 419 p.422(2)

⁵ Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1967) 15 Am J Comp L 419 p.425

⁶ Robert A. Sedler, 'The Constitution and the American Federal System', 55 Wayne L. Rev. 1487 (2009) p.1492,1493



According to the federal judicial system in the United States, the separation of the judicial branches was formed. The federal court system consists of three levels. The first is the circuit courts, which are the first level of appeals; the second is the district courts, which have the broadest jurisdiction in the federal court system; and the last is the United States Supreme Court, which is the last appellate level of the federal system. In the United States, there are 94 district courts, 13 circuit courts, and one Supreme Court.⁷ Normally, the federal system includes 12 circuit courts, but this number has expanded to 13 with the formation of the Federal Circuits Court of Appeal. Despite the fact that this court examines cases all over the country, it is only authorized for particular types of cases.⁸

Unlike state courts, federal courts have a number of marked differences. One of the primary distinctions is that the types of cases that can be heard in the federal system are also defined in civil cases. This implies that federal courts have limited jurisdiction; they can only examine cases that are allowed by the US Constitution or federal statutes.

2. Introduction to the U.S. District Courts

Although understanding the structures of the courts within the common law seems complicated, it is much easier than expected.

a. United States District Courts

The United States District Courts, as trial courts of the federal court system, are responsible for resolving disputes brought before them and performing their duties in accordance with federal statutes, the Constitution, and treaties. District courts handle both civil and criminal trials in the federal court system.⁹ There are 94 federal district courts in the United States, which are located by region. When determining the distribution of these courts by region and the number

⁷ 'Introduction To The Federal Court System' (*Offices of the United States Attorneys*, 2022) <<https://www.justice.gov/usao/justice-101/federal-courts>> accessed 1 February 2022.

⁸ 'About The U.S. Courts Of Appeals' (*United States Courts*, 2022) <<https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals>> accessed 1 February 2022.

⁹ 'Introduction To The Federal Court System' (*Offices of the United States Attorneys*, 2022) <<https://www.justice.gov/usao/justice-101/federal-courts>> accessed 1 February 2022.



of judges assigned to them, the features of the region where the court is located are taken into account. Every state has at least one, and some states may have as many as four.¹⁰

In addition to the general U.S. District Courts, there are other federal courts with more specialized jurisdiction, such as the International Trade Court, the Federal Court of Claims, and the U.S. Tax Court. Courts of Appeal also have specialized jurisdictions; these include the Armed Forces Court of Appeals and the Veterans Appeals Tribunal. These courts have federal jurisdiction, and cases from any of them can be appealed to the Supreme Court, but this is a rare occurrence.¹¹

b. United States Court of Appeals

The Evarts Act of 1891 led to the formation of the United States Courts of Appeals as we know them today. Within the boundaries of their jurisdiction, the U.S. Court of Appeal has granted the power of representation, and the number and size of the courts of appeal have grown over time. Except for the categories of cases that can be brought directly to the supreme court, the decisions of the proper courts, both district courts, and former circuit courts can be appealed.¹²

During the jurisdiction process of the district courts, a case can be appealed to a U.S. Court of Appeal if the losing party in a dispute has concerns about the trial court proceedings, the law that was applied, or how it was applied. Generally, litigants have the right to have the actions of the trial court reviewed by an appellate court on these grounds. A common cause for an appeal is that the dissatisfied party believes that the trial was improperly conducted or that the trial judge applied the wrong law or interpreted the law improperly.¹³ Decisions of the US Courts of Appeals can be appealed to the Supreme Court of the United States. Annually, the U.S. Supreme Court hears a small number of cases that are requested to be reviewed. That indicates that in thousands of cases, the decisions of the Circuit Courts of Appeals across the country and the Federal Circuit Court are final.¹⁴

¹⁰ 'About U.S. Federal Courts' (*Federal Bar Association*, 2022) <<https://www.fedbar.org/for-the-public/about-u-s-federal-courts/>> accessed 1 February 2022.

¹¹ 'The Federal Court System In United States' (2016) 4th Edition. p.43-45

¹² Jon O. Newman, 'History Of The Article III Appellate Courts, 1789–2021: The Evolution Of Their Geographic Scope, Number Of Judgeships, And Jurisdiction'. p.2-4

¹³ 'About The U.S. Courts Of Appeals' (*United States Courts*, 2022) <<https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals>> accessed 1 February 2022.

¹⁴ 'Introduction To The Federal Court System'



3. Structure of the U.S. District Courts

District court judges are in charge of overseeing and managing the staff of the court. Judges for the United States District Court are appointed by the President and confirmed by Congress. The number of these judges changes with each court, but they all have one thing in common: they must maintain 'good behavior' while continuing their duties in court. Moreover, Congress can impeach and remove the judges. In the United States, there are more than 670 district court judges.¹⁵

Federal magistrate judges handle some of the duties of the district courts. Currently, the great majority of magistrate judges work full-time, perform a wide range of judicial powers in civil and criminal cases, and follow the same federal regulations and code of behavior as all federal judges. However, a small number of magistrate judges work part-time and are mostly assigned to outlying geographic areas or to provide back-up federal judicial services to district courts. The term of office of the magistrates is eight years if they work full-time and four years if they work part-time. However, magistrates who have already served their terms can be reappointed.¹⁶

In criminal cases, magistrates have certain powers such as inspecting certain cases, issuing search and arrest warrants, holding preliminary hearings, and deciding on certain actions. In civil cases, magistrates also handle pre-trial motions and discovery. Therefore, they are becoming increasingly important in assisting district courts.¹⁷ Besides that, there is a chief judge in district courts, and it is rotated among the district court judges for the administration of the district courts.¹⁸

Aside from the general features, one of the U.S. District Courts, the District Court of Columbia has a few distinctive features. The District of Columbia is a federal district instead of a state.

(*Offices of the United States Attorneys*, 2022) <<https://www.justice.gov/usao/justice-101/federal-courts>> accessed 1 February 2022.

¹⁵ 'About Federal Judges' (*United States Courts*, 2022) <<https://www.uscourts.gov/judges-judgeships/about-federal-judges>> accessed 14 February 2022.

¹⁶ *ibid.*

¹⁷ '28 U.S. Code § 136 - Chief Judges; Precedence Of District Judges' (*LII / Legal Information Institute*, 2022) <<https://www.law.cornell.edu/uscode/text/28/136>> accessed 8 February 2022.

¹⁸ *ibid.*



As a result, the U.S. District Court for the District of Columbia is a federal court that represents a federal district in Washington. This court has heard civil and criminal cases in the District of Columbia since 1863. The court consists of 15 judges who are appointed by the President with the advice and consent of Congress.¹⁹

4. Jurisdictions of the U.S. District Courts

The District Courts of the United States have the authority to settle disputes by examining the facts and applying legal principles to determine who is right. A trial court consists of a district judge who hears the case and a jury who decides it.²⁰ District courts have original jurisdiction in all civil disputes arising from the United States Constitution, laws, or treaties, according to the US Code.²¹ Furthermore, a district court is always considered open for any filing, issuing, and returning process, filing a motion, or entering an order about criminal issues.²²

After the public has been informed and given the opportunity to comment, a district court acting with a majority of district judges may adopt and amend the rules regulating its practice in civil and criminal cases handled in U.S. District Court. These modifications must be consistent, and they must comply with and not contrast with federal statutes and provisions found in the United States Code.²³

Apart from the special trial courts and their authorization of certain legal fields, the type and limitations of the jurisdiction of the U.S. District Court for various legal areas are mentioned in the U.S. Code. Accordingly, any civil action arising under any Act of Congress relating to various areas such as trademarks, patents, postal matters, election disputes, unfair competition, commerce, or protecting trade and commerce against restraints and monopolies has original jurisdiction in the U.S. District Courts. However, there may be regulations stating that some disputes must be filed in special trial courts in legal areas where district courts are authorized.

¹⁹ Rachel Cooper, 'Is the District of Columbia a State?' (*ThoughtCo*, 2020) <<https://www.thoughtco.com/is-the-district-of-columbia-a-state-1038984>> accessed 8 February 2022

²⁰ 'About The U.S. Courts Of Appeals' (*United States Courts*, 2022) <<https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals>> accessed 9 February 2022.

²¹ (28 U.S. Code § 1331 - Federal question, 2022)

²² 2021. *Federal Rules of Criminal Procedure*. 9th ed. Washington: U.S. Government Publishing Office, Rule 56

²³ *Federal Rules Of Criminal Procedure* (9th edn, U.S. Government Publishing Office). Rule 56, *Federal Rules Of Civil Procedure* (9th edn, U.S. Government Publishing Office). Rule 81



Therefore, the district courts should not have jurisdiction over these issues. As an example, on any subject that falls under the exclusive jurisdiction of the International Commercial Court, district courts will not have jurisdiction to resolve a dispute.²⁴

The U.S. District Court for the District of Columbia differs from other district courts on a few points. This court has a specific role to examine disputes involving national government activities, because of its location in the capital of the country. Federal regulation in areas such as the environment, national security, and other key areas is at the center of the issues that are brought before this court, which are often extremely complicated and time-consuming. As a result, the court is regarded as a national court, with judges regularly appointed from outside the District of Columbia.²⁵



Figure 1: United States Court of Appeals for the District of Columbia Circuit²⁶

II. INTRODUCTION TO ANTITRUST LAW

With the legal principles established through court decisions and reliance on precedent, common law has also played an important role in the development of antitrust law. Many rules were established and implemented decades earlier, but they should be updated to reflect

²⁴ 'U.S. Code § 1337 - Commerce And Antitrust Regulations; Amount In Controversy, Costs' (*LII / Legal Information Institute*, 2022) <<https://www.law.cornell.edu/uscode/text/28/1337>> accessed 9 February 2022.

²⁵ 'Opinion | What Makes The D.C. Circuit Different?' (Published 2013) (Nytimes.com, 2022) <<https://www.nytimes.com/2013/06/01/opinion/what-makes-the-dc-circuit-different.html>> accessed 15 February 2022.

²⁶ 'Court Denies SEC's Petition for Rehearing in Conflict Minerals Case' (*GreenSoft Technology Inc.*, 18 November 2015) <<https://greensofttech.com/court-denies-secs-petition-for-rehearing-in-conflict-minerals-case/>> accessed 30 March 2022.



changes in the world, and they should be open to interpretation and development. Although the fundamental concepts of antitrust have long been clear, the interpretations of the laws by the courts and regulatory agencies have developed over time, and some of the assumptions underlying antitrust laws are widely accepted.²⁷

1. Emergence of Antitrust Law

A market is a meeting spot for buyers and sellers to enable the exchange of goods and services. Besides that, market competition refers to the actions taken to establish a new market or set new standards, and it is usually associated with the innovation process that brings new displacing technologies to the market. While these trades are taking place, many countries have a way to protect consumers and regulate how businesses operate. These regulations are important to fair competition for similar businesses in a particular sector, preventing them from gaining too much power over the competition. These rules are known as antitrust laws, and they cover a wide range of suspicious business activities like price-fixing, bid-rigging, market allocation, anticompetitive acquisitions and mergers, predatory pricing, and monopolies. To underline the importance of prohibiting unfair competition, antitrust laws treat infractions from both a criminal and a civil perspective. Individual and corporate violators might face lengthy prison terms and huge fines.²⁸

The first legal regulation in the area of antitrust law was ratified in the United States of America. Since 1890, the growth of antitrust legislation in the United States has been shaped by two main, opposing market and state ideologies. According to the evolutionary perspective, markets are considered a tool for promoting free exchanges among numerous individuals in pursuit of their best interests, and they will eliminate monopolies without government intervention. On the other hand, the intentional perspective sees the market as a tool for powerful interests to coerce consumers, workers, and small businesses; markets, in this view, tend to monopolize unless the government intervenes.²⁹

²⁷ Douglas F Broder, *U.S. Antitrust Law And Enforcement: A Practice Introduction* (1st edn, Oxford University Press, Inc 2010). p.3,4

²⁸ Douglas F Broder, *U.S. Antitrust Law And Enforcement: A Practice Introduction* (1st edn, Oxford University Press, Inc 2010). p.2

²⁹ William H. Page, 'The Ideological Origins and Evolution Of U.S. Antitrust Law,' [2008] *Issues in Competition Law and Policy*. p.1



The Sherman Act was a legislative agreement that brought these two visions together. It agreed that market competition is the essential mechanism for allocating resources, but it argued that government intervention may improve market outcomes. The underlying ideological divide in antitrust has continued to frame the argument over the interpretation of the Sherman Act for the next century and beyond.³⁰

There are other fundamental laws governing the formation of antitrust law, these are the Federal Trade Commission Act (FTC) of 1914 (which also formed the Federal Trade Commission), and the Clayton Antitrust Act of 1914. Essentially, these rules protect consumers and competitors from market manipulation while also maximizing consumer welfare. Aside from the general rules, each of them have provisions on a variety of subjects that are not covered by other statutes. However, an injured party who has been damaged as a result of a violation of the general rules may bring a case for damages under another statute. As an example, the damaged party can bring cases under the FTC Act against violations of the Sherman Antitrust Act.³¹

a. History

The Sherman Act, the first antitrust law, was passed by the United States Congress in 1890 in response to a growing fear of monopolies collecting large amounts of capital stock and resources during the industrial age. This act included provisions addressing the avoidance of unreasonable contracts, mergers, and trade restriction conspiracies, as well as the avoidance of monopolization and merger attempts. The government used the laws that were governed by this act and its newfound power for nearly twenty years to dissolve trusts or cartels in the steel, rail, and petroleum industries.³²

In 1914, the Clayton and Federal Trade Commission Acts were passed by Congress. Unfair competition strategies and unfair or deceptive activities were prohibited under the Federal

³⁰ 'Federal Trade Commission Act' (*Federal Trade Commission*, 2022)
<<https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act>> accessed 9 February 2022.

³¹ *ibid.*

³² Douglas F Broder, *U.S. Antitrust Law And Enforcement: A Practice Introduction* (1st edn, Oxford University Press, Inc 2010). p.5-7



Trade Commission Act.³³ Besides that, the Clayton Antitrust Act addressed particular actions that the Sherman Antitrust Act may not, as well as giving private parties the opportunity to sue for triple damages if they are damaged by activity that breaches both laws. As a result of the establishment of these laws, the government gained more enforcement powers, including the authority to not only attack but also prevent the formation of monopolies and cartels.³⁴

Thereafter, because of the Great Depression and World War II, antitrust laws were only used in limited situations during the 1920s. In 1936, the Robinson-Patman Act was passed by Congress in 1936. This act aimed to protect small businesses by prohibiting price discrimination, which involves charging higher prices to smaller, weaker customers and lower prices to stronger customers, as well as predatory pricing, which implies offering below-cost prices in the hopes of recouping losses through monopoly-level pricing later. The partiality of the Robinson-Patman Act in prohibiting lower prices was criticized from the beginning as being contrary to antitrust principles.³⁵

Following the war and the ensuing economic troubles, a strict approach was adopted, and antitrust law in the United States began to follow structuralist criteria that focused on market structures and concentration levels. However, in the early 1970s, this attitude began to lose favor as a result of strong criticism from University of Chicago economists and legal scholars. Scholars from the Chicago School of Economics have long advocated for reducing price regulation and lowering barriers to entry, and they argued that some practices that were criticized under the structuralist interpretation of the Sherman and Clayton Acts had economic efficiency explanations.³⁶

Furthermore, the new Chicago School analytical ideas were transformed by a few economically sophisticated lawyers into the application of rules that judges could simply use. The key ideas of the Chicago School are that free markets are the best way to allocate goods in an economy and that little or no government intervention is preferable for economic growth. According to

³³ 'Federal Trade Commission Act' (*Federal Trade Commission*, 2022)

<<https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act>> accessed 15 February 2022.

³⁴ Douglas F Broder, *U.S. Antitrust Law And Enforcement: A Practice Introduction* (1st edn, Oxford University Press, Inc 2010). p.6,7

³⁵ *ibid.*

³⁶ William E Kovacic and Carl Shapiro, 'Antitrust Policy: A Century Of Economic And Legal Thinking' (2000) 14 *Journal of Economic Perspectives*. p.10-13



them, the economic analysis showed that some previously criticized acts were actually pro-competitive and provided economic benefits that considerably surpassed the risks. Thereby, they argued that many antitrust per se rules of illegality were unneeded and should be replaced with the rules of per se legality.³⁷

b. Different Points of Views Towards Antitrust

Several points of view and principles have been presented in the definition and application of antitrust law. In settling antitrust disputes, courts and scholars express economic goals for antitrust policy and use theoretical and empirical economic methodologies. Since many ideas have emerged, it has led to the development of this field and the application of various rules from time to time.³⁸

i. Doctrine of Laissez-Faire

Laissez-faire is an 18th-century economic doctrine that rejects government intervention in business matters. It is also a French phrase meaning 'allow to do.' Although the origin of the term is unclear, the ideology of laissez-faire is commonly associated with a group of economists who thrived in France from roughly 1756 to 1778. The main tenet of this ideology is that the less government interferes in the economy, the better off businesses and, by implication, society will be. Free-market capitalism highly depends on laissez-faire economics.³⁹

In the nineteenth century, the idea that by pursuing their own desired goals, individuals would achieve the best results for the society of which they were a part gained popularity. Within that, the role of the states was to maintain order and security while not interfering with the efforts of the people to achieve their own aims. On the other hand, proponents of laissez-faire doctrine argue that the government has a significant role in enforcing contracts and ensuring civil order.⁴⁰

³⁷ Douglas F Broder, *U.S. Antitrust Law And Enforcement: A Practice Introduction* (1st edn, Oxford University Press, Inc 2010). p.12

³⁸ William H. Page, 'The Ideological Origins and Evolution Of U.S. Antitrust Law,' [2008] ISSUES IN COMPETITION LAW AND POLICY. p.1(2)

³⁹ 'What Is Laissez-Faire?' | Jeffrey A. Tucker' (*Fee.org*, 2022) <<https://fee.org/articles/what-is-laissez-faire/>> accessed 16 February 2022.

⁴⁰ 'Laissez-Faire | Definition, Economics, Government, Policy, History, & Facts' (*Encyclopedia Britannica*, 2022) <<https://www.britannica.com/topic/laissez-faire>> accessed 16 February 2022.



ii. Adam Smith

Adam Smith, who is considered the father of modern economics, was a Scottish economist, philosopher, and author who lived in the 18th century. He was also regarded as a pioneer of classical economics. According to his view, markets and trade are beneficial as long as there is enough competition. However, competition is always in danger of being prevented or damaged. Giving way to monopolies that are both comfortable and profitable for their owners might mean disaster for many people.⁴¹

According to the traditional view of competition, certain agreements and commercial practices could be an unfair limitation on the individual liberty of trades people to pursue their careers. Aside from that, the courts determined specific types of agreements and particular terms to be in breach of their economic fairness doctrine when new cases arose and business circumstances changed, but they did not develop an overall concept of market power. As a result, Adam Smith explained in the *Wealth of Nations* that antitrust laws could not be consistent with liberty or justice and that the government should be willing to refrain from encouraging competition violations.⁴²

The idea of the Adam Smith has named '*invisible hand*' guides supply and demand forces in an economy. According to this theory, by looking out for themselves, every person unintentionally helps to achieve the best outcome for all. For instance, a butcher, brewer, and baker aim to make money by selling things that others want to buy. They will be financially rewarded if they are successful in meeting the needs of their customers. They participate in business to make money while also providing items that people desire. According to Adam Smith, this type of system generates wealth for the butcher, brewer, and baker, as well as for the entire nation.⁴³

⁴¹ Heinz D. Kurz, 'Adam Smith On Markets, Competition And Violations Of Natural Liberty' (2015) 40 *Cambridge Journal of Economics*. p.22

⁴² 'Antitrust And Ideology - Econlib' (*Econlib*, 2022) <<https://www.econlib.org/antitrust-and-ideology/>> accessed 23 February 2022.

⁴³ 'Adam Smith - The Wealth Of Nations' (*Encyclopedia Britannica*, 2022) <<https://www.britannica.com/biography/Adam-Smith/The-Wealth-of-Nations#ref24188>> accessed 23 February 2022.



iii. John Stuart Mill

John Stuart Mill was a 19th-century philosopher, economist, and politician. He was a defender of individual rights and progressive social policies. Therefore, in political decision-making and legislation, he advocated for the application of classical economic theory, philosophical thought, and social awareness.⁴⁴

J.S. Mill believed in the validity of the classical economics school and worked to ensure its continuation. The fundamental basic institution of the classical view, the perfectly competitive, self-balancing market, is also ideal for J.S. Mill.⁴⁵

According to his view, perfect competition serves three purposes in the economy:

- 1) Equilibrium Function: The producer tries to achieve a balance between customers by balancing the quantity supplied with the quantity demanded.
- 2) Development Function: The cost of goods can be reduced by finding new production methods through competition. Economic growth is propelled by this power; when competition is restrained, technological progress might be interrupted.
- 3) Flexibility Function: Factors of production vary in response to changing requirements and tastes.

John Stuart Mill expressed his thoughts in his review, *On Liberty*, in the nineteenth century when large firms played a significant role in the market economy. Accordingly, in a market where perfect competition is encouraged and freedom is highly valued, production constraints for trade or commercial purposes are obviously restricted, and any restrictions could be harmful.⁴⁶

⁴⁴ 'John Stuart Mill - Econlib' (*Econlib*, 2022) <<https://www.econlib.org/library/Enc/bios/Mill.html>> accessed 23 February 2022.

⁴⁵ Aydın Yalçın, 'İktisadi Doktrinler ve Sistemler Tarihi' [1991] A.Ü. S.B.F. Yayınları. p.22,23

⁴⁶ Aydın Yalçın, 'İktisadi Doktrinler ve Sistemler Tarihi' [1991] A.Ü. S.B.F. Yayınları. p.28,29



iv. Pareto Optimality

Pareto Optimality assumes that new firms can enter markets and compete with established firms without restriction. As a result, competitive free markets provide allocative, productive, and dynamic efficiency.⁴⁷

Allocative efficiency is defined here in terms of Pareto optimality, which states that no one can be made better off without making someone else worse off. The perfect competition requires that all sellers and buyers have no pricing influence and accept market prices as they are. Aside from that, the two important additional requirements are perfect relevant information and the lack of real external effects. Therefore, a consumer must know that he/she can buy numerous goods at market prices and which ones he/she prefers; a producer of a particular good must know the best available method of production.⁴⁸

v. Chicago School

Frank Hyneman Knight pioneered the Chicago School of economics in the 1930s at the University of Chicago. A group of economists and lawyers, mostly from the University of Chicago, advocate a competition law approach based on the idea that some actions that were once thought to be anticompetitive may actually increase competition. In addition, the University of Chicago has affected competition policy, and the United States Supreme Court has ruled in favor of the approaches of the Chicago School in some cases.⁴⁹

The key subject of the approach of the Chicago School is the belief in the value of free markets. The Chicago School argues that markets will provide the most efficient outcomes for society if government intervention is avoided. One of the fundamental assumptions of the school is the model of human behavior, which states that people generally try to maximize their own self-interest and, as a result, will respond to suitably designed pricing incentives. At the community scale, free markets populated by rational actors will distribute resources according to their

⁴⁷ John Kenneth Galbraith and James K Galbraith, *The New Industrial State* (Library of America 2010) p.10

⁴⁸ Yew-Kwang Ng, 'Welfare Economics' (2015) Second Edition International Encyclopedia of the Social & Behavioral Sciences. p.497-498

⁴⁹ William E Kovacic and Carl Shapiro, 'Antitrust Policy: A Century Of Economic And Legal Thinking' (2000) 14 Journal of Economic Perspectives. p.10-13



allocative efficiency.⁵⁰ Apart from that, legal rules and court decisions, according to the Chicago School of Economics, should be aimed at increasing efficiency. The role of the law is to simply change the incentives of individuals and organizations to engage in certain behaviors.⁵¹

2. Position of the United States of America Regarding Antitrust

From the founding of the United States of America (the USA) in 1776, the USA has enlarged its effect zone immensely through its human capital and utilization of its natural resources by only sharing with Canada and Mexico. This expansion has rendered the USA as a world power in various manners such as economics. This triggered the emergence of various companies and producers including Colgate and Jim Beam.⁵² In this context, the USA had to systemize the antitrust laws in response to the rise of trusts which are legal devices used to coordinate multiple property owners through a unified management structure in monopoly. The trusts had significant market power to suppress the competition in the economy of the USA. Since the enactment of the Sherman Act, the antitrust regulations have evolved and they have been classified into three eras throughout forty-three years.⁵³

a. Antitrust as an Uprising Trend: 1955-1980

Following the detrimental effects of the Second World War, the commerce between countries and economic growth had diminished. During this time the USA restarted to implement an economic competition policy which limits the excessive usage of power. Further, the USA aimed to provide the entrance of new market entrants to challenge the primacy of old competitors. Also, this step enabled the promotion of individualism, innovation, and greater efficiency.⁵⁴

⁵⁰ 'Chicago School Of Economics | Economics' (*Encyclopedia Britannica*, 2022) <<https://www.britannica.com/topic/Chicago-school-of-economics>> accessed 23 February 2022.

⁵¹ *ibid.*

⁵² Taylor Mcneil, 'Why the United States Is the Only Superpower ?' (*TuftsNow*, 21 November 2019) <<https://now.tufts.edu/articles/why-united-states-only-superpower>> accessed 24 February 2022.

⁵³ Laura Philips Sawyer, 'US Antitrust Law and Policy in Historical Perspective' *Oxford Research Encyclopedia of American History* (2019) <https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf> accessed 24 February 2022.

⁵⁴ B. Dan Wood and James E. Anderson, 'The Politics of U.S. Antitrust Regulation' (1993) 37 (1) *American Journal of Political Science* <https://www.jstor.org/stable/pdf/2111522.pdf?casa_token=xf5vC5lq7RIAAAAA:LMIMinNsG-



The USA increased the antitrust enforcement by beginning to bring criminal prosecutions. The government won crucial criminal prosecutions such as IBM and AT&T. Further, the government realized various attacks on mergers and acquisitions hindering the competition. Besides, the necessity of regulating the natural monopolies emerged to prevent their extreme growth by damaging the other entrants. In addition to that, the corporate antitrust compliance programmes were launched to educate the related personnel regarding the antitrust law.⁵⁵

b. Reagan-Bush Era: 1980-1993

In the middle of the 1970's, the ideas of the Chicago School affected most of the economic markets such as the U.S. economic market and following the election of Ronald Reagan. Reagan initiated to concretize the ideas of the Chicago School under the name of '*Hands-Off*' approach.⁵⁶ The Reagan administration freed many competitors from some rigors of market competition. Afterwards, George Bush, the successor of Ronald Reagan, also embraced the hands-off approach of his predecessor. However, the antitrust policy of the Bush was differentiated from the policy of Reagan in the matters of putting antitrust into a vital role, enforcing criminal price-fixing laws, and tightening the antitrust policy by elaborating the issuance of agencies regarding antitrust policy.⁵⁷

c. Antitrust Under Clinton Administration: 1993-1998

Even though it was generally said that the Clinton Administration was the continuation of the Bush Administration in the matter of antitrust, the Clinton Administration took various actions to render antitrust more applicable.⁵⁸ For example, the Department of Justice (the DOJ)

[SVvyY5d3gLONzD_eW9-CGPPRjKIKz8teKjqZOArvPDFBPGnLHm-NckzQhh8DtjY17HJthWkZnnHtU2jrRmMngJiZ0uGXS8F1Q4XaVrc2Vx](https://www.jstor.org/stable/pdf/2111522.pdf?casa_token=xf5vC5lq7RIAAAAA:LMIMinNsGSVvyY5d3gLzD_eW9-CGPPRjKIKz8teKjqZOArvPDFBPGnLHm-NckzQhh8DtjY17HJthWkZnnHtU2jrRmMngJiZ0uGXS8F1Q4XaVrc2Vx)> accessed 28 February 2022.

⁵⁵ Douglas Broder, *U.S. Antitrust Law and Enforcement* (2nd edn, Oxford University Press 2010) p.8

⁵⁶ B. Dan Wood and James E. Anderson, 'The Politics of U.S. Antitrust Regulation' (1993) 37 (1) *American Journal of Political Science*
<https://www.jstor.org/stable/pdf/2111522.pdf?casa_token=xf5vC5lq7RIAAAAA:LMIMinNsGSVvyY5d3gLzD_eW9-CGPPRjKIKz8teKjqZOArvPDFBPGnLHm-NckzQhh8DtjY17HJthWkZnnHtU2jrRmMngJiZ0uGXS8F1Q4XaVrc2Vx> accessed 28 February 2022.

⁵⁷ Philip B. Nelson, 'Reading Their Lips: Changes in Antitrust Policy under the Bush Administration' (1991) 36 *Antitrust Bull* 681

⁵⁸ Theodore Voorhees Jr., 'The Political Hand in American Antitrust - Invisible, Inspirational, or Imaginary' (2014) 79 *Antitrust LJ* 557



increased the amounts collected through the criminal enforcement of antitrust law. The International Antitrust Enforcement Assistance Act was enacted in 1994 to deal with international cartels.⁵⁹ Besides, the administration tightened the merger enforcement to impede the domination of merged firms increasing the prices unilaterally. More than that, the administration initiated to preclude the mergers from reducing the outputs and driving out other competitors from competition.⁶⁰

III. KEY CONCEPTS

In order to understand the case better, the key concepts have always been essential.

1. Liberalism

Liberalism is used in an expression close to the original classical English understanding from the 19th century in Europe.⁶¹ According to this understanding, individuals believe in a system in which they are free to make their own choices without the compulsion of strong and well-established institutions such as monarchy, and oligarchy.⁶² In economic terms, liberalism is associated with free and competitive markets.⁶³

a. Classical Liberalism

In response to the social, economic, and political consequences of the Industrial Revolution and urbanization in Europe, the term classical liberalism developed in the early 19th century. Classical Liberalism is an offshoot, philosophical, and political ideology of liberalism that emphasizes the free market, limited government, consent of the governed, economic freedom,

⁵⁹ David A. Balto, 'Antitrust Enforcement in the Clinton Administration' (1999) 9 Cornell J L & Pub Pol'y 61

⁶⁰ *ibid.*

⁶¹ Jeffrey Frankel, *Liberalism* (Harvard University 2015)

<<https://wcfia.harvard.edu/files/wcfia/files/liberalismageofreflectniran2016jan.pdf>> accessed 13 February 2022.

⁶² Samuel Freeman, 'Liberalism' *Oxford Research Encyclopedia Of Politics* (Oxford University Press USA 2017) <https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/e/483/files/2018/07/liberalism_oup_encyclopedia_politics-1o2lwvr.pdf> accessed 13 February 2022.

⁶³ *ibid.*



and political freedom. Also, with cultural liberalism, it aims to advocate civil liberties guaranteed by the rule of law.⁶⁴

b. Social Liberalism

Social liberalism is a political ideology that aims to strike a balance between individual freedom and social justice. Classical liberalism and individualistic economics are similar in expanding political rights and civil liberties. However, it is also based on a social market that includes the economics of governments and social issues such as poverty, health, and education. In addition, social liberalism is also called modern liberalism in the United States of America, left liberalism in Germany and neoliberalism in the United Kingdom.⁶⁵

c. Neoliberalism

Neoliberalism is an ideologic software for competitive globalization always associated with the reduction of state intervention and the exclusion of the welfare state. It has a long history starting in the 1930's through the publication of the '*An Inquiry into the Principles of the Good Society*' by Walter Lippman.⁶⁶ Lippmann defended the non-intervention of state on the affairs of men and stated that totalitarianism would emerge within the absence of private property. In the following days, a conference was organized in order to discuss the renewal of liberalism and fight against collectivism. In this conference, the fundamental tools of neoliberalism emerged such as the priority of price mechanism, free enterprise, and the system of competition. Furthermore, the seeds of neoliberalism started to be planted in Chile with the concretization of the ideas of Chicago School including abolition of certain regulatory restraints, privatization of public assets, and prioritization of free trade.⁶⁷

⁶⁴ Robert Longley, 'What Is Classical Liberalism? Definition And Examples' (*ThoughtCo*, 2020) <<https://www.thoughtco.com/classical-liberalism-definition-4774941>> accessed 13 February 2022.

⁶⁵ John W. Seaman, 'L. T. Hobhouse And The Theory Of "Social Liberalism"' (1978) 11 (4) *Canadian Journal of Political Science / Revue Canadienne de Science Politique* <https://www.jstor.org/stable/pdf/3231032.pdf?casa_token=uPmhuj1OSg4AAAAA:XzMRkot5kpIqwNeP83vw8JY43XKqX5hS8onWrq30PuPggX_iHqr4MYD3BIAfYR5Nrxij5ePJ7_6NiEHUwK97FGIFNFFtmTkosP9eMQssTUnB9XZoSA> accessed 13 February 2022.

⁶⁶ 'Neoliberalism' (*Oxford Reference*) <<https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100228313>> accessed 8 February 2022.

⁶⁷ Philip Mirovski and Dieter Plehve, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (1st edn, Harvard University Press 2009) p.11



In order to broaden the neoliberal wave, Ronald Reagan, President of the USA in 1980's, and his counterpart in the United Kingdom, Margaret Thatcher took some actions. Thatcher put the notion of competition in the center and stressed that competition is between nations, firms, and individuals. Also, she was seeing the competition as a useful tool to reach optimum efficiency in the market. In order to promote the competition, certain actions were taken including privatization of state-owned public assets such as British Airways, deregulation of product markets, and deregulation in the finance industry. On the other hand, Reagan initiated to deregulate the monopolistic industries, privatize the state-owned companies, and maintain free trade in goods. The government cut taxes by predicting that this policy would give citizens and businesses more money to invest. In this context, the economy would grow faster. In 1981, the Economic Tax Recovery Act was enacted by the Senate and the act diminished the budget of the government by virtue of tax cuts.⁶⁸

Also, it is necessary to stress that neoliberalism has never defended the non-existence of states in the economic market. Instead, it highlights the duty of the state to prepare the proper conditions for free trade and deregulated industry. Also, the state has been consolidating the neoliberalized state forms and modes of governments by destructing Keynesian-welfarist and social-collectivist institutions.⁶⁹

⁶⁸ David Harvey, *A Brief History of Neoliberalism* (1st edn, Oxford University Press 2005) p.2

⁶⁹ David Nugent and Joan Vincent, *A Companion to the Anthropology of Politics* (1st edn, Blackwell Publishing 2007) p.332



Figure 2: Ronald Reagan and Margaret Thatcher⁷⁰

i. Elements of Neoliberalism

Neoliberalism has five essential elements to realize itself including privatization, deregulation, multinational corporations, free trade, and reduction of public expenditure.

a. Privatization

Privatization is a counter-movement against the growth of government in related fields by conserving and promoting the position of private entities.⁷¹ It generally encourages share ownership, reduction of trade union power, improvement of public finance, and distribution of wealth more properly.⁷²

⁷⁰ J. J. Goldberg, 'Margaret Thatcher, Conservative Icon, Was Wiser Than Friend Ronald Reagan' (*Forward*, 12 April 2013) <<https://forward.com/opinion/174710/margaret-thatcher-conservative-icon-was-wiser-than/>> accessed 30 March 2022.

⁷¹ Paul Starr, 'The Meaning of Privatisation' 15 (6) *Yale Law & Policy Review* (1989) <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/17359/17_6YaleL_PolyRev6_1988_.pdf?sequence=2&isAllowed=y> accessed 6 February 2022.

⁷² M King, G Yarrow, J Mairesse, and J Melitz, 'Privatisation in Theory and Practice' (1986) 1(2) Oxford University Press <<https://www.jstor.org/stable/1344560>> accessed 6 February 2022.



It is necessary to explain two aspects of privatization in this circumstance: privatization of competitive firms and privatization of monopolies.⁷³ At first, privatization of competitive firms aims to transfer the execution of state-owned enterprises operating in the competitive product market to a private entity. Second, privatization of monopolies consists of the succession of state-owned enterprises with substantial market power to private sectors. As an example, the privatization of state-owned enterprises having the monopoly in electricity and water might be raised.⁷⁴

b. Deregulation

Deregulation is the removal or reduction of government regulations in a specific industry to allow businesses to operate their businesses freely and remove corporate restrictions.⁷⁵ The notion of deregulation emerged since the original public interest rationale had ceased to conform with economic reality. Especially in certain economic crises, regulations had not been able to adaptate themselves to the new situations easily. In fact, some of the economists highlighted that price and entry regulations had restricted profitability in competitive industries. In these circumstances, they defended the withdrawal of governments from the regulation of prices and non-existence of regulatory agencies.⁷⁶

c. Multinational Corporations

Multinational Corporations (the MNCs) are registered in a singular country but they realise their operations globally.⁷⁷ Even though they have been accused of destroying the fabric of local society and exploiting its resources by some of the theoreticians, they are one of the key actors in the distribution of globalization. They always develop new strategies to adaptate themselves to the new conditions. MNCs may be seen as actors promoting prosperity and

⁷³ J Wickers and G Yarrow, 'Economic Perspectives on Privatization' (1991) 5(2) *Journal of Economic Perspectives* <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.5.2.111>> accessed 6 February 2022.

⁷⁴ *ibid.*

⁷⁵ 'Deregulation' (*Corporate Finance Institute*)

<<https://corporatefinanceinstitute.com/resources/knowledge/other/deregulation/>> accessed 5 February 2022.

⁷⁶ M Derthick and P J Quirk, *The Politics of Deregulation* (1st edn, Brookings Institution Press 1985) p.7

⁷⁷ 'Multinational Corporation' (*Encyclopedia Britannica*, 28 May 2012)

<<https://www.britannica.com/topic/multinational-corporation>> accessed 5 February 2022.



intellectual property around the world. In order to optimize their operations, they demand freedom in their works and want to be out of government control.⁷⁸

d. Free Trade

Free trade defines unrestricted import and export of goods and services between the countries through the trade agreements or custom unions. It has generally become a notion associated with trade liberalization since any tariffs are implemented within free trade. Furthermore, it has lots of profits such as increase of foreign investment, technology transfer, and lower prices.⁷⁹ In addition to that, free trade supports the economic growth of countries and enables governments to tax and raise resources for a variety of objectives such as general protection of the environment. Also, it entails the naissance of different actors in the economic and commercial market.⁸⁰

e. Reduction of Public Expenditure

Public expenditure means the expense item of the governments related to public pensions, income support, health care, and education. Besides, it is seen as an important element for the concretization and achievement of the welfare state. Today, public expenditure is targeted by neoliberalism such as the privatization of public industries like train companies, roads, and energy.⁸¹

2. Economic Market

⁷⁸ John Stopford, 'Multinational Corporations' 1 (113) Foreign Policy
<https://www.jstor.org/stable/pdf/1149229.pdf?casa_token=SjXiSlg5QEcAAAAA:lvjTK-bWSxGMiZzBG3KLR_-H2vE7dcuIc48wpl5bOj8epSP5QmQxJ-zBng_J0Q4i7Opsed-YDRNXI_-EyUxR3U1uqYLTAQhke1hY-H2ig4ELqUtJA> accessed 5 February 2022.

⁷⁹ Pascal Salin, *Competition and Free Trade* (1st edn, Routledge 2018) p.30

⁸⁰ Jagdish Bhagwati, 'The Case for Free Trade' (1993) 269 (5) Scientific American
<https://www.jstor.org/stable/pdf/24941682.pdf?casa_token=LWhbWDEEBGoAAAAA:u-J8hy3UXEGY83Atx-ReeWRRGYcokxvsWsK_UnwuNixRw6hryCXXKXgzz1_xS7nojuZaDpl0YkCniWHJyqJFYvkHUvJGXXK3qpcfJ-191n3qXJdnPnpg> accessed 6 February 2022.

⁸¹ Robert Longley, 'What Is Free Trade ? Definition, Theories, Pros, and Cons' (*ThoughtCo.*, 2018)
<<https://www.thoughtco.com/free-trade-definition-theories-4571024>> accessed 5 February 2022.



An allocative economy controlled by the individuals or persons who own most of the resources, governed by the interaction of supply and demand, is called a market economy.⁸² In fact, it is the economy where private and public ownership of enterprises is the norm. Businesses and consumers own the land, buildings, resources, materials, and money.⁸³

People exchange resources like money, to buy something or for other resources such as goods or services. The value of the resources depends on the demand and supply. For example, if the supply of a resource is low, and the demand is high, the price will be high like gold. This equation works with the opposite one, if the supply is high and the demand is low, the price will tend to be low. Because when everyone wants the same thing and when they can buy it with exchanging resources, the price will be cheap, like buying a bottle of water.⁸⁴

a. Perfect Competition

A market structure with the highest level of competition defines perfect competition.⁸⁵ Many firms offer market homogeneous products. Since there is freedom of entry and exit to the market, firms will not make high profits and prices will be kept low due to competition. Also, there is a lot of information in the market because there are a lot of firms. None of the firms can influence the price of any product because the demand and supply decide the price and every firm is a price taker in perfect competition.⁸⁶

b. Monopolistic Competition

⁸² Kimberly Amadeo, 'What Is The Market Economy?' (*The Balance*, 2022) <<https://www.thebalance.com/market-economy-characteristics-examples-pros-cons-3305586>> accessed 12 February 2022.

⁸³ 'What Is A Market Economy?' (*Investopedia*, 2022) <<https://www.investopedia.com/terms/m/market-economy.asp>> accessed 12 February 2022.

⁸⁴ Kimberly Amadeo, 'What Is The Market Economy?' (*The Balance*, 2022) <<https://www.thebalance.com/market-economy-characteristics-examples-pros-cons-3305586>> accessed 12 February 2022.

⁸⁵ 'What Is Perfect Competition? Definition Of Perfect Competition, Perfect Competition Meaning - The Economic Times' (*The Economic Times*) <<https://economictimes.indiatimes.com/definition/perfect-competition>> accessed 12 February 2022.

⁸⁶ Tejvan Pettinger, 'Perfect Competition - Economics Help' (*Economics Help*, 2019) <<https://www.economicshelp.org/microessays/markets/perfect-competition/>> accessed 12 February 2022.



Monopolistic competition is an environment in which many independent sellers and buyers can exist at the same time.⁸⁷ Firms have an inelastic demand curve as the product can go into differentiation and therefore, they can set prices.⁸⁸ In monopolistic competition, there will be a competitive market as a result of the normal profit of the firms in the long run.⁸⁹ In a monopolistic competitive market, products are not homogeneous, firms compete by producing differentiated products that can replace each other. As a result, a competitive and at the same time, the monopolistic environment is being created. However, since there are many sellers in the market, prices cannot be determined by a small number of firms.⁹⁰

c. Oligopoly

A market consisting of a small number of firms and defining the competition between these firms is called an oligopoly market. This market is dominated by a few firms and there are firms selling homogeneous or differentiated products. Since there are few firms and sellers in an oligopoly market, each seller influences the actions of other firms and sellers. Although the number of firms dominating the market is few, many small firms can still operate in the market.⁹¹

The difference between oligopoly and monopoly market is that in the oligopoly market there are few firms dominating the market whereas in the monopoly market there is only one seller in the market.⁹²

d. Monopoly

⁸⁷ 'Monopolistic Competition | Economics' (*Encyclopedia Britannica*)

<<https://www.britannica.com/topic/monopolistic-competition>> accessed 12 February 2022.

⁸⁸ Tejvan Pettinger, 'Monopolistic Competition - Definition, Diagram And Examples - Economics Help' (*Economics Help*, 2019) <<https://www.economicshelp.org/blog/311/markets/monopolistic-competition/>> accessed 12 February 2022.

⁸⁹ *ibid.*

⁹⁰ 'Monopolistic Competition | Economics' (*Encyclopedia Britannica*)

<<https://www.britannica.com/topic/monopolistic-competition>> accessed 12 February 2022.

⁹¹ 'Oligopoly' (*Economics Online*, 2020)

<https://www.economicsonline.co.uk/business_economics/oligopoly.html/> accessed 12 February 2022.

⁹² Mary Hall, 'What's The Difference Between A Monopoly And An Oligopoly?' (*Investopedia*, 2021)

<<https://www.investopedia.com/ask/answers/121514/what-are-major-differences-between-monopoly-and-oligopoly.asp#:~:text=A%20monopoly%20is%20when%20a.prevent%20other%20enterprises%20from%20competing.>>> accessed 12 February 2022.



Monopoly is a market structure in which one firm controls the entire market as a single producer. Within the monopoly, there is any competitive pressure from other firms with the effects of advertising and service promotion. Monopolists have control over the key resources necessary to produce a good. Accordingly, they have positive network externalities such as increasing the value of a firm. In this case, any other firm would be able to compete with it due to its enormous power in the related field.⁹³

The firms having monopoly may generally have the ability to ignore the prices which other firms charge since the others would not be able to produce the goods and services as qualified as the firm having monopoly.⁹⁴ Also, a monopolist faces a tradeoff between the price it charges and the quantity it sells. In addition to that, for a monopolist, sales can be increased only if price is reduced. As it is guessed, the price can be increased only if the sales are reduced.⁹⁵

When a monopoly is achieved, the monopolist may impose large barriers to entry such as legal barriers, sociological barriers, natural barriers, and technological barriers.⁹⁶

Firstly, legal barriers are generally imposed by the governments to block the entry of more than one firm into the market such as copyrights, foreign-trade tariffs, and licenses.⁹⁷ Besides, the governments grant public franchise making the monopolist firm the exclusive legal provider of a good or service.⁹⁸ For example, the Congress has given the U.S Postal Service the exclusive right to deliver first-class mail.⁹⁹ Secondly, sociological barriers are derived from the restrictions of customs and traditions.¹⁰⁰ Thirdly, natural barriers are imposed when the firm has unique ability that other firms cannot duplicate due to costs, ownership of key resources,

⁹³ David C. Colander, *Economics* (11th edn, McGraw-Hill Education 2020) p.293

⁹⁴ R. Glenn Hubbard and Anthony Patrick O'Brien, *Economics* (7th edn, Pearson 2018) p.508

⁹⁵ Christopher T. S. Ragan and Richard G. Lipsey, *Economics* (13th edn, Pearson Education Canada 2010) p.226

⁹⁶ *ibid.*

⁹⁷ Steven C. Salop & R. Craig Romaine, 'Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft' (1999) 7 *Geo Mason L Rev*

⁹⁸ Paul A. Samuelson and William D. Nordhaus, *Economics* (16th edn, The McGraw-Hill 1998) p.160

⁹⁹ R. Glenn Hubbard and Anthony Patrick O'Brien, *Economics* (7th edn, Pearson 2018) p.512

¹⁰⁰ 'How Monopolies Form: Barriers to Entry' (*BCcampus Open Publishing*)

<<https://opentextbc.ca/principlesofeconomics2openstax/chapter/how-monopolies-form-barriers-to-entry/>>. accessed 14 February 2022.



and high start-up costs.¹⁰¹ Lastly, technological barriers emerge when the size of the market can only support one firm because of the high R&D costs and lack of advanced technology.¹⁰²

As it was seen, the monopoly has become a preventive system to achieve the perfect competition. In order to understand the monopoly more profoundly, stressing firstly the marginal cost and revenue would be profitable.¹⁰³

The marginal cost is the change in the total cost of a firm from producing one unit of a good or service. It might be calculated by dividing the change in total cost by the change in production.¹⁰⁴ In monopoly, the monopolist produces a low level of output with price exceeding marginal cost.¹⁰⁵ Additionally, the monopolists take into account how its output affects the price. Further, one of the key differences between other markets and monopoly is marginal revenue which is the change in total revenue associated with a change in quantity.¹⁰⁶ It may be calculated by dividing the change in total revenue by the change in total output quantity.¹⁰⁷ The point distinguishing the monopoly from the other markets regarding the marginal revenue, in monopoly, the marginal revenue is always below the price and more than the marginal cost. Besides, the profit-maximizing output of a monopolist is where marginal revenue equals marginal cost. Nevertheless, this criterion might differentiate and vary depending on the type of monopoly.¹⁰⁸

i. Types of Monopoly

¹⁰¹ ‘What Are Barriers to Entry?’ (*Corporate Finance Institute*)
<<https://corporatefinanceinstitute.com/resources/knowledge/economics/barriers-to-entry/>>. accessed 14 February 2022.

¹⁰² *ibid.*

¹⁰³ Richard C. Levin, ‘Technical Change, Barriers to Entry, and Market Structure’ (1978) 45 (180) *Economica*
<https://www.jstor.org/stable/pdf/2553450.pdf?casa_token=-ZyGCSws-yQAAAAA:Oo-CKXwL-g-cZb_UQ-Tvlu2b85K4WgeTqhQQal7vIAp6l2PxQwoZH1ROy2XJj7-h-s_z_1eF_dMagl5PiKtiFDJSS5M-O7-LCeky6hD6Pe9hE64ICXA>. accessed 14 February 2022.

¹⁰⁴ R. Glenn Hubbard and Anthony Patrick O’Brien, *Economics* (7th edn, Pearson 2018) p.383

¹⁰⁵ Christopher T. S. Ragan and Richard G. Lipsey, *Economics* (13th edn, Pearson Education Canada 2010) p.230

¹⁰⁶ David C. Colander, *Economics* (11th edn, McGraw-Hill Education 2020) p.314

¹⁰⁷ Alicia Tuovila, ‘Marginal Revenue (MR)’ (*Investopedia*, 30 March 2021)
<<https://www.investopedia.com/terms/m/marginal-revenue-mr.asp>>. accessed 14 February 2022.

¹⁰⁸ David C. Colander, *Economics* (11th edn, McGraw-Hill Education 2020) p.294



The more the different situations revealed in economic systems, the more types of monopoly multiplied. In economics, we have many different varieties concerning the monopoly such as natural monopoly, state monopoly, un-natural monopoly, and attempted monopolization.

a. Natural Monopoly

Natural monopoly is the type of monopoly in which the entire demand within the relevant market can be satisfied at lowest cost by one firm rather than the combination of two or more firms.¹⁰⁹ Furthermore, the competitive price is not possible in natural monopoly since the marginal cost is always below the average total cost.¹¹⁰ However, public ownership and economic regulation of private firms can be used as a substitute for competition to protect consumers from high prices and restricted output. Natural monopoly is mostly found mainly in public utilities such as electricity, railroads, and apart from public utilities, in operating systems.¹¹¹

It is often stated that the average total cost which equals fixed cost divided by quantity produced, is getting lower through the natural monopoly.¹¹² Without the presence of natural monopoly, the average total cost curve would go up and the prices would increase. In the existence of natural monopoly, there would be monopolistic power which would decrease the average total cost. Consequently, the prices would be lower and the other firms would be excluded from the production of service. In order to prevent the abuse of natural monopoly by some companies, the state monopoly may be emerged as a balancing actor.¹¹³

b. State Monopoly

State monopoly is a way to solve the problem of welfare maximization with production under the conditions of maximum production efficiency and the maximization of collective

¹⁰⁹ Richard A. Posner, 'Natural Monopoly and Its Regulation' (1978) 9 J Reprints Antitrust L & Econ 767

¹¹⁰ David C. Colander, *Economics* (11th edn, McGraw-Hill Education 2020) p.314

¹¹¹ 'Natural Monopoly' (*OECD Statistics*, 3 January 2002)

<<https://stats.oecd.org/glossary/detail.asp?ID=3267>>. accessed 14 February 2022

¹¹² Christopher T. S. Ragan and Richard G. Lipsey, *Economics* (13th edn, Pearson Education Canada 2010) p.292

¹¹³ R. Glenn Hubbard and Anthony Patrick O'Brien, *Economics* (7th edn, Pearson 2018) p.515



welfare.¹¹⁴ In the context of state monopoly, the state has a two-stage optimization problem. In the first stage, the cost-reducing investment is chosen and in the second stage, the quantity supplied to the household is indicated.¹¹⁵ As an example, in the United States of America, sole authorization of the U.S Postal Service regarding the distribution of posts may be raised.¹¹⁶

c. Unnatural Monopoly

Unnatural monopolies may arise since one firm acquires and moves out all of its competitors by gaining the control of an essential or unique input to the production process. They are hybrid systems with the synthesis of state and natural monopoly. Also, the monopolists may sign exclusive long-term contracts with customers and suppliers to keep out its rivals from the related market.¹¹⁷

d. Attempted Monopolization

The attempted monopolization defines the attempt(s) to monopolize by requiring anticompetitive conduct, a specific intent to monopolize, and a dangerous probability of achieving monopoly such as business tort, unfair competition, and trade libel.¹¹⁸ In the context of attempted monopolization, the methods, means, and practices are employed to accomplish the monopolization through unilateral predatory conduct by the possible monopolist.¹¹⁹ However, the attempted monopolization has criteria depending on the facts of each case rather than the general criteria regarding what constitutes an attempt. It is necessary to define the relevant market and demonstrate the substantial barriers to entry into the related market.¹²⁰

¹¹⁴ Carlo Scognamiglio and Matteo Caroli, *Oligopoly and Dynamic Competition* (1st edn, Palgrave Macmillan 1992) p.249

¹¹⁵ Akira Nishimori and Hikaru Ogawa, 'Public Monopoly, Mixed Oligopoly, and Productive Efficiency' (2002) 41(2) Australian Economic Papers <https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-8454.00158?casa_token=gTRPeDfo5rEAAAAA:8dZLR_QMajDjtg6N9wQL5jGU6k7yTDAdfnYc22hvix2Ekz iq4j4uxJhiZPXBFN7ZUKQe6uzrDjUg> accessed 15 February 2022.

¹¹⁶ Roger Sherman, *The Regulation of Monopoly* (1st edn, Cambridge University Press 1989) p.12

¹¹⁷ John Quiggin, *Economics in Two Lessons: Why Markets Work So Well, and Why They Can Fail So Badly* (Hardcover, Princeton University Press 2019) p.180

¹¹⁸ 'Single-Firm Conduct and Section 2 of The Sherman Act: An Overview' (*The United States Department of Justice*) <<https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1>> accessed 15 February 2022.

¹¹⁹ Don T. Hibner Jr., 'Attempts to Monopolize: A Concept in Search of Analysis' (1967) 34 Antitrust LJ 165

¹²⁰ *ibid.*



Dangerous probability signifies the specific intent itself to close approximation of actual monopoly power. It is one of the main elements of the crime of attempting to monopolize and some steps are taken to effectuate the monopoly. On the other hand, the specific intent to monopolize is the intent to destroy competition for constituting a monopoly in related fields. In specific intent, the intent goes beyond the mere intent to do the act and of course, it is a subjective element. In this regard, it must be thoroughly analyzed case by case and in accordance with the nature of the particular market. Furthermore, practices of the other actors in trade and the results of their practices must be ignored. The judges ought to check if the expansion of the power of the acquirer exists or not.¹²¹

3. Tying

Tying is the practice of the supplier of a product, tying product; requiring a buyer also to buy a second product, the tied product to robust the efficiency of the tying product, to reduce the costs, and to enable a producer to discriminate between customers.¹²² However, the practice of tying might be illegal such as the purpose of driving out other competitors from the market of tied product. In fact, most of the practices of tying are treated as anti-competitive and illegal by various legal authorities since they create a new monopoly wholly outside the patent. Correspondingly, they are mostly treated as monopolistic exploitation.¹²³

In order to settle if there is illegal tying or not, there are some specific criterions in most of the legal systems. For example, the American antitrust law sets four criterions to check if there is an illegal tying or not.¹²⁴ First, there must be two separate products involved and secondly, the defendant must not have allowed customers to purchase the tied product without the tying product. Third, the arrangement must affect a significant volume of interstate commerce. Finally, the defendant must have market power in the tying product. If all of these four elements are satisfied, the liability from tying would be automatically detected.¹²⁵

¹²¹ Noel I. Smith, 'Attempt to Monopolize: Its Elements and Their Definition' (1958) 27 Geo Wash L Rev

¹²² Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) p.690

¹²³ Ward S. Bowman Jr., 'Tying Arrangements and the Leverage Problem' (1957) 67 Yale LJ 19

¹²⁴ Richard Whish and David Bailey, *Competition Law* (7th edn, Oxford University Press 2012) p.691

¹²⁵ Samuel Noah Weinstein, 'United States v. Microsoft Corp.' (2002) 17 BerkeleyTech LJ 273



Since the scope of the tying is quite broad, it includes many categories such as horizontal tying, vertical tying, technical tying, refusal to supply, and bundling. In case of horizontal tying, consumers are required to purchase an unrelated product or service together with the desired one from the same company. For example, a company sells its pens only with its lighters. In contrast, vertical tying requires consumers to pay for an unrelated product or service from the same company.¹²⁶ Thirdly, technical tying signifies that the tied product is physically integrated into the tying product and this integration is necessary for engineering and the improvement of its function.¹²⁷

The final concept concerning tying is bundling in which a company that has market power in two goods. For example, A and B can make it hard to enter into a market with only one of these goods for their rivals. In this regard, the company would constitute quasi-duopoly in related fields by bundling them.¹²⁸ Bundling is differentiated from the tying since it refers to the situations where a package of two or more products is offered at a discount. Furthermore, it is not necessary to buy the tied product as addition whilst the tying renders obligatory the purchase of tied product.¹²⁹ Technically, bundling might be profitable to reduce the production and transaction costs by selling the products together rather than selling them individually. For example it is often done in software systems by bundling the other programs into a main software system and the inclusion of spell-checkers in word processors.¹³⁰ On the other hand, it might harm the one-product entrants in related markets and help raise the profits of the

¹²⁶ ‘Tying Arrangements’ (*Money-Zine*) <<https://money-zine.com/definitions/career-dictionary/tying-arrangements/>> accessed 1 March 2022.

¹²⁷ Daniel E. Gaynor, ‘Technological Tying’ [2006] Bureau of Economics Working Paper 284 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.183.6914&rep=rep1&type=pdf>> accessed 1 March 2022.

¹²⁸ Barry Nalebuff, ‘Bundling as an Entry Barrier’ (2004) 119(1) *The Quarterly Journal of Economics* <https://www.jstor.org/stable/pdf/25098680.pdf?casa_token=gQHZkXCF-hEAAAAA:osI2cnncO594O9NG2wak3iMhjbjq8m6ELD_g0VU1SpMUw6nAL-XfEbpkeRBWiEEcEqRREk4FwxpEzO4TUwLloMJKKfvz4MTC-K93GD0huVTI3GnAmQ> accessed 1 March 2022.

¹²⁹ ‘Anti-Competitive Tying and Bundling’ (*Competition Commission*) <https://www.compcomm.hk/en/practices/what_is_comp/tying_bundling.html> accessed 2 March 2022.

¹³⁰ Barry Nalebuff, ‘Bundling as an Entry Barrier’ (2004) 119(1) *The Quarterly Journal of Economics* <https://www.jstor.org/stable/pdf/25098680.pdf?casa_token=gQHZkXCFhEAAAAA:osI2cnncO594O9NG2wak3iMhjbjq8m6ELD_g0VU1SpMUw6nALXfEbpkeRBWiEEcEqRREk4FwxpEzO4TUwLloMJKKfvz4MTC-K93GD0huVTI3GnAmQ> accessed 1 March 2022.



monopolist. Accordingly, it is seen as entry-deterrent and monopoly extension strategy by many authorities.¹³¹

4. Anticompetitive Conduct

Anticompetitive conduct is the general name of the violations reducing or eliminating competition. The notion refers to the anticompetitive effect of the actions realized by monopolists or acting monopolists. These conducts cause less innovation and higher prices in the markets. The actions included within the anticompetitive conduct can be varied such as price fixing, group boycotts, monopolization, and exclusive dealing contracts.¹³²

It involves two main categories as horizontal and single firm conducts. Horizontal conduct refers to the agreements contemplating to limit competition and hinder other businesses from entering the market such as price fixing and division of markets.¹³³ Single firm conduct addresses the increase of the profit of the monopolist by weakening or eliminating the competitive constraints provided by the products of rivals. The fact constituting violation is acquiring monopoly through unreasonable methods rather than having a monopoly or charging high prices.¹³⁴

5. Computer

¹³¹ Barry J. Nalebuff, 'Bundling' (2004) 99(14) *Yale International Center for Finance* <http://neconomides.stern.nyu.edu/networks/phdcourse/Nalebuff_Bundling.pdf> accessed 2 March 2022.

¹³² 'Anticompetitive Practices' (*Federal Trade Commission*) <<https://www.ftc.gov/enforcement/anticompetitive-practices>> accessed 2 March 2022.

¹³³ Dennis W. Carlton and Ken Meyer, 'Appropriate Antitrust Policy Towards Single-Firm Conduct' *Economic Analysis Group* (2008) 08-2 <<https://www.econstor.eu/bitstream/10419/202368/1/eag-dp200802.pdf>> accessed 2 March 2022.

¹³⁴ 'Anti-Competitive Tying and Bundling' (*Competition Commission*) <https://www.compcomm.hk/en/practices/what_is_comp/tying_bundling.html> accessed 2 March 2022.



Computer is an electronic device which takes inputs from the user and processes these data under the control of a set of instructions.¹³⁵ It can store and process the information.¹³⁶ The computer needs a processor, memory, motherboard, and storage device to work. These parts are important because the processor executes instructions from software and hardware, memory is the temporary primary storage for the Central Processing Unit (the CPU) and storage, all the interconnected components communicate through the motherboard, and the storage device is secondary storage that stores permanent data.¹³⁷

a. Boot-Up Sequence

Every computer has a boot sequence and booting is a startup sequence that starts the operating system of the computer when the computer is turned on from the user. This order can vary according to the operating systems of computers because the boot order is the order in which a computer searches for persistent data storage devices that contain program code to load the OS.¹³⁸ It does not matter even the computer already has an OS on it, the boot menu allows users to load up other OSs. Furthermore, the boot menu is useful for installing the new operating system on the computer because users can choose what OS to use when starting the computer.¹³⁹

b. Original Equipment Manufacturers (OEMs)

Those who manufacture the systems and components used in any end product of a company are called original equipment manufacturers (the OEMs). Costs can be reduced for a manufacturer or reseller by partnering with the OEM. Thus, companies do not need to establish production facilities or carry out OEM production in-house. They integrate parts of the OEM

¹³⁵ Dinesh Thakur, 'What Is Computer? - Computer Notes' (*Computer Notes*, 2022) <<https://ecomputernotes.com/fundamental/introduction-to-computer/what-is-computer>> accessed 12 February 2022.

¹³⁶ David Hemmendinger, 'Computer | History, Parts, Networking, Operating Systems, & Facts' (*Encyclopedia Britannica*, 2022) <<https://www.britannica.com/technology/computer>> accessed 12 February 2022.

¹³⁷ Dinesh Thakur, 'What Is Computer? - Computer Notes' (*Computer Notes*, 2022) <<https://ecomputernotes.com/fundamental/introduction-to-computer/what-is-computer>> accessed 12 February 2022.

¹³⁸ 'What Is Boot Sequence? - Definition From Techopedia' (*Techopedia.com*, 2016) <<https://www.techopedia.com/definition/3326/boot-sequence>> accessed 11 February 2022.

¹³⁹ B Definitions and Computer Hope, 'What Is A Boot Menu?' (*Computerhope.com*, 2019) <https://www.computerhope.com/jargon/b/boot_menu.htm#:~:text=When%20a%20computer%20is%20starting,on%20the%20computer's%20startup%20screen.> accessed 11 February 2022.



product into their systems and allow vendors or manufacturers to sell them under their own brand name.¹⁴⁰

6. Operating System

An operating system (the OS) is an intermediary between the computer user and computer hardware.¹⁴¹ The aim of an OS is to create an environment for users to execute programs efficiently and fittingly in this environment.¹⁴² The software performs all the ordinary tasks like memory management, file management, process management, handling output, device management, security, and controlling peripheral devices. Basically the software manages the hardware of the computer.¹⁴³ Windows Operating System, Linux Operating System, iPhone Operating System (the IOS) are the most popular operating systems in this period.¹⁴⁴

a. Functions of Operating Systems

Convenience, efficiency, and ability to evolve are the three functions that perform an OS. Convenience makes a computer favorable to use. Efficiency defines how to use the computer system resources in an efficient manner and the description of the last one, ability to evolve; is the creation of an environment that allows the efficient development, testing, and introduction of new system functions simultaneously, without interfering with the service.¹⁴⁵

i. Memory Management

The process of controlling and coordinating computer memory is the mission of memory management. It manages primary memory or main memory, and it is used to store processed data and instructions. The main purpose of a computer is to execute programs and to make it,

¹⁴⁰ 'What Is OEM (Original Equipment Manufacturer)?' (*Ibm.com*, 2019) <<https://www.ibm.com/my-en/services/technology-support/multivendor-it/oem>> accessed 11 February 2022.

¹⁴¹ Patrick McClanahan and San Joaquin, *Operating System: The Basics* (Libre Texts 2022) <<https://batch.libretexts.org/print/Letter/Finished/eng-45605/Full.pdf>> accessed 3 February 2022.

¹⁴² *ibid.*

¹⁴³ 'Research-Articles-Operating-Systems' (*Longdom*) <<https://www.longdom.org/peer-reviewed-journals/researcharticlesoperatingsystems-2080.html>> accessed 3 February 2022.

¹⁴⁴ *Operating System Fundamental OS Concepts* (Tutorials Point 2016) <https://www.tutorialspoint.com/operating_system/operating_system_tutorial.pdf> accessed 3 February 2022.

¹⁴⁵ Patrick McClanahan and San Joaquin, *Operating System: The Basics* (Libre Texts 2022) <<https://batch.libretexts.org/print/Letter/Finished/eng-45605/Full.pdf>> accessed 3 February 2022.



it must be in the main memory because it provides fast storage that can be accessed directly by the Central Process Unit (the CPU). On the other hand, an OS allocates the memory when a process is requested by the user, in contrast, de-allocates the memory when a process is no longer terminated or launched. It keeps tracks of primary memory, which parts are in use or not.¹⁴⁶

ii. Device Management

An OS manages device communication through its respective drivers, and it keeps the tracks of all devices connected to system. A program is responsible for this task as the Input/Output (I/O) controller. It allocates and de-allocates the device in the most influential way.¹⁴⁷

iii. Processor Management

If there is a multiprogramming environment, system will get multiple programs for execution and therefore, the OS decides which program to send to the CPU for execution.. The OS has the control of assigning and de-assigning of process. In meantime, the CPU can only execute one single process, so the selection is done by the OS. And if there is another process waiting to being executed, the OS does not let to get into the CPU for execution and in this condition, process sets into wait condition. This function is called as process scheduling.¹⁴⁸

iv. Security

Security refers to prevent undesirable user logins, and to prevent malware attacks, to hide files, to protect important information, and to protect computer or data from attacks. To create a safe environment for computer, the OS(s) uses passwords. There are various methods such as one-time passwords, username-passwords. For example, companies and governments use passwords to avoid threats like malicious accessing of system memory, viruses, and worms.¹⁴⁹

¹⁴⁶ *Operating System Fundamental OS Concepts* (Tutorials Point 2016)
<https://www.tutorialspoint.com/operating_system/operating_system_tutorial.pdf> accessed 3 February 2022.

¹⁴⁷ Patrick McClanahan and San Joaquin, *Operating System: The Basics* (Libre Texts 2022)
<<https://batch.libretexts.org/print/Letter/Finished/eng-45605/Full.pdf>> accessed 3 February 2022.

¹⁴⁸ 'Processor Management' (Zitoc, 2019) <<https://zitoc.com/processor-management/>> accessed 3 February 2022.

¹⁴⁹ 'Operating System - Security' (Tutorialspoint.com)
<https://www.tutorialspoint.com/operating_system/os_security.htm> accessed 3 February 2022.



v. Error Detection

The CPU, memory hardware, I/O devices, and in the user program, errors or bugs may occur while any task is running. An OS is responsible for the detection of these errors and taking adequate actions for ensuring correct and coherent computing. It acts as a precaution to prevent any damage to the system.¹⁵⁰

vi. Coordination Between Other Softwares and Users

The coordination of interpreters, compilers, assemblers, and other software to various users of computer systems is done by operating systems.¹⁵¹

vii. Job Accounting

Job Accounting is a function included and available on every i5/OS™ system to monitor the usage of system resources. The log accounting information system value determines what type of system usage information is logged in the system accounting log. The type of information that can be collected includes the processing unit time (the CPU) used, the number of transactions, the time the job being active, the number of database transactions, and communication transactions. Basically, the time and resources that are used by the person or user, are keeping track by the OS. That information can be used to see the usage of a particular user or group of users.¹⁵²

viii. File Management

The data that is organized into files are managed by an OS. File management makes it easy for users to find any files using the ‘Windows File Explorer’ in Windows OS, or ‘Mac OS X Finder’ in macOS. An OS organizes and shows where the files are stored, deleted, read, found,

¹⁵⁰ Patrick McClanahan and San Joaquin, *Operating System: The Basics* (Libre Texts 2022) <<https://batch.libretexts.org/print/Letter/Finished/eng-45605/Full.pdf>> accessed 3 February 2022.

¹⁵¹ 'Operating System - Security' (*Tutorialspoint.com*) <https://www.tutorialspoint.com/operating_system/os_security.htm> accessed 3 February 2022.

¹⁵² 'IBM Docs' (*Ibm.com*, 2004) <<https://www.ibm.com/docs/en/i/7.1?topic=reports-job-accounting>> accessed 4 February 2022.



and repaired. Also, a user can see if there is a missing disk or incorrect file names with file management.¹⁵³

b. Different Types of Operating Systems

When the operating systems are elaborated, it is encountered that they have many types.

i. Batch Operating System

For second-generation computers, the Batch OS is the first for it. Computer does not have a direct interaction with this type of the OS. Since there is no direct interaction, an operator takes similar jobs and groups them into a batch. These groups are then executed on a one-by-one service basis.¹⁵⁴ Through the Batch OS, the large works can be managed and it can be shared by multiple users.¹⁵⁵ Payroll System, Bank Statements, and Data Entry may be given as examples concerning the Batch OS.¹⁵⁶

ii. Time-Sharing Operating System

More than one user can use a particular computer system which is located at various terminals at the same time is called time-sharing. In other term, the shared time of the processor, are shared between multiple users at the same time is called time sharing. In the case of the Time-Sharing Systems, the purpose is to minimize the time of response.¹⁵⁷ For its advantages, the equal opportunity exists for each task, time of the CPU idle can be reduced, and there are not a lot of chances to duplicate software. However, the disadvantages are, the reliability and data

¹⁵³ 'File Systems - Operating Systems - GCSE Computer Science Revision - BBC Bitesize' (*BBC Bitesize*) <<https://www.bbc.co.uk/bitesize/guides/ztcdftr/revision/6#:~:text=File%20management,%2C%20read%2C%20found%20and%20repaired.>> accessed 4 February 2022.

¹⁵⁴ 'What Is Operating System And Types Of Operating System' (*Great Learning*, 2021) <<https://www.mygreatlearning.com/blog/what-is-operating-system/>> accessed 5 February 2022.

¹⁵⁵ 'File Systems - Operating Systems - GCSE Computer Science Revision - BBC Bitesize' (*BBC Bitesize*) <<https://www.bbc.co.uk/bitesize/guides/ztcdftr/revision/6#:~:text=File%20management,%2C%20read%2C%20found%20and%20repaired.>> accessed 5 February 2022.

¹⁵⁶ *ibid.*

¹⁵⁷ 'Types Of Operating System' (*Tutorialspoint.com*) <https://www.tutorialspoint.com/operating_system/os_types.htm> accessed 5 February 2022.

communication problem.¹⁵⁸ To give examples of the Time-Sharing OS, both Linux and Unix can be counted.¹⁵⁹

iii. Distributed Operating System

Distributed operating system is the operating system in which all the systems are independent and users have remote access to the files which are not in his/her computer .¹⁶⁰

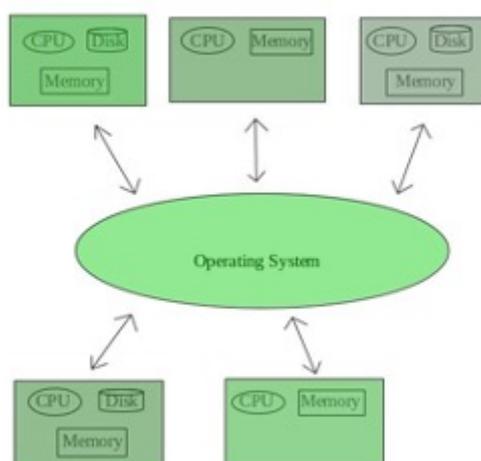


Figure 3: Distributed Operating System¹⁶¹

iv. Network Operating System

Network operating systems have historically been defined this way because operating systems with networking capabilities allow personal computers (the PCs) to join computer networks, share files, and printer access within a local area network (the LAN).¹⁶² They authorize security, shared access of files, applications, and other networking functions on a small private network.

¹⁵⁸ Patrick McClanahan and San Joaquin, *Operating System: The Basics* (Libre Texts 2022) <<https://batch.libretexts.org/print/Letter/Finished/eng-45605/Full.pdf>> accessed 5 February 2022.

¹⁵⁹ *ibid.*

¹⁶⁰ 'Types Of Operating System' (*Tutorialspoint.com*)

<https://www.tutorialspoint.com/operating_system/os_types.htm> accessed 5 February 2022.

¹⁶¹ Geeks for Geeks, 'Network Operating System' <<https://www.geeksforgeeks.org/types-of-operating-systems/?ref=gcse>> accessed 6 February 2022.

¹⁶² 'Types Of Operating Systems / 4. Network Operating System - Geeksforgeeks' (*GeeksforGeeks*, 2021) <<https://www.geeksforgeeks.org/types-of-operating-systems/?ref=gcse>> accessed 6 February 2022.

From different locations and types of systems, server access is remotely possible. Linux, Mac OS X, and Novell NetWare are the examples of Network Operating Systems.¹⁶³

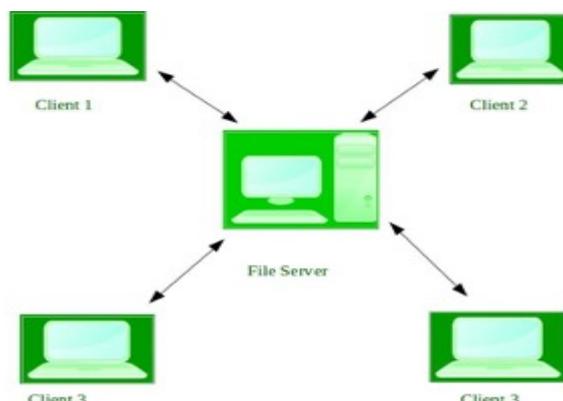


Figure 4: Network Operating System¹⁶⁴

7. Graphical User Interface (the GUI)

For users, they need to see symbols and know the metaphors to use the computer. The Graphical User Interface (the GUI) is a computer program. It enables users to communicate with computer using symbols, visual metaphors, and pointing devices. GUI makes easier to use the computers because without the GUI, the computer would be launched only with commands.¹⁶⁵

8. Internet Browser

Internet browser or web browser is an application used to access and view websites and to read the documents of the Hypertext Markup Language (the HTML) and access to the World Wide Web (the WWW) such as the Microsoft Internet Explorer and the Netscape Navigator.¹⁶⁶ The Internet Browser retrieves the information from other parts of the web and displays it on the desktops. Moreover, it allows the users to browse the web pages, as well as all related contents

¹⁶³ Geeks for Geeks, 'Network Operating System' <<https://www.geeksforgeeks.org/types-of-operating-systems/?ref=gcse>> accessed 6 February 2022.

¹⁶⁴ 'Types Of Operating Systems / 4. Network Operating System - Geeksforgeeks' (*GeeksforGeeks*, 2021) <<https://www.geeksforgeeks.org/types-of-operating-systems/?ref=gcse>> accessed 6 February 2022.

¹⁶⁵ Steven Levy, 'Graphical User Interface | Computing' (*Encyclopedia Britannica*) <<https://www.britannica.com/technology/graphical-user-interface>> accessed 10 February 2022.

¹⁶⁶ 'Web Browser' (*TechTerms.com*) <https://techterms.com/definition/web_browser> accessed 3 March 2022.



across the global network. Informations are transferred by using the Hypertext Transfer Protocol (the HTTP) that is a way to document and transmit messages within the Internet. However, since the Internet Browser is not a system automatized, it is necessitated the Internet Service Providers (the ISPs), the Internet Content Providers (the ICPs), and not specifically on the Internet, the Online Service Providers (the OSLs) to distribute the utilization of Internet across the globe.¹⁶⁷

a. Internet Service Providers (the ISPs)

Internet Providers (the ISPs) are companies that provide internet connections and services to individuals and organizations such as CenturyLink. Besides, they provide software packages, e-mail accounts, and personal web sites or home pages.¹⁶⁸ They should be fair concerning the pricing for all providers involved and encourage future upgrades to their networks. Also they should avoid predatory pricing to not hamper the competition between themselves.¹⁶⁹ Instead, they need to maintain cooperation between themselves to provide global connectivity to all other attachments on the Internet, albeit they compete with each other on price and reliability. In this regard, the notion of peering would be quite important which signifies the business relationship of the ISPs to reciprocally provide each other connectivity to the transit customers of each other.¹⁷⁰

b. Internet Content Providers (the ICPs)

Internet Content Providers (the ICPs) are generally websites, organizations, and persons handling the distribution of the online contents such as blogs and videos. They provide the

¹⁶⁷ ‘What Is Web Browser ??’ (*Oxford Web Studio*) <<https://www.oxfordwebstudio.com/en/did-you-know/what-is-web-browser>> accessed 3 March 2022.

¹⁶⁸ ‘Internet Service Provider’ (*Encyclopedia Britannica*, 13 March 2018) <<https://www.britannica.com/technology/Internet-service-provider>> accessed 3 March 2022.

¹⁶⁹ Linai He and Jean Walrand, ‘Pricing and Revenue Sharing Strategies for Internet Service Providers’ (2005) 1 24th Annual Joint Conference of the IEEE Computer and Communications Societies <https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=1497892&casa_token=FRfc8W3ygIYAAAAA:5muUuKvwgl_PLydwl_JWEIpcTTxQONrSicy2ontwewJK3_19_9WlpgQ2aTXcb5apLU25jO_K&tag=1> accessed 3 March 2022.

¹⁷⁰ William B. Norton, ‘Internet Service Provider and Peering’ (2001) 19 Proceedings of NANOG <<https://courses.cs.washington.edu/courses/cse561/02au/papers/norton-peering-wp01.pdf>> accessed 3 March 2022.



accessibility of these contents for users in multiple formats such as transcripts and videos.¹⁷¹ The news sites such as ABC News and providers focusing on entertainment such as Disney may be given as examples concerning the ICPs.¹⁷²

c. Online Service Providers (the OSLs)

Online Service Providers (the OSPs) are the entities which offer transmission, routing, connections for digital online communication such as the AT&T and T-Online.¹⁷³ They offer connection and information sharing services to provide open and free infrastructure. They also provide applications facilitating digital interaction by not violating their moral responsibilities such as respect to the right to be forgotten and the non-personalization of searching results.¹⁷⁴

IV. CASE BEFORE THE COURT: MONOPOLIZATION OF OPERATING SYSTEM MARKET UNDER THE SHERMAN ACT (UNITED STATES OF AMERICA v. MICROSOFT CORPORATION)

During the case, the parties would be divided upon two as the Plaintiff and the Defendant. Position of Plaintiff would be represented by the United States of America while the Position of Defendant would be replaced by Microsoft Corporation.

1. Overview

Analyzing the background has always been an important element to interpret the case more appropriately.

a. Microsoft Corporation

¹⁷¹ Jay Darrington, 'What Is an Internet Content Provider?' (*CHRON*) <<https://smallbusiness.chron.com/internet-content-provider-57363.html>> accessed 3 March 2022.

¹⁷² *ibid.*

¹⁷³ 'What Is an Online Service Provider?' (*College of Western Idaho*) <<https://cwi.edu/faq/file-sharing/what-online-service-provider>> accessed 3 March 2022.

¹⁷⁴ Mariarosaria Taddeo and Luciano Floridi, 'The Debate on the Moral Responsibilities of Online Service Providers' (2016) 22(6) *Science and Engineering Ethics* <<https://link.springer.com/content/pdf/10.1007/s11948-015-9734-1.pdf>> accessed 3 March 2022.

The idea behind the emergence of Microsoft is based on the strong cooperation between two friends from high school, they are extensively known as Bill Gates and Paul Allen.¹⁷⁵ They decided on the name of their corporation as Microsoft which was constituted with the synthesis of microcomputer and software. Afterwards, the name was registered with the Secretary of State of New Mexico on November 26 1976.¹⁷⁶

Microsoft Corporation (hereinafter the Microsoft) is a private entity which is mostly associated with the softwares for personal computers. Microsoft is one of the strongest actors in the field of software.¹⁷⁷ Concerning the softwares, Microsoft became the first software sold more than a billion dollars worth of products in a single year.¹⁷⁸



Figure 5 : Microsoft Corporation¹⁷⁹

b. Operating Systems of the Microsoft

In 1980, Microsoft released the MS-DOS for the PCs of the International Business Machines Corporation (the IBM).¹⁸⁰ The release of the MS-DOS 1.0 was one of the thresholds of

¹⁷⁵ Mark Leibovich, 'Alter Egos' (*Washington Post*) <<https://www.washingtonpost.com/archive/politics/2000/12/31/alter-egos/91b267b0-858c-4d4e-a4bd-48f22e015f70/>> accessed 4 March 2022.

¹⁷⁶ *ibid.*

¹⁷⁷ Gregg Pascal Zachary and Mark Hall, 'Microsoft Corporation' (*Encyclopedia Britannica*) <<https://www.britannica.com/topic/Microsoft-Corporation>> accessed 4 March 2022.

¹⁷⁸ James Wallace and Jim Erickson, *Hard Drive: Bill Gates and the Making of the Microsoft Empire* (1 st edn, Wiley 1992) p.1

¹⁷⁹ 'Microsoft Logo' (*Flickr*) <<https://www.flickr.com/photos/paxtonholley/5167043548/in/photostream/>> accessed 30 March 2022.

¹⁸⁰ Gregg Pascal Zachary and Mark Hall, 'Microsoft Corporation' (*Encyclopedia Britannica*) <<https://www.britannica.com/topic/Microsoft-Corporation>> accessed 5 March 2022.



Microsoft for its transition to a software industry giant.¹⁸¹ Considering the critics about the GUI and other technical deficiencies, Microsoft introduced its revolutionary operating system ‘Windows 1.0’ in November 1985 with various novelties such as multitasking capability.¹⁸² Briefly, Windows 1.0 was a graphical application environment that ran on the top of the MS-DOS.¹⁸³ As successor of Windows 1.0, Windows 2.0 was released in December 1987.¹⁸⁴ Afterwards, Windows 3.0 was launched in May 1990.¹⁸⁵ It obtained more widespread success and was considered a challenger to the GUI of the Apple called Macintosh by virtue of its more improved interface.¹⁸⁶ In this regard, Windows 3.0 started to be installed more often by the OEMs compared to the other operating systems.¹⁸⁷ Further, Windows 3.1 was released in April 1992 including additional novelties such as device independence which made it easier for manufacturers to write device drivers for their hardware.¹⁸⁸

Windows 95 arrived on the market of the operating systems in August 1995. It was the first operating system of Microsoft incorporating the start button and menu. As a revolutionary step in operating systems, the Internet Explorer 1.0 was firstly occurred in the markets as tied into Windows 95.¹⁸⁹ As the successor of Windows 95, Windows 98 was released in June 1998 with a web-based interface maintaining that the Internet became a part of the user interface.¹⁹⁰ The users would not need the multi-applications as one for the local information, one for the browsing network, and one for the Internet.¹⁹¹ Further, Windows 98 processed a tool called the

¹⁸¹ ‘MS-DOS’ (*Encyclopedia Britannica*, 3 March 2020) <<https://www.britannica.com/technology/MS-DOS>> accessed 5 March 2022.

¹⁸² *ibid.*

¹⁸³ Benj Edwards, ‘35 Years of Microsoft Windows: Remembering Windows 1.0’ (*How to Geek*, 24 August 2021) <<https://www.howtogeek.com/700661/35-years-of-microsoft-windows-remembering-windows-1.0/>> accessed 5 March 2022.

¹⁸⁴ ‘From Windows 1 to Windows 10: 29 Years of Windows Evolution’ (*The Guardian*, 2 October 2014) <<https://www.theguardian.com/technology/2014/oct/02/from-windows-1-to-windows-10-29-years-of-windows-evolution>> accessed 5 March 2022.

¹⁸⁵ ‘From Windows 1 to Windows 10: 29 Years of Windows Evolution’ (*The Guardian*, 2 October 2014) <<https://www.theguardian.com/technology/2014/oct/02/from-windows-1-to-windows-10-29-years-of-windows-evolution>> accessed 5 March 2022.

¹⁸⁶ ‘Windows 3.0’ (*Microsoft Wiki*) <<https://microsoft.fandom.com/wiki/MS-DOS>> accessed 5 March 2022.

¹⁸⁷ Gregg Pascal Zachary and Mark Hall, ‘Microsoft Corporation’ (*Encyclopedia Britannica*) <<https://www.britannica.com/topic/Microsoft-Corporation>> accessed 5 March 2022.

¹⁸⁸ ‘What Is Windows 3.1?’ (*Network Encyclopedia*) <<https://networkencyclopedia.com/windows-3-1/>> accessed 5 March 2022.

¹⁸⁹ ‘Windows 95’ (*Computer Hope*, 21 May 2018) <<https://www.computerhope.com/jargon/w/win95.htm>> accessed 6 March 2022.

¹⁹⁰ Siu Ki T, ‘What Are the Pros and Cons of Windows 95?’ (*Computing Services Centre City University of Hong Kong*, 1996) <<https://www.cityu.edu.hk/csc/netcomp/net6/win95.htm>> accessed 6 March 2022

¹⁹¹ ‘Windows 98’ (*Data Recovery*) <<http://www.data-recovery-app.com/datarecovery/windows98.html>> accessed 6 March 2022.

Active Desktop for browsing network, Internet, and data.¹⁹² The Active Desktop enabled users the ability to customize the desktop with the look and feel of the Internet.¹⁹³



Figure 6: MS-DOS¹⁹⁴

c. Positions of the Microsoft over the Related Markets

By the time passed, Microsoft commenced to distribute its operating systems among the personal computers and the OEMs through the advanced technology of its systems. The company became a strong power in related markets when it entailed the Internet Explorer within its operating systems.

i. Operating System Market

¹⁹² What Does Windows 98 Mean?' (*Techopedia*, 25 June 2020) <<https://www.techopedia.com/definition/10048/windows-98>> accessed 6 March 2022.

¹⁹³ *ibid.*

¹⁹⁴ 'Microsoft Logo' (*Flickr*) <<https://www.flickr.com/photos/paxtonholley/5167043548/in/photostream/>> accessed 30 March 2022..



Figure 7: Bill Gates, CEO of Microsoft Corporation¹⁹⁵

Microsoft possesses the lion share of the world-wide market for the operating systems in excess of eighty percent. In the last couple of years, this percentage of share has been above ninety percent.¹⁹⁶ This share makes Microsoft as almost the sole actor in the operating system market without any viable concurrent.¹⁹⁷ Although the Mac OS of Apple is included in the operating system market, the share of Microsoft still stands above eighty percent.¹⁹⁸ Currently, Microsoft can set the price of the license substantially above the market price. The company may continue to implement the same prices without losing so many customers through its dominance within the operating system market.¹⁹⁹ Even though Microsoft has an enormous market power in operating systems, another potential rival would have to make a huge progress to compete with the leadership of Microsoft. The possible progress provided by the competitors would foster the competition and innovation.²⁰⁰

¹⁹⁵ Aleksandar K., 'Bill Gates Steps Down from Microsoft Board of Directors' (*TechPowerUp*, 16 March 2020) <<https://www.techpowerup.com/264788/bill-gates-steps-down-from-microsoft-board-of-directors>> accessed 30 March 2020.

¹⁹⁶ Thomas M. Lenard, 'Creating Competitor in the Market for Operating Systems: Alternative Structural Remedies in the Microsoft Case' (2001) 9 *Geo Mason L Rev* 803

¹⁹⁷ *ibid.*

¹⁹⁸ U.S. V. Microsoft: Court's Findings of Fact' (*The United States Department of Justice*) <<https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact#ijj>> accessed 7 March 2022.

¹⁹⁹ *ibid.*

²⁰⁰ Mark A. Lemley & David McGowan, 'Legal Implications of Network Economic Effects' (1998) 86 *Calif L Rev* 479



Actually, the dominance of Microsoft in the operating market derives from strengthening itself with the characterization of the operating system market with economies of scale which means a proportionate saving in costs gained by an increased level of production.²⁰¹ In the case of Microsoft, the economies of scale might be varied such as the high fixed costs and low marginal costs to produce an operating system.²⁰²

The second base from where Microsoft derives its dominance is the network effects which are the utilities that the users gain from the consumption of goods.²⁰³ Network effects occur when the user of a product receives not only the inherent benefit of the product, but also a network benefit that increases with the number of the other users of the product.²⁰⁴ Concerning Microsoft, the PC operating system for which there are the greatest number, variety, and quality of operating systems will be selected by the large majority of PC users.²⁰⁵ In turn, the writers of applications will write their programs to work with the most commonly used operating system, to be appealed by as many potential customers as possible.²⁰⁶

ii. Internet Browser Market

Unlike the operating system market, Microsoft has not dominance and the company has to compete with certain actors such as the Netscape Navigator which posed a huge threat against Microsoft. As a response to the rise of the Netscape Navigator, Microsoft increased its investments in browser technology by devoting more than a hundred million dollars to the browser software developments.²⁰⁷ This rise in the investments gave its fruits with the increase

²⁰¹ Benjamin Klein, 'The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?' (2001) 15(2) Journal of Economic Perspectives <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.45>> accessed 7 March 2022.

²⁰² *ibid.*

²⁰³ Roman Beck, *The Network(Ed) Economy* (1st edn, DUV 2006) p.41

²⁰⁴ John E. Lopatka and William H. Page, 'Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion' (1999) 7 (1) Supreme Court Economic Review <<https://www.journals.uchicago.edu/doi/pdf/10.1086/scer.7.1147089>> accessed 7 March 2022.

²⁰⁵ U.S. V. Microsoft: Court's Findings of Fact' (*The United States Department of Justice*) <<https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact#iii>> accessed 7 March 2022.

²⁰⁶ *ibid.*

²⁰⁷ Benjamin Klein, 'The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?' (2001) 15 (2) Journal of Economic Perspectives <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.45>> accessed 7 March 2022.



of the share of Microsoft within the internet browser market from less than five percent to approximately sixty percent.²⁰⁸

Besides, Microsoft bundled its internet browser called ‘Internet Explorer’ and the Windows 95 at zero-price to enable the free distribution of the Internet Explorer within the market.²⁰⁹ This action was interpreted as predatory both in doctrine and the accusations of the United States of America since the price was set below the marginal cost.²¹⁰ However, the browser software has nearly zero marginal production cost with the reduction of costs in production, distribution, and customer support.²¹¹ Furthermore, the zero-pricing is a widespread practice to reduce the prices, expand the distribution, and raise the output in browser softwares. For example, the multimedia player of the RealNetworks price at zero since giving softwares for free can generate the additional revenues by increasing the sales of softwares. Additionally, the zero-pricing would provide the increase of advertising revenue and the e-commerce commissions on the ground that it would facilitate the interactions between firms by enabling the proliferation of internet browsers.²¹²

d. Actors Threatening the Dominance of the Microsoft

As the time passed and innovation became an uprising notion around the world, technology started to evolve and new actors arose that would threaten the dominance of Microsoft in related markets such as Intel, World Wide Web, Netscape, and Java.

i. Intel

²⁰⁸ Steven J. Davis and Kevin M. Murphy, ‘A Competitive Perspective on Internet Explorer’ (2000) 90(2) *The American Economic Review* <https://www.jstor.org/stable/pdf/117217.pdf?casa_token=cumdkAkqJ4kAAAAA:4zgCltjjqkRQwezpoFCOIXUub-tBpR0bzgiHswYCFftk29ZnSvafWRLAyrHO3Q0x4a13mMniWUvUcTyMjHgJJ9dzDtGrtursOhqnVFCCTEfsGypc0A> accessed 7 March 2022.

²⁰⁹ *ibid.*

²¹⁰ Complaint : U.S. V. Microsoft Corp.’ (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 7 March 2022.

²¹¹ Benjamin Klein, ‘The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?’ (2001) 15(2) *Journal of Economic Perspectives* <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.45>> accessed 7 March 2022.

²¹² *ibid.*



Even though Intel is engaged principally in the design and manufacture of microprocessors, it endeavors to develop softwares. In fact, the Intel develops its softwares at the Intel Architecture Labs (the IAL) to consume more microprocessor cycles and increase the demand for advanced Intel microprocessors. In order to enable this integration, Intel released the software referred to as ‘ the Native Signal Processing’ by including in its microprocessors for the non-Windows operating systems. The different versions of the NSP exposed the same set of software interfaces to developers thus more than one application took advantage of interfaces exposed by the NSP. ²¹³

ii. World Wide Web

The World Wide Web was firstly proposed by Tim Berners-Lee to meet the requests for information sharing among universities and scientific institutes in the world. Actually, it finds its origin in his article about the accelerators and experiments at the European Organization for Nuclear Research (the CERN).²¹⁴ In that article, he indicated that the existing information should have been accessible using any new information management system. In addition to that, he stressed the access was required to the same data from different types of systems and platforms.²¹⁵ Further, he resisted the centralisation preventing the existing systems to be linked together without requiring any central control or coordination.²¹⁶ Within the light of the ideas he highlighted in his article, today, it is very easy to distribute, access to information, and manipulate the content with the information pollution through the facilities provided by the World Wide Web, as stated by Bill Gates.²¹⁷

However, the more people saw the facilities provided by the World Wide Web like working on every operating system and access to information in seconds, the more they started to utilize

²¹³ U.S. V. Microsoft: Court’s Findings of Fact’ (*The United States Department of Justice*) <<https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact#iii>> accessed 8 March 2022.

²¹⁴ Karwan Jacksi and Shakir M.Abass, ‘Development History Of The World Wide Web’ (2019) 8(9) *International Journal of Scientific & Technology Research* <https://www.researchgate.net/profile/Karwan-Jaksi/publication/336073851_Development_History_Of_The_World_Wide_Web/links/5d8d1f8f92851c33e94064cb/Development-History-Of-The-World-Wide-Web.pdf> accessed 7 March 2022.

²¹⁵ Tim Berners-Lee, ‘Information Management: A Proposal’(1989) *The European Organization for Nuclear Research* <<https://cds.cern.ch/record/369245/files/dd-89-001.pdf>> accessed 7 March 2022.

²¹⁶ *ibid.*

²¹⁷ Complaint : U.S. V. Microsoft Corp.’ (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 7 March 2022.



the World Wide Web.²¹⁸ This situation absolutely commenced to threaten the dominance of the Windows operating system because a certain part of the World Wide Web involving the special software programmes has been started to use. Additionally, access to these special software programmes is much easier than Windows.²¹⁹

iii. Netscape

The Netscape Communications Corporation released the Netscape Navigator in 1994. Following days, the company became the market leader regarding browser usage with seventy percent. Netscape Navigator could be run on regardless of the operating system of the computer.²²⁰ It increased the proliferation of the World Wide Web and in some aspects, they worked closely.²²¹ In addition to that, it became the first and the most popular web browser in the middle of 1990's by virtue of being licensed freely for personal and non-profit use.²²² Moreover, the Netscape Navigator is ported to more than fifteen different operating systems thus, if a developer writes an application that proceeds solely on the Application Programming Interface (the APIs) exposed by the Navigator, that application would run on many different operating systems.²²³

iv. Java

²¹⁸ Tim Berners-Lee, 'Information Management: A Proposal'(1989) The European Organization for Nuclear Research <<https://cds.cern.ch/record/369245/files/dd-89-001.pdf>> accessed 7 March 2022.

²¹⁹ Steve Lohr and John Markoff, 'Microsoft's World: A Special Report: How Software's Giant Played Hardball Game' (*The New York Times*, 8 October 1998) <<https://www.nytimes.com/1998/10/08/business/microsoft-s-world-a-special-report-how-software-s-giant-played-hardball-game.html>> accessed 7 March 2022.

²²⁰ Henry R. Norr, 'Netscape Communications Corp.' (*Encyclopedia Britannica*, 28 August 2017) <<https://www.britannica.com/topic/Netscape-Communications-Corp>> accessed 8 March 2022.

²²¹ *ibid.*

²²² Netscape 1.x' (*WinWorld*) <<https://winworldpc.com/product/netscape-navigator/1x>> accessed 8 March 2022.

²²³ U.S. V. Microsoft: Court's Findings of Fact' (*The United States Department of Justice*) <<https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact#iii>> accessed 8 March 2022.



Figure 8: Java²²⁴

Java was developed by James Gosling at Sun Microsystems in 1995 in order to be developed for interactive television. Afterwards, it was transformed into a programming language with the motto of ‘Write Once, Run Anywhere’.²²⁵ Java threatened the superiority of Microsoft with its many features like eliminating the ports to access the applications, platform independence allowing the same programme to be managed on multiple operating systems.²²⁶ Also, Java enabled application developers to write programs not depending on Windows. This feature would weaken the network effects strengthening the dominance of Microsoft.²²⁷ In May 1995, the Netscape agreed to include a copy of the Java runtime environment within every copy of the Navigator. The browser quickly became the principal vehicle by which the Sun placed copies of its Java runtime environment on the PC systems of the users of the Windows.²²⁸ The combined efforts of the Netscape and the Sun threatened the applications barrier to entry. This opened the way for the non-Microsoft operating systems to emerge as acceptable substitutes for Windows.²²⁹

e. Emergence of the Internet Explorer

²²⁴ ‘Java Logo’ (1000 Logos) <<https://1000logos.net/java-logo/>> accessed 30 March 2022.

²²⁵ Ken Arnold, James Gosling, and David Holmes, *The Java Programming Language* (4 th edn, Addison Wesley Professional 2005) p.1

²²⁶ *ibid.*

²²⁷ Complaint : U.S. V. Microsoft Corp.’ (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 8 March 2022.

²²⁸ U.S. V. Microsoft: Court’s Findings of Fact’ (*The United States Department of Justice*) <<https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact#iii>> accessed 8 March 2022.

²²⁹ ‘Internet Explorer 1’ (*My Internet Explorer*) <<https://www.my-internet-explorer.com>> accessed 8 March 2022.



As a response to the rise of its concurrents and the alliances between them obliged Microsoft to change its innovation policy. In this context, Microsoft released the Internet Explorer by bundling it with its operating systems, notably the Windows 95 and 98.

i. Internet Explorer

Microsoft responded the initiatives of its concurrents by introducing its own internet browser, which it called the Internet Explorer and released its initial version as a rebranded version of the Spyglass Mosaic in August 1995.²³⁰ The Internet Explorer has always been viewed by Microsoft and the market as an internet "browser" allowing computer users to efficiently locate, access, display, and manipulate content on the World Wide Web.²³¹ Currently, Microsoft plans to continue to distribute and upgrade the versions of its Internet Explorer. In this regard it has distributed the versions of the Internet Explorer for use for the non-Windows operating systems.²³²



Figure 9: Logo of the Internet Explorer²³³

Further, Microsoft bundled the Internet Explorer with both Windows 95 and 98 to promote the distribution of the Internet Explorer within the market.²³⁴

²³⁰ Complaint : U.S. V. Microsoft Corp.' (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 8 March 2022.

²³¹ *ibid.*

²³² *ibid.*

²³³ 'IE Logo' (*Logo* <) <<http://logok.org/ie-logo/>> accessed 30 March 2022.

²³⁴ James F. Ponsoldt & Christopher D. David, 'Comparison between U.S. and E.U. Antitrust Treatment of Tying Claims against Microsoft: When Should the Bundling of Computer Software Be Permitted' (2007) 27 *Nw J Int'l L & Bus* 421



a. Tying of the Microsoft Internet Explorer Software to the Windows 95

On January 5, 1996, Bill Gates, the CEO of Microsoft, stated that winning the Internet browser share was a very important goal for them and declared that the Internet Explorer would be distributed in every way they could.²³⁵

Microsoft tied Internet Explorer to Windows contractually by requiring that computer manufacturers who licensed Windows 95 for installation on new computers also installed the Internet Explorer, and sold the two products as bundled. Afterwards, Microsoft imposed additional requirements on the OEMs such as keeping the icon of Internet Explorer in Windows Desktop. Furthermore, Microsoft did not allow the placement of the icons of other desktops larger than its desktops. Also, the OEMs could not modify the boot sequence or have programs that automatically launch.²³⁶ Microsoft highlighted that it had integrated the Internet Explorer into the Windows 95 and by creating a single integrated product and they were not separated products.²³⁷ Consequently, Microsoft argued that this practice did not constitute tying since the tying requires two separated products.²³⁸

Microsoft possessed an inherent advantage over Netscape in competing for browser distribution due to the fact that the OEMs had to license Windows to remain in business. In this context, Microsoft could foreclose Netscape from the personal computer distribution channel by tying the Internet Explorer exclusively to Windows.²³⁹

b. Agreements with Internet Service Providers and Online Services

²³⁵ Joel I. Klein, 'Cut off Their Air Supply: Justice Department's Case against the Microsoft Monopoly (III)' (1998) 29 Antitrust L & Econ Rev 17

²³⁶ Michael D. Whinston, 'Exclusivity and Tying in U.S. v. Microsoft: What We Know, and Don't Know' (2001) 15(2) Journal of Economic Perspectives <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.63>> accessed 9 March 2022.

²³⁷ Renato Mariotti, 'Rethinking Software Tying' (2000) 17 Yale J on Reg 367

²³⁸ *ibid.*

²³⁹ Benjamin Klein, 'The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?' (2001) 15(2) Journal of Economic Perspectives <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.45>> accessed 9 March 2022.



Microsoft has entered into exclusionary agreements with the ICPs such as Disney, Hollywood Online, and CBS Sportsline. The company provided different levels of channel placement such as platinum²⁴⁰. In order to obtain platinum placement, the ICPs are required to agree:

- 1) Not to compensate in any manner the manufacturer of an 'Other Browser' (defined as either of the top two non- Microsoft browsers), including by distributing its browser, for the distribution, marketing, or promotion of the ICP's content;
- 2) Not to promote any browser produced by any manufacturer of an "Other Browser";
- 3) Not to allow any manufacturer of an Other Browser" to promote and highlight the ICP's "channel" content on or for its browsers; and
- 4) To design its web sites using Microsoft-specific, proprietary programming extensions²⁴¹

The most significant exclusionary contract of Microsoft was its deal with America Online which is the largest IAP with nearly forty percent of the subscribers within the IAPs in the world.²⁴² The America Online was looking for a new and improved replacement for its own proprietary browser to incorporate into its internet access software. Accordingly, the platform informed both Microsoft and Netscape.²⁴³ Microsoft won the competition and the company agreed with America Online on the crucial points such as licensing the Internet Explorer at zero price, developing a modular version of the Internet Explorer, and including the America Online in the Windows desktop for free.²⁴⁴

²⁴⁰ Complaint : U.S. V. Microsoft Corp.' (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 9 March 2022.

²⁴¹ Joel I. Klein, 'Cut off Their Air Supply: Justice Department's Case against the Microsoft Monopoly (III)' (1998) 29 *Antitrust L & Econ Rev* 17

²⁴² Michael D. Whinston, 'Exclusivity and Tying in U.S. v. Microsoft: What We Know, and Don't Know' (2001) 15(2) *Journal of Economic Perspectives* <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.63>> accessed 9 March 2022.

²⁴³ Benjamin Klein, 'The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?' (2001) 15(2) *Journal of Economic Perspectives* <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.45>> accessed 9 March 2022.

²⁴⁴ *ibid.*



c. Customization of PC Boot-Up Sequence and PC Screens

In August 1996, Microsoft obligated the OEMs on the licensing terms that restrict the ability of the OEMs to alter the Windows 95 boot-up sequence through certain provisions such as;

- 1) Modifying or obscuring the sequence or appearance of any screens displayed by Windows in all subsequent boot-ups unless the user initiates some action to change the sequence,
- 2) Displaying any content, including visual displays, sound, welcome or tutorial screens, until after the Windows desktop screen first appears,
- 3) Modifying or obscuring the appearance of the Windows desktop screen, beyond a narrowly limited set of permitted changes,
- 4) Adding a screen that would automatically appear after the initial boot-up sequence or in place of the Windows desktop screen.²⁴⁵

These prerequisites allegedly hindered the development of alternative user interfaces by the OEMs to compete with browser suppliers. In this connection, Microsoft has consolidated its leadership in the operating systems. Further, Microsoft allowed the customization of the Active Desktop in the Windows 98 and the Internet Explorer 4.0. However, an OEM would not be able to add new icons and folders to the Windows desktop screens unless the OEMs do not preinstall the Active Desktop.²⁴⁶

Further, the OEMs including the Micron, the Hewlett Packard, and Gateway requested the Microsoft to provide alternative user interfaces, boot-up sequences and default screens for the new PC purchasers²⁴⁷. This request has been refused by Microsoft to prevent the OEMs and

²⁴⁵ Joel I. Klein, 'Cut off Their Air Supply: Justice Department's Case against the Microsoft Monopoly (III)' (1998) 29 Antitrust L & Econ Rev 17

²⁴⁶ Complaint : U.S. V. Microsoft Corp.' (*The United States Department of Justice*, 18 May 1998)

<<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 9 March 2022.

²⁴⁷ *ibid.*



other actors from acquiring ultimate control power over the desktops.²⁴⁸ This decision was explained by the statement of the Vice President of Marketing and Developer Relations of the Microsoft following as: *'In order to protect our position on the desktop and increase the likelihood that IE gets the prominent position with the end user we should move the [Internet] Sign Up Wizard into the boot-sequence some where, before we give control over to the OEM'*.²⁴⁹

In the further proceedings, the DOJ found these agreements inconsistent with the antitrust law since these restrictions limited the ability of OEMs to modify or customize the screens.²⁵⁰

d. Tying of the Microsoft Internet Explorer Software to the Windows 98

On January 2, 1997, James Allchin, the Senior Vice President of Microsoft, urged his colleagues that they were not investing sufficiently in finding ways to tie the Internet Explorer and Windows together.²⁵¹ He wrote that the more the Internet Explorer tightened to Microsoft, the more the Netscape would be cut off. Further, Microsoft bundled Internet Explorer with Windows 98. The company permitted the OEMs and end users to delete the Internet Explorer from Windows 98. However, Microsoft has designed Windows 98 with the Add/Remove utility that will remove all or any part of the Internet Explorer.²⁵² Microsoft defended the principle that it could put whatever it wanted to in its operating system. The company declared the bundling of Internet Explorer and Windows 98 as a single product as response to the allegations including the separability of the operating system and internet browser markets.²⁵³

2. Timeline of the Case

²⁴⁸ Joel I. Klein, 'Cut off Their Air Supply: Justice Department's Case against the Microsoft Monopoly (III)' (1998) 29 Antitrust L & Econ Rev 17

²⁴⁹ Complaint : U.S. V. Microsoft Corp.' (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 9 March 2022.

²⁵⁰ *ibid.*

²⁵¹ Steve Lohr, 'Browser Memos Pose Challenge To Microsoft' (*The New York Times*, 5 November 1998) <<https://www.nytimes.com/1998/11/05/business/browser-memos-pose-challenge-to-microsoft.html>> accessed 9 March 2022.

²⁵² Complaint : U.S. V. Microsoft Corp.' (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 9 March 2022.

²⁵³ Steve Lohr and John Markoff, 'Microsoft's World: A Special Report.; How Software's Giant Played Hardball Game' (*The New York Times*, 8 October 1998) <<https://www.nytimes.com/1998/10/08/business/microsoft-s-world-a-special-report-how-software-s-giant-played-hardball-game.html>> accessed 9 March 2022.



The first time the dominance of Microsoft was questioned by the legal authorities was through the investigation started by the Federal Trade Commission (the FTC), in June 1990.²⁵⁴ It is necessary to state that the investigation was limited to the joint announcement of the OS/2 by Microsoft and IBM in a computer trade show in 1989.²⁵⁵ This collaboration was perceived as dangerous by the government officials since this collaboration would be able to impair the competition and constitute collusion against the other competitors.²⁵⁶ In 1991, the FTC expanded the scope of the investigation to examine the claims of concurrents following as Microsoft had monopolized or attempted to monopolize the operating system market.²⁵⁷ In this context, The FTC elaborated the practices of the Microsoft and reached to the certain findings including:

- 1) Microsoft announced that it was developing a non-existent version of software to impede the OEMs from integrating an operating system of a competitor,
- 2) Microsoft required the OEMs that licensed its operating system software also to license the applications of the Microsoft,
- 3) Microsoft licensed its operating systems to the OEMs to only be used with a designated server.²⁵⁸

Afterwards, the Commission could not reach either the consensus or majority on whether Microsoft was harming the competition.²⁵⁹ Any administrative action was filed and the FTC

²⁵⁴ ‘Janet D. Steiger’ (*Federal Trade Commission*) <<https://www.ftc.gov/about-ftc/commissioners-staff/janet-d-steiger>> accessed 14 March 2022.

²⁵⁵ Wash Redmond, ‘Report: FTC Staff to Seek Action on Microsoft’ (*UPI*, 17 December 1992) <<https://www.upi.com/Archives/1992/12/17/Report-FTC-staff-to-seek-action-on-Microsoft/1493724568400/>> accessed 14 March 2022.

²⁵⁶ *ibid.*

²⁵⁷ Graham Lea, ‘Ten Years Hard – Microsoft’s Long Antitrust Struggle’ (*The Register*, 19 June 2000) <https://www.theregister.com/2000/06/19/ten_years_hard_microsofts_long/> accessed 14 March 2022.

²⁵⁸ ‘Memorandum Opinion : U.S. v. Microsoft Corp.’ (*The United States Department of Justice*) <https://www.justice.gov/atr/memorandum-opinion-us-v-microsoft-corp#N_1> accessed 14 March 2022.

²⁵⁹ John Burgess, ‘FTC Deadlocks Again in Microsoft Investigation’ (*The Washington Post*, 22 July 1993) <<https://www.washingtonpost.com/archive/business/1993/07/22/ftc-deadlocks-again-in-microsoft-investigation/dd8ce8ed-1d66-4c32-b5af-6334f422e364/>> accessed 14 March 2022.



suspended the investigation against Microsoft.²⁶⁰ This became the first legal step to investigate the alleged monopoly of Microsoft in related markets and led further investigations, notably by the Department of Justice.²⁶¹

By the time it arrived on July 15, 1994, the Department of Justice firstly brought the complaint against Microsoft. In the complaint, the Department of Justice asserted that the Microsoft had signed anticompetitive agreements and had engaged anticompetitive marketing practices directed at the OEMs.²⁶² These agreements required the OEMs to pay Microsoft for each time they sell the PCs involving the non-Microsoft operating systems. Important part of these agreements were long-term agreements.²⁶³ Further, the DOJ claimed that Microsoft had used these contracts to restrain trade, monopolize the operating system market, and induce the OEMs to the anticompetitive contracts.²⁶⁴ Besides, the department indicated that these agreements would hamper the innovation and deprive the customers of an effective choice among the operating systems.²⁶⁵

The Department of Justice also addressed the provisions of the Non-Disclosure Agreements (the NDAs) between Microsoft and the Independent Software Developers (the ISVs). The DOJ found the scope of the NDAs quite broad. The department stressed the anticompetitive conduct of the NDAs such as prohibiting third parties from raising complaints against Microsoft. Microsoft denied these allegations and stated that the NDAs were not broad, restrictive, and the agreements were very essential to protect trade secrets.²⁶⁶

²⁶⁰ ‘Memorandum Opinion : U.S. v. Microsoft Corp.’ (*The United States Department of Justice*) <https://www.justice.gov/atr/memorandum-opinion-us-v-microsoft-corp#N_1> accessed 14 March 2022.

²⁶¹ Carla Lazzareschi, ‘IBM, Microsoft Admit FTC Probe on Software : Investigation: The Two Computer Firms Have Been Questioned about a 1989 Plan That Could Have Been Anti-Competitive’ (*Los Angeles Times*, 13 March 1991) <<https://www.latimes.com/archives/la-xpm-1991-03-13-fi-179-story.html>> accessed 14 March 2022..

²⁶² Richard J. Gilbert and Michael L. Katz, ‘An Economist’s Guide to U.S. v. Microsoft’ (2001) 15(2) *Journal of Economic Perspectives* <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.25>> accessed 15 March 2022.

²⁶³ *ibid.*

²⁶⁴ ‘Competitive Impact Statement: U.S. V. Microsoft Corporation’ (*The United States Department of Justice*) <<https://www.justice.gov/atr/competitive-impact-statement-us-v-microsoft-corporation>> accessed 15 March 2022.

²⁶⁵ *ibid.*

²⁶⁶ ‘US Department of Justice vs. Microsoft: Internet Explorer Case’ (*Stanford*) <<https://cs.stanford.edu/people/eroberts/cs201/projects/microsoft-vs-doj/ie/MSResponse.html>> accessed 15 March 2022.



At the end of these accusations and responses, Microsoft consented to the entry of the final judgment, in other words consent decree. The Final Judgment would terminate the civil actions. However, the Court would retain the jurisdiction for further proceedings that may be required to interpret, enforce, or modify the Judgment.²⁶⁷ The Court also retained the competence to punish in case of the violations of the Final Judgment.²⁶⁸ On August 21, 1995, the Court entered the Consent Decree (hereinafter 1995 Consent Decree).²⁶⁹

a. 1995 Consent Decree

The 1995 Consent Decree involved important provisions that would restrict the activities of the Microsoft and its usual practices for years follows as;

- 1) Microsoft shall not enter into any license agreement for any product that has a total duration exceeding one year,
- 2) Microsoft shall not enter into any license agreement prohibiting or restricting the licensing of the OEMs, sale or distribution of any non-Microsoft operating system ,
- 3) Microsoft shall not enter into any per processor license,
- 4) Microsoft shall not enter into any license agreement in which the terms of that agreement are expressly or impliedly conditioned upon:
 - a) the OEMs not licensing, purchasing, using or distributing any non-Microsoft product,

²⁶⁷ ‘Competitive Impact Statement: U.S. V. Microsoft Corporation’ (*The United States Department of Justice*) <<https://www.justice.gov/atr/competitive-impact-statement-us-v-microsoft-corporation>> accessed 15 March 2022.

²⁶⁸ *ibid.*

²⁶⁹ Complaint : U.S. V. Microsoft Corp.’ (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 15 March 2022.



- b) the licensing of any other product, operating system software or other product (This provision shall not be construed to prohibit Microsoft from developing integrated products)
- c) Microsoft shall not enter into any NDA that would restrict in any manner any person subject to the NDA from developing software products that will run on competing operating system products.²⁷⁰

The 1995 Consent Decree mainly imposed two types of restrictions, namely horizontal and vertical.²⁷¹ The horizontal restriction precluded Microsoft from using zero marginal cost pricing while the vertical restriction prohibits bundling two products through the contract.²⁷² In other words, the 1995 Consent Decree disallows the contractual bundling whilst it allows technological bundling impliedly. Additionally, the Court impeded Microsoft to enter into the per-processor contracts with the OEMs.²⁷³ Under the per-processor contracts, the OEMs pay Microsoft a fee for each sale of a computer system using a designated microprocessor whether or not the sale is realized with the operating systems of Microsoft. Besides, the OEMs are obliged to pay Microsoft for sales of all computers including the designated microprocessor.²⁷⁴

b. The Period Following the Issuance of 1995 Consent Decree

Right before the settlement of 1995 Consent Decree, Bill Gates had written: *'A new competitor 'born' on the Internet is Netscape. Their browser is dominant with 70 percent usage share, allowing them to determine which network extensions will catch on. They are pursuing a multi-platform strategy where they move the key API [applications programming interface] into the client to commoditize the underlying operating*

²⁷⁰ '[Proposed] Final Judgment' (*The United States Department of Justice*)

<<https://www.justice.gov/atr/proposed-final-judgment-us-v-microsoft-corp>> accessed 16 March 2022.

²⁷¹ Nicholas Economides, 'The Microsoft Antitrust Case' (2001) 1(1) *Journal of Industry, Competition, and Trade* <<https://link.springer.com/content/pdf/10.1023/A:1011517724873.pdf>> accessed 16 March 2022.

²⁷² *ibid.*

²⁷³ Richard J. Gilbert, 'Networks, Standards, and the Use of Market Dominance: Microsoft (1995)' (1998) 3 *The Antitrust Revolution: The Role of Economics*, <https://global.oup.com/us/companion.websites/fdscontent/uscompanion/us/pdf/kwoka/0195120159_17.pdf> accessed 16 March 2022.

²⁷⁴ Daniel J. Gifford, 'Microsoft Corporation, the Justice Department, and Antitrust Theory' (1996) 25 *Sw U L Rev* 621



system.’ In June 1995, two months before the release of Windows 95, Microsoft held a meeting with Netscape which was its rising rival. In this meeting, Microsoft offered Netscape to invest by obtaining nearly twenty percent of the company, giving Netscape the technical informations of Microsoft. In return, Netscape would give a seat to Microsoft on its executive board, license its technology to Microsoft, and give Microsoft advanced knowledge about its efforts.²⁷⁵ These offers were rejected by Netscape. Following the refusal, Microsoft started to sharpen its teeth by threatening Netscape with cutting off its air supply through the release of Internet Explorer without any charge.²⁷⁶

Further, Microsoft entered into agreements with the OEMs, the ISPs, and the Internet Content Vendors (ICVs) requiring them to utilize Internet Explorer rather than Netscape. These agreements included important elements such as distribution of Internet Explorer for free and bundling it with the operating systems of Microsoft. Microsoft has always alleged that these agreements were lawful since they had enabled the OEMs to improve their products instead of restricting them. Conversely, the DOJ reiterated that these tying agreements are inconsistent with the antitrust law.²⁷⁷

As a response to these conducts, Netscape filed a complaint to the Department of Justice in August 1996 by stating that Microsoft was obtaining unfair advantage through the agreements. The company exemplified the anticompetitive conducts as impeding the distribution of Netscape Navigator and creating monopoly in the browser market through the agreements.²⁷⁸ On October 20, 1997, the Department of Justice commenced the investigation and asserted that Microsoft had violated the 1995 Consent Decree by

²⁷⁵ Steve Lohr and John Markoff, ‘Microsoft’s World: A Special Report.; How Software’s Giant Played Hardball Game’ (*The New York Times*, 8 October 1998) <<https://www.nytimes.com/1998/10/08/business/microsoft-s-world-a-special-report-how-software-s-giant-played-hardball-game.html>> accessed 21 March 2022.

²⁷⁶ Steve Lohr, ‘Microsoft Executive’s Testimony Attacks Accusers’ (*New York Times*, 23 January 1999) <<https://www.nytimes.com/1999/01/23/business/microsoft-executive-s-testimony-attacks-accusers.html>> accessed 21 March 2022.

²⁷⁷ Steven C. Salop & R. Craig Romaine, ‘Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft’ (1999) 7 *Geo Mason L Rev* 617

²⁷⁸ John E. Lopatka and William H. Page, ‘Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion’ (1999) 7 *Supreme Court Economic Review* <<https://www.journals.uchicago.edu/doi/pdf/10.1086/scer.7.1147089>> accessed 21 March 2022.



requiring the OEMs to install Internet Explorer 4.0 as a prerequisite in order to obtain the license of Windows 95.

According to the DOJ, this tying practice impeded the implementation of 1995 Consent Decree due to the violation of a provision, notably not conditioning entry into a licensing agreement on the licensing of any other product. Furthermore, the DOJ claimed that Microsoft signed exclusionary licensing agreements with the OEMs. Within the scope of these agreements, Microsoft conditioned the installation of Internet Explorer to obtain the license of Windows 95. The DOJ also asserted that Microsoft was exploiting its monopoly power by entering into tying agreements with the OEMs. Additionally, the DOJ asked the Court to impose a fine on Microsoft for \$1 Million Dollars if the violation of the consent decree continued. Microsoft denied these allegations and indicated that the bundling of Windows 95 and Internet Explorer is consistent with the 1995 Consent Decree. Microsoft based this assertion on the alleged violation by the DOJ by stating that the related provision allowed Microsoft to develop integrating products. In this context, this practice constituted an integrated product rather than the bundling of two separate products.²⁷⁹

On December 11, 1997, the Court issued a preliminary injunction precluding Microsoft from continuing to require the OEMs to license both Internet Explorer 4.0 and Windows 95. More than that, Microsoft allowed the OEMs to delete its Internet Explorer icon. After the proclamation of the preliminary injunction, Microsoft appealed the injunction to the United States Court of Appeals, notably the District of Columbia (D.C Circuit). At the end of hearings, the Court of Appeal reversed the preliminary injunction by stating that the Internet Explorer and Windows 95 were integrated products. Furthermore, the Court stated that this conduct did not violate the related provision of the 1995 Consent Decree since Microsoft developed the performance of Windows 95 by integrating Internet Explorer into its operating system in accordance with the 1995 Consent Decree.²⁸⁰

²⁷⁹ Complaint : U.S. V. Microsoft Corp.' (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 15 March 2022.

²⁸⁰ John E. Lopatka and William H. Page, 'Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion' (1999) 7 *Supreme Court Economic Review* <<https://www.journals.uchicago.edu/doi/pdf/10.1086/scer.7.1147089>> accessed 22 March 2022.



Figure 10: Bill Gates during the deposition²⁸¹

On May 18, 1998, the DOJ filed another complaint while the consent decree case was on the appeal. This time, the DOJ accused Microsoft of violating Sections 1 and 2 of the Sherman Act. The USA claimed that Microsoft had obtained a monopoly power within the market of operating systems. The DOJ continued its claims that there was no alternative in the operating system market which could be replaced by the OEMs. Further, the DOJ claimed that the company was liable under attempted monopolization in the browser market since the offer of Microsoft to Netscape about the collaboration was a dangerous probability to obtain the monopoly power. Microsoft resisted this claim by stating that there were many viable alternatives like Intel and Java. Microsoft also stated that ability to set prices and being the sole producer is necessary to have a monopoly power. The company also stated that it had fulfilled none of these elements to become a monopoly power. Furthermore, the DOJ persisted on its previous claim concerning the illegal tying of Internet Explorer and Windows 95. In addition to that, the DOJ claimed that the bundling of Windows 98 and Internet Explorer was per se

²⁸¹ ‘Bill Gates Deposition: Rocking in His Chair for a Whole Minute, Telling Lies’ (*Techrights*, 10 June 2020) <<http://techrights.org/2020/10/06/bill-gates-deposition-part-7/>> accessed 30 March 2022.



illegal. Microsoft denied these accusations on the grounds that the bundling practice had many advantages including reduction of transaction and distribution costs.²⁸²

Moreover, the DOJ reminded the precedent case between Sun Technologies and Microsoft to exemplify the unlawful practices of Microsoft. The DOJ stressed that Microsoft had attempted to drive Java out of the competition by creating its own version of Java and inducing the usage of its Java implementation. The DOJ also highlighted the threat of Microsoft towards Intel when the company released its first software called 'Native Signal Processing'. The DOJ claimed that Microsoft had tried to harden the installation of Native Signal Processing to its operating systems.²⁸³

The DOJ also claimed that the agreements between Microsoft and the ISPs, ICPs, and OSLs were illegal since they precluded the other competitors from accessing important channels of distribution. Further the DOJ did not abandon its previous claim regarding the NDAs prohibiting third parties from raising complaint against Microsoft. The company denied these allegations on the same grounds and stated that the agreements enabled third parties to develop their products. Furthermore, the DOJ alleged that Microsoft had imposed high barriers to entry to the related markets including the ability of Windows operating systems being written by a larger number of applications, compared to the other operating systems. On the contrary, Microsoft argued that this feature of its operating systems fostered innovation and this situation should have been associated with positive network effects.²⁸⁴

The DOJ argued that Internet Explorer and the operating systems of Microsoft are separate products since they had separate demand for each other. Further, the DOJ stated that they may be sold separately and the consumers also treated them as separate market.²⁸⁵

In addition to that, the DOJ stressed that the free distribution of Internet Explorer was predatory and Microsoft had raised its investments in the browsers to drive out Netscape from the

²⁸² Benjamin Klein, 'The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?' (2001) 15(2) Journal of Economic Perspectives <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.45>> accessed 23 March 2022.

²⁸³ Steven C. Salop & R. Craig Romaine, 'Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft' (1999) 7 Geo Mason L Rev 617

²⁸⁴ U.S. V. Microsoft: Court's Findings of Fact' (*The United States Department of Justice*) <<https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact#iii>> accessed 23 March 2022.

²⁸⁵ *ibid.*



competition. The DOJ continued that Microsoft had passed Netscape for the first time in the browser market in 1998 through these unlawful practices.²⁸⁶ However, Microsoft alleged that its plan concerning the distribution of Internet Explorer derives its origins before the founding of Netscape. Microsoft explained this claim as the company was developing internet-enabled operating systems in order to compete with the OS/2 of IBM and the Apple Macintosh. Moreover, Microsoft alleged that its zero-pricing on Internet Explorer is consistent with antitrust law on the grounds that the practice decreased the prices and did not reduce the activities of Netscape.²⁸⁷

3. Claims of the Parties

The parties have been enjoying their rights under law to indicate their accusations and responds.

a. Claims of the United States of America

- 1) The United States of America asserted that Windows operating systems and Internet Explorer are separate products on the grounds that there are separate demands for them and they are considered as separate products by consumers and producers.
- 2) The United States of America claimed that Microsoft has a monopoly power within the operating system market due to the share of Microsoft in related market and there is no substitute for the buyers of Intel-compatible PCs produced for working on these computers.
- 3) The United States of America stated that the tying of Windows 95 and 98 with Internet Explorer is illegal under antitrust law.

²⁸⁶ Benjamin Klein, 'The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?' (2001) 15(2) Journal of Economic Perspectives <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.45>> accessed 9 March 2022.

²⁸⁷ 'Statement by Microsoft Corporation' (*Microsoft*, 28 July 1998) <<https://news.microsoft.com/1998/07/28/statement-by-microsoft-corporation/>> accessed 23 March 2022.



- 4) The United States of America claimed that Microsoft had acted with a specific intent to monopolize while the company was bundling Windows 95 and 98 with Internet Explorer.
- 5) The United States of America pointed out that the free distribution of Internet Explorer constituted the practice of predatory pricing.
- 6) The United States of America stressed that the agreements of Microsoft with ISPs, ICPs, and OEMs restrained the ability of the other competitors to supply their browsers to consumers, as it was seen in the case of America Online.
- 7) The United States of America alleged that the licensing agreements of Microsoft with the OEMs concerning the customization of PC Boot-Up Sequence and PC Screens hampered the growth of new actors in the operating system market.
- 8) The United States of America argued that Microsoft was liable for attempted monopolization in the browser market since the offer of Microsoft to Netscape involved dangerous probability that Microsoft might achieve monopoly.

b. Claims of the Microsoft Corporation

- 1) Microsoft described the bundling of Internet Explorer and Windows 95 and 98 as a single product unlike the allegations including the separability of the operating system and internet browser markets.
- 2) Microsoft asserted that it did not have monopoly power in related markets since it did not have the ability to control the prices and it was not the sole producer.
- 3) Microsoft indicated that its practice concerning the Internet Explorer and its operating systems must have been perceived as integration rather than illegal



tying. Microsoft based this claim on this integration had offered advantages which would not be possible if the products were bought separately and integrated after.

- 4) Microsoft stated that the free distribution of Internet Explorer could not be interpreted as predatory since this practice had not reduced the ability of Netscape to compete. The company also indicated that the free distribution provoked lower prices for customers.
- 5) Microsoft stressed that the bundling of the operating systems of Microsoft with Internet Explorer has no relation with Netscape since Microsoft had already planned to incorporate them before the emergence of Netscape.
- 6) Microsoft alleged that its licensing agreements with the OEMs allow them to differentiate their products in the purpose of satisfying customers.
- 7) Microsoft defended that its bundling practice constitutes efficient innovation rather than illegal practice to eliminate the competition in accordance with 1995 Consent Decree.
- 8) Microsoft claimed that the bundling of Windows 95 and 98 with Internet Explorer had various advantages such as the reduction of distribution and transaction costs. Microsoft also noted that the operating system vendors also bundled browsers with their operating systems including Sun and Linux.
- 9) Microsoft highlighted that the zero-pricing of Internet Explorer was a valid business model because it made the PCs more efficient and this increased the sales of its operating systems consistently.

4. Established Agenda

The Court shall decide:



- 1) Whether Microsoft has monopoly in the operating system market under the Sherman Act
- 2) Whether Microsoft attempted to monopolize the browser market with a specific intent to monopolize the market
- 3) Whether Internet Explorer and Windows 95 and 98 are considered as integrated products
- 4) Whether Microsoft bundled its two products with anticompetitive conduct to drive out Netscape from competition
- 5) Whether the bundling practice of Microsoft constitutes illegal tying
- 6) Whether the bundling of the operating systems of Microsoft and Internet Explorer is illegal under antitrust law
- 7) Whether the agreements of Microsoft with the ICPs, ISPs, and OEMs could be founded legitimate under antitrust law
- 8) Whether the licensing agreements of Microsoft with the OEMs concerning the customization of PC Boot-Up Sequence and PC Screens constitutes illegal practice to eliminate the rivals
- 9) Whether the zero-pricing of Internet Explorer could be interpreted as predatory

V. APPLICABLE LAW

In order to elaborate the judgment and assert the claims more profoundly, it is necessary to stress the applicable law of the case.

1. Sherman Act



The Sherman Antitrust Act of 1890 is a federal statute which prohibits activities that restrict interstate commerce and competition in the marketplace. It mainly inclines on trusts, monopolies, and restraints of trade.²⁸⁸

a. Section 1: Trusts, etc., in restraint of trade illegal; penalty

*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*²⁸⁹

Section 1 prohibits every contract, combination, and conspiracy in restraint of trade or commerce among the states. Certain practices are interdicted under Section 1 including price-fixing, customer and market allocations, and some part of tying agreements.²⁹⁰ Provisions of Section 1 do not apply to unilateral conducts which monopolize or attempt to monopolize a market.²⁹¹

b. Section 2: Monopolizing Trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other

²⁸⁸ ‘Sherman Antitrust Act’ (*Legal Information Institute*)
<https://www.law.cornell.edu/wex/sherman_antitrust_act> accessed 20 March 2022.

²⁸⁹ 15 US Code § 1

²⁹⁰ Douglas Broder, *U.S. Antitrust Law and Enforcement* (2nd edn, Oxford University Press 2010) p.16.

²⁹¹ Steven C. Salop & R. Craig Romaine, 'Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft' (1999) 7 *Geo Mason L Rev* 617



*person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*²⁹²

Section 2 mainly outlaws monopolization, attempted monopolization, acquisition of another firm by the monopolist and conspiracies to monopolize. Besides, it focuses on single-firm conduct rather than the collective conduct to become a monopolistic power.²⁹³

2. The Clayton Act

The Clayton Act involves provisions essentially regarding tying, price discriminations, and civil enforcement of antitrust laws.²⁹⁴

a. Section 3: Trust in Territories or District of Columbia illegal; combination a felony

(a) Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(b) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce in any Territory of the United States or of the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia,

²⁹² 15 US Code § 2

²⁹³ ‘What You Need to Know About Section 2 of the Sherman Act’ (*American Economic Liberties Project*, 8 October 2020) <<https://www.economicliberties.us/our-work/section2-explainer/>> accessed 21 March 2022.

²⁹⁴ Douglas Broder, *U.S. Antitrust Law and Enforcement* (2nd edn, Oxford University Press 2010) p.16.



*or with foreign nations, or between the District of Columbia, and any State or States or foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*²⁹⁵

Section 3 of the Clayton Act prohibits the sales of goods or commodities, and tying arrangements that would hamper the competition or create a monopoly. These practices may be per se illegal if a monopolist conduct exists. Additionally, the tying agreements must have the ability to impede the competition in a substantial share of the relevant line of commerce.²⁹⁶

3. The Robinson-Patman Act

The Robinson-Patman Act essentially interdicts the price discrimination, in other words it forbids the sale of goods at lower or higher prices than the average costs. Also, it prohibits the predatory pricing which signifies selling the goods at unreasonably low prices to eliminate the competitor.²⁹⁷

a. Section 13 (a): Discrimination in price, services, or facilities

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:

²⁹⁵ 15 US Code § 3

²⁹⁶ Douglas Broder, *U.S. Antitrust Law and Enforcement* (2nd edn, Oxford University Press 2010) p.16

²⁹⁷ Douglas Broder, *U.S. Antitrust Law and Enforcement* (2nd edn, Oxford University Press 2010) p.21.



Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:

Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established:

And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade:

And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.²⁹⁸

Section 13 (a) explicitly prohibits price discrimination causing economic damages to competitors. Language of the Section indicates that there are three requirements need to be fulfilled in order to decide that there is a practice of price discrimination. Firstly, the practice must be in the field of commerce, secondly, at least one of the sales must be interstate. Lastly, the price discrimination must cause economic damage of the competitor(s) and discourage the buyers of vendor(s) to buy the related product.²⁹⁹

²⁹⁸ 15 US Code § 13

²⁹⁹ B. Douglas Stephens Jr., 'The Price Discrimination Provisions of the Robinson-Patman Act: A Forthcoming Clarification of the Jurisdictional Requirements?' (1974) 5 (2) Loyola University Chicago Law Journal <<https://lawcommons.luc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2369&context=luclj>> accessed 22 March 2022.



b. Section 13a: Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.³⁰⁰

This Section states that being a party or assisting discriminatory treatment on buyers constitutes a criminal offense against the U.S. Antitrust Law. The sanctions would be getting charged or imprisonment.³⁰¹

VI. CASE LAW

Criteria of the Supreme Court regarding precedent cases constitute an important element in order to settle the dispute more properly.

a. Standard Oil

Standard Oil Company and Trust was a company of the Rockfellers and associated with its quasi-monopolies on refining of crude oil, pipelines, and railroads. For example, the Rockfellers were controlling nearly ninety-five percent of the petroleum market through

³⁰⁰ 15 US Code § 13a

³⁰¹ Hugh C. Hansen, 'Robinson-Patman Law: A Review and Analysis' (1983) 51 Fordham L Rev 1113



acquisitions.³⁰² The Supreme Court ruled that these acquisitions were illegal under restraint of trade and the firm had engaged in predatory pricing to monopolize the petroleum market under Section 2 of the Sherman Act. The Court indicated the criteria where there was a restraint of trade including monopolistic behaviour, reduced output, and reduced quality. Furthermore, the Court described predatory pricing as '*local price cutting at the points where necessary to suppress competition*'.³⁰³

b. Kodak

Eastman Kodak Company is an American manufacturer of photographic supplies and the company provides digital imaging services and products.³⁰⁴ During the case, Kodak was accused of selling its replacement parts only to the Kodak machine users having their machines serviced with Kodak. It was alleged that Kodak had illegally tied Kodak services to the replacement parts for Kodak machines and the company was attempting to monopolize the market for its replacement parts.³⁰⁵ The Supreme Court decided that Kodak had market power due to its ability to engage in price discrimination and its predominate share in the market. The Court defined having market power as to force a producer to do something that he/she would not do in a competitive market.³⁰⁶

c. AT&T

American Telephone and Telegraph Company (the AT&T) is an American corporation which provides long-distance telephone and local telephone networks. During the case procedures, the AT&T was controlling ninety-five percent of the long-distance communication market.³⁰⁷ The District Court set the elements constituting monopoly as refusing to deal, providing inferior facilities to the competitors, and setting tariffs higher for competitors to increase their costs.³⁰⁸

³⁰² Benjamin Klein, 'The Hub-and-Spoke Conspiracy That Created the Standard Oil Monopoly' (2012) 85 S Cal L Rev 459

³⁰³ Christopher R. Leslie, 'Revisiting the Revisionist History of Standard Oil' (2012) 85 S Cal L Rev 573

³⁰⁴ 'Eastman Kodak Company' (*Encyclopedia Britannica*, 18 January 2015)

<<https://www.britannica.com/topic/Eastman-Kodak-Company>> accessed 19 March 2015.

³⁰⁵ Herbert Hovenkamp, 'Market Power in Aftermarkets: Antitrust Policy and the Kodak Case' (1993) 40 UCLA L Rev 1447

³⁰⁶ William W. Schwarzer & Alan Hirsch, 'Summary Judgment after Eastman Kodak' (1993) 45 Hastings LJ 1

³⁰⁷ Michael L. Katz & Robert D. Willig, 'The Case for Freeing AT&T' (1983) 7 Regulation 43

³⁰⁸ Ben M. Enis and E. Thomas Sullivan, 'The AT&T Settlement: Legal Summary, Economic Analysis, and Marketing Implications' (1985) 49(1) Journal of Marketing



d. Jefferson Parish

Jefferson Parish Hospital District No. 2 entered into a contract with Roux & Associates requiring that every patient undergoing surgery at the hospital would use the services of Roux & Associates. Afterwards, Edwin Hyde who was an anesthesiologist petitioned to the Federal District Court on the ground that the contract violated Section 1 of the Sherman Act. Furthermore, the case was brought before the Supreme Court at the end of other proceedings and the Court inclined on the notion of ‘consumer demand’. The criterion of consumer demand consists of two separate products and sufficient consumer demands to induce competitive markets to provide products unbundled. Additionally, the plaintiff has a burden of proof concerning the consumer demand test.³⁰⁹

VII. CONCLUSION

The case between Microsoft Corporation and the United States of America is currently under the investigation of the United States District Court. Briefly, the United States of America accuses Microsoft of hampering the competition in the operating system and browser markets. Conversely, Microsoft defends that it has never monopolized the aforementioned markets; in fact, it has always taken the actions fostering innovation. The case has a huge potential for being one of the landmark cases of the United States Antitrust Law since the defendant party is Microsoft, one of the biggest companies in the world. The prospective verdict would affect the related markets regardless if the verdict would be affirmative or against Microsoft. Additionally, the case inclines on many aspects such as monopoly, tying agreements, bundling, predatory and zero pricing, and the licensing agreements. Within the United States Antitrust Law, there were no cases which included so many elements. In this context, interpreting all of these concepts accordingly would be crucial for the future of the U.S Antitrust Law.

Since the applicable law of the United States of America regarding antitrust law is not quite broad, the parties and judges would need to research the previous cases before the Courts of the United States of America While elaborating the previous cases, the principles and criterions

https://www.jstor.org/stable/pdf/1251182.pdf?refreqid=excelsior%3A40fcc223a09d9d1d61ccb035d45fde6&ab_segments=&origin=> accessed 19 March 2022.

³⁰⁹ Norman W. Hawker, 'Consistently Wrong: The Single Product Issue and the Tying Claims against Microsoft' (1998) 35 Cal W L Rev



of the courts would be quite important to analyze the case between Microsoft Corporation and United States of America.

VIII. BIBLIOGRAPHY

1. Books

Arnold K, Gosling J, and Holmes D, *The Java Programming Language* (4th edn, Addison Wesley Professional 2005)

Beck R, *The Network(Ed) Economy* (1st edn, DUV 2006)

Broder D, *U.S. Antitrust Law and Enforcement* (2nd edn, Oxford University Press 2010)

Broder D, *U.S. Antitrust Law And Enforcement: A Practice Introduction* (1st edn, Oxford University Press, Inc 2010)

Colander DC, *Economics* (11th edn, McGraw-Hill Education 2020)

Derthick M and Quirk PJ, *The Politics of Deregulation* (1st edn, Brookings Institution Press 1985)

Galbraith JK and Galbraith JK, *The New Industrial State* (Library of America 2010)

Harvey D, *A Brief History of Neoliberalism* (1st edn, Oxford University Press 2005)

Hubbard RG and O'Brien AP, *Economics* (7th edn, Pearson 2018)

Mirovski P and Plehve D, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (1st edn, Harvard University Press 2009)

Nugent D and Vincent J, *A Companion to the Anthropology of Politics* (1st edn, Blackwell Publishing 2007)

Quiggin J, *Economics in Two Lessons: Why Markets Work So Well, and Why They Can Fail So Badly* (Hardcover, Princeton University Press 2019)

Ragan CTS and Lipsey RG, *Economics* (13th edn, Pearson Education Canada 2010)

Salin P, *Competition and Free Trade* (1st edn, Routledge 2018)

Samuelson PA and Nordhaus WD, *Economics* (16th edn, The McGraw-Hill 1998)

Scognamiglio C and Caroli M, *Oligopoly and Dynamic Competition* (1st edn, Palgrave Macmillan 1992)



Sherman R, *The Regulation of Monopoly* (1st edn, Cambridge University Press 1989)

The Federal Court System In United States (4 th edn, Administrative Office of the U.S. Courts 2016)

Wallace J and Erickson J , *Hard Drive: Bill Gates and the Making of the Microsoft Empire* (1 st edn, Wiley 1992)

Whish R and Bailey D, *Competition Law* (7th edn, Oxford University Press 2012)

Yalçın A, *İktisadi Doktrinler ve Sistemler Tarihi* [1991] A.Ü. S.B.F. Yayınları

2. Articles

Balto DA,, 'Antitrust Enforcement in the Clinton Administration' (1999) 9 Cornell J L & Pub Pol'y 61

Berners-Lee T, 'Information Management: A Proposal' [1989] The European Organization for Nuclear Research <<https://cds.cern.ch/record/369245/files/dd-89-001.pdf>> accessed 7 March 2022

Bhagwati J, 'The Case for Free Trade' (1993) 269 (5) Scientific American <https://www.jstor.org/stable/pdf/24941682.pdf?casa_token=LWhbWDEEBGoAAAAA:u-J8hy3UXEGY83Atx-ReeWRRGYcokxvsWsK_UnwuNixRw6hryCXKXgzz1_xS7nojuZaDpl0YkCniWHJyqJFYvKHUvJGXK3qpcfJ-191n3qXJdnPnpg> accessed 6 February 2022.

Carlton DW and Meyer K, 'Appropriate Antitrust Policy Towards Single-Firm Conduct' Economic Analysis Group (2008) 08-2 <<https://www.econstor.eu/bitstream/10419/202368/1/eag-dp200802.pdf>> accessed 2 March 2022.

Cooper R, 'Is the District of Columbia a State?' (ThoughtCo, 2020) <<https://www.thoughtco.com/is-the-district-of-columbia-a-state-1038984>> accessed 8 February 2022

Dainow J, 'The Civil Law and the Common Law: Some Points of Comparison' (1967) 15 Am J Comp L 419

Davis S. J and Murphy K. M, 'A Competitive Perspective on Internet Explorer' [2000] 90(2) The American Economic Review <https://www.jstor.org/stable/pdf/117217.pdf?casa_token=cumdkAkqJ4kAAAAA:4zgCltjjqkRQwezpoFCOIXUub-tBpR0bzgiHswYCFfk29ZnSvafWRLAyrHO3Q0x4a13mMniWUvUcTyMjHgJJ9dzDtGrtursOhqnVFCcTEfsGypc0A> accessed 7 March 2022



Economides N, 'The Microsoft Antitrust Case' [2001] 1(1) Journal of Industry, Competition, and Trade <<https://link.springer.com/content/pdf/10.1023/A:1011517724873.pdf>> accessed 16 March 2022

EK William and Shapiro C, 'Antitrust Policy: A Century Of Economic And Legal Thinking' (2000)

Enis B. M and Sullivan E. T, 'The AT&T Settlement: Legal Summary, Economic Analysis, and Marketing Implications' [1985] 49 (1) Journal of Marketing <https://www.jstor.org/stable/pdf/1251182.pdf?refreqid=excelsior%3A40fcc223a09d9d1d61ccb035d45fde6&ab_segments=&origin=> accessed 19 March 2022.

Frankel J, Liberalism (2015) 2 The Age of Reflection <<https://wcfia.harvard.edu/files/wcfia/files/liberalismageofreflectniran2016jan.pdf> > accessed 13 February 2022.

Gaynor DE, 'Technological Tying' [2006] Bureau of Economics Working Paper 284 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.183.6914&rep=rep1&type=pdf>> accessed 1 March 2022.

Gifford D. J, 'Microsoft Corporation, the Justice Department, and Antitrust Theory' [1996] 25 Sw U L Rev 621

Gilbert R. J and Katz M. L, 'An Economist's Guide to U.S. v. Microsoft' [2001] 15(2) Journal of Economic Perspectives <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.25>> accessed 15 March 2022

Gilbert R. J, 'Networks, Standards, and the Use of Market Dominance: Microsoft (1995)' [1998] 3 The Antitrust Revolution: The Role of Economics, <https://global.oup.com/us/companion.websites/fdscontent/uscompanion/us/pdf/kwoka/0195120159_17.pdf> accessed 16 March 2022

Hansen H. C, 'Robinson-Patman Law: A Review and Analysis' [1983] 51 Fordham L Rev 1113

Hawker N. W, 'Consistently Wrong: The Single Product Issue and the Tying Claims against Microsoft' [1998] 35 Cal W L Rev

Hovenkamp H., 'Market Power in Aftermarkets: Antitrust Policy and the Kodak Case' [1993] 40 UCLA L Rev 1447

Jaksi K and Abass S. M, 'Development History Of The World Wide Web' [2019] 8(9) International Journal of Scientific & Technology Research <https://www.researchgate.net/profile/Karwan-Jaksi/publication/336073851_Development_History_Of_The_World_Wide_Web/links/5d8d1f8f92851c33e94064cb/Development-History-Of-The-World-Wide-Web.pdf> accessed 7 March 2022

Jr TV, 'The Political Hand in American Antitrust - Invisible, Inspirational, or Imaginary' (2014) 79 Antitrust LJ 557



- Jr. DTH, 'Attempts to Monopolize: A Concept in Search of Analysis ' (1967) 34 Antitrust LJ 165
- Jr. WSB, 'Tying Arrangements and the Leverage Problem' (1957) 67 Yale LJ 19
- Katz M. L and Willig R. D, 'The Case for Freeing AT&T' [1983] 7 Regulation 43
- King M, Yarrow G, Mairesse J, and Melitz J, 'Privatisation in Theory and Practice' (1986) 1(2) Oxford University Press <<https://www.jstor.org/stable/1344560>> accessed 6 February 2022.
- Klein B, 'The Microsoft Case: What Can a Dominant Firm Do to Defend Its Market Position?' [2001] 15(2) Journal of Economic Perspectives <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.45>> accessed 9 March 2022
- Klein B, 'The Hub-and-Spoke Conspiracy That Created the Standard Oil Monopoly' [2012] 85 S Cal L Rev 459
- Klein J. I, 'Cut off Their Air Supply: Justice Department's Case against the Microsoft Monopoly (III)' [1998] 29 Antitrust L & Econ Rev 17
- Kovacic WE and Shapiro C, 'Antitrust Policy: A Century Of Economic And Legal Thinking' (2000) 14 Journal of Economic Perspectives
- Kurz HD, 'Adam Smith On Markets, Competition And Violations Of Natural Liberty' (2015) 40 Cambridge Journal of Economics
- Lemley M. A and McGowan D, 'Legal Implications of Network Economic Effects' [1998] 86 Calif L Rev 479
- Lenard T. M, 'Creating Competiton in the Market for Operating Systems: Alternative Structural Remedies in the Microsoft Case' [2001] 9 Geo Mason L Rev 803
- Leslie C. R, 'Revisiting the Revisionist History of Standard Oil' [2012] 85 S Cal L Rev 573
- Levin RC, 'Technical Change, Barriers to Entry, and Market Structure' (1978) 45 (180) *Economica* <https://www.jstor.org/stable/pdf/2553450.pdf?casa_token=-ZyGCSws-yQAAAAA:Oo-CKXwL-g-cZb_UQ-Tvlu2b85K4WgeTqhQQal7vIAp6l2PxQwoZH1ROy2XJj7-h-s_z_1eF_dMagl5PiKtiFDJS5M-O7-LCeky6hD6Pe9hE64ICXA>. accessed 14 February 2022.
- Lopatka J. E and Page W. H, 'Antitrust on Internet Time: Microsoft and the Law and Economics of Exclusion' [1999] 7 Supreme Court Economic Review <<https://www.journals.uchicago.edu/doi/pdf/10.1086/scer.7.1.147089>> accessed 22 March 2022.
- Mariotti R, 'Rethinking Software Tying' [2000] 17 Yale J on Reg 367



Merryman JH, 'The Public Law-Private Law Distinction in European and American Law' (1968) 17 J Pub L 3

Nalebuff B, 'Bundling as an Entry Barrier' (2004) 119(1) The Quarterly Journal of Economics
 <https://www.jstor.org/stable/pdf/25098680.pdf?casa_token=gQHZkXCFhEAAAAA:osI2cncO594O9NG2wak3iMhjbjq8m6ELD_g0VU1SpMUw6nALXfEbpkeRBWiEEcEqRREk4FwXpEzO4TUwLloMJKKfvz4MTC-K93GD0huVTI3GnAmQ> accessed 1 March 2022

Nalebuff B, 'Bundling' (2004) 99(14) Yale International Center for Finance
 <http://neconomides.stern.nyu.edu/networks/phdcourse/Nalebuff_Bundling.pdf> accessed 2 March 2022.

Nelson PB, 'Reading Their Lips: Changes in Antitrust Policy under the Bush Administration' (1991) 36 Antitrust Bull 681

Newman JO, 'History Of The Article III Appellate Courts, 1789–2021: The Evolution Of Their Geographic Scope, Number Of Judgeships, And Jurisdiction'

Ng YK, 'Welfare Economics' (2015) Second Edition International Encyclopedia of the Social & Behavioral Sciences

Nishimori A and Ogawa H, 'Public Monopoly, Mixed Oligopoly, and Productive Efficiency' (2002) 41(2) Australian Economic Papers
 <https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-8454.00158?casa_token=gTRPeDfo5rEAAAAA:8dZLR_QMajDjtg6N9wQL5jGU6k7yTDAdfnYc22hvix2Ekziq4j4uxJhiZPXBFNf7ZUKQe6uzrDjUg> accessed 15 February 2022.

Norton W. B, 'Internet Service Provider and Peering' [2001] 19 Proceedings of NANOG
 <<https://courses.cs.washington.edu/courses/cse561/02au/papers/norton-peering-wp01.pdf>> accessed 3 March 2022

Page WH, 'The Ideological Origins and Evolution Of U.S. Antitrust Law,' [2008] Issues in Competition Law and Policy

Ponsoldt J. F and David C. D, 'Comparison between U.S. and E.U. Antitrust Treatment of Tying Claims against Microsoft: When Should the Bundling of Computer Software Be Permitted' [2007] 27 Nw J Int'l L & Bus 421

Posner RA, 'Natural Monopoly and Its Regulation' (1978) 9 J Reprints Antitrust L & Econ 767

Salop S. C and Romaine R. C, 'Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft' [1999] 7 Geo Mason L Rev 617

Sawyer LP, 'US Antitrust Law and Policy in Historical Perspective' Oxford Research Encyclopedia of American History (2019) <https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf> accessed 24 February 2022.



Schwarzer W. W and Hirsch A, 'Summary Judgment after Eastman Kodak' [1993] 45 Hastings LJ 1

Seaman JW,, 'L. T. Hobhouse And The Theory Of "Social Liberalism"' (1978) 11 (4) Canadian Journal of Political Science / Revue Canadienne de Science Politique
 <https://www.jstor.org/stable/pdf/3231032.pdf?casa_token=uPmhuj1OSg4AAAAA:XzMRko t5kpIqwNeP83vw8JY43XKqX5hS8onWrq30PuPggX_iHqr4MYD3BIAfYR5Nrxij5ePJ7_6NiEHUwK97FGIFNFFtmTkosP9eMQssTUnB9XZoSA> accessed 13 February 2022.

Sedler RA, 'The Constitution and the American Federal System' (2009) 55 Wayne L. Rev. 1487

Smith NI, 'Attempt to Monopolize: Its Elements and Their Definition' (1958) 27 Geo Wash L Rev

Starr P, 'The Meaning of Privatisation' 15 (6) Yale Law & Policy Review (1989)
 <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/17359/17_6YaleL_PolyRev6_1988_.pdf?sequence=2&isAllowed=y> accessed 6 February 2022.

Stephens Jr. B. D, 'The Price Discrimination Provisions of the Robinson-Patman Act: A Forthcoming Clarification of the Jurisdictional Requirements?' [1974] 5 (2) Loyola University Chicago Law Journal
 <<https://lawcommons.luc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2369&context=luclj>> accessed 22 March 2022.

Stopford J, 'Multinational Corporations' 1 (113) Foreign Policy
 <https://www.jstor.org/stable/pdf/1149229.pdf?casa_token=SjXiSlg5QEcAAAAA:lvjTK-bWSxGMiZzBG3KLR_-H2vE7dcuIc48wpl5bOj8epSP5QmQxJ-zBng_J0Q4i7Opsed-YDRNXI_-EyUxR3U1uqYLTAQhke1hY-H2ig4ELqUtJA> accessed 5 February 2022.

Taddeo M and Floridi L, 'The Debate on the Moral Responsibilities of Online Service Providers' [2016] 22(6) Science and Engineering Ethics
 <<https://link.springer.com/content/pdf/10.1007/s11948-015-9734-1.pdf>> accessed 3 March 2022.

V, 'Common Law And Civil Law Traditions' [2012] SSRN Electronic Journal

Weinstein SN, 'United States v. Microsoft Corp.' (2002) 17 BerkeleyTech LJ 273

Whinston M. D, 'Exclusivity and Tying in U.S. v. Microsoft: What We Know, and Don't Know' [2001] 15(2) Journal of Economic Perspectives
 <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.15.2.63>> accessed 9 March 2022.

Wickers J and Yarrow G, 'Economic Perspectives on Privatization' (1991) 5(2) Journal of Economic Perspectives <<https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.5.2.111>> accessed 6 February 2022.

Wood BD and Anderson JE, 'The Politics of U.S. Antitrust Regulation' (1993) 37 (1) American Journal of Political Science
 <https://www.jstor.org/stable/pdf/2111522.pdf?casa_token=xf5vC5lq7RIAAAAA:LMIMinN>



[sG-SVvyY5d3gLONzD_eW9-CGPPRjKlKz8teKjqZOArvPDFBPGnLHm-NckzQhh8DtjY17HJthWkZnnHtU2jrRmMngJiZ0uGXS8F1Q4XaVrc2Vx](https://www.justice.gov/atr/proposed-final-judgment-us-v-microsoft-corp) > accessed 28 February 2022.

3. Websites

‘[Proposed] Final Judgment’ (*The United States Department of Justice*) <<https://www.justice.gov/atr/proposed-final-judgment-us-v-microsoft-corp>> accessed 16 March 2022.

‘Anticompetitive Practices’ (*Federal Trade Commission*) <<https://www.ftc.gov/enforcement/anticompetitive-practices>> accessed 2 March 2022

‘Anti-Competitive Tying and Bundling’ (*Competition Commission*) <https://www.compcomm.hk/en/practices/what_is_comp/tying_bundling.html> accessed 2 March 2022.

‘Competitive Impact Statement: U.S. V. Microsoft Corporation’ (*The United States Department of Justice*) <<https://www.justice.gov/atr/competitive-impact-statement-us-v-microsoft-corporation>> accessed 15 March 2022.

‘Deregulation’ (*Corporate Finance Institute*) <<https://corporatefinanceinstitute.com/resources/knowledge/other/deregulation/>> accessed 5 February 2022.

‘Eastman Kodak Company’ (*Encyclopedia Britannica*, 18 January 2015) <<https://www.britannica.com/topic/Eastman-Kodak-Company>> accessed 19 March 2022.

‘From Windows 1 to Windows 10: 29 Years of Windows Evolution’ (*The Guardian*, 2 October 2014) <<https://www.theguardian.com/technology/2014/oct/02/from-windows-1-to-windows-10-29-years-of-windows-evolution>> accessed 5 March 2022.

‘How Monopolies Form: Barriers to Entry’ (*BCcampus Open Publishing*) <<https://opentextbc.ca/principlesofeconomics2eopenstax/chapter/how-monopolies-form-barriers-to-entry/>>. accessed 14 February 2022.

‘Internet Explorer 1’ (*My Internet Explorer*) <<https://www.my-internet-explorer.com>> accessed 8 March 2022

‘Internet Service Provider’ (*Encyclopedia Britannica*, 13 March 2018) <<https://www.britannica.com/technology/Internet-service-provider>> accessed 3 March 2022



‘Introduction To The Federal Court System’ (*Offices of the United States Attorneys*, 2022) <<https://www.justice.gov/usao/justice-101/federal-courts>> accessed 1 February 2022

‘Janet D. Steiger’ (*Federal Trade Commission*) <<https://www.ftc.gov/about-ftc/commissioners-staff/janet-d-steiger>> accessed 14 March 2022.

‘Memorandum Opinion : U.S. v. Microsoft Corp.’ (*The United States Department of Justice*) <https://www.justice.gov/atr/memorandum-opinion-us-v-microsoft-corp#N_1> accessed 14 March 2022

‘MS-DOS’ (*Encyclopedia Britannica*, 3 March 2020) <<https://www.britannica.com/technology/MS-DOS>> accessed 5 March 2022

‘Multinational Corporation’ (*Encyclopedia Britannica*, 28 May 2012) <<https://www.britannica.com/topic/multinational-corporation>> accessed 5 February 2022.

‘Natural Monopoly’ (*OECD Statistics*, 3 January 2002) <<https://stats.oecd.org/glossary/detail.asp?ID=3267>>. accessed 14 February 2022

‘Neoliberalism’ (*Oxford Reference*) <<https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100228313>> accessed 8 February 2022.

‘Netscape 1.x’ (*WinWorld*) <<https://winworldpc.com/product/netscape-navigator/1x>> accessed 8 March 2022

‘Operating System Fundamental OS Concepts’ (*Tutorials Point*, 2016) <https://www.tutorialspoint.com/operating_system/operating_system_tutorial.pdf> accessed 3 February 2022

‘Single-Firm Conduct and Section 2 of The Sherman Act: An Overview’ (*The United States Department of Justice*) <<https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1>> accessed 15 February 2022.

‘Statement by Microsoft Corporation’ (*Microsoft*, 28 July 1998) <<https://news.microsoft.com/1998/07/28/statement-by-microsoft-corporation/>> accessed 23 March 2022

‘Tying Arrangements’ (*Money-Zine*) <<https://money-zine.com/definitions/career-dictionary/tying-arrangements/>> accessed 1 March 2022.

‘U.S. V. Microsoft: Court’s Findings of Fact’ (*The United States Department of Justice*) <<https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact#iii>> accessed 8 March 2022

‘US Department of Justice vs. Microsoft: Internet Explorer Case’ (*Stanford*) <<https://cs.stanford.edu/people/eroberts/cs201/projects/microsoft-vs-doj/ie/MSResponse.html>> accessed 15 March 2022



'Web Browser' (TechTerms.com) <https://techterms.com/definition/web_browser> accessed 3 March 2022

'What Are Barriers to Entry?' (*Corporate Finance Institute*) <<https://corporatefinanceinstitute.com/resources/knowledge/economics/barriers-to-entry/>>. accessed 14 February 2022.

'What Does Windows 98 Mean?' (*Techopedia*, 25 June 2020) <<https://www.techopedia.com/definition/10048/windows-98>> accessed 6 March 2022

'What Is an Online Service Provider ?' (*College of Western Idaho*) <<https://cwi.edu/faq/file-sharing/what-online-service-provider>> accessed 3 March 2022

'What Is Web Browser ?' (*Oxford Web Studio*) <<https://www.oxfordwebstudio.com/en/did-you-know/what-is-web-browser>> accessed 3 March 2022

'What Is Windows 3.1?' (*Network Encyclopedia*) <<https://networkencyclopedia.com/windows-3-1/>> accessed 5 March 2022.

'What You Need to Know About Section 2 of the Sherman Act' (*American Economic Liberties Project*, 8 October 2020) <<https://www.economicliberties.us/our-work/section2-explainer/>> accessed 21 March 2022

'Windows 3.0' (*Microsoft Wiki*) <<https://microsoft.fandom.com/wiki/MS-DOS>> accessed 5 March 2022

'Windows 95' (*Computer Hope*, 21 May 2018) <<https://www.computerhope.com/jargon/w/win95.htm>> accessed 6 March 2022

'Windows 98' (*Data Recovery*) <<http://www.data-recovery-app.com/datarecovery/windows98.html>> accessed 6 March 2022

'28 U.S. Code § 136 - Chief Judges; Precedence Of District Judges' (*LII / Legal Information Institute*, 2022) <<https://www.law.cornell.edu/uscode/text/28/136>> accessed 8 February 2022.

'About Federal Judges' (*United States Courts*, 2022) <<https://www.uscourts.gov/judges-judgeships/about-federal-judges>> accessed 14 February 2022.

'About The U.S. Courts Of Appeals' (*United States Courts*, 2022) <<https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals>> accessed 9 February 2022.

'About U.S. Federal Courts' (*Federal Bar Association*, 2022) <<https://www.fedbar.org/for-the-public/about-u-s-federal-courts/>> accessed 1 February 2022.



'Adam Smith - The Wealth Of Nations' (*Encyclopedia Britannica*, 2022)
<<https://www.britannica.com/biography/Adam-Smith/The-Wealth-of-Nations#ref24188>>
accessed 23 February 2022.

Aleksandar K., 'Bill Gates Steps Down from Microsoft Board of Directors' (*TechPowerUp*, 16 March 2020) <<https://www.techpowerup.com/264788/bill-gates-steps-down-from-microsoft-board-of-directors>> accessed 30 March 2022

Amadeo K, 'What Is The Market Economy?' (*The Balance*, 2022)
<<https://www.thebalance.com/market-economy-characteristics-examples-pros-cons-3305586>> accessed 12 February 2022.

'Antitrust And Ideology - Econlib' (*Econlib*, 2022) <<https://www.econlib.org/antitrust-and-ideology/>> accessed 23 February 2022

B Definitions and Computer Hope, 'What Is A Boot Menu?' (*Computerhope.com*, 2019)
<https://www.computerhope.com/jargon/b/boot_menu.htm#:~:text=When%20a%20computer%20is%20starting,on%20the%20computer's%20startup%20screen.> accessed 11 February 2022

'Bill Gates Deposition: Rocking in His Chair for a Whole Minute, Telling Lies' (*Techrights*, 10 June 2020) <<http://techrights.org/2020/10/06/bill-gates-deposition-part-7/>> accessed 30 March 2022

Burgess J, 'FTC Deadlocks Again in Microsoft Investigation' (*The Washington Post*, 22 July 1993) <<https://www.washingtonpost.com/archive/business/1993/07/22/ftc-deadlocks-again-in-microsoft-investigation/dd8ce8ed-1d66-4c32-b5af-6334f422e364/>> accessed 14 March 2022

'Chicago School Of Economics | Economics' (*Encyclopedia Britannica*, 2022)
<<https://www.britannica.com/topic/Chicago-school-of-economics>> accessed 23 February 2022.

Complaint : 'U.S. V. Microsoft Corp.' (*The United States Department of Justice*, 18 May 1998) <<https://www.justice.gov/atr/complaint-us-v-microsoft-corp>> accessed 15 March 2022

'Court Denies SEC's Petition for Rehearing in Conflict Minerals Case' (*GreenSoft Technology Inc.*, 18 November 2015) <<https://greensofttech.com/court-denies-secs-petition-for-rehearing-in-conflict-minerals-case/>> accessed 30 March 2022

Darrington J, 'What Is an Internet Content Provider?' (*CHRON*)
<<https://smallbusiness.chron.com/internet-content-provider-57363.html>> accessed 3 March 2022



Edwards B, '35 Years of Microsoft Windows: Remembering Windows 1.0' (*How to Geek*, 24 August 2021) <<https://www.howtogeek.com/700661/35-years-of-microsoft-windows-remembering-windows-1.0/>> accessed 5 March 2022

'Federal Trade Commission Act' (*Federal Trade Commission*, 2022) <<https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act>> accessed 15 February 2022.

'File Systems - Operating Systems - GCSE Computer Science Revision - BBC Bitesize' (*BBC Bitesize*) <<https://www.bbc.co.uk/bitesize/guides/ztcdftr/revision/6#:~:text=File%20management,%2C%20read%2C%20found%20and%20repaired.>> accessed 5 February 2022

Freeman S, 'Liberalism' *Oxford Research Encyclopedia Of Politics* (Oxford University Press USA 2017) <https://cpb-us-w2.wpmucdn.com/web.sas.upenn.edu/dist/e/483/files/2018/07/liberalism_oup_encyclopedia_politics-1o2lwvr.pdf> accessed 13 February 2022.

Geeks for Geeks, 'Network Operating System' <<https://www.geeksforgeeks.org/types-of-operating-systems/?ref=gcse>> accessed 6 February 2022

Hall M, 'What's The Difference Between A Monopoly And An Oligopoly?' (*Investopedia*, 2021) <<https://www.investopedia.com/ask/answers/121514/what-are-major-differences-between-monopoly-and-oligopoly.asp#:~:text=A%20monopoly%20is%20when%20a,prevent%20other%20enterprise%20from%20competing.>> accessed 12 February 2022.

Hemmendinger D, 'Computer | History, Parts, Networking, Operating Systems, & Facts' (*Encyclopedia Britannica*, 2022) <<https://www.britannica.com/technology/computer>> accessed 12 February 2022.

'IBM Docs' (*Ibm.com*, 2004) <<https://www.ibm.com/docs/en/i/7.1?topic=reports-job-accounting>> accessed 4 February 2022

'IE Logo' (*Logo* < >) <<http://logok.org/ie-logo/>> accessed 30 March 2022

'Java Logo' (*1000 Logos*) <<https://1000logos.net/java-logo/>> accessed 30 March 2022

J. J. Goldberg, 'Margaret Thatcher, Conservative Icon, Was Wiser Than Friend Ronald Reagan' (*Forward*, 12 April 2013) <<https://forward.com/opinion/174710/margaret-thatcher-conservative-icon-was-wiser-than/>> accessed 30 March 2022

'John Stuart Mill - Econlib' (*Econlib*, 2022) <<https://www.econlib.org/library/Enc/bios/Mill.html>> accessed 23 February 2022.



'Laissez-Faire | Definition, Economics, Government, Policy, History, & Facts' (*Encyclopedia Britannica*, 2022) <<https://www.britannica.com/topic/laissez-faire>> accessed 16 February 2022

Lazzareschi C, 'IBM, Microsoft Admit FTC Probe on Software : Investigation: The Two Computer Firms Have Been Questioned about a 1989 Plan That Could Have Been Anti-Competitive' (*Los Angeles Times*, 13 March 1991) <<https://www.latimes.com/archives/la-xpm-1991-03-13-fi-179-story.html>> accessed 14 March 2022

Lea G, 'Ten Years Hard – Microsoft's Long Antitrust Struggle' (*The Register*, 19 June 2000) <https://www.theregister.com/2000/06/19/ten_years_hard_microsofts_long/> accessed 14 March 2022

Leibovich M, 'Alter Egos' (*Washington Post*) <<https://www.washingtonpost.com/archive/politics/2000/12/31/alter-egos/91b267b0-858c-4d4e-a4bd-48f22e015f70/>> accessed 4 March 2022

Levy S, 'Graphical User Interface | Computing' (*Encyclopedia Britannica*) <<https://www.britannica.com/technology/graphical-user-interface>> accessed 10 February 2022

Lohr S and Markoff J, 'Microsoft's World: A Special Report.; How Software's Giant Played Hardball Game' (*The New York Times*, 8 October 1998) <<https://www.nytimes.com/1998/10/08/business/microsoft-s-world-a-special-report-how-software-s-giant-played-hardball-game.html>> accessed 21 March 2022

Lohr S, 'Browser Memos Pose Challenge To Microsoft' (*The New York Times*, 5 November 1998) <<https://www.nytimes.com/1998/11/05/business/browser-memos-pose-challenge-to-microsoft.html>> accessed 9 March 2022

Lohr S, 'Microsoft Executive's Testimony Attacks Accusers' (*New York Times*, 23 January 1999) <<https://www.nytimes.com/1999/01/23/business/microsoft-executive-s-testimony-attacks-accusers.html>> accessed 21 March 2022

Longley R, 'What Is Free Trade? Definition, Theories, Pros, and Cons' (*ThoughtCo.*, 2018) <<https://www.thoughtco.com/free-trade-definition-theories-4571024>> accessed 5 February 2022.

Longley R, 'What Is Classical Liberalism? Definition And Examples' (*ThoughtCo*, 2020) <<https://www.thoughtco.com/classical-liberalism-definition-4774941>> accessed 13 February 2022.

McClanahan P and Joaquin S, *Operating System: The Basics* (Libre Texts 2022) <<https://batch.libretexts.org/print/Letter/Finished/eng-45605/Full.pdf>> accessed 5 February 2022



Mneil T, 'Why the United States Is the Only Superpower ?' (*TuftsNow*, 21 November 2019) <<https://now.tufts.edu/articles/why-united-states-only-superpower>> accessed 24 February 2022.

'Microsoft Logo' (*Flickr*) <<https://www.flickr.com/photos/paxtonholley/5167043548/in/photostream/>> accessed 30 March 2022

'Monopolistic Competition | Economics' (*Encyclopedia Britannica*) <<https://www.britannica.com/topic/monopolistic-competition>> accessed 12 February 2022.

Norr H. R, 'Netscape Communications Corp.' (*Encyclopedia Britannica*, 28 August 2017) <<https://www.britannica.com/topic/Netscape-Communications-Corp>> accessed 8 March 2022

'Oligopoly' (*Economics Online*, 2020) <https://www.economicsonline.co.uk/business_economics/oligopoly.html> accessed 12 February 2022

'Operating System - Security' (*Tutorialspoint.com*) <https://www.tutorialspoint.com/operating_system/os_security.htm> accessed 3 February 2022

'Opinion | What Makes The D.C. Circuit Different?' (Published 2013)' (*Nytimes.com*, 2022) <<https://www.nytimes.com/2013/06/01/opinion/what-makes-the-dc-circuit-different.html>> accessed 15 February 2022.

Pettinger T, 'Monopolistic Competition - Definition, Diagram And Examples - Economics Help' (*Economics Help*, 2019) <<https://www.economicshelp.org/blog/311/markets/monopolistic-competition/>> accessed 12 February 2022

Pettinger T, 'Perfect Competition - Economics Help' (*Economics Help*, 2019) <<https://www.economicshelp.org/microessays/markets/perfect-competition/>> accessed 12 February 2022

'Processor Management' (*Zitoc*, 2019) <<https://zitoc.com/processor-management/>> accessed 3 February 2022

Redmond W, 'Report: FTC Staff to Seek Action on Microsoft' (*UPI*, 17 December 1992) <<https://www.upi.com/Archives/1992/12/17/Report-FTC-staff-to-seek-action-on-Microsoft/1493724568400/>> accessed 14 March 2022

'Research-Articles-Operating-Systems' (*Longdom*) <<https://www.longdom.org/peer-reviewed-journals/researcharticlesoperatingsystems-2080.html>> accessed 3 February 2022



Thakur D, 'What Is Computer? - Computer Notes' (*Computer Notes*, 2022) <<https://ecomputernotes.com/fundamental/introduction-to-computer/what-is-computer>> accessed 12 February 2022.

The Common Law and Civil Law Traditions (*Law.berkeley.edu*, 2022) <<https://www.law.berkeley.edu/wpcontent/uploads/2017/11/CommonLawCivilLawTraditions.pdf>> accessed 16 February 2022.

Tsui Siu Ki, 'What Are the Pros and Cons of Windows 95?' (*Computing Services Centre City University of Hong Kong*, 1996) <<https://www.cityu.edu.hk/csc/netcomp/net6/win95.htm>> accessed 6 March 2022.

Tuovila A, 'Marginal Revenue (MR)' (*Investopedia*, 30 March 2021) <<https://www.investopedia.com/terms/m/marginal-revenue-mr.asp>>. accessed 14 February 2022

'Types Of Operating System' (*Tutorialspoint.com*) <https://www.tutorialspoint.com/operating_system/os_types.htm> accessed 5 February 2022

'Types Of Operating Systems / 4. Network Operating System - Geeksforgeeks' (*GeeksforGeeks*, 2021) <<https://www.geeksforgeeks.org/types-of-operating-systems/?ref=gcse>> accessed 6 February 2022

'What Is A Market Economy?' (*Investopedia*, 2022) <<https://www.investopedia.com/terms/m/market-economy.asp>> accessed 12 February 2022.

'What Is Boot Sequence? - Definition From Techopedia' (*Techopedia.com*, 2016) <<https://www.techopedia.com/definition/3326/boot-sequence>> accessed 11 February 2022

'What Is Laissez-Faire? | Jeffrey A. Tucker' (*Fee.org*, 2022) <<https://fee.org/articles/what-is-laissez-faire/>> accessed 16 February 2022

'What Is OEM (Original Equipment Manufacturer)?' (*Ibm.com*, 2019) <<https://www.ibm.com/my-en/services/technology-support/multivendor-it/oem>> accessed 11 February 2022

'What Is Operating System And Types Of Operating System' (*Great Learning*, 2021) <<https://www.mygreatlearning.com/blog/what-is-operating-system/>> accessed 5 February 2022

'What Is Perfect Competition? Definition Of Perfect Competition, Perfect Competition Meaning - The Economic Times' (*The Economic Times*) <<https://economictimes.indiatimes.com/definition/perfect-competition>> accessed 12 February 2022.



Zachary G. P and Hall M, 'Microsoft Corporation' (*Encyclopedia Britannica*)
<<https://www.britannica.com/topic/Microsoft-Corporation>> accessed 5 March 2022

4. Cases, Codes, and Rules

(28 U.S. Code § 1331 - Federal question, 2022)

'U.S. Code § 1337 - Commerce And Antitrust Regulations; Amount In Controversy, Costs' (*LII / Legal Information Institute*, 2022) <<https://www.law.cornell.edu/uscode/text/28/1337>> accessed 9 February 2022.

15 U.S Code § 13a

15 U.S.C § 1-38 'Sherman Antitrust Act' (*Legal Information Institute*)
<https://www.law.cornell.edu/wex/sherman_antitrust_act> accessed 20 March 2022.

15 US Code § 1

15 US Code § 13

15 US Code § 2

Federal Rules Of Criminal Procedure (9th edn, U.S. Government Publishing Office). Rule 56

Federal Rules Of Civil Procedure (9th edn, U.S. Government Publishing Office). Rule 81